

READY... OR NOT?

An Assessment of Kenya's Preparedness for
the 8 August 2017 General Election

April - June 2017



About us

The Africa Centre for Open Governance (AfriCOG) is an independent, nonprofit organisation that provides cutting edge research and monitoring on governance and public ethics issues in both the public and private sectors so as to address the structural causes of the crisis of governance in Kenya. The overall objectives of our programme activities are: to promote the implementation of the Constitution of Kenya 2010, to strengthen anti-corruption and good governance in Kenya with objective, high-quality research and advocacy and to build citizens' capacity to be permanently vigilant and monitor progress on governance issues in the public and private sectors. We also work at regional and international levels to promote collective efforts towards anti-corruption, accountability, transparency and openness in governance. Our reports, policy briefs and overall work add value to anti-corruption and governance reform processes by stimulating policy discussion and supporting the evidence-based advocacy and the mobilisation of our partners.

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Acronyms

AfriCOG	Africa Centre for Open Governance
AU	African Union
CORD	Coalition for Reforms and Democracy
CSO	Civil Society Organisation
ECK	Electoral Commission of Kenya
ELOG	Elections Observation Group
ERTS	Electronic Results Transmission System
EU	European Union
EUEOM	European Union Electoral Observation Mission
IEBC	Independent Electoral and Boundaries Commission
IFES	International Foundation for Electoral Systems
IPOA	Policing Oversight Authority
IREC	Independent Review Commission
KIEMS	Kenya Integrated Elections Management Systems
KNCHR	Kenya National Commission on Human Rights
KPMG	Klynveld Peat Marwick Goerdeler
KPTJ	Kenyans for Peace with Truth and Justice
KYSY	Kura Yangu Sauti Yangu
MVR	Mass Voter Registration
NASA	National Super Alliance Coalition
ODM	Orange Democratic Movement
PPOA	Public Procurement Oversight Authority
TCC	The Carter Center

Foreword

The Africa Centre for Open Governance (AfriCOG) and Kenyans for Peace with Truth and Justice (KPTJ) are once again pleased to present the latest report in their “Ready or Not?” series, which was launched before the 2013 elections. This is the second of the 2017 series that focuses on the forthcoming August 8 General Election.

AfriCOG is an independent, non-profit organisation that provides research and monitoring on governance and public ethics issues so as to address the structural causes of Kenya’s governance crisis. KPTJ is a coalition of governance, democracy and human rights organisations that was formed following the 2008 post-election violence to work for electoral justice and accountability for the widespread atrocities and political violence that the country had experienced. AfriCOG and KPTJ are members of the steering committee of the Kura Yangu Sauti Yangu (KYSY) electoral platform, which actively monitors the electoral process, engages key stakeholders and facilitates dialogue amongst a broad range of stakeholders to promote credible elections.

We would like to thank our partners at InformAction for kindly availing the data from their recent “ElectionWatch” publications, which can be found at www.informaction.tv, and which have greatly enriched this report.

In these reports, AfriCOG and KPTJ analyse events throughout the electoral cycle, with a special focus on pre-election preparedness, the administration of election day, results announcement processes, and post-election dispute resolution. We offer these objective assessments as contributions to the public debate on critical issues, meant to educate the public on the conduct of their elections and to build the capacity of our partners to monitor performance on key aspects of public life and to demand accountability.

This is the second of several planned reports assessing readiness for, and the conduct of, the 2017 General Election. Future editions will cover later phases of the electoral cycle. Every effort has been made to ensure accuracy but given the pace at which events are moving, some information may have changed by the time of going to print.

The general election is due to be held in a month’s time. It is therefore of extreme concern that so many important processes and issues are still hanging in the balance. It does not augur well for the credibility and peacefulness of the coming general election that key stakeholders appear to be unwilling or unable to learn from the lessons of the past. As this report details, the voters’ register is once again the source of public uncertainty; constitutional provisions on gender equality have been ignored and will no longer be applied to these elections, laying them open to challenge; procurement of ballots is tainted by the suspicion of wrongdoing and has been delayed; violence and intimidation are rife; questions around the deployment and independence of the security forces remain unanswered and yet again voters are being mobilised along ethnic and clan lines. Critically, the IEBC’s actions and omissions have not reduced public anxiety about its competence, independence and impartiality. Elections have been the main cause of widespread instability in the past; once again Kenya finds itself on a knife edge.

There is no such thing as a perfect election; to expect one would be unreasonable. However, in the interests of safeguarding cohesion and peace in this country, all stakeholders must urgently redouble their efforts to address shortcomings and allay public suspicion and fears of a repeat of past failures. They must pro-actively reach out to the public whose interests they are supposed to serve and inform them of plans to mitigate the identified deficiencies. This will not reduce public confidence; on the contrary, it will strengthen the perception that problems are being openly addressed and help set realistic expectations.

A key element in warding off possible disaster is a watchful public that demands answers and action from institutions and leaders. We hope that this report helps to promote a well-informed and ever-vigilant public. We also hope that this report contributes to the holding of credible elections, whose results are accepted by all.

Gladwell Otieno
Executive Director
AfriCOG

Executive Summary

This second edition of the *Ready or Not* election preparedness report series, developed in partnership by the Africa Centre for Open Governance (AfriCOG) and Kenyans for Peace with Truth and Justice (KPTJ), focuses on an assessment of the key activities of the electoral cycle between April and June 2017 and offers an evaluation of the key vulnerabilities in voting, tallying, results announcement and electoral dispute resolution phases of the electoral process.

Overall, the assessment finds that with less than one month remaining until voters go to the polls, there are several issues of serious concern:

Legal Reform

The most serious issues related to legal reform in the current electoral cycle include the following:

- Parliament's failure to pass court-ordered legislation to operationalise constitutional provisions regarding gender parity leaves the country vulnerable to illegal elective and appointive bodies.
- The Public Procurement Oversight Authority (PPOA) found fault with the IEBC's procurement of ballot printing services and there is pending litigation on the matter. These decisions are critical to the integrity of the electoral process. This leaves the IEBC to deal with the challenge of implementing these rules effectively and educating voters about what to expect in a timely and efficient manner. Allegations of the IEBC's mismanagement of procurement processes deeply risk threatening public confidence in the Commission as well as in the integrity of the ballots. Given the procurement scandals that haunted the 2013 election, it is of great concern that little seems to have changed in this regard.¹
- There are pending questions related to the new elections regulations. These include the unclear status of the IEBC's online portal for polling station results, a lack of information regarding what the Commission will use as a "complementary mechanism" if the electronic results transmission system fails, and gaps in the rules for when polling station results can be disregarded.

Recommendations

- First, it is imperative that the Chief Justice write to the president to notify him of the parliament's failure to comply with the order of the Court in *Centre for Rights Education and Awareness & another v Speaker of National Assembly & 5 others [2017] eKLR*. The Chief Justice should advise the president that Parliament would have been dissolved were it not for its adjournment ahead of elections. In this way, there will be a precedent to guide the incoming parliament.

¹ of AfriCOG/KPTJ. May 2015. Rethinking Electoral Management: An emerging agenda for the 2017 elections. p.2 ff. <<https://africog.org/wp-content/uploads/2016/02/Rethinking-Electoral-Management-25082015-2.pdf>>

- Second, with regard to technology, the IEBC must urgently launch the public portal through which the public will be able to see the polling station tally forms, and the IEBC should ensure that the forms are viewable in real time. Now that it is clear that presidential results are final as announced at the constituency level, the IEBC should prioritize the establishment of its online portal for polling station results so that the public can easily follow and verify results as they come in. If members of the public can track results independently as they arrive, it will add a significant level of transparency to the process and will bolster the results with an important degree of legitimacy.
- Third, the IEBC should urgently clarify its plan for receiving results in the case that the electronic results transmission system fails. It should eliminate any requirement that hard copies of polling station forms be matched against electronic results before the declaration of results. If electronic transmission includes a scanned copy of the signed form that is posted on the polling station door, there is little reason to wait for the forms to be physically present before announcing results. This plan actually decreases public trust, because the ferrying of forms is open to manipulation and very susceptible to delays.
- Fourth, the IEBC must also immediately clarify all pending questions related to the new regulations, including those pertaining to the requirements for disregarding results from polling stations. The IEBC should also replace the current rules on disregarding results with rules that require that all votes cast be less than the number of registered voters in a station and that require the total votes cast to be recorded on results forms. In this way, all stakeholders are on the same page on election day, which will minimize confusion and help prevent delays and suspicion.
- Fifth, public faith in the Commission and in its plan for the deployment of technology and printing of ballots would be greatly enhanced by more open communication on this issue. As a first step, the IEBC must hold a stakeholders' forum to openly and honestly discuss the process, what went wrong, how it is improving internal procedures to prevent such a situation in the future and what it is doing now to mitigate public anxiety and the risk of a compromised process.
- Sixth, the IEBC must explain how and why the copy register and biometric registers differ, if at all. If they do not differ, the IEBC must explain how the copy register would catch eligible voters not in the KIEMS kit.

Voter Registration

The late release of KPMG's findings related to its audit of the voters' register revealed serious deficiencies in the process through which the IEBC receives data and in the register itself. KPMG's estimates show that there are more than 1 million dead voters in the register as well as hundreds of thousands of other inaccuracies. Sadly, it seems that little progress has been made since 2007, when the Independent Review Commission estimated that there were 1.2 million dead voters in the register.

Recommendations

- The IEBC should seriously consider supplementing KPMG's findings with an audit that is based on list-to-people/people-to-list methodology and conducted by election experts. Such an audit could shed light on the myriad problems Kenyans encountered when attempting to register as well as on all the reasons why some Kenyans may not even attempt to register. Moreover, it could highlight the many ways in which voters' information is misrepresented in the register.
- In the long run, it is critical that the Civil Registration Department address deficiencies in the public's registration of deaths by investigating and acting on the reasons why so many deaths go undocumented. The Civil Registration Department must also create and maintain a system through which it sends the IEBC updated data on a regular basis so that the register of voters can stay updated.
- Moreover, we recommend that the IEBC immediately publicize the pre-audit voters' register data at all levels so that independent observers and other researchers can understand how things have changed. Finally, the IEBC must honour its legal obligation to publish the voters' register. This was supposed to have been done at least 30 days before the election.²

Party Primaries

Recent party primaries demonstrated political parties' serious lack of administrative and organisational capacity and regulated membership. The chaos, violence and clear disrespect of democratic standards of transparency and accountability that characterized primaries, as well as voters' frustration with parties' conduct, highlight the dire need for party structures' reform.

² The Elections Act, No. 24 of 2011 was revised in 2016 to include this requirement. It can be found in Section 6A(3)(b) of the Act.

Recommendations

- Party primaries are meant to empower rank-and-file party members by giving them a say in who will appear on the ballot on election day. In order for primaries to serve this purpose, they must be voter-centred affairs, characterized by respect for the rules, respect for pre-determined and well-communicated timelines and transparent, reliable processes that are open to public scrutiny.
- As a starting point, political parties must prioritize the creation of reliable membership lists, built from the ground up and based on face-to-face interactions with the public. Between now and the next electoral cycle, political parties should also develop and implement training programs to educate party elites and members about the purpose and administration of primary elections so that in the future they are well-run, credible contests. Training should include – at minimum – capacity building in relation to the development of timelines, administrative/logistical arrangements, and contingency plans.
- Finally, the Registrar of Political Parties must act on her responsibility to hold parties accountable for the ways in which their administration of primaries violated the law. In the long run, stakeholders must undertake a critical assessment of the relevance of the largely moribund Office of the Registrar of Political Parties.

Security

The upsurge in violence, some of which is organised by political elites and their militias and some of which is perpetrated by Kenyan security forces, is of deep concern ahead of elections. Of particular concern is the spike in extrajudicial killings; this trend has been noted by multiple domestic and international human rights organizations as well as by the African Commission on Human and Peoples Rights. Since elections are a time of public demonstration, there is significant worry that the current security situation will suppress the public's right to the franchise and their freedom of expression and association.

Recommendations

- First, the President and Inspector General of Police must officially and immediately acknowledge that extrajudicial and arbitrary killings are a systemic issue, requiring comprehensive investigation via an official inquiry and the prosecution of those found to be responsible. The President and Inspector General of Police should also prioritize increased support of and cooperation with the Independent Policing Oversight Authority (IPOA) to enable it to effectively undertake its mandate.
- Second, the Inspector General of Police must demonstrate his commitment and that of his forces to the Kenyan Bill of Rights by explaining how policies related to public order and crowd control during elections will respect people's rights and freedoms to peacefully express themselves.

- Third, the recruitment of officers from multiple state agencies for the purpose of election-related security requires urgent public clarity. We recommend that security operations in the context of elections remain primarily the responsibility of the National Police Service and that any joint domestic operation with the Kenya Defence Forces receive approval by the National Assembly, as required by law.
- Fourth, lawmakers must align the provisions on public order management in the National Police Service standing orders with those of the African Commission’s Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa. Additionally, the National Police Service should make its guidelines on public order management/policing assemblies publicly available.
- Fifth, the use and deployment of all weapons, lethal and non-lethal, must, as required by police regulations, be accounted for in the aftermath of an operation, including who was issued with a weapon and the circumstances under which it was discharged.
- Sixth, security forces must take care to proactively minimize the possibilities of displacement caused by their operations, and when such displacement occurs, they must ensure that adequate arrangements are made in conjunction with the IEBC to ensure that displaced persons are not deprived of their constitutional political rights under Article 38 of the constitution.

Voter Education

While the provision of voter education does appear to have increased in recent weeks, there is still much to be done. In particular, there is need for a more systematic implementation design for voter educators to reach broad sections of the population, including those who are most marginalized.

Recommendations

- The IEBC must urgently prioritise voter education by assisting its ward-based educators with guidance and funding to create a systematic method through which to reach as many people as possible throughout the country.
- Moreover, the IEBC should create a plan for the provision of continuous voter education, as required by law. Such continuous education would negate the need for and expense of intensive, pre-election day “cramming.”
- In the long term, voter education should also aim to cover issues beyond the technical administration of elections, such as ethnic divisions, ethnic vs policy-based political parties, the leadership and integrity provisions in the constitution, and voters’ and citizens’ roles in democracies.

Counting, Tallying and the Announcement of Results

The re-introduction of manual processes as “complementary mechanisms” to the electoral process has justifiably prompted a certain level of public suspicion and doubt. Despite assurances to the contrary, the “green book” has reappeared, playing a role during voter registration exercises. This, in combination with the lack of clarity around the role of paper forms, raises serious questions about how the IEBC will determine final results and remain in compliance with the recent court ruling that constituency level presidential results are final.

Recommendations

- The IEBC must urgently provide a step-by-step overview of how results will be transmitted, especially if the electronic results transmission fails. In the case of technological failure, what role will paper forms play? Additionally, will the IEBC declare results for each office immediately after receiving all the electronically transmitted results, or will paper forms have to be checked against electronically transmitted results before results declaration?
- It is also imperative for the IEBC to publicly test the election day technology all over the country so that voters know what to expect when they go to the polling station. The testing should include simulations of what will happen if systems fail.
- While it is commendable that the IEBC has taken the time and effort to make detailed training plans, it is imperative that the Commission sticks to its timeline, especially since there is only a three-day gap between the end of training and election day. It will also be important for the Commission to ensure that the most difficult substance and practical lessons are completed well before the 5th of August so that there is plenty of time for questions, clarifications and practice.
- We also recommend that the IEBC ensure that its officers are provided with water and food throughout the day and night so that they are not unduly fatigued by the time they are counting and announcing results.
- Finally, the IEBC’s plan to upload all polling station tally sheets to a publicly accessible portal must be explained in a detailed way so that the public knows how to find and use this portal. If successful, this portal has the potential to transform the election environment and allow all Kenyans to scrutinize their own results.

Electoral Dispute Resolution

Finally, it is important to emphasize that the integrity of the post-election dispute resolution processes will depend a lot on the degree to which the judiciary takes into account public feedback on the new rules for election petitions. Concerns about wording that implies that there may be more than one register in use and the lack of provisions for scrutiny and/or recounts in presidential petitions are among the most critical issues raised during public consultation.

Recommendations

- As Election Day nears, it is important for the public to know the current status of the proposal rules for election petitions, including how stakeholders' feedback was incorporated (or not) in the final version. In that vein, we recommend that the judiciary publish an interim status report on its preparedness.
- Moreover, these rules must be published immediately and made widely available once adopted.
- Once they are published, the Judiciary should also conduct outreach sensitization forums with members as well as training on the new rules for lawyers as part of its stakeholder consultation on the content of the rules.

I. Introduction

In less than one month, Kenyans will head to the polls in the country's second general election since the promulgation of the new constitution. While the pre-election environment has been marked by the successful achievement of several important milestones, a striking lack of transparency, delayed timelines and continuing insecurity and violence in certain parts of the country have significantly tainted progress.

Some of the most concerning issues include:

- serious deficiencies in the voter register and the process through which IEBC receives the relevant data and delay in its publication.
- the violent and clearly undemocratic nature of the party primaries,
- the lack of transparency around the procurement process for election technology and for ballot paper printing,
- parliament's failure to obey a court order to implement legislation regarding the two-thirds gender provision,
- the lack of new, credible complementary mechanisms to use in case the electronic results transmission malfunctions or fails, and
- continued insecurity and violent attacks in parts of the Rift Valley and northern Kenya.

This report, which is the second in the 2017 series, provides an overview of key events in the period April through June 2017 and assesses institutions' preparedness for the remainder of this electoral cycle.

Similar to the first report in this series, this edition's analysis includes a reflection of key events in the 2013 electoral cycle and a subsequent evaluation of what, if anything, has changed since then. As Kenyans take stock of their electoral process, this report offers benchmarks for public assessments and aims to ensure that institutional stakeholders, especially the IEBC, fulfil their duty to make voters aware of what to expect as they get ready to cast ballots on 8 August.

Calendar of Progress

Activity	Originally Scheduled by IEBC and/or law	On Time?	New Deadline/Date Completed	Comments
Parties' membership lists due to IEBC	17 March	No	27 March	As of 5 April, 57 parties had submitted their lists. The IEBC reported that ten parties had not yet submitted their lists.

Activity	Originally Scheduled by IEBC and/or law	On Time?	New Deadline/Date Completed	Comments
Parties' lists of candidates participating in primaries due to IEBC	5 April	Yes	N/A	N/A
Date by which election technology to be delivered	10 April	No	13 June	The IEBC asked MPs to amend the law in order to allow the Commission to arrange for delivery two months ahead of election day. The last batch of kits arrived on 13 June.
Date on which IEBC to gazette names of candidates in all party primaries	12 April	Yes	N/A	N/A
Parties conduct primaries	13 April – 26 April	No	1 May	After an NGO sued the IEBC for allegedly shortening the period allowed by the law for the conduct of primaries, the High Court in Malindi extended the timeline. The law states that parties have until 60 days before the election (7 June) to submit their lists of candidates to the IEBC.
Public inspection of voters' register begins	10 May	No	11 May	The IEBC has not explained this delay.
Parties submit candidates' names to IEBC	10 May	No	14 May	The IEBC extended this deadline because the period for nominations had been extended.
Date by which Parliament must pass implementing legislation regarding the two-thirds gender provision	28 May	No	Parliament adjourned without passing this legislation.	The newly elected parliament could have up to five years to pass the legislation.

Activity	Originally Scheduled by IEBC and/or law	On Time?	New Deadline/Date Completed	Comments
IEBC deadline to award tender for ballot printing	28 May	No	No new deadline given.	The direct award of the tender was announced on 9 June, but that award is currently being challenged in court.
Public inspection of voters' register ends	9 June	Yes	N/A	
Public testing of election technology	9 June	No*	No new deadline or update given.	*The IEBC did a demonstration of the technology in front of a select group of stakeholders, not representatives of the broader public.
Publication of all nominated candidates	10 June – 17 June	No	4 July	
Deadline for parties to submit lists of nominated candidates for special seats to IEBC	24 June	Unknown if parties met the deadline because IEBC has not publicly shared the status of this activity.		
Deadline by which IEBC publishes voters' register online	9 July	No	No new date given.	
Beginning of Campaign Period	28 May	Yes	N/A	N/A
End of Campaign Period	5 August	Pending		
Deadline for arrival of ballot papers in Kenya*	22 July	Pending		

**The contract awarded to Al Ghurair for the printing of ballot papers is being challenged in court. Petitioners claim that the directly sourced company is biased in favour of the incumbent regime.*

II. Preparedness for the General Election

Legal Reform

In the aftermath of the contentious amendments to the electoral law in January 2017,³ there have been five important categories of developments related to the rules governing elections in Kenya. At this late stage in the electoral cycle, with less than one month until election day, the lack of resolution around the following issues suggests a serious lack of preparedness by the state. Delayed election timelines are not new in Kenya;⁴ the current situation demonstrates both the IEBC's and the state's apparent failure to learn from the past. This represents a dangerous pattern of the normalisation of such delays, which can lower expectations and standards for the future.

Gender Provisions

First, the Kenyan parliament failed to obey the High Court's order that an implementing law on the two-thirds gender principle⁵ be passed within 60 days of the Court's judgment. In fact, National Assembly debates on a bill which would have allowed top-up seats for women failed to get traction and never even made it to the Senate. Now, Parliament has adjourned and is unlikely to reconvene. Once the newly elected parliament assumes office later this year, it could have as many as five years to pass the required rules.⁶

Parliament's failure to pass the required legislation demonstrates a worrying lack of respect for the rule of law. It is also evidence of the lack of political will to realise such a basic standard of gender equality. Indeed, Kenya remains far behind other countries in terms of women's inclusion in the legislature. It currently ranks 100th out of 190, falling behind at least 22 other African countries.⁷ As of 8 June, the IEBC reported that women made up a paltry 9 percent of the 15,000 processed nominations.

Although Parliament failed to live up to its constitutional duties to establish gender equality, the High Court ensured that the political parties live up to theirs. In a ruling on a petition filed by the Katiba Institute, the High Court ordered that the nomination lists of the political parties comply with the two-thirds gender provisions. The Court ruled that:

The two-third gender principle should not be downgraded to a contest between men and women. It is not. It is about human dignity, equality, equity, social justice, human rights and fundamental freedoms, essential values in an open and democratic society...Women of Kenya are not lesser beings. They have equal rights and opportunities granted by the constitution. These rights must be

³ KPTJ. 2017. "Ready...or Not? An Assessment of Kenya's Preparedness for the 8 August 2017 General Election." <https://africog.org/wp-content/uploads/2017/05/Ready-Or-Not_An-Assessment-of-Kenya's-Preparedness-for-General-Elections-on-8-August-2017.pdf>.

⁴ KPTJ. 2012. "Ready or Not? An Assessment of Kenya's Preparedness for the General Election, September-December 2012." <https://www.iebc.or.ke/uploads/resources/rPm78XBbWF.pdf>.

⁵ See the Constitution of Kenya, 2010, Article 27.

⁶ Jill Cottrell Ghai. 22 June 2017. "Sex, Laws and Legal Tape." *The Elephant*. Available at <<https://www.theelephant.info/history/2017/06/22/sex-laws-and-legal-tape/>>.

⁷ Inter-Parliamentary Union. 1 June 2017. "Women in national parliaments." Available at <<http://www.ipu.org/wmn-e/classif.htm>>.

respected, protected and upheld by all. It should not be that any time women demand rights granted to them by the constitution, the readily available answer is: ‘there is no enabling legislation’...⁸

Given the short timelines left in the current electoral cycle, however, the Court determined that its ruling did not apply to this election.

Constituency Level Results

The second development concerns a court order in *Maina Kiai & 2 others v Independent Electoral and Boundaries Commission & 2 others*, in which the High Court declared that constituency-level results for the presidential election are final. The petitioners argued that declaring the constituency-level results as final would prevent the potential alteration of results between constituency-level tallies and national-level announcements.

Such alteration had been a concern in past elections. In fact, the 2013 petition against the legitimacy of the presidential results presented evidence of differing results at the constituency and national levels. In 2008, the Independent Review Commission also specifically cited the problems with requiring that hard copies of forms be carried to Nairobi. The report said,

The overall conclusion is, therefore, that conduct of the results transfer from polling stations to constituencies, the tallying in constituencies, the transfer of constituency-level presidential election results and the tallying at national level is – generally speaking – of incredibly low quality: it is actually not acceptable.⁹

The IEBC appealed the ruling, and the case was heard in the Court of Appeal on 6-7 June. The case was contentious, with the opposition alliance, known as the National Super Alliance (NASA), and some civil society groups threatening to boycott the election if the IEBC did not withdraw its appeal.¹⁰ While appellants argued that the IEBC should have the power to verify and “correct mistakes” that may have been made at sub-national levels, respondents argued that the resolution of any possible errors should be done transparently, in an elections court.

On 23 June, the Court of Appeal dismissed the IEBC’s appeal, maintaining the High Court’s judgment that results announced at the constituency level for the presidential election are final. The ruling goes a long way towards setting the stage for public confidence in the results, if the IEBC adheres to its provisions. Polling station results can be monitored and tracked, anomalies can be easily traced to their sources and there will be increased transparency in the tallying process.

⁸ *Katiba Institute v. IEBC, Petition No 19 of 2017*. Available at <http://www.katibainstitute.org/wp-content/uploads/2017/04/JUDGMENT.pdf>.

⁹ Independent Review Commission (IREC). 2008. “Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007,” 127.

¹⁰ Leonard Onyango. 24 May 2017. “Kenya: Civil Society Groups Support NASA on Poll.” *Daily Nation*. Available at <http://allafrica.com/stories/201705240204.html>.

Technology and the Law

Third, there are the recently published elections regulations. The Elections (General) (Amendment) Regulations, 2017 specify some of the “complementary mechanisms” that are now allowed to be used in the case that electronic devices related to voter identification and results transmission fail. With regard to voter identification, the new rules state that if a voter cannot be digitally identified in the Kenya Integrated Elections Management System (KIEMS), the presiding officer is to invite agents and candidates in the polling station to witness the incident and to witness the voter fill out Form 32A. The presiding officer is then to attempt to identify the voter in the printed out version of the register, known as the copy register. If that is successful, the voter can proceed to vote. Since the copy register is supposed to be a printed version of the list contained in the KIEMS kit, it is also unclear why a voter would appear in the copy register but not in the biometric register. This provision thus suggests that there are different versions of the register already in existence.

There are no provisions that specify what to do if candidates/agents are not present at the polling station at the time that a voter cannot be found in the KIEMS kit. Moreover, there is no specificity about how many agents are necessary to verify that the voter is indeed in the printed out register.

Also, there is a lack of clarity with regard to how voters are identified in the first place. The regulations state:

Before issuing a ballot paper to a voter, an election official shall—

- require the voter to produce an identification document which shall be the same document used at the time of registration as a voter;
- ascertain that the voter has not voted in that election;
- call out the number and name of the voter as stated in the polling station register;
- require the voter from the *printed copy register* to place his or her fingers on the fingerprint scanner and cross out the name of the voter once the image has been retrieved.¹¹ (emphasis added)

According to the text, it appears that voters are identified first on the printed copy register, not on the biometric list. It is unclear why the printed list is used in conjunction with the biometric list from the very beginning of the process. Voters should be identified only on the biometric list, unless there is a problem with the technology. The fact that the name of the voter is crossed off the printed copy register also suggests that the biometric list is unable to keep track of who has voted and who has not.¹² This begs the question of how a polling station clerk would be able to determine if a voter had indeed voted already, which is part of the above provision. While the clerk would be able to determine if the voter had voted in that polling station, there is no way to know if the voter had voted in another polling station.

¹¹ The Elections (General) (Amendment) Regulations. 2017. Article 31.

¹² Some observers have noted that when a voter is identified in the biometric kit, he/she is labeled therein as having voted. Since this is not clear in the law, however, the IEBC should publicly explain and test this feature.

It is also worrying that there appear to be no new regulations for the use of complementary mechanisms in the case that the electronic results transmission system (ERTS) fails. Instead, the regulations state only the steps that polling station staff can and should take before suspending or terminating the use of election technology (defined as “a system that includes a biometric voter registration system, a biometric voter identification system, a system that enables the nomination and registration of candidates and electronic results transmission system”¹³). If such a case arises, the presiding officer is supposed to retry the system, create an incident report in the polling station diary, notify the returning officer and submit a copy of the incident report, and inform the director in charge of information communication and technology. The director then investigates and advises on suspension or termination. Finally, the returning officer approves the request based on the advice of the director and invokes the complementary mechanism.¹⁴ “Complementary mechanism” is not defined in this regulation, and in fact it is only the complementary mechanism for the failure of the KIEMS kits that is defined in the law, as discussed above.

At the National Elections Conference, which took place in Nairobi from 12-14 June, the IEBC verbally clarified what it considers to be the complementary mechanism to use in the case of failure of the electronic results transmission system. If the ERTS malfunctions or fails, the IEBC will resort to the use of the tallying forms in hard copy. In effect, then, the IEBC will do exactly what it did in 2013. A reliance on those forms, especially without a check in the form of electronically transmitted results, is an almost definite slash in the fabric of voter confidence in the results. As is explained in detail below, an examination of the 2013 forms revealed multiple problems and irregularities. In fact, there were so many errors, inconsistencies and gaps in the tallies that it was difficult to say with any confidence what the final results were. This situation almost exactly mirrored the 2007 counting and tallying process, which the Independent Review Commission described as:

The conduct of the 2007 elections was so materially defective that it is impossible – for IREC or anyone else – to establish true or reliable results for the presidential and parliamentary elections. IREC has, however, established by means of statistical analysis of a sample of constituencies that innumerable elementary mistakes in tallying and/or transcribing results as well as patent mistakes of omission, duplication and confusion... Almost *all* parliamentary and presidential election results for the constituencies sampled are erroneous, which means that very few of the officially published figures are actually accurate...¹⁵

It is worth noting that, according to the IEBC’s statements at the National Elections Conference, results will not be considered final until hard copies of polling station tally forms are compared against what was submitted via the ERTS. The IEBC claims that this approach is meant to guard against presiding officers submitting false information that does not accurately reflect what is on the hard copies of the forms. As the IEBC itself explained, however, the electronically submitted data is the scanned version of the polling station tally sheet. This sheet is signed by agents and

¹³ The Elections (Technology) Regulations, 2017. Article 2.

¹⁴ The Elections (Technology) Regulations, 2017. Article 26 (2).

¹⁵ IREC 2008, pages 9-10 and 127-128.

posted on the door of the polling station. Moreover, the electronic version is reviewed and signed by agents before it is transmitted. It would seem, then, that the larger risk is requiring hard copies to be taken to Nairobi. This directly contravenes the decisions of the courts which identified the constituency level as the final place of announcement of results, which were only subject to change through a legal challenge.

Disregarding Results

Fourth, there is a lack of clarity with regard to the rules that allow the IEBC to disregard results from polling stations in which the total number of valid votes exceeds the number of registered voters in that polling station.¹⁶

First, using valid votes for this determination is problematic because valid votes do not reflect the total number of votes cast at a polling station and a “valid vote” does not indicate that the vote came from a legally eligible voter registered at that polling station. A “valid vote” simply means that the ballot was marked correctly, in a way that makes it clear who the voter intended to choose. There is no way to determine if the valid votes are those cast by voters registered at that station or not.

Imagine a scenario in which there are 100 registered voters at a polling station. Throughout the day, however, 110 voters successfully cast ballots at that station. During the count, 20 ballots are rejected because they lack security features, the ballot includes marks for more than one candidate, the ballot includes a mark or writing that could identify the voter, the ballot is marked in any way that makes it uncertain who the vote was for, or the ballot is unmarked. 90 ballots are thus counted as valid. In this scenario, it is impossible to know which of the valid and which of the rejected ballots belong to duly eligible voters at that polling station. The fact that there are less valid votes than registered voters does not mean that all the valid votes are from eligible voters. In this case, it is the total votes cast (valid votes + rejected votes) that is necessary to determine a problem. If total votes cast is more than the number of registered voters, this is indicative of a problem.

The regulations also allow the IEBC to disregard results from polling stations in which the total votes exceed the total number of voters who turned out to vote in that polling station. One immediate problem is that there is no dedicated space on results forms to indicate the total number of people who turned out to vote in a polling station (which would be recorded in the KIEMS kit and/or could be ascertained from the copy register). This means that in order to check how the total votes compare to the number of people who voted, the register would have to be consulted. Since this is not part of the counting procedure, this part of the law will be difficult to comply with.

Also, these regulations still allow room for manipulation because they do not require total votes cast to be less than the number of registered voters in a polling station. See the table below for an illustrative example. In this example, the total number of valid votes is less than the number of registered voters (95<100). It thus complies with the first part of the regulation. The total votes cast does not exceed the total number of people who turned out to vote and so it complies with the second part of the regulation as well. The critical point, however, is that the total number of *votes cast* is larger than the number of registered voters. Since the total number of votes cast reflects the total number of people who voted in that polling station, *that* is the critical figure necessary to determine if there is a problem.

¹⁶ The Elections (General) (Amendment) Regulations, 2017, Article 37.

Example Results

Registered Voters	100
Number of People Who Voted	105
Valid votes for Candidate X	30
Valid votes for Candidate Y	30
Valid votes for Candidate Z	35
Total Valid Votes	95
Total Rejected Ballots	5
Total Rejected Objected to Ballots	3
Total Disputed Ballots	2
Total Votes Cast	105

Together, this set of regulations leaves room for manipulation and error.

Recommendations

- First, it is imperative that the Chief Justice write to the President to notify him of the parliament’s failure to comply with the order of the Court in *Centre for Rights Education and Awareness & another v Speaker of National Assembly & 5 others [2017] eKLR*. The Chief Justice should advise the President that Parliament would have been dissolved were it not for its adjournment ahead of elections. In this way, there will be a precedent to guide the incoming parliament.
- Second, with regard to technology, the IEBC must urgently launch the public portal through which the public will be able to see the polling station tally forms, and the IEBC should ensure that the forms are viewable in real time. Now that it is clear that presidential results are final as announced at the constituency level, the IEBC should prioritize the establishment of its online portal for polling station results so that the public can easily follow and verify results as they come in. If members of the public can track results independently as they arrive, it will add a significant level of transparency to the process and will bolster the results with an important degree of legitimacy.
- Third, the IEBC should urgently clarify its plan for receiving results in the case that the electronic results transmission system fails. It should eliminate any requirement that hard copies of polling station forms be matched against electronic results before the declaration of results. If electronic transmission includes a scanned copy of the signed form that is posted on the polling station door, there is little reason to wait for the forms to be physically present before announcing results. This plan actually decreases public trust, because the ferrying of forms is open to manipulation and very susceptible to delays.

- Fourth, the IEBC must also immediately clarify all pending questions related to the new regulations, including those pertaining to the requirements for disregarding results from polling stations. The IEBC should also replace the current rules on disregarding results with rules that require that all votes cast be less than the number of registered voters in a station and that require the total votes cast to be recorded on results forms. In this way, all stakeholders are on the same page on election day, which will minimize confusion and help prevent delays and suspicion.
- Fifth, public faith in the Commission and in its plan for the deployment of technology and printing of ballots would be greatly enhanced by more open communication on this issue. As a first step, the IEBC must hold a stakeholders' forum to openly and honestly discuss the process, what went wrong, how it is improving internal procedures to prevent such a situation in the future and what it is doing now to mitigate public anxiety and the risk of a compromised process.
- Sixth, the IEBC must explain how and why the copy register and biometric registers differ, if at all. If they do not differ, the IEBC must explain how the copy register would catch eligible voters not in the KIEMS kit.

The IEBC

As the body that is constitutionally mandated to administer elections, the IEBC holds enormous power and responsibility. Recent developments cast increasing doubt on the IEBC's commitment to its primary responsibility, which is to protect the sovereignty of the people and to secure the observance by all State organs of democratic values and principles.¹⁷ In fact, the IEBC's reluctance to be open about its decision-making, especially with regard to procurement-related behaviour and its apparent lack of internal cohesion and stability so close to election day cast significant doubt on its preparedness and independence.

Returning Officers

First, in early May, the IEBC announced that it had assigned its 290 constituency returning officers and 47 county returning officers.¹⁸ These assignments are critical to the public legitimacy of the results, because the public must have confidence that those who are in charge of counting and tallying results do not have a personal stake in a particular location's electoral outcome. When making assignments, then, it is important to ensure that returning officers are not assigned to centres in their home areas. Indeed, IEBC's own rules state that returning officers should not be deployed in their home areas and that they should not be deployed to areas where they have previously worked. NASA claims, however, that IEBC contravened its own rules and assigned returning officers in partisan ways. The IEBC insisted that the deployments were made only after conversations with political parties.¹⁹ Soon after the assignments were announced, NASA filed

¹⁷ Constitution of Kenya, 2010, Article 249 (1)(a).

¹⁸ IEBC. 2017. "List of County Election Managers." Available at <https://www.iebc.or.ke/uploads/resources/j7XV6diicu.pdf>.

¹⁹ Citizen TV. 18 May 2017. "NASA sues IEBC over deployment of returning officers." Available at <https://www.youtube.com/watch?v=InozoOG5-Jg>.

suit, alleging that the Commission acted unlawfully by making appointments without requesting parties' inputs regarding the decisions. No judgment has been given to date.

Procurement Scandal

Second, the IEBC is caught in the middle of a significant procurement scandal. After multiple court cases and delays related to the procurement process, on 9 June, IEBC Chairman Wafula Chebukati announced the Commission's decision to directly award the ballot-printing contract to the Dubai-based Al Ghurair firm. Chebukati said that this decision was based on the firm's "modern" machinery, suitable production and delivery capacity, experienced personnel, sufficient and stable financial base, experience in Africa, Asia and the Middle East, competitive prices in previous contracts, and reputation of efficiency and reliability. Chebukati also said that the availability of multiple, direct flights from Dubai to Nairobi played a factor in the Commission's decision. Given the High Court's ruling that the IEBC had not complied with electoral laws when it initially awarded the tender to Al Ghurair, and the Court's order to nullify that original tender, IEBC's insistence on using Al Ghurair is questionable, at best. In a thinly veiled jibe at those who have questioned the decision, in his announcement on 9 June, Chebukati said that Kenyans should now spend their time focusing on other aspects of preparedness.

Public speculation about the decision was compounded by the Public Procurement Administrative Review Board's ruling, which reportedly found the Commission guilty of having flouted procurement rules to favour certain companies' bids for ballot printing contracts. The Board is reported to have described how the IEBC allegedly lied about the number of firms who had applied for the tender and specifically cited the IEBC's CEO, Ezra Chiloba, for submitting a false affidavit.²⁰ The Board's findings are evocative of the IEBC's previous problems with procurement (in 2010 and 2012) and they cast significant doubt on what, if anything, has changed since the leadership of the IEBC was replaced. Finally, public perceptions of IEBC's independence hang in the balance as the opposition claims that there are personal relationships between the Kenyatta family and the Al Ghurair company. Partially based on this alleged relationship, NASA filed suit to block the tender award.²¹ The Court eventually found that the IEBC had not followed rules for public participation in awarding the tender and ruled that it must now cancel the current contract with Al Ghurair. This decision creates a dilemma; a transparent and accountable procurement process is critical to electoral integrity but suspending plans for ballot printing so late in the process threatens the IEBC's ability to effectively administer elections on 8 August.²²

Third, there appears to be internal IEBC conflict. While the secretariat resents what it perceives as interference from the commissioners, the latter feel that they should be consulted more. In fact, the IEBC's recent dismissal of the Procurement Director and the compulsory leave forced on the ICT director have furthered fears that there are significant internal divisions. IEBC Chair

²⁰ Otiato Guguyu. 4 June 2017. "How IEBC bungled Sh 2.5b ballots tender." *Standard Media*. Available at <<https://www.standardmedia.co.ke/article/2001242120/how-iebc-bungled-sh2-5b-ballots-tender>>.

²¹ Luke Awich. 21 June 2017. "NASA to challenge Al Ghurair ballot papers tender in court." *The Star*. <http://www.the-star.co.ke/news/2017/06/21/nasa-to-challenge-al-ghurair-ballot-papers-tender-in-court_c1583883>.

²² The High Court nullified the tender for the printing of presidential ballots on July 7 2017 and ordered the IEBC to restart the process. The commission is appealing the decision. *Daily Nation*. Available at <http://www.nation.co.ke/news/Ballots-tender-ruling--Tough-choices-for-IEBC-/1056-4005704-b6ks8fz/index.html>

Chebukati's statement that one of the officials was fired for "incompetence" adds to worries that the Commission may not have the capacity to deliver on its promises.²³ These kinds of problems in the lead-up to election day can depress public confidence, because internal divisions suggest that senior staff and commissioners are not on the same page. It is easy for the public to then wonder how united the IEBC will be as it administers the election. It is also noteworthy that the new KIEMS kits are equipped with a 24 hour battery life. Assuming all kits are deployed with those batteries, this adds an important level of preparedness for election day.

Technology and the IEBC

In addition to the questions related to "complementary mechanisms" outlined above, it is also important to note the status of the Kenya Integrated Election Management System (KIEMS) kits. On a more positive note, the IEBC did ensure that all 45,000 kits had arrived in Kenya by 13 June. This leaves approximately two months to test all the kits, address any glitches, train poll workers in the use of the technology and deploy the kits before election day. On the other hand, there is a pending legal case challenging the integrity of the KIEMS kits, based on the IEBC's alleged failure to ensure that the kits were up to standard and fit for purpose.²⁴

As preparations proceed, it is important for the public to be able to participate in and witness the testing of this technology. This way, people know what to expect on election day and they also have a sense of how prepared the IEBC is to deal with technological problems or failures. While the IEBC conducted a demonstration on 9 June for a select group of stakeholders, it has yet to conduct public tests that show the public how the machines are meant to work and what the troubleshooting options are.

The IEBC also has other pending responsibilities. According to the Elections Act, the IEBC must publish polling stations' results forms on an online public portal.²⁵ This plan is potentially groundbreaking, because it promises full transparency with regard to results tallying and allows the public to conduct its own parallel count.

The Commission's Acting ICT Director, Chris Msando, has confirmed that the Commission is developing this portal, but it remains unclear when it will be ready, tested and launched. The Acting ICT Director also claimed that the IEBC would be providing one generator to every polling station in the country, along with electricity infrastructure in areas that lack it.²⁶ Updates given at the National Elections Conference indicate, however, that the Commission will only be providing gas lamps at polling stations. The provision of lamps is a step forward, because it means that polling station staff will at least have some source of light for the counting procedure. What is worrying, however, is how effective gas lamps will be in ensuring that all those present during counting can accurately verify the procedure and the results, especially in areas that rely solely on those lamps for light.

²³ Geoffrey Mosoku. 7 June 2017. "NASA presidential candidate Raila Odinga warns IEBC on ballot paper tender." *Standard Media*. Available at <https://www.standardmedia.co.ke/article/2001242605/nasa-presidential-candidate-raila-odinga-warns-iebc-on-ballot-paper-tender>.

²⁴ *Khelef Khalifa & 2 others v the IEBC and the Kenya Bureau of Standards [2017] eKLR*

²⁵ Elections Act, 2011, Section 39(1C)(c)

²⁶ Interview with Chris Msando. 2017. Nairobi Safari Club.

Recommendations

- The IEBC must provide more information about its deployment of returning officers, including a list of these officers' home areas, where they have been currently deployed and how long they have been with the Commission, including whether or not they have worked as ROs before (and the location of that previous assignment, if applicable).
- Going forward, the IEBC should also immediately publicize its plans to publicly test the election day technology around the country. The Commission should invest in broad publicity around these tests in order to ensure that as many people as possible are aware of them.
- Most importantly, the IEBC should generally be much more aware of the fact that – regardless of its new leaders – it carries heavy baggage. Given Kenya's electoral history, the IEBC should expect mistrust, suspicion and criticism. If, instead of being defensive, it invites engagement and open dialogue, the Commission could pave the way for new, stronger relations with the public. In that vein, we urge the IEBC to be more open to questions and criticism about its decision to directly award the ballot printing contract to Al Ghurair. The IEBC should immediately engage political parties and independent civil society organizations in face-to-face talks about the procurement decisions in order to prevent last minute court cases, which could derail the entire electoral calendar. These talks should focus on ways to alleviate mistrust and could include mechanisms through which parties and/or their trusted agents could monitor the process.
- The IEBC must also remember that Kenyans have many reasons to be mistrustful of public procurement processes, especially given the myriad irregularities from past such processes and the evidence related to recent high-profile scandals on this very issue. In light of this context, the IEBC could inspire much-needed public confidence if it openly acknowledged its understanding of this context, communicated the ways in which it is attempting to learn from the past, and proactively invited the public to air their thoughts and questions on this topic. Furthermore, while internal IEBC disagreements are natural, it is essential that such matters do not impact the administration of elections and public confidence in that administration.
- As election day approaches, the IEBC should also widely publicize its plans for the use of technology on election day, including the deployment and security plan for the KIEMS kits, and the status of the online portal through which to access results tally sheets. Finally, we recommend that the IEBC does more to ensure that all polling stations have adequate electricity, especially because polling officers will likely be counting and tallying results at night. Generators must be provided so that these officers as well as agents and observers can clearly see and verify the process.

Voter Registration and Audit of Voters' Register

Verification of the Voters' Register

The IEBC invited those Kenyans who had registered to vote to inspect their registration details from 11 May through 9 June. This process was supposed to start on 10 May, and the IEBC did not provide a reason for the one-day delay. For eligible Kenyans abroad, verification was held between 15-30 May. In order to verify details, Kenyans were required to visit polling stations within their county assembly wards. There, they presented the identification document (ID) used to register and IEBC officials identified them (or not) on the biometric register.

InformAction observers around the country noted several issues during the verification process. First, there were instances in which voters who had registered could not be found in the register. These individuals had to fill out forms, which were then to be forward to IEBC offices. If the IEBC verifies that they did indeed register, they will be added to the biometric register. It remains unclear how exactly the IEBC will verify whether these people did register. One possibility is that the Commission will look for evidence of a completed "Form A," which registrants were supposed to fill out at the time of registration. Since IFA observers noted that these forms were not consistently used, however, it is unclear how reliable the IEBC's verification process will be. Second, there were multiple cases in which people's ID numbers were incorrect in the register. Third, IFA observers witnessed cases in which multiple people shared ID numbers in the register. Finally, observers documented many cases of deceased voters still present in the register. A related and troubling finding is the presence of deceased voters who have been transferred from their original polling stations. These cases raise fundamental questions about the reliability of the process of registration and the overall credibility of the voters' register.

Audit of the Voters' Register

Verification of voters' registration details occurred in parallel to KPMG's audit of the voters' roll. The audit was contentious, primarily because -- despite a public statement from civil society groups requesting regular updates and emphasizing the importance of open communication about the status of the process²⁷ -- neither KPMG nor the IEBC offered progress reports or even updated estimates regarding the expected date of completing the process. The silence was concerning, not least because it was not immediately clear how the IEBC would reconcile voters' verification of their details, which was occurring using the unaudited register, with the data in the eventual audited register.

Moreover, there were inconsistencies in the timeline. While the IEBC claimed that the audit began on 31 March, KPMG explained that the timeline for conducting the audit could not start until it had received access to all the data required, including the list of registered voters, the list of births and deaths, the database of national identity cards and the list of passports. KPMG received the necessary data over a period of three-four weeks, with the last batch only submitted on 19 May.²⁸

²⁷ Kura Yangu Sauti Yangu. 19 April 2017. "Kura Yangu Sauti Yangu Statement on the KPMG audit of the register of voters." Available at <<http://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/595-kura-yangu-sauti-yangu-statement-on-the-kpmg-audit-of-the-register-of-voters.html>>.

²⁸ IEBC. 9 June 2017. "Media Release. Report on Audit of the Register of Voters. June 9, 2017." Available at <<https://www.iebc.or.ke/uploads/resources/Kps2HflmE3.pdf>>.

In a surprise announcement on 8 June, the IEBC informed certain stakeholders that KPMG and the Commission would be holding a joint event to present the audit findings on the following day. Notwithstanding its problematic methodology, KPMG's presentation included several important conclusions. First, it is clear that Kenya's system of registering deaths is highly dysfunctional. Out of the 2.3 million expected deaths in the period January 2012 through December 2016 (including 1,534,009 records of those who were 18 or above), the civil registry included only 970,895 such records, which represents 42 percent of all deaths. For reasons that were not clear, KPMG was given only 435,175 (45 percent) of those records, which represented only 19 percent of the total deaths over this period. Out of these, only 196,988 records were complete enough for use in the register. Overall, then, KPMG used a set of death records that represented only 8 percent of the total estimated deaths and 45 percent of the data that KPMG was given. There is clearly a striking gap in the registry, but it is unknown why so many records are missing. What is more worrying is the lack of an explanation for why KPMG did not receive at least all the records in the registry's possession.

Out of the 196,988 records KPMG investigated, the firm found that 92,277 exactly matched records in the voters' register. It therefore recommended that these 92,277 be immediately purged. Since KPMG did not receive the complete list of deceased persons, however, it is not possible to know exactly how many others remain in the list of voters. The firm estimates, however, that there are about 1,037,260 dead voters currently in the register, representing just over 5 percent of the entire list of voters in Kenya. Notably, this number shows how little progress has been made since 2007, when the Independent Review Commission reported that the register contained approximately 1.2 million dead voters.²⁹

The audit also revealed that the process through which the IEBC receives updates about deceased voters is strikingly inefficient and disorganized. In order to get such updates, the IEBC sends its staff into the field to talk to local authorities and gather information about who in the area has recently passed away. Since it is the registry of deaths that is responsible for collecting this information, however, KPMG recommended that the IEBC cease the practice of fieldwork for gathering this information. Indeed, it would be much more efficient if the civil registry regularly updated the IEBC with a list of recently deceased Kenyans.

KPMG also found that the current voters' list includes:

- 171,476 records in which the national ID number in the voters' list does not match any ID in the National Registration Bureau's data
- 17,523 records of voters whose details could not be found in the data from the Directorate of Immigration
- 264,242 records which were duplicate IDs or passports or were incomplete
- 5,247 records that do not have fingerprint images

²⁹ IREC 2008, 79.

Of the 171,476 records that could not be identified in the civil registry, KPMG reported that clerical errors were likely the cause of much of the problem. Similarly, KPMG said that since the list of passports it had used included only currently active passports, it could be the case that many of the 17,523 invalid passport records were expired passports.

Given the zeal with which Kenya has pursued biometric voter registration and identification, the number of duplicate entries is concerning. In spite of the duplicates, however, KPMG reported that the integrity of Kenya's biometric system is "very good."

In total, KPMG reported that there are 502,409 "irregular exceptions," which should be urgently addressed. It also noted that women and youth continue to be under-represented in the register.

Given the difficulty KPMG faced with regard to acquiring all the necessary data, especially from the registry responsible for keeping track of deaths, it is questionable how complete and accurate the audit's findings are. The complete list of deaths represents only 42 percent of the total estimated deaths in the country, and KPMG received less than half of that already incomplete list. Since KPMG did not conduct fieldwork for its audit, it also has no information about cases such as those in which voters who had never registered found themselves in the list and cases in which voters found that they had been placed in areas that had no connection to their home polling stations. These problems indicate a serious lack of transparency in the creation of the voters' register. If voters appear in the register without their request to be included, it raises critical questions about the security of citizens' data. Moreover, since the audit took place at the same time that voter verification of the register was proceeding, it is impossible to tell whether any of the audit's findings are contradictory to the issues that emerged during that process. As such, the audit has limited utility.

The IEBC released KPMG's full audit report on its website on 11 July, less than one month before election day. The late release makes it very difficult for researchers and members of the public to read and act on the report in enough time to have meaningful impact.

The IEBC has updated the register since the release of the audit results. By its own admission, however, it could only address the issues that KPMG was able to identify and verify. Since so much data was missing for purposes of the audit, the certified register will still include dead voters and other problematic entries. In fact, the public's post-audit check of the register revealed that there are still unresolved problems with nonsensical ID numbers (ie. the number 0 being identified as the ID number of certain registered voters).³⁰

Data

We commend the IEBC's online publication of the updated voters' register statistics, including the number of registered voters at the polling station, polling centre, ward, constituency and county levels. It is also important to note, however, that the law calls for the IEBC to make the register (not just the statistics) publicly accessible. For this data to be most useful, it is also necessary for the IEBC to also publish the pre-audit data. In this way, independent observers, researchers and voters can track and understand changes.

³⁰ Nancy Agutu. 29 June 2017. "IEBC under fire after Kenyans get curious feedback on registration status." *The Star*. Available at <http://www.the-star.co.ke/news/2017/06/29/iebc-under-fire-after-kenyans-get-curious-feedback-on-registration_c1588176>.

Recommendation

- The IEBC should seriously consider supplementing KPMG's findings with an audit that is based on list-to-people/people-to-list methodology and conducted by election experts. Such an audit could shed light on the myriad problems Kenyans encountered when attempting to register as well as on all the reasons why some Kenyans may not even attempt to register. Moreover, it could highlight the many ways in which voters' information is misrepresented in the register.
- In the long run, it is critical that the Civil Registration Department address deficiencies in the public's registration of deaths by investigating and acting on the reasons why so many deaths go undocumented. The Civil Registration Department must also create and maintain a system through which it sends the IEBC updated data on a regular basis so that the register of voters can stay updated.
- Moreover, we recommend that the IEBC immediately publicize the pre-audit voters' register data at all levels so that independent observers and other researchers can understand how things have changed. Finally, the IEBC must honour its legal obligation to publish the voters' register. This was supposed to have been done at least 30 days before the election.³¹

Political Party Primaries

According to the electoral calendar, Kenyan political parties were to hold their primary contests between 13 and 26 April. In response to a petition filed in the High Court, however, the deadline for primaries to take place was extended to 1 May.

Party primaries play an important role in electoral processes, because they shift power away from party elites and transfer it to party members, who have the power to determine who will represent them on the ballot. As such, primaries reflect parties' commitment to internal democracy and demonstrate their organizational and administrative capacity.

Around the country, party primaries were marred by striking disorganization (including delayed opening of polling stations, lack of voting materials, insufficient or incorrect ballots, and lack of space for secret voting); parties' lack of administrative capacity (including untrained and insufficient staff and lack of electricity in polling stations); serious confusion regarding the voters' register and party membership lists; incidents of multiple voting; lack of ballot secrecy; allegations of bribery and other fraud; violence; and multiple delays throughout the process.³² While all these issues were serious, the confusion regarding the register and incidents of violence were the most concerning.

³¹ The Elections Act, No. 24 of 2011 was revised in 2016 to include this requirement. It can be found in Section 6A(3)(b) of the Act.

³² InformAction (IFA). June 2017. "Burning Ballots: Kenya's Chaotic Primaries." Available at <http://inforaction.tv/index.php/news-from-the-field/item/589-election-watch-report-4>.

Problems with voters' register and party membership lists

One of the most serious and widespread problems was the lack of an updated register of voters, which was meant to be used to identify eligible voters during primaries.³³ Despite promises to the contrary, the IEBC did not provide parties with the most updated list of voters to use during their primary contests. As a result, some parties used the now outdated 2013 register to identify registered voters, while others used their own (often incomplete and inaccurate) party membership lists. In fact, the Kenya National Commission for Human Rights noted that names missing from the party registers was a problem in more than half of all polling centres that the Commission monitored,³⁴ and InformAction observers noted the same issue in its field bases.³⁵ In fact, in some cases, parties did not have any list with which to identify voters.³⁶ Domestic observer groups, including InformAction, the Elections Observation Group (ELOG) and the Kenya National Commission for Human Rights (KNCHR) noted that confusion about the availability of the voters' register led to delays, cancellation of voting and multiple voting.³⁷

The lack of a credible register and/or party membership list makes it impossible for authorities to track who is voting and whether or not voters are eligible to cast ballots at all. This leads to the inability to gauge voter turnout or to have any real sense of who participates in such contests. Additionally, it sends a clear message to voters and the public at large that political parties are not interested in empowering ordinary party members or in hearing what the public wants as much as they are in ticking the box of having held a primary election. In the minds of parties, primaries are little more than administrative hurdles on the way to election day. Clearly, parties' lack of respect for the meaning of a primary trickles down; voters have also come to see primaries as a way to game the system.

Violence and intimidation

Observers also witnessed violence and intimidation around the country. In some areas, groups circulated flyers warning people not to vote for certain candidates.³⁸ In Isiolo, members of the Borana community stopped voters from the Turkana community from casting votes in certain polling stations.³⁹ Other prominent examples of violence occurred in Kisii, where disgruntled candidates violently stormed polling stations, and in Kericho, where one politician's hired "goons" destroyed voting materials and set ballots on fire.⁴⁰ Violence also targeted candidates.⁴¹ The KNCHR observers witnessed brutal attacks on party supporters and party staff, including with

³³ The two dominant parties (Jubilee and ODM) require that voters be registered to vote and be party members. Both the IEBC register and the party membership list are thus required, unless party membership lists indicate the registration status of members.

³⁴ KNCHR 2017, 19.

³⁵ IFA 2017.

³⁶ IFA 2017.

³⁷ ELOG. 23 April 2017. "ELOG Preliminary Statement on the on-going political party primaries." Available at <<http://elog.or.ke/index.php/2015-10-03-13-22-34/latest-news/item/78-elog-s-preliminary-statement-on-the-on-going-political-party-primaries>>.

³⁸ ELOG 2017, 3

³⁹ IFA 2017.

⁴⁰ IFA 2017.

⁴¹ IFA 2017.

machetes and other crude weapons.⁴² Overall, the KNCHR witnessed acts of violence in all 33 counties that it monitored.⁴³

Violence was also the result of parties' lack of respect for election results. This was a significant problem in Kisumu, where two of ODM's returning officers awarded nomination certificates to two different alleged winners, incumbent Governor Jack Ranguma and Senator Anyang' Nyong'o. Protests followed, and the matter was eventually taken to the Political Parties Dispute Tribunal. The chaos and confusion surrounding ODM primaries also led to one death and several injuries in Mombasa and Homa Bay.⁴⁴ In Kilifi, ODM awarded nomination certificates in an undisclosed location, raising questions about the credibility of the results.⁴⁵

Parties' clear lack of capacity, severe disorganization and willingness to place elite interests above those of ordinary voters reveal a significant vacuity within these structures. First and foremost, Kenyan political parties are clearly not member-based organizations. Indeed, parties' lack of clear, reliable (or any) party membership lists demonstrates the farcical nature of party membership. In some instances, observers noted party officials handing out membership cards in rooms adjacent to voting areas. Such haphazard issuing of membership cards suggests parties' rather casual view of membership. Moreover, observers' descriptions of multiple voting, including cases in which the same individuals voted in more than one party's primary also indicates parties' lack of willingness to respect and/or enforce membership. Voters have expressed their dissatisfaction. In more than one case detailed above, it was voters who insisted that parties clarify which register would be used and voters sometimes refused to participate without a clear register. It is notable that demand for clear rules is coming from voters and not from parties.⁴⁶

It is also important to acknowledge that the Registrar of Political Parties has the responsibility to register, regulate, monitor, investigate and supervise political parties to ensure that they are in compliance with the Political Parties Act. That law also tasks the Registrar with the verification of the list of all members of political parties. Indeed, the Registrar warned parties that violence during party primaries would result in de-registration.⁴⁷ To date, the Registrar has taken no action to address the chaos and violence that characterized party primaries. This continues a record of inaction and dereliction of duty by this office. It is noteworthy that the Registrar has been serving in an "acting" capacity for the last five years and thus has little security of tenure. The ambiguity of her position is likely a contributing factor to her failure to act in a more decisive manner regarding issues under her purview.

⁴² Kenya National Commission on Human Rights (KNCHR). May 2017. "The Fallacious Vote," pages 26-28.

⁴³ KNCHR 2017, 25.

⁴⁴ Tony Omondi. 24 April 2017. "Death, chaos as ODM polls off in some centres." *Daily Nation*. Available at <http://www.nation.co.ke/news/politics/Death--chaos-as-ODM-polls-off-in-some-centres/1064-3902556-sp4s7p/index.html>.

⁴⁵ Elias Yaa. 25 April 2017. "ODM certificates issued in secrecy as voters protest." *The Star*. Available at http://www.the-star.co.ke/news/2017/04/25/odm-certificates-issued-in-secrecy-as-voters-protest_c1548759.

⁴⁶ IFA 2017.

⁴⁷ Patrick Vidija. 5 April 2017. "Violent parties risk no funds, de-registration, registrar warns." *The Star*. Available at http://www.the-star.co.ke/news/2017/04/05/violent-parties-risk-no-funds-de-registration-registrar-warns_c1538388.

Recommendations

- Party primaries are meant to empower rank-and-file party members by giving them a say in who will appear on the ballot on election day. In order for primaries to serve this purpose, they must be voter-centred affairs, characterized by respect for the rules, respect for pre-determined and well-communicated timelines and transparent, reliable processes that are open to public scrutiny. As a starting point, political parties must prioritize the creation of reliable membership lists, built from the ground up and based on face-to-face interactions with the public.
- Between now and the next electoral cycle, political parties should also develop and implement training programs to educate party elites and members about the purpose and administration of primary elections so that in the future they are well-run, credible contests. Training should include – at minimum – capacity building in relation to the development of timelines, administrative/logistical arrangements, and contingency plans.
- Finally, the Registrar of Political Parties must act on her responsibility to hold parties accountable for the ways in which their administration of primaries violated the law. In the long run, stakeholders must undertake a critical assessment of the relevance of the Office of the Registrar of Political Parties. This assessment should include questions and thinking about how to strengthen the office, including by appointing a substantive officer holder who will not be beholden to external influences and factors.

Security

Security is an urgent concern in the context of upcoming elections, primarily because election periods are prime environments for public expressions of political support and opposition. Indeed, elections are intimately tied to basic rights of assembly, expression and speech. In the Kenyan context, however, police behaviour since the last election demonstrates a complete lack of respect for human rights and a sharp increase in the willingness to use excessive - often partisan - force against members of the public. Combined with widespread impunity for culpable members of the security forces, it creates an extremely hostile environment for the public to freely exercise their rights during elections.

There are at least three areas of concern with regard to security in the lead-up to elections. First, there is a growing body of evidence demonstrating Kenyan security forces' use of extrajudicial killings. Between January and June 2017, reports indicate that police shot and killed 80 individuals. Of those, 57 (71 percent) were unarmed.⁴⁸ Stories of extrajudicial killings and disappearances are increasingly common, especially in informal settlements. The *Machozi ya Jana* (Yesterday's Tears) campaign, initiated by the Police Reform Working Group, religious leaders and several human rights defenders, has highlighted the victims' stories, many of which describe young men

⁴⁸ Daily Nation. 2 July 2017. "Deadly Force." Available at <http://www.nation.co.ke/newsplex/deadly-force-database/2718262-3402136-ms1o0nz/index.html%20>.

being killed for no apparent reason. Families who have pushed for accountability and answers have been met with resistance.⁴⁹ The situation in Kenya has sparked international concern, with the African Commission on Human and People's Rights issuing a letter of appeal to the Kenyan government on the issue, citing "the widespread patterns of extra-judicial killings implicating the police in Kenya and the equally unsettling lack of investigation and prosecution of such cases of extra-judicial killings."⁵⁰ Human Rights Watch researchers have also commented on the Kenyan authorities' less than reassuring response to such abuses.⁵¹

Secondly, security forces have exhibited worryingly poor policing of public assemblies, characterized by the excessive use of force. Some of the most notable examples occurred in mid-2016, when anti-IEBC protests were met with severe police brutality. In one of the worst incidents, police kicked and stomped on a man's inert body, eventually leaving him on the side of the road.⁵² The IPOA found that police brutality during these protests resulted in injury to 88 people, and the Authority made special mention of its great concern about "the use of excessive force on innocent children, women, the disabled and other special interest groups."⁵³ In June 2016, at least five people died and 60 were injured by police gunfire during largely peaceful protests in Nyanza, an opposition stronghold. Victims included uninvolved bystanders, students on their way home from school and people at work or in their homes.⁵⁴

Third, there is the prevailing sense of general insecurity in the country, which acts as a backdrop for the issues mentioned above. Suspected terrorist attacks have re-emerged⁵⁵ in northeastern Kenya, and violent confrontations between ranchers and herders continue in the Rift Valley. This context is worrying, because security forces use insecurity and unrest – especially the threat of terrorism – to justify their tactics, no matter how brutal and unconstitutional. In fact, Human Rights Watch has found that impunity is especially marked in cases involving suspects of terrorism.⁵⁶

These issues are all compounded by the National Security Council's recent findings, which show that politicians are arming private militias and that there is a proliferation of small arms and light weapons ahead of election day.⁵⁷

⁴⁹ Ramadhan Rajab. 21 June 2017. "We are living in a police state! Families of youth slain by rogue cops speak out." *The Star*. Available at http://www.the-star.co.ke/news/2017/06/21/we-are-living-in-a-police-state-families-of-youth-slain-by-rogue-cops_c1579228.

⁵⁰ African Commission on Human and People's Rights. 26 May 2017. "Letter of Appeal to the Republic of Kenya." Available at <http://www.achpr.org/news/2017/06/d290/>.

⁵¹ Otsieno Namwaya. 3 April 2017. "Investigate Killing of Two in Nairobi's Eastleigh." Human Rights Watch. Available at <https://www.hrw.org/news/2017/04/03/investigate-killing-two-nairobis-eastleigh>.

⁵² Lizzie Dearden. 17 May 2016. "Kenya launches inquiry after police photographed kicking and beating man in crackdown on protests." *Independent*. Available at <http://www.independent.co.uk/news/world/africa/kenya-photo-picture-man-beaten-kicked-police-protester-demonstration-nairobi-inquiry-a7034501.html>.

⁵³ Independent Policing Oversight Authority. February 2017. "Monitoring Report on Police Conduct during Public Protests and Gatherings." Available at <http://www.ipoa.go.ke/wp-content/uploads/2017/03/IPOA-Anti-IEBC-Report-January-2017.pdf>.

⁵⁴ Human Rights Watch. 20 June 2016. "Kenya: Police Killings During Protests." Available at <https://www.hrw.org/news/2016/06/20/kenya-police-killings-during-protests>.

⁵⁵ Otsieno Namwaya. 10 June 2017. "Upsurge in attacks threaten to suppress vote." Human Rights Watch. Available at <https://www.hrw.org/news/2017/06/10/upsurge-attacks-threaten-suppress-vote>.

⁵⁶ Human Rights Watch. 19 July 2016. "Deaths and Disappearances." Available at <https://www.hrw.org/report/2016/07/19/deaths-and-disappearances/abuses-counterterrorism-operations-nairobi-and>.

⁵⁷ Samuel Kisika. 23 March 2017. "Uhuru: Politicians are forming militia groups for elections." *The Star*. Available at http://www.the-star.co.ke/news/2017/03/23/uhuru-politicians-are-forming-militia-groups-for-elections_c1529882.

As election day approaches, the tremendous increase in security sector budget allocations and the large scale recruitment of police also raise concerns. For instance, the government allocated KES 54.6 billion to boost security during the 2017-2018 financial year, including KES 8.1 billion for the leasing of police vehicles and KES 24.8 billion for police and military modernization.⁵⁸ Moreover, security forces during elections will include officers from the National Intelligence Service, Kenya Defence Forces, the National Police Service, the Kenya Forest Service, Kenya Prisons, Kenya Wildlife Service and the National Youth Service.⁵⁹ Whose command will these various forces come under? Where will they be deployed? Will all officers receive training in citizen-centred crowd control and the measured use of force?

Recommendations

- The President and Inspector General of Police must officially and immediately acknowledge that extrajudicial and arbitrary killings are a systemic issue, requiring comprehensive investigation via an official inquiry and the prosecution of those found to be responsible. The President and Inspector General of Police should also prioritize increased support of and cooperation with IPOA to enable it to effectively undertake its mandate.
- The Inspector General of Police must demonstrate his commitment and that of his forces to the Kenyan Bill of Rights by explaining how policies related to public order and crowd control during elections will respect people's rights and freedoms to peacefully express themselves.
- The recruitment of officers from multiple state agencies for the purpose of election-related security requires urgent public clarity. The provision of national security is the exclusive function of the National Police Service.⁶⁰ In some cases, however, the Kenya Defence Forces may be deployed for internal security. Specifically, the KDF may be deployed to restore peace in any part of Kenya affected by unrest or instability only with the approval of the National Assembly. This deployment requires actual unrest, a situation grave enough to permit the deployment of the Kenya Defence Forces, and parliamentary approval. Since these criteria have not yet been met, the authorities must justify their rationale for involvement of the Kenya Defence Forces outside the parameters established by the Constitution. We recommend that security operations in the context of elections remain primarily the responsibility of the National Police Service and that any joint operation with the Kenya Defence Forces receive approval by the National Assembly.
- Lawmakers must align the provisions on public order management in the National Police Service standing orders with those of the African Commission's Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa. Additionally, the National Police Service should make its guidelines on public order management/policing assemblies publicly available.

⁵⁸ Cyrus Ombati. 30 March 2017. "Kenya Police given Sh8.1b to lease vehicles ahead of elections." *Standard Media*. Available at <https://www.standardmedia.co.ke/article/2001234542/kenya-police-given-sh8-1b-to-lease-vehicles-ahead-of-elections>.

⁵⁹ Dominic Wabala. 24 June 2017. "Command centre established to respond to violence, attacks during elections." *Standard Media*. Available at <https://www.standardmedia.co.ke/article/2001244694/command-centre-established-to-respond-to-violence-attacks-during-elections>.

⁶⁰ Constitution of Kenya, 2010, Article 243(3).

- The use and deployment of all weapons, lethal and non-lethal, must be accounted for in the aftermath of an operation, including who was issued with a weapon and the circumstances under which it was discharged, in keeping with the relevant laws and regulations. For instance, the National Police Service Standing Orders provide guidance on the operational issues concerning the issuance and carriage of firearms and related equipment. Relevant command officers must adhere to the Service Standing Orders and ensure that there is an effective and auditable system for the issuance of firearms to officers involved in operations for which the issuance of firearms is an integral part. An inventory of the same must be publicly available upon request.
- Security forces must take care to proactively minimize the possibilities of displacement caused by their operations, and when such displacement occurs, they must ensure that adequate arrangements are made in conjunction with the IEBC to ensure that displaced persons are not deprived of their constitutional right under Article 38 of the constitution.

Voter Education

Voter education has been slow to start, but there has been some notable progress in the last month. In May, ELOG's long-term observers noted a sharp increase in the IEBC's provision of voter education. It is also commendable that there was a modest increase in outreach towards those with disabilities.⁶¹ This was an improvement from the previous month, when ELOG noted that less than 50 percent of Kenyan constituencies were benefitting from voter education from the IEBC and civil society organizations. The increase in voter education activities coincides with the IEBC's mid-May release of an updated voter education training manual and voter education curriculum. Unfortunately, hard copies of the materials are not due to be ready until the end of June, leaving IEBC's field-based voter education providers with just a little more than one month to ensure that voters have the information they need before election day. In the meantime, many civil society organizations have been using their own materials to conduct voter education.

The lack of hard copies of the curriculum is compounded by the lack of a structured approach to providing voter education. IEBC ward level educators, for instance, do not always have their own events dedicated to voter education. Instead, they tend to provide information through others' events, including chiefs' *barazas*, church and mosque programs, and CSO meetings. They also used IEBC's voter verification processes as platforms through which to provide people with information. Although this approach ensures that voter educators will have an audience, it is not a systematic approach and so there is little guarantee that the information is reaching everyone, especially the most marginalized.

The IEBC is fairly active on social media, posting updates on its activities and pre-election preparations on Facebook and Twitter. The IEBC has also produced several voter education videos that cover topics such as voter registration, verification of registration details, and biometric voter registration.

⁶¹ ELOG. "ELOG Long Term Observation Key Findings in the Month of May 2017." <<http://elogs.or.ke/index.php/2015-10-03-13-22-34/latest-news/item/82-elogs-may-lto-report>>.

In partnership with the International Foundation for Electoral Systems (IFES), the IEBC also recently launched a program aimed at getting out the youth vote. This program, called Y-Vote, aims to educate, engage and motivate young voters to participate in the election. Y-Vote targets 17 counties, focusing especially in areas where there are large numbers of first-time voters, and plans to use door-to-door canvassing, interactive voter education games and community dialogue to motivate voters.⁶²

Recommendations

- The IEBC must urgently prioritize voter education by assisting its ward-based educators with guidance and funding to create a systematic method through which to reach as many people as possible throughout the country. Moreover, the IEBC should create a plan for the provision of continuous voter education, as required by law. Such continuous education would negate the need for and expense of intensive, pre-election day “cramming.”
- In the long term, voter education should also aim to cover issues beyond the technical administration of elections, such as ethnic divisions, ethnic vs policy-based political parties, the leadership and integrity provisions in the constitution, and voters’ and citizens’ roles in democracies.

Voting, Counting, Tallying and Results Announcement

Voting

In 2013, election day in Kenya was marked by extensive technological breakdowns. While several observer groups commended Kenyans for the patience and calm they exhibited while standing in long queues, they were less positive about the administration of election day activities. The European Union observed that the electronic voter identification device (EVID) kits were not used in nearly half of all polling stations, because they were erroneously configured, there was insufficient battery power, and/or staff had not received adequate training on their use. The EU also cited violations of ballot secrecy, confusion about the register, the use of multiple registers,⁶³ and inadequate assistance for disabled and illiterate voters.⁶⁴ The Carter Center reported that the EVID kits worked in only 41 percent of polling stations it visited.⁶⁵

To its credit, the IEBC does appear to be trying to ensure that its technology has sufficient power. At the National Elections Conference, the IEBC explained that the KIEMS kit is capable of functioning for twelve hours (without an external power source). It also comes equipped with a 12-hour power bank, which means that KIEMS kits should be operational for 24 hours.

⁶² Geoffrey Mosoku. 22 June 2017. “IEBC campaign to target young voters.” Standard Digital. <<https://www.standardmedia.co.ke/article/2001244532/iebc-campaign-to-target-young-voters>>.

⁶³ For a full explanation of the problems with voter registration in the 2013 electoral cycle, please see Africa Centre for Open Governance. 2013. “Voter Registration for the 2013 General Elections in Kenya.” Available at <<http://kptj.africog.org/voter-registration-for-the-2013-general-elections-in-kenya/>>.

⁶⁴ European Union Election Observation Mission (EUEOM) to Kenya. 2013. “Final Report,” page 30.

⁶⁵ The Carter Center (TCC). 2013. “Observing Kenya’s March 2013 National Elections,” page 46.

The IEBC also has a training plan in place. By 8 July, it aims to have finalized all recruitment of its staff. These staff will then take part in a training program from 13 July through 5 August. Training will be conducted at county, constituency, and ward levels.

Moreover, there are nearly two months of time for testing the new technology (13 June – 8 August), training staff in its use, provision of backup batteries and deployment. On 12 June, the IEBC also announced that it had already identified all 40,700 polling stations and that these would be gazetted in June. These were published earlier this month on the IEBC's website.

Results Transmission

Although observers generally agreed that counting at the polling stations was acceptable – notwithstanding the Carter Center's observation that a significant number of counting operations did not reconcile the number of ballot papers properly - the electronic results transmission system largely failed to function and was only able to be used effectively in a few polling stations.⁶⁶

After the ERTS failed, tallying became problematic, especially because there was limited access for observers and agents.

...the provisional results system had been contemplated as the principle transparency measure, with plans for screens at constituency, county and national tally centres. The system for official results tallying did not have sufficient transparency, beginning with the absence of any detailed procedural guidelines in the public domain. EU EOM observers reported that although they and party agents had access to constituency and county tally centres, neither their appointed place nor the disposition of election staff enabled them to follow closely enough how tallying was carried out. Once constituency results forms arrived at the National Tally Centre (NTC), the same principle applied, with observers limited to a balcony overlooking the hall. Party agents were able to [observe] the tallying of 16 constituency results forms before being expelled from the NTC for disrupting the process. From then on, the IEBC accorded party agents 20 minutes to review results before they were announced. EU EOM observers reported that tallied results at lower levels were often not signed by party agents.⁶⁷

Results Announcement

Lacking a complete set of electronic results, the IEBC waited for its poll workers to arrive in Nairobi with the paper forms in hand. This delay caused significant public tension and unease, especially as allegations surfaced that former presidential candidate and current President Uhuru Kenyatta's former party, TNA, shared a server with the IEBC and therefore had access and power to alter results as they came in.⁶⁸ Once the paper forms arrived, they were riddled with innumerable errors and inconsistencies, which are detailed below.

⁶⁶ TCC 2013, 48; EUEOM 2013, 30.

⁶⁷ EUEOM 2013, 30-31

⁶⁸ Ngunjiri Wambugu. 18 March 2013. "Over to you now, Supreme Court judges." Available at <http://www.capitalfm.co.ke/eblog/2013/03/18/over-to-you-now-supreme-court-judges/>.

The results announcement and transparency around the final figures was also problematic. First, the number of rejected ballots was surprisingly high (more than 5 percent), but this was not reflected in the official results. As a way of explanation, the IEBC claimed that the ERTS had erroneously multiplied the number of rejected votes by eight.⁶⁹ Second, it was not clear whether the percentage of presidential votes would be calculated based on the total number of votes cast or on the total number of *valid* votes cast. “It was regrettable that a fundamental element of the electoral framework was undetermined and vulnerable to political controversy as results came in.”⁷⁰ The IEBC used total votes cast to finally determine the percentage, but this was not announced until minutes before the declaration of the winner.

Finally, the IEBC never provided an easily accessible accounting of polling station-level results. Indeed, results were only ever disaggregated and published at the constituency level.

Published presidential results were only disaggregated to constituency level, making it difficult for stakeholders to trace results they had collected. Although in a positive move the IEBC put all polling station results forms on its website, disaggregation down to polling station results is the only way to ensure that figures are easily traceable and verifiable.⁷¹

In this election, presidential results will be final once they are announced at the constituency level. This increases the focus around polling stations, which will be responsible for the first level of counting, announcement and subsequent transmission of final results to higher levels of authority within the IEBC. The IEBC’s promised online portal of polling station results forms will allow the public to follow results as they are posted and verify them once they are announced at the constituency level.

One important vulnerability in the results transmission process is the lack of a legal provision for a complementary mechanism to use if the ERTS fails. Instead, the IEBC has verbally stated that if that technology fails, hard copies of polling station forms will have to be taken to Nairobi, where they will be checked against transmitted results before declaration. This plan takes Kenya back to processes that were used before the introduction of technology and which are open to manipulation.

Recommendations

- The IEBC must urgently provide a step-by-step overview of how results will be transmitted, especially if the electronic results transmission fails. In the case of technological failure, what role will paper forms play? Additionally, will the IEBC declare results for each office immediately after receiving all the electronically transmitted results, or will paper forms have to be checked against electronically transmitted results before results declaration?

⁶⁹ It is noteworthy that dividing by eight did not produce the correct number.

⁷⁰ EUEOM 2013, 32

⁷¹ EUEOM 2013, 32.

- It is also imperative for the IEBC to publicly test the election day technology all over the country so that voters know what to expect when they go to the polling station. The testing should include simulations of what will happen if systems fail.
- While it is commendable that the IEBC has taken the time and effort to make detailed training plans, it is imperative that the Commission sticks to its timeline, especially since there is only a three-day gap between the end of training and election day. It will also be important for the Commission to ensure that the most difficult substance and practical lessons are completed well before the 5th of August so that there is plenty of time for questions, clarifications and practice.
- We also recommend that the IEBC ensure that its officers are provided with water and food throughout the day and night so that they are not unduly fatigued by the time they are counting and announcing results.
- Finally, given the promised availability of the forms on the portal and the fact that many Kenyans may not have access to the internet, we recommend that accredited media outlets be permitted to publish constituency level results as they are announced, as is the normal practice elsewhere.

Post Election Dispute Resolution

Post-election dispute resolution is integral to democratic systems. When citizens and voters trust the courts to impartially hear election disputes and rule on them in an objective and transparent way, they are less likely to resort to violence. Even if violence is not a risk, effective dispute resolution mechanisms can confer legitimacy on the electoral process and on the final results.

For much of the 2013 electoral cycle, the Kenyan judiciary was a leading light in the quest for institutional reform. This was due to Chief Justice Dr. Willy Mutunga. Before his appointment as Chief Justice, Mutunga had been a leader in the fight for democracy in Kenya and his position conferred legitimacy on the Court and inspired people's faith in its commitment to advancing accountability and justice.

In preparation for the election, Chief Justice Mutunga established the Judiciary Working Committee on Election Preparations (JWCEP), whose task was to oversee the judiciary's preparedness to handle electoral disputes. This committee oversaw and implemented special training for judicial staff to handle election offenses and disputes, and it adopted special rules for the presidential election petitions. These rules were published in the newspapers, which promoted transparency.⁷² The JWCEP was also responsible for a number of other matters, including:

- The development and design of a system for monitoring and evaluating the management and administration of election-related disputes in court,
- Liaising and cooperating with other stakeholders to ensure efficient, effective and timely resolution of election related disputes and offences, and

⁷² TCC 2013, 61.

- Advising the Judiciary on the information that needed to be developed and disseminated to the public.⁷³

In the lead-up to elections, the newly established Judges and Magistrates Vetting Board also examined the qualifications and integrity of all judges and magistrates, resulting in a general clean-up of the judiciary.⁷⁴ The judiciary also fast-tracked all election-related matters, successfully finalizing all 188 election petitions within the statutorily mandated six-month period.⁷⁵

The judiciary's work and preparedness contributed to high levels of public confidence in the lead-up to election day in 2013. In fact, between September 2012 and January 2013, the public's confidence in the judiciary's overall performance hovered between 74 and 75 percent.⁷⁶ This confidence suffered in the aftermath of the election, due in part to questions about the Court's judgment (detailed below) of the presidential election petition. In May 2013, a post-election poll by InfoTrak revealed that less than half of respondents (48 percent) were confident in the Supreme Court; 32 percent said they were not confident.⁷⁷

The 2013 Presidential Petition

Three presidential petitions were filed in the Supreme Court of Kenya after the IEBC's declaration of results. The case filed by Gladwell Otieno and Zahid Rajan on behalf of the Africa Centre for Open Governance and the Kenyan Asian Forum focused on the credibility of the entire electoral process, with special attention to problems in the voters' register and in the tallying of results. Raila Odinga, presidential candidate for The Coalition for Reform and Democracy (CORD) also filed a petition, but this petition's emphasis was on the calculation of the results. Finally, Moses Kiarie Kuria, Denis Njue Itumbi and Flowrence Jematiah Serگون filed a case challenging the inclusion of rejected votes in the total number of votes cast in the final tally.

Judicial Verification and Scrutiny

The proceedings and judgment were problematic. At the beginning of the proceedings, the Supreme Court ordered a scrutiny and verification of polling station-level (Form 34) and constituency-level (Form 36) tally forms from 22 polling stations. The Court's Chief Registrar supervised this process, and it was not open to international observation. Although the verification was supposed to focus on the numbers of votes cast, valid votes and rejected votes, the registrar's report did not include any of these figures. "The methodology used for this exercise is unclear...nor did it produce any

⁷³ Melissa Lukulu. 26 April 2017. "Preparedness of the Judiciary in Handling Elections Disputes." East African Centre for Law & Justice. Available at <<http://eacj.org/general/237-preparedness-of-the-judiciary-in-handling-elections-disputes.html>>.⁶⁹ It is noteworthy that dividing by eight did not produce the correct number.

⁷⁴ TCC 2013, 60.

⁷⁵ International Development Law Organization (IDLO). 2017. "Avoiding Violence and Enhancing Legitimacy: Judicial Preparedness for Handling Electoral Disputes in Kenya and Beyond," page 6.

⁷⁶ The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project South Consulting. February 2013. "Kenya's 2013 General Election. A Review of Preparedness," page 15.

⁷⁷ AfriCOG. May 2013. "Perception Poll May 2013." Available at <http://africog.org/new/wp-content/uploads/AFRICOG%20INFOTRAK%20POLL%20ON%20ELECTIONS%20sun%20-%20Final.pdf>.

remark or conclusion on the discrepancies between the forms or provide the court with sufficient elements to take any kind of decision.”⁷⁸

In fact, however, the scrutiny exercise did reveal important findings, especially related to the number of registered voters. AfriCOG’s observers to the scrutiny process found the following:

1. When comparing the number of votes cast as recorded on Form 34 with the number of registered voters in the Principal Register of Voters, there were 16 cases in which the number of votes cast exceeded the number of registered voters. In Don Bosco Polling Station, located in Kajiado West, the number of votes cast exceeded the number of registered voters by 370.⁷⁹ This was the largest discrepancy in this category.
2. When comparing the number of votes cast as recorded on Form 36 with the number of registered voters in the Principal Register of Voters, there were 18 cases in which the number of votes cast exceeded the number of registered voters. The largest difference was again in Don Bosco, where it was 1,483 votes.
3. When comparing the number of votes cast as recorded on Form 36 with the number of registered voters in the Principal Register of Voters, there were 2 cases in which the number of votes cast exceeded the number of registered voters.
4. Moreover, in only one case was the number of registered voters in the Principal Register of Voters and special register equal to the number of registered voters in the “green book.”
5. There were two polling stations in which the number of valid votes recorded was not accurate.
6. There were 11 polling stations in which Form 36 did not contain the number of registered voters.
7. There were 2 polling stations, one of which has 9 streams and one of which had 4 streams, for which the Green Book did not contain the number of registered voters.
8. There was 1 polling station for which the number of votes cast was not recorded on Form 36.

The registrar also supervised the judiciary’s scrutiny of results forms from 18,000 polling stations. Although the final report of that scrutiny revealed that forms were missing from several polling stations, it did not include details on discrepancies between numbers, “thereby considerably reducing the added value of the exercise.”⁸⁰ The Carter Center also criticized the Court for failing to act on the missing forms. “It is unclear to the Center to what end the re-tally exercise was conducted and what part of the Supreme Court reasoning was based on the report from the registrar of the Supreme Court.”⁸¹ Moreover, it is worth noting that the Supreme Court initially ordered scrutiny of forms from all the polling stations. Midway through the process, the Court ordered scrutiny to stop. The reasoning for this change was never publicly given.

⁷⁸ TCC 2013, 63.

⁷⁹ Don Bosco was listed as having 9 streams. While there were 9 Form 34s for this polling station, the principle register of voters only contained numbers for 7 streams. Thus, the AfriCOG calculation was based on 7 streams.

⁸⁰ TCC 2013, 63.

⁸¹ TCC 2013, 64.

Again, AfriCOG observers' analysis of the scrutiny found issues that were never raised to the Court through the registrar's report. With regard to Forms 34, AfriCOG observers noted forms on which:

- The numbers did not add up
- The number of votes cast exceeded the number of registered voters
- The number of registered voters differed between Forms 34 and the judiciary's own list
- There was a difference between the numbers as written in numerals and words on the same form
- There were no agents' signatures
- Forms 34 were missing
- There were blank Forms 34
- There were figures missing from the form
- Numbers had been changed without an authorizing signature
- There were illegible numbers
- There were non-standard, irregular forms
- There were no results listed for certain candidates
- There were non-identical copies of forms
- One Form 34 (PS 83 in Kieni) had only one registered voter

The table below shows some of the most worrying findings related to constituency-level forms. Where there is more than one figure for the same constituency, all figures are included. In many of the cases below, there was more than one non-identical copy of the form from a particular constituency, which called the reported figures into question. It is unclear why multiple figures were reported:

Table 1: AfriCOG's Initial Supreme Court Scrutiny of Forms 36

Constituency Number	Constituency Name	Number of Registered Voters on Form 36	Number of Votes Cast on Form 36	Remarks
24	Wundanyi	23299	18818	2 forms. Handwritten registered voters. ⁸² Registered voters not indicated in one but votes cast are the same.
25	Mwatate	29436	23063	2 Forms 36.
26	Voi	36943	29642	2 Forms 36. Handwritten votes cast.

⁸² Since standard forms were typed, handwritten entries raised questions. It was difficult to tell when those entries were made and if they were authorised

Constituency Number	Constituency Name	Number of Registered Voters on Form 36	Number of Votes Cast on Form 36	Remarks
27	Garissa Township	31756	23272	Two forms 36
28	Balambala	18220	13869	Handwritten number of voters
29	Lagdera	12520	11080; 11081	Two Forms 36, one Form 36 not serialised
30	Daadab	19304	15623	
31	Fafi	17353	13972	Two Forms 36. The 2nd Form 36 was a photocopy.
32	Ijara	16579	14104; 14084	Two Forms 36. 2nd figure on Form 36 not clear.
33	Wajir North	15912	No total for votes cast; 14458	Two Forms 36. All the figures in one of the forms were handwritten. The other was fully typed.
34	Wajir East	19484; 19434	16270	Three Forms 36. All the figures handwritten for two of the three forms. The third form only had registered voters as handwritten.
35	Tarbaj	16422	13830	
	Mandera West	17020	15291	Two Forms 36.
40	Banissa	13764	12151	
41	Mandera North	34659	30040	Illegible numbers
42	Mandera South	10574	9689	Two Forms 36. The 2 nd Form 36 number of registered voters was handwritten.
43	Mandera East	28722	22955	
44	Lafey	13227	11492	Two Forms 36. One had no final tally/aggregate of the figures at the bottom.
45	Moyale	36621	33593	Registered voters handwritten.
46	North Horr	24947	20616	Two Forms 36
47	Saku	20242	18168	
48	Laisamis	21498	17503	

Constituency Number	Constituency Name	Number of Registered Voters on Form 36	Number of Votes Cast on Form 36	Remarks
49	Isiolo North	40060	34409	Two Forms 36. Registered voters in one form handwritten & not legible.
145	Kapseret	47591	40248	
126	Kesses	47693	42302	
147	Marakwet East		25368	No registered voters column.
148	Marakwet West	36055	32729	
149	Keiyo South	40704	37405	
151	Tinderet	33105	29440	
152	Aldai	50401	45777	
153	Nandi Hills			No totals/aggregate
154	Chesumet	52963	42464	
155	Emgwen	39587	39031	
156	Mosop	47917	43967	
157	Tiaty	20485	17948	Two Forms 36. Cast votes are different
158	Baringo North	32961	29745; 29757	Two Forms 36. Cast votes are different
159	Baringo Central	29297	26314; 26129	Two Forms 36. Cast votes are different
160	Baringo South		23766	No registered voters column.
161	Mogotio	23984	22300; 23301	Two Forms 36. Cast votes are different
162	Eldama Ravine	38252	37230; 37407	Two Forms 36. Cast votes are different
163	Laikipia West	82632	Blank; 75500	Two Forms 36. One has no votes cast column.
164	Laikipia East	62795; 63370	57396	Two Forms 36. Different registered voters figures.

Source: AfriCOG 2013 unpublished

The Judgment

The problems with the procedural issues were compounded by the serious failures in the Court's judgment. Specifically, the judgment was silent on the main points in civil society's case, which had focused on irregularities, inconsistencies and blatant failures in the electoral process. Legal expert Wachira Maina emphasized five primary problems with the judgment. Specifically, Maina said,

First, there is the Court's reliance on extremely backward Nigerian authorities urged on it by the Attorney General, Prof Githu Muigai, acting as *amicus curiae*. Second, there is its tolerant and uncritical acceptance of the IEBC's explanations about the ever-fluid totals in multiple voters' registers and what this means in practice. Third, there is the question of tallying and especially, what the Court's own tallies show but is not properly reflected in the judgment. Fourth, there is the Court's use of subsidiary legislation to limit the meaning of "votes cast," an unambiguous phrase in the Constitution. Finally, there is evidential foreclosure that the Court imposes on itself by taking judicial notice of technology failures instead of treating IEBC as spurious, as urged by petitioners.⁸³

The Judiciary in 2017

In 2013, the judiciary was able to fast-track all election-related matters, successfully finalizing all 188 election petitions within the statutorily mandated six-month period.⁸⁴

Since that time, the judiciary has undergone significant changes. Former Chief Justice Mutunga stepped down in 2016, and the Court is now led by Chief Justice David Maraga. Former Chief Justice Mutunga's retirement in June 2016 was followed by a politically charged selection process for a successor, characterized by questions regarding the shortlisting of candidates and the legality of the appointment process. Despite Chief Justice Maraga's stated commitment to the judiciary's readiness to effectively deal with post-election disputes, the public perception that Maraga was a "compromise candidate," questions about his recruitment and the Executive's alleged interference in the selection process threatened to impact on public confidence in the Supreme Court and the judiciary. Chief Justice Maraga rejected imputations on his political loyalties.⁸⁵

Notably, the Court also has a new Chief Registrar. Gladys Shollei, who oversaw the scrutiny of tally sheets in her capacity as Chief Registrar in 2013, was fired from her position in October of the same year over corruption charges. In his public announcement on the matter, Mutunga said she had been dismissed for incompetence, misbehaviour, violation of the code of conduct for judicial officers, insubordination and violation of Chapter Six and Article 232 of the Constitution.⁸⁶ The Judicial Service Commission accused Shollei of misusing over 2 billion KES. The case is pending in court.

⁸³ Wachira Maina. 20 April 2013. "Verdict on Kenya's presidential election petition: Five reasons the judgment fails the legal test." Available at <http://www.theeastafrican.co.ke/OpEd/comment/Five-reasons-Kenya-Supreme-Court-failed-poll-petition-test/434750-1753646-tm96jl/index.html>.

⁸⁴ International Development Law Organization (IDLO). 2017. "Avoiding Violence and Enhancing Legitimacy: Judicial Preparedness for Handling Electoral Disputes in Kenya and Beyond," page 6.

⁸⁵ Interview with ICJ-Kenya, 13 July 2017

⁸⁶ John Ngirachu and Ouma Wanzala. 18 October 2013. "JSC sends Gladys Shollei packing over Sh2 billion scandal." *Daily Nation*. Available at <http://mobile.nation.co.ke/news/JSC-sends-Gladys-Shollei-packing/1950946-2038778-format-xhtml-bsvl6r/index.html>.

Not unlike in 2013, the judiciary has been working to prepare for the 2017 election. In March 2017, the Judiciary Committee on Elections (JCE), which is now a permanent committee within the judiciary, published draft rules for presidential, parliamentary and county election petitions. The Committee has also recently introduced and drafted Court of Appeal Election Petition Rules and invited stakeholders to a workshop to discuss the new rules and to hear comments on potential problems with the rules. Such public engagement is highly encouraging and demonstrates the judiciary's understanding of the need for transparency. Stakeholders identified many concerns, some of which included:

- The presidential petition rules make absolutely no mention of scrutiny/recount procedures.
- There is no mention of the court having the power to make a ruling about the electoral process. It can only make a ruling about the result.
- In the parliamentary rules, the wording in reference to the register of voters implies that there may be more than one register.
- In the presidential rules, the IEBC has the authority to hold the relevant election materials until the court orders them released (after the pre-trial hearing).
- The 14-day timeline for the hearing and conclusion of presidential petitions has not been changed.
- Rule 30 of the presidential election petition rules allows the Court to extend the time “for doing anything required to be done.”⁸⁷ Since such extensions could cause the trial to go beyond the 14-day timeline, they risk undermining the constitution.
- The mode of service does not take into account electronic service in addition to what is provided by the constitution and laws for presidential, parliamentary, county election petitions and appeals from the High Court.
- The rules do not provide enough clarity on the role and place of *amicus curiae* and interested parties in electoral disputes.

As of the date of this publication, however, the new Court of Appeals and Supreme Court rules are yet to be published. Only the parliamentary and county assembly petition rules have been gazetted. As part of its preparations, the Committee embarked on and has been working on an Elections Petitions Bench Book, which will be formally launched and shared widely within the judiciary and with stakeholders. The Bench Book will outline the procedures and substantive issues that the judiciary will be seeking to address in the resolution of electoral disputes. In addition, the Bench Book is intended to standardize the judicial approach to election petitions and deepen the depth of emerging jurisprudence across the various court structures.

⁸⁷ <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2017/03/RevisedSupremeCourtPresidentialElectionPetitionRules2017.pdf>

To date, the JCE has also appointed 92 magistrates who will be focused on electoral dispute resolution. It also visited the Ghanaian judiciary to learn from its experience in adjudicating presidential election disputes.⁸⁸

Recommendations

As Election Day nears, it is important for the public to know the current status of the proposed rules for election petitions, including how stakeholders' feedback was incorporated (or not) in the final version. In that vein, we recommend that the judiciary publish an interim status report on its preparedness. Moreover, these rules must be published immediately and made widely available once adopted. Once they are published, the Judiciary should also conduct outreach sensitization forums with members as well as training on the new rules for lawyers as part of its stakeholder consultation on the content of the rules.

⁸⁸ Joyce Danso. 22 May 2017. "Kenya's Deputy CJ confers with Ghana's Judiciary on resolution of Election Disputes." Available at <<http://www.ghananewsagency.org/social/kenya-s-deputy-cj-confers-with-ghana-s-judiciary-on-resolution-of-election-disputes-117224>>.

II. Conclusion

Sadly, the events of the current electoral process demonstrate stakeholders' inability and/or unwillingness to learn from the past. Unless authorities take urgent action on the issues raised above, public faith in the credibility of the election will also mirror the past, dividing the people along seemingly predetermined lines of identity rather than substance.

In the little time left until election day, the IEBC must galvanize public confidence by answering the myriad pending questions raised in this report in open and honest ways. There is no such thing as a perfect election, and it is unreasonable to expect a complete absence of error. If the public understands the risks as well as authorities' plans to mitigate them, though, suspicion and mistrust can be managed and mitigated. Public knowledge and understanding of what can go wrong does not harm confidence. Instead, it helps set realistic expectations.

The IEBC must also reposition itself as the voters' partner. Its unwillingness to answer questions about procurement, its appeal of the High Court's decision on constituency level results and its complete refusal to make the voters' register data publicly accessible – among other things -- have contributed to the image of the Commission as an obstacle rather than as a conduit to information and voters' empowerment. This stands in complete opposition to the IEBC's fundamental role of protecting the people's sovereignty.

Other electoral stakeholders are also guilty of not prioritizing public confidence. The Executive, Parliament, security forces and political parties must also remember that democratic legitimacy is dependent upon transparency, accountability and proven commitment to people- and voter-centred actions and policies. A trusted and credible election is at the heart of this legitimacy, and indeed of peace and stability. This now hangs in the balance.

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