

Darubini

Ya Uchaguzi

Issue 10

TRENDS IN ELECTIONS:





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MESSAGE FROM THE CHAIR

Greetings from ELOG!

As a permanent national domestic elections monitoring platform, ELOG remains engaged in the various electoral processes throughout the cycle. These include the assessment of the constitutional and legal framework, media coverage on electoral reporting, preparedness by the electoral actors and advocacy for an enabling environment to realize credible electoral processes as the country heads towards the 2022 General Elections.

ELOGs 2017 Observation report, *One Country, Two Elections, Many Voices!* noted that several critical laws were yet to be implemented, while others were yet to have legislative direction. ELOG made significant recommendations to enrich the country's path towards the 2022 General Elections and thus continues to monitor and shed light on the ensuing electoral processes in the country guided by its five key result areas for this electoral period. ELOG further urges all Kenyans to remember the advice given by Judge Johannes Kriegler that electoral reforms should not be undertaken less than one year to the General Elections. The prevailing electoral environment, coupled with the slow rate of reforms, is worrying as it is likely to worsen as the expected referendum and 2022 general elections get closer.

Therefore, it is imperative to engage in continuous conversation geared towards sharing experiences and strategies with the intent of addressing the prevailing challenges before the 2022 General Elections. Based on this, election observers, state and non-state actors need to continue to devise ways to move forward with the electoral processes while taking into account how the citizens can participate in the processes and how to ensure that there is accountability, transparency and inclusivity in the electoral process.

ELOG remains committed to carrying out its mandate to strengthen democracy in Kenya and also the African Region. In this regard, we urge Parliament, the Independent Electoral and Boundaries Commission (IEBC), the Office of the Registrar of Political Parties (ORPP), the Political Parties Dispute Tribunal (PPDT) and other stakeholders to consult and speed up the necessary electoral reforms to safeguard the 2022 General Elections.

God Bless Kenya!

Regina Opondo

ELOG Steering Committee-Chairperson



MESSAGE FROM THE NATIONAL COORDINATOR

With the constitutional amendment process already in high gear and a possible referendum for the same being projected in the mid-year, it seems that we are about to enter into an informal homestretch to the General Elections in 2022. This is expected to usher in a new environment of high voltage politics, frantic electoral reform activities and an unpredictable electoral calendar given the level of preparation required to undertake the exercise itself.

It is not as if this is just beginning to happen. Far from it, the country has been on a permanent campaign mode ever since the last elections in 2017. As the last year, which offers the last window for political sobriety starts, all actors need to acknowledge that things will need to move a little faster so that adequate preparations are done. Apparently, an opportunity to do this comes from the seemingly ominous situation.

While the Constitutional Amendment Bill process was initially expected to foment the existing political differences between opposing camps, it has somehow created a 'détente' of sorts with a latent political settlement coined as a 'no contest referendum' holding forte. It would seem at the moment that the major political camps are agreed as far as the proposed changes and outcomes to/from the constitution are concerned. This offers therefore, an unheralded opportunity to the key technical actors including the IEBC, ORPP, PPDT, Judiciary, Parliamentary Committees and even Civil Society Organizations (CSOs) working on elections to forge ahead with other preparatory activities. These include other electoral reforms not contained in the BBI bill as well as policy and administrative changes that are required to improve the conduct of elections in the country.

Other opportunities that beckon include the conduct of a number of by-elections in the country for continuous testing of the systems and processes in order to identify gaps that should be addressed. If confirmed, the referendum itself will be a good opportunity to test the preparedness of the key actors in undertaking the main elections come next year.

However, all this must be done diligently and with caution. As we have warned before, the same activities contract the timelines required for good preparations. Therefore, unless an expedient approach is taken by the mentioned key actors, the opportunity will be lost and we shall find ourselves running helter-skelter looking for quick fixes for the elections.

Mulle Muga
ELOG National Coordinator





MESSAGE FROM THE EDITOR

Dear Readers,

Happy New Year!

ELOG welcomes you to walk with us in the premier edition of Darubini ya Uchaguzi in 2021. There is a lot of work ahead for every stakeholder on the road towards the 2022 General Elections as the election cycle continues. In this edition of the e-newsletter, ELOG outlines some of the key issues involved in the electoral process that the stakeholders need to grapple with ahead of the anticipated referendum and upcoming general elections.

In this issue, we take a look at Kenya's historical journey in light of the elections and the challenges that continue to plague the electoral environment. In particular, our guest article features an engaging read by Professor Herman Manyora that illuminates "the good, the bad and the ugly" of Kenya's trends in elections.

Further, as ELOG continues to celebrate its 10th anniversary, we feature an article by Francis Aywa and Billy Osogo which assesses the political and electoral violence and its bearing on elections. He further makes a compelling argument on the need for the country to break away from its violent past.

We hope that the informative pieces will be thought-provoking as well as engage you to pause and reflect on the country's electoral journey commencing from independence to date. To keep you informed, check out our regular features including the electoral news roundup section covering current affairs affecting the electoral environment.

Let's engage!

Hilda N Mufandi
Editor and Program Officer

“
To read is to voyage
through time.”
Carl Sagan”



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**GUEST
COLUMN**



TRENDS IN ELECTIONS: The Past, the Present, and the Future

By Professor Herman Manyora
Lecturer, University of Nairobi (UON)

It is not news that elections in Kenya are a cut-throat affair where seemingly winners celebrate the results whilst the losers resort to questioning the legitimacy of the elections in courts, which sometimes leads to violence. This is the story of nearly all the six general elections in Kenya since the advent of multi-party democracy in 1992, with the 2002 and 2013 elections serving as exceptions. From Kenya's experience, it is notable that some of the core issues that impact its elections since its independence to date include the culture of authoritarianism, ethnicity, unequal representation, issues of multi-partyism amongst others.

First, unlike in 1992 and 1997, whereby the executive arm of government had an apparent interest in the presidency as the incumbent was contesting for the same, in 2002, the heavy hand of the Executive was not hell-bent on ensuring their candidate won. This gave an opportunity to the then opposition, led by Mwai Kibaki, to win the presidency. Far from what has been debated before, that the opposition of the day was more organized and hence the overwhelming victory, some have also speculatively argued with the benefit of hindsight that the Executive had planned for the opposition to take over similar to the case of the Democratic Republic of Congo. Therefore, the seeming disinterest and hands-off attitude witnessed during the Moi regime contributed to the stability experienced during the 2002 electioneering period.

Secondly, in 2013 similar to 2002, there was minimal interference from the Executive. However, unlike in 2002, the opposition did not concede, citing cases of irregularities and ultimately petitioning the Supreme Court of Kenya to annul the presidential elections. Furthermore, in 2013 unlike in 2007, the political class was keen on upholding peace to prevent a repeat of the post-election violence witnessed in 2007. It was also assumed that the International Criminal Court (ICC) was still monitoring the country's political and electoral situation, which also acted as a deterrent.

“The formation of coalitions has promoted a culture of political dishonesty by the very fact that the Memorandums of Understanding (MOUs) are rarely respected and implemented post-election, as has been the case since 2002.”

In summary, these two elections stand out because the government's executive arm did not interfere significantly with the politics of the day. In previous elections, it seemed that whenever the Executive had a



clear interest in the presidential elections, as witnessed, violence was almost a certainty as the credibility of the election results was always in scrutiny, taking in mind that the Executive appeared to interfere with the whole electoral process.

The forthcoming elections of 2022 might mirror those of 2013, considering the incumbent will not be contesting and he has not come out clearly in support of any presidential hopeful. Be that as it may, there is a growing trend in Kenyan politics where political parties form pre-election coalitions or alliances. This action has significantly affected Kenyan politics overtly and covertly. For instance, when the coalition of parties, the National Rainbow Coalition (NARC) that won the national elections in 2002 was being formed, no one knew that this very idea would characterize Kenyan politics henceforth. Then, it was just an idea that was being seen as one that would unite the opposition and win the 2002 elections. However, two decades later, it is almost unthinkable for any political party to contest for an election without forming or joining a coalition. In as much as these coalitions have the potential to promote political unity and stability, they, in most instances, give the impression of uniting certain communities at the expense of others.

Coalitions in Kenya, increasingly, can be viewed as tribal groupings taking in mind politics in Kenya is mostly organized around ethnic lines. These coalitions pose the greatest challenge to democracy as we know it in Kenya for the following three reasons:

Firstly, the extent that these coalitions are not ideological explains why ethnicity and personalities inform how coalitions have been formed post-2002.

Secondly, these coalitions weaken political parties. The very idea that ideology is important, by compelling parties to abandon their ideals and ideas in support of individuals who often differ in their ideological dispositions and political orientation. This has since created a culture of party disobedience and disloyalty.

Thirdly, the formation of coalitions has promoted a culture of political dishonesty by the very fact that the Memorandums of Understanding (MOUs) are rarely respected and implemented post-election, as has been the case since 2002.

Finally, let's look at what the future looks like. Currently, Kenya is in a constitutional moment with the talks of amending the 2010 constitution to include some amendments as captured in the Building Bridges Initiative Report, Constitution of Kenya (Amendment) Bill, 2020. This Bill, among other things, seeks to expand the structure of the Executive by creating the office of the Prime Minister and two deputies. This is to deal with the challenge of inclusivity and to create the office of the opposition leader to deal with the challenge of winner-takes-it-all.

This is a good step in the right direction, even though the Bill falls short of making serious changes that might help deal with the problems that have bedeviled Kenya. For instance, the failure to clearly separate the powers between the Prime Minister and the President and the failure to create a strong prime minister means that sooner or later, Kenyans will have to engage in another discussion about how their future should look like.





ELECTIONS & HUMAN RIGHTS

STEMMING THE TIDE OF POLITICAL VIOLENCE IN KENYA

By Francis Aywa
& Billy Osogo

For many, the 2007/2008 post-election violence was the worst in Kenya's history. More than 1,300 people were killed, 600,000 displaced and millions worth of property lost. Economies throughout East Africa recorded were largely affected. As the year 2022 draws closer, the tides of another wave of political violence are visible. In early October 2020, at least two people died in Muranga when the supporters of two political factions clashed. These deaths are reminiscent of past incidents of election-related violence. As is historically often the case, we may see a repeat of the same, or even worse, towards the 2022 general election. In the words of George Shaw, "If history repeats itself, and the unexpected always happens, how incapable must man be of learning from experience?"

How We Got Here – And What It Portends for Future Elections

Political and electoral violence was embedded into Kenya's history via colonialism. Post-independent elites inherited the colonial structure complete with its laws. Ethnicity became the most dominant form of interest articulation. Violence was the glue that held it all together.

The Kikuyu and Luo dominated the Kenya African National Union (KANU), while the Kalenjin dominated the Kenya African Democratic Union (KADU). Successive regimes filled government positions with members of their ethnic communities. To date, the mobilisation of electoral contests is still ethnically driven.

The post-independent state continued using its monopoly of violence to achieve its elitist objectives. Political assassinations and human rights violations became commonplace. The Kenya People's Union (KPU) achieved significant electoral victories in the 1966 "*Little General Election*" despite well-coordinated violence by the state and KANU. The electoral losses by the opposition in the 1992 and 1997 general elections were due to patterns of interference with political freedoms – breaking up opposition rallies on flimsy administrative grounds, as well as kidnapping and intimidation of opposition candidates.

The run-up to the 1992 and 1997 elections saw a simmering of State-sponsored ethnic tensions. Minority communities in parts of the Rift Valley were violently evicted in 1992. The aim was to disenfranchise the so-called "*alien*" communities who mainly supported the opposition. As was the case in the clashes witnessed at the Coast in the run-up to the 1997 elections. Communities seen as supporting the opposition were targeted.

Moi's 2002 succession project was thwarted by the National Rainbow Coalition (NARC), the result of a strategic ethnic calculus that included Mwai Kibaki as its presidential candidate to divide the Kenya African National Union (KANU) vote in Central Kenya.

With the pre-election Memorandum of Understanding (MOU) between Kibaki's NARC and Raila Odinga's Liberal Democratic Party (LDP) collapsing, ethnic tensions rose again. The opposition used the 2005 Referendum as a



dry run for the 2007 General Election. The victorious “orange” referendum symbol evolved into a formidable political party – the Orange Democratic Movement (ODM). By the 2007 general election, these tensions were perfect tinder, set alight by the spark of the bungled election. Kenya stared into the abyss of a civil war.

The 2013 and 2017 elections pitted two of the largest ethnic groups against a combination of other ethnic groups. Whereas this reduced the specter in electoral violence-prone areas such as the Rift Valley, ethnically motivated violence broke out in other areas. The 2017 elections were highly divisive and bore the undertones of the chaos witnessed in the 2007 elections. Predictably, the trends in the elections, including party affiliation, mobilisation of voters, and views about the freedom, fairness, and credibility of the elections, were premised first and foremost on ethnic identity.

Now What?

What, then, should be done to break the country's cycle of political violence?

First, the country needs to make a clean break from its violent past. The government should comprehensively address historical injustices in Kenya, some of which are related to previous incidents of violence. Otherwise, it is bound to repeat what it has not learned from.

Secondly, it is important to note that the best investment in peaceful elections is to ensure the credibility of the electoral process. All the measures necessary to restore public confidence in elections, including the restructuring of IEBC, should be implemented well ahead of the 2022 General Election.

Finally, the law should be applied equally and impartially in dealing with those whose political stock in trade is violence. The police should investigate political violence as they would any other acts of violence. The Director of Public Prosecutions (DPP) should prosecute political violence more capably than has hitherto been the case. The National Cohesion and Integration Commission (NCIC) should act decisively on hate speech and the drivers of ethno-political violence. It is time the Judiciary adjusted its sentencing policy and approach to all crimes associated with political violence.





ELECTORAL news ROUNDUP

Electoral Actors Preparedness towards 2022 General Elections

The Political Parties Dispute Tribunal (PPDT)

Calls for the devolution of the Political Parties Dispute Tribunal (PPDT) to the counties are on-going. In particular, a petition was filed by Jubilee Party officials to devolve the functions of the institution to enhance access to justice at the county level. The petition, filed before Justice Anthony Murima, seeks to, among other things, compel the National



Assembly and the Senate to formulate legislation in this regard by amending the Political Parties Act, 2011 Section 40 (2). The legislation would include the devolution of the internal dispute resolution mechanism process to party branches in compliance with Article 48,

38 and 159 of the constitution. The petition spoke to irregularities arising from political party primaries that could only be addressed at the national office in Nairobi, despite political parties having membership across the country, thus violating the law. Currently, the PPDT exists only in Nairobi's Milimani Law Courts. Additionally, the petitioners requested the court to direct Parliament to amend Section 25 of the Political Parties Act, 2011 thereby providing a formula for the devolution of the Political Parties Fund in line with the Constitution.

Judiciary

The Chief Justice position became vacant recently upon the retirement of Justice David Maraga in January 2021. Following this, a total of 13 legal scholars, top lawyers and judges applied for the same. The Judicial Service Commission (JSC) is expected to embark on the process of verifying the applications before shortlisting candidates for interviews. After the interviews are conducted, one name will be selected and forwarded to the President for appointment upon Parliament's approval.



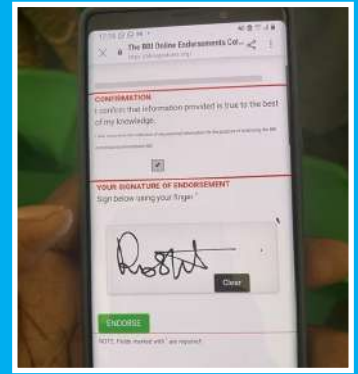
BBI Signature Verification Exercise

On 10th December 2020, the promoters of the Constitutional (Amendment) Bill, 2020, that is the Building Bridges Initiative camp, submitted 4.4 million signatures to the Independent Electoral and Boundaries Commission (IEBC) in support of their initiative for constitutional change. Consequently, and in compliance with Article 257 (4) of the Constitution of Kenya, IEBC undertook a verification exercise to ascertain whether the bill meets the requisite



constitutional threshold.

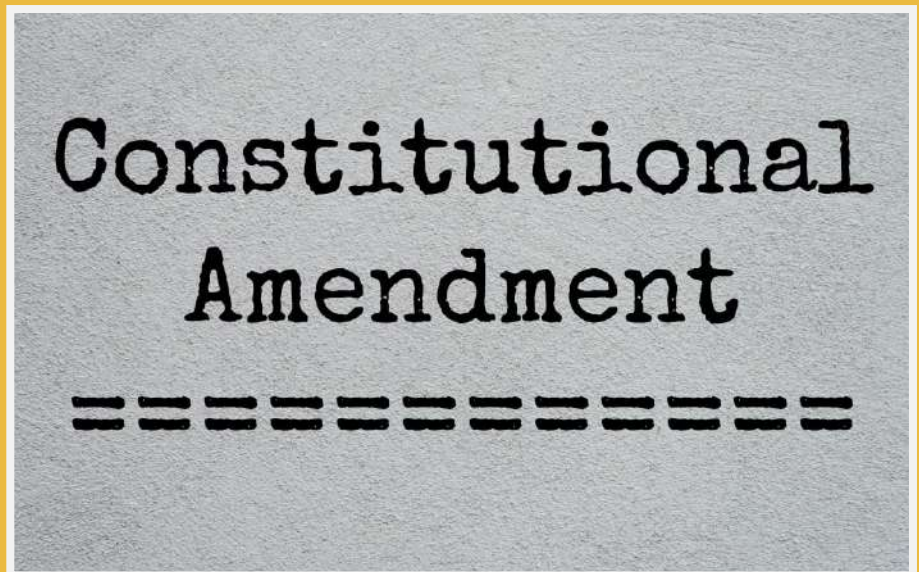
In the ensuing months of January and February, the commission engaged data clerks to verify signatures whilst ELOG deployed daily stationary observers at the Bomas of Kenya to observe the verification exercise. In its second press release, ELOG confirmed that the IEBC had checked and confirmed 1,140,845 signatures after publishing the list and inviting members of the public to confirm their consent. ELOG however, urged IEBC to establish a clear mechanism and framework for verifying signatures in such processes .



The Referendum and the Constitutional Amendment, Bill 2020

Upon the conclusion of the collection and verification of signatures in February 2021, the draft constitutional amendment bill has elicited a lot of debate across the country. Initially, the Independent Electoral and Boundaries Commission (IEBC) was temporarily barred from submitting the Bill to the county assemblies pending the hearing and determination of seven petitions that were filed challenging the Constitution Amendment Bill 2020 and the anticipated referendum. The petitioners argued that if the process was allowed to continue, the citizenry would lose billions of shillings and it would be a blatant violation of the sovereignty of the people.

The Building Bridges Initiative (BBI) sponsored Constitutional (Amendment) Bill, 2020 was introduced before Parliament in March 2021 at both the National Assembly and Senate . Leaders traversed across the country to gather support for the bill as well as to ensure public participation. Kenyans are expected to internalize the contents of the draft constitutional amendment bill and participate in the decision-making process. Thereafter, the legal affairs committee would retreat to compile the views from the public and present a report to Parliament for discussion. The bill will not be taken through the first, second and third reading as it is a unique one and no amendments are anticipated. Once the report is presented to the House, its recommendations to either approve or disapprove the bill will be adopted.





Democracy is not just the
right to vote; it is the right
to live in dignity.

~Naomi Klein

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