Paper laid by Majority Party Whip B. Washiali MP Tuesday 5/6/2018

ONE COUNTRY, TWO ELECTIONS, MANY VOICES!

THE KENYA 2017 GENERAL ELECTIONS AND THE HISTORIC FRESH PRES IDENTIAL ELECTION

OBSERVATION REPORT

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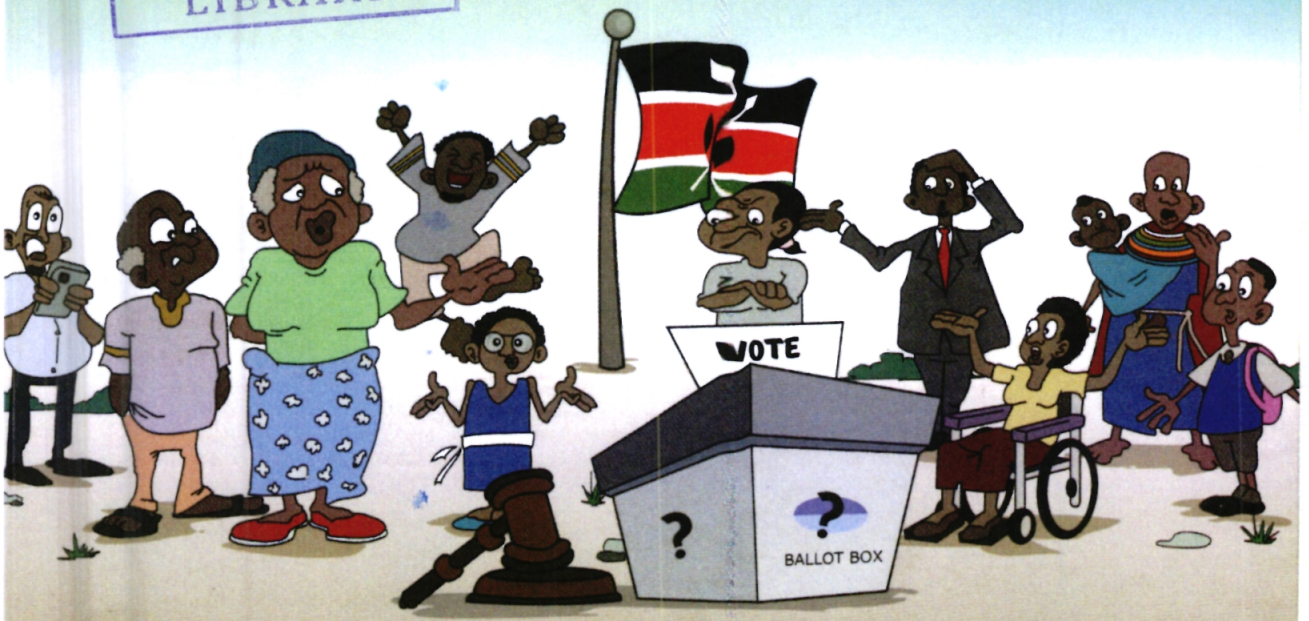

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Working For Peace Through Justice

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United Disabled Persons of Kenya
The Voice of Disability

SUPKEM

Centre for Governance and Development

Federation of Women Lawyers
Haki za Akina Mama
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"Knowledge for Democracy"

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Acronyms and Abbreviations

ANC	–	Amani National Congress
CEDGG	–	Centre for Enhancing Democracy and Good Governance
CEMIRIDE	–	Centre for Minority Rights and Development
CEO	–	Chief Executive Officer
CGD	–	Centre for Governance and Development
CJPC	–	Catholic Justice and Peace Commission
CNN	–	Cable News Network
CORD	–	Coalition for Reforms and Democracy
CRAWN	–	Community and Advocacy Awareness (Trust)
CREAW	–	Centre for Rights and Education Awareness
CRECO	–	Constitution and Reform Education Consortium
CSOs	–	Civil Society Organizations
CUE	–	Commission for University Education
DDP	–	Deepening Democracy Programme
DFID	–	Department for International Development
DPP	–	Director of Public Prosecution
EACC	–	Ethics and Anti-Corruption Commission
ECJP	–	Ecumenical Centre for Justice and Peace
E-HORN	–	East and Horn of Africa Election Observers Network
ELOG	–	Elections Observation Group
EU	–	European Union Delegation to Kenya
EVID	–	Electronic Voter Identification Device
FIDA	–	Federation of Women Lawyers - Kenya
FORD-K	–	Forum for the Restoration of Democracy-Kenya
GOK	–	Government of Kenya
HQs	–	Headquarters
ICC	–	International Criminal Court
ICT	–	Information and Communications Technology

ID	–	National Identification Card
IEBC	–	Independent Electoral and Boundaries Commission
IED	–	Institute for Education in Democracy
ISO	–	International Organization for Standardization
JCE	–	Judiciary Committee on Elections
JSC	–	Judicial Service Commission
KICC	–	Kenyatta International Convention Centre
KIEMS	–	Kenya Integrated Election Management System
KNCHR	–	Kenya National Commission on Human Rights
KODI	–	Kenya Open Data Initiative
KPMG	–	Klynveld Peat Marwick Goerdeler
LRF	–	Legal Resource Foundation
LTO	–	Long Term Observation
MCAs	–	Members of County Assembly
MCK	–	Media Council of Kenya
MOU	–	Memorandum of Understanding
MPs	–	Members of Parliament
NASA	–	National Super Alliance
NCCK	–	National Council of Churches of Kenya
NCIC	–	National Cohesion and Integration Commission
NDI	–	National Democratic Institute for International Affairs
NGOs	–	Non-Governmental Organizations
NPS	–	National Police Service
NRAP	–	Nairobi Remand and Allocation
ODM	–	Orange Democratic Movement
ODPP	–	Office of the Director of Public Prosecution
ORPP	–	Office of the Registrar of Political Parties
OSEIA	–	Open Society Initiative for Eastern Africa

PBO	–	Public Benefits Organization
PPDT	–	Political Parties Dispute Tribunal
PPLC	–	Political Parties Liaison Committee
PVT	–	Parallel Vote Tabulation
PWDs	–	Persons with Disability
SGBV	–	Sexual and Gender-based Violence
SIDA	–	Swedish International Development Cooperation Agency
SIG	–	Special Interest Group
STO	–	Short Term Observation
SUPKEM	–	Supreme Council of Kenya Muslims
TEAM	–	Transform, Empower Action Network
TISA	–	The Institute for Social Accountability
UDPK	–	United Disabled Persons of Kenya
UK	–	United Kingdom
UNDP	–	United Nations Development Program
US	–	United States of America
USAID	–	United States Agency for International Development
WDM	–	Wiper Democratic Movement
YAA	–	Youth Agenda

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Finally, we congratulate Kenyans for their patience and contribution to the overall citizen observation of the historic 2017 general elections.

Regina Opondo
Chairperson, ELOG Steering Committee

Executive Summary

The 2017 electoral cycle is 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 Election results were annulled by the Supreme Court and a Fresh Presidential Election ordered and conducted on 26th October 2018. Thus, apart from the usual six elections that ordinarily constitute the general elections, an additional presidential election was scheduled and conducted, thus 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. The 2017 electoral cycle 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 environment leading up to the 2017 General Elections and the fresh presidential poll that followed was highly volatile and extremely challenging to stakeholders, especially the IEBC and the principal political contestants, opposition coalition, NASA and incumbent government, Jubilee Party. Political supporters and voters were mobilized along ethnic and regional blocks in an environment that typified 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 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

utilised these to dismantle democracy and as a result, many stakeholders and voters lost faith in democratic institutions and norms.

In its 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 that nonpartisan election observation and monitoring by citizen organizations seek 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. The consistency was also observed in the three gubernatorial elections in Busia, Meru, and Nairobi counties that ELOG selected for PVT observation.

ELOG's findings also show that the 8th August 2017 elections day processes were generally held and conducted peacefully and seamlessly. ELOG did not encounter any serious, systematic and/or planned pattern of aberrations that could have impinged upon the integrity and credibility of the elections 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 the 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 Kriegler Report. Based on these overall findings, ELOG makes 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 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 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, 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. 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. This will be in line with international best practices.

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 will require an open consultative approach and process that brings together all stakeholders for a broader buy-in and ownership of the reforms.

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 future elections can be cost effective and afforded by Kenyans.

Electoral Campaigns

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

As potential governments in waiting, political parties should declare clear 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

Credibility of the voter register is critical. First, IEBC should come up with stringent data validation 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 vouches 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 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 steer the Commission in 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 an 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 citizens 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 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, 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 coverage of the electoral process that begins with the pre-election activities.

Civil Society – Sustained Vigilance and Support to Electoral Processes

The civil society should be seen as neutral actors interrogating issues objectively and holding especially 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.

Democracy and human rights defending requires civil society to always remain steadfast, vigil, 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 especially 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, yet Kenyans in general and the survivors, their families, and communities in particular should be assured 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 a lot of 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 on to conduct elections on the 26th October 2017. This not only undermined their independence but also contributed in the erosion of public confident in the institutions. It is imperative that independent institutions should be respected in order for them to effectively discharge their mandate.

ELOG recommends that political actors desist from making disparaging remarks on 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.

CHAPTER 1

Introduction and Observation Strategy

This chapter provides an overview of the ELOG observation journey since 2010 when the platform was formed and further highlights some of the political and environmental happenings that shaped the run-up to the 2017 electoral period.

Set up as a permanent election observation platform, ELOG was expected to observe the entire electoral cycle right from the 2013 elections. However, a number of challenges highlighted in this chapter such as lack of sustainable funding, served to undermine efforts made to achieve this. The chapter captures challenges both in the pre-elections and those challenges encountered during the electoral period.

The second part of the chapter explains the strategies and methods deployed by ELOG in monitoring and observing pre-elections, Election Day and the immediate post elections environments. This should be able to give the reader insights into the framework within which the ELOG findings on the electoral processes are deduced.

1.1 Background

The General Elections held on 8th August 2017 were the 6th general election to be held since the restoration of multi-party democracy in Kenya in 1991, and the 2nd since the promulgation of the Constitution of Kenya 2010. A record of 14, 523 candidates out of 15,082 aspirants were cleared to participate in all the elections. The elections were characterized by an uncertain and extremely charged political environment. They, yet again, pitted the incumbent President Uhuru Kenyatta against Rt. Hon. Raila Odinga as the top two favorite candidates (as was the case in the previous 2013 election), thus, taking the historic character of an epic electoral grand re-match between the two.

The Elections Observation Group (ELOG), which has since 2010 comprehensively and consistently observed the electoral processes in Kenya, observed the 2017 General Elections and the Fresh Presidential Elections. ELOG aimed at promoting electoral integrity and enhancing public confidence in the electoral processes

in line with its vision, mission and core values.[1] Its intervention is informed by the significance and centrality of elections in the consolidation of democracy, which Michael Bratton and Nicolas van de Walle described thus: "... no other democratic institution precedes elections, either in timing or importance.... Elections are the principal and necessary condition of democracy, the first step without which democracy cannot otherwise be born."[2] Michael Bratton further observes that:

> *While elections and democracy are not synonymous, elections remain fundamental, not only for installing democratic governments, but as necessary requisite for broader democratic consolidation. The regularity, openness and acceptability of elections signal whether basic constitutional, behavioral, and attitudinal foundations are being laid for sustainable democratic rule....*

ELOG subscribes to the Declaration of Global Principles (DoGP) for Non-partisan Election Observation and Monitoring by Citizen Organizations and the Code of Conduct for Non-partisan Citizen Election Observers and Monitors[3], which prescribe election observation and monitoring standards for domestic election observers and monitors. These standards demand that observers and monitors remain non-partisan, impartial and politically neutral in assessing and evaluating electoral processes, and conduct election observation and monitoring for the benefit of the country. In particular, ELOG is guided by paragraph 10 of the Declaration, which notes that: "The decision by citizen organizations to observe and/or monitor an election or any element of it does not indicate that the organizations either presume the election process to be credible or to lack credibility...."[4]

ELOG's observation of the 2017 General Elections and the Fresh Presidential Elections was thus premised on the principles that non-partisan election observation and monitoring by citizen organizations ought 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.

ELOG was established in 2010 as a consequence of recommendations made in 2008 by the Independent Review Commission (IREC) on the General Election held in Kenya on 27th December 2007, also famously known as the *Kriegler Commission*, on the need for a permanent and professional domestic observation platform.

Conceptualized as an inclusive citizen election platform, ELOG brings together civil society organizations, faith based organizations, professional groups, institutions and other interest groups with a mandate or focus on election monitoring and observation using the electoral cycle approach[5].

ELOG's elections observation journey therefore spans from 2010 to date. It has observed the 2010 constitutional referendum, the 2013 and 2017 general elections, and numerous by-elections that have occurred in Kenya since then. Indeed, ELOG has grown in capacity, experience, and skills to become the premier, broad-based, and inclusive domestic election observation and monitoring platform in Kenya. It continues to use innovative observation methodologies such as the Parallel Vote Tabulation, and widening the scope of the observation to include non-election year electoral processes.

In order to effectively observe the 2017 General Elections, it was imperative for ELOG to monitor and observe the preceding electoral processes right from the immediate post 2013 electoral period. ELOG's observation of the 2017 General Elections and the subsequent Fresh Presidential Election, however, experienced a number of key challenges:

- **Lack of Sustainable Funding for the Platform**

  In 2013, ELOG developed its 2014-2018 Strategic Plan. The plan proposed interventions on the entire electoral cycle up to and including the 2017 elections. However, due to lack of adequate and sustained funding, ELOG could not implement this Plan. Further, in late 2013, ELOG and four other citizens' elections observation platforms from Sudan (Sudanese Group for Democracy and Elections, SuGDE), South Sudan (South Sudan Network on Democracy and Elections, SSUNDE), Uganda (Citizens Coalition for Electoral Democracy in Uganda, CCEDU), and Tanzania (Tanzania Election Monitoring Committee, TEMCO), joined forces and founded 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. ELOG was elected as the first secretariat, and was expected to spearhead the programmatic activities of the regional network. Yet, again, lack of funding reduced interventions to sporadic activities, key amongst them the hosting of a regional learning forum and conference in 2014, and the deployment of an observation mission to Tanzania in 2015 during the country's General Elections.

Consequently, ELOG's Strategic Plan (2014-2018) could not be implemented effectively and as such needed to be reviewed in order to prepare for the 2017 electoral period. A new plan (2016-2018) was developed at the beginning of 2016 to address this concern. The lack of funding and support further contributed to loss of technical expertise and experience that would have otherwise anchored the platform in order to effectively implement its programs.

- **Shrinking Civic Space**

  ELOG is made up of a broad base of civil society actors, which include democracy and governance organizations, faith-based organizations (FBOs), and special interest organizations. The political environment in the post-2013 General Elections period was not friendly to civil society organizations (CSOs). The civic space continued to increasingly shrink due to the government's intolerance of independent civil society voice. The government severally attempted to restrict and over-regulate the civil society sector using an outdated legislation - the Non-Governmental Organization Coordination Act. It also unsuccessfully attempted to introduce retrogressive amendments to the more progressive Public Benefits Organization (PBO) Act 2013, which it has so far failed to operationalize. This adversely affected many of ELOG's member organizations who in their individual capacity as thematic conveners could therefore not effectively coordinate interventions in their respective thematic areas.

- **Misconceptions Within the Civil Society Sector**

  During and after the 2013 General Elections, ELOG's observation approach, methodology, and findings were criticized by a section of peer civil society advocacy groups and individuals. They not only misconceived ELOG's non-partisan and professional approach and methodology, but some also took partisan perspectives to the political discourse and the elections. The consequence was a protracted attempt by these groups and individuals to disparage and de-campaign ELOG's stature and standing as a non-partisan and professional observation platform amongst development partners. Unfortunately, a few development partners bought into these negative narratives and withdrew their support to ELOG. This adversely affected the support given to the platform in the run up to the 2017 elections.

- **Challenges in the 2017 Operating Environment**

  The 2017 electoral cycle was very challenging for stakeholders, including observers like ELOG. Generally, as a result of the politically charged environment and highly divisive campaigns, observers were viewed with suspicion and skepticism by the political actors. Some of the political actors were very negative towards observers and perceived them as partisan.

  Specifically, ELOG was put under political spotlight, with its leadership subjected to negative profiling in some quarters. During the observation, an ELOG observer was killed in unclear circumstances and several others harassed, intimidated and even attacked by unruly mobs. Tensions, insecurity and violence in parts of the country also led to non-deployment of observers in 75 constituencies and the withdrawal of observers from specific polling stations. This affected ELOG's overall observation coverage.

  ELOG also noted that despite the efforts of previous election observation initiatives, many actors in Kenya, including political contestants, media and CSOs, still did not quite understand the role of observers and the observation approaches and methodologies used in gathering, analyzing and drawing conclusions on the electoral processes. ELOG tried to mitigate the apparent lack of understanding and appreciation of observers and the observation methodologies by reaching out to as many stakeholders as possible with relevant information on the role of observers and the observation methodologies.

1.2 ELOG's Observation Strategy and Methodology

ELOG's election observation strategies and methodologies are built on the principle that elections are a process and not an event, and that elections belong to the people. Both the strategy and methodology were anchored on the electoral cycle approach. Therefore, in the 2017 electoral cycle, ELOG's observation strategy was based on ensuring that the observation covered the pre-elections, elections and the immediate post-elections period. This would enable ELOG to give a wider commentary of the broader electoral environment rather than just the elections day alone. The second strategy was to ensure that in covering the e-day processes, ELOG needed to ensure that despite not comprehensively deploying in all the over 40,000 polling stations, it would use methods that would allow it to give a credible account of the national outlook of the e-day processes

and outcomes in respect of results. It, thus, relied on a representative, sample based observation mission.

ELOG deployed a long term observation (LTO) mission that covered hate speech reporting by media, participation of Special Interest Groups (SIG) in political party dispute resolution activities and electoral campaign, and finally a general election environment observation based on deployment to all the constituencies. On E-Day ELOG deployed a short term mission (STO) which used two approaches. Firstly, deployment of special observers to a small, nationally drawn and representative sample of polling stations and secondly, deployment of general observers to a wider representation of polling stations in each constituency.

LTO refers to a systematic process of observation that continues over a substantial period prior to, during, and after elections in order to assess different aspects of the elections and provide an independent basis to evaluate fairness of the elections. The LTO mechanism provided an independent assessment of conditions/ environment under which the elections were held.

The LTO approach was designed around gathering factual, well-documented information, and tracking election-related events in a manner that allowed them to be quantified to illustrate patterns and trends. The approach was focused on observing the general pre-election political environment and activities based on ELOG's seven thematic areas, namely; voter education, voter registration, political parties and campaign financing, legal framework, electoral violence, media monitoring, and participation of special interest groups. It is indicative to note the seven themes resonate closely with the major phases of the election cycle.

290 LTO monitors were recruited, trained and deployed to observe the electoral processes in every constituency from March to November 2017. This ensured that both pre-election and post-election activities were monitored and reported on. Using a well-designed tool for data collection, the LTOs gathered information on a number of electoral processes in the different constituencies such as voter education initiatives and electoral campaigns. The information gathered across the country on the preparedness, fairness, and credibility of pre-election processes enabled ELOG to make an overall assessment of the entire electoral process.

ELOG also utilized the LTO approach to pioneer innovative monitoring and observation initiatives, such as safeguarding electoral data integrity through open electoral data initiatives; fake news monitoring and debunking; monitoring media for hate speech reporting; and monitoring of special interest groups' participation in political party nominations and dispute resolution processes. The monitoring of hate speech through the media adopted an in-house approach where monitors were trained and deployed to track selected media stations on how they broadcasted hate speech over a seven-month period between April and October 2017. Field monitors were deployed to observe party primaries and the dispute resolution processes and to collect data on participation of the special interest groups (women, youth, PWDs) three-months before the elections. Data collected during the LTO process was analyzed and disseminated to the public on a monthly basis through press statements, reports, talk shows, and the ELOG newsletter, *Darubini Ya Uchaguzi*.

The rationale behind the identification of the above observation themes was based on their effect on the electoral environment leading to the elections. Hate speech had been identified in previous elections as a major contributor to electoral violence and negative ethnicity, which are aggravated by the inability of state organs like NCIC to reign in the culprits.[6] Political party primaries are equally viewed by many as mini-general elections because of their potential to determine election winners in the main elections. As documented by the ELOG 2013 General Elections report, party primaries are largely shambolic. The assessment of the participation of special interest groups in elections, in party primaries and the dispute resolution process, as a cross-cutting theme, was also paramount.

ELOG utilized the short-term observation (STO) strategy on the two elections days (8th Aug and 26th Oct, 2017), in which Parallel Vote Tabulation (PVT), General Observation (GO), Sample Bases Observers (26th Oct) and Tallying Centre Observers (TCO) were deployed. PVT methodology is based on sound, time-tested, statistical principles, and uses a nationally representative sample of polling places. It can be relied upon to provide the most comprehensive and accurate picture of the election process for the entire nation.

ELOG deployed General Observation (GO) strategy to ensure proportionate deployment of stationary observers to the constituencies and in selected polling stations. The purpose of GO deployment was to maximize observation and

reporting on election-day activities and processes in the respective polling stations across the country. This strategy is different from PVT since it is not anchored on a national random representative sample. Rather it ensures wider observer presence, coverage and reporting around the country and more so in areas that are deemed "hotspots" to deter, detect and delay fraud and other malpractices. On the E-Day, observers documented, recorded and reported on the processes, critical incidents, and official elections results.

During the 26th October 2017 Fresh Presidential Election, ELOG deployed observers only in 215 constituencies as a result of insecurity in many parts of the country. The skewed deployment adversely affected the PVT sample and therefore ELOG could not project the results of the second vote. However, ELOG observers in the remaining sample were able to collect and submit data on the quality of the Election Day processes. This sample based observation (SBO) data and the General Observation (GO) data were used to assess the conduct of the fresh presidential poll.

Tallying centre observers (TCOs) were deployed to observe the tallying of votes both at the constituency and national levels. They were also tasked to collect the official results forms (Form 34B).

Endnotes

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[4] Bratton Michael, 1998, Second Elections in Africa, Journal of Democracy Vol.9, No.3

[5] Steering Committee Members of ELOG during the 2017 elections were: Constitutional Reform and Education Consortium, (CRECO), Centre for Governance and Development (CGD), institute for Education in Democracy (IED), Federation of Women Lawyers of Kenya (FIDA-Kenya), The Youth Agenda, National Council of Churches of Kenya (NCCK), Catholic Justice and Peace Commission (CJPC), Ecumenical Centre of Justice and Peace (ECJP), United Disabled Persons of Kenya (UDPK), and Supreme Council of Kenya Muslims (SUPKEM). Thematic Members include: The Institute for Social Accountability (TISA), Centre for Minority Rights & Development (CEMIRIDE), Kimbilio Trust, Legal Resource Foundation (LRF), Code 4 Kenya, and Transform Empower Action Initiative (TEAM).

[6] This was part of ELOG's findings in 2013. See Appendix 2 "ELOG 2013 Key Findings".

CHAPTER 2

The Elections Context

This chapter gives the elections context in which the 2017 elections were held. It looks at the political formations that evolved after the 2013 elections and the political dynamics that played out immediately after those elections. This shaped many of the events and happenings that characterized the preparatory stage of the 2017 elections.

This chapter, therefore, examines how the protracted political divisions led to the 'resignation' of the IEBC commissioners and the appointment of a new commission less than a year to the 2017 elections. It also discusses the implications of the nullification of the presidential elections of 8th August 2017 and the factors that shaped electoral environment in the run-up to the Fresh Presidential Elections.

2.1 Introduction

The 2017 General Elections campaign process began immediately after the Supreme Court ruling on the 2013 presidential election. The immediate post-2013 elections contest had CORD versus the ruling Jubilee Alliance. However, this changed with time as CORD linked up with other political parties to transform into the National Super Alliance (NASA). Earlier, Jubilee Alliance had consolidated its outlook by bringing other parties on board and dissolving all its affiliates to form one Jubilee Party.

While other political party formations and independent candidates emerged later, the electoral scene leading up to the 2017 General Elections and the subsequent Fresh Presidential Election was principally a contest between NASA and the Jubilee Party. The contest was characterized by heightened political tension and suspicion similar to the 2013 elections. The tension and suspicion manifested in every aspect of the public and private life, even at the institutional level, and in many instances overstretched or undermined the capacity of these institutions.

Some elements from both NASA and Jubilee Party appeared determined to mobilize and incite their followers along ethnic and regional blocks as they

prepared for the 2017 General Elections, and the subsequent Fresh Presidential Election. Intense competition and excessive aggression characterized political contestation during the two elections. Indeed, the elections were held in context of extreme anxiety, heightened expectations, political and ethnic divisions, violence, and insecurity across the country.

2.2 The Post-2013 Political/Elections Dynamics

Although divisions in Kenya's political and electoral economy began after the botched 2007 elections, the process and outcome of the 2013 elections escalated them. The 2013 elections cast the IEBC as suspect and biased. CORD maintained that IEBC rigged the 2013 elections for the Jubilee Alliance. Thus aggrieved, CORD challenged the 2013 presidential election results at the Supreme Court, but lost.

Nonetheless, CORD continued to challenge the legitimacy of the Jubilee Alliance government which, however, maintained that it won the 2013 elections fairly and that CORD was simply out to settle political scores[1] in a bid to remain relevant. As Kenya drew closer to the 2017 elections, the divide between the two political sides and their respective supporters deepened and solidified its ethnic dimensions. The political and ethnic divide became highly critical in shaping the environment for the elections.

Even though the dynamics related to the International Criminal Court (ICC) cases[2] were not particularly critical in the 2017 elections, the political and ethnic dimensions of the cases in Kenya's body politic remained significant. The initial perception was that the ICC cases would completely bog down Uhuru Kenyatta and William Ruto and undermine their re-election bid. CORD and its supporters seemingly hoped for this and supported the successful prosecution of the cases. Jubilee and its supporters, on the other hand, opposed the ICC cases because they threatened the candidature of Uhuru Kenyatta and William Ruto in the 2017 elections. As the party in government, Jubilee Alliance mounted campaigns locally, regionally and internationally to discredit the ICC and undermine the cases.[3]

Therefore, while CORD and its supporters were perceived as pro-ICC, Jubilee Party and its supporters were considered to be anti-ICC[4]. The cases were also politically expressed as support for accountability and effective criminal justice systems (anti-impunity) on one hand, and the protection of the presidency and national

sovereignty (pro-*status-quo*), on the other. Therefore, the ICC cases escalated the political and ethnic divide between the CORD and the Jubilee Party sides. The eventual collapse of the ICC cases[5] further deepened the political and ethnic fault lines, and solidified Jubilee Party's support and conviction that its victory in the then forthcoming elections was unstoppable.

As the 2017 elections approached, a political stalemate[6] between CORD and the Jubilee Party was generated. CORD took on the IEBC and argued that the Commission was unfit to conduct Kenya's 2017 elections. CORD demanded for the disbandment of IEBC.[7] Jubilee Party, on the other hand, supported the IEBC and insisted that it could only be disbanded through laid down constitutional and legal processes. In the deadlock, CORD mobilized weekly countrywide demonstrations and protests against the IEBC in a bid to get rid of its commissioners. The government and Jubilee Party responded to the demonstrations swiftly, seeking court interventions and other means.[8] All these failed, as CORD seemed to gain advantage.[9] Then, the government condemned and banned the demonstrations, and deployed aggressive police action that left four people dead and scores injured.[10]

Meanwhile, protracted industrial action by teachers and health workers, together with other public protests paralyzed key services and added political pressure on the Jubilee government. The protracted industrial action and strikes by teachers and doctors[11] were eventually resolved through court interventions[12] after exacting a heavy political toll on the Jubilee government. The strikes provided a political opportunity for CORD to exploit.

As the country settled down, CORD launched the *Okoa Kenya* (Save Kenya) initiative, calling for a referendum to amend the constitution so as to increase revenue allocation from national to county governments, and push for other institutional reforms.[13] IEBC's handling of this initiative seemed quite partisan, and thus worsened the political environment. IEBC rejected CORD's petition for a referendum on account of lack of sufficient valid signatures. In a process that was not open to independent observers, the rejection created a perception that the IEBC had colluded with the Jubilee government to frustrate CORD.[14] The handling of the *Okoa Kenya* referendum petition adversely affected CORD's confidence in IEBC, and strengthened CORD's resolve to purge the IEBC.

2.3 The Re-constitution of the IEBC

The uncovering of the multi-million shillings 'chicken-gate' scandal that allegedly involved senior IEBC officials tarnished the already questionable integrity and image of the Commission. Allegedly, some commissioners and senior officials of the electoral body were bribed to award a tender to print election materials to Smith and Ouzman, a firm in the United Kingdom. Whereas authorities in the UK indicted and jailed the implicated officials of the firm[15], authorities in Kenya were slow in completing their investigations into the scandal. The Ethics and Anti-Corruption Commission also appeared to be selective in its investigations. This created a perception that the implicated IEBC officials were sacred and enjoyed the government's and the EACC's protection.

With the 'chicken gate' scandal, the credibility of the IEBC plummeted, defying efforts to strengthen public perception about its neutrality and ability to conduct free and fair elections. Public confidence in the IEBC was sharply divided along CORD and Jubilee Party and the ethnic communities that dominantly supported the two political camps. Amidst determined calls for their resignation and voices of support from Jubilee Party quarters, the commissioners dug in.[16] Due to the stand-off, political uncertainty in the country escalated, while the elections environment deteriorated.

CORD maintained that it would not follow the constitutionally and legally laid down process for disbanding the IEBC. It argued that a petition through parliament to disband the IEBC was doomed to fail owing to Jubilee Party's majority in Parliament. Indeed, the Parliamentary Committee on Justice and Legal Affairs had earlier on dismissed two petitions that were lodged in parliament by two activists, Wafula Buke and Barasa Nyukuri[17] for the disbandment of the IEBC, arguing that the petitions lacked merit.

As CORD remained resolute in the push to disband the IEBC, the government continued to heavily clamp down on CORD's demonstrations. An atmosphere of fear and uncertainty engulfed the country and this worried many stakeholders. The religious and other faith based organizations, the diplomatic community, and the civil society lobbied to pacify the situation. Their intervention helped the two political sides to negotiate a political settlement.

Subsequently, a Joint Committee of the two houses of parliament was agreed upon, and was mandated to broker a political settlement for electoral reforms. This process was open and included public and stakeholder participation and resulted in a report that was submitted to parliament by the committee. Among its recommendations was the resignation and exit of the IEBC commissioners, and introduction of a number of reforms to the electoral laws. However, it was only in August 2016 that parliament endorsed the report by the Joint Parliamentary Committee (JPC).

The introduction and debate of the reforms in Parliament was protracted. Initially, the process was driven through political consensus that enabled the debate and passage of The Elections Laws (Amendment) Act (2016) in September 2016[18]. The subsequent amendments, however, hit a snag following sharp disagreements and political acrimony between CORD and Jubilee Party members. Following a stalemate, CORD abandoned parliamentary debates amidst chaos and an unusually heavy police presence and security barricades at Parliament. The Elections Laws (Amendments) Act (2017) that were passed in January 2017[19] were, therefore, largely Jubilee Party driven and purposed. Despite parliament's endorsement of the reforms, concerns still remained regarding Kenya's readiness for credible, free and fair elections in August 2017. New commissioners were not appointed to office until February 2017. These concerns remained even during the actual conduct of the 2017 General Elections. The petition to the Supreme Court to nullify the 2017 Presidential Election was, therefore, not a complete surprise.

2.4 Setting the Stage for the 26 October Fresh Presidential Election

On 1st September, the Supreme Court annulled the 8th August presidential election results. The Court found that the election was not held in compliance with the constitutional principles and requirements, and the applicable electoral legal framework. The Court determined that the IEBC failed to organize and conduct the election in compliance with the constitutional and legal requirements that elections should be simple, secure, transparent, and verifiable. The Court ordered that a Fresh Presidential Election be held within sixty days. On 20th September 2017, the Court delivered its detailed and reasoned decision for annulling the presidential election.

The Supreme Court's decision surprised many, including the IEBC. The Commission believed it had conducted the elections according to the laid down procedures.

However, the nullification compelled the IEBC to retreat for reflection, re-organization, and planning. Although the IEBC initially set 17th October 2017 for the Fresh Presidential Election, strict timelines and the resultant acrimonious political environment compelled the Commission to reschedule the election to 26th October 2017. Subsequently, the IEBC announced the preparatory measures that were to be taken for it to comply with the Supreme Court's decision, and accordingly deliver a transparent and accountable Fresh Presidential Election.

Reactions from Jubilee Party and NASA to the Supreme Court ruling, and the ensuing campaigns created a political environment that was inimical to democratic civility and respect for the rule of law. President Uhuru Kenyatta did not hide his rage despite his willingness to accept the Supreme Court decision. Mr. Uhuru and the Jubilee Party intimidated the Judiciary and threatened to retaliate against the Supreme Court judges as well as 'reform' the Supreme Court in the event of their re-election. Mr. Uhuru referred to the judges as "crooks" and further described the nullification of presidential results as a judicial coup and subversion of the will of the people. The attacks on the Judiciary were clearly unwarranted. The attacks ridiculed and undermined the authority, stature, and independence of the Judiciary, and affected public trust and confidence in the institution.

On his part, Hon. Raila Odinga and NASA, who initially were reluctant to trust the Court with the petition, embraced the Supreme Court's decision and interpreted it as a win. NASA focused on the integrity and credibility of the IEBC, even though the Supreme Court did not specifically find evidence of criminal culpability on the part of the IEBC staff. NASA consequently mounted a campaign to either boycott or disrupt the Fresh Presidential Election, under the mantra 'no reforms no elections'. NASA pushed for 'irreducible minimums' in regard to necessary reforms before they could take part in the fresh elections. These demands included the replacement and prosecution of IEBC staff allegedly implicated in bungling the nullified presidential election; securing different companies to print the ballot papers and results forms for the repeat polls; the design and overseeing the electronic results transmission platform; and greater transparency and accountability in the results transmission and management.

The IEBC responded by reaching out to both Jubilee Party and NASA for political dialogue and consensus on the way forward. The IEBC outlined the steps it would take to manage the issues raised by the Supreme Court's decision, and assured

greater transparency and accountability. The Commission pledged to:

- embed technical experts from the United Nations and the Commonwealth into their information technology team;
- standardize polling stations and constituency results Forms 34A and 34B;
- transmit the scanned images with the numerical results only; and
- provide observers and parties with access to all stages of the transmission process including its servers, databases and logs.

NASA, however, maintained its demands for reforms, which the Jubilee Party opposed vehemently. The IEBC also appeared unwilling to give in to NASA's demands. A stalemate followed that jeopardized attempts by the IEBC to bring the two sides to the negotiating table. The stalemate deepened when the Jubilee Party through Parliament introduced amendments to the election laws prior to the Fresh Presidential Election.

NASA, subsequently, began weekly demonstrations across the country to press for their demands. However, there was no let up from the Jubilee Party, the IEBC, and the government. The demonstrations became increasingly violent, fuelled in part by the use of excessive force by the police. With the Fresh Presidential Election date approaching, NASA withdrew from the race on 10th October 2017, citing non-compliance with their demands.[20] Other presidential hopefuls were, vide a High Court ruling on the 11th October 2017, reinstated to the ballot for the Fresh Presidential Election. IEBC's attempts to build political consensus on the way forward to the Fresh Presidential Election were, in the meantime, completely scuttled. Consequently, an environment that was not conducive for a peaceful and credible management and conduct of the Fresh Presidential Election ensued.

As stated earlier, the move to amend the election laws by Jubilee Party parliamentarians in the run-up to the Fresh Presidential Election further poisoned the political environment. Indeed, NASA alluded to this as one of the reasons for its withdrawal from the race.

2.5 Conclusion

The political and electoral environment preceding the 2017 General Elections, and the subsequent Fresh Presidential Election was protracted and extremely challenging. It was a tortuous contest for both NASA and Jubilee Party and indeed the voters and Kenyans at large. Mobilization of followers along ethnic and regional blocks heightened expectations of victory, leading to tension, political and ethnic divisions, violence and insecurity.

Many stakeholders seemed to have abandoned diplomacy, protocol, and common decency. Political battle lines also appeared to have been clearly drawn and entrenched along regional and ethnic lines. Polarization and intimidation thus became common features in the electoral environment.

The IEBC struggled to dispel suspicions and perceptions of bias and rigging from the 2013 electoral process. Sustained political pressure to disband the Commission on various claims, such as lacking public trust and confidence to conduct the 2017 elections, also weighed in. Even after the IEBC was reconstituted, it still came under immense scrutiny from a polarized political environment, lack of adequate preparedness, and constricted timelines. The IEBC was thus operating in an environment where its integrity and credibility came under constant political spotlight by NASA, Jubilee Party, and other stakeholders. The scourge of insecurity, violence, political tension, ethnic divisions, and intimidation also soiled the electoral environment and undermined the efforts by political actors, citizens, and other stakeholders to positively participate in and engage with the election process.

Ultimately, a hostile political and electoral environment was created that adversely affected the preparations for conduct and management of the 8th August 2017 General Elections and the subsequent 26th October 2017 Fresh Presidential Election.

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CHAPTER 3

Thematic Observations and Findings on Pre-Elections Environment

In this chapter, ELOG shares its findings and reports on the pre-election environment based on the long term observation missions that it deployed prior to the 2017 elections. The observed processes included the amendments to the legal framework, political party nominations and subsequent dispute resolution activities, electoral campaigns, participation of special interest groups (SIGs), hate speech monitoring, voter registration, voter education and electoral preparedness by the IEBC.

The Chapter also examines the role of key actors in the elections key amongst them the IEBC, Judiciary, Police, Media, Political Parties, CSOs and other agencies. While the role of these actors in the pre-election is the main focus, a broader analysis of their engagement with the electoral process beyond 8th August and in the run up to the Fresh Presidential Elections is augmented for a more comprehensive examination.

ELOG also shares some interesting findings on the voter register after conducting computer logical tests on the voter register used during the 8th August Elections.

3.0 Introduction

ELOG conducted the pre-election thematic observation so as to gain a focused appraisal of the pre-electoral environment and facilitate the necessary interventions. Thus, ELOG conducted specialized and comprehensive assessments of key electoral themes. This was necessary to assess the electoral environment within six months of the election to coincide with critical processes such as the political party nominations and the voter registration process.

ELOG's deployment mission in the pre-election period included 290 Long Term Observers, eighty-five political party primaries observers, eighty-three Special Interest Groups observers, and twenty-one monitors for the Media Monitoring for Hate Speech project. ELOG also convened several Legal Review and Technical

Working Group meetings with the electoral stakeholders to further assess the political environment.

3.1 The Pre-Election Environment

ELOG observed the pre-election environment using a thematic based approach to monitor the different phases of the electoral cycle. In the final six months before the election, several critical phases were set to be rolled out. These included voter education, voter registration, political parties' nominations, and electoral campaigns. ELOG designed data collection tools to be used by observers to gather information on these processes that would then inform different stakeholders on the level of implementation and credibility of the processes. ELOG also organized stakeholder forums that were useful in assessing some of the thematic aspects of the elections, such as the legal framework.

The Legal Framework

Kenya has fairly comprehensive and robust constitutional and legal frameworks that generally compare with international principles and standards for governing elections. Top in the legal regime is the Constitution of Kenya (2010), which anchors direct application of international principles and standards for elections by providing that any treaty or convention ratified by Kenya shall form part of the laws of Kenya.

Thus international treaties and conventions, regional instruments that prescribe principles and standards for elections, guarantee the right to peaceful, free and fair elections, are part of Kenya's legal framework on elections. The international instruments signed and ratified by Kenya include the Universal Declaration of Human Rights, International Convention on Civil and Political Rights, International Convention on the Elimination of all Forms of Discrimination against Women, African Charter on Human and Peoples Rights, and African Charter on Democracy, Governance, and Elections.

The Constitution is the foundation upon which robust laws that cover nearly all aspects of the electoral process and institutions that impact on elections are anchored. These include The Elections Act and its regulations, The Code of Conduct, Elections Offences Act, Independent Electoral and Boundaries Commission Act, Campaign Financing Act, and Political Parties Act. All these form the regime of laws that directly impact on the electoral processes. Other legal

tools that indirectly affect the electoral processes include The National Cohesion and Integration Act; Leadership and Integrity Act; KBC Act; Kenya Information and Communications Act; Police Act; Public Order Act; and the Penal Code.

Amendments to the Legal Framework

ELOG observed that uncertainties, inconsistencies and lack of clarity still existed in the application of the electoral legal framework, despite its comprehensiveness. The challenges in implementation were highlighted in the lessons from the 2013 elections, which highlighted the need to review and clarify the existing electoral legal framework.[1] Subsequently, towards the end of 2016 and in early 2017, the Elections Act, Political Parties Act, and Election Offences Act, were amended. The amendments aimed at improving the framework for better conduct of future elections by making the legal framework more responsive, clear, and efficient.

Particularly, the Elections Act was amended to clarify that there was only one register of voters; the procedure and qualification for registration; the process of preparing the register; inspection, verification and publication of the register; the need to provide for regular audits of the register; and the need to provide for the use of technology in voter registration. The amendments also focused on the use of technology in elections, whereby an integrated electronic system for elections was adopted for the biometric voter registration, electronic voter identification, and electronic transmission of elections results. A complementary system was also provided for in the event the technology failed.

Finally, the amendments targeted the nomination process in three phases, namely; party nominations/primaries, whereby the electoral timelines were changed to prevent party hopping; presentation of names of candidates to the IEBC for clearance and formal IEBC nomination and, nominations through party lists.

ELOG observed that even though these amendments largely increased the role of technology in the electoral process, their efficacy remained largely untested. This was because of their late introduction (less than one year to the scheduled elections). Furthermore, requisite legal safeguards in relation to data protection were still missing. The late amendments to the electoral laws exacerbated the uncertainty caused by the high number of court cases that were filed and adjudicated during the pre-election period, and close to the 8th August General Elections.

Controversy also surrounded the amendments that were introduced in January 2017. This was because they were passed in an environment of political acrimony where the opposition declined to participate in the parliamentary discourses citing prejudice by the ruling Jubilee members. The highlights of the January 2017 amendments included the capping of number of voters per polling station at maximum 700, empowering IEBC to have a complementary mechanism for voter identification and transmission of results. The complementary mechanism was criticized because it was construed, especially by NASA supporters, as an avenue for vote manipulation since it advocated a manual identification of voters and transmission of results.

Further, controversial amendments were introduced very close to the Fresh Presidential Election. These amendments were deemed unnecessary and contribute to deepening tension in the political environment ahead of the Fresh Presidential Election slated for 26th October 2017. The controversial amendments, among other provisions:

- Deprived the IEBC chairperson powers of being the sole National Returning Officer for presidential elections.
- Empowered the IEBC chairperson to announce the presidential election results without the results from all the 290 constituencies, provided the remaining results would not affect the final outcome of the election.[2]
- Authorized the use of manual system in transmitting election results if the electronic system failed.
- Provided that the manual system would be adopted if discrepancies arose between the manual and electronic system, and,
- Permitted the electoral body to declare a presidential candidate as the winner if his or her competitor withdrew from the poll.

Although President Kenyatta never assented to the amendments, they eventually became law by lapse of time, and they were published in the Kenya Gazette Supplement No. 162 (Acts No. 34) on 2nd November 2017 as The Elections Laws (Amendment) Act, 2017.

ELOG considered the law as problematic because of the timing, even though certain aspects of the controversial law were good – for example having manual backups for the electronic transmission that would serve as the primary results

in the case of a discrepancy. The controversial law was rushed between the August 8th General Elections and the October 26th Fresh Presidential Election, when ideally comprehensive electoral legal reform should only be carried out after the election process is completed. Furthermore, the law was pushed without bipartisan consensus, which is crucial for electoral reforms.

Electoral Law Enforcement and Suspension of Campaign Financing Law

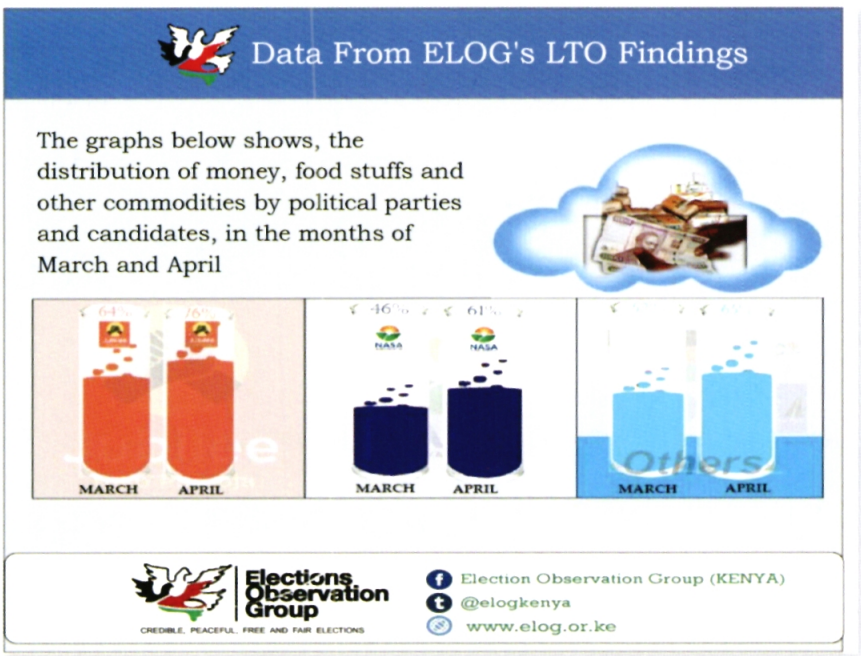
ELOG observed IEBC's lackluster implementation and enforcement of the law, especially the Elections Offences Act and the Electoral Code of Conduct. The IEBC seemed to lack clear rules of procedure and consistency in applying the electoral laws, especially in adjudicating and determining legal matters within its remit. This implementation lapse compounded the uncertainties in the electoral process. The lack of applicable campaign financing law, following the suspension and non-operationalization of the Campaign Financing Act (2013), also impacted negatively on the overall quality of the elections, thus undermining political and electoral equality of opportunity, accountability, and transparency in the electoral campaigns.[3] Only limited party and campaign financing regulation and oversight existed under the Political Parties Act, which could not adequately guarantee equality of opportunity, accountability, and transparency requirements for campaign financing. This encouraged corrupt practices in the electioneering period and increasingly generated an uneven political and electoral playing field. This is also contrary to the constitutional requirement under Article 88(4)(i) which requires IEBC to regulate monies used by parties and candidates during elections.

In August 2016, the IEBC published a notice via Kenya Gazette Notice No. 6307 of 8th August 2016 on the limits of expenditure by the political parties and candidates for the 8th February to 8th August 2017 expenditure period. Thus, presidential candidates were limited to spending KShs. 5.25 billion, while gubernatorial, senatorial, and women representative candidates could spend a maximum of KShs. 433 million only on campaigns. Those seeking national assembly seats were limited to spend KShs. 33.4 million, while those interested in county assembly membership were to spend up to KShs. 10.3 million.[4] However, in January 2017, the High Court suspended the implementation of the Campaign Financing law, which was the basis of the IEBC Gazette Notice on expenditure capping. By this court ruling, attempts by the IEBC to cap campaign financing and expenditure

by candidates and parties were rendered null. This created an ineffective environment that allowed parties and candidates to routinely remain opaque in disclosing their sources of funding and extent of expenditure. The Jubilee Party, NASA, and their respective candidates were the greatest beneficiaries of weak accountability, transparency, and limited oversight mechanisms on political campaign financing. Some of the candidates in these parties had large personal funding and received significant donations during the campaign period.

ELOG's LTOs monitored the spending trends by political parties during the campaign season, as indicated by the following info-graph;

Figure 1: NASA and Jubilee Candidates' Expenditure, March – April 2017



Source: ELOG's LTO Report Compilation

The failure to enforce resource equity meant that provisions of Article 88 of the Constitution, which envisages free and fair elections based on non-discrimination and fair empowerment of key actors, could not be realized. The constitutional principle of equal opportunity for eligible persons to compete in elections, without money or resources being key determinants of the outcome, was also rendered ineffective. Ultimately, this distorted the political and electoral playing

field for parties and their candidates during the 2017 General Elections and the subsequent FPE.

The Status of the Gender Principle and Inclusion of Special Interest Groups

The Constitution of Kenya (2010) sought to eliminate the marginalization of women, youth, persons with disabilities, ethnic minorities, and persons from marginalized communities. It also addressed gender imbalance in democratic governance. Article 27(3) outlines equal rights for both men and women, and states that all Kenyans have equal opportunities irrespective of gender. Article 27(6) requires the government to implement policies, laws, and affirmative action programs to rectify past injustices, including discrimination of women. Article 27(8) introduces a legal requirement requiring that no more than two-thirds of the same gender is elected to the elective or appointive public positions. The Article further requires the government to take legislative measures to implement the gender principle. So as to implement Article 27(8), Article 81(b) demands that the electoral system and process complies with the principle, while Article 177 stipulates the mode of compliance at the county level.

In 2012, the Supreme Court of Kenya gave an advisory opinion in *The Matter of the Principle of Gender Representation in The National Assembly and The Senate [2012] eKLR*, which stated that the provisions of Articles 27(4), (6) and (8) and, Article 81(b) of the Constitution (the implementation of the two-thirds gender rule) was progressive, and gave a deadline of 27th August 2015 for its implementation by parliament. Parliament, however, did not pass legislation to ensure adherence to this principle. Consequently, lobby groups led by the Centre for Rights and Education Awareness (CREAW) took the matter to Court in the case of *Centre for Rights Education and Awareness (CREAW) v the Attorney General and the Commission on the Implementation of the Constitution [2015] eKLR*. They sought to compel the Attorney General and Commission on the Implementation of the Constitution to draft and table the necessary legislation in parliament for debate and passage before the 27th August 2015 deadline. The Court held that the respondents had neglected their duties and ordered them to prepare and table the necessary legislation in parliament within forty (40) days. Thereafter, the Two-Thirds Gender Rule (Amendment) Bill, 2015 was consequently drafted and tabled before parliament.

However, parliament still remained lethargic. In August 2015, to circumvent the deadline, parliament applied Article 261 (2) of the Constitution to extend the timelines for enactment of constitutional legislations. Thus, parliament extended the timeline for enacting the Two-Thirds Gender Rule by one year. Yet, parliament still failed to enact the legislation within the appointed timelines. This prompted lobby groups to go back to court in September 2016, through High Court Petition No. 371 of 2016, the case of *Centre for Rights Education and Awareness (CREAW) and 2 others v the Speaker of the National Assembly and 6 others [2017] eKLR*. The High Court ruled that parliament had contravened the Constitution, and ordered parliament to enact the necessary legislation within sixty (60) days (by 29th March 2017) or face the possibility of dissolution under Article 261(7) of the Constitution. However, parliament still went on recess at the end of its term in May 2017 without complying with the Court orders.

Following the 8th August 2017 General Elections, lobby groups led by CREAW, CRAWN-Trust, Kenya National Commission on Human Rights, Law Society of Kenya, and National Gender and Equality Commission moved to court again as they sought a declaration that parliament was in violation of the Constitution; and that parliament as was constituted, did not meet the required threshold under the two-thirds gender principle. The applicants further sought for an order to compel parliament to enact laws to ensure the implementation of the principle, by making this its first order of business, once it resumed sittings. By the time of writing this report, the case was still pending determination. In the face of continued failure by parliament to enact the required law, anyone could notify the Chief Justice under Article 261(7) for determination and advise the president to dissolve parliament.

Another significant case in the Two-thirds Gender Rule implementation discourse is *Katiba Institute v Independent Electoral and Boundaries Commission [2017] eKLR*. The Katiba Institute petitioned the court to compel the IEBC to ensure that political parties adhered to the Two-Thirds Gender Rule during their party nominations for the 2017 General Elections. The court held that political parties must adhere to the Two-Thirds Gender Rule in all their undertakings, including their nominations. The court also obligated the IEBC to ensure that parties adhere to the rule and if they fail to do so, then IEBC should reject their nomination lists. The court, however,

noted that given the time that the ruling was issued (close to the general elections), it would have been problematic for parties to adhere to it. Therefore, the court ruling would be applied fully during the next elections.

3.2 Role of Key Institutions and Actors in the 2017 Elections

ELOG also observed the conduct of some key institutions and actors in the 2017 General Elections and the Fresh Presidential Election.

The Independent Electoral and Boundaries Commission

Article 88 of the Constitution of Kenya (2010) mandates the Independent Electoral Boundaries Commission (IEBC) to conduct and supervise elections and referenda, continuously register voters, revise the voters roll (in order to exclude dead voters), carry out voter education, and facilitate observation, monitoring, and evaluation of elections, among other roles. The IEBC operated under a challenging environment preparing for the 2017 General Elections and Fresh Presidential Election. The Commission had come under scrutiny of political actors after the 2013 elections, effectively becoming a political punching bag for some political actors. IEBC's credibility was frayed by allegations of corruption and ineptitude, which exposed it to severe attacks from the opposition.

Political pressure led to the removal of its commissioners in December 2016, with new commissioners appointed in March 2017. The Commission's Secretariat, however, remained intact and provided the technical support that enabled IEBC to prepare for the 2017 elections. The late appointment of new commissioners had ramifications on the preparedness of IEBC for elections that were barely five months away.

Amidst these challenges, IEBC prepared its elections operation plan, drew up the elections budget, and procured services and material for elections. It also made technical preparations including voter registration, voter education, recruitment and training of elections staff deployed technology for the elections, among other things, with varying degrees of success, controversies, and failures.

Despite all these, IEBC was confident about its preparedness for the 8th August elections. Other stakeholders were, however, skeptical and felt vindicated when the Supreme Court later nullified the 8th August presidential results.

ELOG observed that the IEBC was under siege from numerous court cases, which resulted from mistrust of the IEBC, lack of clarity in the interpretation of the electoral legal framework and process, and the heightened competitiveness of the 2017 elections. Some of the legal suits were filed, heard, and determined very close to the elections, which gave the IEBC limited space and time to internalize and implement the court decisions.

The murder of IEBC ICT Manager, Chris Msando a week to the August general elections raised concerns about the integrity of the 2017 elections. Mr. Msando had explained to the public during television talk shows the measures that the IEBC had taken to ensure technology did not fail in the August general elections. He had stated that technology's role in electoral process was to enhance transparency and credibility of the process, and assured Kenyans that the technology to be deployed by the IEBC for the 2017 General Elections was foolproof. Earlier, following the 2008 PEV, the Kriegler Commission had recommended adoption of technology to modernize elections infrastructure and eliminate manual processes, which are prone to abuse and manipulation. This is why ICT became an integral component in post-2007 elections in Kenya.

The killing of the ICT Manager was therefore a setback in the preparations for the elections and in safeguarding the integrity of the process. The timing of the killing made it even more suspicious.

Of equal concern was the disbandment of the Elections Technology Advisory Committee (ETAC) two weeks to elections. ETAC's membership comprised technical personnel from political parties, ICT professional bodies, and other stakeholders. ETAC was declared unconstitutional supposedly because it would interfere with the constitutional independence of IEBC. This, therefore, set the stage for the deployment of technology in the management of elections without a framework that allowed stakeholders to engage the IEBC on technology issues or scrutinize its ICT infrastructure. The disbandment of ETAC undermined the efforts to incorporate integrity and accountability in the ICT infrastructure and systems during the 2017 elections.

Although IEBC assured Kenyans that the 2017 August general elections would be credible, Mr. Msando's death undermined the trust and confidence of many Kenyans in IEBC. NASA registered its concerns on the integrity of the process and on several occasions claimed that the elections had already been compromised

to favor President Uhuru Kenyatta, and that Mr. Msando had been eliminated to facilitate rigging the elections.[5]

The Supreme Court's nullification of the 8th August presidential election results had far-reaching effects on IEBC, particularly regarding its preparation for the fresh poll. The IEBC had difficulties understanding the ruling that was delivered on 1st September 2017, and waited for twenty days for the detailed judgment. Even after the court gave the comprehensive judgment, the IEBC still had challenges implementing it.

In an environment of intense political pressure, IEBC seemed to lose the gravitas to mobilize stakeholders together to discuss and agree on the way forward for Fresh Presidential Election. Protests and political pressure from NASA and the Jubilee Party continued unabated. The IEBC seemed to have lost its electoral leadership and convening power, and made some decisions that did not involve all key stakeholders. Such decisions appeared to favour the Jubilee Party side and painted the IEBC as partial. Therefore, stakeholders could not assist the IEBC with the challenges that confronted it and thus, the IEBC continued to appear isolated and operated under very difficult conditions.

There were also internal squabbles at IEBC that spilled to the public. The squabbles were manifested at two levels; between the commissioners and the secretariat, and amongst the commissioners. The commissioners blamed the secretariat for having misled them about the technical aspects of the elections, and blamed the secretariat for the illegalities and irregularities that the Supreme Court established. The accusations and counter-accusations leaked to the public via a memo that the chairperson had written to the IEBC Chief Executive Officer demanding answers to critical issues that went wrong during the August 8th 2017 elections. To date, the IEBC has not publicly shared with stakeholders the CEO's responses (if at all) to these issues.

The situation was worsened when one Commissioner, Dr. Roselyn Akombe, fled the country to the US and resigned on 18th October citing grave intimidation, threats, and other security concerns. Dr. Akombe also stated that the Commission had been politically infiltrated, which rendered the commissioners vulnerable to manipulation by partisan political and party interests. She further indicated that there was an unsuitable political environment for credible Fresh Presidential Election on 26th October. On 19th October, the IEBC chairperson issued a statement

that painted a gloomy picture of the current political environment. He depicted an IEBC under siege by partisan political interests. The chairperson both confirmed Dr. Akombe's concerns, and stated that he could not guarantee free, fair and credible elections. He appealed for political dialogue and consensus, and changes in the secretariat staff, particularly the stepping aside of those whose impartiality had been questioned.[6]

After the chairperson's statement regarding the lack of technical preparedness of IEBC, the Commission could simply not be trusted. At the time of conducting the Fresh Presidential Election, the chairperson had not told Kenyans what had changed in view of the serious concerns he had earlier raised. Furthermore, of the IEBC staff whose impartiality had been questioned, one Praxedes Tororey who was the Head of Legal Department, retired on 22nd October 2017 upon attaining the age of sixty years, while the CEO Mr. Ezra Chiloba agreed to take three weeks leave on 20th October 2017. This was only six days to the Fresh Presidential Election, after virtually all preparations were in place.

On 10th October, IEBC published a response to NASA's demands for 'irreducible minimums.' Although this was a positive step, the response only partially fulfilled NASA's demands.[7] The IEBC maintained that the rest of the demands were unrealistic within the time frame for the Fresh Presidential Election. NASA had raised nine core demands with forty-five inter-related sub-issues in what it called 'irreducible minimums' for purposes of a credible Fresh Presidential Election. The demands covered the procurement of election materials transparent use of and access to ICT, replacement of 'irredeemable' personnel who abetted electoral fraud, gazettement of polling stations, and live media coverage of results declaration at the 290 constituency tallying centres in a similar manner as coverage done at the National Tallying Centre.[8] NASA, therefore, felt that the IEBC had failed to address its demands and, thus, withdrew from the Fresh Presidential Election.

It also appeared IEBC did not benefit from sound legal counsel. First, it gambled with the date of the Fresh Presidential Election and had to subsequently change the date. Second, the IEBC also excluded from Fresh Presidential Election plans the six remaining presidential candidates who had participated in the 8th August elections. Relying on the Supreme Court's by-the-way remark (Obiter dictum) in the 2013 presidential election petition ruling, IEBC gazetted only two presidential

candidates, Uhuru Kenyatta and Raila Odinga. This decision was negated by the High Court in *Petition No. 471 of 2017, Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 others [2017] eKLR* (the Ekuru Aukot case).[9]

The IEBC could not immediately decide on the implication of Raila Odinga's withdrawal from the Fresh Presidential Election. However, the decision came later after seemingly benefitting from the High Court's ruling in the *Ekuru Aukot's* case and which rendered the withdrawal nugatory. In the decision, the IEBC relied on an arguable technical procedure outlined in the Elections Regulations regarding the withdrawal of candidates from an election which required certain statutory forms be submitted to IEBC to formalize the action.

These issues depicted the IEBC as lacking strategic legal counsel, authority, and direction and thus depended on the Courts for bailout and direction.[10]

ELOG observed that regarding IEBC's technical preparations for the Fresh Presidential Election, there were notable improvements in training, gazetted results paths, and complementary mechanisms for electronic processes. Electoral stakeholders expected IEBC to open for scrutiny the ICT systems that had been deployed in the annulled election. However, IEBC failed to this. The commission also failed to conduct field-testing of procedures and technology for Fresh Presidential Election, as they did not fully own the ICT systems and depended on external service providers to run and manage them. The systems included its cloud server, which was managed by an external service provider. Although IEBC increased public communication in the run up to the Fresh Presidential Election, this was adopted too late in the process.

Following NASA's withdrawal, IEBC operated under a difficult and insecure environment. Its trainings and deployment of poll staff and distribution of election materials were disrupted in some areas deemed as NASA strongholds. The attacks, disruptions, and continued insecurity paralyzed IEBC's preparedness and its ability to organize voting in these areas. Consequently, IEBC indefinitely postponed elections in the areas that were affected by insecurity and violence.

Political Parties

The Constitution of Kenya envisages political parties as vital in upholding the democratic values and principles of governance.[11] The Constitution thus provides

for the basic legal and institutional framework for the formation, management and operations of political parties.[12]

During the 2017 elections, political parties provided an avenue for citizens' participation and integration in the democratic processes, including elections. Other roles of parties included the mobilization of citizens and candidates for elections.[13] Political parties also convened under the Political Parties Liaison Committee (PPLC) to dialogue with the Office of the Registrar of Political Parties (ORPP) and IEBC on matters elections and the general electoral environment.[14] These included the procurement of the KIEMS kits[15], the dates for submission of party lists[16], and the campaign financing rules.[17]

The ORPP supervises political parties. The ORPP had particular roles during the party primaries and nominations which, among others included ensuring that every political party that participated in the election conducted their nomination process within the prescribed timelines, gave adequate notice of the elections, provided the updated party register, and submitted the elected candidates' names to the commission as required. The ORPP also ensured that all listed political parties abided by the nomination rules spelt out upon their registration, and any other laws in conducting nominations. The ORPP also issued clearance certificates to candidates certifying that they were not members of any other political parties. However, the ORPP faced certain challenges, including the unprecedented high number of candidates, whose applications for the necessary clearance documentation needed to be processed within a very short time.[18]

Political parties were legally required to conduct their party primaries at least six months before the elections. However, they conducted their primaries between 13th and 30th April 2017. A court order was obtained by Angaza Empowerment Network, a local NGO in Malindi effectively extended the primaries from 26th April to the 1st May 2017.[19] The IEBC had earlier listed 13th to 26th April as the timelines within which the nominations should have taken place.

ELOG observed party primaries for Jubilee, ODM, and WDM parties. The three parties were chosen because of their numerical strengths in the previous parliament. While the ODM and WDM shared with ELOG the tentative lists of counties and schedule of nominations to facilitate observation, Jubilee Party did not, which made it difficult for ELOG to observe Jubilee Party primaries.

The pre-party nomination period was characterized by anxiety. Peddling of fake news to disparage one candidate or other was also common. There was a general feeling among aspirants that their party leadership was favoring certain candidates. This fear, although denied by the party hierarchy, led to disagreements and violence in some places. It also resulted into many political party aspirants decamping or choosing to run as independent candidates. The nomination exercises for the 'big' parties were chaotic, as the number of aspirants was growing daily. Thus, there was stiff competition for parties' slots due to the high stakes, especially for the positions of MCA and Governor. The gubernatorial position in particular attracted well-accomplished MPs/Senators, owing to the power stature, influence, and the huge resources controlled at that level.

ELOG noted that during party nominations, there were inconsistencies in the opening and closing of the polling stations, absence of essential voting materials in some polling stations, insufficient knowledge by some of the polling officials on polling procedures, lack of party membership lists, and use of IEBC registers in many polling stations. Thus, party primaries were vulnerable to multiple voting and non-member voting due to failure to use the membership registers, as it was difficult to identify and ascertain members of political parties. There were also incidents of intimidation, hate speech, and violence in some of the polling stations; and use of derogatory language mainly against women. ELOG observers also reported active campaigns in some of the polling stations.

On a positive note, all the polling stations observed were accessible to PWDs and the security personnel were present to ensure that peace was maintained.

The Judiciary

The role of the Judiciary as a constitutional independent arbiter of electoral disputes cannot be overstated.[20] ELOG noted that the Judiciary was among the most prepared institution for the elections, picking lessons from the 2013 process and establishing internal mechanism to prepare them for the 2017 electoral process.

The Judiciary's preparations to handle petitions that were expected from the 2017 elections included:[21]

- The launch of the Judiciary Committee on Elections (JCE) in August 2015 by the Chief Justice. The JCE is a permanent committee whose principal

mandate was to facilitate training and preparations by the Judiciary to determine all election disputes and petitions in Kenya;

- The appointment/gazettement of ninety-two magistrates by the Chief Justice to preside over electoral disputes. It was recommended that the appointed magistrates did not take leave from July 2017 so that they could hear and determine electoral disputes expeditiously;
- Security officers were also deployed to safeguard the dispute resolution processes, and the safety of the magistrates because of the volatile nature of previous electoral disputes;
- More members were appointed to the Political Parties Dispute Tribunal (PPDT). The High Court was prepared and assigned to handle appeals from the PPDT, and;
- The courts endeavored to adhere to the time limits for electoral disputes settlement to expedite dispute arbitration

In the pre-8th August general elections period, the Judiciary was inundated with numerous court cases that strained its capacity and resilience. There were over 300 court cases and disputes[22] filed at various courts before and after the 8th August 2017 General Elections. Political parties, civil society groups, private citizens, and the candidates, including the 3,752[23] independent aspirants, lodged the suits that mainly targeted the IEBC. The Judiciary determined the cases expeditiously.

Beyond the cases mentioned, the main one was the presidential election petition that challenged the victory and declaration of Uhuru Kenyatta. Despite the short statutory period scheduled for the hearing and determination of the petition, the Supreme Court heard it openly, transparently, and professionally. The judicial process was also flexible and afforded all the legitimate parties due process as required by the Constitution. The Supreme Court ruling was historic and set a precedent in Kenya and Africa. The annulment of the presidential election results meant that President Kenyatta only ruled the country on an incumbency basis for the sixty days within which the Fresh Presidential Election was to be conducted. During this period, the president could not exercise his full powers.

The 1st September Supreme Court ruling not only underscored the supremacy of the law and the independence of the Judiciary but also solidified the gains made since the promulgation of the 2010 Constitution. The ruling underscored the

development of Kenya as a constitutional democracy, especially in Africa where no such ruling had ever been witnessed before, and where electoral impunity has been part and parcel of the electoral process. The precedent-setting ruling bolstered the quest for electoral justice in a non-violent means and signified hope in consolidating constitutionalism, democracy and the rule of law. The ruling thus was momentous "light at the end of the tunnel" for Africa.

In the run-up to the Fresh Presidential Election, the Judiciary was subjected to extreme pressure, intimidation, and threats of violence. Public demonstration against the Judiciary led by NASA and Jubilee Party were a common feature following the Supreme Court nullification of the 8th August 2017 presidential poll. President Uhuru and the Jubilee Party continued to strongly criticize and condemn the Judiciary. They alleged that it had been infiltrated and captured by NASA and was part of a grand scheme of a 'judicial coup' led by NASA. President Kenyatta and Jubilee Party leaders vowed to 'fix the Judiciary'.[24]

On 19th September 2017, the Judicial Service Commission (JSC) through its chairperson, the Chief Justice, issued a statement on the political aggression and attacks against the Judiciary. The JSC raised concerns about political intimidation of the Judiciary. The JSC also raised concerns about insufficient security given to judicial officers. On 24th October 2017, the Deputy Chief Justice's official vehicle was attacked by unknown gunmen who shot and seriously wounded her driver. This occurred just a day before a scheduled Supreme Court hearing of a petition that sought to stop the second election. On 1st October, it was reported that the National Treasury had put in place budget cuts that targeted the Judiciary and other government departments. The Judiciary budget was cut down by USD 19.5 million.[25] The unfolding events threatened the judicial independence.

On 25th October 2017, a day before the election, the Supreme Court could not sit to hear the *Supreme Court Petition No. 17 of 2017, Khelef Khalifa & 2 Others V. Independent Electoral and Boundaries Commission & Another* that sought to delay the 26th October 2017 presidential poll. The Chief Justice Supreme Court, in accordance with Art 163 (2), was unable to raise a quorum[26] as only two judges showed up. The Chief Justice explained to the court that the Deputy Chief Justice was unable to attend following the shooting of her driver the previous day. Other judges, he explained, were out of town for unexplained reasons.

Curiously, 25th October 2017 was for unclear reasons declared a public holiday by the government. This was unusual and it raised questions about possible political sabotage and interference with the Supreme Court's calendar. The consequence was that the constitutional and legal means to judicial remedy before the fresh poll was sabotaged and blocked. Aggrieved citizens were thus denied their constitutional right to seek justice before courts of law.

The lodging of an appeal by the IEBC and hearing of an application for stay in that matter by the Court of Appeal on 25th October 2017 added to the menu of curious events in the courts that day. While 25th October 2017 was a public holiday, and while the Supreme Court hearing could not proceed for lack of quorum, three Court of Appeal Judges were apparently available on the same day to hear an application for stay of the High Court orders that had been issued against the IEBC on 24th October 2017, and indeed issued stay orders late, at around 5.00 p.m.

The foregoing is the political environment within which the Judiciary found itself in the period after the nullification of the 8th August 2017 presidential election. ELOG was concerned that this environment threatened the independence of the Judiciary and placed it in a situation of extreme pressure, coercion and intimidation that put on the spotlight its independence, integrity and reliability in relation to adjudication of future election disputes.

The Judiciary had also been handling other petitions from the 8th August General Elections. These include thirty-five gubernatorial petitions, fifteen senatorial petitions, twelve Women Representatives petitions, ninety-eight Member of National Assembly petitions, and 139 Members of County Assembly petitions.

At the closure of the petition-filing window on September 8th, a total of 299 cases had been lodged challenging outcomes of various elections. This represents a significant increase from the 188 petitions that were filed after the 2013 elections.[27] By the time of writing this report 114 cases had been dismissed/ withdrawn at the High Court; seventeen against MPs, three against Senators, seven against Women Representatives, ten against Governors, fifty-one against MCAs, and twenty-six relating to party list.[28]

Parliament

In the third quarter of 2016 a Joint Parliamentary Committee was established to amend electoral laws, make proposals on the exit of commissioners of the

IEBC, and appointment of new commissioners. Although the Joint Parliamentary Committee's process progressed well especially for the initial election amendments passed in September 2016, debate on the proposed amendments in parliament took a politically bipartisan angle. This resulted in an acrimonious situation with the opposition walking out in protest after a second set of amendments were brought to the House in late December 2016. The Jubilee Party eventually passed the proposed amendments in parliament without input from the opposition. The amendments included the use of manual voting and counting in case the electronic system failed. The opposition argued that the manual system would lead to voter rigging.[29]

After the Supreme Court nullified the 8th August presidential election, parliament was hurriedly convened to elect house speakers and put in place house committees. The new parliament suffered setbacks and was not been able to function properly due to opposition boycott of the sittings. However, one of the key agenda for parliament was the debate and passage of Elections Laws (Amendment) Bill (2017) that was tabled in parliament by a Jubilee Party member. NASA parliamentarians boycotted the proceedings during the debate and passage of the controversial law. The president, however, did not assent to the Bill within the prescribed fourteen (14 days) neither did he return the Bill to parliament as required by law. Thus, the Bill became law by operation of time.[30] Currently the Bill has transitioned into an Act, Elections Laws (Amendment) Act No.34 of 2017.

Jubilee party members supported the controversial law, arguing that it would cure the illegalities and irregularities that the Supreme Court referred to in its ruling. NASA, however, was critical of the law, citing it as unconstitutional. Even the IEBC chairperson was critical of the new law. ELOG noted that the introduction of the controversial law was unnecessary and problematic due to timing. It was introduced hurriedly in between two elections, and in a partisan manner when indeed electoral reforms could have waited until the entire elections process had been completed.

In a nutshell, the controversial law;

α) Divests the IEBC chairperson of his role as the sole National Returning Officer for the presidential elections,

β) Provides for the IEBC chairperson to announce the presidential election results without the results from all the 290 constituencies as long as the

results that remained would not affect the final outcome of the election.[31]

χ) Authorizes the use of manual system in transmitting election results if the electronic system fails.

δ) Provides that if discrepancies arise that lead to conflicts between the manual and electronic system, the manual system takes preference.

ε) Permits the electoral body to declare a presidential candidate as the winner if his or her competitor withdraws from the poll.[32]

Other Key Institutions

There were other players that were located on the margins of the electoral process, but who played a critical role nonetheless.

Media Council of Kenya

The Media Council of Kenya (MCK) was established by the Media Council Act (2013) as an independent national institution. Its roles include setting media standards, ensuring their compliance as spelt out in Article 34(5) of the Constitution of Kenya.[33]Its other functions include promoting and protecting the freedom of the media, enhancing ethical and professional standards amongst journalists and media enterprises, advising the government or the relevant regulatory authority on professional and educational matters in the training of journalists and other media enterprises.

In 2016, as in 2013, the Media Council of Kenya (MCK) signed an MOU with the IEBC as a partnership on media training and civic education ahead of the 2017 General Election. The partnership facilitated the review of the *Guidelines for Election Coverage (2012)* which incorporated new media developments such as regulations on broadcast content, responsible reporting, diversity and marginalization, and conflict.[34] This was to ensure that there was credible reporting and adherence to the ethical principles during the 2017 General Elections. The Media Council of Kenya also established a Board and Complaints Commission which worked closely with the National Police Service (NPS) to investigate arrest and charge bogus journalists.[35] Other issues investigated also included the harassment and intimidation of journalists. The journalists were also trained on electoral related matters including the laws governing elections and political parties.

In preparation for the 2017 Kenya General Elections, MCK advised media houses to release from employment, any journalists and practitioners with political

ambitions, and those who had declared through social media their affiliations to political movements, parties, and groupings. The journalists were advised to be careful on how they presented themselves in their private social media space, because their views could be perceived to be biased.[36]

The Communications Authority of Kenya

The Communications Authority of Kenya (CA) is an oversight authority that regulates the communications sector in Kenya. It was established in 1999 by the Kenya Information and Communications Act (1998). Its mandate is to facilitate the development of the information and communication sectors, which include telecommunications, electronic commerce, postal and courier services, multimedia, and broadcasting. Some of the responsibilities of the CA include licensing all communication systems and services, managing Kenya's frequency band and numbering resources, and protecting consumer rights within the communications environment.

The CA authorized three telecommunications firms to transmit the IEBC elections results during the 2017 elections. The CA also prohibited political parties and media houses with parallel tallying centres from releasing the 8th August 2017 results before the IEBC released them.[37] The role of the CA in the 2017 elections was also shrouded in controversy with political stakeholders raising concerns that it was likely to shut down the internet during the elections week. This did not occur; citizens, the media and bloggers aired their views unhindered. However, this also led to the spread of fake news. ELOG, in partnership Code for Kenya, observed the mainstream and social media during the 26th October Fresh Presidential Election, and debunked at least eighty incidents.[38]

After the Supreme Court's nullification of the 8th August presidential election results, the CA defended the mobile telecommunication operators who assisted the IEBC in the transmission of election results. The CA stated that cases of transmission failures were not reported to them as per a directive given to all mobile operators, and as such, it was confident that the ICTs deployed would support the transmission process of the fresh presidential poll.[39]

The Media

Generally, there is a vibrant media in Kenya with numerous TV, radio stations, newspapers and publications that enjoy greater space and freedom. The Kenyan

media is largely in the hands of strong and influential media houses and business people with close links to the political elite.

For the 2017 elections, the media was also guided by the *Guidelines for Election Coverage* booklet, which was published by the MCK in collaboration with other organizations. The role of the media was to ensure that citizens were empowered to make informed choices by providing coverage that gave them sufficient, accurate, and reliable information on electoral matters. The media's role was also to ensure that all candidates received fair, balanced, and impartial coverage during the elections. Finally, media's duty to the nation was to prevent and reduce polarization and conflict through the promotion of the rule of law, respect for the constitution, and appropriate functioning of institutions.[40]

During the 2013 elections, the media had adopted a self-censorship approach in its coverage of elections due to the condemnations it received for its perceived role in the botched 2007 elections. During the 2017 elections, media coverage, even though varied, remained largely cautious. The fear of being perceived as sensational, coupled with threats of intimidation and violence against journalists, and threats of potential loss of revenue from lucrative government advertisements generally undermined investigative, in-depth, critical, neutral, and objective coverage and reporting by the media.

Even though the media generally provided coverage of the 2017 elections, the main focus was on the principal presidential candidates – Uhuru Kenyatta and Raila Odinga – and their respective political coalitions. Other presidential candidates and parties received minimal coverage, largely due to their limited financial capacity and political leverage.

ELOG observed competitive televised media debates taking place across the country. These moved beyond the traditional presidential contenders to cover gubernatorial contenders and other candidates in public face-offs and debates on issues that resonated with their campaign platforms and the public. At the presidential level, organized televised media debates that were anxiously awaited flopped at the first instance due to objections raised by the two principal contenders on the rules of procedure, and only materialized later. However, the later organized presidential media debate failed to meet the high threshold of public expectation as it was boycotted by Uhuru Kenyatta, leaving Raila Odinga

to debate alone, it also became segregated with the presidential candidates perceived to be of lesser political leverage debating separately.

Generally, the media coverage largely favoured Jubilee Party and its presidential candidate. This was notably seen in the government sponsored media adverts that promoted Jubilee government and Kenyatta's performance and successes in the previous five years (*GOK delivers*). Doubtless, the adverts raised critical concerns on undue influence and use of public/state resources to advantage Jubilee Party and incumbency. NASA and its presidential candidate were second in respect to coverage.

Media Monitoring for Hate Speech and Inflammatory Language

The Media Monitoring for Hate Speech and Inflammatory Language project formed part of ELOGs observation strategies for the 2017 elections.

In the politically volatile and charged environment since the 2013 elections, a number of high profile political actors had been accused of hate mongering. This incited ethnic tensions that characterized the pre-election environment. This phenomenon had been earlier characterized during the pre-2007 electoral environment and was subsequently flagged out for mention by the Kriegler Report as a catalyst to the post-election conflict in 2007/2008. The ELOG 2013 Observation Report, *The Historic Vote*, also identified hate speech as a major concern in the run-up to the 2013 elections. In both electoral periods, there was no elaborate effort by observers to monitor this activity.

The 2017 mission was therefore the first time that it was being deployed since ELOG was formed in 2010. Its purpose was to track and report hate speech and inflammatory language as disseminated through electronic and print media. The strategy was based on the (NCIC Act 2008) legislation to regulate hate speech, and was informed by the post-election violence of 2007/08. It included an assessment of the spread, degree, and substance of hate speech and inflammatory language in Kenya during the 2017 electoral processes.

According to the NCIC Act, hate speech is defined as

> *something that "uses, displays, publishes, distributes, shows or plays threatening, abusive or insulting words or behaviour (including written material, programs, visual images, recordings or plays), with the intent "to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up."*[41]

Despite social media's increasing influence on election-related processes with internet penetration being at 38.8% with 17.6million users, mainstream media such as print, television, and radio, continues to be the largest source of information for Kenyans. Approximately 83.6% of the population relies on mainstream media for news and information, since they are now covered by the digital broadcasting signal.[42]

ELOG established a monitoring unit of twenty-one monitors who observed fourteen radio stations including four county-based ones which offer their broadcast either in respective local languages or in Swahili, five mainstream TV stations which had a country-wide reach, and four newspapers, three of which were the most widely distributed across the country.

Table 1 Details of Media Outlets Observed by ELOG

Electronic & Print Media	Media Outlets
Radio	Mbaitu FM, Ghetto Radio, Kameme FM, Inooro FM, Radio Ramogi, Radio Citizen, Radio Jambo, KassFM, Chamgei FM, Mulembe FM, Radio Rahma, County FM, Radio Lake Victoria, & Radio Ingo
Print	*Daily Nation*, *The Standard*, *The Star* and *People Daily*
TV	CitizenTV, NTV, K24, KBC and KTN

Source: ELOG HS monitoring report

ELOG assessed hate and inflammatory speech on three levels based on the NCIC Act 2008 definition.

Table 2 Levels of Inflammatory Speech

Categories	Definitions
Somewhat Inflammatory	This was the lowest level of hate speech. It had no call for action but it created a negative image of the targeted victim(s).
Inflammatory	This was the medium level of hate speech. It had a dormant call for action. It included the justification of historical cases of violence and discrimination, casting doubt on admitted historical facts and statements, and also statements of criminality of one ethnic group or another.
Dangerously Inflammatory	This was the highest level of hate speech. It was the most extreme and dangerous kind of speech that had the strongest potential to lead to violence. It was characterized by explicit calls for violence and discrimination.

Source: ELOG HS monitoring report

In total, forty-sxi incidents were reported, assessed and analyzed during the six months of monitoring. Out of these, twenty-three were categorized under the somewhat inflammatory category, eighteen under inflammatory language, while only five were considered dangerously inflammatory.

Table 3 Summary of the Incident Count Monitored in TV, Radio and Print

Categories	TV Media	Radio Media	Print Media	Total Count
Somewhat Inflammatory	05	10	08	**23**
Inflammatory	12	02	04	**18**
Dangerous	01	03	01	**05**
Sub Total	***18***	***15***	***13***	***46***
Grand Total				**46**

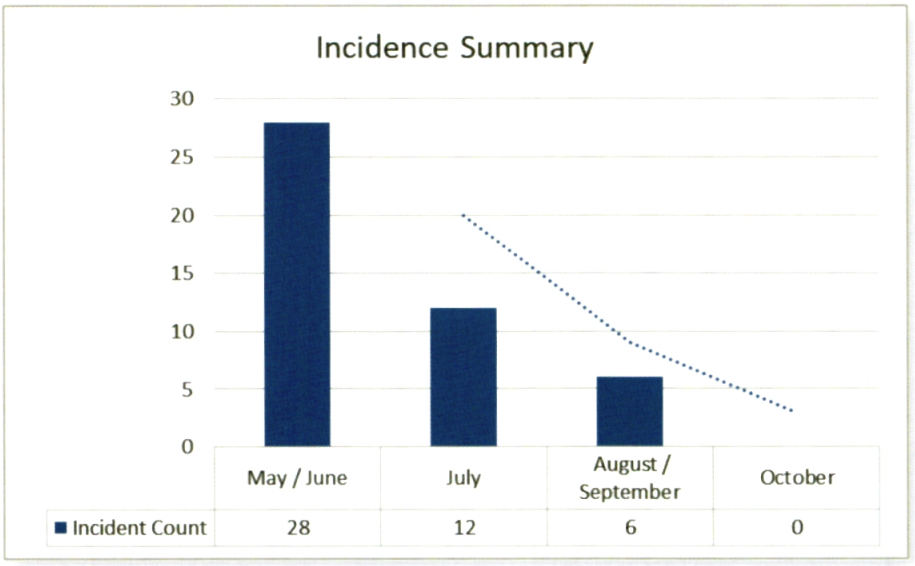
Source: ELOG HS monitoring report

Most incidents reported came from the programs monitored on TV, followed by radio, and finally the print media. Radio produced the highest number of reported dangerous incidents. Most of the reported incidents were perpetrated by political candidates/aspirants and state officers. The most dangerous incident of hate speech was the provocation and incitement of especially local communities by mainly political actors against those they considered to be 'aliens' – a term used to refer minority communities without permanent or traditional roots in the local area. Such incidents were recorded in Eldoret, Kilifi, Nakuru, and Kajiado. In some of these cases, the incidents were followed by distribution of leaflets asking people to leave before the polls.

Notably, a number of reported perpetrators were radio presenters. In one of the incidents, a candidate was ridiculed, insulted, and stereotyped by presenters in a morning program, for shifting parties after losing in the party primaries. The reported act also involved playing mocking songs. Moreover, while in most of the cases the victims were male individuals, there were also cases where the victims were communities or supporters of one party or another. The project registered a single case of a female victim who was targeted using offensive and derogatory language.

Encouragingly, ELOG observed a declining trend in the number of incidents reported from May through to October 2017. In May/June period twenty-eight incidents were reported, in July there were twelve, in August/September, six incidences were reported, while none was observed in October. This could have been attributed to the success of efforts by state and non-state actors in mitigating hate speech, and self-censorship by the respective media outlets.

Figure 2 Summary of Incidence of Hate Speech Prior to 2017 General Elections



Source: ELOG's Compilation

ELOG's Fake News Verification and Debunking Project

The election period fueled the public's hunger for news. In the absence of credible news and information, fake news and misinformation flourished. Fake news, misinformation, and propaganda (a sub-set of fake news) were generated and shared on social media platforms such as Facebook, Twitter, and instant messaging sites such as WhatsApp and Instagram. This contributed to a chaotic environment, which impacted on the process and even the outcome of the election.

While fake news, false reports and other forms of disinformation were normal to Kenyan elections, they however took on new significant dimensions through social media. A study conducted by the communications consulting firms Portland Africa and GeoPoll – May 2017[43] suggested that 90% of Kenyans had seen or heard false news concerning the 2017 elections. The electorate was also inundated with fake news in the period preceding and after the Fresh Presidential Election held on October 26th 2017. Mainstream media also became unwitting purveyors of fake news as they failed to conduct proper scrutiny or verification.

As part of the initiative for open electoral data and processes, ELOG, working in partnership with Code for Kenya, Daystar University journalism students and

PesaCheck[44], were able to quickly verify and fact-check scores of incidents and claims received on e-day ranging from images of children allegedly voting to reports of violence and voter-interference. Using Check[45] developed by Meedan, the team checked claims made on social and mainstream media[46] over a 72-hour period from October 26th 2017, and debunked more than eighty election-related claims drawn mainly from social and mainstream media sources.

Out of this observation, ELOG noted that while rumors, deception, and outright lies were common, fake news took a different approach altogether. It was hyper-personalized and built for a viral effect, in a fast-moving political and electoral situation that proved dangerous to society and the victims. It was also an indicator of political intolerance and hypersensitive attitudes. It propagated political impunity, arrogance and hatred. ELOG believes that effects of fake news can only be countered through expansion of media literacy, accountability for those propagating disinformation on behalf of political actors, wide public access to key electoral data/information to inoculate against fake reports, and a robust media and civil society.

The Police

The National Police Service (NPS) is established under the National Police Service Act (2011) and National Police Service Commission Act 2011[47] of the Constitution of Kenya (2010). It is further broken down into Kenya Police Service, Administrative Police Service, and Directorate of Criminal Investigations. The NPS is under the independent command of the Inspector General. Its functions include compliance with the constitutional standards of human rights and fundamental freedoms, preventing corruption while promoting and practicing transparency and accountability, and striving for the highest principles of discipline and professionalism among its members. Section 24 of National Police Service Act (2011), further outlines the functions of the Kenya Police Service as maintaining law and order, peace preservation, investigating crimes, collecting criminal intelligence, preventing and reducing crime, enforcing laws and regulations under its charge, apprehending offenders, protecting life and property, and performing any other duties that may be dispensed by the Inspector General in accordance to the law.[48]

During the 2017 General Elections, the NPS deployed 180,000 personnel from several security agencies for the 8th August elections and the 26th October Fresh

Presidential Election. The officers were deployed to support the IEBC requirements of provision of electoral security in the 290 constituencies.[49]

Prior, to the August elections, the police had identified certain "hotspots" in the country where they anticipated violence. These were mainly the strongholds of the opposition, NASA. In these areas, large numbers of Kenya's paramilitary units, consisting of Police, General Service Unit (GSU) police, Administration Police (AP), Prisons, Kenya Wildlife Service and National Youth Service were deployed. The heavy deployment in itself raised political tensions and largely contributed to the unrest and violence that followed the announcement of the results. Some of the challenges that the police faced included condemnation on use of excessive force on protesting citizens before and after the 8th August elections, and clamping down on peaceful demonstrations and protests.[50]

Reports by Amnesty International, Human Rights Watch, and the Kenya National Commission on Human Rights, which corroborate some of the accounts given by ELOG observers, indicate that there was use of unlawful and excessive force by the security forces in dealing with the protests and violence. This involved shooting and beating up people to death, conducting illegal house to house searches especially under the cover of darkness, during which the officers committed serious human rights abuses, including sexual violence. The reports document that the death toll arising from security force's brutality could have been as high as sixty-seven people, including children[51]. ELOG noted that this pattern of responding to protesters in the opposition strongholds continued in the period leading to and after the Fresh Presidential Election on 26th October 2017.

These incidents exposed security forces to criticism for bias against NASA, and for meting out terror and repression on demonstrators even in circumstances where they were peaceful. There were also allegations that the police incorporated militia groups in its endeavor to suppress NASA demonstrators.

ELOG observed that there was inadequate public information on police and security deployment and operation. Minimal information also came from the police in terms of explanations on police actions. The reports[52] cited above further indicate that there was also minimal accountability, responsibility, and transparency by the police for their actions. Similarly, the bodies mandated to provide oversight on police actions did not effectively rein in on the police. Hence, the police acted with impunity and in gross violation of human rights.

The National Treasury

The National Treasury derives its mandate from the Public Management Act 2013 and the Executive Order No 2/2013 of the Constitution of Kenya (2010). Among its core mandates is mobilization of domestic and external resources for financing national and county government budgetary requirements.[53] Given its statutory mandate, the National Treasury is critical in the electoral process. IEBC thus heavily relies on the National Treasury to enable it meet its elections budget, timelines and targets.

In 2016, the National Treasury proposed significant budget cuts on the KShs. 45 billion for the IEBC election operation budget, down to KShs. 31 billion. Treasury attributed the budget cuts to the prevailing fiscal strains. IEBC was, however, concerned that a significant reduction of its budget would interfere with its preparations for the general elections as it had increased its number of polling stations by 41%, and sought to register additional 8 million voters by end of the Mass Voter Registration (MVR).[54]

The IEBC stated that through the IFMIS e-procurement process, the Commission would engage in negotiations with both Treasury and parliament to have all funds released in the preceding fiscal year.[55] In July 2017, the Treasury released its pre-election fiscal report in which it was stated that the elections would cost the exchequer KShs. 49 billion. This would include funds for other government bodies and agencies such as the Independent Police Oversight Authority (IPOA), Judiciary, National Intelligence Service (NIS), National Cohesion and Integration Commission (NCIC), and Ethics and Anti-Corruption Commission (EACC). IEBC was allocated KShs. 42 billion out of the total KShs. 49 billion, for the August 2017 elections.[56] The National Treasury disbursed, for the August 2017 elections preparations, KShs. 27 billion in the 2016/2017 FY, and KShs. 22 billion for the 2017/2018 FY. However, due to delays in release of funds, IEBC fell behind its set timelines.[57]

In September 2017, IEBC submitted to the treasury its draft budget (KShs. 11.2 billion) for Fresh Presidential Election, and sought quick release of funds upon approval of the same by parliament. The Treasury also tabled a proposal of KShs. 30 billion budget cut in development expenditure of specific ministries and departments to meet the budget for emerging issues like the unanticipated Fresh Presidential Election. This is how costly Kenyan elections had become in a struggling economy.[58]

Civil Society

The role of the civil society in the democratization process is not a new phenomenon. Civil society played a crucial part in Kenya's 2017 elections by advocating political participation, civic education, pushing for electoral reforms, conflict resolution, peace-building, while monitoring the democratic process, rule of law, and the violation of rights.[59]

Civil society performed checks and balances to ensure that the citizens' democratic rights were not infringed upon by holding the candidates, and that the government was held accountable.[60] Their role also included informing and empowering the citizens about their rights through voter education and human rights advocacy. This encouraged the public to participate in the elections by registering as voters, vying for political seats, and voting.

Civil society also relayed peace messages through the media; acted as watchdogs of human rights violations, and as observers of the campaign process, nominations, and other electoral processes.

Some of the civil society initiatives for the 2017 General Elections and the Fresh Presidential Election included convening:

- A national conference on elections dubbed "Working together towards a credible and peaceful general elections 2017", at Kenyatta International Convention Centre (KICC), Nairobi from 12th to 14th June 2017. Useful resolutions and recommendations that promoted the electoral process emerged from this conference [61]
- A Multi-Sectorial Forum that focused on electoral reforms and promoting peace and national cohesion for peaceful and credible 2017 elections. The Forum also mediated between Raila Odinga and Uhuru Kenyatta, and implored the IEBC to ensure that requisite changes and preparations were made for credible elections to be held; and
- An Open Data Task Force, which focused on enhancing transparency and integrity in the electoral processes through articulating ways of opening up election-related data and information to stakeholders

Civil society faced many challenges in the run up to and after the elections. These included failure by the government to operationalize the Public Benefits Organization (PBO) Act (2013). The Act seeks to provide a more enabling

environment for NGOs, with clear criteria regarding their registration, enhanced accountability, set timelines for processing applications, and tax incentives and benefits for organizations conducting "public benefit activities". Despite its enactment in 2012 and presidential assent on January 14th 2013, the Act has not been operationalized. Several attempts to claw back on the Act were also made by introducing new restrictive amendments.

Civil Society was also targeted, intimidated, and threatened with closure for speaking out against human rights abuse. The controversial government based NGO Coordination Board became the government's tool for harassing, intimidating, coercing, and threatening the Civil Society. Government action against the Civil Society was more pronounced during the elections and appeared to target CSOs that were perceived as sympathetic to the opposition. These included the Kenya Human Rights Commission and the Africa Centre for Open Governance.

National Cohesion and Integration Commission

The National Cohesion and Integration Commission (NCIC) is established under the *National Cohesion and Integration Act (Act No.12 of 2008)*[62] and has the mandate of encouraging national unity through the elimination of ethnic animosity and discouraging incitement to violence and hate speech. NCIC has been keen to investigate and push for the prosecution of those suspected of incitement, hate speech, and the use of insulting or vulgar language.

However, NCIC did not effectively arrest the conflagration of hate speech that destroyed the campaign atmosphere. NCIC was unable to deal with political figures that had become synonymous with inciting the public. The Commission appeared unable to act, despite continued cases of hate speech on social media platforms. Indeed, one of ELOG's key findings in 2013 Election was the failure of NCIC to deal with hate speech.

Kenya National Commission on Human Rights

The Kenya National Commission on Human Rights (KNCHR) is a constitutional body established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya. Article 249(1) of the Constitution outlines KNCHR's mandate. KNCHR is a watchdog over government; it investigates human rights violations, especially those committed by the government and its officials. During the pre- and post-election period, the KNCHR reported on election-related human rights violations

and advocated the prosecution of the violators. In a press statement issued on 12th August 2017, KNCHR reported excessive use of force by the police and violations on the right to life in which twenty-four individuals were killed. KNCHR set up an Electronic Information Management System to capture key human rights issues regarding the misuse of public resources, incitement, bribery, actions and inactions by security organs, unequal access to public resources and facilities, appropriateness, and accessibility of polling venues, violence and security.[63] Subsequently, KNCHR released a report dubbed *Mirage at Dusk: A Human Rights Account of the 2017 General Election*[64].

3.3 Voter Registration

Other than the continuous voter registration, the IEBC conducted a Mass Voter Registration exercise from January to February 2017. It commenced with a seven-day voter education between 8th to 15th January, followed by a thirty-day MVR drive from 16th January to 14th February 2017. ELOG observed the MVR exercise mainly to assess whether it met the international and regional standards on voter registration regarding the transparency of the process, inclusiveness, non-discrimination and accuracy. Even though ELOG noted that the registration process met the above standards, a few hiccups were observed, which, however, did not impact negatively on the overall process.

The mass voter registration exercise attracted a large number of politicians, political parties, and interest groups who were all keen on promoting awareness for the exercise. Sadly, the increased interest by these stakeholders generated an environment of intimidation and threats directed mainly towards persons who had no national identity cards. This is contrary to the electoral laws as it is not mandatory to register as a voter or to vote. There were reports of voter bribery and voter importation during the exercise.

ELOG commended the IEBC for keeping the public updated within the three weeks of registration, by releasing the statistics of voter registration every week. However, ELOG noted that this information was neither broken down to lower demographics nor beyond the county level. ELOG, as a convener of Open Data Task Force on Elections, pushed IEBC to release data in granular forms to enable stakeholders make informed decisions on mobilization and targeting throughout the registration period.

There was a general concern relating to voters who wished to transfer their polling stations. The transfer process was undertaken casually and manually in a way that did not inspire confidence, especially in terms of the safety and security of the transfer forms. The fact that many of those who transferred from one polling station to another could not find their details in the register at the time of inspection confirms this concern.

ELOG was also concerned with the numerous cases of double registration during the voter registration exercise, and quickly raised the matter in their report. It was concerned about the potential risk that came with the failure by relevant stakeholders to correct the problem – and called upon both the IEBC and National Registration Bureau to speed-up the process of addressing the cases, so as not to disenfranchise any eligible Kenyan voter that was affected by the issue. The consolidated register of voters was made publicly available for the biometric voter verification process starting 10th May 2017 and ran until 9th June 2017.

Voters List (Register) Audit

ELOG conducted a computer test audit of the voter's register, which involved undertaking a series of logical tests to analyze an electronic copy of the voters list to determine the degree of errors, registration rates and trends for various demographic groups. The audit was conducted using the KPMG-audited voters register. The register was availed to ELOG by the IEBC, upon request.

Table 4 Summary of ELOG's Findings after KPMG Audit

		Findings By ELOG	Findings By KPMG
1	Total Registered Voters	19,611,423	19,646,673
2	Number of ID/Passport that have Duplicates	81,024	93,548
3	Duplicated ID/Passport Records Plus Surplus Records	169,646	197,677
4	ID Records with More than 8 Numeric Characters in the Field.	44,101	60,853
5	Records with Numeric Characters Only in the Names Field	48	69
6	Records with Letters Only in the ID/Passport Field	568	755
7	Records with a single Name either Primary or Secondary Name Only	11	12
8	Passports whose first Letters did not Start with A, B, C, D or KE	250	6,872

Source: *ELOG's VLA Compilation*

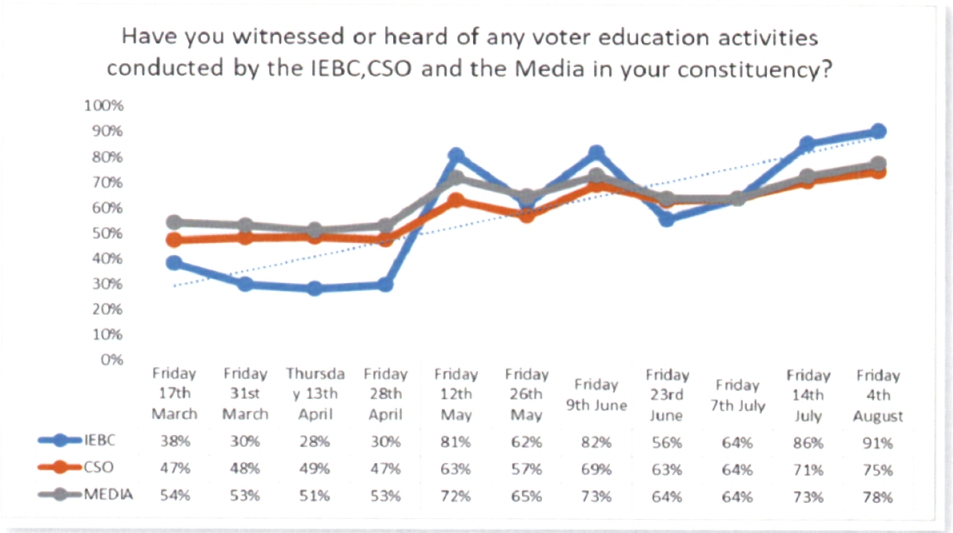
Upon assessing the register of voters, ELOG established that there were errors, inconsistencies, and inaccuracies in the voters' register even after the KPMG audit. The errors were in the ID/Passport field, which was a key field used to identify voters. Thus, IEBC had not fully cleaned up the register, even after the findings of the KPMG audit. This finding was in retrospect vindicated by the number of people whose details could not be found in KIEMS on e-day. In sum, these voters were disenfranchised.

In the run up to the Fresh Presidential Election, ELOG also observed that IEBC publicly shared the voters' register one day to the fresh election. This was in contravention of the spirit of the provisions of the Elections Act that requires adequate time be accorded to the voters to verify their details.

3.4 Civic Education

Using the 290 constituency based LTOs, ELOG monitored the voter education program that commenced on 10th May 2017. The program's objective was to sensitize, educate and mobilize registered voters to verify their registration details before the 9th June 2017 deadline. IEBC recruited and deployed at least 2,900 voter educators at the ward level. The following two info-graphs show the voter education trends as observed by ELOG.

Figure 3 Survey of Civic Education

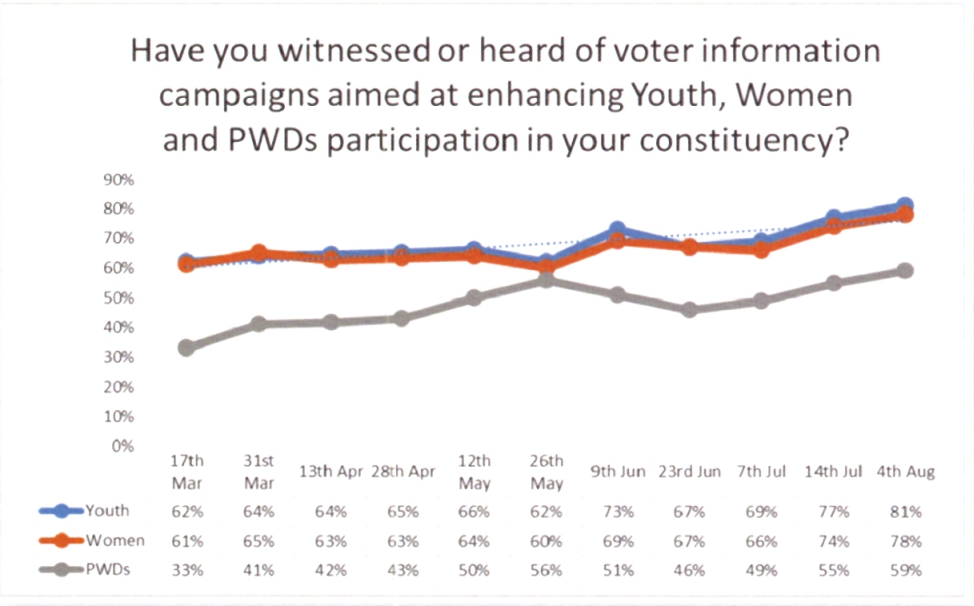


Source: *ELOG LTO Reports Compilation*

The table above shows that voter education began slowly and peaked around the voter verification phase and then close to the elections. On average, IEBC covered 58.9%, Civil Society 59.3% and Media 63.6% of all 290 constituencies in voter education activities. Thus, there was lack of comprehensive voter education campaigns in all parts of the country.

Further, observation on the targeted audiences on voter information aimed at assessing the participation of Special Interests Groups showed that women were more targeted at 68.1% of all constituencies, Youth (66.3%) and PWDs (47.7%) followed. This again was indicative of the fact that Special Interest Groups were not comprehensively targeted, with PWDs receiving the least attention in the country.

Figure 4 Survey of Civic Education among PWD



	17th Mar	31st Mar	13th Apr	28th Apr	12th May	26th May	9th Jun	23rd Jun	7th Jul	14th Jul	4th Aug
Youth	62%	64%	64%	65%	66%	62%	73%	67%	69%	77%	81%
Women	61%	65%	63%	63%	64%	60%	69%	67%	66%	74%	78%
PWDs	33%	41%	42%	43%	50%	56%	51%	46%	49%	55%	59%

***Source**: ELOG LTO Report Compilation*

An enhanced campaign of voter education was adopted by the IEBC in the final voter education drive that ran between 30th June 2017 and 5th August 2017. Besides use of the ward-based voter educators, the commission used live television adverts to mobilize citizens to register and to explain the voting process. The commission also launched a social media programme dubbed 'Y-Vote'[65] targeting seventeen counties.

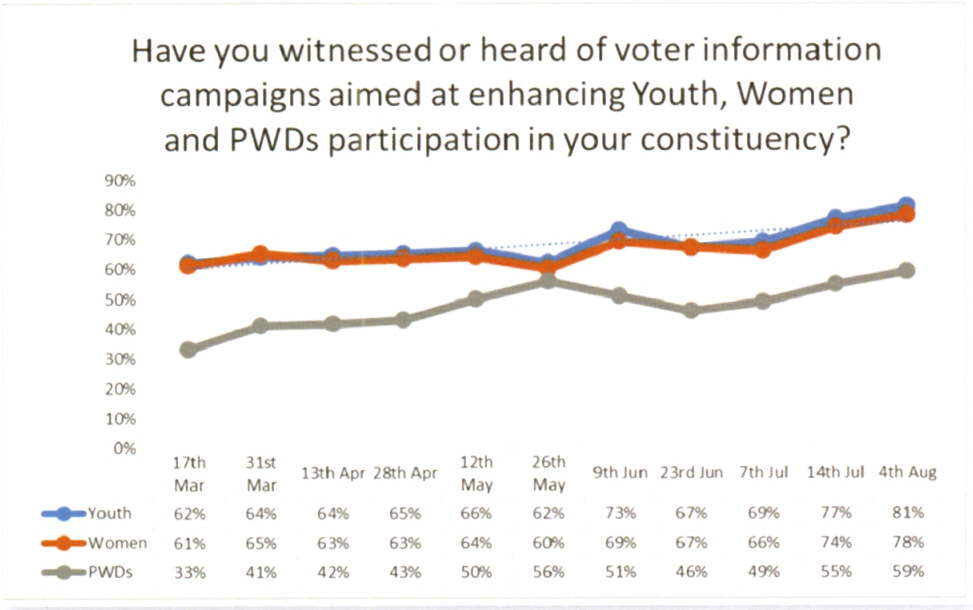
3.5 Elections Campaigns

In May 2017 IEBC announced a ten week official campaign period for the 8th August General Elections, starting from May 30th, 2017 to August 5th, 2017. However, politicians and political parties had commenced campaigns way before the official commencement date of the campaign period.

The IEBC notified all political parties to conduct their party primaries by April 26th and consequently submit their candidate lists by May 10th, 2017. Independent candidates were also directed to submit their names and symbols to the Commission by May 10th, 2017. The IEBC chairperson also stated that no individual seeking to vie as an independent candidate should have been a member of a political party up to three months to the August 8th General Election, thus by May 8th, 2017.

The 8th August 2017 General Elections attracted a total of 14,523 candidates out of 15,082 aspirants. A large number of independent candidates who participated in the elections were initially aligned to political parties, and only ran as independent candidates following their failure to clinch the party nominations. The campaigns thus became tense, which resulted in tough and aggressive competition. Ensuing from the pre-nomination campaigns and as has become the tradition in Kenyan elections, money played a critical role in the attempts to persuade the electorate. Voter bribery was rampant. This resulted to an uneven playing field to candidates with financial constraints.

Figure 5 Survey on Use of Degrading Language to Vulnerable Voters

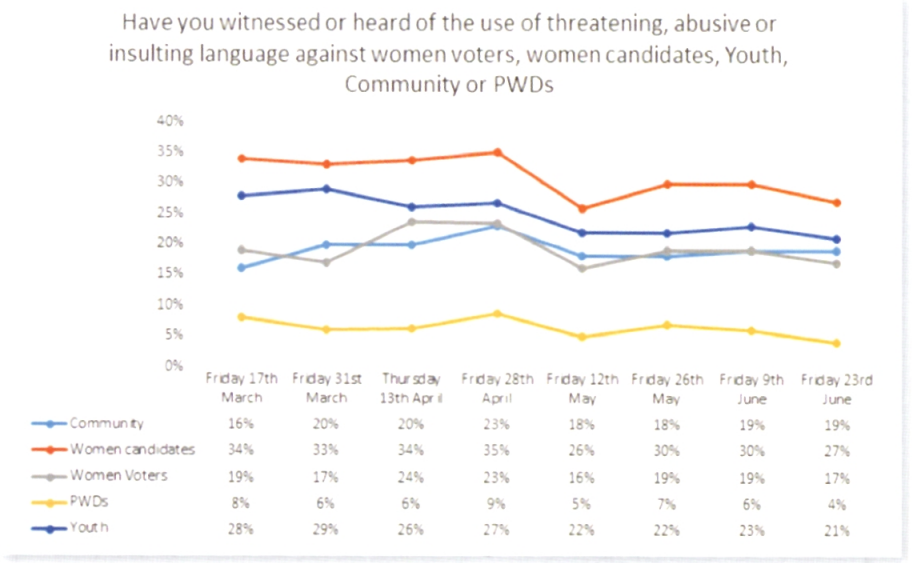


***Source**: ELOG LTO Report Compilation*

In general, parties and candidates campaigned freely and traversed the country to campaign. ELOG observed instances of political intolerance that manifested itself through political zoning in party and ethnic strongholds. Political intolerance degenerated into violence in many instances, which undermined free campaigns, freedom of association, assembly and movement. Cumulatively, these undercut the spirit of free, fair and credible electoral process.

During the pre-election period, ELOG recorded cases of voter bribery, inducement, intimidation, coercion and violence which constituted serious electoral offences. ELOG urged the responsible entities to ensure that such offences were prosecuted so as to bring order to the electoral processes prior to the 8th August, 2017 elections.

Figure 6 Survey of Extent of Bribery in Campaigns



	Friday 17th March	Friday 31st March	Thursday 13th April	Friday 28th April	Friday 12th May	Friday 26th May	Friday 9th June	Friday 23rd June
Community	16%	20%	20%	23%	18%	18%	19%	19%
Women candidates	34%	33%	34%	35%	26%	30%	30%	27%
Women Voters	19%	17%	24%	23%	16%	19%	19%	17%
PWDs	8%	6%	6%	9%	5%	7%	6%	4%
Youth	28%	29%	26%	27%	22%	22%	23%	21%

Source: *ELOG LTO Report Compilation*

With respect forged academic and professional degree certificates and diplomas that some candidates allegedly used to get nominated, ELOG called upon Kenyans to adhere to Chapter 6 of the Constitution and the Leadership and Integrity Act. Similarly, ELOG called upon the Ethics and Anti-Corruption Commission (EACC) and Commission for University Education to be professional when handling the cases.

Regarding the emerging early warning signs in some constituencies, which could foment violence during the elections, ELOG called upon the NCIC, the Police, the DPP, and the IEBC to take decisive action on perpetrators. ELOG further urged for the enforcement of the Electoral Code of Conduct against any candidates instigating violence.

The campaign period for the Fresh Presidential Election commenced on 6th October and ran until 15th October 2017. Jubilee Party mounted their campaigns immediately after the new dates were announced, but NASA wanted reforms at the IEBC before a new election could be called. During the campaigns, Jubilee Party received key opposition figures to their party to strengthen their presence in the opposition zones as was witnessed during various meetings held at State

House in Nairobi. A few of the Jubilee Party losers were also reported to have moved to NASA during the same period.

Advantages of incumbency favored the Jubilee Party in the campaign. Use of state/public resources was conspicuous at national and county levels. State House, Nairobi and other towns became venues for campaigns. Government vehicles and state security were involved in the campaigns, as were public/state officers. Governors openly used county resources and offices to campaign. Campaigns were also carried out during state/public holidays and celebrations, as was the case during the *Mashujaa* Day on 20th October 2017. The government also used campaign occasions to pledge and commission development projects, and issued title deeds to citizens in Mombasa on 8th October 2017.

On its part, NASA seemed uninterested in campaigning. Instead, its focus was on campaigning and mobilizing supporters in its strongholds to boycott the election unless the demands for reforms were met. NASA's campaign messaging rallied around the "no reforms no election" call, besides castigating the IEBC, Jubilee Party, and its presidential candidate. NASA organized public demonstrations in Nairobi and other towns within its strongholds to rally this call across the country. With time, these demonstrations became violent due to confrontations between the protesters and security agencies. Politically sponsored criminal gangs also infiltrated the demonstrations.

On 10th 0ctober, NASA publicly announced that it had written a letter to the IEBC withdrawing its presidential candidate from the Fresh Presidential Election, and called for the poll to be cancelled. This generated a new dimension to the Fresh Presidential Election as it raised the question of whether or not, in the prevailing circumstances, the Fresh Presidential Election should have been cancelled. To consolidate its hardline position on the elections, NASA, on 25th October, publicly announced in a rally in Nairobi that it had transformed itself into a resistance movement whose purpose was to continue resisting what it termed as an illegitimate and repressive government. It also called on its supporters to boycott services and goods from companies that associated with or supported the Jubilee government. In addition, it urged its supporters to boycott the poll by staying at home on e-day.

ELOG's observations during the electoral campaign period depicted a divisive campaign platform characterized by hate speech, suspicion, violence, and

undermining of existing constitutional bodies. A lot of vote buying and use of fake news against opponents remained rampant. These actions especially adversely affected the SIG of women, youth and PWDs; based on our LTO reports, women bore the brunt of abuse and intolerance by political opponents. These instances created unnecessary tension and intimidation across the country and constituted electoral offences. Little was done to apprehend these actions by the relevant bodies.

3.6 Participation of Vulnerable/Special Interest Groups

The Constitution empowers parliament to enact legislation to promote representation of women, PWDs, youth, ethnic minorities and marginalized communities in parliament.[66] The constitution also provides for affirmative action to ensure that youth, minorities and marginalized groups are included in all spheres of the society. Participation of vulnerable or Special Interest Groups is also anchored in Articles 10, 20, 21, 27, 54, 55, 81, 82, 97, 99, 100 and 177 of the Constitution.

In order to observe the participation of SIGs in the political party dispute resolution processes and the campaign period, ELOG deployed 94 SIG observers covering 42 of the 47 counties to monitor and assess the process. The observers were deployed from May to July 2017.

ELOG observed that the IEBC certified voters' register had a record of 19,611,423 million voters, out of which 9,142,275 (47%) were women voters while 9,930,315 (51%) were youth voters.[67] The polls also attracted 14,552 aspirants for all the elective positions, out of which 1,310 (9%) were women, 1,892 (13%) were youth, and 37% were PWDs.

During the campaigns, accessible formats for electoral information for PWDs declined from 51% in May to 47% in July. Accessible voter education materials for PWDs, which were at 24% when the campaigns began, dropped to 21% mid-campaigns, and rose to 28% towards the end of the campaign period. Accessibility of campaign venues for PWDs was 61% in May and gradually increased to 69% in August. Throughout the observation period, cases of violence and intimidation targeting SIGs ranged from 4% to 8% of the 42 counties where the observers were deployed.

Use of violence against women and other SIGs were reported during the campaign period in Elgeyo Marakwet, Nyeri, Kakamega, Siaya, Bomet, among other counties. The violence was used to scare SIG candidates from campaigning.

In the 2017 General Elections, SIG candidates were elected and nominated to the National and County Assemblies. Three women won the gubernatorial seats for Kitui, Kirinyaga and Bomet. Three women were also elected to the Senate seats in Uasin Gishu, Nakuru, and Isiolo counties, unlike in 2013 when no woman clinched the gubernatorial or senate seat. Igembe South Constituency elected the youngest Member of Parliament, at the age of 23 years. Nandi County also made history by electing the youngest governor, at the age of 34 years. Thirty seven aspirants were PWDs, out of whom eight were elected. Among PWDs who were nominated by their parties included two Members of the National Assembly,[68] one Woman Representative, two Senators[69] and forty four Members of County Assembly (MCAs).[70]

Participation of Diaspora Voters

The IEBC designated Bujumbura in Burundi, Arusha and Dar es Salaam in Tanzania, Kigali in Rwanda, Kampala in Uganda and Pretoria in South Africa as centres for diaspora voter registration. IEBC then conducted voter registration at these centres from 20th February 2017 to 6th March 2017. At the close of the registration exercise, there was a total of 4,393 voters in the diaspora: Tanzania (1,377), Uganda (1,184), Rwanda (875), Burundi (164) and South Africa (793). The diaspora voter verification process started on 15th May, 2017 and ended on 30th May, 2017. IEBC confirmed the diaspora numbers as captured during the registration exercise.

During the 8th August 2017 General Elections, only 2,844 Kenyans in the diaspora voted. For the 26th October 2017 election, 1, 361 Kenyans in the diaspora voted: Tanzania (325), Uganda (385), Rwanda (286), Burundi (52), and South Africa (313).

Participation of Prisoners

Participation of prisoners in elections is founded on the judgment in Petition No. 574 of 2012 *Kituo Cha Sheria vs Independent Electoral and Boundaries Commission and 3 Others [2013] eKLR; the* Election Law (Amendment) Act of 2016, which ensured that prisoners were registered as voters and while in prison, they could exercise their right to vote in the 8th August 2017 General Elections. The Legal Resource Foundation (LRF), a member organization of ELOG, specifically focused

on observing voting in eleven prison institutions; Athi River, Kamiti Maximum, Kangeta, Nakuru Main, Nakuru Women, Nairobi Remand and Allocation (NRAP), Kiambu, Kitui Main, Kitui Women, Migori Main, and Migori Women.[71]

Although the 5,528 prisoners registered to vote from the 103 polling stations in the prisons were generally accorded the opportunity to vote, the LRF observed a general lack of targeted voter education for prisoners. This led to many spoilt and rejected votes; the voter identification process took long; the manual register was not present in prisons; there were no political party agents for the presidential candidates; and most inmates did not have their IDs. All these disenfranchised them.

IEBC conducted voter registration in prisons to allow eligible prisoners to vote. This happened in 117 prisons countrywide within the 20th - 27th February 2017 period, registering a total of 5, 528 voters. During the 8th August 2017 Elections, there was no segregated data for prisoners registered as voters; hence it was difficult to determine the turn-out. For the 26th Fresh Presidential Election, 2, 055 registered voters in prisons voted.

3.7 Conclusion

The pre-election environment was extremely competitive, difficult, and tense. There were instances of political acrimony, electoral malpractices including intimidation, insecurity, and violence. However, key duty bearers especially the IEBC and the Judiciary showed resilience and commitment, and ensured that the necessary preparations were in place for the general elections and the Fresh Presidential Election. At the same time, the mandate and roles of many of the key duty bearers in elections, other stakeholders and actors including the civil society, were undermined by intense political pressure, intimidation and lack of political will.

The legal framework, even though fairly comprehensive, did not help much as the laws were also undermined through lack of strict implementation, late amendments, claw-backs and numerous lawsuits. The disbandment of ETAC[72] pursuant to a court order, happening too close to the elections, affected the trust that many stakeholders had invested in the Commission's ability to properly manage technology, which was worsened by the killing of the IEBC ICT Manager, Chris Msando. The phenomenon of fake news added another

angle of intolerance and hypersensitive political attitudes, and perpetuated political impunity, arrogance, and hatred. Therefore, a vulnerable pre-election environment emerged with adverse effects on both the preparations for and conduct of the 2017 Elections emerged. The environment was also characterized by a general lack of information and exclusion of some stakeholders in critical electoral processes

Endnotes

1. ELOG had recommended that an immediate audit of the legal provisions be made after the 2013 elections for onward forwarding to parliament for the necessary changes
2. https://citizentv.co.ke/news/uhuru-to-assent-to-election-law-amendment-bill-after-senate-nod-178287/
3. A detailed analysis of the impact of uncontrolled money in Kenya's elections, see Kennedy Masime and Charles Anderson Otieno, "Money in Politics: Financing of the Kenya 2007 General Elections" in Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections, Karuti Kanyinga and Duncan Okello (Eds.), 2010, Society for International Development (SID)/Institute for Development Studies (IDS), University of Nairobi. Pg.459
4. http://www.nation.co.ke/news/IEBC-caps-political-aspirants-party-expenditure-in-2017-polls/1056-3340778-sxtd31z/index.html
5. The Standard Newspaper. "IEBC ICT Manager Chris Msando was killed because of elections, says Raila [Odinga]" https://www.standardmedia.co.ke/article/2001251947/iebc-ict-manager-chris-msando-was-killed-because-of-elections-says-raila. Accessed on 25th January, 2018.
6. NASA had demanded the sacking of Commissioner Prof. Guliye, who headed the Subcommittee on Research, Strategy and ICT; Chief Executive Ezra Chiloba; ICT Director James Muhati; Voter Registration and Electoral Operations Director Immaculate Kassait; Director of Legal Affairs Praxedes Tororey, and; Deputy CEO and Head of Operations Betty Nyabuto. NASA made the demands at public rallies before and after the Supreme Court's full judgment that nullified the 8th August 2017 presidential election
7. See https://www.standardmedia.co.ke/article/2001256985/iebc-replies-to-national-super-alliance-on-its-demands.
8. For details of NASA's irreducible demands, see https://www.kenya-today.com/opinion/updated-list-raila-nasa-demands-irreducible-minimum-elections.
9. Available at http://kenyalaw.org/caselaw/cases/view/141808/
10. The IEBC's decision to recruit returning officers and issue a gazette notice to that effect without consultation with political parties as required by law nearly derailed the fresh presidential election when the matter was challenged at the High Court and the High Court found that the gazette notice was illegal. This was on 25th October, just a day before the scheduled election on 26th October. The IEBC panicked and rushed to the Court of Appeal with an application for stay of the High Court orders. 25th October was a public holiday and somehow three Court of Appeal Judges were mobilized to sit and hear the application very late on that day. The Court of Appeal issued an order of stay at around 5.00 pm in the evening thereby rescuing the IEBC from the mess.
11. Article 4, Constitution of Kenya, 2010.
12. Articles 91 & 92, Constitution of Kenya, 2010.
13. Office of the Registrar of Political Parties, "The Political Parties Act in a Nutshell", 2014.
14. http://www.orpp.or.ke/index.php/en/extract-of-the-report-on-the-analysis-of-the-okoa-kenya-initiative
15. https://www.standardmedia.co.ke/article/2001228609/political-parties-blame-iebc-over-voter-registration
16. http://mobile.nation.co.ke/news/politics/Parties-want-March-27-deadline--put-off/3126390-3859220-format-xhtml-145p21hz/index.html
17. https://www.standardmedia.co.ke/m/article/2000226108/political-parties-oppose-campaign-financing-rules.
18. https://www.capitalfm.co.ke/news/2017/05/close-5000-independents-cleared-rpp

19. The Star Newspaper. "Relief for Parties after High Court Extends Nomination Deadline to May 1." https://www.the-star.co.ke/news/2017/04/24/relief-for-parties-after-high-court-extends-nominations-deadline-to_c1548976.
20. Under Article 163 of the Constitution, the Supreme Court is bestowed with the jurisdiction to hear and determine presidential election disputes. Other disputes related to the elections of governors and members of parliament shall be determined by the High Court. Decisions of the High Court can be appealed against at the Court of Appeal while decisions of the Court of Appeal can be appealed against at the Supreme Court. The Constitution further provides that the Chief Justice can designate a Resident Magistrate Court to hear and determine election petitions questioning the validity of a Member of County Assembly (MCA). Subsequent appeals are presented before the High Court for determination.
21. Details of the Judiciary's preparedness can be found at http://eaclj.org/general/237-preparedness-of-the-judiciary-in-handling-elections-disputes.html
22. http://www.werutv.co.ke/iebc-fighting-300-court-cases-august-8th-polls/
23. https://www.iebc.or.ke/uploads/resources/UUaCk0NJJL.pdf
24. A Jubilee Party MP for Nyeri Town Constituency, Ngunjiri Wambugu, lodged a petition with the Judicial Service Commission seeking to remove the Chief Justice from office on account of gross misconduct. He claimed that the Chief Justice had allowed the Judiciary to be taken hostage by the opposition and individuals thereby orchestrating a judicial coup against the re-election of Kenyatta This petition is still pending determination. Another petition was lodged by the CEO of Mombasa based Angaza Empowerment Network, Derrick Ngumo, seeking to remove two other Judges of the Supreme Court including the Deputy Chief Justice on the ground of gross misconduct and breach of the Judicial Service Commission core values of conduct. The petitioner claimed that the two judges were in contact with the opposition NASA prior to and during the hearing of the NASA petition to annul Kenyatta's election. The petition is still pending determination
25. Daily Nation. "Treasury CS Raids Judiciary Coffers to Fund Presidential Poll," https://www.the-star.co.ke/news/2017/04/24/relief-for-parties-after-high-court-extends-nominations-deadline-to_c1548976. Accessed on 23rd January, 2018
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38. https://medium.com/meedan-updates/checking-kenyas-election-eb3dbdfab535
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47. http://www.nationalpolice.go.ke/pages/search.html
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CHAPTER 4

Observation and Findings of the 8th August 2017 General Elections

This Chapter shares the findings and analysis of the 8th August 2017 General Elections based on the deployed observation teams. As explained earlier, ELOG deployed both Parallel Vote Tabulation and General Observer missions on the elections day.

The findings are shared using info-graphs and statistics drawn from analyses of observation data submitted by field teams. During the elections, ELOG issues statements that reported findings on the opening and set-up of polling stations, voting closing and counting and finally on the results from the stations observed. Using a nationally representative sample of polling stations, ELOG was able to make projections of the official results.

The Chapter concludes with the ELOG analysis and opinion on the conduct of the elections based on the findings shared.

4.0 Introduction

For the 2017 general elections, ELOG deployed and received field reports from 1,692 PVT observers, 5,083 general observers, and 274 tallying centre observers. ELOG also engaged 580 constituency supervisors to coordinate activities in respective constituencies.

ELOG deployed three methods of collecting data during the 8th August general election day. First, the general observers, with a wider spread across the country, ensured that information (including incidences) from all the parts of the country was collected and assessed. Second, the PVT deployment, which was based on a national representative sample, further collected e-day data that was assessed and analyzed to enable ELOG make quality assessments of the e-day processes, and generate projections of the results for the presidential and the governors' vote in three selected gubernatorial elections in Meru, Busia, and Nairobi. Finally, Tallying Centre Observers (TCO) were also deployed in 274 constituency tallying centres to collect and confirm election results forms.

All these methods complemented each other and were used to corroborate information gathered on the election process. Based on a combined analysis of the data collected using the three methodologies of data collection, ELOG did a broad assessment and analysis that gave a global but succinct picture of its observation of the e-day processes and provided precise projections for the presidential and three selected gubernatorial elections results.

4.1 The 8th August 2017 Elections Day Findings

The PVT was deployed based on a representative sample of the total tally of polling stations in the country. Information collected using the PVT was analyzed to give a national picture regarding the conduct of the August 8th election processes, including making projections on the presidential and three selected gubernatorial elections results. The PVT relied on sample and margin of error calculations to project each result. The PVT sampling distribution by county is annexed to this report as Appendix 4. General observers and tallying centre observers complemented the PVT deployment. In analyzing the data, ELOG used the PVT data for the 2013 general elections day findings for comparative purposes. This enabled ELOG to make informed assessments on any improvements on the quality of the election processes.



Figure 7 Opening of Polling Stations and Commencement of Voting

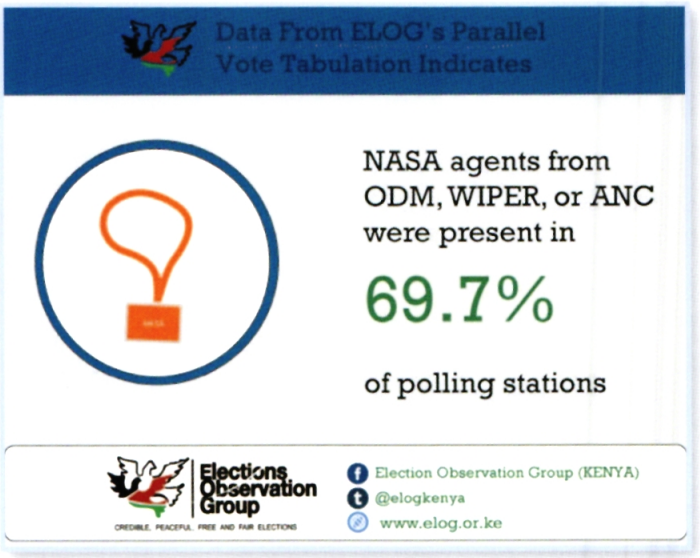
Source: *ELOG Compilation*

Management of the Polling Stations

ELOG established that 33.2% of the presiding officers were women. Counties with the highest percentage of women presiding officers, at over 50% each, were Vihiga, Kirinyaga, Murang'a, and Nairobi.

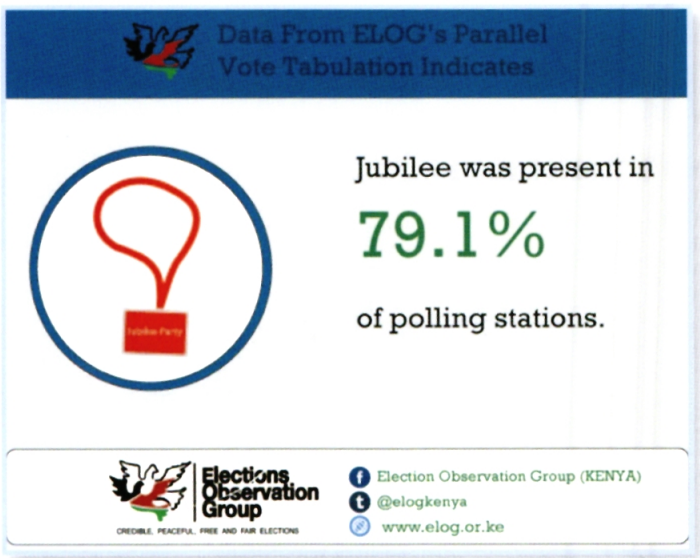
Figure 8 Presence of NASA Party and Candidates Agents at Polling Stations

Figure 8 shows that NASA agents (ODM, Wiper, ANC or Ford Kenya) were present in 69.7% of the polling stations.



Source: *ELOG Compilation*

Figure 9 Presence of Jubilee Party and Candidates Agents at Polling Stations



Source: *ELOG Compilation*

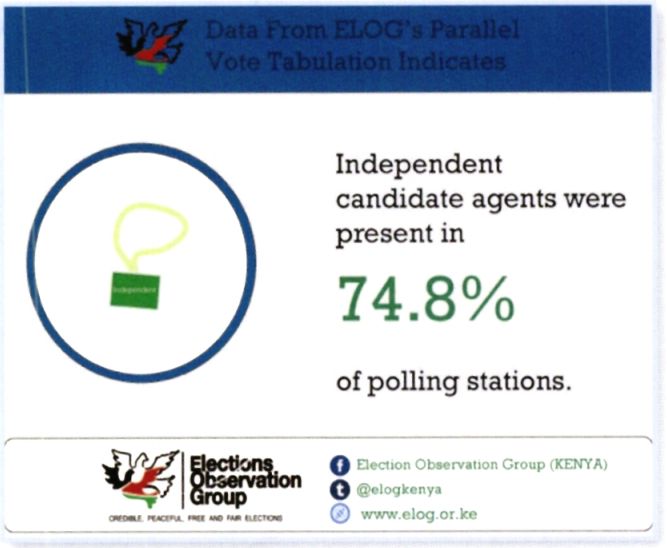


Figure 10 Presence of Independent Candidates Agents at Polling Stations

Source: *ELOG Compilation*

Figure 10 shows that agents for independent candidates were present in 74.8% of the polling stations.

Presence of Strategic Materials for Elections

An overwhelming 99.3% of the polling stations had the Kenya Integrated Elections Management System (KIEMS) kits. This is an improvement from 2013 general elections where only 92% had their equivalents. Majority of polling stations (94.5%) had the requisite strategic materials (ballot boxes, ballot papers, IEBC stamp, indelible ink, copy of voter register and the Results Form 34(A)). This is, however, deterioration from 2013, when 99.4% of polling stations had these materials. In 4.2% of polling stations, the manual voter register was missing.

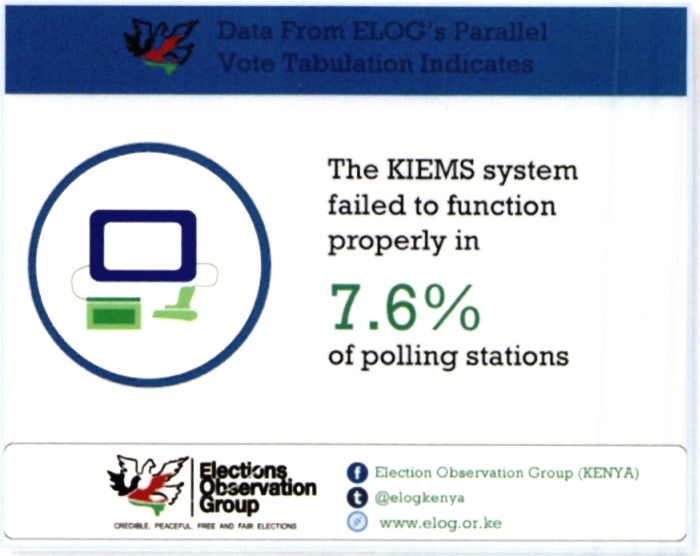
Observation of the Voting Process

In 99.6 % of the polling stations observed, the ballot boxes were shown to be empty before being sealed. In 99.3% of polling stations, ballot papers were stamped with the IEBC official stamp before being issued. This is consistent with the 2013 elections when ballots were stamped in 99.3% of the polling stations.

Voters' fingers were marked with indelible ink in almost all of the polling stations, representing (99.3%). This is consistent with the 2013 observation, which indicated that in 99.9% of the polling stations voters' fingers were marked.

In 7.6% of the stations, the KIEMS kits failed to function properly. This was a major improvement from the 2013 process where the identification devices failed in 54% of the polling stations.

Figure 11 Percentage Failure of KIEMS Kit



Source: *ELOG Compilation*

In 49.2% of polling stations some people (1-25) were not permitted to vote. Many of these cases were as a result of voters visiting the wrong polling station, voters not verified in the KIEMS, or voters failing to carry the identification document used when they registered.

In 41.2% of the polling stations, many (mainly women) people (more than 25 per polling station) were assisted to vote. Of these polling stations where assistance to vote was given, the assisted voters were, however, not allowed to have a person of their choice helping them in 11.5% of the polling stations. Nonetheless, the secrecy of the ballot was not violated in 91.7% of the polling stations (not including those assisted to vote). This is an improvement from 2013, when secrecy was not violated in only 82.7%.

There were queues at 5:00 p.m. in 68.9% of polling stations. Of those stations with a queue at 5:00 p.m., 95.3% were properly permitted to vote.

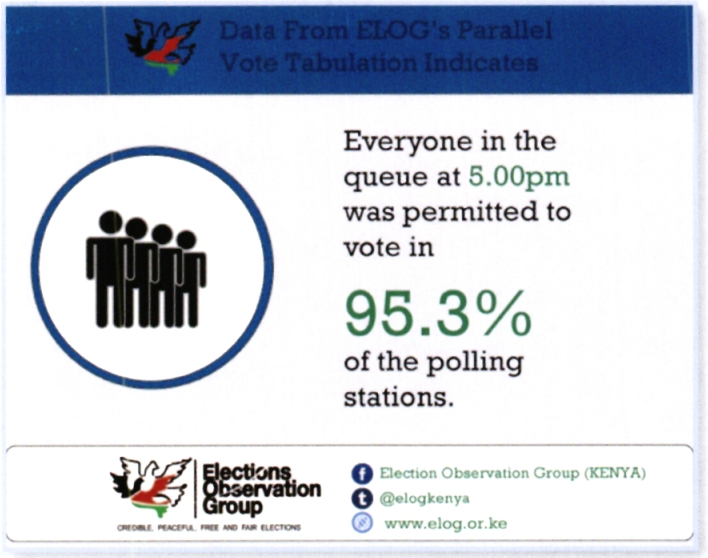


Figure 12 Queues After Hours

Source: *ELOG Compilation*

Observation of Closing and Counting of Votes

In 4.9% of stations, one or more political party agents requested a recount of the presidential ballots. This is a deterioration from 2013 when a recount was requested in only 2.8% of the polling stations.

For the closing and counting process, ODM, WIPER, or ANC party agents (representing the NASA coalition) were present in 84% of all the polling stations. In stations where they were present, the NASA agents signed the declaration of results for the presidential elections in 93.8% of these polling stations (as compared to 94.9% in 2013).

For the closing and counting process, a Jubilee Party agent was present in 92.3% of all the polling stations. In stations where they were present, the Jubilee Party agents signed the declaration of results for the presidential elections in 95.8% of these polling stations (as compared to 95.6% in 2013).

Independent candidates' agents were present in 78.7% of all the polling stations. In stations where they were present, the agents signed the declaration of results for the presidential elections in 88.7% of these polling stations.

In 86.5% of the polling stations, a copy of the Presidential Results Form (Form 34A) was publicly affixed outside (as compared to 89% in 2013).

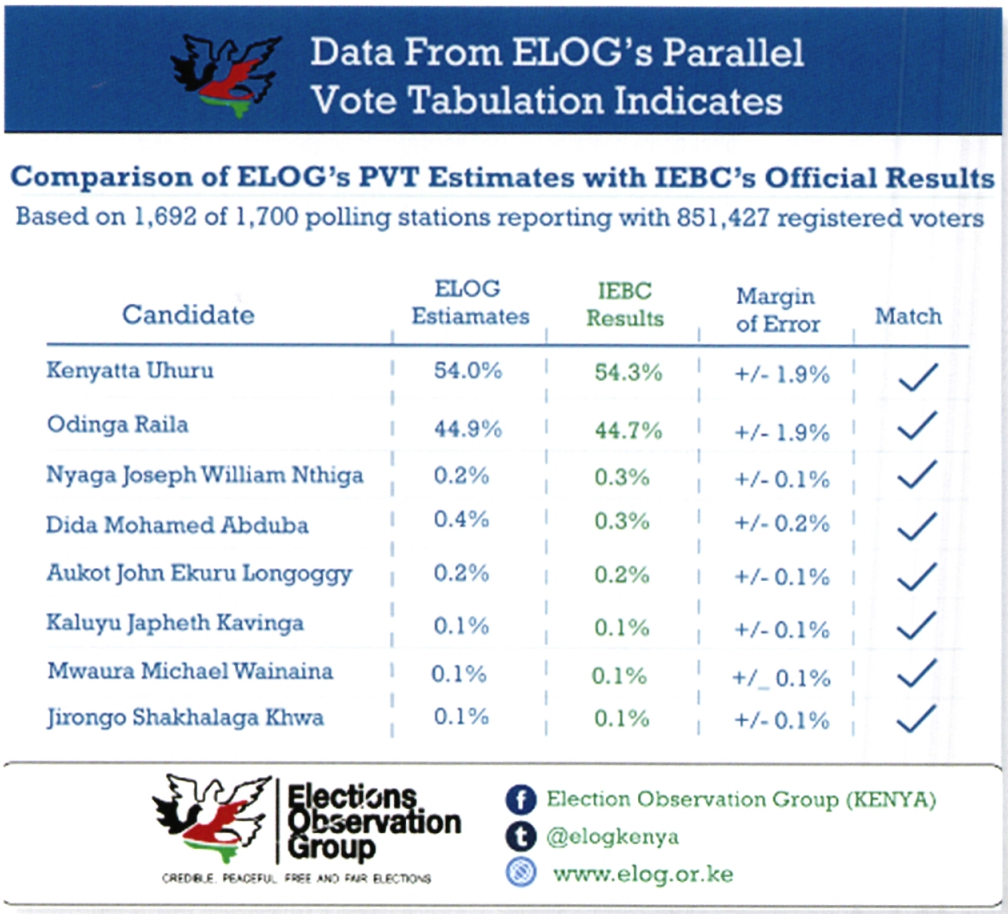
Voter Turn-out

ELOG further projected the voter turnout at 77.4% with a margin of error of +/- 0.5%, while the rejected ballots at 0.6% with a margin of error of +/- 0.1%.

Analysis of the 8th August Presidential Election

In its preliminary statement after IEBC's announcement of results, ELOG reiterated that the IEBC was the body constitutionally mandated to announce and declare the *final, official* results of the elections. The analysis of ELOG's PVT results projections based on the observation indicated that ELOG's estimates were consistent with the IEBC's official results for the August 2017 presidential election. Below are the ELOG PVT projected ranges for each of the presidential candidates.

Figure 13 ELOG's PVT Estimates Compared with IEBC's Official Presidential Results



ELOG PVT Projections

The above ranges were determined by the calculated margins of error. Given our assessment of the e-day processes, ELOG confirmed that the IEBC figures were within the projected ranges. The PVT projections therefore corroborated the IEBC official result for each presidential candidate.

Announcement and Declaration of Results

The IEBC chairperson, who was the National Presidential Returning Officer, declared Uhuru Kenyatta as the duly elected President of the Republic of Kenya on 11th August 2017, with a total of 8,203,290 votes. Raila Odinga closely followed him with 6,762,224 votes. According to the results, Uhuru Kenyatta had crossed the constitutional threshold of 50%+1 of the total votes cast and at least 25% of votes in twenty four counties. Uhuru also polled over 25% of votes in thirty five counties, while Raila Odinga polled 25% in twenty nine counties.

NASA contested the results, alleging that the IEBC results management and transmission system had been hacked and presidential results compromised. NASA rejected the results and moved to the Supreme Court to file a petition. The IEBC responded by categorically denying that its systems had been hacked and the results compromised. The Commission also stated that the results on its portal were provisional and the final tally would be released after receiving and validating all Forms 34A and 34B. However, at the time of declaring the final results, the IEBC could not account for all the Forms 34A and 34B.

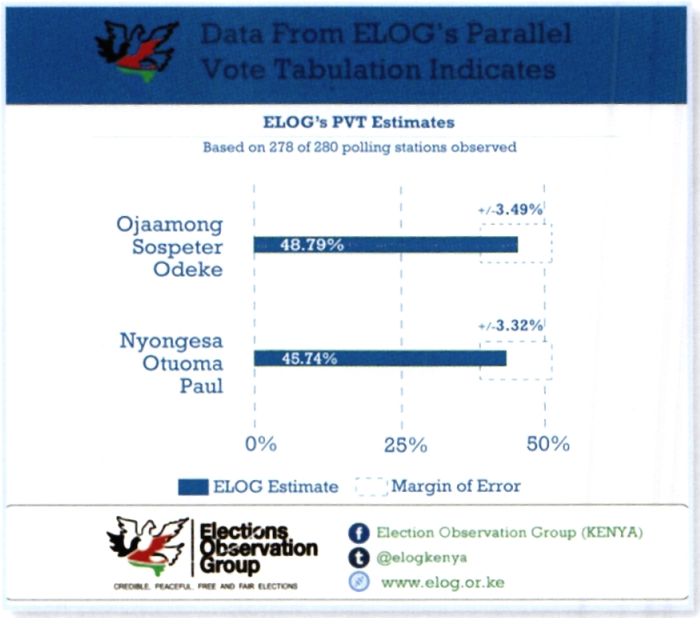
Observations of Gubernatorial Elections

ELOG also observed gubernatorial elections in three counties, whose details are captured below.

Busia County

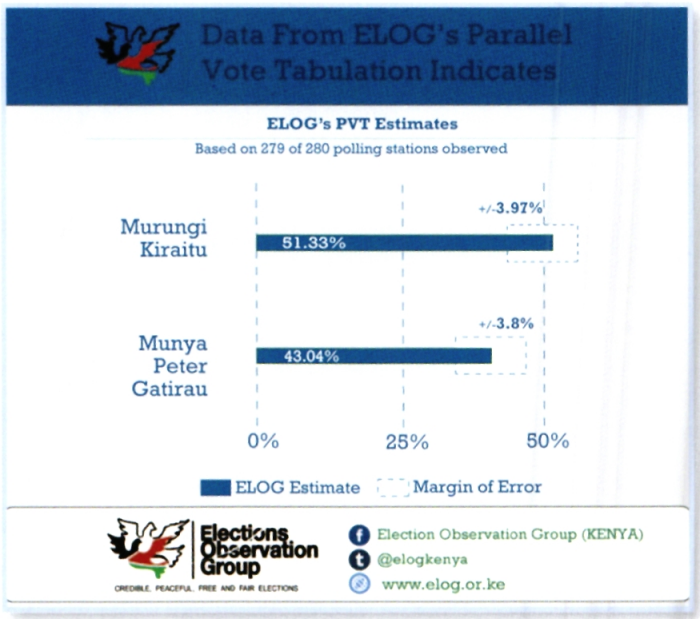
ELOG received data from its 99.3% of the PVT observers deployed in Busia County. The data projected that Ojaamong, Sospeter Odeke garnered 48.79% with a margin of error of 3.49%, while Nyongesa, Paul Otuoma polled 45.74% with a margin of error +/-3.32%. The IEBC's official results were consistent with the ELOG's projections, although the estimates for the top two candidates fell within the margins of each other (overlapped). Therefore, ELOG could not definitively verify the winner in such a case because the contest was too close to call.

Figure 14 Gubernatorial Results in Busia County



Source: *ELOG Compilation*

Figure 15
Gubernatorial Results in Meru County

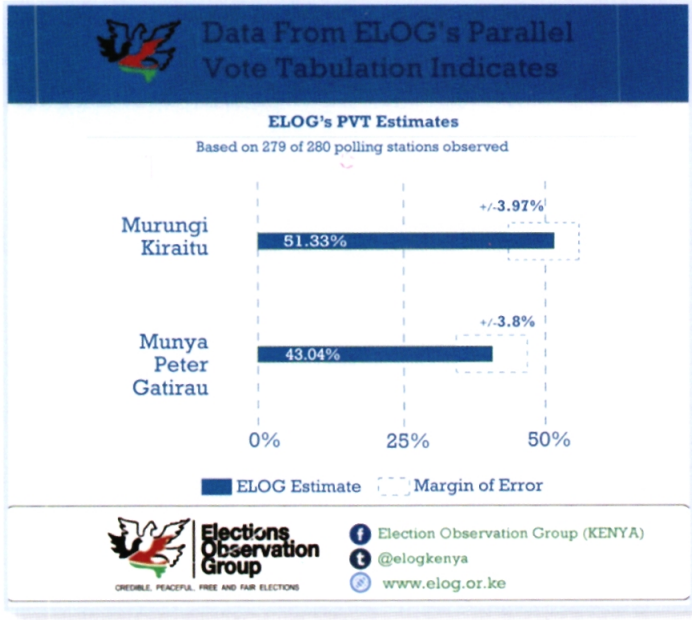


Source: *ELOG Compilation*

Meru County

According to data from 99.6% of the PVT observers, Murungi, Kiraitu garnered 51.33% with a margin of error of +/- 3.97%, while Munya, Peter Gatirau got 43.04% with a margin of error of 3.8%.

Figure 16
Gubernatorial Results in Nairobi County



Source: *ELOG Compilation*

Nairobi County

According to data from 99.6% of the PVT observers, Kioko, Mike Sonko Mbuvi Gideon garnered 52.75%, with a margin of error of +/- 2.86%, while Odhiambo, Evans Kidero garnered 43.63%, with a margin of error of +/- 2.91%.

Constituency Tallying Centre Findings

ELOG deployed 274 observers to 274 constituencies tallying centers to observe and report on the presidential tallying process. ELOG received 161 complete responses, including seventy nine copies of Form 34B from these observers. The observer reports generally indicated that the tallying process went on smoothly, and that the results from FORM 34Bs that they collected corresponded with the results as declared by the commission. However, there were few cases of discrepancies noted in a few constituencies, as depicted in the table below.

SOURCE	COUNTY	CONST	REGISTERED VOTERS	AUKOT	DIDA	JIRONGO	KALUYU	UHURU	MWAURA	NYAGAH	ODINGA
ELOG Obtained 34B	NYANDARUA	KIPIPIRI	50416	19	13	16	16	43385	16	16	217
ELOG Checklist	NYANDARUA	KIPIPIRI	50416	16	11	15	14	35225	12	12	195
IEBC Final	NYANDARUA	KIPIPIRI	50416	19	13	16	16	43385	16	16	217

County: Nyandarua, Constituency – Kipipiri

SOURCE	COUNTY	CONST	REGISTERED VOTERS	AUKOT	DIDA	JIRONGO	KALUYU	UHURU	MWAURA	NYAGAH	ODINGA
ELOG Obtained 34B	MACHAKOS	YATTA	73995	152	80	103	163	7075	149	380	48253
ELOG Checklist	MACHAKOS	YATTA	73995	152	80	103	133	7075	149	380	48253
IEBC Final	MACHAKOS	YATTA	73995	153	79	103	113	7239	95	380	48273

County: Trans Nzoia, Constituency – Kwanza

SOURCE	COUNTY	CONST	REGISTERED VOTERS	AUKOT	DIDA	JIRONGO	KALUYU	UHURU	MWAURA	NYAGAH	ODINGA
ELOG Obtained 34B	MACHAKOS	YATTA	73995	152	80	103	163	7075	149	380	48253
ELOG Checklist	MACHAKOS	YATTA	73995	152	80	103	133	7075	149	380	48253
IEBC Final	MACHAKOS	YATTA	73995	153	79	103	113	7239	95	380	48273

County: Machakos, Constituency Yatta

Source: *ELOG TCO Report*

Despite the few discrepancies, however, ELOG did not find any widespread or systematic aberrations that could upset the declared outcomes.

The Supreme Court Petition and Impact of the Nullification

The Supreme Court heard and determined, within fourteen days, the petition challenging Uhuru Kenyatta's win. The Supreme Court annulled the presidential election results, citing illegalities and irregularities on the electoral process, and determined that the election had not been conducted in accordance with the law. The opposition hailed the ruling as historic and precedent-setting in Kenya and Africa. In equal measure the ruling was sharply criticized by the ruling Jubilee Party members.

The Supreme Court's ruling came as a surprise to many international media, diplomatic missions, organizations, international and domestic observers who had earlier endorsed the elections based only the e-day voting and counting process. These actors were criticized for endorsing the election results before the process of the elections was complete. Statements by the Carter Centre Mission leader John Kerry that the process was "free, fair and credible" despite "little aberrations here and there" were widely cited as an example of premature approval. The media had many articles on how the observers had misunderstood the situation on the election process, and ended up endorsing deeply flawed elections[1]. Local civil society actors dismissed international observers in particular as 'elections tourists' who were not conversant with the countries processes and nuancing of elections.

ELOG was not spared either, with a number of actors, especially the media, misconceiving its PVT preliminary findings as supporting the IEBC outcomes[2]. Consequently, many of the early observers were compelled to either explain their reports and methodology[3] or completely recant their earlier positions.

4.2 Conclusion

Overall, ELOG's assessment of the 8th August 2017 e-day processes, based on the independent observation findings, indicated that IEBC official presidential results were within the ELOG PVT projected ranges, thus ELOG's PVT results corroborated the IEBC official result for each candidate considering the corresponding margins of errors. The consistency between the IEBC official results and ELOG's PVT projections was also observed in the three gubernatorial elections in Busia, Meru, and Nairobi counties that ELOG selected for observation.

ELOG's observation of the e-day processes indicated that there was a general improvement of the management and conduct, as compared to 2013. For instance, the KIEMS identification system (then EVID) failed in 54% of the total polling stations in 2013 compared to 7.6% in 2017. Few incidences were also recorded by all ELOG observers and generally the exercise was better coordinated. In sum, ELOG did not record any serious, systematic and/or planned pattern of aberrations that could have impinged upon the integrity and credibility of the elections day processes.

Following the annulment of the presidential election on 1st September, 2017 and the direction that Fresh Presidential Election be held within sixty days of that date, a number of events and political activities took place whose sum total had the potential to put the electoral process into a tailspin. The nullification highlighted the role and place of observer missions and the scope needed for effective observation. The key emerging issues included the need for greater attention to procedures such as verification of strategic materials and comprehensive observation of the transmission of results process.

Endnotes

1. https://qz.com/1068521/kenya-elections-deeply-flawed-questions-foreign-observers/https://www.the-star.co.ke/news/2017/09/26/free-and-fair-why-the-foreign-election-observers-got-it-wrong_c1633166, and; https://www.standardmedia.co.ke/article/2001253412/supreme-court-decision-leaves-observers-with-an-egg-on-their-face
2. http://www.nybooks.com/daily/2017/08/30/kenya-the-election-and-the-cover-up/
3. https://www.standardmedia.co.ke/article/2001253412/supreme-court-decision-leaves-observers-with-an-egg-on-their-face

CHAPTER 5

The 26 October Fresh Presidential Election

In this chapter, as in the previous, ELOG shares its findings of the Fresh Presidential Election giving analyzed data from observation reports submitted by the field teams.

Having expanded the observation exercise to cover monitoring of tallying centre activities as a result of lessons learnt following the nullification of presidential results for the 8th August Elections, ELOG shares observation reports from both constituency and national tallying centre observers. This gives a new angle of observation to the traditional polling station view of the electoral process.

After another petition on the process, the chapter discusses the process and the verdict of the court and ends with conclusions based on the overall analyses of the historic elections

5.1 Introduction

Following the annulment of the presidential election on 1st September 2017, the Supreme Court directed that a fresh presidential election be held within 60 days from 1st September 2017. Accordingly, the IEBC announced 17th October 2017 as the date for Fresh Presidential Election. Later, however, IEBC deferred the election date to 26th October 2017 for logistical and other reasons.

On 26th October 2017, the IEBC conducted the Fresh Presidential Election. A protracted political environment had ensued thereby creating a tense and toxic pre-election environment that spilled over into the election. The election was characterized by violence that led to deaths in Nairobi, Busia, Migori, Kisumu, and Athi River, following police clashes with protesters. An atmosphere of trepidation was noticeable in many parts of the country during the Fresh Presidential Election.

The unfavorable political environment was further aggravated by the apparent lack of trust in key institutions that were expected to ensure that the Fresh Presidential Election was conducted in a credible manner. The IEBC was under constant attacks, especially from the opposition, which later withdrew from

the Fresh Presidential Election. Police also came under criticism owing to their excessive use of force on unarmed protesters that, among other things, resulted in the death of over sixty Kenyans and also sixty reported cases of SGBV.[1]

The Judiciary also attracted criticism for some of its action. A last minute attempt to stop the elections by three petitioners was technically thwarted by an apparent lack of quorum, on October 25th, by the bench that constituted the Supreme Court, a day that was curiously declared a public holiday by the government. Yet, on the same day, three Court of Appeal Judges were mobilized and unprecedentedly issued an *ex-parte* order of stay against a High Court ruling delivered a day before, which had declared illegal the recruitment and gazettement of election officials by the IEBC.[2]

5.2. ELOG's Preparations to Observe the Fresh Presidential Election

ELOG deployed its short-term observers in all 290 constituencies to monitor the Fresh Presidential Election processes. However, due to political tensions and security concerns arising from Raila Odinga's withdrawal from Fresh Presidential Election and calling on NASA supporters to boycott the election, coupled with reported attacks on the IEBC trainings in NASA strongholds, the plan was reviewed to exclude Bungoma, Kakamega, Busia, Vihiga, Kisii, Nyamira, Kisumu, Siaya, Migori, and Homabay counties. This was done to secure ELOG's observer mission and the individual observers who would have risked their lives in the process. Thus, ELOG only sent observers to 215 constituencies in thirty six counties, with stationary observers in polling stations.

Consequently, ELOG could not carry out a sound analysis of the results in the Fresh Presidential Election using the PVT process. However, since data from the initially sampled stations in the deployed stations was still forthcoming, it was used to assess the quality of the e-day processes using the same methodology. The subsequent assessment reported after the October 26th Fresh Presidential Election was therefore based on the sample based approach.

In the seventy five constituencies that did not have polling station observers, ELOG relied heavily on the Long Term Observers who had been present in the counties since March to give status reports. ELOG further deployed two observers per constituency tallying centre for the Fresh Presidential Election.

5.3. Polling Station Observation Findings

Based on the above deployment, ELOG observed as follows:

Set-up and Opening of Polling Stations

Most of the polling stations (80.7%) opened on time, by 6:15 a.m.; others opened between 7:00 a.m. and 8:00 a.m., with a few opening after 8:00 a.m. or never opened. In 99.9 % of polling stations observed, the ballot boxes were shown to be empty before being sealed. In the majority of the polling stations observed, 98.6%, had security officers present, while in 99.7% of polling stations observed, the KIEMS devices were available. Additionally, a majority of polling stations observed (97.8%) had the requisite strategic materials (ballot boxes, ballot papers, IEBC stamp, indelible ink, and the Results Form 34A). In 36.0% of polling stations observed, the Presiding Officer was a woman. Jubilee Party agents were also present in 82.6% of all the polling stations observed, while agents from other parties were present in 2.8% of all the polling stations observed. However, in 16.4% of all the polling stations observed, there were no party agents.

The Voting Process

ELOG noted that in 99.6% of the polling stations, ballot papers were stamped with the IEBC official stamp before being issued to voters. In 4.8% of the stations, the KIEMS kits failed to function properly during the voting process. Additionally, in 28.8% of polling stations observed, some people (1 to 25) or many people (more than 25) were not permitted to vote while in 57.8% of the stations observed, at least one person was identified alphanumerically, not biometrically by the KIEMS device.

ELOG also noted that in 15.7% of polling stations, many people (25+) were assisted to vote. A majority of those assisted were women. Out of these stations where people were assisted, the assisted voters were not allowed to have a person of their choice (and not a presiding officer) helping them in 3%. The secrecy of the ballot was thus not violated in 86% of the polling stations (not including those assisted to vote). ELOG also observed that there was a queue at 5:00 p.m. in 45.9% of the polling stations, out of which 91.9% were properly permitted to vote. Finally, there was a print-out of the data contained in KIEMS, which was used to verify voter information. This was not present during the 8th August 2017 elections.

The Closing and Counting Processes

In 99.1 % of the stations observed the ballot box seals were intact before counting began. In 1.7% of stations observed, one or more political party agents requested a recount of the presidential ballots.

Jubilee Party agents were present in 94.8% in the polling stations, and they signed the declaration of results for the presidential elections. Also, in 95.4% of the polling stations, a copy of the presidential results Form 34A was publicly affixed outside.

In 99.6% of the polling stations observed, the presiding officers properly signed the presidential results Form 34A while in 99.7% of the polling stations observed, the presiding officers stamped the presidential results Forms 34A using the official IEBC stamp. In 94.8% of the stations, observers witnessed the presiding officers scan and send the presidential results Forms 34A through the KIEMS kit, and receive a confirmation message.

Critical Incidents at the Polling Stations

Critical incidents were reported by all ELOG observers (PVT and non-PVT) from the deployed stations around the country. Key among the incidents were:

- Violence and disruptions: These were recorded in Kibra, Butula, Budalang'i, Mumias West, Kilifi North, Nyali, Teso South, and Lang'ata constituencies. The incidences mainly arose from protesters who did not want the Fresh Presidential Election to proceed.
- Delays in opening and set-up: These were observed in Kibra, Budalang'i, and Mumias West. The major reason for the delay was disruption and barricading of roads to the polling stations.
- Observer attacks: ELOG observers were attacked in Kibra, Nyali, and Ruaraka constituencies. In all cases the observers were subsequently withdrawn from the exercise for security reasons.

5.4 Tallying Centres Observation Findings

A majority of constituency tallying centres (89.7%) opened by 6 a.m. on 26th October 2017 for the Fresh Presidential Election. Only a few centres were unable to open on time but eventually opened by 8.00 a.m., and tallying commenced and proceeded without any major hitches. In 2.9% constituency tallying centres observed, the processes were postponed, disrupted, or halted at some point due

to some reasons ranging from some ballot boxes from polling stations not arriving, or no attached Form 34A with the boxes.

Jubilee Party agents were present in 92.9% of constituency tallying centres, observed while NASA coalition (ODM, WIPER, ANC, FORD-K) agents were present in 6.1% of constituency tallying centres observed. In 98.7% of constituency tallying centres observed, agents present were permitted to observe the tallying process while in 92.4% of constituency tallying centres observed, polling station results were read aloud so that everyone could hear.

In 2.7% of constituency tallying centres observed, there were attempts to intimidate election officials during the tallying process. Nevertheless, in 88.2% of constituency tallying centres, observers witnessed the input of 34A results into the computer spreadsheet. In 99.5% of constituency tallying centres observed, no party agents filed a written complaint regarding the constituency tallying process. Overall, political party agents and observers were present during the tallying processes, and stayed on until the completion of all procedures.

However, in some polling stations in Turkana Central and Saku constituencies, where voting was delayed due to bad weather and logistical challenges, tallying was equally delayed and results transmitted as from 27th October 2017.

Results Transmission

Only scanned Form 34B were transmitted electronically and simultaneously posted online before being followed by the official announcement of results. A few issues were, however, reported during the transmission process, but the same were rectified and the process went on smoothly.

In 98.6% of the constituency tallying centres observed, all polling station results forms (Form 34A) were tabulated before the returning officers filled out the collated results Form 34B. In 96.9% of the constituency tallying centres observed, a party agent was present for the signing of the collation of Presidential Results Form 34B. These were mainly from Jubilee Party. However, in a number of the tallying centres, there were observers who identified themselves with the NASA coalition that had chosen to boycott the elections.

Of the stations in which party agents were present, NASA affiliated agents declined to sign the collation of Presidential Results Form 34B in 2.5% of the centre, while in

0.5% of the constituency tallying centres where party agents were present, Jubilee Party agents refused to sign the collation of Presidential Results Form 34B.

Finally, in 99.5% of constituency tallying centres observed, the returning officers signed the collation of Presidential Results Form 34B while in 95.7% of the constituency tallying observed. ELOG witnessed Forms 34B being scanned and sent electronically to the National Tallying Centre.

Critical Incidents at the Tallying Centres

Incidents were also reported at the tallying centres, but most of them were resolved. Seventeen incidents were reported;[3] for instance, there were cases of ballot boxes received with no Forms 34As attached. This led to the postponement of tallying and subsequently delay in transmission of results, thus delaying the entire process. In summary, the incidents were:

- In Nyali MITC Tallying Centre, Mombasa County, one ballot box was brought with a broken seal. However, IEBC officials reported that the ballot box seal broke during offloading of ballot boxes from the IEBC vehicle.
- In Saku Constituency, tallying could not commence since voting in one polling station had not taken place. The tallying centre was therefore closed until 27th October 2017 when voting took place in the affected station and votes counted.
- In Turkana North, West, Central, and Loima constituencies, voting did not commence on time in a number of polling stations because of heavy rains that damaged roads and interfered with distribution of a voting materials. The delay in voting was compensated by time extensions either on the same day or it was extended to the next day, 27th October 2017, and tallying done thereafter.
- In Samburu West tallying centre, a Presiding Officer had mistakenly put the Form 34A in the ballot box and sealed it. Tallying could not proceed until all party agents were present and the seal broken to access the form.

5.5 Comparison of Forms 34As on the IEBC Website

ELOG observers collected 540 images of Forms 34A in order to compare them with those posted on the IEBC's Forms site, https://forms.iebc.or.ke. The following observations were made:

- 536 out of 540 images of the forms on the IEBC portal were legible
    - 7 out of the 536 forms did not have the official IEBC stamp
    - 1 out of the 536 forms was not signed by the Presiding Officer

ELOG also compared 522 of the forms they collected with forms posted on the IEBC Forms site and found as follows.

- The figures for the candidates in the ELOG copies matched the figures in the corresponding IEBC form in 521 cases. However, there was one case where the figure for Kenyatta in the ELOG form was 86 (eighty six) while the figure in the IEBC form was 286. This was Polling Station 01 in Bolargy Primary School in Garissa Township.
- In all 522 forms compared, the figure for registered voters in the ELOG forms matched that in the IEBC forms
- In all 522 forms, the figure for rejected voters in the ELOG forms matched the one IEBC forms

ELOG uploaded the images of the forms the observers obtained to the ELOG Forms site, https://elogforms.org.

5.6 Observation at the National Tallying Centre

ELOG, working in partnership with Open Data Taskforce[4], monitored the relay and transition processes at selected tallying centres, including the National Tallying Centre at Bomas of Kenya. In the Fresh Presidential Election, IEBC required the Returning Officers to physically deliver their forms, as opposed to August 8th General Election where the documents were sent electronically and downloaded at the Bomas of Kenya National Tallying Centre for final announcement.

The IEBC improved on the standardization of results forms and enhanced transparency through the projection of tallying at constituency centres for agents and observers to see the tabulation process. There was a significant improvement in the electronic transmission and on-line publication of results forms through better use of mobile network providers and modified software. On e-day, nearly all

polling stations that opened reportedly submitted results data through the KIEMS devices. Forms 34A scans were made immediately available online, covering virtually all polling stations where polling took place.

However, ELOG noted that the ICT Centre at the National Tallying Centre was not secured as per standard procedures in Information Security Management Systems ISO 2000 (*Protection of information assets from potential security breaches*). There were also multiple layers of security controlling access to the centre without clear lines of authority. There should be clear mechanism of handling processes and procedures, and the whole process should have been open and transparent to scrutiny.

ELOG observers were denied access to the ICT Centre, and therefore they could not verify the results per transmitted logs. The IEBC was not clear on the criteria used to allow those who visited the ICT Centre; most of them appeared to be diplomats and Chief Party agents.

5.7 Declaration of the Winner

The IEBC declared the results of the Fresh Presidential Election on 30th October 2017. Accordingly, Uhuru Kenyatta won the election with 7,483,895 (98.26%) votes. However, there were controversies around the results. First, the question of voter turnout became a moving target. On 26th October 2017, the IEBC chairperson indicated the voter turnout as 48%. But even before he could publicly declare the final results, Deputy President William Ruto told CNN in an interview on 29th October 2017 that the turnout was 40%. This raised the question of whether it was the IEBC or the Executive that was in charge and more particularly, where the figures pronounced by the Deputy President came from. The IEBC chairperson eventually clarified on 30th October 2017 that the voter turnout was 7,616,217 (38.84%).

Second was the question whether Uhuru Kenyatta's election had met the set constitutional threshold. According to the IEBC, Uhuru Kenyatta garnered 25% of votes cast in forty-five counties, thereby meeting constitutional demands.

Finally, there was the question of the twenty five constituencies where voting did not happen. The IEBC had postponed voting in these constituencies to

28thOctober, 2017. However, voting still did not take place in these constituencies and so the IEBC postponed the voting in the constituencies indefinitely. Yet, on 30th of October when the IEBC was declaring the final results, it remained mum about the indefinite postponement and simply stated that the results from these constituencies would not make any difference to the presidential results.

5.8 Another Supreme Court Petition and its Impact

While the official opposition, NASA, did not directly object to the outcomes of the repeat poll, there were other citizens who were aggrieved by the Fresh Presidential Election results and moved to the Supreme Court for its nullification. The court convened a pre-trial conference to determine the three petitions that were filed. One petition, which sought to have NASA leaders held in contempt of court, was deferred for hearing later while two petitions that sought to invalidate the Fresh Presidential Election[5] were consolidated and heard. The court reached a unanimous verdict which determined that the petitions were not merited and were thus dismissed. The court therefore upheld the 26th October, 2017 Fresh Presidential Election results.[6] This paved the way for the inauguration of President Uhuru Kenyatta and his deputy for a second five-year term in office. The Inauguration took place on 28th October 2017.

5.9 Conclusion

While many of the polling stations opened on time for the Fresh Presidential Election and had the requisite strategic materials, it was also clear that in many parts of the country, there was very little activity in respect to opening and voting processes. This was largely attributable to the election boycott by the NASA coalition and the insecurity that was either perceived or experienced during the run-up to or on the voting day. Therefore voting in some of the constituencies experienced delays while in others, voting simply could not take place due to incidences of intimidation.

For ELOG, the overwhelming issue on the conduct of the Fresh Presidential Election was whether the prevailing political environment was conducive for conducting credible elections. ELOG observed that insecurity, intimidation, fear, coercion, undue influence, and indefinite postponement of voting in twenty-five

constituencies disenfranchised millions of Kenyans who were eligible to vote. The sum effect of these factors was to deny millions of Kenyans the opportunity to express their free will. Also, the absence of non-partisan observers and party agents other than Jubilee Party agents in the majority of polling stations severely compromised the transparency and accountability of the voting and counting processes.

Therefore, ELOG concluded that the then existing environment was not conducive for conducting a credible election. In ELOG's view NASA and Jubilee Party largely contributed to this environment, although IEBC was also responsible through commission and omission. Finally, ELOG could not authoritatively state whether IEBC complied with all the directions of the Supreme Court's ruling regarding the earlier election held on 8th August, or not.

Endnotes

1 According to reports shared by KNCHR, Amnesty International, Physicians for Human Rights and Human Rights Watch.

2 https://www.kenya-today.com/news/court-appeal-justices-githinji-martha-koome-suspends-justice-odunga-ruling-on-iebc-returning-officers

3 See ELOG Tallying Centre Incidents Report

4 The Open Data Taskforce comprising of InfoNet, Kenya Open Data Initiative (KODI), Ushahidi Platform, Kenya Data Science, Code for Kenya, KICTANet and Strathmore University to articulate ways of opening up election related data and information to stakeholders

5 http://www.mwakilishi.com/article/kenya-news/2017-11-15/supreme-court-throws-out-nasa-from-petitions

6 https://www.capitalfm.co.ke/news/2017/11/supreme-court-upholds-oct-26-re-election-uhuru-kenyatta/

CHAPTER 6

Recommendations

The observation findings that ELOG has made in this report significantly reflect the recommendations that ELOG made following the 2013 General Elections (annexed to this report). From the pre-elections to the post-elections period, including legal framework reforms to the management of the elections processes by the IEBC, a number of issues and concerns keep recurring.

ELOG notes that many of the concerns and issues that negatively impacted on the 2017 elections were largely political, institutional, administrative and technical issues that emanate from the failure to fully implement the Agenda 4 reforms and especially the recommendations in the Kriegler Report.

However, based on the findings and observations shared in this report, ELOG makes the following recommendations:

I. Recommendations on Electoral Processes

a. Independent Review of 2017 Electoral Process

In light of the many issues raised on the 2017 electoral process ranging from legal framework, voter registration process, voting operations to management of the elections, 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 and the role of critical actors such as security personnel, political parties and the media.*

The review should *take stock of the recommendations made by the 2007 Independent Review Commission (IREC) to determine progress made in the intervening period.* This process should involve as many stakeholders as possible, and the findings and lessons learned should inform the next phase of electoral reforms.

b. Employment of Electronic Systems in Elections

The IEBC should ensure there is greater accountability and transparency particularly in relation to the electronic management of the elections and

electronic transmission of results. 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.

Where complementary mechanism has to be deployed, the need should be rationalized and publicly explained. The handlers should be correctly and thoroughly trained and the Commission should be able to track the same and where need be, provide logs/records on the usage of the same within practical timelines.

The KIEMS system and kits should be demystified and public trust and confidence in the system enhanced through open public scrutiny, testing of the system and kits, and assurances on their functionality. The system and kits should be simple to comprehend, utilize, manage and secure. The system should be verifiable, auditable, effective and efficient in its transmission of results from various stations.

Networks used for transmission of results should be addressed beforehand (mapping/allocation of network operators), and should be based on both practical and logical conclusions as opposed to mere gambling or convenience. For example, a provider should not be allocated a zone where they clearly lack coverage. The responsibilities of the said providers should equally be clear. The list of these providers and the allocated zones should be gazetted for public and stakeholder awareness.

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 by all stakeholders including political parties and independent observers.*

A record logs of individuals authorized to operate the system must be kept at all times for purposes of accountability. In this regard, they should adopt a watertight file server system with secure IP address system for the purpose of account management protocol(s). The IP address system should be clearly defined from the very beginning and should therefore have a clear line of command on who can access, user and purposes.

c. Dealing with Advantages of Incumbency

ELOG notes that equality of opportunity in elections is achieved when there is a level playing field. This requires electoral stakeholders especially the IEBC to revisit and review the negative impacts of incumbency especially at the presidential election level. *Where necessary, the IEBC should review the existing legislative, administrative, and policy frameworks that allow political contestants to take advantage of incumbency during the electioneering period.*

d. Electoral Legal Reforms and Amendments to Electoral Laws

While ELOG views electoral legal reforms as a progressive process, a number of critical laws are yet to be implemented while others are yet to have legislative direction. The Election Campaign Financing Act (2013) was suspended by the courts in January, 2017. This was a major claw-back and ELOG felt it was a deliberate effort by political actors to circumvent the achievement of a fair and level environment for all electoral contestants. *While the laws are now operational as directed by the same courts, efforts to ensure that such mischief is denigrated should be put in place.*

More importantly, *the IEBC and Parliament should quickly move to ensure the operationalization and implementation of the Election Campaign Financing Act 2013 through enactment of necessary regulations, guidelines and publicizing the law.* At the same time, Parliament must move to ensure that laws that guarantee the 2/3 gender threshold are in place. Justice delayed is justice denied. It is is worrying that seven years after the promulgation of the 2010 Constitution, the country still doesn't have a framework for guaranteeing that not more than two thirds of the same gender are elected into public office. While ELOG appreciates efforts made by the legislature and the civil society, the fact that no framework exists renders the current parliament unconstitutional. *The realization of the gender rule is geared towards creating a fairer egalitarian society, which in itself is an intended outcome of democratic elections.*

ELOG also observes that 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. This will be in line with international best practices.

e. Clear Framework for Electoral Reforms

ELOG urges 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 will require an open consultative approach and process that brings together all stakeholders for a broader buy-in and ownership of the reforms.

f. Clarity on the Electoral Complaints and Dispute Resolution Processes

ELOG observed that while frameworks for handling electoral complaints and disputes were in place both for the party nominations and the general elections, the process was not very clear to the contestants and the public. This tended to adversely affect special interest groups such as women, youth and PWDs.

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.

g. Transparent and Predictable Processes

While ELOG acknowledges that IEBC did unveil an elections calendar and operations plan more than a year to the elections, it is vital to note that early strategic, comprehensive and consultative planning and timely implementation of electoral activities are vital towards the realization of peaceful, credible, free and fair elections.

To achieve this, there is need for continuous review, evaluation, and incorporation of lessons learnt throughout the electoral cycle. The need to ensure open, predictable, transparent, and accountable processes in planning and implementation including matters of procurement is also very critical.

ELOG therefore 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.*

h. 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 future elections can be cost effective and afforded by Kenyans.

ELOG further *calls for a detailed, transparent, and accountable financial audit and reporting for the 2017 elections so that Kenyans can assess the value for money of the exercise.* The audit and reporting should be done in a transparent manner and the reports rendered publicly.

i. Electoral Campaigns

ELOG observed that the electoral campaign period was divisive characterized by hate, suspicion, violence, and disregard of existing constitutional bodies. It was also characterized by many cases of vote buying and a rise in fake news. This adversely affected the special interest group of women, youth and PWDs. Based on our LTO reports, women bore the brunt of abuse and intolerance by political opponents. These instances created unnecessary tension and intimidation across the country and constitute electoral offences.

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

As potential governments in waiting, political parties should declare clear 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.

j. Party Financing

ELOG urges the Registrar of Political Parties to convene all the relevant stakeholders in order to review the regime on party financing so as to ensure a sense of equal or equitable treatment and footing for parties. *Clear, open, transparent, and accountable public funding of parties in promoting the principle of equality of opportunity during elections as well as party strengthening is vital.*

k. Stakeholder Engagement and Public Outreach

The IEBC's role is to manage and conduct elections on behalf of the stakeholders, including citizens. Accordingly, the IEBC should adopt a proactive consultative approach that ensures that all the stakeholders in the electoral process including political parties, civil society, religious and faith based organizations, business

communities, citizens and observers are adequately involved and regularly consulted.

The significance of fostering close cooperation and sound professional relationships with stakeholders need not be overemphasized as it is the basis upon which the IEBC can guarantee support for and goodwill towards its policies, programmes, and activities. It is also the ground for enhancing the IEBC's credibility and strengthening stakeholders' confidence. ELOG therefore, recommends that the IEBC should invest in cultivating an operational culture that allows for consultative processes, and responsiveness and sensitivity towards stakeholders as well as greater knowledge and understanding of the stakeholders' power, influence, expectations, and needs.

Public platforms for dialogue and consensus building should also be availed to enable greater ownership in order to build confidence and legitimacy around the IEBC preparatory measures, planning, and decisions for elections.

The IEBC should cultivate an open-door and flexible policy that can enable it to build stakeholder/public confidence, and generate greater accountability and transparency. Their inadequacy often erodes the confidence and trust of the electorate, civil society, and political parties in the electoral process and in the IEBC itself.

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.

I. Voters Registration

Credibility of the voter register is critical to a free and fair electoral process. To address issues regarding voter register credibility, IEBC should first come up with stringent data validation mechanisms that are properly pre-tested to eliminate errors that still exist in the register. Secondly, there is 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. The IEBC should equally collaborate with the registrar of births and deaths to ensure the data on deceased voters is shared on a timely manner to facilitate cleaning of the voters' register.

m. Training and Education

ELOG urges the IEBC to invest in continuous capacity improvement and training of the commissioners, permanent and temporary staff based on internationally recognized curriculum such as BRIDGE and on-the-job learning through benchmarking visits. *Additionally, ELOG urges the IEBC to pay greater attention in ensuring a secure environment for training of its staff at local level, especially during closely contested elections and a highly charged political environment.*

n. Recruitment of Election 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.

o. Voter/Civic Education

ELOG vouches 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.

p. Focus on Special Interest Groups

ELOG observes that affirmative action legislation and principles are yet to be fully adopted and implemented in accordance with Article 100 of the Constitution. *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 political parties to proactively and strictly implement affirmative action principles and policies during elections.*

ELOG observed that SIGs were adversely affected by lack of credible and transparent processes. Absence of a conducive and level playing field denied

SIGs effective participation in electoral processes. With specific reference to the inclusion of PWDs, *ELOG's elaborate recommendations in 2013 (annexed to this report) are still applicable.*

II. *Recommendations to Electoral Actors*

a. 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.

Similarly, the IEBC chairperson should always demonstrate this leadership and authority and use it to wisely steer the Commission in ensuring that its decisions are independent, transparent, accountable, legal, and guided by the best interests of the nation.

b. Judiciary – A Just Dispute Arbitration and Resolution Process

Having made an 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 citizens and stakeholder confidence in its work through consistent demonstration of its independence, neutrality, and impartiality.

c. 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 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, integrity, transparency, and accountability.

d. Political Parties – Support for Credible Processes

Due to the important role the political parties play in elections, ELOG calls on political parties to open up their processes to public scrutiny. This should be done by publishing the members list, gazetting the polling stations during nominations, and publicly carrying out voter education programs regarding how their nominations would be conducted.

Party members to desist from violence and other electoral malpractices during the party primaries. These calls were not adhered to and the resulting confusion, chaos, intimidation, and violence during political party primaries were evident. These impacted negatively on the party primaries and, ultimately, the general elections. Disciplinary mechanisms on errant party members should be instituted as a deterrence for such malpractices. Last, political parties should train their agents and nomination clerks before deployment to electoral undertakings.

e. Media – Adherence to the Code of Conduct

The independence and impartiality of the media is critical in a democratic society. *The media should, therefore always safeguard its independence and impartiality in elections coverage and reporting while remaining steadfast in its public watchdog and human rights defending roles.* The cautionary approach adopted by some media outlets and reporters during the 2017 elections undermined the media's watchdog role during elections and consequently eroded public confidence in the media.

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 coverage of the electoral process that begins with the pre-election activities.

f. Civil Society – Sustained Vigilance and Support to Electoral Processes

The civil society should be seen as neutral actors interrogating issues objectively and holding especially 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.

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

ELOG recommends the need to build strategic alliances between different groups as part of creating positive synergy when engaging electoral matters.

g. Independent Institutions – Fidelity to Constitutional Mandate

ELOG calls upon independent institutions to always maintain fidelity to the constitution and other relevant laws in Kenya in the discharge of their mandates. This requires that they remain independent, neutral, and impartial in the discharge of their constitutional and legal mandates and most importantly they should discharge their mandates effectively and efficiently in the interest of the nation and without any fear or favour.

III. *General Recommendations*

a. 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 especially 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.

b. Dealing with the Scars of the Violence

ELOG recommends that the Office of the Director of Public Prosecution (ODPP) speedily investigates 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, yet Kenyans in general and the survivors, their families, and communities in particular should be assured 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.

c. Respect for Independent Institutions

The Judiciary and the IEBC came under a lot of attack from both the Jubilee and NASA political coalitions. The Judiciary, by the government, for the nullification of the 8th August presidential elections and IEBC, by the opposition NASA, for going on to conduct elections on the 26th October 2017. This not only undermined their independence but also contributed in the erosion of public confident in the institutions. It is imperative that independent institutions should be respected in order for them to effectively discharge their mandate.

ELOG recommends that political actors desist from making disparaging remarks on independent institutions and where they are aggrieved, they should follow the due process of addressing the raised concerns and issues.

d. 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 a deterrence for future breaches bringing more sanity to the conduct and management of elections.

More resources are also required for this process to facilitate the authorities concerned to undertake thorough investigations and action.

Appendix 1: ELOG 2017 Press Statements

A) Opening statement on 8th August 2017 General Election

Elections Observation Group

8th August 2017

OPENING, SET-UP OF POLLING AND INCIDENTS STATEMENT

Background

The 2017 Elections will be the first one to be held on the 2nd Tuesday of August as envisaged by the Constitution of Kenya. The elections are also the second since the promulgation of the same Constitution. They have also been characterized by a number of changes to the electoral environment. Key among these were changes to the Election Laws some of which impacted the process positively while others have had the opposite effect. The other major change was the replacement of the entire team of commissioners of the IEBC.

Electoral Observation

In its bid to contribute to a credible, peaceful, free and fair election, the Elections Observation Group (ELOG) has deployed over 8000 observers across all forty-seven counties and 290 constituencies. Out of these 1700 Parallel Vote Tabulation (PVT) observers were specially trained and deployed to a nationally representative random sample of polling stations. The rest are deployed to county representative samples in Busia, Meru, and Nairobi counties. PVT is an advanced Election Day observation methodology which allows ELOG to confidently comment on the Election Day and tabulation processes. ELOG's PVT will also provide an independent verification of the presidential results as well as the gubernatorial results in Busia, Meru, and Nairobi, as announced by the IEBC.

The ELOG PVT observers observed the opening and setup of the polling stations and were required to send information on the process. This statement is based on Observation and Incident Reports filed as of 11:00 a.m. by ELOG observers. ELOG has so far observed the following:

Findings

Opening and Set-up

- ELOG observers were properly permitted to observe in 98.4% of polling stations.
- 53.5% of the polling stations nationwide opened on time. The remaining stations opened between 7:00am with some opening after 8:00am. This is a deterioration from 2013 when 59.7% of the polling stations opened on time. Busia County reported a similar trend, however in Meru County 38% polling stations opened on time whereas 55.4% of polling stations in Nairobi County opened on time.
- In 99.6 % of polling stations observed, the ballot boxes were shown to be empty before being sealed. This is an improvement from 2013 when in 95.6% of the polling stations, ballot boxes were show empty before sealed.
- ELOG observers reported that in majority of the polling stations 99% had security officers present. This is consistent with 2013 when security officers were present in 99.6% of the stations.
- 99.3% of polling stations had the Kenya Integrated Elections Management System (KIEMS) present. This is an improvement from 2013. Recall that in 2013, the Electronic Poll Book was missing or malfunctioned in 8.0% of stations during the opening and setup process.
- A majority of polling stations 94.5% had the requisite strategic materials (ballot boxes, ballot papers, IEBC stamp, indelible ink, copy of voter register and the Results Form 34A). This is a deterioration from 2013 when 99.4% of polling stations had the requisite strategic materials. In 4.2% of polling stations, the voter register was missing. For the County Samples:
    - In Busia, 91.7% there were strategic materials present, however in 6.5% a copy of the voter register was missing and in 6.9% the ballot box was missing.
    - In Meru County, 93.5% of polling stations had strategic materials present, however in 4% a copy of the voter register was missing.
    - In Nairobi county, 90.7% of polling stations had strategic materials present, however in 6.4% a copy of the voter register was missing.

- In 33.2% of polling stations, the Presiding Officer was a woman. Notably, in Nairobi County, 45.4% of polling stations the Presiding Officer was a woman.

    - An ODM, WIPER or ANC party agent (representing the NASA coalition) were present in 69.7% of all the polling stations. A deterioration from combined data of the same parties in 2013 when they were present in 87.9% of stations.

    - A Jubilee Party agent was present in 79.1% of all the polling stations. A deterioration from combined data of the same constituent parties 2013 when they were present in 90.0% of stations.

    - Agents from other parties (not listed above) were present in 45.3% of all the polling stations whereas in 74.8% there was an independent candidate agent present.

Critical Incidents

So far ELOG has observed critical incidents during the opening and setup of polling stations process:

Observers not permitted to access polling stations

Early this morning, some ELOG observers were denied access into polling stations by Presiding officers who demanded for oaths of secrecy for observers and stamped IEBC letters. This is contrary to the IEBC election observer guidelines and requirements for observers. A few observers also had their phones confiscated on arrival to their assigned polling stations. ELOG was able to work closely with IEBC officials both at headquarters and in the constituencies to speedily resolve the issues and ensure observers gain access back into the polling stations. We commend the responsiveness and efforts by senior IEBC officials in resolving the issues. ELOG notes that this same confusion in credentials required by different presiding officers to facilitate observers into polling stations also was a problem in the 2013 elections. By the time of this statement nine (9) of ELOG observers have still not been allowed back into their assigned stations. While commending the speedy response from the headquarters to the field staff, ELOG calls upon the IEBC to speedily resolve the pending cases and allow observers back into the polling stations to enable them observe the voting, counting and tabulation processes.

Late Arrival of Polling materials

ELOG also observed late arrival of materials to polling stations across the country with more cases reported in Meru. Of these, ballot papers were missing the most.

Observers also reported cases of delayed opening of polling stations as a result of late arrival by polling officials and subsequent delays in setting up.

What Next?

ELOG will continue observing throughout the day and will be releasing some of its key findings on the voting process to the media and on social media.

ELOG will issue a preliminary statement on the conduct of the elections at 10:00 am on Wednesday, August 9th 2017. This statement will bring together our preliminary findings and conclusions on the conduct of Election Day. This will include assessing the closing, counting and declaration of results processes, such as the presence of party agents during the counting, whether party agents sign off or refuse to sign off on results; as well as, the conduct of counting procedures. Soon thereafter, ELOG anticipates to issue its verification statement of the presidential results and the three gubernatorial results, that is, Nairobi, Busia and Meru. This will take place immediately after IEBC officially announces/declares the final results gubernatorial and presidential results.

ELOG is committed to its mandate and will remain vigilant and diligent in serving Kenyans by comprehensively monitoring and observing the electoral processes and providing timely, impartial and objective reports and recommendations.

We take this opportunity to congratulate Kenyans for turning out early and in large numbers. We appeal to them to exercise patience and tolerance in spite of the challenges experienced with the process.

May God Bless You and God Bless Kenya Thank You

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b) ELOG Statement on the Voting and Counting Processes

9th August 2017

PRESS STATEMENT ON THE VOTING AND COUNTING PROCESSES

Over the last 17 hours, Kenyans across the country have had the opportunity to cast their votes. By this morning, counting had concluded in many polling stations across the country. ELOG through its elaborate network of over 8, 000 stationary observers has kept close vigil over the entire voting, closing and counting processes in all of the 47 counties and 290 constituencies. Yesterday, ELOG shared its findings on the opening of the polling stations process. We now wish to share with Kenya our findings on the voting, closing and counting processes based on reports from ELOG's Parallel Vote Tabulation (PVT) observers.

Deployment and Observation Methodology

The Elections Observation Group (ELOG) has deployed over 8, 000 observers across all 47 counties and 290 constituencies. Out of these 1, 700 Parallel Vote Tabulation (PVT) observers were specially trained and deployed to a nationally representative random sample of polling stations. The rest are deployed to county representative samples in Busia, Meru and Nairobi counties. PVT is an advanced Election Day observation methodology which allows ELOG to confidently comment on the Election Day and tabulation processes. ELOG's PVT will also provide an independent verification of the presidential results as well as the gubernatorial results in Busia, Meru, and Nairobi as announced by the IEBC.

Findings

Voting Process

The following are ELOG's findings on the voting process:

- In 99.3% polling stations, ballot papers were stamped with the IEBC official stamp before being issued. This is consistent with 2013 when ballots were stamped in 99.5% of stations.
- Voters' fingers were marked with ink in almost all of the polling stations

(99.3 %). This is consistent with 2013 where fingers were marked in 99.9% of stations.

- In 7.6% of the stations, the Kenya Integrated Elections Management System (KIEMS) failed to function properly. This is an improvement from 2013 when electronic poll books malfunctioned in 54% of stations.
- In 49.2% of polling stations nationwide, some people (1 to 25 people) or many people (greater than 25) were not permitted to vote. Many of these cases were as a result of voters going to the wrong polling station or voter not verified in the KIEMS or voters not carrying IDs used at registration. This is consistent with 45.4% in 2013.
- In 41.2% of polling stations, many people (i.e. more than 25 per polling station) were assisted to vote. A majority of those assisted were women. This marks an improvement from 2013 when many people were assisted to vote in 54.5% of stations.
- Of these stations where people were assisted in 2017, the assisted voters were not allowed to have a person of their choice helping them in 11.5% of the polling stations. This is a small deterioration from 2013 when, assisted voters were not allowed to have a person of their choice in 9.3% of polling stations.
- The secrecy of the ballot was not violated in 91.7% of the polling stations (not including those assisted to vote). This is an improvement from 2013, when secrecy was not violated in 82.7%.
- There was a queue at 5:00pm in 68.9% of polling stations. Of those stations with a queue at 5:00pm, 95.3% were properly permitted to vote.

Counting Process

We have also concluded our analysis on the counting process. The following are ELOG's findings on the closing and counting process:

- In 99.6% of stations, the ballot box seals were intact before counting begun.
- In 4.9% of stations, one or more political party agents requested a recount of the presidential ballots. This is a deterioration from 2013 when a recount was requested in only 2.8% of the polling stations.
- For the closing and counting process, an ODM, WIPER or ANC party agent (representing the NASA coalition) were present in 84% of all the polling stations. In stations where they were present, the NASA agent signed the

declaration of results for the presidential elections in 93.8% of these polling stations (as compared to 94.9% in 2013).

- For the closing and counting process, A Jubilee party agent was present in 92.3% of all the polling stations. In stations where they were present, the Jubilee agent signed the declaration of results for the presidential elections in 95.8% of these polling stations (as compared to 95.6% in 2013).
- Agents for independent candidates were present in 78.7% of all the polling stations. In stations where they were present, the agent signed the declaration of results for the presidential elections in 88.7% of these polling stations.
- In 86.5% of the polling stations, a copy of the Presidential Results Form (From 34A) was publicly affixed outside (as compared to 89% in 2013)

Critical Incidents

A total of 306 incidents were filed by ELOG observers throughout the course of the day of which 229 were confirmed. The most frequently reported incident was malfunctioning of the KIEMS, although many cases of malfunctioning were resolved by the IEBC in the course of the day, shortage and mix up of ballot papers, requests for recounts, postponement of counting to the following day. However, all of these were isolated incidents and none of them occurred in large numbers.

In Summary

From our observations of the voting process it is clear that more effort needed to be put into voter education and provision of information to the public.

We remain committed to our mandate and will continue to be vigilant in accurately recording and reporting the tabulation process. As such, we would like to reassure Kenyans that through our work on the Parallel Vote Tabulation, we shall be in a position to speak to the final presidential election results and the three gubernatorial results, that is, Nairobi, Busia and Meru as soon as the IEBC officially announces/declares the final results.

Thank You and May God Bless Kenya

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c) ELOG Verification Statement

11th August 2017

ELOG Verification Statement of the Official 2017 Presidential Results

Background

The Elections Observation Group (ELOG) is a permanent national platform composed of civil society and faith-based organizations committed to promoting citizen participation in the electoral processes, through non-partisan and impartial domestic observation, and objective reporting of elections.

ELOG has closely monitored the pre-election environment processes since March 2017. This entailed deploying long term observers in each of the 290 constituencies to observe and report on the pre-election environment. ELOG's goal in collecting this valuable information is to enhance the integrity of the election process and to contribute to a peaceful election.

For the purposes of Election Day (E-Day), ELOG deployed 8,300 observers across all 47 counties and 290 constituencies. Of these 1,703 Parallel Vote Tabulation (PVT) observers were specially trained and deployed to a nationally representative random sample of polling stations and three (3) county samples in Busia, Meru and Nairobi counties. ELOG will issue separate statements summarizing the findings for each county analysis.

PVT is an advanced E-Day observation methodology which allows ELOG to confidently comment on the E-Day and tabulation processes. ELOG's PVT, thus, provides an independent verification of the presidential results as well as the gubernatorial results in Busia, Meru, and Nairobi as announced by the IEBC.

PVT involves deploying highly trained, accredited observers to a representative random sample of polling stations to assess the conduct of the opening, voting and counting processes as well as to verify the official vote count. Unlike exit polls, PVT does not involve observers asking voters for whom they voted. PVT observers observe all the processes in sampled polling stations and, finally, record the official

figures as announced by the presiding officers at the sampled polling stations. The official vote counts from the representative random sample of polling stations are then subjected to rigorous integrity checks and analyzed to draw projections.

ELOG successfully conducted a PVT for the 2010 referendum on the Constitution as well as for the 2013 General Elections. PVT has been successfully applied in other African countries such as Nigeria (2011 and 2015), Ghana (2008, 2012 and 2016), Malawi (2009 and 2014) and Zambia (2008, 2012, 2015 and 2016). In most instances, PVT helped to reduce tensions in the tallying process by providing rapid independent assessment of the opening of polls, voting and counting processes.

The Context

As indicated above, ELOG deployed a robust long term observation mission which highlighted a number of issues:

Voter Education: The ELOG LTO reports consistently indicated that voter education was not comprehensively undertaken in all the constituencies in the country. Deployment mapping reports showed scant voter education provision in fringe areas such as the northern counties. Disaggregated data shows that education targeting women, people living with disabilities (PWDs) and youth was improved from 2013 however that targeting PWDs was the lowest. This partially explains the confusion created by lack of adequate information on e-day that, among other things, saw many voters end up not voting as a result of going to the wrong polling stations.

Voter Registration: Whilst ELOG intended to audit the voter register well before the elections, the same was not possible since it only accessed the register after the verification process and when it was already certified. ELOG, however, pronounced itself to the report that was produced by KPMG, the auditing firm appointed to assess the list. ELOG raised a number of issues that had been flagged by KPMG but which had not been addressed by IEBC when making amendments to the register. These issues and others identified through the observation of the voter verification process raise critical integrity questions on the register. However, without the conduct of its own independent audit which would categorically establish any glitches, ELOG could not authoritatively speak to the concerns.

Political Party Nominations and Campaigns: ELOG noted that all the major political parties conducted shambolic nominations in April this year. That said, our observation of the campaign process was indicative of a much calmer environment despite isolated but loaded incidences of hate speech, intimidation

and violence. Of particular concern to ELOG was the targeting of the women aspirants for abuse consistently through-out the reporting period.

On the broader campaigns, it was unfortunate that the implementation of the law that was aimed at regulating campaign financing, the Election Campaign Financing Act 2013, for all aspirants was suspended.

During the LTO observation period, ELOG noted the formation of militia in a number of constituencies (5%) during the party primaries. It is our hope that all the stakeholders in the electoral process will work to ensure that peace prevails through the remainder of the electoral process.

Election Day Process

Opening and Setup

The opening and set up processes was characterized by delays in opening some stations and delivery of materials. However, in many stations this exercise went well without hitches. The major highlights of the exercise were as follows;

- ELOG observers were properly permitted to observe in 98.4% of polling stations.
- 53.5% of the polling stations nationwide opened on time. Of the remaining stations, most opened between 7:00 am and 8:00 am, with some opening passed 8:00 am. This is a deterioration from 2013 when 59.7% of the polling stations opened on time. At the county level, Busia reported a similar trend. However, in Meru only 38% of the polling stations across the county opened on time; whereas 55.4% of polling stations in Nairobi County opened on time.
- 99.3% of polling stations had the Kenya Integrated Elections Management System (KIEMS) present. This is an improvement from 2013. Recall that in 2013, the Electronic Poll Book was missing in 8.0% of stations during the opening and setup process.

Voting

Our findings noted that the voting process generally went smoothly across the country with isolated incidences reported as indicated below:

- In 7.6% of the stations, the Kenya Integrated Elections Management System (KIEMS) failed to function properly. This is an improvement from 2013 when electronic poll books malfunctioned in 54% of stations.

- In 49.2% of polling stations nationwide, some people (1 to 25 people) or many people (greater than 25) were not permitted to vote. Many of these cases were as a result of voters going to the wrong polling station, voters not verified in the KIEMS or voters not carrying IDs used at registration. This is consistent with 45.4% in 2013.
- In 41.2% of polling stations, many people (i.e. more than 25 per polling station) were assisted to vote. A majority of those assisted were women. This marks an improvement from 2013 when many people were assisted to vote in 54.5% of polling stations. There was a queue at 5:00pm in 68.9% of polling stations. Of those stations with a queue at 5:00pm, 95.3% were properly permitted to vote.

These figures are not statistically significantly different from one another due to margins of error.

Closing and Counting

On the closing and counting process, our findings indicated as follows:

- An ODM, WIPER, ANC or Ford Kenya party agent (representing the NASA coalition) were present in 84% of all the polling stations. In stations where they were present, the NASA agent signed the declaration of results for the presidential elections in 93.8% of these polling stations (as compared to 94.9% in 2013).
- For the closing and counting process, a Jubilee party agent was present in 92.3% of all the polling stations. In stations where they were present, the Jubilee agent signed the declaration of results for the presidential elections in 95.8% of these polling stations (as compared to 95.6% in 2013).
- Agents for independent candidates were present in 78.7% of all the polling stations. In stations where they were present, the agent signed the declaration of results for the presidential elections in 88.7% of these polling stations.
- In 86.5% of the polling stations, a copy of the Presidential Results Form (From 34A) was publicly affixed outside (as compared to 89% in 2013)

ELOG 2017 PVT Results and Final Turnout

ELOG has received, verified and analyzed observation reports from 98.9% of its PVT Observers from 1,692 polling stations. These observers arrived at their assigned polling stations at 5:30 am and remained there throughout voting and counting until the results for the presidential elections for the entire polling station were

announced and posted. As part of the PVT, observers reported the official results as announced by the election officials for sampled polling stations via coded text message using their mobile phones.

ELOG wishes to note and to remind all Kenyans that the IEBC is constitutionally mandated to announce and declare the *final, official* results of the elections. ELOG's PVT estimates are consistent with the IEBC's official results for the 2017 presidential election.

Below are the ranges projected by the ELOG PVT for each of the candidates. These ranges are determined by the PVT estimates and the margins of error. Given our assessment of the Election Day process and that IEBC figures are within the projected ranges, the PVT can corroborate the official result for each candidate.

Comparison of PVT Projections with Official IEBC Results					
Candidate	**PVT Projection**	**Margin of Error**	**Range**		**Official IEBC Result**
		MoE	**Lower Limit**	**Upper Limit**	
Kenyatta Uhuru	54.0%	1.9%	52.1%	56.0%	54.3%
Odinga Raila	44.9%	1.9%	43.0%	46.9%	44.7%
Nyaga Joseph William Nthiga	0.2%	0.1%	0.1%	0.3%	0.3%
Dida Mohamed Abduba	0.4%	0.2%	0.2%	0.6%	0.3%
Aukot John Ekuru Longoggy	0.2%	0.1%	0.1%	0.3%	0.2%
Kaluyu Japheth Kavinga	0.1%	0.1%	0.0%	0.2%	0.1%
Mwaura Michael Wainaina	0.1%	0.1%	0.0%	0.2%	0.1%
Jirongo Shakhalaga Khwa	0.1%	0.1%	0.0%	0.2%	0.1%

Turnout

The PVT projection for final turnout is 77.4% with a margin of error of +/- 0.5%.

Rejected

The PVT projection for the final rejected ballots is 0.6% with a margin of error of +/- 0.1%.

In Conclusion

Having observed the electoral process over a period of time, it is clear that while we have made strides in electoral reforms, the country still has a lot of work to do. Some of the issues that need to be addressed quickly to improve the integrity of our elections include:

1. Ensuring the integrity of the Voter Register - cleaning is still needed on the register considering the unattended details even after the release of the KPMG audit report.
2. Provision of consistent civic and voter education (as provided by the Constitution) to ensure that voters are well informed of their rights and responsibilities.
3. Punishing electoral offences and ensuring enforcement of code of conduct for political parties.
4. Ensuring consistent transparency, inclusive participation and access to information by the IEBC and the other agencies concerned with election management.
5. Ensure that all polling stations have adequate lighting and are physically accessible to PWDs and the elderly.
6. Ensure the implementation and enforcement of the campaign finance regulation and other electoral laws to avoid an undue advantage to the incumbents.
7. Ensure that the results transmission process is clear and understandable to all stakeholders.

As we work on strengthening our democracy and realizing the gains enshrined in the Constitution of Kenya 2010, let us remember that elections are also about the future. Elections are about the pledges that we are making for this country, as politicians, as duty bearers and as citizens that we realize the aspirations for all Kenyans for government and nation based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law

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d) ELOG statement after Election Nullification by the Supreme Court

11th August 2017

ELOG Statement on the Supreme Court Decision

Introduction

On Friday, 1st September 2017, the Supreme Court of Kenya (SCOK) annulled the results of the presidential elections held on 8th August 2017, announced and declared by the Independent Electoral and Boundaries Commission (IEBC) on the 11th August 2017. In a landmark ruling, the SCOK annulled the presidential election on three grounds: firstly, the elections were not conducted according to the principles laid down in the constitution; secondly, IEBC committed illegalities and irregularities in managing the process; and, finally, IEBC neglected its responsibilities in discharging its strategic obligations under the law.

Comment on the ruling by SCok on The Presidential Election

The Elections Observation Group (ELOG) lauds the bold decision taken by the Supreme Court of Kenya (SCoK). Having consistently observed the electoral processes closely for the last eight months and shared findings consistently, the ruling gives Kenyans and the concerned institutions another opportunity to conduct elections that will be credible, free and fair and in accordance with the laws of the country.

ELOG PVT Projection and Election Methodology

ELOG gave its last statement on 12th August 2017. The statement outlined the observers' findings on the e-day processes and projected the presidential result tallies. ELOG notes that the projection has elicited a lot of reactions both positive and negative especially because they compare favorably with the official results announced by IEBC.

ELOG takes this opportunity to inform Kenyans that the PVT is a proven scientific methodology of projecting the outcomes of elections results worldwide. This has been done in Malawi, Zambia, Nigeria Ghana and the Philippines among others.

The PVT uses official results from the polling stations as obtained by specially trained observers who send the information directly to the ELOG Centre for analysis. This information is further validated by verifying the same using the official results forms collected by observers from the polling stations. It is on the basis of this that ELOG made its projections.

Over and above the 1, 700 PVT observers, ELOG deployed other over 5,000 stationary observers to all the 1, 450 wards in the country who filed reports that are still being analyzed.

In the just concluded election for instance, ELOG could not pronounce itself to the results transmission process and the electronic processing of data since it was beyond the scope of the observation tool. Our e-day reports addressed themselves to the polling day activities which included the opening, voting, closing and counting processes.

However as stated above and having observed the pre-election and the immediate post-election environment, ELOG stated that it was premature to make an evaluation on the credibility of the elections. It further recommended that queries that had been raised both on the transmission of results and the availing of the prescribed scanned results forms to the public be addressed by the IEBC. We also advised that any disputes emanating from the process be adjudicated through the courts.

Preparations for the fresh Presidential Election

While we await the comprehensive report of the SCOK verdict, there is a clear indication from the ruling that will require all electoral processes be firmly premised on the constitution and legal provisions, transparency and verifiability. Further, IEBC will be required to properly attend to its obligations both in the management of the election operations but also in engagement with stakeholders on the same.

Going forward, we appeal to IEBC to immediately share a clear framework on the conduct of the presidential re-run within the shortest time possible. We also appeal to the political contestants to conduct their campaigns peacefully and adhere to the electoral code of conduct and refrain from brinkmanship and careless rhetoric that could create tensions in the country in the run-up to the new elections. In this regard, ELOG takes great exception with the utterances of politicians that have cast aspersions on the SCOK ruling and the work of observers.

e) ELOG Opening Statement on Fresh Presidential Election

26th August 2017

Statement on the Repeat Presidential Election Pre-Election, Opening, Set-Up of Polling and Incidents

Background

October 26th 2017 is the day Kenya conducted a fresh presidential poll after the Supreme Court of Kenya nullified, on the 1st September 2017, the initial Presidential results of the elections held on August 8th 2017. This followed a successful election petition by the opposition NASA alliance against the declaration on 11th August 2017 of Uhuru Kenyatta of Jubilee Party as the president elect by IEBC. The court cited irregularities and illegalities in the conduct of the elections and directed a fresh poll conducted within the provision of the constitution.

The Supreme Court directed that fresh elections be conducted within a period of sixty days of the annulment. In turn, the IEBC first declared October 17th as the new date for the fresh presidential election only to revise the date to October 26th. Since then, the country has experienced a most fluid electoral and political environment ever. From scathing attacks on the Judiciary to conditions on irreducible minimums to IEBC issued by NASA, Kenyans eventually saw the withdrawal of the NASA presidential candidate, the onset of anti-IEBC demonstrations followed by brutal response by the state through instances of police brutality against many, including university students. More legal action led to the inclusion of other presidential candidates in the fresh poll that had earlier been unilaterally excluded from running by IEBC. The IEBC has also been at the centre of internal bickering, politicking and confusion with revelations of seeming compromise of its independence, numerous electoral litigations and political brinkmanship leading to the resignation of Commissioner Dr. Roselyn Akombe and the admission by the IEBC Chair Wafula Chebukati that he could not guarantee a credible election.

Compounding the unfolding drama within the Commission are the recent happenings at the Supreme Court where Judges failed to show up for a scheduled petition thereby rendering the petition null due to lack of quorum. The consequence of this has fed into a growing crisis in politics and political parties leading to widening polarization of the country.

It is this polarized environment that forms the backdrop for the fresh presidential elections that began this morning.

Electoral Observation

ELOG has subscribed to the international election observation and monitoring standards which demand that observers remain non-partisan, impartial and politically neutral in assessing and evaluating electoral processes in the country as well as to conduct election observation and monitoring for the benefit of the country. Additionally, ELOG is also guided by paragraph 10 of the DOGP which notes that:

> *The decision by citizen organizations to observe and/or monitor an election or any element of it does not indicate that the organizations either presume the election process to be credible or to lack credibility*

ELOG's observation of the October 26, 2017 presidential election is thus premised on the principles that non-partisan, election observation and monitoring by citizen organizations seeks to evaluate the process and its elements accurately, impartially and as systematically as practicable in order to properly characterize processes according to national legal requirements and applicable international obligations and commitments.

ELOG constituency supervisors have been observing and reporting on the immediate pre-election environment across the country. For Election Day, ELOG has deployed 766 observers to a representative sample of polling stations in the country excluding Nyanza and Western where it was felt that security of the observers was at risk. ELOG will report and process data from the polling stations observed. ELOG will not project results as has previously done. In addition, ELOG has deployed 215 constituency supervisors to aid the polling station observers and assess the security environment. There are also another 730 general observers deployed to polling stations and 430 observers to constituency tallying centers.

Although our deployment has taken concern of the security situation in the country and therefore not comprehensive, we trust that the information collected from all the observed polling stations will offer useful insights into the process during Election Day.

Our observers in 766 sampled polling stations observed the adherence of the opening and setup of the polling stations process. This statement is based on Observation and Incident Reports filed as of 11:30 a.m. by ELOG observers.

Opening and Set-up

- ELOG observers were properly permitted to observe in 99.5% of polling stations observed.
- In 93.0% of polling stations observed, there were or more polling station officials present.
- 80.7% of the polling stations observed opened on time. The remaining stations opened between 7:00am with some opening after 8:00am.
- In 99.9 % of polling stations observed, the ballot boxes were shown to be empty before being sealed.
- ELOG observers reported that majority of the polling stations observed, 98.6%, had security officers present.
- 99.7% of polling stations observed had KIEMS devices.
- A majority of polling stations observed (97.8%) had the requisite strategic materials (ballot boxes, ballot papers, IEBC stamp, indelible ink, and the Results Form 34A).
- In 36.0% of polling stations observed, the Presiding Officer was a woman.
- A Jubilee party agent was present in 82.6% of all the polling stations observed. Agents from other parties (not listed above) were present in 2.8% of all the polling stations observed.
- In 16.4% of all the polling stations observed, there were no party agents.

Critical Incidents

So far ELOG has observed critical incidents during the opening and setup of polling stations process:

Violence, intimidation, or harassment

In Mombasa, Nyali constituency, an ELOG observer was harassed and beaten by unknown assailants on his way to his assigned polling station, preventing him from carrying out his duties. In the same constituency, another observer was threatened by a group of young men at around 5:30 a.m. while she was on a *boda boda* headed to her assigned polling station. They threatened to deal with her in case she returned to the polling station. She defied their orders and returned to the polling station an hour later and reported that it had been opened but was unable to complete her observation role due to the intimidation.

In Ruaraka Constituency, an observer was beaten and robbed of her observation materials by a group of young men who had barricaded a road. She was rescued by officers from the Ruaraka Administration Police Camp.

In Olympic Primary School, Kibra Constituency, the access gate was barricaded with building blocks and voters were assaulted as they tried to access the polling station. People were also reportedly blocked from leaving their homes to go and vote. The protestors also threatened to burn any polling material brought to the station and stoned the police who attempted to disperse them.

Incidents of Disrupted Voting

In Trans Nzoia, at Matisi Cattle Dip Polling Station, voting was disrupted by a group of young men at around 8:30 a.m. who attacked IEBC officials with stones. The police however intervened and voting resumed.

Next Steps of the ELOG Observation Process

ELOG will continue observing throughout the day and will release some of its key findings on the voting process to the media. ELOG will issue a preliminary statement on the conduct of the elections on Friday, October, 2017. This statement will summarize our preliminary findings and conclusions on the conduct of Election Day Processes. This will include assessing the closing, counting and transmission of results processes.

ELOG anticipates to issue its final statement of the presidential elections within reasonable time after the finalization of the presidential election results tabulation process.

ELOG is committed to its mandate and will remain vigilant and diligent in serving Kenyans to comprehensively monitor and observe the electoral processes and provide timely, impartial and objective reports and recommendations.

Due to the reported incidences where observers been targeted, we appeal to Kenyans to desist from harassing or intimidating observers as they conduct their service to the country. Observers are non-partisan and work to promote transparency and accountability in the process.

May God Bless You and God Bless Kenya Thank You

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F) ELOG Statement on 27th October 2017

27th August 2017

TO VOTE OR NOT

Statement on the Voting, Closing and Counting of the Fresh Presidential Election

Yesterday, Kenyans across the country had the opportunity to cast their votes once again during the fresh presidential election. This was an extraordinary election. The process was characterized by boycotts from a large constituency in the country and generally registered low turnout. The Independent Electoral and Boundaries Commission (IEBC) in a statement issued by its chairperson, postponed elections in four counties; Siaya, Migori, Kisumu, and Homabay, citing security concerns for their staff and materials. New elections for these counties are scheduled for Saturday, the 28th October 2017.

The repeat presidential election has considerably amplified the divisions in Kenya's society and body politic. Consequently, it will be an uphill task bringing Kenyans to embrace nationhood and live as one people. The repeat election has also so far witnessed the loss of more than seventy lives, over sixty cases of sexual violence, scores of injuries and the destruction of millions of shillings worth of property. Most of the deaths have resulted from violent confrontation between protesters and security forces. There are also allegations that militia groups and other vigilantes could have been responsible for a small portion of the deaths. Ultimately, it is the responsibility of the state to protect citizens and their property.

ELOG through, the deployment of 1, 773 field observers deployed in 215 out of the 290 constituencies, has kept close vigil over the entire voting process. This statement is based on Observation and Incident Reports filed as of 9.30 a.m. by ELOG's sample based observers.

In our opening statement on 26th October, 2017, we shared our findings on the opening process in the polling stations that ELOG was able to access. While it was indicative that many of the polling stations had opened in time and had the requisite strategic materials, it was also clear from other field reports that in many parts of the country there was very little activity in respect to opening and voting processes. This was largely attributable to the election boycott by the NASA coalition and insecurity.

Incident reports on barricaded polling stations were received from parts of Nairobi and Mombasa. In a number of areas, our observers were barred from accessing polling stations. This happened in Kibra, Ruaraka and Nyali.

It is evident from the observation process that the exercise was characterized by tension, voter apathy, boycott and insecurity in some places which appear to have informed the IEBC's decision to postpone voting in Siaya, Homabay, Kisumu and Migori by IEBC due to security concerns.

Deployment and Monitoring Methodology

ELOG deployed 1, 773 observers in all the 215 constituencies with the exception of constituencies in Siaya, Migori, Homabay, Kisumu, Kisii, Nyamira, Busia, Bungoma, Kakamega and Vihiga counties due to security concerns.

The following are ELOG's findings on the voting process:

- In 99.6% polling stations, ballot papers were stamped with the IEBC official stamp before being issued.
- In 4.8% of the stations, the Electronic Voter Identification Devices (EVIDs) failed to function properly.
- In 28.8% of polling stations observed, some people (i.e., 1 to 25) or many people (greater than 25) were not permitted to vote.
- In 57.8% of the stations observed, at least one person was identified alphanumerically not biometrically by the KIEMS device.
- In 15.7% of polling stations, many people (i.e. 25+) were assisted to vote. A majority of those assisted were women. Out of these stations where people were assisted, the assisted voters were not allowed to have a person of their choice (and not a presiding officer) helping them in 3%.

- The secrecy of the ballot was not violated in 86% of the polling stations (not including those assisted to vote).
- There was a queue at 5:00 p.m. in 45.9% of polling stations. Of those stations with a queue at 5:00 p.m., 91.9% were properly permitted to vote.
- Our observers reported that there was a print out of the data contained in KIEMS which was used to verify voter information. This was not present during the 8th August Elections.

Counting Process

We have also concluded our analysis on the counting process. The following are ELOG's findings on the closing and counting:

- In 99.1 % of the stations observed the ballots box seals were intact before counting began.
- In 1.7% of stations observed one or more political party agents requested a recount of the presidential ballots.
- For the closing and counting process, a Jubilee party agent was present in 94.8% in the polling stations. In stations where they were present, the Jubilee Party agents signed the declaration of results for the presidential elections.
- In 95.4% of the polling stations a copy of the presidential results Form 34A was publicly affixed outside.
- In 99.6% of the polling stations observed, the presiding officer properly signed the presidential results Form 34A.
- In 99.7% of the polling stations observed, the presiding officer stamped the presidential results Form 34A with the official IEBC stamp. In 94.8% of the stations, observers witnessed the presiding officer scan and send the presidential results Form 34A through the KIEMS kit and receive a confirmation message.

Critical Incidents

A number of incidents were received from ELOG observers throughout the course of the day, key among them were:

Opening of Polling Stations

By 11:00 a.m. four polling stations in Kibra had not opened; these are Joseph Kang'ethe Primary, Holy Trinity, Olympic Primary School and Lindi Mosque. In Budalang'i Constituency, Osieko polling station did not open at all following the burning of all polling materials and chaos caused by protesters. In Musanda Ward, Mumias West Constituency, ballot materials were destroyed at Ugana and Buyundo polling centres hence the centres were never opened for voting.

Attack on Observers, Harassment and Intimidation

In Ruaraka Constituency, an ELOG Observer was attacked by a group of armed protesters. In Nyali constituency, an ELOG observer was harassed and beaten by unknown assailants on her way to the polling station. In Kilifi North, there was a group of people destroying the houses of those who attempted to vote. In Lang'ata Constituency St. Jude Church polling station, voters were pelted with stones by unknown people scaring them away from voting. In Teso South, Obekai Primary School Polling Centre, two men masquerading as voters unleashed bees on unsuspecting police officers.

ELOG will be collecting all Presidential Results Forms (34As and 34Bs) from the sampled polling stations that our observers were stationed. These forms will then be compared with the forms that IEBC will be posting forms site (https://forms.iebc.or.ke/).

It is clear from the observation findings that there were mixed outcomes in the voting process. In the main opposition strongholds, very little activity was recorded in the stations with many keeping away. In Jubilee Party strongholds the voting as expected was characterized by good turnouts and long queues.

Going Forward

ELOG therefore recommends as follows;

1. On police brutality

We remind the Minister for Interior, the Inspector General of Police and the National Police Service that their primary role is to serve and protect Kenyans. The Policing Protocols and Code of conduct should be availed publicly and adhered to strictly. The Constitution of Kenya remains in force and must be followed.

We urge the Independent Policing Oversight Authority (IPOA) and the Director of Public Prosecution to also ensure swift action is taken as per their mandates. Kenyans, survivors, their families, and communities should be assured that the state does not condone violence committed by the police or any other person, and will take all measures necessary to end impunity for these violations.

2. *On the ongoing election*

The IEBC must provide clear and timely information to the public on how they will conduct postponed election in Homabay, Kisumu, Migori, and Siaya counties.

3. *On national cohesion*

In August 2010 when Kenya promulgated our Constitution, as Kenyans, we declared that we were proud of our ethnic, cultural, religious and political diversity. We asserted that we were determined to live in peace and unity as one indivisible sovereign nation.

As already observed, this election has been very divisive. ELOG as a diverse citizen platform, notes that despite the outcome of this election; there is need for urgent, inclusive dialogue led by Uhuru Kenyatta and Raila Odinga as soon as possible. This will not only address the political impasse but also start to pull Kenya back together to ensure political, economic and social inclusion and cohesion.

"In the moment of crisis, the wise build bridges and the foolish build dams." African Proverb

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G) ELOG Final Statement on Fresh Presidential Elections

1st November 2017

HAVE KENYANS SPOKEN?

Elog Statement on October 26th Fresh Presidential Election

Background

On the 26th October 2017, IEBC conducted fresh presidential election as directed by the Supreme Court which annulled the August 8th 2017 election and directed that another presidential be conducted within 60 days of the ruling. A protracted tense political environment ensued thereby creating a toxic pre-election environment that spilled over into the election.

In its statement, on the 16th October 2017, ELOG pronounced itself on a number of issues pertinent to the preparations for the fresh election. Key among these issues was the need to address the political brinkmanship that had polarized the country since the first election especially between the two leading contenders: NASA Coalition and Jubilee Party. ELOG also implored the IEBC to show leadership in the process by first putting its house in order and then seeking advice from the Supreme Court on whether, given the prevailing politico- legal environment, it was feasible to conduct the fresh presidential election as scheduled. It highlighted the need for inclusivity and transparency in the election preparations, the excessive use of force by the police service on demonstrators, the breach of law and public order by demonstrators, and the need for a broad-based dialogue amongst the political players.

Unfortunately, many of the issues raised by ELOG before the election were not effectively addressed and as a result Kenyans went into the fresh elections in a cloud of uncertainty, tension and apprehension. Indeed, in two previous statements, the first on the pre-election environment and opening of polls, and the second one on the voting, closing and counting processes, we observed that

the election had amplified the divisions of the country's society and body politic.

The election was also characterized by violence that led to deaths in Nairobi, Busia, Migori, Kisumu and Athi River where police clashed with protesters on the E-Day. An atmosphere of fear and trepidation was also noticeable in many of the cosmopolitan areas around the country.

The unfavorable political environment was further aggravated by the apparent lack of trust in key institutions that would otherwise ensure that the election was conducted in a credible manner. IEBC was under constant attack especially by the opposition which later withdrew from participating in the election. The Police also came under a severe criticism owing to their excessive use of force on un-armed protesters that, among other things, resulted in the death of over 60 Kenyans and sixty reported cases of SGBV according to reports shared by KNCHR, Amnesty International, and Physicians for Human Rights and Human Rights Watch. Despite the historic decision to annul the initial presidential results, the Judiciary attracted criticism when a last ditch attempt to stop the elections by three petitioners was technically thwarted by an apparent lack of quorum by the bench that constitutes the Supreme Court on October 25th.

The above issues notwithstanding and with the Fresh Presidential Election officially confirmed by the IEBC, ELOG deployed observers to document and report the e-day processes.

ELOG Mission for the fresh Presidential Election

Principles of Observation

As earlier stated, ELOG subscribes to the international election observation and monitoring standards which demands that observers remain non-partisan, impartial and politically neutral in assessing and evaluating electoral processes in the country; as well as, in conducting election observation and monitoring for the benefit of the country. Additionally, ELOG is also guided by paragraph 10 of the DOGP which notes that:

The decision by citizen organizations to observe and/or monitor an election or any element of it does not indicate that the organizations either presume the election process to be credible or to lack credibility

ELOG's observation of the October 26th, 2017 presidential election is, thus, premised on the principle that non-partisan, election observation and monitoring by citizen organizations seeks to evaluate the process and its elements accurately,

impartially and as systematically as practicable in order to properly characterize processes according to national legal requirements and applicable international obligations and commitments.

Long Term Observation

ELOG observed the petition process which culminated in the annulment of the August 8th Election and further deployed the long-term observers (290) during the election week when the fresh presidential elections were held. Some of the findings from these processes are shared in the report.

Further, ELOG conducted an assessment of the Voter Register using logical tests to determine the veracity of the data and voter details. This was the first phase of a comprehensive independent audit of the voter register. The second part which will mainly feature field surveys using the 'people to list' methodology will be done in the next phase of our long term observation. The findings of this first phase have been shared with the IEBC and other stakeholders and they form part of our summary findings in this statement.

Election Day Observation

The political environment described above, especially the compromised security situation, informed ELOG's deployment strategy. ELOG deployed 2,196 observers who were confirmed to have observed the process on E-Day. These observers were deployed in all parts of the country apart from Busia, Bungoma, Vihiga, Kakamega, Kisumu, Migori, Homa Bay, Siaya, Nyamira and Kisii Counties. The major reason for this was insecurity. Indeed, three ELOG observers in Nyali, Kibra, Kilifi and Ruaraka constituencies came under attack and had to be withdrawn for their safety.

Further, ELOG could not effectively deploy in Turkana as a result of heavy rains that affected the training of the recruited observers.

Mission Objectives

The ELOG observation mission was premised on three objectives that were largely informed by the Supreme Court ruling that annulled the initial election and directed a new one to be held in within 60 days. The mission objectives were to assess:

- Whether the fresh presidential election was conducted in compliance with the Constitution and the relevant electoral laws

- Whether the IEBC was competent in managing and conducting the fresh presidential election
- Whether there was transparency and inclusivity in the conduct of the election

In this regard, therefore, ELOG deployed 766 Sample-based observers, 517 General Observers, 408 Tallying Centre observers, 290 Long Term observers and 215 General observation supervisors. This made for a total of 2, 196 observers.

Summary Findings

In our previous two statements, we gave statistics on what our observers were able to note on the opening, voting, closing, counting and transmission processes.

Our observers in sampled polling stations observed the opening and setup of the polling stations. This statement is based on Observation and Incident Reports filed as of 26th October 11:30 a.m. by ELOG observers.

Opening and Set-up

- 80.7% of the polling stations observed opened on time. The remaining stations opened between 7:00 am and 8: 00 am, with some opening after 8:00 a.m.
- In 99.9 % of polling stations observed, the ballot boxes were shown to be empty before being sealed

Voting Process

- In 4.8% of the stations, the KIEMS failed to function properly while in 28.8% of polling stations observed, some people (thus, 1 to 25) or many people (greater than 25) were not permitted to vote
- In 57.8% of the stations observed, at least one person was identified alphanumerically not biometrically by the KIEMS device. In 15.7% of polling stations, many people (i.e. 25+) were assisted to vote
- Our observers reported that there was a print out of the data contained in KIEMS which was used to verify voter information. This was not present during the 8th August Elections

Counting Process

We have also concluded our analysis on the counting process. The following are some of ELOG's findings on the closing and counting.

- In 99.1 % of the stations observed, ballots box seals were intact before counting began. In 1.7% of stations observed one or more political party agents requested a recount of the presidential ballots
- A copy of the presidential results form (34A) was publicly affixed outside in 95.4%of the polling stations observed
- In 94.8% of the stations, observers witnessed the presiding officer scan and send the presidential results Form 34A through the KIEMS kit and receive a confirmation message

Constituency Tally Centre Observation Findings

The following are ELOG's findings on the Constituency Tallying Process from 208 constituencies across the country with the exception of Nyanza and Western regions:

- In 2.9% constituency tallying centres observed, the tallying process was postponed, disrupted or halted at some point
- In 2.7% of constituency tallying centres observed, there was an attempt to harass or intimidate election officials during the tallying process
- In 88.2% of constituency tallying centres observed, observers witnessed the input of Presidential results Form 34A results into the computer spreadsheet by the Returning Officers
- In 99.5% of constituency tallying centres observed, no party agents filed a written complaint regarding the constituency tallying process

Closing Process at the Constituency Tallying Centre:

- In 98.6% constituency tallying centres observed, all polling station results forms (Form 34A) were tabulated before the Returning Officer filled out the collated results Form 34B
- In 96.9% of constituency tallying centres observed, a party agent was present for the signing of the Collation of Presidential Results Form 34B
- In 99.5% of constituency tallying centres observed, the Returning Officer

stamped the Collation of Presidential Results Form 34B

- In 95.7% ELOG constituency tallying observers witnessed the Form 34B being scanned and sent electronically to the National Tallying Centre

Results Transmission

Of the polling stations observed by ELOG, 94.5% of observers reported witnessing the Presiding Officers scanning and sending the Presidential Results Form 34A through the KIEMS kit and receiving a confirmation message. As mentioned above, the majority of constituency tallying centre observers (95.7%) also witnessed the electronic transmission of the collated results Form 34B.

While the transmission of the 34As was fast the absence of rolling aggregate provisional results at various electoral jurisdictions and lack of transparency in the process was questioned.

Comparison to 34As on the IEBC's Website

In addition to observing the quality of the process at polling stations, ELOG observers requested copies of the Presidential Results Form (34A). ELOG observers collected 540 images of forms 34A in order to compare them to those posted on the IEBC's Forms site (https://forms.iebc.or.ke). The following observations were made:

- 536 out of 540 images of the forms on the IEBC portal were legible.
    - 7 out of the 536 forms did not have the official IEBC stamp
    - 1 out of the 536 forms was not signed by the presiding officer

ELOG compared 522 of the forms collected to forms posted on the IEBC Forms site. The figures for the candidates in the ELOG copies matched the figures in the corresponding IEBC form in 521 cases.

However, there was one case where the figure for Mr. Uhuru Kenyatta in the ELOG form was 86 and the figure in the IEBC form 286. This was the polling station 01 in Bolargy Primary School located in Garissa Township.

Voter Turnout

As ELOG already noted in its previous statements, turnout on the 26th October 2017 was very low. In large parts of the country many voters stayed away. ELOG was unable to deploy observers comprehensively across the country and, therefore, cannot give a reliable projection of the voter turnout.

Assessment of the Voter's Register- Logical Computer Test

SUMMARY OF ELOG FINDINGS POST KPMG AUDIT

		Findings By ELOG	Findings By KPMG
1	Total Registered Voters	19,611,423	19,646,673
2	Number of ID/Passport that have Duplicates	81,024	93,548
3	Duplicated ID/Passport Records Plus Surplus Records	169,646	197,677
4	ID Records with More than 8 Numeric Characters in the Field.	44,101	60,853
5	Records with Numeric Characters Only in the Names Field	48	69
6	Records with Letters Only in the ID/ Passport Field	568	755
7	Records with a single Name either Primary or Secondary Name Only	11	12
8	Passports whose first Letters did not Start with A, B, C, D or KE	250	6,872

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It is clear from the above analysis that the IEBC did not conduct a thorough cleaning of the register after the KPMG audit. Therefore, the integrity of the register used during the elections could not be guaranteed.

Regulation of Campaign Finance

ELOG has noted the continued lack of regulation of campaign monies by the IEBC in spite of the provision under Article 88 (4)(i) which vests in the Commission the mandate to regulate the amount of money used in respect of any election.

Enforcement of Electoral Offences Act

ELOG equally observed malpractices and electoral offences relating to multiple registration, offences relating to voting, use of threats, violence to force people to vote in a particular way and stopping others from voting, use of public resources and engagement of public

The Phenomenon of Fake Electoral News

As part of the initiative for open electoral data and processes, ELOG, working in partnership with Code for Kenya's "PesaCheck" was able to quickly verify and fact-check scores of incidents and claims received on E-Day ranging from images of children allegedly voting to reports of violence and voter-interference. The team has checked and debunked more than 80 election-related claims drawn mainly from social media and mainstream media sources.

Conclusion

The overwhelming issue on the conduct of the fresh election was whether the political environment created a conducive environment in which credible elections could be conducted. ELOG notes:

- ELOG observes that insecurity, violence, intimidation, fear, tensions, coercion, undue influence and ultimate postponement and cancellation of voting in 25 constituencies, disenfranchised millions of Kenyans who were eligible to vote. The sum effect of these factors was to deny millions of Kenyans the opportunity to express their free will
- The absence of non-partisan observers and party agents other than Jubilee ones in the majority of polling station also severely compromised the transparency and accountability of the voting and counting processes
- On the basis of the above challenges, ELOG concludes that the existing environment was not conducive for conducting a credible election. In our view the NASA coalition and the Jubilee Party largely contributed to this environment. The IEBC was also responsible through acts of commission and omission

Recommendations

1. Elections Management

ELOG recommends a comprehensive independent legal and operational audit of IEBC's management of the election. This process should involve as many stakeholders as possible and lessons learned must inform the next phase of electoral reforms.

2. Voter Register

The Voter Register remains a contentious issue that must be addressed. ELOG noted that IEBC publicly shared the voter register one day to the election. This was in contravention to the spirit of the provisions of the Elections Act that requires adequate time be accorded to the voters to verify their details. Preliminary findings from ELOG's Voter Register Audit indicate that IEBC has not managed to fully clean up the register even after the KPMG audit.

3. *Legal Redress*

Cognizant of respect for the rule of law, ELOG urges parties aggrieved by the conduct and outcome of the October 26th Election to follow due process as laid down in the Constitution and other relevant laws.

4. *Building a Nation: Promoting Tolerance and Harmony*

The political divisions in country immensely affected the outcomes of the fresh presidential elections. As the country readies itself to engage on a political settlement and even possible petitions against the concluded elections, political leaders should promote a culture of tolerance and harmony and dissuade their supporters from violent engagements.

5. *Dealing with the Scars of the Violence*

ELOG recommends that the Office of the Director of Public Prosecution (ODPP) speedily investigates the numerous incidents of assault and killing of civilians in the run-up and during the just concluded elections. So far no official report has been issued by the authorities. Kenyans, survivors, their families, and communities should be assured 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 end impunity for these violations.

6. *Respect for Institutions*

The Constitution of Kenya vests powers to several independent institutions to exercise their mandate. Two of these institutions; the IEBC and the Judiciary have come under heavy attack by political actors. ELOG recommends that respect for institutions must be upheld by all Kenyans. Equally so, the beholders of the said institutions should uphold the dignity of the same by ensuring they conduct themselves in accordance with their delegated mandate and the constitution.

7. *National Dialogue*

There is need for national dialogue to address broad range of social, political and economic issues affecting the country. ELOG urges that all stakeholders be involved in this exercise. Similarly, we urge that the terms of reference and agenda for this dialogue be agreed upon by the relevant stakeholders within the shortest time possible.

ELOG as a Kenyan Citizen's platform remains concerned about the lack of respect for the Constitution of Kenya during the electoral period. These include attacks on independent institutions, disregard for rule of law, inclusivity and public participation and flagrant human rights violations. Kenya must make deliberate and purposeful strides to work towards cohesion by addressing the political challenges that impede Kenya from realizing the aspirations promised and premised in our Constitution.

May God Bless You and God Bless Kenya

Thank You

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Appendix 2: ELOG 2013 Key Findings

- **Delimitation of Boundaries**
  - IEBC completed boundaries delimitation work in November 2012 and published vide NA Constituencies and CA Wards Order, 2012.
  - 125 applications consolidated under Republic v. IEBC & another *Ex-parte* Councillor Eliot Lidubwi Kihuas & 5 Others; challenged the boundaries delimitation by IEBC.
  - Concern: manner in which the delimitation was done. What was the basis of allocating number of wards to a given constituency? Ruling was made in favor of IEBC
- **Voter and Civic Education**
  - IEBC carried out voter education in all constituencies but varied in quality and quantity and as a result some voters were better equipped than others.
  - ELOG's findings – voters were inadequately prepared. IEBC also didn't give clear guidelines on financing and implementing timely civic and voter education.
- **Voter Registration**
  - Procurement process of BVR riddled with controversies putting into question the independence of the Commission. This resulted in the delay in voter registration, compilation and inspection of list.
  - There were challenges during registration: malfunction of kits, insecurity, lack of ID Cards, misconceptions.
- **Party Nominations**
  - Party primaries were unfairly conducted. Political parties instead of using party lists used membership cards resulting in shambolic elections, violence and intimidation.
  - IEBC didn't effectively handle nomination disputes.

- **Violence**
  - Violence was consciously used as an unfair means of achieving political objectives. Physical violence affected youth and female candidates
  - Ability of security agencies to secure the lives and property of Kenyans was a concern.
  - Pre-emptive responses of people relocating from hotspot areas to relatively safe places.
  - Both civilian and security agents participated in and abetted violence
  - Despite increase in hate speech cases, there was inability by state organs (NCIC) to manage the menace.
- **Campaign Financing**
  - Absence of a substantive law governing campaign financing was a blight in the preparation for elections free of "intimidation, improper influence or corruption" according to Art 81 (e) (ii).
  - No clear priorities, strategies and parameters for ensuring compliance with the laws or regulations and plans for their effective implementation.
- **Participation of Women**
  - Nomination fees for women was lowered thus allowing those that couldn't have participated in the process to participate. However, this did not assist as much especially without a proper finance statute.
  - There was increase in number of women candidates, mainly because of the progressive nature of the 2010 Constitution.
  - Delays at IEBC due to logistical problems resulted in failure to provide timely statistics on women who were wrongfully denied nomination thus denying them effective remedies, i.e., access to dispute resolution mechanisms

- **Participation of People with Disabilities**
    - Voter register omitted some information on PWD despite lobbying by UPDK. As a result IEBC didn't provide reasonable accommodation for PWDs. Apart from affirmative action for PWDs not to queue; there was no provision to promote independent voting by PWDs.
    - Use of BVR kits in registration disadvantaged rights of persons without limbs.
    - Violent political campaigns and nominations disenfranchised PWDs.
    - IEBC didn't take into account need for accessible communication (large print, tactile ballots, accessible multimedia as well as written, audio, plain language, human-reader, and augmentative and alternative modes, means and formats of communication).
- **Participation of Youth**
    - Youth experienced difficulties acquiring ID Cards despite calls to government to ensure the youth were not denied right to participate. The youth felt the introduction of 2nd generation IDs was good towards free and fair elections however they felt the process had been politicized.
    - The youth lacked relevant information on the voter registration process. There was delay in processing and issuance of IDs coupled with rampant corruption, high registration fees, few registration centres and poor attitude and communication skills by staff.

Within the political parties, the youth lacked financial resources to seek nomination and campaign for seats. They were subjected to threats and intimidation and there was absence of youth representation in party decision-making organs, manipulation by party leaders and lack of transparency within parties.

Appendix 3: ELOG 2013 Recommendations

1. Audit election legislation to identify conflicting provisions and ensure timely enactment of electoral reforms.

- IEBC should actively involve stakeholders such as political parties, Judiciary, Parliament, independent observers, the media, and civil society in the process of auditing the last election s in accordance with Art 88 (4).
- Clarify date of next election; will give certainty on election timelines.
- Enact the Campaign Finance legislation to regulate disclosure of sources and use of money during elections.
- Enact the Affirmative Action legislation.

2. Adoption and Use of Electronic Technologies

- Technology was meant to increase efficiency, speed and accuracy in the process.
- IEBC should establish clear procedures on the procurement of electronic technologies; procedures should be made public and transport.
- IEBC should be conscious of the timelines for introducing technology; too close to the election doesn't allow for testing and interoperability.
- IEBC should phase-out the introduction of technology across the electoral cycle.
- IEBC should consult with all stakeholders and other key actors to fully understand the working of any electronic technology adopted.

3. Openness and Transparency in Election Management

- Art 82 demands IEBC to be transparent and accountable in management of elections.
- In line with the above, ELOG recommends that IEBC should publish voter register in time, as well as polling station, announce voter turn-out in time to increase voter confidence, publish reports of turn-out per station and provide clarity and uniformity in the use of the terminologies.

4. Promote Issue-based Politics & Regulate Political Party Nominations

- Party development and manifesto building; political parties need to improve functioning and internal organization to create a fully democratic and competitive political arena.

- Institutionalize presidential and other forms of candidate debates.
- The Constitution requires IEBC to regulate political parties' nominations; they thus should design and put in place measures and mechanisms for implementing this.

5. Provision for Voter Education

- Better resourcing of voter education by government to ensure robust and timely voter education
- Better coordination between IEBC and CSO in the provision of structured and comprehensive voter education including: mapping of voter education providers and their coverage, harmonization of voter education material and effective voter education strategies.
- IEBC should ensure voter education information is accessible to all citizens including PWDs.

6. Election Security

- Government should establish a National Tuskforce on Election Security comprising the IEBC, Security Agencies, NCIC and other key actors.
- Process of Accreditation of Observers.
- IEBC should streamline this activity and brief its officers on the regulations applicable to observers to enable uniform treatment of all observers.

7. Inclusion of PWDs

- Register of voters should include disability details where applicable; political party register should also have the same.
- This will help deal with the logistics in time to enable PWDs vote smoothly.
- Rules on accessibility of materials, voting facilities and voting instructions should be made.

8. Clarify the law relating to the validity or invalidity of the election of a presidential candidate

- There is need to define the sufficient threshold needed to determine the validity or invalidity of an election result.
- It's recommended that a competent judicial platform undertakes this talks in order to inform future elections

Appendix 4: ELOG 2013 Recommendations

The 2017 ELOG PVT employed a nationally, representative sample of 1,000 polling stations from the official list of 40,883 polling stations gazette by the IEBC. These stations were stratified by county and constituency to ensure that it is descriptive of all of Kenya. This means that the percentage of sampled polling stations closely matches the percentage of the polling stations in the county compared to the rest of the country. For example, Bungoma County has 1,186 polling stations which represents 2.90% of all polling stations in Kenya. ELOG had twenty-nine observers which represents 2.90% of all observers deployed and so on for all the counties. Through this sampling, the distribution of observers is proportionate to the percentage of polling stations in each county and constituency, ensuring that the overall picture of voting and counting provided is more accurate.

In more technical terms, the sampling methodology employed to draw the ELOG PVT national sample can be described as using a classic single stage cluster sampling and proportional stratification.

Table 1 below shows the sampling distribution by county.

County	IEBC List of Polling stations		ELOG PVT Sample	
	Polling Stations		Polling Stations	
	Number	% Number	Number	% Number
BARINGO	892	2.18%	21	2.10%
BOMET	728	1.78%	17	1.70%
BUNGOMA	1,186	2.90%	29	2.90%
BUSIA	760	1.86%	19	1.90%
DIASPORA	10	0.02%	1	0.10%
ELGEYO/MARAKWET	529	1.29%	13	1.30%
EMBU	710	1.74%	17	1.70%
GARISSA	381	0.93%	10	1.00%
HOMA BAY	1,062	2.60%	26	2.60%
ISIOLO	195	0.48%	5	0.50%

KAJIADO	797	1.95%	19	1.90%
KAKAMEGA	1,497	3.66%	37	3.70%
KERICHO	780	1.91%	20	2.00%
KIAMBU	1,963	4.80%	48	4.80%
KILIFI	988	2.42%	24	2.40%
KIRINYAGA	659	1.61%	17	1.70%
KISII	1,126	2.75%	27	2.70%
KISUMU	1,027	2.51%	25	2.50%
KITUI	1,454	3.56%	35	3.50%
KWALE	612	1.50%	15	1.50%
LAIKIPIA	531	1.30%	13	1.30%
LAMU	167	0.41%	4	0.40%
MACHAKOS	1,332	3.26%	33	3.30%
MAKUENI	1,060	2.59%	26	2.60%
MANDERA	401	0.98%	10	1.00%
MARSABIT	384	0.94%	9	0.90%
MERU	1,473	3.60%	36	3.60%
MIGORI	826	2.02%	21	2.10%
MOMBASA	934	2.28%	23	2.30%
MURANG'A	1,131	2.77%	27	2.70%
NAIROBI CITY	3,378	8.26%	82	8.20%
NAKURU	1,806	4.42%	45	4.50%
NANDI	796	1.95%	20	2.00%
NAROK	750	1.83%	18	1.80%
NYAMIRA	553	1.35%	14	1.40%
NYANDARUA	654	1.60%	16	1.60%
NYERI	917	2.24%	22	2.20%

PRISONS	103	0.25%	2	0.20%
SAMBURU	284	0.69%	7	0.70%
SIAYA	916	2.24%	22	2.20%
TAITA TAVETA	354	0.87%	8	0.80%
TANA RIVER	307	0.75%	8	0.80%
THARAKA - NITHI	625	1.53%	16	1.60%
TRANS NZOIA	639	1.56%	16	1.60%
TURKANA	644	1.58%	16	1.60%
UASIN GISHU	868	2.12%	21	2.10%
VIHIGA	548	1.34%	13	1.30%
WAJIR	434	1.06%	10	1.00%
WEST POKOT	712	1.74%	17	1.70%
Total	**40,883**	**100.00%**	**1,000**	**100.00%**

Elections Observation Group

CREDIBLE, PEACEFUL, FREE AND FAIR ELECTIONS

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