

READY... OR NOT?

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

April - June 2017

A Summary of Key Findings and Recommendations



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An Assessment of Kenya's Preparedness for the 8 August 2017 General Election (April-June)

Background

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's 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. 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.

A Summary of Key Findings and Recommendations

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.

- 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.
- 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. 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.

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.

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.

Table: 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.
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

Activity	Originally Scheduled by IEBC and/or law	On Time?	New Deadline/Date Completed	Comments
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.
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.

Africa Centre for Open Governance - AfricOG

P.O Box 18157 - 00100 Nairobi, Kenya | +254 - 20 - 444 3707 | +254 737 463 166 | Email:admin@afriocog.org | www.afriocog.org | http://kptj.afriocog.org

