

Seattle University School of Law

Seattle University School of Law Digital Commons

VII. Academic and Civil Society Analysis

The Truth, Justice and Reconciliation
Commission of Kenya

5-2012

South Consulting - 2nd Review Report - Executive Summary (Reforms and Preparedness for Elections)

Truth, Justice, and Reconciliation Commission

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/tjrc-academic>

Recommended Citation

Truth, Justice, and Reconciliation Commission, "South Consulting - 2nd Review Report - Executive Summary (Reforms and Preparedness for Elections)" (2012). *VII. Academic and Civil Society Analysis*. 7. <https://digitalcommons.law.seattleu.edu/tjrc-academic/7>

This Report is brought to you for free and open access by the The Truth, Justice and Reconciliation Commission of Kenya at Seattle University School of Law Digital Commons. It has been accepted for inclusion in VII. Academic and Civil Society Analysis by an authorized administrator of Seattle University School of Law Digital Commons.

THE KENYA NATIONAL DIALOGUE AND RECONCILIATION (KNDR) MONITORING PROJECT

Reforms and Preparedness for Elections

Review Report Executive Summary

May 2012



P.O. Box 25626-
00603, Nairobi, Kenya.
Tel: +254 020 4348835/6/7
Fax: +254 020 4348837
Mobile: +254 722207851
Email: south@south.co.ke
www.south.co.ke

Supported by a grant from Foundation Open Society Institute (Zug) /
Open Society Initiative for Eastern Africa

EXECUTIVE SUMMARY

1. The goal of the Kenya National Dialogue and Reconciliation (KNDR) process, launched to end the 2007 post-election violence, was to secure sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights. Under the KNDR agreements, the main parties to the 2007 elections dispute committed to far-reaching reforms to address the causes of conflicts in Kenya. The promulgation of the Constitution in August 2010 was one of the most important outcomes of the KNDR process and a hallmark of Kenya's reform journey. Importantly, the Constitution has provided a new framework for Kenya's electoral system and reforms. The next General Election will be conducted under this new framework.
2. South Consulting has been monitoring progress in the implementation of key reforms since 2008. This is the second report for the year 2012. Previous reports covering the period between December 2008 and February 2012 can be found at www.dialoguekenya.org. This report focuses on the country's preparedness for the first General Elections under the new Constitution.
3. It is recognised that the failure to effectively manage the December 2007 election, and the process preceding the polling itself, contributed to the violence. The Independent Review Commission on the General Elections held in Kenya on 27 December 2007 (IREC or the Kriegler Commission) concluded that the constitutional, institutional and legal framework for Kenya's elections was so weak that it required an overhaul -- including disbanding the Electoral Management Body that administered that election. The Commission emphasised that a new body should be established and its capacity built to manage the elections in a manner that pass as peaceful, credible, free and transparent.
4. This assessment report examines the state of electoral preparedness in the country. It is an assessment of the extent to which the country has revised its electoral processes and implemented actions to improve the management of elections. This review focuses on three priority areas -- and corresponding indicators -- that are critical for successful and credible elections:
 23. Parliament has passed some of the required laws. However, the effectiveness of any law lies in how it is enforced and implemented. There are concerns that the laws are not effectively enforced, thereby allowing some of the role players to flout the laws with abandon. The Registrar of Political Parties and the IEBC should move with speed and begin to enforce the laws in order to ensure that all players contribute to the goal of having a credible, genuinely free, and a peaceful General Election.
 24. Without the deterrent effect of the law, old behaviour will continue. Different groups or supporters of candidates will begin to zone off their geographical territories against those they consider as their opponents. This, on its own, is a worrying indicator of the extent to which the freedom of assembly may be interfered with in the run-up to the next elections. Left unaddressed, it can create conditions, which may lead to greater forms of intolerance and violence.
 25. It is also important and worrying is that politicians are continuing to mobilize support along ethnic lines. This is likely to heighten inter-community tensions. Unfortunately, mobilization of support along ethnic lines has remained a feature of the country's politics, notwithstanding its implications for national cohesion and stability.

Conclusion

20. The context for holding the next General Elections is a mixed bag. So far, the electoral environment comprises several issues competing for attention. There is absence of a single and coherent organising question or theme for the election, yet the organising theme around which an election is conducted determines the leaders to be elected. Building a credible and an all-galvanising theme around which campaigns should revolve is critical. Although effective implementation of the constitution had emerged as an important theme, other competing issues appear to be replacing it.
21. Failure to ensure a credible theme or evolve the main question around which to organise the next General Election may lead to the election of leaders purely on account of parochial considerations. This will also produce a poor agenda for the government that will be formed after the election. To evolve a better reform programme for the next government, it is important to create a formidable reform message as a platform on which the next group of leaders will be elected in order to move the country forward.
22. The IEBC has begun preparations in earnest. So has the Judiciary. But other key players -- such as the political parties -- are yet not. To the political parties, it is business as usual; and they are yet to break from the past. Police reforms have also not been rolled out to have the required impact. However, the police are making progress in improving capacity to secure the next general election. Because the IEBC is neither wholly responsible for nor in control of the broader electoral environment nor other key players, it is suggested that the IEBC constitutes a policy level committee comprising the key players such as the Judiciary, the police, the Registrar of Political Parties, the Political Parties Liaison Committee, the department for immigration and registration of persons, the media and other key players to regularly review the state of preparedness by each. This will enable everyone to identify critical gaps in the state of preparedness and act in earnest.

- The Pre-election Environment: Setting a conducive context for a successful and democratic electoral process.
- Election Management: Managing elections competently and inspiring public confidence in the electoral process.
- Resolving Disputes: settling electoral disputes efficiently and effectively.

FINDINGS

Setting a Conducive Context for a Successful and Democratic Electoral Process

5. The review shows progress in improving Kenya's electoral framework. The introduction of a Two-Round System or a run-off in the presidential election between the first two candidates -- if no candidate is able to garner over 50+1 per cent of the vote and 25 per cent in at least half of the 47 counties -- is one measure introduced to ensure the winning candidate enjoys sufficient support in the country.
6. The Constitution has also introduced quotas to ensure equity in representation along gender lines and to specifically address the historical challenges around the representation of women and marginalised groups. The challenge, however, remains the lack of clarity on how to achieve this requirement without a constitutional amendment.
7. The IEBC is enjoying trust and confidence among Kenyans; 80 per cent have confidence in the Commission. The Commission is rated second to media (90%) in terms of confidence in institutions that play a part in the electoral process. People's confidence in political parties is relatively low (40%) compared to other institutions such as the Judiciary (67%). The parties are rated even lower than the police (43%), implying that people are dissatisfied with the 'business as usual' attitude of the political parties.
8. This trust and high level of confidence in the Commission is emanating from how the Commission was established; the Commissioners were hired through a competitive process and the relevant committee of Parliament vetted them. This, again, points to the importance of transparency in recruiting public offices. Competitive recruitment inspires public confidence in institutions.

9. The IEBC is administratively preparing for the next General Election and is building capacity in key areas for the purpose. Although the Commission is moving forward in preparations to conduct the election, other key role players are not. Political parties are approaching the election without making a break with the past: they are yet to institutionalise?

10. There is progress in enacting the required laws. However, enacting the laws is not enough. The test of any law is in its implementation and effective enforcement. There are concerns that the office of the Registrar of Political Parties is not active in enforcing the Political Parties Act and, therefore, many politicians continue on a 'business-as-usual' attitude. Parties are flouting the Political Parties Act without consequences for their action.

11. There are grey areas in some of the laws, with some provisions of the Constitution being subject to multiple interpretations. The election date is itself a subject of litigation because of these multiple interpretations. The uncertainty over the election date should be addressed soonest in order to allow preparations to proceed without anxiety. In addition, litigation facing the boundaries review process has already delayed voter registration. Further delays in determining these cases will negatively impact the preparations.

12. The environment for the next General Election is becoming increasingly divisive as politicians continue to mobilise along ethnic lines. The trials at the International Criminal Court remain a divisive issue, with discourses for and against the ICC. These divisions are feeding into the electoral environment through mobilization of political support. However, many Kenyans remain supportive of the ICC. They are keen to see an end to the culture of impunity and justice for everyone.

13. The challenges facing the electoral environment have meant absence of a single and coherent theme for the next elections. There are many issues competing for attention. Absence of a single theme has the consequence of creating a divisive electoral environment. A strong and a coherent electoral theme is required because the organising theme determines the kind of leaders to be elected to move the country forward after the next general election. The table provided shows a summary of findings and recommendations on this area.

Priority #3: Settle Electoral Disputes Efficiently and Effectively

Challenges	Recommendations
1. Incomplete legal reforms on electoral dispute resolution	<ul style="list-style-type: none"> Finalize the making of rules under the applicable laws. Prioritize the finalization of pending post-2007 election petitions before the next General Election. Provide the Judiciary Committee on Election Disputes with sufficient capacity to re-orient settlement of election disputes.
2. Weak pre-election dispute handling capability in IEBC and the Political Parties Tribunal	<ul style="list-style-type: none"> Courts should defer to the Political Parties Disputes Tribunal and the IEBC dispute settlement system in the first instance and only interfere in cases of manifest injustice. Provide technical assistance to the new EMB on the settlement of pre-election disputes.
3. Uncertainty over the ability of the Judiciary to hear and determine election disputes efficiently and fairly	<ul style="list-style-type: none"> Speed up the work of the Vetting of Judges and Magistrates Board to ensure timely completion before the General Election. Consider appointing a special bench of judges to hear and determine election related disputes from the nominations period to a year after the General Election in order to accord election petitions the priority that the law requires.

Settling Electoral Disputes Efficiently and Effectively

18. The discussion has pointed to the need for a credible dispute resolution mechanism to handle pre- and post-election disputes. The review shows that the framework for putting this mechanism in place is incomplete. The review also shows that the political parties appear to avoid the Political Parties Disputes Tribunal. They prefer the courts to the Tribunal. However, the Courts have begun referring back these cases to the Tribunal.
19. The Judiciary is undergoing transformation and is, therefore, in its nascent phase. Yet it is being overwhelmed with many cases including those that with consequences for election preparation as well as cases that should be settled out of the courts. This is happening at the time when the capacity of the Judiciary is also challenged and likely to be stretched further after the conclusion of vetting for judges and magistrates. Given the important role the Judiciary will play in addressing some of the disputes over the elections, it is important to consider appointing a special bench of judges to hear and determine election-related disputes from nomination to a year after the elections in order to accord the petitions the priority required by the law. Already the Judiciary has begun paying attention to election-related issues. Other actors in the chain have a responsibility to begin their preparations too. The table provided gives a summary of findings and key recommendations in this respect.

Priority #1: Setting a Conducive Context for a Successful and Democratic Electoral Process

Challenges	Recommendations
1. Continuing uncertainty and lack of clarity over gender quotas	<ul style="list-style-type: none"> Hasten the progress of the Constitution of Kenya (Amendment) Bill, 2011 through Parliament.
2. FPTP and the run-off system raises the possibility of a close zero-sum electoral contest with possible destabilising effects	<ul style="list-style-type: none"> Strengthen early warning and response mechanisms. Conduct civic education on the electoral system, the run-off, and the electoral process.
3. Incomplete legal and administrative reforms	<ul style="list-style-type: none"> Accelerate the promulgation of regulations under the relevant laws. Speed up preparatory work in the Campaign Financing Bill. Strengthen the provisions of the Leadership and Integrity Bill in view of the Constitution's expectations of leaders. Speed up the hearing of lawsuits relating to the boundary demarcation process.
4. Ineffective media regulation and inequitable access to the media	<ul style="list-style-type: none"> Conduct an audit of media ownership in Kenya. Promulgate equitable access regulations under the Elections Act, 2011 and enforce them.
5. Continuing violations of basic political freedoms	<ul style="list-style-type: none"> Speed up police reforms in order to restore public trust in the political neutrality of the police.
6. Weak political parties and ineffective political party regulation	<ul style="list-style-type: none"> Promulgate comprehensive regulations under the Political Parties Act, 2011. Acting Registrar of Political Parties should enforce s. 14 of the Political Parties Act. Restart the process of appointing a substantive Registrar of Political Parties.
7. Weak early response mechanisms	<ul style="list-style-type: none"> Improve coordination of early warning and response mechanisms under UWIANO Refine indicators for identification of violence hotspots. Improve field monitor presence in potential trouble-spots. The government should improve conflict mitigation measures and address challenges likely to threaten security around the elections.
8. Inadequate facilitation of electoral observation	<ul style="list-style-type: none"> Develop a Code of Conduct for Election Observers that includes adequate facilitation for electoral observation. Increase technical engagement with election observer groups and other stakeholders to build stakeholder confidence in the electoral process and strengthen public participation in the electoral process.

Priority 2: Managing Elections Competently and Inspiring Public Confidence in the Electoral Process

15. The IEBC has gained public trust and confidence. However, this trust and confidence can be eroded by the failure to enforce discipline in political practice. The failure to enforce the law, and the Political Parties Act, 2011, in particular, can result in reduced confidence. Continuing weaknesses in enforcement action in respect to electoral malpractice will undermine the trust and confidence that the Commission is enjoying. The recruitment of investigators and prosecution staff is meant to address this shortcoming. But it is also important for the IEBC to liaise with the DPP, the AG and the Police to establish a framework through which these agencies can assist the Commission and/or build the Commission's capacity to investigate and prosecute cases relating to the breach of the new laws.
16. It is also significant that the Commission is moving fast in preparing for the next General Election, but the cases over election boundary disputes could undermine these preparations, especially if the courts take long to rule on these cases. The behaviour of political parties also shows that they are not yet prepared even though they are critical role players. Similarly the decision on the procurement of the biometric voter registration kits is of utmost importance. Delays in making decisions on this can affect the preparations for the elections. Putting in place a fool-proof system for counting votes and transmitting results should be concluded early enough.
17. Again these preparations can be affected by lack of adequate resources or delays in disbursement of funds by both the government and development partners who have pledged to support the Commission. Thus there is need to disburse funds and honour pledges on time to avoid affecting preparations. The table provided summarises key findings and recommendations on this priority area.

Priority 2: Managing Elections Competently and Inspiring Public Confidence in the Electoral Process

Challenges	Recommendations
1. Uncertainty over the election date in view of pending appeal in court	<ul style="list-style-type: none"> Make contingency plans for an early election in the event that the Court of Appeal overturns the High Court decision on the election date.
2. Continuing weakness of enforcement action in respect to electoral offences	<ul style="list-style-type: none"> Coordinate with the Director of Public Prosecutions to pay adequate attention to prosecuting electoral offences. Rapidly build the capacity of the election offence investigation and prosecution personnel upon their hiring.
3. Pending lawsuits relating to boundaries and electoral areas and difficulties in the procurement of technology threaten the timely preparation of a new, more accurate register of voters	<ul style="list-style-type: none"> Consolidate all the 128 lawsuits arising from the boundary delimitation process and push for an expedited hearing process. Speed up voter registration technology procurement and protect the integrity of the procurement process to forestall time-consuming litigation by dissatisfied vendors. If possible avail shape files to allow for independent verification of the constituency review exercise with GIS software.
4. Uncertainty over when the IEBC will put in place a fool-proof system for counting of votes and results transmission	<ul style="list-style-type: none"> IEBC should provide full transparency on a web-based platform for elections results up to polling station level. Improve election planning and conduct further simulation given the shortcomings of the mock elections exercise.
5. Concerns over the recruitment and training of competent staff	<ul style="list-style-type: none"> Recruit competent staff early and train them adequately for the effective conduct of a complex General Election.