REPUBLIC OF KENYA

THE JUDICIARY

INTERIM REPORT OF
THE JUDICIARY WORKING COMMITTEE
ON ELECTION PREPARATIONS
(QUARTERLY REPORT)
LAYING THE GROUND
FOR ELECTORAL JUSTICE

INTERIM REPORT OF
THE JUDICIARY WORKING COMMITTEE
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[THIS IS A WORKING REPORT]

September 2012
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The Judiciary Working Committee on Electoral Preparations is grateful for the invaluable support of the Chief Justice and the Chief Registrar of the Judiciary in achieving its mandate as set out in the terms of reference.

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FOREWORD

The Constitution has granted the Judiciary a critical role in the country’s electoral affairs. The Judiciary is required to effectively and efficiently resolve electoral disputes at all levels. Lack of public confidence in the Judiciary’s ability to adjudicate the dispute over the 2007 presidential election sent the country down a slippery path into a full scale crisis. It was apparent that Kenya had for a long time managed to disguise its weak electoral system from its neighbours and the world at large. The scale of the violence shocked not only Kenyans but the whole world.

The Judiciary therefore enjoyed little public trust that it could uphold its constitutional mandate of defending the principle of separation of powers. The institution had for a long time laboured under the overweening influence of the Executive, causing it to be viewed as a minion of the Executive. The Judiciary therefore enjoyed little public trust that it could uphold its constitutional mandate of defending the principle of separation of powers. Low public confidence in the Judiciary prevented it from playing its proper constitutional role. The Judiciary, as one of the arms of government, ought to play a key role in advancing the rule of law in a modern democracy such as ours. The rule of law in turn underpins socio-economic development.

Proceeding from the lessons of the past, the Judiciary has embarked on winning public faith in how it works.

The promulgation of the Constitution of Kenya, 2010, gave the Judiciary a fresh opportunity to superintend over the fragile social, political and economic transition of the entire Kenyan society.

In obeying the dictates of the Constitution, this third arm of government has begun implementing the Judiciary Transformation Framework (2012-2016), launched on May 31, 2012 to turn it into an efficient and effective institution that is people-centred and service-oriented.

Pillar 1 of the JTF, titled ‘People-Focused Delivery of Justice’, recognises that all judicial authority is derived from the people of Kenya and must, therefore be exercised for their benefit. One of the key result areas under this pillar is Access to and Expeditious Delivery of Justice. The Judiciary has undertaken to ensure that dispute resolution systems are in line with the requirements of the Constitution in terms of timeliness in processing claims and enforcement of judicial decisions. The work of this Committee in preparing for the elections, therefore, builds on this pillar.

It is against the backdrop of these changes and the unprecedented scale of the forthcoming General Election that the Judiciary Working Committee on Election Preparations was appointed. Its terms of reference are geared towards raising the Judiciary’s level of preparedness for the 2013 elections.

The committee has already begun to advise the Judiciary on the administrative arrangements necessary for effective and efficient dispute resolution for the 2013 elections. The Judiciary has already set the pace for electoral dispute resolution with the successful determination of the delimitation case within the parameters established by the Constitution and the Independent Electoral and Boundaries Commission Act. Delimitation being the first stage in the electoral process, it is anticipated that this success will be replicated in other elections-related cases. We are taking stock of the lessons learnt from this process, and from the determination of other cases touching on the electoral process.

Moreover, in order to build the Judiciary’s capacity to handle the multitude of cases anticipated, the Committee is preparing to conduct an extensive training of judges, magistrates and other judicial staff. This training seeks to expose judicial officers to electoral law and practice in anticipation of their role in the electoral dispute resolution process.
In order to be successful, any election preparation process under an electoral regime, such as Kenya’s, needs to be highly consultative. It is for this reason that the committee has, since its inception, continued to engage with other stakeholders in the electoral process in order to streamline the preparation activities of all those involved. This synergy allows not only the sharing of ideas and experiences, but also gives us an opportunity to receive feedback on how effective our own preparation activities are. This also answers to the constitutional requirement for transparency and public participation, particularly in the delivery of access to justice in electoral disputes.

The committee is additionally looking into ways of engaging the public to enlighten citizens on the various avenues that exist for dispute resolution in the electoral process, aside from the courts. Admittedly, the courts have been the main actor in the electoral dispute resolution process. Despite the fact that this role is now shared with other institutions such as the IEBC and the Political Parties Disputes Tribunal, the public is not fully aware of the categories of disputes that are best referred to which body.

Every Kenyan is keen to ensure that we do not have a repeat of the events succeeding the 2007 elections. To say that the work of this committee is important is a gross understatement. The work of this committee lays the foundation for not only the Judiciary’s preparations for the electoral process but also gives the Judiciary a new lease of life in its handling of electoral disputes -- one that ensures that the fairness and effectiveness of the electoral system is incontrovertible.

Hon. Dr. Justice Smokin Wanjala
Acting Chair of the Judiciary Working Committee on Election Preparations
Judge of the Supreme Court of Kenya
PREFACE

Since its inception, the Judiciary Working Committee on Election Preparations has been hard at work readying the Judiciary to handle the multiplicity of petitions expected from the forthcoming General Election.

The committee has held and attended several stakeholder forums on the electoral process. The committee recognizes that even though the role of the Judiciary appears to be at the tail end of the electoral process, it cannot be played effectively if activities within the entire process are not properly facilitated. The committee works with stakeholders to ensure that inconsistencies or deficiencies in electoral law are dealt with early and that all actors know precisely what laws will govern the electoral process.

The committee has joined hands with the Judiciary Training Institute as required in its terms of reference as well as other stakeholders to develop and carry out a training programme for judges, magistrates and other judicial staff across the country between September and December 2012.

After taking stock of how election-related disputes have been handled in the past and particularly of the success of the High Court in dealing with the delimitation case earlier this year, the committee is recommending to the Chief Justice administrative arrangements that can be made to efficiently handle electoral disputes. The committee has recommended pre-trial conferencing once pleadings have closed to give the judicial officers and litigants or their advocates an opportunity to set the rules of engagement in order to avoid delays experienced in the past.

The committee continues to work on ways to engage the public in order to raise awareness on the forums for dispute resolution that now exist in the electoral regime in and outside the courts. This will ease the great burden placed on the Judiciary by cases improperly filed in the courts instead of in the properly mandated dispute resolution bodies.

The committee is sparing no effort in ensuring that the Judiciary is ready for any eventuality after the elections. We remain confident that the Judiciary’s role in these elections will be precedent-setting not just in Kenya but around the world.

Hon. Lillian Arika, Principal Magistrate,

Member and CEO, the Judiciary Working Committee on Election Preparations
# LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>AJC</td>
<td>Annual Jurists’ Conference</td>
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<tr>
<td>CIC</td>
<td>Constitution Implementation Commission</td>
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<tr>
<td>CSO</td>
<td>Civil Society Organisation</td>
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<td>EISA</td>
<td>Electoral Institute for Sustainable Democracy in Africa</td>
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<td>EDR</td>
<td>Electoral Dispute Resolution</td>
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<td>ICI</td>
<td>International Commission of Jurists</td>
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<td>IDLO</td>
<td>International Development Law Organization</td>
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<td>IED</td>
<td>Institute for Education in Democracy</td>
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<td>IEBC</td>
<td>Independent Electoral and Boundaries Commission</td>
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<td>IFES</td>
<td>International Foundation of Electoral Systems</td>
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<tr>
<td>JTI</td>
<td>Judiciary Transformation Institute</td>
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<td>LSK</td>
<td>Law Society of Kenya</td>
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<td>NCIC</td>
<td>National Cohesion and Integration Commission</td>
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<tr>
<td>NCLR</td>
<td>National Council for Law Reporting</td>
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<tr>
<td>PPDT</td>
<td>Political Parties Disputes Tribunal</td>
</tr>
<tr>
<td>SWOT</td>
<td>Strengths, Weaknesses, Opportunities and Threats</td>
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<td>TOT</td>
<td>Training of Trainers</td>
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1. INTRODUCTION

On May 10, 2012, the Chief Justice appointed the Judiciary Working Committee on Election Preparations to design and execute a programme to build the capacity of judges, magistrates and other judicial staff on electoral matters and suggest ways of working with other stakeholders.

Members of the Committee

The Committee members are Justice Mohammed Ibrahim and Justice (Dr.) Smokin Wanjala of the Supreme Court, Justice David Maraga of the Court of Appeal, Justice Paul Kihara Kariuki of the Judiciary Training Institute and the Court of Appeal, Lady Justice Helen Omondi and Justice David Majanja of the High Court, Hon. Roselyn Oganyo, Senior Principal Magistrate, and Hon. Lilian Arika, Principal Magistrate, and both based at the Milimani Commercial Courts in Nairobi. The Committee has also co-opted Justice Mbogholi Msagha, Principal Judge, High Court.

Terms of Reference

The Judiciary Working Committee on Election Preparations was set up with a mandate to:

1. Advise the Judiciary on administrative arrangements and measures for the efficient disposal of election-related disputes.
2. Develop and implement, in conjunction with the Judiciary Training Institute, a training programme for the efficient and effective management of election disputes for judicial officers and support staff.
3. Develop and design a system for monitoring and evaluating the management and administration of election-related disputes in court.
4. Liaise and coordinate with stakeholders to ensure efficient, effective and timely resolution of election-related disputes and offences.
5. Advise the Judiciary on the information that needs to be developed and disseminated to the public on the avenues open to it to pursue electoral disputes and the approaches that will be employed.

This report covers the committee’s work in the first 120 days and sets out a summary of the committee’s work and outlines the activities it plans to use to raise the Judiciary’s level of preparedness for electoral dispute resolution process under the new Constitution.
2. ACTIVITIES TIMELINE

May 10, 2012: Launch of the committee
The Chief Justice named the committee and publishes its terms of reference.

May 29, 2012: Inaugural meeting
The committee held its inaugural meeting to have reflections on the speech of the Hon. Chief Justice. The committee agreed that there was need to have a concise position paper on its engagement with stakeholders and execution of its mandate.

Subsequently, the committee has held frequent meetings where members have been assigned tasks, to discuss the progress of ongoing tasks and to strategise on future tasks.

June 29, 2012: Stakeholders’ forum
The committee held a forum with representatives of the Directorate of Public Prosecutions, Kenya Law Reform Commission, the Political Parties Disputes Tribunal, and the Independent Electoral and Boundaries Commission (IEBC) in order to have a harmonised approach to electoral disputes resolution.

July 10 – July 14, 2012: Technical retreat
The committee held a technical retreat in Naivasha with key stakeholders to deliberate on the legal framework for elections dispute resolutions under the Constitution of Kenya, 2010, and the mechanism for discharging the Judiciary’s mandate. The retreat drew participants from stakeholders including IEBC, PPDT, civil society and experts in the area identified the following key action points for the attention of the committee:

- Design and develop a strategy for delivery of effective electoral dispute resolution
- Undertake a SWOT analysis
- Undertake a needs assessment – both administrative and technical
- Map key stakeholders and determine the support they can offer
- Develop and implement a stakeholder engagement strategy
- Develop partnerships with like-minded institutions and individuals
- Coordination with key agencies, organisations, etc
- Note that support can be from within or external
- Map internal support – based on internal capacities – existing competencies and identified capacity needs
- Develop strategies that can harness existing internal competencies and also respond to internal needs – both administrative and technical
- Option of establishing a sense of complementarity to respond to internal administrative and technical needs
- Develop strategies to harness external support
- Bear in mind issues of buy-in – confidence/trust building and legitimacy – interaction and interdependence of sectors/institutions. Question of trust building and respectful support
- Necessity of an outreach and civic engagement strategy
- Enhanced dialogue and consultations with external actors and agencies (at broader and selective levels) on the basis of needs and determination of preparedness
- Adoption of collaboration instead of competition as a guiding principle
Coooption of the Principal Judge as a member of the Committee

The committee realised that the role of the Presiding Judge of the High Court in the preparedness of the Judiciary cannot be gainsaid or overlooked. The Principal Judge is now a member of the committee and has been sitting in it since August 2012.

July 20, 2012: Meeting with Uganda Judges

ICJ Kenya hosted one-day meeting with Justice Remmy Kasule of the Court of Appeal in Uganda, Justice Musoke Kibuuka and Justice Lawrence Gidudu, both of the High Court Uganda, with selected members of the Bar.

Prior to elections, a task force is set up within the judiciary to prepare for the post election process, with a defined timeframe. It takes stock of all past petitions filed throughout the country and prepares a budget for their disposal. The provisional budget, prepared before the election year, takes into account judges’ allowances, staff support and overheads. The Principal Judge, in consultation with the Chief Justice, selects a team of judges to handle the petitions.

i) Training: Training/planning processes are stock-taking opportunities whose overall objectives are to reflect and put in place measures to dispose of petitions expeditiously. The head of the Civil Division reviews general performance during the past petition session, highlights areas in need of improvement by both the Bench and Bar. This is designed to improve case management.

ii) Pre-trial process: Review of the laws governing elections is discussed, including highlights of any amendments, landmark case law, approaches to affidavits, evidence, admission of documents and disclosure, burden of proof, scheduling conferences, case management and dates for beginning the petitions. The time limit for disposal of election petitions in Uganda is six months from the date of filling. Appeals are heard and determined within six months at Court of Appeal, whose decision is final. Each selected judge is given three to five petitions and is deployed to a region outside where he/she is normally stationed. Judges are required to take two months to finalise petitions.

iii) Pre-trial workshops: A common consensual approach towards the subsequent trials is developed since everyone is expected to play a role and ensure the finalisation of petitions. Opportunity is given to participants to brainstorm on laws and procedures. Counsel evaluate cases ahead of trial – with discussions on points of law, not pending petitions. As a result, a significant number of petitions are settled or withdrawn. In 2011, out of 125 petitions filed, 20 were settled and withdrawn. Only serious issues are agreed upon for trial.

iv) Trial process: A petition is tried by a single judge in open court. Under the rules of procedure, judgement should be pronounced within 30 days. The sitting is on a day-to-day basis, and the judge suspends any other business for this purpose. Evidence is by affidavit, and the deponent may be cross-examined with the leave of the court. The standard of proof is on the balance of probabilities. Before trial, rules require that the court holds a scheduling conference to resolve agreed and outstanding points and possibly settle them through alternative dispute resolution. If parties reach an agreement during the scheduling, the court enters a consent judgement. If parties fail to agree but the court views that they can settle, the case is referred to a neutral person for arbitration. The court then receives agreement and enters a consent judgement. If no agreement is reached, the case goes to full trial but the parties are obliged to exhaust all options to settle. It allows parties to assess the strengths and weaknesses of the case and ‘cool tempers’ in the interim. This proactive approach by Judiciary has reduced the number of petitions.
v) Grounds for setting aside elections by court

- Non compliance with provisions of the Parliamentary Election Act
- A person other than the one elected won the election
- That an illegal practice or electoral offence was committed by a candidate personally or with his knowledge and/or consent
- The candidate at the time of election was not qualified for election

vi) Judgment: Upon hearing a petition, a court can dismiss a petition, declare a candidate as validly elected, set aside election or order new election.

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August 14 – 18, 2012: ICJ Kenya Annual Jurists Conference

ICJ Kenya invited the Committee members to the Annual Jurists’ Conference from August 14-18, 2012 on the theme, Preparing for Elections in a Transitional Society: Kenya’s Preparedness for the Elections. Lessons drawn from the two events are:

i) Run-offs

- There is no clear indication how the resolution of disputes from the first round of the presidential elections. There is no express right to bring an election petition over a run-off. What happens where the runner-up position is contested, for instance? There is a potential of disputes arising from the announcement of the results of the first round. Should it be left to the High court invoke its unlimited original jurisdiction or is there a need to develop clearer rules before the elections?
- There are no legal provisions on how to address such challenges -- whether the High Court could invoke its unlimited original jurisdiction to resolve disputes or if there is need to come up with clearer rules before we get there.

ii) Multiplicity of electoral laws: It was noted there is a plethora of laws governing the elections and that this sometimes causes confusion and poses a danger of contradictions or inconsistencies.

- The Judiciary has been left with the key and emotive task of interpreting policy issues, which is undesirable as the country risks eroding the authority of the institution. There is need for laws to be properly drafted to avoid putting the Judiciary in murky political arenas.
- The roles of the various bodies involved in electoral dispute resolution are also haphazard and poses a risk of causing confusion. There is need for the public to be duly informed of the existence of other bodies and their respective roles in electoral dispute resolution.

iii) Increasing the capacity of magistrates: There is a need to increase the capacity of a number of magistrates in each county to deal with county assembly electoral disputes. This will release judges to expeditiously deal with electoral petitions within the stipulated constitutional timeframe. There is need for judges to manage electoral cases while in court so as speed up the process. There is also a need to regulate and discourage adjournments and unnecessary applications.

iv) New regulations: The Attorney General informed members that a number of regulations governing elections were in the pipeline, including one on campaign financing. A fear was expressed on whether this regulatory framework was excessive, especially for the bodies tasked with implementation to synthesize and implement.

v) Involvement of stakeholders: Committee was encouraged to be more innovative in
discharging its mandate including setting up a stakeholders committee to work with it in effectively discharging its mandate.

**vi) Leadership and integrity:** There is lack of sufficient enforcement mechanisms for the Chapter on Leadership and Integrity, and the Bill is yet to be enacted.

**vii) The two-thirds gender principle:** Article 81 is likely to raise challenges on constitutionality of Parliament if its requirements are not met. There is need for clarity on this issue beforehand.

**viii) Diaspora vote:** There an estimated 1.5 million voters in the Diaspora. There is need to think through their regulation. Currently, there is no legal mechanism in place for their registration and management.

**ix) Hate speech:** The corrosive harm caused by hate speech, especially in a multiethnic country cannot be underestimated. New challenges are posed, especially with devolution as many counties across the country are cosmopolitan and each ethnic community is likely to be keen to have one of ‘their own’ win the various positions. There is a new challenge for the National Cohesion and Integration Commission, the police and the DIRECTORATE OF PUBLIC PROSECUTIONS in dealing with hate speech that employs information communication technology.

**x) Strict enforcement of electoral laws:** There is need to punish bad behaviour and to hold political parties to account.

September 4, 2012: The Committee members presented to the Secretary Kenya Law reform Commission and civil society partners the proposed amendments to the Election Act. The number of elected seats subject to potential election petitions has increased from 222 seats to 347 National Assembly seats, 67 senate seats and over 1450 county assembly seats. It is anticipated that with the increase in the number of electoral positions, there will be an average of 500 petitions filed challenging the validity of the elections. It is necessary for these petitions to be determined expeditiously. The High Court, as currently constituted, with about 70 Judges, is stretched in its handling of the day to day matters. With the expected plethora of petitions, the High Court will not have the capacity to efficiently and effectively handle petitions within the set time-lines. The Committee has forwarded a proposal to the Hon. Attorney General for the law to be amended to give jurisdiction to Magistrates to handle petitions arising out of county assembly elections. Unless this is passed, the High Court may grind to a halt since the normal cases have to proceed alongside the election petitions which must be determined within 06 months.
Committee outreach events and activities

*August 7, 2012:* Justice David Majanja gave a speech entitled ‘Building Confidence: Transforming the Judiciary for Fair and Peaceful Elections’ at the Ahadi Conference on Youth and Social-Economic Implications for Fair and Peaceful Elections’ at the Laico Regency.

*August 14 – 18, 2012:* Justice David Maraga presented a paper entitled ‘The Judiciary’s Role in the Upcoming Elections’ at the ICJ Annual Jurists Conference held in Mombasa.

*August 24, 2012:* Justice Smokin Wanjala gave an overview on the work of the Judiciary Working Committee on Election Preparations’ at the Judges’ Colloquium in Mombasa.

*August 28, 2012:* The Chief Registrar of the Judiciary presented a paper on the role of the Judiciary in peaceful elections, analysing the activities of the Committee.
3. LESSONS FROM THE PAST

Despite the coming into effect of a new constitutional dispensation and significantly amended electoral laws, there are important lessons to be drawn from the handling of parliamentary election petitions emerging from the last General Election in 2007. Contested issues centred mainly on:

i. Scrutiny of votes recorded
ii. Scrutiny of rejected votes
iii. Scrutiny of registered voters
iv. Record of the votes cast
v. Re-count of ballot papers
vi. Conduct of returning officer/agent
vii. Examination of voter registers at polling stations
viii. Electoral offences and misconduct at polling stations.

The main challenges the courts faced included:

1. Judges hearing petitions alongside the routine cause list
2. Lack of training or experience for judicial officers in regard to electoral law, practice and procedure.
3. Unchartered territory around procedural requirements, especially the requirement for personal service.
4. Preliminary matters and interlocutory applications.
5. Witness intimidation.
6. Obtrusive nature of oral and written submissions.
7. Prolonged and winding cross-examinations; calling unnecessary witnesses; witnesses repeating the same facts.
8. Prioritising the advocate’s diary.
9. Inflammatory and unhelpful media reporting.
10. Ethnicity/political pressure.
11. Judicial discretion and the need for comprehensive rules.
12. The security for and preservation of electoral materials.
14. The role of the Deputy Registrar and staff, and the need for training in regard to election dispute management.
15. The long and tedious examination of election materials.

Lessons learnt

1. Training for judicial officers is needed to enable the control of the court process. There is also need to expose them to the challenges they should expect during the consideration of election petitions.
2. Judicial officers should give directions to litigants and their counsel the priority being that the matter must be disposed off expeditiously.
3. Judicial officers should expect delaying tactics and think through how to respond to them beforehand.
4. The hearing of matters should be fixed on a daily, continuous basis. Adjournments should be discouraged and/or avoided. Dates should be given at the court’s convenience and not at the advocate’s.
5. A pre-trial conference should be held, with the judge sitting with advocates in chambers and agreeing on the mode of operation after going through the relevant legislation, rules and regulations.
6. Judicial officers should compel parties to call necessary witnesses who have been mentioned.
7. Courts should intervene where delaying tactics are being employed through unnecessary cross-examination, and objections, as well as control members of public and caution media on reporting.
8. Judges order tallying processes, while a recount is ordered by Deputy Registrar within a specific period.
9. The Judge should direct parties to begin preparing submissions as the case progresses. They can start with the narrative—because if one waits until completion it takes too long—then on completion analyze, make decisions and give reasons. This way, judicial officers would be able to write judgments within 10 days (by using a computer).
10. Deputy Registrars and staff should be trained as they are the ones presented with ballot boxes.
11. At the time when documents are being filed, the Deputy Registrar should have a register to record documents—to avoid interlocutory issues arising about receipt records.
12. Witness protection (both outside and inside court) should be arranged though the provision of a witness waiting room—under guard.
13. Advocates’ non-appearance should be following by the issuance of summonses, and subsequently by the case proceeding ex parte, with the judicial officer ordering that the client be served.
14. There is need to make rules setting out clearly who should recount ballots and set a time within which counting must be completed.
15. Judicial officers should require the filing of witness statements to avoid delaying tactics.
16. Where a complaint is over the scrutiny of ballot, the judicial officer should conduct the scrutiny before hearing.
17. Where complaint relates to polls in a particular polling station, why not order partial scrutiny and conclude case?

Recent cases touching on the electoral process

a. Election date case and appeal

This case presented the courts with an opportunity to interpret the Constitution in regard to the date of the next General Election. By approaching the courts for interpretation, the committee notes that there is public confidence in the Judiciary as the electoral cycle begins. This case, which raised a great deal of public interest, provides a lesson to the Judiciary on what to expect in related matters around the electoral period. The Judiciary exercised efficiency in ensuring the decisions both in the High Court and Court of Appeal were delivered in a timely manner.

b. Boundaries delimitation cases

The challenges to the IEBC decision in delimiting boundaries were of an unprecedented nature, and so were the issues raised therein. From the beginning of the cases, the bench of judges, noting the strict
constitutional timelines, engaged the participants for purposes of achieving expeditiousness in the trial of issues. The lessons to be drawn from this case are the importance of pre-trial engagements to save on time and especially in the anticipated petitions arising out of the 2013 elections. The court was able to hear and determine the 136 cases filed within the three-month constitutional timeline. It is a definite reference point for upcoming election-related court actions.

The Judgment shall be published by the Judiciary in conjunction with the NCLR to make it accessible to the public.

c. Challenges on party nomination processes
Applications nos. 357, 358 and 359 of 2012 were cases filed to challenge to the party nomination processes for by-elections in Ndhiwa, Kangema and Kajiado North. The court in these cases has made it clear that the Judiciary will not entertain claims where other bodies have jurisdiction. An important lesson from these recent decisions is that duplication of roles is avoided and the courts will be freed to handle disputes expeditiously while other bodies that have jurisdiction to handle other matters are strengthened.
4. ALIGNING THE LEGAL FRAMEWORK FOR ELECTIONS

Proposed amendments to the Elections Act

The Committee, in executing its mandate of ensuring efficient, effective and timely resolution of election related disputes, has embarked on a review of the Elections Act, 2011 with a view to proposing amendments where necessary. The committee noted that due to the voluminous nature of the anticipated petitions out of the 2013 elections, the High Court was likely going to be overwhelmed hence the need to amend the Elections Act to give some jurisdiction to the Magistrates Courts in county elections.

The committee drafted a proposed amendment to Section 75 of the Elections Act to provide that petitions arising from County Assembly elections be heard and determined by the Magistrates Courts.

The committee further proposed amendments to the Elections Act to provide for time limits for hearing and determination of appeals and the scope of appeals, if any, from the decision of the Magistrate’s Court or the High Court. The proposed time limit for hearing and determining appeals was set at 6 months, and the scope of the appeals limited to matters of law only.

Since there is no provision in the Elections Act for the making of rules to govern the filing and determination of election petitions, the committee proposed a further amendment to the section 96 of the Elections Act to give the Rules Committee of the High Court the power to make rules regarding election petitions.

Development of election petition rules

The committee is actively involved in the continuing development of rules on elections by the IEBC, the legislative draftsman and Kenya Law Reform Commission Representatives from the committee secretariat are attending meetings organised by the two stakeholders to brainstorm on the draft rules. A finalised draft of the rules will be circulated in due course.

Draft Supreme Court rules on presidential elections

The Committee has finalised draft Supreme Court Rules on Presidential Elections, which have been forwarded to the Chief Justice to generate discussions with a view to validation.

The Supreme Court Technical Committee on Rules is scheduled to commence work on the rules.
5. GOING FORWARD

The committee has approved a work plan for the period August 2012 till the end of the elections with activities ranging from the training of judicial officers, to administrative measures to be taken and engagement with stakeholders.

A draft curriculum is ready and awaiting expert critique and revision. Meetings with partners in civil society such as IFES, IED, IDLO and ICJ- Kenya have been held to seek assistance for capacity building through facilitation of trainings, provision of expertise and input into the draft curriculum.

An August 30, 2012 meeting with EISA, IFES, IDLO, IED and ICJ- Kenya yielded agreements on Judiciary capacity building as outlined here:

Training and curriculum development

Judicial officers will be trained on all aspects of election petition management. Judges will be the immediate target group as currently prescribed by the law. Due to their experience in the expeditious handling of election petitions within a devolved system of government, it was proposed that the Ugandan judiciary be involved in the training of Judges.

Magistrates play an important role in handling electoral and related offences, chief among which relate to impunity, campaign violence, and hate speech. Once the law in regard to Campaign Financing law is passed, magistrates will deal with offences under it, hence the need for their training. In anticipation of the passing of the proposed amendments to the Election Act regarding the jurisdiction of the magistracy to hear county election petitions.

Magistrates will be trained at a later stage in handling election petitions. The Working Committee will undertake the training with the assistance of JTI and civil society organisations and in particular utilise-Training of Trainers (ToT) ) strategy in regard to the training of magistrates. The benefit of such a strategy will also be to improve the long-term internal training capacity within the Judiciary.

Training materials and the curriculum developed will be reviewed and validated with stakeholders before
training commences. An online module will be used to a limited extent, where possible.

Each organisation represented would confirm the extent and level of technical as well as financial assistance it will be able to provide.

IFES was given the responsibility to develop a concept Note on the training, which would be reviewed.

**Development of rules**

The draft rules on the Presidential Petitions and Elections Act that have been developed will be circulated as a matter of priority, as they will from part of the training focusing on both substantive and procedural law as well as the administration of election petitions.

A subsequent meeting will be arranged with the committee, the LSK and civil society partners to validate the rules and to lobby for the publication of the Bills.

**Administration of election petitions**

ICJ-Kenya and EISA will graciously help the Committee in developing rules to guide courts in the management of cases before them.

In addition to training judges on the management of election petitions, the curriculum will also have a component for the training of administrative and support staff so that they are can assist judges in the timely disposal of election petitions and in the management of the anticipated workload.

There is need to clarify in the rules on the administration of election petitions the roles of the various bodies tasked with the adjudication of election disputes, e.g., the IEBC, Political Parties Disputes Tribunal, and the courts. This is especially with regard to possible overlaps in their mandate and transfer of jurisdiction to the magistrates’ courts should amendments to the law succeed.

**Law reform agenda**

Partners will review the laws governing elections and identify any other gaps and areas requiring amendments. The Institute for Education in Democracy will then prepare a joint memorandum of views on the gaps for the committee’s consideration.

International Development Law organisation proposes to attach a pool of experts and researchers to the Secretariat to start anticipating possible scenarios and research on case law and authorities from comparative jurisdictions, well before petitions are filed. This will free judicial officers.

**Availability of electoral laws**

The National Council for Law Reporting is compiling a special CD ROM on electoral laws, in place of a grey book on electoral laws. The NCLR’s PDF statutes have no restrictions against copying of text, which will assist judicial officers in writing decisions. NCLR will make sufficient copies of the CDs for every judge, magistrate and legal researcher by mid September. The copies of these statutes have been updated, with all amendments in force to date. The statutes can be downloaded for free from their website. The contents are:

1. (NCLR) Constitution of Kenya 2010
2. Appellate Jurisdiction Act (Cap. 9), and Court of Appeal Rules, 2010
3. Civil Procedure Act (Cap. 21), and Civil Procedure Rules, 2010
4. County Governments Act
The National Council for Law Reporting has begun preparations to publish a Bench Bulletin on pre-election disputes for distribution to judicial officers.

Planned activities

a. Training of all judicial officers on election disputes and election petition management.
b. Training of magistrates on election offences, mainly campaign violence and hate speech. Once the Campaign Financing law is in place, it will be included as well.
c. Training of administrative and support staff so that they can assist judges in the timely disposal of election petitions and in the management of the anticipated workload.
d. Borrowing from the Ugandan experience, the development of rules to guide courts in the management of cases before them.
e. The development of a strategy, in conjunction with the Director of Public Affairs and Communication, on engagement of the media and the public in addition to publishing simple materials for public awareness.
f. Work closely with LSK and the legal fraternity as the election petition rules are developed

Ongoing activities

a. IEBC technical meetings: The jurisdiction and operations of the Independent Electoral and Boundaries Commission directly impact upon the role and responsibilities of the Judiciary in the election management process. The Judiciary, through the committee, has been invited to engage with the IEBC in its election preparations in order to build on its experience, ensure optimal utilisation and effectiveness of administrative dispute resolution mechanisms, reduce litigiousness during the electoral process, and thereby improve the transparency and accountability of the election process. The committee sends representatives to attend the relevant IEBC Technical Meetings. The committee is currently developing the proposed Rules of Procedure for the IEBC in a process that involves stakeholder meetings, development of a draft, validation workshops and public dissemination. Key input areas from the committee include the challenges of overlapping jurisdictions between the Judiciary, the IEBC, the PPDT, and the Registrar of Political Parties. There is need for harmonisation of rules and procedures; and the establishment of mechanisms of appeal.
b. Development of Election Petition Rules: The Committee is working with the legislative draftsman to develop the rules, which has the input of judicial officers. Part of the validation process will include using the rules as training materials during the training of judicial officers before the final draft is finalized towards the end of November 2012. The rules will be ready for validation by end of November 2012.

c. Continuous civil society and stakeholder engagement: The committee is exploiting the capacity and expertise of relevant civil society actors, particularly IFES, EISA, IED, ICI Kenya and IDLO. Consultations are on-going with the CSOs with a view to enhancing the capacity of the committee and enabling it to effectively discharge its mandate. The CSOs are partners and stakeholders in many of the seminars, workshops and meetings attended by the committee. Their input into the work of the committee in the form of opinion and resources is valuable and continuously sought and accessed. More particularly, selected CSOs have been meeting with the committee to plan and synchronise their contributions to its work. From the provision of resource persons, training materials, facilitating training, human resources, to development of work plans, there is a continuing constructive CSO stakeholder engagement with the committee.

d. Political Parties Dispute Tribunal: Mirroring the engagement with the IEBC regarding the importance of administrative dispute resolution mechanisms and the role of the Judiciary in election dispute management, the committee has also engaged with the Political Parties Dispute Tribunal. At the Tribunal’s workshop on August 10 and 11, 2012, the committee was part of discussions on how to strengthen and enhance the capacity of the PPDT to be an efficient and effective tribunal capable of expeditiously adjudicating political parties’ disputes. This includes the development of rules of procedure for the Tribunal, the discussion of the jurisprudence emerging from the courts on disputes involving political parties and their members, and appeals from the PPDT to the courts on fact and law. The involvement of the committee in the deliberations with both the PPDT and the IEBC is important because the outcomes of these engagements will feed the training programmes that seek to ensure that judicial officers have in-depth knowledge and understanding of the working administrative dispute resolution forums prior to institution of related matters before the courts directly or through appeals.

e. The Committee is currently engaged in talks with the Director of Finance-Judiciary to ensure that the Judiciary prepares, well in advance and prepares a supplementary budget to cover the six-month period for election petition hearings, since each Judge will move with a court clerk, researcher and secretary to a different region to handle a petition. Per diems for the entire period and related overheads need to be factored in.
Appendix:

JUDICIAL WORKING COMMITTEE ON ELECTORAL PREPARATIONS

WORK PLAN ON ESTABLISHING EFFECTIVE ELECTORAL DISPUTE RESOLUTION FRAMEWORK

September 2012 – April 2013
1 Introduction and Background

Chief Justice unveiled the establishment of the Committee on Election Preparations in May 2012. In his speech, he outlined the key themes which mark the responsibility of the Judiciary in Constitutional Transition. These include:

- The Judiciary’s foremost role will be to interpret the Constitution and the law in order to deliver the fullest benefit due to each citizen.
- Secondly, the Judiciary has a role to uphold the rule of law and ensure that justice is done to all, regardless of status.
- Third, the Judiciary is required to provide leadership in ensuring the system of justice works from start to finish.
- Fourth, the Judiciary must arbitrate in electoral disputes. Parties to political disputes should take notice of the decisions by the Constitutional and Human Rights Division of the High Court in referring matters to relevant tribunals rather than it being a first port of call.

The themes outlined above informed the Working Committee’s terms of reference which are to:

1. Advise the Judiciary on administrative arrangements and measures for the efficient disposal of election related disputes.
2. Develop and implement, in conjunction with the Judiciary Training Institute, a training programme for the efficient and effective management of election disputes for judicial officers and support staff.
3. Develop and design a system for monitoring and evaluating the management and administration of election-related disputes in court.
4. Liaise and coordinate with stakeholders to ensure efficient, effective and timely resolution of election related disputes and offences.
5. Advise the Judiciary on the information that needs to be developed and disseminated to the public on the avenues open to it to pursue electoral disputes and the approaches that will be employed.

2 Key Result Areas

The terms of reference outlined generate key result areas which must be achieved to create a judiciary that is accessible, responsive and effectively resolves electoral disputes in a manner that inspire public confidence and integrity of the electoral process. The key result areas deriving from the terms of reference include:

1. Legal, regulatory and administrative arrangements put in place for effective and efficient resolution of electoral disputes.
2. Judicial officers and staff of the Judiciary trained in electoral dispute resolution.
3. Public awareness and stakeholder engagement strategy developed and implemented.
4. Efficient and timely resolution of electoral dispute supported by an effective Case management system and efficient administrative framework.
5. The Judicial Training Institute and judiciary secretariat adequately resourced to facilitate electoral dispute resolution.

2.1 Output #1: Clear legislative framework, rules and procedures on dispute resolution developed.

The Committee recognizes that the starting point to effective dispute resolution framework must be anchored on clear legislative and regulatory framework. The law should be faithful to the broad principles expressed in
the Constitution; best international practice; consistent with the Kenyan context; and facilitate the objectives of procedural and substantive justice. The Committee will work with relevant stakeholders to develop proposals for legal reform to empower the Judiciary to enact Petition Rules. The Committee will also develop draft petition rules in consultation with the IEBC, the Kenya Law Reform Commission for validation by the Rules Committee and publication by the Chief Justice.

The Committee will develop a simplified guide of the rules for common reading and annotated digest of the rules which will be a reference point for the Judicial Officers. The specific deliverables under this output will be:

- Draft Amendment Bill to amend the Elections Act to empower the Judiciary to make Petition Rules.
- Petition Rules drafted, validated and published.
- Simplified digest of the Petition Rules for common consumption.
- Annotated compendium of the Petition Rules for reference by Judicial Officers.

2.2 Output #2: Increased Capacity of the Judicial Officers and staff to settle electoral disputes

In order to prepare the judiciary for the monumental role that is expected in the forthcoming general elections, it is important that intensive training for judges and magistrates. Such training will enhance their skills and knowledge of individual and signal the public that the judiciary is taking its role seriously in preparing for the coming elections. This will further positively impact on the independence of the judiciary as a result of judicial competence on electoral issues.

2.2.1 Objectives of the training:

1. Participants identify best practice, enhance their interest and develop skills and knowledge in adjudication of election disputes.

2. Participants Identify strategies and approaches to enhance judicial independence, diversity, accountability in adjudicating election disputes before, during and post electioneering period.

2.2.2 Scope of the Training:

1. To enhance the understanding and appreciation of the Constitution, 2010 and provisions relating to the representation of the people and the central role played by the Judiciary in ensuring free and fair elections.

2. To provide a clear understanding of the current law governing the conduct of elections, international standards and best practices particularly regarding arbitration of election disputes.

3. To gain an understanding of practices and procedures of conducting elections disputes with a view to handling election disputes effectively and efficiently.

4. To facilitate understanding of independence from democratic pressures, particularly of mass media

5. To appreciate the electoral cycle, the operational issues and the stakeholders expectations.

6. To enable each facilitator train other judicial officers on their role in handling election disputes efficiently and effectively.

7. To foster deconstruction and construction of interpretation of law and of precedent, in the spirit of the
doctrine of *stare decisis* to avert its failure which led to inconsistent decisions and erosion of confidence in the judiciary.

8. To help build competence of judicial officers in addressing electoral disputes thus instilling public confidence in judicial officers.

9. To impart understanding on independence, impartiality towards credibility and independent findings and conclusions.

10. To foster independence from inappropriate influence by/from legislative and executive branches of government.

11. To promote sensitivity to national values and pluralism in decision making

12. To promote an understanding of the legal remedies that are available to the innocent parties and the challenges that are likely to be faced in realizing the remedies.

Under this output, the Committee will develop the following deliverables:

- Training curriculum developed
- Training plan developed and implemented
- Monitoring and evaluation plan developed and implemented.

### 2.3 Output #3: Administrative framework and Case Management System developed to ensure that all petitions are determined within stipulated timeframes.

The electoral legal framework stipulates strict timeframes for resolution of electoral disputes. The traditional tools and safeguards of the adversarial system may not be well suited in achieving the efficiency bias imposed in electoral dispute resolution framework. The Committee will work with stakeholders to ensure that an administrative structures and procedures are put in place to ensure procedural safeguards are protected and the general policy of efficiency and timely resolution of disputes is achieved. Under this output, the Committee will undertake the following activities:

1. Develop a case management system
2. Integrate case management within the training and curriculum for judicial officers and staff.
3. Training of Judiciary staff in regard to case management
4. Monitoring the case management system

### 2.4 Output #4 Enhanced public awareness and confidence in the capacity of the Judiciary to resolve electoral disputes.

The Judiciary has recognized that access to justice hinges on awareness and public confidence in the processes. It is also important to recognize that public apathy in the Judiciary begot the lack of trust which was often used as an excuse to resort to lawlessness or self help “justice.” Deliberate effort to restore the public confidence is a critical aspect of Judicial Transformation. The Committee will develop a structured framework for consultation with key stakeholders; public information in relation to election preparation; and sustained engagement in order to build confidence.

The committee will undertake the following under this output:

- Structured plan for engagement with stakeholders developed and implemented.
- Public information handbook developed and disseminated.
• Media strategy developed and implemented in consultation with the Directorate of Communication.

2.5 **Output # 5: Capacity of the Judicial Working Committee enhanced to facilitate implementation of the TORs.**

The Judicial Working Committee requires secretariat support to support its members in planning and execution of key activities. The Committee also needs technical and financial support to implement key activities within strict timeframes. The Committee will engage researchers, consultants, work with the Directorates of the Judiciary and civil society partners to complement its work. Under this output the Committee will undertake the following:

• Engage researchers;
• Engage thematic consultants on Electoral Dispute Resolution and training;
• Develop and implement a monitoring and evaluation framework on electoral dispute resolution;
• Mobilize necessary resources

2.6 **Develop and disseminate bi-monthly reports.**

3 **Alignment of the Work Plan and Key Assumptions**

This Work Plan forms part of the wider Judicial Reforms and will be mainstreamed under the Judiciary Transformation Framework 2012-2012. The key areas of transformation including public engagement; independence of the judiciary based on constructive consultations; integration of technology; service delivery and value for money will be cross cutting themes in the work of the Working Committee.

The Committee is keen in institutionalizing the gains and ensuring sustainability of its initiatives. A key aspect of institutionalizing the work of the Committee is to recognize and support the integral part that will be played by well resourced Judicial Training Institute in the long term. The Committee will work with other offices and departments in the Judiciary in implementing its activities.

Key Assumptions include the following:

• That required amendments to legislative framework will be enacted;
• The target of training will be all judicial officers and relevant secretariat staff;
• Key stakeholders with complementing mandates in electoral dispute resolution; security and rule of law will robustly undertake their functions;
• Elections will be held in accordance with the pronouncement of the courts and the electoral body;
• Decisions of the courts will be respected.
### 4 Implementation Plan

<table>
<thead>
<tr>
<th>Outputs</th>
<th>Planned Activities:</th>
<th>TIME FRAME</th>
<th>Key Indicator</th>
<th>Budget</th>
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<tbody>
<tr>
<td>OUTPUT 1: Legal, regulatory and administrative arrangements put in place for effective and efficient resolution of electoral disputes.</td>
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<td>1.1 Develop draft Amendment to Elections Act in consultation with the MoJNCCA &amp; AG</td>
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<td>Draft Elections (Amendment) Bill 2012</td>
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<td>1.2 Hold Consultations with the MoJNCCA &amp; AG</td>
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<td>1.3 Develop draft Petition Rules under Elections Act</td>
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<td>1.4 Hold validation workshop on Petition Rules with IEBC and Rules Committee</td>
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<td>1.5 Develop compendium on Electoral Law and Petition Rules</td>
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<td>Compendium on electoral dispute resolution</td>
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<td>1.6 Develop and disseminate e-based resources on Petition Case Law</td>
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<td>E-based resources on election dispute resolution</td>
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<td>OUTPUT 2: Increased capacity of judicial officers to resolve electoral disputes</td>
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<td>2.1 Develop a Curriculum outline for the Judiciary</td>
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<td>Curriculum outline</td>
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<td>2.2 Develop facilitators Guide and participants resource book</td>
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<td>Training Materials (Facilitators Guide &amp; Participants resource book)</td>
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<td>Outputs</td>
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<td>2.3 Conduct Training of Judges</td>
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<td>3 trainings conducted</td>
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<td>2.3 Conduct TOT for Magistrates Trainers</td>
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<td>2.4 Conduct Training of Magistrates</td>
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<td>10 Trainings conducted in the regions</td>
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<td>2.5 Conduct Training of Judicial Staff</td>
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<td>10 Trainings conducted in the regions</td>
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<td>2.6 Develop long term Training Plan with the JTI</td>
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<td>OUTPUT 3: Increased confidence of public and stakeholders in Judiciary’s role as an arbiter of electoral disputes</td>
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<td>3.1 Develop 120 day report for publication by the CJ</td>
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<td>Reports</td>
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<td>3.2 Hold fortnightly meeting with key stakeholders</td>
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<td>Reports on stakeholder</td>
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<td>3.3 Develop a media strategy in consultation with the Directorate of Communications</td>
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<td>Media Strategy</td>
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<td>3.4 Hold Regional Forum on Elections Dispute Resolution</td>
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<td>Report on Regional EDR Forum</td>
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<td>OUTPUT 4: Case Management System developed and deployed to enhance expeditious disposal of election disputes</td>
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<td>Administrative procedures</td>
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<td>4.1 Develop administrative procedures and practice notes on case management</td>
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<td>Training Module on Case Management</td>
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<td>4.2 Develop and integrate Case management training module in the</td>
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<td>Outputs</td>
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<td>4.3 Develop e-based system for case management</td>
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<td>e-based Case Management System</td>
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<td>OUTPUT 5: Secretariat of the Committee empowered to facilitate effective EDR system</td>
<td>5.1 Engage researchers for the Committee</td>
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<td>5.2 Engage consultants on EDR</td>
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<td>5.3 Develop and implement a monitoring and evaluation plan for Committee activities</td>
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<td>5.4 Develop bi-monthly report on Committee work</td>
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Laying the Ground for Electoral Justice