

# Recommendations for Electoral Reform in the Democratic Republic of the Congo

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Recommendations for Electoral Reform in the Democratic Republic of the Congo  
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## List of acronyms

AfCHPR	Court on Human and Peoples Rights
ABA ROLI	American Bar Association Rule of Law Initiative African
AETA	Action for Transparent and Peaceful Elections ( <i>Agir pour des Elections Transparentes et Apaisées</i> )
CEI	Independent Electoral Commission ( <i>Commission Électorale Indépendante</i> )
CENA	National Autonomous Election Commission
CENCO	National Episcopal Conference of the Congo ( <i>Conférence Épiscopale Nationale du Congo</i> )
CENI	Independent National Electoral Commission ( <i>Commission Électorale Nationale Indépendante</i> )
CEPPS	Consortium for Elections and Political Process Strengthening
CEJP	Episcopal Peace and Justice Commission ( <i>Commission Épiscopale Justice et Paix</i> )
CLCR	Local Results Compilation Center (Centre Local de Compilation des Résultats)
CNRI	National Commission for Institutional Reform (Commission Nationale de Réforme des Institutions)
CNRV	National Vote Counting Commission ( <i>Commission Nationale de Recensement de Vote</i> )
CSO	Civil Society Organization
DRC	Democratic Republic of the Congo
ECOWAS	Economic Community of West African States
EDR	Electoral Dispute Resolution
EMB	Electoral Management Body
ERC	Electoral Reform Committee
EUEOM	European Union Election Observation Mission
EVM	Electronic Voting Machines
FCC	Common Front for Congo ( <i>Front Commun pour le Congo</i> )
IEBC	Independent Elections and Boundaries Commission
IFES	International Foundation for Electoral Systems
IIBRC	Interim Independent Boundaries Review Commission
IIEC	Interim Independent Electoral Commission
INEC	Independent National Electoral Commission
MNS	National Monitoring Mechanism ( <i>Mécanisme National de Suivi</i> )
OIF	International Organisation of the Francophonie ( <i>Organisation Internationale de la Francophonie</i> )
PSCF	National and Regional Oversight Mechanism for the Peace, Security and Cooperation Framework
RMS	Results Management System
SADC	Southern African Development Community
SYMOCEL	Coalition of Citizen Election Observation Mission ( <i>Synergie des Missions d'Observation Citoyenne des Élections</i> )

UDPS Union for Democracy and Social Progress (*Union pour la Démocratie et le Progrès Social*)

UNDP United Nations Development Program

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## I. Executive Summary

On January 24, 2019, the Democratic Republic of the Congo (DRC) saw its first peaceful and democratic transfer of executive power with the inauguration of Félix Tshisekedi, following 18 years of Joseph Kabila’s presidency. The 2018 election represented also the first time for Independent National Electoral Commission (Commission Électorale Nationale Indépendante – CENI) to organize three elections on the same day, with electronic voting machines (EVM) replacing paper ballots. Notably, it was the first election in the DRC to be organized without direct financial or logistical international support. Still, after a more than two-year delay, the 2018/2019 presidential, legislative, and provincial elections were widely criticized as lacking integrity, particularly around election results management. The CENI announced total vote tallies for candidates but did not display results at local compilation centers as required by law, which contributed to some loss in public confidence. While Congolese society appears to accept election results, lingering uncertainty over the legitimacy of elected representatives could depress future voter turnout and undermine the current government’s authority.

Meanwhile, post-election reports from observer groups have tended to focus on substantive reforms required to restore electoral integrity but have not in general discussed the reform process itself. This white paper analyzes the DRC context, as well as other best practices on electoral reform efforts on the African continent and seeks to prioritize reforms. Furthermore, it lays out various processes through which these reforms can advance. In terms of processes, the International Foundation for Electoral Systems (IFES) presents a number of considerations and recommendations, according to the following categories: a) initiative for reform; b) timing of reform; c) mandate and scope of reform; d) forum and responsible body for reform; e) inclusiveness and role of the electoral management body (EMB); f) transparency:

Table 1: Recommended DRC Electoral Reform process

Recommended DRC Electoral Reform Process		
Key Elements	Best and Good Practice	Recommendations
Initiative for reform: Who calls for electoral reform?	Based on comparative examples, parliament or the President of the republic generally initiates electoral reform by establishing a special parliamentary committee or a separate commission. Political will is critical to ensuring a successful reform. In parallel, the EMB often initiates post-election review and reform discussions with relevant stakeholders.	<ul style="list-style-type: none"> <li>Parliament or the executive office should initiate an electoral reform roadmap and determine the forum, scope, and timing for reform in consultation with observers, religious confessions, political parties, judiciary, marginalized groups, and CENI officials.</li> <li>Some, if not all, CENI members could be replaced before institutional reform begins.</li> <li>The CENI should initiate institutional reforms by reviewing all recommendations from observers, conducting lessons learned, revising its implementation measures (<i>mesures d’application</i>), decisions, training manuals and designing new systems in consultations with stakeholders.</li> </ul>

<p>Timing of the reform: When should it start? How long should it last? When should the amendments be adopted?</p>	<p>Setting a specific timeframe to conduct the electoral reform creates predictability and builds confidence in the process for electoral participants. This timing should take into consideration the next election by leaving enough time for harmonizing or developing necessary regulations and electoral preparations such as training and voter education materials.</p>	<ul style="list-style-type: none"> <li>• Parliament or the executive office should specify the nature and timing of the reform process. The timeframe should include a collection of recommendations, consultations with key actors, a drafting process, a public consultation on some parts of the draft and its final adoption.</li> <li>• Parliament or the executive office should decide whether local elections should take place: 1) before or after a comprehensive electoral legal reform, and 2) under the existing framework <u>or</u> a new one.</li> <li>• While a constitutional and legal reform takes time, institutional change can be achieved prior to holding local elections without requiring a long delay.</li> </ul>
<p>Mandate: What is the scope of reform?</p>	<p>The body leading the election reform effort will determine whether it reviews the constitution, laws, or/and rules (legal versus institutional). The nature of the reform will affect the responsible body and the timing of the reform process. The election reform should also include a review and development of the procedures and processes of the EMB.</p>	<ul style="list-style-type: none"> <li>• Critical interventions to the legal framework are minimalist, as most of the recommendations can be addressed through revision of CENI or court rules and processes rather than the election related laws.</li> <li>• Rather than a comprehensive legal reform, limited amendments to the CENI organic law could be adopted coupled with institutional reform before holding local elections, assuming a speedy legislative process leaves sufficient time for the CENI to revise its rules and conduct training and voter education.</li> </ul>
<p>Forum: Which body will be responsible?</p>	<p>A diversity of actors involved in election reform process promotes an inclusive and more acceptable reform, but a diversity of fora can potentially lead to confusion and problems of coordination. It is important to ensure there is a clear authority in charge of the institutional and/or legal reform for elections to avoid disparate proposals, delays and miscommunication issues.</p>	<ul style="list-style-type: none"> <li>• Parliament or the executive office should designate an existing mechanism to lead the electoral reform, such as a parliamentary committee, or decide to establish a temporary commission for reform composed of individuals known for their integrity, independence, and neutrality.</li> <li>• A technical election reform working group could support a reform commission by providing expertise and submitting proposals. The working group could include members of the parliament, political parties, CENI officials, independent election experts, and representatives of domestic civil society organizations focused on elections.</li> <li>• The CENI should establish a task force or <i>ad hoc</i> working group on election</li> </ul>

		reform in its structure. As provided in its existing framework, it should call the consultation framework ( <i>cadre de concertation</i> ) on a regular basis to discuss the functions, powers, and consultation mechanism of the working group.
Inclusiveness and role of EMB: Who will be involved?	The reform process should include key stakeholders (election experts, political parties, civil society organizations, minority/ethnic/gender groups) and provide them with opportunities to comment on proposed amendments and submit proposals for reform. An inclusive process will build trust in the EMB and increase the sense of ownership and political buy-in among stakeholders, making a smooth acceptance and understanding of electoral reform more likely.	<ul style="list-style-type: none"> <li>• In addition to ensuring a regular communication flow, the body in charge of the reform should invite and collect proposals and feedback from local observer representatives, government, opposition, the judicial system and CENI leaders.</li> <li>• Consultation should also include decentralized events at the provincial and local level to capture lessons learned, challenges, and suggestions for improvement in local areas.</li> <li>• A series of public consultation events could also be conducted to inform citizen of this reform and collect their feedback on priority issues.</li> <li>• Due to lack of trust in the CENI, new members should be appointed before they are involved in electoral reform process. Once appointed, members of both the bureau and plenary should review recommendations and initiate institutional reforms.</li> </ul>
Transparency	The transparency of the process is a crucial element to regain trust and make electoral reforms acceptable. It is paramount that all stakeholders respect the rules of the reform process.	<ul style="list-style-type: none"> <li>• The body in charge of the reform and the CENI should regularly publish information about progress made and meetings held with stakeholders on electoral reform to build trust ahead of the next elections, including rules, procedures and processes.</li> <li>• The report or proposals for reform submitted to the CENI by observers or parties should also be made publicly available on the CENI's official website. The draft amendments submitted to Parliament for approval should be made public.</li> <li>• Once the revised law or rules are adopted, the CENI should conduct a major voter awareness campaign and should hold briefings with parties and candidates to inform them of the changes made before the next cycle.</li> </ul>

Since the CENI was created in 2010, there have been several legal and institutional (regulatory and operational) amendments that have concentrated critical powers in the CENI presidency,



vice presidency and bureau. Numerous amendments have also affected procedures for electoral dispute resolution (EDR) and results management. As such, long-term, meaningful reform in the DRC will require amendments to the Constitution, the organic law governing the CENI and election, voter registration, and political party laws. These legal changes require harmonized institutional reforms, such as the revision of CENI's regulations and judicial EDR procedures. However, the CENI can undertake some institutional reforms, such as adjustments of decisions, implementation measures (*mesures d'application*), operational plans and procedures before or concurrently with constitutional and legal reform. Still, these changes should be part of a comprehensive reform effort, rather than *ad hoc* measures, as it has been the case in the past in the DRC.

Some priority electoral reforms include redefining the appointment process of the CENI bureau to ensure that CENI leaders remain neutral, unbiased, and free from the influence of external pressures. The reform should also guarantee the balance of powers between the CENI bureau and the plenary, which would also require revisions of CENI's organic law. The legal and regulatory framework governing election technology should also be updated to ensure an appropriate chain-of-custody of EVMs and clarification about the evidentiary value of EVM printouts in cases of EDR. While the electoral law already outlines a solid framework for results aggregation and transmission, that process was generally not followed in the 2018/2019 elections. Undertaking institutional reform to address this issue, the CENI could develop a chain-of-custody system with barcoded logging of results documents, which would improve the performance, transparency, and security of results management. The voter registration process and display would also require institutional (procedural) reform. The CENI currently displays the preliminary voter roll only during registration (daily display); yet the de-duplicated and cleansed register should also be displayed at all registration sites, so that voters and other electoral stakeholders can more effectively file claims and objections to ensure integrity of the final register. Finally, the CENI should discuss options for meeting the country's gender quota to ensure equitable women's representation at all levels.

The reform process in the DRC will ultimately depend on how the government prioritizes changes in CENI's leadership, the local elections, or other constitutional/legal and institutional reforms, as well as the nature and depth of each reform. Ideally, electoral reform debate should be held during post-election period to sustain momentum, build political will, and ensure enough time to implement critical electoral reforms for more credible and transparent elections.

## II. Introduction

A historical leadership change took place in the DRC with the 2018/2019 presidential, legislative, and provincial elections in the DRC. The swearing-in ceremony of President Félix Tshisekedi, leader of the Union for Democracy and Social Progress (*Union pour la Démocratie et le Progrès Social* – UDPS), marked the DRC’s first peaceful democratic transfer of executive power.

Despite widespread allegations of fraud and thousands of petitions against election results at all levels—the bulk of which were still pending at the time of writing this report—election related violence has been minimal.<sup>1</sup> The CENI announced that former President Kabila’s Common Front for Congo (*Front Commun pour le Congo* – FCC) coalition swept the legislative and provincial elections, dividing partisan powers between the executive and legislative branches, a first in the DRC’s history. This new power-sharing offers an unprecedented opportunity to initiate broad electoral reforms—including constitutional and legal reform, as well as institutional reform of the CENI—to shore up the credibility of future elections.

Meaningful and sustainable reform will require long-term efforts, as it could in one hand entail **constitutional and legal reform**, including amendments to the constitution, organic law, and other related laws, and therefore engagement with Parliament (and possibly a referendum). On the other hand, legal changes will necessitate harmonized **institutional reforms**, such as revisions to CENI regulations and judicial EDR procedures. The institutional reform—a short- to medium-term process—entails adjustments in rules, operational plans, recruitment and training systems that can be implemented by the CENI, without other political actors’ involvement. . However, consultations with political parties, observer groups, government, and other stakeholders will still be required to rebuild trust.

Thus, to ensure successful reform outcomes, Congolese actors must define reform procedures in terms of scope, actors involved, and formats, while realistically taking into consideration the political context and time required to achieve objectives before the next election cycle. To inform the dialogue on electoral reform in the DRC, IFES has developed the present white paper to offer best practices and key aspects for stakeholders to consider when preparing for an inclusive electoral reform process (see Section III). IFES also presents priority recommendations for reform (see Section IV) and potential sequencing of CENI appointments, institutional reform, and legal reform (see Section V). Finally, the paper offers electoral reform case studies from Kenya, Senegal and Nigeria which identify relevant challenges, successes, and lessons learned for the DRC to consider for its own reform process (see Appendix).

### **Momentum for Electoral Reform**

In his inaugural address, President Tshisekedi included electoral reform and local elections in his agenda. The government of the DRC has indeed taken initiative to study merits, scope, and direction of electoral reform through the *Mécanisme National de Suivi* (MNS), the National

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<sup>1</sup> IFES was informed that approximately 1,000 complaints relating to the results of the legislative elections were still pending as of mid-May.

and Regional Oversight Mechanism for the Peace, Security and Cooperation Framework (PSCF) for the DRC, which is vested with an international and national mandate for institutional reform.

Since EMBs have the technical knowledge to formulate practical and implementable recommendations, they often play a key role in electoral reform. However, due to lack of public trust in the CENI following the 2018/2019 elections, prominent involvement of current CENI leadership could cast doubt on reform efforts. As the mandate of current CENI commissioners ended in June 2019, the incoming CENI members could be perceived as more impartial advocates, capable of steering reform in consultation with government institutions. Changes in the composition, operations, and functioning of the CENI, especially in its bureau, may precondition renewed stakeholder trust. As shown in other reform processes across the continent (see Appendix I), reforms are often driven with the support of accepted international assistance or experts. Such processes must often be sustained, however, over several years.

Local observers are also advocating for a broader comprehensive electoral reform, rather than only an institutional one.<sup>2</sup> The National Episcopal Conference of the Congo (*Conférence Épiscopale Nationale du Congo* – CENCO), the Episcopal Peace and Justice Commission (*Commission Épiscopale Justice et Paix* – CEJP), the Coalition of Citizen Election Observation Mission (*Synergie des Missions d’Observation Citoyenne des Élections* – SYMOCEL), and the Action for Transparent and Peaceful Elections (*Agir pour des Elections Transparentes et Apaisées* – AETA) have all agreed on a joint enumeration of priority reforms, including gender quotas, out-of-country voting, results publication and management, and EDR rules of evidence.<sup>3</sup> However, the network of observers, including the CEJP, SYMOCEL, AETA, and the Southern African Development Community (SADC) have thus far not focused the importance of “how” reform should unfold.

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<sup>2</sup> See CEJP / CENCO final report, Recommendations, which calls for a review of all reforms adopted in 2018.

<sup>3</sup> See CEJP / CENCO final report, Recommendations for Parliament.

Table 2: Overview of Major DRC 2018 Election Observer Recommendations

	CEJP/ CENCO	SYMOCEL	AETA	Joint Position as of 5/25	SADC (preliminary)	CEPPS March 2018
<b>Institutional Reform and General Recommendations</b>						
Re-establish stakeholder fora under the auspices of the CENI ( <i>cadre de concertation</i> )			X		X	X
Strengthen preliminary voter list display and claims and objections procedure	X	X	X		X	X
Improve the traceability of the paper and electronic results chain – publish national results by polling station	X	X	X	X		X
Complete electoral cycle by holding first local elections	X		X			
Implement out-of-country registration and voting	X		X		X	X
Intensify the capacity building efforts of the courts, notably by regulating and training judges on collection and analysis of evidence, and publication of written decisions	X		X			X
<b>Legal Reform</b>						
Make gender quota enforceable	X		X	X	X	X
Review threshold and lower candidacy deposits	X	X	X	X		
Legally frame use of EVMs	X	X	X	X		X
Review appointment of the CENI bureau positions and their respective duties	X	X	X	X		
Directly elect governors and prohibit candidacy for, and holding of, multiple elective offices	X	X	X	X		
Better guarantee access to effective EDR remedies and widen legal standing	X	X	X	X		X
Render voter registration permanent and link it to civil registration	X	X	X	X		

### Political Context and History of Elections in the DRC

Following the Second Congo War in 2003, a three-year transitional government oversaw and adopted a constitutional and electoral framework. In preparation for the 2006 elections, the Independent Electoral Commission (*Commission Electorale Indépendante – CEI*) was established, and one of Africa’s first biometric voter files was established.

The first multi-party elections took place in 2006 for the presidency and legislature, although the cycle deferred local elections. Local government elections, then mooted for 2008, have never taken place to this date, although they are fully established by the election and decentralization laws.

Ahead of the 2011 elections, the CENI was created by the Organic Law No. 10/013 (July 2010). Following passage of the organic law, the CENI had only ten months to organize the 2011 elections under a new leadership. Meanwhile, the two-round presidential system introduced

by the 2006 constitution was abrogated in favor of a single-round system. In this context, the 2011 elections were widely criticized for lacking credibility.<sup>4</sup> The election process was also marred<sup>5</sup> by discrepancies in the abnormally high voter turnout in Kabila strongholds and results from some voting stations unaccounted for in opposition strongholds.

International election observation missions<sup>6</sup> disputed the credibility of results, because 17 percent of voters—more than the discrepancy between the two top candidates—were cast “off-the-list.”<sup>7</sup> Efforts to mediate tensions surrounding the 2011 elections were seen as largely unsuccessful due to deep-rooted mistrust and the zero-sum dispensation associated with presidentialism.<sup>8</sup>

Renewed incumbent dominance over all branches of government was also extended to the EMB: a new organic law reshuffled the organization and functioning of the CENI in 2013, internally concentrating powers in the hands of CENI president, the vice president, and the bureau—thereby attributing limited prerogatives to more than half of the CENI’s members.<sup>9</sup>

Article 10 of the 2013-amended organic law stipulates that 13 members comprise the CENI plenary, six of whom are designated by the parliamentary majority, while four are designated by the parliamentary opposition, and three are designated by civil society (religious organizations, women’s organizations, and civic election/elections organizations designate one member each). Article 24 of the organic law defers composition of the CENI bureau to its internal regulations, which also list the functions of the six bureau members. They are designated as follows: (1) president designated by civil society, (2) vice president designated by the majority, (3) reporting officer designated by the opposition (4) deputy reporting officer designated by the majority, (5) treasurer designated by the majority, and (6) deputy treasurer designated by the opposition. This structure has not been amended since 2013.

President Kabila’s second term was stretched by two years beyond the end of his constitutional mandate through ‘slippage’ (*glissement*) of the electoral timeline. On one hand, an audit<sup>10</sup> carried by the International Organization of the Francophonie (OIF) in 2015

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<sup>4</sup> “The Carter Center International Election Observation Mission Democratic Republic of Congo, Presidential and Legislative Elections, November 28, 2011.” The Carter Center, n.d. <https://www.cartercenter.org/resources/pdfs/peace/democracy/Carter-Center-Preliminary-Statement-DRC-Elections-113011.pdf>.

<sup>5</sup>Shale, Victor, and Robert Gerenge. “Electoral Mediation in the Democratic Republic of the Congo, Lesotho and Kenya.” ACCORD, February 16, 2017. <https://www.accord.org.za/conflict-trends/electoral-mediation-democratic-republic-congo-lesotho-kenya/>.

<sup>6</sup> “République démocratique du Congo, Rapport final, Élections présidentielle et législatives, 28 Novembre 2011.” Mission d’observation électorale de l’Union Européenne, n.d.

<sup>7</sup> Polling agents handwrote the names of any voter whose card showed their polling station but whose name did not appear on the list.

<sup>8</sup> Idem.

<sup>9</sup> Organic Law No. 10/013 on the structure and functions of the National Independent Electoral Commission (2010) and its amendments in 2013.

<sup>10</sup> The *Organisation Internationale de la Francophonie* (OIF) conducted an audit of the voter list and formulated recommendations ahead of the polls.

declared insufficient the 2011 voter's biometric file for a new electoral cycle, which required a new nationwide voter registration.

The extension of the term was ratified by a Constitutional Court decision in May 2016, ruling that outgoing president should remain in power until the inauguration of the newly elected president on grounds for the of the continuity to avoid power vacuum. In addition, the political impasse, which predated this decision, irreversibly hardened the process. It was only in late 2016 that the CENI calendar was eventually reset by the Saint Sylvester Agreement (*Accord de la Saint-Sylvestre*) in a compromise negotiated by the Catholic Church and signed by most of the political spectrum. Despite this agreement, the run-up to the 2018/2019 elections was characterized by violent repression of opposition demonstrations.

Both the government in place and the CENI instituted tardy legal, regulatory, and operational reforms shortly before the 2018/2019 elections.<sup>11</sup> A new voter registration law and regulations thereunder were adopted in 2016, a seat threshold was introduced, candidate deposits were raised in 2017 (which ultimately disadvantaged small parties and independents)<sup>12</sup>, and EVMs were procured in 2018. EVMs were introduced without adjusting the law to EVM use, which left in doubt what evidentiary value EVM printouts would carry in EDR. Moreover, despite the DRC's international, regional, and constitutional commitment to gender parity in political office, the electoral women's quota for party lists remained optional and was therefore largely ignored.<sup>13</sup>

Ahead of the 2018/2019 elections, the electoral law was modified three times overall, but the consolidated law was not disseminated on time for the elections, which meant that stakeholders did not have comprehensive access to the framework and created legal uncertainty. Belated timing of those electoral reforms, which concluded less than one year ahead of the December 2018 polls, was criticized by observers due to lack of consensus and consultations.<sup>14</sup> The African Union's preliminary declaration also noted that consultation mechanisms, such as the consultation framework (*cadre de concertation*), were insufficiently provided by the CENI during the election period.

The opinion polls conducted by the Congo Research Group<sup>15</sup> also showed that the CENI lacked trust amongst most Congolese citizens. Key actors questioned the CENI's impartiality

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<sup>11</sup> Prior to the 2018/2019 elections, a series of amendments to Electoral Law No. 06/006 was adopted in 2011, 2015, 2016, 2017, and 2018.

<sup>12</sup> Esambo, Jean Louis, and Benoit Kapiamba. "Elections Présidentielle, Législatives et Provinciales En République Démocratique Du Congo - 2018, Guide Pratique Du Contentieux Électoral." EISA, AETA, 2018. <https://eisa.org.za/pdf/drc2018context.pdf>.

<sup>13</sup> "Mission d'observation Électorale de l'Union Africaine pour les élections générales du 30 décembre 2018 en République Démocratique du Congo." African Union, January 2, 2019. [https://au.int/sites/default/files/pressreleases/35577-pr-conclusions\\_preliminaires\\_de\\_la\\_mission\\_dobservation\\_electorale\\_de\\_lunion\\_africaine\\_pour\\_les\\_el\\_lections\\_generales\\_du\\_30\\_decembre\\_2019\\_en\\_republique\\_democratique\\_du\\_congo.pdf](https://au.int/sites/default/files/pressreleases/35577-pr-conclusions_preliminaires_de_la_mission_dobservation_electorale_de_lunion_africaine_pour_les_el_lections_generales_du_30_decembre_2019_en_republique_democratique_du_congo.pdf).

<sup>14</sup> See SYMOCEL final report, Lack of consensus and consultations as noted in (voting machine).

<sup>15</sup> According to a BERCI/GEC survey in September 2018, only 24.3% of Congolese believe that the CENI will run fair and equitable elections.

and characterized its actions by unilateral decision-making around key matters such as EVM use.

The assessment report of the Consortium for Elections and Political Process Strengthening (CEPPS) in 2016 on supporting the DRC Elections noted that the CENI's decision to embark on a full-blown voter registration exercise did not have the general support from all stakeholders.<sup>16</sup> Moreover, a 2018 audit of the International Organization of the Francophonie (*Organisation internationale de la Francophonie* – OIF) and several other observer groups criticized the voter register for lacking fingerprint data for nearly 17 percent of registrants, even after 6 million duplicate and underage entries were cleared from the register.

When election results were declared on January 9, 2019, CENCO maintained that the announced winner did not coincide with data gathered by its 40,000 observers. To date, the CENI has not published vote tabulation, but instead announced global totals only, without providing a breakdown by polling station or by local results compilation center (*Centre Local de Compilation des Résultats* – CLCR), as per international best practice and as required by the DRC's legal framework. Moreover, CLCR results were only partially displayed, depriving interested parties of the evidentiary basis to contest the CENI's provisional vote results.

Alleged leaks of partial election results tallies<sup>17</sup> cast further doubt on the legitimacy of the totals announced by the CENI. Moreover, while the FCC officially garnered less than a quarter of the vote in the presidential elections, it swept a super-majority in the National Assembly, as well as the near totality of seats on most provincial assemblies. The discrepancy between presidential, parliamentary, and provincial election results has further eroded public trust in the DRC's electoral process. Even if Congolese society appears to accept the results for now, lingering uncertainty over the legitimacy of elected representatives could depress future voter turnout and undermine the current government's authority.

Largely dysfunctional and long delayed EDR procedures compound this predicament, The Constitutional Court had disqualified five presidential candidates without ever rendering written decisions and frustrated countless results appeals by disallowing EVM-generated results protocols into evidence. It then annulled in bulk the election of 23 members of the opposition coalition in what appears to be a flagrant act of partisan judicial activism. Some of these decisions were later reversed by the court based on material errors, and 19 members were re-instated.

### **III. Best Practices and Impact on Electoral Reform in the DRC**

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<sup>16</sup> "Support to DRC Elections Assessment Report." CEPPS, July 18, 2016.

[https://www.ifes.org/sites/default/files/CEPPS\\_DRC\\_Assessment\\_Report\\_English.pdf](https://www.ifes.org/sites/default/files/CEPPS_DRC_Assessment_Report_English.pdf).

<sup>17</sup> Wilson, Tom, David Blood, and David Pilling. "Congo Voting Data Reveal Huge Fraud in Poll to Replace Kabila." *Financial Times*, January 15, 2019. <https://www.ft.com/content/2b97f6e6-189d-11e9-b93e-f4351a53f1c3>.

Electoral reform can stand alone, pursuing specific objectives to reframe electoral processes for the next cycle, or be part of a broader reform process initiated by the government.<sup>18</sup> Approaches vary between constitutional/legal reform and institutional reform: constitutional and legal reform concerns laws, regulations, and rules, while institutional reform refers to the mandate, composition, structures, policies, and procedures of the EMB and other institutions involved in elections.<sup>19</sup> The mechanism channeling the reform effort, the actors involved, the scope, and timing of reform adjust to the legal or institutional changes sought. IFES presents in this section best practices for electoral reform processes and formulates recommendations for the DRC.

### **Leadership, Political Will, and Role of the CENI**

Building on global and regional comparative examples, the parliament or the president of the republic generally initiates electoral reform by establishing a special parliamentary committee or a separate commission (see Appendix I). Political will is critical to ensure successful reform. Frequent discussions on electoral reform with members of political parties, or members of parliament and government officials can also galvanize political will for electoral legal reform. Regular discussions and meetings with Parliament can also ensure that the CENI keeps track of the reform process and is consulted to avoid unrealistic amendments to the law, especially relating to election technology (see Kenya in Appendix I).

Political party representatives engaged in legal reform discussions should regularly consult their leaders to avoid delays in the adoption of the amendments when they are reviewed in plenary sessions in Parliament. Indeed, without influential members of Parliament sponsoring, or at least supporting the reform process, there is a risk that the revised law might not be adopted—wasting both the effort of EMB officials, political space, and financial resources. For this advocacy and reform agenda to be successful, observers, parties, and candidates should continue to put pressure and encourage Parliament and the government to establish a reform mechanism and a clear timeline.

In addition to this political process, EMBs often initiate post-election review and reform discussions with relevant stakeholders. In fact, DRC's CENI should have tabled its cyclical "activity report" with Parliament before the expiration of its members' terms. The role of the CENI will differ depending on the type of electoral reform targeted. While EMBs have generally played an important role in electoral reform processes, legal reform can only be achieved with consent of parliamentary majorities, and in most cases, that of the government. The law regulating the CENI nevertheless provides in Article 9 (4) that one of its duties and functions is to contribute to the development of the legal framework relating to the election process and referendum—a competence currently held by the CENI vice presidency.

But while the CENI has a mandate on electoral reform, lack of confidence in the CENI may impact acceptance of its members' input. Conversely, new CENI leadership could take center stage in reform efforts, especially during the new commissioners' 'honeymoon period' following the start of their terms. Even current CENI members, a select number of whom may

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<sup>18</sup> See Senegal in Appendix I.

<sup>19</sup> Political reform is a third type of electoral reform, which is not discussed in this paper. Political reform refers to changes in the political environment that impact how an EMB operates.



be renewed to preserve institutional memory, could still play a role and be consulted in electoral reform, since the CENI will need to implement the reforms in practice. Their role, however, should be balanced with a technical group of non-institutional stakeholders, including independent experts and observers providing input into the legal reform process.

Once CENI bureau and plenary members are appointed, they could initiate institutional reforms by reviewing all recommendations from observers, conducting lessons learned activities, revising its implementation measures, decisions, and training manuals, and designing new systems in consultations with stakeholders. . Whether its commissioners are renewed in the coming months or not, such internal institutional reform requires strong leadership to succeed.

### **Scope of the Reform and Clarity and Stability of the Law**

The laws, rules and regulations, guidelines, policies, and manuals should be reviewed to ensure a comprehensive electoral reform and identify most propitious reform processes. In this way, actors will be able to clearly distinguish what would require a legal change and what would require a regulatory or operational (institutional) change. The scope of the reform may impact the timing of the process.<sup>20</sup> IFES' assessment shows that critical interventions to DRC's legal framework are only minimalist, as most of the recommendations can be addressed through revision of CENI regulations or of court rules and procedures, rather than of the election laws themselves (see Section IV on Priority Recommendations).

Moreover, rule of law requires legal stability and predictability.<sup>21</sup> Best practices recommend carrying out a single coordinated and comprehensive electoral legal reform process, rather than a series of one-off reforms. Scattered amendments can undermine the clarity and stability of the law and may confuse, or even mislead stakeholders. However, the current political context in the DRC may require a staggered, yet comprehensive and progressive approach.<sup>22</sup> Due to the political pressure for the holding of local elections and the low public trust in the CENI, the adoption of targeted legal amendments on the appointment process and internal operation of the CENI may be required before the start of a full-scale review of the electoral framework (see Appendix 2: Local Elections and Impact on Reform). Such institutional changes do not require harmonization with other components of the legal framework, but only with internal CENI regulations. -

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<sup>20</sup> For example, reforms about independence of the CENI or the election system would require a legal, or even a constitutional change (if one seeks maximum entrenchment) and would abide by the legislative process and applicable deadlines. Other reforms, such as procedural rules on use of EVMs, are within the rule-making power of the CENI and do not require parliamentary approval—although they should still be developed through a consultative and transparent process.

<sup>21</sup> The Venice Commission has addressed the issue of stability of legislation in the electoral field: Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, II.2; Interpretative Declaration on the Stability of the Electoral Law, CDL-AD(2005)043. "The Rule of Law Checklist." The Venice Commission of the Council of Europe, 2016. [https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule\\_of\\_Law\\_Check\\_List.pdf](https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf).

<sup>22</sup> Especially since reform would spread across several distinct standalone laws on the CENI, political parties, their funding, voter registration, and election procedures.

## Timeliness

Setting reform timeframes creates predictability of the reform and builds confidence in the process for electoral stakeholders. Per international best practices, fundamental elements of electoral legislation should not be open to modification less than one year before an election, to ensure that laws are set in advance and clear for all stakeholders.<sup>23</sup> This principle should not be invoked when a legal amendment is adopted to meet international standards or to implement a recommendation made by international organization.<sup>24</sup> Timely adoption of laws also enables operational procedures, procurement, training, and voter education to be conducted on time for the electoral cycle (see Kenya in Appendix I). Due to the knock-on effects of belated reform, legal and institutional changes should ideally begin in the immediate post-electoral period. Freshly elected legislators may also vote on law reform more objectively than at a time when their own reelection prospects outweigh principled objectives. Observer groups and the CENI must thus highlight the importance of timely reform to the government and the Parliament. Following the adoption of legal amendments, the Parliament, the CENI will have to harmonize relevant regulations and rules, develop updated manuals, conduct trainings and engage in voter education activities.

When Congolese electoral stakeholders develop action plans or roadmaps for electoral reform, they should distinguish between short-term versus long-term reform measures. CENI members or staff could determine what improvements should be made before the local elections and/or before next general elections in 2023. However, the CENI should sensitize stakeholders on this distinction and explain that electoral legal reform requires additional time.

Moreover, amendment of the CENI's organic law may impact the appointment procedures of its new cohort of members, if it precedes the latter. Yet, assuming the CENI plays a role in electoral reform, the current uncertainty over the appointment of new members impacts the timing of reform efforts, while the timing of legal reform determines the CENI's capacity to implement and effectively deliver amendments for the next elections. Should appointment of the new cohort of commissioners be deferred, the current CENI leadership should already embark on regulatory reform, as long as the process is inclusive and transparent.

Timing of the electoral reform should take into consideration when to hold local elections. If local elections are called within a short timeframe, legal reform should not collide with their implementation. (In the past, Congolese actors have abused the reform process to manipulate the legal framework for political advantage, thereby imperiling the legitimacy of local elections from the outset.) Any reform that impacts the holding of local elections must thus either sufficiently precede or follow those elections. Still, the CENI could undertake institutional reforms in consultation with stakeholders, provided that a new CENI or interim

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<sup>23</sup> "Code of Good Practice in Electoral Matters, Guidelines and Explanatory Report." Venice Commission of the Council of Europe, 2002.

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev2-cor-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev2-cor-e).

<sup>24</sup> Fundamental elements of the legislation include election system, commission membership or boundary delimitation. "Interpretative Declaration on the Stability of the Electoral Law." Venice Commission of the Council of Europe, 2005. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2005\)043-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)043-e).

CENI leadership is appointed quickly to enable preparation for the local elections and adoption of the needed reforms (see Appendix II).

### **Forum for Electoral Reform**

Diversification of actors involved in legal reform processes promotes inclusion and transparency, but a multiplicity of fora can potentially lead to a redundancy of efforts and potential coordination lapses. At the start of reform processes, especially legal reform, it is important to streamline consultation and coordination, perhaps even unifying efforts under one single umbrella mechanism. Stratification of actors can create delays and inconsistencies in legal reform proposals. Thus, ensuring that a single authority oversees the legal reform is critical for avoiding disparate and potentially contradictory proposals, delays, and miscommunication.

One possible approach to enhance coordination among stakeholders in support of electoral reform in the DRC could be establishing a separate reform commission or an ad hoc parliamentary committee supported by a technical working group. The working group could include members of Parliament, political parties, CENI members and officials, government representatives, representatives from the judiciary, independent election experts, as well as representatives of CSO and religious confessions. This technical working group or task force could also be used as a consultative mechanism for the CENI when discussing and planning institutional reform (regulatory or operational changes), including the use of technology in elections.

The institution or the personality leading this working group or committee must also be perceived as neutral, competent, and beyond reproach by the full political spectrum.<sup>25</sup> A technical reform committee could be appointed along an open and transparent selection process, and then publish its recommendations upon submission to Parliament. The CENI members of the plenary and bureau should generally refrain from involving themselves in political debates, which often include questions related to the election system or electoral thresholds, and instead leave these issues for discussion among politicians.

### **Inclusiveness and Consultation**

Electoral reform should include consultations key stakeholders, including political party representatives, electoral institutions, relevant government departments, legal and judicial representatives, observer groups, and representatives from CSOs, women's groups, as well as minority and vulnerable groups. During workshops and roundtables, election officials and stakeholders should be given the opportunity to comment on amendments and table proposals. Moreover, the importance of decentralized events should not be underestimated during the reform process. Holding roundtables and workshops on reform at the provincial and local levels is crucial to ensuring the regional challenges are captured and addressed in the reform process.

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<sup>25</sup> Fall, Ismaila, Mathias Hounkpe, Adele Jinadu, and Pascale Kambale. "Organes de gestion des élections en Afrique de l'ouest." Open Society Foundations, 2011.

Following the adoption of election law amendments in 2017, implementation of key changes brought to the election process lacked stakeholder buy-in, including use of EVMs, the application of threshold minimums, candidate deposits, and only optional gender quotas on candidate lists.<sup>26</sup> Actors involved may differ depending on the reform topic and whether it relates to the constitution (such as reinstatement of the presidential run-off system, which was discarded in 2011), to the domain of legislation, or only to regulatory reform. The CENI could support this process by initiating and facilitating inter-institutional working groups for the development of electoral reform recommendations on specific topics. For instance, for the discussion on access to and admission of evidence, as well as rules of procedures for the adjudication of petitions, the CENI and the judiciary could hold thematic workshops including political, human rights, and institutional stakeholders, such as the Supreme Judicial Council (*Conseil Supérieur de la Magistrature*), Constitutional Court, Court of Appeals (*Cours d'Appel*), Superior Court (*Tribunaux de Grande Instance*), and Bar Association (*Barreau*). An inclusive reform process could help rebuild trust in the CENI and enhance acceptance and understanding of legal reform, as well as of its implementation.

### **Transparency in the Reform Process**

Transparency of the process is critical for regaining trust and making electoral reforms acceptable to all electoral stakeholders, including the general public. Widespread publication of draft reform proposals, public legislative hearings, or public consultations at the provincial and local levels can help in rebuilding confidence in electoral processes and institutions.<sup>27</sup> The body in charge of the reform and the CENI should regularly publish information about progress made and meetings held with stakeholders on electoral reform to build trust ahead of the next elections, including rules, procedures, and processes. Reform proposals submitted by parties, observers, or the CENI should also be made public, for example on the official CENI and Parliament websites, and a feedback mechanism should be offered online. Public consultations could also be held in several parts of the country to collect feedback on priority reform areas before submission to Parliament. Following the adoption of reform measures or amendments, the CENI should then conduct a voter awareness campaign and hold briefings with parties and candidates to inform them of the changes made before the next cycle. All these above-mentioned measures can enhance trust in the CENI and government to conduct a more inclusive and transparent election process.

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<sup>26</sup> "Mission d'observation Électorale de l'Union Africaine pour les Elections Generales du 30 Decembre 2018 en Republique Democratique Du Congo." African Union, January 2, 2019.

[https://au.int/sites/default/files/pressreleases/35577-pr-conclusions\\_preliminaires\\_de\\_la\\_mission\\_dobservation\\_electorale\\_de\\_lunion\\_africaine\\_pour\\_les\\_elctions\\_generales\\_du\\_30\\_decembre\\_2019\\_en\\_republique\\_democratique\\_du\\_congo.pdf](https://au.int/sites/default/files/pressreleases/35577-pr-conclusions_preliminaires_de_la_mission_dobservation_electorale_de_lunion_africaine_pour_les_elctions_generales_du_30_decembre_2019_en_republique_democratique_du_congo.pdf).

<sup>27</sup> Merloe, Patrick. "Promoting Legal Frameworks for Democratic Elections." NDI, 2008.

<https://www.ndi.org/sites/default/files/Legal%20Frameworks%20Guide%20Sections%201-3%20-%20EN.pdf>.

## IV. Priority Electoral Reforms in the DRC

### Independence, Impartiality, Integrity, and Internal Balance-of-Powers of the CENI

*Relevant reform requires some amendment of the 2010-2013 organic law on the CENI and/or supplementing the CENI's constitutional framework. However, critical steps could already be achieved by amending the CENI's internal regulations, for which Parliament is not needed.*

Public accountability of government institutions is critical to democracy. EMB independence from the government is equally important to ensure the impartial administration of elections. EMBs should therefore enjoy institutional and organizational autonomy. The Congolese CENI is set up as a permanent constitutional body tasked with supervising and administering national and local elections and referenda. The CENI legally enjoys financial and budgetary autonomy.<sup>28</sup> But despite formally following the 'independent EMB model,' the perception of CENI's impartiality has suffered during the past cycle.<sup>29</sup> Interlocutors allege that the executive branch exerts undue influence on the CENI, and that some bureau and plenary members appointed by the opposition and by civil society were subsequently influenced by the majority. However, the electoral framework has constitutional, legal, and regulatory provisions<sup>30</sup> relating to the composition, duties, and functions of the CENI members that formally provide for its independence by setting up barriers against undue influence.<sup>31</sup>

The CENI's semi-political composition is not unique in Africa, and peer commissions with similar appointment processes and mixed plenary makeup can enjoy public trust. However, in the DRC, the government nominates six members, while the opposition only nominates four, giving rise to a political imbalance within the EMB. Addressing such an issue in Côte d'Ivoire, the African Court on Human of Peoples' Rights (AfCHPR) issued a 2016 judgment holding that the appointment process, criteria, and composition of the electoral commission in Côte d'Ivoire did not meet the requirements for independence and impartiality according to

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<sup>28</sup> CENI, Rule of Procedure, Article 2.

<sup>29</sup> OIF, TOME II, "Organe de conception, d'orientation, de décision, d'évaluation et de contrôle de la CENI, elle comprend treize membres désignés par les forces politiques au sein de l'Assemblée nationale à raison de six délégués, dont deux femmes, par la majorité et de quatre, dont une femme, par l'opposition. La Société civile y est représentée par trois délégués issus respectivement de confessions religieuses, des organisations féminines de défense des droits de la femme et des organisations d'éducation civique et électorale."

<sup>30</sup> CENI Rules of Procedure, CENI Members' Code of Conduct (*Règlement intérieur de la Commission, Code de bonne conduite des membres de la CENI*)

<sup>31</sup> The CENI Code of Conduct imposes restrictions on the activities of the members to guarantee their independence and impartiality and to shield them from influence, such as prohibition of communication with parties, immunity, budgetary autonomy, or disclosure of conflict of interest.

international and regional conventions and treaties.<sup>32</sup> The AfCHPR ordered that new legislation shall be adopted within a year.<sup>33</sup>

Closely analogous to the DRC's CENI, the Ivorian CEI is composed of representatives from the government, judiciary, CSOs (including religious organizations), and four representatives of the party or coalition parties in power and four from opposition party or coalition parties.<sup>34</sup> The petition alleged that CEI's government members (President's Office, Head of Ministry) remained beholden to the majority political forces, which created a *de facto* imbalanced representation in favor of the government. The AfCHPR held that, "the electoral body in place should, in addition, be constituted according to the law in a way that guarantees its independence and impartiality and should be perceived as such." While the DRC has not signed the protocol recognizing the competence of the AfCHPR, this decision sets an important normative precedent on EMB independence in the African region.

When rebalancing the CENI's political composition, the gender balance of the CENI's plenary could also be improved (for example by amending the wording to "at least two women", rather than capping women members at two), as well as that of the bureau (by requiring the bureau's gender balance).<sup>35</sup> But in the DRC, the issue at stake is not only the CENI's composition and appointment procedure *per se*, but its internal distribution of responsibilities which mainly gives more competencies to the president, vice president and the bureau, rather than the plenary.

This disproportionate dispensation arose from the 2013 reform of CENI's 2010 organic law, as well as from CENI's internal regulations adopted thereunder. Because of its formal independence, the CENI is vested with self-regulatory powers, which could in theory operate in favor of its impartiality. However, after the 2013 law amendment, the CENI did not use its regulatory discretion to boost its internal checks and balances and to reallocate prerogatives among other members. It would hence be of highest priority to restore the CENI's internal balance of powers, and to entrench restored internal checks and balances in its organic law—or even the Constitution.

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<sup>32</sup> Article 17 of the African Charter on Democracy, Elections and Governance, "State Parties re-affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa. To this end, State Parties shall: Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections (...)." And Article 3 of the Protocol of the ECOWAS.

<sup>33</sup> African Court on Human and Peoples' Rights, *Actions pour la protection des droits de l'homme (APDH) v. Republic of Côte d'Ivoire*, Application 001/2014, Judgement on November 18, 2016.

<sup>34</sup> Article 5 of the Law on mandate, composition, functions of the CEI.

<sup>35</sup> Articles 4 and 5 of the CENI Code of Conduct reinforces this legal obligation to remain independent and impartial. The Code provides in article 9 that the members should refrain from putting themselves in a situation where they could be influenced or where their independence could be put in jeopardy while disclosing all conflicts of interest. Article 13 also states that the members cease to communicate with its party or party group (*groupement de partis*) and cease any behavior that could be interpreted as a connection to a party. Article 18 also strengthens the neutrality / impartiality requirement saying the "members refrain from assisting parties or candidate during elections in any matter." Members should also refrain from holding functions incompatible with their position during their term.

The 2013 amendments also tilted the composition of the CENI bureau in the ruling party's favor, as the majority appoints three positions in the bureau (out of six), including the vice president one, who maintain extraordinary prerogatives.<sup>36</sup> The current dispensation therefore limits the opposition's role in the most sensitive aspects of the CENI's mandate.

The 2013 organic law and the internal regulations thereunder should thus be revised to redefine the appointment process of the bureau, with discussion on the appointment of independent technical experts or civil service members through an open and transparent mechanism. The law requires neutrality and impartiality of the bureau,<sup>37</sup> but in practice, bureau members appointed by political parties have tended to remain loyal to them. Congolese civil society hence proposes to eliminate politically appointed CENI members from the bureau entirely, so that only technocrats would staff the bureau.

Extraordinary powers (such as preliminary results announcement by the CENI president) currently concentrated by the 2013 organic law in the president, vice president, and bureau must be re-stratified across the plenary, to ensure effective internal checks-and-balances. The necessity to concentrate most executive powers within the bureau should also be studied, and certain presidential, vice presidential, and bureau powers could be re-devolved to the plenary, which could boost transparency and accountability.

Select provisions in the regulatory framework could be strengthened,<sup>38</sup> although CENI compliance with the framework remains the most problematic issue. Greater transparency in the appointment of members, recruitment of staff, shortlists, and civil society monitoring of the commission appointment process should be introduced to guarantee the neutrality and impartiality of each member. The shortlist could be published to allow citizens to challenge a nominee within a specific timeframe based on evidence that they do not meet the criteria. The DRC could also consider establishing a committee to compile a temporary list of candidates for the bureau.

Whatever option is retained, the main lesson learned from 2018 is not to concentrate power over the results chain, "legal affairs", or voter registration on only one or two individual members. Amendment of the 2013 CENI law is hence of utmost priority, regardless of the timing of local elections.

Another element to consider is the electoral reform's impact on other institutions in the DRC. Reforming the composition of an independent body or its secretariat may create a precedent to reform other independent or governmental institutions.

In terms of the CENI's involvement in its own institutional reform, Article 25 of its organic law vests exclusive competence in "legal/legislative" affairs in the CENI vice president, a post

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<sup>36</sup> Originally the Organic law of 2010 did not state which position should be held by majority and opposition, but the distribution of positions was determined by internal rules. However, civil society was not represented in the previous composition.

<sup>37</sup> Additionally, Article 20 of the CENI Code of Conduct for members could be strengthened to provide for a timeframe within which a former member cannot hold a party function after his or her term.

<sup>38</sup> *Ibidem*.

currently awaiting re-appointment. When involving the present or future CENI in reform processes, it is paramount to transcend the 2013 organic law's concentration of this competence in the CENI vice presidency, and to involve not only the full bureau, but also the plenary and its permanent technical staff.

Recommendations:

- 1) *In the institutional reform of the CENI, include its plenary and bureau, not only its vice presidency, as the current organic law and internal regulations seem to suggest.*
- 2) *In terms of substance of the CENI's institutional reform, restore internal check and balances, so that critical powers currently concentrated in its presidency, vice presidency, and bureau are re-devolved to its plenary. In the alternative, if the bureau retains its prerogatives over the plenary, political appointees could be excluded from bureau membership.*
- 3) *The CENI can already revise its internal regulatory framework to re-devolve powers to its plenary and operationalize the new dispensation for local elections, while Parliament embarks on the lengthier legislative process to restore the CENI's internal checks and balances in its organic law, or on the constitutional level.*
- 4) *Ensure that the CENI's future composition includes an equal number of government and opposition nominees, and that both the plenary and bureau respect gender balance in line with DRC's sub-regional, regional, and international commitments.*
- 5) *Establish more transparent and competitive staff recruitment procedures.*

## Use of Technology

*Use of technology in elections requires only regulatory changes through the CENI's rules and court's rule of procedure. No legal changes are required in order to retain flexibility in light of continuously evolving technology.*

The DRC is a leader in adopting cutting edge elections technology, having used biometric voter registration since its 2006 election cycle. In 2018, it became only the second country in sub-Saharan Africa to adopt EVMs, just behind Namibia. The legal framework, however, gives the prerogative to choose between the utilization of paper ballot or electronic voting to the CENI, that adopted implementing measures to adapt the use of EVMs to the legal framework.. The CENI issued regulations that held that the paper results chain prevails over documents printed by the EVM, or over results transmitted off the EVM's internal electronic tally. However, declaring the machine a printer does not distinguish it from the commonly held international definition of electronic voting.<sup>39</sup>

To the surprise of many stakeholders and observers, the EVMs performed above expectations on election day. Yet the lack of sound legal footing for the use of EVMs entailed a number of critical pitfalls: 1) The legal and regulatory framework lacked procedures to ensure a traceable

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<sup>39</sup> "Goldsmith, Ben, and Holly Ruthrauff. "Implementing and Overseeing Electronic Voting and Counting Technologies." IFES, NDI, 2013. [http://www.eods.eu/library/Implementing\\_and\\_Overseeing\\_Electronic\\_Voting\\_and\\_Counting\\_Technologies.pdf](http://www.eods.eu/library/Implementing_and_Overseeing_Electronic_Voting_and_Counting_Technologies.pdf).



chain-of-custody of the EVM devices themselves, so that observer organizations reported incidents of EVMs in the hands of political parties; and 2) The CENI had advertised EVMs to political parties for their capacity to print as many results protocols as there were party agents. This misled many party agents to accepting the signed EVM results printout, in lieu of the handwritten results form based on the manual ballot tally. However, because CENI regulations hold that the latter form prevails in evidentiary value over the former, EDR jurisdictions disallowed EVM results printouts into evidence outright, so that most contestants did not have any actionable evidence to contest results.

Therefore, the existing legal and regulatory framework should be updated to ensure that the use of technology produces its promised benefits in terms of results transparency and actionability. The same applies to the validity of a high percentage of voter register entries that lack any biometric fingerprint data at all.

When proposing such amendments to the law, or when rewriting its own rules, the CENI should be careful to retain enough flexibility to update technology, or operationally adapt it, while still guaranteeing fundamental stakeholder rights. The CENI should also ensure that the legal and regulatory framework provides for a backup or contingency plan in case of failure of technology so that it does not risk the annulment of an entire election in the event the technology fails.

The current framework, for instance, does not contemplate procedures to replace individual machines that breakdown, and how the results stored in the broken machine factor into the electronic results transmission (see Kenya in Appendix 1, where the law imposed on Independent Electoral and Boundaries Commission (IEBC) impossible deadlines to procure technology).

#### Recommendations

- 1) *Establish a real-time tracking system and inventory of EVMs to allow accountability of their whereabouts at any given time along the electoral calendar.*
- 2) *Develop an effective and transparent contingency plan for replacing failing machines on election day, as well as a periodic EVM testing regime that allows a timely inspection of operational inventory.*
- 3) *Revise the regulatory framework so that it effectively and holistically puts EVM use on a transparent normative footing.*
- 4) *Investigate voter register entries that lack biometric data and ensure that future registration exercises bar voter register entries lacking biometric data.*

#### **Result Management System (RMS)**

*The improvement of the results management system could be obtained by regulatory action, enhanced training, and the establishment of clear processes by the CENI. Limited law reform could be pursued to entrench some of its critical reform aspects.*

As noted under the section “Independence, Impartiality, Integrity, and Internal balance-of-powers of the CENI” above, the CENI’s 2013 organic law vests the vice president with exclusive substantive competence to regulate results management (as well as exclusive competence

over legal affairs). The law further vests exclusive power to announce provisional results in its president. The 2013 dispensation hence puts results regulation, management, and announcement powers in the hands of only two individuals, which reduces checks and balances by other members of the bureau and the plenary. As such, rebalancing of RMS powers would require a revision to the organic law.

In terms of procedures, the electoral law already imposes a solid framework for paper results display at every level of the RMS chain. However, this framework that was not met in 2018 with the absence of paper trails for final results, which per the legal framework and per CENI regulations prevails over electronically transmitted results. IFES has been informed that the CENI relied on electronic transmission, despite its legal obligation to derive national results from the paper-based manual aggregation, and not from EVM transmission. In fact, the CENI announced the results before completing the paper trail aggregation and transmission. Moreover, the logistical and operational procedures to complete the transmission and redeployment of paper results (*ramassage*) were delayed and the EDR courts—which by law should receive a carbon copy of the polling station results—received paper results several days after the elections.

Results management should thus be re-developed for the next election cycle and could be piloted for the local elections, which have a much shorter results aggregation and transmission chain. A chain-of-custody system that synchronizes in real time with CENI results management tracking and that allows barcoded logging of received results documents would go a long way in securing critical evidence. Such a system is indispensable for effective EDR remedies and could be implemented through institutional reform.

#### Recommendations

- 1) *Ensure that the paper results chain is sustained and completed, as the law requires, and introduce a bar-coded real-time tracking system of the integrated paper results chain.*
- 2) *Require by law reconciliation of EVM direct-transmitted results with the paper-based results aggregation chain.*
- 3) *Ensure observer training on and access to the paper results transmission and aggregation.*
- 4) *Stipulate in the law that loss of the paper results chain entails invalidation of relevant polling stations and would result in a rerun if the annulment impacts on the election outcome.*

#### **Publication of Results**

*The commitment to publish results can be achieved by a regulatory action by the CENI (mesures d'application, instructions, and training manuals), and additionally publication – instead of a mere announcement – can be later entrenched at the legislative level.*

The CENI has not published any results in writing or on its website, but only verbally announced results totals. Article 9 (11) of the CENI organic law refers to the announcement

of results, while article 70 of the election law requires the CENI to display results aggregation, albeit only at the CLCR level. Article 71 of the election law then requires all members of the CENI bureau to countersign a national results protocol, which must be physically displayed and transmitted to the Constitutional Court. The current legal framework hence neglects to require national results publication disaggregated by polling station, a loophole that legal reform must address in the long-term. Nevertheless, the CENI could take action to fix this loophole, committing to national results publication and disaggregation by revising its own regulations. CENI regulations would be as enforceable as legal amendment.

Lastly, the CENI procured a results transmission system that is lockable behind a binary hash-code, which EMBs in other countries partition among various stakeholders.<sup>40</sup> In the DRC, however, only select CENI bureau members hold the access code, so that the unsealing of electronic results lacks transparency and checks-and-balances. This issue could be solved by splitting the results access code between several members and stratifying it among a greater number of more impartial individuals. This measure could be introduced either by legislative or by regulatory means.

#### Recommendations

- 1) *Consistently display paper-based results and EVM printouts at the polling-station level, post CLCR tabulation disaggregated by polling station at CLCR-level and publish national and constituency wide preliminary results disaggregated by polling station on CENI's website.*
- 2) *Consistently allow observer access to CLCR sites and procedures.*
- 3) *Amend CENI RMS regulations to reflect the above safeguards in the immediate term and ensure that legal reforms entrench them on legislative footing in the medium-long term.*

### **EDR Capacity and Procedural Framework**

*Most EDR related recommendations can immediately be implemented by capacity building programs, court rules, and CENI regulations, with some legislative interventions following downstream.*

Both the Constitutional Court and Provincial Appeals Courts continue to deliberate over election results disputes.<sup>41</sup> Those courts need to reinforce their capacity to examine large pools of results evidence within short statutory deadlines in order to shield the process from arbitrary fact-finding behind closed doors. Filing and adjudication timelines should also be extended to account for the limited number of available magistrates and for the growing scale

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<sup>40</sup> For instance, Venezuela's National Electoral Council (*Consejo Nacional Electoral*).

<sup>41</sup> The law provides that the Constitutional Court is responsible to hear presidential and legislative election disputes; the Administrative Court of Appeal (*Cour Administrative d'Appel*) hears provincial election disputes, and the Administrative Court (*Tribunal Administratif*) hears urban, communal and local elections disputes. The Court of Appeal (*Cour d'Appel*) and the High Court (*Tribunal de Grande Instance*) are temporarily adjudicating these complaints before the Administrative Court of Appeal and the Administrative Court are established.

of litigation. The American Bar Association Rule of Law Initiative (ABA ROLI), OIF, and UNDP conducted a series of trainings with magistrates and are building a case management system, but additional support to the courts on electoral dispute resolution are necessary to strengthen their grasp of the election process, and to develop more appropriate rules for election adjudication, notably for evidence collection and admissibility.<sup>42</sup>

In addition, most of the trainings for the 2018/2019 elections were conducted for high-level judges (handling presidential, legislative and provincial elections cases), but lower courts will be responsible for handling election petitions for local elections and have received only limited cascade training through Provincial Appeals Court magistrates. That training apparently instructed local magistrates to disallow EVM-generated results into evidence, which is highly paradoxical, since ballots, the first step of the manual RMS chain, are themselves EVM printouts.

Moreover, the legal framework requires that a carbon copy of the manually written polling stations results forms be routed directly to the competent court. Since 2018/2019 EDR decisions are not yet published, IFES has not been able to ascertain whether those manually generated results forms reached the courts, or whether any courts unsealed those records and entered them into evidence.

In practice, general rules or codes of civil procedure and rules of evidence are sometimes inadequate for election proceedings, especially if they do not define the applicable standard of proof, which would shift the burden of proof from the petitioner to the CENI. Standard of proof would define the degree and nature of evidence to show reasonable cause, or to rebut the presumption of integrity of the results announced by the CENI.

The DRC's EDR courts by law receive their own manual paper results chain, so that the CENI might not even be required to produce evidence in terms of its own results chain. However, the framework should expressly require the EDR court to proactively inquire into results integrity by unsealing relevant manual results forms that are due to it,<sup>43</sup> once a petition meets the civil standard of proof (which in common law is the balance of probabilities).

The necessity for speed and efficiency of election petitions is not always compatible with regular judicial proceedings. For example, the DRC's courts require authenticated documents, which may be very difficult to obtain for candidates in the limited time they have to file and respond (albeit an EVM printout duly signed by the head-of-polling station and by party agents should in theory qualify as an or authenticated instrument (*acte authentique*)). Due to the restrictive rules on evidence, the Congolese EDR courts currently dismiss a high number of election petitions considering evidence inadmissible without making minimal effort to inquire into the merits of the claims. It opens the door to arbitrary bulk dismissals and 'negotiated'

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<sup>42</sup> ABA ROLI conducted training-of-trainer workshops in EDR. UNDP used ABA ROLI's manual for training magistrates. However, while judges at the top level were trained, those who hear cases of first instance were not.

<sup>43</sup> As is already law and practice in Burkina Faso, Niger, and Senegal for instance.

EDR. The Supreme Judicial Council and the Constitutional Court are invited to develop their own special procedures for election petitions to define more effective rules of evidence.

Lastly, the present framework wisely vests EDR judges with the power to order recounts, albeit as a discretionary last resort. While IFES commends the legal framers' circumspection in introducing this remedy, legal reform should make recounts a remedy of first and not of last resort. Considering that EVM use makes polling fraud more difficult, most irregularities can be cured by recounts instead of annulment, the latter of which is far costlier—especially in the case of the DRC. Many peer frameworks impose standards that trigger automatic recounts, which could be an option worth considering in the DRC.

#### *Recommendations*

- 1) *Amend the law to abrogate the power of the president of the Constitutional Court to 'top-up' the EDR bench beyond three judges and ensure that EDR benches are drawn by lot.*
- 2) *Amend CENI regulations to expressly authenticate and allow EVM printouts into EDR evidence and bring those provisions on statutory footing during subsequent law reform.*
- 3) *Compel the CENI to produce the full paper results chain to relevant EDR courts, if they have not received their dedicated copy of the RMS paper chain. Stipulate that loss of the paper results chain entails invalidation of relevant polling stations and their rerun, if invalidation impacts the election outcome.*
- 4) *Eliminate court power to 'reform' results and overturn election outcomes without rerunning relevant elections.*
- 5) *Ensure sufficient training of EDR judges, including at the first instance level, to ensure quality adjudication of voter registration claims and objections, as well as of local election candidacy and results disputes.*

#### **Voter Registration Process and Display**

*Improvement of the voter registration process and display of voter lists can be fully achieved through the CENI operational plan and regulatory reform.*

The CEPPS 2018 [Assessment of Electoral Preparedness in the DRC](#) warned about the CENI's practice to limit preliminary voter list exhibition to a rolling daily display, during, instead of after, registration ("*album quotidien*"). If the current practice is retained, IFES recommends that the de-duplicated, cleansed register be displayed at the level of the 17,000 registration center sites, so that stakeholders, including political parties and CSOs, can effectively play their part in ensuring the final register's integrity.

Voter registration claims and objections fall under the jurisdiction of the same magistrates who will adjudicate local elections candidacy and results appeals, so that training on all three topic areas could be synergized. Whether or not the current register should be displayed prior to the holding of local elections is a complex issue question that revolves around both time and funding. It is unclear whether the CENI's current budget for local elections includes voter

registration activities. Any reopening of the registration process might benefit from capping the fingerprint override function to reduce the number of entries lacking such data.

Observer groups noted that few, if any, voter cardholders who appeared on the list of voters struck by de-duplication, or did not appear on the final voter register, were ultimately prevented from voting. Since over six million Congolese voter cards were annulled by de-duplication or on grounds of under-age registration, lack of enforcement of the final register remains a concern.

Lastly, the CEPPS assessment report highlighted the disproportionate number of Congolese allowed to vote by derogation in 2006 and even more so in 2011 (i.e. allowed to vote at a polling station other than that of registration). It has been reported that in 2018, the CENI more effectively compiled and posted supplementary voter lists by the statutory deadline 15 days before polling. IFES would like to commend CENI for this measurable improvement, even if it remains impossible to ascertain what percentage of votes were cast by derogation in 2018 (because of lack of results publication). Removing candidates and their extended families from the class of voters legally allowed to vote by derogation would further legitimize the exemption and lighten CENI's administrative burden. These changes would require institutional reforms.

*Recommendations:*

- 1) *Publish the final voter registration and make public the latest statistics broken down by constituency/district and polling station.*
- 2) *Ensure no one is allowed to vote unless the person appears on the list of voters pre-authorized to vote by derogation.*
- 3) *Inquire into voter records lacking biometrics and attempt to de-duplicate relevant records along biographical data or facial recognition.*
- 4) *For the next electoral cycle, ensure sufficient display of the preliminary de-duplicated register at the registration center level to allow an effective claims and objections process, with the aim to stem demographic anomalies.*

### **Applying the Gender Quota to Future Elections**

*Preferably, stringent temporary special measures could be adopted in the law, but the CENI could already revise its regulations to enforce respect of the legal gender quota by parties following consultation with stakeholders.*

The DRC uses an open-list proportional electoral system in its multi-member constituencies, and the simple majority system in a limited number of single-member constituencies. Engineering an effective gender quota for either system is a significantly more complex exercise than in a closed-list proportional system. The latter allows ranking lists by alternating gender, which guarantees almost equal election of both genders. In the DRC, however, the electorate casts ballots for individual candidates (single preferential votes), which then accrue to the count of the list for the purpose of seat attribution. The ultimate ranking of the open

list emerges with the number of preferential votes each of its candidates respectively obtains, which could in theory yield no women elected.

During the parliamentary elections, of which some appeals have not been resolved, the share of women's representation reached, for the first time, exceed 10 percent, with potentially up to 52 women elected among the 500 seats (up from 48 in 2011). Numbers for provincial assemblies may not be available soon, as thousands of appeals remain to be finalized, and could still be appealed to the Council of State (*Conseil d'État*) in the last instance.

The slow growth in women's representation justifies more stringent temporary special measures. Given the open list system, several options avail, and merit deeper discussion at law reform debates:

- 1) A candidate quota that is already enshrined in law though lacking enforcement sanction, would guarantee more women included in open lists, but provides no guarantee that more of those women would be elected. The correlation of numbers of women candidates and women elected into office seems, however, to move in the same direction in a way that the candidate quota itself might bear impact.
- 2) A candidate quota combined with ranking preference for women would have some women selected over men in taking seats, with women taking every second or third seat a list wins, even if men obtained more preferential votes. This measure would likely meet the greatest resistance.
- 3) Local election voters could be given two, instead of one single preferential vote per election. This has helped to boost the election of women, since some voters are more inclined to vote for women as a second but not first choice.

Option 3 could be made even more effective when voters are given a second preferential vote only if they split the two votes by gender. Use of the EVM makes this easily implementable, although it would require the greatest effort in terms of voter information.

The CENI should have discussions with electoral stakeholders, including the recently elected speaker of the National Assembly, Jeanine Mabunda—the first female speaker in DRC history—to discuss these options. In the alternative, the CENI could take an executive decision to accept only lists that respect the legal gender quota for local elections, as the CENI appears to have this power under its general regulatory mandate.

#### *Recommendations*

- 1) *Organize national and provincial consultations to discuss the most acceptable and effective temporary special measure options for the DRC.*
- 2) *Lobby Parliament to bring chosen options on enforceable statutory footing for the next electoral cycle.*
- 3) *Modify CENI regulations for local elections, compelling its sub-units to enforce the gender quota upon candidate list registration.*

## V. Electoral Reform Scenarios

IFES has identified four possible scenarios for electoral reform during the 2019-2023 electoral cycle taking into consideration the political environment characterized by:

- Lack of public trust in the CENI following contested election results;
- Open-ended implementation time before new CENI leadership is appointed; and
- Public / political impatience for the launch of the electoral process for local elections, which is also one of the electoral promises of President Tshisekedi.

Variables that can impact these scenarios include an EMB leadership change, institutional reform, regulatory reform, legal reform, and the holding of local elections. In Scenario A, CENI leadership remains the same to conduct local elections. As such, the CENI first undertakes institutional reform before the local elections and then longer term institutional and legal reform afterwards. Under Scenario B, new CENI leadership is appointed under current laws. Local elections are conducted under this new leadership, and long-term institutional and legal reform and undertaken thereafter. Meanwhile, in Scenario C, an interim CENI is appointed through a political agreement. Institutional reforms are undertaken prior to local elections, and longer term institutional and legal reforms take place afterwards. Finally, Scenario D prioritizes comprehensive institutional and legal reform so that CENI leadership is appointed under a new legal framework, and local elections are delayed.

### Scenario A: No Change in CENI Leadership, Local Elections Prioritized



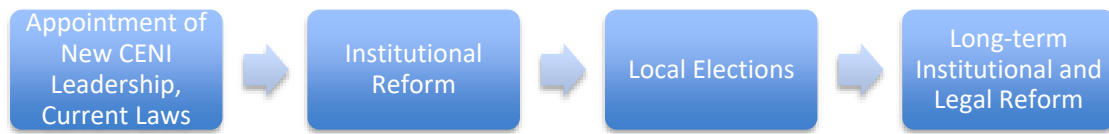
This scenario emphasizes improving CENI performance within the existing legal framework and under existing leadership. Revisions of regulations, rules, and procedures could be adopted following a consultative process with civil society and government stakeholders, followed by staff trainings to ensure implementation of reform and voter education campaigns to increase public awareness of CENI improvements. Once the local elections are complete, longer-term questions of legal reform can be considered.

**Advantages:** Local elections are conducted in the near-term. Limited assistance is required for personnel and leadership capacity building. Assistance on operations and training is quick and limited.

**Disadvantages:** Lack of public trust in the EMB and electoral process may limit improvements through internal CENI regulatory reform, possibly resulting in low voter turnout, protests, or boycotts. Current CENI leadership could undermine perception of implemented reforms. Application of the gender quota depends on CENI's political will to adopt a decision under the existing law.



## Scenario B: New CENI Leadership, Local Elections Prioritized

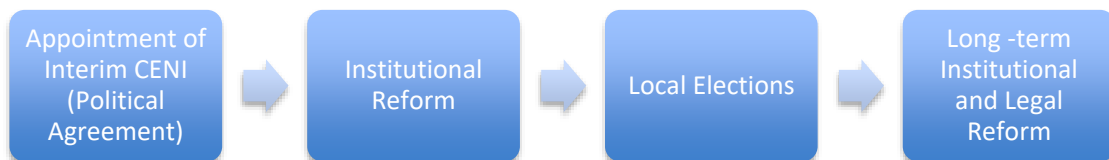


In this scenario, new CENI leadership is put in place through a more open and transparent selection process, and a particular attention is paid to improving CENI performance before the next election cycle. Revisions to regulations, rules, and procedures could be adopted following a consultative process with civil and government stakeholders, followed by staff training to ensure implementation of reform and voter education campaigns to improve public awareness of CENI improvements. Once the local elections are completed, longer-term questions of legal reform can be considered.

**Advantages:** New leadership addresses calls for more independence and impartiality of the CENI and bureau with a more open and transparent selection process. New leadership may be more likely to undertake meaningful regulatory reform. No further delays in conducting local elections. Better trust in institutions.

**Disadvantages:** Capacity building training for new CENI leadership is necessary. The new legal appointment process of the CENI may not be sufficient to satisfy reform efforts.

## Scenario C: Interim CENI, Local Elections Prioritized



In this scenario, following a political agreement and consultation with stakeholders, an interim CENI is appointed for a limited term, composed of independent experts. Under the leadership of this new interim body, institutional reform could be conducted to address the main issues of the last cycle, including results management, lack of timely publication of results, or insufficient consultation framework (*cadre de concertation*). This transitional body could serve to rebuild trust and to hold local elections under an improved framework. Once the local elections are complete, longer-term legal reform can be undertaken.

**Advantages:** Potential for enhancing trust in the institutions. Local elections held in a timely manner.

While an interim CENI would not be in line with the provisions of the law, this temporary political solution could build trust in the CENI to conduct quick institutional reform before holding local elections. Legal reform could take place at a later stage without delaying the local elections.

**Disadvantage:** Capacity building is a necessity for the CENI leadership. Non-compliance with legal framework for CENI composition could set potentially negative precedent for the interim CENI and brokered agreement between political actors.

### Scenario D: Comprehensive Reform, Local Elections Delayed



In this scenario, stakeholders decide that comprehensive institutional and legal reform is needed before elections can be held. The government decides that local elections will be delayed further. The government initiates an electoral reform process with decentralized and inclusive consultations across the country and all stakeholders represented. The reform recommendations are compiled by an interim independent body on reform or by a technical task force on election reform with representatives from government institutions, political parties, CSOs, and independent experts. Parliament adopts the new law within one or two years. The CENI bureau and plenary are appointed under the new legal framework. Revisions to regulations, rules, and procedures are then adopted by the CENI following a consultative process with civil and government stakeholders, followed by personnel trainings to ensure implementation of reform and voter education campaigns to improve public awareness of CENI improvements. Once the legal and regulatory framework is in place, local elections can be held.

**Advantages:** New legal framework calls for more independence and impartiality of the CENI. Comprehensive reform conducted. Better trust in institutions.

**Disadvantages:** Capacity training needed for leadership. Local elections delayed or never held, which could lead to protests and impede local development. Long-term legal and institutional reform leave room for a derailed process. Long-term technical assistance required for reform process and reformed CENI.

### Summary

Each of the scenarios carry its own set of risks. Deficiencies in the rule of law and financial improbity may compromise compliance with the legal framework. A commitment to hold local elections jointly with national elections in 2023 may not transpire, since the CENI may become logistically overwhelmed in operationalizing five elections in one day, and the electorate may confuse electoral offices, candidates, and lists (although several other African countries have held five to six elections in a single day, such as Kenya). Congolese stakeholders will have to evaluate both the proposed reforms, as well as the method by which these reforms will be actioned. Examples from the African continent demonstrate that the electoral reform process can have far-reaching impact on the sustainability and effectiveness of the reforms, as well as restoring trust in the electoral management body and the electoral process.

## VI. Conclusion

Based on comparative examples, a comprehensive electoral reform process in the DRC can be initiated by the government or the Parliament, which would determine the forum, scope, and timing of the reform. Despite uncertainty around the composition of CENI leadership, institutional reforms at the CENI could begin with reviews of observer report recommendations and lessons learned exercises, as well as regulations, processes, and procedures. It is important to mention that the government should decide whether local elections should take place before or after electoral reform and under the current or a new framework. An existing mechanism or a temporary commission composed of independent, neutral stakeholders should lead and oversee reform efforts, with the possibility of a technical working group providing additional expertise. Regardless of the scope of reform or the oversight mechanism, the process must be transparent and consultative, with engagement of civil society, political parties, religious and traditional leaders, and representatives of marginalized communities, among others. Information must also be shared regularly with the public to ensure buy-in and build trust in the reform effort. A truly inclusive, sustainable, and holistic electoral reform could take years to complete and thus should begin now to ensure more credible, transparent elections in 2023 and beyond.

## Appendix 1: Key African Electoral Reform Examples

This section highlights the challenges and successes of electoral legal reform in other countries, which can provide some lessons learned for DRC as it enters a new cycle of electoral reform.

### Kenya

Year(s)	Initiating Measure	Responsible Body or Forum	Mandate	Participants	Timing and Outcome
2015-2017	Post-2007 elections violence resulted in review of the EMB and electoral processes. Members of Parliament and Permanent Committee for	Joint Select Committee composed of MPs from both political parties/ coalitions; Independent Elections and Boundaries Commission (IEBC)	Revise Political Parties Act, Election Commission Act, and Election Act	Creation of the Independent Review Commission (Kriegler) . Electoral Commission of Kenya disbanded. New interim EMB established (Interim Independent Electoral Commission of Kenya (IIEC)). Hearings of Commission,	Delayed adoption of the laws less than a year before election day and scattered amendments, which led to operational delays for the IEBC.  Outcome: Use of technology made mandatory;

	Legislation initiate reforms.			submission of draft law and draft rules by the IIEC to Parliament.	definition of campaign period; adoption of campaign finance law.
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**Reform Drivers:** In a context riddled with deep-rooted mistrust, local initiatives around electoral reform were deemed insufficient following the 2007 post-elections violence. The Independent Review Commission, and external commission, headed by former election commissioner and retired judge from South Africa, Justice Johann Kriegler, examined the role of the EMB and the electoral process in-depth. Recommendations from this commission formed the foundation for all subsequent electoral reforms in Kenya; the commission and its recommendations remain a regular reference point for all discussions on electoral reform.

**Interim Bodies Appointed:** After the 2008 election crisis in Kenya, two temporary bodies were appointed during the reform process, namely the Interim Independent Boundaries Review Commission (IIBRC) and the IIEC. The IIBRC oversaw the redrafting of existing constituency boundaries based on geographical size and population thresholds. However, its work never concluded due to contestations in the courts and Parliament.<sup>44</sup> The IIEC oversaw the referendum of 2010, ushering in a new constitution in Kenya, and in-line with the new constitution, morphed into the current IEBC, which has managed the 2013 and 2017 general elections.

**Legal Reform in 2016-2017 and the Use of Technology:** Following the 2013 elections, a piecemeal and politicized law reform process led to a very prescriptive legal framework that can be difficult to implement, especially regarding the use of technology. Some amendments adopted in 2016 by the Parliament required the IEBC to implement technology in the election and held the IEBC to a very high standard regarding the use and efficiency of this technology in a tight deadline before elections. These mandatory legal provisions about technology led to operational difficulties for the IEBC, which had to set up an integrated system only a few months before election day. Moreover, these amendments to the law were adopted late, leaving little time for the IEBC to implement changes or for stakeholders to become familiar with the process. The European Election Observation Mission (EUEOM) in 2017 elections noted, “Prior to the 2017 elections an electoral reform process was undertaken extremely close to election day. This resulted in a compressed timeframe that put extremely high levels of operational pressure on the new IEBC commissioners, especially regarding the adoption and use of election technology. This was particularly difficult in a highly politicized environment.”<sup>45</sup>

**Legal Drafting:** The choice of wording when drafting laws should be carefully considered. Section 83 of the Kenya electoral law stated that: “no election shall be declared to be void by

<sup>44</sup>Shiundu, Alphonse. “MPs Threaten to Disrupt House over Boundaries.” Daily Nation. Accessed July 12, 2019. <https://www.nation.co.ke/news/politics/MPs-threaten-to-disrupt-House-over-boundaries/1064-1060358-w8u2nbz/index.html>.

<sup>45</sup> EUEOM, 2017 Kenya Election Observation Mission, Final Report.

reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.” The word “or” significantly impacted the Kenyan Supreme Court ruling of September 1, 2017. The Supreme Court’s 2017 interpretation diverted from the Court’s 2013 ruling, in which the Court considered the petition had to prove the impact on the results of the election for an election to be declared invalid.

**Forum for reform:** After the 2017 elections, political tensions remained high even following the political agreement between the government and the opposition, while trust in the IEBC was low. There was also little political will for the IEBC to conduct multi-stakeholder meetings as part of electoral reform efforts in 2018. In addition, the judiciary postponed consultations and meetings with the IEBC until all election related petitions were finalized. Therefore, IEBC started its reform effort by establishing a legal task force in March 2018 to conduct an internal legal review process of the election laws and its regulations and policies. The Office of the Registrar for Political Parties also established a similar task force with members of partner organizations, including the IEBC. In the spring of 2019, parliamentarians started to revise election laws, and consulted with the IEBC on proposals to amend the IEBC Act. Two parliamentary committees (Constitutional Oversight and Implementation Committee and the Justice and Legal Affairs Committee) have both tabled two different proposals to reform the IEBC (vacancy, composition, and selection panel), along with a private citizen bill amending the same articles of the law. Additionally, a parliamentary caucus is looking into political party related issues, such as party list and candidate nomination that affect the elections. This diversity of fora and the lack of coordination between the parliamentary committees may put in jeopardy the legal reform effort. Finally, the parliamentary committees have already mentioned four priority areas for election reform, including campaign finance, boundary delimitation, IEBC composition, and holding of a referendum, which all entail sensitive political issues. The IEBC, however, will submit a proposal for comprehensive reform to the Parliament that is not limited to these areas of focus. The IEBC then will also engage with stakeholders including the judiciary, state actors, observer groups and parliamentary committee and caucus to present its proposal for reform.

## Senegal

Year(s)	Initiating Measure	Responsible Body or Forum	Mandate	Participants	Timing and Outcome
2012-2018	Following a peaceful transfer of power in 2012, the president decided to establish a permanent	CNRI composed of independent citizens with expertise in good governance and institutional	Hold consultations and collect opinions to formulate proposals for institutional reforms, including participatory democracy,	The CNRI was supported by a Technical Platform with experts and worked closely with organizations specialized in	The establishment of a permanent election commission (the National Autonomous Election Commission –

	reform commission to hold consultations with citizens, organizations, and stakeholders on broad reforms. Previously, the National Commission for Institutional Reform (CNRI) was a consultative mechanism only.	reform. <sup>46</sup> It also covers electoral legal reform.	decentralization, and checks and balances.	participatory consultations. A non-governmental actors' platform was established, and experts were consulted during the entire process. Opinions from diaspora were also collected. Multi-stakeholder consultations and workshops were held.	CENA) instead of the ministry conducting elections; proposal of amendments to the Constitution/new Constitution.
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**Reform Drivers:** Senegal's 1991 electoral reform unfolded under circumstances with parallels to the DRC's current political context: Senegal's reform was triggered by widespread lack of trust in the procedures and outcomes of the 1988 presidential elections, which extended the 28-year-rule of the Socialist Party (*Parti Socialiste*), and the 8-year rule of then President Abdou Diouf. The lack of electoral legitimacy of his second term was compounded by international conflicts with Mauritania, as well as the enduring Casamance rebellion and the deepening economic crisis that culminated with disputes with international financial institutions. Student revolts were met with disproportionate police brutality, with President Diouf having to ease the pressure of the street protests by inviting the main opposition party to designate several ministers.

**Reform Mechanism:** This power sharing arrangement allowed the overdue electoral reform to move to the top of the government agenda. As recommended in the present paper, President Diouf appointed Justice Keba Mbaye, a universally accepted eminent judge, to recruit a small committee of technical experts to deliberate and consult with the full spectrum of political and civil society actors to distill a catalogue of priority reform measures. The forum that emerged from this initiative, the Technical Commission for Review of the Electoral Code (*Commission Technique de la Revue du Code Électoral*) has materialized into a Senegalese constitutional convention framing frequent periodic electoral reform processes to this day. It has also become a key consolidator of Senegal's long-term political stability. Each of the commission's renewals is formalized by presidential decree.

**Results Verification:** The main output of the commission's first incarnation in 1991 remains especially relevant to address the DRC's 2018 primary lesson learned, notably the mechanism

<sup>46</sup> CNRI Official Website: [http://www.cnrisenegal.org/page-interne.php?id\\_page=NQ==](http://www.cnrisenegal.org/page-interne.php?id_page=NQ==)

by which results are vetted at both the provincial and central levels. Justice Mbaye's committee designed a mixed results management committee, the National Vote Counting Commission (*Commission Nationale de Recensement de Vote* – CNRV), presided by appeals court judges who oversee an arbitration-like 72-hour procedure that vets, debates, and corrects every disputed polling station results form. The procedure unfolds in the presence of the CENA, observer groups, and representatives of all relevant election contestants.

Polling station results the CNRV fails to approve by arbitration are referred for EDR adjudication by the Constitutional Court, which thereby receives a much reduced, and thus more manageable amount of disputed evidence. When the CNRA debuted in 1993, the arbitration process collapsed, and President Diouf called on Justice Mbaye, who then presided the Constitutional Court, to preempt the CNRA's arbitration process by declaring final results by *fait accompli*. That same day, Justice Mbaye resigned from the Constitutional Court to defy the President. CNRA finally completed the results arbitration, and President Diouf was sworn in for another term. The CNRA arbitration process has since performed flawlessly, and it was instrumental in ushering in Senegal's first democratic change of power in 2000.

## Nigeria

Year(s)	Initiating Measure	Responsible Body or Forum	Mandate	Participants	Timing and Outcome
2007 – 2008	Following the controversial 2007 general elections, newly elected President Umaru Yar'Adua inaugurated a 22-member electoral reform committee.	Electoral Reform Committee (ERC)	Examine shortcomings of previous elections and the entire electoral process to ensure that the quality and standard of elections are raised.	<p>22-member committee (Uwais Commission) composed of retired justices, former legislators, former government officials, former EMB chairmen, CSOs, labor unions leaders, and university professors.</p> <p>EMB and CSOs submitted recommendations /proposals to the committee. The ERC received a total of 1,466 memoranda from the general public.</p> <p>ERC conducted public hearings across the six geo-political zones of the country, with a total of 907 presentations made before the committee.</p>	<p>The ERC had 12 months to submit a report, which was later extended by three months. The report was submitted to the president. Recommendations were selected and forwarded in an executive bill to the National Assembly. Amendments were passed in December 2010, a few months ahead of the April 2011 elections.</p>
2013 – 2015	Building on the successes of the 2011 elections and strengthening loop holes in the Electoral Act 2010 as amended.	Parliament initiated the reform and established two legislative committees: Senate Committee to look at the Independent	To examine the laws to aid in building on the successes of the 2011 elections and strengthening loop holes in	Two committees in the legislature (the Senate Committee on INEC and the House Committee on Electoral Matters) were supported by a technical working group. The	<p>Within 12 months. This deadline was later extended. The law was assented to the President a few days (March 26, 2015) before general elections.</p>



		National Electoral Commission (INEC) and a House of Representatives committee to look at electoral matters.	the Electoral Act 2010.	committees presented a bill for amendment before both chambers.  The EMB and CSOs submitted recommendations /proposals to the committees. Public hearings were conducted with local organizations providing logistics and technical support to the committee.	
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**Reform Drivers:** Nigeria has a long history of electoral reforms, which have become recurrent after each election since the country’s independence in 1960.<sup>47</sup> The review of the electoral process has taken three different forms in Nigeria: 1) proposal for reform by civil society, observers, and the public; 2) outcome of the litigation process by the courts; and 3) establishment of a specific commission on electoral reforms. After the 1983 elections, the Babalakin Committee was established by government to inquire into the election process.<sup>48</sup> Following heavily contested and criticized elections in 2007, President Yar’Adua included in his inaugural address a commitment to establish a panel to review the electoral process in a comprehensive manner to reinforce democracy in Nigeria. An electoral reform committee (ERC) was set up shortly after the election and headed by a former Chief of Supreme Court (the Uwais Commission). Both reform cycles led to improvements of the legal framework for elections and of the election activities of the commission.<sup>49</sup>

**Comprehensive reform and wide consultations at local level:** The scope of the reform included the review of past elections, the legal and institutional framework (including electoral system), the independence of the electoral commission, the integrity of the process, and electoral violence prevention. The ERC conducted consultations across the country and witnessed wide participation during its public sessions. This decentralized reform consultation process enabled the ERC to capture local and regional challenges; Its open process built confidence in the work of the ERC by holding public hearings and publicly releasing its report;

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<sup>47</sup> Ibeanu, Okechukwu. “Between Refuge and Rights: Internally Displaced Persons and Inclusive Electoral Process in Nigeri.” INEC, 2015.

<sup>48</sup> Ibidem.

<sup>49</sup> Ibidem.

It created a pro-electoral platform with consensus on critical issues; Its recommendations were therefore mainly accepted thanks to this effort of consultations.<sup>50</sup>

**Independence of EMB:** The independence and impartiality of the EMB has been a recurrent issue raised in Nigeria’s reforms. The election body has often changed names and composition over the years, and the independence of the institution and the integrity of its members remain one of the key elements perceived to be responsible for Nigeria’s history of compromised elections. One unique aspect of Nigerian election reform is the call of the electoral body for reduced responsibilities – compared to other countries in the region that advocate for more extensive functions and powers to control the electoral process. Indeed, the INEC advocated for transfer of duties to other governmental bodies or new commissions to regulate political parties, adjudicate election disputes, or to conduct civic education. The extent of its responsibilities is considered one of the causes of poor performance.

During the 2008-2010 cycle of reforms, the Election Reform Commission made a comprehensive set of recommendations affecting the INEC, including the length of mandate of the members, the method of removal of members, the revision of its structure, and its financial and budget autonomy. This combination of measures will enable the commission to be protected from undue influence from government or other actors and deter its members from politically biased behaviors. The Electoral Code of Nigeria incorporated some of these recommendations to strengthen the independence of the Commission in 2010 ahead of the 2011 federal and state elections. But, the Nigeria context shows that legal reforms are not sufficient to ensure the independence of an electoral body. To establish efficient safeguards for the independence, impartiality, and integrity of an EMB, legal and regulatory provisions must be augmented by training so that personnel can abide by revised rules, and a political context wherein the rules can be implemented without fear of political consequences.

### **African Court on Human and Peoples’ Rights: Côte d’Ivoire Case<sup>51</sup>**

**Regional Court Judgement:** The AfCHPR found that the Government of Côte d’Ivoire had violated the African Charter by not establishing an independent and impartial electoral commission. The allegation before the court was that the government “violated its commitment to establish an independent and impartial electoral body as well as its commitment to protect the right to equality before the law and to equal protection by the law” as required by the African Charter on Democracy, Economic Community of West African States (ECOWAS) Protocol on Democracy and Good Governance, the Universal Declaration of Human Rights, and other international obligations. The applicant contended that because the majority of members of the Independent Electoral Commission (*Commission Électorale Indépendante* – CEI) represented specific political parties and groups or individuals in government, they could not claim to be independent or impartial. In practice, the government is represented by eight members, with four heads of ministries and four individuals appointed

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<sup>50</sup> Fall, Ismaila, Mathias Hounkpe, Adele Jinadu, and Pascale Kambale. “Organes de Gestion Des Élections En Afrique de l’ouest.” Open Society Foundations, 2011.

<sup>51</sup> Africa Court on Human and Peoples’ Rights. *Actions Pour La Protection Des Droits De l’Homme (APDH) v. Republic of Côte d’Ivoire, Application 001/2014*. November 18, 2016.

by the majority. The opposition appoints four members. The decision notes that there are no precise indications in the relevant documents as to the characteristics of independence and impartiality, so holds that “an electoral body is independent where it has administrative and financial autonomy; and offers sufficient guarantees of its members’ independence and impartiality.” The Court held that institutional independence in itself is not sufficient to guarantee the transparent, free, and fair elections advocated in the African Charter and the ECOWAS Protocol on Democracy and Good Governance.

**Centrality of Independence:** The AfCHPR stated that “the electoral body in place should, in addition, be constituted according to law in way that guarantees its independence and impartiality and should be perceived as such.” The Court found that the numerical representation of the ruling party was imbalanced as the government is represented by eight members against four members from the opposition. Moreover, the CEI takes its decisions by simple majority, not encouraging consensus decision-making and lacked public confidence according to observers’ reports. The AfCHPR found that the Government of Côte d’Ivoire violated its regional and international obligations and ordered it to change the law within a year. This jurisprudence from the AfCHPR shows that while the legal provisions provide for an independent model with members of the government, representatives from majority, and the opposition parties, the balanced composition of an EMB in practice and the perception by stakeholders shall be considered when determining whether the election commission meets the independence and impartiality requirement as provided in the African Charter.

**Lingering lack of reforms:** This case was decided in November 2016; as of April 2018, the decision had not been fully implemented. March 2018 protests on the eve of senatorial elections were met with police response,<sup>52</sup> and 18 opposition parties indicated that they would withdraw support from the CEI. While Ivorian President Alassane Ouattara committed to reform the CEI in-line with the AfCHPR’s findings, as of May 2019, the decisions had still not been implemented. The composition of the CEI, along with deep reforms, stands as a major disagreement between the government and opposition, and threatens the 2020 elections.

## Appendix 2: Local Elections and Impact on Reform

Piloting the first cycle of local elections comports a unique set of complications. For this balancing exercise, IFES identifies the following select election management and framework vulnerabilities:

- Several aspirants have begun campaigning for membership in the CENI, whose current mandate lapsed in June 2019. The government may consider renewing a limited number of commissioners to preserve institutional memory, but new commissioners

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<sup>52</sup> Patuel, Francois. “Côte d’Ivoire: Arbitrary Arrests, Crackdown on Dissent and Torture Ahead of Presidential Election.” Accessed July 12, 2019. <https://www.amnesty.org/en/latest/news/2019/02/cote-divoire-arbitrary-arrests-crackdown-on-dissent-and-torture/>.

will still need leadership and technical training to autonomously and competently exercise their function.

- A question arises whether institutional restructuring of the CENI should precede or follow the holding of local elections—and whether such immediate restructuring should entail reform of CENI’s organic law.
- The legal framework suffers certain weaknesses, such as lack of enforceability of the gender quota, high candidate deposits, and a ten percent threshold to obtain seats (without specifying what would happen if no list reaches that threshold). Moreover, the current law requires candidate lists to be ranked in alphabetical order, which could open the doors to “negotiated” post-electoral seat assignments, while largely rendering a women candidate quota inoperative.
- The regulatory framework suffers several shortcomings, such as lack of clarity on whether party agents are entitled to signed copies of EVM generated results sheets, and whether those are then admissible into EDR evidence. Nor does the framework guarantee party agents a copy of handwritten results forms, the only document currently accepted by the courts.
- First instance judges<sup>53</sup> have never adjudicated candidacy and results appeals, over which they will have jurisdiction in local elections for the first time.
- The CENI has already submitted a \$340,000,000 budget, even though in 2015, it had budgeted only \$19,000,000 for the holding of local elections. A realistic budget must hence still be agreed upon.
- Local elections will see a manifold increase in the number of lists and candidates, when compared to national and provincial assembly elections. Candidacy registration will likely be received by lower-level CENI sub-units, which will necessitate more resources and infrastructure to take on the situation. EVM reconfiguration will also be more complicated than for national elections, and electronic ballot errors/omissions will be difficult to document at the EDR stage.
- The CENI’s EVMs have not yet been fully inventoried, so that the current number and storage location of fully functional EVMs remains unknown.
- While CENI headquarters retains the prerogative to officially announce local election results, display of preliminary district totals must be effectively decentralized for transparency purposes. Yet, many CLCRs malfunctioned during the December 2018 results tabulation, display, and transmission.

A greater level of results transparency offers a major advantage to local elections vis-à-vis national elections; sector and chiefdom districts count rarely more than a dozen polling centers so that contestants and observers have easy access to constituency results totals when compared to national aggregation based on satellite transmission. Even if the CENI’s national headquarters retains the prerogative to officiate local election results, paper-based aggregation is finalized by CLCRs in each district. Candidate representatives and observer access to those district-wide compilation centers (and provisional elections results totals) could hence become a marked improvement vis-à-vis the 2018 national results chain.

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<sup>53</sup> High Court (*Tribunal de Grande Instance*) / Court of First Instance (*Tribunal de Première Instance*). Administrative Courts (*Tribunaux Administratifs*) are not yet established.





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