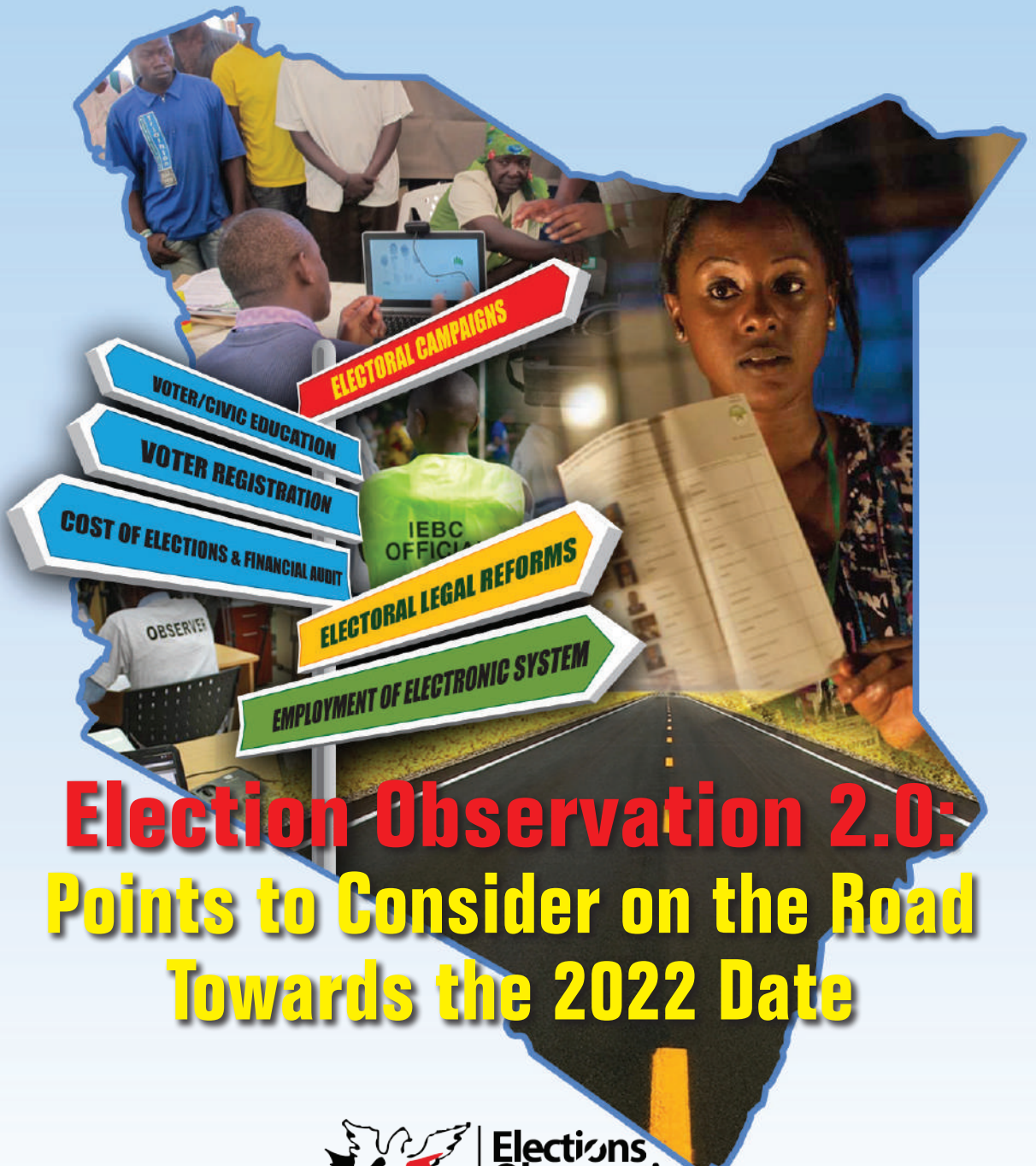


Darubini

DARUBINI YA UCHAGUZI NO. 4 JUNE-AUGUST 2018

YA UCHAGUZI



Election Observation 2.0: Points to Consider on the Road Towards the 2022 Date



**Elections
Observation
Group**

CREDIBLE, PEACEFUL, FREE AND FAIR ELECTIONS



CONTENTS

Message From the Chair	3
Message From the National Coordinator	4
Message From the Editor	5
The Observation Report: Key Recommendations	6
Election Observation 2.0: Re-thinking Domestic Election Observation in post 2017 Kenya	13
Negotiating Electoral Justice in Kenya Through Systemic, Systematic, Legislative and Institutional Reforms for the Common Good	22
The Good, The Bad and the Ugly: 2017- The Year that was for the youth	25
IEBC Must Keep The Electoral Cycle Spinning for 2022	29
Counting the Numbers	32
Information Age: A Hijack to Democracy?	34
Upcoming Events	36
One Too Many a Voice (Old Krieglerr an' his Crew)	37
ELOG Activities	38

Editor:

Msanii Kimani wa Wanjiru

Assistant Editor:

Renee Kamau

Design and Layout:

Timothy Ojore

Illustration Artist:

Bwana Mdogo

Photo Credits:

Communication Desk

Contributors:

The ELOG Communication Team

Adipo Sidang'

Andrew Limo

Francis A. Aywa

Javas Bigambo

Susan K Mwangera

Anne Kathurima

Musembi Mutisya

Published by:

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Darubini ya Uchaguzi is a monthly magazine that provides comprehensive information on the Election Process from the onset of the Pre-Election Phase, the Election Day events, and the Post-Election Phase.

To contact the editor write to:

The Editor,

Darubini ya Uchaguzi,

P. O. Box 4037-00506, Nairobi,

Kenya

Tel: +254 711 247 181

Email: info@elog.or.ke

Facebook: Elections Observation Group

Twitter: [@elogkenya](https://twitter.com/elogkenya)

www.elog.or.ke

MESSAGE FROM THE CHAIR

Marching towards 2022: Lessons and Recommendations



As the country and stakeholders embark on this journey of a new electoral cycle, ELOG will boldly continue to play its role and continue to observe the implementation of these recommendations.

Greetings, on behalf of ELOG.

Let me begin by restating that ELOG is a long-term and permanent national platform for civil societies, faith based organizations and other key stakeholders interested in promoting citizen participation in the electoral processes, through non-partisan, impartial domestic observation and objective reporting of the forthcoming general elections as well as future elections in Kenya and Africa. ELOG has steadily established itself as a professional, inclusive and objective citizen election observation platform and has been able to speak authoritatively on the electoral processes and the outcome. It will continue to seek ways to defend this position and that is why it will be a major cog in the new electoral cycle.

Early this year, we launched our final report on the 2017 Electoral Process dubbed it “One Country, Two Elections, Many Voices.” In it, we make significant recommendations to improve the next electoral cycle. ELOG noted that many of the concerns and issues that negatively impacted on the 2017 elections largely emanated from the failure to fully implement the Agenda 4 reforms and the recommendations in the 2008 Kriegler Report.

Our recommendations are broad and they touch on pertinent issues such as reforms on the electoral processes, where we will focus on the Independent Review of 2017 Electoral Process; Employment of Electronic Systems in Elections; Dealing with Advantages of Incumbency; Electoral Legal Reforms and Amendments to Electoral Laws; Clear Framework for Electoral Reforms; Clarity on the Electoral Complaints and Dispute Resolution Processes; Transparent and Predictable Processes; Cost of Elections and Financial Audit.

Other specific recommendations are on Electoral Actors and this specifically speaks to the IEBC; the Judiciary; Security Agents; Political Parties – Support to Credible Electoral Processes; the Media; and Civil Society.

We also make general recommendations that should enrich the path the country takes in its journey towards the 2022 plebiscite. Some of our general recommendations touch on the need for a National Dialogue – Political Problems Require Political Solutions; Dealing with the Scars of the Violence; Respect for Independent Institutions and Taking Action on Electoral Offences

As the country and stakeholders embark on this journey of a new electoral cycle, ELOG will boldly continue to play its role and continue to observe the implementation of these recommendations. This will define the country’s preparedness to the 2022 date and as usual, we shall “speak authoritatively.”

God Bless Kenya!

Regina Opondo
ELOG Steering Committee- Chairperson



MESSAGE FROM THE NATIONAL COORDINATOR



Moving forward from the 2017 Elections

We have re-attached these proposals in the current issue of *Darubini* for wider dissemination and reflection.

So the elections are over and done with. Or are they? The electoral cycle approach to elections demands observers and other stakeholders to shift attention to the consolidation of lessons learnt from the obtaining electoral process and the tracking of recommendations aimed at improving future processes.

In this regard, ELOG released its final 2017 Elections Report; *One Country, Two Elections, Many Voices*, in March this year detailing its findings, conclusions and more importantly recommendations for consideration in the electoral reform process. We have re-attached these proposals in the current issue of *Darubini* for wider dissemination and reflection.

Elections offer an opportunity for self reflection too. Many observers including ELOG, were castigated on their reports and work done during the 2017 elections. Their integrity and objectivity was severely tested especially after the nullification of the Presidential elections by the Supreme Court in September of the same year.

Using this as a departure point and in our current issue we have featured a number of commentaries that seek to interrogate the work of observers as well as an assessment of the future prospects for election observation. The well articulated pieces offer innovative and enlightening proposals for re-establishing the relevance of observation in electoral dispensations.

The current Issue also features expert commentaries on election management, the emerging attention to the electoral justice and the threats posed by the indulgence of technology in electoral processes.

As always we hope you will enjoy the read.

Mulle Musau
ELOG-National Coordinator

MESSAGE FROM THE EDITOR

Points to Ponder in the New Elections Cycle



In one of the opinion pieces, IEBC indicated that they are already making plans on what they will be doing in this journey towards 2022.

Elections is a cycle. We have come to the end of one that was full of drama and lots of highs and lows for the country. Many stakeholders that were involved have either been evaluating their performance in the 2017 election or have already written and launched their reports and are embarking on implementing their recommendations.

There is a lot of work ahead for every stakeholder on the road towards 2022 as the new election cycle begins. ELOG is a key stakeholder and will be taking its place in the new cycle. ELOG was involved in the August 8, 2017 election and the subsequent October 26, 2017 Fresh Presidential Election (FPE) and its findings were launched early this year. ELOG's key recommendations set the tone for this edition of *Darubini ya Uchaguzi*. We outline some of the things that stakeholders need to grapple with in this journey towards 2022. The ELOG recommendations are broad and detailed.

There is a felt need to re-engineer several things and Francis A. Aywa makes an insightful case for "re-thinking domestic election observation in post 2017 Kenya." It is an approach that has been christened "*Election Observation 2.0*" and it makes for an engaging read.

This is followed up by a compelling read by Javas Bigambo, a governance and communication expert, who also chairs of the Board of Directors of the Youth Agenda. Bigambo discusses the need to "negotiate electoral justice in Kenya through systemic, systematic, legislative and institutional reforms for the common good."

The youth will continue to be an important actor in the election cycle. 2017 was also the year when the youth were really tested. Youth Agenda engaged with them and Susan Mwangera illuminates "the good, the bad and the ugly" in what went on.

The Independent Election and Boundaries Commission (IEBC) is at the heart of all election cycles. In one of the opinion pieces, IEBC indicated that they are already making plans on what they will be doing in this journey towards 2022.

The election cycle that will culminate with the 2022 date has started in earnest and it will be an engaging one for every stakeholder. Going by the observations and recommendations that have been outlined by participants in this process, there is a lot of work that awaits each and every one. *Darubini ya Uchaguzi* has captured some of them and kick started the discourse. Let's engage.

Msanii Kimani wa Wanjiru
Communications Expert



ONE COUNTRY, TWO ELECTIONS, MANY VOICES!

The Observation Report: Key Recommendations

By ELOG Communication Team



Elections Observers at a tallying center during the August 8, 2017 Election

The 2017 electoral cycle was one of the most remarkable in Kenya's political and electoral history. Not only were the scheduled general elections held on 8th August 2017 in line with the five-year electoral calendar, but also the Presidential Elections were annulled by the Supreme Court and a Fresh Presidential Election ordered and conducted on 26th October 2018. Thus, apart from voting for six electoral positions that would ordinarily constitute a general election, an additional presidential election was scheduled and conducted, making the 2017 electoral cycle unprecedentedly characterized by seven elections.

The 2017 electoral cycle was a protracted and unrelenting process for many electoral stakeholders.

It was also historical given that a record 14,523 candidates out of 15,082 aspirants were cleared to participate in all the elections. It also rekindled the memories of the 2013 electoral cycle as the 2017 presidential elections yet again pitted the incumbent President Uhuru Kenyatta against Hon. Raila Odinga, as the top two favorite candidates, as was the case in the previous elections, thus taking the character of an epic electoral grand re-match between the two.

The political and electoral landscape leading up to the 2017 General Elections and the fresh presidential poll that followed was highly volatile and greatly challenging to stakeholders, especially the IEBC and the principal political contestants, being the opposition coalition - NASA and the incumbent government - the Jubilee Party. Political supporters

and voters were mobilized along ethnic and regional blocks in an environment that was typified by heightened expectations, extreme anxiety, tension, political and ethnic division, violence, and insecurity. Political party and ethnic polarization and intimidation were also common in the electoral environment.

Ultimately, the extremely charged political and electoral environment that ensued adversely affected the preparations for, and the actual management and conduct of, the 8th August 2017 General Elections and the subsequent 26th October



Elections observers visiting a polling station

2017 Fresh Presidential Election. It was evident that political populism, polarisation, insecurity, intimidation, and fear were deliberately employed to undermine democratic elections. Political actors, other stakeholders, and citizens alike utilised these tactics to dismantle democracy and as a result, many stakeholders and voters lost faith in democratic institutions and norms.

In keeping with tradition, and as the premiere broad-based domestic elections monitoring and observation platform in Kenya, ELOG monitored and observed the 2017 general elections and the Fresh Presidential Election. ELOG was guided by the principles of nonpartisan election observation and monitoring by citizen organizations. ELOG sought to evaluate the process and its elements accurately, impartially, and as systematically as possible, in order to properly characterize processes according to national legislation requirements and applicable international obligations and commitments.

In so doing, ELOG deployed two principal strategies and methodologies: Long Term

Observation (LTO) and Short Term Observation (STO) strategies and methodologies to observe pre-, Election Day, and post-elections processes. Regarding the STO methods, ELOG employed the Parallel Vote Tabulation (PVT) used to scientifically assess the quality and operations of the e-day processes and help in verification of e-day official results using projections based on a sample of the total polling stations.

ELOG established that on the 8th August 2017 Election Day processes, the official presidential results that were declared by the IEBC were within the projected PVT ranges and, in that sense, ELOG's projected results corroborated the IEBC official result for each presidential candidate considering the corresponding margins of error. Observation also took place at the consistency level for three gubernatorial elections in Busia, Meru, and Nairobi counties that ELOG selected for sample PVT observation.

ELOG's findings also show that the 8th August 2017 Election Day processes were generally held and conducted peacefully and seamlessly. ELOG did not encounter any serious, systematic and/or planned

“
ELOG's findings also show that the 8th August 2017 Election Day processes were generally held and conducted peacefully and seamlessly.
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pattern of aberrations that could have impinged upon the integrity and credibility of the election day processes.

The above findings notwithstanding, the Supreme Court was persuaded through a petition to annul the 8th August presidential election results. The events and political activities that followed after the Supreme Court decision were far-reaching and drove the country to the brink of precipice. The 26th October 2017 Fresh Presidential Election was consequently held in an environment noted for election boycott by a leading political coalition, grave insecurity, fear, violence, and intimidation.

For ELOG, the critical issue for determination during the Fresh Presidential Election was whether the prevailing political environment was conducive enough to conduct credible elections. ELOG observed that insecurity, violence, intimidation, fear, tensions, coercion, undue influence, and indefinite postponement of voting in 25 constituencies, disenfranchised millions of Kenyans who were eligible and entitled to vote thus denying them the opportunity to express their free will. Therefore, ELOG concluded that the existing environment was not conducive for a credible election. ELOG found that NASA and Jubilee Party coalitions largely contributed

to this environment. The IEBC was also culpable through acts of commission and omission.

While making these findings, ELOG noted that many of the concerns and issues that negatively impacted on the 2017 elections largely emanated from the failure to fully implement the Agenda 4 reforms especially the recommendations in the 2008 Krieglger Report. Based on these overall findings, ELOG made the following key recommendations:

Recommendations pertaining to electoral processes

Independent Review of 2017 Electoral Process

ELOG recommends that a comprehensive independent legal, institutional, and operational audit of the IEBC's management and conduct of the elections should be undertaken immediately. The review should also involve evaluation of the other electoral processes (including party nominations and the other five elections), and the role of critical actors such as security personnel, political parties, and the media.

Employment of Electronic Systems in Elections

Greater accountability and transparency should be assured by the IEBC in relation to the electronic

management of the elections. In particular, the IEBC should ensure that there is a complementary mechanism whose procedures are simple, accountable, transparent and verifiable, well-known, and understood by all stakeholders that could be deployed in the event of technology failure.

The IEBC should further commit to greater accountability and transparency in relation to the deployment and operation of its entire IT system and infrastructure for the elections. This should include opening up the system and infrastructure and allowing access, inspection, and audit at every stage



A voter casting her vote during the August 8, 2018 election



Clear Framework for Electoral Reforms

ELOG encourages the IEBC to develop a clear strategy for initiating, managing, and implementing post-2017 electoral cycle reforms. The IEBC should use its convening power to carefully and timeously manage and drive necessary and purposeful electoral reforms, which should include institutional, administrative, and technical reforms. This would require an open consultative approach and process that brings together all stakeholders for broader buy-in and ownership of the reforms.

by all stakeholders including political parties and independent observers.

Dealing with Advantages of Incumbency

IEBC should revisit and review the negative impacts of incumbency advantages especially at the presidential and gubernatorial election level. Where necessary, IEBC should review the existing legislative, fiscal, administrative, and policy frameworks that allow political contestants to take advantage of incumbency during the electioneering period.

Electoral Legal Reforms and Amendments to Electoral Laws

IEBC and Parliament should quickly move to ensure the operationalization and implementation of the Election Campaign Financing Act 2013. At the same time, Parliament must move to ensure that laws that guarantee the 2/3 gender threshold are in place and enforced. Justice delayed is justice denied.

Further, the electoral cycle approach dictates that changes to the legal framework begin immediately after an election. While these changes may take time, ELOG recommends that electoral laws should not be amended within six months of an election, and should be subjected to public participation. This will be in line with international best practices.

Clarity on the Electoral Complaints and Dispute Resolution Processes

ELOG recommends that the IEBC, the Judiciary, the Political Parties Dispute Tribunal (PPDT) and other stakeholders should further review and clearly establish the procedures for submitting electoral complaints, lodging electoral disputes, and the jurisdiction of the relevant adjudicating bodies.

Furthermore, the complaints and dispute resolution procedures should be consistently undertaken within reasonable timelines, transparently, with open public hearings, and publication of decisions and reasons thereof.

Transparent and Predictable Processes

ELOG recommends that a clear electoral calendar for the next cycle, beginning with reforms, should be developed by the IEBC in consultation with all stakeholders. This should be done very early in the new electoral cycle.

Cost of Elections and Financial Audit

The cost of elections in Kenya is among the highest in the world. ELOG recommends that a detailed, transparent, and accountable financial audit be undertaken for the 2017 elections. IEBC should then take measures to review the cost drivers so that



ELOG observers at the PVT tallying centre

future elections can be cost effective and affordable by Kenyans.

Electoral Campaigns

ELOG recommends that political actors adhere to the code of conduct and, in case of a breach, swift and stringent action be taken by the relevant bodies such as IEBC, ORPP, DPP, and NCIC.

As potential governments in waiting, political parties should clearly articulate their election agenda and policy proposals to the electorate. Adverse campaigning should be strongly condemned and negatively profiled by media and civil society, among other stakeholders.

Stakeholder Engagement and Public Outreach

The IEBC should adopt a continuous engagement policy and approach that is more inclusive, structured, regular, open, and predictable in relation to the electoral preparedness, the emerging challenges, and the measures taken to proactively respond to the challenges. In particular, IEBC should set up regular thematic based engagements with stakeholders to appraise progress in different electoral processes.

Voter Registration

The sanctity and credibility of the voter register is critical. First, IEBC should come up with stringent

data verification mechanisms that are properly pre-tested to eliminate errors that still exist in the register.

Secondly, there is also need for a massive publicized campaign to mobilize registered voters to thoroughly inspect their details in the register in order to update records and clean up as many inconsistencies as possible. Further, the National Registration Bureau and the IEBC should explore ways of integrating civil registration and voter registration, so that when one is issued with an ID card he/she is automatically registered as a voter.

Recruitment of Elections Personnel

ELOG urges the IEBC to invest in timely recruitment of elections personnel and to undertake such recruitment based on strict compliance with the laid down laws and regulations. Furthermore, deployment of elections personnel should be guided by the need to enhance electoral integrity.

Voter/Civic Education

ELOG strongly encourages and stresses the need for better planning and timely roll-out of civic and voter education programmes and activities. This involves better resourcing by government and other development partners, better leadership and coordination by the IEBC, and stakeholders such as civil society. It also involves comprehensive, effective, and efficient roll-out through improved mapping, strategic, and inclusive implementation.

Focus on Special Interest Groups

ELOG urges Parliament to quickly enact the required affirmative action legislation to facilitate inclusive elections as envisioned in the Constitution. ELOG also urges other stakeholders such as the IEBC, the ORPP, and secretaries-general of political parties to proactively and strictly implement affirmative action principles and policies during elections.

Recommendations Pertaining to Electoral Actors

IEBC – Leadership and Authority of the IEBC

ELOG urges all stakeholders, especially politicians, to respect the leadership and authority of IEBC. In particular, ELOG emphasizes the special role and authority of the IEBC chairperson who, in the context of Kenya’s electoral regime and practice, is appointed and operates as “the first amongst equals” and the spokesperson of the Commission. Conversely, the IEBC chairperson should always demonstrate this leadership and authority and use it to wisely to steer the Commission towards ensuring that its decisions are independent, transparent, accountable, legal, and guided by the best interests of the nation.

Judiciary – Securing the Emerging Electoral Jurisprudence

Having made a historic ruling in nullifying the August 8th Presidential Elections where the Supreme Court placed a high threshold on management of the electoral process in respect to strict adherence to the law, the Judiciary should consolidate this position forthwith in all the electoral processes.

The Judiciary should also enhance citizen and stakeholder confidence in its work through consistent demonstration of its independence, neutrality, and impartiality.

Security Agents – Creating a Conducive Environment for Credible Elections

Adequate security should be provided to ensure that voters and other stakeholders are protected during elections. Thorough training of the deployed personnel on how to cope with a range of eventualities during electoral processes should be undertaken.

Security agents deployed during elections should always remain independent, neutral, and impartial in the discharge of their duties. They should always discharge their duties with

utmost professionalism, proportionality, integrity, transparency, and accountability.

Political Parties – Support to Credible Electoral Processes

Political parties and candidates should endeavor to recruit and deploy agents to all polling stations and the various tallying centres. They should ensure that the agents are duly accredited, properly trained and deployed in time to enable them effectively and efficiently discharge their duties.

Further, as critical institutions of democracy, political parties should endeavor to conduct their affairs in a democratic, participatory, and inclusive manner, especially during party primaries which produce the candidates for the General Elections.

Media – Adherence to the Code of Conduct

The media should not allow politicians to use their platforms to spread fear, ethnic hatred, and despondency especially during an electoral period. Additionally, the media should work to enhance transparency of the elections through wide, impartial coverage of the electoral process that begins with the pre-election activities.



Security agents providing tight security on election day



Civil Society – Sustained Vigilance and Support to Electoral Processes

The civil society should be seen as neutral actors interrogating issues objectively and holding the political and public authorities accountable. Where civil society is seen to be partisan, especially during an electoral process, the perception generally adversely affects their integrity and standing in the

society, thus leading to erosion of public confidence and trust thereby diminishing their legitimacy as the third sector and representatives of the citizenry.

Democracy and human rights defending requires civil society to always remain steadfast, vigilant, and demanding of accountability from duty bearers regardless of threats and the diminishing civil society space.

General Recommendations

National Dialogue – Political Problems Require Political Solutions

ELOG recommends that a national dialogue be convened to address a broad range of social, political, and economic issues affecting the country and the socio-political and economic scars caused by the 2017 electoral process.

ELOG further recommends a broad-based and inclusive process that should have a clear agenda agreed upon by all competing political actors and the broad civil society actors. The dialogue process should, among other issues, address and lead to sober decisions on the electoral system to address the sharp divisions that perennially emerge from the periodical electoral contests.

Dealing with the Scars of the Violence

ELOG recommends that the Office of the Director of Public Prosecution (ODPP) should speedily investigate the numerous incidents of assault and killing of civilians in the run-up to, during and after the Fresh Presidential Election. ELOG is concerned that no official report has been issued by the authorities so far. Kenyans in general and the survivors, their families, and communities in particular are entitled to assurance that the State does not condone violence committed by the police or any other person; and that the State will take all measures necessary to punish the perpetrators.

Respect for Independent Institutions

The Judiciary and the IEBC came under attack from both the Jubilee and NASA political coalitions. The Judiciary: by the Jubilee Party for the nullification of the 8th August presidential elections, and IEBC: by the opposition NASA, for going ahead to conduct elections on the 26th October 2017. This not only undermined their independence but also contributed towards the erosion of public trust and confidence in the institutions. It is imperative that independent institutions be respected in order for them to effectively discharge their mandate. ELOG recommends that political actors desist from making disparaging remarks regarding these institutions; and where they are aggrieved, they should follow the due process of addressing the raised concerns and issues.

Taking Action on Electoral Offences

During the 2017 electoral process, ELOG noted flagrant violations of electoral laws and breach of code of conduct by different actors including voters.

ELOG recommends that IEBC, Office of the Director of Public Prosecutions and other enforcement agencies be swift in responding to incidents of electoral offences. This will act as deterrence for future breaches bringing more sanity to the conduct and management of elections.



By Francis A. Aywa

EXPERT OPINION

Election Observation 2.0: Re-thinking Domestic Election Observation in post 2017 Kenya

Introduction

The nullification of the August 8, 2017 presidential election by Kenya's Supreme Court on September 1, 2017² was no doubt a seismic event not only in the country's electoral history but also in Africa's.³ It necessitated the holding of a fresh presidential election – conducted on October 26, 2017, boycotted by the opposition citing several concerns with the quality of the process, and which President Kenyatta won again. The outcome of the fresh poll was also litigated at the Supreme Court, albeit unsuccessfully.⁴ As

the country's attention inexorably shifts to the 2022 General Election, questions still abound as to the effect the first judgement had on, amongst others, the credibility of election observation.

Following the invalidation of the presidential election by the Supreme Court, mainstream media reports and social media were awash with criticism of observers for their findings on the poll.⁵ While for the most part, it was the international observers that this criticism was directed at, the country's foremost domestic observation group – the Elections Observation Group (ELOG) – was not spared. The criticism of observers is not new (either in Kenya or

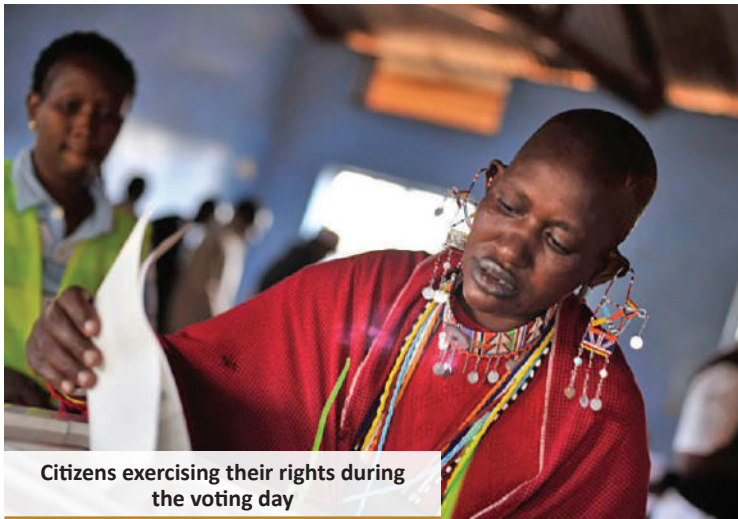


Election observers verifying their data from the field

elsewhere); is expected to continue for some time; and is likely to pick up closer to the country's next General Election in 2022. In the meantime, the period before then presents an apposite moment to reflect on the quality of the country's domestic election observation. This includes reflections on how it can be improved and how domestic election observers can avoid getting accused of contributing to, rather than preventing, what some pundits argue is an inevitable slide into electoralism⁶ (in which elections get confused with democracy) or, even worse, electoral authoritarianism⁷ (in which the opposition has a theoretical change of winning but conditions always favour the incumbent).

1. *Raila A. Odinga & Another vs IEBC & Others* (Presidential Petition No. 1 of 2017).
 2. See <https://www.reuters.com/article/us-kenya-election-court/kenyan-court-scrap-kenya-presidential-vote-kenyatta-calls-for-calm-idUSKCN1BC4A5> and <http://ohrh.law.ox.ac.uk/historic-judgment-kenyas-presidential-election-declared-null-and-void-and-fresh-election-ordered/>.
 3. *John Harun Mwau & Others vs IEBC & Others* (Presidential Elections Petition No. 2 & 4 of 2017).
 4. See, for example, <http://ohrh.law.ox.ac.uk/historic-judgment-kenyas-presidential-election-declared-null-and-void-and-fresh-election-ordered/>; <https://qz.com/1068521/kenya-elections-deeply-flawed-questions-foreign-observers/>; <https://freedomhouse.org/blog/future-election-observation-after-kenya-s-supreme-court-judgement/>; and <https://www.cfr.org/blog/international-observers-and-kenya-election>.

5. See Schmitter, P. C. & Karl, T. L. "What Democracy Is ... and Is Not" *Journal of Democracy*, Volume 2, Number 3, Summer 1991, pp. 75-88; and Norris, Pippa (2014) *Why Electoral Integrity Matters*. New York: Cambridge University Press.
 6. See, for example, <http://bostonreview.net/politics/aziz-rana-kenyas-new-electoral-authoritarianism>; <https://www.nation.co.ke/news/Raila-Odinga-campaign-on-electoral-justice-in-Kenya/1056-4066460-ux1frv/index.html>; and Bogaards, Mathijs & Elischer, Sebastian (2016) 'Competitive Authoritarianism in Africa Revisited'. *Z Vgl Polit Wiss* (2016) (Suppl) 10:5-18.
 8. Kelley, Judith (2008), *supra*, p. 221.



Citizens exercising their rights during the voting day

In this paper, we discuss some early and tentative ideas on what needs to be done to improve domestic election observation in Kenya. The paper begins with elucidating some basic principles that need to be borne in mind in understanding the nature and purpose of election observation generally, and domestic election observation in particular. We then discuss the various strands of criticism against election observation and, by extension, domestic election observation. This leads to a discussion of the role of domestic election observation and a prognosis of the same. We finally draw a number of conclusions from the preceding discussions and offer recommendations on how to improve domestic election observation in future.

The Place of Election Observation in Electoral Practice

According to the Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers, “[g]enuine democratic elections are an expression of sovereignty, which belongs to the people of a country, the freedom of whose will provides the basis for the authority and legitimacy of government”. The Declaration draws from the 1948 Universal Declaration of Human Rights (UDHR); and the 1966 International Covenant on Civil and Political Rights, both of which

form part of what is referred to as “the International Bill of Rights”. The 1981 African Charter on Human and Peoples Rights; and the 2007 African Charter on Democracy, Elections and Governance also reiterate these principles. Kenya’s 2010 Constitution states in Article 38 that every citizen has the right to “free, fair and regular elections based on universal suffrage and the free expression of the will of the electors”.

With the increase in the number of countries holding periodic elections, international interest in elections spawned the practice of election observation. It involves gathering information and making an informed judgement on the quality of elections. It should not be confused with election monitoring, which involves the authority to observe an election process and to intervene in that process if relevant laws or standard procedures are being violated or ignored.

International election observation has its roots in 1857, when several European countries sent monitors to observe the referendums that united Moldavia and Wallachia, forming present day Romania. Supervision of elections by the United Nations (UN) in “trust and non-self-governing territories” was also an important precursor to modern election monitoring. Costa Rica, which invited a delegation from the Organisation of American States (OAS) to observe its elections in 1962, led the way in the modern era. Beginning in 1964, the Commonwealth Secretariat undertook several missions in territories controlled by Britain.⁸

After the collapse of the Soviet Union, the ‘90s saw a dramatic rise in observation missions around the world. According to *The Economist*, quoting Susan Hyde of the University of California, Berkeley, observers today scrutinise around 80% of all elections, up from less than 30% in 1989.⁹ In Kenya,

8. <https://www.economist.com/the-economist-explains/2017/06/21/what-do-election-observers-do>.

election observation can be traced back to when the National Election Monitoring Unit (NEMU) undertook an observation exercise of the 1992 General Election held upon the resumption of multi-party politics in Kenya. All General Elections in the country since then, as well as many by-elections in between, have been observed by either domestic observers or international observers or both.

International election observation is now generally accepted around the world.

It plays an important role in providing accurate and impartial assessments of electoral processes. In order to render such accurate and impartial findings, election observation involves the use of credible methodologies and cooperation with national authorities and political competitors, amongst others. Conducted correctly, an election observation mission has the effect of building the legitimacy and credibility of an election. Hence the assertion, in the Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers, that “genuine democratic elections are an expression of sovereignty, which belongs to the people of a country, the freedom of whose will provides the basis for the authority and legitimacy of government” holds true. However, election observation has increasingly come under criticism for a variety of reasons. In the next section, we explore some of the critiques levelled against election observation over the years.

Growing (and Robust) Criticism of Election Observation

The growing, and increasingly robust, criticism of election observation is a cause of for reflection. As early as 1991, Jason stated that ‘neither the objectivity nor the independence of [IEO] organizations ought to be assumed; they, too, have an agenda’¹⁰ Calling

international election observation a “growth business” in Africa, Geisler¹¹ argued that autocratic African leaders who had hitherto rejected foreign observers as meddlers in domestic affairs, had since realised that the presence of observers had become a *sine qua non* for internationally acceptable elections and sought to selectively allow their participation in their elections. Fearing that outright rejection of results would perhaps lead to violence, many observers rendered ambivalent findings that contributed to the legitimization of regimes from flawed elections.

“It is commonly agreed that domestic observers, when well-organised and deployed, have significant advantages over foreign or international observers.”

Foeken & Dietz pointed to various shortcomings in the observation teams that observed the 1992 and 1997 General Elections – raising the possibility that professionalisation could remedy observers’ flaws.¹² However, Lyngge-Mangueria disagrees, and contends that “professionalising” international election observation might not be enough to ensure effective election observation. In his opinion, any (realistic) extension or expansion of international election observation missions will not necessarily enable them to collect accurate information, nor to detect and deter electoral irregularities.¹³

In her earliest article on the subject, Judith Kelley wondered why countries that intended to cheat in elections still invited monitors.¹⁴ In a subsequent article, she stated that the notion of “neutral” election observers was a myth.¹⁵ Soon thereafter, working with a dataset of 591 election monitoring missions, she concluded that monitors’ assessments

9. Jason, Karen J. (1991), ‘The Role of Non-Governmental Organizations in International Election Observing’, *New York University Journal of International Law and Politics*, 24/4, 1795-1843 at 1796.
10. Geisler, Gisela (1003) “Fair? What Has Fairness to Do With It? Vagaries of Election Observations and Democratic Standards” *The Journal of Modern African Studies*, Vol. 31, No. 4 (Dec. 1993) 613-637, at p. 614 et seq.
11. Foeken, D. & Dietz, T. (2000) “Of Ethnicity, Manipulation and Observation: the 1992 and 1997 Elections in Kenya”, 122-149, at p. 135 et. seq.
12. Lyngge-Mangueria, Halfdan (2012) *Why ‘Professionalizing’ International Election Observation Might Not Be Enough to Ensure Effective Election Observation*. Stockholm: International IDEA, p. 5.
13. Kelley, Judith (2008) Assessing the Complex Evolution of Norms: The Rise of International Election Monitoring. *International Organization*, 62, Spring 2008, 22-255, at p. 222.
14. Kelley, Judith (2010) “Election Observers and their Biases” *Journal of Democracy* Vol. 21, Number 3, 158-171, at p. 168.



reflected the interests of their member states, or donors, other “tangential organizational norms”.¹⁶ In yet another article, she stated that her 2012 study had elicited mixed feelings and argued that while election observers could indeed improve election quality (the good part), they mostly don’t (the bad part). She went on to state that they are sometimes biased and contribute to the false legitimisation of governments.¹⁷

Overall, there are generally three strands of criticism. The first is that observers are partisan. This criticism was part of the stock in trade of autocrats who sought to minimise international scrutiny, but has also been levelled in other quarters. Kew, for example, in a study of the 1999 elections in Nigeria, argues that most IEO missions ‘had generally decided beforehand that they were willing to accept - and indeed preferred - an Obasanjo outcome to the Abubakar transition. Similar assertions have been made of observers in the 2000 elections in Zimbabwe,¹⁸ and the 1998 elections in Cambodia.¹⁹ Ronceray also argues that there is some bureaucratic bias in European Union (EU) observation missions in Africa which, in his opinion, accounts for “breaches of EOM independence”.²⁰

The second strand of criticism revolves around inaccuracy – that the information available to IEO missions is inaccurate or inconsistently analysed. This is evident in Geisler’s work, in which she argues that ‘international observation exercises remain so superficial that conclusions are either too vague or empirically untenable’.²¹ Kelley’s “conservative” estimate is that IEO mission assessments are



IECB officials verifying a voter’s details on voting day

inaccurate 10 per cent of the time.²² Oda van Cranenburgh argues that ‘international observation is heavily focused on procedures on polling day’, although ‘it is precisely in the preparation of elections that many opportunities for irregularities and abuse occur’.²³

Finally, observers have also been criticised for inability to detect and deter electoral irregularities. This is the case, for instance, when Carothers argues that ‘government officials planning elections in transition countries often overestimate the ability of foreign observers to detect fraud’.²⁴ Some studies have even suggested that international observer missions simply encourage shifts from observable to non-observable types of electoral irregularities (hacking is a likely example as countries move to technology enabled elections). Hyde’s study²⁵ of the 2004 elections in Indonesia, and Simpser’s study²⁶ of similar “unintended consequences” of election observation, are cases in point. It is this same strand of criticism that is evident in Kura Yangu Sauti Yangu’s

15. Kelley, Judith (2009) ‘D-Minus Elections: The Politics and Norms of International Election Observation’, *International Organization* 63, Fall 2009, 765-787, at p. 782.
16. Kelley, Judith (2012) ‘The Good, the Bad and the Ugly: Rethinking Election Monitoring’, Stockholm: International IDEA, p. 7.
17. Laakso, Lisa (2002) ‘The Politics of International Election Observation: The Case of Zimbabwe in 2000’, *Journal of Modern African Studies*, 40/3, 437-64.
18. Bjornlund, Eric (2004) ‘Beyond Free and Fair: Monitoring Elections and Building Democracy’ (Washington DC, Baltimore; London: Woodrow Wilson Center Press and Johns Hopkins University Press)
19. Ronceray, Martin (2017) *A Bureaucratic Bias? UE Election Observation Missions in Africa: Between Independence and Development Industry*. EU Diplomacy Papers, 3/2017, pp. 24-25.
20. Geisler (1993) *supra*, at p. 634.
21. Kelley (2009) *supra*, p. 783.

22. van Cranenburgh, Oda (2000), ‘Democratization in Africa: the Role of Election Observation’, in Jon Abbink, Gerti Hesselting (ed.), *Election Observation and Democratization in Africa* (New York: Palgrave Publishers, 2000), p. 29.
23. Carothers, Thomas, ‘The Observers Observed’, *Journal of Democracy*, 8/3 (1997), 17-31, pp. 19-20.
24. Hyde, Susan D. (2007), ‘The Observer Effect in International Politics: Evidence from a Natural Experiment’, *World Politics*, 60/1 (2007), 37-63, p. 63.
25. Simpser, Alberto, ‘Unintended Consequences of Election Monitoring’, in Michael R. Alvarez, Thad E. Hall, Susan D. Hyde (ed.) (2008), *Election Fraud: Detecting and Deterring Electoral Manipulation* Washington DC: Brookings Institution Press, 216-234, p. 216.
26. <https://www.capitalfm.co.ke/news/2017/09/orderly-queues-do-not-equal-credible-polls-international-observers-told/>.

statement to this effect:

“The observers who came from abroad seemed to have come here, observed Kenyans queuing orderly and went back and said this was a fair election. They should have said Kenyans are able to queue, because that was the observation they made.”²⁷

Seen against this backdrop, the criticism arising from Kenya’s 2017 General Election is therefore neither new nor an isolated case. NEMU’s work in 1992;²⁸ the report of the 1997 General Elections by the Institute for Education in Democracy (IED); the National Council of Churches of Kenya (NCCK) and the Catholic Justice and Peace Commission (CJPC);²⁹ the 2002 findings by the Kenya Domestic Observation Programme (K-DOP);³⁰ the 2007 Kenya Elections Domestic Observation Forum (KEDOF);³¹ as well as the 2013³² and 2017³³ ELOG reports have all faced criticism of one kind or other. Irrespective of the particular strand(s) of criticism, there is potential here for reducing the effectiveness of election observation. It is also important to note that such criticism is an integral and necessary part of improving the practice of election observation. Election observers therefore need to reflect on the criticisms levelled against them and either change negative public perceptions or improve their work in order to make a significant contribution to the advancement of democracy. As ELOG’s work is primarily domestic,³⁴ we turn to the role of domestic election observation and its future in the next two sections.

The Uniqueness of Domestic Election Observation

It is commonly agreed that domestic observers, when well-organised and deployed, have significant advantages over foreign or international observers.³⁵ Several reasons have been advanced for this. First, they can much more easily turn out in large numbers – usually thousands.³⁶ They also understand the context better, including the political culture and language, and are therefore able to see many things that foreign observers cannot due to the short time the latter are deployed,³⁷ and to provide a wealth of information.³⁸ Thirdly, as citizens, they have a higher degree of agency and embody the “crucial idea that the society in question should take primary responsibility for improving its own political processes”.³⁹ Their presence is very often long term, beginning before the elections and extending after they have been concluded, in sharp contrast to the “here today, gone tomorrow” nature of foreign observers.⁴⁰ Finally, they can deliver more “bang for the buck” than foreign groups, given the fact that their travel, accommodation and other logistical costs are typically lower.⁴¹

By playing an active role in promoting the integrity of elections and participating in the development of democratic institutions throughout the entire electoral cycle, domestic observers also contribute to civil society strengthening.⁴² They may be able to reach remote places that foreign observers may be unable to reach⁴³ either due to logistics or security concerns.

Consequently, international election observation cannot be a substitute for domestic election observation. Although international observers usually get more attention from national authorities (Kenya is no exception) and the media, they ought to

27. National Elections Monitoring Unit (1993) *The Multiparty General Elections in Kenya, 29 December 1992*. Nairobi: NEMU.

28. Institute for Education in Democracy, Catholic Justice and Peace Commission & National Council of Churches of Kenya (1998) *Report of the 1997 General Elections in Kenya, 29-30 December 1997*. Nairobi: IED/CJPC/NCCK.

29. Kenya Domestic Observation Programme (2003) *When Kenyans Spoke: Report of the 2002 General Elections*. Nairobi: K-DOP.

30. KEDOF, the most criticised observation group, was plagued by deployment delays and disunity amongst the observer groups, with the result that its report was completed much later – after the Krieger Commission (appointed in March 008 to investigate the 2007 General Election) had rendered its report.

31. Elections Observation Group (2013) *The Historic Vote: Elections 2013*. Nairobi: ELOG.

32. ELOG (2018) *One Country, Two Elections, Many Voices! The Kenya 2017 General Elections and the Historic Fresh Presidential Election: Observation Report*. Nairobi: ELOG, p. 4.

33. In late 2013, ELOG was one of the founders of the East and Horn of Africa Elections Observers Network (E-HORN) to spearhead solidarity and cooperation on citizen observation activities in the eastern part of Africa, and was elected as the first secretariat of the regional network. Elections Observation Group, *op. cit.*

34. Carothers, Thomas (1997), *supra*, p. 7.

35. Carothers, *op. cit.*; Lidauer, Michael & Gil, Eva, *op. cit.*

36. Carothers, *op. cit.*; Lidauer, Michael & Gil, Eva, *op. cit.*

37. OSCE/ODIHR (2007) *Handbook for Long-Term Election Observers: Beyond Election Day Observation*. Warsaw: OSCE/ODIHR, p. 8.

38. Carothers, *op. cit.*

39. Carothers, *op. cit.*; Lidauer, Michael & Gil, Eva (2015) *Domestic Election Observation: Key Concepts and International Standards*. Democracy Reporting International. <http://democracy-reporting.org>.

40. Carothers, *op. cit.*

41. Lidauer, Michael & Gil, Eva, *supra*, p. 2.

42. *Ibid.*

43. Lidauer, Michael & Gil, Eva, *op. cit.*



A citizen exercising his right as an IEBE official looks on to ensure that all is well

quality of the final report. KEDOF's 2007 effort is clearly the lowest point due to the general failure to abide by the norms of election observation; leadership and administrative challenges; and the quality of the final report – not to mention its late delivery. In this section we nevertheless take the view that while there have been some clear missteps, domestic election observation still has a bright future not only in Kenya but elsewhere as well.

To illustrate this, we go back to the country's immediate past and review the criticism of observers against

share information with domestic observers, including logistical and security conditions for deployments, and collaborate with them. Domestic observers also need to understand that international observers may be freer to report the truth without fear of retribution, especially in repressive contexts.⁴⁴ They also usually have developed methodologies and comparative experience and knowledge from other countries⁴⁵ that may add to the effectiveness of the overall election observation effort. Against this backdrop, what is the future of domestic observation in Kenya?

The Future of Domestic Election Observation

Taking the long-term view of things since 1992, it is safe to argue that Kenyan domestic observation has come a long way since the first such effort by NEMU. It is not possible for something to be done for over 25 years and be faultless: there have been some good times and bad times, so to speak. In our opinion, the NEMU (1992), IED/CJPC/NCCK (1997), K-DOP (2002) and ELOG (2017) exercises stand out as the “good times” not because they were perfect but because they represented greater fidelity to the norms of election observation – especially when prevailing challenges are taken into account. The 2013 ELOG exercise falls somewhere in the middle, due to the failure to rise above internal administrative challenges and the

realities, challenges and limitations of election observation, as well as other commentaries on the same. A good number of those who took issue with the findings of observers either did so either on the basis of their subjective views of what they understood to be the truth or material misconceptions of the manner in which determinations on electoral integrity are made.

First, we quickly review the main criticism and its basis. Critics of observers may be divided into essentially two groups.⁴⁶ On the one hand, there were the partisans (especially contestants in the process, but also some citizens). On the other hand, there were those who were not active contestants (including the media, some civil society groups and some citizens). The basis for the criticism arose mostly from the final statements, often issued on conclusion of the elections but before final reports were written and released. Observers were either criticised for their overall findings on the elections, or the basis for such findings or both the findings and the reasons for doing so. Hon. Odinga, of the National Super Alliance

44. Lidauer, Michael & Gil, Eva, *op. cit.*

45. Sample the following: <https://www.theelephant.info/features/2017/09/21/see-no-evil-how-international-election-observers-lost-credibility-during-the-august-elections/>; <https://www.pambazuka.org/democracy-governance/after-kenya%E2%80%99s-august-2017-elections-observing-observers>; <https://qz.com/1068521/kenya-elections-deeply-flawed-questions-foreign-observers/>; https://www.washingtonpost.com/news/democracy-post/wp/2017/11/15/its-time-for-international-election-monitors-to-start-doing-their-job/?noredirect=on&utm_term=.9ae3e400dba8.

46. <https://qz.com/1068521/kenya-elections-deeply-flawed-questions-foreign-observers/>.

(NASA), who successfully moved the Supreme Court to invalidate the August 4 vote, released a statement saying, “With this courageous verdict we put on trial the international observers who moved fast to sanitize fraud.”⁴⁷ Some civil society groups, such as Kura Yangu Sauti Yangu, were also critical of observers’ findings accusing them of (1) unduly focussing on the sheen of election day processes;⁴⁸ (2) an undue focus on the pre-election and election day aspects to the exclusion of the rest of the process;⁴⁹ and (3) making wrong determinations, given the circumstances (for example, disparities in statutory forms) and facts of the election.⁵⁰

Next, we turn to some likely exculpatory factors. In their defence, some observers said they had only endorsed the voting process and not the election as a whole.⁵¹ If so, to have praised the voting process only and not spoken clearly about the overall process then led to question-begging at best and, at worst, a public relations misstep for a clearly contentious process. Secondly, it is important to restate a fact (not always widely-understood by the public) that observers have no power to intervene to stop electoral malpractices, or to enforce electoral law at all. However, this does not absolve them from objective determination or whether the process had integrity or not. As Arne Tostensen⁵² argues, observers can only do what observers can, which is (1) scrutinise the electoral context; (2) scrutinise the electoral process; and (3) pass a verdict on the electoral process. For an example, he quotes Carothers’ statement that “Foreign observers cannot force profoundly polarised political factions to cooperate with one another.”⁵³ Thirdly, juxtaposing the decision in *Odinga & Another vs IEBC & Others* with observers’ findings largely misses the point and is, in

certain ways, undue criticism since the information available for determination in both instances is different in marked ways.

For instance, while the court process is based on both sides submitting material to the court to prove their case, and the court can order the production of material useful for its final determination,⁵⁴ observers have to work with whatever they can lay their hands on (and variously said, for instance, that they had no way of proving hacking claims).

Lastly, *ad hominem* criticism of observers, or even international observers, ignores the fact that they have varying mandates and experience different challenges.⁵⁵ Inter-governmental missions (e.g. the African Union), for instance, cannot be judged on the same scale as non-governmental missions (e.g. the National Democratic Institute). Neither should foreign observers (e.g. the European Union Observer Mission, which is quite dependent on host government cooperation⁵⁶) be judged on the same scale as domestic observers (e.g. ELOG).

It seems, therefore, that domestic election observation still has a future.⁵⁷ This is not to say that there aren’t aspects of practice or design that require a re-look or improvement.

What is still up for debate is what that future will look like and how to ensure that it is overall a bright future in which independent citizen scrutiny of election quality is part and parcel of their participation in those elections, and a critical adjunct to voting or contesting in elections. In the final section of this paper, we draw some conclusions on the practice of domestic election observation in Kenya and propose ways in which it can be made more effective. Indeed, as Morris Odhiambo states,

47. <https://www.capitalfm.co.ke/news/2017/09/orderly-queues-do-not-equal-credible-polls-international-observers-told/>.
 48. <http://riftvalley.net/news/after-kenya%E2%80%99s-august-2017-elections-observing-observers#.WyFBM1IUk74>.
 49. <https://www.nytimes.com/2017/10/27/opinion/kenya-election-kenyatta.html>
 50. <https://qz.com/1068521/kenya-elections-deeply-flawed-questions-foreign-observers/>.
 51. Tostensen, Arne (2004) ‘Election Observation as an Informal Means of Enforcing Political Rights’ *Nordisk Tidsskrift for Menneskerettigheter* 22:3, p.
 52. *Ibid.*, p. 336.
 53. Instructively, the court in *Raila & Another vs IEBC and Others* ordered IEBC to allow access to its server data for verification and, when IEBC failed to do so, made a presumption of malfeasance against IEBC.

47. <https://www.capitalfm.co.ke/news/2017/09/orderly-queues-do-not-equal-credible-polls-international-observers-told/>.
 48. <http://riftvalley.net/news/after-kenya%E2%80%99s-august-2017-elections-observing-observers#.WyFBM1IUk74>.
 49. <https://www.nytimes.com/2017/10/27/opinion/kenya-election-kenyatta.html>
 50. <https://qz.com/1068521/kenya-elections-deeply-flawed-questions-foreign-observers/>.
 51. Tostensen, Arne (2004) ‘Election Observation as an Informal Means of Enforcing Political Rights’ *Nordisk Tidsskrift for Menneskerettigheter* 22:3, p.
 52. *Ibid.*, p. 336.
 53. Instructively, the court in *Raila & Another vs IEBC and Others* ordered IEBC to allow access to its server data for verification and, when IEBC failed to do so, made a presumption of malfeasance against IEBC.
 57. <https://freedomhouse.org/blog/future-election-observation-after-kenya-s-supreme-court-judgement>.



the shortcomings of the international missions in Kenya present an opportunity to improve election monitoring standards for all countries.⁵⁸

Conclusions and Recommendations

The first conclusion that can be drawn from Kenya's practice of domestic observation over a quarter century is that it has come a long way and has undergone incremental improvements. For instance, the need for longer-term scrutiny and analysis of the electoral environment from an electoral cycle approach is now more or less taken as a given, even though certain details of it (such as how to strike a balance between a 5-year investment and, say, starting a year or so before a General Election) are still debatable. Despite some lingering doubts⁵⁹ as to whether professionalising election observation is helpful, it is difficult to see how technical improvements to election observation are not nevertheless useful. Put differently, professionalising election observation may not be sufficient to make it more effective, but it is still necessary. For example, earlier preparation; more robust analytical frameworks; more rigorous analysis; and fidelity to the results of the analysis rather than vested ethnic, political, economic or other interests are all unassailably useful improvements. However, since professionalization has its limitations, what else needs to be done?

Although seen in some quarters as escapist,⁶⁰ it is important to internalise the fact that expectations of observers sometimes outstrip what they can feasibly do. It is worth reiterating the fact that they can only observe the process and make a conclusion on its quality, based on electoral law and principles. They cannot intervene to right electoral wrongs or to enforce electoral law in the face of incompetence or intentional malfeasance. This is not a paradox: observers are useful to shoring up electoral integrity

but should not be seen as the elixir for ensuring clean elections where lack of political will and other factors are stacked against the electoral process. Going forward, it will be important for local observation missions to manage stakeholder expectations early and clearly explain the limits of their mandates. Some respite could also be achieved by early analysis and pointing out possible weaknesses in the electoral process, but this should be interpreted as influencing the quality of the electoral process⁶¹ rather than determining its integrity overall – the responsibility of election management body and other agencies critical to the conduct of the process.

Looking at the current domestic observation scene, one of the inescapable facts is that there is a diverse set of actors all staking claim to the ability (and credibility) to conduct election observation better. This is a result of some of the weaknesses of previous election observation exercises, but could also be the result of cut-throat competition for funding, amongst other reasons. While a diversity of voices and actors is precisely what makes Kenya's civil society vibrant, the lack of a common agenda on how to make Kenya's elections more credible is a weakness that invites some debate before 2022. This is important not only for improved domestic election observation but also protection of shrinking civil society space and civil liberties overall.

If the initial intent of a joint domestic observation outfit is difficult to achieve if not outright undesirable, for more effective domestic observation, it is important to nevertheless institutionalise the practice of domestic election observation.⁶² It is therefore incumbent on the leadership of ELOG to reflect on how it can be strengthened into a stronger (not to be confused with bigger) organisation that can reflect growing capacity for credible domestic election observation while at the same time striking

58. See, for example, Lyngge-Mangueria, *op. cit.*

59. See, for example Dauti Kahura's criticism in <https://www.theelephant.info/features/2017/09/21/see-no-evil-how-international-election-observers-lost-credibility-during-the-august-elections/>.

60. Or, as Tostensen calls it "an informal means of enforcing political rights". Tostensen, *op. cit.*

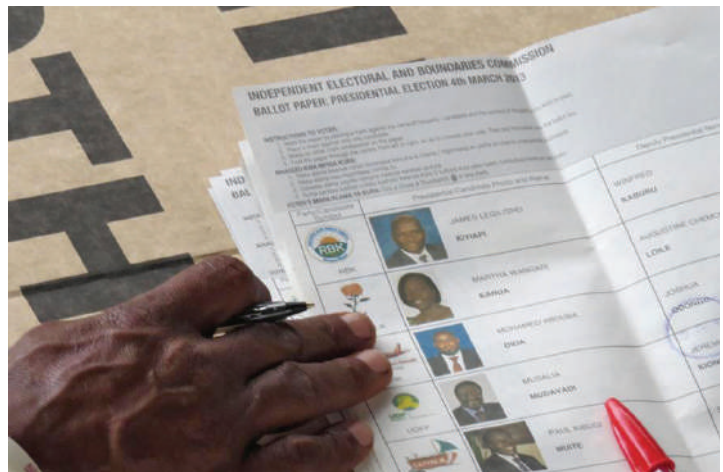
61. In this respect, there is a lot to learn from other more established observer groups – the defining attribute should be knowledge and institutional capacity rather than maintaining a standing cadre of personnel.

62. See, for example, <https://www.pambazuka.org/democracy-governance/after-kenya%E2%80%99s-august-2017-elections-observing-observers>; and <https://www.nation.co.ke/oped/opinion/A-look-into-pivotal-role-observers-play-in-elections/440808-4202354-t8t7ebz/index.html>.

the balance in organisational make-up that balances these aims with the ebb and flow of investments in the electoral cycle. Without being overly prescriptive, the fact that elections are a seasonal activity would suggest the need for a certain core establishment in “low seasons” that nevertheless allows for rapid personnel build-ups at critical points or “high seasons” in the electoral cycle through bringing on board staff on short-term contracts; as well as long-term partnerships with credible organisations that can be a source of capable observers. Other domestic observation groups can follow this same model, with necessary adaptations.

A lot has been said of late about how observers should adapt to the changing times.⁶³ For instance, there is growing realisation that electoral fraud and malpractice has shifted from past practices such as stuffing ballot boxes and kidnapping opponents to hacking databases and manipulating results. Harnessing technology will therefore be a useful addition to the domestic election observation toolkit. For instance, insisting on the availability of election data in machine-readable formats that can be quickly analysed should make the analysis of voters’ registers easier and make it possible to engage early on this critical part of the electoral process. The fact that polling station data is now much more available than before, and that it is now easier to put a smartphone in every observer’s hand, should translate to the redesign of the massive forms that observers use and to securely feed data (including images of polling station level results) into a central database for easier comparison of election observer data with data from the Independent Electoral and Boundaries Commission (IEBC).

Since counting, collating, verification and announcement of results seems to have become the remain-ing Achilles’ heel of the Kenyan electoral process, the observation exercises of the future will



A sample ballot paper drawn from the 2013 presidential election

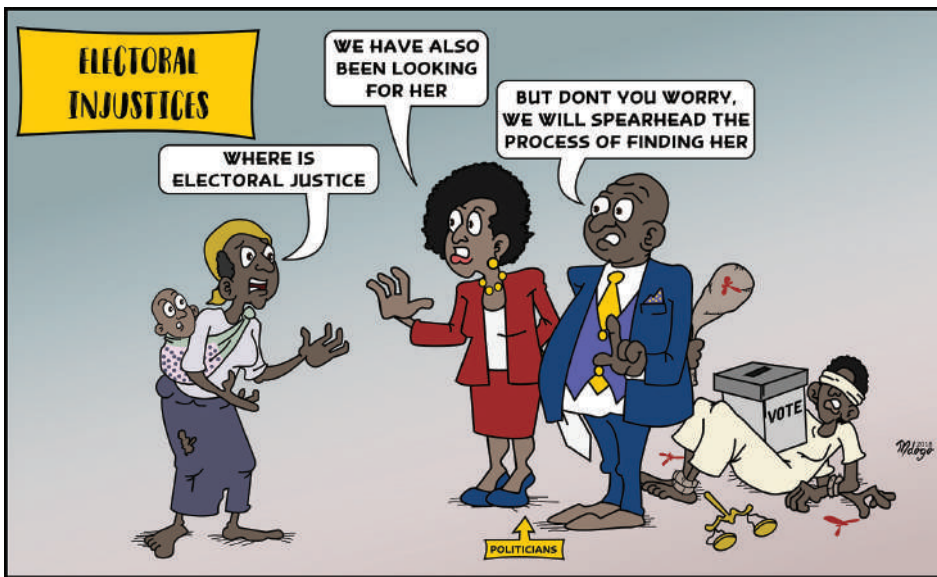
be more about observers’ contribution to the court-mandated verification exercises that inevitably ensue after every election. With the changing spending priorities and the increasing pressures on funding sources, technology is not only a means for improving practice but could also reflect serious value for money. The upshot of the foregoing is that there is clearly a need for the country’s 25-year old practice of domestic observation to undergo a radical make over. What this “Election Observation 2.0”, as we have had the occasion to call it, will entail is still a developing story. However, at this point, it is safe to say that it can only be arrived at by reflecting on the improvements (in the country’s electoral process as well as the practice of domestic observation generally); refining current practice to reinforce past improvements and adjust to the current context (including the changing behaviour of stakeholders in the electoral process; and redesigning the election observation process to ensure observation outcomes that improve stakeholders’ confidence in the utility of election observation. Election observers (in and of themselves) may not invalidate an election through their proclamations but should be in possession of credible information and analysis that if availed to a court by either side in an election dispute would amount to expert opinion that swings the hand of electoral practice in the direction of electoral justice.



By Javas Bigambo

COMMENTARY

Negotiating Electoral Justice in Kenya through Systemic, Systematic, Legislative and Institutional Reforms for the Common Good



stubborn refusal by powerful politicians to respect the dictates of the rule of law. It remains disturbing that despite major constitutional reforms that heralded the Constitution of Kenya 2010, which brought forth critical institutional reforms in the electoral process pursuant to progressive election legislation, it is worrying that avoidable challenges abound.

Such challenges relate to delayed voter or staggered

Since Kenya's founding upon Independence, the earnest quest for electoral integrity and electoral justice processes has incessantly remained elusive, though encouraging steps have periodically been made. It is immutable trite law that electoral processes are the vital pillars in establishing the Hobbesian Social Contract between political leaders and citizens. The primacy of that contractual process is guided by the fundamentals of unadulterated franchise as provided for and preserved by facilitative legislation that guides the election process, so as to establish an esteemed democracy where the majority have their way.

An incisive look at the pre-election, election and post-election challenges that have dogged Kenya since the advent of multiparty democracy point to a

voter registration processes due to insufficient biometric voter registration equipment; corrupted procurement processes of election materials; disputes and suspicions over printing of ballot papers; treating of voters during campaigns; lack of capacity in monitoring and prosecuting individuals and politicians engaging in election offenses; election-related violence; extra-judicial executions during election season; political threats aimed at intimidating security and judicial officers among a galaxy of other challenges.

These challenges spiral into disputed election outcomes - testing the limits of nationhood and at times fragmenting civic cultures that are otherwise supposed to be bolstered; and diminishing the perceptive capacity of the Independent Electoral

and Boundaries Commission (IEBC) to conduct a free, verifiable, independent and fair election, which bears a consequential material effect on the election outcome.

The confluence between rule of law and fool-proof election management system anchored on the foundation of integrity is what can deepen public confidence in election outcomes.

Public confidence in election management has then to be seen as a vital premium that is procured through the tripartite intersection of the law, a respectable value system and unfettered accountability or verifiability of election results.

The Youth Factor in Elections

If Kenya's democratic normative frameworks are intended to be enforced and realized as progressive and productive, the place of youth and women in the body politic has to be re-negotiated.

The youth can no longer be spectators or cheerful bystanders whose only significance is to be feted as town-criers, carriers of leaves and marginal composers of songs or seat-fillers within the political framework. Beyond leadership roles that have to be taken up in political parties, campaign management and institutional management within government, the young people in Kenya must re-imagine their roles in the political process, and re-think their place at the frontiers of electoral processes, governance and political leadership. It is no longer worthwhile to have young people wasted or to waste themselves as dis-engaged agitators who count for nothing.

Rising above the Challenges

What is undeniably needed is the urgency of constitutional commissions and independent offices to claim their real independence which is preserved by the Constitution. The IEBC and the Kenya National

Commission on Human Rights (KNCHR) must of necessity be sufficiently funded. Commissioners to these bodies should be competitively recruited, and political parties should respectfully stop interfering with the discharge of duties of the IEBC. It would, in addition, serve the ends of justice to have serious investigations of election offenses conducted during and after elections, and charges brought where need be.

The Kenyan nation has to deliberately discuss the normative underpinnings of the historical dimensions and multiple interests that play out and get settled through elections.

The prevalence of mischief and pre-emptive distrust of election management on the part of different political actors; the hegemonic controls of the election management process by the ruling elite as seen through the preserved memory lenses of state influence and interference with election process; perceived lack of impartiality and professionalism of election management staff; inclining on the mischief of technology as opposed to its benefits, are indubitably factors that altogether lead to an election outcome that entrenches more divisions, hatred, and distrust in election process management, far from the much desired cohesion and smooth transition from the heat of high stakes election campaigns to responsive governance.

Managing Political Matters by Political Institutions

Political freedom and independence is a constitutionally safeguarded right, which makes political parties the main cog in the wheel driving both the challenges and solutions in managing political situations. Beyond internal mechanisms established by political parties to address myriad challenges internally, as well as mechanisms of addressing other challenges that transcend the party, there is

“
All criminal offenses related to elections have to be tackled decisively and seriously within the provisions of the law.
”



need for political actors to enhance institutional and stakeholder interlinks and interfaces in ways that can boost responsiveness and accountability of political parties to charges of election offenses or malpractices by their members and supporters.

Political parties are central institutions within the democratic framework; as such, they should not be exploited to undermine the need for accountability as a core value in political governance.

Punishment has to be meted out to those political parties and political leaders who assail the law. Regrettably, the bravado with which political parties and their leaders brush aside allegations against their undesirable conduct always accelerates impunity as they tactfully duck demands for accountability. Justice has to remain blind, and all criminal offenses related to elections have to be tackled decisively and genuinely within the purview of the law.

Additionally, it is judicious that election legislation and political party actions are elaborately stipulated within existing legislation such as the Political Parties Act; Independent Electoral and Boundaries Commission Act; Office of the Registrar of Political Parties Act and corresponding regulations; against the backdrop of key provisions of the Constitution. Even so, the gulf between constitutional and statutory provisions and practical adherence to those provisions in letter and spirit are the causal root of challenges in Kenya's political cosmos.

The net consequence of that gulf is manifest in unpunished political actions, especially of those seen as parties' supreme leaders who easily go scot-free, are enablers of a sustained culture of defiance that does not make sense of our laws. More vigilance and enforcement has to be demanded from the Office of the Registrar of Political Parties. The stated object of the institution is, in fact, to advocate for stringent compliance to the law, so that legal provisions are not assailed.

On its part, the IEBC could also establish an electoral justice database that documents all persons seeking elected or nominated positions

investigated of election offenses, and those found culpable prosecuted and barred from presenting themselves to the electorate for election in two subsequent elections. This is necessary to fill the gap left by the less than effective integrity clauses in the legislation meant to give effect to Chapter six of our Constitution.

It is similarly necessary to re-think our legislation, policy and monitoring of campaign financing and expenditure by each politician and each political party, with proper reporting within specified times. As it is presently, the regulations on campaign financing presently in place are anything but useful.

For the avoidance of doubt, existence of law alone without a sustained firmness for execution with strict observance of relevant policy guidelines becomes a major inhibitor of public confidence in election management.

Further, it should be understood that to lose honourably an election that is transparently managed is more decent than to clandestinely or even brazenly wheedle managers of election processes so as to influence processes, or to inveigh against the judicial system for making decisions that seem unfavourable to the ruling elite. Kenya has to incessantly demonstrate unreserved observance of the election regulations provided for in municipal law, as well as unpruned fidelity to the principles and element of the African Charter on Democracy, Elections and Governance to which Kenya is a party.

To the extent that there will be incessant systematic and systemic failure to extirpate electoral malpractice or subsequent injustice, there will be perpetual worthless casuistry of electoral processes by the government of the day or subsequent ones that will germinate from such injustices, and the appropriateness of a social contract between the people and the political establishment will invariably be dishonoured.

The writer is a Governance and Communication Expert at Interthoughts Consulting, and the Chair of the Board of Directors at Youth Agenda. E-mail: bigambojavas@gmail.com.

2017 ELECTIONS

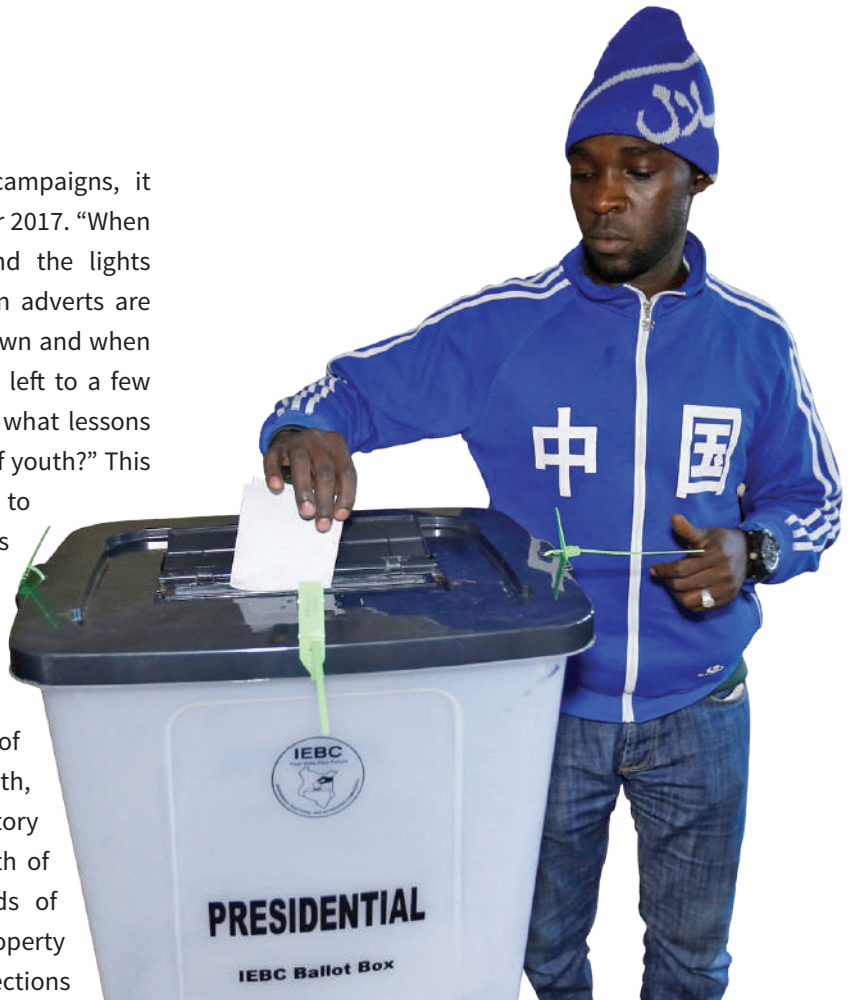

Susan K. Mwongera
Chief Executive Officer, Youth Agenda

The Good, The Bad and the Ugly: 2017- The Year that was for the youth

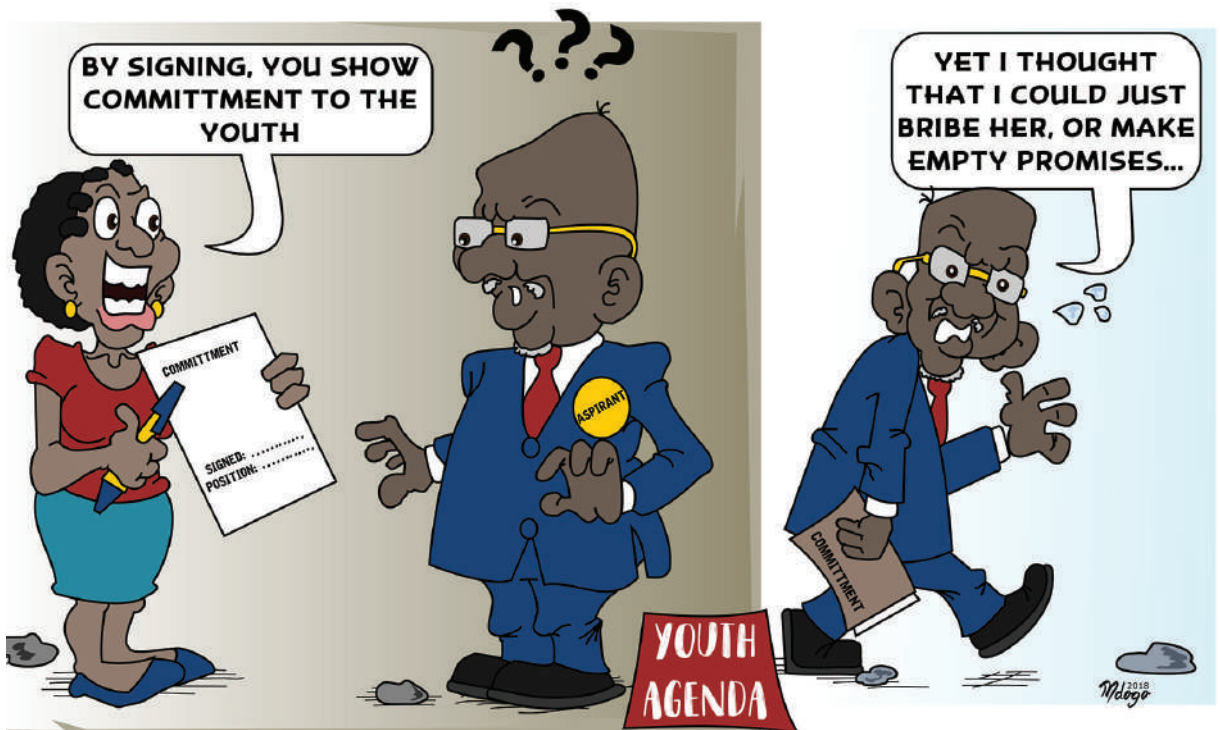
After months of pulsating campaigns, it finally closed on 26th October 2017. “When the curtains are closed and the lights are out, when the campaign adverts are silent and the billboards are pulled down and when the ever crowded political parties are left to a few individuals, what next after elections, what lessons can we learn about the participation of youth?” This is the question that this article seeks to answer in the context of 2017 Kenya’s General Election

Evidently, 2017 elections were complex and politically charged compared to 2013 whose outcomes were different because of internalized lessons from the bloodbath, spontaneous, organized and retaliatory violent eruptions that led to the death of thousands, displacement of hundreds of thousands and gross destruction of property from the disputed 2007 presidential elections which had imprinted a bitter legacy on the national psyche which no one wanted to repeat. In 2017 it was also clear among some Kenyans that there are areas worth correcting and safeguarding to celebrate democratic elections in the years to come.

The good; The Kenyan youth can be considered as the proverbial phoenix rising from the ashes; in spite



of the notion that millennials are not interested in elections, the youth continue to post a strong showing on election registration. By the end of the second Mass Voter Registration drive, IEBC registered a total of **19,611,423** voters. Of these, young people were **9,951,899** strong, effectively making up 50.7% of the total registered voters and an increase of



0.6% compared to 2013. The second good thing about 2017 elections was the fact that most political parties had articulated the youth agenda in their party manifesto which was an indication that they had for the first time understood the magnitude of Kenyan youth problems and their solutions.

The third good thing in my view was that young people were at the forefront of setting the national agenda for young people through county vetting platforms and on social media this took center stage through #DearPolitician where they took to calling out their leaders to share their youth agendas.

This trended at number one on twitter attracting 7 Million+ young people to speak up on what they want their leaders to do for them. The topics ranged from what the incumbents had failed to do to what they needed leaders to promise to do before they could give their vote. The discussion of social media received media attention as a trending topic forcing

the nation to pay attention to the young people's agenda.

“ A call to Political Parties: For political parties to continue being competitive especially among the youth, they will need to purposefully engage them. ”

In a bid to identify the commitments politicians were making to the youth, youth developed a questionnaire for all presidential & gubernatorial candidates to underscore their commitment to the things young people cared about and use it as a bond to deliver upon their election. A number of politicians unfortunately did not want to pen their commitments perhaps due their fear of being held accountable to what they sign.

The bad ; The first bad thing was the drop in the number of elected and nominated youth, as well as a drop in the number of youth in political party leadership, as compared to 2013. Secondly, there was a failure by IEBC and Political Parties to disaggregate their date by age and if they did this was not easily accessible to the public.

Thirdly, there was a non enforcement of youth affirmative action measures by political parties and IEBC which locked out many youth. Fourthly, political parties failed to comply with the nomination rules and constitution. While the Office of the Registrar of Political Parties is tasked with ensuring that political parties adhere to the rules and regulations governing political parties, office of the registrar has continued to perform poorly with regards to providing oversight to political parties particularly on the implementation of affirmative action within the parties. A quick dip stick in the political parties revealed that the Political Parties Fund; to which a share should go towards promotion of Youth, Women & Persons with Disabilities has hardly been utilized for that purpose at all, in fact most parties are at pains to mention what the funds have actually been spent on by the political parties.

In addition, the political party members' lists which should be deposited to the registrar, who in turn certifies that the party is compliant is hardly in a state to inform this fact. The lists are poorly maintained and as such, one in some instances may not be able to deduce any information on the participation on the youth demographic in the political party membership.

The Ugly: Incidences of voter buying and failure to enact the necessary regulation to operationalise the Campaign Finance Act which disenfranchised young aspirants due to their lack of resources to compete with their more monied opponents.

Moving on, 2022 Elections can only be better for the youth and the sector if we address and respond to:

Information Sharing and Data Management: It will be important for information about election and electoral processes be shared with youth on



A voter displaying his voter's card



Branding a voter registration centre well

a continuous basis. Voter Education should not be carried out towards election but integrated in the continuous civic education and engagement. Similarly and related to information sharing, IEBC, Political Parties, Registrar of Political Parties office should improve on data management by disaggregating all its data by age including data on aspirants, membership to enable all stakeholders factually authenticate the extent to which youth participate and are represented in the electoral process whose information is key in informing decisions.

A call to Political Parties: For political parties to continue being competitive especially among the



youth, they will need to purposefully engage them. This calls for allocating for certain positions within the party leaderships to young people (below the age of 35) and ensuring that representative numbers of young youths are nominated to run for elections. In addition, supporting the youth both financially and leadership mentoring will need to be planned for. Political parties ought to publicly make available their constitutions and nomination rules and not to treat them as secret documents. In this regard, it is critical for political parties to publish their constitutions and nomination rules on their websites. There is need for political parties to revise their constitutions and nominations rules to make them compliant to the Elections (General) (Amendment) Regulations, 2017, Elections (Voter Education) Regulations 2017 and the Elections (Party Primaries and Party Lists) Regulations, 2017. Once political parties do so, they should strictly adhere to the constitutions and nomination rules.

Issuance of IDs; National identity issuance will also need to be addressed. This will need to be done within reasonably short periods of time, with minimal bureaucracies and delivered when promised. In addition to addressing the issues countrywide, there will be a need to focus on marginalized communities

Need for a Youth Affirmative Action; Political Parties should uphold affirmative action principles for nomination processes including a “Zebra Formulae” for top up party list so as to promote young women’s candidature. This should be well documented in party constitutions, political party nomination rules. IEBC as an enforcer should have a youth responsive checklist for assessing political party nomination rules adherence to youth principles.

Moreover, IEBC should demand for explicit affirmative action provision while generating party lists, aim to standardize nomination procedures including compelling all parties to have youth leagues that benefit from Affirmative Action Fund, provide mechanism for vetting and confirming youth identity and commitment to youth agendas through National Identity Cards and certificate of confirmation from Youth Leagues or National Youth Council.

In addition, IEBC should ensure it safeguards the nomination list from interference by political operatives and provide proper and robust mechanisms to deal with parties that do not follow the nomination guidelines and their own nomination rules. With regards to public appointments which are relatively political, parliament should push a legislation to entrench the 30% appointments promised by Jubilee to youth in law

Peer to peer accountability a good strategy for instilling hope among voters: Good performance of the youth in leadership positions currently should be encouraged and celebrated and bad performance discussed to positively shape the perceptions of the electorate who had little or no faith in youth leadership.

Time good for Campaign Financing Act Regulations. Unregulated resources spent during campaigns will continue to present a systemic threat and barrier to youth political participation. Parliament should immediately start working on the operationalization of Campaign Financing Act Regulations.



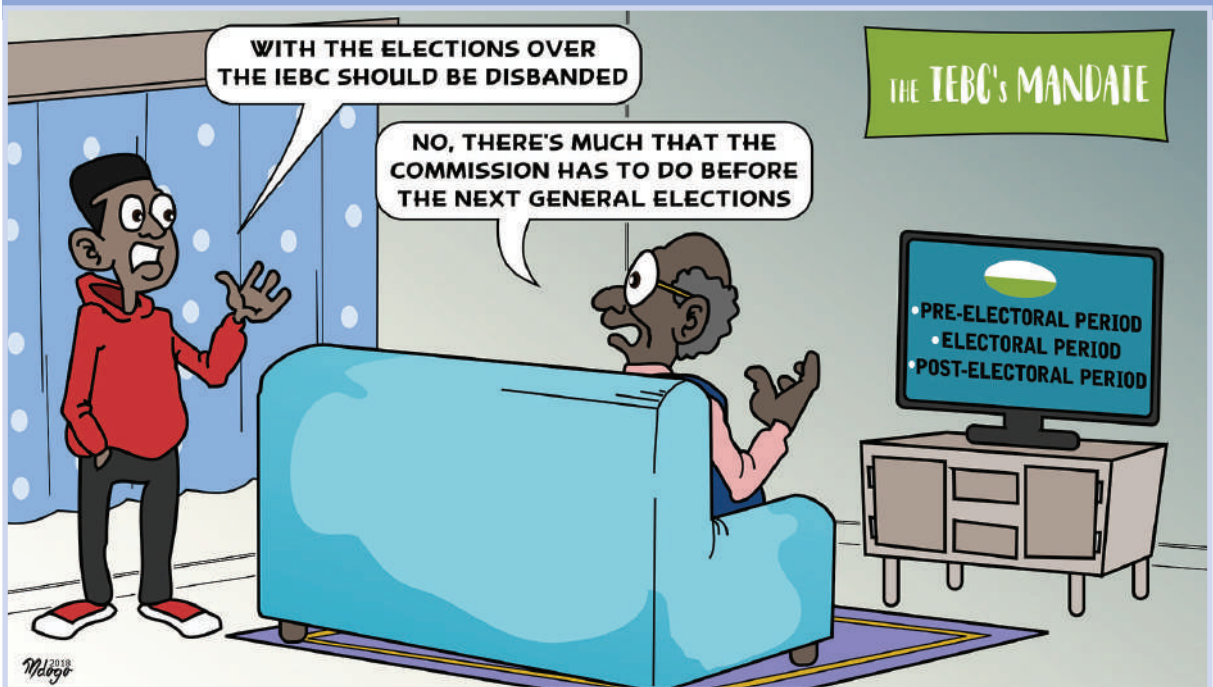
An IEBC official displaying a sample ballot paper



By Andrew Limo
Communications Manager, IEBC

IEBC Must Keep the Electoral Cycle Spinning for 2022

A Twitter user, Kogei@254, recently asked what many would easily ask about the electoral management body, the IEBC. “What will you people be doing there for the next four years-or [will you be] just eating our money?”



Contrary to the notion that IEBC is idle once voting ends, there are critical programs that need to be attended to now to ensure a smooth and credible 2022 General Elections.

As aptly pointed out by ACE (Administration and Cost of Elections), an online portal which offers a wide range of services on administration and cost of elections (<https://aceproject.org/>), “the electoral process is cyclical in nature.”

Developed with the support of electoral experts and institutions such as the European Commission (EC), the International Institute for Democracy and

Electoral Assistance (International IDEA) and the United Nations Development Programme (UNDP), the electoral cycle is divided in three main periods: the pre-electoral period, the electoral period and the post-electoral period. Electoral bodies all over the world plan their operations based on the electoral cycle structure. Elections are continuous processes without fixed starting and ending points.

In view of this, what has the IEBC up to now that ‘elections are over’? The electoral cycle indicates post-election period is a time for review, reform and strategy. The Commission is undertaking a post-



Election Evaluation (PEE) which is expected to be completed by August, this year. County forums begin soon and various stakeholders will be involved. From the PEE it will be possible to know what worked well and what needed to be improved to ensure a better voting experience. The final PEE report will be tabled in Parliament and thereafter availed to stakeholders. The outcome of this exercise will inform legal, policy and institutional reforms as well as formulation of strategies going forward.

There are already suggestions that the diaspora voting be made electronic. It makes a lot of sense considering the high cost of undertaking the out of country voting. To realize e-voting for Kenyans living abroad, there will have to be changes to the electoral laws.

The IEBC is working to reduce the cost of elections. There is an on-going audit of the procurement of election materials and services. This should inform strategies for cost containment. On the other hand, the Commission is concerned that the wealthy could be influencing elections. The effort

to introduce campaign financing law was shot down by politicians. There is renewed effort to ensure compliance with Chapter Six of the constitution on leadership and integrity. The IEBC Code of Conduct Committee has helped to realize some improvement since 2013 but a lot more needs to be done.

The IEBC Chairman, Mr. Wafula Chebukati, successfully presided over 350 dispute resolution committee cases, 71 code of conduct enforcement hearings and 23 party list dispute hearings inter alia.

There exists another challenge. It is noteworthy that a large number of voters do not fully understand the electoral process. There are misconceptions on election technology, the nomination process, electoral offences and laws. The results transmission system is being enhanced. If IEBC is to address these misgivings and misunderstandings, which undoubtedly has impacted on the perception voters have on the electoral body, then the time to tell its story is now. Going by our political culture, it won't be long before

“ Going by our political culture, it won't be long before political conversations become too loud for IEBC to pass the message to the people. ”



IEBC officials during the August 8, 2017 elections

political conversations become too loud for IEBC to pass the message to the people. Voter education should kick off early to ensure an all-inclusive and a well-understood process. The process of boundary delimitation, voter registration and legal reforms must be communicated well and early.

The delimitation of boundaries is a critical task that is bound to generate considerable interest and even polarize communities if not well managed. The Commission has developed a work plan and budget for

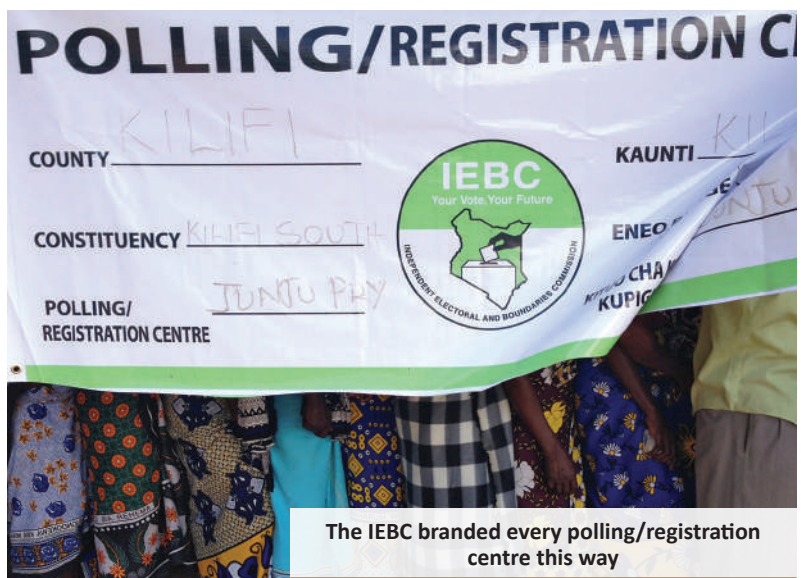
the delivery of the Second Review of Constituencies and Wards. The law allows for a review of boundaries within the 8 to 12 years provided for in law starting from 2012. This means it must be completed between 2020 and 2024.

Since the bulk of work with the boundary delimitation has to start after census, IEBC has been in contact with the KNBS and is in the process of signing a Memorandum of Understanding (MOU) in geo-database and technical skills sharing to create synergies and uniformity of information.

As proposed in the work plan, the Second Review Programme (https://www.iebc.or.ke/resources/?Boundary_Delimitation) will adopt a phased approach. The following are the proposed phases:

1. *Initiation Phase*
2. *Legal Review and boundaries harmonization Phase*
3. *Data Collection and Analysis Phase*
4. *Reporting Phase*
5. *Finalization Phase*

The IEBC has a clear roadmap however the replacement of the Commissioners who resigned remains the single most daunting hurdle. With a properly constituted Commission it would be possible to put in place policies and strategies and



even publish clear timelines. The Commission has successfully improved efficiency through adoption of a devolved structure with the establishment of 47 county election management offices – from the previous 17 regional offices.

The Commission is aware and concerned about the low levels of public trust facing them now. It can be said to have delivered free, fair and credible 2017 General Elections under very difficult circumstances. The focus now is on the transformation of the institution as regards our structure, systems, processes and staff to make the Commission a transparent and credible electoral management body [EMB].

But in realizing the objective of the electoral cycle, IEBC will need the support of others, including the National Treasury and Parliament. It is important that funding is timely. The Chairman has said there should never be critical procurement issues at least six months to the polls. Equally there should not be changes to the law close to elections. This is to allow for development of materials, training of poll officials and distribution of materials.

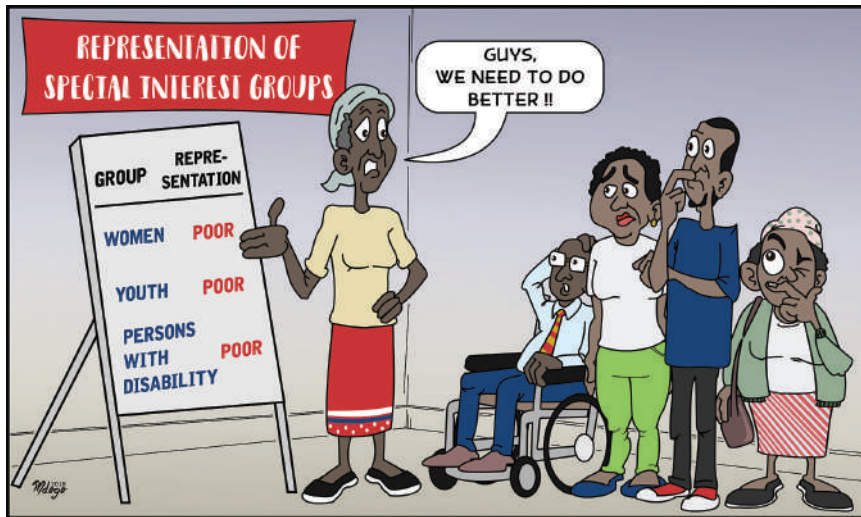
IEBC is therefore not sitting pretty, eating public funds. It has the unenviable task of delivering its mandate under high expectations and a constrained environment.



SPECIAL INTEREST GROUP

Counting the Numbers

By Anne Kathurima, ELOG Program Officer



democratic right and only 15,593,050 (79.51%) turned out to vote¹.

Women constituted the majority of eligible voters in Kenya whereas they are the least represented in the country. The 47 affirmative seats for Women Representatives was meant to bridge the gap in elected women in office but to date this has not increased the representation of women

Kenya held a General Election on August 8th 2017. The national-level elections included races for president, members of the National Assembly and the Senate. County-level races included those for governor (47) and members of County Assemblies (in 1450 wards). This was the 2nd election since the 2010 promulgation of the constitution.

19,611,423 individuals registered as voters with 9,142,275 (46.6%) being Women, 10,469,148 (53.4%) Men and 9,930,315 (51%) Youth. The youth accounted for 4,842,082 (48.8%) Female and 5,088,233 (51.2%) Male. As at May 2017 the National Registration Bureau (NRB) informed 25,323,059 had been issued with national IDs thus eligible voters. Of this 12,859,678 (51%) were female while 12,355,377 (49%) were male, this means female eligible voters were more than male eligible voters by 2% (504,301). This shows 5,711,636 Kenyans did not exercise their

in the August house. The 2/3rd gender rule is yet to be achieved despite the enactment of legislation by Parliament to address this gap but political will remains the elephant in the room for implementation.

CSOs such as FIDA and CREAM have gone to court to compel the government and parliament to act so as to bridge the gap but little or no effort has been forthcoming. The 11th Parliament and the cabinet was unable to meet the 2/3rd gender rule threshold as stipulated in the Constitution Article 81² which led to the High Court making a pronouncement that the next Parliament and Cabinet must constitute the inclusion.

Currently the Women elected in office are; 3 Governors, 3 Senators, 23 Members of Parliament and 85 MCAs. Country Assembly Speakers 5, nominated senators 16, nominated MPs 12, clerks 3 and nominated MCAs 434³. At least 10 counties namely Embu, Garissa, Isiolo, Kajiado, Kirinyaga,

Mandera, Narok, Samburu, Wajir and West Pokot did not elect a single woman to the local assemblies and had to nominate at least 10 women each to meet the legal threshold⁴.

The youth represent 51% of registered voters yet their representation remains minimal. Of those elected to office the office bearers consist of; 1 Governor, 5 Senators, 3 Women Representatives, 23 Members of Parliament and 297 MCAs. County Assembly Speakers 4, deputy speakers 9, nominated Senators 4, nominated MP 1, clerks 3 and nominated MCAs 230 (49 Men, 181 Women)⁵.

Persons with disabilities (PWD) are also another group of the electorate that is left behind in representation. The IEBC statistics indicate there were 146,000 registered PWDs but the United Disabled Persons of Kenya (UDPK) report that there are 6 million registered PWDs⁶. Of these only a handful were elected in 2017, and this included 1 Women Rep, 2 MPs, 16 MCAs, 2 deputy speakers and 48 nominated MCAs. 17 County Assemblies have no PWDs elected or nominated thus faulting Art 54 (2) which admonishes that the State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.

Kenyan elections have been cited as some of the most expensive in the world. It cost USD25 per voter making it the most expensive in Africa and second in the world after Papua New Guinea's 2017 of USD63. For comparative analysis, the 2011 Democratic Republic of Congo (DRC) election cost USD44, Ghana's 2016 USD18, Nigeria 2015 USD8.5, Liberia 2017 USD6.6, Tanzania 2015 USD5.16, Uganda 2016 USD4 and Rwanda 2017 USD1.1.

Kenya also stands out among countries where its Citizens are over represented. An average Kenyan is represented by almost 8 leaders in Parliament and

County Assembly, yet the most uninformed public participates in governance based on rumors and guesswork. The electorate continues to wallow in electoral misinformation and most voters are left to educate themselves or be at the mercy of politicians who many a times mislead them.

Despite adequate legislation being developed for addressing electoral processes, including specific legislation on the conduct of elections and subsequent electoral legal frameworks full enforcement of the legislation is hindered by the lack of specific policies addressing the same and insufficient political good will to fully enforce and combat election malpractices.

The election campaign and financing act was suspended by parliament and its operation postponed until the 2022 election. The act was meant to regulate campaigns spending with a view of curtailing voter bribery, manipulation among other electoral malpractices but this was not achieved. The electoral act was amended late in the electoral calendar by parliamentarians and thus there was no adequate time for civic education thus affecting voter education and the making of informed political choices.

If these gaps are not addressed early enough, we will continue to have under representation of Special Interest Groups (SIGs) in the next parliament.

Kenya is set to hold its census in August 2019 and delimitation of boundaries in 2021 and every effort needs to be employed by electoral actors in governance to ensure that no one is left behind in the process.

“ It cost USD25 per voter making it the most expensive in Africa and second in the world after Papua New Guinea’s USD63. ”

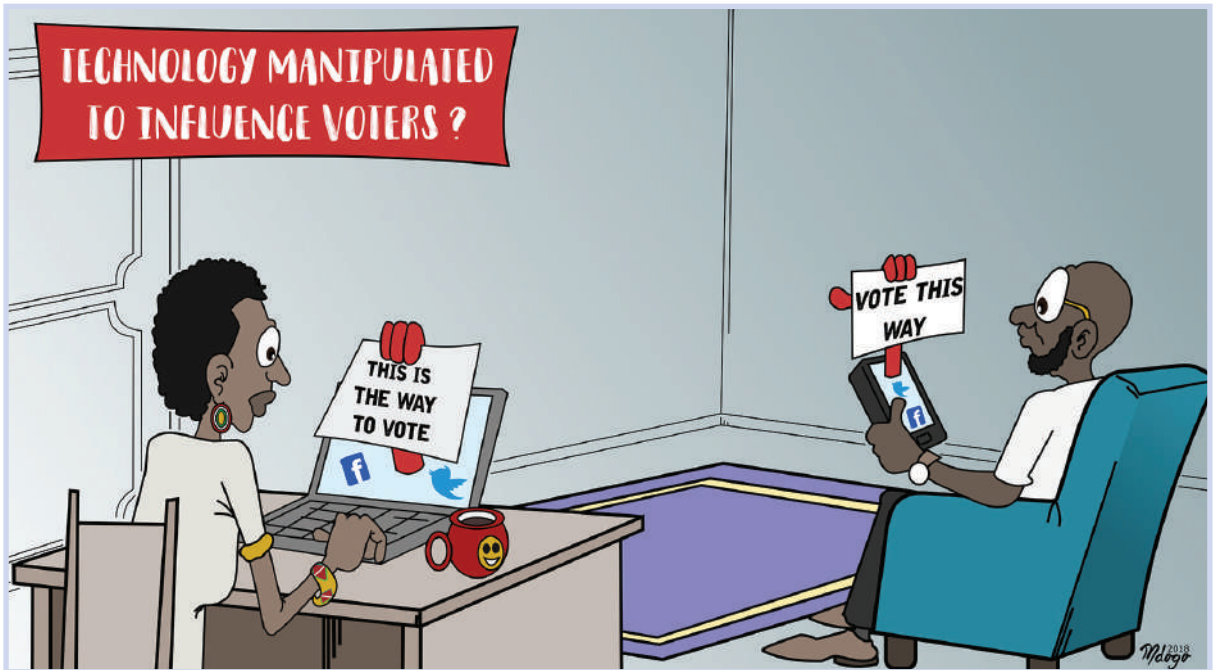
¹. ELOG VLA 2018 Report
². Constitution of Kenya Art 81 (b) pg 50
³. IEBC source
⁴. <https://www.nation.co.ke/news/Taxpayers-to-fork-out-Sh2bn-for-gender-top-up-MCAs/1056-4058902-u9fd13z/index.html>
⁵. IEBC source
⁶. UDPK source



ADVOCATING FOR OPEN ELECTION DATA

Information Age: A Hijack to Democracy?

By Musembi Mutisya - Research, Innovation & Technology, ELOG



The onset of the *Information Age* is associated with the digital era, characterized by the rapid shift from traditional mindsets of enterprise. It has transformed virtually every aspect of everyday life, from the economy to entertainment to education. More information is easily available than ever before through the use of technology.

Technology has the power to transform society, its phenomenal growth is a major component of the internet revolution which has spurred a wave in the modernization process. But as internet is being used to define trends in innovation, it has also produced a new avenue for fraud, theft, invasion of privacy, and

the distribution of pornography, hate speech and fake news.

The anonymity of the Internet makes it an appealing communications channel to spread misinformation and propaganda, now increasingly being seen as one of the greatest threats to democracy. Political camps are employing political consulting companies to obtain feedback in addition to public opinion. ELOGs' Elections Report 2017 – noted a high number of well-crafted false news items distributed on social media during the 2017 Kenyan General Elections¹.

Cambridge Analytica - CA, a UK marketing analytics firm which is at the heart of the



Facebook data scandal, mounted a massive online campaign which is said to have played a decisive role in U.S. President Donald Trump's 2016 election victory. CA also allegedly helped in hijacking Kenya's democracy² - mining voters' data to help manipulate voter decision making through attack ads and smear campaigns for targeted aspirants.

CA faces legal suits after it acquired the data of over 50 million Facebook users, without users' expressed consent, in order to create a system that could target voters with political ads and other personalized posts based on their personal profile. They're currently being investigated on their possible role in the UK EU membership referendum and the US Elections which is also linked to Trump-Russia collusion³. CA did what countless third-party apps do as they mine private data from social media for tactical messaging. This kind of engagement evidently breaches ethical boundaries.

At the best, this ongoing data mining scandal has fueled fierce political battles. At worst, it has influenced millions of voters - and more than one election across the globe.

#DeleteFacebook⁴ initiative - a response to the scandal over facebook user information that wound up in the hands of political advertisers without users'

consent simply isn't a practical solution, we need to talk about systemic solutions. Disconnecting isn't realistic, rather better laws, policy and web literacy⁵. The internet is a fast-growing ecosystem, and in all parts of the world, laws are struggling to keep up.

In light of the foregoing, it is imperative that data protection laws are in place to secure and protect personal data to avoid any possible leaks and frauds, sometimes by third parties. Europe has initiated the enforcement of the *European Union's General Data Protection Regulation - GDPR*⁶ which require businesses to protect the personal data and privacy of EU citizens for transactions that occur within EU member states.

Kenya does not currently have specific data protection legislation. However, the *Data Protection Bill, 2015*⁷ was tabled in Parliament in 2015. The Bill has not yet passed. Poor data practices are nothing new, the manner in which we treat our personal information is taken too lightly. Once law, the Bill would give effect to Article 31(c)⁸ & 31(d)⁹ of the Constitution, which outlines how public and private entities handle information entrusted to them.

The new *Computer Misuse and Cybercrimes Act, 2018* will play a foremost role in fighting cyber bullying and cybercrime related incidences but more needs to be done. The CA saga solely provides a trigger - and specifically it will compel the need for better laws, and a better understanding of how the web really works.

Political camps are employing political consulting company to obtain insight into users' political inclinations in addition to public opinion.

1. <http://elog.or.ke/index.php/resource-centre/item/32-the-2017-elog-general-elections-observation-report>
2. https://www.washingtonpost.com/news/global-opinions/wp/2018/03/20/how-cambridge-analytica-poisoned-kenyas-democracy/?noredirect=on&utm_term=.aa4a7cfed956
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UPCOMING EVENTS



The National Stakeholders Learning and Dialogue Conference

Having successfully brought together domestic observation organizations to a National Observers Symposium (March 22nd and 23rd 2018) in which observers and electoral experts shared their experiences, findings, gaps and recommendations arising from the observation of the 2017 electoral processes, ELOG will facilitate the Technical Working Group (TWG) to host another national conference in July/August 2018 that will bring together all electoral duty bearers in which the symposium report will be shared and implementation framework of the recommendations contained therein drafted.

Some of the duty bearers include the following: Office of the registrar of political parties, IEBC, Judiciary, Register of Persons, TWG, Developmental partners, DPP, The National Police Service, Editors Guild, Media Council, KLRC, NGEC, KNCHR, NCIC, and major Political Parties leadership and representatives.

It will be expected that at the end of the two-day conference, a clear implementation framework will be arrived with responsible parties committing to agreed timelines.



Regional Observation Conference

ELOG currently sits as the secretariat of the East and Horn of Africa domestic election observation network (E-HORN). E-Horn observation network works towards advancing democracy by providing citizens with a platform to observe and monitor their own electoral processes.

ELOG will host a regional election observation conference in August, 2018 that will bring together E-Horn members: Citizens Coalition for Electoral Democracy in Uganda (CCEDU), Tanzania Election Monitoring Committee (TEMCO), Sudanese Group for Democracy and Elections (SuGDE), South Sudanese Network for Democracy and Elections (SSuNDE) and Elections Observation Group (ELOG). The conference will seek to advance common standards and principles of election observation, foster resource cooperation and sharing, and exchanges and learning between member citizens' observation groups.



Targeted Thematic Stakeholder meetings

Having held a national stakeholders conference in which ELOG and TWG members arrived at implementation strategy and work plan with the duty bearers, ELOG and TWG members will host meetings with specific duty bearers as part of its monitoring and evaluation strategy of the electoral reform agenda. Similarly, the membership of ELOG as well as the membership of TWG will use such stakeholder forums for advocacy purposes.



One Too Many a Voice (Old Kriegler an' his Crew)

By Adipo Sidang'

Long queues veined our cities, towns an' villages:
Like blood vessels that feed nations for ages
Our bold feet unfettered in the long wait
On the chilly morning of August 8.
As the flag rose to the anthem
'We' rose up against 'Them'.

*Old Kriegler an' his crew,
once came said to you:
that every election year,
our voices speak in fear
of bullets in ballot boxes,
of ghosts in our voices,
'17 was year of choice*

but we broke dawn with one too many a voice!
September came an' October rolled with a turn:
The servers tight-lipped on who really won
Still somebody 'won' an' somebody 'lost'
In remembrance of August ghost,
Carrying our votes like a totem
'We' rose up to end the game.

*Old Kriegler an' his crew,
once came said to you:
that every election year,
our voices speak in fear
of bullets in ballot boxes,
of ghosts in our voices,
'17 was year of choice*

but we broke dawn with one too many a voice!
And everybody couldn't agree election was done:
Vociferous voices in loud whispers of a gun
Midnight lullabies to a country roaring
Like hungry tides folding up fleeing
What's an ocean without tides?
A country without strides?

*Old Kriegler an' his crew,
once came said to you:
that every election year,
our voices speak in fear
of bullets in ballot boxes,
of ghosts in our voices,
'17 was year of choice*

but we broke dawn with one too many a voice!

Sidang' is a poet, novelist, playwright and author of "Parliament of Owls" collection of poems (Contact Zones Publishers, 2016), and "A Boy Named Koko" (2017 Burt Awards for African Writers winning novel) Email: info@adipoetry.com



ELOG ACTIVITIES



Group Photo – During the ELOG Final Observation Report Validation

1 ▶

Mulle Musau, National Coordinator, ELOG making his presentation during Open Election Stakeholder Forum



2 ▶

Regina Opondo, Chairperson, ELOG making her presentation during Open Election Stakeholder Forum



3 ▶

Andrew Limo, Communication Manager, IEBC making contributing his during the plenary



4 ▶

IEBC Team sharing a break moment during the Voter List Audit Report Validation Meeting



5 ▶



Bishop Alfred Rotich, Advisory Peace Panel Member, ELOG making the Opening Remarks during the ELOG Final Observation Report Launch

Daudi Were & Musembi Mutisya consulting during Open Election Stakeholder Forum



Silas Njeru, ICT Manager, IEBC contributing during the plenary

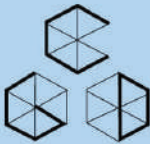


Latiff Shaban, Steering Committee Member, contributing during the plenary



Venerable Gathaka, Steering Committee Member, contributing during the plenary

ELOG Affiliate Organizations



CENTRE FOR GOVERNANCE AND DEVELOPMENT



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"Peaceful Positive Change"



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Jumuia Place, Lenana Road

P.O Box is 45009-00100 Nairobi, Kenya.

Tel. +254 715551268

Email: info@elog.or.ke

Facebook: Elections Observation Group (Kenya)

Twitter: @elogkenya

Website: www.elog.or.ke