



ELGIA

**ELECTORAL LAW AND GOVERNANCE
INSTITUTE FOR AFRICA**

THE DECLINE AND FALL OF ELECTORAL INTEGRITY **How and Why Elections seem to Frustrate the Popular Will in Kenya**



Electoral Law and Governance Institute of
Africa (ELGIA)
Landmark Plaza 13th Floor
Tel: +254 720 280 822.
P.O. Box 8281-00100
Nairobi, Kenya. info@elgia.org; felix@elgia.org
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ABBREVIATIONS

ACE	Electoral Knowledge Network
ACDEG	African Charter on Democracy Elections and Governance.
AFRICOG	Africa Center for Open Governance.
BBI	Building Bridges Initiative
BVR	Biometric Voter Registration.
CKRC	Constitutional of Kenya Review Commission.
CSO	Civil Society Organisations.
CRA	Commission on Revenue Allocation
ECK	Electoral Commission of Kenya.
EDR	Electoral Dispute Resolution.
EMB	Election Management Body.
EVID	Electronic Voter Identification Device.
FTPT	First Past The Post.
ICC	International Criminal Court
IEBC	Independent Electoral and Boundaries Commission.
IFES	International Foundations for Electoral System
IIBRC	Interim Independent Boundaries Review Commission.
IIEC	Interim Independent Electoral Commission.
IPPG	Inter Parties Parliamentary Group.
IREC	Independent Review Electoral Commission.
JCE	Judiciary Committee on Elections
KANU	Kenya African National Union
KIEMS	Kenya Integrated Electoral Management Systems.
KNCHR	Kenya National Commission on Human Rights.
PPADT	Public Procurement and Asset Disposal Tribunal.
PPDT	Political Parties Dispute Tribunal
PPOA	Public Procurement Oversight Authority
OMR	Optical Marker Reader.
PPLC	Political Parties Liaison Committee.

THE DECLINE AND FALL OF ELECTORAL INTEGRITY: Explaining How and Why Elections seem to frustrate the popular will in Kenya

1. EXECUTIVE SUMMARY

1. This is a study of Electoral Integrity in Kenya. The study addresses a recurrent puzzle: Why have electoral reforms since 1992 failed to deliver elections that have integrity? Kenya has changed how EMB commissioners are appointed thrice over, in 1997, in 2008 and in 2016. In each of these episodes the laws have spelt out in detail how the EMBs should be managed and yet the old problems of impunity keep recurring. Kenya has changed the process of voter registration nearly as many times, even adopting different types of electoral technologies, ostensibly to reduce fraud. Invariably, every 'reform and improvement' seems to increase opacity and fraud. Reforms have even been directed at procurement of electoral materials but always these have failed to reduce or even control procurement corruption at EMBs - especially since 2007. Politicians wax lyrical on the virtues of peaceful elections, but violence has plagued all but the two of Kenya's five multiparty elections, 2002 and 2013. Not only have the authorities failed to control electoral violence when it erupts, they have never held anyone to account, even when culprits have been identified by judicial inquiries, as they were by the Akiwumi Commission of Inquiry and the Commission of Inquiry into Post-Election Violence, CIPEV.
2. The study argues that the standard menu for achieving electoral integrity - legal reform, reconstitution of the EMB and widespread use of technology - will not work - unless accompanied by sufficient political goodwill and commitments to safeguard integrity of the process. The real problem stems from an inadequate reckoning with the impact of two dimensions of electoral integrity: the external dimension and the internal dimension. The external dimension is the constitutional system and the internal dimension is the electoral process itself. Constitutional institutions are the deep determinants of the integrity of the electoral system. The problem in Kenya is that the constitutional system and associated institutions have been captured and re-purposed to the private interests of the state elite. Whenever that happens, or if the constitutional system is broken or deeply fractured, no amount of legal reform can guarantee that elections and the electoral system will have integrity. The study argues that it is possible to undo state capture and sharply increase the price that politicians pay for manipulating and subverting the constitution and undermining the integrity of the electoral system. But that it is hard work, much harder than statutory tinkering.
3. The Study builds the theory from the ground up: empirically and normatively, by tracing the historical evolution of democracy and asking how the changing forms of democracy have influenced and shaped the problem of integrity. It argues that representative

democracy must solve two problems: collective action (the inability of people to work together in a common cause) and agency problems (the tendency of leaders once elected to pursue their personal interest to the detriment of the public good). Most of the institutional and normative values underlying representative democracy are designed to minimise or eliminate these two problems. It then applies those theoretical insights to the problems of electoral integrity in Kenya.

4. The study is organised into three parts. Part 1 is historical and normative: it is a thumb-nail sketch of democracy, its values and transformations as it rose from its 'assembly form' in antiquity to the modern representative form we are familiar with. It is the challenge posed by the modern state's geographical scale and population magnitude that make the core institutions of democracy- effective participation backed by a panoply of basic rights; voting equality; enlightened understanding; popular control of the political agenda and inclusion of all adults- not merely important but necessary. Without these institutions, there can be no electoral integrity or legitimate election. That is why Part One also introduces the concept of state capture. State capture subverts the basic norms and hollows out the core institutions of democracy, fatally undermining – even in the face of wide-ranging legal reforms- all possibility of electoral integrity.
5. Part 2 is an overview of internal dimension of electoral integrity, the actual internal workings of Kenya's electoral system. Adopting the Electoral Integrity's Project definition of an electoral system, Part 2 shows the sources and nature of integrity failure. It highlights the impact of institutionalised impunity- which arises from state capture- even as it chronicles the history of integrity failure in elections since 1992. It then analysis the various ways in which the electoral system fails: the role and impact of Kenya's personalised political parties; the appointment of electoral commissioners; the perennial conflict between commissioners and staff of the commission; the mismanagement of electoral procurement and the impunity surrounding mis-procurement; voter registration and its problems; the role of technology in making elections more, rather than less opaque and political and campaign financing.
6. Part 3 explores ways in which electoral integrity might be restored. A crucial step would be to undo state capture, the principal factor hobbling Kenya's democracy and free and accountable elections. This part identifies ways in which state capture could unravel. It then suggests a few constitutional changes that might restore checks and balances, itself a way of ensuring that the executive does not supplant the other branches of government. It also proposes that electoral violations be enforced on leaders even after they have left office. The last set of reforms are on designing an effective electoral oversight mechanism. The proposal is that the Kenya National Commission on Human Rights be given this mandate, which would allow the commission to exercise oversight over the elections in the context of a stronger, better funded Judiciary and an enforceable Integrity Charter. The idea is that KNCHR should be able to ask the hard questions that would force the EMB to be accountable on all the areas of perpetual failure: procurement; voter-registration; transmission of results and purchase and deployment of electoral technology. The study is not optimistic that another raft of legislative reforms a la the

IPPG in 1997 and the Windsor Club reforms of 2016 will work or are necessary without corresponding commitment to holding credible elections in compliance with the constitutional norms and standards.

PART 1

2. DEMOCRATIC THEORY AND ELECTORAL INTEGRITY IN HISTORICAL PERSPECTIVE

2.1 Democracy in Theory and Practice: A Thumbnail Sketch

7. Theories of democracy are strong on institutional design and social and political pre-conditions for its success, but they are oddly silent about the role of moral precepts such as integrity and honesty in the making of democracy. To understand what role such moral precepts play, we need a thumbnail sketch of democracy through the ages. Though the idea that all adult citizens should decide who governs is ancient, the actual participation of all adult citizens in making that decision is fairly recent.
8. The earliest forms of what may be termed democracy are probably lost in the mists of time. Conventional accounts credit Athens with originating the idea and practice of democracy. However, there is recent scholarship arguing that though democracy did originate in Greece, Athens was not its home. These accounts date democracy to a much earlier time and to a different place, Mycenae and the urban settlements of the Peloponnese, a peninsula in the southern part of Greece. How exactly the first democracy came to be is a much-debated issue, in part because it could not have emerged through democratic means. One persuasive account holds that it must have sprouted from the factional fights of elites: it is conceivable that intra-elite conflicts ended with one or more factions mobilising and aligning with the commoners to defeat their competitors. The quid for the quo- the pay-out for the support of the commoners- would have had to be more voice and power in rulership. Indeed, the first governing body in Athens, the Council of Five Hundred, would seem to hint at such an elite/commoner compact. The idea was unique and powerful: previously powerless people could, acting in concert, congregating as 'a demos', make decisions about who and how they should be governed.
9. In its early form, democracy was an assembly affair: citizens gather in a public square and voted, expressing their will about the direction the country should go or convicting those accused of crime. In this early form, democracy had few internal checks but there were rules to restrain excess. From our perspective 2500 years later, some of these seem quaint. For example, a citizen could prosecute another if that other made an illegal proposal in the assembly. Another rule provided that unduly popular leaders could be and often were banished for ten years by a vote in the assembly. The first rule seemed designed to restrain exuberant citizens from ill-founded proposals whilst the second seems intended to discourage excessive demagoguery and populism.
10. It is from its the assembly form that democracy was borrowed into the modern age, first in local councils of northern Europe and then in the city states of renaissance Italy. Before tracing out the subsequent transformations of 'the democratic idea' let's observe some

important features of assembly democracy. First, because assembly democracy was direct democracy, it was severely limited in territorial scale. One can only fit so many people in the agora or wherever else the demos congregated. Assembly democracy was only possible in very small geographical units. The voting unit, the demos, was also kept small and restricted. In the Roman Republic voting rights were initially limited to the patrician class- the aristocracy; in the Greek polis only to male citizens; in the 10th century assemblies of the Vikings to free men, who were equal in theory but were in fact distinguished by wealth and status. As in Greece and Rome, under the free-men of Viking government were slaves. Likewise, when popular assemblies emerged in the city states of Northern Italy around 1100 CE, participation was first limited to upper-class families, that is to say, “nobles, large landowners and the like.” In time, the franchise would be expanded to the middle class, that is “the newly rich, the smaller merchants and bankers, the skilled craftsmen organized in guilds [and] the foot-soldiers commanded by knights.” In short, those who could organize and bring pressure to bear on the aristocracy.

11. Yet as democracy expanded in this co-optative fashion, it soon reached both a territorial and political limit, severely limiting the ability of a growing body of free citizens to assemble in one place. It was out of such limits that the idea of representation arose. Over time, these ‘emerging’ representative assemblies- from Italy and northern Europe- Iceland Norway Denmark, Sweden – were transplanted and transformed as the Vikings spread their influence by conquest. These would gradually morph into inchoate parliaments.
12. With an inchoate system of representation, other institutions that we associate with democracy grew apace. In places such as Netherlands, where the early expansion of commerce had already created a significant middle class, cash-strapped Kings evolved fiscal compacts in which they sought the consent of the newly rich in exchange for contributions to the Royal fisc. Out of this emerged the building blocks of what would later become the foundational democratic principle of “no taxation without representation.” But it was in England, in the convulsive conflicts between grasping monarchs and rebellious parliaments in the 17th century that the modern democratic state of checks and balances was formalised and from which it was copied by other countries.
13. Conflicts between the King and the Commons had culminated in the Glorious Revolution of 1688. England thence became a constitutional monarchy. In 1707 it joined with Scotland to form the Kingdom of Great Britain. By the end of the second decade of the 18th century the principle of ‘no taxation without representation’ was firmly rooted. The modern ensemble of separate state institutions exercising specialized powers- judicial, legislative and executive- but also checking and balancing each other had finally taken shape. Montesquieu, looking at the United Kingdom, theorized that the scheme of separated judicial, legislative and executive powers was essential to restraining despotism. Montesquieu’s ideas were widely borrowed, first and most prominently, in the making of the American Constitution and then by emulation of the US, throughout the world.

14. The transformation of democracy from its 'assembly form' in the Greek polis to representative democracy of the modern era brought two innovations that are central to the idea of elections and therefore to ethical case for electoral integrity.
15. Representation made it possible for democracy to scale up, that is, to expand territorially from the small city-states of antiquity to the geographically extensive state. But geography also enlarged the demos. So long as democracy meant direct citizen action, its territorial scale and demographic scope had to be small. In Greece and the ancient democracies, the demos, was always anywhere between one quarter to one third of the adult population. Civic life consisted mainly of regular attendance by citizens in the public square. This was possible, in part, because citizens of the early assembly democracies enjoyed a certain life of ease, supported by those who had no rights: slaves, women and foreigners. It was only possible because it denied universal inclusion of adults and equality.

2.2 Theorising Integrity: Integrity and its Foundations

16. Unlike the assembly form of antiquity, the touchstone of modern representative democracy is 'universal adult suffrage,' that is, no adult is without rights of to participate in the political life of his or her country. This is, of course, a very new idea. As Robert Dahl points out, until the First World War, 'a good half of all adult citizens' in 'every independent democracy or republic that had ever existed up to then' 'had always been excluded from the full rights of citizenship.'" One consequence of universal adult suffrage is that the citizen freedom rests on individual vigilance, not on the labours of slaves and an underclass of women and foreigners.
17. But geography and demography create a problem that assembly democracy never really experienced: The more extensive and populous the state becomes, the greater the geographical and political distance between representatives and those represented. As that distance grows, the links between the one and the other become tenuous, as do the ability of citizens to consult and agree on common interests and positions. This spawns two potentially intractable problems: the problem of collective action and the classic principle-agent problem.
18. Let's take each of these problems in turn. A democracy with the bulk of its voting population spread over a vast territory finds that it has citizens so heterogeneous that they could hardly ever have let alone agree on common interests. Even when they agree, they find it hard to organize to pursue those interests, partly because they face serious co-ordination and information problems. Distance and heterogeneity increase both the cost of seeking information and of direct political action. When political action is costly, many people find it in their interest to shirk that is, they realise that they can still benefit from policies that others have struggled for and won. In short, scale creates both potential and opportunity to free-ride on the efforts of others, to benefit without expending any personal effort. This is the collective action problem: In its most basic formulation, it

occurs when, “even if it is in the best interest of all individuals in a group to act collectively towards a common goal, group members do not do so; instead, group members find it in their individual interest to not contribute at all or to limit their contributions, ensuring that the collective benefit is not realised to its fullest potential.”

19. This problem stems from the fact that ‘democratic government’ is a public good. One, as with other public goods, it is impossible to exclude a member of the public from enjoying the benefits of democracy even if he or she did not struggle for them. For example, a democratically enacted law that gives subsidies to farmers benefits even the individual farmer who opposed it. Two, one person’s use of a public good does not reduce the amount available for other people to enjoy. That is to say democratic goods are, like other public good, non-rivalrous. If citizen X benefits from free public education, it does not preclude citizen Y from enjoying the same good.
20. The insight in collective action theories is the fact citizens who know that they cannot be excluded from the benefits of democratic laws and policies have no real incentive to invest the time and resources (energy, public participation) required to produce those policies and laws. They become free riders. People “free-ride when they know their level of contribution towards the collective goods does not impact their beneficiary status.” The risk that some people will free ride is the nub of the collective action-problem. The downside that when things go wrong, only a few people will struggle to put them right is, unfortunately, also true. Scale and distance makes representative democracy prone to free riding both in good times and bad.
21. The second problem is the classic agency problem. The problem is shortly stated. In a democracy, the voters are the principals whilst the representatives - politicians - are the agents. Representatives - the ‘agents’ – are given authority by the voters - the ‘principals’ so that they can act on their behalf. That ‘agency relationship’ has two in-built problems: most times the ‘agents’ know more than the principals and can conceal vital information from the principals. Secondly, many of the efforts of the agents are not always observable to the principals – that is, their actions are often opaque. By concealing vital information and hiding behind the opacity of the relationship, agents often act in ways that benefit them personally but are harmful to the interests of the principals.
22. This theoretical background frames the central justification for democratic institutions and is foundational to the argument for integrity in elections. Democratic institutions aim to solve these two problems. One, they aim to make collective action possible and low-cost for the citizens. Two, they are designed to stop representatives from using public power to pursue their personal interests to the detriment of the public.
23. On this perspective, democratic norms and basic democratic rights have intrinsic and instrumental value: they are intrinsic to human worth and human flourishing but they are also instrumental to achieving full democratic citizenship in which individuals

radically and ultimately responsible for the life that they live, protecting their interest and stopping their leaders from hurting those interests. As John Stuart Mill put it, there is a principle “of as universal truth and applicability as any general propositions which can be laid down respecting human affairs” that “the rights and interests of every or any person are secure from being disregarded when the person is himself able, and habitually disposed, to stand up for them.... Human beings are only secure from evil at the hands of others in proportion as they have power of being, and are, self-protecting.”

24. How does this Millian principle translate into practice? Robert Dahl summarises into five the institutional forms that must be in place to bring the principle into effect and to minimise collective action and agency problems. These institutions are 1) Effective participation; 2) Voting equality; 3) Enlightened understanding; 4) Control of the agenda and 5) Inclusion of all adults. What each of these requires is summarized in Table 1 below.

Table 1: Five Criteria for Democracy

Criteria	What it is	What it entails
Effective participation	Equal and effective opportunity to have views known	Right to participate Right to express views on political matters Right to discuss political matters with other citizens (Organisation of political parties; role of money in politics;)
Voting equality	Equal and effective opportunity to vote All votes must be counted as equal	Right to vote Right to have one’s vote counted equally (Size and equality of electoral districts; honest management of elections)
Enlightened understanding	Equal and effective opportunity to learn the relevant alternatives and their consequences	Right to investigate alternatives Information on alternatives must be costlessly available (Free press, access to information)
Control of the agenda	The policies of the government must always be open to change by the citizens if they choose to	Right to participate in deciding what should be on the agenda (Agency problems; role of money in politics; impact of corruption on subverting the public interest)
Inclusion of adults	All adults should have full rights of citizenship	The equality of voice (are poor and rich equally heard? Role of insular minorities)

2.3 Electoral Integrity and the State Capture Perspective

25. In a representative democracy, unlike assembly democracy where they do so directly, citizens participate in governance through election of representatives. What Table 1 illustrates is that elections are an effective means of governance only when they satisfy some foundational values, to wit, people must have effective opportunity to participate (which means that expressive freedoms such as speech, assembly and the ability to organise politically in functional parties must be protected); they must have voting equality (that is to say that they must have equal opportunity to vote and their votes must carry equal weight); they must have enlightened understanding (which is to say the cost of informing themselves about alternatives must be low and information needed to evaluate alternatives must be easily available); they must be able to have ultimate control of the agenda (that means that leaders must not be able to usurp the role of the public or be able to use public power to subvert democratic control) and all adults must be included in the demos (which means that irrelevant criteria of exclusion such as gender, wealth or birth and place origin must not be considered in the decision of who is in the demos).
26. When elections embed these principles, they make it possible and reasonably easy for adult citizens to hold politicians to account and subject them to democratic control. In this sense, elections are a form of 'episodic vetting' that provide legitimacy for the incoming leaders. They also provide opportunity for the demos to peacefully resolve thorny or controversial issues and thus minimize the risk of violent conflict. They set the agenda for the nation for a period and they offer nations an opportunity for renewal by rejecting old ideas they think dysfunctional and adopting new ones they think necessary to carry the country forward. In short, the modern representative democracy is unthinkable without elections. And yet it is not every election that achieves the lofty purposes that Dahl describes, only elections that embody the values set out here, that is, elections with integrity. An election with integrity has been summarised as one "based on the democratic principles of universal suffrage and political equality as reflected in international standards and agreements, and is professional, impartial and transparent in its preparation and administration throughout the electoral cycle."
27. According to the Electoral Knowledge Network, ACE:
- "Without electoral integrity, leaders and officials lack accountability to the public, confidence in the election results is weak, and the government lacks necessary legitimacy. Electoral integrity allows for peaceful resolution of conflict, open dialogue, debate, and information sharing among leaders and the public. Integrity depends on public confidence in electoral and political processes. It is not enough to reform institutions; citizens need to be convinced that changes are real and deserve their confidence. To ensure that elections have integrity, other factors outside of the electoral institutions themselves need to be taken into account and strengthened. Election officials, judges and courts must have independence that is respected by politicians."

28. What the ACE definition points out is that there are two dimensions to electoral integrity: an external dimension and an internal dimension.
29. The external dimension is the constitutional system as a whole. The constitutional system provides the building blocks of electoral integrity, that is to say, constitutional stability; a robust protection of basic rights; checks and balances; an accountable executive; independent judges and an effective parliament. It is also important to have other operational criteria: a neutral state that is even-handed between citizens and their interests so that there is no favouritism in the making of laws and policies; an effective government; competent decisions drawn from the best evidence possible; governmental transparency and comprehensibility, that is the requirement that government operations are sufficiently open to scrutiny and are understandable to the public and, finally, legitimacy. In other words, the quality of the rule of law and the strength and resilience of institutions are the constitutional determinants of electoral integrity.
30. The internal dimension of integrity refers to the quality and effectiveness of electoral institutions qua electoral institutions. Though this study primarily focusses on the internal dimension of electoral integrity, it situates that dimension firmly in the constitutional determinants. It concludes that the systematic failure of the electoral system in Kenya reflects, the failure of the constitutional determinants not of the electoral system as such. That, the study argues, is what explains why persistent reforms in the electoral laws and institutions, however detailed and wide-ranging, have failed to deliver electoral integrity.
31. The nub of the argument is that when we combine the two perspectives, the constitutional determinants of democracy and the electoral system, we run into a puzzle. Even with a newly minted constitution of checks and balances and a comprehensive framework of electoral laws and an independently constituted EMB, electoral integrity is perpetually elusive. The assumption in 2010 was that the coming into force of the new Constitution would eliminate institutional and political sources of impunity, weak accountability and flawed elections.
32. Yet the picture since the Constitution came into force has been a discouraging one: checks and balances are clear on paper but thin on the ground. Parliament has often played second fiddle to the executive whose actions it seems unable to check. Both Parliament and the Executive have been hostile to the Judiciary and have worked in concert to weaken it through budget cuts and hostile rhetoric. The constitutional infrastructure of integrity: the Auditor General, the Controller of Budget, the Commission on Revenue Allocation, the Ethics and Anti-Corruption Commission and the Kenya National Commission on Human Rights have been weakened by progressive defunding and constant interference. What this has reminded the optimists is that the Constitution may be a necessary condition for an effective and functional democracy but it is not a sufficient one. For a constitution to work, it must both *assert* and *exert* authority. A constitution asserts authority when its stipulations are clear and capable of obedience.

And it exerts authority when those stipulations are obeyed, enforced and their violations punished. The Constitution of Kenya asserts but does not exert authority. Why is this?

33. The answer to the puzzle lies in a Report published by Africog in 2019 State Capture: Inside Kenya's Inability to Fight Corruption.¹ Analyzing Kenya's inability to fight corruption, Africog argued that the problem Kenya faced was 'state capture', which the report defined "as a political project in which a well-organized elite network constructs a symbiotic relationship between the constitutional state and a parallel shadow state for its own benefit."² When capture succeeds, governance institutions are subverted and re-purposed to private ends. Over time, the constitutional state is hollowed out of its substantive elements even though its formal democratic features and processes are maintained. Elections are regularly held but their effectiveness is neutered through manipulated processes, described elsewhere in this report. Formal mechanisms of accountability exist but the enforcement pathways are blocked. Powers are separated and formally defined but there are pervasive financial and shadow controls everywhere. When capture happens, the law and order state continues to function formally and fastidiously but there is always an all powerful parallel government- a state within a state."³
34. The state capture perspective requires us to see the state elite- politicians, the senior bureaucracy and well connected businessmen- not as a government and stakeholders in the democratic sense but as a vertically integrated 'power and profit machine' that operates in the shadow of the constitutional state. On that view, even political rivals co-exist uneasily⁴ with those in power in a cyclical policy of exclusion and inclusion in which no one is ever permanently excluded. This machinery exists primarily and concretely for "extracting resources for personal gain."⁵ Given these private goals, the state does not exist to further constitutional intent – democracy, elections, checks and balances, rule of law - or public purposes, deliver development, education or health.
35. In order to stabilize the governance for state capture, 'capture politics' must eliminate electoral surprises. That means retaining the form and procedures of elections but banishing the risk of losing power. This means that elections must be designed to defeat all the criteria of democracy set out by Dahl, that is, elections must aim to frustrate what the Africog Report called, quoting Michael Johnston, deep democratization', defined as:

"[The] process whereby citizens become able to defend themselves and their interests by political means. It is "democratization", not in the sense of establishing formal democratic institutions for their own sake, but rather in the

¹ See Wachira Maina, Anatomy of State Capture: Inside Kenya's Inability to Fight Corruption, Africog 2019 at <https://africog.org/reports/state-capture-inside-kenyas-inability-to-fight-corruption/>

² This follows the perspective developed by South Africa's State Capacity Research project, Betrayal of the Promise: How South Africa is being Stolen, May 2017.

³ Pauw at p.78.

⁴ Chayes id.

⁵ Chayes at p. 62.

sense of *broadening the range of people and groups* with some say about the ways power and wealth should- and should not – be pursued, used and exchanged.”⁶ (emphasis added)

36. Without a commitment to deep democratisation, the procedural elements of democracy become ritualistic- voters are registered but not equally, consistently or transparently; nominations both by parties and the EMB are conducted every election time but these are often corrupt, regularly violent and invariably manipulated; on voting day polling is often clean and reasonably trouble-free in many places but counting and recording of results is often mismanaged, the arithmetic of tallying never ‘adds up’ and the results are shot through with questions and suspect numbers. In short, the rituals and sacraments of democratic elections are routinely observed but its substantive commitments- equality of the vote; control of the agenda; inclusion; observance and protection of basic rights are egregiously violated. The intention always is to do enough to keep the diplomatic respectability that regular elections confer.

⁶ Burbidge, Shadow at p. 20

PART 2

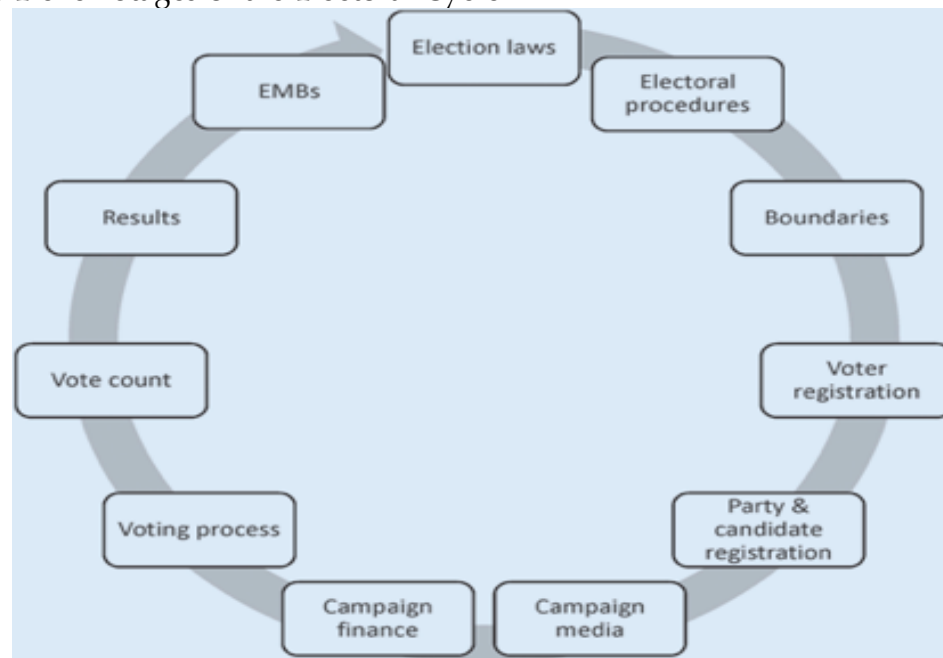
3. KENYA'S ELECTORAL SYSTEM: THE INTEGRITY THAT WENT INTO THE COLD

3.1 Overview of the Electoral System

37. In order to illustrate how the wider constitutional and political system undermines the delivery of elections with integrity, this part takes a deep dive into the structure, management and weakness of the electoral system qua electoral system in Kenya. The definition of the Electoral process adopted here is that of the Electoral Integrity Project.⁷ The Project surveys elections around the world to assess whether they meet international standards of integrity basing its' methodology on "49 key indicators clustered into 11 stages of the electoral cycle from which the Project generates an overall Perception of Electoral Integrity (PEI) 100-point index."

38. The eleven stages of the electoral cycle used by the Electoral Integrity Project are set out in Fig 1 below:

Fig 1: The Eleven Stages of the Electoral Cycle



Source: Norris, Pippa; Frank and Coma, Ferran Martínez, Measuring Electoral Integrity around the World: A New Dataset.

39. The electoral system is the means by which votes are transformed into seats for legislators and a popular mandate for the president. Subject to meeting the criteria discussed in Part

⁷ See the work of the Project at <https://www.electoralintegrityproject.com>

1, an electoral system is more or less democratic to the extent that the seats won by legislators or the votes of the president are based on the greatest number. Whether this is so depends on the electoral system design and also on how the electoral system is manipulated, by design, fraud or inadvertently. To discharge the function of converting votes into a mandate for governance, the electoral system and all its components must have integrity. That means two things.

40. One, they must be designed in a manner that strengthens all the criteria of democracy in Table 1, that is to say, they must a) enhance equal participation; b) ensure equality of the vote; c) provide for opportunity for voters to know and assess all the alternatives on offer; d) enhance the people's sovereignty over the democratic agenda and e) be inclusive of all adults. An electoral system that achieves none of this or that blocks their achievement lacks integrity in a deep constitutional sense.
41. Two, the electoral system qua electoral system, must also have integrity. That means that all the components of the process leading to the vote: electoral laws; the structure, management and powers of the electoral management body; the drawing of electoral boundaries; the registration of voters; the nomination of candidates; access to and regulation of media; the political campaign financing process; and the voting system - that is ballot casting, counting, results transmission and announcement must be transparent, accountable and, crucially, auditable.
42. The Kenya Electoral System checks few of these boxes: the laws are generally sound but they are implemented patchily and partially; Political parties are weak, without real roots in society and mere coalitions of 'ethnic entrepreneurs'; their nominations are laughable caricatures of elections; the EMBs set up since 1997 have always have been appointed through methods supported by stakeholders and have often had adequate powers but no sooner appointed than they have been compromised and rendered ineffectual; Electoral boundaries have usually been drawn by an independent body but few such exercises have been without controversy; the formal process of voter registration has been reasonably open but the management of the construction and maintenance of the register- including its regular clean-up- has always been a black box as successive elections, election petitions and a 2016 forensic audit have proved; the nomination of candidates at the EMB level has been reasonably uncontroversial but the dispositive factor- nomination by political parties in the primaries has been a cat's cradle of the bizarre and the unacceptable. Though parties have had reasonable and generally equal access to the private media but less equal and reasonable access to the state owned media, the major problem with media has been excessive partisanship especially in the local, vernacular media that invariably responds to local pressure; campaign financing laws have been enacted but these have significant gaps and even where their stipulations are strong, they are rarely implemented; the results process has been a mysterious black box since 1992 even when it was made electronic as it was in both 2013 and 2017. Most controversial has been electoral technology, first deployed too much fanfare in 2013 and since then proven to be neither transparent nor accountable in spite its wanton expense.

43. The rest of this study explains why reforms of the electoral system that promise integrity fail to deliver it and identifies some of the things – architectural and managerial - that block the realization of electoral integrity in Kenya. Its failures of integrity can be distilled into four clusters: 1) the constitutional and political context; 2) A culture of institutionalised impunity both within electoral process and in the constitutional system; 3) Political Parties and the Nomination Process; 4) structure and the composition of the EMBs; 5) Relationships within the EMB, especially between the commissioners and the Secretariat; 6) the management of the EMBs key functions, especially procurement and voter registration; 7) the nature of parties and party nominations; 8) Political Financing and 9) Electoral Disputes Resolution. We consider each of these elements in turn.

3.2 The Prehistory of Elections and Integrity in Kenya

44. Since the return to multi-party politics in 1992 Kenya has had only one truly non-controversial election: the 2002 election that marked the end of President's Daniel arap Moi's 24-year reign and ushered in the first non-KANU government in nearly 40 years. The other five multiparty elections – 1992, 1997, 2007, 2013 and 2017 were either been violent – before and after the results- or were so badly managed that they have been widely perceived to be insufficiently legitimate- as the 2013 election was - or have led to such illegitimate government that law and order has threatened to break down, as was the case in 2017.

45. The factors that have led to this are all connected with the collapse of integrity: a) an opaque and non-auditable electoral process; b) a managerially weak- in spite of clear powers and robust stipulations in the law- often politically compromised Electoral Management Bodies, EMBs, - whether this was the Electoral Commission of Kenya, ECK; the Interim Independent Electoral Commission, IIEC; or the Independent Electoral and Boundaries Commission, IEBC. That these problems recur with such metronomic regularity indicates that fixing the electoral system qua electoral system will not work. The problem lies in both the electoral system and in the constitutional determinants of electoral integrity discussed above.

46. In the three successive elections in 2007, 2013 and 2017, there were similar systemic failures. A hastily cobbled Government of National Unity and an internationally mediated settlement forestalled state collapse in 2007. In 2013 a new constitution and a fresh-faced Supreme Court gave the opposition the confidence to take their grievances to court, but the court's poorly reasoned judgment left a deep-seated sense of injustice and betrayal which would be carried forward to the 2017 election. In that year, a partially reconstituted Supreme Court nullified the first presidential election for many of the reasons that had aggrieved the opposition parties in 2013. The opposition boycotted the repeat election, setting the stage for the violence and stand-off that has led to the rapprochement between the Opposition and the government, termed the handshake. A political settlement is now being hammered out under the auspices of the Building Bridges Initiative, BBI. More will be said on this shortly.

47. What has been the problem? The violence, death and destruction that followed the 2007 election led to the appointment in the Independent Review Commission, IREC, a blue-ribbon commission composed of high-profile experts from Kenya and abroad with a mandate review what had gone wrong in the 2007 elections. Its Terms of Reference, TORs, included an in-depth assessment of the electoral process in terms of a) gaps and weaknesses in the constitutional and legal framework; b) the independence, capacity, functions, structure and composition of the EMB; c) the electoral environment with a focus on political parties, civil society, the media and observers; d) the management, organization and conduct of the 2007 elections - civic education, voter registration, polling, logistics, security, vote-counting and tabulation, results-transmission and dispute resolution; e) the integrity of the vote-tallying and counting with special attention to the presidential contest; and f) the efficiency, effectiveness of the ECK and its capacity to discharge its mandate. IREC was to identify the changes that would need to be implemented to improve future elections and obviate violence.
48. IREC's Report was a chronicle of systemic failure of integrity and a withering criticism of Kenya's electoral laws, the Electoral Commission of Kenya, ECK, the Kenya Police Service and the office of the Attorney General. There was a plethora of laws governing elections that spawned both confusion creating, first, unnecessary complexity and second, unchecked discretion in key institutions. The gaps and overlaps created a permissive environment in which it was easy to scapegoat or pass the buck to someone else. This made it easy for a wide array of malfeasance to occur: i) vote-buying; ii) the partisan use of public resources for campaigning; iii) involvement of public servants in partisan politics and campaigns; iv) ballot-stuffing v) gang and "zone" politics in which partisans locked out certain electoral areas from their opponents; vi) widespread use of hate speech and ethnic baiting; vii) slander and abuse of opposing candidates and viii) virulent sexism and gender violence to intimidate women candidates.
49. IREC reached the grim conclusion that the fault did not lie in the law. Instead, it was the ECK's unwillingness to act in defence of the electoral process that was at fault. Put differently, it was the fact that wrongdoing by people in high office was never sanctioned that undermined the elections. Neither the Attorney General nor the Police lost sleep fretting over the crimes being committed. Notwithstanding all the powers that the ECK had under the various laws- especially the National Assembly and Presidential Elections Act, the Electoral Code of Conduct and the Electoral Offences Act - it was not inclined to take action against any wrong doer. Impunity was compounded by mismanagement of all the critical elements of the election. In fact, the electoral records were in such a parlous state that even after trawling through the ECK data, IREC could not conclusively tell who had won the 2007 election.
50. The aftermath of the 2007 elections, of the IREC investigation and its recommendations and of the electoral reforms implemented since then underline the central thesis of this study: electoral integrity depends on securing and respecting the constitutional

determinants of democracy as much as strengthening the integrity of the electoral process itself.

3.3 Electoral Integrity and the Problem of Institutionalised Impunity

51. Violence has stalked elections in Kenya since the return to multiparty democracy in 1992. The ruling party, the Kenya African National Union, KANU launched a vicious campaign of hate and ethnic abuse as soon as its monopoly of power was abrogated. Kanu strongholds were locked out as exclusive zones from which the opposition and their supporters were to be expelled. The ramping up of anti-opposition rhetoric soon turned violent as gangs allegedly trained on farms owned by diehard Kanu supporters started a campaign of plunder, murder and rapine. In the aftermath of the election, Africa Watch estimates, more than 1,500 people had been murdered and another 300,000 evicted. The violence was accompanied by other illegalities and irregularities directly related to the balloting process: scores of polling stations opened late, some in the afternoon; in places election materials - ballot boxes, ballot papers and stamps - arrived late; candidates had names missing from ballot papers, but voting still went on; ballot papers for some constituencies ended up elsewhere; in at least 40 constituencies and there were inordinate delays in counting the votes and release of results.⁸ A study by D. Foeken and T. Dietz⁹ – concluded that one could not tell whether the 1992 election was either free and fair. Many its processes were deeply flawed, to wit i) the registration of voters; ii) the nomination process, especially in the Rift Valley; iii) high number of unopposed Kenya African National Union, KANU MPs, 16 in total; iv) the lack of transparency on the part of the ECK; v) political intimidation and violence during the campaign; and vi) partisan broadcasts by state-owned media.
52. Both the National Council of Churches of Kenya, NCCCK, and a select committee of Parliament headed by Kennedy Kiliku investigated the 1992 violence and concluded that it was politically motivated and incited by politicians. Both reports called for criminal investigations and indictment of politicians who had inflamed the violence, including Nicholas Biwott and Ezekiel Barng'etuny, both bosom friends and political allies of President Daniel arap Moi, who were thought to have organized and funded the murderous gangs. The report was issued on September 17th but rather than act on it, the government MPs voted, on October 14, to reject the Kiliku Report in its entirety. Those who had had a hand in the violence and illegalities were never held to account.
53. Perhaps unsurprisingly, violence would break out again in August and September of 1997, three months to the election. The Coast Province and the Rift Valley Province, especially Narok district, were particularly hard hit. As in 1992, murder and mayhem followed incendiary speeches by politicians and the results were as baleful. According

⁸ See D. Foeken and T. Dietz, *Of Ethnicity, Manipulation and Observation: The 1992 and 1997 Elections in Kenya* at <https://openaccess.leidenuniv.nl/bitstream/handle/1887/4672/ASC-1241504-040.pdf?sequence=1>

⁹ See D. Foeken and T. Dietz, *Of Ethnicity, Manipulation and Observation: The 1992 and 1997 Elections in Kenya*.

to Human Rights Watch, 2000 people were murdered and another 400,000 displaced by well-organized gangs. Then, as earlier, the 'goal' was to evict 'non-native' residents from Kanu strongholds. The election was totally disorderly. In the words of the Daily Nation,¹⁰ anything that could go wrong did: half of the polling stations opened late; materials were not delivered in time; voting was open rather than secret in many polling stations and vote-buying and bribery were widespread. As in the previous election the youth were disenfranchised: four million of them had not been issued with IDs to enable them register as voters; the government-owned radio did not cover the opposition and when it did, it did so unfavourably. Some candidates did not have their names on the ballot papers. Others had their names misspelt.

54. Following international and domestic pressure – especially the sizable opposition presence in Parliament- President Moi appointed the Akiwumi Commission of Inquiry to investigate the sources of and culpability for the 1997 electoral violence. The Commission reported that both politicians and the administration were culpable, the one for stoking the violence, the other for abetting or covering it up. As usual, the ECK wrung its hands saying that it lacked sufficient powers. The Commission was hard pressed to explain why it had been so partisan in its behavior or so ineffectual in implementing the Electoral Code of Conduct. As in 1992, no one was held accountable for the 1997 violence even though the Akiwumi Report – and a helpful summary of it prepared by the LSK - named the perpetrators.
55. That is the pre-history foreshadowed the election in 2007. Any difference between the events of 2007 and those of 1992 and 1997 was one of scale not of form or nature. 1300 people were murdered and nearly 600,000 displaced. Even the illegalities and irregularities echoed those of 1992 and 1997: the register lacked integrity- many instances of double registration and over a million dead voters; polling station records were replete with errors; the tallying was confused as well as confusing; the ECK was both partisan and ineffectual in managing the logistics of the election, whether by incompetence or by contrivance. More than 1992 and 1997- when government media ruled the roost- media- especially vernacular radio- played a truly malignant role. These were the same issues and themes that had arisen before.
56. The deadly difference between the violence that ensued from the election in 2007 and the earlier cases was that this time the violence threatened to spiral out of control; erode the very foundations of the state and spawn total breakdown. If the violence in 1992 and 1997 was one-sided- that is, a case of political hirelings terrorizing the opposition- in 2008 episodes of violence provoked retaliatory attacks. The opposition leaders and their supporters dug in.
57. The resulting standoff framed the context in which the opposition and government reached an internationally mediated settlement: the parties agreed to end the violence; restore fundamental rights and liberties; form a Commission of Inquiry into Post-Election

¹⁰ See The Daily Nation, 30th December 1997

Violence, CIPEV, and share power in a Government of National Unity, GNU. CIPEV's final report not only detailed widespread human rights abuses, it blamed the government for not providing direction, for being partisan and failing to investigate public officers involved in the violence. It named the culprits and noted the systemic nature of impunity. CIPEV prepared a list of the main perpetrators and handed it over to Kofi Annan, the principal mediator, with the recommendation that a Special Judicial Tribunal be appointed to try the culprits with the rider that should the Tribunal abort, the list of suspects was to be handed over to the Prosecutor of International Criminal Court. The tribunal was still-born and the list of the main suspects was handed over to the ICC.

58. Moreno Ocampo, the ICC prosecutor launched investigations and eventually indicted Uhuru Kenyatta, William Ruto and four others, among them, a former commissioner of police General Ali and a radio host on a Rift Valley based vernacular radio station. Though indicted Mr. Kenyatta with William Ruto as his deputy contested and won the presidential election in 2013, making them the first sitting president and deputy to be indicted by the ICC.

59. Yet in identifying the suspects¹¹ the Commission did not stop at the leaders. It traced responsibility down the chain of command: perpetrators of sexual violence, state security agents- administration police, regular police, the General Service Unit, GSU; organized political gangs (e.g. Mungiki, Kalenjin warriors, and others), neighbours, relatives, supposed friends, and individuals working in IDP camps. The Report linked a number of police officers to serious crimes and violence¹² and lamented that police action and inaction had resulted in "the senseless death of scores of innocent citizens."¹³ These violations were compounded by inept investigations¹⁴ and inability or reluctance to hold perpetrators accountable "even when strong evidence existed."

60. Most relevant to this study, CIPEV noted that impunity was systemic. It reviewed in detail the then attorney general's unwillingness to indict those involved in electoral violence. The commissioners could not understand why the Attorney General had taken no action on the violence of the 1992 and 1998 elections, given the recommendations of the Akiwumi Commission of Inquiry and a report from Criminal Investigation Department, CID. The Commission was skeptical on the "doubts about the impotence expressed by the Attorney General in enforcing the directives given to the Commissioner of Police." It thought the Attorney General's 'impotence defence' spurious and his tardiness inexplicable. Of the time-lines and the AG's inaction, CIPEV noted:

"That was seven years ago and the latest report from the Criminal Investigation Department dated 21st August, 2008, shows that 37 out of the 70 files – related to the 1998 electoral violence- were closed; 9 files are with the DPP having been re-submitted after further investigations; and 24 are with the police for

¹¹ CIPEV p. 253

¹² id. at p. 421

¹³ CIPEV, *Infra* at p. 417

¹⁴ Report of the Commission of Inquiry into Post-Election Violence at p. 420

further investigations. The reference made by the Attorney General in the press statement issued on 1st October, 2002 that 1324 persons had been charged for various offences ranging from murder, inciting violence and taking part in riots relating to the clashes which occurred between October 1991 and December 1992, was not related to the findings of the Akiwumi report.”

61. The Commission was scathing: the “lack of any visible prosecution against perpetrators of politically-related violence” showed “that the Attorney General cannot act effectively or at all to deal with perpetrators [of post-election violence]” and that this “has promoted the sense of impunity and emboldened those who peddle their trade of violence during the election periods to continue doing so.”
62. Yet again, neither the principal suspects nor the intermediaries further down the hierarchy were ever convicted of the crimes related to the 2007-2008 violence. The ICC cases were eventually dismissed principally for lack of evidence arising from the disappearance of witnesses and widespread recantations. None of those recommended for trial domestically were ever indicted let alone convicted.
63. Thus by 2010, when the new Constitution came into force, the country had had nearly two decades of institutionalized impunity: the politicians’ attitude to both the Constitution and electoral laws was cavalier. They saw violence as a low-cost, high return and efficient method of achieving electoral goals. It is that attitude that explains both why electoral processes fail so regularly and the inability of electoral institutions- especially the IEBC- to function independently and guarantee the integrity of the process.
64. The 2010 Constitution and its implementing legislation adopted many of the constitutional reforms proposed by IREC including the composition and appointment of IEBC Commissioners; the delimitation of electoral boundaries; the quick finalization of election petitions and the rationalization of the structures of the IEBC focusing on when Commissioners’ terms end as well as the recruitment of staff. Unfortunately, even though the laws have elaborate regulations governing many of the things that shape the actual election - the procurement of election materials; voter registration; the counting of votes; the transmission of results; the tallying of votes; the provision of adequate time to political parties to verify provisional results and the providing full access by media to tallying centres – these have been regularly and flagrantly violated. That was partly the reason for the crisis in 2013 and 2017.

3.4 Anatomy of Debility: How the Electoral System Fails

3.4.1 The Role of Political Parties, Pocket Constituencies, Booth Capture and Party Nominations

65. Giovanni Sartori defines a political party as “any political group that presents at elections, and is capable of placing through elections, candidates for public office.”¹⁵ That definition still leaves the question of the particular form that a party takes quite open. In some countries, ideology and party platforms are central to the competition for elected office; in other countries, parties are mere labels on what is essentially personalistic politics. Yet even in personalistic politics party labels are important. They frame the lines of political difference and put an emblem on political conflict. By doing this, political parties reduce the electorate’s informational costs. Rather than try to figure out what every candidate involved in an election stands for, many voters simply assume that candidates carry the views the party puts out as its electoral platform.
66. Political parties determine and are a product of the electoral environment. They are, as Mainwaring and Scully, point out “institutions with important consequences for how political systems function.” The highly personalistic, virtually party-less, civil service driven political system that President Jomo Kenyatta crafted to govern Kenya in the aftermath of his triumph over the breakaway Kanu radicals led by Jaramogi Oginga Odinga created a highly personalistic style of politics whose legacy still plagues party formation and party politics in Kenya. Even when President Moi revived Kanu in the early 1980s to wrest power and state control away from the civil service, his revived Kanu was a highly mobilised tool of personal power not a political institution driven by ideology with roots in economic or social groups in Kenya, say labour unions or farmers’ co-operatives.
67. This legacy of personalistic politics was to have a deleterious effect on party politics in Kenya even after the country’s return to multiparty democracy in 1992. The parties that emerged out of the personalised, one party Moi dictatorship were equally personalised, “akin to electoral vehicles of political entrepreneurs” not “fundamental conduits of political life.”¹⁶ Yet, precisely because these parties were not properly institutionalised, they have had far-reaching effects on the evolution of multiparty politics. One, parties have an exceptionally high mortality rate and in every electoral cycle there are ‘sharp discontinuities in the number of relevant parties’ which means that “major parties appear and then just as quickly evaporate.”¹⁷ Two, such discontinuities are also correlated with ideological flip-flopping and very high electoral volatility. Electoral volatility measures the “net change in the seat (or vote) shares of all parties from one election to the next.”¹⁸ There has been unusually high electoral volatility in political party performance since 1992, indicating poorly institutionalised parties and highly personalised politics. That fact is also attested to by high variance between presidential and parliamentary votes in virtually all elections. We would expect that in countries where parties are institutionalised and have robust roots in society, parties become the primary tools by which voters are mobilised into politics. We should expect that to the

¹⁵ Quoted in Mainwaring, Scott & Scully, Timothy R, *Building Democratic Institutions: Party Systems in Latin America* at p. 2

¹⁶ Mainwaring and Scully, *id* at p. 3

¹⁷ Mainwaring and Scully, *id* at p. 6

¹⁸ Mainwaring and Scully, *id* at p. 6

extent that voters choose parties in such countries, the variance between the votes for legislators and votes for the president in concurrent elections would be much smaller.

68. This is the context in which to understand political parties and their impact on electoral integrity in Kenya. Lacking ideological orientation, often driven by the interest of a particular 'political entrepreneur' whose electoral vehicle it is, a political party in Kenya can be a volatile and unstable mix of money, corruption, ethnic chauvinism, patriotism, idealism and whatever else its leaders think attractive to the electorate. Since political entrepreneurs' plan from election to election, they do not invest in long-term party building. They mobilise whatever force is ready to hand, whether this be identity or land hunger. This is part of the explanation for Kenya's highly divisive ethnic and land politics. The antagonism that characterizes elections stems from the ways politicians use and manipulate identities or resource conflicts to gain advantage for themselves.
69. In order to tighten their grip on their parties, political entrepreneurs try to create 'pocket constituencies' in which their own political survival is guaranteed. This is the logic of 'the party strong-hold' that has been used to undermine electoral integrity with such devastating effect. 'Strong-hold politics' affect all aspects of the election from nomination at party primaries; voting day activities to the integrity of monitoring and counting. This is because whoever wins the primary in a particular party's 'pocket constituency' or strong-hold, achieves 'booth capture' because he or she is guaranteed victory at the election. But the booth-capture effect reaches much further.
70. Parties also skew the electoral environment in other ways, not just by shambolic nominations. As the IREC reported in 2007, and has been observed by others in every election since, political parties in Kenya breach every norm stipulated in the Code of Conduct for Political Parties Campaigning in Democratic Elections developed by the International Institute for Democracy and Electoral Assistance (International IDEA).¹⁹ Among the breaches that IREC reported were stronghold parties denied other parties the right to campaign; failed to restrain their supporters when they attacked opponents; refused to co-operate with electoral officials to ensure peaceful and orderly polling; forcibly occupied polling stations or performed other illegalities in polling stations; threatened or endangered election officials before, during and after the polls or unjustifiably and in bad faith obstructed them in their duties and undermined the secrecy of the vote. IREC concluded that where "zoning" was practised "free and fair elections cannot take place."
71. There were instances where agents of rival political parties were expelled from polling stations during counting; they were other cases in which agents were barred from accompanying ballot boxes to the constituency tallying centres, raising the spectre of ballot-box tampering. Conversely, agents of the dominant party in particular regions

¹⁹ See Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007 at p. 53 at <http://aceproject.org/regions-en/countries-and-territories/KE/reports/independent-review-commission-on-the-general>

were often able to enter polling stations without proper identification. In short, there were too many instances of parties doing all they could to undermine the integrity of elections.

3.4.2 Appointing Commissioners of the EMB

72. One reason why politicians and political parties are able to interfere so dramatically with the election, as described above, is the inability of successive electoral management bodies to discipline and sanction those who violate electoral laws. To understand why this is so one need look no further than the politics surrounding the appointment of EMB commissioners and to the terms on which they remain in office after appointment.
73. With the exception of the Electoral Commission of Kenya in 2002, the various Electoral Management Bodies that Kenya has had since 1992 have failed to deliver a trustworthy election. Politicians and civil society alike have wrestled, unsuccessfully, with various dimensions of an effective EMB, proposing a garden variety of measures on composition, structure and appointment of the commissioners to no effect. The proposal now on the table is by the Building Bridges Task Force, BBI. The BBI Report proposes an IEBC run by full-time Commissioners appointed by political parties on a non-partisan basis who must have a record of accomplishment and integrity. It suggests a chair who is not necessarily a lawyer and, as was recommended in 1997 and after the electoral debacle in 2007, BBI also suggests that new Commissioners be appointed to run 2022 election so as to “restore” the public’s faith in the IEBC.
74. Unfortunately, some variant of what the BBI proposes has been tried before and found unworkable. The first problem is to see how to enforce the requirement that commissioners not only be appointed by political parties but that they also be non-partisan professionals.
75. The logic and workability of political parties’s appointed EMB commissioners was tested under the Inter-Parties Parliamentary Group, IPPG, reforms in 1997. It is from those reforms that the Samuel Kivuitu headed Electoral Commission of Kenya, ECK, was expanded to incorporate nominees of the opposition parties. Though the ECK oversaw Kenya’s best election in 2002, it also ran one of the country’s worst elections in 2007. The reasoning behind having parties nominate Commissioners is that the nominees are likely to press the case and represent the interest of the appointing parties. It is then assumed that in a kind of Newtonian clash of ‘equal and opposing forces’ the Commission’s decisions would be for the benefit of all.
76. The logic of the IPPG reforms proved to be seriously flawed: though appointed by political parties, Commissioners served in their personal capacity rather than as party representatives. The fact that they had constitutionally secure tenure also meant that they were shielded both from scrutiny by the appointing parties and also freed from political accountability to those parties. In short, security of tenure for politically

appointed commissioners meant that they had neither an incentive to pursue party interest nor reason to feel beholden to the party once appointed. So that the theoretical safeguard that commissioners from opposed parties would in a Newtonian balance of equal and opposing forces lead to an independent commission proved illusory. The cure, it would seem, would have been to appoint commissioners who could be recalled by the nominating parties. Yet even that would not have worked because for them to be recallable they would have had to be without security of tenure. However, without security of tenure, commissioners could not only be recalled by the nominating parties, they could also be fired by the party of government. The key insight from the IPPG experience is that when political parties can appoint but not recall Commissioners, they face serious agency problems as those Commissioners can pursue personal interests and against those of their parties.

77. The solution to the conundrum raised by the IPPG experience would seem to lie in the BBI proposal that commissioners be appointed by political parties but that the parties be obliged to appoint non-partisan commissioners. On scrutiny, that proposal fares no better: it is not only very difficult to ensure that the requirement has been complied with, it is hard to know how to enforce it. Suppose one of the parties eligible to nominate objects to the nominee of another party on partisanship grounds, what is the sort of evidence that the court might draw upon to dispose of the question? Suppose the nominee is a brother of the leader of the party but has no known political affiliation? He would seem to pass the non-partisan test but not the bias test, the key issue in an independent commission. Yet there is a deeper objection at the level of principle. The requirement of non-partisanship could well reward hypocrisy and deception. Consider a nominee who is a hard-core partisan of the nominating party but is so reticent that his political filiation is unknown. On purely perceptual grounds he would qualify for appointment. In contrast, a mildly partisan but voluble nominee would be vetoed on partisan grounds notwithstanding that he would be a less biased commissioner.
78. The recommendation that new commissioners be appointed to run the IEBC in the 2022 elections is welcome but it will probably be ineffectual. There was a new commission to run the election in 2002 as there was in 2013 and again in 2017. The replacement of commissioners after the 2007 debacle did not improve the credibility of the 2013 election. As part of the political agreement on electoral reforms in 2016 the commissioners who ran the 2013 were handsomely pensioned and a new lot appointed to run the 2017 elections. The newly minted commission ran such an irregular- even illegal presidential election- that it was nullified by the Supreme Court on a petition by the opposition. It seems then, that changing the mode of appointing commissioners or appointing new commission on the eve of an election guarantees neither an election with integrity not a commission that is trustworthy. With the deck stacked that way, it is unlikely that new faces at the IEBC will calm the public's jangled nerves where credible elections are concerned.

3.4.3 Polarised relations between EMB Commissioners and the Secretariat

79. One of the persistent problems in electoral mismanagement in successive Electoral Management Bodies in Kenya has been fractured relationships between the commission and the secretariat. IREC identified it as a problem and proposed sweeping changes in the way in which the EMB was then managed. Changes were made on how the EMB was managed, first after IREC and then more broadly in the 2016 electoral reforms. However, starting from the very first post-IREC EMB, the Interim Independent Electoral Commission, IIEC, the nature of this internal conflict has merely morphed and persistently hobbled operations at successive commissions. IIEC folded up when the new Constitution came into force but its commissioners and staff were transferred into the newly-minted Independent Electoral and Boundaries Commission, keeping the problem alive. That conflict was in full play in the run-up to the 2013 election, especially in the mismanagement of procurement in the purchase of electronic devices for that elections. In a sweetheart deal in 2016, the commissioners who has so badly ran the 2013 election were palmed off into early retirement with hefty allowances, in effect a reward for all their impunity in 2013. The secretariat remained as was even as a new commission was installed for the 2017 election. The commissioners were no sooner appointed than splits and wrangles between them the secretariat flared up as before.
80. This abiding conflict delays and frustrates decision-making at the commission and undermines effectiveness, contributing in no small way to the overall lack of electoral integrity. The latest proposal for dealing with this problem in the BBI report is to term-limit the IEBC Secretariat. Unfortunately, a little scrutiny shows that this is a bad idea. Good corporate practice should aim at a balance between innovation at the top - the strategic level- and efficiency and effectiveness at the business unit level- the departmental level. Frequent changes at the business unit level squanders all the experience and skill that staff have accumulated and forces the organisation to keep having to re-learn operational routines. The BBI's proposes that Commission staff retire after six years- 3 year-terms renewable once on good behaviour. Coupled to comparably regularly turnover at the level of the commissioners, this will create permanent flux in the IEBC and place the institution on a cycle of learning. Most of IEBC work entails logistics and co-ordination, tasks in which routinization is key to effectiveness. That is IEBC the core functions are exactly of the sort in which staff become more adept with practice. The BBI proposal will leave the country marooned on a desert island of self-inflicted failure: an IEBC without institutional memory, ran by neophyte commissioners and hordes of untried staff. That is a warrant for bungles and cock-ups. The problem with the proposal is its hidden but false assumption that operational failures at IEBC arise from the commission's staff career longevity. The mundane but true reason is that staff at IEBC fail to secure the integrity of elections mostly because of political interference. Politicians interfere both with the commissioners and the staff, insidiously factionalising and thus polarising the commission, splitting commissioners against one another and then commissioners as a group against the staff as a group. Politicians do this so regularly because there is no price to be paid for interfering with and subverting the electoral process.

81. We can then summarise why have past legal reforms in Kenya failed to create a trustworthy Electoral Management bodies that can deliver elections that have Integrity?

- a) A naive reform assumption that constitutionally mandated independence can eliminate political partiality in an appointee who is not professionally independent to begin with. Though stipulations in the constitution are explicit that the commissioners must be independent the process of identifying, and interviewing candidates is so politicised that many good candidates are eliminated long before the final short list.
- b) An inordinate focus on laws in which legal reform, which is a necessary condition is believed as an article of faith to be a sufficient condition for electoral integrity. Even IREC mistakenly thought that the primary source of ECK's weakness was lack of an establishment statute. The false hopes behind such a belief became obvious when IEBC statute was enacted but promptly failed to eliminate the operational failings of the IEBC.
- c) The naïve belief that security of tenure alone would guarantee non-interference with the Electoral Management Body. Tenure provisions, it appears to have been forgotten, are meant to protect good professionals from undue pressure not to give succour to the corrupt and the incompetent. There was then as now, a fundamental misunderstanding of the nature of the security of tenure provisions. Security of tenure was interpreted to mean non-removal on any ground that did not point to a serious criminal offence, such as corruption or other economic crime. The purpose of security of tenure is not to create difficulties in removing failed officers, its goal is to ensure that there is justice in the process of removal, rather than make removal almost impossible.
- d) The appointments' process needs to be one that public believes in and trust. If the appointments' process does not inspire public confidence, all guarantees of institutional independence don't matter. If the selection criteria do not identify Commissioners that have the integrity, good judgment and the courage to impartially referee a political contest institutional independence will be seen as useless.

3.4.4 Electoral Procurement as Political Bribery

82. If violence and breach of electoral laws is the nub of impunity among the politicians, procurement is the heart of impunity within Kenya's EMB. Since the 1990s, illicit payments- in the form of unlawful allowances or unlawful procurement- have been the means that the political class uses to keep the Electoral Management Body regime-friendly. Once appointed, the EMB Commissioners have always been legally independent. Nonetheless, as soon as the EMB is constituted commissioners and senior managers are soon compromised, by being allowed to draw illegal payments or to profit

from illicit procurement. What do politicians get in return for looking the other way? This 'Sweetheart Covenant' between politicians and EMBs has been in place since 1992. A 1996 study by the Institute of Economic Affairs revealed that ECK Commissioners were paid Kshs 38,443,800 (equivalent to Kshs. 375 million today) in allowances between 1992-1995 for every day of the year whether they were on duty or not. Even on public holidays. They were also allowed to use privately registered cars without work tickets.

83. In 1997, the Inter-Party Parliamentary Group, IPPG, changed the composition of the Electoral Commission by permitting opposition parties to nominate commissioners. That should have made the ECK more independent and bolstered the integrity of the subsequent election. It didn't. Opposition parties like the ruling party appointed reliable partisans in the belief that they would be vigilant over party interests in the election. The opposition was soon disappointed. The newly appointed commissioners realized that they were independent of their nominating parties and that there were ample opportunities to cash in their 'discretion and judgment' to the ruling party. As before, after 1997 the same pattern of waste, diversion of funds and fraudulent spending at the electoral management blossomed.
84. A study by the Africa Centre for Open Governance, Africog,²⁰ analysed electoral spending by the ECK between 1991 and 2007. The EMB got Kshs 15.8 billion to run elections of which Kshs 1.9 billion went to the commissioners in irregular payments and allowances; unaccountable vehicle hire; unsupported and wasteful expenditure and imprests not accounted for. That is Kshs 127 million in illicit payments for each of the 15 years since 1992.
85. After the chaos of 2007, waste, fiscal illegalities and irregularities at the EMBs became prodigious: the earlier malfeasance now seemed like frugal *hors d'oeuvres* to the Bacchanalian feast of procurement corruption that followed the establishment of the IIEC after the 2008 election, and of the IEBC in 2010.
86. In the shadow of the IREC Report, within months of its recommendations, the Interim Independent Electoral Commission, IIEC, - successor to ECK was embroiled in chicken-gate, corruption on a scale that the ECK had never reached. IIEC set a new pattern: the ECK commissioners and top managers had previously drawn illicit allowances or had merely trimmed and larded their budgets to cream off payments. In the post-2008 period, rigging the EMB's procurement processes has been both extensive and promiscuous.
87. In the first such, the Chicken-gate procurement, senior officials of the EMB palmed off handsome payouts from Smith and Ouzman, a UK-based security printer contracted to supply electoral materials. In a criminal trial for corruption in the UK, it was disclosed that the company had paid Sterling £349,057 in bribes christened 'chicken' to IIEC

²⁰ Free for all?: Misuse of Public Funds at the Electoral Commission of Kenya

officials and Commissioners²¹ so to secure a contract to print materials for the by-elections arising from the 2008 election and the 2010 referendum. The quid pro quo was that the IIEC gave Ouzman information on rival bidders. Many IIEC officials - including the Chair, Isaack Hassan, – were lavishly entertained by Ouzman on visits to the UK.

88. The Chicken-gate paled in comparison to the profligate illegalities committed by the newly established Independent Electoral and Boundaries Commission, IEBC, in its procurement for the 2013 election. Virtually every purchase for that election was corrupt. The principal procurement, for the Electronic Voter Identification Devices, was so corrupt that the Public Procurement Administrative Review Board, PPARB, stopped short of cancelling the contract only because the election was months away. Giving its decision in Avante International Technology Inc. and 2 others v. The IEBC, the Board was scathing. IEBC had ignored professional advice and awarded a tender of US\$16,651,139.13 - Kshs 1,397,724,925.51- to Face Technologies, a South African company. The award was only possible because IEBC had irregularly revised Face Technologies' technically unresponsive bid and made it compliant.²² The PPARB wondered why the IEBC had been so 'magnanimous in interpreting its tender documents' in favour of Face Technologies. According to the Board, IEBC had acted in flagrant disregard of the law and appeared "bent on awarding the [EVID] tender to Face Technologies."²³

89. Now caught out in this web of self-inflicted illegalities, the IEBC was "waving the card of public interest as its defence in the various breaches of the procurement law."²⁴ Had the circumstances been less pressing the Board said it "would have [had] no hesitation [annulling] this tender". It recoiled from that decision only because it would "certainly jeopardize the holding of the forthcoming general elections." The Board recommended that the "Director General of the Public Procurement Oversight Authority (PPOA) carry out investigations pursuant to powers conferred by section 102 of the ACECA and take appropriate action."²⁵ A Special Audit on the Procurement of Electronic Voting Devices for the 2013 General Election by the IEBC ordered by parliament would later prove that the Face Technology procurement was just the tip of a monstrous iceberg. All the electronics for the 2013 election had been procured illegally.

²¹ The indictment also included corrupt payments made to officials in Ghana, Mauritania and Somali-land.

²² These actions are corruption offences under sections 45 and 46 of the Anti-Corruption and Economic Crimes Act.

²³ See p. 43 of the Public Procurement Administrative Review Board, PPARB, decision in Review No. 59/2012 of 19th November, No. 61/2012 of the 20th of November and No. 62/2012 of the 21st of November 2012.

²⁴ *id* at p. 63.

²⁵ See *id* p. 64; Section 102 provides that:

- (1) The Director-General may order an investigation of procurement proceedings for the purpose of determining whether there has been a breach of this Act, the regulations or any directions of the Authority.
- (2) An investigation shall be conducted by an investigator appointed for the purpose by the Director-General.

90. The Biometric Voter Registration kits had also bought irregularly: Treasury budgeted money for the procurement but even with the ‘vote in the pocket’, IEBC had still borrowed commercially to buy the kits. This highly irregular action meant that the taxpayer would needlessly pay fees and interests on monies that ought never to have been borrowed in the first place. Comparable illegalities were committed in procuring the Results Transmission System which was never even inspected on delivery.
91. The audit on the procurement for the 2013 election so outraged the Public Accounts Committee, PAC, that it recommended sweeping measures: an anti-corruption audit and criminal investigation of all IEBC Commissioners and the various IEBC committees and of the CEO Ezra S. Chiloba. In addition, PAC said that Chiloba should be barred from holding any public office and also surcharged for paying Kshs 258 million to Face Technologies without a valid contract in place.
92. As before, no one was held to account. Ezra Chiloba would still be the CEO of the IEBC come the 2017 election. Equally scandalous was the sweetheart deal reached between IEBC commissioners and Politicians in which in consideration for their early retirement – to pave way for the appointment of a new commission- the commissioners received undisclosed amounts. Though this was put together a bipartisan committee of Parliament, it signaled that politicians on either side of the aisle would sooner reward rather than punish impunity.
93. These then were the ‘inglorious’ antecedents for the behavior of the IEBC in 2017. The Commission’s attitude to corruption should have been clear from its decision to clear for election 106 candidates- for governor, MPs, and members of county assembly (MCAs) who the Ethics and Anti-Corruption Commission, EACC had named as unfit to hold office.²⁶ None of the 106 was barred. 60 per cent of them got elected.
94. The Auditor General’s findings in his audit of the procurement contracts for the 2017 General Election as well as the repeat Presidential Election might as have been ‘cyclostyled’ from his audit of the 2013 election. According to his Report, the IEBC could not account for Sh9.5 billion for contracts awarded for the supply of goods and services for both the August 2017 general election and the repeat October 2017 election. Goods paid were never delivered and others were delivered but never used. The cost of this corruption and profligacy expressed in US dollars for every voter turned out and every voter registered for both the 2013 and the 2017 elections are summarized in Table 1 below:

Table 2: Cost of elections in Kenya, 2013, 2017

Election	Voter turn-out	Cost per voter turned out (in US\$)	Registered voters	Cost per reg. voter (in US\$)
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²⁶ See Antony Gitonga, Corrupt leaders were cleared by IEBC for polls, says EACC standard digital edition of September 22nd 2017 at <https://www.standardmedia.co.ke/article/2001255237/corrupt-leaders-were-cleared-by-iebc-for-polls-says-eacc>

2013	12,194,586	24.0	14,388,789	16.0
2017	15,164,826	36.7	19,601,502	28.9

84) *Source:* Constructed from the Auditor General IEBC audit reports for 2013 and 2017 and voter turnout data from the international Institute for Democracy and Electoral Assistance, IDEA.

Notes:

The global cost of elections expressed in US dollars per voter is \$5. The 2017 election in Rwanda cost \$1.05 per voter, itself a significant drop from the \$1.71 per voter the country had spent in 2010. The 2016 election in Uganda cost \$4 per voter. Tanzania spent \$5.16 per voter in 2015 down from US\$7.66 in 2000 and US\$7.88 in 1995.

95. The Auditor General's Report echoed both details that had emerged in pre-election litigation against IEBC procurement and findings of an earlier internal audit. According to the court records, IEBC single sourced Safran Identity and Security (also referred to as Safran Morpho) the same controversial French company that IEBC had negotiated a tripartite agreement to buy BVR kits for the 2013 election and to provide election equipment. As in 2013, the IEBC argued that this single sourcing was necessitated by the limited time left to comply with the election timetable, a problem they said had been compounded by interminable litigation. Safran Morpho has a chequered history and due diligence might have ruled them out. In the USA, its subsidiary had been accused of misrepresenting the firm's track record. In 2013, Safran was fined \$630,000 by a French court on being found guilty of bribing public officials in Nigeria to win a Sh17 billion identity cards tender. More on Safran shortly.
96. The internal audit, the second source of details of IEBC malfeasance, reviewed 31 contracts, worth Kshs. 6.2 billion that the Commission had signed. The audit concluded that taxpayers did not get value for money in ten contracts of those thirty-one contracts, all worth Kshs. 4.6 billion. The profligacy covered every conceivable aspect resulting in goods and services being bought at inflated prices. The culprits were CEO Ezra Chiloba- now suspended- the directorates of finance, ICT, Supply Chain Management and Legal and Public Affairs. The audit reprised the old conflict between the commissioners and secretariat. The commission had to send Mr Chiloba on compulsory leave to allow for "a comprehensive audit of all major procurements relating to the 2017 general and fresh presidential elections." The wrangles and splits led to the resignation- later rescinded- of three commissioners - Ms Connie Maina, Dr Paul Kurgat and Ms Margaret Mwachanya, saying that they had lost confidence in Mr. Chebukati the chair.
97. As with the IIEC with the Smith Ouzman and IEBC in 2013 with the Face Technologies, the IEBC was hell-bent on contracting particular firms, this time Safran Morpho.²⁷ The audit showed that IEBC had awarded a Kshs. 2.5 billion contract to Safran to supply election technology for the repeat presidential election of October 26, 2018 on a performance guarantee of Kshs. 423.6 million that had expired two months earlier. Safran Morpho also got a further contract to re-configure the 40,883 Kenya Integrated Elections Management System (KIEMS) kits it had supplied for the August election. IEBC

²⁷ The eponymously named Morpho is a master of the 'morph.' According to Wikipedia

paid Kshs 2.5 billion for the Safran system: this was two thirds of the cost of the six elections – Ward, constituency, gubernatorial, senate, women’s representative and presidential- in August 2017. Safran charged IEBC a further Kshs 443.8 million for Election Day support. This was almost double the Sh242.5 million that that same support had cost the country in the more logistically-intense election in August. IEBC paid Safran another Kshs. 384.6 million for ‘programme and project management’ which the auditor termed both unnecessary and wasteful.

98. As in the 2013 election, many aspects of technology acquisition in 2017 were corrupt and highly irregular. Airtel was contracted to supply 1,553 units of Thuraya IP SIM loaded with data bundles for the results transmission system in geographical areas without 3G and 4G network, a total of 11,115 polling stations in all. The company could only supply 1,000 by election day. The additional 553 units were supplied after the election. Oracle Technology Systems (Kenya) Ltd provided database and security solutions at Kshs 273.6 million without a signed contract. Scanad Kenya Ltd got the contract for the IEBC’s ‘strategic communication and integrated media campaign consultancy services’ even though its price was more than twice the Kshs 350 million budget IEBC had earmarked. Africa Neurotech was contracted to install IEBC data centre equipment but at a cost of Ksh249.3 million, an amount almost double the IEBC budget of Kshs 130 million. The data centre equipment was not ready on election day.

99. The dimensions and details of IEBC’s ethical and corruption are summarized in Table 3 below:

Table 3: Summary of Integrity Issues in Procurement

Ethical and Integrity Related to Procurement		
Graft	Corrupt firms offer kickbacks or other financial incentives to purchasing officers.	✓ In 2013, IEBC manipulated the tender to benefit of Face Technologies. ✓ IEBC’s director of ICT had warned that the system could fail ✓ IFES advised the Chair of IEBC to cancel the EVID contract.
Purchase of sub-standard equipment.	Poorly defined specifications or the prospect of a kickback or other personal profit may result in an inappropriate purchase.	✓ The EVID kit was meant to be on a hand-held device that had 11 hours of battery life; ✓ Eventually hosted on lap-tops some of these had only 4 hours' battery life. Some died before voting started.
Late delivery of goods or services.	Without timely delivery, it may be difficult to stick to the election calendar.	✓ Electoral technology has never been bought in good time. ✓ In 2013 none of the equipment passed the usability testing. ✓ In 2017, it was not clear that any testing of the technology even happened and if it did,

		which of the usual tests may have been left out altogether
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100. The poignant question raised by this litany of ethical failures is *qui bono*? Who benefits from an EMB that is unaccountable? Kenya regularly performs the rituals of election and international observers routinely says that these elections ‘broadly reflect’ the will of the people but surely no EMBs can be ran so opaquely and unaccountably and still produce an election with integrity.

3.4.5 Voter Registration in Perpetual Flux

101. It is difficult to assess the equality of the vote if the Register of Voters, RoV, has no credibility. If the register has dead voters or it is vulnerable to manipulation or its details are erroneous or its totals are in a state of permanent flux then there just is no way of determining whether the voting is honest. Yet the credibility of the Register of the Voters’ has been at issue in every election in Kenya since 1992, principally for many of these very failures.

102. Before 2002, it was thought that the massive disenfranchisement of youth that characterized elections in 1992 and 1997 arose from the system of periodic voter registration then in place. Continuous voter registration was introduced in 2002. Kenya now had a system that combined continuous registration – which depended on walk-in applicants coming before ECK officers in the districts to register – and mass voter registration campaigns which the electoral management body launched close to the election to supplement the continuous registration exercise. When IREC reviewed the combined system after the violence in 2007 its conclusion were discouraging: Continuous voter registration just had not worked. Only 2% to 3% of the registration had been done at the local ECK offices in the inter-electoral period.²⁸ The ECK complained that the problem lay in its lack of capacity. The solution the ECK suggested was for it to “have an office in each constituency.” IREC dismissed this as an excuse observing that “a significant proportion of the Kenyan population lives within a reasonable distance of an ECK district office.”²⁹

103. But the ECK system had more profound problems. In IREC’s judgment it was characterized by “low productivity”: In the 2007 pre-election mass registration exercises the ECK had registered one voter per registration centre per day. Continuous registration was even worse: Of the 553 transactions recorded in the four months after the 2007 elections, the ECK network recorded an average of one transaction per fortnight). In addition, the Register had low and biased coverage. Noted IREC:

²⁸ See Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007 at p. 78 at <http://aceproject.org/regions-en/countries-and-territories/KE/reports/independent-review-commission-on-the-general>

²⁹ *Id.* at 78

“Registered voters represent only 71% of the 19.8 million persons over 18 years of age who were issued national ID cards. Women are significantly under-registered: they represent 51.4% of the population and only 47.1% of the voter register. Worse, the proportion has been declining: in 1997 the proportion of women in the register was 47.9%. Young people are similarly under- registered: the proportion of persons between 18 and 30 years of age is 46.2% of the population and only 32.1% of the registered voters.”

104. The bias and low productivity were made worse by lack of integrity. The Register was full of dead voters and the clean-up of such voters from the register was slow and ineffective. 1,733,000 adults had died since 1997 but the ECK had only expunged only 513,000, meaning that there could have been up to 1.2 million dead persons on the register. As we show below, this problem would dog every election after 2007. Not just that, IREC described the voter registration exercise as “outrageously expensive” noting that the cost of maintaining field offices in non-election years was exorbitant: Ksh. 309 million in 2006 and “expected to reach Ksh. 377.4 million in 2008.” Add to that the cost of the mass registration campaigns – Ksh. 412.2 million in 2006; Ksh. 2.2 billion for two registration exercises for 2007 and a further allocation of Ksh. 596.6 million for 2007/2008.

105. Reviewing all this evidence, a rather dispirited IREC concluded that the solution would not “be found in increasing the number of offices, as the ECK suggests, but rather in a change of system.” It recommended that the Kenya should move to a voter registration system “based in other population databases, including the transfer of ECK human and financial resources to support the prompt implementation of such solution.” In effect, IREC was saying that the national registration and identification process be the basis of voting and that if needs be, the resources that the IEBC was spending on voter registration be reprogrammed to make the national registration system fit-for-electoral-purposes.

106. That recommendation was never implemented and in the 2013 the Register of Voters’ would, once again, be at the heart of that year’s controversies on electoral integrity. As one article noted, the IEBC maintained multiple registers with different totals; the names of many voters had been deleted and thousands added; voters didn’t have enough time to verify the accuracy of the Register and some biometrics did not match the personal details on file. As the Table 4 below- compiled by the African Centre for Open Governance, AFRICOG, after the 2013 elections- shows, the various registers released by the IEBC contained different totals:

Table 4: The Conflicting Registers

Register	Total
Provisional Register	14,340,036
Special Register	36,236
Principal Register	14,352,545

Total Announced on March 9, 2013	14,352,533
Total Announced on July 18, 2013	14,388,781
Green Book (the EMB's base book)	UNKNOWN

107. There were, as AFRICOG noted, numerous deletions and additions. Quoting the Africog data, another study concluded:

“13,790 voters were deleted from the Register in Coast and Nyanza; 50,102 were subtracted from the Register in Nairobi; 2,938 were subtracted from Western. In Central and the Rift Valley, 68,836 voters were added; 6,604 were added in North-Eastern and 4,222 voters were added in Eastern. In Turkana County, voters were added in five constituencies: in Loima a total of 4,519 were added; in Turkana Central another 8,516; in Turkana East, 1,867; in Turkana North an additional 5,122 and Turkana South another 3,957;³⁰ 11,261 voters were taken away from Turkana West. Some deletions might be explained on the basis of faulty or unverified entries, but what explains the additions? IEBC initially said that these were not additions but transfers from other areas but this would not “explain the overall increase in the total number of registered voters.” Moreover, based on what IEBC has said, one cannot differentiate between “transferred” voters and added voters.”³¹

108. These problems were repeated and compounded in 2017. It was agreed, as part of inter-parties agreement on electoral reform in 2016, that an international professional firm would be hired to conduct an in-depth forensic audit of the Register of Voters. This was done by KPMG in May 2017 but too late to be truly useful in the 2017 election. The audit proved that the Register was in a more parlous condition than previously thought and that it was catalogue of deliberate and inadvertent failures, illegalities, irregularities and just plain bad corporate governance. The audit noted the effects of ignoring the IREC recommendations to integrate voter registration to the population database. First, the delay to operationalize the Kenya Citizens and Foreign Nationals Management System had undermined collaboration with IEBC. Second, even if the Service had been operationalized, its data would not have been useful to IEBC: it lacked a unique

³⁰ See Wachira Maina, Uhuru initiative on IEBC merely delays inevitable political standoff <http://www.nation.co.ke/oped/Opinion/Uhuru-initiative-on-IEBC-merely-delays-inevitable-standoff/-/440808/3244254/-/ogt9dcz/-/index.html>

³¹ See Wachira Maina, Electoral Management in Kenya: Undoing a History of Corruption, Opacity and Fraud, study done for Kura Yangu, Sauti Yangu 2016; also Wachira Maina and George Kegoro, The IEBC did not conduct a credible or fair election, Daily Nation March 16, 2013 at https://africog.org/reports/AfriCOG-KPTJ_%23Elections2013_Compendium.pdf

identifier; population data in the system was not aligned to electoral units; the data was not stored in usable form (it is stored as indices) and there was no regulatory framework for inter-agency collaboration.³² The audit also identified serious slippages in the way the Register was compiled and noted serious gaps in the initial data capture and its updating at the constituency-level and at its consolidation at the IEBC headquarters in Nairobi. The audit attributed this to the quality of IEBC staff and to poor collaboration and co-ordination between IEBC and other relevant agencies.

109. These problems were magnified by poor logistics and mismanagement of the inventory for voter registration. At the time of audit, IEBC did not have “centralised BVR kit records showing the serial numbers by location.”³³ The system used by EMB did not embed the serial numbers of the many BVR kits into the BVR system. That meant that there was always be a problem of authenticating a particular kit against the BVR system. In practice, that lapse allow additional – even illicit or rogue- BVR kits to be plugged into the system. The result would be that the IEBC could not reliably ‘track and reconcile’ the BVR kits centrally.³⁴ That problem was made worse by the fact that “BVR kit names changes” in the database was not restricted which means that changes could be made to add new kits at any time. KPMG recommended that IEBC prepare a central ‘master list of BVR kits with serial numbers on the basis of delivery notes’ at the time of purchase and that it “should periodically perform reconciliation of the inventory of BVR kits and record the serial number, as a unique reference for each kit.”

110. Equally troubling were the large numbers of voters without valid identification documents in the Register of voters. KPMG found 171,476 voters’ records without matching IDs, 83 per cent of these were enrolled before the 2013 elections and the rest after that election. Another 17,523 voters’ records did not have matching passport numbers. Interestingly, exactly 83 per cent of these- as with the IDs- were enrolled before the 2013 election and the rest 17 per cent after that election. And then there were the voter records with the same identity document numbers. The audit unearthed 93,548 duplicated ID and passport numbers in the Register: this created a total of 197,677 records. 1,656 identity records were duplicated three times; 502 were duplicated four times; 361 five times; 289 six times; 261 seven times; 176 eight times; 123 nine times; 59 ten times; 8 eleven times; 1 twelve times; 2 thirteen times; 1 eighteen times and 1 thirty-five times!³⁵ A total of 182,692 of these records that shared the same ID or passport numbers did not share the same names.

111. The audit confirmed that the problem of dead voters on the register was as acute in 2017 as it had been when the IREC review was done in 2008. According to KPMG there were 92,277 dead people who were on the register with matching IDs and names and applying a voter enrollment rate of 77.58 percent, KPMG estimated that between 2012-

³² See KPMG, Independent audit of the Register of Voters, 31 May 2017 at p. 63.

³³ Independent audit of the Register of Voters, 31 May 2017 at p. 71.

³⁴ Independent audit of the Register of Voters, 31 May 2017 at p. 71

³⁵ Independent audit of the Register of Voters, 31 May 2017 at p. 119.

2017 there as potential for an additional 1,037,260 dead voters on the register. This assumes, of course, that IEBC had expunged from its records the estimates of the dead from the IREC Report. Summarizing its audit findings on this score across four categories, that is, 1) total number of deceased on the register; 2) records on the register with invalid IDs based on comparison between the register and National Registration System; 3) records with duplicated, missing or invalid IDs/Passport references and 4) records with both IDs and Passport number, KPMG concluded that there were 502,409 representing 2.56 per cent of registered voters.

112. A register of voters with these many infirmities lacks the basic honesty that would give one confidence that there is no fraudulent voting, including voting by the dead.

3.4.6 Votes Lost in Ether: The Transmission, Tallying and Announcement of Results

113. One of the triggers for the violence that followed the election in 2007 was incompetent, perhaps even corrupt management of the transmission, tallying and announcing of results. In fact every aspect of vote counting, tallying and announcing results that IREC looked at in 2008 proved egregiously faulty: the transfer of data from primary documents was imprecise and unreliable, notwithstanding in the words of IREC “the simplicity of the exercise”³⁶; at the national level the ECK had in some cases accepted patently erroneous results whilst rejecting accurate ones³⁷; some source documents, the infamous form 16A, never made it to the constituency tallying centres; others were not available for IREC’s review when it audited the process; virtually “all parliamentary and presidential election results for the constituencies” that IREC sampled were erroneous, meaning that “few of the officially published figures [were] accurate.” As a result- Kirinyaga Central constituency showed- these errors, omissions and manipulations must have had an impact on the final results. In this particular constituency, the candidate who won the most votes lost to “the candidate with the second highest number of votes.”³⁸ IREC’s conclusion was unequivocal:

“The....conduct of the results transfer from polling stations to constituencies, the tallying in constituencies, the transfer of constituency-level presidential election results and the tallying at national level is – generally speaking – of incredibly low quality: it is actually not acceptable.”³⁹

114. Based on an analysis of nineteen sample constituencies IREC came to “the irrefutable conclusion that the ECK was not able to manage the counting, tallying and results announcement processes in such a way that it secured the integrity of the electoral process at either the presidential or the parliamentary level.”⁴⁰ Among the

³⁶ See IREC report p. 127

³⁷ Id at p.127

³⁸IREC report p. 127. Even the returning officer from the constituency in question accepted the correctness of IREC’s analysis that this was indeed so.

³⁹ IREC report at p. 127

⁴⁰ IREC Report at p. 137

recommendations that came out of this analysis is that the EMB should develop “an integrated and secure tallying and data transmission system” that would “allow computerised data entry and tallying at constituencies, secure simultaneous transmission (of individual polling station level data too) to the national tallying centre, and the integration of this results-handling system in a progressive election result announcement system.” More important, IREC proposed that the media be given “full access to this new system” and that “ample time be allowed for verifying provisional results.”

115. The manual transmission and tallying system that IREC blamed for the 2007 debacle was replaced by a computerized transmission and tallying system in 2013 which was strengthened on the front end by a voter registration system based on computerised biometric kits. But the Biometric Voter Registration, BVR, Electronic Voter Identification EVID, and the Electronic Results Transmission System solved none and aggravated all of the problems that had hobbled the election in 2007. First, the procurement of all the electronics was corrupt; even with all the biometrics, the Register was faulty and unaccountable; the transmission system collapsed midstream and, once this happened, the tallying of results reverted to the more easily manipulable manual system so discredited in 2007; many results for the presidential election at the polling station level were incomplete and a total of 2,585 polling station tallying forms had gone missing.

116. Even in courts, the IEBC data was not auditable or even tractable in a basic arithmetic sense. During the Presidential petition, the Supreme Court ordered 22 polling stations results scrutinised. Many more polling stations results were actually scrutinised. Even so the numbers did not add up: many of these polling stations had voter turnout of more than 100 per cent; twenty-eight Forms 34 had more valid votes than registered voters. A detailed analysis by Dr. Seema Shah of AFRICOG of a larger sample of unearthed more egregious violations and just plain data manipulation. Table 5 summarises three of the polling stations reviewed by Dr. Shah:

Table 5: Polling Stations with more than 100% voter Turn-Out in Turkana

Turkana Central Polling Station	Votes Cast	Registered Voters (as published by IEBC)	Voter Turnout	Registered Voters (on Form 34)	Voter Turnout
PS 49	134	66	203.0%	165	81.2%
PS 82	1019	1010	100.9%	1515	67.3%
PS 91	269	161	167.1%	300	89.7%

117. Rather than address the underlying data integrity problems that the Supreme Court’s and Dr Shah’s analysis had exposed, the IEBC continued to release manipulated results. ‘A final report’ issued by IEBC in July 2013 jacked up the numbers’ it had announced in the results it had published in March 2013. Given these inconsistent numbers it is impossible to tell what the true result was. Some argued that the results released in March were provisional. That is clearly a case of post-facto rationalization. IREC had identified this as a problem in 2007, and had been explicit that provisional results should only ever be declared final “only once

there is no risk that errors may still be found.” The EMB cannot keep uploading a series of ‘final reports’ with each succeeding report showing numbers that were different from the previous one.

118. As with all else, the 2017 election reprised many of the problems of transmission, tallying and announcing results experienced in the 2007 and 2013 election and created a few new ones. According to the Carter Center which deployed observers to 39 counties and covered 424 polling stations in 185 constituencies, the Kenya Integrated Election Management System (KIEMS), the system acquired by IEBC for the 2017 elections functioned reasonably well at the voting stage. But the KIEMS system experienced problems galore as soon as transmission started. The source document, that is the paper version of form 34A, was to be scanned at the polling stations. In many stations there were problems reported, both with KIEMS system or with phone connectivity. That meant that the scanned forms could not be sent electronically, at least not until connectivity was restored. In many places, no results were displayed. Often the results beamed at the national level were different from those released at the constituency level. Often the arithmetic totals transmitted via the KIEMS system were not accompanied by the scanned source document, form 34A, which raised questions about how IEBC national office could have verified that the totals it had received were accurate.

119. Contrary to the recommendations of IREC in 2007, the arithmetic totals received via KIEMS but not verified against scanned form 34A were announced without disclosing that these were actually ‘provisional’ and ‘unverified.’ There were other inexplicable goings-on. In theory, one would expect that the scanned forms 34A would, when connectivity failed, be ‘stacked up’ in the ‘out-boxes’ of the KIEMS system. These should then have been automatically transmitted when ‘connectivity’ was restored or when the Returning Officers arrived at a place with network coverage. In fact it took more than a week to get these results to the Bomas of Kenya, the National Tallying Centre. As the Carter Center Report noted, “several thousand forms were still outstanding one day before the deadline to lodge a petition challenging the presidential results.”⁴¹

120. The contrived delays, the failure of the Results Transmission System; the IEBC’s closet-minded approach made it impossible to verify the authenticity of results. It also made the final result- which the Commission announced well before it had all the forms 34A- wholly unaccountable. This was, in part, the reason why the results of the Presidential election were nullified by the Supreme Court on a petition by the opposition.

⁴¹ See the Carter Center, Kenya 2017 General and Presidential Elections: Final Report at pp. 25-26 at https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-2017-final-election-report.pdf

3.4.7 How Technology makes Elections Opaque and Compromises Integrity

121. Under article 86 of the Constitution elections must be simple; accurate; verifiable; secure; accountable and transparent. Most people think, echoing one of IREC's recommendations in 2007, that in this day and age, these requirements could not be met by a purely manual system. Moreover, in the period since 2007, sophisticated electoral technology has become available. The problem, as always, is whether Kenya has the appropriate governance systems to ensure that technology will actually work when deployed. Badly deployed, technology can increase opacity and make elections less accountable. The converse is true too: It can improve the efficiency and transparency of elections. As IFES notes,⁴² technology can reduce both the costs and logistics of elections. If the voting is electronic, ballots papers are unnecessary; EVID technology improve voter identification and eliminate multiple voting; electoral technology make it easier to decentralize polling even further (the same staff can do more) making voting more accessible; it eliminates complexity, standardizes counting and tallying and it eliminates certain types of fraud and is faster and more accurate. However, as happened in 2013 and 2017, if technological inputs are not traceable, it can become harder to audit the results. Moreover, without sufficient firewalls it may allow unauthorized access and irreparably compromise the security of the voting, the counting and the overall integrity of the final result. For technology to support electoral integrity, its governance systems must have effective inbuilt capabilities, that is to say, strong "transparency mechanisms," rigorous "testing and certification regimes," appropriate "authentication mechanisms" and robust "audit mechanisms."⁴³ Table 5 below describes what these capabilities are and what each requires.

Table 6: Making Technology Work for Elections

Component	What it entails, adopted from IFES/NDI Report
Transparency mechanisms	Stakeholders must be given opportunity to monitor critical elements of the process. This might include access to system documentation; source codes review; the testing of the equipment; storage and distribution of the equipment; machine configuration; training of the polling staff and the civic education efforts being made.
Testing and certification regimes	The testing should demonstrate not just that the equipment meets the specification of the EMB but also of the environment in which it will be used. There are six types of testing:

⁴² This part draws from the 2013 report by the International Foundation for Electoral Systems, IFES, and the National Democratic Institute for International Affairs, NDI; Ben Goldsmith & Holly Ruthrauff, Implementing and Overseeing Electronic Voting and Counting Technologies at http://www.eods.eu/library/Implementing_and_Overseeing_Electronic_Voting_and_Counting_Technologies.pdf

⁴³ See IFES and NDI Report at p. 17

	a) Acceptance testing - what tests have been carried out before delivery and are the results available for review by stakeholders? b) Performance testing - how fast and effective is the equipment? c) Stress-testing - how stable is the system once tested beyond its operational capacities? d) Security testing - does the system protect the data as intended? e) Usability testing - how do real users interact with the system? f) Source-code review - This is meant to review and rectify software mistakes.
Authentication mechanisms	Authentication goes to the integrity of the system Involves ensuring that the EMB has signed the version of the software that is tested and approved If data is carried through portable devices (such as memory sticks) there must be a method for verifying its validity.
Audit mechanisms	This might include maintenance of a paper record of the voting choices A random sample should be routinized into the system The audit should be conducted in a public manner.

Source: Constructed from Ben Goldsmith & Holly Ruthrauff, Implementing and Overseeing Electronic Voting and Counting Technologies, IFES/NDI 2013

122. When KPMG audited the Register of Voters in 2017, it found an opaque system characterized by inadequate authentication and testing and one that had insufficient auditability. The central findings were that IEBC had an ICT policy but this had not been approved; the database controls and infrastructure security were defective in all the dimensions in Table 5 above; the ‘security governance framework’ was weak and exposed the Commission’s databases to key risks; the IEBC did not have adequate continuity controls over the Register of Voters; network connections between the head office and the regional offices lacked redundancy; system changes were not strengthened with ‘user acceptance testing’ and, worse, that the contract signed between IEBC and Morpho SAS for provision of “Biometric Vendor Support and Maintenance Services” was not backed by sufficient ‘user acceptance documentation.’ This, KPMG noted, created the risk that changes could be made to the functionality of the system without IEBC having an inbuilt ability to track whether these were aligned to its requirements, a central element in accuracy. For example, though IEBC had asked Morpho to provide additional modifications to include the national ID card as a unique primary field with its own validations as well as a separate unique field for the Kenya passport, those changes had not been done at the time of the audit.

123. The administration of the system was so defective and so negligent as to border on gross incompetence. KPMG was not shown any of the forms granting Returning Officers and Administrators access to the BVR system. In some cases, Returning Officers were not mapped onto their constituencies at the database level. There were serious weaknesses in the control of the database hosting the BVR system

servers. For example, the datacenter fire alarm and suppression system was faulty: one out of three Uninterrupted Power Supply batteries meant to ensure the system works in cases of power outages was not working. Though the operating temperature recommended by the vendor for the UPS was in the range of 16-18 degrees Celsius, the temperature readings on the ACs in the datacenter on one of the audit days was 28 degrees Celsius and on a second AC, 37 degrees Celsius. KPMG observed that the high temperatures had caused two of the four ACs to malfunction on the weekend leading to May 1, 2017.

124. The management of the system was equally bad. The audit could not establish whether, in fact, the IEBC ICT manager ever reviewed the logs of activities performed by users: he said performed such reviews on an ad hoc basis. In addition, the system Access Revocation Procedures were weak and hardly enforced. There were, for example, system accounts for staff who had already left IEBC that showed logs long “after their last working day at the Commission.” One officer whose last working day was September 1 2014 had a last system log dated April 1, 2015, that is, 447 days after the last date on which her access should have been revoked.⁴⁴ Another officer left the Commission on the January 12 2015 but had a last system log with a date of 29th March 2016, that is, 442 days after the last date on which his access should have been revoked.⁴⁵ This indicates fundamental weaknesses in the enforcement of the rules of access to critical databases. The problem was not localized: as the KPMG audit noted, though there were clear stipulations permitting Returning Officers to only have access to and make changes in Constituency Registers onto which they are mapped in the Register of Voters’ database, there were instances of a returning officer being linked to two constituencies⁴⁶; another was mapped onto a constituency in which a different person was named as the returning officer⁴⁷ and there were instances of which constituencies coding was duplicated and each of codes mapped to different returning officers.⁴⁸

125. At the administrator level, the system had obvious lapses and obviously at risk from access unauthorized persons. As the audit explained, the Oracle System that IEBC used allowed high-level administrator accounts with default passwords which should be disabled except two (for system processing). When these accounts are left open, they allow unauthorized sessions. When KPMG did the audit, it found that three of default administrator level accounts at the IEBC were open and that contrary

⁴⁴ An officer named Florence. See KPMG, Independent Audit of the Register of Voters at p. 156

⁴⁵ An officer named James. See KPMG, Independent audit of the Register of Voters at p. 156

⁴⁶ See p. 157 KPMG, Independent Audit of the Register of Voters, regarding a Returning Officer named ‘msimiyu’.

⁴⁷ See p. 157 KPMG, Independent Audit of the Register of Voters, regarding Bomet Central (which was duplicated and then coded as both as ‘bometcentral’ and ‘bomet central’ where the constituencies were mapped to a returning officer with user IDs ‘drono’ and ‘DRono’ but whose returning officer, gazette on 16th January 2017 vide gazette notice no. 396 of that date was one Emurua Dikirr.

⁴⁸ See p. 157 KPMG, Independent Audit of the Register of Voters regarding Ainamoi Constituency which was duplicated with two different constituency codes with each mapped to a returning officer with two user IDs ‘iruto’ and ‘jngeno’.

to normal practice, the passwords for these accounts had not been changed after then initial set up. These lapses made it possible for an authorized but rogue employee to use the default account passwords to add or remove voters records and to quit the system without leaving a trace, concealing the unauthorized changes. Particularly worrying, was the finding that the Register of Voters' database is susceptible to what is technically termed a Transport Network Substrate poisoning attack, which broken down, simply means that unauthorized data sources- both external and internal to the IEBC - could be configured to transmit data to the IEBC database holding the Register of Voters. That would allow an unauthorized person- inside and outside IEBC- to add, amend or delete the voters' records.⁴⁹ This problem is aggravated by the settings within the database that permit an administrator to "clone another user's access rights". This ability gives administrator accounts 'excess privileges'. The implication is that an administrator can clone another user's access rights, make unauthorized changes to the Register and having done so revert to their own privileges, thereby concealing the irregular and unauthorized access.

126. Though the KPMG audit was limited to the Register of Voters, the systematic nature of its failures; its poor management; its failure to align with the most basic protocols of handling electoral – or any technology-; the cavalier management of issues of security; the insufficient protection against unauthorized access to the register of voter's database gives one very little comfort that other aspect of technology: Results Transmission and Tallying, for example, are ran with a high degree of care and professionalism.

3.4.8 Who Pays the Piper: Political and Campaign Financing?

127. Since democracy rests on the equality of all adult citizens and their equal participation and inclusion, all the things that affect the equal inclusion and participation of all adults, especially force and money must be controlled.
128. The UN handbook Human Rights and Elections requires national electoral law to "protect the political process from corruption, official malfeasance, obstruction, undue influence, impersonating, bribery, treating, intimidation and all other forms of illegal and corrupt practice." This means that states are under a duty to outlaw all those things that count as corrupt. That includes corrupt procurement of electoral materials; bribery, vote-buying, extortion, cronyism, graft, embezzlement and even the instrumentalization and weaponization of legitimate development projects and service delivery into political financing.
129. The more expensive elections become, the more they narrow the franchise. This happens in at least three ways. In the first place, high electoral expenses act as a rationing device that excludes all but those who have money or can raise money from offering themselves as candidates. In the second place, money amplifies both

⁴⁹ See p. 161 KPMG, Independent Audit of the Register of Voters.

the voice (the ability to get heard) and reach (the ability to mobilise) of those who have it tilting the electoral field to their favour at the expense of those who cannot it. One of the ways that money does this is by drowning out from the media of policy alternatives of poorly funded parties and candidates. Thirdly, money mirrors the existing class and income divisions in society. If money becomes the dispositive factor in an election it reinforces existing class advantages and disadvantages: women, marginal groups and insular and discrete minorities inevitably find the channels of political representation blocked. Even when affirmative action programmes are established to redress these historical exclusions, money can block and subvert their implementation, often to the benefit of the already privileged who can reframe their identities as the 'legitimately excluded.'

130. The scale of the problem is staggering: Across the world, elections have become increasingly more costly both in terms of what it actually costs the government to run them and also in terms of the amounts of money that political parties and candidates actually spend. According to the Centre for Media Studies (CMS) the 2009 election in India cost approximately US\$2 billion whilst the political parties and candidates spent about \$5 billion for the 2014 election. The United States presidential and congressional elections for 2016 cost \$11.1 billion.

131. It is for this reason that many democracies the world over have enacted rules to minimize the role of money in politics. According to the International IDEA virtually all countries in the world now have some rules that regulate the use of money in politics. Those rules cluster into seven categories: 1) total bans on certain types of donations; 2) limits on donations; 3) rules on public funding for political activities; 4) prohibitions on certain types of expenditures; 5) limits on expenditures; 6) financial disclosure and 7) rules on enforcement and sanctions.

Table 7: Dimensions of Political Financing

What is included	What this relates to	How to categorise these rules
Bans on donations	Spells out who is not permitted to make donations Set out what sorts of donations are not allowed	Prohibited sources and categories (foreign interests; state resources and anonymous donations)
Limits on donations	Sets out the quantitative limits on donations	Covers permitted sources but restricts what can be received from those sources.
Provision of public funding	Sets out what direct and indirect support from the state political parties can receive	Speaks to the need for equality of arms between the parties of government and the parties of opposition.
Bans on expenditure	Certain types of expenditures banned	Focuses on Prohibited types and purposes (cannot use money to buy

	Partisan use of state resources banned	votes; cannot use tax resources to promote one political view)
Limits on expenditures	Places quantitative limits on spending for: • Political parties • Candidates	Focuses on permitted spending but constrains total spending (money amplifies voice, excessive spending drowns some voices)
Financial disclosure	Submission and publishing of financial reports	Transparency of funding and expenditure
Enforcement and sanctions	The consequences of not complying with financial regulations on political financing	Exercise of oversight and application of disincentives (exclusion of elections/ disentanglement to state funding?)

132. In Kenya political and campaign financing are regulated by the Political Parties' Act 2011 and the Election Campaign Financing Act 2013 ban donations from foreign interests to political parties but do not ban such donations if they go to candidates. However, though the Political parties act is in force, the election campaign financing act was not operationalised for the 2017 election. (It has been enacted too late in the day for the 2013 election).

133. The problem in the laws is that even the provisions that seem strong- such as section 27 of the Political Parties Act- turn out to be quite weak on closer scrutiny. Consider sub-section (2) for example: This allows a foreign agency, or a foreign political party that shares an ideology with a political party in Kenya, to provide technical assistance. Though sub-section (3) says that such technical assistance must not include providing assets to the political party that seems too loose. Do assets in this context means only tangible assets? Often some of the most expensive assets that parties need for success in elections are intangible - ideas, training on campaigning, fund-raising techniques, voter mobilization techniques, graphic designs for promotional materials, ad writing and design, branding and branding ideas. These are all exceedingly valuable, perhaps more so than many tangible assets.

134. If the ban covers only tangible assets - as it appears to do - then it is largely ineffective and if it is meant to cover all assets, then the technical assistance permitted is entirely empty of any meaningful content. Moreover, by not restricting foreign funding for candidates, the Political Parties Act leaves a huge loophole for foreign funding of parties. Often the political parties' largest expense in elections is the campaign costs for its candidate: so, a party that is able to off-load candidate-financing costs to foreign donors frees vast resources for its other electoral activities. Moreover, the ban on foreign money- criminalized by section 28 - depends crucially on how 'foreign interests' are defined: Is a company or an NGO owned by a Kenyan abroad a foreign or local interest? In law, a company is a different person from its shareholders. Nonetheless, it does seem otiose to treat a company owned by a Kenyan abroad as a foreigner in these circumstances since a Kenyan could easily

circumvent the restriction of his 'foreign' company by simply drawing down from the company accounts and transferring the money to the party he wishes to support in Kenya.

135. Corporate donations- the regular sources of electoral corruption across the world- are implicitly permitted by section 27(1)(c) of the Political Parties Act 2011 which includes among 'other sources of funding to political parties' 'donations, bequests and grants from any other lawful source, not being from a non-citizen, foreign government, inter-governmental or non-governmental organisation.' Sections 29 and 30 set strict rules for disclosing monies received and publishing assets and liabilities of the political parties. Since parties have been famously opaque about their accounts and spending ever since the law was enacted, these two sections have, in effect, died of desuetude.
136. One issue of particular concern is the status of anonymous funding. Section 27(4) of the Political Parties Act imposes a duty on political parties "to disclose to the Registrar full particulars of all funds or other resources obtained by it from any source." It is a ticklish question whether the duty to disclose can be legitimately read as an implicit ban on anonymous contributions. But even if it were read as such, anonymous donations could just simply be re-baptised as something else or lumped together with monies collected from "members' fund-raisers," which are permitted. That in turn raises the question posed by International IDEA whether in fact it is possible to enforce "a ban on foreign funding.... if anonymous donations are allowed" even if these are allowed only implicitly.
137. Section 11 of the yet-to-be enforced Election Campaign Financing Act, 2013 permits contributions from any person, political party or any other lawful source; contributions from a lawful source and contributions from a harambee. There is no restriction as to who can participate in the 'harambee' for a political party and given the omnibus contributions phrase 'from Mr. X and his friends', there is no doubt that an avenue for illicit flows- even from foreign governments, is wide open under section 11 even if it were in force. Section 13 explicitly says that "anonymous contributions or contributions from an illegal source" are banned and that candidates, political parties or referendum committees must not retain such contributions whether in 'cash or in kind'. However, this prohibition is completely undone by the harambee exception.
138. Though parastatals - as public institutions- are banned from contributing to political financing, corporations with the greatest incentive to manipulate elections- that is, those that have government contracts - are not prohibited from contributing to parties or to candidates. Both the Political Parties Act and the Election Campaign Financing Act permit 'persons' – which includes legal persons- to make donations to both political parties and candidates. This basically licenses wide-ranging influence-peddling. Contractors can bribe incumbents thus securing their revenue streams when such incumbents are re-elected. Where incumbents are weak, government contracts can soften the incoming administration by providing them with the money to buy their passage into office.

139. Both the Political Parties Act and the Election Campaign Financing Act have banned the use of state resources by political parties or candidates, except of course those provided under the political parties' fund. However, the promiscuous use of service delivery visits, christened as "inspection of development projects" by incumbents completely undermines this ban. It permits incumbents to use state transport (helicopters, vehicles) and facilities (offices and infrastructure) and resources (out of station allowances, staff and per diems) to effectively campaign for themselves and their parties at election time.
140. Section 28(2) and (3) of the Political Parties Act 2011 places quantitative limits on what one person - legal or natural – is allowed to give to a political party. It says that no person or organisation can contribute in cash or kind more than five per cent of the total expenditure of the political party. This 'total expenditure' is defined in reference to the previous year's audited accounts of that party. But since a company and its shareholders are different in law, this restriction is quite easy to overcome by the simple expedient of providing funding from both shareholders - in person- as well as from all the companies with which such shareholders are affiliated.
141. There are other loopholes: Parties may invest in income generating activities under section 27(1)(d) of the Political Parties' Act. That, potentially, allows parties to establish investment vehicles or to incorporate corporations. The law places no limits as to whom parties can go into business with. Given that money is fungible, what is the Registrar of Political Parties Registrar to do when the parties income from its 'for-profit' corporate activities is intermixed with illicit payments? In addition, both parties and candidates are restricted in their ability to take loans for election campaigning under Section 12(1)(d) of the yet-to-be-operationalised Election Campaign Finance Act 2013. No numerical limit is placed on such loans but the law permits the Independent Electoral and Boundaries Commission to set appropriate quantitative limits. How is this to be enforced? Parties and candidates can borrow for all manner of legitimate reasons unrelated to campaigning. Parties may want to invest and individuals have needs that are not specific to campaigns. A law that purports to restrict borrowing runs into several difficulties. One is how to establish that a loan reflected in a political party's account or a candidate's bank is 'for election' campaigns. Another is how to treat monies borrowed for commercial activity but diverted to campaigns for the purpose of this section (is that money borrowed for election campaigns?). Three is why the IEBC should have any power to pry into the non-election related finances of candidates and parties. In order to enforce this section, it seems obvious that IEBC must necessarily pry into these non-election finances in order to know whether restrictions have been violated.
142. There is of course the overarching problem issue: the false assumption underlying both the Political Parties Act and the Election Campaign Financing Act that monies for political parties and candidates will go through the banking system. Kenya has a long-history of 'mattress-banking' in which vast amounts of cash never

enter the banking system. So long as such a practice continues, interdicting donations from 'illicit sources' and sanctioning those who burst 'quantitative limits' is almost impossible. Large sums of money from legitimate sources, such as what is collected through harambee regularly bypasses the banking system altogether. That means that the requirement that a candidate should record the date, venue and amount raised from a particular harambee is wholly ineffectual and inauditable.

143. The conclusion then is that the laws regulating political finances and the limits that such laws place on political and campaign spending are largely without effect. The result is that in reality there are no effective, quantitative spending on elections in Kenya. No wonder that elections have become such expensive affairs, the party primaries alone being estimated to have cost US\$3million, for instance.

3.4.9 Weak Electoral Oversight: The Judiciary, Auditor General and Parliament

144. One of the more serious deficiencies of the electoral system in Kenya is its lack of an effective oversight mechanism. There are three possible mechanisms for providing oversight: the Judiciary, the auditor General and Committees of Parliament. In 2017 electoral cycle, the Judiciary did a fairly good job in guiding the electoral process and securing electoral integrity. Similarly the Auditor General reports unearthed massive procurement irregularities that were central to questions of integrity. The weakest link in strengthening the electoral oversight, however, remains Parliament.
145. An independent and courageous judiciary which can scrutinise and eliminate blockages in the electoral system as a whole. But the judiciary a passive actor, it does not have a mandate to proactively identify and pre-emptively remove barriers to honest elections. It must await litigants to bring cases before it. It does not even control the timing of a case or define the issues brought before it for resolution. The effect is that even when the judiciary potentially can help clean up the process of representation, the issue may come before it too late- as happened with procurement issues in 2013 and 2017- for the court to act.
146. A second oversight mechanism is the office of auditor general. But the auditor general cannot act proactively either, unless requested by another agency of government or a committee of parliament. Even so, the auditor general does not determine what questions should be asked of electoral institutions. The result is that audit tools have a post-mortem character, that may identify what went wrong in the just concluded elections and may provide lessons for the future but is completely without effect at all in forestalling abuse of the electoral system.
147. Reviewing the role of the Judicial and the Auditor General it is clear that what electoral process lacks is an effective 'live oversight mechanism'. These two oversight

mechanisms- election petitions or law-suits challenging the EMB decisions- by the judiciary and the electoral audits by auditor general can only assess an already failed election, they cannot forestall failure.

148. Which brings us to possible scrutiny by an appropriately mandated parliamentary committee. In theory, this might work but it suffers some weaknesses. One, Senators and MPs are beneficiaries of the broken system. They have no real incentives to ask the difficult questions. Two, even where a few of these representatives might believe in a credible IEBC, the period in which scrutiny and oversight are most critical, that is, in the last 12 months to the election, is also the period in which MPs and Senators are most distracted by their own political survival, fundraising and building campaign teams.

149. In summary then: the oversight institutions that do actually work- the auditor general and judiciary - come onto the scene too late to address failures and the institutions that are on the scene at the right time- parliamentary committees- either lack real incentives to clean up the system or are too distracted by personal interests to undertake oversight effectively.

150. An effective oversight mechanism over the elections in Kenya must be one that must keep the gravity of the elections front and centre of its work and it must be one that gives the public confidence that it will catch malfeasance before mischief is unleashed. Countries must tailor oversight to their realities: Mexico's uses the Federal Electoral Tribunal. Austria, Croatia, Germany, and Romania use their Constitutional Courts to perform that role. In many parts of the commonwealth, parliamentary committees play the oversight role. The key design features of an effective oversight mechanism is as detailed in Table 8 below.

Table 8: Elements of an Effective Electoral Oversight Mechanism

Features of Effective Electoral Oversight	
Feature	Why it matters
Must be Independent	✓ Nature of election is such that oversight must be seen as independent and impartial. ✓ Staff helping the body do oversight must be non-partisan and have no personal stake in the outcome.
Must be Accessible	✓ Effective oversight depends on access to i) electoral offices, ii) personnel and iii) information. ✓ Oversight institutions need access to confirm that the goods bought with public funds actually exist and are in good condition. ✓ The Institution must be able to examine documents and computer files or databases, if needs be.

Must ensure Quality and Accuracy	✓ Oversight must be professional, impartial, accurate and if it is to be useful. ✓ The findings of oversight agencies should be accurate and reflect the actual situation. ✓ Non-compliance should be documented and reported objectively without unsubstantiated claims. ✓ Accurate and factual reports are useful in building the integrity of the electoral process.
Must have Authority	✓ Oversight institution must act authoritatively, avoiding secrecy and sweetheart deals behind closed doors. ✓ The electoral process has more integrity if the oversight reports and recommendations are published without 'political reviews' or interference. ✓ Oversight reports that are suppressed or censored because they embarrass commissioners undermine integrity.
Must not use oversight politically	✓ Oversight by parliament, for example, is easy to manipulate for political ends. ✓ An independent institution ensures that politics does not affect the timing of an investigation (e.g. at a politically sensitive moment).
Must be capable of Enforcing of Findings	✓ Integrity problems identified by oversight must be dealt with effectively. ✓ The oversight mechanism must have immediate and effective access to court. ✓ If criminal wrong-doing is disclosed mechanisms for suspension of staff or activities pending investigation must be instituted. ✓ Enforcement must be shielded from being poisoned by partisan politics or subverted by money or power.

PART 3:

4. RESTORING ELECTORAL INTEGRITY, BEYOND THE BUILDING BRIDGES INITIATIVES

4.1 The Reform Problem is Kenya's "Choice-less Democracy"

151. The point of this study has been to show the deeply subversive ways in which Kenya's electoral system has partially aborted the country's transition to and consolidation of democracy. Integrity failure is in fact the central obstacle to long-term democratic consolidation. The optimism of the early 1990s that the unravelling of one-party autocracy would ineluctably transit Kenya in a linear path to a consolidated democracy within two or three elections has proved naïve. The democratic pathway, in Kenya and elsewhere, has not been linear:⁵⁰ Some countries have slipped into perpetual transition and others have backslid into the old autocratic ways. Indeed, the macro trend, globally for more than a decade now, has been towards democratic retreat. As the Freedom House's Survey for 2019 "Democracy in Retreat" noted, 2019 was the 13th year in a row that democracy around the world had been in decline, a fact confirmed by other surveys and indices.
152. The Economist Intelligence Unit (EIU)'s Democracy Index for 2019 – the Survey assesses the state of democracy in 167 countries based on a) electoral process and pluralism; b) the functioning of government; c) political participation; d) democratic political culture and e) civil liberties—found that democracy had had another bad year. The global score for 2019 was 5.44 out of 10, the lowest recorded since the Index began in 2006. Of particular concern in both the Freedom House Survey and the Economist's Democracy Index is the fact that this retreat is not merely a case of transition democracies back-sliding into authoritarianism, it is also an affliction of advanced democracies, many of which have seen significant reversals in openness, protection for human rights and safety and inclusion of groups on the margins.
153. In short, it may be thought that the deteriorating quality of Kenya's electoral democracy since 2007 is part of the wider global retreat from democracy. But that would be erroneous. The truth is that since 1992 Kenya has never invested any real effort to make 'democracy the only game in town.' Reforms are invariably implemented in perfect bad faith- whether these are the Kanu Review Committee Reforms of 1990; the IPPG reforms of 1997; the 2010 Constitution and related laws. Always, official effort is expended and political capital squandered in full knowledge

⁵⁰ See Alina Rocha Menocal, and Verena Fritz with Lise Rakner, Hybrid regimes and the challenges of deepening and sustaining democracy in developing countries in *The South African Journal of International Affairs* Vol. 15, No. 1, June 2008, 29-40 at <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4160.pdf>

that even when the changes are made in the laws, they won't be implemented and if implemented, they will be done in such a way as to limit their aims and purposes. The result is that Kenya has been stuck in transition as an ambiguous democracy.⁵¹ It has become in many ways a paradigmatic example of what the late Thandika Mkandawire termed "choice-less democracies"⁵² - "societies which can vote but they cannot choose". The result is a political sphere that combines "rhetorical acceptance of liberal democracy, the existence of some formal democratic institutions and respect for a limited sphere of civil and political liberties with essentially illiberal or even authoritarian traits."⁵³

154. The explanation for this history of 'undemocratic and flawed elections' the study argued at the beginning, is that the state has been captured and repurposed to the private goals and objectives of the ruling elite. What Kenya's 'frozen in transition democracy' proves is that capture can be stable and that it can be transitioned from one government to the next. As the Africog study on corruption and state capture argued Kenya's 'ambiguous democracy' makes deep reform especially difficult. The knock-on effect of that fact is that investing more reforms in perfecting electoral laws and re-designing electoral institutions is unlikely to improve overall electoral integrity. There are two reasons for this.
155. The recurrent cycle of opaque and unaccountable elections has spawned deep distrust in electoral democracy even as Kenyans have become more politicised. This paradox, described by Reybrouck as the union of 'distrust and passion' has been responsible for the political lurch to the extremities of the political spectrum and the rise of the politics of 'fantasy reforms' put out by populist leaders like Donald Trump in the USA, Viktor Orban in Hungary or Jair Bolsonaro in Brazil. Central to this type of politics is distrust of moderates and a deep apathy at the centre of politics. The rise of politicians like Governors Mike Mbuvi Sonko in Nairobi and Ferdinand Waititu in Kiambu represent this trend.
156. Second, the persistence of impunity in Kenya has generated what might be termed the problem of 'mandate ambiguity:' what exactly are leaders to be held accountable for? That problem has been compounded by a growing sense of civic helplessness. The public feels that it has no instruments or levers that it can press to force leaders to account to them or to sanction them when they go rogue.⁵⁴ As Kenyan democracy has got stuck in a rut, the government's resort to more authoritarian methods has made

⁵¹ Alina Rocha Menocal, and Verena Fritz id at p. 30

⁵² Mkandawire, Thandika, "Crisis management and the making of 'Choiceless Democracies' in Africa" in Richard Joseph (ed.), *The State, Conflict and Democracy in Africa*. Lynne Rienner Publishers, Boulder, CO.

⁵³ Alina Rocha Menocal, and Verena Fritz id at p. 30 quoting from Ottaway M, Democracy Challenged: The Rise of Semi-Authoritarianism. Washington, DC: Carnegie Endowment for International Peace, 2003.

⁵⁴ See a good early discussion of this in Fearon, J. (1999) Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance in A. Przeworski, S. Stokes, & B. Manin (eds) *Democracy, Accountability, and Representation*, Cambridge Studies in the Theory of Democracy, (pp. 55-97) Cambridge, Cambridge University Press.

political action by citizens costly, undermining many of the accountability tools in the new constitution: freedom of expression; the freedom of association and the right to assemble. The progressive weakening of these tools makes it more than likely that politicians will continue to pursue what has worked for them before, that is to say, impunity and wanton interference with elections.

4.2 Possible Pathways out of State Capture

157. What, then, can be done to restore electoral integrity in Kenya? If the state capture diagnosis is correct, there are three ways to undo capture: One, is a terminal crisis arises from a deeply intractable political or severe economic crisis that causes splits in the elite leading to defections that create new opposition forces and sweeps anti-reform hardliners out of power. Such changes can occur unexpectedly- as they did in Sudan in 2019; in the Philippines in 1986 and in Peru from 1979. The on-going fragmentation of the ruling Jubilee Coalition and the realignments taking place on the political scene could be the beginning of exactly this sort of terminal crisis.
158. The second potential trigger for transition from capture is a political fallout amongst the state elite stemming from an economic crisis. A debt-fueled crisis can lead to elite fragmentation as described above. The transitions to democracy in Latin America in the early 1980s was driven, in part by the sub-continent's deep indebtedness. Ballooning inflation strained the working class and spawned food protests and riots. The governments' inability to resolve these problems quickly tore asunder the business elite as well as the military. A debt crisis splits the capture elite because it erodes 'state capture benefits', turning the more opportunistic of the state elite into over-night pro-democracy 'reformers.' As the jubilee splits widen, some of the politicians who were formally hardliners have softened their tone expressing support for judicial reform and constitutional checks, subjects that were once anathema to them.
159. Thirdly, the political campaigns and mobilization for the 2022 election could unleash a new pro-integrity and pro-democracy coalition. A black swan event⁵⁵ that is a rare, unpredictable event that is beyond what current circumstances lead one to expect, is always possible.
160. The transitions in Eastern Europe in 1989 and the reforms in the decade that followed; the rupture of dictatorships in Tunisia and Egypt after 2011 and in Ethiopia in 2018, were all, in some senses, black swan events. Such events could occur if on-going attempts to control the 2022 elections go awry and 'transition management' aborts. It could lead to

⁵⁵ Though Swans are white birds, black swans do exist. The phrase 'black swan event' was popularized by Nassim Nicholas Taleb in his must-read book, *The Black Swan*. He used the phrase to describe an extremely rare, unpredictable event that is beyond what one would expect of the situation that, potentially, has very severe consequences. The phrase implies that one's current experience does not prepare him or her for the event.

a new coalition committed to undoing capture and genuinely interested in honest and competitive elections.

161. What other reforms are possible?

4.3 Constitutional Reform: Can BBI Restructure the State and Restore Electoral Integrity?

4.3.1 Good Institutions Matter: They Socialize People into Norms and Attitudes

162. Another route through which deep democratization could be achieved is through reforms proposed under the Building Bridges Initiative, BBI. Though which of the BBI content will go to referendum remains unknown, the BBI Report has set out in detail its diagnosis of the issues that need to be addressed to deal with the crisis in Kenya. According to the report, Kenya problems lie in its political culture: Kenyans do not have shared ideals⁵⁶; they lack a national ethos⁵⁷; they are uncomfortable under their African skins⁵⁸; they have ignored their history; they are disconnected from African traditional societies and mores⁵⁹; they are too divided along ethnic lines⁶⁰; they don't take their responsibilities seriously⁶¹; they are too individualistic⁶² and, above all else, they are way too invested in getting personal gain from the country's clientelist politics.⁶³

163. Though much of this is true, the Report ignores how the country's defective institutions and opportunistic politicians have contributed to the malignant politics that the Report describes. As noted at the beginning of this study, personalistic politics and manipulated institutions have played a major role in the culture of political impunity that creates divisive and ethnically-driven politics. The danger in the BBI diagnosis is that it leads very naturally from the argument that people's culture, ethos and beliefs are the problem to the solution that what they need is additional training and attitude change, which is what in fact the Report largely recommends.

164. What the BBI Report has overlooked is the fact that people's behavior and values are shaped by the institutions that socialize them into citizenship. Kenya's political pathologies- widespread corruption; divisive politics; ethnic competition for resources; negative individualism- are spawned by its defective institutions. Thus, if Kenyans are

⁵⁶ BBI Report para 24, p. 30

⁵⁷ id.

⁵⁸ Para 33, p. 32

⁵⁹ Para 25

⁶⁰ Paragraphs 59-63, p.44

⁶¹ Para 41, p. 37

⁶² Para. 41 id.

⁶³ Para. 74, p. 482002

without idealism it is because they had found ideals are useless and costly in an environment of widespread corruption and dishonesty. If Kenyans routinely shirk the responsibilities of citizenship it is because civic responsibility is unrewarding where honest effort is punished. If Kenyans are divided ethnically it is because ethnic affiliation opens doors and opportunities. In other words, the problems that the BBI Report analyses are perfectly rational responses to life under dysfunctional institutions.

165. The long-term solution is to change the politicians incentives by making it harder, expensive and painful for them to mobilise identities for political purposes. The practice in Kenya is that once they are out of office, leaders who in their time corrupted the electoral system or undermined Kenya's democracy or in some other way weakened the constitution, are allowed to go scot-free. That has set a precedent for their successors in office do the same.

166. In the 1978 transition to the Daniel arap Moi presidency, the errant Kenyatta elite was forgiven unconditionally, even though 78 prosecution files had been prepared.⁶⁴ That same forgiveness was tacitly extended to the Moi elite when Mwai Kibaki took over in 2003. The leniency was similarly extended to the Kibaki elite in 2013 when President Uhuru Kenyatta took over.

167. A relay race of impunity hand-over has thus been created. The lesson from the rest of the world, that is, from South Korea where three ex-presidents have been imprisoned⁶⁵; from Brazil where the immensely popular Lula da Silva has been jailed and from Angola where the ex-president Do Santos' children face the prospects of imprisonment by the man their father hand-picked for the presidency, is that there must be an end to impunity if the country is to make progress. If the Kenya Constitution is changed as part of BBI reforms, a provision must be introduced that makes it criminal to undermine the Constitution. Such conduct would be sanctionable no matter how long out of power the leaders have been. Both the Constitution and the Public Finance Management Act already have such a provision for the mismanagement of public monies, it should not be extended to the mismanagement and abuse of the electoral process.

4.3.2 Leadership is Crucial but it Cannot be legislated into being

168. Comparative experience shows that highly defective and malignant governance systems have been radically changed and re-oriented to become accountable, resilient

⁶⁴ Personal communication from a former attorney general familiar with the Moi transition.

⁶⁵ In October 2018, the former president of South Korea Lee Myung-bak was to 15 years in prison and fined 13bn won (£8.8m) bribery and embezzlement. His successor Park Geun-hye had earlier been forced from office amid protests before being jailed for 33-year sentence for corruption. The court found that he had taken bribes from some of South Korea's largest companies, including Samsung. In 2009 former President Roh Moo-hyun- president from 2003 to 2008 – committed suicide he being questioned by prosecutors for alleged corruption. Earlier in 1996 two former presidents, Chun Doo-hwan - 1980-88- and Roh Tae-woo - 1988-1993- were also convicted of bribery but were pardoned in 1997.

and effective by strong leadership. Singapore and Hong Kong are the outstanding examples of what visionary leaders can do. Lee Kuan Yew in Singapore and Governor Sir Murray Maclehoose in Hong Kong- show that it is never all lost. Singapore under the British was a desperately corrupt place. The police were “thieves and opium smugglers”⁶⁶ who worked closely and “collaboratively with Chinese gangs.”⁶⁷ When he came to power, Lee Kuan Yew enacted a strict Prevention of Corruption Act, reformed the police and strengthened the anti-corruption Bureau, progressively raising its budget from S\$1 million in 1979 to S\$34 million in 2011. By 2003 the Bureau was “completing 99 per cent of its investigation, usually within 90 days of inception”⁶⁸ out of which “prosecutions took place in 85 percent of those.”⁶⁹ Singapore shows- as does Hong Kong- that state collapse and bad governance can be reversed by leaders ready to re-create institutions.

169. In the context of Kenya, what has been lacking so far are leaders with an interest in electoral integrity, the rule of law and constitutional government. Some may be pessimistic that such leaders could emerge in Kenya. Counties seem like a potential seed-bed from which such committed leaders could emerge. Some counties like Makueni and Laikipia are generating peer pressure that other governors are feeling compelled to emulate. Makueni County has Kenya’s most robust system of public participation. The country has shown that participatory budgeting is possible and effective and left to their devices, citizens can design and implement their own priorities. Laikipia has set up its Economic Development Board modeled on Singapore’s and Rwanda’s Development Boards. Makueni has a universal health care system and Laikipia is hard at work setting up one too.

4.3.3 The Kenya Presidential System needs reform to strengthen constitutionalism and checks and balances

170. As this study has argued, electoral integrity depends crucially on robust checks and balances. One of Kenya’s recurrent problems is that every effort to subject the executive to checks rapidly comes undone. The effect is that whatever reforms Kenya implements, their effectiveness is vetoed by leaders lodged in the executive. One reason for this is a chronic inability to design proper executive- legislative relations, even under the 2010 Constitution.
171. The central problem in Kenya today is a badly designed bicameral Parliament that is so internally conflicted that it cannot adequately act as a check on the executive. The underlying problem is that Kenya has a presidential system, but its legislature is

⁶⁶ Rotberg, p. 111

⁶⁷ Rotberg, p.111.

⁶⁸ Rotberg, at p. 112

⁶⁹ Rotberg, at p. 112.

bifurcated, half designed to serve a presidential system and half designed to serve a parliamentary system. This makes it ineffectual for either as a legislative chamber or as part of checks and balances.

172. In a fully presidential system, the legislature should be perfectly bicameral – that means that the Senate should have equal powers to the National Assembly- such as is the case in Nigeria, US or Brazil. Kenya currently has the National Assembly as a full legislative chamber and a weak Senate designed on the principle of ‘devolution protecting bicameralism’ – a feature of parliamentary systems.
173. That this matters profoundly needs to be explained: In parliamentary systems that have sub-national governments, the role of upper houses is to protect the sub-national governments. This is the case in South Africa (the National Council of Provinces); in Germany (the Bundesrat); in Ethiopia (the House of Federation) and in India, (the Rajya Sabha). In such legislatures, the powers of the upper houses are limited and are typically fewer than the powers of the lower houses. In such a system, the lower house is made up of directly-elected representatives and the upper houses of representatives selected by the sub-national governments. In such cases, the national government is formed from the party with the largest number of seats in the lower house, the directly elected house. On the basis of the principle of fiscal constitutionalism ‘no taxation without representation,’ the directly elected house is given budget powers. Conversely, upper houses, which are indirectly ‘selected’, to represent sub-national government. For this reason, they are denied budget powers and exist to protect the interests of the sub-national governments. In that case, the logic is that upper houses should be represented in parliament to ensure that the national government (armed with financial power and represented in the lower house) does not usurp the powers or invade the functions of sub-national governments.
174. By way of contrast, in presidential systems - the USA, Nigeria, Brazil- where legislative and executive powers are fully separated, members of the Senate are directly elected like those of the lower house and there is perfect bicameralism, in that both chambers have full legislative powers. The paradox of the Kenya Senate is that it is directly elected- like in a presidential system- but its powers are limited to protecting sub-national governments- like in a parliamentary system. Under the current system, county governments have no voice in how the Senate is selected or elected- unlike in a parliamentary system.
175. The result of this conundrum is that Senators today have neither the power nor the incentive to protect counties as the Constitution says they should. The BBI proposals have made matters worse: they have not addressed the conundrum. Which means that BBI’s proposal for a parliament-based executive- discussed below- can only further weaken the autonomy and functions of the Senate. With a weakened Senate, even the enhanced 35% allocation to counties that BBI proposes to give to the counties is unlikely to be implemented. Consider the reality today: even without the executive sitting in the National Assembly, MPs have been willing instruments of the executive in the

weakening of the Senate. What will it be like with the executive actually sitting in the National Assembly but not in the Senate?

176. The BBI also recommends that Kenya should return to some variant of the mixed system Kenya had before 2010. Unfortunately, if adopted that will increase the President's dominance over parliament and undermine checks and balances. The old system had a one chamber parliament; the president was a member of parliament and the cabinet was collectively accountable to parliament. Under that system, parliament's fate was tied to that of the President: if Parliament passed a vote of no confidence the President could dissolve parliament and force an election of the National Assembly or do nothing and force a general election in which even he would have to seek a new mandate. In short, the system punished the legislature but not necessarily the executive in a vote of no confidence.
177. The system the BBI proposes vests executive power in the President not in the Cabinet. In parliamentary systems, executive power is vested in the Cabinet collectively not in the Prime Minister. That is why the Cabinet is collectively answerable to Parliament. In the BBI proposal power is vested in parliament but it is the cabinet collectively that is answerable to parliament and the prime minister only that may be removed by a vote of no confidence. Whatever the President does it is the prime-minister and the cabinet that bear the brunt of parliament's loss of confidence not the president.
178. In addition, under the BBI proposal, MPs pay no price for multiple, even frivolous votes of no confidence and therefore have an incentive to politically punish a prime minister that they dislike.⁷⁰ Moreover, the vote of no confidence does not affect the cabinet at all, which is strange because if the cabinet is collectively answerable to parliament then a lack of confidence in the Prime Minister should be read as a lack of confidence in the cabinet that he supervises.
179. Taken together, these proposals will re-invigorate the unchecked presidency of the previous constitution. That is hardly going to create an environment for democratically accountable elections. On the argument that elections in Kenya lack integrity because of the impact of the wider constitutional context, then the reforms that will strengthen constitutional government, namely a strong senate to check an overenthusiastic national assembly and both united to check and balance the presidency is a basic minimum for future electoral integrity.

4.4 Electoral Reforms? Yes, Stronger and Independent Oversight by a Combination of KNCHR, Judiciary and Parliament

⁷⁰ If votes of confidence are too easy to call, they will be used as bargaining tools by legislators. This has been one of the reasons why governments in Italy have been so fragile: votes of confidence are too easy to call. Italy as a result has had 61 governments since 1945, an average of one government every 16 or so months.

This study has argued that the failures of Kenya's electoral system arise from the manipulation and abuse of the constitutional system. That means that there is very little scope for changing the electoral system to cure problems that are, in a deep sense, problems in the constitutional system. The truth is that Kenya's electoral laws are detailed and reasonably well thought out and implemented in good faith, are sufficient to ensure the integrity of elections. What urgently needs to be fixed is to find a new mechanism of electoral oversight that could actually work.

180. In the Kenya National Commission on Human Rights, KNCHR, and the Judiciary, Kenya has two bodies with the mandate and the human rights orientation necessary for to enforce of electoral integrity. It would be necessary to amend the constitution to entrench an electoral integrity mandate for the KNCHR and to provide fast-track access by the commission to the courts. Once the mandate has been expanded the Commission should have the powers – on its own motion and on petition- to inquire into all the management of all the core elements of the electoral process: scrutiny of the register; oversight over and scrutiny of the procurement, acceptance and testing of electoral equipment; the process voting, transmission; tallying and announcing election results. If dissatisfied or where the IEBC is unresponsive the KNCHR should be able to obtain an order from the courts to enforce compliance.
181. In order to give the relationship between the IEBC and the KNCHR legal footing, the IEBC Act should be amended to require the EMB to agree with the Commission, a binding Memorandum of Transparency and Accountability at least two years before the elections. From this Memorandum, the KNCHR would develop an Integrity Charter, a public document which any citizen could use to petition the KNCHR when things go wrong to trigger action.
182. In addition to the changes related to the KNCHR, the judiciary should internally create 'fast-track electoral processes that ensure problems that the commission identifies can be litigated quickly and effectively without causing delays to the elections.
183. To support the independence of the judiciary two changes are necessary: One, defunding the judiciary that is deliberately reducing its vote- should be expressly prohibited and two, the judiciary Fund should be ring-fenced at a specified percentage of nationally collected revenues.
184. In order to enhance accountability and avoid stalemates or late reforms to the electoral law, it is necessary to establish a bi-partisan standing committee of the two houses of parliament. This will complement the functions of the Departmental Committee of Justice and Legal Affairs of the National Assembly in the oversight of IEBC, consider delegated legislation on elections and build consensus on election laws.

4.5 Strengthening the Resilience of the Judiciary

185. In a bid to offer clarity and streamline and promote electoral integrity during the 2017 general elections, the Judiciary was called upon to make determination of the various phases of the electoral cycle. For the most part, the judicial interpretation underscored the need for quality, free, fair and credible elections provided for in the constitution and election sector laws, which was an important hallmark of securing electoral integrity. Some of the judicial determination were as below;
186. Despite the hindsight of the 2013 experience of Smith and Ouzman as the ballot paper printer, which was impugned at home for bias and indicted in the UK for fraud, IEBC procured the services of Al-Ghurair for the supply of ballot papers in the 2017 General Elections under questionable circumstances. This tender was the subject of the Judicial Review Application by NASA Coalition. The court in Independent Electoral and Boundaries Commission (IEBC) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017], was critical of IEBC albeit falling short to rapture the constitutional election date. In its critical comments against IEBC the Court noted that *“We accept that this history demonstrates troubling questions on the competence of the IEBC to navigate the admittedly murky and complex waters of tendering of Ballot Papers.”* While finding clear demonstration of incompetence, possibility of bias and lack of transparency or non-compliance with the values expressed under article 10 of the constitution”.⁷¹
187. IEBC suffered similar fate during the procurement of the KIEMS kits. The procurement was invalidated by the Public Procurement and Asset Disposal Tribunal (PPADT) in April 2017 for failure to comply with mandatory procedures under the Public Procurement and Assets Disposals Act. The IEBC in, now customary fashion, used the excuse to pick a preferred supplier, MORPHO OT through direct procurement process without any mark of transparency. That decision was never challenged by any of the bidders except in a subsequent constitutional petition⁷² which fell short of proving non-compliance with the Constitutional Standards under Articles 10 and 38. The Court took a permissive view of the IEBC explanation to establish complementary mechanism in order to implement the counter reform provisions under Section 44A and Regulations an of the Elections Act.⁷³ This decision effectively operated to dwarf the objectives of the consensus obtained through the bi-partisan parliamentary process and the 2016 legal reforms⁷⁴ to the extent that the Commission was expected to invest in a system that gave full effect of Article 86 of the Constitution as far as management of election results was concerned. The decision also dwarfed the progressive instinct of Maina Kiai vs IEBC⁷⁵.

⁷¹ Owuor Felix, 2018; ‘Reflections on Electoral Management in Kenya- Violence and Intimidation; Lessons Learnt from 2017 Presidential Elections; ICJ- Kenya

⁷² *Khelef Khalifa & 2 others v Independent Electoral and Boundaries Commission & another* [2017] eKLR Constitutional Petition No 168 OF 2017

⁷³ *National Super Alliance (Nasa) Kenya v Independent Electoral & Boundaries Commission & 2 others* [2017] eKLR Petition No. 328 of 2017

⁷⁴ Election Law Amendment Act of 2016 following the recommendation of the bi partisan parliamentary committee chaired by Senator James Orengo and Kiraitu Murungi.

⁷⁵ Maina Kiai case on the finality of the vote at the polling station.

188. Maina Kiai Vs IEBC, had concerned the interpretation of Article 86 of the Constitution and Section 39 (2) and (3) of the Elections Act (finality of the vote at the polling station). In this case the petitioners had impugned the provisions of Section 39 which purported to give the Commission officials at the Headquarters the power to alter the declaration of elections at the constituency level. The Case also attacked the regulations 83(2) and 87(2) (c) which were made pursuant of Section 39. In Maina Kiai vs IEBC, the Court expressed itself with unprecedented clarity that was new to this area of electoral reforms. It brought to bear the cumulative learning from the ECK challenges in 2007, the mischief upon which the constitution elaboration in Article 86 (on finality of the vote at the polling station) was based and pronounced itself extensively. The learning from this decision is that electronic results is at the core of election integrity and a critical investment within the constitutional scheme and cannot be viewed as “provisional, temporary or interim.” This position is at the center of the attempts at electoral reforms from 2002 when Kenya adopted counting of ballots at polling stations and tallying at constituency level. The reversal which was obtained by the counter reform legislation in 2017⁷⁶ reversed the gains obtained through the implication from Article 86, the bi-partisan amendments in 2016 and the decision in Maina Kiai vs IEBC.

189. These court decisions, intransigence at the political level, and a commission unpreparedness or unwilling to seize any opportunity for genuine inclusive progress were the prelude to the challenges of the 2017 presidential election and the supreme court determination. The Supreme Court was seized of the questions as to the validity of the 2017 Presidential Election in Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR Election.⁷⁷ The Presidential Petition was fought in somewhat different strategy from the 2013 petition. The petitioners framed the issues before the court to include the court’s interpretation in the 2013 petition regarding interpretation of Section 83 of the Elections Act. The court adopted a disjunctive approach in interpreting the section which gives due prominence to qualitative analysis of validity and is consistent with jurisprudence elsewhere (Morgan v. Simpson [1974] 3 ALL ER 722; opinion of Justice Professor Lilian Tibatemwa Ekirikubinza issued in the case of Col. DR Kizza Besigye v. Attorney-General⁷⁸ and the decision in Gatirau Peter Munya v. Dickson Mwenda Githinji and 2 Others (2014) eKLR).

190. The central question on the second substantive issue for determination in the case concerned the results management framework. IEBC in their submissions opined rightly, as has been alluded to in this paper by a reading of Article 86, Section 39, Section 44 of the Elections Act and the decision of the Court of Appeal in Maina Kiai vs IEBC that the regime of provisional or interim results was effectively extinguished. However, in complete disregard of the implication that investment in electronically transmitted

⁷⁶ Election Security Amendment Act, 2017: otherwise known as the Duale Amendments.

⁷⁷ *Petition No. 1 of 2017*

⁷⁸ *Col DR Kizza Besigye v. Attorney General Constitutional Petition Number 13 of 2009*

results ought to yield data that can reflect and verify the statutory forms. IEBC impressed upon the court to accept a position that electronic results were mere “statistics” and of no value. According to IEBC the “numbers manually entered in the KIEMS kit at the close of polling, and transmitted simultaneous to the CTC and the NTC, bore no status in law. They were mere statistics, although, as Mr. Muhati stated in his affidavit, the presiding officer had to show the agents present the entries made for confirmation before transmission.⁷⁹” The decision turned largely on non-compliance with the constitutional and legal provisions on results management framework. Despite attempts by the Judiciary to give life and meaning to the progressive constitution of Kenya 2010, it is remarkable to note that IEBC was at the center of each of these moments, each time choosing the opposing side of the argument instead of making genuine and inclusive steps to enhance transparency and electoral integrity.

191. From the foregoing, it is clear that Judiciary is an important and indispensable player in the electoral process. To consolidate gains realised during the 2017 electoral cycle, EDR institutions both at the pre-election and post election stage should be strengthened. To this end, deliberate effort should be geared towards supporting Political Parties Dispute Tribunal (PPDT), IEBC Dispute Tribunal and the Judiciary Committee on Elections (JCE) to strengthen their resilience and effectiveness in supporting the electoral process. Support to EDR institutions will in turn enhance electoral integrity in Kenya.

4.6 Elections Operations: Intergration of Technology

192. The Bipartisan Committee led by Senator James Orengo and Kiraitu Muringi legislated a comprehensive framework for integration of technology under the Kenya Intergrated Elections Technology Framework. However, this development was watered down by the Election Security Amendments Act (Duale Amendments) that clawed back some of the progressive provisions on the use of technology in elections. Elections Technology serves the mutually reinforcing purposes of increased transparency and efficiency. Whereas election technology is perceived to have contributed to increased efficiency in electoral management, it has not contributed effectively to enhanced transparency and integrity. Verifiability of the register, management of election results suffered challenges in the 2013 and 2017 general elections. As mentioned in the previous chapter, there is also questions regarding the decision making, procurement and deployment of technology.
193. In 2016, parliament sought to mitigate these challenges through legal reforms and the establishment of the Elections Technology Advisory Committee (ETAC). Interventions of the Judiciary in cases such as the Maina Kiai case also sought to crystalise judicial approach to the instrumentality of technology in enhancing verifiability of results. These efforts have have been largely derailed or thrown to further doubt through subsequent amendments and conflicting judicial pronouncements. There is need to review the process of integration of technology with the objective of facilitating inclusive

⁷⁹ See Submission of IEBC Lawyers during the hearing of Petition No 1 of 2017.

engagement, transparency, accountability and verifiability to the electoral process. To this end, there is need to review and or re-legislate the Orembo/ Kiraitu Bi-partisan consensus. Perhaps the most important question that Kenyans must determine is “what kind of technology should be deployed and utilised during the 2022 general elections?”

4.7 Results Management System: Counting, Tallying, Transmission and Declaration of Results

194. Integrity of election results is at the centre of results management system. Results management system pose significant challenges on election management and administration⁸⁰. The invalidation of presidential election results in Kenya and Malawi by the respective Supreme Courts was largely due to the inability to vouch for the integrity of results as announced by the electoral commissions in the two countries. Despite clear constitutional provisions and the judiciary intervention during the 2017 elections, handling of election results remains a big problem. The fundamental question involving results management is this, what happens when a voter casts a ballot and the results are declared?⁸¹ In 2007, 2013 and 2017 the flow of results from the polling stations to the constituencies and finally to the national tallying center showed discrepancies and interference that the true reflections and aspirations of Kenyans could not be ascertained. Results Management System remains the weakest link in securing electoral integrity in Kenya. Radical legal reforms and review of the Elections Act, 2011 and Election General Regulations to align them with the constitutional provisions in Article 1, 38, 81, 86 and 138 is key. Utilisation of technology transmission process with sufficient integration of transparency and accountability mechanism will further improve on the integrity of results. Additional measures aimed at guaranteeing the integrity of results, including allowing the media transmit the results, strengthening political party poll-watching and domestic election observation (Parallel Vote Tabulation), should also be considered.

⁸⁰ Owuor Felix, “LLM Research Thesis: *Reforming Election Management and Administration in Kenya: The Case for IEBC*. University of Nairobi, {2016}

⁸¹ Owuor Felix; *LLM Research Thesis: Reforming Election Management and Administration in Kenya: the Case for IEBC*: University of Nairobi [2016]

5. CONCLUSIONS

195. This study has made few new legal reforms proposals. The reason is the lessons of history. Kenya has been here many times before and all to no purpose. There is nothing inherently weak, technically speaking, about the legal framework for elections in Kenya in terms of appointing EMB commissioners; requirements for use of technology or even on the powers of the commission. The problem, we have shown, that even blatant wrong-doing- by the EMB, by politicians, by security forces- is never punished. That stems in part from opaque processes and impunity. Those are problems that can be addressed partly by strengthening the reach of the law over those who undermine elections even after they leave office; designing a stronger oversight mechanism and ensuring a more robust system of checks and balances that reduce the executive's overweening power over other branches of government. The Constitution of Kenya 2010 is right based, transformative and progressive particularly on the Representation of the People. Articles, 38, 81 and 86 are key to securing quality elections and electoral integrity. The constitutional framework sets out the political and governance system which is in turn given effect primarily through elections. This include the structure of the state, the extent of its accountability to the people, separation and of the organs of state,

checks and balances among the different organs, levels of devolution, and complementary institutions. The design of electoral system must therefore of necessity respond to and be aligned with the political system. A holistic and comprehensive review of the legal and constitutional framework for elections is therefore key, but this must be accompanied by corresponding need to comply with the rule of the game and a willingness by Kenyans and all the stakeholders to do the right thing. The latter, regrettably, cannot be legislated.

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ANNEX

ELECTION INTEGRITY (PROCUREMENT) MATRIX

STRENGTHENING ELECTORAL INTEGRITY THROUGH EFFECTIVE PLANNING

Public sector procurement plays a significant role in the management of elections in any country as this is where election materials are sought for the conduct of elections. Electoral goods and services represent one of the most important and costly parts of an election. Any delay or shortfall in the procurement or distribution of electoral materials or timely receipt of required services can have serious implications for an election, potentially affecting its schedule or even outcome.

As expected of every electoral cycle, the Independent Electoral and Boundaries Commission has since taken stock of lessons learnt from the 2017 GE and moving forward should seek to treat elections as project. This will require project management which involves planning, organizing including control of resources in an endeavor to achieve the specific goal of delivering free, fair and credible elections.

To achieve this, procurement of resources, ranging from stationery, electoral materials, voting infrastructure, catering, etc. will need to be undertaken through a formal procurement process that deliberately seeks to harmonize provisions of the Constitution, Elections Act, Public Finance Management Act Public Procurement Act and Treasury Regulations.

The challenge as witnessed in 2017 lies in the fact that electoral operations take place in contexts that are affected by a unique confluence of political, social, historical, and cultural factors. Should these resources be acquired late, then the credibility of election stands compromised.

The question before us therefore being- What is best for the IEBC between the quality of service delivery and the strict compliance to law and regulations? How will the IEBC balance value for money and best quality in all products and services acquired? (Scope in time; cost; and quality in relation to, Voter Registration, Election Day Operations, Counting and Results Transmission procurement, Accreditation, Out-of-country Voting and other special voting services, contracting a CSO to conduct trainings or voter education, identifying and hiring specialists on short-term contracts, buying radio and TV spots align with procurement, logistics and budgeting).

The Matrix below Attempts to Demonstrate:

No.	Policy	Measures (To be Implemented)	Requirements (To be effected)
1.	Conduct of election planning meetings at national before any election where timelines and budget are discussed, experiences, challenges and best practices shared.	At a strategic level where policies are formulated and strategized.	▪ Requirements for goods, works and services to be justified, recorded and duly approved. ▪ Timely disbursement of funds to meet identified requirements.
2.	Procurement of goods and services to effectively undertake elections through design of an electoral plan aligned to procurement plans and budgetary estimates to avoid any delay or shortfalls in the procurement and distribution of materials that could have serious ramifications on the rest of the electoral timelines.	Development of lean and non-bureaucratic structures within the IEBC. Putting in place measures (legislative reforms?) to deal with emergencies leading to deviation from normal public procurement procedures. Putting in place Contingency plans/Reserves.	▪ Appropriate Budgetary allocations (managing cost increments). ▪ Functional Organizational Structure (Adaptable functional & project sets of responsibilities). ▪ Government Policy (widening the scope of application of the to provide a proper basis for deviation). ▪ Managing the external environment.
3.	Conduct of open and transparent procurement process.	Processing and management for complete procurement cycle through close coordination with the budget process, commitment control, and finance and expenditure management. All steps of the procurement cycle properly documented and filed with each step being approved by the Accounting Officer.	Best practice approaches: ▪ Pre-qualification Lists-Based on appropriate qualification criteria defined in advance. ▪ Accredited Suppliers- Through establishing long term Agreements for a period of time.

No.	Policy	Measures (To be Implemented)	Requirements (To be effected)
			▪ Pre-bid Briefings- Especially for highly specialized and technically complex procurement.
4.	Provision of adequate and conducive infrastructure that will take care of all voters in an election.	Designing and putting in place systems aimed at achieving not only effectiveness and efficiency but ascertain audit ratings. Managing administrative and technological systems interchangeably.	▪ Efficiency in handling huge procurement spending. ▪ Balancing between value for money maximization and economic, social and environmental goals. ▪ Complying with government procurement legislation. ▪ Perception that procurement is an area of corruption and bribery ▪ Awareness on Supply market conditions. ▪ Awareness on Legal and political influence in the procurement process.
5.	Acquisition of specified voting materials and equipment for the effective and efficient management of elections based on existing needs, technological changes and emerging trends globally.	Appropriate planning at the start of the process towards achieving timely procurement and a better allocation of resources, avoiding the risks of unjustified higher costs due to late action, and without compromising established regulations or quality levels.	▪ Initiation of standard bidding documents align with Treasury guidelines. ▪ Developing documents that seek to accumulate more information from Vendors. (In most cases including significant information about the vendor's background, performance

No.	Policy	Measures (To be Implemented)	Requirements (To be effected)
			and ethical dealings, so as to combat corruption and fraud and enhancing competition and equity.
6.	Putting in place the appropriate technology necessary before an election towards enhancing integrity, efficiency, and transparency of the election process. Undertake timely testing, verification and deployment of technology before the election.	The technology to be used for voter registration and voting shall be acquired within the appropriate time as prescribed in law with the appropriate infrastructure to be audited on or before commencement of the exercise by a reputable firm selected competitively to establish its viability, efficiency and availability.	Deployment of practice /procedures and strategies to use technology without jeopardizing the electoral process: ▪ Involving stakeholders. ▪ Surveying the political environment and cultural issues. ▪ Carrying out feasibility studies ▪ Transparency in procurement procedures, time of deliveries, costs and risks. ▪ Undertaking pilot and evaluation tests ▪ Civic education, public outreach and consensus - building measures.
7.	Compiled register of voters to be publicized and subjected to an audit by a reputable, professional and independent firm that will be appointed by the IEBC through a competitive process.	Ensuring contractual engagement distinct to the requirement while equally achieving value for money.	▪ Provide a clear benchmark the Audit Firm must meet. ▪ Use of recognized and measurable references.
8.	Appointment of professionals, technical and administrative officials and other temporary staff by the IEBC through a	Weighing the perceptions of voters and other stakeholders-balance between transparency and security of the electoral process and	▪ Planning and implement a training programme for effective training of all cadres of election officials.

No.	Policy	Measures (To be Implemented)	Requirements (To be effected)
	competitive process to facilitate the conduct of elections.	integrating existing skills with 'borrowed' expertise in the electoral process. Enhance quality on engagement of poll officials to be deployed to respective electoral areas from time to time based on qualification, suitability and competence.	Conduct of meetings with political parties/aspirants to provide a forum to raise their concerns.
9.	Putting in place an integrated logistical and security plan to enhance efficiency in the electoral process.	The IEBC will be expected to promote efficiency, economy and effectiveness by ensuring that stocks are received, stored, managed and issued from a designated warehouse facility. Integration of logistics and supply chain management- (this way when planning distribution and warehousing, procurement challenges are considered in context of planning, coordination and implementation of procurement including disposal management).	- Development of Distribution plan that requires that all election materials to be deployed to the county warehouses six months to Election Day except ballot papers. - Keeping Warehouses secure, clean, with proper layout and arrangement, including well labelling for easy identification. - At all-time subject all goods, works and services to verification, inspection prior to acceptance
10.	Development of a detailed transport plan to enhance efficiency in the electoral process.	Mode of transport procured to be dependent on the terrain and prevailing climatic condition and able to meet outlined specifications.	- Vendor early involvement. - Designing deliberate acquisition process that will entail, procurement and deployment of a vehicle per polling station.

No.	Policy	Measures (To be Implemented)	Requirements (To be effected)
11.	Development and implementation of a detailed security plan in.	Mechanisms to ensure data availability, accuracy, integrity, and confidentiality.	▪ Collaboration with government security agencies. ▪ Storage of ICT related equipment under a favorable environmental, technical and physical condition. ▪ Adopting tools to detect, prevent and protect against attacks and compromise of the election technology.
12.	Enhancement of Result management Processes including the National Tallying Centre processes so as to ensure smooth processing and declaration of presidential results.	Processing and management of information through in the entire electoral process.	▪ Establish communication centers to manage information flow and attend to emerging issues arising from election officials. ▪ Acquisition of applicable technological infrastructure to project results in real-time.
13.	Enhanced partnership with stakeholders and relevant government agencies and the IEBC towards establishing and setting up of Registration Centers for citizens including those residing outside the Country.	Special administrative arrangement should be made to facilitate registration and voting for special categories of citizens.	▪ Consultations when embarking on procurement processes for management of elections in the Diaspora. ▪ Choosing ‘Implementation Partners’ (Technical; Financial; Administrative ▪ Coordination between the various local stakeholder and international organizations.

