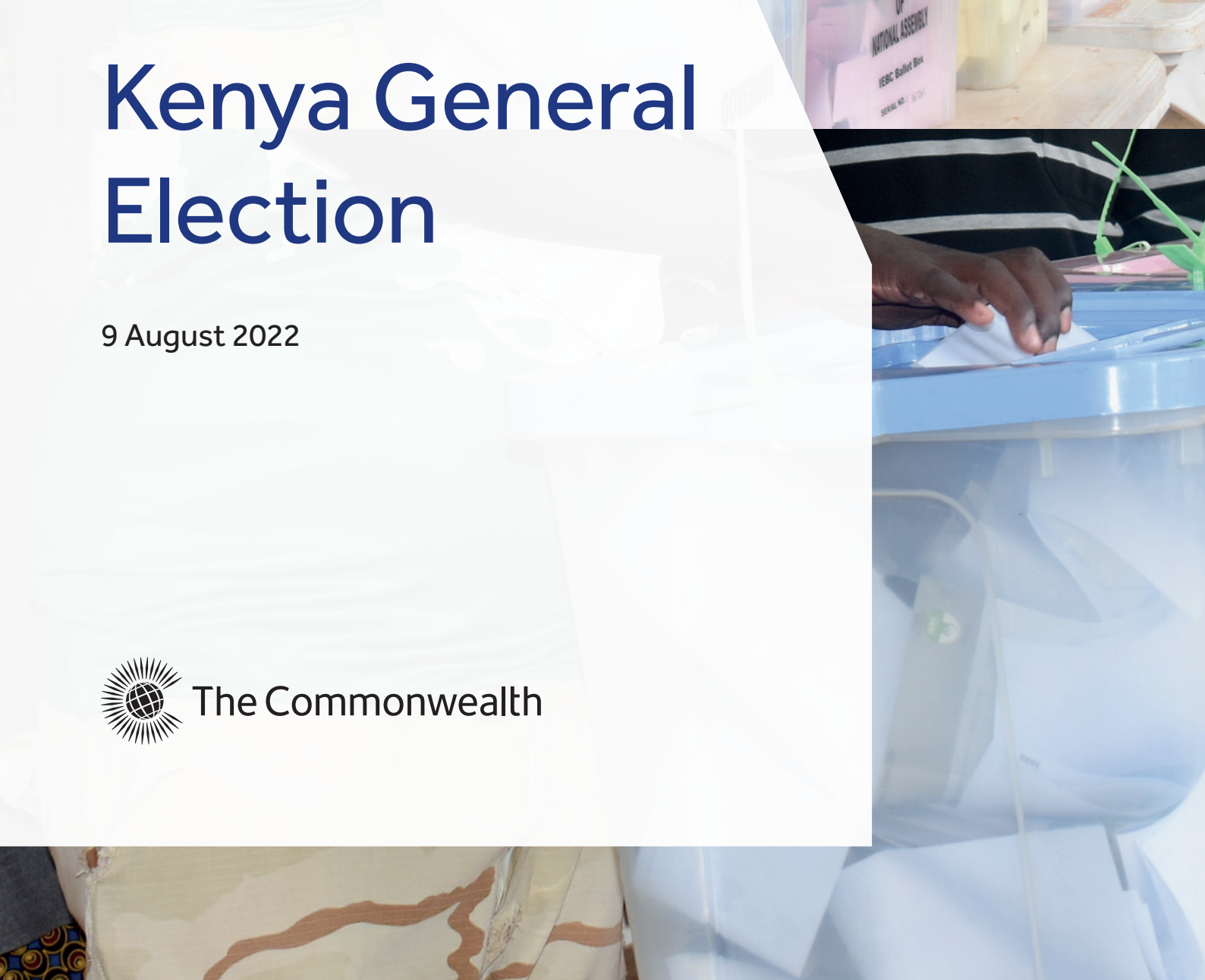




Kenya General Election

9 August 2022



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The Commonwealth

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Acronyms and Abbreviations

AI	artificial intelligence
AU	African Union
AWLN	African Women Leaders Network
BBI	Building Bridges Initiative
BVR	biometric voter registration
CA	Communications Authority
CMCA	Computer Misuse and Cybercrimes Act
COG	Commonwealth Observer Group
COMESA	Common Market for Eastern and Southern Africa
CORD	Coalition for Reforms and Democracy
CRO	constituency returning officer
CSO	civil society organisation
DPA	Data Protection Act
EAC	East African Community
ECVR	Enhanced Continuous Voter Registration
EISA	Electoral Institute for Sustainable Democracy in Africa
ELOG	Elections Observation Group
EU	European Union
FIDH	International Federation for Human Rights
FORD-Kenya	Forum for the Restoration of Democracy
IAWRT	International Association of Women in Radio and Television
ICCPR	International Covenant on Civil and Political Rights
ICGLR	International Conference of the Great Lakes Region
ICT	information and communication technology
IEBC	Independent Electoral Boundaries Commission
IEOM	international election observation mission
IFES	International Foundation for Electoral Systems
IGAD	Intergovernmental Authority on Development
KBC	Kenya Broadcasting Corporation

KCHR	Kenya Human Rights Commission
KICA	Kenya Information and Communications Act
KICTANet	Kenya ICT Action Network
KIEMS	Kenya Integrated Electoral Management System
KUJ	Kenyan Union of Journalists
M&E	monitoring and evaluation
MCK	Media Council of Kenya
MoU	memorandum of understanding
MP	member of parliament
MSWG	Media Sector Working Group
NASA	National Super Alliance
NC4	National Computer and Cybercrimes Coordination Committee
NCIC	National Cohesion and Integration Commission
NCPWD	National Council of Persons with Disabilities
NDI	National Democratic Institute
NGO	non-governmental organisation
ODM	Orange Democratic Movement
ODPC	Office of the Data Protection Commissioner
ODPP	Office of the Director of Public Prosecutions
ORPP	Office of the Registrar of Political Parties
PBO	Public Benefits Organisations
PDD	polling day diary
PEAM	Pre-Election Assessment Mission
PO	presiding officer
PRO	presidential returning officer
PSD	polling station diary
PWD	person with disabilities
RO	returning officer
TCC	The Carter Center
UDA	United Democratic Alliance
UNHCR	United Nations High Commissioner for Refugees

Letter of Transmittal

**Commonwealth Observer Group
Kenya General Election
9 August 2022**

14 August 2022

Dear Secretary-General,

I am pleased to forward you the final report of the Commonwealth Observer Group you constituted to observe the Kenyan General Election held on 9 August 2022.

I was deeply honoured to have chaired this Group of eminent persons from across the Commonwealth, and to be present for this important moment in Kenya's democratic history.

Our Group was given a warm and hospitable welcome by all stakeholders with whom we met during our time in the country. Our Group was briefed by, amongst others, the Independent Electoral and Boundaries Commission (IEBC), political party representatives, civil society organisations (CSOs), traditional and social media representatives, the police, Smartmatic (election voting technology), domestic and international election observer groups, and Commonwealth High Commissions.

Our Group was deployed to seven of the country's eight provinces, whereupon observers met with local stakeholders in advance of the election and observed the voting, counting and results tabulation processes. The Group's report is based on extensive consultations with national stakeholders, discussions with international observers, and observations throughout the period of deployment.

We noted that the primary process and the campaign period were each very competitive; political parties and candidates were able to campaign freely throughout the country (notwithstanding some security issues in the north and north-east). In a sign of the increasing maturity of Kenya's democracy, this election saw campaigns place a greater emphasis on issues and policies than in previous elections. The Group was pleased to note the continuing vibrancy and diversity of Kenya's civil society, which played an active and positive role throughout the electoral cycle. The youth turnout was low, however, which suggests politicians must do more to identify and tackle the root causes of youth apathy.

The IEBC is to be commended for addressing a number of the challenges that had beset the 2017 election, particularly regarding the reliability of the electoral technologies. Despite some pre-election concerns, these technologies worked well on election day and enhanced the integrity of the process. The voting, counting and tabulation processes were for the most part smooth, although there is room for improvement regarding the results declaration process, which caused some initial confusion and anxiety.

The Group identified some challenges that should be addressed by stakeholders in future elections, including delays in the appointment of IEBC commissioners; delays in the IEBC receiving funding; the failure to publish the voter register to allow for inspection and objections; a lack of implementation of the Electoral Campaign Financing Act and the Constitution's two-thirds gender rule for candidates; and errors in the printing of ballots in some areas. These challenges, whilst significant, did not rise to the level of affecting the overall credibility, transparency and inclusivity of the electoral process.

As Kenya seeks to further enhance and refine its democratic institutions and processes, it is hoped this report's recommendations will be received in the positive and constructive spirit with which they are offered. The IEBC, political parties, the judiciary, CSOs and the media are encouraged to seek mechanisms to take forward these recommendations and further deepen the level of cooperation between themselves so as to continue to build trust and confidence in Kenya's electoral processes.

Once again, I extend on behalf of the Group my deep appreciation to the people of Kenya for their warm welcome. It was a great privilege to bear witness to this important milestone in Kenya's democratic life. I must also extend my thanks and appreciation to the staff of the Commonwealth Secretariat for their valued support to the mission.

Our continued best wishes to the people of Kenya.

Yours sincerely,



The Hon Bruce Golding

Chairperson, Commonwealth Observer Group

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Commonwealth Foundation, Australia

Darrell Bradley, former Mayor of Belize City,
Belize

Dr Simon Munzu, former UN Deputy Special
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Executive Summary

Following a Commonwealth Secretariat Pre-Election Assessment Mission, which took place from 24 to 30 April 2022, the Commonwealth Secretary-General, The Rt Hon Patricia Scotland KC, decided to deploy a Commonwealth Observer Group (COG) to observe the Kenya General Election of 9 August 2022. An Advance Observer Group arrived in the country on 17 July 2022, with the main Group of observers arriving on 1 August 2022. Upon arrival of the main Group, observers were briefed on the findings of the advance observers. In total, the COG comprised the Chair and 15 observers, supported by a Commonwealth Secretariat staff team of 13 persons.

In carrying out its terms of reference, the Group met, among others, the Independent Electoral and Boundaries Commission (IEBC), political party representatives, civil society organisations (CSOs), traditional and social media representatives, the police, Smartmatic, domestic and international election observer groups and Commonwealth High Commissions. Observers were deployed to seven out of the country's eight provinces. At their respective deployment locations, observers met with presiding officers and polling staff, constituency and county returning officers, police, prison officials, candidates, polling agents, media representatives, local CSOs and a cross-section of the electorate.

The atmosphere surrounding the 2022 General Election was largely peaceful, and the election represented a number of firsts: it was the first election to have three female presidential running mates; the first in which there was no Kikuyu presidential candidate; and the first in which the outgoing president campaigned for his deputy's main competitor. While ethnicity remains a key determinant of political support in Kenya, a combination of the above factors altered the electoral dynamics and contributed to an election in which candidates put a greater emphasis on policies and issues than in previous elections. These signs of political maturity in Kenya are encouraging and should be further nurtured and encouraged.

The Group commends political parties, their leaders and supporters, and all Kenyan citizens for the peaceful and forthright manner in which they

exercised their democratic rights. Politicians must do more, however, to address the root causes of youth voter apathy.

The legal framework guaranteed fundamental freedoms and political rights, and provided an adequate basis for the conduct of democratic elections. There is, however, a need for the full implementation of key constitutional and legislative provisions, including the constitutional two-thirds gender rule and the 2013 Elections Campaign Financing Act. In addition, relevant stakeholders must review laws relating to freedom of expression and media freedoms, to ensure full alignment with international laws to which Kenya is party.

The IEBC is to be commended for administering credible and transparent elections under challenging logistical and operational circumstances. The IEBC, the Communications Authority and telecommunications companies, in particular, are to be congratulated for rectifying problems with the digital transmission of results that had beset the 2017 General Election. Yet there is room to strengthen certain processes. The IEBC should review its chain of custody procedures relating to the printing of ballots to avoid the types of errors that led to the postponement of elections in some areas, including Kakamega and Mombasa. The IEBC should also ensure the voter register is published for an adequate amount of time in advance of the election to allow for inspection and objections. Finally, while stakeholders reported an improvement in the IEBC's transparency, and while the IEBC's memorandum of understanding with the media is to be lauded, there is still room for improvement in terms of the timeliness with which the IEBC releases information.

The IEBC faced some challenges as a result of factors beyond its control. There is a pressing need for the IEBC to receive a much greater portion of its funding earlier on in the electoral cycle, rather than towards the end, to allow it to adequately plan and undertake its electoral activities in accordance with its own desired timeframe. Taking cognisance of the split in the IEBC on the declaration of results, the Government and the National Assembly should also review the legislative and procedural framework of the appointments

process for members of the Commission so as to ensure appointments are made promptly, political interference is avoided and appointees discharge their responsibilities with impartiality, transparency and accountability.

Kenya's vibrant civil society should be commended and supported with increased vigour; CSOs proved themselves to be indispensable interlocutors in monitoring and safeguarding the rules-based electoral process. CSOs were active throughout the electoral cycle, and indeed some court cases brought by CSOs and private citizens resulted in greater legal clarity regarding important parts of the electoral process. Citizen observer groups also demonstrated excellent technical competence in undertaking their parallel voter tabulation exercises. The IEBC is encouraged to further enhance its engagements with CSOs on voter education. Such efforts may go some way to addressing the low youth turnout in future elections.

Notwithstanding the ballot paper issues in Kakamega and Mombasa, the voting process was generally well administered. Polling officials demonstrated professionalism, transparency and integrity, and ensured voters were able to exercise their right to vote. Polling officials acted swiftly to resolve any issues where they arose. The police are to be commended for their calm and helpful presence at polling centres. Party agents and citizen observers were present and able to perform their duties unhindered.

The counting process at polling stations visited was conducted in an orderly, transparent and collegial manner, with agents and citizen observers working harmoniously with polling officials. Some polling officials had some initial difficulties with submitting results via the Kenya Integrated Electoral Management System (KIEMS) kits but these were usually resolved in a timely manner. The KIEMS kits had an impressive level of success nationwide. The results announcement process could benefit from improvement, however. The sudden halting of reporting of results by the media increased tensions and contributed to unwanted rumour and speculation.

The Supreme Court is to be commended for its handling of the post-election presidential petition process. The Court ensured both sides were able to present their evidence, and facilitated the recounting of a sample of ballot boxes. The Court is to be particularly lauded for the issuing of its

judgement within the constitutionally mandated timeframe. The Court demonstrated impartiality and sound reason in delivering its judgement.

The Group's overall assessment was that the election, as a whole, was credible, transparent and inclusive. However, all electoral processes can be further strengthened. In accordance with the Group's mandate, this report offers a number of recommendations for electoral stakeholders in Kenya to consider.

The Group wishes to congratulate the IEBC, polling staff, constituency and county returning officials, political parties, CSOs, the media, prison officials and the police service for their collective commitment to ensuring Kenyan voters were able to exercise their democratic rights. Kenyan voters are to be commended for turning out in significant numbers to ensure their voices were heard at the ballot box.

Recommendations

Electoral framework and electoral administration

- The Kenya Law Reform Commission should consolidate the various amendments to the Elections Act to ensure greater accessibility and certainty of the applicable law.
- In deciding electoral disputes, courts should seek to balance the quantity or number of proven irregularities against their substantive weight.
- In order to increase diaspora voter registration figures, the IEBC should begin its planning further in advance and consider ways of improving voter education targeted at the diaspora.
- The IEBC should ensure timely publication of all future voter registers to afford time for verification and objections.
- There is an urgent need to review the IEBC commissioner appointment process to ensure the timely appointment of satisfactorily non-partisan commissioners and that the independence of the IEBC is safeguarded and strengthened.
- The IEBC and the Government should ensure that all judgements and orders of the Supreme Court and High Courts be implemented and adhered to.

- Relevant stakeholders may wish to consider a deadline of at least one month prior to the election for hearing the majority of cases, with High Courts making exceptions in only limited circumstances.
- A new statutory elections code should be put in place that consolidates existing law and is more easily understood. Caution should be exercised not to change applicable laws close to the holding of elections.
- The National Assembly, in consultation with the Kenya Law Reform Commission and other relevant stakeholders, should consult on the possible establishment of a Special Elections Court, ideally in the Constitutional Division of the High Court, with judges specialised in election laws presiding over electoral disputes. To further speed up the process, it is recommended that there be one layer of appeal from the elections court – that is, direct to the Supreme Court. Stakeholders should agree on, and codify in law, the length of time in advance of the election that the Special Elections Court should be constituted.
- In order to improve transparency and public understanding of the process, relevant stakeholders should ensure all judgements are made publicly available in a timely fashion.
- The conviction of any candidate for corruption, electoral malpractice or unethical conduct contrary to national values should lead to automatic disqualification of such a candidate as per the law. In order to satisfy the public interest in certainty, any conviction at the time an election is called should preclude a person from standing in that election. Appeals against conviction should be heard and decided promptly to avoid stagnation and encumbrance in the electoral process.
- There is a need for the Elections Campaign Financing Act to come into force and to draft regulations. The IEBC should immediately begin public consultations as to the appropriate spending limits in order to ensure the Act is in place, and is enforced, by the time of the next General Election.
- The Elections Campaign Financing Act should be amended to exclude necessary and reasonable security costs from the list of prohibited state resources during the campaign period.
- In order to allow the IEBC to initiate electoral preparations far in advance of the election, the Kenyan Government should ensure the IEBC receives balanced funding throughout the course of the five-year electoral cycle, rather than receiving the bulk of it in the final year.
- The Government should not interfere with the IEBC's lawful right under the IEBC Act to seek funding from the donor community.
- The IEBC, perhaps with support of the international community, should undertake a comparison of election expenditures in comparative countries to identify any cost-saving measures for future elections.
- The provision of information on the ownership of technology vendors should be made a requirement of the IEBC's tendering process, and the IEBC should publish this information.
- The IEBC should ensure that it retains full control over biometric voter registration data in future contracts and that all contractors are in full compliance with the Data Protection Act (DPA).
- To ensure adequate coverage and effective public outreach, the IEBC should ensure more time is allocated for voter education.
- To overcome the voter education resource challenges, the IEBC should create a dedicated funding stream for voter education.
- In addition to staff training on key electoral processes and other electoral operations, the IEBC should consider providing training for all its staff to enhance its strategic communication capabilities, transparency and accountability.

Participation and inclusion

Civil society organisations

- The National Assembly should pass the amendments to the Public Benefits Organisations Act to strengthen civil society against banning and deregistration. This would allow for greater civil society involvement within the electoral process.
- The IEBC should disseminate clear instructions to polling officials to ensure consistency in the application of rules for citizen observers on polling day.

- Despite a promising number of accredited CSOs in the 2022 elections, there was an uneven spread across the country on polling day. Strengthened collaboration and co-ordination between CSOs are required for deployment on election day.

Women

- It is vital that political parties comply with the two-thirds gender rule. The IEBC should ensure political parties are made aware of this rule early on in the electoral calendar, and that those not adhering face appropriate sanctions.
- More efforts are needed from political parties to identify women candidates and implement gender equality principles in their own guiding documents in line with the Kenyan Constitution.
- The media should provide equal media access to both men and women. This should include access to relevant training opportunities for women candidates.
- Preventive and protective measures, including stronger criminal justice mechanisms and approaches, should be implemented to eliminate sexual and gender-based violence, which are barriers to women's political participation.
- Law enforcement must strictly enforce the Computer Misuse and Cybercrimes Act (CMCA) to prevent cyberbullying attacks directed at women.
- Women are greatly disadvantaged when it comes to raising funds for campaigning. The Government should establish a well-resourced trust fund to provide seed grants for women vying for political office. This could include adapting the current Political Parties Fund to prioritise women.

Persons with disabilities

- The IEBC should conduct a thorough review of the electoral process *vis-à-vis* persons with disabilities (PWDs), with the aim of identifying practical measures that remove barriers to PWD participation.
- The IEBC should conduct more sensitisation programmes on the issue of PWDs, as well as more accessible voter education initiatives targeted at PWDs.

- There must be consistent engagement from political parties around disability inclusiveness, which could include an audit of the entire electoral cycle to identify and remove barriers to PWD participation.
- The Government, the IEBC and relevant stakeholders must work further to fill the implementation gaps around the legal provisions on disability, including fulfilment of its obligations under the Convention on the Rights of Persons with Disabilities, to which it is a party.
- The interface and co-operation between political parties and the National Council of Persons with Disabilities must be strengthened.

Youth

- The National Assembly should increase budget allocations for the IEBC and youth-led CSOs working on the ground for better reach.
- The IEBC should significantly improve its online communication strategy to reach youth, and redouble its efforts to use music, sports, arts and entertainment to target its voter education programmes. The IEBC should also consider the recruitment of dedicated youth outreach officers to spearhead its youth voter education programme.
- The IEBC should ensure youth voter education programmes include materials that educate youth on the dangers to themselves and others of online hate speech and mis- and disinformation.
- The IEBC should continue to strengthen its partnerships not only with well-established CSOs, faith-based organisations, universities and technology companies but also with smaller organisations working in more rural and coastal areas using localised and context-specific voter education.
- The IEBC should seek to develop public-private partnerships with local companies to encourage young staff to register to vote, as well as to utilise corporate workspaces as civic education opportunities.
- The IEBC should explore plans for future digital-based voter registration that allow youth to register more easily.

- The Government should ensure the Youth Manifesto is implemented and feeds into relevant stakeholder strategies as well as the National Action Plan.
- Institutionalisation of the engagement processes must be strengthened to ensure early youth mobilisation.
- Political parties should strengthen the substantive allocation they provide to youth candidates.
- The Office of the Registrar of Political Parties (ORPP) should do more to provide support and oversight to political parties on youth engagement, including more capacity-building. The ORPP should consider making youth issues a specific segment in its annual reporting.
- Political parties should seek additional ways to meaningfully engage youth throughout the electoral cycle, not just during election season, in order to combat voter apathy and increase youth political participation.
- Political parties should do more to ensure a greater number of youth candidates are supported (including financially) to stand for election.
- Political parties should make greater efforts to include youth in decision-making processes and within political party hierarchies.

Prison voting

- The IEBC and the Prisons Department must work together to implement a framework that allows every prisoner to be verified as a voter and enable their registration immediately upon being admitted to any prison. This includes strengthening the process and mechanisms for the retrieval of ID for prisoners that do not have it and, consequently, stronger standard operating procedures within the Prisons Department.
- The Prisons Department should advise the IEBC if prisoners are released prior to the election. Prisoners who registered to vote while in prison should be advised to change their registration details upon leaving prison.
- Observer groups should find ways to co-ordinate to ensure at least one observer is in the polling station for the counting process.

Campaign and the media

- Political party leaderships are strongly encouraged to promote the Code of Conduct within their own parties and engender a culture that promotes the value of democracy above short-term political and economic interests.
- The Department of Public Prosecutions, as the enforcing institution of the Code of Conduct (as per *Chege v IEBC*), is encouraged to redouble efforts to sanction violations of the Elections Act and the Code of Conduct.
- The IEBC should undertake the necessary public consultations on campaign finance, including on party and candidate expenditure caps, to ensure the Campaign Finance Act is in force for the next election.
- The Government is urged to repeal Sections 22 and 23 of the CMCA and seek alternative means of addressing mis- and disinformation that do not encroach on other constitutional freedoms.
- The Government is encouraged to review legislation pertaining to hate speech, including the National Cohesion and Integration Commission (NCIC) Act, and to bring definitions of hate speech legislation in line with Kenya's international human rights obligations. The Government is further urged to ensure the NCIC is appropriately resourced to enforce the provisions of the Act pertaining to hate speech.
- Social media companies are encouraged to take more responsibility and action on disinformation, misinformation and hate speech to improve the speed at which dangerous/misleading content is removed from their platforms, and to ensure such efforts continue for a sufficient period after the election to combat post-election mis- and disinformation and hate speech. Special consideration should be given to the political leaders' profiles that have huge following and verified status that spread disinformation and hate speech as well political supporters' accounts with massive followings.
- Under the Freedom of Information Act, public institutions and relevant authorities should meet information requests by journalists and non-governmental organisations promptly and procedures should be simplified.

- The Government should consult with the Communications Authority and the Media Council of Kenya (MCK), as well as the Law Reform Commission, to clarify any legal ambiguities relating to the roles and responsibilities of the respective institutions regarding the regulation of broadcast media.
- Media houses should endeavour to always disclose and identify political advertorials paid for by interested parties when they carry or broadcast sponsored content by candidates and political parties, in line with their obligations under the MCK Act.
- The IEBC is strongly encouraged to ensure maximum transparency at each stage of the election process and that all relevant stakeholders are provided with timely information.
- The IEBC should further enhance its media strategy to run from the campaign period to the results announcement phase in order to better manage expectations in the post-election period.
- The Government should ensure the Office of the Data Protection Commissioner is sufficiently resourced to enforce the DPA.
- The data commissioner should be much more vocal in educating the public on efforts taken to enforce the DPA, and should make greater efforts to educate both data subjects (i.e., voters) and data controllers on their rights and responsibilities, respectively.

Voting, counting and the results process

- Special arrangements should be made to allow early voting for polling staff, security personnel and other affected categories. Such early voting could take place a day or two before the stipulated day. This would entail sealing and storing the ballots, which would then be opened on or after the official polling day.
- The IEBC should address space constraints by establishing minimum common standards for each polling station, be it in a classroom or in

a tent in a public field. This will ensure agents do not unwittingly compromise the secrecy of the ballot, and will also ensure compliance with COVID-19 protocols on social distancing. Such standards should ideally be included in the regulations.

- The conditions under which polling officials spend the night on the eve of elections, especially in rural areas, should be significantly improved to increase the morale and productivity of polling staff.
- The IEBC should ensure better signage is introduced to guide voters at the polling stations.
- The IEBC should undertake increased voter education on how to access and use the IEBC website, portal and SMS system.
- The IEBC should continue to provide training to ensure ongoing competence and efficiency in the discharge of assigned duties and responsibilities.
- In its post-election review, the IEBC should consider administrative and technological solutions that would expedite the official announcement of results.
- The IEBC should revise its procedures to ensure polling staff announce the name of the voter, and put in place measures to enable the agents to satisfy themselves that the ID of the voter has been verified.
- A copy of the voter register should be made available to party agents, either by the IEBC or by political parties.
- Political parties must ensure their members do not engage in physical or verbal harassment of IEBC staff at any tallying centres.
- Security services are encouraged to be more proactive in ensuring the safety of IEBC staff at tallying centres and a reduction in the possibility of violent attacks occurring.

1. Introduction

The Commonwealth Secretary-General, Rt Hon Patricia Scotland KC, constituted a Commonwealth Observer Group (COG) for the 8 August 2022 General Election of Kenya, at the invitation of the Independent Electoral Boundaries Commission (IEBC). The Secretary-General's decision was informed by a Pre-Election Assessment Mission (PEAM) undertaken by a core Secretariat staff team to Kenya in April 2022. During this mission, staff met with key stakeholders including the IEBC, political parties and civil society organisations (CSOs). The political and electoral landscape analysis, country assessment and stakeholders' input were synthesised into a report that ultimately informed the Secretary-General's decision to approve a COG to Kenya.

Composition

The COG consisted of 15 distinguished observers from 4 regions of the Commonwealth (see Annex I). They were invited in their individual capacities, based on complementary areas of expertise, essential for a robust analysis of the elections in Kenya. The Hon. Bruce Golding, former Prime Minister of Jamaica, chaired the group, which was supported by 13 technical staff members led by Dr Arjoon Suddhoo, Deputy Secretary-General of the Commonwealth.

Terms of reference

The mandate and agreed terms of reference for the group was as follows:

The Group is established by the Commonwealth Secretary-General at the invitation of the Independent Electoral and Boundaries Commission.

The Group is to consider the various factors impinging on the credibility of the electoral process as a whole.

The Group will determine in its own judgement whether the elections have been conducted according to the standards for democratic elections to which the country has committed itself, with reference to national election-related legislation as well as to relevant Commonwealth, regional and other international norms and commitments.

The Group is to act impartially and independently. It has no executive role: its function is not to supervise but to observe the process as a whole and to form a judgement accordingly. It is also free to propose to the authorities concerned such action on institutional, procedural and other matters as would assist the holding of such elections.

Advance Observer Group

An Advance Observer Group, consisting of three observers and one technical staff member, arrived in Kenya on 20 July 2022, prior to the rest of the Group. The advance observers were deployed in key areas around the country, including Eldoret and Kakamega, and met with various electoral stakeholders including the chair of the IEBC, political parties, CSOs and social media platforms (Meta and Twitter). Once the main Group had arrived in Nairobi, the advance observers briefed on some of their key observations and findings and provided additional context for the main Group on important areas of focus for the elections.

Activities and timelines

The interim chair provided an Arrival Statement on 3 August 2022 (see Annex II). Prior to this, the African Union (AU) and the Common Market for Eastern and Southern Africa (COMESA) hosted a joint co-ordination meeting for technical staff representatives of international elections observer missions (IEOMs) present for the elections. The aim of the meeting, spearheaded by the AU and COMESA, was to co-ordinate activities and synchronise timelines. The IEOMs represented at the General Election were the AU, COMESA, the East African Community (EAC), the European Union (EU), the International Conference of the Great Lakes Region (ICGLR), the Intergovernmental Authority on Development (IGAD), the National Democratic Institute (NDI) and The Carter Center (TCC).

From 3 to 6 August, the Group was briefed by various stakeholders, invited to share their views on a number of issues related to the election. Representatives came from the IEBC, the Office of the Registrar of Political Parties (ORPP), the National Cohesion and Integration Commission

(NCIC), three political parties (the Azimio la Umoja ('Resolution in Unity') alliance of 23 parties, Kenya Kwanza ('Kenya First') and the Roots Party), CSOs, traditional and new media, and Smartmatic.

The Group was deployed in 14 teams from 7 to 9 August in Nairobi (including Kiambu), Central (Nyeri, Kitui and Meru), Coast (Mombasa), North Eastern (Machakos), Nyanza (Kisumu, Kisii), Rift Valley (Nakuru, Eldoret, Kitale and West Pokot) and Western Region (Kakamega, Vihiga, Bungoma and Busia).¹ While on deployment, observers met with presiding officers, constituency and county returning officers, political party representatives, party agents, candidates, prison officials, local media representatives, local CSOs and voters.

The chair issued an Interim Statement on 11 August in a joint press briefing with the chairs of the AU, COMESA and Electoral Institute for Sustainable Democracy in Africa (EISA) observer missions.

The chair noted the mostly peaceful electoral atmosphere, the dedication and hard work of polling staff, and the appreciation for the logical undertaking for the elections. The chair also noted some challenges, such as the slow tallying and transmission rate for election results and a lack of transparency regarding the finalisation of the voter register.

The final report was drafted in Nairobi and was concluded prior to the departure of the Group on 14 August.

¹ The full deployment plan is at Annex III.

2. Political Background

The 2022 elections were the seventh to be held since the introduction of multi-party politics in Kenya in 1992. Hitherto, Kenyan politics has been characterised by an emphasis on personality rather than any ideological differences between political parties or alliances, which instead are often formed along ethnic lines. Political elites from select families have also played a significant role in Kenyan politics. Ethnic divisions reached a nadir in the aftermath of the 2007 election, in which over 1,200 people were killed and as many as 350,000 people were internally displaced.

In 2010, Kenya adopted a new Constitution. Although this had been under deliberation for many years, the events of 2007 contributed to the drafting of a Constitution that sought to strengthen democratic accountability and mitigate factors in Kenya's political system that had led to ethnic polarisation and violence in the post-election period. The Constitution created a presidential system by removing the position of prime minister; curtailed presidential powers; introduced certain requirements for winning the presidential election aimed at ensuring the president garners national support; established a bicameral legislature through the creation of the senate; devolved powers to 47 counties (rather than 8 provinces and 46 districts) and ensured equitable sharing of resources between the national and county-level governments; and introduced requirements that elective bodies comprise no more than two-thirds of one gender. The 2022 election was the third to be held under the new Constitution.

The 2013 and 2017 elections

Uhuru Kenyatta was elected president in the elections of 2013 and 2017. His victory in 2013 was achieved through the establishment of the Jubilee Alliance, a conglomeration of smaller coalitions that merged Kenyatta's popularity among his Kikuyu ethnic group in central Kenya with running mate William Ruto's support among the Kalenjin ethnic group in the Rift Valley. In 2016, this coalition developed into the Jubilee Party, which secured victory for Kenyatta in the following year's election.

In 2013, Kenyatta's main opposition was the Coalition for Reforms and Democracy (CORD), which comprised Raila Odinga's Orange Democratic

Movement (ODM) alongside the Wiper Party and the Forum for the Restoration of Democracy (FORD-Kenya). This coalition consolidated support among ethnic groups in Western Kenya (Luos and Luhyos), the former Eastern province east of Mount Kenya (Kamba) and the Coast region. With the Amani National Congress joining the coalition in 2016, the coalition rebranded as the National Super Alliance (NASA) to contest the 2017 election.

These elections thus represented a continuation of political polarisation along regional and ethnic lines. The Supreme Court's annulment of the presidential election as a result of various technical deficiencies with the electoral process² resulted in violent and deadly clashes between voters and the police. While this violence was of a different nature to that in 2007, and was more limited in scope, it nonetheless served as a reminder of the knife-edge and high-stakes character of Kenyan elections.

The handshake

In March 2018, former political foes Kenyatta and Raila Odinga joined each other on stage and put an end to their rivalry. The resulting handshake in front of a large audience became a moment of enormous political significance, and marked the beginning of an alliance that caused divisions between Kenyatta and Ruto, splintered the alliance of the Jubilee Party and ultimately resulted in Kenyatta supporting Odinga's presidential bid.

To some, the 'handshake' represented an opportunity for Kenya to move beyond political blocs based on ethnicity. The alliance precipitated the development of the Building Bridges Initiative (BBI) by Kenyatta and Odinga. BBI was a proposed series of constitutional reforms that included plans

² Raila Odinga's petition alleged that the IEBC had interfered with the digital results transmission process. There were further alleged discrepancies in the tallying and transmission of results. The Supreme Court ruled there were a number of illegalities and irregularities in the IEBC's actions, and that poor 3G connectivity in many parts of the country had affected the digital results transmission process. It also found that paper forms from around 10,000 polling stations across the country were missing when the results were announced. Based on the above, along with the IEBC's refusal to grant the Court access to its servers, the Supreme Court ruled the election had not been conducted in line with the provisions of the Constitution. A fresh election was called within 60 days.

to increase the size of the National Assembly by 70 members of parliament (MPs), to reinstate the position of a prime minister (to be appointed by the president and subject to nomination by the National Assembly) and to nominate two deputy prime ministers. In May 2021, BBI was struck down by the High Court as being unconstitutional, a decision the Supreme Court later upheld.

To Ruto's base, Kenyatta's decision to back Odinga was seen as a betrayal of the deal between himself and Ruto to back the latter's presidential aspirations. Further, BBI was regarded as an attempt by Kenyatta and Odinga to consolidate power through undemocratic reforms. In response to Kenyatta's changing allegiances, Ruto established the United Democratic Alliance (UDA) and formed a coalition, Kenya Kwanza, with nine other parties, including two (Amani and FORD-Kenya) that were formerly in allegiance with Kenyatta's Jubilee Party.

2022 election: from ethnicity to policy

The 2022 Kenyan General Election represented a number of firsts: it was the first time that three of the deputy presidential running mates were women; it was the first time since Kenya's independence that none of the presidential candidates was from the Kikuyu ethnic majority; and it was the first time that a sitting president and his deputy were in opposing political camps, with the incumbent president endorsing a political rival.

Regarding the first point, the high number of women deputy presidential candidates demonstrated a level of progress on the issue of women's political representation. Each of the women candidates was highly respected in Kenya, and their presence on the campaign trail garnered significant media attention and proved to be substantial draw cards for many voters.

Regarding the second and third points, while ethnic divisions still largely dominate Kenyan politics, presidential candidates and their running mates elected to run campaigns that went beyond efforts to secure the vote of ethnic blocs. The presidential election was characterised as a two-horse race between Raila Odinga of the Azimio la Umoja alliance and Deputy President William Ruto of the Kenya Kwanza party – of the Luo and Kalenjin ethnic groups, respectively. Ruto selected Rigathi Gachagua, a prominent Kikuyu businessman and

former MP for Mathira constituency in Central Kenya, while Raila Odinga chose Martha Karua, a Kikuyu and former minister of justice.

Alliances between different ethnic groups are not new in Kenya – indeed, they are often viewed as an important component of electoral strategy – but a number of factors contributed to the decision of politicians to focus more on policy than in previous elections. These factors included the lack, for the first time, of a Kikuyu presidential candidate; Odinga and Kenyatta's decision to join forces; grievances of voters within Odinga and Kenyatta's respective ethnic blocs; and an economic climate that placed material and financial needs above ethnic considerations in the minds of many voters.

Yet, regardless of the factors that led to this more issues-based election, the very fact that parties and voters alike placed greater importance on substantive policy platforms than ethnic allegiance contrasted sharply with what had been the case in previous elections. This led to analysts considering the extent to which this might represent the beginning of a sustained shift from ethnic-based politics in the country, and indeed whether Kikuyu, Luo and Kalenjin political elites could work together and move beyond old tensions, such as between Kikuyu and Kalenjin peasants over land in the Rift Valley, and between Kikuyu and Luo elites over Jomo Kenyatta's perceived betrayal of Odinga's father.

Analysts noted that Odinga's ability to present himself as a political underdog and 'man of the people' was damaged as a result of his alliance with President Kenyatta; indeed, the alliance resulted in Odinga's opponents characterising him as the elite candidate representing the country's political 'dynasties'. This stood in contrast to Deputy President Ruto's populist 'hustler economics' campaign, aimed at building inter-ethnic support among the working class. In addition, a number of politicians, such as FORD-Kenya leader Moses Wetangula, switched allegiance from Odinga to Ruto during this election – decisions that can in large part be traced back to 'the handshake'. These factors contributed to an election in which the traditional voting direction of Kikuyu and Luhyo voters was less of a guarantee than in previous elections. This, in turn, contributed to election campaigns that focused more on economic and welfare policy than has traditionally been the case.

Economics and political apathy

Economic inequalities and grievances formed much of the backdrop to the election, with voters concerned about the enduring impact of COVID-19 on the economy and unemployment, as well as the impact of the Russia–Ukraine conflict on food security, supply chains and rising costs of living (one-third of Kenya's wheat is based on imports from Ukraine). In addition, public debt had increased from US\$16 billion in 2013 to \$71 billion in late 2021.

A March 2022 Afrobarometer poll of Kenyan voters suggested that the economy was the most important issue. This stands in contrast with a similar poll ahead of the 2017 election, in which the economy ranked sixth.³ According to some of the stakeholders and civil society actors who briefed the Group, ongoing economic insecurity and perceived failures of successive governments to deliver on electoral promises had left some Kenyans, particularly youth, disillusioned and politically apathetic. Such heightened economic concerns may also have contributed to graft and apparent campaign finance violations being topical issues during this election. Concerns about political apathy seem to have been borne out by the relatively low voter turnout of ~57 per cent, a significant decrease from the ~80 per cent turnout in 2017.

The Kenya Kwanza party campaigned on a 'bottom-up', inclusive approach to economic transformation that focused heavily on agricultural investments; developments in micro, small and medium enterprises; and social spending in the areas of housing and healthcare. It also promised to make Ksh50 billion (US\$417 million) in credit available to 'hustlers' – that is, men and women trying to eke out a living through low-level and informal entrepreneurial endeavours.

The Azimio la Umoja alliance spoke mainly about transforming the economy through economic liberalisation and investments in manufacturing and agriculture. But it also included commitments to government spending on education, universal healthcare and the development of a social programme to give a stipend of Ksh6,000 (US\$50) per month to vulnerable families.

The Roots Party focused on introducing new exports, including dog meat and snake breeding for anti-venom treatments, and a commitment to legalising cannabis for the development of value-added products. The party also promised to deport idle foreigners, hang the corrupt, shut down the Standard Gauge Railway and introduce a four-day work week.

The Agano Party called for the repatriation of Ksh20 trillion (US\$169 billion) shifted offshore and promised to offer tax waivers, subsidise maize and reduce corruption.

Despite these manifestos' focus on economic issues, a number of Kenyan voters expressed the view that the campaigns did not go far enough in dealing with issues that face the average Kenyan, and that certain manifesto promises were superficial, and without a clearly explained path to implement their promises.

Party primaries

Political parties were required to conduct their primaries by 22 April 2022. In January 2022, an amendment to the Political Parties Act was passed that provided a more propitious legal framework for the establishment of political party coalitions. Consequently, both of the forerunners in the presidential election, Ruto and Odinga, formed alliances between their and other political parties.

During the primaries, political parties were able to campaign in the strongholds of other parties, illustrating a heightened level of political maturity in Kenyan politics. However, the primary process did display a number of shortcomings:

- Stakeholders who briefed both the PEAM and the COG noted that, while some candidates were selected through elections, others were given direct tickets.
- The Group was informed that some women candidates were subjected to physical violence and online abuse. In addition, despite multiple court cases confirming the constitutional imperative of the two-thirds gender rule, many parties failed to meet this criterion.
- Some stakeholders noted that youth and persons with disabilities (PWDs) may have been disadvantaged during the primaries, reflecting the ongoing presence of barriers that affect full participation of marginalised groups in Kenyan politics.

3 Afrobarometer (2022) 'Kenyans See Government Failing on Their Top Priorities – the Economy and Corruption, Afrobarometer Survey Shows'. News Release, 25 March. www.afrobarometer.org/wp-content/uploads/2022/04/news_release-kenyans_see_government_failing_on_the_economy_and_corruption-afrobarometer-25march22.pdf

- The ODM informed the PEAM that one of its aspirants had won a party ticket through intimidation. This ticket was subsequently withdrawn.

Any disputes arising from the party primaries were to be addressed through internal political party dispute resolution mechanisms, in accordance with the Political Parties Act.

Role of the security forces

The prevailing atmosphere in the run-up to the elections was one of relative peace. The two main candidates publicly pledged to uphold peace and urged their supporters to do the same. CSOs, youth groups and faith-based organisations were also influential in promoting and spreading a message of peace, with the latter holding frequent national prayer meetings in places of worship.

Yet there have been instances in Kenya's history of excessive and disproportionate use of force by law enforcement officers. The experience of past elections, particularly that of 2017, has reinforced the view of some that Kenyan police are instruments for enforcing the will of the governing party – *utumishi kwa wanasiasa* – as opposed to being an impartial body that protects and provides security to all Kenyans.

In the pre-election period, the refrain of the Ministry of the Interior, as well as the Inspector General of Police and the regional and county police forces, was that they were there to maintain peace and ensure safety and security, and to support the right of Kenyans to participate in the elections. Chapters 5 and 6 discuss the role of the police in more depth.

3. The Electoral Framework and Electoral Administration

Kenya is a constitutional republic. The Constitution of Kenya (2010) guarantees fundamental democratic and political rights, including the right to vote and participate in regular elections. The country uses a semi-presidential system that includes a bicameral legislature. The Constitution requires that presidential and legislative elections take place on the second Tuesday of August every five years. The 2022 General Election therefore comprised harmonised presidential, legislative, gubernatorial and local council elections.

Background to the 2010 Constitution

Kenya undertook comprehensive constitutional reforms in 2009, leading to the 2010 Constitution, under which the general rules of international law shall form part of the law of Kenya, and any treaty or convention ratified by Kenya shall form part of the law of Kenya under Article 2(5)(6).

The constitutional reforms that Kenya undertook were aimed at reconfiguring the system of governance and rectifying, among other issues, problems in the electoral system that had been identified as underlying causes to the electoral violence that erupted in 2007/08. These problems involved voter registration, and the counting, tallying and transmission of elections results from polling centres to the then-Electoral Commission.

The new system of governance established under the 2010 Constitution also sought to broaden and widen the political space in Kenya. It comprises the national government and the devolved system of government as equal entities of government. Devolution of government established 47 counties based on the original lawfully created districts. With a devolved system of government, the scope of elections expanded considerably to include presidential elections, elections to the National Assembly and Senate, and the election of county governors, County Assembly members and county women representatives to the National Assembly.

President

The president is head of state, head of government, and commander-in-chief of the armed forces. He or she is elected for a five-year term in a single national constituency, based on a majority system. Presidents can serve a maximum of two terms. A deputy president is elected based on the same conditions as stated above. In order to be elected in the first round, a candidate must receive 50 per cent plus one of all votes cast and also at least 25 per cent of the votes in at least half the counties (i.e., in 24 out of 47 counties).

If no candidate meets the above conditions in the first round, the two candidates with the most votes in the first round enter a run-off within 30 days of the first round. The candidate with the most votes in the run-off is declared the winner.

Senate

The upper house (Senate) was re-established under the 2010 Constitution and consists of a total of 68 members. A total of 47 senators, representing Kenya's 47 counties, are elected using a first-past-the-post system. According to their share of the vote, political parties also elect a further 16 women. Two additional senators are elected to represent youth, while two are elected to represent PWDs. The Senate elects an *ex-officio* member to act as speaker.

National Assembly

There are 349 seats in the lower house (National Assembly), comprising 290 members elected by constituency votes using a first-past-the-post system. An additional 47 women are elected on a first-past-the-post system from the country's 47 counties, and 12 members are elected by parliamentary political parties to represent the special interests of youth, PWDs and workers. The Senate elects an *ex-officio* member to act as speaker.

Local government

In accordance with Articles 6 and 10 of the Constitution, some executive powers of government are devolved to the county level, with 47 governors elected by registered votes to the executive of the local government. County Assembly members are elected from a total of 1,450 wards.

Legislative framework

The core legislative framework applicable to the 2022 General Election comprises:

- the Constitution of Kenya (2010);
- the Elections Act (2011), as amended;
- the Election Offences Act (2016);
- the IEBC Act (2011), as amended;
- the Political Parties Act (2011), as amended;
- subsidiary legislation, such as regulations;
- various other pieces of legislation, as well as regional and international standards and commitments, which are set out in Annex V.

Voter eligibility

The Constitution sets out an elaborate framework in which the right to vote is part of the political rights guaranteed in the Bill of Rights under Article 38 of the Constitution.

Article 38(2) entitles every Kenyan citizen the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for:

- a. any elective public body or office established under this Constitution; or
- b. any office of any political party of which the citizen is a member.

Exercise of the right to vote under Article 38(3) includes the right, without unreasonable restrictions:

- a. to be registered as a voter;
- b. to vote by secret ballot in any election or referendum; and
- c. to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

Independent Elections and Boundaries Commission

To ensure the exercise of these rights, the Constitution establishes the IEBC in Article 88 as an independent constitutional body with a mandate to conduct and supervise elections in Kenya. The IEBC is empowered by the Constitution to administer presidential, parliamentary, county governor and County Assembly elections.

The mandate and responsibility of the IEBC, as per Article 88 of the Constitution, is to ensure that:

- a. whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
- b. the votes cast are counted and tabulated and the results announced promptly by the presiding officer at each polling station;
- c. the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and
- d. appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

The mandate of the IEBC is specified in more detail in Article 88(4) of the Constitution, namely:

- a. the continuous registration of citizens as voters;
- b. the regular revision of the voters' roll;
- c. the delimitation of constituencies and wards;
- d. the regulation of the process by which parties nominate candidates for elections;
- e. the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;
- f. the registration of candidates for election;
- g. voter education;
- h. the facilitation of the observation, monitoring and evaluation of elections;
- i. the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;
- j. the development of a code of conduct for candidates and parties contesting elections; and

- k. the monitoring of compliance with the legislation required by Article 82(1)(b) relating to nomination of candidates by parties.

This mandate is to be exercised in accordance with the Elections Act 2011 as amended, and the IEBC Act 2011. The Elections Act implements the right to vote (Section 3), eligibility to vote (Section 10), registration of voters (Section 5), register of voters (Section 4), inspection of register of voters (Section 6) and verification of voter's register by biometric data within 60 days before elections are held as specified (Section 6(a)).

The Elections Act in particular establishes an integrated voting electoral system (Section 44) and a complementary registration system (Section 44(a)). In addition, there is a vast array of other laws that pertain to elections in Kenya (see Annex V) and reforms to the Elections Act 2011 have been made, notably by the three Election Laws (Amendment) Acts of 2016 and 2017. There is a need to consolidate these various amendments into one law to avoid confusion and increase accessibility.

Pre-election disputes

While sometimes overlapping, electoral disputes typically fit into the following five categories:

1. disputes within and between political parties;
2. electoral offences and illegal practices;
3. voter registration disputes;
4. candidate nomination disputes;
5. IEBC Electoral Code of Conduct disputes.

The legal framework underpinning Kenya's electoral dispute mechanism comprises the Constitution, the Elections Act, the Election Offences Act and the Political Parties Act, as well as mechanisms and institutions including the IEBC, the ORPP, the Political Parties Liaison Committee and the Political Parties Dispute Tribunal. Political parties are also required to have internal mechanisms to resolve internal disputes but can resort to the Tribunal if such efforts fail.

Article 88 of the Constitution mandates the IEBC to settle all pre-election disputes relating to the first four of the above categories. This authority is echoed in Section 74 of the Elections Act, which states that, 'Pursuant to Article 88 (4) (e) of the Constitution, the Commission shall be responsible

for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of results.'

Chege vs IEBC

Regarding violations of the Code of Conduct, a pre-election High Court case resulted in the Court ruling that the IEBC's powers to enforce the Code of Conduct were unconstitutional, given that Article 252 of the Constitution does not include the IEBC in its list of five public bodies that are clothed with the authority to summon witnesses. As such, the High Court ruled that the Office of the Director of Public Prosecutions (ODPP), in line with Section 21 of the Elections Act, should be the sole enforcer of the Code of Conduct. The IEBC and the ODPP thus signed a memorandum of understanding (MoU) in July 2022 setting out the procedures for the IEBC to provide information to the ODPP.

High Court Constitutional Bench

The legal framework has been enriched by important decisions of the courts on the application of electoral laws regarding which key issues have arisen. Some decisions have been handed down shortly before elections, however, thus causing further uncertainty to electoral conduct by the IEBC and other stakeholders. This includes the High Court case surrounding the use of the manual register, an issue the Group believes could have been litigated long in advance of the election. The Group appreciates that the High Court should be available to determine any cases up to the eve of the election in instances where electoral law is not settled. However, relevant stakeholders may wish to consider a deadline of at least one month prior to the election for hearing the majority of cases, with High Courts making exceptions in only limited circumstances.

Post-election petitions

Section 163(3)(a) of the Constitution confers the Supreme Court with singular authority to hear election petitions relating to the presidential election. Petitions must be filed with the Supreme Court within 7 days of the declaration of results, and the Supreme Court must issue its judgement within 14 days. While noting the importance of a speedy conclusion to post-election presidential petitions in order to sustain calm among the populace,

the Group was concerned by the extremely high workload placed on the Supreme Court, given the high number of petitions received. The Group recommends stakeholder consultation regarding a possible constitutional amendment for an appropriate extension to the deadline.

Certainty and accessibility of the law

It is clear that the complexity of election laws poses uncertainty in the understanding and application of the laws by the IEBC, judges, citizens and other stakeholders. Consolidation of electoral laws is necessary to ensure accessibility and certainty of the law. A consolidated statutory elections code should be put in place to aid ease of reading.

Training of judges and Special Elections Court

Prior to the election, judges received training on different aspects of electoral law, including thematic training on issues such as electoral technologies, electoral cybersecurity and electronic evidence. This is commendable and should be maintained for future elections.

Nonetheless, the Group is of the view that Kenya might benefit from the establishment of a Special Elections Court, ideally in the Constitutional Division of the High Court, with judges specialised in election laws presiding over electoral disputes. Such a court might help mitigate the abuse of the judicial process by electoral actors, particularly close to elections, and might also inject speed in disposing of electoral cases. Lastly, stakeholders should consult and come to an agreement on the length of time in advance of the election that such a court should be constituted, and codify this in law.

It was noted that some decisions made by judges on electoral matters are not available to the public or lawyers. In order to improve transparency and public understanding of the process, relevant stakeholders should ensure all judgements are made publicly available, and in a timely fashion, in the Law Reports of Kenya and on the judiciary's website.

Consideration should be made as to how to improve co-operation and efficiency among electoral stakeholders. The Group notes with approval the establishment of the Judicial Committee on Elections. However, the Group also noted the failure of Parliament to pass legislation and changes

to the Elections Act proposed by the IEBC. The IEBC is burdened with myriad legal challenges, which, if not well managed, could have impacts on its effectiveness.

The issue of qualifications and corruption in nominations should be viewed in the context of the application of national values (see especially Chapter Six of the Constitution).

Campaign finance

The Elections Campaign Financing Act was passed in 2013 with the aim of regulating funding and spending during elections and referendums. However, owing to procedural and legislative wranglings, it has not yet entered into force. In May 2022, Justice Mrima ruled that the IEBC had failed to conduct public consultation on the regulations and spending limits but that the IEBC did not need to seek parliamentary approval over either of these. While the High Court ruling occluded the imposition of limits for the 2022 General Election, it does mean that the IEBC will be free of parliamentary oversight with regard to the drafting of future regulations.

The Elections Campaign Financing Act must come into force so as to defend against the abuse of state resources during the campaign period. The Group notes that the Act excludes from its list of prohibited resources any funds dispersed to political parties from the Political Parties Fund. The Group recommends that such exclusion be extended to security costs, so long as these are necessary and reasonable.

Election administration

The Commission consists of a chairperson and six other members, who are appointed in accordance with the provisions of Article 250 of the Constitution, Sections 5-9 of the IEBC Act 2011 and the IEBC (Amendment) Act 2020. Commissioners are elected for a single term of six years and are selected by a seven-member panel consisting of four members of the Parliamentary Service Commission, two members of the Law Society of Kenya and two persons recommended by the Inter-Religious Council of Kenya. The members are approved by the National Assembly and are appointed by the president. The chairperson for the 2022 General Election was Wafula Chebukati, who was also chairperson for the 2017 election.

The IEBC has a secretariat tasked with carrying out the day-to-day duties of the Commission. For the 2022 General Election, the Secretariat was headed by Chief Electoral Officer Marjan Hussein.

For the conduct of the elections, the IEBC has 17 Regional Offices, 47 County Offices and 290 Constituency Offices, each of which is run by an IEBC coordinator. For the purpose of candidate nominations and establishing and communicating election results, a returning officer is appointed at each level.

Independence and neutrality of the IEBC

Although the IEBC is legally independent, as detailed above, the Group is aware that two factors unduly impact the functional independence and neutrality of the IEBC: the appointments process and the funding process (see 'Funding' below). The Group is aware that, contrary to the provisions of the IEBC Act, the Commission remained only partially constituted until September 2021, when four additional commissioners were appointed to replace those who had resigned after the 2017 election.

The Group was unable to ascertain the precise reasons for the four-year delay in filling the vacancies on the Commission but regards it as a matter of acute concern. At best, the late appointments resulted in commissioners taking on enormous responsibilities with just a year to go before the election, which could have adversely impacted electoral preparations. At worst, some stakeholders attributed these delays to undue political influence, and consequently raised concerns as to the independence of the IEBC.

A High Court case was brought against the appointment of one of these commissioners on the basis that she had, within the last five years, campaigned under the Jubilee Party ticket to be elected as a women's representative. The High Court ruled that, with less than a year to go until the election, it was in the public interest that she be allowed to take office in order to avoid a constitutional crisis.⁴ The Group was also notified of allegations of political deal-making in relation to the appointments of the four commissioners but was unable to confirm these.

The Group was made aware of divisions between the old and new commissioners throughout late 2021 and 2022, which ultimately resulted in the decision of the four new commissioners to refuse to accept the result of the presidential election.

There is an urgent need to review the appointments process to ensure the timely appointment of satisfactorily non-partisan commissioners and that the independence of the IEBC is safeguarded and strengthened.

Funding

Funding of the Commission is provided for in Sections 17-24 of the IEBC Act 2011. The funding of the IEBC is approved by Parliament but the Commission may also accept grants and donations from elsewhere, such as the international donor community.⁵

In late 2021, a letter was sent from the Ministry of Foreign Affairs to all embassies and many international organisations stating that the Government, rather than the IEBC, had the sole prerogative to request funding from the donor community, and that it would do so if it felt such support was necessary. This position was later reversed in late January 2022, although international donor community representatives noted that the tight timeframe until the election limited the scope of possible support that could be offered to the IEBC.

In its 2017 post-election evaluation report, the IEBC expressed a number of grievances regarding its ability to fulfil its mandate, including:

- the high (and increasing) cost of elections; and
- untimely funding, with the bulk of the funding received the year before the election rather than in line with the five-year electoral cycle.

Sections 21 and 22 of the IEBC Act require the IEBC to submit estimates on revenue and expenditure to the treasury cabinet secretary in advance of each financial year, with the latter presenting these estimates to the National Assembly for review and approval. The IEBC requested a budget of Ksh41 billion (~US\$353 billion) from the National Assembly Budget Committee to conduct the elections. It ultimately received a total of Ksh44.6 billion

4 Wangui, J. (2021) 'Court Declines to Bar New IEBC Commissioners from Office'. Nation, 3 September. <https://nation.africa/kenya/news/court-declines-to-bar-new-iebc-commissioners-from-office-3536718>

5 In its 2017 post-election evaluation report, the IEBC stated that donor funds amounted to 2.5 per cent of the total budget.

(~US\$384 billion), comprising two bulk payments of Ksh22.9 billion (~US\$197.2 billion) and Ksh21.7 billion (~US\$186.9 billion)– the latter tranche announced by Treasury Cabinet Secretary Ukur Yatani on 7 April 2022.

The IEBC informed the Advance Observer Team that it had faced difficulties delivering its mandate amid delays in budgetary approvals by Parliament, and challenges posed by receiving the bulk of its budget within a year of the election, thus putting a strain on its ability to conduct activities such as voter registration. The IEBC has publicly stated its desire for a constitutional amendment to entrench the IEBC Fund in the Constitution. It has also requested that it be funded on a five-yearly basis in line with the electoral cycle, rather than on an annual basis.⁶

There was some concern among electoral stakeholders regarding the high cost of conducting Kenya's General Election, which is one of the most expensive per capita in the world. Chairperson Wafula Chebukati has stated that these high costs are the result of legally binding requirements, including the use of electoral technology, the requirement for no more than 700 voters per polling station and the use of ballot papers with multiple security features. While noting that each of these is a legally binding requirement, the Group recommends the IEBC, perhaps with support from the international community, undertake a comparison of election expenditures in comparative countries to determine whether there are possibilities for cost-saving for future elections.

Boundary delimitation

The last delimitation exercise took place in 2012. The legal framework for the delimitation of boundaries is provided for by Articles 89 and 188 of the Constitution and the Fifth Schedule of the IEBC Act 2011. The framework stipulates, *inter alia*, the following:

- There must be 290 constituencies. While the IEBC can review the number and delimitation of ward boundaries, it can review only the delimitation of constituencies. The number of constituencies cannot be changed without a constitutional amendment.

- A review must take place every 8–12 years. If a review is finalised within 12 months of an election, it cannot be brought into effect until after the election.
- Constituencies and wards must, where possible, be based on the population quota, which itself must be based on census figures compiled by the most recent population and housing census and figures from the Kenya National Bureau of Statistics. There can be a 40 per cent deviation from the quota in urban and sparsely populated areas and a 30 per cent deviation in other areas if there is a need to consider geographical features, communities of interest, historical sites and several other criteria.
- The IEBC must publish a preliminary report and invite public representations on the proposals therein. Having considered the views of the public, the IEBC submits the report to the relevant parliamentary committee, which has 14 days to forward its revised report to the National Assembly along with its recommendations. Once the report and recommendations are considered, the final report must be approved by two-thirds of both the lower and the upper houses of Parliament, as per Article 188 of the Constitution, after which the IEBC must gazette the report within 14 days.

With the last review having taken place in 2012, a boundary review is due between 2020 and 2024. In early 2020, the IEBC was initially allocated Ksh150 million (US\$1.25 million) in the Supplementary Budget II to conduct a review, and it subsequently formed a Boundary Review Operations Plan to implement the review, but this was stalled by the COVID-19 pandemic. The IEBC later stated that temporal and financial constraints would preclude the ability to carry out such a review until after the 2022 General Election. The IEBC said it planned to initiate the review in September 2022.

The Government's BBI Bill envisaged the establishment of an additional 70 constituencies but in March 2020 this Bill was ruled to be unconstitutional on a number of grounds, including in relation to this specific provision.

Boundary delimitation is a contentious issue in Kenya for a number of reasons, including its ability to dissect traditional tribal areas and transfer control of

⁶ IEBC (2017) 'The Post Election Evaluation Report for the August 8, 2017 General Election and October 26, 2021 Fresh Presidential Election'. Nairobi: IEBC. www.iebc.or.ke/uploads/resources/V9UUoGqVBK.pdf

resources and collection of levies from one county to another. An attempt by the Ministry of Interior to resolve disputes through the establishment of a boundary dispute committee was found to be *ultra vires*, given that such powers are vested in the IEBC.⁷

Compliance with court orders

The Group notes the failure of the IEBC to comply with certain court decisions. Although the IEBC informed the Commonwealth PEAM that it had implemented 14 Supreme Court orders, other stakeholders noted that some of these had not been sufficiently addressed. The IEBC should ensure that all court orders are implemented and adhered to.

Kenya Integrated Electoral Management System

Following the disputed elections of 2007, Kenya's 2010 Constitution introduced provisions aimed at ensuring greater integrity and transparency of the electoral process. Article 81(e)(v) states that elections must be 'administered in an impartial, neutral, efficient, accurate and accountable manner', while Article 86(a) states that 'whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent.' Section 44 of the Elections Act 2011 further calls for the establishment of 'an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.'

In order to comply with these constitutional and legal provisions, in 2013 Kenya adopted the Kenya Integrated Electoral Management System (KIEMS). KIEMS is a tablet-based system that includes an integrated camera and biometric fingerprint scanner. In accordance with the provisions of Section 44 of the Elections Act, the KIEMS kit is used for three purposes in Kenya: voter registration, voter verification and the digital transmission of election results from polling stations to constituency and national tallying centres. The use of KIEMS for digital results transmission applies only to the presidential election.⁸

2017: lessons learnt

For both the 2013 and 2017 elections, the IEBC purchased the underlying hardware and software for KIEMS from French firm Safran (since merged with OT Morpho and now called Idemia). The enactment of the Public Procurement and Asset Disposal Act in 2015 provided a new legal framework for the procurement process for the 2017 election. Around 45,000 tablets were purchased from Safran, with the total contract eventually coming to Ksh4 billion (US\$40 million). In its 2017 post-election evaluation report, the IEBC detailed a number of challenges it had faced with the procurement process, including legal challenges and late disbursement of funds from the Government.

These obstacles had knock-on effects on the testing and deployment of technologies during the 2017 election, which ultimately contributed to the failure of the results transmission process and the nullification of the August election results by the Supreme Court. In spite of the new legal framework for procurement, questions were also raised as to the transparency of the process that led to Idemia being granted the contract. Moreover, recent investigative reporting has brought to light contemporaneous committee meeting minutes, in which it appears part of the rationale for awarding the 2017 contract to Safran was concern that another vendor's voter verification and results management systems might lack compatibility with Safran's voter registration system.⁹ In effect, the IEBC, confronting time constraints, court cases and delayed funding, found itself bound to Safran.

The above is of significance to the 2022 General Election for three reasons. First, the IEBC experienced similar challenges regarding court cases and late disbursement of funds during this election, thus raising concerns as to the degree to which relevant government institutions had implemented lessons learnt from 2017. Second, 41,000 of the IEBC's inventory of 55,000 tablets being used for the election were those purchased from Idemia in 2017, which has contractual implications as well as implications for the testing of the KIEMS kits. Third, the IEBC's extant contract with Safran (now Idemia), specifically its provisions regarding the ownership of voter registration data,

7 Constitutional Petition 511 of 2015. <http://kenyalaw.org/caselaw/cases/view/137183/>

8 A detailed explanation of the use of KIEMS for digital results transmission is contained in Chapter 6.

9 Namu, J.-A. (2022) 'Kenya's 2022 Elections: Is the Past a Prelude?' Africa Uncensored. <https://africauncensored.online/kenyas-2022-election/>

had direct impacts on the voter registration process for the 2022 General Election, as is discussed in greater detail below.

Awarding of Contract To Smartmatic

In May 2021, the IEBC issued an invitation to tender for the 'supply, delivery, installation, testing, commissioning, support and maintenance of KIEMS' for the 2022 election.¹⁰ Five companies submitted tenders, with the contract eventually going to Smartmatic International Holdings (hereafter 'Smartmatic'), a Dutch company that, according to its website, has provided electoral technologies for elections in 30 countries across the world.¹¹ The IEBC stated that 'Smartmatic was found to have achieved the highest technical and financial score among the 5 bidders.'¹² The Public Procurement Administrative Review Board upheld a complaint by a competitor but the High Court later threw this complaint out.¹³

Smartmatic's provision of electoral technologies for various elections across the world has at times been followed by negative reports as to the success of the technology in delivering transparent and accurate elections. The Group has no interest in discussing the veracity of these reports, as its focus is solely on the administration of the present election.

Yet the Group was somewhat concerned by comments made by IEBC CEO Hussein Marjan in a press conference on 13 July 2022 in response to a journalist's questions regarding his knowledge of such controversies. Mr Marjan responded that he 'relied on the report of the evaluation committee did their due diligence [sic] and provided me with the report. That is what I rely on. These issues were never cited ... This information did not come to our attention.'¹⁴ Given the considerable sensitivities associated with the procurement of election technologies, and mindful of the ease with which rumour and hearsay can leave an indelible

impression on public opinion, it is incumbent on the IEBC to perform due diligence not only for its own sake but also to ensure that the Commission can be front-footed in assuaging any concerns that Kenyans might have. That is to say, the IEBC not only must undertake due diligence but also should *be seen* to undertake due diligence, including through public statements that convey that the IEBC leadership is fully apprised of such issues.

The Group notes that Smartmatic appears to have an opaque ownership structure, and that the company has not been forthcoming regarding this information. While appreciating that legitimate security concerns may play some role in this, the ownership structure of the company is a matter of public interest, given the sensitive role of the company in administering Kenya's General Election. The Group recommends the provision of such information be made a requirement of the IEBC's tendering process, and this information should be published by the IEBC.

Neither Smartmatic's tender nor its contract with the IEBC has been made public, but the IEBC has stated the contract is valued at Ksh3.2 billion (~US\$27.5 million). This is around Ksh700 million (~US\$6.1 million) less than the 2017 Idemia contract, and cost savings were made by requiring Smartmatic to provide software that could enable the reusing of Safran tablets (the IEBC stated that 41,000 were reused for this election).¹⁵ Yet it is important to note that the IEBC purchased just 14,100 tablets under its contract with Smartmatic, compared with 45,000 under its Safran equivalent.

The high cost of administering elections in Kenya has, in the past, been raised as a cause for concern by the IEBC itself. Such costs are to some extent unavoidable so long as the legal framework necessitates the use of electoral technologies. Yet the Group is concerned by the relative lack of transparency regarding some elements of the procurement process. The Group is of the view that the IEBC should ensure maximum transparency regarding the procurement process, terms of reference and contract in order to build confidence in the IEBC's choice of supplier and reduce the scope for mistrust, speculation and rumour.

10 IEBC Tender No. IEBC/OIT/001/21/2020/2021. www.iebc.or.ke/uploads/tenders/s6mOW7E2Hv.pdf

11 <https://www.smartmatic.com/about/>

12 IEBC (2022a) 'Update to the Nation on Deployment of Technology in the 2022 General Election'. www.iebc.or.ke/uploads/resources/RNMB9N2EwU.pdf

13 Civil Appeal (Application) E008 of 2022. <http://kenyalaw.org/caselaw/cases/view/230131>

14 Kimani, B. (2022) 'Journalist Exposes Flaws in IEBC Award of KSh4 Billion Kiems Tender'. Kenyans, 14 July. www.kenyans.co.ke/news/77235-journalist-exposes-flaws-iebc-procuring-process

15 IEBC (2022a) 'Update to the Nation on Deployment of Technology in the 2022 General Election'.

This being said, the costs associated with the procurement of electoral technologies must be fully contextualised. Given the country's painful experiences during the 2007 and 2017 elections, in particular, the Group accepts that high costs may be a price worth paying for a system that is able to deliver on its constitutional requirement to ensure elections are 'administered in an impartial, neutral, efficient, accurate and accountable manner.' The Group appreciates that KIEMS achieved its constitutional requirements during the 2022 election.

Migration from Idemia to Smartmatic

The migration to Smartmatic was not without its own challenges. A reported contractual dispute between the IEBC and Idemia (formerly Safran) resulted in the latter withholding the biometric voter registration (BVR) data, including photos and fingerprints, of 2.2 million citizens from the IEBC until such a time as debts had been paid. As such, there were delays in Smartmatic being able to consolidate its BVR data of newly registered voters with that of extant BVR data held by Idemia. This delayed the ability of the IEBC to produce a single voter register for inspection, auditing and cleaning.

The Group finds this concerning for two reasons. In the first instance, the delays this dispute caused may have contributed to the broad range of issues with the register identified by KPMG (discussed in more detail later). It is incumbent on the IEBC and the Government to work together to ensure any dispute arising from debt obligations to contractors is resolved long before it can have any material impact on the IEBC's electoral preparations.

Second, the apparently lawful withholding of BVR data by Idemia suggests the IEBC entered into a contract in which it did not have outright ownership of the BVR data of millions of Kenyan citizens. Aside from the data protection implications of this arrangement, this meant that the IEBC was beholden to a former contractor for a key part of Kenya's electoral process.

While the Group has not seen the IEBC's contract with Smartmatic, it received assurances from the company's executive director that Smartmatic did not own and would not copy any of the data it processed as part of the voter registration or voter verification processes. Yet the IEBC's invitation to tender requires the contractor to 'submit a compressive [sic] data migration plan'.

The requirement of Smartmatic's technology to facilitate the voter registration and verification processes compelled Smartmatic, at the very least, to handle the data of Kenyan voters. As such, it would appear that Smartmatic ought to have been in full compliance with the Data Protection Act (DPA), which includes the requirement to register with the Office of the Data Protection Commissioner.

The Group strongly encourages the IEBC to ensure it retains full control over BVR data in future contracts and contractors are in full compliance with the DPA.

Results transmission process: 3G coverage

For the 2022 election, the IEBC partnered with Telkom and Safaricom to ensure network coverage for the digital results transmission process. The Communications Authority stated that national 3G network coverage stood at 96 per cent - a vast improvement on the 76 per cent coverage during the 2017 election but still meaning that 1,111 polling stations did not have sufficient 3G coverage for the electronic results transmission process. The security situation in some of these areas represented a significant obstacle. As a back-up, the IEBC provided satellite phones to be used at affected polling stations.

Procurement of ballot papers

As the above section outlined, the legal framework underpinning the IEBC's procurement process is the Public Procurement and Asset Disposal Act 2015. The IEBC procured the services of a Greek company, P Lykos SA, for the printing of over 130,000 ballots for all of the elective positions. In late July 2022, the IEBC deployed a delegation to monitor preparations for the printing of these ballots. The delegation included political party representatives.

On election day, errors were discovered on ballot papers in a number of elective positions, including in Kakamega and Mombasa (see Chapter 6). The IEBC immediately postponed those elections until a later date. The Group is concerned by the apparent laxity in the process. The IEBC should review and strengthen its procedures related to the custody of ballots, including their supervision and inspection, in order to avoid such occurrences in the future.

Voter registration

Article 88 of Kenya's Constitution provides for a continuous voter registration system. Eligibility to vote is restricted to adult citizens of Kenya aged 18 and above. Persons are disqualified from registering to vote if they are declared to be of unsound mind or have been convicted of an election offence during the preceding five years.

Ahead of the 2022 election, the IEBC noted the low number of young voters to have registered since 2017, and so embarked on a two-phased Enhanced Continuous Voter Registration (ECVR) exercise beginning in October 2021. Its aim, the IEBC said, was to register a total of six million new voters. By the conclusion of the second and final phase, it had registered just 2.4 million additional voters.

A number of reasons have been posited to explain the low uptake among young Kenyans. These include, but are not limited to, voter apathy following the various challenges with the previous four elections; an inability to see the connection between voting and their own daily lives, particularly given what many regard to be the transactional nature of Kenyan politics; and, for some voters, a negative view of politics, given the violence it has led to on multiple occasions.

The IEBC enlisted the services of KPMG to conduct an independent audit of the voter register. KPMG made use of certified reference data from the National Population Registry, the National Passports Registry, the Register of Deaths from Civil Registration Services, the National Population Data and current projections from the Kenya National Bureau of Statistics, and statistics on Kenyans living in the diaspora from the Ministry of Foreign Affairs.¹⁶ The IEBC delayed publication of the report, stating that this was in order to correct a number of inaccuracies, although the Commission did issue a statement on the preliminary findings, with Chair Wafula Chebukati stating the report found 'a total 246,465 deceased voters, 481,711 duplicate records - these are people sharing more than one ID, 226,143 registered with IDs that don't validly belong to them - [and] 164,269 registered voters with voter records which are not recognised.'¹⁷

The IEBC finally released the full report to the public on 3 August 2022. The IEBC should be commended

for enlisting KPMG to undertake this review. The Group also recognises that legal disagreements between the IEBC and Idemia had knock-on effects regarding the timing of the audit by KPMG. Yet the Group regrets that, ultimately, the IEBC did not make the voter register open to the public for inspection and objections. The Group recommends that the IEBC ensure publication of all future voter registers.

Eligible Kenyan citizens in the diaspora are constitutionally entitled to vote, but practical difficulties in implementing this provision have meant that this right has not been afforded to all Kenyans. In December 2021, IEBC Chair Wafula Chebukati announced the Commission's plans to facilitate registration for voters in the following 12 countries for two weeks in January and February 2022: Canada, Burundi, Germany, Qatar, Rwanda, South Africa, South Sudan, Tanzania, Uganda, the United Arab Emirates, the United Kingdom and the United States of America.

In a 1 February 2022 memo, CEO Marjan Hussein directed consulates to allow eligible Kenyans to vote using a passport or national ID card, yet this was appealed against on account of regulations on voter registration stating that the diaspora must register using BVR kits. These kits were eventually deployed to embassies and consulates in all 12 countries, yet a series of logistical challenges meant registration began late and the voter registration exercise ended with a total of just 10,433 members of the diaspora registered to vote.¹⁸ The Group appreciates the complexities of such an undertaking, and acknowledges that the IEBC has shown a commitment to expanding voter registration for the diaspora. The Group nonetheless recommends the IEBC initiate planning for diaspora voter registration earlier and seek ways to improve voter education targeted at diaspora voters.

Candidate nomination – IEBC review of party lists¹⁹

High school and degree qualifications

Part 2 of Chapter 8 of the Constitution outlines the qualifications and disqualifications for election to Parliament, with Sections 22-24 of the Elections

16 KPMG (2022) 'Independent Audit of the Register of Voters'. 16 June.

17 Kiplangat, J. (2022) 'Audit Unearths Rot in Voter Register'. PD, 8 June. www.pd.co.ke/inside-politics/audit-unearts-rot-in-voter-register-131308/refs

18 IEBC (2022b) 'Statistics of Voter 2022'. www.iebc.or.ke/registration/?Statistics_of_Voter_2022

19 The Group notes that many parties did not adhere to the constitutional requirement that party candidate lists contain no more than two-thirds of either gender. Chapter 4 covers this issue in more detail.

Act providing additional requirements and disqualifications. One of the more contentious provisions of the Act is the requirement that candidates for the Senate or National Assembly should have at least a high school diploma and presidential candidates should have a degree from a university recognised by Kenya. It is common for politicians – even those who have been elected representatives for many years – to have the legitimacy of their qualifications called into question in advance of elections. In this election cycle, both William Ruto and Raila Odinga were the subject of online mis- and disinformation regarding their qualifications. Yet the Group also heard suggestions that a number of aspirants obtained fake educational certificates in order to receive clearance from the IEBC to stand in the election. The Group was not able to substantiate these claims.

Ethics and Anti-Corruption Commission: 'red listed' candidates

Article 75(3) of the Constitution disqualifies individuals who have been removed from office owing to a conflict of interest between personal and public duties or for demeaning the office that they hold. Article 99 of the Constitution lists further reasons for qualification or disqualification. Article 99(3), however, states that such individuals are not disqualified 'unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.' Therefore, candidates appealing their convictions at the time of the gazetting of the list of candidates should be allowed to remain on the ballot.

The Ethics and Anti-Corruption Commission submitted to the IEBC a list of 241 prospective candidates that it said should be disqualified on the grounds of corruption and economic crime.²⁰ The IEBC holds that it has authority to determine whether such individuals should be allowed to stand in accordance with Chapter 6 requirements on integrity. Yet the matter of the IEBC's authority in this regard ended up in the High Court. Prior to the conclusion of this case, and prior to the issuing of the gazette containing the final list of candidates, the IEBC elected to instruct Greek

company Inform P Lykos SA to commence with the printing of ballot papers. This was necessary, the IEBC argued, in order to ensure that ballot papers could be printed in time for the election. The High Court, cognisant of the tight timeframe prior to the election and persuaded by the IEBC's arguments that reprinting would lead to a postponement of the election, ultimately ruled in favour of the IEBC.

Recruitment and training

Impact of delayed appointment of the commission

The IEBC is mandated with the appointment of staff in accordance with Section 11 of the IEBC Act 2011. It is worth noting that, even before fulfilling this obligation, the Commission itself experienced some challenges as a result of not having been fully constituted for the first four years after the 2017 elections. According to stakeholders who met with the Commonwealth Observation Mission, the delay in appointment of these new commissioners constrained the Commission oversight function and decision-making. This is more so given that each of the commissioners chairs specific committees, as follows:

- Information and Communication Technology Committee;
- Voter Education, Partnerships and Stakeholder Engagement Committee;
- Finance and Supply Chain Management Committee;
- Legal, Compliance and Political Party Liaison Committee and Leadership and Integrity Committee;
- Election Operations, Research and Boundary Delimitation Committee;
- Human Resource, Administration and Training Committee.

The newly appointed commissioners were assigned responsibilities over the Information and Communication Technology Committee; the Voter Education, Partnerships and Stakeholder Engagement Committee; the Finance and Supply Chain Management Committee; and the Legal, Compliance and Political Party Liaison Committee and the Leadership and Integrity Committee.

20 Wambui, M. (2022) 'EACC Blacklists 241 Aspirants, Asks IEBC to Bar Them'. Nation, 1 June. <https://nation.africa/kenya/news/politics/eacc-blacklists-241-aspirants-asks-iebc-to-bar-them-3834824>

The staffing of the Commission falls within the Human Resources Department, headed by the director of human resources and administration, who reports to the commission secretary. The appointment of staff is two-pronged – that is, it entails the recruitment of professional, technical and administrative officers and support staff; and the recruitment of seconded staff where needed. Section 11(5) of the IEBC Act stipulates that:

The Commission shall ensure that in the appointment of employees, not more than two-thirds of the employees of the Commission shall be of the same gender and that the following are also taken into account— (a) persons with disabilities; and (b) regional and other diversity of the people of Kenya.

The Mission noted that the filling of the professional, technical and administrative officers was delayed, resulting, in some instances, in delays in the implementation of the identified priority activities and in the mitigation of risks entailed in the electoral process. For instance, the Mission noted that the advertisement for the commission secretary position was put out on 21 January 2022 and a successful candidate was appointed only in March 2022 (although this person had acted in a similar position since 2017). Vacancies for the deputy commission secretary support services were also filled only a few months before the election.

Besides the senior positions, the IEBC recruited and inducted 64 operational staff officers during December 2021. These officers comprised:

- managers;
- constituency election co-ordinators;
- constituency administrative assistants;
- procurement officers;
- accountants;
- warehouse assistants.

Temporary workforce

The IEBC also employs and trains temporary (voting) staff during elections. The following temporary positions were advertised for the 2022 elections:

- 47 deputy county returning officers;
- 290 deputy constituency returning officers;

- 52,481 presiding officers;
- 52,481 deputy presiding officers;
- 389 logistics officers;
- 5,827 support electoral trainers;
- 580 information and communication technology (ICT) clerks;
- 302,860 polling clerks/counting clerks;
- 47 county-based voter educators;
- 290 constituency-based voter educators;
- 2,900 ward-based voter educators (2 per County Assembly ward).

The temporary and permanent staff are bound by the ethical conduct contained in the fifth schedule of the Elections Act. The Group was pleased to note a display of professionalism and compliance with the Code of Conduct by permanent and temporary staff, as well as security police, at all visited polling stations. The Group commends the IEBC for its successful recruitment of the temporary workforce, which could not have been achieved without a level of buy-in from the private sector. The Group wishes to reiterate the importance of such private sector consultations for future elections.

Training of IEBC staff

Notwithstanding the recruitment delays and limited financial resources, the IEBC trained its staff on areas such as the electoral cycle, electoral technology, election materials, election management best practices and polling. Simulations of the electoral process were also used as part of the training for the old and new officers, in which they played the roles of presiding officers, security, voting clerks, voters, party agents, media and observers while observing COVID-19 protocols.

The Group reported high levels of professionalism by the IEBC staff in all the visited polling stations and counting centres across the country. The Group observed a he systematic approach to election logistics and meticulous attention to detail during the voting and counting processes.

The IEBC also conducted monitoring and evaluation (M&E) training for its officers at different levels. The trainings were conducted jointly with the International Foundation for Electoral Systems (IFES), using a training of trainers approach. The

first level saw 47 M&E champions drawn from the 47 counties, and a further 15 from the IEBC headquarters. The second level entailed the training of trainers at the county level. Following the training across all counties, an institutional M&E framework was developed. The IEBC is to be commended for these efforts.

Voter education

Among its key responsibilities stated in Article 88(4)(g) of the Kenyan Constitution, the IEBC is responsible for ensuring citizens' awareness on the electoral process through voter education. In pursuit of this responsibility, the IEBC's Directorate of Voter Education and Partnerships produced various types of information materials and posters to educate voters on these elections.

However, the mission noted that, although widely distributed, these materials were largely produced in English and Swahili. Some interlocutors expressed concerns that the predominant use of these two main languages may have disadvantaged communities that speak different vernacular languages.

In addition, as articulated in the Participation and Inclusion chapter of this report, stakeholders expressed concerns regarding the lack of inclusivity of the voter education content design and delivery. The Group makes recommendations on this issue in Chapter 4.

The IEBC's Strategic Plan 2020-2024 outlines the Commission's intentions to enhance citizen participation in the electoral process, and to improve the co-ordination and quality assurance of the delivery of voter education. The Plan aims to develop a voter education co-ordinating framework, and to build the capacity of 500 voter education providers by 2022.

However, the Group noted that the IEBC's efforts were hampered by two major factors – namely, the COVID-19 pandemic and limited financial resources. The pandemic delayed implementation of the IEBC Strategic Plan, bringing nearly the entire election programme to a halt. The election budget was also reduced and released in batches, with the bulk of funding received in the final year, resulting in the late delivery of voter education. Consequently, coverage was greater in urban and peri-urban areas than in deep rural areas, where more time and resources are required owing to the difficult terrain.

The Group observed that, while this could have affected communities where there are no other sources of election-specific information with which to compensate the shortfall, the observers did not witness high numbers of rejected ballot papers, which could be an indicator of limited or poor voter education. Nor did the Group observe significant trends of voter uncertainty in terms of voting procedures and processes that would warrant a conclusion that the voter education was a significant problem during the 2022 elections.

The Group also noted that the IEBC accredited several CSOs to provide voter education in line with its strategic objectives for public outreach. The application form for voter education provider accreditation was published in October 2020. However, the COVID-19 lockdowns led to the actual processing of applications after the June 2022 deadline. This meant that the time the prospective voter education providers had was too short for the effective delivery of a voter education programme before the 9 August 2022 General Election. More time would have ensured comprehensive coverage of the old information and of the new information introduced by means of a number of amendments in electoral laws ahead of the election.

The Mission also heard from some of the consulted CSOs that the Government discouraged donors from providing funds to CSOs. Although some donors provided funding, this was released late, and this affected their voter education efforts.

Communications and stakeholder engagement

The IEBC's strategic objectives for communication and stakeholder engagement for the 2022 General Election included a desire to build a robust and proactive media engagement plan and a strong engagement plan with social media companies. The Group recognises the IEBC's initiative in strategic communication and stakeholder engagement prior to, during and after the polling. However, the Mission observed a lack of effective communication, both internally and externally, to update both polling staff and Kenyan citizens on vital benchmarks of the electoral process.

The Group noted that the IEBC took on board stakeholder recommendations regarding the need to improve its communication in the weeks leading up to election day in order to manage public expectations following the day, because the

somewhat slow process of finalising results can lead to public concern and disquiet. The IEBC's efforts in this regard included establishing a media centre for live media briefings and a call centre to handle inquiries from the public.

Recommendations

- The Kenya Law Reform Commission should consolidate the various amendments to the Elections Act to ensure greater accessibility and certainty of the applicable law.
- In deciding electoral disputes, courts should seek to balance the quantity or number of proven irregularities against their substantive weight.
- In order to increase diaspora voter registration figures, the IEBC should begin its planning further in advance and consider ways of improving voter education targeted at the diaspora.
- The IEBC should ensure timely publication of all future voter registers to afford time for verification and objections.
- There is an urgent need to review the IEBC commissioner appointment process to ensure the timely appointment of satisfactorily non-partisan commissioners and that the independence of the IEBC is safeguarded and strengthened.
- The IEBC and the Government should ensure that all judgements and orders of the Supreme Court and High Courts be implemented and adhered to.
- Relevant stakeholders may wish to consider a deadline of at least one month prior to the election for hearing the majority of cases, with High Courts making exceptions in only limited circumstances.
- A new statutory elections code should be put in place that consolidates existing law and is more easily understood. Caution should be exercised not to change applicable laws close to the holding of elections.
- The National Assembly, in consultation with the Kenya Law Reform Commission and other relevant stakeholders, should consult on the possible establishment of a Special Elections Court, ideally in the Constitutional Division of the High Court, with judges specialised in election laws presiding over electoral disputes. To further speed up the process, it is recommended that there be one layer of appeal from the elections court – that is, direct to the Supreme Court. Stakeholders should agree on, and codify in law, the length of time in advance of the election that the Special Elections Court should be constituted.
- In order to improve transparency and public understanding of the process, relevant stakeholders should ensure all judgements are made publicly available in a timely fashion.
- The conviction of any candidate for corruption, electoral malpractice or unethical conduct contrary to national values should lead to automatic disqualification of such a candidate as per the law. In order to satisfy the public interest in certainty, any conviction at the time an election is called should preclude a person from standing in that election. Appeals against conviction should be heard and decided promptly to avoid stagnation and encumbrance in the electoral process.
- There is a need for the Elections Campaign Financing Act to come into force and to draft regulations. The IEBC should immediately begin public consultations as to the appropriate spending limits in order to ensure the Act is in place, and is enforced, by the time of the next General Election.
- The Elections Campaign Financing Act should be amended to exclude necessary and reasonable security costs from the list of prohibited state resources during the campaign period.
- In order to allow the IEBC to initiate electoral preparations far in advance of the election, the Kenyan Government should ensure the IEBC receives balanced funding throughout the course of the five-year electoral cycle, rather than receiving the bulk of it in the final year.
- The Government should not interfere with the IEBC's lawful right under the IEBC Act to seek funding from the donor community.
- The IEBC, perhaps with support of the international community, should undertake a comparison of election expenditures in comparative countries to identify any cost-saving measures for future elections.

- The provision of information on the ownership of technology vendors should be made a requirement of the IEBC's tendering process, and the IEBC should publish this information.
- The IEBC should ensure that it retains full control over biometric voter registration data in future contracts and that all contractors are in full compliance with the Data Protection Act (DPA).
- To ensure adequate coverage and effective public outreach, the IEBC should ensure more time is allocated for voter education.
- To overcome the voter education resource challenges, the IEBC should create a dedicated funding stream for voter education.
- In addition to staff training on key electoral processes and other electoral operations, the IEBC should consider providing training for all its staff to enhance its strategic communication capabilities, transparency and accountability.

4. Participation and Inclusion

Civil society

Kenyans vote in six different elections on the same day. Therefore, like any society, civic education, mobilisation, access to credible information and communication are critical for broad-based participation and upholding democratic principles. The freedom of opinion and expression, including the right to access to information, are of particular importance in the electoral process and, according to the United Nations Office of the High Commissioner for Human Rights, are fundamental rights that allow for a human rights landscape essential to facilitating credible and transparent elections.

Monitor Civicus, an organisation that tracks the health and openness of countries' civic space, has rated Kenyan civic space as 'obstructed', meaning, among other things, that 'power holders ... impose a combination of legal and practical constraints on the full enjoyment of fundamental rights.'²¹ Efforts to pass progressive amendments to the Public Benefits Organisations (PBO) Act have proved futile. These amendments have aimed to promote constructive government-CSO engagement and address vulnerabilities associated with the deregistration of CSOs.

Despite these limitations, civil society in Kenya has remained vibrant and passionate about the entrenchment of the rule of law, human rights and good governance, engaging every aspect of the electoral process. These efforts contributed to a largely peaceful electoral climate. Broadly, civil society groups engaged in diverse ways through innovative approaches and were determined to promote a credible, transparent and inclusive election that conformed to international standards.

All of the CSOs the Group consulted had engaged the IEBC and reported that the relationship was professional. According to the IEBC, 120,731 citizen and international observers were accredited, of whom 50,321 were observers and 70,500 were monitors. There were a large number of citizens observer organisations and many international observer organisations. The COG observed that, while these numbers were promising, there was an

unequal distribution of these observers across the country, with some polling stations having few or no observers present and others exhibiting a large number. The Group appreciates, however, that security concerns in some parts of the country may have contributed to this.

At different stages of the process, CSOs in Kenya expressed concerns around the election. In its 2022 statement to the African Commission on Human and Peoples' Rights, Defenders Coalition noted access to information, freedom of expression, freedoms of assembly and association, and the right to privacy as key election-related concerns.²²

Article 33 of the Constitution enshrines freedom of expression. Article 34 guarantees freedom of the media. Article 35 guarantees access to information, including the right to seek and obtain information held by the state. The Access to Information Act 2016 gives effect to Article 35 and provides a framework for public entities and private bodies to disclose information that they hold in line with the Constitution. CSOs have criticised the implementation of the Act, particularly on the delay in developing accompanying regulations.²³

Prior to election day, a group of 280 national and international CSOs wrote to President Kenyatta urging him to maintain free and secure access to the internet before, during and after the election.²⁴ However, civil society concerns about access to information and freedom of expression were alleviated, as no 'internet shutdowns' occurred in the 2022 elections.

²¹ <https://monitor.civicus.org/country/kenya/>

²² Defenders Coalition (2022) Situation of Human Rights Defenders in Kenya on the 71st Virtual Ordinary Session of the African Commission on Human and Peoples Rights'. Statement, 15 April. <https://defenderscoalition.org/situation-of-human-rights-defenders-in-kenya-on-the-71st-virtual-ordinary-session-of-the-african-commission-on-human-and-peoples-rights/>

²³ Wesonga, S. (2021) 'Kenya: Implement Access to Information Regulations Now'. Article 19, 1 November. www.article19.org/resources/kenya-access-to-information-regulations/

²⁴ #KeepItOn Open Letter. www.accessnow.org/wp-content/uploads/2022/06/KeepItOn-open-letter-Kenyas-2022-elections_June-2022.pdf

The role of religious institutions, including churches and mosques, in promoting civic participation, encouraging citizens to exercise their franchise and vote peacefully, has also been particularly notable.

Perhaps the most significant initiative for the electoral cycle was the continued civic mobilisation of election observers to enhance election credibility in Kenya. Groups like the Elections Observation Group (ELOG), comprising 18 CSOs and having existed since 2010, deployed long-term observers to each of the 290 constituencies, each of whom reported on the pre-election environment. On estimate, ELOG deployed 5,108 observers on polling day. This included around 1,000 specially trained observers who conducted Parallel Vote Tabulation on a nationally representative sample of 1,000 polling stations. In a statement released on election day on the set-up and opening procedures, ELOG reported that, at the initial stage of the process, observers were not permitted in 2.8 per cent of polling stations owing to lack of an 'oath of secrecy', despite this not being a requirement for accredited observers.²⁵

Recommendations

- The National Assembly should pass the amendments to the Public Benefits Organisations Act to strengthen civil society against banning and deregistration. This would allow for greater civil society involvement within the electoral process.
- The IEBC should disseminate clear instructions to polling officials to ensure consistency in the application of rules for citizen observers on polling day.
- Despite a promising number of accredited CSOs in the 2022 elections, there was an uneven spread across the country on polling day. Strengthened collaboration and co-ordination between CSOs are required for deployment on election day.

Women's political participation

Legal framework

Kenya is a signatory to international and regional instruments that promote women's rights, such as the Universal Declaration on Human Rights, the

Convention on All Forms of Discrimination Against Women, the African Union Protocol on the Rights of Women in Africa (Maputo Protocol), the Solemn Declaration on Gender and Equality in Africa, the Beijing Declaration and Platform for Action and United Nations Security Council Resolution on Women, Peace and Security 1325.

Article 81(b) of the Kenyan 2010 Constitution states that 'not more than two thirds of the members of elective or appointive bodies shall be of the same gender.' However, since the promulgation of this Constitution, and in spite of multiple judicial rulings noting the constitutional requirement to adhere to the gender rule, the country has been unable to fulfil its legal obligations, with female representation falling short in 2013 and 2017. Following the 2017 elections,²⁶ only 6 of the 47 county governors were women and, out of the 349 seats in Parliament, women held only 76.

In addition, Article 27 in the Constitution's Bill of Rights explicitly recognises women's equality and also provides for women's right to equal opportunities in the social, economic and political spheres. It imposes an obligation on the state to implement affirmative action to redress past discrimination. Furthermore, Kenya has a robust legal framework prioritising the inclusion of women within electoral processes with legislation such as the Political Parties Act 2011, the National Gender and Equality Commission Act 2011 and the Elections Act 2011, among others.

The legal framework includes clear provisions on the equal civil and political rights of women, and no aspects of the election law, political party law or other election-related legislation and regulations indirectly disadvantage women. However, the law does not reflect reality and major challenges with implementation remain.

Women in Kenya who vie for office have complained of being passed over for regular elective seats and are instead forced to vie for one of the 47 designated 'women representative' seats in the National Assembly, or are told to wait to be nominated through party lists. The African Women Leaders Network (AWLN) advised that, once elected, women's representatives can access

25 ELOG (2022) 'ELOG's Statement on the Official 2022 Presidential Results'. <https://elogs.or.ke/elogs-statement-on-the-official-2022-presidential-results/>

26 Kachambwa, M. (2018) 'Political Participation for Kenya's Women Still a Far Cry from Its Constitutional Provision'. Women Deliver, 28 February. <https://womendeliver.org/political-participation-kenyas-women-still-far-cry-constitutional-provision/>

considerably less funding than that for constituency members of the National Assembly, and therefore they are perceived as less impactful and effective for constituents. The elite-based process adopted at the primaries disproportionately impedes the chances of women winning party tickets.

Lack of access to funding, combined with the high cost of entering politics, also disproportionately affects women's ability to participate in the elections. High financial expenses are involved in building a political constituency in Kenya. According to one report exploring the cost of politics in Kenya, it would cost an aspirant for a women representative seat an estimated US\$240,000 to run for office, with some even spending three times this.²⁷ This significantly affects the already economically disadvantaged, particularly given the disproportionate impact of COVID-19 pandemic on women.

The 2022 elections

The 2022 elections were held against a backdrop of continuous – and subsequently ignored – judicial orders against Parliament to ensure the fulfilment of the two-thirds rule.²⁸ Simultaneously, IEBC aims to ensure compliance by parties were also restricted by judicial actors following UDA actions.

Only 11 per cent of candidates contesting the elections were women, which reflected an intimidating culture for women candidates in certain parts of Kenya. Compared with previous years,²⁹ there was a slight increase in the number of women elected but this was still insufficient to fulfil the two-thirds gender rule.

Nonetheless, it is the view of stakeholders consulted that female candidature for election

has definitely improved compared with in previous elections, owing to increased efforts around the two-thirds gender rule and commitments by political parties to field women candidates.

The nomination of three women as deputy presidential candidates did have an impact in terms of advancing women in Kenya's political space but, of more than 16,000 political aspirants, fewer than 2,000 were women.³⁰ Several CSOs and donor partners also aimed to support women's political participation in the elections. Media Focus on Africa gave capacity-building support to 20 women contesting for various elective seats from the counties of Narok, Nyandarua, West Pokot and Kajiado, which have some of the lowest numbers of women representatives.³¹

Women constituted 49.12 per cent of registered voters in 2022. The Group collected anecdotal evidence of improved female political participation as compared with in previous electoral cycles. The Group observed that women participated in the elections as election workers, voters and election observers. During polling, pregnant women, aged women and women with children were all given priority to cast their votes.

However, the 2022 election campaign in Kenya was not different from previous elections in the way women experienced campaigns. Female aspirants complained of being assaulted and harassed, both physically and verbally.³² There were many examples of such harassment. According to the Kenya Women Parliamentary Association, aspirant Liz Njue had her hair pulled and her clothes torn in a campaign related attack.³³ Another aspirant was even prevented from voting in a political primary election where she was vying for a position.

27 Kanyinga, K. and Mboya, T. (2021) 'The Cost of Politics in Kenya: Implications for Political Participation and Development'. Report for WFD and NIMD. https://nimd.org/wp-content/uploads/2021/07/WFD_NIMD_2021_The-cost-of-politics-in-Kenya-1.pdf

28 See the court ruling Constitutional Petition No. 19 of 2017 in Katiba Institute v IEBC.

29 In 2022, seven women were elected governors, compared with four in 2017. Three women were elected to the Senate (just as in 2017). A total of 30 women were elected to the National Assembly, up from 23 in 2017. This is now the third successive parliament not to meet the two-thirds gender rule set out in the Constitution. In addition to the 47 women representatives in the National Assembly, the Senate also reserves 16 seats for women according to political parties' share of the vote. As for members of county assemblies, 115 women candidates were elected, up from 96 in 2017. Seven did not elect any women candidates.

30 Saddam, R.S. and Sanya, J. (2022) 'The Advancement of Women in Kenyan Politics'. HORN, 5 August. <https://horninstitute.org/the-advancement-of-women-in-kenyan-politics/>

31 Media Focus on Africa (2021) 'Kenya 2022 Elections: Finding the Gender Balance'. 11 August. <https://mediafocusafrica.org/?news=coronavirus-and-covid19-pandemic>

32 Madowo, L. and Feleke, B. (2022) 'A Record Number of Women Are Running but Many Face Harassment and Abuse'. CNN, 6 August. www.cnn.com/2022/08/06/africa/kenya-elections-women-candidates-intl/index.html

33 Aljazeera (2022) 'Women Candidates in Kenyan Elections Endure Abuse and Attacks'. 1 August. www.aljazeera.com/features/2022/8/1/women-candidates-in-kenyan-elections-endure-abuse-and-attacks

At a two-day conference convened by development partners and attended by security agencies at the start of the campaign season, Lillian Mbilo, a data analyst for the Kenya National Commission on Human Rights, noted that situations of political intolerance were common. In recognition of this, UN Women had supported efforts to train the police on election security management, to strengthen public order management and improve the prevention of and response to violence against women in elections.³⁴ In 2022, notwithstanding challenges, there have been marked improvements when compared with 2007/08, 2013 and 2017, when women faced sexual and gender-based violence such as gang rapes on a massive scale.³⁵

Online hate speech and violence against women candidates is a growing threat, however. While data to compare the magnitude of the problem with previous electoral cycle reports does not exist, reports from the Kenya ICT Action Network (KICTANet) and Amnesty International suggest that online hate speech led many women candidates to deactivate their social media channels, thus depriving them of an important tool through which they could engage prospective voters.³⁶ Women journalists also complained of increased attacks both online and offline against them in the 2022 election. They were victims of trolls, hacks and impersonation with the ultimate goal of intimidating, discrediting or silencing them during the elections.³⁷

Media political coverage was also characterised by gender imbalances that are further accentuated by the high cost of airtime. Women's issues were also a secondary concern when it came to the manifestos

of the two leading parties. This led women groups to develop the Women's Economic Recovery Manifesto for Women in Kenya 2022–2027.³⁸

Recommendations

- It is vital that political parties comply with the two-thirds gender rule. The IEBC should ensure political parties are made aware of this rule early on in the electoral calendar, and that those not adhering face appropriate sanctions.
- More efforts are needed from political parties to identify women candidates and implement gender equality principles in their own guiding documents in line with the Kenyan Constitution.
- The media should provide equal media access to both men and women. This should include access to relevant training opportunities for women candidates.
- Preventive and protective measures, including stronger criminal justice mechanisms and approaches, should be implemented to eliminate sexual and gender-based violence, which are barriers to women's political participation.
- Law enforcement must strictly enforce the Computer Misuse and Cybercrimes Act (CMCA) to prevent cyberbullying attacks directed at women.
- Women are greatly disadvantaged when it comes to raising funds for campaigning. The Government should establish a well-resourced trust fund to provide seed grants for women vying for political office. This could include adapting the current Political Parties Fund to prioritise women.

Persons with disabilities

Legal framework

A total of 18.98 per cent of voters in the elections are PWDs. The legal framework shows that there are adequate laws in place and general principles for

34 UN Women (2022) 'Police Training Rolled out across Kenya Ahead of Elections'. 26 July. <https://africa.unwomen.org/en/stories/news/2022/07/police-training-rolled-out-across-kenya-ahead-of-elections#:~:text=A%20joint%20project%20from%20UN,when%20dealing%20with%20these%20cases>

35 FIDH and KHRC (2022) 'Sexual Violence as a Political Tool during Elections in Kenya: State Actions Needed ahead of the 2022 Polls'. www.khrc.or.ke/publications/232-sexual-violence-as-a-political-tool-during-elections-in-kenya-state-actions-needed-ahead-of-the-2022-polls/file.html

36 KICTANet (2020) 'Trends of Online Violence against Women in Politics during the COVID19 Pandemic in Kenya'.

37 IAWRT (2022) 'Discussion on Online VAW against Women Journalists Covering the Elections in Kenya'. 20 July. <https://iawrt.org/discussion-on-online-vaw-against-women-journalists-covering-the-elections-in-kenya/>

38 Akina Mama wa Afrika (2022) 'Politics Unusual – Women Groups in Kenya Dialogue Towards a Women's Economic Recovery Manifesto for Women in Kenya, 2022-2027'. www.akinamamawaafrika.org/politics-unusual-womens-groups-in-kenya-dialogues-towards-a-womens-economic-recovery-manifesto-for-women-in-kenya-2022-2027/

electoral systems to promote the inclusion of PWDs in society.

The Constitution has laid a solid foundation for this. Article 260 defines disability as 'any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual's ability to carry out ordinary day-to-day activities.' There is clear accommodation within the Constitution around PWDs, including Article 21 on the implementation of rights and fundamental freedoms.

Sub-Article 3 further states that 'all State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.' Sub-Article 27(4) states that 'the State shall not discriminate directly or indirectly against any person on any ground, including ... disability.'

Article 54(1) provides that PWDs are entitled to reasonable access to all places, public transport and information; to use Sign language, Braille or other appropriate means of communication; and to access materials and devices to overcome constraints arising from the person's disability. Article 81, which details general principles for the electoral system, emphasises that the electoral system shall comply with, among others, the principles of fair representation of PWDs. More importantly, the Constitution also reserves seats in the National Assembly (97(1)) and Senate (98(1)) for PWDs. Additionally, the Constitution directs Parliament to enact legislation to promote representation of PWDs (100(b)).

The Persons with Disabilities Act of 2003 contains provisions on voting and polling stations. PWDs are entitled to request assistance with voting (Section 29). Section 30 states 'polling stations shall be made accessible to persons with disabilities during elections, and such persons shall in addition be provided with the necessary devices and assistive devices and services to facilitate the exercise of this right under this section.'

The Elections Act 2011 provides that the IEBC may make regulations that 'provide for the manner in

which a voter with special needs including a person with a disability may vote or be assisted in voting' (Section 109(o)). No such regulations seem to have been drafted.

The Political Parties Act 2011 established the Political Parties Fund. Among the main purposes of this is promoting representation in Parliament and county assemblies of women, PWDs, youth, ethnic and other minorities and marginalised communities (Section 26(1)(a)). The Fund is administered by the ORPP.

The 2022 elections

The Group was informed that the National Council of Persons with Disabilities (NCPWD) engaged the IEBC at different stages of the electoral process to promote visibility and inclusion. The Westminster Foundation for Democracy partnered with 13 political parties, 21 disabled persons organisations, CSOs and the Parliamentary Association to promote inclusivity in the elections. The disability leagues in party structures were activated, and parties were willing to subsidise nomination fees for disabled candidates. The IEBC also registered PWDs in places of convenience and the Group observed that assistance and support was provided to PWDs to vote in cases of long queues on polling day.

Despite the solid legal framework and the above stated efforts, though, PWDs still struggle with discriminatory attitudes, which ultimately affect their visibility and inclusion in electoral processes.

PWDs also find it difficult to campaign and exercise their franchise. While the provisions in the Constitution that reserve seats in the counties, the National Assembly and the Senate are progressive, the fact that political parties have the responsibility to fill those seats remains a challenge, as the positions are primarily reward-based in parties. Equally, PWDs are less active in political parties because of the financial expense attached to participation and mobilisation.

Generally, information on the elections and ballot materials did not adequately cater for PWDs. PWDs also suffered from a lack of understanding of electoral processes because of inadequate targeting of messages to PWDs, especially the deaf, in order to promote their political and voting rights. Unequal access to education and fear of

election-related violence also deterred PWDs from voting. In addition, PWDs in Kenya could not easily access election infrastructure. During the NCPWD consultations, the IEBC stated that it was procuring accessible polling booths in the form of adjustable cardboard polling booths.

Recommendations

- The IEBC should conduct a thorough review of the electoral process *vis-à-vis* PWDs, with the aim of identifying practical measures that remove barriers to PWD participation.
- The IEBC should conduct more sensitisation programmes on the issue of PWDs, as well as more accessible voter education initiatives targeted at PWDs.
- There must be consistent engagement from political parties around disability inclusiveness, which could include an audit of the entire electoral cycle to identify and remove barriers to PWD participation.
- The Government, the IEBC and relevant stakeholders must work further to fill the implementation gaps around the legal provisions on disability, including fulfilment of its obligations under the Convention on the Rights of Persons with Disabilities, to which it is a party.
- The interface and co-operation between political parties and the National Council of Persons with Disabilities must be strengthened.

Youth participation

Numbering around 54 million, youth (those aged 18-35) constitute around 75 per cent of the total population in Kenya. Therefore, youth feature as an important stakeholder in Kenyan elections. In the 2022 elections, some youth excitement was observed during the electoral period. Youth were seen in voting lines, as polling stations clerks and in political parties. However, the figures tell a different story.

According to the IEBC, 74.82 per cent of Kenyans holding national ID cards were included in the final voter register. The lack of registration of the remaining 25 per cent appears to be related largely to youth apathy and protest. Final statistics

provided by the IEBC showed that youth comprised only 39.84 per cent of registered voters, a decline of 5.27 per cent compared with 2017.³⁹

The IEBC's role is to encourage as many people to register as possible. It achieved just 60 per cent of its registration target of 6 million Kenyans. There is therefore a serious need to review and analyse the approach it takes in order to improve voter registration for future elections. It was clear from the Group's observations that there were insufficient efforts around youth inclusion. While the IEBC can only educate, encourage and facilitate easy registration processes where possible, greater reach could be achieved through partnering with other stakeholders for this exercise.

While the IEBC did continue to deploy a continuous voter registration system in line with the provisions of the electoral framework,⁴⁰ the Group is of the opinion there was no real strategy to be present in youth spaces, leading to the aforementioned apathy. The budget allocated to this portion of voter education must therefore be increased for the IEBC, and also to enable funds to support grassroots non-governmental organisations (NGOs) to do more outreach in vernacular languages.

The changing youth media landscape suggests the IEBC should roll out targeted voter education resources in online areas frequented by youth. The IEBC could be guided in this endeavour through co-operation with media companies as well as CSOs. The need for the IEBC to increase its online presence is made more urgent by the need to counter hate speech and mis- and disinformation on election matters.

Nonetheless, a serious problem that distances youth from voting processes is that approximately 30 per cent of youths lack a national ID card, and Kenyans aged 18-25 represent around 85 per cent of the total number of Kenyans who lack an ID card.⁴¹ Without other forms of ID, many young Kenyans would therefore be unable to register to vote.

39 Africa News (2022) 'Kenya Records Fewer Youth for High Stakes August Polls'. 21 June. www.africanews.com/2022/06/21/kenya-records-fewer-youth-for-high-stakes-august-polls/

40 Eligibility to vote is restricted to adult citizens of Kenya (aged 18 and up), who must be registered to vote.

41 FSD Kenya (2022) 'Identity in Kenya: FinAccess'. PowerPoint Presentation, 27 January. www.fsdkenya.org/wp-content/uploads/2021/12/22-01-27-FinAccess-ID-analysis.pdf

Youth voter apathy is a challenge that bedevils many countries across the world. In Kenya, it may be the result of a combination of factors common to many countries, as well as characteristics specific to the country's political landscape, such as feelings of political, economic and social exclusion; mistrust in politicians; a lack of faith in the social contract between themselves and the state; and an absence of belief that their vote will bring material benefits to their lives. Some youths may also be more focused on economic survival and may prioritise this over political and electoral participation. The lack of financial muscle to stand for election and participate more fully in politics is a problem in and of itself but may also contribute to voter apathy.

However, some have cautioned against confusing voter apathy with political apathy, suggesting instead that, while many youths may be dissatisfied with 'institutional politics', they can instead be found engaging politically in a broader sense, such as participating in arts and other activities that promote peaceful elections.

There is a need for political parties to engage youth in meaningful ways throughout the electoral cycle, not just during election season. Political parties must also field more youth candidates, and seek to empower youth and break the notion that politics is designed only for the elite class.

Recommendations

- The National Assembly should increase budget allocations for the IEBC and youth-led CSOs working on the ground for better reach.
- The IEBC should significantly improve its online communication strategy to reach youth, and redouble its efforts to use music, sports, arts and entertainment to target its voter education programmes. The IEBC should also consider the recruitment of dedicated youth outreach officers to spearhead its youth voter education programme.
- The IEBC should ensure youth voter education programmes include materials that educate youth on the dangers to themselves and others of online hate speech and mis- and disinformation.
- The IEBC should continue to strengthen its partnerships not only with well-established CSOs, faith-based organisations, universities

and technology companies but also with smaller organisations working in more rural and coastal areas using localised and context-specific voter education.

- The IEBC should seek to develop public-private partnerships with local companies to encourage young staff to register to vote, as well as to utilise corporate workspaces as civic education opportunities.
- The IEBC should explore plans for future digital-based voter registration that allow youth to register more easily.
- The Government should ensure the Youth Manifesto is implemented and feeds into relevant stakeholder strategies as well as the National Action Plan.
- Institutionalisation of the engagement processes must be strengthened to ensure early youth mobilisation.
- Political parties should strengthen the substantive allocation they provide to youth candidates.
- The ORPP should do more to provide support and oversight to political parties on youth engagement, including more capacity-building. The ORPP should consider making youth issues a specific segment in its annual reporting.
- Political parties should seek additional ways to meaningfully engage youth throughout the electoral cycle, not just during election season, in order to combat voter apathy and increase youth political participation.
- Political parties should do more to ensure a greater number of youth candidates are supported (including financially) to stand for election.
- Political parties should make greater efforts to include youth in decision-making processes and within political party hierarchies.

Prisoner voting

The 2010 Constitution of Kenya guarantees voting rights for all Kenyan citizens above the age of 18, except those who are guilty of electoral offences within the past five years or those who are of an unsound mind. As such, the Constitution guarantees the right to vote for prisoners. Given

that prisoners may be held in locations outside of their constituency, their vote is restricted to the presidential election, as this is a single national constituency.

Prisoners were allowed to vote for the first time in the 2010 referendum but were allowed to vote in a presidential election for the first time only in 2017.⁴² According to the Kenyan Prison Service, the current prison population stands at 54,000, with 48 per cent pre-trial detainees and 2,683 female inmates.⁴³ The IEBC registered 7,483 prisoners for the 2022 General Election as compared with 5,182 in 2017.⁴⁴

The 2022 election saw a low voter turnout for prisoners, for various reasons. One was that the transfer of prisoners between prison facilities often led to prisoners being in different locations to where they had registered to vote. There were also registered prisoners who had been released just prior to the elections and who did not return to prison to cast their vote. Another major obstacle for prisoner voting was that many prisoners did not possess ID cards and were therefore unable to register to vote. Greater efforts need to be made to ensure more prisoners are able to retain their national ID cards to enable them to register, or amend their registration details if they are moved to other locations before the finalisation of the voter registration process.

Finally, election observers were permitted and welcomed at the voting centres, which demonstrated a commendable effort to promote transparency of the voting processes within Kenyan prisons.

Recommendations

- The IEBC and the Prisons Department must work together to implement a framework that allows every prisoner to be verified as a voter and enable their registration immediately upon being admitted to any prison. This includes strengthening the process and mechanisms for the retrieval of ID for prisoners that do not have it and, consequently, stronger standard operating procedures within the Prisons Department.
- The Prisons Department should advise the IEBC if prisoners are released prior to the election. Prisoners who registered to vote while in prison should be advised to change their registration details upon leaving prison.
- Observer groups should find ways to co-ordinate to ensure at least one observer is in the polling station for the counting process.

42 Petition 574 of 2012. <http://kenyalaw.org/caselaw/cases/view/87145>

43 Kenya Prisons Service data: <https://www.correctional.go.ke/departments/kenya-prison-service>; World Prisoner Brief data: <https://www.correctional.go.ke/departments/kenya-prison-service>

44 KPMG (2022) 'Independent Audit of the Register of Voters'.

5. Campaign and the Media

The campaign

The campaigns were energetic, competitive and to a large extent peaceful. Political parties used various means of campaigning to spread their message. This included holding large-scale political rallies, which were colourful and spirited; erecting campaign banners, posters and billboards across the country; and the wide use of print, radio, television and social media to advertise. All political parties reported that freedom of movement was respected and that they were able to spread their message freely and to campaign in all parts of the country without restrictions.

The Group notes that there were reports of clashes between party supporters, including a few instances of violence; that particular campaigns were not allowed free access into certain party strongholds; that there were political attacks and accusations of corruption levied against political opponents; and that there were reports of campaign materials being torn down. Yet these instances were isolated: campaigns were largely peaceful and all presidential candidates publicly denounced campaign violence. Indeed, according to various stakeholders the Group met, the general feeling among Kenyans was that the 2022 campaign was a significant improvement over previous elections in terms of the absence of political violence and the quality of the campaigns.

Presidential elections dominated the campaign. Further, despite there being four candidates, this election was regarded as a two-horse race between Raila Odinga, leader of the Azimio la Umoja alliance, a coalition of 23 political parties, and William Ruto, leader of the Kenya Kwanza party, a coalition of nine political parties. At the county level and in rural areas there was acute interest in the contest for governor. Equal attention was not given to senatorial races or to campaigns for local members of the National Assembly.

Notable characteristics of the Kenyan election campaign included the following:

- The noticeable movement from ethnic identification to a greater focus on policies and manifestos, which represented a shift away from previous campaigns;
- The interconnectedness of the state of the economy and campaign tactics;

- The dominance of the presidential campaign over the Senate, National Assembly, gubernatorial and County Assembly campaigns;
- The large amount of money expended on campaigning, including transport (presidential candidates frequently use helicopters), paid advertisements and physical material such as hoardings, banners and posters. Such high expenses effectively discourage women and young people from putting themselves forward as candidates, even in the local county elections;
- Reports from a number of stakeholders alleging that political parties made payments to individuals to attend campaign rallies.

Televised debates

A prominent feature of the campaigns was the televised presidential and deputy presidential debates. Debates between the deputy leaders of the two other parties (both women), as well as the two running mates of the presidential candidates, were direct, informative, balanced, well-controlled and effective vehicles for the explanation of policy positions. The debate between the two presidential running mates, in particular, gave an air of seriousness and maturity. Notwithstanding the occasional barb directed at their opponent, the candidates explained their party's position on various issues pertinent to the campaign. According to the Media Council of Kenya (MCK), over 82 per cent of Kenyans (34 million people) watched the deputy presidential debate.

The televised debate between the two presidential candidates, however, ended up being a 90-minute interview of William Ruto, owing to the decision of the other major presidential candidate, Raila Odinga, to decline to participate: he travelled to the debate venue but then walked out. This presidential debate proceeded without him and the persons conducting the debate showed professionalism and asked challenging questions of William Ruto.

Campaign finance

Although there is campaign finance legislation, the Campaign Finance Act is not in force and there

are no regulations that cap the amount that any coalition, political party or candidate can spend on the campaign.⁴⁵ This leads to significant and often unreported campaign spending. Meanwhile, in the absence of regulations limiting the amount that any party or coalition can spend on its campaign, the cost escalates as the campaign progresses.

While the scale of lawful campaign expenditure and the lack of campaign finance regulation represent a concern, so, too, does campaign finance expenditure that is in violation of Section 16 of the Election Offences Act. The Group was informed that candidates and political parties are able to exploit Kenyans based on their precarious financial position, and that, as a result of past practices, voters expect to be paid, either with money or in-kind goods, in exchange for attendance at political rallies or for their vote. This creates a culture of 'vote-buying' even though it is noted that paying a person does not necessarily result in that person voting for a particular candidate.

Observers received reports that young people were paid to attend political rallies to swell the numbers and for the sake of media impact. People would attend rallies based on the highest payer or attend rallies of different political parties simply to receive payment twice. Observers also received reports that family members, particularly women, would sometimes be chastised for attending a political rally or meeting and not coming home with money to help feed their family. Sometimes, people received goods instead of money, such as two bags of maize flour or other household necessities. Observers also received reports of money being thrown from the back of vehicles; there was one incident in which two people died as a result of an accident resulting from this type of activity.

This unregulated spending obviously has an impact on women and young people as candidates. Women and young people are far less able to spend in a political campaign and this becomes a deterrence to their candidature. Observers received reports that women candidates who could not afford to treat voters with money or goods gained a reputation as being mean and people were discouraged from voting for them. Despite this, women's organisations continued to encourage women to stand as candidates, training them in the skills required but also urging them to save whatever money they could, to prepare for

the cost of campaigning. Meanwhile, the interplay between the state of the economy, high youth unemployment rates and low wages has an impact on campaign tactics.

This culture of 'vote buying' is not only contrary to the Election Offences Act and Section 6(h) of the Code of Conduct but also antithetical to the fundamental principles of credible, transparent and inclusive elections. Political party leaderships are strongly encouraged to promote the Code of Conduct within their own parties and engender a culture that promotes the value of democracy above short-term political and economic interests. The IEBC is encouraged to redouble voter education programmes that inform voters of the illegality of such activities. And the Department of Public Prosecutions, as the enforcing institution of the Code of Conduct (as per *Chege v IEBC*), is encouraged to ramp up efforts to sanction violations of the Election Offences Act and Code of Conduct.

The media

Kenya has long enjoyed a vibrant and diverse media landscape, with a strong base of investigative journalists. There are 40 newspapers, 50 television stations and more than 150 radio stations, as well as a robust blogging culture.

There are 4 main daily newspapers and around 35 other weekly and local/vernacular newspapers across the country. All newspapers have a digital presence.

There are around 50 television stations in Kenya. The state broadcaster is the Kenya Broadcasting Corporation (KBC) but the most popular broadcaster is Citizen TV, with a market share of over 50 per cent. KBC has 1 TV station and 14 radio stations across the country serving Kenya's 43 ethnic communities.

There are at least 150 radio stations in Kenya, broadcasting in English, Swahili and other local languages. Radio remains the most common news source in Kenya.⁴⁶

In January 2022, Kenya's internet penetration stood at 42 per cent. Around 21 per cent of Kenyans – 11.75 million individuals - were social media users

46 Royal Media (2019) 'KARF Audience Tracker 2019: Snapshot Findings March–May'. PowerPoint presentation. <https://royalmedia.s3.amazonaws.com/wp-content/uploads/2019/10/KARF-Tracker-MARCH-to-MAY-2019-RMS.pdf>

45 See Chapter 3 for more detail.

as of January 2022. The most popular platforms in Kenya are Facebook, WhatsApp, YouTube and Twitter.⁴⁷ Newer applications such as TikTok have a smaller base but are growing, particularly among younger segments of the population. It is important to note the significant movement of content across platforms, and the ways in which online content can shape debate and discussion in traditional and more mainstream media.

Legal framework

The right to freedom of expression is guaranteed by Articles 34 and 35 of the Constitution. Kenya has also ratified the International Covenant on Civil and Political Rights (ICCPR), which provides for freedom of expression and the free flow of information under Article 19. Other relevant laws include (among others):

- Books and Newspapers Act 1960;
- Kenya Film and Stage Plays Act 1962;
- Kenya Broadcasting Corporation Act 1988;
- Kenya Information and Communications Act 1998, as amended;
- Media Council Act 2013;
- Access to Information Act 2016;
- Computer Misuse and Cybercrimes Act 2018;
- Data Protection Act 2019.

Regulation of broadcast media

There are two media regulatory bodies but the Group was informed that there appears to be a lack of clarity as to which regulatory authority has legal oversight over certain sections of the media, particularly broadcast media. The MCK was established by the Media Council Act 2013 and is responsible for setting media standards and ensuring compliance with these. The Act defines media as 'the production of electronic and print media for circulation to the public' and journalism as 'the collecting, writing, editing and presenting of news or news articles in newspapers and magazines, radio and television broadcasts on the internet or any other manner as may be prescribed.'

Meanwhile, the Communications Authority (CA) was established in 1999 by the Kenya Information and Communications Act and is responsible for regulating and facilitating the development of the information and communications sectors, including broadcasting, cybersecurity, multimedia, telecommunications, electronic commerce, and postal and courier services.

The CA is of the view that, since it is the licensing body for broadcasting, it therefore has a legitimate interest in seeing how licensees use these licences, and that the MCK's oversight should be limited to print media. The MCK, however, avers that the definitions of 'media' and 'journalism' in the Media Council Act grant it the authority to regulate broadcast media. The Group acknowledges that this does appear to be a legal lacuna worthy of rectification through a review of relevant legislation. The Group therefore recommends that relevant stakeholders, including authorities, Parliament and the Kenya Law Reform Commission, engage in consultations on this issue.

The IEBC and the media

There has been persistent criticism of the IEBC by the mainstream media on electoral process transparency, electronic results transmission and the non-publication of the KPMG report, among other matters.

The media stakeholders consulted were of the view that, while the IEBC showed a degree of transparency in terms of access to information, at other times the Commission was slow to release information relating to electoral preparations, the procurement and use of electoral technologies, and election day operations. They further suggested that, while the IEBC aimed to enforce the Code of Conduct with respect to certain violations by political parties and candidates, it did not enforce the Code in terms of attacks on the media.⁴⁸

Efforts aimed at developing a constructive working relationship between the IEBC and the traditional media have been fostered through MoUs signed with the Kenya Media Sector Working Group (MSWG). The MSWG was established a year in advance of the 2022 election to ensure the media

47 Kemp, S. (2022) 'Digital 2022: Kenya'. Data Reportal, 15 February. <https://datareportal.com/reports/digital-2022-kenya>

48 The Group notes the judgement of Justice Maina in *Chege v IEBC* regarding the latter's constitutional ability to enforce the Code of Conduct. This notwithstanding, the Group wishes to reflect the views of media stakeholders.

were better prepared for the elections, and to promote better information-sharing between the IEBC and the media; to guarantee the safety of journalists; to establish joint media centres; and to provide for the training of journalists on election coverage. The MSWG and the IEBC together established the Joint Media Taskforce on Elections, through which the MSWG raised several key issues with the IEBC. A National Elections Media Centre was launched on 31 July, and daily briefing started thereafter. Communications by IEBC Chair Wafula Chibukati were generally recognised as showing a marked improvement from 2017.

The Group nonetheless acknowledges the concerns of the Kenyan Union of Journalists (KUJ),⁴⁹ which stated it was still not seeing the full implementation of the MoU in terms of the timely release of information by the IEBC. The Group also acknowledges IEBC concerns that there was, at times, and from some parts of the traditional media, a tendency to repeat unsubstantiated information and unwarranted criticisms regarding the conduct of the election without checking the accurate position with the IEBC.

The Group wishes to commend the IEBC and all members of the MSWG on the establishment of the Working Group, which was a valuable and positive endeavour. The Group recommends that the MSWG become a permanent feature of all future elections, and strongly encourages close adherence to the provisions, and spirit, of future MoUs.

Traditional media coverage of the campaign

Traditional media covered the run-up to the election satisfactorily. During the campaign there was extensive coverage of key topics, such as the economy, governance, graft and anti-corruption, in addition to a broad range of opinion pieces by the major newspapers covering the two frontline parties as well as editorials scrutinising electoral promises.

The media coverage was overall fair and balanced and provided space to both critics and supporters of the candidates and the political parties. The MCK stipulates that, as a 'state broadcaster, KBC has a duty to provide fair and balanced election coverage and afford fair opportunity for the

presentation of divergent views and dissenting opinions. The law further requires that KBC should, in consultation with the IEBC, during the campaign period preceding any presidential, parliamentary or county government election, allocate free airtime to registered political parties participating in the election to expound their policies'.⁵⁰

In the heavily contested presidential campaign, no serious issues were raised by either camp with the MCK. However, Kenya Kwanza claimed it was disadvantaged in the campaign and that the state broadcaster, KBC, gave more airtime to Raila Odinga's coalition. The UDA also registered discontent that Ruto had to contend with media interventions on behalf of Odinga by the incumbent president.

KBC told the Group it was committed to fair and equal coverage. The Group notes the efforts of the MCK to maintain balance in the media coverage of political party campaign activities. A July 2022 report by the MCK found that Ruto had received a marginally higher share of coverage across all news media for the two-week period since the beginning of that month: 46 per cent compared with Odinga's 45 per cent. The MCK attributed the slight increase in coverage for Ruto to the launch of his party's manifesto in April.

While coverage may be difficult to track on an equal time basis, the Group notes that coverage across all platforms seemed robust and fair. The MCK stated that, while it had read media reports that the two top contenders alleged media violations, no formal complaints were received. The MCK also has clear guidelines for community and vernacular media to provide 'objective and fair coverage of all parties and candidates.' However, the Group observes that there are no clear assessment tools to ensure these principles are adhered to.

Media stakeholders informed the group that non-payment of journalists' salaries under the auspices of the Kenya Correspondence Association dampens the spirit of some journalists towards election coverage, and that, in their view, this could affect the quality of election reporting by journalists.

49 During discussions between the KUJ and the Commonwealth Secretariat on the latter's PEAM, the substance of which was conveyed to the Commonwealth Observer Group.

50 MCK (2022) 'Guidelines for Election Coverage 2022'. Nairobi: MCK. <https://mediacouncil.or.ke/sites/default/files/downloads/GUIDELINES%20FOR%20ELECTION%20COVERAGE.pdf>

Media ownership

The majority of Kenya media is privately owned. The Group observed that there is a level of proprietorial interference in editorials in the media, which has implications for the type of news stories that get covered. Citizen TV, the most popular television station in the country, is owned by a supporter of Raila Odinga.

Newspapers and broadcasters, when clearly identified with one party or the other, nevertheless still covered the campaigns of the other candidates. Regarding advertising time in media outlets, the MCK states that if a media outlet 'sells an advertising time to one candidate or party, other candidates and parties must also be given an opportunity to buy slots from that outlet' and that such content should be 'flagged as paid for'. Even though the political bias of some media establishments is commonly known, the Group notes that political advertorials are not always disclosed in accordance with the MCK guidelines on election coverage. The Group is concerned that political adverts could be perceived as news and lead unsuspecting media consumers to amplify undisclosed adverts as real news.

Media freedoms

Articles 33 and 34 of Kenya's Constitution guarantee media freedoms, including freedom of expression and independence from control by government or political interests. Kenya has also ratified the ICCPR. General Comment 34 of Article 19 of the ICCPR lays out media freedom principles against which state adherence to the Covenant can be cross-referenced, including within an electoral context.

Despite the improvement in quality of the media ecosystem, as evidenced in Kenya's climb to 69th place in the 2022 Reporters Without Borders index from its former 112 ranking, the MCK informed the Group that, from January to July 2022, there had been pockets of press freedom violations, including intimidation and harassment of local journalists covering regional, county and constituency political activities. One MCK report stated, 'Journalists and media workers across the country have been attacked by police and their equipment confiscated, intimidated and made to flee by goons and well-known personalities while a number of media houses have been dragged to courts to gag them against publishing on certain

topics, organizations or personalities.'⁵¹ The MCK's reporting states that journalists reporting at these levels have at times been intimidated for their perceived biased coverage or perceived support for certain candidates.

The Group condemns these instances of harassment targeted at journalists covering the campaign as well as the exclusion of specific journalists, perceived as hostile to a particular aspirant, from information about that aspirant, and asks that the MCK continue to investigate and report these violations.

The MCK briefed the Group that it had recorded 51 complaints of violations of press freedoms in 2022.⁵² These violations include the denial of access to information - a violation of the right of every Kenyan citizen under Section 35 of the Constitution, as well as the Access to Information Act.

In the past few years, a number of laws that had a deleterious impact on freedom of expression of journalists and bloggers have been found to be unconstitutional by the courts. In April 2016, a judge struck down as unconstitutional Section 29 of the Kenya Information and Communications Act (KICA), which criminalises the sending via an electronic device of 'a message or other matter that is grossly offensive or of an indecent, obscene or menacing character' or 'a message that he knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person'.⁵³ In July 2019, a judge ruled that Section 84(D) of KICA, which criminalises the publication of 'any material which is lascivious or appeals to the prurient interest', was too vague and was contrary to two articles of the Constitution: Article 33 on freedom of expression and Article 25(C) on the right to a fair trial.⁵⁴

51 MCK (nd) 'National Mechanism for the Safety and Protection of Journalists in Kenya'. Nairobi: MCK. <https://mediacouncil.or.ke/sites/default/files/downloads/Safety%20Mechanism%20for%20Journalists%2003.pdf>

52 Shortly before the arrival of the Group in Nairobi, the MCK published a status report on media violations, which put the number at 49 (<https://mediacouncil.or.ke/node/445>).

53 The Saturday Standard (2016) 'Law on Misuse of Telecommunication Devices Declared Illegal'. 20 April. www.standardmedia.co.ke/business/counties/article/2000198855/law-on-misuse-of-telecommunication-devices-declared-illegal

54 CGTN Africa (2019) 'Kenyan Court Strikes Down Law against Sharing Obscene Material Online'. 31 July. <https://africa.cgtn.com/2019/07/31/kenyan-court-strikes-down-law-against-sharing-obscene-material-online/>

The Group wishes to commend members of the judiciary for upholding Kenya's constitutional provisions relating to freedom of expression; the repealing of these sections enhanced the legislative framework under which the media, bloggers and individual citizens were able to express their opinions relating to the election.

Article 24 of the Constitution places limitations on the freedom of individuals if justified by the need to protect the freedoms of others and to preserve the peace. Making reference to Article 24, Section 22 of the CMCA 2018 places limitations on Article 33 of the Constitution (freedom of expression) 'in respect of the publication of false, misleading or fictitious data or information that is likely to propagate war; incite persons to violence; constitutes hate speech; advocates hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm.'

In 2021, a bill was tabled in the National Assembly that sought to amend the CMCA to provide the National Computer and Cybercrimes Coordination Committee (NC4) with greater powers to recommend websites that should be made inaccessible, and to prohibit the use of electronic mediums to promote terrorism, extreme religious or cult activities.⁵⁵ Media stakeholders' concern with this law extended beyond freedom of expression, with some noting an increased tendency by the Government to use 'security concerns' – in this case, terrorism – as a pretext for such media freedom violations. In addition, some media stakeholders raised concerns that efforts to amend the CMCA so close to the election represented an effort to stifle freedom of expression in the election year.⁵⁶ The Group recommends that Sections 22 and 23 of the CMCA be repealed, and the Government consider alternative means of addressing disinformation that do not unduly curtail other constitutional freedoms.

55 National Assembly (2021) 'Report on the Consideration of the Computer Misuse and Cybercrimes (Amendment) Bill'. www.parliament.go.ke/sites/default/files/2021-08/REPORT%20ON%20THE%20CONSIDERATION%20OF%20COMPUTER%20MISUSE%20AND%20CYBERCRIMES%20%28AMENDMENT%29%20BILL%2C%202021%20%28NATIONAL%20ASSEMBLY%20BILL%20NO.%2011%20OF%202021%29%20%281%29.pdf

56 Discussions with the Commonwealth Secretariat occurred on the PEAM in April 2022.

Hate speech

Hate speech, and the 'advocacy of hatred', is outlawed in Kenya under Article 33(2)(c) and (d) of the Constitution. Hate speech is also prohibited under Section 13 of the National Cohesion and Integration Act of 2008. The MCK Act makes reference to hate speech in Section 26 of the Code of Conduct but this does not include a proper definition.

The Constitution's use of the term 'hate speech' and the phrase 'advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm' may be too broad when compared with Kenya's international obligations under Articles 19 and 20 of the ICCPR. As stated by freedom of expression CSO Article 19 in 2010, 'The term "vilification of others" lacks any definition and may be interpreted more broadly than the concept of incitement contained in Article 20 of the ICCPR to include criticisms and disparaging comments which fall below the threshold of international law'.⁵⁷ The NCIC definition of hate speech, meanwhile, speaks only to the intention to incite violence, and not to the level of imminent danger presented by the speech – the latter regarded by free speech advocates as an important component in determining whether statements constitute hate speech. Relevant stakeholders may wish to review the constitutional provisions relating to hate speech and freedom of expression alongside its commitments to the ICCPR and the African Charter on Human and Peoples' Rights.

The Group received anecdotal evidence of the use of hate speech (according to Kenyan law) on vernacular radio and more extensively online. The latter will be covered in the social media section of this chapter.

Media coverage of the vote, count and post-election period

For the first time in Kenya's electoral history, the media was allowed to tally votes alongside the IEBC, even though under IEBC rules they are not allowed to announce official results before the IEBC does. The elections were conducted in a spirit of openness, with the accreditation of a record high of 4,850 local and international journalists to cover the elections and the launch of toll-free calls for citizens to file complaints to the IEBC.

57 Article 19 (2010) 'Commentary on the Regulation of "Hate Speech" in Kenya'. www.refworld.org/pdfid/4c4feb242.pdf

Journalists and media houses played a critical role in conveying information about the voting process to the public and were also involved in observing, monitoring and providing oversight of the count, tally and results process. For example, at the end of news bulletins on KBC, information was provided in English and Swahili on how to vote; and the media was used to urge citizens not to be influenced on how to vote by offers of money or other benefits.

Journalists were present at counts at polling centres, and at the constituency, county and national levels. The results were extensively covered and, while the nation awaited the official result of the presidential vote from the IEBC, the media continued to operate in a responsible and open manner.

However, observers note that the four-layered verification process for the presidential election result means it can take days to announce the result. This can lead to a vacuum in official information and conflicting accounts in the media as to which candidate is ahead. In addition, there were occasions when the media provided airtime to candidates who prematurely claimed victory, thus adding to the confusion.

Social media and the election

The importance of social media for political and election-related discussions is such that social media platforms have a huge influence on elections. In our extensive briefings with various stakeholders, it was observed that the social media companies acknowledged this.

While social media's impact on electoral campaigns should not be overstated,⁵⁸ it nonetheless played a significant role in the 2022 election in Kenya by enabling citizens, the IEBC and political parties to engage on key issues, articulate their positions and conduct voter education. The Group notes that, while social media has provided a cheaper alternative for marginalised groups and otherwise economically excluded aspirants to discuss their issues, stakeholders generally raised concerns about online mis- and disinformation and hate speech – particularly that which is an incitement to violence.

58 As noted, only around 12 million people (21 per cent) of Kenyan citizens use social media. Of these, around 69 per cent are between the ages of 18 and 34 (www.statista.com/statistics/1029198/facebook-user-share-in-kenya-by-age/).

Disinformation, which differs from misinformation in its deliberate intent to mislead,⁵⁹ was a feature of Kenya's political landscape in the run-up to the 9 August election. For example, an investigation by Mozilla Fellow Odanga Madung flagged 130 TikTok accounts allegedly spreading hate speech during the elections. Post-election disinformation was also widespread, particularly by the respective political parties in declaring their candidates as winners before the official announcement by the IEBC, causing confusion among Kenyan citizens regarding the election results.⁶⁰

To address concerns that its platforms were facilitating falsehoods, Meta – which owns Facebook, WhatsApp and Instagram – signed an MoU with the IEBC to tackle disinformation and hate speech. In the Group's discussion with Meta, the platform claimed to have conducted a pre-election mapping and an electoral risk assessment. It also deployed civic engagement messaging aimed at building user awareness campaigns on hate speech, disinformation and misinformation. To further support this, Meta informed the Group it had trained more than 1,000 young people – in partnership with the United Nations Educational, Scientific and Cultural Organization – on the positive use of social media for peace and social cohesion.

Both Meta and TikTok – the latter a new but important space for the spread of political falsehoods – also claimed to be ensuring all political advertisements met the companies' community standards. Candidates were given clear guidelines in this regard. However, work by Global Witness on Meta's acceptance of political advertisements seems to suggest that flaws remain. Global Witness submitted 10 real-life hate speech advertisements translated into both English and Swahili – for a total of 20 advertisements – and 17 of these advertisements were approved, with just 3 English-language adverts denied for violating Meta's Grammar and Profanity Policy. After minor grammatical changes and the removal

59 For more information, see e.g. UNHCR (2022) 'Factsheet 4: Types of Misinformation and Disinformation'. www.unhcr.org/innovation/wp-content/uploads/2022/02/Factsheet-4.pdf

60 Madung, O. (2022) 'Case Study: Labeling Failures'. Opaque and Overstretched Part II. Mozilla. <https://foundation.mozilla.org/en/campaigns/opaque-and-overstretched-part-ii/#case-study-labeling-failures>

of several profane words, Facebook approved the adverts even though they still contained clear hate speech.⁶¹

Although TikTok made last-minute efforts to collaborate with the IEBC and other groups, there were major concerns raised about the platform's content moderation policies and delayed response to the reported content. During briefings, representatives of political parties and civil society expressed frustration about the lack of action by the online platforms on reported and flagged content. While artificial intelligence (AI) tools were being used to remove content, they argued that most were not adequately trained in detecting local languages and failed to consider the local context.

The Group noted stakeholders' concerns regarding the use of social media platforms for fostering mis- and disinformation and hate speech by a few of the candidates and supporters. In one instance, leaflets promoting hate speech exploded on social media ahead of the elections, sparking concerns among CSOs.

The Group was informed that political actors recruited young people to post and propagate hate speech on the internet in order to discredit public institutions. Additionally, key stakeholders raised concerns around the hiring of social media bloggers and influencers to spread disinformation and dangerous narratives. The Group was unable to verify such reports.

Targeted gendered online harassment and disinformation campaigns against female politicians, campaigners and journalists have emerged as a common concern among key stakeholders. Several of them raised that sexualised and gendered online harassment affects women disproportionately, resulting in some of them becoming hesitant to use online spaces for their political campaigning. The Group found dissatisfaction among the representatives of the political parties and CSOs on the lack of action by the online platforms on reported and flagged content.

The Group also noted the lack of access to data provided by social media platforms to researchers. CSOs raised concerns about the non-transparency of the social media platforms with regard to

detailed public reporting, with many requesting that platforms release post-election reports detailing labelled content, reported content, the number of removals, reasons for removals, response times and other metrics. Ideally, platforms should also be more transparent regarding the development and calibration of their *ex-ante* AI content moderation tools, as well as the methods used to determine hate speech and disinformation in vernacular languages.

Kenya's National Cohesion and Integration Commission (NCIC) has a mandate to promote national unity, equity and facilitating peaceful resolution of conflicts and respect for diversity, among other responsibilities. As such, the NCIC represents an important component of the country's peace architecture.

Ahead of the election, the NCIC released a National Action Plan to combat hate speech and mapped out actors with mandates on addressing hate speech in the country. Through its regular publication of a State of Peace and Political Decency report, the Commission identified issues such as the proliferation of online hate speech, the use of pseudonyms and, in its opinion, weak legal definition of hate speech. However, limited funding at its disposal to counter online hate affected its ability to deal robustly with the challenges identified. In addition, the NCIC received criticism for its announcement of 23 English, Swahili and other vernacular words that it has banned from use in political campaigns. These include words such as 'fumigate', 'eliminate' and 'kill'. This list of words, while being an honest attempt to grapple with a genuine problem, was criticised by a number of stakeholders, including media representatives, for lacking sound legal footing and not accounting for the context in which words are used.

The Group noted that the NCIC's role appeared somewhat limited to that of a monitor, with the ORPP appearing to have greater authority in relation to the enforcement of hate speech laws. The Group recommends that the NCIC and ODPP conduct a post-election review that seeks to identify ways in which the NCIC can exercise greater authority in discharging its mandate.

Data protection

Data protection in Kenya is regulated by the 2019 Data Protection Act (DPA), as well as subsidiary legislation passed in 2021. The DPA has established

61 Global Witness (2022) 'Facebook Unable to Detect Hate Speech Weeks away from Tight Kenyan Election'. 28 July. www.globalwitness.org/en/campaigns/digital-threats/hate-speech-kenyan-election/

the Office of the Data Protection Commissioner (ODPC), currently headed by Immaculate Kassait. The DPA establishes the ways in which personal data must be accessed, processed, used and stored by data controllers, and provides penalties for data breaches and violations of individuals' right to privacy. Section 6 of the Elections Act does not state that the processing of personal data is subject to the provisions of the DPA but it is important to note that the DPA has made an amendment to the IEBC Act, whose Section 25(i) now states that the 'principles of personal data protection set out in the Data Protection Act apply to the processing of personal data of voters'.

In the months before the election, there were a number of data protection issues. The Group was informed through its briefings with stakeholders that political parties had access to and used the personal data of voters without their consent for political campaigning, including sending political ads via SMS. In addition, there were widespread reports of voters being registered to political parties without their consent. The Group notes that the ODPC worked with the ORPP to act on complaints received, and made efforts to advise voters on how to check if they were affected by this issue.

In June 2022, three IEBC officials were arrested for the illegal transfer of voters to different polling stations without their consent. The IEBC was made aware of this issue during an audit, and subsequently advised voters to check their polling station via SMS or via the online portal. While the Group appreciates the IEBC acted swiftly to address this issue, this breach nonetheless underscores the need for greater information security measures within the IEBC to prevent such illegal transfers in the future.

The Group appreciates the positive steps taken to ensure regulations had been passed, and further appreciates that such regulations only came into force shortly before the election. Nonetheless, the Group was concerned by an apparent lack of enforcement of the DPA in relation to reported violations. Further, the relative lack of visibility of the data protection commissioner contributed, at times, to rumour and misinformation among voters and stakeholders regarding these violations. There is a need for adequate measures to ensure the ODPC is able to enforce the DPA, including through the provision of adequate funding. The ODPC should also make greater efforts to be

more forthcoming with public statements so as to educate data controllers of their responsibilities and data subjects of their rights.

Fact-checking

Fact-checking operations in English, Swahili and six vernacular languages were also part of efforts to reduce misinformation and disinformation online. Groups such as Africa Check, Pesa Check, Agence France-Presse Fact Check and Fumbua, with funding from the United Nations and Meta, undertook these efforts. The Group commends these efforts, and calls for their continued funding for future elections.

Lack of digital literacy emerged as another significant concern among social media users in relation to understanding ways to report hate speech, disinformation and harassment to the platforms. While social media users in urban areas have a slightly better understanding of how to identify mis- and disinformation, fact-checking and verifying content before posting is still a huge challenge for users in remote and rural communities.

Recommendations

- Political party leaderships are strongly encouraged to promote the Code of Conduct within their own parties and engender a culture that promotes the value of democracy above short-term political and economic interests.
- The Department of Public Prosecutions, as the enforcing institution of the Code of Conduct (as per *Chege v IEBC*), is encouraged to redouble efforts to sanction violations of the Elections Act and the Code of Conduct.
- The IEBC should undertake the necessary public consultations on campaign finance, including on party and candidate expenditure caps, to ensure the Campaign Finance Act is in force for the next election.
- The Government is urged to repeal Sections 22 and 23 of the Computer Misuse and Cybercrimes Act and seek alternative means of addressing mis- and disinformation that do not encroach on other constitutional freedoms.

- The Government is encouraged to review legislation pertaining to hate speech, including the NCIC Act, and to bring definitions of hate speech legislation in line with Kenya's international human rights obligations. The Government is further urged to ensure the NCIC is appropriately resourced to enforce the provisions of the Act pertaining to hate speech.
- Social media companies are encouraged to take more responsibility and action on disinformation, misinformation and hate speech to improve the speed at which dangerous/misleading content is removed from their platforms, and to ensure such efforts continue for a sufficient period after the election to combat post-election mis- and disinformation and hate speech. Special consideration should be given to the political leaders' profiles that have huge following and verified status that spread disinformation and hate speech as well political supporters' accounts with massive followings.
- Under the Freedom of Information Act, public institutions and relevant authorities should meet information requests by journalists and non-governmental organisations promptly and procedures should be simplified.
- The Government should consult with the Communications Authority and the MCK, as well as the Law Reform Commission, to clarify any legal ambiguities relating to the roles and responsibilities of the respective institutions regarding the regulation of broadcast media.
- Media houses should endeavour to always disclose and identify political advertorials paid for by interested parties when they carry or broadcast sponsored content by candidates and political parties, in line with their obligations under the MCK Act.
- The IEBC is strongly encouraged to ensure maximum transparency at each stage of the election process and that all relevant stakeholders are provided with timely information.
- The IEBC should further enhance its media strategy to run from the campaign period to the results announcement phase in order to better manage expectations in the post-election period.
- The Government should ensure the Office of the Data Protection Commissioner is sufficiently resourced to enforce the DPA.
- The data protection commissioner should be much more vocal in educating the public on efforts taken to enforce the DPA, and should make greater efforts to educate both data subjects (i.e., voters) and data controllers on their rights and responsibilities, respectively.

6. Voting, Counting and Results Process

Background

On 9 August 2022, polling was scheduled to occur from 06:00 to 17:00 and was organised in 46,229 polling stations across 290 constituencies in Kenya, with an additional constituency for prison voting and the diaspora.⁶²

A total of 22,120,458 registered voters were eligible to cast their votes in the 2022 General Election. The polling stations were located within County Assembly wards and gazetted prisons in the country; for diaspora voting, they were located in Kenyan diplomatic missions in 12 countries – Burundi, Canada, Germany, Qatar, Rwanda, South Africa, South Sudan, Tanzania, Uganda, United Arab Emirates, United Kingdom and United States of America.

The IEBC operates an election management structure consisting of 17 regional offices, 47 county offices and the 290 constituencies. Each of these is headed by an IEBC co-ordinator. Two returning officers (ROs) were appointed for each electoral constituency, to work on the compilation, tabulation, declaration and transmission of results. The first was the county-level RO, for the senatorial, gubernatorial and women's representative elections; the second was the constituency-level RO, for the County Assembly and the National Assembly elections.

Each polling station had eight designated staff: a presiding officer (PO), a deputy PO and six polling clerks. Two police officers were assigned to each polling station to provide security and maintain peace and order. All polling and security officials were expected to arrive at the polling station the night before to ensure adequate preparations for commencement at the fixed time of the opening of the polls. Polling agents and accredited citizen and international observers were also authorised to be present at polling stations.

Six translucent ballot boxes are provided, each colour-coded, for ballot papers for president, National Assembly member, County Assembly member, county governor, senator and county woman member of the National Assembly. Each of the six ballot papers must be cast in the correct ballot box.

For the 2022 elections, a total of 55,100 KIEMS kits were deployed nationally. Configured KIEMS kits were provided to each of the 46,209 polling stations, containing only the electronic register of voters of the polling station, for biometric voter identification and authentication before voting, and for results transmission to the National Tallying Centre at the end of voting and counting. The IEBC said it had provided an additional six KIEMS kits per County Assembly ward, as redundancy, to enable quick replacement in case of technical failure. There were also protocols to mitigate any failure to appropriately capture a voter's fingerprints. In addition to the KIEMS kits, and in compliance with a High Court order a few days from the date of the elections, the IEBC undertook to provide manual voter registers to each polling station.

POs were mandated to extend polling hours by an amount of time equivalent to that of the initial delay. Polling stations were primarily located within or outside public facilities such as schools, churches and community centres.

The law required political campaigning to end 48 hours before election day. Provisions were made to mitigate the spread of COVID-19, including various methods of sanitisation.

The IEBC rescheduled elections on 23 August 2022 in eight electoral areas as a result of court orders and a mismatch of electoral materials. These included elections for:

- Gubernatorial positions in Mombasa and Kakamega counties;
- National Assembly members in Kitui Rural constituency (Kitui county), Kacheliba constituency (West Pokot county), Pokot South constituency (West Pokot county) and Rongai constituency (Nakuru county);

⁶² A diaspora voter or a voter in prison could vote only for the presidential candidate of their choice.

- County Assembly ward member: Nyaki West (North Imenti constituency, Meru county) and Kwa Njenga (Embakasi South constituency, Nairobi county).

Key procedures for pre-poll activities

Key activities pre-election include but are not limited to the following.

On arrival at the polling station, the PO:

- confirms the suitability of the polling room and the adequacy of furniture;
- confirms the availability of election officials;
- checks the temperature of the poll officials and informs the RO in case of abnormal temperatures;
- completes the staff attendance list in the Polling Station Diary (PSD);
- confirms the availability and adequacy of election materials.

Just prior to the commencement of polling, the PO:

- ensures COVID-19 protocols;
- briefs polling officials;
- demarcates the polling station;
- labels and posts relevant posters;
- sets up the polling station and the hand-washing point.

In the period between 04:00 and 05:59, the PO:

- ensures personal protective equipment is being used;
- confirms the sobriety and general health status of officials and stakeholders;
- admits agents, observers and media (if present) and has them fill in the PSD;
- ensures all polling officials including security are briefed;
- powers on and logs into KIEMS at 05:15 and fills in the PSD;
- allocates duties to officials and clearly explains to them their roles.

Assessment of pre-poll preparations

On 8 August 2022, the Group deployed observers to 17 counties across Kenya, to observe pre-

election, election day and post-election day activities. Observers went to Kisii, Kisumu, Kitui, Kakamega & Vihiga, Bungoma & Busia, Meru, Machakos, Nyeri, Kiambu, Nairobi and Environs, Mombasa, Eldoret, Nakuru, and Kitale and West Poket. The Group met key stakeholders in these counties, most of whom expressed confidence in preparations ahead of polling day and optimism that the polls would be conducted in a peaceful manner. We were impressed at the improvements in the Commission's readiness.

IEBC officials were observed preparing the sensitive materials ahead of the vote with the assistance of security personnel. In some cases, voting materials were received late, which meant that IEBC officials had a very long night sorting them out. At some polling stations, the voter lists had not been pinned securely, causing them to be damaged. In some instances, the voter lists had been vandalised.

We also noted and applauded the IEBC for taking immediate action to deal with emerging problems, including by postponing polling in isolated cases owing to security issues and sacking polling officials who had violated electoral rules and procedures. Also, the Group noted that, where it was discovered that ballots had printing errors, the relevant ROs were swift to notify the IEBC in Nairobi. It is commendable that the IEBC also took swift action and suspended elections for the affected seats, and soon after communicated the new election date of 23 August. However, greater efforts must be made to avoid such an occurrence in the future.

On 8 August, the eve of the election, the Court of Appeal overruled a High Court ruling that had ordered the use of printed voter registers alongside the KIEMS kits. The Court of Appeal ruled that the printed voter register must be used only as a back-up in instances where the KIEMS kit had failed. The fact that this ruling came on the eve of the election led to some uncertainty and inconsistency regarding the correct implementation of procedures for voter verification. This affected the smooth administration of this procedure in some polling stations, which left open the possibility of legal petitions. The Group did not witness any instances of this inconsistency leading to the disenfranchisement of voters, however.

The Group noted that no arrangements for early or advance voting currently exist for polling staff, security personnel or other essential workers, some of whom are required to work on election

day away from where they are registered to vote. The Group recommends that the IEBC consider this issue in its post-election review to ensure no Kenyan citizens are unintentionally disenfranchised in future elections.

Key procedures for the opening of the polls and voting

The key prescribed procedures for opening and voting were as follows.

Opening of the polls

The voting process commences prior to 06:00 with the PO addressing the accredited political party agents and observers, briefing them on the procedures, displaying the empty ballot boxes before sealing them and inviting the agents to write down the serial numbers of the seals.

Voting process

The voter is expected to go through the following steps at the polling station.

At 06:00, the first voter in the queue is asked to approach the clerk for biometric verification and authentication. The voter presents their national ID card to the clerk, some details of which are put into the KIEMS kit, and their fingerprint is taken. Once this is successfully done, the voter moves to the next clerk for their name to be marked on the manual register. Each of the next three clerks issues two ballot papers to every voter, stamped on the back, to a total of six ballots.

The colour of the ballot papers corresponds with the six colour-coded ballot boxes. Once the voter receives all the ballot papers, they proceed to the polling booth to mark their votes, before folding their ballots and placing them in the corresponding box. Upon completion of this last task, a clerk puts indelible ink on the cuticle of the small finger of the left hand of the voter before they exit the polling station.

Alphanumeric searches are undertaken to identify those voters whose details are not retrieved using the fingerprint scanner. In such cases, the clerk uses the voter's ID/passport number or name, or a scan of the barcode of the ID document. If after alphanumeric searches the voter cannot be identified, the PO uses the KIEMS Supervisor Validation Form, witnessed by polling agents present.

The IEBC deploys ICT officers across counties to resolve any issues with the KIEMS kits reported by ROs and POs. On election day, the Commission authorised the use of the manual register in Makueni county (Kibwezi West constituency) for 84 polling stations and Kakamega county (Malava, Mumias West and Mumias East constituencies) for 154 polling stations.

Assisted voting is permitted for those who require it, either by means of a voter bringing someone to assist them (such persons have to be 18 years or above, present an ID or passport/fill out Form 32 and can assist only one voter in the election) or by the PO marking the ballot paper in the presence of agents.

In relation to queue management, pregnant women, nursing mothers, PWDs and the elderly are permitted to 'jump' the queue and be assisted as necessary.

COVID-19 protocols are to be observed throughout the polling day processes. The PO ensures the availability of soap, sanitiser, face shields, gloves and face masks at the polling station and proper queue management (social distancing) by all those involved in the process – voters, polling station officials, party agents and observers.

ROs issue Certificates of Authority to Vote for persons who are unable to cast their vote at the polling stations to which they are assigned (polling officials, police, army personnel, etc.).

Assessment of the opening of the polls and voting

On election day, the Group reported a largely peaceful process that was well managed and transparent, with voters free to exercise their franchise. Party agents and national, regional and international observers were largely present at the polling stations observed.

Voter turnout was heaviest in the early morning hours, with long queues, which were nevertheless calm and orderly, as voters waited patiently to cast their votes for their candidates of choice. The people of Kenya deserve commendation for the peaceful and orderly manner with which they participated in the elections and exercised their right to vote.

Some of the key observations of the Group were as follows.

The Group's overall impression of polling was that it was conducted peacefully and in an orderly manner. No campaign activities were observed on election day. Observers reported that most polling stations opened on time and that in general pre-poll procedures were adhered to. In those cases where the opening was delayed, it was noted that the IEBC granted all POs the mandate to extend polling hours by the same length of time as the initial delay. Long queues of voters waited patiently for their turn. The queues were calm and orderly. Voters expressed their commitment to peaceful elections.

Polling station locations and layouts

The Government of Kenya issued a Gazette Notice on 12 July 2022 listing the number and location of the 46,229 polling stations that were to be used for the 2022 general election.⁶³ Section 7(2) of the Elections (General) Regulations 2012 (as amended) states the following:

In determining the number of polling stations and the location of any polling station, the Commission shall have regard to geographical considerations, accessibility for persons with special needs, (including persons with disabilities), population and any other factors affecting communication between places within the electoral area.

Polling stations were mainly located in schools, in classrooms of varying sizes, or on public land/ open fields, with tents erected to serve as polling stations. These locations necessitated adequate signage. Although the IEBC provided a diagram of the polling station layout, slight variations were observed owing to differences in the locations at which the polling stations were sited.

The IEBC ensured the voter register was pasted on the wall or pinned to a noticeboard in places where many polling stations were located, to enable voters to identify where they were supposed to vote. Nevertheless, it was observed that some voters still had difficulty locating their polling station or polling stream from the displayed voter list. The Group recommends that better signage be introduced to guide voters.

It was observed that many polling stations had serious space constraints, with resultant overcrowding. Indeed, at some locations, particularly in rural areas, the conditions in which polling officials were expected to work, often overnight, were grossly unsatisfactory, and thus require significant improvement. Voting centres are not of identical size but the serious space constraints in some polling stations mean that the IEBC should put in place a minimum common standard for voting station size to manage voters, IEBC staff, agents and observers. Ideally, such common standards should be included in the Elections (General) Regulations 2012 (as amended).

Some voters had not been aware of, or had been unable to access, the IEBC webpage or SMS system, which would have allowed them to identify their polling station before they arrived to cast their ballot. Some voters complained that their registration to vote had been transferred somewhere else.

Conduct of polling

Polling staff were generally well trained, efficient, meticulous and highly transparent in the conduct of their duties. However, there were a few inconsistencies in the application of procedures or in their communication and interaction with party agents when dealing with queries on process. Such staff would benefit from additional training to respond to any challenges that may arise during the conduct of their duties, to minimise such anomalies in the future.

Voter verification

The use of KIEMS kits to verify and authenticate the identity of voters registered at polling stations proceeded smoothly for the most part. In one of its media briefings, the IEBC acknowledged the failure of around 200 of the more than 46,000 deployed KIEMS kits. This is a remarkably good success rate, for which the IEBC is to be commended.

There were many cases of the KIEMS kits failing to read voters' fingerprints. In such cases, the voter was asked to wipe clean their fingers or wash their hands. If that did not work, the polling staff were able to resort to alternative measures to identify voters, as provided for in the regulations/guidelines, including entering the alphanumeric ID number of the voter in the KIEMS kit to access their details and taking a photo on the device.

63 Republic of Kenya (2022) 'The Constitution of Kenya, the Elections Act (No. 24 of 2011), the Elections (General) Regulations, 2012 (L.N. 2012 and L.N. 2017), Polling Stations for the 9th August 2022 General Election'. The Kenya Gazette Notice No. 7996, 1 July. <https://www.iebc.or.ke/uploads/resources/6eYBKyk30d.pdf>

COVID-19 protocols

It was observed that compliance with COVID-19 protocols was not uniformly observed. While polling officials were provided with masks, few bothered to use them. Also, few party agents, and far fewer voters, used them. Social distancing was honoured more in the breach than its observance. It did not appear that hand sanitisers were provided and/or used in most of the polling stations.

Participation and priority voting

We applaud all polling staff and security personnel for being proactive in assisting and granting priority to the elderly, pregnant and nursing mothers, PWDs and others, who were allowed to speedily and easily access polling stations to cast their votes, without having to join long queues. In some polling stations, however, we observed that there was some variation in how this was managed.

Prison voting

We commend the IEBC for abiding by constitutional provisions to allow prison voting for the presidential election. The Group was able to observe prison voting in a number of locations. We also commend the initiative to appoint designated welfare officers to assist and facilitate voting in prisons. The Group noted, however, that a significant proportion of prisoners did not have ID documents to enable them to vote. The Group observed released prisoners returning to the prison to vote. Ironically, the prison staff were themselves effectively disenfranchised. The Group's recommendations relating to prisoner voting are in Chapter 4.

Party agents

Party agents were observed in all polling stations, in significant numbers, from opening to the declaration and posting of results. They were alert and attentive in the conduct of their duties. The Group did not receive any reports of agitation or dissatisfaction, and disputes were resolved satisfactorily with polling staff.

The Group did notice some shortcomings, however. As voter ID is conducted digitally, party agents do not have the benefit of engaging with this aspect of the process. It is recommended that party agents be as engaged as possible to build greater confidence in the electoral process, including by altering procedures such that the identity of voters

is read aloud for agents to hear. To aid this, either the IEBC or political parties should provide agents with copies of the register.

In many polling stations, agents did not have enough space to sit; indeed, agents were often forced to stand so close to the booths that this could have affected the secrecy of the ballot. The Group recommends a review of polling stations that takes into consideration the need for agents to have space to sit.

Finally, lanyards were often not distinctive, and in many cases agents did not have lanyards at all. It is recommended that this be rectified in future elections.

Security

Security was present at every polling station observed, and the Group noted that many women were deployed as part of the security detail. All were professional and carried out their duties diligently; they should be commended for their role in maintaining peace during this period.

Situation rooms

The Group visited a number of CSO Situation Rooms hosted by citizen observers. These initiatives are beneficial as they enhance transparency and provide a national perspective on key data emerging from the electoral process, especially on election day. This instils a level of confidence in the electoral process, and should therefore be encouraged.

Key procedures for closing

By 17:00, polling is officially closed; no new arriving voter is permitted to join the queue. If there are still people on the queue at the time of official closure, one of the two police officers at the polling station stands at the end of the queue to prevent other latecomers from joining it. In such cases, polling closes as soon as the last person in the queue has voted.

At the close of polls, the PO invites the party agents to witness the sealing of the aperture through which ballot papers have been dropped into the ballot boxes, and notes the serial numbers of the seals. This is followed by the counting of the unused ballot papers, after which arrangements are made for the sorting and counting of the cast ballot papers.

Key procedures for counting, announcement and completion of forms

The roles and responsibilities of election officials during counting are as follows.

The PO:

- is in charge of the counting process at the polling station;
- lays out the polling station for the counting of votes;
- assigns counting duties to the clerks;
- is answerable to the RO;
- briefs agents on what constitutes a valid or rejected vote;
- tallies, tabulates and counts votes cast;
- announces promptly election results in a designated polling station;
- signs the official results declaration forms in a polling station;
- submits polling station results to the RO;
- performs any other duties assigned by the RO.

The deputy PO:

- deputises the PO;
- signs statutory forms and other documents;
- performs the duties assigned to him/her by the PO;
- assists in sorting and counting of ballot papers and votes.

Procedures for counting are as follows:

- The ballot boxes are emptied and the ballot papers for each of the candidates are sorted. Prior to the beginning of the count, the PO undertakes a reconciliation of the ballots to confirm that the number of ballots in the ballot boxes corresponds to the number of voters recorded as having cast votes, and that the number of used and unused ballots corresponds to the total number of ballots provided to the polling station.
- The votes cast for each candidate are counted openly and transparently, ensuring that party agents can see and verify the accuracy of the count.

- The scores for each candidate are recorded on the appropriate forms.
- If there is no problem with the reconciliation, the winner is declared, and results are recorded on the appropriate forms, signed by the PO and countersigned by the party agents.
- A copy is pasted at the polling station, party agents are given copies, and observers and other citizens/voters and media representatives are permitted to scan/take photos of the posted results declaration form.

Settlement of disputes arising from the counting of votes

- Upon completion of counting of the ballots by the PO, candidates or their agents may seek a recount. No more than two recounts shall be carried out.
- During counting, the PO shall note and record the number of disputed votes on the statutory forms and in the Polling Station Diary (PSD). During the counting process at the polling station, a disputed ballot is treated as a valid vote and assigned to a candidate. Ballot papers marked 'disputed' are later subject to review by the RO at the Constituency Tallying Centre, witnessed by candidates and/or agents.

Statutory forms used for filling in election results

- Form 34: Declaration of Presidential Election Results at a polling station;
- Form 35: Declaration of National Assembly/ County Woman Member of the National Assembly/Senator/County Governor/ County Assembly Election Results at a polling station;
- Form 36: Declaration of Election Result at Constituency and County Levels.

For presidential results, the RO collates results from Forms 34 to Form 36. For parliamentary and county elections, the RO collates results from Forms 35 to Form 36. At the constituency level, Form 36 is used to announce and declare results for members of the National Assembly and members of the County Assembly.

Activities that take place after the counting of votes

- The PO, after the counting of votes concludes, makes a statement on the number of rejected ballots. The reasons for rejection may include the following:
 - features a lack of security;
 - is marked for more than one candidate;
 - has a mark that may reveal the identity of the voter;
 - is unmarked;
 - is unstamped;
 - does not make clear the intention of the voter.
- The PO fills in Form 34 or Form 35 and statements on rejected ballots, respectively, where applicable, and affords the opportunity to the candidate and/or agent to append their signature onto the forms.
- The PO also records:
 - the absence of a candidate and/or agent;
 - reasons for refusal by candidate(s) and/or agent(s) to sign a declaration form.
- The absence of a candidate and/or agent at the signing of a declaration form or announcement of results shall not invalidate the results announced.
- The PO announces the results from Form 34 or Form 35.
- The PO, on completion of counting, seals in separate tamperproof envelopes:
 - the counted ballot papers that are not disputed;
 - rejected ballot papers together with the statement;
 - disputed ballot papers;
 - the 'rejected objected to' ballot papers;
 - unused ballot papers;
 - stray ballots.
- The PO seals the ballot box with the seals of the Commission and records the serial numbers, witnessed by candidates and/or agents and observers.
- The PO hands over to the RO the ballot boxes, as soon as practicable, at the Constituency Tallying Centre.

Assessment of the closing and of the counting, announcement and completion of forms

It was observed that those who were in the queue at the 17:00 official closing of the polls were allowed to vote, in accordance with the established procedures. Though a number of polling stations remained open well past 17:00 to process the remaining voters in the queue, the polling staff were generally diligent in ensuring they finalised all polling as soon as possible.

The close and count process generally followed due process, with commendable transparency. Any disputes that were observed were settled amicably. The IEBC and its polling officials and party agents deserve commendation for this. However, in a few polling stations observed, counting was done without sorting, party agents could not see and verify the ballot papers as they were being counted, and poor lighting further constrained the transparency of the count.

Key procedures for results transmission and tallying: polling station, Constituency Tallying Centre and National Tallying Centre

The IEBC shall electronically transmit election results from the polling station to the constituency, county and national tallying centres. The results must be transmitted from the official statutory forms that have been duly signed and announced by the PO at the polling station.

The results management processes at tallying centres are determined by the type of election or elective position. The County Assembly member and National Assembly member election results are tallied and declared at the Constituency Tallying Centre, whereas those for governor, senator and county woman member of the National Assembly elections are collated at the Constituency Tallying Centre and verified, tallied and declared at the County Tallying Centre. The results for the presidential election are collated at the Constituency Tallying Centre and tallied and declared at the National Tallying Centre.

An overview of the results transmission and tabulation processes for each of the elective positions is provided below:

Results Transmission and Tabulation Processes	Form
President	
PO completes the form at Polling Station. Form is uploaded to KIEMS and the original is taken to the Constituency Tallying Centre	34A
CRO tabulates results and completes form at Constituency Tallying Centre	34B
PRO tabulates results and completes form at National Tallying Centre	34C
PRO announces results	34D
Member of Parliament	
PO completes form at Polling Station. The original is taken to the Constituency Tallying Centre	35A
CRO completes form at Constituency Tallying Centre	35B
CRO announces results	35C
Member of the County Assembly	
PO completes form at Polling Station. The original is taken to the Constituency Tallying Centre	36A
CRO tabulates results and completes form at Constituency Tallying Centre	36B
CRO announces results	36C
Governor	
PO completes the form at Polling Station. The original is taken to the Constituency Tallying Centre	37A
CRO tabulates results and completes form at Constituency Tallying Centre. Form taken to County Tallying Centre	37B
County RO tabulates results and completes form at County Tallying Centre	37C
County RO announces results	37D
Senator	
PO completes the form at Polling Station. The original is taken to the Constituency Tallying Centre.	38A
CRO tabulates results and completes form at Constituency Tallying Centre. Form taken to County Tallying Centre	38B
County RO tabulates results and completes form at County Tallying Centre	38C
County RO announces results	38D
Women's Representative	
PO completes the form at Polling Station. The original is taken to the Constituency Tallying Centre	39A
CRO tabulates results and completes form at Constituency Tallying Centre. Form taken to County Tallying Centre	39B
County RO tabulates results and completes form at County Tallying Centre	39C
County RO announces results	39D

The results transmission and tallying procedures are as follows:

1. The polling station level deals with the results for all six elective positions. The tallied results are then taken to the Constituency Returning Officer (CRO) manually. At the same time, the presidential results forms are transmitted electronically via KIEMS to the IEBC online portal. Legally, the electronically transmitted results are provisional while the manually tallied and signed copies are the final official results.

Procedure for the digital transmission of presidential results forms via KIEMS:

- The PO captures an image of Form 34A using the KIEMS tablet.
- The PO allows agents, if present, to verify the image.
- The PO transmits the image through KIEMS to the public portal.

- In the event that a 3G network is not available, the PO travels to the nearest location with 3G on the way to the tallying centre and transmits from there.
- The PO then physically conveys the original form to the CRO for further necessary action.

2. At the Constituency Tallying Centre, the polling centre results are consolidated to become constituency results. The CRO announces the results and declares the winners of two elective posts – namely, County Assembly member and National Assembly member. The tallied results for each candidate for the posts of senator, county woman member of the National Assembly and governor are forwarded to the county RO. The tallied results for the presidential ballot are taken to the National Tallying Centre.

Procedure:

- On receipt of the election results from the polling stations, the RO, in the presence of candidates and agents, enters results from Forms 34A–39A (which comprise election results for all elective positions at each stage of the tabulation process) onto two different soft copies of each of Forms 34B–39B.
- The CRO compares the two entries frequently to confirm consistency.
- If the two are not consistent, the CRO refers to the respective Forms 34A–39A to rectify the anomaly.
- In case the total valid votes in a polling station exceed the number of the registered voters in that polling station, the CRO brings the anomaly to the attention of the agents present and disregards the results of the count of that particular polling station in the announcement of the election results and make a statement to that effect.
- The CRO prints out a copy of duly filled Forms 34B–39B and verifies each entry against respective Forms 34A–39A.
- The CRO prints out a final original of Forms 35B and 36B and invites the agents present to confirm the results and sign.
- The CRO signs, dates and stamps duly filled results Forms 34B–39B.
- The CRO makes adequate copies of Forms 34B–39B.

- The CRO declares the results and provides copies to the agents.
- The CRO packages all other election results declaration forms for other elections that have not been declared in tamperproof envelopes and as soon as practicable transmits these to the county RO and the chair of the IEBC.
- The CRO makes photocopies and files Forms 34A–39A serially and ensures their safe custody throughout the tallying process.

3. At the County Tallying Centre, the county RO tallies all the results coming from the constituencies and announces results and winners for the positions of governor, senator and county woman member of the National Assembly.

Procedure:

- RO 1 enters results for senator on the soft copy of Form 38C from Forms 38A.
- RO 2 enters results for county women member of the National Assembly on the soft copy of Form 39C from Forms 39A.
- RO 3 enters results for governor on the soft copy of Form 37C from Forms 37A.
- After receiving all results from the constituencies and confirmation of the tallied results, print the declaration results Forms 37C, 38C and 39C for the various elective positions.

4. The National Tallying Centre receives, tallies and announces presidential results from constituencies. It also receives all the official results for the six elective positions. The chair of the Commission is responsible for announcing the presidential election results. In addition, the National Tallying Centre co-ordinates all activities, including emergency response and interventions to deal with any reported occurrence in the field. Further, this tallying centre operates a call centre, a media centre and an operational centre where logistics are co-ordinated.

Procedure:

- The centre receives the electronically transmitted images of Forms 34A.
- It receives original Forms 34A and 34B from the respective ROs.
- It verifies results on Forms 34A against the collated results on Form 34B.
- It tallies results from the original Forms 34A onto Form 34C.

Key procedures for the verification of results at the National Tallying Centre

At the National Tallying Centre, CROs are required to bring Forms 34A and 34B to go through a four-tier verification process before the results are tallied onto Form 34C by Wafula Chebukati, the presidential returning officer (PRO).

1. Preliminary checks: Basic checks are undertaken, such as whether the forms have been stamped and signed and data have been entered correctly. Electoral officials at the desk also conduct a quality check on the entry Form 34B against the original Form 34A.
2. Coordination: IEBC officers check for any error in the forms, then generate an error report. The desk will also look at whether forms uploaded on the public portal match the forms brought by the ROs.
3. Administrative: Officers check what their counterparts on the first and second desks have done to ensure everything is in order.
4. Quality assurance: Officers conduct a quality check of the forms before they are kept in a secure room in the auditorium, which is manned by police. Once the quality assurance desk has completed its work, the officers share the original forms with the presidential RO. The originals are kept under lock and key in the IEBC's safe.

Presidential agents are allowed at all the desks to witness the presentation of the forms and the authentication process.

Key procedures for the declaration of election results at the tallying centres

- At the Constituency Tallying Centre, the CRO collates and announces, on forms 34B, 37B, 38B and 39B, the final results for four elective positions:
 - president;
 - senator;
 - county woman representative of the National Assembly;
 - county governor.
- The RO tallies, announces and declares, on form 35B and 36B, the final results for two elective positions:

- member of the National Assembly;
- member of the County Assembly.
- The RO issues the certificate of results (forms 35C and 36C) to the winning candidates as members of the National Assembly and the County Assembly.
- The RO scans all the forms 35C and 36C and uploads them to the Electronic Document Management System (the IEBC public portal).
- At the County Tallying Centre, the county RO collates and announces, on form 37C, 38C and 39C, the final results for three elective positions: senator, governor and woman representative of the National Assembly. The county RO then tallies, announces and declares the final results for these elections on forms 37D, 38D and 39D.
- The constituency RO packs and takes the originals of Forms 34A and 34B containing the results of the presidential election, labelled and sealed in an A4 tamperproof envelope, to hand over to the National Tallying Centre.
- The IEBC chair then verifies, tallies, announces and declares the presidential results received from the constituencies within seven days in accordance with Article 138(10) of the Constitution.
- The chair of the Commission, having ascertained that a candidate has garnered 50 per cent + 1 of the votes cast and at least 25 per cent of the total votes cast in 24 counties, issues a certificate of result (Form 34D) to the winning candidate.

Sharing, publication and access to results

- Political party and independent candidates' agents are provided with copies of the results.
- The results are displayed outside the polling station, as well as at tallying centres at all levels.
- Media houses broadcast election activities at all levels.
- A public portal is maintained by the IEBC.

Assessment of the results transmission and tallying

While the use of the KIEMS kits for voter identification led some to question as to what would happen if they failed, the Court of Appeal's decision

in its ruling on 8 August to allow use of the paper register in such instances provided clarity on this aspect for election day. However, the late ruling meant that some polling staff and agents were unaware of the ruling, or unclear as to its substance. While this did lead to some confusion, the Group was not aware of any instances in which voters were disenfranchised as a result.

As far as the Group was able to observe, the results transmission phase commenced fairly smoothly, with few issues reported, although the Group notes the slow rate of the processing of results at the National Tallying Centre. While there were some instances of political parties raising concerns about this, the Group notes that the IEBC's commissioners dealt with the issues directly to defuse tensions. As a compensatory measure, in the early hours of 12 August, the IEBC chairperson announced the establishment of additional processing desks at the National Tallying Centre, to speed up the results process.

The Group also noted that the IEBC faced a challenge in ensuring it conducted the results announcement process with the necessary due diligence and transparency, while responding to calls from Kenyan citizens to minimise the time lag between the announcement of the official results by the IEBC and the provisional, and at times conflicting, results announced by the media.

Tensions were often high at the National Tallying Centre. ROs are to be commended for their calm and transparent handling of concerns by political parties and their agents. The Group notes, however, that the attendant security were at times too slow to intervene when tempers were fraying. The Group notes with concern the attack on IEBC commissioners on 15 August by political party operatives that resulted in one commissioner receiving hospital treatment. First and foremost, the onus is on political parties to ensure their members do not engage in physical or verbal harassment of IEBC staff. Security services are also encouraged to do more to ensure the safety of IEBC staff and limit the possibility of violent attacks occurring.

Recommendations

- Special arrangements should be made to allow early voting for polling staff, security personnel and other affected categories. Such early voting could take place a day or two before the stipulated day. This would entail sealing and storing the ballots, which would then be opened on or after the official polling day.
- The IEBC should address space constraints by establishing minimum common standards for each polling station, be it in a classroom or in a tent in a public field. This will ensure agents do not unwittingly compromise the secrecy of the ballot, and will also ensure compliance with COVID-19 protocols on social distancing. Such standards should ideally be included in the regulations.
- The conditions under which polling officials spend the night on the eve of elections, especially in rural areas, should be significantly improved to increase the morale and productivity of polling staff.
- The IEBC should ensure better signage is introduced to guide voters at the polling stations.
- The IEBC should undertake increased voter education on how to access and use the IEBC website, portal and SMS system.
- The IEBC should continue to provide training to ensure ongoing competence and efficiency in the discharge of assigned duties and responsibilities.
- In its post-election review, the IEBC should consider administrative and technological solutions that would expedite the official announcement of results.
- The IEBC should revise its procedures to ensure polling staff announce the name of the voter, and put in place measures to enable the agents to satisfy themselves that the ID of the voter has been verified.
- A copy of the voter register should be made available to party agents, either by the IEBC or by political parties.
- Political parties must ensure their members do not engage in physical or verbal harassment of IEBC staff at any tallying centres.
- Security services are encouraged to be more proactive in ensuring the safety of IEBC staff at tallying centres and a reduction in the possibility of violent attacks occurring.

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Annex I. Composition and Biographies of the Group

Chairperson of the Commonwealth Observer Group

The Hon Bruce Golding (Jamaica)

Hon. Bruce Golding is the former prime minister of Jamaica (2007–2011). Mr Golding was elected to parliament five times during his political career, starting in 1972. He was appointed a member of senate from 1977 to 1983 and 2002 to 2005. He was minister of housing and construction (1980–1983), shadow minister of finance (1989–1995), chair of the Public Accounts Committee (1989–1995) and shadow minister of foreign affairs and foreign trade (2002–2005). Mr Golding has served on the Board of Governors of the Institute of Jamaica and as a member of the Electoral Advisory Committee (now the Election Commission of Jamaica). Mr Golding is a graduate of the University of West Indies, where he is currently an honorary distinguished fellow, focusing on public policy management.

Observers

Dr Evarist Bartolo (Malta) – Acting Chair

varist Bartolo is a Maltese politician within the Labour Party and until very recently he has served as the Minister for Foreign and European Affairs. He previously served as Malta's Minister for Education and Employment. In 1975 Bartolo graduated from the University of Malta with a B.A.(Hons) degree in English Literature. In 1984 he was awarded a scholarship for a diploma course in journalism at Stanford University. He read for a Master's in Education at the University of Cardiff which he completed in 1986. Over the years, Evarist Bartolo has championed civil liberties as well as civil and social rights.

Dr Anne Gallagher

Dr Anne T. Gallagher AO is Director-General of the Commonwealth Foundation. A lawyer, practitioner, teacher, and scholar, her long international career has involved specialisation in a wide range of areas including human rights and the administration of criminal justice.

After several years teaching in the law school of the Australian National University, Anne was recruited to the United Nations where she served for 12 years, including as a special adviser to the UN High Commissioner for Human Rights, Mary Robinson. From 2003, Anne worked with the Association of South-East Asian Nations and its ten Member States to strengthen legislative and criminal justice responses to human trafficking and related exploitation.

Her recent and current appointments include President of the International Catholic Migration Commission; Co-Chair of the International Bar Association's Presidential Task Force on Human Trafficking; Academic Adviser at Doughty St Chambers; member of the Asia Dialogue on Forced Migration; and Chairperson of Girls Not Brides.

Anne's work for human rights, justice, and equality has been widely recognised, earning her, among other honours, the Australian Freedom Award and the 'Peace Woman of the Year' award for the Women's International League for Peace and Freedom. In 2012, she was appointed Officer of the Order of Australia (AO) and named a '2012 hero' by US Secretary of State Hilary Clinton.

As Director-General, Anne is the Commonwealth's ambassador for civil society: working closely with Member States to advance people's participation in all aspects of public dialogue.

Mr Darrell Bradley (Belize)

Darrell Bradley is a Belizean attorney and partner at *Bradley Ellis & Co. Law Firm*. He is adjunct faculty at the University of the West Indies (Open Campus), the University of Belize and Wesley Junior College. He was formerly President of the Belize Senate, Opposition Senator and Chairman of the Social Security Appeal's Tribunal and he served two terms as mayor of Belize City and three terms as president of the Belize Mayor's Association. Darrell was also vice-present of the London-based Commonwealth Local Government Forum, vice-president of the Belize Bar Association and a member of the Board of Directors for the Central Bank of Belize. Darrell has bachelor's degrees in sociology, international

studies and law and a master's degree in public administration and a graduate certificate in teaching and a certificate of legal education.

Dr Simon Munzu (Cameroon)

Simon Munzu is a Cameroonian lawyer and democracy, human rights and good governance advocate. He holds a doctoral degree in law from the University of Cambridge and master's and bachelor's degrees in law from London. He is also of the Honorable Society of the Middle Temple, Barrister-at-Law (since September 1973). After teaching in Cameroonian universities and professional institutions for over a decade, he joined the United Nations as a volunteer in September 1995 and retired in August 2016 as Assistant Secretary-General and Deputy Special Representative of the Secretary-General. Dr Munzu and his wife, Julia, live in Cameroon and the United States.

Hon Halifa Sallah (The Gambia)

Former Member of National Assembly

Mr Jerald Joseph (Malaysia)

For the last 28 years, Mr Jerald Joseph an experienced trainer consultant at both local and international levels on human rights issues including Indigenous Peoples, anti-racism and ESC Rights. He is a former Commissioner of 6 years with SUHAKAM for the term 2016-2019 / 2019-2022. He has pioneered the programme of anti-racism since 2006 in Malaysian CSO context. He is a senior CSO members who has led the Malaysian NGOs' UN UPR framework. He was Chairman of the ACSC/ASEAN People's Forum (APF) process in 2006/2007. He had served as a member of various organisations, including the Commonwealth Foundation Advisory Body, Asian South Pacific Bureau for Adult Education (ASPBAE), NGO Steering Committee UN WCAR. He is a Board Member of Pusat KOMAS and Greenpeace Southeast Asia.

The Hon Maryan Street (New Zealand)

Maryan Street is a former Member of the New Zealand Parliament (MP) for the New Zealand Labour Party. She was a cabinet minister in the 2005-08 Coalition Government led by former Prime Minister Helen Clark. She has been active in the field of human rights and good governance, participating in numerous Commonwealth Observer Groups in Africa and South Asia since 2007. She was an MP for nine years between 2005 and 2014.

In 1990 she was awarded the New Zealand 1990 Commemoration Medal for service to New Zealand and in 1993 the New Zealand Suffrage Centennial Medal for service to women. During her nine years as an MP and Cabinet Minister her responsibilities included housing, ACC, foreign affairs, human rights, overseas aid, higher education, and economic development.

Professor Attahiru Jega (Nigeria)

Professor Attahiru Muhammadu Jega, PhD, is Professor of Political Science at Bayero University, Kano, Nigeria. He was Chairman of Nigeria's Independent National Electoral Commission (INEC) from June 2010 and July 2015, during which he presided over the conduct of two general elections (April 2011 and February/March 2015). He was a member of the Justice Muhammed Lawal Uwais (rtd.) Electoral Reform Committee, 2008/09, which made wide-ranging recommendations for electoral reforms in Nigeria, before he was appointed Chairman of INEC. He holds the Nigerian national honour of Officer of the Federal Republic, awarded in 2005. He is also a recipient of the Charles T. Manatt Democracy Award, conferred by IFES, Washington, DC, in 2015; and the Electoral Commissioner of the Year Award, in 2013 as well as 2015, conferred by the International Centre for Parliamentary Studies, London.

Ms Idayat Hassan (Nigeria)

Idayat Hassan is Director of the Centre for Democracy and Development (CDD), an Abuja based policy advocacy and research organisation with a focus on deepening democracy and development in West Africa. As its Director, she has overseen CDD's rise from being unranked in 2013 to 11h out of 94 think tanks in Sub-Saharan Africa, according to the 2020 University of Pennsylvania Global Go To Think Tank Index Report. She has strengthened CDD's position as a civic tech leader with a portfolio of projects, including, but not limited to: analyses of the relationship between social media platforms, election processes and electoral outcomes, using a mobile app to identify electoral fraud and analysing the use of personal data in political campaigning in Nigeria. Her work on social media has been discussed and covered by the Economist, BBC and in scholarly publications such as the Journal of Democracy.

Idayat is a lawyer and has held fellowships in Yale and Columbia universities, United States. Idayat's insights on governance and development in Nigeria

and West Africa are regularly sought by BBC, RFI, VOA, AIT, Bloomberg, VOA, The Washington Post, The Financial Times, The Guardian and Deutsche Welle. She is also a regular panellist on leading Nigerian television programmes. Her interests span democracy, peace and security, transitional justice, and ICT4D across West Africa.

Idayat has provided thought leadership at different phases of Boko Haram's development. She provided operational advice and strategic ideas to Operation Safe Corridor (OSC) from its inception. Her work revolves around three approaches to counterinsurgency: a decentralised, bottom-up approach, a deradicalisation, rehabilitation and reintegration approach, and a transitional justice approach. She has presented these ideas as they apply in Nigeria at international conferences and works to ensure that, where possible, they have practical applications for communities affected by the insurgency.

Ms Nighat Dad (Pakistan)

Nighat Dad is the founder and Executive Director of Digital Rights Foundation, a non-profit working on digital freedoms in Pakistan. Nighat is also a member of the Facebook Oversight Board. Her work focuses on digital rights, particularly, data protection, free speech online, and online violence. She identifies as a feminist and works to empower women in the Global South through the use of digital technology. Nighat is the recipient of the prestigious Human Rights Tulip Award. She is also a TED Fellow and a TIME's Next Generation Leader.

Mrs Marcella Samba-Sesay (Sierra Leone)

Marcella Samba-Sesay is a civil society leader, political analyst and good governance expert with 20 years civic activism experience. She works in the fields of Democracy, Elections, Women's participation, Peace and Security. She is the Executive Director of Campaign for Good Governance (CGG), advocating for citizens' participation in democratic governance and chairperson National Election Watch (NEW), where she leads a coalition of over 400 organizations promoting credible, free and fair Public Elections in Sierra Leone. Marcella is also the Vice Chairperson for the National Public Debates Committee (NPDC), Marcella has observed a number of elections across continents.

Professor Mandla Mchunu (South Africa)

Mandla Mchunu is a former law teacher and Chief Electoral Officer of the South African Independent Electoral Commission. After holding several other senior government positions, he established a consulting outfit, AfriCore Advisory, which specialises in national IDs, Voters Rolls and related electoral democracy systems. He has undertaken consulting assignments to strengthen electoral democracy in several African countries viz. Nigeria, Sierra Leone, Malawi etc.

As a person who contributed significantly to setting up the infrastructure and machinery for electoral democracy in South Africa, he is widely respected. He remains active and keen on matters related to constitutional democracy. He is a member of the board of trustees of Africa Check, and a member of the PwC Africa Public Interest Board.

Dr Victor Shale (South Africa)

Dr Victor Shale has over 20 years of academic and practical experience in democracy and electoral assistance work in Africa. He holds a PhD in Politics from University of South Africa and MPhil in Conflict Transformation from University of Port Elizabeth. He is the Principal Consultant at Shalestone Elections and Governance Consultants Pty LTD. He is widely published in democracy, political parties, traditional institutions, conflict management, peacebuilding, and local governance. He is the Lead Author of the SADC Model Law on Elections, and recently developed a Youth Participation Guide in political and electoral processes for the African Governance Architecture (AGA) and Common Market for East and Southern Africa (COMESA).

Mrs Fern Narcis-Scope (Trinidad & Tobago)

Chief Election Officer, Elections and Boundaries Commission

Justice James Ogoola (Uganda)

Justice James Ogoola is a retired Senior Judge of Uganda, and of the Regional Courts of Eastern Africa. He is Emeritus Principal Judge of Uganda; former Lord Justice of the COMESA Court of Justice in Lusaka, Zambia; Justice of Appeal, East African Court of Justice in Arusha, Tanzania; and former Chairman of the Judicial Service

Commission of Uganda. He has participated as a Commonwealth Election Observer twice before: in Kenya (2017), and in Dominica (2019).

Baroness Denise Kingsmill (United Kingdom)

Baroness Denise Patricia Kingsmill was born in Rotorua, New Zealand. She later moved with her family to the UK. After graduating from the University of Cambridge with a degree in Economics and Anthropology, she spent the early years of her career in the fashion industry in Paris and New York. She then qualified as a Solicitor of the Supreme Court, and, after a 20-year legal career, was appointed Deputy Chair of the Competition Commission, the UK's anti-trust regulator. In 2000, Baroness Kingsmill was awarded a CBE, and in June 2006 she was appointed to the House of Lords as a Life Peer.

Baroness Kingsmill has had an extensive business career. She is a member of the Board of Inditex SA. (Zara) and until recently she was also a member of the Boards of E.ON SE, IAG S.A, and Telecom Italia. She was the founding Chair of Monzo Bank, a mobile-only internet bank.

Ms Zeinab Badawi (United Kingdom)

Broadcast journalist and filmmaker Zeinab Badawi was born in the Sudan. She studied Philosophy, Politics and Economics at Oxford University and an MA (with distinction) at SOAS, London University. Zeinab is President of SOAS, on the International Advisory Boards of think tanks Afro-Barometer and MINDS: the Mandela Institute for Development Studies, a board member of the Africa-Europe Foundation, the Mo Ibrahim Foundation, the Arts, Humanities and Research Council of UKRI, The Royal Foundation of the Duke and Duchess of Cambridge, BBC Media Action and the Royal Opera House.

She was Chair of the Royal African Society and the freedom of speech advocacy organisation Article 19. She has received many media awards as well as honorary doctorates, including the President's Medal of the British Academy.

Mr Mark Stephens, CBE (United Kingdom)

Mark Stephens, CBE is a lawyer by training, as well as a seasoned observer of both elections and trials around the globe. Specialising in international, human rights and constitutional law, Mr Stephens has undertaken some very high-profile cases.

Mr Stephens is the co-chair of the International Bar Association's Human Rights Institute. A past president of the Commonwealth Lawyers Association, he has also litigated and advised in many Commonwealth jurisdictions. Mr Stephens has been mandated by the Commonwealth Parliamentary Association to consult and produce draft template legislation in the area of media law, to comply with international human rights standards.

Mr Stephens has been appointed by the United Kingdom foreign secretary to the Foreign, Commonwealth & Development Office Free Expression Advisory Board, and by the Lord Chancellor to be a champion for the Community Legal Service (legal aid providing access to justice for the economically excluded). In 2018, he became board chair of Internews Europe, an international charity dedicated to freedom of expression and a trusted media. Mr Stephens has significant experience in the area of mis- and disinformation.

Mr Stephens acts in many Privy Council cases (the Ultimate Appeal Court for parts of the Commonwealth), as well as before international courts, committees and tribunals such as the European Court of Human Rights, the Inter American Court of Human Rights, the United Nations Committee on the Elimination of Discrimination against Women and the Optional Protocol to the United Nations International Covenant on Civil and Political Rights.

Dr Chaloka Beyani (Zambia)

Dr Chaloka Beyani is a member of the UN Fact Finding Mission to Libya 2020-2022 and has taught International Law at LSE since 1996. He was a member of the Committee of Experts that drafted the 2010 Constitution of Kenya. He was a mediator in Mozambique where he drafted amendments to the Constitution of Mozambique 2017-2019. He was a member of the High-Level Panel that monitored the elections in Tanzania with civil society organisations in 2020. He served as an Expert to the UN Secretary-General's High-Level Panel on Internal Displacement 2019-2021 and was UN Special Rapporteur on the human rights of internally displaced persons 2010-2016. He has served as an Expert to the Commonwealth Secretariat in various capacities.

Commonwealth Secretariat Support Staff

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Annex II. Arrival Statement



The Commonwealth

Arrival Statement by the Chair of the Commonwealth Observer Group to The 2022 Kenya General Election

Statement by The Hon Bruce Golding Former Prime Minister of Jamaica

Nairobi, 3 August 2022

The Commonwealth Secretary-General, The Rt. Hon. Patricia Scotland QC, has invited me to chair the Commonwealth Observer Group for Kenya's General Elections. I consider this a great honour to be a part of this important democratic endeavour.

This Group, whose members have been chosen from across the Commonwealth, was constituted at the invitation of Kenya's Independent Electoral and Boundaries Commission (IEBC), ahead of the elections to be held next week, Tuesday 9 August.

I am joined by nineteen other eminent persons with a wealth of experience spanning the social and political spectrum of our Commonwealth. We are here to observe the electoral process and will act impartially and independently as we assess its organisation and conduct.

The deployment of this Observer Group follows a PEAM to Kenya in April 2022. An advance team has been on the ground since 16 July to observe preparations ahead of the polls and campaigns. They will update us, the main Group, regarding their meetings with stakeholders and their preliminary findings, which will play a pivotal role in our team's work and our subsequent observation role and report.

We know how important elections are in a democracy; they empower the people to choose representatives who will, in turn, make decisions on their behalf. We, therefore, hope our presence in this country serves as a reminder that the people of the Commonwealth stand together with Kenyans

as they exercise their democratic rights, recognising how important these elections are to the people of Kenya, East Africa, Africa, and the whole of the Commonwealth at large.

We are also reminded that the COVID-19 pandemic is not over, especially as we continue to hear and read reports of soaring infection rates in certain parts of the world. We urge all stakeholders to abide by national and international COVID-19 protocols, which my team and I will continue to adhere to until we depart Kenya on 14 August 2022.

While we are here, our mandate is to observe and assess the pre-election environment and the conduct of elections on polling day, against the backdrop of Kenya's national legislation and regulations - as well as regional and international commitments. And as is customary, we will report on whether the elections have been conducted to the standards to which Kenya has committed itself, including its own laws.

Our planned briefings with relevant stakeholders, which will continue tomorrow from where the advance team left off, will be wide-ranging, encompassing updates from the IEBC, political parties, the media, civil society organisations including citizen observers, persons with disabilities, women, and youth groups. We will also engage closely with other international observer missions which have been deployed to Kenya for these elections.

From Sunday 7 August, our observers, grouped into small teams, will be deployed to locations across the country to observe preparations ahead of the polling day. They will also meet with various stakeholders in their respective locations.

On polling day, which is 9 August, we will observe the opening, voting, closing, counting, and the results management processes. We will then issue a statement on our preliminary findings on Thursday 11 August.

After that, a final report will then be prepared and submitted to the Commonwealth Secretary-General, and subsequently shared with the government of Kenya, relevant stakeholders, and the people of Kenya.

Today, the Commonwealth's support to Kenya and its democratic processes is evidenced by our presence here. In March this year, the Marlborough House Dialogues, which take their name from the historic London headquarters of the Commonwealth Secretariat, welcomed Deputy President Ruto and former Prime Minister of Kenya, The Right Honourable Raila Odinga, to discuss key issues affecting the development of free and democratic societies as well as committing to a peaceful election.

Just as politicians have made a commitment to a peaceful election, we urge stakeholders, including the electorate, to commit to doing the same, consistent with the Commonwealth's values and principles.

On behalf of the Group, I would like to thank the people of Kenya for their participation and for allowing us to be a part of this important process.

Asanteni sana...

ENDS

Annex III. Deployment Plan

Administrative Division (Town)	Team
Nairobi (Nairobi & Environs)	Team 1: The Hon Bruce Golding (Chair), Dr Arjoon Suddhoo (Staff Team Leader), Linford Andrews, Temi Kalejaiye, Pauline Reynolds
Nairobi (Kiambu)	Team 2: Hon Evarist Bartolo, Segametsi Mothibatsela
Central (Nyeri)	Team 3: Dr Simon Munzu, Abiola Sunmonu
Central (Meru)	Team 4: Justice James Ogoola, Zeinab Badawi
Central (Kitui)	Team 5: Hon Halifa Sallah, Fern Narcis-Scope
Coast (Mombasa)	Team 6: Mark Stephens CBE, Nighat Dad
North Eastern (Machakos)	Team 7: Lindsey Adjei, Zippy Ojago, Matt Westley
Nyanza (Kisumu)	Team 8: Marcella Samba-Sesay, Prof Attahiru Jega, Toshit Godara
Nyanza (Kisii)	Team 9: Prof Mandla Mchunu, Baroness Denise Kingsmill
Rift Valley (Nakuru)	Team 10: Dr Victor Shale, Dr Shavana Haythornthwaite
Rift Valley (Eldoret)	Team 11: Darrell Bradley, Dr Anne Gallagher
Rift Valley (Kitale and West Pokot)	Team 12: Jerald Joseph, Arlene Bussette, Piotr Palasinski
Western Region (Kakamega & Vihiga)	Team 13: Hon Maryan Street, Dr Chaloka Beyani, Adewale Ogunleye
Western Region (Bungoma & Busia)	Team 14: Idayat Hassan, Andrew Baines

Annex IV. Interim Statement



The Commonwealth

Interim Statement by the Chair of the Commonwealth Observer Group to The 2022 Kenya General Election

Statement by The Hon Bruce Golding Former Prime Minister of Jamaica

Nairobi, 11 August 2022

Introduction

Good morning to you, the people of Kenya, members of the media, fellow observers, members of the diplomatic corps, ladies and gentlemen. Thank you for coming to this Commonwealth Observer Group Press Conference, where I will now present the interim observations of the Commonwealth Observer Group on the electoral process thus far.

The final report, setting out our full findings on the entire process and our recommendations in greater detail, will be submitted to the Commonwealth Secretary-General. The Commonwealth is honoured to have been invited by the Independent Electoral and Boundaries Commission of Kenya to stand in solidarity with all Kenyans through this significant election.

This is the third general, and the fourth presidential, election Kenya has held since the promulgation of the 2010 constitutional referendum. Our Group was constituted by the Commonwealth Secretary-General, The Right Honourable Patricia Scotland QC. It comprises experts drawn from the political, legal, media, civil society and electoral fields and from several Commonwealth regions.

We arrived in Kenya on 2 August, having been preceded by a Commonwealth advance Observer Team that has been in the country since 16 July. On 7 August, we deployed ourselves in small teams across the country to observe the prevailing environment and gain a comprehensive picture of final preparations before Election Day.

Prior to our deployment to the regions, we were briefed in Nairobi by various stakeholders, including the Independent Electoral and Boundaries Commission (IEBC); presidential candidates or their representatives; political parties; media houses; social media platforms and fact-checking organisations; security agencies; Commonwealth High Commissioners; and various civil society organisations, including women and youth 2 groups; and persons with disabilities. We also established working relationships and exchanged information with other international observers as well as local citizen observer groups.

Key Findings

Let me begin by commending the largely peaceful environment that has prevailed in the pre-election period and commend the efforts by political parties, their leaders, presidential candidates, and the people of Kenya, to foster a peaceful environment in the lead-up to the 2022 General Elections.

I also wish to commend the IEBC for undertaking the preparations for these elections in the face of numerous challenges, not least the lack of sufficient, guaranteed and predictable funding by Government over the five-year period preceding the election. We note that various COVID-19 mitigation measures were put in place by the IEBC to ensure that these elections were conducted safely and securely.

We noted that voters were largely able to cast their ballots freely. The elections were competitive, with freedom of association and participation rights provided for and respected. By and large, there was an understanding that any disputes arising would be referred to the courts. We were reassured to hear that the judiciary commands public confidence. We will reflect further on these issues in our Final Report.

Legal and Electoral Framework

We note that the Constitution of Kenya (2010) guarantee fundamental democratic and political rights, including the right to vote and participate in regular elections for all Kenyans. The electoral laws regulating elections are, however, not consolidated, which leads to uncertainty.

Legal and Judicial Challenges

The introduction of election technology in the form of a digital system, the Kenya Integrated Elections Management System (KIEMS), which is used for the biometric identification of registered voters, resulted in controversy and confusion prior to the elections, regarding its reliability. The lack of a comprehensive review of the Elections Act and of the KIEMS system has led to some uncertainty in the electoral process. I will comment on the impact of this shortly in our assessment of Election Day.

The multiplicity of unconsolidated amendments to the electoral laws has also complicated the administration of elections in Kenya, and resulted in its ambiguity. These complications hampered the IEBC's electoral preparations and resulted in rulings which necessitated last-minute changes to procedures. It is noted, for example, that the issue of whether the digital or printed register would be the primary mechanism to verify voter identity was only decided the day prior to the elections, following a ruling by the Court of Appeal. Kenya may wish to consider the establishment of a specialist court to deal with election-related matters.

Election Administration: Use of KIEMS Kits for Biometric Voter Registration, Voter Verification and Electronic Transmission of Results

The introduction of election technology in the form of a digital system, the Kenya Integrated Elections Management System (KIEMS), which is used to register and identify voters using biometrics, resulted in much controversy and ambiguity prior to the elections, regarding its reliability in facilitating the electoral process.

The Group notes that the IEBC applied a lessons-learned approach from the 2017 elections, and adopted new software and hardware through the requisition of the KIEMS kit from a company called Smartmatic. It was noted that the IEBC undertook two simulation exercises of the KIEMS kits for the electronic transmission of results, the second of which our Advance Team was able to observe.

We acknowledge these efforts, as the transparency they displayed contributed to building confidence in this key feature of the electoral process. This clearly illustrates a commitment on the part of the IEBC to improve vital aspects of the electoral process since the 2017 General Elections.

Voter Registration

Ahead of this election, we noted the IEBC's efforts to address the low number of young voters that had registered since 2017, embarking on a two-phased 'Enhanced Continuous Voter Registration (ECVR)' exercise in October 2021, and January 2022. We note that the goal of registering six million new voters was not met, with only 2.4m additional voters registered by the conclusion of the second phase. We encourage the IEBC and the country as a whole to reflect on this experience in its post-election review, and recommend strengthened voter education as one measure to counter voter apathy, increase the number of registered voters who will register, thereby enhancing participation in the electoral process.

Voter education and strategic communication

We recognise the IEBC's initiative in producing various types of information materials and posters to promote and educate voters on these elections. However, we observed a lack of effective communication, both internally and externally, to update both polling staff and Kenyan citizens on vital benchmarks of the electoral process.

We are pleased to note the IEBC took on board recommendations to improve its communication in the weeks leading up to Election Day to manage public expectations following Election Day, while the results process is finalised. This includes the establishing of a media centre for live media briefings and setting up a call centre to handle inquiries from the public.

We recommend that the IEBC considers training for all its staff to enhance its strategic communication capabilities, transparency and accountability. We also recommend the creation of a dedicated funding stream for voter education.

The Campaign

In various briefings by stakeholders, the Group learnt that campaigns were colourful, well-attended and largely peaceful. We also learnt that the campaign rallies of major political parties were very competitive, and that they were highly visible in various parts of the country, with fundamental rights of candidates, political parties and supporters to assemble and campaign generally respected.

We commend the efforts made to provide security for all the presidential candidates throughout the campaign period. Our Group notes reports of vote-buying by some candidates and political parties.

We were informed that there have been challenges in progressing the Elections Campaign Financing Act and campaign finance regulations, with the aim of regulating funding and spending during elections and referendums. It is recommended that the Kenyan Government and IEBC revisit key stakeholder consultations required for consensus-building towards achieving full implementation of the Act.

In various briefings received from stakeholders, the Group was told that campaigns were colourful, well-attended and largely peaceful. We were also told that the campaign rallies of the major political parties were very competitive, and that they were highly visible in various parts of the country, with fundamental rights of candidates, political parties and supporters to assemble and campaign generally observed. We commend the efforts made to provide security for all the presidential candidates throughout the campaign period.

Media

Traditional media have covered the process adequately, linking the outcomes of the elections to the economy, anti-corruption and governance. There was a tendency to repeat unsubstantiated information and unwarranted criticisms regarding the conduct of the election without checking the accurate position with the IEBC. The traditional media had a healthy coverage of the campaign, with a fair coverage of all sides, including giving space to those critical of the candidates and the political parties.

Newspapers and broadcasters carry sponsored content by candidates and political parties. We recommend that they should always disclose and identify political advertorials paid for by interested parties.

The Group notes that, while social media has provided a cheaper alternative for marginalised groups and otherwise economically excluded aspirants, to discuss their issues, stakeholders generally raised concerns about online mis- and disinformation and hate speech – particularly that which is an incitement to violence – on social media by politicians and their supporters.

We note that, in signing an MoU with Meta, the IEBC has seen the importance of collaborating with social media organisations. We urge well planned systemic and inclusive engagement with all social media platforms and specialist fact-checking

organisations in future elections. We strongly urge social media platforms to act quickly on reports of targeted online harassment of women politicians.

We also condemn pockets of harassment targeted at journalists covering the campaign as well as the exclusion of specific journalists, perceived as hostile to a particular aspirant from information about that aspirant, and ask that the Media Council of Kenya to investigate and report these matters.

Participation and Inclusion

Financial constraints remain a major impediment to potential candidates, particularly women and youth. The IEBC attempted to have political parties comply with the two-thirds gender rule. While we note that political parties have made commitments to this effect in their manifestos, we call upon political parties to increase capacity-building and to put in place robust implementation plans. There has been some improvement on the implementation of the two-thirds gender principle, but more political action and investment is required.

Election Day

Eve of Poll

Commonwealth Observers were deployed to 20 counties across Kenya. They met key stakeholders in these counties, who expressed confidence in preparations ahead of polling day and optimism that the polls would be conducted in a peaceful manner. Other citizen and international observers were visible in the counties where they evaluated final preparations.

We were impressed at the improvements in the Commission's readiness. IEBC officials were observed preparing the sensitive materials ahead of the vote with the assistance of security personnel. In some cases, voting materials were received late which meant that IEBC officials had a very long night sorting out materials.

At some polling stations, the displayed voter lists had not been pinned securely, causing them to be damaged. In some instances, the voter lists had been vandalised. We also noted and applaud the IEBC for taking immediate action to deal with emerging problems, including postponing polling in isolated cases due to insecurity issues and sacking polling officials who had violated electoral rules and procedures.

Also, our observers noted that, where printing errors with some ballots had been discovered, the affected returning officers were swift to notify the IEBC in Nairobi of the discovery. It is commendable the IEBC also took swift action and suspended elections for the affected elective seats, and soon thereafter communicated the new election date of 23 August. Greater effort must be made to avoid such an occurrence.

The fact that the Court of Appeal's late ruling I referred to earlier, of whether the digital or printed register would be the primary mechanism to verify voter identity, was only decided the day prior to the elections, also had an impact on the conduct of the poll.

Advance Voting

We noted that no arrangements for early or advance voting currently exist for polling staff, security personnel, or other essential workers who are required to work on Election Day away from the locations where they are required to vote. We would recommend that the IEBC considers this issue in its post-election review to ensure that no Kenyan citizens are unintentionally disenfranchised in future elections.

Opening and Conduct of Polls

I wish to commend the people of Kenya for the peaceful and orderly manner in which they exercised their right to vote on 9 August 2022. Our observers reported that most polling stations opened on time and that all pre-poll procedures were generally adhered to. In those cases where the openings were delayed, it was noted that the IEBC granted all presiding officers the mandate to extend polling hours by the same length of time as the initial delay.

Long queues of voters waited patiently for their turn. The queues were calm and orderly. Voters expressed their commitment to peaceful elections. The location of polling stations, mainly in schools or in tents on open fields, necessitated adequate signage, but we noted that voters struggled to identify their polling stations or streams from the displayed voters lists. While realising the size of voting centres are not identical, the serious space constraints for some polling station needs to be addressed so that IEBC has minimum common standard for voting station size to manage the voters, IEBC staff, agents and observers at locations across the country.

Some voters had not been aware of or able to access the IEBC webpage or SMS system, which would have allowed them to identify their polling

station before they arrived to cast their ballot. Some voters complained that their registration to vote had been transferred somewhere else. We would recommend that better signage be introduced to guide voters.

Polling staff were generally efficient, meticulous, and highly transparent in the conduct of their duties. However, there were a few inconsistencies in the application of procedures or in their communication when dealing with queries on the process, especially in their interaction with party agents. They would benefit from additional training to respond to any challenges that may arise during the conduct of their duties, to minimise such anomalies in the future.

At some locations, particularly in rural areas, the conditions in which polling staff were expected to work, often overnight, was grossly unsatisfactory, and should be improved. The use of the KIEMS to verify voter identity proceeded largely smoothly. However, we note that the IEBC in their media briefings acknowledged the failure of around 200 of the more than 46,000 KIEMS kits.

Though there was some concern about those cases where the KIEMS kit failed to read some voters' fingerprints, the polling staff were nevertheless able to resort to alternative measures to identify voters, including entering the alphanumeric ID number of the voter to access their details, and taking a photo on the device. In some cases, voters were sometimes advised to wash their hands and return if verification process failed.

COVID-19 Protocols

While COVID-19 protocols were adhered to in many cases, it was noteworthy that this was not always the case by some polling staff and voters.

Participation and Priority Voting

Voters were witnessed voting freely, and we applaud all polling staff and security personnel for being proactive in assisting and granting priority to the elderly, pregnant and nursing mothers, persons with disabilities, and others. In some polling stations, we observed that there was some variation in how this was managed.

Prison voting

We commend the IEBC for abiding by constitutional provisions to allow prison voting for the presidential election. Our Group was able to observe prison voting in a number of locations. We also commend

the initiative to appoint designated welfare officers to assist and facilitate voting in prisons. We noted, however, a significant proportion of prisoners did not have identification documents to enable them to vote. We observed released prisoners returning to the prison to vote. Ironically, the prison staff were themselves effectively disenfranchised. We will make recommendations on addressing this in our Final Report.

Party agents

Party agents were present in all polling stations observed in significant numbers and were alert and attentive in the conduct of their duties.

We did not receive any reports of agitation or dissatisfaction, and any disputes were resolved satisfactorily with polling staff. Noting that voter identity is conducted digitally, party agents do not have the benefit of engaging with this aspect of the process. It is recommended that party agents be as engaged to build greater confidence in the electoral process.

Security

Security was present at every polling station observed, and the Group noted that many women were deployed as part of the security detail. All were professional and carried out their duties diligently, and should be commended for their role in maintaining peace during this period.

Situation Room

The Group visited a number of CSO Situation Rooms hosted by citizen observers. These initiatives are beneficial as they enhance transparency and provide a national perspective on key data emerging from the electoral process, especially on Election Day. This instils a level of confidence in the electoral process, and should therefore be encouraged.

Close and Count

It was observed that those who were in the queue at the 5pm close of polls were allowed to vote. The close and count followed due process, with a high degree of transparency. Polling staff undertaking the count were clear and methodical in the conduct of their duties, and any disputes that we observed were settled amicably. The IEBC, its polling staff and party agents are commended for this.

The Tallying Process

While the use of the KIEMS kit for the electronic transmission of results gave rise to some questions of trust in the new system, the Court of Appeal's decision in its ruling on 8 August provided clarity on this aspect for Election Day. As far as we were able to observe, the results transmission phase commenced fairly smoothly with few issues reported. We are conscious that this is an ongoing, and crucial, phase of the electoral process. We are still observing this process and will provide a thorough assessment in our Final Report.

As the results management phase of the electoral process reaches its finalisation, we call upon all political party leaders and their supporters to continue to show restraint and magnanimity. The IEBC should conduct the results announcement process with all the necessary due diligence and transparency.

The time lag between the announcement of the official results by the IEBC and the provisional, and at times conflicting, results announced by the media is an area of concern. Special attention needs to be given to how to expedite the official announcement of results without compromising the integrity of the process.

Conclusion

We would like to express our appreciation to all international and national observer groups we met on Election Day for the cooperation and exchange of views on the unfolding process. It is our hope that by bringing this electoral process to a successful conclusion, Kenya will serve as an inspiration for the Commonwealth and indeed, the rest of the world, that relevant lessons have been learned from the past, and that each successive election is an improvement on the previous one.

Our full assessment of the entire process, including any recommendations for improvement, will be contained in our final report, which will be made available to the public. We will continue to observe the results process.

Asanteni sana.

Ends.

Annex V. List of Legislation, Regulations and International Commitments Relevant to the General Election

Legislation and Regulations

Aside from the Constitution, the legislative framework underpinning these elections consists of the following:

- Elections Act (2011), as amended
- Election Laws (Amendment) Act No. 36 of 2016
- Election Laws (Amendment) Act No. 1 of 2017
- Election Laws (Amendment) Act No. 34 of 2017
- Political Parties Act (2011) as amended
- Independent Electoral Boundaries Commission Act (2011), as amended
- Elections Campaign Financing Act (2013), as amended
- Election Offences Act (2016), as amended
- County Governments Act (2012), as amended
- Supreme Court Act (2011), as amended

Elections are also administered in accordance with the following regulations:

- Electoral Code of Conduct, Second Schedule, Elections Act, 2011
- Elections (Voter Education) Regulations (2012)
- Elections (General) (Amendment) Regulations, 2017
- Elections (Voter Registration) Regulations, 2017
- Elections (Voter Education) Regulations, 2017
- Elections Party Primaries and Party (Lists) Regulations, 2017

- Elections (Technology) Regulations, 2017
- Rules of Procedure on the Settlement of Disputes, 2012
- Elections (Parliamentary and County Elections) Rules 2017
- Supreme Court (Presidential Election Petition) Rules, 2022
- Nomination Guidelines, 2012
- Communications Authority Programming Code for Broadcasting

The following is a non-exhaustive list of other legislation relevant to the conduct of elections:

- Public Order Act, Cap 56
- Civil Procedure Act, Cap 21
- National Cohesion and Integration Act (2008), as amended
- Leadership and Integrity Act (2012)
- Public Procurement and Asset Disposal Act (2015)
- Kenya Broadcasting Corporation Act, Cap 21
- Kenya Information and Communications Act (1998), as amended
- Computer Misuse and Cybercrimes Act (2018)
- Data Protection Act (2019)
- Media Council Act (2013)
- Access to Information Act (2016)
- Books and Newspapers Act, Cap 111 (1960)

- Subsidiary legislation
- Case law

International Standards, Commitments, and Instruments

Kenya has signed, committed, or agreed to the major regional and international commitments and instruments relating to democracy, human rights and the conduct of elections. These include:

- Universal Declaration of Human Rights (1948)
- International Covenant on Civil and Political Rights (1966)
- Convention on the Elimination of All Forms of Discrimination Against Women (1979)
- African Charter on Human and Peoples' Rights (1981)
- Convention on the Rights of the Child (1990)
- International Convention on the Elimination of All Forms of Racial Discrimination (1996)
- The Treaty for the establishment the East African Community (1999)
- Convention on the Rights of People with Disabilities (2006)
- African Charter on Democracy, Elections and Governance (2007)
- Port of Spain Affirmation of Commonwealth Values and Principles (2009)
- Commonwealth Charter (2012)

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