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Democratic Transitions in Africa:

A Case Study of National Executive Power
Transfer in Kenya

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Acronyms

AU	African Union
CBK	Central Bank of Kenya
COE	Committee of Experts on Constitutional Review
COMESA	Common Market for Eastern and Southern Africa
CS	Cabinet Secretary
CSOs	Civil Society Organisations
EAC	East African Community
ECK	Electoral Commission of Kenya
EPRA	Energy and Petroleum Regulatory Authority
EU	European Union
IEBC	Independent Electoral and Boundaries Commission
IRI	International Republican Institute
KANU	Kenya African National Union
KLRC	Kenya Law Reform Commission
MISC	Moi International Sports Centre
NARC	National Rainbow Coalition
NDI	National Democracy Institute
NSAC	National Security Advisory Committee
PEV	Post-Election Violence
PSC	Public Service Commission

Foreword

The importance of democratic elections as a prerequisite for any democratic regime has been discussed and analyzed countless times. Citizens are supposed to participate in free and fair elections, where they cast their votes to elect their representatives and leaders at various levels of government, whereupon the votes are counted, and the election results are determined. The electoral authorities, or an independent body responsible for overseeing the election process, announce the official results. All this leads to concession or acceptance: If the election results indicate a winner, the losing candidate or party is expected to concede defeat.

But even given these ideal conditions, the logical next step is not always as smooth as it is supposed to be. It is generally acknowledged how the following peaceful transfer of power ought to be organized: Once the election results are confirmed and accepted, the outgoing government and elected officials begin the process of transferring power to the incoming government and officials. This transition typically involves a series of administrative procedures, such as sharing information, briefing the incoming leaders on ongoing issues, and generally facilitating a smooth handover. In reality, though, the handing over of power, be it symbolical or factual, can create friction, if not outright denial of, the electoral process thus far.

The process of democratic transition can, therefore, serve as a relevant indicator of the state of democracy in a given country.

Within the framework of the African Democratic Transition Dialogue, Hanns Seidel Foundation together with Strathmore University Law School, initiated a series of country studies that focus specifically on the aspects of democratic power Transitions after democratic elections.

The first case study in this series analyzes the general elections in Kenya 2022, as a reference point for further studies. The reader will find fascinating analyses and various entrance points for further critical engagement concerning the State of Democracy in Africa.

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Executive Summary

Since the 1990s, evaluations of the state of democracy in Africa have focused on the quality of elections. The primary feature of analysis has been the occurrence of multiparty elections in an open and fair environment. As several states have now had successive democratic elections, attention should also be paid to other elements of democratic evolution.

Following a democratic election, a smooth and orderly transition from an incumbent administration to a new one is a key test for a young democracy. Smooth power transfer not only complements a free and fair election but also serves to entrench democratic principles. Over time, these actions give rise to democratic consolidation.

Drawing from the events of Kenya's general election in 2022, this report examines the management of executive power transfer in Kenya. In addition to analysing the process of presidential power transfer, it evaluates the constitutional and legal framework for transferring power from an incumbent President to an incoming one. In the findings, it identifies key challenges in Kenya's post-2010 power transfers, highlighting the roles played by key actors during the process. Finally, it makes recommendations on how to improve the management of the transition process.

The constitutional and legal framework on power transfer at the national executive level is grounded in the Constitution of Kenya and the Assumption of the Office of the President Act 2012. This framework provides the procedure to be followed in the handover and taking over of power from an incumbent President to an incoming one. Since it became operational, the framework has significantly impacted the transparency of the process of power transfer. In 2022, the Assumption of the Office of the President Committee undertook its mandate and documented the process. The report demonstrates adherence to constitutional and legal requirements on the transfer of power at the presidential level. It also indicates that handover reports were prepared in other national executive offices such as ministries, departments, and agencies. Two key challenges during power transfer are presidential election petitions and long-term transition management pressures. It is not clear in law what the legal effect of a petition is on the Committee's mandate. A quick power handover and a short temporary incumbency period worked well in Kenya's case. However, there are improvements to be made in settling into power, and on the part of the opposition, adapting to the new environment.

It is recommended that Parliament clarifies the timeline of the transition Committee's mandate when a presidential election petition is filed in court. Further, Parliament should develop a statutory framework for the transfer of executive power beyond presidential power. Lastly, key actors should scrutinize the process of executive power transfer as an element of democratic progress.

Introduction

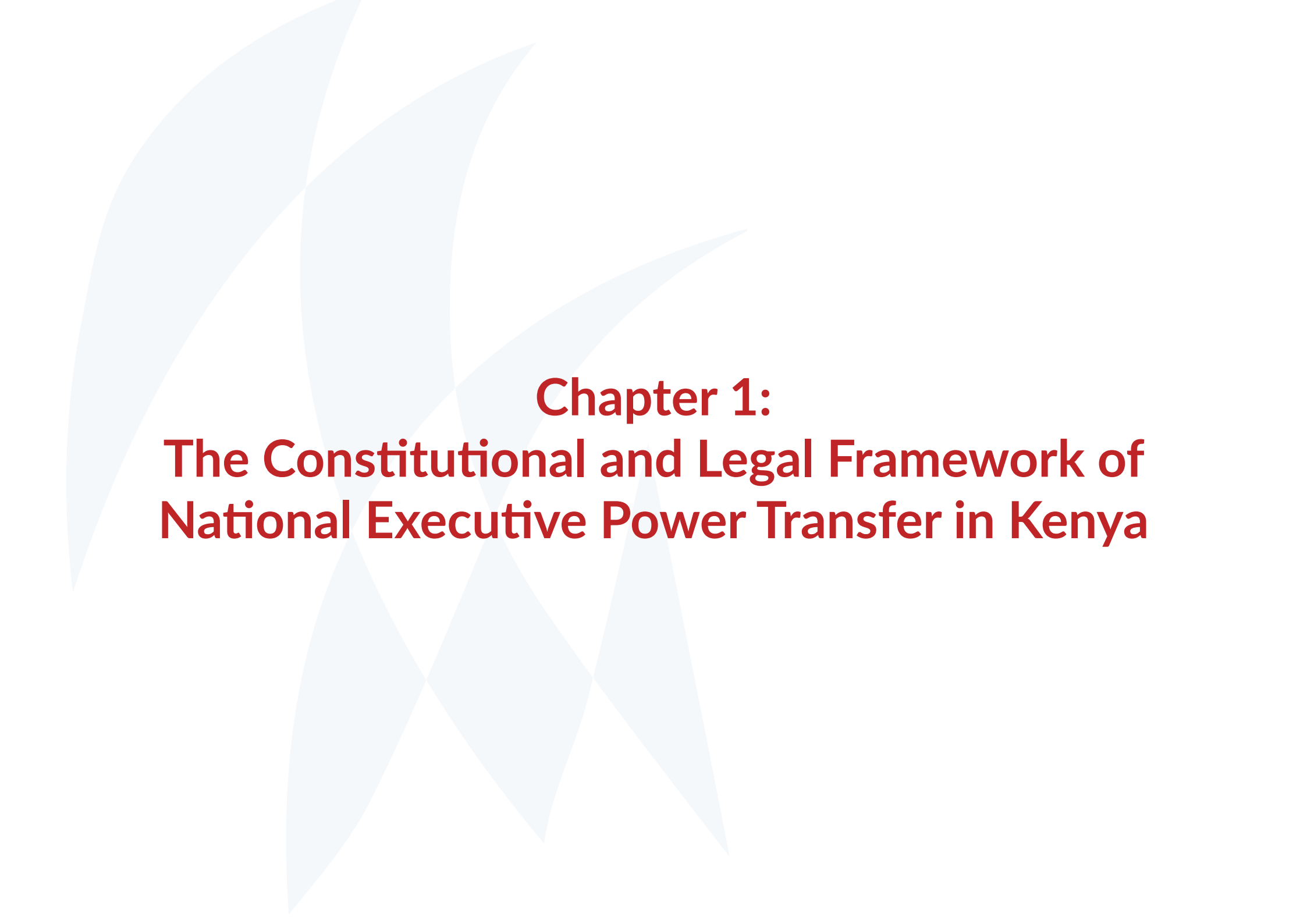
The Constitution of Kenya 2010 is widely accepted as a benchmark for the democratic enterprise desired by the Kenyan electorate and society. An ambitious but progressive document, it set in motion a much-delayed democratization process following more than three decades of democratic repression in the country.

The successful completion of three electoral cycles since 2010 is partly attributable to the design of the electoral system, and partly a result of how key actors have managed the election cycle. Although neither of these elections has been problem-free, it is significant that the country has experienced a period of continuous political peace over the past 10 years (2013-2022). This can be immediately contrasted with the previous decade (2002-2012), where the 2007/08 election and post-election violence (PEV) resulted in the deaths of 1,800 people, the internal displacement of up to 600,000 people, and the destabilization of the Kenyan state. This conflict was only resolved through a post-election pact in the form of a power-sharing agreement establishing a grand coalition government in 2008.

Before 2002, Kenya had similarly experienced consistent election-related violence dating back to multipartyism's return in 1992. Again, before this, the period between 1992 going back to independence was characterised by democratic repression and decline. Examples include banning the opposition party, Kenya People's Union, in 1969, turning Kenya into a de facto one-party state. This status was codified through an amendment to the constitution in 1982.

Noting the significant milestone in conducting regular, and largely peaceful elections since 2010, it is an opportune moment to assess the Kenyan nation-state's progress in facilitating smooth transfers of executive power following these elections.

This report chronicles the process of executive power transfer undertaken following the General Election that was held on 9 August 2022. The report focuses on executive power transfer at the national level of government. The central components of the report are the legal framework regulating the transfer of executive power following a presidential election, the process of power transfer as managed by the mandated committee, the key challenges that emerged during the transition of 2022, and the roles played by key actors during the period of power transfer. In conclusion, recommendations are made on how to build on the post-2010 progress in managing smooth power transfer.



Chapter 1:
**The Constitutional and Legal Framework of
National Executive Power Transfer in Kenya**

1.1 Background

The power transfer from the Kenya African National Union (KANU) regime to the National Rainbow Coalition (NARC) in 2002 can be considered the first democratic transition in Kenya. This handover was significant because the incumbent, President Daniel Arap Moi, handed over power to his successor, Mwai Kibaki, and an alliance of opposition parties who defeated KANU in 2002 after multiple attempts. Still, the absence of a law governing the process of power transfer is notable between the years 2002 and 2012. This lacuna was brought into the spotlight during 2007's disputed election. Following the declaration by the Electoral Commission of Kenya (ECK) of Mwai Kibaki as the winner of the presidential election, a rushed and controversial swearing-in ceremony took place the same day. The 2007 swearing-in coupled with the incidence of widespread electoral violence and political instability in the country at the time highlighted the vital need for constitutional canons on power transfer. It is these events, together with the democratic contests in post-independence Kenya that led to the introduction of the power transfer requirements that are now in law. Kenya's laws currently provide for power transfer at the national executive level, and the devolved executive level.¹

1.2 The current framework for national executive power transfer

In the post-2010 constitutional dispensation, Kenya has gained significant experience in managing smooth power transfers based on a clear constitutional framework. The national executive transition process, as earmarked by the process of transferring presidential power, is institutionalised and enshrined in law. The Constitution and the Assumption of the Office of the President Act 2012 delineate the constitutional and statutory framework governing the transfer of presidential power in Kenya. The framework defines the period and nature of presidential executive power during temporary incumbency and provides for the composition of the body responsible for managing the process of power handover. Collectively, these provisions are the most significant factor that has contributed to reasonably smooth power transfer in Kenya since 2010.

¹ *The Assumption of the Office of Governor Act, 2019 provides the procedure for assumption of the offices of Governors.*

² Article 129, Constitution of Kenya, 2010.

³ Article 129, Constitution of Kenya, 2010.

⁴ Article 131, Constitution of Kenya, 2010.

⁵ Article 147, Constitution of Kenya, 2010.

⁶ Article 130, Constitution of Kenya, 2010.

⁷ Article 132, Constitution of Kenya, 2010.

⁸ Article 153, Constitution of Kenya, 2010.

⁹ *Committee of Experts on Constitutional Review, Final Report of the Committee of Experts on Constitutional Review, 11 October 2010.*

https://katibaculturalrights.files.wordpress.com/2016/04/coe_final_report-2.pdf on 28 June 2023

1.2.1 The Constitution of Kenya

Chapter Nine of the Constitution defines 'executive authority' in Kenya. First, it is derived from the people of Kenya.² Second, it shall only be exercised in accordance with the Constitution, in service to the people.³ Third, it is exercised by the President, 'with the assistance of the Deputy President and Cabinet Secretaries'.⁴ The Deputy President is designated 'the principal assistant of the President'.⁵ Together, the President, Deputy President, and the Cabinet are 'the national executive'.⁶ The President is responsible for nominating Cabinet Secretaries and with the approval of Parliament appointing them, chairing Cabinet meetings, and for directing and coordinating 'the functions of ministries and government departments'.⁷ Cabinet Secretaries are accountable, individually and collectively, to the President for the exercise of their powers and the performance of their functions.⁸

It follows that the handover of power from the President and their assistants is the principal ingredient in executive power transfer in the Kenyan state. At the pinnacle of that process is the transfer of power from an outgoing President to a President-elect.

Article 134 of the Constitution of Kenya sets out the period and circumstances under which temporary incumbency subsists and significantly limits the exercise of presidential power during that period. This period is demarcated as 'the date of the first vote in a presidential election' until 'the newly elected President assumes office'. During temporary incumbency, a President may not exercise their power to nominate or appoint judges of the superior courts, any public officer whom the President is required to appoint under the Constitution or statute, or any high commissioner, ambassador, diplomat, or consular representative.

Article 141 of the Constitution sets out a timeline and procedure for a President-elect to assume office. It is the act of assuming office that represents the handing over of power or the transfer of power from an outgoing President to an incoming President. The assumption of the Office of the President takes place through a swearing-in ceremony.

The swearing-in ceremony is required to take place on the first Tuesday following either the fourteenth day after the declaration of the result of the presidential election or the seventh day following the Supreme Court's decision declaring an election to be valid in the case a petition was filed. This period is no doubt short but was a deliberate choice by the constitution drafters. According to the Committee of Experts on Constitutional Review (CoE), the initial period to swearing-in was twenty-eight (28) days but was changed to fourteen (14) days because the longer period was not sufficiently 'rapid and effective'.⁹

The swearing-in must be in 'public before the Chief Justice, or in the absence of the Chief Justice, the Deputy Chief Justice'. The Constitution further provides the mode of assuming office, that is, by taking and subscribing to the oath or affirmation of allegiance, and the oath or affirmation for execution of the functions of the offices as prescribed in the Third Schedule of the Constitution.

The constitution also provides the procedure for swearing in of the Deputy President and Cabinet Secretaries. The constitutional procedure for swearing in of the Deputy President is also contained in the Constitution, and mirrors that of the President.¹⁰ Similarly, Cabinet Secretaries assume office by a swearing in procedure set forth in the Constitution.¹¹

1.2.2 The Assumption of the Office of the President Act 2012

The Assumption of the Office of the President Act 2012 establishes the Assumption of the Office of the President Committee ('the Committee'). It is defined as an 'ad hoc committee' and is made up of a cross-section of office holders in government who represent various offices, departments or agencies, and 'three persons nominated by the President-elect'.¹² The President-elect's nominees 'may cause the chairperson to call for a meeting to consider important matters of an urgent nature'.¹³

The functions and some procedures of the Committee are set out in the Act. The Committee is tasked to:

- a. facilitate the handing over process by the outgoing President to the President-elect;
- b. organise for the security of the President-elect;
- c. organise the necessary facilities and personnel for the President-elect;
- d. coordinate briefings of the President-elect by relevant public officers;
- e. facilitate communication between the outgoing President and the President-elect; and
- f. prepare the programme and organize the swearing-in ceremony.

To fulfil its functions, the Committee has a power to appoint sub-committees. The Committee can co-opt into a sub-committee, persons whose 'knowledge and skills are considered necessary' for the better carrying out of its functions.¹⁴ As defined by the Committee itself in 2022, its 'core mandate is to facilitate a smooth transition from the in-power administration to the incoming administration'.¹⁵ This understanding suggests that the Committee's mandate goes beyond

the assumption of office process and includes a wider role in facilitating a transition. As highlighted in the State of Democratic Transitions in Africa Report, most African states have laws on assumption to the office but lack 'coherent and comprehensive' frameworks on power transfers. Given the centrality of the President to the exercise of executive authority in the Constitution, an argument can be made that the Committee essentially operates as a transition Committee. The actual role played by the Committee in 2022's transition similarly suggests a more considerable role from the analysis contained in Chapter 2 of this report.

Crucially, the Act anchors the process of executive power transfer in the handover of power from an incumbent President to a President-elect. Accordingly, the Committee takes centre stage in planning for the formal handover. The President-elect participates in security briefings and can request information from public officers. Where information is requested, public officers are compelled by the Act to provide the information. The Committee is responsible for the administration of these exchanges and organizing the swearing-in ceremony.

Once the swearing-in is complete, the Committee must prepare a detailed report of their work within one month of the swearing-in date.¹⁶ The Committee is also directed to 'publish and publicize all important information within its mandate affecting the nation'. Citizens can formally request information from the Committee based on public interest. The Act provides the grounds upon which such a request can be declined.¹⁷

¹⁰ Article 148, Constitution of Kenya, 2010.

¹¹ Article 152(4), Constitution of Kenya, 2010.

¹² Section 5, Assumption of the Office of the President Act, 2012.

¹³ Section 8, Assumption of the Office of the President Act, 2012.

¹⁴ Section 7, Assumption of the Office of the President Act, 2012.

¹⁵ The Assumption of the Office of the President Committee (2022) Report, Kenya Gazette Notice No. 13278, 28 October 2022, 8037.

¹⁶ Section 19, Assumption of the Office of the President Act, 2012.

¹⁷ Section 20, Assumption of the Office of the President Act, 2012.

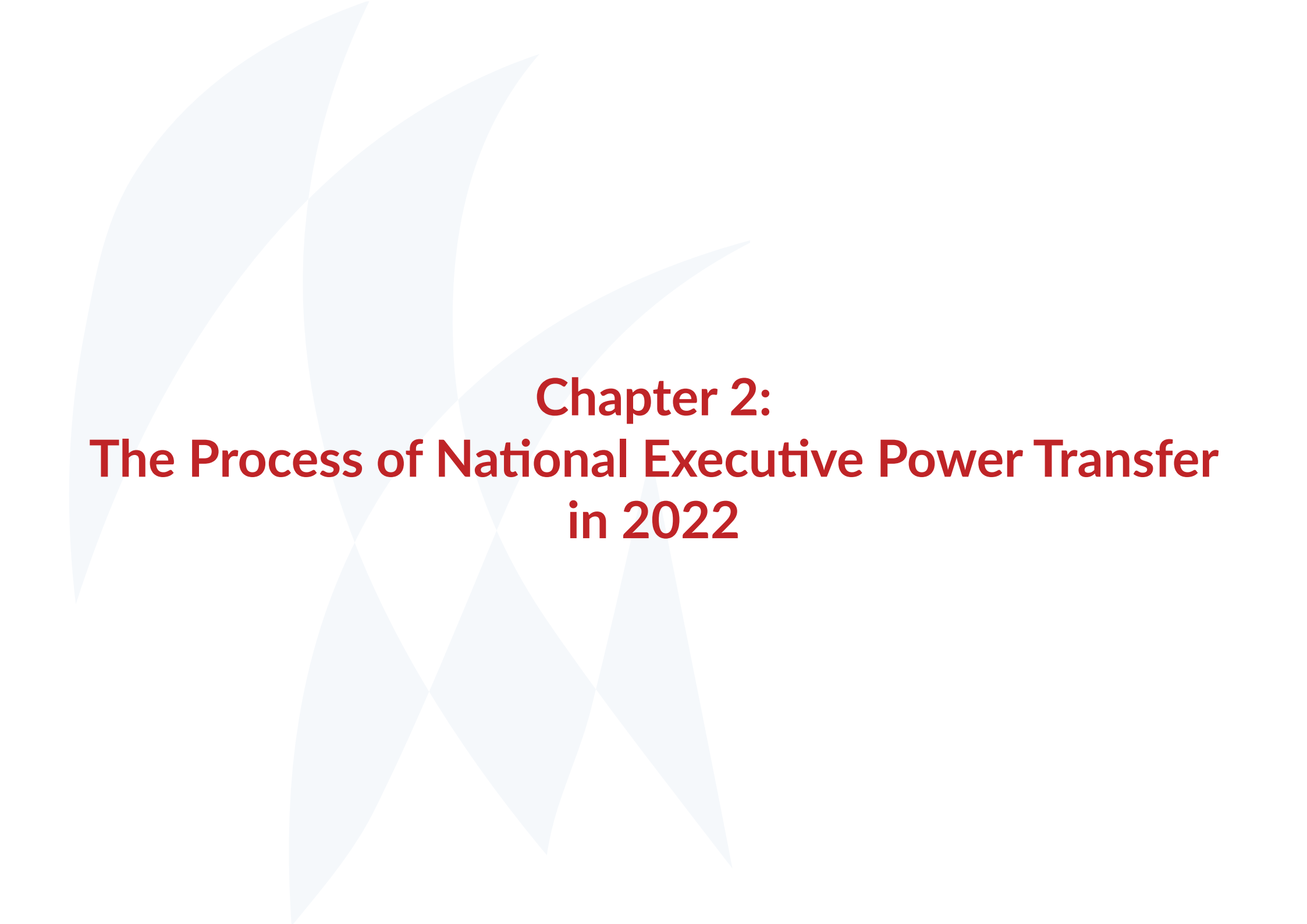
1.3 Early Achievements and Continued Challenges: The 2013 Experience

Some immediate effects of the Act and constitutional provisions were apparent in 2013. Asingo marks the 2013 power transfer as a progression on the 2007 one.¹⁸ The President-elect's taking over of power happened through an easily visible swearing-in ceremony that took place in daylight hours. Second, the national security services were part and parcel of the power transfer process. The formal incorporation of security chiefs into the Assumption of Office Committee demonstrates that there was no power vacuum. This is significant because of the concern in 2007 that the election period may have resulted in a power vacuum. Still on the matter of security, one of the enduring questions is whether the President-elect should receive security briefings if the election result has been challenged in Court. Asingo argues that this may lead to a compromise of the impartiality of the security sector if the President-elect's win is nullified because it gives security organisations an unanticipated and undesirable level of exposure. This remains a matter of concern despite the nullification of the first subsequent presidential election in 2017. Following a repeat election, however, the incumbent was declared the winner. The matter of compromise of the security sector therefore did not play much part, as the incumbent became the newly elected President.

Beyond security, little is known from 2013 and 2017 about the transfer of power from the Cabinet Secretaries, as prime agents of the President's executive authority, and similarly, the transfer in government departments and agencies.

The next chapter elaborates on the actual process of assumption of office, and the broader transfer of power as carried out in 2022.

¹⁸ Asingo P, 'Party Strengths, Partisan Identities and Voter Mobilization in the Kenya Elections of 2013' in Otieno F, (ed) *New Constitution, Same Old Challenges: Reflections on Kenya's 2013 General Election*, Society for International Development/Uraia Trust, Nairobi, 2013.
https://profiles.uonbi.ac.ke/patrick_asingo/files/elections_book_2013.pdf on 28 June 2023



**Chapter 2:
The Process of National Executive Power Transfer
in 2022**

The power transfer that took place in August 2022 followed the third election since the introduction of the Constitution of Kenya in 2010. Notably, despite a tense, highly contested, and close election, the actual process of executive power transfer from the incumbent President to the President-elect occurred in line with the law. It could also be argued that 2022 presented a 'test' situation for power transfer that had not occurred before. In 2013, the handover was between two political allies at the time, while in 2017, the incumbent was installed for a second (and final) term. In 2022, however, the handover of power was one between two different political groupings. The handover between incumbent President Uhuru Kenyatta and the new President, William Samoei Ruto was therefore particularly significant.

2.1 Adherence to Legal and Constitutional Procedure(s)

An application of Article 141 of the Constitution to the 2022 power transfer process reveals that the President-elect was sworn in as per the constitutional requirements. The swearing-in took place in public, before the Chief Justice, Hon. Martha Koome on the first Tuesday following the seventh day after the Supreme Court rendered its decision declaring the election held on 9 August to be valid. President-elect William Samoei Ruto assumed office by taking and subscribing to the constitutional oaths and affirmations therein prescribed. The swearing-in was conducted by the Chief Registrar of the Judiciary, Anne Amadi. The ceremony took place between 10:00 am – 2:00 pm, with the then President-elect completing the oaths at 12:45 pm.

The published report of the Committee details the process followed by the Committee. Below are the identified steps taken by the Committee in fulfilling its functions as prescribed by Section 6 of the Act:

1. Facilitating the handing over process by the outgoing President to the President-elect

The Committee convened its first meeting and its first press briefing on Friday 12 August 2022. It established 5 sub-committees to undertake its comprehensive mandate: the Legal- Sub Committee; the Security and Logistics Sub-Committee; the State Event, Media and Publicity Sub-Com-

mittee; the Budget Sub-Committee; and the Sub-Committee on Ongoing State Programmes and the Status of Flagship Projects. The Legal Sub-Committee prepared legal briefs on legal issues about the transition and assumption of Office by the President-elect and Deputy President-elect and was available to fulfil any other function or task deemed necessary to deliver on its mandate. It also prepared a Gazette Notice on the date and place for the conduct of the swearing-in ceremony; and advised the Committee on legal issues arising out of the execution of its mandate. This Sub- Committee noted that separate handover reports had been prepared by the relevant Ministries, Departments, and Agencies. The Security and Logistics Sub-Committee developed a comprehensive Security Operation Plan and Orders.

2. Organise for the security of the President-elect

The Security and Logistics Sub-Committee provided Security to the President-elect and the Deputy President-elect. This task begins immediately after the declaration of the results of the presidential election. The security provided must be 'adequate' as per section 9 of the Act.

3. Organise the necessary facilities and personnel for the President-elect

Except for the facilities for the swearing-in ceremony and security arrangements, it is not obvious from the report whether any particular steps were taken to organize personnel for the President-elect. It is also not clear from the Act what this entails on the part of the Committee. This is one area of the transition that should be clarified.

4. Coordinate the briefings of the President-elect by relevant public officers

The Committee created 'an institutional framework' to address all requests from the President-elect's team and to coordinate any briefings required in the form of the Sub-Committee on Ongoing State Programmes and the Status of Flagship Projects. This Sub- Committee prepared a report on all rolling State Programmes and the Status of Flagship Projects and coordinated the briefing of the President-elect's team by various public officers.

5. Facilitate communication between the outgoing President and the President-elect

As noted above, the Committee took detailed steps to facilitate the handover from the outgoing President to the President-elect. It is not clear from the report whether the Committee took specific steps to facilitate communication between the two individuals.

However, there were separate media reports of a highly strained relationship to the effect that they hardly communicated with one another during this period. A brief statement by the then President-elect on Monday 5 September, after the Supreme Court's decision upholding the election, revealed that the two had not spoken in months. On Wednesday 7 September, a brief statement by the President-elect revealed that he had a telephone conversation with the incumbent President on the topic of the concluded election and upcoming transition. While the preparations for the assumption of office do not appear to have been immediately affected, it is concerning because of the kind of anxiety that may call into question whether a handover was going to be smooth. It is suggested that the two principals should always gauge their actions against the constitutional requirements of their respective offices.

6. Prepare the programme and organise the swearing-in ceremony

The Committee, through the Cabinet Secretary for Interior and Coordination of National Government declared Tuesday 13 September, demarcated the seventh day following the rendering of a decision by the Supreme Court declaring the election valid, a Public Holiday of General Observance to conduct the swearing-in ceremony.¹⁹ Through its Chairperson, the Committee published a notice in the Kenya Gazette notifying members of the public of the date, venue, and time of the swearing-in ceremony.²⁰

The Security and Logistics Sub-Committee prepared a venue and programme, prepared and sent invitations for local and foreign dignitaries, organized a State Luncheon in honour of the newly inaugurated President and Deputy President, established a central command centre at the swearing-in ceremony venue, coordinated the logistical arrangements for the outgoing President and President-elect and their families, state officers and guests.

The State Event, Media and Publicity Sub-Committee accredited journalists to cover the ceremony, set up and managed a media centre at Moi International Sports Centre (MISC), Kasarani, and produced infomercials that were broadcast by the Kenya Broadcasting Corporation (KBC) and affiliated radio stations.

The Committee's self-assessment concluded that their mandate was completed 'exceptionally as evidenced by a successful inauguration ceremony...'. The Committee also observed the 'self-executing accountability mechanism framework' in the Act by submitting its report to Parliament and publishing it in the *Kenya Gazette*. This action is defended as enhancing the national values enumerated in Article 10 of the Constitution.

Adherence to the legal and constitutional requirements of power transfer supports the maturing of electoral democracy in Kenya. Observance of similar requirements during other stages of the electoral process has been noted in the past. In Kenya's case, the holding of elections for the third consecutive time as per the constitutional calendar is evidence of respect for the constitution and the rule of law. It also suggests that accountability mechanisms, both institutional and stakeholder-led, are having some desirable effects on the level of transparency in the electoral process.

The Deputy-President-elect assumed office as per the constitutional procedure, as evidenced in the Committee's report.²¹ Likewise, Cabinet Secretaries were sworn-in on 27 October 2022 and thereafter assumed their respective offices through separate 'handovers' at their respective premises. The Committee also noted the preparation of handover reports at the government ministry level. These events indicate that in practice, national executive handovers take a longer time than is anticipated in the assumption of office provisions. This demonstrates a need to buttress the constitutional procedures with provisions that direct national executive power transfer processes before and after swearing-in ceremonies.

2.2 Additional Steps Taken to Deliver a Smooth Transfer

During the swearing-in ceremony, the President's Aide-de-Camp switched from the outgoing President's side to the incoming President's side. This was intended to both 'signify the transition and the change of guard' and to symbolize 'the smooth and seamless transition'.²² At the same time, the Fifth President's Presidential Standard was raised and the Fourth President's Presidential Standard was lowered.

Official messaging on the swearing-in ceremony and the transfer of power was geared towards communicating both continuities of government and a change in the leadership reigns. The Committee held a total of five (5) briefings between the start of its mandate on 12 August and the inauguration ceremony on 12

¹⁹ Kenya Gazette No. 10540.

²⁰ Kenya Gazette No. 10540 and Kenya Gazette No. 10538.

²¹ The Assumption of the Office of the President Committee (2022) Report, 8046.

²² The Assumption of the Office of the President Committee (2022) Report, 8038-8039.

September. These briefings were intended to keep members of the public up to date on the swearing-in ceremony. Meanwhile, security services repeatedly assured the public of security arrangements made for the election stage and the post-election pre-inauguration phase. Public statements by securocrats expressed that the electorate and the sanctity of their vote would be protected irrespective of the outcome of the election and that security agencies do not have allegiance to a particular President or political group.

2.3 Recommendations of the Committee

By its 2022 report, the Committee's assessment of the framework for the assumption of the Office of the President makes several recommendations. All recommendations are aimed at achieving clarity and predictability in the procedure of assumption of the Office of the President, as well as the broader process of power transfer. The recommendations are divided into three categories in the below analysis: recommendations relating to the operations of the Committee, recommendations on the scope of executive power during the election stage, and recommendations of a symbolic nature intended to underline the evolution of Kenya's political democracy.

2.3.1 Recommendations Relating to the Operations of the Committee

1 Define in law the start date of the Committee's mandate. An amendment to the Act should stipulate that the Committee's mandate begins within seven days of nomination and clearance of Presidential Candidates by the IEBC. Currently, there is a question of whether their mandate begins when the candidates are cleared to run for the presidential position, or when the IEBC declares the results of the presidential election. The Committee's proposal is in line with a recommendation from the Managing Smooth Transfer Guide that a transition roadmap should 'begin at least 3 months before election'. The Committee puts to task the Kenya Law Reform Commission (KLRC) and the Attorney General to, at a minimum, clarify the ambiguity of the Committee's timeline. This would be beneficial to the assumption of office process and may also have residual positive effects on the broader process of power transfer. Yet, it is questionable how much preparation can be done with presidential candidates

before an election takes place and a President-elect is declared. With some history of overreaching presidential powers in Kenya's electoral history, the mandate of the Committee is limited to working with a President-elect and acting as a protection.

2. Expand the mandate of the Committee to include a power to advise the President-elect 'on the place and date for the first sitting of the new House of Parliament'.²³ This is rationalized on the basis that:

- a. Article 126(2) of the Constitution stipulates that the first sitting of a newly elected Parliament shall not be more than thirty days after the election;
- b. The date for convening a newly elected Parliament is not certain in law;
- c. Article 126(2) of the Constitution vests the power to appoint the place and date of a new House in the President;
- d. The President's constitutional duty to convene a newly elected Parliament is not limited by Article 134(1) of the Constitution; and
- e. Parliament has a 'unique role as the foremost political institution' in the country.

Therefore, to ensure that the President fulfils the constitutional duty to convene the first sitting of the new Parliament as per the Constitution, it is recommended that the Committee be given the power to advise the President-elect.²⁴

In 2022, the Committee prepared draft Gazette Notices and sent these to the President for his review and approval by signature. The then President, Uhuru Kenyatta, convened the first sitting of Parliament on 8 September 2022 through Kenya Gazette No. 10527 and Kenya Gazette No. 10528. This date fell within the constitutional timeline of not more than 30 days after the election. The first formal sitting was held on 8 September. Both Houses, the National Assembly and the Senate had their newly elected members sworn in and elected their Speakers.²⁵ On 29 September, following notification of the newly sworn-in President William Samoei Ruto, a second sitting took place which has been described as the 'official opening' of the 13th Parliament.

²³ The Assumption of the Office of the President Committee (2022) Report, 8038 & 8040.

²⁴ The Assumption of the Office of the President Committee (2022) Report, 8040.

²⁵ <http://www.parliament.go.ke/president-william-samoei-ruto-addresses-inaugural-joint-sitting-13th-parliament-on-4-july-2023>

3. Provide a specific budget for the assumption of the Office of the President process/the Committee's work in every fifth financial year (i.e., when a General Election is scheduled to take place). An established budget has the potential to increase 'predictability and certainty' for the Committee, and definitively set 'accountability and independence' parameters by which to measure the performance of the Committee in fulfilling its mandate.²⁶

4. By legal amendment to Section 5 of the Act, provide for 'an alternative Chairperson' of the Committee where the Office of the Secretary to the Cabinet is vacant or the office holder is absent. This is because, in 2022, the office was indeed vacant. To avoid uncertainty in such cases, the matter can be easily resolved through an amendment to the Act.

5. 'Include an express provision on whether the mandate of the Committee is suspended when a petition is filed in Court or whether the Committee should proceed to prepare for the inauguration'. The present position creates some limbo for the Committee because if a petition is successful, the work of the Committee may be redundant. Thus, a vital question that remains here is regarding the security detail and briefings to the President-elect during this period when the petition is yet to be determined. In response to this concern, the Committee Report highlights that, upon the announcement of the results of the Presidential Election by the IEBC, and the declaration of Hon. William Samoei Ruto as the President-elect and Hon. Rigathi Gachagua as the Deputy President-elect on 15 August 2022, the Committee facilitated the enhancement of their security and their briefings by the various public officers including the National Security Advisory Committee (NSAC), the National Treasury, the Central Bank of Kenya (CBK), the Public Service Commission (PSC), and the Energy and Petroleum Regulatory Authority (EPRA). It is not clear what the legal effect of this would be if the elections are nullified in the presidential petition.

2.3.2 Recommendations addressing questions on the exercise of executive power

1. Stipulate in law 'that all Cabinet Secretaries and Principal Secretaries shall continue in office until their successors are appointed'²⁷. This is intended to have the effect of affirming 'the enduring nature' of the Kenyan government. That is to emphasise that a change in leadership does not mean a change in core governance in Kenya. This recommendation also foresees that the new President may direct that limited powers are exercised during the said period.

2. Consider an amendment to Article 134 of the Constitution to restore the President's power 'in full' to an incumbent President if the election and declaration of a President-elect are nullified by the Supreme Court. This would ensure that the President has an express constitutional basis to exercise executive power during the period leading up to a fresh election. While this recommendation can be understood in the circumstances, it must also be viewed in the context of the ill that restricted presidential powers sought to cure.

Article 134 is a partial remedy to abuse of power by office holders, including the President, during an election period. In addition, Article 134 restricts a very specific set of powers, and leaves many powers with the incumbent President. The case for this amendment as proposed by the Committee is not compelling, considering the risk of abuse of powers that are currently restricted under Article 134. Nonetheless, there is a part of those powers that could be necessary to reinstate in full should a presidential election be nullified. As a stopgap, the law could reinstate the sitting President's powers relating to the conduct of an election 'in full'. The sole purpose of this would be to ensure that an election is completed in line with constitutional and legal requirements.

²⁶ *The Assumption of the Office of the President Committee (2022) Report*, 8038.

²⁷ *The Assumption of the Office of the President Committee (2022) Report*, 8038.

2.2.3 Recommendations of a Symbolic Nature

1. In Section 14(1) of the Act, amend the order of precedence of the instruments of authority to better reflect 'Kenya's role model status' 'as a constitutional democracy' from:

- a. a sword; and
 - b. the Constitution,
- to:
- a. (a) the Constitution;
 - b. (b) the Presidential Ceremonial Sword; and
 - c. (c) the encased medal for the highest national honour – the Order of the Golden Heart – First Class – Chief of the Order of the Golden Heart (C.G.H.).

Most of these recommendations are directed at Parliament. The constitutional role of Parliament is to make law, consider and pass amendments to the Constitution, and at the same time protect the Constitution while promoting democratic governance. Parliament should as a matter of priority, review all the recommendations made on power transfer and take decisive action before the next scheduled election in 2027.



Chapter 3: Key Challenges During Power Transfer in Kenya

3.1 Legal Challenges: Presidential Election Petitions

Presidential election petitions in the Supreme Court pose a major challenge during power transfer. Irrespective of whether such petitions are successful or not, the political environment in the country during the consideration of petitions is dominated by uncertainty. As evidenced by previous electoral cycles, this uncertainty in turn can create undesirable conditions including violence, the perception of a power vacuum and government mismanagement.

In 2022, following the declaration of the results of the presidential election on 15 August, a total of nine (9) petitions were filed in the Supreme Court. The petitions challenged the election results based on various irregularities and illegalities. The losing presidential candidate and his running mate, Raila Odinga and Martha Karua, were amongst the petitioners.

The occurrence of a presidential election petition in 2022 echoes similar sentiments in 2017 and 2013 on the validity and integrity of the election. Nonetheless, the Supreme Court has reached different decisions in different years. In 2013, the petition was unsuccessful. In 2017, the petition was successful and resulted in a repeat presidential election. In 2022, the petition was unsuccessful. The SC released its full judgment which upheld the results of the presidential election declared on 15 August. In all three instances, the main legal issue was whether illegalities and irregularities occurred, whether these were significant enough to affect the outcome of the election, and whether each election met the constitutional threshold in Article 81 of the Constitution.

Considering that all three presidential elections post-2010 have resulted in petitions, it is notable that the Supreme Court has in all instances delivered a judgment as per the constitutional timeline.

It is however not clear how the case of nullification of an election affects the work of the Assumption of the Office of the President Committee. As noted in the Committee report, it is desirable to have an explicit position in law on whether the Committee's preparations for the handover of power are suspended when a petition challenging the election result is filed.

Secondly, it may be important to consider the legal effect of the briefings given to the President-elect before a decision of the Supreme Court nullifying an election. In the least, the attendant risks ought to be known by the Committee and, beyond that, necessary mitigation taken to minimize the risks to the general population.

3.2 The Handover of Power

Kenya's handover timeline is short. It is important to appreciate this as a matter of constitutional design. A short process helps to mitigate the potential for abuse of power by incumbent leaders, and on the other hand, the chances to incite violence by different sides of the political divide. It is not workable to have a so-called 'cooling-off period' as happens in mature democracies. The appearance of a newly elected government taking over power and an incumbent government handing over power must be completed quickly for the sake of stability. The completion of the handover instils confidence in national stakeholders because it signifies the movement from an old administration to a new one. A relatively quick handover also reinforces the continuity of government and its service to the general population irrespective of which leaders are at the helm. Repeated over multiple election cycles, as has occurred in Kenya three times now, the handover of power becomes embedded as an ordinary part of the political process. Repeated handovers further embed democratic principles of power transfer. The outgoing administration further played a role in ensuring that government functions continued during the period of temporary incumbency. Going forward, one of the markers that would be helpful to track is the pace and ease that different sectors of the economy are able to get back to business following an election.

3.3 Post-Inauguration and Post-Election Challenges: 'Taking Power' Problems, Priorities and Measuring Progress

After swearing-in, the fundamental challenge is for the new government to move from transition to governing. The first 100-200 days are key for the new government to make quick gains and generate the drive needed to propel its core agenda.²⁸ In 2022, the new administration closed the assumption of office operation as signalled by the Committee completing its mandate, presenting its report to Parliament and publishing the report in the Kenya Gazette. This decisive action helped to signal a change of power.

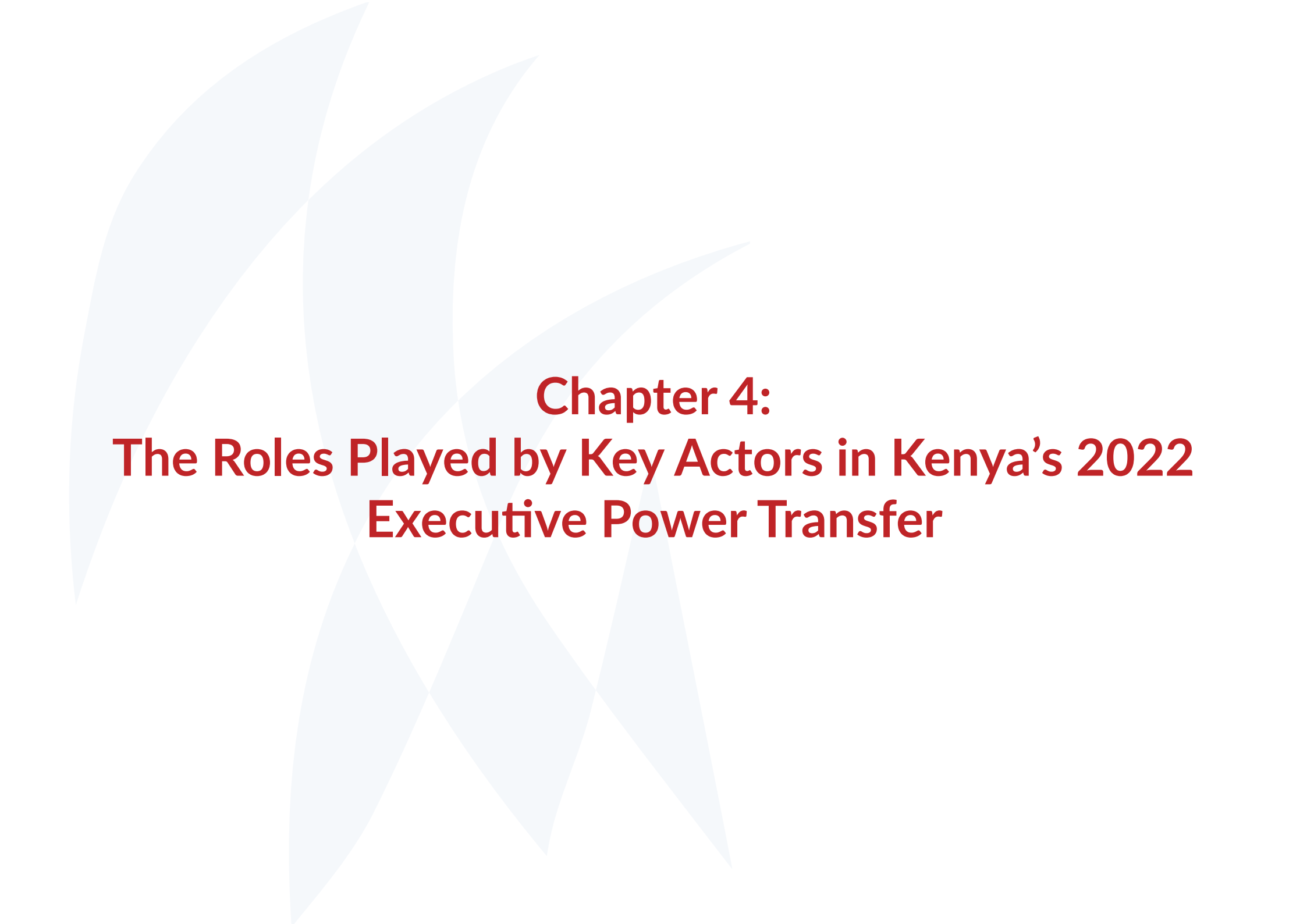
Beyond this, however, a policy of gradualism is encouraged at least for long-term agendas.²⁹ The new government's decisive actions and pronouncement in the first 100-200 days specified their key priorities and policy direction for their term in power. There was also a narrative about discarding some inherited programmes, coming soon after the handover. This latter decision set a highly critical tone towards the former administration. This was not helped by specific

²⁸ Okumu W, *Managing Smooth Transfer and Peaceful Transition of Power in Africa: A Get Ready to Govern Guide*, Hanns Seidel Foundation, 2022, 32.

²⁹ *Managing Smooth Transfer and Peaceful Transition of Power in Africa*, 33.

targeting of the incumbent president in public statements. At the same time, the opposition refused to formally recognize the new administration and later launched a campaign to have their objections heard (the 'Maandamano' protests). It is also apparent that the Kenyan system has little in the way of preparing opposition parties to govern. The conduct of the opposition can either enhance or diminish democratic progress. In this sense, a self-imposed 'cooling-off' for the opposition or losing political parties is useful. This could be several days or weeks. Such action signals to the electorate that the election cycle has ended. Losing political candidates and parties are also best placed to adapt to their role(s) in the opposition within a reasonable amount of time and adopt strategies to hold the government to account. This type of pragmatism may pay off in the long-term by ensuring that a robust opposition supports the prevailing goal of democracy. In all cases, the actions of the opposition should not erode the democratic gains made.

As noted in the *Managing Smooth Transfer Guide and the State of Democratic Transitions in Africa Report*, these events underscore that long-term lasting peace and democracy can only be achieved where all sides of the political divide see it necessary to ensure that a transition is positive and orderly. In 2022, for the benefit of the nation, the outgoing President and incoming President could have presented a more united front during the initial part of the power transfer process. Since then, some actions have demonstrated some level of accord for the good of the nation-state. Key amongst these is the Kenya Kwanza and Azimio La Umoja decision to form a bipartisan parliamentary committee to be the forum for resolving the stalemate. This promotes the use of Parliament as a primary political discussion forum. It remains to be seen what the tangible outcome(s) of parliamentary debate on key issues will be.



**Chapter 4:
The Roles Played by Key Actors in Kenya's 2022
Executive Power Transfer**

4.1 The IEBC

The primary role of the IEBC is to deliver a fair and credible election. While the IEBC is not involved in the process of executive power transfer itself, it is involved in securing a viable foundation for the transfer of that power. As the body responsible for managing the election, it must be seen to have conducted its role by the Constitution and attendant laws. It is the foundation of a credible election on which a democratic power transfer can occur.

Monitoring and observation of the election in 2022, in addition to the Supreme Court's decision on the presidential election petition, affirmed that overall, the election was fair, credible, and met the constitutional threshold. In addition, it was noted that significant improvements had been made since the previous election in 2017.

Specifically, on the question of power transfer, the IEBC communicated its position on the legal challenge to the presidential election results through official statements.

On 15 August 2022, the IEBC uploaded the 'Declaration for the Election of President of the Republic of Kenya at the National Tallying Centre'. Apart from providing official documentation, the IEBC spoke publicly about threats to the elections. On 17 August, the IEBC released a press statement on 'Staff Murder, Profiling and Misleading Reports on Presidential Election'. The statement expressed concern over the murder of the Embakasi East Returning Officer and the physical assault of the Commission Chairperson, two Commissioners, and CEO during the announcement of presidential results. The statement called for 'the arrest and prosecution of the assailants regardless of their political affiliation'. The statement also stipulated that the 'constitutional mandate' of declaring the winner of the presidential election 'falls squarely' on the Chairperson. IEBC relied on the *Kiai* (2017) decision and Articles 138 and 86 of the Constitution.

The IEBC responded to and addressed allegations of electoral mismanagement which were raised by four Commissioners. IEBC asserted that all Commissioners were involved in 'all activities of verification and tallying' and they had access to 'all results'. IEBC also stated that: the four commissioners 'demanded that the Chairperson moderates the results to force an election re-run contrary to their oath of office; the Chairperson refused to yield to this demand; and the claim of an increase of 0.01% in the total number of votes was 'false and misleading'.

On 5 September, IEBC issued a statement on the Verdict of the Supreme Court on the Presidential Election. The statement noted instances of harassment, assault, unwarranted arrest of Commission staff, and breaking into offices with no arrests having been made. The Commission stated that it had been 'finally vindicated' by the judgment. The IEBC, therefore, came out of the 2017-2022 election cycle as an affirmed electoral management body.

The Supreme Court stood by the interpretation of the IEBC that the Chairperson

is the person mandated by the Constitution to declare the winner in a presidential election. Further clarity on a situation where part of the electoral commission has legitimate concerns is needed. A challenge could also arise when those commissioners resign before the declaration of the results because illegalities and irregularities affect the results or the electoral process.

4.2 Political Parties and Coalitions

In addition to formally and legally challenging the presidential election results, political parties engaged directly with the electorate and other stakeholders through messaging. The Azimio Law Umoja Kenya One Coalition took the following approach. On 16 August 2022, in an address to Azimio politicians, elected governors and elected MPs, Odinga formally rejected the result, termed the declaration of President-elect by IEBC illegal.

Two issues were raised: disagreement between the commissioners on the final results; and the IEBC Chairperson's failure to explain how the final results were arrived at. Odinga 'called for calm' and said that he and his team would follow legal channels to have their grievances addressed. Nonetheless, the Azimio coalition exercised their democratic rights by formally disputing the results through a petition to the Supreme Court.

Despite losing at the Supreme Court, Azimio La Umoja continued to dispute the election results. On 18 January 2023 Jubilee SG Jeremiah Kioni stated that Odinga won the election with 8,170,355 votes against Ruto's 5,919,973 votes. The statement cited a report by an alleged IEBC whistleblower and was allegedly compiled by Vanguard Africa. On 23 January 2023, Odinga stated that Azimio will not accept the current government based on a whistleblower report. Vanguard Africa CEO stated that the leaked data 'cast doubt on the validity of the final results'. He also tweeted that the discrepancies were not 'material'.

4.3 Independent Offices and Constitutional Commissions

These offices were engaged in election monitoring, and specifically as a component of free and fair elections, human rights monitoring.

KNCHR noted the chaotic scenes at the National Tallying Centre, commended some political leaders for directing their followers to refrain from violence, and called on all stakeholders to pursue legally provided redress mechanisms to their grievances. KNCHR commended the Supreme Court for delivering a judgment within prescribed timelines and congratulated the President-elect and Deputy President-elect.

KNCHR found the 2022 election 'more efficient and transparent, with fewer human rights violations' when compared to previous elections. The security services were acknowledged for facilitating the safety of voters and desisting from the use of force. KNCHR found a similar restraint on the part of the public. The progress in this area can be interpreted in several ways. On the one hand, citizens today are better informed not only on the electoral process but also their role in democratic participation. On another hand, the security services have accepted that their administrative position as guardians is distinct from their role as agents of a specific leadership. Further, this is an outcome of the considerable work that has been carried out by civil society to sensitise, educate and call to account both citizens and security services.

The observations of independent offices and constitutional commissions were almost completely limited to the period before election day and election day itself. Going forward, the fourth arm of government could enhance their electoral monitoring or observation to include the handover of power and power transfer post-inauguration. This has the potential to enhance the assessment of democratization beyond elections.

4.4 Media

Various media houses reported on the status of the presidential election petition, and following the Supreme Court's judgment, on the progress of the arrangements for the inauguration of the President-elect and Deputy President-elect. Many had dedicated programming and online pages on a larger scale than in the previous election. Some media houses looked at possible scenarios after the declaration of results.

Mainstream media houses reported on preparations for the inauguration ceremony and highlighted what the process of handover entails.³⁰ The media also informed members of the public of the composition of the Committee.³¹ The Committee also reported on financial implications to the public purse.³² These steps were important for transparency and accountability to the electorate.

Various media houses were accused of bias in reporting the result of the presidential election. At the start of the official vote counting and tallying, several broadcasters provided their tallies in the interests of keeping the public informed and up to date. However, following reports of tallies appearing to favour the alleged preferred candidate(s), the reporting was aborted. Media also faced backlash from the government following the swearing-in ceremony. There were statements by leaders in government that call into serious question the democratic space for freedom of the press. Such actions by both leaders and media have the potential to limit coverage of the electoral process and post-election issues, including fair and unbiased reporting on the performance of the new government.

Going forward, the media can play a more active role in providing in-depth information on the power transfer process. Given their protected status, media actors should provide more objective reporting on the election process. The media can also be more pro-active, by requesting information on the power transfer process from the government, with the goal of providing thorough reports on events. To assist in these endeavours, the media would benefit from capacity building by non-state actors.

4.5 Civil society

Civil society conducted large-scale monitoring and evaluation of the elections. There was consensus that the election was largely conducted by the law and the Constitution. ELOG noted 'registered improvements' in the 2017 elections management as compared with previous elections. The official results announced were consistent with ELOG's PVT projections. ELOG also noted some challenges in the electoral process, although none of them were specific to the period of power transfer.

To build on the extensive monitoring and observation operations currently carried out by civil society, organisations and networks should develop policies and frameworks to monitor the period of power transfer. This should include both the handover of power from the outgoing President to the President-elect, and the handover at Ministry, Department and Agency levels.

Civil society can also support the work of other key actors such as the media. With the necessary resources, civil society can offer capacity building to media actors who wish to augment their election reporting.

³⁰ Citizen, 'How Presidential Power Handover is handled in Kenya' <https://citizen.digital/news/how-a-presidential-transition-is-handled-n301710> on 30 May 2023

³¹ The East African, 'Kenya forms team for the presidential inauguration' <https://www.theeastafrican.co.ke/tea/news/east-africa/kenya-forms-presidential-inauguration-committee-3912568> on 31 May 2023

³² The People's Daily, 'Ksh 200 million set aside to ensure peaceful transition of presidency' Retrieved from: <https://www.pd.co.ke/august-9/sh200-million-set-aside-to-ensure-peaceful-transition-of-presidency-136840/> on 31 May 2023

4.6 International actors

The role of international actors in supporting the democratic process during elections in Kenya is evident from the observation missions and groups that have grown in number and scale as Kenya's electoral democracy becomes further entrenched. The 2022 Kenyan election was observed by multiple international actors including African regional bodies, intergovernmental organisations, and international civil society organisations.³³

Overall, international observers found the election in line with democratic rights and principles, peaceful, free, and transparent. Analysing the 2022 election in the context of Kenya's electoral cycles post-2010, it was noted that the latest election is indicative of democratic progress in elections. In the end, international observers were pleased with the election. International actors also recognized the repeated testing of Kenya's institutions such as the IEBC and Supreme Court. It was recommended that the issues pertinent to the election process that were highlighted in presidential election petitions and recorded by observers, should be addressed in the next electoral cycle.

Alongside local CSOs, international actors can play a more significant role in supporting smooth power transfer. Two suggested ways are through capacity building programmes and through formal scrutiny of the process of executive power transfer.

³³ This included the East African Community (EAC), the African Union (AU)/ Common Market for Eastern and Southern Africa (COMESA), the Intergovernmental Agency for Development (IGAD), The Commonwealth, the European Union (EU) and the National Democracy Institute (NDI)/International Republican Institute.



Chapter 5: Recommendations

5.1 Legal amendments

1. Parliament should amend the existing law to include an express provision on whether the mandate of the Committee is suspended when a presidential election petition is filed in court, or whether the Committee should proceed to prepare for the inauguration notwithstanding the filing of a petition and the possibility of a repeat presidential election.
2. Parliament should develop a 'comprehensive' framework for the transfer of executive power beyond the transfer of presidential power. This should include the processes and procedures to be followed during the pre-election, election, and post-inauguration phases, as well as rules regulating power transfer beyond the presidential level.
3. The African Union should facilitate the development of a model law on executive power transfer at national and devolved or decentralized levels of government.

5.2 Documenting, reporting and monitoring power transfers

1. The Kenyan government should inform the public about the processes and procedures of power transfer in ministries, departments and agencies.
2. Media, civil society and independent offices and constitutional commissions should observe, monitor and evaluate the process of power transfer, including the handover of presidential power, power transfer in the post-inauguration phase, and power transfer in both national government and county governments.
3. Independent offices and constitutional commissions and civil society should monitor how well the new government settles in and hold the government to account for election promises.
4. Media should develop detailed programming in the first 100-200 days following the inauguration of the President.
5. Research institutions should undertake more in-depth studies, documentation and evaluation of executive power transfer in Kenya.

Conclusion

Since 2010, Kenya's democratic transition has focused on regular, peaceful, free and fair elections. As its democracy matures and moves towards consolidation, more attention should be paid to the management of the transition. This report examined the management of national executive power transfer following Kenya's 2022 election. It focused on the process of power transfer from an incumbent President to a President-elect as the pinnacle of a broader power transfer process.

The report notes that Kenya has a legal framework regulating the transfer of executive power in Kenya, from an incumbent President to a President-elect. This framework is underpinned by the Constitution of Kenya 2010 and the Assumption of the Office of the President Act 2012. The responsibility of managing the transfer is given to the Assumption of Office of the President Committee, an ad hoc committee created for this purpose.

In 2022, the constitutional and legal framework was observed. The transfer of power occurred as per the Constitution and the Assumption of the Office of the President Act. The Committee operated as a transition committee. Government ministries, departments and agencies prepared handover reports to facilitate the transfer of power to incoming executive leaders. The process is partially documented in law and was published for public reading following the completion of the Committee's mandate.

The system in place largely focuses on the assumption of office of the President and his immediate assistant, the Deputy President. It, therefore, lacks an all-inclusive framework for power transfer beyond the swearing-in ceremony. Nonetheless, the power transfer at the national executive level is a significant accomplishment. It establishes a strong blueprint for future years, especially when documented as it was in 2022.

After the conclusion of an election, it is important that the transfer of executive power is smooth and orderly. It is also vital that the process is transparent. A process enshrined in law is the surest way of protecting the electorate's democratic rights. Throughout the process, key actors played various roles. Political leaders and parties disputing the election challenged the result through a court petition. Media and civil society engaged the electorate by reporting the election process. It was noted, however, that monitoring and observation have been focused on the election stage. Detailed reporting on power transfer should therefore be developed.

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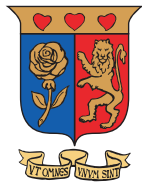
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