



**Elections
Observation
Group**

CREDIBLE, PEACEFUL, FREE AND FAIR ELECTIONS

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MEMORANDUM ON THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION (IEBC) AND ELECTORAL REFORMS
SUBMITTED
TO THE JOINT PARLIAMENTARY SELECT COMMITTEE
BY
THE ELECTIONS OBSERVATION GROUP (ELOG)

27th July, 2016

The Co-Chairs,

Members of the Joint Parliamentary Select Committee.

MEMORANDUM TO THE JOINT PARLIAMENTARY SELECT COMMITTEE ON MATTERS RELATING TO THE IEBC AND ELECTORAL PROCESS.

The Elections Observation Group (ELOG) is a long-term and permanent national election Observer platform that comprises of Civil Society Organizations and Faith Based Organizations, with a mandate of strengthening democracy in Kenya and the African Region through promotion of inclusive, transparent and accountable electoral processes. Since its inception in 2010, the Elections Observation Group (ELOG) has consistently monitored and observed the electoral process in Kenya and the African region with an aim of improving the entire electoral cycle processes for the realization of free, fair and peaceful elections. The Institute for Education in Democracy (IED) is hosting ELOG for this electoral cycle. The Institute for Education in Democracy (IED) is a non-profit making Non-Governmental Organization founded in 1993. IED provides non-partisan contribution and leadership in the democratization and governance processes in Kenya through four flagship programmes namely Electoral Processes and Institutions of Democracy; Civic Engagement and Flames of Democracy; Research, Documentation and Dissemination; Policy and Legal Reform.

ELOG members include the following organizations: Center for Governance and Development (CGD), Constitution and Reform Education Consortium (CRECO), Institute for Education in Democracy (IED), Supreme Council of Kenya Muslims (SUPKEM), United Disabled Persons of Kenya (UDPK), Ecumenical Center for Justice and Peace (ECJP), Catholic Justice and Peace Commission (CJPC), National Council of Churches in Kenya (NCKK), Federation of Kenya Women Lawyers (FIDA-Kenya) and Youth Agenda (YAA).

We, Election Observation Group (ELOG),

ACKNOWLEDGING, fact that democratic elections are a cornerstone for entrenching democratic values in the society and a basis of establishing legitimate governments,

AWARE, of the issues that have been raised by a section of Kenyan voters on the management of elections and the calls for Institutional, constitutional, legal, and policy reforms to enhance a free, fair and credible elections,

RECOGNIZING, that the Senate and the National Assembly on Tuesday, 5th July, 2016 and Wednesday, 6th July, 2016 respectively approved a Motion that established a Joint Parliamentary Select Committee on matters relating to the Independent Electoral and Boundaries Commission (IEBC),

HONOURS, the Committee's mandate to, among others, receive views from experts, members of the public, the business community, civil societies and others, on matters relating to the IEBC,

SUBMITS AND PROPOSES the following:

THEMATIC AREA 1: As regards the allegations made against Commissioners and the Secretariat of the Independent Electoral and Boundaries Commission, specifically on their credibility, impartiality, integrity and independence.

ELOG notes as follows:

- i. The independence of the Commission was questioned when it failed to pass the procurement test of the BVR kits which prompted the government to intervene. The intervention by the government to procure electoral technology on behalf of the Commission dented the independence and credibility of the Commission with regard to preparation of the 2013 general elections and the technology that was used.
- ii. The failure of the two technologies namely, the Electronic Voter Identification Devices (EVID) and the Results Transmission System (RTS) created a lack of transparency and expected efficiency that could have contributed to lack of confidence and trust among a section of Kenyan voters. The said lack of public confidence has been compounded by the fact that upto date the Commission has not come out clearly to explain to Kenyans what made technology to fail despite undertaking an audit of the same.
- iii. Issues touching on the integrity of the voters' register have not yet been resolved three years post 2013. We still have discrepancies of voter records between the electronic register uploaded in EVID and the manual register. This was evidenced in Kericho Senatorial by elections where EVID identified voters but the same voters could not be traced in the manual register of the same polling Station. Most of the issues touching on the credibility of the voter's register formed the major concern for filling electoral petitions post 2013. The lack of availing a credible and authoritative voters register for the 2013 general elections and subsequent by-elections is an issue that has impacted on the credibility of the Commission.
- iv. A number of Commissioners including the Chairman were implicated in the chickengate scandal. Even though the EACC has cleared the Chairman and JLAC has thrown out the petition. The fact that they continued to hold office after the allegations had been made was perceived as a sign of non adherence to rule of law. Furthermore, EACC's implications of a number of senior former IEBC officials creates serious doubts on the integrity of the electoral processes in the run-up to the 2013 elections.
- v. Article 73 (a)(iv) of the Constitution provides that the authority assigned to a state officer is a public trust to be exercised in a manner that promotes public confidence in the integrity of the office. A number of opinion polls conducted have shown that public confidence in the Commission is at 30%. The fact that public opinions and perceptions in the manner that elections are managed play a key role in acceptance of electoral outcomes or otherwise, the current low levels of public confidence in the Commission are not in line with the letter and spirit of Article 73 of the Constitution.
- vi. Key stakeholders in the electoral processes such as the political parties/coalitions, civil societies organization and the religious sector have expressed lack of confidence in the IEBC.

Based on the above six issues and points, ELOG makes the following proposals;

1. Electoral Management Body must enjoy the broadest support and confidence from a majority of stakeholders, including the public in order to discharge its Constitutional mandate in a credible and legitimate manner. In light of the above, it appears that the the IEBC does not enjoy a broad support from the stakeholders as it should.
2. In respect to the point above, ELOG calls the 9 commissioners to voluntarily resign. If the commissioners agree to resign, we recommend that the JPSC considers a negotiated political settlement that is ought unanimously arrived which will include a compensation plan. This will allow the new commissioners to get to work as soon as possible. International standards require certainty in the electoral infrastructure and processes atleast 1 year to an election and desirable that a Commission is in place at least 2 years to an election.
3. The senior secretariat officers, Regional Election Coordinators and Constituency election Coordinators should be vetted by the new Commission to establish their role in the current Commission's confidence crisis. Those who will be found to be incompetent should be replaced.

THEMATIC AREA 2: On legal mechanisms for the vacation from office of the current Commissioners and the Secretariat of the Independent Electoral and Boundaries Commission in accordance with the Constitution, ELOG recommends as follows:

- i. The Joint Parliamentary Select Committee to consider the provisios of Chapter 6 of the Constitution and particulary Article 73 (a)(iv) that provides that a holder of a public office shall exercise the mandate of that office in a manner that promotes public confidence in the integrity of the office and come up with a negotiated strategy for all the 9 Commissiones to leave office and political settlement of the same.
- ii. The negotiated strategy should provide compensation for the remaining period. JPSC should avoid the long route of removing Commissioners through a tribunal as provided for in Article 251 of the Constitution as this will deny the people of Kenya a mechanism to put in place a credible Commission as quickly as possible to manage the 2017 General elections on 8th August 2017.
- iii. ELOG is of the view that the ongoing electoral reforms including the restructuring of the Commission should not be a justification to change the elections date.

THEMATIC AREA 3: On Legal, Policy and Institutional Reforms to strengthen the IEBC so as to ensure the August 2017 elections are free and fair and are administered in an impartial, efficient, simple, accurate, verifiable, secure, accountable and transparent manner.

a). Composition of the Independent Electoral and Boundaries Commision and Secretariat

- i. ELOG proposes that there is need to have a lean Commision that is composed of professionals in the area of elections, governance and democracy. We propose 5 Commissioners who should be engaged on a full time basis. Inoder to address the issue of their term coming to an end the same time, we propose staggering the

appointments to have all FIVE recruited to oversee the 2017 general elections, with the chairperson and the deputy having an initial longer periods than the other 3 commissioners. All the five Commissioners should have an eventual fixed term of 6 years.

- ii. Not more than two-thirds of the Commissioners shall be of the same gender and at least one Commissioner should be from persons with disability.

b). Appointment, term of office, terms of service and removal from office of the Commissioners and Secretariat of the Independent Electoral and Boundaries Commission

- i. ELOG proposes the amendment of the 1st Schedule of the IEBC Act 2011, with regard to the composition of the selection panel to recruit the Chairman and Commissioners. We propose that the selection panel should be inclusive to include the participation of all stakeholders in the electoral process. In this regard we propose a 9 member selection panel with membership from the following:
 - One member nominated by KEPSA
 - One member nominated by COTU-Kenya
 - Three members nominated by religious sector
 - One from from PWDs
 - One member from JSC
 - Two members from Civil Society Organization
 - Two Joint Secretaries one the from Public Service Commission
- ii. That the compositions of the above should be such that not more than two thirds are of the same gender.

c). On Establishing the Electoral Fund

The Joint Parliamentary Select Committee should take up the responsibility of establishing an Electoral Fund that will give the Independent Electoral and Boundaries Commission (IEBC) independence and autonomy in budgeting, planning, execution of mandate and accountability to the people of Kenya. Source of funds should be from the government, development partners, members of the public, private sector and any other person or organization that would wish to fund elections.

THEMATIC AREA 4: As regards recommendations on Legal, Policy and Institutional reforms to improve the electoral system and processes so as to ensure the August 2017 elections are free and fair and are administered in an impartial, efficient, simple, accurate, verifiable, secure, accountable and transparent manner on the following issues:

A) VOTER REGISTRATION

- i. The Commission should ensure that details provided in the register adhere to regulation 8 of the Voter registration regulations of 2012. As provided in the regulation 8 of the voter registration regulations, the register should have the following details:
 1. County name of the voter
 2. Constituency Name

- | | |
|-------------------------------------|--|
| 3. Name of the registration centre | 10. Email address |
| 4. Surname and other names | 11. Disability if any |
| 5. Identity card or passport number | 12. Whether the voter will require assistance during voting or not |
| 6. Date of Birth | 13. Signature of the voter or thumbprint |
| 7. Residential address | |
| 8. Contact telephone | |
| 9. Postal address | |

ELOG noted that the Register lacks details from numbers 7 to 13 from the list above and therefore this poses challenges in terms of voter assessment and verification of voters' details. Having accurate records of voters with disability and those who would require assistant during voting would provide useful baseline data for Commission's planning for PWDs.

- ii. IEBC to have a repository of digitized voters' signatures or thumbprints. Article 257(4) provides that the promoters of popular initiative shall deliver the draft bill and the supporting signatures to the Commission, which shall verify that the initiative is supported by at least one million registered voters. The Commission was not able to verify signatures of voters submitted by CORD for the OKOA Kenya initiative. The Commission admitted that it doesn't have soft copies of voters' signatures or thumbprints and therefore it never verified the same.
- iii. Amend Section 4 (3) of the Elections Act (2011) so that the information to be prescribed by the Independent Electoral and Boundaries Commission (IEBC) in the Principle Register to include disability-disaggregated voter data.
- iv. An immediate, independent and comprehensive assessment of the existing Principal Register of voters should be undertaken to interrogate its accuracy, completeness and timeliness. The assessment findings will support the Commission in cleaning the register for the 2017 general elections. The NRB should also be compelled to share with the Commission persons who have passed on to have them removed from the register.
- v. Article 88 (4) (b) of the Constitution provides for the regular revision of the voter's register. Section 8 of the Elections Act, also provides for the regular update of the register. Regulation 9 of the Voter (Registration) Regulations mandates the Voter Registration Officer at the Constituency level to continuously update the register by correcting errors, deleting dead voters, ensuring no person registers more than once as well as dealing with voter transfers.
- vi. Regulation 11 further mandates the Registration officer to be compiling a list of changes once every six months and making the list publicly available at the constituency for the public scrutiny. ELOG notes that the regular revision of the register has not been undertaken effectively leading to cases of duplicate records in the register, discrepancies in the records in the register and other errors. We therefore recommend that regular revision of the register to be conducted as provided by the law.
- vii. Low Voter registration Rates: Current voter registration rates shows that the continuous voter registration post 2013 yielded only 175, 650 new voters and the 1st phase of MVR yielding 1,467,407 out of whom 600,000 were transfers. These dismal voter registration yields can be attributed to a number of factors such as high levels

of voter apathy, inadequate voter education and ineffective distribution of BVR Kits. We propose as follows:

- That the Commission mounts targeted and continuous voter education to create awareness on voter registration;
 - That the IEBC utilizes all 15,000 BVR kits during phase 2 of the MVR taking into consideration strategic deployment of the kits based on special needs of the target group. Each BVR Kit should be shared by two registration centres
- viii. In Section 4 (3) of the Elections Act (2011), the information to be prescribed by the Independent Electoral and Boundaries Commission (IEBC) for inclusion in the Principal Register should include disability-disaggregated voter data. This will ensure that the IEBC and other stakeholders have current information for purposes of providing necessary electoral facilities and services to the constituency of voters with disabilities.
- ix. The inspection period for the voters register should be 30 days and should be at the registration centre level or through any other user-friendly ICT platforms.
- x. The National Registration Bureau (NRB) to decentralize the issuance of ID Cards. NRB should also develop an effective communication strategy to create awareness on ID application process, documents required and where to apply and collect ID Cards. It should also develop a strategy of ID Card collection to avoid having huge number of ID cards lying in their offices.
- xi. In future consider the implementation of the Integrated Population Registration System (IPRS) to have Kenyans have one identification document that should be used for all purposes of identification including voting.
- xii. Article 82(1) (e) of the Constitution requires Parliament to enact a law to provide for progressive registration and voting for Kenyans in the diaspora. In the case of *New Vision Kenya and three others versus IEBC and Five others* (petition No. 25 of 2014), the Supreme Court ordered that the commission shall effect progressive voter registration and voting of the diaspora. The court also ordered that the Commission shall put in place an infrastructure for a comprehensive registration of Kenyans in the diaspora with intent to increase the number progressively. It is on this basis that we recommend as follows:
1. IEBC to liaise with the Ministry of Foreign affairs to identify countries that have a minimum of 3000 eligible voters as provided in its diaspora voter registration and voting policy for Kenyans in the Diaspora. The commission should inform Kenyans about these countries and its plans to franchise Kenyans living in these countries.
 2. Once the countries are identified, the Commission to come up with an online voter education programmes for the diaspora and establish voter registration centres near the Diaspora residents.
 3. IEBC to consider establishing a separate unit within the department of voter registration whose focus would be on diaspora registration and diaspora voter education. This will enable the rest of the Commission to concentrate on county registration processes.

4. As a progressive measure, the diaspora should voter for presidential elections only come 2017.

B). VOTER EDUCATION

Article 88(4) (g) of the Constitution mandates the Commission to conduct voter education. ELOG recommends as follows:

- i. Adequate funding for the Commissions Voter education programmes should be availed to ensure that voter education is provided on a continuous basis rather than one off event few months to elections.
- ii. IEBC should develop a continuous voter education strategy and widely publicize it with stakeholders. The strategy should include effective strategies for dissemination of voter education messages notably use of local radio FMs, Television, Social media, churches, mosque and other platforms.
- iii. The provision of voter education should take into account that communication is in accessible formats for persons with disabilities.
- iv. The Communication Commission Authority should subsidize civic and voter education messaging as public service announcements in the pre-election year.
- v. IEBC to develop voter information, voter awareness and voter education messaging that meets the needs of various sectors of society is inclusive of special interest groups and culturally and linguistically diverse audiences.
- vi. Continuous efforts to institutionalize civic and voter education in Kenyan schools to support their school election processes should be sustained
- vii. Improved coordination and partnerships between the EMB, government agencies and civil society to educate citizens on civic and voter education.
- viii. Institutionalize and build the capacity of Civic Education Units in County Governments.

C). NOMINATION AND REGISTRATION OF CANDIDATES

- i. ELOG recommends that the IEBC Voters register should not be used by parties to conduct their primaries. We are of the view that the use of voters' register in party primaries is retrogressive factor to parties' internal democracy. As provided in Article 91 of the Constitution, parties are required to hold regular elections. Therefore parties should be encouraged to compile a credible list of their members for purposes of conducting party elections and nominations.
- ii. Parties should compile a credible parties list that should be verified by the registrar of political parties and by members of the party before it is used for party primaries.
- iii. Article 88(4) (d), mandates the Commission to regulate the process by which parties nominate candidates for elections. In this regard we recommend that the IEBC develop standardized party nomination rules that should guide party nominations for parties participating in elections.

- iv. Parties that do not adhere to the standardized nominations rules to the conduct of credible party primaries should be not be cleared by the Commission to run for elective positions.
- v. ELOG recommends the amendment of the Political Parties Act, 2011 to have all registered political parties benefit from the Political parties Fund which should support parties conduct party primaries.
- vi. Parties with support of Office of Register of Political Parties (ORPP) to develop standardized guidelines for vetting and verification of candidates vying for various elective positions to ensure compliance with Leadership and integrity Act.
- vii. Electoral laws should include measures to ensure that individuals do not masquerade as persons with disabilities for purposes of participating in the electoral processes. Law should provide that proof of disability shall involve credentials (disability card) issued by the National Council for Persons with Disabilities.

D). USE OF INFORMATION TECHNOLOGY IN ELECTIONS

ELOG supports the employment of open data principles (namely, timely, granular, analyzable, complete, non-proprietary, non-discriminatory, available, license free and permanent) in elections. Technical assistance should be used where necessary for it is a facilitative element to credible elections but not a solution to electoral challenges. In this regard, we recommend as follows:

- i. The IEBC should make public the audit report on use of the electoral technology during 2013 general elections.
- ii. IEBC strengthens the three technologies that were used in 2013 and not to introduce new ones
- iii. IEBC creates awareness on the technology it intends to use for 2017 general elections.
- iv. All the technology for the 2017 should be procured by December 2016. No technology should be used if it has not been tested and proved to work on a large scale or nationally.
- v. The Commission to ensure it has competent staff to handle the relevant technology both at constituency and national level.

E). VOTING PROCESS, DECLARATION AND TRANSMISSION OF ELECTION RESULTS

On voting processes, declaration and transmission of election results, ELOG recommends the following:

- i. Amend Regulations 79 (2) (a) to provide that elections results announced by the presiding officer at the polling station are final. In addition, amend regulation 82 of the Elections (General) Regulations of 2012 to provide that the results announced at the polling stations should be transmitted to both the Returning Officer at the Constituency and the National level and should not be subjected to any alteration by a returning officer or anybody else.

- ii. The results declaration forms should be electronically scanned at the polling stations to facilitate verification process. The presiding officers should be empowered enough to address issues pertaining the voting and counting of voters to avoid cases where the returning officers nullify results announced by presiding officers.
- iii. Introduce advance voting to facilitate implementation of Article 38 of the Constitution that provides for the right of all persons to vote. This would allow certain class of persons who are not able to exercise their right to vote on elections day to do so. These include policemen, election officials, election observers, those hospitalized etc. This will require development of an advance voting policy that stipulates voting procedures and timeline for announcement of results.
- iv. Provide mechanisms for registering prisoners and allowing them to vote
- v. Article 138 (4) should be amended to state expressly that a person will be declared a presidential winner if he/she garners 50 plus one vote of valid votes cast. In this regard ELOG recommends that the interpretation by the Supreme Court of valid votes casts excluding rejected ballots be integrated in the law.

F). ALLOCATION OF SPECIAL SEATS

- i. Candidates with disability to have documents from the National Council for persons with disability for prove of disability status. This will address the challenge of faking disability.
- ii. That the Political Party Convention where the Party List shall be voted for by the Political Party members be gazetted by the IEBC in consultation with the National Executive Committee (NEC) of the Political Party.
- iii. The Political Parties Act be amended to ensure that the above affirmative action enhances the participation of the youth, persons with disability, minority groups and women.
- iv. That the political parties be required to provide democratic competition by the affected constituencies within the party to select people for special seats.

G). DISPUTE RESOLUTION (INCLUDING NOMINATIONS AND PETITIONS)

- i. ELOG recommends that there be an amendment or deletion of Article 88 (1) (e) of the Constitution so that the jurisdiction to hear and determine disputes relating to or arising from nominations be solely vested in the Political Parties Dispute Tribunal (PPDT).
- ii. The period to hear and determine presidential petition be increased from 7 and 14 days to 30 days.
- iii. That the Supreme Court only to hear and determine presidential petitions only. Other election petitions to be determined by other courts and appeals end at the Court of Appeal.

H). STRENGTHENING OF POLITICAL PARTIES

- i. Recruitment of a substantive Registrar of Political Parties and the three assistants as provided in the Political Parties Amendment Act 2016. The Registrar of Political Parties has been in an acting capacity for the last five (5) years. The Public Service Commission (PSC) should move with speed to ensure the registrar and the three assistants are recruited by end of September 2016.
- ii. The acting capacity of the Registrar of Political Parties at any time should not be more than six (6) months.
- iii. Political parties to review their constitutions to align them with Article 91 of the Constitution and the amended political parties Act, 2016.

I). ENHANCING THE PARTICIPATION AND REPRESENTATION OF WOMEN, YOUTH AND PERSONS WITH DISABILITIES

- i. Enact the Two Thirds Gender Laws (Amendment) Bill 2015 which seeks to promote the representation in Parliament of minority groups as provided in Article 100 of the Constitution without further delay since constitutional timelines have lapsed.
- ii. ELOG recommends that the Chekonga Bill, 2015 that seeks to progressively realize the Two-Thirds principle be withdrawn forthwith.

J). ENACTMENT OF A REFERENDUM LAW

- i. ELOG notes that there is lack of a referendum law to guide the operationalization of Article 257 on the popular initiative to amend the constitution. We recommend that Parliament and IEBC to take initiatives to enact a Referendum Law and the corresponding Regulations immediately.

Conclusion

As ELOG, we note that elections are a celebration of fundamental civil and political rights of the people and therefore we support all inclusive, transparent and accountable process in the determination of the current electoral issues.

ELOG wishes to bring to the attention of this honorable committee that time for adequate preparation for the 2017 general election is running out. This process must be expedited in the shortest time possible to be able to allow for adequate preparations.

Lastly, ELOG reiterates that as a nation, we need to support, strengthen and build strong and effective institutions that last.

Yours Sincerely,

Steering ELOG's Steering Committee

Institute for Education in Democracy (IED)

Name:

Signature

Constitution and Reform Education Consortium (CRECO)

Name:

Signature

Center for Governance and Development (CGD)

Name:

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Supreme Council of Kenya Muslims (SUPKEM)

Name:

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United Disabled Persons of Kenya (UDPK)

Name:

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Ecumenical Center for Justice and Peace (ECJP)

Name:

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Catholic Justice and Peace Commission (CJPC)

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Federation of Kenya Women Lawyers (Kenya)

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The Youth Agenda

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