

READY... OR NOT?

An Assessment of Kenya's Preparedness for
the 8 August 2017 General Election



About us

The Africa Centre for Open Governance (AfriCOG) is an independent, nonprofit 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 Kenya. 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 the evidence-based advocacy and the mobilisation of our partners.

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Acronyms/Abbreviations

AfriCOG	Africa Centre for Open Governance
AU	African Union
BVR	Biometric Voter Registration
CIC	Commission for the Implementation of the Constitution
CORD	Coalition for Reforms and Democracy
CSO	Civil Society Organisation
ECK	Electoral Commission of Kenya
EMB	Electoral Management Body
EU	European Union
EUEOM	European Union Electoral Observation Mission
FPTP	First Past the Post
IEBC	Independent Electoral and Boundaries Commission
IEMS	Integrated Elections Management System
IFES	International Foundation for Electoral Systems
IIEC	Interim Independent Electoral Commission
KAF	Kenyan Asian Forum
KES	Kenya Shillings
KHRC	Kenya Human Rights Commission
KPTJ	Kenyans for Peace with Truth and Justice
KYSY	Kura Yangu Sauti Yangu
MVR	Mass Voter Registration
NCIC	National Cohesion and Integration Commission
NDI	National Democratic Institute
ODM	Orange Democratic Movement
OSCE	Organization for Security and Cooperation in Europe
PR	Proportional Representation
TCC	The Carter Centre

Foreword

The Africa Centre for Open Governance (AfriCOG) and Kenyans for Peace with Truth and Justice (KPTJ) are pleased to present the latest report in their “Ready or Not?” series, which was launched before the 2013 elections. In these reports, AfriCOG and KPTJ assess and analyse events throughout the electoral cycle, with a special focus on pre-election preparedness, the administration of election day and results announcement, and post-election dispute resolution. We offer these objective assessments as contributions to the public debate on critical issues, meant to educate the public on the conduct of their elections and to build the capacity of our partners to monitor performance on key aspects of public life and to demand accountability.

This will be the first of several planned reports assessing readiness for the 2017 General Election. Future editions will cover later phases of the electoral cycle, including election campaigns, election day, counting and results, dispute resolution, and an overall assessment of the administration of the General Election.

AfriCOG is an independent, non-profit organisation that provides research and monitoring on governance and public ethics issues so as to address the structural causes of Kenya’s governance crisis. KPTJ came into being following the 2008 post-election violence to work for electoral justice and accountability for the widespread atrocities and political violence that the country had experienced.

AfriCOG and KPTJ are members of the steering committee of the Kura Yangu Sauti Yangu (KYSY) electoral platform, which actively monitors the electoral process, engages key stakeholders and facilitates dialogue amongst a broad array of stakeholders to promote credible elections. These include the Independent Electoral and Boundaries Commission (IEBC), the judiciary, political parties and candidates, faith-based organisations, civil society organizations, unions and private sector and employers’ representatives, professional associations and others.

We would like to thank our partners at InformAction for kindly availing their data from their two most recent “Election Watch” publications, which can be found at www.informaction.tv, and which have greatly enriched this report.

As the country now prepares for elections in August 2017, it is important to evaluate what has changed since 2013 and to identify where problems remain. We do this in the belief that true peace cannot be separated from the question of credible, transparent, verifiable elections; in the absence of the latter, the risk of violence rises. Since it is the public that will ultimately grant legitimacy to the election and therefore to the elected government, it is critical that reliable, objective information and analysis be available. We hope that this report promotes an ever-vigilant public, one that is key to an accountable government and one that serves as the cornerstone of a strong democracy.

Gladwell Otieno
Executive Director
AfriCOG

Executive Summary and Key Findings

Despite the hope that marked the 2013 elections in Kenya, a wide range of irregularities, inconsistencies and errors during multiple phases of the electoral cycle left the country further divided and without answers to a series of questions about the administration of the election. In fact, at the end of the last election cycle, there was deep distrust about the validity of the presidential result, which had been announced before all tally sheets had been submitted. Moreover, serious weaknesses in the law, especially with regard to constitutional provisions for leadership and integrity, and severe technical failures, including the collapse of the electronic results transmission system, the existence of multiple voters' registers, and numerous errors and inconsistencies on polling station tally forms, had been left unaddressed and unexplained. Unsurprisingly, in the aftermath of the election, public faith in the Independent Electoral and Boundaries Commission (IEBC) plummeted.

As the country now prepares for the next general election, scheduled for 8 August 2017, it is important to evaluate what has changed since 2013 and to identify where problems remain. In this report, which is the first in a series, the analysis focuses on an assessment of activities in the pre-election phase. Future editions will cover later phases of the electoral cycle.

The IEBC is now headed by a new set of commissioners, who took office late last year. This change came in the aftermath of several months of opposition-led protests demanding an overhaul of the Commission over allegations of bias and corruption. Some of the protests were violently dispersed by the police, with scores of people injured. The new commissioners are working on an extremely tight timeline under strenuous conditions characterized by significant public apprehension. Much of this anxiety is rooted in the 2013 election, the results of which lacked broad public legitimacy and left the country deeply divided. Since then, mistrust has only grown. The political environment has been characterized by shrinking space for public engagement and growing intolerance of dissent, even as the government finds itself implicated in multiple corruption scandals.

Unfortunately, preparations thus far have been plagued by several of the same problems that marred the last election cycle, suggesting a dearth of lessons learned. Notable examples include the following:

- Delays and irregularities haunt the procurement of the integrated elections management system (IEMS).
- Important proposed changes to the election law, including campaign finance regulations and gender parity bills have been defeated by parliament.
- Long-standing laws, especially those related to leadership and integrity, have been left unenforced by authorities.
- Voter registration was marked by serious and widespread technological and administrative problems, most of which are the same problems that have tainted past registration processes.

- Similarly, party primaries have been characterized by widespread chaos, administrative and technical disorganization, intra-party violence, the lack of membership lists and registers and a general lack of preparedness.
- Evidence points to political elites' roles in fueling pre-election violence around the country. This violence has led to several deaths and an environment of fear in certain regions.

In order to salvage the credibility of the current electoral process, we recommend the following urgent actions:

- The IEBC must prioritize its relationship with the public. As a first step, it is important for the Commission to develop a long-term communication strategy that keeps the public informed of developments in a timely fashion. Traditional and social media can and should be used to address issues such as the practical implications of the new amendments to the electoral law, glitches in voter registration processes, questions around the procurement of election technology, upcoming deadlines, findings of the audit of the register and other relevant topics. In this way, the public knows what to expect and how the IEBC is dealing with problems. Elections are never perfect, but suspicion and criticism can be preempted and public confidence can be boosted by timely and meaningful communication.
- The IEBC and the Registrar of Persons must respond to public questions and criticisms related to the MVR exercises. Registration was rife with problems, including nonfunctional and dysfunctional BVR kits, the unexplained use of green books, shared ID numbers, severe difficulties in obtaining IDs, the lack of security of data and many logistical hurdles at registration centres. Although registration is now closed, the IEBC and the Registrar of Persons should explain what they are doing to fix the problems that plagued registration up to the present. Moreover, since some registration problems have implications for what voters may face on election day, it is even more urgent that the IEBC explains how it is dealing with public concerns in this area.
- In order to begin to change the pattern of electoral impunity in Kenya, it is critical that stakeholders create and maintain the will to enforce the law. Kenya is fortunate to have one of the world's most progressive constitutions, which vests power in the people and demands high levels of professionalism and selfless service from political leaders. This election offers an opportunity to start with a relatively clean slate. If Chapter Six provisions are enforced, the new leadership could be of a higher standard, and that could have long-term domino effects with regard to more transparent and accountable institutions.
- Parliament must fulfill its duty to pass legislation for the implementation of the two-thirds gender law. There have been several proposals over the years to realize the constitutional standard, including those in the Attorney General's 2015 taskforce report, the Green Amendment Bill, 2015, and several others. In order to fulfill their responsibilities under the constitution and to avoid a constitutional crisis, it is now imperative that legislators consider the options and make a decision as soon as possible.

I. Introduction

In March 2013, Kenya held its fifth general election since the re-introduction of multiparty democracy in 1992. The period leading up to that election, which was marked by the implementation of a host of new, progressive reforms and the promulgation of an internationally lauded constitution, was infused with hope. In fact, in the lead-up to election day, the country's new electoral management body, the Independent Electoral and Boundaries Commission (IEBC) enjoyed public confidence rates above 90 percent. For many, the 2013 election was meant to usher in a new era in electoral politics, one that made a clean break from the often chaotic, widely mistrusted and violent elections of the past. Unfortunately, however, the process was marred by a series of administrative, technical and political irregularities, which together cast significant doubt on the final result.

At the end of the 2013 electoral cycle, there were several unanswered questions related to the formulation and status of the voters' register, the counting and tallying processes, and the integrity of the final result. Indeed, the final result of the presidential race was announced without data from all polling stations having been received (Kadida and Kiplagat 2013). Moreover, it was clear that key provisions of the constitution, including but not limited to those related to leadership and integrity, the character of political parties, and gender and minority inclusion, had been flouted and/or willfully ignored. Although many domestic and international observer and monitoring groups praised the election, many of these analyses placed much more emphasis on the relative lack of violence than they did on the administrative and technical integrity of the process.

Almost five years later, Kenya is now preparing for the next general election, scheduled to be held on 8 August 2017. Although there have been some significant changes, including a new set of IEBC commissioners and the introduction of "complementary mechanisms" (in addition to technological tools) for voter registration, identification and results transmission¹, much remains the same. The current electoral cycle has already been characterized by problems such as electoral technology procurement delays, debates over the use of technology versus the use of manual systems, pre-election violence, shifting timelines, voter registration irregularities, chaotic party primaries, backtracking on campaign finance regulations and slow progress related to implementation of the gender parity law. Once again, the rhetoric around elections pits peace against credible polls, falsely portraying these issues to the public as a winner-take-all choice between the two.

This state of affairs is concerning and begs public questioning and engagement. In an effort to educate domestic and international stakeholders, keep a watchful eye on the process and flag potential problems, this report provides an assessment of the country's preparedness for the upcoming election. This report is the first in a series, each of which will explore specific phases of the electoral cycle. This edition, which covers the period from January through March 2017, focuses on activities in the pre-election phase, offering an overview of historical problems related to each activity and providing an evaluation of where the country stands today with regard to each activity.

¹ The law does not clearly define "complementary mechanism," making it unclear what the IEBC will use as a back-up to the electoral technology. So far, however, voter registration was carried out using BVR kits and manual recording of registrants' details. The assumption is that such manual systems will also be used for voter identification and results transmission.

Important Dates in the 2017 Electoral Cycle

- March 27 – deadline to submit membership list to IEBC
- March 26 – April 5: Parties must submit names of candidates for party primaries
- April 12 – IEBC must gazette names of candidates in all party primaries (no party hopping allowed after this date)
- April 13 – April 26: Party primaries conducted
- May 8 – May 10: IEBC approves names and symbols of independent candidates
- May 10 – Public inspection and verification of voters' register begins
- May 28 and May 31: Nominations for members of the county assembly
- May 28 – May 29: Nominations for presidential and senate elections
- May 30 – May 31: Nominations for women's representative for national assembly
- June 1 – June 2: Nominations for gubernatorial and National Assembly elections
- June 9: Public inspection and verification of voters' register ends
- June 10 – 17: publication of all nominated candidates
- 8 August: Election Day
- 15 August: Deadline to submit presidential election petitions to Supreme Court
- 22 August: Deadline for Supreme Court judgment on presidential petition(s).

II. Preparedness for the General Election

Leadership and Integrity

One of the Kenyan constitution's most progressive features is Chapter Six, which lays out the conduct expected for those who seek state office. Specifically, Chapter Six specifies leaders' responsibilities, the guiding principles of leadership and integrity, and rules of conduct for and restrictions on the activities of state officers. Overall, this chapter establishes a framework for the behavior of Kenyan leaders that requires them to promote public confidence, uphold the highest standards of personal and professional integrity and to undertake their professional duties in selfless service and explicitly in the public interest. The Leadership and Integrity Act, which came into effect in 2012, was meant to give life to these constitutional provisions.

Unfortunately, however, the spirit of the law has not been upheld. In fact, from the outset, implementation of the constitutional provisions has been riddled with obstacles. While the Leadership and Integrity Bill, developed by the Commission for the Implementation of the Constitution (CIC), was being deliberated on, the then-Cabinet deleted the bill's core enforcement provisions. "In the form in which it was enacted, the Bill fulfilled a prevalent political view that so long as one was popular enough to be elected to public office, nothing else mattered and once elected, one fell outside the orbit of moral accountability" (*AfriCOG 2015, 15*). The Act was eventually passed, but the final version was significantly different from what the CIC had envisioned. In fact, the CIC filed suit in the High Court to invalidate the Act. The Court ruled against the CIC, judging that it did not adequately demonstrate its claims. In 2013, the European Union (EU) observer mission criticized the weak implementation of integrity laws:

The Leadership and Integrity Act designed to give life to Chapter Six was diluted by the National Assembly in 2012 to exclude a stricter vetting system, and the extension of nomination timelines by amendments to the Elections Act meant that even if the IEBC wished to check on the integrity of candidates it did not have the time to do so...Ultimately, no candidates were rejected by the IEBC for integrity reasons. (*EU 2013, 17*)

In 2013, there was also an attempt to use the leadership and integrity provisions to halt the candidacies of Uhuru Kenyatta and William Ruto, alleging that these individuals, by virtue of having been indicted by the International Criminal Court for crimes against humanity, failed the constitutional integrity test. The Court ruled, however, that the integrity provisions apply only to appointed candidates and not to those who are running for election (*EU 2013, 17*). The Kenya Human Rights Commission came out strongly against the ruling, calling it erroneous in law, a complete negation of Article 3 of the constitution, which obligates citizens to defend the protect the constitution, and an instrument that effectively undermines Article 22 of the constitution, which deals with the enforcement of the bill of rights (*KHRC 2013*).

Unsurprisingly, as of 2016, there were 17 MPs who had been charged in court for committing serious criminal offenses, including fraud, forgery, hate speech, rape, corruption and incitement to violence. At least 90 others were under suspicion for graft (*Standard Team 2016*). Additionally, in March 2017, the IEBC cleared Joshua Waiganjo, who had been convicted of posing as a police officer, to run for parliament (*Chepkwony 2017*).

In an attempt to address the weak and/or non-existent enforcement of Chapter Six, the IEBC recently formed the Chapter Six Working Group on Election Preparedness. This group aims to create awareness about Chapter Six, enhance collaboration in the enforcement of Chapter Six, and provide an integrated, effective and efficient mechanism for resolving leadership and integrity issues. Collaborating institutions include:

- The Judiciary
- Office Of the Attorney General and Department of Justice
- Independent Electoral and Boundaries Commission
- Ethics and Anti-Corruption Commission
- Office of the Registrar of Political Parties
- Office of the Director of Public Prosecutions
- Public Service Commission
- Higher Education Loans Board
- Kenya Revenue Authority
- Commission for University Education
- Kenya National Examination Council
- Department of Immigration
- The Official Receiver
- Credit Information Sharing Association of Kenya
- Professional Bodies.

Part of this group’s work will be to vet candidates who plan to contest elections. If parliament passes the IEBC’s proposed elections regulations, the Commission could also bar candidates who have pending court cases. Given the Court’s previous ruling, however, it is unclear what authority this Working Group has to enforce the leadership and integrity provisions. Moreover, there is the risk that the Working Group could be used to bar opponents of the regime from participating in elections. In fact, a current case in the High Court raises this very issue along with the constitutionality of the Working Group. The case asks for an opinion on the parameters that the Working Group may use to decide who can and cannot contest elections.

In some ways, the leadership and integrity provisions, and the failure of state institutions to enforce them, frames the current electoral environment in Kenya and sets the stage for this election. If individuals are not held to constitutional standards of leadership and integrity, it is unrealistic to expect the institutions they manage to implement and enforce laws. As is detailed throughout this report, the root of many election-related problems lies in the lack of enforcement of rules and regulations. Unfortunately, this scenario does not bode well for electoral justice in Kenya. In fact, it threatens to continue the pattern of electoral impunity that has beleaguered Kenya’s post-independence history.

Recommendation: Committed enforcement of the letter and spirit of Chapter Six of the Kenyan constitution has the potential to transform the political landscape. The IEBC-led Working Group is a potentially positive first step in this regard. If it is successful, its vetting procedures could ensure that those running for elective office meet the minimum requirements of the law. Going forward, however, it is imperative that there is clarity regarding the Working Group’s jurisdiction and authority. In the future, it will also be critical for stakeholders, especially civil society groups, to push for a holistic set of reforms that seek to strengthen

the Leadership and Integrity Act and empower those responsible for enforcing the Act and all related laws. Such advocacy could be complemented by studies that investigate the effects of weak enforcement on the quality of leadership.

Legal Framework

Kenya's election-related legal framework is strong. The country has ratified the major international instruments covering electoral rights, including the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples' Rights (ACHPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the Convention on the Rights of Persons with Disabilities (CRPD). Under the 2010 Constitution, such treaty obligations are incorporated directly into Kenyan law at ratification and can be relied on in court (*EU 2013, 6*). Domestically, a host of laws, including the Political Parties Act, the Elections Act, the Independent Electoral and Boundaries Commission Act, and the Leadership and Integrity Act govern the conduct and management of elections. Together, these laws provide a strong and comprehensive framework for credible elections. The problem, as detailed below, is in implementation.

Amendments to the electoral law

As contexts change, it is natural and useful to amend electoral laws. International good practice with regard to electoral legal reform advises that changes in the electoral law should not take place shortly before elections, because last minute amendments could cause confusion and lead to unstable election environments (*OSCE 2010, 50*). Some experts advise legislators to avoid changes to the electoral law within the six months prior to election day (*TCC 2013, 21*). Unfortunately, Kenya has not always followed this guidance. In 2013, laws were explicitly amended to loosen this window so that lawmakers could change election rules as soon as four months before election day. By the end of the 2013 election cycle, other implementation gaps were also evident. The National Assembly failed to pass campaign finance regulations and the statutory mechanism to implement the right to access information. The Kenyan judiciary also failed to enforce constitutional provisions regarding gender parity and integrity of those seeking elective office. These problems are detailed in the sections below.

2017 Election Cycle

Some things have improved since 2013. The last set of amendments to election-related laws was passed in January, almost eight months before election day. On the other hand, the IEBC's new elections regulations were submitted to Parliament in early March, just five months ahead of elections. By the time Parliament approves the regulations, it will be even closer to election day.

In the last election, the IEBC also failed to follow the law consistently, even choosing at times to ignore judicial orders. For instance, the Commission failed to follow a High Court order to include certain candidates' names on the ballot after dispute resolution had settled. It also flouted a High Court order to allow prisoners who had registered before detention to vote. The EU described these acts as emblematic of "a residuary view that government agencies are beyond the rule of law" (*EU 2013, 9*). Notably, in the current election cycle the IEBC did carry out registration for prisoners, registering a total of 4,094 prisoners.

At the same time, however, legal reforms for this election have already caused significant uproar and even violence. The Election Laws (Amendment) Bill, which was signed into law just one week prior to the beginning of the latest mass voter registration exercise, made a series of changes to election laws. Some of the most notable provisions include:

- the requirement that the Registrar of Persons issue ID cards within 30 days of registration
- the substitution of “Principal Register of Voters” with “Register of Voters” to clarify that there is only one register
- clarification of the definitions of electoral terms
- tightening of rules around IDs accepted at the polling station
- creation of an online portal for verification of the register
- modification of the timelines for public verification of the register, party primaries, submission of independent candidates’ information, submission of party membership lists, submission of Party Lists, filing of petitions
- rules for an audit of the register
- clarification of who is eligible to vote, based on biometric data and required identification
- requirement that the IEBC is to conduct and supervise party primaries upon request
- limitation of the number of voters per polling station to 500
- requirement for electronic transmission of result to the National Tallying Centre
- provision for the IEBC to partner with non-state agencies for voter education
- establishment of an integrated electronic electoral system
- limitation of the use of technology in 2017 to the registration and identification of voters and the transmission of results
- clarification of several aspects of electoral offenses
- provision for the progressive registration of prisoners.

The primary point of contention, however, is the stipulation that allows the IEBC to use “a complementary mechanism for identification of voters and transmission of elections results” in case the electronic systems fail. Given the history of manipulation of manual vote counting, manual identification of voters and manual transmission of results, however, the reintroduction of manual systems immediately sparked outrage and suspicion. Indeed, the opposition claims use of manual systems will do little more than open the door to rigging. Unsurprisingly, the lead-up to the reforms was marked by dramatic scenes in parliament, including fistfights between MPs and a walkout by the opposition.

Other potentially problematic aspects of election-related law are found in the proposed new rules on election petitions. Among the most troubling aspects of these proposals are provisions which imply the existence of multiple registers, the lack of provisions for the Supreme Court to order the scrutiny of ballots or a recount in relation to presidential election petitions, and the clause that allows the IEBC to keep election materials during the period that petitioners would be collecting evidence (The Elections (Parliamentary and County Elections) Petition Rules, 2017 and The Supreme Court (Presidential Election Petition) Rules, 2017). Any suggestion that the law allows more than one voters' register is dangerous, because it opens the door to errors and fraud. There should be only one register, and that same register must be used in all polling stations, in all elections. The Court must also consider that it is very unlikely that aggrieved parties will file presidential petitions if there are no provisions for the Court to order scrutiny of election materials or recounts of votes. These are critical parts of any election dispute resolution mechanism, and the laws that detail how they are carried out and who has authority to oversee and assess them will determine public confidence in those processes. Considering the significant difficulties petitioners faced when trying to collect polling station tally forms in preparation for the Supreme Court case in 2013, the Court must also rethink the decision to allow the IEBC to hold all such material until the pre-trial hearing. Since the burden of proof falls on petitioners, the law should facilitate their access to necessary evidence.

On the other hand, some critical aspects of the law have also been greatly clarified. Most recently, the High Court ruled that certain IEBC regulations related to the counting and announcement of presidential results are unconstitutional. Specifically, the Court ruled that constituency-level results of the presidential elections are final and subject to question only by the elections court. Once results from the constituency are announced, then, the Commission has no authority to "confirm" or alter them in any way (*Maina Kiai and 2 Others v IEBC and 2 Others [2017] High Court Pet 207 of 2016, eKLR*).

Recommendation: In order to ensure credible elections, it is imperative that there are no further amendments to laws governing elections. Instead, stakeholders should concentrate on the implementation of current laws. As part of the implementation process, it is critical for the IEBC to publicly explain what kind of "complementary mechanisms" it will use and how and when it will use them. This will help the public know what to expect. As a first step, the IEBC should convene a stakeholders' meeting to discuss and agree on what complementary mechanism will be used on election day. The mechanism must meet the constitutional threshold for transparency, verifiability and accountability in electoral processes. This will go a long way in increasing public confidence in the administration of the election.

Moreover, the Court should be commended for its effort to collect public feedback on the proposed new rules for election petitions. It will be important for the Court to carefully consider the wide variety of inputs it received from stakeholders and to amend the new rules to reflect the concerns raised.

Electoral System

Kenya's electoral system is made up of a mixture of first-past-the-post (FPTP), proportional representation (PR) and direct nominations. On election day, Kenyans cast six separate ballots for the president, governors, members of the National Assembly, members of the Senate, women's representatives, and members of county assemblies.

The victorious presidential candidate must win 50% plus one of all valid votes cast as well as more than 25% of the votes in 24 of the 47 counties. If no candidate receives a majority of the vote in the first round, a second round is held. These requirements are meant to ensure that the president has support from different communities and to encourage coalitions across ethnic groups (*TCC 2013, 23*). Certain seats, including those reserved in the National Assembly for youth, persons with disabilities and workers, as well as those for women in the Senate, are filled via nomination by political parties (*Constitution of Kenya, Articles 90, 97 and 98*). This mixed system encourages support beyond ethnic affiliation and has been noted for its "remarkable" intentions to foster a political environment that embraces Kenyan diversity (*AU 2013, 9*). Elections for all other offices are conducted using FPTP.

Recommendation: Although the electoral system used for the president is meant to ensure that the office holder enjoys broad legitimacy, it has had limited effectiveness. Indeed, Kenya remains extremely divided along ethnic lines and ethnicity remains the basis for political mobilisation. Going forward, it is important to more proactively implement provisions that require political parties to promote and uphold national unity, have a national character, and respect and promote gender equality, among others (*Constitution of Kenya, Article 91*). If enforced, these provisions would ensure that all state officers have broad legitimacy.

The IEBC

The Independent Electoral and Boundaries Commission (IEBC) is Kenya's electoral management body, and it is a constitutionally mandated commission, bearing primary responsibility for conducting and supervising referenda and elections to any elective body or office established by the Constitution and for any other election prescribed by parliament (*Constitution of Kenya, Article 88*). The IEBC came into being in 2010. Prior to the IEBC, Kenyan elections were conducted by the Electoral Commission of Kenya (ECK), which was disbanded in 2008, following severe post-election violence and an international investigation into the problems with election management in Kenya. In the immediate aftermath of the ECK's disbandment, Kenyan elections were conducted by the Interim Independent Electoral Commission of Kenya (IIEC). The IIEC successfully administered the constitutional referendum of 2010 as well as several by-elections. Two of the IIEC commissioners, including its chairman, continued their posts in the IEBC when it took over in 2010.

The IEBC enjoyed high levels of public confidence in the lead-up to the 2013 election. At the end of 2012, surveys showed that 70 percent of Kenyans had faith that the IEBC was carrying out its work impartially and 72 percent believed in the Commission's independence (*KPTJ 2012, 9*). One month before election day, 91 percent of respondents said that they had faith in the IEBC's competence

to manage the election and 89 percent believed in the Commission's impartiality (South Consulting 2013, 30 and 33). 91 percent of respondents also said they believed the IEBC was independent enough to conduct the election in a free and fair manner (*South Consulting 2013, 34*).

These pre-2013 election levels of confidence were a high point for the Commission, which suffered from plummeting levels of public faith after the 2013 election. It is difficult to determine with certainty which specific events contributed to this change in the public's attitude, but it was likely partially due to a combination of factors, the most notable of which included procurement delays and irregularities in the lead-up to election day, problems with technology during voter registration and election day, the failure of the electronic results verification system and the subsequent delay in announcing the result. The Supreme Court case challenging the integrity of the entire process, filed by the Africa Centre for Open Governance and the Kenyan Asian Forum, also publicly highlighted the multiple technical and administrative problems throughout the process. Indeed, post-election polls revealed a precipitous drop in public confidence in the Commission. In 2015, only 43 percent of Kenyans had confidence in the IEBC. Among opposition supporters, 71 percent reported that they did not have confidence in the Commission (*Lynch 2016*).

The IEBC's own post-election evaluation report acknowledged some of these problems. The report admitted that the voters' register was compromised by the existence of multiple registers, the loss of data, mismatches between biometric data and alpha-numerical data (listing names and dates of birth) and individuals who lacked biometric data (*IEBC 2014, 64*). The report also cited problems with errors on tallying forms, inadequately trained polling station staff, and many other issues (*IEBC 2014, 70-72, 76*).

In the years between 2013 and the present, the IEBC's reputation was further tarnished by its alleged involvement in what is referred to as the "Chickengate" scandal, in which members of the Commission were accused of having taken kickbacks in the amount of KES 52 million in return for awarding ballot-printing contracts to Smith & Ouzman, a British firm. Among those accused were former IEBC Chairman Issack Hassan, former Energy Secretary Davis Chirchir (who previously served on the IIEC), former IEBC CEO James Oswago, former IIEC Commissioner Ken Nyaundi and Kenneth Karani, who was employed in the procurement division of the Commission (*Business Daily 2016*). Smith & Ouzman were found guilty in a British court (Connett 2016). Kenya's Ethics and Anti Corruption Commission (EACC) cleared Hassan of the charges but recommended that Oswago, Karani, and two others be prosecuted. These four individuals were arrested in February 2017.

Partly in response to this scandal, the opposition and its supporters began to demand that the IEBC leadership resign ahead of the 2017 election. As early as 2014, the Coalition for Reforms and Democracy (CORD) called for the resignation, arrest and prosecution of former IEBC Chair, Issack Hassan, alleging that the revelations regarding the Chickengate affair brought into disrepute the integrity and legitimacy of the 2013 election (*Daily Nation 2014*). CORD also felt that the IEBC was biased against it, especially after Hassan signed an affidavit containing a virulent personal attack on CORD leader Raila Odinga during the 2013 Supreme Court presidential election petition (*Otieno 2016*). CORD continued its demands, and in 2016 the suppression of public protests against the Commission resulted in the death and injury of several civilians (*Daily Nation 2016*). The protests led to a national crisis, and in August 2016 a Joint Parliamentary Select Committee submitted

a report outlining proposed reforms to electoral laws and management. This report, which was based on the committee’s seven-point agreement, included – among other things – “a dignified negotiated vacation from office of the current commissioners” (*Muraya 2016*). In October 2016, the IEBC commissioners resigned. In December 2016, the selection committee announced the names of the new chair and commissioners of the IEBC. Although there was criticism of some of the choices, including questions related to competence and integrity, the new commission enjoys relatively high public confidence, particularly in the former Central and Rift Valley provinces. A recent poll shows that 72 percent of respondents feel that the IEBC will conduct a free and fair election (*Infotrak Briefing 2017*). On the other hand, the proportion of the population that is unsure about the IEBC’s ability is significant. In four of Kenya’s former provinces, more than one-fifth of the population is not sure that the Commission will be able to administer a credible election.

Are you confident that the IEBC will conduct free and fair elections?

Province	Yes	No	Don’t Know
Central	86.3%	3.8%	9.8%
Rift Valley	77.5%	11.5%	11.0%
Eastern	73.9%	7.9%	18.3%
Nyanza	63.8%	14.6%	21.6%
Western	57.6%	18.5%	23.8%
North Eastern	66.7%	5.6%	27.8%
Nairobi	71.7%	9.6%	18.7%
Coast	65.5%	7.2%	27.3%
Overall	72.4%	10.2%	17.4%

Source: InfoTrak Briefing 2017

Recommendation: While the high level of public confidence is encouraging, the new IEBC stands at an important crossroads. In order to maintain public faith, the Commission will have to work to show Kenyans that it is serious about avoiding the mistakes that marred the last process and that it is willing to fight to maintain its independence. The signs so far are mixed. As is detailed below, the Commission’s decision to cancel the tender process for election technology and engage in a direct award of the contract to the same firm that was partially responsible for the previous set of botched technology raises questions about how well the IEBC has learned from past mistakes. Moreover, recent analysis of the last mass voter registration exercise has revealed serious administrative and technical irregularities (*InformAction 2017*). On the other hand, the Commission’s stated commitment to enforcing gender parity in party lists and to enforcing leadership and integrity standards in the vetting of candidates is admirable.

Going forward, the Commission should consider replacing senior staff who were involved in administering the 2013 election. New commissioners provide much-needed, new public leadership, but the public must also be assured of independence and competence amongst

those staff who are in charge of the technical administration of elections. Given the myriad examples of errors and inconsistencies throughout the 2013 election process, it is vital that the Commission demonstrate that it is working to ensure that its staff are experts in their respective areas and that they are committed to correcting the mistakes that plagued the last election. The Commission must also proactively engage with stakeholders and the public at large throughout the remainder of the electoral process (*NDI 2017, 3*). It is imperative that the IEBC moves away from issuing directives to stakeholders and instead dialogues with them before major policy decisions and directions are announced. In order to maintain public trust, the IEBC should provide regular public updates about election-related developments. These updates should be honest evaluations of the Commission's strengths and weaknesses and should include an overview of what the Commission is doing to address problems.

Boundary Delimitation

According to the law, the IEBC is responsible for reviewing electoral boundaries every eight to twelve years. When drawing boundaries, the constitution stipulates that the IEBC must consider population density, the need to balance representation of urban and rural areas, population trends, the means of communication and level of infrastructure, relevant geographical features, the existing electoral boundaries, existing patterns of human settlement and shared community interests, needs and identities. In Kenya, electoral boundaries are drawn for 290 constituencies (which are represented by members of the National Assembly), 1,450 wards (which are represented by members of county assemblies), and 47 counties (which are represented by senators and women's representatives).

Boundaries were last reviewed in 2012, following which there were 128 appeals to the High Court. Out of these, 70 were dismissed. The remainder were addressed in an omnibus judgment, with the Court largely tending to accept the IEBC's decisions. In some instances, the Court asked the IEBC to clarify its reasoning. A few cases were further appealed, but these were "overtaken by time" (*EU 2013, 10*).

One of the primary concerns related to boundary delimitation is equality of the vote. Electoral constituencies should be roughly the same size so that no matter where voters live, all votes will carry the same weight. As a goalpost for determining the desired population size per constituency, boundary delimitation starts with a calculation of the average number of people per constituency. This average is determined by dividing the population by the number of constituencies (for national government) or wards (for local government). Based on the 2009 census, the average number of people in each of Kenya's national electoral constituencies was 133,138 inhabitants in 2013. The upper and lower limits around this average are as follows:

- The number of inhabitants in a city may exceed the population quota by 40 percent, for a total of 186,396.6 inhabitants.
- In other areas, an additional 30 percent is allowed, for a total of 173,079.4 inhabitants.

- In non-city areas, the allowed population may be smaller than the ideal number by 30 percent, or a total of 93,196.6 inhabitants.
- In sparsely populated areas, the population may be smaller than the average by 40 percent, for a total of 79,882.8 inhabitants (*TCC 2013, 26-27*).

The EU asserted that 28 constituencies had populations that were larger than the 40 percent threshold, and 15 constituencies were smaller than the 40 percent allowance. “Counties are also demarcated with insufficient regard for equality of the vote: 15 of the 47 counties have populations more than 40% bigger or smaller than the average county size.” According to EU observers, the allowed deviations are too large, making them inconsistent with the principle of equality of the ballot (*EU 2013, 10*).

Boundaries are next scheduled to be reviewed between 2020 and 2024.

Recommendation: When the IEBC next reviews boundaries, it will be important to conduct a holistic re-evaluation of the situation. The review should be based on updated population figures, and the allowed variances in size should also be assessed to ensure that some areas do not carry more weight than others.

Calendar Issues

In 2013, the electoral calendar suffered from several rounds of amendment and modification, largely in response to administrative delays and political elites’ self interest (*Commonwealth 2013, 14*). The delays impacted the entire electoral cycle and set a poor precedent for future elections (*EU 2013, 7; Commonwealth 2013, 13*). In fact, the law was amended in order to allow changes to the electoral framework as late as four months before election day.

The most notable delays in 2013 included the following:

- **Voter Registration:** One of the most significant delays in the 2013 electoral cycle was related to the IEBC’s procurement of election technology. Due to a series of controversies over the legality of the tender process, the BVR kits did not arrive in Kenya until ten days before the start of voter registration, and the beginning of voter registration was delayed four times (*AfriCOG 2012*). This delay had a domino effect, leading to shortening of timelines for training registration clerks, for the conduct of voter registration and for public verification of the register. “Procurement problems resulted in a three-month delay and a curtailment of all stages of voter registration. This delay was to have serious repercussions on election preparations and, ultimately, on the reliability and perceived credibility of the register itself” (*EU 2013, 14*).
 - o The late arrival of the BVR kits also caused the shortening of registration timelines. Amendments were passed to allow for registration to finish 60 days before elections instead of 90 days, as had been stipulated in Section 6 of the Elections Act. The time for public verification of the register was also shortened from 28 days to 14 days.

- **Submission of Party Membership Lists:** Section 28 of the Elections Act was amended to allow parties to submit their membership lists to the Registrar of Political Parties up to 60 days before the election, instead of 90 days.
- **Party Nominations:** Section 34 of the Elections Act, which focused on the minimum length of party membership required in order to be able to stand for election for the considered party, was changed to reduce the requirement from three months of party membership to being a member on the day of submission. This change was clearly made to allow for last minute party hopping by politicians. The Carter Center described this amendment as one that created “unnecessary confusion” and that undermined political stability (*TCC 2013, 29*).
 - According to the law, parties are required to hold their nominations at least 45 days before elections. In order to try and prevent party hopping, the major parties held their nominations on the last day of this 45 day window. This decision caused serious delays in the rest of the process, including in submission of lists of nominated candidates to the IEBC, delayed dispute resolution and late conclusion of the final candidate list. The official publication of the names of candidates and the forwarding of their names to ballot printing companies was also delayed (*TCC 2013, 33-34*).

Recommendation: In this election cycle, the IEBC has asked that the deadline for finalizing acquisition of the Integrated Elections Management System be modified in order to give the Commission more time. It also extended the deadline for parties’ submission of membership lists. In order to protect the integrity of the remainder of the electoral cycle, it is critical that no other timelines are modified before the election. If they are modified, the IEBC must publicly explain what steps it is taking to mitigate the possible adverse effects of these modifications later in the electoral cycle.

Voter Education

The right to voter education in Kenya is enshrined in the constitution and is reinforced in the Elections Act. “The [IEBC] shall, in performing its duties under Article 88(4)(g) of the constitution establish mechanisms for the provision of continuous voter education and cause to be prepared a voter education curriculum” (*Elections Act No. 24 of 2011, Art. 40*). The IEBC does have a Directorate of Voter Education, and it handles CSOs who wish to collaborate in the provision of voter education.

Voter education was especially important in 2013, because it was the first election held under the new constitution and it was necessary to educate Kenyans about what to expect at the polls, the roles of the new elective offices, and the meaning of devolution. It was disappointing, then, that voter education programming started so late in the electoral cycle (*Commonwealth 2013, 46; AU 2013, 11*). In fact, the bulk of the IEBC’s efforts did not begin until just before election day. In the month before election day, the IEBC implemented its regular voter education programming, which took place in each ward. Its “crash course” was launched just three weeks before election day,

and mock elections took place at the ward level only one week before election day (*EU 2013, 13*). Moreover, the IEBC's voter education materials were inadequate for semi-literate, illiterate and blind citizens (*TCC 2013, 30*).

In this election cycle, voter education continues to be a problem, largely because of the shrinking space for civil society. In President Kenyatta's Jamhuri Day speech, he said that foreign money was coming into the country "in the guise of supporting good governance or civic education." In reality, however, Kenyatta said this money was being used to influence Kenyans' electoral choices. He cautioned foreign governments:

I want to caution those members of the International Community taking these actions that the Kenyan people do not look kindly on such actions. I urge all Kenyans to reject such interference. This is our country, and no one should ever try and control our choices for their selfish interests. (*Kenyatta 2016*)

Soon thereafter, the Kenyan government suspended a KES 2 billion civic education program operated by the US-based International Foundation for Electoral Systems (IFES). The NGO Board falsely alleged that IFES was not registered in Kenya and that its employees did not have work permits. As a result, the Board announced that IFES was operating illegally (Odhiambo 2016). Such sentiments and actions have had the effect of chilling domestic voter education programs. Domestic providers have reported being questioned on sources of funding, budgets and curricula by the Ministry of the Interior. Some providers have also been asked to stop trainings. Overall, organizations have felt pressured to carry out their work in a less overt way.

Voter education programming has also been implemented extremely late in the electoral cycle, and it is unclear whether or not the Commission has developed updated voter education materials. Some domestic groups have reported that they have been accredited by the IEBC to conduct voter education, but the Commission has yet to provide them with new materials. Moreover, the lack of coordination between those who are providing voter education, including domestic and international CSOs, the IEBC and the national government means that there is inefficient and possibly repetitive programming.

Recommendation: Moving ahead, it is critical that the space for voter education be opened up, especially given the delays in the implementation of programming. With less than four months until election day, the IEBC should consider the development and dissemination of updated voter education material an urgent priority – especially since it cannot conduct voter education alone. Moreover, it is important for organizations like the IEBC, domestic voter education providers and the Office of the Attorney General to work together to minimize repetitive programming and to ensure broad geographical coverage of programming. Finally, stakeholders must commit to developing material that goes beyond the basics of casting a ballot and confronts some of the more difficult issues facing voters, including leadership and integrity standards and the role of ethnicity in politics. Stakeholders must also work towards the continuous provision of voter education so that voters are well prepared to think critically and deeply about their choices by the time election season starts.

Voter Registration

In Kenya, the IEBC is responsible for voter registration. Although the Kenyan constitution calls for continuous registration (*See Article 82(1)(c) of the Constitution of Kenya*), the IEBC uses quasi-periodic “mass voter registration” (MVR) drives in specific intervals leading up to elections. While these MVR exercises build on previous voters’ lists and do not require voters who previously registered to register afresh, it is not possible to easily register outside of these times. In the lead up to the 2017 Kenyan election, the IEBC has held two MVR processes – one in 2016 (MVRI) and one in 2017 (MVRII).

Voter registration has long been contentious in Kenya, and it has been repeatedly plagued by several issues, including severe difficulties in obtaining national IDs (which are required to register and vote), procurement scandals, administrative and technological problems, the lack of a single, verifiable register and inconsistent numerical data regarding the total number of registered voters in the country. New problems in this electoral cycle include an upsurge in transfer applications and coercive registration practices. Together, these issues have contributed to an environment in which the validity of the register is in significant doubt and suspicion around the possibility that obstacles to registration are by political design remains.

Procurement

In 2013, the first problems related to voter registration emerged during the procurement of biometric voting kits. The tender process was initially cancelled because of doubts about the shortlisted companies’ quality of work, and in the end the governments of Kenya and Canada agreed that the Canadian company – Morpho Canada – would supply the kits. The inter-governmental agreement cast doubt on the IEBC’s independence, and it also caused delays further into the electoral cycle, most notably with the delivery of the kits. In fact, the last batch of kits arrived only ten days before the start of voter registration (*Mayabi 2012*). By the time they arrived, it was difficult for the IEBC to effectively train its staff in the use of the kits as well as to equip them with battery supplies and distribute them to all registration centres in a timely fashion.

Unfortunately, this election cycle has also been plagued by procurement problems. Most recently, the IEBC canceled the tender for the Integrated Elections Management System (IEMS), which is a technological tool for voter registration, voter identification and results transmission. The cancellation came after multiple objections to the way in which the process was carried out, and the IEBC has now decided to directly procure the IEMS from Safran Identity and Security, previously known as Morpho, on the grounds that it can comply with the tight timelines and that it has already supplied the biometric voter registration (BVR) kits. Unsurprisingly, these issues have caused delays and doubt, especially because the chosen company is the same one that supplied the underperforming BVR kits in 2013. The IEBC now wants extra time for procurement and has proposed shifting the deadline for procurement from four months ahead of elections to two months prior to polling (*Ayaga 2017*).

It also seems that the IEBC may not have followed procurement rules related to direct awards. Petitioners allege that the IEBC is in violation of the Public Procurement and Asset Disposal Act, 2015. In one ongoing court case, petitioners allege that the IEBC is in contravention of Articles 102 and 103 of the Act, which lay out procedures for restricted tendering and specify the conditions under which direct procurement may occur. The petitioners assert that there is no emergency to justify the direct procurement, and they also contend that the IEBC violated the Elections Act by removing the voter registration component from the IEMS (*Mburu 2017*).

There is also suspicion around the possible involvement of the government in the tender. Some Jubilee leaders have been accused of trying to influence the tender award for the delivery of the planned Integrated Elections Management System in favor of a French firm of questionable repute (*The Star 2017*).

The delays caused by the procurement problems could again derail the remainder of the electoral calendar.

Recommendation: The IEBC should endeavor to carry out open and transparent procurement of electoral materials in all instances. Single sourcing, as practised in this instance, leads to credibility questions and could cast doubts on the integrity of the elections. Given the selected company's tarnished reputation in Kenya, the IEBC should also provide election stakeholders and the general public with a detailed explanation of how and why this company has again been awarded a direct contract. The IEBC must demonstrate why it has confidence that this company can be trusted. A question and answer session with interested stakeholders would be one place to start.

Registration Campaigns

The latest MVR exercise was also characterized by the use of coercive registration. Examples include elites' use of criminal gangs to restrict access to public places and transport for citizens who cannot produce a voter registration card and elites' payments to chiefs, especially in Jubilee stronghold areas, to ensure that all eligible voters are registered. Elites have allegedly also supplied chiefs with lists of who is and is not registered so that chiefs can effectively target potential registrants (*Ngige 2017*).

There were also instances of faith-based organizations requiring their congregations to show proof of registration. In Embu, Rev. Isaiah Njagi, an Anglican clergyman, threatened to deny the Holy Eucharist to his congregation unless they were registered to vote. He also planned to extend the rule such that members of his congregation will have to prove they voted to receive Communion (*Craig 2017*).

Procedural Issues

Voter registration processes in Kenya have often been marred by serious irregularities and allegations of fraud. In 2013, domestic and international observers and analysts noted the IEBC's use of multiple voters' registers, each with different totals, and several problems with the accuracy of those lists. Observers and analysts also criticized the use of the infamous "green books," which were a collection of notebooks in which manual records of registered voters were kept. These books had been used by the pre-2010 Kenyan EMB, known as the Electoral Commission of Kenya (ECK), and their use had been critically derided by the Independent Review Commission, which was tasked with investigating election administration in Kenya following the 2007-2008 post-election violence. Other related problems included security and back-up of the digital data.

The Voter Register was not the subject of controversy until after Election Day, when its weaknesses led to the use of several different lists and closer scrutiny of the provisional and final figures. Thereafter, the Voter Register's reliability was called into question. Just two days before polling, the IEBC published lists detailing 36,236 registrations for which biometric data was not available. Only after the announcement of election results did it emerge that these were not included in the overall figure of entries published earlier, or in the figures cited in the election results. In conjunction with inconsistent procedures for verifying registration on polling day, this separate list of voters contributed to some of the discrepancies that were later identified in the results." (*EU 2013, 15*)

In addition, the act of registering to vote was plagued by dysfunctional and/or nonfunctional BVR kits, an insufficient number of kits, low turnout and the fear of violence in certain areas. The difficulty associated with obtaining national ID cards, which are required to register and to vote, was also considered a key problem (*EU 2013, 15 and TCC 2013, 28*).

Unfortunately, not much has changed since 2013 with regard to voter registration. The domestic observer group InformAction, who monitored the two phases of MVR, witnessed the following categories of problems:

- **National Identification (ID) Process:** There have been serious and widespread delays related to the process of obtaining national ID cards, which are required to register and to vote. Delays have been attributed to corruption and vetting procedures, the latter of which disproportionately target Kenyans from marginalized communities. The MVR processes have also revealed that many Kenyans share their ID numbers with other Kenyans. This problem has yet to be adequately addressed by the Registrar of Persons, and its full effect on registration and voter identification has yet to be understood (*IFA 2016 and IFA 2017a*).
- **Equipment Error and Failure:** As in previous elections, registration has also been marred by dysfunctional and nonfunctional BVR kits (*IFA 2016 and IFA 2017a*).
- **Use of Manual Notebooks:** The latest set of amendments to the electoral law allows the IEBC to utilize non-technological voter registration systems as complementary to technological registration, in the event that the latter fails. Thus far, it appears that the IEBC has interpreted this law to mean that it can freely use the green book. In fact,

manual notebooks have been seen in several counties around the country. At the same time, however, they have not been consistently used so it is unclear exactly how and when these books will be used for data collection and/or verification (*IFA 2017a*).

- **IEBC Field Performance:** The IEBC's MVR processes were also marred by a variety of logistical problems, including inconsistently and poorly organized registration centres, haphazard registration hours, poorly trained staff, noncooperation with observers, and insufficient data security (*IFA 2016 and IFA 2017a*).
- **Registration Bribery:** InformAction observers witnessed politicians paying voters to register (*IFA 2017a*).
- **Transfers:** One of the most concerning issues in this election cycle is registration transfers, in which citizens change the location of the centres at which they are registered and at which they will cast their ballots. In some instances, IEBC clerks have noted more applicants for transfers than for registration. During MVRI in 2016, the IEBC received 700,000 transfer applications (*Omulo 2017*). In the first week of MVR II, the IEBC noted that 40 percent of those Kenyans turning out were actually applying to transfer their polling stations (*Ongiri and Odhiambo 2017*). The Commission raised concerns that politicians were organizing the transfers in an attempt to boost their potential vote share. In fact, a bodyguard of Teso South MP Mary Emase was arrested for trying to register Ugandans as Kenyan voters (*Ombati 2017*). In Nyeri, the IEBC was investigating MP Esther Murugi over claims that she was bribing voters from Tetu, Othaya and Kieni to transfer to Nyeri Town (*Wangui 2017*). There were also suspicions related to transfers and the gubernatorial race in Nairobi. In an attempt to prevent such dubious transfer applications, the IEBC announced that it is no longer possible to apply for transfers at the ward level. Instead, applicants have to submit their transfer requests at IEBC's constituency offices. Unfortunately, however, it seems the new rule had limited impact. The IEBC announced that 1,001,819 individuals applied for transfers (*Nyamori 2017*).

Registration in the diaspora was also marred by logistical problems in 2013. Despite earlier statements to the contrary, in the end the IEBC only conducted diaspora registration for Kenyans residing within the East Africa Community. Registration lasted for ten days, and 2,637 diasporan Kenyans registered during this time. In this election cycle, the IEBC extended diaspora registration and voting to South Africa as well. The Kenya Diaspora Alliance filed suit against the IEBC, demanding that all diasporan Kenyans across the world should be allowed to register and vote. Overall, the IEBC registered approximately 1,500 Kenyans in the diaspora and 4,094 prisoners.

The Audit

The new electoral law allows the IEBC to engage a professional firm to conduct an audit of the voters' register (*The Election Laws (Amendment) Act, 2016, Article 6*). The stated purposes of such an audit are to verify the accuracy of the register, recommend mechanisms to enhance the accuracy of the register and to update the register (*The Election Laws (Amendment) Bill, Section 6*). While an audit may go a long way in promoting public confidence in the register, the process

has thus far been controversial. In fact, activist Okiya Omtatah and CORD have raised problems with the way in which the IEBC entered into a contract with KPMG. Omtatah and CORD filed suits against the selection process, but both suits were dismissed (*Maina 2017*). Moreover, there is mistrust with regard to the choice of KPMG because of the firm’s lack of expertise in conducting such audits. Indeed, KPMG’s proposed methodology does not reflect internationally accepted best practice for the audits of voters’ registers, and there has thus far been a lack of transparency with regard to KPMG’s progress and therefore its eventual findings (*KYSY 2017*).

The Numbers

Overall, the IEBC registered 14,388,781 voters in 2013, which represented roughly 80 percent of its target of 18 million voters. This number was not released until after election day, by which point several other totals had been used at various points throughout the process. Table 1 shows the various totals.

Table 1: Shifting Totals of Registered Voters in Kenya

Provisional Register (December 2012)	14,340,036
Principle Register (February 2013)	14,352,545
Special Register (March 2, 2013)	36,236
Election Results Total (March 9, 2013)	14,352,533
Green Book Total	14,388,793
Post-Election Register (July 2013)	14,388,781

Source: AfriCOG/KPTJ. 2013. “Voter Registration for the 2013 General Elections in Kenya.”

Suspicion around shifting totals was compounded by seemingly strategic changes to the register. One fundamental, unresolved issue was the increased size of the final 2013 register, as compared to the provisional list. To date, the IEBC has not provided an acceptable explanation of how, given that registration closed as the IEBC compiled the provisional register, the final register could have been larger than the provisional register. During the 2013 Supreme Court presidential petition trial, the IEBC revealed that the growth in the size of the register was due to approximately 36,000 voters whose biometric data could allegedly not be captured, as well as to data that had not originally been downloaded from BVR kits. Even when including those voters, however, the numbers still did not add up (*Shah 2013*). In this electoral cycle, the IEBC has already stated that the final register will likely be larger than the provisional numbers due to be released in the near future. A related second issue was that these changes appeared to be politically strategic. Table 2 provides details of regions in which the number of registered voters grew and those in which the number decreased.

Table 2: Changes to the Voters Register between December 2012 and February 2013

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

Source: AfriCOG/KPTJ. 2013. "Voter Registration for the 2013 General Elections in Kenya."

Since 2013, the IEBC has continued to update the register. Between 2013 and the present, the Commission has conducted two mass voter registration drives. While the final county- and constituency-level numbers have yet to be released, the total number of registered voters at the national level is reported to be approximately 19,749,310. This total includes the voters from both phases of MVR, registration of prisoners and registration of Kenyans in the eligible diaspora countries (*Kabiera 2017 and Muraya 2017*). Based on the last total released from 2013 (in July), this represents a 37% increase in the number of registered voters.

In some cases, a look at the data thus far reveals potentially problematic inconsistencies. According to the IEBC, its target during MVR II was to register at least 67 percent of the population that possessed IDs but were not registered. Domestic observers noted, however, that target numbers appeared to have changed midway through MVR II. In Kilifi, for example, 67 percent of the non-registered population is 229,759. In early February, however, observers saw that IEBC documents showed a target of 175,340 voters, or just 51 percent of eligible voters in Kilifi County. In Lamu County, the original target was 19,989 voters. Observers noted that this target had changed to 20,430, which is 68 percent of the eligible population.

Recommendation: In many ways, the voter registration process has already been severely compromised. The use of green books alone casts serious doubt on the ability of the IEBC to create a single, verifiable list of registered voters in the country. In order to save the credibility of the register, the IEBC must clearly explain to the public how the register will be cleaned, how shared ID numbers will affect (or not) registered voters, and why the final register may be larger than the provisional one. This explanation should include details regarding how KPMG will conduct the audit of the voters' register and the rationale behind the firm's decision not to use internationally accepted methods for conduct of the audit. Moreover, the IEBC must ensure that there is an easy and secure way for voters to verify their data in the register and correct it if it is wrong. There must be clarity regarding the unique personal identifiers being used by the

Commission in creating the voters' register. This will address instances where same ID number has been used to register several voters. The Commission, by its own admission, has stated that there are over 128,000 persons sharing the same ID numbers in its database. This number was arrived at before the audit of the register and may just be the tip of the iceberg.

Going forward, it is important for the Commission to do more to keep the public updated and informed about election-related developments. Most urgently, the Commission should tell the public what "complementary mechanisms" will mean for them, what they can expect and when and how they can expect it. This should include public testing of all technology the IEBC intends to use throughout the process. Finally, the IEBC should update the public on the progress of the audit of the register, including the provisional findings as they come to light, the timeline and expected date of completion and how it may affect voters on the list, if at all. In the future, the IEBC must take steps to merge voter registration with the acquisition of national IDs.

Campaign Finance

Campaign finance is largely unregulated in Kenya. In previous election cycles, observers have noted the unequal playing field, describing an environment in which candidates with more money have more influence within parties and in which wealthier candidates are far more likely to win (*TCC 2013, 40 and EU 2013, 20*). In 2013, for example, wealthier candidates were able to traverse the country via helicopters while less moneyed candidates struggled to receive basic levels of exposure (*AU 2013, 9*). In addition, the need to stock campaign chests is a powerful incentive for corruption before and after elections, when campaign funding "debts" are repaid through lucrative public contracts and other means.

In 2014, Kenya passed the Election Campaign Financing Act. According to this law, the IEBC is mandated to regulate and administer campaign financing. It is empowered to set and enforce spending limits, monitor and regulate campaign expenses, set contribution limits and verify contribution sources, provide a framework for the reporting of campaign expenses and supervise actors in relation to campaign finances (*Election Campaign Financing Act 3(1)*). In 2016, the IEBC submitted campaign finance-related regulations to parliament for approval. These rules, which were intended to enforce Section Six of the Act, required political parties to open expenditure accounts, appoint individuals authorized to manage these accounts and to submit the bank account details to the IEBC. The regulations also established expenditure limits for parties.

In December 2016, Raila Odinga filed suit in Milimani High Court, alleging that the law is unfair and discriminatory. In January 2017, the High Court ruled in favor of Raila Odinga, suspending the law temporarily. Since that time, the National Assembly has failed to pass the regulations and referred them back to the Commission.

Today, the situation remains starkly unequal. In Kirinyaga County, for instance, Purity Ngirici, who is running for Women's Representative, has used her personal wealth to equip her campaign with two helicopters and 300 vehicles, each branded with her campaign details (*Kamau 2017*). In contrast,

less affluent candidates, including youth candidates, are printing their portraits and manifestos on matchboxes, posting flyers on household goods sold in shops and relying on motorbikes, walking and lifts from others to conduct their campaign activities (*Chepkoech 2017*).

Recommendation: The lack of campaign finance regulations helps maintain the status quo in Kenyan electoral politics. The dominance of wealthy candidates leaves little chance for new candidates to have a realistic chance of gaining ground, and it perpetuates corruption and the highly unequal playing field. Going forward, the passage of campaign finance regulations should take priority, especially since the regulation of money spent during elections is a constitutional provision (*Article 88*).

Party Primaries

Although Article 81 of the Kenyan constitution obligates parties to “abide by the democratic principles of good governance [and] promote and practice democracy through regular, fair, and free elections within the party,” party primaries and nominations in Kenya have long been messy and sometimes violent affairs. The chaos is partly the result of the high stakes in primaries. In many cases, winning the nomination essentially means winning the election. This is because, in party stronghold areas, the dominant party’s backing gives that candidate a clear advantage over other parties’ candidates.

In 2007 and 2013, international observers described the primary process as having been marred by serious violence, allegations of rigging, widespread technical problems and accusations of fraud and manipulation of results (*EU 2008, 19; TCC 2013, 32; EU 2013, 16*). In fact, party primaries have been observed as violent processes since the opening up of political space in Kenya in 1992 (*EU 2013, 16*). Many of these problems are rooted in the clear lack of intra-party democracy. The Carter Center observed the following in 2013:

In some cases, winners succeeded through a show of might within political parties where the strongest ended up as winners and allies were rewarded without competition through direct nominations rules entrenched in party constitutions. Carter Center observers witnessed demonstrations in many places throughout the country as disgruntled supporters of defeated aspirants took to the streets, which in some cases resulted in violence. (*TCC 2013, 34*)

Timing has also been a problem. In 2013, new laws required parties to hold nominations at least 45 days before elections. In order to try and prevent party-hopping, the major parties held their nominations on the last possible day. This decision delayed vote counting and effective and timely dispute resolution (*TCC 2013, 33; EU 2013, 16*). In fact, the last minute nomination procedures were so devastating to planned timelines that the IEBC extended the deadline for submission of the final lists of candidates from 18 January to 24 January. “The shift by the IEBC of the nomination date... was a breach of the electoral law. Although the IEBC denied shifting this deadline, the cumulative effect was a clear violation of the provisions of the law requiring all political parties to present the list of nominated candidates 45 days prior to the elections, that is, on Jan. 18.” (*TCC 2013, 34*)

Other problems included poorly trained officials who committed errors and malpractices, logistical problems caused by the late arrival of ballot papers, erroneous ballot papers, and low levels of intraparty democracy (*TCC 2013, 33-34*).

Developments since 2013

There has been some notable progress since 2013. The newest set of amendments to the electoral law changes the timeline, requiring parties to conduct primaries at least 60 days before elections (*Election Laws Amendment Act, Clause 8*). Furthermore, on 8 March, the IEBC announced that 67 registered parties and one coalition had submitted their nomination rules to the Commission on time. The High Court also recently upheld the law barring party-hopping less than 120 days before elections. The decision is a positive step which has the power to promote party unity and committed party members.

On the other hand, there is evidence of the continuation of old problems in the current electoral cycle. Parties were required to submit their membership lists to the IEBC by 19 March. On 17 March, however, the IEBC announced an eight-day extension, moving the deadline to 27 March. While this is still within the legal timeframe (lists must be submitted at least 120 days before elections), it is a worrying sign that the IEBC is again ready to shift timelines.

Other questions for this electoral cycle include a lack of clarity regarding the role of the IEBC in administering primaries. Clause 10 of the new amendments requires the Commission to conduct and supervise party primaries for those parties that request such assistance. It remains to be seen, however, whether or not the Commission is prepared with staff and resources to offer such assistance. Moreover, the ODM party has expressed its opposition to the IEBC's proposed role in Jubilee party primaries. Specifically, ODM asserts that it is a conflict of interest for the IEBC to be involved in conducting primaries when it is also supposed to be the arbiter of post-primary disputes. ODM also claims that state money should not be used to finance party nominations. The party also worries about how IEBC's proposed involvement will impact its readiness for the general election (*Wanjala 2017*).

The upcoming primaries will also be watched for violence. Certain subnational races have already been tainted with pre-election violence, (*Nkaari 2017*) and ongoing conflicts in the Rift Valley have been linked to manipulative politicians who are using violence and fear to win votes (*Aglionby 2017*).

Finally, it will be important to pay attention to post-primary dispute resolution processes. In the last election cycle, there was confusion regarding whether aggrieved candidates were to take cases to the Political Parties Dispute Tribunal or to the IEBC. Parties' constitutions are supposed to explicate dispute resolution, but in 2013 there was rampant "forum shopping," where individuals went to the forum in which they expected to receive the most favorable ruling. Overall, the IEBC presided over 260 such cases, and 74 of these went on to the high court (*TCC 2013, 34-35*).

The IEBC and the Political Parties Dispute Tribunal have since signed an agreement on how they will exercise jurisdiction over nomination disputes. The contents of the agreement are yet to be made public, and it remains to be seen how the two entities will wade through the jurisdictional issue and forum shopping by political aspirants. The next report in this series will cover the issues that arose in the political party primary process.

Recommendation: Moving ahead, it is important for political parties and the IEBC to publish party constitutions and nomination rules so that interested stakeholders can check party performance against parties' own standards. It will also be important for the IEBC to clarify exactly what role it will play, if any, in helping to administer party primaries. Political parties must have their own internal mechanisms in place, and the Commission and the Tribunal must have clear boundaries that demarcate the types of disputes over which they each have jurisdiction. The IEBC should deal with nomination disputes arising from the decisions of the Returning Officers, while the Tribunal should deal with disputes arising from political party nomination processes.

Pre-Election Violence

Pre election violence is common in Kenya and has tainted every election since 1992, with the exception of 2002. The country has seen worrying levels of violence in recent months, ranging from police violence against protestors to inter-group violence around the country. In one of the most well known incidents, British farmer Tristan Voorspuy was shot dead by armed raiders on his ranch in Laikipia. This attack was one of many in the area, pitting farmers against herders. Some of the current violence is being attributed to the drought, which is allegedly causing nomadic herders to trespass onto farmers' land as they search for grazing areas for their animals. On the other hand, however, politicians have been accused of encouraging the invasions to push out their opponents' supporters ahead of the election and appease their own supporters (*Aglionby 2017*). In response to the violence, President Kenyatta recently deployed the army to the region. Questions were raised about the constitutionality of the deployment, which had not been approved by the National Assembly.

This recent violence is only the latest in an ongoing pattern. In fact, conflict between pastoralists and ranchers is an old story, dating back to agreements between colonial rulers and Maasai, who were unfairly and deceptively pushed off their land in the early 1900s. Since then, land ownership in Kenya has only become increasingly unequal. For instance, fewer than 50 individuals – most of whom are wildlife ranchers - own 45 percent of all the land in Laikipia (*Maina 2017*). The most recent violence in Laikipia may have been partially sparked by the drought, but it is firmly rooted in the Maasai group's multiple failed attempts to win justice for these grievances. During elections, politicians, some of whom own the largest farms in the area, exploit these issues for their own campaign-related ends. They support either the pastoralists or the ranchers, depending on what is in their own interests at the time. Their financial stakes in Laikipia also mean that there is little political will to push for change. Laikipia is not the only area where such conflicts exist. In fact, unresolved land issues regularly become hotspots for election-related violence in many parts of the Rift Valley as well.

The pre-election period has also already been marked by the proliferation of gangs and militia groups, some of whom are funded by and work directly for politicians. During the MVR period, members of the Mungiki group were used by certain elites to pressure people to register to vote (*InformAction 2017b*). The National Security Council has also noted the upsurge of gangs and the proliferation of small arms and light weapons ahead of elections. These groups have already been linked to certain

elites (*Kisika 2017*). Police violence has also been a significant problem in the lead-up to elections. In 2016, Human Rights Watch described police brutality against protestors as “shocking,” and recent allegations of the police force’s use of extrajudicial killings demonstrate the continuing problem (*Namwaya 2016 and Gaffey 2017*).

Moreover, the fear of more violence is widespread, especially in relation to gubernatorial and county assembly races. Many stakeholders have reported that some violence is almost certain. What remains to be known is where it will happen and how much to expect (*NDI 2017, 5*).

Recommendation: In a positive step forward, President Kenyatta recently signed the Prevention of Torture Act, 2016 into law. This law allows victims of police brutality, cruelty and punishment to sue the state. It also empowers the Kenya National Commission for Human Rights to investigate alleged violations under this law. Going forward, it is critical for those police officers who have killed and injured individuals to be held accountable for their actions. It is also important to establish independent and secure mechanisms through which individuals can safely report incidents and victimization. It is especially important for all those security personnel who will be involved in policing election-related activities to understand the law and the country’s commitment to human rights. Officers should be trained in law-compliant security provision. This training is especially critical in light of a new report by The Observatory for the Protection of Human Rights Defenders, which cites high levels of police violence as one of three major areas of concern (*OMCT 2017, 5*). Furthermore, security, intelligence and monitoring agencies must work together, share information and enforce penalties against those convicted of violence and incitement to violence. It is also imperative for stakeholders, including politicians, civil society groups, and government agencies, to create spaces for dialogue and debate in the period between elections. In this way, people can begin to air and address grievances in constructive ways, in a political context that is not overshadowed by the pressures of election campaigns.

Campaign Activities

Although campaigns have not officially begun in Kenya, political parties and candidates are already mobilizing supporters, holding rallies, and publicizing their plans for the future of the country.

In 2013, most stakeholders’ primary concern was the avoidance of violence. In keeping with this concern, the IEBC asked parties to notify its constituency offices of their planned campaign activities. In most cases, this helped promote peaceful campaigning and ensured that parties did not have to cross each other’s paths too much. In some cases, however, parties did not adhere to this rule. The IEBC also appointed campaign monitors at the county level, but their impact was limited due to poor equipment (*TCC 2013, 38*).

Overall, observers of the 2013 election felt that the campaign was calm, with respect for freedom of expression, assembly and movement for political parties and candidates around the country. At the same time, however, the campaign start date was not announced by the IEBC, thus giving an advantage to wealthier parties who could afford to campaign for longer periods. There was also limited violence. Finally, some observers directly observed voter bribery during this period (*EU 2013, 18*).

Thus far, the pre-campaign period in Kenya has been marked by isolated incidents of hate speech. In recent months, several politicians, including MPs Kimani Ngunjiri (JP Bahati), Timothy Bosire (ODM, Kitutu Masaba), Junet Mohamed (ODM, Suna East) as well as woman representatives Florence Mutua (ODM Busia) and Aisha Jumwa (ODM Kilifi) have been accused of spreading divisive messages. Earlier this year, Moses Kuria was accused of calling for the assassination of Raila Odinga. He and Ferdinand Waititu, who recently won the Jubilee Party gubernatorial nomination for Kiambu, were later acquitted for lack of evidence.

In order to tighten restrictions regarding hate speech, parliament is soon due to debate the National Integration and Cohesion (Amendment) Bill 2017. The bill broadens the definition of hate speech to include coded language, acts or gestures. If passed, individuals convicted of engaging in and spreading hate speech will face fines of up to KES 10 million and jail time of up to five years. It would also bar politicians who are convicted of running for office for five years. The bill also targets social media and seeks to fine users Kes 5 million for spreading messages of hate on these networks. While such penalties and restrictions can be useful, there is a fine line to tread with regard to freedom of speech. For instance, the bill's definition of hate speech extends to public performances, the directors of which could be charged for including scenes that depict ethnic hatred (*Olick 017*). Provisions like this one may go too far and could infringe even on speech that aims to educate and inform.

Recommendation: Regardless of whether or not the bill passes, it will be critical for monitoring and enforcement agencies, such as the IEBC and the NCIC, to be vigilant about identifying and taking action against the use of hate speech. Without enforcement, Kenya's laws have little meaning and even less authority. Moreover, the IEBC should clearly state the dates on which the official campaign period begins and ends. In this way, the parties have equal opportunities to plan and carry out their campaign activities.

Gender Parity and Elections

Kenya's constitution makes great strides in promoting gender parity. According to Article 27 (8) of the Constitution, the State "shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender." In addition, there are 47 reserved seats for women in the National Assembly, 16 reserved seats for women in the Senate, and two reserved seats for women in the Parliamentary Service Commission (*Article 97(1)(b), Article 98(1)(b), Article 127 (2)(c)(i)*). The law requires that women occupy at least 33 percent of all seats in parliament. Kenya's 11th parliament includes 86 women, who make up 21 percent of the national legislature.

Kenya has been extremely slow to implement the law. In the lead-up to the 2013 election, the Supreme Court ruled that the two-thirds provision could be implemented "progressively," giving parliament until 2015 to enact appropriate legislation. In a notable dissent, then-Chief Justice Willy Mutunga said the ruling "flew in the face of the struggle by Kenyan women for gender equality" (*Lucheli 2012*). Despite the deadline, no such legislation exists. In fact, on two occasions in the

past year, parliament has failed to approve proposed new laws on this issue. Moreover, there is little indication that parties possess the political will to implement the gender parity provisions. In 2013, political parties declined to adopt specific policies to enhance women's participation in the party primary process, and the number of women eventually nominated by political parties was significantly lower than their male counterparts (*TCC 2013, 36*).

In fact, it seems as if the reserved seats for women has actually worked against the goal of gender parity. Many political elites have taken the view that the existence of these seats means that women's representation is already "taken care of." They therefore do little to empower women to fully engage in the political process as candidates and elected representatives (*TCC 2013, 40-41*). Indeed, some parties used the reserved seats as an excuse to exclude women, and they regarded women's interest in other legislative positions as unwelcome and unnecessary (*EU 2013, 25*).

Most recently, however, the High Court ruled that the National Assembly and Senate failed in their constitutional obligations to enact the necessary legislation regarding the two-thirds gender rule. Further, it was the Court's opinion that this failure is a violation of the rights of women to equality and freedom from discrimination and a violation of the constitution. The Court therefore ordered parliament and the Attorney General to enact the required legislation within 60 days of the date of the judgement, failing which the petitioners or any other interested party will be free to petition the Chief Justice to advise the President to dissolve parliament (*Centre for Rights Education and Awareness & another v Speaker of National Assembly & 5 Others, High Court Pet 371 of 2016, eKLR [2016]*). This recent ruling is encouraging, but it remains to be seen how willing parliament is to abide by the judgment. Moreover, much will depend on the quality of any new legislation. In a hopeful development, the IEBC has said that it will not accept party lists that do not comply with the two-thirds gender provision. IEBC Chairperson Wafula Chebukati stated that lists which do not comply with the rule will be returned to the respective parties for amendment (*Wakaya 2017*).

In response to a petition filed by the Katiba Institute, in late April the High Court also ruled that political parties are required to ensure that their candidate lists for the general election are in compliance with the two-thirds gender provision. Given that elections are less than three months away, however, the Court exempted parties from compliance in this election cycle.

Recommendation: Without a law to enforce the constitutional provision, Kenya is now at a dangerous crossroads. If an insufficient number of women are elected, the country will face a constitutional crisis. Parliament must immediately fulfill its constitutional and court-ordered duty to enact legislation to implement the two-thirds gender rule. At minimum, the law should include provisions that facilitate women's access to party funding and also include incentives for male counterparts to support the promotion of women leaders. Going forward, political elites must take the lead in supporting women aspirants and in taking steps to integrate them into political leadership positions. This must include proactively helping women leaders be more than mere custodians of what are considered "women and children's issues." Women leaders must be supported and encouraged to take on the broad range of policy questions and issues facing Kenya.

III. Conclusion

The credibility of the 2017 election in Kenya ultimately depends on the public's trust in the process, and that trust (or lack thereof) hinges largely on functional and smoothly operating procedures, transparent and accountable decision-making, and a professional, independent EMB that is in constant communication with the people. In order to ensure a credible election, we recommend that stakeholders pay heed to the above recommendations. In addition, we emphasize that the following issues must be urgently addressed:

- The IEBC must prioritize its relationship with the public. As a first step, it is important the Commission publicize KPMG's final report of the audit of the voters' register as soon as it is received. Secondly, the IEBC must develop a long-term communication strategy that keeps the public informed of developments in a timely fashion. Traditional and social media can and should be used to address issues such as the practical implications of the new amendments to the electoral law, glitches in voter registration processes, questions around the procurement of election technology, upcoming deadlines, findings of the audit of the register, and other relevant topics. In this way, the public knows what to expect and how the IEBC is dealing with problems. Elections are never perfect, but suspicion and criticism can be preempted and public confidence can be boosted by timely and meaningful communication.
- The IEBC and the Registrar of Persons must respond to public questions and criticisms related to the MVR exercises. Registration was rife with problems, including nonfunctional and dysfunctional BVR kits, the unexplained use of green books, shared ID numbers, severe difficulties in obtaining IDs, the lack of security of data and many logistical hurdles at registration centres. Although registration is now closed, the IEBC and the Registrar of Persons should explain what they are doing to fix the problems that plagued registration up to the present. Moreover, since some registration problems have implications for what voters may face on election day, it is even more urgent that the IEBC explains how it is dealing with public concerns in this area.
- In order to begin to change the pattern of electoral impunity in Kenya, it is critical that stakeholders create and maintain the will to enforce the law. Kenya is fortunate to have one of the world's most progressive constitutions, which vests power in the people and demands high levels of professionalism and selfless service from political leaders. This election offers an opportunity to start with a relatively clean slate. If Chapter Six provisions are enforced, the new leadership could be of a higher standard, and that could have long-term domino effects with regard to more transparent and accountable institutions.
- Parliament must fulfill its duty to pass legislation for the implementation of the two-thirds gender law. There have been several proposals over the years to realize the constitutional standard, including those in the Attorney General's 2015 taskforce report, the Green Amendment Bill, and several others. In order to fulfill their responsibilities under the constitution and to avoid a constitutional crisis, it is now imperative that legislators consider the options and make a decision as soon as possible.

IV. References

Africa Centre for Open Governance (AfriCOG). 2012. "Ready or Not? An Assessment of Kenya's Preparedness for the General Election, September—December 2012." Available at http://africog.org/new/wp-content/uploads/Ready%20or%20Not%20Election%20Report%20Revised_0.pdf.

Africog/KPTJ. 2013. "Voter Registration for the 2013 General Elections in Kenya." KPTJ: Nairobi, Kenya.

AfriCOG. 2015. "Integrity in Leadership? An Assessment of Kenya's performance in enforcing constitutional values." AfriCOG: Nairobi, Kenya.

African Union Commission. 2013. "Report of African Union Elections Observation Mission to the 4 March 2013 General Elections in Kenya."

Aglionby, John. 2017. "Rift Valley violence sparks fears ahead of Kenyan elections." *Financial Times*. Available at <https://www.ft.com/content/1c13aae0-042b-11e7-aa5b-6bb07f5c8e12>.

Ayaga, Wilfred. 2017. "Chebukati admits hackers attacked IEBC servers." *Standard Digital*. Available at <https://www.standardmedia.co.ke/business/article/2001232988/yes-hackers-attacked-our-systems-admits-iebc>.

Business Daily. 18 March 2016. "IEBC's Hassan named in UK's fresh 'Chickengate' papers." Available at <http://www.businessdailyafrica.com/IEBC-s-Hassan-named-in-UK-s-fresh-Chickengate-papers/539546-3122324-view-printVersion-b85mes/index.html>.

Chepkoech, Anita. 11 April 2017. "Bomet youth unfazed by moneyed rivals in poll duel." *The Nation*, pages 21-22.

Chepkwony 2017. "IEBC clears jailed police impostor Joshua Waiganjo to vie for MP seat." Available at <https://www.standardmedia.co.ke/article/2001231575/iebc-clears-jailed-police-impostor-joshua-waiganjo-to-vie-for-mp-seat>.

Commonwealth Observer Group. 2013. "Report of the Commonwealth Observer Group."

Connette, David. 2016. "Landmark corruption fine levied against Smith and Ouzman." *The Independent*. Available at <http://www.independent.co.uk/news/business/news/landmark-corruption-fine-levied-against-smith-and-ouzman-a6803526.html>.

Constitution of Kenya. 2010.

Craig, Jill. 2017. "Kiss the Bride, Mourn the Dead, Register to Vote in Kenya." *Voice of America*. Available at <http://www.voanews.com/a/kiss-the-bride-mourn-the-dead-register-to-vote-in-kenya/3681344.html>.

Daily Nation. 2014. "Cord demands resignation and arrest of IEBC boss Isaack Hassan over graft claims." Available at <<http://www.nation.co.ke/news/politics/Cord-Issack-Hassan-IEBC-chair-resign-over-graft-claims/1064-2526760-2s1bslz/index.html>>.

Daily Nation (b). 2016. "Death, violence mar protests against IEBC." Available at <http://www.nation.co.ke/news/Death-and-violence-mar-protests-against-IEBC/1056-3235456-jxu00tz/index.html>.

European Union Electoral Observation Mission to Kenya. 2013. "Final Report."

Gaffey, Conor. 2017. "Kenyan police watchdog to probe 'extrajudicial killings' video." *Newsweek*. Available at <<http://www.newsweek.com/eastleigh-kenya-police-shooting-578148>>.

Namwaya, Otsieno. 8 May 2016. "Dispatches: Police Brutality Threatens Rights in Kenya." *Human Rights Watch*.

IEBC. 2014. "Post-Election Evaluation Report on the March 4th 2013 General Elections."

InformAction. 2017a. "Election Watch 3: Gateway to the Ballot Box." Available at <<http://informaction.tv/index.php/news-from-the-field/item/583-election-watch-report-3>>.

InformAction. 2017b. Pre-primaries training. Nairobi, Kenya.

InformAction. Unpublished manuscript on pre-election violence.

Infotrak. 2017. Briefing to Kura Yangu, Sauti Yangu. Nairobi, Kenya.

Institute for Security Studies (ISS). 2012. "Kenya's Biometric Voter Registration: New Solution, New Problems." Available at <http://reliefweb.int/report/kenya/kenya's-biometric-voter-registration-new-solution-new-problems>.

Judgment <http://www.knchr.org/Portals/0/CourtRulings/GENDER%20RULE%20-JUDGMENT.pdf?ver=2017-03-29-120419-267>

Kabiera, Judie. 2017. "Half of 19mn Kenyan voters are from Rift Valley, Eastern and Central." *Capital News*. Available at <<http://www.capitalfm.co.ke/news/2017/02/half-of-19mn-kenyan-voters-are-from-rift-valley-eastern-and-central/>>.

Kadida, Jillo and Sam Kiplagat. 2013. "Vote Tally Finds Forms Missing in Ten Areas." *The Star*. Available at <http://www.the-star.co.ke/news/2013/03/30/vote-tally-finds-forms-missing-in-ten-areas_c756276>.

Kamau, Munene. 13 April 2017. "Battle for woman rep seat overshadows governor's race." *The Standard*, page 22.

KHRC. 2013. "KHRC Position on Integrity and Accountability of Candidates for the Upcoming General Elections on March 4, 2013." Available at <<http://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/408-khrc-position-on-integrity-and-accountability-of-candidates-for-the-upcoming-general-elections-on-march-4-2013.html>>.

Kenyatta, Uhuru. 2016. "Read: President Uhuru Kenyatta's speech during 53rd Jamhuri Day celebrations." *The Star*. Available at <http://www.the-star.co.ke/news/2016/12/12/read-president-uhuru-kenyattas-speech-during-53rd-jamhuri-day_c1472055>.

Kisika, Samuel. 2017 "Uhuru: Politicians are forming militia groups for elections." *The Star*. Available at http://www.the-star.co.ke/news/2017/03/23/uhuru-politicians-are-forming-militia-groups-for-elections_c1529882.

KPTJ. 2012. "Ready or Not? An Assessment of Kenya's Preparedness for the General Election, September – December 2012." KPTJ: Nairobi, Kenya.

Kura Yangu, Sauti Yangu (KYSY). 2017.

Lucheli, Isaiah. 2012. "Mutunga dissents in landmark ruling on women seats." *Standard Digital*. Available at <<https://www.standardmedia.co.ke/article/2000072698/mutunga-dissents-in-landmark-ruling-on-women-seats>>.

Lynch, Gabrielle. 2016. "LYNCH: How to raise public confidence in the IEBC ahead of the 2017 election." *Daily Nation*. Available at <http://www.nation.co.ke/oped/Opinion/How-to-raise-public-confidence-in-the-IEBC/440808-3026348-13q9976z/index.html>.

Maina, Carole. 2017. "Activist fails to stop IBEC from giving KPMG tender for audit." *The Star*. Available at <http://www.the-star.co.ke/news/2017/04/04/activist-fails-to-stop-iebc-from-giving-kpmg-tender-for-audit_c1537161>.

Maina, Wachira. 2017. "Trouble in paradise: Laikipia ranchers must join local politics." *The East African*. Available at <<http://www.theeastafrican.co.ke/OpEd/comment/Why-Laikipia-ranchers-must-join-local-politics-/434750-3887018-dsqwx8/index.html>>.

Mayabi, Lordrick. 2012. "Kenya: Last Batch of BVR Kits Arrive in Kenya." *Capital FM*. Available at <<http://allafrica.com/stories/201211030459.html>>.

Mburu, Racheal. 2017. "Case filed to block single sourcing of KIEMS for polls." *Capital FM*. Available at <<https://www.capitalfm.co.ke/news/2017/04/case-filed-block-single-sourcing-kiems-polls/>>.

Muraya, Joseph. 13 August 2016. "IEBC committee reaches 7-point agreement." *Capital News*. Available at <http://www.capitalfm.co.ke/news/2016/08/iebc-committee-reaches-7-point-agreement/>.

Muraya, Joseph. 2017. "1,500 Kenyans in Diaspora and 4,000 inmates registered as voters." *Capital News*. Available at <<http://www.capitalfm.co.ke/news/2017/03/1500-kenyans-diaspora-4000-inmates-registered-voters/>>.

Nation Team. 2016. "Aden Duale under fire for 'hate speech' clip." *Daily Nation*. Available at <http://www.nation.co.ke/news/politics/Leaders-want-Duale-arrested-for-incitement-/1064-3508916-13p5ly5z/>.

NDI. 2017. "Statement of the NDI Pre-Election Assessment Mission to Kenya's 2017 General Elections."

Ngige, Fred. 2017. "Revealed: Inside Jubilee's vote machine to beat Raila Odinga." *Standard Digital*. Available at <https://www.standardmedia.co.ke/article/2001228175/revealed-inside-jubilee-s-vote-machine-to-beat-raila-odinga>.

Nkaari, Martin. 2017. "Nightmare of party nominations: Why the IEBC should intervene." *The Star*. Available at http://www.the-star.co.ke/news/2017/03/18/nightmare-of-party-nominations-why-the-iebc-should-intervene_c1520825.

Nyamori, Moses. 2017. "Kenya's destiny lies in the hands of 19m voters." *Standard Digital*. Available at <https://www.standardmedia.co.ke/article/2001230263/kenya-s-destiny-lies-in-the-hands-of-19m-voters>.

Odhiambo, Rhoda. 2016. "Kenya cancels Sh2 billion US civic education fund." *The Star*. Available at http://www.the-star.co.ke/news/2016/12/19/kenya-cancels-sh2-billion-us-civic-education-fund_c1475919.

Olick, Felix. 2017. "MPs seek five years in jail for hate mongers." *The Star*. Available at http://www.the-star.co.ke/news/2017/03/28/mps-seek-five-years-in-jail-for-hate-mongers_c1532106.

Ombati, Cyrus. 2017. "Kenyan MP escapes, bodyguard detained in Uganda over voter fraud claims." *Standard Digital*. Available at <https://www.standardmedia.co.ke/article/2001227770/kenyan-mp-escapes-bodyguard-detained-in-uganda-over-voter-fraud-claims>.

Omulo, Collins. 2017. "Voter transfer to be done at constituency level, IEBC says." *Daily Nation*. Available at <http://www.nation.co.ke/news/politics/Voter-transfer-to-be-done-at-constituency-level/1064-3514246-3y1wnp>.

Ongiri, Isaac and Moses Odhiambo. 2017. "IEBC alarmed by huge voter transfers." *Daily Nation*. Available at <http://www.nation.co.ke/news/IEBC-alarmed-by-huge-voter-transfers/1056-3091572-12py2b3z/index.html>.

OSCE. 2010. Election Observation Handbook. Sixth Edition. ODIHR: Warsaw, Poland.

Otieno, Rawlings. 2016. "Raila Odinga insists IEBC bosses biased and must leave now." *Standard Digital Media*. Available at <https://www.standardmedia.co.ke/article/2000201086/raila-odinga-insists-iebc-bosses-biased-and-must-leave-now>.

Shah, Seema. 2013. "Are US election watchdogs enabling bad behavior in Kenya?" *Foreign Policy*. Available at <<http://foreignpolicy.com/2013/04/26/are-u-s-election-watchdogs-enabling-bad-behavior-in-kenya/>>.

South Consulting. 2013. "The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project: Kenya's 2013 General Election. A Review of Preparedness." Available at <<http://katibainstitute.org/Archives/images/KNDR%20Review%20Report%202013.pdf>>.

Standard Team. 2016. "Integrity crisis rocks Kenyan parliament as MPs battle criminal cases." *Standard Digital*. Available at <<https://www.standardmedia.co.ke/article/2000190450/integrity-crisis-rocks-kenyan-parliament-as-mps-battle-criminal-cases>>.

The Carter Center. 2013. "Observing Kenya's March 2013 National Elections."

The Elections (Parliamentary and County Elections) Petition Rules, 2017

The Star. 2017. http://www.the-star.co.ke/news/2017/03/18/top-jubilee-leaders-in-sh3bn-iebc-tender-row_c1526497

The Supreme Court (Presidential Election Petition) Rules, 2017

Wakaya, Jeremiah. 2017. "IEBC to ensure party lists pass gender rule test – Chebukati." *Capital News*. Available at <http://www.capitalfm.co.ke/news/2017/03/iebc-ensure-party-lists-pass-gender-rule-test-chebukati/>.

Wangui, Trizah. 2017. "Nyeri residents threaten to call for demonstrations over mass voter transfer." *Standard Media*. Available at <<https://www.standardmedia.co.ke/ureport/story/2001228087/nyeri-residents-threaten-to-call-for-demonstrations-over-mass-voter-transfer>>.

Wanjala, Emmanuel. 2017. "ODM opposes IEBC involvement in Jubilee party primaries on constitutional grounds." *The Star*. Available at <http://www.the-star.co.ke/news/2017/02/18/odm-opposes-iebc-involvement-in-jubilee-party-primaries-on_c1509227>.

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