

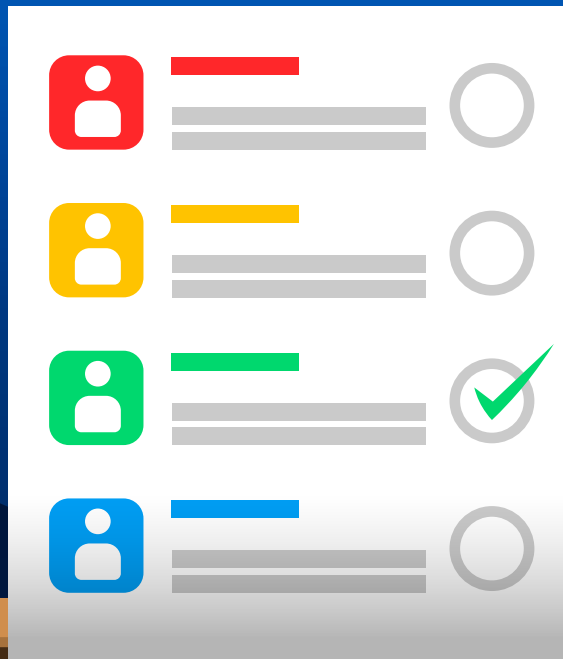
# Darubini

*Ya Uchaguzi*

Issue 12

*Electoral Reforms*

THE UNFINISHED AGENDA



## Contents and Credits Page

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The Late Venerable Jephthah Gathaka

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**MESSAGE FROM THE CHAIR****Anne.W. Ireri****ELOG Steering Committee-Incoming Chairperson**

### **Greetings from ELOG!**

This year, I had the distinct honour of being elected as the Chair of ELOG's Steering Committee (SC) during a meeting held in March 2021. ELOG has a membership of fourteen (14) organisations that the Federation of Women Lawyers (FIDA-Kenya) is privileged to be a part of. As the Executive Director of FIDA-Kenya and a member of ELOG SC, I am proud of the work being done as we transverse through the journey of monitoring and observing the electoral and political environment as the country heads towards the 2022 General Elections.

Since its inception, ELOGs main goal has been to strengthen democracy and good governance in Kenya and the African region. ELOG approaches elections as a process and not an event using the electoral cycle model divided into three phases: observing what occurs before, during, and after elections. ELOG has spoken of its concerns based on the rising levels of impunity and electoral violence witnessed through its press statements which negatively impact the country's democracy. ELOG calls for the security organs to execute their mandate impartially in order to ensure the safety of the citizenry. Further, there is a need to upscale continuous voter and political education in order to ensure inclusivity in all electoral processes.

As we march towards the 2022 General Elections, it is crucial that all the relevant electoral actors continue to engage in discussions to ensure that the fundamental human rights of voters are promoted and fulfilled. Additionally, the sanctity of every vote must be protected and the rights of the voters and electoral institutions respected. ELOG will boldly continue to play its role in monitoring and observing the country's preparedness for the same and as usual, we shall speak authoritatively.

In closing, I take this opportunity to thank the entire ELOG Steering Committee (SC) membership for electing me as the Chair. Further, I would like to thank my predecessor Regina Utita Opondo, the Advisory Peace Panel (APP), Steering Committee (SC), and the Secretariat for spearheading the initiatives put in place thus far navigating ELOG to where it is today.

Let us embrace the future together!

Sincerely,

*Anne W Ireri*

**ELOG Steering Committee-Incoming Chairperson**



MESSAGE FROM THE

# NATIONAL COORDINATOR



Mule  
Musau

Early this year, ELOG went through a leadership handover after the term of the previous Chairperson of the Steering Committee, Regina Opondo, ended on 31st March 2021. I take this opportunity to thank Regina for her leadership since 2016. Under her leadership, ELOG steered through a tumultuous election period where, for the first time in the country's history and indeed in Africa, a presidential election was nullified by the court and a fresh one held. I also take the opportunity to congratulate the new ELOG Chair and the Executive Director of FIDA-Kenya, Anne W. Ireri, who will lead the platform into the 2022 General Elections.

The election season is here, and ELOG plans to use the rest of the current year to conduct periodical appraisals on the level of electoral preparedness through targeted stakeholder engagements. As we have stated before, it will be important to ensure that the envisioned electoral reforms, many of which are still in different processing stages, are finalised before the advent of the final preparations for the elections. In Justice Kriegler's thinking (IREC report 2008), electoral reforms should ideally have been processed at least a year to the elections. As it stands, this advice cannot be realised since it's only two months to that desired timeline, and we are still a long way off from finalising the required reforms.

However, it is not all doom and gloom because many of the erstwhile development partners supporting

elections seem to have read the script from the 2017 observers' reports on funding requirements. For a long time, election stakeholders have expressed the need for early funding and support for election-related programs in line with the electoral cycle approach. Led by the Embassy of the Federal Republic of Germany, the Foreign, Commonwealth and Development Office (FCDO), United States Agency for International Development (USAID) and even the European Union (EU), these partners have already initiated efforts to support election programs through various Civil-Society Organisations (CSOs) and formations more than a year into the elections. Although the local partners would have wished for more time, it is still a laudable effort considering that it is the first time that this has happened.

ELOG and the other partners who are already recipients of some of the grants have begun implementing programs whose objectives are to ensure the integrity of pre, during and post 2022 general elections. The import of this will be to offer a more rounded and comprehensive assessment of these processes while at the same time providing for a more proactive role in addressing any evident gaps.

Mule Musau  
ELOG National Coordinator



**Hilda  
Mulandi**

MESSAGE FROM

**THE EDITOR**

*Dear Reader,*

ELOG's newsletter Darubini ya Uchaguzi continues to feature informative articles on issues impacting the electoral space. There is a lot for the citizenry to contemplate and reflect upon as the country heads towards the home-stretch of the 2022 General Elections. In the current issue's guest column, we feature Tom Kagwe, a political scientist and human rights researcher. His insightful and informative article speaks on matters of fraud and impunity that impact the electoral processes in the country.

In the follow-up article, we commemorate Venerable Jephthah Gathaka as we remember the contributions he made in the governance sector. He initiated, organised and participated nationally and internationally in various advocacy and lobbying efforts to promote justice, peace and reconciliation, inter-religious dialogue and environment. In his interview, he spoke on the history, evolution and journey of election observation as well as its implications on elections and electoral processes.

As is the norm, the electoral news roundup brings you a full range of issues occurring in the country. Further, ELOG would like to offer a word of thanks to our contributors, readers and reviewers for their support of the e-newsletter and its mission to disseminate and share information on issues impacting the electoral environment, guided by the electoral cycle. Re-launching it was no small feat, and we have achieved a good measure of success with timely articles and consistently high-quality content

**“Keep reading. It's one of the most marvelous adventures that anyone can have.~ Lloyd Alexander”**

from outstanding contributors. We continue to welcome contributions to this ideal forum of information exchange on topics related to elections and electoral processes. If you have any questions, suggestions or concerns, please address them to [info@elog.or.ke](mailto:info@elog.or.ke).

Enjoy!

*Hilda M Mulandi*  
**Editor and Program Officer**

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## GUEST COLUMN

# ELECTORAL PROCESSES' FRAUD AND IMPUNITY

## The Unfinished Agenda Towards 2022

Written By

Tom Kagwe, J.P.

Political Scientist and Human Rights Researcher



All over the world, nothing attracts attention in a country's political, social and economic life than electoral processes, including Election Day itself and the electoral outcomes. As stated by the Kenyan scholar Godwin Murunga, most democracies and electoral processes are mostly pre-determined; however, the electoral outcomes are not known. In most of Africa, this norm and value of ensuring elections and their results should reflect the will of the democratic electorate are seemingly not abided to. As per Abraham Lincoln's dictum, **government** is of the people, by the people and for the people.

However, other scholars have also argued that electoral processes are uncertain, whilst the electoral outcomes are pre-determined – either by the incumbent president or government trying to outlive their stay in office. This is apparently done by illegally extending their term limits or through intimidating the opposition into submission if not by outright violence, threats, or even death of key figures. Illustratively, the trends in elections across Sub-Saharan Africa in countries such as Kenya, Uganda, Burkina Faso, Togo, Burundi, Rwanda, the Central African Republic, Democratic Republic of Congo, Côte d'Ivoire, Ethiopia, Niger, Somalia and Tanzania among others have seemingly proved this for the last four (4) or so decades.

### Oversight Standards

The role of election observers and other actors need not be gainsaid. As well-phrased in 2018 by Joseph Siegle and Candace Cook, elections “...**represent an important**

**benchmark of whether African citizens (especially its increasingly active and networked youth), regional organisations, and international partners will tolerate efforts to erode democratic norms – or whether a renewed effort to uphold certain standards...**” will be upheld.<sup>2</sup>

These standards are about the universal principles upheld in the International Covenant on Civil and Political Rights (ICCPR), that elections should be free, fair, genuine and credible. This can only occur if there is an Independent Electoral Management Body (EMB). Unfortunately, EMBs in Africa are deemed uncredible, untrustworthy, and hugely influenced by the government in power. This generally occurs through how:

- a. The laws are drafted;
- b. The recruitment of the EMB leadership is done;
- c. The management of the Secretariat is selected;
- d. The administration of the entire electoral processes from voter registration to the announcement of the electoral results is done;
- e. The drawing of electoral boundaries occurs, which is primarily influenced by politics;
- f. The role of independent observers and monitors, whether domestic or foreign and their regulatory environment; and
- g. Most of all, which is ignored, the role of the supposed democratic electorate in abetting criminality within all the above processes – knowingly or unknowingly.

<sup>2</sup> <https://www.demdigest.org/africas-2020-elections-key-issues-to-watch/>



The above, and many more, form the fulcrum of what election observation and monitoring should be. Electoral actors should stress these standards and ensure countries hold free, fair, credible and genuine elections. All the foregoing, if breached, accountability of the highest levels should be insisted upon by the standard-bearers. For clarity purposes, standard-bearers are not outside Africa. That is, this is not just an African phenomenon. Now, in other continents as recently observed in Europe, Asia, Latin America as well as countries such as Myanmar, Belarus, Russia, Romania, Italy, Hungary, Serbia, Venezuela, Uruguay, Peru, Bolivia and Brazil, have had their fair share of controversial elections in the last decade. The home of Abraham Lincoln, the United States of America (USA), has had its fair share of the same controversy from 1792 to 2020 at the gubernatorial and the presidential levels.

### Conceptual Clarity: The Unfinished Agenda

From the preceding, there is a need to conceptualise the monitoring and observation of elections as Kenya heads towards the 2022 General Elections. Election actors should go beyond the norm. First, some or all electoral processes will occur amid COVID-19. This is the **“new normal.”** Most, if not all, of the elements of the electoral system, policies and laws, processes, procedures and regulations, should be able to reflect this reality. As much as there has been a first, second and now a third wave in the country, it is virtually and conceptually difficult to plan with a so-called post-COVID-19 mindset and programmes. Even with the rolling out of vaccines to mitigate the spread of the pandemic, electoral actors will need to re-strategise their methods of conducting and observing elections and electoral processes within the current environment.

Secondly, electoral violence emanating from the emergence of the radical/violent or right-wing groups represents a major departure again from normalised elections and electoral processes. These have been seen in the last five (5) or so years in various elections in several continents. In Africa, they are somewhat represented by radical militant groups such as al-Shabab. In Mozambique, the al-Shabab generates enough violent commotion despite the Mozambique Liberation Front (FRELIMO) presence, having won the 2019 General Election. Further, in Myanmar, the army took over power

on 01st February 2021 from an already democratically elected government. According to the United Nations (UN), as of 12th March 2021, at least seventy (70) people had perished from the military and police violence since February. These global examples point out that all Civil Society Organizations (CSOs), particularly those in the democracy, human rights and governance sector, need to strategise about Kenya's electoral processes and outcomes of 2022. This goes beyond the scope of Africa.

### Setting the Agenda

Currently, the agenda on the table is that of electoral reforms such as the Building Bridges Initiative (BBI) and the Parliamentary Initiatives. The Building Bridges Initiative (BBI), which is deemed to be elite-led and elite-opposed with those in between the rich and poor being seen as pawns in the chess game, a majority of issues affecting the people are outlined therein. These include violation of socio-economic rights, lack of respect for political and civil rights, the public debt burden, leadership and integrity including impunity, theft of public resources for personal gain, and a lack of accountability among those who commit these ills.

The civil society organisations (CSOs) working with other advocacy partners should develop interventions to further inform the electoral reforms agenda and advance its own reforms to address the gaps presented in the Building Bridges Initiative (BBI). This may be similar to what the Kenya Human Rights Commission (KHRC) did in 2002, but not without vilification from other CSOs. Kenya's 2022 elections, and the processes preceding the same, are unique for CSOs to aggressively champion for and stand for what is right and just for the country's future. Illustratively, in early 2010, the Constitution and Reform Education Consortium (CRECO) rallied over twenty-five (25) organisations to start the Katiba ni Sasa (the Constitution is Now) campaign which was one of the contributory factors that led to the development of the 2010 Constitution.

Finally, in 2022, Kenya needs a new direction, politically, economically, and socially. Ethnic voting most likely may or may not influence electoral processes and outcomes, as some, if not most Kenyans, have learnt that the economic disparity between the rich and the poor goes beyond ethnicity.



Additionally, corruption is a key agenda and accountability for it would be influential, but this is with reservations. This is because the citizenry's democratic rights are seemingly influenced by factors such as outlook or even the age of the candidates, where the wind is blowing politically, what they have gained personally from the candidates, or strangely even with evidence to the contrary, the tribe

of the candidates!

In conclusion, electoral actors should advocate for the notion of a democratic and progressive Constitution. Additionally, electoral actors such as commissions, judiciary, parliament and the executive need to take an active role in educating the electorate on national ethos and the importance of ensuring that the implementation of the Constitution is adhered to, not excluding its amendments.

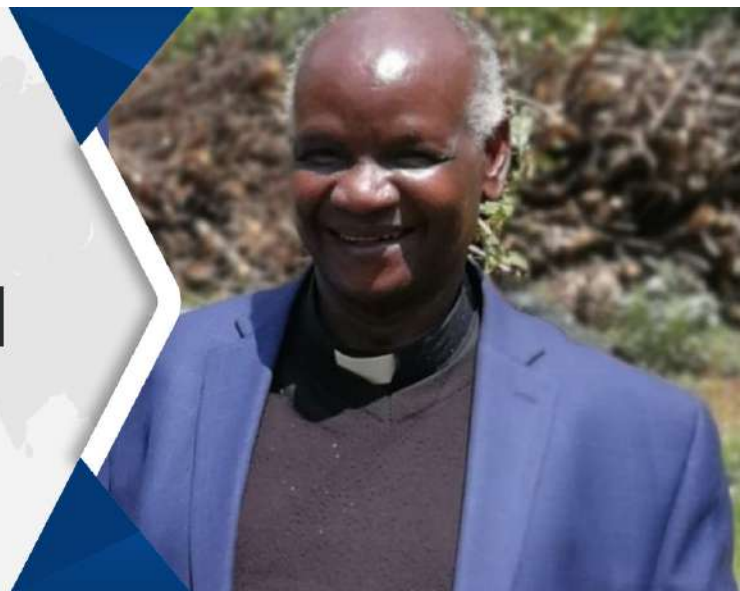




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# ELECTIONS & ELECTIONS OBSERVATION

In memory of Venerable Jephthah Gathaka ☒



*In memory of Venerable Jephthah Gathaka, Darubini ya Uchaguzi features an interview conducted after the 2017 General Elections. He was a Founder and Steering Committee member of the Elections Observation Group (ELOG). He consulted, trained and wrote extensively as well as published materials on civic education, church development, democracy, governance, devolution, constitutionalism and human rights, peace, education, anti-Corruption and environmental issues. Additionally, he worked with institutions such as the Ecumenical Centre for Justice and Peace (ECJP), the National Council of Churches of Kenya (NCCK), the Bible Society of Kenya (BSK) and the Anglican Diocese.*

### **What is your name and occupation?**

My name is Ven. Jephthah Gathaka and I am an Anglican priest ordained in the Anglican Church. My areas of expertise are related to the following fields: civic education, advocacy, lobbying, promoting human rights, and democracy.

**Thank you for telling us a bit about yourself. Please tell us more about your personal history, that is, where you were born and if you ever envisioned yourself working with the Church as well as the governance sector?**

My father told me that I was born in the same year as

Prince Charles of England. Therefore, I believe that my year of birth was in 1948, even though no documentation was available at the time. Like most individuals, my education journey commenced with primary school then secondary school. In 1966, while working as a Sunday school teacher, I felt a calling to join full-time ministry as a priest. Thereafter, I joined the Anglican Bible School in 1973 in Muranga. In 1976, I became a full-time priest in charge of a parish in Kaggio, Kirinyaga. Interestingly, in my early years, I didn't envision that I would become a priest. I thought that I would become a Public Relations Officer because of my love for books.

Two and a half years later, I became an administrative secretary and personal assistant to the Bishop and I was based at the diocese headquarters. In hindsight, as I reflect on my life, the late Bishop Gitari was an inspirational pillar on matters of social justice, political reforms and so much more.

**That is profound, and you were at the parish for six years. When you left, what did you do after that?**

The Bishop seconded me to the Bible Society of Kenya as they were recruiting a Marketing Manager and I had an interest in the position. I worked with the Bible Society of Kenya for a year. Afterward, I was promoted to join the National Council of Churches of Kenya (NCCK) to run the "Church and Society" program. The program addressed political, social, economic and spiritual issues in the society.



***Therein lies your journey towards socio-political work. What has the Church done to respond to these issues and challenges?***

Does the Church involve itself in preaching and forget other things? Do they look aside when human rights are being violated? Does it forget that there is bad governance? What was the response of the Church to these issues? I got the challenge of managing these issues while working with NCKK.

***It would seem that the Church's involvement in socio-political work at the time might have been tricky. How did you approach the same?***

As previously mentioned, I joined NCKK in 1989 and if you can recall two years prior, Kenya would vote using the Mlolongu system. I undertook my first observation process of elections in 1988 and I was tasked to document the process using a video-camera. I filmed the short and long queues where it was expected that the long queue would win. However, that was not the case as the short queue won. In response, I produced the film as evidence which was featured in Beyond Magazine. Nonetheless, the magazine was deemed to be illegal and anyone found in possession of it was arrested. We had to hide some of the copies so that they were not destroyed.

***That was your first observation mission? You got into the Church a year later when the wind of change was blowing not just in Kenya but globally when the Berlin Wall was coming down and reforms were taking place all over Africa. The focus in Kenya was the need to change Section 2A to allow multi-party democracy resulting from the bungled elections in 1988 that served as your first observation mission. So, you were getting into observation when the country was going through a period of difficult times.***

At the time, there was an agitation for the country to change from a de-facto one-party system to multi-partism. Therefore, if a member was de-registered from Kenya African National Union (KANU), they had no other party to run to and could not participate in political activities.

Those were challenging times, and my first duty with NCKK under the "Church and Society" program was to address these issues and bring justice. It was important for the Church to be at the forefront in promoting justice. However, this was not an easy task as the Church became divided. I had to assist the Church in understanding its role in addressing the underlying issues of the one-party system and multi-partism.

NCKK commenced civic education with the citizenry to enhance their knowledge of these issues, which led to the formation of the Saitoti Review Committee. The Committee's agenda was to investigate the issues of the one-party system and multi-partism. On the other hand, NCKK enlarged its mandate and prepared a memorandum in response to the Committee's call for public participation. The memorandum addressed not only the constitutional and political pluralism matters but also the KANU nomination rules.

Additionally, as you have already mentioned, when tides were shifting globally to end the cold war and the Berlin Wall was falling, back at home, Kenya was also experiencing its own shift as there were talks of repealing Section 2A of the 1963 Constitution. In this light, NCKK and the international community supported the clamor to have the same repealed.

***What were some of the fundamental challenges that you faced as you walked in this journey of political-social justice?***

The first challenge faced was division within the Church, whereby the Church felt that religion and political affairs were separate entities and thus the Church should not be involved in political affairs. The second was from the ruling party when we carried out civic education to inform Kenyans about voting. The ruling party had preconceived perceptions about civic education and that Kenyans did not require the same to vote.

***Let's get a bit deeper into your election observation journey. How did this become an area of interest to the extent that you worked as a domestic and international observer?***

I got involved in election observation while working with NCKK. In order to observe the 1992 elections, the



National Elections Monitoring Unit (NEMU) was formed in partnership with other churches and professional bodies. Emanating from the 1988 elections, the citizenry developed voter apathy; thus, we felt a need to sensitise Kenyans on the importance of voting through civic education. We taught them about the significance of elections as well as the importance of the vote. We further taught them about democracy, governance and the importance of the opposition. As such, we came up with a catchphrase that stated, "Bad governments are elected by people who do not vote and bad leaders as well."

I developed further interest in election observation as we rolled out the program across the whole country. However, we faced various challenges in the process, such as inadequate funding, difficulties in recruiting observers, and opposition from the now-defunct Electoral Commission of Kenya (ECK). Further, the polling stations were inaccessible as the Commission and its electoral officers saw us as enemies instead of allies. In retrospect, one time, we were told to keep quiet and talk to no one, including the presiding officers. One of the presiding officers stated, "Kazi yako ni kutazama na kuandika yale ambayo unataka kuandika (Your work is to observe the processes and to write what you want to write)."

***With respect to the Unit that was formed to observe elections in 1992, in your view, how did it perform?***

NEMU performed very well and even proceeded to publish a report that has been vital to the reform agenda since then. If the observations undertaken then had not been documented, ad-hoc committees would still be formed to observe elections to date.

***The journey that began in 1992 changed not only election laws but also election observation as a discipline. Take us through the transition process.***

As I mentioned earlier, the ground was hostile and the Commission was not appreciative of the election observation process. However, they had to become accommodative as the clamor for change progressed. For instance, in 1993, after observing elections in Lesotho, we noted that ballots were counted at the polling station.

Further, the voters who required assistance came with their helpers. However, this was not the case in Kenya, and once I returned to the country, I approached the Commission to adopt the same, but they declined the advice shared. I was told, "Reverend, you like dreaming and you can continue dreaming."

Nowadays, not only does the counting of votes take place at the polling station, but assisted voting is also encouraged. I believe that one day, the blind will also be able to vote using the tactile ballots as I had witnessed when I observed elections in Ghana. Further, as presiding officers, observers and monitors communicate amicably regarding the electoral process, the ground is no longer hostile as it was in the past.

***Let me take you back. After NEMU, what came next?***

After NEMU, many civil society organisations and other stakeholders thought through it and stated, "Yes, we can do it, we can observe elections and the electoral processes as groups."

***In relation to the evolution of election observation and building of NEMU, could you please take us through the history of election observation in Kenya?***

Towards the 1992 elections, it was difficult to rally institutions and individuals to undertake the election observation process due to the hostility faced then. We were unsure whether the process would continue. However, in 1997, churches under the leadership of NCKK rallied efforts and developed a better election observation program that ensured that elections would be observed systematically. Further, the civil society organisations were in support of the same. NEMU's recommendations guided the process of enhancing election observation. This resulted in the development of better programs and further, a criteria/checklist was developed and used to observe elections. Thereafter, better reports on elections and electoral processes were developed.

A critical factor to note in election observation is that the same is governed by what I call the three D's, which include:



- a. Detect- What is likely to go wrong;
- b. Delay-Hinder that which is likely to go wrong; and
- c. Deter-Stop completely whatever is going to go wrong.

### **How did NEMU evolve as the country headed towards the 1997 elections as well as other elections?**

By 1997, NEMU evolved to the Kenya Election Domestic Observation Forum (KEDOF) while another organisation represented civil society. Election observation was now recognised as a professional discipline. Fast forward to the 2002 elections, many individuals and organisations became interested in the election observation process. However, this presented a new challenge as divisions arose due to conflict of interests, especially during the 2007 elections. Out of these misunderstandings, we were able to strengthen the election observation process based on lessons learnt and come the 2013 elections, we were a force to be reckoned with.

### **Please take us through your experience on international election observation. How has it enabled you to grow in the same?**

Election observation was a calling for me due to my zest and passion for democracy, justice and human rights. Internationally, I have been involved in election observation in countries such as Lesotho, Zimbabwe, South Africa, Ethiopia and Gambia. For example, in the Gambia, I was a rapporteur on behalf of the African Union (AU) election observation team. During their elections, I noted that the voters used marbles instead of ballot papers to vote. At this moment, I realised an election system is based on its implementation and use.

In Ethiopia, I noted that they had a different system whereby once the voters got to the polling station, ten (10) of them were counted and taken aside to receive civic education before they voted. They were trained on how to vote, such as marking the ballot papers based on the candidates they wished to vote for. The whole process took about ten (10) minutes and after that, they were directed to the voting booth.

With respect to my observation experience in Ghana, I noted that they used the Parallel Vote Tabulation (PVT) system. Before the Commission announced the results,

the election observers' maintained secrecy concerning the results until the Commission officially announced the same. This was the case also in Kenya during the 2013 and 2017 General Elections.

Additionally, in Germany, I observed the elections whereby I noted that the ballot papers were long similar to those of the Democratic Republic of Congo. In summary, if the citizenry are determined to have a good election, they can do it. If they are determined to have a flawed election, they can also do so. A country's leaders also play a crucial role in ensuring that elections are credible, peaceful, free and fair.

Election observation has made elections credible, peaceful, free and fair based on the indicators that guide the process, such as, have voters been registered correctly? Have campaigns been carried out? Have election officials conducted elections correctly? ELOG looks at these indicators before releasing its reports.

### **What would you say were the challenges of election observation from the foregoing?**

In 2013 and 2017, the election management body made inquiries on the electoral processes being observed. This has helped them improve their implementation processes with respect to electoral processes. There have been improvements in voter education and voter registration, among others.

### **The nature of elections is competitive and the acceptance of results is part of the process. In light of the concept of election observation, should election observation be part of competitive elections for organisations such as churches, professional bodies, among others?**

The Universal Declaration of Human Rights (UDHR) Article 21 states that the people's free will is expressed through elections. In my mother tongue, we have a saying with respect to elections that states, "Elections finishes discontent, it causes two feuding parties to agree." In Latin, it states "Vox Populi, Vox Deo," meaning, the "Voice of the People, is the Voice of God." Accepting results is something good and it should help people. That is why they are mechanisms in place of going through the courts when one is discontented. The Constitution



has provided a solution through the court system. Although it is human nature to dispute results, state and non-state actors need to develop mechanisms that can assist humanity in comprehending the ups and downs of elections and their processes.

### **Concerning elections and the youth, what would say is their level of involvement?**

The youth's involvement is pertinent and cannot be done away with as the youth are part and parcel of Kenya. The youth's involvement is vital as they are part and parcel of the Kenyan population. The Kenyan Constitution clearly defines the youth age bracket (18-35 years) and as they make for a large percentage of the population, if they decided to vote and choose a young leader within their age bracket, they would succeed.

However, the youth need to come out and participate as well as make a concerted effort to become the leaders of today and tomorrow. The Constitution stipulates that anyone who is 18 and above can vie for leadership positions. The youth should not just be spectators but facilitators too.

The youth need to be the first line when it comes to the registration of voters. They should be the first to enroll as members of political parties too. Further, they should also be members of not only the County Assemblies but also in Parliament. Why should one make history when they are elected as a Member of Parliament at the age of 23 years? This alludes to the fact that something isn't right. This shouldn't be history. 18-year-olds should be joining parliament. Therefore, the youth should refuse to be "wings" in a political party but members, leaders in the political party, leaders in Parliament.

**You have talked about election observation. I cannot imagine Kenya counting votes with marbles similar to the Gambia. On the other hand, Germany's citizens go to vote and continue to undertake other duties and events such as a Marathon. Here in Kenya, we have to close businesses and nearly everything is at a standstill during E-Day. There seems to be a gap between the politician, the electoral Commission and the observer. What can**

### **be done to bridge the gap so that when the election observers give their findings and the Commission speaks on their processes, the politician can believe the information shared?**

The problem the country has is the lack of political education. Nowadays, though with the current curriculum, matters such as democracy are being discussed in subjects such as Social Studies. Matters such as national principles and values, integrity are also discussed in primary schools. The country should engage in political education from as early as nursery school. Children should begin learning about elections and democracy from an early age. Without civic education, we will never appreciate elections as a contest for worthy opponents; the view will remain that election is a fight among opponents.

### **With respect to the participation of persons with disabilities, Article 54 (2) of the Constitution states that 5% progressive implementation in elective and appointive bodies shall be for persons with disabilities. What can be done to ensure the implementation of the same?**

In my experience, although the government can guarantee the rights of persons with disabilities, it is vital for persons with disabilities to continue to fight for their rights. The championing of the progressive implementation of Article 54 should continue as human rights are inherent, invaluable and inalienable.

### **What do you think is the future of election observation moving forward?**

The citizenry, through election observation, has the rightful duty to ensure that elections are credible, peaceful, free and fair. We should not give up on election observation as it plays a vital role in ensuring that elections are conducted credibly.



## ELECTORAL ACTORS PREPAREDNESS TOWARDS 2022 GENERAL ELECTIONS

### Independent Electoral and Boundaries Commission (IEBC)



The IEBC Selection Panel expected to facilitate the appointment process of IEBC Commissioners took the Oath of Office in May. This set in motion the process to fill four vacancies in the Commission. The Panel was expected to select and forward the names of

the qualified candidates for the vacant positions to the President for appointment on or before 9th June 2021<sup>2</sup>.

The Selection Panel was established following the passing into law of the Independent Electoral and Boundaries Commission (Amendment) Bill No.3 of 2019. The Panel was set up to oversee the filling up of vacant positions at the Commission as well as future appointments to the electoral agency.

#### Parliament

Both houses of Parliament (National Assembly and Senate) passed the Constitutional (Amendment) Bill, 2020 by acquiring the two-thirds majority of the votes

<sup>2</sup> <http://www.parliament.go.ke/selection-panel-iebc-commissioners-takes-oath-office-holds-inaugural-meeting>

required to pass the Bill. With the Bill's passing, the country is faced the imminent possibility of holding the anticipated referendum within the next three months. This would be the first milestone with respect to the first amendment process to the 2010 Constitution of Kenya. However, the Bill was disputed in the courts, and the High Court declared the BBI process null and void, including the Bill.

#### The Judiciary

### Nomination and Appointment of Justice Martha Koome for the Chief Justice Position

The Judicial Service Commission (JSC) nominated Justice Martha Koome to become Kenya's first female Chief Justice upon the retirement of former Chief Justice David Maraga. The unanimous nomination was announced after a televised interview process with ten (10) candidates. Upon lengthy deliberations and careful consideration, the JSC submitted her name for appointment by President Uhuru





Kenyatta ahead of the 2022 General Elections. Thereafter, Parliament approved her nomination and the President appointed her, paving the way for her swearing-in as the first female Chief Justice in Kenya to head the Judiciary.

### ***Ruling on the Constitutional (Amendment) Bill, 2020 and the Building Bridges Initiative (BBI)***



EDGAR

The High Court made a historic ruling on a petition filed challenging the Building Bridges Initiative (BBI) process. The 5-judge bench unanimously ruled that the entire BBI process was unconstitutional. The judges dismissed the actions

of all the key players in the process, such as the initiators of the process, the Independent Electoral and Boundaries Commission (IEBC) and the BBI Steering Committee, as unconstitutional due to the following<sup>3</sup> :

- a. The BBI Steering Committee was unlawfully and unconstitutionally constituted and thus could not initiate any action towards promoting constitutional changes.
- b. The BBI Steering Committee did not avail adequate copies of the Bill to the public.
- c. The BBI was a hybrid initiative unknown to the constitution. The power to amend the constitution was reserved for Parliament and Wanjiku (the citizenry) under Articles 255-257. Neither the president nor any state organ could utilise article 257 of the constitution to amend it.
- d. The Basic Structure Doctrine<sup>4</sup> limits the legislature's powers to amend the structure of the Constitution.
- e. Although a Constitutional amendment can be initiated through a popular initiative, the President, government, or state organ cannot initiate the same. Therefore, the popular initiative to amend the Constitution could only be started

by the people and not the government.

- f. As the Constitutional (Amendment) Bill, 2020 was initiated by the President, he overstretched his powers by proposing the said amendments, which was outside of his mandate.
- g. The attempt to distribute seventy (70) constituencies in the BBI bill was unconstitutional and this was a clear violation of IEBC's independent functions.
- h. The Second Schedule of the Constitution of Kenya (Amendment) Bill, 2020 on the delimitation of constituencies and apportionment within the counties was unconstitutional as it did not incorporate Public Participation.
- i. Under Article 143 (3) of the Constitution, the President could be sued during his tenure in office in respect to anything done or not done contrary to the 2010 Constitution of Kenya in the exercise of his power. Additionally, by initiating the constitutional amendment process, the President had contravened Chapter 6 of the 2010 Constitution.
- j. The entire constitutional change process was unconstitutional, null and void.
- k. The Independent Electoral and Boundaries Commission (IEBC) had failed to conduct a nationwide voter registration exercise and thus, the Constitutional (Amendment) Bill, 2020 could not be subjected to a referendum.
- l. The IEBC did not have a quorum as required to conduct a referendum. Further, the verification of signatures in support of the Bill was done without a quorum. At the time of the launch of the Constitutional (Amendment) Bill, 2020 there was no legislation governing the collection, presentation and verification of signatures. Thus the Bill was flawed, making it null and void.
- m. There was no legal framework to govern the conduct of referenda.
- n. The County Assemblies and Parliament could not change the Bill's content since it was initiated through a Popular Initiative under Article 257 of the Constitution.
- o. That Article 257(10) of the Constitution requires all the specific proposed amendments to the Constitution to be submitted as separate and distinct referendum questions to the People.
- p. An injunction was issued restraining the Independent Electoral and Boundaries

3 <https://www.afronomicslaw.org/category/analysis/bbi-consolidated-high-court-kenya-judgement-constitutional-and-human-rights>



Commission (IEBC) from undertaking any processes relating to the Constitution of Kenya (Amendment) Bill 2020.

The Independent Electoral and Boundaries Commission (IEBC) filed an appeal at the High Court of Kenya in response to the ruling. Further, the promoters of the Building Bridges Initiative and the Attorney-General intend to file appeals at the high courts. The BBI process emanated from the Handshake between President Uhuru Kenyatta and the former Prime Minister Raila Amollo Odinga.

## **By-Elections**

The Commission held By-Elections for the following positions on 18th May 2021:

1. Senator- Garissa County.
2. Members of the National Assembly (MNA)- Bonchari and Juja Constituencies.
3. Members of the County Assembly (MCA)- Nyandarua County.

Upon the conduct of the by-elections, The Elections Observation Group (ELOG) released a preliminary press statement raising concerns after the disruption of the counting and tallying process in Juja Constituency. Further, ELOG also noted numerous incidences reported on voter bribery, failure of the Kenya Intergrated Elections Management System (KIEMS) Kits, voter identification (missing names in the voter register) and the compromising of the secrecy of the ballot for assisted voters.<sup>5</sup>

Further, the Commission gave notice that Parliamentary and County Assembly By-Elections for the following positions would be held on 15th July 2021:

1. Member of the National Assembly (MNA)- Kiambaa Constituency
2. Member of County Assembly (CAW)-Muguga Ward -Kiambu County.

<sup>5</sup> [https://m.facebook.com/story.php?story\\_fbid=4156117551078417&id=138567719500107](https://m.facebook.com/story.php?story_fbid=4156117551078417&id=138567719500107)





# ELOG ACTIVITIES

## EVENT RECORDINGS

Recordings of recent ELOG events are now available at:

- a) **ELOG Press Conference on the 18th May 2021 By-Elections**
- i. {<https://www.capitalfm.co.ke/news/2021/05/elections-observer-group-condemns-juja-by-election-violence-urges-action/>}
  - ii. {<https://allafrica.com/stories/202105200331.html>}
  - iii. {<https://dbntv.co.ke/elections-observer-group-condemns-juja-by-election-violence-urges-action/>}
  - iv. {<https://www.youtube.com/watch?v=-cdgKR18FTY>} (Courtesy of Yash Media)
  - v. {<https://www.pd.co.ke/news/outrage-over-chaotic-scenes-in-mini-polls-77680/>}
  - vi. {<https://www.facebook.com/watch/?v=767499477294928>} (Courtesy of TV 47)

## National Dialogue Conference

The National Dialogue Conference held on 23rd and 24th June 2021 brought together state and non-state actors that were drawn from key electoral duty bearers, civil society and faith-based organisations. The conference discussed the status of electoral reforms, the preparedness of electoral actors and the level of uptake of electoral reforms ahead of the 2022 General Elections.



Voting is the expression of our  
commitment to ourselves, one another,  
this country and this world.

*Sharon Galtzberg*



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