

**AVOIDING VIOLENCE AND ENHANCING LEGITIMACY:  
JUDICIAL PREPAREDNESS FOR HANDLING ELECTORAL  
DISPUTES IN KENYA AND BEYOND**

**EXECUTIVE SUMMARY**



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## **LESSONS LEARNED PROGRAM**

As part of IDLO's pledge to continuously enhance the impact of its work and be at the forefront of thinking on how change occurs and can be fostered in the rule of law field, the IDLO Lessons Learned Program analyzes select IDLO programs in combination with international theory and practice. The aim is to learn what types of interventions can lead to positive change, under what conditions, and how such change can be sustained. In order to share good practices both internally as well as with the broader rule of law community, findings are compiled in a series of Lessons Learned Briefs, to be used in program design and implementation, and as 'building blocks' for evidence-based theories of change.

The 2013 Kenyan elections were relatively violence free, an impressive outcome given the presence of several of the same incendiary factors that had triggered post-election violence in 2007. One of the elements credited for the peaceful power transfer was the judiciary's management of electoral disputes. Overall, 188 petitions challenging results of the election process were filed in the courts. All such disputes were finalized within the statutorily mandated six-month period by the court of first instance. In spite of time constraints, the electoral bench of the High Court was praised for the consistency of its jurisprudence and attention to substantive electoral justice, marking an important departure from past tendencies to rely on legal technicalities to dismiss electoral petitions.

From mid-2012 onwards, the International Development Law Organization (IDLO) implemented a program to help establish and provide support to the Judiciary Working Committee on Elections Preparations (JWCEP). The program's notable achievements include:

- Supporting the JWCEP to develop procedural rules for hearing disputes concerning presidential elections;
- Training over 700 judicial officers and court staff on the new Constitution and electoral laws;
- Creating a frequently asked questions (FAQ) document, disseminated widely to the public through different platforms;
- Embedding a group of researchers within the judiciary to serve as reference points for judicial officers hearing electoral disputes; and
- Assisting the judiciary with comprehensive stakeholder engagement, including regular dissemination of information about progress of cases in the EDR system.

IDLO support for Kenya's EDR system continues to evolve, working with the JWCEP's successor organization, the permanent Judiciary Committee on Elections (JCE), in preparation for the 2017 elections.

The Lessons Learned Brief, *Avoiding Violence and Enhancing Legitimacy: Judicial Preparedness for Handling Electoral Disputes in Kenya and Beyond* presents lessons on electoral dispute preparation (EDP) and electoral dispute resolution (EDR) programming, drawing from IDLO's pioneering support to the Kenyan judiciary in the 2013 general election, and the international literature on EDR systems. This Summary provides an overview of its key messages.

Section 1 introduces EDR systems and their objectives, noting the potential for EDR systems to address two contemporary difficulties facing governments in emerging democracies: electoral violence and the legitimacy of the electoral process.

Section 2 provides insights for effective EDP programming, documenting lessons learned on: (1) program content; (2) program implementation and management; and (3) the interlinkages between EDP programming and the broader context, including electoral management and the rule of law. These 'building blocks' for robust EDP programming can be tailored and applied to different national contexts where the judiciary is responsible for election disputes.

Section 3 synthesizes main findings and signals areas for further research.

## 1. INTRODUCTION

### Mitigating risk of electoral violence and enhancing legitimacy: the relevance of timely, fair and effective resolution of electoral disputes

As a competition for political power, elections invite disputes at all stages of the electoral cycle (pre-election, election day, and post-election). These disputes may be vexatious, intended to derail the democratic process, or may reflect a genuine conviction that the rules of the electoral process were not followed.

While disputes arise in all democracies, they are particularly common in emerging democracies. This can be attributed to a host of factors: low levels of commitment to electoral integrity; high propensity for violence; lack of independence of electoral institutions; and arguably, the higher stakes of elections in such contexts.

In extreme form, disillusionment with the quality of an election can lead to mass protests and violent riots. Providing a peaceful means for the resolution of electoral grievances, EDR systems help mitigate the risk that disgruntled candidates and voters will resort to violence.

Even when electoral violence is not a pronounced risk, the consequences of a poorly managed election are considerable: lower voter participation; reduction of public trust in political institutions; and public resentment, especially among youth. Fair and impartial adjudication of electoral disputes helps to confer credibility on electoral processes and results, thereby improving public confidence in democratic institutions.

Typically, national constitutions and electoral laws have identified courts as the appropriate institution to deal with election disputes, often within the framework of the existing judiciary. Unfortunately, courts in emerging democracies are rarely in a position to assume such a

function. With limited financial and human capacities, electoral cases are liable to cause immense strain.

### Judiciaries face challenges in handling electoral disputes

Four challenges confronting judiciaries in emerging democracies in performing their EDR role can be identified:

1. *Judicial independence*: Courts enjoy limited legal and functional judicial independence, deterring opposition candidates from using the courts to adjudicate political matters.
2. *EDR frameworks*: Laws and regulations for electoral complaints are weak and incoherent, preventing the expeditious and fair handling of electoral disputes.
3. *Public confidence*: Widespread lack of public understanding and confidence in the judiciary minimizes its viability as a forum to fairly adjudicate important political questions.
4. *Judicial preparations*: With many competing priorities, judiciaries are not prepared for hearing electoral disputes, which are filed and registered in intense bursts, with complex questions of electoral law needed to be disposed of in quick succession, and in the public spotlight because of the importance attached to the outcome.

Fostering positive change in these four spheres is not an easy task. An overriding message from past programming is that concerted and early planning to address these challenges is instrumental to ensure the EDR system is ready to handle electoral disputes when and should they arise at election time. Early planning also has the added advantage of deepening the organizational capacities of the judiciary, with positive flow-on effects for management of matters that come before the judiciary.

*Synthesis of lessons learned for electoral dispute preparation programming*

<b>Building Block 1: Intervention logic</b>	<b>Lesson 1:</b> EDP programs require a measure of judicial independence to achieve their intended impact and should aim to strengthen judicial independence	<b>Lesson 2.1:</b> The judiciary should be involved in strengthening the EDR legal framework	
	<b>Lesson 2:</b> EDP programming should involve an advance review of the legislative framework for EDR, with the aim to create a consistent, transparent and comprehensive framework ahead of elections		<b>Lesson 3.1:</b> Establishing a committee within the judiciary with a mandate to prepare for electoral disputes can contribute to leadership, judicial ownership and coordination of EDR preparations
	<b>Lesson 3:</b> EDP programming should be owned and led by the judiciary with the judiciary assuming a coordinating role within the EDR sector		<b>Lesson 3.2:</b> Judicial preparations should include a comprehensive and tailored skills building program targeting judges and judicial support staff
	<b>Lesson 4:</b> EDP programming should involve preparing the public for electoral disputes		<b>Lesson 3.3:</b> Judicial preparations should include the development of easy-to-use informational resources <b>Lesson 3.4:</b> Judicial preparations should include the development of a resource mobilization plan
<b>Building Block 2: Programmatic approach</b>	<b>Lesson 1:</b> EDP programming should be designed to enhance ownership and leadership of reforms by the judiciary with flexibility and room for adoption of solutions to problems as they emerge	<b>Lesson 4.1:</b> Public outreach should empower the public to use the EDR system <b>Lesson 4.2:</b> Public outreach should include information on preparation activities, and should be led by senior representatives of the judiciary <b>Lesson 4.3:</b> Public outreach should target groups with specific responsibilities in the hearing of electoral disputes <b>Lesson 4.4:</b> Public outreach should continue in the post-election phase	
	<b>Lesson 2:</b> EDP programming should take a broad approach, engaging non-legal partners and strengthening skills in different thematic areas		
	<b>Lesson 3:</b> EDP programming impact is strengthened when capacity development initiatives are interlinked and target all four levels of capacity development		
<b>Building Block 3: Embedding in the wider context</b>	<b>Lesson 1:</b> A thorough assessment of the socio-political context should be undertaken before engaging in EDP programming, which should take into account variables likely to affect electoral violence		
	<b>Lesson 2:</b> EDP program design should take into account the incentives for justice actors to act independently, as well as the incentives of the executive to respect judicial independence		
	<b>Lesson 3:</b> EDP program design should take into account levels of investment in judicial independence within the judiciary, particularly in the apex court		
	<b>Lesson 4:</b> EDP programs should be taken in parallel with measures to strengthen the legislative framework for elections, electoral administration, and electoral management bodies more generally		

## 2. ELECTORAL DISPUTE RESOLUTION SYSTEMS ARE IMPORTANT AND REQUIRE ELECTORAL DISPUTE PREPARATION PROGRAMMING

### BUILDING BLOCK 1: ELECTORAL DISPUTE PREPARATION

*Lesson 1: EDP programs require a measure of judicial independence to achieve their intended impact and should aim to strengthen judicial independence*

Most dispute resolution experts emphasize that the independence of any adjudication body and its enforcement powers is the most crucial variant in determining whether the EDR system will offer a real alternative to the use of force by disgruntled candidates or voters.

The IDLO Kenya program underscores the importance of legal reforms solidifying judicial independence prior to EDP programming. When shortcomings in the Kenyan judiciary were diagnosed as having contributed to the 2007 post-election violence, attention was successfully directed to ensuring that the 2010 Constitution provided for the judiciary's legal independence. The judiciary subsequently instituted a widespread reform program. This included establishment of a Judges and Magistrates Vetting Board in 2011, with a mandate to assess the entire judiciary and remove judges whose qualifications and integrity were in question. These legal measures, alongside the departure of the then Chief Justice, signaled to the public that the Kenyan courts were different from the past, and would be independent in their handling of electoral disputes – in effect building the foundations for an effective EDR reform program. The impact of these efforts is well established, with public surveys showing a doubling in the levels of public satisfaction with the judiciary in Kenya between December 2008 and January 2013.

*Lesson 2: EDP programming should involve an advance review of the legislative framework for EDR, with the aim to create a consistent, transparent and comprehensive framework ahead of elections*

A common problem facing judiciaries in their adjudication of electoral petitions is the legal framework for the resolution of electoral disputes. Four pervasive deficiencies can be identified:

- (i) Complex procedural rules, often applied at the expense of substantive justice;
- (ii) Absence of time limitations for the filing and disposal of cases;
- (iii) Inefficient or undefined jurisdictional mandates; and

- (iv) Lack of coherence between different pieces of electoral legislation, unclear rules of procedure, and weak enforcement provisions.

The Kenya EDP program and the literature, notably the EDR Guidelines from the International Foundation for Electoral Systems, emphasize the inclusion of the following features in the EDR legal framework, with any legislative reforms to be undertaken well in advance of election day:

- Transparent rules and procedures for filing and responding to complaints;
- Strict timelines for lodging and finalization of complaints and provide only a limited right to appeal;
- Appropriate sanctions for violations of electoral laws, including criminal liability, where appropriate;
- A requirement of transparent decision-making (i.e. that decisions are publicized); and
- Specific rules for the selection of the election bench.

*Lesson 2.1: The judiciary should be involved in strengthening the EDR legal framework*

In the lead-up to the 2013 Kenyan elections, the JWCEP sought to address weaknesses in the Kenyan EDR legal and administrative framework by proposing amendments to the Electoral Act 2011, drafting rules for electoral petition hearings, and advising the Chief Justice on administrative arrangements for election petitions. Many of these changes, especially those focused on improving judicial case management by setting case timelines, have been credited for the judiciary's efficient handling of electoral petitions in the aftermath of the 2013 elections. The involvement of the Kenyan judiciary in EDR reforms resulted in three positive consequences for the EDR system:

- (i) The appropriate committees were willing to adopt the proposed legal standards, due to the credibility and impartiality of the JWCEP drafters;
- (ii) The reforms were relevant and feasible, because they took into account the JWCEP judicial officers' own experience in handling electoral petitions; and
- (iii) There was limited resistance to the reforms among judicial officers, because such officers had a sense of ownership over the mandated changes.

The participatory manner in which the legal or procedural proposals were finalized prior to submission, their high quality, and their relatively uncontroversial

nature also contributed to their adoption and implementation by relevant institutions.

*Lesson 3: EDP programming should be owned and led by the judiciary with the judiciary assuming a coordinating role within the EDR sector*

The internal and external changes required to prepare the judiciary for electoral disputes relate to numerous and diverse aspects of judicial administration: large numbers of judicial actors need to be trained; appropriate (accessible, secure and resourced) courtrooms need to be located; judicial officers need to work with lawyers to ensure cases are heard and disposed efficiently; a system for the correct handling and storage of evidence needs to be established; the public needs to have confidence in the judiciary's preparedness; the public needs to know how to file cases; and the public needs to know how cases have been decided.

For such measures to be effective, court officials and judges must commit to the reforms proposed. This commitment is facilitated when changes are owned and led by the judiciary, with program officers working in close cooperation with judicial staff who are well placed to encourage their peers within the system to embrace reforms. Judicial ownership of reforms is important not only to gather necessary political will - it is also essential to increase the relevancy and quality of programming.

However, even when the judiciary commits to the changes necessary for efficient and fair disposal of electoral disputes, it cannot achieve such objectives without engaging with other actors in the EDR system. Lawyers, political parties, prosecutors, members of the electoral management body, lawmakers, civil society and the media are all critical to ensuring that judicial preparations result in achieving goals of violence prevention and ensuring legitimate election results.

Given the centrality of the judicial role within the broader EDR system, the judiciary is in a good position to perform a coordinating role for the entire electoral dispute sector, or at least a coordinating role with regard to the spectrum of actors involved in post-election disputes.

*Lesson 3.1: Establishing a committee within the judiciary with a mandate to prepare for electoral disputes can contribute to the leadership, judicial ownership and coordination of EDR preparations*

In the lead-up to the 2013 general elections, the Kenyan Chief Justice, Dr. Willy Mutunga, established the JWCEP. The Committee had a comprehensive mandate designed to address aspects of the preparation process:

- To advise the judiciary on administrative arrangements and measures for the efficient disposal of election-related disputes;
- To develop and implement a judiciary training program for the effective management of election disputes;
- To design a system for monitoring and evaluating the management and administration of election-related disputes in court;
- To liaise and coordinate with stakeholders to ensure efficient, effective and timely resolution of election-related disputes and offences; and
- To advise the judiciary on civic education matters in relevant areas.

The structure of the JWCEP promoted ownership of reforms, with exclusive representation comprising each level of the judicial hierarchy. The establishment of the JWCEP also signaled to internal and external stakeholders the importance the judiciary attached to electoral dispute preparations. Good practice further suggests that judicial electoral preparations for the judiciary should be permanently institutionalized, which has since occurred in Kenya with the establishment of the JCE.

*Lesson 3.2: Judicial preparations should include a comprehensive and tailored skills building program targeting judges and judicial support staff*

When electoral decisions are based on weak legal foundations, petitioners and the general public may come to believe that the EDR system is subject to political influence. For this reason, legally sound decisions are particularly important in electoral petitions. Contrary to common perception, however, judges will not be able to adjudicate electoral petitions effectively simply by virtue of their position as legal generalists who can quickly understand complex rules. New skills are required to fulfill this function. Several important lessons can be gleaned from the literature and the IDLO Kenya program on the content of EDR capacity development programs, and how such capacity development programming should be structured:

- Skills building should include, but also go beyond training on electoral law;
- Initiate skill-building initiatives early and strategically, with a focus on sustainability;
- Skills building should target judges and judicial support staff; and
- Skill-building measures should be sequenced and timed with legal reforms.

*Lesson 3.3: Judicial preparations should include the development of easy-to-use informational resources*

Judiciaries are more liable to handle electoral disputes fairly and speedily when they have easily accessible

guidance on the procedural and substantive aspects of electoral law. Preparing the judiciary for electoral disputes should include the provision of tangible information on electoral laws, procedural requirements and electoral petition jurisprudence.

Useful lessons can be drawn from the Kenya experience where the judges, judicial officers and court staff were provided with an EDR handbook; a checklist for election petitions (supporting the accurate filing of the requisite documents by petitioners and their safe keep); and online access to decisions of the electoral bench and regular access to a helpdesk where staff were available to answer questions or address urgent concerns (the JWCEP Secretariat). Magistrates were also provided with access to legal researchers in the absence of in-house assistance such as law clerks, who supported higher court judges.

*Lesson 3.4: Judicial preparations should include the development of a resource mobilization plan*

Preparing the judiciary for electoral disputes comes at a financial cost that the judiciary is not always able or willing to absorb from its existing budget allocation.

In Kenya, despite the JWCEP's budgetary estimates being approved as part of the judiciary's budget, funds were not forthcoming. Concerted financial and human resource planning and flexible attitudes ensured that budgetary resource gaps were addressed by seconding staff from other parts of the judiciary, donor support, and the doubling of functions by members of the JWCEP and the Secretariat staff.

*Lesson 4: EDP programming should involve preparing the public for electoral disputes*

In many emerging democracies, lack of confidence has led the public to shun the judiciary as a viable forum to adjudicate questions of national importance. An effective EDP program requires significant public outreach to ensure the public understands the system, feels empowered to use it, and trusts it will deliver swift and independent justice. Public outreach should continue into the post-election petition phase, where confidence in the legitimacy of electoral decisions is likely to dwindle if 'their' preferred candidate does not succeed in court.

*Lesson 4.1: Public outreach should empower the public to use the EDR system*

An EDR system has little value if it remains inaccessible or unknown to the public. Measures should be adopted to ensure that electoral justice is not restricted to elites or well-resourced petitioners. This may require a specific outreach strategy to reach vulnerable populations – such as remote voters and unemployed urban youth.

In Kenya, the JWCEP took steps to inform the public about how to file a case through the publication and dissemination of a pamphlet that answered frequently asked questions (FAQs) on EDR, a documentary on elections prepared by the public relations department of the judiciary, the circulation of the new election petition rules in daily national newspapers, and electoral dispute support at a helpdesk.

*Lesson 4.2: Public outreach should include information on preparation activities, and should be led by senior representatives of the judiciary*

It is important to reassure the public that the judiciary is prepared for electoral disputes. This is particularly true in contexts where the judiciary has failed to perform its EDR role adequately in the past. Such outreach should also include information on the principles behind the investment of resources in judicial preparations (i.e. violence prevention and ensuring legitimate election results) so as to confront perceptions that the judiciary is only concerned with justice for 'political elites'.

The development of a media engagement strategy by the JWCEP in Kenya in 2013 permitted strategic and ongoing dissemination to the public on the JWCEP's activities through infomercials, editorial supplements, talk shows and the publication of a 'pre-election report' on judicial preparations. The JWCEP's efforts were reinforced by consistent public outreach undertaken by the Chief Justice, which added to the credibility of the messaging and the sense that the entire judiciary was working together to prepare for such disputes.

Where possible, initiatives to improve public awareness on judicial preparedness should be linked to the preparation activities of other dispute resolution institutions to maximize resources and reach. This should only be undertaken in circumstances where such synchronization would not impinge on perceptions of the judiciary's independence.

*Lesson 4.3: Public outreach should target groups with specific responsibilities in the hearing of electoral disputes*

Special interest groups require different information from that provided to the general public. As noted by the International Foundation for Electoral Systems, lawyers need to be provided with information about the whole process of a claim: the parties who have legal standing; the required burden of proof; appeal possibilities; and sanctions and penalties. Political parties, candidates and electoral management bodies need to know how to file a claim, which entity has jurisdiction to handle such a claim, and what evidentiary elements they should collect to support their claim. The media needs to understand decisions so they can report responsibly, while civil society organizations, as



watchdogs of the election and constitutional rights, should be in a position to accurately critique any failings in the EDR process or file complaints with the court about the election itself. In Kenya, targeted outreach addressed each of these special interest groups.

*Lesson 4.4: Public outreach should continue in the post-election phase*

A common challenge in contexts where political parties are divided on ethnic or religious lines is the perception among large sections of the public that electoral petition decisions, especially those concerning superior posts (such as the presidency), are made on the basis of non-legal considerations. This perception is particularly acute in circumstances where, despite evidence of irregularities in the electoral process, the court rules that such irregularities are insufficient to order a re-election. In other cases, lack of information about case progress fuels perceptions of political bias.

Efforts to counter unhelpful public speculation were undertaken in Kenya in 2013 through the use of a robust case management system. Legal researchers, based in the JWCEP Secretariat, would collect on a daily basis the results of the election courts and upload them onto a website created by the JWCEP, in collaboration with the National Council for Law Reporting. The website enabled petitioners, citizens and the media to obtain regular updates on election petitions. The JWCEP also sent emails with updates of election petition cases to the Kenya Law Reports, and members of the judiciary and stakeholders.

Nonetheless, the intense public backlash against the Kenyan judiciary following the 2013 presidential petition decision, alongside the divided public response to nationally important electoral decisions in other contexts, provides a lesson on the immense difficulties of convincing a cynical public that ‘conservative’ electoral decisions are based on legal reasoning, rather than direct or indirect political pressure. This brings to the fore one of the key challenges linked to the global trend for the judiciary to resolve high-level electoral matters, namely, ensuring that the ‘judicialization’ of politics does not lead to perceptions of the ‘politicization’ of the judiciary. Key factors that are critical in striking this delicate balance are the provision of transparent information concerning the judiciary’s role in resolving such disputes, and the professionalism and independence of the judiciary.

## BUILDING BLOCK 2: PROGRAMMATIC APPROACH

*Lesson 1: EDP programming should be designed to enhance ownership and leadership of reforms by the judiciary with flexibility and room for adoption of solutions to problems as they emerge*

Part of the success of IDLO’s support to the Kenyan judiciary in 2013 can be attributed to the design of the program itself, which, from the outset, focused on enhancing ownership and leadership by the judiciary of the change process. IDLO financed the program by revising its existing multiyear programming with the Danish International Development Agency (DANIDA) to include a broad component aimed at strengthening the office of the Chief Justice. Subsequent funding from the United States Agency for International Development (USAID) was granted on the basis of a narrative and budget that largely reflected the outcomes set out in the JWCEP’s mandate. IDLO explicitly highlighted the importance of the judiciary leading the change process in these funding documents, signaling that its approach would be primarily to support the JWCEP in executing its responsibilities through the provision of specialized expertise.

In the implementation phase, this flexible funding structure meant that the JWCEP could lead the change process, and draw upon IDLO to provide support for priorities as they became apparent, ensuring the program was more resilient in the face of unexpected mishaps. This adaptable approach also made it possible to test new models of capacity building.

*Lesson 2: EDP programming should take a broad approach, engaging non-legal partners and strengthening skills in different thematic areas*

Preparing for electoral disputes is not simply a matter of reforming electoral dispute laws and training the bench on the content of such laws. Effective dispute resolution systems require the cooperation of a host of different actors, from IT staff and registrars who handle evidence, to electoral officials, police, lawyers and political parties. An effective system also requires that the relevant actors are equipped with a range of skills – communication, budget drafting, strategic planning and management, and teamwork, among others.

By adopting a problem-solving approach to the program in Kenya, IDLO supported a host of interventions aimed at enhancing key actors’ skills in priority areas and incorporated measures to address the skills and mindsets of various actors who could impede the smooth hearing of electoral disputes. This involved looking beyond judicial decision-makers, and working with non-legal actors, such as court IT staff, staff in the

Court of Appeal, the public relations department within the judiciary, and the public.

Sustainable change in the electoral dispute resolution field requires rule of law organizations to move away from a strictly 'legal' perspective. This means appreciating that gaps in knowledge and skills are not always related to technical areas or 'hard' law, but may extend to non-technical aspects and the attitudes or behavior of non-legal actors. Programs should always begin with an honest exchange of ideas on why electoral petitions are not having their desired impact on higher level goals, and what steps can be taken to effectively address weaknesses in the system.

*Lesson 3: EDP programming impact is strengthened when capacity development initiatives are interlinked and target all four levels of capacity development*

Another defining feature of the IDLO program approach in Kenya was engagement at all four levels of capacity development – individual, organizational, sectoral and enabling environment:

- *Individual:* Activities aimed at ensuring actors in the EDR system have the skills, experience and knowledge to perform the tasks for which they are responsible. Activities focusing on human capacity and leadership.
- *Organizational:* Activities aimed at improving the culture and systems of formal and informal organizations responsible for EDR.
- *Sectoral:* Activities focused on strengthening relationships and cohesion within the entire electoral dispute or electoral chain.
- *Enabling environment (or sometimes referred to as institutional capacity development):* Activities aimed at supporting, reforming or strengthening the 'rules of the [EDR] game'. Such rules can be either tangible and to a certain extent measurable (procedures, processes, mandates, rules), or intangible (symbols, social norms and values, traditions, ideologies, etc.). The focus is on the culture, customs and practices that enable or block accountability and transparency.

## BUILDING BLOCK 3: THE WIDER CONTEXT

*Lesson 1: A thorough assessment of the socio-political context should be undertaken before engaging in EDP programming. This assessment should take into account variables likely to affect electoral violence*

The literature highlights the following external variables liable to influence electoral violence:

- (i) The experience of the country with democratic transition;
- (ii) The extent to which the private employment sector has developed;
- (iii) Levels of correlation between political parties and ethnicity or religion;
- (iv) The extent to which power is diffused across the branches of government and regions;
- (v) The electoral system itself and levels of independence of the electoral management body;
- (vi) Levels of social inclusivity; and
- (vii) The extent to which democracy has evolved, especially with regards to free opposition parties and an independent media.

An analysis of Kenya's socio-political environment during the violence-filled 1992, 1997 and 2007 elections underscores the relevance of these variables. The Kenya experience points to two further factors likely to influence the occurrence of electoral violence. First, the public mood with regards to the election and second, the political independence of the security forces, their capacity to control electoral violence, and the extent to which early warning and violence prevention mechanisms are in place.

*Lesson 2: EDP program design should take into account the incentives for justice actors to act independently, as well as the incentives for the executive to respect judicial independence*

Studies on emerging democracies reveal that the passage of legal reforms supporting judicial independence will not necessarily ensure judicial assertiveness and independence in highly sensitive electoral disputes. Two key variables that should be considered in the design phase include:

- (i) Whether the incumbent government considers that respecting judicial authority will bring them a benefit (or undermining judicial authority will carry a cost) exceeding the 'burden' of judicial accountability; and
- (ii) Levels of support available to the judiciary to assert its independence and the relative strength of this support.

*Lesson 3: EDP program design should take into account levels of investment in judicial independence within the judiciary, particularly in the apex court*

The Chief Justice's personality, and the degree of politicization of the Chief Justice's office, is central to the development of an independent judiciary. It is therefore important to take into account the background and attitude of the Chief Justice (or equivalent position) towards the judicial function, which will weigh heavily on whether EDP programming will achieve its intended impact.

Where the Chief Justice is unlikely to support reform, an assessment of whether there are any other influential leaders in the management structure supporting change is warranted. If not, a different institutional structure for electoral disputes should be considered.

*Lesson 4: EDP programs should be taken in parallel with measures to strengthen the legislative framework for elections, electoral administration, and electoral management bodies more generally*

The Kenya experience in 2013 and international literature indicate that at a minimum the following three types of programming should be taken in parallel with EDP programming to maximize the impact of activities

on the higher goals of violence-free elections and ensuring legitimate election results:

- (i) Programming that addresses the challenges facing the electoral management body in overseeing a fair, free and credible election;
- (ii) Programming that supports the formal and de facto independence of the electoral management body, and a stronger legal framework for elections; and Programming that targets the development of a democratic culture and non-violence norms among the public and political parties.

### 3. CONCLUSION AND WAY FORWARD

*Avoiding Violence and Enhancing Legitimacy: Judicial Preparedness for Handling Electoral Disputes in Kenya and Beyond* offers guidance on how to design and implement EDP programs, with a focus on working effectively with the judiciary. Several overall take-away messages may not surprise seasoned rule of law practitioners, yet rarely coalesce in one program:

- the importance of adopting a comprehensive approach to developing capacity at all relevant levels (enabling environment, sectoral, organizational and individual);
- the importance of taking a broad programming approach and supporting non-legal skills where needs demand;
- the need to carefully consider the entire EDR ‘chain’ and where gaps exist;
- the value of working with both legal and non-legal actors; and
- the improved impact of programming when it is driven and owned by the judiciary.

In the IDLO Kenya program, local ownership was nurtured through an innovative mechanism – a committee within the judiciary dedicated to the preparation of the judiciary for electoral disputes. IDLO practitioner’s provided pragmatic and flexible support to the JWCEP, which provided leadership as a ‘champion of change’.

Turning to the future, a scan of the EDR horizon reveals several key knowledge gaps, with the following questions deserving further exploration:

- How can an EDP program focused on the judiciary effectively engage with other actors in the EDR sector to support the improved adjudication of

complex and often highly controversial pre-election disputes?

- How can EDP programs strengthen the incentives for political parties to comply with electoral rules, so as to maximize the impact of EDP programming?
- What steps can be taken to improve the accessibility of EDR systems, especially to remote voters or vulnerable groups? How can access to justice strategies be applied to electoral disputes, and what is the role for low-cost alternative dispute resolution mechanisms?
- How can EDP programs tackle the seemingly inevitable dent in public confidence in the judiciary following intensely scrutinized presidential petition decisions, whose outcome will invariably displease at least one group of the population?
- How can the resources invested in EDR be maximized to improve other aspects of judicial service delivery, and avoid courts being seen as prioritizing the justice needs of political elites?
- What structures and mechanisms can be set up to ensure embedded long-term experts transfer knowledge to permanent judicial staff?

Turning to the implications for Kenya, many of these same questions surfaced during and in the aftermath of IDLO’s EDP program for the 2013 elections. While there is little doubt that this program heralded remarkable successes in preparing the judiciary for electoral disputes and strengthening the connections among the different actors in the electoral dispute sector, continued work is required to ensure those achievements are consolidated and entrenched for the 2017 general elections. This is especially critical as the memory of the horrific 2007 violence begins to fade from public consciousness.

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*The full version of this report can be found at [www.idlo.int](http://www.idlo.int).*

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### About IDLO

The International Development Law Organization (IDLO) enables governments and empowers people to reform laws and strengthen institutions to promote peace, justice, sustainable development and economic opportunity.