



**EUROPEAN UNION  
ELECTION OBSERVATION MISSION**



**FINAL REPORT  
REPUBLIC OF KENYA  
General Elections 2017**





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### **European Union Election Observation Mission**

### **FINAL REPORT**

### **General Elections 2017**

**January 2018**

## KEY CONCLUSIONS OF THE EU EOM KENYA 2017

1. The Kenyan people, including five million young people able to vote for the first time, showed eagerness to participate in shaping the future of their country. However, the electoral process was damaged by political leaders attacking independent institutions and by a lack of dialogue between the two sides, with escalating disputes and violence. Eventually the opposition withdrew its presidential candidate and refused to accept the legitimacy of the electoral process. Structural problems and specific electoral issues both need to be addressed meaningfully to prevent problems arising during future elections.
2. Electoral reform needs to be carried out well in advance of any election, and to be based on broad consensus. The very late legal amendments and appointment of the leadership of the Independent Electoral and Boundaries Commission (IEBC) before the 2017 elections put excessive pressure on the new election administration.
3. Despite efforts to improve the situation, there was a persistent lack of trust in the IEBC by the opposition and other stakeholders, demonstrating the need for greater independence and accountability as well as for sustained communication and more meaningful stakeholder consultation. There was improved use of technology, but insufficient capacity or security testing. Technology cannot replace trust.
4. The 8 August general elections were competitive with on average nearly eight candidates per seat being elected. Campaigning was largely free but marred by politicians' attacks on state institutions and by the misuse of state resources at national and local levels. Polling on 8 August was largely peaceful and well conducted but there were problems with results transmission, tallying and transparency. Incumbent President Kenyatta of the Jubilee Party was declared the winner by a margin of 1.4 million votes.
5. The Supreme Court's annulment of the August presidential election was historic in ruling against an incumbent president and for focusing on the process of the election (rather than the result). The ruling appeared to prompt improvements in results transmission, verification and transparency in the fresh presidential election in October and thus raised standards of public service. However, the political environment deteriorated sharply.
6. Disturbances from August to December 2017 involved some disproportionate actions by security forces (including the use of live fire), costing dozens of lives and also reportedly involved sexual violence. Criminal elements and gangs also contributed to the violence. There was an increasingly ethnic dimension, with ethnic profiling and threats observed in different parts of the country.
7. Jubilee's unilateral amendments to electoral legislation during the fresh election, harsh rhetoric against the judiciary and acts of intimidation against civil society were highly antagonistic and not consistent with international commitments and good practice for democratic functioning.
8. Supporters of the opposition National Super Alliance (NASA) assaulted and intimidated polling staff, attacked IEBC offices, and disrupted electoral preparations. This is illegal and anti-democratic.
9. The judiciary was subject to increasing pressure. It was extremely concerning that the day before the fresh presidential election a case seeking postponement of polling could not be heard by the Supreme Court due to a lack of a quorum. This deepened concerns of political intimidation of the judiciary.
10. The fresh presidential election in October was generally well conducted, with full results data and forms made available promptly. Following NASA's boycott, there was a severely reduced turnout and a landslide victory for Jubilee.
11. Key civil society organisations and networks were subject to intimidating state actions just before each of the two deadlines for lodging presidential petitions (in August and November). The media provided increasing scrutiny of the process, but could not always report freely and attempts were made to restrict live coverage of disturbances.
12. The newly elected Parliament does not comply with the two-thirds gender principle prescribed by the Constitution, although there was a slight increase in the number of women elected.
13. Stakeholders referred to the need to address deep-rooted structural issues of exclusion and the "*winner-takes-all*" system of government in order to prevent future electoral problems and the risk of violence.

**The EU election observation mission (EOM) offers 29 recommendations for reform.** These include: taking actions to provide for the resilience of independent institutions involved in elections, inclusive legal reform, strengthening of the IEBC's independence and accountability, improved ICT arrangements and IEBC oversight, a legal requirement for a comprehensive results framework, and review of the electoral system considering impact on the political participation of women and inclusivity.

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*An audio podcast version of the executive summary of this report is available on the [EU EOM Kenya 2017 website](https://eeas.europa.eu/election-observation-missions/eom-kenya-2017_en) ([https://eeas.europa.eu/election-observation-missions/eom-kenya-2017\\_en](https://eeas.europa.eu/election-observation-missions/eom-kenya-2017_en)).*

## I. EXECUTIVE SUMMARY AND PRIORITY RECOMMENDATIONS

The 2017 general elections were characterised by a protracted and damaging presidential race that cost lives and weakened Kenya's democratic functioning. Following the Supreme Court's landmark annulment of the 8 August presidential result, the Independent Electoral and Boundaries Commission (IEBC) struggled, but ultimately the results process for the fresh presidential election was improved, with higher levels of transparency. However, the political environment deteriorated, with an increase in violence and ethnic divisions as well as extreme polarisation. This culminated in an opposition boycott and sometimes violent obstruction of the election process. The courts and the IEBC came under attack, as did civil society, and excessive police force was sometimes fatal and exacerbated tensions. Extensive reform is needed to address societal divisions and deep-rooted exclusion issues, as well as recurrent electoral problems. A number of structural problems need to be addressed to prevent future elections from being divisive, problematic and dangerous.

In August, Kenyans voted in **six elections** for the presidency, the parliament, governors and county assemblies. The 2017 elections were the second under the 2010 Constitution, but since the return of multi-party democracy the presidency has only been held by representatives of the Kikuyu and Kalenjin communities. Traditionally, Kenyans have voted predominantly along ethnic lines and the 2017 elections were no exception, contested by the same two broad ethno-regional alliances as in 2013. Incumbent President Uhuru Kenyatta and his Deputy William Ruto, for the Jubilee Party, contested for a second and final term. For the opposition National Super Alliance (NASA), Raila Odinga vied, with Kalonzo Musyoka as his running mate.

Prior to the 2017 elections an **electoral reform process** was undertaken extremely close to election day. This resulted in a compressed timeframe that put extremely high levels of operational pressure on the new IEBC commissioners, including in regards to the adoption and use of election technology. This was particularly difficult in a highly politicised environment. Of the 22 recommendations made by the 2013 EU election observation mission (EOM), it appears that only 2 have been fully implemented.

The **legal framework** for elections generally complies with international standards for elections, with a progressive Constitution adopted in 2010. Kenya has ratified the major international instruments covering electoral rights, although the African Charter on Democracy, Elections and Governance has only been signed, but not ratified. However, some criteria for candidates overly exclude citizens from running for office, and subjective integrity requirements risk weak and inconsistent implementation. After the August election, the ruling party made controversial changes to the electoral laws during the process and without consensus (contrary to recognized good practice). This escalated tensions to dangerous levels and caused legal uncertainty over applicability of the changes.

**Electoral dispute resolution** mechanisms were used extensively during the election process, with adjudications having a profound impact on the course of the election. The judiciary received over 845 pre-election cases, a significant increase on the few lodged in 2013. This resulted in an environment of procedural uncertainty before the election. The Supreme Court ultimately decided on the validity of the results for both presidential elections.

The 1 September **landmark Supreme Court decision** annulling the August presidential election demonstrated the ability of the judiciary to adjudicate independently of government. The court's strong emphasis on process, including results transparency and verifiability not just for candidates but also for citizens, appears to have contributed to increased integrity in the electoral process. However, there was a dangerous escalation of tension during the fresh presidential election that furthered political and ethnic divisions. In November, the Supreme Court unanimously upheld the election of President Kenyatta. NASA immediately responded by stating that the decision was taken under duress and refused to recognize the government.

Throughout the electoral process, the **judiciary was subject to intimidation**. Negative commentary about the judiciary and/or justices was voiced by some politicians at the highest level. The Chief Justice made several public statements underlining the need for politicians to respect the independence of the courts and to refrain from intimidation. After the annulment of the presidential elections, there were demonstrations against the judiciary, complaints were lodged, and the driver of the Deputy Chief Justice was shot and injured two days before the fresh presidential election. The following day, the Supreme Court did not have the necessary quorum to hear a petition for a delay to the poll. This is highly unusual and raised serious questions among Kenyan

stakeholders, including whether this was the result of political interference. The failure to hear the case *de facto* cut off the path for legal remedy before the election.

Despite improvements, there is a persistent lack of trust in the **IEBC**, showing a need for enhanced independence and accountability. Given the tensions between political camps, the IEBC needed to be above suspicion and to be transparent and trusted by all. The IEBC did not sufficiently consult stakeholders and despite some efforts public communication lacked sufficient structure, consistency and depth. The Supreme Court's annulment of the presidential election put the IEBC under intense pressure and some internal IEBC divisions became very apparent. Nevertheless, the IEBC made significant technical improvements that were evident on the 26 October election day. Following NASA's decision to withdraw its candidates, there were regular demonstrations against the IEBC outside its offices, and some NASA supporters violently disrupted electoral preparations in some parts of the country. These violent and illegal actions put the IEBC and its staff in a difficult and dangerous position.

While some hoped that the use of more **technology** would prevent fraud, reliance on technologies did not remove mistrust and led to specific new concerns. These became very evident with the torture and murder of Chris Msando, a prominent IEBC ICT manager, at the end of July. After the general elections, NASA made claims that the displayed keyed-in presidential results were "*computer-generated*", despite the availability of paper and scanned results forms substantiating the declared results. There was improved use of ICT in the fresh presidential election, with enhanced voter identification and results transmission with data made available promptly. Overall capacity and security testing of technology was late and insufficient. Institutional ownership of ICT by the IEBC remained limited and implementation challenges arose from its dependence on contracted private sector service providers and limited knowledge transfer. The contracting of technology companies also significantly increased the cost of the elections.

The **voter register** was comprised of 19,611,423 voters, which is estimated to be approximately 82% of all adult citizens based on population projections. However, the real percentage is likely to be lower given the possibility, according to an independent KPMG audit, of one million deceased persons still included in the register. Biometric voter identification in polling stations provided a safeguard against people voting in the name of deceased voters (in October 96.2% of voters were biometrically identified). Jubilee argued that NASA sought a delay in the election so the voter register could be re-opened and the opposition could more effectively register its supporters. Delays in obtaining ID cards for 18-year-olds, and reportedly for some minority groups, can reduce the opportunity to register and therefore vote. A stronger inter-agency framework is warranted for future development and maintenance of the voter register, including possible integration of national databases.

The **primaries** were overall competitive, with an increased number of incumbents losing their nominations, including governors and MPs from both Jubilee and NASA. However, selective interference by party leaderships, a lack of party membership lists and inadequate procedures were reported to an advance team of EU experts. The IEBC nomination process was controversial, with accusations of insufficient exclusion of candidates on grounds of legally-established ethics and integrity criteria. There were a total of 14,523 candidates competing for 1,882 elective seats in the August general elections, an average of nearly 8 candidates per seat.

The six races were competitive and generally candidates could **campaign freely before the August elections**. However, there were problems with the misuse of state positions and resources by both camps, but more to the benefit of the national incumbent. There were also some cases of violence-inciting language and violent incidents as well as a growing climate of fear, resulting in the internal displacement and consequent disenfranchisement of minority groups in some areas. Both sides accused the other of election sabotage and there were increasing verbal attacks on institutions.

The **8 August election day** went well, with voting and counting proceeding with few complaints or incidents. The EU EOM did not receive reports from either camp of manipulations or of agents being unable to work, and there appeared to be an overall commitment to the process. Generally, the electronic identification of voters proceeded smoothly, although there was a lack of consistent accountability procedures in cases where voters could not be biometrically identified. On election day, the EU EOM observed 663 polling stations in 147 constituencies across 35 counties (out of 47).

The **August tallying and results process** was marred by extensive problems with results transmission and delays in the IEBC's publication of results forms. These aroused suspicions of interference and weakened the ability of

parties and others to prepare petitions. EU EOM analysis of over 1,550 publicly available forms showed transparency shortcomings, some mathematical errors and some procedural gaps. This did not appear to consistently advantage one candidate, and problems appeared across both strongholds and in swing constituencies. However, in a closer race, such problems could have a decisive impact on the outcome. A lack of IEBC explanation or acknowledgement of errors and omissions undermined confidence in the results process and in the institution and also fuelled allegations of manipulations and fraud.

The declared **August results** showed that overall a high proportion of incumbents were voted out and that Jubilee made gains across the races. Kenyatta received 8,203,290 votes (54.27%), giving him an official margin of victory of 1,441,066 votes over Odinga's 6,762,224 (44.74%). While the country stayed generally calm, post-election violence erupted in some counties, with some looting also taking place. The Kenya National Commission for Human Rights (KNCHR) recorded 37 people killed, mainly through disproportionate police responses, including two children. Sexual violence was also documented, reportedly mainly perpetrated by police officers. Following the 1 September Supreme Court ruling, NASA supporters were jubilant with some seeing it as an affirmation of their claims of electoral victory, though the annulment was based on shortcomings in the process rather than the declared results. In contrast, Jubilee supporters referred to the court "*stealing*" their victory.

There was a disturbing escalation of tension, hostility and national uncertainty during the **second campaign period** before the 26 October fresh presidential election. Public calls for dialogue between the two political sides remained unanswered, campaign narratives became more extreme and hostilities intensified, culminating in NASA boycotting the process and supporters obstructing it in some areas. There were violent conflicts between the police and protesters as well as criminal elements, with some excessive use of force and live fire by security agencies that led to deaths and injuries.

NASA's boycott of the **26 October polling** had an obvious effect on turnout. Going to the polls or not became a political statement, and there were reports of intimidation of supporters of both camps when people were checked to see if they had indelible ink on their fingers from voting. In Nyanza there were severe obstructions and violence, resulting in the IEBC declaring indefinite postponement of polling in 25 constituencies (out of a national total of 290). From what was seen by EU EOM observers, technical improvements from August were apparent, including the marking off of each voter on the voter register. However, despite a range of safeguards, the lack of agents from competing parties weakened checks and balances and left the process vulnerable to abuse.

The **October tallying and results process** was considerably improved, with greater standardization of results forms, enhanced transparency through the projection of tallying at constituency centres, and extensive electronic transmission and display of results forms. On election night, the scanned results forms of virtually all polling stations that opened were made immediately available online. However, further information and explanation was not provided regarding evident discrepancies between different levels of results forms. Positively, the IEBC granted read-only access to the back-end of the Kenya Integrated Elections Management System (KIEMS) and published full KIEMS data. This revealed some apparent irregularities at a local level, in particular in Garissa county.

On 30 October, the IEBC **declared the presidential results** and a turnout of 7,653,930 voters, which was announced to be 42.36% of voters in the parts of the country where voting took place, and 38.84% of all registered voters. This was a sharp reduction from the 77.48% turnout in the August elections. President Kenyatta was declared the winner with 98.27% of the votes.

**Immediately after the October election** there was further violence and reports of excessive police actions resulting in injuries and deaths. On 17 November, when Odinga returned to Kenya from abroad, the government's clampdown on public assembly restricted people's rights and further fuelled frustrations, resulting in running street battles lasting over 10 hours around Nairobi. The police claimed no live ammunition was used during the disturbances, but others reported dozens of police shootings and fatal beatings. NASA accused Jubilee of ethnic profiling and genocide in Nyanza, vowed to declare Odinga President, and called for an interim government. There were various public calls from Kenyan stakeholders to address structural problems of exclusion, Kenya's "*winner-takes-all*" politics, the lack of rotation in the presidency beyond two ethnic groups, and the over-reach of the government. It was argued that without reforms, elections will continue to be a point of conflict. As before, there was a lack of dialogue between the two camps.

Kenya has a vibrant **media** landscape, but self-censorship is widely reported and journalists in several counties were threatened or harassed in connection with political or election-related matters. During the disturbances in November, the Communications Authority of Kenya directed the media to immediately cease live coverage of political events. However, this was without legal basis and some media houses immediately refused to follow the direction. Positively, news media provided increasing scrutiny of the election process, including of the tallying. State media gave equitable news coverage, although they favoured Jubilee in some programmes. Private vernacular radio stations monitored by the EU EOM favoured one or other political camp. An extensive paid media campaign promoting government achievements raised concerns about incumbent advantage and was suspended in a High Court ruling on 19 October.

Disinformation distributed on **social media** heightened uncertainty in an already volatile environment. Such materials, including forged statements in the name of international organisations, were often attributed to political camps aiming to delegitimize genuine stories and/or confuse voters. The lack of data protection regulations and applicable campaign finance legislation leaves the use of data mining as well as political advertisements unregulated, insufficiently transparent and difficult to assess.

During the election, seven **civil society** organisations (CSOs) and networks were subject to intimidating actions by the NGOs Coordination Board just before each of the two deadlines for lodging presidential petitions (in August and November). Without a clear legal basis, the Board issued letters to them that demanded *inter alia* that they cease all political operations, including all electoral-related programmes. While accountability is appropriate, the organisations concerned denied the allegations against them and in some cases pointed out that they are limited companies and therefore do not fall under the Board's oversight. The Board's actions go against the commitments Kenya has made in regard to creating a conducive environment for civil society. The government has been criticised for failing to implement the Public Benefits Organisations Act 2013.

Up to the 31 October, there were only 15 successful convictions for **electoral offences** and no prominent person had been charged. While new efforts have been made in regard to prosecutions, the difficulties in gathering evidence and the timeframes involved in criminal proceedings risk perpetuating a culture of impunity. The lack of any requirement for public updates on the status of investigations and prosecutions diminishes public accountability on respective institutional responsibilities and progress.

Kenya's lack of applicable **campaign finance** legislation and regulation undermines equality of opportunity and transparency in the election process. The current legal framework provides only for political party finance regulation without regulating individual candidates. Arrangements for parties do not appear to be fully effective, with limited transparency and enforcement. EU EOM long-term observers (LTOs) observed the distribution of money (also referred to as a "*transportation refund*") at campaign events and noted a common expectation of payments or other hand-outs such as food or drink.

**Women** were elected in greater numbers than in 2013, including for the first time to governor seats. However, the National Assembly and Senate do not meet the constitutional two-thirds gender requirement. Only 9.4% of all candidates were women. In 12 county assemblies not a single woman was elected. Advocacy groups, media organisations and EU EOM observers reported cases of women aspirants and candidates being harassed, attacked or discriminated against during the primaries and/or campaign period.

Kenya has ratified the Convention on the Rights of Persons with Disabilities and its Constitution reserves special seats in Parliament and county assemblies for **persons with disabilities** (PWDs). Despite various legislative and regulatory measures being adopted over the last year, PWDs continue to be marginalised in public life, representing 0.74% of all registered voters and 0.2% of candidates for elective positions. Only seven PWDs were directly elected to office. Positively, media coverage of campaign and other election events included the use of sign language.

During nearly six months of EU EOM observation, the mission issued 13 public statements, including preliminary statements after each election day and recommendations for remaining parts of the process. The EU EOM offers 29 recommendations for future election reform based on observations, analysis and extensive discussion with a range of stakeholders. Priority recommendations include:

1. **Actions be taken to strengthen the resilience of constitutionally independent institutions involved in elections**, to preserve checks and balances in the electoral process.
2. **The parliament undertake a process of electoral legal reform on a cross-party basis well in advance of the next elections**, involving consultation with the IEBC, stakeholders and experts. The IEBC could support this process by initiating and facilitating inter-institutional working-groups for the development of electoral reform recommendations.
3. **The IEBC's independence and accountability be strengthened** through greater financial autonomy and the appointment of future chairpersons and commissioners through a merit-based, multi-stakeholder selection committee. The quorum for commissioners' meetings, as well as the decision-making majority, be increased to promote institutional cohesiveness and consistency. Plenary meeting decisions be required to be immediately publicly available.
4. **The IEBC have ICT arrangements that are tried and tested, secure and publicly accountable**. Advance feasibility studies be undertaken, and simulations be conducted well ahead of general elections. Procurement be based on transparent criteria ensuring maximal safeguards for public interest, accountability and oversight. Technology be periodically reviewed independently, considering security, sustainability, institutional ownership and effectiveness. Stakeholders be consulted throughout and have controlled access. Public explanation be given on system and data integrity measures.
5. **Legal requirements be made for a comprehensive results transmission framework**. To include prompt publication of disaggregated results and polling station result forms for all elections, as well as clear provisions for electronic and manual results transmission, so as to enable consistent application and confidence in the declared outcomes.
6. **The Parliament promptly review the electoral system and its impact on the political participation of women and inclusivity in a broader sense, and reform as appropriate**, for compliance with the constitutional two-thirds gender principle for elective positions.

## II. EU EOM FULL LIST OF RECOMMENDATIONS

Of the 29 recommendations offered by the EU EOM, 18 are considered to require changes in the primary legislation, and for a further 5 it would be desirable to secure the suggested changes in law. An additional three recommendations would involve change in the Constitution (without a referendum). All recommendations are based on extensive consultation with a broad range of stakeholders. The recommendations are also elaborated in a table format with related information, including on international commitments and standards (annex 2).

\* = Priority recommendations (six in total)

### ***POLITICAL PARTIES AND THE CAMPAIGN***

1. *\* Actions be taken to strengthen the resilience of constitutionally independent institutions involved in elections, to preserve checks and balances in the electoral process.*
2. *Promote internal party democracy through stronger enforcement powers for the IEBC and the Office of the Registrar of Political Parties. Including in regard to candidate nominations and representation of marginalized groups.*
3. *Strengthen the ban on public resources being used for campaigning. Including by removing the exemption for cabinet secretaries and members of county executive committees (contained in the Leadership and Integrity Act).*

**LEGAL FRAMEWORK**

4. *\* The parliament undertake a process of electoral legal reform on a cross-party basis well in advance of the next elections, involving consultation with the IEBC, stakeholders and experts. The IEBC could support this process by initiating and facilitating inter-institutional working groups for the development of electoral reform recommendations.*
5. **Candidacy criteria be reviewed to remove subjective criteria and reduce restrictions.** Objective criteria be defined for determination of ethical candidacy requirements. Restrictions on candidacy based on educational qualifications and financial situation be repealed. Requirements for voters to be of “sound mind” be removed.

**ELECTORAL DISPUTES RESOLUTION (EDR)**

6. **Establish legal time limits for the filing, hearing and determination of pre-election cases, and consider reducing the number of appeal levels, so cases are completed well in advance of election day.**
7. **Extend the deadline for the determination of post-election presidential petitions, to allow more realistic time for the preparation of cases after results publication and full due process in court, including the possibility of recounts.**
8. **Strengthen the mechanism for enforcement of the Electoral Code of Conduct.** Including through defined rules of procedure covering warnings, proportionate sanctions, transparency measures and procedures for immediate referral to the Office of the Director of Public Prosecutions. Also to have separate investigators and adjudicators and for the process to be more accessible.

**ELECTION ADMINISTRATION**

9. *\* The IEBC’s independence and accountability be strengthened through greater financial autonomy and the appointment of future chairpersons and commissioners through a merit-based, multi-stakeholder selection committee. The quorum for commissioners’ meetings, as well as the decision-making majority, be increased to promote institutional cohesiveness and consistency. Plenary meeting decisions be required to be immediately publicly available.*
10. **The IEBC strengthen transparency, communication and public outreach** through a public communication strategy that provides continuous, comprehensive, clear and prompt information. Including on IEBC decisions, procedures, plans and results data.
11. **The IEBC undertake regular, structured and meaningful stakeholder consultation** throughout the whole electoral cycle, to enable discussion and buy-in on key decisions, including from political parties, citizen observers, CSOs, faith-based organizations and the media.
12. **The IEBC develop full and clear procedures and plans in good time, seeking judicial clarification in situations of uncertainty.** Procedures be tested, consistently applied, reviewed routinely (for example after by-elections) and made public.
13. *\* The IEBC have ICT arrangements that are tried and tested, secure and publicly accountable. Advance feasibility studies be undertaken and simulations be conducted well in advance of general elections. Procurement be based on transparent criteria ensuring maximal safeguards for public interest, accountability and oversight. Technology be periodically reviewed independently, considering security, sustainability, institutional ownership and effectiveness. Stakeholders be consulted throughout and have controlled access. Public explanation be given on system and data integrity measures.*
14. **Civic education programmes be developed** and implemented as a multi-stakeholder exercise, with a focus on individual choice, inclusion, accountability of those elected and electoral integrity issues. Target youth and marginalized communities. Resources at community level be used to complement school curriculae.

**VOTER REGISTRATION**

15. **The IEBC develop a voter registration plan based on recommendations from the KPMG audit** (and any subsequent audits). Including formalized, structured inter-institutional collaboration and development of a strategy for the removal of names of deceased voters. Also, research be conducted on possible future integrated systems involving other agencies responsible for population databases.
16. **The availability of national identification cards be enhanced.** Identification cards to be available to citizens before they reach the age of 18, so they can register and be able to vote immediately on turning 18. The distribution of cards be fully consistent and transparent across the country (to avoid allegations of selective provision) and within legal timeframes.

**POLLING, COUNTING AND TALLYING**

17. **Include in polling station results forms more information for strengthening accountability.** Statistics from electronic identification devices be recorded together with the number of people who voted by manual procedures, as well as ballot reconciliation data.
18. \* **Legal requirements be introduced for a comprehensive results transmission framework.** To include prompt publication of disaggregated results and polling station result forms for all elections, as well as clear provisions for electronic and manual results transmission, so as to enable consistent application and confidence in the declared outcomes.

**THE MEDIA AND SOCIAL MEDIA**

19. **Narrow the legal definition of hate speech** in line with international human rights obligations (so both intention and imminent risk are demonstrated), to decrease risk of self-censorship among journalists and bloggers.
20. **Strengthen the independence of the media and journalists, including through the Communications Authority of Kenya and the financial autonomy of the Media Council of Kenya, and clarify their respective mandates** to reinforce freedom of the media and to eliminate unnecessary and overlapping regulation of the media. Invest in media literacy, including critical thinking about sources and the potential of falsified documents.
21. **Develop the Kenya Broadcasting Corporation** into a genuine public service broadcaster with full editorial and financial independence, including by reducing the government's role in leadership appointments and regulations.
22. **Develop a data protection law** as well as other mechanisms to protect citizens' right to privacy online and offline.

**CIVIL SOCIETY**

23. **Provide protection for civil society by promptly bringing into force the Public Benefits Organisations Act,** in accordance with the Constitution, to enable the effective regulation and administration of NGOs.

**PROSECUTION OF OFFENCES RELATED TO ELECTIONS**

24. **Establish shorter timelines for prosecutions of electoral offences, with requirements for regular updates by the Office of the Director of Public Prosecutions and other agencies involved.** Similarly, in regard to cases of threats to or violence against journalists and others involved in the election process.

**CAMPAIGN FINANCE**

25. **The Parliament operationalise the Election Campaign Financing Act** to regulate the amount of money received and spent by candidates and political parties during an election or referendum.

26. **Strengthen oversight mechanisms for political party financing.** *Include more specific monitoring requirements by the Office of the Registrar of Political Parties of parties' incomes and expenditures (including during election campaigns) and accompanying transparency provisions.*

### **THE PARTICIPATION OF WOMEN**

27. \* *The Parliament promptly review the electoral system and its impact on the political participation of women and inclusivity in a broader sense, and reform as appropriate, for compliance with the constitutional two-thirds gender principle for elective positions.*
28. **Require the Office of the Registrar of Political Parties to publicly report on parties' compliance with gender requirements (for memberships and governing bodies) and on the application of penalties.**

### **THE PARTICIPATION OF PERSONS WITH DISABILITIES (PWDs)**

29. **Establish requirements for parties to increase the proportion of persons with disabilities in party leadership positions and running as candidates, and to publicly report on this and on their policies on disability.**

## **III. EU EOM METHODOLOGY**

The EU EOM Kenya 2017 is independent, including from governments, and strictly neutral, with no vested interest in the outcome of the election. The EU EOM followed an established methodology and adheres to the Declaration of Principles for International Election Observation endorsed at the United Nations in October 2005.<sup>1</sup> The EU EOM assessed the whole electoral process against the laws of Kenya and also Kenya's international obligations and commitments for elections. The EU EOM was deployed following an invitation from the IEBC.

The EU EOM was led by Chief Observer, Marietje Schaake, Member of the European Parliament from the Netherlands. From April, a small EU team followed the party primaries and voter registration and then the EU EOM was deployed with a core team of experts, who were in Kenya from 14 June until 23 November.

During nearly six months of EU EOM observation, the mission issued 13 public statements, including preliminary statements after each election day and recommendations for remaining parts of the process, as well as three joint communiqués with other international election observation missions. See annex 3 for a full list and links. This EU EOM Final Report was finalised on 21 December 2017.

For the 8 August elections, the mission had a core team of 10 analysts and 30 long-term observers (LTOs) deployed across the country, except in the northeast for security reasons. On election day, the mission was composed of over 130 observers from 28 EU Member States, Canada, Norway and Switzerland. A delegation of seven Members of the European Parliament, headed by David McAllister (Germany), also joined the mission. The EU EOM observed 663 polling stations in 147 constituencies across 35 counties.

For the 26 October fresh presidential election, the EU EOM had 8 core team experts and 24 LTOs deployed across the country. However, on election day the mission was compelled to have limited field coverage for security, methodological and political reasons, and was composed of 57 observers from 23 EU Member States, Norway and Switzerland.

## **IV. POLITICAL BACKGROUND**

### **Ethnic voting lines and a history of concentrated presidential power**

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<sup>1</sup> [EU EOM methodology and the Declaration of Principles for International Election Observation.](#)

The 2017 general elections were the sixth consecutive elections since the multi-party system was introduced in 1991, and the second under the 2010 Constitution. Kenya has a history of pronounced ethno-political divisions, disputed presidential election results and election-related violence. Devolution has substantially altered the electoral dynamics by creating new local arenas of political competition and four new elective posts were being contested for the second time.<sup>2</sup>

Kenyans have traditionally voted predominantly along ethnic lines and programmatic differences between political camps have not been very pronounced. With no ethnic community being in a majority position, formal and informal ethno-regional alliances have been forged to form coalition governments. The two ethnic communities mainly involved in the 2007 post-election violence (Kikuyu and Kalenjin) have been in an alliance since 2013. The presidency has so far only been held by representatives from the Kikuyu and Kalenjin communities.<sup>3</sup>

The presidential elections in 2017 were contested by the same two broad ethno-regional alliances as in 2013. President Uhuru Kenyatta, with his Deputy William Ruto, contested for a second and final term. Raila Odinga vied for the fourth time for the presidency, with Kalonzo Musyoka as his running mate. Kenyatta's Jubilee Party consolidated itself from an alliance into a party in September 2016, and Odinga's opposition expanded into the National Super Alliance (NASA) at the end of 2016.<sup>4</sup> Odinga and his supporters entered into the election with a conviction of having been denied victory twice (2007 and 2013) through manipulations of the results transmission and aggregation process and a perceived lack of judicial remedy. Mistrust underscored Odinga's and NASA's attitude towards the IEBC and other state agencies.

## V. ELECTORAL REFORM PRIOR TO THE 2017 GENERAL ELECTIONS

### *Very late reforms put excessive pressure on the election administration and increased legal challenges just before election day*

In summer 2016 there was a stand-off between the ruling Jubilee Party and the opposition over the leadership of the IEBC. This involved regular demonstrations and some violence. Following actions by religious leaders and others, there was agreement for IEBC leadership selection through an open recruitment process and a committee consisting of religious leaders and some ruling and opposition party MPs. The final selection by the President was later questioned by some, as the highest scoring candidates were not always selected.<sup>5</sup> The IEBC commissioners' terms then began on 18 January 2017, less than eight months before the elections. This is not consistent with international good practice or the recommendations of the Kriegler report and put excessive pressure on the IEBC.<sup>6</sup>

Two legislative amendments were also made very late in the process, putting extremely high levels of operational pressure on the new IEBC commissioners. The September 2016 amendments to the Elections Act, which covered the use of technology in elections, were the result of a political negotiation with a joint select committee comprised of MPs from both political sides. However, the January 2017 changes, on the use of complementary

<sup>2</sup> Governor, senator, county women representative and member of county assembly. Counties receive a minimum of 15% of the national budget and have legislative and political powers.

<sup>3</sup> Jomo, Kenyatta (1964-78), Mwai Kibaki (2002-13) and Uhuru Kenyatta (2013- ) are from the Kikuyu ethnic group, while Daniel arap Moi (1978-2002) is from the Kalenjin ethnic group.

<sup>4</sup> NASA was formed in October 2016 when the leader of the Amani National Congress (ANC), Musalia Mudavadi, announced cooperation with the Coalition for Reforms and Democracy (CORD) led by Raila Odinga and Kalonzo Musyoka. NASA was officially launched on 11 January 2017.

<sup>5</sup> On 23 December 2016, the selection panel settled on two candidates for the IEBC Chairperson: Kina scoring 77% and Chebukati scoring 63%. President Kenyatta, (allowed by law to choose the IEBC chairperson from a choice of two), chose Chebukati. Questions have been raised about why the President did not apparently select all IEBC commissioner positions on the basis of merit (with some applicants not chosen, despite scoring 70 – 80%).

<sup>6</sup> The Venice Commission Code of Good Practice, page 10, paragraph 2, refers to the fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, not being open to amendment less than one year before an election, or being written in the constitution or at a level higher than ordinary law. The Kriegler Report on the 2007 elections recommended no changes to the leadership of the electoral management body within fifteen months of an election.

mechanisms in case of technology failure, were passed without opposition participation in the process. The lack of political consensus inevitably made implementation more complicated and likely to be challenged.

Other legislative initiatives with relevance to elections have been criticised for being extremely protracted, with delays in: parliamentary scheduling and passing, presidential assent, legal notification, establishment of a date of commencement, and/or the passing of enabling regulations. Examples include the Access to Information Act and the Public Benefits Organisations Act 2013 (for civil society regulation).

Of the 22 recommendations made by the 2013 EU EOM, it appears that none of the five priority recommendations have been implemented, and only two have been fully implemented (related to a unified voter register and defining the duration of the campaign). The rest have been partially implemented, albeit minimally in some cases, or not implemented at all.

## VI. LEGAL FRAMEWORK

### **A Constitution and a legal framework that mostly meets international obligations, but with questionable late amendments made during the process without political consensus**

In August 2010, a new Constitution was promulgated with significant changes, including an improved Bill of Rights and a devolved system of governance with 47 county assemblies and governors, as well as a bicameral parliament and a president. The judiciary was strengthened, with more judges and measures to secure its administrative, operational and financial independence.

The legal framework generally complies with international standards for elections. Kenya has ratified the major international instruments covering electoral rights, including the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPD). Kenya is also state party to the Convention against Corruption. Kenya has ratified relevant regional instruments including the African Charter on Human and Peoples' Rights (ACHPR) and the Convention on Preventing and Combatting Corruption (CPC). However, the African Charter on Democracy, Elections and Governance (ACDEG) has been signed but not ratified.

A number of candidacy requirements are not fully consistent with Kenya's international commitments. Moral and ethical requirements (in the Leadership and Integrity Act) are subjective (with a reliance on self-declaration). This is not consistent with authoritative ICCPR interpretation, which refers to any restriction on candidacy being objective,<sup>7</sup> risking inconsistent implementation, and increasing pressure on the IEBC. There are also excessive restrictions based on educational requirements for presidential and governor candidates (and all candidates in future elections),<sup>8</sup> and financial restrictions with "*undischarged bankrupts*" unable to run.<sup>9</sup>

The Constitution establishes universal suffrage for every adult citizen and, positively, for the first time prisoners were given the right to vote in the presidential race. In 2015 the Supreme Court directed the IEBC to register some Kenyans in the diaspora for voting. However, the requirement to be of sound mind to be able to vote is not consistent with the CRPD.

The Constitution requires that elections have to be "*simple, accurate, verifiable, secure, accountable and transparent*". However other primary legislation is based primarily on legislative texts that pre-date the progressive Constitution, and therefore do not give detail on how to fulfil these constitutional requirements. The legal framework is also complex as a result of the amendments and supplements that have come from judicial rulings.

<sup>7</sup> ICCPR, Human Rights Committee, General Comment 25 "Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria" (paragraph 15).

<sup>8</sup> ICCPR, Human Rights Committee, General Comment 25 "Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education..." (paragraph 15).

<sup>9</sup> Constitution, articles 99.1(b), 99.2. (f), 193 1(b), and 193.2(e).

The Elections Act includes a comprehensive Electoral Code of Conduct (ECC), which is binding on political parties, candidates, leaders, agents, party members and supporters. The ECC commits contenders to *inter alia* preventing and condemning violence and intimidation, promoting ethnic tolerance, adhering to the national values and principles of the Constitution, and promoting gender equality, cultural diversity and fair representation of persons with disabilities. The code also binds contenders “*without prejudice to the right to present a petition to an election court, accept the final outcome of the election and the Commission’s declaration and certification of the results thereof*” (in line with ACDEG article 17).<sup>10</sup>

During the electoral process the ruling party made controversial changes to the electoral laws, contrary to good practice for elections, in effect attempting to change the rules of the game part-way through, without consensus.<sup>11</sup> Their introduction to parliament on 28 September was antagonistic, brought uncertainty and further divided the two camps. The bill was in part used as a justification for non-participation by NASA in the electoral process (as was the IEBC’s lack of reform). None of the proposed changes were critical for Kenya to comply with international commitments nor were pre-requisites for improvements to the fresh election. The bill went to the President for assent on 13 October, and following the lapse of 14 days, automatically passed for gazette notification. This took place on 2 November, generating uncertainty about applicability, given that this was after polling and the results declaration but before the deadline for petitions. The constitutionality of the amendments were challenged by the Katiba Institute, with the High Court suspending the operation of the Elections Law Amendment Act on 13 December until 16 March 2018 when the case will be determined.

### ***A presidential electoral system that is criticised for being excluding and “winner-takes-all”***

The presidential electoral system became subject to increasing criticism from a variety of stakeholders for being a “*winner takes all*” arrangement.<sup>12</sup> The concentration of power and resources in the presidency and the lack of a parliamentary role for unsuccessful presidential candidates are seen as liable to escalate frustration among losing parties. The risks of exclusion are further amplified by tribal voting patterns resulting in ethnically dominant coalitions being able to retain a hold on power and resources.

At the national level, the President is elected by a qualified majority to serve a five-year term, which is renewable once. To win the first round outright, a candidate must obtain a majority (50% plus 1 vote), plus at least 25% of the valid votes in more than half the 47 counties.

The five other elections being contested were for senators, members of the National Assembly, county woman representatives to the National Assembly, governors and Members of County Assemblies (MCAs). Of the 349 members of the National Assembly, 290 are directly elected in constituencies using the first-past-the-post (FPTP) system, and 47 are reserved for women elected at the county level. An additional 12 seats are reserved for nominated members of special interest groups, including persons with disabilities (PWDs), youth and workers, on the basis of party lists.<sup>13</sup> Likewise, of the 67 members of the Senate, 47 are directly elected at the county level using FPTP. An additional 16 seats are reserved for nominated women, while 2 are reserved for youth and 2 for PWDs (male and female). The allocation of seats for the nominated members is proportional to the number of seats won by a party in the National Assembly, Senate and county assemblies respectively. At the county level, 47 governors and 1,450 MCAs (one per ward) are directly elected using FPTP. There are eight nominated seats

<sup>10</sup> Electoral Code of Conduct, paragraph 6(o). The ACDEG (signed by Kenya in 2008) refers in article 17 to “*Ensuring that there is a binding code of conduct governing legally recognized political stakeholders, government and other political actors prior, during and after elections. The code shall include a commitment by political stakeholders to accept the results of the election or challenge them in through exclusively legal channels.*”

<sup>11</sup> For further information see Statement EU EOM Kenya 2017 from 3 October. “*The EU Election Observation Mission calls on Kenya’s political leaders to demonstrate commitment to democratic electoral competition and institutions.*” The Economic Community of West African States (ECOWAS) notes “*No substantial modification shall be made to the electoral laws in the last six months before the elections, except with the consent of a majority of political actors.*” Protocol on Democracy and Good Governance, 2001. The Venice Commission Code of Good Practice refers to the fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, not being open to amendment less than one year before an election.

<sup>12</sup> For example religious leaders have suggested the creation of a post of leader of the opposition so the losing presidential candidate has an on-going role in parliamentary politics..

<sup>13</sup> The Elections (Party Primaries and Party Lists) Regulations, 2017, requires that party nomination lists for special interest groups in the National Assembly must alternate between female and male candidates, without specifying which gender should have the first position on the list.

in each county assembly, at least two of which are for PWDs, two for youth, and two for marginalised groups. Each county must nominate additional members of the under-represented gender for compliance with the two-thirds gender principle of representation.

## VII. ELECTORAL DISPUTE RESOLUTION (EDR)

### **Extensive resolution of disputes through the courts, with the judiciary demonstrating its independence but coming under increasing pressure**

Electoral dispute resolution mechanisms were used extensively during the election process, with adjudications having a profound impact on the course of the election. The judiciary received over 845 cases before the August elections, a significant increase from the few lodged in 2013. Some reasons given for the increased litigation close to the election are: trust in the judicial system for redress, deeply-rooted grievances, lack of trust in other institutions, the IEBC not always addressing stakeholder concerns directly or in good time, very new IEBC leadership, late changes in legislation and high levels of competition. The volume and timing of cases meant that changes were happening late in the election process. Overall this resulted in an environment of procedural uncertainty before the elections, and ultimately in the Supreme Court deciding on the validity of the results for both presidential elections.

Civil electoral cases were prioritized at all levels with pre-election disputes resolved within three weeks.<sup>14</sup> However some decisions on the electoral framework and administration were taken late in the process, and the volume of cases meant not all could be decided in time. This is due to the absence of time limits on the lodging and adjudication of pre-election petitions related to primaries and other matters, and to pre-election cases being open to appeal to the High Court, the Court of Appeal and the Supreme Court.<sup>15</sup> More than 240 pre-election petitions were still pending at the time of polling in August. Late rulings that were problematic to implement included the reinstatement of some disqualified candidates after ballot printing and the preparation of the KIEMS devices.<sup>16</sup> There were also late decisions over ballot printing, with a 7 July High Court decision nullifying the IEBC tender (due to lack public participation), then being overturned three days later by the Court of Appeal.<sup>17</sup>

Additionally, during the pre-election period party-related issues can be resolved by the Political Parties Disputes Tribunal (PPDT), which comes under the judiciary.<sup>18</sup> The PPDT appeared to deal with many more cases than in 2013 and to play a much more significant enforcement role.<sup>19</sup> During the 2017 elections, the PPDT adjudicated over 306 cases relating to party primaries and 235 cases relating to party lists. Penalties included disbanding the Kisumu County Elections Board of the Orange Democratic Movement (ODM) and ordering a rerun of party

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<sup>14</sup> This is in part attributed to the preparatory work undertaken by the Judiciary Committee on Elections, which was launched in August 2015 by the Chief Justice as a permanent committee of the judiciary. One of its main functions is to develop and implement, in conjunction with the Judiciary Training Institute, a training programme on election disputes. It is also tasked with increasing court preparedness (including resource allocation), and shortening timeframes for determination of criminal cases.

<sup>15</sup> For example, from the 306 cases filed at the Political Parties Disputes Tribunal, 117 were appealed to the High Court, 32 to the Court of Appeal and two to the Supreme Court.

<sup>16</sup> Up to 4 August, 17 candidates were reinstated, some as late as 4 days before the election, and 10 were removed.

<sup>17</sup> High Court Judicial Review 378 of 2017. The opposition alleged that the IEBC failed to follow the law by single-sourcing from the Dubai-based firm Al Ghurair Printing (with alleged links to the President's family), and by not facilitating public participation in tendering, contrary to the Constitution and the Public Procurement and Asset Disposal Act. Court of Appeal Civil Appeal 224 of 2017.

<sup>18</sup> A 2016 amendment to the Political Parties Act defined distinct jurisdictions, with the PPDT hearing disputes from the party primaries, and the IEBC adjudicating on disputes relating to candidate nominations by parties. However, the EU EOM observed ten cases where parties filed their cases in the wrong forum, leading to dismissal due to lack of jurisdiction, while others filed more than one case in different forums, resulting in the dismissal of cases.

<sup>19</sup> The Constitution establishes that the PPDT hears appeal cases from the decisions of political parties. Party election boards, which are mandated by law to resolve disputes relating to the nomination of candidates within each party, are designed as the first instance for aspirants.

nominations in several races.<sup>20</sup> The PPDT also ordered the reconstitution of at least 19 party lists for non-compliance with requirements for inclusion of PWDs, youth and ethnic minorities.<sup>21</sup>

***Landmark annulment of the August presidential election raised standards of verifiability, followed in November by a unanimous decision to dismiss petitions***

Presidential petitions must be filed to the Supreme Court within 7 days of the declaration of the results and must then be determined within 14 days. The short timelines for petitions arguably undermines the use of judicial means for redress, as it gives petitioners little time to gather sufficient evidence to support their case. The limited time available makes prompt access to polling data even more important. The 14 days for adjudication also leaves the court very little time to scrutinize evidence and election materials or to undertake a recount of votes.

The 1 September Supreme Court decision annulling the August presidential election demonstrated the ability of the judiciary to adjudicate independently of government and was a landmark ruling in focusing not on the *outcome* of the election but on the constitutional requirements of the results *process*.<sup>22</sup> The strong emphasis on results transparency and verifiability, not just for candidates but also for citizens, appears to have contributed to increased integrity in the electoral process. This could ultimately increase confidence in future electoral processes. However, the decision for a fresh presidential election to be held within the constitutionally-stipulated 60-day limit posed immediate implementation challenges (during this period there was also an escalation of political tensions).<sup>23</sup> The ruling identified illegalities and irregularities warranting annulment, and found systemic institutional problems but no individual criminal intent or culpability.<sup>24</sup> Problems identified by the EU EOM (for example in the 10 August “*preliminary statement*” the 14 September “*18 recommendations for the re-run*”) were consistent with the issues elaborated in the Supreme Court’s detailed judgement released on 20 September.

Candidate eligibility for the subsequent fresh presidential election was another contentious issue requiring adjudication. On 10 October the NASA presidential candidates, Raila Odinga and Kolonzo Musyoka, informed the IEBC of their withdrawal, arguing that on the basis of a 2013 Supreme Court decision the fresh election should be cancelled and a new nominations period called (with elections in 90 days). However, in keeping with jurisprudence, the IEBC kept the NASA candidates’ names on the ballot.<sup>25</sup> This decision was later supported in the Supreme Court’s detailed judgement on the petitions challenging the fresh presidential election, which upheld that no new nominations process was warranted. The following day, on 11 October, the High Court ruled against an IEBC decision that only NASA and Jubilee Party candidates were to be on the ballot, stating that previous presidential challenger Dr Aukot should also be able to run.<sup>26</sup> The IEBC then gazetted all the original eight candidates and had 15 days to amend the ballot design and results forms with more candidates.

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<sup>20</sup> Nakuru Town West constituency, Shinyalu constituency, South Mugirango constituency, Olkaria Ward in Naivasha constituency, Ibeno Ward in Nyaribari Chache constituency, Birongo Ward in Nyaribari Chache constituency, St. Monica Polling Station (Kitengela Ward, Kajiado East constituency), four polling stations in Taveta constituency (Jipe Primary School, Chala Primary School, Mahandakini Primary School, and St. Joseph Kivukoni Primary School).

<sup>21</sup> The IEBC also heard 23 cases on party list nominations. The IEBC has jurisdiction for party list nomination disputes related to non-compliance with law, while the PPDT has jurisdiction for disputes related to political parties and their members.

<sup>22</sup> The court’s ruling is unprecedented in Africa. Globally there are few examples of a court nullifying a presidential election (Ukraine in 2004, the Maldives in 2014 and Austria in 2016).

<sup>23</sup> No party to the petition requested a recount. Furthermore, the 14-day time limit for judicial adjudication *de facto* prevents the court from such a measure. The decision of the seven-judge bench of the Supreme Court was taken by four judges, with two dissenting opinions and one judge taken ill. All related documents are available at <http://www.judiciary.go.ke/portal/page/election-petitions>.

<sup>24</sup> The IEBC’s lack of compliance with court orders for access to its servers and insufficient explanation for shortcomings in transparency is often referred to as contributing to the decision on annulment.

<sup>25</sup> Section 52 (1). Election (General) Regulation 2012 states that a candidate who has been nominated may withdraw his/her candidature by submitting a form 24A within three days of nomination. No such form was submitted by the NASA candidates. Furthermore, the ruling in the Aukot petition the following day established that parts of the 2013 judgment are *obiter dicta* and therefore are not binding.

<sup>26</sup> Dr Aukot was an interested party in the presidential petition of 2017.

Following the fresh presidential election, three petitions were filed on 6 November.<sup>27</sup> On 20 November, the Supreme Court unanimously determined that the petitions were not merited and the election of President Kenyatta was upheld. NASA immediately responded by saying that the decision was taken under duress and by refusing to recognize the government. The detailed reasoning followed on 11 December noting that no new candidate nomination process was required, that those that instigate violence cannot plead invalidation on the basis of such violence, and that the outcome was not affected by the 25 constituencies where polling did not take place.<sup>28</sup> Also that the appointment of returning officers is valid, polling stations were moved for valid reasons of violence, and that no serious anomalies were detected in the forms.

Petitions relating to other races have longer timeframes. For parliamentary and country elections, petitions must be filed within 28 days of the declaration of results and must be resolved within 6 months. Petitions relating to national parliamentary and governor elections are determined by the High Court (with second instance by the Court of Appeal), and for members of county assemblies by the Resident Magistrate’s Court (with subsequent appeal possible to the High Court). Overall, there were 288 petitions for other races, an increase from 2013, when 188 were filed, with a surge after the Supreme Court’s 1 September decision.<sup>29</sup>

### *Escalating pressure on the judiciary*

Before the August elections there was high-level negative commentary on the integrity and neutrality of the judiciary, with President Kenyatta, Deputy President Ruto and other Jubilee leaders criticizing the Chief Justice and questioning the independence of the judiciary after the High Court ballot paper decision. The Chief Justice responded with a statement noting “*the Judiciary will continue making its determinations on the basis of the constitution, the law, and evidence before it.*”<sup>30</sup> Later, on 2 August, the Chief Justice gave another press conference, in which he denounced both political camps for “*attacks on the judiciary*” (with six of the seven cases he mentioned referring to Jubilee leaders).

Following the Supreme Court’s 1 September annulment of the presidential election, the judiciary came under increased attack. Threatening crowds of demonstrators were observed outside the Supreme Court. Jubilee Party leaders appeared to warn the Supreme Court, saying it must be “*fixed*”,<sup>31</sup> and questioned its independence, alleging “*infiltration by NASA*”. On 19 September, the Chief Justice issued a statement on the aggressive attacks against the judiciary, referring to demonstrations bordering on violence, intention to intimidate, and to the threats of senior political leaders to cut the judiciary down to size. He also referred to insufficient security protection for judicial officers. There is a strong concern among a variety of stakeholders about political reprisals by the executive against the judiciary, including cuts to budget and staff.<sup>32</sup>

The day before the fresh presidential election, the Supreme Court could not form the necessary quorum to hear a petition for a delay to the poll. This is highly unusual and raised serious questions among Kenyan stakeholders, including about possible political interference having prevented judges from attending the hearing. The previous day, the driver of the Deputy Chief Justice was shot and injured.<sup>33</sup> Not hearing this case *de facto* cut off the legal path for remedy before the election. On 6 November, the deadline for filing petitions, a complaint was lodged

<sup>27</sup> One stated that the absence of a candidate nominations period rendered the whole election invalid, Another, filed by members of civil society, accused the IEBC of non-compliance with the Constitution and the law in regards to: unilaterally disenfranchising voters from constituencies where polling did not take place, illegally recruiting returning officers, tampering with the election declaration forms and the voter register, and failing to conduct nominations for the presidential elections. The third petition did not challenge the election, rather it accused NASA leaders of electoral offences and attempting to sabotage the process, and asked the court to find that their actions amounted to electoral offences.

<sup>28</sup> On 11 December the Supreme Court read a shortened summary of the full judgement. The written judgement was only made available on 20 December 2017.

<sup>29</sup> Of these, 98 were in relation to national assembly seats, 15 for senators, 35 for governors, 12 for women’s representatives, 35 for governors, and 128 for members of county assemblies. Updated information is available at: <http://kenyalaw.org/kl/index.php?id=7760>.

<sup>30</sup> Press release, Chief Justice, 9 July 2017.

<sup>31</sup> President Kenyatta, in Kiswahili and English, 2 September 2017, in a State House address to governors, senators, members of the National Assembly and members of county assemblies elected on a Jubilee Party ticket.

<sup>32</sup> See for example notice of a 75% budget reduction to the Judiciary Training Institute, following cuts across government announced on 25 September ([posted on 9 November 2017](#)).

<sup>33</sup> This was given as a reason for the Deputy Chief Justice’s non-participation. Another judge was taken ill, and other judges were away without a clear explanation, leaving only two judges available to hear the case.

with the Judicial Service Commission requesting the resignation of Deputy Chief Justice Philomena Mwili and Judge Isaac Lenaola for alleged lack of integrity, and of Judge Mohammed Ibrahim over his incapacity to perform his duties due to ill health.

### ***Lack of clear procedures for IEBC decisions on enforcement of the Electoral Code of Conduct***

Enforcement of the Electoral Code of Conduct (ECC) is legally mandated of the IEBC commissioners, who form the IEBC Electoral Code of Conduct Enforcement Committee (ECCEC). EU EOM LTOs reported that stakeholders complained of limited access to this enforcement mechanism given its centralised location and the costs involved. The lower level peace committees had legally-mandated authority to mediate, but no sanctioning powers. While the centralised ECC enforcement mechanism shielded Returning Officers from political controversy, it also reduced the number of cases that could be dealt with, thereby risking perceptions of impunity.

The ECCEC did not generally use powers of initiative and in total determined 71 cases (with 8 decisions appealed in the High Court). Most cases referred to plagiarism of political party symbols, colours and the use of pictures of presidential contenders by independent candidates. In addition, there were 11 cases relating to violence, primarily involving governor candidates. The relatively low number of cases may also be partly attributable to some fines issued to complainants (as well as accused persons).

The ECCEC lacked clear rules of procedure, and rulings and penalties were not evidently consistent.<sup>34</sup> Penalties applied included disqualification and large fines up to KSH 3 million (approximately €24,000) to be paid within 24 hours. The IEBC has not published the decisions of the ECCEC (or its Dispute Resolution Committee dealing with party primaries, nomination of candidates and party list nominations). On 3 August, the High Court overturned an ECCEC decision, criticising it for a lack of reasoning and for issuing a very punitive order.<sup>35</sup> The IEBC decision to suspend campaigning by all contenders in Siaya county for one week did not appear to be consistent with legal provisions.<sup>36</sup>

## **VIII. ELECTION ADMINISTRATION**

### **Despite improvements there is a persistent lack of trust in the IEBC, showing the need for enhanced independence and accountability as well as sustained consultations**

The IEBC was responsible for administering a complex process with six elections and 1,882 elective positions in a highly charged political environment, in which its actions were regularly subject to legal challenge. In the run-up to the general elections, the demanding new legal framework and compressed timeframe put extremely high levels of operational pressure on the Commission, intensified by prescriptive legal requirements on new integrated technology for key aspects of the electoral process. The fresh presidential election was undertaken in an intensely difficult political environment, with the institution coming under increasing attack.

The IEBC is a constitutionally independent body vested with significant authority, however, consecutive leaderships have been subject to accusations of bias. The Chairperson and six commissioners are identified by a selection panel appointed by the President, are approved by the National Assembly and then appointed by the President. The first selection panel after the 2016 amendments was required to be multi-sectoral and consisted of religious leaders and some MPs. However, for subsequent appointments there is more presidential/parliamentary discretion, which increases the risk of actual or perceived incumbent bias.<sup>37</sup> The Commission may make regulations, but these are subject to parliamentary approval.

<sup>34</sup> Sanctions that may be imposed against a candidate or party include formal warnings, a fine, prohibition from participation in the next elections, prohibition from engaging in certain campaign activities, or to be disqualified in the current elections.

<sup>35</sup> High Court Judicial Review 462 of 2017.

<sup>36</sup> The IEBC on 30 June issued an order suspending all campaign action in Siaya County for 7 days (1-7 July 2017), citing violence, intimidation and destruction of campaign materials. This action by the IEBC was not based on any law and the order was lifted on 6 July 2017.

<sup>37</sup> The appointment procedure followed for the current Commission is in line with the recommendations of the Joint Parliamentary Select Committee on Electoral Reform, which delivered its report on 16 August 2017. The Committee also recommended that “*after the August 2017 General Elections, the law be amended to provide for a different composition for*

Currently, the Treasury and the National Assembly approve the IEBC's budget on an annual basis and extra budgetary costs for unforeseen expenditures require executive approval.<sup>38</sup> While full accountability in financial management is needed, the current arrangements appear to limit the IEBC's budgetary flexibility and weakens the institution's independence as the executive has a stronger role. The IEBC has requested the Treasury to establish an "*electoral fund*" under the oversight of the commissioners, with provision for independent audits (similar to an existing fund for the judiciary). Any increase in financial control would require a corresponding increase in robust public accountability, including in advanced budgetary planning, public transparency and multiple-source procurement.

The current IEBC Chairperson and commissioners were sworn in on 20 January 2017, after extensive political controversy about the neutrality and performance of their predecessors. The Chief Electoral Officer (CEO), who heads the secretariat, continued in post following his appointment two years earlier.<sup>39</sup> Despite the replacement of all commissioners, the IEBC continued to lack stakeholder trust and was subject to on-going public criticism and legal challenge, particularly from NASA. Greater transparency, inclusiveness and communication were repeatedly called for by the opposition and various CSOs.

The IEBC did not sufficiently consult stakeholders or proactively address concerns, including on key electoral issues, and attempts to bring contestants together became increasingly problematic as political tensions escalated.<sup>40</sup> Mechanisms for regular, purposeful stakeholder consultation (such as the Political Party Liaison Committee) did not function effectively, with the exception of the controversial Election Technology Advisory Committee (ETAC), which was eventually disbanded.<sup>41</sup> The IEBC failed to refer sufficiently to parties over key matters such as the date of the fresh election and the appointment of returning officers. Before the fresh presidential election, the Chairperson only once succeeded in bringing party leaders together (despite repeated attempts to hold joint candidate meetings) amidst mounting political tensions. Positively, the Commission maintained an open-door policy with parties and candidates, undertook some stakeholder forums and before the August elections progressively engaged with contestants and other stakeholders, including by organising a National Elections Conference.

The Commission might have avoided some late changes and subsequent legal challenges by seeking judicial clarification on unclear provisions in the law and court rulings, for example on the status of official results (given that there were paper result forms, electronic copies of prescribed forms, and "*keyed-in*" results data). Also, on whether to conduct candidate nomination for a fresh election following nullification. Later, on 4 October, the IEBC did seek the Supreme Court's clarification, under a certificate of urgency, on the verification of polling station results at the national tallying centre and this was granted on 17 October.

While specific efforts were made, overall IEBC public communication lacked structure, consistency and depth. Information on core aspects of the IEBC's work was not made public.<sup>42</sup> In particular, there was little public accountability for commissioners' plenary meetings, as meetings were closed and there was no systematic publication of all decisions made.

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*future selection panels.*" However, the IEBC (amended) Act 2011, First Schedule, section 1 states "*the President shall appoint a selection panel consisting of such persons as Parliament shall determine*".

<sup>38</sup> The Commission cannot reallocate funds and unspent budget cannot be carried over to the next financial year, which can lead to delays with operations and procurement, debt creation and potential loss of services (as reportedly happened with IBM).

<sup>39</sup> The secretariat consists of 9 directorates and 17 departments, with permanent offices headed by election coordinators in all of the 47 counties and 290 constituencies.

<sup>40</sup> Related international commitment "*Each State Party shall take appropriate measures... to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption*". CAC, article 13:

41 A High Court order on 15 June ordered that ETAC be disbanded, regarding its oversight role as inconsistent with constitutional requirements for IEBC independence (Articles 88 and 249(2)). Petition no. 127 of 2017.

<sup>42</sup> Related international commitments include: "*Each State Party shall... endeavour to adopt, maintain and strengthen systems that promote transparency.*" CAC article 7.4. "*Taking into account the need to combat corruption, each State Party shall ... take such measures as may be necessary to enhance transparency in its public administration*". CAC article 10. "*To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest*". ICCPR GC 34, para 19.

EU EOM observers saw higher and more consistent levels of public confidence in the work of IEBC staff at local levels (across counties regarded as pro-NASA, pro-Jubilee or swing). The 337 county and constituency returning officers seemed to be generally regarded as impartial, well-prepared and regularly engaging with stakeholders.

***Preparations for the August general elections were marked by multiple court challenges and late preparation of procedures***

The IEBC was repeatedly legally challenged by NASA and civil society actors prior to the August general elections, resulting in significant operational challenges and extended uncertainty. A 7 July High Court ruling quashing the award to Al Ghurair of the presidential ballot printing for lack of public consultation was eventually overturned by the Court of Appeal on 20 July, some 19 days before the elections.<sup>43</sup> Several other IEBC procurements were also challenged in court, including KIEMS hardware, software and support, as well as the selection of the firm KPMG to conduct an audit of the voter register. Positively, the Commission showed resilience and electoral preparations, including the recruitment and training of over 360,000 temporary staff, were kept on track.

Accusations of IEBC partiality and fear of results manipulation at the national level resulted in civil society actors seeking a court order on the finality of results as declared by constituency returning officers. This was granted by the High Court on 7 April 2017 and was followed by a Court of Appeal ruling on 23 June 2017 confirming the finality of results at constituencies and polling stations. While addressing the opposition's concerns and easing the pre-election climate, the rulings presented serious operational challenges for the IEBC, in particular in regard to the electronic transmission of results from constituencies. The finality of lower-level results meant there are no provisional results, and thus no possibility for correction and administrative remedy.<sup>44</sup>

For the high technology and sensitive aspects of the elections (biometric voter identification and electronic results transmission), the IEBC procedures lacked detail and were finalised very late in the process, once training had started and manuals had been printed. Guidelines were communicated to the public at the end of July, and information was shared on social media. However, the IEBC's communication only partly helped promote stakeholders' understanding of the process.

A variety of stakeholders emphasized the need for more comprehensive voter education, with concerns raised about it becoming politically sensitive.<sup>45</sup> A new regulation adopted in April 2017 seemingly promotes continuous voter education, however it also appears to reduce the role for CSOs.<sup>46</sup> EU EOM LTOs consistently reported activities as primarily run by the IEBC with only limited CSO cooperation.

***IEBC technical preparedness for the fresh presidential election was undermined by leadership issues, in a deteriorating environment, with attacks on the institution and violent obstruction***

The Supreme Court's annulment of the presidential election put the IEBC under intense pressure to reform and to demonstrate changes. The Supreme Court's detailed judgment on the presidential petition was released after 20 days, the legislative framework was uncertain,<sup>47</sup> and several court cases were on-going with adjudication taking place up until one day before the election. The Commission had to operate under increasingly difficult political conditions and frequent protests were organised by NASA outside the IEBC offices.

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<sup>43</sup> The procurement of ballot papers, forms and voter lists was initiated in 2016, and repeatedly halted or nullified by the courts and the Public Procurement Administrative Review Board.

<sup>44</sup> The Kriegler Commission recommended "that ample time be allowed for verifying provisional results, so that they are declared final/official only once there is no risk that errors may still be found, or non-frivolous objections raised... Given a clear explanation of what a provisional result is, there is no problem in making voters understand that election results are so important that they can be declared final only once they have been properly scrutinised and checked"

<sup>45</sup> On 12 December 2016, President Kenyatta said in a speech: "There is already money coming into Kenya from abroad in the guise of supporting good governance or civic education. However, its true intention is to influence our electoral choices. I want to caution those members of the International Community taking these actions that the Kenyan people do not look kindly on such actions."

<sup>46</sup> [The Elections \(Voter Education\) Regulations 2017](#).

<sup>47</sup> The bill of amendments to the electoral laws could potentially have entered into force during the election preparation.

Nevertheless, following an internal review, the IEBC made significant improvements that were later evident over the 26 October election day period.<sup>48</sup> However, the Commission only explained the improvements it was making late in the process and overall its public communication continued to lack structure.

Meanwhile some internal IEBC struggles became very apparent, further damaging public confidence in the institution. On 18 October, Commissioner Akombe resigned, citing security concerns, partisan commissioners and the absence of a suitable political environment for credible elections. The IEBC Chairperson then gave a statement confirming “*full technical preparedness*” but saying that political agreement and changes in staff were needed for him to commit to serving as the National Returning Officer and for a “*free, fair and credible election*”.

NASA brought out 9 demands for the fresh presidential election, known as “*irreducible minimums*” (which contained 45 interrelated sub-points).<sup>49</sup> Positively, on 10 October, the IEBC published a detailed response, showing an effort to fulfil NASA’s demands. Following the 18 October call by the Chairperson for “*adversely mentioned*” staff to step aside, the CEO publicly committed to taking three weeks’ leave, reportedly as a measure to avoid the Chairperson’s possible resignation.<sup>50</sup> Other NASA “*minimums*” were not realistic within the constitutional 60-day time limit.<sup>51</sup> Regrettably, the IEBC did not offer NASA or other stakeholders access to the 8 August ICT systems and server.

Following NASA’s decision to withdraw its candidates, there were regular demonstrations outside IEBC offices. Some NASA supporters violently disrupted electoral preparations, including trainings and the distribution of materials, with attacks on staff, training locations and vehicles.<sup>52</sup> Reportedly, 1,000 polling stations were affected, with some staff later trained in a different location. These security challenges put the IEBC and its staff in an unfair position and were not consistent with the Electoral Code of Conduct, which requires parties to “*condemn, void and take steps to prevent violence and intimidation.*”<sup>53</sup>

### ***Technology could not replace trust***

Increased use of technology was advocated for, in particular by NASA, in the hope of preventing fraud and manipulations of the electoral process. While the technology used provided for stronger voter identification and results transmission and transparency (particularly in the October fresh presidential election), it did not result in consistent confidence in the process and outcome. Electoral integrity and confidence requires more than an electronic system of voter identification and results transmission, with stakeholder engagement and the way technology is planned, prepared and managed being crucial.

Opportunities to gain trust and assure people of the resilience of the ICT systems in use were missed. Overall the procured technologies were not sufficiently independently tested for capacity or security. Weaknesses with the electoral data security system were only addressed close to the August elections when the IEBC contracted some specialised international companies and an external certification of the KIEMS system was conducted in

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<sup>48</sup> Including better standardized results forms and security features, electronic transmission of polling station results forms (including through improved network coverage), verification of polling station results at the national tallying centre, and clear complementary mechanisms.

<sup>49</sup> Some of NASA’s irreducible minimums were consistent with 18 recommendations made by the EU EOM for the fresh election.

<sup>50</sup> Reportedly other staff also took leave, but no public commitment was made. Earlier in a leaked memo, the Chairperson had challenged the CEO over shortcomings in the 8 August election. This was followed by other commissioners issuing a dissenting press statement. The Chairperson announced the establishment of a project team to oversee the fresh election, which was initially controversial and perceived as a unilateral initiative, and later endorsed by the commissioners.

<sup>51</sup> Those not implemented by the IEBC included changing contracted service providers, appointing new constituency returning officers, providing system security information, and barring two commissioners and ten staff members from having a role in the fresh election.

<sup>52</sup> Cases of serious threats, stoning of venues and blocking of premises were reported in western Kenya. EU EOM LTOs observed or received consistent reports of disruption of trainings in Migori and Homa Bay counties and in at least one constituency of Busia county. LTOs also referred to attacks in Siaya and Kisumu, with trainings cancelled in all Siaya constituencies and possible kidnapping of IEBC staff.

<sup>53</sup> Elections Act, Second Schedule Electoral Code of Conduct, section 5(d).

October.<sup>54</sup> The KIEMS hardware, software and system were also not sufficiently tested under field conditions prior to the elections.<sup>55</sup> This put increased pressure on staff, risked shortcomings not being addressed, and contributed to some stakeholder misunderstandings. Furthermore, the heavy dependence of the IEBC on private vendors led to challenges of public accountability and lack of clarity on ultimate responsibility for processes and systems. The violent murder of a prominent IEBC ICT manager, Chris Msando identified dead on 31 July 2017, weighed heavily over the electoral process, and fuelled mistrust about the use of technology.

After the general elections, NASA made claims that the displayed keyed-in results were “*computer-generated*”, despite the availability of paper and scanned results forms substantiating the declared results. The EU EOM looked into logs that NASA alleged were evidence of hacking, but concluded the logs presented, as such, did not amount to evidence of hacking.

Institutional ownership of ICT remained limited, for example the cloud server continued to be run through an external service provider. Implementation challenges arose from dependence on contracted service providers with limited knowledge transfer; for instance, in managing changes needed in the results system after additional candidates were allowed to run in October.<sup>56</sup> However, both in August and October, the IEBC internally developed some last-minute ICT solutions to address late changes.<sup>57</sup> Overall, there was a lack of public accountability and clarity about IEBC technology procurement and IEBC oversight and accountability of contracted private-sector ICT service providers.

After the August general elections, there was growing acknowledgement that technology alone cannot solve electoral problems.<sup>58</sup> While technology in elections has the potential to increase efficiency and transparency, excessive reliance on it can raise disproportionate expectations and reduce institutional ownership. Its use requires sound mitigation measures of technology-related risks.<sup>59</sup> Use of technology also significantly increased the cost of the running the election. Greater emphasis is needed on ensuring that tender processes of ICT products are scrutinized and involve stakeholder consultation.

## **IX. VOTER REGISTRATION AND THE DELIMITATION OF CONSTITUENCIES**

### **A voter register with comprehensive biometric data, seemingly with some variation in registration rates by stronghold, shows a need for more inclusiveness and greater inter-agency collaboration**

Following the disputed 2007 elections, parties advocated for the introduction of a high-technology biometric voter registration (BVR) system. Continuous registration was supplemented by IEBC mass voter registration exercises at the beginning of 2016 and again in 2017. The voter register was then closed on 7 March 2017.<sup>60</sup> The

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<sup>54</sup> The IEBC undertook an external certification of the KIEMS system prior to the October election, mainly aimed at assessing security issues. The certification report was not made public prior to the election.

<sup>55</sup> A public dry-run results transmission test was conducted on 2 August from 47 locations. However, the system was not tested under field conditions.

<sup>56</sup> Time constraints meant that the KIEMS devices could not be reconfigured and therefore, differently from the general elections, the polling station keyed-in results could not be used (so only scanned polling station results forms were sent),

<sup>57</sup> For example, the IEBC ICT team put in place a system for consolidating constituency results into an electronic 34C form and displaying results aggregation at the national tallying centre some days before the October election.

<sup>58</sup> For example, NASA’s “*Irreducible minimums on electoral reforms before the fresh presidential election*” requested that polling station results not be keyed in again and constituency results forms be completed manually.

<sup>59</sup> Good practice for the introduction of new technology includes participatory decisions, assessments and feasibility studies, and not relying on technology to address structural issues. For example, the International Workshop on Information Technology and Election Management, held in Mombasa in 2012 and hosted by the IEBC recommended to “*not rely on ICTs to solve structural issues affecting elections*”, that legal frameworks “*should not be specific about the use of technology*”, that “*the decision-making process on ICTs must be characterized by early and ongoing consultation with stakeholders*” and that “*the introduction of ICTs must be preceded by feasibility studies that are broad in scope, comprehensive and consultative.*”

<sup>60</sup> New (continuous) voter registrations and transfers were suspended by the IEBC by gazette notification on 7 March, to resume on 6 September. Following the August presidential election annulment, the IEBC extended the suspension until 8 November.

voter register, as certified on 27 June 2017, comprises of 19,611,423 voters, an increase of 36.6% from 2013.<sup>61</sup> In late July, the IEBC published the full register by polling station (with some masked fields for data protection).<sup>62</sup>

Registered voters comprise approximately 82% of all adult citizens, if data from the 2009 population and housing census is used (this indicates a current population of 46.5 million of which nearly 24 million are adult citizens).<sup>63</sup> However, the real percentage is lower, as a proportion of the registered voters have since died, mostly without having their records removed from the register. A total of 51% of registered voters are under the age of 35, and there were five million young people able to vote for the first time. Limited diaspora registration was undertaken with 4,393 voters recorded at the diplomatic missions in Burundi, South Africa, Rwanda, Tanzania and Uganda for voting in the presidential election. Positively, 5,528 prisoners were registered in 103 prisons across the country, also for voting in the presidential election only.

Jubilee argued that it campaigned effectively for registration of actual and potential supporters during the mass registration exercises, and that NASA was less effective, thereby limiting its potential to win the presidential race. According to Jubilee, NASA pushed for a substantial delay in the election so as to increase registration of its potential supporters. Based on projections by the Kenya National Bureau of Statistics (KNBS) of the adult population in mid-2017, there appear to be some differences in registration rates by stronghold. However, this is a rudimentary measure and should be taken as merely indicative. In counties which can be seen as Jubilee strongholds, or where Jubilee obtained a majority, it appears that 15% and 14% respectively of adult citizens are not registered. In counties which can be seen as NASA strongholds, or where NASA obtained a majority, this is 17% and 25% respectively. In swing counties, it appears that 24% of adult citizens are not registered.<sup>64</sup>

Difficulties in obtaining ID cards can reduce opportunity to register and therefore to vote. To be registered as a voter, a citizen must provide a national ID card or a Kenyan passport as evidence of being 18 or older. The law prescribes that every person must apply for an ID card within 90 days of becoming 18. Thus, citizens who turn 18 around election day, are *de facto* disadvantaged if at the time of registration they do not yet have an ID card. Although it is possible to obtain a passport before the age of 18, in practice this is costly and less accessible. EU EOM LTOs received reports that some minority groups faced more rigorous screenings and delays in obtaining ID cards.<sup>65</sup> Some stakeholders referred to ID cards at times being selectively issued as an administrative obstacle to voter registration in some parts of the country.

The late amendments to the Election Act require that to be eligible to vote, citizens must have their biometric data entered in the polling station's register. However, this can overly-exclude some people, as biometric data and the use of identification equipment are not 100% reliable.<sup>66</sup> Positively, provisions were also made for complementary mechanisms to be put in place in cases where there was no biometric match or of technology failure in the identification of voters.<sup>67</sup>

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<sup>61</sup> For the 2013 elections, a total 14,352,545 voters were registered, amidst procurement issues and highly compressed timelines, with biometric data (ten finger prints), photographs, and alphanumeric (text) data.

<sup>62</sup> Positively, the voter register was certified much earlier than in 2013. From 10 July, copies of the complete register were reportedly made available for a fee. However, the IEBC was criticised by CSOs and the opposition for not having made copies of the provisional register available prior to the KPMG audit, to allow for comparison and scrutiny.

<sup>63</sup> The 2017 projections data was provided by the Kenya National Bureau of Statistics to EU experts looking at voter registration in May 2017.

<sup>64</sup> In counties which can be seen as Jubilee strongholds or where Jubilee obtained a majority, voter registration seemingly increased by 35% since 2013. In counties which can be seen as NASA strongholds or with a NASA majority, voter registration apparently increased by 41% and 35% since 2013. In swing counties it appears that the increase was 31% since 2013.

<sup>65</sup> Minority groups such as Muslims and Hindus in Embu, Nyeri and Machakos counties reportedly needed to follow a longer procedure with more rigorous screening and approval by a vetting committee before proceeding to the National Registration Bureau, thus potentially delaying their ID card issuance.

<sup>66</sup> For example, there can be complete or partial failure of biometric devices, some voters finger prints can no longer be detectable due to manual work or other circumstances, some voters were registered without their biometric data being captured (5,247 according to KPMG's audit of the voter register), or data could be lost before reaching the central database.

<sup>67</sup> The Election (amended) Act 2011, section 10(1), provides for biometric registration, and section 44A provides for the use of complementary mechanisms for voter identification in the event of technology failure. The IEBC Quick Reference Guide for Presiding Officers, specifies one procedure for voters who are only alphanumerically identified through the KIEMS, and one for voters who are solely identified on the manual register, following KIEMS failure and impossibility of replacement or repair of the device.

*Some inaccuracies and irregularities were identified as well as an estimated million deceased people on the register (with the potential for abuse mitigated through effective biometric voter identification)*

The report of a legally-mandated independent audit of the voter register conducted by KPMG, published on 11 July, identified various security and accuracy issues.<sup>68</sup> These included weak database security settings and a lack of operational continuity plans. In total 14.7% of all voter records were found to have inaccuracies mainly due to clerical errors. These were then reportedly mostly corrected, along with other corrections from the inspection period when the register was open to the public.<sup>69</sup> Irregularities affecting 2.32% of total records were also identified, but they remained largely unaddressed by the IEBC given the short time available before the August elections.<sup>70</sup> Preliminary findings from the Elections Observation Group (ELOG) from a voter register audit published on 1 November found that some inaccuracies and most irregularities had not been resolved.<sup>71</sup>

KPMG estimated that approximately one million voters had died but had not been removed from the register since its establishment at the end of 2012. Removal of deceased voters is challenging whenever a voter register is not linked to an accurate and complete civil register. Challenges in Kenya include: very limited issuance of death certificates, partial coverage by the Department of Civil Registration (DCR) which estimates that it registers 64% of all births and 50% of all deaths, and digitalization of births and deaths records only starting recently. The IEBC has proactively tried to address the issue of deceased voters with uneven and limited results, through liaison between returning officers, DCR offices, chiefs and sub-chiefs (appointed local administrators). KPMG was only able to identify 92,000 records of deceased voters on the voter register by cross-checking with data provided by the CRD. Following verification, the IEBC removed 88,000 of these records, as removal of more records would have risked error, disenfranchisement and controversy.

NASA emphasised the potential for abuse given the possibility of one million deceased voters on the register. The Commission stressed that the biometric voter identification technology used in polling stations should safeguard against people voting in the name of deceased people. Although data is not available for the August polling, in October 96.2% of voters were biometrically identified and thus the biometric safeguard appears to have been predominantly effective.

Currently, three Ministry of Interior agencies have responsibilities for gathering and managing civil data.<sup>72</sup> The biometric ID cards database, reportedly comprising of 25.6 million citizens, does not provide a link to registrants' actual locations (as typically citizens are registered according to their place of origin), and therefore further information is needed for the IEBC to plan polling arrangements. KPMG recommendations for the long-term included: reviewing the legal framework, developing an appropriate inter-agency framework, regularly auditing population databases, and conducting ICT penetration tests. KPMG also recommended considering the introduction of an integrated citizen registration system allowing for the linking of personal records using a unique identifier. Legally, the IEBC has the discretion to decide whether to update the current voter register or to start registration afresh, every 8 to 12 years, after a boundary delimitation review.<sup>73</sup>

<sup>68</sup> Independent Audit of the Register of Voters, KPMG Kenya, 31 May 2017.

<sup>69</sup> Public inspection and biometric verification of the voter register were conducted from 11 May to 9 June, during which voters could check their registration, request corrections, add missing biometric data, file a claim for inclusion or object to other voters' presence on the register. Later, voters could also check their details using the dedicated SMS number (70000) and through the IEBC website.

<sup>70</sup> Irregularities relate primarily to records with shared or missing ID numbers, records with ID numbers not found in the NRB database, and passport numbers not found in the Immigration database.

<sup>71</sup> "Have Kenyans spoken?", *ELOG Statement on 26 October fresh presidential election*", 1 November 2017. The irregularities listed by ELOG affected 1.5% of the total records of voters.

<sup>72</sup> The National Registration Bureau (NRB) issues ID cards, the Directorate of Immigration and Registration of Persons issues passports, and the Department of Civil Registration (DCR) registers deaths and births and issues certificates. All have offices at county and sub-county level.

<sup>73</sup> Election (amended) Act 2011, section 8(2).

### ***Growing disparities between constituency sizes weakens equality of the vote***

The Constitution refers to equality of the vote and stipulates that the number of inhabitants in a constituency should, as nearly as possible, be equal to the “*population quota*”. Variations are allowed from the population quota by 40% for urban and sparsely populated areas, and 30% for the other areas.<sup>74</sup> Boundaries of the 290 constituencies must be periodically reviewed, every 8 to 12 years, for progressive implementation of quota requirements. Delimitation was last undertaken by the IEBC in 2012, involving public consultation and a complaints process. Since the last census in 2009, the population is projected to have grown by 17%, according to the KNBS, with high population increases in urban counties such as Nairobi and Mombasa. When calculating the population quota based on the KNBS mid-2017 population projections, several counties fail to remain within the constitutionally-stipulated deviation rate. Counties such as Lamu, Wajir and Garissa are approximately 50% below the projected population quota,<sup>75</sup> while counties such as Nairobi, Kwale and Trans Nzoia are well above the population quota (and therefore significantly under-represented in parliament). The IEBC is expected to review boundary delimitations after the new census due in 2019 and before the next general elections.<sup>76</sup>

## **X. PARTY PRIMARIES AND THE REGISTRATION OF CANDIDATES**

### **Competitive primaries but with inadequate procedures, a multiplication of independent candidates and on average nearly eight candidates per seat in the general elections**

Political party primaries have traditionally been one of the most contested and controversial parts of the electoral process. As nomination in party strongholds often automatically entails winning a seat in the general elections, competition and stakes are high. Parties have the discretion to make direct nomination of candidates or to hold primaries. Although parties can request the IEBC to conduct their primaries, in practice this is not realistic given that this is the time when preparations are being undertaken for the general elections.<sup>77</sup>

Positively, participation was high and the primaries were overall competitive, with an increased number of incumbents losing their nominations (including governors and MPs from both Jubilee and NASA). However, selective interference by party leaderships, lack of party membership lists and inadequate procedures were reported to an advance team of EU election experts. Organisational difficulties also resulted in rescheduled or repeated primaries.

A new provision bound parties to submit membership lists to the IEBC at least 21 days before the primaries, in order to prevent “*party hopping*” by losing aspirants and to support the building and consolidation of party structures. However, instead of joining other parties, losing aspirants often ran independently.<sup>78</sup> This resulted in an increase in the number of independent candidates from just 237 in 2013 to 4,781 in 2017. Many EU EOM interlocutors criticised this arrangement for *de facto* undermining the consolidation of political parties and the spirit of the new Constitution.

Following the primaries or party appointments, aspirants need to pass an IEBC nomination process. This was controversial for not sufficiently excluding candidates on the basis of ethics and integrity criteria contained in the Constitution and the Leadership and Integrity Act. A multi-agency working group was established to vet aspirants under the Office of the Attorney General, comprising the IEBC, Ethics and Anti-Corruption Commission (EACC), and the Office of the Registrar of Political Parties (ORPP). The EACC provided a list of 106 aspirants with pending integrity issues, and the red-card initiative by four CSOs named 20 aspirants they argued should be barred.<sup>79</sup> However, the IEBC cleared most, arguing on the constitutional presumption of innocence until proven

<sup>74</sup> The population quota is the average population per constituency, i.e. the total population divided by the number of constituencies. Constitution, article 89(5).

<sup>75</sup> The national projected population for mid-2017 is 46,595,046, thus the constituency population quota is 160,673.

<sup>76</sup> The Statistics Act 2016 stipulates that the KNBS is responsible for conducting a census every ten years.

<sup>77</sup> The IEBC declined one request by the Jubilee Party for reasons of limited capacity.

<sup>78</sup> The Constitution states that independent aspirants cannot be party members three months or less before election day, thus aspirants who lost in party primaries had until 8 May to submit their nomination papers as independent candidates.

<sup>79</sup> The Society for International Development, Transparency International – Kenya, Mzalendo Trust and Inuka Trust; see [www.recardke.co.ke](http://www.recardke.co.ke).

guilty, and also that all possible appeal mechanisms should first be exhausted. This was viewed by many as undermining the spirit of the Constitution and reducing the integrity of the election process.

There were nearly eight candidates on average for each seat being elected in the August general elections. A total of 14,523 candidates competed for the 1,882 elective seats.<sup>80</sup> Eight candidates vied for the presidency.

## XI. THE FIRST CAMPAIGN PERIOD FOR THE GENERAL ELECTIONS

### **The 8 August general elections were competitive with largely free campaigns, but were marred by attacks on state institutions and the misuse of state resources**

All six races in the August elections were highly competitive, with most focus on the presidential and gubernatorial campaigns. EU EOM observers reported that candidates could generally campaign freely, including in the strongholds of their opponents, with freedoms of association, assembly and movement respected.<sup>81</sup> EU EOM observers also reported an overall appropriate security force presence at rallies.<sup>82</sup> The unprecedented high number of independent candidates, most having lost in party primaries, resulted in more complex local dynamics and weakened the ability of the two main presidential candidates to promote uniform voting in all six races at county and constituency levels (known as the “*six-piece*” campaign).<sup>83</sup>

However, the campaign atmosphere was tense and dominated by mutual accusations between the two main camps and state institutions. Kenyatta and Ruto accused NASA of deliberately trying to postpone the elections through repeated petitions to the courts. They also strongly criticised the judiciary for potentially jeopardizing the election date and siding with the opposition. NASA alleged collusion between the Jubilee government and the IEBC, the National Police Service and the Kenya Defence Forces, to selectively suppress turnout and manipulate the elections. The two main presidential candidates, Kenyatta and Odinga, did not share a stage (as they had in 2013).

Violent incidents occurred mostly in the context of local election races, for example between followers of gubernatorial candidates in Uasin Gishu, Bungoma, Mandera, Marsabit, Siaya and Garissa counties. These included some five killings in three separate incidents. There was also some violent language, for example, video footage seen by the EU EOM shows one of NASA’s main campaign managers chanting with crowds “*we have defeated teargas, now we want bombs*”.<sup>84</sup> The EU EOM observers also learned from multiple sources of weapons being moved into some informal settlements in Nairobi by both camps.

There was an atmosphere of uncertainty and fear before the August elections with some citizens temporarily moving back to their rural home areas, and thereby jeopardising their possibility to vote. This is likely to have disproportionately affected women as men moved their families away. EU EOM observers noted the posting of leaflets against local ethnic minorities in Eldoret, Naivasha, Nairobi and Mombasa, threatening violence if they did not leave the area.

National incumbency benefitted Jubilee, however the advantages of incumbency at county level were evidently to the benefit of both political camps.<sup>85</sup> During the 141 rallies observed by EU EOM LTOs, 27 instances of misuse

<sup>80</sup> This was out of a total of 15,082 initial aspirants for the August general elections.

<sup>81</sup> Heckling of both Kenyatta and Odinga in the strongholds of their opponents occurred for a short period in mid-July and immediately subsided after various state institutions and the candidates themselves came out strongly against violence and intolerance.

<sup>82</sup> On 9 October, the KNCHR released a report commending the police for their professional management of tense security situations throughout the campaign period prior the 8 August elections. The report indicated two deaths caused by security force actions during the campaign.

<sup>83</sup> The high number of independent candidates was related to legislative amendments requiring parties to submit membership lists at least 90 days before the elections, with candidates who have changed their party after the submission of the lists not being eligible to run in the election. The six-piece campaign called on voters to choose the same party/coalition in all six races.

<sup>84</sup> In a presidential rally in Dandora, Nairobi on 14 July, Senator Muthama said in Swahili: “*We have defeated stones, we have defeated tear gas, now we want bombs*”, with the crowd repeating his sentences. The head of the NASA campaign team, Musalia Mudavadi, is shown in the car ahead of Muthama’s.

<sup>85</sup> During the campaign Jubilee and Jubilee-associated parties had 25 governors and NASA had 22 (totalling 47).

of state resources in 16 counties were witnessed. These included 18 instances involving Jubilee and 4 involving NASA. This primarily concerned the use of official county and national government vehicles to and from campaign events (including one military helicopter in Makueni county). Four days before the election, NASA alleged that one of their offices for tallying results was raided by state security services and that two campaign consultants working with NASA were deported (for alleged visa irregularities).

Controversially, cabinet secretaries and members of the county executive committees are exempt from a campaign ban for civil servants.<sup>86</sup> Consequently, cabinet secretaries were regularly seen campaigning across the country and filmed praising government achievements.<sup>87</sup> The Kenya National Commission on Human Rights (KNCHR), an independent constitutional body, stated that the exemption contradicts the spirit of the legal framework on the misuse of state resources and “*should be revised as it opens avenues for abuse.*”<sup>88</sup> The launching of an internet portal by the government in April advertising development projects carried out by the Jubilee administration prompted public debate as to whether it breached the law or was simply a transparency and accountability mechanism.<sup>89</sup> Later, on 8 November, the High Court responded to a petition by the Katiba Institute declaring that the use of public resources to launch and maintain a website to advertise the government achievements was unlawful and ordered the President’s Delivery Unit to disclose the amount of money that had been spent on advertisements during the campaign.

## **XII. 8 AUGUST ELECTION DAY AND RESULTS PROCESS**

### **Peaceful well conducted polling on 8 August, but problems with results transparency**

Voting and counting proceeded smoothly and there appeared to be an overall commitment to the process from both camps. No party reported manipulations to the EU EOM. Voters showed exceptional determination, queuing from the early morning. Voting was conducted in a calm atmosphere, with just a few disturbances observed in the vicinities of some polling stations. The EU EOM observed 663 polling stations, in 147 constituencies across 35 counties.

During voting, EU EOM observers saw security officers appropriately deployed. Citizen observers and party agents were seen to be able to operate freely in the stations observed. Jubilee agents appeared to be more widely deployed, with one or two in 76% of polling stations observed and NASA in 45%. Jubilee agents were not seen in 6% of visited stations in NASA strongholds, whereas NASA agents were not seen in 27% of stations visited in Jubilee strongholds.

Polling was consistently well assessed by EU EOM observers in 93% of stations observed, in Jubilee and NASA strongholds as well as in swing constituencies. Voting procedures were generally well implemented and transparent and the IEBC took resolute action in replacing some staff. However, in over a quarter of stations visited, voters' fingers were not checked for traces of indelible ink. Also, in approximately one third of stations observed the secrecy of the vote was not sufficiently protected, due to polling booth position, group voting or poor lighting. While biometric data was seen to be correctly checked by default, EU EOM observers noted that there was often a lack of record keeping for voters who were only identified by their alphanumeric data. This was in part due to insufficient 32A forms and also to presiding officers not validating voters in the KIEMS system.<sup>90</sup>

<sup>86</sup> The Leadership and Integrity Act (section 23 (1)) explicitly exempts cabinet secretaries and county executive committee members from political neutrality requirements, while the Elections Offences Act prohibits national and county governments from advertising achievements during the election period: “*No government shall publish any advertisements of achievements of the respective government either in the print media, electronic media, or by way of banners or hoardings in public places during the election period*” Section 14 (2).

<sup>87</sup> Examples include 10 Cabinet Secretaries (CSs), among them CS Education and Acting CS Interior speaking during the launch of the Jubilee manifesto, CS Water & Irrigation speaking during the same event and campaigning with Kenyatta at the coast. There were also speeches at the Jubilee manifesto launch by CS Foreign Affairs, CS ICT and CS Industrialisation and Enterprise Development, late CS Interior, Joseph Nkaissery, CS Transport and CS health.

<sup>88</sup> KNCHR press statement on 9 October 2017. Similarly, the Law Society of Kenya wrote in June to the head of the Public Service Commission to take action against CSs campaigning.

<sup>89</sup> President’s Delivery Unit.

<sup>90</sup> In some polling stations, staff improvised and recorded ID numbers of such voters in polling station diaries or notebooks.

There was also no manual marking of voters on a paper voter register.<sup>91</sup> Such lack of accounting of who has voted leaves space for potential abuse.

Overall, closing and counting was well conducted in the 44 polling stations observed, in the presence of agents and observers, without interference, and with good levels of transparency. In some cases, not all voters in line at closing time were allowed to vote, or some voters arriving after closing time were issued ballots. In some polling stations observed, polling staff did not undertake mathematical consistency checks and had some difficulties completing results forms. Carbonated copies of results forms were generally provided to agents and posted outside the polling stations. In almost all counts observed, presidential results were properly recorded onto the form 34A in full view of agents and observers, then keyed in to the KIEMS device and with the form scanned on the KIEMS. In a few cases, presiding officers were observed sending through the keyed-in results without the scanned form.<sup>92</sup>

***Delay in the publication of presidential results forms caused public suspicion and controversy and also weakened the ability of contenders to prepare petitions***

The conduct of tallying was overall positively evaluated by EU EOM observers in the 40 constituency and 6 county tallying centres visited. However, there was insufficient transparency and some procedural shortcomings, including sensitive materials left unattended and ballot boxes arriving unsealed. Unauthorized persons were present in five tallying centres and in two cases were found to be interfering in the process. Although observers and agents had a clear view, they were not always close enough to ICT clerks to be able to follow the data entry. Also, when projections were used, as per IEBC procedures, aggregated polling station keyed-in results rather than the actual tally of 34A forms were displayed.<sup>93</sup> NASA agents were absent from 4 of 46 observed tallying centres, and Jubilee from 5.

On 11 August, presidential results were declared at the Bomas national tallying centre based on aggregation of 291 constituency 34B forms, which in turn were based on collation of 34A polling station result forms. This happened amidst much controversy, with NASA saying the keyed-in results were a computer-generated fabrication.<sup>94</sup> The display and immediate online availability of polling stations' keyed-in results were intended to ease the tension around the lengthier tallying of forms. However, limited IEBC explanation about the unofficial status of keyed-in results from polling stations exacerbated confusion.<sup>95</sup> Crucially, at the time of the results declaration the IEBC had not published all the polling station results forms, thereby increasing suspicion.

The IEBC did not give progress updates or explain the reasons for the delayed upload of results forms. Although such results were in principle all available at constituency level, this was not sufficient, given the levels of mistrust (especially in the higher levels of the IEBC), because parties did not have total coverage of all 290 constituency

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<sup>91</sup> With many presiding officers not being aware of having received a paper register with their materials.

<sup>92</sup> The results transmission software, intended to simultaneously send the keyed-in results and the scanned form, was in fact configured to also offer the possibility of only sending the keyed-in results in case of weak network, which resulted in a number of unsent forms. Before the election, the IEBC had published a list of 11,000 polling stations with poor network (and distributed 1,000 satellite devices to the 290 tallying centres and some remote polling centres).

<sup>93</sup> Constituency results were tallied based on paper polling station 34A forms, and presiding officers were sometimes not present during all of the processing and data entry.

<sup>94</sup> The Commission replied on 10 August to allegations and requests contained in a letter by NASA about *inter alia* alleging hacking of the KIEMS system, by dismissing all allegations and pointing to mistaken references.

<sup>95</sup> In a press release on 4 August the IEBC stated “*there is a possibility of inconsistencies between the keyed-in result transmitted by officers and the scanned forms transmitted. In such cases, the Commission has decided that the result in the scanned forms takes precedence.*” The declared presidential results had little variation from the keyed-in results, although the proportion of rejected (invalid) ballots dropped from 2.6% in the keyed-in results to 0.54% in the declared results. EU EOM analysis found that in 677 polling stations the (much higher) number of registered voters had been erroneously keyed in in the KIEMS in place of the number of rejected ballots. The 677 polling stations having made the same mistake totalled 289,968 “*rejected*” ballots, largely explaining the excessive 406,249 rejected ballots in the keyed-in results. The validation rules of the KIEMS results transmission software did not prevent this mistake from happening: while the software rejected keyed-in results if the number of valid votes exceeded the number of registered voters, there was no validation rule to prevent the sum of valid votes and rejected ballots from exceeding the number of registered voters.

tallying centres, and also for extending access to a broader range of stakeholders beyond the parties.<sup>96</sup> Publication of presidential results forms is also legally required, albeit without specified time limits.<sup>97</sup> Some 30,000 scanned 34A forms, out of 40,883, were published on 9 August, while the remaining nearly 11,000 were slowly uploaded and only completed after the deadline for filing petitions (on 25 August).<sup>98</sup> Also, the constituency results forms (34Bs), crucial for enabling stakeholders to check the declared totals, were only published online on 16 August, two days before the deadline for petitions.

The EU EOM conducted limited analysis of 34B forms and a sample of 1,558 34A forms from 82 constituencies (covering strongholds and swing areas).<sup>99</sup> Some issues were identified but there was no evidence of a pattern benefitting a particular candidate. In a closer race, such problems would have been more critical. Some of the problems found on forms show the complication of having polling station and constituency results as final, with no opportunity for correction. Findings included:

#### Transparency problems

- **Delayed online availability.** On 15 August, 14% of 34A forms sampled were missing, on 19 August 7% and on 23 August 0.7%. There was little variation in availability between strongholds.
- **Limited scan quality.** In total 76% of 34A forms were rated as readable, 18% as partially readable and 5% as not readable. Some constituencies were clearly more problematic than others. For example, in Bura (Tana River), 48% of 34A forms were missing or not readable, while in Kibera (Nairobi) this was only 0.5%.
- **Some format changes in uploaded 34B forms** were apparent. However, these were essentially changes in the format of the form or the quality of scan, rather than changes in content.
- **Inconsistent numbers of polling stations due to problems with scanning pages.** Four constituencies were found with a page missing from the scanned 34B form (Kandara, Kilgoris, Karachuonyo and Shinyalu) and one was found with a duplicated page (Balambala).

#### Problems with completion of the sampled presidential results forms

- **Some problems on 34A forms.** In the sample examined there were some signs of mathematical anomalies in 2.3% of cases, altered figures of some sort in 3%, and missing data in 3%.
- **Non-standardised 34B forms.** Some forms (or sub-pages) were printed on plain paper rather than on the paper with dedicated security features. There was also a lack of consistency of format for the tabulation tables used.
- **Small errors in transcribing polling station results onto 34B forms.** Small differences in numbers were found in some cases. In the forms examined there was little variation in the patterns of anomalies/errors between strongholds/swing constituencies, and no obvious advantage to one camp or another.
- **Missing signatures.** Overall, 1% of sampled 34A forms were not signed by presiding officers. Of the 290 34B forms examined in the days immediately after they were made available online, 20 were found without the returning officer's name recorded and 5 had no returning officer signature. In the majority of 34B forms, the "handover" section (recording the number of 34A forms received) had not been completed. Of the total 290 34B scanned forms scrutinized by the EU EOM, it appears that Jubilee agents had not signed 25%, and NASA agents had not signed 29% (in some cases there were other signatures that were not identified as belonging to a particular party or candidate).<sup>100</sup>

<sup>96</sup> NASA's chief agents, who participated in constituency results confirmation at the Bomas, were reportedly provided with hard copies of 287 constituency results forms on 11 August, after being granted online access to 34A forms and keyed-in results in the KIEMS back-end. However, civil society organisations did not have such access.

<sup>97</sup> The election law requires that presidential polling result forms be published "on an online public portal maintained by the Commission." Elections Act, section 39 (1C) (c).

<sup>98</sup> The national presidential results form (34C), with results per constituency (290) and county (47), was published on 14 August.

<sup>99</sup> Other analysis could result in different findings, given that some 34Bs were replaced online.

<sup>100</sup> Agents' signatures are a positive integrity measure, but not necessary for the validity of the form.

On 14 September, the EU EOM publicly reported on these problems and on the need for reforms for the fresh presidential election.<sup>101</sup> On 20 September, the Supreme Court issued its detailed judgment on the annulment of the presidential election. This emphasized the need for stakeholders to be able to verify results. This requires the IEBC to verify all 34A and 34B forms before declaring the results, and to publicly identify any inconsistencies/variances (with changes only possible through a judicial process).

### XIII. REACTIONS TO THE AUGUST RESULTS AND THE CAMPAIGN PERIOD

#### **Disputed presidential results, with disturbances and disproportionate police force, followed by an extreme deterioration in the political environment and more violence**

On 11 August, the IEBC chairperson declared the results of the presidential elections, with incumbent Uhuru Kenyatta receiving 8,203,290 votes (54.27%), while the opposition candidate Raila Odinga received 6,762,224 (44.74%).<sup>102</sup> With a margin of victory of 1,441,066 votes, Kenyatta was declared President-elect. The presidential results were overall in line with those of other races, with for example Jubilee winning 29 gubernatorial seats and NASA winning 18 (out of the total 47 counties).<sup>103</sup> Kenyatta improved his performance in 41 of the 47 counties, and Odinga in 16 counties.<sup>104</sup> A high proportion of incumbents were voted out. For example, in governor, National Assembly, Senate and county women representative races, on average 62% of incumbents were voted out.<sup>105</sup>

NASA rejected the presidential results, claiming that Odinga was the actual winner, and accused the government of manipulation. While the country stayed generally calm on election day, post-election violence erupted on 9 August, firstly in the informal settlements of Nairobi,<sup>106</sup> followed by Nyanza (Nyalenda/Kisumu town and Siaya), as well as Migori town. During the protests, there was also looting (Mathare in Nairobi), and the burning of a petrol station (Bondo in Kisumu) and a maternal health clinic (Kibera in Nairobi).

Dozens of people were reportedly killed, mainly through disproportionate police responses, according to the Kenya National Commission for Human Rights (KNCHR), Human Rights Watch, the Kenya Red Cross and the Independent Medico Legal Unit. Later, on 9 October, the KNCHR published a comprehensive report recording 37 deaths between 9 and 15 August, most of them resulting from gunshots attributed to the police during the post-election disturbances.

The police denied using live bullets, stating that force was used only against looters and reported only six people killed, all criminals. The Independent Policing Oversight Authority (IPOA) set up an investigation team, including prosecutors from the Office of the Director of Public Prosecutions (ODPP), and welcomed information from the public. On 13 November, IPOA forwarded to the ODPP its findings on the killings of one infant and one minor, allegedly by the police in the aftermath of the elections.<sup>107</sup> Other cases reportedly remain under investigation.

<sup>101</sup> EU EOM interim statement “*18 recommendations for the re-run*”, 14 September 2017.

<sup>102</sup> The other six candidates garnered a little less than 1% of the votes. Data from the [IEBC declaration of results](#) (form 34C), which erroneously missed figures for Nyando constituency in Kisumu.

<sup>103</sup> In the gubernatorial races, Jubilee won 6 more counties, bringing its total to 29, including two independents aligned to Jubilee as well as re-elected Machakos Governor Alfred Mutua (Maendeleo Chap Chap Party). NASA won 18 out of the total 47 counties. This is broadly in line with the results of the other races. Jubilee won 28 of the 47 senatorial seats, and 139 National Assembly seats against NASA’s 103 (the rest of the 290 seats being shared among smaller parties and 19 independent candidates). Jubilee won 32 of the women representative seats in the National Assembly and NASA won the remaining 15.

<sup>104</sup> Most notable were Kenyatta’s gains in the two Kisii counties (Kisii and Nyamira), where he increased his share from 28.5% in 2013 to 46.6% in 2017. In the Luhya area (4 counties) he improved his share from 5% to 15.8%, particularly through strong gains in Bungoma (from 12.3% to 30.2%). Strong upsurges were also noted in the north-east and north (between 3% and 36%).

<sup>105</sup> Women representatives having the highest turnover (67.4%) and the governors the lowest (55.4%).<sup>105</sup>

<sup>106</sup> Mathare, Kibera, Dandora, Huruma, Kawangware and Lucky Summer.

<sup>107</sup> Reportedly, in Kisumu police broke into a house, assaulted the adults and injured a six-month-old baby so severely, that she later died in hospital (15 August). The second case concerns a nine-year-old girl, who was fatally shot on the third-floor balcony of a building in Mathare North, on 12 August.

In reaction to the violence, Odinga visited Kibera and Mathare on 13 August, and together with the Siaya Senator and NASA lawyer James Orengo, called for people to stay out of harm's way. After these public addresses tensions calmed down in the following days. Odinga's call for a countrywide strike as an expression of contempt for the election results remained widely unheeded.<sup>108</sup>

Concerns about possible interference in the results process escalated with the delay in the publication of presidential results forms on the IEBC website. Furthermore, the lack of complete data and explanation from the IEBC on the status of results and updates meant that stakeholders looked to unofficial keyed-in results rather than the results forms.

After the declaration of results there was a strong perception among NASA followers that the ethnic communities that make up NASA had again been denied their electoral victory and their right to govern the country, evoking some debate on secession. In his public address after being declared winner of the presidential election and again on 14 August, Kenyatta offered cooperation with Odinga and his team, acknowledged people's right to peaceful protests, and called on the police to exercise restraint when handling protests. This conciliatory message was valuable at this time of heightened tensions and divisions.

NASA leaders initially ruled out filing a petition against the presidential election results, stating that the matter was now in the "*court of public opinion*" and asked Kenyans to reject the results. However, on 16 August, Odinga stated that NASA would file a petition, calling for rejection of "*computer-generated leaders*" and fraud.

NASA supporters were jubilant in their victory at the Supreme Court on 1 September, with some seeing it as affirmation of their purported electoral victory, though, the annulment was based on shortcomings in the process rather than the results. By contrast, Jubilee supporters referred to the court stealing their electoral victory, in which when Jubilee had clearly won more votes. Thus, both political camps went into the fresh election with a sense of electoral injustice and entitlement.

***The campaign period before the October fresh presidential election was characterised by uncertainty, extreme brinkmanship, attacks on institutions, and protests that included violence***

One month before the election, NASA started regular demonstrations with the slogan "*no reforms, no elections*", threatened to boycott the fresh poll if the IEBC did not meet certain conditions ("*irreducible minimums*"), and increasingly criticised state actions as repressive. Demonstrations took place mostly in the NASA strongholds of Nyanza and some areas of Nairobi, where there were violent conflicts between the police and protesters as well as criminal elements.<sup>109</sup> Reports on the possible incorporation of militia groups into security agencies and/or protester groups furthered concerns about an escalation of violence, with an increasing ethnic dimension.<sup>110</sup> On 12 October, the Acting Interior Cabinet Secretary Matiang'i ordered a ban on protests in the Central Business Districts of Nairobi, Kisumu and Mombasa, which was temporarily suspended by the High Court five days later.

There has been public criticism of security agencies for excessive use of force during some of the demonstrations resulting in deaths and injuries, as well as during the earlier post-election protests in August. The Inspector General of Police (IGP) only first issued a press statement on police actions on 13 October.<sup>111</sup> The lack of public information on security force deployment, as well as timely and independent investigation of killings, diffused accountability, eroded responsibility and reduced transparency. The police have confirmed that four people were killed in the pre-election demonstrations, although NASA and civil society organisations (CSOs) make reference to higher numbers.

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<sup>108</sup> Elected NASA governors in Kisumu and Mombasa did not toe the coalition line and explicitly asked people to return to normal daily life.

<sup>109</sup> Demonstrations were initially held weekly and then became daily, with some exceptions.

<sup>110</sup> NASA claimed the outlawed Mungiki group had been revived in Jubilee strongholds to disturb peaceful NASA demonstrations, create chaos, and in this way justify excessive use of force by the police. In an interview with CNN on 28 October, Deputy President Ruto claimed that NASA had hired militia to orchestrate protests and block voting in some areas.

<sup>111</sup> The police have not so far given full information on the circumstances of the deaths. Some media and CSO reports have attributed the killings to police using live fire. The 13 October police report was later revised in a press statement on 20 October, which reported four deaths from police fire during the protests between 2 and 16 October.

The extent to which violence during this period and throughout the election was spontaneous, opportunistic or orchestrated is not clear. The violence included sexual abuse and rape. Twenty CSOs, professional associations and independent state organizations wrote an open letter on 25 October citing at least 60 cases of sexual violence, reportedly mainly committed by police officers.<sup>112</sup> Later on 14 December Human Rights Watch released a report noting that most women referred to being raped by policemen or men in uniform, and most had not received post-rape medical or psychological care.<sup>113</sup>

Jubilee conducted large-scale campaign events, including in major NASA strongholds and attracted some public defections of prominent opposition leaders.<sup>114</sup> Jubilee benefited from the advantages of incumbency, for example using a national event, Mashujaa Day, for campaign purposes.<sup>115</sup> It also used county and national government vehicles for campaign events.<sup>116</sup>

On 10 October, NASA declared it would boycott the elections and mobilised supporters accordingly, including in large-scale rallies. At a rally in Nairobi on 18 October, Odinga promised to lead “*the mother of all demonstrations*” on election day. At the same time, NASA supporters obstructed IEBC activities in some areas, including training and the transportation of materials. Some commentators argued that NASA did this to delay the election enough to open up the voter registration process and/or to increase their bargaining position for negotiating some sort of power-sharing arrangement outside of the Constitution. On the eve of the election, NASA declared its transformation into a “*resistance movement*”, advancing a “*national campaign of defiance of illegitimate governmental authority and non-cooperation*” and economic boycotts. Odinga also referred to staying at home on election day and mobilising for fresh elections to be held later (within 90 days).

Extreme and provocative discourse became increasingly common before the fresh election. For example, on 14 October, NASA released a press statement entitled “*CS Matiang’i and IG Boinnet committing genocide.*” On 21 October, the government spokesperson released a statement alleging an “*elaborate conspiracy by sections of NASA and a web of renegade foreigners to subvert the Constitution and the rule of law by sabotaging democratic presidential elections*”. The cited reason was to create opportunities for “*corruption, drug trafficking and other practices which will eventually kill this country’s development and progress and make it an international pariah.*”<sup>117</sup>

Increased incidences of hate speech exacerbated ethnic tensions, with some cases resulting in charges being brought but with few convictions made before the end of the electoral process.<sup>118</sup> EU EOM LTOs saw leaflets with messages of incitement in several counties.<sup>119</sup> At the end of September, the National Cohesion and

<sup>112</sup> Open letter on 25 October 2017 to the Inspector General of Police, the Acting Cabinet Secretary for Interior and the Cabinet Secretary for Health.

<sup>113</sup> “*They Were Men in Uniform’: Sexual Violence against Women and Girls in Kenya’s 2017 Elections*”, Human Rights Watch, 14 December 2017.

<sup>114</sup> For example, the former Bomet governor Isaak Ruto (CCM), former senator Hassan Omar (Wiper) and most recently the governor of Taita Taveta, Granton Samboja.

<sup>115</sup> At the official public ceremony of Mashujaa Day (20 October), President Kenyatta addressed the nation saying “*As a candidate, I humbly appeal to all Kenyans to vote me back to office for another term of five years... With your continued support, we can collectively achieve more and better results in the second term.*”

<sup>116</sup> EU EOM LTOs reported the use of county government vehicles being branded in Jubilee logo and colours, for example in Kiambu and Muranga counties.

<sup>117</sup> Another example is from 17 October, when Acting Interior Cabinet Secretary Matiang’i was recorded telling Gusii people in South Mugirango (Kisii county) that “*Any person planning to stop people from voting here, remember I am in charge of security. I will order the police officers to look the other way so that you can slap him.*” There was no evident official response to this.

<sup>118</sup> On 5 September, Moses Kuria, Jubilee MP, was filmed at a rally in Kiambu referring to the opposition as “*demons*” and calling for a manhunt for those voting for NASA. On 10 September, former NASA Senator Johnson Muthama was arrested and charged with incitement to violence for calling President Kenyatta and his Deputy to a duel at a rally. On 25 September, the Jubilee Party chairman in Nakuru, David Manyara, was charged with incitement to ethnic violence. At a public rally in Nakuru on 19 September, Manyara reportedly addressed the public, saying “*Let Raila be warned that we are ready for a war (...) from today the real Kenyans are going to rise up.*” The same day, NASA Embakasi East MP, Paul Ongili, was charged with creating disaffection against the presidency at a campaign event.

<sup>119</sup> For example, in Thika constituency, Kiambu county, EU EOM LTOs saw leaflets stating “*Enough is enough!!! Every Luo community should leave Central Province within 48 hours.*” LTOs also saw similar leaflets in Nakuru Town.

Integration Commission (NCIC) reported that more than 300 cases of hate speech were under investigation.<sup>120</sup> The NCIC was criticised by civil society representatives for failing to sufficiently initiate sanctions for hate speech.

#### XIV. 26 OCTOBER ELECTION DAY AND RESULTS PROCESS

##### **Well-conducted polling and results process, but violent disruptions in some areas and a lack of competing agents to check the process**

NASA organised an apparently successful boycott that had an obvious effect on turnout, with reduced or minimal participation in many parts of the country. Merely going to the polls became a political statement, and there were reports of intimidating checks in different areas by supporters of both camps checking whether people had indelible ink on their fingers from voting.<sup>121</sup>

In Nyanza, there was severe obstructions by NASA supporters resulting in the IEBC declaring towards the end of election day the postponement of polling by two days in four counties: Homa Bay, Kisumu, Migori and Siaya (covering 9.6% of the electorate).<sup>122</sup> The next day the vote was “*rescheduled until further notice*”,<sup>123</sup> with the Chairperson referring to staff being ambushed and tortured, having their homes broken into and being violently prevented from entering their assigned polling station. EU EOM LTOs also received consistent reports of staff being threatened, blockades of offices, officials fleeing, stoning and attacks on security personnel. In addition to street actions there was strong resistance to polling from community leaders. For example, Nyanza Anglican clergy noted regional profiling, police brutality, risk of a “*state massacre*”, and that there could come a time for “*self-defence*” measures.<sup>124</sup> Governors and other elected representatives also stated that polling would not take place in their respective counties, which was seen as giving license to further violent obstructions.<sup>125</sup>

There were also disruptions and security problems in other parts of the country, including Nairobi, involving for example road blocks, barricades and walls being broken.<sup>126</sup> Some citizen observers were intimidated and attacked.<sup>127</sup> Official sources confirmed that four people were killed by the police on election day, although national and international media cited more.<sup>128</sup> However, in many parts of the country the process proceeded smoothly, and EU EOM observers reported that the polling took place in a peaceful and orderly environment.

EU EOM observers were limited both numerically (to 50) and geographically (for security reasons), and therefore the mission did *not* gather a representative sample. From what was seen, polling was well conducted, being positively assessed in all 119 polling stations visited. Voting procedures were generally well implemented and improvements from August were identified, including the marking off of each voter on a voter register, and more accurate and transparent complementary mechanisms for voter identification.<sup>129</sup> In the 16 observations of closing

<sup>120</sup> For example, reports say the NCIC is currently dealing with a case against Moses Kuria (Jubilee MP) for asking the IGP on 25 September to shoot the opposition leader. Also, NASA MP Gladys Wanga is alleged to have said on the same date that President Kenyatta and his deputy William Ruto spread cholera.

<sup>121</sup> For example, EU EOM observers reported hate leaflets being found in Rongai and Njoro constituencies (Nakuru county) close to election day. These made death threats in case votes were found to be cast in favour of NASA. Although the authenticity of such leaflets could not be established, there appeared to be a steady increase in the occurrences of such leaflets and the level of threats being conveyed since the campaign began.

<sup>122</sup> Referring to section 55B of the Elections Act and regulation 64A of the general regulations.

<sup>123</sup> *Chairman’s Address on the Status of Fresh Presidential Election*, 27 October 2017, referring to 27 constituencies in the 4 counties. Later, on 28 October the Chairperson confirmed the vote being postponed in 25 of the 29 constituencies.

<sup>124</sup> Press conference, 27 October 2017.

<sup>125</sup> E.g. Kisumu Governor, Senator and Women Representative, Nyando MP (Kisumu) and Suna East MP (Migori).

<sup>126</sup> On 3 November, KNCHR released its preliminary findings on the election, stating that in several areas voting was obstructed by violent youth who in some cases also destroyed and looted personal property and harassed and robbed citizens.

<sup>127</sup> The Elections Observation Group (ELOG) reported on 27 October that on election day one observer was attacked by armed protesters (Ruaraka constituency) and another was harassed and beaten (Nyali). Kura Yangu Sauti Yangu reported that as of 14.00 on election day, 6% of their observers had been obstructed or attacked.

<sup>128</sup> Press statement of the Office of the Inspector General National Police Service, 27 October 2017.

<sup>129</sup> The complementary mechanisms for voter identification were gazetted on 12 October. In cases where a voter is only recognized in the KIEMS by his/her alphanumeric data (ID number, name), the voter should be validated by the presiding officer

and counting, procedures were also generally well conducted, although ballot reconciliation measures were not always fully followed. The lack of agents from competing parties meant a lack of checks and balances and left the process vulnerable to abuse, despite the range of safeguards included in the procedures for polling and counting.<sup>130</sup>

***Improved results procedures and transparency, in line with EU EOM recommendations, but more communication was still needed***

Overall, the IEBC considerably improved the tabulation process, with greater standardization of results forms and enhanced transparency through projection of tallying at constituency centres, for agents and observers to see what was actually being totalled.<sup>131</sup> In 17 constituencies out of 19 observed by the EU EOM, the tallying process was positively assessed as being orderly and transparent. However, in two constituencies projectors were not working (thereby reducing transparency), and in only about half of centres observed were paper copies of 34A polling station results forms compared with the corresponding scanned 34A forms. In a third of constituencies observed, completed results forms were not posted outside the centres for public scrutiny.

Jubilee MP, Alice Wahome, physically harassed an IEBC returning officer in Kandara (Muranga County), to which the IEBC responded by immediately and publicly noting that such harassment “*is an electoral offence that must be punished.*”<sup>132</sup> Later, on 3 November, the IEBC Chairperson wrote to the Director of Public Prosecutions, requesting an investigation and possible prosecution of Garissa electoral officials who had allegedly altered results in violation of the Election Offences Act.

There was clearly a significant improvement in the electronic transmission and display of results forms from August, through better use of mobile network providers and modified KIEMS software. On election day, virtually all polling stations that opened submitted results data through the KIEMS devices, with 34A scans made immediately available online. The vast majority of the missing forms 34A were from the 25 constituencies in the four counties in Nyanza where voting did not take place. Before the declaration of results on 30 October, 37,187 results forms were apparently available on the IEBC public portal, i.e. covering virtually all polling stations where polling took place. Similarly, for all the 266 constituency 34B results forms. Furthermore, the scans were of a higher quality than in August (see annex 1). Comprehensive results data being promptly provided to the public was a significant improvement from the August elections.

Earlier, on 4 October, the IEBC had sought judicial clarification on verification of results forms at the Bomas national tallying centre. On 17 October, the Supreme Court re-emphasized the need for results to be verifiable and transparent, stating that it is the duty of the IEBC Chairperson to bring to the attention of the public any inaccuracies discovered in the verification of results forms (34As from polling stations and 34Bs from constituency tallying centres), with the 34B forms then used as the basis for tabulation of the national 34C form.<sup>133</sup> Accordingly, the IEBC undertook multiple checks of forms at Bomas, and also allowed agents to actively participate in the verification. At the results declaration on 30 October, the IEBC Chairperson reported a discrepancy of 273 votes on the form 34C.<sup>134</sup> However, further information was needed to explain this number, and also other evident inconsistencies (for example in Garissa county, see below).

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in the system and a “*supervisor validation*” form filled in. Similarly, for each voter only manually identified following KIEMS failure (without possibility of replacement or repair), a form 32A should be filled in and approval requested from the returning officer. The identification procedure would, however, benefit from stronger safeguards such as recording KIEMS statistics and the number of manually identified voters on the 34A forms.

<sup>130</sup> EU EOM observers saw Jubilee agents present in 101 polling stations out of 105 visited. NASA was only present in one, and agents representing other candidates were only seen in two polling stations. Jubilee agents were present in all tallying centres observed.

<sup>131</sup> This is in line with the EU EOM recommendations from 14 September.

<sup>132</sup> IEBC Statement on Intimidation of Election Officials, 28 October 2017.

<sup>133</sup> This is consistent with the court directions given in the *Maina Kiai* case, in which the court established that the results declared at polling stations and constituency tallying centres are final and the IEBC cannot alter them. Civil Appeal 105 of 2017, IEBC vs Maina Kiai and five others.

<sup>134</sup> The discrepancy seems related to several incorrect entries on a single 34B form from the Ainamoi constituency in Kericho county. The most prominent case is the Chemorir Tea Buying Centre polling station where the total valid votes are recorded as 0 on the 34B form, despite the candidates being assigned a total 274 votes.

The most controversial communication shortcoming was in regard to announced turnout given on election night, with the IEBC initially giving inconsistent information without explanation. Later, further explanation would have been beneficial on apparent anomalies, such as differing voter registration figures given by the Commission,<sup>135</sup> as well as which polling stations opened and for how long.<sup>136</sup>

Positively, on 1 November the IEBC published the full KIEMS voter identification report per polling station. This was a significant improvement in terms of transparency, although again a lack of explanation resulted in misunderstanding of the data and the number of people who had been biometrically identified. The EU EOM analysed the KIEMS data and found that in October the vast majority of voters were biometrically identified (96.2%). It also found apparent irregularities at a local level, in particular in polling stations in Garissa county, with exceptionally high numbers of voters not identified biometrically and 19 cases of extra digits being added on to polling station results forms resulting in an extra 100 to 400 votes per polling station (see annex 1 for further information). Given the finality of polling station results, the Commission is not in a position to correct any such errors or manipulations. Such shortcomings were more possible in the October elections due to the absence of competing candidate agents at polling stations.

Positively, the Commission granted agents read-only access to the KIEMS back-end on election day until the declaration of results, thus introducing an important transparency measure. The offer of ICT access was taken up by political parties and candidates, who received soft copies of voter identification and results transmission logs. Observer groups were also allowed access to the ICT parts of the national tallying centre and later international and citizen observer groups requested access to data and logs.<sup>137</sup>

## XV. REACTIONS TO THE OCTOBER RESULTS

### **Kenyatta re-elected amid uncertainty and concern about deepening political tensions**

At the results declaration on 30 October, the IEBC announced a turnout of 7,653,930 voters, i.e. 42.36% of voters in the parts of the country where voting took place, and 38.84% of all registered voters. This was a sharp reduction from the 77.48% turnout in the August elections. President Kenyatta won 98.27% of the votes.<sup>138</sup> NASA and some civil society groups rejected the legitimacy of Kenyatta's mandate, referring to more than half of eligible voters not going to the poll.<sup>139</sup> Jubilee argued that with almost the same number of votes (7.4 million) as in the last presidential election (8.5 million), the results reconfirm the August victory of Kenyatta, noting also that in October Kenyatta still received more votes than Odinga won in August (6.8 million).<sup>140</sup>

<sup>135</sup> The IEBC has at times presented the same data in different ways, for instance there appear to be differences in the number of registered voters per county between the gazetted voters per polling station and the 26 October presidential results 34C form. However, the gazetted voters file puts the registered prisoners together in one group, whereas the 34C file puts the registered prisoners in their respective constituencies, hence there is no difference in the total number of registered voters between the two files. Aside from this, when comparing the number of registered voters per county between the 26 October 34C form and the 8 August 34C form, there are some differences in the numbers for seven counties, seemingly due to some minor mistakes in the 8 August 34C form.

<sup>136</sup> Communication from the IEBC would also have been beneficial in regard to 331 polling stations (mostly located in Kisumu West and Muhuroni constituencies in Kisumu county, and Butula constituency in Busia county), with no return of results, despite being in parts of the country where voting took place. These results are shown as zero on the 34C form, yet there is no corresponding form 34A.

<sup>137</sup> NASA did not take up ICT access after their boycott of the fresh presidential election. The EU EOM was provided with the KIEMS identification report, all results forms and identification and results transmission logs, following a request on 29 October. The EU EOM later requested 8 August logs and reports, to enable comparisons but these were not made available.

<sup>138</sup> Even though NASA boycotted the election, with his name still on the ballot Odinga garnered 73,228 (0,96%) votes. The other six candidates received in total 59,094 votes (0,78%).

<sup>139</sup> Voters' participation in the election strongly reflected Kenya's political and ethnic map. While turnout in Kenyatta's strongholds (Rift Valley and Central region) was similar to the levels seen in August, in Mombasa (a stronghold of the opposition) turnout fell from 59% in the August elections to 14%.

<sup>140</sup> Jubilee also referred to turnout typically diminishing for a second election. However, in the three countries where a court has annulled an incumbent's victory, the turnout does not appear to be so affected. For example, in Ukraine the turnout went from approximately 81% to 77%, in the Maldives from approximately 88% to 87% and 91%, and in Austria from approximately 69% and 73% to 74%.

Immediately after the election, tension was extremely high, especially in western Kenya and parts of Nairobi, with violence resulting in deaths and many injured.<sup>141</sup> In Kawangware, a stronghold of NASA in Nairobi, there were acts of retaliation between Luos and Kikuyus, shops were burned down, people were shot or wounded by machetes and armed militia patrolled the streets. In western Kenya NASA supporters continued to clash with the police. EU EOM observers saw evidence of ethnic profiling of Luos in Nairobi and Kikuyus in Bungoma, with houses and businesses marked with large red crosses.

As during the earlier post-election protests in August, there was public criticism of the security agencies for excessive use of force in their response to protestors and hooligans that resulted in deaths and a high number of injured persons, including children. A preliminary report by the KNCHR indicated 12 deaths (including one under 18-year-old) and 60 injuries (the youngest victim being 10) between 25 and 27 October. These figures are compatible with the findings of the Independent Medico Legal Unit (IMLU).<sup>142</sup> The police rebutted the cited figures, calling the reports “*sensational reporting*” based on “*falsified figures clearly aimed at tainting the image of the National Police Service.*”<sup>143</sup> A later KNCHR report documented a total of 30 killings on the 26 October election day (6 deaths) and the post-election period (24 deaths), including 3 under 18-year-olds.<sup>144</sup> The majority of alleged perpetrators were identified as security personnel, similarly for the 75 injuries documented.

While Jubilee emphasized a clear victory and the need to move on, Odinga denounced the “*sham election*”, called for fresh elections, and referred to the establishment of a “*people’s assembly*” to resist the government. In the following days, NASA accused Jubilee and the IEBC of “*ethnic profiling and genocide in Nyanza*”,<sup>145</sup> launched a boycott of companies seen to be supportive of the government,<sup>146</sup> vowed to declare Odinga president,<sup>147</sup> and called for an interim government.<sup>148</sup> Leaders also referred to the formation of county-level people’s assemblies by NASA governors to pass resolutions on self-determination upon Kenyatta being sworn in. The secession debate was revived, with top NASA politicians from several coastal counties publishing a “*Statement on intent to pursue self-determination*”, and Homa Bay Town MP, Peter Kaluma, drafting a bill to create the People’s Republic of Kenya.<sup>149</sup> After the Supreme Court ruling on 20 November upholding the election of President Kenyatta, NASA stated that it refused to recognize the government. Uncertainty, tensions and concerns about violence continued with consequent effects on business and national functioning.

### ***Continued lack of dialogue and limitations on freedom of assembly fuelled frustrations and a sense of exclusion***

In his acceptance speech President Kenyatta made a personal commitment to “*constitutionalism, the rule of law, respect for independent institutions and respect for human life.*” In regard to the legislative amendments, he stated “*Some argued that I was changing the rules of engagement half-way through the game. Others argued to change the electoral law ahead of the 26 [October] election is to privilege myself over the other competitors. And because law must be founded on reasoned national consensus, I listened to these voices. I did not sign the new Bill into Law.*” However, without signing, the bill was automatically approved after 14 days, with gazette

<sup>141</sup> Election violence occurred in Kawangware and Kibera (Nairobi); Kondele, Muhoroni, Nyalenda, Nyamasaria, and Seme (Kisumu); Mbita (Homa Bay); and also in Bungoma, Busia, Machakos, Migori and Vihiga counties.

<sup>142</sup> IMLU released a statement on 1 November indicating 64 cases of excessive use of force by the police during the 26 October election, with 34 people being shot, 13 of whom died between 25 and 28 October.

<sup>143</sup> In the same statement on 2 November, the police published information on 6 people killed, 13 injured and 86 arrested in election-related unrest from 25 to 30 October. However, the police statement lacks details (dates and places of the reported incidents), thereby preventing cross-referencing and clarification as to the actual number of deaths.

<sup>144</sup> “*A Human Rights Monitoring Report on the 2017 Repeat Presidential Election*”, KNCHR, December 2017.

<sup>145</sup> NASA press statement on 27 November.

<sup>146</sup> NASA press statement on 4 November.

<sup>147</sup> “*We will use August 8 result to swear in NASA presidential candidate Raila Odinga if Uhuru Kenyatta tries to use the October 26 poll results to be sworn in... Uhuru does not have sovereign authority, you people have.*” Senator Orenge at a rally in Athi River in Machakos on 28 October.

<sup>148</sup> In an interview with Reuters on 7 October, Odinga stated “*We need to have an interim arrangement of governance involving representatives of both parties, and six months will be required to carry out all these changes that we need in our country in order to have a free and fair election.*” A similar statement was made by We-The-People, an alliance of civil society actors, professional associations, trade unions, academia and media on 31 October.

<sup>149</sup> On 13 November, the Orange Democratic Movement (ODM) Homa Bay Town MP, a constitutional lawyer, submitted a bill to IEBC for review which envisaged the secession of 40 counties to constitute a new People’s Republic of Kenya.

notification then legally required within 7 days, and thus was arguably applicable for the petitions process. The IEBC Chairperson questioned why the same challenges arise with each election, noting that hard questions need to be addressed, including why the Commission is never seen as a fair umpire.

There were various public calls to address over-arching problems of exclusion, Kenya's "winner-takes-all" politics, the lack of rotation in the presidency beyond two ethnic groups and the perceived over-reach of the government. It was argued that without reform in these areas, elections would continue to be a point of conflict. To ease the political stalemate, suggestions were made concerning the establishment of parliamentary positions for opposition leaders to serve as a platform for their contribution to national debates.<sup>150</sup> For example, religious leaders under the umbrella of the National Council of Churches of Kenya proposed restoring the positions of Prime Minister and Deputy Prime Minister, as well as an official Leader of the Opposition and Deputy in parliament.<sup>151</sup> The reactions to this were mixed, with some Jubilee politicians strongly opposing the proposal and NASA representatives proposing amendment of the Constitution to change to a parliamentary system of democracy.<sup>152</sup>

The government's clampdown on public assembly further fuelled frustrations.<sup>153</sup> Odinga made a high-profile trip to the United States, returning on 17 November to a welcome organised by NASA supporters. However, the police banned a planned procession from the airport and a rally at Uhuru Park in Nairobi, resulting in severe confrontations with NASA supporters. The chaotic scenes around Nairobi involving NASA supporters and the police lasted over 10 hours and resulted in 5 people being killed, according to official figures. The police claimed no live ammunition was used and people were killed by stoning before the police arrived at the scene.<sup>154</sup> But the media reported mortuary attendants, media photographers and eyewitnesses as saying the bodies had bullet wounds. Human Rights Watch noted multiple reports that "police either shot or beat to death dozens of people" and spoke of the need to "investigate scores of killings, most of them by the police."<sup>155</sup> The disturbances continued the next day in parts of Nairobi, with an apparent ethnic dimension that was also denied by the police. Witnesses also reported the involvement of *mungiki*, an outlawed pro-government armed group responsible for many killings in the 2007/8 post-election violence. There was further violence after the Supreme Court's 20 November decision that affirmed Kenyatta's victory.

## XVI. MEDIA AND SOCIAL MEDIA

**Kenya's vibrant media reported extensively on the election process and provided diverse coverage, however media freedom continues to be limited**

<sup>150</sup> Throughout the whole election period, various actors referred to the political stalemate as arising from Kenya's "winner-takes-all" electoral system, which does not allow for losing presidential and deputy-presidential candidates to have a seat in parliament.

<sup>151</sup> Canon Reverend Peter Karanja, General Secretary of the NCKK, who is the author of the idea of "dignified landing of the opposition after elections", referred to the proposal to amend the Constitution in order to create a parliamentary position for the leader of the opposition as one of the few ways left for breaking the political impasse. A meeting with the EU EOM on 10 November.

<sup>152</sup> For example, the majority leader in parliament, Aden Duale, stated to media on 2 November "Jubilee will not support amendments aimed at creating positions for individuals... We cannot bring Kenyans to a parliamentary system just because some people have seen the current Constitution does not give them leadership." On the same day, the Kisumu Governor (NASA), Anyang Nyong'o, commented a parliamentary system "would remove the near fratricidal wars we have every five years to elect one person to one post called the President. It is not worth it: too expensive, too divisive, too prone to give ruthless tycoons influence and access to the most powerful office in the land and too amenable to the politics of exclusion."

<sup>153</sup> Article 37 of the Constitution provides for freedom of peaceful assembly and states that "every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities". Kenya has ratified several international and regional instruments protecting the right to peaceful assembly and association, particularly Article 20 of the Universal Declaration of Human Rights, Article 11 of the African Charter on Human and People's Rights and Article 21 of the ICCPR protecting the right to peaceful assembly. According to article 24.1 of the Constitution, freedom of assembly and association can only be limited by law, and then only to the extent that the limitation is reasonable and justifiable in an open, democratic society.

<sup>154</sup> Nation Police Service statement on 17 November and NASA statement on 19 November.

<sup>155</sup> "Rein in Police, Condemn New Abuses" Human Rights Watch, 21 November 2017.

Kenya has a vibrant media landscape, including over 200 radio and TV stations. Radio remains the key media and most accessible source of information, with television, the internet and social media growing rapidly, especially for urban populations. However, powerful private media houses with links to the country's political elite dominate the media sector. Journalists interviewed across the country referred to varying degrees of self-censorship when reporting on political issues. This is in part due to political and business interests of those who control the media, and is also attributed to concern over the withdrawal of government advertising (historically an important source of media revenue).<sup>156</sup> Also, the legal definition and public perception of hate speech appears to be broad, including negative campaigning, and therefore perpetuates self-censorship.<sup>157</sup>

Threats and violence against journalists, and a lack of credible and timely investigations, are long-term concerns of the sector, as affirmed by Kenyan media stakeholders.<sup>158</sup> Prior to 8 August, the EU EOM received credible reports of journalists being subject to threats or incidents for political/election related matters in five constituencies.<sup>159</sup>

The media were obstructed in their coverage of disturbances. After the 8 August election, several journalists were blocked by security forces, denied access to information, assaulted or detained while reporting from the scene in Nairobi and Kisumu.<sup>160</sup> The national media initially gave limited coverage of the August disturbances, but later gave more coverage of demonstrations and the ensuing violence.<sup>161</sup> On 9 October, one journalist was beaten and some others from major media houses were tear-gassed, threatened and prevented by police from covering the NASA protests in Kisumu. On and after the 26 October election, some journalists were prevented by security forces from covering electoral activities and protests, others were threatened by agitated party supporters, and some were injured.<sup>162</sup> On 17 November, the Communications Authority of Kenya directed electronic media to “*cease airing live coverage of political events*” with immediate effect. However, there was no legal basis to the restriction, and some media houses immediately refused to follow the directions.<sup>163</sup>

***The legal framework for the media in elections would benefit from regulations covering access to information and more independent regulatory bodies***

The 2010 Constitution guarantees freedom of expression and of the press and prohibits state interference in journalists' editorial decisions. Positively, an Access to Information Act was passed in 2016., although the Cabinet Secretary for Information, Communications and Technology and the Commission on Administrative

<sup>156</sup> The advertising budget was streamlined on 1 July 2015 when the government established the Government Advertising Agency (GAA). Instead of each ministry having a budget for advertising, funds were consolidated in the GAA under the Ministry of Information, Communications and Technology. The rules on distribution of advertising are not publicly available and are not clear.

<sup>157</sup> The Constitution limits freedom of expression in the case of hate speech, which is defined broadly as including “*vilification of others*”. The NCIC Act (section 13) stipulates that hate speech is committed if a person presents intention to promote hatred, or if ethnic hatred is likely to be stirred up.

<sup>158</sup> Kenya ranks 95 out of 180 in the 2017 Reporters Without Borders World Press Freedom Index. The 2017 report notes that “*many independent journalists have been the target of threats and attacks by both the public and the authorities*” in the lead-up to the 2017 general elections.

<sup>159</sup> In Isiolo, Kajiado, Kirinyaga, Kitui and Siaya. The EU EOM learned about similar incidents in Bungoma, Kakamega, Nairobi and Siaya that allegedly occurred prior to the EU EOM's arrival. A journalist from the *Daily Nation*, was detained by police on 18 June 2017 for two days for allegedly taking a bribe during his investigation into Jubilee Party fundraising activities. The case raised questions as to possible complicity between the security agencies and pro-government bloggers.

<sup>160</sup> On August 12, a KTN journalist was arrested for allegedly wearing a helmet and body armour without a proper license. He was reporting on post-election protests in Kibera in Nairobi. Citizen TV journalists were reportedly interrogated and intimidated by police on 13 August in Kisumu while reporting on post-election protests.

<sup>161</sup> This was in line with the 18 Recommendations for the Re-Run issued by the EU EOM on 14 September 2017.

<sup>162</sup> For example, journalists from Standard and NTV reported being prevented from covering election and post-election developments and their recordings being confiscated by security forces in Migori. One freelance journalist referred to a similar treatment by the security forces on election day in Lamu. Several journalists from KTN and Capital FM were attacked and harassed by party supporters in Nairobi. Two citizen TV journalists were physically attacked at NASA headquarters by NASA supporters.

<sup>163</sup> Related international commitments include “*Every individual shall have the right to receive information.*” African (Banjul) Charter on Human and Peoples' Rights, article 9. State Parties commit to “*Promoting freedom of expression, in particular freedom of the press and fostering a professional media*” ACDEG, article 27. [article 19 rights]... “*may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary*” ICCPR, article 19.3.

Justice (the Act's enforcing agency) have not yet adopted the regulations to enable its full use. The previous parliament adopted some laws that restricted press freedom.<sup>164</sup> However, the High Court declared such provisions as not consistent with the Constitution.

The Media Council of Kenya (MCK) is a national institution that deals with journalistic standards. While it is independent from the government in terms of the selection of its members, it depends on funding allocated by the National Assembly. During the elections, the MCK was side-lined as its activities were hampered by a lack of funding. Instead, the Communication Authority of Kenya (CA), the regulatory body for the communications sector (in charge of media licensing and technical aspects of broadcasting) took a more prominent role. The CA adopted a Programming Code in 2016, which in part overlaps with the ethical and media standards already regulated by the MCK.<sup>165</sup> Despite its financing being separated from the state budget, the CA lacks full independence from government.<sup>166</sup> The CA became more controversial with its direction to stop live coverage of political events, thereby attempting to limit the media and the public's access to information. The media regulatory bodies would benefit from increased clarity, consistency and independence.<sup>167</sup>

Positively, MCK Guidelines for Election Coverage were developed after consultation, consolidating media-related provisions in the Elections Act and other laws, as well as the Code of Conduct for the Practice of Journalism in Kenya.<sup>168</sup> All media are required to empower citizens to make informed choices and to provide sufficient, accurate and reliable information on electoral matters. Broadcast media are required to offer balanced and impartial coverage of elections and campaigns.<sup>169</sup>

### ***Increasing media scrutiny and coverage of the election process***

During the 8 August election, the media did not scrutinize the constituency tallying processes or results and instead focused on the figures provided by the IEBC.<sup>170</sup> However, in October the media provided live autonomous reporting of tallying, with major media outlets collecting election results from constituency tallying centres and organizing teams to tabulate results and provide prompt independent information to the public.<sup>171</sup> Some journalists interviewed by EU EOM LTOs noted capacity constraints and a lack of training on the results process.

Overall, the media provided extensive coverage of campaigning prior to 8 August, though the broadcast media could have given more in-depth analysis. In some counties, there were televised debates among gubernatorial

<sup>164</sup> The 2013 Kenya Information and Communications Act and Media Council Act introduced provisions increasing penalties for breaches of the code of conduct, and allowed for tighter media control. The 2014 Security Laws Amendment Act introduced severe punishment in cases of distribution of security-sensitive information. For example, the Security Laws Amendment Act stated that “a person who publishes, broadcasts or causes to be published or distributed, through print, digital or electronic means, insulting, threatening or inciting material or images of dead or injured persons which are likely to cause fear and alarm to the general public or disturb public peace commits an offence” and is liable to a fine up to five million KSH (approximately €40,000) and/or imprisonment for up to three years.

<sup>165</sup> Furthermore, the CA's Multimedia Appeals Tribunal (MAT) has an overlapping and superceding mandate over the MCK's Complaints Commission. The CA's MAT was however not operational during the current election period.

<sup>166</sup> The CA is managed by a Board of Directors. Its members are appointed by the President and Cabinet Secretary from a group of applicants shortlisted by a selection panel consisting of various organizations. However, the law (Kenya Information and Communications Act) is vague on whether the organizations nominating the members of the panel can select their representatives for the panel, or if these are government-picked. The CA is financed from licence and frequency fees.

<sup>167</sup> Related international commitment “Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature... The appointments process for members of a regulatory body should be open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party.” Declaration of the Principles on Freedom of Expression in Africa: Public Broadcasting article VII.

<sup>168</sup> MCK [Guidelines for Election Coverage](#) were adopted in March 2017.

<sup>169</sup> The Guidelines states that “The media should be able to demonstrate that the main parties or candidates vying for office are given equitable opportunities to be heard or questioned and, that minor parties or candidates are not treated unfairly. Fair and balanced coverage also means that individual stories, and their pattern over a period of time, reflect the views of different parties or candidates.”

<sup>170</sup> Prior to the 8 August elections, the government and media regulatory body warned the media not to release results of the elections other than those declared by the IEBC. This contributed to uncertainty in the media as to whether they could publish the election results without being reprimanded.

<sup>171</sup> This was in line with the 18 [Recommendations for the fresh elections](#) issued by the EU EOM on 14 September 2017.

and some other candidates, but at times such efforts by the media failed due to lack of candidate interest. A highly anticipated presidential debate did not offer voters an opportunity to compare the leading candidates as the President did not participate. The presidential election continued to dominate the media after the 8 August polls, with constant coverage of the activities of the two major political camps, the IEBC and others.

### *Adverts on the success of the executive were stopped*

At odds with the legal framework, there was an extensive paid advertising campaign in the media promoting the successes of the President and government prior to 8 August, raising questions about the misuse of public funds to the advantage of the incumbent.<sup>172</sup> Such campaigning was banned by the High Court on 19 October and did not appear again in the period leading up to the 26 October election.<sup>173</sup>

Prior to 8 August, the Jubilee Party initially had considerably more paid adverts in the electronic media than NASA, with a levelling out only in the last two weeks of the campaign. Prior to 26 October, Jubilee paid-for adverts appeared only in the last week of the campaign, while NASA did not undertake any paid campaigning in the media at all.

### *EU EOM media monitoring found the state broadcaster provided equitable news coverage but lacks full independence*<sup>174</sup>

The national state broadcaster, the Kenya Broadcasting Corporation (KBC), is legally required to provide independent and impartial broadcasting services and to offer a diversity of views. It is obliged to provide fair and balanced election coverage, and to give divergent views and dissenting opinions. However, KBC lacks editorial and financial independence as the president/government appoint its board of directors and managing director and also have the mandate for KBC regulations. KBC also relies in part on government subsidies. KBC struggles to attract audience in areas with higher media concentrations.

KBC is obliged to allocate free airtime during the campaign to registered political parties participating in the election. While it provided free airtime to some candidates, the criteria for allocation was not transparent and the slots did not appear to be granted in a systematic way. KBC representatives stated to the EU EOM it would provide the airtime to all contestants who requested it, however this was not publicized.

EU EOM media monitoring found that KBC TV and radio provided equitable news coverage of the two main camps through both campaign periods. However, Jubilee received additional coverage in other editorial programmes on KBC TV.<sup>175</sup>

### *Equitable coverage in private national media, but not in vernacular radio stations*

The private national broadcast media at times leaned towards one or the other camp, but the overall coverage was relatively equitable. NTV was the most equitable and provided more diverse and balanced coverage of 8 August post-election day developments than other national private TV channels (Citizen and KTN).<sup>176</sup> KTN offered all presidential candidates slots of approximately one hour to present their platforms (this was not taken up by the two leading candidates). Private radio, Jambo, offered equitable coverage but favoured NASA in its tone.

<sup>172</sup> The Election Offences Act (section 14 (2)) stipulates that no government “shall publish any advertisements of achievements of the respective government...in the print media, electronic media...”

<sup>173</sup> The High Court issued a permanent injunction restraining the national government from advertising claims of its achievements from the past four years in the media. Petition 162 of 2017 Apollo Mboya vs. AG, IEBC and DPP, declared that the Kenya Government Delivery web portal was unlawful and in violation of the Election Offences Act and the Constitution in advertising government achievements.

<sup>174</sup> From 24 June until 5 August, and from 28 September until 23 October, the EU EOM analysed election coverage in a representative sample of 15 media outlets, consisting of 4 TV channels (KBC, Citizen, NTV and KTN), 7 radio stations (KBC Radio Swahili service, Radio Jambo, Kameme, Kass, Mulembe, Musyi and Ramogi) and 3 dailies (Nation, Standard and Star) and a weekly, The East African. Broadcasts monitored were in English, Kiswahili, Kalenjin, Kamba, Kikuyu, Luhya and Luo.

<sup>175</sup> KBC TV for instance aired live Facebook chats of Kenyatta with his followers on 23 July (30 minutes) and on 30 July (50 minutes). No other monitored media aired these chats.

<sup>176</sup> At a meeting with supporters in Kibra, Nairobi, on 13 August, NASA lawyer James Orengo complained about the bias of Kenyan media, and specifically asked NASA supporters to boycott the Daily Nation and its affiliated television station NTV. This was a surprising statement, as the only TV channel airing the meeting live was NTV.

Vernacular radio stations showed a clear preference for one or the other camp, mainly in terms of time allocated. This was most pronounced for Kameme, which clearly promoted Jubilee in time allocated as well as tone of coverage, while it presented NASA negatively. Kass also leaned towards Jubilee, while Mulembe, Musyi, and Ramogi leaned towards NASA. In the last week of campaign coverage prior to 8 August, the favouring of one or the other camp significantly intensified. Prior to 26 October, Kameme promoted Jubilee's views and urged high voter participation on election day, while it also portrayed NASA in a very negative light. Ramogi allocated the majority of its news coverage to NASA, focusing on their protests.

The print media attempted to provide detailed reporting on the campaigns, including less prominent contestants, prior to 8 August. The monitored print media gave almost equal coverage of both camps during both campaign periods.

### ***Increasing fake news stories on social media and concerns over data mining***

Social media was increasingly used by institutions (including the IEBC) to communicate messages to the public and as a campaign tool of contestants.<sup>177</sup> Facebook and WhatsApp were the most popular for electoral information, however they have low levels of trust compared to traditional media.<sup>178</sup>

The frequent spreading of rumours and fake news on social media eroded trust and heightened uncertainty in an already volatile environment. Disinformation material, sometimes of high quality, was often attributed to political camps to delegitimize genuine stories and/or confuse voters.<sup>179</sup> This highlights the need for responsible fact-based reporting through training of journalists and improved public awareness of how to identify disinformation.

Guidelines on the use of bulk messages and social media by the National Cohesion and Integration Commission (NCIC) and the CA were circulated in mid-June as a draft and later gazetted on 13 July.<sup>180</sup> These include requirements for “*honesty and accuracy*” in publications, and for providers to remove “*undesirable political content*”. While the later version is less restrictive than the initial draft, concerns were raised about the risk of selective application and/or of a restraining effect on critical views.

Some EU EOM interlocutors claimed that both campaigns were using data miners to undertake targeted social media campaigning. Concerns were raised about the lack of data protection laws, leaving individuals at risk of exposure and possibly advantaging the ruling party because of its access to citizen information through state institutions.<sup>181</sup> The lack of applicable campaign finance laws further obscures the use of data mining as it is not clear who has paid for adverts and web-based materials and messaging (some of which were highly controversial).<sup>182</sup>

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<sup>177</sup> On 9 November 2017, the numbers of followers of key institutions and political actors on Twitter were: IEBC (over 352,000), DPP (over 53,500), Inspector General of Police (over 223,000), Raila Odinga (over 1.47 million) and Uhuru Kenyatta (over 2.67 million). On Facebook, Odinga has 1.16 million and Kenyatta 3.38 million followers.

<sup>178</sup> Portland and GeoPoll [opinion poll](#) on fake news in Kenya, May 2017.

<sup>179</sup> For example, a fake preliminary statement on the election by the International Republican Institute, or a [fake opinion poll](#) published on a website imitating the Ipsos polling agency and distributed in its name, attempting to present the race between the two presidential front-runners as extremely close.

<sup>180</sup> [The Guidelines for Prevention of Dissemination of Undesirable Bulk Political SMS and Social Media Content Via Electronic Communications Networks.](#)

<sup>181</sup> The right to privacy is guaranteed in article 31 of the Constitution, including protections for privacy of communication. However, while several laws cover issues related to surveillance, there is no specific data protection legislation. Relevant good practice includes Freedom of Information. “*Each State Party shall commit itself to establishing a legal framework aimed at strengthening fundamental rights and public freedoms, particularly the protection of physical data, and punish any violation of privacy without prejudice to the principle of free flow of personal data.*” African Union Convention on Cybersecurity and Personal Data Protection, 27 June 2014, article 8 (1) – not signed or ratified by Kenya.

<sup>182</sup> See for example [The Real Raila](#) campaign. The African Union Convention on Cybersecurity and Personal Data Protection (not signed or ratified by Kenya) states in article 4.1 “*...any advertising action, irrespective of its form, accessible through an online communication service, shall be clearly identified as such. It shall clearly identify the individual or corporate body on behalf of whom it is undertaken.*”

## XVII. CIVIL SOCIETY AND CITIZEN OBSERVATION

### Civil society put under unwarranted state pressure, potentially undermining critical discourse and access to electoral remedy

Kenya has a competent and diverse civil society sector engaged with private and public sectors and involved in policy formulation and service delivery on a broad range of issues. The electoral process was scrutinised by various CSOs with specific expertise assessing *inter alia*, the legal framework, IEBC capacity, the 2016 mass voter registration exercise, hate speech and the performance of security forces.<sup>183</sup> Interlocutors commented on the political alignment of some CSOs active on election issues. EU EOM LTOs reported that democracy and governance NGOs were not typically very present at the local level.

The government has long been criticised for over-controlling and restricting the activities of CSOs and for failing to implement the Public Benefits Organisations Act, 2013. The transfer of the mandate for CSO regulation from the Ministry of Devolution and National Planning to the Ministry of Interior and National Coordination at the end of 2016 is seen by CSO representatives as further extending government control rather than promoting partnership.

During the election period, seven organisations and networks focusing on governance, justice and human rights issues were subject to intimidating actions by the NGOs Coordination Board.<sup>184</sup> Crucially these actions were just prior to the deadlines for submission of presidential petitions in both August and November.<sup>185</sup> Some organisations had been critical of government, and had legally challenged the on-going electoral arrangements. Others were seen as likely to submit petitions challenging the presidential election results.<sup>186</sup> In August attempts were made to unlawfully deregister the Kenya Human Rights Commission (KHRC).<sup>187</sup> In November, without a clear legal basis, the NGOs Coordination Board issued letters referring *inter alia* to financial and employment compliance issues and demanded that all political operations cease, including all electoral-related programmes.<sup>188</sup> References to punishments under the penal code were also made. Some of the concerned organisations said they had received the letters by email, while others had reportedly just heard of them through the media.<sup>189</sup>

While accountability of CSOs is needed, these actions by the NGOs Coordination Board effectively intimidate and thwart civil society activities in respect of elections, and have a chilling effect even if they are revoked or later ruled illegal.<sup>190</sup> The organizations concerned denied the allegations made against them, and in some cases

<sup>183</sup> Other election-related initiatives include Kura Yangu Sauti Yangu co-organising the National Elections Conference with the IEBC in June, and various peace and mediation initiatives.

<sup>184</sup> In a [statement on 16 August](#), the EU EOM expressed its concern at a letter revoking the registration rights of a key NGO (Kenya Human Rights Commission, KHRC) and the orders to close down another (AfriCOG).

<sup>185</sup> Inuka Nisisi Kenya, Katiba Institute, and Muslims for Human Rights (MUHURI) received letters on 3 November. The Kenya Human Rights Commission (KHRC) and AfriCOG received similar letters immediately after the 8 August election. All these organizations are partners of the coalition Kura Yangu Sauti Yangu (KYSY), which has been critically observing the August and October elections. KYSY and We-the-People, a citizens' alliance of civil society leaders, trade unions, professional associations, academia and media, received a letter from the NGOs Co-ordination Board on 6 November. The letter was copied to the KHRC, the International Commissions of Jurists (ICJ) and the International Centre for Policy and Conflict (ICPC).

<sup>186</sup> Supreme Court Presidential Petition 4 of 2017 Khelef Khalifa (MUHURI) and Njonjo Mue (ICJ) vs IEBC and others; Supreme Court Petition 17 of 2017 Khelef Khalifa (MUHURI) and Samwell Mohochi (ICJ) vs IEBC; CoA Civil Appeal 105 of 2017 Maina Kiai and Khelef Khalifa (MUHURI) vs IEBC; High Court Petition 168 of 2017 Khelef Khalifa (MUHURI), Maina Kiai and others vs IEBC; Judicial Review 628 of 2017 Khelef Khalifa (MUHURI) and others vs IEBC; High Court Petition 447 of 2017 Gladwell Otieno (AfriCOG) and others vs IEBC; Constitutional Petition 548 of 2017 Katiba Institute and AfriCOG vs AG and others.

<sup>187</sup> This resulted in a 2016 High Court decision concluding that the Board infringed the KHRC's right to fair administrative action and the right to fair hearing (articles 47 and 50 of the Constitution).

<sup>188</sup> See for example the [letter](#) to We-the-People and Kura Yangu Sauti Yangu on the NGOs Coordination Board's Twitter account.

<sup>189</sup> On 5 October, a letter by the Executive Director of the Board was circulated on social media announcing the suspension of activities of the International Development Law Organisation (IDLO), an inter-governmental organisation promoting the rule of law and providing support services to the judiciary.

<sup>190</sup> On 6 November 2017, the Katiba Institute filed a petition at the High Court against the NGOs Coordination Board, the Cabinet Secretary for Interior and the Attorney General. The next day the High Court issued a temporary injunction restraining

pointed out that they are limited companies and therefore do not fall under the regulatory oversight of the Board.<sup>191</sup> They describe the Board's letters as acts of intimidation and harassment, designed to obstruct civil society actions.<sup>192</sup>

The NGOs Coordination Board's actions go against the commitments Kenya has made in regard to creating a conducive environment for civil society, including for elections.<sup>193</sup> Good governance in Kenya is further weakened by the absence of any response by other state bodies to the Board's actions.

Civil society has also been active in observing and advocating on the election. The Elections Observation Group (ELOG), a permanent CSO network, monitored extensively and had a reported deployment of 8,300 observers countrywide on 8 August. It undertook a parallel vote tabulation (PVT), which confirmed the declared IEBC presidential results.<sup>194</sup> Kura Yangu Sauti Yangu reportedly deployed 500 monitors in partnership with International Commission of Jurists, KHRC and InformAction. The KNCHR had 84 long-term monitors and 140 on election day.

For the October election, ELOG reportedly deployed 1,773 observers, albeit only in 215 constituencies (out of 290) for security reasons. Some observers sustained attacks and personal threats were also made to some of its leadership. Kura Yangu Sauti Yangu was also active throughout in advocating for reforms. It reported a deployment of some 2,000 observers in 44 of Kenya's 47 counties in October. The KNCHR reported deploying a total of 339 monitors across all constituencies in October.

## **XVIII. PROSECUTION OF OFFENCES RELATED TO ELECTIONS**

### **Few convictions to date, with increasing pressure for high-level prosecutions**

Given the extensive allegations of corruption in the electoral process, prosecution of electoral offenses is of heightened importance for confidence in electoral justice and the integrity of future elections. Perceptions continue that only lower-level offenders will be subject to prosecution, with the more powerful left untouched.

A series of high-profile demands were made on the Office of the Director of Public Prosecutions (ODPP). On 12 July 2017, the Commission on Administrative Justice (Office of the Ombudsman) wrote to the ODPP about alleged misuse of public resources and positions, naming 12 high-ranking officials (including two sitting Jubilee and three sitting NASA governors).<sup>195</sup> On 22 September, NASA publicly demanded prosecution of one IEBC commissioner and ten staff, including the CEO. NASA gave the ODPP 72 hours to file charges against officials accused of bungling the elections, saying they would also pursue private prosecutions. A consortium of 12 civil society organisations also sought prosecutions against some election officials and held a demonstration outside the ODPP and IEBC offices.<sup>196</sup>

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the NGOs Coordination Board from summoning the Katiba Institute or from interfering in their operations (pending a later hearing).

<sup>191</sup> From the three organisations, which received letters on 3 November, only Muslims for Human Rights (MUHURI) is a Non-Governmental Organisation (NGO). The Chairperson of MUHURI, Khelef Khalifa, stated that the last financial report of his organisation was duly submitted to the Board in March 2017 and they had never received an official letter by the Board pointing at irregularities in their documentation.

<sup>192</sup> The NGOs Coordination Board, which falls under the Ministry of Interior and Coordination of National Government, has not been available for comment.

<sup>193</sup> Related international commitments include "Create an enabling environment that will enable civil society and the media to hold governments to the highest levels of transparency and accountability in the management of public affairs." Convention on Preventing and Combatting Corruption (CPCC) article 12. "State Parties... Create conducive conditions for civil society organizations to exist and operate within the law" African Charter on Democracy, Elections and Governance (ACDEG), article 12. "State Parties shall create a conducive environment for independent and impartial national monitoring or observation mechanisms." ACDEG, article 22. Kenya has signed but not ratified the ACDEG.

<sup>194</sup> 1,703 of ELOG's observers conducted the parallel vote tabulation. According to ELOG's PVT results (with a margin of error of 1.9%) Kenyatta scored 54% and Odinga 44.9%.

<sup>195</sup> The Jubilee governors are in Meru and Kericho, and the NASA governors are in Mombasa, West Pokot and Kitui.

<sup>196</sup> The petitioners wanted two IEBC commissioners, the CEO, and senior staff prosecuted and barred from conducting the fresh presidential election.

Up to the 31 October, there were only 15 successful convictions for **electoral offences** and no prominent person has been charged. The ODPP reported 95 pre-election-related criminal cases,<sup>197</sup> mostly relating to party primaries. Up to 31 October, 177 people had been charged.<sup>198</sup>

While new efforts have been made in regard to prosecutions, the difficulties in gathering evidence and the timeframes involved in criminal proceedings risk perpetuating a culture of impunity. The lack of requirements for public updates on the status of investigations and prosecutions diminishes public accountability. The new Election Offences Act (EOA) requires the ODPP to institute all EOA offences through magistrates courts within 12 months of the election.<sup>199</sup> The ODPP has the power to direct investigations and has promoted this through an inter-agency reporting framework, involving the police, the IEBC, the National Cohesion and Integration Commission (NCIC), and the Ethics and Anti-Corruption Commission (EACC).<sup>200</sup> However, ODPP actions are reportedly limited by its annual budget being finalized in advance of its new responsibilities and the office thereby lacking sufficient resources.

## **XIX. POLITICAL FINANCE**

### **Lack of applicable campaign finance legislation and regulation undermines equality of opportunity and transparency in the election process**

Currently, the legal framework for elections does not include any campaign finance requirements for candidates. The regulations for political parties lack sufficient transparency requirements, and enforcement mechanisms are not fully effective. The lack of information available for public scrutiny, the absence of regulations on individual candidates' financing, and the absence of a requirement for all transactions to be made through a designated bank account, all limit transparency and accountability. This weakens Kenya's compliance with ICCPR obligations for a genuine election,<sup>201</sup> and Convention against Corruption transparency measures.<sup>202</sup> The Election Campaign Financing Act, enacted in December 2013, was suspended by parliamentary amendment in January 2017 and has not been made operational through parliament-approved regulations.<sup>203</sup>

Financing and reporting by candidates therefore remains regulated. There is no requirement for candidates to open dedicated campaign bank accounts and no legal prohibitions or limits on cash donations. Most candidates interviewed referred to funding the bulk of their campaigns through personal savings and private donations, with little support from their party leaderships.

<sup>197</sup> 34 under the Electoral Offences Act and the rest under the Penal Code.

<sup>198</sup> Of which 111 are election offence cases, 60 are election-related cases, 6 are hate speech and related cases. 15 involve IEBC staff, 13 involve prominent persons, politicians or government officials and 159 involve civilians.

<sup>199</sup> New legislative provisions have been made with the EOA coming into force on 4 October 2016, which supplements other overlapping provisions in the Penal Code, National Cohesion and Integration Act, and the Public Order Act.

<sup>200</sup> The ODPP trained 105 special prosecutors to handle electoral offence cases, and signed an MOU with the IEBC so that its officials testify in court where they witness election-related crimes.

<sup>201</sup> ICCPR, Human Rights Committee, General Comment 25 "Reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined, or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party." (paragraph 19).

<sup>202</sup> Convention against Corruption, article 7(3) "Each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties." The African Union Convention on Preventing and Combating Corruption (ratified by Kenya in 2007) also states in article 10 "Each State Party shall adopt legislative and other measures to proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and incorporate the principle of transparency into funding of political parties."

<sup>203</sup> Election Campaign Financing Act, section 1A. Parliament passed the amendment apparently in reaction to the publication of IEBC guidelines on campaign finance without parliamentary approval and too close to the election (as the Act refers to regulations being made at least 12 months before a general election). ODM had also petitioned the High Court to challenge the IEBC's authority to publish the guidelines unilaterally.

There are limited requirements for party financing. There is no limit on spending by political parties, although the Political Parties Act (PPA) of 2011 establishes a ceiling for individual donations to parties.<sup>204</sup> The PPA requires that all parties publish the source and size of donations, their incomes and expenditures, as well as their assets and liabilities.<sup>205</sup> However, the Office of the Registrar of Political Parties (ORPP) acknowledges that parties routinely under-report their incomes. At the time of writing only 40 out of 67 registered parties had submitted their annual financial reports for 2016/2017 within the deadline (30 September). Although warnings have reportedly been issued and adhered to, primarily regarding financial reporting deadlines, the ORPP also refers to a lack of sufficient evidence to impose sanctions.<sup>206</sup> Others have also referred to the political difficulty of challenging powerful parties. To date, the ORPP has de-registered only one political party and the decision was later overturned by the Political Parties Disputes Tribunal.<sup>207</sup>

The ORPP did not develop any monitoring tools to capture parties' spending during the campaign period. Thus, it appears that the ORPP will not be able to actively assess parties' financial reports. However, the office did try to identify illegal expenditures such as voter bribery. The ORPP only provided the EU EOM with the 2016 financial reports of ODM and Wiper Democratic Movement Kenya (both members of NASA) and of no other parties.

Public financing of political parties has been criticized for being inadequate and not helping to level the playing field.<sup>208</sup> The Political Parties Fund, at 370,504,799 Kenyan shillings (approximately €3.3 million), is reportedly only 10% of the amount prescribed in the law.<sup>209</sup> Only three parties qualified in the 2017 financial year for the fund: Jubilee, ODM, and Wiper Democratic Movement-Kenya (WDM-Kenya).<sup>210</sup> The fund is then allocated proportionately according to the number of votes obtained in the preceding general elections (80%) and to the number of candidates elected from special interest groups (15%), with the remaining 5% used to administer the fund. Public funding reportedly represents a small fraction of the funds that the Jubilee Party and NASA raised for the general elections.

There is a common perception, as well as concrete observation, of funds raised being used for alternative forms of campaigning, including inducement payments, which are widely accepted and also demanded.<sup>211</sup> Video footage seen by the EU EOM shows candidates handing out money directly to people lining up. EU EOM LTOs observed the distribution of money (also referred to as a "*transportation refund*") in seven separate campaign events in Embu, Kakamega, Kwale, Mombasa, Nairobi and Nyeri counties. Sources of political finance became a campaign issue with the two main sides accusing each other of being backed by "*corruption cartels*" (networks of powerful business people who benefit from skewed awards of government tenders in exchange for financial support). On 16 October, the police raided and besieged for 72 hours the house of Jimmy Wanjigi, a key financier and strategist for the NASA campaign, stating they were investigating alleged offences by the controversial businessman related to the illegal possession of firearms and explosives.<sup>212</sup>

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<sup>204</sup> The PPA prohibits individuals and organisations from contributing an amount exceeding 5% of the total expenditure of the recipient party from the previous year. The PPA also prohibits donations from non-citizens, foreign governments, and non-governmental organizations.

<sup>205</sup> This is to be undertaken within 90 days of the end of the financial year. All parties are also required to have their books audited by the Auditor General within 90 days of the end of the financial year. The law also compels parties to submit a list of their assets and liabilities to the Registrar at least 60 days before a general election.

<sup>206</sup> Under the PPA, the Registrar can impose a range of administrative sanctions against non-compliant parties, including suspension of registration, withholding of funds and de-registration.

<sup>207</sup> The Party of National Unity in 2014,

<sup>208</sup> Public financing is protected by the Constitution, regulated by the PPA and supervised by the ORPP.

<sup>209</sup> The ORPP indicated to the EU EOM that the Fund is approximately 10% of the amount prescribed by PPA section 24(1)(a), which is 0.03% of the national government revenue or about KSH 3 billion (approximately €27 million).

<sup>210</sup> Only political parties that garnered at least 3% of votes in the previous elections are eligible for public funding. In addition, a party needs at least 20 elected members of the National Assembly, 3 elected members of the Senate, 3 elected governors and 40 members of county assemblies.

<sup>211</sup> NB, spending on political advertising was relatively modest: media houses and outdoor billboard companies reported to the EU EOM in August that relevant revenues had declined compared to the 2007 and 2013 elections.

<sup>212</sup> Mr. Wanjigi, who supported the Jubilee camp in the 2013 elections, claimed that the government was persecuting him for his support of Raila Odinga.

While the amount of money spent cannot be independently verified, according to data available on political advertising and the level of support provided to candidates, it appears that Jubilee undertook higher levels of spending than NASA. No civil society organisation tracked parties' or candidates' revenues and expenditures, except for Transparency International Kenya, which informally monitored key donations to Jubilee and NASA campaigns.

## XX. PARTICIPATION OF WOMEN

### **A slight increase in the number of women in elective positions, but the two-thirds gender principle prescribed by the Constitution remains unfulfilled**

The two-thirds gender requirement for elective and appointive positions enshrined in the 2010 Constitution demonstrates Kenya's commitment to promoting women's political participation.<sup>213</sup> However, there has been a failure to establish sufficient enabling mechanisms, leaving women under-represented in legislative assemblies and in the electoral process. Thus, Kenya's commitments under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa remain unfulfilled.<sup>214</sup> Similarly for the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which refers to temporary special measures to ensure (*de facto*) equality.<sup>215</sup>

However constitutional provisions have not been complied with. In the outgoing National Assembly and Senate, women comprised 19.4% and 26.5% of legislators respectively. In defiance of a 2012 Supreme Court advisory opinion and two subsequent rulings from the High Court, Parliament either voted down or failed to reach a quorum to consider a constitutional amendment bill that would have created additional special seats for women.<sup>216</sup>

Some positive measures are in place, but these have not sufficiently facilitated opportunities for women to campaign or increased the number of elected women. The measures include reduced fees in primaries and lower nomination charges for special interest groups.<sup>217</sup> Also, allocation of the Political Parties Fund is based on the number of party candidates from special interest groups, including women, that ran in the previous elections.

Women candidates are reportedly unable to raise as much money as their male counterparts, are less likely to attract large donors, and seldom receive support from their political parties. Women's advocacy groups and the media report numerous cases of women aspirants and candidates being harassed, attacked or discriminated against by other contestants and their supporters, or by their own party leadership.<sup>218</sup> EU EOM LTOs reported that in Trans Nzoia, two women candidates were threatened with sexual assault and in Mombasa a female Orange

<sup>213</sup> Constitution, article 27(8), "*the state shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.*" Article 81(b), "*The electoral system shall comply with the following principle – ... not more than two thirds of elective public bodies shall be of the same gender.*"

<sup>214</sup> Kenya ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa in 2010. Article 9(1) notes "*States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that: a) women participate without any discrimination in all elections; b) women are represented equally at all levels with men in all electoral processes.*"

<sup>215</sup> Kenya ratified CEDAW in 1984. The treaty committee notes in General Recommendation 23 that "*The Convention obliges State' parties in constitutions or legislation to take appropriate steps to ensure that women, on the basis of equality with men, enjoy the right to vote in all elections and referenda, and to be elected. These rights must be enjoyed both de jure and de facto.*" (paragraph 18).

<sup>216</sup> The Constitution of Kenya amendment bill No. 4 of 2015 was defeated in May 2016 and the Senate failed to endorse the bill in 2016 and early 2017. In March 2017, the High Court ruled that parliament had 60 days to enact a law for compliance with the two-thirds gender principle. However, the National Assembly failed to vote on the Constitution of Kenya bill No. 6 before the 16 June parliamentary recess.

<sup>217</sup> IEBC Legal Notice No. 69, Elections Regulations, 2017, section 14(2)(b) prescribes that political party primaries' fees must be graduated or waived for members of special interest groups. In addition, candidate nomination fees payable to the IEBC are reduced by 50% for members of special interest groups.

<sup>218</sup> For example, in Homa Bay, the bodyguard of a female aspirant MP was killed amid clashes with supporters of an opponent during the Orange Democratic Movement (ODM) primaries.

Democratic Movement (ODM) aspirant with a disability was repeatedly threatened with physical violence during the primaries.

Women are under-registered as voters, with the 2017 register composed of 53% men and 47% women, whereas the 2017 adult population projections show 49% men and 51% women. This is a greater gender differential than in 2013 (when the certified register was comprised of 51% men and 49% women).

Women were more subject to sexual violence than men during the disturbances, with the majority of documented cases involving adult females and girls.<sup>219</sup> The uncertain environment and fears of insecurity also reportedly resulted in more women than men temporarily moving back to rural home areas, and thereby jeopardising their possibility to vote.

Positively, women were elected in greater numbers in 2017. Since the 2010 Constitution came in there had only been male governors, but positively in August three women were elected governors and another three won senatorial seats. However, women won only 23 of the 290 constituency-based seats in the National Assembly (up from 16 in 2013), and 96 county assembly seats out of 1,450 (up from 82 in 2013). In 12 county assemblies, not a single woman was elected.<sup>220</sup>

The 12<sup>th</sup> Parliament does comply with the two-thirds gender principle of representation prescribed by the Constitution.<sup>221</sup> In the National Assembly, women will only comprise 21.8% of members.<sup>222</sup> In the Senate it is closer, with women comprising 31.3% of all senators, taking into account the 16 nominated seats reserved for women and the 2 additional special interest seats that must go to women. Cases were filed in the High Court in August on the two-thirds gender principle and at the time of this report finalization were still to be adjudicated.<sup>223</sup>

## **XXI. PARTICIPATION OF PERSONS WITH DISABILITIES**

### **Despite affirmative measures, people with disabilities continue to be marginalized in the electoral process as voters and candidates**

When Kenya ratified the Convention on the Rights of Persons with Disabilities (CRPD) in 2008, it committed itself to providing “*political rights and the opportunity to enjoy them on an equal basis with others.*”<sup>224</sup> However, Kenya has not signed the Optional Protocol, which allows the Committee on the Rights of Persons with Disabilities to receive and hear individual complaints.

Kenya’s constitution provides special protection to persons with disabilities (PWDs), including special seats in the National Assembly, the Senate and county assemblies. It also requires affirmative state actions for progressively increasing representation so that 5% of the members of elected and appointed institutions are

<sup>219</sup> “*They Were Men in Uniform’: Sexual Violence against Women and Girls in Kenya’s 2017 Elections*”, Human Rights Watch, 14 December 2017.

<sup>220</sup> These are Embu, Garissa, Isiolo, Kajiado, Kirinyanga, Mandera, Narok, Samburu, Taita Taveta, Turkana, Wajir and West Pokot.

<sup>221</sup> County assemblies, however, are compliant with the two-thirds gender principle due to article 177(1)(b) of the Constitution, which prescribes the creation of as many special seats as is necessary for compliance.

<sup>222</sup> This includes 47 elected seats for county women representatives and the 6 special interest group seats that must go to women, according to IEBC guidelines. Constitution articles 97(1)(c) and 98(1)(c) and (d) and Elections (Party Primaries and Party Lists) Regulations, 2017. Party nomination lists for special interest groups in the Senate include two qualified youth and two qualified persons with disabilities, with one woman and one man in each case. Likewise, party nomination lists for the National Assembly must include 12 youth, persons with disabilities, workers and other special interest groups, such as ethnic minorities, and must alternate between female and male candidates.

<sup>223</sup> By the Centre for Rights Education and Awareness (CREAW) and the Community Advocacy and Awareness Trust (Crawn Trust). The Federation of Women Lawyers-Kenya agreed to consolidate their own petition with CREAW and Crawn Trust’s on 21 August. The case is against the Speakers of the National Assembly and the Senate, the Attorney General and the IEBC.

<sup>224</sup> CRPD, article 29.

PWDs.<sup>225</sup> However, Kenya’s Constitution establishes mental capacity as a condition for registering as a voter and standing as a candidate, which is not consistent with the CRPD.<sup>226</sup>

The reserved seats notwithstanding, PWDs continue to be marginalised in the electoral process. PWDs are very under-represented as candidates. For example, the United Disabled Persons of Kenya (UDPK) reports only 29 PWDs out of a total of 14,523 candidates, i.e. 0.2%.<sup>227</sup> Seven were directly elected to office, while another four were nominated to seats in Parliament. Only 144,530 PWDs were reportedly registered to vote for the 2017 elections, according to IEBC statistics, i.e. 0.74% of all registered voters. This contrasts with the estimated six million PWDs in Kenya, according to the World Health Organization and local Disabled Persons Organisations (DPOs).<sup>228</sup>

Positively, new regulations graduate or waive party primary fees for members of special interest groups, and PWD party nominees for special seats require submission of a certificate from the National Council for Persons with Disabilities. The IEBC is also required to explain measures put in place to promote participation, and officers must assist PWD with access to electronic data. Also, positively the Elections Act prescribes that the IEBC “*put in place appropriate infrastructure, including special voting booths*”, and the Persons with Disabilities Act stipulates that PWDs shall “*be provided with the necessary devices and assistive devices and services.*”<sup>229</sup>

In practice the EU EOM assessed that 73.2% of polling stations observed in August were accessible, and that 70.8% of them had layouts that were suitable to voters with reduced mobility. Although the IEBC developed specimen tactile ballot guides for the 2017 elections, they were not available in polling stations. Nor did the IEBC make information on voting procedures available in multiple formats for voters with disabilities. EU EOM observers noted that those needing assistance in voting were often accompanied by multiple party agents, thereby compromising secrecy of the vote.<sup>230</sup> Positively, the IEBC consulted with the UDPK throughout the electoral process and a majority of EU EOM LTO teams reported that constituency ROs had met with local DPOs, albeit inconsistently. Recruitment of PWDs as temporary poll workers was reportedly low due to limited outreach to local DPOs. Media coverage of campaign and other election events included sign language, as is legally required.<sup>231</sup>

## ANNEX 1 - EU EOM STATISTICAL ANALYSIS OF 26 OCTOBER POLLING AND RESULTS DATA

### Unprecedented access to IEBC data reveals overall results integrity with some localised irregularities

The IEBC provided unprecedented and prompt polling and results data to the public after the fresh presidential election, including online publishing of all results forms before the results declaration, and later provision of

<sup>225</sup> Article 54(2) of the Constitution

<sup>226</sup> Constitution, article 83(1)(b) states “*A person qualifies for registration as a voter at elections or referenda if the person... is not declared to be of unsound mind.*” However, the CRPD committee’s interpretation of CRPD articles 12 and 29 note that mental incapacity should not serve as a basis for the deprivation of the right to vote and to be elected under any circumstances.

<sup>227</sup> Reportedly, 150 aspirants with disabilities competed in the party primaries in April 2017, of whom only 18 were nominated for member of county assembly positions, 2 for county woman representatives to the National Assembly, and 1 for National Assembly. An additional seven PWDs ran as independent candidates for county assembly seats and another independent candidate ran for an MP seat.

<sup>228</sup> According to the Kenya National Population Census of 2009, the overall disability rate in Kenya is 3.5%, which translates to 1,330,312 million PWDs. This is considerably lower than the World Health Organization estimate of 15% of the global population having a form of disability (this includes persons with chronic diseases and the elderly). Kenyan DPOs, including UDPK and the semi-autonomous National Council of Persons with Disabilities, use the WHO metrics of approximately 6 million.

<sup>229</sup> Persons with Disabilities Act, section 30.

<sup>230</sup> The IEBC voter education training manual stipulates that a voter who requires assistance may bring along his/her personal assistant who must take an oath of secrecy before being allowed to assist the voter, or may request the presiding officer to assist. The IEBC instructed polling officials to prioritize PWDs in queues.

<sup>231</sup> Section 39 of The Persons with Disabilities Act stipulates that all television stations shall provide a sign language inset or subtitles in all newscasts and educational programmes.

KIEMS voter identification data. The EU EOM undertook an analysis of the available data, initially looking at a random sub-sample of 1,550 polling station 34A result forms, and then looking at all results forms, including constituency 34B forms. The following was identified:

***Results forms were made promptly available***

The initial examination of a random sample of 1,550 pre-selected polling stations found most forms to be available within 24 hours after the close of polling,<sup>232</sup> with only 2% not being fully readable due to poor scan quality.<sup>233</sup> The EU EOM further examined a random sub-sample of 300 polling stations and confirmed that 48 and 72 hours after the close of polling, the 34A forms available on the IEBC portal were the same as those uploaded on election night. Over the same period, seven 34Bs with missing results pages were replaced with their full versions, with all available data matching.<sup>234</sup>

The IEBC made public 37,187 polling station results forms.<sup>235</sup> However, another 11 stations appear to have opened and filled in results forms.<sup>236</sup> In the case of a few polling stations with zero turnout it is not clear whether the station remained open throughout election day or closed early possibly due to disruptions, since the 34A form does not require this to be noted or stipulate the time of closing.

***Results forms contained fewer errors or omissions than in the August elections***

Of the 1,550 sampled 34A forms, only one form was not signed by a presiding officer, 2.6% were not stamped, 1.1% had some data missing (usually concerning the number of registered voters and/or rejected or disputed ballots), and 0.9% contained arithmetical errors. On a further random sub-sample of 500 34A forms, the EU EOM verified the results figures transposed from 34A forms onto 34B forms and found them accurate in all cases. However, the EU EOM noted some inconsistency in how votes that had apparently been mistakenly allocated to minor candidates on 34A forms were dealt with on 34B forms.<sup>237</sup> In total, only 49 constituency results forms (18.4%) had completed handover sections (listing polling station results forms submitted to the constituency).

***Extensive voter validation through KIEMS kits***

A comparison of KIEMS voter identification data with results forms indicates that in polling stations with functional kits, 98.98% of voters were duly validated in the KIEMS devices.<sup>238</sup> A total of 78,124 voters were identified outside the KIEMS, supposedly through a complementary manual mechanism to be used in case of technology failure (once it was not possible to repair or replace the KIEMS device). This required notification to the returning officer and a special form (32A) be completed for each voter. To date, the IEBC has not published any information on the number of 32A forms used. This number also includes the 21,684 persons who voted in the 261 polling stations (0.7% of all) which did not provide any KIEMS electronic voter identification (EVI) data at all, but which did submit 34A results forms. It is likely in these cases that the KIEMS kit was either not

<sup>232</sup> In total 89.5% of the sample were online within 24 hours of the close of polling. Those not available online belonged mainly to stations in parts of the country where voting did not take place.

<sup>233</sup> This was a marked improvement from August when 18% of the 1,558 34A forms examined by the EU EOM were only partially readable and 5% were not readable at all.

<sup>234</sup> At the time of writing the 34B form from Ol Kalou constituency (Nyandarua county) still had one page with 71 polling station results missing. Also, three minor unresolved issues remained: the 34B from Kipipiri constituency (Nyandarua county) still bore the mark “COPY” instead of being on the official paper; the 34B from Kwanza constituency (Trans Nzoia county) was still on black and white paper with one page lacking the official IEBC header and the serial number; and the form from Isiolo South constituency (Isiolo county) was still printed in landscape mode with hardly legible data.

<sup>235</sup> Obstructions and threats to polling staff resulted in no polling at all in two counties (Siaya and Homa Bay) and partial polling in two others (Kisumu and Migori). Thus, in 25 constituencies there was no polling whatsoever (out of 290 plus one for the diaspora). Due to unspecified localised impediments, 331 polling stations in 12 counties did not return a result in parts of the country where the election was otherwise held.

<sup>236</sup> Based on the EU EOM’s own research, involving a cross-check of all available 34As with all polling station results entered on the national tallying form 34C, as well as KIEMS voter identification logs. There are 20 additional polling stations (all in Busia county) that according to KIEMS logs have opened but have not submitted any results forms.

<sup>237</sup> For example, in Narok North the votes on the 34A for the minor candidate (seemingly recorded by mistake) were then awarded to President Kenyatta, despite the finality of polling station results (polling station 033179089100402, Narok North).

<sup>238</sup> This figure does not include voters from the 261 stations where no KIEMS data was available.

operational/available, or there was no network during polling, and that the presiding officer failed to later send the EVI logs.

### *The vast majority of voters were identified biometrically*

Clerks were trained to identify voters biometrically by default (by fingerprints), to avoid impersonation and multiple voting<sup>239</sup>. When the biometric check did not return a match, voters were due to be identified by their alphanumeric data (by keying-in the ID number or personal details or else scanning the ID card code number), followed by a further attempt at biometric identification. In cases where the biometric identification was not successful but the alphanumeric search was, voters could still be validated in the KIEMS device through the presiding officer's password. Provisions were also made for a complementary paper-based mechanism to prevent disenfranchisement in case of complete technology failure.

In total, 96.22% of all voters were biometrically identified.<sup>240</sup> 72.2% of all voters were identified immediately through their biometric data, and 24% were biometrically identified only after an initial failed biometric search or ID scanning and a successful alphanumeric identification.<sup>241</sup> However, biometric identification was not successful or not attempted in 79,204 cases after ID scanning (1.03% of all voters), and in 132,227 cases following alphanumeric search (1.73% of all voters). In those cases, the voters were validated in the KIEMS device through a command of the presiding officer.

### *Uneven distribution of non-biometrically identified voters*

Non-biometric identification was particularly high in the three scarcely populated counties along the Somali border. In Garissa, Wajir and Mandera, only 52%, 72% and 82% of voters respectively were biometrically identified (see table below). However, the three counties' combined share of the overall voter turnout is only 1.24%.<sup>242</sup> It is possible that some of these cases may be a result of fraudulent activity, taking place in the absence of competing candidate agents in polling stations, in particular in cases where there is only an alphanumeric search (with PO validation) or no validation in the KIEMS device at all.<sup>243</sup>

### *Questionable results in Garissa county*

In Garissa, every tenth voter was validated by the presiding officer with an alphanumeric search but without biometric identification, and in 15 polling stations more than half of all voters were validated in this way. KIEMS EVI logs show that these stations were often validating voters some two or three hours after the scheduled close of polling without reporting any technical or other complication.

Moreover, almost every third voter in Garissa was manually identified without being recorded in the KIEMS kit at all (in total 11,498 voters, i.e. 20% of all such cases in the whole country). There were 53 polling stations that

<sup>239</sup> The KIEMS kits also allowed voter identification to begin with scanning a person's ID, which according to individual KIEMS logs, was done in approximately 5.9% of cases (of those who were successfully validated in the KIEMS kits before voting).

<sup>240</sup> The 2017 KPMG *Independent Audit of the Register of Voters* estimates that 98.73% of voters were registered with all 10 fingerprints. In terms of *usable fingerprints* per subject this share decreases slightly to 94.95% (p.138). The audit further noted that there are some 412,000 (2.1%) voters with irregularities and/or omissions in their biometric data.

<sup>241</sup> However, biometric identification was not successful or not attempted in 79,204 cases after ID scanning (1.03% of all voters), and in 132,227 cases following alphanumeric search (1.73% of all voters). In those cases, the voters were validated in the KIEMS through a command of the presiding officer.

<sup>242</sup> Specifically, 0.51% in case of Garissa, 0.41% in Wajir, and 0.32% in Mandera

<sup>243</sup> In addition, in Wajir county there was a remarkably high proportion of presiding officer validations after scanning of identity cards (without biometric identification), with this accounting for 18% of all who voted. These were concentrated with 3 polling stations having more than 300 such cases (Della ward, Eldas constituency), and 29 polling stations having more than half of voters identified in this way. A closer examination of individual KIEMS voter identification logs shows that some of these locations were still validating voters some two or three hours after the official close of polling, without reporting any technical or other complications. After the closing time, a pattern appears to emerge of presiding officer validation of dozens of voters after ID scanning without a single attempt at biometric recognition.

reported more than a quarter of their voters not having been validated in the KIEMS (without any indication of KIEMS malfunctioning).<sup>244</sup>

A comparison of available turnout data and corresponding results sheets shows that an extra digit appears to have been manually added to the paper results forms in 19 polling stations, all of which were in Garissa. In these cases, the total number of votes cast in a polling station exceeds the number of KIEMS-identified voters by exactly 100, 200, 300 or 400. These extra votes from 19 polling stations gave an additional 4,900 votes to President Kenyatta.<sup>245</sup>

### *Unusual turnout patterns in a few polling stations*

Available data shows generally consistent turnout rates with only little variance within a given geographical area. Countrywide, there were only 113 polling stations with turnouts higher by 35% or more than respective ward averages. Among them, significantly over-represented were the counties of Garissa, with 24 such cases, Narok (14), Laikipia (10) and Wajir (8). Thus, these four counties account for 49.6% of all PSs with unusually high turnout.<sup>246</sup>

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<sup>244</sup> However three quarters of all polling stations in Garissa county showed no difference between the number of KIEMS-validated voters and those recorded on the official results sheets.

<sup>245</sup> In total, 16 of the 19 cases were in Garissa Township constituency, 2 were in Fafi and 1 in Dadaab constituency. In three cases the available polling station (007027013100402, 007027013201902 and 007027013302401) results forms 34A do not show the additional digit, which appears only on the higher tallying sheets 34B and the 34C.

<sup>246</sup> In the 10 wards with the highest variance in turnouts across polling stations (measured by the standard deviation) six are in Garissa county and two are in Wajir county.

EU EOM compilation of voter identification data

Data compiled by the EU EOM based on the IEBC’s form 34C and KIEMS Voter Identification Report.

Abbreviations: FP = finger print identification, VI = voter identification

County Name	KIEMS validated											Parallel to KIEMS				Total number of those who voted acc. to 34C			
	Biometrically identified				KIEMS supervisor validation				Total validated in KIEMS		PSs with KIEMS		PS with no KIEMS VI data						
	FP authentication - default procedure	FP authentication after ID scanning	FP authentication after alphanumeric search	Biometrically (FP) authenticated total	Supervisor validation after ID scanning without FP	Supervisor validation after alphanumeric search without FP			Voters not validated in KIEMS	Voters not validated in KIEMS									
BARINGO	15963	75.8%	1697	1.1%	29842	19.5%	147502	96.4%	1052	0.7%	3182	2.7%	151736	99.2%	984	0.64%	255	0.2%	152975
BOMET	155305	68.3%	5256	2.3%	59432	26.1%	219993	96.7%	1194	0.5%	5053	2.2%	226240	99.4%	1292	0.57%		0.0%	227532
BUNGOMA	75859	74.6%	591	0.6%	21371	21.0%	97821	96.2%	560	0.6%	2757	2.7%	101138	99.5%	379	0.37%	173	0.2%	101690
BUSIA	18526	77.8%	51	0.2%	4168	17.5%	22745	95.6%	93	0.4%	759	3.2%	23597	99.1%	115	0.48%	92	0.4%	23804
DIASPORA	1287	94.5%	1	0.1%	55	4.0%	1343	98.6%	0	0.0%	18	1.3%	1361	99.9%	1	0.07%		0.0%	1362
ELGEYO/MARAKWET	101683	79.3%	548	0.4%	24460	19.1%	126691	98.8%	75	0.1%	884	0.7%	127650	99.5%	600	0.47%		0.0%	128250
EMBU	164733	75.3%	5674	2.6%	38144	17.4%	208551	95.3%	2834	1.3%	6537	3.0%	217922	99.6%	899	0.41%		0.0%	218821
GARISSA	18648	48.1%	56	0.1%	1697	4.4%	20401	52.6%	2314	6.0%	3851	9.9%	26566	68.5%	11498	29.6%	735	19%	38799
ISILO	15953	78.8%	118	0.6%	2179	10.8%	18250	90.1%	325	1.6%	1379	6.8%	19954	98.6%	291	1.44%		0.0%	20245
KAJIADO	138448	80.5%	1580	0.9%	25694	14.9%	165722	96.3%	1232	0.7%	2663	1.5%	169617	98.6%	2154	1.25%	257	0.1%	172028
KAKAMEGA	32406	72.8%	1119	2.5%	10029	22.4%	43554	97.5%	135	0.3%	556	1.2%	44245	99.0%	295	0.66%	151	0.3%	44691
KERICHO	164268	59.8%	52242	19.0%	50462	18.4%	266972	97.1%	3066	1.1%	2503	0.9%	272541	99.1%	2129	0.77%	217	0.1%	274887
KIAMBU	702319	75.5%	41961	4.5%	159137	17.1%	903417	97.1%	7746	0.8%	10857	1.2%	922020	99.1%	5670	0.61%	3135	0.3%	930825
KILIFI	34768	81.7%	93	0.2%	6873	16.1%	41734	98.1%	45	0.1%	691	1.6%	42470	99.8%	62	0.15%	31	0.1%	42563
KIRINYAGA	212941	72.1%	16194	5.5%	57782	19.6%	286917	97.2%	1923	0.7%	5221	1.8%	294061	99.6%	955	0.32%	227	0.1%	295243
KISII	96630	66.7%	1108	0.8%	42292	29.2%	140030	96.7%	729	0.5%	3932	2.7%	144691	99.9%	186	0.13%		0.0%	144877
KISUMU	671	74.2%	0	0.0%	182	20.1%	853	94.4%	1	0.1%	34	3.8%	888	98.2%	16	1.77%	0	0.0%	904
KITUI	40278	79.3%	119	0.2%	9363	18.4%	49760	98.0%	122	0.2%	717	1.4%	50599	99.6%	46	0.09%	150	0.3%	50795
KWALE	28307	84.9%	37	0.1%	4420	13.3%	32764	98.2%	22	0.1%	546	1.6%	33332	100.0%	16	0.05%	0	0.0%	33348
LAIKIPIA	120743	69.5%	5634	3.2%	39989	23.0%	166366	95.8%	2242	1.3%	3975	2.3%	172583	99.4%	856	0.49%	255	0.1%	173694
LAMU	19895	84.8%	22	0.1%	2706	11.5%	22623	96.5%	66	0.3%	368	1.6%	23057	98.3%	392	1.67%		0.0%	23449
MACHAKOS	48735	71.9%	1169	1.7%	15908	23.5%	65812	97.0%	542	0.8%	1063	1.6%	67417	99.4%	205	0.30%	206	0.3%	67828
MAKUENI	15966	81.3%	58	0.3%	3097	15.8%	19121	97.4%	52	0.3%	394	2.0%	19567	99.7%	8	0.04%	58	0.3%	19633
MANDERA	17830	71.7%	225	0.9%	2539	10.2%	20594	82.8%	1948	7.8%	1949	7.8%	24491	98.5%	254	1.02%	119	0.5%	24864
MARSABIT	36857	80.8%	73	0.2%	7270	15.9%	44200	96.9%	158	0.3%	712	1.6%	45070	98.8%	340	0.75%	189	0.4%	45599
MERU	283981	63.4%	35133	7.8%	109175	24.4%	428289	95.7%	5961	1.3%	9225	2.1%	443475	99.1%	1646	0.37%	2577	0.6%	447698
MIGORI	25724	76.6%	136	0.4%	612	18.2%	31972	95.2%	50	0.1%	447	1.3%	32469	96.7%	161	0.48%	944	2.8%	33574
MOMBASA	70337	86.9%	360	0.4%	8613	10.6%	79310	98.0%	114	0.1%	865	1.1%	80289	99.2%	317	0.39%	304	0.4%	80910
MURANGA	334891	67.0%	42256	8.4%	19326	21.9%	486473	97.3%	3483	0.7%	5244	1.0%	495200	99.0%	4481	0.90%	483	0.1%	500164
NAIROBI CITY	663195	83.0%	9164	1.1%	100336	12.6%	772695	96.7%	6135	0.8%	13258	1.7%	792088	99.1%	4984	0.62%	2089	0.3%	799161
NAKURU	481858	73.3%	29356	4.5%	122203	18.6%	633417	96.3%	8724	1.3%	8952	1.4%	651093	99.0%	2963	0.45%	3710	0.6%	657766
NANDI	176948	76.4%	4502	1.9%	47955	20.7%	229405	99.0%	513	0.2%	1255	0.5%	231173	99.7%	584	0.25%		0.0%	231757
NAROK	91509	70.7%	2161	1.7%	27500	21.3%	121170	93.6%	1764	1.4%	5302	4.1%	128236	99.1%	178	0.14%	995	0.8%	129409
NYAMIRA	50525	56.4%	8128	9.1%	29054	32.5%	87707	98.0%	788	0.9%	757	0.8%	89252	99.7%	139	0.16%	116	0.1%	89507
NYANDARUA	174896	62.2%	18215	6.5%	68802	24.5%	261913	93.1%	8381	3.0%	8744	3.1%	279038	99.2%	2299	0.82%		0.0%	281337
NYERI	237756	61.7%	48930	12.7%	83122	21.6%	369808	96.0%	5168	1.3%	5665	1.5%	380641	98.8%	4055	1.05%	384	0.1%	385080
SAMBURU	22359	76.6%	136	0.5%	4550	15.6%	27045	92.7%	344	1.2%	1006	3.4%	28395	97.3%	41	0.14%	740	2.5%	29176
TAITA TAVETA	19785	75.8%	96	0.4%	5171	19.8%	25052	96.0%	104	0.4%	595	2.3%	25751	98.7%	104	0.40%	236	0.9%	26091
TANA RIVER	22467	85.6%	62	0.2%	2732	10.4%	25261	96.3%	208	0.8%	725	2.8%	26194	99.8%	46	0.18%	0	0.0%	26240
THARAKA - NITHI	11799	77.6%	309	0.2%	28488	19.8%	140596	97.6%	182	0.1%	1193	0.8%	141971	98.6%	892	0.62%	1133	0.8%	143996
TRANS NZOIA	61928	63.9%	5857	6.0%	26104	26.9%	93889	96.9%	851	0.9%	957	1.0%	95697	98.7%	956	0.99%	258	0.3%	96911
TURKANA	32455	71.3%	467	1.0%	9276	20.4%	42198	92.7%	661	1.5%	1815	4.0%	44674	98.2%	98	0.22%	736	1.6%	45508
UASIN GISHU	200302	74.4%	6741	2.5%	57224	21.3%	264267	98.2%	1085	0.4%	1906	0.7%	267258	99.3%	1391	0.52%	474	0.2%	269123
VIHIGA	7685	70.9%	166	1.5%	2485	22.9%	10336	95.4%	212	2.0%	293	2.7%	10841	100.1%	-13	-0.12%	4	0.0%	10832
WAJIR	18871	59.8%	568	1.8%	3072	9.7%	22511	71.3%	5666	18.0%	2046	6.5%	30223	95.8%	1326	4.20%	2	0.0%	31551
WEST POKOT	57125	71.9%	470	0.6%	19625	24.7%	77220	97.2%	334	0.4%	1376	1.7%	78930	99.4%	254	0.32%	249	0.3%	79433
Total	552545	72.2%	348839	4.6%	1490016	19.5%	7364270	96.22%	79204	1.0%	132227	1.7%	7575701	99.0%	56545	0.74%	21684	0.3%	7653930

## ANNEX 2 – EU EOM RECOMMENDATIONS CHART (WITH RELATED INTERNATIONAL COMMITMENT/STANDARD)

No	Context	<b>Recommendation</b> * = priority recommendations (six in total)	<b>Primary implementation responsibility</b> + <b>change in legal framework required<sup>247</sup></b>	<b>Principle</b> + <b>International obligations, commitments and good practices</b>
<b>POLITICAL PARTIES AND THE CAMPAIGN</b>				
1	Kenya has a number of constitutionally independent institutions with a role in the elections. References have been made to reprisals against the judiciary following the annulment of the presidential election, including cuts to budget and staff. There was a 75% budget reduction to the Judiciary Training Institute, following cuts across government. This could result in weakening adjudication and access to remedy, for example if the Political Parties Dispute Tribunal were no longer able to function. The Kenya National Commission on Human Rights has also faced budget cuts of more than 25%. Actions could include budget protection and consistently respectful language.	<b>* Actions be taken to strengthen the resilience of constitutionally independent institutions involved in elections, to preserve checks and balances in the electoral process.</b>	Executive	Division of powers <i>“States parties... shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter”</i> African (Banjul) Charter on Human and Peoples’ Rights, article 26. <i>“... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”</i> International Covenant on Civil and Political Rights (ICCPR), article 14.
2	The Constitution provides a framework for inclusive political participation and representation (articles 10, 38 and 91). The Political Parties Act contains detailed provisions on internal party democracy (section 9 and the first schedule). However, party primaries have involved inadequate procedures, manipulation, intimidation and violence. Disadvantaged groups are not nominated in proportionate numbers. The Office of the Registrar of Political Parties (ORPP) has not undertaken many enforcement actions in regards to the legal provisions for inclusive political participation.	<b>Promote internal party democracy through stronger enforcement requirements</b> for the IEBC and the Office of the Registrar of Political Parties. Including in regard to candidate nominations and representation of marginalized groups.	Parliament PL	Internal party democracy <i>“States should ensure that, in their internal management, political parties respect the applicable provisions of article 25 in order to enable citizens to exercise their rights thereunder”.</i> ICCPR General Comment (GC) 25, para 26.

<sup>247</sup> C = constitution, PL = primary legislation, D = desirable to be secured in law

3	<p>In order to mitigate unfair advantages of incumbency, the Election Offences Act (section 14) bans the use of public resources for the purpose of electoral campaigning and bars government from advertising its achievements during the election period. Yet, the Leadership and Integrity Act (section 23) allows cabinet secretaries and members of county executive committees to campaign, thus blurring the lines between state and candidate/party activities.</p>	<p><b>Strengthen the ban on public resources being used for campaigning.</b> Including by removing the exemption for cabinet secretaries and members of county executive committees (contained in the Leadership and Integrity Act).</p>	<p>Parliament PL</p>	<p>Equality of opportunity</p> <p><i>“Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.”</i> UN Convention against Corruption (CAC), article 19.</p> <p><i>“Strengthen political institutions to entrench a culture of democracy and peace.”</i> ACDEG, article 12.</p> <p><i>“Equality of opportunity must be guaranteed for parties and candidates alike. This entails a neutral attitude by state authorities, in particular with regard to the election campaign.”</i> Council of Europe (Venice Commission) Code of Good Practice in electoral matters, article 2.3.</p>
<b>LEGAL FRAMEWORK</b>				
4	<p>Electoral reform was undertaken very late in the process, with substantial amendments passed at the end of 2016 and the January 2017 amendments passed without the agreement of the opposition. Similarly, during the fresh election, amendments were made without political consensus, furthering divisions and generating uncertainty about their applicability.</p>	<p><b>* The parliament undertake a process of electoral legal reform on a cross-party basis well in advance of the next elections, involving consultation with the IEBC, stakeholders and experts. The IEBC could support this process by initiating and facilitating inter-institutional working groups for the development of electoral reform recommendations.</b></p>	<p>Parliament PL</p>	<p>Agreed legal framework</p> <p><i>“The rights and obligations provided for in [ICCPR article 25] paragraph (b) should be guaranteed by law.”</i> ICCPR GC 25, para 9.</p> <p><i>“...elections must be conducted fairly and freely on a periodic basis within a framework of laws guaranteeing the effective exercise of voting rights.”</i> ICCPR GC 25, para 19.</p> <p>Good practice</p> <p>The Venice Commission Code of Good Practice refers to fundamental elements of electoral law (in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries) not being open to amendment in the year before an election.</p> <p>The Economic Community of West African States (ECOWAS) notes <i>“No substantial modification shall be made to the electoral laws in the last six months before</i></p>

				<i>the elections, except with the consent of a majority of political actors.” Protocol on Democracy and Good Governance 2001.</i>
5	<p>Ethics are not defined in Kenyan law. The moral and ethical requirements in the Leadership and Integrity Act are open to inconsistent implementation. No mechanism is prescribed as to how the IEBC should determine whether ethical candidacy criteria have been met, resulting in varied expectations and risk of minimal or inconsistent application.</p> <p>Various restrictions on eligibility to stand are not consistent with authoritative interpretation of the ICCPR. The educational requirements for presidential and governor candidates will be applicable to other elected positions in future elections (Section 22 of the Elections Act, 2011 and Regulation 47 of Elections (General) Regulations, 2012). The Constitution stipulates that a person who is an “<i>undischarged bankrupt</i>” is disqualified. The Constitution also stipulates that voters, and therefore candidates, cannot be of “<i>unsound mind</i>”, which is not consistent with the Convention on the Rights of Persons with Disabilities (CRPD).</p>	<p><b>Candidacy criteria be reviewed to remove subjective criteria and reduce restrictions.</b> Objective criteria be defined for determination of ethical candidacy requirements. Restrictions on candidacy based on educational qualifications and financial situation be repealed. Requirements for voters to be of “<i>sound mind</i>” be removed.</p>	Parliament C, PL	<p>Right to stand</p> <p><i>“Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria.” ICCPR GC 25, para 4.</i></p> <p><i>“Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation” ICCPR GC 25, para 15.</i></p> <p><i>“States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others” CRPD, article 29.</i></p>
<b>ELECTORAL DISPUTES RESOLUTION (EDR)</b>				
6	<p>The law is silent on time limits for determination of pre-electoral cases (civil and criminal). Decisions on pre-election petitions related to primaries and other matters are open to appeal to the High Court, the Court of Appeal and the Supreme Court, resulting in prolonged adjudication times. Some cases were only decided very close to election day and others after election day.</p>	<p><b>Establish legal time limits for the filing, hearing and determination of pre-election cases, and consider reducing the number of appeal levels,</b> so cases are completed well in advance of election day.</p>	Parliament PL	<p>Right to remedy</p> <p><i>“Establish and strengthen national mechanisms that redress election-related disputes in a timely manner.” ACDEG, article 17.2.</i></p> <p><i>“To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.” ICCPR, article 2(3)(a).</i></p>
7	<p>In October 2015, the Judiciary Committee on Elections proposed that the timelines for post-electoral presidential petitions be extended from 14 to</p>	<p><b>Extend the deadline for the determination of post-election presidential petitions,</b> to allow more realistic time for the preparation of</p>	Parliament C	<p>Right to fair trial</p> <p><i>“In the determination of any criminal charge against him, or of his rights and obligations in a suit at law,</i></p>

	30 days. A bill was introduced in parliament on 2 June 2016, but is yet to be discussed in parliament.	cases after results publication and full due process in court, including the possibility of recounts.		<i>everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law” ICCPR, article 14.</i>
8	<p>There was inconsistent adjudication with varied and excessive penalties issued by the IEBC Electoral Code of Conduct Enforcement Commission (ECCEC). Anyone with pre-election disputes (relating to the code of conduct or candidate lists) has to file their claims in Nairobi. This has reportedly discouraged aggrieved parties from lodging complaints.</p> <p>The Elections Act specifies a centralised structure, involving five or more Commissioners forming the ECCEC. It makes no requirement for defined rules of procedures or transparency measures. The Act is also not very specific on what constitutes a breach of the Electoral Code of Conduct, save for the provisions in the Elections Act.</p>	<b>Strengthen the mechanism for enforcement of the Electoral Code of Conduct.</b> Including through defined rules of procedure covering warnings, proportionate sanctions, transparency measures and procedures for immediate referral to the Office of the Director of Public Prosecutions. Also, to have separate investigators and adjudicators, and for the process to be more accessible.	Parliament PL	<p>Right to remedy</p> <p><i>“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him” ICCPR, article 14.</i></p>
<b>ELECTION ADMINISTRATION</b>				
9	<p>The First Schedule of the IEBC (amended) Act 2011 specifies criteria for the broad composition of the selection panel for the appointment of the first Commission. However, for subsequent appointments it states <i>“the President shall appoint a selection panel consisting of such persons as Parliament shall determine”</i>. This risks excessive influence by the ruling party.</p> <p>The IEBC has requested the Treasury to establish an Electoral Fund, as is already the case for the judiciary. This would fall under the commissioners’ oversight and include provision for independent audits. The fund would give the IEBC flexibility to allocate and re-allocate budgetary provisions, thus enhancing financial independence. Currently, IEBC budget re-allocations are subject to the Treasury and Parliament’s approval.</p>	<b>* The IEBC’s independence and accountability be strengthened through greater financial autonomy and the appointment of future chairpersons and commissioners through a merit-based, multi-stakeholder selection committee. The quorum for commissioners’ meetings, as well as the decision-making majority, be increased to promote institutional cohesiveness and consistency. Plenary meeting decisions be required to be immediately publicly available.</b>	Parliament PL	<p>Independent electoral administration</p> <p><i>“Strengthen political institutions to entrench a culture of democracy and peace.” ACDEG, article 12.</i></p> <p><i>“State Parties shall provide the above-mentioned institutions with resources to perform their assigned missions efficiently and effectively.” ACDEG, article 15.</i></p> <p><i>“Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections.” ACDEG, article 17.</i></p> <p><i>“An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant.” ICCPR GC 25, para 20.</i></p>

	Under the recent legal amendments, the quorum for Commission meetings was reduced from 5 to 3 members, and the decision-making majority from 4 to 2 members.			
10	The IEBC did not overall provide sufficiently structured and timely communication. Some key information was not available (e.g. official results for elections other than the presidential race). Information on important positive action was sometimes missing (e.g. publication on the IEBC website of the full voter register). In other cases, such as the positive publication of the KIEMS identification report for the 26 October election, explanatory notes were missing, resulting in stakeholder misinterpretation.	<b>The IEBC strengthen transparency, communication and public outreach</b> through a public communication strategy that provides continuous, comprehensive, clear and prompt information. Including on IEBC decisions, procedures, plans and results data.	<b>IEBC</b> D	Transparency and access to information <i>“Holding of regular, transparent, free and fair elections”</i> . ACDEG, article 3. <i>“Each State Party shall... endeavour to adopt, maintain and strengthen systems that promote transparency.”</i> CAC, article 7.4. <i>“Taking into account the need to combat corruption, each State Party shall ... take such measures as may be necessary to enhance transparency in its public administration”</i> . CAC, article 10. <i>“To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest”</i> . ICCPR GC 34, para 19.
11	The Constitution includes public participation among the national values and principles of governance. Under the IEBC (amended) Act 2011, the Commission is required to consult with stakeholders. The IEBC was criticized (including by courts) for failing to consult on ballot printing and on the appointment of returning officers. The IEBC also failed to consult the parties over the October election date. Although the IEBC made attempts at multi-party consultations in September and October, the political environment became increasingly problematic.  The political party liaison committee, established under the IEBC (amended) Act 2011, reportedly did not provide an effective consultation platform.	<b>The IEBC undertake regular, structured and meaningful stakeholder consultation</b> throughout the whole electoral cycle. To enable discussion and buy-in on key decisions, including from political parties, citizen observers, CSOs, faith-based organizations and the media.	<b>IEBC</b>	Active participation <i>“Each State Party shall take appropriate measures... to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption”</i> . CAC, article 13.
12	In August, some important procedures and guidelines were late, unclear and/or lacking detail, and some were changed close to implementation.	<b>The IEBC develop full and clear procedures and plans in good time, seeking judicial clarification in situations of</b>	<b>IEBC</b>	Guaranteeing the free expression of the will of the electors

	<p>The IEBC sought, under a certificate of urgency, the Supreme Court’s clarification on the verification of results. However, on other occasions the IEBC did not seek judicial opinion, leaving the process further open to later legal challenge. For example, on candidate nomination for the fresh presidential election.</p>	<p><b>uncertainty.</b> Procedures be tested, consistently applied, reviewed routinely (for example after by-elections) and made public.</p>		<p><i>“Every citizen shall have the right and the opportunity, .... to vote and to be elected at genuine periodic elections ... guaranteeing the free expression of the will of the electors”.</i> ICCPR, article 25.</p> <p><i>“To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest”.</i> ICCPR GC 34, para 19.</p>
13	<p>Technology was extremely controversial, with NASA claiming that the August election results were “computer-generated”.</p> <p>New technology was introduced without feasibility studies, with compressed timelines and insufficient testing, partly due to late legislative amendments.</p> <p>International ICT companies are increasingly involved in managing critical parts of the electoral process. While this may improve security, it entails a risk of reduced institutional ownership.</p>	<p><b>* The IEBC have ICT arrangements that are tried and tested, secure and publicly accountable.</b> Advance feasibility studies be undertaken and simulations be conducted well ahead of general elections. Procurement be based on transparent criteria ensuring maximal safeguards for public interest, accountability and oversight. Technology be periodically reviewed independently, considering security, sustainability, institutional ownership and effectiveness. Stakeholders be consulted throughout and have controlled access. Public explanation be given on system and data integrity measures.</p>	IEBC	<p>Guaranteeing the free expression of the will of the electors</p> <p><i>“Every citizen shall have the right and the opportunity, .... to vote and to be elected at genuine periodic elections ... guaranteeing the free expression of the will of the electors”.</i> ICCPR, article 25.</p> <p><i>“The security of ballot boxes must be guaranteed and votes should be counted in the presence of the candidates or their agents.”</i> ICCPR GC 25, para 20.</p>
14	<p>Following the controversies of these elections, and the recent history of elections in Kenya, there is concern of electoral disillusionment. Also, that a considerable number of voters vote along tribal lines rather than based on individual preference.</p> <p>The IEBC is responsible for voter education and the Office of the Attorney General has a civic education programme. Both seemingly fell short on effectiveness. The Elections Observation Group (ELOG) found that voter education for the 8 August elections was not comprehensively undertaken throughout the country. There appeared to be reduced voter education for the October election.</p> <p>There appears to be reduced space for the involvement of civil society. A new IEBC regulation on voter education adopted on 21 April 2017 appears to reduce the role for CSOs. On 12 December 2016</p>	<p><b>Civic education programmes be developed</b> and implemented as a multi-stakeholder exercise, with a focus on individual choice, inclusion, accountability of those elected, and electoral integrity issues. Target youth and marginalized communities. Resources at community level be used to complement school curriculae.</p>	IEBC	<p><i>“Integrate civic education in their educational curriculae and develop appropriate programmes and activities.”</i> ACDEG, article 12.</p> <p><i>“Voter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by an informed community.”</i> ICCPR CG 25, para 11.</p>

	President Kenyatta said in a speech “ <i>There is already money coming into Kenya from abroad in the guise of supporting good governance or civic education. However, its true intention is to influence our electoral choices.</i> ”			
<b>VOTER REGISTRATION</b>				
15	<p>The IEBC was legally required to undertake a biometric voter register audit and to implement its recommendations within 30 days. The firm KPMG delivered a report on 9 June. Some longer-term recommendations are pending.</p> <p>With uneven results, and without a clear policy, the IEBC has since 2013 been collecting official records of deceased people at the constituency level, for removal from the voter register. The Civil Registration Department has partial records, however there is a lack of systematized and formalized working arrangements.</p> <p>State agencies responsible for national population databases include: the National Registration Bureau (NRB), which is in charge of issuing ID cards; the Directorate of Immigration and Registration of Persons (DIRP), in charge of issuing passports; and the Civil Registration Department (CRD), in charge of registering births and deaths. All are part of the Ministry of Interior. The Kenya National Bureau of Statistics is in charge of conducting periodical population and housing censuses.</p>	<p><b>The IEBC develop a voter registration plan based on recommendations from the KPMG audit</b> (and any subsequent audits). Including formalized, structured inter-institutional collaboration and development of a strategy for the removal of names of deceased voters. Also, research be conducted on possible future integrated systems involving other agencies responsible for population databases.</p>	<p><b>IEBC</b> D</p>	<p>Universal suffrage</p> <p>“<i>Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed</i>”. ICCPR CG 25, para 11.</p>
16	<p>The law prescribes that to be registered as a voter a citizen must provide a national ID card or a Kenyan passport as evidence of having attained 18 years of age. Allegations of uneven ID card issuance throughout the country were made by some stakeholders, including vetting procedures for minority groups, thereby protracting the process.</p> <p>Citizens who have turned 18 close to election day are <i>de facto</i> excluded as they do not have the necessary ID card for registration (and passports are</p>	<p><b>The availability of national identification cards be enhanced.</b> Identification cards to be available to citizens before they reach the age of 18, so they can register and be able to vote immediately on turning 18. The distribution of cards be fully consistent and transparent across the country (to avoid allegations of selective provision) and within legal timeframes.</p>	<p>National Registration Bureau PL</p>	<p>Universal suffrage</p> <p>“<i>Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed</i>”. ICCPR CG 25, para 11.</p>

	prohibitively more expensive and involve a more elaborate procedure).			
<b>POLLING, COUNTING AND TALLYING</b>				
17	<p>Currently, the polling station results form (34A) has no data on voter identification. Inclusion of identification statistics and ballot reconciliation data on results forms would provide security checks and enhance transparency.</p> <p>A complementary mechanism of manual voter identification is clearly needed to prevent disenfranchisement, but is more open to potential abuse. Under regulation 26 of the Election (Technology) Regulations 2017, the IEBC has a duty to state publicly cases of technology failure and consequent use of manual procedures.</p>	<p><b>Include in polling station results forms more information for strengthening accountability.</b> Statistics from electronic identification devices be recorded together with the number of people who voted by manual procedures, as well as ballot reconciliation data.</p>	<p><b>IEBC</b> D</p>	<p>Transparency</p> <p><i>“Holding of regular, transparent, free and fair elections”</i>. ACDEG, article 3.</p> <p><i>“Promote good governance by ensuring transparent and accountable administration”</i>. ACDEG, article 12.</p> <p><i>“Each State Party shall... endeavour to adopt, maintain and strengthen systems that promote transparency.”</i> CAC, article 7.4.</p> <p><i>“Taking into account the need to combat corruption, each State Party shall ... take such measures as may be necessary to enhance transparency in its public administration.”</i> CAC, article 10.</p> <p><i>“To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest.”</i> ICCPR GC 34, para 19.</p>
18	<p>For the 8 August general elections, results forms from polling stations and constituencies were only transmitted and made available for the presidential race, but not for the other races taking place (for which only unverified keyed-in results were displayed). For the October fresh presidential election, polling station and constituency results forms were electronically transmitted and available. However, for the subsequent by-elections there was no electronic results transmission at all (in part due to the IEBC’s lack of institutional ownership of ICT processes).</p> <p>Under the very recent Election Laws (Amendment) Act of 2 November 2017, in case of discrepancy between electronically transmitted and physically delivered results, the prevailing results are the ones verified to be an accurate record of the polling station results. This risks uneven application and there is</p>	<p><b>* Legal requirements be introduced for a comprehensive results transmission framework. To include prompt publication of disaggregated results and polling station result forms for all elections, as well as clear provisions for electronic and manual results transmission, so as to enable consistent application and confidence in the declared outcomes.</b></p>	<p><b>Parliament</b> PL</p>	<p>Security of the ballot and the counting of the votes</p> <p><i>“The security of ballot boxes must be guaranteed and votes should be counted in the presence of the candidates or their agents.”</i> ICCPR GC 25, para 20.</p>

	concern that paper forms can be manipulated between the polling station and the constituency tallying centre. The Act also states that failure to electronically transmit or publish results would not be a basis for invalidation. While this allows for normal operational shortcomings, it could also undermine crucial transparency measures.			
<b>THE MEDIA AND SOCIAL MEDIA</b>				
19	The Constitution limits freedom of expression in case of hate speech, which is defined broadly to include “vilification of others”. The NCIC Act (section 13) stipulates that hate speech is committed if a person presents intention to promote hatred, or if ethnic hatred is likely to be stirred up. However, internationally both intention and imminent risk need to be demonstrated.	<b>Narrow the legal definition of hate speech</b> in line with international human rights obligations (so both intention and imminent risk are demonstrated), to decrease risk of self-censorship among journalists and bloggers.	Parliament PL	Freedom of expression <i>“When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.”</i> ICCPR GC 34, para 35.
20	While the Media Council of Kenya is independent from government, the scope of its activities is to a large extent dependent on the funding allocated by the National Assembly. The Communication Authority of Kenya has a strong model of financing separated from the state budget, but is less independent from the government due to the mechanism for the appointment of its board of directors.	<b>Strengthen the independence of the media and journalists, including through the Communications Authority of Kenya and the financial autonomy of the Media Council of Kenya, and clarify their respective mandates</b> to reinforce freedom of the media and to eliminate unnecessary and overlapping regulation of the media. Invest in media literacy, including critical thinking about sources and the potential of falsified documents.	Parliament PL	Freedom of the media <i>“Every individual shall have the right to receive information.”</i> African (Banjul) Charter on Human and Peoples’ Rights, article 9. State Parties commit to <i>“Promoting freedom of expression, in particular freedom of the press, and fostering a professional media”</i> ACDEG, article 27. [article 19 rights]... <i>“may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary”</i> ICCPR, article 19.3. <i>“Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature... The appointments process for members of a regulatory body should be open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party.”</i> Declaration of the Principles on Freedom of Expression in Africa: Public Broadcasting, article VII.

21	<p>The Kenya Broadcasting Corporation (KBC)'s board of directors and managing director are all appointed by the government or President. In addition, the government has the mandate for KBC regulations. The institution conducts its business as a commercial entity, however it is not financially sustainable and at times receives subsidies from government. While its news coverage was relatively balanced, it provided Jubilee with some additional coverage in other editorial programmes.</p>	<p><b>Develop the Kenya Broadcasting Corporation</b> into a genuine public service broadcaster with full editorial and financial independence, including by reducing the government's role in leadership appointments and regulations.</p>	<p>Parliament PL</p>	<p>Equality of campaign opportunities</p> <p><i>“State and government controlled broadcasters should be transformed into public service broadcasters... be governed by a board which is protected against interference... public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets.”</i> Declaration of the Principles on Freedom of Expression in Africa: Public Broadcasting, article VI.</p> <p><i>“States parties should ensure that public broadcasting services operate in an independent manner. In this regard, States parties should guarantee their independence and editorial freedom. They should provide funding in a manner that does not undermine their independence”</i> ICCPR GC 34, para 16.</p>
22	<p>The right to privacy is guaranteed in article 31 of the Constitution, including protections for privacy of communication. While several laws pertain to issues of surveillance, there is no specific data protection legislation. Some interlocutors raised concerns about the lack of data protection laws, leaving individuals at risk of exposure from data-miners, possibly advantaging the ruling party due to its access to citizen information through state institutions.</p>	<p><b>Develop a data protection law</b> as well as other mechanisms to protect citizens' right to privacy online and offline.</p>	<p>Parliament PL</p>	<p>Right to Privacy</p> <p>Good practice</p> <p><i>“Each State Party shall commit itself to establishing a legal framework aimed at strengthening fundamental rights and public freedoms, particularly the protection of physical data, and punish any violation of privacy without prejudice to the principle of free flow of personal data.”</i> African Union Convention on Cybersecurity and Personal Data Protection, 27 June 2014, Article 8 (1). Not signed or ratified by Kenya.</p>
<b>CIVIL SOCIETY</b>				
23	<p>The government has failed to gazette a commencement date for the Public Benefits Organisations (PBO) Act 2013. Consequently, the sector remains regulated by the NGOs Coordination Board and the NGOs Coordination Act 1990, which is not in line with the 2010 Constitution. This leaves NGOs vulnerable to manipulation, intimidation and interference.</p>	<p><b>Provide protection for civil society by promptly bringing into force the Public Benefits Organisations Act</b>, in accordance with the Constitution, to enable the effective regulation and administration of NGOs.</p>	<p>Executive PL</p>	<p>National monitoring</p> <p><i>“Create an enabling environment that will enable civil society and the media to hold governments to the highest levels of transparency and accountability in the management of public affairs.”</i> CPCC, article 12.</p> <p><i>“State Parties shall create a conducive environment for independent and impartial national monitoring or observation mechanisms.”</i> ACDEG, article 22.</p>
<b>PROSECUTION OF OFFENCES RELATED TO ELECTIONS</b>				

24	<p>The Office of the Director of Public Prosecutions (ODPP) has exclusive jurisdiction to prosecute offences under the 2016 Election Offences Act. The ODPP has established a framework for inter-agency collaboration with the Directorate of Criminal Investigations, the IEBC and the National Cohesion and Integration Commission (NCIC). The ODPP refers to problems and delays in investigations by other agencies affecting their ability to bring charges.</p> <p>The ODPP has up to one year to initiate prosecutions, with no timelines for completion of cases. Information is not made publicly available on the number or status of cases.</p> <p>A lack of timely investigations into threats and violence against journalists is a long-term concern of the media sector.</p>	<p><b>Establish shorter timelines for prosecutions of electoral offences, with requirements for regular updates by the Office of the Director of Public Prosecutions and other agencies involved.</b> Similarly, in regard to cases of threats to or violence against journalists and others involved in the election process.</p>	<p>Parliament PL</p>	<p>Prohibition of abusive interference</p> <p><i>"Any abusive interference with registration or voting as well as intimidation or coercion of voters should be prohibited by penal laws and those laws should be strictly enforced."</i> ICCPR GC 25, para 11.</p>
<b>CAMPAIGN FINANCE</b>				
25	<p>The Election Campaign Financing Act was enacted in December 2013 and was expected to take effect for the 2017 general elections. In August 2016, the IEBC submitted the Election Campaign Financing Regulations to the National Assembly. These were not reviewed or approved by Parliament as required, but the IEBC still published them in December 2016. The legislature then suspended the Act altogether in January 2017.</p>	<p><b>The Parliament operationalise the Election Campaign Financing Act</b> to regulate the amount of money received and spent by candidates and political parties during an election or referendum.</p>	<p>Parliament PL</p>	<p>Transparency in funding and free choice of voters</p> <p><i>"Each State Party shall adopt legislative and other measures which proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and incorporate the principle of transparency into funding of political parties."</i> Convention on Preventing and Combatting Corruption (CPC), article 10.</p> <p><i>"Reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party."</i> ICCPR GC 25, para 19.</p> <p><i>"Each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to</i></p>

				<i>enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties."</i> CAC, article 7.3.
26	<p>The Political Parties Act (PPA) of 2011 empowers the Office of the Registrar of Political Parties (ORPP) to regulate political party financing and administer the Political Parties Fund. The Registrar can in principle issue warnings, suspend registration, withhold funds and de-register non-compliant parties. However, there are limited requirements for ORPP monitoring and transparency.</p> <p>The oversight mechanisms appear to be limited in practice. The ORPP is aware that parties routinely under-report their incomes or do not comply with legal requirements (for example, to allocate 30 percent of public financing to promoting marginalized groups). The ORPP did not monitor the spending and sources of donations of political parties during the 2017 electoral campaign.</p>	<p><b>Strengthen oversight mechanisms for political party financing.</b> Include more specific monitoring requirements by the Office of the Registrar of Political Parties of parties' incomes and expenditures (including during election campaigns) and accompanying transparency provisions.</p>	Parliament D	<p>Rule of law and transparency</p> <p><i>"Strengthen political institutions to entrench a culture of democracy and peace."</i> ACDEG, article 12.</p> <p><i>"Each State Party shall adopt legislative and other measures which proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and incorporate the principle of transparency into funding of political parties."</i> CPCC, article 10.</p>
<b>THE PARTICIPATION OF WOMEN</b>				
27	<p>The Supreme Court advised in December 2012 that the two-thirds gender principle should be implemented progressively by 27 August 2015, in accordance with the Constitution's transitional provisions. This deadline, which Parliament extended by one year, has since expired and the two-thirds principle has still not been met.</p> <p>Parliament can add additional seats for women without changing the Constitution. However, there is criticism that such additional seats (based on parties' proportions in the Parliament) will result in women MPs who have less status, as they have not been elected and are more dependent on their parties, as well as putting more budgetary burden on tax-payers.</p> <p>Stakeholders criticize the electoral system for not promoting the inclusion of women (or different ethnic groups), as it is based on a "winner-takes-all" design.</p>	<p><b>* The Parliament promptly review the electoral system and its impact on the political participation of women and inclusivity in a broader sense, and reform as appropriate, for compliance with the constitutional two-thirds gender principle for elective positions.</b></p>	Parliament C PL	<p>Women's participation in political life</p> <p><i>"States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures (...) States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making."</i></p> <p>- Article 9, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.</p> <p>The UN General Assembly "... urges all States to take, inter alia, the following actions to ensure women's equal participation, (a) <u>To review the differential impact of their electoral systems on the political participation of women and their representation in elected bodies and to adjust or reform those systems where appropriate</u>". UN General Assembly Resolution 66/130 on Women and Political Participation (distributed March 2012).</p>

28	Only 9.4% of all candidates to elective positions in 2017 were women. This was due, in part, to political parties not sufficiently recruiting or promoting women within their internal leadership structures as required by article 91 of the Constitution, section 7 of the Political Parties Act and section 5(b) of the Code of Conduct for Political Parties.	<b>Require the Office of the Registrar of Political Parties to publicly report on parties' compliance</b> with gender requirements (for memberships and governing bodies), and on the application of penalties.	Office of the Registrar of Political Parties	Women's participation in political life <i>"Political parties have an obligation to demonstrate their commitment to the principle of gender equality in their constitutions, in the application of those rules on their executive boards so that these bodies may benefit from the full and equal participation... by both sexes."</i> Convention on the Elimination of all forms of Discrimination against Women (CEDAW), general recommendation (GR) 23, para 34. <i>"Political parties must endeavour to balance the number of male and female candidates".</i> CEDAW GR 23, para 22. <i>"Political parties have a responsibility to ensure that women are... nominated in areas where they have a likelihood of electoral success."</i> CEDAW GR 23, para 28.
<b>THE PARTICIPATION OF PERSONS WITH DISABILITIES (PWDs)</b>				
29	Article 54(2) of the Constitution prescribes the progressive implementation of the principle that PWDs fill at least 5% of elective and appointive positions. PWDs remain very under-represented as voters (0.74% of registrants), as candidates (0.2%) and as elected officials. The Persons with Disabilities Bill 2016, which strengthens the right to legal capacity, remains under consideration.	<b>Establish requirements for parties to increase the proportion of persons with disabilities in party leadership positions and running as candidates</b> , and to publicly report on this and on their policies on disability.	Parliament PL	Participation in political life <i>"States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake:</i> <i>(a) To ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected..."</i> CRPD, article 29.

**Totals for primary implementation responsibility**

Parliament = 18, IEBC = 7, executive = 2, Office of the Registrar of Political Parties = 1, National Registration Bureau = 1

**Totals for changes in the legal framework**

Changes in the Constitution (C) = 3 (none of which requires a referendum),

Changes in the primary legislation (PL) = 18

Desirable to be secured in law (D) = 5

## ANNEX 3 – THE ELECTIONS IN NUMBERS AND CHRONOLOGY OF EVENTS

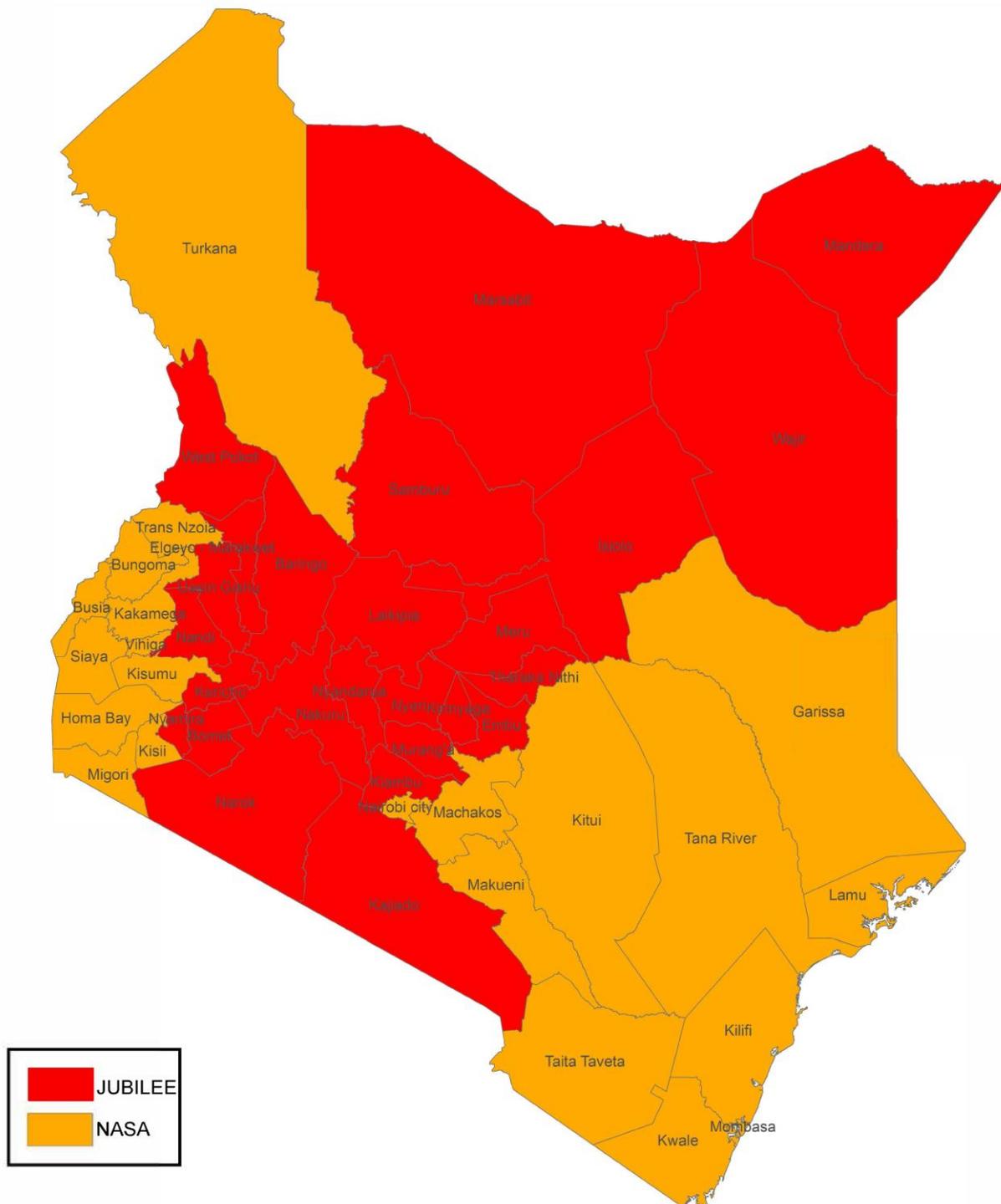
<b>THE ELECTION IN NUMBERS</b>	
Electoral boundaries	
Counties	47
Constituencies (+ diaspora)	290 (+1)
Wards	1,450
Political parties	28
Certified registered voters	19,611,423
Polling stations	40,883
<u>County tallying centres</u>	47
<u>Diaspora polling centres</u>	5
Seats being elected (total)	1,882
President (+ deputy)	1 (+ 1)
Governors	47
Senators	47
Women Representatives to the National Assembly	47
Members of the National Assembly	290
Members of County Assemblies	1,450
Candidates for elective positions (total)	14,523
President (+ deputy)	8 (+ 8)
Governors	210
Senators	256
Women Representatives to the National Assembly	299
Members of the National Assembly	1,893
Members of a County Assemblies	11,857
Women candidates elected (total)	
President	0
Governors	3
Senators	3
Women Representatives to the National Assembly	47
Members of the National Assembly	23
Members of a County Assemblies	96
Independent candidate	4,781
<u>Petitions</u>	
Pre-August election-related petitions	845
<u>Post-August election petitions</u>	338
August presidential election petition	1
October presidential election petitions	3
Voter turnout	
August election	15,593,050 (77.48%)
October election	7,653,930 (38.84%)
August presidential votes for major candidates	
Uhuru Kenyatta (Jubilee Party)	8,203,290 (54.27%)
Raila Odinga (NASA)	6,762,224 (44.74%)
October presidential votes for major candidate	
Uhuru Kenyatta (Jubilee Party)	7,483,895 (98.27%)

<b>CHRONOLOGY OF EVENTS</b>	
<b>Date</b>	Court/legal events, IEBC events, other events, election days EU EOM activities and statements
Wednesday 14 June	EU election observation mission (EOM) deployed following an announcement on 8 June by the High Representative of the European Union for Foreign Affairs and Security Policy: <i>“EU deploys EOM in Kenya”</i>
Wednesday 14 – Thursday 15 June	<b>IEBC National Elections Conference</b>
Monday 3 July	<i>“Chief Observer (CO) launches EU EOM Kenya 2017”</i> at a press conference
Friday 7 July	<i>“EU EOM statement of the CO”</i> to clarify comments made following the launch of the EU EOM High Court nullification of presidential ballot paper printing tender by Al Ghurair
Saturday 8 July	<u>Death of Rtd. Maj. General Joseph Nkaisery, Cabinet Secretary, Ministry of Interior and Coordination of National Government</u> <i>“EU EOM Message of condolence from the CO following the death of Rtd. Maj. General Joseph Nkaisery”</i> Court of Appeal reverses nullification of presidential ballot paper printing by Al Ghurair
Sunday 9 July	<u>Chief Justice statement about independence of the judiciary</u>
Monday 24 July	Presidential debate
Monday 31 July	Chris Msando, IEBC ICT Manager found dead (last seen alive three days earlier) <i>“EU EOM message of condolence and call for Kenyans responsible for organising the elections to be able to work freely”</i>
Wednesday 2 August	<u>Statement by the Chief Justice on attacks on the judiciary by political leaders</u>
Monday 7 August	Pre-election <u>joint communiqué by International Election Observation Missions (IEOMs)</u>
Tuesday 8 August	<b>General elections</b>
Wednesday 9 August	<u>Post-election communiqué from IEOMs heads</u>
Thursday 10 August	<u>EU EOM “preliminary statement for the general elections”</u>
Friday 11 August	<b>IEBC Chairperson’s declaration of presidential results</b>
Saturday 12 – Sunday 13 August	Disturbances in Kisumu and Nairobi, including some excessive use of force against protestors
Wednesday 16 August	EU EOM statement <i>“on promptly publishing all results forms, for rule of law to be followed and the need for space for civil society”</i>
Friday 18 August	<u>Deadline for presidential election petitions. NASA submits.</u>
Friday 1 September	<u>Supreme Court ruling annulling the presidential elections and ordering a fresh presidential election to be held within 60 days</u> <i>“EU EOM statement following the 1 September Supreme Court ruling”</i>
Tuesday 12 September	<u>NASA “irreducible minimums” released</u>

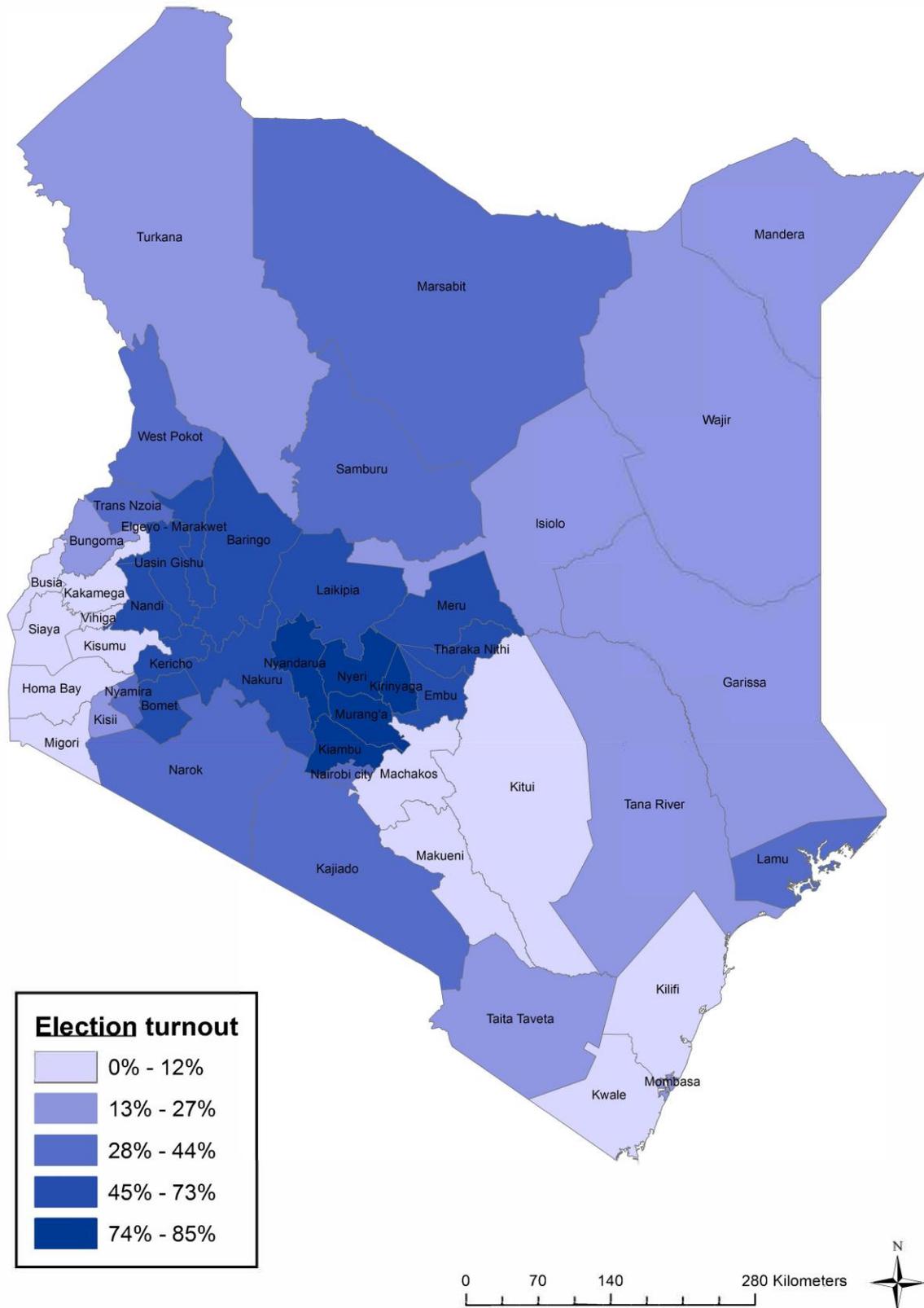
Thursday 14 September	EU EOM interim statement “ <a href="#">18 recommendations for the re-run</a> ” and accompanying <a href="#">press release</a>
	Jubilee MP files petition for the removal of the Chief Justice followed by cases against two other justices for alleged affiliation with NASA
Tuesday 19 September	Protests against the judiciary take place in Nairobi, Eldoret, Nakuru and Nyeri
	<a href="#">Statement by the Judicial Service Commission on attacks on the judiciary</a>
Wednesday 20 September	Supreme Court detailed judgment (on 1 September ruling) - <a href="#">majority opinion</a> and <a href="#">dissenting opinions</a> of <a href="#">SCJ Njoki Ndungu</a> and <a href="#">SCJ Jackson Ojwang</a>
Thursday 21 September	IEBC Chairperson pushes the fresh presidential election date to 26 October from the 17 October date originally announced
Tuesday 26 September	NASA announcement on poll protests
	20 security guards attached to NASA leadership withdrawn
Wednesday 27 September	Elections Offences ( <a href="#">Amendment</a> ) Act, 2017 and Elections Laws ( <a href="#">Amendment</a> ), 2017 introduced to parliament
	President Kenyatta convenes Jubilee Party parliamentary group to discuss amendments to the electoral laws
Thursday 28 September	Dialogue talks between IEBC, Jubilee and NASA collapse after NASA walks out
Tuesday 3 October	EU EOM statement on changing electoral laws “ <a href="#">Kenya’s political leaders to demonstrate commitment to democratic electoral competition and institutions</a> ”
	NASA first day of “no reform, no election” protest. Reports of police using excessive force to quell protests
Tuesday 10 October	NASA candidates Odinga and Musyoka withdraw their candidacies for presidency and deputy presidency from the fresh presidential election
Wednesday 11 October	Ekuru Aukot wins case to be included in the fresh presidential election
	IEBC statements on 1) <a href="#">NASA irreducible minimums on electoral reforms before the fresh presidential elections are held</a> and 2) <a href="#">Legal compliance to the Supreme Court judgment in preparation for the 26 October fresh presidential election</a>
Friday 13 October	Launch of International Criminal Court case against NASA candidates (Odinga and Musyoka) by Otieno and Nkari of the International Policy Group
Monday 16 October	EU EOM statement “ <a href="#">18 recommendations progress update</a> ” and accompanying <a href="#">press release</a>
Tuesday 17 October	IEBC <a href="#">Commissioner Akombe resigns</a>
	IEBC <a href="#">Chairperson statement on IEBC preparedness, his role and the political environment</a>
	NASA supporters disrupt IEBC training of polling staff in various parts of Kisumu and Vihiga. IEBC officials travelling to Awendo, Kisumu are attacked
Thursday 19 October	IEBC Chairperson meeting with NASA leaders Odinga and Mudavadi
	Chief Justice statement on aggressive attacks against the judiciary
Friday 20 October	IEBC CEO Ezra Chiloba announcement of leave for three weeks, effective from Monday 23 October
Monday 23 October	IEBC Chairperson meeting with President Kenyatta
	<a href="#">Appointment of IEBC Vice Chairperson as Deputy National Returning Officer</a>

Tuesday 24 October	EU EOM statement “ <a href="#">EU EOM statement on the mission’s reduced observation coverage</a> ”
	Shooting and injuring of the driver/bodyguard of the Deputy Chief Justice
Wednesday 25 October	Supreme Court unable to raise quorum to hear a case on delaying the election
	High Court rules that returning officers were not legally appointed, but does not annul their gazette. Later that night, the Court of Appeal rules that returning officers were legally appointed
	EU EOM statement “ <a href="#">Supreme Court’s failure to raise quorum to hear the petition on delaying 26 October election</a> ”
	NASA launch of the National Resistance Movement
Thursday 26 October	<b>Fresh presidential election day</b>
Friday 27 October	<i>Joint communiqué by the IEOM heads</i> on the postponement of the fresh presidential election in 4 counties
Monday 30 October	<b>Declaration on fresh presidential election results</b>
	Reports of at least 14 deaths occurring since 26 October in election-related violence and scores more injuries
Tuesday 31 October	EU EOM preliminary statement “ <a href="#">Dangerous political stand-off, uncontested election and assaults on institutions damage Kenya’s democracy</a> ”
Thursday 2 November	Gazette notification of the Elections Offenses (Amendment) Act, 2017 and Elections Laws (Amendment) Act, 2017
Monday 6 November	<b>Submission of petitions on the fresh presidential election: 1) Harun Mwau, 2) Njonjo Mue and Khelef Khalif, 3) Institute of Democracy and Governance</b>
Tuesday 7 November	NASA calls for interim government to run for six months while national dialogue and electoral reform are undertaken
Sunday 19 November	Sporadic eruptions of violence after Nairobi slum killings
Monday 20 November	<b><a href="#">Supreme Court ruling upholds the election of President Uhuru Kenyatta</a></b>
	NASA statement refusing to recognize the government
	NASA supporters protest and torch vehicles following the Supreme Court decision
	Jubilee supporters take to the streets to celebrate the Supreme Court’s decision
Tuesday 28 November	Swearing in of President Kenyatta
	NASA memorial service disrupted
Monday 11 December	Supreme Court read a shortened summary of the full judgment (following the ruling made on 20 November)

ANNEX 4 – MAP OF 8 AUGUST 2017 PRESIDENTIAL RESULTS



ANNEX 5 – MAP OF 26 OCTOBER 2017 TURNOUT



**ANNEX 6 - LIST OF ACRONYMS**

ACDEG	African Charter on Democracy, Elections and Governance
ACHPR	African Charter on Human and Peoples' Rights
AfriCOG	African Centre for Open Governance
ANC	Amani National Congress
BVR	Biometric voter registration
CA	Communication Authority of Kenya
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CEO	Chief Electoral Officer
CO	Chief Observer
CORD	Coalition for Reforms and Democracy
CPCC	Convention on Preventing and Combatting Corruption
CRAWN Trust	Community Advocacy and Awareness Trust
CREAW	Centre for Rights Education and Awareness
CRPD	Convention on the Rights of Persons with Disabilities
CSOs	Civil society organisations
CSs	Cabinet Secretaries
DCR	Department of Civil Registration
DPO	Disabled persons organisation
EACC	Ethics and Anti-Corruption Commission
ECC	Electoral Code of Conduct
ECCEC	Electoral Code of Conduct Enforcement Committee
EDR	Electoral dispute resolution
ELOG	Elections Observation Group
EOA	Election Offences Act
EOM	Election observation mission
ETAC	Election Technology Advisory Committee
EVI	Electronic voter identification
FTPT	First past the post
GAA	Government Advertising Agency
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
ICPC	International Centre for Policy and Conflict
IDLO	International Development Law Organisation
IEBC	Independent Electoral and Boundaries Commission
IEOMs	International election observation missions
IGP	Inspector General of Police
IMLU	Independent Medico-Legal Unit
IPOA	Independent Policing Oversight Authority
KBC	Kenya Broadcasting Corporation
KHRC	Kenya Human Rights Commission
KIEMS	Kenya Integrated Elections Management System
KNBS	Kenya National Bureau of Statistics
KNCHR	Kenya National Commission for Human Rights
KYSY	Kura Yangu Sauti Yangu

LTOs	Long-term observers
MAT	Multimedia Appeals Tribunal
MCAs	Members of County Assemblies
MCK	Media Council of Kenya
MUHURI	Muslims for Human Rights
NASA	National Super Alliance
NCIC	National Cohesion and Integration Commission
NGO	Non-governmental organisation
NRB	National Registration Bureau
ODM	Orange Democratic Movement
ODPP	Office of the Director of Public Prosecution
ORPP	Office of the Registrar of Political Parties
PPA	Political Parties Act
PPDT	Political Parties Disputes Tribunal
PVT	Parallel vote tabulation
PWDs	Persons with disabilities
UDPK	United Disabled Persons of Kenya
WDM-Kenya	Wiper Democratic Movement Kenya

EU Election Observation Mission, Kenya 2017

Website [www.eueom.eu/kenya2017](http://www.eueom.eu/kenya2017), Facebook [www.facebook.com/eueomkenya2017](http://www.facebook.com/eueomkenya2017), Twitter [@eueomkenya2017](https://twitter.com/eueomkenya2017)