

# Darubini

Ya Uchaguzi

Issue No. 5



## **ELECTORAL REFORMS**

The Election Laws,  
Reforms Process and  
Milestones in Kenya



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**EDITOR** Hilda N. Mulandi

**DESIGN AND LAYOUT** Muthengi Mbuvi

**PHOTO CREDITS** Communications Desk

**CONTRIBUTORS:**

Emmanuel Mwango

Laureen Odera

Marcus Ageng'a

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# MESSAGE FROM THE CHAIR



## Greetings on behalf of ELOG.

This year the Election Observation Group is celebrating its 10th Anniversary since its formation on 8th April 2010 after the signing and ratification of its first Memorandum of Understanding (MoU) by its founding member organizations. The membership of ELOG's Steering Committee has since grown from the original five members to the present ten members and six thematic members. Since 2010 ELOG has consistently monitored and observed the electoral processes in Kenya and the African region.

This is also the year that we observe the 10th Anniversary of the Constitution of Kenya which was promulgated in August 2010. In recognition of the aspirations of Kenyans in this covenant, ELOG remains committed to carrying out its mandate to strengthen democracy in Kenya and also the African Region. This includes assessing the ongoing legal and electoral reform processes and advocacy for an enabling environment to realise credible electoral processes.

ELOG's 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 path the country would take 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. We continue to observe the performance of key electoral actors namely IEBC, ORPP, Judiciary, Political Parties, Media and Parliament.

The mood in the country has now changed with the unprecedented times brought about by the COVID-19 pandemic. However, the key electoral actors must continue to inform the public on measures being undertaken to ensure the prudent implementation of the electoral timelines. As the world continues to manage the COVID-19 pandemic, we remember the families that have been afflicted and the

livelihoods that have been lost.

I also take this opportunity on behalf of the Election Observation Group (ELOG) to share my condolences with the family, friends and community of the Ecumenical Centre for Justice and Peace (ECJP) on the passing on of its Founder and Executive Director, Venerable Jephthah Kiara Gathaka. Ven. Gathaka was also a founding member of ELOG who made great strides in fighting for good governance and human rights. To many, he was a great teacher, spiritual leader, mentor, and a champion of Social Justice. This copy of Darubini is dedicated to the Ven. Gathaka and all the Kenyans who fought, bled and died for our liberation

**God Bless ELOG, God Bless Kenya.**

**Regina Opondo**  
**ELOG Steering Committee-Chairperson**



# MESSAGE FROM THE NATIONAL COORDINATOR



## A call for sobriety on electoral reforms

Since the disputed 2017 elections, the country has been on a permanent campaign mode that has created both a heated political landscape and excitement, especially around the conduct and management of electoral processes. This environment has been largely fueled mainly by succession politics, given that the incumbent President is on his final term and also taking into account that the last three General Elections outcomes in the country have been fiercely contested

With the recent 2017 dispute over the conduct of the elections leading to a historic annulment and holding of fresh presidential elections, a cross-section of actors have been very animated in initiating early electoral reforms that would lead to a more credible and acceptable electoral process in 2022.

Three main initiatives that seek to address a number of these reform issues have been engaged over the last year; The Punguza Mizigo Initiative (PMI) by the Third Alliance Party, The Building Bridges Initiative (BBI) fronted by the incumbent President and the Orange Democratic Party leadership, and lastly the faith-led Dialogue Reference Group (DRG). This is in addition to the normal reform approaches spearheaded by the Independent Electoral and Boundaries Commission (IEBC), Parliament, and other actors, especially the Civil Society Organizations (CSOs).

While all these initiatives seek to improve the conduct of elections, they have served to create a very politicized and at times polarizing atmosphere that has created tensions in the midstream of the current electoral cycle. The PMI, which sought to make far-reaching structural changes to the legal framework through a popular initiative, was dealt a blow when it was technically defeated after failing to obtain the requisite number of county assembly endorsements. Both the DRG and BBI have moved on to prepare sound proposals which are in the process of being converted into reform bills that would require processing through the available constitutional avenues.

The BBI process has especially created a lot of political excitement given that it is fronted by political actors, who themselves are at the centre of the succession agenda. This has created divisions within the ruling party as well as in the opposition. Proponents and opponents of the reforms under

BBI have since been at each other whenever the opportunity has arisen.

From an observer point of view, the required reforms will need a more sober environment in which the proposals can be canvassed, discussed and adopted. This requires a calm environment, robust participation and inclusion of the citizenry as well as progressive engagements of different actors such as government agencies, political parties and CSOs. The process would also immensely benefit from political goodwill by the country's leadership.

As things stand, protracted engagements full of political bickering and grandstanding will only serve to delay the advent of timely and necessary reforms for our elections. If this does not therefore stop, the usual electoral mayhem will be revisited in the next national polls.

**Mulle Musau,**  
**Elections Observation Group (ELOG) - National Coordinator**

# MESSAGE FROM THE EDITOR

## Dear Reader,

This year has seen a plethora of surprises and disillusionments with the COVID-19 pandemic. ELOG first order of business has been to immerse in the beguiling technology world and launch of our E-Newsletter. Although a modest factor initially, previous copies of this magazine primarily relied on paper production to share its stories and acumen from innumerable expert writers. We opted to incorporate technology in a bid to ensure better access to information. Well, the good news for our dear readers is that quarterly, our E-Newsletters will be available on our website and social media sites. The newsletters will feature guest columns, legal notices, latest news and other commentaries concerning the electoral processes in Kenya and beyond. While the Darubini ya Uchaguzi Magazine is no longer merely a quarterly print, but a magazine that relies on long-standing values of integrity, impartiality and inclusivity for everyone, We continue to produce the print publication with as much dedication as ever.

In addition to this, the Election Observation Group (ELOG) celebrates its 10th Anniversary this year and we would like to express our gratitude in earnest to our partners, writers, readers, the secretariat, observers and citizens for their support throughout the years. In the last ten years, although the earth did not topple over its axis, the electoral space witnessed numerous changes

from one election to the next. ELOG takes pride in the fact that we stayed true to our course of safeguarding the integrity of electoral processes in Kenya and beyond. ELOG observed the referendum, general elections, by-elections, influencing major policy and legislative reforms as well as participating in and providing technical support to international election observation missions across the world. For this magazine, it has indeed been a privilege to work with many literary voices.

Earlier this year, we were deeply shocked and saddened to learn of the passing of our Steering Committee Member, Venerable Jephthah Gathaka. We would like to pass our heartfelt condolence to his family, friends and the community in which he served. Venerable Jephthah Gathaka was a great visionary and spiritual leader and he will be greatly missed.

Lastly, in this issue, we feature a variety of voices on various electoral concerns and issues. Our guest column by Emmanuel

Mwango features the electoral reforms journey in Kenya, which resulted in the promulgation of the 2010 Kenyan Constitution and the much popularized Punguza Mizigo Initiative and the Building Bridges Initiative. Our other articles consist of: an exploratory piece from Marcus Ageng'a on the various ensuing scenarios of the Building Bridges Initiative Referendum process that was initially slated for June this year; and commentary by Laureen Odero on the 2019 Kenyan census report and its implications. We hope you enjoy the stories!

**See you in the next issue!**

**Hilda Mulandi,  
Editor and Program Officer**





# ONWARDS & UPWARDS

## Kenya's Journey in Constitutional Development

By Emmanuel Mwango - Project Officer with Kenya Water for Health Organization (KWAHO)

### BACKGROUND

Kenya's history of constitutional and electoral reforms predates its independence from the British colonial rule. The journey started from the Lyttleton constitution of 1954 to the Lennox Boyd constitution of 1958 and the subsequent Macleod constitution of 1960.

In the succeeding decades from 1960, Kenya experienced a protracted constitution-making process. Perhaps more so in recent years. In Kenya's formative years, there were fundamental amendments to the Constitution that have indelibly shaped the country's electoral system. Before the promulgation of the 2010 Constitution, none is more lucidly remembered than the introduction of section 2A (previous Constitution) and its subsequent repeal, which reverted Kenya to a multi-party state through the **Amendment Act 12 of 1991**. This change was primarily attributed to a new wave for constitutional reform in the republic.

The clamor for a new constitution gained steam after the 1992 General Elections. The Report of the Committee of Eminent Persons on the Constitution Review Process 2006, records in reference to the 1997 general elections that the Inter Parties - Parliamentary Group (IPPG) electoral reforms, "*served to regulate the process in a better manner than the 1992 electoral process*". Fundamental to this progress was the bipartisan agreement to increase the membership of the then Electoral Commission of Kenya (ECK) by 10 with additional commissioners seconded by opposition political parties to take the membership from 12 to 22. Keen observers would however, cast doubt on the impartiality of such an expanded ECK. The enactment of the **Constitution of Kenya Review Act of 1997**

and the subsequent Amendment (**No. 2)Act, 2011** which had expanded membership inclusive of the Ufangamano Initiative, ushered a more united front in the Constitution-making effort.

The National Constitutional Conference (NCC)-Bomas I, II and III Conferences and the lack of consensus around "*contentious issues*" that characterized the work of the Parliamentary Select Committee on Constitution Review in 2004/2005 were a prelude to the defeat of the Proposed New Constitution (PNC) on the 21st of November 2005. The PNC was rejected by 58.12% of 6,158,072 of the valid votes cast. In the aftermath of the polarizing 2007 elections, the **National Accord and Reconciliation Act, 2008**, brokered a political peace deal. The establishment of the Kenya National Dialogue and Reconciliation Forum (KNDR) in 2008 informed constitutional, legal and institutional reforms that were domiciled under Agenda 4 of the key focus areas. The promulgation of the new Kenyan Constitution on the 27th August 2010 was the most significant milestone of the Agenda 4 items on constitutional reform.

### CURRENT REFORM PROCESSES

Since the promulgation of the 2010 Constitution, there have been attempts to amend certain sections. Most notable have been the *Okoa Kenya Initiative*, the *Punguza Mizigo initiative (PMI)*, and the *Building Bridges Initiative (BBI)*. For purposes of this discussion, I shall limit myself to the two most recent attempts, which are the PMI and the BBI initiatives. The PMI Amendment Bill 2019, failed to meet the legal threshold as prescribed in article 257 of the Constitution of Kenya, 2010. The Bill was

only passed in one of the 47 counties. The BBI is by all indications in the latter stages of validating its report whose recommendations enumerate a raft of legal, institutional changes and strict enforcement of existing laws.

According to the Independent Review Commission (IREC) Report, gerrymandering and grossly skewed constituency delimitation patterns were some of the weaknesses that compromised the integrity of the general elections in 2007. Essentially, the Kriegler Commission Report indicted Kenya's "first past the post" electoral system. It is also instructive that constitutional lawyer Gill Ghai opines that certain sections of the Thirdway Alliance proposal would not do justice to the equality of the vote. The Thirdway proposal sought to amend article 89 of the Constitution whereby the Independent Electoral and Boundaries Commission (IEBC) "...shall use each of the 47 counties as a single constituency unit". The import of this is best described by Ghai & Wanyoike 2020, who hypothesizes that "the voice of every Lamu voter would be 32 times as strong as that of every Nairobi voter". Gill asserts this is in respect to the disparate number of registered voters in Nairobi (2,250,853) versus those in Lamu (69,776).

The Building Bridges Initiative was birthed from President Uhuru Kenyatta's and Hon Raila Odinga's famed handshake, which brought an end to the long-standing political impasse that existed post the 2017 general elections. The two national leaders identified nine salient issues that have curtailed or challenged the success and development of the Kenyan Republic thus far. The issues are; Ethnic Antagonism and Competition, Lack of national ethos, inclusivity, devolution, divisive elections, safety and security, corruption, shared prosperity and responsibility and rights. Gazette Notice No. 5154 of 31st May established the BBI to Unity Advisory Presidential Taskforce, whose mandate was to evaluate the salient challenges cited in the BBI joint communique and to make recommendations that would solve them.

Experts have however, questioned how much the birth of the BBI and the scope of its work has been inclusive. Are the nine salient agenda points of the BBI pertinent to Kenyans? Relatedly, what was the criterion used in

the identification of these agenda points?

The Preliminary Report of the Committee of Experts (COE) on Constitution Review; issued upon the publication of the Harmonized Draft Constitution on 17th November 2009 and pursuant to the mandate of the COE, was crystal clear on the statutory origin of its work. The Constitution of Kenya Review Act, 2008 was explicit on what the minimum criteria of identifying the contentious issues was based on. They were based on the Bomas Draft, the Proposed New Constitution (PNC) and The Constitution of Kenya Review Commission Draft 2002. These were documents that were born out of rigorous public consultation and participation. Perhaps the BBI joint communique would have been deemed more inclusive if it sought to extensively gather from Kenyans, what the most teething issues were before the technical taskforce embarked on its mandate. In the same breadth, constitutional lawyers Waikwa Wanyoike & Gill Ghai argue that "So much public participation was involved – and required in detailed law – in making the Constitution we have, it would be a gross injustice not to ensure plenty of informed public input if it is to be changed."

Chapter 5 Point 71 of the BBI report states that *"Our politics have taken on the aspect of a conflict that every five years threatens to destroy lives, and even puts the continuity of our country at risk."* This phenomenon has caused untold destruction to many families ravaged by indiscriminate killing and lost livelihoods. The country's economy also bears the brunt of this instability. The Institute of Economic Affairs Kenya (IEA) illuminates this further by observing *"that there is a 50% chance of witnessing a lower GDP growth rate on an election year in Kenya"*. These cycles of political instability, the BBI report contends is fueled by a winner takes all electoral system that breeds a feeling of ethnic exclusion. As a remedy, the BBI taskforce recommends the expansion of the Executive to establish the office of the prime minister and re-establish the office of opposition leader who shall be the runners up in a presidential election. What might however, be of worry is that the BBI recommendations stipulate that the Prime Minister *"may be dismissed by the president or through a vote of no confidence in the National Assembly that wins an absolute majority."* If the President will have the powers to dismiss the Prime Minister, will it be a unilateral decision? The implication



of such discretion conferred upon the President will by all intents and purpose mean that the Prime Minister will be serving at the pleasure of the President. This will frustrate the ability of the Prime Minister to be semi-autonomous in executing his mandate.

As earlier suggested in this discussion, the expanded membership of the defunct Electoral Commission of Kenya that included opposition parties did not entirely fit universal best practices. The BBI taskforce report recommends - *"A mechanism be devised that gives leaders of parliamentary political parties a role in the recruitment of Commissioners of IEBC. In nominating candidates to be Commissioners, the political party leaders should nominate individuals who are non-partisan, with a record of accomplishment and integrity, and who are not known political supporters or activists of the party"*. The foregoing recommendation might alleviate the fears of political players who would be less apprehensive knowing they have "an impartial arbiter" on the inside. However, in retrospect, the potential presence of *"aligned commissioners"* might only serve to accentuate suspicions, thereby causing *"judicial gridlock"* in the management of the electoral body. Such an impasse in dispensing critical management decisions would be least welcome, especially during vote tallying. It is during tallying when Kenyans are most nervous about electoral outcomes.

Another danger of commissioners being nominated by political parties to the national electoral body is elucidated by the Africa Centre for Open Governance (AfriCOG) state of the nation report "State Capture; inside Kenya's inability to fight Corruption 2019" indicated that the danger is the proliferation of corruption. The report further argues that the IPPG reforms that co-opted opposition party nominees were expected to make the ECK independent. Contrary to expectations, *"Once the commissioners were in place, they realized they were independent of their appointing parties and that they had unlimited opportunities to 'sell' their discretion and judgment to the party of government. The result is that since 1997, the diversion of funds and fraudulent spending at the electoral management body has ballooned, not subsided"*.

A key point of contention and varied opinion has been on the mandate that should be conferred on an electoral commission chair Vis-a-Vis the secretariat. The BBI taskforce recommendation- "Reform the IEBC " advocates that the chairman of the Commission should be made the Chief Executive Officer. While many experts might hold this school of thought, the BBI taskforce report does not give the historical context or the technical underpinning that informs the reasoning behind this recommendation. Former commissioner of the IEBC Roselyn Akombe was previously quoted recommending that "The organizational structure of the commission should be reformed to maintain only one center of power – the chairman – with sufficient authority to take decisions, probably with a veto vote on certain issues."

This would seem like a significant departure from the Kriegler report that recommended "a clearer management-commission separation of roles." The IEBC highlights in its recommendation to the BBI taskforce team that the defunct ECK had an Executive chairman. IEBC goes on in its response. "However, Kriegler commission identified having an Executive Chairman as a contributor to the challenges faced by the commission then." Could it be then that the position of chairman of the Electoral Management Body, as currently constituted is structurally vulnerable? How then do we reconcile this thought with the fact that the late ECK chair was on record as not knowing who won the 2007 elections? He was an executive chairman, wasn't he?

In an interview on 18th October 2017 with KTN, former IEBC commissioner Roselyn Akombe shocked Kenyans with allegations that part of the IEBC secretariat had colluded with some commissioners to frustrate the work of the IEBC Chairperson, Wafula Chebukati. Aided by decades of history, wouldn't it then be safe to draw inference that a malignant institutional problem exists not exclusively in the structure of our electoral body but by extension our electoral system and the values therein?

Countless experts, commissions of inquiries and select committees have bequeathed to Kenya well-drafted, intellectually sound recommendations on the solutions to our electoral system. I will just but

reiterate some of these proposals if only for the sake of emphasis.

## RECOMMENDATIONS

1. It is crucial to maintain the existing managerial structure of the IEBC with commissioners tasked with policy formulation and oversight and the secretariat overseeing the implementation of the commissioners' directives.
2. There is a need to make grand election offences very costly to transgressors. Liability in respect to grand election offences should be "commensurate" to the socio-political and economic damage it causes Kenyans
3. Considerations should be made to re-establish the leader of the official opposition office who shall be the runners- up in a general election.
4. Strengthen the role of the National Cohesion and Integration Commission (NCIC) in spearheading national dialogue around values, national ethos, and ethnic harmony.
5. Amend the timeline to hear a presidential petition to 30-45 days. This is to allow the Supreme Court ample time to exhaustively examine the merits of the case before them and give Kenyans the benefit of internalizing the reasoning of the verdict. This will also build jurisprudence.

This will further demarcate the role of "government in waiting" tasked with checking the government in office. The opposition leader shall have a shadow cabinet that will be able to offer alternative policy direction to that of the incumbent executive party leader.





# CENSUS REPORT: *The Game Changer*

By Lauren Odero- Lawyer and Program Coordinator  
with YouCaneGive

## INTRODUCTION

In Kenya, the earliest census was conducted in 1948 by the British colonial administration. From 1969 the census process was regularly undertaken every ten years. In the past, Kenya has been commended for being the first African country to process and publish census data within one year of it being captured. Skip to 2019 and for the first time, Kenya incorporated the use of technology in the census conducted moving away from the paper-based method utilized previously. All the same, questions of accountability and transparency were still raised concerning this paperless census. The concerns raised were similar to those specified during the 2017 General Elections in

Kenya, whereby the electoral process was questioned due to a lack of back-up and the over-reliance on electronic data.

The Kenyan census report is essential for several processes and in November 2019 the institution in charge of the census process, the Kenya National Bureau of Statistics (KNBS) officially released the total number of enumerated population results as 47,564,296 (Male-23,548,056 and Female-24,014,716), with the intersex population constituting 1,524 persons. This saw an increase of 9,000,000 from the last count in 2009, whereby 37 million persons were counted (18.67 million were male; 19.05 million were female).

## Intersex

0%

1,524

## 2019 Enumerated Population Results

**MALE**  
**50.5%**  
24,014,716



**FEMALE**  
**49.5%**  
23,548,056

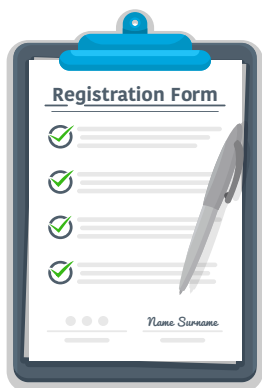
## IMPLICATIONS OF THE 2019 CENSUS REPORT

### National Allocation of Resources

In Kenya, the redistribution of state resources, shifting of political boundaries and the shaping of future elections highly depend on population reports. The 2019 census report is no different. It will play a major role on how resources are distributed. The report provides the best opportunity to address the country's inherent development inequalities that have reared their heads time and again. Throughout the years, the population census has driven the planning and national allocation of resources. The Census report thus provides solutions to the contentious issues of resource allocation that have been brought afoot by the devolution process. Although fair resource allocation is vital in addressing historical disparities that have plagued some regions in the country, it is necessary to interrogate whether Kenya's system of representation is adequate to address other injustices noted. In particular, the population data has been negatively branded for laying bare the ethnic extractions of people. This has been quoted as the "single most important variable" in the Kenyan political arena according to the Ethnicity and Politicisation in Kenya Report by the Kenya Human Rights Commission (KHRC). The ethnographic data plays a significant role in campaign considerations for the presidential seat.

### VOTER REGISTRATION

The census report is crucial in the establishment of a revised register of voters; a legal requirement set out under Section 8 of the Elections Act No. 24 of 2011. The Act clearly outlines that the Register of Voters must be updated between every 8 to 12 years and it must be in line with the boundary review conducted at the time. The Act also stipulates that the data and information of deceased persons must be deleted from the Register regularly. In view of this, the census report thus acts as a blueprint for the IEBC. The IEBC relies on the population data not only to



set out constituency boundaries proportionate to the population, but it also uses the report to project target numbers of the voter registration process. The report is further utilized in conducting voter education based on population densities.

### BOUNDARIES REVIEW/ DELIMITATION

The delimitation of boundaries, a core principle of universal suffrage, effective representation and equality of the vote is key to any electoral system. The process, which is expected to be conducted at intervals of 8 and 12 years, heavily relies on the census results regularly obtained. Legally, this process is provided for under Article 89 of the Constitution of Kenya, which among other things stipulates that any review of boundaries must ensure that the constituency boundaries correspond closely to the population quota.

As the last delimitation of boundaries in Kenya was conducted in 2012, it has been highly anticipated that the boundary review process would be conducted in the year 2020 prior to the set deadline of the year 2024 due to the necessitated release of the census report back in 2019. Some experts argued that it was imperative to conduct the boundary review process in the year 2020. The expectation is that the country will have experienced at least a 20% population increase by the next Kenyan general elections, scheduled for the year 2022, thereby leading to some serious electoral inequalities. Contrary to this expectation, the Electoral Management Body has been unable to conduct the delimitation process due to financial, legal and administrative challenges.

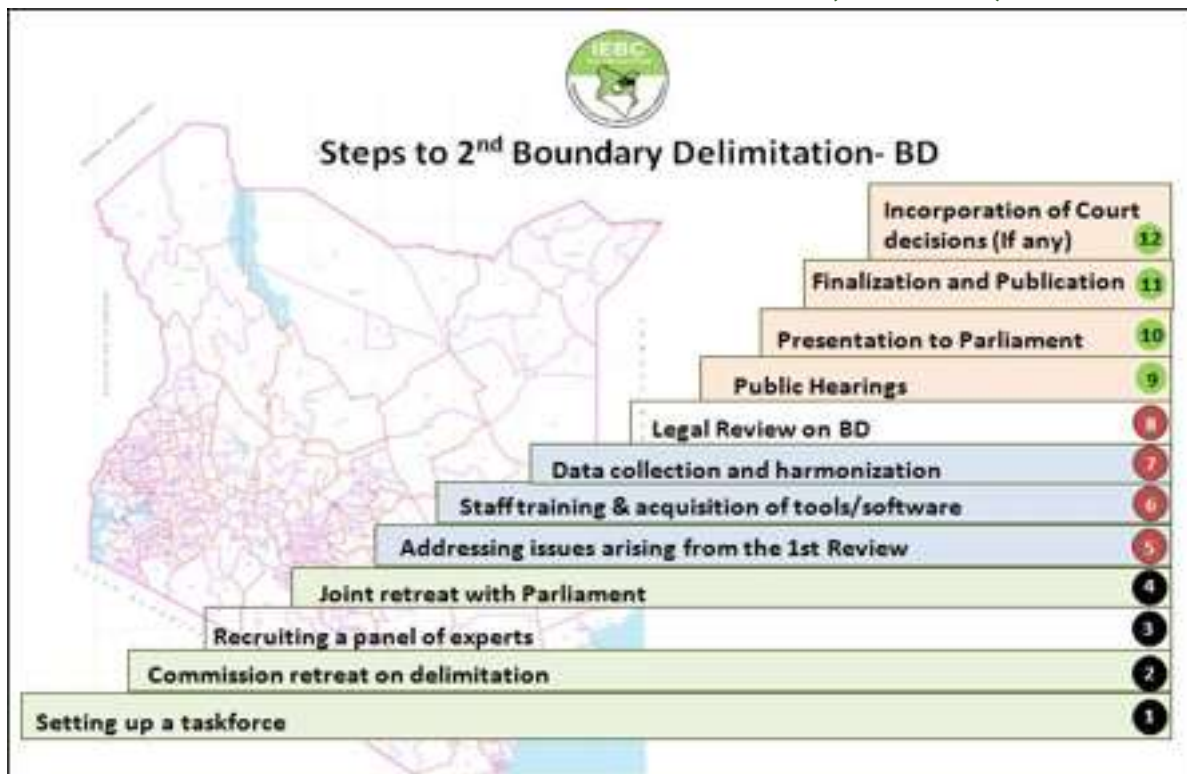
Most recently, the Independent Electoral and Boundaries Commission (IEBC) in a press statement informed the public that they would conduct the next review by the set deadline of the year 2024, but not necessarily in the year 2020. The Commission further indicated that it would share the schedules, dates and timelines for the exercise at an opportune time. Of note however, is that the Commission had previously come up with a Boundaries Review Operation Plan (BROP), a 12-step plan and roadmap to ensure that the review process is effectively initiated and accomplished. Nevertheless, the Commission would still require government funding, as well as the census data which they had indicated, were yet to be received, to implement the



BROP. In this light, the implementation of the BROP is expected to commence once the National Treasury releases funds for the new financial year starting on 1st July 2020. It is further clear that although the BROP attempts to take into account the role of Parliament and the Courts in

the process, the plan does not incorporate the role of other stakeholders that the Commission engages with. Some of these stakeholders that the Commission has claimed are vital to the process include the National Treasury and the Kenya National Bureau of Statistics (KNBS).

*(Source: IEBC)*



### **CHALLENGES TO THE DELIMITATION PROCESS: The Kenyan Experience**

The delimitation of electoral boundaries is a complex, time consuming and expensive process. It is thus, no wonder that the Kenyan Electoral Management Body has faced a myriad of challenges in conducting the review of electoral boundaries. While the Commission cited financial, legal and administrative challenges, it is crucial to acknowledge that the Commission also faced some serious time constraints. This is as a result of the constitutionally set timelines, which stipulate that in the event that a review is conducted, the same must be completed before a year to the general elections. Therefore, if the commission decides to undertake the review, it must be so by July 2021. This places immense pressure on the Commission to complete the exercise in addition to preparing for the next general elections.

As to whether this infringes on the Bill of Rights, the right to adequate representation and equality of the vote, this will be discussed in the recommendation section of this Article.

As earlier indicated, one of the major challenges as quoted by the IEBC has been the enactment of legislation to operationalize the boundaries review process. Although the law makes provision for the boundary review process, changes need to be effected on the Fifth Schedule of the Independent Electoral and Boundaries Commission Act, 2011 to eliminate provisions that are obsolete and no longer relevant. Thus, although Parliament had set before it the Independent Electoral and Boundaries Commission (Amendment) (No.2) Bill, 2019 to mitigate this, the same is yet to be enacted.

The delimitation of electoral boundaries also largely relies on the performance and delivery of services by other key institutions and stakeholders such as Parliament, the National Treasury and KNBS. These institutions each have a role to play in the delimitation process.

While Parliament, is duty-bound to enact legislation, the Kenya National Bureau of Statistics (KNBS) is mandated to conduct population censuses and share the population data with the IEBC. In this respect therefore, the Commission has faced serious logistical challenges as a result of the back and forth tussle between the Commission and the Kenya National Bureau of Statistics regarding the census report . Although an administrative problem, it is critical to acknowledge that the required population data is essential as it is utilized to inform the boundary review delimitation process.

Lastly, the lack of resources or funding cited by the Commission has also hindered the delimitation of boundaries exercise . Initially, no budgetary allocation was made for boundary review exercise. Although no longer a matter in contention, the process continues to be hindered as funds can only be made available once the new budget/ financial year comes into effect.

## LEGAL FRAMEWORK ON THE BOUNDARIES DELIMITATION PROCESS

Any boundary review process must be guided by a legal framework that dictates how electoral boundaries are drawn and defined. Kenya has an array of national legislation that provides for the boundary delimitation review process. The process is particularly provided for under Article 89 of the Kenyan Constitution, the supreme law of the land. Other legislation that informs the delimitation process is Section 8 of the Elections Act, 2011, which provides for the regular updating of the Register of Voters and the Fifth Schedule of the Independent Electoral and Boundaries Commission (IEBC) Act, 2011 which operationalizes the delimitation of boundaries process.

As already discussed, Article 89 (2) of the Constitution of Kenya gives the IEBC the mandate to review the

names and boundaries of constituencies at intervals of not less than eight years, and not more than 12 years. The Constitution further stipulates that the process should be completed at least 12 months before a general election. The number of constituencies as stipulated in the Constitution is 290. Article 89 of the Constitution on the delimitation of electoral units notes: *"...boundaries of each constituency shall be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota."*

The law also gives allowance, under special considerations for a constituency to be less or more than the quota. The delimitation of boundaries usually takes into account the means of communication, community of interest, historical, economic and cultural ties, geographical features and urban centres. The Constitution also stipulates that the Commission shall *"...consult and engage with all the interested parties"*.

Once the alterations are made to the names and boundaries of constituencies, the same is expected to be published by the Commission and put on the gazette. The alterations then come into effect upon the dissolution of Parliament following their publication. A Kenyan citizen may also apply to the High Court to review a decision made by the Commission within 30 days from the publication thereof in the gazette . The same must be heard and determined by the High Court of Kenya within three months.



## RECOMMENDATIONS

### i. Voter Education and Registration

The population results play a significant role in the voter education and registration process. Although not in contravention of the set laws, it is necessary to interrogate how the Commission intends to conduct the voter registration and education process in light of the 23% population increase. The Commission needs to use current population data to avoid facing more challenges in the future.

### ii. Role of Parliament in the Boundaries Review Process

Parliament is constitutionally mandated under Article 82(1)(a) to enact legislation to provide for the delimitation of electoral units and boundaries, yet some feel that they continue to be in contravention of this and hinder the boundaries review process. Parliament thus needs to enact the Independent Electoral and Boundaries Commission (Amendment) (No.2) Bill, 2019 legislation that seeks to operationalize the boundaries review process.

### iii. Proportional Representation and Equality of the Vote (The Principle of "One-Man-One-Vote")

The principle of "one-man-one-vote" which Kenya ascribes itself to, must be upheld. The principle stipulates that all citizens, regardless of where they live in a country, are entitled to equal legislative representation.

The apportionment of legislative seats thus must be proportional to the population so that the voting power of each voter is equal as possible to that of other voters. With 26 constituencies already falling out of the population quota as was the case in the last general elections of 2017, it is clear that the Commission may need to re-evaluate the issue.

### iv. Public Participation Timelines

Although the law and the BROP set out the procedure for the delimitation of boundaries allowing for both Parliamentary and public participation, there is a need to reassess whether the 30 day period set out for the review of the Commission's decisions is sufficient.

### v. Intervention Measures

High-level intervention and harmonization is required among the key duty bearers such as the Independent Electoral and Boundaries Commission (IEBC), Parliament and the National Treasury to ensure funds are adequately allocated and availed to the Commission. This will ensure that the country proceeds effectively in the current unprecedented times brought about by the COVID-19 pandemic.

## CONCLUSION

It will be quite interesting to observe how the political and electoral circumstances play out in the future, especially in the unprecedented wake of the COVID-19 pandemic. Perhaps, the challenges and hindrances faced by the Commission may instead present opportunities for the improvement of the delimitation process.

Of particular interest will be the delivery of a judgement by the High Court of Kenya concerning a current suit filed by the County Government of Mandera seeking scrutiny of the census report as well as an injunction to stop the Independent Electoral and Boundaries Commission from using the 2019 Census Report in carrying out the boundary delimitation exercise in Mandera.



# THE COVID-19 PANDEMIC, Electoral Reforms, Referendum and the Ensuing Scenarios

By Marcus Ageng'a- Senior Programs Officer (ELOG)

Constitutional, legal, policy and administrative reforms have preceded the majority of the six general elections in Kenya since the advent of multiparty democracy in 1992. Just before the outbreak of the novel Corona Virus Disease (COVID-19) in Kenya, the most common and popularized remarks during the Building Bridges Initiative (BBI) rallies and meetings was that the 'referendum was inevitable' with a section of political class calling for the plebiscite in June 2020. Political parties like Wiper, Orange Democratic Movement (ODM), Ford Kenya, Maendelo Chap Chap, the Council of Governors (CoG) and a section of the Jubilee Party leadership had generally agreed that if some of the proposals contained in the report were to be effected, constitutional and legal reforms would be necessary condition for the realization of a Kenya

devoid of divisive elections. However, the snowball effect of the COVID-19 pandemic precipitated a global crisis that eventually manifested in the country and thus 'reggae was stopped.'

Before we look keenly at each of the possible scenarios towards the call for a referendum, it would be important to indicate how the Constitution can be amended and what would necessitate a referendum in Kenya. Article 255 of the Constitution (2010) states that the supreme law can be amended through a Parliamentary Initiative (as stipulated in Article 256) or through a Popular Initiative (stipulated in Article 257), and adopted in accordance with Article 255 (2) of the Constitution. Any changes to the following would necessitate a referendum (Article 255 (1)):

- (a) the supremacy of the Constitution;*
- (b) the territory of Kenya;*
- (c) the sovereignty of the people;*
- (d) the national values and principles of governance referred to in Article 10(2)(a) to (d);*
- (e) the Bill of Rights;*
- (f) the term of office of the President;*
- (g) the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies;*
- (h) the functions of Parliament;*
- (i) the objects, principles, and structure of devolved government; or*
- (j) the provisions of the Chapter on amendment of the Constitution.*

*A proposed amendment shall be approved by a referendum if - (a) at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum; and (b) the amendment is supported by a simple majority of the citizens voting in the referendum.*

*An amendment to the Constitution that does not relate to a matter specified above is enacted either - (a) by Parliament, in accordance with Article 256; or (b) by the people and Parliament, in accordance with Article 257.*



It is worth indicating that experts and observers are sharply divided on whether the proposals contained in the BBI report meet the threshold provided above in order to demand amendments by popular initiative. Most political actors in Kenya (before the COVID-19 pandemic) and the BBI discourse were unanimous in calling for amendments to the Constitution through a referendum.

But what exactly does this (Referendum) entails? Is it practical in an already heavily charged political environment? If it is untenable, would the proposals in this report and other similar initiatives be lost? What alternatives exist that could be explored to ensure the timely enactment of electoral reforms?

### What exactly are the possible scenarios for the plebiscite given the new reality of the COVID-19 pandemic?

Two broad scenarios emanate from this. They are:

- i. A referendum is held and the constitutional, as well as the legal changes are effected by Parliament;
- ii. No referendum is held however, constitutional and legal changes are effected; or
- iii. In the worst-case scenario, no referendum is held nor the constitutional reforms enacted prior to the 2022 elections.

### Scenario 1: A referendum is held and constitutional and legal changes effected

A referendum can be held in the country via the two avenues stipulated in the Constitution. This scenario envisions the country going into a referendum before the 2022 General Elections as demanded by a section of the political class and their supporters. This means that the BBI taskforce would:

- i. Complete its validation meetings;
- ii. Produce a final report before the end of June 2020;
- iii. The Committee of Experts would produce a technical document together with a Constitutional (Amendment) Bill 2020;
- iv. The promoters of the Bill collect at least one million signatures as demanded by Article 257

- (1); and thereafter submit the signatures together with the draft Bill to the IEBC. Once satisfied that the initiative meets the requirements, the Commission submits the draft Bill to the 47 county assemblies for consideration within three (3) months;
- v. Once approved by a majority of the county assemblies, it is introduced to Parliament (Senate and National Assembly) and if approved, IEBC then frames the referendum questions and sends the same for approval to Parliament; and
- vi. Once approved and gazetted, a referendum is conducted and if it is ascertained that at least 20% of the registered voters, in at least half of the counties, voted during the plebiscite and that it was supported by a simple majority of the citizens, as demanded by Article 255(2) (b) then the President assents the Bill and it becomes law. This would constitute amendments by popular initiative.

Similarly, the Constitutional Amendment Bill is introduced in Parliament and after the 2nd and 3rd reading is then passed by both the National Assembly and Senate by no less than two-thirds of all members of each house. The passed Bill is then submitted to the President for assent (if it does not relate to the provisions of Article 255 (1)) and thereafter it is published. This would constitute an amendment by Parliamentary initiative.

Any provisions proposing changes to any or all of the sections of Article 255 (1), are then referred by the President to the Independent Electoral and Boundaries Commission (IEBC) with a request to conduct a national referendum within three months and after being duly passed in accordance with provisions in Article 255 (2) (a) and Article 255 (2) (b), the President assents to it and it becomes law.

This would constitute the most ideal way of reforms as two avenues of electoral reforms are actualized.

## Scenario 2: No Referendum is held however, constitutional and legal changes are effected

This scenario envisions a situation where the country is not subjected to a referendum in the manner described above (with specific reference to Articles 256 (5) and 257). However, amendments that do not relate to the provisions of Article 255 (1) are enacted by Parliament under its legislative powers (Article 109 (1)) through bills assented to by the President.

It essentially means that a bill to enact any necessary legal reforms would be introduced in Parliament by:

- i. A Parliamentary Party duly introduced in the name of the leader of majority or minority or their deputies;
- ii. The Executive in which a bill is introduced in the names of the leaders of majority or minority, or the name of the chairpersons of the relevant committee;
- iii. A member at the behest of a citizen;
- iv. A Committee of the House in the name of Chairperson or member designated by the committee; and
- v. A member on his or her behest sponsoring the Bill.

## Scenario 3: No Referendum is held and No constitutional or legal changes are effected

This scenario envisions a situation where there is no referendum in the manner described above (with specific reference to Articles 256 (5) and 257). Further, it also implies that any electoral legal reforms

suggested by various initiatives and actors are not enacted by Parliament by virtue of its legislative powers (Article 109 (1)). As already indicated above, this would be the worst-case scenario.

## CONCLUSION:

Without stipulating in absolute terms that a referendum is an impossibility in Kenya post-COVID-19, the substantial impact of the pandemic in the country just like globally has spread to every sphere of life. The pandemic has caused massive economic disruption and compelled Kenya to institute a framework of economic recovery. In deciding whether a referendum is to be held within the context of economic turmoil and stress, stakeholders will have to decipher how to ensure and advocate for the inter-relatedness and dependability of political in addition to the economic rights of citizens. Ultimately they may have to decide which takes precedence.

Citizens, Parliament and Civil Society Organizations (CSOs) should not lose sight of the need to enact the necessary legal, policy, administrative and institutional reforms ahead of the 2022 General Elections. Suppose that the country does indeed hold a referendum before the 2022 General Elections as is now emerging to be the case, the Building Bridges Initiative (BBI) proposals regarding divisive elections do not in any way constitute an omnibus for all the reforms needed in the electoral processes. This therefore, calls for a multi-sectorial and multi-faceted approach and advocacy for timely reforms through the legislative power of Parliament over and above the call for a referendum.





# ELECTORAL NEWS ROUNDUP

## **ELOGS 10TH ANNIVERSARY CELEBRATIONS**

### **The Role of Election Observation in Electoral Processes in Kenya** By ELOG Secretariat

On 8th April 2020, the Election Observation Group (ELOG), a long-term, permanent and national election observation network which comprises of Civil Society Organizations (CSOs) drawn from Non-Governmental Organizations (NGOs) and Faith-Based Organizations (FBOs) celebrated its 10th Anniversary. Its 1st MoU was signed on 8th April 2010 by its founding organizations (Institute of Education in Democracy (IED), Centre of Governance and Development (CGD), Ecumenical Centre for Justice and Peace (ECJP). ELOG's mandate is to strengthen democracy in Kenya and the African Region by promoting credible electoral processes.

The historic ruling of the Supreme Court of Kenya (SCOK) on 1st September 2017, which invalidated the results of the presidential election put into question the role of election observers. The charge against election observers was that: they were quick to declare the results as free and fair yet the SCOK declared the same results as nullified and accordingly ordered for fresh presidential elections. With this charge, the role of election observers and observation in general attracted mixed reactions with others questioning the reliability of election observers in democratic elections.

While democracy is more than just periodic elections, the holding of transparent, accountable and credible elections is an essential cornerstone of the democratic process in any country. Therefore, domestic election observers make a significant contribution to this process. According to the International Institute for Democracy and Electoral Assistance (International IDEA), "Election observation is the purposeful gathering of information regarding an electoral processes and the making of informed judgments about the process on the basis of the information collected."

The Constitution of Kenya confers the Independent Electoral Boundaries Commission (IEBC) with the mandate of conducting and supervising elections to any elective body or office in Kenya as well as referenda. Thus, the role of election observation is to provide impartial, informed and accurate information on electoral processes as conducted/presided over by the IEBC, political parties, security apparatus, judiciary and other relevant bodies.

Election observers undergo extensive training and are equipped with data collection tools. They are deployed throughout the entire electoral cycle to collect electoral related data, which is then analyzed. Thereafter the observation report detailing findings and recommendations is developed and disseminated to relevant stakeholders.

In addition to providing credible information on electoral processes, the presence of election observers

builds voter confidence in the integrity of the process as well as the election management body. Non-partisan election observation also helps to deter or expose violence or intimidation, as well as manipulation of the vote or election results.

Since its inception in 2010, ELOG has approached elections not as an event but as a process with each phase feeding into each other. Hence ELOG takes the electoral cycle approach in its monitoring and observation programs. Observing elections can be divided into three phases which include: observing what occurs before, during and after elections. The pre-election period consists of all activities that occur before the actual day of voting. The election-day observation covers all activities that occur on the day of actual voting. The post-election period includes all activities that occur ex post facto (For instance, the adjudication of disputes over election results, petitions and the formation of the government).

In observing the electoral processes, ELOG seeks to achieve the following objectives:

- i. To help avoid fraud and expose fraud where it occurs;
- ii. To help identify human errors in the electoral processes;
- iii. To promote citizen confidence in the electoral processes;
- iv. To verify the results of the election and referenda;
- v. To provide systematic information on whether electoral processes are conducted according to the established legal regimes; and
- vi. To document gaps and propose concrete recommendations to improve future elections.



Figure 1. ELOG report



## ELOGs MILESTONES



**Elections  
Observation  
Group**

CREDIBLE. PEACEFUL. FREE AND FAIR ELECTIONS

### KEY MILESTONES

Since its inception in 2010, ELOG has achieved the following:

- a) Successfully observed the 2010 national referendum in Kenya
- b) Successfully observed the 2013 general elections in Kenya and subsequent by elections including the post election electoral processes.
- c) Successfully observed the 2017 general election and subsequent by-election including the post election electoral processes.
- d) Participated in regional and international observation missions in Uganda, Tanzania, Zimbabwe, South Sudan, Pakistan and the Dominican Republic.
- e) Provided technical support to observation missions in Nigeria, Zambia, Zimbabwe and Ethiopia.
- f) Influenced major policy and legislative reforms through consistent recommendations derived from robust observation missions.



THANK YOU FOR BEING PART OF  
OUR JOURNEY AS WE CELEBRATE



**ANNIVERSARY**

OF WATCHING THE BALLOT



## CONCLUSION

In conclusion, election observation plays a pivotal role in safeguarding the integrity of the electoral processes by performing three functions namely: deterring, detecting and delaying any malpractice. The future of election observation will largely depend on how well the citizens own these processes as well as being alive and responsive to the adoption of technology on the same.

### Independent Electoral and Boundaries Commission (IEBC) release of the data report on the 2017 General Elections.

The Independent and Electoral Boundaries Commission (IEBC) released the 2017 election data report on 17th May 2020 that was later determined to have various discrepancies. Shortly afterwards, the report was recalled due to reasons that were termed as "a few typographical errors occasioned by massive data."

Guided by its five key result areas for this electoral period, and by the principles of open data, ELOG addressed the discrepancies by issuing a press statement on the same. The press statement called upon the Commission to release the data report promptly. The Commission later shared the corrected document on 22nd May 2020, as well as an official press release clarifying the status of the data report on the 2017 General Elections.

### Independent Electoral and Boundaries Commission (IEBC) release of the Boundary Delimitation Process.

The Independent and Electoral Boundaries Commission (IEBCs) released a press statement confirming that the Commission would conduct the next boundary review by 2024. The Commission stated that it would share the dates, schedules, and timelines for the exercise with the public at the appropriate time. The process will be undertaken

using the Boundaries Review Operation Plan that is the 12-step plan that will act as a road map towards ensuring that the boundary review process is managed effectively within the timelines stipulated in the Constitution.

## LEGAL NOTICES

Gazette Notice on the Referendum Bill 2020, and the Special Interest Groups (SIGs) Amendment Bill 2019 Recently, the Kenyan Parliament published gazette notices in reference to two bills that are before the National Assembly. The Bills in discussion are the Referendum Bill, 2020 and the Special Interest Groups (Amendment) Bill, 2019. The public was invited to participate and share their views by way of Memoranda.

The bills seek to address serious lacunas in law. In particular, the Referendum Bill, 2020 strives to provide a clear legal framework on how the referendum process should be conducted. Although the Kenyan Constitution (2010) and the County Government Act, 2012 provide for referenda, the process was not clearly outlined.

The Bill ensures public participation and the participation of persons living in the diaspora as well as other voters with special needs such as hospitalized patients, the aged, expectant mothers, prisoners and persons with disabilities.

On the other hand, the Special Interest Groups Bill, 2019 seeks to give effect to Article 100 of the Constitution of Kenya (2010). It aims to ensure the representation and inclusion of Special Interest Groups (SIGs) in various public institutions and bodies.

The Elections Observation Group (ELOG) drafted a memo that was submitted to Parliament on the Special Interest Groups (SIGs) bill that seeks to give effect to Article 100 of the Constitution of Kenya (CoK) 2010.

## ELOG ACTIVITIES



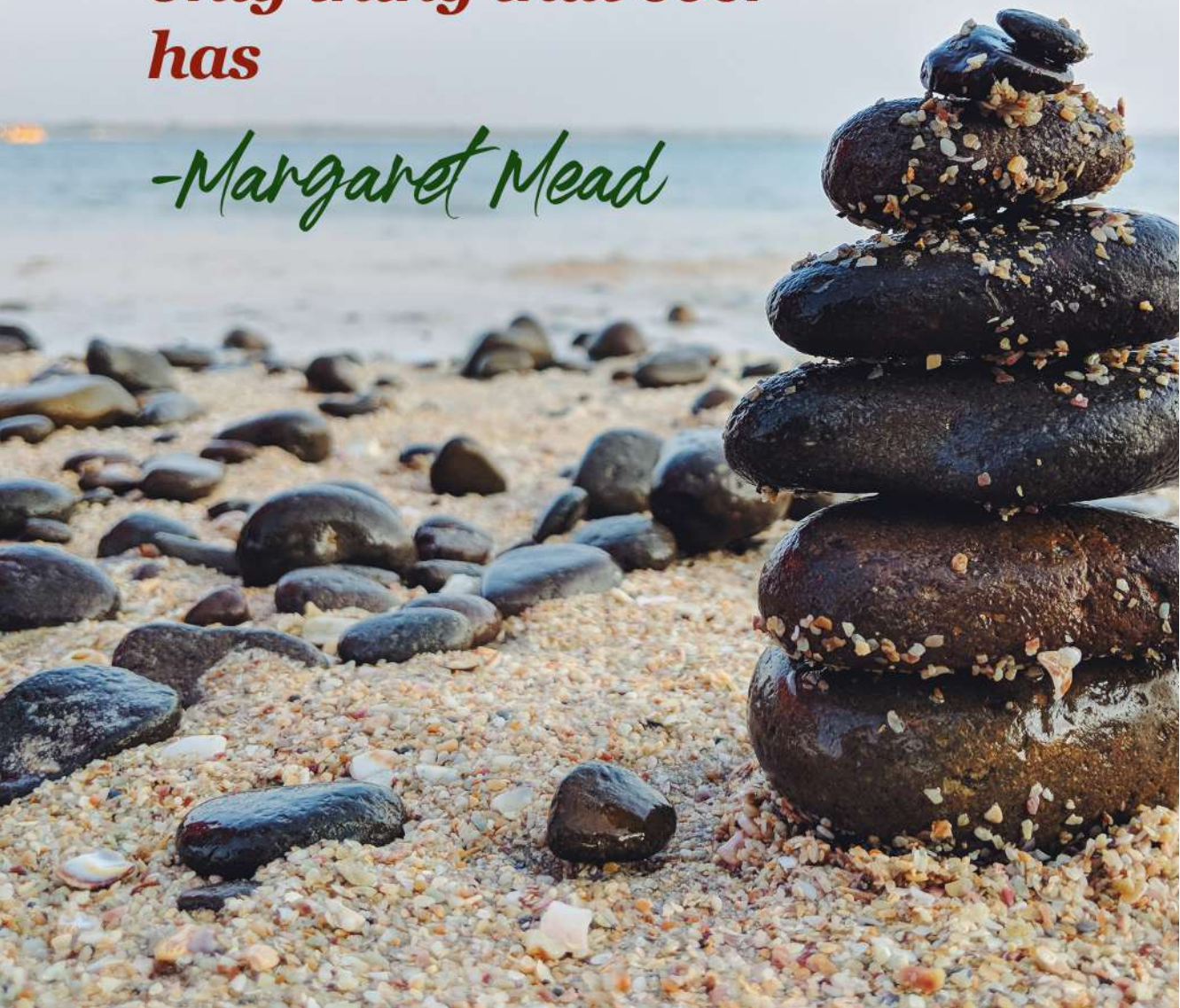
*The Elections Observation Group (ELOG) presented its memorandum at the validation engagement forum of the Building Bridges Initiative (BBI) report.*



*ELOG Leadership led by ELOGs Chair, Regina Opondo holding conversation with the Building Bridges Initiative (BBI) Taskforce led by its Chair, Senator Yusuf Haji.*

*Never doubt that a  
small group of  
thoughtful committed  
citizens can change the  
world: indeed, it's the  
only thing that ever  
has*

*-Margaret Mead*





# THE LATE VENERABLE Jephthah Kiara Gathaka

Venerable Gathaka was a founder Trustee and Secretary of the Ecumenical Trust and the consultant and advisor of the Ecumenical Centre for Justice and Peace (ECJP). ECJP is a faith-based national organization contributing to the enhancement of peace in Kenya through civic education and advocacy. It promotes justice, democracy, good governance and constitutionalism, the rule of law, respect and protection of human rights.

Venerable Gathaka was a Founder and Steering Committee member of the Elections Observation Group (ELOG), Kenya’s biggest domestic election observation platform. He wrote extensively and published materials on civic education in the following sectors:

- a. Church development;
- b. Democracy;
- c. Governance;
- d. Devolution;
- e. Constitutionalism;
- f. Human rights;
- g. Peace education;
- h. NEPAD/APRM;
- i. Anti-Corruption; and
- j. Environmental issues

He was a trainer, facilitator and consultant for the Trainer of Trainers (TOTs) programmes on civic/voter and peace education especially with the Independent Electoral and Boundaries Commission (IEBC), Elections Observation Group (ELOG), Kenya National Integrated Civic Education Programme (K-Nice), URAIA and other civil society organizations. He further initiated, organized and participated in various advocacy and lobbying efforts nationally and internationally. These were geared towards the promotion of justice, peace

and reconciliation, inter-religious dialogue and environment.

With the Anglican Church of Kenya (ACK), Gathaka served as a Parish Priest, Diocesan Administrative Secretary, Director of Communications and briefly as a missionary Archdeacon in the Anglican Diocese of The Gambia.

Venerable Jephthah Gathaka was a graduate of Theology from the Australian College of Theology. He also studied communications, elections and conflict resolution, peace-building, administration/management, human rights among others in Kenya, USA, Canada, Singapore, Denmark, Ghana and Australia. He served as the Senior Director for the Programme of Justice, Peace and Reconciliation at the National Council of Churches of Kenya (NCCCK). He devised and implemented the first Civic Education programme in Kenya in 1991 known as Education for Participatory Democracy.

Venerable Gathaka was also the former chair of NEPAD/ Africa Peer Review Mechanism (APRM) National Governing Council in Kenya (2005-2007), whereby he steered the review of Kenya second to Ghana. He was the former chair and until his death a member of the Board of Directors of the Institute for Education in Democracy (IED). He observed elections with. Apart from being a long term domestic observer in Kenya commencing from 1988, he also observed elections with the Africa Union Mission and EISA in Ghana, Zimbabwe, Ethiopia, South Africa, Namibia, Lesotho, Ghana, The Gambia, and Germany.

**Rest in Peace  
Venerable Jephthah Gathaka**

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