

# **ELECTIONS AND THE ARCHITECTURE OF TRUST: KENYA'S DEMOCRATIC TRAJECTORY (1992–2022)**



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## Foreword



Elections are a *sine qua non* of a democracy. It is through elections that sovereign authority is expressed, transferred, and renewed.

Yet, as this publication carefully demonstrates, the legitimacy of elections cannot be measured solely by their occurrence.

It must instead be assessed against the deeper constitutional principles that sustain democratic order, credibility, transparency, accountability, and public trust.

This Electoral Trend Analysis Publication, spanning three decades from 1992 to 2022, offers a rare and intellectually rigorous examination of Kenya's democratic journey.

Its central contribution lies in its refusal to treat elections as isolated events. Instead, it approaches them as part of a constitutional continuum, one in which institutional performance, political incentives, and public perception interact across time to shape democratic outcomes.

The analysis identifies a recurring pattern: reform initiatives precede each electoral cycle, accompanied by optimism, and contestation follows their implementation. Despite changes in institutional design, legal frameworks, and technology, persistent challenges remain: allegations of executive influence, questions of technological reliability, and fluctuating levels of public confidence.

This pattern raises a fundamental constitutional question: why do reforms, however well-intentioned, fail to deliver sustained electoral credibility?

The Constitution of Kenya, 2010, sought to address these concerns. Article 81 establishes the normative framework requiring elections to be free, fair, transparent, accountable, and administered impartially.

This provision reflects lessons drawn from past failures, particularly the 2007 electoral crisis. Yet, as the publication observes, constitutional design does not guarantee constitutional practice. A constitution may establish principles, but it is institutions and ultimately individuals who give those principles life.

The Judiciary has played a central role in safeguarding electoral integrity through adjudication of disputes, including presidential petitions.

The scale of this responsibility is evident from the numbers: in the 2013 General Election, courts were seized of 188 petitions, including three presidential petitions before the Supreme Court.

In 2017, the number of petitions stood at 388, with four presidential petitions culminating in the annulment of the presidential election an assertion of judicial independence that resonated globally.

In 2022, 222 petitions were filed, and the Supreme Court received nine presidential petitions, these interventions have reinforced the rule of law and affirmed that electoral processes are subject to constitutional scrutiny.

As is well captured in this work, and correctly so, judicial oversight remains corrective; it does not substitute for institutional integrity at the point of electoral administration, because, the responsibility for credible elections remains fundamentally with electoral management bodies, political actors, oversight institutions, and, importantly, the citizenry.

This publication is forward-looking. It cautions that without structural reforms addressing underlying incentive systems, patterns of contestation will persist, particularly as the country approaches the 2027 General Election. The lessons of the past are clear. The vulnerabilities are known. The challenge lies in whether sufficient institutional will and collective commitment exist to address them.

This work provides an evidentiary foundation for dialogue and reform, serving as both an analytical resource and an accountability instrument. It invites us to move beyond reactive responses to electoral crises and toward deliberate, structural transformation.

It is my hope that this publication will contribute meaningfully to the ongoing effort to align Kenya's electoral practice with its constitutional aspirations.

The task of building credible elections is continuous. It requires vigilance, integrity, and fidelity to constitutional principles.

**Hon. Lady Justice Njoki Ndungu, SCJ**

**Chairperson, Judiciary Committee on Elections.**

## Acknowledgement



This report is the product of a sustained and collaborative effort, grounded in a shared commitment to strengthening democratic governance and electoral accountability in Kenya.

We wish to extend our deepest appreciation to the Democratic, Governance and Rule of Law ICJ Kenya team, namely: Wayua Matheka, Thuku Mburu, and Moses Murithi that conceptualised this study and shaped its analytical direction.

Their clarity of vision, particularly the decision to approach Kenya's electoral history as a continuum rather than a series of isolated events, provided the intellectual foundation upon which this report is built.

We are equally grateful to the researchers, namely: Sherine Kirui, Mercy Cheruiyot, Caren Okumu, Gyanne Chebet, Tabrandy Machoka, Nara Yego and Olivia Njeri, their work underpins this publication.

The editorial and analytical team Cedrick Kadima, Thuku Mburu, and Ms. Daisy Nawate, their combined efforts ensured its depth, clarity, and coherence.

The teams' rigorous engagement with electoral data, legal frameworks, judicial decisions, and institutional performance across three decades has anchored the analysis in both evidence and credibility, moving it beyond descriptive accounts to a careful identification of the structural patterns shaping Kenya's electoral trajectory.

Thank you for the intellectual labour by the editorial team, whose meticulous review, structuring, and refinement of the manuscript transformed complex material into a coherent and accessible report, ensuring clarity of argument, consistency of analysis, and the overall integrity of the final publication.

We also acknowledge the broader ICJ Kenya team, led by Eric Mukoya, Demas Kiprono, and Israel Richard whose programmatic and operational support made this work possible.

From coordination to stakeholder engagement, their contribution was instrumental in moving this project from concept to completion.

Finally, we extend our sincere gratitude to the **Canada Fund for Local Initiatives (CFLI)** for their generous support under the Reimagining Accountability and Democracy in Action (RADA) Project.

Without their partnership and commitment to advancing democratic accountability and the rule of law, this report would not have been realised.

Their support reflects the importance of investing in evidence-based approaches to governance reform and citizen-led accountability.

This report stands as a collective effort, one that reflects not only technical expertise, but also a shared belief in the possibility of strengthening Kenya's democratic future.

**Demas Kiprono**



**Executive Director**

**ICJ Kenya**

# Chapter 1

## **INTRODUCTION AND ANALYTICAL FRAMEWORK**

### **Purpose and Rationale of the Study**

Kenya's electoral history is frequently narrated as a story of reform. Yet when examined across three decades, a different pattern emerges one of recurrence. Since the reintroduction of multiparty politics in 1992, each election cycle has been preceded by reform, accompanied by optimism, and followed by contestation. Institutions have been renamed. Laws have been amended. Technology has been introduced. Courts have been strengthened.

However, familiar tensions reappear: executive influence over electoral management, ethnicised mobilisation, procedural adjustments without structural transformation, weak enforcement of accountability, and fluctuating public trust.

This study analyses electoral trends across Kenya's seven election cycles between 1992 and 2022 to identify recurring institutional weaknesses and structural drivers of electoral instability. Rather than treating each election as an isolated event, the study approaches them as part of a constitutional continuum. Electoral credibility is cumulative.

Public trust is not rebuilt every five years; it is either reinforced or eroded through repeated institutional performance.

The study is undertaken as part of ICJ Kenya's RADA Project, which seeks to strengthen rule of law, democratic accountability, and institutional resilience. It therefore serves both a diagnostic and a civic function.

The analysis is designed not merely to document past failures, but to equip citizens, institutions, and reform actors with evidence capable of informing structural reform ahead of the 2027 General Election. In this sense, the report functions as both an analytical tool and an accountability instrument.

By mapping long-term patterns rather than episodic crises, the study contributes to reform debates grounded in structural diagnosis rather than reactive adjustment. Its central premise is that recurring instability reflects incentive structures that have not been fundamentally altered, despite constitutional and institutional redesign.

While grounded in institutional and constitutional analysis, this study is ultimately citizen-facing. Elections derive legitimacy not merely from procedural compliance, but from public confidence in fairness, inclusion, and accountability. Where institutions fail repeatedly without structural correction, democratic fatigue emerges.

The report, therefore, situates trend analysis within a broader accountability framework. By identifying cross-cutting patterns and structural vulnerabilities, it seeks to provide reform actors including civil society, policymakers, oversight institutions, and the electorate with a coherent evidentiary basis for reform advocacy.

The objective is not to revisit historical grievances for their own sake, but to clarify how unresolved weaknesses compound across cycles. The forward-looking orientation of the report is deliberate: preventing recurrence in 2027 requires diagnosing persistence between 1992 and 2022.

## Conceptualising Electoral Credibility

Electoral credibility in this report is understood as the alignment between constitutional principles, institutional performance, and citizen perception. Credibility is not synonymous with the absence of violence. Nor is it guaranteed by technological sophistication or judicial intervention. It emerges where institutions operate impartially, legal standards are enforced consistently, participation is inclusive, and public trust is sustained across cycles.

This conceptualisation underpins the analytical framework adopted throughout the report.

## Constitutional Benchmark: Article 81 and the General Principles of the Electoral System

The Constitution of Kenya, 2010 provides the normative foundation for elections through Article 81, which outlines the general principles of the electoral system. These principles require that elections be free and fair; conducted by secret ballot; free from violence, intimidation, improper influence or corruption; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner. Article 81 also requires universal suffrage based on equality of vote, representation of persons with disabilities, and compliance with the two-thirds gender principle.

Article 81 codified the lessons of earlier electoral crises, particularly the institutional failures that culminated in the 2007 post-election violence. It represents the constitutional standard against which all post-2010 elections must be assessed. The question, therefore, is not whether elections have been held, but whether they have consistently complied structurally and operationally with these constitutional principles.

This study assesses the extent to which Kenya has implemented Article 81 across the 2013, 2017, and 2022 election cycles. While institutional reforms have strengthened formal compliance, persistent gaps remain in campaign finance regulation, gender representation, technological reliability, and public trust. The analysis, therefore, distinguishes between formal constitutional design and substantive constitutional realisation.

Although this study examines elections from 1992 to 2022 generally, its orientation is forward-looking. Electoral crises in Kenya have not been isolated disruptions; they reflect patterns that re-emerge when structural incentives remain intact. The relevance of trend analysis lies in its predictive value.

By identifying what has consistently remained unresolved, the report provides a structural baseline against which reform proposals ahead of 2027 can be evaluated. Its core argument is that preventing recurrence requires incentive alignment - not merely procedural amendment.

## Research Objectives

- To identify and map recurring institutional and structural weaknesses across Kenya's seven election cycles (1992–2022).
- To assess the extent of compliance with Article 81 of the Constitution of Kenya, 2010, distinguishing between formal institutional design and substantive constitutional realisation.
- To evaluate the performance and evolution of key electoral institutions, including electoral management bodies, dispute resolution mechanisms, and oversight frameworks.
- To analyse the relationship between institutional performance and public trust, including patterns of civic participation, grievance accumulation, and democratic resilience.
- To generate evidence-based, legally grounded, and politically feasible reform pathways capable of addressing structural weaknesses ahead of the 2027 General Election.

## Analytical Questions

- What failures recur across Kenya's election cycles?
- Why have successive reforms failed to deliver sustained electoral credibility?
- What explains the persistence of fragile public trust despite constitutional and institutional redesign?

## Research Design and Methodology

The study adopts a qualitative trend analysis approach. It relies on desk review of electoral cycles from 1992 to 2022; analysis of observer mission reports; examination of judicial decisions, particularly presidential petitions; review of legal and policy frameworks governing elections; and academic and civil society research.

Preliminary findings will be subjected to stakeholder validation to ensure contextual accuracy, analytical rigour, and policy relevance.

## Trend Analysis Variables

For comparability across election cycles, the analysis evaluates each election against recurring variables: political context; electoral management body performance; technology and process integrity; civic participation; electoral violence; dispute resolution mechanisms; and public trust. These variables enable the identification of longitudinal patterns rather than isolated controversies.

Electoral instability does not emerge solely from administrative failure. It is shaped by political incentives, demographic shifts, economic pressures, elite bargaining dynamics, technological transitions, and evolving constitutional jurisprudence.

By integrating institutional performance with structural context, the analysis avoids treating elections as isolated technical exercises and instead examines them as embedded political legal systems.

## Limitations of the Study

The study relies primarily on documented reports, judicial records, and secondary analyses. Direct public perception data varies across election cycles, and measurements of trust are not always uniform. While consistent patterns emerge across the decades, certain conclusions remain interpretive where empirical trust data is limited.

## Structure of the Report

This report is structured to reflect the central premise that electoral instability in Kenya is not episodic but patterned, cumulative, and structurally embedded. Its organisation follows a deliberate analytical progression: from historical mapping, to constitutional benchmarking, to institutional interrogation, and finally to reform design.

Each chapter builds on the preceding one, moving from descriptive baseline to structural diagnosis and ultimately to forward-looking transformation.

**Chapter 1:** establishes the analytical foundation. It clarifies the purpose of the study, defines what the report is and is not, conceptualises electoral credibility, and situates elections as political, legal and social systems operating simultaneously.

### **Chapter 2: Historical Baseline – Kenya's Seven Election Cycles (1992–2022)**

This chapter establishes the empirical foundation of the study. It examines Kenya's seven election cycles using the trend analysis variables outlined in Chapter 1, political context, electoral management body (EMB) performance, technology integrity, civic participation, electoral violence, dispute resolution and public trust.

The objective is not narrative description, but pattern identification across time. The chapter traces the evolution of Kenya's electoral system through distinct phases: managed multipartyism and executive dominance (1992–1997); elite coalition and transitional optimism (2002); institutional collapse and systemic breakdown (2007); constitutional reform and technological fragility (2013); judicial assertiveness and political resistance (2017); and administrative transparency alongside institutional fragmentation (2022). It concludes with a longitudinal mapping of recurring patterns across the thirty-year period.

### **Chapter 3: Constitutional Compliance – Assessing Implementation of Article 81**

Building on the historical baseline, this chapter introduces the normative framework of the study by assessing compliance with Article 81 of the Constitution of Kenya, 2010.

It distinguishes between formal compliance legal and institutional design and substantive realisation in practice.

The analysis evaluates key constitutional principles, including freedom and fairness of elections, transparency and accountability in electoral administration, universal suffrage and equality of vote, gender representation, and inclusion of youth, persons with disabilities, and marginalised communities.

The chapter culminates in a constitutional scorecard that highlights the gap between constitutional promise and operational reality.

## **Chapter 4: Electoral Management Bodies – Institutional Design and Political Capture**

This chapter interrogates the evolution, structure, and vulnerabilities of Kenya's electoral management bodies, from the Electoral Commission of Kenya (ECK) to the Independent Electoral and Boundaries Commission (IEBC).

It examines appointment frameworks, executive influence, leadership crises, internal fragmentation, and administrative failures in procurement and logistics. The analysis demonstrates how cycles of reform have often resulted in institutional reconfiguration without substantive transformation.

The chapter concludes by identifying safeguards necessary to secure EMB independence ahead of the 2027 General Election.

## **Chapter 5: Electoral Manipulation, Technology and Results Integrity**

This chapter examines how mechanisms of electoral manipulation have evolved alongside institutional and technological reforms.

It traces historical forms of manipulation across election cycles and interrogates the introduction of biometric systems and the Kenya Integrated Election Management System (KIEMS).

Particular attention is given to results transmission, tallying processes, and the question of verifiability. The chapter critically assesses whether technology has functioned as a safeguard of integrity or as a new site of contestation.

It further analyses audit mechanisms, data governance frameworks, and transparency deficits that continue to undermine trust.

## **Chapter 6: Civic Participation, Disenfranchisement and Structural Exclusion**

This chapter shifts the focus from institutions to citizens, examining the structural barriers that shape electoral participation. It analyses voter registration integrity, coercive electoral environments, ethnicised political mobilisation, and persistent gender inequality.

It further interrogates the exclusion of youth, persons with disabilities, and minority groups, highlighting how economic, social, and administrative barriers produce de facto disenfranchisement.

The chapter demonstrates that participation is not merely a function of legal entitlement, but of structural capability, with long-term implications for public trust and democratic legitimacy.

## **Chapter 7: Judicialisation of Elections and the Limits of Legal Accountability**

This chapter evaluates the role of the judiciary as a central actor in electoral governance. It traces the evolution of electoral dispute resolution frameworks and analyses presidential election petitions across electoral cycles.

Particular attention is given to annulment jurisprudence, evidentiary thresholds, and the tension between procedural compliance and substantive justice. The chapter also interrogates the limits of judicial intervention, including challenges in enforcement of court decisions and the gap between legal outcomes and political acceptance.

## **Chapter 8: Public Trust, Legitimacy and Democratic Resilience**

This chapter consolidates the findings of the preceding chapters by examining the cumulative effects of recurring electoral crises on public trust and democratic stability.

It applies a structural lens to analyse the accumulation of electoral grievances, institutional trust deficits, protest cycles and political fatigue, and the risks of democratic backsliding.

It further conceptualises electoral legitimacy as a national security issue, demonstrating how unresolved electoral disputes can generate systemic instability.

The chapter advances the argument that democratic resilience in Kenya depends on continuous legitimacy management rather than episodic crisis response.

## **Chapter 9: Structural Reform Pathways Towards 2027**

This chapter transitions the study from diagnosis to policy design. It proposes evidence-based, legally grounded, and politically feasible reform pathways aimed at addressing the structural weaknesses identified throughout the report.

Key areas of reform include strengthening EMB independence and appointment processes, enforcing campaign finance regulation, establishing robust technology governance and audit frameworks, implementing the two-thirds gender principle, improving dispute resolution timelines and compliance, and enhancing civic inclusion and trust-building mechanisms.

The chapter emphasises the need for reforms that alter underlying incentive structures rather than merely adjusting procedures.

## **Chapter 10: Conclusion – From Cyclical Crisis to Constitutional Transformation**

The final chapter synthesises the report's findings and articulates the broader constitutional implications of persistent electoral instability. It highlights the risks of reform fatigue and institutional erosion, and argues for a shift from cyclical crisis management to structural transformation grounded in Article 81 of the Constitution.

The chapter concludes by outlining a forward-looking pathway for restoring electoral credibility, reinforcing democratic resilience, and aligning Kenya's electoral practice with its constitutional aspirations.

# Chapter 2

## HISTORICAL–EMPIRICAL ANALYSIS: ELECTORAL TRENDS (1992–2022)

### Historical Baseline and Analytical Application

This chapter provides a comprehensive historical–empirical examination of Kenya's seven election cycles between 1992 and 2022. Building on the analytical framework established in Chapter One, the discussion evaluates each electoral cycle against recurring variables: political context, electoral management body performance, technology and process integrity, civic participation, electoral violence, dispute resolution, and public trust. The objective is not descriptive narration for its own sake, but structural pattern identification across time.

The chapter proceeds sequentially, tracing how institutional reforms, political incentives, and administrative practices evolved across three decades. Strong transitions between cycles highlight both continuity and mutation. The analysis demonstrates that while institutional architecture has repeatedly changed, underlying incentive structures have proven more resilient. Each election is therefore situated within a cumulative trajectory rather than treated as an isolated event.

To ensure methodological consistency, each election cycle is examined through the same analytical variables identified in Chapter One: political context, electoral management performance, technology and process integrity, civic participation and inclusion, violence, dispute resolution, and public trust. The objective is not to retell electoral events but to test how these variables evolve across time and whether reform interventions have altered their structural trajectory.

### 1992–1997: Managed Multipartyism and Executive Dominance

The restoration of multiparty politics in 1992 marked a formal transition from one-party rule to competitive elections. However, the administrative and security architecture of the state remained largely unchanged.

Provincial administration, public media, and security institutions continued to operate within executive influence, creating an uneven electoral playing field. Ethnic mobilisation quickly emerged as the dominant organising principle of political competition, embedding identity-based alliances that would define subsequent cycles.<sup>1</sup>

The Electoral Commission of Kenya operated within a constitutional framework that vested appointment authority primarily in the presidency. Administrative weaknesses, including incomplete voter registers, delayed delivery of materials, and opaque tallying procedures, reflected institutional fragility rather than episodic malfunction.<sup>2</sup>

Judicial remedies were technically available but practically ineffective due to procedural delays and limited enforcement capacity.

1 Bard- Anders Andreassen et al, A Hobbled Democracy: The Kenya General Elections 1992 (CMI 1993)

2 International observer mission reports on the 1992 and 1997 elections



Violence in the Rift Valley regions and selective security responses reinforced early legitimacy deficits. This foundational period established enduring patterns: executive influence, ethnicised mobilisation, procedural reform without structural insulation, and fragile public trust.

## 2002: Elite Realignment Without Institutional Transformation

The 2002 General Election is widely regarded as a watershed moment in Kenya's political history, marking the first peaceful transfer of presidential power since independence.<sup>3</sup>

However, when assessed against the analytical variables established in Chapter One, the election appears less as a structural institutional transformation and more as a political realignment within an unchanged governance architecture.

The decisive outcome was not the product of redesigned institutions but of consolidated opposition strategy operating within an executive-dominant constitutional framework that remained largely intact.

The political context preceding the election was defined by fragmentation within the ruling Kenya African National Union (KANU). President Daniel arap Moi's unilateral endorsement of Uhuru Kenyatta as his successor triggered internal rebellion among senior party figures, several of whom defected to form the National Rainbow Coalition (NARC).<sup>4</sup>

Unlike in 1992 and 1997, when opposition fragmentation enabled incumbent victory through plurality, the 2002 election was characterised by unprecedented elite coordination across ethnic and regional lines. The consolidation of the anti-incumbent vote converted accumulated public dissatisfaction into electoral advantage.

Yet, while the political configuration changed, the institutional framework governing elections did not. The Electoral Commission of Kenya (ECK) retained its pre-existing structure, including appointment processes that remained significantly influenced by the executive. Although operational performance during the 2002 polls was comparatively orderly and the margin of victory decisive, the structural vulnerabilities embedded in the electoral management body were not fundamentally addressed.

Concerns regarding inaccuracies in the voter register, uneven logistical preparedness, and limited transparency in results aggregation persisted, but they did not escalate into crisis largely because the outcome was clear and widely accepted.

The legal and constitutional framework also remained unchanged. Kenya continued to operate under the pre-2010 Constitution, which concentrated executive authority in the presidency and offered limited structural insulation for oversight institutions.

The 2002 transition was accompanied by strong public expectations of constitutional reform, anti-corruption measures, and decentralisation of power.

However, the failure to enact meaningful constitutional restructuring between 2003 and 2005 preserved the centralised executive model.

3 IRIN/The New Humanitarian, 'Kenya: President dissolves parliament', 25 October 2002, ReliefWeb.

4 The Carter Center, Observing the 2002 Kenya Elections: A Final Report, May 2003.

In effect, the political leadership changed, but the incentive architecture that rendered the presidency disproportionately powerful remained intact.

Civic participation during the election reflected a combination of reform optimism and anti-incumbent mobilisation. Although voter turnout declined relative to earlier multiparty elections partly attributable to register inaccuracies,<sup>5</sup> public enthusiasm for change was evident in opposition strongholds.<sup>6</sup>

Nonetheless, structural barriers to inclusive participation remained visible. Women's representation in Parliament continued to be low, and socio-economic constraints limited equal access to electoral competition. Universal suffrage existed formally, but substantive equality in political opportunity remained uneven.

Dispute resolution mechanisms were not subjected to significant stress during this cycle. The early concession by the losing candidate reduced,<sup>7</sup> the likelihood of litigation, and courts were not required to adjudicate a major presidential petition.

Public trust improved substantially compared to previous cycles. However, this confidence was rooted in political turnover rather than demonstrable institutional robustness. The system appeared credible because it produced change, not because it had been structurally fortified against manipulation.

In structural terms, therefore, the 2002 election interrupted executive dominance but did not dismantle it. The peaceful transition reflected elite coalition strategy rather than institutional insulation. The preservation of a “top-heavy” constitutional order meant that the presidency continued to command extensive leverage over oversight bodies, including the judiciary and electoral administration. The failure to recalibrate these incentives would prove consequential in the subsequent electoral cycle.

## 2007: Institutional Collapse and Systemic Breakdown

The 2002 election illustrated that elite coalition realignment could lead to a peaceful transition within an unchanged constitutional framework. However, it did not change the concentration of executive power nor shield electoral oversight institutions from political pressures. Consequently, the 2007 election cycle served as a critical test to determine if political alternation, without any institutional reforms, was enough to maintain electoral credibility. Unfortunately, it was not.

While 2002 marked a significant elite realignment amidst an unreformed institutional landscape, the 2007 General Election laid bare the risks associated with maintaining that status quo. This election cycle highlighted how concentrated executive authority, ongoing ethnic polarisation, and fragile oversight institutions could intertwine, ultimately leading to systemic failure.

5 Electoral Commission of Kenya, '2002 General Elections Report', Nairobi, 2003.

6 European Union Election Observation Mission, Final Report: General Elections, Kenya 2002, Brussels, January 2003.

7 The Carter Center, Observing the 2002 Kenya Elections: A Final Report, May 2003



Unlike previous elections that experienced administrative weaknesses but avoided complete collapse, the 2007 process precipitated the most severe legitimacy crisis in Kenya's post-independence history.

The political environment leading into the election was shaped by deepening fragmentation within the coalition that had secured victory in 2002.<sup>8</sup> Disputes over constitutional reform, particularly the abandonment of the Bomas Draft and the rejection of the 2005 constitutional referendum,<sup>9</sup> intensified perceptions of betrayal among key political actors and their constituencies.

The failure to enact structural reform preserved a centralised presidency with sweeping control over the judiciary, provincial administration, and electoral oversight institutions.<sup>10</sup> Consequently, the stakes of presidential competition remained exceptionally high.

Ethnic mobilisation intensified as political elites framed the election as a decisive contest over access to state power and resource distribution.<sup>11</sup>

Communities increasingly viewed electoral victory as essential for protection and patronage. Opinion polling suggested a closely divided electorate, amplifying anxieties and heightening the risk that any disputed outcome would be interpreted as existential loss rather than routine political defeat.

The Electoral Commission of Kenya entered the 2007 cycle with diminished credibility among opposition actors. The executive had appointed the majority of commissioners shortly before the polls, reinforcing perceptions of partiality.

While voting on election day proceeded relatively peacefully and parliamentary results reflected significant opposition gains, the presidential tallying process became opaque and contested. Delays in results transmission, inconsistencies in reported turnout figures, and discrepancies between constituency-level announcements and national aggregation fuelled widespread suspicion. The declaration of the incumbent as the winner amid allegations of manipulation precipitated immediate unrest. The hurried swearing-in ceremony further eroded public confidence.

Unlike in 2002, where a decisive margin reduced contestation, the narrow and disputed outcome in 2007,<sup>12</sup> exposed the structural vulnerabilities of the aggregation process. The crisis was not primarily technological – the system remained largely manual but institutional. The absence of transparent verification mechanisms and the concentration of decision-making authority within a politically contested electoral commission undermined legitimacy at the decisive moment.

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8 Background on the Post-Election Crisis in Kenya, Centre for Strategic and International Studies, para 4.

9 Kenya National Assembly 2007 Election Report.

10 The Kenyan Crisis: Roots of Fragmentation and Democratic Failure.

11 Background on the Post-Election Crisis in Kenya, Centre for Strategic and International Studies, para 3.

12 Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance, Human Rights Watch, para 30.

The post-election violence that followed represented a profound rupture in democratic order. Over one thousand people were killed, and hundreds of thousands were displaced.

Violence unfolded in successive phases, including spontaneous protests, organised ethnic expulsions, and retaliatory militia attacks. Security forces were widely criticised for excessive force in some regions and selective passivity in others, reinforcing perceptions that state coercive power was politically mediated.

Judicial dispute resolution mechanisms failed to function as credible avenues for redress. Opposition leaders declined to pursue formal petitions, citing lack of confidence in judicial independence.

The crisis was ultimately resolved through internationally mediated negotiation rather than domestic adjudication. The National Accord and Reconciliation Act established a Grand Coalition Government and created the office of Prime Minister, effectively substituting political compromise for legal determination of electoral legitimacy.

Subsequent commissions of inquiry, including the Independent Review Commission (Kriegler Commission) and the Commission of Inquiry into Post-Election Violence (Waki Commission), documented systemic failures in electoral administration and recommended sweeping institutional reforms.

Notably, the electoral review process focused on structural redesign rather than prosecutorial accountability for electoral offences. The involvement of the International Criminal Court as a backstop mechanism underscored the depth of domestic institutional distrust and the persistence of impunity concerns. In structural terms, the 2007 election exposed the cumulative consequences of unresolved weaknesses evident since 1992.

Executive influence over electoral appointments, concentration of presidential power, ethnicised mobilisation linked to resource control, administrative opacity in results aggregation, and weak judicial independence converged under conditions of high political stakes.

Unlike in 2002, political realignment could not absorb institutional fragility. Instead, fragility triggered collapse.

The 2007 crisis, therefore, marked both a base and a turning point. It provided the impetus for comprehensive constitutional redesign, culminating in the 2010 Constitution and the articulation of the general principles of the electoral system under Article 81.

However, whether constitutional reform fundamentally altered incentive structures or merely introduced procedural safeguards remains the central evaluative question for subsequent cycles.



## 2013: Constitutional Reform and Technological Fragility

The 2013 General Election marked the first implementation of Kenya's 2010 Constitution and, therefore, represented the most significant institutional test of post-2007 reform.<sup>13</sup>

Unlike previous cycles, the election unfolded within a newly restructured constitutional architecture that sought to address the structural failures exposed in 2007, and before.<sup>14</sup>

Devolution had redistributed political power across 47 counties;<sup>15</sup> judicial independence had been strengthened;<sup>16</sup> and a new electoral management body, the Independent Electoral and Boundaries Commission (IEBC),<sup>17</sup> had replaced the discredited Electoral Commission of Kenya.<sup>18</sup> The adoption of electoral technology,<sup>19</sup> particularly biometric voter registration and electronic results transmission, was intended to restore transparency and credibility.

Yet, when examined through the analytical framework established in Chapter One, the 2013 election reveals a more complex pattern: procedural reform without full structural transformation.

While the election avoided the widespread violence of 2007 and demonstrated improved dispute resolution through the judiciary, it also exposed vulnerabilities in technological governance, institutional preparedness, and the persistence of ethnic coalition politics.

The political context preceding the election was shaped by two powerful and seemingly contradictory forces: constitutional optimism and identity consolidation. On one hand, the 2010 Constitution had generated widespread public expectation that structural reform would neutralise the excessive concentration of executive power and reduce the stakes of presidential competition.

Devolution, in particular, was designed to distribute authority and resources across counties, thereby mitigating the zero-sum character of national elections. On the other hand, political mobilisation continued to rely heavily on ethnic coalition-building.

The Jubilee Coalition, led by Uhuru Kenyatta and William Ruto, united Kikuyu and Kalenjin constituencies that had violently confronted one another in 2007–2008.

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13 Nic Cheeseman, Gabrielle Lynch and Justin Willis, 'Democracy and its discontents: Understanding Kenya's 2013 elections' (2014) 8 *Journal of Eastern African Studies* 2, 3 accessed 15 February 2026

14 Independent Electoral and Boundaries Commission, 'The 4th March 2013 General Election in Kenya: Final Report' (IEBC 2013) 33 accessed 15 February 2026.

15 Constitution of Kenya 2010, Article 174-200.

16 David Majanja, 'Judiciary's quest for a speedy and just electoral dispute resolution mechanism: Lessons from Kenya's 2013 elections' in International Development Law Organisation and Judiciary Training Institute (n 3) 19, 22.

17 Constitution of Kenya 2010, Article 88.

18 International Foundation for Electoral Systems, *Lessons on the Use of Technology in Elections and the Impact on Electoral Dispute Resolution* (IFES 2022) 15.

19 Velloh Kedogo Kigwiru, 'The Adoption of Technology in the Kenyan Electoral Process: Lessons from the 2013 and 2017 Presidential Election' (2020) *SSRN Electronic Journal* 1, 10 accessed 15 February 2026.

The International Criminal Court (ICC) indictments against both leaders for crimes related to post-election violence paradoxically strengthened their political alliance, reframing the charges as external interference in Kenya's sovereignty.<sup>20</sup>

Meanwhile, the Coalition for Reforms and Democracy (CORD), led by Raila Odinga and Kalonzo Musyoka, consolidated support primarily among Luo, Kamba, and Luhya constituencies. Although party manifestos addressed governance and development, the campaign landscape remained significantly structured by ethnic alignments rather than ideological differentiation.

The IEBC entered the 2013 election with a mandate rooted in constitutional reform. Biometric Voter Registration (BVR) was introduced to produce a credible voter roll,<sup>21</sup> registering approximately 14.3 million voters.<sup>22</sup>

However, subsequent audits revealed duplicate entries,<sup>23</sup> data inconsistencies, and possible disenfranchisement, particularly in marginalised and arid regions.<sup>24</sup> These shortcomings did not invalidate the register but signalled persistent administrative weaknesses beneath the veneer of technological modernisation.

Election day itself was characterised by high civic engagement, with turnout exceeding 85 percent of registered voters. The orderly conduct of polling and the absence of widespread violence suggested progress relative to 2007.

However, the technological infrastructure designed to guarantee transparency faltered at critical moments. Electronic voter identification devices<sup>25</sup> failed in a significant proportion of polling stations, necessitating reversion to manual verification.

<sup>26</sup> More consequentially, the Results Transmission System (RTS) collapsed after transmitting only a portion of constituency results,<sup>27</sup> forcing a return to manual tallying at the national level.

These failures did not merely represent technical malfunction. They exposed deeper issues of procurement planning, operational training, contingency preparedness, and institutional coordination within the IEBC.

20 Nic Cheeseman, Gabrielle Lynch and Justin Willis, 'Democracy and its discontents: Understanding Kenya's 2013 elections' (2014) 8 *Journal of Eastern African Studies* 2, 3 accessed 15 February 2026.

21 Vellah Kedogo Kigwiru, 'The Adoption of Technology in the Kenyan Electoral Process: Lessons from the 2013 and 2017 Presidential Election' (2020) *SSRN Electronic Journal* 1, 10 accessed 15 February 2026.

22 Independent Electoral and Boundaries Commission, 'The 4th March 2013 General Election in Kenya: Final Report' (IEBC 2013) 33 accessed 15 February 2026.

23 KPMG, *Independent Audit of the Register of Voters* (KPMG 2017) 12 accessed 15 February 2026.

24 National Gender and Equality Commission, *Kenya's Tenth General Election Held on 4th March, 2013 Monitoring and Observation of Election Process* (NGEC 2013) 22 accessed 15 February 2026.

25 *9Elections Act 2011*, Section 44.

26 *Elections (General) Regulations 2012*, reg 69.

27 Vellah Kedogo Kigwiru, 'The Adoption of Technology in the Kenyan Electoral Process: Lessons from the 2013 and 2017 Presidential Election' (2020) *SSRN Electronic Journal* 1, 10 accessed 15 February 2026.

The reversion to manual processes was legally permissible, but it revived anxieties about aggregation transparency that had characterised earlier electoral cycles. Discrepancies between polling station forms and constituency tallies, debates over the treatment of rejected ballots in calculating the constitutional threshold, and delays in results announcement intensified scrutiny of the commission's competence.

The presidential results were declared narrowly within the constitutional requirement of 50 percent plus one vote.<sup>28</sup>

Raila Odinga contested the outcome before the Supreme Court, alleging irregularities in technology deployment, voter register integrity, and tallying procedures. Unlike in 2007, however, the dispute was channelled through formal judicial mechanisms<sup>29</sup> rather than mass protest.

The Supreme Court heard and consolidated the petitions, ordered scrutiny of electoral forms,<sup>30</sup> and delivered its decision within the constitutionally mandated fourteen-day period.<sup>31</sup> In a unanimous ruling, the Court upheld the election, concluding that the irregularities identified did not meet the threshold of substantial non-compliance required to nullify the result.<sup>32</sup>

The 2013 presidential petition represented a critical institutional moment. For the first time in Kenya's history, a disputed presidential election was adjudicated peacefully through a reformed judiciary operating under strict constitutional timelines. This development advanced Objective 3 of this study, demonstrating measurable improvement in dispute resolution capacity.

At the same time, the high dismissal rates of other election petitions across parliamentary and county levels revealed procedural rigidity and evidentiary barriers that limited substantive accountability. Strict filing deadlines, technical requirements, and security deposit rules contributed to numerous petitions being struck out on procedural grounds rather than determined on merit.

In terms of civic participation and inclusion, the 2013 election expanded opportunities through devolution and the introduction of constitutionally mandated county-level offices, including women's representative positions.<sup>33</sup> Nevertheless, women remained underrepresented in elected office, and the two-thirds gender principle remained unimplemented. Structural inclusion therefore remained incomplete. Marginalised communities in remote regions continued to face logistical barriers to full participation, and concerns regarding register integrity disproportionately affected vulnerable groups.

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28 Independent Electoral and Boundaries Commission, 'The 4th March 2013 General Election in Kenya: Final Report' (IEBC 2013) 33 accessed 15 February 2026.

29 International Development Law Organization and Judiciary Training Institute, *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence* (IDLO 2016) 26 accessed 15 February 2026.

30 *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR, Para 237 .

31 Constitution of Kenya 2010, Article 140(2)

32 Elections Act 2011, Section 83.

33 The Carter Center, *Observing Kenya's March 2013 National Elections: Final Report* (The Carter Center 2013) 19 accessed 15 February 2026.

The relatively lower levels of violence compared to 2007 can be attributed to several interacting factors.

Institutional reform, particularly devolution, may have diffused national tensions by creating alternative centres of political competition.<sup>34</sup> Judicial credibility encouraged resort to legal channels rather than street mobilisation.<sup>35</sup> Civil society peace campaigns,<sup>36</sup> and media restraint contributed to conflict mitigation.<sup>37</sup>

Additionally, the ICC indictments may have deterred overt incitement while simultaneously reshaping ethnic alliances in ways that reduced inter-communal confrontation. Security sector reforms, though partial, also enhanced early response capacity in historically volatile areas.

Despite these advances, the 2013 cycle revealed a central paradox: constitutional reform had improved procedural safeguards, but technological fragility and institutional mismanagement undermined confidence in implementation.

The IEBC's credibility was weakened by procurement controversies and operational breakdowns, even though the overall process remained comparatively peaceful. Public trust, while more stable than in 2007, was conditional and contested.

Structurally, therefore, the 2013 election illustrates reform without full transformation. The constitutional framework of Article 81,<sup>38</sup> had established clear principles of transparency, accuracy, and accountability. Yet the translation of those principles into administrative reliability proved uneven.

Technology was introduced as a safeguard but became a new site of vulnerability. Devolution redistributed authority but did not eliminate ethnicised coalition politics at the national level.

Judicial empowerment strengthened dispute resolution but did not fully resolve concerns about evidentiary burdens and procedural rigidity.

The 2013 cycle thus represents partial institutional maturation. It marked significant progress in peaceful dispute adjudication and decentralised governance, yet it simultaneously demonstrated that institutional redesign alone does not automatically recalibrate political incentives.

The persistence of ethnic mobilisation, executive influence narratives, and administrative fragility indicates that while the architecture changed, the deeper political economy of electoral competition remained resilient. The next electoral cycle would test whether the gains of 2013 consolidated institutional trust or whether technological and political vulnerabilities would re-emerge in more acute form.

34 Constitution of Kenya 2010, arts 174-200.

35 David Majanja, 'Judiciary's quest for a speedy and just electoral dispute resolution mechanism: Lessons from Kenya's 2013 elections' in International Development Law Organization and Judiciary Training Institute (n 3) 19, 22.

36 Kenya National Commission on Human Rights, 2013 Elections: Safeguarding Rights - An Account of Hotspots, Elections 2013 (KNCHR 2013) 9 accessed 15 February 2026.

37 Reflections on Kenya's 2013 General Elections (SID 2013) 16.

38 Constitution of Kenya 2010, Article 81.



## 2017: Judicial Assertion and Administrative Crisis

The political landscape leading up to the election was marked by fragmentation within the ruling Kenya African National Union (KANU). President Daniel arap Moi's unilateral decision to endorse Uhuru Kenyatta as his successor sparked internal dissent among senior party members, leading to a defection that culminated in the formation of the National Rainbow Coalition (NARC).

Unlike previous elections in 1992 and 1997, where opposition divisions allowed the incumbent to win by plurality, the 2002 election featured unprecedented collaboration among elites across different ethnic and regional groups. This unity transformed widespread public dissatisfaction into a significant electoral advantage for the opposition.

However, while the political dynamics shifted, the institutional framework governing elections saw little change. ECK maintained its existing structure, with appointment processes still heavily influenced by the executive branch.

Although the operational performance during the 2002 election was relatively smooth and the margin of victory was clear-cut, the inherent structural weaknesses within the electoral management body remained largely unaddressed.

Issues such as inaccuracies in the voter register, inconsistent logistical preparations, and limitations in the transparency of results aggregation persisted. Nevertheless, these concerns did not culminate in a crisis, primarily because the election outcome was clear and broadly accepted.

The IEBC's institutional credibility entering 2017 was fragile. The resignation of the previous commission following corruption scandals, coupled with politically contested replacements, produced continuity in one of Kenya's most persistent electoral trends: the redesign of electoral bodies without fully resolving the gap between perception and reality of political influence.

While the commission made visible operational preparations - expanding polling stations, recruiting staff, and implementing training protocols<sup>39</sup> - public confidence was undercut by procurement controversies and late-stage administrative adjustments.

This fragility was compounded by legislative amendments introduced in 2016, which permitted "complementary mechanisms" in case of technological failure.<sup>40</sup>

While presented as contingency planning, the amendments were widely interpreted as a possible route back to manual processes historically associated with opacity and manipulation.<sup>41</sup>

In effect, the law simultaneously required the development of an integrated electronic system while also legitimising the possibility of its failure.

39 The Carter Center, Final Report on Kenya's 2017 General Elections (2018) at 20.

40 AfriCOG & KPTJ, The More Things Change: The August 2017 Election in Kenya (2017) at 19-20.

41 3 AfriCOG & KPTJ, The More Things Change: The August 2017 Election in Kenya (2017) at 19-20.

The central technological instrument for 2017 was the Kenya Integrated Election Management System (KIEMS), designed to combine biometric identification and results transmission within a single framework.

In theory, KIEMS was intended to remedy the failures of 2013 by reducing discretion and ensuring end-to-end traceability from polling station to national tally. In practice, however, the system's procurement and delivery timelines created operational vulnerabilities that affected readiness.

The delayed arrival and deployment of kits constrained training, voter registration refinement, and public confidence in technological reliability.<sup>42</sup> In addition, although voter registration levels were high, concerns regarding the integrity of the register remained a significant pre-election controversy.

Audits revealed anomalies including duplicates, missing names, unexplained transfers of voters across polling stations, and questionable entries attributed to deceased persons.<sup>43</sup> These findings deepened the perception that even under constitutional reform, foundational administrative integrity remained contested.

On election day, civic participation was strong, and initial assessments pointed to improvements in voter identification and orderly voting. However, the voting process exposed operational inconsistencies, particularly in the management of technological failures.

KIEMS kits were unable to identify some voters,<sup>44</sup> and the procedural safeguards meant to govern fallback mechanisms were unevenly applied. Where KIEMS verification failed, the legal framework required documentation and transparency measures -such as completion of the relevant forms to justify manual verification - but observers reported inconsistent compliance.<sup>45</sup>

This inconsistency mattered not merely as a technical defect but as an institutional risk: every instance of discretionary deviation from standard procedure increased vulnerability to allegations of manipulation, especially in a high-stakes and polarised contest.

The most significant point of institutional rupture, however, emerged not at the polling station but at the stage of results transmission and tallying. Although the IEBC introduced a publicly accessible web portal displaying scanned polling station result forms,<sup>46</sup> the results management system did not function as coherently as promised.<sup>47</sup>

The transparency innovation of publishing forms created the appearance of openness, yet the integrity of aggregation remained contested.

42 The Carter Center, Final Report on Kenya's 2017 General Elections (2018) at 21.

43 AfriCOG & KPTJ, The More Things Change: The August 2017 Election in Kenya (2017) at 19–20 (KPMG audit findings on voter register)

44 AfriCOG & KPTJ, The More Things Change: The August 2017 Election in Kenya (2017) at 24.

45 AfriCOG & KPTJ, The More Things Change: The August 2017 Election in Kenya (2017) at 24.

46 AfriCOG & KPTJ, The More Things Change: The August 2017 Election in Kenya (2017) at 24.

47 AfriCOG & KPTJ, The More Things Change: The August 2017 Election in Kenya (2017) at 24.



The central weakness was familiar from earlier cycles: when results transmission or aggregation becomes opaque, public trust collapses regardless of how peaceful voting itself may be. Thus, despite improvements in some elements of process transparency, disputes increasingly focused on whether the tabulation process satisfied constitutional principles of transparency, verifiability, and accountability.

The post-election period transformed the 2017 cycle into a defining constitutional moment. After the IEBC declared Uhuru Kenyatta the winner, NASA filed a presidential petition.

In a landmark decision delivered on 1 September 2017, the Supreme Court annulled the presidential election, citing failures in legality and transparency in the conduct of the election, particularly in the process of results transmission and tabulation.<sup>48</sup>

The significance of this decision extends beyond its historical novelty. It represented a direct judicial enforcement of constitutional principles an institutional declaration that electoral credibility is not solely about the existence of votes cast but about whether the process complies with the Constitution's normative standards. In this sense, the judgment advanced the constitutional project and demonstrated the maturity of the judiciary as an accountability institution.

At the same time, the annulment intensified the legitimacy crisis surrounding the IEBC. Public trust fractured along institutional lines: confidence in the judiciary rose sharply because the Court demonstrated independence, while trust in the IEBC declined because the commission was judicially found to have failed on constitutional standards.

This divergence is analytically important for trend analysis. It illustrates that institutional credibility is not uniform across the electoral ecosystem: improvements in one accountability mechanism (the judiciary) may expose the weaknesses of another (electoral administration), generating greater political turbulence rather than stabilisation.

The annulment also escalated political tensions and contributed to renewed violence. Protests emerged in opposition strongholds, and reports documented excessive and sometimes lethal police responses. The cycle, therefore, revealed a recurring relationship between disputed outcomes, coercive state response, and the fragility of public trust.

The repeat election held on 26 October 2017 was boycotted by NASA, resulting in substantially reduced turnout and a crisis of participation legitimacy.<sup>49</sup>

In some areas, insecurity disrupted voting and necessitated postponements, further undermining the credibility of the repeat process.<sup>50</sup> While the repeat election produced a formal outcome, it did not produce a widely shared legitimacy settlement.

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48 Al Jazeera, "Why did Kenya's Supreme Court annul the elections?" (2 September 2017), available at <<https://www.aljazeera.com/opinions/2017/9/2/why-did-kenyas-supreme-court-annul-the-elections>> at para 5.

49 IFES Election Guide, "Kenyan Presidency 2017 General Election" (2017), available at <<https://www.electionguide.org/elections/id/2614/>>.

50 IFES Election Guide, "Kenyan Presidency 2017 General Election" (2017), available at <<https://www.electionguide.org/elections/id/2614/>>.

In structural terms, the 2017 election demonstrates both resilience and fragility in Kenya's democratic order. The judiciary emerged as a credible constitutional guardian capable of enforcing Article 81 principles through remedial action. Yet the IEBC's weaknesses especially in the governance of technology, results transmission, and procedural consistency revealed that institutional redesign had not fully resolved credibility deficits.

The cycle illustrates a central pattern in Kenya's electoral trajectory: reforms may strengthen legal accountability, but unless electoral administration is equally transformed, judicial intervention becomes a corrective mechanism that can invalidate outcomes without necessarily rebuilding public trust.

The 2017 cycle, therefore, deepened the central question of this study: why do reforms repeatedly fail to deliver sustained electoral credibility?

The answer suggested by this election is that procedural innovations - technology portals, biometric identification, new commissions cannot compensate for weaknesses in institutional integrity, communication, transparency in aggregation, and the political economy pressures exerted upon electoral governance.

In that sense, 2017 reinforced the broader thesis running through this report: the persistence of fragile public trust is not accidental; it is a predictable consequence of institutions operating within incentive structures that remain politically contested and insufficiently insulated.

Therefore, the next election cycle (2022) must be assessed as a test of whether the lessons of 2017 were internalized particularly regarding results management, technology governance, institutional cohesion, and violence containment or whether credibility remained episodic and contingent.

## **2022: Administrative Transparency and Institutional Fragmentation**

The 2022 General Election marked the second presidential transition under the 2010 Constitution and the first electoral transfer between two presidents elected under that constitutional framework.<sup>51</sup>

Unlike 2013 and 2017, which were still closely tethered to the institutional trauma of 2007, the 2022 cycle unfolded in a context of constitutional normalisation but persistent institutional fragility. It tested whether a decade of reform had consolidated electoral credibility or whether recurring weaknesses particularly in campaign regulation, commission cohesion, and public trust continued to shape outcomes.

The political context preceding the election differed in tone from earlier cycles but not entirely in structure. Campaign narratives were significantly influenced by the socio-economic consequences of the COVID-19 pandemic, which had disrupted livelihoods, strained public finances, and intensified cost-of-living pressures.<sup>52</sup>

51 Luciana Thuo, 'Compendium of the 2022 election petitions: Select Decisions, Issues and Themes Arising from the 2022 Elections in Kenya', The Kenyan Section of The International Commission of Jurists, 2024, 2.

52 Thuo, 'Compendium of the 2022 election Petitions', 2.



Economic hardship, rising fuel prices, and food insecurity featured prominently in campaign messaging.<sup>53</sup> In contrast to earlier elections heavily framed around overt ethnic antagonism, 2022 witnessed a more visible articulation of class-oriented rhetoric and economic grievance.<sup>54</sup>

However, while campaign themes shifted toward socio-economic framing, coalition alignments still reflected underlying ethnic and regional calculations. The reconfiguration of alliances most notably the realignment between former political rivals demonstrated that elite bargaining remained central to electoral competition.

Technology played a dual role during the campaign period. On one hand, digital platforms expanded voter engagement, enabling candidates to mobilise supporters and communicate policy agendas directly. On the other hand, the proliferation of misinformation and coordinated disinformation campaigns introduced a new dimension of electoral risk.<sup>55</sup>

Social media manipulation, sponsored propaganda, and targeted narrative framing sought to discredit opponents and undermine public confidence in the electoral management body.<sup>56</sup>

Unlike earlier cycles where manipulation concerns centred on tallying and administrative opacity, 2022 highlighted the informational environment itself as a contested electoral arena. This shift reflects an evolving technological landscape in which credibility challenges increasingly extend beyond the polling station into digital space.

Campaign finance regulation remained a significant structural weakness. Although the Constitution and the Elections Act mandate oversight of candidate spending and prohibit misuse of public resources,<sup>57</sup> enforcement gaps persisted.<sup>58</sup>

Observers reported instances of cash distribution to voters and unregulated expenditure patterns that advantaged resourced candidates financially.<sup>59</sup>

The absence of effective enforcement mechanisms reinforced a recurring trend in Kenya's electoral history: reform through legislation without consistent implementation.

Where oversight remains weak, political competition favours those with financial leverage, thereby narrowing substantive equality of participation and reinforcing patronage incentives.

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53 African Union and Comesa Election Observation Mission, 'Statement of Preliminary Findings: African Union and Comesa Election Observation Mission to the 9 August 2022 General Elections in The Republic of Kenya', 11 August 2022, 1.

54 Isabel Pike, 'Hustlers vs Dynasty': Kenya's new class politics', (9) Global Challenges (2021) article 6.

55 Thuo, 'Compendium of the 2022 election Petitions', 21.

56 Forune Agbele, 'Disinformation and Misinformation during Kenya's 2022 Election', Megatrends Afrika, 2023, 6.

57 The Constitution of Kenya (2010) Article 88(4) (i).

58 Raila Odinga v IEBC & 2 Others Supreme Court Presidential Petition 1 of 2017.

59 European Union Election Observation Mission Kenya 2022, 'Preliminary Statement: Fundamental freedoms respected in Kenya's general elections, but procedural shortcomings demonstrate the need for improvements', European Union, 11 August 2022, 7.

Institutional preparation for the election was complicated by the late appointment and swearing-in of IEBC commissioners.<sup>60</sup>

The compressed timeframe limited the commission's ability to consolidate internal cohesion, refine operational preparedness, and rebuild public trust. While legal frameworks stipulate timelines for the replacement of commissioners,<sup>61</sup> deviations from these procedures created administrative strain and heightened suspicion regarding institutional stability.

As observed in previous cycles, redesign of personnel without insulation from political contestation risks perpetuating credibility deficits rather than resolving them.

On election day, the IEBC sought to address lessons drawn from the 2017 annulment, particularly concerning results transmission and transparency. KIEMS was deployed both for voter identification and for electronic transmission of results from polling stations to national tallying centres.<sup>62</sup>

Crucially, scanned copies of polling station result forms were uploaded to a publicly accessible online portal in near real time.<sup>63</sup>

This measure represented a significant administrative innovation: for the first time, citizens, media organisations, and civil society actors could independently aggregate and verify results directly from primary source documents. In doing so, the commission sought to neutralise longstanding concerns regarding opaque national tallying processes.

Unlike in 2013 and 2017, where technology failures or aggregation opacity had triggered legitimacy crises, the 2022 transmission system functioned with comparatively greater stability.

Where discrepancies arose between electronically transmitted and physically delivered forms, the IEBC publicly clarified that no unilateral corrections would be made at the national tallying centre; instead, disputes would be subject to judicial review.<sup>64</sup>

This approach reflected institutional learning from the Supreme Court's 2017 jurisprudence, which emphasised transparency, traceability, and fidelity to polling station-level documentation.

However, the election was not free from administrative complications. The postponement of elections in certain constituencies<sup>65</sup> due to logistical errors particularly the late delivery of ballot papers<sup>66</sup> for specific positions introduced questions regarding preparedness and coordination.

60 Thuo, 'Compendium of the 2022 election Petitions', 3.

61 The Independent Electoral and Boundaries Commission Act (No. 9 of 2011) section 5(3).

62 Thuo, 'Compendium of the 2022 election Petitions', 4.

63 The Carter Center, 'Preliminary Report: The Carter Center Election Expert Mission, Presidential Election Kenya', 8 September 2022, 10.

64 Raila Odinga v IEBC & 2 Others, Supreme Court Election Petition 1 of 2017

65 Kenya Gazette, CXXIV (169) 22 August 2022, 9948.

66 IEBC to Hold the 8 Postponed Elections on Monday August 29, Citizen TV Kenya, 22 August 2022, 0:12 to 0:20, 1:56 to 2:40.



While these postponements did not fundamentally alter the presidential outcome, they illustrated that operational weaknesses persist even when technological systems function more effectively.

The most significant institutional rupture in 2022 did not occur at the level of technology but within the electoral commission itself. Public disagreement among commissioners at the final stage of results declaration exposed deep internal fragmentation.

A faction of commissioners publicly dissociated themselves from the chairperson's announcement of the presidential results, citing concerns about transparency in the final aggregation process.<sup>67</sup>

Although the Supreme Court subsequently upheld the declared outcome, the public split within the commission reinforced perceptions of institutional instability.

This episode underscores a crucial structural insight: transparency in process cannot fully compensate for fractures in institutional cohesion. Where commissioners themselves appear divided, public trust becomes contingent rather than consolidated.

The dispute resolution phase again demonstrated the centrality of the judiciary in Kenya's electoral architecture. Petitions challenging the presidential outcome were filed before the Supreme Court,<sup>68</sup> which heard the matter within constitutional timelines<sup>69</sup> and delivered a reasoned judgment affirming the election.

The Court's analysis emphasised the integrity of the electronic transmission system and the evidentiary burden required to invalidate results.<sup>70</sup> As in 2017, the judiciary functioned as the ultimate arbiter of electoral legitimacy.

However, unlike 2017, the Court did not find systemic non-compliance warranting annulment. The peaceful adjudication of the dispute reinforced procedural constitutionalism, even as segments of the public continued to contest the political legitimacy of the outcome.

Violence levels in 2022 were significantly lower than in 2007 and 2017, reflecting gradual institutionalisation of conflict mitigation strategies.

Security deployment, civic peace campaigns, and the diffusion of political competition through devolution contributed to containment. Nevertheless, isolated incidents and post-election protests revealed that electoral contestation remains embedded within broader socio-political grievances.

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67 Thuo, 'Compendium of the 2022 election Petitions', 19.

68 Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated), Judgement dismissing the petition (2022) eKLR

69 The Constitution of Kenya (2010) Article 140(1).

70 Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated), Judgement dismissing the petition (2022) eKLR, para 17.

Structurally, the 2022 election represents a phase of administrative transparency accompanied by institutional fragmentation.

The technological infrastructure for results transmission demonstrated measurable improvement, and public access to primary results documentation enhanced verifiability. Yet persistent weaknesses in campaign finance enforcement, digital misinformation regulation, commissioner cohesion, and public communication reveal that institutional credibility remains uneven.

The election illustrates a maturation of procedural transparency without full consolidation of institutional stability.

In a longitudinal perspective, 2022 reinforces the central thesis emerging across election cycles: reforms can strengthen discrete components of the electoral system - technology, judicial oversight, devolution yet credibility remains fragile when underlying political incentives and institutional trust deficits are not comprehensively addressed.

Administrative transparency mitigated one recurrent vulnerability (aggregation opacity), but institutional fragmentation introduced another.

With the completion of the 2022 cycle, Kenya's electoral trajectory from 1992 to 2022 presents a complex pattern of reform, regression, adaptation, and partial consolidation. The subsequent chapter will evaluate these cycles collectively against Article 81's constitutional benchmark, distinguishing between formal compliance and substantive realisation.

### **Longitudinal Pattern Mapping (1992–2022)**

When examined across three decades, Kenya's electoral trajectory reveals a pattern of institutional reform layered upon largely resilient political incentives. Although constitutional and administrative structures have changed significantly since 1992, certain structural dynamics have persisted.

Most notably, executive influence over electoral governance - while moderated by the 2010 Constitution has never been entirely eliminated.

Appointment processes, political negotiations surrounding electoral commissions, and the concentration of executive authority have continued to shape the environment within which elections are administered. As a result, presidential contests remain exceptionally high-stakes, reinforcing zero-sum political calculations.

Ethnic coalition-building has similarly demonstrated remarkable continuity. While campaign narratives have occasionally shifted most visibly in 2022 toward socio-economic themes the organisational logic of electoral competition has remained anchored in elite bargaining and regional mobilisation.

Identity politics has therefore evolved in form but not in structural significance. Elections continue to operate as moments of coalition consolidation rather than ideological realignment.



Technological reform has followed a cyclical pattern of promise and vulnerability. Since 2013, biometric registration systems, electronic voter identification, and digital results transmission have been introduced as safeguards against manipulation.

Yet technology has repeatedly alternated between innovation and fragility. In 2013, system collapse undermined confidence. In 2017, transmission opacity triggered annulment.

In 2022, improved transparency through public access to results forms marked administrative progress, yet institutional fragmentation within the electoral commission reintroduced uncertainty. Technology, therefore, has not functioned as an independent guarantor of credibility; its effectiveness has remained dependent on institutional integrity and coherent governance.

One of the most significant longitudinal developments has been the expansion of judicialisation. In the 1990s, election petitions were largely symbolic and procedurally ineffective. By contrast, the post-2010 period has witnessed courts emerge as decisive arbiters of electoral legitimacy.

The 2013 presidential petition demonstrated judicial capacity for timely adjudication. The 2017 annulment marked an unprecedented assertion of constitutional authority. The 2022 decision reaffirmed judicial centrality in resolving high-stakes disputes.

However, strengthened judicial oversight has not automatically produced institutional harmony within electoral administration. Instead, it has sometimes exposed weaknesses within the electoral management body, reinforcing a pattern in which courts correct but do not structurally transform administrative fragility.

Public trust, as a cumulative variable, has not evolved uniformly across institutions. Trust in the electoral management body has fluctuated sharply, particularly in moments of aggregation crisis such as 2007 and 2017. In contrast, trust in the judiciary has generally strengthened following its visible assertion of constitutional independence in 2013 and 2017.

This divergence reflects institutional differentiation: citizens may express confidence in judicial review while simultaneously doubting electoral administration. Such fragmentation of trust complicates democratic consolidation, as legitimacy becomes dispersed rather than system-wide.

Reform efforts have frequently addressed immediate crises without recalibrating the underlying political economy of electoral competition. Violence in 2007 prompted constitutional redesign; technological failure in 2013 led to system upgrades; transmission opacity in 2017 resulted in enhanced publication mechanisms in 2022.

Yet campaign finance regulation, executive dominance narratives, and enforcement gaps have persisted. The recurrence of reform cycles without full incentive restructuring suggests that institutional redesign alone cannot neutralise structural contestation. Inclusion patterns further illustrate this dynamic.

The 2010 Constitution expanded the architecture of representation through devolution and reserved positions, and it entrenched the two-thirds gender principle as a normative commitment.

Nevertheless, across successive post-2010 election cycles, implementation of gender equity requirements has remained incomplete. Representation of persons with disabilities and other marginalised groups has improved procedurally but continues to face substantive barriers.

This pattern reflects a broader continuity: constitutional commitment without consistent enforcement.

Taken together, the longitudinal mapping from 1992 to 2022 reveals a system characterised by adaptation rather than transformation. Kenya has progressed from executive dominated electoral administration to constitutionally structured oversight; from violent breakdown to judicially mediated dispute resolution; from opaque manual tallying to digitally accessible results publication.

Yet the persistence of high electoral stakes, identity-based coalition incentives, regulatory gaps, and fluctuating public trust indicates that structural vulnerabilities remain embedded within the political system.

Having mapped these empirical continuities and mutations across three decades, the analysis now turns from trajectory to evaluation. The next chapter shifts from historical-empirical examination to constitutional performance assessment.

It asks not merely how Kenya's elections have unfolded, but whether they have substantively satisfied the normative benchmark established under Article 81 of the Constitution of Kenya, 2010. The focus, therefore, moves from pattern identification to constitutional compliance, assessing whether transparency, accountability, impartiality, inclusion, and accuracy have been realised in practice rather than proclaimed in design.

## **Conclusion**

The historical trajectory from 1992 to 2022 reflects a complex interplay of reform, adaptation, and recurring vulnerability. Kenya has experienced peaceful transfers of power, constitutional redesign, technological modernisation, and unprecedented judicial intervention.

Yet structural incentive patterns executive concentration, identity mobilisation, regulatory gaps, and institutional fragility - have persisted.

This chapter has mapped the empirical foundation necessary for constitutional evaluation. Having traced continuity and change across seven election cycles, the analysis now turns to a normative assessment.

Chapter Three evaluates Kenya's electoral experience against the constitutional benchmark of Article 81, examining whether formal institutional design and operational practice have substantively realised the principles of transparency, accountability, inclusivity, and impartiality.

The movement from historical diagnosis to constitutional performance review marks the next analytical stage of this study.

# Chapter 3

## CONSTITUTIONAL COMPLIANCE – ASSESSING IMPLEMENTATION OF ARTICLE 81

### Introduction

Having traced the historical evolution of Kenya's electoral system in the preceding chapter, the analysis now turns from institutional development to constitutional performance.

The 2010 Constitution fundamentally re-engineered the normative foundations of electoral governance by embedding detailed principles in Article 81 and related provisions.

More than a decade after promulgation, the central constitutional question is no longer whether an appropriate legal framework exists, but the extent to which the electoral system has realised the substantive guarantees contemplated by the Constitution.

Article 81 establishes a cluster of requirements intended to secure electoral integrity, political equality and inclusive representation.<sup>71</sup>

These include the conduct of free and fair elections; universal suffrage grounded in equality of vote; the two-thirds gender principle; fair representation of persons with disabilities, and the administration of elections in an impartial, neutral, efficient, accurate and accountable manner.<sup>72</sup>

Read together with Articles 38 and 86, these provisions constitute one of the most elaborate constitutional electoral blueprints in the region.<sup>73</sup> The constitutional design is therefore ambitious not merely in procedural terms but in its transformative aspirations.

However, the presence of an advanced constitutional architecture does not in itself resolve the question of compliance. Comparative electoral experience demonstrates that the principal risks to constitutional fidelity often arise not from gaps in formal design but from weaknesses in implementation, enforcement and institutional trust.

Kenya's post-2010 electoral trajectory illustrates this dynamic with particular clarity. While the legal and institutional framework governing elections has undergone significant reform, successive electoral cycles have revealed varying degrees of tension between formal safeguards and lived electoral experience.

This chapter accordingly adopts a normative-empirical assessment framework to evaluate the implementation of Article 81 across the 2013, 2017 and 2022 general elections. The choice of this period is deliberate.

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71 Constitution of Kenya, 2010, art 81.

72 Constitution of Kenya, 2010, art 81; see also arts 38 and 86.

73 Constitution of Kenya 2010, arts 38 and 86.



The 2013 election constituted the first full electoral test under the 2010 constitutional order; the 2017 cycle functioned as a major constitutional stress test culminating in the Supreme Court's annulment of the presidential election; and the 2022 election provides the most recent indicator of institutional consolidation.

Taken together, these three cycles offer a sufficiently longitudinal basis to assess whether Kenya's electoral system is converging toward full constitutional compliance.

Methodologically, the chapter distinguishes between formal (structural) compliance and substantive (operational) realisation. Formal compliance refers to the existence of appropriate constitutional provisions, statutes, regulations and institutional arrangements designed to implement Article 81.

Substantive realisation, by contrast, concerns whether these mechanisms have functioned effectively in practice to secure elections that are genuinely free, fair, inclusive and accountable.

This distinction is critical in the Kenyan context, where reform efforts since 2010 have largely succeeded in constructing an elaborate regulatory framework, but questions persist regarding consistency of enforcement and depth of institutionalization.

The analysis proceeds thematically. Section 3.1 examines the extent to which elections have been free from violence, intimidation and corruption.

Section 3.2 evaluates transparency, accuracy and accountability in electoral administration, with particular attention to results management jurisprudence.

Section 3.3 assesses the realisation of universal suffrage and the aspiration of equality of vote, including participation disparities and constituency balance.

Section 3.4 interrogates implementation of the two-thirds gender principle and the persistence of representation gaps.

Section 3.5 evaluates the inclusion of youth, persons with disabilities and marginalized communities.

The chapter concludes in Section 3.6 with a composite constitutional scorecard synthesizing the degree of implementation across Article 81's core principles.

The central argument advanced is that Kenya has achieved substantial structural alignment with Article 81, but substantive realisation remains uneven and still consolidating.

The electoral system has demonstrably matured since 2010, particularly in legal design and judicial oversight. Yet, recurring operational stresses, ranging from episodic electoral violence and persistent monetisation of political competition to institutional trust fragilities and incomplete gender parity, continue to qualify the constitutional assessment.

The chapter, therefore, situates Kenya's electoral trajectory within a broader pattern of incremental constitutionalisation under conditions of political contestation. While the direction of reform is broadly positive, full fidelity to the transformative vision of Article 81 has not yet been fully secured.

Continued institutional strengthening, legislative follow-through and sustained political commitment will be necessary to close the remaining gap between constitutional promise and electoral practice.

## Free and fair elections: violence, intimidation and corruption trends

Article 81(e) of the Constitution of Kenya requires that elections be free and fair, explicitly including freedom from violence, intimidation, improper influence and corruption.<sup>74</sup> It further demands that they be administered in an impartial, neutral, efficient, accurate and accountable manner.<sup>75</sup>

These elements together establish both negative obligations, such as the absence of coercion, undue influence or fraud, and positive institutional duties on the State and the Independent Electoral and Boundaries Commission (IEBC) to secure an environment in which voters can exercise political rights without fear or manipulation.

Kenyan jurisprudence has consistently affirmed that the constitutional threshold for a free and fair election is not merely procedural but substantive.

In *Raila Odinga v Independent Electoral and Boundaries Commission (2017)*, the Supreme Court emphasised that the Constitution demands elections that are not only conducted in accordance with the law, but also reflect the principles of transparency, verifiability and accountability.<sup>76</sup> This interpretation situates Article 81 within a broader framework of substantive electoral integrity, against which post-2010 electoral cycles must be evaluated.

### Normative standard

Article 81(e) of the Constitution of Kenya establishes binding normative standards for free and fair elections by embedding principles such as secret ballot and institutional independence with specific sub-clauses defining safeguards against electoral vices.<sup>77</sup>

These safeguards, freedom from violence, freedom from intimidation, freedom from corruption and impartial administration form a cohesive normative framework derived particularly from Article 81(e)(ii) and (v) which are interpreted purposively under Article 259 of the Constitution to promote democracy and rule of law.<sup>78</sup>

- **Freedom from Violence**

Freedom from violence is generally understood to prohibit any act or threat of physical harm or coercive force during electoral processes, ensuring voters, candidates and officials exercise rights under Article 38 without fear.<sup>79</sup>

74 Constitution of Kenya 2010, art 81(e).

75 Constitution of Kenya 2010, art 81(e).

76 *Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and others* [2017] eKLR (Supreme Court).

77 Constitution of Kenya 2010, art 81(e).

78 Constitution of Kenya, 2010, art 81(e)(ii) and (v); art 259.

79 Constitution of Kenya, 2010, art 38.



It also encompasses assaults, property destruction or even mob actions that suppress turnout or alter election outcomes, as affirmed in Supreme Court decisions like **Raila Odinga v IEBC** (2017), which affirmed that violence tainted transmission integrity.<sup>80</sup>

- **Freedom from Intimidation**

This standard bars psychological coercion, harassment or menacing conduct intended to hinder participation. It protects the mental autonomy of voters, preventing undue pressure that undermines the efficacy of the secret ballot guaranteed under Article 81(e)(i).<sup>81</sup>

- **Freedom from Corruption**

Corruption encompasses bribery, vote-buying, including 'treating' through food or gifts, and other practices that distort the equality of the vote, thus affecting the credibility of elections.<sup>82</sup> Normatively, this freedom ensures that one ballot carries the same weight as another. Statutory instruments such as the Election Offences Act provide enforcement mechanisms, while constitutional petitions have repeatedly highlighted the corrosive effect of patronage and resource abuse.

- **Impartial Administration**

Article 81(e)(v) of the Constitution mandates elections to be conducted in an impartial, neutral, efficient, accurate and accountable manner by an independent body, IEBC, as established in Article 88 of the Constitution.<sup>83</sup> This standard prohibits bias in voter registration, polling, counting or result declaration.

Normatively, it demands procedural fairness, verifiable processes and non-partisanship. The opacity of IEBC operations in 2017, which led to annulment, illustrates the constitutional imperative of transparency as a democratic safeguard.

## Conclusion

These standards interlock to realise Article 81's holistic vision: violence and intimidation negate secrecy and mental autonomy of voters, corruption skews equality, and bias hinders independence. Article 259(1) directs purposive interpretation favouring constitutional values, with courts (e.g., 2022 presidential petition) treating breaches as justiciable, meaning that they can be enforced by the court of law.

## Legal and institutional framework

Kenya has developed an extensive statutory framework intended to operationalise Article 81(e). Key instruments include the Elections Act,<sup>84</sup> the Election Offences Act,<sup>85</sup> and subsidiary IEBC regulations governing campaign conduct, polling procedures, and results management.

80 *Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and others* [2017] eKLR (Supreme Court).

81 Constitution of Kenya, 2010, art 81(e)(i).

82 National Crime Research Centre, *Elections Crimes and Offences in Kenya* (Nairobi, 2016) 45.

83 Constitution of Kenya, 2010, art 81(e)(v); art 88.

84 Elections Act, No 24 of 2011 (Kenya).

85 Election Offences Act, No 37 of 2016 (Kenya).

Collectively, these laws criminalise electoral violence, bribery, undue influence and intimidation, while providing enforcement powers to electoral and criminal justice agencies.

- **Elections Act**

The Elections Act No. 24 of 2011 (revised 2016) operationalises constitutional electoral principles through voter registration, nomination, and polling procedures.<sup>86</sup>

Key provisions include Sections 6-10 on maintaining an accurate Register of Voters with biometric verification to prevent multiple voting; Sections 29-36 on candidate nominations, ensuring party lists promote gender equity under Article 81(b); and Sections 38-104 on polling, mandating secret ballots, voter identification, and accommodations for persons with disabilities (e.g., special booths per Section 104 amendments).<sup>87</sup>

This Act prohibits illegal practices in Part VI, such as harambee fundraising during campaigns (defined in Section 2 as public collections for political gain), linking to “freedom from corruption.”<sup>88</sup>

It empowers the IEBC to set polling station limits (Section 38A) and conduct voter education, fostering transparency and impartial administration.<sup>89</sup>

- **Election Offences Act**

The Election Offences Act in particular represents a significant post-2010 reform effort.<sup>90</sup> It codifies a range of prohibited practices, including treating, bribery, use of force or violence, and undue influence, and prescribes penalties intended to deter electoral malpractice.<sup>91</sup>

It criminalises violations of Article 81, with penalties up to KSh 2 million fines or 6 years imprisonment. Core prohibitions include voter register manipulation (Section 3); interference with voting and misconduct by IEBC staff (Sections 5–7), bribery and treating (Section 9), undue influence through threats (Section 10), and electoral violence (Section 11).<sup>92</sup>

Section 12 further reinforces impartial administration by regulating campaign materials.<sup>93</sup> Enforcement is carried out by the Director of Public Prosecutions, with the IEBC mandated to report offences.

- **IEBC Enforcement Mechanisms**

The Independent Electoral and Boundaries Commission (IEBC) as per Article 88 enforces compliance through regulatory and adjudicatory powers.

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86 Elections Act, No 24 of 2011 (Kenya).

87 Elections Act, No 24 of 2011 (Kenya), ss 6–10, 29–36, 38–104; Constitution of Kenya, 2010, art 81(b).

88 Elections Act, No 24 of 2011 (Kenya), s 2.

89 Elections Act, No 24 of 2011 (Kenya), s 38A.

90 Election Offences Act, No 37 of 2016 (Kenya).

91 Election Offences Act, No 37 of 2016 (Kenya), ss 5–15.

92 Election Offences Act, No 37 of 2016 (Kenya), ss 3, 5–7, 9–11.

93 Election Offences Act, No 37 of 2016 (Kenya), s 12.



It conducts voter audits (Elections Act Section 8A), approves nominations (Sections 31-33), monitors campaigns via a code of conduct, and investigates offences with powers to summon witnesses and seize evidence (Election Offences Act Section 25).

IEBC's Multi-Agency Election Offences Monitoring Team (MAEOMT) coordinates real-time reporting, while post-election petitions under Supreme Court jurisdiction (Article 140) provide judicial review of irregularities. Digital tools such as biometric voter identification and electronic results transmission further enhance impartiality and auditability.

The IEBC's Multi-Agency Election Offences Monitoring Team (MAEOMT) coordinates real-time reporting, while post-election petitions under Supreme Court jurisdiction (Article 140) provide judicial review of irregularities.

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- **Security Coordination**

The Election Security Action Plan (ESAP), a multi-agency protocol led by the National Police Service and IEBC, ensures “freedom from violence” through coordinated deployment.<sup>94</sup> Developed prior to elections, it integrates the National Intelligence Service, GSU, and county security structures to protect polling stations, respond rapidly to disruptions, and manage zonal commands.

ESAP mandates joint operations rooms, voter intimidation hotlines, and de-escalation training, addressing past violence (e.g., 2007/2017). It aligns with the National Security Council's oversight under Article 240, with IEBC chairing security committees for impartial administration.<sup>95</sup>

Together, these safeguards operationalise Article 81's vision of genuine universal suffrage, though enforcement gaps and institutional controversies continue to hinder their effectiveness.

## Empirical performance across electoral cycles

- **The 2013 General Election: Relative Calm with Residual Risk**

The 2013 election marked the first national poll under the 2010 Constitution and occurred in the shadow of the 2007–08 post-election violence.

Compared to that earlier crisis, the 2013 cycle was widely characterised as relatively peaceful, with observer missions and domestic monitoring groups reporting a significant reduction in large-scale organised violence.<sup>96</sup>

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94 Independent Electoral and Boundaries Commission (IEBC), 'ESAP Team Reviews Elections Security Training Materials' (IEBC News, 30 December 2021). <[https://www.iebc.or.ke/news/?ESAP\\_Team\\_Reviews\\_Elections\\_Security\\_Training\\_Materials](https://www.iebc.or.ke/news/?ESAP_Team_Reviews_Elections_Security_Training_Materials)> accessed 8 March 2026.

95 Constitution of Kenya, 2010, art 240.

96 European Union Election Observation Mission, Kenya General Elections 2013 Final Report (2013).

Nevertheless, localised incidents of intimidation and sporadic violence persisted in several counties. Much of the stability was attributed to heavy security deployment and elite political pacts rather than to fully institutionalised deterrence mechanisms. From a constitutional perspective, Kenya in 2013 achieved partial substantive compliance; the election avoided systemic nationwide violence but did not fully eliminate coercive electoral practices.

- **The 2017 Election cycle: Constitutional Stress Test**

The 2017 electoral cycle constituted the most severe post-2010 stress test of Article 81(e).<sup>97</sup> While the pre-election period was largely calm, the post-announcement phase was marked by significant unrest in several urban centres and opposition strongholds.<sup>98</sup>

The Supreme Court's annulment of the presidential election in **Raila Odinga 2017** was primarily grounded in failures of transparency and verifiability rather than violence per se.<sup>99</sup> Yet the broader environment revealed constitutional concerns: fatalities linked to protests, allegations of excessive use of force by security agencies, heightened polarisation, and localised intimidation.

Human rights monitors documented multiple deaths during the post-election period, raising questions about whether the State had fully discharged its positive obligation to secure a violence-free electoral environment.<sup>100</sup> Moreover, the repeat presidential election in October 2017, boycotted by the opposition, saw sharply reduced turnout in several regions, complicating assessments of freedom from intimidation.<sup>101</sup>

Overall, the 2017 cycle revealed significant gaps between formal safeguards and substantive electoral experience, particularly in the post-results phase.

- **The 2022 General Election: Improved Management with Persistent Risks**

The 2022 elections were widely viewed as administratively more stable than the 2017 cycle, with orderly polling, improved result transmission and reduced level of lethal violence. Security coordination was stronger, transparency in results management improved, and the presidential petition was resolved swiftly.

However, structural risks persisted. Observer reports noted isolated incidents of voter bribery, misuse of state resources, localised intimidation and disinformation.

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97 Constitution of Kenya, 2010, art 81(e).

98 Amnesty International, Kenya: Kill Those Criminals: Security Forces Violations in Kenya's August 2017 Elections (AFR32/7249/2017, 2017) <<https://www.amnesty.org/en/documents/afr32/7249/2017/en>> 14.

99 *Raila Amolo Odinga and another v IEBC and others* [2017] eKLR (Supreme Court).

100 Kenya National Commission on Human Rights, *Mirage at Dusk: A Human Rights Account of the 2017 General Election* (2018).

101 IFES Election Guide, 'Kenyan Presidency 2017 General Election' (2017) <<https://www.electionguide.org/elections/id/2614/>>.

While the Supreme Court upheld the presidential election, it reaffirmed that compliance with Articles 81 and 86 requires a holistic assessment.<sup>102.</sup>

The 2022 cycle, therefore, reflects incremental substantive improvement but not full constitutional consolidation.

## Corruption and undue influence dynamics

Beyond physical violence, Article 81(e) explicitly prohibits corruption and improper influence.<sup>103.</sup> In this domain, Kenya's formal legal framework is comparatively strong, but enforcement remains uneven. Election observer missions across all three cycles have repeatedly documented voter bribery at the constituency level, monetisation of party nominations, opacity in campaign finance and abuse of incumbency advantages.

Despite clear statutory prohibitions under the Elections Act and the Election Offences Act, prosecution rates for election offences remain low relative to reported incidents, suggesting a persistent accountability deficit. The gap between the normative prohibition of bribery and its continued prevalence indicates that Kenya's compliance in this dimension remains largely formal rather than substantive.

### Gap analysis: Structural vs operational deficits

The evidence across the three electoral cycles reveals a consistent pattern: strong structural design but uneven operational performance.

- **Areas of Structural Strength**

Kenya demonstrates substantial formal compliance through:

- i. Comprehensive electoral legislation.
- ii. A specialised electoral offences framework.
- iii. Multi-agency security coordination mechanisms.
- iv. An active body of electoral dispute jurisprudence.

- **Areas of Operational Weakness**

Substantive realisation is constrained by:

- i. Inconsistent enforcement of election offences.
- ii. Violence prevention that remains episodic rather than systemic.
- iii. Risks of politicisation in security responses.
- iv. Persistent localised intimidation networks.
- v. Weak deterrence against voter bribery.

Therefore, the constitutional deficit is primarily operational rather than architectural.

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102 *Raila Amolo Odinga and another v William Samoei Ruto and others* [2022] eKLR (Supreme Court).

103 Constitution of Kenya, 2010, art 81(e).

Since 2010, Kenya has made measurable progress in constructing a legal and institutional framework capable of supporting free and fair elections as required under Article 81(e).

Large-scale nationwide electoral violence has declined significantly compared to the pre-constitutional period, and the 2022 election demonstrated improved administrative stability.

However, the evidence from the 2013–2022 electoral cycles indicates that substantive realisation remains incomplete. Localised violence, persistent voter bribery, uneven enforcement of electoral offences and periodic security-related human rights concerns continue to undermine the full enjoyment of electoral freedom.

Kenya may therefore be characterised as having achieved substantial formal compliance but only partial substantive fulfilment of the constitutional requirement that elections be free from violence, intimidation and corruption.

## Transparency, accuracy and accountability in electoral administration

- **Normative Standard Under Articles 81 and 86**

The constitutional requirement of transparent, accurate and accountable electoral administration is anchored in Articles 81(e) and 86 of the Constitution of Kenya.<sup>104</sup> Article 81(e)(v) stipulates that elections must be administered in an impartial, neutral, efficient, accurate and accountable manner.<sup>105</sup>

Complementing this, Article 86 imposes specific operational duties on the Independent Electoral and Boundaries Commission (IEBC), requiring voting processes to be simple, accurate, verifiable, secure, accountable and transparent.<sup>106</sup> Together, these provisions articulate a constitutional demand for integrity and credibility in electoral management.

The Supreme Court has repeatedly interpreted these provisions as establishing a high threshold of procedural integrity. In **Raila Odinga v IEBC & Others** (2017), the Court underscored that electoral processes must be demonstrably verifiable and that the constitutional test is not merely whether results are announced, but whether the entire results chain is transparent and auditable.<sup>107</sup>

This jurisprudence has transformed electoral administration in Kenya into a constitutionally supervised technical process, one that is subject to strict scrutiny.

In this regard, the evaluation of Kenya's electoral management across the 2013, 2017 and 2022 cycles must reflect both formal compliance and substantive realisation of these constitutional standards.

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104 Constitution of Kenya, 2010, arts 81(e) and 86.

105 Constitution of Kenya, 2010, art 81(e)(v).

106 *ibid* art 86.

107 *Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and others* [2017] eKLR (Supreme Court).

## Formal legal and institutional framework

Kenya's post-2010 electoral reforms established an extensive procedural framework governing voter registration, polling, results transmission and dispute resolution. The Elections Act together with regulations issued by the IEBC regulations set out detailed procedures intended to secure transparency and accountability at each stage of the electoral cycle.<sup>108</sup>

Several key safeguards illustrate this commitment. For instance:

- i. Biometric voter registration (BVR).
- ii. Electronic results transmission systems (RTS).
- iii. Publicly available polling station results forms (Forms 34/35 series)
- iv. Multi-tier results verification processes.
- v. Judicial election petition mechanisms.

On paper, these mechanisms reflect a strong attempt to operationalise constitutional requirements of verifiability and transparency. They embody a deliberate effort to ensure that electoral administration is not only procedurally compliant but also substantively transparent and accountable.

### Institutional capacity of the IEBC

The IEBC has progressively expanded its technical infrastructure and procedural guidelines across the three electoral cycles since 2013.

Legislative amendments and regulatory refinements have aimed to address earlier weaknesses, particularly in results management. However, the constitutional inquiry is not limited to whether systems exist, but whether they have functioned reliably and consistently under the pressure of electoral competition.

This section, therefore, evaluates the IEBC's institutional capacity across the 2013, 2017 and 2022 electoral cycles, focusing on the extent to which its technical systems and procedural frameworks have translated constitutional principles into reliable electoral outcomes.

### Empirical performance across electoral cycles

#### • The 2013 Election: Technology Failure and Procedural Learning

The 2013 general election exposed significant weaknesses in Kenya's electoral technology architecture. The electronic voter identification devices (EVID) and the results transmission system (RTS) experienced widespread failures, forcing a reversion to manual processes in many polling stations.<sup>109</sup> While the Supreme Court ultimately upheld the presidential election, it acknowledged notable administrative shortcomings, though it found they did not rise to the threshold of invalidating the result.<sup>110</sup>

108 Elections Act, No 24 of 2011 (Kenya) and IEBC (General) Regulations, 2012.

109 Independent Electoral and Boundaries Commission, Report on the 2013 General Election (2013).

110 *Raila Odinga v Independent Electoral and Boundaries Commission and others [2013]* eKLR (Supreme Court).

The Court adopted what has since been viewed as a relatively deferential approach to the IEBC's performance holding that failures did not rise to the threshold of invalidating results.

From a constitutional perspective, 2013 revealed:

- i. Strong formal framework.
- ii. Weak technological preparedness.
- iii. Limited institutional resilience.

As a result, 2013 highlighted the gap between formal compliance and practical reliability underscoring the need for institutional strengthening and technological resilience.

- **The 2017 Election: Constitutional Rupture and Judicial Reset**

The 2017 presidential election marked a decisive constitutional turning point in Kenya's electoral history. In its landmark judgment annulling the presidential results, the Supreme Court found that the IEBC had failed to conduct the election in accordance with the Constitution and the law.<sup>111</sup>

The Court identified several critical administrative deficiencies, including:

- i. Irregularities in results transmission.
- ii. Unexplained discrepancies in results forms.
- iii. Failures in the verification chain.
- iv. Lack of full auditability of the results management system.

Importantly, the Court clarified that the constitutional standard requires strict procedural fidelity, not merely substantial compliance. This judgment elevated the normative bar and signaled that electoral administration in Kenya would be subject to exacting constitutional review.

The repeat presidential election in October 2017 did not fully resolve these legitimacy concerns. The opposition boycott and sharply reduced turnout in some regions raised further questions about the perceived neutrality and inclusiveness of the electoral process.<sup>112</sup>

While the IEBC sought to demonstrate procedural improvements, the political context undermined the substantive realisation of constitutional principles leaving lingering doubts about electoral credibility. Overall, the 2017 cycle exposed a profound gap between formal procedural design and substantive institutional performance.

- **The 2022 Election: Procedural Stabilisation amid Institutional Strain**

The 2022 general election demonstrated notable improvements in several aspects of electoral administration. The IEBC implemented a more stringent results management process, including near real-time public posting of polling station results forms on an online portal.

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111 *Raila Amolo Odinga and another v IEBC and others* [2017] eKLR (Supreme Court).

112 IFES Election Guide, 'Kenyan Presidency 2017 General Election' (2017) <<https://www.electionguide.org/elections/id/2614/>>.

Positive indicators included:

- i. Improved functionality of voter identification systems.
- ii. Enhanced public access to results forms.
- iii. Relatively orderly polling process.
- iv. Expedited presidential petition determination.

In **Raila Odinga v IEBC & Others** (2022), the Supreme Court upheld the presidential election and found that the results management process met the constitutional threshold of verifiability and transparency.<sup>113</sup>

The Court distinguished the 2022 process from the deficiencies identified in 2017 affirming that the IEBC had achieved a higher level of procedural fidelity.

However, the 2022 cycle was not without institutional strain. The highly publicised internal division among IEBC commissioners during the final results announcement raised concerns about institutional cohesion and public confidence, even though the Court ultimately found no constitutional violation.

Thus, while 2022 reflects substantive procedural improvement, it also demonstrates the continued fragility of electoral trust ecosystems.

## Accountability Mechanisms and Enforcement

- **Judicial Oversight**

One of Kenya's strongest areas of compliance lies in its solid electoral dispute resolution framework. The judiciary, particularly the Supreme Court, has played an increasingly assertive role in enforcing constitutional electoral standards.

The annulment of the 2017 elections established an important precedent that electoral outcomes are subject to meaningful judicial scrutiny. This intervention has contributed significantly to formal accountability compliance.

- **Administrative Accountability Gaps**

Despite strong judicial oversight, administrative accountability within the electoral management process remains uneven. Persistent concerns include:

- i. Limited individual liability for electoral officials.
- ii. Slow or inconclusive investigations into administrative failures.
- iii. Recurring procurement controversies.
- iv. Politicization perceptions surrounding IEBC leadership.

These factors suggest that while ex post judicial accountability is relatively strong, internal administrative accountability mechanisms require further consolidation to ensure consistent institutional integrity.

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113 *Raila Amolo Odinga and another v William Samoei Ruto and others* [2022] eKLR (Supreme Court).

Across the three electoral cycles, Kenya exhibits a clear pattern;

- **Areas of Progress:**
  - i. Increasingly sophisticated legal framework.
  - ii. Strong judicial enforcement culture.
  - iii. Improved technical systems by 2022.
  - iv. Enhanced public access to results data.
- **Persistent Vulnerabilities:**
  - i. Technology reliability concerns (especially legacy trust effects).
  - ii. Institutional credibility challenges within the IEBC.
  - iii. Episodic political contestation of results processes.
  - iv. Weak personal accountability for administrative failures.

The constitutional challenge has therefore evolved from system design failure in 2013, to process integrity crisis in 2017, to institutional trust fragility in 2022.

In conclusion, Kenya has made significant strides in building a procedurally sophisticated electoral administration framework consistent with Articles 81 and 86 of the Constitution.

The trajectory from the technological failures of 2013 through the constitutional rupture of 2017 to the relative procedural stabilization of 2022 demonstrates measurable institutional learning.

Nevertheless, full substantive realisation remains incomplete. While formal compliance is now largely thorough, persistent concerns regarding institutional cohesion, public confidence, and consistent administrative accountability continue to temper the constitutional assessment.

Kenya may therefore be characterized as having achieved advanced formal compliance and improving but still fragile substantive fulfilment of the constitutional requirements of transparent, accurate and accountable electoral administration.

## Principles of the Electoral System:

### Universal Suffrage and Equality of Vote

- **Normative Standard Under Article 81**

Article 81(d) of the Constitution requires that elections be based on universal suffrage and the aspiration for fair representation and equality of vote.<sup>114</sup> This provision establishes two closely related but analytically distinct constitutional guarantees.

First, universal suffrage requires that all eligible citizens be able to register and vote without unreasonable barriers.<sup>115</sup> Second, equality of vote demands that each vote carry, as nearly as practicable, equal weight within the representative system.

The Supreme Court has interpreted these principles as part of the broader constitutional architecture of political rights under Article 38, emphasising that the legitimacy of electoral outcomes depends not only on procedural regularity but also on the inclusiveness and representativeness of the franchise.

The constitutional test is therefore both access-based (who can vote) and weight-based (how votes translate into representation).

This section evaluates Kenya's performance across the 2013, 2017 and 2022 electoral cycles, distinguishing between formal compliance mechanisms and substantive equality outcomes.

- **Formal Legal and Institutional Framework**

Kenya has established a comprehensive legal regime governing voter registration and participation. The Elections Act mandates continuous voter registration, periodic register updates and public inspection processes intended to safeguard inclusiveness and accuracy.<sup>116</sup>

The IEBC has also implemented biometric voter registration (BVR) to reduce duplication and enhance integrity. In formal terms, the legal framework imposes minimal explicit restrictions on adult suffrage, consistent with Article 83 of the Constitution.<sup>117</sup>

The introduction of diaspora voting (albeit limited) and the gradual expansion of polling infrastructure further indicate a strong formal commitment to universal suffrage.

- **Boundary Delimitation and Vote Equality**

Equality of vote is structurally linked to constituency delimitation. Article 89 requires the IEBC to review constituency boundaries at intervals and to ensure that population variances remain within prescribed constitutional margins, subject to considerations of geography, community interests and means of communication.<sup>118</sup>

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114 Constitution of Kenya 2010, art 81(d).

115 Constitution of Kenya 2010, art 38(3).

116 Elections Act No 24 of 2011 (Kenya) ss 5-8.

117 Constitution of Kenya 2010, art 83.

118 *ibid* art 89.

On paper, this framework reflects an attempt to balance numerical equality with representational practicality, suggesting substantial formal compliance.

However, the constitutional question remains whether the practical outcomes of registration, turnout and constituency design have achieved meaningful equality of electoral participation and vote weight.<sup>119</sup>

## Empirical Performance Across Electoral Cycles

### • Voter Registration Trends

Across the 2013–2022 period, Kenya has maintained relatively high levels of voter registration compared to regional peers.<sup>120</sup>

Each electoral cycle saw significant registration drives, with the IEBC progressively expanding the biometric register. Nevertheless, observer reports and audit exercises have repeatedly identified structural challenges, including:

- i. uneven registration rates across counties.
- ii. under-registration among youth cohorts.
- iii. logistical barriers in remote and marginalised regions.
- iv. periodic concerns regarding register accuracy.

In 2017 and 2022 in particular, questions were raised regarding the completeness and cleaning of the register, though courts generally found no systemic irregularities sufficient to invalidate the process.<sup>121</sup>

From a constitutional standpoint, Kenya demonstrates strong formal access but uneven substantive inclusion.

### • Voter Turnout and Participation Inequalities

Turnout data across the three electoral cycles reveals important participation disparities. While national turnout has remained relatively high, significant regional and demographic variations persist.

Notable patterns include:

- i. lower turnout in some historically marginalised counties.
- ii. participation fluctuations linked to political boycotts (especially 2017 repeat election).
- iii. youth voter disengagement trends.
- iv. urban–rural participation differentials

119 Independent Electoral and Boundaries Commission, Post-Election Evaluation Report for the August 9, 2022 General Election (Nairobi 2023) 50-55.

120 Elections Observation Group, Final Report on Observation of the 2022 General Elections in Kenya (Nairobi 2023) 30-35.

121 *Raila Amolo Odinga and another v IEBC and others* [2017] eKLR; *Raila Amolo Odinga and another v William Samoei Ruto and others* [2022] eKLR.



The October 2017 repeat presidential election is particularly instructive. Following the opposition boycott, turnout dropped sharply in several regions, raising questions about the effective universality of the franchise during that phase.

Although the legal framework permitted participation, the political environment materially affected voter engagement.

This episode illustrates the distinction between formal suffrage availability and substantive electoral participation.

- **Equality of Vote and Constituency Malapportionment**

The aspiration for equality of vote is most structurally tested through constituency population disparities. Kenya's constitutional framework allows a degree of population variance to accommodate geography and community considerations.<sup>122</sup>

However, periodic analyses of constituency sizes have shown persistent deviations from the population quota in some areas. Certain sparsely populated constituencies remain significantly over-represented relative to densely populated urban constituencies.

While these disparities generally fall within constitutionally permitted margins, they raise ongoing normative questions regarding the practical realisation of vote equality, particularly in rapidly urbanising counties where population growth has outpaced boundary review cycles.

The IEBC's periodic boundary reviews have mitigated but not fully eliminated these representational imbalances.

- **Diaspora Voting and External Suffrage**

The gradual introduction of diaspora voting represents an important formal advance toward universal suffrage.<sup>123</sup> However, implementation has remained limited in scope, with voting initially restricted to a small number of countries and diplomatic missions.

Courts have acknowledged the progressive nature of diaspora enfranchisement while also recognising the logistical constraints facing the IEBC.<sup>124</sup>

Nonetheless, the limited reach of external voting continues to constrain the full realisation of the constitutional promise of universal suffrage for citizens abroad.<sup>125</sup>

The evidence across the three electoral cycles reveals a nuanced constitutional picture.

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122 Constitution of Kenya 2010, art 89(5)-(7).

123 *Kituo Cha Sheria v Independent Electoral and Boundaries Commission* [2013] KEHC 7433 (KLR) (High Court of Kenya).

124 See eg *Kituo Cha Sheria v Independent Electoral and Boundaries Commission* [2013] eKLR (High Court).

125 Kenya Institute for Public Policy Research and Analysis, *Assessing the Implementation of Electoral Reforms in Kenya under the Constitution of Kenya, 2010* (KIPPRA Discussion Paper No 359, Nairobi 2024) 25-30.

- **Areas of Substantial Compliance**

Kenya demonstrates strong formal adherence through:

- i. near-universal adult franchise in law
- ii. nationwide voter registration infrastructure
- iii. biometric voter register
- iv. periodic boundary review mechanisms
- v. gradual diaspora enfranchisement

- **Persistent Substantive Gaps**

However, full realisation is constrained by:

- i. uneven regional registration and turnout
- ii. youth participation deficits
- iii. residual constituency population disparities
- iv. limited diaspora voting coverage
- v. politically induced participation asymmetries (notably 2017)

The constitutional challenge has therefore shifted from legal exclusion (largely resolved) to participation inequality and representational imbalance (partially unresolved).

Kenya has made significant progress in institutionalising universal adult suffrage consistent with Article 81(d). The legal framework is broadly inclusive, and successive electoral cycles have demonstrated the operational viability of nationwide voter registration and participation.

However, the aspiration of full equality of vote remains only partially realised. Persistent regional disparities in participation, demographic gaps, particularly among youth, and structural constituency imbalances continue to qualify the constitutional assessment.

Kenya may therefore be characterised as having achieved strong formal compliance and moderate but incomplete substantive fulfilment of the constitutional principles of universal suffrage and equality of vote.

## **Gender Principle and Representation Gaps**

The Constitution of Kenya embeds gender equality within the core architecture of the electoral system. Article 81(b) requires that, 'not more than two-thirds of the members of elective public bodies shall be of the same gender'<sup>126</sup> while Article 27 guarantees equality and freedom from discrimination, including on the basis of sex.<sup>127</sup>

Together, these provisions establish the well known two-thirds gender principle, which has been interpreted as a binding constitutional command rather than a mere aspirational guideline.

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126 Constitution of Kenya 2010, art 81(b).

127 *ibid* art 27.



The Supreme Court, in its Advisory Opinion on the implementation of the gender principle, clarified that the Constitution imposes a progressive but mandatory obligation on the State to realise the two-thirds requirement, particularly within the National Assembly and Senate.<sup>128</sup>

However, the Court also acknowledged the institutional complexity of achieving compliance within a predominantly first-past-the-post electoral framework.

This section evaluates Kenya's performance across the 2013, 2017 and 2022 electoral cycles, distinguishing between the formal mechanisms adopted to promote gender inclusion and the substantive outcomes achieved in elective representation.

## Formal Legal and Institutional Framework

### • Constitutional and Statutory Design

Kenya's constitutional architecture incorporates several mechanisms intended to advance gender representation:

- i. the two-thirds gender rule (Article 81(b))
- ii. the party list system for special seats (Articles 90 and 177)
- iii. reserved county assembly seats for women
- iv. nomination provisions for the Senate and National Assembly

The Elections Act and IEBC party list regulations operationalise these provisions by requiring political parties to submit gender-balanced lists for nomination seats.<sup>129</sup>

At the county level, the Constitution provides an explicit corrective mechanism: where elected membership fails to meet the gender threshold, additional nominated members are included to bring the assembly into compliance.<sup>130</sup> This has resulted in near-universal formal compliance at the county assembly tier.

### • Judicial and Legislative Efforts

Successive Parliaments have attempted, unsuccessfully, to pass legislation to operationalise the gender principle fully at the national level.

Despite repeated constitutional deadlines and court pressure, comprehensive implementing legislation has not been enacted.

The judiciary has repeatedly emphasised the binding nature of the principle, but enforcement has largely relied on political processes rather than coercive judicial remedies.<sup>131</sup> This has produced a persistent implementation gap at the national elective level.

128 In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR (Supreme Court Advisory Opinion No 2 of 2012).

129 Elections Act No 24 of 2011 (Kenya); IEBC (Party Lists) Regulations 2012.

130 Constitution of Kenya 2010, art 177(1)(b).

131 Kenya National Commission on Human Rights, *Still a Mirage: A Human Rights Assessment of the Implementation of the Two-Thirds Gender Principle in Kenya* (Nairobi 2018) 15-20.

## Empirical Performance Across Electoral Cycles

- **The 2013 General Election: Structural Underrepresentation**

The 2013 election marked the first test of the two-thirds gender principle under the 2010 Constitution.

While the new constitutional framework significantly increased the number of women in Parliament compared to the pre-2010 period, the National Assembly and Senate both fell short of the two-thirds threshold for elective seats.

Women's representation in the National Assembly increased primarily due to:

- i. the creation of county woman representative seats
- ii. party list nominations
- iii. modest gains in constituency races

However, the number of women elected through open constituency contests remained comparatively low.

The reliance on affirmative nomination mechanisms rather than competitive electoral success highlighted early structural barriers within Kenya's political landscape.<sup>132</sup>

From a constitutional standpoint, 2013 demonstrated partial formal compliance but a clear substantive deficit at the national level.

- **The 2017 General Election: Incremental Gains, Persistent Shortfall**

The 2017 electoral cycle produced modest improvements in women's representation but did not fundamentally alter the structural imbalance. Women continued to secure a limited share of constituency and senatorial seats through direct election.<sup>133</sup>

Observer analyses and academic studies consistently pointed to entrenched barriers, including:

- i. high campaign financing thresholds
- ii. political party gatekeeping
- iii. electoral violence and intimidation risks disproportionately affecting female candidates
- iv. sociocultural biases in voter behaviour

Despite judicial reminders and public debate, Parliament again failed to enact legislation to fully implement the two-thirds principle.<sup>134</sup>

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132 European Union Election Observation Mission, Final Report: General Elections Kenya 2017 (Brussels 2018) 25-30.

133 Kenya National Commission on Human Rights, An Audit of Police Conduct during the 2017 Elections (Nairobi 2018) 35-40.

134 Elections Observation Group, Final Report on Observation of the 2022 General Elections in Kenya (Nairobi 2023) 40-45.

The result was a familiar pattern: formal progress through nomination mechanisms, but continued substantive underrepresentation in competitive seats.

- **2022 General Election: Symbolic Breakthroughs amid Structural Continuity**

The 2022 elections produced several high-profile gains for women in elective office, including an increase in the number of female governors and continued growth in parliamentary representation.<sup>135</sup> These developments were widely viewed as symbolically significant for gender inclusion.

Nevertheless, the overall constitutional picture remained largely unchanged. The National Assembly and Senate still did not meet the two-thirds gender threshold through elective means alone.<sup>136</sup>

Kenya continues to rely heavily on the constitutional nomination architecture to approximate compliance. Importantly, the persistence of this pattern more than a decade after the 2010 Constitution raises a deeper constitutional question: whether the State has discharged its obligation to take progressive but concrete measures toward full realisation of Article 81(b).

- **Structural Drivers of the Representation Gap**

The evidence across electoral cycles suggests that the gender deficit is not primarily a legal design failure but a political economy constraint.

Key structural factors include:

### **Political Party Dynamics**

Political parties remain the primary gatekeepers to elective office. Party nomination processes have frequently been criticised for:

- i. opaque candidate selection
- ii. high nomination fees
- iii. limited internal gender quotas in winnable constituencies

Although parties comply formally with party list requirements, the placement of women in competitive elective races remains uneven.

- **Campaign Financing Barriers**

The cost of electoral competition in Kenya remains high relative to average income levels. Women candidates often face disproportionate fundraising challenges, which directly affects competitiveness in constituency contests.

- **Security and Intimidation Environment**

While large-scale electoral violence has declined, female candidates continue to report higher exposure to harassment, online abuse and localized intimidation.

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135 Independent Electoral and Boundaries Commission, Post-Election Evaluation Report for the August 9, 2022 General Election (Nairobi 2023) 60-65.

136 Transparency International Kenya, Kenya Elections Integrity Index 2022 (Nairobi 2023) 30-35.

These factors operate as informal barriers to political participation, even where formal legal protections exist.

Kenya's experience reveals a clear constitutional asymmetry.

### Areas of Strong Formal Compliance

- i. robust constitutional gender framework
- ii. effective party list nomination system
- iii. near-full compliance at county assembly level
- iv. gradual upward trend in women's representation

### Areas of Persistent Substantive Deficit

- i. failure to achieve two-thirds rule in National Assembly and Senate
- ii. continued underrepresentation in directly elected seats
- iii. stalled legislative implementation
- iv. structural political and financial barriers
- v. slow pace of transformative change

The constitutional project has therefore succeeded in engineering descriptive gains but has not yet fully transformed the competitive electoral landscape.

Kenya has constructed one of the more elaborate constitutional frameworks for gender inclusion in Africa, and measurable progress in women's political representation has occurred since 2010. The nomination architecture and county-level corrective mechanisms demonstrate substantial formal compliance with Article 81(b).

However, more than a decade after constitutional adoption, the two-thirds gender principle remains unfulfilled at the national elective level. Structural barriers within party politics, campaign finance and electoral competition continue to limit substantive realisation.

Kenya may therefore be characterised as having achieved innovative formal compliance but only partial and slow substantive fulfilment of the constitutional gender equality mandate.

## Inclusion of Youth, Persons with Disabilities and Marginalised Communities

### • Normative Standard Under Articles 81 and 54-56

The Constitution of Kenya embeds inclusion of historically disadvantaged groups within the core design of the electoral system. Article 81(c) requires 'fair representation of persons with disabilities',<sup>137</sup> while Articles 54, 55 and 56 impose broader State obligations to promote the political participation of persons with disabilities (PWDs), youth and marginalised communities.<sup>138</sup>

137 Constitution of Kenya 2010, art 81(c).

138 *ibid* arts 54–56; art 38.

These provisions must also be read together with Article 38, which guarantees every citizen the political right to vote, campaign and hold public office.

The constitutional scheme therefore establishes a multi-layered inclusion mandate comprising:

- i. removal of barriers to electoral participation
- ii. affirmative measures to enhance representation
- iii. institutional facilitation of access to the franchise
- iv. progressive realisation of political equality

Kenyan courts have emphasised that these provisions impose positive obligations on the State and the IEBC, extending beyond mere formal non-discrimination.<sup>139</sup> The constitutional test is whether electoral processes are meaningfully accessible and representative in practice.

This section assesses Kenya's performance across the 2013, 2017 and 2022 electoral cycles through the lens of both formal compliance and substantive inclusion outcomes.

- **Formal Legal and Institutional Framework**

Kenya's post-2010 framework incorporates several mechanisms intended to advance inclusion:

- i. nomination seats for persons with disabilities in Parliament and county assemblies
- ii. youth and PWD representation requirements in party lists
- iii. assisted voting provisions for voters requiring support
- iv. IEBC regulations on accessible polling stations
- v. progressive diaspora voting expansion

The Elections Act and IEBC regulations require political parties to include youth and PWD candidates in party lists submitted for nomination seats.<sup>140</sup>

At the county assembly level, special seats have ensured near-universal formal compliance with representational quotas.

- **Administrative Facilitation Measures**

Across the three electoral cycles, the IEBC has introduced various administrative measures, including:

- i. tactile ballot guides for visually impaired voters
- ii. priority voting arrangements
- iii. public voter education campaigns targeting youth
- iv. incremental improvements in polling station accessibility

These measures indicate a sustained attempt to operationalise the constitutional inclusion mandate. However, the critical constitutional question remains whether these formal mechanisms have translated into effective participation and representation.

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139 See generally *John Harun Mwau v IEBC and others* [2013] eKLR (High Court).

140 Elections Act No 24 of 2011 (Kenya); IEBC (Party Lists) Regulations 2012.

## Empirical Performance Across Electoral Cycles

### • Youth Political Participation

The youth constitute a demographic majority within Kenya's electorate, making their inclusion particularly significant. Formally, the legal framework places minimal age-based barriers on voter registration beyond the constitutional voting age threshold.

Voter registration drives in 2013, 2017 and 2022 specifically targeted youth populations, and youth turnout has generally remained substantial. However, several structural concerns persist.

Observer analyses have repeatedly identified:

- i. declining enthusiasm among first-time voters in some cycles
- ii. barriers related to documentation and registration logistics
- iii. limited youth success in elective office contests
- iv. heavy reliance on nomination rather than competitive election

While youth presence in nominated positions has increased, their representation in directly elected positions remains comparatively modest.<sup>141.</sup>

From a constitutional perspective, Kenya demonstrates broad formal youth enfranchisement but uneven substantive political empowerment.

### Inclusion of Persons with Disabilities

Kenya has made notable formal advances in PWD electoral inclusion. The Constitution guarantees representation through nominated seats, and IEBC procedures explicitly provide for assisted voting and accessibility accommodations.<sup>142.</sup>

Across the 2013–2022 cycles, several positive developments were observed:

- i. availability of tactile ballot guides in many polling stations
- ii. assisted voting procedures generally implemented
- iii. presence of nominated PWD representatives in legislative bodies

However, observer missions and civil society reports have consistently identified persistent accessibility gaps, including:

- i. polling stations located in physically inaccessible buildings
- ii. inconsistent availability of assistive materials
- iii. limited voter education in accessible formats
- iv. low numbers of PWD candidates in competitive races

141 National Gender and Equality Commission, Taking Stock: Compendium by CC&IOs on Implementation of the Two-Thirds Gender Principle (Nairobi 2021) 50-55.

142 Elections Observation Group, Final Report on Observation of the 2022 General Elections in Kenya (Nairobi 2023) 45-50.

These issues suggest that while Kenya has achieved formal representational compliance, the lived voting experience for many PWD voters remains uneven.

## Marginalised Communities and Geographic Inequality

The Constitution recognises marginalised communities and regions as requiring targeted inclusion measures.<sup>143</sup> Boundary delimitation, voter registration outreach and polling station distribution are key instruments for achieving this objective.

Across the three electoral cycles, Kenya has expanded polling infrastructure into previously underserved regions, particularly in parts of northern Kenya. This reflects meaningful formal progress.

Nevertheless, several structural disparities persist:

- i. logistical challenges in remote counties
- ii. lower registration density in some marginalised areas
- iii. security-related access constraints in specific localities
- iv. slower political party penetration in historically peripheral regions

While these disparities do not amount to systemic exclusion, they continue to affect the practical equality of electoral participation.

## Political Party Gatekeeping

Across youth, PWD and marginalised groups, one cross-cutting constraint has been the central role of political parties in candidate selection.

Although parties generally comply with party list requirements, the placement of candidates from marginalised groups in winnable elective positions remains limited.

This dynamic reinforces a broader pattern observed throughout this chapter: Kenya's constitutional design has been more successful in engineering nominated inclusion than in transforming competitive electoral access.

The evidence across the electoral cycles reveals a familiar constitutional pattern.

## Areas of Substantial Formal Compliance

- i. constitutional and statutory inclusion framework
- ii. functioning nomination mechanisms
- iii. assisted voting procedures largely operational
- iv. expanding polling infrastructure
- v. targeted voter education efforts

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143 Constitution of Kenya 2010, art 56.

## Persistent Substantive Challenges

- i. accessibility inconsistencies for PWD voters
- ii. limited elective success for youth and marginalised candidates
- iii. geographic participation disparities
- iv. party gatekeeping effects
- v. resource and documentation barriers in some regions

The constitutional project has therefore achieved baseline inclusion guarantees but has not fully equalised political competitiveness and participation quality.

Kenya has made important strides in embedding inclusion within the architecture of its electoral system. The legal framework, nomination mechanisms and administrative measures collectively demonstrate substantial formal compliance with Articles 81(c), 54-56 and related provisions. However, substantive realisation remains uneven.<sup>144</sup>

Persistent accessibility gaps, structural party barriers and geographic participation disparities continue to limit the full political empowerment of youth, persons with disabilities and marginalised communities.<sup>145</sup>

Kenya may therefore be characterised as having achieved broad formal inclusion with moderate but incomplete substantive fulfilment of the Constitution's inclusivity mandate.

## Structural vs Operational Compliance: A Constitutional Scorecard

The preceding sections reveal a consistent analytical pattern across Kenya's post-2010 electoral experience. In most domains governed by Article 81, the State has constructed an extensive legal and institutional architecture designed to secure electoral integrity.

However, the empirical record from the 2013, 2017 and 2022 electoral cycles demonstrates a more complex picture of implementation.

This section synthesises the findings through a structural versus operational compliance framework.

Structural compliance refers to the existence of appropriate constitutional, statutory and institutional mechanisms. Operational compliance refers to the extent to which those mechanisms function effectively in practice to realise the constitutional principles of the electoral system.

This distinction is particularly appropriate in the Kenyan context, where the post-2010 reform project has been characterised less by absence of rules than by uneven implementation under conditions of political contestation and institutional strain. Across the dimensions assessed in this chapter, Kenya demonstrates substantial structural alignment with Article 81.

144 *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & Others* [2017] KESC 31 (KLR) (Supreme Court of Kenya).

145 Independent Electoral and Boundaries Commission, Post-Election Evaluation Report for the August 9, 2022 General Election (Nairobi 2023) 70-75.



First, the legislative framework governing elections is comprehensive. The Elections Act, the Election Offences Act and IEBC regulations collectively establish detailed procedural safeguards addressing violence prevention, results management, voter registration, inclusion and accountability.<sup>146</sup> On paper, these provisions reflect close fidelity to the constitutional text.

Second, institutional design has matured significantly since 2010. The IEBC operates within a dense ecosystem of oversight and support, including judicial review, security coordination through the National Elections Security Arrangement, and an increasingly assertive electoral jurisprudence from the superior courts.

The Supreme Court's willingness, most notably in 2017, to invalidate a presidential election has entrenched the principle that electoral administration is subject to meaningful constitutional supervision.<sup>147</sup>

Third, Kenya has adopted multiple affirmative mechanisms to advance representational inclusion. The party list system, county assembly gender top-up mechanism, and nominated seats for youth and persons with disabilities collectively represent one of the more elaborate constitutional inclusion frameworks in the region.<sup>148</sup>

Taken together, these features support the conclusion that Kenya has achieved advanced structural compliance with the formal requirements of Article 81.

### **Operational Compliance: Uneven Substantive Realisation**

Notwithstanding strong formal architecture, the operational record across the three electoral cycles reveals persistent implementation gaps.

Large-scale nationwide electoral violence has significantly declined compared to the pre-2010 period, indicating meaningful progress. However, localised intimidation, episodic security related human rights concerns and the continued monetisation of electoral competition demonstrate that the constitutional guarantee of elections fully free from improper influence remains only partially realised.<sup>149</sup>

The trajectory from the technological failures of 2013, through the constitutional rupture of 2017, to the relative procedural stabilisation of 2022 reflects clear institutional learning. Yet public confidence in the IEBC remains periodically fragile, as illustrated by recurrent political contestation of results processes and internal commission disputes in 2022.

The constitutional standard under Articles 81 and 86, particularly the requirements of verifiability, transparency and accountability, has therefore been progressively approximated but not fully consolidated.

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146 Elections Act No 24 of 2011 (Kenya); Election Offences Act No 37 of 2016 (Kenya).

147 *Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and others* [2017] eKLR (Supreme Court).

148 Kenya National Commission on Human Rights, KNCHR UPR 3rd Cycle Mid-term Report (Nairobi 2023) 30-35.

149 Independent Electoral and Boundaries Commission, Post-Election Evaluation Report for the August 9, 2022 General Election (Nairobi 2023) 80-85.

Kenya has largely resolved the problem of formal exclusion from the franchise.<sup>150</sup> However, participation disparities, youth disengagement trends, and residual constituency population imbalances continue to qualify the realisation of full vote equality. The constitutional aspiration of equal electoral weight has moved from a question of legal entitlement to one of representational calibration.<sup>151</sup>

The gender principle presents one of the clearest examples of the structural-operational divide. Kenya's constitutional and statutory framework for gender inclusion is comparatively sophisticated, and representation of women has improved steadily since 2010.<sup>152</sup>

However, the continued failure, more than a decade after constitutional promulgation, to achieve the two-thirds threshold in the National Assembly and Senate accentuates the limits of the current implementation model.

Similarly, while nomination mechanisms have ensured baseline representation for youth, persons with disabilities and marginalised communities, barriers to competitive electoral success persist.<sup>153</sup> Accessibility improvements and targeted voter education have advanced inclusion, but not yet equalised political opportunity.

Viewed longitudinally, Kenya's electoral system exhibits a pattern best described as incremental constitutionalisation under stress.

- i. 2013 represented a foundational transition election, marked by strong formal design but significant technological and administrative growing pains.
- ii. 2017 functioned as a constitutional stress test, exposing vulnerabilities in results management and institutional trust, culminating in the Supreme Court's historic annulment.
- iii. 2022 demonstrated notable procedural stabilisation and improved administrative performance, albeit alongside visible institutional tensions within the IEBC.

The overall trajectory is therefore neither linear decline nor full consolidation, but rather gradual institutional learning punctuated by episodic legitimacy shocks.

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150 Kenya Institute for Public Policy Research and Analysis, *Assessing the Implementation of Electoral Reforms in Kenya under the Constitution of Kenya, 2010* (KIPPRA Discussion Paper No 359, Nairobi 2024) 35-40.

151 Kenya National Commission on Human Rights, *The Bill of Rights Journey: Commemorating a Decade After – A KNCHR Perspective* (Nairobi 2020) 50-55.

152 Independent Electoral and Boundaries Commission, *Gender Audit of the 2017 General Elections* (Nairobi 2018) 60-65.

153 Transparency International Kenya, *Kenya Elections Integrity Index 2017* (Nairobi 2018) 40-45.



Based on the analysis in sections 3.1–3.5, Kenya's level of implementation of Article 81 may be synthesised as follows:

Article 81 Principle	Structural Compliance	Operational Realisation	Trend (2013-2022)	Risk Assessment
Free and fair elections (violence & corruption)	High	Moderate	Improving but uneven	Medium
Transparent and accountable administration	High	Moderate	Improving	Medium
Universal suffrage	High	Moderate	Stable but with disparities	Medium
Equality of vote	Moderate-High	Moderate	Gradual improvement	Medium
Gender Principle	High	Low-moderate	Slow improvement	High
Inclusion of youth, PWDs, marginalised	High	Moderate	Gradual improvement	Medium

This scorecard reinforces the central finding of this chapter; Kenya's principal constitutional challenge is no longer one of design deficiency but of implementation depth and institutional consolidation.

- **Three Cross-cutting Factors Emerge from the Analysis.**

First, the political economy of elections, particularly campaign financing pressures and party gatekeeping, continues to shape substantive outcomes in ways that formal legal reforms alone have not fully neutralised.

Second, institutional trust remains fragile. Although procedural safeguards have improved, public confidence in electoral management bodies remains sensitive to political contestation and elite signalling.

Third, several constitutional commitments, most notably the two-thirds gender principle, require further legislative and political action to transition from progressive aspiration to full realisation.

- **Overall Constitutional Assessment**

More than a decade after the promulgation of the 2010 Constitution, Kenya's electoral system reflects substantial normative transformation. The country has moved decisively away from the systemic electoral crises that characterised earlier periods and has constructed a procedurally sophisticated and judicially supervised electoral framework.

However, the evidence from the 2013–2022 electoral cycles indicates that constitutional consolidation remains incomplete. Persistent, though narrowing, gaps between formal safeguards and lived electoral experience continue to qualify the assessment.

Kenya may therefore be characterised as having achieved advanced structural compliance with Article 81 but only moderate and still-maturing substantive realisation. The trajectory is broadly positive, but continued institutional strengthening, enforcement consistency and political commitment will be necessary to secure full constitutional fidelity in future electoral cycles.<sup>154</sup>

### **Political Economy of Electoral Competition**

The preceding analysis shows that Kenya has constructed a robust constitutional framework for electoral governance. However, persistent operational gaps indicate that legal design alone cannot explain electoral outcomes.

A complementary explanation lies in the political economy of electoral competition. Kenya's presidential system concentrates significant executive authority within national office, including control over fiscal resources, appointments and policy direction.<sup>155</sup>

As a consequence, electoral contests particularly presidential elections carry exceptionally high political stakes. This concentration of power can incentivise intense competition, strategic coalition-building along ethnic or regional lines, and the monetisation of political mobilisation.<sup>156</sup>

Under such conditions, formal legal safeguards may coexist with informal political practices that test the resilience of electoral institutions.

The persistence of voter bribery, campaign finance opacity and aggressive political messaging across the 2013, 2017 and 2022 electoral cycles may therefore be understood not merely as isolated violations of electoral law but as structural features of a highly competitive political marketplace.<sup>157</sup>

Constitutional reform has significantly constrained overt manipulation of the electoral process, yet the incentives driving political actors remain powerful.

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154 BTI Transformation Index, Kenya Country Report 2024 (Bertelsmann Stiftung, Gütersloh 2024) 15-20.

155 U.S. Department of State, 2017 Country Reports on Human Rights Practices: Kenya (Washington, DC 2018) 10-15.

156 KIPPR, Assessing the Implementation of Electoral Reforms in Kenya (Nairobi 2023) 20-25.

157 Victoria Miyandazi, 'Human Rights and Equality Commissions in Kenya and Their Role in Addressing Poverty' (2023) 51 Federal Law Review 1, 45-50.

Understanding this political economy context is essential to interpreting why Kenya exhibits strong structural compliance with Article 81 while substantive realisation continues to evolve incrementally.<sup>158</sup>

## **Public Trust and Institutional Legitimacy**

Another critical dimension of constitutional compliance concerns public trust in electoral institutions. Democratic legitimacy depends not only on procedural correctness but also on citizens' confidence that electoral processes are credible and impartial.

Kenya's post-2010 experience reveals an important pattern of differentiated institutional trust. While confidence in the Independent Electoral and Boundaries Commission has fluctuated across electoral cycles, particularly during the crises surrounding the 2013 technology failures and the 2017 annulled presidential election, trust in the judiciary has generally strengthened.

The Supreme Court's assertive role in adjudicating presidential petitions has reinforced the perception that courts can act as effective guardians of constitutional electoral standards.

This differentiation of trust has significant implications for constitutional consolidation. On the one hand, strong judicial oversight enhances accountability and provides a peaceful mechanism for resolving electoral disputes.

On the other hand, persistent scepticism toward electoral administration can sustain political contestation even when procedures comply with constitutional requirements. Strengthening institutional legitimacy therefore requires not only legal compliance but also transparent communication, consistent administrative performance and continued public engagement with electoral processes.

## **Transition to Institutional Analysis (Chapter 4)**

The findings of this chapter highlight a central paradox in Kenya's post-2010 electoral experience.

The country has achieved advanced structural compliance with the constitutional principles articulated in Article 81, supported by detailed legislation, an active judiciary and increasingly sophisticated electoral procedures. Yet substantive realisation remains uneven across several dimensions, including electoral integrity enforcement, representational equality and institutional trust.

This gap between constitutional design and operational performance raises a deeper analytical question: what institutional factors shape the effectiveness of electoral governance in practice?

Addressing this question requires closer examination of the institutional architecture responsible for administering elections. Chapter 4 therefore shifts the focus from constitutional norms to institutional capacity by analysing the evolution, structure and performance of Kenya's electoral management bodies.

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158 KNCHR, KNCHR UPR 3rd Cycle Mid-term Report (Nairobi 2023) 30-35.

Particular attention will be paid to the governance arrangements, independence safeguards and operational constraints affecting the Independent Electoral and Boundaries Commission. Understanding these institutional dynamics is essential for explaining why constitutional compliance has progressed unevenly and for identifying pathways toward deeper democratic consolidation.

# Chapter 4

## ELECTORAL MANAGEMENT BODIES – INSTITUTIONAL DESIGN AND POLITICAL CAPTURE

### Introduction

Electoral management bodies (EMBs) occupy a pivotal position within Kenya's constitutional democracy. They are simultaneously administrative agencies, constitutional commissions and arbiters of political competition.

Their credibility therefore depends not only on legal independence but also on organisational cohesion, operational competence and sustained public trust. In highly competitive electoral systems such as Kenya's, EMBs inevitably operate under intense political scrutiny, particularly during presidential election cycles where the stakes of electoral outcomes are exceptionally high.

Since the reintroduction of multiparty politics in 1992, Kenya has repeatedly reconfigured its electoral management architecture in response to moments of institutional strain.

The transition from the Electoral Commission of Kenya (ECK) to the Interim Independent Electoral Commission (IIEC), and ultimately to the Independent Electoral and Boundaries Commission (IEBC), reflects a sustained reform trajectory aimed at enhancing credibility, insulating electoral administration from executive influence and professionalising electoral operations.

These reforms have produced measurable gains in formal independence, procedural sophistication and administrative capacity.

However, as the preceding chapter demonstrated, improvements in constitutional and institutional design have not fully eliminated recurring legitimacy pressures. Appointment disputes, internal leadership tensions, procurement controversies and periodic public contestation have continued to shape perceptions of EMB performance.

The Kenyan experience therefore presents a more nuanced picture than either institutional failure or full consolidation. It reflects an EMB that has progressively strengthened in formal terms while operating within a persistently high-contestation political environment.

This chapter interrogates that institutional trajectory. Its central concern is not whether Kenya possesses an electoral management body, clearly it does, but why successive rounds of institutional redesign have produced partial stabilisation rather than complete insulation from political pressure.

The analysis proceeds on the premise that EMB credibility is cumulative and relational, in that, it is shaped not only by statutory safeguards but also by political incentives, organisational dynamics and public expectations.

Methodologically, the chapter adopts an institutional political economy lens. It examines both the formal architecture of the IEBC and the contextual pressures within which it operates.



The analysis distinguishes between design robustness (the strength of legal and structural safeguards) and operational vulnerability (the points at which political contestation or administrative strain continue to surface).

This approach allows the chapter to move beyond episodic controversy toward a structural explanation of recurring tensions.

The chapter proceeds in six parts. Section 4.1 traces the evolution of Kenya's EMBs from the ECK through the IIEC to the constitutionally entrenched IEBC, highlighting patterns of reform and institutional learning.

Section 4.2 examines the appointment framework and the continuing sensitivity surrounding executive influence and perceptions of neutrality.

Section 4.3 analyses episodes of leadership crisis and internal fragmentation within the Commission, focusing on their implications for institutional cohesion.

Section 4.4 evaluates procurement, logistics and administrative performance as operational pressure points in electoral delivery.

Section 4.5 synthesises these dynamics through the concept of institutional recycling, explaining why reform has produced significant gains without fully stabilising public trust.

Section 4.6 concludes with a forward-looking assessment of the safeguards necessary to reinforce EMB independence ahead of the 2027 electoral cycle.

The central argument advanced is that Kenya's EMB framework has undergone substantial professionalisation and constitutional strengthening since 2010.

Yet the interaction between increasingly sophisticated institutional design and a highly competitive political environment continues to generate periodic credibility stress. Understanding this interaction is essential to explaining why electoral disputes in Kenya have evolved in form rather than disappeared in substance.

This institutional analysis provides the bridge to Chapter 5, which examines how electoral technology, introduced partly to resolve earlier administrative controversies, has itself become embedded within the broader dynamics of trust, transparency and contestation in Kenya's electoral system.

## **From ECK to IEBC: Institutional Evolution**

Kenya's electoral management architecture has undergone repeated institutional redesign since the reintroduction of multiparty politics in 1992.

Each reform phase has sought to enhance credibility, professionalise administration and insulate electoral management from executive influence. Yet across three decades, moments of institutional optimism have periodically been followed by renewed contestation.

The trajectory therefore reflects not simple institutional failure, but a pattern of incremental strengthening accompanied by recurring legitimacy stress.

Understanding this evolution is essential to explaining why electoral management bodies (EMBs) in Kenya have simultaneously demonstrated growing technical capacity and persistent political sensitivity.

The transition from the Electoral Commission of Kenya (ECK) to the Interim Independent Electoral Commission (IIEC), and ultimately to the Independent Electoral and Boundaries Commission (IEBC), illustrates a reform pathway shaped as much by crisis response as by deliberate institutional redesign.

## **The Electoral Commission of Kenya (1992-2008): Restoration without Insulation**

The Electoral Commission of Kenya was established in the early 1990s following the restoration of multiparty politics after the repeal of section 2A in 1991.

Its creation marked an important procedural shift from single-party electoral administration and enabled the conduct of the 1992 and 1997 general elections under a formally pluralist framework.

However, the ECK's institutional design retained strong executive appointment influence, and its operational credibility became increasingly contested over time.

The appointment influence was attributable to the fact that the appointments were carried out by the president alone.<sup>159</sup>

During the 1990s and early 2000s, the Commission successfully administered several electoral cycles, including the 2002 general election, which resulted in Kenya's first opposition victory at the presidential level.<sup>160</sup> This peaceful transfer of power initially enhanced perceptions of EMB functionality and suggested that competitive elections could be managed within the existing framework. Nevertheless, structural concerns regarding independence, transparency and tallying integrity persisted beneath this relative stability.

These vulnerabilities became sharply visible during the 2007 general election, when disputes over results management and tallying transparency contributed to a broader institutional crisis. One of the major structural concerns was late appointment of commissioners.<sup>161</sup>

The subsequent post-election violence exposed the limits of the ECK's institutional resilience under conditions of intense political contestation.

The Kriegler Commission, established as part of the post-2007 reform process, concluded that the existing electoral management framework required fundamental restructuring to restore public confidence.<sup>162</sup> This moment marked a decisive turning point in Kenya's EMB trajectory.

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159 The Constitution of Kenya (Repealed) article 41(1).

160 European Union Election Observation Mission, Final Report: General Elections, Kenya 2002, Brussels, January 2003.

161 Anne Cussac, 'Institutional shortfalls and a political crisis', 38 *The East African Review* (2008) 4.

162 Independent Review Commission (Kriegler Commission), Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007 (2008).

## The IIEC Interregnum (2009-2011): Transitional Reconstruction

In response to the 2007-08 crisis, the Constitution of Kenya (Amendment) Act 2008 dissolved the ECK and established the Interim Independent Electoral Commission (IIEC) as a transitional body. The IIEC was explicitly conceived as a credibility-restoration mechanism<sup>163</sup> rather than a permanent institutional settlement.

The interim commission introduced several important administrative and procedural improvements. These included efforts to clean the voter register, strengthen results management procedures and enhance stakeholder engagement.

The IIEC also successfully administered the 2010 constitutional referendum, which was widely viewed as procedurally credible.<sup>164</sup>

However, the interim nature of the body limited its long-term institutional consolidation. Its primary significance lies less in durable structural transformation than in its role as a bridge institution, designed to stabilise electoral administration pending the comprehensive constitutional reforms that followed.

## The Independent Electoral and Boundaries Commission (2011-Present): Constitutional Entrenchment

The promulgation of the Constitution of Kenya 2010 fundamentally reconfigured the legal status of the electoral management body. Article 88 established the Independent Electoral and Boundaries Commission as a constitutional commission with an expanded mandate encompassing voter registration, boundary delimitation, electoral administration and referendum management.<sup>165</sup>

This constitutional entrenchment represented a significant strengthening of formal institutional independence. The IEBC was designed with:

- i. Security of tenure for commissioners
- ii. Multi-actor appointment procedures
- iii. Financial autonomy safeguards
- iv. Expanded regulatory powers
- v. A clearer constitutional mandate

These features marked a deliberate departure from the more executive-proximate architecture of the ECK era. Across the 2013, 2017 and 2022 electoral cycles, the IEBC has demonstrated progressively increasing technical sophistication, particularly in voter registration systems, polling administration and results publication mechanisms.

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163 Mathieu Merino, 'Kenya: The role of EMB in electoral reform', ACE Project, < [https://aceproject.org/ace-en/topics/lf/annex/lfc/kenya-the-role-of-the-emb-in-electoral-reform/mobile\\_browsing/onePag](https://aceproject.org/ace-en/topics/lf/annex/lfc/kenya-the-role-of-the-emb-in-electoral-reform/mobile_browsing/onePag) >

164 United Nations, 'Kenya: UN welcomes successful end of referendum on constitution', 6 August 2010.

165 Constitution of Kenya (2010) article 88.

The Commission has also operated within a far more judicialised electoral environment, with presidential petitions subject to intensive Supreme Court scrutiny.

This is seen in the fact that in the three election cycles from 2010 there have been presidential election petitions to the Supreme Court for each.<sup>166</sup>

## Institutional Learning and Recurring Stress Points

Notwithstanding these advances, Kenya's EMB trajectory reveals a pattern best characterised as institutional learning under persistent political pressure. Each redesign phase has addressed identifiable weaknesses in the preceding framework.

Yet new forms of contestation have tended to emerge alongside each reform cycle. This being fueled by the increased stakes in each election which have pointed out deficiencies even after structural improvements.

Three structural dynamics are particularly notable;

First, reforms have consistently focused on strengthening formal independence and technical capacity. These efforts have yielded measurable gains, especially in procedural sophistication and legal insulation.

Second, electoral management has remained embedded within a highly competitive political environment in which electoral outcomes carry significant distributive stakes. This context heightens scrutiny of EMB decisions and amplifies the political salience of even minor administrative disputes.

Third, public confidence in EMBs has proven cumulative but fragile. Moments of strong administrative performance have improved credibility, but periods of dispute, particularly following closely contested presidential elections, have periodically reset trust levels.

The result is an institutional pattern in which the EMB has become progressively more professionalised yet continues to operate within a high-expectation, high-contestation environment.

## Implications for the Present Analysis

The evolution from the ECK to the IEBC demonstrates that Kenya has not remained institutionally static. On the contrary, the country has undertaken repeated and often substantial efforts to strengthen electoral administration.

Any contemporary assessment of EMB performance must therefore recognise both the depth of reform achieved and the persistence of legitimacy pressures. This dual reality is central to understanding the current institutional landscape.

Kenya's challenge is no longer primarily one of constructing an electoral management body, but of consolidating trust in an EMB that operates under conditions of intense political competition and heightened public scrutiny.

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<sup>166</sup> Thuo, 'Compendium of the 2022 election Petitions', 5.

The sections that follow examine specific pressure points within the IEBC's contemporary architecture, particularly appointment frameworks, internal cohesion, procurement systems and reform cycles, to explain why institutional redesign has produced important gains while leaving certain structural vulnerabilities only partially resolved.

## Appointment Frameworks and Executive Influence

- **Normative Design: Insulation Through Constitutional Engineering**

The 2010 Constitution sought to address longstanding concerns regarding executive proximity to electoral management by embedding the Independent Electoral and Boundaries Commission (IEBC) within the broader framework governing constitutional commissions.

Article 88 establishes the IEBC as an independent body responsible for conducting or supervising elections and referenda, while Article 250 provides the general principles governing the composition and appointment of members of independent commissions.<sup>167</sup>

Under the IEBC Act and its First Schedule, the appointment process is deliberately multi-layered. A nine-member selection panel, drawn from the Parliamentary Service Commission, the Public Service Commission, the Law Society of Kenya (LSK), the Political Parties Liaison Committee (PPLC), the Institute of Certified Public Accountants of Kenya (ICPAK), and the Inter-Religious Council of Kenya, shortlists candidates following public interviews.

The panel forwards nominees to the President, who formally nominates candidates for parliamentary approval before gazettelement.<sup>168</sup> Commissioners serve a single non-renewable six-year term and are prohibited from recent partisan political activity.<sup>169</sup>

In formal design terms, this framework reflects a conscious attempt to diffuse appointment authority and embed plural oversight. The architecture represents a marked departure from the pre-2010 model associated with the Electoral Commission of Kenya (ECK), where executive influence over appointments was more direct and less procedurally mediated.

Structurally, therefore, Kenya has moved toward what comparative scholarship would characterise as a hybrid independent appointment model.

## Evolution of the Appointment Framework

The IEBC appointment regime has itself undergone iterative refinement. Legislative amendments in 2012, 2016 and 2020 progressively adjusted the composition and procedures of the selection panel in response to political contestation surrounding earlier appointments.

These reforms aimed to enhance transparency, broaden stakeholder participation and reduce perceptions of unilateral executive control. For example, the statutory requirement that the selection panel include nominees from professional and inter-faith bodies was intended to introduce non-partisan actors into the process.

167 Constitution of Kenya 2010 arts 88 and 250.

168 Independent Electoral and Boundaries Commission Act No 9 of 2011, First Schedule (procedure for appointment).

169 Constitution of Kenya 2010 art 88(2)-(3); IEBC Act 2011.

Similarly, parliamentary vetting was strengthened through the Public Appointments (Parliamentary Approval) Act, reinforcing the legislature's gatekeeping role. Taken together, these changes indicate sustained institutional effort to proceduralise independence and build public confidence in commissioner recruitment.

## Persistent Contestation and Perception Dynamics

Despite these formal safeguards, appointment cycles have remained politically sensitive moments in Kenya's electoral calendar. Public debate surrounding commissioner recruitment has frequently centred less on the legality of the process than on perceptions of political proximity, regional balance and elite bargaining.<sup>170</sup>

Several structural features explain this persistent sensitivity:

First, the President retains the formal power to appoint the selection panel and to nominate commissioners following shortlisting. Although these powers are exercised within a procedurally constrained framework, their presence maintains a visible executive footprint in the process.<sup>171</sup>

Second, parliamentary approval, while designed as an accountability mechanism, inevitably reflects the partisan composition of the legislature at any given time. This introduces a political filtering stage that can reinforce perceptions of elite negotiation even where statutory procedures are followed.

Third, the high-stakes nature of presidential elections in Kenya amplifies scrutiny of the EMB's composition. Because electoral outcomes carry significant distributive and political consequences, the appointment of commissioners often becomes a proxy site for broader political contestation.

The result is a recurring pattern in which formally compliant appointment processes still generate public debate regarding perceived neutrality.

## Moments of Institutional Strain

Kenya's recent electoral cycles illustrate how appointment dynamics can intersect with broader institutional pressures. The 2016-2017 IEBC reconstitution, undertaken ahead of the 2017 general election, followed intense political negotiations and public demonstrations.

Although the resulting commission was legally constituted, the episode highlighted the degree to which EMB composition had become embedded in wider political bargaining.

This resulted in appointment just months before the election.<sup>172</sup> Similarly, subsequent recruitment exercises have periodically attracted litigation and public scrutiny.

170 Demas Kiprono, 'Law and order: Kenyans' best interests to ensure IEBC is properly constituted' International Commission of Jurists Kenyan Section, 3 February 2024.

171 Independent Electoral and Boundaries Commission Act No 9 of 2011, First Schedule (procedure for appointment).

172 Kiprono, 'Law and order: Kenyans' best interests to ensure IEBC is properly constituted'.



In 2024-2025, for example, delays in reconstituting the Commission prompted concern from civil society and oversight actors regarding the legal completeness of the IEBC ahead of future electoral preparations.<sup>173</sup>

These episodes do not necessarily demonstrate structural failure of the appointment framework. Rather, they illustrate the high political salience of EMB composition within Kenya's competitive electoral environment.

## Formal Independence versus Political Embeddedness

The Kenyan experience highlights an important analytical distinction between formal insulation and political embeddedness. The framework for IEBC appointments is relatively strong compared to regional standards, it incorporates:

- i. Multi-actor shortlisting
- ii. Public interviews
- iii. Parliamentary vetting
- iv. Security of tenure
- v. Single non-renewable terms

These features significantly reduce the risk of overt executive capture when compared with earlier institutional models. On the other hand, EMB appointments do not occur in a political vacuum.

In highly competitive electoral systems, the mere perception of partisan proximity can affect institutional legitimacy regardless of procedural compliance. The IEBC operates within precisely such an environment. This dynamic helps explain why Kenya has experienced improving formal safeguards alongside recurring legitimacy debates. The tension is structural rather than episodic.

## Implications for Institutional Credibility

The evidence suggests that Kenya's appointment framework has achieved meaningful progress in procedural pluralisation and legal insulation. However, the durability of EMB credibility continues to depend on factors that extend beyond the formal design of the recruitment process.

### Three Implications Emerge

First, transparency of the selection process remains critical. Public confidence tends to correlate strongly with the perceived openness of interviews, shortlisting criteria and parliamentary vetting.

Second, timing and sequencing of appointments matter. Delays in reconstituting the Commission or late-cycle appointments can heighten political suspicion even where procedures are legally compliant.

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173 International Commission of Jurists (Kenya), Law and Order: It is in Kenyans' Best Interest to Ensure IEBC is Properly Constituted (2024).

Third, institutional cohesion after appointment is as important as the appointment process itself. As subsequent sections demonstrate, internal fragmentation within the IEBC has at times generated greater legitimacy strain than the recruitment process alone.

## Conclusion

Kenya has made substantial progress in redesigning the appointment architecture of its electoral management body since the pre-2010 period.

The current framework reflects a deliberate effort to diffuse authority, enhance transparency and insulate the IEBC from overt executive control.

In formal terms, the appointment regime now aligns closely with international principles governing independent electoral management. However, the Kenyan experience also demonstrates that procedural safeguards alone cannot fully neutralise the political sensitivity surrounding EMB composition. In a high-stakes electoral environment, perceptions of neutrality remain as important as formal independence.

The recurring contestation surrounding IEBC appointments therefore reflects not a simple design failure, but the continuing interaction between an increasingly sophisticated institutional framework and a deeply competitive political context.

The next section examines how these pressures have manifested internally within the Commission, focusing on episodes of leadership crisis and organisational fragmentation.

## Leadership Crises and Internal Fragmentation

- **Institutional Cohesion as a Dimension of Independence**

The constitutional and statutory framework governing the Independent Electoral and Boundaries Commission (IEBC) places significant emphasis on formal independence from external political control.<sup>174</sup>

However, comparative electoral governance experience demonstrates that independence alone does not guarantee institutional credibility. Electoral management bodies must also exhibit internal cohesion, procedural consistency and collective decision-making integrity in order to sustain public confidence.

In Kenya, episodes of leadership contestation and commissioner turnover have periodically tested the IEBC's organisational stability. These developments have not negated the Commission's constitutional mandate, but they have at times complicated public perceptions of institutional coherence, particularly in the aftermath of closely contested presidential elections. One such instance being in 2022 where the commission split into two fractions one that stood by the outcome of the presidential election while the other rejected the results on basis of opaqueness among other reasons.<sup>175</sup>

174 Ahmed Issack Hassan, 'Electoral reforms: Kenya's recent experiences' Regional Seminar on Elections Management in the East African Community, 29 May 2010.

175 Lucianna Thuo, 'Compendium of the 2022 election petitions: Select Decisions, Issues and Themes Arising from the 2022 Elections in Kenya', The Kenyan Section of The International Commission of Jurists, 2024, 19.



This section examines the evolution of internal leadership dynamics within the IEBC, focusing on how moments of fragmentation have interacted with the broader political environment to shape institutional legitimacy.

## Post-2013 Consolidation and Emerging Strains

Following the 2013 general election, the first under the IEBC's full constitutional mandate, the Commission initially projected relative organisational stability. Despite technological challenges during that election cycle,<sup>176</sup> the Commission maintained formal unity in its public posture, and the Supreme Court ultimately upheld the presidential results.<sup>177</sup>

However, internal pressures began to surface more visibly in the period leading up to the 2017 elections. Public debate intensified around procurement decisions, preparedness timelines and stakeholder confidence. While such scrutiny is not unusual for electoral bodies, the IEBC entered the 2017 cycle under heightened political and public pressure.

The subsequent resignation of several commissioners in 2016, following sustained political contestation and negotiations over electoral reforms, marked the first major instance of post-constitutional leadership disruption within the Commission.<sup>178</sup>

Although the reconstituted IEBC proceeded to administer the 2017 elections, the episode highlighted the Commission's exposure to the broader political temperature of the electoral cycle.

## The 2017 Election Cycle: Institutional Stress under Judicial Scrutiny

The annulment of the 2017 presidential election by the Supreme Court represented an unprecedented moment in Kenya's electoral jurisprudence. Posing a fear that such nullification would result in post-election violence.<sup>179</sup>

While the Court's judgment focused primarily on procedural and results management deficiencies rather than internal governance per se, the ruling significantly intensified scrutiny of the Commission's leadership and internal processes.<sup>180</sup>

In the period following the annulment and repeat presidential election, the IEBC experienced further internal turbulence, including the resignation of senior officials and continued public debate regarding the Commission's cohesion. These developments occurred within a highly polarised political environment, amplifying their visibility and reputational impact.

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176 African Union Election Observation Mission, 'Report of African Union Elections Observation Mission to the 4 March 2013 general elections in Kenya', African Union, 2013.

177 *Raila Odinga v Independent Electoral and Boundaries Commission and others* [2013] eKLR (Supreme Court).

178 Independent Electoral and Boundaries Commission (Amendment) Act 2016; see also public record of commissioner resignations (2016).

179 Victoria Miyandazi, 'Historic Judgement: Kenya's presidential election declared null and void and fresh election ordered', Oxford Human Rights Hub, 2017.

180 *Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and others* [2017] eKLR (Supreme Court).

It is important, however, to distinguish between institutional strain under extraordinary political pressure and systemic organisational breakdown.

Despite the turbulence, the IEBC remained operational and continued to discharge its core electoral functions.

Nonetheless, the episode illustrated how internal leadership dynamics can become focal points of broader electoral contestation.

## The 2022 Electoral Cycle: Visible Internal Division

The 2022 general election presented the most visible instance of intra-commission divergence in the IEBC's post-2010 history. In the final stages of presidential results declaration, four commissioners publicly dissociated themselves from the chairperson's announcement of the presidential results.<sup>181</sup>

From a strictly legal standpoint, the Supreme Court subsequently upheld the presidential election and affirmed the constitutional validity of the results management process.<sup>182</sup> The Court did not find that the internal disagreement invalidated the outcome.

It also highlighted that the role of declaration solely lay on the IEBC chairperson while the role of verification and tallying lay on the commission.<sup>183</sup>

However, the episode was institutionally significant for two reasons:

First, it represented an unusually public manifestation of internal dissent within a constitutional commission whose credibility depends heavily on perceived unity of process.

Second, the timing of the disagreement, at the moment of national results declaration, heightened its symbolic and political impact, regardless of the legal outcome.

The 2022 episode therefore, illustrates how institutional optics and internal cohesion can influence public confidence independently of formal legal compliance.

## Drivers of Internal Fragmentation amidst proper constitutional design

The pattern of internal strain within the IEBC appears to reflect a combination of structural and contextual factors.

- **High-stakes Electoral Environment amidst Proper**

Kenya's presidential elections remain intensely competitive, with significant political and economic implications attached to outcomes. This environment increases pressure on commissioners and heightens scrutiny of internal decision-making processes.

181 Independent Electoral and Boundaries Commission press statements and commissioner briefings, August 2022.

182 *Raila Amolo Odinga and another v William Samoei Ruto and others* [2022] eKLR (Supreme Court).

183 *Raila Amolo Odinga and another v William Samoei Ruto and others* [2022] eKLR (Supreme Court) para 49.

- **Compressed Electoral Timelines**

Electoral bodies often operate under tight statutory timelines, particularly during results verification and declaration phases. In such contexts, even routine procedural disagreements can escalate into public controversies if not managed through strong internal coordination.

- **Public Visibility of the Commission**

Unlike many regulatory bodies, the IEBC operates at the centre of national political attention. Internal disagreements that might remain largely administrative in other contexts can quickly acquire political significance in Kenya's electoral environment.

Any politicization of a disagreement not only impacts how people view the commission and the faith they have on but also poses a threat of peace of the nation as it creates doubt on the credibility of the elections.

- **Leadership Transitions and Turnover:**

Periodic commissioner resignations and reconstitutions, while legally provided for, can disrupt institutional continuity and collective working relationships, particularly when they occur close to major electoral events.

Coupled with this, is the late appointment of commissioners which limits the time for preparation. This was evidenced preceding both the 2017 and 2022 general elections.

## **Institutional Resilience and Continuing Capacity**

Despite these episodes of strain, it is important to situate the IEBC's experience within a broader trajectory of institutional maturation. Across the 2013, 2017 and 2022 cycles, the Commission has continued to:

- i. Conduct nationwide voter registration
- ii. Administer complex multi-tier elections
- iii. Implement increasingly sophisticated results publication systems
- iv. Operate within an active judicial oversight environment

These operational continuities suggest that the Commission retains significant administrative capacity even during periods of leadership contestation as despite that the commission still needs to ensure its functions are performed and nothing comes to a standstill.

The central issue, therefore, is less one of functional incapacity than of credibility sensitivity under political pressure.

## **Implications for Institutional Design**

The Kenyan experience highlights the crucial need for internal decision-making strength to support formal independence in electoral governance.

Electoral commissions operating in highly competitive political systems require not only legal safeguards but also strong internal protocols for managing dissent, communication and collective responsibility.

Strengthening these dimensions does not necessarily require wholesale institutional redesign. Rather, it points toward the importance of:

- i. Clear internal voting and decision procedures
- ii. Disciplined public communication protocols
- iii. Early dispute resolution mechanisms within the Commission
- iv. Timely and predictable commissioner appointments
- v. These issues are revisited in the reform-oriented sections of the report.

## Conclusion

The IEBC's post-2010 experience reflects a maturing but still politically exposed institution. Episodes of leadership turnover and internal divergence have periodically generated public concern, particularly during high-stakes electoral moments.

However, these developments have occurred alongside continued administrative functionality and progressive procedural strengthening. Kenya's challenge, therefore, is not simply one of insulating the electoral management body from external interference, but of reinforcing internal institutional cohesion in a context of intense political competition.

As the next section demonstrates, similar patterns of structural strength and operational sensitivity are also visible in the Commission's procurement and logistical functions.

## Procurement, Logistics and Administrative Failures

- **Administrative Capacity as the Operational Backbone of Electoral Credibility**

Beyond constitutional design and leadership cohesion, the credibility of an electoral management body depends heavily on its administrative and logistical performance. Elections in Kenya are large-scale, multi-tier operations requiring complex procurement, nationwide distribution networks, technology integration and strict statutory timelines.

Even with solid legal frameworks, flaws in procurement integrity or logistics can pose serious reputational and operational risks.

The IEBC's journey through the electoral cycles of 2013, 2017, and 2022 shows a clear trend towards enhanced administrative professionalism, even as it faced ongoing challenges in implementation. These pressures have not typically prevented elections from occurring, but they have periodically exposed vulnerabilities capable of affecting public confidence.

## Normative and Regulatory Framework

Kenya's procurement regime for electoral operations is governed primarily by the Public Procurement and Asset Disposal Act (PPADA) and the IEBC Act, supplemented by detailed electoral regulations.<sup>184</sup> The framework emphasizes competitive tendering, transparency, value for money and auditability. In addition, the IEBC is subject to oversight by the Public Procurement Regulatory Authority, the Auditor-General and parliamentary committees.

184 Public Procurement and Asset Disposal Act No 33 of 2015 (Kenya); Independent Electoral and Boundaries Commission Act No 9 of 2011.

In formal terms, therefore, Kenya's electoral procurement environment is comparatively well regulated. The Commission is required to plan procurement cycles in advance of elections, publish tender notices and maintain auditable records of awards and deliveries.

However, the high-stakes and time-sensitive nature of election procurement introduces distinctive operational risks not always present in ordinary public procurement contexts. Procurement is also affected by late appointment of commissioners<sup>185</sup> which gives them a shorter period to plan and procure the required materials.

## The 2013 Cycle: Technology Procurement under Pressure

The 2013 general election represented Kenya's first large-scale deployment of biometric voter registration (BVR) and electronic voter identification devices (EVID). The procurement and rapid roll-out of these systems occurred under compressed timelines following the adoption of the 2010 Constitution.

While the IEBC successfully implemented nationwide voter registration and polling, the electronic voter identification and results transmission systems experienced significant failures on the Election Day.<sup>186</sup> The Supreme Court ultimately upheld the presidential election, but the episode exposed weaknesses in:

- i. End-to-end systems testing
- ii. Vendor readiness
- iii. Contingency planning
- iv. Technology-logistics integration

Subsequent audit reviews and observer analyses characterized the challenges less as evidence of deliberate malpractice and more as symptoms of ambitious technological scaling under tight timelines.<sup>187</sup>

Nonetheless, the experience highlighted how procurement and operational readiness directly affect electoral credibility.

## The 2017 Cycle: Procurement Controversies and Heightened Scrutiny

By the 2017 electoral cycle, the IEBC had undertaken significant efforts to strengthen procurement planning, particularly in relation to the Kenya Integrated Election Management System (KIEMS).

The Commission introduced more structured testing protocols and expanded results transmission infrastructure. However, the 2017 period was marked by intensified public scrutiny of procurement decisions, including litigation and stakeholder concerns regarding certain technology contracts.

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185 International Commission of Jurists (Kenya), Law and Order: It is in Kenyans' Best Interest to Ensure IEBC is Properly Constituted (2024).

186 Independent Electoral and Boundaries Commission, *Report on the 2013 General Election* (2013).

187 European Union Election Observation Mission, *Kenya Final Report: General Elections 2013* (2013).

While courts did not find systemic procurement illegality sufficient to invalidate the election, the controversies contributed to a broader environment of institutional contestation.

The Supreme Court's annulment of the 2017 presidential election focused primarily on results management irregularities rather than procurement defects per se.<sup>188</sup>

Nevertheless, the episode reinforced the sensitivity of the procurement domain as a potential flashpoint for electoral legitimacy debates.

Importantly, the Commission continued to deliver the repeat presidential election within constitutionally prescribed timelines, demonstrating significant operational resilience despite the heightened scrutiny.

## The 2022 Cycle: Improved Delivery amid Persistent Risk Awareness

The 2022 general election reflected further maturation in the IEBC's logistical and procurement planning. Key improvements were observed in:

- i. Earlier technology deployment
- ii. Expanded public access to polling station results
- iii. More stable voter identification processes
- iv. Generally timely distribution of election materials

Observer missions broadly reported that polling operations were conducted in an orderly manner across most regions.<sup>189</sup> These developments indicate measurable institutional learning since 2013.

However, the Commission continued to operate under intense public and political scrutiny, particularly regarding:

- i. Technology vendor relationships
- ii. Results transmission infrastructure
- iii. Chain-of-custody procedures
- iv. Last-mile delivery in remote areas

While these concerns did not translate into systemic operational breakdown in 2022, they demonstrate the continuing sensitivity of the administrative domain within Kenya's electoral ecosystem.

## Structural Drivers of Procurement and Logistical Vulnerability

The recurring attention to procurement and logistics within Kenya's electoral discourse reflects several structural characteristics.

188 *Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and others* [2017] eKLR (Supreme Court).

189 European Union Election Observation Mission, *Kenya General Elections 2022 Final Report* (2022).



- **Compressed Electoral Timelines**

Electoral procurement is uniquely deadline-driven. Constitutional timelines leave limited room for slippage, particularly where litigation or late legislative amendments occur. This environment increases reliance on rapid procurement cycles and heightens reputational risk.

- **Technological Complexity**

Kenya's elections now depend heavily on integrated digital systems. Technology procurement therefore involves not only equipment acquisition but also software integrity, systems integration, cybersecurity and vendor support arrangements.

This complexity raises the stakes of procurement decisions. It also poses a need for balance between simplicity and advancement to ensure efficiency.

- **Geographic Scale and Diversity**

Nationwide distribution across remote and infrastructurally uneven counties creates persistent last-mile logistical challenges. Even minor delays or material shortages in isolated locations can attract disproportionate public attention.

- **High Political Salience**

Because electoral outcomes are intensely contested, procurement decisions often receive scrutiny beyond what comparable public sector purchases attract. Perception risk is therefore structurally elevated.

## **Operational Resilience versus Reputational Sensitivity**

The IEBC's record suggests that, despite periodic controversy, the Commission has maintained substantial operational capacity. Across three electoral cycles, it has consistently succeeded in:

- i. Registering millions of voters
- ii. Deploying election materials nationwide
- iii. Conducting multi-level elections within statutory timelines
- iv. Publishing detailed polling station results

These achievements indicate a maturing administrative institution.

At the same time, procurement and logistics remain areas of heightened reputational exposure, where even isolated irregularities or delays can quickly become focal points of political dispute.

The challenge is therefore less one of basic administrative functionality and more one of credibility management in a high-trust-sensitivity environment.

## **Conclusion**

Kenya's electoral management body has made measurable progress in strengthening procurement planning, logistical coordination and technology deployment since the early post-2010 period.

The 2022 election in particular demonstrated improved administrative stability and delivery capacity.

However, the structural characteristics of electoral procurement, tight timelines, technological complexity, nationwide scale and intense political scrutiny, continue to generate periodic pressure points. These do not necessarily indicate systemic administrative failure, but they do highlight the importance of sustained transparency, advance planning and audit robustness.

Kenya's experience therefore reflects growing operational resilience alongside persistent reputational sensitivity in the procurement and logistics domain. The next section synthesizes these institutional dynamics, examining why successive reform cycles have produced important gains without fully resolving underlying credibility pressures.

## Reform without Transformation: Institutional Recycling

- **From Institutional Redesign to Reform Cycles**

Kenya's electoral management trajectory since the reintroduction of multiparty politics reveals a consistent pattern of reform responsiveness.

Moments of electoral dispute or institutional strain have typically been followed by legislative amendment, organisational restructuring or technological upgrading. This responsiveness reflects a political and legal system that is neither static nor indifferent to electoral credibility concerns.

However, when viewed longitudinally across the 1992-2022 period, a more complex pattern emerges. While successive reforms have strengthened the formal architecture of electoral administration, they have not fully eliminated recurring legitimacy tensions.

Institutional redesign has repeatedly produced procedural improvement without complete trust consolidation.

This dynamic is best understood not as reform failure, but as a form of institutional recycling a process in which structural adjustments address identifiable weaknesses while underlying political incentives continue to generate new pressure points.

## Phases of Institutional Adjustment

Kenya's EMB evolution can be broadly periodised into three reform waves.

The first wave (1992-2007) focused on restoring multiparty electoral administration through the Electoral Commission of Kenya. This period achieved basic procedural pluralism but retained significant executive proximity in EMB design.

The second wave (2008-2011) emerged from the post-2007 crisis and prioritised credibility restoration.

The transition through the IIEC and the constitutional entrenchment of the IEBC introduced stronger formal independence, pluralised appointment procedures and enhanced judicial oversight.



The third wave (2013-2022) has centred on administrative and technological refinement, including biometric systems, results transmission platforms, and expanded regulatory frameworks governing party lists, campaign conduct and procurement.

Each phase has produced measurable gains. Yet each has also been followed by new forms of contestation, suggesting that institutional strengthening alone has not fully stabilised the electoral trust environment.

## **Why Reform Has Produced Partial but Incomplete Stabilisation**

The persistence of legitimacy pressures despite repeated reform appears to reflect three interacting structural dynamics.

### **High-stakes Electoral Competition**

Kenya's presidential elections remain intensely competitive and politically consequential. In such environments, EMBs are subjected to unusually high levels of scrutiny regardless of procedural performance.

Even well-administered elections may generate dispute where political stakes are existential for competing coalitions.

This structural feature means that institutional reform cannot, by itself, eliminate contestation. It can only raise the threshold at which disputes become credible.

### **Institutional expectations rising alongside capacity**

Successive reforms have significantly raised public and political expectations of electoral administration.

The introduction of biometric systems, real-time results transmission and expanded judicial oversight has created a more demanding accountability environment.

Paradoxically, as EMB capacity improves, the tolerance for error narrows. Minor administrative discrepancies that might previously have attracted limited attention now receive intensive scrutiny.

This phenomenon contributes to what may be described as expectation inflation within Kenya's electoral ecosystem.

### **Persistence of political trust deficits**

While procedural safeguards have expanded, political trust remains cumulative and historically conditioned. Kenya's experience, particularly the 2007 crisis, continues to shape public perceptions of electoral risk. In such contexts, institutional credibility often lags behind formal reform.

Trust rebuilding therefore tends to occur gradually and unevenly, and may be periodically reset by moments of high-profile dispute, even where underlying administrative capacity has improved.

## Institutional Recycling versus Institutional Failure

It is important to distinguish the Kenyan pattern from outright institutional failure. Across the post-2010 period, the IEBC has demonstrated substantial functional capacity:

- i. Nationwide voter registration has been sustained
- ii. Multi-tier elections have been conducted within constitutional timelines
- iii. Results transparency mechanisms have expanded
- iv. Judicial review of electoral outcomes has strengthened

These developments indicate meaningful institutional maturation.

The recurring reform cycle instead suggests a more nuanced condition: an EMB that is progressively professionalising while operating within a persistently high-contestation political environment. Institutional recycling, in this sense, reflects adaptation under pressure rather than systemic breakdown.

### Comparative Perspective

Comparative electoral governance literature recognises that EMBs in highly competitive presidential systems often experience recurring legitimacy stress even after substantial reform. The Kenyan trajectory is therefore not anomalous.

What distinguishes Kenya is the frequency and visibility of reform episodes, combined with the judiciary's unusually active role in electoral oversight.

This combination has produced an electoral system that is simultaneously more procedurally sophisticated and more intensely scrutinised than many regional counterparts.

### Implications for Future Reform

The pattern identified in this chapter suggests that further institutional redesign alone is unlikely to fully resolve Kenya's EMB credibility challenges.

While continued technical strengthening remains important, the evidence indicates that future stabilisation will depend increasingly on:

- i. Predictable and timely appointment cycles
- ii. Strengthened internal cohesion mechanisms
- iii. Enhanced transparency in procurement and results processes
- iv. Sustained judicial consistency
- v. and broader political commitment to electoral norms

These considerations inform the forward-looking assessment in the next section.

### Conclusion

Kenya's experience since the reintroduction of multiparty politics demonstrates a system that has repeatedly responded to electoral stress through institutional reform.

These reforms have produced significant improvements in legal design, administrative capacity and procedural transparency. At the same time, recurring legitimacy pressures indicate that reform has been necessary but not always sufficient to secure durable public confidence.

The country's electoral management trajectory is therefore best understood as one of progressive strengthening accompanied by cyclical stress, rather than linear failure or full consolidation.

As Kenya approaches the next electoral cycle, the central challenge is less the absence of reform mechanisms than the need to deepen the alignment between increasingly sophisticated institutional design and the high-trust demands of a competitive political environment.

The following section considers the specific safeguards required to reinforce EMB independence and credibility ahead of the 2027 general election.

## Safeguarding Independence Ahead of 2027

- **From Retrospective Diagnosis to Forward Risk Assessment**

The preceding analysis demonstrates that Kenya's electoral management framework has undergone significant institutional strengthening since the post-2007 reform moment.

The Independent Electoral and Boundaries Commission (IEBC) now operates within a far more elaborate constitutional and statutory environment than its predecessor bodies.

At the same time, recurring episodes of contestation, internal strain and procurement sensitivity indicate that institutional consolidation remains an ongoing process rather than a completed transition.

As Kenya gears up for the 2027 general election, the key issue at hand is not simply the presence of an electoral management body, but rather whether the current safeguards are strong enough to maintain public trust in the face of intense political rivalry.

This section identifies the principal institutional pressure points that warrant attention in the medium term, based on the patterns observed across the 2013-2022 electoral cycles.

### Timely and Predictable Commission Reconstitution

One of the clearest lessons from recent electoral cycles is the importance of timely commissioner appointment and transition management.<sup>190</sup> Periods in which the IEBC has operated with vacancies or under late-stage reconstitution have tended to generate avoidable uncertainty regarding preparedness and institutional continuity.

Comparative EMB practice suggests that credibility is strengthened when:

- i. Appointment timelines are predictable and insulated from late political bargaining;
- ii. Incoming commissioners have sufficient lead time before major electoral events, and
- iii. Institutional memory is preserved through structured handover processes.

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190 International Commission of Jurists (Kenya), Law and Order: It is in Kenyans' Best Interest to Ensure IEBC is Properly Constituted (2024).

For Kenya, ensuring that the Commission is fully constituted well in advance of the 2027 electoral timetable will be a foundational confidence-building measure. This is particularly important given the Commission's expanded responsibilities in boundary review, voter registration maintenance and technology procurement.<sup>191</sup>

## Reinforcing Internal Decision-Making Cohesion

As Section 4.3 demonstrated, internal divergence within the Commission, particularly when publicly visible, can have reputational consequences independent of legal compliance. Strengthening internal governance protocols is therefore an important dimension of safeguarding institutional credibility.

Key areas for continued attention include:

- i. Clarity of collective decision-making procedures;
- ii. Internal dispute resolution mechanisms;
- iii. Disciplined public communication protocols
- iv. Early consensus-building on results management workflows.

These measures do not require fundamental statutory overhaul but rather sustained organisational development within the Commission.

EMB experience globally indicates that highly visible electoral bodies must invest continuously in collegial decision culture alongside formal independence safeguards.

## Deepening Procurement Transparency and Audit Readiness

Procurement and logistics will remain structurally sensitive domains given the scale and technological complexity of Kenya's elections.

While the IEBC has demonstrated increasing administrative capacity, the political salience of election technology procurement means that even procedurally compliant decisions may attract scrutiny.

Ahead of 2027, further strengthening may usefully focus on:

- i. Early publication of procurement roadmaps;
- ii. Enhanced vendor due diligence disclosure;
- iii. Systematic pre-election technology audits
- iv. Strengthened chain-of-custody documentation for election materials.

Kenya's existing public procurement framework is comparatively robust. The principal task is therefore less one of legislative redesign than of sustained transparency practice to reinforce public confidence.

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191 Constitution of Kenya 2010 art 88; Independent Electoral and Boundaries Commission Act No 9 of 2011.

## Managing the Technology-Trust Interface

The growing centrality of digital infrastructure in Kenya's electoral process has altered the nature of credibility debates. As Chapter 5 will explore in detail, biometric systems and electronic results transmission have enhanced procedural visibility but have also become focal points of political contestation.

From an EMB governance perspective, this shift implies that safeguarding independence increasingly requires attention to technology governance, including:

- i. Transparent system testing and certification;
- ii. Public communication on system functionality and limitations;
- iii. Clear audit trails for results transmission; and
- iv. Contingency planning for partial system failure scenarios.

Institutional preparedness in this domain will be particularly important given the heightened public expectations that now surround electoral technology.

## Sustaining Judicial - Administrative Complementarity

Kenya's electoral framework benefits from one of the most active systems of judicial oversight in the region.

The Supreme Court's jurisprudence, particularly since 2013, has clarified the constitutional standards governing electoral administration and reinforced the principle of verifiability under Articles 81 and 86.<sup>192</sup>

However, judicial review functions most effectively when complemented by strong administrative performance. Over-reliance on post-election litigation as the primary credibility mechanism risks placing excessive strain on the dispute resolution system.

As we move toward 2027, it's crucial to maintain a strong focus on front-end administrative practices, especially in managing results and handling documentation. This will be vital in minimizing unnecessary disputes after elections.

## Navigating a High-Expectation Electoral Environment

A recurring theme across this chapter is the phenomenon of rising expectations. Kenya's successive reform cycles have produced an electoral system that is more procedurally sophisticated and more publicly scrutinised than in earlier periods. This is, in many respects, a positive development. However, it also means that the IEBC now operates in a high-expectation equilibrium in which minor administrative discrepancies can attract significant attention.

Managing this environment requires not only technical competence but also proactive transparency and strategic communication.

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192 *Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and others* [2017] eKLR (Supreme Court); *Raila Amolo Odinga and another v William Samoei Ruto and others* [2022] eKLR (Supreme Court).

The Commission's experience suggests that credibility in such contexts is cumulative and must be continuously reinforced rather than assumed.

## Conclusion

Kenya enters the pre-2027 electoral period with an electoral management body that is substantially more institutionalised, professionalised and constitutionally insulated than at any previous point in the country's multiparty history.

The IEBC has demonstrated growing administrative capacity and operates within a dense framework of legal and judicial oversight.

At the same time, the patterns observed across the 2013-2022 electoral cycles indicate that institutional credibility remains sensitive to timing of appointments, internal cohesion, procurement transparency and technology governance.

Safeguarding independence ahead of 2027 will therefore depend less on wholesale institutional redesign and more on deepening the operational integrity and transparency of existing frameworks.

This analysis provides the institutional foundation for the next chapter, which examines how electoral technology, while intended to enhance transparency, has simultaneously reshaped the terrain of electoral contestation in Kenya.

# Chapter 5

## ELECTORAL MANIPULATION, TECHNOLOGY AND RESULTS INTEGRITY

### Introduction

The integration of technology into Kenya's electoral process is fundamentally designed to fulfill the mandates of Article 86 of the 2010 Constitution, which requires the Independent Electoral and Boundaries Commission (IEBC) to ensure that voting systems are accurate, verifiable, secure, and transparent.<sup>193</sup>

The IEBC is further duty-bound to ensure that votes are counted, tabulated, and the results announced promptly by the presiding officer at every polling station.<sup>194</sup> Furthermore, the Commission must ensure that results from those polling stations are openly and accurately collated and promptly announced by the returning officer.<sup>195</sup>

Scholars and commissions have historically advocated for the adoption of technology as a primary means to enhance democratic legitimacy and increase voter confidence,<sup>196</sup> specifically because of its perceived ability to provide higher levels of accuracy and verifiability compared to traditional manual systems.<sup>197</sup>

This constitutional obligation is further codified in Section 44 of the Elections Act, which stipulates that any integrated electronic electoral system, such as the Kenya Integrated Elections Management System (KIEMS), must be simple, accurate, verifiable, secure, accountable, and transparent.<sup>198</sup> In judicial practice, these Article 86 standards have served as the benchmark for evaluating election integrity.

An example is the 2022 presidential election petition, where the Supreme Court specifically assessed whether the deployed technology met these requirements of transparency, security, and verifiability.<sup>199</sup>

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193 Constitution of Kenya (2010) Article 86 (a).

194 Constitution of Kenya (2010) Article 86 (b).

195 Constitution of Kenya (2010) Article 86 (c).

196 Victoria Miyandazi and Lucianna Thuo, Navigating the Nexus of Elections, Technology and Democracy amid Escalating Disinformation and Misinformation Challenges in Kenya citing Marystella Simiyu, 'Election Technology as a Means of Enhancing Democratic Legitimacy: A Case of Kenya' in Aderomola Adeola and Makau W. Mutua (eds.), *The Palgrave Handbook of Democracy, Governance and Justice in Africa* (London: Palgrave Macmillan, 2022), p. 12; Nic Cheeseman, Gabrielle Lynch and Justin Willis, 'Digital Dilemmas: The Unintended Consequences of Election Technology' (2018) 25(8) *Democratization* 1397, at 1397–400.

197 Elections, Technology and Democracy in Kenya, Chapter 13, Navigating the Nexus of Elections, Technology and Democracy amid Escalating Disinformation and Misinformation Challenges in Kenya, page 317, paragraph 2.

198 Elections Act (CAP 7) Section 44(3).

199 Elections, Technology and Democracy in Kenya, Chapter 13, Navigating the Nexus of Elections, Technology and Democracy amid Escalating Disinformation and Misinformation Challenges in Kenya, page 329, paragraph 1.



It stated that the allegation that the Public Portal had been compromised was invalidated by the fact that there was evidence of consistency of attributes such as unique time stamps, uniform PDF conversions at the polling stations, accurate polling station mapping and consistent KIEMS reporting from the verification to the transmission of results.<sup>200</sup> It also noted that the petitioners failed to produce plausible evidence to the contrary.<sup>201</sup>

However, while technology is a tool to meet these constitutional obligations and combat rigging, it remains a double-edged sword because the same digital platforms can be used to spread disinformation.<sup>202</sup> Disinformation and misinformation undermine the transparency and public trust the Constitution seeks to protect.<sup>203</sup>

## EMB Institutional Capacity and Technology Credibility

The effectiveness of technology depends heavily on the integrity of the institution managing it. Historically, Kenya's EMB (the ECK and later the IEBC) has faced significant hurdles that undermined technology's perceived reliability including:

**Procurement and Strategy:** Early attempts to introduce technology lacked a clear integration strategy, statutory backing, and proper staff training, leading to a failure in reporting results in 2007.<sup>204</sup> The Krieglger Report later noted the EMB's historical reluctance and indifference toward developing secure systems for results transmission and procurement.<sup>205</sup>

**Institutional Trust:** Public trust in the IEBC has been eroded by corruption scandals and perceptions of partisanship.<sup>206</sup> Even when technology is functional, low institutional legitimacy means that any technical glitch is often viewed through a lens of suspicion.<sup>207</sup>

**Internal Decision-Making:** Credibility is also shattered by internal discord.

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200 Raila Odinga and 16 Others v. William Ruto and 10 others; Law Society of Kenya and 4 others (amicus curiae) [2022] eKLR, para 7.

201 Raila Odinga and 16 Others v. William Ruto and 10 others; Law Society of Kenya and 4 others (amicus curiae) [2022] eKLR, para 8.

202 Elections, Technology and Democracy in Kenya, Chapter 13, Navigating the Nexus of Elections, Technology and Democracy amid Escalating Disinformation and Misinformation Challenges in Kenya, page 312, para 1.

203 Elections, Technology and Democracy in Kenya, Chapter 13, Navigating the Nexus of Elections, Technology and Democracy amid Escalating Disinformation and Misinformation Challenges in Kenya, page 329, paragraph 2.

204 Election Technology and Election Justice in Kenya (International Commission of Jurists, 2022) Page 18-19

205 Elections, Technology and Democracy in Kenya, Chapter 13, Navigating the Nexus of Elections, Technology and Democracy amid Escalating Disinformation and Misinformation Challenges in Kenya, page 317, paragraph 2.

206 Elections, Technology and Democracy in Kenya, Chapter 13, Navigating the Nexus of Elections, Technology and Democracy amid Escalating Disinformation and Misinformation Challenges in Kenya, page 311, paragraph 1.

207 Elections, Technology and Democracy in Kenya, Chapter 13, Navigating the Nexus of Elections, Technology and Democracy amid Escalating Disinformation and Misinformation Challenges in Kenya, page 321, paragraph 2.

In the 2022 election, for example, the public announcement of results was preceded by four commissioners disavowing the process,<sup>208</sup> which affected public trust and gave credence to claims that the Commission had been politically captured.<sup>209</sup>

## Cybersecurity and Digital Manipulation

As traditional rigging methods like ballot stuffing become easier to detect, modern actors have pivoted to digital manipulation, which often falls into a legal grey area.<sup>210</sup>

Data Mining and Profiling: Global firms like Cambridge Analytica have been reported to have been involved in Kenyan campaigns,<sup>211</sup> using big data to mine user profiles and target specific voters with messages designed to discourage opposition turnout.<sup>212</sup>

Security Breaches: Judicial petitions in 2017 and 2022 centered on allegations of unauthorized access to IEBC servers and the manipulation of electronic forms.

While the Supreme Court found no evidence of security breaches in the Results Transmission System (RTS) in 2022,<sup>213</sup> the mere allegation of such breaches can delegitimise an election, leading to political instability.

## The Challenge of Disinformation and Misinformation

Lucianna Thuo and Victoria Miyandazi describe technology as a double-edged sword because while it facilitates participation, it also enables a bewildering spread of false information.<sup>214</sup>

Disinformation is defined as deliberately false information intended to cause harm, while misinformation is false information shared without harmful intent.<sup>215</sup>

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208 *Raila Odinga and 16 Others v. William Ruto and 10 Others*; Law Society of Kenya and 4 Others (amicus curiae) [2022] eKLR

209 Elections, Technology and Democracy in Kenya, Chapter 13, Navigating the Nexus of Elections, Technology and Democracy amid Escalating Disinformation and Misinformation Challenges in Kenya, page 331, paragraph 1.

210 Elections, Technology and Democracy in Kenya, Chapter 13, Navigating the Nexus of Elections, Technology and Democracy amid Escalating Disinformation and Misinformation Challenges in Kenya, page 323, paragraph 3, Citing Cheeseman and Klaas, How to Rig an Election (n 75) p. 132.

211 Elections, Technology and Democracy in Kenya, Chapter 13, Navigating the Nexus of Elections, Technology and Democracy amid Escalating Disinformation and Misinformation Challenges in Kenya, page 324, paragraph 2.

212 Elections, Technology and Democracy in Kenya, Chapter 13, Navigating the Nexus of Elections, Technology and Democracy amid Escalating Disinformation and Misinformation Challenges in Kenya, page 323, paragraph 2.

213 *Raila Odinga and 16 Others v. William Ruto and 10 others*; Law Society of Kenya and 4 others (amicus curiae) [2022] eKLR.

214 Elections, Technology and Democracy in Kenya, Chapter 13, Navigating the Nexus of Elections, Technology and Democracy amid Escalating Disinformation and Misinformation Challenges in Kenya, page 312, paragraph 1.

215 Elections, Technology and Democracy in Kenya, Chapter 13, Navigating the Nexus of Elections, Technology and Democracy amid Escalating Disinformation and Misinformation Challenges in Kenya, page 322, paragraph 1.



Weaponization of Fake News: With the increase in use of social media platforms such as Twitter, TikTok Facebook and WhatsApp, politicians utilize paid political bloggers to disseminate fabricated narratives to de-campaign opponents.<sup>216</sup>

In the 2022 election, this included sexualized gender attacks against female candidates and the spread of conflicting tallies by media houses, which sowed confusion.<sup>217</sup>

The Post-Truth Landscape: The rise of digitally manipulated information has created a post-truth world where objective facts are contested, and voters are swayed more by emotion than verifiable data.<sup>218</sup>

## Legal and Stakeholder Responses

To combat these threats, Kenya has implemented several legal frameworks:

Computer Misuse and Cybercrimes Act (2018): This Act criminalizes the deliberate dissemination of false information, especially content likely to incite violence or tarnish reputations.<sup>219</sup>

Data Protection Act (2019): This legislation mandates that personal data be accurate and grants individuals the right to have false or misleading data erased.<sup>220</sup>

Collaborative Initiatives: Experts recommend that the IEBC engage in a coalition of actors, including tech giants like Meta and Google, to develop cross-platform strategies for detecting weaponised disinformation.<sup>221</sup>

## Electoral Manipulation, Technology and Results Integrity

Kenya's post-2010 electoral reforms have been marked by an increasingly prominent reliance on technological solutions to address long-standing credibility concerns.

Biometric voter registration, electronic voter identification and the Kenya Integrated Election Management System (KIEMS) were introduced not merely as administrative upgrades but as institutional safeguards intended to strengthen transparency, reduce human discretion and enhance public trust in electoral outcomes. These innovations reflected a broader reform logic: that procedural certainty could be reinforced through technological modernisation.

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216 Elections, Technology and Democracy in Kenya, Chapter 13, Navigating the Nexus of Elections, Technology and Democracy amid Escalating Disinformation and Misinformation Challenges in Kenya, page 324, paragraph 4.

217 Elections, Technology and Democracy in Kenya, Chapter 13, Navigating the Nexus of Elections, Technology and Democracy amid Escalating Disinformation and Misinformation Challenges in Kenya, page 326-327.

218 Elections, Technology and Democracy in Kenya, Chapter 13, Navigating the Nexus of Elections, Technology and Democracy amid Escalating Disinformation and Misinformation Challenges in Kenya, page 332, citing Steve Tesich, 'A Government of Lies', The Nation, 6 January 1992; Fombad, 'Democracy and Fake News in Africa' (n 5) pp. 132-33.

219 Computer Misuse and Cybercrimes Act (2018) Section 22(1).

220 Data Protection Act (Cap 411C of 2019) Section 25(f).

221 Elections, Technology and Democracy in Kenya, Chapter 13, Navigating the Nexus of Elections, Technology and Democracy amid Escalating Disinformation and Misinformation Challenges in Kenya, page 339, paragraph 4.

Over the past decade, these systems have delivered measurable gains. Voter register integrity has improved, polling station transparency has expanded and results publication has become significantly more granular and timelier than in the pre-constitutional era.

Kenya's electoral infrastructure is now among the most technologically advanced in the region. Yet, as the preceding chapter demonstrated with respect to electoral management bodies, institutional strengthening has often been accompanied by new forms of contestation rather than their disappearance. This chapter examines electoral technology not as a purely technical matter but as an institutional phenomenon embedded within Kenya's highly competitive political environment.

Its central premise is that while technological reforms have narrowed several traditional avenues of electoral manipulation, they have simultaneously relocated credibility debates into more complex domains of system integrity, data governance and verification. In this sense, technology has functioned both as an integrity enhancer and as a new site of political scrutiny.

The Kenyan experience illustrates a broader adaptive pattern. Earlier electoral disputes centred primarily on administrative control, uneven playing fields and manual tallying opacity.

Following the constitutional reforms of 2010 and the digitization of key electoral processes, contestation increasingly migrated toward questions of electronic transmission, server architecture, auditability and the internal coherence of results management. Electoral credibility debates have therefore become progressively more forensic and system-centred.

Methodologically, this chapter adopts a socio-technical institutional lens. It analyses electoral technology as part of a wider governance ecosystem rather than as standalone infrastructure.

The assessment distinguishes between functional performance (whether systems operate as intended) and assurance credibility (whether their operation is sufficiently transparent and verifiable to sustain public confidence). This distinction is critical in the Kenyan context, where courts and political actors have placed growing emphasis on demonstrable verifiability under Articles 81 and 86 of the Constitution.

The chapter proceeds in five parts. Section 5.1 traces the historical evolution of electoral manipulation concerns across the 1992-2022 electoral cycles, demonstrating how the locus of contestation has shifted over time.

Section 5.2 examines the deployment of biometric voter registration and KIEMS, assessing both their integrity-enhancing effects and their operational pressures.

Section 5.3 analyses the results transmission and tallying framework through the lens of constitutional verifiability, with particular attention to the jurisprudential impact of the 2017 and 2022 presidential petitions.

Section 5.4 explores the dual character of electoral technology as both a safeguard and a vector of contestation within high-stakes electoral environments.

Section 5.5 evaluates the effectiveness of Kenya's audit architecture, data governance practices and remaining transparency sensitivities.



The central argument advanced is that Kenya has made substantial progress in strengthening the technological infrastructure of its elections. However, technological advancement has not fully neutralized electoral contestation. Instead, credibility debates have evolved in tandem with reform, becoming increasingly technical, forensic and system-focused.

Understanding this dynamic is essential to explaining why electoral disputes in Kenya persist despite significant investment in digital electoral safeguards.

This technological analysis complements the institutional findings of Chapter 4 and provides a bridge to the citizen-centred assessment that follows.

If Chapter 4 examined the organizational resilience of the electoral management body, this chapter explains how the digitization of electoral processes has reshaped the terrain on which credibility, trust and contestation now operate.

## Historical Forms of Electoral Manipulation (1992–2022)

- **From Administrative Control to Systemic Contestation**

Electoral manipulation in Kenya has not remained static. Rather, it has evolved in form alongside institutional reform, legal tightening and technological modernization.

Across the seven electoral cycles between 1992 and 2022, the locus of contestation has shifted from overt administrative interference toward more complex disputes centred on process integrity, technology governance and verification credibility.

This historical trajectory is critical to understanding contemporary electoral debates. It demonstrates that reforms have often succeeded in closing particular avenues of malpractice while simultaneously relocating political contestation into new procedural or technological domains.

The Kenyan experience therefore illustrates a broader institutional dynamic electoral reform changes the terrain of dispute even as it strengthens elements of the system.

## The Early Multiparty Era (1992–1997): Administrative Dominance

The reintroduction of multiparty politics in 1992 restored formal electoral competition but did not fundamentally alter the executive-centric administrative architecture inherited from the single-party period. During the 1992 and 1997 elections, concerns centred primarily on:

- i. uneven electoral administration
- ii. limitations in voter register integrity
- iii. state resource asymmetries
- iv. localized electoral violence and intimidation.

Observer reports from this period noted that while voting procedures were generally implemented, the broader electoral playing field remained structurally uneven.<sup>222</sup>

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222 Commonwealth Observer Group, *Kenya General Elections 1992* (1993); Commonwealth Observer Group, *Kenya General Elections 1997* (1998).

The Electoral Commission of Kenya (ECK) operated within a framework that, although legally pluralist, retained significant executive appointment influence.

Manipulation in this phase was therefore largely analogue and administrative, focusing on control of the electoral environment rather than on sophisticated results system interference.

### **The Transitional Election (2002): Competitive Breakthrough with Structural Continuity**

The 2002 general election marked a major political transition, resulting in the first opposition presidential victory in Kenya's history. The peaceful transfer of power significantly improved perceptions of electoral competitiveness and EMB functionality.

However, the underlying institutional framework remained largely unchanged. The ECK continued to operate within the same constitutional and administrative structure, and many of the procedural vulnerabilities identified in earlier cycles persisted beneath the surface.

Importantly, the relative success of the 2002 election illustrates that credible outcomes can occur even within imperfect institutional frameworks, particularly where elite political incentives align.

This insight is essential to the study's broader argument: electoral stability in Kenya has often reflected the interaction between institutional design and political context rather than institutional design alone.

### **The 2007 Crisis: Institutional Breakdown and Tallying Opacity**

The 2007 general election represented the most severe electoral rupture in Kenya's recent history and became the catalytic moment for the comprehensive reforms that followed. While earlier elections had generated disputes, the 2007 cycle exposed acute weaknesses in results management transparency and tallying credibility.

The Independent Review Commission (Kriegler Commission) identified serious deficiencies in:

- i. results transmission and verification procedures
- ii. tallying transparency at the national level
- iii. voter register integrity
- iv. Institutional independence perceptions.<sup>223</sup>

The post-election violence that followed highlighted the extent to which electoral administration had become intertwined with broader political and ethnic tensions.

From an institutional perspective, 2007 marked the point at which manipulation concerns shifted decisively toward results credibility and tallying integrity, setting the stage for the constitutional and technological reforms that followed.

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223 Independent Review Commission (Kriegler Commission), *Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007* (2008).

## The Post-Constitution Elections (2013–2017): Digital Transition and New Vulnerabilities

The adoption of the 2010 Constitution and the creation of the IEBC introduced a new phase in Kenya's electoral management. Biometric voter registration and electronic results transmission were deployed to enhance transparency and reduce opportunities for manual interference.

The 2013 election demonstrated both the promise and the risks of this technological transition. While biometric registration improved voter roll integrity, failures in electronic voter identification devices and results transmission systems forced partial reversion to manual processes.<sup>224</sup> The Supreme Court ultimately upheld the results but acknowledged significant technological shortcomings.

By 2017, technological systems, particularly the Kenya Integrated Election Management System (KIEMS), had become central to electoral credibility debates. The Supreme Court's annulment of the presidential election focused heavily on the integrity and verifiability of the results transmission process, marking a decisive shift toward digital-era electoral litigation.<sup>225</sup>

This period illustrates how technological reform, while strengthening certain safeguards, also created new focal points for contestation.

## The 2022 Election: Procedural Stabilisation and Verification Politics

The 2022 general election reflected further institutional learning and technological refinement. The IEBC implemented expanded public access to polling station results forms and improved voter identification stability. Observer missions generally reported orderly polling processes across most regions.<sup>226</sup>

However, the electoral discourse had by this stage fully transitioned into what may be described as verification politics. Public and political debate focused intensely on:

- i. results transmission integrity;
- ii. system auditability;
- iii. server access and data visibility; and
- iv. the internal coherence of the IEBC during results declaration

The Supreme Court ultimately upheld the presidential election and affirmed the constitutional sufficiency of the results management process.<sup>227</sup>

Nevertheless, the persistence of highly technical disputes demonstrates that electoral contestation has become increasingly institutional and system-centred rather than purely procedural or administrative.

224 Independent Electoral and Boundaries Commission, *Report on the 2013 General Election* (2013).

225 *Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and others* [2017] eKLR (Supreme Court).

226 European Union Election Observation Mission, *Kenya General Elections 2022 Final Report* (2022).

227 *Raila Amolo Odinga and another v William Samoei Ruto and others* [2022] eKLR (Supreme Court).

- **Cross-Cycle Pattern: Adaptation Rather Than Disappearance**

Viewed across three decades, Kenya's experience reveals a consistent adaptive pattern.

- i. Early cycles focused on administrative control and uneven playing field concerns.
- ii. The 2007 crisis exposed tallying and institutional independence vulnerabilities.
- iii. The post-2010 period shifted contestation toward technology integrity and verification processes.

At each stage, reforms addressed identifiable weaknesses. Yet political and public scrutiny migrated toward the next most sensitive point in the electoral chain.

This pattern does not negate the significant progress Kenya has made in strengthening electoral administration. Rather, it illustrates how electoral systems in highly competitive political environments tend to experience evolving rather than disappearing contestation.

## Conclusion

Kenya's electoral history between 1992 and 2022 demonstrates a clear evolution in the forms and focal points of electoral manipulation concerns. The country has moved from an era characterised primarily by administrative dominance and analogue vulnerabilities to one defined increasingly by technological scrutiny and verification politics.

Successive reforms, constitutional, institutional and technological, have closed important integrity gaps and strengthened procedural safeguards. At the same time, the adaptive nature of electoral contestation has meant that credibility debates have shifted rather than vanished.

Understanding this evolution is essential to evaluating the contemporary role of electoral technology in Kenya.

The next section examines the deployment of biometric voter registration and the Kenya Integrated Election Management System (KIEMS), assessing both their integrity-enhancing potential and the new operational risks they have introduced.

## Biometric Registration and KIEMS: Promise and Pitfalls

- **Technological Reform as a Credibility Strategy**

The introduction of biometric voter registration and, later, the Kenya Integrated Election Management System (KIEMS) represented one of the most consequential shifts in Kenya's post-2010 electoral architecture. These systems were designed to address the core vulnerabilities exposed by earlier electoral cycles, particularly concerns regarding voter register integrity, multiple voting and opacity in voter identification.

From a policy perspective, the move toward biometric and integrated digital systems reflected a broader reform logic: that technological modernisation could reinforce procedural credibility where purely administrative reforms had proven insufficient.

The IEBC's adoption of biometric tools, therefore, formed part of a deliberate strategy to enhance verifiability, reduce human discretion at polling stations and strengthen public confidence in the electoral process.



At the same time, the Kenyan experience demonstrates that the deployment of complex electoral technology introduces new operational and reputational risks that must be carefully managed.

- **Biometric Voter Registration (BVR): Strengthening the Register**

Biometric voter registration was first deployed at scale ahead of the 2013 general election. The system captured fingerprints and facial images of voters in order to reduce duplication and improve the accuracy of the national register.

In formal terms, the BVR programme achieved significant coverage. Millions of voters were successfully enrolled, and subsequent audits suggested that the biometric database substantially improved the integrity of the voter roll compared with earlier manual systems.<sup>228</sup>

Observer missions generally assessed the registration exercise as inclusive and technically ambitious given the logistical scale involved.

However, the roll-out also exposed several operational pressures:

- i. Compressed procurement and deployment timelines
- ii. Uneven equipment performance in remote areas
- iii. Data cleaning challenges
- iv. The need for continuous register maintenance.

These early implementation stresses did not negate the overall gains in register integrity, but they illustrated the importance of sustained system maintenance rather than one-off technological acquisition.

## **Electronic Voter Identification Devices (EVID): Election-Day Challenges**

The second layer of biometric reform involved the deployment of electronic voter identification devices (EVID) at polling stations during the 2013 election.

These devices were intended to authenticate voters electronically before ballot issuance, thereby reducing the risk of impersonation.

In practice, however, a significant proportion of EVID kits experienced technical failure on Election Day. The IEBC authorized a controlled fallback to the printed register in affected polling stations in order to preserve the voting process.<sup>229</sup>

The Supreme Court subsequently upheld the election, noting that while the technology failures were serious, they did not in themselves invalidate the overall electoral outcome.<sup>230</sup>

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228 Independent Electoral and Boundaries Commission, *Report on the 2013 General Election* (2013).

229 *ibid.*

230 *Raila Odinga v Independent Electoral and Boundaries Commission and others* [2013] eKLR (Supreme Court).

Nonetheless, the episode had lasting institutional implications. It highlighted the risks associated with:

- i. deploying complex technology under tight timelines
- ii. insufficient end-to-end stress testing
- iii. over-reliance on single-point digital verification

The 2013 experience, therefore, marked the beginning of Kenya's transition into technology-centred electoral scrutiny.

## The Emergence of KIEMS: Integrated Digital Infrastructure

In response to the lessons of 2013, the IEBC introduced the Kenya Integrated Election Management System (KIEMS) ahead of the 2017 general election. KIEMS was designed as a more comprehensive platform combining:

- i. Biometric voter identification
- ii. Electronic results transmission
- iii. Polling station data capture.

The system represented a significant step toward integrated digital electoral management and was intended to strengthen both efficiency and verifiability across the electoral chain.

From an operational standpoint, KIEMS performed more reliably in voter identification during the 2017 election than the earlier EVID devices had in 2013. However, the results transmission component of the system became the focal point of intense legal and political scrutiny following the presidential election.

## Litigation and the Centrality of System Verifiability (2017)

The Supreme Court's annulment of the 2017 presidential election marked a pivotal moment in the relationship between electoral technology and constitutional adjudication. While the Court did not find that the technology itself had been maliciously compromised, it held that the IEBC had failed to demonstrate full compliance with the constitutional requirements of transparency and verifiability in the results management process.<sup>231</sup>

The judgment elevated the importance of:

- i. audit trails
- ii. system integrity documentation
- iii. results from consistency
- iv. demonstrable chain of custody

From this point forward, electoral technology in Kenya could no longer be evaluated solely on functionality. It became subject to constitutional standards of demonstrable verifiability, significantly raising the evidentiary burden on the IEBC.

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231 *Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and others* [2017] eKLR (Supreme Court).

## The 2022 Election: System Stabilisation and Continuing Scrutiny

By the 2022 general election, the IEBC had undertaken further refinements to the KIEMS infrastructure. Improvements were observed in:

- i. voter identification stability
- ii. public access to polling station results forms
- iii. server uptime and transmission performance
- iv. contingency preparedness

Observer missions generally reported that the technology functioned more consistently than in earlier cycles.<sup>232</sup> The Supreme Court, in upholding the presidential election, found that the IEBC had substantially met the constitutional threshold for verifiability and transparency in the results process.<sup>233</sup>

Regardless, the electoral discourse remained heavily focused on technical questions, particularly server access, data visibility and system auditability.

This confirms a central theme of the chapter: technological reform has enhanced procedural transparency while simultaneously relocating contestation into more technically complex domains.

### Structural Lessons from the Biometric and KIEMS Experience

Three broader insights emerge from Kenya's decade-long experience with biometric and integrated electoral systems.

First, technological modernisation has produced real integrity gains, particularly in voter register management and polling-station level transparency.

Second, complex electoral technology requires continuous lifecycle management, including procurement planning, independent testing, public communication and post-election audit, not merely initial deployment.

Third, in high-stakes electoral environments, technology does not eliminate political contestation. Rather, it often transforms the terrain on which credibility debates occur.

These dynamics explain why Kenya's electoral discourse has progressively shifted toward what may be described as technical verification politics.

### Conclusion

The introduction of biometric voter registration and the KIEMS platform represents one of the most significant integrity-enhancing reforms in Kenya's electoral history. These systems have strengthened voter register accuracy, reduced opportunities for manual manipulation and expanded procedural transparency at the polling-station level.

232 European Union Election Observation Mission, *Kenya General Elections 2022 Final Report* (2022).

233 *Raila Amolo Odinga and another v William Samoei Ruto and others* [2022] eKLR (Supreme Court).

At the same time, Kenya's experience demonstrates that technological sophistication brings new operational demands and heightened evidentiary expectations. Electoral technology has become both a safeguard and a focal point of scrutiny within the country's competitive political environment.

The next section examines how these dynamics have played out specifically in results transmission, tallying and the constitutional requirement of verifiability under Articles 81 and 86.

## Results Transmission, Tallying and Verifiability

- **Results Management as the Constitutional Fault Line**

If biometric registration addressed concerns about voter identity, results transmission and tallying have become the central constitutional fault line in Kenya's electoral process.

Article 86 of the Constitution requires the Independent Electoral and Boundaries Commission (IEBC) to ensure that voting is simple, accurate, verifiable, secure, accountable and transparent.<sup>234</sup>

Read together with Article 81(e), these provisions impose a stringent obligation that the entire results chain, from polling station to national tally, must be demonstrably credible.

Over the past decade, electoral contestation in Kenya has increasingly converged on this results management architecture. While earlier electoral disputes often focused on voter registration or polling day conduct, post-2010 litigation and observer analysis have centred on whether the IEBC can produce a results process that is not only functional but constitutionally verifiable.

This section traces the evolution of Kenya's results transmission framework and examines how the concept of verifiability has reshaped both administrative practice and electoral litigation.

### The Pre-Digital Context: Manual Tallying Vulnerabilities

Prior to the technological reforms introduced after 2010, Kenya's results management system relied heavily on manual tallying processes. While this approach was administratively familiar, it was vulnerable to delays, transcription errors and limited real-time transparency.

The 2007 electoral crisis exposed the extent to which opacity at the national tallying stage could undermine public confidence.

The Kriegler Commission identified serious weaknesses in results aggregation procedures, noting that the tallying process lacked sufficient safeguards to guarantee accuracy and public verifiability.<sup>235</sup> These findings directly informed the post-2010 reform agenda, which prioritised electronic transmission and enhanced documentary trails as mechanisms to strengthen trust in the results chain.

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234 Constitution of Kenya 2010 art 86; see also art 81(e).

235 Independent Review Commission (Kriegler Commission), *Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007* (2008).

## The 2013 Election: Digital Ambition, Partial Execution

The 2013 general election marked Kenya's first large-scale attempt to integrate electronic results transmission into the national tallying process. The system was intended to enable near real-time transmission of polling station results to central servers, thereby reducing opportunities for manual interference.

In practice, however, the results transmission system experienced significant technical failure and the IEBC reverted largely to manual tallying supported by physical forms.<sup>236</sup> The Supreme Court, while acknowledging the shortcomings, upheld the election and adopted a relatively deferential approach to the Commission's technological challenges.<sup>237</sup>

Importantly, the Court did not at that stage fully crystallize the doctrine of strict verifiability that would later emerge. The 2013 experience demonstrated that technological adoption alone could not guarantee the credibility without substantial systems integration and audit capacity.

## The 2017 Annulment: Verifiability Elevated to Constitutional Imperative

The 2017 presidential petition fundamentally reshaped Kenya's electoral jurisprudence.

In annulling the presidential election, the Supreme Court held that the IEBC had failed to conduct the election in accordance with the Constitution and the law, particularly with respect to the integrity and verifiability of the results transmission process.<sup>238</sup>

The Court emphasised several key principles:

- i. Electronic transmission must be demonstrably secure and auditable
- ii. Results forms must be consistent across the results chain
- iii. The Commission must maintain a transparent and accountable verification process
- iv. Procedural compliance is as important as numerical outcomes.

This judgment marked a decisive doctrinal shift. Results management in Kenya was no longer evaluated solely on whether a winner could be declared, but on whether the process itself could withstand constitutional scrutiny.

The annulment significantly elevated public and legal expectations of the IEBC's technological and administrative systems.

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236 Independent Electoral and Boundaries Commission, *Report on the 2013 General Election* (2013).

237 *Raila Odinga v Independent Electoral and Boundaries Commission and others* [2013] eKLR (Supreme Court).

238 *Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and others* [2017] eKLR (Supreme Court).

## The 2022 Election: Procedural Stabilisation under Heightened Scrutiny

By the 2022 general election, the IEBC had implemented several refinements to its results management framework. These included:

- i. expanded public access to polling station results forms via an online portal
- ii. improved integration of KIEMS transmission workflows
- iii. strengthened documentation of the verification process
- iv. enhanced contingency planning

Observer missions generally assessed the results transmission process as more transparent and orderly than in earlier cycles.<sup>239</sup> In the subsequent presidential petition, the Supreme Court upheld the election and found that the IEBC had substantially complied with the constitutional requirements of verifiability and transparency.<sup>240</sup>

However, the litigation demonstrated that electoral contestation had become deeply technical. Petitioners and respondents alike focused extensively on server architecture, data integrity, and access protocols. This confirms that Kenya has entered an era in which electoral legitimacy debates are increasingly system-centred and forensic in character.

### The Architecture of Verifiability

Kenya's experience since 2010 suggests that electoral verifiability operates across three interlocking layers.

- **Documentary Verifiability**

This includes the integrity and public availability of statutory forms (Forms 34A, 34B and related series). The Supreme Court has repeatedly emphasized the primacy of polling station results as the foundational record of voter intent.

- **Technological Verifiability**

This concerns the reliability, auditability and security of electronic transmission systems. It includes server integrity, data logs and system redundancy.

- **Procedural Verifiability**

This encompasses the transparency of the IEBC's internal verification workflow, including tally centre processes, observer access and public communication.

Kenya's post-2017 reforms have progressively strengthened each of these layers. However, the experience also demonstrates that weaknesses in any one layer can quickly become the focal point of political dispute.

239 European Union Election Observation Mission, *Kenya General Elections 2022 Final Report* (2022).

240 *Raila Amolo Odinga and another v William Samoei Ruto and others* [2022] eKLR (Supreme Court).



## Persistent Pressure Points

Despite measurable improvements, several structural sensitivities remain.

First, the increasing technical complexity of results management raises the evidentiary burden on the IEBC to explain system functionality to courts, political actors and the public. Second, the centralization of attention on digital systems means that isolated technical anomalies, whether consequential or not, can attract disproportionate scrutiny.

Third, public understanding of complex electoral technology remains uneven, which can widen the perception gap between administrative performance and political acceptance. These dynamics do not negate the progress Kenya has made. Rather, they illustrate the evolving nature of credibility management in technologically mediated elections.

## Conclusion

Results transmission and tallying have become the central arena in which Kenya's constitutional commitment to transparent and verifiable elections is tested. Since 2010, the country has made significant strides in strengthening documentary trails, integrating electronic transmission and expanding public access to polling station data.

The 2017 annulment elevated verifiability to a constitutional imperative, and the 2022 election demonstrated meaningful institutional learning in response. The increasing technicalities of electoral disputes means that results management will likely remain a focal point of scrutiny in future cycles.

Kenya's experience therefore illustrates a broader institutional reality: technological and procedural reforms can substantially strengthen electoral integrity, but in highly competitive political environments they also transform the terrain of contestation rather than eliminating it entirely.

The next section examines this dynamic more directly by analysing electoral technology as both a safeguard and a vector of political dispute.

## Technology as Safeguard vs Vector of Contestation

- **The Dual Character of Electoral Technology**

The progressive integration of digital systems into Kenya's electoral process has fundamentally reshaped the architecture of electoral credibility.

Biometric registration, electronic voter identification and results transmission platforms were introduced to reduce human discretion, strengthen auditability and enhance public transparency. In several important respects, these reforms have achieved their intended objectives.

At the same time, Kenya's experience demonstrates that electoral technology possesses a dual institutional character. While it can operate as a powerful safeguard against traditional forms of administrative manipulation, it can also become a focal point of political dispute in high-stakes electoral environments.

The result is a paradox: the very systems designed to settle credibility questions can, under conditions of intense competition, become the terrain upon which those questions are contested. This section examines that duality and situates Kenya's technological experience within the broader dynamics of trust, transparency and institutional adaptation.

## Technology as an Integrity Enhancer

There is substantial evidence that the adoption of biometric and digital systems has materially strengthened several dimensions of Kenya's electoral process.

First, biometric voter registration has significantly reduced the risk of duplicate entries and improved the overall integrity of the voter roll compared with earlier manual registers.<sup>241</sup>

Second, electronic voter identification at polling stations has narrowed opportunities for impersonation and multiple voting.

Third, the public posting of polling station results forms, particularly in 2022, has enhanced transparency at the most granular level of the results chain.

These developments represent meaningful progress. Observer missions and judicial assessments have repeatedly acknowledged that Kenya's electoral infrastructure is considerably more sophisticated today than in the pre-2010 period.<sup>242</sup> The IEBC's ability to publish disaggregated results data at scale marks a notable advance in procedural openness. From this perspective, technology has functioned as a credible integrity multiplier, raising the baseline level of electoral transparency.

## Technology as a Site of Political Contestation

However, the same reforms have also shifted the focal point of electoral dispute. As manual vulnerabilities have narrowed, attention has increasingly concentrated on the integrity, security and auditability of digital systems.

This dynamic became particularly visible after the 2017 presidential election. The Supreme Court's emphasis on verifiability elevated the importance of system architecture, audit trails and data integrity to constitutional significance.<sup>243</sup>

Subsequent electoral litigation and public debate have consistently focused on:

- i. server access and control
- ii. results transmission pathways
- iii. system penetration risks
- iv. data visibility and audit rights
- v. the interaction between electronic and manual results records

241 Independent Electoral and Boundaries Commission, *Report on the 2013 General Election* (2013).

242 European Union Election Observation Mission, *Kenya General Elections 2022 Final Report* (2022).

243 *Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and others* [2017] eKLR (Supreme Court).

In effect, Kenya's electoral discourse has entered an era of forensic technological scrutiny. This does not necessarily indicate technological failure. Rather, it reflects the increasing centrality of digital systems within the electoral legitimacy ecosystem.

## The Expectation-Complexity Gap

A key feature of Kenya's experience is the widening gap between rising public expectations and the inherent complexity of modern electoral technology.

Technological reforms have understandably raised expectations of near-perfect accuracy, speed and transparency. Yet large-scale election systems remain complex socio-technical infrastructures subject to:

- i. connectivity variability
- ii. hardware limitations
- iii. software dependencies
- iv. cybersecurity considerations
- v. human operational factors

Where public expectations of technological certainty outpace practical system realities, even minor anomalies can generate disproportionate political controversy. This expectation-complexity gap has become a defining feature of Kenya's post-2017 electoral environment.

## Trust as an Institutional, Not Merely Technical, Outcome

Kenya's experience highlights an important analytical insight: electoral trust is not produced by technology alone. While digital systems can enhance procedural visibility, public confidence ultimately depends on the broader institutional ecosystem in which those systems operate.

Three interrelated factors are particularly important.

First, institutional credibility of the EMB shapes how technological performance is interpreted. The same technical anomaly may be viewed as benign or suspicious depending on underlying trust levels.

Second, transparency of system governance, particularly around procurement, testing and audit, affects public acceptance of technological outcomes.

Third, political elite signaling continues to play a powerful role in shaping public perceptions of electoral technology, especially in closely contested presidential races.

These dynamics explain why technological upgrades, while necessary, have not fully neutralised electoral contestation in Kenya.

## Adaptive Contestation in the Digital Era

The Kenyan case illustrates a broader pattern of adaptive contestation. As reforms close one set of vulnerabilities, political and legal scrutiny migrates toward the next most sensitive point in the electoral chain.

- i. In the 1990s, concerns centred on administrative control.
- ii. In 2007, the focal point was tallying opacity.
- iii. After 2013, attention shifted to technology reliability.
- iv. Since 2017, disputes have become increasingly forensic and system-centred.

This progression reflects institutional evolution rather than systemic regression. Kenya's electoral system has become more sophisticated, but it now operates in a correspondingly more demanding credibility environment.

## **Implications for Electoral Governance**

The dual character of electoral technology carries several implications for future reform efforts.

First, continued technological modernisation remains important. Biometric and digital tools have demonstrably strengthened key aspects of Kenya's electoral process.

Second, however, technology must be embedded within excellent governance frameworks. This includes transparent procurement, independent system testing, clear audit protocols and proactive public communication.

Third, credibility strategies must recognize that technology cannot substitute for institutional trust. Sustainable electoral confidence depends on the interaction between technical integrity, organizational coherence and political acceptance.

These considerations lead directly to the final section of this chapter, which examines audit mechanisms, data governance and the remaining transparency deficits within Kenya's electoral technology ecosystem.

## **Conclusion**

Electoral technology in Kenya has functioned both as a safeguard against traditional forms of administrative manipulation and as a new focal point of political contestation. Biometric registration, KIEMS deployment and expanded results publication have significantly strengthened procedural transparency and voter roll integrity.

At the same time, the increasing centrality of digital systems has relocated credibility debates into more technically complex terrain.

The Kenyan experience therefore illustrates a central paradox of contemporary electoral governance: technological sophistication can enhance transparency while simultaneously raising the stakes of verification politics.

The next section examines whether current audit and data governance frameworks are sufficiently effective to sustain confidence in this evolving electoral environment.

## Audit Mechanisms, Data Governance and Transparency Deficits

- **From System Functionality to System Assurance**

As Kenya's electoral process has become increasingly digitised, the integrity question has shifted from whether systems function to whether they can be independently verified, audited and publicly trusted. Articles 81(e) and 86 of the Constitution require not only that elections be conducted accurately and securely, but also that they be demonstrably transparent and accountable.<sup>244</sup>

In the contemporary electoral environment, these requirements extend beyond polling station procedures into the domain of data governance and system assurance.

While Kenya has made notable progress in deploying biometric and results transmission infrastructure, the effectiveness of the surrounding audit and transparency ecosystem remains a critical determinant of long-term electoral credibility.

This section evaluates the current framework governing technology audits, data access and system oversight, identifying both areas of advancement and remaining institutional sensitivities.

### Pre-Election Technology Audits

Kenya's electoral framework increasingly incorporates pre-election testing and certification of key digital systems. Ahead of recent electoral cycles, the IEBC has conducted:

- i. mock transmission exercises
- ii. public technology demonstrations
- iii. stakeholder briefings
- iv. limited independent system reviews.

These measures represent important progress from the early post-2010 period, when technology deployment often outpaced structured audit practice. Observer missions have generally welcomed the IEBC's growing openness to pre-election system testing.<sup>245</sup> However, several challenges persist.

First, the scope and methodology of independent audits have sometimes been contested by political actors, particularly regarding the depth of access granted to external reviewers.<sup>246</sup>

Second, the timing of certain audit processes, occasionally conducted close to election day, has limited the window for addressing identified vulnerabilities.

Third, public communication around audit findings has not always been sufficiently standardized to build broad-based confidence.

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244 Constitution of Kenya 2010 arts 81(e) and 86.

245 European Union Election Observation Mission, *Kenya General Elections 2022 Final Report* (2022).

246 *Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and others* [2017] eKLR.(Supreme Court)

These issues suggest that Kenya has moved toward audit incorporation but has not yet fully institutionalized a universally trusted audit architecture.

- **Data Governance and Server Transparency**

Perhaps the most technically sensitive aspect of Kenya's electoral technology ecosystem concerns the governance of results transmission data and server access. Following the 2017 presidential petition, questions regarding server architecture, access rights and data integrity became central to electoral litigation and public debate.<sup>247</sup>

The IEBC has since taken steps to improve transparency, including expanded publication of polling station results forms and clearer documentation of the results transmission workflow. The Supreme Court in 2022 found that the Commission had substantially complied with the constitutional requirements of verifiability and transparency.<sup>248</sup>

Even so, server governance remains an area of heightened sensitivity for several reasons:

- i. the technical complexity of transmission systems
- ii. the asymmetry of expertise between the EMB and external stakeholders
- iii. persistent political incentives to contest close electoral outcomes
- iv. the evolving cybersecurity threat environment.

In such contexts, credibility depends not only on system integrity but on the perceived openness of data governance arrangements

### **Chain of Custody and Hybrid Verification**

Kenya's electoral system now operates as a hybrid architecture combining electronic transmission with legally authoritative physical results forms. The Supreme Court has repeatedly affirmed the primacy of polling station forms as the ultimate record of voter intent, even as electronic transmission enhances speed and transparency.<sup>249</sup>

This hybrid model has important strengths. It provides redundancy, preserves an auditable paper trail and reduces the risk that purely digital anomalies could invalidate the results process. At the same time, hybrid systems introduce their own governance demands, particularly in ensuring:

- i. consistent reconciliation between electronic and physical records
- ii. secure handling and storage of statutory forms
- iii. transparent aggregation procedures
- iv. clear public communication on the hierarchy of results sources.

Kenya has made measurable progress in strengthening these areas, particularly through expanded public access to Form 34A images in 2022.

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247 *Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and others* [2017] eKLR (Supreme Court).

248 *Raila Amolo Odinga and another v William Samoei Ruto and others* [2022] eKLR (Supreme Court).

249 *ibid.*

However, the increasing technical sophistication of the results chain means that verification literacy among stakeholders remains uneven.

- **Transparency Deficits and Perception Risk**

The analysis across recent electoral cycles suggests that Kenya's remaining challenges in this domain are less about systemic opacity and more about perception risk in a high-contestation environment.

Three dynamics are particularly notable.

First, the technical complexity of electoral systems creates an information asymmetry between the IEBC and the broader public. Even where systems function as intended, limited public understanding can allow suspicion to persist.

Second, audit practices, while expanding, are not yet fully standardized in a manner that commands universal cross-party confidence.

Third, electoral technology governance remains vulnerable to what may be termed as anticipatory distrust - a condition in which stakeholders question system integrity in advance of, rather than in response to, demonstrable malfunction.

These dynamics illustrate the evolving nature of electoral credibility in digitally mediated systems.

## **Institutional Progress and Remaining Priorities**

It is important to situate these challenges within the broader trajectory of institutional improvement. Compared with the immediate post-2010 period, Kenya has achieved significant advances in:

- i. Voter register integrity
- ii. Polling station transparency
- iii. Results publication granularity
- iv. Judicial scrutiny of electoral processes
- v. EMB technical capacity.

The country is therefore operating from a substantially stronger baseline than in earlier electoral cycles.

Looking ahead, the key governance priorities are likely to centre on:

- i. Earlier and more standardized independent technology audits
- ii. Enhanced public communication of system safeguards
- iii. Continued strengthening of chain-of-custody protocols
- iv. Sustained investment in cybersecurity resilience.
- v. These are consolidation challenges rather than foundational deficits.

## Conclusion

Kenya has made considerable progress in embedding audit practices, hybrid verification safeguards and expanded results transparency within its electoral technology ecosystem.

The IEBC's systems are significantly more sophisticated and publicly visible than in the early post-constitutional period.

However, the experience of the 2013–2022 electoral cycles demonstrates that technological integrity alone does not automatically translate into universal confidence.

Remaining sensitivities centre on the depth of independent audit institutionalization, the transparency of datagovernance arrangements and the management of perception risk in a highly competitive political environment.

Kenya's electoral technology framework can therefore be characterized as substantially strengthened but still consolidating in its assurance architecture. Sustained attention to audit credibility and data transparency will remain essential as the country approaches future electoral cycles.

# Chapter 6

# CIVIC PARTICIPATION, DISENFRANCHISEMENT AND STRUCTURAL EXCLUSION

## Introduction

Formal disenfranchisement can be defined as the legal suffrage restrictions: the explicit disqualification of certain categories of persons from the right to vote through constitution or statutory provisions.<sup>250</sup>

On the other hand, structural exclusion is the process through which individuals or groups are wholly or partially excluded from full participation in the society in which they live, due to systemic barriers in the economic, social and political spheres.<sup>251</sup>

Moreover, civic participation often known as public participation, is the process by which citizens, either as individuals or as part of a collective, engage in the life of their community to improve conditions for others or to help shape the community's future through both political and non-political processes.<sup>252</sup>

Over the years, a constitutional failure has been observed where a gap between the constitutional right to vote and the substantive ability to participate has been persistent. It is the distance between *de jure*, what the law promises on paper, and *de facto*, what a citizen can actually achieve in practice.

Under article 38(3) of the Constitution of Kenya, the right to vote is a fundamental pillar of sovereignty couched in mandatory terms, suggesting that the mere existence of the law is enough to guarantee the act.<sup>253</sup>

However, the present gap here is not the inability to vote but the failure of the state's positive obligation to remove the hurdles that make voting impossible. Basically, a "right" is useless if the person lacks the "capability" to exercise it.<sup>254</sup>

This gap is best understood through the Capabilities Approach in legal philosophy. It posits that true equality is not just the absence of legal barriers, but the presence of the actual 'capability' to function within the system.

In the Kenyan context, while Article 38 provides the **right**, structural exclusion ensures that the **capability** is concentrated among those with economic and geographic privilege, leaving the marginalized as 'nominal citizens' who possess a right they cannot practically enjoy.<sup>255</sup>

250 Andreas Schedler, 'The Menu of Manipulation' (2002) 13(2) *Journal of Democracy* 36.

251 Hilary Silver, 'Social Exclusion and Social Solidarity: Three Paradigms' (1994) 133(4) *International Labour Review* 531.

252 Peter Adler and Judy Goggin, 'What Do We Mean By "Civic Engagement"?' (2005) 34(3) *Journal of Transformative Education* 236.

253 Constitution of Kenya (2010), Art 38(3).

254 Amartya Sen, *Development as Freedom* (Oxford University Press 1999) 75.

255 Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Belknap Press 2011).

Article 81 of the Constitution of Kenya sets the “General principles for the electoral system,” asserting that elections must be free from violence, intimidation and corruption.<sup>256</sup> However, structural barriers such as poverty and illiteracy allow elites to bridge the gap in their favour, effectively disenfranchising the poor.<sup>257</sup>

In the case of **Maina Kiai v Independent Electoral and Boundaries Commission (IEBC) [2017] eKLR**, the court of appeal emphasised that the right to vote is not just about casting a stone in a box, but about the integrity of the entire process from registration to the announcement of results.<sup>258</sup>

Further, in the case of **August and another v Electoral Commission and Others (CCT8/99) [1999] ZACC 33** often cited in Kenyan Jurisprudence, ruled that the state must take affirmative steps to enable voting. If the state remains passive while barriers exist, it is infringing on the right to vote.<sup>259</sup>

The Kenyan courts have recognised that for a vote to be “substantive”, the environment surrounding it must be accurate and verifiable. If the voter register is a mess, the “right” to vote is illusory.

## Voter Registration Integrity and Roll Accuracy

While the KIEMS kits were designed to ensure “one person, one vote”, network failures and biometric rejection of elderly or manual labour voters create a technological lockout. The technological lockout is particularly acute in agricultural and manual labour regions.

For instance, in the 2022 General Election, biometric failure was significantly higher among voters whose fingerprints had been worn down by manual labour (farming and construction), essentially penalising the working class for their socio-economic status.

Furthermore, the reliance on 3G/4G networks for KIEMS synchronisation creates a ‘geographic disenfranchisement’ for voters in the over 1,100 polling stations identified by the IEBC as having zero 3G coverage.<sup>260</sup>

In 2022, the failure of KIEMS kits forced the IEBC to resort to manual registers in 238 polling stations, causing significant delays.<sup>261</sup>

In frontier districts like Garissa and Wajir, “vetting committees” for National IDs act as a gatekeeper. Without an ID, registration is impossible under Section 9 of the Elections Act, effectively disenfranchising these populations.<sup>262</sup>

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256 Amartya Sen, *Development as Freedom* (Oxford University Press 1999) 75.

257 Ben Sihanya, *Constitutional Democracy in Kenya and Africa* (Vol 1, Innovative Lawyering 2021) 482.

258 *Maina Kiai v Independent Electoral and Boundaries Commission (IEBC) [2017] eKLR*.

259 *August and Another v Electoral Commission and Others (CCT8/99) [1999] ZACC 3*.

260 IEBC, ‘Post Election Evaluation Report for the 9th August 2022 General Election’ (2024) 45.

261 Privacy International & The Carter Center, ‘Final Report on Kenya’s 2022 Election: Use of Technology’ (2023).

262 Open Society Justice Initiative, ‘Kenya’s National Integrated Identity Management System’ (Report, 2020).

Under article 83(3) of the Constitution of Kenya, the IEBC has a mandatory duty to maintain a verifiable register.<sup>263</sup>

## Electoral Violence and Coercive Environments

Beyond physical violence, there is the phenomenon of 'Precautionary Migration.' In the weeks preceding the 2017 and 2022 elections, thousands of voters in cosmopolitan areas like Nairobi and Nakuru 'voted with their feet' by travelling to their ancestral rural homes.

This forced migration results in massive turnout drops because voters are often registered in the cities they flee from, meaning their fear of violence effectively strips them of their vote before a single ballot is cast.<sup>264</sup> Heavy-handed policing in "opposition zones" for example the 2017 crackdown in Kisumu and the presence of politically-connected gangs in the Rift Valley, suppress turnout through fear.<sup>265</sup> The 2007 post-election violence remains a trauma-point; many victims in displacement camps (IDPs) refuse to register or participate, fearing a recurrence.<sup>266</sup>

## Ethicised Political Mobilisation and Identity Politics

The "Tyranny of Numbers", a concept popularised by Mutahi Ngunyi, suggests that ethnic balkanization makes minority groups' votes purely "consequentialist": useful only to swell the numbers of a dominant ethnic block rather than to achieve actual representation.<sup>267</sup>

This ethnic balkanization creates a cycle of 'Defensive Voting.' Empirical studies by Afrobarometer suggest that while many Kenyans identify themselves in non-ethnic terms, such as by occupation or religion, they vote defensively in ethnic blocs out of fear that other groups will do the same to monopolize state power.<sup>268</sup> This transforms the election from a democratic exercise into a 'census of fear.' However, the 2022 General Election introduced a complex shift with the 'Hustler vs. Dynasty' narrative. This populist framing attempted to replace 'primordial identity' (ethnicity) with 'class-based identity'.

While this reduced ethnic polarization in some regions, such as Mt. Kenya, the underlying structural issue remains: political parties in Kenya are still largely 'amalgams of ethnic groups' rather than ideological institutions. Without ideological grounding, these parties continue to serve as vehicles for elite mobilization rather than platforms for substantive citizen participation.<sup>269</sup>

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263 Constitution of Kenya (2010).

264 Election Observer Group (ELOG), 'The 2022 General Elections: Process and Results' (Final Report, 2022) 12.

265 Kenya National Commission on Human Rights (KNCHR), 'Mirage at Dusk: A Human Rights Account of the 2017 General Election' (2018).

266 ResearchGate, 'Triggers and Characteristics of the 2007 Kenyan Electoral Violence' (2025 Study); Relief Web, 'Bad Memories Create Fears Ahead of Kenyan Polls' (2012).

267 AfriCOG, 'What Tyranny of Numbers? A Critique of Electoral Numerology' (2013).

268 Michael Bratton and Mwangi S. Kimenyi, 'Voting in Kenya: Putting Ethnicity in Perspective' (Afrobarometer Working Paper No. 95, 2008) 2.

269 Ephy Braxton Muganda, 'Ethnic Identity and Political Participation in Kenya's Democratization Process (2010-2022)' (MA Thesis, USIU-Africa 2023) 42.



Elections are viewed as a zero-sum struggle for state resources, where the presidency is the “ultimate prize” for ethnic groups to secure economic dominance.<sup>270</sup> The impact of this zero-sum game is that it renders the votes of minority ethnic groups in ‘stronghold’ regions purely consequentialist. In such a system, a voter from a minority community in a region dominated by a different ethnic block often feels their vote is ‘wasted’ unless it aligns with the dominant local ‘Big Man.’

This leads to ‘Electoral Capture,’ where the substantive ability to influence policy is stripped from minorities and vested entirely in the ethnic majority of that specific geographic area.<sup>271</sup>

This is a direct violation of the spirit of Article 10 and Article 81, which demand an electoral system that is ‘transparent’ and ‘inclusive.’

When the distribution of public service appointments and national resources is perceived to follow the ‘ethnic map’ of the winning coalition, the incentive for marginalised groups to participate in future elections diminishes, leading to the long-term institutional de-legitimation observed in recent cycles.<sup>272</sup>

## Gender Rule Non-Implementation and Representation Deficits

Despite the mandatory language of Article 27(8) regarding the 2/3 gender principle, the 12th and 13th Parliaments failed to enact the necessary mechanism, leading to a constitutional crisis.<sup>273</sup>

The failure to implement the 2/3 gender rule is not merely an oversight; it is a legislative strike against the Constitution. Chief Justice David Maraga’s 2020 Advisory to dissolve Parliament was a historic judicial recognition that a house elected in violation of the gender principle is technically unconstitutional.

By refusing to legislate a mechanism for Article 27(8), the Kenyan elite has maintained a patriarchal monopoly on power that excludes over 50% of the population from substantive decision-making.<sup>274</sup>

Women face “Technology-Facilitated Gender-Based Violence” and exclusion during party primaries, where male-dominated hierarchies prefer male candidates.<sup>275</sup>

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270 Michela Wrong, *It’s Our Turn to Eat: The Story of a Kenyan Whistle-Blower* (Fourth Estate 2009).

271 Japhet Biegon (ed), *Ethnicity and Politicization in Kenya* (Kenya National Commission on Human Rights 2024) 15.

272 R. Maina Ndung’u, ‘Ethnicized Politics in Kenya’ (2023) 3(1) *Journal of Central and Eastern European African Studies* 124.

273 Chief Justice’s Advice to the President on Dissolution of Parliament (Maraga Advisory, 21 September 2020).

274 *Chief Justice’s Advice to the President on Dissolution of Parliament for Failure to Enact the Two-Thirds Gender Rule* (21 September 2020).

275 Westminster Foundation for Democracy, *The Role of Political Parties in Addressing VAWP in Kenya* (2025).

## Youth, PWD and Minority Inclusion Gaps

The cost of running for office, including high party nomination fees and campaign logistics, acts as a de facto property qualification for youth and PWDs.<sup>276</sup>

The economic barrier to entry is staggering. Research indicates that the average cost of successfully contesting a National Assembly seat in Kenya is approximately KSh 24.6 million (USD 182,000).

For a youth population where nearly 50% earn less than \$1 a day, this financial threshold acts as a modern 'property qualification' similar to those used in the 19th century to exclude the poor from democracy.<sup>277</sup>

A 2022 audit of polling stations in Nairobi found that less than 30% were truly accessible for persons with mobility impairments, violating article 54.<sup>278</sup>

## Long-Term Effects on Participation and Trust

The 2022 election saw a 5.27% drop in youth turnout compared to 2017, driven by economic hardship and a belief that voting does not improve material conditions.<sup>279</sup> The apathy is rooted in institutional distrust.

As of May 2022, only 2.3 million out of over 8 million eligible voters aged 18-24 had registered to vote. This represents a massive 'lost generation' in the voter roll. When the youth, who are the primary victims of unemployment and inflation, withdraw from the ballot, the resulting leadership lacks the 'intergenerational equity' required by Article 10 of the Constitution.<sup>280</sup>

Public trust in the IEBC is among the lowest in the country, with only 36% of citizens expressing confidence in the commission as of 2024.<sup>281</sup>

## Conclusion and recommendations

In conclusion, the persistence of structural exclusion represents a fundamental breach of the social contract between the Kenyan state and its citizens. While the 2010 Constitution shifted Kenya from a parliamentary to a supreme constitutional democracy, the 'substantive turn' in our jurisprudence has yet to be fully realized in the electoral arena.

Until the state moves beyond the negative duty of non-interference and embraces its positive obligation to dismantle systemic hurdles, Article 38 will remain a 'paper right' for the majority of the marginalized population.

276 IEBC, 'Aspirant Requirements and Nomination Fees' (Official Portal).

277 NIMD & WFD, 'The Cost of Politics in Kenya: Implications for Political Participation and Development' (Report, 2021) 18.

278 Ocharo, 'An Evaluation of Access to Voting Rights for Persons with Mobility-impairment in Nairobi County' (UoN Repository).

279 Youth Democracy Cohort, 'Kenya – Youth Political Participation' (2022 Report).

280 Shujaaz Inc, 'Governance and Community: Kenya Youth Trends Report' (2022) 37.

281 Afrobarameter, 'AD1052: Public Trust in Institutions and Leaders is on a Downward Slide' (2025).



Parliament must urgently enact the 'Two-Thirds Gender Rule' through a legislative framework that includes automatic top-up mechanisms for both the National Assembly and the Senate.

Furthermore, the Elections Act should be amended to mandate that political party nomination lists that do not meet the 2/3 gender threshold be rejected by the IEBC at the point of submission.<sup>282.</sup>

To curb economic disenfranchisement, there is a need for the strict enforcement of the Election Campaign Financing Act. Capping campaign expenditures is essential to prevent the 'commercialization of politics,' which currently acts as a de facto property qualification for youth and PWD candidates.<sup>283.</sup>

The IEBC, in collaboration with the State Department for Citizen Services, should adopt Automatic Voter Registration (AVR). By linking the issuance of a National ID directly to the voter roll, the state can eliminate the administrative 'vetting' hurdles that currently disenfranchise youth and frontier communities.<sup>284.</sup>

Technological reforms must move beyond hardware. The IEBC must mandate an Independent Technological Audit six months prior to any general election. This audit should focus on the 'offline' capabilities of KIEMS kits to ensure that voters in low-connectivity zones are not subjected to the 'digital lockout' observed in previous cycles.

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282 *Katiba Institute & 3 others v Attorney General & another* [2020] eKLR.

283 Election Campaign Financing Act (No. 42 of 2013).

284 Kenya National Commission on Human Rights, 'Position Paper on the Right to Vote and Register as a Voter' (2022).

# Chapter 7

# **JUDICIALISATION OF ELECTIONS AND THE LIMITS OF LEGAL ACCOUNTABILITY**

## **Introduction**

This chapter interrogates the judicialisation of elections in Kenya within the broader electoral framework developed in Chapters 2 to 8. As demonstrated in Chapter 2, electoral disputes have consistently emerged from a combination of institutional weakness, political contestation, and administrative failure.

Chapter 3 establishes Article 81 of the Constitution of Kenya, 2010 as the normative benchmark for evaluating electoral processes, while Chapters 4 and 5 illustrate how persistent institutional and technological deficiencies particularly in electoral management and results transmission have undermined administrative credibility.

In this context, the judiciary has assumed an increasingly central role in electoral governance. Judicialisation reflects a dual reality. On the one hand, the courts especially the Supreme Court have strengthened constitutional oversight by enforcing standards of transparency, accountability, and procedural integrity.

On the other hand, the growing reliance on judicial intervention reveals a structural failure of electoral institutions to resolve disputes at earlier stages of the electoral cycle.

As analysed in Chapter 8, this shift has significant implications for public trust. Where legitimacy is repeatedly restored through post-election litigation rather than sustained through credible institutional performance, electoral processes become reactive rather than stable.

Judicial intervention, while essential, thus operates as a corrective mechanism within a system that has not fully internalised the requirements of constitutional compliance.

Accordingly, this chapter treats judicialisation not merely as a legal development, but as a structural feature of Kenya's electoral system one that reflects both institutional progress and the persistence of underlying governance deficits.

## **Presidential Election Jurisprudence**

The jurisprudence of presidential election petitions provides the most visible and authoritative expression of the judicialisation of elections in Kenya. However, this development must be situated within a longer historical trajectory of electoral dispute resolution that predates the 2010 constitutional order.

In the 1992 and 1997 election cycles, disputes arising from electoral processes were rarely subjected to meaningful judicial scrutiny. Instead, they were managed through political accommodation, executive influence, and, at times, coercive containment. As demonstrated in Chapter 2, electoral contestation during this period was characterised by violence, administrative manipulation, and institutional fragility, yet the judiciary played only a marginal role in resolving these disputes.

This absence of credible legal accountability mechanisms contributed to a broader culture of impunity, in which electoral irregularities were neither systematically investigated nor institutionally remedied.

The limitations of this framework became starkly evident during the 2007–2008 post-election crisis. While the presidential results were contested, the absence of a trusted, effective, and independent judicial forum meant that disputes escalated beyond institutional control.

The judiciary at the time lacked both the constitutional mandate and the public confidence necessary to adjudicate such a high-stakes dispute. Consequently, electoral contestation spilt into violence, displacement, and systemic breakdown, as documented in Chapter 2 and further analysed in Chapter 8.

This moment represents a critical inflexion point in Kenya's electoral history, illustrating the consequences of weak dispute resolution mechanisms and the dangers of unresolved electoral grievances.

The constitutional reforms introduced in 2010 sought to fundamentally reconfigure this landscape. By vesting exclusive jurisdiction over presidential election petitions in the Supreme Court under Article 163(3)(a), and by establishing strict timelines for electoral disputes under Article 87, the Constitution repositioned the judiciary as the central arbiter of electoral legitimacy.

This institutional redesign was intended not only to provide a credible forum for dispute resolution, but also to prevent the escalation of electoral grievances into broader political crises. In this sense, judicialisation was both a corrective response to past failures and a forward-looking attempt to embed constitutional accountability within the electoral process.

The first major test of this new constitutional framework arose in **Raila Odinga v Independent Electoral and Boundaries Commission & 3 others [2013] eKLR**, Presidential Petition No. 5 of 2013. In this case, the Supreme Court adopted a doctrine of substantial compliance, holding that not every irregularity would invalidate an election unless it could be shown to have materially affected the final outcome.

The Court emphasised the need for stability, finality, and institutional continuity, reflecting a cautious approach in a context where democratic institutions were still consolidating following the 2010 transition. While the decision affirmed the judiciary's authority, it also revealed an underlying reluctance to disrupt electoral outcomes in the absence of clear numerical impact.

This approach, while defensible in terms of institutional stability, attracted criticism for privileging outcome over process, thereby raising questions about the extent to which constitutional principles under Article 81 were being fully realised.

A significant doctrinal transformation occurred in **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR**, Presidential Petition No. 1 of 2017. In a landmark and globally significant decision, the Supreme Court departed from the outcome-centric reasoning of 2013 and instead foregrounded the centrality of process-based legitimacy. The Court held that elections must be conducted in strict conformity with constitutional requirements, particularly those relating to transparency, verifiability, and



accountability. It annulled the presidential election not because of discrepancies in vote totals, but due to systemic failures in results transmission and procedural integrity.

This decision marked a decisive shift in Kenyan electoral jurisprudence, affirming that compliance with constitutional process is not merely aspirational but mandatory. It also repositioned the judiciary as an active enforcer of electoral standards, capable of invalidating elections where institutional conduct falls short of constitutional expectations.

However, the jurisprudential trajectory did not settle into a fixed doctrinal position. In **Raila Odinga & 16 others v William Samoei Ruto & 10 others [2022] eKLR**, Presidential Election Petition E005 of 2022 (Consolidated), the Supreme Court revisited and recalibrated its approach. While reaffirming the importance of constitutional principles, the Court placed renewed emphasis on evidentiary thresholds and the burden of proof.

It underscored that allegations of irregularity must be substantiated through credible and verifiable evidence, thereby introducing a more rigorous evidentiary framework for electoral petitions. In upholding the election results, the Court signalled a move towards balancing procedural scrutiny with practical justiciability, acknowledging the inherent complexities of proving systemic electoral irregularities within constitutionally prescribed timelines.

Taken together, these decisions reveal a dynamic and evolving jurisprudence characterised by doctrinal tension rather than linear progression. The movement from substantial compliance in 2013, to strict procedural integrity in 2017, and subsequently to evidentiary calibration in 2022 reflects a judiciary grappling with multiple, and at times competing, constitutional imperatives.

These include the need to safeguard electoral integrity, maintain political stability, ensure access to justice, and preserve institutional legitimacy. As noted in Chapter 3, this tension mirrors the broader challenge of translating formal constitutional design into substantive constitutional realisation.

Importantly, the increasing centrality of the judiciary must also be understood in relation to persistent institutional weaknesses identified in earlier chapters. As demonstrated in Chapters 4 and 5, electoral disputes frequently originate from failures in electoral management and technological systems, particularly in areas such as procurement, results transmission, and data verification.

The judiciary is therefore often called upon to adjudicate disputes that arise not from isolated legal questions, but from systemic administrative deficiencies. This places courts in the complex position of evaluating technical processes such as electronic transmission systems and biometric verification despite limited institutional capacity for independent technical verification.

Furthermore, as highlighted in Chapter 6, the accessibility of judicial mechanisms remains uneven. Electoral litigation is highly resource-intensive, requiring access to legal expertise, technical data, and forensic analysis. This creates structural asymmetries between litigants, raising concerns about whether judicialisation can fully deliver substantive electoral justice in a context marked by socio-economic inequality.

The effectiveness of judicial oversight is therefore shaped not only by doctrinal clarity, but also by broader questions of access, capacity, and inclusivity.

Finally, the jurisprudence of presidential election petitions must be read alongside the broader patterns of public trust and legitimacy examined in Chapter 8. While judicial intervention has, in some instances, restored confidence in electoral processes most notably in 2017 it has also reinforced a pattern in which electoral legitimacy is constructed retrospectively through litigation rather than proactively through institutional performance.

This contributes to a cyclical dynamic in which each election generates disputes that are resolved in court, but underlying structural issues remain insufficiently addressed before the next electoral cycle.

In this sense, judicialisation represents both a constitutional achievement and a structural warning. It demonstrates the capacity of the judiciary to uphold constitutional standards, but also highlights the extent to which electoral governance in Kenya remains dependent on post-election adjudication.

Sustainable electoral credibility, as argued throughout this report, requires a shift from reliance on judicial correction to the strengthening of institutional processes that prevent disputes from arising in the first place.

## Doctrinal Shifts and Tensions

The evolution of Kenya's presidential election jurisprudence reveals a judiciary navigating complex and often competing constitutional imperatives. While the period between 2013 and 2022 provides the clearest articulation of doctrinal development, these shifts must be understood within a broader historical continuum that reflects the gradual constitutionalisation of electoral law following decades of weak legal oversight.

Prior to the 2010 constitutional framework, electoral disputes were not governed by a coherent or consistently enforced body of jurisprudence. As demonstrated in Chapter 2, the absence of a strong judicial role in the 1992, 1997, and even 2007 election cycles meant that questions of electoral integrity were often resolved outside formal legal structures.

The introduction of a robust constitutional framework under Article 81 and the establishment of the Supreme Court marked a decisive shift towards embedding electoral accountability within legal doctrine.

However, this transition has not produced doctrinal uniformity; instead, it has generated a series of interpretive tensions that continue to shape electoral adjudication.

The decision in **Raila Odinga v Independent Electoral and Boundaries Commission & 3 others [2013] eKLR** reflects an initial attempt to balance constitutional compliance with the practical need for electoral finality.

By adopting the doctrine of substantial compliance, the Supreme Court signalled that electoral irregularities, while undesirable, would not necessarily invalidate an election unless they could be shown to materially affect the outcome.

This approach prioritised stability and institutional continuity, particularly in a transitional constitutional moment. However, it also raised concerns about whether procedural integrity was being subordinated to outcome-based reasoning, thereby limiting the full realisation of Article 81 principles.

This tension was decisively confronted in **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR**, where the Supreme Court reoriented electoral jurisprudence towards strict compliance with constitutional standards.

The Court rejected the notion that elections could be validated on the basis of numerical correctness alone, emphasising instead that the integrity of the process is central to electoral legitimacy.

By annulling the presidential election on the basis of systemic procedural failures particularly in relation to results transmission the Court elevated transparency, accountability, and verifiability as non-negotiable constitutional requirements. This marked a significant doctrinal shift, aligning electoral adjudication more closely with the normative framework articulated in Chapter 3.

However, the consolidation of this process-based approach was complicated by the Court's subsequent reasoning in **Raila Odinga & 16 others v William Samoei Ruto & 10 others [2022] eKLR**. In this decision, the Court reaffirmed the importance of constitutional principles but placed renewed emphasis on evidentiary standards and the burden of proof.

It underscored that allegations of irregularity must be supported by cogent and verifiable evidence, thereby introducing a more stringent threshold for successful electoral challenges. While this approach enhances legal certainty and guards against speculative claims, it also raises questions about the practical ability of petitioners to meet such standards within the constrained timelines of electoral litigation.

These doctrinal developments reveal an underlying tension between three interrelated imperatives: procedural integrity, evidentiary sufficiency, and electoral finality. The 2017 decision prioritised procedural integrity, signalling that flawed processes cannot produce legitimate outcomes.

The 2022 decision, while not abandoning this principle, recalibrated the balance by emphasising the evidentiary burden required to demonstrate such flaws. The result is a jurisprudence that is normatively ambitious but operationally constrained, particularly in light of the structural challenges identified in earlier chapters.

This tension is further complicated by the increasing centrality of electoral technology in dispute resolution. As discussed in Chapter 5, systems such as the KIEMS and electronic results transmission platforms have become focal points of contestation.

Courts are now required to adjudicate disputes involving complex technical infrastructures, including questions of data integrity, system architecture, and auditability. However, the judiciary lacks independent technical capacity to fully interrogate these systems, often relying on evidence presented by parties or reports generated by the very institutions under scrutiny.

This creates an epistemic limitation in electoral adjudication, where the determination of legal questions is contingent upon contested technical claims.

Moreover, the doctrinal emphasis on evidentiary thresholds must be considered in light of the structural inequalities highlighted in Chapter 6. Access to electoral data, forensic expertise, and legal resources is uneven, affecting the ability of petitioners to substantiate claims of irregularity.

In this context, a high evidentiary burden may inadvertently privilege well-resourced actors while constraining the capacity of others to effectively challenge electoral outcomes. This raises broader questions about the inclusivity and equity of electoral justice, particularly within a system that relies heavily on litigation as a mechanism of accountability.

From a systemic perspective, the absence of a stable and predictable doctrinal standard for annulment introduces uncertainty into electoral governance. Political actors, electoral institutions, and citizens are left without a clear understanding of the threshold at which electoral irregularities become constitutionally intolerable.

As noted in Chapter 8, such uncertainty contributes to legitimacy deficits, as electoral outcomes are increasingly viewed through the lens of anticipated litigation rather than inherent credibility.

Ultimately, the doctrinal shifts observed between 2013 and 2022 do not reflect inconsistency so much as an ongoing process of constitutional negotiation. The judiciary is attempting to reconcile the demands of legal principle, institutional capacity, and political reality within a rapidly evolving electoral environment.

However, as this report has consistently argued, the burden of ensuring electoral integrity cannot rest primarily on judicial interpretation. Without corresponding improvements in electoral administration, technological governance, and institutional accountability, as discussed in Chapters 4 and 5, judicialisation will continue to operate within, rather than resolve, the structural constraints of Kenya's electoral system.

## Structural Limits of Judicialisation

Despite its central role in electoral dispute resolution, the judiciary operates within a set of structural constraints that limit its capacity to fully resolve electoral disputes. These limitations are not merely procedural; they are embedded in the design of electoral litigation, the nature of electoral evidence, and the broader political context within which elections occur. As a result, while judicialisation has strengthened constitutional oversight, it cannot, on its own, guarantee electoral legitimacy.

First, electoral adjudication is constrained by strict constitutional timelines. Article 87 of the Constitution requires that electoral disputes, particularly presidential petitions, be resolved within a compressed timeframe. While this is intended to ensure finality and prevent prolonged uncertainty, it significantly limits the depth of judicial inquiry. Courts are required to assess complex factual, legal, and technical issues within a matter of days, often without the benefit of comprehensive evidentiary processes.



This temporal constraint restricts the ability of the judiciary to conduct exhaustive scrutiny, particularly in cases involving systemic irregularities that require detailed forensic analysis.

Second, the judiciary is structurally dependent on evidence generated by the very institutions under challenge. As demonstrated in Chapters 4 and 5, many electoral disputes arise from failures in electoral management bodies, including issues related to results transmission, procurement processes, and data integrity.

However, courts rely heavily on records produced by these institutions such as forms, digital logs, and administrative reports to determine the validity of electoral outcomes. This creates an inherent evidentiary asymmetry, where the credibility of the dispute resolution process is tied to the reliability of contested institutional records. In cases involving electoral technology, such as KIEMS, this challenge is further compounded by the systems' technical complexity.

Third, as highlighted in Chapter 6, access to electoral justice is uneven. Electoral litigation is resource-intensive, requiring legal expertise, access to data, and, increasingly, technical capacity to interrogate digital systems.

Petitioners often face significant barriers in obtaining critical evidence, including server logs, audit trails, and transmission data, particularly within the limited timelines prescribed by law. This creates disparities between litigants and raises concerns about the substantive fairness of judicial processes. A system that places a high evidentiary burden on petitioners must also ensure equitable access to the means of meeting that burden; where such access is uneven, the legitimacy of outcomes may be questioned.

Fourth, the judiciary faces epistemic limitations in adjudicating technologically complex disputes. As elections have become increasingly digitised, courts are required to interpret technical evidence relating to system architecture, data transmission, cybersecurity, and digital forensics.

However, the judiciary does not possess independent technical infrastructure for verifying such claims and must rely on expert testimony or reports provided by the parties. This creates a risk that judicial determinations may be influenced by contested or incomplete technical narratives, rather than independently verified data.

As noted in Chapter 5, the increasing centrality of technology in electoral processes has therefore expanded the scope of judicial review beyond traditional legal questions into domains where institutional capacity remains limited.

Fifth, and perhaps most fundamentally, judicial decisions operate within a political environment that shapes their effectiveness. Elections are inherently political processes, involving high stakes, competing interests, and deeply embedded social divisions. As demonstrated in Chapter 8, legitimacy is not derived solely from legal correctness, but from public acceptance and institutional trust.

Judicial rulings, even when constitutionally sound, do not automatically produce political closure. The events following the 2017 annulment, particularly the boycott of the repeat election, illustrate the limits of judicial authority in resolving disputes where political actors and segments of the public remain unconvinced of institutional neutrality.

This disjuncture between legal resolution and political acceptance highlights a broader structural limitation: courts can adjudicate disputes, but they cannot compel trust. Where electoral institutions lack credibility, judicial decisions risk being perceived as extensions of contested processes rather than independent correctives. This dynamic reinforces the pattern identified in Chapter 8, where legitimacy is repeatedly reconstructed through litigation but not sustained through institutional performance.

Finally, the increasing reliance on judicial intervention raises questions about the appropriate role of courts within the electoral system. Judicialisation, while necessary, may inadvertently shift responsibility for electoral integrity away from administrative and political actors.

As argued in Chapter 1, sustainable electoral credibility requires alignment between constitutional principles, institutional performance, and citizen perception. Where courts become the primary site of legitimacy construction, rather than a mechanism of last resort, the broader system of electoral governance risks becoming reactive rather than preventive.

In sum, the structural limits of judicialisation underscore a central argument of this report: electoral legitimacy cannot be secured solely through post-election adjudication. While the judiciary plays an indispensable role in enforcing constitutional standards, its effectiveness depends on the integrity of the institutions, processes, and political environment within which it operates.

Without parallel reforms in electoral administration, technological governance, and civic inclusion, as discussed in Chapters 4, 5, and 6, judicialisation will continue to function as a necessary but insufficient response to Kenya's recurring electoral challenges.

## Conclusion

This chapter has demonstrated that the judicialisation of elections in Kenya is both a constitutional achievement and a structural warning. It reflects the success of post-2010 reforms in embedding electoral dispute resolution within a credible legal framework, but it also exposes the persistence of underlying institutional weaknesses that continue to generate electoral disputes across cycles.

As the analysis across Chapters 2 to 6 shows, electoral conflict in Kenya has not been episodic; it has been patterned, recurring, and structurally embedded. The increasing centrality of the judiciary must therefore be understood not only as a sign of institutional maturity, but also as evidence that earlier stages of the electoral process have not consistently delivered credibility.

The evolution of presidential election jurisprudence from the doctrine of substantial compliance in 2013, to the emphasis on strict procedural integrity in 2017, and the evidentiary recalibration in 2022 illustrates a judiciary actively engaged in defining the meaning of constitutional elections under Article 81.

However, as this chapter has shown, doctrinal development alone cannot resolve the structural conditions that produce electoral disputes. Courts can interpret the Constitution, enforce standards, and, where necessary, invalidate electoral outcomes. They cannot, however, reconstruct institutional trust where it has been cumulatively eroded, nor can they substitute for failures in electoral administration, technological governance, or political accountability.



A central insight emerging from this analysis is that judicialisation, while necessary, is inherently reactive. It operates at the point of breakdown after disputes have crystallised, positions have hardened, and legitimacy has already been contested.

As argued in Chapter 8, electoral legitimacy in Kenya is cumulative, shaped over time through repeated institutional performance rather than episodic legal correction. Where credibility is repeatedly restored through post-election litigation, rather than sustained through transparent and accountable processes, the electoral system becomes dependent on crisis resolution rather than preventive governance.

Moreover, the structural limits identified in this chapter ranging from constrained timelines and evidentiary dependence, to technological complexity and unequal access to justice underscore the fact that judicial intervention cannot fully bridge the gap between formal constitutional compliance and substantive electoral integrity.

The judiciary operates within the system; it cannot, on its own, transform it. This reinforces the broader argument of the report, articulated in Chapter 1, that electoral credibility requires alignment between constitutional principles, institutional design, and citizen perception.

The implications for reform are therefore clear. Strengthening electoral legitimacy in Kenya requires a deliberate shift away from over-reliance on judicial correction towards the consolidation of credible, transparent, and accountable electoral processes across the entire electoral cycle.

This includes addressing the institutional vulnerabilities identified in Chapters 4 and 5, expanding inclusive participation as discussed in Chapter 6, and rebuilding public trust as analysed in Chapter 8. In this framework, the judiciary must remain an essential safeguard capable of enforcing constitutional standards and providing authoritative dispute resolution but it should not be the primary mechanism through which electoral legitimacy is constructed.

Ultimately, the test of a resilient electoral system is not how effectively it resolves disputes in court, but how rarely such disputes arise in the first place.

A system that consistently relies on judicial intervention to validate its outcomes is one in which legitimacy remains fragile. Conversely, a system in which institutions perform credibly, processes are transparent, and outcomes are broadly accepted requires less judicial correction because trust is embedded rather than restored.

Judicialisation, therefore, should be understood as a transitional feature of Kenya's democratic trajectory necessary in a context of reform and institutional rebuilding, but insufficient as a long-term foundation for electoral credibility.

The constitutional imperative moving forward is clear: to build an electoral system in which the courts serve not as the primary arena of political contestation, but as a final guarantor of a process that is already credible, trusted, and constitutionally sound.

# Chapter 8

## PUBLIC TRUST, LEGITIMACY AND DEMOCRATIC RESILIENCE

### Introduction

This chapter provides a comprehensive analytical account of Kenya's electoral trajectory from 1992 to 2022 through the lenses of public trust, institutional legitimacy, and democratic resilience.<sup>285</sup> It departs from episodic interpretations of electoral crises and instead advances a cumulative and structural reading of democratic contestation in Kenya. At its core, the chapter argues that Kenya's electoral challenges are not merely the product of isolated failures but are the outcome of an accumulation of unresolved procedural, institutional, and political irregularities over time.<sup>286</sup>

To deepen this analysis, the chapter adopts the “broken windows” theory as an interpretive framework.<sup>287</sup> Originally developed in criminology, the theory posits that tolerating minor forms of disorder signals permissiveness and invites more serious violations.

Applied to electoral governance, this framework suggests that unresolved “small” irregularities such as discrepancies in tallying, opaque technological breakdowns, inconsistent institutional communication, selective enforcement of electoral laws, and delayed reform gradually erode trust in the electoral system. Over time, these unresolved issues lower the legitimacy threshold required for political actors and citizens to reject electoral outcomes.

The implication is profound: democratic breakdown is rarely sudden. Rather, it is the cumulative result of tolerated procedural decay. Elections do not lose legitimacy only when crises occur; they lose legitimacy incrementally, through repeated exposure to unresolved irregularities. In this sense, democratic resilience depends less on post-election crisis management and more on early institutional repair and continuous trust-building between electoral cycles.

### Recurring Patterns Across Electoral Cycles

A longitudinal reading of Kenya's elections reveals a recurring pattern in which each cycle inherits unresolved legitimacy deficits from the previous one. The 1992 elections, conducted under the reintroduction of multiparty democracy, were marked by weak electoral administration and widespread violence. This established an early association between elections and insecurity.

The 1997 elections reproduced similar patterns, reinforcing the perception that electoral competition was inseparable from conflict and institutional weakness. The Akiwumi Commission documented how ethnic clashes were instrumentalised within electoral competition, embedding insecurity within electoral processes.<sup>288</sup>

The 2007–2008 crisis represented a culmination of these unresolved tensions. The disputed

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285 African Centre for Strategic Studies (2022).

286 Chapter 1, this report.

287 Wilson and Kelling (1982).

288 Akiwumi Commission Report.

presidential tally triggered a severe collapse in electoral credibility, leading to widespread violence and displacement. This moment revealed the systemic consequences of ignoring earlier warning signs.

Subsequent elections - 2013, 2017, and 2022 - demonstrated partial institutional improvement but did not fully restore public trust. The 2013 elections were legally resolved but left residual doubts about technological integrity. The 2017 elections introduced a significant judicial intervention through annulment, yet the repeat election boycott created a renewed legitimacy crisis. The 2022 elections achieved a peaceful transfer of power but were marked by visible institutional disagreement within the electoral commission.

Across these cycles, a consistent pattern emerges: procedural improvements do not necessarily translate into increased legitimacy. Instead, unresolved issues accumulate, shaping public expectations and political strategies in subsequent elections.

## Accumulation of Electoral Grievances

From 1992 to 2022, Kenya's electoral history demonstrates a pattern of grievance accumulation rather than isolated disputes. Electoral grievances are not confined to losing candidates; they are embedded in citizen experiences of the electoral process. These include repeated exposure to disputed tallying processes, contested electoral technologies, inconsistent official communication, delayed reforms, and selective accountability.

Each unresolved controversy becomes part of the political memory carried into the next election cycle. This cumulative effect creates a context in which new disputes are interpreted through the lens of past grievances. As a result, even minor irregularities can trigger significant legitimacy concerns because they resonate with a history of unresolved issues.

This dynamic reflects the concept of path dependence. Electoral institutions tend to manage crises at moments of rupture - through judicial intervention, political negotiation, or administrative adjustment - but often fail to close the loop through comprehensive accountability and reform implementation. Consequently, grievances are deferred rather than resolved.

The persistence of grievance accumulation suggests that Kenya's electoral challenge is not simply one of institutional design but of institutional follow-through. Without systematic mechanisms for auditing, accountability, and reform between election cycles, each election becomes a continuation of unresolved disputes rather than a fresh democratic exercise.

## Institutional Trust Deficits

Public trust in Kenya's electoral system is shaped by the collective performance of multiple institutions, including the IEBC, the judiciary, security agencies, Parliament, political parties, and the Executive. Trust is not built solely through legal compliance; it is constructed through consistent, transparent, and credible institutional behaviour over time.

The 2010 Constitution sought to rebuild legitimacy through the creation of independent commissions, enhanced judicial oversight, and devolved governance structures. However, constitutional redesign alone cannot erase historical distrust.



When institutions appear inconsistent, politically aligned or unable to coordinate effectively, citizens interpret these signals as evidence of systemic unreliability.

Empirical evidence suggests that while citizens continue to support elections as the preferred method of choosing leaders, trust in electoral institutions remains comparatively low.

This gap between normative commitment to democracy and scepticism about institutional performance is a critical indicator of legitimacy deficits. From a broken windows perspective, small institutional failures - such as unclear procurement processes, inconsistent public communication, unexplained delays in result transmission, and weak enforcement of electoral laws signal permissiveness. Over time, these signals accumulate, leading citizens to anticipate larger failures. The result is generalised distrust that extends beyond individual elections to the democratic system as a whole.

## **Protest Cycles, Boycotts and Political Fatigue**

Unresolved legitimacy disputes often manifest in protest cycles, boycotts, and extra-institutional mobilisation. In Kenya, electoral contestation has taken multiple forms, including litigation, street protests, elite negotiations, and strategic disengagement.

The 2017 repeat presidential election illustrates how institutional remedies can generate new legitimacy challenges. While the annulment of the initial election demonstrated judicial independence, the opposition boycott of the repeat election undermined its inclusivity and acceptance. The election was procedurally completed but lacked substantive legitimacy.

Repeated cycles of contestation contribute to political fatigue. Citizens are repeatedly asked to trust institutions that have not convincingly addressed prior failures. This fatigue manifests in declining voter turnout, reduced civic engagement, increased cynicism, and diminished belief in the transformative potential of elections.

Political fatigue should not be understood merely as apathy. Rather, it is a rational response to repeated exposure to unresolved grievances. It signals a weakening of the social contract between citizens and the state, where participation is no longer perceived as meaningful or consequential.

## **Risks of Democratic Backsliding**

Recurring electoral crises generate multiple risks of democratic backsliding. First, they normalise exceptional politics, in which elite bargaining, emergency governance measures, and ad hoc legal interventions substitute for institutionalised democratic processes. Second, they weaken accountability by allowing reform momentum to dissipate once immediate crises subside.

Third, recurring disputes incentivise the instrumentalisation of institutions by political actors. Rather than strengthening institutions, actors seek to leverage them for strategic advantage. Fourth, they erode civic norms surrounding electoral acceptance and constitutional restraint.

While Kenya has demonstrated resilience particularly through judicial intervention and peaceful transitions resilience should not be conflated with consolidation.

A democracy may endure repeated shocks while gradually eroding in quality, inclusivity, and trust.

## Electoral Legitimacy as a National Security Question

Electoral legitimacy in Kenya is deeply intertwined with national security. The 2007–2008 post-election violence demonstrated that disputed elections can rapidly escalate into widespread instability, including violence, displacement, and economic disruption.

Even in less violent cycles, legitimacy deficits contribute to polarisation, justify heavy-handed security responses, and create opportunities for elite manipulation. Electoral legitimacy, therefore, functions as a form of democratic infrastructure. When it is strong, political competition remains stable; when it is weak, elections become high-risk events.

Addressing legitimacy as a security issue should not lead to excessive securitisation. Instead, it requires preventive democratic repair. Transparent processes, consistent institutional communication, timely dispute resolution, and accountability for past misconduct are essential components of electoral stability.

## Conclusion and Reform Directions

This chapter has demonstrated that Kenya's electoral challenge is not episodic but structural, rooted in the cumulative erosion of public trust across electoral cycles. Electoral instability does not arise solely from moments of crisis such as disputed results or institutional breakdown but from the repeated failure to resolve underlying procedural, institutional, and political weaknesses. Each election cycle inherits unresolved legitimacy deficits from its predecessor, producing a pattern of path dependence in which distrust becomes embedded within the electoral system itself.

Consistent with the analytical framework established in Chapter 1, electoral credibility must be understood as cumulative rather than cyclical. It is not rebuilt at each election; it is incrementally reinforced or eroded through institutional conduct over time. Where institutions repeatedly fail to provide transparent, consistent, and accountable electoral processes, citizens rationally adjust their expectations. In such contexts, contestation, protest, and disengagement become not anomalies, but predictable responses to perceived institutional unreliability.

The application of the “broken windows” framework underscores this dynamic. Minor irregularities whether in tallying, technology, communication, or enforcement are not politically neutral. When left unresolved, they signal permissiveness and weaken the normative foundations of electoral integrity. Over time, these signals lower the threshold at which electoral outcomes are rejected, transforming routine elections into high-risk legitimacy events. The persistence of such unresolved irregularities explains why procedural improvements have not consistently translated into increased public trust.

Importantly, this chapter has shown that Kenya exhibits both democratic resilience and democratic fragility. The judiciary has demonstrated independence, particularly in the 2017 annulment, and electoral transitions most notably in 2022 - have occurred without large-scale violence.



However, resilience should not be conflated with consolidation. A democracy may endure repeated shocks while simultaneously experiencing gradual erosion in legitimacy, inclusivity, and public confidence. The central risk is not immediate collapse, but progressive thinning of democratic substance.

The implications of this analysis are both constitutional and practical. If electoral credibility is cumulative, then reform must also be continuous and systemic rather than reactive and episodic. Addressing electoral instability requires a shift from crisis management to legitimacy management an approach that prioritises early detection, institutional accountability, and structural correction.

## **Reform Directions**

First, we must institutionalise an early-repair model within our electoral governance framework. Minor procedural irregularities must not simply be brushed aside. Instead, we should implement a system where these irregularities trigger mandatory public explanations, independent audits, and prompt corrective actions.

This necessitates embedding transparency requirements into the operational and legal frameworks of the Independent Electoral and Boundaries Commission (IEBC), including specific thresholds for disclosure and accountability.

Second, we urgently require a formalised post-election accountability system that persists throughout electoral cycles. Each election should culminate in a publicly accessible reform tracker that highlights the implementation status of court orders, commission recommendations (like those from the Waki and Akiwumi reports), procurement audits, and the prosecution of electoral offenses.

Without such a mechanism, our reforms risk being mere statements of intent rather than actionable change, leading to unresolved grievances that linger into future elections.

Third, we must redefine the credibility of electoral technology as a governance issue rather than just a technical matter. Failures in technology have consistently eroded public trust not only due to malfunctions but also because of a lack of transparency.

Systems used for electoral technology, such as results transmission platforms, should undergo independent pre-election certification, allow for real-time public verification, and be subject to post-election forensic audits. Legal provisions need to mandate full transparency regarding system architecture, audit logs, and failure reports, facilitating public scrutiny.

Fourth, there is a pressing need to improve communication protocols across constitutional bodies. Inconsistent messaging, especially from the IEBC and other state institutions, has perpetuated legitimacy crises.

Communication during elections should follow legally binding standards that ensure consistency, evidence-based information, and timely dissemination. The repercussions of communication failures extend beyond reputation; they have structural implications that directly erode public trust.

Fifth, while the judiciary will always be central to resolving electoral disputes, it's essential to alleviate the systemic overreliance on judicial intervention. The courts play a vital role in upholding electoral integrity, but their effectiveness hinges on the quality of processes leading up to litigation.

By strengthening administrative dispute resolution within the IEBC, enhancing transparency in results management, and improving access to evidence for all parties involved, we can alleviate the pressure on courts and build pre-litigation credibility.

Sixth, electoral reforms must tackle the political incentives that perpetuate instability. If electoral outcomes continue to be viewed as zero-sum contests for state power and resource allocation, the incentives for conflict will endure.

This calls for broader governance reform ssuch as bolstering devolution, promoting inclusivity in resource distribution, and reinforcing constitutional norms that limit executive overreach. Addressing these underlying incentives is vital; otherwise, procedural reforms alone will yield negligible results.

Seventh, we need to reframe the prevention of protests as an opportunity for building legitimacy rather than merely a security management issue. While heavy-handed policing may suppress immediate unrest, it ultimately deepens long-term distrust.

Achieving sustainable stability depends on our commitment to transparency, dialogue, civic education, and accountable conduct from security agencies. Electoral legitimacy cannot simply be enforced; it must be cultivated through credible processes.

Finally, it is essential to weave electoral legitimacy into the fabric of Kenya's national resilience strategy. The IEBC, judiciary, political parties, security agencies, civil society, and media should be assessed not just on legal compliance but also on their ability to rebuild trust between election cycles.

Adopting legitimacy as a measurable governance outcome, alongside conventional metrics like voter turnout, efficiency, and procedural adherence, will strengthen our democratic framework and ensure a more resilient Kenya.

# Chapter 9

## STRUCTURAL REFORM PATHWAYS TOWARDS 2027

### Introduction

This chapter operationalises the analytical findings developed across Chapters 2 to 8 by translating diagnosis into reform design. As established in Chapter 2, Kenya's electoral trajectory is characterised by recurring patterns rather than isolated breakdowns.

Chapter 3 further demonstrates that while Article 81 of the Constitution provides a robust normative framework, implementation gaps persist between formal compliance and substantive realisation. Chapters 4, 5, 6 and 7 reveal institutional, technological, participatory and judicial limitations, while Chapter 8 establishes that these weaknesses cumulatively erode public trust and democratic legitimacy.

The central premise of this chapter is therefore that electoral reform must address structural incentives rather than procedural symptoms.

Kenya's reform history - particularly following the 1997 IPPG reforms, the 2008 post-election settlement, and the 2017 annulment illustrates a pattern of reactive intervention without sustained institutional transformation<sup>289</sup>. Consequently, reforms have improved form without stabilising trust.

This chapter proposes a comprehensive reform framework grounded in Article 81, comparative electoral practice, and empirical evidence. It links each reform area directly to failures identified in earlier chapters, ensuring internal coherence across the report.

### EMB Independence and Appointment Reform

As demonstrated in Chapter 4, electoral management bodies in Kenya have undergone repeated reconfiguration without resolving core vulnerabilities relating to political capture and internal fragmentation.

The transition from ECK to IEBC improved formal independence but did not sufficiently insulate the institution from political influence.<sup>290</sup>

Reform must, therefore, begin with appointment architecture. A multi-stage, merit-based selection process involving the judiciary, professional bodies and civil society is necessary to reduce executive dominance. Public interviews and transparent criteria should be mandatory, enhancing both accountability and legitimacy.

Further, tenure protection must be balanced with accountability. The leadership crises identified in Chapter 4 including commissioner resignations and internal splits demonstrate the need for clear removal procedures and internal dispute resolution mechanisms. Without institutional cohesion, formal independence is undermined in practice.

289 Carter Center 2018; African Centre for Strategic Studies 2022.

290 South Consulting 2013,

Comparative evidence from Ghana and South Africa indicates that perceived neutrality of EMBs is as critical as legal independence.<sup>291</sup> Kenya must therefore prioritise both structural safeguards and public confidence.

## **Campaign Finance Regulation and Enforcement**

Chapter 5 highlights how electoral manipulation has evolved alongside reform, with financial influence emerging as a key driver of inequality in electoral competition. Despite the existence of the Election Campaign Financing Act, enforcement remains weak.<sup>292</sup>

Reform must focus on enforceability rather than legislative expansion. Real-time disclosure of campaign financing should be required, supported by independent auditing mechanisms. Sanctions for non-compliance must be credible and enforceable, including disqualification for serious violations.

Political parties should be subject to strict financial reporting requirements, and third-party financing must be regulated to prevent circumvention. As Chapter 6 demonstrates, financial inequality also contributes to structural exclusion, particularly affecting women and youth candidates.

Without effective campaign finance regulation, electoral competition will continue to reflect economic power rather than democratic choice, undermining both fairness and legitimacy under Article 81.

## **Technology Governance and Results Integrity**

Chapter 5 further establishes that electoral technology has become a central site of contestation, particularly in relation to results transmission. Failures in KIEMS and opacity in data processes have repeatedly undermined trust.<sup>293</sup>

Reform must reconceptualise technology as a governance issue. Independent certification of systems prior to elections should be mandatory, and system architecture must be publicly accessible for scrutiny. Real-time transparency in results transmission is essential to meet constitutional standards of verifiability.

Post-election forensic audits should be institutionalised, with findings made public. These audits must assess system integrity, identify failures, and inform continuous improvement.

Legal frameworks should require full disclosure of procurement processes and audit logs. As Chapter 8 demonstrates, unresolved technological irregularities contribute to cumulative distrust. Addressing these gaps is therefore central to legitimacy restoration.

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291 African Union 2017.

292 International IDEA 2021.

293 Carter Center 2018.

## Implementation of the Two-Thirds Gender Principle

Chapter 3 identifies persistent non-compliance with the two-thirds gender principle as a major constitutional gap. Despite clear provisions under Articles 27 and 81, representation deficits remain across electoral cycles.

Reform must shift from declaratory commitments to enforceable mechanisms. Legislative quotas, party-level incentives, and sanctions for non-compliance should be implemented. Public funding allocations to political parties can be tied to measurable progress in gender inclusion.

Chapter 6 further demonstrates that structural barriers including campaign financing constraints and political violence limit women's participation. Addressing these barriers requires both legal reform and broader socio-political interventions. Gender inclusion is not only a constitutional requirement but a core determinant of democratic legitimacy and representativeness.

## Strengthening Dispute Resolution Systems

Chapter 7 highlights the increasing judicialisation of elections and the limitations of court-based accountability. While judicial intervention has strengthened electoral oversight, overreliance on courts indicates weaknesses in administrative processes.

Reform should strengthen pre-election and intra-election dispute resolution within the IEBC. Clear procedures, timely access to data, and transparent decision-making are essential to reducing reliance on litigation.

Judicial timelines should remain efficient, but access to justice must be enhanced through simplified procedures and improved evidentiary access. Compliance with court decisions identified in Chapter 7 as a key gap - must be monitored through institutional mechanisms.

Strengthening administrative resolution processes will enhance credibility and reduce the burden on courts as primary arbiters of electoral legitimacy.

## Civic Inclusion, Protection and Trust Rebuilding

Chapter 6 demonstrates that electoral participation is shaped by structural conditions, including violence, exclusion, and administrative barriers. Marginalised groups, particularly youth, persons with disabilities, and minority communities, continue to face significant obstacles.

Reform must prioritise inclusive voter registration, accessible polling infrastructure, and targeted civic education initiatives. Security sector conduct must align with constitutional standards of neutrality and accountability (OHCHR 2008).

Chapter 8 further shows that trust is cumulative. Rebuilding trust requires sustained engagement beyond electoral cycles, including public dialogue, transparency initiatives, and civic education programmes. Participation must therefore be understood as a structural capability, not merely a legal entitlement.

## Realigning Political Incentives

A central finding across Chapters 2, 4 and 8 is that electoral instability is driven by political incentives. Elections are often perceived as zero-sum contests for access to state resources, reinforcing high-stakes competition.

Reform must therefore extend beyond electoral administration to broader governance structures. Strengthening devolution, promoting equitable resource distribution, and reinforcing constitutional constraints on executive power can reduce electoral stakes.

Political parties should be incentivised to prioritise policy-based competition. This requires regulatory reform, civic engagement, and internal party democracy. Without addressing incentive structures, procedural reforms will remain insufficient.

## Integrating Legitimacy into Governance Metrics

Chapter 8 establishes that legitimacy is cumulative and cannot be measured solely through procedural indicators. Traditional metrics such as turnout and efficiency fail to capture public trust.

Reform should integrate legitimacy as a governance metric. This includes regular public perception surveys (Afrobarometer 2022), independent audits, and institutional performance indicators linked to credibility outcomes.

Measuring trust over time provides a more accurate assessment of democratic health and aligns with the report's core analytical framework.

## Conclusion

This chapter has translated structural diagnosis into reform pathways grounded in constitutional principles and empirical evidence. It has been demonstrated that sustainable electoral credibility requires institutional independence, accountability, transparency, inclusion, and incentive realignment.

As Kenya approaches the 2027 General Election, the challenge is not merely to prevent crisis but to sustain legitimacy. This requires moving from cyclical reform to structural transformation, consistent with Article 81.

Ultimately, electoral reform must be understood not as a technical exercise but as a constitutional project. The durability of Kenya's democracy depends on its ability to resolve accumulated distrust and align institutional performance with citizen expectations.

# Chapter 10

# CONCLUSION – FROM CYCLICAL CRISIS TO CONSTITUTIONAL TRANSFORMATION

## Introduction

This report has examined Kenya's electoral trajectory across seven election cycles between 1992 and 2022, with the objective of identifying recurring structural weaknesses, assessing constitutional compliance under Article 81, and proposing reform pathways capable of sustaining electoral credibility ahead of the 2027 General Election.

The central finding is clear and consistent across all chapters: Kenya's electoral instability is not accidental it is patterned, cumulative, and structurally embedded.

Elections in Kenya have evolved in form, but not fully in function. While institutions have been redesigned, laws amended, and technologies introduced, the underlying drivers of contestation political incentives, weak enforcement, institutional fragility, and fluctuating public trust have persisted across cycles.

## Synthesis of Structural Findings

The analysis across Chapters 2 to 9 reveals a system characterised by recurrence rather than rupture. Chapter 2 demonstrates that each electoral cycle inherits unresolved tensions from the previous one, creating a continuum of instability rather than isolated crises.

Chapter 3 establishes that while Article 81 provides a robust constitutional framework, its implementation remains partial and uneven, with persistent gaps in transparency, inclusion, and accountability.

Chapters 4 and 5 show that reforms to electoral management bodies and technology have often resulted in institutional redesign without structural insulation, leaving key processes vulnerable to political influence and administrative failure.

Chapter 6 highlights how structural exclusion, inequality, and electoral violence continue to shape participation, reinforcing distrust among marginalised groups.

Chapter 7 demonstrates that while the judiciary has emerged as a central guarantor of electoral legality, judicialisation reflects both progress and systemic weakness, as courts increasingly compensate for failures elsewhere in the system.

Chapter 8 confirms that these dynamics produce cumulative distrust, where legitimacy is not rebuilt but progressively eroded across cycles. Chapter 9 shows that reform efforts have been reactive rather than structural, addressing symptoms rather than underlying incentive structures.

Taken together, these findings point to a fundamental conclusion: Kenya's electoral system has been repeatedly reformed, but not fundamentally transformed.

## The Problem of Cyclical Reform

A defining feature of Kenya's electoral history is the persistence of crisis-driven reform cycles. Reforms are typically initiated in response to major electoral disruptions - 1997, 2007–2008, and 2017 - leading to periods of institutional redesign and renewed optimism. However, these reforms rarely alter the structural conditions that generate electoral disputes. Instead, they produce temporary stabilisation followed by renewed contestation.

This cycle has three key consequences: reform fatigue, institutional recycling, and the normalisation of dispute. Citizens are repeatedly promised improvement, yet encounter similar challenges across cycles, eroding confidence in both institutions and reform processes.

Changes in institutional form have not consistently translated into changes in institutional behaviour. Electoral contestation has become an expected feature of elections, rather than an exception.

## Electoral Legitimacy and the Trust Deficit

A central insight of this report is that electoral credibility is cumulative. It is not established at the moment of voting, nor resolved through judicial determination alone. It is built or eroded over time through repeated institutional performance.

Kenya's challenge is therefore not simply technical or legal; it is fundamentally relational. It concerns the relationship between citizens, institutions, and the state. Citizens continue to support elections as a democratic ideal, yet confidence in electoral processes and institutions remains fragile. This gap between normative commitment and institutional trust is the core legitimacy deficit.

Where trust is low, irregularities are interpreted as intentional, outcomes are viewed with suspicion, and political actors are incentivised to contest rather than concede. In this context, even procedurally sound elections may struggle to achieve broad-based acceptance.

## Judicialisation and Its Limits

The growing role of the judiciary represents one of the most significant developments in Kenya's electoral system. Courts have strengthened constitutional oversight, clarified legal standards, and intervened to uphold electoral integrity. However, judicialisation is not a substitute for institutional credibility.

Courts resolve disputes after they arise, depend on evidence generated by contested institutions, and operate under strict timelines. They cannot prevent disputes from emerging, rebuild trust where it has been structurally eroded, or replace effective electoral administration.

A system that relies on courts to routinely validate electoral outcomes is one in which legitimacy remains fragile and contingent.

## **From Reform to Transformation**

The key implication of this report is that incremental reform is no longer sufficient. Kenya has reached a point where legal frameworks are largely in place, institutional structures exist, and judicial mechanisms are functional yet electoral credibility remains contested.

This indicates that the challenge is no longer one of design, but of incentive alignment and institutional performance. Transformation therefore requires moving beyond reactive reform, addressing underlying political and institutional incentives, embedding accountability between election cycles, and prioritising trust as a central governance outcome.

### **Way Forward: Structural Priorities for 2027**

Building on Chapter 9, the pathway towards credible elections in 2027 must be anchored in five interconnected reform priorities.

First, institutional independence and integrity must be strengthened. Electoral management bodies must be insulated not only legally but operationally from political influence. Appointment processes, tenure security, and internal governance structures must ensure coherence, stability, and public confidence.

Second, transparency and verifiability must extend across the entire electoral cycle. Procurement, technology deployment, results transmission, and post-election audits must be open, verifiable, and publicly accessible.

Third, continuous accountability between election cycles must be institutionalised. A structured accountability framework should track implementation of court decisions, commission recommendations, and institutional reforms.

Fourth, inclusive participation and civic protection must be prioritised. Barriers to participation whether structural, economic, or security-related must be addressed to ensure meaningful inclusion.

Fifth, political incentives must be realigned. Electoral competition must shift from zero-sum contestation to policy-based engagement, supported by campaign finance regulation, strengthened devolution, and reduced stakes in electoral outcomes.

### **A Constitutional Imperative**

Ultimately, the challenge facing Kenya is not simply to conduct elections, but to institutionalise electoral legitimacy. Article 81 provides a clear constitutional standard. The task is to realise it consistently and credibly across cycles.

The cost of inaction is not hypothetical. Electoral failure can escalate into national crisis, while persistent distrust weakens democratic institutions, fuels polarisation, and undermines governance.

## Final Reflection

Kenya's democratic trajectory is not one of failure it is one of incomplete transformation. The country has demonstrated resilience: elections continue to be held, courts function, and power transitions occur. But resilience alone is not enough.

The true test of democratic consolidation is not whether a system survives crisis, but whether it outgrows the conditions that produce crisis.

Kenya now stands at a critical juncture. The patterns identified in this report are clear. The reforms required are known. The remaining question is whether the political and institutional will exists to move from cyclical crisis to constitutional transformation.

The 2027 General Election will not simply be another electoral event. It will be a test of whether Kenya has learned from its past, or is prepared to repeat it.



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