



**Elections
Observation
Group**

CREDIBLE, PEACEFUL, FREE AND FAIR ELECTIONS

MEMORANDUM OF THE ELECTION OBSERVATION GROUP (ELOG) AND THE TECHNICAL WORKING GROUP ON ELECTIONS (TWG) TO NATIONAL ASSEMBLY ON THE REPRESENTATION OF SPECIAL INTEREST GROUP LAWS (AMENDMENT) BILL, 2019

DATE: MAY 27TH 2020

INTRODUCTION

Pursuant to the provisions of Article 100 and National Assembly Bill No.52, the Elections Observation Group (ELOG) wishes to make submissions on the said Bill and other amendments to the election laws with an objective of enhancing electoral management in the country.

ELOG is the largest domestic observation platform in the country comprising of 16 mainstream civil society organizations (including faith-led and special interest groups). ELOG has observed electoral processes in Kenya since 2010 and has gathered, compiled and shared numerous and consistent reports on the conduct of electoral processes in the country including the 2017 general elections. In this regard, ELOG wishes to submit its responses to the proposed bills as well as other general recommendations on improving election management in the country.

There have been statutory and institutional failings that have undermined the full representation of Special Interest Groups (SIGs) in elective and appointive bodies. For instance, despite clear provisions in the Constitution on the representation of persons with disabilities (PWDs) in county assemblies, 17 of the 47 county assemblies do not have any PWDs as representatives while 8 of them have only 1 representative. The 2/3rd gender rule is yet to be realized despite the enactment of legislation by Parliament to address this gap as stipulated in Article 81 of the constitution.

The law will need to recognize that inclusion cannot be attained if specific interventions are not made to ensure the full participation of SIGs both as voters and as candidates to elective and appointive positions as provided in sections 54(2), 55(b), 56(a) and 100 of Kenya Constitution 2010.

THE OBJECTS OF THE BILLS

The Representation of Special Interest Groups Laws (Amendment) Bill, 2019 is an act of Parliament to amend various laws to give further effect to Article 100 of the Constitution to promote the representation in Parliament of Women, Persons with disabilities, Youth, ethnic and other minorities and marginalized communities and for connected purpose.

ELOG's understanding of this is that the Bill once enacted the object and purpose is to amend the provisions of electoral and related laws to give further effect to Article 100 of the Constitution on the promotion of the representation in Parliament of Women, Persons with disabilities, Youth, Ethnic and other minorities and marginalized communities.

ELOG NOTES AS FOLLOWS: Noting that the Bills have already been passed and forwarded to Senate for consideration, ELOG opines that the bill still needs further amendments to ensure full representation of Special Interest Groups as anticipated in the constitution.

Provisions	Comments
<p>Section 2 on the objects and purpose of the Act</p>	<p>One of the listed general objects is to require political parties to allocate funds disbursed from Political Parties Fund to election campaigns of special interest groups through publicity and other measures.</p> <p>This object is vague as it is not clear or specific as to how the funds will be allocated to the different special interest groups. The discretion or lack of a guideline as to determine how much goes to each individual group could not only occasion discrimination and frustration but also leave out a group to the process.</p> <p>Secondly, the listed objects are aimed at ensuring that Articles 54 (2) and 81 (b) are implemented.</p> <p>This addresses the representation of women and persons with disabilities leaving out the rest of the groups. Why isn't this object addressing Article 97 to ensure that ethnic minority communities are nominated to parliament?</p> <p>Section 2 c proposes that NGEC be mandated to conduct and facilitate voter education for the purpose of sensitizing the public on the rights of SIG to political participation.</p> <p>Section 2f proposes that the list submitted by political parties to the IEBC to comply with Art 54 (2) and 81 (b)</p> <p>ELOG's Proposals</p> <ul style="list-style-type: none"> • Amend the Political Parties Act 2011 to indicate that 30% of funds they receive from the Fund be allocated to fund campaigns of the SIGs. • Develop clear framework on how this fund is to be allocated. • Expand the meaning of SIG to include ethnic minorities in line with Art 97. • That civic and voter education for the purposes of the participation of SIG in the political processes be left with the

	<p>IEBC. In the alternate, mandate NGEC to play a complimentary role.</p> <ul style="list-style-type: none"> Amend the provisions of Section 2 (f) to include the provisions of Art 55(a) and 55(b)- Youth and Minorities.
<p>Amendments proposed to the Independent Electoral and Boundaries Commission Act, 2011</p>	<p>Section 4 (k) is amended by inserting (ka), which provides that the Commission shall conduct and regulate the process by which political parties conduct their nominations of party lists in line with Article 90. Notably, the implementation of Article 90 is tied to oversee nominations under Article 97.</p> <p>ELOG's proposals</p> <ul style="list-style-type: none"> That the Commission not only oversees the nomination but also assists to ensure that nomination process of ethnic minorities is fair with the representatives nominated being a voice of the minority communities and put forward by the minority communities.
<p>Amendments proposed to the Political Parties Act, 2011</p>	<p>1. The definition of ethnic minorities is substituted by the following definition 'a group that is not the dominant one in a given society and includes racial minorities'</p> <p>This definition is incomplete and falls short of internationally accepted definitions with respect to ethnic minorities and marginalized communities. We note that while being non- dominant is a major factor to be considered in defining minority communities' other factors must also come to play. The concept of minorities in the Kenyan context refers to communities that are non-dominant, economically, politically and socially.</p> <p>ELOG's proposal</p> <ul style="list-style-type: none"> Amend to include ethnic minorities and marginalized communities. Insert Section 20(2) so as to state "any other approach of information sharing recommended by registrar of political parties" Insert Section 25 (2) (b) so as to state "The party has in its governing body, "at least 30%" representation of special interest groups and that "the party has its governing body, At Least 30%" representation of youth". Insert 29(2) to state that "Any other approach of information sharing recommended by registrar of political parties" <p>The other proposed amendments lack in specificity. The continuous</p>

	<p>generalization of special interest groups without specifying the numbers of each and programmes for each special group may cause political parties to overlook a certain special group.</p> <p>ELOG's proposals:</p> <ul style="list-style-type: none"> • Amend to specifically mention youth, women persons with disabilities, ethnic minorities with individuality and provides numbers for each group individually. • The IEBC should also provide political parties with data to assist with the engagement process.
<p>Proposed amendments to the Elections Act, 2011</p>	<p>Section 13 of the Elections Act is amended by inserting subsections 1A and 3A which provide that 'Every political party participating in an election shall ensure that not more than one third of its nominees are one gender and that 5% of the parliamentary and county nominees are persons with disabilities.</p> <p>3A provides that the Commission shall not accept the list of nominated candidates for a political party until it is satisfied that it conforms to the previous requirements.</p> <p>This provision creates affirmative action but for women and persons with disabilities and leaves out youths and ethnic minority communities.</p> <p>ELOG's proposal</p> <ul style="list-style-type: none"> • Amend to explicitly include youth and ethnic minority communities. • Amend to explicitly state that the IEBC will not accept a nominee's list where youths and ethnic minority communities are not represented. • Insert 13(c) so as to state that Least Thirty percent of the nominees for parliamentary and county assembly elections are Youth

OTHER GENERAL RECOMMENDATIONS ON THE LEGAL FRAMEWORK AND MANAGEMENT OF ELECTIONS

ELOG together with members of the Technical Working Group on Elections (TWG) which is made up of 23 CSOs working on election related fields convened a symposium for election observers and experts in 2018 to discuss and consolidate proposals on the elections. The output from this engagement was a CSO proposal on wide ranging issues that form a comprehensive electoral reform agenda. The matrix summarizing these proposals is attached to this memorandum.

In respect to the management of elections in the country that will enhance full and active participation of SIGs in the electoral processes in Kenya, ELOG and the TWG have made the following recommendations:

- a. That the composition of the IEBC to adhere to the representation of SIG amongst its Commissioners and Secretariat.
- b. That the electoral process should be accessible in terms of physical facilities, transport, communication and information including provision of Kenya Sign Language Interpretation, Braille and other augmentative means of communication.
- c. That political parties to adhere to the United Nations Convention on the Rights of Persons with Disabilities (CRPD), rule of law and the Constitution on inclusion and self-representation of persons with disabilities.
- d. That the law to require that persons with disabilities specifically determine who should represent them. This will call for cooperation between political parties and organisations of persons with disabilities in the selection of their representatives. We propose that electoral college made up of representative of organisations of persons with disabilities should be adopted as the model for the election of persons with disabilities to be nominated to serve in the National Assembly, Senate and County Assemblies. In addition, elections of persons with disabilities at all levels must put into consideration representation by both men and women with disabilities as well as different disability categories.
- e. That the integrity of the electoral process for persons with disabilities should be specifically protected. Persons who purport to have a disability for purposes of exploiting seats set aside for persons with disabilities should be sanctioned severely.
- f. That the representation of persons with disabilities should be enforced to the effect that the National Assembly, Senate and County Assemblies which do not have members with disabilities will be deemed not to be properly constituted as per the Constitution.
- g. That the electoral laws should be amended to ensure inclusion of persons with disabilities and ensure implementation or compliance with relevant laws. For instance, political parties should ensure funding for disability concerns and the Independent Electoral and Boundaries Commission should ensure that the register of voters capture disaggregated data on persons with disabilities in terms of disability categories, age and gender.