



Statement EU EOM Kenya 2017

Nairobi, Tuesday 3 October 2017

The EU Election Observation Mission calls on Kenya's political leaders to demonstrate commitment to democratic electoral competition and institutions

The intensifying accusations between political rivals and against the institutional pillars of the democratic process, in particular the judiciary and the Independent Electoral and Boundaries Commission (IEBC), have led to escalating tensions and risk derailing the election. The EU election observation mission (EOM) therefore calls on the political contenders to come together constructively and overcome the challenges for the upcoming presidential election. Political leaders have a specific responsibility to respect the law and ensure that people's rights are honoured.

Demands for far-reaching changes to the election administration need to be matched with the constitutional requirements for the re-run to be held by 31 October. Excessive demands, which cannot be met by the IEBC, place an extraordinary burden on the institution and escalate tension and antagonism in the election. The EU EOM suggests that contenders focus as a matter of urgency on practical and meaningful integrity measures that can be realistically undertaken to strengthen operations and systems.

Decisive improvements in the electoral process are still achievable if Kenyans come together in a constructive manner. The EU EOM suggests that the IEBC provide regular public information on the measures it is undertaking in view of the Supreme Court ruling and demonstrate stronger transparency. The EU EOM has made 18 recommendations for the re-run, 9 of which are directed to the IEBC.¹

Late amendments to electoral legislation risk being politically polarizing, undermining the predictability of law, reducing the quality of legislation and generating implementation problems. It is good practice for the fundamental elements of an electoral process to be legally finalised at least one year before an election.² The Economic Community of West African States (ECOWAS) notes "*No substantial modification shall be made to the electoral laws in the last six months before the elections, except with the consent of a majority of political actors.*"³

Proceeding to pass the "*Election Laws (Amendment) Bill, 2017*" and the "*Election Offences (Amendment) Bill, 2017*" before the re-run would be a highly problematic process, with changes being extremely controversial. If passed, the changes would likely be subject to legal challenge, including on constitutional grounds, resulting in further uncertainty in the electoral process. Changes to the electoral law would also hinder the on-going work of the IEBC in preparing elections in an already limited time frame.

An EU EOM analysis of the two bills shows that there are some potentially positive proposals. These include attempting to clarify the status of keyed-in results and harmonising existing legislation with jurisprudence. Some proposals in the bill warrant additional elaboration and clarification. For example the electronic and manual transmission of tabulated results provides an additional safeguard, but goes against the

¹ EU EOM [Interim Statement](#) "*Recommendations for the Re-Run Based on Findings Since the 8 August Election Day*", 14 September 2017.

² See the EU EOM [Preliminary Statement](#) of 10 August which in footnote 2 notes: "*The Venice Commission Code of Good Practice refers to the fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, not being open to amendment less than one year before an election.*"

³ [Protocol on Democracy and Good Governance](#). 2001.

recommendations of the Kriegler report in stating that manual results automatically prevail (thereby risking potential manipulations not being considered).⁴

Importantly, some proposals weaken safeguards without qualification. For example the bill states that failure to electronically transmit or publish results would not be a basis for invalidation. While this allows for normal operational shortcomings, it also undermines crucial transparency measures. Changes to the composition of the IEBC and the powers of the chairperson are not appropriate mid-way through an electoral operation. The phrase “*absence of the chairperson for any reason*” is insufficiently defined, and is therefore open to arbitrary interpretation. The reduced requirements for a quorum risk inconsistent decision-making.

None of the proposed changes are critical for Kenya to comply with international commitments or appear to be pre-requisites for improvements to the fresh election entailed in the Supreme Court’s ruling. The EU EOM therefore suggests that, for the sake of consistency with recognised good practice and for the smooth running of the current electoral process, the proposed legal reforms are tabled after the current election. This will enable a more comprehensive approach to amendments, and more time for debate, consultation and legislative development.⁵ Stakeholders should be consulted in order to provide for reforms being supported and implementable. Election reform is always stronger when there is broad political consensus.⁶

Democracy requires a balance of powers, with institutions able to deliver on their respective mandates. All institutions need to be able to work independently and their actions to be constructively scrutinized (including by election observers). Checks and balances provided by civil society and an independent media are an integral part of democracy.

Far from strengthening integrity in the election, the demands and accusations from both sides of the political divide are having an antagonistic effect, escalating tensions and risking instability and violence. Dialogue is urgently needed to identify meaningful and practical improvements for the people of Kenya to be able to elect their President through a trusted process. When Kenyans come together to consolidate democratic reforms and the rule of law, all will benefit.

The EU EOM is independent, separate from EU governments and embassies, and is led by Marietje Schaake, Member of the European Parliament from the Netherlands.

For further information, please contact the press officer of the EU EOM Kenya 2017:
Paul Anderson, Press and Public Outreach Officer, EU Election Observation Mission Kenya 2017
paul.anderson@eueomkenya2017.eu, + 254 0740 033217

⁴ The Kriegler and Waki Reports, 2009, undertaken after the 2007/8 electoral problems.

⁵ The EU EOM has commented on the importance of comprehensive legal reform, recommending in its 10 August Preliminary Statement: “*In order to get an agreed and clear legal framework well in advance of the next elections, a process of legislative reform be undertaken promptly, including consultation with all stakeholders and to be based on cross-party consensus.*”

⁶ Good practices for positive electoral law reform include: 1) good time to allow for deliberation and implementation, 2) consultation with stakeholders and consideration of technical factors, research and international commitments, 3) transparency, and 4) cross-party consensus. For example also see the “[Beyond Election Day, Best Practices for Follow-Up to EU Election Observation Missions](#)”, 2017. Also The Organisation for Security and Cooperation in Europe “[Handbook on Follow-up to Electoral Recommendations](#)”, page 30.