



READY OR NOT

AN ASSESSMENT OF KENYA'S PREPAREDNESS
FOR THE GENERAL ELECTION

April 2012



KENYANS FOR PEACE WITH TRUTH & JUSTICE (KPTJ) is a coalition of citizens and organisations working in the human rights, governance and legal areas that came together after the crisis over the disputed results of the 2007 Presidential Election and the Violence that followed thereafter. Members include: Africa Centre for Open Governance (AfriCOG), Bunge la Mwananchi, Centre for the Development of Marginalised Communities (CEDMAC), Centre for Law and research International (CLARION), Centre for Multiparty Democracy (CMD), Centre for Rights, Education and Awareness for Women (CREAW), The Cradle - the Children's Foundation, Constitution and Reforms Education Consortium (CRECO), East African Law Society (EALS), Fahamu, Foster National Cohesion (FONACON), Gay and Lesbian Coalition of Kenya (GALCK), Haki Focus, Hema la Katiba, Independent Medico-Legal Unity (IMLU), Innovative Lawyering, Institute for Education in Democracy (IED), International Commission of Jurists (ICJ-Kenya), International Centre for Policy and Conflict, Kenya Human Rights Commission (KHRC), Kenya Leadership Institute (KLI), Kenya National Commission on Human Rights (KNCHR), Kituo cha Sheria, Mazingira Institute, Muslim Human Rights Forum, The National Civil Society Congress, National Convention Executive Council (NCEC), RECESSPA, Release Political Prisoners Trust, Sankara Centre, Society for International Development (SID), The 4 Cs, Urgent Action Fund (UAF)-Africa, Youth Agenda.

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ABBREVIATIONS and ACRONYMS

CAJ	Commission on Administration of Justice
CEO	Chief Executive Officer
CIC	Commission for the Implementation of the Constitution
CIPEV	Commission of Inquiry into Post Election Violence
CSOs	Civil Society Organization
DGDG	Democratic Governance Donor Group
DK	Don't Know
DPP	Director of Public Prosecutions
EACC	Ethics and Anti- Corruption Commission
ECK	Electoral Commission of Kenya
ELOG	Elections Observer Group
EMB	Elections Management Body
FPTP	Fast Past the Post
ICC	International Criminal Court
IDs	Identification Cards
IDPs	Internally Displaced Persons
IEBC	Independent Elections and Boundaries Commission
IIBRC	Interim Independent Boundaries Review Commission
IIEC	Interim Independent Electoral Commission
IPOA	Independent Police Oversight Authority
IREC	Independent Review Commission
KNDR	Kenya National Dialogue and Reconciliation
K-NICE	Kenya National Integrated Civic Education
MCK	Media Council of Kenya
MoJNCCA	Ministry of Justice National Cohesion and Constitutional Affairs
MPs	Members of Parliament
MRC	Mombasa Republican Council
NCIC	National Cohesion and Integration Commission
NGOs	Non Governmental Organizations
NSC	National Steering Committee
PEV	Post Election Violence
PWDs	Persons With Disabilities
TV	Television
UN	United Nations
UNDP	United Nations Development Programme
US\$	United States dollar
UWIANO	<i>Kiswahili for platform for peace</i>
TRS	Two Round System

INTRODUCTION

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, another 3,561 people injured and 117,216 private properties and 491 Government-owned ones destroyed. Approximately 350,000 people were displaced from their homes or usual places of business, with about 1,916 Kenyans seeking refuge in Uganda.¹

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, chaired by retired Judge Johann Kriegler, and the Waki Commission recommended a range of reforms.

A number of reform efforts emanating from the two commissions' recommendations, as well as others recommended earlier, have been undertaken. Following the recommendations of the Kriegler Commission,² 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 Review 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.

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 more is expected. Similar changes are expected in a number of other key institutions of

government that play important roles in getting ready for 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. A new elections management body – the Independent Electoral and Boundaries Commission, has been appointed as required by the constitution.

The next General Election in Kenya is a source of considerable concern not only because of the problems witnessed during and after the 2007 one, but also because of a number of other factors related to the country's transition to democracy. The new constitution establishes more electoral offices than those contested in 2007. The elections for all these offices must be held on the same day. Unlike in the 2007 General Election, Kenyans will be electing six representatives for the following offices:

- A President;³
- A Deputy President, nominated by the candidate for President;⁴
- A member of parliament (MP) for each of the 290 constituencies;⁵
- A woman MP, for each of the 47 counties;⁶
- A senator for each of the 47 counties;⁷
- A member of the county assembly from each of the proposed 1,450 wards;⁸
- A county governor for each of the 47 counties;⁹ and
- A deputy county governor, nominated by the candidate for county governor.¹⁰

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

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

3 Constitution of Kenya, 2010, art. 136.

4 Ibid., art. 148.

5 Ibid. 3, art. 97(1)(a).

6 Ibid. 3, art. 97(1)(b).

7 Ibid. 3, art. 98(1)(a).

8 Ibid. 3, art. 177(1)(a).

9 Ibid. 3, art. 180(1).

10 Ibid. 3, art. 180(5) and (6).

In the past, Kenyans have elected three representatives only (a president, MP and councilor) at every General Election. Even if little else changes (such as the number of polling centres and stations, the number of candidates, and the weather patterns), the next General Election will be almost three times as demanding as all the previous ones. Should it rain at election time (something that is common in August and December, the months on the cards for elections are usually rainy), getting materials to the polling stations and getting people to vote could become very difficult.

Kenya is emerging from a failed General Election that raised doubts about its capacity to successfully conduct polls. Notably, the former ECK conducted a few by-elections and the 2005 referendum successfully, while its successor, the IIEC, conducted many by-elections and the 2010 referendum successfully. Despite considerable concern and some misgivings, the 2010 national referendum was praised as a remarkable success. Nevertheless none of these

exercises is anywhere close to the demands that the next General Election will exact on the electoral commission and others with a role in the elections. Matters are not helped by the fact that this will be a first time experience both for the IEBC team – even with two commissioners from the former IIEC and another seven fresh faces.

For Kenya to hold credible elections, it needs to overcome three challenges related to its past elections: (i) establish a conducive context for a successful electoral process; (ii) manage the next General Election reliably, competently and in a manner that inspires public trust in the process; and (iii) proactively manage pre-election violence triggers and settle election disputes effectively. This report outlines priorities related to the elections, assesses the country's readiness to hold elections and recommends actions on what needs to be done to make the next elections a democratic success.

1. KENYA'S ELECTORAL PREPAREDNESS INDICATORS

In order to establish how ready Kenya is to hold a successful election, certain indicators were used to measure the countries preparedness. Each of the three priorities identified by the Kriegler and Waki commission reports as well as from international literature on elections was broken down into a long list of indicators. Election assessment reports from several countries with contexts similar to Kenya's were also reviewed and used to collapse the long list of indicators into a short list of 20. A focus group made up of stakeholders in the electoral process, from both civil society and the government, reviewed these indicators, made some changes and produced the final list of 20. The focus group also resolved to include the original long list of indicators as sub-indicators for ease of application. The following is a descriptive summary of each indicator, for each of the three identified election-related priorities.

Priority 1:

Set a Conducive Context for a Successful Electoral Process

For any country to undertake a successful electoral process, the laws and behaviour of various stakeholders should establish an environment in which it is possible to prepare for and conduct genuine elections that reflect the free expression of the will of the voters. Given Kenya's previous experience, the following indicators are particularly critical, and it is against these that the assessment of its preparedness was conducted.

1.1 Electoral system establishes a fair basis for electoral competition: The electoral system is the body of rules that determines how votes cast are translated into seats. Kenya's recent history suggests that the extent to which the seats won correspond to the votes cast, and the degree to which significant groups feel that the system results in fair representation are critical to a successful election. The Kriegler Commission concluded that the debate over Kenya's electoral system should be settled as part of the country's constitutional reform process.¹¹

1.2 Electoral laws effectively establish an environment and procedures for periodic and genuine elections: If elections are equated to a competitive game, electoral laws set the rules of the game. The extent to which these rules cover all the key aspects of the process and establish order are critical to electoral efficiency and effectiveness. The Kriegler Commission found substantial flaws in the body of electoral laws that, combined with a culture of lawlessness at election time, reduced the capacity of the law to provide a fair playing ground for political competition.¹²

1.3 Laws and practices effectively regulate the media and guarantee equitable access to the media: For an election to be democratic, it has to offer a reasonable choice between the way the country is being run and the alternatives on offer. Therefore, access to the media in modern society is crucial to the dissemination of party platforms and programmes.

¹¹ 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. 18-21.

¹² *Supra* note 11, pp. 22-24.

- 1.4 Laws and practices guarantee freedom of assembly: Genuine elections allow people to assemble freely in the course of selling different policy alternatives and choices for leadership. The Kriegler Commission decried the use of harassment and intimidation of opponents to zone off certain parts of the country as the exclusive strongholds of specific parties.¹³
- 1.5 Laws and practices guarantee freedom of organisation and association: The freedom to organise and associate includes the freedom to form parties, coalitions and other groupings necessary for electoral contests.
- 1.6 Laws and practices guarantee free electoral participation: Good electoral laws guarantee the right to elect and to be elected without any exception, except limitations that are consistent with a democratic state. The Kriegler Commission recommended that the right to vote and be elected at genuine periodic elections be included in the Constitution.¹⁴
- 1.7 Citizens have adequate civic and voter education: The state of civic knowledge and competence to participate in the electoral process can determine electoral outcomes. Meaningful participation requires knowledge about the democratic process and electoral rules, for which civic and voter education is critical. The Kriegler Commission recommended long-term investments in civic and voter education as a necessary condition for full access to civic participation and leadership.¹⁵
- 1.8 Donor support for the democratic process is effectively coordinated: Kenya's electoral process is still evolving and, in certain respects, dependent on external democracy assistance. The Kriegler Commission found that, for this to be effective, it needed to be coordinated. Donors should align with the country's electoral cycle and provide support at the point when it is required.¹⁶
- 1.9 Political parties are responsible actors in the electoral process: A successful election depends not only on the work of the electoral management body but also on the behaviour and actions of other stakeholders in the electoral process. As the principal protagonists in electoral contests, political parties are expected to conduct their affairs in a manner that inspires confidence in the electoral process.
- 1.10 Mechanisms exist for early warning, early response and mitigation of election-related violence: Political violence has been a feature of Kenyan elections for many years, and the 2007 elections were accompanied by deadly violence and destruction of property on a scale hitherto unseen. The Kriegler Commission recommended better enforcement of the Electoral Code of Conduct and ordinary criminal law, while the Waki Commission recommended many measures to deal with the more serious factors associated with this violence.¹⁷
- 1.11 Observers have access to all aspects of the electoral process: Election observers are expected to enjoy freedom of movement and access to all stages of the electoral process, to examine factors 'impinging on the credibility' of the process, and to determine whether, in their judgment, conditions before the election are conducive to the holding of genuine elections and whether the elections were, in fact, genuine.

¹³ *Supra* note 11, pp. 59, 93 and 121.

¹⁴ *Supra* note 11, p. 22.

¹⁵ *Supra* note 11, pp. 87-89.

¹⁶ *Supra* note 11, pp. 102-104.

¹⁷ *Supra* note 11, p. 72; Republic of Kenya (2008). Report of the Commission of Inquiry into Post-Election Violence (Nairobi: Government Printer).

Priority 2: Manage Elections Competently and Inspire Public Trust in the Electoral Process

The failure of the 2007 General Election seriously eroded public trust in elections in Kenya. However, this erosion of trust began much earlier, when the President – acting alone -- appointed commissioners to the Electoral Commission of Kenya in a manner that raised doubts among some of the key players about the independence and impartiality of the election management body. Success in the next elections will be determined by how the IEBC commissioners are appointed and how they steer the electoral process from the date of their appointment through the next elections.

- 2.1 The legal and institutional framework for the Electoral Commission is adequate: For the electoral management body to effectively perform its role, it requires an enabling legal and institutional framework. The Kriegler Commission recommended a reconstitution of the Electoral Commission, alternative appointment mechanisms and restructuring for efficiency and effectiveness.¹⁸
- 2.2 The Electoral Commission exercises effective control of the electoral process: Although the Electoral Commission requires the support of other government agencies to succeed, it solely retains the responsibility of ensuring that the election is conducted properly. The Kriegler Commission recommended measures to improve the degree of control the Electoral Commission has in the process, including prosecuting election offences.¹⁹
- 2.3 The register of voters is comprehensive, accurate and current: The voters' roll is a key source of fraud in any election, because only those on the roll are eligible to vote. Because of human error, death and other factors, all voters' registers eventually become outdated at some point and a new roll is called for. The Kriegler Commission estimated, using statistical calculations, that the 2007 voters' register had some 1.2 million dead voters.²⁰

- 2.4 The demarcation of constituencies is transparent and fair: Kenya's constituency distribution is believed to be the result of many years of gerrymandering, in which the principle of equality of votes does not hold. The Kriegler Commission recommended a fairer system of drawing up constituency boundaries based on the number of voters, with necessary exceptions.²¹
- 2.5 The Electoral Commission is perceived as independent fair, competent and impartial: The body running the elections should conduct its affairs transparently, competently and impartially. Although impartiality is ultimately the critical test, public confidence in the electoral process in newly democratising states, such as Kenya, is also related to the degree to which the institution managing elections enjoys operational independence from any of the people or parties competing in the elections. The Kriegler Commission recommended measures to guarantee the Electoral Commission operational efficiency, independence and changes to its procedures and structure to transform it into a trusted agency for managing elections.²²
- 2.6 Counting, transmission, collation and announcement of election results are free of fraud and manipulation: An electoral process is only as good as the degree of public confidence in the final results the Electoral Commission announces. Votes must, therefore, be counted, collated and transmitted safely, accurately and transparently. The Kriegler Commission recommended an integrated and secure tallying and data transmission system to deal with the administrative and logistical problems experienced in 2007.²³

¹⁸ Supra note 11, pp. 25-51.

¹⁹ Supra note 11, pp. 25-51.

²⁰ Supra note 11, pp. 77-80.

²¹ Supra note 11, p. 77.

²² Supra note 11, pp. 25-51.

²³ Supra note 11, pp. 115-138

Priority 3: Settle Electoral Disputes Efficiently and Effectively

Many observers believe that the 2007 General Election would probably not have ended the way it did if the electoral dispute resolution mechanisms and process in the country had enjoyed public confidence. Regrettably, the judiciary was at that time operating on a trust deficit. Additionally, the manner in which it had handled elections until that point had led to a widely held belief that it was impossible to not only serve and file an election petition against an incumbent president, but also that one could not obtain a favourable judgement. Election petitions were filed with respect to a number of parliamentary and civic elections all over the country but not with regard to the presidential election that had primarily contributed to the violence in the first place. If unsatisfied role players have faith in the ability of the electoral dispute resolution machinery to resolve their disagreements, violence is less likely to be seen as an alternative.

3.1 Electoral dispute resolution laws are adequate: Because electoral processes are competitive, each has the potential for disputes. Effective laws and procedures for settling these disputes through administrative/quasi-judicial decisions by the Electoral Commission as well as judicial decisions the country's courts are necessary. The Kriegler Commission recommended changes to a system of laws and procedures that make it possible for those dissatisfied with election outcomes to go to court to resolve electoral disputes in good time before swearing in.²⁴

3.2 The Electoral Commission settles pre-election disputes effectively: Many electoral disputes in the courts need not necessarily end up there. If the Electoral Commission can settle minor pre-electoral disputes transparently and fairly, it can go a long way in improving public confidence in the electoral process and reducing the contestation in the final stages of the process.

3.3 The judiciary is an efficient, effective and trusted arbiter of pre-election and post-election disputes: While proactive action to improve the process helps to minimise disputes, an independent and impartial judiciary resolving disputes in respect to any part of the process is a useful addition to effective electoral administration and management. Ultimately, the courts are the final arbiter of any disputes that come before them. They must resolve them efficiently and effectively. The Kriegler Commission recommended a special election disputes resolution court to more effectively handle such disputes.²⁵

²⁴ Supra note 11, pp. 141-151.

²⁵ Supra note 11, pp. 22, 142 and 150.

2. ELECTORAL PREPAREDNESS ASSESSMENT

A combination of several methods was used to make the first assessment of Kenya's preparedness to hold elections. Besides reviewing literature on Kenya (including relevant laws and the parliamentary record), the team also discussed the indicators with the same focus group that validated the indicators. Finally, the team conducted in-depth interviews with key informants from a number of institutions critical to the electoral process and the implementation of governance reforms.

Priority 1: Set a Conducive Context for a Successful Electoral Process

1.1 A Fairer Electoral System

Kenya has had a simple majority, first-past-the-post, electoral system since independence in 1963. In addition to the inbuilt unfairness of the system, and its wastage of votes, years of gerrymandering have resulted in unequal constituencies. For example, Embakasi Constituency, with 219,994 registered voters, stood (by 2007) in contrast to Ijara, with 11,108 voters. The Constitution settled for a plurality-majority design for all of Kenya's elections: it provides for a two-round system (TRS) in the presidential elections and a first-past-the-post (FPTP) system with quotas for the national assembly, the senate and county assemblies. The National Assembly will be made up of (a) 290 members elected directly in single-member constituencies; (b) 47 women, one elected from each

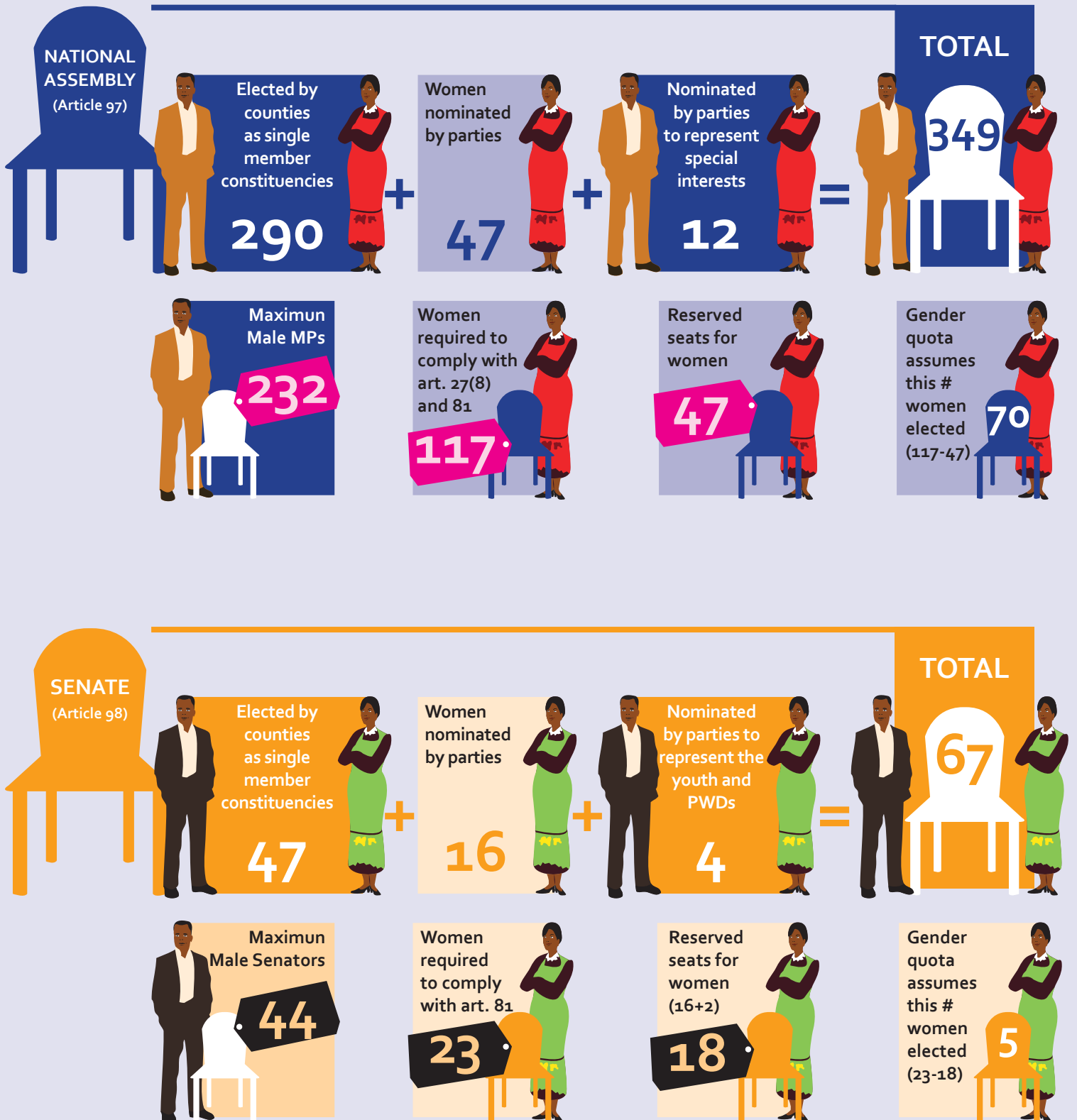
county; and (c) 12 members nominated to represent special interests, including the youth, persons with disabilities and workers.²⁶ The Senate will consist of (a) 47 members elected by each county; (b) 16 nominated women; (c) a man and a woman nominated to represent the youth; and (d) a man and a woman to represent people with disabilities.²⁷ Each county assembly shall consist of (a) members elected to represent the wards in each county; (b) nominated special seat members necessary to ensure the principle that no more than two-thirds of the representatives shall be from one gender; and (c) nominated members of marginalised groups, including persons with disabilities and the youth.²⁸ Each county will have a governor elected in a first-past-the-post election.

²⁶ Article 97.

²⁷ Article 98.

²⁸ Article 177.

Table 1: The Source of Kenya's Gender Quota Dilemma



Source: Author's calculation based on the Constitution of Kenya, 2010

Some progress has been made with regard to the electoral system: there is a two-round system for the presidential election and a somewhat enhanced first-past-the-post system for the other elections, with measures to improve the representation of women and special interests as well as marginalised groups. However, the gender quotas for the National Assembly and the Senate have provoked debate due to their imprecise formulation (Table 1), more so for the National Assembly where even the 12 special interest seats are not a sufficient safety valve in the event that insufficient women are elected in the 290 constituencies. Additionally, if the electoral system before the new Constitution encouraged zero-sum (winner-take-all) politics, this time it is doubly so due to the fact that the distribution of seats on party lists will be based on the seats each party has won in the constituency elections rather than the votes cast for each party.²⁹ The distortionary effects of the system (i.e. between the percentage of seats won in the representative bodies and the percentage of votes cast) are also likely to be higher, depending on how the overall demarcation of the additional 80 constituencies is done.

1.2 Effective Electoral Laws

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.³⁰ 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 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 nor does it institutionalise political parties. Parliament also recently passed the Elections Act, which consolidates and strengthens electoral law. In addition to laws relating to elections in the strictest sense,³¹ 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;³² 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 judicial³³ and police³⁴ reforms.

Even with some of the proposed reforms not materialising -- such as the express bar against party hopping, that was removed at the Third Reading of the Political Parties Bill, 2011; the lack of strong campaign finance laws; and ambiguity in the framing of gender quotas referred to above, 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.³⁵

²⁹ Constitution of Kenya, 2010, article 90(3).

³⁰ International IDEA (2002). *International Electoral Standards: Guidelines for Reviewing the Legal Framework of Elections* (Stockholm: International IDEA) p. 11.

³¹ The Independent Electoral and Boundaries Commission Act, 2011; The Political Parties Act, 2011; and The Elections Act, 2011.

³² 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.

³³ Judicial Service Act, 2011; The Vetting of Judges and Magistrates Act, 2011; and the Supreme Court Act, 2011.

³⁴ The National Police Service Act, 2011; The Independent Policing Oversight Authority Bill, 2011; and the National Police Service Commission Bill, 2011.

³⁵ Republic of Kenya (2008). *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007* (Nairobi: Government Printer) p. 24.

Table 2: Overview of Electoral Law Reform in Kenya

Type of electoral law	Before	After
1. Constitution of Kenya, 2010	Inadequate protection of the right to vote; unfair constituency delimitation; electoral gender imbalance.	Right to vote enshrined; more inclusive and participative; integrity provisions relating to leadership.
2. Electoral law	Substantive flaws in the framework combined with a culture of lawlessness at election time.	Consolidated electoral law with provisions to punish electoral impunity; EMB law in place.
3. Other significant laws	Substantive flaws in the framework combined with a culture of lawlessness at election time.	New Political Parties Act expected to stimulate better political party management; hate speech legislation; police reforms; judicial reforms.
4. Rules and regulations	Substantive flaws in the framework combined with a culture of lawlessness at election time.	New rules and regulations yet to be drafted to operationalise new electoral law and other significant laws.
5. EMB instructions and directives	ECK management marked by incompetence; IIEC has inspired public trust in the electoral process.	IEBC enjoys high public trust; Most of the IEBC commissioners are new hence institutional memory largely rests with the staff.
6. Codes of conduct for political parties, election officials and election observers	Electoral Code of Conduct for political parties and candidates in existence, though largely breached; Code of Conduct for Election Officials; Code of Conduct for Observers.	Electoral Code of Conduct covers parties, candidates and the media. There is also a Code of Conduct for Political Parties.

Source: Author's analysis

1.3 Media Regulation and Access to Media

The Constitution provides protections necessary for a free and vibrant media. The Communications Commission of Kenya (CCK) is also seen as generally acting more fairly than was the case in the past, when it was seen as an extension of a coercive state, though contestations regarding the political appointment of its Director-General³⁶ have recently dulled its sheen somewhat. However, there is still inadequate protection against the undue control of the media by particular interests (with most mainstream media companies owned by politically connected individuals). The statutory Media Council of Kenya is also perceived as suffering one of the ills of emergent self-regulation – the protection of its members rather than effective maintenance of discipline within the industry. 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.

1.4 Freedom of Assembly

The Constitution protects the right of every person, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities. Of particular importance to the electoral environment is the right to freely assemble, since this underpins – by extension – the right to hold campaign (and other) meetings necessary to mobilise

funds, sell party and candidate agenda and policies to the electorate and do all such other things as are necessary to lawfully win an election. The degree of respect for this right is not limited to elections, indeed its respect, protection and fulfilment on matters that are not election-related may serve as a good indicator of how it will be respected, protected and fulfilled in a charged electoral environment. A review of political behaviour to date indicates that there are still some vestiges of undemocratic tendencies. Although the Public Order Act does not require a licence to hold a meeting since its amendment by the Statute Law (Miscellaneous Amendments) Act No. 10 of 1997, police still routinely break up peaceful demonstrations on the pretext that they are unlicensed. The last such meeting ended up with the arrest of a group that wanted Education Minister Prof Sam Ongeru sacked over the alleged mismanagement of Sh4 billion meant for primary education.

1.5 Freedom of Organisation and Association

The Constitution now contains stronger guarantees for the freedom of association. The Political Parties Act, 2008, also made it easier, at least on paper, to establish political parties. This law, and its successor, the Political Parties Act, 2011, have shifted decision making from a hitherto opaque and pliant Registrar of Societies to an independent office of Registrar of Political Parties. Nevertheless, a residual culture of self-censorship, if not a “spiral of silence”, is still discernible. This is attributable to the fact that although there is freedom of expression, there is a sense in which “freedom after expression” is somewhat constrained – undemocratic tendencies still pervade the social space, in which ideas deemed unpopular are suppressed. An independent and impartial judiciary is nevertheless expected, over time, to enlarge this space.

³⁶ Following the Minister’s re-appointment of Mr Njoroge, in spite of a Board decision to the contrary, in *Consumers Federation of Kenya vs AG & The Minister for Information and Communication* in the High Court suspended the Minister’s decision and ordered the appointment of an Acting Director-General until the suit is heard and determined.

1.6 Free Electoral Participation

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 constitutional order, such as electoral violence and bribery. Violence, or the threat of it, has been witnessed in some by-elections since 2007, and remains a veritable constraint on electoral participation because it affects turnout, notably of women. Voter bribery is also still rampant, and 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 thin and far between. In the recent Shinyalu by-election, for example, it was reported that some people were arrested on suspicion of engaging in bribery, but it is not known what became of the cases. Unless action is taken to deter such activities, the two will continue to undermine free electoral participation in the unforeseeable future.

1.7 Adequate Civic and Voter Education

Since the 1990s, numerous civic and voter education programmes have been implemented in Kenya. From diverse initiatives by individual organisations, improved coordination – albeit at the urging of donors – saw the start of the National Civic Education Programme (NCEP) in 2001. 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 recognised as an integral part of the process 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.

Overall, these efforts are still seen as largely uncoordinated, unstructured and unfocused. 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 also 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).

1.8 Effectively Coordinated Donor Support

As a newly democratising state, Kenya needs technical assistance in many areas, one of which is elections. For this support to be effective, it needs to be delivered at the point of need. Generally, donor support as currently organised is well-coordinated. Heads of Mission are responsible for holding political dialogue with key government officials. On the specific issue of elections, donors meet regularly under the Elections Sub-Group of the Democratic Governance Donor Group (DGDG) to address issues of electoral preparedness, funding and technical assistance. There is also coordination among implementing agencies, such as the United Nations Development Programme, the International Foundation for Election Systems (IFES) and International IDEA. The Electoral Commission is the centre of these discussions and is given the responsibility of designing the agenda. This enables the maximisation of resources and avoids duplication.

A number of challenges persist, though. What is agreed is not always necessarily what is implemented. There is need to follow through on what is agreed upon. Government also provides budgets that are beyond donor capacity. Because of frequent staff transfers and lack of institutional memory, some agencies do not understand Kenyan dynamics. Some donors

dictate what should be done or decide that Kenya does not deserve donor funding. There is also a general concern that financial resources are not made available adequately, where and when required. Some donors have been accused of cherry-picking what to fund instead of supporting strategic initiatives. These critics say this is explained by the fact that donors still see elections as events. Among civil society organisations, there is a widely held belief that donors force groups to work as coalitions in order to access the basket funding – with the Kenya Domestic Observation Forum (KEDOF) in 2007 cited as an example. In contrast, the Elections Observation Group (ELOG) is nevertheless seen as an organic formation.

1.9 Responsible Political Parties

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.

The fruits of this law will be seen in how it is implemented, which should include promulgation of regulations under it, and the enforcement of the Code of Conduct for Political Parties. Currently, not much has changed in terms of political party management in Kenya. Parties are still controlled by oligarchies, if not individuals; party-hopping and straddling is expected to continue after strict provisions to regulate party-hopping were removed at the final stage in Parliament; and oversight by the current registrar is seen as weak – even in regard to the regulation of state funding for political parties and their accountability. Parties

have yet to evolve a democratic culture and have a weak membership base. Overall, internal governance structures are weak or, in some parties, virtually non-existent.

1.10 Early Warning, Early Response and Mitigation of Election-Related Violence

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.³⁷ 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. IIEC also, at various times, directed politicians to act with restraint and used the Political Parties Liaison Committee to cool down temperatures.

Even though some politicians have been prosecuted for hate speech, albeit unsuccessfully, following incendiary remarks made in the run up to the 2010 referendum on the Constitution, Trade minister Chirau Mwakwere is yet to be prosecuted for similar utterances in the Matuga by-election in July 2010, despite NCIC's recommendation to the Commissioner of Police. Occasionally, information has filtered into the media about threats of communities re-arming. UWIANO is also seen as effectively dealing with early warning but not as effective on early response, which is the role of national security agencies. If the system is to succeed, it will need to be designed to process information and respond better than the laid back state response to the information provided to it by the National Security Intelligence Service (NSIS), adjudged by the Waki Commission to have been insufficient, if not ineffective.

³⁷ An initiative of NCIC, the state-led National Steering Committee on Peace Building and Conflict Management (NSC) and PeaceNet Kenya, it was established to jointly gather comprehensive and real-time data from across the country on cohesion and integration related to early warning and rapid response matters, as well as to serve as a platform for documenting and celebrating positive action among Kenyans.

1.11 Access for Election Observers

The Constitution requires IEBC, among other functions, to facilitate the observation, monitoring and evaluation of elections. This express duty has been further elaborated on in the Elections Act, 2011. IEBC, like its predecessors, has generally facilitated the participation of observers in the elections it has conducted since its formation. Nevertheless, access to information is still limited. Observers also argue that the

role should extend beyond the grant of an accreditation letter. There are hopes that ELOG will evolve into a strong long-term observation outfit, but this hope is somewhat diminished by the tendency for infighting in Kenyan CSO coalitions (chiefly over resources and status). Regulations to be promulgated by IEBC should also further strengthen the existing provisions to ensure that the electoral commission meets the full transparency requirements for meaningful election observation, monitoring and evaluation of elections.

Priority 2: Manage Elections Competently and Inspire Public Trust in the Electoral Process

2.1 Adequate Legal and Institutional Framework for the Electoral Commission

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 on 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 in the new commission to ensure the retention of some institutional memory.

The IEBC's legal and institutional framework includes the election date, which is now written down in the Constitution as the second Tuesday in August of every fifth year. However, for the first elections, the transitional provisions preserved the life of the current National Assembly for its unexpired term. There was a fair degree of disagreement on the precise election date for these elections, with some arguing for the second Tuesday in August 2012, while others saying it falls on the tradition under the old Constitution, which places polls in December of 2012. Others argue that, as Parliament was sworn in and first sat in January

2008, the next general elections could be held as late as March 2013. After the Constitution Implementation Commission filed a case for an advisory opinion on this and other issues, a three-judge High Court bench decided that elections could be held on March 15, 2013, or earlier if the President and the Prime Minister agreed to dissolve the coalition. Whichever date it will be, time seems to be running out for the IEBC to effectively complete the work of the IIBRC (see further elaboration under demarcation of constituencies below), prepare a voters' roll and competently get ready for the next elections. At best, things are in a state of flux. As one focus group discussion member put it: "The old is dying and the new is yet to be born".

2.2 Effective Electoral Commission

IIEC enjoyed considerable public trust compared to its predecessor. Its handling of the by-elections since its formation and the 2010 constitutional referendum was generally seen as a success. To its credit, showed readiness to rein in electoral mischief by arresting people who have registered more than once after issuing a warning and allowing a grace period for the surrender of the extra voters' cards. However, its inability to enforce the Electoral Code of Conduct and to clamp down on bribery, among a number of ills, was still a cause for concern among many election stakeholders by the time it was leaving office. In any event, nothing much is known of the fate of the people arrested for multiple registration or bribery (such as those arrested in the Shinyalu by-election). It is hoped that the IEBC will enforce the code of conduct and ensure that cases of electoral malpractices are punished.

2.3 Comprehensive, Accurate and Current Register of Voters

IIEC registered voters for the 2010 referendum. At the time, the commission used an electronic voter registration system in some 26 constituencies on a pilot basis, while using the old manual registration system in the rest. This improved on the register that was in place at the time of IIEC's formation. However, some of the traditional bottlenecks to successful registration still linger. For over a year, the Ministry of Immigration and Registration of Persons could not issue new citizens' identity cards (IDs) due to procurement wrangles. There is a risk that some people may not have obtained their identity cards in time to register as voters if a new registration drive is conducted. The ID issuance process has since resumed and a third generation identity card with enhanced security features and a microchip for data storage has been promised, based on an integrated population registration system (IPRS). Curiously, the integrated registration system that the Kriegler Commission recommended is not being pursued and the old register may be rendered obsolete much faster due to deaths and other factors, owing to the fact that the IEBC will continue to register voters separately while the Ministry of Immigration and Registration of Persons also does so separately – each with its own database that is not linked to the other. New laws on citizenship and immigration may also have an effect on this aspect of the electoral process. The Kenyan Diaspora is increasingly interested in participating in governance, not least in voting. However, the legal framework for registering Kenyans abroad and facilitating their participation in elections has not yet been developed, even as concerns about their high number and the likelihood of electoral malpractices related to Diaspora voting being raised.

2.4 Transparent and Fair Demarcation of Constituencies

The Constitution provides for better criteria for the demarcation of constituencies. Demarcation is an especially important aspect of the elections since Kenya has retained the FPTP electoral system it had, and the distribution of party lists is also (unfairly) pegged on the number of seats a party wins from among the 290

single-member constituencies rather than the total votes garnered. IIBRC, which was established to review constituencies and create a further 80, ended up with a flawed process and controversial report. However, the IEBC was required to complete reviewing the boundaries using the IIBRC report as its primary reference point and the parliamentary report on the IIBRC as its second reference point. Having reviewed the documents, the IEBC launched its preliminary report, which was subjected to public hearings in all the 47 counties to get Kenyans' views on the boundaries for constituencies and wards. After getting public input, a revised boundaries review report was sent to Parliament for debate and adoption. MPs recommended the creation of 100 new wards, which IEBC refused but it however altered and rearranged several wards and placed them in new areas in constituencies. The IEBC has published a final boundaries review report and starting March 8, Kenyans have 30 days to lodge appeals in courts over the report. Thereafter, the IEBC intends to conduct voter education on the published report and then map the new electoral units.

2.5 Independent, Competent and Impartial Electoral Commission

IIEC was widely perceived as independent, professionally competent and impartial. By December 2011, the IEBC commissioners and a Chairperson had been selected, vetted and appointed. The process produced a team that is trusted and therefore perceived as independent, competent and impartial.

However, previous controversies regarding the IIEC's staff hiring processes and procurement (arising from an email leaked to the media, and as a result of which at least one member of staff was dismissed) may have diminished public trust in the predecessor to the current electoral body. The failure to effectively separate the board from the management of the electoral commission in the enabling legislation suggests the possibility of an overlap of roles between the commissioners and staff, a veritable recipe for workplace conflict, and weaker oversight on strategic issues relating to administration of elections. A court had already issued an order barring the commission from advertising or recruiting for the position of its chief executive officer.

IEBC begins work, therefore, with a trust deficit owing to how it effectively deals with concerns emerging from its predecessor's experiences. Looking to the future, IEBC will also need to address some of the old enforcement issues in order to fully earn public trust.

2.6 Accurate Counting, Transmission, Collation and Announcement of Results

In addition to constitutional provisions relating to the representation of the people in Article 81 of the Constitution, and the 2007 experience, this stage of the electoral process is cause for serious concern. The manner in which the IIEC counted, transmitted, collated and announced results has, nevertheless, inspired confidence in the process and made it somewhat transparent. IEBC, in anticipation of the tough task ahead has not only been exploring the possibilities of electronic voting, but also plans to undertake mock election exercises in select constituencies. It also intends to use electronic tallying and transmission in all the constituencies during the next elections.

However, some doubts persist, and they will need to be assuaged long before the next elections. The apparent failure of the system to update referendum results at Bomas of Kenya, though amicably resolved, meant that bottlenecks experienced at the time need to be removed ahead of the next major electoral exercise – Kenya cannot afford to have results marked by the many errors and contestations that accompanied the 2007 presidential election. Matters are not helped by the fact that, for some inexplicable reason, the final 2010 referendum results cannot be publicly accessed on the IEBC website. By all indications, the next presidential election will not only be closely contested, but may also go into a run-off. There have also been reports to the effect that the training of election personnel is not yet streamlined and standardised. In addition to the credibility issues surrounding their recruitment and deployment, these concerns combine to undermine the credibility of the electoral commission.

Priority 3: Settle Electoral Disputes Efficiently and Effectively

3.1 Adequate Electoral Dispute Resolution Laws

Article 88(1)(e) of the Constitution provides for two kinds of election disputes: (a) disputes arising out of nominations and before the declaration of results; and (b) disputes subsequent to the declaration of election results and election petitions. The former can be settled by IEBC while the latter can only be settled by the courts – the Supreme Court in the case of presidential elections, by dint of article 163(3)(e). Service of an election petition can either be direct or by advertisement in a newspaper with national circulation. Further provisions are to be found in the Elections Act, 2011. Confidence in the courts is further buoyed by the fact that a new Chief Justice and Deputy Chief Justice; Supreme Court; High Court Judges and Chief Registrar have been appointed. Once the vetting of judges and magistrates is successfully concluded, it will close the chapter on a process that has been one of the sub-plots of the constitution review process – the final clean-up of a much discredited institution. However, rules will need to be developed for supporting legislation and the Supreme Court's ability to create jurisprudence remains untested. Finally, as the Constitution did not create an Election Disputes Resolution Court, as recommended by the Kriegler Commission, there may be backlogs if case flow management is not radically transformed.

3.2 Effective Settlement of Pre-election Disputes

Granting IEBC powers to settle disputes arising from the nominations as well as others preceding the declaration of results has given the Kenyan electoral process the opportunity of forestalling some of the major problems witnessed in the 2007 elections. It is sound electoral practice to resolve these problems where they arise -- speedily, transparently and competently. In fact, if IEBC develops this competence, many of these disputes will be settled in ways that not only are affirmed by the courts (should dissatisfied parties still go to court) but also save the taxpayer costs from the numerous election petitions that the

electoral management body loses following every general election due to administrative errors on the part of its staff or other malpractices perpetrated by contestants. The Political Parties Dispute Tribunal is also expected to deal with some of these disputes, and should acquire similar competence to be of use in the next elections. As the IEBC has yet to use these powers, only the future will tell how their use contributes to the overall acceptability of the next elections.

3.3 Effective Judicial Settlement of Election Disputes

Either in response to the impending structural changes or for other reasons, the Kenyan judiciary has dealt with election petitions arising out of the 2007 General Election in ways that have restored some public faith in the judiciary as an arbiter of electoral disputes. Measures currently being undertaken by the Judicial Service Commission to transform the Judiciary, under the leadership of the new Chief Justice, will add further impetus to this. This is instructive: it will be recalled that one of the protagonists in the violent aftermath of the 2007 presidential election flatly refused to go to court, despite persistent retorts by the other protagonist's side that it was the only route for resolving the dispute. Before then, the courts had consistently shown that when faced with a petition challenging the election of an incumbent president, they would either throw it out on technical grounds (such as service, which was in turn rendered impossible by presidential security) or dismiss the same after a substantive hearing on the basis of shaky legal reasoning.

For this to work, however, the Judiciary needs to deal with the old operational problems in the dispensation of justice generally and election petitions in particular. It is noteworthy that some of the 2007 election petitions are only now getting concluded (at least two with pending appeals), one year or so before the next General Election. This is way beyond the efficiency requirements of the Constitution (which requires presidential election disputes to be settled in the transition period preceding the swearing in of the president-elect) and the Election Act, 2011, which also

provides for the expedited hearing and determination of election petitions. Computerisation of the courts will only be useful if it adds to judicial efficiency in the dispensation of justice. Other stakeholders also need

to make their contribution: police reforms should lead to better investigations, while the Bar is also expected to adjust to the efficiency requirements of the new election disputes regime.

3. CONCLUSIONS AND RECOMMENDATIONS

Several efforts have been made to improve various aspects of Kenya's electoral process since the 2007 electoral debacle. However, there are a number of issues that still require to be addressed. In this section we summarise the current state of play on the three key priorities and recommend remedial action. Although Kenya is still in the pre-voting period, with a legal framework that is still taking shape, these issues are of concern because the voting period is between 12 and 15 months away (see Figure 1 below).

Figure 1: Electoral Cycle



Source: European Commission & United Nations Development Programme Partnership on Electoral Assistance

**Priority 1:
Set a Conducive Context for a Successful Electoral Process**

The context for holding elections in Kenya is a case of mixed signals. Despite a successful constitutional reform process, continuing legal reforms and a new elections management body, there are still quite

a number of loose ends to tie up to set up a truly conducive context for the next General Election. Table 3 contains the key challenges that are still outstanding as well as their possible solutions.

Table 3: Towards a More Conducive Electoral Environment

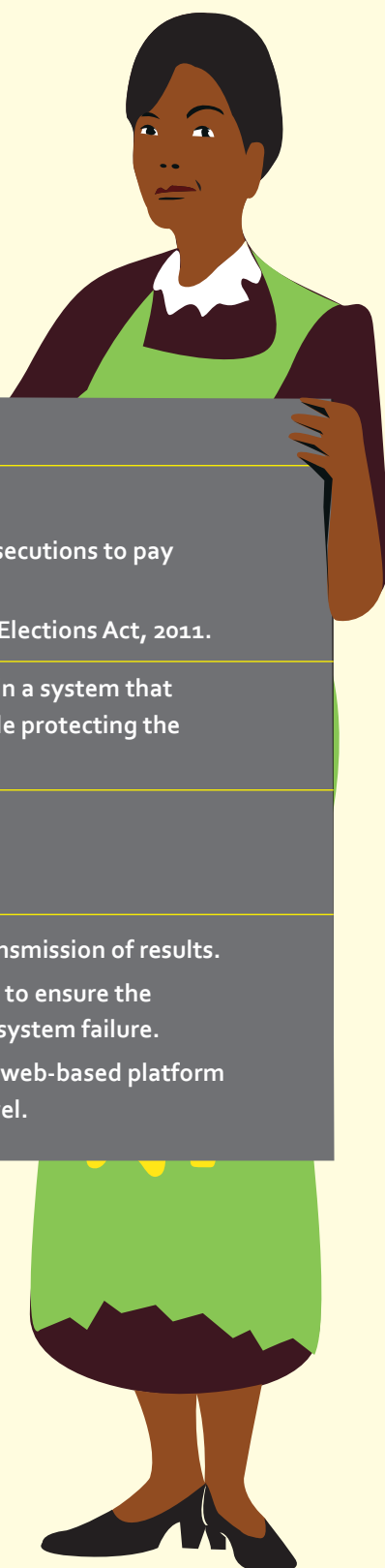
Challenges	Recommendations
1. Continuing uncertainty over gender quotas	<ul style="list-style-type: none"> Speedily resolve the doubts over the system through a suitable constitutional amendment.
2. FPTP system raises the possibility of a close, zero-sum electoral contest with distortionary effects	<ul style="list-style-type: none"> Strengthen early response mechanisms Conduct civic education on the electoral system
3. Incomplete legal reforms	<ul style="list-style-type: none"> Hasten the promulgation of regulations under the relevant laws.
4. Ineffective media regulation and inequitable access to the media	<ul style="list-style-type: none"> Conduct an audit of media ownership in Kenya. Promulgate equitable access regulations under the Elections Act, 2011, and enforce them
5. Continuing violations of basic political freedoms	<ul style="list-style-type: none"> Speed up police reforms and judicial reforms
6. Uncoordinated, under-funded, unstructured and unfocused civic education	<ul style="list-style-type: none"> Agree on the minimum content for an election-centred voter education programme within the context of an inclusive national civic education programme
7. Weak political parties and ineffective political party regulation	<ul style="list-style-type: none"> Promulgate comprehensive regulations under the Political Parties Act, 2011
8. Weak early response mechanisms	<ul style="list-style-type: none"> Speed up police reforms Strengthen peace committees
9. Inadequate facilitation of electoral observation	<ul style="list-style-type: none"> Develop a Code of Conduct for Election Observers that includes adequate facilitation for electoral observation

Priority 2: Manage Elections Competently and Inspire Public Trust in the Electoral Process

A new legal and institutional framework for the electoral management body has been put in place amid concerns about the results of reconstituting it, especially with regard to preserving its institutional memory. Table 4 contains the persistent challenges that will need further attention.

Table 4: Towards Better EMB Readiness and Competence

Challenges	Recommendations
1. Continuing weakness of enforcement action in respect to electoral offences.	<ul style="list-style-type: none"> • Speed up police reforms. • Coordinate with the Director of Public Prosecutions to pay adequate attention to electoral offences. • Firmly use enforcement powers under the Elections Act, 2011.
2. Continuing bottlenecks against the maintenance of an accurate and current register.	<ul style="list-style-type: none"> • Integrate voter registration with the IPRS in a system that allows the sharing of registration data while protecting the integrity of the register.
3. Incomplete constituency delimitation process in a charged electoral environment.	<ul style="list-style-type: none"> • Speed up constituency delimitation.
4. Uncertainty over the ability of the EMB to put in place a fool-proof system for counting of votes and results transmission.	<ul style="list-style-type: none"> • Establish a computer-based system for transmission of results. • Choose electronic voting solution carefully to ensure the availability of an audit trail in the event of system failure. • EMB should provide full transparency on a web-based platform for election results up to polling station level.

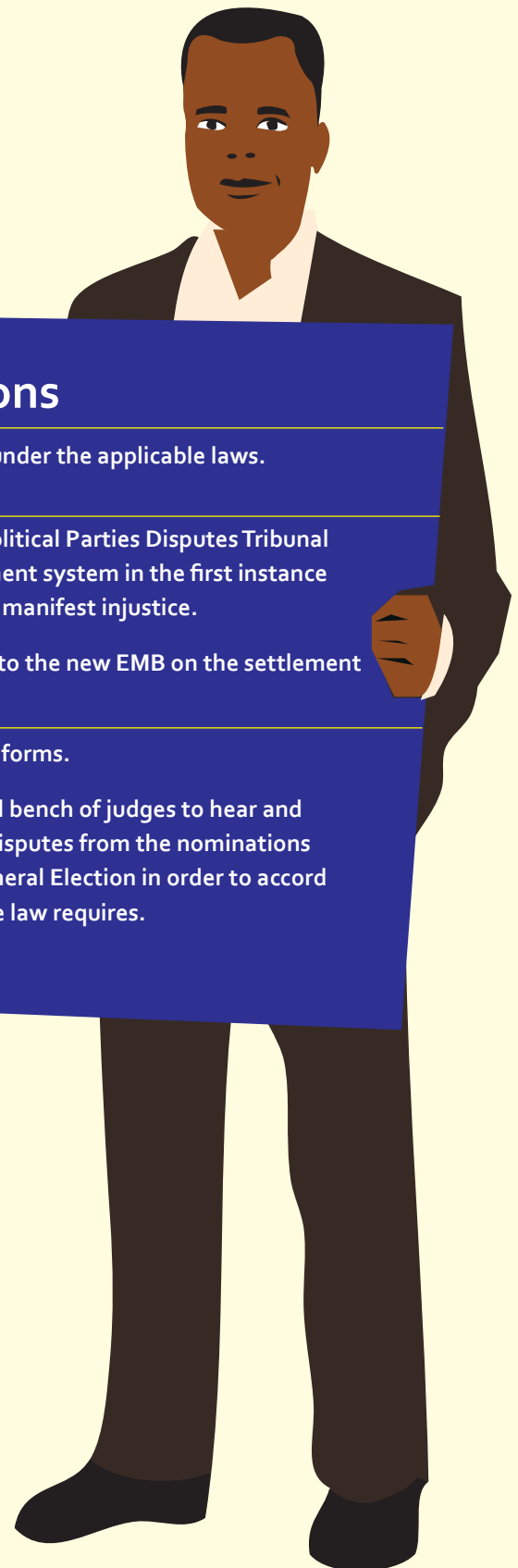


Priority 3: Settle Electoral Disputes Efficiently and Effectively

Although election petition determination after 2007 has inspired confidence in the courts and judicial reforms will further bolster this confidence, there are still concerns relating to case-flow management. The vetting of judges and magistrates started but has currently been stalled. Table 5 contains the key outstanding challenges and recommended solutions.

Table 5: Towards Improved Electoral Dispute Resolution

Challenges	Recommendations
1. Incomplete legal reforms on electoral dispute resolution.	<ul style="list-style-type: none"> Finalise the making of rules under the applicable laws.
2. Uncertainty over the ability of the EMB to effectively and efficiently handle pre-election disputes.	<ul style="list-style-type: none"> Courts should defer to the Political Parties Disputes Tribunal and the IEBC dispute settlement system in the first instance and only interfere in cases of manifest injustice. Provide technical assistance to the new EMB on the settlement of pre-election disputes.
3. Uncertainty over the ability of the judiciary to hear and determine election disputes efficiently and fairly.	<ul style="list-style-type: none"> Speed up on-going judicial reforms. Consider appointing a special bench of judges to hear and determine election-related disputes from the nominations period to a year after the General Election in order to accord petitions the priority that the law requires.



ANNEX 1: Summary of election preparedness

Priority 1: Set a Conducive Context for a Successful Electoral Process

Electoral Process Indicators	Sub-indicators (Kriegler, Waki Reports; Other Sources)	Progress	Deficits
<p>1.12 Electoral system establishes a fair basis for electoral competition</p>	<ul style="list-style-type: none"> Resolve the question of the electoral system as part of the constitutional reform process 	<ul style="list-style-type: none"> An inclusive electoral system with better affirmative action for marginalised groups Principles for elections stated in the Constitution 	<ul style="list-style-type: none"> Entrenches winner-take-all politics Uncertainty over the manner of achieving not more than 2/3 gender representation. Ambiguity on the value and weight of each vote expected to be resolved after the boundaries delimitation process is completed.
<p>1.13 Electoral laws effectively establish an environment and procedures for periodic and genuine elections</p>	<ul style="list-style-type: none"> Strengthen and consolidate laws relating to the process of conducting elections Guarantee voting by universal suffrage and secret ballot without discrimination Set the electoral date in law Enact substantive laws prohibiting hate speech Bar the use of public servants, as well as public finances and materials in elections 	<ul style="list-style-type: none"> Constitution provides for periodic elections Legal framework guarantees inclusivity and participation Electoral rights entrenched in Bill of Rights Integrity, accuracy and transparency requirements in the Constitution <ul style="list-style-type: none"> Political parties' act 2011 has come into force. Elections Act 2011 has come into force. Campaign financing bill 2011 is undergoing stakeholder input. Leadership and integrity bill is undergoing stakeholder input. 	<ul style="list-style-type: none"> Campaign Financing Bill is yet to be finalised – still undergoing public input Ambiguity in constitution language <ul style="list-style-type: none"> a) elections date b) how to realise the gender principle c) lack of clarity on seats to be contested Less stringent provisions on party hopping Does not effectively deal with impunity related to electoral offences Ambiguity in enforcing chapter 6 regarding elective positions

Electoral Process Indicators	Sub-indicators (Kriegler, Waki Reports; Other Sources)	Progress	Deficits
1.14 Laws and practices effectively regulate the media and guarantee equitable access to the media	<ul style="list-style-type: none"> Media ownership is effectively regulated by the state Guarantee free and equitable access to the media Media Council should oversee the conduct of the media and enforce its Code of Conduct Develop a media and elections policy and promote responsible election reporting There should be full disclosure on a regular basis of the actual owners of media 	<ul style="list-style-type: none"> Law on equitable access to media not in place CCK is impartial <ul style="list-style-type: none"> Media bill 2012 being drafted Interim Communication Commission of Kenya bill 2012 being drafted. Freedom of Information bills is with CIC Data protection bill 2012 is with CIC. 	<ul style="list-style-type: none"> Media ownership is unregulated – is it a question of a) control by one mogul (UK), b) access by others of contrary view? From owners - accountability Media council is weak though statutory legislation as media laws do not take into account social media, the internet etc Equity and access to state media is not guaranteed Ineffective regulation of FM stations.
1.15 Laws and practices guarantee freedom of assembly	<ul style="list-style-type: none"> Guarantee the freedom of assembly 	<ul style="list-style-type: none"> Constitution guarantees freedom of assembly Independent candidates Justiciable freedoms 	<ul style="list-style-type: none"> Arbitrary abuse of freedom of assembly – it is not fully respected a) by zoning (party) b) by security forces c) by communities
1.16 Laws and practices guarantee freedom of organization and association	<ul style="list-style-type: none"> Guarantee the freedom of organisation and association 	<ul style="list-style-type: none"> Freedom of association is guaranteed 	<ul style="list-style-type: none"> There are restrictions on this right, e.g., registering a political party “Freedom of expression versus freedom after expression” (Munir Mohammed) Self-censorship, “spiral of silence” Constraints on freedom of organisation:- a) infiltration by security forces, b) space for organising “social environment” c) unpopular ideas

READY OR NOT

AN ASSESSMENT OF KENYA'S PREPAREDNESS FOR THE GENERAL ELECTION

Electoral Process Indicators	Sub-indicators (Kriegler, Waki Reports; Other Sources)	Progress	Deficits
1.17 Laws and practices guarantee free electoral participation	<ul style="list-style-type: none"> Guarantee the right to electoral participation 	<ul style="list-style-type: none"> Effective purposeful participation still wanting Guaranteed in the political rights 	<ul style="list-style-type: none"> Bribery, violence, inhibitive cultural practices hinder free electoral participation
1.18 Citizens have adequate civic and voter education	<ul style="list-style-type: none"> Provide adequate civic and voter education 	<ul style="list-style-type: none"> Voter education is guaranteed in constitution <ul style="list-style-type: none"> Kenya National Integrated Civic Education (K-NICE) has been set up. Voter and civic education curriculum has been drafted Voter education by IEBC 	<ul style="list-style-type: none"> Limited civic and voter education No legal framework to guide civic education Civic education is unregulated, is not focused Voter information being confused with civic education
1.19 Donor support for the democratic process is effectively coordinated	<ul style="list-style-type: none"> Effectively coordinate donor support for the democratic process 	<ul style="list-style-type: none"> Better/fairly coordinated donor effort Efforts to form thematic sub-groups to facilitate coordination between donor and with civil society and EMB 	<ul style="list-style-type: none"> Donor support not timely. Donors not availing adequate resources Donors "force" groups to work in coalitions/ basket funding (KEDOF) cf. ELOG Donors cherry picking initiatives Not depending on local capacity, always import mediocrity- knowledge transfer? Limited institutional memory Still seeing elections as an event

Electoral Process Indicators	Sub-indicators (Kriegler, Waki Reports; Other Sources)	Progress	Deficits
1.20 Political parties are responsible actors in the electoral process	<ul style="list-style-type: none"> • Improve the management and regulation of political parties • Effectively regulate political financing and expenditure 	<ul style="list-style-type: none"> • Efforts to strengthen the office of Registrar of Political Parties both from a legal framework and capacity building aspect • Political Parties Act 2011 being implemented 	<ul style="list-style-type: none"> • Office of registrar is still vacant. • Political Parties controlled by elites and power brokers, individuals • Sections in Political Parties Act that targeted responsible behaviour are neutralised (watered down) • Oversight on political parties is weak • Parties have not evolved a democratic culture • Weak membership base • Internal governance of Political Parties is weak • Laws regulating funding of political parties are not comprehensive/ consolidated • Lack of awareness/ knowledge by citizens on the provisions of the Political Parties Act.
1.21 Mechanisms exist for early warning, early response and mitigation of election-related violence	<ul style="list-style-type: none"> • Strengthen early warning of election-related violence. • Put in place measures for early response to election-related violence. • Institute mitigation measures against election-related violence 	<ul style="list-style-type: none"> • Mechanism for mitigation being discussed (e.g. UWIANO) • NCIC effective /creating awareness • Threats of violence (arming and rearming) • Traditional mechanisms for early warning and conflict resolution 	<ul style="list-style-type: none"> • Mechanisms still being discussed or lacking • Enforcement mechanisms lacking / weak • No access to early warning system

READY OR NOT

AN ASSESSMENT OF KENYA'S PREPAREDNESS FOR THE GENERAL ELECTION

Electoral Process Indicators	Sub-indicators (Kriegler, Waki Reports; Other Sources)	Progress	Deficits
<p>1.22 Observers have access to all aspects of the electoral process.</p>	<ul style="list-style-type: none"> • Establish and enforce a Code of Conduct for election observers • Establish a permanent election observation group comprising diverse CSO interests • Provide observers with access to the tallying process and provide copies of statutory returns to observers. 	<ul style="list-style-type: none"> • Access for participation • Preparation by IEBC • Political Parties processes are open for observation • Access to information • Strengthened enabling legislation for observation. 	<ul style="list-style-type: none"> • Tracking of legislation and regulations by observers is difficult (deadlines are too short) • Need to strengthen broad, concerted and long term observation • Infighting and lack of capacity (knowledge and resources) by CSOs • Facilitation needs to take place for comprehensive observation to take place • Professionalisation lacking

Priority 2: Manage Elections Competently and Inspire Public Trust in the Electoral Process

Electoral Process Indicators	Sub-indicators (Kriegler, Waki Reports; Other Sources)	Progress	Deficits
1.23 The legal and institutional framework for the Electoral Commission is adequate	<ul style="list-style-type: none"> Strengthen the legal and institutional framework for the Electoral Commission Reduce the maximum number of commissioners and improve appointment process Reorganise the expiry of terms of commissioners to ensure at least two years' experience before every election Institute commission-management separation of roles IEBC's functions should include advising the government on electoral law reform 	<ul style="list-style-type: none"> Fairly good laws are in place A lean IEBC established with Commissioners competitively hired and publicly vetted IEBC commissioners have assumed office and are working. IEBC has published final report on delimitation of boundaries 	<ul style="list-style-type: none"> Lack of clarity under scheduling elections Institution framework is in a state of flux (the old is dying and the new is yet to be born) Terms of IEBC Commissioners to end in November 2017 – an election year
1.24 The Electoral Commission exercises effective control of the electoral process	<ul style="list-style-type: none"> Provide the Electoral Commission with effective control over the electoral process Establish a political parties liaison committee and agree on fairer nomination rules No political parties should be registered once Parliament has been dissolved Specifically define the campaign period and enforce the Electoral Code of Conduct 	<ul style="list-style-type: none"> IEBC so far has inspired public confidence. IEBC inherited IIEC staff and some commissioners, which should improve institutional memory. 	<ul style="list-style-type: none"> Inability to enforce the law e.g. on voter bribery, etc. Lack of clarity of election date hinders effective planning for elections by IEBC.

READY OR NOT

AN ASSESSMENT OF KENYA'S PREPAREDNESS FOR THE GENERAL ELECTION

Electoral Process Indicators	Sub-indicators (Kriegler, Waki Reports; Other Sources)	Progress	Deficits
<p>1.25 The Electoral Commission is perceived as independent, fair, competent and impartial</p>	<ul style="list-style-type: none"> • Make Electoral Commission accountable to Parliament and financially independent • Review Electoral Commission's administrative procedures to improve certainty and uniformity of performance • Review Electoral Commission's overall training/briefing procedures • Establish clear lines of accountability for service delivery for commissioners and staff • Rationalise the Electoral Commission's structure for efficient and effective operations • Establish a performance management system for the Electoral Commission • Appoint a Commission Secretary who is a competent and experienced election manager • Improve public confidence in the Electoral Commission and the electoral process 	<ul style="list-style-type: none"> • IEBC widely perceived as independent, professional and non-partial • IEBC enjoys financial independence. • IEBC Commissioners publicly vetted by parliament. • IEBC has been created • Internal reorganisation of IEBC is ongoing 	<ul style="list-style-type: none"> • Old enforcement issues still virtually unaddressed (voter bribery still rampant) – soft underbelly

Electoral Process Indicators	Sub-indicators (Kriegler, Waki Reports; Other Sources)	Progress	Deficits
1.26 The register of voters is comprehensive, accurate, and current	<ul style="list-style-type: none"> Simplify requirements for registration and voting Revise the voters' register, avail it for scrutiny and address registration bottlenecks 	<ul style="list-style-type: none"> Electronic voter registration to be carried out in selected constituencies Issuance of IDs back on track New laws on citizenship and immigration have been passed. 	<ul style="list-style-type: none"> Potential electors don't have IDs Challenges on citizenship documents Legal framework on registering Diaspora lacking Voter registration yet to begin Central registry of persons lacking ; Disconnect between registration regimes
1.27 The demarcation of constituencies is transparent and fair	<ul style="list-style-type: none"> Establish and implement a fairer, more transparent system of demarcating constituencies 	<ul style="list-style-type: none"> The constitution principles on demarcation are clear Boundaries review is complete and final report published. 	<ul style="list-style-type: none"> Public debate on boundaries delimitation clouded by ethnic, political and sectoral undertones.
1.28 Counting, transmission, collation and announcement of election results is fraud-free	<ul style="list-style-type: none"> Align job skills and qualifications to a modern, IT-facilitated electoral process Improve the counting, transmission, collation and announcement of election results Publish results up to polling station level to improve transparency Improve procedures for safe storage of election materials pending post-election analysis and dispute resolution Introduce a reasonable transition period between elections and swearing in 	<ul style="list-style-type: none"> Election Act has been enacted IEBC experience on same evident Human resource capacity is there Election results transmission system working well IEBC regularly reshuffles regional staff to improve professionalism 	<ul style="list-style-type: none"> Staff selection perceptions (might lower credibility)

Priority 3: Settle Electoral Disputes Efficiently and Effectively

Electoral Process Indicators	Sub-indicators (Kriegler, Waki Reports; Other Sources)	Progress	Deficits
1.29 Election dispute resolution laws are adequate	<ul style="list-style-type: none"> • Enact a law to cater for comprehensive electoral dispute resolution by the Electoral Commission and an Electoral Dispute Resolution Court • Replace current election petition laws with new laws that ensure petitions are heard in a just and timely manner • Institutionalise the practice of post-election audits and evaluations to improve practice 	<ul style="list-style-type: none"> • Election Act spells out duration of election petitions. • Judiciary reforms are on-going. • Supreme Court is working – to handle Presidential election petitions • Clear timelines for resolving electoral disputes in constitution • JSC has increased number of judges in the High Court and Court of Appeal 	<ul style="list-style-type: none"> • Dispute resolution is not tested.
1.30 The Electoral Commission settles pre-election disputes effectively	<ul style="list-style-type: none"> • Institute some prior adjudication and settlement by the Electoral Commission • Manage pre-election conflict triggers effectively 	<ul style="list-style-type: none"> • Political Parties dispute Tribunal has been established and working - some cases have been settled. • Elections and Political parties Acts have been enacted. 	<ul style="list-style-type: none"> • Concurrent jurisdiction may still bring problems

Electoral Process Indicators	Sub-indicators (Kriegler, Waki Reports; Other Sources)	Progress	Deficits
1.31 The judiciary is an efficient, effective and trusted arbiter of pre-election and post-election disputes	<ul style="list-style-type: none"> Establish a culture of settling electoral disputes efficiently and satisfactorily 	<ul style="list-style-type: none"> Vetting of Judges and Magistrates has started New crop of judicial officers appointed Increased number of judicial officers Perceived independence Independent Chief Justice Credible Judicial service Commission constitutionally entrenched Transparent recruitment process of Judges Criminal prosecutions to be handled by state counsel 	<ul style="list-style-type: none"> Vetting of Judges and Magistrates is not public – it might not achieve intended impact of restoring public trust and confidence in judiciary. Slow pace of computerisation Police reforms not concluded Investigations likely to remain weak Capacity:-Need for judicial officers continued training to be knowledgeable on constitutions and election Role of the bar in judicial reforms still undetermined

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