

THE HISTORIC VOTE: ELECTIONS 2013

Contents

LIST OF ACRONYMS AND ABBREVIATIONS.....	v
ACKNOWLEDGMENTS	viii
EXECUTIVE SUMMARY	1
CHAPTER 1: SOCIO-POLITICAL ENVIRONMENT	7
1.2 Reforms in the Run-up to the Elections.....	7
1.2.1 Point “zero” – announcement of the 2007 election results & post-election violence	7
1.2.2 The February 2008 Power sharing Agreement and Agenda 4	7
1.2.3 The Agenda 4 Commissions	8
1.3 Popular Narratives in the 2013 Elections.....	11
1.3.1 International Criminal Court	11
1.3.2 “Tyranny of Numbers”	13
1.3.3 Kenya’s Youth Unemployment	14
1.3.4 “Analogue vs. Digital Debate” and the Use of New Technologies	14
1.3.5 Opinion polls.....	15
1.3.6 Party Manifestos and Issue-based Politics.....	15
1.4 Conclusion	16
CHAPTER 2: LEGAL FRAMEWORK.....	17
2.1 Introduction.....	17
2.2 International Legal Standards.....	17
2.3 The Kenyan Electoral Legal System.....	18
2.3.1 Constitution of Kenya 2010 as a landmark	18
2.3.2 The Elections Act, 2011.....	19
2.3.3 The Political Parties Act, 2011	20
2.3.4 The Independent Electoral and Boundaries Commission Act, 2011.....	20
2.3.5 The National Cohesion and Integration Act, 2008.....	20
2.3.6 The Leadership and Integrity Act, 2012	20
2.3.7 The Supreme Court Act, 2011.....	21
2.3.8 Other Laws and Regulations which were relevant in light of the 2013 elections.....	21

2.4	Important Court Decisions.....	22
2.4.1	Gender rule and possible judicial challenge after the first round in the presidential election ..	22
2.4.2	Integrity ruling (The Kenyatta – Ruto Eligibility Case).....	22
2.4.3	Election Date Petition	23
2.5	Key Legal Challenges Arising from the March 2013 Elections	23
2.5.1	Campaign financing	24
2.5.2	Overlap of jurisdiction to more than one institution.....	24
2.5.3	Disputes relating to the First Round of Presidential Elections.....	25
2.5.4	The laws relating to the use of technology during elections	26
2.6	Conclusion	26
CHAPTER 3: KEY ACTORS IN THE 2013 ELECTION		28
3.1	Introduction.....	28
3.2	Institutions and Actors.....	29
3.2.1	The Independent Electoral and Boundaries Commission (IEBC)	29
3.2.2	Registrar of Political Parties.....	30
3.2.3	Political Parties	31
3.2.4	Parliament	32
3.2.5	Judiciary	33
3.2.6	Media.....	33
3.3	ELOG’s Engagement with the IEBC	34
3.3.1	Effective Communication and information sharing.....	35
3.3.2	Access to Resources to enable effective election observation.....	35
3.3.3	Observer Accreditation and access to polling places.....	36
3.4	Conclusion	37
CHAPTER 4: ASSESSMENT OF PRE-ELECTION DAY PROCESSES.....		38
4.1	Introduction.....	38
4.2	Methods for the Assessment.....	38
4.3	Key Findings	40
4.3.1	Delimitation of Boundaries.....	40
4.3.2	Voter and Civic Education.....	41
4.3.3	Voter Registration.....	42
4.3.4	Party Nominations	43

4.3.5	Violence	44
4.3.6	Campaign Financing.....	45
4.3.7	Participation of women	46
4.3.8	Participation of People with Disabilities	48
4.3.9	Participation of the Youth.....	50
4.4	Conclusion	51
CHAPTER 5: THE E-WEEK: BALLOT BOX TO BOMAS		52
5.1	Introduction	52
5.2	Rationale for E-Week Observation	52
5.3	Observations.....	53
5.3.1	PVT Objectives	53
5.3.2	PVT Methodology and Sampling.....	54
5.3.3	Testing the PVT System.....	58
5.3.4	Rate of Response	59
5.4.1	Credibility of E-Day Processes.....	59
5.4.2	Observations from areas outside sampled polling streams.....	62
5.4.3	Projection of Presidential Results	63
5.4.4	Overall Turnout.....	64
5.5	Key Findings from General Observation	64
5.6	Conclusion:	65
CHAPTER 6: THE AFTERMATH		66
6.1	Introduction.....	66
6.2	2013 Presidential Election Petition.....	66
6.2.1	The petition	66
6.2.2	The law relating to the validity or invalidity of the election of a presidential candidate	68
6.2.3	Rejected votes	68
6.2.4	Timelines in electoral dispute resolution.....	69
6.2.5	Presidential party agents	70
6.2.6	Following the ruling	71
6.3	Other Petitions.....	71
6.4	Conclusion	71
CHAPTER 7: RECOMMENDATIONS		73

7.1	Introduction	73
7.2	Electoral Reforms.....	73
7.2.1	Ensure timely enactment of electoral reforms	73
7.2.2	Engage stakeholders in post-election audit.....	73
7.2.3	Clarify the date of the next election	73
7.2.4	Enact the Campaign Finance legislation	73
7.2.5	Enactment of the Affirmative Action Legislation	74
7.2.6	Timing and election calendar.....	74
7.3	Adoption and use of Electronic Technologies.....	74
7.4	Openness and Transparency in election management.....	74
7.4.1	Enhance transparency in Voter Registration	75
7.5	Promote issue-based politics	75
7.5.1	Regulate Political parties' nominations	75
7.5.2	Provision of Voter Education	76
7.9	Election Security	76
7.10	Streamline process of accreditation of Observers.....	76
7.11	Inclusion of Persons with Disabilities.....	76
7.12	Clarify the law relating to the validity or invalidity of the election of a presidential candidate	78
7.13	CONCLUSION.....	78
	ANNEXES	79
	ELOG PRESS STATEMENTS.....	79

LIST OF ACRONYMS AND ABBREVIATIONS

AFRICOG	Africa Centre for Open Governance
AP	Administration Police
BVR	Biometric Voter Registration
CBO	Community Based Organization
CEO	Chief Executive Officer
CGD	Centre for Governance and Development
CIOC	Constitutional Implementation Oversight Committee
CIPEV	The Commission of Inquiry into Post Election Violence
CJPC	Catholic Justice and Peace Commission
CORD	Coalition for Reforms and Democracy
CRECO	Constitution and Reform Education Consortium
CSOs	Civil Society Organizations
EACC	Ethics and Anti-Corruption Commission
ECJP	Ecumenical Centre for Justice and Peace
ECK	Electoral Commission of Kenya
E-Day	Election Day
ELOG	Elections Observation Group
EMB	Election Management Body
E-Week	Election Week
FIDA	Federation of Women Lawyers

GO	General Observation or General Observer
GoK	Government of Kenya
ICC	International Criminal Court
IDEA	International Institute for Democracy and Electoral Assistance
IDP	Internally Displaced Persons
IEBC	Independent Electoral and Boundaries Commission
IED	Institute for Education in Democracy
IIEC	Interim Independent Electoral Commission
IIBRC	Interim Independent Boundaries Review Commission
IREC	The Independent Review Commission
KANU	Kenya African National Union
KLRC	Kenya Law Reform Commission
NARC	National Rainbow Coalition
NCCK	National Council of Churches of Kenya
NCIC	National Cohesion and Integration Commission
NGO	Non-Governmental Organization
NSIS	National Security Intelligence Service
ODM	Orange Democratic Movement
PEV	Post Election Violence
PNU	Party of National Unity
PVT	Parallel Vote Tabulation
PWDs	People with Disabilities
SSAs	State Security Agencies
SUPKEM	Supreme Council of Kenyan Muslims

TJRC	The Truth, Justice and Reconciliation Commission
TNA	The National Alliance
UDPK	United Disabled Persons of Kenya
YAA	The Youth Agenda

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Kennedy Masime

Chairperson

ELOG Steering Committee

EXECUTIVE SUMMARY

March 4th 2013 will remain a special day in the history of Kenya. On this day, millions of Kenyans turned out to cast their vote in the biggest and most expensive election event ever in the country's electoral history.

This election recorded many firsts for Kenya: it was the first to attract the biggest ever turn out of voters with more than 12 million Kenyans casting their votes; it was the first under the new Constitution of Kenya 2010; it was the first under the new devolved system of government; it was the first in which six elective offices were being voted for on the same day; it was the first in which technology was expected to safeguard electoral integrity; it was the first in which all presidential aspirants and their deputies participated in live media presidential debates; and it was the first election in which independent candidates were allowed to run. It was also the first in which a presidential dispute petition was filed in the Supreme Court and determined within the constitutionally stipulated timelines.

Following the tragic events that came in the wake of the 2007 general elections, the shadow of violence and potential instability stalked the entire 2013 election process. Kenya had to pass the test of conducting credible, peaceful, free and fair elections. In 2007, soon after the announcement of Mwai Kibaki as the winner of the presidential election, violence broke out in most parts of the country. Kibaki's political rival, Raila Odinga, and his ODM party contested the presidential results. What followed were days of bloody violence and mayhem. More than 1, 300 people were killed and over 600,000 displaced from their homes.

This report presents ELOG's evaluation of the entire 2013 election process. It covers the pre-election period, election-day, and the immediate post-election period. The evaluation is based on direct observations by trained observers who were deployed throughout the entire electoral cycle. Additional information was provided by ELOG member organizations that directly monitored various thematic aspects such as; voter registration, party nominations, and campaign financing. The report places ELOG's findings within the country's socio-political context. It outlines important recommendations for improving future elections.

The first chapter captures the socio-political context in which elections took place. It reviews efforts to reform political and electoral institutions, as part of the peace agreement negotiated by the Panel of Eminent Persons led by former United Nations Secretary General, Kofi Annan. The peace agreement, brokered by Annan and Tanzanian President Jakaya Mrisho Kikwete, helped stop the 2007/08 Post Election Violence. Whereas much had been achieved between 2007 and 2013, there are many issues yet to be resolved. The unresolved issues include: the culture of impunity, historical injustices, and negative ethnicity.

The report analyses the key narratives in the 2013 elections. These include: the role of the International Criminal Court (ICC); the role of the international community; the presence of violence in the run-up to the elections; the concept of “tyranny of numbers”; high youth unemployment; the age debate; and the role of opinion polls in the run-up to elections.

A newly formulated legal framework provided impetus and hope for improvement in the conduct of elections in Kenya. The new laws and regulations further reflected consensus on a normative framework to evaluate: the organization of elections; the registration of political parties and coalitions; manifestos of political parties; the role of state bodies and institutions in the elections such as the Independent Electoral and Boundaries Commission (IEBC); political party’s primaries and nominations; and the election disputes and the role of the Judiciary.

Nevertheless, the 2013 elections revealed that many legal loopholes still exist. Such loopholes, among other things, undermine the representation of women and people with disabilities. The country is yet to tackle the issue of campaign financing. A bill developed and tabled in Parliament in 2012 was never adopted. The financing of politicians and political parties remains an opaque issue. There is confusion over which institution is in charge of which electoral disputes and offences. The legal framework for the use of technology needs to be further strengthened to remove all ambiguities.¹

For the elections to be considered free and fair, it is important that all state institutions involved in it function well. Whereas it is impossible to blame all failures on one individual or institution, some mistakes in the execution of the elections engendered suspicion and mistrust among Kenyans. The key factors that fuelled suspicion and mistrust were: the flawed use of technology; the failure to continuously register voters; unconvincing implementation of delimitation of boundaries; and inadequate enforcement of legal requirements for party nominations. The confidence that Kenyans had in the IEBC has been overshadowed by these shortcomings. IEBC and other institutions needed to make the whole electoral process more transparent.²

The Registrar of Political Parties and IEBC failed to hold political parties to account for some obvious breaches of the Political Parties Act and the Elections Act, respectively. They turned a blind eye to the numerous malpractices that permeated political party nominations. The dispute over the concrete date of the elections did not help in establishing credibility in all institutions concerned with the conduct of elections.

¹ Refer to ELOG Recommendations 7.2, 7.4, 7.5 and 7.7

² Refer to ELOG Recommendations 7.3 and 7.4.

Political Parties need to further improve their functioning and internal organization in order to create a fully democratic and competitive political arena. Political parties' nominations need to follow the same principles as the elections themselves – they have to be credible, free and fair.³

The Judiciary also failed to ensure full compliance with the constitutional requirement on leadership and integrity. Its advisory decision on the one-third rule for ensuring gender equality and participation prolonged marginalization of women in elections and politics, and the tentativeness of the decision on the date of the elections did not help establish the credibility of the Judiciary. The proceedings of the Supreme Court following the submission of the presidential petition further shook the trust of the public in the functioning of the highest judicial organ in the country.

ELOG's monitoring and observation during the last election cycle focused on: voter registration; voter and civic education; party nominations; participation of women, people with disability, and the youth; campaign financing; violence; and delimitation of electoral boundaries. It adopted a number methodologies including long-term observations, baseline mapping and identification of violence hotspots, extensive reviews of legal and other electoral materials, interviews with key informants, and focus group discussions.

Complaints were raised regarding the manner in which the additional 80 constituencies and 1, 450 County Assembly Wards were created, their distribution, names, boundaries and areas of allocation. There were also grievances regarding the number of wards given to certain constituencies. The complaints revolved around population density, geographical boundaries, clan, community, and other interests.

Although voter education was conducted in all the constituencies, it was of varying and uneven quality and quantity. Voters in some areas were better equipped to participate in the elections than others. ELOG's assessments found that, overall; the voters were not adequately prepared for the elections. It was instructive that IEBC and/or GoK did not set aside enough resources for voter education.⁴

Although not a constitutional requirement, there was broad consensus and expectation that a new voter registration system, Biometric Voter Registration (BVR), would be implemented to enhance the integrity of the voters roll. However, the implementation of BVR was dogged by serious concerns and failures that undermined their efficiency and effectiveness. This considerably reduced public confidence in the voting process on Election Day.

³ Refer to ELOG Recommendation 7.6 and 7.7.

⁴ Refer to ELOG Recommendation 7.8.

The concerns and failures include: a botched procurement process that was dogged by allegations of impropriety, delays in timelines for voter registration, and widespread failure of biometric verification kits on election-day. Indeed, the failure of the biometric voter registration system ranked amongst the most serious threats to the integrity of the 2013 elections, and contributed to public perceptions of incompetence, corruption and electoral fraud.⁵

Generally, as widely expressed by key political actors, the party nominations were shambolic and abused basic tenets of democracy and fairness. There were reports of violence and intimidation and lack of internal party democracy, including favouritism and nepotism. The parties lacked capacity to conduct successful nominations. Moreover, the ability of the IEBC to manage the elections was seriously weakened by the way it guided the nomination processes. Similarly, the conduct of the political parties during the party nominations also cast serious doubts on their ability to promote transparent, open, free, and fair elections.

On the whole, violence monitoring revealed a relatively peaceful election, compared to the scale and scope of the 2007/2008 PEV. However, prior to the elections, violence incidences were reported in the Coast region (Tana River) and Upper Eastern/North Eastern (Baragoi area), with hostilities spewing in several other parts of the country. Though these cases could not directly be linked to election process, their occurrence affected election activities in the said areas. Violence has increasingly and consciously been used as an unfair means of achieving political objectives. Physical violence affected female candidates and the youth more than other political actors. Concerns were also raised regarding the ability of the security agencies to secure the lives and properties of residents in all the areas where violence was monitored. Pre-emptive responses focused mainly on relocation of people from hot spots to relatively safe areas. Both civilians and security agencies actively participated in violence and/or abetted it.⁶

While there was a notable increase in hate speech particularly transmitted via the social media, there was surprising inability by the State and the National Cohesion and Integration Commission (NCIC) to manage the outraging menace. Finally, there was clear lack of determination, motivation, and even capacity on the part of security agencies to ensure the safety of all Kenyans.

The absence of a substantive law governing campaign financing was a major blight in the preparation of elections free of intimidation, improper influence or corruption. From the onset, it was clear that the process of enforcing campaign and political financing regulations was poor. Furthermore, the existing legal framework for campaign and political financing was inadequate

⁵ Refer to ELOG Recommendations 7.3 and 7.5

⁶ Refer to ELOG Recommendation 7.9

and incoherent policy-wise. Yet both popular media reports and our own assessment showed that the 2013 elections were undoubtedly the most expensive in Kenya's electoral history.⁷

Participation of women, persons with disabilities and the youth in the pre-election processes was limited. Although the number of women candidates was higher than in previous elections, this did not necessarily constitute significant gains for women participation in elections. Effective women participation was greatly undermined by intimidation, violence, and irregularities targeted against them.

Although Article 81 (e) of the Constitution provides for free and fair elections by secret ballot devoid of violence, intimidation, improper influence or corruption, IEBC Election-Day arrangements were wanting. IEBC could not ensure the independence and sanctity of the vote for assisted voting for voters with disabilities.⁸

Older and wealthier politicians continued to dominate political parties. The youth who had been advocating for affirmative action to increase their participation in electoral processes especially nomination processes were still locked out of elective politics.

Nomination rules of political parties were not favourable to the youth. The nomination process excluded the youth from the mainstream party activities. Nevertheless, youth participation in the 2013 general election was much better compared to previous elections.

ELOG deployed both the Parallel Vote Tabulation (PVT) and general observation methodologies in observing the March 4th 2013 Election Day processes. These two methodologies of observation complemented each other, thus, enriching the entire observation exercise. PVT enabled ELOG to systematically observe Election Day processes (opening of polling stations, voting, closing of polling stations, and counting) and rapidly project the results whilst general observation enabled it to establish a presence of non-partisan observers countrywide. The presence of observers helped deter malpractices and fraud. Since the PVT observers are deployed to nationally representative random sample of polling stations, their data is not biased in any way, and is statistically valid for generalizing findings to the national level. Consequently, ELOG's assessment of Election Day processes is largely based on data received from the PVT observers.

ELOG deployed 580 Constituency supervisors and over 7, 000 observers in all 290 constituencies. Out of these, 976 were deployed as Parallel Vote Tabulation (PVT) observers in nationally sampled polling streams. This enabled ELOG to authoritatively comment on E-day processes and provide an

⁷ Refer to ELOG Recommendation 7.2.4

⁸ Refer to ELOG Recommendation 7.11.

independent verification of the presidential results announced by IEBC. Of the 976 PVT observers deployed, a high response rate of 97.5% was achieved. Reports from these observers were used to project the outcome of the presidential elections.

Despite the many serious problems such as widespread malfunctioning of electronic verification kits witnessed during the E-Day, the PVT exercise determined that the process was generally credible. It is on the basis of this that ELOG utilized the PVT data to project and verify the accuracy of the presidential results. The PVT verified that the results announced by the IEBC were within the range projected for each of the presidential candidates. Based on its projection, and in view of the problems witnessed, ELOG called on the IEBC to immediately make public all information pertinent to the results, including results collation forms at all the various levels of tabulation.⁹

Although the 2013 general elections were much better than the previous ones, it is clear that a number of issues still need to be addressed to ensure credible, peaceful, free and fair elections in the country. This report shades light on such issues and recommends the way forward.

⁹ Refer to ELOG Recommendation 7.4

CHAPTER 1: SOCIO-POLITICAL ENVIRONMENT

1.1 Introduction

This chapter provides an overview of the most relevant social and political issues and narratives that shaped the run-up to the 2013 elections. It captures some of the landmark moments in the pre-election phase, such as Agenda 4 and the commissions tasked with proposing reforms considered necessary for conducting credible, free, fair, and transparent elections. It discusses six issues: government structure; political contenders in the 2013 elections; reforms in the run-up to the elections; most important issues in the 2013 election cycle; the role of the international community; and the role of civic and voter education. It also incorporates the role and recommendations of the relevant commissions.

A socio-political context is always a very complex matter. It is much more than a sum of its parts. Indeed, due to its ambiguous nature of being both a static and dynamic environment for observation, it is never possible to provide an “ultimate” overview of all the elements contributing to it. In this chapter, however, we have tried to point to some of the most relevant facts and processes that formed the background of the March 2013 elections, with the hope that this will allow the reader to judge the elections within their proper context.

1.2 Reforms in the Run-up to the Elections

1.2.1 Point “zero” – announcement of the 2007 election results & post-election violence

The most dominant factor in the 2013 general election was the overbearing shadow of the 2007 elections. After the announcement of the presidential results in 2007, violence broke out in several parts of the country. An estimated 1,300 people lost their lives. 600,000 others were displaced. The fear of a repeat cycle of violence reigned supreme before, during and after the March 4th 2013 general elections. The 2007 election was widely perceived as fundamentally flawed. Kenyans lost confidence in the election management body, the Electoral Commission of Kenya (ECK).

1.2.2 The February 2008 Power sharing Agreement and Agenda 4

After days of bloodletting, a powersharing agreement was brokered by Kofi Annan¹⁰, serving as Chair of the Panel of Eminent African Personalities established by the African Union, in February 2008¹¹. The Agreement resulted in the formation of the government of national unity (the Grand Coalition Government). Mwai Kibaki was the President while Raila Odinga became the Prime Minister. The two political rivals shared power with an equal number of ministers coming from the

¹⁰ Africa Review, March 31, 2013

¹¹ CSMonitor, February 29, 2008

Party of National Unity (PNU) and the Orange Democratic Movement (ODM). The Grand Coalition's mandate was to pursue comprehensive political and social reforms.

A host of "historical injustices" or "unfinished business" conceived by the country's troubled past, were identified under the Agenda 4 item of the agreement: constitutional, legal and institutional reforms, poverty and inequality, youth unemployment and land reforms. Their resolution was deemed essential for healing the complex network of social, political and economic ailments, facing the country. Several mechanisms were put in place to address the pressing issues, regarded as causes of the 2008 post-election violence. Commissions were established for this task. These were: the Independent Review Commission on the General Elections held in Kenya in December 2007 (IREC); the Commission of Inquiry into Post Election Violence (CIPEV); and the Truth, Justice and Reconciliation Commission (TJRC). IREC and CIPEV completed their work in 2008. The constitutional review process kicked off as a continuous voyage.

1.2.3 The Agenda 4 Commissions¹²

The mandate of the *Commission of Inquiry into Post Election Violence (CIPEV)*, also known as the *Waki Commission* was to investigate the facts and circumstances surrounding the violence in the country and the conduct of state security agencies during the period of the violence. The Commission was then to make recommendations concerning these and other matters. The Waki Commission addressed the role of State Security Agencies (SSAs) identified as: the Police; the Administrative Police (AP); the Military; the Prisons Service; and the National Security Intelligence Service (NSIS). The Commission established that there was a lack of leadership by the Cabinet Security Committee and its co-opted members. This Committee was the highest level of the Security Intelligence Machinery yet the Commission could find no evidence that the committee operated at all, let alone effectively, in the lead up to the 2007 elections and during the post-election violence.

The Commission indicted the police for being most unprepared for the elections. The police, the Commission said, were arrogant in their presumptions of preparedness for the elections and had ignored prior intelligence reports. The Waki Commission identified the absence of a response mechanism to security intelligence received prior to the elections.

The Waki Commission established that violence had been institutionalized to become part and parcel of the political process. This came in the wake of the introduction of multi-party politics in Kenya. The deliberate use of violence to obtain political power and the decision not to punish perpetrators had led to the establishment of a culture of impunity. This, in turn, led to the spread of violence in the country, which is beyond the control of the state and its institutions.

¹² The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project – South Consulting

The personalization of power around the presidency had given rise to the view that it is essential to win the presidency to access state resources. This had led to the denudation of the authority of other institutions.

The Waki Commission also reported that there was a growing population of poor, restless and unemployed youth who agreed to join militias and organized gangs. These gangs intersected with parts of the state and security forces to form shadow governments in slums. Indeed, frustrations and the feeling of marginalization by some ethnic groups had been tapped by politicians to mobilize for violence.

The Waki Commission recommended that a special tribunal, to be known as the Special Tribunal for Kenya, be established as a court that would seek accountability against persons bearing the greatest responsibility for crimes relating to the PEV. The Waki report recommended circumstances in which the International Criminal Court (ICC) in The Hague, Netherlands, would be used to try the persons whose names appeared in a sealed envelope handed over to Kofi Annan. These were:

- 1) If the agreement to establish the Tribunal is not signed; or
- 2) If the Law establishing the Tribunal is not passed by Parliament; or
- 3) If the Law is not implemented after being passed; or
- 4) If the implementation is subverted.

This arrangement and lack of an adequate domestic mechanism later led to the indictment of a number of individuals before the International Criminal Court. The ICC turned out to be a mobilizing political factor in the 2013 general election.

The Independent Review Commission, popularly known as the Kriegler Commission, was appointed in March 2008 to look into the conduct of the 2007 General Elections and make recommendations towards realising better democratic electoral processes and outcomes.

The Commission was tasked to analyse the Constitutional and legal framework for elections, review the Electoral Commission of Kenya (ECK) and its capacity at the time to discharge its mandate efficiently. The Kriegler Commission generated several legal, institutional and policy reform recommendations. These recommendations, if implemented would help to put power back in the hands of the people of Kenya.

The recommendations of the Kriegler Commission revolved around six main issues:

- 1) the country's constitutional and legal framework relating to elections;

- 2) structure and composition of the election management body;
- 3) the electoral environment and the role of political parties, civil societies, the media and observers;
- 4) the electoral preparations;
- 5) vote counting, tallying and announcement of results; and
- 6) post-election procedures.

The Kriegler Commission recommended that all laws related to elections be consolidated under one law and that a specific law dealing with electoral disputes be enacted. This has been fulfilled in the enactment of the *Elections Act 2011*, the *Supreme Court Act 2012* and the Rules therein, and the *IEBC Act of 2011*.

Furthermore, the High Court and Supreme Court obtained jurisdiction to hear and resolve electoral disputes. The Chief Justice established an Electoral Disputes Resolution Court to hear all pending electoral disputes from the previous elections. Following that, the Supreme Court developed specific rules to handle electoral disputes related to presidential elections.

However, some challenges in implementing the recommendations of the Kriegler Commission remained. On citizenship and universal suffrage, the right of Kenyans living in the Diaspora is being progressively realized. Namely, only the Kenyans living within the East African region could vote in the 2013 presidential election. In order to do so, they needed to have a valid passport and be physically present at the polling site.

Regarding the rights of persons with disabilities, although the Constitution guarantees their rights, the statutory provisions to enforce them remained inadequate. The Party Nomination rules did not ensure that persons with disabilities get on party lists. As such, in practice, discrimination against persons with disabilities continues.

The delay and controversy surrounding the procurement of BVR kits was damaging for IEBC's standing in the public eye. Political patronage was perceived to be a major threat to the independence of IEBC. During this exercise, the publicly-played out wrangles between the CEO of IEBC secretariat, the chair of IEBC and other Commissioners may have diminished public confidence in the autonomy of the body.

The Political Parties Liaison Committee did not function optimally. This mechanism is relatively more effective at the national level and is yet to be fully devolved to the county level. The dominant and large parties have also not taken the Committee seriously.

The enforcement of the Political Parties Act was widely neglected and the Registrar of Political Parties was exploiting the ambiguities in the Act to avoid holding political parties accountable. IEBC also did not crack the whip on political parties and politicians who violated the law.

Item Four of the National Dialogue and Reconciliation Process related to long term issues and reforms provided the framework for transitional justice, through the *Truth, Justice and Reconciliation Commission (TJRC)*.

Kenya's civil society had been calling for a truth, justice, and reconciliation process since 2002 when the NARC government came into power. In 2003, the government appointed a task force that recommended the establishment of a Truth, Justice and Reconciliation Commission. Had this recommendation been acted upon then, the country might have avoided the 2007/08 post-election violence.

The TJRC investigated, analysed, and later in 2013 tabled its report. The report focused on what happened between 1963 and 2008. It dwelt on: gross violations of human rights; economic crimes, and illegal acquisition of public land; marginalization of communities; ethnic violence; and the context in which the crimes occurred. The TJRC did not, however, have the power to prosecute. It could recommend prosecutions, reparations for victims, institutional changes, and amnesty in exchange for truth for perpetrators who did not commit gross human rights violations.

1.3 Popular Narratives in the 2013 Elections

1.3.1 International Criminal Court

The Waki Commission recommendations were basically ignored by the politicians. Attempts by a few legislators to have a criminal investigation of the key perpetrators of the Post Election Violence tried in Kenya failed miserably. Justice Waki eventually handed over the sealed envelope to Kofi Annan who proceeded to hand over the case to the International Criminal Court (ICC). Kenya's cooperation with ICC became one of the most controversial, contested and divisive campaign issues in the 2013 general election.

In 2010, Luis Moreno Ocampo, the then ICC Prosecutor, announced that he was seeking summonses for six people: the then Deputy Prime Minister, Uhuru Kenyatta; Industrialisation Minister, Henry Kosgey; Higher Education Minister, William Ruto; Secretary to the Cabinet, Francis Muthaura; radio journalist, Joshua arap Sang; and former police commissioner, Mohammed Hussein Ali. Ocampo described the six as persons bearing the greatest responsibility to the Post Election Violence. They were all accused of crimes against humanity. The six suspects, known colloquially as the "Ocampo six" were indicted by the ICC's Pre-Trial Chamber II, on 8th March 2011, and summoned to appear before the Court.

The Government of Kenya and the National Assembly both attempted to stop the ICC process. The government appealed to both the United Nations Security Council and the Court itself regarding the admissibility of the case. The National Assembly even voted in favour of removing Kenya as a state party to the Rome Statute, the international treaty which established the ICC. Despite this opposition, the suspects cooperated with the proceedings and attended preliminary hearings in the Hague in April 2011 and confirmation of charges hearings in September of that year. On 23rd January 2012, the Pre-Trial Chamber II confirmed the charges against Kenyatta, Muthaura, Ruto, and Sang. It declined to confirm the charges against Ali and Kosgey. On 11th March 2013, the charges against Muthaura were dropped by the ICC following the discrediting of a key witness. The trial of Ruto and Sang will begin in September 2013. That of Kenyatta will begin in November 2013.

Pundits believe that by politicising the ICC case as one targeting communities, Uhuru and Ruto turned it into their salvation tool in the 2013 elections. Warnings from the civil society and Western powers on the consequences of electing two suspects to lead the Kenyan nation seemed to galvanise more support for the “suspects” from the Kikuyu and Kalenjin communities that Uhuru and Ruto hail from. Occasional reminders from Kofi Annan, US African envoy Johnnie Carson¹³ and some European countries¹⁴ against electing Uhuru and Ruto went unheeded as the duo’s popularity grew with every intervention, judging from the popularity polls conducted at that time. The pair managed to craft a narrative around their role as revolutionaries, defying “Western imperialists who seek to undermine Kenya’s sovereignty.”

Another unintended consequence of the ICC in Kenya was temporary or ‘negative peace’ (the peace arising from the absence of overt violent conflict where underlining issues are not addressed). The case, however, also had positive though unintended impact. It led to the emergence of issue-based politicians at the national and county level outside the three leading coalitions. Unfortunately, this had a limited overall impact on the elections. The three leading coalitions were largely supported by their ethnic groups, although the voting cannot be neatly defined as purely ethnic.

Nevertheless, the ICC was a deterrent to violence in the 2013 elections. Many politicians, citizens and members of the media acted more responsibly in both public and private spheres. They avoided hate speech and any actions that could be construed to cause tension in a country that is deeply divided along ethnic lines. This responsibility was driven by the fear of being investigated

¹³ Voice of America, February 7, 2013

¹⁴ E.g. The Independent, February 25, 2013, <http://www.independent.co.uk/news/world/africa/if-raila-odinga-wins-kenyas-elections-britains-interests-are-secure-but-if-uhuru-kenyatta-wins-8510687.html>

by the ICC. However, despite this positive impact, the ICC element in the elections did not purge the country of impunity, which remains a significant problem in Kenya.

The role of the international community in these elections was perceived in two ways, as simultaneously advocating for free and objective elections, and being biased when it comes to the choice of candidates. These perceptions were particularly motivated by the indictments of some of the contenders before the International Criminal Court. Namely, it was very difficult for the international community to accept that it would have to deal with ICC indictees in the event that they won the election.

1.3.2 “Tyranny of Numbers”

“Tyranny of numbers”, a term coined by the political analyst Mutahi Ngunyi¹⁵ is a simplified presentation of the ethnic complexity in Kenya. Its basic premise is that whoever manages to garner support or votes of the largest ethnic group(s) in Kenya can in advance be considered as victor in the elections. This thinking is rooted in two premises: all members of one ethnic group act as one in social and political issues, such as elections, and members of the same ethnic group help each other in everyday life, if necessary even at the expense of other ethnic groups. Consequently, in order to predict the outcome of any election or content of a government’s political agenda following the election, it is enough to add numbers, and in particular to determine where how the largest ethnic group will vote.

This perception has been a common narrative in Kenyan public life since the country’s independence, and it has been most visible in the choice of presidential candidates in all post-colonial elections. At the first glance, the 2013 general election was not an exception either. The two largest coalitions rallied their ethnic supporters behind their respective candidates leaving little doubt that one of them did not succeed only because it fell short in numbers. Mutahi Ngunyi even predicted that the winner was known already on the final day of the voters’ registration, since then it was very easy to simply add numbers and conclude who the winner will be. One additional variable – the voters turnout – can thus only further confirm the original premise. Perceived in this way, the “tyranny of numbers” is an attempt to bring certainty into an uncertain world of Kenyan politics and social relationships.

Even though very speculative, the concept of “tyranny of numbers” remains a very common narrative, with some analysts claiming that it is very difficult to perceive any president outside Kikuyu or Kalenjin communities in the near future. In other words, this “numbers doctrine” has found its expression in the general perception that only one or two ethnic groups can thrive and be in the position to dominate other, smaller communities in the country. Coupled with the sense

¹⁵ E.g. AFRICOG analysis, <http://www.africog.org/content/what-tyranny-numbers-inside-mutahi-ngunyi%E2%80%99s-numerology>

of strong presidency, as well as “culture” of impunity, which endures up until this day, this may result in a sense of helplessness among smaller communities. This feeling was very much present during the 2013 elections.

1.3.3 Kenya’s Youth Unemployment

The importance of unemployment among the Kenyan youth for the country’s socio-economic reality cannot be underestimated¹⁶, and it played a significant role in the way politicians formulated their strategies in the run-up to the 2013 elections¹⁷. With a high rate of unemployment among the youth, that segment of the Kenyan population remains vulnerable to various forms of political influence and manipulation by politicians which, in turn, results in more aggressive sentiments when it comes to its political choices. In the 2013 election, major political blocs played the card of solving the problem of youth unemployment should they be elected.

Youth unemployment rates are several times higher than the rates among adults and particularly high in cities and among females. As young people grow older, two trends stand out in their choices: a steep reduction in full-time studies and the rise of work in the informal labour market. These trends are remarkable for two reasons. First, the proportion represented by each of these two activities is large. Second, trends start promptly in the young people’s lives, and, as school attendance drops for those aged between 15 and 20 years, strong pressures are put on the labour market, with many youth joining the informal labour market. Most politicians tried to use this issue to motivate young people to go to the polling stations.

1.3.4 “Analogue vs. Digital Debate” and the Use of New Technologies

This “debate”¹⁸ was one of the more important symbolic narratives of the 2013 election cycle, especially in the context of the “tyranny of numbers” explained above, as well as the role of youth in the 2013 election. Namely, one political camp used the younger age of its contenders to portray its policies as more modern and, consequently, more progressive. This was especially visible in the frequent use of the new communication tools, and in particular the social media and mobile phone technology.

The question, however, remains whether this “new” style of campaigning actually brought modernity and political progressiveness to Kenya. Some critics posit that the Uhuru-Ruto ticket was known to be a very retrogressive one, even though they frequently emphasized digital vs.

¹⁶ “Youth and the 2013 Elections in Kenya”, Network for Youth in Transition, February 27, 2013,

http://networkforyouthintransition.org/profiles/blogs/youth-and-the-2013-elections-in-kenya?xg_source=activity

¹⁷ The Guardian, February 25, 2013, <http://www.guardian.co.uk/global-development/2013/feb/25/kenya-election-jobs-young-people>

¹⁸ E.g. Standard Digital, February 11, 2013,

http://www.standardmedia.co.ke/?articleID=2000077082&story_title=Magazines:%20Crazy%20questions%20for%202013%20Presidential%20Debate

analogue divide as being an issue in this election. The central point of these criticisms is that essentially the ticket wanted things of old, especially given their open or secret opposition to the new Constitution.

Due to this dichotomy, the debate may have shifted the focus from relevant and pressing issues to something which can eventually be regarded as a tool or mere form to attain certain results. It may have helped the politicians divert attention from real problems facing Kenyans.

1.3.5 Opinion polls

Opinion polls played an important role in the 2007 general elections. However, it is in the 2013 election cycle that they assumed an unprecedented position in the political constellation of the country. This position is a paradox in itself, for all actors were (mis)using the polls intermittently, according to what polls had been saying about their standing.

It is especially interesting that majority of actors tried to downplay the objective value of the polls¹⁹, yet the results of every single poll were eagerly awaited and vigorously debated. As a consequence, the polls played an important role in shaping various political strategies and influencing political opinion. In other words, they became an important social tool without an explicit acceptance of their relevance on the part of major political contenders.

Tuning into the concept of “tyranny of numbers”, it is interesting to note that whereas one political bloc was more often perceived as winner of the polls, this ultimately did not result in the same bloc winning the election.

1.3.6 Party Manifestos and Issue-based Politics

For the first time in Kenya’s history, political parties were legally obliged to adopt and publish their programme manifestos. This created a true issue-based political arena. Nevertheless, whereas issue-based politics was clear present in the local-level elections and in the campaigns of minor presidential contenders who did not belong to the two major blocs, the national political rallies were still predominantly devoid of concrete policy debates and focused more on personal suitability of political contenders.

In fact, political parties have been developing manifestos or party programmes every election since the 1992 multi-party elections, thus, thus potentially contributing to genuine political diversity in the country even before this became a legal requirement. However, despite the

¹⁹ E.g. “Kenya’s Electoral Opinion Polling Marred by Suspicion” by Miriam Gathigah, Inter Press Service, <http://www.ipsnews.net/2013/02/kenyas-electoral-opinion-polling-marred-by-suspicion/>

number of issues raised in the three televised presidential debates, this has not contributed to an issue-based diversification of the country's political field.

Kenyan political parties lack basic elements that define political parties. They are created, dominated and sustained by powerful personalities rather than informed and convinced members. The parties seem to become "alive" only when national elections are announced. Although the leadership of all political parties is composed of members from diverse ethnic groups of the country, they are still distinguished not by ideologies but by personalities who lead them and their ethnic base.

In other words, the weaknesses of political parties, and in particular their weak internal organization, contributed to the general sense of disorder on the political scene. This was especially visible during the chaotic party nominations.

1.4 Conclusion

Though Kenya is an infant democracy, it has a vibrant and dynamic public scene. However, not all manifestations of this vibrancy and dynamism result in positive outcomes for the Kenyan society. In fact, some of them contributed to the turbulences of the past and played a negative role in all election cycles to date.

The central question in the run-up to the 2013 general election was whether the reforms triggered by the unfortunate events during the 2007/08 post-election violence addressed these issues adequately. Kenya has certainly made progress, but some painful wounds remain untreated. Several regions in the country are still prone to politically instigated violence. There are no feasible policies for the country's many social and economic problems, and there is a general lack of interest in the public good on the part of the ruling elites.

That the 2013 elections were free of violence to the scale of the 2007 elections does not mean that Kenya is safe. Despite Uhuru and Ruto joining hands to win elections, the issues of historical injustices that led to the 2007/2008 violence remain untouched. Ethnicity still reigns supreme in the choice of the president. Impunity is still a major malaise that needs to be healed. This impunity is fueled by supremacy and hegemony of some ethnic groups over the others as popularly expressed in the idea of "tyranny of numbers".

All these aspects need to be taken into account when discussing the future of Kenya. Their handling will influence subsequent election cycles. It remains to be seen whether the progress observed in the 2013 election cycle will outweigh the obvious challenges that the Kenyan society still faces.

CHAPTER 2: LEGAL FRAMEWORK

2.1 Introduction

The violence that engulfed Kenya in 2007/2008, was mainly blamed on the failure of institutions such as the judiciary, the police and the elections management body. There was a general consensus that most institutions needed to be reformed or new ones established.

New institutions were, thus, created for the management of elections and resolution of election disputes. These included the Registrar of Political Parties, the Independent Electoral and Boundaries Commission (IEBC), the Political Parties Disputes Tribunal, the Ethics and Anti-Corruption Commission (EACC), and the National Cohesion and Intergration Commission (NCIC). The newly established Supreme Court was to play an important role in the post-election dispute resolution. The central goal of this reform overhaul was to improve the effectiveness of these institutions, but also to introduce safeguards against any potential negative post-election consequences.

This chapter provides an overview of the laws and regulations and court rulings which were instrumental in creating the legal framework for the 2013 elections, as well as some challenges that the Kenyan electoral system still needs to address.

2.2 International Legal Standards

The evolution of democratic values has embraced many issues that can be lauded to be international in standard and status. Whenever elections are conducted they are, therefore, measured against these standards. The electoral legal system has its own specific standards too.

In order to have effective and responsive laws, the International Institute for Democracy and Electoral Assistance (IDEA)²⁰ summarises the requirement thus: *'[T]he legal framework should be so structured as to be unambiguous, understandable and transparent, and should address all components of an electoral system necessary to ensure democratic elections.'*

In translating this standard, there are various other legislations that have to be in place to ensure that the electorate and other elections stakeholders realize their democratic rights and are shielded from the excesses of an unfair system.

In brief, the electoral laws of a country have to meet the following criteria:

²⁰International Institute for Democracy and Electoral Assistance (IDEA)

1. they should be objective, clear and publicly accessible;
2. they must meet the fundamental suffrage rights;
3. they must ensure the conduct of free and fair elections;
4. the entire body of all electoral laws must be in harmony with each other and consistent; and
5. it should be ascertained that none of the laws are enacted just before elections in order not to send a signal of unfair advantage to any candidate or party.

The legal framework governing Kenya's electoral system and processes has evolved considerably since the re-introduction of multiparty politics in 1991 and the 1992 multiparty elections. But several gaps still remain that need to be filled to protect the sanctity of future elections.

The adequacies and inadequacies of Kenyan electoral laws are seen through the substance of the laws themselves and how they have been exposed through the practice of the courts and the experience of the elections.

2.3 The Kenyan Electoral Legal System

2.3.1 Constitution of Kenya 2010 as a landmark

The Constitution of Kenya 2010 replaced the 1963 or Independence Constitution, whose aim was primarily to ensure smooth transition from the colonial to post-colonial functioning of the state apparatus.

The Constitution of Kenya 2010 in Chapter 1, Article 1 proclaims that: "all sovereign power belongs to the people of Kenya" and that this sovereign power "shall be exercised only in accordance with this Constitution". This essential legal basis opens the door wide for participatory democracy that had been neglected throughout Kenya's history.

The Constitution is the supreme law relating to the conduct of elections. Its supremacy is critical since it subsists in cases of any incoherence of other laws. The promulgation of the Constitution of Kenya 2010 came after a long, tedious, tearful and often bloody journey to reforms and democracy. The Constitution has commendably regulated many legal, social and electoral elements. Some of the areas, which were not and/or adequately previously *constitutionalized*, among others, include: political parties' management and operations, independence and operational autonomy of the election management body (EMB), and the resolution of presidential electoral disputes. With regards to the electoral system, the Constitution has to a large extent *constitutionalized* the elements of proportionality of representation. It incorporates provisions that ensure special categories of people are represented, including women, youth and people with disabilities.

The Constitution guarantees every citizen the right to free, fair and regular elections as a basis of expressing their will as electors. While the concept of free and fair elections is of universal application, the Constitution requires that they should be:

- a. conducted by secret ballot;
- b. free from violence and intimidation;
- c. free from improper conduct or corrupt practices;
- d. conducted by an independent body;
- e. transparent; and
- f. administered in an impartial, neutral, efficient, accurate and accountable manner.

The country's electoral system is predominantly a "First Past the Post" system with elements of proportional representation. The majority of the electoral seats are to be contested through direct elections where the winner will be the one with most votes from the electorate.

The country also has party list seats for elections at the county assembly, national assembly and senate, mainly for under-represented groups comprising women, youth, and persons with disabilities, workers and marginalized groups. These seats are filled from closed party lists compiled by parties and submitted to the IEBC before the election. The allocation of the seats is done by the IEBC based on the proportion of first past the post seats that each party has won in each election.

The Constitution also provides qualifications for one to register as a voter and eventually vote. These include:

- g. being an adult citizen;
- h. being of sound mind; and
- i. not having been convicted of an election offence in the previous five years.

2.3.2 The Elections Act, 2011

This is the key legislation, which consolidated a number of previous electoral laws in one single volume. Previously, the system was networked through a system of laws²¹ which were sometimes not easily identifiable or coherent. Judging from the conduct of the 2013 elections, the Elections Act is not immune to inadequacies. It has, however, been hailed as progressive in the conduct of elections. The law is operationalized through a number of regulations and rules:

²¹These included the National Assembly and Presidential Elections Act, Electoral Offences Act, Local Government Act, Societies Act among others.

- a. Supplement No. 60 - Election (voter Registration) and Election (Voter Education) Regulations, 2012.
- b. Supplement No. 161 - Election (General Regulations), 2012.

2.3.3 The Political Parties Act, 2011

Previously, political parties were regulated via the Societies Act. The term “Political Parties Act” may relate to the two versions of the Act - the November 2007 one and the current one, enacted in 2011. This section focuses on the latter one.

The *Political Parties Act of 2011* includes many provisions that aim at regulating political party activity in Kenya. The Act provides for the Office of the Registrar of Political Parties, it establishes the Political Parties Fund, the Political Parties Disputes Tribunal and the Political Party Liaison Committee. Other regulations related to this Act, meant to operationalize it, include:

- a. Political Parties Registration Regulations
- b. Political Parties Funding Regulations

2.3.4 The Independent Electoral and Boundaries Commission Act, 2011

Besides the Constitution, the Kenyan Electoral Management body, the IEBC is regulated by the IEBC Act. This Act specifies the working and the function of the Commission in the management of Elections. The Constitution, however, gives Constitutional protections necessary for the effective functioning of the Commission’s duties such as the appointments and security of tenure.

2.3.5 The National Cohesion and Integration Act, 2008

The National Cohesion and Integration Act provides for the establishment of the National Cohesion and Integration Commission (NCIC). The Commission was set up to deal with the problem of ethnicity, which was identified as one of the root causes of violence following the 2007 elections.

In the discharge of its functions, the NCIC is duty bound to ensure that the actions of all citizens promote national cohesion and do not sow seeds of hatred. This was particularly important during political campaigns. Parties, candidates and their supporters were also under a duty to ensure that they do not engage in actions and speech that amount to hate speech. Hate speech refers to words or actions which incite hatred, disaffection or prejudice based on ethnicity, race, colour or sex.

2.3.6 The Leadership and Integrity Act, 2012

Chapter Six of the Constitution outlines the basic principles of leadership and integrity for all state officers in their public and private lives. State officers are to conduct themselves in a manner that:

- j. demonstrates respect for the people;
- k. brings honour to the nation and dignity to the office that they serve; and
- l. promotes public confidence in the integrity of the office that they serve.

The Leadership and Integrity Act, seeks to enforce the provisions of Chapter Six of the Constitution. It requires every candidate contesting an election to complete a Self-Declaration Form and submit it to the IEBC. However, its efficacy in terms of facilitating vetting of candidates was greatly reduced when Parliamentarians removed requirements such as tax compliance, higher education loans payment, among others, which would have served as concrete indicators for vetting potential leaders.

2.3.7 The Supreme Court Act, 2011

The Act provides for the structure, administration, functioning and jurisdiction of the Supreme Court, as well as appeals to the Supreme Court.

In Part III – Jurisdiction of the Supreme Court – it specifically stipulates that the Court determines the disputes arising out of presidential elections. This was *the* standard of reference for the presidential petition that was used following the announcement of the 2013 election results.

2.3.8 Other Laws and Regulations which were relevant in light of the 2013 elections

1. Transition to Devolved Government Act (Act No. 1 of 2012)
2. The National Gender and Equality Commission Act, 2011
3. The Penal Code and the Criminal Procedure Code, Cap 75
4. Civil Procedure Code, Cap 75
5. Supreme Court (Presidential Elections) Rules 2013
6. National Police Service Act 2011
7. Kenya Police Service Standing Orders on Elections Management
8. The Electoral Code of Conduct
9. The Political Parties Code of Conduct
10. The Communication Commission of Kenya Act
11. The Kenya Broadcasting Commission Act
12. The Public Officer and Ethics Act
13. The Public Order Act
14. Preservation of Public Security Act
15. The Election Offences Act
16. The Media Act
17. The Media Code of Conduct

It is important to note that the term legal framework for elections refers to both legal and quasi-legal materials. This implies that a decree, proclamation, or directive of an electoral management body is also to be held with the same standard as an Act of Parliament in terms of the international standards.

2.4 Important Court Decisions

2.4.1 Gender rule and possible judicial challenge after the first round in the presidential election

In this case, an advisory opinion was sought from the Supreme Court on two issues:

A. Whether the Constitution requires progressive realization of the enforcement of the one-third gender rule or requires the same to be implemented during the general elections scheduled for 4th March, 2013?

B. Whether an unsuccessful candidate in the first round of Presidential election or any other person is entitled to petition the Supreme Court to challenge the outcome of the first round of the election?

Regarding the first issue, the Court ruled that legislative measures for giving effect to the one-third-to-two-thirds gender principle should be taken by 27 August 2015. In this way, the constitutional requirement of one third representation of both genders for elected offices did not garner a judicial support for the March election. The Chief Justice Dr. Willy Mutunga issued a dissenting opinion on this rule pointing out that it is his opinion that “the two-thirds gender principle be implemented during the General Election scheduled for March 4, 2013.”

As for the second issue, the Court ruled that “presidential-election disputes, in their whole range, should be impartially and expeditiously resolved by the Supreme Court as the ultimate judicial body, and that the words “within thirty days after the previous election” should be read to mean thirty days from the date on which disputes in respect of the first round will have been resolved.

2.4.2 Integrity ruling (The Kenyatta – Ruto Eligibility Case)

As a part of the “leadership and integrity debate”, this ruling by the High Court in Nairobi was a unified decision of the High Court on a number of consolidated petitions questioning the suitability of Uhuru Kenyatta and William Ruto to take part in the election process, given the indictments against them before the International Criminal Court. This was in relation to Chapter 6 of the Constitution on Leadership and Integrity.

The Court ruled that “despite the serious nature of the charges facing the respondents at the ICC, under Article 50 of the Constitution, they are presumed innocent until the contrary is proved”, thus, confirming the right of the Kenyatta-Ruto ticket to contend in the March election.

2.4.3 Election Date Petition

The decision to hold election in March of 2013 was a very contentious one, for the election date under the Constitution was set in August, every five years. However, given the specific situation in Kenya and its coalition government following the 2007 elections, the President and Prime Minister had to agree on when to dissolve the Coalition Government to pave way for IEBC to set an election date. This generated ambiguity as to when the next general election should be held, which led a group of Kenyans moving to the High Court. The court ruling gave two options. One was that the president and prime minister agree on a date to dissolve the coalition, allowing the election to be called.

The second was to wait for the lapse of the life of the parliamentary term, which was January 14, 2013, and then hold the election within 60 days after that, as set out in the law.

Since the President and Prime Minister could not reach agreement, with the former favoring the second option and the latter keen to see a 2012 election, IEBC opted to go for the second option. The Orange Democratic Movement had urged the Commission to set a date in December of 2012.

The Court of Appeal, however, ultimately ruled that the first general election under the 2010 Constitution shall be held on March 4, 2013. All judges but one (Justice Martha Koome, who suggested that the elections should be on or before January 15, 2013) supported the decision.

2.5 Key Legal Challenges Arising from the March 2013 Elections

It is important to note that there have been highly commendable developments in the Kenyan electoral legal framework in comparison with what existed previously. However, it has to be conceded that the system continues to face challenges in a number of ways. It is through addressing these challenges that the system can be improved for the better expression of democracy in the country.

Article 81 of the Constitution of Kenya outlines the general principles for the electoral system. The principles include fair representation of persons with disabilities²² universal suffrage based on the aspiration for fair representation and equality of vote²³, free and fair elections²⁴.

Of particular concern is principle (e) under Article 81, requiring that the electoral system complies with the principle of free and fair elections. This principle indicates a high degree of centrality since

²² Art. 81 (c), Constitution of Kenya, 2010

²³ Art. 81 (d), Constitution of Kenya, 2010

²⁴ Art. 81 (e), Constitution of Kenya, 2010

unlike all other principles in Article 81, it is the only one that has been elaborated and explained. In order to be free and fair, the elections need to be “by secret ballot; free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner”). It is important to note that these principles, as expressed in this provision, are highly in consonance with international standards of free and fair elections²⁵.

2.5.1 Campaign financing

In order to have free and fair elections, the system has to ensure that voters are not negatively influenced to make political choices. Although integrity will always be a personal choice, the law needs to safeguard and ensure that money is not the sole motivation for the selection of a candidate.

This has happened for instance when it comes to the aspect of criminalizing voter bribery and regulating political parties funding. The law is, however, insufficient when it comes to the regulation of individual candidates whose campaign is not necessarily being conducted at the political party level and those who vie for seats independently of any parties.

Article 82 of the Constitution which recommends a list of legislations on elections to be enacted by parliament, does not mention specific legislation on funding or campaign financing. This omits the key aspect on the impact of finance on election outcomes.

Article 88 (4) provides that among the mandate of the IEBC, is regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election. This provision is insufficient owing to the fact that it has not been actualized in any way by the IEBC, especially with regard to individual candidates. The lack of specific rules and obligations of candidates goes to aggravate the ills of finance on democracy.

The 10th Parliament failed to enact the Election Campaign Financing Bill 2012 that sought to regulate election campaign financing for political parties and candidates.

2.5.2 Overlap of jurisdiction to more than one institution

The relevant articles related to elections and the electoral laws establish various institutions to deal with election related matters. As far as the resolution of disputes is concerned, some of these institutions include; the IEBC, the Registrar of the Political Parties and the Political Parties tribunal.

²⁵Guy S. Godwin, ‘Free and Fair Elections’

The law seems to confer concurrent jurisdictions to more than one of these institutions.

Article 88 (4) of the Constitution notes that the IEBC will, as prescribed by an Act of Parliament, settle electoral disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of the election results.

On the other hand, Section 40 (1) (a) of the Political Parties Act, provides that the Tribunal shall determine disputes arising between the members of a political party and 40 (1) (b) disputes between the member of a political party and a political party.

Section 31 of the Elections Act on the other hand provides for ‘nomination’ by a political party in accordance with the rules in the Constitution of the political party.

Regarding the definition in Section 2 of the Elections Act, a party is incapable of nominating. It can only undertake a party primary. Whatever dispute arises from that ‘nomination’ exercise would be a dispute between a member of a political party and a political party to be dealt with by the Political Parties Tribunal. This is not what the Constitution envisages in Article 88(4)²⁶.

It is clear from the foregoing that there exists incoherence between the Constitution, the Elections Act and the Political Parties Act.

This lack of legal clarity was expressed in the 2012 party primaries, where the disputes then, were handled by a special committee of the IEBC. There is need for the law to properly confer jurisdiction to the IEBC or other specific institution since the law is not indicative with certainty that the IEBC is the proper forum for such resolution of disputes.

2.5.3 Disputes relating to the First Round of Presidential Elections

The Constitution as well as the Elections Act is silent on the criteria for resolving disputes arising from the first round of presidential election. Article 140 entails only those disputes challenging the election of a president elect. At the first round of election and where the IEBC has declared that the interested party must go for a run-off, there would be no president elect and no one can challenge the results under article 140 of the Constitution. This lacuna was addressed by the Supreme Court Advisory Opinion No. 2 of 2012 in which the court held that the Supreme Court has jurisdiction over the whole range of presidential election disputes.

²⁶Under Article 88(e) the Commission is responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but not excluding election petitions and disputes subsequent to the declaration of election results.

2.5.4 The laws relating to the use of technology during elections

One of the key issues discussed during the presidential election petition was whether the law as it stood placed an obligation upon the IEBC to use technology. The petitioners had argued that the malfunctioning technology was designed to bestow an unfair advantage on one of the parties. Most of the discussions then centred on whether there was a specified obligation to apply the use of technology in the electoral process.

The court then determined in its ruling that there was a duty on the IEBC to conduct the elections in a fair, transparent and credible manner, but there was no obligation to use computer technology or otherwise. The court, however, commendably recommended that a probe be conducted in order to expose the complexities surrounding the procurement, acquisition and subsequent failure of the BVR kits.

As far as the clarity of the law is concerned, the court has, indeed, clarified the position that there is no obligation. But we believe that with time technology will become indispensable towards ensuring that elections are conducted in a more transparent and efficient manner.

2.6 Conclusion

International standards stipulate that a law must be certain, precise and predictable²⁷, and likewise such law must not be unjust, unreasonable and unpredictable²⁸. It is, therefore, hoped that there will be reforms to ensure clarity in the legal framework governing the electoral system and processes to address the challenges noted above.²⁹

However, the above mentioned examples show that there are still many important areas where additional work is needed in order to strengthen the capacity and ability of all institutions involved in the election processes to perform their duties in a fashion suitable to the new constitutional order of the country.

For example, the legal obligation of the IEBC to publish all registers forming part of the principal register must also be tightened. The public has the right to inspect all registers whether Biometric or otherwise for an election to be fair and transparent.³⁰

²⁷ *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, 9 March 1987 (US Supreme Court)

²⁸ *Minister for Immigration and Multicultural Affairs v. Khawar*[2002] HCA 14, 11 April 2002 (High Court of Australia)

²⁹ Refer to ELOG Recommendation 7.2.

³⁰ Refer to ELOG Recommendations 7.4 and 7.5.

Likewise, the legal framework needs to provide answers and solutions for greater accountability of the relevant actors in the election process. For example, the so called “party hopping”, which allowed the political candidates to switch from one political option to the other in the last moments prior to the elections, needs to be further regulated.³¹

³¹ Refer to ELOG Recommendation 7.7.

CHAPTER 3: KEY ACTORS IN THE 2013 ELECTION

3.1 Introduction

This chapter serves as a prelude to the discussions about the quality of the 2013 elections. It argues that while there was broad agreement on the breadth and depth of electoral reforms necessary to deliver credible, free, fair, and transparent elections, the important institutions that were birthed by these reforms were bedevilled by great expectations. They never met these expectations. Inherent institutional weaknesses and fragmented political support greatly undermined their effectiveness in managing the 2013 elections.

For purposes of this report, key institutions and actors are understood as those agencies and persons who played a critical role in complementarity, and not in opposition, to the mandate of the commission - to ensure that the 2013 general elections were democratic.

The Commission is responsible for conducting or supervising elections.³² It is a fundamental requirement of the Constitution that all these elections must be democratic. This is partly realised by the adoption of an electoral system which is underpinned by principles that include protection of the freedom of citizens to exercise their political rights, universal suffrage and holding of free and fair elections that are, transparent, free from violence and administered in an accountable manner.

Elections are quite complex and require significant resources and participation of different institutions, in a complementary and supporting role, to facilitate their success. In other words, the Commission - because of limitations imposed by specific legal and institutional mandate, inherent institutional frailties or dearth of financial resources - may not do all that is required to ensure the elections are free and fair. A few examples are illustrative. The Commission may suffer from a dearth of funds and the donors ensure the requisite financial and logistical support is provided. It may not “watch” over itself and, in this regard, the civil society and the religious organizations play an active watchdog role, in addition to providing the much needed civic education and mobilisation of public support. The politicians, mainly through Parliament, pass the relevant legal and institutional frameworks whose goal is to realize the changes in elections and management of elections. The executive provides security to ensure the elections are free from intimidation and violence.

Indeed, without the active participation of the key actors, electoral reforms would have been impossible. The credibility of the general elections would have suffered more without their

³² Article 88 (4), Constitution; s. 4, Independent Electoral and Boundaries Commission Act.

participation. In this chapter, we consider the effectiveness of these institutions in realizing the changes in elections and elections management that were envisaged in the Constitution.

The rest of the chapter is presented in four sections. The first section (3.2 below) discusses the role of the key actors in the development of the 2013 election/processes. This is followed by a review of the effectiveness of the institutions that resulted from the electoral reforms. A brief reflection and lessons from ELOG's engagement with IEBC is covered in the third section. The final section presents the main conclusions from the discussions in the preceding phases.

3.2 Institutions and Actors

Several institutions played very important roles in the last elections. Some of these key institutions include; the IEBC, the Registrar of Political Parties, political parties, Parliament, the Judiciary, the media, and non-partisan election observers. We consider each of these separately.

3.2.1 The Independent Electoral and Boundaries Commission (IEBC)

The IEBC was established to conduct and supervise elections and referenda in Kenya. Its functions include: the continuous registration of citizens as voters; delimitation of constituencies and wards; regulation of the process by which parties nominate candidates for elections; settlement of electoral disputes, including those related to nominations; voter education and facilitation of observation, monitoring and evaluation of elections³³. Its performance has, however, been varied with some of the roles executed better than others.

The IEBC was unable to continuously register voters. Several factors account for this. First, was the decision to undertake fresh registration of voters - in substitution of the register used during the referendum for the Constitution 2010 - using the biometric voter registration (BVR) system. However, voter registration did not start on time. In IEBC estimates, voter registration was to start in August³⁴, but the date was later changed to September³⁵ and later still to 18th November 2012³⁶. The genesis for this was delay in procurement of BVR kits. The Commission terminated the tender for procurement of the BVR kits citing irregularities and, instead, announced that it intended to use the manual registration system³⁷. After government intervention, the IEBC reversed its decision and bought BVR kits using a government-to-government arrangement between Kenya and Canada. The delay in buying of BVR kits and the consequent delay in the start of voter registration impacted on the timelines for compilation, inspections and publication of the voters' register. Also, the time was too short for the Commission to train staff.

³³ Article 88, Constitution of Kenya 2010

³⁴ Mosoku Geoffrey, Kenya: IEBC to Start Voter Registration in August, <<http://allafrica.com/stories/201207121318.html>>

³⁵ Joseph, Voter Registration Kicks off in September, <<http://m.news24.com/kenya/MyNews24/Voter-registration-will-kick-off-in-September-20120822>>

³⁶ Moses Njagah, *All set for voter registration as first batch of BVR kits arrives*, <http://www.standardmedia.co.ke/?articleID=2000069765>

³⁷ IEBC meets Parliamentary Committee on BVR and elections preparedness, <http://www.iebc.or.ke/index.php?start=44>

Second, the IEBC did not, convincingly implement the delimitation of boundaries. The IEBC inherited an incomplete task from the Interim Independent Boundaries Review Commission (IIBRC) and was required to complete the delimitation process of constituency and ward boundaries within a period of four months.

The IEBC finalized and published the delimitation of boundaries of constituencies and wards vide the National Assembly Constituencies and County Assembly Wards Order. This Order was contested in court by way of filing of over 125 applications - consolidated under *Republic v Independent Electoral and Boundaries Commission & another Ex-Parte Councillor Eliot Lidubwi Kihusa and 5 others* - made throughout the country challenging the boundaries delimitations by IEBC. The complaints were raised regarding the manner in which the 80 constituencies and 1, 450 County Assembly Wards were created, their distribution, their names, boundaries and areas of allocation. There were also grievances and controversies regarding the number of wards given to particular constituencies mainly on the basis of population, geographical, ethnic, clan, community and other interests and the adequacy of the wards allocated.

The third aspect relates to the management of the nomination of candidates. Because we discuss this in the next chapter, here we only outline the main issues. It is not clear whether and how the Commission implemented this requirement. The experience of the pre-election day processes strongly suggests that the Commission did not enforce the law on party nominations.³⁸ Although political parties were to use the party membership lists submitted to the Commission to conduct internal party nominations, these were only notionally complied with as some allowed those voting to use their party membership cards. Furthermore, although a disputes resolution mechanism was established, like the rest, it was belated, and mainly ineffective. For instance, the Commission constituted an internal dispute committee that heard and determined over two hundred disputes arising from political parties nominations within a period of three days. Although the problem was occasioned by a belated amendment to the Elections Act that allowed very restricted time for the conduct of political party primaries and the presentation of party nomination lists to the Commission, the IEBC surprisingly gave the impression that it could very easily manage the nominations despite its widely known institutional weaknesses. A bigger problem was that the IEBC lacked transparency and accountability by, for instance, locking out key stakeholders in its dealings and activities.

3.2.2 Registrar of Political Parties

The Registrar of Political Parties is responsible for, among other roles, registering, regulating, monitoring, investigating and supervising political parties to ensure compliance with the Political Parties Act. Therefore, the Registrar has the mandate for verifying and publicly making available

³⁸ Article 88(4)(d), the Constitution 2010

the list of all members of political parties and ensuring that no one is a member of more than one party at any one time. The present Registrar was appointed under the Political Parties Act 2007 and occupies an awkward position as an employee of the IEBC, an independent commission, while at the same time managing another independent office, the Registrar of Political Parties.

Certain challenges were experienced in enforcing the Act. Forty-seven political parties were registered under the Act. But this was arduous and cumbersome in terms of verifying statutory requirements before the parties were registered. With such obvious weaknesses, the political parties engaged in malpractices such as fraudulently registering party members. There was frequent party hopping making it difficult to update member's register. Yet the same register was to be submitted to the IEBC at least 45 days³⁹ before elections. The same register was to be used in conducting party nominations and to verify whether candidates were members of political parties on whose tickets they were vying. Since most political parties held their nominations on the last day of nominations, it was not easy to ascertain whether those nominated were members of the parties.

While the Registrar regulates political parties, the responsibility for regulating party nominations lies with the IEBC. With the Registrar being both a holder of independent office and at the same time an employee of another independent Commission, it was not surprising the Commission did not take any steps to develop mechanisms and procedures to regulate political party nominations. As a result, political parties had the latitude to conduct nominations that did not meet the Constitutional and statutory standards. For example, many parties failed to hold nominations but nonetheless declared a winner from such contests.

Finally, to a lot of the actors, the manner in which the IEBC established the date for general elections was also found to be indecisive and contributed to a lot of confusion in the election processes. For several actors, the IEBC was justifiably viewed as increasingly partisan and undermining its own independence by indulging the interests of the Executive.

3.2.3 Political Parties

Political Parties were key players in the electoral processes. They, among other roles, provided an avenue for vying for elective positions and promoting pluralistic debates by presenting alternative policy platforms. The Constitution and the Political Parties Act acknowledge their importance in governance and provide the legal and institutional framework for their formation, operations and management. Generally, political parties were grappling with the challenge to transform into institutions that could competently and effectively discharge their mandate in the society and this came out during the last general elections in some ways.

³⁹ S. 28 of the Elections Act initially stipulated 6 months but this was later amended to 45 days.

Before a political party is registered it has to satisfy several legal requirements including recruiting as members not fewer than one thousand registered voters from more than half of the counties. All political parties claimed to have met this requirement. But it was later discovered that they had fraudulently registered people as their members. The political party primaries also offer an avenue for members who win to be cleared and supported by the party to contest elections. Credible, free and fair party nominations are a precursor to credible, free and fair elections. Generally, the nominations were shambolic, disorganised and subverted the basic tenets of democracy. Like the other institutions created by Constitution and statutes, the parties were bereft of capacity to conduct nominations. Cases of rigging, violence and intimidation during the nominations were common.

As mentioned in section 3.3.2 above, the major political parties held their nominations on the very last day. They did not want candidates who lost to move and contest on tickets of other parties. Political parties' nominations were, thus, beset with challenges and difficulties, emanating from indiscipline in political parties, and lack of capacity and ability to conduct nominations. This forced the Commission to extend the deadlines for submission of party nomination lists by three days, from 18th to 21st January 2013, although not provided for in the law. This extension significantly reduced the time within which the Commission could reasonably and fairly settle political parties nominations disputes from seven days to three days. Predictably, a number of these decisions by the Commission were challenged at the High Court.

3.2.4 Parliament

From the accounts above, it is evident that the role of Parliament was two-fold – a helpful and supportive role, and an unhelpful and destructive role. We begin with the positive role. Parliament successfully enacted the laws relating to the elections within the time lines prescribed in the Fifth Schedule of the Constitution. Its Constitutional Implementation Oversight Committee (CIOC) was most supportive in this endeavour.

Yet even with the complementary support of the Commission on the Implementation of the Constitution, the quality of laws constituting the legal framework for managing elections (see Chapter 2) blighted the positive contribution made by Parliament. Since Parliament and the Executive play specific roles in the enactment of statutes, the two institutions must share blame in any slackness in effecting enactment. The amendments to the Elections Act to serve their interest by, for instance, removing education qualifications and reducing time for submission of nomination rules and party membership lists,⁴⁰ in the tail end of its term, the structural weaknesses that it bequeathed to institutions such as the IEBC, the Registrar of Political Parties, and the dilution of the supporting legal framework for implementing Chapter Six of the

⁴⁰ The Elections (Amendment)(No.3), Act No.48 of 2012.

Constitution on leadership and integrity, are examples of how unhelpful the Executive and Parliament were in the preparations for the 2013 elections.

3.2.5 Judiciary

Like the Parliament, the Judiciary played both a negative and positive role in the March 2013 General Elections. But unlike Parliament that was seen to have greatly undermined its positive contribution, the Judiciary was generally viewed as having played a positive and supportive role. First, the Chief Justice appointed the Judicial Working Committee on Elections to advise on the handling of disputes arising from elections. The Committee was instrumental in formulating the Elections (Parliamentary and County Elections) Petition Rules, 2013 and Supreme Court (Presidential Election Petition) Rules, 2013 that provide procedures governing conduct of elections petitions. Second, and mainly as a result of the first, special election courts were established and specific time frames for resolving disputes were established. This is unprecedented in the history of Kenya's elections.

With regard to negative role, the Judiciary suffered considerable loss of credibility in three instances. It was justifiably viewed as undermining the realization of the constitutional threshold for elections. The first instance was the expectation that it would enforce the constitutional requirement on leadership and integrity. However, when cases challenging the suitability of some Presidential candidates were heard in the High Court, the Court's decision⁴¹ to allow the concerned candidates to participate in the elections, whilst supported by the relevant statute, were considered a betrayal of expectations that had been generated by the Judiciary.

The second instance relates to the advisory decision by the Supreme Court on the implementation of the one-third rule for ensuring gender equality and participation.⁴² The decision by this Court to defer the implementation of the progressive rule on gender, while defensible, may have served to continue the marginalization of women in elections and politics. The third instance was the case of the determination of the date for elections.

3.2.6 Media

The Kenyan Media is arguably well developed with a diverse composition of electronic, print, and cyber media. Moreover, the Constitution of Kenya 2010 has considerably raised the standard for freedom of expression and the media. It prohibits the State from infringing on decisions of the media, including of the public broadcaster. Although there was robust public debate on reviewing the policy and legal framework to ensure further independence of key media actors such as the Communications Commission of Kenya, there was notable reluctance by the state to grant media

⁴¹ *International Centre for Policy and Conflict & Others v. The AG & Others*, Petition N. 552 of 2012.

⁴² *In the matter of Advisory Opinion*, Supreme Court of Kenya, Reference No. 2 of 2012.

freedom; ensure the independence of the public broadcaster; and facilitate access to information in accordance to Article 35 of the Constitution on Freedom of information.

While it was not possible to assess the impact of the various media on the 2013 elections, it is generally agreed that the media contributed to the enhancement of transparency and accountability in the elections. It was also clear that both the political parties and the state were not always supportive of the media in instances that were not favourable to their respective courses. The political parties also intimidated and in some cases prevented journalists from covering their political rallies.

3.3 ELOG's Engagement with the IEBC

Public participation is one of the distinguishing features in the Constitution of Kenya 2010 that justify its progressiveness. The Constitution grounds public participation as a key national value and principle of governance.⁴³ Further, the Independent Electoral and Boundaries Act require IEBC to observe the principle of public participation and consultation with stakeholders in the performance of its function.⁴⁴ Of importance is Article 88(4) (h) of the Constitution which grounds the work of election observation within the Kenyan legal framework by mandating the IEBC to facilitate observation, monitoring and evaluation of elections. The Elections Act and resultant regulations also make provision for accreditation of observers. The legal and policy framework outlined above was the basis upon which ELOG engaged with the IEBC. ELOG has endorsed the Declaration of Global Principles for Non-Partisan Election Observation and Monitoring by Citizen Organizations and Code of Conduct for Non-Partisan Citizen Election Observers and Monitors⁴⁵ that guide its work including cooperation with the election management body.⁴⁶

Although our engagement with the IEBC was productive and greatly contributed to our success as non-partisan observers, it also suffered some important challenges. In our view, on the whole, the engagement with the IEBC contributed to ELOG's success in planning and execution of the 2013 election observation efforts. This success was as a result of constant and consistent engagement with the IEBC including the designation of the Vice Chair of the Commission as the focal point between the Commission and ELOG. The Commission instituted stakeholder dialogue fora, which were designed to provide stakeholders with information and updates from the IEBC during the electoral period. ELOG participated in these meetings and made relevant presentations and interventions as was relevant.

⁴³ Article 10 (1)(a)

⁴⁴ Article 26

⁴⁵ The Declaration of Global Principles was commemorated on April 3, 2012 at the United Nations, New York and is endorsed by over 160 nonpartisan election-monitoring organizations in more than 75 countries on five continents.

⁴⁶ Paragraph 21 (d), Declaration of Global Principles n3 above

ELOG also participated in the development of the guidelines for International and Citizen Observation. In this regard, ELOG played a key role in the development of the first drafts, which the IEBC drew on to finalize and publish the guidelines. This engagement enabled inputs from observers into the document in line with international and regional standards for election observation. But even with these successes challenges still existed.

3.3.1 Effective Communication and information sharing

In order for nonpartisan election observation by citizen organizations to be conducted successfully, certain conditions and requirements should be present. Key of these is effective communication with an Election Management Body. ELOG noted that whereas IEBC had established the stakeholder dialogue fora to engage with stakeholders, the fora were not consistent and, therefore, were not as effective as they were designed to be. Although the fora brought together all stakeholders, ELOG noted that they ought to have been structured specifically to target observers- in the run up to the elections. These would have afforded an opportunity for better communication and cooperation between observers and IEBC, not only at the policy level but also in the regions. Unfortunately, for inexplicable reasons, IEBC unexpectedly stopped holding these sessions, way before commencement of voter registration.

3.3.2 Access to Resources to enable effective election observation

Secondly, unfettered access to information from the Commission is critical towards effective and efficient election observation exercise. ELOG in its various communications with the IEBC, made requests of resources it required to undertake its work.⁴⁷ ELOG had set out to observe various aspects of the electoral process including the voter registration exercise and E-day processes, using advanced tools of election observation such as the Parallel Vote Tabulation (PVT) and Voter List Audit. Effective deployment of these observation tools relied on timely access to the voter register and lists of polling stations (lowest electoral unit) with voter assignments. In addition, and to enable ease in using these documents including drawing the PVT sample and analysis of the voter register, ELOG requested for electronic and machine accessible formats - Microsoft Excel or CSV file formats. PDF files are unsuitable as they create the risk of introducing errors during the conversion process. ELOG faced challenges in accessing these documents which greatly impacted on its planning. Whereas the IEBC eventually shared the lists of polling stations with ELOG, this came very late in the day. ELOG was, however, not able to conduct a Voter List Audit before the elections as planned, since IEBC did not avail the final Voter Register as requested. ELOG notes

⁴⁷ See ELOG - IEBC Communication dated 30th August 2012.

that access to these instruments is a matter of right for observers, which should be facilitated by the IEBC in accordance with the Constitution.⁴⁸

3.3.3 Observer Accreditation and access to polling places

Article 18(b) of the Declaration of Global Principles for Non-Partisan Election Observation and Monitoring by Citizen Organizations is emphatic on the need for EMBs and other governmental authorities concerned with electoral related processes to honour the right for citizens to participate in government and public affairs. This includes providing accreditation, where it is required for access, in a timely manner, without proscribed discrimination or unreasonable restrictions. The Constitution of Kenya 2010 and the Elections Act 2011 make provision for accreditation of observers. ELOG received timely accreditation for over 9,000 personnel from the IEBC that enabled the deployment of observers in the pre-election period and on Election Day.

IEBC's progressive policy on accrediting long term observers greatly enhanced ELOG's work to enable deployment of observers in the pre-election period. This also reduced the numbers of additional accreditation sought on Election Day, as long-term accreditation was sufficient. It is commendable that ELOG observers were allowed access into most of the polling stations. They were also allowed the use of mobile phones inside the polling stations. This enabled effective and timely reporting and, consequently, the overall success of the ELOG PVT exercise.

ELOG, however, identified certain accreditation procedures that the IEBC should revise to enhance effectiveness in delivery of quality observation work. First, the requirement to submit photographs for each observer before accreditation was a tedious and time consuming exercise. Citizen election observation involves the deployment of thousands of observers across the country. Such a requirement, thus, has the potential to hamper election observation. It is not only burdensome but also time consuming as observer groups have to collect photographs from thousands of observers spread out all over a country. They then have to supply the EMB with a complete and comprehensive list before accreditation badges can be issued. Further to this, and where the accreditation badges are printed with individual observer photographs, the modalities of ensuring that the unique accreditation badge reaches the correct observer are, to say the least, logistically painful. Moreover, the use of photographs considerably slowed the accreditation process since the Commission had challenges matching photos with names.

Secondly, and whereas swearing of oaths of secrecy is no longer a requirement for observers, there were cases where ELOG observers were turned away. This was mainly as a result of adamant returning and presiding officers who insisted on the production of an oath of secrecy and letters from IEBC, in addition to the accreditation badge. Whereas a number of these cases were resolved

⁴⁸ ELOG authored a draft Memorandum of Understanding between ELOG and IEBC to guide mutual cooperation. The Memorandum was never executed.

on Election Day and observers allowed access inside polling stations, Kandara Constituency election officials maintained that oaths must be produced, thereby, hampering observation by ELOG observers.

3.4 Conclusion

It is clear that these key actors i.e. the IEBC, Registrar of Political Parties, Political Parties, Parliament, Judiciary and the Media played an important and indispensable role in determining the breadth and depth of electoral reforms necessary to deliver credible, free, fair, and transparent elections. They also helped ensure the adoption of the relevant constitutional framework. However, our assessments of the effectiveness of the institutions revealed mixed results. Although there were positive attempts by these institutions to implement their respective mandates, they were also bedevilled by great expectations, inherent institutional weaknesses, and fragmented political support.⁴⁹

⁴⁹ Refer to ELOG Recommendations 7.4, 7.5, 7.6, 7.7, and 7.10.

CHAPTER 4: ASSESSMENT OF PRE-ELECTION DAY PROCESSES

4.1 Introduction

This chapter discusses the results of the assessment of the pre-election day processes. We argue here that even though there were remarkable, even impressive improvements in the pre-election day processes, these did not fully meet the expectations laid out in Chapter Seven (Representation of the People) of the Constitution. This chapter is organized in four parts. The first section (4.2 below) presents the methodological approach used for the assessment. This is followed by a discussion of the results, and the conclusion.

4.2 Methods for the Assessment

The pre-election period covers the processes that take place before the elections. These include delimitation of electoral boundaries, appointment of election officials, provision of civic and voter education, the registration of voters, the compilation and inspection of the voters' register, campaign finance, and review and enactment and/or amendment of laws and regulations governing elections. Our assessment focused on: voter registration; voter and civic education; party nominations; participation of women, people with disability and youth; campaign financing; violence; and delimitation of electoral boundaries.

We were fully aware of the scope of pre-election processes but addressed the above mentioned for three main reasons. First, our knowledge and experience of the elections showed that these areas were extremely critical in realizing the constitutional threshold for elections. Second, these also happened to be areas where we had exceptional capacity and experience since ELOG member organizations have monitored elections from 1992 as members of different bodies before settling for ELOG in 2010. Finally, we had time and financial constraints that could not allow for broadening the scope of the assessment.

Because of the diverse and complex nature of the pre-election day processes, our methodology was of necessity elaborate. This included the deployment of long term observers (LTOs) between June and October 2012 and December to February 2013. The LTOs were trained and deployed in all 290 constituencies with the main objective of reporting on threats to the electoral process during the pre-election period. All the reports from the field personnel were consolidated into monthly reports and disseminated through the ELOG newsletter, *Darubini ya Uchaguzi*.⁵⁰ In addition to the LTO work, ELOG member organisations employed various other methods in monitoring specific aspects of the electoral process. These were baseline mapping of violence and

⁵⁰ ELOG Long Term Observation Reports are annexed to this main report.

identification of violence hotspots, extensive reviews of legal and other electoral materials, interviews with key informants, and focus groups.

Table 4.1 summarizes the methods we employed to assess the pre-election day processes.

Table 4.1: An overview of methodology for pre-election day processes

Process	Method	Implementing ELOG member
Comprehensive Long Term Observation covering violence incidences, inflammatory language and incitement, voter importation, riots and disruptions, voter registration issues, vote buying and voter bribery and misuse of government resources.	Monthly reports between June 2012 to February 2013 from 542 ELOG long term observers	Joint ELOG partners effort
Violence	Mapping of hot spots	CJPC, CRECO
Issuance/ acquisition of identity cards	Focus groups, key informant interviews	Youth Agenda,
Youth participation	Extensive reviews of electoral materials, focus groups	Youth Agenda
Campaign financing	Key informant interviews, literature reviews	CGD
Compliance to Political Parties Act	Surveys, key informant interviews, focus groups, literature reviews	CGD, UDPK
Participation of women	Desk and literature reviews, review of political and legal framework, gender matrix	FIDA
Participation of persons with disabilities	Literature review, focus groups, key informant interviews	UDPK
Boundaries delimitation	Desk and Literature reviews	IED
Voter Registration Monitoring	Reports from field monitors	IED
Voter Education	Focus groups, key informant interviews	ECJP
Party Nominations	Reports from field monitors	Joint ELOG partners effort
Participation of marginalized communities	Literature review, focus groups, key informant interviews	SUPKEM

While every care was taken to ensure the assessment of the pre-election day processes was reliable and valid, we nonetheless experienced some challenges. First, all the participating ELOG members did not use the tool for long-term observation. The observation tool was not amenable to all the areas we observed. The second challenge related to funding and human resources. We faced limitations in the acquisition of funds and recruitment of staff. The corollary was some reduction in the duration and areas we covered in the assessment. The above constraints notwithstanding, the reliability and validity of the assessment was not significantly affected.

4.3 Key Findings

4.3.1 Delimitation of Boundaries

Before the promulgation of the Constitution of Kenya 2010, the legitimacy of electoral boundaries was much contested. There were also astounding accounts of gerrymandering in how electoral areas were previously established. For instance, the Kriegler Commission noted that:

The delimitation of boundaries in Kenya as presently established does not respect the basic principle of the equality of the vote. The differences are unacceptable in terms of international standards. The Kenyan legal framework does not establish, as is accepted international practice, the maximum possible departure from the principle of equality of the vote...

As a result, the Kriegler Commission and key political actors concurred that the integrity of the electoral process was impaired. Key among the recommendations by the Kriegler Commission was that the process of delimitation should be transparent and conducted in consultation with the public. It also recommended that constituency delimitation be removed from the defunct Electoral Commission of Kenya (“ECK”) and turned over to The Interim Independent Electoral Commission (“IIEC”) and the Interim Independent Boundaries Review Commission (IIBRC). The mandate of the IIBRC was to make specific “recommendations to Parliament on delimitation of constituencies and local authority electoral units and optimal number of constituencies on the basis of equality of votes taking into account.”

Because the IIBRC completed its work in November 2010, the IEBC finalized and published the delimitation of boundaries of constituencies and wards vide the National Assembly Constituencies and County Assembly Wards Order. These included, amongst others, the names and details of the boundaries of the 290 constituencies. But the process of delimitation of boundaries was, as expected, fraught with a lot of controversy. Political interests played in a variety of unproductive ways. As a result of publication of the final report and the National Assembly Constituencies and County Assembly Wards Order, 2012, there were over 125 applications - *consolidated under Republic v Independent Electoral and Boundaries Commission & another Ex-Parte Councillor Eliot Lidubwi Kihusa & 5 others*- made throughout the country challenging the boundaries delimitations by IEBC.

Complaints were raised regarding the manner in which the additional 80 constituencies and 1, 450 County Assembly Wards were created, their distribution, their names, boundaries and areas of allocation. The movement of sub-locations hitherto situated in one constituency to a new constituency also generated further controversy. There were also grievances regarding the number of wards given to a particular constituency mainly on the basis of population, geography, ethnic, clan, community and other interests and the adequacy of the wards allocated. Consequently, the aggrieved parties filed cases raising various complaints and grievances and these were consolidated into one case. Even though the Court ruled in favour of the IEBC and the new electoral boundaries and areas approved, there was a nagging feeling among a considerable section of politicians that the court decision undermined the constitutional standard.

4.3.2 Voter and Civic Education

Like the delimitation of boundaries, voter and civic education were not without challenges. Chiefly, these processes were hastily and belatedly implemented. Article 88(4)(g) of the Constitution requires the Commission to carry out voter education, and for this purpose, has to establish mechanisms for the provision of continuous voter education and cause to be prepared a voter education curriculum.⁵¹ The essence of voter education was to disseminate information, materials and programmes whose goal was to inform voters about the electoral process. Specifically, voter education imbues voters with understanding of their rights and obligations in the electoral process; builds a democratic culture which can promote and protect free and fair elections; assists in forestalling electoral malpractices such as voter buying, intimidation and rigging; and provides voters with factual information that they could use to participate in the electoral process knowledgeably.

The IEBC set out the objectives of voter education as:

- To arouse public interest in the electoral process and their involvement in the process of electing political leaders.
- To inform the public on the IEBC - its history and mandate.
- To inform the public on the specific measures that IEBC has put in place to restore public confidence in the electoral process and encourage active public participation in the process.
- To inform the public on the rationale and importance of participating in elections.
- To educate the public on the electoral process.

Although IEBC had overall mandate for the coordination of voter education, other players were also involved. Indeed, the Commission partnered with several NGOs, CBOs and self-help groups, amongst other organizations, to do so. For instance, the Ecumenical Centre for Justice and Peace

⁵¹ S. 40, Elections Act

developed a manual that covered many electoral issues such as rationale for voting and what happens during the actual voting.⁵²

Several methods were used to provide voter education including focus group discussions, seminars and information technology. Although voter education was carried out in all the constituencies, it was of varying and uneven quality and quantity. Invariably, voters in some areas were better equipped to participate in the elections than others. The differences in civic and voter education notwithstanding, our assessment found that, overall, the voters were inadequately prepared. Moreover, it was instructive that organizations that participated in civic and voter education relied heavily on donors for financial support. Furthermore, the IEBC did not give clear guidelines on financing and implementing timely civic and voter education.

4.3.3 Voter Registration

Although not constitutionally set, the adoption of a new voter registration procedure, the Biometric Voter Registration (BVR) system for the 2013 election, was the singular and broadly accepted standard for voter registration. However, the procurement and implementation of the BVR system was also arguably the most important aspect of the voter registration that was unsatisfactorily done. The BVR captures specific information such as fingerprints, facial features, name, gender and identification number and by so doing is able to curb fraud such as some of the fraudulent practices of manipulation and vote rigging prevalent in the manual registration system such as double registration, registration of unqualified voters and the retention of names of deceased voters on the voter roll.

The process of acquiring the BVR kits was riddled with controversies that eroded the confidence in the voter roll and the Commission. A high-profile procurement process for the BVR kits in the amount of \$50 million USD was cancelled occasioning public concern about the Commission's independence and ability to conduct elections and allegations of political sabotage. As a result of the controversy, the Commission terminated the process of acquiring BVR kits. It announced that it intended to use the Optical Mark Reader, which was used in the 2010 referendum. However, after government intervention, the IEBC reversed its decision and was to buy 15,000 BVR kits using loans negotiated between the government and Standard Chartered Bank of London.

Under the Elections Act, voter registration would have started in the month of September 2013 while compilation, inspections and publication of the register would have commenced in the month of December 2013.⁵³ However, because of the delay in procuring the BVR equipment, voter registration took a month, starting in November and ending in December. Compilation, inspections and publication of the register also took a half a month instead of the one-month initially

⁵² NCKK AND ECJ Report on Voter Education.

⁵³ Ss 5 and 6 Elections Act.

contemplated in the law. Parliament had to amend the Elections Act to accommodate change in dates for registration of voters and compilation of the register necessitated by the delay in procuring the BVR. These compressed timelines, caused by delay in procuring the BVR equipment, clearly affected preparations for elections.

During registration, a number of challenges also came up including malfunctioning of some of the BVR kits, few BVR kits, low turnout of voters, insecurity in some of the regions in Kenya, lack of national identity cards by many people and misconception by some people that the BVR kits were harmful to the body.⁵⁴ In the context of the foregoing, that the BVR and electronic voter registration was bound to fail was in much evidence. Surprisingly, however, the IEBC, the government, political parties, voters, and other actors did not raise any objections and instead urged for continuation of the elections as planned on March 4, 2013.

4.3.4 Party Nominations

Nomination of political parties' candidates to contest elections was a two-stage process. First, political parties carry out internal party nominations, based on party constitutions and nomination rules. Second, political parties forward to the Commission names of candidates they nominate. Also, candidates nominated by political parties are required to submit certain credentials and information to the Commission so that they are cleared to contest elections.

With regard to internal party nominations, the law provided mechanisms for their conduct. Political parties were to submit their nomination rules to the Commission at least six months before the nomination of its candidates⁵⁵, normally forty-five days before elections⁵⁶, estimated to be on or before 18th January 2013. The goal was to enable the Commission review the rules so as to ensure they would engender free and fair elections. Political parties were also to submit to the Commission a party membership list of the party at least three months before the nomination of the candidate.⁵⁷ The parties were to use the list to conduct internal party nominations. The Commission was to use the list to verify that candidates who were nominated by political parties were actually their members. Parliament, for selfish reasons, amended the Elections Act to considerably reduce when these activities were to be carried out.

On account of the Elections Act, political parties were to hold nominations on or before 18th January 2013 and submit the list of nominees to the Commission on the same day. However, when carrying out the exercise, it was imperative that they make provision for settling disputes that could arise, meaning that the nominations need to have been carried out earlier than this. Only

⁵⁴ IED and ELOG, Second Statement on BVR Processes, 23rd December 2012. The Elections Act was amended to allow people to register using ID waiting cards.

⁵⁵ S. 27, Elections Act.

⁵⁶ S. 13(1), Elections Act.

⁵⁷ S. 28, Elections Act.

candidates who participated in party nominations by midnight Friday 18th January 2013 were eligible for nomination to contest elections. Most of the parties, especially the big ones, chose to have the nominations on the last day set out in the law. This was to prevent those who lost nominations from defecting to and contesting in other parties. The result of this is that the parties did not conduct the nominations effectively and fairly and there was no time for them to arbitrate on disputes presented by contestants. The Commission, although not provided for in law, extended the nomination deadline by one day and allowed for three days for dispute resolution.

Candidates who were not satisfied with internal parties' dispute resolution mechanism were allowed to further appeal to the Commission's internal dispute resolution committee. The committee heard and determined over two hundred disputes arising from nominations. Some decisions of the Commission were challenged at the High Court.

The functions of the Commission are set out in the Constitution and the IEBC Act. They include the regulation of the process by which parties nominate candidates for elections.⁵⁸ It is not clear whether and how the Commission implemented this requirement. There is a view that the Commission did not enforce the law as regards nominations. For instance, the parties were to use the party membership list submitted to the Commission to conduct internal party nominations. This appears not to have been complied with and media reports indicate that some may have used party membership cards.

Generally, as widely expressed by key political actors, the nominations were shambolic and abused basic tenets of democracy and fairness. There were reports of violence and intimidation and lack of internal party democracy, including favouritism and nepotism. The parties lacked capacity to conduct successful nominations. Moreover, the ability of the IEBC to manage the elections was seriously weakened by the way it guided the nomination processes. Similarly, the conduct of the political parties during the party nominations also cast serious doubt about their ability to promote transparent, open, free, and fair elections.

4.3.5 Violence

The assessment of violence during the pre-election day processes focused on eight specific areas. These included:

- Violence - victims of violence, motivation/reason for violence, participants or perpetrators of violence;
- hate speech - victims of hate speech, medium of incitement;
- disruption of campaigns;
- vote-buying/bribery;
- movement or displacement of populations;

⁵⁸ The Constitution, Art 88(4)(d)

- misuse of government resources;
- disputes over electoral boundaries; and
- issuance of national identity cards

The assessment of violence revealed intensification of violence and hostility in several parts of the country. There were, however, seven main findings that we established. First, violence was increasingly and consciously used as an unfair means of achieving political objectives. We were concerned that there were indisputable facts to show that various actors applying violence to meet political objectives and gain power.

Second, while violent incidences were felt across the country, physical violence affected the youth and female candidates more. Third, concerns on the ability of the security agencies to secure the lives and properties of residents were increasingly raised in all the areas where we monitored violence. Fourth, we also noted pre-emptive responses, mainly relocation of people from hot spots to relatively safe areas. This not only disrupted their normal livelihood, but also affected the voters who would have been available in these hot spots. Fifth, we also found that both the civilian and security agencies actively participated in violence and/or abetted violence. Sixth, while there were notable increases in hate speech particularly transmitted via the electronic media, there was surprising inability by the state and institutions such as the National Cohesion and Integration Commission to manage the outraging menace.

4.3.6 Campaign Financing

The absence of a substantive law governing campaign financing was a major blight in the preparation for elections free of “.... *intimidation, improper influence or corruption.*”⁵⁹ From the outset, it was very clear that the process of enforcing campaign and political financing regulations was poor. Furthermore, the existing legal framework for campaign and political financing was not only inadequate but also suffered incoherent policy. Yet both popular media reports and our own assessment showed that the 2013 elections were undoubtedly going to be the most expensive ever in Kenya’s electoral history.

Our assessment of the existing legal and policy frameworks showed that there were no clear priorities, strategies and parameters for ensuring compliance with the laws or regulations and plans for their effective implementation. The institutions mandated to enforce the regulations had had no training or capacity building and also suffered insufficient technical, human and financial resources. A coordinated framework for all the agencies responsible for implementing various laws and rules on campaign and political financing was glaringly missing. Political parties, politicians,

⁵⁹ Art 81 (e)(ii)

public officers, state institutions, private sector, and organizations including civil society had also not been fully informed of their legal obligations under the new laws and regulations.

Although there was a major omission in not establishing substantive laws on campaign financing, our analysis of the existing frameworks revealed some positive aspects. First, inherent in Kenya's campaign and political financing regulations was the aim to prevent political corruption and misuse of public resources, regulate political party funding, regulate campaign funding and expenditure, overcoming inequalities between political parties and candidates and provide public funding for candidates and political parties.

Under the *Election Act 2011* political parties have access to state owned media services, and public officers are prohibited from publicly indicating support for or opposition to a political party or a candidate, or engaging in the activities or campaign activities of a political party or candidate or using public resources to initiate new development projects. The *Election Act 2011* also prohibits the use of public resources by candidates during elections and empowers the Independent Electoral and Boundaries Commission to demand a full account of all public resources ordinarily at the disposal of the candidates, where the candidates are members of parliament, county governors, deputy county governor, or members of county assemblies. It also criminalizes bribery of voters and election officials.

The *Independent Electoral and Boundaries Commission Act 2011* sets out the functions of the Independent Electoral and Boundaries Commission to include; the regulation of money that may be spent by or on behalf of a candidate or party in respect of any election. The Independent Electoral and Boundaries Commission is therefore the main enforcement body responsible for overseeing and controlling the operations of campaign and political financing practices.

Under the *Political Parties Act 2011* the Political Parties Fund administered by the Registrar of Political Parties was established. It regulates the source of funds of a political party, the distribution and the purpose for which the Fund may be used and makes it compulsory for a political party to declare its assets and liabilities ninety days before a general election. It also spells out the manner in which a political party should keep and audit its accounts.

While the existing legal and policy framework bears positive and supportive aspects for campaign financing, these were woefully inadequate to both ensure and assure a purge of intimidation, improper influence and corruption in the elections that were to be conducted on March 4, 2013.

4.3.7 Participation of women

In addition to observing by-elections that were held during the period covered by the assessment, we focused on four specific areas in appraising the quality of participation of women. Although the results of the observation of the by-elections indicated some improvement in women

participation, the large number of assisted women voters observed pointed to the need for increased effective voter education and the provision of trusted and credible assistants.

Nominations Process

While the nomination fees were lowered by half for women candidates for a number of elective positions, the envisaged benefits were difficult to harness. For example, many women candidates who would ordinarily be excluded from nomination because of higher nomination fees participated in the nomination process. But without a comprehensive and supportive campaign finance statute, the difficulties faced by women in raising campaign funds remained. Although unprecedented and indicative of an aspiration to alleviate historical economic and political injustices, the lowering of fees on its own cannot significantly enhance participation of women in the electoral process.

The number of women candidates was higher than in previous elections. This however, did not necessarily indicate significant gains for women participation in elections. Since the 2010 Constitution is clearly progressive, the increase in the number of women candidates was not unexpected. But because of the many reports of intimidation, violence, and irregularities targeted against women, genuine increase of women's participation in a free and fair manner was greatly undermined.

Logistical problems at the IEBC, specifically the delays with which they have produced statistics regarding women who were wrongfully denied nomination, led to lapsing of statutory time limitations to access dispute resolution mechanisms. Such delay denied effective remedies for such women. These violations, including restrictions to the right to access information further constrained the participation of women.

Legal Analysis

The gender matrix was used to review the electoral legal framework. This was also circulated to other key stakeholders such as the Kenya Law Reform Commission (KLRC) and the Commission for the Implementation of the Constitution. The analysis identified gaps in the legal framework and clear opportunities for future interventions to enhance women's participation and representation in the electoral and political process. We utilized this knowledge by sensitizing political parties on effective measures aimed at including women that were identified as lacking from the Political Parties Act. Generally, our engagement with political parties and the Office of the Registrar of Political Parties also fostered relationship with bodies that hold key access paths toward increasing women's participation.

Representation

ELOG's in-depth research study on women's representation in political parties will also be disseminated to key power and duty holders such as the IEBC, Office of the Registrar of Political Parties, civil society organizations and media. The aim here is to highlight areas for intervention, strategies for change and influence these bodies to increase women's participation by addressing

various gains and challenges. The study will also inform areas for legal reform relating to increasing the gender responsiveness of electoral and political processes.

From the above, in contrast to earlier elections, we note that while there was remarkable improvement in conditions that would enhance participation of women, these improvements were too little to result in significant changes in the participation of women.

4.3.8 Participation of People with Disabilities

Compared to previous elections, the Constitution of Kenya 2010 and the Persons with Disabilities Act 2003 radically changed the supporting framework for the participation of persons with disabilities in elections. For instance, the Persons with Disabilities Act, 2003 promotes the rights of persons with disabilities particularly in access to rehabilitation, education, work, and environment. The Persons with Disabilities Act, 2003 also provides for voting rights to include entitlement of persons with disabilities to be assisted by persons of their choice in voting presidential, parliamentary, and civic elections. The Act further provides for accessibility of all polling stations, and provision of necessary devices and services to facilitate persons with disabilities to exercise of this right. But even with such an unprecedented and supportive framework, the participation of persons in the pre-election process left a lot to be desired. Since the Constitution of Kenya 2010 specifically promotes the participation and representation of persons with disabilities, institutions charged with the mandate of handling elections have to ensure that persons with disabilities participate both as voters and as candidates for various elective positions.

Our assessment of participation of persons with disabilities was limited to five areas; namely: the voter register, political campaigns, independence and sanctity of the vote and assisted voting, persons with intellectual disability, and quality of voting facilities. Beginning with the voter register; we found that although the UPDK and other disability rights organizations lobbied for the voter register to include specific details of voters with disability, this was not done. This anomaly greatly undermined the rights of voters with disability. Since the data on voters with disabilities was not captured, it follows that IEBC could not possibly have adequately provided reasonable accommodation for persons with disabilities as required. Apart from an affirmative action for persons with disabilities not to queue, there was no initiative provided to persons with disabilities to support independent voting. The use of technology such as the BVR kits in the registration process in many instances also disadvantaged the right of persons without limbs.

In view of the fact that political campaigns were violent, persons with disabilities were invariably more adversely affected. Moreover, the rules and practice on campaigning process failed to mitigate the negative impact on candidates with disabilities. Given the violence that was experienced during the political party nominations; the participation of persons with disabilities was irretrievably undermined.

Although Article 81 (e) of the Constitution provides for free and fair elections by secret ballot and free from violence, intimidation, improper influence or corruption, we found that IEBC did not implement anything that would ensure the independence and sanctity of the vote and assisted voting for voters with disabilities. UPDK continued to lobby the IEBC to also consider making the ballots accessible through the provision of a tactile ballot. The Convention on the Rights of Persons with Disabilities defines accessible communication to include large print, accessible multimedia as well as written, audio, plain language, human-reader, and augmentative and alternative modes, means, and formats of communication. From the assessment, it was clear that the above lobbies did not also yield any results, hence continued exclusion of persons with disabilities in the elections.

Although persons with mental disability are allowed to vote, our assessment showed that there was need for effective support mechanisms to enable voters with intellectual disability to vote. The practical challenge, however, remained ensuring persons of unsound mind cannot vote, on one hand, whilst on the other hand, ascertaining that persons with disability are not prejudiced.

The final aspect in assessing the participation of persons with disabilities in the pre-election day processes related to voting facilities. Like the other assessments above, quality of voting facilities was simply not supportive of the participation of persons with disabilities. This was evident in the following:

- Architectural barriers: at some polling stations, there were gutters and steps, clearly an inconvenience and a deterrent for voters with disabilities. Roads leading to some of the polling stations were not accessible to persons with disabilities especially those on wheel chairs. Toilets around these polling stations were not accommodative to the needs of persons with physical disabilities.
- The polling station: barriers pertaining to the polling station include hazardous curbs, steps or stairs, inaccessible entrances, walkways and narrow doors.
- Voting furniture: barriers in this category usually manifest themselves in polling booths which are too high and too narrow for wheelchair users, lack of provision of disability friendly voting furniture. IEBC did make an effort to provide low-level polling booths. But not all polling stations had one.
- New technologies: the use of the electronic voter register was also a disadvantage to persons with disabilities who do not have fingers. There were complaints that this process was prejudiced against such voters.
- Access to information: Access to information particularly for the deaf remained a major barrier. This was experienced during the voter education exercise. The general information provided through television for the general public was not accessible to deaf persons. The information was not interpreted, nor did it have sub-titles and inserts. Additionally, support

from IEBC to Disabled Persons Organizations to conduct targeted education to persons with disabilities was not forthcoming. UDPK was listed as one of the organizations to be funded by IEBC to conduct voter education. However, UDPK did not receive any funding from IEBC to facilitate targeted voter education. Access to information during the Election Day is a challenge that the deaf have to contend with. Since IEBC does not know where deaf persons vote, it is not surprising that sign language interpretation services are not provided by IEBC during the E-day.

4.3.9 Participation of the Youth

Like the women and persons with disabilities, the participation of the youth in the pre-election processes was limited. Our assessment of participation of the youth focused on the following areas.

- a) acquisition of national identity cards;
- b) voter registration;
- c) participation in political party nomination processes;
- d) candidature for the 2013 general elections;
- e) affirmative action for the youth, i.e. young people living with disabilities and minorities; and
- f) affirmative action for the young women.

Our assessments show that the youth experienced significant difficulties in accessing identity cards. This was despite early calls to government to ensure the youth were not denied their right to participate in elections because of lack of identity cards. The youth felt the second generation identity cards was a progressive step towards ensuring a free and fair election because of the clear personal image of an individual hence easier for identification than the old system. But there was a strong feeling that the issuance of IDs had been politicized and used as a political weapon to frustrate various opponents in the political cycle. Typical challenges faced by the youth in their pursuit of IDs included: lack of information on registration/application requirements, lack of required registration documents, delays in processing and issuance of IDs, rampant corruption, high registration fees, few registration centres, and poor attitudes and communication skills by staff.

Youth participation in the electoral process significantly improved. For instance, 3,780 youth contested various seats across the country. The voter registration turnout was also reported to have increased by 2%. However, some challenges that hinder the proper participation of the youth, both male and female, persisted. Amendments done on the electoral laws by the 10th Parliament also greatly altered the timelines for the submission of rules by political parties and the recruitment and nomination of candidates. Since the alterations were meant to defeat the

stringent laws that sought to instil sanity in the political parties and high levels of discipline in its members, the youth continued to be disadvantaged.

Although there was great improvement in the conduct of political party nominations, the environment was not favourable for the participation of the youth due to lack of financial resources, culture, threats and intimidation, absence of youth representation in party decision making organs, manipulation by party leaders and lack of transparency within parties.

Most parties conducted their nominations a day before the deadline (January 18th 2013). This is mainly because the amendment to the Elections Act that extended the deadline by which political parties were expected to submit the membership list to the IEBC.

The nomination process further confirmed that the youth were still excluded from the mainstream party activities. The high nomination fees levied on candidates by bigger parties also curtailed the participation of the youth to high office in the political parties. This ensured that the majority of leaders in political parties were older and wealthier persons or young people with tacit or even explicit support of the older members.

Although the youth had been advocating for affirmative action to increase their participation in electoral processes especially nomination processes, the older politicians and those with financial muscles continued to dominate political parties. In general, nomination rules of political parties were not favourable to the youth aspirants. Only the TNA had an elaborate mechanism and made sufficient provision for affirmative action including affirmative action within affirmative action – e.g. the party list for senate women nominees alternated between an older woman and a younger woman.

4.4 Conclusion

The results of our assessments of the pre-election day processes revealed mixed results. While there were clear cases of progress and improvement in terms of preparedness for elections, it is reasonable to conclude that these improvements were inadequate and could in no way ensure that free, fair, transparent, and incontestable elections could be delivered in accordance with the standards established in Chapter Seven of the Constitution of Kenya 2010.⁶⁰

⁶⁰ Refer to ELOG Recommendations 7.2.4, 7.7, 7.8, 7.9, and 7.11.

CHAPTER 5: THE E-WEEK: BALLOT BOX TO BOMAS

5.1 Introduction

This chapter captures the observation of events between 4th March and 9th March 2013; hence the Election-Week (E-Week). We begin with a brief outline of the methods used for the observation. This is followed by a justification of the methods; then the chapter turns to discussion of the main findings from the observation.

5.2 Rationale for E-Week Observation

During the E-week, our observation scrutinized and evaluated the election process: “for purposes of determining its impartiality in terms of organization and administration”. ELOG deployed both Parallel Vote Tabulation (PVT) observers and General Observers (GO) for the entire week of electoral activities. They had a clear mandate to closely observe and pronounce on the entire process and outcomes. The two methods of observation served complementarily to boost confidence in the fairness of the entire electoral process. They helped deter fraud in the balloting and counting procedures. They also enabled compilation of a report to the country’s citizens and the international community on the overall integrity of the elections.

The Parallel Vote Tabulation (PVT) is an advanced methodology for observing the Election Day process. It is a powerful citizens' tool for assessing the conduct of polling on Election Day and for verifying official results as announced by the Election Management Body. Unlike Exit Polls, the PVT measures the votes as actually cast and indicates whether the data should be trusted based on information about the voting and counting process. The Parallel Vote Tabulation (PVT) was the main methodology used to monitor the Election Day processes. As a scientific method that relied on a sample of less than a thousand observers who were deployed in predetermined sample polling streams across the country, there was need to deploy a complementing General Observer team. Approximately 6, 000 individuals were deployed across the country. Their role was to provide the numbers that would assist in beefing up election observer team that was to observe the entire E-Day activities and report on the same.

The PVT comprises both quantitative and qualitative methods. The former was aimed at projecting the Presidential results and confirming the extent to which official results released by the Independent Electoral and Boundaries Commission (IEBC) were either valid or invalid. The latter, on the other hand, systematically assesses the conduct of Election Day process with the assistance from the General Observation (GO) team. Therefore, the PVT provides the public with specific, timely and detailed information about the conduct of an election at a polling station. While GO provides a much more extensive coverage for vigilance and general monitoring of the process within and without the polling station.

5.3 Observations

ELOG deployed both the PVT and general observation methodologies in observing the March 4th 2013 Election Day processes. These two methodologies of observation complemented and enriched the entire observation exercise. The PVT was able to systematically assess the process on Election Day. It rapidly gave a projection of the results. The general observation, helped to create a presence of non-partisan observers countrywide. This was hoped to deter malpractices and fraud. However, since the PVT observers are deployed to a statistically random sample, their data is not biased in any way. Consequently, for purposes of this report, the results are based on the sample data from the PVT observers.

Building on the success of the 2010 ELOG PVT exercise, we deployed 580 Constituency supervisors and over 7, 000 observers in all the 290 constituencies. Out of these, 976 were deployed as Parallel Vote Tabulation (PVT) observers in nationally sampled polling streams to enable ELOG to confidently comment on E-day processes and also provide an independent verification of the presidential results announced by IEBC. The PVT observers were deployed to a nationally representative sample of polling streams in all of the 290 constituencies. ELOG received reports from 97.5% of the PVT observers.

All PVT observers received additional training on how to undertake the PVT observation on Election - Day and how to collect and transmit the PVT data using text messaging. As part of the extensive training, PVT observers were given a detailed manual covering all aspects of the PVT. IEBC accredited PVT observers, like all observers. All ELOG observers signed *ELOG's Pledge of Neutrality*. This required them to be nonpartisan, abide by the IEBC's Code of Conduct for Observers, and to provide only accurate and unbiased reports.

Given that the PVT is a special Election - Day observation tool, it cannot provide a direct evaluation of pre-election processes such as problems with voter registration and the legislative framework. Similarly, the PVT cannot assess motivation for voters to vote. The PVT can only evaluate the process of the election on Election Day and only information standardized on the PVT observer form can be used to form an estimate of the results.

5.3.1 PVT Objectives

The ELOG 2013 PVT was aimed at providing all the stakeholders in elections, including the public, with credible, independent and impartial information on the conduct of Election Day. The PVT was also aimed at removing uncertainty by independently validating the official election results and is, thus, able to increase public confidence in a well-run election and reduce the potentials for political violence. The ELOG PVT was designed to make an assessment of the election-day processes as well as provide a projection of presidential results.

5.3.2 PVT Methodology and Sampling

In principle, a PVT is anchored on four building blocks namely; observers, statistics, a sophisticated database, and rapid communication. It entails deploying specially trained observers to a representative sample of polling stations, where they observe the entire voting and counting processes, complete their standardized form at the polling station and transmit the results announced at the polling station to a database. The data is checked for completeness and then undergoes several quality control tests before it is analysed and used to make projections.

The PVT is based on sound, time tested statistical principles. It uses a nationally representative sample of polling places. On that basis, the PVT can provide the most comprehensive and accurate picture of the election process for the entire nation. The 2013 PVT employed a nationally representative, random sample of 976 polling streams drawn by experienced statisticians from the official list of polling streams provided by the IEBC. The nationally representative sample contained polling streams in all the 290 constituencies in Kenya. To ensure the sample was representative, it was stratified by county and by polling stream size by using the number of registered voters to split streams into three categories: large, medium, and small. This means that the percentage of the sampled polling streams in a county closely matches the percentage of all polling streams that are in that County compared to the rest of the country. For example, according to IEBC, Nairobi County has 2,228 of the 31,977 polling units or 6.97% of the total number of polling units in Kenya. In the national PVT sample, Nairobi has 68 polling units representing 6.97% of the 976 polling units in the entire sample. The same logic is applied within counties to allocate the sample to each size category. Within each county, polling streams were selected entirely at random.

In more technical terms, the sampling methodology employed to draw the national PVT sample can be described as using a classic single-stage cluster sampling (with unequal clusters) and proportional stratification. The result is a national sample that is both representative and random and that includes polling units in all of the 47 counties and polling units of every size category (large, medium, and small) and polling units. Table 5.1 shows the sampling distribution by county. Table 5.2 shows the distribution of the sample by size category.

The techniques used to draw the samples are based on time-tested statistical principles to ensure that they are both representative (meaning that the sample of polling units has the same distribution of the complete list of polling units) and unbiased (meaning that polling units were selected randomly). Without bias, observers deployed through PVT can truly reflect voting patterns and conduct during voting day. The speed of transmitting information through PVT also means that votes can be calculated instantaneously, and that the release of the official vote counts by the IEBC can be immediately verified.

Since the PVT results were highly credible, it was not surprising that results from the general observation that used the same tools with over 6,000 observers spread widely across the country

tended to validate and triangulate the PVT. There were no noticeable or even significant differences between these two sets of results.

Table 5.1: The 2013 PVT Sampling Distribution by County

COUNTY	UNIVERSE (ALL)		PVT SAMPLE	
	POLLING STREAMS		POLLING STREAMS	
	NUMBER	PERCENTAGE	NUMBER	PERCENTAGE
BARINGO	866	2.71%	27	2.77%
BOMET	604	1.89%	19	1.95%
BUNGOMA	941	2.94%	30	3.07%
BUSIA	595	1.86%	19	1.95%
ELGEYO/MARAKWET	499	1.56%	15	1.54%
EMBU	587	1.84%	18	1.84%
GARISSA	315	0.98%	9	0.92%
HOMA BAY	878	2.75%	27	2.77%
ISIOLO	166	0.52%	5	0.51%
KAJIADO	604	1.89%	19	1.95%
KAKAMEGA	1153	3.61%	36	3.69%
KERICHO	623	1.95%	19	1.95%
KIAMBU	1336	4.18%	39	4.00%
KILIFI	726	2.27%	22	2.25%
KIRINYAGA	500	1.56%	15	1.54%
KISII	877	2.74%	27	2.77%
KISUMU	741	2.32%	24	2.46%
KITUI	1345	4.21%	41	4.20%
KWALE	468	1.46%	15	1.54%
LAIKIPIA	412	1.29%	13	1.33%

LAMU	136	0.43%	4	0.41%
MACHAKOS	1059	3.31%	32	3.28%
MAKUENI	914	2.86%	27	2.77%
MANDERA	326	1.02%	10	1.02%
MARSABIT	335	1.05%	11	1.13%
MERU	1102	3.45%	32	3.28%
MIGORI	665	2.08%	19	1.95%
MOMBASA	608	1.90%	19	1.95%
MURANG'A	843	2.64%	26	2.66%
NAIROBI CITY	2228	6.97%	68	6.97%
NAKURU	1352	4.23%	40	4.10%
NANDI	660	2.06%	20	2.05%
NAROK	615	1.92%	19	1.95%
NYAMIRA	427	1.34%	13	1.33%
NYANDARUA	487	1.52%	15	1.54%
NYERI	735	2.30%	21	2.15%
SAMBURU	272	0.85%	9	0.92%
SIAYA	665	2.08%	20	2.05%
TAITA TAVETA	307	0.96%	8	0.82%
TANA RIVER	270	0.84%	9	0.92%
THARAKA - NITHI	585	1.83%	18	1.84%
TRANS NZOIA	448	1.40%	14	1.43%
TURKANA	578	1.81%	18	1.84%

UASIN GISHU	644	2.01%	20	2.05%
VIHIGA	413	1.29%	13	1.33%
WAJIR	383	1.20%	12	1.23%
WEST POKOT	684	2.14%	20	2.05%
Grand Total	31977	100.00%	976	100.00%

For example, 1.95% of all polling streams are in Kericho County and 1.95% of the all the PVT Observers are in Kericho County. The IEBC provided the list of all polling streams in Kenya (i.e., sampling frame) on Tuesday 26th February 2013.

Table 5.2: The 2013 PVT Sampling Distribution by Size of Stream

Type	UNIVERSE (ALL)		PVT SAMPLE	
	POLLING STREAMS		POLLING STREAMS	
	NUMBER	PERCENTAGE	NUMBER	PERCENTAGE
Large Size	11,465	35.85%	346	35.45%
Medium Size	12,971	40.56%	398	40.78%
Small Size	7,541	23.58%	232	23.77%
Grand Total	31,977	100.00%	976	100.00%
NB: The number of registered voters assigned to the specific stream was used to sort it into the sizes. For example, if a stream had 750 or more voters, it was categorized as a large stream. If a stream has between 250 and 751 voters, then it was categorized as medium. If a stream had fewer 250 voter or fewer, it was categorized as a small stream. By categorizing stations by the number of registered voters, the sample is representative of urban (i.e., large) streams, sub-urban (i.e., medium) streams, and rural (i.e., small) streams.				

5.3.3 Testing the PVT System

We conducted a complete simulation exercise to test all the major components of the PVT and ensure that the PVT worked before Election - Day. The simulation exercise tested the commitment of each observer, their understanding of how to report, the accuracy of their reports, and the

network coverage at assigned stations. Additionally, we developed a sophisticated PVT database that the simulation confirmed was properly evaluating the quality of the data and tracking which observers had and had not reported.

The results of the simulation helped to identify potential problems and then allowed time to make any necessary corrections and adjustments prior to Election Day. The simulation exercise was open to the IEBC, media, domestic and international observers, and development partners to observe as part of our outreach on the 2013 Parallel Vote Tabulation exercise.

5.3.4 Rate of Response

ELOG had a high rate of response from the national sample (97.5%). This means that ELOG received data from - and the data passed quality control checks for - 952 polling streams out of the 976 total polling streams in the sample.

5.4. Key Findings from the Observation

The results from the observation are presented in two main parts: first the observation of E-Day processes, and secondly, the projection of Presidential results. It should be noted that if the observation of the E-Day processes found serious flaws, then the projections of Presidential results would be based on false data and would be unreliable and, therefore, would not be published in the first place. Furthermore, in this PVT, the main argument was: the more flawless the E-Day processes, then the more credible and reliable the Presidential election results announced by the IEBC.

5.4.1 Credibility of E-Day Processes

The analysis of the E-Day processes is presented in three stages: opening and set up; the voting or casting of votes; and closing and counting of votes cast.

Opening and set up

Table 5.2 below presents a summary of the assessment of the early stages of E-Day. Although there were some challenges, the results of the observation show that the opening and set up of polling streams proceeded very well.

Table 5.2: Integrity and safety of polling streams

Critical Indicators	Percentage of all polling streams (%)
Polling streams opened on time (6.15am)	59.7
Polling streams had security personnel present	99.6
Ballot boxes were shown to be empty before being sealed	95.6

Polling streams had strategic items for voting	99.4
Polling stream did not have an electronic poll book or the poll book failed to function	8.0

Source: ELOG 2013 PVT Data (National Sample)

The analysis in Table 5.2 above shows that except for variations in opening times, the integrity and safety of the polling streams was exceptionally impressive. However, there were also concerns about the absence and/or failure of electronic poll books. The impact of the failure and/or absence of these electronic poll books on the overall E-Day processes were established in the assessment of the voting.

Voting/casting of votes

The results show that voting also proceeded quite well. Unsurprisingly, as shown in Table 5.3 below, the electronic poll book was reported to have failed at some point during voting in 55.1% of all polling streams.

Table 5.3: Assessment of the quality of voting

Access and actual voting	Percentage of all polling streams (%)
Electronic poll book failed at some point during voting	55.1
Many voters within the stream (i.e., 25 or more) received assistance when voting	54.0
People whose details were not on voters' register not permitted to vote (as prescribed by law)	84.8
People whose details were not on voters' register were permitted to vote	15.2
Secrecy of the vote was violated during voting	17.6
Voters' fingers were marked with ink	99.9
Some people not permitted to vote	46.4
Voters names were properly marked or crossed out once their details were confirmed in the voters register.	99.4
Ballot papers were properly stamped with the IEBC official	99.5

stamp before being issued.	
Polling streams still voting at 7.30 p.m.	6.9

Source: ELOG 2013 PVT Observation Data (National Sample)

In 84.8% of polling streams in the sampled areas nationwide, people whose details were not on the voters register were not permitted to vote as prescribed in law. However, in 15.2% of all polling streams, voters whose details were not on the voters register were allowed to vote. It is not clear the extent to which the failure of the electronic poll book had on the voting and overall results. By 4:00 p.m., 68.5% of all registered voters had voted for the presidential election. That combined with the fact that people were still voting in 6.9% of the polling streams at 7.30 p.m. suggests that the voting was characterized by an unprecedented voter turnout and security.

Closing and counting of votes

As the results in Table 5.4 below show, the integrity of closing and counting votes on E-Day was generally not compromised.

Table 5.4: Integrity of closing poll streams and counting of votes

Key Indicators	Coverage (%)
Voters in the queue at 5.00 pm allowed to vote	95.4
Ballot box seals were intact before counting	99.5
Party agents requested a recount of Presidential ballots	2.8
CORD agents present in polling streams	87.9
CORD agents signed declaration of Presidential results (in the 87.9% of polling streams where CORD agents were present).	94.9
JUBILEE agents present in polling streams	90.0
JUBILEE agents signed declaration of Presidential results (in the 90.0% of polling streams where JUBILEE agents were present).	95.6
Other agents present in polling streams	88.5
Other agents signed declaration of Presidential results (in the 88.5% of polling streams where Other agents were present).	88.3

Official Presidential results posted outside polling streams after counting	89.1
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Source: ELOG 2013 PVT Observation Data (National Sample)

From Table 5.4 above, it is evident that ballot boxes were not tampered with in most of the polling streams. Party Agents from the two leading coalitions, CORD and JUBILEE were present in most of the polling streams. Moreover, that party agents requested a recount of Presidential ballots in only 2.8% of the polling stations further supports that the earlier finding that the ballot box seals were intact and that the voting process generally went well.

Although 89.1% of the polling streams posted official presidential results outside after counting, the 10.9% that did not post raised genuine concerns about the transparency of the closing of polling streams and the counting of votes.

5.4.2 Observations from areas outside sampled polling streams

Tension and insecurity in Mombasa

There were attacks and senseless killings of senior police officers in Mombasa County. The incident, which took place on the eve of the election, affected the opening of polling stations in the Jomvu and Changamwe constituencies in the early hours of the morning. However, our observer reports indicate that polling stations were, subsequently, opened and voting commenced later in the morning. The efforts by the security agencies in restoring calm, thus, enabling the IEBC to commence polling were commendable. But it was not possible to establish the impact these attacks had on the E-Day processes in the two constituencies.

Observer access inside polling stations

Some of the ELOG observers and other observers were denied access into polling stations by Presiding Officers. This was because they lacked stamped IEBC letters and in some stations presiding officer asked for oaths of secrecy. This was contrary to what had been agreed between IEBC and observation groups. The agreement was that requirements for observers in the election be an accreditation badge and a letter of appointment by an accredited organization in this case the Election Observation Group. This confusion was attributed to inconsistent communication to the presiding officers. IEBC made efforts in resolving the situation and allowed observers free access to polling stations. It was also not possible to confirm the effect such restriction of observers would have had on the E-Day processes.

Speedy resolution of any pending issues barring observers from accessing polling stations is not easy on Election Day due to congested communications between IEBC headquarters and its officers on the ground. This hampered observers' free access to observe the entire voting process and more particularly the counting process, which is sacrosanct to the integrity of the process and

validity of the results. Independent confirmation by observers is ultimately in the best interest of the Commission especially where the results are disputed.

In summary, since the opening and setting up of polling streams proceeded well, the voting went equally well too. The integrity of the closing of polling streams and counting of votes was not compromised. It is justifiable to conclude that E-Day processes were of high standards. We turn to the presidential results next.

5.4.3 Projection of Presidential Results

Using data collected from a nationally representative random sample of polling streams, as announced by presiding officers and recorded in official Form 34s, the PVT projects a statistical range within which the official presidential results should fall. The PVT, therefore, directly observes results at polling stream level, and indirectly at all other intermediate levels of tabulation. Table 5.5 below compares the results from the PVT with the official presidential results released by the IEBC.

Table 5.5: Comparison of Projected Results and Official Results

Candidate	PVT Projection	Margin of Error	Range		Official IEBC Result
			Lower Limit	Upper Limit	
Kenyatta Uhuru	49.7%	2.7%	47.0%	52.4%	50.07%
Odinga Raila	43.4%	2.5%	40.9%	45.9%	43.31%
Mudavadi Musalia	4.2%	0.8%	3.4%	5.0%	3.93%
Peter Kenneth	0.6%	0.1%	0.5%	0.7%	0.59%
Dida Mohamed	0.5%	0.1%	0.4%	0.6%	0.43%
Karua Martha Wangari	0.4%	0.0%	0.3%	0.4%	0.36%
Kiyiapi James Legilisho	0.3%	0.0%	0.3%	0.4%	0.33%
Muite Paul Kibugi	0.1%	0.0%	0.1%	0.1%	0.10%
Rejected	0.9%	0.1%	0.8%	0.9%	0.88%

Source: ELOG 2013 Observation Data and IEBC 2013 Presidential Results

5.4.4 Overall Turnout

The PVT projection for final turnout was 85.6% with a margin of error of +/- 1.7% and was consistent with the IEBC's results of 85.9%.

Adequate care was taken to ensure the reliability and validity of the PVT. The observations of the E-Day processes indicated that these processes were generally despite some problems. The PVT Projections for the Presidential Election can be trusted. Furthermore, since the official presidential results released by the IEBC, on 9th March 2013, were within the range of the PVT predictions, it is reasonable to conclude that the outcome of the presidential elections as shown in Table 5.5 above can be trusted as a credible and reliable reflection of the voting processes during the E-Week.

5.5 Key Findings from General Observation

The General Observers (GOs) used the same checklist as PVT. The GO data tended to validate and triangulate the PVT findings. There were no noticeable or a significant difference between these two sets of results, a clear indication that the official ELOG projections were valid. One of the most critical questions was whether observers were permitted into the polling stations to observe elections. 99.5% of general observers reported having been permitted to observe elections in the various polling stations, a clear indication that all our observers could easily access the polling stations as required by law.

Other GO findings also speak to credible E-day process. For example; security personnel were present in 99.6% of the polling stations, voters with disability were assisted by a person of their choice in 90.5% of the polling streams, and ballot boxes were intact before counting began in 98.9% of polling streams.

The presence of political party agents in the polling stations during the voting was also impressive. ODM scored highest at 83.4%, followed by TNA with 79.5%, and the other parties at 75.5%. Only 1.8% of the GO observers indicated that party agents were not present in the polling stations they observed. Equally, the reported availability of strategic materials and items in 98% of the polling streams is an indication of good preparation on the part of the IEBC.

Voting was reported as free by 99.6% of the general observers who indicated that that the required procedures were complied with, for example; voting starting at 6.15 a.m. scoring 69.8%, by 7.00 a.m. scoring 24%, by 8.00 a.m. scoring 4.1%, and a score of only 2.1% of the polling stations opening after 8.00 a.m.

0.5% of the observers indicated that names of the voters were not crossed or marked out once their names were confirmed at the polling stations. They reported a score of 99.6% indicating that the ballot papers were stamped with the validating stamp before being issued to the voters and a 99.5% reporting that people's fingers were marked with indelible ink after voting.

However, 93.5% of the polling stations observed had challenges using the poll books. Specifically, 59.2% of the general observers reported that the electronic poll books failed to function properly at some point during the voting process.

5.6 Conclusion:

This chapter has presented the findings from observation of the election-week as analysed from data received from over 7,000 ELOG election-day observers. It has highlighted the key findings from the opening of polling stations, voting, close of polls and counting processes. In addition, the chapter has shared the projection of presidential results as a result of the successful deployment of the PVT Methodology. It is important to note that the election-day tools by design only addressed election-day processes.

From the findings above, ELOG observed that the election-day processes were generally credible with the greatest challenge being the failure of the electronic poll books and many people being assisted to vote.⁶¹

ELOG also notes that over and above the 7,000 ELOG election-day observers, IEBC accredited approximately 25,000 observers. Of these domestic observers were the majority. Better synergy amongst domestic observers in the deployment and standardization of observation tools is desirable in future election observation efforts.

⁶¹ Refer to ELOG Recommendations 7.3 and 7.8.

CHAPTER 6: THE AFTERMATH

6.1 Introduction

One of the key triggers of the 2007/08 post election violence was the absence of an impartial arbiter. When the then opposition party ODM disputed the official results as announced by ECK, they also denounced the use of judicial means to resolve the impasse. The party noted that the courts could not be trusted to be impartial since they did not enjoy full independence from the Executive. This prompted the need for international mediation. It also led to judicial reforms to take care of possible similar situations in the future.

One of the main objectives of the judicial reforms, as far as elections are concerned, was thus to establish a time-sensitive structured mechanism for resolving election disputes, especially presidential elections disputes because of their potential to destabilize the country. To address the reality of post-election disagreements, Kenya enacted laws, policies and regulations which enhanced the judicial authorities' ability to deal with election complaints.

Consequently, Kenya for the first time in its history of elections witnessed the rare occasion where a presidential petition was presented in its entirety, issue by issue, in the full glare of national and international media. Following this petition, the Supreme Court affirmed Uhuru Muigai Kenyatta's win.

The assessment of the presidential election petition in this chapter focuses on the extent to which the mechanisms put in place through the reforms filled the initial gaps. It looks into how they fared or performed during the process, and finally whether based on the experience of the exercise the Kenyan public can be confident the Supreme Court will deliver in future elections.

6.2 2013 Presidential Election Petition

6.2.1 The petition

March 4th 2013 gave the Kenyan voter a chance to ensure that the dream of a new Kenya announced on 27th August 2010 was firmly cemented. This was the time to establish progressive governance set up.

Exercising both its statutory as well as constitutional mandate, the IEBC conducted its obligation and, thereafter, declared Mr. Uhuru Kenyatta the Fourth President of the Republic of Kenya. Mr. Kenyatta had garnered 6,173,433 of the possible 12,338,667. His closest rival Raila Amollo Odinga

received 5,340,546 votes. President Kenyatta, thus, satisfied the constitutional threshold for winning a presidential election in the first round, having garnered 50.07% of all the votes cast.

However, Raila Odinga, the runners-up, refused to concede defeat. He questioned the credibility of the elections terming them: “an affront to our constitutional gains”. According to Mr. Odinga, “Our democracy was on trial”. As a result, he lodged a petition in the Supreme Court in a bid to have the election results nullified. Another organization, the African Centre for Open Governance (AFRICOG) filed a separate petition challenging the same results.

On 14th March 2013, Moses Kiarie, Dennis Itumbi and Florence Serгон moved to the Court against the IEBC. Unlike the other petitions, they sought to challenge the illegality of including the invalid votes in the counting of the percentage outcome of each presidential candidate. Their claim was that invalid votes ought not to have been included in the final tally.

After extensive consultations at a pre-trial conference, the Supreme Court summarized the issues to be determined as follows:

1. Whether the President-elect Mr. Uhuru Kenyatta and Deputy President-elect Mr. William Ruto (3rd and 4th Respondents) were validly elected and declared as winners of the elections in that election.
2. Whether the 2013 election was conducted in a free, fair, transparent and credible manner in accordance with the rule of law.
3. Whether the rejected votes ought to have been included in determining the final tally of votes in favor of each of the presidential election candidates.
4. What consequential declaration, orders and reliefs the court should grant based on the determination of the petition.

Fourteen days after the filing of the petition, and acting within the constitutional requirements, the Supreme Court unanimously answered all these intriguing questions but one to the affirmative. The Court in brief made a decision on one consolidated petition *inter alia*, confirming the win of the President-elect Mr. Uhuru Kenyatta.

The role of observers in an election, however, does not end with a judicial decision, but they must respond to the need of the public to understand the fullness of such a judgment. As a result, ELOG further observed that there was a need to give an observer’s comment as to which electoral irregularities could be verified and to what extent they could affect the election of a president in the future, or influence the freeness and fairness of the election.

6.2.2 The law relating to the validity or invalidity of the election of a presidential candidate

The Constitution under Article 140 stipulates that one can file a petition to challenge the election of a president elect in the Supreme Court. The court shall then make a determination of whether the presidential elections were valid or invalid. During the hearing of the Presidential Petition, CORD provided examples to demonstrate alleged malpractices and irregularities.

The understanding exposed by counsels before the Supreme Court, revolved around the issue of substantiality of the irregularity. The court ruled to the effect that the irregularities exposed did not warrant an invalidation of the presidential elections. It is observed and acknowledged herein that the kind of irregularity that should qualify as invalidating the presidential election should not be simply a case of electoral offences or unprofessional election officials, but should be one where as stated by the Kriegler report, *the elections were so flawed that it would be difficult to ascertain who won*.

There is a need to clarify the sufficient threshold needed to determine the validity or invalidity of an election result. A competent judicial platform is, therefore, necessary to undertake this important task within the shortest time to possibly inform the other on-going petitions and future elections.

6.2.3 Rejected votes

The validity of votes cast was one of the issues of contention from Petition No. 3, where petitioners sought to have rejected votes excluded from the total tally of votes acquired by the respective presidential candidates. In their petition, they stated that the inclusion of such votes had a prejudicial effect on the acquired percentage.

A mathematical approach informs the conclusion that the more the votes in the total number of votes cast are calculated, the more difficult it is to achieve the required 50% threshold. One of the consequences of such a decision is that with the votes garnered, President-elect Uhuru Kenyatta could only claim 50.07% of the total votes cast. This number could have been higher had the rejected votes been excluded.

The arguments of the interested parties' legal teams revolved around the interpretation of Article 138(4) of the Constitution which states that the winner of the election could only be the person who cumulatively wins 25% of votes in at least half of the counties and at least 50% plus one vote of the total votes cast. The problem lay in assessing whether the word 'cast' included the rejected votes as well.

Pointing to different legal arguments, the petitioners indicated that the rejected votes should not have been considered in the assessment of the requisite threshold for election as a president. They also relied on the rules of interpretation of the Constitution under Article 259. In the same vein they emphasized the provision of the Election (General) Regulation 2012, whose Rule 77 states that rejected votes shall be void.

Those who supported the inclusion of rejected votes were of the opinion that had the writers of the Constitution intended for the rejected votes to form a part of the total votes cast, they would have explicitly stipulated so.

The strength of these legal arguments and the unclear meaning of the term ‘votes cast’ leads us towards the conclusion that the judiciary needs to provide a definite and authoritative opinion on the nature of the rejected votes. ELOG’s position is that, in order to enhance legal certainty, it is important for the law to provide precise and unambiguous clarity. The importance of such assertion is especially visible in such tight situations as the 2013 presidential election. A different interpretation of the term “cast”, coupled with a smaller difference in votes, would have resulted in a run-off.

ELOG, therefore, feels that this is another area where legal and even literal clarity is needed to forestall the necessity of surrendering the determination of a country’s presidency to the courts.

6.2.4 Timelines in electoral dispute resolution

The legal maxim *justice delayed is justice denied* presupposes a fairly quick determination of judicial matters. In fact justice is seen more to be done when it is delivered promptly.

From the terms of Article 140 of the Constitution, speed is of essence. This is meant to cure a state of anticipation and uncertainty which would not serve the public interest. However, it is unclear why legally there seems to be and rightly so, different timelines for presidential and other office bearers. For instance, disputes relating to parliamentary elections would be determined within six months after filing of the petition⁶².

In the case of *Raila Odinga v Independent Electoral and Boundaries Commission*⁶³ the Supreme Court stated regarding the expeditious disposal of the petition:

⁶² Constitution, article 105

⁶³ *Ibid* note 4

“If the court affirmed the election of the president-elect, then the transition process would be responsibly accomplished; and if the court annulled the election, the electorate would peacefully attune itself to the setting for a fresh election-to be held within 60 days.”

Time constraints should not be deemed to subvert a constitutional concern. A desire for speed should not be a general excuse for constitutionally protected guarantees⁶⁴. The judges involved should never be perceived to be hiding behind timelines to defeat justice. In exercising this judicial authority, the courts should administer justice without undue regard to procedural technicalities⁶⁵. The essence of this provision is that a court of law should not allow the prescription of procedure and forms to subvert the primary object of dispensing substantive justice to the parties⁶⁶.

There is a very grey line between timelines and substantive justice. The Supreme Court opinion on this issue cannot really help much so long as that provision remains as subjective as it is. Probably to strike this balance and sustain the principle of substantive justice, our system can refer to that of Zambia where all electoral disputes - including the presidential petition - shall be heard and determined within six months of filing⁶⁷. In as much, Kenya may not adopt the exact time specification, we can consider an adequate extension to the duration prescribed by the Constitution.

Finally, if electoral disputes are not determined expeditiously democracy itself suffers⁶⁸. Thus, a religious examination of these timelines must be reconsidered with a holistic purpose of sustaining democracy in Kenya. On the other hand, emphasis should be put on IEBC to avail all the material and evidence for all parties involved without recourse to court to obtain the same.

6.2.5 Presidential party agents

One of the elements in the petition was that presidential party agents were excluded from the verification of presidential election forms transmitted to the national tallying centre by the constituency returning officers. Ideally, both major political blocs had (or should have had) both party and presidential agents in all polling, constituency, county and national tallying centres. The IEBC justified the exclusion on the basis that some agents were unruly and even made special arrangements for the agents to confirm the information on the verified votes.

⁶⁴ *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC).

⁶⁵ Constitution Article 159

⁶⁶ *Ibid* note 4

⁶⁷ Constitution 1996, Sec 102 (1)

⁶⁸ *Zdanoka v Lativa* (2007)45 EHRR 478 at 525

ELOG holds that the responsibility of protecting the credibility of the vote should not be on the IEBC alone but also on the party agents who must conduct themselves with decorum and accept the electoral body's authority in managing order at the tallying centre.

6.2.6 Following the ruling

After the Supreme Court gave its ruling on 30th March 2013, both Uhuru Kenyatta and Raila Odinga accepted the verdict.

In a televised speech, Uhuru Kenyatta said that: "judgment upholding his election as the Fourth President of Kenya is a victory to all Kenyans". He also said that his administration will be an all inclusive one and nobody should feel isolated. He further extended an olive branch to his major competitor, Raila Odinga.

In reaction to the ruling, Raila Odinga said 'Kenya is more important' and urged Uhuru Kenyatta to "reunite all Kenyans and uphold constitutionalism". He disagreed with the court, but he also noted that its decision is final.

6.3 Other Petitions

In addition to the resolved presidential petition, there were approximately 190 other election petitions filed around the country, at the various levels of elections. The Chief Justice has recently appointed judges to adjudicate in these disputes.

6.4 Conclusion

The acclamatory support for the "new constitutionalism" by Kenyan politicians, the civil society, and the public entrenched the rule of law and independence of judiciary as the supreme principles guiding all state affairs. Past disregard of these principles, especially in elections, has resulted in disagreements, solvable disputes and even violence.

It was of paramount importance for Kenya's democracy that all participants in the March 4th elections accept court decisions as the ultimate verdict on who won the elections. Such trust and support still needs to find a "more perfect" response on the part of the institutions involved in the solemn process of the people electing their political representatives.

The 2013 presidential petition is a fundamental milestone in Kenya's democratic development. Its practical manifestation needs to be further supported by adequate legal and institutional designs.

There is a role for everyone involved. State institutions need to adequately address the shortcomings observed in 2013. The civil society needs to pay more attention to this essential element in the puzzle of pluralistic democracy; in particular, by dedicating more time and efforts to monitor this stage of the electoral process. The public needs to keep striving for greater transparency and accountability of all actors involved.

CHAPTER 7: RECOMMENDATIONS

7.1 Introduction

The analyses in the preceding chapters have shown that even though the March 4th 2013 elections faced challenges, and even serious failures in the technology, they were significantly freer and fairer than previous ones. Moreover, the complexity of the elections, the limited time for preparations and high expectations on the part Kenyans citizens and the country's friends and partners were unprecedented. Several issues emerged from the observation exercise that requires action for the improvement of future elections in Kenya. We delineate these below in the form of recommendations.

7.2 Electoral Reforms

7.2.1 Ensure timely enactment of electoral reforms

The passing of the Constitution of Kenya 2010 and enactment of legislation relating to elections set in motion the process of electoral reforms in Kenya. However, this was not without challenges. Whereas most of the election legislation came into force by November 2011, the enactment of regulations for implementation of the laws happened very close to the elections leaving very little room for input by stakeholders as well as time to acquaint themselves with the rules. ELOG recommends immediate audit of the election legislation in order to identify conflicting provisions. Parliament should then amend the concerned election laws to enhance clarity and certainty, and provide a clear legal framework for the next elections.

7.2.2 Engage stakeholders in post-election audit

ELOG welcomes IEBC's audit and evaluation of the last elections pursuant to article 88(4) of the Constitution. It recommends that the IEBC should actively involve other stakeholders such as Political Parties, Judiciary, Parliament, independent observers, the media, and civil society in the process.

7.2.3 Clarify the date of the next election

The date of the election was one of the legal hurdles that the country had to traverse during the electoral process. Whereas certainty was eventually restored this only complicated matters in as far as subsequent election dates are concerned. ELOG recommends that IEBC takes leadership in ensuring that clarity is sought on the next election date. This will provide certainty on election timelines.

7.2.4 Enact the Campaign Finance legislation

ELOG recommends the enactment of a campaign and political financing legislation to regulate the disclosure of sources and use of money during elections. This will create transparency and, thus, eliminate corruption and improper influence in the electoral process. It will also enhance fair competition and protect the electoral process from being corrupted and used as an avenue for money laundering.

7.2.5 Enactment of the Affirmative Action Legislation

ELOG recommends that Parliament fast tracks the enactment of affirmative action legislation as envisaged by the Constitution and the Supreme Court Advisory Opinion.

7.2.6 Timing and election calendar

One of the main challenges for the elections was implementation of election activities within a compressed timeline. Indeed, the situation was worsened by amendments made to the Elections Act and Political Parties Act altering timelines relating to the adoption of regulations, voter registration and party nominations. The effect of this reduced the period to complete these activities as well as create overlaps particularly in relation to voter registration and party nominations. ELOG recommends a review of these amendments in order to ensure that ample time is allocated for each activity. This will allow for adequate time for independent evaluation of processes such as voter registration and constructive feedback and action by the IEBC. These timelines should be strictly adhered to. The IEBC should also publicise the electoral calendar well in advance of the elections.

7.3 Adoption and use of Electronic Technologies

Whereas the adoption of technology in the 2013 elections was supposed to increase efficiency, speed and accuracy in the electoral process, this was not without challenges. The technology challenges began right from the lengthy and controversial procurement process. This, consequently, constrained the time required to test the systems for their optimum application and performance. ELOG recommends the following with regard to the adoption and implementation of technology in future elections:

- 7.3.1 Establish clear procedures on the procurement of electronic technologies. Such procedures should be made public and should be completed within specific timelines. The process should also be transparent and open to public scrutiny.
- 7.3.2 The IEBC should be conscious of the time available when introducing technology in the management of elections. Introduction of technology too close to the elections does not allow for adequate testing of the interoperability, efficiency and effectiveness of such technology. It should also allow for independent audit of such new systems before fully rolling them out.
- 7.3.3 IEBC should phase out the introduction of technology across the electoral cycle.
- 7.3.4 The IEBC should consult widely and create awareness with political parties, civil society, media and other key actors to ensure they fully understand the working of any electronic technology adopted. This will help in managing public expectations on the use of technology for elections.

7.4 Openness and Transparency in election management

Article 82 of the Constitution of Kenya requires the IEBC to observe the principles of transparency and accountability in the management of elections. This allows key actors such as political parties, media, civil society and the general public to participate as well as build confidence in the electoral

process. In this regard, ELOG recommends the following measures to be undertaken by the IEBC to ensure transparency and openness during elections:

- 7.4.1 Allow party agents and observers access to all aspects of the election process including provision of necessary statutory forms.
- 7.4.2 Timely publication of the voters roll in its entirety before elections. This will alleviate any disputes on the actual voter register.
- 7.4.3 Timely publication of complete list of polling streams with number of registered voters before election.
- 7.4.4 Timely publication of all election results disaggregated by lower unit of tabulation.
- 7.4.5 Timely publication of all statutory forms and materials pertinent to results such as Form 34s and 36s.
- 7.4.6 Enable political parties and independent observers access and analyse pertinent data on constituency delimitation, voter register, candidate lists, and election results in machine-readable formats.
- 7.4.7 Announce voter turn-out at various intervals on election day to increase accountability.
- 7.4.8 Publish reports of turn-out per station, compared to previously published lists of polling streams with the number of registered voters.
- 7.4.9 Provide clarity and uniformity in the use of the terminologies e.g. polling stations and polling streams.

7.4.1 Enhance transparency in Voter Registration

The timely publication of a single, comprehensive and accurate list of registered voters is critical for the credibility of an election. This was one of the shortcomings of IEBC in the last elections. ELOG, therefore, recommends that IEBC avails the register publicly before the election. Additionally, and in order to enable independent verification by political parties and independent observers, the same should be availed in machine readable formats.

7.5 Promote issue-based politics

- 7.6.1 Party development and manifesto building. Political Parties need to further improve their functioning and internal organization in order to create a fully democratic and competitive political arena.
- 7.6.2 Institutionalize presidential and other forms of candidate debates.

7.5.1 Regulate Political parties' nominations

The Constitution requires IEBC to regulate political parties' nomination. The Commission is expected to design and put in place measures and mechanism for implementing this. Clearly, the Commission did not discharge this responsibility as effectively as it ought to. Hence the chaotic, undemocratic and shambolic nominations that were witnessed in the run-up to the 2013 general elections. ELOG encourages the Commission to establish appropriate mechanisms and procedures for regulating political parties' nominations.

7.5.2 Provision of Voter Education

Voter Education is one of the most important events in the electoral cycle in an emerging democracy. It enables the electorate to fully understand the election process and exercise their political rights without fear and intimidation. The IEBC bears the Constitutional mandate to provide voter education. The implementation of this mandate was constrained by inadequacy of time and resources. As a result of the insufficiency of voter education, many voters in more than half of the polling stations were assisted to vote. ELOG, therefore, recommends:

- Better resourcing of voter education by the Government to ensure robust and timely voter education.
- Better coordination between IEBC and civil society in the provision of structured and comprehensive voter education including: mapping of voter education providers and their coverage, harmonization of voter education material, and effective voter education strategies.
- IEBC should ensure that voter education information is accessible to all citizens including persons with disabilities. Additionally, voter education information should be produced in vernacular.

7.9 Election Security

Whereas commendable steps have been made towards dealing with cases of insecurity during elections, such measures have mostly been uncoordinated. ELOG, therefore, recommends the establishment of a National Taskforce on Election Security comprised of the IEBC, Security Agencies, NCIC and other key actors for purposes of coordination of security during elections.

7.10 Streamline process of accreditation of Observers

Although ELOG commends the IEBC for its cooperation in accrediting observers during the elections, it is necessary that the Commission streamlines its procedures for this activity. For instance, taking oaths of secrecy is no longer a requirement for observers, but there are instances when returning and presiding officers turned ELOG observers away insisting on the production of an oath of secrecy in addition to letters from the IEBC and accreditation badges. ELOG recommends that the IEBC briefs its officers on the regulations applicable to observers to enable uniform treatment for all observers.

7.11 Inclusion of Persons with Disabilities

7.11.1. Rules on registration - the register of voters should include the disability details of voters where applicable. Political party registers should also include disability details of their members. Registration with the National Council for Persons with Disabilities as per the Persons with Disabilities Act of 2003 will be sufficient proof of one's disability. This will enable IEBC to put in place voting logistics for persons with disabilities. This information will also enable the appropriate state agencies to determine matters such as the numbers of persons with disabilities in particular political parties for purposes of promoting inclusion in political parties.

7.11.2. Rules should be in place regarding the campaigning process to mitigate negative impact on candidates with disabilities. Kenya's election campaign realities include violence which will tend to affect a candidate with disability more severely than their non-disabled peers.

7.11.3. The sanctity of the vote for voters with disabilities must be maintained at all times and as much as possible and practicable. The elections body must factor into its budget the extra costs necessary to provide reasonable accommodation for voters with disabilities. A section of the Commission should be fully dedicated to providing direction on how to ensure the vote for persons with disabilities.

7.11.4. Whenever a voter with disability requires the use of an assistant to vote, the choice of such assister must be made strictly by that voter. The assister shall take an oath of secrecy before assisting the voter.

7.11.6. Intellectual disability - the elections body should act on the basis that there is a clear distinction between persons who have intellectual disabilities and persons of unsound mind. While the Constitution provides that persons of unsound mind cannot vote, persons with intellectual disabilities must be facilitated to vote. Appropriate support mechanisms should be put in place to enable voters with intellectual disabilities to cast their ballots.

7.11.7. Rules on accessibility of voting materials and voting instructions for all persons, including persons with disabilities, should be made. These rules should ensure that ballot papers and instructions are in accessible communication formats for voters with disabilities. The Convention on the Rights of Persons with Disabilities defines accessible communication formats to include: "... languages, display of texts, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain language, human-reader, and augmentative and alternative modes, means and formats of communication".

7.11.8. Voting Facilities - the Commission should not declare any place a polling station unless it meets basic accessibility standards for persons with disabilities. Accessibility should include the following:

- a. Polling stations should not be in buildings accessible only by stairs.
- b. Ramps and lifts, as necessary, should be made available for persons who use wheelchairs.
- c. The Commission should explore ways of making the ballot more accessible for voters who are blind or those with low vision. Some African countries have already introduced tactile ballots or Braille ballots; and this should be explored.
- d. Polling stations should be proximal to the populace of the area.
- e. Sign language interpreters should be available within reasonable reach in each constituency to assist deaf voters. The hiring of polling clerks by the Commission should take into account sign language interpretation skills as an added advantage.

7.11.9. Assistive and New technologies - measures must be put in place for electronic registration of voters and electronic voting. This will take care of all Kenyans that may want to vote.

7.11.10. Advance Voting; vide Clause 101 (u) of the Bill. Certain categories, if not all, of PWDs should be entitled by the Bill to vote in advance. In general the Bill should put in place foolproof mechanisms for scrutinizing those desiring to vote in advance.

7.12 Clarify the law relating to the validity or invalidity of the election of a presidential candidate

There is need to clarify the sufficient threshold needed to determine the validity or invalidity of an election result. We recommend that a competent judicial platform undertakes this task in order to inform future elections.

7.13 CONCLUSION

This report has delved deep into the electoral process starting the journey from the troubled times of 2007/2008 when the country burnt. It has given an insight into the insidious political problems that Kenya has had to grapple with.

The report analyses the ills that the country must heal before it finally gets out of the political woods. From negative ethnicity fuelled by the “tyranny of numbers” to weak or unreliable institutions, the country has major problems to fix to ensure free and fair elections that are beyond reproach.

The report also makes it clear that although the restored faith in the judiciary and the fear of the ICC may have averted the violence that engulfed the nation after the 2007 general elections, faith in the IEBC and the judiciary was eroded following the Supreme Court ruling on the presidential petition filed by former Prime Minister Raila Odinga.

All stakeholders need to put in extra work and resources to help enhance the public understanding of their civil rights while enhancing the efficiency of all institutions charged with conducting elections in Kenya.

ANNEXES

ELOG PRESS STATEMENTS



CREDIBLE, PEACEFUL, FREE AND FAIR ELECTIONS

ELOG CALLS FOR PEACFUL AND CREDIBLE ELECTIONS

PRESS STATEMENT

3RD MARCH 2013

As Kenyans prepare to exercise their democratic right to vote tomorrow, the Elections Observation Group (ELOG) is largely confident of the country's state of preparedness for the elections. Amidst the great pressure to organize and conduct a credible election, we have observed readiness on the part of the Independent Electoral and Boundaries Commission (IEBC) to conduct the first elections under the new Constitution. We have also observed that the political campaigns have been largely peaceful.

However, we realize that the credibility of this election is hinged on how transparent, professional and efficient the Election Management Body will be, particularly in handling election-day procedures and the tabulation of results. ELOG, therefore, appeals to the IEBC to use the remaining period to provide clear information on any concerns raised by any of the key stakeholders such as political parties, domestic and foreign observers, and members of the public ahead of the elections in order to clear unnecessary misunderstandings. In particular, we would wish for timely transparent, honest and sincere communication by the IEBC on the state of final voters register, concerns around the possibility of voting spilling over to the second day and security and reliability of the electronic tally and transmission infrastructure in place.

ELOG is further concerned by reported tensions and threats to peace by way of intimidating leaflets in parts of the country. In this regard, we urge the security agencies to be vigilant and execute their duties focusing on the security of the ballot, electoral process and the security of all Kenyans during this period. We also call upon all the politicians and their polling agents to adhere to the code of conduct for elections and conduct themselves responsibly on the polling day and, during and after the announcement of results.

Additionally, we also appeal to the media to remain non-partisan in the coverage and reporting of the elections and discharge their mandate in an objective and professional manner.

ELOG E- Day Observation Preparedness



CREDIBLE, PEACEFUL, FREE AND FAIR ELECTIONS

ELOG is prepared to adequately observe the elections. We have successfully trained and deployed 580 constituency supervisors and over 7000 observers in all the 290 constituencies in readiness for the elections on Monday 4th March 2013 and the following day in case that becomes necessary.

ELOG subscribes to the *"Declaration of Global Principles for Non-Partisan Election Observation and Monitoring by Citizen Organizations"*. As a result all trained ELOG observers have been trained on the code of conduct for observers and are expected to uphold the principles of non-partisanship and professionalism.

For the Election Day on March 4th 2013, ELOG will employ two complementary methodologies of observation namely Parallel Vote Tabulation (PVT) and General Observation. PVT is an advanced election-day observation methodology. It will allow ELOG to confidently comment on both the process of the elections countrywide and also provide an independent verification of the results announced by the IEBC. ELOG will deploy observers to a nationally representative, random sample of polling stations across the country. Throughout Election Day, they will report by SMS to a specialized database. They will also record the election results announced at the polling station. This will enable ELOG to aggregate the observer reports and form highly-accurate projections of the Presidential results, voter turnout, and the overall conduct of the election.

Our simulation exercise on the PVT exercise on 25th February 2013 tested our preparedness was very successful. It tested the commitment of each observer, their understanding of how to report, the accuracy of their reports, and the network coverage at their assigned station. The exercise recorded a 90% observer response rate. We are, therefore confident that our observers are ready to undertake their duties tomorrow with utmost commitment, integrity and competence. We trust that the IEBC will, pursuant to Article 88(4) (h) of the Constitution of Kenya, facilitate access for our observers into polling stations and allow the use of mobile phones for SMS inside the polling stations as the success of our work is contingent on these aspects.

Reporting

On the basis of observation findings and incidents filed by our observers, ELOG plans to issue statements in the course of election day and after on the opening of the polls, voting process, closing and counting processes and tabulation of results. We will be issuing the statements here at **Silver Springs Hotel**. A final detailed report containing analysis of the pre-election environment, the election- day observations, as



CREDIBLE, PEACEFUL, FREE AND FAIR ELECTIONS

well as lessons learned and recommendations will be prepared and made available to stakeholders and the public at a later date.

In conclusion we call upon all the 14.3 million registered voters to turn out tomorrow and exercise their democratic right to elect their leaders in a peaceful manner. The public should not fall prey to political manipulation and violence. Rather, they should report all concerns to the appropriate institutions and channel their complaints through the established legal processes.

May God Bless Kenya

Thank you.

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CREDIBLE, PEACEFUL, FREE AND FAIR ELECTIONS

4th MARCH 2013

OPENING OF POLLS STATEMENT

Today's General Elections are the first to be conducted within the framework of the Constitution of Kenya, 2010. As such they are critical to the country's journey towards truly representative and democratic governance systems.

In our bid to contribute to a credible, peaceful, free and fair election, we have deployed 580 Constituency Supervisors and over 7000 observers in all the 290 constituencies. Out of these approximately 1000 are deployed as Parallel Vote Tabulation (PVT) observers in sampled polling stations. PVT is an advanced election-day observation methodology. It will allow the Elections Observation Group ELOG to confidently comment on both the process of the elections countrywide and also provide an independent verification of the results announced by the IEBC. The PVT observers were deployed to a nationally representative sample of polling stations in all of the 290 constituencies.

This statement is based on **Observation and Incident Reports** filed as of 11:30am by ELOG observers.

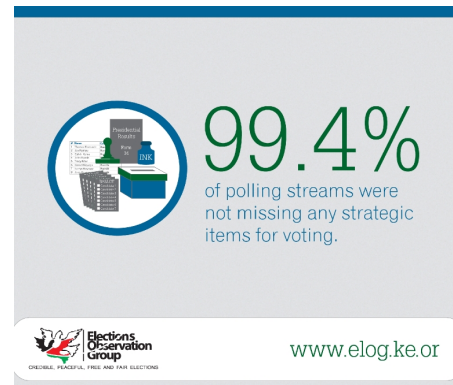
ELOG has so far observed the following:

Opening and Set-up

- 59.7% of the polling stations opened on time. The remaining stations opened between 7:00am with some opening after 8:00am.
- In 95.6% of polling stations observed, the ballot boxes were shown to be empty before being sealed.
- ELOG observers reported that majority of the polling stations 99.6% had security officers present.



- In 8.0% of polling stations observed either Electronic Poll book was missing or they malfunctioned.
- A vast majority of polling stations (99.4%), had the requisite strategic materials (ballot boxes, ballot papers, IEBC stamp, indelible ink, and the Results Form 34)



Critical Incidents

So far ELOG has observed critical incidents during the opening and setup of polling stations process:

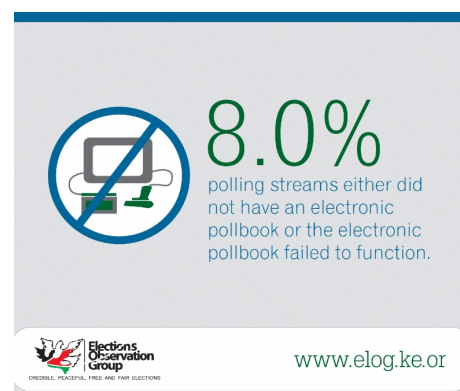
Tension and insecurity in Mombasa

ELOG strongly condemns the attack and senseless killings of senior police officers in Mombasa County. The incident, which took place on the eve of the election, affected the opening of polling stations in the Jomvu and Changamwe Constituencies in the early hours of the morning. However, our observer reports indicate that polling stations subsequently were opened and voting commenced later in the morning.

ELOG commends the efforts so far by the security agencies in restoring calm thus enabling the IEBC to commence polling. We urge the Minister for Internal Security to deploy additional security to restore and maintain peace and calm in the affected areas and potential hotspots.

Poll Books Malfunction

ELOG has also received reports of malfunctioning and/or absence of the electronic poll books in 8.0% of the stations observed. We are happy that the IEBC, as a backup, made provision for the use of hard copy registers to enable manual identification of voters thereby ensuring that the voting process did not stall. Both registers are official and either may be used to identify a voter. However, ELOG is concerned that this could potentially slow down voter identification and by effect, increase the time a voter takes in order to cast their ballot.

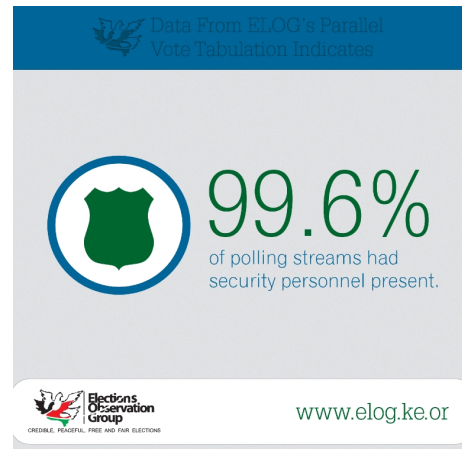


Observer access inside polling stations

In the early hours of the morning some ELOG observers were denied access into polling stations by Presiding Officers for reasons that they lacked stamped IEBC letters and in some

stations presiding officer asked for oaths of secrecy. We note that the requirements for observers in this election are an accreditation badge and a letter of appointment by an accredited organization in our case the Election Observation Group. This confusion therefore is largely attributable to inconsistent communication to the presiding officers.

ELOG would like to call for a speedy resolution of any pending issues which may bar observers from accessing the polling stations. We would especially call on the IEBC to expedite its communications between the headquarters and its officers on the ground. It is our hope that observers will be allowed free access to observe the entire voting process and more particularly the counting process, which is sacrosanct to the integrity of the process and validity of the results.



We, however, commend the IEBC for their efforts in resolving this situation and thus allowing observers to access the polling station.

In Conclusion:

ELOG is committed to its mandate and will remain vigilant and diligent in serving Kenyans to comprehensively monitor and observe the electoral processes and provide impartial and objective reports and recommendations.

We take this opportunity to congratulate Kenyans for turning out early and in large numbers. We appeal to them to exercise patience and tolerance in spite of the challenges experienced with the process.

May God Bless You and God Bless Kenya

Thank You

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4TH MARCH 2013

PRESS STATEMENT ON THE VOTING PROCESS

Over the last 12 hours, Kenyans across the country have had the opportunity to cast their votes. ELOG through its elaborate network of over 7000 observers has kept close vigil over the entire voting process in all the 290 constituencies.

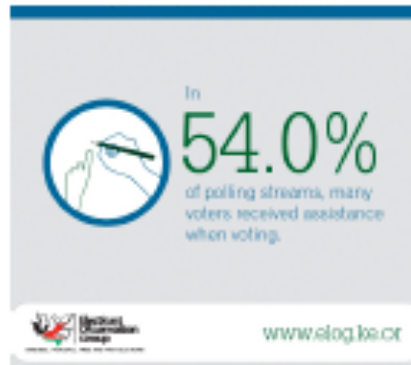
This statement is based on **Observation and Incident Reports** filed as of 8.30pm by ELOG observers.

The following are ELOG's findings on the voting process:

- As at 4.00pm, 68.5% of all registered voters had voted.
- Although we noted in our earlier statement that in about 8.0% of the streams observed electronic poll books were either missing or malfunctioning as at 11.30 am, by 8.30pm 55.1% of the polling streams observed that electronic poll books failed to function properly.
- In 84.8% of polling streams nationwide, people whose details were not on the voters register were not permitted to vote as prescribed in law. However, in 15.2% of polling streams some people were permitted to vote even though their details did not match the register.
- Voters' fingers were marked with ink in almost all of the polling streams (99.9%).
- In 54.0% of polling streams many (i.e. 25+) people were assisted to vote. Out of these, in 9.3% of the polling streams, assisted voters were not allowed to have a person of their choice assisting them.



- In 99.4% of polling streams throughout the country, voters names were marked or crossed out once their details were confirmed in the voters register.
- In 99.5% polling streams ballot papers were stamped with the IEBC official stamp before being issued.
- In 46.4% of polling streams, we noted some people were not permitted to vote. However, in 50.8% of polling streams, people were permitted to vote.
- 93.1% of polling streams finished with voting by 7.30pm.



We take this opportunity to commend IEBC's timely responses to some of the emerging challenges.

We note that the counting process has commenced and results have begun streaming in. We call upon Kenyans not to draw quick conclusions based on these, but rather wait for all the results to come in from the constituencies.



In conclusion

ELOG continues to thank Kenyans for conducting themselves peacefully and appeals to them to maintain the same spirit in the remaining part of the process.

We remain committed to our mandate and will continue being vigilant in accurately recording and reporting on the closing, counting and tabulation processes.

Thank You and May God Bless Kenya

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7TH MARCH 2013

PRESS STATEMENT ON THE ONGOING TALLYING OF PRESIDENTIAL RESULTS

The Elections Observation Group (ELOG) has so far issued two statements on the Election Day processes highlighting on the setup and opening of polls and the voting process. On these, our findings generally noted that the opening and closing processes went well albeit with some challenges; namely, late opening of polling streams and malfunctioning of the electronic poll books, amongst others.

We have also concluded our analysis on the counting process of which our findings indicate that the process was up to the set standards. Particularly, on the counting process, we noted that political party agents requested a recount in the presidential election in only 2.8% of the polling streams. Additionally, an ODM/WIPER party agent (representing the CORD Coalition) was present in 87.9% of all the polling streams. Where they were present, the ODM/WIPER agent signed the declaration of results for the presidential elections in 94.9% of these polling streams.

Similarly, A TNA/URP party agent (representing the Jubilee Coalition) was present in 90.0% of all the polling streams. Where they were present, the TNA/URP agent signed the declaration of results for the presidential elections in 95.6% of these polling streams.

We are aware of the challenges that have arisen with regard to the electronic transmission of results and the consequent decision and action by the IEBC to manually tally the presidential results. We wish to note that the manual tallying process is recognised in the law and, consequently, IEBC's abandoning of the electronic tallying process and resorting to manual tallying does not invalidate the credibility of the process. What clearly is lost is efficiency and transparency, hence the delay and anxiety. While not much can be done to make the process much more efficient, we take this opportunity to urge the IEBC to open

Page | 1

the manual tallying process to thorough scrutiny in order to retain the transparency which ought to have been enhanced by the electronic tallying system.

We, therefore, urge politicians and the general public to remain calm and allow the IEBC to finish its work. We would like to reassure Kenyans that through our work on the Parallel Vote Tabulation, we shall be in a position to verify and safeguard the integrity of the final presidential election results as announced by the IEBC.

We remain committed to our mandate and will continue being vigilant in accurately recording and reporting the tabulation process.

Thank You and May God Bless Kenya

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The Official Results are Consistent with Elections Observation Group's Parallel Vote Tabulation (PVT)

9th March 2013

Background

The Elections Observation Group (ELOG) is a permanent national platform composed of civil society and faith-based organizations committed to promote citizen participation in the electoral processes, through non-partisan, impartial domestic observation and objective reporting of elections.

ELOG has been closely monitoring the pre election environment processes since June 2012 during which 542 long term observers were deployed to observe and report on the pre-election environment. Our primary goal in collecting this valuable information is to contribute to a peaceful election and to enhance the integrity of the election process.

We deployed 580 constituency supervisors and over 7000 observers in all the 290 constituencies. Out of these, approximately 1000 were deployed as Parallel Vote Tabulation (PVT) observers in sampled polling stations to enable ELOG to confidently comment on electoral processes and also provide an independent verification of the results announced by the Independent Electoral and Boundaries Commission (IEBC). The PVT observers were deployed to a nationally representative sample of polling streams in all of the 290 constituencies.

PVT involves deploying highly trained, accredited observers to a representative random sample of polling streams to assess the conduct of the voting and counting process as well as to verify the official vote count. Unlike exit polls, PVT does not involve observers asking voters for whom they voted. PVT observers record the official figures as announced by the presiding officers at the sampled polling streams. The official vote counts from the representative random sample of polling streams are subjected to rigorous integrity checks and then analyzed to draw projections.

ELOG successfully conducted a PVT for the 2010 referendum on the Constitution. In the African elections, PVT has been applied successfully in countries such as Nigeria (2011& 2012), Ghana (2008& 2012), Uganda (2011) and Zambia (2008& 2012). In most of these exercises, the PVT helped to reduce mistrust in the tallying process by providing rapid independent verification of the voting process.

ELOG's 2013 PVT employed a nationally representative, random sample of 1000 polling streams drawn by experienced statisticians from the official list of polling streams provided by the IEBC. The sample contains polling streams in all 290 constituencies.

Election Day Process

Opening and Setup

With a few cases of late opening of polling streams, ELOG was generally satisfied with opening and setup process. We were equally satisfied with the security measures in place and the availability of strategic materials.

Voting

Our findings noted that the voting process generally went well albeit with some challenges, namely; malfunctioning of the electronic poll books and a high number of assisted voters.

Closing and Counting

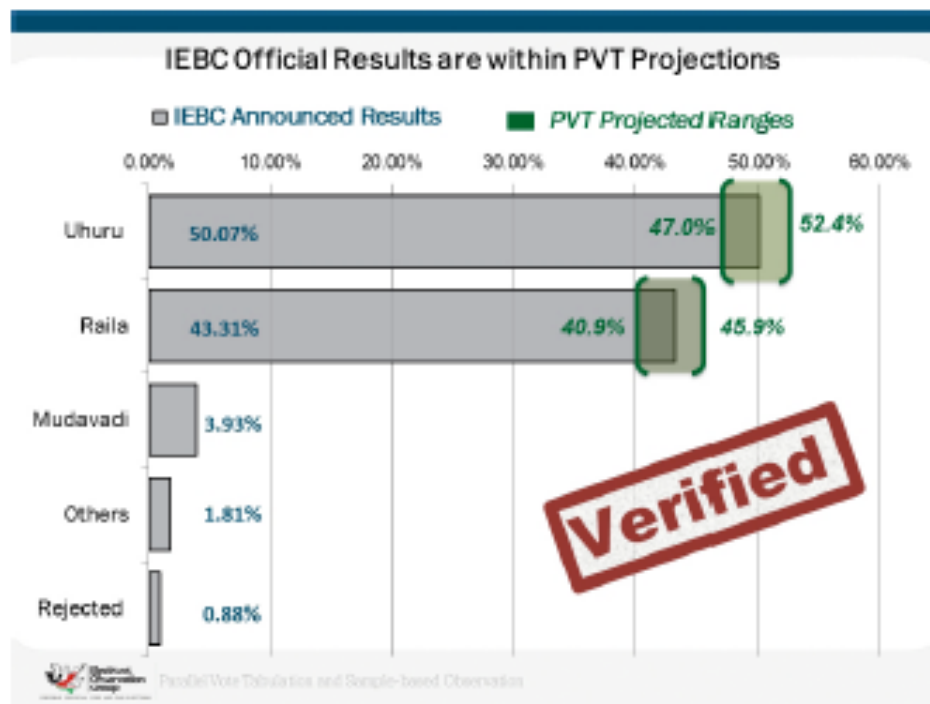
On the closing and counting process, our findings indicated as follows:

- An ODM/WIPER party agent (representing the CORD coalition) was present in 87.9% of all the polling streams. Where they were present, the ODM/WIPER agent signed the declaration of results for the presidential elections in 94.9% of these polling streams.
- A TNA/URP party agent (Representing the Jubilee Coalition) was present in 90.0% of all the polling streams. Where they were present, the TNA/URP agent signed the declaration of results for the presidential elections in 95.6% of these polling streams.
- A UDF party agent was present in 60.8% of all the polling streams. Where they were present, the UDF agent signed the declaration of results for the presidential elections in 87.6% of these polling streams.
- Agents from other parties were present in 88.5% of all the polling streams. Where they were present, they signed the declaration of results for the presidential elections in 88.3% of these polling streams.
- A copy of the presidential results form (Form 34) was affixed publicly outside of many polling streams (89.1%).

ELOG 2013 PVT Results and Final Turnout

IEBC's official results are consistent with ELOG's PVT projections. ELOG wishes to note and to remind all Kenyans that it is the IEBC which is constitutionally mandated to declare and announce the *final, official* results of the elections. Based on the PVT, ELOG has verified that the IEBC results fall within our projected range for all the eight presidential candidates.

Below are the ranges projected by the ELOG PVT for each of the candidates. These ranges are determined by the PVT estimates and the margins of error. Please note that the official result announced by the IEBC for each candidate falls within the range projected by the PVT. Thus, the PVT can confidently verify that the official result for each candidate is accurate.



Comparison of PVT Projections with Official IEBC Results

Candidate	PVT Projection	Margin of Error	Range		Official IEBC Result
			Lower Limit	Upper Limit	
Kenyatta Uhuru	49.7%	2.7%	47.0%	52.4%	50.07%
Odinga Raila	43.4%	2.5%	40.9%	45.9%	43.31%
Mudavadi Musalia	4.2%	0.8%	3.4%	5.0%	3.93%
Peter Kenneth	0.6%	0.1%	0.5%	0.7%	0.59%
Dida Mohamed	0.5%	0.1%	0.4%	0.6%	0.43%
Karua Martha Wangari	0.4%	0.0%	0.3%	0.4%	0.36%
Kiyiapi James	0.3%	0.0%	0.3%	0.4%	0.33%
Legilisho					
Muite Paul Kibugi	0.1%	0.0%	0.1%	0.1%	0.10%
Rejected	0.9%	0.1%	0.8%	0.9%	0.88%

Turnout

The PVT projection for final turnout is 85.6% with a margin of error of +/- 1.7% is consistent with the IEBC's results of 85.9%.

In Conclusion:

ELOG is confident that the Election Day process has been generally credible. We call on the IEBC to immediately make public any information relevant and material to the results as announced. More specifically, we call on the IEBC to make public the individual results (Form 34) from all polling streams.

We urge any party or person who may feel aggrieved by the outcome of the elections to seek redress through the courts of law. We call upon the courts to act expeditiously on any complaints that may be filed, and apply fairness which is essential to ensure equal protection of the law and the guarantee of effective peaceful redress. ELOG will continue to observe the process as it unfolds.

We congratulate Kenyans for making history by turning out in large numbers to exercise their right to vote. We want to acknowledge the peaceful manner with which Kenyans have conducted themselves and urge that peace continues to prevail.

May we dwell in unity, peace and liberty.

God Bless Kenya

Thank You

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