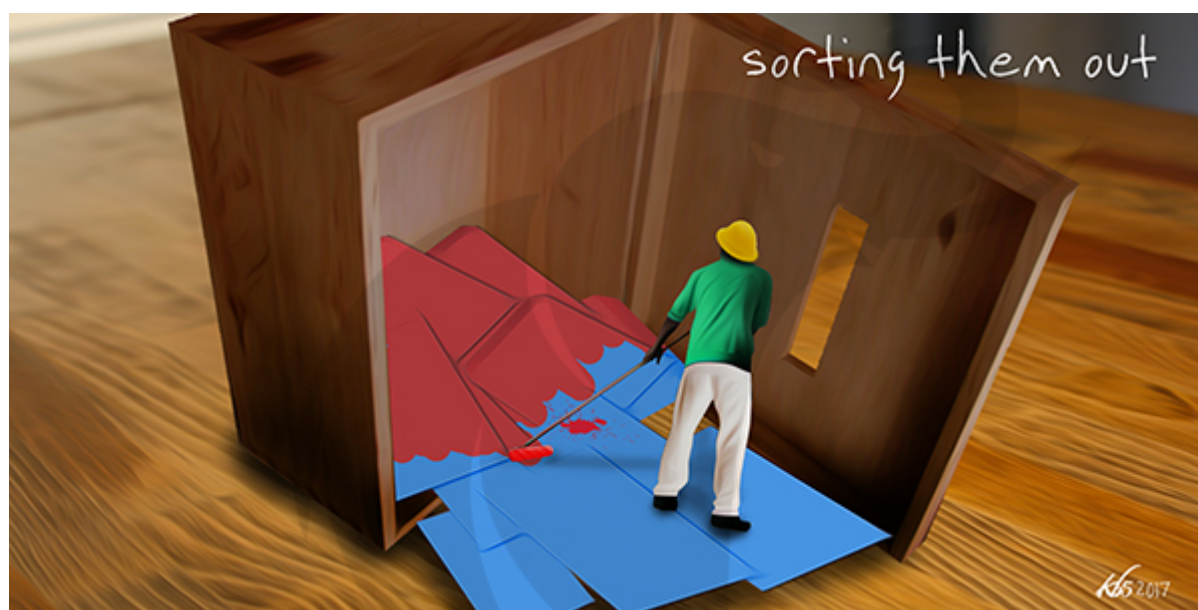




# The Will of the People: Further Reflections on the Post 2017 Election Evaluation Report and a New Electoral Management Culture

By Willy Mutunga



I was privileged to share my thoughts, concerns, hopes and aspirations during the launch of the [Post Election Evaluation Report](#) on 12<sup>th</sup> of February 2018 as a guest speaker particularly because it bears great significance to the Independent Electoral and Boundaries Commission (IEBC), as an institution, and to the nation at large. In the following essay, I share my own insights on an occasion that afforded us an opportunity to reflect and review the journey the IEBC and electoral stakeholders have travelled, so far, in entrenching sound processes in our electoral operations and systems. The expectation that I believed was shared by many, was the IEBC had prepared a report that was candid and honest in its assessment, and that it addressed, comprehensively, the political, legal, administrative, financial and managerial aspects of the 2017 General Elections.

While the Launch of the Post-Election Evaluation report stands as an epilogue in the election cycle, its utility cannot be gainsaid. It is a moment to celebrate successes, acknowledge and appreciate the failures, and identify the pathways to a better future.

The event brought back to mind two instances during my tenure as Chief Justice when I addressed the previous electoral commission. I believe that the words I spoke then ring true today as they did several years back. First was at the swearing-in of IEBC commissioners on 14<sup>th</sup> November 2011. On that occasion, I spoke at length on the importance of keeping true to the oath of office that

Commissioners take. I stated that failure of any election is a failure of an oath betrayed and that:

*'[T]here is no higher crime an individual, an institution, or a group of people can commit than one that subverts the sovereign will of the people, or whether through incompetence, negligence, or design make the expression of that will inarticulate'.*

I hope that in the recently launched Report, the IEBC has answered that question, and done it with candour and honesty.

Second was in my Concurring Opinion in **Petition 2B of 2014** (commonly referred to as **Munya II**) where in paragraphs 251-253 I addressed the issue of electoral management where I cautioned that 'nothing could imperil our democracy more than an electoral agency that is contaminated by bias, infected with incompetence, and afflicted by a virulent virus of minimal public accountability.

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Arguably, Kenya can do with one or two indolent *political parties*, but she cannot afford an *electoral management* agency that exhibits these weaknesses...the IEBC must demonstrate *competence, impartiality, fairness, and a remarkably high sense of accountability to the public and the parties who are its primary customers*. It must embrace high *disclosure standards*, and must avoid conduct such as hoarding of information and data that the public has a right to, both as a matter of course, and also as a matter of *Article 35 of the Constitution*. Materials that are in the possession of IEBC are not private property but rather they are *public resources*. The IEBC, therefore, must demonstrate an instant readiness to respond to public concerns, whenever these are raised, and to maintain a *public accountability* posture at all times.

I also hope that in the Evaluation Report, the IEBC has addressed these issues in a forthright and accurate manner.

Whereas these issues will sound familiar to the current IEBC commissioners, they were said long before you came into office. The fact that some of these matters still emerged in the 2017 election, speak to an enduring electoral management culture that is still far from perfect. And it underscores that fact that the country needs to pull together to create and realise an electoral infrastructure and operations that it has absolute faith and confidence in.

Elections are an important pillar of our democracy. The right to vote must not be taken lightly. The duty to protect that vote is also an important democratic imperative. There is an emerging, and a rapidly entrenching notion, that electors or voters no longer decide who their leader are - whether in party primaries or the general election itself. That leaders are decided either by party barons, manipulated electoral management agency, or by the courts. In Africa, there is a widening chasm between voting and counting - an irony of literacy where peasants (most voters) know how to peacefully cast their ballots during the day, but the educated (presiding and returning officers) and technology forget how to count on election night. There is urgency in changing this perception and/or reality by reclaiming and reaffirming public faith in electoral politics. The IEBC has an oversized role in this regard, but only if it conducts itself competently, credibly and fairly.

But IEBC cannot achieve this on its own. It needs an enlightened political leadership and engaged citizenry. There is no doubt that for a truly independent electoral commission to emerge, the political class needs to drop its practice of capturing and enslaving the commission - completely

rendering it incapable of discharging its mandate. The political class falsely sees itself as 'owning' every space, initiative, or decision in the country, an erroneous 'political class as sovereign' notion that precipitates overreach and disregards the constitutive and operational autonomy of independent institutions such as IEBC, and even the Judiciary.

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The Constitution created independent institutions precisely to cure this mischief - as a necessary bulwark against the highly predictable proclivities and mission creep tendencies of the political class. We cannot create independent institutions then deny them that independence through the bullying of the political class. When those institutions fail because of such political infiltration, we turn around and blame them - and disband them only for the silly cycle to begin afresh with another predictable inane result! Our political class must be self-respecting enough to allow independent institutions to work.

But I have also come to learn that constitutional independence does not work on its own. The leadership and membership of these institutions matter much more. IEBC must fight for its independence by rejecting patronage and partisan politics, and through its conduct, comportment and decisions, project and elevate its authority - effectively. The division that the Commission showed in the last election went a long way in sapping away public confidence. The IEBC evaluation report must acknowledge the problem of disunity in the spirit of honest and candid evaluation and make recommendations on how to deal with it in the future.

It is astonishing that the current IEBC assumed office only seven months to the general election. This was reckless and irresponsible on the part of the country. That it even managed to organize the six-tier election, is a mini-miracle. The demand on the Commission to deliver on the general elections within this short period of time must have been huge. Added to Kenya's unique legal, political and administrative minefields that attend our elections, the pressure must have been incalculable.

The political class slow-pedaled and mismanaged the transition from the old Commission to the present one. And even today, almost four years before the next election, the Commission is debilitated and cannibalized, and the political class is in *lala land* - evidently unbothered waiting until the last minute to deal with the outstanding issues in the Commission. There is urgency in getting the Commission working properly and in its full capacity.

It is not my desire to dwell on the 2017 General Elections that I trust is adequately covered in the evaluation report. However, I deem it necessary to share some reflections on our electoral processes by highlighting some issues that I think we also need to address.

First, is the manner in which political parties conduct party primaries. Political party primaries have become theatres of the absurd characterized by patronage, violence, ineptitude, rigging. Whereas considerable progress has been made in developing internal party dispute resolution mechanisms these are still not effective as most disputes still find their way into the court system.

We need to remember that Political Parties are institutions that mobilize the people towards capturing political power. This obligates them to entrench democratic values and principles in their internal systems, especially party nominations. I urge all players including, Parliament, Political parties, Registrar of Political Parties and the IEBC to adopt a multisectoral collaborative approach in developing a legal, regulatory and administrative framework that will promote internal party

democracy.

Second, there is need for a national conversation on the practicability of critical timelines within the electoral process. For instance, the Constitution compels the Supreme Court to make a determination on a Presidential Petition within 14 days of its filing. From experience, this limited time forces the Court to sit for long hours during proceedings; grant much shorter time for the conduct of important processes like scrutiny and submissions; and limits or even bars parties from preparing adequately for their petitions. The proposal made by the Judiciary Committee on Elections to extend the presidential election petition by another 16 days merits attention.

Third, statutory enactments and amendments by the legislative arm of Government should provide reasonable time for implementation. Undertaking piecemeal legal reforms close to the elections leads to inconsistencies and administrative challenges in the application of the law. Furthermore, we should consider the possibility of staggering elections. The IEBC conducts polling for six elective positions concurrently. The undertaking is quite daunting and demanding in terms of logistical planning and processing of results. This is a debate that Kenyans need to have.

Fourth, we need to cure the country of the strong scorched-earth electoral culture. We shed too much blood, damage too many properties, steal too many votes, rupture too many friendships, destroy too many institutions, throw too many ethnic insults, worship too many false gods, spend too much money during our electoral contests. Elections have become corrosive and divisive in a manner that hemorrhages the country in an eminently destructive way. They have become existential contests rather than a civil contest between ideas and policy choices. This absolutist view of elections is what has led to the over judicialization of politics and militarization of politics, thereby giving courts (and security agencies) power to determine who the leaders are, and not the citizens. I believe that if the IEBC were to assert its authority and competently and fairly manage the electoral process, the social costs of elections would considerably go down. Similarly, if leaders put national interests first, then the fear of exclusion that drives this desperation would evaporate.

Fifth, the independence of the IEBC can only be guaranteed if its operations are independent of any executive, legislative or foreign control and direction. An institution can only speak of independence if its processes are not prone to manipulation from executive, parliamentary or international misadventure. It is about time we interrogated and stopped the hugely negative influence of the intelligence and security operatives in Kenya's electoral processes, particularly since 2007. Similarly, the international community also plays an over-sized role in the electoral commission and this needs to be reduced if not eliminated completely. Therefore, to cushion the Commission from financial incapacitation, the Independent Electoral and Boundaries Commission Fund should be operationalized.

Lastly, the role of technology and technology companies in Kenya's elections also need urgent examination. It has emerged as a contested issue and if the country is not careful, we may hand over the election of our leaders not to voters, parties or courts but to technology and data management companies.

I urge the IEBC Commission to continuously engage stakeholders and the public at large in its processes. The Constitution of Kenya has elevated public participation and inspired citizen vigilance, to the extent that unless harnessed into meaningful engagement, it can be a recipe for constant standoffs and unnecessary legal battles between the IEBC and the various stakeholders in the Electoral Process. This will not only enhance trust among stakeholders but also reduce the cost of conducting elections. The reason our ballot papers have security features that are equal to, if not more than, our currency is because of the trust deficit among the electoral stakeholders.

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I wish the IEBC a productive season as it gears up for the next election cycle that will culminate in the conduct of the 2022 General Elections.

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