

THE KENYA NATIONAL DIALOGUE AND RECONCILIATION (KNDR) MONITORING PROJECT¹

Reforms and Preparedness for Elections

Review Report

May 2012



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ABBREVIATIONS

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



EXECUTIVE SUMMARY

1. The goal of the Kenya National Dialogue and Reconciliation (KNDR) process, launched to end the 2007 post-election violence, was to secure sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights. Under the KNDR agreements, the main parties to the 2007 elections dispute committed to far-reaching reforms to address the causes of conflicts in Kenya. The promulgation of the Constitution in August 2010 was one of the most important outcomes of the KNDR process and a hallmark of Kenya's reform journey. Importantly, the Constitution has provided a new framework for Kenya's electoral system and reforms. The next General Election will be conducted under this new framework.
2. South Consulting has been monitoring progress in the implementation of key reforms since 2008. This is the second report for the year 2012. Previous reports covering the period between December 2008 and February 2012 can be found at www.dialoguekenya.org. This report focuses on the country's preparedness for the first General Elections under the new Constitution.
3. It is recognised that the failure to effectively manage the December 2007 election, and the process preceding the polling itself, contributed to the violence. The Independent Review Commission on the General Elections held in Kenya on 27 December 2007 (IREC or the Kriegler Commission) concluded that the constitutional, institutional and legal framework for Kenya's elections was so weak that it required an overhaul -- including disbanding the Electoral Management Body that administered that election. The Commission emphasised that a new body should be established and its capacity built to manage the elections in a manner that pass as peaceful, credible, free and transparent.
4. This assessment report examines the state of electoral preparedness in the country. It is an assessment of the extent to which the country has revised its electoral processes and implemented actions to improve the management of elections. This review focuses on three priority areas – and corresponding indicators – that are critical for successful and credible elections:
 - a. The Pre-election Environment: Setting a conducive context for a successful and democratic electoral process.
 - b. Election Management: Managing elections competently and inspiring public confidence in the electoral process.
 - c. Resolving Disputes: settling electoral disputes efficiently and effectively.

FINDINGS

Setting a Conducive Context for a Successful and Democratic Electoral Process

5. The review shows progress in improving Kenya's electoral framework. The introduction of a Two-Round System or a run-off in the presidential election between the first two candidates -- if no candidate is able to garner over 50+1 per cent of the vote and 25 per

cent in at least half of the 47 counties -- is one measure introduced to ensure the winning candidate enjoys sufficient support in the country.

6. The Constitution has also introduced quotas to ensure equity in representation along gender lines and to specifically address the historical challenges around the representation of women and marginalised groups. The challenge, however, remains the lack of clarity on how to achieve this requirement without a constitutional amendment.
7. The IEBC is enjoying trust and confidence among Kenyans; 80 per cent have confidence in the Commission. The Commission is rated second to media (90%) in terms of confidence in institutions that play a part in the electoral process. People's confidence in political parties is relatively low (40%) compared to other institutions such as the Judiciary (67%). The parties are rated even lower than the police (43%), implying that people are dissatisfied with the 'business as usual' attitude of the political parties.
8. This trust and high level of confidence in the Commission is emanating from how the Commission was established; the Commissioners were hired through a competitive process and the relevant committee of Parliament vetted them. This, again, points to the importance of transparency in recruiting public offices. Competitive recruitment inspires public confidence in institutions.
9. The IEBC is administratively preparing for the next General Election and is building capacity in key areas for the purpose. Although the Commission is moving forward in preparations to conduct the election, other key role players are not. Political parties are approaching the election without making a break with the past: they are yet to institutionalise?
10. There is progress in enacting the required laws. However, enacting the laws is not enough. The test of any law is in its implementation and effective enforcement. There are concerns that the office of the Registrar of Political Parties is not active in enforcing the Political Parties Act and, therefore, many politicians continue on a 'business-as-usual' attitude. Parties are flouting the Political Parties Act without consequences for their action.
11. There are grey areas in some of the laws, with some provisions of the Constitution being subject to multiple interpretations. The election date is itself a subject of litigation because of these multiple interpretations. The uncertainty over the election date should be addressed soonest in order to allow preparations to proceed without anxiety. In addition, litigation facing the boundaries review process has already delayed voter registration. Further delays in determining these cases will negatively impact the preparations.
12. The environment for the next General Election is becoming increasingly divisive as politicians continue to mobilise along ethnic lines. The trials at the International Criminal Court remain a divisive issue, with discourses for and against the ICC. These divisions are feeding into the electoral environment through mobilization of political support. However, many Kenyans remain supportive of the ICC. They are keen to see an end to the culture of impunity and justice for everyone.

13. The challenges facing the electoral environment have meant absence of a single and coherent theme for the next elections. There are many issues competing for attention. Absence of a single theme has the consequence of creating a divisive electoral environment. A strong and a coherent electoral theme is required because the organising theme determines the kind of leaders to be elected to move the country forward after the next general election. The table provided shows a summary of findings and recommendations on this area.

Priority #1: Setting a Conducive Context for a Successful and Democratic Electoral Process

Challenges	Recommendations
1. Continuing uncertainty and lack of clarity over gender quotas	<ul style="list-style-type: none"> • Hasten the progress of the Constitution of Kenya (Amendment) Bill, 2011 through Parliament.
2. FPTP and the run-off system raises the possibility of a close zero-sum electoral contest with possible destabilising effects	<ul style="list-style-type: none"> • Strengthen early warning and response mechanisms. • Conduct civic education on the electoral system, the run-off, and the electoral process.
3. Incomplete legal and administrative reforms	<ul style="list-style-type: none"> • Accelerate the promulgation of regulations under the relevant laws. • Speed up preparatory work in the Campaign Financing Bill. • Strengthen the provisions of the Leadership and Integrity Bill in view of the Constitution's expectations of leaders. • Speed up the hearing of lawsuits relating to the boundary demarcation process.
4. Ineffective media regulation and inequitable access to the media	<ul style="list-style-type: none"> • Conduct an audit of media ownership in Kenya. • Promulgate equitable access regulations under the Elections Act, 2011 and enforce them.
5. Continuing violations of basic political freedoms	<ul style="list-style-type: none"> • Speed up police reforms in order to restore public trust in the political neutrality of the police.
6. Weak political parties and ineffective political party regulation	<ul style="list-style-type: none"> • Promulgate comprehensive regulations under the Political Parties Act, 2011. • Acting Registrar of Political Parties should enforce s. 14 of the Political Parties Act. • Restart the process of appointing a substantive Registrar of Political Parties.
7. Weak early response mechanisms	<ul style="list-style-type: none"> • Improve coordination of early warning and response mechanisms under UWIANO • Refine indicators for identification of violence hotspots. • Improve field monitor presence in potential trouble-spots. • The government should improve conflict mitigation measures and address challenges likely to threaten security around the elections.
8. Inadequate facilitation of electoral observation	<ul style="list-style-type: none"> • Develop a Code of Conduct for Election Observers that includes adequate facilitation for electoral observation. • Increase technical engagement with election observer groups and other stakeholders to build stakeholder confidence in the

Challenges	Recommendations
	electoral process and strengthen public participation in the electoral process.

Priority 2: Managing Elections Competently and Inspiring Public Confidence in the Electoral Process

14. The IEBC has gained public trust and confidence. However, this trust and confidence can be eroded by the failure to enforce discipline in political practice. The failure to enforce the law, and the Political Parties Act, 2011, in particular, can result in reduced confidence. Continuing weaknesses in enforcement action in respect to electoral malpractice will undermine the trust and confidence that the Commission is enjoying. The recruitment of investigators and prosecution staff is meant to address this shortcoming. But it is also important for the IEBC to liaise with the DPP, the AG and the Police to establish a framework through which these agencies can assist the Commission and/or build the Commission's capacity to investigate and prosecute cases relating to the breach of the new laws.
15. It is also significant that the Commission is moving fast in preparing for the next General Election, but the cases over election boundary disputes could undermine these preparations, especially if the courts take long to rule on these cases. The behaviour of political parties also shows that they are not yet prepared even though they are critical role players. Similarly the decision on the procurement of the biometric voter registration kits is of utmost importance. Delays in making decisions on this can affect the preparations for the elections. Putting in place a fool-proof system for counting votes and transmitting results should be concluded early enough.
16. Again these preparations can be affected by lack of adequate resources or delays in disbursement of funds by both the government and development partners who have pledged to support the Commission. Thus there is need to disburse funds and honour pledges on time to avoid affecting preparations. The table provided summarises key findings and recommendations on this priority area.



Priority 2: Managing Elections Competently and Inspiring Public Confidence in the Electoral Process

Challenges	Recommendations
1. Uncertainty over the election date in view of pending appeal in court	<ul style="list-style-type: none"> Make contingency plans for an early election in the event that the Court of Appeal overturns the High Court decision on the election date.
2. Continuing weakness of enforcement action in respect to electoral offences	<ul style="list-style-type: none"> Coordinate with the Director of Public Prosecutions to pay adequate attention to prosecuting electoral offences. Rapidly build the capacity of the election offence investigation and prosecution personnel upon their hiring.
3. Pending lawsuits relating to boundaries and electoral areas and difficulties in the procurement of technology threaten the timely preparation of a new, more accurate register of voters	<ul style="list-style-type: none"> Consolidate all the 128 lawsuits arising from the boundary delimitation process and push for an expedited hearing process. Speed up voter registration technology procurement and protect the integrity of the procurement process to forestall time-consuming litigation by dissatisfied vendors. If possible avail shape files to allow for independent verification of the constituency review exercise with GIS software.
4. Uncertainty over when the IEBC will put in place a fool-proof system for counting of votes and results transmission	<ul style="list-style-type: none"> IEBC should provide full transparency on a web-based platform for elections results up to polling station level. Improve election planning and conduct further simulation given the shortcomings of the mock elections exercise.
5. Concerns over the recruitment and training of competent staff	<ul style="list-style-type: none"> Recruit competent staff early and train them adequately for the effective conduct of a complex General Election.

Settling Electoral Disputes Efficiently and Effectively

17. The discussion has pointed to the need for a credible dispute resolution mechanism to handle pre- and post-election disputes. The review shows that the framework for putting this mechanism in place is incomplete. The review also shows that the political parties appear to avoid the Political Parties Disputes Tribunal. They prefer the courts to the Tribunal. However, the Courts have begun referring back these cases to the Tribunal.
18. The Judiciary is undergoing transformation and is, therefore, in its nascent phase. Yet it is being overwhelmed with many cases including those that with consequences for election preparation as well as cases that should be settled out of the courts. This is happening at the time when the capacity of the Judiciary is also challenged and likely to be stretched further after the conclusion of vetting for judges and magistrates. Given the important role the Judiciary will play in addressing some of the disputes over the elections, it is important to consider appointing a special bench of judges to hear and determine election-related disputes from nomination to a year after the elections in order to accord the petitions the priority required by the law. Already the Judiciary has begun paying attention to election-related issues. Other actors in the chain have a responsibility to begin their preparations too. The table provided gives a summary of findings and key recommendations in this respect.

Priority #3: Settle Electoral Disputes Efficiently and Effectively

Challenges	Recommendations
1. Incomplete legal reforms on electoral dispute resolution	<ul style="list-style-type: none">• Finalize the making of rules under the applicable laws.• Prioritize the finalization of pending post-2007 election petitions before the next General Election.• Provide the Judiciary Committee on Election Disputes with sufficient capacity to re-orient settlement of election disputes.
2. Weak pre-election dispute handling capability in IEBC and the Political Parties Tribunal	<ul style="list-style-type: none">• Courts should defer to the Political Parties Disputes Tribunal and the IEBC dispute settlement system in the first instance and only interfere in cases of manifest injustice.• Provide technical assistance to the new EMB on the settlement of pre-election disputes.
3. Uncertainty over the ability of the Judiciary to hear and determine election disputes efficiently and fairly	<ul style="list-style-type: none">• Speed up the work of the Vetting of Judges and Magistrates Board to ensure timely completion before the General Election.• Consider appointing a special bench of judges to hear and determine election related disputes from the nominations period to a year after the General Election in order to accord election petitions the priority that the law requires.

Conclusion

19. The context for holding the next General Elections is a mixed bag. So far, the electoral environment comprises several issues competing for attention. There is absence of a single and coherent organising question or theme for the election, yet the organising theme around which an election is conducted determines the leaders to be elected. Building a credible and an all-galvanising theme around which campaigns should revolve is critical. Although effective implementation of the constitution had emerged as an important theme, other competing issues appear to be replacing it.
20. Failure to ensure a credible theme or evolve the main question around which to organise the next General Election may lead to the election of leaders purely on account of parochial considerations. This will also produce a poor agenda for the government that will be formed after the election. To evolve a better reform programme for the next government, it is important to create a formidable reform message as a platform on which the next group of leaders will be elected in order to move the country forward.
21. The IEBC has begun preparations in earnest. So has the Judiciary. But other key players -- such as the political parties -- are yet not. To the political parties, it is business as usual; and they are yet to break from the past. Police reforms have also not been rolled out to have the required impact. However, the police are making progress in improving capacity to secure the next general election. Because the IEBC is neither wholly responsible for nor in control of the broader electoral environment nor other key players, it is suggested that the IEBC constitutes a policy level committee comprising the key players such as the Judiciary, the police, the Registrar of Political Parties, the Political Parties Liaison Committee, the department for immigration and registration of persons, the media and other key players to regularly review the state of preparedness by each. This will enable everyone to identify critical gaps in the state of preparedness and act in earnest.

22. Parliament has passed some of the required laws. However, the effectiveness of any law lies in how it is enforced and implemented. There are concerns that the laws are not effectively enforced, thereby allowing some of the role players to flout the laws with abandon. The Registrar of Political Parties and the IEBC should move with speed and begin to enforce the laws in order to ensure that all players contribute to the goal of having a credible, genuinely free, and a peaceful General Election.
23. Without the deterrent effect of the law, old behaviour will continue. Different groups or supporters of candidates will begin to zone off their geographical territories against those they consider as their opponents. This, on its own, is a worrying indicator of the extent to which the freedom of assembly may be interfered with in the run-up to the next elections. Left unaddressed, it can create conditions, which may lead to greater forms of intolerance and violence.
24. It is also important and worrying is that politicians are continuing to mobilize support along ethnic lines. This is likely to heighten inter-community tensions. Unfortunately, mobilization of support along ethnic lines has remained a feature of the country's politics, notwithstanding its implications for national cohesion and stability.



1. INTRODUCTION

1. The failure to effectively manage the General Election conducted in December 2007 contributed partly to the post-election violence. The Independent Review Commission on the General Election held in Kenya on 27 December 2007 (IREC, referred to hereafter as the Kriegler Commission²), found, inter alia, that Kenya's constitutional and legal framework for elections contained weaknesses and inconsistencies that limited the effectiveness of the electoral system. The Commission found fault with several institutions with roles on elections and subsequently recommended an overhaul of the process and the Electoral Commission of Kenya (ECK).
2. The Kriegler Commission called for reconstituting a new electoral management body, and recommended urgent executive, legislative and political measures to enable the new electoral body to effectively manage future elections. IREC also underlined the need to manage the electoral process in a manner that would make elections pass muster as peaceful, credible, free and transparent.
3. This report examines the state of electoral preparedness in the country. It is an assessment of the extent to which the country has revised its electoral processes and implemented actions to improve on the management of elections so as to ensure that the next General Election is peaceful, credible and a true expression of the free will of the people.
4. This assessment report has utilised both quantitative and qualitative data. Quantitative data has been derived from a national survey carried out in April 2012. The survey findings are also compared with those of past surveys in order to establish the main trends in perceptions about the next elections. Qualitative data is drawn from interviews with key informants from a broad array of organisations, including government ministries, the Independent Electoral and Boundaries Commission (IEBC), the office of the Registrar of Political Parties, the media, political parties, civil society organisations, and the public. Secondary sources have also been reviewed for additional information. These include media sources and reports by other organisations.
5. This review focuses on three priority areas – and corresponding indicators – that are critical for successful and credible elections. These include:
 - a. The Pre-election Environment: Setting a conducive context for a successful and democratic electoral process
 - b. Election Management: Managing elections competently to inspire public confidence in the electoral process
 - c. Resolving Disputes: Settling electoral disputes efficiently and effectively.
6. The indicators for each priority area are shown in the tables provided while Annex I (Matrix on Progress Towards the Next General Election) comprises detailed analyses and recommendations on each of the priority areas and corresponding indicators.

² Named so after Justice Johann Kriegler, who chaired the Commission

7. The priority areas and corresponding indicators are:

Priority Area 1: The Pre-Election Environment -- Setting a conducive context for a successful and democratic electoral process

- i. Electoral system establishes a fair basis for electoral competition.
- ii. Electoral laws effectively establish an environment and procedures for periodic and genuine elections.
- iii. Laws and practices effectively regulate the media and guarantee equitable access to the media.
- iv. Laws and practices guarantee freedom of assembly.
- v. Laws and practices guarantee freedom of organization and association.
- vi. Laws and practices guarantee free electoral participation.
- vii. Citizens have adequate civic and voter education.
- viii. Donor support for the democratic process is effectively coordinated.
- ix. Political parties are responsible actors in the electoral process.
- x. Mechanisms exist for early warning, early response and mitigation of election-related violence.
- xi. Observers have access to all aspects of the entire electoral process.

Priority Area 2: Election Management -- Managing elections competently and inspiring public confidence in the electoral process

- i. The legal and institutional framework for the Electoral Commission is adequate.
- ii. The Electoral Commission exercises effective control of the electoral process.
- iii. The register of voters is comprehensive, accurate and current.
- iv. The demarcation of constituencies is transparent and fair.
- v. The Electoral Commission is perceived as independent, fair, competent and impartial.
- vi. Counting, transmission, collation and announcement of election results is free of fraud and manipulation.

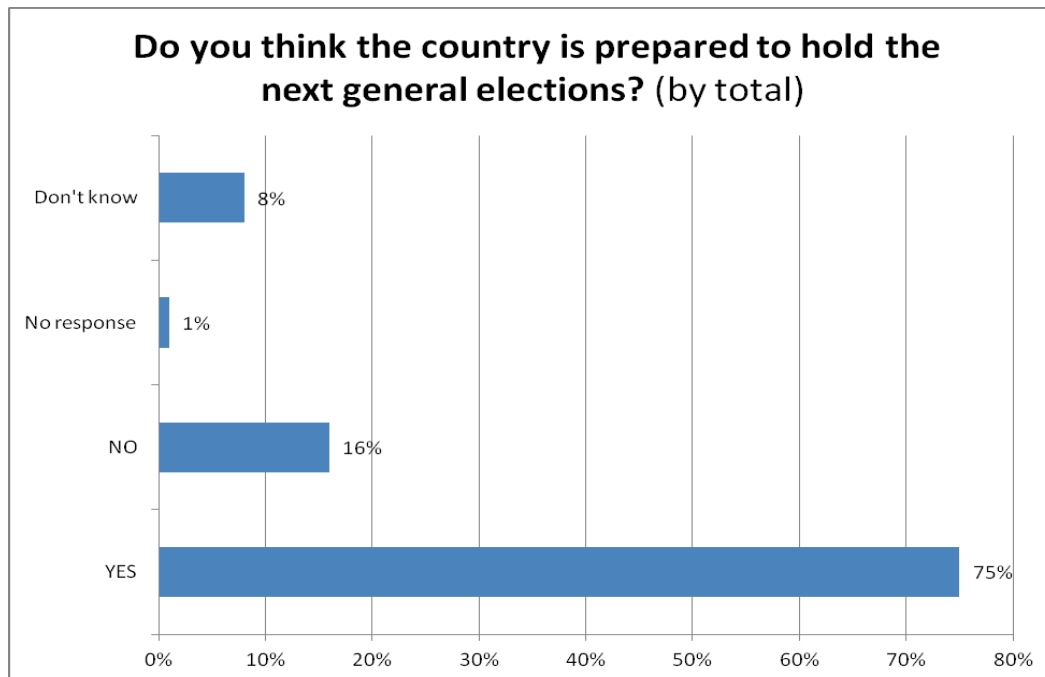
Priority Area 3: Resolving Disputes -- Settling electoral disputes efficiently and effectively

- i. Electoral dispute resolution laws are adequate.
 - ii. The Electoral Commission settles pre-election disputes effectively.
 - iii. The Judiciary is an efficient, effective and trusted arbiter of pre-election and post-election disputes.
8. This review shows that remarkable progress has been made in many areas suggested by the Kriegler Commission in regard to reforming the framework for conducting elections. A new electoral body was established following the disbandment of the Commission that conducted the 2007 elections. The new body, the Independent Electoral and Boundaries Commission (IEBC), followed the Interim Independent Electoral Commission (IIEC) and the Interim Independent Boundaries Review Commission (IIBRC), which were established after the disbandment of the former

Electoral Commission of Kenya in line with the Kriegler Commission recommendation.

9. After the promulgation of the new constitution, IEBC was established and its commissioners recruited through a competitive process. This included advertising for the posts, interviews by an independent panel, and vetting by Parliament as required of public offices under the Constitution. The new Commission has inspired people's confidence in the electoral process; people have trust in the Commission and are confident that it will conduct free and fair elections. Three in every four people (75%) surveyed said they were confident that the country is prepared to hold the next General Election.

Figure 1: Do you think the country is prepared to hold the next elections?



10. The Commission has been making preparations for the elections. A work plan has been developed based on the Commission's announcement to hold elections on March 4, 2013.

Table 1: Work Plan

	April 2013	Presidential runoff
	March 2013	Elections
	Feb. 2013	IEBC nomination and campaigns
	Jan 2013 (45 days before elections)	Submission of Political Parties nomination lists
	Dec. - Jan 2012	Political parties primaries
	Oct. 2012	Submission of party membership list
	Dec. 2012	Independent candidates submit symbols for approval
	Dec. 2012	Deadline for independent (not belonging to a political party) candidates
	Dec. 2012 - Feb. 2013	Recruitment, training and deployment of election officers
	Aug. 2012	Resignation of public servants intending to contest in elections
	July 2012	Stop of fundraising by election candidates
	July 2012	Submission of Party Nomination Rules to IEBC
	June - Dec. 2012	Procurement of Elections Materials
	Nov. 2012	Certification of the register
	Oct. 2012	Inspection of the Voters Register
	Sept. 2012	Compilation of the Register
	Aug. 2012	Commencement of voter registration
	June - July 2012	Recruitment and training of registration officers
	April - June 2012	Mapping of registration centres
	Feb. - July 2012	Procurement of voter registration materials
	30 April 2012	Compliance with the Political Parties Act
	May 2012	Finalization of the election regulations
	May 2012 (continuous)	Conduct of voter/civic education on boundaries
	7 March 2012	Gazettement of the final report on constituencies and wards

Source: Adopted from the IEBC work plan

11. Remarkable progress has been recorded in other areas, too. Judicial reforms have

begun to restore public confidence in the courts and the justice system. New constitutional Commissions have been established and are hard at work. The Commissions have stamped their authority on their respective areas. Public appointments are also no longer made at the sole discretion of the Executive; Parliament and other bodies are involved in vetting candidates for key posts. Generally, these institutions are responsible for the new sense of hope among Kenyans.

12. The new institutions, however, are generally fragile. Only political commitment to give them space and independence to function will strengthen them and insulate them from the consequences of divisive politics that characterise Kenya's electoral process.
13. The police remain the only institution that has recorded limited progress in undertaking reform. The Independent Police Oversight Authority (IPOA) is already in place but the Police Service Commission is yet to be established. The delay establishing the Commission has in turn delayed the appointment of the Inspector General of Police, an appointment that is critical for creating the required momentum for police reforms.
14. The review also shows that the country is yet to close the chapter on the post-2007 election violence. Issues around Internally Displaced Persons (IDPs) and the International Criminal Court's intervention in the Kenya situation with regard to the perpetrators of the post-election violence are continuously influencing the election environment. These issues are informing the campaigns and are, therefore, affecting the electoral environment in different ways -- including slowing the process of healing the country while deepening ethnic divisions. This report considers some of these issues as critical for the conduct of a free and fair, as well as credible, election.
15. Besides this introductory section, the report has four other sections corresponding largely to the priority areas and indicators for a successful, credible and democratic election.
 - a. Section Two: The environment for a successful and democratic election
 - b. Section Three: Managing elections competently and inspiring public trust in the electoral process
 - c. Section Four: Resolution of disputes
 - d. Section Five: General conclusion
 - e. Annex One: Matrix on Progress Towards the Next General Elections.



2. THE ENVIRONMENT FOR A SUCCESSFUL AND DEMOCRATIC ELECTION

16. For a country to undertake a successful, credible and democratic election, its legal and general legislative framework and the conduct of all players in electoral processes should establish a conducive environment. Such an election should reflect the free expression of the will of the voters. For the voting process and the final outcome to be adjudged as credible and genuinely democratic, the environment preceding the voting, and the vote count itself, must be beyond reproach.
17. This section reviews the state of preparedness for the election in relation to pre-election features of the legislative framework in place, enforcement of the law, media regulations and conduct, and enjoyment of freedoms and rights conducive for meaningful participation in the electoral process. The assessment also assesses the adequacy of civic and voter education as well as the conduct of the players in the electoral process.

Fairness of the Electoral System

18. The 2010 constitution sought to create a fairer electoral system through establishment of a two-round system (TRS) in the presidential election, and a 'first-past-the-post' system with quotas for the National Assembly, the Senate, and County Assemblies.

The Two-Round-System (TRS) – Run-off

19. The two-round-system was introduced to ensure that the winning president has broad support in different parts of the country. For a candidate to win the presidential election, she or he would have to win by more than 50 per cent of the total vote in the first round and obtain at least 25 per cent support from each of 24 counties. Failure to meet these two thresholds leads to a second round of voting pitting the top two from the first round.
20. TRS has its own challenges, too. Going by recent experiences in a few African countries where the system has been tried, it is evident that the TRS has the potential to erode party ideologies and identities. Since it is reduced to a two-candidate contest, there is a tendency for voters to focus more on the personalities of the candidates rather than the party differences and ideologies, if any. The system promotes cooperation along the main cleavages such as ethnicity and religion. It tends to sharpen existing divisions. The system could create incentives for alliance building and, therefore, see the candidate who wins being the one who can corral the support of those who did not make it to the second round.
21. These are the challenges that the Commission should be aware of and prepare for. Importantly, these challenges require the Electoral Commission to conduct intense voter education and provide sufficient information to voters on how the system operates so as to prevent violent disputes over any outcome. These challenges also required the Commission to carefully plan and manage the electoral process. In other words, if not well planned, a run-off election in Kenya could easily lead to a hot dispute over the final results. Thus the electoral process must be planned in a credible and



transparent manner.

The gender quotas

22. The quotas for gender in elective and appointive positions are aimed at filling gaps in the representation of gender and special interests as per the constitutional requirement: No gender should occupy more than two-thirds of elective and appointive public posts. Similarly, the constitution underlines the need to include special groups such as the youth and persons with disability.
23. The constitution lacks clarity on how to accomplish the requirement that no gender should comprise more than two thirds of elective and appointive posts. There is no formula to guarantee gender quotas for the National Assembly and the Senate in the event that elections fail to produce a sufficient number of representatives of one gender to meet this requirement. As shown in Table 1, the current design does not qualify to meet this requirement.

Table 2: The Kenya Elections' Gender Quota Dilemma

National Assembly (Article 97)		Senate (Article 98)	
Elected by single member constituencies	290	Elected by counties as single member reps	47
Women elected by in the counties	47	Women nominated by parties	16
Nominated by parties to represent special interests	12	Nominated by parties to represent youth and Persons with Disabilities	4
Total	349	Total	67
Male MPs cannot exceed this no.	232	Male Senators cannot exceed this no.	44
No. of women MPs required to comply with Art 27(8) and 81	117	No. of women Senators required to comply with Article 81	23
No. of reserved seats for women(47+6)	53	No. of reserved seats for women (16+2)	18
Gender quota assumes this no. of women elected (117-53)	64	Gender quota assumes this no. of women elected (23-18)	5

24. The government has introduced the Constitution of Kenya (Amendment) Bill, 2011 to remedy the situation by re-writing the formula for special seats relating to the National Assembly and the Senate. By the end of May, 2012, Parliament had not debated this Bill.
25. Overall, the electoral system is largely First Past the Post (FPTP), which engenders zero-sum or 'winner-take-all' politics. Even with well-defined quotas, the system does not address the problem of disparities between the proportion of votes cast for specific parties and the proportion of seats they win in the National Assembly, Senate and the County Assembly.

Enacting Effective Electoral Laws

26. The Kriegler Commission pointed out that Kenya's constitutional and legal framework for conducting elections was defective. The report raised concerns about the capacity of the law to provide a fair and sufficient framework for political competition. It was against this background that IREC recommended a review and overhaul of laws relating to elections in order to create an even playing field and restore confidence in the electoral process.
27. *Critical laws have been passed -- the Political Parties Act, 2011, and the Elections Act, 2011 -- but they are yet to impact on the environment:* There has been significant progress in the passage of key laws relating to the management of the electoral process. The Political Parties Act, 2011, and the Elections Act, 2011, have been passed and operationalized. The two laws came into force in November and December 2011, respectively. However, it is not enough to pass laws. The effectiveness of laws is in their enforcement. As argued later, there are concerns that these laws are not actively enforced. There are concerns that politicians are flouting the Political Parties Act, 2011, for instance, by party hopping without being held to account, yet the law clearly provides that no one should be a member of more than one political party at a time.³
28. Politicians are continually straddling parties despite the law providing that a person should not be a member of more than one political party at the same time. The affected parties have filed cases in court and the Registrar is also awaiting a legal opinion from the Attorney General.
29. Regulations governing the operationalization of the relevant laws are yet to be finalised. By the end of May 2012, the IEBC had finalised consultations on the political parties regulations. It is hoped that these will be gazetted soon so that they can guide political practice under the new law. Parliament is yet to pass several Bills to guarantee peaceful, credible and democratic elections. These include the Campaign Financing Bill, 2012; the Assumption of the Office of the President Bill, 2012; the Leadership and Integrity Bill, 2012; the Media Bill, 2012; and the Freedom of Information Bill, 2012. These and other related laws should be processed with speed so that they can assist in institutionalising good practice in the electoral process.
30. In this regard, it is important to insist on effective enforcement of the law so that people can see a clear break with the past. Indeed, IREC singled out enforcement of the electoral laws as an area of concern. This remains so, even after the passage of these laws.⁴
31. Lack of clarity on the date for the next General Election is creating anxieties over preparedness: The date for the next General Election has been a subject of debate. The Supreme Court referred the interpretation of this question to the High Court, which in turn ruled that the IEBC has the responsibility to fix the exact date of the election and that 'the first elections under the Constitution can only be lawfully held as follows: (a)

³ s.13(4) and (5) of the Political Parties Act, 2011.

⁴ Interview with a former Commissioner of the Electoral Commission of Kenya (ECK), 25 April 2012



In the year 2012, within sixty days from the date on which the National Coalition is dissolved by written agreement between the President and Prime Minister in accordance with section 6(b) of the National Accord and Reconciliation Act, 2008; and (b) within sixty days from the expiry of the term of the National Assembly on 15th January 2013.⁵

32. Based on this ruling, the IEBC set the election for 4 March 2012. Some politicians criticised both the IEBC date and the court's ruling, while others supported it. Some of those dissatisfied with the decision appealed to overturn the ruling. The matter was scheduled for hearing at the Court of Appeal in early June 2012. There is thus general uncertainty on the election date, even though time is running out for a December 2012 or March 2013 election.
33. Without a clear framework for resolving disputes within the coalition government or even within the electoral process, the controversy over the election date has divided the Executive yet again. The Prime Minister informed Parliament that one side of the Grand Coalition Government is in favour of the date announced by the IEBC while another is in favour of a December 2012 date. These divisions are likely to lead to an unhealthy atmosphere if not effectively managed. The country needs to settle the election date question soonest to avoid unnecessary anxiety and uncertainty.
34. Arguing for or against the election date is not important. The debate should instead focus on the technical, administrative and organisational preparedness of the IEBC, the political parties, candidates, and the voters themselves.
35. *The review of boundaries is mired in disputes:* The law mandates the IEBC to review boundaries, but once this was done, Members of Parliament (MPs) revised some of the boundaries and created new wards. The main issue of contention is whether Parliament over-stepped its mandate⁶ by reviewing the boundaries and creating additional wards rather than advising the IEBC.
36. In the end, the IEBC treated Parliament's resolutions⁷ as advisory opinions rather than directives. Consequently, over 100 disputes were filed in the courts seeking to have the IEBC report reviewed and some decisions on boundaries rescinded. Politicians or the allies of politicians seeking a favourable review of boundaries in case they stand for elections have filed some of the cases.
37. The cases are the only hurdle to the registration of voters, which can only begin at the conclusion of the boundaries review process. It is possible that there will be more delays if the Courts do not resolve these cases fast. Importantly, the law provides that the High Court should conclude such petitions within 30 days but there is no time limit for Appeals that might arise after the ruling by the High Court.⁸ The capacity of the Judiciary is also stretched, as it is yet to recruit additional judges. The vetting of judges

⁵ Constitutional Petition No. 65 of 2011, consolidated with Petitions Nos. 123 of 2011 and 185 of 2011 (High Court of Kenya).

⁶ Regarding First Review (fifth schedule) par.3(6)

⁷ The Revised Preliminary Report of the Proposed Boundaries of Constituencies and Wards

⁸ Interview with a policy analyst, 17 April 2012

and magistrates might further reduce this capacity if it results in the suspension of some of these judicial officers.

38. These issues may affect the speedy delivery of justice on these cases. Further delays in concluding the court cases will hold up the registration of voters and could affect electoral preparedness in general. Speedy conclusion of these cases is, therefore, important.
39. To repeat, progress has been accomplished in passing laws relating to elections. But passing laws is not enough. It must be followed with effective enforcement in order for the country to have a credible, free and transparent election. It has been noted that politicians are not abiding by the Political Parties Act, 2011, yet they are not penalised for their actions. The failure to punish those who flout any law is likely to create an impression of 'business as usual' and lead to the flouting of other laws whose enforcement would lead to a peaceful, free and credible election. Finalising regulations to guide operationalization of these laws should be expedited.
40. Concerns are emerging regarding delays in finalising the enactment of the Leadership and Integrity Bill, 2012, which would assist in introducing principles and values of governance to guide political practice. Some are concerned that politicians will set low standards in the Leadership and Integrity Bill to operationalize Chapter 6 of the Constitution. Similarly, it is feared that the draft Campaign Finance Bill will be watered down to allow money to continue to influence elections. Whether legitimate or not, these fears emanate from what people see as the failure of political parties to abide by the Political Parties Act, 2011. With regard to these and other laws, it is important to underline the need for the Commission for the Implementation of the Constitution (CIC) to remain vigilance on the making of these laws so that they are in line with the spirit of the constitution.
41. There is hope that the IEBC will arrest the situation now that it has the legal mandate to investigate and prosecute cases of electoral malpractice. The Commission is recruiting investigation and prosecution staff. It is hoped that this will improve on its capacity and enable the Commission to deal firmly with electoral malpractice. This capacity will be tested close to the General Election when the tendency for malpractice usually increases.
42. The time to act is now: the Commission should set the pace by punishing those not abiding by the Political Parties Act and the Elections Act in the early stage of the electoral process. Only injurious consequences for flouting electoral laws will deter – or eradicate altogether -- cases of poor political conduct.

Freedoms of Assembly and Association

43. *Freedom of Assembly and Association:* Free and fair elections are only possible when laws, inter alia, guarantee freedom of assembly and association and are enforced. Having free and fair elections also requires that people exercise their rights without compromising the rights of other people. Chapter 4, which contains the Bill of Rights under the Constitution, guarantees these rights and freedoms.

44. The period under review witnessed incidents of police taking actions that flouted the spirit of the Bill of Rights on the freedoms of assembly and association, in particular. In April 2012, the police violently dispersed participants of a meeting yet they had allowed a similar meeting to be organised earlier.⁹ This created a perception of police partiality.
45. The reaction of senior policy makers and government officials was indicative of a divided government. They did not speak with one voice. For instance, the Prime Minister ordered the Minister for Internal Security to take action against the Police Commissioner. It is not clear what happened thereafter but the police remained defiant and insisted that they dispersed the group because they had information that the meeting would be used to re-launch a dangerous criminal group.¹⁰
46. These issues require a careful balance between enforcing the rule of law and respecting freedoms and rights as enshrined in the constitution. The failure to enforce the law with impartiality will create an impression of a biased police force. Such perceptions do not augur well for election preparations.
47. Political intolerance is growing even among the Kenyan public. In some counties, supporters of different viewpoints violently confronted one another during the IEBC's consultations on boundaries earlier in the year.¹¹ There are also several instances where supporters of different political candidates are reported to have engaged in violence or shouted down those they were opposed to. This is happening in funerals and at public rallies, among other forums.
48. The Political Parties Act, 2011, prohibits this form of intolerance. But without the deterrent effect of the law, this intolerance will continue. Different groups or supporters of candidates will begin to zone off their geographical territories against those they consider as their opponents. This, on its own, is a worrying indicator of the extent to which the freedom of assembly may be interfered with in the run-up to the next elections. Left unaddressed, it can create conditions, which may lead to greater forms of intolerance and violence.
49. It is also important and worrying is that politicians are continuing to mobilize support along ethnic lines. This is likely to heighten inter-community tensions.¹² The series of meetings held as 'prayer rallies' early in the year did indeed raise ethnic emotions because the discourses in those meetings sought to create solidarity among members of particular ethnic communities.¹³ Unfortunately, mobilization of support along ethnic lines has remained a feature of the country's politics, notwithstanding its implications for national cohesion and stability.
25. Mobilizing for the purpose of exclusive access to power or to win elections through

⁹ This is in reference to a meeting called by a group of people in Limuru who claimed to have organized it to counter a previous one organized by the Gikuyu, Embu and Meru Association cultural group in April 2012.

¹⁰ Citizen News Online (20 April 2012). Available at:

<http://www.citizennews.co.ke/news/2012/local/item/1395-pm-on-limuru-2b-meeting>

¹¹ See, for example, "Boundaries 'war': Murang'a IEBC public hearing turns physical". Available at:

<http://www.youtube.com/watch?v=v5MNRbRDzro>.

¹² Interview with a policy analyst, 25 April 2012

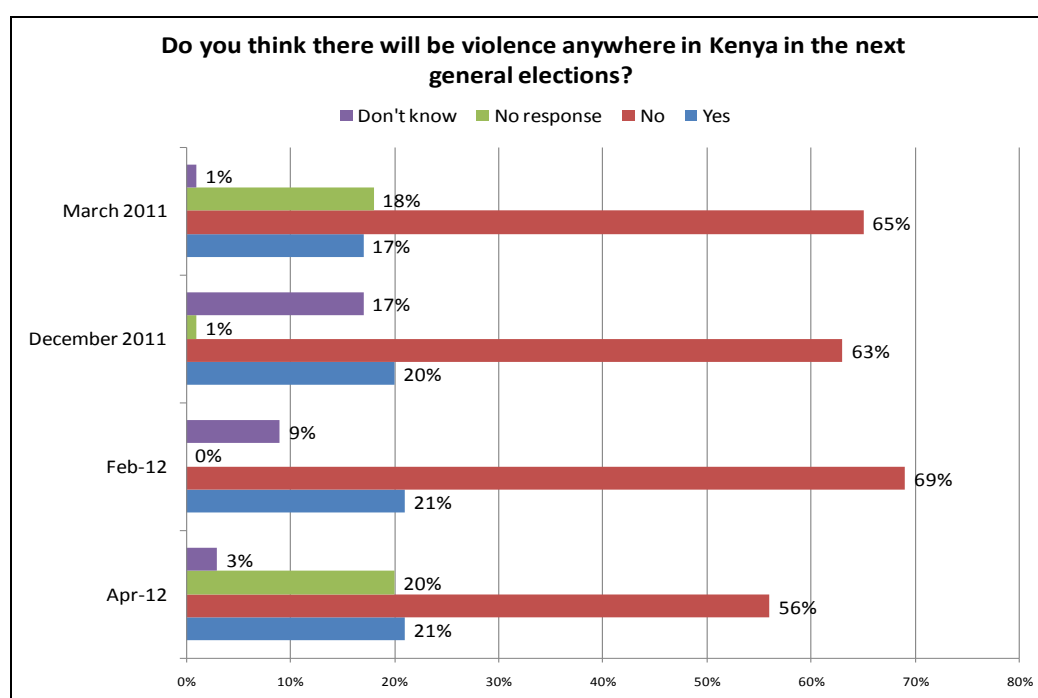
¹³ Interview with a political analyst, 23 April 2012



ethnic coalitions that are not inclusive of all communities lays the foundation for conditions that contributed to the post-election violence. These events reinforce the need for various actors to evolve a structured approach to investigation and prosecution of people who fail to abide by the law and the hate speech law in particular. A structured engagement among the IEBC, the National Cohesion and Integration Commission (NCIC), the Police and the Judiciary is crucial for this purpose. The foundation for this collaboration is in place. Already a Joint Vetting Committee comprising the IEBC, Ethics and Anti-Corruption Commission (EACC), Commission on Administration of Justice (CAJ), and Office of the Director of Public Prosecutions (DPP) has been established. These joint efforts aim at contributing to the objective of having a credible, peaceful and democratic elections.

50. Taking measures against hate speech is critical at this stage because apprehension is slowly building up. The number of those who are optimistic that there will be no violence has declined slightly, again because of this. Asked whether they think there will be violence in the next General Election, 56 per cent of survey respondents said they think there will be no violence. This is a significant drop from the 69 per cent who thought so in February 2012 and 63 per cent in December 2011. This drop could be attributed to apprehensiveness from mobilisation accompanying meetings and motivated by considerations to build ethnic solidarity for the purpose of winning the next presidential election.

Figure 2: Do you think there will be violence anywhere in Kenya in the next General Election?



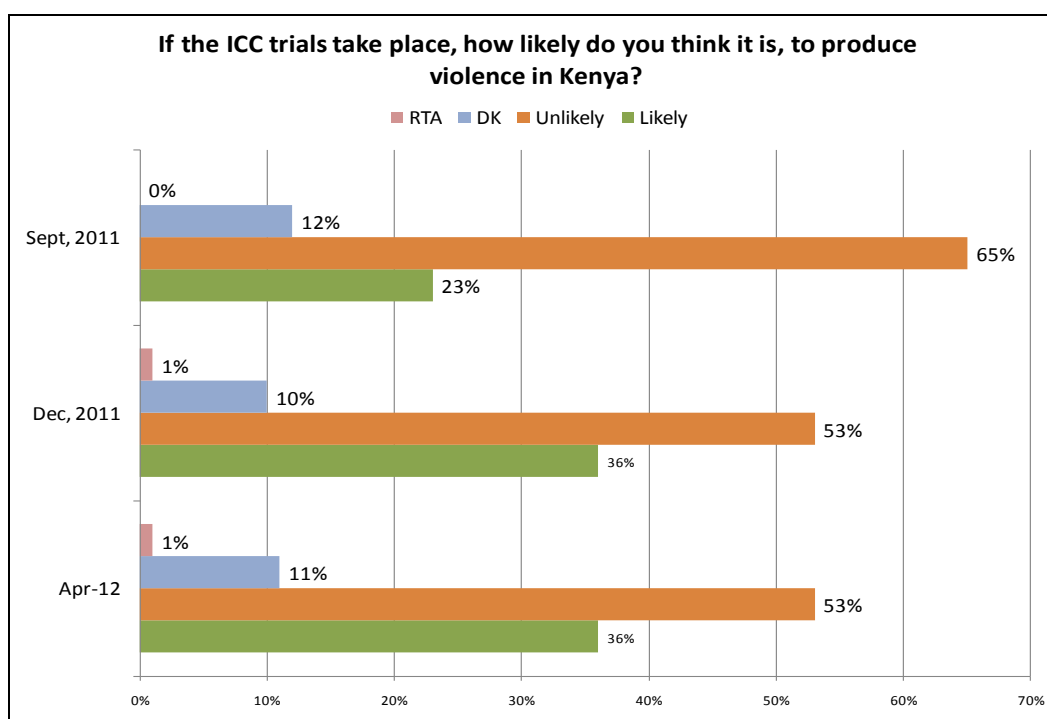
51. The fact that those optimistic about a violence-free election are reducing in number is worrisome and enough warning that there is need for action against hate speech and

any form of mobilisation that leans towards inciting groups against others. Any hate speech or tension in the electoral process has consequences at two levels. One, it is likely to affect the economy. Already, business leaders are warning that potential investors are very sceptical about the business environment in Kenya. Some are 'holding back on investments probably until after the elections and a smooth transition.¹⁴ Two, it is likely to constrain efforts to heal the country. It will undermine the progress made in promoting national cohesion.¹⁵ These observations raise the need for the relevant institutions to be pro-active in enforcing the necessary laws so that the country can have a credible and democratic elections as well as a peaceful transition.

The ICC and the Electoral Environment

52. *Violence and ICC trials:* The mobilisation of ethnic coalitions discussed above also relates to the ICC. The trend to mobilise communities against the ICC is a phenomenon that has been on the rise from the time the ICC identified six Kenyans as suspects who bore great responsibility for the post-election violence. A point worth noting here is that although it was feared that continued investigation and subsequent trial of the suspects would lead to violence, survey findings continue to show that many people do not think that the trials will produce violence.

Figure 3: If the ICC trials take place, how likely do you think it is, to produce violence in Kenya?

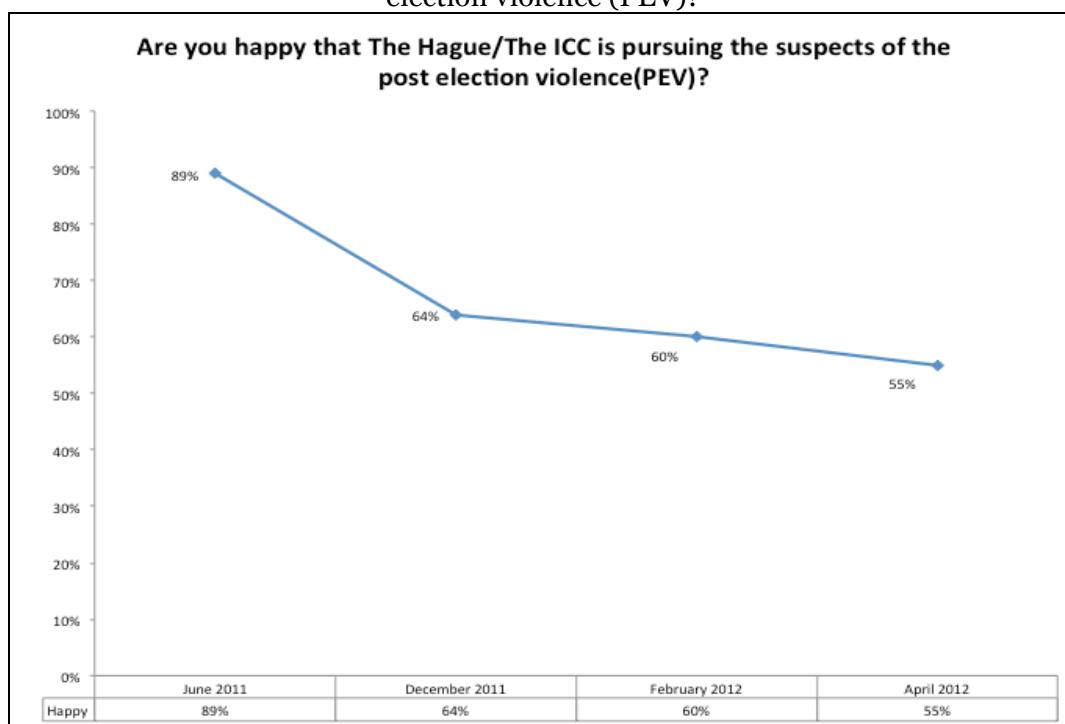


¹⁴ Interview with an official of a national business association, 24 April 2012

¹⁵ Interview with a key informant, 20 April 2012

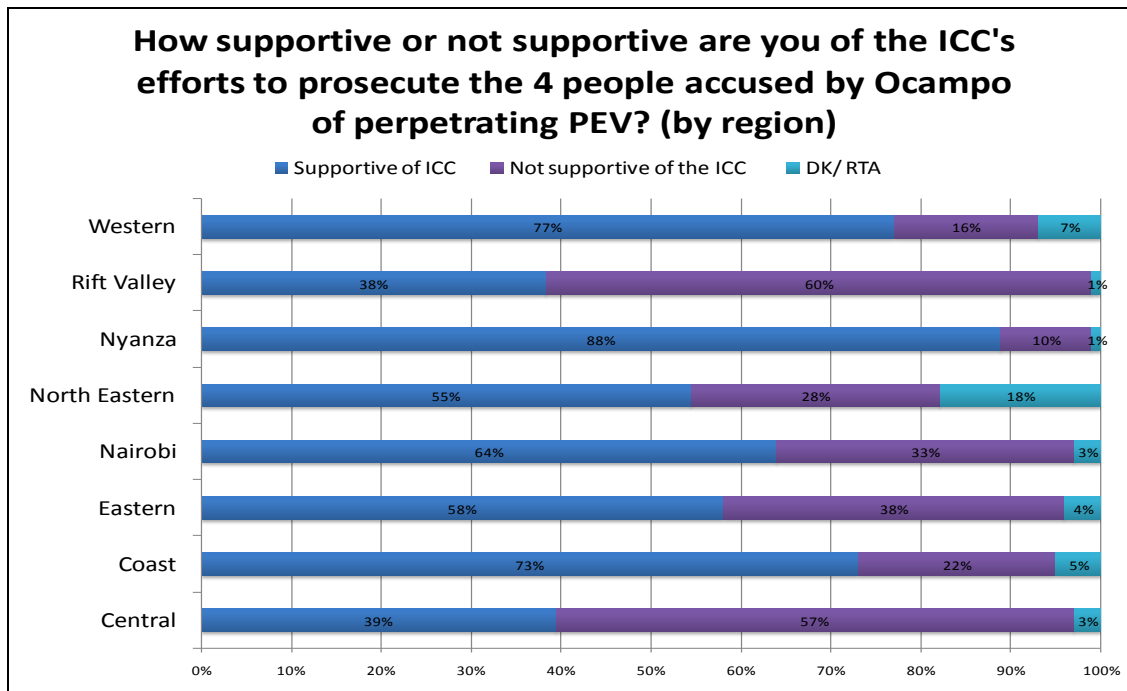
53. In mobilising against the ICC, some leaders have publicly argued that their communities are on trial and that certain leaders are responsible for trials of their political opponents in the presidential race. Still, there are those who argue that those supporting the ICC process are traitors to their communities. On the whole, these discourses tend to politicise a process that seeks to hold people to account.
54. It is worth emphasising that the ICC does not try communities. The Kenya government invited the ICC only after failing to establish a local judicial mechanism to try post-election violence cases. Unfortunately, these facts are rarely brought to light on the political podium. Instead they are concealed and twisted to suit political ends.
55. The consequence of concealing basic facts about the ICC and the Kenya situation is likely to increase tensions in the electoral process. Those against the ICC insist that the individuals indicted will stand as candidates in the next General Election. Those supportive of the ICC argue that they cannot. On the whole, this is polarising the country between those building their electoral platform using arguments against the ICC, and those wishing to have accountability embedded in Kenya's political life.
56. In spite of these discourses, Kenyans' support for ICC is still high. Over half of Kenyans are supportive of ICC and are happy that the courts will try the four people charged with crimes against humanity during the post-election violence. Up to 58 per cent of Kenyans are happy that the ICC is pursuing the PEV suspects; they think this is the only viable way of getting justice.

Figure 4: Are you happy that The Hague/The ICC is pursuing the suspects of the post election violence (PEV)?



57. Although the number of people happy about the ICC intervention has declined, over half of Kenyans are happy that the ICC is pursuing the perpetrators of the post-election violence. The support for ICC is also widely spread across all regions. People in regions where some of the leaders on trial come from are supportive of the ICC process as shown below.

Figure 5: How supportive or unsupportive are you of the ICC's efforts to prosecute the four people accused by Ocampo of perpetrating PEV? (by region)



58. There are several reasons for people supporting the ICC. Some think that it will end the culture of impunity; others want justice for the victims.

Table 3: Are you happy or unhappy that The Hague/the ICC is pursuing the six suspects of the post-election violence (PEV)? If happy explain your answer.

Are you happy or unhappy that The Hague/The ICC is pursuing the six suspects of the post election violence (PEV)?				
IF HAPPY (Very Happy/Somewhat happy) Please explain your answer?				
	June 2011	December 2011	February 2012	April 2012
So that justice can be done	36%	46%	67%	59%
It will end impunity	7%	22%	8%	16%
We will know the truth about the post-election violence	4%	15%	8%	8%
We do not trust Kenyan courts	6%	6%	2%	3%
Prevent future violence	4%	11%	5%	12%
Because the Government failed to establish a local judicial mechanism	0%	1%	1%	1%
Others	10%			

59. Those not supportive of ICC have varying reasons. Some argue the list was not complete or that these are not the real perpetrators.

Table 4: Are you happy or unhappy that The Hague/the ICC is pursuing the six suspects of the post-election violence (PEV)? If unhappy, explain your answer.

Are you happy or unhappy that The Hague/The ICC is pursuing the six suspects of the post election violence (PEV)?				
[IF UNHAPPY] Please explain your answer				
	June 2011	December 2011	February 2012	April 2012
Should have been tried using local courts	10%	21%	10%	13%
The six accused are not the real suspects	9%	16%	14%	23%
The current list is incomplete	6%	13%	15%	6%
Enough investigation was not done	1%	13%	11%	14%
The process has been politicised	2%	9%	17%	13%
They should have been tried using a special tribunal	2%	6%	7%	5%
Kenyans should forgive each other and move on	2%	6%	8%	8%
It will cause more violence in the country	2%	4%	1%	6%
Do not trust the ICC process to deliver justice	4%	4%	4%	4%
The Hague/ICC process will be costly to the country	1%	3%	2%	2%
It will cause disunity in the country	0%	3%	2%	3%

60. Arguments in support of or against the ICC are some of the factors feeding into electoral politics through mobilisation of ethnic communities discussed above. The polarisation likely to emerge from this form of mobilisation is not conducive for the electoral environment. Whether outreach programmes on the role of the ICC can address this challenge is an issue of debate. At this stage of the electoral process, people are generally in need of voter education and information in relation to the new Constitution.

Resurgence of Illegal Groups

61. The emergence of illegal and criminal groups similar to those that formed during the post-election violence is likely to negatively affect the electoral environment. Resurgence of these groups during elections is common, particularly because political leaders use them to fence off their opponents. Past review reports noted that it was indeed difficult to disband some of these groups because they worked closely with influential politicians.

62. Of concern is the absence of a clear and effective strategy to deal with these groups. There are conflicting positions in this respect. While some would like to negotiate and understand their grievances, others argue against this approach. Without a coherent and common voice on these groups, it is possible that they will organise again for the next General Election and affect preparations to secure the electoral process.¹⁶ Already, the signs of the extent to which such groups can affect electoral preparedness showed during the mock election organised by the IEBC in the Coast Province when some members of one group disrupted the mock elections.¹⁷
63. Addressing the challenges posed by these groups is not the responsibility of the IEBC alone. Indeed the IEBC has enormous responsibilities but there are areas where it is the joint responsibility of the IEBC, the police, the youth, the local administration and other actors, including the concerned communities. These other bodies must shoulder their burden too; the focus to ensure that the elections are peaceful, credible and democratic is not solely the responsibility of the IEBC. Therefore the focus should not be on the Commission alone. Nevertheless, forming a partnership comprising these bodies is critical for the purpose of consulting on how best to conduct a peaceful election and avoid the problems and incidents similar to those experienced during the mock election.

Security and police reforms and the electoral environment

64. *Lack of fundamental police reforms remain an issue of concern.* The police play an important role in providing security during elections. In all the surveys, respondents usually point to enhanced security as a factor that can contribute to free and fair elections. In spite of this, the police are yet to undertake fundamental reforms. The relevant police laws have been passed but the formation of the National Police Service Commission, an institution critical to initiating the momentum for reforms, has stalled. In early May 2012, the High Court temporarily stopped the process of appointment of nominees to the Commission.¹⁸
65. The process of selecting members of the Commission had its own challenges even before the court's injunction. Members of the selection panel could not agree on how to select the final list to be submitted to the Executive for appointment. Some members disowned the names.¹⁹ Further, disagreements arose between the two Principals on the nominees submitted to Parliament, with the Prime Minister arguing that he was not consulted before the final list of names was composed.²⁰
66. These disagreements have delayed the process for recruiting the Inspector General of Police. The delay and these disagreements are a pointer to the nature of interests around the post of Inspector General and the police reforms in general. Without fundamental reforms, the police remain an institution for control by these vested

¹⁶ Interview with a senior police officer, 25 April 2012

¹⁷ "MRC headache for polls body," Sunday Nation, 21 April 2012

¹⁸ "Court stops appointment of police commission," *Standard*, 26 April 2012. Two NGOs had filed a case seeking orders for the selection panel to short-list afresh applicants and forward names of persons seeking to serve in the Commission in accordance with performance ranking through the scoring tallied after the interviews

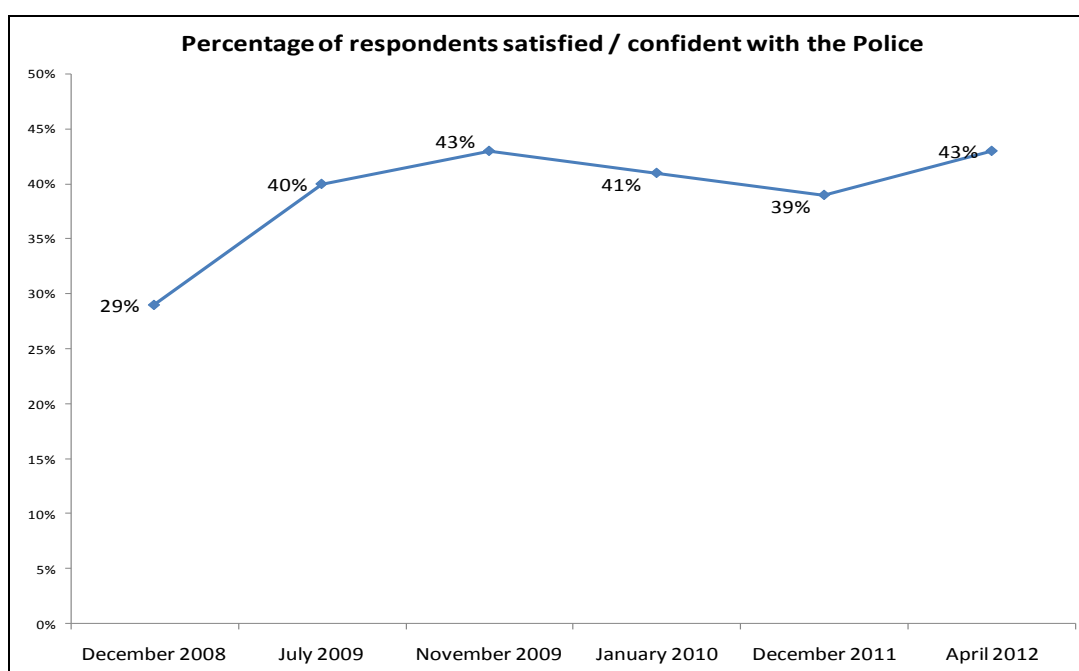
¹⁹ Interview with policy analyst, 9 March 2012; Interview with senior police officer, 25 April 2012

²⁰ "Raila now disowns Police Service nominees", *Standard*, 8 March 2012

interests as well as an institution for manipulation by forces outside the police.²¹ Indeed the IREC report underlined the need to transform the police force into a democratic unit that is of service to everyone rather than just a few.²² A point to note is that immediate recruitment using merit and transparent procedures will inspire people's confidence in the police. Increased confidence in the Judiciary is good evidence in this respect.

67. Respondents are generally dissatisfied with the performance of the police. Over half of the survey respondents said they do not have confidence in police. This is worrying, given that the country is approaching another General Election.

Figure 6: Percentage of respondents satisfied/confident with the police



68. *Lack of adequate resources for police:* Both the Commission of Inquiry into the Post-Election Violence (CIPEV) and the IREC reports raised concerns with the capacity of the police force and argued for increased resources to improve it.²³ Inadequate resources to procure the necessary equipment and improve on skills through training continue to recur as an issue hindering the effectiveness of the police.²⁴ In addition, recruitment of new officers has not been regular, yet many officers continue to retire every year.²⁵ This creates a gap; the ratio of police to the population is about 1:1,900 and, therefore, below recommended UN police to population ratio of 1:400.

²¹ Interview with policy analyst, 20 April 2012

²² Interview with senior police officer, 25 April 2012

²³ Report of the Independent Review Commission on General Elections, 2008; Commission of Inquiry into Post Election Violence, October 2008

²⁴ Interview with senior police officer, 25 April 2012

²⁵ Interview with senior police officer, 25 April 2012

Nonetheless, the government is planning to employ over 9000 police officers before the next elections and will deploy additional staff from the disciplined forces during the polling. Other preparations made to secure the elections include increasing the number of officers involved in intelligence gathering and training of officers on their role during elections. Notwithstanding this progress, it is important to ensure that the recruitment and the actual composition of the National Police Service reflect the regional and ethnic diversity of the people of Kenya.²⁶

Responsible political parties

69. Responsible political parties obey the law; they do not circumvent or undermine the law. The Political Parties Act came into force in November 2011. This set off a tight timeline within which political parties and candidates should comply with the Act. It also established the time frames for other activities critical for a credible General Election (as shown in the work plan in Table 2).
70. The Act allowed the existing political parties to continue enjoying their registration status before complying with the provisions of the law within 180 days, when they would meet the requirements for full registration. A total of 41 political parties met the April 30 deadline for compliance with the Political Parties Act. Some of the older parties failed to meet the deadline and were deregistered.²⁷ It is expected that compliance with the new law will institutionalise political parties and improve their internal governance. However, this law is still subject to abuse. Politicians continue to express support for other parties without formally resigning from the parties on whose ticket they joined elective leadership. Some have shifted allegiance from the parties on which they were elected to parliament or to the local government civic seats without reference to the new law.
71. Some parties also allegedly recruited members fraudulently because they did not follow the procedures prescribed by the law. Some are alleged to have presented membership lists comprising names of some individuals who, hitherto, did not know they were members.²⁸ There are allegations that political parties registered members by using mobile phone money transfer registers — which have the full names and national Identity Card numbers of clients — to shore up their registers. There are also allegations that parties used previous voter registers instead of recruiting members in at least half of the counties as required by law. There were also cases of double registration of members, which have been rejected at the Registrar's office.²⁹
72. It is important that these allegations are investigated so that political parties found to have violated the law are punished, and also to allay anxieties that might emanate from perceived register padding. Violation of the Act disenfranchises potential voters who would have liked to participate in the primaries of their political parties but will not be

²⁶ This is a constitutional requirement, Article 246 (4)

²⁷ "Two previously registered political parties deregistered", Capital News, 1 May, 2012

²⁸ Interview with several individuals who claimed they were not members of some of the parties that have registered them as members. Ever since the Registrar of Political Parties publicized the web address on which to verify party membership, social media had numerous interaction of people claiming to be members of parties they did not register in.

²⁹ Interview with the Registrar of Political Parties, 20 April 2012

able to do so since they have been assigned to a different party. By engaging in these malpractices, the parties are also denying themselves the opportunity to gain genuine membership, especially from the grassroots.

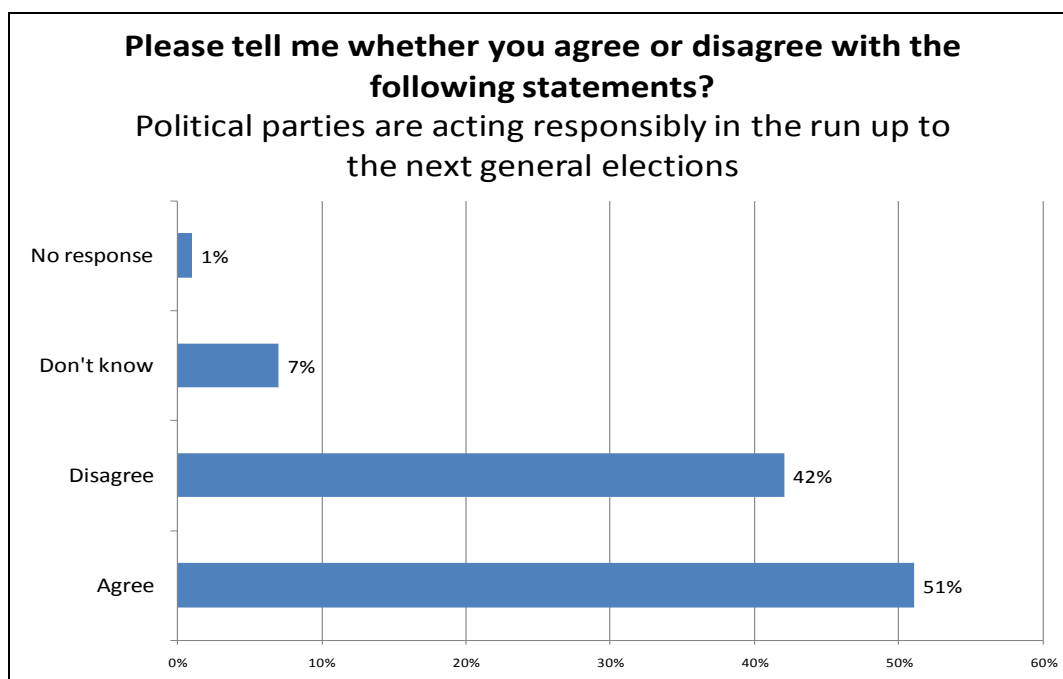
73. The IEBC, including the Office of the Registrar of Political Parties, is aware about complaints regarding fraudulent registration of party members. However, there have been no formal complaints from either the public or the political parties themselves. The Registrar hopes to complete the process of documentation of party membership before publishing the membership lists. Those who find themselves registered as members of a party they do not belong to or, in which they did not voluntarily register, have the Political Parties Act as the main recourse.
74. The feeble enforcement of the Political Parties Act and politicians' cavalier attitude towards the law governing them reflects how people perceive the parties. People's confidence in political parties is relatively low (40%) compared to other institutions that play a part in the electoral process: Judiciary (67%), the media (90%) and the Independent Electoral and Boundaries Commission (80%). People rate the parties even lower than the police (43%), implying that people are dissatisfied with the 'business as usual' attitude in this institution and its failure to abide by the law. It is remarkable that both the parties and the police, which enjoy the least levels of public confidence, appear to be resisting reforms.³⁰ This low level of confidence results from how the parties behave.
75. *There are grey areas in the law:* Article 77(2) of the Constitution bars State officers from holding positions in political parties. However, there is lack of clarity on whether Cabinet Ministers, since they are State officials, can hold political party positions. Section 12(2) of the Political Parties Act allows the President, his deputy, MPs, Governors and their deputies and members of the County Assemblies to hold party positions.³¹ Thus, since they are elected MPs, the law allows them to hold party positions. However, there are questions on whether Article 77(2) of the Constitution, which prohibits state officers from being members of political parties, is applicable at present or after the next general election.³² This will remain a subject of controversy unless the courts give a constitutional interpretation to ensure that such grey areas are not exploited to weaken the process of institutionalising parties. Perhaps because of these issues, only about half of respondents think political parties are acting responsibly.

³⁰ While police have taken a strong position about the appointment of the Inspector General, political parties have equally been reluctant about enforcing the provisions requiring State Officers not to hold political party offices.

³¹ "Confusion after registered parties list ministers as officials", Standard, 2 May 2012

³² *ibid*

Figure 7: Are political parties acting responsibly in the run-up to the next General Election?



76. In order to address some of these challenges, the IEBC and the office of the Registrar of Political Parties have been carrying out county sensitization programmes to ensure that everyone effectively complies with the Act.³³ Some CSOs have also been building the capacity of political parties in terms of accountability, participation of women and minorities, internal party democracy, leadership and integrity among others. Others have been educating the parties and aspirants on the requirements of the 2010 Constitution.³⁴
77. Generally, parties lack sufficient organisational and financial management skills. Indeed, the Auditor General's 2009/10 report noted that political parties were far from attaining proper financial management skills. While filing their returns, most did not declare the source of their funds and how they spent them.³⁵ Further, it is notable that most registered political parties do not have women as national officials, despite the requirements of the Constitution for gender balance.³⁶ Registration of parties is just the initial step but more work needs to be done to ensure the party offices and membership continues to exist and operate.
78. *Office of Registrar of Political Parties is yet to be filled:* Even as the parties were complying with the new laws, the Registrar of Political Parties continued to hold the position in an acting capacity. The recruitment of the new Registrar of Political Parties

³³ www.iebc.or.ke

³⁴ Interview with civil society organization leader, 27 April 2012

³⁵ "Political parties get Sh430 Million from the Treasury," Star, 30 April 2012

³⁶ Interview with a youth leader, 2 May 2012

could not take place in December 2011 as required. The panel, which would have facilitated the recruitment process, should have been constituted 14 days after the commencement of the Act. Internal differences within Parliament's Departmental Committee on Justice and Legal Affairs, delayed the process. The names submitted for vetting by Parliament also faced another hurdle. One of the parliamentary political parties complained that it was not consulted before the names were taken to Parliament for vetting.³⁷

79. The Acting Registrar, therefore, continues to discharge the duties of that office from the IEBC as the Director, Registrar of Political Parties. This is due to the fact that the Registrar's office was originally domiciled in the defunct Electoral Commission of Kenya (ECK), and subsequently in IIEC, which preceded the IEBC. A substantive office holder will have to operate independently as the Political Parties Act envisages.³⁸ The process of recruiting a Registrar will begin afresh.
80. The dilemma over the recruitment of the Registrar of Political Parties revolves around whether to recruit now or wait until after the General Election.³⁹ There are fears that a new person may take some time to learn the job, yet preparations for the elections are very much under way. Whether a new person is recruited or not, the point to stress is the need for the office to effectively enforce the law, institutionalise the parties, and promote party discipline so that the parties can effectively discharge their duties.

Media Regulations

81. *Media guidelines released:* The IREC (Kriegler) report faulted the media for their role in the post-2007 election violence. In particular, local language radio stations were said to have played a prominent role in making inflammatory and highly partisan and ethnicised broadcasts. IREC recommended that relevant legal measures be taken to regulate the media without necessarily undermining its freedom. In line with these recommendations, the Media Council of Kenya has issued guidelines on the coverage of general elections.⁴⁰ The IEBC has also established guidelines on media elections monitoring.
82. These accomplishments notwithstanding, there are fears that Media Council of Kenya (MCK) efforts at self-regulation suffer from the ills of protecting its members rather than promoting effective maintenance of discipline within the industry. Importantly, media regulation continues to lag behind technology, to the extent that social media and other Internet-based forms of publishing (e.g. Facebook, Twitter, and blogs) are virtually unregulated. Finally, there are still no laws guaranteeing equitable access to the media at election time (though the Elections Act, 2011 anticipates that regulations will be made by the IEBC to that effect) and access to information, both by the media and the general public, is also far from being realized.

³⁷ The Star (Thursday, 22 December 2011). "MPs delay vetting of nominees for Registrar". Available at <http://www.the-star.co.ke/national/national/55083-mps-delay-vetting-of-nominees-for-registrar>.

³⁸ Interview with Registrar of Political Parties, 20 April 2012

³⁹ Interview with a senior IEBC official, April 2012

⁴⁰ Levi Obonyo, "Media and elections: Our journalists must follow the rules to prevent chaos," Daily Nation, 1 May 2012



83. Effective regulation of the media industry is critical for the country's preparedness in terms of creating conditions for peaceful, free and fair elections. Development of guidelines to regulate the media industry and promote access to media requires better coordination. There is a danger of coming up with different sets of guidelines and run the risk of losing the opportunity to have an industry-wide buy-in and enforcement. Improved consultation and coordination are necessary for developing such guidelines so that the entire industry can enforce these guidelines in a uniform manner.
84. The industry must also develop strategies for dealing with the new global challenge of unregulated social media, which is an emergent key player in communicating political messages. Already parliament has passed a law on opinion polling which prohibits dissemination of opinion poll results on the day of the election and five days before the date of the election. This is a pointer that a legal framework is evolving to address new issues and challenges.

Adequate Civic and Voter Education

85. The Ministry of Justice, National Cohesion and Constitutional Affairs (MoJNCCA) has been emphasising the need for civic education to be recognized as an integral part of the process of implementing the Constitution. The Ministry has launched the Kenya National Integrated Civic Education (K-NICE) programme. K-NICE, a partnership of Non-State Actors and the government, is intended to provide a long-term strategy for enlightened citizen participation in the implementation of the Constitution.⁴¹ A curriculum and guides on a number of key themes (including elections) have been developed. Civic education providers have been identified and the programme has begun in earnest.
86. In view of the importance of civic education in the implementation of the Constitution, the Task Force on Devolved Government recommended that a civic education programme be put in place for the long-term. This recommendation was effected in both the Sessional Paper on Devolved Government and the County Governments Bill, 2012.⁴² The Bill contains the principles of civic education, its purpose and objectives, and proposals for inclusive design and implementation of civic education by each county.
87. In addition to the foregoing, the National Cohesion and Integration Commission (NCIC) launched a national campaign, 'Kenya Kwanza Campaign 2012' on 16 March 2012 aimed at promoting a cohesive, inclusive and peaceful Kenya.⁴³ It also posted a charter to be signed by all Kenyans to individually and collectively commit to uphold the values of the campaign.

⁴¹MOJNCCA (2011). *Kenya National Integrated Civic Education (K-NICE) Programme: Strategy and Implementation Plan* (May 2011). Available at

http://www.justice.go.ke/index.php?option=com_content&task=view&id=211&Itemid=43.

⁴² Ministry of Local Government (2011). *Sessional Paper on Devolved Government Under the Constitution of Kenya, 2010* (Unpublished); and The County Governments Bill, 2012 ss. 96-99.

⁴³ Kenya Broadcasting Corporation. "NCIC launches peace campaigns ahead of poll." Available at <http://www.kbc.co.ke/news.asp?nid=75424>.

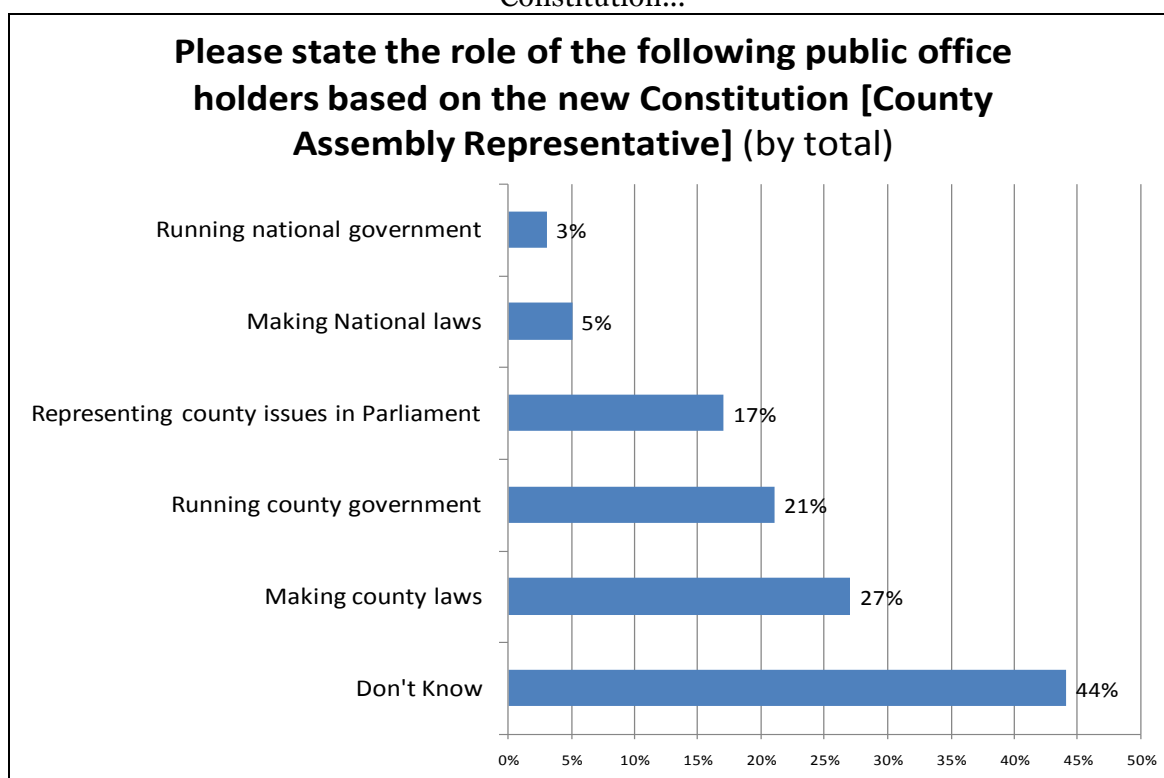


88. Other initiatives complementing the campaign for peaceful election include the My Kenya – Mkenya Daima campaign, an initiative of the private sector in partnership with civil society including the Faith Based Organisations; and the Tuvuke campaign under the Kenya Women’s Finance Trust. In addition, the national civic education programme, Uraia, is continuing, with a focus on elections, or Uchaguzi Bora (Kiswahili for “Better Elections”). IEBC is also rolling out its voter education programme and has shortlisted voter education providers. The Commission now has a regular programme on TV to educate citizens on the electoral process. The two Principals have been also urging Kenyans to promote peace.
89. Overall, these efforts provide an opportunity for coordinated, structured and focussed civic and voter education. But given the short time left before the next election, there is need to focus more on voter education and information. Overlapping generic civic education with voter education and information might reduce the potential for voters to acquire sufficient knowledge to vote in a new and a complex General Election. Voters will be required to make about six choices at the same time in the balloting booth. This, on its own, calls for a cautious choice of information to improve on the knowledge of voters.
90. *Civic and voter education needs to be enhanced:* Various actors in the civil society have already started civic and voter education.⁴⁴ Findings from the survey show that 29 per cent of the respondents do not know the role of a Governor while a significantly high number (44%) have no idea what the role of the county assembly representative is.

⁴⁴ Interviews with civil society leaders, April 2012



Figure 8: Please state the role of the following public office holders based on the new Constitution...



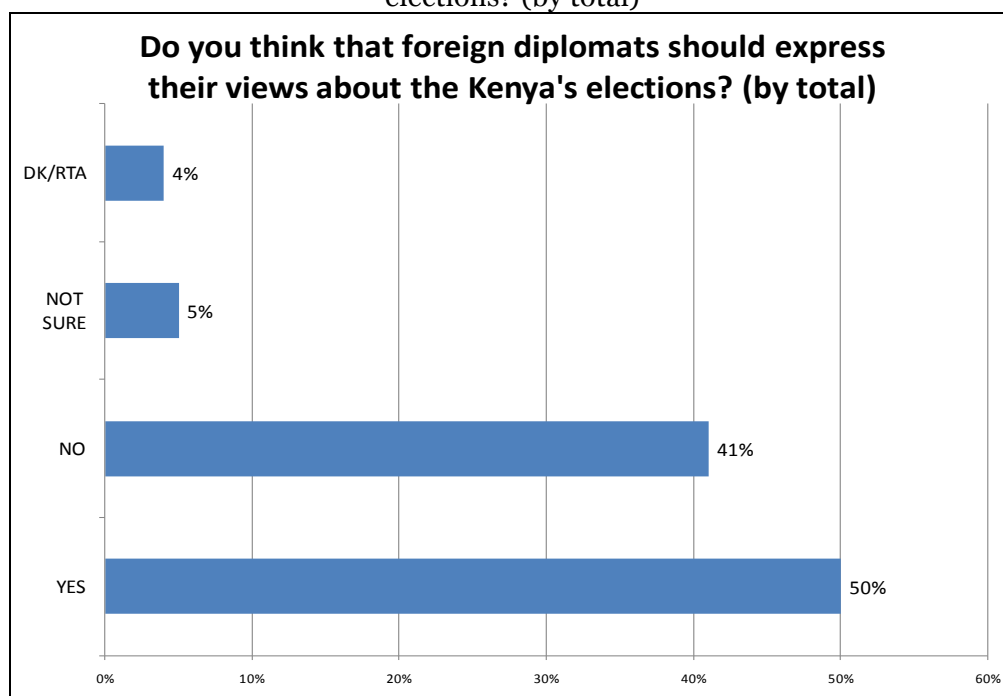
Effectively Coordinated Donor Support

91. Donors under the Elections Sub-Group of the Democratic Governance Donor Group (DGDG), who initially had supported the work of IIEC, were quick to express support for IEBC early in its term. At a meeting on 16 November 2011 they pledged support for IEBC and urged the Commission to ensure the next General Election is free and fair. In order to maximize resources and reduce or avoid duplication, they have established a number of mechanisms for collaboration and coordination. In view of IEBC's recent challenges in obtaining government funding for its entire budgetary outlay, donors will need to re-visit their financial projections and discuss how to enable the Commission to meet its core obligations.
92. But making pledges is one thing. Ensuring prompt disbursement of the pledged funds is a critical aspect of the electoral funding process because failure to disburse the pledged support necessitates changes in planning. There are instances where donors pledged support but did not disburse the funds on time for planned activities or failed to disburse altogether. Given these experiences, there is need to honour the pledges and ensure that funds are disbursed on time to support planned activities. The donors elections support group may need to continuously review the status of disbursement of pledged funds and put pressure on those delaying disbursement of pledges to honour them on time. Similarly, there is need for the government to increase funding to the IEBC in view of the fact that the new electoral design is complex. There are several

elections to be held at the same time, which implies new challenges and demand for adequate resources.

93. As it is, half of the surveyed respondents do not mind donors expressing their views about Kenya's elections. Only 41 per cent feel that donors should not express their views about Kenya's elections.

Figure 9: Do you think that foreign diplomats should express their views about Kenya's elections? (by total)



94. This finding is not strange. The re-introduction of multiparty politics in Kenya in the early 1990s was the result of a combination of domestic and international pressure. Western donors exerted pressure on the government to introduce multi-party democracy and supported the nascent human rights and governance civil society in their struggles for political reforms. From then on, donors have been an important part of Kenya's politics of transition.

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

95. Election preparedness necessarily involves preparedness to detect election-related conflicts early, provide early warning to key stakeholders and respond early and effectively – including taking action to mitigate conflicts. The Uwiano Platform for Peace, unveiled before the 2010 referendum on the draft constitution, has recently been re-launched.⁴⁵ The programme of work consists of conflict mapping, peace

⁴⁵ An initiative of NCIC, the state-led National Steering Committee on Peace Building and Conflict Management (NSC) and PeaceNet Kenya, it was established to jointly gather comprehensive and real-time data from across the country on cohesion and integration related to early warning and rapid response matters and serve as a platform for documenting and celebrating positive action among Kenyans. UNDP has set aside US\$

caravans, consolidating partnerships for peace, continuation of the messaging platform, and conflict analysis. The National Steering Committee for Peace Building and Conflict Management plays a central role, connected to all the provincial administrators and supported by monitors on the ground. Reports are coded and contact made with administrators in trouble spots where action is warranted. The National Security Intelligence Service and the Police also provide crucial information in terms of early warnings on violence.

96. However, coordination with other structures (especially civil society) is still weak. The indicators for classification of hotspots also require a review because of the possibility of new forms of violence emerging from contestations over new electoral seats and creation of counties. Important also is the disillusionment with failure to successfully prosecute anyone charged with hate speech. Politicians charged with hate speech offences during the 2010 referendum were acquitted on 14 December 2011.⁴⁶ There are still others awaiting trial.
97. As long as there is no successful prosecution for hate speech, there will be no real deterrent for the kind of incendiary speeches that will likely be made closer to the General Election. This suggests that in addition to early warning, early response and mitigation, justice should be a core component of any measures to reduce the prospects of a violent election.

Access for Election Observers

98. IEBC has generally facilitated the participation of observers in its work. IEBC's partners' dialogue forum also gives donors, the media and civil society an opportunity to interact more closely with IEBC's work and to offer constructive criticism. There are, however, concerns that IEBC tends to sometimes act without sufficient consultation with stakeholders in the electoral process (a case in point being the declaration of the election date and the mock election exercise).
99. Besides these large stakeholder meetings, there may also be need for smaller technical ones at which issues can be thought through and decisions made about how to jointly approach intractable issues such as security. It is important to consider having both policy and technical stakeholder forums in which all players involved in elections regularly meet. A policy forum may include IEBC, the Judiciary, the Police, the NCIC, the Ministry of Immigration and Registration of Persons, and a representative of the Political Parties Liaison Committee. Such a forum should bring together the heads of these institutions in order to make binding decisions.
100. A grouping of civil society groups, the Elections Observation Group (E-LOG), has been preparing for the observation of the next General Election, while it pursues other avenues of dialogue and engagement with IEBC. Donor resources are trickling in and it

3m over a one-year period ending December 2012 <http://www.ke.undp.org/index.php/projects/uwiano-peace-platform-project>.

⁴⁶ Africa Review (2011). "Kenya MPs acquitted of hate speech charges." Available at <http://www.africareview.com/News/Kenya+MPs+acquitted+of+hate+speech+charges/-/979180/1289250/-/nmfq2uz/-/index.html>.



is expected that a substantial amount of the obligations will be available to support electoral observation. With the available bilateral resources, E-LOG is continuing with the thematic observation on issues such as campaign financing and general preparedness analyses. They have started recruiting core staff and will soon start the core training of trainers (ToTs). They intend to have coordinators in all 47 counties and have an effective presence at ward level. However, E-LOG is concerned about the rising level of impunity in political parties.

101. In addition to E-LOG, and going by past experience, other observers are likely to include the European Union, the African Union, and the Commonwealth group among others. Without effective implementation of the Political Parties Act, the work of observers will be laborious.

Conclusion

102. The IEBC is enjoying trust and confidence among Kenyans; 80 per cent of Kenyans have confidence in the IEBC. The IEBC has developed a road map and work plans to guide implementation of key activities towards a 4 March 2013 General Election. Although IEBC is institutionally preparing for the next elections, it is not in control of the entire electoral environment because other actors remain independent of the IEBC. Clearly, political parties are not prepared for a credible and transparent election; they are weak and are yet to organise.
103. There is progress in enacting the required laws. But the test of any law is in implementation. There are concerns that the Registrar of Political Parties is not active in enforcing the Political Parties Act and, therefore, many politicians continue in a 'business as usual' style. Parties are flouting the Political Parties Act with abandon, and yet suffer no consequences. Effective implementation of the law is critical at this stage in order to show that there is a clear break with the past.
104. There are grey areas in some of the laws. There are also some provisions of the Constitution that are open to multiple interpretations. The election date is a subject of litigation because of such multiple interpretations. This uncertainty over the election date should be addressed soonest in order to allow preparations to proceed without anxiety. In addition, litigation on the boundaries review has already arrested the process of voter registration. Any delays in determining these cases will negatively affect election preparations.
105. Finally, it is worth emphasising that the reforms witnessed in the Judiciary have rekindled people's trust and confidence in the institution. A similar impact would be felt in relation to the police if meaningful reforms are effected before the elections. And because of increased trust and confidence in the Judiciary, people are taking cases concerning political parties to the courts. In the end, the Judiciary is likely to be overburdened with cases that should be resolved at other levels including the Political Parties Disputes Tribunal. The Judiciary is aware of this challenge. Indeed the Constitutional and Human Rights division has already referred back some of the cases to the tribunal. It is hoped that the parties will begin with the Tribunal as the first port of call on election related disputes, as a way of building the new institution and also strengthening the culture of political parties.

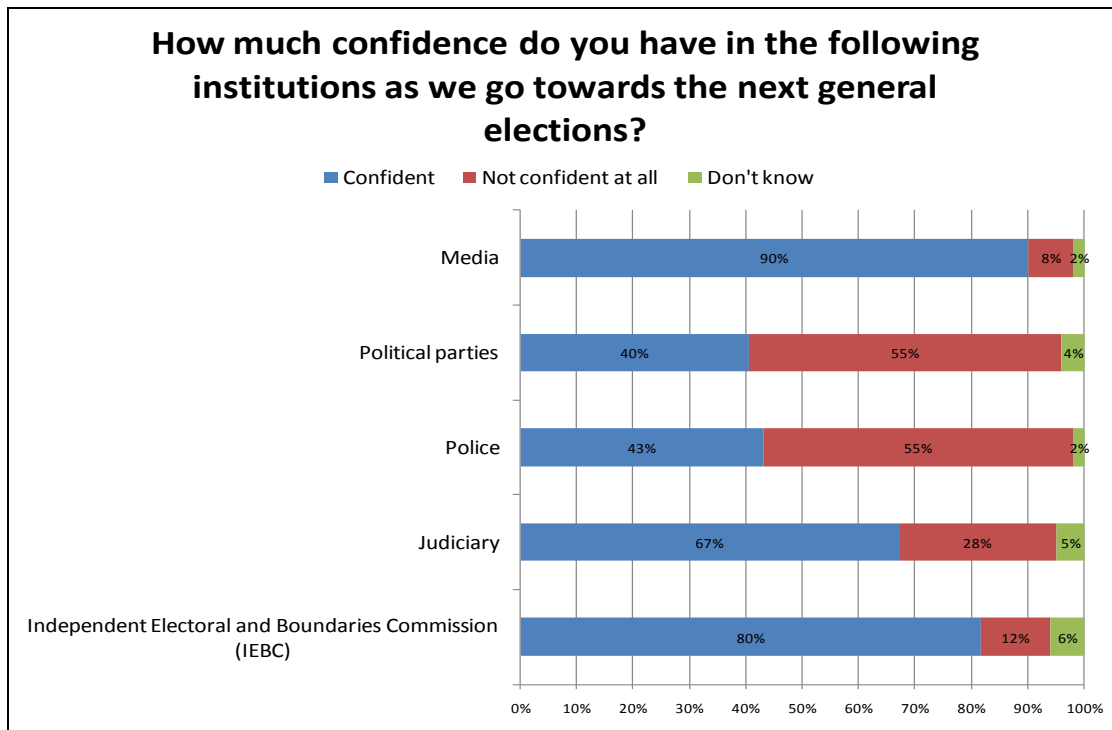
3. MANAGING ELECTIONS COMPETENTLY AND INSPIRING PUBLIC TRUST IN THE ELECTORAL PROCESS

106. The IREC report noted that the manner and timing of the appointment of the majority of electoral commissioners before the 2007 elections had cast a shadow of suspicion over ECK's ability to carry out free and fair elections. The report noted that the manner of appointment of commissioners and the structure, composition and management system of the ECK were materially defective. This resulted in serious loss of independence, capacity and functional efficiency of the commission. Public trust and confidence in ECK were lost; some role players had doubts about the independence and impartiality of the commission.
107. This section reviews the institutional framework for the present electoral management body, the IEBC, and examines the extent to which the Commission is able to exercise control over the electoral process. The review also focuses on issues around voter registration, and demarcation of boundaries. People's perception of the Commission and building capacity for counting and transmission of the results are also reviewed.

Effective Electoral Commission

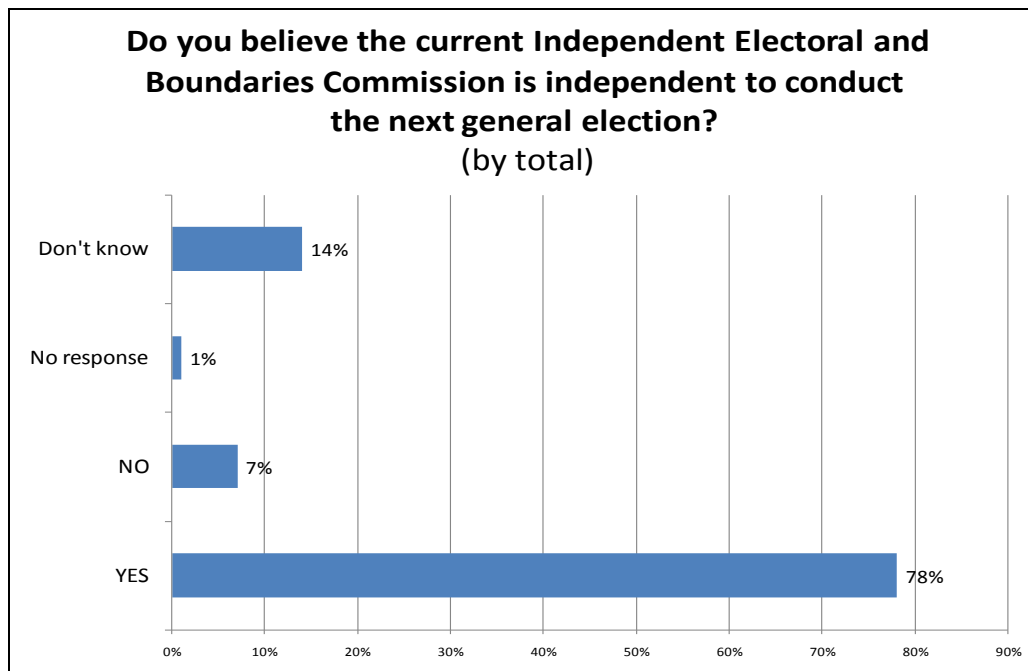
108. There has been remarkable progress in implementing recommendations to improve public trust and confidence in the new elections management body – the IEBC. When IEBC was constituted, one of its first tasks was to run a by-election and embark on concluding the boundary delimitation exercise. It managed to run these tasks fairly quickly. The boundary delimitation, however, resulted in litigation, which is probably unavoidable given the nature of the subject in dispute. The IEBC also began making plans for the General Election, including the procurement of biometric voter registration kits.
109. The IEBC now enjoys up to 80 per cent public confidence. The public ranks the IEBC second to the media (90%) in terms of confidence in the key role players in the election process. This is no mean accomplishment. In fact, after the disbandment of the former Commission, the interim body set up undertook to demonstrate a departure from the past. It was similarly rated highly in terms of performance.

Figure 10: How much confidence do you have in the following institutions as we go toward the next elections?



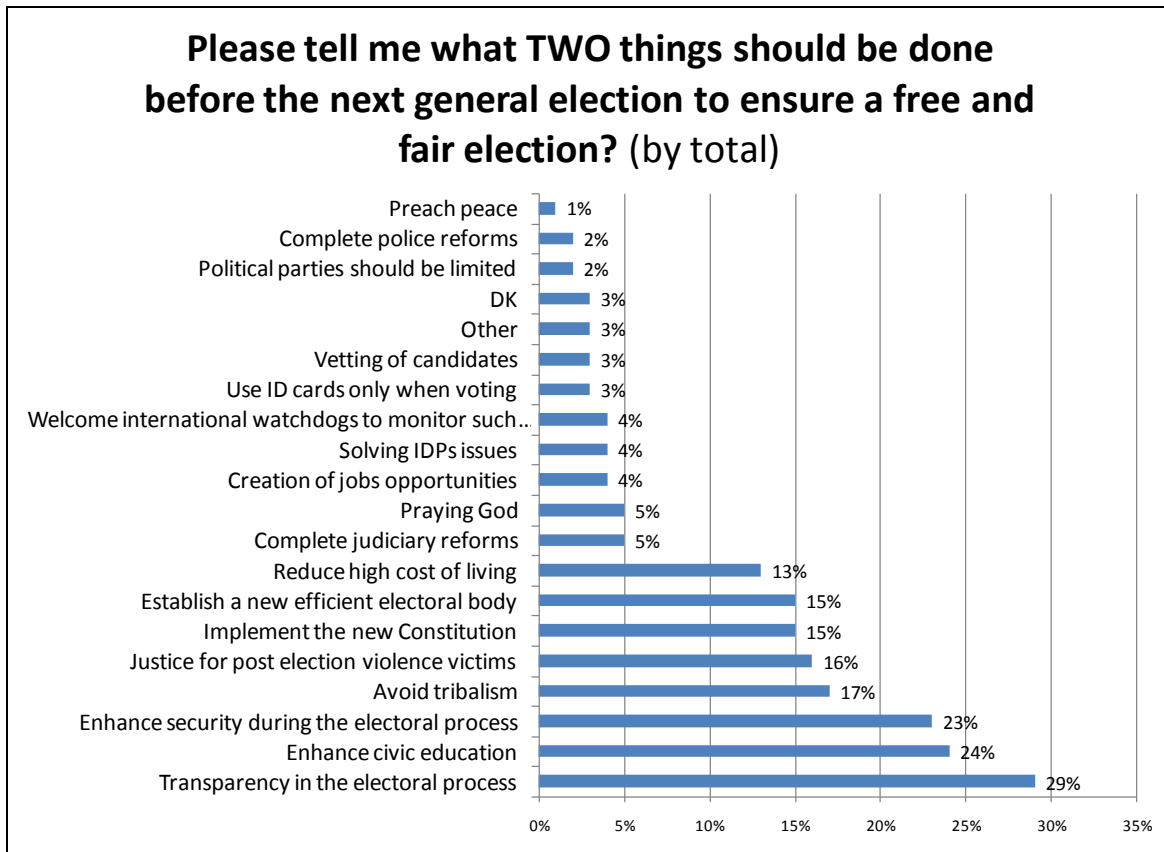
110. People are optimistic that the IEBC is capable of managing the next General Election. When asked whether they believed the IEBC was independent enough to manage the next General Election, 78 per cent answered in the affirmative. Only 7 per cent said they did not think so.

Figure 11: Do you believe the Independent Electoral and Boundaries Commission is independent enough to conduct the next General Election?



111. The Commission has regained public trust and confidence but people still want to see that it can manage the process in a transparent manner. When asked what two things should be done to ensure the next General Elections is free and fair, 29 per cent of respondents said they want transparency in the electoral process, 24 per cent said they wanted civic education to be enhanced, while 23 per cent said they wanted security to be guaranteed.

Figure 12: Please tell me what TWO things should be done before the next General Election to ensure a free and fair election? (by total)



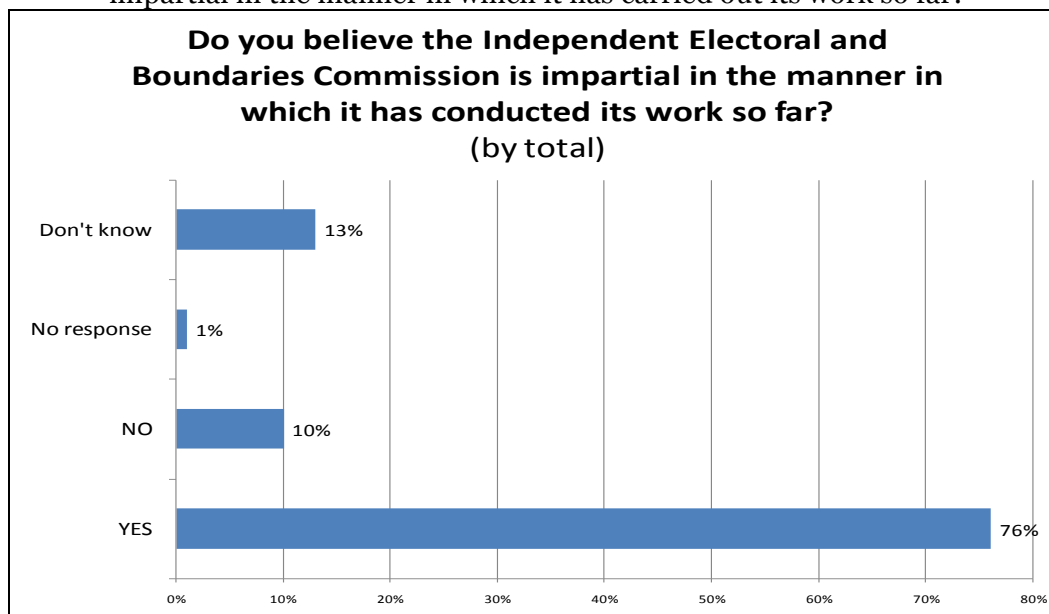
112. Respondents have been emphatic that transparency in the electoral process, enhancing civic education and providing security are critical for ensuring a credible, free and fair election.

Table 5: How to have a free and fair election

How to have a free and fair election			
	Nov. 2010	June 2011	April 2012
Enhance civic education	6%	11%	24%
Have an independent powerful electoral body/establish a new efficient electoral body	14%	21%	15%
Ensure / improve / enhance security during elections / electoral process	19%	12%	23%
Through / use electronic Voting	22%	23%	-
Transparency in the electoral process	23%	-	29%

113. People are generally happy about how the Commission has conducted its affairs so far. Up to 76 per cent of survey respondents feel that that the IEBC has been fair in the manner in which it has conducted its work so far.

Figure 13: Do you believe the Independent Electoral and Boundaries Commission is impartial in the manner in which it has carried out its work so far?



114. These findings demonstrate that people are happy with the Commission so far, and that they think it can conduct a credible election. As noted earlier, people are not confident with the performance of the political parties and the police. The implication of this is fairly obvious. While the Commission can deliver on its part, the political parties might not. This suggests drawing attention to the entire election chain to identify the weak links and strengthen them ahead of the election.

Institutional Framework for the Electoral Commission

115. The IEBC enjoys high public confidence. Sustaining this confidence and trust is critical for election preparedness. However, maintaining this confidence will depend on how the IEBC conducts its activities in the run-up to the election as well as how the commissioners and other staff cohere and work to accomplish the IEBC's mission.
116. In the early days of the Commission, there arose a dispute over the recruitment of the chief executive officer. The matter ended in the courts and has reportedly caused some divisions within the Commission.⁴⁷ This notwithstanding, the public appearance of the leadership is one of calm. It suffices to note that an internally coherent, stable and cohesive Commission is critical for efficiency and effectiveness. The absence of these elements always compromises the quality of an election.⁴⁸
117. The Commission has faced challenges in addressing some politically sensitive issues such as determining the date of the next General Election. Granted, there had been growing apprehension about the uncertainty around the election date that made it necessary to dispense with the matter quickly. Since different people want a date that suits them, some opposed while others supported the IEBC's decision to set the election date as 4 March 2013. The matter is again at the Court of Appeal awaiting determination. Interestingly, the public appear to prefer December as the election date. In the April 2012 survey, 76 per cent of respondents wanted elections to be held in December 2012, while only 14 per cent wanted elections held in March 2013.
118. The lack of consensus on the election date results from multiple interpretations of the Constitution. The Constitution set the election date as the second Tuesday of August in every fifth year. But the transitional provisions preserved the life of the National Assembly for its unexpired term, which ends on 14 January 2013. These contestations have persisted even after IEBC settled for 4 March 2013, as the official election date. These contestations have polarised the players in the electoral process. Some of those unhappy following the ruling of the High Court are questioning the independence of the Commission.⁴⁹
119. This underscores the need for the IEBC to uphold high standards of integrity and competence in order to safeguard the credibility of the electoral process. There is also need for stability and unity of purpose within IEBC in the lead-up to the elections.

⁴⁷ The Standard (10 January 2012). "Court blocks IEBC from replacing its CEO Oswago". Available at <http://www.standardmedia.co.ke/archives/hague/InsidePage.php?id=2000049790&cid=4&>.

⁴⁸ Interview with an elections expert, 2 May 2012

⁴⁹ Interview with a political party official, 26 April 2012

120. Notwithstanding all the concerns, preparations for the elections appear to be generally on course. IEBC has released a calendar of events culminating in the elections and the chairman gives regular press briefings on how the Commission is preparing for the elections.
121. The Commission held two mock elections in Malindi North and Kajiado constituencies with a view to examining the suitability of strategies to be used in the general election. The mock election covered various steps in the electoral process. From the mock elections the Commission and observers concluded that there is need to: comprehensive plan for security; enhance training of polling officials; have adequate staff for the six ballot box model; use electronic votes transmission; use electronic poll book alongside the paper register; and ensure funds are adequate and disbursed in a timely manner.⁵⁰
122. The IEBC has also been recruiting more staff and has awarded tenders for biometric registration kits and mobile electronic voter identification systems. It has also launched its civic education programme and is working closely with the Ministry of Justice, National Cohesion and Constitutional Affairs to translate civic education materials into local languages to be used by radio stations and organizations that will conduct the voter education. IEBC staff are also undertaking various internal self-improvement training programmes on different aspects related to the elections and devolution.⁵¹
123. *Electoral malpractices remain unpunished:* The IEBC has not been tested on its commitment to deal with electoral malpractices. Some of the malpractices such as vote buying and voter bribery witnessed during the by-elections⁵² in parts of the country have yet to be dealt with. According to a former commissioner at the IIEC, *there is very beautiful law in the country on elections ... the problem is obeying that law, implementing it and dealing with offenders.*⁵³ As pointed out earlier, there is need to improve on enforcement of the law in this respect.

Comprehensive, Accurate and Current Register of Voter

124. So far, the main hindrance to registration of voters is the pending judgement on the many cases in the High Court concerning disputes over the new constituency and ward boundaries. The IEBC sought to have all the cases consolidated and heard on an expedited basis to prevent delays that would undermine its preparations for the next General Election. There is also the issue of how Kenyans in the diaspora will be registered and vote and the issue of issuing Identity Cards (IDs) to the youth who are eligible to register as voters. With the General Election several months away, these are bothersome. There is need to put measures in place to ensure all eligible voters are registered because failure to do so would disenfranchise many people.
125. By end of May 2012, the final decisions in the procurement process for the electronic voter identification kits had not been communicated to the public. And given that

⁵⁰ Interviews with voters in Malindi North and Kajiado constituencies and views from deliberations by IEBC and stakeholders reviewing lessons learnt from the mock election, 15 May 2012

⁵¹ Interview with IEBC staff member, 19 April 2012

⁵² South Consulting's monitoring report of the Kitutu Masaba By-Election in November 2011

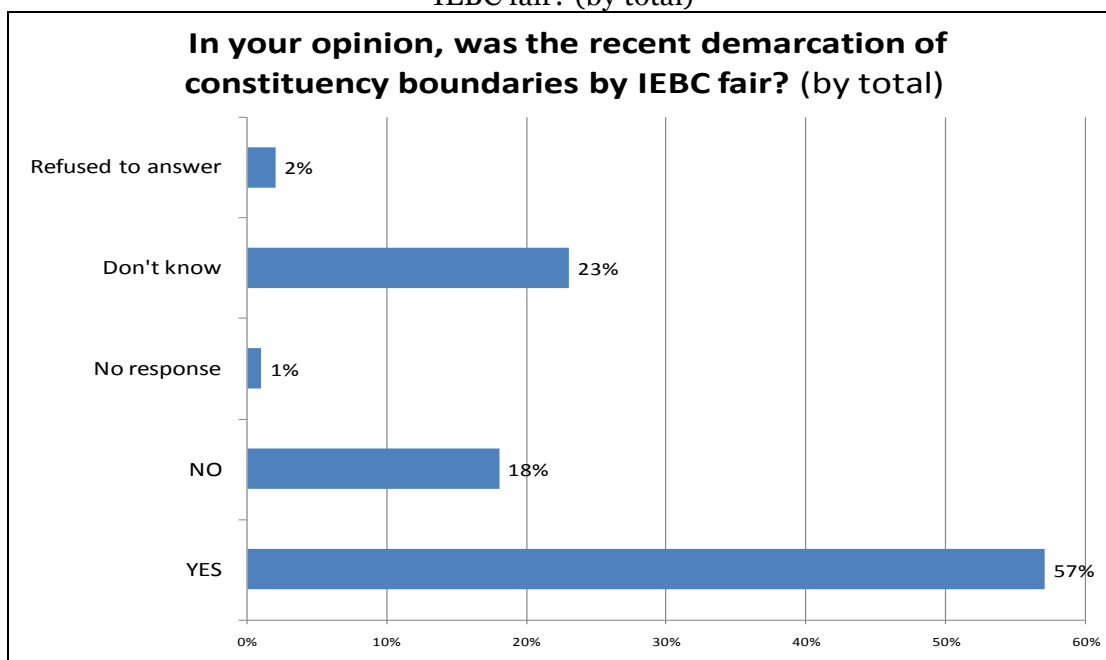
⁵³ Interview with a former commissioner of the Electoral Commission, 25 April 2012

procurement of such materials is always a contentious issue, it is important for the Commission to ensure that its decisions emerge from a transparent and credible process. This is one area that can diminish the trust and confidence in the IEBC if the process followed to make the final decisions is perceived as wanting or lacking transparency and credibility. Finalising the procurement decision well in advance is important so that voter registration can begin immediately the court gives direction on the disputes over boundaries, as discussed hereafter.

Transparent and Fair Demarcation of Constituencies

126. IEBC restarted the process of demarcation of constituencies and wards in January 2012 when it published its Preliminary Report based on a review of the report of the defunct Interim Independent Boundaries Review Commission (IIBRC) as required by the Fifth Schedule of the Independent Electoral and Boundaries Commission Act, 2011. It then conducted public consultations and considered written memoranda.
127. The IEBC submitted its Revised Preliminary Report to Parliament in accordance as required by law. Both reports elucidated the legal provisions relied on, the methodology adopted for the review, and the decisions made in regard to constituency and ward boundaries. Parliament considered the report and sent it back to IEBC with its own resolutions. IEBC considered these resolutions and made its final decisions before producing its final report.
128. People are generally happy with the IEBC's delimitation of boundaries. Up to 57 per cent of the survey respondents think the boundaries demarcation process was fair. A worrying 23 per cent claim not to know whether or not it was fair.

Figure 14: In your opinion, was the recent demarcation of constituency boundaries by IEBC fair? (by total)



129. The small number of respondents (18%) who think the process was not fair does not necessarily correspond to the number of disputes on the review of boundaries. Boundary review itself is a political issue. Boundaries for elective units are usually coterminous with the identity of groups, such as ethnic group, sub-ethnic or even clan clusters. Under Kenya's FPTP electoral system, such groups usually wish to have distinct representation. It is possible that there are individuals or groups that prefer to have electoral units comprising a bloc of loyal and homogenous supporters.⁵⁴

Accurate Counting, Transmission, Collation and Announcement of Result

130. According to IEBC, the mock elections enabled it to tailor its plans for the General Election to the prevailing circumstances on the ground. It will, therefore, make adjustments to its staff training and deployment plans to improve Election Day service delivery. However, given prior antecedents, there is still some cause for concern in this penultimate stage of the electoral process. Because of the small sample of polling stations involved in the mock elections relative to the intended number of voters in the General Election, a more reliable basis for planning may have to be established. IEBC has also not yet shown that it can establish a transparent audit trail for purposes of results verification, especially if the experience of the IIEC during the 2010 referendum is anything to go by.

Conclusion

131. The discussion has demonstrated that the IEBC has gained public trust and confidence. However, this trust and confidence will be tested in how the Commission undertakes some of its functions. The failure to enforce the law, and the Political Parties Act, 2011, in particular, can undermine confidence. Continued weaknesses in enforcement action in respect to electoral malpractice will undermine the trust and confidence that the Commission is enjoying. The recruitment of investigators and prosecution staff is meant to address this shortcoming.
132. It is also significant that the Commission is moving forward with its preparations for the next General Election, but the cases over election boundary disputes could affect these preparations. The behaviour of political parties also shows that they are not adequately prepared to contribute to a credible, free and fair election, yet they are critical role players in the process. Similarly important is the decision on procurement of the biometric voter registration kit. Delays in making decisions on this can affect the preparation for the elections. Putting in place a fool-proof system for counting votes and transmitting results should be completed early enough.
133. Finally, the IEBC enjoys high public trust and confidence. In this regard, the IEBC should safeguard the credibility and integrity of the Commission and the electoral process itself to secure a peaceful election.

⁵⁴ Interview with a policy analyst, 2 May 2012

4. **SETTLING ELECTORAL DISPUTES EFFICIENTLY AND EFFECTIVELY**

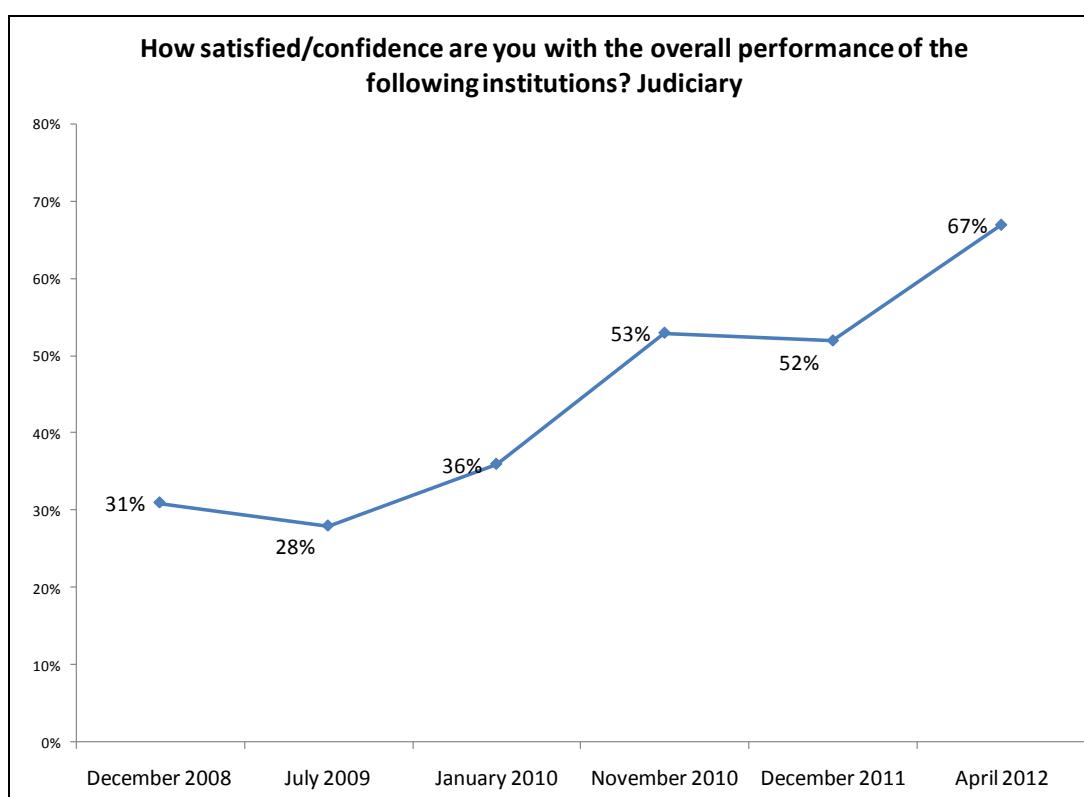
134. The review of the 2007 General Election pointed out that neither the electoral commission nor the police, or even the Judiciary enjoyed public trust at the time of conducting the elections. There had been no effective electoral dispute resolution mechanism. The manner in which the Judiciary handled election petitions led to a belief that it was difficult to serve and file an election petition against an incumbent official and have the issue expedited. Had there been trust in dispute resolution mechanisms, or even the Judiciary at the time, it is possible that unsatisfied players would have had faith in these institutions to arbitrate the dispute.
135. Establishing a credible, election dispute resolution machinery is an important gap that the IEBC should fill early in the preparatory stages. It should put in place an effective and impartial mechanism to manage pre- and post-election disputes.
136. It should be recognised that the election will be conducted under a coalition government that lacks cohesion and that is usually divided on important policy matters. Without unity of purpose, the two parties in the coalition will continue to disagree on important decisions depending on the political benefits that such a decision is seen to provide.
137. The importance of an effective electoral dispute resolution mechanism is recognized by the Constitution, which, at Article 87 (1), places the responsibility on Parliament to enact legislation for timely settlement of electoral disputes. The IEBC Act, at Section 4 (e), empowers the IEBC to be responsible for ‘the settlement of electoral disputes, including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to the declaration of election results.’ This provision is restated in Section 74 of the Elections Act, 2011, which empowers the IEBC to make regulations to ‘provide for complaints resolution mechanisms and for the manner of settlement of electoral disputes.’
138. The IEBC is yet to issue such guidelines but it is hoped that they can be released ahead of the General Election in order to enhance its standing as a methodical and neutral arbiter. Generally, and largely because of the on-going reforms in the Judiciary, most respondents in the survey think the Judiciary has the capacity to settle the electoral disputes fairly.
139. There are concerns relating to case flow management and the effects of the vetting of judges and magistrates. The number of judges and magistrates has not significantly increased. In addition, the vetting process is further reducing the number of judges both in the High Court and the Court of Appeal, which are the two courts with jurisdiction to hear election petitions. Considering that the elections will have many aspirants and contested seats than usual, it is expected that the petitions will also be numerous. This means that the Judicial Service Commission will need to consider a quick increase in the number of judges across the country. Parliament has already taken the significant first step by allocating an unprecedented Ksh16 billion to the



Judiciary⁵⁵. This should support key reforms ahead of the General Election.

140. The Chief Justice has established a Judiciary Working Committee on Election Preparations to create a training curriculum for judges and magistrates to prepare them to deal with election offences cases as well as disputes. The committee is also expected to suggest ways of organising the Judiciary to avoid the institution being swamped by election-related cases and disputes. On the whole, the Judiciary is aware of the need to make preparations for processing disputes emanating from the elections. Its level of preparedness is evident in some of the administrative reforms underway as well as pronouncements by the senior officials.
141. The Judiciary is itself enjoying high approval rating by Kenyans. Starting at a low of 31 per cent in 2008, the Judiciary today has about 67 per cent of Kenyans satisfied in its performance or confident about how it is undertaking its work.

Figure 15: How satisfied/confidence are you with the overall performance of the Judiciary



⁵⁵ "Judiciary pushes for more funding", The Standard, 25 April 2012

Adequate Electoral Dispute Resolution Laws

142. The Constitution did not create an Election Disputes Resolution Court as recommended by the Kriegler Commission, thereby raising the possibility of backlogs if case flow management is not radically transformed. The Judiciary has nonetheless moved to address this gap. The Chief Justice recently appointed a committee to advise the Judiciary on the handling of electoral disputes.

Effective Settlement of Pre-election Disputes

143. IEBC's dispute settlement ability remains untested. Surprisingly so is the capacity of the Political Parties Dispute, which aggrieved parties are avoiding in favour of the courts. Some of the parties argue that the Tribunal is under-resourced and they fear that it is not independent. They prefer the Judiciary.⁵⁶ The Judiciary, or some of the courts in which these matters are currently pending, will need to lay down administrative guidelines to encourage the use of the Tribunal as an important first port of call for litigants on political party matters. This is especially so in matters on which both the courts and the Tribunal apparently have concurrent jurisdiction. Already the Constitutional and Human Rights Division of the High Court has sent such cases back to the Tribunal.
144. However, some of these choices may also have to do with the fact that the Tribunal is still setting up systems and is reportedly under-funded. These quasi-judicial bodies are established and run with taxpayers' money and there is a public policy imperative for their use in the first instance, in addition to their potential to unclog the normal court systems.

Effective Judicial Settlement of Election Disputes

145. Effective judicial settlement of election disputes is the final bulwark for the realization of electoral justice. It is not useful for courts to function efficiently if litigants get quicker but manifestly unfair decisions. In addition to the substantive reforms to electoral law in regard to some of the historical problems associated with electoral petitions, such as the removal of the requirement for personal service, judicial officers' work will now be judged by the quality of their judgements. If there was any doubt about this, the Vetting of Judges and Magistrates Board has shown that this will be a key determinant for establishing judicial fairness, and hence effectiveness, in the dispensation of electoral justice.
146. The Board has renewed hope in the public that a clean-up of the Judiciary and a clean break with its sordid past is possible. As the Board commences its work with judges and magistrates, public expectations are high that it maintains its current quality of scrutiny. However, there are concerns about how long it will take to conclude the second and third phases of the vetting exercise – and the effects on the administration of justice. Even though the Judiciary came up with some strategies to minimize the number of cases that needed to be re-heard, the majority of them that were partly heard might have to start afresh. A long-drawn out process can also engender undue

⁵⁶ Interview with a political party official, May 31, 2012.

anxiety in the Judiciary, with deleterious effects on the dispensation of justice.

Conclusion

147. The discussion has pointed to the need to have a credible dispute resolution machinery to handle pre- and post-election disputes. The review shows that the framework for setting this machinery up is incomplete. The review also shows that political parties appear to avoid the Political Parties Tribunal; they prefer the courts to the Tribunal. In this regard, it is important that the courts defer to the Tribunal and the IEBC in the first instance, and only interfere in cases of manifest injustice.
148. The Judiciary is undergoing transformation and is, therefore, in its nascent phase. Yet, it is being overburdened with many cases that could be settled out of the courts. This is happening at the time when the capacity of the Judiciary is also stretched and likely to be stretched further after the conclusion of vetting for judges and magistrates. Given the important role the Judiciary will play in addressing some of the disputes over the elections, it is important to consider appointing a special bench of judges to hear and determine election related disputes from the time of nominations to a year after the elections in order to accord the petitions the priority that the law requires.

5. GENERAL CONCLUSION AND RECOMMENDATIONS

149. This review shows that progress has been accomplished in reforming Kenya's electoral framework. A new electoral body, the IEBC, is in place. The Commissioners were recruited through a competitive process that included applying for advertised posts and being interviewed. Parliament vetted the candidates before their final appointment. The electoral design also comprises new features.
150. The process for recruiting Commissioners was a break from the past where the Executive unilaterally appointed office holders. The new Commission enjoys high public trust and confidence, with as many as 80 per cent of the respondents saying they have confidence in the Commission and many are confident that the Commission will conduct free and fair elections. Indeed, the Commission has prepared a comprehensive work plan and is undertaking activities as per the work plan. However, one challenge facing the Commission is the issue of registration of voters. There are many cases filed against the Commission's decisions on the delimitation of boundaries and it cannot proceed before these cases are resolved.
151. Administratively, the IEBC is moving forward with its preparations to conduct the next elections but other critical role players such as the political parties are not. People's confidence in the political parties and the police is relatively low compared to their confidence in the IEBC and the Judiciary. Contributing to this is the failure by political parties to institutionalise. Leaders are flouting the political parties Act, 2011, without being penalised for their actions. There are allegations of political parties fraudulently recruiting members, but these are yet to be acted upon.
152. Lack of effective enforcement of the law is leading to perceptions of 'business as usual' in political practice. Politicians appear not to recognise the need to change in line with the new electoral laws. Unless the law is effectively enforced, Political Parties will not grow as institutions to contribute to the democratic governance of the country. They will remain weak, personalised, and ineffective agents of political change and social transformation.
153. The environment for the next General Election has witnessed instances of violations of basic freedoms and rights. The atmosphere is itself becoming divisive as politicians continue to mobilise along exclusive ethnic lines. The expected ICC trial of four Kenyans charged with crimes against humanity during the post-2007 election violence is also polarizing the country between those who support and those who oppose the ICC intervention. These divisions are feeding into the electoral environment through mobilization of political support, with polarising effects. Failure to successfully prosecute politicians charged with hate speech crimes is partly responsible for this tendency. The tendency is likely to continue if the IEBC and NCIC, among other players, do not investigate and demand prosecution of key players.
154. There is general uncertainty over the date of the next elections in view of the pending appeal in the courts. There are also many lawsuits relating to boundaries and electoral areas. This is in addition to absence of a decision on procurement of voter registration



technology. Regulations to govern operationalization of the relevant electoral laws are also yet to be published. These gaps are affecting preparations for the elections. There is thus need to speed up procurement of technology, as failure to do so will threaten the timely preparation of a new and more accurate register of voters.

155. Legal reforms on the electoral dispute resolution are yet to be finalised. As a result, many people are filing cases in the courts rather than with other bodies that have jurisdiction to hear such cases. For this reason, the Political Parties Tribunal remains under-utilised. This is already stretching the capacity of the Judiciary, which is likely to be affected by the on-going process to vet judges and magistrates.
156. Generally, a number of issues appear to hamper the electoral process. The IEBC should be encouraged to be vocal about the challenges that would prevent the Commission from effectively discharging its responsibilities. To address some of these challenges, it is suggested also that the IEBC initiates a process to establish a structured engagement with other important role players. A policy committee comprising the IEBC, the Judiciary, the Registrar of Political Parties, the office responsible for registration of persons, the Police and other role players should be established to review the state of electoral preparedness by each of them. This will ensure that the IEBC is fully aware about the gaps that exist in preparations for the elections and take the necessary measures in good time.
157. The campaigns for the next General Election appear to have begun in earnest, thereby closing the window for key reforms. Alongside this development are a number of issues that are competing for attention. The chapter on Kenya's post-election violence is yet to close. So are some of the critical reforms that the country should have finalised before the next General Election.
158. One consequence of these challenges is the absence of a clear organising theme for the next General Election. While all elections held since the 1992 period have had a central organizing theme, the next General Election's question is yet to be framed. Yet the theme for any General Election determines the type of leaders to elect and the reform programme for the government to be formed. Thus, in 2002, the theme was 'We want change'. Kenyans elected leaders they thought would foster change. In the 2007, competing themes, and in particular the theme of economic recovery versus political inclusion, caused general tension resulting in the violent conflict.
159. There are competing issues and, therefore, competing themes for the next General Election. The ICC trials of those indicted for crimes against humanity during the post-2007 election violence, the demand for effective implementation of the Constitution, consolidation of devolution, among others, are competing for attention as themes on which to build a platform for the next elections.
160. Building a credible and an all-galvanising theme around which campaigns should revolve is critical. Failure to ensure a credible theme or the main question around which to organize the next General Election will lead to the election of leaders on account of negative and parochial considerations. Such leaders will fail the country. This will also produce a poor agenda for the government that will be formed after the

election. To evolve a better reform programme for the next government, it is important to create a formidable reform message as a platform on which the next group of leaders will be elected in order to move the country forward.

Specific Recommendations

161. The following matrices are a summary of key challenges and recommendations on each of the priority areas.

Priority #1: Set a Conducive Context for a Successful and Democratic Electoral Process

Challenges	Recommendations
<ul style="list-style-type: none"> Continuing uncertainty and lack of clarity over gender quotas 	<ul style="list-style-type: none"> Hasten progress of the Constitution of Kenya (Amendment) Bill, 2011, through Parliament.
<ul style="list-style-type: none"> FPTP and the run-off system raises the possibility of a close zero-sum electoral contest with distortionary effects 	<ul style="list-style-type: none"> Strengthen early warning and response mechanisms. Conduct civic education on the electoral system, the run-off, and the electoral process.
<ul style="list-style-type: none"> Incomplete legal and administrative reforms 	<ul style="list-style-type: none"> Hasten the promulgation of regulations under the relevant laws. Speed up preparatory work on the Campaign Financing Bill. Strengthen the provisions of the Leadership and Integrity Bill in view of the Constitution's expectations of leaders. Speed up the hearing of lawsuits relating to the boundary demarcation process.
<ul style="list-style-type: none"> Ineffective media regulation and inequitable access to the media 	<ul style="list-style-type: none"> Conduct an audit of media ownership in Kenya. Promulgate equitable access regulations under the Elections Act, 2011 and enforce them.
<ul style="list-style-type: none"> Continuing violations of basic political freedoms 	<ul style="list-style-type: none"> Speed up police reforms in order to restore public trust in the political neutrality of the police.
<ul style="list-style-type: none"> Weak political parties and ineffective political party regulation 	<ul style="list-style-type: none"> Promulgate comprehensive regulations under the Political Parties Act, 2011. Acting Registrar of Political Parties should enforce s.14 of the Political Parties Act. Restart the process of appointing a substantive Registrar of Political Parties.
<ul style="list-style-type: none"> Weak early response mechanisms 	<ul style="list-style-type: none"> Improve coordination of early warning and response mechanisms under Uwiano Refine indicators for identification of violence hot spots. Improve field monitor presence in potential trouble-spots. The state should improve conflict mitigation measures and engage the groups that would threaten election security.
<ul style="list-style-type: none"> Inadequate facilitation of electoral observation 	<ul style="list-style-type: none"> Develop a Code of Conduct for Election Observers that includes adequate facilitation for electoral observation. Increase technical engagement with election observer groups and other stakeholders to build confidence in the electoral process and strengthen public participation in the electoral process.

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

Challenges	Recommendations
<ul style="list-style-type: none"> Uncertainty over the election date for the next elections in view of pending appeal 	<ul style="list-style-type: none"> Make contingency plans for an early election in the event that the Court of Appeal overturns the High Court judgment on the election date.
<ul style="list-style-type: none"> Continuing weakness of enforcement action in respect to electoral offences 	<ul style="list-style-type: none"> Coordinate with the Director of Public Prosecutions to pay adequate attention to electoral offences. Rapidly build the capacity of the election offence investigation and prosecution personnel upon their hiring.
<ul style="list-style-type: none"> Pending lawsuits relating to boundaries and electoral areas and difficulties in the procurement of technology threaten the timely preparation of a new, more accurate register of voters 	<ul style="list-style-type: none"> Expedited the hearing process of the over 120 cases. Speed up voter registration technology procurement and protect the integrity of the procurement process to forestall time-consuming litigation by dissatisfied vendors. If possible provide shape files to allow for independent verification of the constituency review exercise with GIS software.
<ul style="list-style-type: none"> Uncertainty over the ability of the EMB to put in place a fool-proof system for counting of votes and results transmission 	<ul style="list-style-type: none"> IEBC should provide full transparency on a web-based platform for elections results up to polling station level. Improve election planning and conduct further simulation given the shortcomings of the mock elections exercise.
<ul style="list-style-type: none"> Concerns over the recruitment and training of competent staff 	<ul style="list-style-type: none"> Recruit competent staff early and train them adequately for the effective conduct of a complex General Election.

Priority #3: Settle Electoral Disputes Efficiently and Effectively

Challenges	Recommendations
<ul style="list-style-type: none"> Incomplete legal reforms on electoral dispute resolution 	<ul style="list-style-type: none"> Finalize the making of rules under the applicable laws. Prioritize the finalization of pending post-2007 election petitions before the next General Elections. Provide the Judiciary Committee on Election Disputes with sufficient capacity to re-orient judicial settlement of election disputes.
<ul style="list-style-type: none"> Weak pre-election dispute handling capability in IEBC and the Political parties Tribunal 	<ul style="list-style-type: none"> Courts should defer to the Political Parties Disputes Tribunal and the IEBC dispute settlement system in the first instance and only interfere in cases of manifest injustice. Provide technical assistance to the new EMB on the settlement of pre-election disputes.
<ul style="list-style-type: none"> Uncertainty over the ability of the Judiciary to hear and determine election disputes efficiently and fairly 	<ul style="list-style-type: none"> Speed up the work of the Vetting of Judges and Magistrates Board to ensure timely completion of their task before the General Election. Consider appointing a special bench of judges to hear and determine election related disputes from the nominations period to a year after the elections in order to accord election petitions the priority that the law requires.

Annex #1: Summary of Election Preparedness Assessment

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

Electoral Indicators	Process	Sub-indicators (Kriegler, Waki Reports; Other Sources)	Progress	Deficits
1.1	Electoral system establishes a fair basis for electoral competition	<ul style="list-style-type: none"> Resolve the question of the electoral system as part of the constitutional reform process 	<ul style="list-style-type: none"> An inclusive electoral system with better affirmative action for marginalised groups Principles for elections stated in the Constitution 	<ul style="list-style-type: none"> Entrenches winner-take-all politics Uncertainty over the manner of achieving 'not more than 2/3' gender representation. Ambiguity on the value and weight of each vote expected to be resolved after the boundaries delimitation process is completed.
1.2	Electoral laws effectively establish an environment and procedures for periodic and genuine elections	<ul style="list-style-type: none"> Strengthen and consolidate laws relating to the process of conducting elections Guarantee voting by universal suffrage and secret ballot without discrimination Set the electoral date in law Enact substantive laws prohibiting hate speech Bar the use of public servants, as well as public finances and materials, in elections 	<ul style="list-style-type: none"> Constitution provides for periodic elections Legal framework guarantees inclusivity and participation Electoral rights entrenched in Bill of Rights Integrity, accuracy and transparency requirements in the Constitution <ul style="list-style-type: none"> Political Parties' Act, 2011, has come into force. Elections Act, 2011, has come into force. Campaign Financing Bill, 2011, is undergoing stakeholder input. Leadership and Integrity Bill is undergoing discussion to benefit from stakeholder input. IEBC setting up an office to address electoral offences 	<ul style="list-style-type: none"> Campaign Financing Bill is yet to be finalised – still undergoing public scrutiny and discussion Ambiguity in a) elections date b) how to realise the gender principle Less stringent provisions on party hopping Enforcement of Political Parties Act is weak. Ambiguity in enforcing Chapter 6 regarding elective positions Election guidelines have not been released by IEBC
1.3	Laws and practices effectively regulate the media and guarantee equitable access to the media	<ul style="list-style-type: none"> Media ownership is effectively regulated by the state Guarantee free and equitable access to the media Media Council should oversee the conduct of 	<ul style="list-style-type: none"> Law on equitable access to media not in place CCK is impartial IEBC has issued media guidelines for coverage of elections Some media houses have 	<ul style="list-style-type: none"> Media ownership is unregulated – is it a question of a) control by one mogul, b) access by others of contrary view? From owners - accountability Media council is weak though statutory Media laws do not take into account

Electoral Indicators	Process	Sub-indicators (Kriegler, Waki Reports; Other Sources)	Progress	Deficits
		<ul style="list-style-type: none"> the media and enforce its Code of Conduct Develop a media and elections policy and promote responsible election reporting There should be full disclosure on a regular basis of the actual owners of media 	<p>published guidelines for political advertising</p> <ul style="list-style-type: none"> Media Bill, 2012, being drafted Interim Communication Commission of Kenya Bill, 2012, is undergoing stakeholder input Freedom of Information Bill is with CIC Data Protection Bill, 2012, is with CIC. 	<p>social media, Internet, etc.</p> <ul style="list-style-type: none"> Equity and access to state media is not guaranteed Ineffective regulation of FM stations. Difficult to monitor social media, blogs, list serves, etc.
1.4	Laws and practices guarantee freedom of assembly	<ul style="list-style-type: none"> Guarantee the freedom of assembly 	<ul style="list-style-type: none"> Constitution guarantees freedom of assembly Independent candidates Justiciable freedoms 	<ul style="list-style-type: none"> Arbitrary abuse of freedom of assembly – it is not fully respected a) by zoning (party) b) by security forces c) by communities
1.5	Laws and practices guarantee freedom of organization and association	<ul style="list-style-type: none"> Guarantee the freedom of organisation and association 	<ul style="list-style-type: none"> Freedom of association is guaranteed 	<ul style="list-style-type: none"> There are restrictions on this right, e.g., registering a political party “Freedom of expression versus freedom after expression” (Munir Mohammed) Self-censorship, “spiral of silence” Constraints on freedom of organisation:- a) infiltration by security forces, b) space for organising “social environment” c) unpopular ideas Resurgence of illegal groups
1.6	Laws and practices guarantee free electoral participation	<ul style="list-style-type: none"> Guarantee the right to electoral participation 	<ul style="list-style-type: none"> Effective purposeful participation still wanting Guaranteed in the political rights 	<ul style="list-style-type: none"> Bribery, violence, inhibitive cultural practices hinder free electoral participation Weak law enforcement
1.7	Citizens have adequate civic and voter education	<ul style="list-style-type: none"> Provide adequate civic and voter education 	<ul style="list-style-type: none"> Voter education is guaranteed in constitution <ul style="list-style-type: none"> Civic education by IEBC Kenya National Integrated Civic Education (K-NICE) has been set up Uraia CSOs have rolled out their civic education 	<ul style="list-style-type: none"> Limited civic and voter education No legal framework to guide civic education Civic education is unregulated, is not focused Voter information being confused with civic education

Electoral Indicators	Process	Sub-indicators (Kriegler, Waki Reports; Other Sources)	Progress	Deficits
			<p>programmes</p> <ul style="list-style-type: none"> Voter and civic education curriculum has been drafted 	
1.8 Donor support for the democratic process is effectively coordinated		<ul style="list-style-type: none"> Effectively coordinate donor support for the democratic process 	<ul style="list-style-type: none"> Better/fairly coordinated donor effort Efforts to form thematic sub-groups to facilitate coordination between donor and with civil society and EMB 	<ul style="list-style-type: none"> Donor support not timely. Donors not making adequate resources available in good time Donors “force” groups to work in coalitions/basket funding (KEDOF) cf. E-LOG Donors cherry picking initiatives Knowledge transfer? Limited institutional memory Still seeing elections as an event
1.9 Political parties are responsible actors in the electoral process		<ul style="list-style-type: none"> Improve the management and regulation of political parties Effectively regulate political financing and expenditure 	<ul style="list-style-type: none"> Efforts to strengthen the office of Registrar of Political Parties both from a legal framework and capacity building aspect Political Parties Act, 2011, being implemented Political parties are complying with the Act Campaign Financing Bill undergoing stakeholder review 	<ul style="list-style-type: none"> Office of Registrar of Political Parties is not yet reconstituted. Office of registrar has capacity and structural challenges Political parties controlled by elites and power brokers, individuals Sections in Political Parties Act that targeted irresponsible behaviour are watered down Oversight/enforcement on political parties is weak Parties have not evolved a democratic culture Weak membership base Disconnect between political parties and public Internal governance of political parties is weak Campaign Financing Bill yet to be passed to regulate campaign funding for political parties. Lack of awareness/knowledge by political parties and citizens on the provisions of the Political Parties Act. Unregulated party funding Political party institutionalisation not instantaneous – will take time
1.10 Mechanisms exist for early warning, early response and mitigation of election-related violence		<ul style="list-style-type: none"> Strengthen conflict early warning of election-related violence. Put in place measures for early response to election-related violence. Institute mitigation measures against election-related violence 	<ul style="list-style-type: none"> Some mechanisms for early warning are in place (e.g. Uwiano, NSIS) NCIC creating awareness on peace, national cohesion (Kenya Kwanza campaign) Civil society and private sector creating awareness on need for peace. NCIC and CSOs have mapped violence hotspots Mechanisms for concerted early warning and conflict 	<ul style="list-style-type: none"> Enforcement mechanisms lacking /weak Limited access to early warning system Threats of violence in some counties Efforts by different actors in creating awareness for peace are largely uncoordinated. Inadequate rapid response mechanisms

Electoral Indicators	Process	Sub-indicators (Kriegler, Waki Reports; Other Sources)	Progress	Deficits
			resolution reactivated, e.g., District peace committees	
1.11 Observers have access to all aspects of the entire electoral process.		<ul style="list-style-type: none"> Establish and enforce a Code of Conduct for election observers Establish a permanent election observation group comprising diverse CSO interests Provide observers with access to the tallying process and provide copies of statutory returns to observers. 	<ul style="list-style-type: none"> Elections Observation Group (ELOG) is working. Access for participation is open Preparation by IEBC to facilitate observers is ongoing Political parties processes are open for observation Observers have access to information on elections Strengthened enabling legislation for observation. Code of conduct is in place 	<ul style="list-style-type: none"> Need to strengthen broad, concerted and long term observation Infighting and lack of capacity (knowledge and resources) by CSOs Facilitation needs to take place for comprehensive observation to take place Professionalisation lacking

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

Electoral Indicators	Process	Sub-indicators (Kriegler, Waki Reports; Other Sources)	Progress	Deficits
1.12 The legal and institutional framework for the Electoral Commission is adequate		<ul style="list-style-type: none"> Strengthen the legal and institutional framework for the Electoral Commission Reduce the maximum number of commissioners and improve appointment process Reorganise the expiry of terms of commissioners to ensure at least two years' experience before every election Institute commission-management separation of roles IEBC's functions should include advising the government on electoral law reform 	<ul style="list-style-type: none"> Fairly good laws are in place A lean IEBC established with Commissioners competitively hired and publicly vetted IEBC commissioners have assumed office and are working. IEBC has published final report on delimitation of boundaries (though it has been contested) 	<ul style="list-style-type: none"> Lack of consensus on scheduling elections Institution framework is in a state of flux (the old is dying and the new is yet to be born) Over 100 petitions on boundary delimitation in court; might delay voter registration.
1.13 The Electoral Commission exercises effective control of the electoral process		<ul style="list-style-type: none"> Provide the Electoral Commission with effective control over the electoral process Establish a political parties liaison committee and agree on fairer nomination rules No political parties should be registered once Parliament has been dissolved 	<ul style="list-style-type: none"> IEBC so far has inspired public confidence. IEBC inherited IIEC staff and some commissioners, which should improve institutional memory. IEBC has released to the public a calendar of events culminating in the elections IEBC announced election date (4 March 2013) 	<ul style="list-style-type: none"> Inability to enforce the law, e.g., on voter bribery, etc. No consensus on election date as announced by IEBC

Electoral Indicators	Process	Sub-indicators (Kriegler, Waki Reports; Other Sources)	Progress	Deficits
		<ul style="list-style-type: none"> Specifically define the campaign period and enforce the Electoral Code of Conduct 		
1.14 The Electoral Commission is perceived as independent, fair, competent and impartial		<ul style="list-style-type: none"> Make Electoral Commission accountable to Parliament and financially independent Review Electoral Commission's administrative procedures to improve certainty and uniformity of performance Review Electoral Commission's overall training/briefing procedures Establish clear lines of accountability for service delivery for commissioners and staff Rationalise the Electoral Commission's structure for efficient and effective operations Establish a performance management system for the Electoral Commission Appoint a Commission Secretary who is a competent and experienced election manager Improve public confidence in the Electoral Commission and the electoral process 	<ul style="list-style-type: none"> IEBC widely perceived as independent, professional and non-partial IEBC enjoys financial independence. IEBC Commissioners publicly vetted by Parliament. Internal reorganisation/ recruitment s of IEBC staff is ongoing IEBC accountable to Parliament 	<ul style="list-style-type: none"> Verbal attacks by politicians may erode public confidence on IEBC. Old enforcement issues still virtually unaddressed (voter bribery still rampant) – soft underbelly IEBC decisions become easily politicised
1.15 The register of voters is comprehensive, accurate, and current		<ul style="list-style-type: none"> Simplify requirements for registration and voting Revise the voters' register, avail it for scrutiny and address registration bottlenecks 	<ul style="list-style-type: none"> Preparations being made for electronic voter registration in all constituencies Issuance of IDs back on track; government to expedite the process New laws on citizenship and immigration have been passed. Measures are being made to have the Diaspora vote 	<ul style="list-style-type: none"> Potential electors don't have IDs Challenges on citizenship documents Legal framework on registering Diaspora lacking (concerns rigging, which election do they vote in?) Voter registration yet to begin Central registry of persons lacking; Disconnect between registration regimes
1.16 The demarcation of constituencies is transparent and fair		<ul style="list-style-type: none"> Establish and implement a fairer, more transparent system of demarcating constituencies 	<ul style="list-style-type: none"> The constitution principles on demarcation are clear Boundaries review is complete and final report published. 	<ul style="list-style-type: none"> Public debate on boundaries delimitation clouded by ethnic, political and sectoral undertones. Judiciary might not have enough capacity to settle the many boundary review petitions Limited time (90 days) given for

Electoral Indicators	Process	Sub-indicators (Kriegler, Waki Reports; Other Sources)	Progress	Deficits
				<ul style="list-style-type: none"> determining the petitions Delay in determining petitions may delay voter registration
1.17 Counting, transmission, collation and announcement of election results is fraud-free		<ul style="list-style-type: none"> Align job skills and qualifications to a modern, IT-facilitated electoral process Improve the counting, transmission, collation and announcement of election results Publish results up to polling station level to improve transparency Improve procedures for safe storage of election materials pending post-election analysis and dispute resolution Introduce a reasonable transition period between elections and swearing in 	<ul style="list-style-type: none"> Election Act has been enacted IEBC experience on same evident Human resource capacity is there Election results transmission system working relatively well IEBC regularly reshuffles regional staff to improve professionalism IEBC conducted mock elections in Kajiado and Malindi constituencies 	<ul style="list-style-type: none"> Staff selection perceptions (might lower credibility) Threat of disruption, e.g., MRC in the Coast Province

Priority #3: Settle Electoral Disputes Efficiently and Effectively

Electoral Indicators	Process	Sub-indicators (Kriegler, Waki Reports; Other Sources)	Progress	Deficits
1.18 Election dispute resolution laws are adequate		<ul style="list-style-type: none"> Enact a law to cater for comprehensive electoral dispute resolution by the Electoral Commission and an Electoral Dispute Resolution Court Replace current election petition laws with new laws that ensure petitions are heard in a just and timely manner Institutionalise the practice of post-election audits and evaluations to improve practice 	<ul style="list-style-type: none"> The Constitution and Election Act spell out the duration within which election petitions must be finalised. Judiciary reforms are on-going. Supreme Court is working – to handle presidential election petitions JSC has increased the number of judges in the High Court and Court of Appeal 	<ul style="list-style-type: none"> Dispute resolution is not tested. Capacity concerns about the Judiciary's ability to handle a high number of petitions after elections
1.19 The Electoral Commission settles pre-election disputes effectively		<ul style="list-style-type: none"> Institute some prior adjudication and settlement by the Electoral Commission Manage pre-election conflict triggers effectively 	<ul style="list-style-type: none"> Political Parties Dispute Tribunal has been established and working - some cases have been settled. Elections and political parties laws have been enacted. 	<ul style="list-style-type: none"> Concurrent jurisdiction (with Judiciary) may still bring problems Office of Registrar of Political Parties yet to be reconstituted Political Parties Dispute Tribunal facing funding and staffing challenges
1.20 The judiciary is an efficient, effective and trusted arbiter		<ul style="list-style-type: none"> Establish a culture of settling electoral disputes efficiently and 	<ul style="list-style-type: none"> Vetting of Judges and Magistrates has started New crop of judicial officers 	<ul style="list-style-type: none"> Vetting of judges and magistrates is not public – it might not achieve intended impact of restoring public

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of pre-election and post-election disputes		satisfactorily	appointed <ul style="list-style-type: none"> • Increase in number of judicial officers • Perceived independence • Independent Chief Justice • Credible Judicial Service Commission constitutionally entrenched • Transparent recruitment process for judges • Prosecutors are being increased • Criminal prosecutions to be handled by state counsel 	trust and confidence in judiciary. <ul style="list-style-type: none"> • Vetting of judges & magistrates may portend a new challenge of manpower, technical expertise institutional memory in Judiciary • Slow pace of computerisation • Slow progress in police reforms • Investigations likely to remain weak • Capacity: Need for judicial officers' continued training to be knowledgeable on the Constitution and elections • Role of the Bar in judicial reforms still undetermined