



Rethinking Electoral Management in Kenya

An Emerging Agenda for the 2017 Elections



About Us

The Africa Centre for Open Governance (AfriCOG) is an independent, non-profit organisation that provides cutting edge research and monitoring on governance and public ethics issues in both the public and private sectors so as to address the structural causes of the crisis of governance in this country. Since the post-election violence of 2008, AfriCOG has also been working with partners in Kenyans for Peace with Truth and Justice (KPTJ) to promote accountability for political violence and credible and legitimate elections in Kenya that are generally accepted as such, as a crucial contribution to lasting peace. The overall objectives of our programme activities are: to promote the implementation of the Constitution of Kenya 2010; to strengthen anti-corruption and good governance in Kenya with objective, high-quality research and advocacy and to build citizens' capacity to be permanently vigilant and monitor progress on governance issues in the public and private sectors. We also work at regional and international levels to promote collective efforts towards anti-corruption, accountability, transparency and openness in governance. Our reports, policy briefs and overall work add value to anti-corruption and governance reform processes by stimulating policy discussion and supporting evidence-based advocacy and the mobilisation of our partners.

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Abbreviations

| | |
|---------|---|
| AfriCOG | Africa Centre for Open Governance |
| BVR | Biometric Voter Registration System |
| EACC | Ethics and Anti-Corruption Commission |
| ERT | Electronic Results Transmission |
| EU-EOM | European Union Election Observation Mission |
| EVID | Electronic Voter Identification Device |
| IEBC | Independent Electoral and Boundaries Commission |

Background

This policy brief emerges from a public forum convened to reflect on Kenya's experiences with the 2013 elections, its readiness for the next general elections in 2017 and the need to address critical issues to ensure that the next elections will be free, fair, transparent and accurate, as required by Article 81 of the Constitution. The forum brought together prominent political representatives and various key stakeholders. Participants assessed the performance of the IEBC and the implications of the decision of the Supreme Court of Kenya on the presidential election of 2013 for future elections. It is noteworthy that participants from across the political spectrum agreed that there were significant shortcomings in both the management of the 2013 elections by the IEBC and in the Supreme Court decisions that must be addressed in a timely manner if credible and peaceful elections are to be held in 2017. They called for deeper and broader debates to raise awareness of the need to institute the necessary remedial measures well before the next elections.

This paper is the latest in the series of reports by AfriCOG/KPTJ on elections¹. The report opens with an overview of the situation following the 2013 general elections; it analyses the various shortcomings of the last elections starting from the pre-election period, covering issues such as procurement of materials and registration, to the post-election period, examining issues related to dispute resolution, and then makes a series of recommendations to address the shortcomings identified. These recommendations are not intended to be exhaustive; they cover aspects that were under scrutiny at the forum. AfriCOG/KPTJ will continue to publish analyses and reports on these issues to stimulate public debate, raise awareness and promote the implementation of critical reforms.



¹ See the publications on elections at www.africog.org

Summary

The management of the 2013 general elections demonstrated serious gaps in transparency and accountability, exemplified by the IEBC's inability to authoritatively state which voters' register was used during the elections, and its failure to ensure the effectiveness of its Electronic Results Transmission system. The IEBC has been unable to demonstrate its independence as provided for in the Constitution², giving rise to the perception of a Commission under the thumb of the executive arm of government.

The legal framework on elections management fails to integrate the participation of main stakeholders throughout the electoral process, thereby giving the Commission an opportunity to exercise administrative authority to block stakeholders from investigating and overseeing the electoral process.

Efficient, transparent and accountable management of electoral processes is key to promoting public confidence in elections and their outcomes. The Constitution of Kenya provides a general principles framework, and the statutory and administrative framework on elections integrates these principles.

Elections management is not static. Rather, it is an evolving process, one that must respond to the developing national context. It is therefore timely to reflect on experiences of past elections and identify solutions to those problems as Kenya heads into the next election period. Such proposals should aim to develop an agenda for reform that seeks to facilitate credible, free and fair elections that adhere strictly to the constitution and reflect the true will of the people. They should also facilitate the adoption of practices and measures that ensure the transparent administration of all aspects of the electoral cycle, including the full participation of electoral sector stakeholders throughout the cycle. The following analysis concludes with recommendations to contribute to this endeavour.

2 Art. 81 (iii)

Introduction

Article 88 of the Constitution of Kenya 2010 establishes the Independent Electoral and Boundaries Commission (IEBC) as the principal body tasked with the responsibility of managing elections in Kenya. The Commission is made up of eight members and a chairperson appointed through a so-called competitive process. Chapter Fifteen of the Constitution identifies the Commission as one of the independent commissions and offices to which that chapter applies. Commissions set up under this chapter to secure the observance of democratic values and principles by all state organs are “independent and not subject to control by any person or authority”³ in implementing their mandates. The structure, design and nomenclature of the Commission are intended to create an electoral commission that is independent in the execution of its mandate. This places a duty on commissioners to unconditionally protect the independence of the IEBC.

Article 81 of the Constitution sets out the basic principles of the electoral system which include free and fair elections that are transparent and administered in an impartial, neutral, efficient, accurate and accountable manner. In delivering elections in Kenya, the Commission is expected to adhere to these principles in all processes of the electoral cycle, from procurement and voter registration up until the declaration of results and post-election dispute resolution.

Parliament has also enacted the Independent Electoral and Boundaries Commission Act, 2010 as the main legislation that seeks to further actualise the constitutional provisions on the management and operations of the IEBC; the Act replicates the provisions of the Constitution and provides for the recruitment of commissioners through a competitive process.

The 2013 general elections in Kenya

The management of the 2013 general elections in Kenya demonstrated severe challenges that gravely undermined the credibility of the outcome, leading to the filing of two petitions at the Supreme Court challenging the conduct and integrity of those elections. These flaws were a culmination of several structural design weaknesses at the Commission, which ultimately damaged and affected its ability to deliver free and fair elections. The numerous errors and misconduct witnessed in the last elections include: non-transparent procurement of materials; uneven distribution of biometric voter registration kits across the country; significant shortcomings in the voter register; inadequate opportunities for inspection of the voter register by voters; problematic party nomination and dispute resolution procedures; failure of electronic voter identification and electronic results transmission systems; failure by key players to systematically audit or monitor the work of the IEBC; the questionable role of the national tallying centre in producing a final count; and troubled post-elections dispute resolution procedures. These are discussed below:

3 The Constitution of Kenya, Article 249

- **Non-transparent procurement of electoral materials**

To conduct elections, the Commission must first procure the necessary goods and services. The Independent Electoral and Boundaries Commission Act, 2011, specifies in Section 17 and 18 that the Commission is entitled to “monies allocated by Parliament” to be known as the “Independent Electoral and Boundaries Commission Fund”, to pay for, among other things, “any other operational . . . expenses incurred by the Commission in the performance of its functions”. The IEBC is classified as a public entity under the Constitution and is therefore subject to the provisions of the Public Procurement and Disposal Act, 2005, and the Public Procurement and Disposal Regulations, 2006, which require a transparent and accountable process for the procurement of goods and services.

Box 1:

Article 227 of the Constitution states that: “When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.” It further prescribes the legislation of an enabling framework, which is provided by the Public Procurement and Disposal Act whose objectives are to maximise economy and efficiency, promote fair competition, integrity, transparency and accountability, thereby enhancing public confidence in procurement in order to promote local industry and economic development.

The procurement of Biometric Voter Registration (BVR) kits by the IEBC in 2012 was neither transparent nor effective due to the failure to meet the set standards and timelines within the Procurement Act. The Commission was not able to procure Biometric Voter Registers (BVRs) within the provisions of the Public Procurement and Asset Disposal Act, and ceded this function to the Executive. The Executive then entered into what was referred to as a “government to government” deal with the Canadian government to acquire the materials through a Canadian company. In the end, the BVR kits were supplied by a French company, Safran Morpho. By yielding its mandate to the Executive, the IEBC had surrendered its constitutional independence as guaranteed in Article 249 of the Constitution, and circumvented the requirements of the Procurement Act.

The cost of procuring the BVR kits was an estimated US\$ 72 million.⁴ This was a major investment in technology, which, considering the Commission’s inability to generate a complete and accurate voter register, is an indictment of its efficiency and judgement in the use of public resources. Article 201 of the

4 Joel Barkan, “Kenya’s 2013 Elections, Technology is not Democracy”, in: *Journal of Democracy*, vol. 24, No. 3, July 2013 p. 160

Constitution requires the “prudent and responsible” use of public money, yet significant financial resources were invested in a process that ultimately failed to deliver the desired outcome: an effective voter register. In a special report, the Auditor General criticised the government for single sourcing the kits at a highly inflated price and needlessly contracting a commercial loan to finance the deal⁵.

The opacity of the electoral materials procurement process has returned to haunt the Commission. Investigations by the Ethics and Anti-Corruption Commission (EACC) implicated senior IEBC officials in wrongdoing. As a result of this investigation, the Director of Public Prosecutions is prosecuting Mr. James Oswago, the former CEO of the Commission, the Deputy Commission Secretary in charge of support services, Mr Wilson Shollei, the Director of Finance, Mr Edward Karisa, and the Procurement Manager, Mr Willy Kamanga. Criminal charges have since been brought against the officials. The charges against them relate to the tender to procure Electronic Voter Identification Devices (EVIDs), which was awarded to a private company, Face Technologies, at a cost of Sh1.3 billion.⁶

In a later development in 2015, UK prosecutions found the principals of a British company, Smith & Ouzman, to be guilty of bribing foreign public officials to obtain contracts for printing ballots. Among them were alleged to be Kenyan officials of the Interim Independent Electoral and Boundaries Commission, some of whom transited to its successor body, the IEBC. The affair became known as Chickengate, from the use of “chicken” by the company’s go-between as the code word for bribes. Although the UK court has sentenced the company representatives involved in the affair, there has been no action by Kenyan authorities against the Kenyan officials named in the investigation, despite the fact that Smith & Ouzman was the company contracted by the IEBC to print ballots for the 2013 elections, and thus may have benefited from an on-going corrupt relationship.

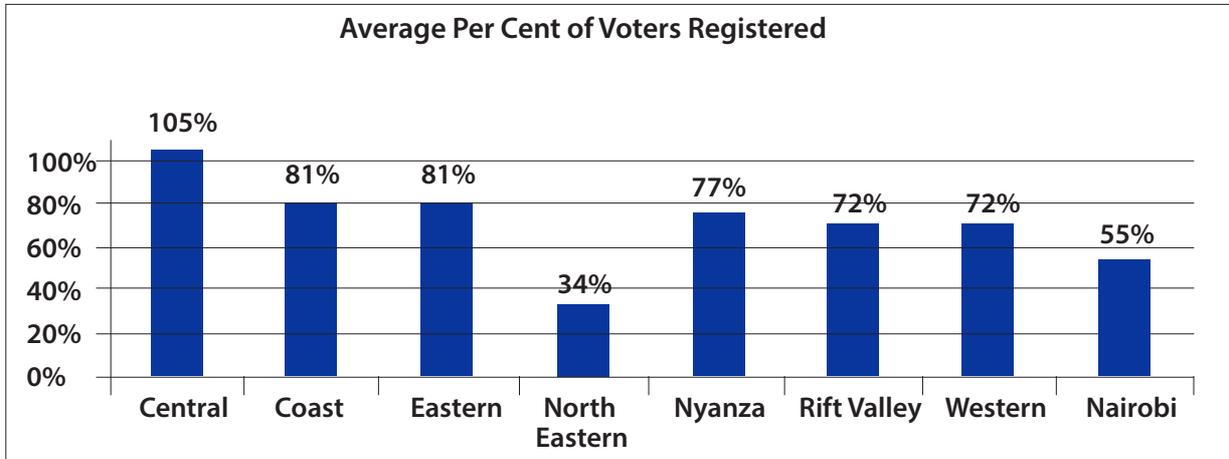
- **Unequal and non-transparent distribution of voter registration kits**

Even when the BVR kits had been procured, the Commission did not adopt transparent processes in distributing BVR kits to registration centres across the country. The Commission also ordered a smaller number of BVR kits than necessary for each voter registration centre to have at least one; the kits were to be shared between registration centres. They were also delivered late, and were distributed across registration centres without the Commission explaining to the public, or to sector players, what distribution criteria they used to allocate kits across the country. Some regions had more kits than others; in some parts, one BVR machine would serve a whole division, while elsewhere one machine would serve a particular location. For example, the registered voters in Kakamega County, the most populated rural county in Kenya, had less registered voters than Kiambu County, which registered more than 116% of the projected voters.

5 Office of the Auditor General, June 6 2014, Special Audit of Procurement of Electronic voting Devices for the 2013 General Elections by the Independent Electoral and Boundaries Commission.

6 Munguti, Richard. “More IEBC Staff on Tender Charge”. Daily Nation. 7 November 2013. Accessed at <http://www.nation.co.ke/news/politics/More-IEBC-staff-on-tender-charge--/1064/2064584/-/view/printVersion/-/puhso5/-/index.html>

Table 1: Average Per Cent of Voters Registered in Regions



AfriCOG, 2013⁷

Such discrepancies can partially be attributed to the distribution of voter registration kits, which was done in a manner that disadvantaged certain counties. The IEBC never gave an explanation of how it had dealt with the shortage of BVR kits and on what basis it had made its decisions on their distribution, despite public calls for this.

In addition, a comparison of unexplained changes in the numbers of registered voters per region between December 2012 and February 2013 shows that Jubilee stronghold regions of Central and Rift Valley province gained a total of 68,836 additional voters, while opposition strongholds in Nyanza and Coast Province were stripped of 14,122 voters.

| Region | Changes Between December 2012 and February 2013 |
|---------------|---|
| Coast | +901 |
| Nyanza | -15,026 |
| Central | +1,848 |
| Rift Valley | +67,000 |
| North Eastern | +6,604 |
| Western | -2,938 |
| Eastern | +4,222 |
| Nairobi | -50,102 |

A closer look reveals how changes affected counties. The table below illustrates the ten counties that experienced the largest number of additions and deletions.⁸

| County | Change in Number of Voters |
|-------------|----------------------------|
| Trans Nzoia | +13,288 |
| West Pokot | +13,092 |
| Turkana | +12,540 |
| Uasin Gishu | +11,913 |
| Narok | +9,652 |
| Nairobi | -50,102 |
| Kajiado | -10,707 |
| Homa Bay | -5,872 |
| Kilifi | -4,816 |
| Murang'a | -4,211 |

In terms of internal shifts, there were about 153,664 subtractions and 166,164 additions made to the register⁹. The irregularities detailed here appear far more systematic and significant than the “clerical”, “random” and “scattered” errors that IEBC’s lawyers subsequently described.

Using out-dated census data, the IEBC ultimately claimed to have registered 79% of eligible voters¹⁰.

- **Incomplete and unverified voter register**

The delay in procuring BVR kits, together with their late delivery and deployment across the country, compromised the integrity and accuracy of the register. Registration of voters appeared to be incomplete at the time of legal closure of registration.¹¹ At the Supreme Court hearings of the presidential petition, the Commission admitted that changes were made to the Voter Register even after the date for closure of the register as provided in the Elections Act. That changes were made to the register beyond the determinate date demonstrate that there was never a complete voter register in place in the manner required by the Act. In addition, any observers wishing to audit the register would have been unable to do so because it was not accessible. The register was only available after 20th February 2013, ten days before the general elections.¹² Thus, the 2013 general election took place on the basis of an uncertain, unreliable and inaccurate voters’ register. After the elections, it became apparent that the supposed final register was not the one used during the 2013 general election. This emerged from responses by the IEBC during the Supreme Court petitions discussed below.

8 AfriCOG, Voter Registration for the 2013 General Elections in Kenya, March 2014

9 Seema Shah, “The 2013 Kenyan Presidential Elections: Lessons Left Unlearned”, presentation at AfriCOG forum on the 2013 elections, May 2013, <http://kptj.africog.org/the-2013-kenyan-presidential-election-lessons-left-unlearned/> Accessed on June 9, 2015.

10 Barkan, 2013, 161

11 Ibid p.11

12 European Union Elections Observation Mission to Kenya. General Election 2013, Final Report, 2013

At the Supreme Court hearings, the IEBC claimed that it actually used three registers: the principal register, the special register (for a group of people described by IEBC as being without biometrics), and the ‘Green Book’, which was a manual compilation of voters. The discredited ‘Black Book’ of the 2007 general election, which the Kriegler Commission (IREC) had concluded provided opportunities for ballot-stuffing and double registration, seemed to have returned with a new name and colour.

The Commission staff admitted at the hearings that they were still making changes to the voter registers in the final days running up to the elections.¹³ The EUEOM, in its report, noted that a total of four different lists were used: the register in poll books; the lists printed for individual polling stations; the list of people whose biometric data had not been captured; and finally, the entries listed in the ‘green books’ – the manual records of entries made during voter registration.¹⁴

It is well established that a core principle of free and fair elections is a single, verifiable voter register, which must be comprehensive, authoritative and accurate. The use of multiple voter registers creates serious questions about the integrity, transparency and accuracy of the entire electoral process. For example, why does the total number of voters contained in the various voter registers that IEBC supposedly used not add up to the total announced in the final election results? And, more fundamentally, why weren’t all registered voters, irrespective of the availability of their biometric details, included in the legally gazetted register?

| Voter Registration in Kenya | |
|---------------------------------------|-------------------|
| Provisional Register | 14,340,036 |
| Special Register | 36,236 |
| Trainee Registrations | 12 |
| Total of the Above Three Lists | 14,376,284 |
| Principal Register | 14,352,545 |
| Total Announced on March 9, 2013 | 14,352,533 |
| Total Announced on July 18, 2013 | 14,388,781 |

- **Incomplete inspection of the voter registers by the public**

A credible and transparent election requires that voters be given the opportunity to test and affirm the voter register’s accuracy through inspection. The Elections Act requires this as an important step in the preparatory stages of elections. The IEBC, however, did not give the public and stakeholders’ sufficient opportunity to inspect and verify the voter register once the registration process was complete. Delays in the procurement of election materials led to a shortened period for registration of voters and further shortened the period for

13 Ibid
14 Ibid

inspection of the voter register. The Commission rolled out an SMS verification system that enabled persons to confirm that their details were captured accurately in the register. This was not an inspection of the register as envisaged under the Elections Act; voter register inspection as envisaged in the Act is a complete audit of the register with a possibility of challenging the registration of a person who does not qualify to be registered, not simply an SMS or online message confirming the registration of an individual voter¹⁵.

This failure of the IEBC to allow for substantive inspection of the register meant that their subsequent claims about which voter register (or which combination of voter registers) they used could not be properly scrutinised; the opacity of the entire registration process, as well as the unavailability of a reliable voter register to check the final results against, only casts further doubt over the credibility of the 2013 elections.

- **Failure of electronic voter identification and electronic results transmission**

The choice of a BVR system also meant that a second set of laptops and fingerprint scanners were purchased and loaded with the appropriate software, as well as the national-register data, so that voters could be identified on Election Day. These were known as electronic voter-identification devices, or EVIDs, and 33,100 (1 per polling station) were eventually purchased by the IEBC. Because generators were cumbersome and expensive, and electricity was often either non-existent or unreliable, the IEBC also decided to equip each EVID laptop with three rechargeable batteries to ensure sufficient power on Election Day, which were supposed to be recharged ahead of time.¹⁶

The IEBC claimed that it had uploaded the BVR voter register on the EVID kits in readiness for the elections. However, questions were raised as to whether the commission actually had the time to do this. It was suggested by lawyers for one of the petitioners at the Supreme Court hearings that the IEBC had failed to upload the BVR registers onto the EVID kits to facilitate identification of voters¹⁷.

EVID kits arrived in the country less than two weeks before the elections. IEBC workers reportedly only finished loading laptops with the necessary data and software 48 hours before the elections. On polling day many registered voters' details could not be traced in the EVID kits. The entire electronic identification system failed and the Commission resorted to manual identification of voters. It defeats logic to invest in biometric registration of voters and then adopt manual identification of voters. In many instances the electronic poll books used to verify the biometric data of registered voters either stopped working (due to a lack of electricity to recharge the batteries) or never functioned at all.¹⁸

Experts providing technical support to the commission had reportedly advised before the election that there would not be enough time to do this and that it would be better not to procure the kits altogether

15 The Elections Act 2012 (2011), Section 6 (1) "The Commission shall cause the Principal Register of Voters to be opened for inspection by members of the public at all times (...)".

16 Barkan, op cit, p. 160

17 *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others*, Supreme Court Petition 5, 3 & 4 of 2013 [2013 eKLR] available at <http://kenyalaw.org/caselaw/cases/view/87380>

18 Commonwealth Observer Report, Kenya Elections 2013

and acquire a technologically simpler system¹⁹. While the Commission had agreed, the President and Prime Minister stepped in and insisted on sticking to the BVR solution²⁰.

A post-election poll conducted by AfriCOG revealed that 8% of registered voters responding saw people whose names were missing from the register vote, while 10% of the respondents couldn't vote because their names were missing from the register.²¹

Transmission of results required that votes be tallied at the constituency and county levels before they are transmitted for final tallying and compilation at the national level. Electronic transmission of the results from polling stations was hampered by the failure of the mobile encrypted systems. EU-EOM observers reported that many polling stations had difficulty in sending in the results electronically.²² Cases were reported of batteries failing or not being charged at all and returning officers not having passwords to the phones. This affected the IEBC's ability at the national level to communicate results consistently and reliably.

The total cost of all the computers, mobile phones, and accessory equipment for Election Day is estimated to have been as high as US\$120 million, or about US\$10 for each of the 12.2 million Kenyans who ultimately took part in the election. The Independent Review Commission, chaired by retired South African judge Johan Kriegler, had placed the cost of the 2007 Kenyan election per registered voter at \$20.4 (or \$29 per cast ballot), one of the most expensive in the world .

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Expensive controls collapse

On polling day, the entire ICT infrastructure deployed for the elections collapsed, from the electronic identification devices (EVIDs) to the results transmission system (ERT). The heavy investment in financial and human resources and in the technological aspects of the elections was wasted. In most polling stations, the electronic voter identification kits failed to function and IEBC officials resorted to the use of the manual register or the so-called "green book", which, in the absence of BVR, had no controls against multiple voting.²⁵ In some cases, the returning officers approved the creation of supplementary lists of voters, provided that voters could show proof of registration.²⁶ This introduced irregularities in the voting process.

19 "IEBC got warning the voting kits will fail". The Standard. 8 August 2013.

20 Barkan, op cit, p.

21 AfriCOG, 'Post-Election Public Opinion Poll' (March 5-6 2013); AFRICOG/KPTJ, 'Voter Registration for the 2013 General Elections in Kenya'.

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

23 Ibid

24 *Daily Nation*, "Why Kenyan election is world's most expensive", May 18 201225

25 The Carter Centre (2013), *Post-election Statement on Tabulation and Announcement of Final Election Results*, Nairobi

26 Commonwealth Secretariat, *supra* note 735.

In many instances, the electronic poll books used to verify the biometric data of registered voters did not work at all (due to software failure) or stopped when their batteries ran out of power. Rather than results being transmitted immediately after counting at the polling station was completed, there was a long delay by those stations that managed to transmit at all, and the ERT lost relevance as a control mechanism. Strangely, in a few cases, some results transmitted electronically were higher than the final, manually compiled results, although electronic transmission was stopped earlier, as shown in the table below.²⁷ This anomaly has never been explained.

Table: ERT Results v. Form 34 Results: Unresolved Discrepancies

| Presidential Candidate | Constituency | Electronic Results Total Votes | Final Results as Reported by IEBC | Difference (IEBC Less Electronic Results) | Total Number of Votes Lost | Differences between electronic results and form 34 |
|------------------------|--------------|--------------------------------|-----------------------------------|---|----------------------------|---|
| Kenyatta | Masinga | 2,605 | 2,507 | -989 | 8 | |
| Odinga | Masinga | 33,780 | 33,361 | -419 | 419 | <ul style="list-style-type: none"> Wamboo Primary School Form 34: 380; Electronic Register: 280. Muthesya Primary School Form 34: 639; Electronic register: 630. Muthamwaki Primary Sch Form 34: 279; Electronic register: 275. Several forms also appear to have been edited (Ndelekeni Primary School, Muri Farm Primary School, Mukameni Primary School, Mbusyani Primary School, Kivuthi Primary School, Kiambani Primary School and Eendei Primary School) |
| | Ruiru | 142 | 43 | -99 | | |
| | Masinga | 319 | 308 | -11 | | |
| | Nyeri Town | 279 | 120 | -159 | | |

27 AfriCOG/KPTJ, Election Day 2013 and its Aftermath, March 2014, p. 11

As the table below shows, in only 13% of Kenya’s constituencies were over 80% of polling stations able to transmit the presidential vote electronically.

Table: Percentage of Constituencies by Level of Success at Reporting Results Electronically

| Constituencies where: | Presidency | Parliament |
|---|------------|------------|
| 0-20% of polling stations reported successfully | 27 | 59 |
| 21-40% of polling stations reported successfully | 24 | 12 |
| 41-60% of polling stations reported successfully | 17 | 15 |
| 61-80% of polling stations reported successfully | 19 | 10 |
| 81-100% of polling stations reported successfully | 13 | 8 |
| Number of observations | (290) | (290) |

Source: Barkan, J.D. (2013) ‘Technology Is Not Democracy’, *Journal of Democracy*, 24(3), p. 162

- **Failure by players to audit or monitor the work of the IEBC**

Political parties and observers did not monitor the Commission’s work in the run up to elections. Parties did not audit or monitor the uploading of the BVR register on EVID kits, distribution of election materials, recruitment of temporary staff, transferring of constituency elections coordinators and returning officers across counties, testing of results transmission system, or setting up of the tallying centre. These are key components in any preparations for free, fair and accountable elections, which players in the process must interrogate and monitor. According to the principles of the Constitution, the IEBC is bound to allow its processes to be subjected to public scrutiny to ensure accountability. Parties also have an obligation to proactively monitor and interrogate the IEBC’s work. To this end, they must ensure that their agents are trained, competent and committed.

The role of the media

The role of the media was circumscribed by self-censorship, and the regulations of the IEBC, which constrained all stakeholders to only rely on the results as they were announced by the IEBC. The self-censorship had its roots in the aftermath of the post-election violence of 2008, when the media was blamed for having played a negative role. This was particularly true of local language radio stations²⁸. Anxiety over the possibility of a repeat of the chaos of 2008 and an overwhelming national consensus that valued order and stability and devalued vigorous, critical debate led to the dominance of a “peace narrative”, which had a muzzling effect on the media, and an acceptance of the need for restraint²⁹.

28 One of the ICC accused is a reporter on a local FM radio station.

29 cf. Harrington and Manji, op cit p. 12.

The result was that the media largely abdicated its role as a watchdog exposing wrongdoing and protecting the public interest. In particular, in contrast to the 2007 elections where the media observed and announced constituency results as they emerged, in 2013 the sole source of information on results as they developed was the IEBC³⁰.

- **Political parties nominations and disputes resolution**

The Political Parties Act requires that members of a political party must also be registered voters. However, political parties conducted their nominations without referring to the voter register to ascertain if their members were actually in it. The Commission did not avail to parties the voter register in sufficient time to enable them hold credible nominations. In any event, as demonstrated by the IEBC at the Supreme Court hearings, the principal register was not even in place at the time political parties were conducting their primaries.

Political parties delayed submitting names of persons they had nominated to contest elections within the set timelines by the Commission. This was partly as a result of accommodation by the Commission, which was willing to extend deadlines for parties to submit these names³¹. Party primaries were marred by incidents of violence, intimidation of voters and other electoral malpractices³². The Commission, however, failed to regulate or supervise political party nominations, thereby leaving political parties to their own devices in selecting candidates.

The IEBC also heard and determined disputes arising from the political party primaries. The Commission had interpreted its functions under Article 88 of the Constitution to resolve nomination disputes to include disputes arising from political party nomination/primaries. The Political Parties Disputes Tribunal (PPDT) also asserted jurisdiction over party primaries and heard party primaries disputes. This led to a parallel dispute process that at times witnessed conflicting decisions on the same subject and forum shopping by disputants looking for the decisions most favourable to them. The Political Parties Act in section 40 provides that the PPDT shall hear and determine disputes between members of a political party and disputes between a member of a political party and the political party. The involvement of the IEBC in internal political parties dispute-resolution distracts the Commission from its core mandate of planning for elections.

- **Post election dispute-resolution**

The 2013 general elections resulted in three presidential election petitions, one by AfriCOG/Kenya Asian Forum on the electoral process, one by CORD on the results of the elections, and one by two voters on the interpretation of "total votes cast." The petitioners in the latter plea argued that only valid votes should be counted. In addition, there were over 188 subsequent petitions challenging various aspects of the election process at non-presidential levels.

30 Cf. Angela Mureithi and Georgina Page, "The Kenya Election 2013: the Role of the Factual Discussion Programme Sema Kenya (Kenya Speaks), BBC Media Action, 2013

31 IEBC, January 17, 2013, Clarification on Political parties Dispute Resolution and Submission of Political Parties' Nominees to IEBC, www.iebc.or.ke

32 See, for example, Tom Odula, January 18, 2013, Associated Press, "Analysts: Political party polls in Kenya a failure",

The Supreme Court published rules governing the conduct of presidential election petitions a mere month to the elections³³. It has been a subject of discussion whether these new rules could be subject to varying interpretation by affected stakeholders³⁴. The presidential election petitions were the first to be heard and the court dismissed two of those petitions on the basis that the petitioners did not prove their cases. The petition that sought to address the question of the number of votes to be used to determine an election - whether only valid votes cast or total votes cast - was allowed. The Supreme Court, in hearing the petitions, adopted a very technical and narrow approach to procedural issues, to the extent that it refused to admit additional evidence of irregularities brought to court by one of the petitioners, on the basis that it was time barred.

The court also presented petitioners in presidential cases with an almost insuperable burden of proof. The judgment put the same burden of proof on them as if they were "hostile prosecutors, charging the Commission with culpable incompetence or serious criminal conduct and required to prove all elements of their case to the highest standard"³⁵. These difficulties are compounded by the fact that, as lawyers for the petitioners noted, the IEBC has a near monopoly of relevant information, as was demonstrated during the petition itself.³⁶

The Supreme Court, in determining the petition, failed to conclusively address some core issues that determine the fairness, transparency and accountability of elections. The conduct of the proceedings and the judgement left Kenya with many unanswered questions as it approaches the next elections. These included;

- **Non-conclusive pronouncement on the voter register:** There were three sets of registers hitherto not known to public. The Court failed to fault both the use of multiple registers by the IEBC and the failure by the Commission to gazette the principal register. The Court accepted the IEBC's "Green Book", with 14,352,536 voters, as the legitimate register, ignoring the register officially gazetted on February 18, 2013. By allowing the Commission to keep an indeterminate register, the Court opened the door to future abuse.
- **Acceptance of exclusion of party agents from the electoral process:** The Court acquiesced to the exclusion of party agents from the electoral process and did not find any fault with a decision by the IEBC to exclude party agents from the national tallying centre. In doing so, the Court prioritised the need to maintain order over the constitutional requirement of transparency.

33 Legal Notice 15/2013, February 1 2013, The Supreme Court (Presidential Election Petition) Rules, 2013 accessed at <http://kenyalaw.org>. See in particular S10

34 Ibid s10 1 (f) and (h)

35 Cf. John Harrington and Ambreena Manji, 2015, Restoring Leviathan? The Kenya Supreme court, constitutional transformation, and the presidential election of 2013, in: *Journal of Eastern African Studies*, 2015, p.6

36 Harrington & Manji, Ibid

- **Overreliance on discredited judicial authorities:** This included reliance on what turned out to be a minority decision from Seychelles, to interpret the “votes cast” issue. The court also relied on a retrogressive Nigerian precedent that placed an extremely high burden of proof on the petitioners to prove both that there had been criminal activity and that this had affected the outcome of the elections, even though there are subsequent authorities from Nigeria that are more in keeping with the spirit of the Constitution 2010.
- **Determination on ‘valid’ as against ‘total’ votes cast:** The court held that rejected votes do not count. The political salience of this decision was that if only valid votes were included in the count then it would be easier for the leading candidate to reach the 50% hurdle³⁷. The Court’s decision was criticised for having limited the broad and unambiguous language of the Constitution based on the language used in statute and regulations³⁸.
- **Court recommendations:** The Court found there had most likely been problems with the procurement of voting equipment and recommended investigations on BVR acquisition. Courts speak through orders and not recommendations.
- **Problematic expansion of the Supreme Court’s jurisdiction:** The Supreme Court, in a subsequent case, *Peter Munya vs Dickson Mwendwa & 2 Others*,³⁹ held that it had jurisdiction to hear appeals from decisions of the Court of Appeal arising in election petitions. The Elections Act provides that decisions of the Court of Appeal in election petitions are final and not appealable. The Supreme Court, however, interpreted its jurisdiction liberally to allow it to exert jurisdiction over all other election petitions. This exposed a contestation between the two courts in terms of how to determine the fairness and accountability of elections⁴⁰. Whereas the Court of Appeal, in its decisions, had adopted a qualitative approach to determining the effect of irregularities in elections, the Supreme Court adopted a narrow, quantitative approach that sought to only identify and deduct those votes procured through irregularity from the total tally. Such a narrow quantitative approach to resolving disputes undermines the will of the voters. Some challenges to elections may be qualitative and not based purely on a mathematical, quantitative approach to resolving disputes. Certain aspects of electoral malpractice like violence, intimidation of voters or bribery cannot be quantified and can only be addressed through their qualitative impact on the elections.

Public disquiet was also raised by the failure to read the judgment in open court despite the fact that this decision was a momentous one and in stark contrast to the openness with which the entire proceedings had been conducted.

37 Harrington and Manji, p.8

38 Wachira Maina, April 20 2013, “Verdict on Kenya’s presidential election petition: Five reasons the judgment fails the legal test”, the *East African*

39 Petition No 2 of 2014

40 A Kenyan legal scholar confidentially described this contestation as a “Cold War” between the Supreme Court and the Court of Appeals

Contradictory election forms

The trial of election petitions by the Magistracy and the High Court further revealed serious challenges in the handling of election forms. Parties would present to court different forms in respect of the same elections. Numerous and conflicting forms were generated for the same elections, thereby making it difficult for the courts to determine which form was the genuine form used at the elections. In its petition, civil society had pointed out the existence of numerous election forms with conflicting information. The Supreme Court does not appear to have considered this aspect with any seriousness, and where it did, it accepted all the explanations of the IEBC on the discrepancies. Even in its own scrutiny of the ballots of 22 stations, the Supreme Court report to the judges failed to point out at least 83 missing Forms 34 (the forms used to record polling station level results for the presidential race); between 16 and 18 stations showing over 100 per cent turnout (involving 9,000 votes); and incomplete forms, such as forms missing the number of registered voters. Following the Supreme Court decision, the IEBC uploaded Forms 34, at least 60 of which were different from the forms used in the judicial scrutiny; at least 34 of the Forms 34 used in the scrutiny had not been uploaded; and at least 83 Forms 34 were still missing. To date, the IEBC has never released a complete set of polling station level, or even constituency level, results for all the elective positions⁴¹. By the estimate of Mars Group Kenya, about 2,585 Forms 34 are still missing from the public record⁴².

The role of a national tallying centre in results declaration

The IEBC designated its chairperson to be the returning officer for presidential elections and set up a national tallying centre at which presidential election results would be aggregated and announced by the commissioners, with the chairperson announcing the final results. In this capacity, the IEBC chairperson declared results of the election without looking at even a single ballot box for presidential elections. At the Supreme Court hearings, when an application was made for the delivery of the boxes, the Commission argued that it would take an inordinately long time to deliver the boxes from across the country where they were stored. The Court supported the Commission in this contention and did not require it to deliver the boxes.

According to the law, presidential elections are held at the constituency level and are conducted by the respective constituency returning officers, and, as such, their declarations of results at the respective constituencies should be final and only subject to a court of law. Thus, once a constituency returning officer has made a declaration of results, that declaration is complete and can only be questioned in a court of law. This position was affirmed by the Supreme Court in the case of *Shabhal vs. Joho*. This is further supported by the decision in the case of a petition challenging the results in Mathare Constituency, Petition No 10 of 2013 before the Supreme Court of Kenya. Article 138 (2) of the Constitution further buttresses this point⁴³.

41 A month after the elections, the Carter Centre criticized the IEBC's "continuing unwillingness" to publish polling station level results. See Edwin Mutai, April 4 2013, *Business Daily*, "Carter Centre faults IEBC on release of poll station results"

42 AfriCOG, September 2014, Not So Final? Analysis of the IEBC's report on the March 2013 General Election, p.6. See also Mars Group Kenya, www.marsgroupkenya.org/elections/pages/marsaudit accessed on August 30 2014

43 The Constitution of Kenya, Art 138 (2) "If two or more candidates are nominated an election shall be held in each constituency"

In contrast to the provisions of the Constitution in relation to the holding of elections, the IEBC set up a national tallying centre to verify, and announce results. Civil society petitioners before the Supreme Court played videos showing results being announced at the constituency level that were different from those announced at the national tallying centre⁴⁴. In one instance, as the chair of the IEBC announced the results, the screen behind him displayed different results. This had been preceded by the ejection of all party agents from the national tallying centre at Bomas under the pretext that they were “unruly”. For the second time in as many presidential polls, elections were breaking down at the point of tallying.

There are other examples of elections conducted without a national tallying centre. In other jurisdictions such as the United States, presidential elections results are announced at the state level and are final. Anyone aggrieved can go to court and seek justice in regard to only that state. A case in point is *Bush vs. Gore*. 531 US. 98 (2000), whereby the challenge was in regard to certain precincts in Florida.

The strength of this model is that any challenge to results is limited to a specified constituency and therefore it is possible to trace and open the ballot boxes in respect of that particular constituency. This would have the result of reducing the scope of petitions to the specific contested constituencies, rather than involving the entire national results. It would also make it more feasible to mount a legal challenge in the time prescribed by the constitution. Currently, there appears to be no opportunity for petitioners to access ballot boxes once they are transported from the constituency, as demonstrated in the Supreme Court case.

One might argue that returning officers (RO) at constituency level could easily be compromised. However, it would appear to be far easier to corrupt one individual, (Chairman of the IEBC) than it would be to corrupt 290 constituency returning officers. Furthermore, at the national stage it is easier to tamper with figures to achieve a desired outcome since at that level one is aware of all returns from the constituencies. At the constituency level, since all constituencies are returning at around the same time, it is difficult to tell what numbers are needed to arrive at a desired outcome.

44 See the film, *Guidebook to Impunity*, 2015, Information

Conclusion

The management of the 2013 general elections demonstrated serious gaps in transparency and accountability, exemplified by the IEBC's inability to authoritatively state which voters' register was used to conduct those elections and its failure to ensure the effectiveness of its electronic results transmission system. The IEBC has been unable to demonstrate its independence as provided for in the letter of the Constitution, giving rise to the perception of a Commission beholden to the executive arm of government. There have been few attempts to exact accountability for the failures identified in this analysis.

The legal framework on elections management fails to integrate the participation of main stakeholders throughout the electoral process, thereby giving the Commission an opportunity to exercise administrative authority to block stakeholders from interrogating and overseeing the electoral process.

Efficient, transparent and accountable management of electoral processes is key to promoting public confidence in elections and their outcomes. The Constitution of Kenya provides a general principles framework, and the statutory and administrative framework on elections integrates these principles.

Recommendations

In view of the problems outlined above, policy interventions to achieve the desired changes will require legislative and administrative interventions, including the following:

Voter register

- The creation of a single, verifiable principal register should be prioritised. The Green Book, or any similar unpublished register, should be eliminated once and for all. Paper versions of the register should simply be printouts of the principal register.
- The voter register should be published and gazetted six months before the date of the general elections, to reduce the window for tampering and accord more realistically with the campaigning period, which is currently set at an unrealistic 15 days to the elections. No new entries to the register should be made after the publication of the gazette.

Monitoring and participation by political parties

- Political parties (and observers) should be able to monitor all stages of the entire electoral cycle. This includes the work of the IEBC from the acquisition and distribution of election materials, through to the recruitment of staff, deployment of election officials and storage of election materials, voter registration, Election Day, and after.
- Political parties (and observers) should be able to monitor the deployment of the ICT infrastructure for elections, including uploading of the EVID kits, testing of mobile results transmission kits, and monitoring both the transmission centres and the telephony service providers facilitating the process.
- Party agents and observers should be able to access and closely scrutinise the process of entering votes in the tallying at constituency and county levels.

Participation of party agents and observers in the electoral process must be respected and it should not be at the whim or invitation of the IEBC.

- Parties and other stakeholders must take up the responsibility of effectively monitoring the electoral process.

Selection of returning officers and deputy returning officers

- Posting of returning officers should be done in a random manner under the close supervision of political parties and observers. Returning officers should be made to randomly ballot in public and in the presence of political parties and observers, in order to assign them to constituencies.

Independence of commissioners

- The IEBC tested a professional model whereby commissioners were independently vetted professionals, supposedly not beholden to political interests. The failure of this model to deliver a credible election raises the question of whether a return to the model agreed in the Inter-Parties Parliamentary Group reforms of 1997 is warranted, where political parties negotiated and chose commissioners. This would have the benefit of openly accommodating political interests, rather than denying their existence and ensuring that commissioners act as a check on each other. Additional commissioners could be selected by a caucus of political parties that do not qualify for the selection of commissioners in the parliamentary process. There would appear to be little value in having ostensibly non-party commissioners if their independence and impartiality is compromised.

Electoral dispute resolution

- The IEBC should not participate in resolving disputes relating to political parties' primaries. Its jurisdiction, if any, should be restricted to the formal nomination of candidates by the Returning Officer and NOT the selection of candidates by political parties.
- The courts should not rely on technicalities in determining elections disputes and all evidence necessary to assist the courts to determine a petition should be admitted into the proceedings. The Courts, in determining electoral disputes, should practise the spirit and intent of Article 159 on the principles of justice.
- The Supreme Court's jurisdiction related to election dispute resolution should be limited to presidential election petitions. The decisions of the Court of Appeal in determining non-presidential election disputes should be final.

Tallying of votes

- Election officials should only complete one form, from which duplicates are generated, to reduce the opportunities for tampering with forms. Electoral forms should only be generated in duplicates from the original and agents given copies. The original form should be placed in the ballot box while agents are given a duplicate of the same form.
- Elections have twice failed at the point of the national tallying centre, which has no basis in law. The national tallying centre should be eliminated and results announcement devolved to the constituency level and county level for county level elections; discrepancies can be more easily and rapidly pointed out and attended to at the local level. More work is required to flesh out the mechanics of this process in the Kenyan context, drawing on models in other countries where it is used, such as the US.
- Constituency returning officers should be the only returning officers for presidential elections. Final results should be announced at the constituency. The chairperson of the IEBC should not be able to announce different results. Constituency results, once announced, should only be amended by a court of

law, as a result of a petition. The chairperson's should not have a role as a returning officer. His role should be limited to an administrative one of gazetting results or of handing over certificates to winners.

- Other players in the electoral process, such as the media, should be empowered and able to conduct their own tallying of results from the point of announcement, aggregate and announce them, as has been done in earlier elections, and as is done in other jurisdictions in keeping with agreed codes of conduct.

Accountability and enforcement of rules

- Commissioners, officials of the IEBC and returning officers found to be in violation of the law and of codes of conduct should be held accountable and barred from participating in future elections.

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Africa Centre for Open Governance
P.O. Box 18157-00100, Nairobi, Kenya
Telephone: +254 20-4443707/0737463166
Email: admin@africog.org

www.africog.org