



The Road to Credible 2017 Elections

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**The Kenya Human Rights Commission and Kura
Yangu Sauti Yangu Briefing Paper**

Introduction

Kura Yangu, Sauti Yangu (KYSY) is a citizen movement spearheaded by a number of like-minded civil society organizations (Kenya Human Rights Commission (KHRC), Independent Medico-Legal Unit (IMLU), Constitution and Reforms Education Consortium (CRECO), the Africa Centre for Open Governance (AfriCOG), InformAction (IFA), the Civil Society Organization Reference Group (CSO-RG), Inuka Kenya Ni sisi, Katiba Institute, Development through Media (DTM), the Kenyan Section for the International Commission of Jurists (ICJ-Kenya), Awaaz Magazine, Mazingira Institute, Muslims for Human Rights (MUHURI), National Women Steering Committee, Kenyans for Peace with Truth and Justice (KPTJ)) who have come together to proactively support Kenya's preparations for the 2017 elections with a view to ensuring that the country minimizes the risks related to dysfunctional electoral systems and practices.

KYSY is also committed to promoting political dialogue across the country. We believe that political consensus on the elections will increase public confidence and ultimately make both the process and results more credible and legitimate, and therefore contribute to the overall state of political certainty and stability of the country.

With less than two months left until Election Day on 8th August, KYSY wishes to express its growing concerns regarding the credibility of the current electoral process. A credible election, one which enjoys broad public legitimacy, depends wholly upon the integrity of each of the electoral cycle's constituent phases. Problems in one stage impact the next, and the domino-like effects can have potentially destabilizing consequences throughout the entire cycle.

Multiple phases of the current electoral process, including legal reform, voter registration, party primaries, procurement of technology, and security deployment have already been marred by errors, irregularities and a striking lack of transparency. Since many of these problems have plagued past elections and have been left unresolved, they are now a very real threat to public confidence in this electoral cycle.

This Civil Society briefing paper seeks to draw attention to key areas of concern and make recommendations targeting all stakeholders at the national conference.

The most critical pending issues include:

- administrative and political obstacles to voter registration and related doubts regarding the reliability of the voters' register,
- delays in and irregularities with the procurement of critical electoral technology,
- the lack of clear back-up mechanisms to address potential problems with the functionality of electronic results transmission,
- the lack of clarity regarding how voters will be identified on election day, including the use of the biometric and/or the copy register,
- disagreement on how to count votes in order to determine if total votes exceed the number of registered voters at a particular polling station,
- controversial and unilateral last-minute changes to the legal framework on elections,
- the continuing failure to implement constitutionally required measures on gender equity,
- disproportionate responses by security forces to public protests and indications of involvement of political elites in fueling pre-election violence; and
- the IEBC's continued failure to effectively communicate updates and changes to the Kenyan public.

These problems are compounded by a highly constrained political environment, one that promotes silence at the expense of lively public debate and informed discussion. Indeed, much of the dominant political rhetoric today pushes a blind and vacuous "peace," and it falsely positions this peace as the opposite of candid discussion of problems. This argument risks endangering Kenya's democratic trajectory by suppressing the kind of debate and discussion that are the drivers of democracy and by encouraging the public to support subpar elections.

We believe that credible elections are the best guarantor of peace. Kenyan voters, just like any other voters, deserve elections in whose results they can have confidence, whether their side wins or loses.

The Issues

There is still time to save the credibility of the current electoral cycle. Going forward, it is critical that the IEBC and other stakeholders address the following issues:

1) Lack of effective communication with the public on key electoral issues

The public struggles to stay up to date on election-related developments. The lack of easily accessible information contributes to decreasing public confidence in the IEBC as Election Day approaches.

It is not too late for the IEBC to create a communication strategy for the remainder of the electoral cycle. This should include regular meetings and/or open fora where stakeholders can ask questions and seek clarity on specific points. To its credit, the IEBC does post press releases and other news updates on its website. It is important, however, that it goes one step further by providing interactive sessions with members of the public. The Commission's constitutional mandate includes the responsibility to protect the sovereignty of the people and to secure the observance of democratic values and principles by all State organs; as such, the promotion of public confidence deserves to be a top priority. The points raised below include many of the unresolved issues and questions to date.

2) The voter registration process

There is a lack of clarity with regard to how problems during mass voter registration will be resolved, especially since many of these problems have existed for several election cycles. Although registration is now closed, the IEBC and the Registrar of Persons have not adequately responded to the myriad problems that marred the voter registration processes. These include nonfunctional and dysfunctional BVR kits, the use of 'green books,' shared Identification (ID) numbers, severe difficulties in obtaining IDs, first-time registrants who found their names already in the register as well as previous voters who are now missing from the register, the lack of security of data and many logistical hurdles at registration centers¹. These problems have a real impact on people's right to vote, and they will shape voters' perceptions about and experiences on Election Day. It is important

¹ InformAction (2017). Election Watch Report #3: Gateway to the Ballot Box. Available here as accessed on June 11, 2017: <http://informaction.tv/index.php/news-from-the-field/item/583-election-watch-report-3>

to know, at minimum, what authorities are doing to ensure that issues like shared ID numbers, incorrect data and nonfunctional do not affect access to the ballot box.

3) The audit of the register of voters

There are several unresolved questions related to the reliability, accuracy and verifiability of the audit of the voters' register.

There is significant public apprehension about KPMG's audit of the voters' register, primarily because of the firm's lack of expertise in conducting such audits, the choice of methodology – which does not reflect internationally accepted best practice for such audits – and the ongoing lack of transparency. Thus far, despite a public statement from civil society groups requesting regular updates and emphasizing the importance of open communication about the status of the process², neither KPMG nor the IEBC has offered the public any news on the progress of the audit; it is impossible to know what the initial findings are, what obstacles KPMG may be encountering or what changes in the register the public can expect.

4) Access to register of voters' data

Given the lack of updates related to the audit and the significant problems that arose during mass voter registration, the validity of the register is in significant doubt. This mistrust is compounded by the fact that there is no publicly accessible registration data, including constituency- and ward- level numbers of registered voters. In order for independent observers and civil society groups to track and monitor changes to the register, this access is of utmost importance.

5) Lack of clarity on the complementary mechanisms to technology

There is lack of clarity about the definition of and implementation plan for the allowed “complementary mechanisms” to electoral technology on Election Day.

The recent amendments to the electoral law include contentious provisions about “complementary mechanisms” to be used alongside election technology. The Elections (General) (Amendment) Regulations, 2017 specify that one such mechanism relates to voter identification. Specifically, if a voter cannot be identified in the EVID, the regulation

² 'KYSY Statement on the KPMG Audit of the Register of Voters'. Available here as accessed on June 11, 2017: <http://www.khrc.or.ke/images/docs/StatementontheKPMGauditoftheregisterofvoters.pdf>

states that the presiding officer is to invite agents and candidates in the polling station to witness the event 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. If that is successful, the voter can proceed to vote. Since candidates and agents are sometimes not present in all polling stations, it remains unclear what the IEBC will do in these cases. It is also unclear how many candidates and/or agents are necessary for verification that the voter is indeed in the printed out register.

Also, there are questions with regard to how voters will be identified in the first place. The regulations indicate that when voters go to the polling station, they will be identified via the printed copy of the register as well as via the biometric register. It is unclear why the printed register plays a role in identification if the biometric register is functional.

Moreover, there appear to be no regulations for the use of complementary mechanisms in the case that the electronic results transmission system fails. Given the failure of this system in 2013, a contingency plan for this part of the electoral cycle is critical for public confidence.

Finally, given that domestic observers witnessed the use of the green book during Mass Voter Registration (MVR), the public now wonders if, why and how these books will be used on Election Day. On a related note, the purpose and meaning of the “polling station diary,” which is mentioned in the election regulations, is also uncertain. What information will be recorded and who will have access to this information? It is essential that voters know the specific purpose of the diary, if it relates to the green book, who will have access to it and how it will be stored and accessed.

6) Lack of clarity on total votes cast and valid votes cast at a polling station

There is disagreement about the stated rules for determining whether a polling station’s votes exceed the polling station’s number of registered voters.

There is also a lack of clarity with regard to the possibility of disregarding results from certain polling stations. The new regulations allow for 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. Using valid votes for this determination, however, 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 it is possible to tell who the vote was for. There is no way to determine if the valid votes are those cast by voters registered at that station or not.

7) Lack of credibility in the procurement process

The IEBC’s conduct in the procurement process for ballot printing threatens public confidence in the days leading up to elections.

According to the Public Procurement Administrative Review Board’s recent ruling, the Commission is guilty of having flouted procurement rules to favor certain companies’ bids for ballot printing contracts. The Board described how the IEBC 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. This news comes not long after controversy surrounding the Commission’s decision to offer a direct award to Safran Identity and Security, the same company that provided the problematic technology in 2013. Given the previous IEBC commissioners’ involvement in the Chickengate scandal, the current Commission’s behavior and decisions with regard to procurement are questionable.

8) Enforcement of the leadership and integrity provisions

There is virtually no political will to enforce the leadership and integrity provisions. The resulting political environment leaves little room for public confidence in the benefits of democratic governance.

The IEBC, together with the Ethics and Anti-corruption Commission (EACC), the Office of the Registrar of Political Parties (ORPP) and the Office of the Director of Public Prosecutions (ODPP) have attempted to enforce Kenya’s leadership and integrity provisions. Together, they have established the Chapter Six Working Group on Election Preparedness, which brings multiple stakeholders together to vet political aspirants’ compliance with integrity rules. The problem however is that all these offices save for the ODPP lacks the authority to prosecute any candidate. IEBC for example, lacks the authority to bar candidates with

questionable records from contesting in elections. This can be attributed to the 2013 High Court ruling, which determined that the integrity provisions did not apply to candidates seeking elective office (versus those who are appointed), means that any move the IEBC now takes to stop candidates can be challenged in court³. Moreover, a loophole in the law prevents the IEBC from taking action against politicians whose cases are ongoing or whose cases are on appeal.

9) Unfulfilled constitutional imperatives on the two thirds gender principles

Within Kenya's 2010 Constitution, the Bill of Rights provides that no more than two-thirds of members of elected public bodies are from the same gender – the so-called “two-thirds gender principle”. With the August 2017 elections fast approaching, there is no mechanism to implement the gender principle at the national level despite consistent pressure by civil society.

The lack of a mechanism to implement the gender principle at national level can precipitate a constitutional crisis which would affect the next parliament and by extent the whole country for the following reasons: the 2010 Constitution states clearly in Article 3 (2) that any attempt at forming government other than in compliance with the constitution is unlawful – a parliament with more than two thirds of the same gender is patently unconstitutional. Second, the Constitution sets the two thirds principle as among the principles of the electoral process. This means that a failure to implement robs the elections of their credibility which anyone can use as grounds to invalidate the entire electoral process.

10) Violence

There has been ongoing pre-election violence, some of which is tied to political elites, and some of which has been and continues to be perpetrated by the state.

Devolution has been positive, but it brings challenges in relation to violence. First, it has created localized political contests for lucrative posts, some of which come with localized threats of violence. Second, devolution has weakened the traditional control by the capital over the country, making it more difficult for the centralized security forces to address local

³International Centre for Policy & Conflict & 5 others v Attorney General & 4 others [2013] eKLR

threats of violence. Now that Kenyans are more familiar with devolution and particularly with the benefits that come with local office, there are concerns that competition around local seats could become violent.

There have also been three unrelated killings of persons that were candidates in local elections in different parts of the country. Furthermore, since February, seven of Kenya's 47 counties have had ongoing violence that includes banditry and land invasions. Not less than two dozen people have been killed, including a British national whose ranch was invaded. Violence has also been perpetrated by State officers. In fact, in 2016, Human Rights Watch described police brutality against protestors as "shocking," and recent allegations of the police force's use of extrajudicial killings demonstrate the continuing problem.

Although Kenya managed to overcome its worst violence in 2007, the after-effects remain intact, and the root causes have not been effectively addressed, making the country vulnerable to repeat violence, and also undermining the national capacity to resolve serious political differences. The need for dialogue on important problems is resisted until it is almost too late, driving up the stakes and impacting negatively on the quality of any solutions agreed on.

11. Shrinking civic space

Human rights defenders and Civil Society Organizations (CSOs) working around promotion of democratic governance continue to operate in a very restrictive environment. Specifically organizations working to support credible elections have particularly been targeted by the state as we approach the general elections. The state has been championing the view that programs that seek to empower the voters to make informed choices are 'infiltrated by foreign interests' purposely to delegitimise the crucial work CSOs play in championing for democracy. A good case in point being the attacks against International Foundation for Electoral Systems (IFES). In his speech during the Jamhuri Day Celebrations held in Nyayo Stadium Nairobi, on December 12, 2016, President Uhuru Kenyatta condemned the work of NGOs, targeting especially the ones working in the field of civic education ahead of 2017 general elections, accusing them of being agents of foreign powers trying to influence the electoral process and threatened to prevent them from receiving foreign funding. Soon after the President's speech, Mr. Jackson Mandago, Uasin Gishu County Governor,

announced that all NGOs and civil society groups planning to carry out civic education and peace work in the Rift Valley ahead of the general elections would be vetted, and monitored closely, adding that county security teams would clear all NGOs “so that their activities are clearly known”

On January 6, 2017, in a governmental directive addressed to the 47 county Commissioners, the Interior Principal Secretary Karanja Kibicho accused NGOs of ‘nefarious activities’ that pose a serious threat to national security including money laundering, diversion of donor aid and terrorism financing, and asked for stricter monitoring on CSOs throughout the country.

12. Electoral Disputes and law enforcement of Electoral Offences.

Whereas the legal framework has now been settled on electoral related disputes and offences, the investigation and prosecution by law enforcement agencies remains weak and uncoordinated. There have been evidenced breach of elections codes of conduct evidenced during the political party primaries. There has not been any successful prosecutions that have included offences such as voter bribery, intimidation and violence and use of public resources. There needs to be an enhanced coordination strategy between the Police, Offices of the Director of Public Prosecutions (ODPP) and the Judiciary in order to foster public confidence in law enforcement and dispute resolutions. The question of public confidence in law enforcement institutions is intricately linked to declining public confidence in IEBC and Judiciary. The crisis of confidence also affects the Judiciary and in particular, the Supreme Court which has exclusive jurisdiction over presidential election disputes and potential pronouncements on the leadership and integrity constitutional imperatives. The emerging judicial decisions and lack of enforcement of court pronouncements on the electoral process have also failed to inspire public confidence in the respect for the rule of law.

Recommendations

- 1) IEBC must prioritize its relationship with the public.** It is essential for the IEBC to urgently develop a multimedia communication strategy that keeps the public informed of developments in the electoral process. This strategy must include honest, open and timely communication about how it is dealing with emerging problems. It should also include regular meetings with key stakeholders from across the political spectrum.
- 2) The IEBC and the Registrar of Persons must respond to public questions and criticisms related to the MVR exercises.** Even though registration is closed, the IEBC and the Registrar of Persons should explain what they are doing to fix the problems that plagued voter registration, especially including nonfunctional and dysfunctional BVR kits, the unexplained use of green books, shared ID numbers, severe difficulties in obtaining IDs, the lack of security of data and many logistical hurdles at registration centers.
- 3) The IEBC must immediately provide the public with an update on the status of the audit of the voters' register.** This update must include the estimated date of completion and findings thus far. The Commission should also ensure that KPMG's final report is made publicly accessible.
- 4) IEBC should immediately and publicly explain exactly what kind of "complementary mechanisms" it will use as a back-ups to electoral technology.** Specifically, it must address pending questions about how manual identification of voters will include, what the manual mechanism for results transmission is, and what the role of the green book and/or polling station is.

- 5) **The IEBC must immediately provide public access to the numbers of registered voters at the constituency- and ward-levels, both in the pre-audit and post-audit scenarios.** The ability of independent observers and other third parties to see, track and monitor changes to the register is integral to public faith in the validity of the register.
- 6) **It is vital for the IEBC to clarify how it will determine when to disregard results from polling stations in which there are more votes than there are registered voters.** Will this be determined based on total votes cast, total valid votes or some other formulation? It is also important that the IEBC's explanation of the calculation be accompanied by a justification and rationale so that voters and the public understand the rules.
- 7) **IEBC should endeavor to carry out open and transparent procurement of electoral materials in all instances, and it should engage in an open conversation with the public to explain its procurement decisions thus far.** In particular, the Commission should explain the decision to directly procure the Integrated Elections Management System (IEMS) from Safran Identity and Security, given the company's tarnished reputation in Kenya. It should also explain its response to the Procurement Board's allegations against it with regard to the tender for ballot printing.
- 8) **The IEBC, EACC, ORPP and the ODPP should ensure strict enforcement of Leadership and Integrity provisions of the Constitution.** Whereas the EACC has gone ahead and published the list of candidates who have either been investigated, charged, convicted or have pending cases in courts, there is need for the working committee on chapter six to take an extra step to ensure that Kenyans can only vote for people with integrity.
- 9) **It is important for the State to hold perpetrators of violence accountable for their actions and to take steps to reform the security forces so that they are aware of the limits on their power.** Going forward, it is critical for police officers who have killed and injured individuals to be held accountable for their actions. It is especially important for all those security personnel who will be involved in policing election-

related activities to understand the law and the country's commitment to human rights. Officers should be trained in law-compliant security provision. Furthermore, security, intelligence and monitoring agencies must work together, share information and enforce penalties against those convicted of violence and incitement to violence. It is also imperative for stakeholders, including politicians, civil society groups, and government agencies, to create spaces for dialogue and debate in the period between elections. In this way, people can begin to air and address grievances in constructive ways, in a political context that is not overshadowed by the pressures of election campaigns.

- 10) Regarding the shrinking civic space,** there is need for the immediate implementation of the Public Benefits Organizations (PBO) Act. There is however the need for political dialogue on this issue where political leaders should state their position and make commitments to protect civil society space and human rights.

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