



# European Union Election Observation Mission to Kenya

General Elections 2013

Final Report

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## I. EXECUTIVE SUMMARY

- The 2013 Kenyan General Elections took place following major reforms and massive society-wide efforts for the elections to be peaceful, transparent and credible. This was reflected on Election Day itself by a huge turn out and remarkable patience of Kenyan voters, who must be congratulated for their civic pride and responsibility. While several serious violent incidents occurred in some parts of the country, overall the atmosphere was calm and the democratic spirit of Kenyans prevailed.
- These elections were the first real test of Kenya's new Constitution, new electoral framework and reformed Judiciary. It was an ambitious undertaking to elect the president, the national assembly, women's representatives, the senate, governors and county assemblies in one day. This placed enormous responsibility and called for major endeavours on the part of the Independent Electoral and Boundaries Commission (IEBC), Kenya's legal institutions, its political parties, civil society and other stakeholders, as well as dedication on the part of Kenya's electorate.
- Late amendments to the Elections Act made the pre-election timelines too short. It was therefore very difficult for political parties and the IEBC to attain the high standards demanded of them by the 2010 Constitution for the nomination and vetting of candidates. Another negative consequence of the amended timelines in the Elections Act was that some candidates who won their High Court bid to be on the ballot were still excluded.
- Throughout the electoral preparations, the IEBC retained the electorate's trust. Nonetheless, the IEBC's inconsistent decision-making mechanisms drew it into a series of delays. Overall though, EU observers found that the IEBC and its staff succeeded in overcoming the technical and operational difficulties that arose on Election Day to ensure that the integrity of the vote was protected.
- The application of technology support to Kenya's elections was not a success. This was due in large part to the attempt to introduce new electoral technology less than a year, and in some cases just months prior to the elections. This practice runs contrary to the recommendations of the EC-UNDP conference on IT and Elections Management hosted by the IEBC in Mombasa in 2012. The IEBC did not manage the procurement and implementation efficiently and in a timely fashion, and there was insufficient time left to test the technology and train officials how to use it.
- While the biometric voter registration process successfully registered 14.35m Kenyans, the time allocated was insufficient to register all who were entitled to vote. More than 3m eligible voters were not registered and were therefore unable to vote in these elections. In addition, some Kenyan communities and marginalised groups remain disenfranchised as a result of not having national ID cards.
- The Electronic Voter Identification Devices (EVIDs) were not working or not used in about half the polling stations observed by the EU EOM, while the Electronic

Transmission of Results System (ETRS) eventually delivered just less than half of polling station results, much later than originally envisaged. The technology was supposed to provide back up to the manual checks and tallies, but instead the failure to operate it successfully led to delays and ignited suspicion about the IEBC's management of the elections.

- The processing of official results lacked the necessary transparency. Party agents and election observers were not given adequate access to the tallying processes in the constituency, county and national tallying centres. EU EOM observers noted widespread minor discrepancies in tallies and between numbers of votes cast for presidential and other electoral races, however the differences were almost all less than 1%. This figure tends to imply tallying errors rather than fraud.
- Civil society played an active and positive role in supporting the electoral process, with young people playing an important part. Kenya's state commissions, constitutionally responsible for monitoring and protecting equality and human rights, remained independent and constructive throughout the election.
- Freedom of speech in the media was respected. The media were active in advocating for a peaceful process. They offered extensive coverage of elections and voters were able to access information about contestants and compare candidates in the broadcast debates. However it is also the case that the major broadcast media filtered potentially disagreeable messages that might not conform to their calls for calm and patience.
- Despite the quota system and constitutional principles for affirmative action, women's participation as candidates was disappointingly low. As a result, no women were elected senator or governor. Only 16 women were elected to the National Assembly, 5.5% of the total number of members. Even so, women were well represented in the electoral administration and committed as voters.
- The legislative framework for pre-election dispute resolution in Kenya is extensive but complex and involves multiple channels for complaints and appeals on electoral issues. Judicial reforms since 2010 have increased the capacity of the courts to handle disputes and sufficient avenues for election dispute resolution have been put in place.
- The reforms implemented since 2007 to make Kenyan courts more independent were absolutely vital to the major success of the 2013 Kenyan elections, which was the peaceful resolution of electoral disputes. The numerous electoral petitions filed put these reforms to the test, showing that the Kenyan Judiciary has made a strong and genuine effort to become a truly independent institution of justice. Parties and candidates fulfilled their promise to use the courts to settle their disputes, and accepted their verdicts. Also, the opportunity for parties to win seats in a variety of assemblies from the national to the county level may also have contributed to peaceful acceptance of results.

## **Key recommendations**

A detailed list of the EU EOM's recommendations can be found at the end of this report. Below is a summary of the mission's five key proposals to enhance Kenya's future elections.

- Provide mechanisms to ensure registration and voting for all eligible citizens, including prisoners and staff on duty on Election Day. Revise policies with regard to citizen registration and voter registration in order to provide more inclusivity for marginalised communities.
- Review the legislative framework in order to provide appropriate mechanisms for the implementation of the gender equality principle with respect to the National Assembly and Senate, through legal reform, training and education.
- Improve the planning and management capacity of the IEBC to address the different steps of the electoral cycle in a sequenced and timely manner. Incorporate measures inside the IEBC for full disclosure of its methods at every stage of election administration. Enhance communication within the IEBC to benefit the efficiency of its work, as well as its communication to the public. Review staff planning and training procedures to ensure good quality preparations and that staff numbers are adequate to tasks throughout the electoral process.
- Adopt sound preparations for the introduction of technology, to ensure it functions optimally, with evaluation of purpose and usefulness made public in advance.
- Launch far earlier in the process accessible civic education and voter information programmes to ensure delivery of timely, impartial information to the public.

## **II. INTRODUCTION**

Following an invitation from the Independent Electoral and Boundaries Commission (IEBC), the European Union Election Observation Mission (EU EOM) was present in Kenya from 19 January to 4 April 2013 to observe the 4 March General Elections. The mission was led by Chief Observer Alojz Peterle, Member of the European Parliament (Slovenia). In total, the EU EOM deployed 65 observers from 26 EU Member States, Norway and Switzerland across the country to assess the whole electoral process in accordance with international and regional commitments for elections as well as the laws of Kenya. A delegation of members of the European Parliament, headed by Krzysztof Lisek MEP, also joined the mission to add its expertise around Election Day.

This report provides details of the EU EOM's findings and presents its recommendations for the enhancement of Kenya's future elections. The EU EOM is independent in its findings and conclusions and adheres to the Declaration of Principles for International Election Observation signed at the United Nations in October 2005. The mission wishes to express its appreciation to the Independent Electoral and Boundaries Commission and the other

authorities, political parties and civil society organisations, as well as the people of Kenya, for their cooperation and assistance in the course of the observation. The EU EOM is also grateful to the Delegation of the European Union to Kenya and the European Union member states' diplomatic missions for their support throughout.

### **III. POLITICAL BACKGROUND**

#### **A. Political Context**

The 2013 General Elections were the fifth consecutive General Elections since the re-introduction of the multiparty system in Kenya in 1991. The Kenya African National Union (KANU) party, having been in power since 1963, won both the 1992 and 1997 General Elections. Its leader, Daniel arap Moi, became President of the Republic of Kenya in 1978, when he succeeded after founding President Jomo Kenyatta's death. Ethnic Clashes occurred in the 1992 and 1997 elections. The 1990-2000 decade of Moi's presidency was characterised by land grabbing, corruption and scarcity of state resources. As a consequence, the 2002 elections were an important event in Kenya's history, as the then incumbent President Moi, could not contest it since he had concluded his second and constitutionally final term in the multiparty era.

In 2002 the KANU government, having been in power since independence, lost the elections to the newly founded National Rainbow Coalition (NARC) led by former Vice President Mwai Kibaki (1978–1988). The elections held in December 2007 suffered from a lack of transparency in the process of tallying, which led to a lack of confidence in the accuracy of the results. Mwai Kibaki, then incumbent President, officially won with 46.4% against the opposition leader, Raila Odinga, who garnered 44.1%. After the announcement of the results, widespread violence and ethnic clashes swept through the country for several weeks. Around 1,300 people were killed and around 600,000 displaced from their homes. The international community engaged with Kenyans to achieve a peaceful solution and the Kofi Annan-led dialogue resulted in the formation of a coalition government in 2008, with Mwai Kibaki as President and Raila Odinga as Prime Minister. In the years that followed, enormous efforts were undertaken to reconcile the different communities, including by civil society organisations and the National Cohesion and Integration Commission among others. A national reform process was undertaken to revise Kenya's laws and its legal institutions. Kenya's new Constitution was adopted by referendum in August 2010.

The 2013 General Elections constituted the first major test for the Constitution, for the many implementing laws, for the Independent Electoral and Boundaries Commission (IEBC) and for the reformed Judiciary. Most of the recommendations of the final report of the 2007 EU



EOM to Kenya and the 2008 Kriegler Commission report<sup>1</sup> were integrated into the Constitution and the Elections Act. The Constitution introduced a bicameral parliamentary system, devolved the government to 47 counties and introduced elections for six offices in one general election, namely the President, Senator, Governor, Member of Parliament, Women's Representative, and County Assembly Representatives.

## **B. Key Political Actors**

According to data from the IEBC Office of the Registrar of Political Parties,<sup>2</sup> there are 59 registered political parties in Kenya. The political landscape was characterised by the formation of strategic alliances along ethnic lines, rather than strong ideological positions. The three main alliances were:

- (i) The Jubilee coalition (The National Alliance-TNA/United Republican Party-URP), led by Uhuru Kenyatta and William Ruto.
- (ii) The Coalition for Reform and Democracy (CORD) alliance (ODM/Wiper Democratic Movement), led by Raila Odinga and Kalonzo Musyoka.
- (iii) The *Amani* coalition (UDF/Kenya African National Union–KANU/ New Forum for the Restoration of Democracy Kenya–New-FORD-Kenya): Musalia Mudavadi led the *Amani* coalition during 2013 campaign.

In addition, there was also the Eagle alliance led by Peter Kenneth (Kenya National Congress – KNC) and Raphael Tuju (Party of Action – POA). Two relatively young Kenyan politicians led the Eagle alliance presidential ticket, with a strong focus on performance and targeting young urban voters. Other contenders for the presidency included: Martha Karua of NARC-Kenya, James Ole Kiyapi of Restore and Build Kenya party (RBK), Mohamed Abduba Dida of the Alliance for Real Change (ARK) and Paul Muite of SAFINA party.

The political environment was affected by the forthcoming trials at the International Criminal Court (ICC). Mr Kenyatta and Mr Ruto (Jubilee presidential candidates) both face charges for crimes against humanity committed in the course of the post-electoral violence in 2007/8, however the candidates reframed their charges to the nation as a conspiracy by the international community to impose its preferred leaders on Kenyans. This was used as a method to rally their ethnic communities' support. However the ICC case also raised

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<sup>1</sup> The Kriegler Commission, set up in March 2008 and comprising eight members, held an inquiry into the facts and incidents of the elections held in December 2007. The Commission then presented its conclusions in a report that was made public in September 2008; *The Kriegler Report on the December 2007 Elections*, Nairobi, 2008.

<sup>2</sup> 3.4 million Kenyans have registered themselves as members of political parties. According to data compiled by the IEBC, the top four are: TNA with 290,730 members, ODM with 278,217 members, UDF with 209,217 members and URP with 198,737 members.

consciousness about judicial consequences for violent actions during elections, which likely played a role in contributing to a broadly peaceful campaign.

## **IV. LEGAL FRAMEWORK**

### **A. Kenya's international and regional obligations**

The electoral legal framework of Kenya was completely overhauled since the 2007 elections. The Constitution and all the relevant laws have been replaced, the Judiciary reformed and the dispute resolution mechanisms much expanded. The new transformed framework is in accord with Kenya's international and regional obligations related to the conduct of democratic elections. Kenya has ratified the major international instruments which cover electoral rights including the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and People's Rights (ACHPR), the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities. Under the 2010 Constitution<sup>3</sup> such treaty obligations are incorporated directly into Kenyan law at ratification and can be relied on in court. In this spirit the courts of Kenya have applied Article 25 of the ICCPR and the General Comment thereon from the United Nations Human Rights Committee.

The legal framework with regards to gender equality is compliant with international standards as CEDAW is directly applicable and the Constitution<sup>4</sup> outlaws gender discrimination in relation to land, property and inheritance and provides that women and men have the right to equal treatment and opportunities in political, economic, cultural and social spheres.

### **B. Constitution**

The 2010 Constitution entrenches an expansive Bill of Rights which strengthens protection for the civil and political rights relevant to elections, access to information and freedom of the media, and gives special attention to the rights of women, persons with disabilities, children, young persons, minorities and marginalised groups. Under Article 81 the general principle for the electoral system is *'free and fair elections which are by secret ballot, free from violence, intimidation, improper influence or corruption, conducted by an independent body, transparent, and administered in an impartial neutral, efficient, accurate and accountable manner'*, and further in Article 38(2) *'every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors, for any elective body or office established under this Constitution, or any office of any political party of which the citizen is a member.'*

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<sup>3</sup> Article 2(6)

<sup>4</sup> Article 27

### **C. National legal framework**

The Elections Act, Political Parties Act, and Independent Electoral and Boundary Commission Act, all from 2011, elaborate the electoral legal framework. The Constitution required other laws which the out-going National Assembly failed to pass in time for these elections, such as in the area of campaign financing<sup>5</sup> where the existing system of accounts and statements is inadequate to provide transparency, the failure to provide a statutory mechanism to implement the right to access information<sup>6</sup>, and the failure to effectively implement<sup>7</sup> the integrity vetting procedure set out in Chapter Six.

The other gaps in the framework were laws about applying the constitutional gender quota<sup>8</sup> to the National Assembly and provisions about disputes after the first round of the presidential poll. Those gaps were addressed by the Supreme Court in December 2012 after an application by the Attorney General for an Advisory Opinion.

The Elections Act deals with voter registration, the method of nomination and qualification of candidates at all levels, sets out election offenses and the rules for post election petitions. It contains an elaborate Electoral Code of Conduct which is compulsory for all parties and candidates with criminal sanctions and a separate complaint resolution procedure. Since July 2012 the Elections Act was amended by six later acts, principally to reduce candidacy requirements and shorten time limits. Many of the later amendments were stated to apply for these elections only. The date when aspirants could switch political parties was amended from 17 October 2012 to 4 January 2013 and later to 18 January. These amendments had the effect of encouraging parties to leave nomination choices until the last minute with the result that many dissatisfied aspirants took the option of party hopping rather than dispute the nomination decision. Insufficient time was left for the dispute resolution process to be completed before ballots were printed, so in most cases where the High Court ordered that the name of a candidate be added to the ballot, the IEBC stated that it was too late to do so. This breached the right of those candidates to an effective remedy and their right to participate in public life. The late amendments also meant that there was insufficient time for the IEBC and the other constitutional agencies to carry out candidate vetting procedures which were expected to flow from Chapter Six of the Constitution.

The Political Parties Act provides that a party must have one thousand members in each of at least 24 of the 47 counties.<sup>9</sup> This restriction on the freedom of association and political rights through political parties<sup>10</sup> may be excessively restrictive, however it is the result of political compromise and based on the view that Kenyan political parties should rise above localised

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<sup>5</sup> Under Article 88(4) of the Constitution the IEBC is responsible for capping campaign expenditure.

<sup>6</sup> Required by Article 35 of the Constitution.

<sup>7</sup> The machinery under the Leadership and Integrity Act 2012 is incomplete.

<sup>8</sup> In Article 81(b).

<sup>9</sup> Section 7(2)

<sup>10</sup> As set out in Article 38(1).

(ethnic) allegiances. Political parties must also comply with the comprehensive “Code of Conduct for Political Parties” attached to the Political Parties Act, which requires respect for the Constitution and national unity.

#### **D. Courts and judges**

The legal system follows the common law model with the availability of judicial review of administrative actions by the High Court. There is a new and powerful Supreme Court, a Court of Appeal, a High Court which is the court of first instance for constitutional matters, and Magistrate’s Courts. Under the Constitution all courts are bound to follow decisions of the Supreme Court.<sup>11</sup>

The Kenyan Judiciary was discredited after the 2007 elections. A comprehensive judicial vetting process started in 2012<sup>12</sup> as a result of which 25% of the higher judges were found unfit to continue serving.<sup>13</sup> The process continues with the magistracy. The reformed Judiciary has shown itself to be active and protective of election rights, and constructive in filling some of the gaps in the legal framework. The courts filled gaps in the legal framework by clarifying the election date,<sup>14</sup> the application of gender quota, the mechanism for disputes on first round of the presidential election, the requirement for educational qualifications,<sup>15</sup> and the ability of prisoners<sup>16</sup> and Kenyans living abroad<sup>17</sup> to vote. In the application by CORD just after the election the High Court gave direct effect to the constitutional right<sup>18</sup> to access public information in the context of documents required for the planned presidential election petition.

Before the election there was concern about security for the Judiciary following five attacks on High Court judges and a threatening letter to the Chief Justice.<sup>19</sup> Despite these concerns the Judiciary was proactive in planning for the workload associated with the elections through the Judiciary Working Committee on Electoral Preparations.

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<sup>11</sup> Article 169(7)

<sup>12</sup> Section 23 of the Sixth Schedule to the Constitution as elaborated in the Judges and Magistrates Vetting Act 2011

<sup>13</sup> Some judges appealed against this decision and a small number were reinstated. This is a positive reflection of the vetting system as it shows that due process applied.

<sup>14</sup> Centre for Rights Education and Awareness v John Harun Mwau and others [2012] eKLR. There was a clash between the substantive and the transitional provisions of the Constitution and a three judge bench in January 2012 decided that the election had to be within 60 days of 15 January 2013.

<sup>15</sup> In Johnson Muthama v Minister for Justice and Constitutional Affairs and another [2012] eKLR the court decided that the requirement for post primary education for all candidates was unconstitutional in the context of access to education in Kenya and on gender grounds.

<sup>16</sup> Kituo Cha Sheria v IEBC and another [2013] eKLR

<sup>17</sup> New Vision Kenya and three others v IEBC and eight others [2012] eKLR

<sup>18</sup> Found in Article 35

<sup>19</sup> See press release from Chief Justice of 20 February 2013 and Daily Nation 21 February.

A culture of constitutionalism and respect for the rule of law is embedded in the 2010 Constitution and applied by the reformed Judiciary. However some elements remain from an earlier culture of control by government. These include the government memorandum restricting foreign travel by office holders and senior judges without approval, and the blanket ban on marches and public meetings announced by the Head of the Civil Service and the Inspector General of Police after election day and again as the Supreme Court petitions got underway. This ban had no basis in the relevant statute (Public Order Act) and was a disproportionate restriction on the rights of assembly and expression protected by the Constitution and international obligations. The failure to ensure compliance with the case allowing prisoners to vote and to put on the ballot paper those candidates who were so ordered by the High Court reflects a similar residuary view that government agencies are beyond the rule of law. Rather than proceeding at the election with the ballot papers without those added candidates the IEBC had the option of a postponement which it used on 1 March in the three cases of ward elections where it was discovered that the ballots had been printed wrongly. The prisoners' case will result in an application for contempt of court against the IEBC.

### **E. The Electoral System**

As well as introducing a bicameral parliamentary system (the National Assembly and the newly-created Senate), the 2010 Constitution devolves power to County Assemblies and Governors. The 2013 General Elections encompassed Presidential, Parliamentary and County Government elections, and under the reformed government system, this entails six direct elections: Presidential; National Assembly; Senate, Reserved Women's seats to National Assembly; County Governor and County Assembly. Under the Constitution these elections should be held on the same day.

All elected posts have a five-year term and follow the majoritarian system (first-past-the-post), with electoral areas varying according to the post. For the purposes of electing a president, the national territory constitutes a single constituency. To be elected in one round, a presidential candidate requires more than 50% of the valid votes cast and at least 25% of the votes cast in more than half of the counties, i.e. in at least 24 of the 47 counties. One National Assembly member is elected from each of the 290 constituencies, while Senate members and National Assembly seats reserved to women are elected from counties. County assembly members are elected from wards, the smallest administrative unit.

In addition to the directly-elected positions, the new electoral system provides for some seats nominated by political parties in proportion to their elected representation in the National Assembly (12 nominated seats, alongside 290 elected seats), Senate (20 nominated seats, alongside 47 elected seats) and County Assemblies (variable numbers, on the basis of one county assembly member elected from each of the 1450 wards.) The nominated seats include a number reserved for youth, workers and disabled representatives, among whom a certain

number must be women. The Elections Act does not specify how these nominated seats should be allocated but the IEBC issued a formula two days before the elections.<sup>20</sup>

#### **F. Delimitation of electoral boundaries**

One of the IEBC's first tasks<sup>21</sup> was to review the constituency and ward boundaries planned by the earlier Interim Election Body. Here the IEBC focused on the application of the population quota in the Constitution,<sup>22</sup> which aims at equality of vote, stipulating that constituencies should have populations within a margin of 30% or even 40% of the average, depending on whether rural or urban areas are involved. There was a public consultation process and after the final report in March 2012, there were 128 appeals to the High Court of which 70 were dismissed. The court dealt with all these matters in an omnibus judgment<sup>23</sup> in July 2012, and tended to accept the decision of the IEBC unless it appeared arbitrary. Some decisions were sent back to the IEBC to have reasoning clarified. In some cases the issue under appeal was the name of the electoral area. Some cases went on further appeal but were eventually overtaken by time. Following the review, the number of legislative constituencies was increased to 290 from 210, and 1,450 local constituencies. In addition, 47 counties have been created under the new legislative framework. These are also electoral areas, from which Senate and women NA members are elected.

The Constitution provides that boundaries must be reviewed periodically at intervals of not less than eight and not more than twelve years and requires a progressive movement towards the population quota. The extent of the deviation allowed by the Constitution is inconsistent with the general principle of the equality of the ballot, since it allows large variations in constituency size. In addition, 43 of the 290 constituencies do not meet the requirements, with 28 constituencies having populations more than 40% larger than average, and 15 with populations more than 40% smaller than the average. The smallest constituency (Lamu East) records 18,841 inhabitants, while the biggest (Mandera South) has 247,619 inhabitants, a 13-fold difference. Counties are also demarcated with insufficient regard for equality of vote: 15 of the 47 counties have populations more than 40% bigger or smaller than the average county size.

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<sup>20</sup> The formula for determining how many seats any political party may nominate in the Senate, Parliament and County Assemblies is: number of elected seats divided by total number of seats in the house, multiplied by total number of nominated seats available.

<sup>21</sup> See the Fifth Schedule to the IEBC Act 2011.

<sup>22</sup> Article 89

<sup>23</sup> Republic v IEBC & another Ex Parte Councillor Elliot Lidubwi Kihusa [2012] eKLR

## V. ELECTION ADMINISTRATION

### A. Structure and Composition of the Election Administration

The 2010 Constitution established the IEBC and granted it a particularly wide mandate, encompassing the organisation of all elections and referenda, as well the delimitation of constituencies; continuous voter registration; the regulation of party nominations and registration of candidates; voter education; regulation of campaign spending; settling electoral disputes and prosecution of electoral offenses.

The IEBC's eight Commissioners and its Chairman were appointed for a single six-year term through a thorough and accountable process culminating in approval by the National Assembly and the President.<sup>24</sup> This appointments process and the high requirements for integrity for its Commissioners ensured that from the outset, the IEBC was considered to be professional and impartial.

The IEBC has a Secretariat responsible for programme implementation, headed by the Chief Election Officer and composed of nine directorates and 17 departments. A single Directorate is responsible for both Voter Registration and Election Operations, and although several departments are responsible for elements of results processing, there is no operational unit responsible for the oversight of election results.

Other permanent positions include the 17 Regional Election Coordinators (RECs) and the 290 Constituency Returning Officers. In addition, 47 County Returning Officers are appointed for the election period. These last were released from their duties in the days following the announcement of results and it might have been useful for their employment to be extended some further weeks. All Returning Officers are supported by a Deputy Returning Officer, but the range of their responsibilities are such that further temporary managers could be useful to help implement their work. RECs and Returning Officers were posted to regions other than their usual residence, in order to protect them from pressure and accusations of local bias. Although in some cases language difficulties posed a challenge, this system appears to have worked well on the whole.

Lastly, staff was employed to administer voting procedures in the 32,613 polling stations. The number of staff members varied according how many voters were registered at a particular station and allocation of staff was generally adequate, except for when larger polling stations

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<sup>24</sup> The full process is described in the First Schedule of the Independent Elections and Boundaries Commission Act 2011. It begins with the composition of a Selection Panel, itself approved by the National Assembly and made up of seven members named by the President, the Prime Minister, the Judicial Services Commission, the Kenya Anti-Corruption Board and the Association of Professional Societies of East Africa. After these first elections under the new Constitution and the removal of the position of Prime Minister, four members of the Selection Committee will be named by the President, according to Article 8 of the First Schedule, IECB Act 2011.

required late counting procedures and the physical demands on staff could have been alleviated with the provision of more staff.

## **B. Administration of the Elections**

The IEBC was charged with simultaneously administering six nationwide elections; the volume and complexity of its tasks were extraordinary. Throughout election preparations, the IEBC retained the public's trust and it was not until after the tallying process and announcement of results that any political party made any allegations regarding the Commission's partiality.

However, the IEBC's efficiency was sometimes hindered by the lack of a consistent decision-making process, resulting in a series of delays. Beginning with a three-month delay of voter registration as a result of procurement difficulties, key elements of the electoral framework were carried out in evermore compressed timeframes and too close to polling to ensure steady implementation. In the last few weeks of preparations, endeavours such as recruitment of polling staff and the distribution of materials were made more difficult in the absence of finalised decisions about polling stations, which the Election Regulations imply should be gazetted three months before Election Day.<sup>25</sup> Many of the problems which emerged on and after Election Day were connected to lack of time for sufficiently thorough preparation. Lack of time also impeded addressing the results of human error. For example, it was only discovered on Election Day that ballots in four wards were misprinted – county assembly elections in these wards were therefore postponed.

The IEBC invested in technology to ensure transparency and efficiency, specifically in relation to voter registration and identification, and the processing of results. However this was not adequately planned, and some of the confidence-building advantages sought from technology could equally have been achieved by more systematic and detailed communications to the electorate, alongside more precise, comprehensive and widely disseminated published procedures covering all stages of the electoral process.

The IEBC is empowered to issue regulations to supplement the Elections Act, subject to approval by the National Assembly, and it published three sets of regulations, covering general procedures, as well as voter education and voter registration. Although issued late in the process, these regulations contributed to transparency. It would be useful for future elections for the general procedures regulations to be expanded to cover all elements of the process.

Training of election staff was of high quality at the top of the cascade training system, but at the later stages large classes and the incomplete deployment of devices for Electronic Voter Identification and Electronic Transmission of Results contributed to limited practical

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<sup>25</sup> Article 7(3), The Elections (General) Regulations 2012.



understanding of how to use the devices. A simulation of voting, counting and results transmission procedures held in every ward of the country was a useful exercise, enabling participating polling staff to practice, but the event being held just a week before Election Day limited the scope for addressing technical problems.

The IEBC maintained a useful website and in the last weeks before polling communicated frequently to the public, although it tended to emphasise reassurances, creating high expectations rather than informing citizens of the challenges and potential imperfections of the administration.

### **C. Civic Education and Voter Information**

Civic education and voter information programmes started late for such a complex election process under a new legal framework. The IEBC carried out its own programmes as well as accrediting other organisations to do so but there was little evidence of effective voter education until the IEBC launched its programme in every ward of the country one month before polling. Topics ranged from peaceful campaigns and making sound choices to voting procedures. High quality civic education manuals were produced but, at such a late stage of election preparations, this was not likely to have achieved any significant impact on levels of awareness about governance and the elected posts. It would have been useful to establish civic education programmes earlier, which could then have been supplanted by voter information.

Voter information materials were well designed but only produced in English and Swahili, which may have disadvantaged Kenyans whose mother tongue was one of over 60 other languages used in the country. In the media, voter information was only visible some two weeks before the elections but it was not limited to spots and also involved good quality programmes addressing voters' understanding of voting procedures.

One week before polling, mock elections were held in each of the country's 1,450 wards, serving both as a voter information event and a training and simulation exercise for polling staff. It was reported to be useful for those who attended, and expanding the exercise would be beneficial.

## **VI. VOTER REGISTRATION**

### **A. The Right to Vote**

The Constitution establishes extremely inclusive criteria for the right to vote. It is sufficient to be an adult citizen of sound mind and without convictions for electoral offenses in the previous five years. In practice however, the Elections Act stipulates that qualifying age and citizenship must be proven by possession of a National Identity Card and not all citizens have one. Groups most likely not to have Identity Cards include young people and pastoralists,

while procedures for confirming age and identity in border areas can be disproportionately cumbersome, particularly for those who lack official proof of citizenship. The IEBC assessed its maximum registration target on the basis of an estimated 3 million citizens without identity cards.

Although the IIEC set a positive precedent during the Constitutional Referendum by enabling prisoners to register and vote, the IEBC did not register prisoners, nor enable voting for those prisoners who had registered prior to detention, despite a High Court order to that effect on 25 January 2013, which the IEBC judged came too late to implement.

Provision was made for Kenyans residing in Burundi, Rwanda, Tanzania and Uganda to register and vote in the presidential elections. Although registration from the diaspora was very limited (2,637 voters in all), a precedent was set and implementation of the Constitution's provisions with respect to universality of the right to vote could be applied progressively. If logistical obstacles impede the full implementation of the universal right to vote, these should be explicitly considered, discussed and the decision published.

### **B. Voter Registration Process**

Since the National Identity Card system already uses biometrics, there was arguably no need to carry out biometric voter registration and the IEBC initially preferred a simpler optical marker recognition system. However, political parties insisted on the use of Biometric Voter Registration (BVR). Procurement problems resulted in a three-month delay and a curtailment of all stages of voter registration. This delay was to have serious repercussions on election preparations and, ultimately, on the reliability and perceived credibility of the register itself.

The Elections Act was amended to reflect the new timeframes for voter registration, reducing the period for registration from 60 to 30 days, citizen verification from 28 to 14 days, and setting the deadline for finalisation of the Voter Register 14 days before polling, rather than one month before. Considering that the Voter Register is a cornerstone of the election process, these limited timeframes are problematic. Registration was carried out in 15,000 centres across the country from 18 November 2012, but an insufficient number of BVR kits meant that these were not all functional throughout the registration period. Recorded data – names, fingerprints and photographs as well as address and registration location – were sent to a central database as well as saved on backup discs, while manual entries were made in 'green books', which remained in constituency registration centres.

The IEBC published provisional figures at the close of registration in December and between 14 and 28 January 2013, citizens were able to check their registration details in person at registration centres, online or by SMS, this last method being the most frequently used. It was unfortunate that neither online nor SMS methods were facilitated between the end of the

official verification period and polling. Reports indicated that most citizens did not check their registration details.

From end January until 20 February, the IEBC processed data, identifying and removing duplicate entries, as well as retrieving data which had not been sent to central register.

### **C. The Voter Register**

The Voter Register was officially completed on 20 February 2013 and summaries of registration figures were released a few days later, just 10 days before polling. It listed 14,352,545 people, around 80% of the targeted 18 million citizens estimated to have national ID cards (and corresponding to around 68% of the voting age population). This constituted an improvement over registration for the 2010 Referendum. Registration figures varied significantly from region to region but this was widely considered to be due to different political parties' variable efforts in mobilising people.

The Voter Register was not the subject of controversy until after Election Day, when its weaknesses led to the use of several different lists and closer scrutiny of the provisional and final figures. Thereafter, the Voter Register's reliability was called into question. Just two days before polling, the IEBC published lists detailing 36,236 registrations for which biometric data was not available. Only after the announcement of election results did it emerge that these were not included in the overall figure of entries published earlier, or in the figures cited in the election results. In conjunction with inconsistent procedures for verifying registration on polling day, this separate list of voters contributed to some of the discrepancies that were later identified in the results.

The use of the voter register on Election Day did not enable consistently reliable records of registered citizens, nor of how many had voted. Following the failure of pollbooks (laptops with a full voter register and a fingerprint-reading device), alongside difficulty in identifying voters in the correct polling stations, a total of four different lists were used: the register in pollbooks; the lists printed for individual polling stations; the list of people whose biometric data had not been captured, and finally, the entries listed in the 'green books' – the manual records of entries made during voter registration.

## **VII. NOMINATION AND REGISTRATION**

Until 2008, there was no proper legal framework to regulate the operation of political parties despite the fact that political parties play a central role in the country's governance process. Instead, political parties were registered and regulated under the Societies Act, an umbrella law that governed the operations of all associations. In June 2008, the Political Parties Act was passed and created the office of the Registrar of Political Parties. The 2008 Act gives this office the duty of regulating the registration and operations of political parties. In 2011, the

new Political Parties Act still governed the registration and operation of political parties through the office of the Registrar of Political Parties at the IEBC. This office supervises the implementation of the Political Parties Act. The office of the Registrar of Political Parties is also working on the political parties' nomination rules.

### **A. Candidate and Party Nomination**

The nomination of candidates by political parties in Kenya has always been an internal affair conducted on the basis of each party's constitution and election nomination rules. However, complaints often arose about the manner in which political parties conducted their nominations. Moreover, in the past (in 1992, 1997, 2002 and 2007), primary elections were characterised by complications and serious violence. Realising that the nomination process impacts on the entire electoral process, the new Constitution worked towards regulating the manner in which political parties conduct their nominations. For the first time in Kenya's history, the new Constitution formally recognised political parties as essential institutions of governance. This underscores the role that political parties are expected to play in consolidating democratic governance.<sup>26</sup> The Constitution also provides room for independent candidates; candidates that stand for election without any affiliation to a political party.<sup>27</sup> It also requires that internal party elections be regular, fair and free and this covers the party primaries for candidates.<sup>28</sup> The Elections Act, as originally enacted, outlined a coherent structure of timelines to allow for internal party competitions, nominations to the IEBC, checking of qualifications and time for disputes relating to these steps. Unfortunately these timelines were shortened in the six amending Acts in 2012 and early 2013 so that there was no time at nominations for disputes to be resolved or the candidate vetting procedure contemplated by the Constitution to be carried out.

The 2013 nominations for political party primaries took place rather chaotically amid accusations of rigging. The IEBC extended the deadline for political parties to submit their final list of candidates from 18 to 24 January 2013. Factors such as lack of experience, late preparation, and mismanagement caused delays and subsequently provoked multiple disputes over the results. Major political parties failed to meet crucial deadlines and this led to protracted nominations in some areas. Only six out of 59 parties managed to deliver their list on time. In some areas, the party primaries were marred by violent incidents, especially in Nyanza. Nominations were also tense in the Kilifi County where the Mombasa Republican Council (MRC), which seeks to break away from Coast Province and declare itself an independent state, warned residents not to participate in the nominations. The way the

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<sup>26</sup> Article 91 of the Constitution of Kenya, 2010. In addition, the requirement for parties to have a national character is expected to counter regional or ethnic-based political parties. According to the Political Parties Act, parties are therefore required to have registered at least 1,000 members in a minimum of 24 out of the 47 counties. The membership is also required to reflect regional and ethnic diversity.

<sup>27</sup> Article 85 of the Constitution of Kenya, 2010.

<sup>28</sup> Article 91(1)(c) of the Constitution of Kenya, 2010.

political party nomination process was carried out led to party hopping and was also discriminatory against women and marginalised groups. Nevertheless, despite all these difficulties, political parties managed to register well over 20,000 candidates for the 1,882 elective positions.

One of the milestones of the process was that candidates who had complaints sought legal redress in large numbers through the channels accorded by the Kenyan legal framework. In this case, IEBC Commissioners were tasked with reviewing the cases (207 in total).

The nomination process run by the IEBC at the beginning of February exposed the ineffectiveness of integrity vetting in relation to candidates, which had been anticipated to flow from Chapter Six of the Constitution. The Leadership and Integrity Act designed to give life to Chapter Six was diluted by the National Assembly in 2012 to exclude a stricter vetting system, and the extension of nomination timelines by amendments to the Elections Act meant that even if the IEBC wished to check on the integrity of candidates it did not have the time to do so. Further, the High Court held<sup>29</sup> that while the integrity provisions applied to appointed positions, it did not for election candidates where the test is “free and fair elections”. Ultimately, no candidates were rejected by the IEBC for integrity reasons.

## **B. Registration of Candidates**

The certification of presidential candidates by the IEBC took place over a two-day period on 30 and 31 January 2013 without major problems. Eight presidential candidates and their running mates were cleared by the IEBC: Martha Karua (NARC-Kenya); Peter Kenneth (KNC - Eagle Alliance), James ole Kiyiapi (RBK), Musalia Mudavadi (UDF - Amani Coalition), Uhuru Kenyatta (TNA – Jubilee Coalition), Mohamed Abduba Dida (ARK), Raila Odinga (ODM - CORD Coalition) and Paul Muite (SAFINA party). The ninth candidate Chris Matata Musyoka, who had intended to run for a Party of Democratic Unity ticket (PDU), was disqualified for failing to show up on time.<sup>30</sup> Mr Musyoka declined to petition the decision of the IEBC. As a sign of commitment to peaceful campaigning and acceptance of results, political parties and candidates all signed Electoral Codes of Conduct, agreeing in particular that they would be held "personally responsible" for electoral malpractices, including violence, incitement to violence and bribery and promised that any complaints would be dealt with through the courts.

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<sup>29</sup> In a case brought by an NGO, Kitua Cha Sheria. That case is under appeal.

<sup>30</sup> According to an IEBC notice, candidates were supposed to present their papers between 8am and 4pm and Mr Musyoka arrived at 4.07pm.

The Electoral Commission finalised the candidate lists on 1 February 2013. In all, 59 political parties registered 12,491 candidates vying for the 1,882 elective positions. ODM and TNA emerged as the two major political parties, with 1,394 and 1,271 candidates for all the elections respectively. Women's participation as candidates in the General Elections was disappointingly low. Out of 237 candidates for 47 governor positions, only seven candidates are women (3%). Out of the total number of 244 candidates for 47 elected Senate positions, only 19 candidates are women (8%). Out of the 9,603 candidates for county assembly 697 candidates were women (7%). Finally, 198 candidates have been cleared to run as independents.

## **VIII. CAMPAIGN ENVIRONMENT**

### **A. Overview of the Election Campaign**

EU observers reported a calm election campaign with respect for freedom of expression, assembly and movement for political parties and candidates around the country. Some isolated cases of destruction of campaign materials were observed (Nakuru and Nyeri) which had a negligible impact on the electoral atmosphere. A number of positive factors (the new Constitution, independent Judiciary) contributed to a more relaxed campaign environment, while many of the contenders spoke out against political violence, which was not the case during the 2007 General Elections. The establishment of the National Cohesion and Integration Commission (NCIC)<sup>31</sup> was a milestone for Kenya. The widely broadcast presidential debates were a positive element, helping to acquaint the electorate with the candidates and their policies. However, there were isolated outbreaks of violence, especially in Coast, North Eastern and Rift Valley. The most serious incidents observed by EU EOM took place in Meru and Embu on 14-15 February during CORD presidential rallies which were disrupted by rival supporters. Several instances of intimidation of women candidates and their supporters were also reported.

An unequal playing field was noticeable throughout the campaign. This was exacerbated by uncertainty over the exact starting date of the campaign, which was not officially announced by the IEBC, giving the advantage to those parties which could afford to finance a longer campaign period. The Jubilee coalition and the CORD alliance were the most dominant campaigners, enjoying more media coverage and clearly having more financial resources. The handing out of money to voters was directly observed by the EU EOM during rallies (Nairobi, Western, Rift Valley and Coast). At the local electoral levels candidates used their own resources for campaigning and did not receive substantial support from their parties.

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<sup>31</sup> Following the 2007/08 post-elections' violence, as a long-term measure, Kenya adopted the National Cohesion and Integration Act, which provides for the establishment of the NCIC.

The strategy of the two major players, Jubilee and CORD, was to consolidate their strongholds and focus on “uncertain” counties. Thus, the large coalitions concentrated efforts on peripheral counties surrounding the former Central Province (Machakos, Embu, Meru Tharaka Nithi, Laikipia, Nyandarua and Nakuru). These counties are highly populated and there were many undecided voters. In parallel, CORD Coalition presidential candidate Raila Odinga was reaching out to small communities (Masaï, Meru etc.). Although parties belonging to the same coalitions often claimed to campaign together for the presidential election, intense competition was witnessed within the individual coalitions in the scramble for lower-level seats, as in the South Rift between URP and TNA, or between ODM and Wiper in Mombasa.

Major campaign themes included land reform and ethnic identity, which were used to rally support from different regions. Political parties used these issues to boost their popularity, even though they risked dividing Kenyans. Nevertheless, the presidential candidates held two debates in February where they challenged each other on issues of governance and public policy.

### **B. Abuse of public resources**

The Elections Act contains a prohibition on the use of public resources for the purpose of campaigning<sup>32</sup> and also prohibits<sup>33</sup> public officers from campaigning or initiating new development projects for the purpose of supporting a candidate or political party.

There was active oversight by the courts and responsible agencies of public spending which could be abused for campaign purposes. On 7 February the High Court ordered<sup>34</sup> that the planned release of Ksh 10 billion to the Constituency Development Fund should not go ahead until further order, as disbursements from that fund are heavily influenced by Members of Parliament and their nominees at constituency level and could be abused for campaign purposes. On 8 February the Ethics and Anti-Corruption Commission also expressed concern that this fund could be abused. On the same day the Head of the Civil Service announced that no more major government tenders would be initiated before the election, and on 11 February he issued a circular warning civil servants including District Commissioners, District Officers, Chiefs and Assistant Chiefs not to engage in politics or they would be disciplined. That official was himself accused by CORD of plotting with provincial administrators to rig the poll. That allegation was investigated by the police and later dismissed by the Director of Public Prosecutions.

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<sup>32</sup> Section 68

<sup>33</sup> Section 43

<sup>34</sup> On the application of an NGO, The Institute of Social Accountability.

These developments helped heighten understanding of the prohibitions in the Elections Act on the use of public resources in the campaign. These matters were monitored by a constitutional commission, the Commission for Administrative Justice, which at an early stage of the campaign persuaded the Prime Minister's Office to stop using its official website for campaign purposes.

### **C. Campaign financing**

Despite the failure of the National Assembly to pass the Election Campaign Financing Bill 2012 and of the IEBC to fulfil its constitutional responsibility<sup>35</sup> to cap campaign spending, there were still some restrictions and transparency provisions on political parties' funding set out in the Political Parties Act 2011. However these are very general in nature and not effective to control excessive spending, the consequence of which was to marginalise smaller parties and candidates with less money. There was no limitation on how much cash parties or candidates could distribute at election rallies. Although such activity constituted an election offense it was reported by EU EOM observers to be carried out by various parties and candidates. The more long established parties had the added benefit of funding from the Political Parties Fund under the earlier Political Parties Act of 2008.

## **IX. MEDIA AND THE ELECTIONS**

### **A. Media environment**

Kenya's media sector is well developed; in the last decade the broadcast media proliferated rapidly and there are around 100 radio and 15 TV stations currently operating in the country. The popular national media are available in English or Kiswahili, however radio stations broadcasting in vernacular languages are also important sources of information, in particular for the rural population. While radio remains the overall dominant medium, TV and Internet are increasingly used to receive information, especially in urban areas. Access to radio signals and Internet is also available through mobile phones utilised by some 30 million users.

The media environment in Kenya is vibrant and provides for pluralism of views. However the media are not free from political influence as many are controlled by political actors. A few private media companies own a dominant part of the media industry including the most popular broadcast and print media outlets and media cross ownership is an issue of concern.<sup>36</sup> The State-owned broadcaster - Kenya Broadcasting Corporation (KBC) has national coverage and operates nation-wide TV and two radio stations in official languages as well regional

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<sup>35</sup> Article 88(4)(i).

<sup>36</sup> The key private companies include Nation Media Group (large group of media outlets include for instance Nation TV, Q FM, Easy FM or popular daily newspaper Nation), Royal Media Services (owns the most popular Citizen TV and Citizen radio, as well as 10 vernacular radio stations), Standard Group (TV KTN, Radio Maisha and daily newspaper The Standard), Radio Africa Group (several radio stations including Kiss FM, East FM, as well as TV and the newspaper Star) and Media Max (TV K-24, Kameme FM and the newspaper People).



services in 18 vernacular languages. While KBC aims at fulfilling several criteria of a public service broadcaster, it lacks editorial and financial independence from the government.

### **B. The legal framework for the media and elections**

The 2010 Constitution expands and guarantees freedom of expression and press; the state is prohibited from interference with editorial decisions of journalists and the state-owned media should be impartial and offer diversity of views. For the overall legal framework for the media to be more consistent and compliant with the Constitution, the set of legislation has to be amended or new laws adopted. There are ongoing discussions amongst stakeholders' about draft laws to address the status and powers of media regulatory structures (the Communications Commission of Kenya and the Media Council of Kenya), with an aim to making them more independent and effective. However, other issues which are vital for freedom of press in the country, such as independence of the state media (transformation to public service broadcasting) or better access to information (a Freedom of Information Act exists in a draft version for several years) are pending.

The election law and the Guidelines for Election Coverage adopted by Media Council of Kenya<sup>37</sup> provided general principles for media coverage of elections, but gave little details on how this coverage has to be conducted (relying on media self-regulation). As the legal framework required, contestants had to be given access to the broadcast media including to the private ones, and provided reasonable shares of airtime. The broadcast media were also obliged to offer balanced and impartial coverage of elections and campaigns. According to the Kenya Broadcasting Corporation Act, the state broadcaster was obliged to provide free airtime (in consultation with the Electoral Commission) to the registered parties running in the election to explain their platforms. While KBC did provide free airtime to candidates in its talk shows and current affairs programmes, it focused on highly contested areas or major towns. The criteria for time allocation was not transparent, and the free slots were not provided in a systematic way; as a result not all eligible contestants could benefit.

### **C. Monitoring of Media Coverage of the Elections**

The election was presented in the media as a major event and received extensive coverage. In a positive development, voters were given ample opportunity to compare all eight presidential contestants in two debates televised during last three weeks prior to the elections.<sup>38</sup> Media also aired debates between gubernatorial candidates running in the key areas as well as a few debates between candidates running for other posts. Visible voter information in the media

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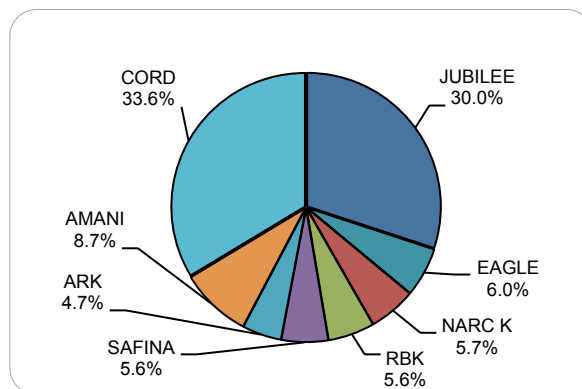
<sup>37</sup> On 2 April 2012 Media Council of Kenya adopted Guidelines for Election Coverage in cooperation with several media stakeholders, IEBC as well as the government, with an aim to stipulate and promote accurate, comprehensive, impartial, fair and responsible coverage of the elections.

<sup>38</sup> While the media initially invited only six candidates, a few hours before the start of the first debate on 11 February the High Court ordered that the debate could only go ahead if all presidential candidates who were cleared by the IEBC were included. This was on the application of the Safina Party. The broadcasters airing the debate eventually decided to include the two candidates, Paul Muite and Abduba Dida.

was launched only about two weeks before the elections, however, it offered a variety of programmes (in some cases very creative) addressing voters’ understanding of voting procedures. Unfortunately, some media also perceived this period as an opportunity to increase their income and charged commercial rates for airing voter information spots. Given the complexity of elections and devolution process, citizens could have benefited from more civic education about new posts elected, such as governors or senators.

The media outlets monitored by the EU EOM<sup>39</sup> provided voters with an opportunity to access a variety of views, although their coverage was predominantly focusing on two front running coalitions – Cord and Jubilee. These two coalitions received about two thirds of time/space, combined, in vast majority of the media monitored. Both alliances dominated the news programmes, talk shows and other regular programmes. The state-owned KBC also offered most of its time to two key coalitions (each of them getting about one third of coverage), but in comparison with other media monitored, it gave a more even picture of all eight presidential candidates and their parties in terms of time dedicated to their coverage.<sup>40</sup>

KBC Radio 1 news programmes



While the national broadcast media did not demonstrate apparent bias toward any of the contestants, some vernacular radio stations showed a degree of preference by dedicating significant shares of time to one or another of two key coalitions. This was for instance the case of Kikuyu language radio Kameme FM (Jubilee received 54% and Cord 24 % of the news coverage) or Luo language radio Ramogi FM (Cord was given 52% and Jubilee 21%). However, negative media coverage was rare. In comparison with broadcast media, monitored

<sup>39</sup> From 31 January the EU EOM monitored 20 media outlets for their coverage of elections. These were the key national TV and radio stations (Citizen TV, Kenya Television Network, Nation TV and KBC TV; KBC radio, Citizen radio, Q-FM, Milele FM and Kiss FM), vernacular radio stations Egesa FM (Kisii), Inooro FM and Kameme FM (both in Kikuyu), Kass FM (Kalenjin), Mbaitu FM (Kamba), Mulembe FM (Luhya) and Ramogi FM (Luo), as well as three national newspapers *Nation*, *Standard* and *Star*. In addition, community radio station Pamoja, serving Nairobi’s Kibera, was monitored for three weeks prior to the elections.

<sup>40</sup> Similarly even coverage of presidential candidates and their parties was also offered by private radio station Q FM. Please see the results of the media monitoring at [www.eueom.eu/kenya2013](http://www.eueom.eu/kenya2013).

newspapers demonstrated a more analytical approach. They also focused on the frontrunners, the coverage of which was generally balanced.

Although most monitored media concentrated their coverage on presidential elections or the election process in general, some vernacular radio stations, especially Inooro (Kikuyu language) or Mbaitu (Kamba language), gave fair shares of airtime to other candidates running for gubernatorial seats, the senate, MPs and woman representatives positions. This also resulted in more equitable distribution of airtime in the coverage of women candidates (up to 30%), in comparison with the level of women's coverage in the national media (overall, only a few per cent).

In spite of these examples, the access of less prominent parties and contestants to the media's regular programmes (news and current affairs) as well as paid programmes, overall, was limited. Lack of financial means was a discriminatory factor weighing against smaller parties in their access to media. Some candidates complained to the EU EOM about the need to pay journalists in exchange for regular news coverage. Paid spots, used predominantly by the major players, were not always properly designated as such, leaving viewers/listeners in confusion about the nature of the information.

The media played a very active and important role in advocating for peace during and after the elections. However, as a part of this peace effort, and also aiming at compliance with a rather restrictive legal framework regulating incitement to hatred, the media also self-censored and tended to filter inflammatory messages articulated at times by politicians in their campaign rallies prior to elections. During the presidential elections tallying process, they implemented an even more strict approach and offered only limited views of the parties concerning the tallying (media did not air live coverage of parties' press conferences during this period). This approach resulted in a somewhat restricted access of the public to real and timely information about political developments. While the media demonstrated a great degree of control over the information space, in this period they failed to properly analyse and inform the public about the tallying process, and in general also to uphold their watch-dog role.

Despite limited access to the Internet outside of the cities, the social media were vital for some candidates as a campaign vehicle, and at times they were also key, albeit not always reliable, sources of timely information about political developments (this was apparent especially during the tallying process). As in all other media, the major presidential candidates and their coalitions dominated communication on social media platforms during the campaign period. Portrayal of the parties in social media was at times negative and

inflammatory, especially in the period during the petition process challenging presidential results as announced by the IEBC on 9 March.<sup>41</sup>

During the campaign, some journalists were intimidated or prevented from conducting their work, usually by supporters of various political groups, who perceived particular media (and subsequently journalists representing them) as biased against the party of their choice. This was in particular the case for journalists working for Royal Media Services group, the owner of which publically supported CORD in the pre-election period. In February the Communications Commission of Kenya (CCK) shut down RMS transmitters following a long-running dispute over the setting up of illegal transmitters. While RMS claimed the action was politically motivated, it was true that the transmitters had been set up without lawful permissions and there were complaints about interference with other frequencies.

## **X. PARTICIPATION OF MARGINALISED GROUPS**

### **A. Women's participation**

Women's political empowerment takes place in Kenya in a sometimes conservative cultural and difficult economic context. Tradition places women in a lower position than men in all areas of life and the differences are particularly dramatic in education, health and politics. Even though illegal, practices such as early and forced marriage, wife-inheritance, polygamy and female genital mutilation remain widespread, especially among certain traditional, pastoralist communities.

Apart from the constitutional quota principle stating that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender, the legal framework aims at supporting women political participation and envisages a number of special measures to such as: 47 special Women Representatives seats in the National Assembly, nominated seats for women at all levels of legislative and gender quotas in political parties. While the principles of affirmative action and equality are firmly entrenched in Kenya's legal framework, implementation of the latter lags behind.

Despite affirmative action measures, women's participation in 2013 General Elections remained very low. There were 19 women candidates for senator positions (out of 244 candidates) and only seven women vied for governor positions (out of 237 candidates). As a result, no women were elected as senator or governor. Out of the elected 290 National

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<sup>41</sup> Hate speech on Internet was dealt with by the ad-hoc body – the Steering Committee on Media Monitoring composed of various state bodies launched a year before elections to supervise the media activities in order to prevent distribution of hate messages. Social media and their role in spreading hate or “dangerous” speech were also monitored by the iHub Reserach since September 2012.

Assembly members 16 are women, just 5.5%.<sup>42</sup> For 1,450 ward representatives position only 88 (6%) of the elected candidates were women.

Two major factors in particular contributed to the poor performance of women: an incomplete legal framework and imperfect candidate nomination process. Following the Attorney General's request for an advisory opinion on the minimum one third gender requirement in the National Assembly and the Senate, the Supreme Court on 11 December 2012 advised that the quota is not applicable to current elections and that it should be implemented progressively by 27 August 2015, in accordance with Constitution's transitional provisions. While this decision allowed for avoiding constitutional crisis, it removed the pressure from political parties to search and nominate female candidates.<sup>43</sup>

The decision of the Supreme Court effectively to postpone the implementation of the gender quota as well as the failure of the outgoing Parliament to pass appropriate legislation before elections, show that political will to implement gender equality principles in Kenya has been limited. More efforts are needed in the new National Assembly and by political parties to implement the law not only in its letter, but also its spirit. With regards to the county assembly level, provisions in the Election Code to nominate candidates of the less represented gender were not fulfilled. Lack of appropriate implementing regulations and clarity on the way to implement constitutional provisions resulted in stalling the nomination process. This deprived women, as well as other marginalised groups, of the possibility to pursue a number of decision-making positions in the assemblies, such as assembly speakers.<sup>44</sup>

The political party primaries were marred by attempts to sideline women as in the case of Mary Wangari and Mary Wambui.<sup>45</sup> Many EU EOM interlocutors indicated that the Women's Representative seats were used as an argument to push women out of the regular race to the parliament. Male politicians perceived female contestants as having their seats "guaranteed" by the nomination procedures (for the Senate and county assemblies) and the creation of Women's Representative seats. Therefore their participation in the regular contest for legislative positions was regarded as not necessary and unwelcome. A similar trend of using reserved seats as an excuse to exclude women, youth and other minority groups was observed with regard to the local level elections. As a result, the quota system established to

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<sup>42</sup> Among those 16 there are two who have made history as the first female MPs from the pastoralists' communities.

<sup>43</sup> Also, a number of the EU EOM's interlocutors said they were difficulties in finding an appropriate number of qualified, motivated women candidates.

<sup>44</sup> The process was delayed due to the complaint raised in the High Court by the National Gender and Equality Commission about to the composition of the lists and the role the IEBC has played in the process. See more section Human Rights.

<sup>45</sup> Mary Wangari (Embakasi East constituency) following her complaint to the IEBC, was issued a nomination certificate and her name was included in the TNA list. In case of Mary Wambui (Othaya constituency), who also complained to the IEBC that her name was not on the list despite the success in party primaries, the agreement was reached internally in the party. In general, out of the total number of 207 complaints related to candidate nomination process, 26 complaints concerned women.

enhance gender equality actually worked against women, as it was implemented in such a way as to limit women's political participation to the minimum, legally constrained scope.

In campaigning, there were three major obstacles to women's political participation: patriarchal culture, security issues and lack of financial resources.<sup>46</sup> According to EU EOM field findings, many female candidates from larger parties such as TNA, ODM, URP, UDF paid for their own security while campaigning, by employing teams of two to five party activists. Despite these special measures, several instances of violence against women candidates and their supporters, as well as gender-biased rhetoric, have been reported.

Finance played a major role. Even though many political parties ( ODM, URP, UDF) charged women lower internal fees for candidate nomination and provided financial and organisational support to more prospective candidates, this was not sufficient to ensure a level playing field between the two genders.

On a positive note, the representation of women in the public administration is on the rise. The majority of constitutional and independent offices have a gender-balanced composition. This includes the IEBC, where there are three women (out of ten members), including vice-chair. Election observation results have shown that the electoral commission staff were very gender balanced - 49% women and 51% men, with 39% of women appointed as presiding officers and 47% as deputy presiding officers.

## **B. Marginalised groups**

The elections in Kenya took place in the shadow of past events and the 2007/2008 post-election violence. This time no major human rights violations were observed. Election-related gender based violence, such as intimidation of women voters, female candidates or employees of election administration were isolated.<sup>47</sup> During the Election Day incidents of violence were reported in Mombasa and the North (Maarsabit Wajir). Moreover, after the announcement of the Supreme Court decision with regard to CORD petition unrest broke out in Kisumu and Nairobi areas of Kibera, Mathare and Kawangera.

The new Constitution provides an enhanced legal framework and introduces special mechanisms for human rights protection. To better protect human rights and gender equality, the Constitution envisages establishment of independent institutions. Consequently, in 2011 three such commissions have been established: Kenya National Commission on Human Rights (KNCHR); National Gender and Equality Commission on Gender Equality (NGEC) and the Commission on Administrative Justice. With regards to the elections these institutions

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<sup>46</sup> In rural and pastoralist areas, an aspirant was expected to obtain the approval of councils of elders. The latter proved not to be obligatory, as shown by the case of Peris Tobiko a Maasai candidate, cursed by elders who strongly opposed her candidacy. Nevertheless, she won in the regular contest to the National Assembly, on a TNA ticket.

<sup>47</sup> For example, the Gender Violence Recovery Centre has reported only three cases related to Election Day.

have the mandate to investigate and report on the observance of human rights, to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated.

During 2013 General Elections in Kenya both the NGEC and the KNCHR conducted awareness-raising campaigns and were involved in election monitoring. The NGEC together with the Ministry of Gender, Children and Social Development deployed over 180 monitors in the field before and on Election Day was active in monitoring the candidate nomination process. The KNCHR, apart from deploying over 40 long-term monitors, had established a free hotline number, where citizens could report electoral malpractices for immediate action.

All EU EOM interlocutors assessed the role of the police as good or very good. There were 99,000 police officers deployed for Election Day who were trained on election security, crowd control techniques and contingency plans prepared by the Inspectorate General. However at the same time there was a low level of trust, on the part of voters and contestants, in the police and their ability to investigate electoral offenses. Kenyan police have not enjoyed a positive reputation in the past. The 2013 elections have been a step in the right direction as far as the reputation and the performance of the police is concerned. Nevertheless there remains room for improvement in their ability to prosecute common electoral offenses.

The Constitution provides for affirmative measures with regards to marginalised groups. The latter include women, the disabled, youth and minority communities. The elections resulted in three disabled candidates winning seats in the National Assembly and one in the Senate. Together with the nominated seats this group will have eight representatives in the Parliament. As for youth, despite isolated success stories, their representation in the legislature will remain low.

Apart from special seats in the Senate and the National Assembly, county assemblies should have representation of marginalised groups, which include minority communities representatives, women and the disabled. According to Article 90 of the Constitution equal representation is ensured by the nomination process. The latter was stalled due to the petition brought to the High Court by the National Gender and Equality Commission against the IEBC. The petition challenged the process of the party lists nominations and the role that the IEBC has played and that contrary to the Constitution, IEBC did not conduct and supervise the selection for the party lists.

On 15 April the High Court determined that the responsibility to settle any disputes concerning the lists and supervising the fulfillment of the quotas with regards to marginalised groups, lies with the IEBC. Following this decision, over 600 disputes regarding nominated members of county assemblies were resolved by the IEBC Disputes Resolution Committee on

4 May. The final list of nominees was published on the IEBC website, together with the formula that was used to calculate the number of special seats each party is entitled to in every county assembly.

Altogether the delay in the nomination process resulted in representatives of marginalised groups assuming their positions in county assemblies with more than two months delay, thus not having the same opportunities to participate in the establishment of the assemblies as those members elected in the regular contest.

Seven million pastoralists (18 per cent of society) remain disenfranchised due to the remote distances to polling stations and difficulties in obtaining ID cards. An overly bureaucratic and lengthy process of obtaining ID cards causes pastoralists and other minority communities difficulties in registering as voters. Significant discrepancies between the numbers of voters registered in the pastoralist, agricultural areas and urban areas were noted. For example, in Turkana and Garissa an average of 30 per cent of the population registered to vote, while in central areas the numbers oscillated around 98 per cent. The fact that voter education and official election materials are only in English and Swahili languages contributed to political marginalisation of indigenous communities.

## **XI. CIVIL SOCIETY AND NATIONAL OBSERVER GROUPS**

In the aftermath of the post-election violence in 2008, civil society organisations and religious groups resolved to prevent future election-related violence and in 2013, civil society played a positive role in Kenya's electoral process by managing voter education campaigns, awareness-raising programmes and peace promotion events. Special road shows, caravans, debates and trainings were organised throughout the country to promote peace by religious leaders, non-governmental organisations as well public bodies, mainly via Peace Committees. Moreover, many mass prayers took place, including one which gathered six presidential candidates and was widely covered in the media.

The Kenyan legal and regulatory framework for elections refers to the IEBC's duty to facilitate observation and evaluation of the process and the Commission complied with its requirement to issue Guidelines for election observers – these are largely consistent with the Declaration of Global Principles for Nonpartisan Election Observation and Monitoring by Citizen Organizations launched at the United Nations in April 2012, and do not place undue restrictions on observers.

The 2013 General Elections have been observed by multiple civil society organisations, some of which have issued detailed reports with critical analysis of the state of preparations. Over 50 Kenyan organisations were accredited by the IEBC, of which the largest was the Elections



Observation Group (ELOG), a permanent platform of civil society organisations established in 2010 and which began observation of the General Elections process with 580 observers in all constituencies, from November 2012. On Election Day, ELOG deployed over 5,500 observers across the country, as well as 1,580 observers who carried out a Parallel Vote Tabulation (PVT). The Electoral Observation Group (ELOG) issued a number of reports over the course of the election process, including publication of the results of their PVT exercise immediately after the announcement of final results, which stated that these were consistent with the group's findings. ELOG's contemplated margin of error meant that their findings would also have been consistent with a second-round outcome.

The importance of ELOG's contribution to the credibility of the electoral process should not be underestimated. Following Election Day, trust in the IEBC was in a precarious state, after the failure of electoral technology and the lack of transparency during the tallying process, both of which left it open to rumours and speculation. ELOG's PVT indicated that broadly the IEBC tally was confirmed by an independent national source, acting in the public interest.

Other organisations which publicly reported on electoral developments with a high degree of technical awareness included the coalition the Kenya Human Rights Commission and the coalition of legal groups Kenyans for Peace with Truth and Justice, while the National Gender and Equality Commission deployed observers with a focus on the participation of women and youth.

In addition, Uchaguzi *Protect the Vote Kenya 2013* established an online platform which received, verified and mapped over 4,000 citizen reports on topics ranging from problems at polling stations to security issues, alongside positive elements such as peaceful policing and testimonies that election was going smoothly.

## **XII. ELECTION DAY**

### **A. Opening and Polling**

On Election Day, polling was marred in Coast and North Eastern regions by attacks which in some cases involved significant loss of life. Violent incidents remained isolated and polling day was largely characterised by a high turnout of motivated voters waiting for many hours, most often with great patience and fortitude.

In roughly half of polling stations observed, the Electronic Voter Identification Device (EVID) was not used, largely due to the limited timeframe in which hardware was received, configured and deployed, alongside incomplete training for polling staff. As a result of this and other weaknesses in the Voter Register, there was no single method of checking people's registration and marking them as having voted. In total, four different kinds of lists were used: the National Voter Register on the EVID; the voter lists printed for individual polling

stations; the list of voters whose biometric details were not captured, and finally, in some cases, there was recourse to the 'green books' which had been used to record entries during registration. These measures prioritised inclusivity but did not enable clear records regarding who had voted.

Polling stations were adequately staffed, opening and polling procedures were generally followed, and EU EOM observers considered that in most of the stations visited, the overall conduct of operations was good. Nonetheless, in a third of cases EU EOM observers found that secrecy of vote was not sufficiently protected, mainly because of the way polling booths were arranged and because provisions for assisted voting for disabled or illiterate voters were not adequately applied.

The speed with which large numbers of voters could proceed to vote and leave depended in part on the number of polling booths in each station, which varied significantly.

### **B. Closing and Counting**

Most polling stations attended by EU EOM observers closed within an hour of the official closing time and in all observed cases, counting took place in a peaceful atmosphere. Closing and counting procedures were respected, including correct allocation of votes to candidates, determining valid and invalid ballots and the procedures for disputed ballots and EU EOM observers considered that in all the polling stations attended, the overall conduct of operations was good and that the recorded results reflected the will of voters. However, counting was a very lengthy process and in some cases by the time it concluded, polling staff had been awake for close to 24 hours.

Party agents were able to attend counting and observe procedures unhindered in the polling stations observed but in nearly half of these, not all party agents received a copy of the results forms, either because there were no copies to give them or because they did not ask.

The Electronic Transmission of Results System had been devised to provide swift provisional figures, with results to be sent immediately from polling stations on mobile telephones configured for the purpose, over a closed internet system. However, delayed preparations stymied the system's full implementation and electronic transmission of results was only successfully carried out in a small number of the polling stations attended by EU EOM observers.

### **C. Tallying**

The IEBC had always planned to carry out manual tallying for the official results, but when the provisional results system failed, results processing was carried out under significant pressure. In addition, the provisional results system had been contemplated as the principle transparency measure, with plans for screens at constituency, county and national tally centres. The system for official results tallying did not have sufficient transparency,

beginning with the absence of any detailed procedural guidelines in the public domain. EU EOM observers reported that although they and party agents had access to constituency and county tally centres, neither their appointed place nor the disposition of election staff enabled them to follow closely enough how tallying was carried out. Once constituency results forms arrived at the National Tally Centre (NTC), the same principle applied, with observers limited to a balcony overlooking the hall. Party agents were able to attend the tallying of 16 constituency results forms before being expelled from the NTC for disrupting the process. From then on, the IEBC accorded party agents 20 minutes to review results before they were announced. EU EOM observers reported that tallied results at lower levels were often not signed by party agents.

EU EOM observers noted widespread minor discrepancies in tallies and between numbers of votes cast for presidential and other electoral races, however the differences were almost all less than 1%. This can be accounted for on the whole by tallying errors, as intention to cheat would normally be indicated by much larger differences in the numbers. There was no overall pattern favouring one candidate or another.

EU EOM observers carried out a number of comparisons based on the sets of results obtained at the close of tallying or after. These revealed relatively small inconsistencies, particularly between results announced at constituency or county level, as compared with official results published at the national level. This may be explained by insufficiently clear procedures and training; inadequate tools (the tally forms did not have the same categories of votes as the polling station results forms); and human error under pressure. However, while verifications and possible corrections may be warranted, changes to results during tallying must be clearly indicated, explained and traceable, and this was not the case.

## **XIII. RESULTS**

### **A. Declaration and Announcement of Results**

The Electronic Transmission of Results System provided provisional presidential results which were displayed on television and online, until results from almost half of the polling stations (some 14,000) had been received. At this point the system stalled, for a number of technical reasons, including problems with the receiving server.

Unable to provide provisional results as intended within 48 hours, the IEBC focused on tallying official results. Although the Commission was legally entitled to a week before declaring a winner, it endeavoured to provide information as quickly as possible and announced results by constituency as they arrived.

During the announcement of provisional results, two controversies arose. The first was a startlingly high rate of rejected votes (over 5%), which was not later reflected in the official results: a programming error had caused entries for rejected votes to be multiplied by eight.

Secondly, there was uncertainty about whether the percentage of presidential votes should be calculated on the basis of all votes cast or on the basis of all valid votes cast. It was regrettable that a fundamental element of the electoral framework was undetermined and vulnerable to political controversy as results came in.

When the IEBC progressively announced official results by constituency, it never announced or published associated percentages, instead simply announcing total numbers of votes cast in favour of the different presidential candidates. While it was clear that Kenyatta had a substantial lead, whether or not he passed the threshold for winning in one round was unclear until the last moment, in part because of the uncertainty about how the threshold would be calculated. The public confirmation that all votes cast would be used as a basis was announced minutes before the declaration of the winner.

On 9 March, Uhuru Kenyatta was declared the winner of the presidential election, with 6,173,433 votes, while Raila Odinga garnered 5,340,546. Kenyatta was attributed 50.07% of all votes cast (valid plus rejected). Uhuru Kenyatta qualified for a first-round win by 8,419 votes. The final voter turnout was 85.9% and rejected votes represented 0.8%.

Published presidential results were only disaggregated to constituency level, making it difficult for stakeholders to trace results they had collected. Although in a positive move the IEBC put all polling station results forms on its website, disaggregation down to polling station results is the only way to ensure that figures are easily traceable and verifiable.

The winners of the other elections were declared by Returning Officers at the corresponding electoral area: constituency for National and County Assembly members; county for governors, Senate members and women-only National Assembly seats. These were gazetted on 18 March but unlike the presidential elections, one month after polling no summary of results had been published.

### **B. Constitutional threshold for first round win**

There was a debate in the days after the vote about the precise block of votes to which the 50% and 25% thresholds should apply for the purpose of declaring a winner after the first round. The only legal provision is in Art.138(4) of the Constitution which says ‘half of all the votes cast’ and ‘25% of the votes cast’.

The percentages published for provisional results at the main tallying centre after the election used a base of the valid votes cast in apparent contradiction to the constitutional formula. When the IEBC were asked for an explanation on 5 March they first said the calculation only

applied to valid votes. A short time later it was made clear by the chairman that the block of votes to be used is all ballots cast for the presidency including the invalid ones. The decision to include invalid votes was further complicated by the fact that this category also captures ballots for other elections mistakenly placed in the presidential ballot boxes.

Since the margin over the 50%+1 threshold in the declaration of presidential results by the IEBC on 9 March was very narrow, it was to be expected that the IEBC’s decision on this issue would feature in a Supreme Court presidential petition brought by Jubilee supporters. That petition was successful with the result that the winner had approximately 50.5% of the valid votes instead of 50.07%.

### C. Political Overview of the Election Results

Naturally, the announcement of the presidential results was received differently by Jubilee and CORD. Uhuru Kenyatta, Jubilee’s presidential candidate, gave an acceptance speech in which he called for his “supporters to be modest in victory”, pledged to forge closer ties with the international community and said that he would run an inclusive government. CORD challenged the validity of the election results and undertook to seek legal redress at the Supreme Court. Raila Odinga accused the IEBC of failing to conduct credible elections. He stated that his coalition would challenge the outcome of the election at the Supreme Court but appealed to Kenyans to look upon each other as “brothers and sisters whose national bond should not be broken”. He also alluded to the previous elections saying: “It has happened again just like in 2007 but this time we have an independent Judiciary.”

From 5 to 8 March, the IEBC announced the results for the Ward Representatives, Woman Representatives, MPs, Senators and Governors at the Constituency and County levels. The results indicated that the CORD and Jubilee alliances had eclipsed their rivals in the race for Governor, Senator and MP. ODM, a partner of the CORD coalition, TNA and URP (Jubilee Alliance) dominate as follows: ODM has 16 Governors, 11 Senators and 78 MPs; TNA has 10 Governors, 11 Senators and 72 MPs; URP has eight Governors, nine Senators and 62 MPs. However, neither of the two major alliances obtained a clear majority in both chambers.

**Table 1: Members of the National Assembly per coalition**

TOTAL PER COALITION	
Jubilee Alliance	167
CORD Coalition	142
Amani Coalition	24
Eagle Alliance	2
The other political parties and Independents	14
<b>TOTAL MEMBERS</b>	<b>349</b>

*Source: Government of Kenya, Gazette Vol. 45-14-2-2013.*

**Table 2: Members of the Senate per coalition**

TOTAL PER COALITION	
Jubilee Alliance	30
CORD Coalition	28
Amani Coalition	6
Eagle Alliance	0
The other political parties and Independents	3
<b>TOTAL MEMBERS</b>	<b>67</b>

*Source: Government of Kenya, Gazette Vol. 45-14-2-2013.*

Given this context, the smaller alliances and political parties such as New FORD-Kenya (Amani coalition) and the Alliance Party of Kenya (APK) were in a position to play a decisive role during the negotiations for majority control of the Senate and National Assembly. After intense discussions, Jubilee obtained the majority at the National Assembly with 178 seats (absolute majority is 175). CORD secured the leader of the minority party in both houses.

#### **XIV. ELECTORAL DISPUTE RESOLUTION**

##### **A. Electoral Offenses**

Election offenses in Kenya are regulated in Chapter VI of the Elections Act 2011. The law includes a comprehensive list of electoral and illegal practices. Penal sanctions range from high fines of up to Kshs 1,000,000 to six years imprisonment in the case of offenses related to the voter register or voting process. In addition to the specific penal sanctions for the commission of any election offense, a person convicted of an offense under the Elections Act loses eligibility for election or nomination in an election for five years following the date of conviction.

The IEBC has, with the new legal framework, investigation and prosecutorial powers to act on electoral offenses, working closely with the Office of the Director of Public Prosecutions (ODPP) for additional support; for this purpose, a special body was created to be in charge of electoral offenses: the Tri-partite Committee on Electoral Offenses, composed of the Judiciary, IEBC, ODPP and police. However it was decided that since there was inadequate time for the IEBC to recruit and train enough prosecutors, the ODPP would continue with its own prosecution of election offenses.

The ODPP established a Joint Response Team during the election period in order to ensure a timely, effective and efficient response to election-related offenses, before, during and after the elections. Its mandate ran from 2 March 2013 until the conclusion of the elections. During this period, 45 people were charged with electoral offenses, related to creating a disturbance and threatening peace and tranquillity during campaigning, taking part in unlawful assembly, defacing campaign materials of opponents and interfering with free political campaigning. However the biggest challenge during this period was to get admissible evidence for alleged offenses to allow for prosecution of the offenders. In several cases offenders were released without charge due to police inaction. In a report released after Election Day, the ODPP criticised the police and the IEBC's of lack of cooperation in dealing with offenses and sharing information. The report, prepared by the Criminal Investigation Department and attached to the ODPP's report of 20 March stated that Embu had the highest number of offenses, with 28 people arrested and charged for various offenses. However despite the fact

that the law provides very strict mechanisms to combat electoral offenses, many other offenders avoided prosecution due to police inaction, poor training or lack of cooperation with the DPP's office.

A breakthrough in the fight against hate speech was the incorporation of officers from the DPP office in the National Steering Committee on Media Monitoring in order to advise the media against incitement and hate speech.

### **B. Complaints and Appeals: Pre-Election Disputes**

The legislative framework for election disputes resolution in Kenya is primarily set out in the Constitution, the Elections Act, the Independent Electoral and Boundaries Commission Act, and the Political Parties Act. The new legislation on dispute resolution is complex and involves multiple resolution bodies. This sometimes created confusion among complainants. The competence for electoral disputes is shared between the IEBC, which has the responsibility for the settlement of electoral disputes before the announcement of results including disputes related to or arising from nominations of candidates but excluding election petitions; the Political Parties Dispute Tribunal (PPDT) and the Courts, whose authority is mostly focused on election results petitions. The Judiciary is however seen as the traditional dispute resolution body in relation to elections, and despite the fact that this role is now shared with other institutions such as the IEBC and the Political Parties Disputes Tribunal, the public is not fully aware of the categories of disputes that are best referred to which body.

The Constitution provides two stages of election disputes: disputes arising during the nominations and before the declaration of results; and disputes subsequent to the declaration of election results and election petitions. The first can be settled by the IEBC or the courts, while the second can only be settled by the courts.

The Judiciary has justly received much praise for moving from being perceived as one of the most corrupt institutions in Kenya to one that is truly independent, transparent and with wide acceptance by the population. The jurisdiction of the High Court is regulated under Article 165(3) and (5) of the Constitution, including the jurisdiction to hear pre-election disputes and to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

The Political Parties Disputes Tribunal and the IEBC have powers to settle various disputes, with the exception of those concerning election petitions and disputes subsequent to the declaration of election results. The Political Parties Act confers power to settle political party disputes on the Political Parties Disputes Tribunal while the Constitution and the IEBC Act confer on the IEBC, particularly, the Dispute Resolution Committee, the power to settle electoral disputes, excluding election petitions and disputes subsequent to the declaration of election results. All disputes filed at the PPDT must be determined within a period of three

months. The decisions of the Tribunal are not final and parties have the option of appeal to the High Court. Although the law requires first the exhaustion of internal mechanisms of resolving disputes within parties, and in the case of dissatisfaction, that questions go to the Political Parties' Tribunal, followed by the IEBC, many candidates who were dissatisfied with internal party mechanisms defected to other parties in order to stay in the campaign.

Although the mandate of the IEBC includes the regulation of the nomination process, it adopted a passive policy stating that it was not directly involved with nominations by political parties and not responsible for the outcome. The IEBC was also criticised for clearing candidates in contravention of the legal timeframe which required parties to submit their final list of aspirants 45 days before the election. Although the Commission said that it would not recognise any nomination submitted after 18 January, it did in fact accept nominations after the deadline.

The Institute for Education in Democracy (IED) and the Law Society of Kenya (LSK) separately called on the Commission to revoke the certificates issued to such individuals and recoup any lost public confidence. Holding the party primaries too close to the deadline constrained the parties' ability to address disputes arising from the primaries, while weak dispute resolution mechanisms at the level of political parties led to an increase in the number of cases proceeding to the IEBC. Many of the complaints were dismissed for lack of sufficient evidence or because some of the complainants belonged to more than one political party, while other did not appear. Those who were dissatisfied with the decision of the IEBC appealed to the High Court.

During the nomination process, the IEBC did not meet the legal timeline requiring it to complete nomination disputes seven days before the official nomination of candidates. Decisions were taken by the Commission only one day before the official date for the presidency nomination. Party nominations were held too close to the elections, leaving little time for nomination disputes. As a result, some parties failed to submit their list of nominees for various elective offices, and most parties forfeited the seven-day possibility to resolve nomination disputes by opting to pick candidates on 17 January, just 24 hours before the deadline.

After the IEBC dispute resolution mechanism was completed, covering a total of 207 complaints, more than 50 cases were appealed to the High Court. While the court rejected some of the cases, in others it ordered the IEBC to include or remove names of some candidates from the ballot papers, requiring the Commission to change the printed ballots, which had already been printed. The IEBC considered that it lacked the financial and logistics capacity to comply, and continued with the electoral process without making any changes to



the ballots. The Political Parties Dispute Tribunal, which was not widely used by electoral actors, received 30 complaints to date of which two have been appealed to the High Court.

Up to Election Day there were 100 cases related to electoral issues filed at the High Court (including Constitutional Applications, Petitions and Judicial Review). On 15 February 2013, the High Court refused to rule in an integrity case brought by civil society groups against presidential candidate Uhuru Kenyatta and his running mate William Ruto, citing lack of jurisdiction. The judgment was considered procedurally correct because Article 163(3) of the Constitution of Kenya vests the Supreme Court with the exclusive jurisdiction to hear and determine disputes relating to elections to the office of president. Further, barring Kenyatta and Ruto from running for office two weeks before the election would have been disruptive to the election, impinging on their right to run for office even though they had not been found guilty of the crimes alleged.

On 12 March a petition was filed by CORD against IEBC at the High Court trying to compel the IEBC and Safaricom to release information for its presidential election petition at the Supreme Court. The petition was filed by Eliud Owalo, head of the campaign for Presidential Candidate Raila Odinga, requesting that the IEBC provide them with key documents and electronic evidence from all polling stations, including all Forms 34, 35 and 36 from the more than 33,000 polling stations and constituencies, serial number of electronic devices used as well as provisional and final registers of all registered voters. The court ordered the parties to reach an agreement on how to cooperate and they did so.

### **C. Election petitions**

The Constitution establishes that a petition to challenge the election of a president-elect has to be filed in the Supreme Court for determination within seven days after the date of declaration of the results of the presidential election in the Kenya Gazette and a newspaper with national circulation, and to be heard and determined within 14 days after the filing of the petition.

The Supreme Court (Presidential Election Petition) Rules 2013 establish that before the hearing of the case, the court conduct a pre-trial conference with all the parties in the petitions. This pre-trial conference is a meeting between the judges and the lawyers involved in the election petition to agree on what will be presented at the trial. At the end of the hearing, the court may give its decision and reserve its reasons for a later date. The determination of the Supreme Court is final.

Petitions to determine the question as to whether a person has been validly elected as a Member of Parliament or County Governor are filed at the High Court. A question regarding the validity of a County Assembly election is determined by the Magistrate's Court within the

county or nearest to the county. The law previously provided that all these petitions were to be heard by the High Court, but anticipating a large number of election disputes, there was an amendment of the Elections Act in order to enable magistrates to have jurisdiction on election petitions arising at the county level.

With the exception of petitions concerning a presidential election, all other petitions challenging election results must be filed within 28 days after the declaration of the election results by the IEBC in the Kenya Gazette, and determined within six months of the date of filing. Appeals from the decision of the Magistrate's Court shall be filed at the High Court. Appeals from the High Court shall be filed to the Court of Appeal. In both instances the appeals shall be heard and determined six months from the date of filing of the appeal.

The Judiciary Working Committee stated that in challenging the presidential election it may not be feasible to gather evidence and file a complaint within seven days. The 14 days provided by the Constitution for the Supreme Court to hear and determine the case also requires that the Judiciary be extremely efficient, and effectively excludes the presentation of oral evidence during the judicial process. While the Committee expressed the view that the determination period ought to be extended up to 28 or 30 days, the Supreme Court considered that the time frame had its strong justifications. From its judgement on the presidential petitions:

*“[217] The rigid time-frame for the resolution of Presidential-election disputes was not, in our opinion, conceived in vain at the time of the constitution-making process. From the terms of Article 140 of the Constitution, it is clear that expedition is of the essence, in determining petitions relating to Presidential elections. As the electoral process had, in this case, led to the declaration of a winner, but one who could not assume office pending the determination of the petition, the protracted holding-on of a President-elect, as well as a retiring President, would, in our opinion, present a state of anticipation and uncertainty which would not serve the public interest.”*

On 16 March 2013 Prime Minister Raila Odinga filed a petition at the Supreme Court challenging the victory of Uhuru Kenyatta as President-elect, seeking fresh presidential elections through invalidation of the 4 March poll and to declare the voter register as well as the election itself flawed. The petition stated that the election was not conducted in accordance with the Constitution on the following grounds: IEBC failed to carry out a transparent, verifiable, accurate and accountable election; electoral technology had failed; the results were announced without proper verification and there was inconsistency in the results where some areas had higher number of votes cast than those of registered voters. Africog filed a similar petition to challenge the presidential election results, asking the Supreme Court to invalidate the results on the grounds that electoral malpractices were committed. Africog

claimed that the presidential results announced at various counties were different from those declared by the IEBC at the national tallying centre.

The third petition was filed by three citizens asking the Supreme Court to rule on whether the IEBC should have included rejected ballots in its final tally of presidential results. They argued that the slightly more than 100,000 rejected votes should not have been included in the final tally.

The three petitions were consolidated in one, and during the process, Raila Odinga's lawyer alleged that from the Forms 34 and 36 it was possible to prove that Uhuru Kenyatta's votes were intentionally inflated while those of Raila Odinga were reduced. Africog's lawyer alleged that the results of the presidential elections were altered, bringing to the court examples of results from some county tallying centres where there were differences from the results finally announced and reflected in Form 36. They also alleged that there were different numbers of registered voters for parliamentary and presidential elections in different parts of the country. The respondents IEBC, the Chairperson of IEBC, Uhuru Kenyatta and William Ruto, asked the judges to dismiss the Odinga and Africog petitions on the grounds that the allegations were unfounded.

The six Supreme Court judges, in a unanimous verdict, dismissed the Odinga and Africog petitions, ruling that the elections were conducted in accordance with the Constitution and the law.

On the question raised by the three citizens of including rejected votes in calculating the final percentage of total votes obtained by presidential candidates, the Supreme Court allowed the petition and ruled that the rejected votes do not have to be included in calculating the final tallies in favour of each of the presidential candidates. However the Supreme Court declined to re-compute the final percentages as being not within its jurisdiction.

These petitions were the first exercise of the Supreme Court's jurisdiction over presidential election petitions under Articles 140 and 163 of the Constitution. The court was conscious of the importance of its task in the context of political and constitutional stability in Kenya, and of the need to exercise judicial restraint in propounding on the exercise of the popular will. Its proceedings were highly transparent and broadcast live to the nation. In its full judgment, the court held that the IEBC, as a constitutional organ, was entitled to a presumption that its actions were carried out in a constitutional manner. The court found that the applicable standard of proof was a high civil standard falling short of the criminal standard of 'beyond a reasonable doubt' except where specific offenses were alleged. Its verdict was that the evidence did not disclose any profound irregularity in the management of the election to undermine the declared result.

The Supreme Court's decision was accepted, although it met with criticism from Raila Odinga, his supporters and some civil society organisations.

In relation to the petitions filed against the results of elections other than the presidential, after the deadline of 10 April the total number of petitions filed at the High Court and the Magistrate's courts all over the country was 181, out of which 69 petitions were for Members of Parliament, 11 for senators, nine for Women's Representatives, 65 for County Assembly Representatives, 23 for Governors and four for Speaker of the County Assembly. The Courts have six months to decide from a starting date of 11 April 2013.

This number, far less than the 500 non-presidential petitions expected by the Judiciary, may be related to the fact that in the presidential cases the Supreme Court decided against the arguments of constitutional invalidity which might have been raised at the lower levels (for those hoping to base their case on similar accusations) and may also be due to the high cost of legal fees.

The reforms implemented over the past two years to make Kenyan courts more independent were absolutely key to the major success of the 2013 Kenyan elections – the peaceful resolution of electoral disputes. Renewed trust in the Kenyan courts meant that Raila Odinga's challenge to the presidential election results was directed to the Supreme Court. The electoral petitions put these reforms into practice, showing that the Judiciary has made a strong and genuine effort to become a truly independent institution of justice. The number of petitions filed is an indication that the Judiciary have gone a long way to regaining public confidence since the days of previous elections, where they suffered a total lack of confidence in their independence. In order to increase transparency, the proceedings of the presidential petitions were broadcast live.

As part of this reform process extensive training has been carried out of judges, magistrates and other judicial staff on electoral dispute resolution; Kenya's Court of Appeals was decentralised from Nairobi with the creation of additional courts in Nyeri, Malindi and Kisumu; and the number of Appeals Court judges tripled to 27. Ultimately however, the success of judicial reforms can only be guaranteed if they are accompanied by reforms in supporting institutions such as the police and prison system.

## **XV. RECOMMENDATIONS**

RECOMMENDATIONS						
Area	Purpose	Recommendation	Suggested Activities	Targeted Institution	Principles [International and/or Regional Commitments]	Reasoning
Legal Framework	Increase gender equality in elected posts	Review the legislative framework in order to provide appropriate mechanisms for the implementation of the gender-equality principle with respect to the National Assembly and Senate, through legal reform, training and education. Develop sustainable policies to increase the number of elected women, including assistance with regards to campaign financing.	Amendment of the Electoral Code and the Political Parties Act, providing a mechanism to fulfil gender quota in the Senate and the National Assembly Trainings aimed at preparing women aspirants to vie for an elected post. Education and outreach campaigns focused on gender equality and women political participation Amendment of the Political Parties Act, increasing the amount of resources allocated via political parties fund to gender equality, to reach at least 34% (from current 30% allocated for women and marginalized groups) Support the creation of funds and/or policies within political parties, aimed at supporting women candidates	Parliament Political Party Leaders Office of the Registrar of the Political Parties Political Parties NOG and donor community	Art 3, ICCPR (equal rights men/women) Art 2, 3, 4, 7 CEDAW MDG 3 Art 18, ACHRP	Despite the quota system and affirmative action principles women participation as candidates in 2013 general elections remained extremely low.
	To promote equality of opportunity and transparency in campaigning and reduce the advantage held by wealthier parties and candidates.	Regulate the amount of money spent by or on behalf of a candidate or party during an election. IEBC has the responsibility for this under Article 88(4)(i) of the Constitution but it requires a statutory framework to make it operational.	Enactment of a Campaign Financing Act and regulations.	Parliament of Kenya IEBC Registrar of Political Parties	Art 88(4)(i) of the Constitution of Kenya. General Comment no 25 to ICCPR Art 25, at para 19.	EU EOM observers reported that money was being handed out to supporters at rallies by parties. While this was an election offense it was expected by the public and common practice by parties.
	Timely decisions on the location and registrations within polling stations would enhance operational planning as well as contribute to transparency.	Clarification of Elections Act regarding deadline to gazette polling stations. To be carried out preferably at least one month before polling to ensure voters can check in good time. Introduction of a legal limit on the number of voters at any one polling station. 500 would be a reasonable maximum.	Implement Elections Act.		IEBC, Parliament.	Article 21, UDHR Article 25, CCPR
Election Administration	To harmonise the national legal framework with international commitments and to better guarantee the right to freedom of expression.	Legal provisions of National Cohesion and Integration Act pertaining to hate speech are too broadly defined, their amendment in line with international human rights obligations (intention to promote ethnic hatred along with imminence of the risk of discrimination/aggression should both be present, not just one or the other) could decrease the level of self-censorship among journalists.	Amendment of the National Cohesion and Integration Act.	Parliament, NCIC	ICCPR, articles 19 and 20 and ICCPR General Comments 11 and 34.	
	Provision of the means to register and vote for all those eligible	Provision of mechanisms to ensure registration and voting for all eligible citizens, including prisoners and staff on duty on Election Day. Increase inclusivity for marginalised communities.	<p>Voter registration in prisons and provision of means to vote; expansion of registration and voting for the diaspora, system to enable staff on duty to vote on Election Day.</p> <p>Better communication with the National Registration Bureau to ensure knowledge of number of citizens with ID cards, as coordination in the lead-up to elections to ensure maximum allocations of ID cards. More mobile voter registration teams in marginalised areas and mobile national ID centres in remote areas, civic education targeting marginalised communities, anti-corruption measures targeting public administration officials.</p>	IEBC Prison authorities Kenyan representations abroad National Bureau of Registration	Right to vote (art. 21, UDHR), Concluding Observations of the Human Rights Committee, Hong Kong, U.N. Doc. A/50/40, paras. 408-435 (1995).	While the IEBC registered a reasonable number of people with respect to its target, the proportion of estimated population registered could be improved overall and particularly in some parts of the country.

Area	Purpose	Recommendation	Suggested Activities	Targeted Institution	Principles	Reasoning
Election Administration	Effective use of technology	Sound preparation to ensure technology serves its purpose, with evaluation of purpose and usefulness made public in advance of introduction.	When technology is opted-for, comprehensive study of the necessary hardware and infrastructure, alongside adequate time for procurement, preparation and deployment of hardware, prior to staff training.	IEBC	Article 21, UDHR Article 25 ICCPR, General Comment 25 para 11	The use of technology was intended to guarantee credibility of the elections but the way in which the systems were prepared and implemented contributing to doubts about the election.
	The credibility of results would be better safeguarded by ensuring all tallying is transparent, efficient and easily traceable.	Improve planning, implementation and results management to address the different steps of the electoral cycle in a sequenced and timely manner	Publication of detailed procedures for tallying. Design of tallying procedures to ensure easy traceability from polling station results onwards, including for those cases where verification leads to the need to make arithmetic corrections. Amendment of the Elections Act to require publication of all election results disaggregated down to polling station level for all elections. Amendment of Elections Act to stipulate publication of all results for all elections – not just winners – within a specified deadline. Timely training for all staff involved in results processing, with access for observers and party agents. Free availability of results at all levels for any interested party, even after the official announcement of results. Extra tallying staff where necessary, to avoid errors due to exhaustion.	IEBC, Parliament	Genuine elections, respect of the will of voters. Article 19 and 21, UDHR Article 25, ICCPR, UNCAC for transparent and accountable public administration	The tallying process was not directly observable and results were not sufficiently traceable.
Election Administration	A reliable, accurate and inclusive Voter Register	The existing Voter Register and any separate lists should be consolidated to ensure that all registrations are included in a single register.	Extension of the stipulated time for voter registration and verification, by amendment of the Elections Act. Finalisation of Voter Register at least two months before polling, for the purposes of transparency as well as planning polling stations and distribution of materials. Clear explanations of all stages of the voter registration process, including processing of data after the close of registration. Unexplained changes in the Voter Register and unofficial inclusion of new entries damage the VR's credibility. Expansion of the voter verification period to enable both VR corrections and later, citizen information about where to vote. Consistent implementation of the provision to verify at polling station level. Enable qualified and neutral CSOs to carry out an audit on the VR, in sufficient time for rectification of serious problems.	IEBC, Parliament	The right to vote; equality of vote; genuine elections. (article 21, UDHR), UNCAC for accountable public administration, General Comment 25 para 11	Largely for lack of time, the Voter Register was not adequately consolidated and prepared, leading to the use of multiple lists. This brought the credibility of the IEBC and the elections into question and was a major factor in petitions against the results.  The very late publication of the VR reduced the opportunity of any scrutiny by stakeholders until after the elections and also impeded some operational preparations.
	Ensure equal access to nominated posts for the representatives of marginalised groups.	Revise IEBC policy with regards to compiling and publishing party lists of nominated candidates. Aim towards a more pro-active, management oriented approach on the part of the IEBC. Develop clear regulations on political party election of candidates for the nominated lists to ensure equal access is respected.	Amendment of the Elections Act Developing regulations on the application of Art. 90 of the Constitution by the IEBC Closer cooperation between the IEBC, the political parties and NGEC from the early stages of the process of compiling the lists of candidates for nominated positions Trainings for the political parties on fulfilment of the constitutional principles of affirmative action	Parliament IEBC Political parties National Gender and Equality Commission	Art 25, ICCPR Art 27, ICCPR Art 7, CEDAW, General Comment 25 para 26	National Commission on Gender and Equality challenged the way the lists of nominated candidates were compiled and the role the IEBC played in the process
Election Campaign	A well-informed electorate able to choose freely.	Earlier launching of accessible civic education and voter information programmes to ensure delivery of timely, impartial information.	Possible separation of the IEBC's civic education and voter information aims. It could be useful to accredit CSOs for the former, while retaining implementation of the latter. Support and evaluation of the work of CSOs accredited to carry out civic education for the IEBC. Production of civic education and voter information materials in vernacular languages.	IEBC, CSOs	Art 25,27 ICCPR Art 13, 19 ACHPR, General Comment 25 para 11	Uncertainty over duration of campaigns could favour certain candidates.
	A finite period with a specific starting point would limit the early campaigning afforded only by wealthy parties.	Define the duration of the electoral campaign period to help level the playing field.	Provision of an official election calendar by IEBC in order to ensure fairness in the campaigns (amend. the Elections Act 2011).	IEBC, Political parties	ICCPR, General Comment 25 para 19	

Area	Purpose	Recommendation	Suggested Activities	Targeted Institution	Principles	Reasoning
Election Campaign	Well trained and motivated party agents contribute to the transparency of the elections	Professionalisation of party agents through improved recruitment procedures, training and commensurate payment.	Party agents from all polling areas recruited no later than the date of IEBC's gazetting of polling stations. IEBC information support to training party agents Adequate security for party agents to ensure they are safe in all areas Clarification of procedures for accreditation and identification of party agents at all levels.	Office of the Registrar of Political Parties Government of Kenya Civil Society Kenya Police Service IEBC	The OUA/AU Declaration on the Principles Governing Democratic elections in Africa (8 July 2002), Section IV, article 7.	Poor training and casual hiring of party agents compromises reliability of election results.
	Increase gender equality in elected posts	Develop sustainable policies to increase the number of elected women, including assistance with regards to campaign financing.	Trainings aimed at preparing women aspirants to vie for an elected post Education and outreach campaigns focused on gender equality and women political participation Amendment of the Political Parties Act, increasing the amount of resources allocated via political parties fund to gender equality, to reach at least 34% (from current 30% allocated for women and marginalized groups) Support the creation of funds and/or policies within political parties, aimed at supporting women candidates	Parliament Political Party Leaders Office of the Registrar of Political Parties Political Parties NOG and donor community	Art 3, ICCPR (equal rights men/women) Art 2, 3, 4, 7 CEDAW MDG 3 Art 18, ACHRP	Despite the quota system and affirmative action principles women participation as candidates in 2013 general elections remained extremely low
	To better guarantee impartial and diverse coverage by the media owned by all citizens of Kenya.	In line with the Constitution, which prohibits the state from interference with editorial decisions of journalists and requires impartial state media offering diversity of views, it is recommended to transform the KBC to Public service broadcasting. It is vital to address the issues of its financial and editorial independence.	Amendment of Kenya Broadcasting Corporation Act, or, a new legislation addressing the birth of Public Broadcasting Service.	Parliament, KBC, CSOs	Constitution art. 34; art. VI of the Declaration of Principles on Freedom of Expression in Africa, ACHPR, ICCPR General Comment 34	
Media	Access to media for all parties, even those who lack financial means for paid political advertising, to be able to present their election platforms to voters.	When free airtime is granted, provide it in a fair manner, on the basis of transparent and objective criteria. Legal provisions pertaining to free access slots for party political broadcasts could be more clearly defined as to the rights of the parties and candidates in law.	Amendment of Kenya Broadcasting Corporation Act.	Parliament, KBC	Fair access of contestants to state media/genuine election, ICCPR General Comment 34	
	To improve conditions for fairness in the licensing process and media accountability.	For the media regulatory and self-regulatory bodies to be efficient and respected, their independence from the government and sufficient capacity to operate are key. The media regulatory structure also needs adequate powers to effectively regulate the media sector.	Amendment of Media Act and Communications Act.	Parliament, Media regulatory framework	Constitution art. 34; art. VII of the Declaration of Principles on Freedom of Expression in Africa, ACHPR, ICCPR General Comment 34	
	Voters' awareness of the nature and origin of information they receive through media. Active and creative voter information and civic education campaign in the media.	To facilitate viewers/readers awareness of the nature of the paid political advertising during the election campaigns, such materials have to carry some sort of identification, in order to be easily recognised as paid for. Considering the social responsibility of the broadcasters, they could play a more active role in civic and voter education prior to election and offer free time as well as more favourable rates if charging for airing voter information and/or civic education campaigns materials.	To be addressed in the Code of conduct for the media coverage of election.	Media regulator and/or IEBC	ICCPR General Comment 34 para 39	

Area	Purpose	Recommendation	Suggested Activities	Targeted Institution	Principles	Reasoning
Dispute Resolution	To ensure that the election administration rigorously follows its own regulations for the handling of complaints and appeals, making clear which complaints/appeals body has jurisdiction at which stage.	Implement electoral regulations that ensure decisions taken by courts and electoral bodies on election disputes are determined promptly and effectively within the timeframe of the electoral process.	Amendment to the Elections Act and the IEBC Act	IEBC, Parliament	The right of every individual or political party to a remedy for violation of political and electoral rights ICCPR Articles 2.3, 25; UNHRC General Comments 25, 31, 32; Article 4 IEBC Act.	Disputes filed at IEBC still have not been resolved, and there is no a clear period for taking decision.
	To clarify the roles of the various bodies involved in electoral dispute resolution and reduce the risk of causing confusion. There is need for the public to be duly informed of the existence of other bodies and their respective roles in electoral dispute resolution	The Elections Act needs to establish a clear demarcation of the respective jurisdictions of the Courts and the electoral bodies. It is recommended to avoid multiple channels for electoral dispute resolution of the same matter which could lead to jurisdictional conflict or abuse.	Amendment to the Electoral Act and IEBC Act	IEBC, Judiciary, Parliament	Access to justice UNHRC General Comments 31, 32; Article 47 and 48 Constitution; Section 40 Elections Act"	During the nomination process, candidates complained to IEBC Dispute Resolution Committee as well as Political Parties Dispute Tribunal and High Court
	To provide a single channel for the initiation of prosecutions for electoral offences.	Strengthen enforcement mechanisms for electoral offences under the Elections Act, 2011. Cases which give rise to criminal prosecution should be conducted only through the ODPP and following the rules and standards prescribed in the law governing criminal proceedings.	Amendment to the Elections Act and the IEBC Act. Strengthen enforcement mechanisms: prosecution, investigation, charged in court.	Parliament of Kenya, IEBC Office of the Director Public Prosecution (ODPP)	Part VI Elections Act, Article 107 Elections Act; General Comment 25 para 11	ODPP was in practice the body addressed for offences. IEBC should collaborate and cooperate very closely with the ODPP but not to have the power to prosecute any offences under the Elections Act and impose sanctions, this should be for the ODPP.
	To ensure the right to have an effective legal remedy in regard to electoral offences and raise the public's trust in the police in that regard.	Further training of prosecutors, IEBC staff and police on election related offences focused on the Elections Act and the National Cohesion Act conducted on a regular basis as well as coordination among the bodies involved	Training on legislation and particularly offences to all bodies involved. Outreach activities directed to voters and candidates on how to raise criminal complaints.	IEBC, DPP, Police	Art 8 UDHR, Art 26 ICCPR Article 107 Elections Act. General Comment 25 para 11	Police did not take election offences seriously resulting in many reported cases not been investigated. Police should investigate the cases submitted by the ODPP.