Evaluation of the performance of the Judiciary and the Judiciary Working Committee on Election Preparations in managing the electoral dispute resolution process

MAY 2014
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Executive Summary

The General Election held on 4th March, 2013, was the first under the new constitutional dispensation that laid the foundation for the transformation of all aspects of the Kenyan society. The preparation and conduct of this election were informed by historical challenges that had bedevilled the country since independence and particularly the causes of the more recent 2007 post election violence. The vision of peaceful, free and fair elections, therefore, buttressed these preparations and conduct of the General Election, with the Judiciary being accorded a platform to reform, exercise its independence, uphold the rule of law and protect the Constitution.

Before the new constitutional dispensation, the Judiciary had been seen as a weak institution, lacking adequate human and physical capacity, with weak governance and leadership and perceived to lack independence. Under these perceptions, election petitions would take long to resolve, with some being disposed of just a few months to the next General Election. The 2013 General Election presented an opportunity for the Judiciary to regain public confidence in resolving electoral disputes and demonstrating its institutional transformation. This informed the Hon. Chief Justice’s decision to unveil the formation of the Judiciary Working Committee on Election Preparations (JWCEP) on 10th May 2012, with a mission to “design and execute a Judiciary programme to build the capacity of judicial officers and staff on electoral matters, and suggest ways of working with other stakeholders”.

The mandate of the committee was to:
• Advise the Judiciary on administrative arrangements and measures for the efficient disposal of election related disputes
• Develop and implement, in conjunction with the Judiciary Training Institute, a training programme for the efficient and effective management of election disputes for judicial officers and support staff
• Develop and design a system for monitoring and evaluating the management and administration of election related disputes in court
• Liaise and coordinate with stakeholders to ensure efficient, effective and timely resolution of election related disputes and offences
• Advise the Judiciary on the information that needs to be developed and disseminated to the public on the avenues open to it to pursue electoral disputes and the approaches that would be adopted.

The overall purpose of the committee was to strengthen and improve the Judiciary’s capacity to resolve election petitions in a “people-focused and expeditious justice” manner. The committee planned to deliver the following outputs:
• Develop clear legislative framework, rules and procedures on dispute resolution
• Increase capacity of judicial officers and staff to settle electoral disputes
• Develop an administrative framework and a Case Management System to ensure that all petitions are determined within stipulated timeframes
• Enhance public awareness and confidence in the capacity of the Judiciary to resolve electoral disputes
• Enhance the capacity of the committee to facilitate implementation of the Terms of Reference (TORs).

This report presents a comprehensive evaluation of the performance of the committee and the Judiciary in the management of the Electoral Dispute Resolution (EDR) process by evaluating two key components:
• The performance of the committee, and
• The performance of the Judiciary in managing the EDR process.

The methodology and scope of the evaluation included:
• Designing an appropriate evaluation framework and corresponding evaluation and data collection tools
• Undertaking data collection and analysis including thorough desk review of key documents and interviews with a wide range of stakeholders
• Facilitating qualitative feedback sessions with the Judiciary to identify lessons learnt, success stories and emerging best practice
• Preparing a draft and final evaluation report capturing activities undertaken, outcomes realised, success stories obtained, key learning lessons, challenges and recommendations for improvement of the Judiciary with regard to future electoral dispute resolution processes.

This was realised through key questions that guided the evaluation in assessing the committee itself and the performance of the Judiciary as provided in the report.

Limitation of the evaluation
The evaluation assessed the capacity building, policy, legal framework and the systems developed to manage the EDR in relation to their effectiveness, efficiency and sustainability and how these impacted on the performance of the Judiciary. The evaluation did not cover the substantive aspects of the electoral disputes and the jurisprudence arising from the cases. These were outside the scope of the evaluation.

Key findings on the performance and achievements of the committee
• Within a very short time, the committee established legal, regulatory and administrative arrangements for effective resolution of electoral disputes
• The committee developed The Election (Parliamentary and County Elections) Petition Rules replacing the National Assembly and Presidential Elections Rules of 1993
• It also developed the Supreme Court rules on Presidential election to establish procedures for disposing presidential election petitions within the set timeframe
• It developed rules on administration of election petitions to facilitate efficient management of petitions at the court level
• Developed a training curriculum, and trained trainers to deliver the curriculum and trained a wide range of judicial officers and Judiciary staff. The training was highly relevant, addressed key knowledge and skills gap among the judicial officers and Judiciary staff and achieved many “firsts”
• In collaboration with the ICT department, the committee developed a Case Management System, and trained ICT assistants on the use of the system, who were then deployed to the courts handling petitions to implement the system
• The committee identified various opportunities for liaising with stakeholders and coordinated stakeholder participation in key activities
• The committee delivered results on time and to sufficient quality with limited human resource capacity and in a very short period of time.

All the above contributed significantly to disposing petitions within the set timelines.

Key findings on the performance of the Judiciary in management of electoral disputes

This part focuses on the extent to which the committee’s achievements contributed to the Judiciary’s management of the electoral disputes in relation to timeliness, fairness, impartiality, independence and transparency. The key findings include

• All election petitions were disposed of within the set timeline. The legal, regulatory and administrative arrangements established enabled this to happen and most stakeholders interviewed viewed the set time for parliamentary and county elections dispute resolution as adequate
• The training of judicial officers and administrative staff led to the success of the Judiciary in managing petitions
• The committee enabled effective monitoring of the electoral petitions and communication with the courts, despite the public pressure on the Judiciary
• There was high perception of fairness. The lawyers and litigants interviewed observed that they felt fairly treated, even when they did not win the cases and this was enhanced by the pre-trial conferences where all parties agreed to work in a particular way and any unfair advantage was addressed. There was equal access to information
• The wide consultations held with stakeholders – political parties, IEBC, DPP, NCAJ, NCLR, PPDT and LSK among others increased the perception of transparency of the Judiciary
• There was a general perception that the Judiciary was independent in handling election disputes. The new legal framework provided optimism of an independent Judiciary and the Judiciary did well to maintain its political independence. The only exception was in the presidential election petition, where there was a mix of opinions on the integrity of the process by the persons interviewed.

Key challenges

• Inadequate financing: There was an inadequate budget for the electoral process from the Judiciary
• Inadequate capacity of courts to handle petitions: Some courts had limited space to hear petitions. For instance, Kisii and Malindi courts had many petitions and had to share the available courtrooms
• Inadequate judicial officers to handle petitions: A total of 38 judges and 66 magistrates handled the petitions. This constituted over 60 per cent of all the judicial officers in the country
• Inadequate support: A judge handling election petitions was meant to be supported by one legal researcher irrespective of the number of petitions

the judicial officer handled. In some instances, judges in the same station shared one legal researcher, while in others they had to move with their secretaries to the new stations

• Inadequate capacity to deliver (crisis management): The Judiciary suspended hearing of other cases so that judges could concentrate on the petitions
• Inadequate time for presidential election petitions: While the six months was adequate for hearing other petitions, the timeline for the presidential petition was too tight
• Quality of Judgements: Due to the pressure to comply and need to show uniformity in rulings, some judges noted that the rulings and judgments ended up being very similar
• Media coverage: Media coverage of the Judiciary was not always positive or “accurate”. Some of the election petitions were sensationalised along party or personality lines. Similarly, the presidential election petition that took place at the beginning of the petitions period eroded public confidence in the Judiciary’s independence to some extent. However, interviews with several stakeholders revealed that the public had different views on the presidential election petition, and parliamentary and county level petitions.

Recommendations

• There is a need to review the timelines for various stages of the Parliamentary and County election disputes, with many stakeholders recommending the need to revisit the time set for disposal of presidential election disputes

• The Judiciary has established several court divisions. In the Magistrate Courts, there are the Anti-corruption, Criminal, Civil and Children divisions. In the High Court, there are Constitutional and Human Rights, Judicial Review, Commercial, Family, Criminal and Civil divisions. In 2013, an Ad Hoc Division on Election Disputes Settlement was established. There is need to retain the committee’s management processes through either a unit or team in the Judiciary to always manage and monitor the hearing of not only election petitions but also election related cases and appeals from various tribunals, and to ensure that learning is continuous and retained. The committee can be renamed and the present membership changed to have those who have been active in the process continue to participate and include others as long as institutional memory is always maintained. While the committee may not be active all the time, it should continuously be in place to review the Judiciary’s past handling of election petitions and prepare for hearing of petitions arising from the next General Election, noting the nature of the electoral cycle
• A training needs assessment on EDR should be carried out, and the curriculum and training materials for judicial officers and staff on EDR reviewed and updated
• An immediate follow-up training of judicial officers and staff after the electoral petitions should be organised to reflect and document lessons on the management of election petitions. This will document the knowledge and skills gained by judicial officers and staff
• There is a need to review and update the various election petition rules currently in place. This is informed by the lessons learnt from the applications filed in the petitions, and to ensure improved management of the electoral disputes in future
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Judiciary Working Committee on Election Preparations

MAY 2014

1.1 Background

The Constitution of Kenya 2010, laid the foundation for the transformation not only of the Judiciary but also of all aspects of the Kenyan society. The General Election held on 4th March 2013 was the first under this new constitutional dispensation. Preparation and conduct of this election took place in an environment of unprecedented reform in virtually all aspects of society and more particularly in the governance sector, informed by historical challenges that had bedevilled the country since independence and the causes of more recent 2007 post-election violence. The vision of peaceful, free and fair elections underpinned the preparation for and conduct of the General Election.

The Constitution of Kenya 2010 accorded the Judiciary a platform to reform, exercise its independence as a co-equal arm of government, protect the Constitution and uphold the rule of law. To this end, the Judiciary embarked on holistic institutional transformation focusing on four reform areas: People-focused delivery of justice with emphasis on access to and expeditious delivery of justice; transformative leadership, organisational culture and professional and motivated staff; adequate financial resources and physical infrastructure; and harnessing technology as an enabler of delivery of justice.

The Constitution of Kenya 2010

It is hoped that the report provides the basis for a continued engagement and improvement on the election petitions’ cycle and that the findings and recommendations herein will be used to further the integrity of elections in Kenya.

- Planning for management of electoral disputes resolution for the next elections is required to lead to an electoral cycle approach in the wholesome management of all aspects of electoral disputes resolution. This would revolve around developing a plan for management of EDR, training, engaging legislators on law reform well before the next elections, public and stakeholder engagement, and further, setting aside adequate funding for management of electoral dispute resolutions. Inadequate funding for the EDR process was a major handicap in 2013
- The Judiciary needs to seek ways of rapidly building its human resource capacity with robust training
- A monitoring and case management system is required. What was in place was e-filing, which while appreciated, did not constitute proper case management. There is need to rethink what constitutes case management
- While it is near impossible to estimate the exact amount of petitions that will be filed, the criteria for workload allocation and sharing among judicial officers and staff are needed. For instance, it was not clear how judicial officers were assigned the election petitions and such criteria would improve efficiency and ensure optimal use of the limited resources
- Development of a continuous and robust stakeholder engagement and communication plan to disseminate and publicise the transformation of the Judiciary is required
- Whereas the Judiciary does not engage in civic education, there is need to devise effective ways of reaching a large section of the public. What was largely used, though effective, left out those who had no access to the electronic and print media, talking heads and the internet.

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To a large extent, the post-election violence over the 2007 presidential election results exposed the weak judicial system in Kenya. The institution had for a long period been viewed as being under undue influence of the Executive and therefore lacking the capacity to uphold its constitutional mandate in delivering fair and timely justice. The Judiciary was a weak institution lacking adequate human and physical capacity, having weak governance and leadership, perceived to lack independence and bedevilled by chronic delays or a backlog of cases. In the past, election petitions would be disposed just a few months to the next General Election, making it an academic exercise. The Judiciary, therefore, prepared to play its role of efficiently and effectively resolving electoral disputes against a backdrop of low public confidence to fairly and impartially adjudicate electoral disputes in the past elections culminating into the post-election violence of 2007-2008.

The Judiciary took the 2013 elections as an opportunity to regain public confidence in resolving electoral disputes and to demonstrate its institutional transformation. As part of the wider reform and to prepare the Judiciary to deliver its specific mandate on resolution of electoral disputes, the Judiciary Working Committee on Election Preparations (JWCEP) herein after referred to as ‘the committee’ was set up in May 2012. The mission of the committee was to "design and execute a Judiciary programme to build the capacity of judicial officers and staff on electoral matters, and suggest ways of working with other stakeholders".

The work of the committee should be contextualised within the overall Judiciary transformation. Its mandate was to:

- Advise the Judiciary on administrative arrangements and measures for the efficient disposal of election related disputes
- Develop and implement, in conjunction with the Judiciary Training Institute, a training programme for the efficient and effective management of election disputes for judicial officers and support staff
- Develop and design a system for monitoring and evaluating the management and administration of election related disputes in court
- Liaise and coordinate with stakeholders to ensure efficient, effective and timely resolution of election related disputes and offences
- Advise the Judiciary on the information that needs to be developed and disseminated to the public on the avenues open to it to pursue electoral disputes and the approaches that would be adopted.

The committee developed a strategy and programme of work to deliver on its mandate laid out in its first report of September 2012. The committee aimed at achieving four key results in line with its mandate:

- To put in place legal, regulatory and administrative arrangements for effective and efficient resolution of electoral disputes
- To train judicial officers and staff in electoral disputes resolution
- To develop and implement a public awareness and stakeholder engagement strategy
- To ensure efficient and timely resolution of electoral disputes supported by an effective case management system and an efficient administrative framework
- To ensure that the Judicial Training Institute (JTI) and the committee’s secretariat are adequately resourced to facilitate electoral disputes resolution.

To achieve these results, the committee planned to deliver the following outputs:

Output 1: Develop clear legislative framework, rules and procedures on dispute resolution
Output 2: Increase capacity of judicial officers and staff to settle electoral disputes
Output 3: Develop an administrative framework and a case management system to ensure that all petitions are determined within stipulated timeframes
Output 4: Enhance public awareness and confidence in the capacity of the Judiciary to resolve electoral disputes
Output 5: Enhance the capacity of the committee to facilitate implementation of the Terms of Reference (TORs).

The outcomes of the committee’s work were to be realised through improved performance of the Judiciary in resolving election petitions arising from the 2013 General Election. The immediate results laid out above were only a step towards achievement of the overall purpose of setting up of the committee which was the strengthening and improvement of the Judiciary’s capacity to resolve election petitions in a “people-focused and expeditious justice” manner.
1.2 Purpose and scope of the evaluation

The purpose of this report was to conduct a comprehensive evaluation of the performance of the committee and the Judiciary in the management of the Electoral Dispute Resolution (EDR) process.

The evaluation had two components:

(i) Assessing the performance of the Committee, and

(ii) Assessing the performance of the Judiciary in managing the EDR process.

The scope of this report included:

• Designing an appropriate evaluation framework and corresponding evaluation tools

• Undertaking data collection and analysis including thorough desk review of key documents and interviews with a wide range of stakeholders

• Facilitating qualitative feedback sessions with the Judiciary to identify lessons learnt, success stories and emerging best practice

• Preparing a draft and final evaluation report capturing activities undertaken, outcomes realised, key learning lessons, challenges and recommendations for improvement for the Judiciary with regard to future electoral disputes resolution processes.

1.3 Methodology

1.3.1 Evaluation questions

As indicated above, the evaluation had two components: The assessment of the committee itself and the assessment of the performance of the Judiciary. Key questions that guided the evaluation of the two components were as follows:

(i) Evaluation questions for Judiciary Working Committee on Election Preparations

Evaluation of the committee sought to answer the following questions, modelled along a fourpoint criteri – relevance, efficiency, effectiveness and sustainability.

- To what extent was the committee suitable as a mechanism for supporting the Judiciary in managing electoral disputes? How relevant was the mandate of this committee?

- How suitable was the positioning of the committee within the Judiciary? To what extent did the committee contribute to internal cohesion, information sharing and effectiveness of the Judiciary in managing electoral disputes?

- What are the main achievements of the committee? What were the factors contributing to the achievement or non-achievement of the committee’s objectives?

- How appropriate and efficient were the structures and processes established by committee? Did the committee have adequate capacity to implement its mandate?

- What challenges (internal and external) did the committee face while implementing its mandate?

- What are the lessons learnt? What is the future relevance of the committee within the Judiciary? Is such a mechanism applicable to other aspects of the Judiciary work?

(ii) Evaluation questions for the Judiciary’s performance in managing electoral disputes resolution

- What procedures and regulations did the Judiciary establish to ensure accessibility and efficiency in the resolution of electoral disputes arising from the last General Election?

- To what extent did the Judiciary resolve electoral disputes in a timely manner? What factors contributed to meeting the timelines?

- To what extent was the Judiciary’s management of election disputes viewed as fair and impartial?

- To what extent was the Judiciary viewed as independent in the management of electoral disputes? What are the perceptions of various stakeholders with regard to the Judiciary’s independence? What factors facilitated or undermined the independence of the Judiciary?

- What measures did the Judiciary take to ensure transparency in the management of election disputes? What are the stakeholders’ perceptions on transparency of the Judiciary in management of electoral disputes?

- To what extent did the Judiciary take into account the political and social realities in Kenya in the management of electoral disputes?

- What challenges did the Judiciary face in managing electoral disputes?

- What were the key lessons learnt in the management of electoral disputes?
1.3.2 Data collection

The evaluation was conducted through a highly consultative and participatory process. Key documents were reviewed which included:

- The committee’s progress reports
- Relevant legislation governing the conduct and management of elections including the Constitution and the Elections Act (No. 24 of 2011) as well as the Elections (Parliamentary and County Elections) Petition rules, 2013
- Monitoring reports on progress in the hearing and determination of election Petitions
- Election observers’ reports
- Commission on Implementation of the Constitution (CIC) reports
- Reports by various civil society organisations.

The second aspect of the methodology involved interviewing a wide range of stakeholders including:

- JWCEP members and the secretariat
- Judiciary officials and staff at the Judiciary headquarters including the Office of the Chief Justice (CJ), Deputy Chief Justice, Principal Judge, acting Chief Registrar of the Judiciary (CRJ), Registrars for the Supreme Court, Court of Appeal, High Court and Magistrate Courts among others
- The select bench on election petitions: Selected judges, magistrates and staff who handled election petitions; deputy registrars and Court Executive Officers (EOs) and the Judiciary IT clerks and legal researchers involved in the EDR process in selected courts
- External stakeholders who participated in the electoral dispute resolution process including public institutions, civil society organisations and development partners
- A selection of litigants whose disputes were handled at various levels of courts — Magistrates and High courts, Court of Appeal and Supreme Court

1.3.3 Data analysis

The evaluation data was analysed using two frameworks:

(i) Evaluation of the committee: The committee’s performance was evaluated against the relevance, effectiveness, efficiency and sustainability criteria. The analysis identified the extent to which the committee’s mandate was relevant,

the effectiveness of the committee in implementing its terms of reference, challenges, lessons learnt and recommendations. The terms of reference and the results the committee set out to achieve provided the basis against which performance was measured.

(ii) The performance of the Judiciary in managing the EDR process was analysed based on the attributes of an effective EDR. These included efficiency, timeliness, fairness and impartiality, independence, accessibility and sanctions and enforcement and relevance of the rules and procedures put in place. The underlying factors that facilitated or hindered the Judiciary in performing effectively were to be identified. Overall challenges and lessons learnt would be identified. The implications of the lessons learnt on the wider Judiciary transformation would also be assessed. We would also make recommendations on how the Judiciary could improve the management of electoral disputes in future.

1.3.4 Limitations of the evaluation

This evaluation reviewed the performance of the committee and the Judiciary from the perspective of capacity building, policy and legal framework put in place and systems developed to manage the electoral disputes resolution. The issues addressed included the effectiveness, efficiency and sustainability of the capacity built in the Judiciary and how these impacted on the performance of the Judiciary. However, the evaluation did not cover the substantive aspects of the electoral disputes and the jurisprudence arising from the cases. These were outside the scope of this evaluation.
Key findings Part 1:

JWCEP Performance

2.1 Introduction

Part 1 of the findings of this evaluation focuses on the performance of the Judiciary Working Committee on Election Preparations.

2.2 Establishment of the Judiciary Working Committee on Election Preparations

Prior to the 2013 elections, election petitions were managed under the framework provided by the National Assembly and Presidential Elections Act (Chapter 7 of the Laws of Kenya), and the National Assembly and Presidential Election Rules, 1993. These rules emphasised procedural technicalities at the expense of substantive justice and played a significant role in eroding public confidence in the Judiciary’s handling of electoral disputes. Secondly, there were no timelines set within which election petitions were to be heard and determined, as under the old system, the subordinate court heard council petitions while the High Court heard parliamentary and presidential petitions. The time taken to hear and determine election petitions was subject to the overall efficiency of the judicial system. As a result, petitions took long to dispose and this, among other factors, discouraged potential petitioners from taking their matters to court.

The Constitution of Kenya 2010 changed the framework within which the Judiciary was to manage the resolution of electoral disputes. Timelines were set within which presidential, parliamentary and county election petitions were to be determined – 14 days for presidential and six months for all others. This constitutional imperative did not provide the Judiciary with discretion to do otherwise but to comply. The Judiciary, therefore, had to undertake a deep analysis of the constraints it faced to meet these deadlines and at the same time deliver justice.

It is also important to note that at various points of the electoral cycle, other dispute resolution mechanisms were established that needed to be exhausted before disputes were filed in the courts. Political parties were expected to establish an internal dispute resolution mechanism while the Independent Electoral and Boundaries Commission (IEBC) and the Political Parties Dispute Resolution Tribunal (PPDT) would also hear and determine pre-election disputes. Parties dissatisfied with the decisions of these other forums had the right to file cases before the courts. The Judiciary, on the other hand, was the only institution with jurisdiction to hear election petitions.

The committee was, therefore, set up to advise and support the Judiciary to build its capacity, lay down proper rules and procedures and systems that would enable it to deliver its mandate. The committee’s work was part of the wider Judiciary transformation, which aimed at changing the judiciary to be an independent and effective institution that was accessible and delivered justice expeditiously.

Findings of the evaluation of the extent to which the committee delivered its mandate are outlined in this section.

1.3.5 Relevance of the committee

The committee addressed the need the Judiciary had in capacity building, engagement with stakeholders, ensuring transparency and remaining focused on resolving electoral disputes within the set timelines.

Stakeholders observed that the committee addressed the needs that the Judiciary had in capacity building and engagement with stakeholders, which created focus and relevance in resolving electoral disputes.

The Judiciary was and still is undergoing a holistic transformation touching on all its structures and systems. Within this context, it needed a body such as JWCEP to focus its efforts to effectively manage the resolution of electoral disputes. Secondly, this was the first time the Judiciary was to handle electoral disputes under the new constitutional framework.
within the new governance system ushered in by the 2010 Kenya Constitution and the relevance of the committee was therefore evident in ensuring this smooth transition. With about 2,000 elective positions being filled through the 2013 elections, it was estimated that about 500 petitions would arise. This was a huge number of petitions that needed to be handled within the period of six months and the Judiciary had not handled such a workload within the set time in the past hence the need for it to have such a committee to facilitate delivery of this responsibility with limited resources.

Most external stakeholders viewed the committee as a necessary tool that enabled the Judiciary to achieve the set timelines, and provide a platform for the Judiciary to engage with other stakeholders. It was observed that in the past, stakeholders did not have an avenue to engage with the Judiciary other than through the Chief Justice’s office. The committee served as an interface between the Judiciary and other institutions without exposing the Judiciary’s independence, hence strengthening the committee’s relevance.

Judicial officers and staff noted that the Judiciary had limited time to prepare for the election petitions and the committee served as an avenue for effective planning, capacity building, linking the Judiciary with other stakeholders and judges from other jurisdictions for lessons and providing support throughout the period of the petitions. Many interviewees singled out training activities as having provided the best opportunity that demonstrated the relevance of the committee.

Thus, the committee’s mandate was largely relevant to the needs of the internal and external stakeholders. It advised and provided technical guidance to the Judiciary, facilitated capacity building of judicial officers and Judiciary staff on management of electoral disputes and advised on the legal framework and administrative arrangements related to election petitions.

The committee was viewed as relevant in enabling the Judiciary to navigate a new environment and dispose election petitions within a period of six months for the first time. However, a question remains whether there is need for its continued existence and whether it will be relevant in future. This question is answered in a different section of this report.

1.3.6 JWCEP’s effectiveness

Evaluation of effectiveness focused on the committee’s achievements in line with its mandate and the factors that facilitated the achievements or non-achievements of its results. Overall, the committee achieved commendable results with the limited time and resources it had.

1. Advise the Judiciary on administrative arrangements and measures for the efficient disposal of election related disputes

Under this term of reference, the committee established legal, regulatory and administrative arrangements for effective resolution of electoral disputes.

More importantly, these arrangements were to be established within a short period – from May 2012 when the committee was established and before the dissolution of Parliament in January 2013. The Legal, regulatory and administrative arrangements established were as follows:

a. Amendments to the Election Act, 2011:
   (i) Amendment to Section 75 of the Elections Act to provide for petitions arising from County Assembly elections to be heard and determined by the Magistrate Courts.
   (ii) Amendments to the Elections Act, 2011, to provide for appeals, scope of appeals, and the time limits for the hearing and determination of appeals from decisions of Magistrate and the High Courts.
   (iii) Amendment to Section 96 of the Elections Act, 2011, to give the Rules Committee of the High Court the power to make rules regarding election petitions.


c. Developing Supreme Court rules on presidential election to establish procedures for disposing presidential election petitions within the set timeframe.

d. Developing rules on administration of election petitions to facilitate efficient management of petitions at the court level.

Key achievements

(i) Legal, regulatory and administrative arrangements established were relevant and contributed significantly to the efficiency of the Judiciary in disposing petitions within set timelines.

The committee advised on the legal changes needed based on lessons learnt from the challenges the Judiciary faced in handling election disputes in the past (especially the 2007 elections); the Judiciary’s handling of election related cases (cases on “date of elections” and “delimitation of boundaries”) and lessons from the Uganda Judiciary.
Stakeholders interviewed observed that these changes were timely, necessary and relevant; they enabled the Judiciary to deliver justice in a timely manner. For instance:

a. Amendments to the Elections Act enabled magistrates to hear and determine election petitions and thus expanded the capacity of the Judiciary to dispose petitions within set timelines.

b. Amendments brought clarity to the appeal process for election petitions and defined the timelines and scope of the appeals. This clarity provided a clear legal framework for dissatisfied litigants to seek remedy through the appeal process.

c. Amendments empowered the Rules Committee of the High Court to make election petitions rules to improve the management of petitions.

(ii) The petition rules established efficient procedures and ensured uniformity in the manner in which petitions were handled across all courts. The rules defined procedures such as the pre-trial conference and filing of witness affidavits among others that enabled the Judiciary to dispose election petitions within the set timelines.

(iii) Administrative rules put in place with the advice of the committee contributed to efficient management of election petitions. For instance, judges were not allowed to hear other matters nor take leave during the duration of election petitions and they were expected to rationalise their diaries with the electoral cycle. Administrative arrangements for implementing specific aspects of the petition rules such as pre-trial conferences, scrutiny and handling of ballot boxes were provided for. Although some of the rules, such as moving judicial officers to different courts were not effectively implemented, they ensured uniformity and efficiency in the management of petitions to a large extent.

(iv) There is a level of understanding, appreciation and ownership of the legal and regulatory arrangements within the Judiciary and among external stakeholders.

The legal changes were made through a wide stakeholder consultation process that involved judicial officers and Judiciary staff, other public institutions in the justice sector such as the National Council on Administration of Justice (NCAJ), National Council for Law Reporting, Registrar of Political Parties, the Law Society of Kenya and Director of Public Prosecution; IEBC, political parties and civil society organisations.

The amendments, and the petition and administrative rules were also included in the curriculum for training of judicial officers and judiciary staff for validation and also to ensure effective implementation.

Due to the wide consultations facilitated by JWCEP, most of the stakeholders interviewed observed that the amendments and the petitions rules were one of the key factors that led to the successful disposal of election petitions within the time set. The consultative process enabled the stakeholders understand the rules and apply them during the petitions.

2. Develop and implement, in conjunction with the Judiciary Training Institute, a training programme for the efficient and effective management of election disputes for judicial officers and support staff.

The committee aimed at increasing the capacity of judicial officers and Judiciary staff to efficiently and effectively settle electoral disputes. To achieve this objective, the committee developed a training curriculum, trained trainers to deliver the curriculum and trained a wide range of judicial officers and Judiciary staff.

Judicial officers trained included those working at the High Court, the Court of Appeal, Industrial Court, Land and Environmental Court judges and magistrates. Almost all (over 90 per cent) of judicial officers were trained on election dispute resolution. Judiciary staff trained included staff in the Supreme Court and Court of Appeal, legal researchers, law clerks, deputy registrars, executive and ICT officers. The trainings held before the elections targeted all judicial officers and Judiciary staff given that it was not possible to anticipate the number of petitions. After elections, the judicial officers assigned to hear cases were taken through a more detailed training.

Key achievements

(i) The training was highly relevant, addressed a key knowledge and skills gap among the judicial officers and Judiciary staff and achieved many “firsts”. Below are illustrations of this achievement:

a. This was the first time the Judiciary conducted training on how to resolve electoral disputes. The trainings provided judicial officers and Judiciary staff with an opportunity to familiarise themselves with the new laws and regulations.

“...We had a new constitution and many new laws. There were new legal issues to consider. We all had little expertise, so the training became a learning opportunity for all of us.” – A Judge of the High Court said.
b. The trainings also provided a form of ‘orientation’ for judicial officers and Judiciary staff on handling election disputes. For most, it was the first time to handle election disputes. Training provided judicial officers access to relevant laws, references and resource materials including compendium of cases.

“We had no experience. Even though a judge is supposed to know the law, exposure to precedence and experiences of those who had handled petitions placed us in a better position to handle election petitions; we were better prepared.” – A Judge of the High Court said.

c. Trainings provided a platform for team and consensus building on electoral issues. Trainings enabled sharing of experiences and lessons learnt. Local and international judges who had handled petitions shared their experiences on a broad range of issues.

“Six months might seem like a long time but when you work backwards, you realise it is not long at all. We were shown how to identify what actions had to be taken within what timeline.” – A magistrate.

d. The trainings served as a validation process for the legal, regulatory and administrative instruments to be applied during the petitions.

“For the first time, decision-makers were able to interrogate the instrument they were going to use before hand, ask questions, seek answers, and achieve uniformity.” – An advocate.

e. Training on media engagement on electoral matters helped tone down sensational reporting by the media.

“Journalists are not versed on what goes on in court and they don’t know how their use of language can misrepresent the nuances of law; the danger is that what they report is not what the judge meant; the training helped those involved to see how to use the same language.” – A journalist.

(ii) Judicial officers and Judiciary staff applied the training to positive effect.

The training enabled most of them to manage time effectively, control the schedule of the court, apply the electoral law and regulations with confidence and focus on substantive issues rather than technicalities. The Judiciary would, perhaps, have not met the timelines set and resolved the election petitions with uniformity across courts without the trainings.

(iii) Trainings were rushed and some relevant issues were not covered adequately. Stakeholders appreciate the short timeframe within which training was delivered. However, there is need to improve the curriculum based on an in-depth assessment of training needs and to develop modules that ensure staff are exposed to all aspects of the electoral process – administrative and legal for better management of electoral disputes. For instance, training of administrative staff focused on their aspects of work with limited exposure to legal aspects.

3. Develop and design a system for monitoring and evaluating the management and administration of election related disputes in court.

In the past, there was no follow-up on petitions allocated to judges until judgment was delivered. The committee focused on establishing an administrative and a case management system to monitor the management of all petitions for the 2013 elections. The committee worked in collaboration with the ICT department to develop a case management system, train ICT officers on the use of the system and deploy these officers to the courts handling petitions to implement the system. The purpose was to use this system to provide reports on progress in the petitions to the committee in real time.

However, the ICT case management system did not work as envisaged. Stakeholders at the national and court level observed that they hardly interacted with the ICT officers and had no access to the case management system; poor internet connectivity hindered the use of this system and the ICT officers did not have a legal background to enable them capture data effectively.

To go over this hurdle, the committee devised a different reporting tool used by deputy registrars and executive officers to report to the committee. The data sent using this tool enabled the committee to monitor the petitions on a daily basis.

Key achievements

(i) Improved uniformity in addressing similar legal issues by judicial officers across courts handling petitions. The committee played a key role in ensuring this uniformity by sharing judgments and other information among judicial officers. The committee succeeded in accessing the judgments in real time and sharing them across the courts electronically.

(ii) Improved monitoring of petitions: Although the case management system did not work as envisaged, the reporting tool developed by the committee provided data in real time and enabled the committee to monitor petitions on day-to-day basis. The data received was well utilised to make decisions and was disseminated to judicial officers and to the Judiciary to support decision-making. Examples of effectiveness of the monitoring include the efficient sharing of judgments to other judicial officers to aid uniformity and supporting rapid responses by the Judiciary to issues such as handling of ballot boxes (security and space).
(iii) Improving transparency of the Judiciary: Through monitoring, the committee collected data on the progress made in handling of petitions which was disseminated to the public through mainstream media and also through the Judiciary press briefings. This demonstrates the value added by the committee’s monitoring role.

The monitoring system established to mitigate the weaknesses of the case management system was innovative and met the purpose of tracking progress of the petitions and supporting timely decision-making. Judicial officers and administrative staff observed that the committee kept a schedule of all cases and would call the court stations immediately after the hearing to collect information on progress made, record emerging issues and seek answers on the next steps. This direct real-time communication provided an opportunity for the courts to also receive feedback from the committee. This innovation provides lessons for the Judiciary on how effective communication – both reporting and feedback processes – can enhance case management in the courts.

4. Liaise and coordinate with stakeholders to ensure efficient, effective and timely resolution of election related disputes and offences.

The committee identified various opportunities for liaising with stakeholders and coordinated stakeholder participation in key activities through which the Judiciary was preparing for electoral disputes resolution such as development of petition rules, amendments to the Electoral Act and training among others. It also represented the Judiciary in key activities of other institutions and contributed significantly to the electoral process. Below is an outline of the main stakeholders the committee engaged with.

1. Independent Electoral and Boundaries Commission (IEBC)

The Judiciary, through the committee, participated in the IEBC’s technical meetings. The jurisdiction and operations of IEBC directly impacts on the roles and responsibilities of the Judiciary in the handling of electoral disputes. The Judiciary, through this committee, engaged with IEBC during the election preparations stage to ensure optimal utilisation and effectiveness of administrative dispute resolution mechanisms and to reduce litigiousness during the electoral process. Through this participation, the Judiciary provided input into the Rules and Procedures for IEBC. Key input of the Judiciary included the challenges of overlapping jurisdictions between the Judiciary, IEBC, PPDT and the Registrar of Political Parties focusing on harmonisation of rules and procedures, and the establishment of mechanisms of appeal.

2. Civil Society Organisations (CSOs)

Engagement with CSOs was centred on gaining from their capacity and expertise in the management of electoral disputes resolution and in validation of the amendments to the electoral law and rules for petitions. The CSOs engaged with included IFES, EISA, ICJ, GIZ and IDLO. The CSOs support to the committee included provision of resource persons, training materials, facilitating training, bridging the human resource gaps at the committee’s secretariat, development of work plans and provision of information on best practices as well as linking the committee to the Ugandan Judiciary for lessons learning.

3. Political Parties Disputes Tribunal (PPDT)

The committee engaged with the PPDT on how to strengthen and enhance PPDT’s capacity to efficiently and effectively adjudicate on political parties’ disputes as a mechanism that is intended to reduce the number of disputes handled by courts. The committee provided input into the development of the rules and procedures for the PPDT, reflection on jurisprudence emerging from courts on political parties’ disputes and appeals from PPDT to the courts. The outcome of the engagement formed part of the training materials for the judicial officers on election disputes resolution to ensure they understood the role and workings of the tribunal.

4. Interagency committee comprising the DPP, the IEBC, the National Police Service and the JWCEP

The committee participated in the development of charge sheets for election offences; election offences documentation focusing on investigations and charges, and development of a handbook on investigation and prosecution of election offences.
5. National Council on Administration of Justice (NCAJ)

The committee participated in meetings of NCAJ to update the council on the preparedness of the Judiciary in handling of election disputes and engagement with other institutions in the justice chain on their own preparedness.


Engagement with the NCLR involved use of the council’s website as a resource for legislation and case law on elections, posting of the petition rules on the website as a way of disseminating them to the public. The council also supplied case law materials to legal researchers and judicial officers to facilitate the adjudication of petitions and drafting of judgments.

7. Law Society of Kenya

The LSK participated in the validation of the petition rules. It also participated in the development of petition rules and sent out the rules to all advocates through its mailing list for comments and awareness. The committee liaised with the LSK to organise five Continuous Legal Education (CLE) events focused on the elections and the committee ensured selected judges of the Court of Appeal and High Court made presentations during these forums.

Key achievements

(i) The committee provided a platform for stakeholders to engage with the Judiciary: Stakeholders observed that in the past, they would only engage with the Judiciary through the office of the Chief Justice, which sometimes was not responsive. The setting up of the committee enabled the Judiciary to engage with stakeholders without compromising the independence of the Judiciary.

(ii) Improved transparency of the Judiciary: The engagement of stakeholders in the development of the legal and regulatory arrangements for the petitions as well as in key events and trainings promoted the Judiciary’s transparency. It made it possible for stakeholders to provide input into the preparations for election dispute resolution.

(iii) Improved stakeholder confidence on the Judiciary’s preparedness to handle election disputes: The committee organised events where the Judiciary shared information with stakeholders on its preparedness.

(v) Promoted understanding of jurisdiction of the alternative dispute mechanisms such as IEBC tribunal and the Political Parties Dispute Tribunal. The committee engaged with these institutions to clarify their jurisdiction in handling electoral disputes and also participated in developing rules for the PPDT.

8. Advise the Judiciary on the information that needs to be developed and disseminated to the public on the avenues open to it to pursue electoral disputes and the approaches that will be employed.

Engagement with the public was done mainly through the media and using various public fora. Various judicial officers including the Chief Justice addressed press conferences and public events where they reiterated to the public the Judiciary’s preparedness to resolve election disputes. Key achievements in dissemination of information to the public are as follows:

Transparency of the Judiciary to the public: The committee promoted the transparency of the Judiciary to the public by advising on avenues for information dissemination. For instance, the committee posted in mainstream media progress reports on the preparedness of the Judiciary to handle elections and the hearing of the petitions.

Increased public and potential petitioners’ confidence on the Judiciary: Through regular updating of the public on the Judiciary preparedness to handle election petitions, the political parties and other potential litigants gained confidence that the Judiciary was committed to expeditious delivery of justice.

1.3.7 Efficiency in delivery of the committee’s mandate

Efficiency was analysed based on two parameters:

(i) Efficiency gains resulting from achieving results with less cost (or most optimal unit costs based on market rates)

(ii) Achieving more results with the same costs. In both cases, the quality of results should not be compromised. Efficiency gains can be achieved through ensuring activities are implemented at the best unit cost or by adopting implementation approaches that cost less but achieve the same quality of results.

In the case of the committee, evaluation of efficiency focused on appropriateness of implementation processes, human resource capacity, funding levels and management of the secretariat.

Findings

JWCEP’s mandate was implemented in a timely manner, using appropriate processes and produced sufficient quality of outputs

(i) The committee had limited time to implement its mandate. Its mandate was
time-sensitive – the legal and regulatory arrangements had to be completed before dissolution of Parliament; the training curriculum and materials and all trainings had to be completed before election day; the monitoring system or case management for the petitions had to be in place before the start of petitions; all deployment of judicial and administrative officers handling petitions had to be completed before election date as well as the necessary capacity building for the Judiciary to be fully prepared. Stakeholder engagement and information dissemination to the public had to be implemented in tandem with all the activities. A review of the committee’s progress reports and interviews with stakeholders (internal and external) show that the committee achieved all time sensitive outputs on time. This demonstrates a high level of efficiency.

(ii) High quality of the outputs produced within the short period: Matching speed in implementation with quality of work is a challenge that organisations have to face. Stakeholders pointed out the high quality of work undertaken by the committee. The advice and technical support the committee provided to the Judiciary on amendments to the Election Act, 2011; the petitions rules for parliamentary/county elections and the presidential elections were adequate and provided effective procedures for handling election petitions; the administrative rules were relevant and to a large extent enabled the Judiciary to manage the petitions within the set timelines; the training materials and delivery were highly relevant with judicial officers and staff noting the importance of the trainings in preparing them adequately. These outputs, among others, were sufficient or adequate in preparing the Judiciary to manage arising election disputes.

(iii) Processes adopted promoted ownership of outputs by the Judiciary and other stakeholders: The committee adopted processes for implementing its mandate that placed ownership of its outputs and processes in the Judiciary despite having very limited time to discharge its mandate. The outputs delivered are not viewed as the committee’s products.

**JWCEP delivered results on time and to sufficient quality with limited human resource capacity and in a very short period**

The organogram envisioned at the start of the committee provided for staffing of the secretariat according to the skills needed to achieve its terms of reference. This organogram provided for 17 positions including the chief executive officer and deputy, research officers, training coordinator, communications officer, monitoring and evaluation officer, accountant, office support staff and security.

The actual organogram implemented was leaner. As a result, the committee depended on short-term consultants and interns supported by development partners and civil society organisations. The staff included those seconded by the Judiciary; technical staff supported by development partners and civil society organisations, some on need basis, and consultants undertaking short-term assignments.

Below is a table indicating the actual staffing levels of the secretariat.

<table>
<thead>
<tr>
<th>Staff category</th>
<th>Position</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judiciary staff attached to the JWCEP secretariat</td>
<td>Head of Secretariat, clerical/logistics/finance officer, events coordinator, administration/operations officer and office manager</td>
<td>5</td>
</tr>
<tr>
<td>Technical experts seconded to the Secretariat supported by development partners/civil society organisations</td>
<td>Legal researchers</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>Research interns</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>Administration interns</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>Consultants undertaking short term assignments</td>
<td>6</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>22</strong></td>
</tr>
</tbody>
</table>

The staffing of the JWCEP secretariat shown in the table above has the following implications:

(i) Opportunities for the Judiciary staff to build skills and learn from the “project” were limited because staff seconded by the Judiciary carried out administrative functions while staff supported from external sources carried out functions relevant to the core mandate of the committee. The externally supported staff has/will leave the secretariat at the closure of the committee’s work, hence they will not be available to the Judiciary on a continuous basis to support the next cycle of elections.

(ii) The secretariat adopted a multi-tasking and task shifting approach to implement all aspects of its terms of reference. For instance, the committee did not have a communication/media unit or a training and M&E expert on board but used the skills available to carry out these tasks. This means that the staff went through a steep and short learning curve to deliver the committee’s mandate within a short period.

(iii) The committee achieved the results outlined in the previous section in the face of huge human capacity constrains. This was achieved through commitment, teamwork, good relationship with development partners and civil society organisations interested in this “project”, and use of technical expertise from other arms of the Judiciary notably the Office of the Chief Justice, the Judiciary Training Institute, the Registrar of the High Court, DPAC and the Registrar of the Magistrate’s Courts.
Judiciary preparedness for management of election disputes achieved with huge financial resource constrains

The cost of delivering the committee’s mandate was estimated in a budget as shown in the table below. The committee needed about Sh 600 million to adequately prepare the Judiciary to handle election petitions.

<table>
<thead>
<tr>
<th>Key Result</th>
<th>Total (Kshs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal, regulatory and administrative arrangements</td>
<td>302,331,000</td>
</tr>
<tr>
<td>Training of judicial officers and staff</td>
<td>79,264,500</td>
</tr>
<tr>
<td>Public awareness and stakeholder engagement</td>
<td>42,919,200</td>
</tr>
<tr>
<td>Monitoring and evaluation/ case management</td>
<td>108,108,600</td>
</tr>
<tr>
<td>JWCEP Secretariat (management and administration)</td>
<td>55,303,975</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>587,927,275</strong></td>
</tr>
</tbody>
</table>

Findings

(i) Inadequate funding: The committee’s budget was not fully funded as envisaged and therefore the committee relied on support from development partners and civil society organisations to meet some of the funding gaps. There seems to have been a mismatch between the prioritisation of the “election preparations” as a key task for restoring the public confidence in the Judiciary and funding of this priority.

(ii) Delays in funds disbursement added to the constraints of the committee: Payment for the committee’s activities was done through the Judiciary financial system. The practice was that the Judiciary processes payments in the IFMIS/G-Pay and then makes a request to the National Treasury weekly for the exchequer releases to settle its obligations. This led to delays in funding the committee’s activities given their time sensitivity. The Judiciary approved a request from the committee to be allowed to open a bank account directly accessible to the committee to mitigate delays in implementation. However, though the account was opened, no funds were released to the committee. External funding sources came in handy and were also efficient and timely given the less bureaucracy in the internal systems of these organisations.

Effectiveness of the working relations with Judiciary varied across departments

Good liaison between the committee and the departments at the Judiciary headquarters was critical for successful implementation of its mandate. This relationship varied across departments. Some departments provided timely and adequate support in implementation of the committee’s mandate. However, there were also notable challenges in working with some departments in the delivery of the committee’s terms of reference.

Factors that contributed to efficiency of the committee

Some of the factors that contributed to efficient operations of the committee included:

(i) Strong leadership and commitment of most of the committee members: The committee met regularly to plan, review progress and make decisions. The vision of the committee and by extension the Judiciary of delivering justice expeditiously and restoring public confidence was clearly articulated and the committee members and the secretariat were committed to making it a reality.

(ii) Efficient management and teamwork at secretariat level: The secretariat developed a detailed and well-articulated implementation plan which was reviewed regularly; internal meetings between the committee and the secretariat also provided clear leadership. Though the staff of the secretariat was a mix of those seconded by the Judiciary and those supported by partners, efforts were made to build a coherent team.

(iii) Support from development partners/CSOs: These organisations linked the committee with other jurisdictions such as Uganda that had established a system for managing election disputes, supported international and national experts to interact with the committee and the Judiciary to share lessons, supported and participated in the implementation of some of the activities using their own internal expertise such as development of administration rules, petition rules and training materials among others.

(iv) The urgency and importance of ensuring effective management of election petitions: The public interest and local and international pressure on the Judiciary to avoid a repeat of the 2007 post-election violence weighed heavily on the committee. There was no option but to succeed. Thus, the committee and the secretariat staff invested a huge amount of energy and time to ensure preparedness of the Judiciary was achieved despite the resource limitations.

(v) The relationship with the Chief Justice office, which prioritised the work of the committee: This played a key role in having the Chief Justice providing guidance and “listening” to the committee.

1.3.8 Sustainability

The extent to which the achievements of the committee can be sustained was assessed and the following are the key findings:

(i) Legal, rules and administrative arrangements established for improved management of election petitions are perhaps the most sustainable results of the committee. These rules have been adopted by the Judiciary and will guide future election disputes. However, there is scope for continued improvement of the legal administrate arrangements.
(ii) Training: Trainings conducted by the committee can be sustained by being adopted by the Judiciary Training Institute (JTI). It is important to note that the trainings were conducted in liaison with JTI. A basis for sustaining the training has, therefore, already been established.

(iii) Monitoring and case management system: This is perhaps the aspect of the committee's work which faces difficulties in sustainability given that the monitoring system that the committee adopted was labour intensive and perhaps suited for a short-term project. The case management system itself was not integrated to the Judiciary's system and was implemented with limited reference to other sections of the Judiciary.

(iv) Stakeholder engagement: The committee provided a platform for the Judiciary to engage other stakeholders. An avenue for Judiciary-wide engagement with stakeholders on a variety of issues (not just elections) is needed to sustain the work of the committee. Without such a platform, the stakeholder engagement may not be sustained beyond the life of the committee.

(v) Public engagement or dissemination of information to the public: The committee worked with the communication department of the Judiciary to provide information to the public through the media and other public events. Sustainability of this engagement needs a clear Judiciary-wide communication plan. Without such a plan, the transparency and public confidence gained through the committee may also not outlive the committee.

3.1 Introduction

The results of the committee's work were to be reflected in the improved performance of the Judiciary especially in the management of electoral disputes. Part 2 of the evaluation details the findings on the extent to which the committee's achievements contributed to the Judiciary's management of the electoral disputes. The evaluation of the Judiciary's performance focused on timeliness in the disposal of election petitions, the fairness and impartiality of the Judiciary, and the extent to which the Judiciary was perceived as independent and transparent.
3.1.1 Timeliness in disposal of election petitions

Litigants are entitled to a swift resolution of their disputes. More so, speed of dispute resolution is all the more important when it comes to electoral disputes as lingering contests and delay in dispute resolution can render the process a mere academic exercise; and result in violent conflict that threatens state stability.

This evaluation assessed the timeliness in disposal of election petitions arising from the March 2013 elections by the Judiciary. The timeline was statutory, so there was no flexibility to alter. All petitions were completed within six months. Therefore, the focus of the evaluation is on the strategy that the Judiciary applied to meet this requirement. The petition rules set out timelines for various stages of the litigation process to ensure petitions were disposed within the six months period as shown below.

Figure 1: Timelines for each stage of the petition process

Number of election petitions were 188, nine party list petitions and one petition filed in January 2014 at Machakos following the December by-election. The total election petitions therefore were 198, 117 of them filed at the High Court.

Voters filed the highest number of election petitions compared to any individual political party. The figure below shows the petition filed by political parties and other petitioners.

Figure 2: Number of election petitions filed at the High Court

Figure 3: Election petitions by political parties and voters
The figure below shows the distribution of election petitions per county. The highest number of petitions was filed in Malindi, Nairobi, Mombasa and Kisii counties. Data was not available to allow for a trend analysis of distribution of past election petitions in order to ascertain whether there are counties that typically have high election petition cases.

**Figure 4: Number of election petitions per county**

<table>
<thead>
<tr>
<th>County</th>
<th>Magistrate Court</th>
<th>High Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nairobi</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>Mombasa</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Makeni</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Trans Nzoia</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Kisumu</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Kericho</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Kalamaque</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Nairobi</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Kiwi</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Mbarakani</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Makeni</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Bungoma</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Busia</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Uasin Gishu</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Embu</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Gotnie</td>
<td>2</td>
<td>1</td>
</tr>
</tbody>
</table>

In terms of proceedings, the figure below shows the outcome of the cases filed at the high courts and magistrate courts.

**Figure 5: Outcome of petitions**

**Key findings**

All election petitions were disposed of within the set timeline. The following are key findings of measures taken to enable the Judiciary to comply and the challenges it faced in complying with the timeliness.

1. The legal, regulatory and administrative arrangements established

   (i) The setting of the time within which all election petitions needed to be disposed of was an enormous improvement from previous elections when disputes were finalised towards the next elections and contributed to the speedy disposal of the petitions. Most stakeholders interviewed viewed the set time for parliamentary and county elections as adequate. For instance, advocates interviewed expressed the following views on the timelines:

   “I am one of those who benefited from an efficient timeline in the Judiciary. Previously I had a petition case resolved two years after the election in 2007. This shows how bad things were with petitions.” Advocate, Nairobi.

   “The courts were in control unlike where the petitioners wanted their wishes to override the courts. The Kilgoris court was exceptional in performance and was assertive.” Advocate, Kilgoris.

   “Even the days set for the petitioners and respondents to set out their ground rules and iron out their issues was enough and informative. There is a lot to learn from how the courts performed in managing the process.” Advocate, Kisumu.

   (ii) Amendments to the Elections Act, 2011: The amendment to allow magistrates to hear and determine county assembly petitions expanded the capacity of the Judiciary to meet the timelines.

   (iii) Petition rules: Judicial officers and lawyers were aware of the rules and the courts were bound by the rules. The rules defined the procedures for handling petitions focusing on substantive aspects of petitions and not on technicalities. These rules played a key role in enabling the Judiciary to dispose petitions within the set timelines.
• The rules defined timelines for specific stages of the process—from filing to disposal of cases.

• The process set out by the rules disciplined advocates to focus on issues of merit.

• The rules improved predictability and flow of proceedings. Predictability of a court process is a key facilitating factor for expeditious delivery of justice.

• The pre-trial conference was very good because it helped all parties agree on the timelines and set a schedule. It provided an opportunity for courts to reduce delays by addressing issues such as filing all affidavits and the number of witnesses.

• It was easy to keep the timelines by all parties because of a common understanding by all parties and the public:

  “Everybody knew that we had to finish within six months. There was a lot of sensitisation in the media; there were guidelines and checklists and notes. Everybody cooperated with the timelines.” – Magistrate.

  Because of the set timelines, “parties were under intense pressure to work within the timeframe and for individual judges to also show that they had finished; nobody wanted to be told that they were the ones who did not finish.” – Judge, High Court of Kenya.

• While there was general agreement that the timelines were adequate and parties were eager to comply, some judges allowed flexibility on dates by which particular documents could be filed. This showed the humanity of the judges to the processes and an understanding of the difficulty that the different parties were undergoing in complying with the timeframes.

  “Initially we said both parties should file their affidavits on the same day, but realised that after service, either party needed to file more documents which were not foreseen. In most cases we allowed late filing.” Judge, High Court of Kenya.

  (iv) Administrative rules improved management of petitions at court level and also improved overall timelines of the Judiciary. Key features of these rules included judges being allowed not to hear other matters during the period of the petitions, not being allowed to take leave, reconciling their diaries with the electoral cycle and being moved to hear petitions in different stations from where they work among others. Most aspects of these rules were applied to very positive effect. However, the posting of judges to new stations to hear petitions did not take place in all areas due to logistical challenges and financial constraints. Only 12 judges moved to new stations. Dealing with electoral matters in the area where a judge serves makes it sensitive and poses a security risk.

Challenges in implementation of the law and petitions rules

(i) Inadequate time for presidential election petitions: While the six months was adequate for hearing other petitions, the timeline for the presidential petition was too tight.

  “We got it right with the MPs and county officials, but woefully wrong with the presidential petition; it was too rushed! That is the reason we had the type of ruling we saw. There was no time to write the judgment. Delaying to explain your legal reasons why you ruled in a particular way can open all manner of speculations. The Judiciary might never recover from what happened. That is why I strongly submit that this timeline be extended to 28 days.” – Judge, High Court of Kenya.

(ii) Quality of judgements: Due to the pressure to comply and need to show uniformity in rulings, some judges noted that the rulings and judgments were very similar.

  “I can tell you for a fact that you will see a lot of plagiarism in judgments. Some are so rushed and are of poor quality; some are not responding to the substance of the petitioners’ submissions, meaning such judgments can be challenged in a court of appeal and cause delays.” – Judge, High Court of Kenya.

(iii) Delays were caused mainly by interlocutory applications by advocates. Most judicial officers said they allowed some applications (and spent time writing rulings) but denied others. This was mostly where such applications were clearly made to buy time to prepare.

  “Interlocutory applications caused delays and they were also tricky because sometimes you realise you have ruled on a matter that is already a substantive matter in the main petition” – Judge, High Court of Kenya.

  “Delays were also caused by appeals on rulings on interlocutory applications. In the case regarding when the time starts running (and the meaning of declaration of results), the matter is still before the Supreme Court.” – Judge, High Court of Kenya.
(iv) Delays also caused by failure by the IEBC to file documents as requested or deliver ballot boxes on time. There is, therefore, need to review this process as the public is not aware that the delay is not caused by the Judiciary but rather by its partners in the election process.

(v) Lack of storage space within the Judiciary also caused delays.

“I had no idea where we were going to store the ballot boxes and there seemed to be no coordinated effort from within the Judiciary to solve this urgently. Many times we had staff members vacate their offices to ensure we had the ballot boxes stored safely.” – Judge, High Court of Kenya.

(vi) Timelines as relating to fees: While the issue of timelines received a positive response from the interviewees, the issue of timelines as related to fees was seen as a bottleneck to the election petitions process, with the interviewees recommending a review of the time and amount. The below verbatim statements provide a range of issues raised on the question of fees and timelines:

“The new procedures were a challenge to some of the applicants like depositing of the security which was hard to comply with for some and led to striking out of the petitions. For example: Case No. 11 of 2013 for Anastasia Wanjiru Mwangi which was struck out due to non-compliance of Sect. 78 of the Elections Act and Rule No. 14; also Case No. 13 of 2013 for Kumbatho Naomi Cidi; Case No. 16 of 2013 and No. 15 of 2013 for Mohammed Oohai Maro.” Magistrate.

“On payment of security, perhaps the days could be increased from 10 to 14. As it is a monetary issue, it is costly to the petitioner as they also have to cater for the legal fees for the advocates at the same time when being required to pay Sh100,000 or Sh 500,000.” Judge, High Court of Kenya.

2. Training of judicial officers and administrative staff

The training of judicial officers led to the success of the Judiciary in managing petitions. The officers reviewed the petitions rules, applicable case law and lessons from other jurisdictions shared by experts. Secondly, the training enabled the officers to be prepared to handle petitions for the first time. It had always been assumed that they understood the electoral process.

3. The monitoring and communication with the courts and public pressure on the Judiciary

(i) Urgency created by the timelines and the public interest on the Judiciary’s role: The tight timelines created a sense of urgency to deliver and there was interest from the public to find out whether the Judiciary would meet this obligation. The Judiciary wanted to redeem its past image using these elections.

(ii) Monitoring by the committee and posting of proceedings on the web-link and mailing list created a sense of oversight. Judicial officers worked hard to keep the pace.

(iii) Level of preparations that had been in place such as pre-trial checklist and past electoral cases judgements gave a clear framework to guide the court.

(iv) Personal initiative and commitment of the judges and researchers to work additional hours.

(v) Efficient communication with the Judiciary. This included communicating through the Judiciary e-mail system set up by the committee and telephone calls to the committee’s secretariat where there was always someone to provide assistance. It was noted that the committee’s secretariat addressed issues quickly, sometimes on the same day.

Challenges

(i) Inadequate financing: There was an inadequate budget for the electoral process from the Judiciary.

(ii) Inadequate capacity of courts to handle petitions: Some courts had limited space to hear petitions. For instance, Kisii and Malindi courts had many petitions and had to share the available courtrooms.

(iii) Inadequate judicial officers to handle petitions. A total of 38 judges and 61 magistrates handled the petitions. This constitutes over 60 per cent of all the judicial officers in the country.

(iv) Inadequate support: A Judicial officer involved in EDR was meant to be supported by one legal researcher irrespective of the number of petitions the judicial officer handled. In some instances, judges in the same station shared one legal researcher. It was difficult for the researchers to meet the demand. The back up support provided by the committee by disseminating case law materials as well as judgements made in other stations in real-time assisted the judicial officers and legal researchers to mitigate this inadequacy to some extent.

(v) Inadequate capacity to deliver (crisis management): The Judiciary suspended hearing of other cases so that they could concentrate on petitions. The performance could have been said to have improved if all other work was proceeding as normal while still attending to petitions.
(vi) The Judiciary delivered on election petitions at very high cost of increased backlog: People with other cases complained that the Judiciary was only serving the politicians. However, the Judiciary should reflect on what should be done to reduce the burden of petitions on its system given that this will remain a recurring phenomenon post elections.

Suggestions made on the timelines by stakeholders

Stakeholders interviewed made the following suggestions to improve compliance with timelines:

- A review on the appeals process when recount and scrutiny is still required
- A review of the timelines on presidential election petitions
- Filing of affidavits with all testimonials: This obviated the need to lead evidence in chief and instead allowed cross-examination of the witnesses which is a new and great venture in reducing the time taken to hear election petitions
- Judicial officers to limit applications that are interlocutory
- Time allocations on every address to the court: This includes areas of cross-examination and submissions, limiting the time and demanding that one sticks to the subject. Courts should encourage written submissions to avoid side-shows
- Elimination of hand written notes even for the judges. This calls for investment in technography
- Training staff on election petitions to be prepared on the magnitude of the work
- Training and sensitising the staff early enough
- Opening forums to share experiences including selection of the staff for scrutiny and recount needs to be done in an open manner to avoid repercussions
- Harmonisation of the timelines with the Constitution and the Elections Act with various provisions of 28 days and 35 days respectively is required.

3.1.2 Fairness

Fairness is a key building block for public confidence in an electoral disputes resolution system, including the Judiciary. It is only when citizens perceive the system as fair or impartial that they can be willing to use it as an avenue for resolving electoral disputes. In the 2007 post-election violence, the disputing parties did not bring disputes to the Judiciary partly because they perceived it not to be impartial.

Fairness of the Judiciary in the management of electoral disputes resolution was focused on (i) clarity of the procedures for handling election petitions, (ii) treatment of all "parties" the same way, (iii) certainty or predictability of the rules, (iv) timely disposal of election petitions, and (v) being treated with respect and given a chance to be “listened to”.

Findings

(i) Petitions done against the background of recruitment of new judges; there was faith that there was a new government and a new Judiciary that could be trusted to give an impartial verdict. In addition, there was a new Constitution and more optimism in a new way of doing things.

(ii) The Judiciary’s assurance that it would adhere to set timelines and focus on substantive issues rather than technicalities promoted a perception of fairness. Lawyers and petitioners indicated that previously, cases were struck off on minor, technical grounds. Now focus was on substantive justice. The six month timeline was alluring, an incentive to go to court because the case would not become protracted.

(iii) Training of judicial and administrative staff promoted fairness: The training conducted prepared the judicial officers and staff to handle all petitions in a uniform manner. Handling every “party” the same way is critical for ensuring fairness. Training led to uniformity in the management of petitions and, therefore, increased the perception of fairness and impartiality of the Judiciary.

(iv) Petitions rules established fair procedures that enabled all parties to be treated the same way. The fact that the rules were highly publicised made it possible for parties and the public to monitor their applications.

(v) Uncertainty is a key obstacle to fairness in the management of other cases by the courts. The fact that election petitions rules addressed this issue was a key outcome of the elections preparation process. The petitions rules brought clarity and predictability or certainty to the procedures for handling election petitions. “Parties” knew what to expect and when the cases would be completed.

(vi) Information sharing: Access to court rulings and judgements helped the judicial officers in handling similar issues and therefore contributed to the perception of fairness by petitioners and the public in general.

(vii) High perception of fairness: The lawyers and litigants interviewed observed that they felt fairly treated, even when they did not win the cases. They identified the following as reasons why the Judiciary was fair in handling election petitions:

a. The pre-trial conferences where all parties agreed to do things in a particular way and any unfair advantage was addressed.
b. Equal access to information – EOs and DRs ensured information was made available to all – it was posted on notice boards, sent directly to the parties’ emails or posted on the web-link.

“The openness with which information was shared increased my faith in the Judiciary even though we did not win. They gave me ample time to present my case and when the judge ruled against me, I saw how he interpreted the law and I respected it, even though my client did not.” – Advocate.

c. All parties were given time to call their witnesses. At the end, they felt that they were not forced to drop witnesses and had time to make their case.

d. Judicial officers stepped up efforts to demonstrate their neutrality.

“No lawyer could follow me to the chambers; we were sensitive to allegations of bribery or bias.” – A High Court Judge.

e. Support staff were trained to act with care to preserve an image of professionalism and impartiality.

f. What was to be done was predetermined in the law, and everybody knew the rules of engagement. Attempts to delay or scuttle the cases were not permitted.

3.1.3 Transparency

Sharing of information pertaining to the operations and procedures of an EDR determines transparency. This evaluation sought to establish the extent to which the Judiciary provided information on the electoral disputes resolution mechanism that was put in place as a key determinant of transparency of the system.

Findings

(i) Engagement with stakeholders during preparation period: The wide consultations held with stakeholders – Political parties, IEBC, DPP, NCAJ, NCLR, PPDT and LSK among others improved the transparency of the Judiciary. Stakeholders had confidence in the Judiciary’s preparedness and knew what to expect from it in the handling of election petitions.

(ii) Engagement with the public: The dissemination of information on various stages of the Judiciary’s preparedness and the proactive effort made to have a different Judiciary from 2007, increased public confidence. It made the Judiciary to be seen as transparent and accountable. The media coverage of the presidential petition also promoted this perception of transparency. Regular reporting in the media kept the public and the parties abreast. The information was available because all concerned entities engaged in a robust media campaign to sensitise and raise awareness.

“It was prepared to handle petitions and any other dispute.” An observation by a lawyer who handled petitions.

(iii) Access to information: Lawyers and litigants would easily access information they needed from the Judiciary. The information was also displayed on notice boards and readily available at the customer care desks in the courts. During pre-trial conferences, judicial officers took time to explain the procedure and the rules, laying the ground for a transparent and accountable process.

(iv) Information specific to a case was communicated directly to the parties through delivery of letters, emails or through telephone calls.

“Rulings in courts were made in the presence of everyone; next hearing date and any orders were made in public, so everybody knew.” Advocate.

3.1.4 Independence

Independence is key in establishing the legitimacy and integrity of the Judiciary as an electoral dispute resolution system. Independence means that the Judiciary is free from any outside influence, intimidation and control and it should be seen to be independent by the parties using it to resolve disputes. Independence can be influenced by factors such as the system for appointment of judicial officers, laws, regulations and procedures governing the electoral dispute resolution process and financing of the Judiciary among others. This evaluation assessed the actions taken to ensure independence of the Judiciary as an Election Dispute Resolution (EDR) system and the perception of the Judiciary’s independence by stakeholders.

Findings

(i) There was a general perception that the Judiciary was independent in handling elections disputes: The Judiciary affirmed and re-affirmed its independence but there were challenges of always being perceived as independent in a political process: The general perception was that the Judiciary did well to maintain its political independence. This is true for all except in the presidential election petitions.

(ii) The new legal framework provided optimism of an independent Judiciary: The Constitution (2010), vetting of judges and many electoral laws created an impression of high levels of professionalism. As observed by one of the judges, “The new CJ instilled a lot of hope in the Judiciary when he came; people were keen to project an image of a reformed judiciary.”

(iii) There was strict adherence to the law rather than other issues. “There was a time IEBC delivered ballot papers but no order had been made; I told them to wait for the order.” – Judge
(iv) Effective preparations for elections through a consultative process raised the perception of the Judiciary determined to be independent: The Judiciary was better organised and prepared to handle petitions; trainings were done for all parties and stakeholders knew the rules.

(v) Stakeholder and public engagement was key in promoting the Judiciary’s independence: There was a deliberate effort by the Judiciary to reach out to other stakeholders.

“The CJ and some judges went to the media and assured people of the independence of the Judiciary. Regular media briefings were done to update the public.” – Deputy Registrar

(vi) Openness and transparency: Openness in handling matters, explaining things to staff and the public ‘to increase perception that nothing is being hidden. All information was posted on notice boards to increase public understanding of what the court was doing, and I was accessible as a judge.” Judge

Challenges:

(i) Media coverage: Media coverage of the Judiciary was not always positive or “accurate”. Some of the election petitions were sensationalised along party or personality lines.

(ii) The presidential election petition that took place at the beginning of the petitions’ period eroded public confidence on the Judiciary’s independence to some extent. However, interviews with several stakeholders found out that the public had different views on the presidential election petition and parliamentary and county level petitions.

(iii) Financing of election preparations: A key challenge to the independence of the Judiciary manifested itself in the funding of election preparations. The processing of payment through the government financial management system affected effective preparations and handling of electoral disputes. It led to delays in implementation and also limited effectiveness. The Judiciary (especially the committee) could not run its own budget and, therefore, could not determine its own calendar of activities effectively. This led to, for instance, the inability of the Judiciary to move judges to hear petitions in different stations.

3.1.5 Relevance

Relevance refers to the extent to which an EDR system takes into consideration the political and social culture in which it operates. The procedures, regulations and sanctions and their enforcement should be informed by the political and social realities. This evaluation assessed how the electoral dispute resolution process established by the Judiciary took into consideration the Kenyan political and social realities in general and the specific contextual issues that prevailed at various stages of the electoral process.

Findings

(i) Petitions rules developed responded to the sensitivity of elections as a political process. Hence, the focus on substantive aspects of law and not technicalities. Secondly, Kenyans, through the constitution, demonstrated the need to resolve election disputes with speed. The petitions rules made this a reality.

(ii) The administrative rule that required judges to be moved to hear cases in different courts responded to the local sensitivity of election petitions, though this was not fully implemented. Judicial officers interviewed observed the need to implement this rule in future.

(iii) Sensitivity to cost as a barrier: In the past, cost was a barrier for potential petitioners. The petitions rules capped costs. However, stakeholders noted the need to review the capping costs to meet the actual costs incurred by lawyers during the petitions.

(iv) Sensitivity to the mistrust between political parties: The Judiciary engaged with the public and stakeholders to emphasise its independence and preparedness to play its role in resolving election disputes.

(v) Training curriculum: The training of the judicial officers and staff responded to the sensitivity of the political process. Curriculum included skills on how to ensure and be seen to be fair and impartial.

(vi) Some petitions threatened to get out of hand because rival supporters came to court. The Judiciary responded by seeking security reinforcements in the courtrooms and to guard individual judges. In some cases, judges were evacuated following threats to their safety.
Conclusions and recommendations

3.2 Conclusions

The Judiciary’s management of electoral disputes responded to a constitutional imperative. The timelines had been set and the Judiciary had no choice but to comply. The issue was how, not whether to comply. The setting up of the committee and all the preparations that went into building the capacity of the Judiciary focused on “how to comply” with its constitutional mandate.

Several conclusions can be drawn based on the manner in which the Judiciary managed electoral disputes resolution:

(i) Cost of complying with the constitutional mandate: The Judiciary did finalise all petitions within the timeline of six months. The compliance was achieved at a huge cost of increased backlog of other cases and deployment of huge proportions of its resources—legal researchers, ICT officers, court clerks, deputy registrars and executive officers among others. This was necessary given that the Judiciary was almost in crisis mode. However, the same approach may not suffice nor even be appropriate in the future.

(ii) The Judiciary’s capacity is still very limited: The management of election dispute resolution exposed the limitations of the Judiciary’s management, human and financial resources. The Judiciary had to pool most of its capacity to manage the election petitions. It would be difficult to replicate across other cases.

(iii) Election preparations put in place scored many “firsts” for the Judiciary. It was the first time for most judicial officers and administrative staff to be trained on electoral law and processes, first time to develop comprehensive petitions and administrative rules, first time to engage stakeholders and the public in an open and transparent manner and first time to complete petitions in a short period. However, being the first time to undertake these processes gave room for innovation, experimentation as well as high social capital from the public and stakeholders. The Judiciary may not have the same space in the next elections. There is need to learn lessons and improve on the management of electoral disputes.

(iv) While the committee has served its purpose, that is — It successfully prepared the Judiciary to manage electoral disputes within the set timelines and in a transparent and efficient manner — its continued existence will be needed to support the sustainability of the capacity it built in the Judiciary. Further recommendations on the above is provided in the next section.

(v) The Judiciary faces a new challenge: Sustaining the perception of fairness, transparency and independence created through the management of electoral disputes. There is a need to focus on how this perception can be developed beyond election petitions.

3.3 Recommendations

The recommendations focus on three aspects: (i) sustainability of the capacity built in the Judiciary, (ii) preparations for electoral disputes resolution in the next General Election and (iii) improvement of Judiciary transformation.

3.3.1 Timeliness in disposal of election petitions

Kenya has made huge strides on the issue of time limits to the election process. However, nothing is ever cast in stone where the human element interacts with rules. There is thus need to revisit the time element in election disputes management even with the huge improvement made in the 2013 elections. This issue is critical given the fact that a delay in the management of such disputes could lead to two problems: Issue and actor proliferation.

By “issue proliferation” is meant that if solutions are not found to the dispute early enough, new issues are raised by the disputants or even a third party and this tends to further compound the problem. As the issues proliferate, more actors join the dispute and this contributes to the escalation of the crisis.
Timely management of an election dispute is itself a conflict prevention method in the sense that it prevents new issues and actors from joining the problem. As was seen through the Kenya experience of the 2007 General Election, when the results of an election are challenged and the matter is not dealt with expeditiously, the political system could grind to a halt and this might goad people into resorting to self-help strategies to deal with the dispute.

Stakeholders recommended the need to revisit the time set for disposal of presidential election disputes. Secondly, there is a need to review the timelines for various stages of the parliamentary and county election disputes.

3.3.2 Sustainability and further improvement of capacity built in the Judiciary

The capacity of the Judiciary was built to enable it manage electoral disputes in the 2013 elections. This included establishing legal, regulatory and administrative arrangements, training of judicial officers and staff, stakeholder engagement, monitoring of election petitions, enhanced communication within the Judiciary and to the public and overall change of attitude among staff. The first step for the Judiciary is to sustain this capacity and build on it going forward.

The following actions are recommended:

(i) For efficient delivery of justice, the Judiciary has established several court divisions. In the lower court, there are Criminal, Civil and Children divisions. In the High Court there are Constitutional, Judicial Review, Commercial, Family, Criminal and Civil divisions.

However, there is need to retain the committee’s management processes through a unit or team in the Judiciary to always manage the hearing of election petitions. As has been demonstrated through this report, the election cycle is one that is continuous and requires several interventions from the Judiciary and a coordination of the other stakeholders in government and civil society involved in the process. This latter process has not in the past been an active role that the Judiciary has managed and to which the Judiciary was put to task after the 2007 election process. To ensure that learning is continuous and retained, the committee can be renamed and the present membership changed to have those who have been active in the process continue to participate and include others as long as institutional memory is always maintained. While the committee may not be active all the time, it should continuously be in place to review the Judiciary’s past handling of election petitions and prepare for hearing of petitions arising from the next General Election.

(ii) Training on electoral disputes resolution: The curriculum and training materials for EDR were developed within a short period. A training needs assessment on EDR should be carried out, and the curriculum and training materials for judicial officers and staff on EDR reviewed and updated.

(iii) Training of judicial officers and staff on EDR: There should be an immediate follow-up training of judicial officers and staff after the electoral petitions to reflect and document lessons on the management of election petitions. This will document the knowledge and skills gained by judicial officers and staff.

(iv) Review and update election petitions rules: The rules were applied for the first time. There is a need to review them informed by the lessons learnt from their application to ensure improved management of the electoral disputes in future.

3.3.3 Planning for management of electoral disputes resolution for next elections

(i) Electoral cycle approach to management of elections disputes resolution: If the Judiciary retains a team/unit or committee then in the next General Election, an electoral cycle approach to management of electoral disputes resolution should be adopted. This involves developing the plan for management of EDR as early as 2015.

(ii) Capacity development: It is apparent that the Judiciary would find it challenging if election petitions were to double or triple compared to those of 2013 elections. In 2013, there were 176 petitions and the Judiciary deployed about 60 per cent of judges as well as a large proportion of magistrates. Case backlog increased significantly as a result.

The Judiciary, at its current capacity, would be in a state of paralysis if over 500 election petitions were to be heard and determined within six months. Hence, there is a need for the Judiciary to seek ways of rapidly building its human resource capacity. Secondly, election petitions only served to expose the Judiciary’s capacity limitations, which are otherwise adversely affecting all cases.

(iii) Funding for election petitions: In the next General Election, the Judiciary needs to set aside adequate funding for management of electoral disputes resolutions. Inadequate funding was a major handicap in 2013.

3.3.4 Improvement of Judiciary transformation

Based on lessons learnt from the management of election dispute resolution in 2013, the following recommendations are made for Judiciary-wide transformation:

(i) Training: A service delivery improvement approach to training of judicial officers and staff is required for almost all types of cases that the Judiciary handles. The assumption that judicial officers are well-versed in all technical and legal aspects has been proved not to be true. Thus, the same approach needs to be extended to other areas such as land and labour cases. Perhaps, this approach can be piloted on those cases that constitute the highest backlog in the courts.
(ii) A monitoring and case management system is urgently required: A rethink of what constitutes case management has to happen and a proper case management system established. The innovative monitoring system used by the committee to mitigate weaknesses of the case management system developed for election petitions cannot be a substitute. The system used by the committee, however, underscored the importance of effective communication between the “centre” and the courts.

(iii) Criteria for workload allocation among judicial officers and staff need to be established. Such criteria were lacking and consequently, it is not clear how judicial officers were assigned the election petitions they handled. Such criteria will improve efficiency and ensure optimal use of the limited resources available.

(iv) Stakeholder engagement and communication to the public: Whereas the Judiciary did well in engaging stakeholders and disseminating information to the public on election petitions, the same cannot be said with regard to the overall transformation of the Judiciary. There is a need for it to develop a robust stakeholder engagement and communication plan to disseminate and publicise its transformation.

This report has endeavoured to bring out the “voices” of the participants who took part in the election petitions both from within the court and outside – judicial officers, Judiciary staff, petitioners, advocates, civil society organisations and other stakeholders. It is hoped that the report provides the basis for a continued engagement and improvement on the election petitions’ cycle and that the findings and recommendations herein will be used to further the integrity of elections in Kenya.