



CREDIBLE, PEACEFUL, FREE AND FAIR ELECTIONS

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NAIROBI

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The Chairperson,

Presidential Taskforce on Building Bridges to Unity Advisory,

Kenyatta International Conference Center (KICC),

Nairobi.

MEMORANDUM TO THE TASKFORCE ON BUILDING BRIDGES INITIATIVE

The Elections Observation Group (ELOG) is a long-term and permanent national election Observer platform that comprises of 16 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 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 credible, free, fair and peaceful elections.

We, the Election Observation Group (ELOG),

ACKNOWLEDGING *the 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 domestic observers, experts and international observers on the conduct and management of elections as well as the calls for Institutional, constitutional, legal, and policy reforms to enhance credible free and fair elections,*

RECOGNIZING, *the need for electoral reforms in Kenya's system of governance, and the Task Force's mandate to among other things, propose administrative, policy, statutory or constitutional changes that may be necessary for the implementation of the recommendations in the Taskforce Report, hereby*

HONOURS *the taskforce's invitation to this validation meeting.*

ON THE PILLAR ON DIVISIVE ELECTIONS,

ELOG notes as follows:

- I. In the recent past, particularly since 2007, Kenya has had disputed presidential election results. The disputed 2007 electoral outcomes plunged the country into political unrests leading to post election violence with over 1,200 lives lost, 350,000 internally displaced persons and property worth millions lost.
- II. In the pre and post 2013, and even when the Supreme Court upheld presidential results, violence and tension escalated leading to more lives lost as the opposition reluctantly accepted the decision of the courts.

- III. In 2017, after the Supreme Court nullified the presidential results citing irregularities and illegalities and ordered fresh presidential election within 60 days, tensions were raised as a result and in the ensuing violence more lives were lost and property destroyed.
- IV. Since the advent of multi party politics in 1992 the country has changed the election management body six times; EC (Chesoni Commission), EC (IPPG Commission), ECK (Kivuitu Commission), IIEC (Hassan commission), IEBC (Hassan Commission) and IEBC (Chebukati Commission) indicating lack of faith and consistency in the management of elections in the country.
- V. Having observed electoral processes in Kenya for the last ten years, ELOG notes the following as the core issues that continue to affect the realization of credible, peaceful, free and fair electoral processes in Kenya:
 - a. Trust deficit
 - b. Impunity/non adherence to the laws.
 - c. Gaps in the election management
 - d. Zero sum politics
 - e. Lack of inclusion
 - f. High costs of elections
 - g. Electoral fraud

And makes the following broad recommendations.

No	Core Issue	Observed manifestation	Broad recommendations
1	Trust Deficit	<ul style="list-style-type: none"> • Electoral System deficits • Consistently Disputed Results (07,13,17) • Violence and intimidation • Poor stakeholder engagement and outreach • Perceived lack of independence of EMB • Divisive campaigns • Lack of prosecution of offenders • Gender/age prejudices 	<ul style="list-style-type: none"> • A second 'Kriegler'. Independent review and evaluation 10 years later. • Robust engagement of the public and key stakeholders by IEBC • Thorough vetting of electoral officials including temporary staff • Clear framework for inclusion • Bring closure to past electoral crimes
2	Impunity/non adherence to electoral laws	<ul style="list-style-type: none"> • Non-implementation of the 2/3 gender rule • 'Suspension' of the campaign financing laws • Non-prosecution of electoral offenders • Integrity of the Electoral Dispute Resolution processes (EDR) • Arbitrary electoral law amendments 	<ul style="list-style-type: none"> • Timely implementation of constitutional provisions • Devolvement of EDR processes • Clarity in the administration of EDR processes • Enforcement of electoral offences law
3	Poor management of Elections	<ul style="list-style-type: none"> • Instability and fluidity of IEBC • Perceptions of lack of independence of the IEBC • Lack of proper inter and intra party 	<ul style="list-style-type: none"> • Respect for Independent institutions • Fill obtaining vacancies in the Commission

		<p>democracy</p> <ul style="list-style-type: none"> • Inadequate training of temporary staff • Unpredictable electoral processes 	<ul style="list-style-type: none"> • Thorough vetting of all IEBC personnel
4	Zero sum political infrastructure	<ul style="list-style-type: none"> • Abuse of incumbency • State capture of independent institutions • Political party patronage • Divisive campaigns/party processes • Negative ethnicity • Violence/Intimidation 	<ul style="list-style-type: none"> • Address electoral system gaps • Consider more equity-based representative democracy models • Tighter regulation of political parties
5	Lack of Inclusion in Elections	<ul style="list-style-type: none"> • High numbers of eligible voters not registered – Women, PWDs, Diaspora • Inadequate voter education • Skewed voter registration processes • Lack on disaggregated data in civil registers • Poor stakeholder engagement 	<ul style="list-style-type: none"> • Targeted registration process • Harmonize civil registration process. • Dis-aggregated data at all levels of registration • More robust civic/voter education campaigns
6	High costs of Elections	<ul style="list-style-type: none"> • Overall financial cost of over USD 25/voter • High cost of technology vis a vis efficiency • Prohibitive/discriminatory cost of electioneering (nomination fees, campaigning, petitions) • Corruption, vote buying • Loss of life, property, medical costs, displacement of populations 	<ul style="list-style-type: none"> • Employ best practices in electoral technology • Operationalize expenditure limits and disclosure • Fair nomination and petition costs • Secure electoral processes
7	Electoral Fraud	<ul style="list-style-type: none"> • Lack of thorough vetting of candidates/aspirants • Incredible party nomination processes • Integrity of Election Dispute Resolution processes • Insincere electoral officials • Incomprehensive voter education/registration • Unpredictable electoral processes 	<ul style="list-style-type: none"> • Set up apolitical electoral board in PPs • Devolve EDR processes • Targeted and more robust voter education/registration • More robust public outreach programs • Transparent and clear processes

In response to the *Building Bridges to a United Kenya Taskforce Report*, ELOG makes the following observations:

No	BBI Recommendations	ELOG's Take
1	An autochthonous national executive structure	<ul style="list-style-type: none"> • On mixed Cabinet, ELOG is of the opinion that this proposal is likely to undermine the <i>doctrine of separation of powers</i> and therefore proposes that present <i>status quo</i> as outlined in Article 152 (3) for a technocrat cabinet remains. • ELOG supports the proposal that the runners-up of the Presidential election becomes an <i>ex officio</i> MP and the Leader of the Official Opposition as it will further enhance the role of opposition in governance and leadership of the country. • Regarding the proposal to expand the executive, ELOG is currently undertaking a comparative study of electoral and governance systems and will share its expert opinion on the preferred model upon the completion of the study.
2	Representation in the Electoral System	<ul style="list-style-type: none"> • ELOG supports the taskforce's recommendation that whatever form the electoral representation takes, it should adhere to the principles of fair and equal representation as enshrined in Article 81 of the Constitution. • Further, as recommended in our 2017 election observation report, <i>One Country, Two Elections, Many Voices</i>, a comprehensive audit of the current electoral system needs to be undertaken so as to establish its merits and demerits. <p>On Political Party Processes and Management:</p> <ul style="list-style-type: none"> • ELOG has observed that the Office of the Registrar of Political Parties has had no substantive holder and that the three assistants to the Registrar of Political Parties have never been filled since the enactment of the Political Parties Act, 2011. • ELOG therefore recommends that a Selection Committee be appointed so as to commence the process of recruiting of the positions. • ELOG's observation reports of the political party processes and especially the primaries paint a very sad state of affairs. The taskforce's recommendation that party primaries be upheld through fair, free and transparent elections is consistent with ELOG's recommendations. • Furthermore, in order to safeguard the integrity of intra and inter party democracy, ELOG recommends that a Political Party Nomination Act be established. • ELOG recommends that IEBC delinks itself from conducting party nominations as well hearing and determining petitions arising from political party primaries. Instead, political party dispute tribunal (PPDT) should be strengthened to take up this role and be devolved to counties.

- ELOG supports the taskforce recommendation that Parties be compelled through the Political Party Act (2011) to be consistent with the Constitutional requirement on gender representation.
- ELOG supports the proposal to have party lists for Member of County Assembly to follow same principles and processes of public participation, election and vetting as the National Assembly.
- On the proposal of *Party of Independents* ELOG is of the view that this proposal diminishes the need for independence in the first instance since the use of any vehicle denotes a type of political *housing* of elected independent Members of Parliament. ELOG therefore recommends that the *status quo* as is in Article 85 of the Constituion remains.

On the IEBC

- ELOG notes with concern the high costs of elections in Kenya and therefore supports the taskforce recommendation on exploring ways of reducing the costs. However, it is not clear in your proposal of how the Party List system willll do this.
- In our opinion, a comprehensive party list system would invite a proportional representation approach that would require a change in the electoral system. This requires exhaustive consultations.
- ELOG notes the taskforce’s recommendaton that political parties have a role in the recruitment of Commissioners. While this proposal has precedent in the country and has the ability to bring about a much-needed political consensus, there are no guarantees that experts will be appointed to the commission. Rather ELOG fears that the appointments may be based on political cronyism compromising the independence of the commission.
- ELOG therefore proposes the formation of an all inclusive and representative selection panel and that the present vacant position in the Commission be filled up as soon as possible.
- In line with Constitutional requirement (Art 54 (2)), ELOG recommends that the Commission to have representative from PWDs.
- Furthermore, to prevent a situation where the terms of the Commissioners end all at once, ELOG proposes that the appointment of Commissioners be staggered.
- The taskforce’s recommendation that IEBC Commissioners reflect the face of Kenya is commendable. However, ELOG is of the view that with only 7 Commissioners, this might be a challenge. *A mechanism of how this can be achieved needs to be clearly defined.*
- ELOG has observed apparent ‘two centres of power’ in the Commission and therefore understands taskforce’s proposal that the chair of the Commission be the Chief Elections Officer. However, ELOG is of the view that while it reduces potential conflict between

		<p>the Head of the Secretariat and the Chair, it may interfere with the normal operations of the secretariat.</p> <ul style="list-style-type: none"> • Instead, ELOG proposes that a proper legislative framework be put in place to clearly define the role of the Commission and the Secretariat. • On the proposal to have a seemingly <i>semi permanent</i> IEBC human resource structure (Part-Time ROs for one election only, 3-year staff contracts, renewable only once) ELOG is of view that this will be counter productive as it will likely create a culture of <i>short-termism</i> and may hamper the professionalization of election management in the long run. • Instead, ELOG recommends that instutional strengthening of the Commission to ensure its independence. <p>To further ensure effective and efficient management of elections in Kenya, ELOG makes the following recommendations.</p> <ul style="list-style-type: none"> • To enhance transparency and accountability, ELOG proposes amendments to section 39(1) of the Elections Act to require electronic transmission of <i>all</i> results. • That Commissioners be in pace at least 2 years before an election. • Amendment to the Constitution to increase the timelines for filing, hearing and determination of the presidential petition from 14 days to at least 30 days. • ELOG proposes an amendment to the Constitution that enables the Supreme Court to only hear and determine presidential petition. Other election petitions to be determined by other courts and appeals to terminate at the Court of Appeal. • Constitution and Elections Act be amended to restrict amendments to the electoral laws to at least 6 months before an election. In the alternative, provide that any amendments enacted 6 months to an election take effect in the next general election. • To address the logistical and operational challenges of cumulative (conducting 6 elections in one day), ELOG proposes amendments to the Constitution to allow for staggering of elections so that National and County elections are conducted separately. • Need to establish an <i>Electoral Fund</i> 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 public coffers and development partners.
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Conclusion

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

ELOG wishes to bring to the attention of this taskforce that the window period of political sobriety necessary to undertake electoral reforms is quickly closing especially with an impending referendum and boundary review processes and therefore appeals for a timely enactment of these reforms.

In order to inform further discussions on improving electoral processes, we have attached a comprehensive matrix of reform areas that have been suggested by ELOG in conjunction with other CSO members of the Technical Working Group on Elections.

Yours Sincerely,



Regina U. Opondo
Chairperson,
ELOG Steering Committee



Mulle Musau
Coordinator
ELOG Secretariat



The ELOG membership is made up of the following institutions; 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), The Youth Agenda (YAA), Code 4 Africa, Legal Resources Foundation (LRF), The Institute of Social Accountability (TISA) Transform Empowerment Action Initiative (TEAM) and Centre for Minority Rights Development (CEMIRIDE)