

PROTECTING ELECTIONS: THE CASE OF KENYA

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INTRODUCTION

This case study examines how reforms of the electoral, legal and institutional framework in Kenya and constitutional amendments in 2010 have influenced electoral integrity in subsequent electoral cycles. Strategies to prevent electoral risks, withstand threats, and recover from crises are presented with case examples. The role of the Independent Electoral and Boundaries Commission (IEBC) and the judiciary in the protection of elections is discussed. The lessons learned from this case study demonstrate that the protection of electoral integrity in Kenya is complex and dynamic, and requires a multi-faceted approach.

BACKGROUND

Electoral integrity in Kenya has historically been shaped by constitutional amendments, political intrigues between politicians and political parties, and a culture of disputed presidential election results. Kenya's electoral history can be divided into three phases: immediate post-independence (1963) to the 1980s; the 1990s, characterized by agitation for electoral reforms; and the post-2010 Constitution period.

The period immediately after independence experienced political party intrigues as the pre-independence politicians tried to position themselves in the new state. The first election in 1963 was conducted under multipartyism with the Kenya African National Union (KANU) and Kenya African Democratic Union (KADU) contesting (Kenya Gazette 1963). In 1964, KADU dissolved itself

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to join the ruling KANU party, making Kenya a de facto one-party state. In 1966, radical KANU members formed the Kenya People's Union (KPU) to challenge KANU's dominance, but the party was banned in 1969 prior to the 1969 election (I. O. Otieno 2016; Willis et al. 2021).

This left KANU as the only party fielding candidates for the election. A failed coup d'état in 1982 led to a constitutional amendment repealing section 2A of the Constitution making Kenya a de jure one-party state (Constitutional Amendment No. 7 of 1982). It was during this period that the infamous *Mlolongo* voting system (Kiswahili word meaning a queue) was implemented, which removed ballot secrecy despite opposition from stakeholders (ICJ 1997). Voters queued behind the photo of their preferred candidate.

The absence of electoral integrity during the 1980s clearly stemmed from constitutional amendments and political power plays aimed at reducing the political space and limiting freedom of association.

The opposition accused the president of planning to rig the 2007 election and, predictably, the results of the presidential election were disputed.

The 1990s were characterized by agitation for a multiparty system and the expansion of political space. As a result, Constitutional Amendment No. 12 of 1991 repealed section 2A of the Constitution and reintroduced multipartyism. Further, the 1991 bipartisan Inter-Parties Parliamentary Group (IPPG) between the ruling KANU party and the opposition led to a mutually agreed electoral management body (EMB) (Parliament of Kenya 1997). The IPPG accord was later disregarded in the appointment of commissioners for the 2007 election (DFID n.d.; VOA 2009). The opposition accused the president of planning to rig the 2007 election and, predictably, the results of the presidential election were disputed. This led to protests and violence that left a trail of death, displacement, massive destruction of property and sexual and gender-based violence (SGBV). The latter included gang rapes (Wanyeki 2008) and forced circumcisions of males from communities that do not culturally practice circumcision (Kihato 2015). The Electoral Commission of Kenya (ECK) was flagged as having presided over a flawed electoral process (IREC 2008). In 2008, parliament amended section 41 of the Constitution, disbanded the ECK and created the Interim Independent Electoral Commission (IIEC). The IIEC had the huge task of restoring public trust in an electoral system that had broken down (Hassan 2023).

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Electoral system

Elections in Kenya have largely been managed by EMBs that are executive-driven. The Constitution of Kenya 2010 changed this by establishing, under articles 88 and 248, the Independent Electoral and Boundaries Commission (IEBC) to conduct or supervise referendums and elections to any elective body. Under article 89, the IEBC is responsible for delimiting constituency and ward boundaries. In a groundbreaking move towards correcting the historical marginalization of women in elective positions, the Constitution also introduced a gender quota (under article 81 (b)). In 2017, 23 women were elected out of 290 elected members to the National Assembly through the single-member constituency. In 2022, this number increased to 30. In the Senate, out of 47 senators only 3 women were elected; this number increased

to 7 in 2022. Out of the 47 governors only 3 were women in 2017; the number rose to 7 in 2022 (IEBC 2022a).

In Kenya, the electoral system combines the majoritarian first-past-the-post (FPTP) in single-member constituencies with an element of proportional representation (PR). FPTP is used for elections of the president, 290 members of the National Assembly, 47 county members of the National Assembly and 47 members of the Senate. The president must win 50+1 per cent of all valid votes cast, as well as at least 25 per cent of the votes cast in at least 24 counties. At the county level, FPTP is applied in the election of 47 governors and 1,450 county ward representatives. PR is used in the National Assembly for nomination of 12 members (by political parties) to represent youth and persons with disabilities, in accordance with article 97 (c) of the Constitution. In the senate, PR is used for nomination of women, youth, and persons with disabilities (Kenya 2010: article 98) while at the county assembly PR is only applied to cater for the representation of all genders.

Electoral justice is an important pillar to protect the integrity of elections and democracy. Chapter 10 of the 2010 Constitution establishes an independent judiciary which among other functions provides electoral dispute resolution. Under article 88 (4), the IEBC settles disputes relating to or arising from nominations but excludes petitions and disputes after the declaration of election results. However, this does not stop an aggrieved party from using the court process.

PREVENTION OF ELECTORAL RISKS

In Kenya, risk management is a legal requirement on public institutions. Articles 10, 201 and 232 of the Constitution recognize the importance of accountability to good governance. The Public Finance Management Act and the Public Finance Management (National Government) Regulations (Kenya 2012; Kenya 2015) require accounting officers of all public institutions to establish and maintain appropriate systems of risk oversight and management. These legal requirements provide a business approach to risk management; application in an electoral environment requires the IEBC to customize them to suit its functions, as described below.

A regulatory and collaborative approach

The IEBC's approach to preventing risks to the integrity of elections is threefold. This relates to (a) discharging its constitutional regulatory mandate; (b) building infrastructure to prevent risks from materializing; and (c) collaborating with other institutions whose mandates promote electoral integrity.

The Constitution mandates the IEBC to monitor and regulate processes by which political parties nominate candidates; settle disputes arising from nominations; regulate the amount of money that may be spent by or on behalf

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of a candidate or party in respect of any election; develop a code of conduct for candidates and parties contesting elections; and monitor compliance in relation to the nomination of candidates (Kenya 2010: article 88 (4)). The IEBC also monitors compliance with constitutional provisions on leadership and integrity (chapter six), as well as other qualifications required for the different elective positions. While the IEBC can enforce some of these provisions alone, others require collaboration with partner institutions. For instance, upholding compliance with chapter six requires collaboration with the Ethics and Anti-Corruption Commission (EACC) to establish if aspirants for elective positions meet the educational, moral and ethical requirements set for them (IEBC 2022a).

Similarly, article 88 (4)(i) requires the IEBC to regulate the amount of money that may be spent by a candidate or party in respect to any election. While the Election Campaign Financing Act (Kenya 2013) is in place, the IEBC could not enforce the provisions of the Act during the 2022 general election as it depended on parliament putting in place the necessary regulations which had not been done (IEBC 2022a). These two examples show the interdependence of the different players in preventing risks to electoral integrity.

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The gains of institutional collaboration are exemplified by the Election Security Arrangement Programme (ESAP), a multi-agency partnership led by the IEBC. Other actors in ESAP include the National Police Service, judiciary, Office of the Director of Public Prosecution (ODPP), National Cohesion and Integration Commission (NCIC), Independent Police Oversight Authority (IPOA), National Steering Committee on Peacebuilding and Conflict Management, Office of the Registrar of Political Parties (ORPP), human rights organizations and media outlets. The programme was executed through a joint committee at different levels creating a seamless approach to electoral security. Although at the time of writing the evaluation of ESAP is not complete, the IEBC's post-election evaluation report of the 2022 general election documented the gains made through the programme. Most notable was the enhanced coordination of electoral security efforts towards an election free of violence. However, one gap in ESAP's approach is that it did not include a specific initiative focusing on preventing violence against women, given that SGBV remains a challenge to integrity at various stages of the electoral cycle (IEBC 2018, 2022a).

Another successful example of collaborative efforts to protect electoral integrity was the 2011 joint pilot of the Election Risk Management Tool (ERMT) between IEBC and International IDEA. The project strengthened the capacity of the IEBC's elections managers, administrators and partners using a variety of innovative learning content and approaches in conducting fair and credible elections (IEBC 2013). The ERMT enhanced understanding of existing electoral violence early warning systems and promoted data collection, analysis and dissemination by the IEBC and other stakeholders (Asplund and Matatu 2016) in the process of preventing or minimizing occurrences.

Internal institutional approach

The IEBC's internal approach to preventing electoral risks is through the development of governance structures, policy frameworks and staff capacity.

Risk management framework

To customize and institutionalize the risk management requirements of the Public Finance Management Act 2012, the IEBC developed a risk management framework that is aligned to its constitutional mandate. The policy statement outlines the organization's commitment to manage risks and its responsibility for the maintenance of an effective and transparent system for doing so (IEBC 2020b). Monitoring and evaluation are embedded in the framework to get feedback internally and from external stakeholders (Lomoywara 2023). This ensures continuous learning and a focus on emerging risks. However, a gender sensitive approach in the framework is notably lacking considering the high risk of election-related SGBV, faced especially by women candidates.

Risk management governance structure

The IEBC risk governance structure comprises several committees: the Board Risk Management Committee, at the policy level; the Audit and Risk Committee, which is independent and reports to the board; the Commission Secretary/Chief Executive Officer (CEO); and Risk Management Committees at the headquarters and counties. The risk owners are the CEO, directors, and county election managers. The committees take the lead and bear responsibility, but all IEBC staff are expected to take personal responsibility by adhering to the risk management policy and procedures. The post-election evaluation of the 9 August 2022 general election revealed that the 'risk management structure adopted by the commission allowed for the systematic identification, analysis, and mitigation of risks' (IEBC 2022a: 102).

To ensure that risks are addressed in a timely and appropriate manner, risk management is a standing agenda in all management meetings. Any matter, concept paper or report tabled for discussion and approval in management and the board must include a risk analysis matrix (Marjan 2023). To ensure inclusivity, effort is made to apply the provisions in the IEBC gender and social inclusivity policy in matters presented for discussion (IEBC 2019).

At the IEBC, risks that materialize into a threat or crisis are handled at the management level and at a higher level by the Audit and Risk Committee. Depending on their severity, the electoral challenges are escalated to the board. In terms of gender, at the time of writing there are only 2 women out of 12 senior management staff and only 1 woman on the 5-member Audit and Risk Committee.

Risk champions and training

Data collection, analysis and reporting is an important component in risk prevention. Every electoral cycle, the IEBC's CEO appoints risk champions among the staff of the commission who lead on these tasks. For the 2022 election cycle, a total of 55 risk champions were appointed, of whom 14 were women. As of September 2022, the total number of permanent staff was

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902; 326 female and 576 male. The IEBC gender and social inclusion policy is clear on the institutionalized inclusion of women and marginalized groups in all internal affairs of the commission (IEBC 2019). However, implementation of the policy is being carried out progressively (Onyango 2023). The risk champions are responsible for coordinating risk identification, analysis, evaluation, reporting, and updating the risk register. Risk identification is a consultative process that involves data collection from constituencies, counties and headquarters departments. Through collaboration, the IEBC also receives data from institutions whose mandate includes some aspects of elections. These risks can be communicated directly to the headquarters or through county and constituency offices.

Training is an integral part of risk management in the IEBC. The risk management department coordinates the cascaded training which is delivered by a core team drawn from the IEBC and other institutions (such as the National Police Service, NCIC, ODPP and the judiciary). Resources are a constraint, but more are made available in election years and training is accordingly intensified. In the 2021/2022 financial year, 56 members of staff were trained (IEBC 2022b). To promote continuous learning the IEBC envisages progressive training of all the permanent staff on risk management, awareness and prevention (Marjan 2023; Akeyo 2023). Social inclusion is an aspect of training content that needs to be further addressed (Akeyo 2023).

Institutional risk registers

To keep abreast of emerging risks to electoral integrity at any point in the cycle, maintenance of an up-to-date risk register at the county, directorate and corporate level is a measure that the IEBC continues to observe. The risk owners are responsible for taking action to prevent, minimize or escalate the risks to the next level if beyond their capacity. Any risk that is beyond the IEBC's mandate is communicated to the relevant (risk-owning) institution—by the chairperson if it requires policy intervention, or by the CEO if it is operational.

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RISK PREVENTION AND THE 2022 GENERAL ELECTION

The IEBC used the lessons learned from previous electoral cycles to identify risks likely to occur during the 2022 general election. Those rated as high included: legal, operational, financial, health, election-related violence and technological risks, and risks connected to the information environment (IEBC 2020a, 2021). Measures undertaken to prevent or minimize occurrence of the identified risks are presented below.

Legal risks

Based on the legal gaps identified in the 2017 post-election evaluation and the nullification of the 2017 presidential elections (see section on nullification of the 2017 presidential election), the IEBC drafted amendments to address the gaps as a preventive measure. The amendments were: the Election Campaign Financing (Amendment) Bill 2019, the Independent Electoral and Boundaries

Commission (Amendment) Bill and the draft Electoral Campaign Financing Regulations, 2019. None of these bills were passed by parliament (IEBC 2022a). The 2022 elections were therefore conducted with the same gaps as identified in 2017, notably lack of effective campaign finance regulation. The latter disadvantages marginalized groups such as women, youth and people with disabilities, as was noted by the EU's election observer mission (EU EOM 2022).

Operational and financial risks

Over the years and as evident in the post-election evaluation reports of the 2013, 2017 and 2022 general elections, inadequate funding, and late disbursement of funding not in tandem with the electoral cycle, is a perennial challenge. This 'exposes the commission to risks relating to non-compliance with constitutionally set electoral timelines, procurement laws and inadequate time to test technologies' (IEBC 2022a: xiii). The African Union–COMESA (Common Market for Eastern and Southern Africa) election observation mission noted the effect of inadequate funding on key electoral activities (AU–COMESA 2022). To reduce the risk of late procurement and high prices, the IEBC adopted a three-year framework contracts to procure goods and services for the general election under conditions specified in section 114 of the Public Procurement and Assets Disposal Act, 2015 (IEBC 2022a). The establishment of framework contracts—which determine an agreed rate of pricing over a specified time period—created some level of stability.

Technological risks

Section 44 of the Elections Act (Kenya 2011) stipulates that the IEBC may use such technology as it considers appropriate in the electoral process. Additionally, section 39 (1C) (a) compels the IEBC to transmit results of the presidential election electronically. To adhere to the legal provisions, prevent fraud and safeguard public trust in the election process, the IEBC has progressively introduced electoral technologies in voter registration and identification, candidate registration and transmission of presidential election results, as mentioned (Njeru 2023). However, malfunction of ICT systems and equipment remains a high risk, as shown by risk assessment for the 2022 general election (IEBC 2021) and experiences of the 2013 and 2017 general elections (IEBC 2018; EU EOM 2018; AU EOM 2019).

To mitigate this risk, the IEBC developed and approved an ICT policy and procedures manual to guide the use of technology in the electoral process and undertook maintenance and testing of ICT equipment used in 2022. Roving ICT support teams were deployed in each constituency to deal with unforeseen risks that could occur on polling day and to offer support to presiding officers.

Information environment

Misinformation and disinformation are common in highly contested elections. If unchecked, they can lead to electoral-related violence, intimidation, and other unfair practices that threaten the integrity of elections. Disinformation, especially during campaigns, can discourage women from political participation (Trabelsi 2022). To minimize disinformation during the 2022

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general election, the IEBC signed a memorandum of understanding (MoU) with the Kenya Media Working Group which comprises the Media Council, Kenya Editors Guild and the Kenya Union of Journalists (Gachuhi 2022; IEBC 2022c). The MoU covered capacity building; enhancement of factual, credible, and verifiable information; promoting media access to electoral activities, including polling stations and tallying centres; and provision of a portal for the media to access election results in real time (AU–COMESA 2022).

The other notable measure was the establishment of a National Election Communication Centre (NECC) in the national tallying centre at the Bomas of Kenya, a cultural complex in Nairobi. The NECC had three units, namely an Operations Support Unit, a Public Support Unit and a Media Monitoring Unit (IEBC 2022a: 85). The structure contributed to the real-time flow of electoral information to electoral officials and the public throughout the country and provided an opportunity to counter false information, especially on social media platforms (Abdi 2023). The AU–COMESA report of the 2022 general elections noted improvement in the IEBC’s strategic communication.

RESILIENCE AND RECOVERY

Risks that have materialized; stresses and shocks

Elections in Kenya have historically faced risks with the potential to impact negatively on the integrity of electoral processes. The four examples presented in this section show IEBC resilience to stresses and shocks by drawing from its experience, asserting its independence, and collaborating with institutions with a mandate to protect the integrity of elections.

In order to build resilience to electoral fraud, in 2017 the IEBC introduced a Kenya Integrated Electoral Management System (KIEMS) for voter verification, voter ID and transmission of results.

Judicial rulings made too late in the electoral schedule

In order to build resilience to electoral fraud, in 2017 the IEBC introduced a Kenya Integrated Elections Management System (KIEMS) for voter verification, voter ID and transmission of results. In 2022, the IEBC declared that voters would only be identified using biometrics. A legal challenge to this directive was mounted by the AZIMIO la Umoja–One Kenya Alliance, 23 parties which had registered as a coalition for the 2022 general election. The High Court ruling compelled the IEBC to use the printed register (Kenya Law Reports 2022). The decision came at a time when all polling officials had already been trained on the biometric devices but not on the use of the printed register. The IEBC demonstrated resilience to this unforeseen pressure by rapidly developing a guideline on the use of the printed register for distribution to presiding officers (Abdi 2023). But ultimately it was the Court of Appeal setting aside the High Court orders—pending hearing and determination of a petition by the United Democratic Alliance (UDA)—that resolved the crisis. The effect of the last-minute court decisions was noted by observer missions. The International Republican Institute and National Democratic Institute (IRI/NDI) reported inconsistencies in the application of procedures (IRI/NDI 2022), while African Union–COMESA deemed it ‘a risk to smooth implementation of electoral operations’ (AU–COMESA 2022: 11).

In a second instance of late rulings, the High Court ordered extension of voter registration by seven days (Mwai 2021). To protect the integrity of the process the IEBC filed a challenge to the decision and, pending a determination of the case, continued with registration to the original timescale (B. Otieno 2021). This showed some level of resistance as well as resiliency. The IEBC Chairperson informed parliament's Budget and Appropriation Committee that the commission was under a tight budget and could not extend the registration exercise (Brian 2021). This was not well taken, with the chair of the parliamentary committee calling the request for additional funding 'exorbitant' (Bwana 2021).

Harassment and intimidation of election officials

Elections in Kenya are emotive and very competitive; use of threats, harassment and intimidation against election officials by political competitors are a common occurrence. To ensure elections are not interrupted, the IEBC works with the security sector to protect election officials and materials. During the critical period, key election staff such as returning officers are provided round the clock security, while all polling stations and tallying centres are guarded by security personnel. Despite these measures, breaches of security still happen. Some incidences are extreme like the murders of an ICT manager in 2017 and Embakasi East constituency returning officer and the shooting and injuring of a presiding officer in Wajir county (also in 2022) (Carter Center 2022; IEBC 2022e).

Another case of harassment was the arrest of three employees of an election technology contractor, Smartmatic International B.V., upon their arrival at the Jomo Kenyatta International Airport. Stickers and electronic items containing sensitive electoral information were confiscated (DW 2022; Mwende 2022). Smartmatic International B.V. had been contracted by the IEBC to supply, test and maintain hardware and accessories for the 2022 general election. Resilience was exhibited by the commission Chairperson issuing a press release condemning the arrests in no uncertain terms as unjustified intimidation, harassment and blackmail and calling for the contractors' release (IEBC 2022d). After consultations between the IEBC and National Police Service and confirmation that the stickers belonged to the IEBC the incident was resolved. But it had elicited mixed reactions among politicians and citizens depending on their political inclination. For the Kenya Kwanza party, it was intimidation of poll officials aimed at interfering with the election (Mwangi 2022) whereas the AZIMIO la Umoja-One Kenya Alliance questioned the intentions of the three foreigners (Baraza 2022). Similarly, public reaction to the Chairperson's statement depended on people's political disposition.

Another episode of intimidation was witnessed on 15 August 2022 when chaos erupted inside the national tallying centre leaving some electoral officials injured, including commissioners. The IEBC nevertheless asserted its power to respond flexibly to events, postponing by-elections that had been scheduled to take place on 23 August 2022 and citing intimidation of IEBC commissioners and staff as the reason. The by-elections were held on 29 August 2022 giving

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election officials some days to recover from the shock of the attack (Kenya Gazette 2022).

Covid-19 pandemic

In 2020 Kenya, like the rest of the world, was fighting to control rising cases of Covid-19 infections. At the time, there were pending by-elections in seven county assembly wards, two constituencies and one senatorial. The IEBC showed its resiliency by collaborating with the Ministry of Health to develop protocols for discharging its mandates in the new context, 'Acknowledging the risks inherent in electoral activities and striking a balance between legitimacy of the processes and the measures to be adopted amidst the pandemic outbreak' (IEBC 2020c). Observing the implementation of the protocols during the by-election, Molony concluded that they offered valuable lessons that could be replicated during the 2022 general election (Molony 2021). The protocols were also applied during the general election but scaled down (Abdi 2023). By the flexibility of its approach, the IEBC ensured that electoral processes were navigated through the pandemic without harm to their credibility.

Independence of the electoral management body

In preparation for the 2022 general election, the Ministry of Interior and Coordination of National Government established a National Multi-Agency Consultative Forum on Election Preparedness comprising the IEBC, all ministries, agencies and departments responsible for the election cycle (Ministry of Interior 2021). The IEBC resisted its inclusion into the forum and withdrew, asserting that preparation of elections is the mandate of the IEBC (Kinyanjui 2021; People Daily 2021) and that participation in the committee was likely to erode public trust in the commission (K'Onyango 2021).

Other examples of resiliency are: (1) adoption of framework contracts for procurement of goods and services for the 2022 general election (IEBC 2022a); and (2) invitation of stakeholders to observe the maintenance and testing of ICT equipment (Njeru 2023).

RECOVERY FROM CRISIS

Kenya's recovery from electoral crises has primarily been through constitutional and legal reforms, along with intervention from the international and regional community. With respect to recovery from crisis, two examples stand out.

2007 disputed presidential election

Electoral-related violence has historically been witnessed in Kenya since the onset of multipartyism. However, the scale of violence and knock-on effects in 2007 were such as to attract the attention of the international and regional community. Mediation efforts took place through a National Dialogue and Reconciliation Committee (NDRC) chaired by Kofi Annan, former UN Secretary-General and then Chair of the Panel of Eminent African Personalities. This led

to the signing of a peace agreement and subsequent coalition government between the ruling Party of National Unity (PNU) and the opposition Orange Democratic Movement (ODM) (Kenya Law Reports 2008; Peace Agreements Database 2008). The NDRC also recommended the establishment of the Independent Review Commission (IREC, commonly known as the Kriegler Commission) to enquire into the conduct of the 2007 general election. Intended to prevent crises that could escalate to the level witnessed in 2007, the latter recommended review of constitutional and legal frameworks governing conduct of elections (IREC 2008: xi). Electoral integrity was further restored with the promulgation of the 2010 Constitution. It established the IEBC under articles 88 and 248 and provided for recruitment of commissioners through a competitive process prior to their appointment by the president. The constitutional provisions on independence of the IEBC and recruitment process of commissioners offered hope that electoral integrity would be restored and the effects of violence in 2007–2008 recovered from (Mule 2023).

Nullification of the 2017 presidential election

After the results of the 8 August 2017 presidential election were declared they were rejected by the main opposition party, which filed a petition to the Supreme Court. The court declared the results invalid, null and void asserting that the election had not been conducted in accordance with the Constitution and the applicable law. The IEBC was directed to conduct a ‘fresh presidential election’ within 60 days in accordance with article 140 (3) of the Constitution (Kenya Law Reports 2017). The Supreme Court’s ruling was unprecedented. It created a crisis within the IEBC and anxiety in the country. Earlier routine preparations for a rerun (in case no candidate attained the first-round threshold, 50+1 per cent of votes) offered an opportunity to implement the directive and an avenue for recovery.

However, the crisis was compounded by the withdrawal of the main opposition candidate from the fresh presidential election. The opposition political party outlined several reasons for withdrawal key among them being lack of electoral reforms to address the gaps highlighted by the Supreme Court (Odinga 2017). The withdrawal resulted in diverse interpretations from legal practitioners and politicians leading to many speculations and uncertainty in the country. The crisis was resolved through a High Court ruling that all candidates who had participated in the 8 August 2017 presidential election be included in the ballot (Kenya Law Reports 2017).

Based on the lessons learned from 2017, the IEBC introduced a new practice whereby it posted all result forms (34A’s)¹ from the polling stations and (34B’s)² from the constituencies to a public portal on the commission’s website. This meant that anybody could access the presidential results and do their own tally (Abdi 2023; IRI/NDI 2022)—in addition to Form 34As being affixed outside polling stations in compliance with clause 79 of the Elections

¹ Form filled by the presiding officer at the polling station. It shows the votes garnered by each presidential candidate. It is signed by party and candidate agents before being transmitted electronically to the constituency, county, and national tallying centres as well as the public portal in the IEBC website.

² Form filled by the constituency returning officer after tallying presidential results from all polling stations in the constituency. It shows results of each presidential candidate.

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(General) Regulations, 2012. The display of results in the public portal was seen to have enhanced transparency (EU EOM 2022; ELOG 2022) while AU–COMESA concurred that it was a measure to improve the integrity of the electoral process (AU–COMESA 2022).

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In 2022 the IEBC signed an MoU with Media Council of Kenya (MCK) allowing media houses to tally and display results for the presidential election. Due to lack of an agreed sequence of tallying, media houses displayed different results. Among the public this resulted in doubt and confusion, anxiety, and the perception of rigging of election results. The MCK CEO went to the press to assure the public that the results displayed by different media houses were accurate as they were all from the IEBC portal (Maritim 2022). Further confusion was caused when local media houses stopped displaying results without providing an explanation to the public. By the time the MCK gave an explanation, social media was already awash with speculation casting doubt on the results. This demonstrates how solutions to one risk, if lacking details of implementation—in this case, the EMB’s dispersing control of the information environment—can inadvertently create other risks.

CONCLUSIONS

In Kenya, six distinct elections are conducted on the same day under the same conditions, yet discussion on protecting the integrity of elections is synonymous with presidential elections. Measures that the country has taken to protect electoral integrity therefore focus mainly on the presidential election but also extend to the others.

Historical analysis of elections in Kenya has shown that the country has faced many threats and crisis to electoral integrity, some of which have thrown the country into a crises emergency. Outcomes of the three presidential elections held under the Constitution of Kenya 2010 have been rejected. After every electoral cycle, calls for electoral reforms are almost always certain. The search for measures to safeguard electoral integrity has led to highly legislated and prescriptive electoral processes and increased use of technology. These measures do not, however, seem to increase Kenyans’ faith in the integrity of elections based on the repeated rejection of presidential election outcomes. The lesson learned is that protecting the integrity of elections may need much more than the formal approach. It may call for measures towards change of citizenry expectations of the presidency, and political parties rethinking their operations especially adhering to the rule of law and their own political party internal constitutions. A member of the Elections Observation Group (ELOG) suggested that the country needs to address bad political manners and lack of trust and respect in the institutions mandated to conduct or support elections (Mule 2023).

Based on the examples presented, this case study concludes that the prevention of external and internal risks to electoral integrity is enhanced

through the use of a variety of approaches, such as the Strategic collaboration with institutions with a mandate to protect elections as well as an EMB's administrative policies and procedures. However, not all collaborations work. For instance, the IEBC withdrew from the National Multi-Agency Consultative Forum on Election Preparedness (Junior 2021).

In Kenya, the EMB bears the biggest blame whenever electoral risks materialize. As this case study demonstrates, it is common for blame to be apportioned to the EMB leading calls to disband the EMB after every presidential election and actual disbandment as in the case of the ECK after the disputed 2017 elections. In the long run, however, this does not offer solutions to the protection of the integrity of elections as it focuses on only one institution instead of a broader approach involving all relevant stakeholders.

REFERENCES

Independent Electoral and Boundaries Commission (IEBC)

Abdi, A., Manager, Voter Registration, author's interview, Nairobi, August 2023

Akeyo, L., Risk and Election Security Officer, author's interview, Nairobi, August 2023

Lomoywara, M., Acting Director of Research, Electoral Boundaries and Risk Management, author's interview, Nairobi, August 2023

Marjan, H., Chief Executive Officer, author's interview, Nairobi, September 2023

Njeru, S., Manager ICT Delivery Services, author's interview, Nairobi, August 2023

Onyango, L., Director of Human Resources and Administration, author's interview, Nairobi, September 2023

Post-Election Evaluation Report on the March 4th, 2013, General Election (Nairobi: IEBC, 2013)

The Post-Election Evaluation Report for the August 8, 2017, General Election and October 26, 2017 Fresh Presidential Election (Nairobi: IEBC, 2018), <<https://www.theelephant.info/documents/iebc-post-election-evaluation-report-for-2017-kenya-elections>>, accessed 27 December 2023

Gender and Social Inclusion Policy (Nairobi: IEBC, 2019)

IEBC Strategic Plan 2020–2024 (Nairobi: IEBC, 2020a)

Risk Management Framework (Nairobi: IEBC, 2020b)

'Protocols for conducting electoral activities in the Covid 19 context: Quest for responsive credible elections in a global pandemic', 19 October 2020c, <<https://www.iebc.or.ke/uploads/resources/OFt91j0dYQ.pdf>>, accessed 27 December 2023

Elections Operations Plan (Nairobi: IEBC, 2021)

The Post-Election Evaluation Report for the 9th August 2022 General Election (Nairobi: IEBC, 2022a)

Annual Report 2021/2022 (Nairobi: IEBC, 2022b), <<http://www.parliament.go.ke/sites/default/files/2022-11/Annual%20Report%20and%20Financial%20Statements%20>

[on%20Independent%20Electoral%20and%20Boundaries%20Commission%20for%20FY%202021-2022.pdf](#)>, accessed 27 December 2023

'Commission Inks MoU with Media Working Group', 11 March 2022c, <https://www.iebc.or.ke/news/?Commission_Inks_MoU_with_Kenya_Media_Sector_Working_Group_>, accessed 27 December 2023

(@IEBCKenya), 'Arbitrary arrest and harassment of IEBC election technology personnel', press release, Twitter, 21 July 2022d, <<https://twitter.com/IEBCKenya/status/1550214110205415424>>, accessed 7 January 2024

'Staff murder, profiling and misleading reports on presidential results', press release, 17 August 2022e, <<https://www.iebc.or.ke/uploads/resources/qWGXy8s9t.pdf>>, accessed 27 December 2023

Legal and constitutional documents

Kenya, Republic of, Elections Act No. 24 of 2011, <<https://www.iebc.or.ke/uploads/resources/902SFZiDqt.pdf>>, accessed 13 January 2024

–, Public Finance Management Act No. 18 of 2012, <<https://www.worldbank.org/content/dam/Worldbank/document/Africa/Kenya/Kenya%20Devolution/Public%20Finance%20Management%20Act%20%282012%29.pdf>>, accessed 27 December 2023

–, Elections Campaign Financing Act No. 42 of 2013, <<https://www.iebc.or.ke/uploads/resources/SrIIWeBWMH.pdf>>, accessed 13 January 2024

–, Public Procurement and Assets Disposal Act 2015 (Revised 2022), <<https://ppra.go.ke/download/the-public-procurement-and-asset-disposal-act-revised-edition-2022>>, accessed 27 December 2023

Kenya Gazette, The, 'Kenya Independence Order in Council 1963', Supplement No. 105 (Legislative Supplement No. 69), 10 December 1963, <https://eacc.go.ke/default/wp-content/uploads/2018/07/1963_Constitution.pdf>, accessed 27 December 2023

–, 'Holding of Postponed Elections', Vol. CXXIV-No.169, 23 August 2022, <http://kenyalaw.org/kenya_gazette/gazette/volume/MjY3NA-/Vol.CXXIV-No.169>, accessed 27 December 2023

Kenya Law Reports, 'Kenya Human Rights Commission & 6 others v Independent Electoral and Boundaries Commission & 2 others; Communication Authority Of Kenya & 3 others (Interested Parties) (Petition E306 of 2022) [2022] KEHC 10579 (KLR)', 4 August 2022, 1 September 2017, <<http://kenyalaw.org/caselaw/cases/view/140478>>, accessed 27 December 2023, accessed 27 December 2023

–, 'Kenya Human Rights Commission & 6 others v Independent Electoral and Boundaries Commission & 2 others; Communication Authority Of Kenya & 3 others (Interested Parties) (Petition E306 of 2022) [2022] KEHC 10579 (KLR)', 4 August 2022, <<http://kenyalaw.org/caselaw/cases/view/236467>>, accessed 15 January 2024

Kenya Law Reports, 'National Accord and reconciliation Act No. 4 of 2008', <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/NationalAccordandReconciliationAct_No4of2008.pdf>, accessed 26 September 2023

Other

Asplund, E. and Matatu, N., 'Electoral risk management in Kenya, Nepal and Nigeria', in S. Alihodžić et al., *Risk Management in Elections* (Stockholm: International IDEA,

2016), <<https://www.idea.int/sites/default/files/publications/risk-management-in-elections.pdf>>, accessed 27 December 2023

African Union (AU) and Common Market for Eastern and Southern Africa (COMESA), 'Statement of preliminary findings: African Union and COMESA election observation mission to the 9 August 2022 general elections in the Republic of Kenya', 13 August 2022, <<https://reliefweb.int/report/kenya/statement-preliminary-findings-african-union-and-comesa-election-observation-mission-9-august-2022-general-elections-republic-kenya>>, accessed 20 September 2023

AU EOM, 'Report of the African Union election observation mission to the 8 August 2017 general elections and 26 October 2017 fresh presidential elections in the Republic of Kenya', 14 May 2019 <<https://au.int/en/documents/20190514/report-african-union-election-observation-mission-8-august-general-elections-and>>, accessed 20 September 2023

Brian, G., 'IEBC says it has no money to extend voter registration exercise', *People Daily*, 27 October 2021, <www.pd.co.ke/news/iebc-says-it-has-no-money-to-extend-voter-registration-exercise-101011>, accessed 27 December 2023

Bwana, J., 'IEBC will not extend registration exercise', *The Standard*, 27 October 2021, <<https://www.standardmedia.co.ke/national/article/2001427458/iebc-will-not-extend-registration-exercise>>, accessed 23 November 2023

Carter Center, The, 'The Carter Center Election Expert Mission: Presidential Elections Kenya' (Preliminary Report), September 2022, <https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya/2022/kenya-preliminary-report-2022.pdf>, accessed 27 December 2023

DFID (UK Department for International Development), 'Elections in Kenya in 2007', [n.d.], brief, adapted from 'The Political and Institutional Context of the 2007 Kenya Elections and Reforms Needed for the Future' by D. K. Leonard and F. Odhiambo Owuor (8 March 2009), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/67654/elections-ke-2007.pdf>, accessed 22 December 2023

DW, 'Police arrest election contractors', 22 July 2022, <<https://www.dw.com/en/kenya-police-condemned-over-arrest-of-election-contractors/a-62563501>>, accessed 27 December 2023

Elections Observation Group (ELOG), 'ELOG's Statement on Official 2022 Presidential Results', 17 August 2022, <<https://elog.or.ke/elogs-statement-on-the-official-2022-presidential-results>>, accessed 17 August 2023

European Union (EU EOM), 'Final Report: Republic of Kenya General Elections 2017', 10 January 2018, <<https://reliefweb.int/report/kenya/eu-eom-republic-kenya-general-elections-2017-final-report>>, accessed 20 December 2023

—, 'Kenya 2022 Final Report: General Elections 9 August 2022', 27 October 2022, <https://www.eeas.europa.eu/sites/default/files/documents/EU_EOM_Kenya_2022_EN.pdf>, accessed 20 December 2023

Gachuhi, K. K., 'IEBC signs deal to work with media, ensure credibility in polls', *Sunday Standard*, 4 March 2022, <<https://www.standardmedia.co.ke/counties/article/2001439374/iebc-signs-deal-to-work-with-media-ensure-credibility-in-polls>>, accessed 27 December 2023

Hassan, A. I., *Referee of a Dirty Ugly Game: In the Theatre of Kenya's Elections – An Insider's Account* (Dubai, United Arab Emirates: Big Books, 2023)

- International Commission of Jurists (ICJ), *Democratization and Rule of Law in Kenya: ICJ Mission Report* (Geneva: ICJ, 1997), <<https://www.icj.org/wp-content/uploads/1997/01/Kenya-democratisation-and-rule-of-law-fact-finding-mission-report-1997-eng.pdf>>, accessed 22 December 2023
- Independent Review Commission (IREC), 'Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007', 17 September 2008, <<https://aceproject.org/regions-en/countries-and-territories/KE/reports/independent-review-commission-on-the-general>>, accessed 20 December 2023
- International Republican Institute and National Democratic Institute (IRI/NDI), 'IRI/NDI International Election Observation Mission to Kenya. Final Report of the 2022 General Election', 2022, <https://www.ndi.org/sites/default/files/NDI%20IRI_International%20Election%20Observation%20Mission%20to%20Kenya.pdf>, accessed 20 December 2023
- Junior, M., 'IEBC announces exit from 2022 polls preparedness team', *The Standard*, 30 November 2021, <<https://www.standardmedia.co.ke/politics/article/2001430567/iebc-announces-exit-from-2022-polls-preparedness-team>>, accessed 27 December 2023
- Kihato, C. W., 'Go back and tell them who the real men are! Gendering our understanding of Kibera's post-election violence', *International Journal of Conflict and Violence*, 9/1 (2015), pp. 12–14, <https://genderandsecurity.org/sites/default/files/Wanjiku_Kihato_-_Ging_Our_Understandg_of_Kiberas_Post-Election_Vio.pdf>, accessed 27 December 2023
- Kinyanjui, M., 'IEBC withdraws from 2022 Election Preparedness Committee', *Citizen Digital*, 30 November 2021, <<https://www.citizen.digital/news/iebc-withdraws-from-2022-election-preparedness-committee-n287902>>, accessed 22 December 2023
- K'Onyango, O., 'IEBC pulls out of election preparedness forum', *Nation*, 30 November 2021, <<https://nation.africa/kenya/news/iebc-pulls-out-of-election-preparedness-forum-3636036>>, accessed 27 December 2023
- Maritim, E., 'Media Council reveals why media houses stopped tallying presidential election results', *People Daily*, 23 August 2022, <<https://www.pd.co.ke/august-9/media-houses-stopped-tallying-presidential-election-results-146105>>, accessed 20 December 2023
- Ministry of Interior (Kenya (@InteriorKE), 'The National Multi-Agency Consultative Forum ...', Twitter, 23 November 2021, <<https://twitter.com/InteriorKE/status/1463148088302972936>>, accessed 7 January 2024
- Molony, T., 'Covid-19 and Kenya's March 2012 By-Elections', *African Elections during the COVID-19 Pandemic project (ACEP) Working Paper*, 2021, <<https://aecp.sps.ed.ac.uk/wp-content/uploads/2021/04/COVID-19-and-Kenyas-March-2012-By-Elections.pdf>>, accessed 22 December 2023
- Mule, M., National Coordinator, ELOG, author's interview, Nairobi, August 2023
- Mwai, M., 'IEBC: We've no funds to extend voter listing', *People Daily*, 3 November 2021, <<https://www.pd.co.ke/news/iebc-weve-no-funds-to-extend-voter-listing-101957>>, accessed 27 December 2023
- Mwangi, I., 'Stop intimidating IEBC: Kenya Kwanza to President Kenyatta', *Capital News*, 22 July 2022, <<https://www.capitalfm.co.ke/news/2022/07/stop-intimidating-iebc-kenya-kwanza-to-president-kenyatta>>, accessed 27 December 2023

- Mwende, S., 'Chebukati: Police confiscated all electronic items, demanded passwords from 3 foreigners', *The Star*, 22 July 2022, <<https://www.the-star.co.ke/news/2022-07-22-chebukati-police-confiscated-all-electronic-items-demanded-passwords-from-3-foreigners>>, accessed 20 September 2023
- Odinga, R., 'Raila Odinga quits: Nasa's full statement', *Nation epaper*, 10 October 2017, <<https://nation.africa/kenya/news/raila-odinga-quits-nasa-s-full-statement-461666>>, accessed 15 January 2024
- Otieno, B., 'IEBC now extends mass voter registration', *Business Daily*, 3 November 2021, <<https://www.businessdailyafrica.com/bd/economy/iebc-extends-mass-voter-registration-3606178>>, accessed 27 December 2023
- Otieno, I. O., 'Dynamics in Party Politics in Kenya, 1963–2013; Beyond the Neoliberal Paradigm', PhD Thesis, Kenyatta University (2016), unpublished, <<https://ir-library.ku.ac.ke/handle/123456789/17649>>, accessed 27 December 2023
- Parliament of Kenya, 'Sessional Paper on Adoption of the Administrative Reforms Recommended by the Inter-Parties Parliamentary Group (IPPG)', 1997, <<http://libraryir.parliament.go.ke/xmlui/handle/123456789/4370>>, accessed 13 September 2023
- Peace Agreements Database, Public statement: National dialogue and reconciliation mediated by H.E Kofi Annan and the panel of eminent African personalities, 2 February 2008, <<https://www.peaceagreements.org/viewmasterdocument/696>>, accessed 20 September 2023
- People Daily, 'Chebukati pulls out of poll preparedness team', 30 November 2021, <<https://www.pd.co.ke/news/chebukati-pulls-out-of-poll-preparedness-team-104770>>, accessed 7 January 2024
- Trabelsi, M., 'Summary of the e-Discussion on Women in Politics and Media', *iKnow politics*, 3 March 2022, <<https://www.idea.int/news/women-politics-and-media>>, accessed 27 December 2023
- VOA, 'Kibaki Electoral Commission appointments draw fire from Kenyan opposition', 1 November 2009, <<https://www.voanews.com/a/a-13-2007-11-05-voa2/336482.html>>, accessed 27 December 2023
- Wanyeki, L. M., 'Lessons from Kenya: Women and the post-election violence', *Feminist Africa*, 10 (2008), pp. 91–98, <<https://www.jstor.org/stable/48725956>>, accessed 27 December 2023
- Willis, J., Cheeseman, N. and Lynch, G., 'The history of elections in Ghana, Kenya and Uganda: What we can learn from these "national exercises"', *Journal of African Elections*, vol. 20 No 2 (2021) <<https://www.eisa.org/wp-content/uploads/2023/05/2021-journal-of-african-elections-v20n2-history-elections-ghana-kenya-uganda-national-exercises-eisa.pdf>>, accessed 28 September 2023

ABBREVIATIONS

CEO	Chief Executive Officer
COMESA	Common Market for Eastern and Southern Africa
ECK	Electoral Commission of Kenya
EMB	Electoral management body

ELOG	Elections Observation Group
ESAP	Election Security Arrangement Programme
ERMT	Election Risk Management Tool
FPTP	First-past-the-post
IEBC	Independent Electoral and Boundaries Commission
IIEC	Interim Independent Electoral Commission
ICT	Information and Communications Technology
IPPG	Inter-Parties Parliamentary Group
IREC	Independent Review Commission
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KIEMS	Kenya Integrated Elections Management System
MCK	Media Council of Kenya
MoU	MoU Memorandum of understanding
NCIC	National Cohesion and Integration Commission
NDRC	National Dialogue and Reconciliation Committee
NECC	National Elections Communication Centre
ODPP	Office of the Director of Public Prosecution
PR	Proportional representation
SGBV	Sexual and gender-based violence

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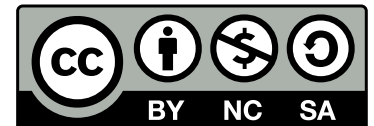
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