

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



© Taylor Martyn

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.

TABLE OF CONTENTS

List of Acronyms	4
List of Tables and Figures	5
1. INTRODUCTION	6
2. ELECTORAL DISPUTE RESOLUTION SYSTEMS ARE IMPORTANT AND REQUIRE ELECTORAL DISPUTE PREPARATION PROGRAMMING	10
JUDICIARIES FACE CHALLENGES IN HANDLING ELECTORAL DISPUTES	12
3. BUILDING BLOCKS OF A THEORY OF CHANGE FOR PROGRAMMING ON PREPARING THE JUDICIARY FOR ELECTORAL DISPUTES	13
BUILDING BLOCK 1: ELECTORAL DISPUTE PREPARATION INTERVENTION LOGIC	14
BUILDING BLOCK 2: ELECTORAL DISPUTE PREPARATION PROGRAMMATIC APPROACH	28
BUILDING BLOCK 3: EMBEDDING ELECTORAL DISPUTE PREPARATION IN THE WIDER CONTEXT	33
4. CONCLUSION AND WAY FORWARD	39
Acknowledgments	43

LIST OF ACRONYMS

CIPEV	Commission of Inquiry into Post-Election Violence
CSO	Civil society organization
DANIDA	Danish International Development Agency
EDP	Electoral dispute preparation
EDR	Electoral dispute resolution
EMB	Electoral management body
FAQ	Frequently asked questions
IAC	Inter-Agency Committee
ICT	Information and communication technology
IDLO	International Development Law Organization
IEBC	Independent Electoral and Boundaries Commission
IFES	International Foundation for Electoral Systems
IT	Information technology
JCE	Judiciary Committee on Elections
JTI	Judiciary Training Institute
JWCEP	Judiciary Working Committee on Elections Preparations
LLB	Lessons Learned Brief
NGO	Non-governmental organization
PPDT	Political Parties Disputes Tribunal
UNDP	United Nations Development Programme
USAID	United States Agency for International Development

LIST OF TABLES AND FIGURES

Table 1: Synthesis of lessons learned for electoral dispute preparation programming	9
Table 2: Categories of electoral disputes	10
Table 3: Levels of capacity development	30
Figure 1: Goal and outcome level programming intervention logic	14
Figure 2: Outcome 2 and intermediate outcome 2.1 programming intervention logic	16
Figure 3: Outcome 3 and intermediate outcomes 3.1 to 3.4 programming intervention logic	20
Figure 4: Outcome 4 and intermediate outcomes 4.1 to 4.4 programming intervention logic	25
Figure 5: Individual capacity development in the IDLO electoral dispute preparation program in Kenya	31

1. INTRODUCTION

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

Electoral dispute resolution (EDR) systems are an integral part of the architecture of democracy. Providing a peaceful means for the resolution of electoral grievances, such systems help mitigate the risk that disgruntled candidates and voters will resort to violence. EDR systems also provide an independent assessment of the compliance of the election with the relevant constitutional standards and related electoral laws. More generally, when electoral violence is not a pronounced risk, dispute resolution mechanisms can confer credibility on electoral processes and their results, thus helping to improve 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. Yet courts, especially courts in emerging democracies, are rarely in a position to assume this function. The intense bursts in which election petitions are filed, the short time limits in which election matters must be dispensed, their political sensitivity, and the public interest in their outcomes,

collectively mean that electoral cases cannot be treated the same as other matters that come before the judiciary. One of the ongoing challenges facing emerging democracies is ensuring the judiciary is adequately prepared to handle disputes challenging election results in a timely, fair and effective manner.

Pioneering support: the IDLO Kenyan electoral dispute preparation experience

The 2013 Kenyan elections were relatively violence free¹ and transferred power peacefully,² an impressive outcome given the presence of several incendiary factors that had triggered post-election violence in 2007.³ Further, the 2013 Kenyan general elections were complex, with voters electing candidates for six different positions, four of which had been developed under the 2010 Constitution.

One of the many factors credited for the calm of the 2013 elections was the Kenyan judiciary's management of election petitions. Overall, 188 petitions were filed challenging results of the election process.⁴ All disputes handled by the courts at first instance were finalized within the statutorily mandated six-month period.⁵ In the most renowned case, the losing presidential candidate, Mr. Odinga, petitioned Kenya's newly

¹ Institute of Security Studies, "The 2013 General Elections in Kenya", Policy Brief 74, (February 2015) p. 5, available from www.issafrica.org/uploads/PolBrief74.pdf. This is not to say there was no violence at all. Based on its post-election survey, the United States Institute of Peace (USIP) notes that there were in fact some manifestations of electoral violence – including attempted or threatened murder, physical harm, voter bribery, intimidation and psychological abuse and vandalism throughout the pre-election period. Claire Elder and others, *Elections and Violent Conflict in Kenya: Making Prevention Stick*, (United States Institute of Peace, 2014) p. 7. The USIP study cautions against the description of the election as 'successful' due to the absence of violence. This study describes the 2013 electoral experience as one of 'tense calm' or 'unstable peace' and states that narratives of 'fear and memory' were the dominant explanations for why the country averted mass violence, with strong recollections of the 2007-2008 post-election violence reducing the appeal of violence and encouraging restraint. The Federation of Women Lawyers (FIDA) and ELOG, the Kenyan civil society election observation body, also respectively reported physical harassment of women voters and candidates. See FIDA Kenya, National Democratic Institute, USAID, *Key Gains and Challenges: A Gender Audit of Kenya's 2013 Election Process* (2013) and ELOG, *Final Report on 2013 elections in Kenya* (2013) p. 4, available from www.gndem.org/ELOG_Report_2013 (hereinafter 'ELOG Report').

² John Harbeson, "Kenya's 2013 Elections", *African Studies Review* 57(1) (April 2014), p. 201.

³ These include unresolved land grievances; ethnic tensions; perceptions of attempts to centralize power in the Presidency in the period before the first county governments were in place; political parties primarily created on ethnic lines and personalities; a large, young, underemployed and poor population; and a highly president-focused pre-election campaign period. Troubling bursts of violence occurred during the 2012-13 campaign period, including

confrontations between supporters of rival candidates during the party primaries, local skirmishes between and within various communities, and threats and sporadic attacks linked to the al-Shabaab movement based in Somalia and the Mombasa Republican Council. Irregularities in the actual election and a delay in the announcement of results also echoed the 2007 experience. See James Long and others, "Choosing Peace over Democracy", *Journal of Democracy* 24(3) (July 2013), p. 141. Further, notwithstanding important reforms to Kenya's electoral management body (EMB), the Independent Elections and Boundary Commission (IEBC), the 2013 elections were riddled with administrative errors similar to those that arose in 2007. For example, while some voting results came on the evening of election day, updates slowed down over the subsequent days, ensuring that it was only on 9 March that the result was known, five days after votes had been cast. This was similar to the delays faced in 2007 and fuelled strong suspicions of vote manipulation. In addition, the newly introduced biometric voting system failed on voting day, requiring tally booths to revert to manual voting, leading 30% of respondents in a post-election survey to state that they believed the ballots had not been counted correctly. This was reflected in a subsequent study, wherein 30% of voters in a poll indicated that they did not think the votes had been counted fairly. A majority (57%) thought the votes had been counted fairly, while 13% said they did not know. Institute of Security Studies, "The 2013 General Elections in Kenya", available from www.issafrica.org/uploads/PolBrief74.pdf.

⁴ Tom Mogeni and Dr Monica Kerretts-Makau, *Evaluation of the Performance of the Judiciary and the JWCEP in Managing the Electoral Dispute Resolution Process* (JWCEP, May 2014) (hereinafter 'JWCEP Evaluation'), pp. 38-39. The figure of 188 excludes the nine party list petitions and one election petition filed in January 2015 at Machakos following the December 2013 by-election.

⁵ JWCEP Evaluation, pp. 38-39. Several matters, however, were appealed through the system beyond this timeframe.

established Supreme Court to annul and re-administer the election due to irregularities. The filing in the Supreme Court by the presidential contender, alongside his and the public's acquiescence of the Court's decision,⁶ which was also determined within the fourteen-day period set out in the 2010 Constitution, was a marked improvement from the 2007 elections, where the judiciary was perceived as too politicized to objectively rule on political disputes.⁷

Further, 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,⁸ especially in light of past tendencies to rely on technicalities to dismiss electoral petitions.⁹ These successes led the Carter Center to recommend that Kenya's EDR experience should be "reviewed to generate a written record of best practice in electoral justice."¹⁰

From mid-2012 onwards, IDLO implemented a program to help establish and provide support to the Judiciary Working Committee on Elections Preparations (JWCEP). The JWCEP was set up in May 2012 and tasked to prepare the judiciary for handling disputes anticipated to arise out of the 2013 elections. 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 on a variety of 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 successor judicial organization, the permanent Judiciary Committee on Elections (JCE), in preparation for elections in 2017.¹¹

Practitioner insights: programming for electoral dispute preparation

While electoral dispute preparation (EDP) programming has grown in recent years, there is limited practical information on how rule of law practitioners can assist the judiciary in preparing for their EDR role. Reasons for this include the absence of public data on EDR, language barriers in capturing information, and the diversity of electoral laws and EDR systems.¹²

Avoiding Violence and Enhancing Legitimacy: Judicial Preparedness for Handling Electoral Disputes in Kenya and Beyond addresses this gap pragmatically, providing an overview of lessons from past efforts to prepare judiciaries for their EDR function and presenting building blocks of a theory of change for EDP programming. The approach reflects international literature on EDR systems, triangulated with data from IDLO's pioneering EDP support to the Kenyan judiciary in the lead-up to the 2013 general elections and the EDR process after the elections.¹³ The building blocks for programs presented in this Lessons Learned Brief (LLB) relate to three aspects of EDP strengthening: (1) the intervention logic followed; (2) the approach to program implementation and management; and (3) the interlinkages between EDP programming and broader context dynamics, both in the fields of electoral management and rule of law and justice. These building blocks for theories of change on EDP programming can

⁶ There were few serious incidents before and after the announcement of the Supreme Court's decision on the election results. Carter Center, *Observing Kenya's March 2013 National Elections: Final Report* (16 October 2013), p. 15.

⁷ Mugambi Laibuta, "Electoral Dispute Resolution: Kenya's Jump Start from Street Justice to Judicial Institutions", *ConstitutionNet* (11 June 2013).

⁸ JWCEP Evaluation, p. 45.

⁹ Dr. Collins Odote and Linda Musumba, "Introduction", in *Balancing the Scales of Electoral Justice: 2013 Kenyan Election Disputes Resolution and Emerging Jurisprudence*, (IDLO/JTI, 2016), p. 152.

¹⁰ Carter Center, *Observing Kenya's March 2013 National Elections*.

¹¹ Subsequent program activities include efforts to address shortcomings in the first phase of program, with an eye to supporting EDR institutions in the lead-up to the 2017 elections. One notable achievement in the second phase of the program has been the development, in partnership with the Kenyan Judicial Training Institute (JTI), of the book: *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence* (2016).

¹² Violine Autheman and others, "The Resolution of Disputes Related to Election Results: A Snapshot of Court Practice in Selected Countries Around the World", IFES Rule of Law Conference Series (February 2004), pp. 1-2. Added to these difficulties is the cross-cutting character of EDR, which has relevance to the thematic areas of electoral management, conflict mitigation, democratic transitions, institutional strengthening, judicial independence, constitutionalism, human rights and criminal law. The multidisciplinary nature of the subject can prove overwhelming to a practitioner who may have no practical experience working in these areas of development, or who is used to engaging only with justice actors and institutions. Moreover, these overlapping areas of work enlarge the spectra of potential actors that need to be engaged with to ensure programming success, further complicating the process of developing a coherent theory of change.

¹³ The Kenya data included information collected via a desk review and stakeholder interviews undertaken in Nairobi, Kenya (October–December 2015). Drawing from the data collected, this LLB presents lessons learned from the 2012–2014 phase of the IDLO Kenya program and international white and grey literature.

be applied to different national contexts where the judiciary is responsible for election disputes.

The LLB is structured as follows: Section Two provides an overview of the relevance of EDP programming, examining the purpose of EDR systems, the role of the judiciary within the framework of the EDR system, and how judiciaries can assist in responding to two contemporary difficulties facing governments in emerging democracies: electoral violence and ensuring the legitimacy of the electoral process. The section explores the range of problems courts experience in assuming their electoral oversight role: limited legal and functional judicial independence; incoherent and weak legal frameworks for electoral complaints; widespread

lack of public understanding and confidence in the judiciary; and lack of judicial preparations.

Section Three provides the building blocks of a theory of change on EDP programming – the ‘what’ and the ‘how’ of effective EDP programming. This section hones in on the lessons learned in each of the three categories of building blocks. A synthesis of these lessons is provided in Table 1.

Finally, Section Four summarizes main messages, signals areas for further research and highlights priorities for the next generation EDP programming in Kenya.

Table 1: Synthesis of lessons learned for electoral dispute preparation programming

Building Block 1: Intervention logic	Lesson 1: EDP programs require a measure of judicial independence to achieve their intended impact and should aim to strengthen judicial independence	<p>Lesson 2.1: The judiciary should be involved in strengthening the EDR legal framework</p> <p>Lesson 3.1: 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</p> <p>Lesson 3.2: Judicial preparations should include a comprehensive and tailored skills building program targeting judges and judicial support staff</p> <p>Lesson 3.3: Judicial preparations should include the development of easy-to-use informational resources</p> <p>Lesson 3.4: Judicial preparations should include the development of a resource mobilization plan</p>
	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	
	Lesson 3: EDP programming should be owned and led by the judiciary with the judiciary assuming a coordinating role within the EDR sector	
	Lesson 4: EDP programming should involve preparing the public for electoral disputes	
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	<p>Lesson 4.1: Public outreach should empower the public to use the EDR system</p> <p>Lesson 4.2: Public outreach should include information on preparation activities, and should be led by senior representatives of the judiciary</p> <p>Lesson 4.3: Public outreach should target groups with specific responsibilities in the hearing of electoral disputes</p> <p>Lesson 4.4: Public outreach should continue in the post-election phase</p>
	Lesson 2: EDP programming should take a broad approach, engaging non-legal partners and strengthening skills in different thematic areas	
	Lesson 3: EDP programming impact is strengthened when capacity development initiatives are interlinked and target all four levels of capacity development	
Building Block 3: Embedding in the wider context	Lesson 1: 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	
	Lesson 2: 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	
	Lesson 3: EDP program design should take into account levels of investment in judicial independence within the judiciary, particularly in the apex court	
	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	

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

As a competition for political power, elections by their nature invite disputes. Such 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. The disputes liable to arise at different stages of the electoral cycle are illustrated in Table 2.¹⁴

Table 2: Categories of electoral disputes

Pre-election	Election day	Post-election
Delimitation of electoral districts/ boundaries	Verification of voters	Validity of election outcomes (civil or criminal)
Eligibility/registration of new political parties	Voter intimidation	Eligibility of the declared winner for office
Eligibility/qualification of applicants (civil/administrative)	Opening and closing of electoral booths	
Financing and oversight of the resources of political parties	Ballot audits	
Political party publicity	Transmission of results to central system	
Voter registration/maintenance of lists	Verification of ballots	
Voter verification/suspension and reinstatement	Decisions on polling officials and the placement of polling stations	
Absentee ballots/early voting		
Procurement of election-related material/ballot design by an electoral management body (EMB)		
Use of media		

While disputes arise in all democracies, as evidenced by the 2000 US Supreme Court case of *Bush v. Gore*,¹⁵ they are particularly common in emerging democracies. This can be attributed to a host of factors, including low

levels of commitment to electoral integrity, the high propensity for violence, the lack of independence of electoral institutions¹⁶ and arguably the higher stakes of elections in such contexts.¹⁷

¹⁴ Jesús Orozco-Henríquez and others, *Electoral Justice: The International IDEA Handbook* (International IDEA, 2010), pp. 148-169. As observed by International IDEA, electoral disputes may arise in relation to any number of activities undertaken during the electoral cycle, and can involve civil, criminal and administrative claims. For a list of the type of disputes liable to arise at the various stages, see Jesús Orozco-Henríquez and others, *Electoral Justice*.

¹⁵ *Bush v. Gore*, 531 US 98, 2000.

¹⁶ As noted by Hartlyn, McCoy and Mustillo, in several emerging democracies, the EMB is *de facto* controlled by the executive, even if this is not always reflected in the legal framework. This relationship can fuel suspicions about the integrity of the electoral process and the government's commitment to a fair election. The deep suspicion felt towards the ruling party and the EMB by aspiring politicians and their supporters may result in a heightened number of disputes or allegations arising from the electoral process. Jonathan Hartlyn, Jennifer McCoy and Thomas M Mustillo, "Electoral Governance Matters: Explaining the Quality of Elections in Contemporary Latin America", *Comparative Political Studies* 41(1) (January 2008), p. 90. In

many cases such suspicions are justified, with 'ample' recent studies confirming that in new democracies, electoral manipulation or misconduct is "the rule, rather than the exception." Thad Hall, Susan Hyde and Beth Wellman, *Election Quality and Public Confidence in Political Institutions: Revisiting the Orange Revolution* (forthcoming), p. 5, available from

<http://hyde.research.yale.edu/HallHydeWellman.pdf>.

¹⁷ The increased incentive for electoral manipulation in emerging democracies is explained by the economic value of political power in such contexts. Emerging democracies are often characterized by a weak private sector employment market coupled with a post-colonial legacy of centralized government. This has led to the prevalence of paternalism or nepotism in their political arrangements, with election to government viewed as an opportunity to give a party and its supporters, often from one ethnic, religious, tribal or other socio-economic group, hand-outs and preferential treatment for lucrative government positions, while denying such benefits to other groups. In some cases, winning an election becomes literally "a matter of survival in the eyes of the parties competing for power". K Höglund, "Electoral

Mitigating risk and improving confidence: addressing electoral violence and illegitimate electoral results

While ubiquitous in all elections, electoral disputes become problematic when they are badly managed. In extreme form, disillusionment with the quality of an election can lead to mass protests and violent riots. The European Union and the United Nations Development Programme (UNDP) have stated: "...the potential for [post-election] conflict to occur can be reduced through equal access to electoral justice by marginalized groups; impartiality of judicial authorities; timeliness of judicial processes; and adequate remedies, penalties and compensation."¹⁸ Similarly, the International Foundation for Electoral Systems (IFES) considered that strengthening Timor Leste's election complaints procedure in the lead-up to the 2007 election positively impacted the peacefulness of elections.¹⁹ Nonetheless, the lack of detailed studies on the relationship between functioning EDR systems and violence reduction suggests that the connection should not be overstated.²⁰

However, even in circumstances where electoral violence is not common, the consequences of a poorly managed election are considerable: lower voter participation;²¹ reduction of public trust in political institutions; and public resentment, especially among youth. Using past examples from the Philippines and Kenya, one commentator proposes that when grievances about the electoral process and its legitimacy are left unaddressed, the victorious candidates and political parties are unable to govern effectively.²²

Fair and impartial adjudication of electoral disputes also helps ensure the legitimacy of the electoral process and its outcomes. Pre-election dispute institutions, whether

the judiciary or another body, provide a mechanism to reprimand violations of electoral standards, such as voter intimidation or unfair campaign advertising. In doing so, they help to ensure that the votes collected accurately reflect the free will of the people on election day. In the post-election period, dispute resolution mechanisms can lend further reliability and legitimacy to election results, by marking the declared election results as fair. In cases where evidence indicates significant irregularities or fraud impacting the result, recourse can be a recount and even a re-election to ensure that the results correspond with the genuine will of the electorate.

Robust EDR systems have the potential to help emerging democracies address the twin challenges of electoral violence and illegitimate electoral results. Yet, for the most part, there has been a wide gap between the potential of EDR systems to support peaceful power transitions and ensure the legitimacy of election, and the empirical reality. While most emerging democracies have, at a minimum, some kind of legislatively mandated mechanism to resolve pre- and post-election disputes, there are few signs that these systems have had a positive impact on the higher-level objectives of violence mitigation and ensuring the legitimacy of the electoral result.

The prevalence of weak EDR systems in nascent democracies is particularly observable in relation to post-election disputes, where, even in the face of overwhelming evidence of electoral fraud or manipulation, courts have shown a tendency to dismiss electoral petitions on a technicality, or have taken years to arrive at a decision, ultimately rendering the decision moot.²³ For these reasons, programmatic efforts to

Violence in Conflict-Ridden Societies", *Terrorism and Political Violence*, 21 (2009), pp. 420-422. See also Robert Pastor, "The Role of Electoral Administrations in Democratic Transitions: Implications for Policy and Research", *Democratization* 6(4) (Winter 1999), p. 5. A change of power following an election not only eliminates important financial benefits, but may even result in exile or a prison sentence for former party leaders, especially if they have indulged in extensive corruption or committed atrocities while in government. Prosecutions may be undertaken by the new government, but also by regional or international courts, with many immunities available to sitting heads of state no longer applicable upon removal from power.

¹⁸ European Commission, United Nations Development Programme, "Elections, Violence and Conflict Prevention, Summary Report", Thematic Workshop (2011), p. 73, available from www.undp.org/content/dam/brussels/docs/Other/JTF%202011.06_Summary_report-Barcelona_workshop_Elections&conflict.pdf.

¹⁹ The IFES highlights that supporting the Timor Leste National Elections Commission to design and implement an effective complaints processing system was an important measure that prevented election grievances from being a catalyst for violence and disorder during the 2007 Timor Leste parliamentary and presidential elections. See Chad Vickery, ed., *Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections* (IFES, 2011) (hereinafter *GUARDE*), p. 4, citing Mary Lou Schramm and others, *Timor-Leste: Conflict Resolution and Electoral Assistance* (IFES, 2008).

²⁰ As will be discussed in section 3.4 (embedding electoral programming in the wider context), it is important to take into account the governing framework and the socio-political context before presuming that any structural incentives for electoral violence will be mitigated through the availability of a judicial forum to resolve disputes arising from the electoral process. The courts are unlikely to mitigate post-election violence in circumstances where violence is considered a legitimate means to express a particular segment of society's dissatisfaction with the declared outcome, regardless of whether the election was free, fair and credible. See Nordiska Afrikainstitutet, "Electoral Violence in Africa", Policy Notes (2012), p. 3.

²¹ Thad Hall, Susan Hyde and Beth Wellman, *Election Quality and Public Confidence in Political Institutions*, available from <http://hyde.research.yale.edu/HallHydeWellman.pdf>.

²² Dr Cheselden George V Carmona, "Enhancing the Capacity of Judges to Resolve Election Disputes: Preliminary Considerations", Paper presented to the 6th International Conference on the Training of the Judiciary of the International Organization for Judicial Training (IOJT), Washington D.C., 3-7 November 2013, available from www.iojt-dc2013.org/-/media/Microsites/Files/IOJT/11042013-Enhancing-Capacity-Judges-Resolve-Election-Disputes.ashx.

²³ For an analysis of these issues in Zimbabwe and Kenya prior to 2007, see Edwin Odhiambo Abuya, "Can African States Conduct Free and Fair Presidential Elections?", *Northwestern Journal of International Human Rights* 8(2) (Spring 2010), pp. 122-164. It should be noted that the hesitation of courts to interfere with the published electoral results

strengthen EDR systems are essential, particularly those targeting the judiciary, as the institution most commonly mandated to resolve post-election disputes.²⁴

JUDICIARIES FACE CHALLENGES IN HANDLING ELECTORAL DISPUTES

Four challenges, specific to emerging democracies, can be identified that confront judiciaries performing an EDR role:

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 to avoid paralyzing either the election schedule (in the case of pre-election disputes) or the newly elected government (in cases of election petitions), and in the public spotlight because of the importance attached to the outcome. While these factors alone can test judiciaries in developed democracies, they are liable to cause immense strain in emerging democracies, where the financial and human capacities of judiciaries are far more limited.

Fostering positive change in these four spheres is not an easy task. A clear message from past programming is that concerted and early planning addressing these challenges can be instrumental in ensuring 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 the management of other types of matters the judiciary faces. The following section explores in detail the core components or ‘building blocks’, of an EDP program.

is a problem not unique to the courts in emerging democracies, as was seen in the *Bush v. Gore* decision.

²⁴ Almost all democracies have established some kind of mechanism in their legal framework to adjudicate electoral complaints. Although the specifics of EDR systems vary, the general trend has been for pre-election disputes to be managed by a court or a specialized administrative body with some kind of appeal right to the courts. Post-election disputes challenging the results of the election are almost always dealt with by ordinary courts or specialized judicial tribunals. According to International IDEA, the main differences between jurisdictions in post-election disputes is whether the court or administrative body dealing with the matter is a generalist court or specializes in electoral disputes, whether it is permanent or ad hoc and whether it has exclusive responsibility for electoral disputes or shares jurisdiction with another institution. Five types of institutional structures can be identified for this purpose: (i) specialized permanent or temporary administrative body sharing parallel responsibility with

the ordinary courts for electoral disputes; (ii) specialized permanent or temporary administrative body with exclusive jurisdiction; (iii) specialized permanent or temporary electoral court with exclusive jurisdiction for election-related disputes; (iv) existing courts and administrative body applying electoral laws/specialized procedures; and (v) legislative bodies. See Orozco-Henríquez and others, *Electoral Justice*. An exception to this rule is criminal violations of the electoral laws. In almost all jurisdictions, these are immediately dealt with by the police and then referred to court. IFES, *GUARDE*, pp. 115-117, available from www.ifes.org/sites/default/files/guarde_final_publication_0.pdf. For the purpose of this Brief, EDR systems refer here to the series of institutions responsible for adjudicating the different types of complaints that arise in the electoral cycle. These are alternatively described as ‘electoral complaint systems’, or ‘electoral adjudication mechanisms’.

3. BUILDING BLOCKS OF A THEORY OF CHANGE FOR PROGRAMMING ON PREPARING THE JUDICIARY FOR ELECTORAL DISPUTES

A theory of change is a practical tool to understand not simply *what* program developers think will happen when a program is implemented, but also to establish a framework that explores *why* and *how* this change is going to happen, including the conditions that need to be in place for the intended results to be achieved. Each outcome is dissected, always asking:

- What has to be in place for this outcome to be achieved?
- Are these preconditions sufficient for the outcome above to be achieved?
- Is anything missing?
- What is the rationale behind thinking that this outcome will lead to the outcome above?²⁵

This process continues until the earliest change that needs to occur for the long-term goal to be achieved is

identified. Only once these outcome pathways have been developed is it appropriate to consider types of interventions to undertake to support the achievement of some or more of the identified outcomes that lead to the higher goal.²⁶ This section details three building blocks for a theory of change on EDP programming, based on lessons learned.

The building blocks approach recognizes that although a theory of change must always be tailor-made to a specific programming context, certain overlaps in programmatic environments and similar challenges arise across jurisdictions, which can support lessons learned. These form a foundation for future programming, which will necessarily require further investment to ensure an appropriate response to the demands of the context concerned.

²⁵ For further details on theories of change, see Dr. Dana H. Taplin and others, *Theory of Change Technical Papers: A Series of Papers to Support Development of Theories of Change Based on Practice in the Field* (ActKnowledge, April 2013), pp. 1-21, and Isabel Vogel, *Review of the use of Theory of Change in International Development: Review Report* (DFID, April 2012), pp. 1-82.

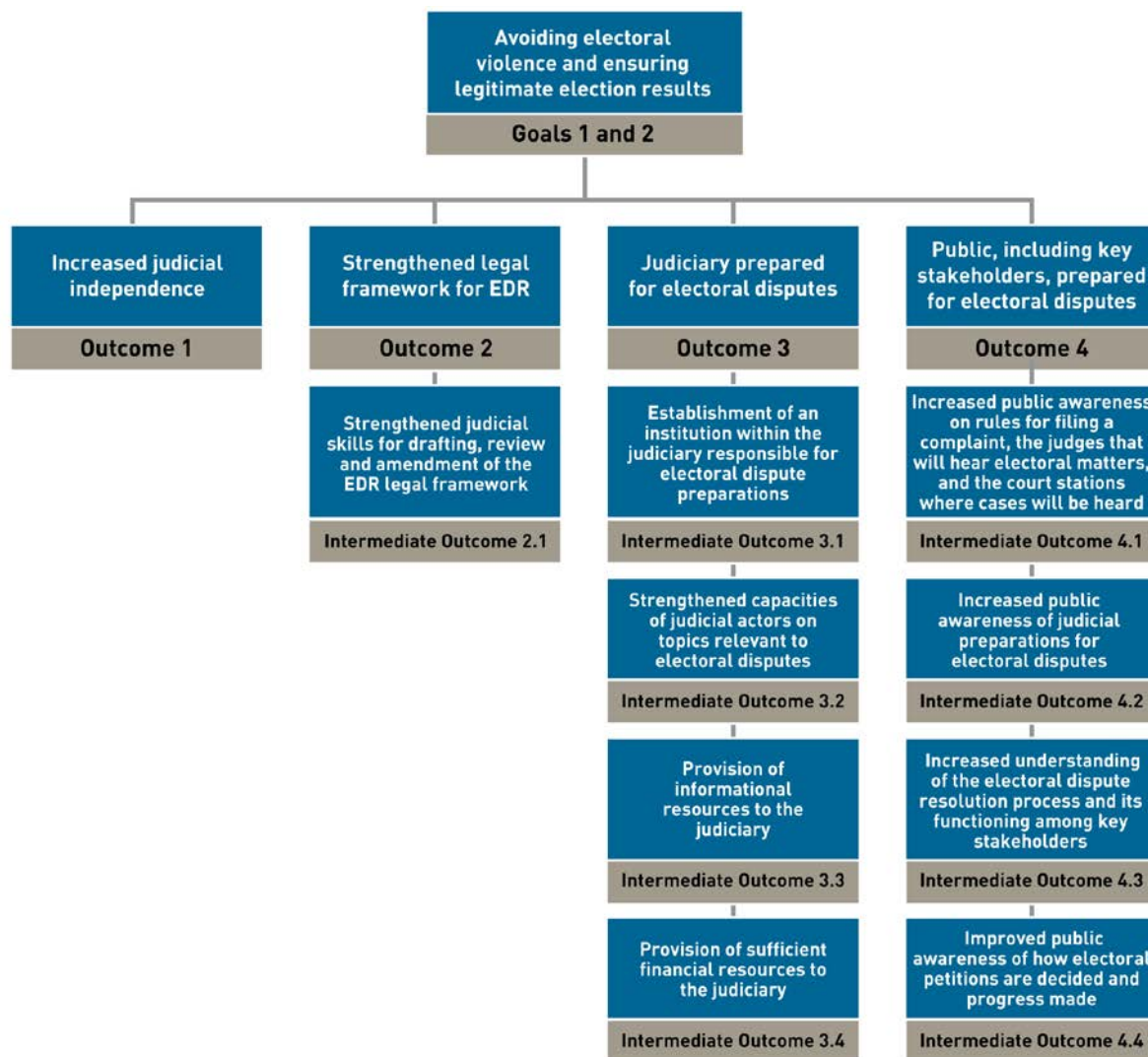
²⁶ Unlike conventional program design, which usually begins with activities and describes their likely impact, the theory of change process begins with the long-term outcome or broader problem to be resolved, and works backwards to determine what types of outcomes are necessary for the long-term change to occur. ActKnowledge and The Aspen Institute, *Making Sense: Reviewing Program Design with Theory of Change* (2003), pp. 2-3.

BUILDING BLOCK 1: ELECTORAL DISPUTE PREPARATION INTERVENTION LOGIC

Program intervention logic refers to the program’s goals, outcomes, intermediate outcomes (within the sphere of

control of the intervention) and the activities undertaken to foster positive change. Figure 2 provides an overview at the goal and outcome level for EDP programming.

Figure 1: Goal and outcome level programming intervention logic



Outcome 1: Increased judicial independence

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

Studies on the behavior of courts around election times reveal that they have exercised an uneven

accountability function on issues of elections and political succession.²⁷ 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

²⁷ In theory, competitive elections should work to strengthen judicial independence due to the uncertainty that surrounds the results and the equal needs of political parties for an independent arbiter. Judges are said to have a motivation to act independently due to the uncertainty as to who will be the future political rulers. Siri Gløppen

and Fidelis Edge Kanyongolo, “Judicial Independence and Judicialization of Electoral Politics in Malawi and Uganda”, in *Accountable Government in Africa*, Danwood Chiwira and Lia Nijzink, eds. (United Nations University Press, 2012), p. 3.

candidates or voters.²⁸ In circumstances where the judiciary has limited functional authority, while the executive enjoys both law-making power and the unilateral power to appoint the judiciary, it is unlikely that the judiciary will perform its electoral dispute adjudication function independently.²⁹ In such contexts, it is also doubtful that the public and political parties will have confidence that electoral decisions will be made impartially.³⁰

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,³¹ attention was successfully directed to ensuring that the 2010 Constitution provided for the judiciary's legal independence.³² The judiciary subsequently instituted a widespread reform program.³³ 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.³⁴ 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.³⁵ 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 2013.³⁶

Some measure of judicial independence is essential for successful EDP programming. If the level is too low, EDP programming will have little impact on higher goals, as it will usually be impossible to tackle such complex issues within the confines of a short-term EDP program. Where such a base for judicial independence exists, a successful EDP program will usually only make modest improvements on that independence, especially with regard to public confidence in the court's independence. The uncertainty of such a result means strengthened judicial independence would rarely form a distinct outcome in an EDP program. This is further discussed under Building Block 3, which emphasizes embedding EDP programming in the wider context and taking into account factors impacting judicial independence.

²⁸ For example, Joanna Kalb argues that if the opposition and its supporters believe there is nothing to be gained through participating in political processes, both because elections and judicial procedures will always be resolved in favor of the regime, such groups are more likely to resort to force. Johanna Kalb, "The Judicial role in New Democracies: A Strategic Account of Comparative Citation", *The Yale Journal of International Law* 38 (2013), p. 436. Höglund further observes that violence will often occur in environments where security forces and the judicial system are politicized and weak, and therefore unable to provide effective tools for solving conflict. Höglund, "Electoral Violence in Conflict-Ridden Societies", p. 421.

²⁹ For example, a recent study, looking at the highest courts' decisions in Malawi and Uganda, suggests that political influence on appointments affects the performance of courts around election times. Gloppen and Kanyongolo, "Judicial Independence and Judicialization of Electoral Politics in Malawi and Uganda".

³⁰ In the words of Justice Katju of the Indian Supreme Court: "It is of utmost importance for the public to have confidence in the judiciary. The role of the judiciary is to resolve disputes amicably. Without it, people may use violence to resolve differences. To avoid this, the judiciary must be independent. This is an inherent trait. If a judge is independent, and knows the law, the losing party is likely to be pacified. He or she will be content, notwithstanding the fact that he or she has lost the action." Cited in Carmona, "Enhancing the Capacity of Judges to Resolve Election Disputes".

³¹ For example, the losing presidential candidate, Mr. Raila Odinga, explicitly stated in the aftermath of the elections that he would choose public protest over the judicial system because he knew that he would not get a fair hearing in "Kibaki's Courts". Abuya, "Can African States Conduct Free and Fair Presidential Elections?", p. 159. For the responsibility of the judiciary for the post-2007 election violence, see *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007* (Nairobi, Government Press, 2008) (herein after the Krieger Report). "During the 2007 general election period in Kenya, a material contributor to the tension at KICC, broadcast live to the country, was the absence of an effective electoral dispute resolution (EDR) mechanism to resolve the mounting challenges to the integrity of the results from Kibaki strongholds..." Krieger Report, p. 141.

³² The 2010 Constitution removed the President's right to unilaterally appoint election officials or judges, and reaffirmed the independence of the judiciary in its decision-making. The Constitution established a Supreme Court and Court of Appeal, and enhanced the judiciary's independence through new rules for appointment of members and requirements of qualification. It established that disputes over the results of presidential elections would be heard by the Supreme Court. The Bill of Rights preserved certain election-related rights, whose violation by the state could be challenged in the Supreme Court.

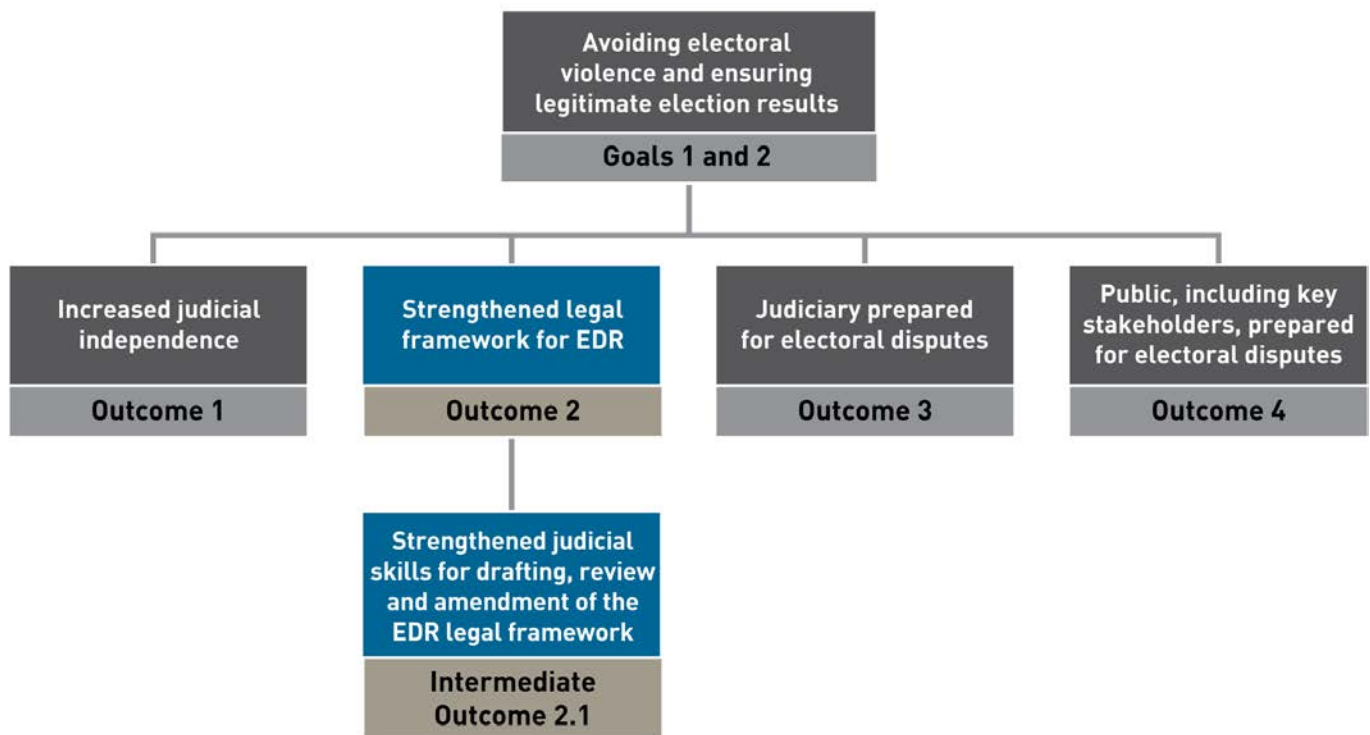
³³ These reforms were laid out in the document, "Integrated Comprehensive and Institutional Transformation Framework". Under the Framework, priority areas for the judiciary include the consolidation of the judiciary's transformation, vision and strategic direction; review of the value system and competencies of the judiciary; recruitment and placement; operationalization of the Supreme Court; inter-agency and stakeholder collaboration; and mobilization of technical expertise for sustained program implementation growth. The Leadership Committee chaired by the Chief Justice, the Transformation Steering Committee chaired by the Deputy Chief Justice and a Technical Secretariat are charged with the implementation of the Transformative Framework. IDLO, "DANIDA Project Proposal", IDLO internal document (2010).

³⁴ Vetting of Magistrates and Judges Act, 2011.

³⁵ In the words of one stakeholder interviewed, "...public confidence [in the courts] was very much a question of perception as much as reality". Mugambi Laibuta supports this view, writing, "...without this process [i.e. the Vetting board] of rebuilding trust between the Kenyan people and the judiciary, it is doubtful whether the Supreme Court would have been seen as the appropriate forum to hear and decide such a critical case [the Odinga presidential petition]". Laibuta, "Electoral Dispute Resolution".

³⁶ A survey undertaken by South Consulting in January 2013, assessing the state of electoral preparedness, found that the 75% of respondents stated that they were satisfied with the performance of the judiciary, vis-à-vis 31% in December 2008. South Consulting, *Kenya's 2012 General Election: A Review of Preparedness: February 2013 Report*. The Kenya National Dialogue and Reconciliation Monitoring Project (February 2013), p. 15.

Figure 2: Outcome 2 and intermediate outcome 2.1 programming intervention logic



Outcome 2: Strengthened legal framework for electoral dispute resolution

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 and their impact on the capacity of courts to adjudicate election petitions can be identified:³⁷

- (i) *Complex procedural rules at the expense of substantive justice:* Judiciaries, in fear of the executive, have often used the demanding procedural requirements contained in electoral laws

to dismiss matters on a technicality. Lawyers have also used complex procedural laws to delay the hearing of matters.³⁸

- (ii) *Absence of time limitations for the filing and disposal of cases:* Lack of public confidence in EDR systems has been linked to the long time frame in which disputes can be filed, the time it takes for decisions to be announced by courts, and the expansive appeal rights available to petitioners.³⁹ For example, at least ten petitions from the 2002 elections remained unresolved as Kenyans went to the polls in 2007.⁴⁰
- (iii) *Inefficient or undefined jurisdictional mandates:* The possibility of multiple bodies simultaneously sharing the burden of resolving the same types of disputes

³⁷ See IFES, GUARD and OSCE for further details. See also Denis Petit, *Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System* (Organization for Security and Co-operation in Europe, 2000), p. 7.

³⁸ JWCEP Pre-Election Report. In Kenya, for example, prior to 2011, the vast majority of electoral disputes were eventually dismissed on a technicality – for example, provisions requiring ‘personal service’ of a petition to the respondent were interpreted strictly to dismiss petitions that had not been personally handed to the respondent. Procedural rules were also often used by capricious lawyers to prolong litigation, or, alternatively to defeat matters being heard on their merits. Similar experiences have been witnessed in Nigeria. Hakeem O. Yusuf, “Democratic transition, judicial accountability and judicialization of politics in Africa: The Nigerian experience”, *International Journal of Law and Management*, 50(5) (2008), p. 236.

³⁹ Ibid. For example, following Ghana’s presidential elections in 2008, the Carter Center wrote “[t]he major obstacle regarding electoral dispute resolution in Ghana has been the low confidence that people have in the ability of the courts to provide timely responses to election-related complaints”. Carter Center, “Carter Center Finds Ghana’s Presidential Run-off Elections Credible and Peaceful”, Preliminary Report (30 December 2008), available from www.cartercenter.org/news/pr/ghana_prelim_123008.html. In Kenya, election petitions took between one to two years to adjudicate in the years 1992–2011 (72%). Abuya, “Can African States Conduct Free and Fair Presidential Elections?”, p. 159.

⁴⁰ Ibid. Prior to 2011, Kenya’s election legislation provided no time limitations for the hearing of electoral matters and their appeals. See also ELOG Report, p. 19.

can lead to wasted resources and forum shopping.⁴¹ Inefficient jurisdictional rules have also seen the overburdening of one level of the ordinary courts with electoral matters, quickly leading to a backlog in other cases.⁴² The former was witnessed in Kenya in 2013 in the pre-election period, where a lack of jurisdictional clarity in certain pre-election matters, especially between the Political Parties Disputes Tribunal (PPDT) and the Independent Electoral and Boundary Commission (IEBC), led to forum shopping among litigants.⁴³ This had widespread consequences, with few to no political parties or their supporters effectively sanctioned for breaching important electoral rules that had been introduced post-2010 to encourage Kenyan political parties to become issues-based, democratic and gender equitable.⁴⁴

- (iv) *Lack of coherence between different pieces of electoral legislation, unclear rules of procedure, and weak enforcement provisions:* In situations where EDR rules are contained in different pieces of legislation, the task of the judges and advocates is made more difficult, and therefore more time consuming. This complexity has widened the scope for judges to dismiss cases on a technicality so as to avoid adjudicating sensitive political issues and has led to inconsistent treatment for like cases, thereby increasing the perception that cases have been decided according to political preferences.

The Kenya EDP program and the EDR literature, notably the IFES Guidelines,⁴⁵ emphasize the following reforms to the legal framework, to be undertaken well in advance of election day:

- *Establish transparent rules and procedures for filing and responding to complaints:* Laws and procedures

should establish where, when, how and in what form complaints or demands must be filed, including standards for sufficiency of evidence and who can bring a complaint. The fees for filing should not be overly burdensome nor too low, which might encourage vexatious applications. Due to political sensitivity, the rules should clearly indicate procedures for ballot authentication and recounts. The delineation of forum should be carefully decided, taking into account available officers and the type of petition. For example, legal reforms undertaken in the lead-up to the 2013 Kenyan elections required that disputes over county elections were to be handled by Magistrates Courts, seen as a way to avoid clogging the High Court with electoral disputes.⁴⁶

- *Include strict timelines for lodging and finalization of complaints and provide only a limited right to appeal:* Although there is no ‘standard time’ for filing and disposal of electoral petitions, good practice suggests that time limits and case management schedules should be tiered according to the complexity of the electoral issue at stake, the seriousness of the matter, and the potential consequences if the matter is delayed. Reforms initiated in Kenya following the 2007 violence required that non-presidential matters were to be filed within 28 days of declaration of results by the electoral management body, the IEBC,⁴⁷ while presidential petitions were to be filed within seven days.⁴⁸ Courts were required to hear and determine all general election petitions in six months,⁴⁹ with 14 days for presidential petitions.⁵⁰ Appeals were permitted on matters of law, and were to be decided within six months for all courts.⁵¹

⁴¹ See for example, the use of multiple forums in the pre-election dispute phase in Kenya’s 2013 elections.

⁴² “Ambiguous or conflicting jurisdictions among courts and administrative bodies are confusing and unfair to political parties, candidates, the news media and the voting public.” Robert Dahl, “Electoral Complaint Adjudication and Dispute Resolution: Key Issues and Guiding Principles”, Speech delivered at the 2008 General Assembly of the Association of Asian Election Authorities (IFES, 22 July 2008), p. 4. See also Petit, *Resolving Election Disputes in the OSCE Area*, p. 7.

⁴³ For instance, the Naivasha Multi-Stakeholder Forum report notes “there is an overlap in the law with regard to the institution that has jurisdiction to determine political party nomination disputes. As a result of this, many nomination losers applied to the IEBC under Article 88(4)(e) of the Constitution for determination of their nomination disputes. However, upon failing to obtain a favorable result, they went to the PPDT seeking the same relief. If PPDT was aware of the IEBC’s decision, it would not go against it. Most of the parties went forum shopping without declaring that they had appeared before PPDT or the IEBC Tribunal when the outcome was not favorable. This was discovered later.” See IDLO, *Report on the Multi-Stakeholder Forum for State Actors on Electoral Reforms*, (Naivasha, Kenya, 1-3 July 2015), pp. 9-10.

⁴⁴ The FIDA Gender Audit of the 2013 elections highlighted that this failure to implement electoral rules during the party nomination process led to lawlessness during the nomination process, which worked to the disadvantage of female political candidates. FIDA

Kenya, National Democratic Institute, USAID, *Key Gains and Challenges: A Gender Audit of Kenya’s 2013 Election Process* (2003), p. 3.

⁴⁵ Many of the points described here are drawn from the IFES document, *GUARDE*. Some references also draw from Petit, *Resolving Election Disputes in the OSCE Area*.

⁴⁶ The Statute Law (Miscellaneous Amendments) (No. 2) Act of 2012, section 2.

⁴⁷ Kenya, Kenyan Constitution, Article 87(2); Elections Act 2011, Article 76(1)(a).

⁴⁸ Kenya, Kenyan Constitution, Article 140(1) (2010).

⁴⁹ Kenya, Kenyan Constitution, Article 105(2) (questions regarding whether a person has been validly elected as a member of Parliament); Elections Act 2011, Article 75(2) (questions regarding the validity of the election of a county governor or member of a county assembly).

⁵⁰ Kenya, Kenyan Constitution, Article 140(2).

⁵¹ Kenya, Elections Act 2011, Article 74(4)(b) (Magistrate’s Court to High Court); Elections Act 2011, Article 85A(b) (High Court to Court of Appeal). The Supreme Court, under Article 163(4) and (5) of the 2010 Constitution, may hear appeals in relation to the interpretation or application of the Constitution or a matter of substantial general public interest. The Supreme Court was ambivalent about the strictness of these requirements in its hearings of appeals from the Court of Appeal in the 2013 election petition matters. See discussion in Muthomi Thiankolu, “Standards of Review and Resolution of Electoral Disputes in Kenya: A Review of the Jurisdiction of the High

Stakeholders indicated that these timelines were adequate for non-presidential matters, but not for the hearing of presidential petitions, which required amassing large quantities of evidence.⁵² In allowing appeals from the Court of Appeal to the Supreme Court, critics also contended that the superior court slowed the efficiency of the system.⁵³ Proposals have since been made to reduce the time frame from six months to three months for the Court of Appeal, and to three months for the Supreme Court, so that the petition process will be completed in one year.⁵⁴ It has also been suggested that the Supreme Court should be divested of jurisdiction to entertain electoral disputes (such as appeals) other than presidential ones. The most recent amendment bill, however, only captures changes to the presidential election petition timeline.⁵⁵

- *Provide appropriate sanctions for violations of electoral laws, including criminal liability, where appropriate:* Electoral offences and proportionate sanctions, such as fines or imprisonment, should be available to courts to ensure general and specific deterrence for electoral offences.⁵⁶ Particularly relevant offences are corruption, voter bribery and voter intimidation. Legislation should clearly specify that criminal prosecution is not contingent on the outcome of court decisions addressing the impact of the alleged violations on the electoral process.⁵⁷
- *Insert a requirement of transparent decision-making:* Electoral dispute decisions should be required to be published, and, where possible, to be made available on the Internet, with summaries in plain-language format disseminated to the public.⁵⁸ This helps avoid false rumors and conspiracy theories, which can act as catalysts for electoral violence.

Court, the Court of Appeal and the Supreme Court”, in *Balancing the Scales*, pp. 114-148, especially p. 128.

⁵² According to the JWCEP Evaluation, although most lawyers and aggrieved candidates interviewed indicated that a time frame of six months for non-presidential matters was adequate, several indicated that the time frame for filing and hearing a presidential case prevented them from amassing the evidence and preparing their case effectively. JWCEP Evaluation, pp. 8-9. While the interviewees for the JWCEP Evaluation proposed that presidential matters should be heard over a two-month period, the multi-stakeholder working group suggests 30 days. See IDLO, *Report on the Multi-Stakeholder Forum for State Actors on Electoral Reforms*, p. 20. Such changes will require a constitutional amendment.

⁵³ Stakeholder interviews. The wide berth allowed by the Supreme Court to hear appeals from the Court of Appeal is discussed by Muthomi Thiankolu in “Standards of Review and Resolution of Electoral Disputes in Kenya”.

⁵⁴ IDLO, *Report on the Multi-Stakeholder Forum for State Actors on Electoral Reforms*, p. 28.

⁵⁵ Constitution of Kenya (Amendment) Bill 2016, which proposes to change the timeline from 14 days to 30 days. Available from http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2016/TheConstitutionofKenya_Amendment_Bill_No_79of2016.pdf.

⁵⁶ Petit, *Resolving Election Disputes in the OSCE Area*, p. 5.

- *Specify rules for the selection of the election bench:* The policies for the selection of the electoral bench should include criteria that will disqualify judicial officers with ties to political parties or who could be perceived to be biased, especially when rules for judicial selection are weak. Where it is inevitable that the executive will be involved in the process, as far as possible a review mechanism should be included in the relevant legal framework.⁵⁹

Intermediate Outcome 2.1: Strengthened judicial skills for drafting, review and amendment of the EDR legal framework

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 legal and administrative framework in accordance with its mandate. It did so 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.⁶⁰ 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.⁶¹

The JWCEP’s capacity to contribute to law reform was boosted through the embedding on a short-term basis of a legislative drafting and electoral dispute expert at the outset of the program. This support, provided by IDLO, helped to guide the judiciary through the reform process; ensured the inclusion of established good practices in the draft law reform proposals; and improved the quality of the language and structure of

⁵⁷ *Ibid.*, 10.

⁵⁸ IFES, *GUARDE*, pp. 20-21.

⁵⁹ International IDEA provides a useful overview of the advantages and disadvantages of the presence of representatives of political parties on EDBs. They note that some commentators argue that this helps to achieve consensus among the contenders in the election process and can help to strengthen transparency. However, International IDEA cautions on the importance of such individuals ceasing to act for the political party once appointed, and being required to make decisions according to the law. See Orozco-Henríquez and others, “Principles and Guarantees of EDR Systems”, in *Electoral Justice*, pp. 83-134. It could be argued that rules for selection of the electoral bench are less important in circumstances where the ordinary judiciary is used and where that judiciary enjoys a high degree of independence from the executive and has robust criteria for the selection of judges.

⁶⁰ It proposed amendments to the 2011 Electoral Act and drafted rules on the handling of (general) electoral petitions and presidential petitions. These were subsequently validated by lawyers and other key stakeholders at a series of roundtable workshops and then presented to the relevant institution for their adoption.

⁶¹ This included a requirement for the judiciary to set case timelines with advocates (‘pre-trial conferencing’) to avoid cases becoming unnecessarily delayed. JWCEP Evaluation, p. 22.

reform proposals, minimizing delays in their adoption due to concerns.⁶²

The involvement of the Kenyan judiciary in these legal reforms resulted in three positive consequences for the EDR system in Kenya:

- (i) the appropriate committees were willing to adopt the new legal standards proposed, due to the credibility and impartiality of the drafters;⁶³
- (ii) the reforms were relevant and feasible, because they took into account the JWCEP judicial officers' own experience in handling electoral petitions; and

- (iii) the judiciary encountered fewer implementation challenges among judicial officers, because it had a sense of ownership over the mandated changes.⁶⁴

The participatory manner in which the legal or procedural proposals were finalized prior to submission (validation workshops with advocates, the Law Reform Commission, the IEBC and others), their high quality, and their relatively uncontroversial nature also contributed to their adoption and implementation by relevant actors in the courts.

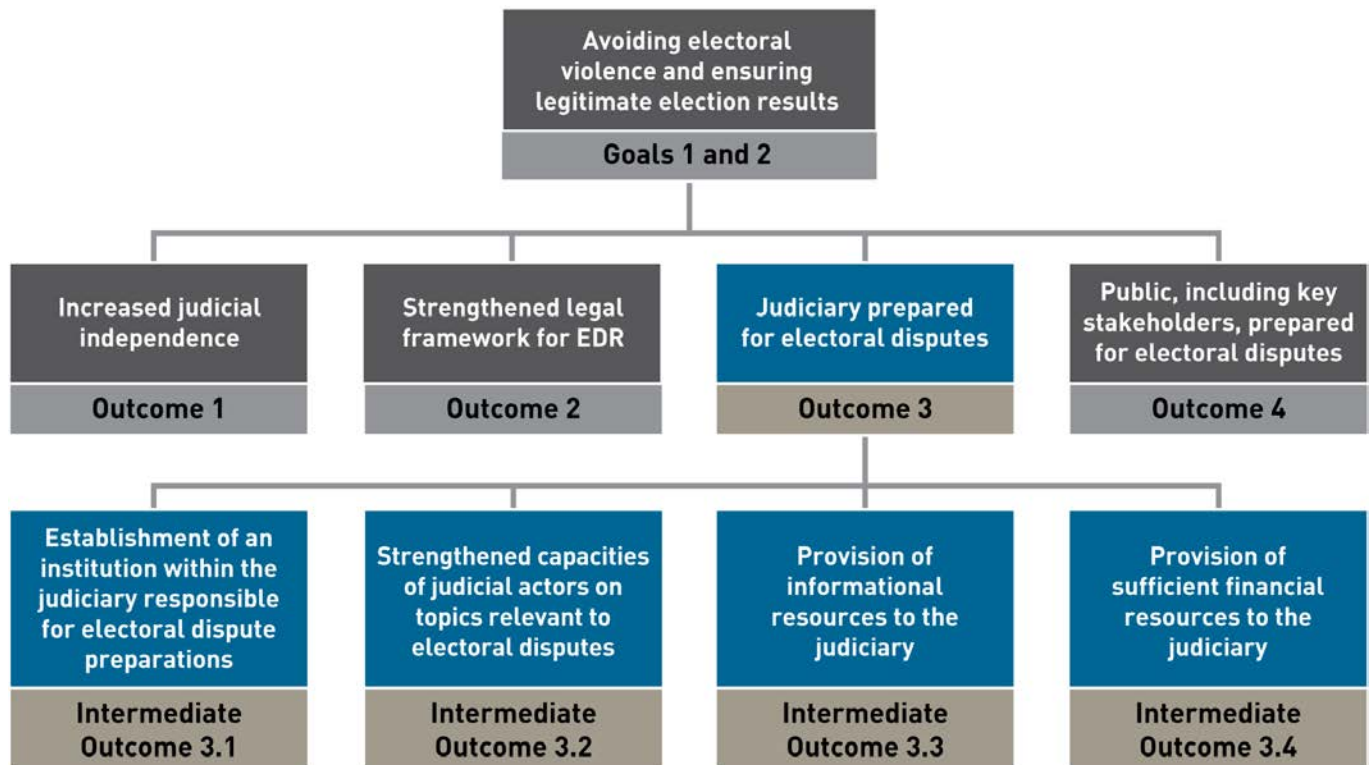
⁶² For instance, administrative arrangements used in Uganda, a jurisdiction with similar provisions in its laws relating to the timeline.

⁶³ The relevant committees included: The Supreme Court Technical Committee (for the Presidential Election Petition Rules), the Rules

Committee (for the Election Petition Rules), the Justice and Legislative Affairs Committee and the Commission for the Implementation of the Constitution (amendments to the Elections Act).

⁶⁴ Stakeholder interviews.

Figure 3: Outcome 3 and intermediate outcomes 3.1 to 3.4 programming intervention logic



Outcome 3: The judiciary is prepared for electoral disputes

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

Early and concerted preparation of the EDR system is required for the judiciary to handle electoral disputes effectively. The need for judicial preparation is driven by the following realities:

- electoral disputes are filed and registered in intense bursts, every three to four years, and need to be disposed of in quick succession, placing significant pressure on judges and the justice system;
- electoral dispute law, with unique burdens of proof and evidentiary standards, requires specialized knowledge; and
- electoral petition cases are of national importance and closely scrutinized, necessitating consistent and well-drafted decisions to avoid accusations that they were based on political considerations rather than legal merits.

The implementation of internal and external reforms required to prepare the judiciary for electoral disputes relates to numerous aspects: dispersed judicial actors need to be trained; appropriate (accessible, secure and

resourced) courtrooms need to be located; judges need to work with lawyers and even prosecutors to ensure cases are heard and disposed efficiently; evidence needs to be handled correctly; 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.

To be effective, preparation measures require a commitment to change from court officials and judges. Such commitment is generated when proposed 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. As noted above, when discussing legislative reform, the judiciary is well placed to identify gaps and weaknesses in the EDR system and to identify which issues should take priority in the context of limited resources.

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 EMB, lawmakers, civil society and the media are all

critical to ensuring that judicial preparations result in achieving goals of violence prevention and ensuring a legitimate election result. 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 electoral dispute sector, or at least a coordinating role with regard to the actors involved in post-election disputes.

Intermediate Outcome 3.1: Establishment of an institution within the judiciary responsible for electoral dispute preparations

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 noted JWCEP (Judiciary Working Committee on Elections Preparations), operating under the Judiciary Training Institute (JTI).⁶⁵ 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.

Comprised of ten members, representing each level of the judiciary involved in electoral disputes,⁶⁶ and supported by a Secretariat, the JWCEP met on a bi-weekly basis, with more frequent meetings in the weeks immediately preceding the election, and in the post-

election petition period. The structure of the JWCEP naturally promoted ownership of reforms, with its exclusive representation comprising each level of the judicial hierarchy.⁶⁷

The establishment of the JWCEP also signaled to internal and external stakeholders the importance attached to electoral dispute preparations within the judiciary, and had the advantage of putting a group of judicial members in a position where they had the authority to initiate the necessary changes and control developments. For example, the JWCEP was able to select the most appropriate organizations to undertake the training component of its mandate and coordinate interventions tailored to the judiciary's needs, avoiding overlap. The JWCEP also became a readily available 'Board of Advisors' to the Chief Justice and other judicial departments on electoral preparations, providing guidance on the measures needed to support reform. For example, the development of a culture of expeditious and rule-based decision-making was reinforced in the pre-election period when the Chief Justice, acting on a recommendation from the JWCEP, issued a circular providing that judges were not to take annual leave in the post-election petition period, and that they were to prioritize election matters.

As explained further below, because it represented the judiciary and enjoyed the support of the Chief Justice, the JWCEP had the convening power to bring diverse actors together. In the course of achieving its mandate, the JWCEP took on the important role of coordinating the interface *between* the judiciary and other stakeholders on electoral dispute matters. Such stakeholders included the IEBC, other government and non-government bodies, and political parties. As an example, the JWCEP (supported by IDLO) organized a forum for lawyers, key state law reform agencies, civil society organizations, and the IEBC to come together to agree on procedural rules for post-election disputes.⁶⁸ The establishment of a judicial committee also permitted the judiciary to attend inter-agency meetings, keeping abreast of debates in other areas pertinent to electoral disputes, in addition to updating relevant actors on its own preparation activities.⁶⁹

⁶⁵ In November 2015 this committee was formalized, operating under the Office of the Chief Justice (OCJ). The present analysis, however, covers the period from the establishment of the JWCEP to the final evaluation of the Committee in June 2014.

⁶⁶ The Supreme Court, the Court of Appeal, the High Court and the Magistrates Courts.

⁶⁷ This had the advantage of avoiding a turf war between the respective branches: JWCEP stakeholder interviews.

⁶⁸ Elections (Parliamentary and County Elections) Petition Rules 2013 (Legal Notice Number 54), the Code of Conduct under the Election Petition Rules and Supreme Court (Presidential Election Petition) Rules 2013. As the focal point for judicial preparations, the JWCEP could also credibly participate in discussions on electoral reforms or electoral management by other government and non-government

bodies. This allowed the JWCEP to keep abreast of debates in other areas pertinent to electoral disputes; it offered an opportunity for the judiciary to check that its reforms were relevant and in coordination with the needs of the EDR system; and it provided an opportunity to inform relevant actors of the judiciary's extensive preparations and 'new' approach to electoral disputes. In contexts where these tasks fall to different actors in the judiciary, or even to one person, such as the Chief Justice or Principal Judge of the High Court, the chances of mixed messaging or failure to capture critical information from other institutions is increased.

⁶⁹ Meetings with different actors, such as the National Council for Administration of Justice, provided the JWCEP an opportunity to check that its own reforms were relevant and in coordination with the needs of the EDR system while also providing an opportunity to update

Good practice indicates that electoral preparations for the judiciary should be permanently institutionalized, which has since occurred in Kenya. Such a measure avoids preparations being contingent on individual preferences (especially those of the Chief Justice) or political dynamics. Measures to achieve this could include tying preparation activities to the work plans of permanent judicial institutions or other relevant bodies, such as the EMB. Specifically, EDR training could be integrated into the curriculum for entrance to ensure a minimal quantity of knowledge among the judiciary in the lead-up to an election. Bringing preparation activities into the framework of wider reforms aimed at improving service delivery by the judiciary also has the benefit of ensuring that the reform momentum and skills generated by preparatory activities seep into other areas of the judiciary's practice.

Intermediate Outcome 3.2: Strengthened capacities of judicial actors on topics relevant to electoral disputes

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

If electoral decisions are based on weak legal foundations, petitioners and the general public may come to believe that the judiciary is subject to political influence. This is especially the case when decisions are high profile and each sentence of the judgment is subject to intense media and public scrutiny. Such decisions can dent the legitimacy of the entire judiciary in the eyes of the public, subverting its claim to be a reliable and independent forum to resolve disputes.

Shortcomings in understanding complex electoral laws help explain the prevalence of poor judicial decision-making in electoral disputes. As highlighted below, electoral petitions are rarely straightforward matters that follow 'normal' procedures:

[election petitions] often contain a mix of claims, some of which allege "criminal" offenses (for example, fraud, bribery) that may invite penal, if collateral, sanctions or consequences. The fact that the election whose results the petitioner seeks

to invalidate as being in violation of law is typically the act of a public body, which body is often a named respondent in the suit, also gives an election petition proceeding an administrative law posture. Moreover, in terms of the judge's role, an election judge has been described by an English court as occupying "an intermediate position" between a civil court judge, who must try an adversarial dispute between the parties, and a "coroner", whose function is primarily "inquisitorial". This combination of the adversarial and the inquisitorial means that an election judge must be more "interventionist" and "ask a lot more questions than would be the norm in civil cases..."⁷⁰

Further, because the court is essentially adjudicating on voters' preferences, it is not as concerned for the rights of the parties as it would be in others matters. As noted by the electoral court in Hong Kong, the election petition, though in the form of a legal dispute, often leans heavily and decisively on multiple 'non-legal' policy considerations for its resolution.⁷¹

Contrary to common perception, 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.⁷² New skills are required to fulfill this function. Several important lessons can be gleaned from the literature and the IDLO program on the content of capacity development programs, and how such capacity development programming should be structured:

- *Skills building should include, but also go beyond training on electoral law:* A thorough baseline is required to ensure that any skill-building activities address urgent needs and take into account existing levels of knowledge.⁷³ At a minimum, the electoral bench should be aware of the following topics to effectively handle electoral petitions: (i) electoral jurisprudence; (ii) international standards and principles on elections; (iii) lessons from other countries with a similar context;⁷⁴ and (iv) jurisdictional rules.⁷⁵ Training systems should also consider emerging types of election disputes or legal issues arising from new infrastructure, for

actors on the judiciary's extensive preparations and 'new' approach to electoral disputes.

⁷⁰ H. Kwasi Prempeh, "Comparative Perspectives on Kenya's Post-2013 Election Dispute Resolution Process and Emerging Jurisprudence", in *Balancing the Scales*, p.152.

⁷¹ *Leung Chun Ying v. Ho Chun Yan Albert*, (2013) 16 HKCFAR 735, para 44 (noting that election petitions have "considerations other than legal ones"). As explained by Prempeh: "The political and partisan character of the underlying dispute, the supremacy of the voters' will, the time-sensitivity and urgency of the matter, cost considerations, the need for finality, and the importance of ensuring continuity in office and government; all of these policy considerations must be weighed in the balance, along with the imperative to do justice between the parties, in the judicial resolution of the petition". Ibid., p.155.

⁷² IFES, *GUARDE*, p. 195.

⁷³ Interventions targeting the skills of judicial officers should be competency-based and address the most urgent needs. For example, some judicial offices may not need training on 'direct' electoral issues, but could benefit from other skills – such as communication strategies, strategic policy analysis or legislative drafting.

⁷⁴ For instance, the lessons from Uganda proved useful to judges in Kenya.

⁷⁵ "Judges must not only be knowledgeable of the nature of election complaints and petitions that reach the courts for adjudication. They should also be able to determine when and how they should arbitrate or whether they should intervene at all". Carmona, "Enhancing the Capacity of Judges to Resolve Election Disputes".

instance, legal challenges to policy and procurement decisions of electoral management bodies or the handling of electronic evidence.⁷⁶ Where appropriate, skill-building material should be used for different audiences within the judiciary, as well as audiences beyond the judiciary.⁷⁷

Several factors can be identified that facilitated the uptake of training by judges in Kenya in 2013: (i) the emphasis on higher principles by trainers, with training highlighting the importance of the judiciary's role in handling electoral disputes to prevent a repeat of the 2007 violence; (ii) the presence of senior members of the Kenyan judiciary at the trainings, as well as judges from similar jurisdictions (for instance, Uganda and South Africa); and (iii) the use of instructors from the judiciary itself.⁷⁸ Collectively, these elements signaled the seriousness with which the judiciary considered electoral matters, creating a sense of team purpose. This in turn helped generate the necessary consensus among judges to engage with the JWCEP, and to work overtime to ensure cases were decided within their statutory time limits. The use of foreign judges also gave the trainees a very practical sense of what type of issues they were liable to face and how these could be handled.

- *Initiate skill-building initiatives early and strategically, with a focus on sustainability.* Rushed or last-minute training is unlikely to be absorbed by participants. Nor is it likely to strengthen the confidence of the public in the judiciary, especially if it has long been perceived as corrupt or biased. In Kenya, the JWCEP undertook training for the High Court on electoral law in November 2012, four months before the election.⁷⁹ One of the lessons from the JWCEP's training process was the importance of improving the timing of such trainings to align with reforms to the electoral law, to ensure up-to-date content. Good practice for sustainability includes integrating electoral dispute trainings into the judicial continuous education cycle. The JWCEP's structure, linked to the JTI, for example, and the use of a training of trainer's approach, helped to ensure skills learned were retained in the institutional memory of the judiciary.
- *Skills building should target judges and judicial support staff:* The smooth hearing and adjudication of electoral disputes involves the cooperation of actors other than the judges and magistrates deciding cases. These can include registrars (filing

and handling of evidence), information technology staff (uploading of cases), and legal researchers (support for drafting judgments). Recognizing the critical function such individuals play in the efficient and fair hearing of electoral disputes, such staff were provided with specialized training as part of the JWCEP's preparation efforts in Kenya.

- *Skill-building measures should be sequenced:* Where resources are stretched, capacity-development initiatives should target the staff of the judicial institution vested with jurisdiction to hear at first instance the most common electoral disputes. Subsequently, specific training can be provided to judicial officers selected for the electoral bench and then to those officers responsible for appeals. As an example, in Kenya, the JWCEP began its capacity development program with a one-week electoral dispute training in early November 2012 with High Court judges and Court of Appeal judges on elections and election petition management, followed by a training for magistrates. In Kenya, the High Court and the Magistrates Court have first instance jurisdiction for disputes over parliamentary and county elections, respectively. A more specialized training followed this for the Select Bench on Elections (magistrates and High Court judges who had been selected by the Chief Justice to hear electoral matters). This training focused on case management aspects, challenges faced in the past and in other jurisdictions, and the processes for vote scrutiny, tallying, examination and recount.

Intermediate Outcome 3.3: Provision of informational resources to the judiciary

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, therefore, 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

⁷⁶ See "Case Studies Related to Training of Arbiters in Election Complaints" in *GUARDE*, pp. 188-197.

⁷⁷ This maximizes limited resources and ensures consistent messaging. As noted by one commentator, "A properly organized and repeatable training program or series of programs is ultimately a more efficient use of time and money than poorly planned individual sessions." Carmona, "Enhancing the Capacity of Judges to Resolve Election Disputes".

⁷⁸ The trainers were Kenyan judges, who themselves had been trained separately by partner organizations.

⁷⁹ While this was relatively in advance of the elections, some members of the JCE interviewed indicated that even four months in advance was not early enough. The current plan for 2017 provides for all trainings to finish four months before the beginning of the election petitions.

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.

Intermediate Outcome 3.4: Provision of sufficient financial resources to the judiciary

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

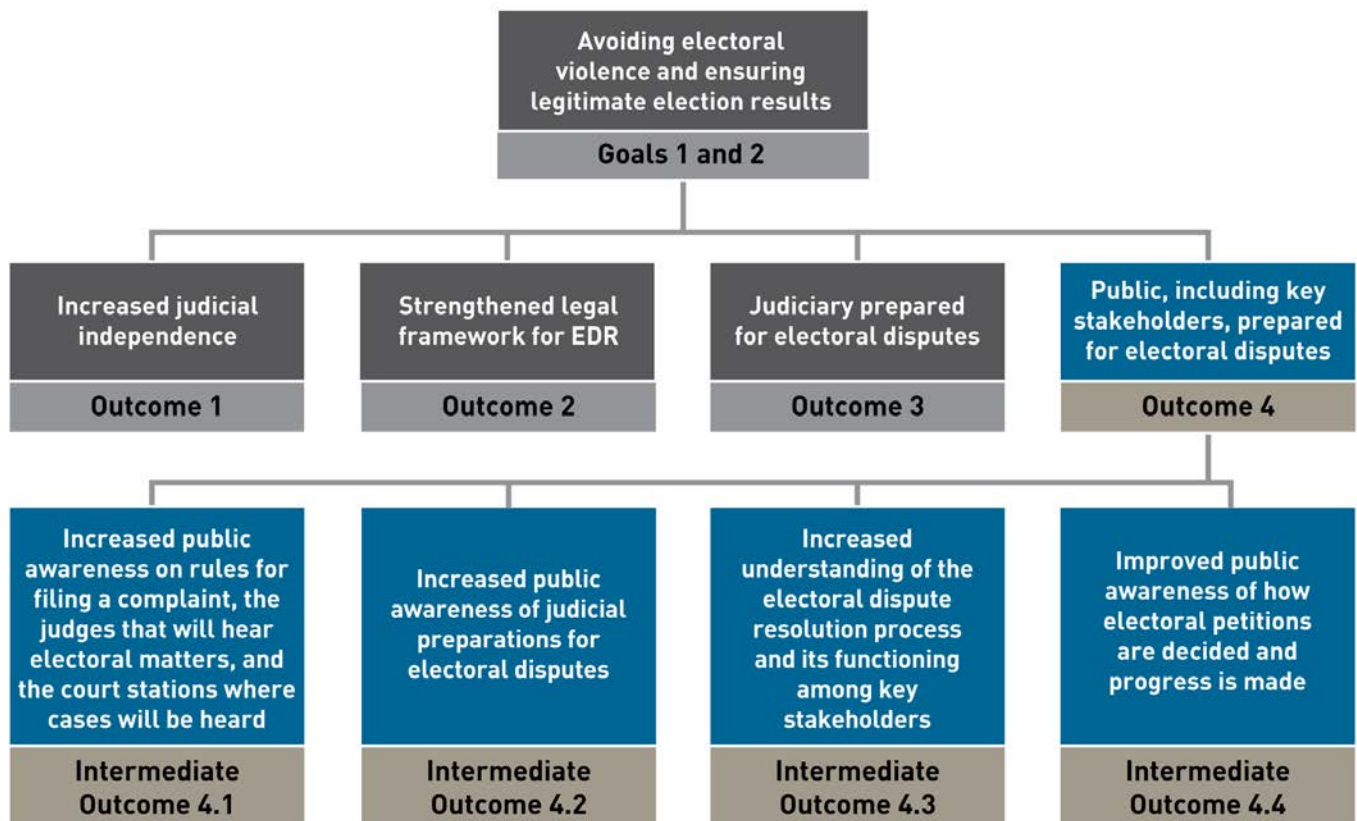
Preparing the judiciary for electoral disputes comes at a financial cost that the judiciary is not always able or

willing to absorb from its existing budget allocation. This was demonstrated in 2013 in Kenya, when, despite the JWCEP's budgetary estimates being approved as part of the judiciary's budget, the deposit of the specified funds into the JWCEP's bank account was not forthcoming.⁸⁰ This forced JWCEP members and the Secretariat to individually request support from other judicial departments and outside organizations, a situation that led JWCEP members to describe the Committee as a "begging bowl" that was filled "only through the good will from other departments."⁸¹ 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.

⁸⁰ JWCEP Evaluation, pp. 32-33.

⁸¹ Stakeholder interviews and JWCEP Evaluation, pp. 32-33.

Figure 4: Outcome 4 and intermediate outcomes 4.1 to 4.4 programming intervention logic



Outcome 4: Public, including key stakeholders, prepared for electoral disputes

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 needs significant public outreach to ensure the public understands the system, feels empowered to use it, and trusts it will deliver swift and independent justice.⁸² 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. The following sections provide examples of good practice and lessons regarding public outreach, again with reference to the 2013 Kenya experience where public outreach was a component of the JWCEP’s mandate, and the international literature.

⁸² One former electoral official describes these needs in the following terms: “You must have an ability to go somewhere to seek redress, which is the first thing. The second thing is that the place you go has to be somehow independent, and the people and the contestants have to have some faith that it will be independent. It has to have a procedure that is open to you and that you understand, and it has to

Intermediate Outcome 4.1: Increased public awareness on rules for filing a complaint, the judges that will hear electoral matters, and the court stations where cases will be heard

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. 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. By simplifying the electoral laws and procedures for the public, the FAQs contributed to empowering them to engage the system as and when an electoral dispute arose. When the election bench was selected in April 2013, the JWCEP published, in

have the ability to deliver the goods. It has to be able to say, ‘Here is a remedy, and this remedy can be enforced.’ Pat Merloe, cited in “Panel II: Emerging Principles Pertaining to the Resolution of Election Disputes”, in “Symposium: Resolution of Election Disputes”, *Administrative Law Review* 57(3) (2005), p. 899.

newspapers with wide circulation and on the judiciary website, information on the judicial officers who had been selected by the Chief Justice to handle petitions and the court stations where the cases would be heard.

Despite these commendable improvements on past practice, the 2013 EDR public education process was criticized for not sufficiently reaching vulnerable populations – especially remote voters and unemployed urban youth, the latter forming the bulk of those instigating violence in 2007.⁸³ This criticism echoes some concerns with the voter education process in general in the lead up to the 2013 elections.⁸⁴

To address youth voters, one consideration is engaging social media to disseminate information about the EDR process. This is likely to reach a larger audience, while remaining cost-effective, given the proliferation of mobile phones in many emerging democracies. To address remote voters, public service announcements via the radio or television are recommended. Representatives of the judiciary responsible for electoral petitions could also consider traveling to remote parts of the country, to improve awareness.⁸⁵ To ensure that citizens can use the system once they are informed of it, the setting up of legal assistance services (clinics or helpdesks at courts) could also be considered. Such measures help to ensure that electoral justice is not restricted to elites or well-resourced petitioners.⁸⁶

Intermediate Outcome 4.2: Increased public awareness of judicial preparations for electoral disputes

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

Stakeholders in Kenya emphasize the importance of reassuring the public that the judiciary is prepared for electoral disputes.⁸⁷ This is particularly important in contexts where the judiciary has failed to perform its EDR role adequately in the past.⁸⁸ Such outreach should 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'.⁸⁹

The development of a media engagement strategy by the JWCEP in Kenya in 2013 served this purpose. This permitted strategic and ongoing outreach 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. There is some evidence that this outreach had its intended effect. As noted by one court advocate, "reforms under the Constitution, and driven by the Supreme Court of Kenya itself in the pre-election days, resulted in an image that would not have left even the most skeptical of Kenyans in doubt regarding its ability and competency to resolve any matter before it – including the presidential elections – in a credible, transparent and impartial manner."⁹⁰

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.

Intermediate Outcome 4.3: Increased understanding of the electoral dispute resolution process and its functioning among key stakeholders

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 electoral organization IFES, 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 EMBs need to know how to file a claim, which entity has jurisdiction to

⁸³ Stakeholder interviews.

⁸⁴ In Kenya, a major challenge in coordinating public outreach on the electoral process was the late timing of electoral reforms and the complexity of the new election rules, which hampered the IEBC's dissemination efforts. USAID, *USAID Support for Kenya's 2013 Elections: Rapid Assessment Review* (February 2014), p. 18.

⁸⁵ Examples of this type of public outreach can be observed in Mexico and Pakistan. In Mexico, the Federal Electoral Court (TEPJF) develops television programs, public service announcements, new media and social networking to spread its message. In Pakistan, public service announcements on the radio are combined with the distribution of brochures, and traveling of the EMB to remote parts of the country to explain the complaints process. See "Approaches to Voter Education and the Role of Civil Society", in IFES, *GUARDE*, pp. 202-211.

⁸⁶ For example, during the 2004 Ukrainian presidential election cycle, the NGO, CEELI facilitated the establishment of student legal clinics that provided pro bono legal services to voters filing complaints with the courts or territorial electoral commissions. See "Approaches to Voter Education and the Role of Civil Society", in IFES, *GUARDE*, pp. 202-211.

⁸⁷ Stakeholder interviews.

⁸⁸ Stakeholder interviews.

⁸⁹ Stakeholder interviews.

⁹⁰ Advocate, High Court of Kenya, Researcher with the Commission for the Implementation of the Constitution, cited in Laibuta, "Electoral Dispute Resolution".

handle such a claim, and what evidentiary elements they should collect to support their claim.⁹¹ The media needs to understand decisions so they can report responsibly, while civil society organizations (CSOs), 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. Lawyers were informed of the process via the JWCEP's engagement with the Law Society of Kenya. The Law Society participated in the preparation of the election petition rules and worked with the JWCEP to ensure sessions on electoral law were included in continuous legal education activities in different parts of the country⁹² and discussion forums at law faculties.⁹³ Political parties were engaged via the Political Parties Forum, where the JWCEP presented the Supreme Court Presidential Rules and discussed their electoral dispute preparations.⁹⁴ Engagement with political parties slowed down closer to the elections, so as to avoid any impression of bias or a conflict of interest, while CSOs were involved in the validation of the election petition rules. The participation of these groups in the rule drafting process established a common standard for how matters were to be dealt with in the courts. Finally, the media was informed about the legal framework and how decisions were made at a breakfast roundtable with the Chief Justice.

Intermediate Outcome 4.4: Improved public awareness of how electoral petitions are decided and progress made

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

⁹¹ IFES, *GUARDE*, p. 77.

⁹² During consultations with the Law Society of Kenya Council, it was agreed to hold five Continuous Legal Education (CLE) events focused on the elections. The JWCEP arranged for the judges of the High Court to make presentations at these forums. The judges used this as an opportunity to engage with advocates on the new election petition rules and what would be expected of them if they filed an electoral petition. The CLE events were held in locations across the country.

⁹³ In cooperation with the Electoral Institute for Sustainable Democracy Africa (EISA) and the Kenyatta University School of Law, the JWCEP organized "The International Conference on Elections March 2013: Imminent Debates in the Event of a Presidential Election Run-off" on 14-15 January 2013. This conference brought together participants not only from Kenya but also from other African countries and provided a forum to brainstorm on the possible outcomes of a presidential election and assess how prepared the country was for a possible second round of elections. It served to remind the media and the public by extension that the judiciary and the IEBC were considering every possibility in preparing the country for elections. On 29 January 2013, Justice Majanja was the main speaker at a public lecture on the elections, organized by the Riara Law School. The talk, which was titled "Election Preparedness: Judging the March 4 General Elections", was well received both by the faculty and the members of the public who were present. On 22 February 2013, Justice Maraga attended a forum for gubernatorial candidates organized by the

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 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.⁹⁵ The JWCEP also sent emails with updates of election petition cases to the Kenya Law Reports, and members of the judiciary and stakeholders, using a template prepared with IDLO support. IDLO's embedded consultants also contributed legal expertise in preparing press statements to keep the public apprised of the progress made in handling election petitions. In addition to these efforts, the Supreme Court also handed over the Presidential Election Petition decision to Nairobi University Law School to encourage discussion on its jurisprudence.

Nonetheless, the intense public backlash against the judiciary following the presidential petition decision in the Supreme Court in Kenya,⁹⁶ alongside the divided public response to nationally important electoral decisions in other contexts,⁹⁷ provides a lesson on the immense difficulties of convincing a cynical public that 'conservative' electoral decisions are based on legal

Transitional Authority, to apprise candidates of the steps the judiciary had taken to prepare for the elections. JWCEP, *Pre-Election Report, September 2012-February 2013*, (2013), pp. 45-46.

⁹⁴ The JWCEP, in conjunction with the IEBC, the Registrar of Political Parties (RPP) and the National Democratic Institute (NDI), organized a forum with political parties in order to engage with the parties on the Supreme Court (Presidential Election Petition) Rules on 10 January 2013. In addition, the draft rules were published in national newspapers on 11 January 2013.

⁹⁵ The JWCEP required legal researchers and IT staff to update and disseminate information daily regarding the election petitions within their area. This included information concerning rulings, mentions, new hearing dates and petitions that had been struck out, among others. The JWCEP Secretariat then compiled this information and published it on the website.

⁹⁶ See ELOG Report, p. 33; Wachira Maina, "Verdict on Kenya's Presidential Election Petition: Five Reasons the Judgment Fails the Test", *The East African* (20 April 2013).

⁹⁷ For some examples of the intense criticism of the US Supreme Court's decision in *Bush v. Gore* see G. D. Savage, "The Vote Case Fallout: Ruling could harm respect for Court and its federalism decision (Bush v. Gore, Supreme Court ruling on contested presidential election of 2000)", *ABA Journal* 87(2) (2001); George Priest, "Reanalyzing Bush v. Gore: Democratic Accountability and Judicial Overreaching", *University of Colorado Law Review* 72 (2001).

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.⁹⁸ 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: ELECTORAL DISPUTE PREPARATION PROGRAMMATIC APPROACH

The IDLO EDP program in Kenya was a multi-donor funded program aimed at strengthening the judiciary’s capacity to manage the disputes arising out of the 2013 elections. The program described took place between May 2012 and June 2014, when the final external evaluation was issued.⁹⁹ IDLO’s work in this period was unique in many ways and provides valuable lessons on the optimal approach for EDP programming.

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 EDP 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 mandate, 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. For example, when it became clear that the JWCEP needed additional funding to fulfill its work plan, IDLO helped the Committee convene a series of donor roundtable meetings between December 2012 and February 2013, with the sole purpose of mobilizing support for JWCEP’s work plan in high priority areas. IDLO also supported the embedding of a short-term budgetary and planning expert, when it became evident that the JWCEP Secretariat required assistance in putting together a strategic plan and budget that could be approved by the National Assembly (and that could later be presented to potential donors). Neither of these activities was specifically detailed in the funding proposals.

Another advantage of a flexible implementation approach is that it allows practitioners to experiment with new models of capacity building. For example, rather than providing international experts to the Committee for short periods, IDLO tested an approach whereby several long-term Kenyan legal researchers were available to the Secretariat. These six researchers had wide terms of references, permitting them to support the Secretariat in different capacities according to needs arising in different phases of the election petition cycle. In the pre-hearing phase, for example, they helped prepare training materials and provided logistical support for the trainings. In the hearing phase, they responded to legal inquiries from the bench and provided support to ensure certificates were served at the conclusion of matters as well as providing other forms of ad hoc support.¹⁰⁰

This adaptable approach also meant that the program was more resilient in the face of unexpected mishaps. For example, the legal researchers stepped in to support the case management system when the information technology (IT) officers were unable to perform their role of providing the Secretariat with daily information on the status of election petitions.

⁹⁸ See for example, Bjorn Dressel and Marcus Mietzner, “A Tale of Two Courts: The Judicialization of Electoral Politics in Asia”, *Governance: An International Journal of Policy, Administration and Institutions*, 25(3) (July 2012), pp. 391-414. In this piece, Dressel and Mietzner discuss the expansion of judicial power globally over the last century. They highlight that the reliance on courts to resolve political controversies has often been at the expense of representative institutions, with growing concerns about the involvement of judges in politics. The piece analyzes the differing experiences of the Thai and Indonesian constitutional courts, with the latter lauded for its professionalism and independence while the Thai court was accused of bias and politicized decisions.

⁹⁹ With renewed funding, IDLO in Kenya continues to work on EDR programming, with a view to supporting the 2017 Kenyan elections.

¹⁰⁰ During the election petition hearing period, the legal researchers also drafted legal opinions in response to inquiries made by judges hearing electoral petitions in different stations, critical for magistrates who had no legal researchers. Several of the issues that arose were unanticipated, concerning scrutiny and recount, payment of staff working overtime, security concerns and the issuance of certificates to be sent to the IEBC, the Chief Justice and the Speaker of the National Assembly or county concerned on conclusion of a petition either by withdrawal, petition being struck or final judgment.

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

One of the lessons learned from Kenya's experience in the lead-up to the 2013 elections is that 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, IDLO supported a host of interventions aimed at enhancing key actors' skills in priority areas. Examples of the wide scope of IDLO's skill strengthening include: media support for the JWCEP (embedded legal researchers providing support for the issuance of press statements); budget preparation support; editorial assistance for the JWCEP to publish reports on its initiatives pre- and post-election; support for the JWCEP's mobilization of donors; public relations training for the staff at the Court of Appeal;¹⁰¹ and a change management course provided in February 2013 to the JWCEP and its Secretariat.¹⁰²

IDLO also incorporated into its program 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. This pragmatic and needs-driven approach to programming is exemplified in IDLO's development of an 'Election Petitions Checklist', which aimed to ensure that judicial officers and staff could quickly check whether a petition had been filed in accordance with the Electoral Petitions Rules. The reference tool was incorporated into trainings as well as used by various court stations and the Judiciary Help Desk Center to respond to external and internal queries on the petition process.

The IDLO experience in Kenya vividly illustrates that 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. EDP programs should always begin with an honest exchange of ideas on why electoral petitions are not having their desired impact on the 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 aspect of the IDLO program approach was engagement at all four levels of capacity development – individual, organizational, sectoral and enabling environment. Table 3 provides an explanation of these terms from an EDR programming perspective, followed by key capacity development activities and the methods used in the IDLO program in Kenya.

¹⁰¹ See Manzoni Lodge, "Court of Appeal Staff EDR Training" (JWCEP, 14-16 August 2013), pp. 1-15.

¹⁰² Undertaken in the month before the elections, the change management course aimed to strengthen the relational skills within the JWCEP. The course covered such topics as negotiation, teamwork and conflict resolution, discipline and job responsibilities. Feedback from the JWCEP Secretariat confirms that the workshop helped to build a committed team with a common vision, both of which were important because the Secretariat and the JWCEP consisted primarily of staff seconded by the judiciary and those supported by partners such as IDLO. They therefore had no history of working together. In

due course, it became clear that teamwork and commitment were critical to the JWCEP's operational competency, as the Secretariat's intense workload and resource limitations required its staff to work overtime and to undertake tasks beyond their initial terms of reference. The cohesion of the team also facilitated its interactions with the electoral bench and other stakeholders, by ensuring that the Secretariat and the JWCEP presented a consistent message and professional image. These findings are based on stakeholder interviews with JWCEP members/Secretariat and the JWCEP Evaluation.

Table 3: Levels of capacity development

Mode	Description
Individual capacity development	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 capacity development	Activities aimed at improving the culture and systems of formal and informal organizations responsible for EDR.
Sectoral capacity development	Activities focused on strengthening relationships and cohesion within the entire electoral dispute or electoral chain.
Enabling environment (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.

Individual capacity development

Individual capacity development activities focused on building the knowledge of key actors to handle electoral petitions through the application of training methods. In total, 577 actors were reached through diverse trainings for judges, magistrates, law clerks, legal researchers, information and communication technology (ICT) officers, and executive officers, which took place prior to election petition hearings.¹⁰³ A separate training for Court of Appeal staff took place on the conclusion of the election petitions heard at first instance, in anticipation that many matters would be appealed.¹⁰⁴

Other methods of individual capacity development included embedding a long-term legislative drafting expert within the JWCEP. Working side by side with JWCEP members, this support was critical in ensuring that the JWCEP was able to propose quality

amendments to the Electoral Act 2011, and develop sophisticated electoral rules and rules on presidential petitions.

Due to the JWCEP's ownership of the training agenda, IDLO's interventions were well coordinated with training efforts undertaken by other development partners and CSOs in their relative areas of expertise. This coordination and cooperation among different support organizations, alongside the availability of funding, meant that a large majority of the individuals who were to be involved in the electoral petitions were provided with some kind of skills-building relevant to their role in this process. This went a long way to ensuring the success of the EDR system, given that many of these individuals had never dealt with electoral disputes before.¹⁰⁵ The JWCEP's coordination role also meant the messaging among training organizations was consistent.

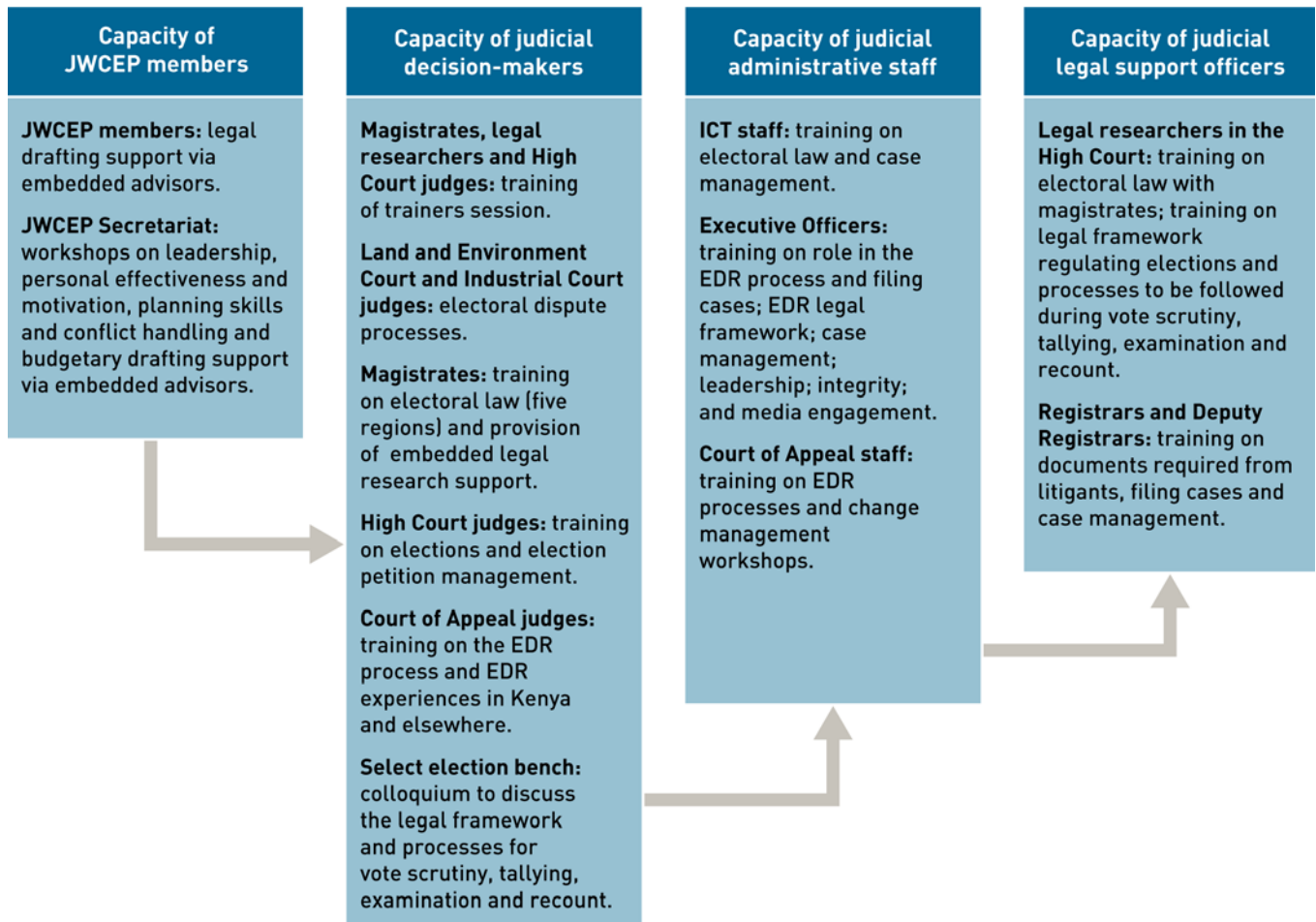
¹⁰³ Dates for, and participants in, the trainings were as follows: 17–20 January 2013: 25 Judges of the Land and Environment, Industrial Court; 20–27 January 2013: 400 magistrates, 7 law clerks, 55 researchers; 20 February–01 March 2013: 45 ICT officers; 24–27 March 2013: 45 executive officers.

¹⁰⁴ Judges in the Court of Appeal had been trained by a partner organization in November 2012. This IDLO training was a refresher

course. It involved sensitization of 44 staff members, consisting of 30 women and 14 men, on the new electoral regime and what their role would be in the electoral appeal process. During this training, change management experts also carried out a Court of Appeal team-building exercise.

¹⁰⁵ JWCEP Evaluation, p. 42.

Figure 5: Individual capacity development in the IDLO electoral dispute preparation program in Kenya



Organizational strengthening

Individual capacity development measures were supplemented by organizational strengthening efforts undertaken at two levels. First, IDLO targeted improvements to the organization of the JWCEP itself, in recognition that the organization mandated to prepare the judiciary for electoral disputes needed to have a clear structure and processes to perform its function effectively, particularly in light of the limited resources and timeframe available. Second, IDLO, in conjunction with the JWCEP, aimed to strengthen the organization of the select electoral bench, with the objective to improve consistency, transparency and efficiency of the (judicial) EDR decision-making process. Activities at the two levels included:

- *Supporting the JWCEP to develop its strategy and work plan and establish internal systems:* IDLO adopted a participatory approach to facilitate the process, defined as “guiding a group of people to define their objectives, and help in the planning to

achieve those objectives”.¹⁰⁶ Tools were developed through the application of an organizational assessment, embedded planning expertise, and two change management retreats.

- *Enhancing the financial security of the JWCEP:* By providing a short-term embedded budget and planning expert, IDLO helped the JWCEP and the Secretariat prepare budget estimates for its work. These were eventually presented to and approved by the National Assembly as part of the judiciary’s supplementary budget. As noted, IDLO also supported the JWCEP in developing its relationships with donors by convening a series of donor roundtable dialogues and preparing a follow-up meeting to brief partners on progress made and support required for the remaining phases of work.
- *Strengthening systems for public engagement:* IDLO supported the development of four templates/publications that the judiciary and JWCEP used, and can continue to use, to engage with the public on electoral disputes.¹⁰⁷ The

¹⁰⁶ “IDLO Capacity Assessment” (internal document, 21 November 2014), p. 18.

¹⁰⁷ These included the JWCEP’s Pre-Election Report, Post-Election Report and Final Report – used to inform the public and key

methods adopted to ensure the uptake of these tools were notable – drafting by embedded researchers working side-by-side with the JWCEP and its Secretariat, or initial IDLO drafts, followed by widespread consultation with judicial actors on their appropriateness and relevance.

- *Developing procedures for the electoral bench to monitor electoral decisions:* In coordination with the JWCEP, the six embedded legal researchers within the Secretariat were tasked with establishing a system for the monitoring of electoral petitions being heard around the country.¹⁰⁸

Sectoral strengthening

The electoral dispute sector exists over and above the judiciary and any judicial elections preparation committee. While the electoral dispute sector has a role in ensuring legitimate election results and violence prevention, different components of the sector have different mandates and means of making their contribution to these overall goals.

In Kenya, the dialogues and meetings discussed above helped improve the cohesion and trust among different actors operating in the election dispute sector (including pre-election disputes), with possible flow-on effects such as: electoral dispute lawyers were highly professional¹⁰⁹ during the hearing of election petitions; the media were more ‘restrained’ in reporting on electoral petitions; different CSOs worked together to complement their respective interventions, including by informally sharing materials widely and updating one another on their activities; and candidates publicly respected the findings of the court.¹¹⁰

Within the broader elections and justice sectors, the JWCEP participated, as the representative of the

stakeholders of the judiciary’s efforts in preparing for the elections and progress in handling cases; the FAQs flyer (discussed above) that was distributed to the wider public and print media; and the template for the publication of the list of judges and magistrates selected to the election bench in national newspapers and the Kenya Gazette in accordance with the Election Petitions Rules, Rule 6(3).

¹⁰⁸ In conjunction with the JWCEP, they developed a Petitions Table and Petitions Appeal Table, which, following communications with judicial officers by the researchers, were updated on a daily basis. The tables were then sent to the JWCEP to alert them of the status of cases being handled, as well as jurisdictional trends in terms of how decisions were being made. This monitoring system permitted the JWCEP and the public affairs department of the judiciary to update the public regularly on petition outcomes around the country.

¹⁰⁹ “The lawyers representing petitioners avoided making personal accusations, and the Supreme Court judges kept the hearings in line with the highest standards of professionalism and integrity necessary for the conduct of electoral litigation.” Carter Center, *Observing Kenya’s March 2013 National Elections*, p. 64.

¹¹⁰ For example, Mr. Odinga responded with a television appearance acknowledging the Supreme Court’s decision and affirming his support for the rule of law and constitutional order. *Ibid.*, p. 99.

¹¹¹ The IAC, active since September 2012, had among its many objectives the compilation and development of a handbook on

judiciary on EDR, in the Inter-Agency Committee (IAC), comprising the Director of Public Prosecutions, the IEBC and the National Police Service.¹¹¹ One output of its work was the joint drafting of particulars of investigations and charges of elections offences. The JWCEP also participated in the National Council on the Administration of Justice meetings, to update both organizations on judicial preparations and other activities taking place.

The impact of initiatives aimed at strengthening the cohesion of the broader elections or EDR sector were limited, due to a number of factors, several of which are explored in the following section.

Building the enabling environment

The IDLO program also included aspects aimed at building the enabling environment for the judiciary’s handling of post-election disputes. One of the first steps undertaken by the JWCEP to further its mandate was to assess the sufficiency of the EDR legal and regulatory framework. As noted above, IDLO provided legislative drafting expertise to the JWCEP, with the objective of securing the passage of a legal framework for electoral dispute resolution that was transparent, internally consistent, and provided the framework for the fair, yet expedient disposal of cases.¹¹²

IDLO’s support for a conducive environment also included addressing more intangible aspects such as tackling the culture of slow dispute resolution and vexatious interlocutory claims. As noted, following the drafting of the 2013 Presidential Election Rules, IDLO assisted the JWCEP in holding a stakeholder’s validation forum where CSOs, lawyers and the Kenyan Law Reform Commission undertook an energetic discussion on the scope of the Rules, security for costs and *amicus*

relevant electoral laws and regulations and the development of mechanisms for coordination and collaboration among the various stakeholders, with a focus on violence prevention.

¹¹² The JWCEP recommended several areas for reform, including amending the Elections Act 2011 to devolve jurisdiction to the Magistrates Courts to hear disputes relating to members of the County Assembly, so as to not overburden the High Court, and establishing limits for the hearing and timing of appeals (six months). In order to facilitate the passage of these reforms to the Elections Act, JWCEP representatives engaged with the relevant parliamentary committees. The reforms were tabled on 31 December and came into force in early January 2013. These efforts were followed up with a revision of the 1993 election rules, which, among stakeholders, were seen to have eroded public confidence in the judiciary’s handling of electoral disputes because of their overwhelming focus on procedural technicalities. The JWCEP also drafted Rules for the Presidential Election Petition, which was forwarded to the Chief Justice for approval. The Rules were published in national newspapers and then presented to the political parties at the Political Parties Forum. The final Rules determined the process through which aggrieved parties disputed the presidential election results in “Raila Odinga & 2 Others versus Independent Electoral and Boundaries Commission, Isaack Hassan, Uhuru Kenyatta and William Ruto”. They likewise guided the Supreme Court in reaching a verdict.

curiae. By explaining to participants the purpose of the rules (expeditious, fair and rule-based decision making) and soliciting participants' input, the meeting created a sense of ownership of the rules among key players and set forth a new standard for the hearing of such disputes.

Efforts to develop positive norms around election petitions with relevant interest groups continued throughout the pre-election period. The Chief Justice, on the advice of the JWCEP, issued a circular, providing that judges were not to take annual leave during the post-election period, and that they were to prioritize election matters. In public events, the Chief Justice also underscored that unnecessary delays would not be tolerated and that the select bench had a responsibility to the public and litigants to conclude matters within the statutory and constitutional timeframes provided.

BUILDING BLOCK 3: EMBEDDING ELECTORAL DISPUTE PREPARATION IN THE WIDER CONTEXT

Lesson 1: 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

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 EMB; (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. Kenya was, and to an extent still is, an emerging democracy, in the sense that it has limited experience with democratic transition.¹¹³ The administrative incapacity of Kenya's various electoral commissions was regularly matched with the high stakes of elections. Identified factors that help to perpetuate the intensity of elections and trigger violence include: historic inequalities, especially concerning land distribution, between ethnic groups, which led to hostilities and political parties being formed on ethnic lines;¹¹⁴ the centralization of political power within the office of the President under the former colonial-era constitution,¹¹⁵ which promoted a patrimonial system of politics;¹¹⁶ the 'first-past-the-post' voting system in the context of roughly equal ethnic groups, which dissuades cross-party coalitions and power-sharing and encourages voting on ethnic lines;¹¹⁷ and an EMB and judiciary historically subservient to the executive.¹¹⁸ All these factors led the Kenyan Commission of Inquiry into Post-

¹¹³ The second multi-party elections took place in 1992. Four have taken place since: 1997, 2002, 2007 and 2013. The first multi-party elections were held in 1963.

¹¹⁴ Violence in the 1992 and 1997 elections took place in areas where public support for devolution of political power to the regions (*majimboism*) and land distribution was greatest. Lahra Smith, "Explaining violence after recent elections in Ethiopia and Kenya", *Democratization* 16(5) (October 2008), p. 890.

¹¹⁵ As noted by Mbote and Akech, judicial power was not defined in the repealed 1963 Constitution, nor was its exclusive function vested in the judiciary. In contrast, the Constitution expressly vested executive authority and

legislative powers in the President and Parliament respectively (see sections 23 and 30 respectively of the repealed Constitution). Patricia Kameri Mbote and Migai Akech, "Kenya Justice Sector and Rule of Law", *Open Society Initiative for Eastern Africa* (March 2011), p. 99.

¹¹⁶ Governance in Kenya has traditionally been based on patrimonial politics and 'negative ethnicity', an opportunity for one ethnic group to ensure 'their people' have access to state resources, land and jobs. This began in the pre-independence time, progressively increased and ultimately became a major factor in national politics, particularly under Daniel Arap Moi. For more details, see for example John Lonsdale, "Kenya: Ethnicity, Tribe and State", *OpenDemocracy.Net* (17 January 2008), available from www.opendemocracy.net/article/kenya_ethnicity_tribe_and_state. Most analysts have concluded that the disillusionment of voters and the public with the lack of reforms turned them against members of 'other' communities in 2007, who they believed to have benefited from the status. See Smith, "Explaining violence after recent elections in Ethiopia and Kenya", pp. 867-897.

¹¹⁷ The impact of this situation is neatly summarized by Karuti Kanyinga: "The electoral system has prevented the institutionalization of political parties. It motivates parties to form along ethno-regional lines since, what is required is to win by a simple majority. Mobilizing ethnic numbers then becomes a priority for leaders as they compete against one another. The parties are at best institutionally weak and are formed as vehicle for electoral politics. Very few live beyond one election period in their current form in terms of size of membership and support, the parties generally revolve around wealthy ethnic elites, as they rely on ethnic coalitions or singular ethnic groups as their primary bases of support. Many do not espouse a coherent ideology or doctrine on which to articulate." Karuti Kanyinga, *Kenya: Democracy and Political Participation* (AfriMAP, Open Society Initiative for Eastern Africa, and the Institute for Development Studies, University of Nairobi, March 2014), p. 20. For example, in the 2007 election, 94% of Kikuyus voted for the Kikuyu candidate (Kibaki) and 98% of Luos for the Luo candidate (Odinga). See Ferree, Gibson and Long, "Voting behaviour and electoral irregularities in Kenya's 2013 Election", *Journal of Eastern African Studies* 8(1) (2014), p. 155.

¹¹⁸ For commentary on the lack of independence of the judiciary and the EMB, and the connection between this and the 2007 violence, see the findings of the Kriegler Report, "The 2007 elections in Kenya: Introduction", Chapter 1 (2008), pp. 141-143; Arne Tostensen, "Electoral Mismanagement and Post-Election Violence in Kenya: The Kriegler and Waki Commissions of Inquiry" (Nordisk Tidsskrift for Menneskerettigheter 27, 2009), p. 441. The Kriegler Report, for example, notes "...Government institutions and officials lack in integrity and autonomy. One result of this in the 2007 election was the perception by sections of the public that Government institutions, and officials, including the judiciary, were not independent of the presidency, were partisan and lacked integrity. Hence, were perceived

Election Violence (CIPEV) of 2007 to conclude that electoral violence had been institutionalized in Kenya and become integral to the political process.¹¹⁹ Notably, opportunities between 1992 and 2007 to address these complex causes of electoral violence, and to kick-start a more inclusive, equitable and transparent government structure were consistently frustrated.¹²⁰

The reform momentum in the years following the violence-ridden 2007 elections addressed several deficiencies and laid the foundations for the JWCEP to be able to strengthen the EDR system and contribute to mitigating the potential for post-election violence.¹²¹ First, the passage of the 2010 'transformative' Constitution in many ways contributed to a peaceful election in 2013 by putting in place measures to check presidential power via the judiciary, and to diffuse centralized power, including through the introduction of 47 county governments. These new levels of the state, introduced through the devolution provisions, offered some political consolation to Mr. Odinga and his supporters, thereby 'softening the blow' of losing the presidential election and reducing the stakes of that elective position.¹²² The 2010 Constitution also included several provisions to address only long-term grievances, including measures to instigate land reform.¹²³ The importance of these developments suggests that constitutional reform addressing the causes of electoral violence and supporting an independent judiciary is an

as not able to conduct the election fairly. This led to some officials not following the law themselves, and sections of the provincial administration and security forces even themselves engaging in acts of violence. This has built a culture of impunity, which the CIPEV has advised as a pertinent issue to the recurrence of election related violence and should be dealt with once and for all." Konrad-Adenauer-Stiftung, "Kriegler and Waki Reports on 2007 Elections: Summarized Version", (Kenya Office, Kenya, 2009), p. 48.

¹¹⁹ These findings of the Waki Commission on post-election violence are cited in the Carter Center report on Kenya's March 2013 elections. Further, Smith notes that mass youth unemployment and the weak state of the rule of law facilitates this scenario, with youth gangs prone to manipulation by political elites around election times forming gangs that act as 'shadow governments' and which 'dovetail with the state and its security apparatus'. Smith, "Explaining violence after recent elections in Ethiopia and Kenya", p. 890. See also ELOG Report, p. 8.

¹²⁰ Between 2003 and the adoption of the new Constitution in August 2010, four draft constitutions were prepared. One was put to a referendum in late 2005; it proposed land reform and the power sharing of the post of Prime Minister and President. This was narrowly rejected, and formed the political backdrop to the 2007 electoral contests, with one observer going so far as to say that the 2007-2008 crisis would have been avoided had this constitution passed. Njoki S. Ndungu, "Kenya: The December 2007 Election Crisis", *Mediterranean Quarterly* 19(4) (Fall 2008), p. 120.

¹²¹ The soul-searching that took place following the violence in 2007 garnered renewed energy to revise the Constitution and address the weakness of the judiciary, reinforcing its functional and legal independence and responsibility to uphold constitutional rights and principles. In response to these new responsibilities, the judiciary commenced a widespread reform program, laid out in the document Integrated Comprehensive and Institutional Transformation Framework. Most remarkably, in 2011, the Vetting of Judges and Magistrates Act established the Judges and Magistrates Board, which resulted in a clean-up of the judiciary, with the removal of judges whose qualifications and integrity were in question. The new faces and

important precursor to efforts to support an effective EDR system that contributes to the higher goals of violence prevention. Constitutional change also provides a momentum that can be capitalized upon by reformists within the judiciary¹²⁴ and other reforms.

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. In 2013, a broad swath of Kenyans committed both time and energy to avoid a repeat of the 2007 post-election violence, which had come as "terrifying evidence...of the value of peace and stability".¹²⁵ The pressure for peace 'at all costs', even over fair political competition, created a very different backdrop to that of the 2007 elections and goes a long way to explaining the absence of violence in the 2013 elections.

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 were put in place, played a significant role. Following the 2007 elections, the police struggled to cope with the rising violence and insecurity, and were quickly overcome. In some instances, they were also willing participants in the violence and were accused of using excessive force.¹²⁶ By contrast, in 2013, the police were deployed alongside 90,000 Kenyan military personnel, with forces concentrated in 'hot

the forced departure of the previous Chief Justice all acted as signs to the public that the court would be fair in its handling of disputes. In the words of one interviewee, "confidence was very much a question of perception as much as reality". These constitutional reforms in essence set the stage for important changes to improve the functioning of elections and election dispute resolution. Stakeholder interviews.

¹²² Carter Center, *Observing Kenya's March 2013 National Elections*, p. 15.

¹²³ See Article 60(1) of the Kenyan Constitution, which lays out the principles for Kenya's national land policy.

¹²⁴ As noted by one interviewee, the JWCEP's efforts were aided by the fact that "the winds of reform were still blowing from the 2010 Constitution", especially within the judiciary. The JWCEP capitalized on the Kenyan judiciary's reform momentum.

¹²⁵ Key influencers of public opinion supported peace, including religious leaders and the media, who refrained from reporting violent episodes and party violations. Radio airwaves were full of calls for tolerance, local radio being the most important broadcast media in Kenya. Some radio stations organized peace rallies, while popular stations generally played songs that praised national patriotism and intercommunity pacifism. Nic Cheeseman, Gabrielle Lynch and Justice Willis, "Democracy and its Discontents: Understanding Kenya's 2013 Elections", *Journal of Eastern African Studies* 8(1) (2014), pp. 2-24. Mathieu Merino, "The 4 March 2013 General Elections in Kenya: From Latent Tension to Contained Violence", in *Kenya's Past as Prologue: Voters, Violence and the 2013 General Election*, Marie-Aude Fouere and Susan Mwangi, eds. (African Books Collective, Oxford, 2015), p. 46. Public efforts were made under the 'I am Kenyan movement', with peace messaging disseminated via bulletin boards, TV, comic books, online art projects and peace texting. See Horacio R. Trujillo and others, "The Role of Information and Communication Technology in Preventing Election Related Violence in Kenya, 2013", *Perspectives on Global Development and Technology*, 13 (2014), pp. 111-128.

¹²⁶ Ndungu, "Kenya: The December 2007 Election Crisis", pp. 111-121.

spots' like the Rift Valley.¹²⁷ Security forces were also trained on electoral security by the IEBC. Parallel efforts at the local level supporting conflict early warning and early response systems set up by non-governmental organizations (NGOs) and supported by local police, backstopped these initiatives.¹²⁸ It is reported that in some hostile situations in 2013, the police even offered to stand down if an NGO or other leaders were in a better position to mitigate potential violence.¹²⁹

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:

- *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:* If the incumbent government is in a weak position in the election, it is likely that the government will attempt to reign in the independence of the judiciary.¹³⁰ Counter-intuitively, this suggests that EDR programming is likely to be more effective in circumstances where the incumbent government believes it has a significant lead over political opponents. These considerations should be balanced against the strategic calculations of the judiciary itself, which, in situations of political instability, may decide it makes sense not to put all their "eggs in the basket of the existing government".¹³¹ They may therefore

decide electoral matters strictly on legal technicalities in political cases, so as to avoid being labeled as pro or anti-government.¹³² In short, the approach of judges to electoral cases may depend on how they anticipate the incumbent government or other institutional actors will react to their independence, and any personal risks that may carry.

The Kenya experience provides a telling example of the importance of assessing political leaders' incentives to support the peaceful resolution of disputes. The shadow of events surrounding the 2007 election resulted in increased support for an independent judiciary in 2013, especially from the executive and other key stakeholders. Although three of the leaders involved in the 2007 elections were running again in the 2013 presidential elections, this time they each had strong incentives to avoid violence.¹³³ Two high-profile inquiries into the violence surrounding the 2007 elections had highlighted the key role politico-ethnic leaders played in manipulating voters to instigate violence, in some cases, resulting in a recommendation of criminal charges.¹³⁴ For these reasons and more, there was a need for political leaders to proactively distance themselves from any violence in the 2013 elections. The result was that each leader publicly committed to a peaceful election in televised addresses, public debates, and even participated in a peace rally in the months leading up to the elections. Further, all candidates signed a new code of conduct that forbade violence and fraud, and solemnly swore, if defeated, to accept the verdict of the ballot box.

The relative peace that eventuated in 2013 indicates that in some instances, at least in Kenya, powerful national politicians can effectively

¹²⁷ See "Democracy and Its Discontents", pp. 2-24. According to the Carter Center, police response to politically motivated civil disorder was "prompt, pre-emptive, robust and proportionate." Carter Center, *Observing Kenya's March 2013 National Elections*, p. 67.

¹²⁸ See comments on the *Uchaguzi/Ushahidi* software developed for the elections in the USAID report. *USAID Support for Kenya's 2013 Elections* p. 22.

¹²⁹ *Ibid.*, p. 18.

¹³⁰ Gløppen and Kanyongolo, "Judicial Independence and Judicialization of Electoral Politics in Malawi and Uganda", p. 11. This theory is likely to hold true in societies where political office is central to social and economic power, and where ex-presidents face personal risks (arrest/detention/freezing of assets) if they lose the election.

¹³¹ Johanna Kalb, "The Judicial role in New Democracies: A Strategic Account of Comparative Citation", *The Yale Journal of International Law* 38 (2013), p. 433.

¹³² *Ibid.*

¹³³ The International Criminal Court's indictment of Mr. Uhuru Kenyatta, on charges of crimes against humanity arising from his alleged role in promoting the post-election violence in 2007 and 2008, and of Mr. William Ruto, led to the formation of the Jubilee Coalition in December 2012, with Mr. Ruto joining Kenyatta as his running partner. This coalition brought together the two groups allegedly most involved in the 2007-2008 election violence. Several

analyses highlight the key role this alliance played in mitigating violence, especially in the Rift Valley, where most of the violence had taken place in 2007. Through the alliance, both leaders could project themselves as an exemplar of peace for Kenyans and victims of foreign interference. See Cheeseman, Lynch and Justice Willis, "Democracy and Its Discontents", pp. 8-9. The third leading politician, Mr. Raila Odinga, was incentivized to address electoral disputes pacifically due to his central role in drafting and supporting the 2010 Constitution, including reforms relating to an independent judiciary and the IEBC. According to one interviewee, it would have been highly hypocritical for Mr. Odinga to not use the mechanisms that "he himself had spent so long advocating for". His use of the prescribed EDR adjudication process and his acceptance of the Supreme Court ruling have also been described as critical in averting inter-ethnic violence, notwithstanding the close result and the underlying ethnic divisions in the country. *USAID Support for Kenya's 2013 Elections*, p. 4.

¹³⁴ The Waki Commission identified several suspects including senior politicians as the main perpetrators of violence and recommended that an independent special tribunal for Kenya be established to try the suspects. The Commission also recommended that the International Criminal Court take up the matter if the government failed to establish a special tribunal. See Kanyinga, *Kenya: Democracy and Political Participation*, pp. 135-136.

constrain ethnic tension and the resort to violence, although this works best in combination with determined efforts at the local level to prevent such clashes and a general public demand for non-violence. Such an environment bears well on opportunities for the judiciary to confidently hold the executive or electoral management body accountable for errors or irregularities during the electoral cycle.

- *Levels of support available to the judiciary to assert its independence and the relative strength of this support:* In societies where there is an internal or external constituency supportive of judicial independence, the incumbent government may find it too costly to overrule, or ignore the courts, thereby providing an incentive for the judiciary to assert its independence, including around electoral disputes.¹³⁵ Influential supporters of judicial accountability are likely to be found in the legal, business and religious communities – as well as among donors, international organizations or the general public.¹³⁶ In Kenya, for example, major international donors invested significantly in supporting Kenyans to prepare for the 2013 elections from early 2008, with an eye to the long-term goal of supporting peaceful elections. There was tangibly strong support for the Kenyan judiciary to resolve any concerns with the process.¹³⁷ The conceptualization phase of an EDP program should therefore begin with an assessment of the extent to which there is a constituency that supports judicial accountability, and the extent to which the elections are being scrutinized and supported, nationally and internationally. In the absence of any public support for judicial independence, practitioners should potentially focus efforts on how to build such a constituency.

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. As noted by one commentator, "in the context of a new democracy, chief justices strongly influence the judicial corporate culture and the judge's conception of their own role vis-à-vis the executive and the political domain".¹³⁸

These findings point to the importance of taking 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. As was seen in Kenya in 2013, with a reform-minded Chief Justice, there was highly influential support for a strengthened EDR system.¹³⁹ For example, JWCEP efforts were reinforced by consistent messaging from the Chief Justice, at public events and to the judiciary itself, that unnecessary delays would not be tolerated and that the select bench had a responsibility to the public and litigants to conclude matters within the statutory and constitutional timeframes provided.

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 structure for electoral petitions should be considered – such as the establishment of a separate permanent EDR institution with strict selection criterion for electoral arbiters. Such an approach should only be taken after thoroughly assessing the availability of the resource demands required to support a new institution, and the potential of institutional capture that often accompanies a permanent institution with a restricted mandate.¹⁴⁰

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 electoral dispute preparations to maximize the impact

¹³⁵ Gloppen and Kanyongolo, "Judicial Independence and Judicialization of Electoral Politics in Malawi and Uganda", p. 12.

¹³⁶ Ibid., p. 13.

¹³⁷ USAID for example, spent more than US\$150 million in support of democracy, human rights and governance in the five-year period preceding the 2013 elections. One criticism of this broad approach, highly focused on peace messaging as a component of conflict prevention programming, was that it resulted in the suppressing of disagreement about the fairness of the election and broader issues of justice, i.e., that it was more important to avoid violence than to have fair elections, or to support transitional justice structures. This was confirmed to an extent by the muted international reaction to the election process, which made it clear that the international community would not tolerate a reaction from Mr. Odinga that did not correspond to the peace narrative, even in the face of what appeared to be widespread significant electoral irregularities. See *USAID Support for*

Kenya's 2013 Elections, p. 5 (funding for election); Claire Elder and others, "Elections and Violent Conflict in Kenya: Making Prevention Stick" (United States Institute of Peace, 2014) (peace 'at all costs' narrative).

¹³⁸ Gloppen and Kanyongolo, "Judicial Independence and Judicialization of Electoral Politics in Malawi and Uganda".

¹³⁹ The support of the Chief Justice was an important factor in the judiciary's preparation for electoral disputes in the 2013 elections. The Chief Justice's commitment to preparations and 'stamp of approval' of the JWCEP gave it the credibility it needed to approach other departments within the judiciary for human resources support, including through secondments (stakeholder interviewers).

¹⁴⁰ Stakeholders interviewed in Kenya, for example generally agreed that a permanent EDR institution with permanent arbiters would not work in the Kenyan context because of the likelihood of corruption and institutional capture.

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

- *Address the challenges facing the EMB in overseeing a fair, free and credible election:*¹⁴¹ Although disputes arise in all elections, their frequency and impact is higher in nascent democracies due to resource constraints.¹⁴² Given the fundamental role of EMBs in managing elections, it is critical that EMBs are provided with sufficient human and financial resources to implement their mandate. Important in this regard is access to technology for the voting process such as tools for tallying, recording, transcribing and transmitting results, which can help to minimize the human errors known to arise in the electoral process and that so often promote suspicion of foul play by the EMB. Nonetheless, it is well recognized that technology is not a panacea for electoral disputes. The Kenya 2013 experience with biometric voting registration highlights that technology (and technological failures) may, in fact, increase the number of disputes. Where possible, EMB staff should be provided with similar resources and training on electoral laws, where sessions or modules are particularly relevant to their work. Such measures help to avoid overburdening the judiciary at the conclusion of the election with claims of impropriety¹⁴³ and increase the consensus between the judiciary and the EMB about the content of

electoral laws and their respective roles and responsibilities. The presence of election observers contributes to the awareness and openness of elections, and increases pressure on the EMB to comply with electoral rules, minimizing the recurrence of electoral irregularities. The findings of observers can also help to minimize vexatious disputes concerning the election results.¹⁴⁴

- *Strengthen the formal independence of the EMB and the legal framework for elections:* Reforms supporting the legal and functional independence of EMB staff, including provisions concerning the appointment, status and removal of members,¹⁴⁵ can minimize opportunities for the election to be seen as unfair.¹⁴⁶ International IDEA suggests that in emerging democracies, input from opposition parties on the composition of the EMB will go far in improving public and opposition confidence in the electoral process.¹⁴⁷ Decisive steps signaling a break with the past (such as updating of the voter's register) also help to improve trust in the EMB.¹⁴⁸ By way of example, in the years and months preceding the Kenyan 2013 elections, improvements were made to the financial and functional autonomy of the IEBC,¹⁴⁹ and to the legal framework for elections.¹⁵⁰ Further, despite some mishaps, the voter's register was updated with 14.3 million Kenyans registered to vote, more than in any previous election.¹⁵¹ These measures, alongside

¹⁴¹ The importance of the 'preventative' aspect of electoral justice is underscored by International IDEA. "Electoral justice includes both the means for *preventing* violations of the electoral legal framework, and...*resolving* electoral disputes that arise from the non-observance or breach of the provisions of the electoral law." Orozco-Henríquez and others, *Electoral Justice*.

¹⁴² In such countries, which by their very definition have little or no experience in free elections, the multitude of tasks involved in the election process are rarely within the technical capacity of the official EMB, increasing the chances of errors in the electoral process. As a result, most election tasks, including important steps such as the registration of voters, or the delivery of election materials are said to be done "out of sequence, badly or not at all." Pastor, "The Role of Electoral Administrations in Democratic Transitions", p. 7. Pastor notes that in emerging democracies, electoral officials are often recruited and trained during a very intense period just before the election rather than being employed permanently throughout the electoral cycle, while the infrastructure required to support a smooth election, namely, good roads, telecommunications, vehicles, printing presses and access to technology, is usually lacking.

¹⁴³ Abuya, "Can African States Conduct Free and Fair Presidential Elections?" p. 125.

¹⁴⁴ Commonwealth Convention, article 15(1) cited in IFES, *GUARDE*, p. 90.

¹⁴⁵ Key reforms include the process for appointment of members, which in many contexts has remained the prerogative of the President. See Abuya, "Can African States Conduct Free and Fair Presidential Elections?" p. 125.

¹⁴⁶ Notably, studies have shown there is a "direct correlation between the mode of appointment of officials and their ability to discharge their role independently". The Krieglger Commission affirmed that the staff recruitment process has a "significant impact on the quality of an election and the 'credibility' of the EMB", Krieglger Report, p. 84.

¹⁴⁷ International IDEA, "Electoral Management during Transition: Challenges and Opportunities", Policy Paper (August 2012), p. 14.

¹⁴⁸ *Ibid.*, p. 29, drawing from the Ghanaian elections in 1996.

¹⁴⁹ The 2010 Constitution established the IEBC as the responsible agency for conducting or supervising referenda and elections to any elective body or office established by the Constitution, replacing the Interim Independent Electoral Commission (IIEC) established in 2008. A year later, parliament passed the IEBC Act, 2011, as the Commission's enabling law. The Act established that a chairperson and eight commissioners were to be appointed via a selection panel assembled by the President and the Prime Minister. The panel invited applicants, shortlisted and conducted interviews, then forwarded the names of the successful applicants to the National Assembly, which vetted them and submitted the approved names to the President, who then appointed them following consultations with the Prime Minister. The Act further establishes the IEBC's financial autonomy and financial procedures, and includes a code of conduct for IEBC members and employees. For more details on Kenya's IEBC, see Francis A. Aywa, "Kenya", in *Election Management Bodies in East Africa: A Comparative Study of the Contribution of Electoral Commissions to the Strengthening of Democracy*, A. Makulilo and others eds. (Open Society Initiative for Eastern Africa and AfriMAP, 2015), pp. 67-125.

¹⁵⁰ Changes included the development of a compulsory code of conduct for candidates and political parties as set out in the IEBC Act, 2011; introduction of clearer rules for the conduct of elections and the resolution of electoral disputes (Elections Act 2011; Political Parties Act, 2011, among others), and afore discussed reforms to the judiciary; introduction of rules for the registration, regulation and funding of political parties, including the creation of the Office of a Registrar of Political Parties via the Political Parties Act 2011.

¹⁵¹ The voter's register was initially updated using biometric voter registration. However, the process of acquiring this system was highly controversial, leading the IEBC to cancel the exercise in August 2012 and announce that it would use the traditional manual system of registration. Eventually this decision was reviewed when the Canadian government offered the kits on loan to the government of Kenya. This

successfully managed by-elections and the 2010 Constitutional referendum, offered an opportunity for the interim organization, the Interim Independent Electoral Commission, to demonstrate its management capacities. Two months before the general elections, there were high levels of voter confidence in the IEBC, and in the forthcoming elections more generally.¹⁵² This potentially explains the high level of voter turnout, with 86 per cent of registered voters casting ballots, the largest in the nation's history.¹⁵³

- *Strengthen democratic culture and non-violence norms among the public and political parties:* Rooting out electoral violence requires concerted, non-partisan commitment to electoral integrity on the part of political leaders as well as the general public and other governmental and non-governmental organizations.¹⁵⁴ Lessons learned

from Kenya in 2013 as to how this can be achieved include: (i) establishing the internal rules for political parties so they embrace non-violence and commit to negotiation and use of the EDR system; (ii) establishing an inter-party dialogue for political parties to break down hostility; (iii) supporting peaceful TV debates and other forms of positive engagement among political parties; and (iv) supporting pacts committing to non-violence. Another step includes strengthening rules for political party leaders, including disbarment from running for those who have been prosecuted in the past for violence or inciting violence or hate speech. A final key lesson from Kenya's peaceful 2013 elections is the importance of establishing tools and systems to regulate and sanction hate speech, especially on social media.¹⁵⁵

delayed the voter registration by six months and the time set for registration had to be reduced to 30 days. The time to inspect the register was also reduced to 15 days. Aywa, "Kenya", p. 119.

¹⁵² A survey undertaken by South Consulting in January 2013, assessing the state of electoral preparedness, found that 91% of respondents responded yes to the question 'Do you believe the IEBC is independent enough to conduct the next general election freely and fairly'. South Consulting, *Kenya's 2012 General Election*, p. 34.

¹⁵³ *USAID Support for Kenya's 2013 Elections*, p. 21.

¹⁵⁴ Kriegler Report, p. 9. The CIPEV noted that the post-election violence beginning in 2007 was both spontaneous outrage against a result perceived to be massively flawed and organized and orchestrated violence, targeting certain communities living in strongholds of political opponents, with some evidence that the violence was planned, financed and implemented with the knowledge of political actors. See Ndungu, "Kenya: The December 2007 Election Crisis", pp. 111-121.

¹⁵⁵ The ever-present fear of violence in 2013 saw the introduction of measures targeting violence prevention. The National Communications Commission of Kenya targeted political messages sent to mobile phones, imposing an obligation on network operators to filter content that was likely to encourage violent behaviour. Political parties were only able to write their text messages in English

or Swahili, thereby excluding many vernacular languages. The Commission also required parties to submit their proposed messages to network operators 48 hours before broadcast, so that content could be deleted if necessary. Penalties for sending hate messages via SMS reached up to US\$56,000 or three years in prison. Citizens were also able to report any hate messages via a mobile phone application set up by the National Police Service Commission. The National Cohesion and Integration Commission worked with local administrators, organizations and networks to monitor hate speech and to train the media on conflict-sensitive reporting. While the regulation of the airwaves and mobile phone network was to a certain extent effective, questions remain about the capacity of the government to control hate speech on the social networks, which became invested with it, just two weeks before the vote. Attempts by the Committee on Media Monitoring to bring actions against these networks were to no avail. While these efforts were a precondition to a peaceful election, they were not without long-term consequences. Some commentators highlight that this extensive regulation of the media and international support for peace resulted in media self-censorship and the delegitimization of truthful reporting, with journalists refraining from reporting on irregularities in the electoral process and political party violations of electoral law.

4. 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 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 practitioners 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?¹⁵⁶
- 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 extensive resources invested in EDR be used 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 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 shadow of the horrific 2007 violence is liable to be less intense in 2017.

Promising signs are already visible. In its follow-on programming with the JCE, the JWCEP’s successor organization, the IDLO team in Kenya, with the JCE, have already begun exploring how they can use the networks established in the first phase of EDP programming to tackle more intractable concerns of the overall system that emerged from the 2013 elections. For example, the JCE convened stakeholder workshops in 2015 to reflect on the lessons learned from the 2013 elections and strengthening inter-agency collaboration, gathering the momentum to undertake the steps necessary for improved results, especially in relation to the management of pre-election disputes. One such meeting was deliberately designed to gather consensus on the proposed legislative reforms among the main actors, including two key EDR institutions, the IEBC and the PPDT.¹⁵⁷

Nonetheless, such positive developments should be weighed against growing public dissatisfaction with the key electoral institutions. Concerns over the independence, credibility and capacity of the IEBC have already led to tense protests and a threat of boycott of the elections by the opposition.¹⁵⁸ With the departure of

¹⁵⁶ In the 2013 elections, for example, disputes over boundary delimitations, political party nominations, allocation of party lists and the regulation of political parties and campaigns were poorly handled, if at all.

¹⁵⁷ See for example, IDLO, *Report on the Multi-Stakeholder Forum for State Actors on Electoral Reforms*.

¹⁵⁸ Editorial, “IEBC Must Toil Hard to Win Public Confidence”, *The Standard*, 6 May 2016. Available from

the reform-championing Chief Justice and accusations of corruption in the highest ranks of the judiciary in relation to one 2013 election petition, perceptions are mounting that the Supreme Court can be compromised.¹⁵⁹ If these core institutions are not seen as fair arbiters, then there is a high probability that one or more political parties could reject the 2017 results, thereby increasing political tension and threatening Kenya's fragile peace.¹⁶⁰ This all points to the importance of EDP programming for 2017 and a focus on the public preparedness component of the intervention logic described above.

In addition, work can expand to assist partners who have expressed interest in improving accountability for violations of electoral laws in Kenya. At the national level, this could begin by engaging with the specialized

election offences prosecutors within the Director of Public Prosecutions and the IEBC to determine needs, or by supporting the implementation of the Inter Agency Committee's mandate, for instance through organizational capacity-building support akin to that provided to the JWCEP in 2013. To maximize success, working with partner CSOs and the media to garner the necessary public support for improved accountability are important. More broadly, the JCE could improve its coordination with communications regulators to ensure that procedures for regulating hate speech are extended and applied to social media. Such measures, while by no means exhaustive, will help to tackle the culture of impunity, especially for political elites, that the CIPEV identified in 2007 as a defining characteristic of Kenyan elections.

www.standardmedia.co.ke/article/2000200793/iebc-must-toil-hard-to-win-public-confidence.

¹⁵⁹ "Corruption Scandal in Kenyan Judiciary", *Deutsche Welle*, 24 February 2016. Available from www.dw.com/en/corruption-scandal-in-kenyan-judiciary/a-19071166.

¹⁶⁰ Editorial, "IEBC, Judiciary Must Win Public Confidence", *The Nation*, 26 March 2016. Available from www.nation.co.ke/oped/Editorial/IEBC--Judiciary-must-win-public-confidence/-/440804/3134112/-/l2d2ccz/-/index.html.

ACKNOWLEDGMENTS

This Lessons Learned Brief is the work of a team of IDLO staff and consultants led by IDLO’s Department of Research and Learning. IDLO is especially grateful to Renée Chartres for her work on this project and the IDLO Kenya Office for its support in undertaking the research.

IDLO would also like to acknowledge the contribution of the experts whose comments and insights improved prior versions of this LLB. These include Justice David Maraga, former Chair of the JCE and current Chief Justice of the Republic of Kenya, and Dr. Collins Odote, the JCE Legal Adviser.

IDLO’s work on EDR in Kenya and the publication of this LLB have been supported by USAID and DANIDA.

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.



Published by: International Development Law Organization (IDLO)

Viale Vaticano, 106 00165 | Rome | Italy

Tel: +39 06 40403200 | Fax: +39 06 40403232 | Web: www.idlo.int | Email: idlo@idlo.int | Twitter: @IDLO

United Nations Permanent Representation

Uganda House | 336 East 45th Street | 11th Floor | New York | New York 10017 | USA

Tel: +1 212 867 9707 | Fax: +1 212 867 9719 | Email: NewYork@idlo.int

Publication date: April 2017. Copyright © 2017, International Development Law Organization (IDLO). All rights reserved.

The views expressed in this Publication are the views of the authors and do not necessarily reflect the views or policies of IDLO or its Member Parties. All rights reserved. This material is copyrighted but may be reproduced by any method without fee for any educational purposes, provided that the source is acknowledged. Formal permission is required for all such uses. For copying in other circumstances or for reproduction in other publications, prior written permission must be granted from the copyright owner and a fee may be charged. Requests for commercial reproduction should be directed to the International Development Law Organization.

ISBN Number 9788896155196