

Chapter 3

Electoral Framework and Election Administration

Electoral system

The General Elections of 4 March 2013 were held under the new Constitution of 2010 to elect a President, members of the National Assembly, Women representatives for the National Assembly, Senators, County Governors and members of the County Assemblies.

The President

The President of Kenya is elected for a five-year term and can serve a maximum of two terms in office. A Deputy President, who also serves a five-year term and is also limited to two terms, is elected on the same ballot. The President is elected in a single national constituency on the basis of a majority system.

In order to be elected in the first round a candidate needs to secure more than half of all the votes cast in the election plus at least 25 per cent of the votes cast in each of more than half of the counties (i.e. 24 counties out of the total of 47). If no candidate fulfils both conditions then the two leading candidates contest a run-off election. In the run-off whichever candidate secures the most votes is the winner.

The National Parliament (National Assembly and Senate)

The Kenyan Parliament consists of the National Assembly and the Senate and both are elected for a five-year term.

The 350-member National Assembly consists of:

- 290 members elected from single-member constituencies on the basis of the first-past-the-post system
- 47 women elected from the counties, with one woman elected from each county on the basis of first-past-the-post.
- 12 members nominated by parliamentary parties, on a proportional basis according to the seats won by the party, to represent special interests – youth, persons with disabilities and workers
- 1 ex-officio member elected by the National Assembly to act as the Speaker

The 68-member Senate consists of:

- 47 members elected from each of the 47 Counties on the basis of the first-past-the-post system

- 16 women members nominated by political parties, with members allocated on a proportional basis according to the proportion of seats won by each party.
- 2 members, one man and one woman, representing youth
- 2 members, one man and one woman, representing persons with disabilities
- 1 ex-officio member elected by the Senate to act as the Speaker

County government (Governor and County Assembly)

A Governor will be elected in each of the 47 counties on the basis of first-past-the-post. For the 47 County Assemblies:

- One member is elected from each Ward in a County on the basis of first-past-the-post
- Additional members are nominated by parties in proportion to the seats received by the party in the election in the County to ensure no more than two-thirds of the County Assembly members are of the same gender.
- 8 members are also nominated to represent special interests: four shall be persons with disabilities and four shall be youth.

International and regional commitments and national legal framework

Kenya has signed or agreed to the major regional and international commitments and instruments relating to human rights and the conduct of elections. These include:

- Port of Spain Affirmation of Commonwealth Values and Principles (2009)
- AU African Charter on Democracy, Elections and Governance (2007)
- International Convention on the Elimination of All Forms of Racial Discrimination (1996)
- African Charter on Human and Peoples' Rights (1981)
- Convention on the Elimination of All Forms of Discrimination Against Women (1979)
- International Covenant on Civil and Political Rights (1966)
- Universal Declaration of Human Rights (1948)

The Kenya Constitution guarantees fundamental rights and freedoms, including freedom of expression, assembly, association and participation in elections.

The key documents providing the legal and regulatory framework for the conduct of the elections are:

- The Constitution (2010)
- Elections Act (2011) and Supplementary Acts
- Political Parties Act (2011)
- IEBC Act (2011)
- Elections (Voter Education) Regulations (2012)
- Electoral Code of Conduct

The Independent Electoral and Boundaries Commission (IEBC)

The 2010 Constitution provides for the establishment of the IEBC, and following the promulgation of the new Constitution and the passing of the 2011 IEBC Act, the current Commissioners were appointed in 2011. The IEBC comprises a Chair (currently Mr Ahmed Issack Hassan) plus eight Commissioners. All are appointed for a six-year term on a full-time basis and are not eligible for re-appointment.

Appointment of Commissioners follows a rigorous open application process, including public broadcasting of the vetting process. In order to qualify as a Commissioner a person must, among other things, be a citizen of Kenya, hold a degree from a recognised university and have proven relevant experience. Further, Commissioners must not have held office in the Parliament or County Assembly or have stood for election in the previous five years and should not have membership in a political party. In order to assess nominees a Selection Committee is established, which makes a proposal to the National Assembly. The Selection Committee is made up of two people proposed by the President, two by the Prime Minister, one by the Judicial Services Commission, one by the Kenya Anti-Corruption Advisory Board and one by the Association of Professional Societies of East Africa. Nominees must be approved by the National Assembly and then by the President.

There is a Chief Electoral Officer who oversees Departments for Electoral Operations and Support Services. There is also an Office of Registrar of Political Parties which operates under the IEBC.

For the conduct of the elections, the IEBC establishes: a) 17 Regional Offices; b) 47 County Offices; and, c) 290 Constituency Offices. Each of these is run by an IEBC Coordinator. For the purpose of candidate nominations and establishing and communicating election results a Returning Officer is appointed at each level (see Chapter 5).

As provided for by Article 88(4) of the Constitution, the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament. Its prescribed duties are quite broad and include:

- continuous registration of citizens as voters and regular revision of the voters' roll
- delimitation of constituencies and wards in accordance with the Constitution
- regulation of the process by which parties nominate candidates for elections
- settlement of electoral disputes, including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to the declaration of election results
- registration of candidates for election
- voter education
- regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election

- development and enforcement of a code of conduct for candidates and parties contesting elections
- investigation and prosecution of electoral offences by candidates, political parties or their agents

Voter eligibility and voter registration

In order to be eligible to vote, a person must be an adult citizen of Kenya and must be registered to vote. Persons are disqualified from voting if they are declared to be of unsound mind or have been convicted of an election offence during the preceding five years.

For the purpose of these elections a new national biometric registration of voters was conducted. Voter registration began on 18 November 2012 and lasted for 30 days (see below). At the point of registration a person had to provide proof of age and citizenship, by using either their national ID Card or Passport. The biometric voter registration captured a series of details for each individual voter, including a fingerprint, photo, the electoral unit ID and each voter's unique electoral number. At the outset of the exercise the IEBC had estimated on the basis of the number of National ID Cards issued that the total number of eligible citizens was around 18 million and set itself this figure as a target. At the completion of the exercise it was reported that some 14.3 million persons had been provisionally registered.

In addition to the eligible Kenyan citizens inside the country those eligible in the Diaspora could also register to vote. In the event this was limited to East Africa and the total number of registered persons in this category was some 2,000.

The provisional lists were displayed for the public at the local level from 14–28 January 2013 for verification. Following this the IEBC also conducted a cleaning of the lists, including checking for double registrants, correcting some of the recorded data and checking for omissions. The IEBC also had to verify data collected during registration in each individual Biometric Verification Registration kit.

The legal deadline for the final certification of the national voter register was 18 February 2013. The IEBC missed that deadline by a couple of days. The final list contained 14,352,533 voters. In addition there was a list of some 13,000 persons who were identified as double registrants and therefore excluded from voting.

Candidate eligibility and nomination

In order to be eligible as a presidential candidate, a person must be a citizen by birth; nominated by a party or stand as an Independent; nominated by 2,000 or more voters from at least 24 counties; and, have a degree from a university recognised in Kenya. A person is not qualified if she/he owes allegiance to a foreign state or if she/he is not otherwise qualified to be an MP.

In order to be eligible as a parliamentary candidate, a person must be a registered voter; have a post-secondary school qualification; and must satisfy moral and ethical requirements prescribed by the Constitution or by Act of Parliament. Further, a person must be nominated by a party or stand as an independent candidate and, in the case of a National Assembly candidate, must be endorsed by at least 1,000 voters registered in the Constituency, and in the case of the Senate, endorsed by at least 2,000 registered voters of the County.

A person is disqualified as a parliamentary candidate if she/he is a state officer or other public officer. Such persons must resign seven months before the date of the election in order to be eligible. Further, a person is disqualified if she/he has held office as a member of the IEBC in the immediate past five years or has not been a citizen of Kenya for at least ten years immediately before the date of the election.

Political parties are required to hold primaries in order to identify their officially eligible candidates. These were conducted in January 2013. In the event, some 12,400 candidates contested for 1,882 elective positions.

Complaints, appeals and election petitions

Every person has the right to petition the High Court if she/he claims to have been denied a right or a fundamental freedom. Election disputes during the pre-election period, for instance relating to nominations and other disputes prior to the declaration of results, can be dealt with by the IEBC or the High Court. The IEBC created a Dispute Resolution Committee to settle disputes related to nominations of candidates, and decisions in this regard are appealable to the High Court.

There is also an Electoral Code of Conduct Committee and Peace Committees, which were set up by the IEBC to receive complaints related to the Code of Conduct. The Peace Committees function more as an informal conflict resolution body and were envisaged to be present in each Constituency.

In addition there is a Political Parties Disputes Tribunal, whose decisions can be appealed to the Court. The Tribunal resolves disputes between members of a party as well as between political parties. However, political parties are required by law to have an internal party dispute resolution mechanism, in order to address internal matters first. This was supposed to be used, for instance, with regard to complaints regarding party nominations prior to those nominations being submitted to the IEBC as final.

Petitions against presidential election results have to be filed with the Supreme Court within seven days of the declaration of results. The Court has 14 days to hear and determine a petition. If the decision is that the election was not conducted properly then there is to be a new election within 60 days. Petitions against results for the Parliamentary and Gubernatorial elections must be filed at the High Court within 28 days of the declaration of

the results. The High Court has six months from the date of lodging the petition to hear and determine on the case.

The Elections Act identifies a series of election offences, and stipulates sanctions for these. Convicted persons are ineligible for election for five years following the date of conviction. Such offences include: false or multiple voter registration; multiple voting or destruction of voting materials; use of force or violence; use of public resources; personation; treating; bribery; undue influence; and, offences by IEBC staff.

The Judiciary set up fast track mechanisms in order to prioritise the handling of election-related complaints and petitions to avoid any undue delays in the handling of such complaints.

Key issues

1 Independent Electoral and Boundaries Commission (IEBC)

As stated earlier, the IEBC was only created in 2011 and many of the laws necessary for the conduct of the 2013 elections were only passed in that year. It was therefore a virtually new body working in a new legal framework which had to prepare for six elections, including for three newly created elective institutions. Further, as well as preparing for and conducting the six elections, the IEBC, in the same period, had to conduct a nationwide constituency boundary delimitation and the national biometric voter registration.

In this context, the task of the IEBC was extremely demanding and it is to its credit that many of the conditions precedent to polling were satisfactorily met in a reasonably timely manner, enabling the elections to be held as scheduled. The IEBC was able to maintain a high level of public confidence in the pre-election period, which was critical in ensuring trust and peaceful participation.

While the IEBC generally managed the preparation of the process well it also faced a number of challenges due to delays in internal decision-making as well as delays and problems related to the voter registration process, late amendments of laws by the outgoing parliament and late passage of laws in some instances (see below for a fuller discussion of these issues). These time pressures may have contributed to the IEBC's relatively late launching of its voter education campaign (see Chapter 5). Further, the IEBC's handling of the problems over the transmission of results and initial presentation of results at the National Tally Centre (see Chapter 5) highlighted some considerable shortcomings.

2 Voter registration

The registration of some 14.3 million people in 30 days was a major undertaking and in this context it was a largely successful exercise, which represents a solid platform for future registration exercises to further increase the registration rate.

The voter registration exercise, however, did experience a series of problems. It was conducted later than originally expected, with delays due to the time it took to decide on the type of registration system and delays in the procurement of equipment for the biometric registration. Reportedly, the IEBC was under pressure from the Executive, which favoured biometric registration, whereas the IEBC favoured a somewhat simpler system due to the time constraints for implementation. The IEBC also faced challenges when the procurement of the biometric equipment was cancelled and later taken over by the Government. As a consequence, the time available for registration was shortened to only 30 days which placed extreme pressure on the IEBC and the period for public verification was shortened to just 14 days.

During the registration process itself there were some technical challenges, such as with the failure of some of the biometric kits. However, overall the voter lists proved reliable on election day, especially as reliance on the voter lists was provided for. The IEBC has published registration data on its website and it is apparent that the rate of registration does vary from area to area. This may reflect varying levels of public interest, poor public mobilisation in some areas or greater technical challenges in some cases. But the shortened timeframe was difficult to work with and limited the IEBC's options with regard to following up later in areas of lower registration.

3 The legislative framework

The new Constitution and associated legislation provide a new framework for the conduct of elections in Kenya and overall offer the basis for credible, competitive elections.

However, there were a series of late changes and amendments to legislation by the outgoing parliament which impacted on the process. Some of these changes appeared to be to the benefit of parties and potential candidates but had the effect of making administration of the elections a harder task. There were also some cases where expected legislation was not passed, thereby weakening the legislative framework for the polls. For instance, in addition to the changes to the timelines for voter registration, the time for submission of party membership lists was reduced from three months prior to the elections to 45 days and the minimum period for party membership prior to nomination was reduced from a minimum three month period to only being required to be a member of a party on the day of nomination. This later example facilitated the party hopping which was prevalent during the party primaries (see below). Further, the deadline for party nominations was very late in relation to the time the IEBC required to print the ballot papers (see below).

Parliament failed to pass new legislation on campaign financing and expenditure, which weakened transparency and accountability in this regard. Political parties do receive some funds from the Public Fund, which has to be accounted for, but other funds and expenditure do not (see Chapters 2 and 4).

4 Candidate nomination and political party primaries

As part of the candidate nomination process political parties were obliged to hold party primaries to select their respective candidates. Each party was also expected to have internal dispute resolution mechanisms, so that the list of candidates submitted to the IEBC was final. The IEBC was then able to use these lists for the purpose of confirming the eligibility and nomination of candidates and printing ballot papers.

However, a number of problems arose. Most political parties held their primaries virtually on the eve of the deadline for nomination, for fear of unsuccessful aspirants switching parties (party hopping). Secondly, the primaries were very poorly organised with widespread reports of fraud and manipulation of results.

Thirdly, it does not appear that parties had adequate internal dispute mechanisms, or did not leave themselves enough time to properly complete all necessary procedures before the nomination deadline. As a consequence, in some cases the lists given to the IEBC were not always correct, with some wrong names appearing. This meant that at the time the IEBC was compelled to be printing the ballot papers some aspirants were in the courts contesting the nomination process. In cases where they were successful it meant that the wrong name appeared on the ballot paper and thus an election petition was likely after the polls.

As well as concerns regarding the conduct of party primaries, which should help to enhance the democratic process and not undermine it, there is a concern regarding the truncated timelines which again impacted negatively on the administration of the election just for narrow political party interest.

5 Women's participation and representation

The level of women's representation in elective institutions under the current dispensation is improved compared to previously, when some 10 per cent of the members of parliament were female. There are 47 seats reserved for women in the National Assembly, 16 seats allocated in the Senate from party lists and women members for County Assemblies, in addition to any women winning for any of the open competitive seats.

Article 27(8) of the Constitution states that the 'State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender'. However, following the Attorney-General's request for an advisory on the minimum one-third gender requirement in the National Assembly and the Senate, the Supreme Court ruled that the quota was not applicable to the 2013 elections but should be implemented 'progressively' by 2015. At the time of writing this decision was being challenged in court by the Gender and Equality Commission.

While women were well represented as voters, the level of participation of women as candidates was fairly low. Indeed, it was reported to the Observer Group that the provision of special seats may have acted against women being selected for the open competitive seats. For these elections, just one of the eight presidential candidates was a woman; and the number of women candidates for other elective positions was: seven out of 237 for Governor (2.95%); 19 out of 244 for the Senate (7.79%); and, 697 out of 9,603 for the County Assemblies (7.26%).

6 The electoral system for the presidential election

Article 138(4) of the Constitution states that: 'A candidate shall be declared elected as President if the candidate receives –

- a) More than half of all the votes cast in the election; and
- b) At least twenty-five per cent of the votes cast in each of more than half of the counties.'

However, during the tallying and announcement of presidential results there was some confusion as to whether the rejected ballots should be included in the total of votes cast or not. On its public results screens, which were broadcast live on TV and were the basis for media reporting on the tallying of results, the IEBC initially expressed each candidate's percentage of the vote share as a percentage of the valid votes cast. This was later identified as a mistake and the IEBC stated that in determining the number of 'all votes cast' it would include both valid and rejected votes.

Recommendations

1 *Electoral timelines*

It is important that the electoral timelines are established in a manner that facilitates the timely and effective administration of the election. This includes, but is not limited to, providing an adequate period for voter registration which can be completed in good time prior to the polls; ensuring candidate nominations are finalised and confirmed in good time for the ballot printing; and, ensuring that voter education is conducted for a long enough period to ensure it is effective. Both parliament and the election management body have to work together in this regard to ensure the legislative process and election administration are in harmony.

2 *Voter registration*

It is envisaged in the law that voter registration will be continuous, enabling the IEBC to build upon the strong platform provided by the new voter register compiled for these polls. It is apparent that some areas have lower registration rates than others, and so there is now an opportunity to rectify this.

Further, if the IEBC intends to continue to utilise the biometric voter identification devices in polling stations then it must ensure that there is sufficient time to adequately test the system, train personnel in their use and ensure that the local resources are suitable for their use; notably with regard to suitable power or battery back-up.

3 *Legislation on campaign financing and expenditure*

New legislation governing campaign financing and expenditure was not enacted for these polls, but it is required. It is hoped that the new parliament will consider this and pass such legislation, thereby ensuring adequate transparency and accountability in this regard.

5 *Women's representation*

It is important that the quota for gender balance in representation in the parliament, as envisaged in the Constitution, is enforced as soon as is feasible. Further, there remains a broader need to encourage and facilitate women's participation as candidates for future elections.

6 *Electoral system for presidential elections*

During these elections, the calculation as to whether or not a particular candidate has secured a majority of all the votes cast has been defined as all of the valid votes cast plus all of the rejected ballots. It is important that this is clearly articulated for future elections to avoid any further uncertainty in this regard.