TABLE OFFICE
S/ No.....
10 OCT 2017
Sign.....
PAPER LAID

REPUBLIC OF KENYA

PARLIAMENT OF KENYA LIBRARY
COUNTY HALL
P.O. Box 41842-00100, NAIROBI



Paper laid at the Table Office on 10.10.2017 Home by Hon. William Cheptumo, MP

THE NATIONAL ASSEMBLY

PARLIAMENT OF KENYA LIBRARY

TWELFTH PARLIAMENT (FIRST SESSION)

THE SELECT COMMITTEE ON ELECTION LAWS, 2017

REPORT OF THE SELECT COMMITTEE ON THECONSIDERATION OF THEELECTION LAWS (AMENDMENT) BILL, (NATIONAL ASSEMBLY BILLS NO. 39 OF 2017)

VOLUME II

Published by:-
The Directorate of Committee Services
Clerk's Chambers
NAIROBI

October, 2017

01

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

POSITION OF THE COMMISSION ON THE ELECTION LAWS (AMENDMENT) BILL, 2017 AND ELECTION OFFENCES (AMENDEMENT) BILL, 2017

MATRIX ON THE ELECTION LAWS (AMENDMENT) BILL, 2017 IEBC ACT, 2011					
	Clause	**Subject**	**Current provision**	**Proposed change in law**	**Remarks**	**Recommendations**
	Clause 2	Definitions **Section 2**	• "chairperson" means the chairperson of the Commission appointed in accordance with Article 250(2) of the Constitution;	• Chairperson" means the chairperson of the Commission appointed in accordance with Article 250(2) of the Constitution and, in the absence of the chairperson, the vice-chairperson, or such other person acting as the chairperson in the absence of both the	• Implies that that the Commission may appoint anyone else to act as the Chairperson in absence of the Chairperson and Vice-Chairperson.	• *Replace the word "Person" with "Member"*

				chairperson and Vice-Chairperson.		10
	Clause 4	Qualifications of the Chairperson **Section 6**	(1) The Chairperson of the Commission shall be a person who is qualified to hold the office of Judge of the Supreme Court under the Constitution	1) A person shall be qualified for appointment as the chairperson of the Commission if the person— (a) holds a degree from a recognized university in public administration, public finance, governance, electoral management, social science, or law; (b) has proven experience in any of the fields specified in paragraph (a) of not less than fifteen years; (c) meets the requirements of Chapter Six of the Constitution"; (d) inserting the following new subsections immediately after subsection (1)— "(1A) In the absence of the Chairperson for any reason, the vice-chairperson shall assume the duties of the	• The amendment requires that the Chairperson of the Commission need not be a person who is qualified to hold the office of Judge of the Supreme Court under the Constitution. • Elections are managed through a complex web of legal procedures that require the head of the institution to be competent in. • A good intervention should balance between the need for continuity and relevant qualifications. • It is will be useful to have a provision that provides for the exercise the powers of the Chairperson on acting capacity.	• Maintain the qualifications of the Chairperson as set out in the current law. • The provision of 1A and 1B should be seen within the context of Article 259(3)(b) of the Constitution.

				Chairperson and exercise the powers and responsibilities of the Chairperson until such time that another Chairperson shall be appointed • (1B) In the absence of the Chairperson and the vice-Chairperson, members of the Commission shall elect from amongst themselves one of their number to act as the Chairperson and exercise the powers and responsibilities of the Chairperson until such time that another Chairperson shall be appointed	• Proposed 1A is consistent with the provisions of Article 259(3)(b) of the Constitution.	
	Clause 4	Process of conduct of Commission meetings **Second schedule**	• Par. 5 The quorum for the conduct of business at a meeting of the Commission shall be at least five members of the Commission • Par. 7 Unless a unanimous decision is reached, a decision on	Par 5. deleting the words ***"five members of the Commission"*** and replacing them with "**half of the existing members of the Commission, provided that the quorum shall not be less than three members";**	• The proposal affects the quorum of the commission plenary to make decisions. • It also reiterates mandatory voting in the procedure of making decisions where there is no unanimous decision at	• Par. 5 - Retain the quorum at 5 members. • Amend Par 7 - to read: *"Unless a unanimous decision is reached, a decision on any matter before*

			any matter before the Commission shall be by concurrence of a majority of all the members.	• (b) Substituting par 7 Unless a unanimous decision is reached, a decision on any matter before the Commission shall be by a majority of the members present and voting"	plenary as already provided for under IEBC Act Schedule II. • In order to enhance majority decision-making the current quorum of 5 should be retained • A decision of the Commission shall be by at least simple majority of the total members of the Commission.	*the Commission shall be by concurrence of a* ***simple majority*** *of all the members "*

MATRIX ON THE ELECTION OFFENCES (AMENDMENT) BILL, 2017					
ELECTIONS ACT, 2011					
Clause	**Subject**	**Old provision**	**Remarks**		
5	Deletion of Section 29 of the Act	29 Power to nominate (1) The persons who nominate a presidential candidate shall be members of the candidate's political party. (2) The persons who nominate an independent presidential candidate shall	*Delete*	• The Section was declared unconstitutional in Peter Gichira vs IEBC	• Proposal accepted

		not be me...bers of any political party [Act No 47 of 2012, Sch , Act No. 48 of 2012, s. 5]			
6	Determination and declaration of election results **section 39**	(1C) For purposes of a presidential election the Commission shall — (a) electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre; (b) tally and verify the results received at the national tallying centre, and (c) publish the polling result forms on an online public portal maintained by the Commission.	*Electronically and manually transmit the tabulated results for an election for the president from a polling station to the constituency tallying centre and national tallying centre.* *tally and verify the results received at the constituency tallying centre and national tallying centre, and* *(c) publish the polling result forms on an online public portal maintained by the Commission* *"(1D) Where there is a discrepancy between the electronically transmitted and manually transmitted*	• The proposed amendments seek to provide clarity on which results suffice in cases of discrepancy between the transmitted and manually transmitted results. It gives credence to the original statutory forms. • It deletes the words provisional and replaces it with final results • The proposals also direct the Commission to provide and establish mechanisms for the <u>live streaming of results</u> as announced at polling stations which shall not be used as a basis for declaration by the Commission • *Include definition for provisional results to mean electronically transmitted text results Experience shows that human error in data entry is likely to occur when entering text data into the KIEMS.*	• Replace the Amendment of 39(1C)(a) as follows: *"Electronically transmit **and physically deliver** the tabulated results for an election for the president from a polling station to the constituency tallying centre and national tallying centre* • Amend Section 39 (2) by replacing it as follows: *"Before determining and declaring the final results of an election under subsection 1, the Commission **shall have received the physically delivered results in accordance with the Act**."* • Amend 39 (1F) as follows· *"The Commission **MAY**, establish a mechanism for*

8

			results, the manually transmitted results shall prevail *"(1E) Any failure to transmit or publish the election results in an electronic format shall not invalidate the result as announced and declared by the respective presiding and returning officers at the polling station and constituency tallying centre, respectively* *"(1F) The Commission shall, to facilitate public information, establish a mechanism for the live-streaming of results as announced at polling stations, and the results so streamed shall be for purposes of public information only and shall not be the basis for a declaration by the Commission*		*the electronic display of provisional results, and the results so displayed shall be for purposes of public information only and shall not be the basis for a declaration by the Commission*

7	Use of Technology **Section 44**	(5) The Commission shall, for purposes of this section and in consultation with relevant agencies, institutions and stakeholders, including political parties, make regulations for the implementation of this section and in particular, regulations providing for — (a) the transparent acquisition and disposal of information and communication technology assets and systems; (b) testing and certification of the system, (c) mechanisms for the conduct of a system audit, (d) data storage and information security; (e) data retention and disposal, (f) access to electoral system software source codes; (g) capacity building of staff of the Commission	Sub-Section 5 is deleted and substituted with the following provision The Commission shall, in consultation with the relevant agencies, institutions and stakeholders, make regulations for the better carrying into effect the provisions of this section"; Sub sections 6,7 and 8 are deleted.	• The new proposed Sub-section 5 requires the Commission to consult with relevant agencies, institutions and stakeholders, make regulations for the implementation of this section • Subsection 7 applied for the first general election where the Commission was required to deploy technology which is restricted to the process of voter registration, identification of voters and results transmission; • Subsection 6 is a spent proviso, it can be repealed. • Subsection 7 could also be spent, if one interprets "general election" to mean the elections of 8th August, 2017. • Subsection 8 was declared unconstitutional in the Keneth Otieno Case of 2017.	No comment.

		and relevant stakeholders on the use of technology in the electoral process; (h) telecommunication network for voter validation and result transmission, (i) development, publication and implementation of a disaster recovery and operations continuity plan, and (j) the operations of the technical committee established under subsection (6) Notwithstanding the provisions of section 109(3) and (4), the Commission shall prepare and submit to Parliament, the regulations required made under subsection (4) within a period of thirty days from the date of commencement of this section. (7) The technology used for the purpose of the first general elections upon the commencement of this section shall — (a) be restricted to the process of voter registration,			

		identification of voters and results transmission; and (b) be procured at least one hundred and twenty days before the general election. (8) For the purposes of giving effect to this section, the Commission shall establish a technical committee of the Commission consisting of such members and officers of the Commission and such other relevant agencies, institutions or stakeholders as the Commission may consider necessary to oversee the adoption of technology in the electoral process and implement the use of such technology. [Act No. 36 of 2016, s. 17, Act No. 1 of 2017, s. 18.]			
8	Complimentary mechanism for identification of Voters – **section 44A**	Notwithstanding the provisions of section 39 and section 44, the Commission shall put in place a complementary mechanism for identification of voters and transmission of election results that is	Notwithstanding the provisions of section 44, the Commission may put in place a complementary mechanism for identification of voters that is simple, accurate,	• The proposed amendments do not tie complimentary mechanism to section 39. • It removes the mandatory requirement to provide for a complimentary mechanism for	• Maintain complementary mechanism for results transmission.

		simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the Constitution	verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the Constitution	Transmission of Election Results. • It is a necessary consequence of the amendment to Section 39, which makes the manual form to be the results.	
9	Non - Compliance with the law **(section 83)**	No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law **OR** that the non-compliance did not affect the result of the election	deleting the word "or" appearing immediately before the words "that the non-compliance" in the renumbered subsection (1) and substituting therefor the word "and", (c) inserting the following new subsection immediately after the renumbered subsection (1)— "(2) Pursuant to section 72 of the Interpretation and General Provisions Act, a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead".	• The proposal suggests that where there is deviation from the law in form which deviation is not calculated to mislead then the process will not be void by reason of that deviation • Not all infractions to the regulations should result in nullification of the elections The burden should be placed on a person challenging an election to prove that there was a breach of the law and that that breach affected the results	• Proposal accepted

10	Certificate of court as to validity of election ***Section 86***	-	Provides for a procedure at Fresh Presidential election	• That the Commission will Gazette the new election date on 7 days. • Proposal state who will be the candidates participating in a fresh election depending on the parties to a presidential petition. • It also provides whether or not there will be fresh nominations after nullification of an election. • It also provides for instances where a candidate(s) withdraw and the effects of the withdrawal and the procedure thereof. Of importance to note is that the proposal states that where there are two candidates and one of the candidates withdraws the other will be declared as the president elect and no election will be held.	• Proposal accepted however there is need to provide for the procedure for elections under Article 138 (5) and 138 (8). • Proposal to include the procedure where a candidate dies before the election is held.

MATRIX ON THE ELECTION OFFENCES (AMENDMENT) BILL, 2017				
ELECTION OFFENCES ACT,2016				
Subject	**Old provision**		**Remarks**	
Failure or refusal to sign results	-	**Insert new 6A** Notwithstanding any other provision in this Act or any other written law, a presiding or returning officer in an election who, in relation to the prescribed document containing the results of the election— (a) knowingly fails or refuses to sign the document; (b) knowingly fails to complete the document, or (c) willfully submits an incomplete document; (d) willfully alters or falsifies a document, commits an offence and shall be liable, upon conviction, to	This proposal places an obligation to the Returning Officers and Presiding Officers to sign, completely fill election materials including statutory forms and lays criminal liability in failure thereof. This is over legislation considering that; firstly, the mischief sought to be cured never occurred, and secondly, the facts which would constitute an offence under this Section have are provided for under Section 6 of the Election Offences Act	• Proposal accepted

		imprisonment for a term not exceeding five years,		
Use of public resources **Section 14(2)**	(2) No government shall publish any advertisements of achievements of the respective government either in the print media, electronic media, or by way of banners or hoardings in public places during the election period	• The whole of section 14(2) in its entirety		• No comment as matter is pending in Court in Petition Number 468 of 2017 – Katiba Institute Vs. Presidency Delivery Unit and 3 Others

NEW PROPOSAL			
ELECTIONS ACT, 2011			
Subject	**Old provision**		**Remarks**
Right of Recall (45)	The old provision was declared unconstitutional	Provide for the procedure for recall namely the number of signatures to support a recall election, the verification process and the recall elections	Preparation of draft legislative proposal

02

JUBILEE LAWYER-MPS FORUM

(JUSTICE AND LEGAL AFFAIRS MEMBERS OF THE 11TH PARLIAMENT)

3RD OCTOBER 2017

MEMORANDUM OF VIEWS TO THE SELECT COMMITTEE ON ELECTION LAWS (AMENDMENT) BILLS

The Lawyers and Advocates of the High Court of Kenya who are also Jubilee Members of the Justice and Legal Affairs Committee in the 11th National Assembly have a created a caucus to look at emerging legal issues having both the knowledge of law and experience in the practice of politics in Kenya. The Group members are: Hon Chepkonga (Former Chair JLAC); Hon Priscilla Nyokabi (Former Vice Chair); Hon Florence Kajuju; Hon Waiganjo J M; Hon Boniface Otsiula and Hon Samuel Gichigi.

The intersection of law and politics is always complex and interesting. It is an intersection that grips the country creating legal and constitutional moments as our democracy matures. We are in one such intersection with the nullification by the Supreme Court of the Presidential Election held on 8th August 2017. With this understanding the group supports the Election Laws Amendments to both the Elections Act and the Election Offences Act.

The group supports the election laws amendments for the following reasons:-

1. The Amendments are in pursuit of compliance with the Supreme Court Decision that nullified the election of 8th August 2017 requiring a fresh election to be held within 60 as stipulated in the Constitution. The repeat fresh election is to be conducted by the Independent Electoral and Boundaries Commission (IEBC) in strict compliance with the law and adhering to the constitutional dictates. As there were gaps and gray areas identified in the Judgment there is no option but to cure them using an amendment bill.

2. The amendments are necessary to secure the repeat election before the expiry of 60 days which run out on 31st October. The election is scheduled to be held on 26th October. It is in the best interest of the country and its stability that that this election is held on 26th. The

RECEIVED
04 OCT 2017
CLERK'S OFFICE

economic situation is not getting any better until the election is held. Although Article 142 is clear that the President holds office until another President is elected failure to hold the election within 60 days will lead to legal quagmires and myriads of interpretations that will not aid stability of the Country. There is no risk or cause for alarm as institutions and organs of state are in place but the best situation is to hold the election of 26th October and put it behind us as a Country.

3. The Supreme Court it its decisions points out some legal gaps and areas needing clarification and improvement. Law is written based on certain circumstances and events. Law is passed to cure illegalities and irregularities whenever they arise. Some situations call for amendments of existing laws to achieve desired outcomes. To avoid the scenario posed by the Supreme Court, that even in future it will nullify an election where there are irregularities and illegalities it is important to cure any such legal gaps. Once gaps are identified, they need to be addressed. The amendments are post Supreme Court decision. There is nothing out of order. There is no issue around the timing of the regulations as they come hot on the heels of the Supreme Court decision.

4. In Kenya our judges and the larger systems of law follow the positivist approach. It is common in courts to hear the phrase 'nothing would have been easier than for Parliament to provide'. In more natural law systems one need not spell out everything in law. That is not our legal heritage. Our laws do not trust; our laws are very prescriptive providing for as many eventualities as possible. In this approach any gaps in law is filled through amendments. A majority of the judges in Kenya are positivist requiring laws to be written in as much detail and clarity as possible. In following this school of thought, the gaps identified must be cured by legislation.

5. While serving in the Justice and Legal Affairs the members had identified issues and proposed amendments to the Orengo and Kiraitu Team Bills. The Kenya Integrated Election Management system was going to pose a challenge given the wording of the Bills. However it was agreed between the Majority and Minority sides that all proposed amendments would be dropped. There is need to remember that the Orengo Kiraitu Committee had a very short span to complete their work. They had to burn the midnight oil. It is this hurry and speed that may have caused the Bill to contain unrefined ideas.

6. The proposed amendments do not interfere or curtail fundamental rights as provided for in the Constitution Bill of Rights. Equating proposed amendments to rolling back Constitutional rights is to

stretch the truth. The rights for the citizens remain the same as during President Kibaki tenure. There is no connection between the proposed amendments and fundamental freedoms. The Constitution is clear that Kenya is a multiparty state. The proposed amendments do not in any way provide for a single party system.

7. The proposed amendments are necessary and helpful to development of electoral law in Kenya. For instance:-

   (a) In the past Presiding Officers were categorized as polling clerks with minimal responsibility attached to their tasks in law. In view of the new development of law where the polling station results are final, the Presiding Officers at each polling station have acquired some status thus need to criminalize some of the conduct they may engage in that makes us keep repeating elections.
   (b) Technology and law – technology keeps evolving faster than the law The rapid changes in technology and the new application of technology in the 8th August election and the nullification of the Presidential vote mean that there is need to tighten the provisions on technology and its application. It is especially necessary that the Bill provides for challenges encountered because of the network and in such a scenario the Commission may revert to manual system. Technology is good but if it fails we revert to manual.
   (c) The amendments have done well to cover the area of fresh nomination in a case like the one we have where the Supreme Court nullifies the election and only the President and the Petitioner are entitled to resign. For the purposes of Article 138 (1) which applies where only one candidate is nominated there was reason to cover this part in the amendments. Any candidate who wishes to pull out of the election, they would need to do so in writing and deliver the letter to IEBC.
   (d) The amendments relating to the Chairperson and who can perform his functions if he is not there are welcome to avoid a legal gap. In future the person appointed to serve as Vice Chair should have the same qualifications as the Chair.
   (e) The s covering the reliefs courts can give should start with re-tallying then recounting and in very limited cases escalate to nullification after ascertainment of a higher threshold of malpractices that substantially affect the outcome of the election.

We thank the Select Committee for the audience and warm reception,

Signed at Nairobi this 3rd Day of October 2017

03

Information Communication Technology Association of Kenya

IMPROVING LIVES THROUGH ICT

ICTAK

P.O. Box 17429-00100 Nairobi; 0721 754 218; 0731 786 644; secretarygeneral@ictak.or.ke; www.ictak.or.ke

October 4, 2017

The Chairpersons,
Joint Select Committee on Election-Related Laws,
Republic of Kenya,
Parliament Buildings,
P.O. Box 41842-00100,
Nairobi.

Received
4/10/2017

Honourable Members of Parliament,

MEMORANDUM ON THE ELECTION LAWS / ELECTION OFFENCES (AMENDMENT) BILLS 2017

Receive warmest compliments from the ICT Association of Kenya. Most profoundly we acknowledge with gratitude that your immense legislative foresight has brought about significant progress in this nation. In response to the Election Laws (Amendments) Bill, 2017, may it please you to consider this brief memorandum which summarizes our views with regard to the proposed amendments.

Background

Generally, the rationale behind adoption of electoral technology revolves around the need to:

- Boost efficiency in the electoral process
- Assure of the integrity of the vote
- Secure eligible voters while excluding non-eligible voters
- Enhance transparency and reliability of election outcomes

The prevailing voting method in use by IEBC integrates the following key elements:

1. Biometric Voter Register (BVR)-

Operational Requirements for BVR

- High Resolution camera
- Finger print scanners
- Application software and database tools
- Algorithms to structure captured input into compact and retrievable format

2. Biometric Voter Identification Device (BVID)-

Operational Requirements for BVID

- Database of all registered voters
- Biometric data of voters relating the particular polling stations
- Embedded with biometric scanning and data reader capabilities
- Power to run during the entire voting duration
- Designed to recognize biometrics captured earlier during registration
- Back up batteries to supplement built in capabilities/to address power shortfalls

Technical Challenges

- Breakdown of biometric verification machines
- User problems-Mainly due to inadequate training leading to "artificial" failure
- False positives and negatives- Likely to be more pronounced in 2017 since bulk of the current biometrics were captured in 2013. Phenomena likely to manifest in greater terms among:
  -Persons living with disabilities
  -Persons engaged in occupations that diminish biometric impressions, e.g. quarrying, meat roasting business, tea picking, milking, honey harvesting etc. Repetitive impact on biometric surface diminishes the biometric clarity occasioning false negatives.

AMMENDMENT TO SECTION 44A

How do we deal with possible system failures while eliminating potential manipulation of electoral outcomes?

Case of Ghana:
2012- No Biometric verification No Voting: Led to massive voter disenfranchisement
2016 election: Reverted to manual identification of voters with problematic biometrics

Kenya's Options:

a) Enforce the "No Biometrics - No voting principle". The outcome would be to disenfranchise legitimate voters in the effort to eliminate perceived ghost/dead voters-Contrary to Article 38 of the Constitution

b) Create a complementary identification system for bona fide voters with missing biometrics encompassing safeguards against abuse- Can be modeled along the Ghanaian concept- A safer route

Ultimate option must be anchored on the need to secure the right of every eligible voter to exercise constitutionally enshrined rights while safeguarding the integrity of the electoral process

3. Electronic Results Transmission (ERT) System-

- Conveys the outcomes of voting to Constituency and National Tallying points
- Manual input fed into customized devices

AMMENDMENT TO SECTION 39

Section 39 (1C) of the Elections Act provides that:

For purposes of a presidential election the Commission shall —

(a) Electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;

(b) Tally and verify the results received at the national tallying centre; and

(c) Publish the polling result forms on an online public portal maintained by the Commission.

Potential Challenges

As the information flows from source to destination, it is vulnerable to multiple attacks as it traverses across the network channel;

a) Difficulty in network signal deficient areas
b) Transmission security risks
   -Physical risks e.g. DOS attacks
   -Programmed threats e.g.

- Interruption- the information is destroyed enroute or is lost, or becomes unusable. E.g. malicious destruction of a hardware device, erasure of a program or data file, or malfunction of FTP. This attack affects the availability of information.

- Interception- The information may be captured or accessed by an unauthorized person through wiretapping on the network or by illegally copying the information at intermediate nodes with the help of a program. Silent interception leaves no trails that would enable detection. The confidentiality of the information is compromised in this type of attack.

- Modification. The information on the network is accessed by an intruder, tampered with and then forwarded to the original destination. Modification may involve change of the values in a database, program alteration or additional computation of data being transmitted electronically. Some

cases of may be easily detected but other may be indiscernible. This is an attack on the integrity of the information

- Fabrication. In this type of attack, an unauthorized person generates fraudulent message and passes it on to the destination. Intruders may insert spurious transactions to a network communication system or add records to an existing database. Meticulously executed, they are virtually impossible to detect.
- SQL injection- Malicious code elements embedded in improperly designed applications which are then passed to the backend database. Executes illegal actions

Critical Considerations

- End to end Security- Virtual Private Network to minimize scope of potential vulnerabilities
- SFTP
- Rigorous Security Assurance measures-Intrusion detection, Penetration testing, peak load testing etc.
- Network layer security
- Application layer security
- Server security-Capacity, integrity, mirroring, server logs, audit trails
- Transmission in low/no signal areas-3G/VSAT integration
- Redundant transmission apparatus

IN CASE TECHNOLOGY FAILS, WHAT NEXT?

Article 86 of the Constitution provides that:

At every election, the Independent Electoral and Boundaries Commission shall ensure that—
(a) ***Whatever voting method*** is used, the system is simple, accurate, verifiable, secure, accountable and transparent;

At best the Kenyan format of election can only be termed as a "Technology Enhanced Election" NOT an ELECTRONIC VOTING/ELECTION as buttressed by the following hallmarks:

- Voting is undertaken manually-Involves use of physical ballot papers
- Verification, Counting, Tallying of votes is manual
- Filling and Processing of declaration forms is undertaken manually
- Inputting of voting results for transmission purpose is manual

Basically, ALL the **MISSION CRITICAL** electoral activities are **MANUAL**. Accordingly, the **COMPLEMENTARY OPTION** that naturally commends itself in the circumstances is a **MANUAL BACKUP SYSTEM**.

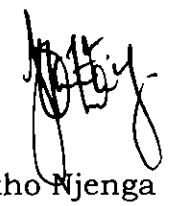
ELECTION OFFENCES (AMMENDMENT) BILL, 2017

Our view is that the clauses Section 14 (2) is vague hence its deletion is proper

CONCLUDING REMARKS

Our considered view is that the proposals in the Election Laws (Amendments) Bill, 2017 are extremely necessary in streamlining the Kenyan electoral affairs. Accordingly, we vehemently urge the distinguished Senate and National Assembly to secure Kenya's electoral process by diligently enlightening the entire nation on the foregoing issues which necessitate sound contingency plans and most importantly enacting the amendments as a matter of priority.

Sincerely,



Kamotho Njenga

Secretary General,
ICT Association of Kenya (ICTAK)

UNITED DISABLED PERSONS OF KENYA

P. O. Box 13488-00800
Nairobi, Kenya

Along Waiyaki Way
Opposite ABC Place
Orthopaedic Complex

Tel: +254 722 126 197
Email: udpk@udpk
Website: www.udp nya.or.k

04

Gazemba PCA
TMA.
Silva
24/10/17

NATIONAL ASSEMBLY
RECEIVED
04 OCT 2017
CLERK'S OFFICE
P. O. Box 41842, NAIROBI

The Clerk,

National Assembly,

Parliament Buildings,

Parliament Road,

Nairobi.

3rd October 2017

Dear Sir,

RE: MEMORANDUM ON PUTTING ON HOLD THE ELECTION LAWS (AMENDMENT) BILL, 2017

We have perused the above Bill, and without prejudice to the merits or demerits of the same, we urge that the Bill be put on hold until after the fresh presidential election.

The premise for the above recommendation is that while we appreciate Parliament's legislative mandate, the timing and publication of the Bill and its intended enactment is polarizing the country.

Yours Sincerely,

Anderson Gitonga-CEO,

United Disabled Persons of Kenya.

Mothers United for Peace

I want to believe the ICT Supreme Court will not give us

05

VOTER'S VOICE

I VOTED MANUALLY, NOT ELECTRONICALLY

WHERE DID MY VOTE GO?

Received by JF 4/10/2017

By Sheila Githaiga

Im **Mrs Sheila Githaiga** from my polling station **Ihithe Primary polling station, wamagana ward, Tetu constituency of Nyeri County.**

My first contact with my leaders on that day of 8th of August was the BALLOT PAPER. By 6 oclock in the morning, I was already at the polling station waiting to vote in my president and other leaders. I walked (manually), represented my ID to the election team(manually), presented my fingers for fingerprints (manually), picked the BALLOT PAPER (manually), ticked the name of my President and other leaders in the box provided (manually), proceeded to the ballot box and dropped the ballot paper in the ballot box (manually). This marked the end of my voting and I went home. My business and my responsibility as a citizen to express my right to choose my leaders was done and for me, any other process was not my business.

This is what every voter did on that day all over Kenya and this was purely a manual process.

The Chief Justice ruled that my vote did not matter because it was not transmitted according to the law and constitution although I voted

according to the law and the constitution. I was made to understand that after my business was done, another process called "Electronic Transmission"took over my vote and somewhere along this process inside machines called computers which I don't understand how they work, except that they are "manually" activated, my vote got lost. ***That is how I got disenfranchised as a voter! This 'electronic Transmission' disenfranchised me! This is why my country is in the volatile situation at present. I had hoped the Supreme Court would have wanted to trace my vote back to the ballot box. If they did that they would definitely have found it inside the ballot box where I dropped it, manually. This way my vote would have been made to count. This did not happen.***

Article 86 states " At every election, IEBC shall ensure that (a) whatever voting method is used (for me I voted by manual method), it must be SIMPLE, verifiable, secure, accountable and transparent".

Eectronic process **is not simple.** For the voter it is compex. I don't understand it. I don't understand how a commuter works.

Electronic transmission **is not verifiable.** As voter I cant verify what happened to my vote. I cannot physically touch it or see it.

Electronic transmission **is not accountable.** As a voter I cannot account for my vote. The Supreme Court could not either. That is why Iam asking where my vote went and the machines have not given me any answer neither can the judges

Electronic transmission **is not secure.** As a voter as long as I cannot see my vote I can only assume it got lost somewhere, therefore not secure and that is why we are all here. Our votes cannot be traced in the

machines so we voters don't know what happened our to 15 million+ votes

Electronic transmission **is not transparent.** At least not to me as a voter. I cannot see my vote. It is that simple.

Manual transmission is all what electronic transmission is not

I want to support my manual voting as described because if I was able to vote then it is ***simple***.

It is ***verifiable*** because my ballot paper can be physically seen and verified and traced back if need be.

It is ***secure*** because the ballot box is sealed and guarded by security personnel as I witnessed. It is ***accountable*** because I had been sensetised through civic education that IEBC team had been trained and vetted. It is ***transparent*** because my manual vote can be seen by me and everybody else.

As voter I have no control of my vote in the process of 'electronic transmission" nor do I understand it. The machines can and will fail. To this end my manual voting must become supreme to carry the day and not machines. I don't want my vote to get lost in computers this time round. I have surrendered my rights to my member of parliament to make laws in parliament that work for me and not against me. I support the amendments urgently.

Electronic process is not simple for me and it is my humble submission that Kenya is not ready for it to the extent that it can be the basis of nullifying a serious election like presidential election. MANUAL

VOTING SHOULD AND MUST BE SUPREME. If machines make the work easy, use them but they should not effect or affect my vote.

Other developed countries like German have found the electronic process wanting and reverted to manual process.

Kenya is a developing country and we dont need to prove to the world that we can do it by trying so hard thereby risking another bungled election that has the potential of plunging our country in the abyss of destruction.

Kenya is the 4th country in the world and the 1st in African to have a presidential election nullified. This is not an ordinary phenomena and so it requires extraordinary measures to make sure that the coming elections will not suffer the same fate. The urgent law amendments are such extraordinary interventions that must be applied to an extraordinary situation we find ourselves in.

I would also want to debunk the "tyranny of numbers" narrative. This has been demonized to fit the whims of some people. Numbers is why we have members of parliament in the house and not their opponents. Numbers or majority is the fundamental process of democracy. That is the reality. The best the minority can do is to persuade the majority to join them so that they have the numbers. Numbers do not necessarily have to be used for bad or evil. Numbers can be used for "tyranny of good" especially for a time as this.

In conclusion I would like to state that our country is at crossroads. We must choose the good way for all of us, our children and the children of their chidren. Like on wise writer said

> *"Great men are dangerous. When their dreams fail, they bury them under ruble of cities where simple folks once lived". May God protect Kenya that this does not happen.*

Sheila Githaiga – Voter Contact: 0706553333 sheilak52@yahoo.com

2nd October, 2017



06

Received
4/10/2017

WAZALENDO HURU

MEMORANDUND PRESENTED TO THE JOINT SELECT COMMITTEE ON ELECTION-RELATED LAWS THE ELECTION LAWS (AMENDMENT) BILL, 2017

4th October 2017

Introduction

Wazalendo Huru is a not for profit, non-political and non religious institution that focuses on social cohesiveness, community stability, empowerment programmes, social responsibility among other objectives and functions.

Wazalendo Huru envisions a society that is free, social-political and economically empowered. A society that believes in the beauty of their dreams. A society that lives in brotherhood, loving each other, socio-coexists and above all value human life and dignity. A society that is always eager to rise to the occasion when called upon. Where were discuss issues and ideas other than tribal segregation, where we share common ideologies and dreams, working towards making our society great.

Background

We acknowledge that Sovereign power belongs to the people of Kenya Article 1(1) . We are also aware that such power may be delegated through their democratically elected representatives (Article 1 (2). We recognize that Kenyan elections are very emotive, simply because, they offer the single most important way Kenyans can delegate their sovereignty

We are where we are today as a country, because the Supreme Court of Kenya invalidated the presidential elections in Kenya:

SPECIFIC ISSUES WE OBSERVED FROM THE SCOK RULLING

1. We learnt that technicalities can invalidate a presidential election and that processes may affect the will of the Kenyan people. It does not matter how many votes we give a candidate if the process has issues the elections will be invalidated and hence the will of the Kenyan people is subdued by acts of omission or commission.
2. We learnt that some Form 34 A's were not signed by Presiding Officers.
3. We learnt that Constituency Returning Officers did not sign Form 34B's.
4. We learnt that IEBC Chairperson announced the results before receiving all forms 34 A's and 34 B's.
5. We learnt that in some areas the electronic transmission failed due to unavailability of 3G and 4G networks.
6. We learnt that whatever IEBC was transmitting to Kenyans from the national tallying centre were merely statistics that were not binding.

7. We learnt that Kenya's electoral system did not have a defined complimentary system especially in situations where the electronic system failed and or is not simple, efficient, accurate, accountable and verifiable
8. After the ruling and subsequent analysis we learned that IEBC may be incapacitated should the National Returning Officer be unable, in one way or another, to carry out his mandate as there are no constitutional and or legislative provisions that mandate the vice chairperson and
9. We have also learnt that, since the ruling was made, the political climate in Kenya has intensified with various political players making their demands and increasing the anxiety among the Kenyan people.

OUR UNDERSTANDING OF THE BILL

1. THAT the amendments will make it a criminal offence for any Presiding officer and Returning Officer to fail to sign their Form 34A's and 34B's
2. THAT the amendments make the original Form 34A the single source of truth in case there is no connectivity in a polling station. This means that the changes will make the manual tallying and transmission of results superior to the electronic system.
3. THAT the amendments will enable live-streaming of results declared at polling stations and make it mandatory for the poll commission's chairman to have all forms 34A and 34B before announcing the presidential election results and THAT the amendments bind the National Returning Officer to receive all 34 As and 34Bs, validate them and reconcile them before announcing the Presidential Result
4. THAT the Bill contains a provision for the vice-chairman to act as the chairman of the electoral agency in the absence of the chairman
5. THAT the amendments make it possible for IEBC's work to continue uninterrupted should the Chairman be indisposed. We all know that good corporate governance demands that there is continuity in any organization even if the leadership is indisposed This is just a contingency plan that offers continuity in case of occurrence of unforeseen risk

OUR OPINION

We opine that:

1. The Kenyan citizen at the local level does not understand how a technicality caused by a third party (IEBC) could subvert his will to freely choose their leaders of choice. Their voice is heard by the physical ballot paper which is supreme when exercising their right as per Article 1(2) of the Kenyan Constitution:

   The people may exercise their sovereign power either directly or through their democratically elected representatives

2. The bill does not seek to introduce the manual system in our electoral system
   We opine that the will of the Kenyan people should not be subverted by technicalities and hence support the introduction of a manual complimentary system that will allow the Independent Electoral and Boundaries Commission (IEBC) to come up with a manual system of identifying voters and transmitting results, complementary to the electronic tallying system

Notwithstanding the provisions of Section 44, the commission shall put in place a complementary mechanism for identification and transmission of results that is simple, accurate, verifiable, secure, accountable and transparent to ensure it complies with the provisions of Article 38 of the Constitution.

Changes do not mean the country will resort to manual voting and tallying systems It only suggests putting in place of a complimentary mechanism should the electronic system fail

3. We do not think that these laws have the potential to take us back to the dark ages, those claiming that these laws will wear down the progresses we have made as a country they are wrong. These laws are meant to better the election management in Kenya. They are ring fencing any mischievous avenue that may lead to the subversion of the will of the Kenyan people

4. That parliamentary is within its constitutional mandate to carry out its legislative functions and the tyranny of numbers should not be used to delegitimize the functions of parliament. The Supreme Court of Kenya handed down its detailed judgment in a petition challenging the re-election of President Kenyatta. By a 4-2 majority, the SCOK invalidated the presidential election and hence we are bound by that majority decision.
In our opinion there is nothing wrong with Kenyan parliament in the course of their legislative work, by a majority decision, make amendments to the elections law. They are within their mandate and after all tyranny of numbers is determined by the people of Kenyan people through their vote in a free, fair, and transparent election.

5 Thus, in a country where broadband connectivity remains a huge challenge particularly in far-flung areas, and in a global context where technology presents complex vulnerabilities, it is patently unreasonable and outright reckless to expect electronic transmission to be faultless and to demand this to be the single measure of a successful election.

Section 39 of the current Election Act to address this article's specific concern. It includes the proposal that "any failure to transmit or publish the election results in electronic format shall not invalidate the result as announced and declared by the respective presiding officers at the polling station and constituency tallying centres respectively."

RECOMMENDATIONS

1. **Executive IEBC Chairpersons**
We recommend that the IEBC chairperson be made an executive chairperson whose main responsibility is to announce Presidential results. This is because where all other commissioners are incharge of specific electoral components the Chair has a general scope of work and therefore he should always be bound by decisions of other commissioners who have primary scope and jurisdiction on each and every specific electoral component assigned to them

2. **Polling Station Agents**
Make it mandatory for every agent, whose details should have been forwarded to IEBC by political parties, to sign all forms 34As and 34Bs respectively Failure to sign such forms should be made an electoral offence punishable by law

3. **Transmission of Results by the Media**
Make it mandatory for IEBC to facilitate public information by establishing a mechanism for live streaming of results at the Constituency level (In line with Maina Kia's decision) and the results streamed shall be for public information only and shall not be the basis for a declaration by the commission.

Conclusion
Our memorandum is meant to support the amendments of the election laws so that the will of the Kenyan people is not determined by the Supreme Court, the ICT, IEBC and any other technicality that may arise.

Name: MONICAH MUTHONI KI

Sign: _____ Date: 4th oct 2017

Name: MARION ATIENDE

Sign: _____ Date 4th oct 2017

Name: CHRIS WANYAMA KIOMI

Sign: _____ Date: 4th OCT, 2017

07

Received
4/10/2017

MOLO/KURESOI INTERNALLY DISPLACED NETWORK AND RIFT VALLEY IDP'S CBO

The above referenced is a community based organization of persons who have been rendered to be internally displaced during election cycles since 1992 in the sub counties of Molo and Kuresoi.

Some of our members have been internally displaced severally in 1992,1997 and 2007.

Our displacements have been as a result of pre and post-election violence emanating from presidential poll dispute.

During 2007-2008 disputed election, tens of thousands of people were displaced in both sub counties and properties worth millions of shillings were destroyed.

The destruction of properties included ;homes, shopping centers ,schools, churches and even cattle dips In short our membership have suffered unfathomably loss and damage as a result of election dispute.

On 8th of August 2017 tens of thousands turned out very early in the morning in different polling station to cast our votes in the sixth elections that took place simultaneously elections for the MCA, MP,WOMEN REPRESENTATIVE ,SENATOR,GORVENOR AND PRESIDENT.

At the end of the voting the votes were counted, tallied and the results declared at each polling station.

The requisites forms were filled in the presence of all the candidates and party agents and also in the presence of local and international observers and the media

The forms related to presidential tallying were scanned and transmitted electronically to both the constituency and national tallying centers in the presence of all the agents and the observers.

Each of the agent representing all the candidates and parties in the six elections were given a copy of the relevant filled and signed forms and a copy thereof was fixed on the outside side of the door to the polling station.

On the 11th of August our membership received the declaration of presidential poll results with jubilation. It therefore came as a surprise to us when the supreme court annulled the declaration of the presidential results on the basis that the conduct of the elections did not follow the constitutional principles laid down by the constitution and the law.

Further the court found that there were irregularities in the conduct of the elections because some statutory forms did not have security features and /or were not signed by the presiding officers or the returning officer and that there were systematic and systemic failures in the transmission of the results.

It is therefore these shortcomings that the amendments to various electoral laws including the IEBC act section 6,the election act section 29,39(1)(c) ,44 and 83. AND section 86 A of the election offences act.

It is to be noted that there is nothing unconstitutional or retrogressive concerning the intended amendments.

Further it must be noted that parliament has a constitutional mandate to make initiate any legislation or amendment thereof without direction from any quarter bills brought to parliament can emanate from

party in power, the opposition or through private members bills. The proposed amendments we note, do not in any way impose any additional burden to IEBC in its mandate to carry out election or referenda in Kenya.

The proposed amendment to be IEBC act simply proposes to remove the restriction that the chairman of IEBC must be an advocate of the High court with more than 15 years' experience there is no tangible members of other professions cannot be appointed chairman. The appointment further allows any other commissioner to act as the chair of the commission in the unlikely event that he chairman and the vice chair are either out of the country or ill disposed to the extent they cannot chair commission meetings.

This sits well with modern corporate governance principles the amendment changing the quorum of the commission from five to half of the membership i e. three or four commissioners will ensure that the business of the commission will not be paralyzed in the event three commissioners are out of the country or for whatever reason are unable to attend commission meetings.

The new section 86 A gives effects to article 138(1) of the constitution. The section defines who the presidential candidates are if a fresh election is to be held after an annulment by the supreme court and further defines the mechanism to be followed in managing a fresh election.

These sections enhances the penalties to be imposed on electoral official who falsifies election documents of fails to sign the requisite statutory forms by imposing a five year sentence upon conviction

IN SUMMARY ; the proposed amendments to the IEBC and the election offences act can only be a welcome feature to our electoral laws.

The proposed amendment to section 29 of the election act seeks to implement the constitutional court's decision in the case of Peter Solomon Gichira versus IEBC and another(2017) eKLR which found the restriction on section 29 of the act was unconstitutional simply puts a party 's nomination of a presidential candidate must be done only by members of his own political party or that of an independent presidential candidate must be nominated by persons who are not members of any political party was found to be unconstitutional.

Section 31 (1) (c) provides only for electronic transmission of results of a presidential election only and does not provide for a fallback position in case of failure for whatever reason The proposed amendment to the section provides for both electronic and manual transmission of results and puts in place a complimentary mechanism to facilitate verification of results.

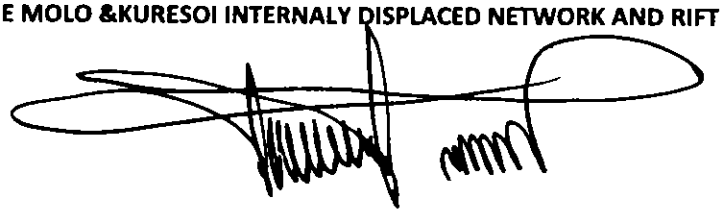
The amendment further stipulates that in case of a discrepancy between the electronically transmitted and the manually transmitted results takes precedence It further stipulates that failure to transmit or publish the results electronically shall not invalidate the results announced and declared by the presiding officer and the returning officer at the polling station and constituency tallying center respectively. It also provides for the publication of information through live streaming of results as announced but which results are not to be dimmed as the basis for declaration of presidential poll results.

The live streaming allows the presidential agents, observers and the media to keep track of the tallies at each step of verification.

IN SUMMARY; the proposed amendment enhance the integrity of the process and removes public anxiety.

NJENGA MWANGI &PETER KARIUKI

FOR THE MOLO &KURESOI INTERNALY DISPLACED NETWORK AND RIFT VALLEY IDP'S CBO



THURSDAY AT NOON

5/10/2016

2:30pm

IPG International Policy Group
Peace & Justice

08

October 4th, 2017

Received written Submission
by
5/10/2017

Mr. Michael Silai
Clerk of the National Assembly
P.O Box 41842-00100
Nairobi

Dear Sir,

SUBMISSION

MEMORANDUM IN SUPPORT OF THE ELECTION LAWS (AMENDMENT) BILLS 2017

(AMENDMENT TO THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT NO. 9 OF 2011, ELECTIONS ACT NO. 24 OF 2011 AND THE ELECTION OFFENCES ACT 37 OF 2016) The Election Laws (Amendment), Bills 2017 before both Houses of Parliament.

Submitted on Wednesday October 4, 2017

The memorandum seeks to support the above-mentioned amendments which seek to provide for the proper conduct of the affairs and business of the Independent Electoral and Boundaries Commission (IEBC), and for effective management of elections. The is in line with the Constitution which empowers Parliament to enact legislation and even amend the Constitution in order to provide for and uphold the rule of law in all matters of governance including elections

The Chairperson, Quorum and Conduct of business at a meeting of the Commission
In particular, we seek to unequivocally support the amendments that addresse, *inter alia*, the professional qualification of Chairman of IEBC and conduct of the Commission's business. It is worth pointing out that the ultimate job of IEBC chairman is to certify that elections have been conducted in accordance with the written laws of Kenya.

The bills propose empowerment of IEBC vice chair to declare the presidential results in the absence of the chair. While this may appear to a lawyer's job, the question here is whether Parliament can enact a law that permits an ordinary member of a commission without legal qualifications to perform a function which the Constitution vests in the chairperson of the Commission.

Kenya House 2nd Floor, Suite 16D P.O. Box 50240 - 00100 Nairobi Cell: 0771 219 361 Website: www.policy-group.org

Qualifications of Chairperson and Commissioners

In determining qualifications, it is notable that the two major democracies in the commonwealth do not adhere to this non-existent norm requiring a legal background on the part of the chairperson. For instance, India's Elections chief is a Chemist. UK's is a diplomat and in South Africa he is Business Management degree holder. There is therefore no no constitutional basis for purporting to restrict who can assume the position of chairperson on the basis of a legal background To deal with this anomaly that is misaligned to commonwealth norms and practices, it is proposed that section 2 of the IEBC Act 2011 be amended by deleting subsection (1) thereby providing that a person shall qualify for appointment to the Commission if that person "holds a degree from a recognized university in public administration, public finance, governance, electoral management, social science or law among other requirements.

Continuity and Risk Management

In this regard, clarification is provided by the proposed modification that section 2 of the IEBC Act 2011 be amended to provide that the term "chairperson" means the chairperson of the commission, and in the absence of the chairperson, the vice-chairperson or such other person acting as the chairperson in the absence of the chairperson and vice chairperson. In addition it is proposed that section 6 of the IEBC Act 2011 be amended to provide for, *inter alia*, that in the absence of the chairperson, the vice-chairperson shall assume the duties and responsibilities of the chairperson. Further the Bill provides that in the event of the absence of the chairperson, or the vice-chairperson, the members of the Commission shall elect among themselves one of their members to act as chairperson and exercise the duties and responsibilities of the chairperson. These amendments will align the law with the provisions of Article 259(3)(b) and (c) of the constitution.

Quorum to Conduct Business

It is further proposed that the Second Schedule of the IEBC Act 2011 be amended to provide that a quorum for the conduct of business at a meeting of the Commission shall be at least half of the existing members of the commission, provided that the quorum shall not be less than three members. Additionally, the amendment seeks to provide that that a decision on any matter before the commission shall be by the members present and voting unless a unanimous decision is reached. This seals the loophole that exists by ensuring continuity in the absence of half of the commissioners.

Support for Amendments

The support for these amendments is informed by the fact that the electoral laws conform to good corporate governance practice in regard to accountability, continuity planning and

risk management particularly in the case where the chairperson is unexpectedly indisposed. It also allows for widening of the pool of professionals who can take up the chairperson's position to include those outside the legal profession thereby bringing in more depth, breadth, inclusivity and dynamism into the office of the IEBC Chairperson by "casting the net wider" when recruiting for the position.

The amendments are also aligned to dominant rational-legal authority for public administration proposition espoused by leading sociologist Max Weber, in which the authority of an organization is largely tied to legal rationality, legal legitimacy and bureaucracy whereby the authority lies with the office, and not the office holder, as opposed to traditional or charismatic authority. The majority of modern states are rational-legal authorities, including the three arms of government; the Executive, Legislature and Judiciary as well as all Ministries, Departments, Agencies (MDAs), devolved units and Independent bodies in the Republic of Kenya. The IEBC should therefore not be an exception to the existing norms and standards.

Furthermore, the proposed amendments demystify the IEBC Chairman by divorcing the office from the office holder and ensuring that no one person holds the ultimate key to decisions pertaining to the sovereign will of the people in exercising their democratic right to have their vote count. In fact, rather than disabling the role of the chairperson, it buttresses this office by implanting a "fail safe" mechanism that removes the risk factor of having an entire election fall apart simply because the chairperson is unavailable and no one is qualified to take up the role of National Returning Officer in declaring a presidential result. The amendment closes this lacuna by ensuring that the burden can be ably taken up by the other equally qualified commissioners.

It is for these noble reasons that this memorandum is hereby submitted to strongly support and endorse the proposed amendments to the Electoral Laws that are now before both Houses of Parliament.

DR ROBERT KAGIRI
DIRECTOR

194

REPUBLIC OF KENYA

THE JUDICIARY

090

THE JUDICIARY

JUDICIARY COMMITTEE ON ELECTIONS

Ref: JCE/NA/2017

Date: 04th October 2017



Mr. Michael R. Sialai, EBS
The Clerk of the National Assembly
Parliament Buildings
P. O. Box 41842 - 00100,
NAIROBI

Mr. J. M. Nyegenye, CBS
The Clerk of the Senate/Secretary, Parliamentary Service Commission
Parliament Buildings
P O. Box 41842 - 00100,
NAIROBI

RE: INVITATION TO A PUBLIC HEARING OF THE JOINT SITTINGS OF THE SELECT COMMITTEES OF THE NATIONAL ASSEMBLY AND THE SENATE ON ELECTION LAWS, 2017

We acknowledge with thanks, receipt of your letter Ref. JSCEL/CORR/2017 dated 02nd October 2017 addressed to the Chairperson JCE.

On behalf of the Chairperson, Judiciary Committee on Elections (JCE), I write to express gratitude of the JCE for the invitation to make a presentation before the joint sittings of the Select Committee on Thursday, 5th October, 2017 at the Mini Chamber, County Hall, Parliamentary Buildings.

Part of the JCE's mandate includes stakeholder engagement and legal reform. However, it focuses on matters that touch on elections disputes resolution (EDR) and not on election processes generally. The current Bill does not capture any issues that focus on EDR for which JCE would be able to contribute to. Consequently, JCE regrets that it will not be able to honour the invitation to appear before the Committee.

We wish you the very best in your deliberations.
Yours Sincerely,

Arika

LILLIAN A. ARIKA
SECRETARY, JUDICIARY COMMITTEE ON ELECTIONS

CC Chairperson JCE

D.D. Comm

Kindly bring to the attention of the Committees.

05/10/17

Milimani Law Courts / Room Number 418 **Telephone:** 0730 -181090 0730 - 181340/42
Email : jce@judiciary.go.ke **P O Box** 30041- 00100 Nairobi, Kenya

www.judiciary.go.ke



International Governance Institute

...building integrity in acquiring and exercising public duty...

10

THE SENATE CLERK'S OFFICE
RECEIVED
04 OCT 2017
P.O Box 41842 - 00100, NAIROBI

3RD OCTOBER, 2017

THE CLERK OF THE SENATE,
SECRETARY,
PARLIAMENTARY SERVICE COMMISSION,
PARLIAMENT BUILDINGS,
P.O BOX 41842 – 00100, NAIROBI.

D.D. Comm

Kindly bring to the attention of the Committee.

05/10/17.

Dear Sir/Madam,

RE: MEMORANDUM TO THE JOINT PARLIAMENTARY SELECT COMMITTEE ON MATTERS RELATING TO THE ELECTION LAWS (AMENDMENT) BILL, 2017.

Introduction

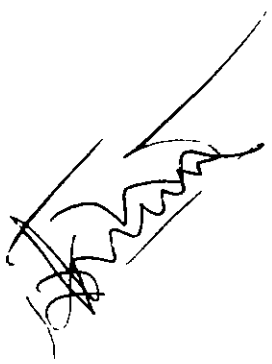
International Governance Institute is an international charity registered by the Charity Commission of England and Wales and registered in Kenya as a not-for-profit organization with the principle mandate of engaging local communities in monitoring the exercise of public authority and ensuring the maintenance of integrity in public transactions. The organization is a member-driven association running local citizens' initiatives in different parts of the country; empowering the communities and building their capacity to demand public accountability.

Harambee Sacco Estate, Greenfields, House No. 94A.
P. O. Box 17197 00100 Nairobi- Kenya * Tel: 254 736 360 064 * Mobile 254 722 109 609
Email: info@igi-integrity.com *Website: www.igi-integrity.com

Background

Since the advent of multi-partyism in the 1990s, Africa has witnessed both progress and reversals in electoral administration and management. Several Electoral Management Bodies (EMBs), for example those in Benin, Botswana, Ghana, Mauritius, Sierra Leone and South Africa, have performed creditably in a relatively professional, non-partisan and efficient manner. They have built public confidence in electoral administration and management. Electoral Management Bodies, being the fulcrum around which electoral administration and management revolves still, however, face daunting challenges around the continent. If political institutions and processes lack transparency and accountability, general confidence in the EMBs tends to be low, although the fault usually lies in contradictions in the political architecture and in the societal ethical values within which the EMBs operate.

When an election yields a close vote between parties and particularly between presidential candidates, there is a likelihood of an explosive situation that must be carefully managed. The flare-up can assume the form of a violent conflagration of ethnic, ethno-regional conflict, as it did in the aftermath of close and highly contentious presidential elections in Kenya in 2007 and Côte d'Ivoire in 2010. For such eruptions to be contained, it requires established legal, policy and institutional mechanisms for election dispute adjudication, which impel aggrieved parties to seek recourse to, and accept, court decisions as final arbitration.



Following your notice published in the national dailies, requesting for submission of memoranda, we hereby humbly make our written submissions in regard to the above referenced matter under The Elections Laws (Amendment) Bill, 2017 itemized below:-

1. In the proposed changes, there is a clear attempt at legally legitimizing illegalities, irregularities and misdemeanors; for instance:-
   (a). In Sec 6 (a) (a), the Commission is required to transmit results electronically, but that responsibility is quickly removed in Sec 6 (a) (b) IE where it is stated that "Any failure to transmit or publish the said results electronically shall not result into the nullification of results...."

   This is meant to encourage the Commission staff not to relay results electronically by any means including deliberate refusal, jamming the system, hacking the system, not entering data into the system or not availing the electronic gadgets at all. There's no incentive for electoral officials to meticulously deploy electronic equipment, fit for purpose and successfully transmit results electronically. In fact ANY failure (intended or unintended) is encouraged instead.

   (b). In Sec 6 (a) (b) IF, live-streaming of results is encouraged but the results so streamed need not necessarily be authentic, it is restricted to be purely for public relations and public information and such streamed results shall not be used as the basis for the declaration of final results.

   This is meant to encourage rogue Commission staff to fabricate artificial figures for public consumption as the election goes on, for purposes of creating a certain public perception of a certain candidate being on a winning streak and/or another being on a losing trip – but at the moment of declaration, those results being viewed on television screens and IEBC portal don't need to be authentic, and no one should be held accountable for them, as the Commission will still come up with other results to be announced as final.

(c). In Sec 9 (c) of the Bill, falsification, transference, distortion, prevarication, forgery and misrepresentation of results transmission Forms 34As, 34Bs and 34C of results is encouraged and legally protected.

No teacher/examiner would morally/legitimately/validly admit an exam answer sheet as valid even if the student being a known "A" grade material, had scored an A in the said examination, if the "A" is scored on a falsified sheet or paper from a back-street photocopier not supplied by the examiner and where no responsibility is put on the student to explain what happened to the genuine exam answer sheet supplied by the examiner. This law is meant to allow crooked electoral officers to replace results transmission forms with fake ones, bearing no security features and no serial numbers, off course with altered results.

2. In the proposed law, the absence of the Chairperson being contemplated in Sec 3 is suspicious, chary and wary, considering that the Chairperson is the only Commission officer contemplated in the Constitution to (i) announce presidential results as the National Returning Officer, and (ii) submit the results to the Chief Justice.

It is not lost to many that during the turbulent 2007 Presidential Elections, the then Chairman of the Commission Samuel Kivuitu mysteriously vanished from the scene and was said to be having a bed rest after a sudden bout of infection where foul play by Government agencies was highly suspected. We all know what followed! In the same vein, the sudden 'absence/ disappearance' of Chris Msando on the eve of Elections on August 8th at the Commission IT nerve center led to his 'replacement'. We all know what followed! In our humble view therefore, either this law is meant to threaten the Chairman of the Commission to toe a certain official line or he may surely be missing in action come October 26th and another officer with a pre-determined script takes charge to execute a heinous plan. In short, given the current circumstances and previous experience with presidential elections in Kenya (2007, Aug 2017), we must tread cautiously with such schemes coming just a few days to a highly polarized and contentious election, especially bearing in mind that these

amendments are being religiously bulldozed through by one side of the political divide with no regard for what the other side thinks.

3. In the proposed law, putting the quorum of the Commission at 3 Commissioners out of 7 as contemplated in Sec 4 of the proposed Bill and going further to state that a binding decision of IEBC could be reached by a majority of those 3 – implying 2 members - is not only callous but extremely treacherous to the proper management of elections in Kenya.

   This makes it further injurious to public interest when we consider that is Sec 3 of the said Bill, any Commissioner can act as Chairman and have all the powers of the Chairman including declaration of presidential results - so long as the Chairman 'fails to be in action'.

4. In Sec 6 (b) of the proposed Bill, the world-acclaimed democratic standard of electronic voter registration, electronic voter identification and electronic results transmission – what is now commonly referred to as the Kenya Integrated Electronic Elections Management System which works well in conformity with our Constitutional threshold of a simple, accurate, verifiable, secure, accountable and transparent system has been bastardized.

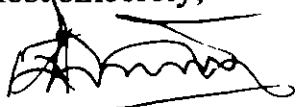
   In this Bill, manual transmission of results is elevated above electronic transfer of results. Off course the manual transmission includes Presiding and Returning Officers carrying Presidential Results Forms in their pockets, briefcases and handbags; being rained on or their cars getting stuck in mud, spending nights in lodges or forests with presidential results on their bodies, getting attacked, kidnapped or bribed along the way, disappearing from the Commission radar at some point, re-appearing with torn or mutilated results forms. Considering also that the Bill states that it will not matter what kind of paper carries the results, whether from a photocopy bureau or street vendor; what will matter will be the figures so affixed on the sheet and the signature of the bearer.

In conclusion, we believe this Bill is clearly meant to **sanitize** the messes in the August 8th Elections, make them agreeable and legitimate – as if they are meant to

be repeated - and tie the hands of the Supreme Court in declaring them 'illegalities, irregularities and invalidities' - as they are now well captured in the Election Laws (Amendment) Bill, 2017 and protected. We hold that the proposed changes to the election laws are ill-advised, untimely, unwarranted and with high possibilities of plunging the country into a failed state.

We believe our submission has merit and therefore warrants your consideration and we are ready to appear before you to defend this position for your further consideration and possible adoption.

Most sincerely,



SAKWA BULIBA
SECRETARY, International Governance Institute

11

Received
4/10/2017
by

SMALL TRADERS WOMEN SELF HELP GROUP
(CBD CHAPTER)

PO BOX 10031, NAIROBI

Tel 0727621533

- On behalf of ourselves and all the small female business traders in Nairobi, we support the elections amendment bill because the amendments do not impose any additional burden to IEBC as they only seek to simplify and ease the management of elections while providing clarity in case there are challenges during the elections.

Signed

Chairlady ....F. Nyagathii

Secretary .....

Hon. Gazmenda pct

12

Centre for
Minority Rights
Development

Suite 132, Dam Estate, Off Langata Road
P.O. Box 14892- 00100 Nairobi, Kenya
Tel: 254-020-5255204/2622118
Cellphone: 0708-122435
E-mail : mail.admin@cemiride.org
www.cemiride.org

4/10/17

SUBMISSION OF MEMORANDA TO THE NATIONAL ASSEMBLY

The 12th parliament - First Session

In the matters of consideration by the National Assembly –

1. The Elections offences (Amendment) Bill (National Assembly Bill No 38 of 2017
2. The Election Laws (Amendment) Bill (National Assembly Bill No 39 of 2017)

PRESENTATION TO THE JOINT SELECT COMMITTEE ON ELECTION-RELATED LAWS THE ELECTION LAWS (AMENDMENT) BILL, 2017

4th October 2017

PREAMBLE

The Centre for Minority Right Development (CEMIRIDE) works to support minorities and indigenous communities in Kenya to secure their rights. Because of CEMIRIDE's work, today we have in the Constitution of Kenya 2010, Article 56 on the rights of Minorities and Marginalised Communities. Article 56(a) provides that the State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups participate and are represented in governance and other spheres of life. Further Article 91 (1) (e) provides that every political party shall respect the right of all persons to participate in the political process, including minorities and marginalised groups and through various other provisions, including Article 100, the Constitution provides for representation of marginalised communities in the various arms of government. The realisation of these provisions for marginalised communities in Kenya is greatly hinged on a transparent and credible election. Suffice to say, credible and transparent elections are very critical in ensuring that the country remains peaceful and that normal life is not disrupted in the event of a disputed election as has been witnessed in the recent past. CEMIRIDE has also litigated complex cases against the state including at the African Court and African Commission (see. Application No. 006/2012

NATIONAL ASSEMBLY
RECEIVED
04 OCT 2017
CLERK'S OFFICE
P. O. Box 41842, NAIROBI

African Commission on Human and Peoples Rights V Republic of Kenya (on behalf of the Ogiek), CEMIRIDE (on behalf of the Endorois Community) v. The Republic of Kenya; Communication No. 276/2003 at the African Commission on Human and Peoples' Rights & Communication 317 / 2006 – The Nubian Community in Kenya vs The Republic of Kenya)

It is against this backdrop of challenges faced by minorities in Kenya that The Election Laws (Amendment) Bill, 2017 must be viewed. While declaring the August 8 Presidential Elections null and void, the Supreme Court of Kenya (SCOK) observed that the elections held on the said day were not transparent and credible. It must be emphasised that the enjoyment by minorities and marginalised communities of the gains in the Constitution of Kenya 2010 is greatly dependent on credible elections, and therefore, are among the key groups that are on the forefront to push and advocate for a fresh credible and transparent election

It is therefore important that reading the detailed judgement of the SCOK in invalidating the August 8 2017 Presidential elections, the Court noted a number of significant electoral problems that eventually led to their decision, such as transmission of results and lack of signing of elections forms by presiding officers It is important that such gaps be sealed to avoid a repeat process being annulled over the same claims, as indeed the Court indicated that it would not hesitate to invalidate the results of the fresh elections if the same mistakes were repeated.

While it is understandable that the proposed amendments have raised political heat, even roping in the diplomatic community Kenya, it is important that all stakeholders view this process from a position of neutrality. Parliament is the legislative arm of the government, and therefore has a right to deliberate on the said ruling of the Supreme Court, and seek to cure the gaps that definitely led to the annulment of the presidential vote. The proposed changes should not be misconstrued as mischief by Jubilee to ensure victory at the forthcoming elections, but to cure the areas of irregularities cited by the Supreme Court while annulling the August 8 2017 Presidential elections. This country must not burn because of these elections and all members of parliament have a responsibility of ensuring that they midwife a repeat election that will not only be credible but acceptable to all Kenyans.

SPECIFIC ISSUES

1. It is in the interest of marginalized communities that the process of presiding of elections happens without an administrative hitch The proposed amendment of Section 2 of the Elections Act, 2011 therefore provides for a succession solution should there be a vacancy in the office of the Chairperson of the IEBC It is also noteworthy that the process of appointment of a Chairperson of any Commission is not straightforward and such a gap especially during an important election like a presidential one would throw the country into an unprecedented crisis For more clarity, and avoidance of doubt, this amendment should make reference to ***Article 259 (3b)*** of the Constitution which provides:

   "any reference in this Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time

   This provision of the Constitution already contemplates the role of a successor in State or public offices, the Chair of the IEBC being one of them, as per Article within the meaning of Article 260, and Article 248 of the Constitution that defines who a state officer is.

2 There is no provision in the Constitution that the Chairperson of IEBC must be a lawyer. In view of the fact the main function of the IEBC chairperson is to nominate presidential aspirants and declare the winners, which functions are performed for other electoral positions at the Constituencies and Counties by returning officers who are not necessarily lawyers, it is therefore discriminatory that the IEBC chairperson's position should be reserved for a specific profession We are therefore in support of this amendment as it opens up the position to more Kenyans including people from marginalized communities who may not necessarily be lawyers but can competently interpret the law and effectively perform the roles under the said positions The Constitution of Kenya 2010 was written, and as enacted includes diversity in terms of professional qualifications. The person contemplated in the amendment for Chairperson requires at 15 years' experience in seven diverse backgrounds amongst other qualifications. This provision will go a long way in promoting inclusiveness, equity and equality. This is especially important to members of other academic qualifications who have felt left out of key positions that have exclusively been reserved for lawyers, even

when it has been clear that legal education is not necessarily a pre requisite for effective performance of the roles in such positions.

3. The question of quorum of the Commission has also generated a lot of heat, with a section of Kenyans alluding that the amendment of paragraph 5 of the Second Schedule of the IEBC Act will reduce the quorum for transacting business at the IEBC from five (5) to three (3) members. The amendment reads

> ***"by deleting the word "five members of the commission" and appearing in paragraph 5 and substituting therefor "half of the existing members of the commission, provided the quorum shall not be less than three members"***

Our understanding of this amendment is that it seeks to protect the IEBC, which plays a very critical role from being held hostage for any unforeseen reason by anyone and it by no means necessarily reduces the quorum to three. This amendment simply places more onus on the IEBC commissioners at any one given time to ensure that they are available to transact business of the commission as their absence may and should not impede the commission from transacting business especially during an electioneering period, which is critical to our democracy. This amendment is clearly in line with ***Article 250 (1) of the Constitution*** provides that each commission shall consist of at least three, but not more than nine, members In this case, the requirement under the current law that the quorum for conduct of business be five members of the IEBC is ill thought out. The assumption that the Commission will always have the Constitutional maximum of nine members is flawed and lacks basis. In the event that there are less than nine IEBC Commissioners in total in future or even where for reasons unknown the Commission may not reach the number of five then the Commission's operations would be crippled By setting the minimum number of the Commissions, including IEBC, Kenyans clearly sought an administrative mechanism that was simple and easily executable, to ensure smooth running of the commissions. It would therefore be a violation of the will of the people of this Country should for any uncontemplated reasons, the IEBC, as currently set out, is unable to raise a quorum and hence conduct its business, especially important process like the fresh presidential election.

4. The cause of disagreement during the 2017 presidential election petition related to the validity and transmission of forms 34A and 34B. As noted by the Supreme Court, the result of the process to be valid, the process must also pass the integrity test. It follows therefore, that there is an urgent need to ensure that the gaps that led to problems concerning validity of the forms in question and the results transmission be addressed with finality. The proposed section 39 (1D) of the Elections Act (and the related amendments) seeks to address this states that in the event of discrepancy between electronically transmitted and manually transmitted results, the manually transmitted results shall prevail. It is however important that the historical context for the use of technology in the elections as set out in the Kriegler Report is not ignored, especially recalling that In 2007, some returning officers disappeared with the manual results. The proposed amendments should, therefore, be read together with proposed Section (1F) which states

   The Commission shall, to facilitate public information, establish a mechanism for live streaming of results at polling stations, and the results streamed shall be for public information only and shall not be the basis for a declaration by the commission.

   This provision is particular understood by us to want to bring clarity and uphold the provisions of ***Section 44 (3)*** that technology used must be simple, accurate, verifiable, secure, accountable and transparent. The citizenry's fundamental political rights under ***Article 38*** are encapsulated in the principles of free and fair elections in ***Article 81(e)*** and IEBC's obligation to conduct elections in a simple, accurate, verifiable, secure, and accountable and transparent manner as stated in ***Article 86 of the Constitution***. A sure way of ensuring this is by making sure that the Kenyan public is accessible to results of the election as they are announced at the respective polling stations and at the Constituency tallying centres. To strengthen this provision, we suggest an amendment to proposed section 39 (1F) as follows

   The Commission shall, to facilitate public information, establish a mechanism for live streaming of results at polling stations, by the media, and while the results streamed shall be for public information only and shall not be the basis for a declaration by the commission, the commission shall have the discretion to investigate and determine any major discrepancy between such streamed results and the official verified results in its possession before making a final declaration, and

in so doing it shall be under obligation to explain the cause of such discrepancy to the public.

Further, as a way of ensuring the integrity of the manual result and hence its superiority over any other result, we propose that there should be a provision under this section for all agents of any candidate to keep a copy of the final result form, that has been duly signed by all parties and stamped by IEBC and for verification purposes, with IEBC keeping the original of the form, in case of a dispute arising as to the actual announced results

5. On the other hand, we would like to differ with the proposed amendments to section 83 of the Elections Act are unconstitutional and upset Article 2(4), 10, 38, 81 and 86 of the Constitution The proposed amendment will require persons who file an election petition to prove not only the non-compliance with the principles set out in the Constitution but that such non-compliance affected the results to make an arguable case before the Supreme Court. While making its ruling, the Supreme Court importantly observed that

   the results of an election in terms of numbers can be overturned if a petitioner can prove that the election was not conducted in compliance with the principles laid down in the Constitution and the applicable electoral law. Never has the word 'OR' been given such a powerful meaning?

An election is such a critical process in Kenya and provides the single most important way of Kenyans exercising their sovereignty as provided by Article 2 of the Constitution that provides that the people may exercise their sovereign power, either, directly or through their democratically elected representatives. IEBC being the responsible institution to oversee elections that ensure that Kenyans exercise this power through free, fair and transparent elections, must therefore be held to highest levels of integrity and the process of electing leaders must be beyond reproach This provision thus should be upheld to ensure that not only the fresh elections ordered by the Supreme Court but also subsequent elections are held by this high level standard, to ensure that the IEBC and by extension the political leadership gains the trust of the people of Kenya

We believe that the worry that informs the foregoing provision is well captured in the introduced Section 81 (2) which captures the provisions of **Section 72 of the Interpretation and General Provisions Act (Cap 2)** which states as follows:

"Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead."

6 We would like to also differ with the proposed deletion of section 29 of the Elections Act as it negates the requirement for a presidential candidate to be nominated solely by the members of his political party. The Constitution under Article 38 underscores the political party as a basic institution through which Kenyans exercise their political right and as such this cannot be substituted in any way. The provision for political party (meaning the legally recognised membership of that party) nomination of a presidential candidate should be upheld. While there is provision of independent candidates, progressive democracies organize around political parties, which sell their agenda to the electorate during campaigns to win the mandate to govern. We should therefore not lose the gains so far, by seeking to destroy the political parties in Kenya by disempowering them. We should instead nurture and strengthen Kenya's nascent political party system as the mainstream mechanism for canvassing for elective offices.

CONCLUSION

As we conclude, we would like to reiterate that contrary to opinion that has been shared, Parliament has a responsibility of ensuring that the fresh election, as ordered by the Supreme Court on November 1 2017, is not in any way affected by a myriad of problems that were seen in the invalidated elections, because of legislative gaps that could easily be exploited from either side of the political divide. Indeed, by pointing out as to exact illegalities that led to the invalidation, the Court by virtue of its ruling, provided parliament, as the legislative arm of the government, to cure those hitherto unforeseen challenges experienced in election results tallying and transmission We would therefore like to take this opportunity to appeal to the opposition side in government to play its role in this process, as duly elected members of parliament, already sworn in as such, and earning salary

by virtue of the same, to ensure that the laws that we do get will ensure the country gets a credible election. It must be pointed out that while many Kenyans are tired of the political posturing that has led to undue anxiety, minorities and marginalised communities included, majority would wish that this issue is dealt with finality so that they resume normal life. As it stands now, it is actually these communities, who because of their low socioeconomic and political status, who are bearing the greatest brunt of the political standoff in a stalling economy. Life is quickly becoming unbearable and this must be arrested sooner than later. Finally we would also like to urge the Jubilee side of parliament to reach out, diplomatically to the opposition so that together they agree on laws that will serve this country not only on 26th October 2017, but for many years to come This country belongs to all of us, and laws are not meant and should not be meant tp serve one section of the society because experience tells as they do not.

Thank you

==========

For more information contact

CENTRE FOR MINORITY RIGHTS DEVELOPMENT - CEMIRIDE
Nyang'ori Ohenjo
Programmes and Administrative Advisor
Langata Rd, 132 Dam Estate, Nairobi, Kenya
Cell: +254 701 705 620 www.cemiride.org

Adhoc Committee, Election Laws
To Consider - Sialai
CNA 2/10/17

14

The National Council of NGOs

Tel: +254(0) 202211761/ +254 (0)721843924
/0722450798,
Email: ngoscouncilofkenya@gmail.com or
ngosnewsinkenya@gmail.com,

Nyayo House 6th Floor
P.O Box 5798 Nairobi - 00200

Working in partnerships with stakeholders for Peace and sustainable Development in Kenya.

Ref: NCN/17/09

30th September 2017

RECEIVED
02 OCT 2017
CLERK'S OFFICE

TO:
Clerk National Assembly
Parliament Buildings

Dear *Sir/Madam,*

RE: PRESENTATION OF VIEWS ON ELECTION ACT, AMENDMENTS BILL 2017.

The above subject refers:

The National Council of NGOs appreciates parliament and senate for good work to the Country.

We wish to inform you that we shall be ready to present our views to the joint committee of National Assembly and Senate receiving views on **Elections Amendments bill, 2017.**

We ask that we be granted the opportunity to the same to the joint committee.

The National Council of NGOs is an umbrella body that brings together registered NGOs in Kenya, we work with stakeholders to peace and sustainable development. Our Member Organizations operate across the country to serve the citizens in various sectors of the economy. We champion key values of probity, transparency, accountability and good governance among our membership as we serve the Kenyan people. We have mandate of self regulation of NGOs sector as we strive to build the capacity of our member Organization and intervene on policies for an enabling environment in our work as we complement Government efforts in development.

We take this opportunity to re-affirm our total working closely with **National assembly and senate** and other areas where our participation could be necessary and more so on areas of sharing views around bills/laws being developed by the national assembly and senate, through this letter we further request sharing session with the clerk of the houses. We look forward for your positive response.

Kind regards,

Stephen K. Cheboi
National Chairman
C.C 1. Clerk Senate

THE NATIONAL COUNCIL OF NGO'S
Tel: 0202211761
0721843924
0722450798
e-mail: ngosnewsinkenya@gmail.com
P. O. Box 2275-00200, NAIROBI

Zimbra **clerk@parliament.go.ke**

INTENTION TO PRESENT VIEWS ON THE PROPOSED ELECTION ACT, AMENDMENTS 2017

From : NGO COUNCIL OF KENYA <ngoscouncilofkenya@gmail.com> Sun, Oct 01, 2017 09:14 AM

Subject : INTENTION TO PRESENT VIEWS ON THE PROPOSED ELECTION ACT, AMENDMENTS 2017

To : clerk@parliament.go.ke

Cc : csenate@parliament.go.ke

TO Clerk
National Assembly and Senate
Parliament Building.



Dear Sir/Madam,

This is to led you know that we wish the present our views on the proposed, the Election Laws (Amendment) Bill, 2017 and Election Offenses Bill, 2017.

we shall appreciate meeting the Joint committee of National Assembly and senate to present our views on the same.

The National Council of NGOs exist to preserve,strengthen and promote voluntary action in pursuit of a just, equitable and sustainable development in Kenya. We provide overall Leadership to the NGOs/CSOs Sector. We Champion key Values of probity, Transparency, Accountability,justice and good governance in the society.

We do have mandate to build capacity of our NGOs and other CSOs,we intervene on policy issues and represent the Charity Sector in Kenya.

Kind Regards.

Stephen K Cheboi,

National Chairman.

The National Council of NGOs

Tel: +254(0) 202211761 / +254(0) 721 843 924 /+254 (0) 722 450 798 / +254(0) 733298969

e-mail:ngoscouncilofkenya@gmail.com or ngosnewsinkenya@gmail.com

The NGOs Council of Kenya exist to preserve,strengthen and promote voluntary action in pursuit of a just, equitable and sustainable development in Kenya. We are established under section 23 and 24 of the Non-governmental Organizations Co-ordination Act, of 1990 (Laws of Kenya) with a mandate of self Regulation, Capacity building and policy intervention for the NGOs Sector. We provide overall Leadership to the NGOs/CSOs Sector. We Champion key Values of probity,Transparency, Accountability,justice and good governance in the society. We exist to build capacity of our NGOs and other CSOs,we intervene on policy issues and represent the Charity Sector in Kenya.

We proudly celebrate 27 Years of outstanding charitable community service in Kenya and Africa.

15

1. OFFICE OF THE CLERK OF THE NATIONAL ASSEMBLY
   PARLIAMENTARY SERVICE COMMISSION 1ST FLOOR,
   MAIN PARLIAMENT BUILDING
   NAIROBI

2. OFFICE OF THE CLERK OF THE SENATE/SECRETARY
   PARLIAMENTARY SERVICE COMMISSION 1ST FLOOR,
   MAIN PARLIAMENT BUILDING
   NAIROBI

NATIONAL ASSEMBLY
RECEIVED
06 OCT 2017
CLERK'S OFFICE
P. O. Box 41842, NAIROBI

RE: JUBILEE PARTY MEMORANDUM ON AMENDMENTS TO ELECTION LAWS

A. INTRODUCTION

1. This is a written memorandum on behalf of Jubilee Party in response to the invitation by the Joint Select Committee on Election-Related Laws to submit views regarding the Election Laws (Amendment) Bill (National Assembly Bill No. 39 of 2017) and the Election Offences (Amendment) Bill (National Assembly Bill No. 38 of 2017).

2. As we understand the two bills, The principal object of the Election Laws (Amendment) Bill (National Assembly Bill No. 39 of 2017) is to amend the Independent Electoral and Boundaries Commission Act, 2011, the Elections Act, 2011 (No. 24 of 2011), and the Election Offences Act, 2016 (No. 37 of 2016) to provide for the proper conduct of the affairs and business of the Independent Electoral and Boundaries Commission, and for effective management of elections.

Jubilee House, Pangani Interchange, Exit 3, Thika Road
P.O. Box 38601-00623, Nairobi - Kenya
Tel: 0771 399841, 0780 184393, 0780 445098, 0704 367983, 0717 041240
SMS 30553 | #TukoPamoja | Email: info@jubileepamoja.co.ke
jubileepamoja
www.jubileepamoja.co.ke

3. On the other hand, the principal object of the Election Offences (Amendment) Bill (National Assembly Bill No. 38 of 2017) is to amend section 14 of the Election Offences Act, 2016 to ensure that the section conforms to Article 35 of the Constitution. Article 35(1) (a) provides that every citizen has a right of access to information held by the State. Article 35(3) further provides that the State shall publish and publicize any important information affecting the nation. The Bill seeks to delete subsection (2) of section 14 which limits the right to access to information held by the State as specified in that Article during the election period.

4. The said amendments are also necessary in light of the judgement of the Supreme Court arising from the recently concluded Presidential Election Petition where the court identified certain areas of the law that require improvement. The court went further to state as follows at paragraph 402 of the Majority judgement:

> ***"Our judgment is also simple, and in our view clear and understandable. It ought to lead IEBC to a soul-searching and to go back to the drawing board. If not, this Court, whenever called upon to adjudicate on a similar dispute will reach the same decision if the anomalies remain the same, irrespective of who the aspirants may be. Consistency and fidelity to the Constitution is a non-wavering commitment this court makes."***

5. In view of the said pronouncement, we firmly believe that the proposed amendments are not only necessary but of critical importance. Due regard must also be given that the Supreme court decision is a first of its kind in Africa and only the 5th in the world. All institutions that play a role in managing the electoral process must therefore exercise maximum patience and a willingness to navigate through the process in a manner that strengthens our institutions and provides solutions to the novel challenges that confront us over the next few weeks.

6. We nevertheless have proposed some amendments to the two bills under consideration which are set out in the executive summary attached hereto. Our submissions are thus as follows.

B. IEBC ACT NO 9 OF 2011

Amendment to Section 2 of no 9 of 2011

7. The Chairperson of the IEBC is the official returning officer for presidential elections pursuant to ***Article 138 (10) and 39 (D) of the Elections Act***. As such, only the Chairperson may declare the final results in a Presidential election. ***Article 259 (3b)*** of the Constitution provides:

"any reference in this Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time;

8. This provision of the Constitution contemplates the role of a successor in State or public offices. It is noteworthy that the Chairperson of the IEBC is a State officer within the meaning of ***Article 260 of the Constitution and*** the IEBC is a Commission and the Chairman is therefore a State office within the meaning assigned under ***Article 248.***

9 Should there be a vacancy in the office of the Chairperson of the IEBC, the law as it is currently does not provide any succession procedure regarding who would perform the above unique role of the Chairperson before a new Chairperson is appointed. It is also noteworthy that the process of appointment of a Chairperson of any Commission isn't straightforward and such a lacuna especially during an election year would throw the country into an unprecedented crisis

10. Authority assigned to a State officer under ***Article 73 of the Constitution*** is a public trust to be exercised in a way that is consistent with the objects and principles of the Constitution and demonstrates respect for the people of Kenya ***Good governance*** is one of the key National Values and Principles that guide all public and state officers in Kenya. Having an effective succession plan may be termed as one of the main principles of good governance not just for independent commissions such as the

IEBC, but also any other statutory body, institution or organization within the Republic.

11. Parliament is duly mandated by the Constitution under ***Article 94(3) and (4)*** to consider and make amendments to the Constitution as well as make laws. The National Assembly under ***Article 95 (5) (c)*** exercises oversight of State organs. In exercising this oversight, the National Assembly is then expected by law to ensure that State organs operate within the Provisions of the aforementioned Articles 10, 73 and 259 of the Constitution.

Section 45 of the Interpretation and General Provisions Act provides that:

"the powers and duties of holder of office where a written law confers a duty on the holder of office as such, unless a contrary intention appears, the power may be exercised and the duty performed by the person for the time being holding that office."

12. The import of this Section then covers the role of the Vice Chairperson of IEBC in the event that she/he succeeds the Chairperson and holds such office as is covered in the proposed amendment

Amendment to Section 6 of no 9 of 2011

13. The intentions behind the amendments to this Section are the same as the ones above. It is important to add however that the requirement for the Chairperson of the IEBC to be a person who is qualified to hold the office of judge of the Supreme Court under the Constitution has been amended to include diversity in terms of professional qualifications. The person contemplated in the amendment for Chairperson requires at least 15 years' experience in seven diverse backgrounds

amongst other qualifications. Parliament in exercise of its roles is tasked with promoting inclusiveness, equity, equality.

14. Diversity in qualifications for public officers such as the office of the IEBC Chairperson may be seen as one of the ways it effectively exercises this function. Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty ***(Article 94 (4) of the Constitution).***

Amendment of the Second Schedule to No. 9 of 2011

15. The quorum for the conduct of business at a meeting of the Commission shall be at least five members of the Commission as per the current provision. ***Article 250 (1) of the Constitution*** provides that each commission shall consist of at least three, but not more than seven, members. In this case, the requirement under the current law that the quorum for conduct of business be five members of the IEBC is ill thought out. The assumption that the Commission will always have the Constitutional maximum of seven members is flawed and lacks basis In the event that there are less than seven IEBC Commissioners in total in future or even where for reasons unknown the Commission may not reach the number of five then the Commission's operations would be crippled.

16. This is a clear contravention of the will of the people of Kenya who have a right to exercise their political rights under *Article 38* and particularly that of universal suffrage and free expression of the will of the electors. It is important to appreciate the unique role of the Commission in conducting or supervising referenda and elections under ***Article 88 of the Constitution***. A failure of the IEBC to make decisions, hold meetings, pass resolutions etc. due to this unreasonable quorum demands is in clear contravention of the Constitution and an obstacle in the furtherance of the people's will and Constitutional rights. Parliament must then

enact legislation to cure such defects as mandated more-so noting that the people of Kenya may exercise their sovereign power either directly or through their democratically elected representatives *(Article 2 of the Constitution).*

C. ELECTIONS ACT NO 24 OF 2011

Deletion of Section 9 of No. 24 of 2011

Amendment of Sections 39, 44 and deletion of 44A of No. 24 of 2011

17. Due to confusion as to the exact mandate of the Commission under the above provisions, there was a lot of litigation on these issues before the general election.

18. The Court of Appeal in the case of *Independent Electoral & Boundaries Commission v MainaKiai, Khelef Khalifa, Tirop Kitur,Attorney-General, Katiba Institute& Coalition for Reforms & Democracy [2017] eKLR,* declared the law to be as follows;

> *"It cannot be denied that the Chairperson of the appellant has a significant constitutional role under Sub-Article (10) of Article 138 as the authority with the ultimate mandate of making the declaration that brings to finality the presidential election process. Of course before he makes that declaration his role is to accurately tally all the results exactly as received from the 290 returning officers country-wide, without adding, subtracting, multiplying or dividing any number contained in the two forms from the constituency tallying center. If any verification or confirmation is anticipated, it has to relate only to confirmation and verification that the candidate to be declared elected president has met the threshold set under Article 138(4), by receiving more than half of all the votes cast in that election; and at least twenty- five per cent of the votes cast in each of more than half of the counties."*

19. As contrasted with the above, the findings at Paragraph 293 of the Majority judgment in ***Raila Odinga and Another vs IEBC and 2 others [2017]*** the Supreme Court stated that: *"We have already held that we find little or nothing in this decision to suggest that, by deciding the way it did, the Appellate court restrained or barred the 1st Respondent from verifying the results before declaring them, or that it was relieving the former the statutory duty of electronically transmitting the results. What the 2nd Respondent was barred from doing by the Court of appeal and High Court was to vary, alter or change the results relayed to the National Tallying Centre from the polling stations and constituency".*

20. From a reading of the above paragraph of the Supreme Court, it is clear that the Commission is supposed to verify results before releasing them and also electronically transmit them. Electronic results are generated from a manual form. Parliament seeks to then ensure that the Commission , in the course of transmission of presidential election results transmits both the manual and electronic results to ensure accuracy as is required by the law and also by the Supreme Court standard. The position taken by Parliament above is in line with the opinion of Justice Njoki Ndungu in her dissenting opinion in the ***Raila Odinga 2017 case*** under paragraph 161 where she states:

> *Article 39(1) (C) mandates that for purposes of a presidential election, the Commission shall electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the Constituency tallying centre. Technology however, per Section 44, is used SUBJECT to the provisions of the entire section, meaning, that there are prerequisites to be met, before technology can be employed. Parliament was keen to introduce conditions preceding the use of technology in elections."*

21. Further we would cite Court of Appeal case No. 258 of 2017 in ***National Super Alliance (NASA) Kenya vs Independent Electoral and Boundaries Commission, The Attorney General& Jubilee Party of Kenya***: The appeal arose from a petition filed by NASA in the High Court seeking orders that would essentially repeal ***Section 44A of the Elections Act*** which makes provision for a complementary mechanism. The essence of the decision is set out at paragraphs 22,23 and 27 of the judgment which is set out hereunder in extenso:

> *"[22] In our considered view, the High Court judges properly appreciated the meaning of Section 44A when they posited as follows at paragraph 80-82 of the impugned Judgment;*
>
> *"80.A plain interpretation of section 44A shows that the legislature intended the establishment of a mechanism that is complementary to the one set out in section 44 of the Act. The system under section 44 is an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results. It places emphasis on the use of technology.*
>
> *81.In the Concise Oxford English Dictionary, Oxford University Press, 12thEdition 2011, the word Complementary "Means forming a complement or addition... combining in such a way as to form a complete whole or enhance each other" while complement means "a thing that contributes extra features to something else so as to enhance to improve it..." that being the plain and literal meaning of the word complementary, our view is that section 44A of the Act presupposes a mechanism that will compliment, add enhance or improve the mechanism already set out in section 44 of the Act.*

82.It follows therefore that the complimentary mechanism in section 44 A need not be similar, same, akin or parallel to the one set out in section 44 of the Act. All that is required for that mechanism is that itshould add to or improve the electronic mechanism in section 44 of the Act. But at the same time, be simple accurate, verifiable, secure, accountable and transparent. It should allow the citizens to fully exercise their political rights under Article 38 of the Constitution. This complimentary mechanism only sets in when the integrated electronic system fails"

[23]Counsel for the appellant urged us to consider the Hansard report on the detailed debate on the amendment of section 44 A which in his view envisaged an electronic backup and not a manual register which in his view was alternative and not complimentary. To us, the plain and literal meaning of a complimentary mechanism which was envisaged was a system that would ensure no eligible voter who is registered was left out of voting because the voters biometrics could not be identified or the results could not be transmitted because of an electronic failure of a system as enshrined in Article 38 (2 and (3) of the Constitution. It is common ground that even the best technology can fail; it was also admitted that in the conduct of the 2013 general elections it largely failed; it can also be interfered with through criminal and human elements; for these reasons we sought to know, from counsel for the appellant what would happen if technology failed in the process of voter identification and result transmission and it resulted to some voters being disenfranchised. Sadly, counsel did not provide a solution that would be in line with the provisions of Article 83(3) which provides;

"Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny an eligible citizen the right to vote or stand for election"

[27]Moving away from the experiences of the 2013 general election and in order to improve on electoral process, the Legislature directed under Section 44A of the Elections Act, that IEBC do develop a 'complementary mechanism'. This came in the form of the enactment of Regulations 69, 82 and 83 so as to operationalize the provisions of the said section 44A which in turn is supposed to give full effect to the provisions of Article 38 (2) (3) and 81, 86(a) and 87 (1) of the constitution. There was no allegation that the complementary procedure in the aforesaid regulations contradicted the provisions of the Constitution. Therefore, just like the learned trial judges of the High Court, we dispose of the grounds of appeal challenging the provisions of the aforesaid regulations as a non- starter as the greatest danger lies in withdrawing those regulations that are supposed to back electronic voter identification and result transmission and thereby leaving IEBC with no alternative fall back system of ensuring the dictates of the Constitution are fulfilled in the charge of its mandate. In so doing, we underscore the fact that the IEBC has a constitutional duty of balancing all the rights and ensuring all voters, especially those whose biometrics are not be picked by KIEMS are accorded an opportunity to vote if they are genuinely registered voters who can be traced from the register of voters and who can be identified by their identification card or passport."

22. **The amendment to Section 44** seeks to bring clarity and uphold the provisions of *Section 44 (3)* that technology used must be simple, accurate, verifiable, secure, accountable and transparent The citizenry's fundamental political rights under *Article 38* are encapsulated in the principles of free and fair elections in *Article 81(e)* and IEBC's obligation to conduct elections in a simple, accurate, verifiable, secure, and accountable and transparent manner as stated in *Article 86 of the Constitution*.

23. The majority decision in ***Raila Odinga 2017*** stated:

> ***"[392] Having taken note of Mr. Nyamodi's submissions, which appeared to suggest that IEBC had put in place a complimentary system for the transmission of results; a system that was neither simple nor known to the petitioners, we hereby direct that in conducting the fresh election IEBC must put in place a complementary system that accords with the provisions of Section 44(A) of the Elections Act. It goes without saying that such a system as held by the High Court, in the case of the National Super Alliance (NASA) Kenya v. The Independent Electoral and Boundaries Commission & 2 Others, only comes into play when technology fails."***

24. Through the **amendment to Section 44 A**, Parliament seeks to ensure that the IEBC complies with the Court's findings by putting in place a complementary system for identification of voters that is simple, accurate, verifiable, secure, and accountable and transparent in line with simple, accurate, verifiable, secure, and accountable and transparent ***Article 38 of the Constitution.***

Amendment of Section 83 of No 24 of 2011

25. We draw the attention of Parliament to a letter dated 11th September 2011sent to our advocate on record by the Registrar of the Supreme Court. Attached to the letter was a ruling also dated 11th September 2017 which, at the material sections, states as follows?

> ***"[1] This court gave its ruling on the 28th August 2017 partially allowing the Petitioners Notice of Motion Application dated 25th August 2017, which sought scrutiny of votes and technological materials. At paragraph [32] and [34] of the Ruling, the Court made reference to Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 which have since been revoked.***

[2] We have noted that we inadvertently cited the repealed Rules of 2013 instead of the Elections (Parliamentary and County Elections) Petition Rules 2017. In that regard, and in exercise of the powers conferred to this court by Section 21 (4) of the Supreme Court Act (Act No 7 of 2011), we hereby correct the error on record and order a deletion of the reference to Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 and replace it with Rule 29 of the Elections (Parliamentary and County Elections) Petition Rules, 2017..... .....

[5] By virtue of this order, the Ruling dated 28th August, 2017 is accordingly amended and the correction shall constitute part of the Ruling of the Court."

26. In view of the fact that the aforesaid ruling was made without hearing any of the parties a full 14 days after the hearing had ended and whilst reasons for the decision were still pending, we feel compelled to make the following observations:

    i) The ruling underscores the inbuilt mechanisms our system of law makes available to decision makers for purposes of making corrections or rectifying errors that on the face it, appear to have been made without malicious or criminal intent. Indeed , the aforesaid Section 21(4) of the Supreme Court which is cited in the ruling as the source of its jurisdiction states as follows:

    "Within fourteen days of delivery of its judgment, ruling or order, the Court may, on its own motion or on application by any party with notice to the other or others, correct any oversight or clerical error of computation or other error apparent on such judgment, ruling or order and such correction shall constitute part of the judgment, ruling or order of the Court."

    ii) The principle underlying enactment of the said section is essential given human imperfection and proclivity to make errors which would explain the fact that numerous other statutes contain similar provisions including, without limitation, the following:

        a) Section 99 of the Civil Procedure Act which states that :

        " Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be

corrected by the court either of its own motion or on the application of any of the parties."

b) Rule 35 0f the Court of Appeal Rules which states as follows.

"Correction of errors

(1) A clerical or arithmetical mistake in any judgment of the Court or any error arising therein from an accidental slip or omission may at any time, whether before or after the judgment has been embodied in an order, be corrected by the Court, either of its own motion or the application of any interested person so as to give effect to what the intention of the Court was when judgment was given.

(2) An order of the Court may at any time be corrected by the Court, either of its own motion or on the application of any interested person, if it does not correspond with the judgment it supports to embody or, where the judgment has been corrected under sub-rule (1), with the judgment as so corrected."

c) Section 346 of Criminal procedure code which states as follows:

"The court may at any time amend a defect in substance or in form in an order or warrant, and no omission or error as to the time and place, and no defect in form in an order or warrant given under this Code, shall be held to render void or unlawful an act done or intended to be done by virtue of that order or warrant, provided that it is therein mentioned, or may be inferred therefrom, that it is founded on a conviction or judgment, and there is a valid conviction or judgment to sustain it. "

d) Section 382 of Criminal procedure code which states as follows:

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

Substance over form

27. At paragraph 362 of the Majority judgement, the Supreme Court acknowledges and/or accepts the fact that there is no specific requirement or provision of law that requires forms 34A and 34B to have watermarks, serial numbers or indeed any of the other security features that played such a significant role in the scrutiny report and ultimately in the courts' majority decision.

28. The findings of the scrutiny report, which was presented to parties at the tail end of the hearing and which did not receive sufficient scrutiny given that the parties were only granted an aggregate 15 minutes each to submit on both scrutiny reports, has however now come under sharp focus for the following reasons:

i) The court received, from IEBC, certified copies of all 40,883 form 34A's, 291 form 34B's and 1 form 43C pursuant to the provisions of Section 12(2) of the Supreme Court Act which states that: *"The Independent Electoral and Boundaries Commission shall, within a period of forty-eight hours from the date of the service of a presidential election petition, submit to the Supreme Court certified copies of the documents used to declare the results of the presidential election, including the forms used to announce the results of the election at the polling station and the constituency tallying centre and to declare the result at the national tallying centre."*

ii) All forms 34B's had on 16th August 2017 been made available, by IEBC, for verification by the public on a portal at: https://forms.iebc.or.ke/form34b. Thousands of Kenyans have downloaded and, in the ultimate measure of transparency and confidence building, verified forms from the said portal including our results analysis team.

iii) Form 34C was compiled, verified and signed on 11th August 2017 on the floor of the National Tallying Centre at the Bomas of Kenya in full view of the nation and indeed the world in a demonstration of transparency that is almost impossible to improve on.

iv) An analysis of the aforesaid forms submitted to court pursuant to Section 12(2) of the Supreme Court Act, set out at paragraph 669 of the Dissenting Judgement of Lady Justice Njoki Ndungu, indicates that there were no significant anomalies or discrepancies contrary to the impression created by the scrutiny report.

v) As far as we are aware, there have not been any complaints or reports, to date, that the results announced at polling stations or at constituency tallying centers varied materially from those recorded in form34A and 34B. This is a critical issue given the critical role played by announcement of results in the Constitution of Kenya at Article 86 (b) and (c) which states that:

> *"(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;*
> *(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; "*

vi) Nearly all forms were signed by political party agents who confirmed numerical accuracy and that the forms were in order from a qualitative perspective. At any length , failure or refusal to sign forms by agents should not invalidate results by virtue of the provisions of Regulations 79(5) and (6) of the Elections (General) Regulations which state as follows:

> *"(6) The refusal or failure of a candidate or an agent to sign a declaration form under sub regulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under sub regulation (2)(a).*
>
> *(7) The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under sub regulation (2) shall not by itself invalidate the results announced."*

vii) The aforesaid issue is particularly important given the finality of results announced/declared at the polling station and constituency levels as was emphasized in the Maina Kiai case , which the Supreme Court has now unanimously upheld, in the following terms:

"It cannot be denied that the Chairperson of the appellant has a significant constitutional role under Sub-Article (10) of Article 138 as the authority with the

ultimate mandate of making the declaration that brings to finality the presidential election process. Of course before he makes that declaration his role is to accurately tally all the results exactly as received from the 290 returning officers country-wide, without adding, subtracting, multiplying or dividing any number contained in the two forms from the constituency tallying center. If any verification or confirmation is anticipated, it has to relate only to confirmation and verification that the candidate to be declared elected president has met the threshold set under Article 138(4), by receiving more than half of all the votes cast in that election; and at least twenty- five per cent of the votes cast in each of more than half of the counties."

viii) The Supreme Court also unanimously, albeit more emphatically at paragraphs 373 and 394 of the Majority opinion, restated the importance of strictly adhering to the Constitution and the laws established thereunder in the conduct of elections. As regards the import and consequences of deviating from forms, and in light of the Majority determination that security features are not a requirement of the law , we believe the law to be as stated in the following provisions which the court did not, unfortunately, address at all:

a) Section 72 of the Interpretation and General Provisions Act. (Cap 2) which states as follows:

Deviation from forms

Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead.

b) Section 26 of the Statutory Instruments Act, 2013 which states as follows:

Forms

(1) Where an enabling legislation confers power on any person to prescribe any form, then unless that person prescribes such form, any form approved for the purpose by that person may be used.

(2) Where any form has been prescribed by or under any legislation, a document or statutory instrument which purports to be in such form

shall not be void by reason of any deviation there from which does not affect the substance thereof or which is not calculated to mislead.

ix) The Constitution itself sets the tone that substance is to take precedence over technicalities and form at Articles 23 (3)(b) and (c) and Article 159(2)(d) which respectively state as follows:

Articles 22 (3) (b) and (c)

The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—

(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;

(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities;

Article 159(2) (d)

2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—(d) justice shall be administered without undue regard to procedural technicalities;

x) At paragraph 403 of the Majority decision, the court highlights the fact there wasn't sufficient time to conduct a proper scrutiny or re-count of votes due to tight constitutional timelines. We set out the said paragraph in full:

"Between the decision in the 2013 Raila Odinga case and the present petition, it was a matter of agreement across Kenya that 14 days is not enough for parties and the court to fully deliver on their respective mandates not because they cannot (in fact they all have) but because there may be the need to conduct exercises such as a recount of votes or scrutiny which requires substantial amounts of time."

29. The Majority Judgment of the Supreme Court (*Raila Odinga 2017*) pronounced itself as hereunder regarding *Section 83 of the Elections Act of 2011*. In fact, it

30. The Supreme Court acknowledged that indeed, the mandate to make laws in Kenya lies with the Legislature. As such, the legislature as provide under ***Articles 95 and 96 of the Constitution*** should make laws to not only reflect the will of the people but in exercise of their sovereign power

31. This amendment to Section 83 is legal and seeks to bring further clarity to the provision. A provision such as Section 83 is and has been at the heart of election disputes in Kenya since 2013. It is therefore paramount that it is clear, unambiguous and most importantly accurate.

Insertion of Section 83 (2)

32. This seeks to introduce the provision of **Section 72 of the Interpretation and General Provisions Act (Cap 2)** which is reproduced above in full.

33. The issue of electoral forms was the subject of litigation at the Supreme Court where the Court found itself in a rather awkward position as it was forced to determine on the validity and intention behind electoral forms. Parliament seeks to give clarity in exercise of it legislative function under ***Article 94 and 95 of the Constitution*** by ensuring clarity of the same through this amendment. This is not an entirely new provision/ amendment as it has been the existing position in Kenyan law under Cap 2.

34. Further, this amendment is bolstered by the provisions of ***Section 26 of the Statutory Instruments Act, 2013*** **which is also set out in full above.**

35. Further, The Constitution itself sets the tone that substance is to take precedence over technicalities and form at ***Articles 23 (3) (b) and (c) and Article 159(2)(d)*** which respectively state as follows:

36. At paragraph 403 of the Majority decision, the court highlights the fact there wasn't sufficient time to conduct a proper scrutiny or re-count of votes due to tight constitutional timelines. We set out the said paragraph in full :

> **[483]** ***One other peripheral but important matter requires our attention; the timeframe for hearing and determining a presidential election petition in Kenya. The Court is able to bear all manner of criticisms but one would be extremely unfair; alleged inability to deliver on time. Where is that time? Between the decision in the 2013 Raila Odinga case and the present petition, it was a matter of agreement across Kenya that 14 days is not enough for parties and the Court to fully deliver on their respective mandates not because they cannot (in fact they all have) but because there may be the need to conduct exercises such as a recount of votes or scrutiny which require substantial amounts of time. Yet the Legislature ignored pleas to rethink the timeframe. It is time they did so. The reasons for doing so are obvious and need no extrapolation here.***

37. The above amendments by Parliament seek to make the work of the Supreme Court easier in its delivery of justice given the rigid time frames in determination of presidential petitions.

Insertion of new Section 86A of 2011

38. The Constitution of Kenya provides that a fresh election shall be held within sixty days after the determination ***(Article 140 (3)]*** after the invalidation of a presidential election. Following the invalidation of the Presidential elections, there has been a lacuna regarding procedure to be followed by the IEBC in

44. Harking to the values set out at Article 10 of the Constitution and in perhaps the most cited passage of its Majority judgement, the Supreme Court, at paragraph 394 stated that *"the greatness of a nation lies in its fidelity to the Constitution and strict adherence to the rule of law, and above all, the fear of God. The Rule of law ensures that society is governed on the basis of rules and not the might of force. It provides a framework for orderly and objective relationships between citizens in a country."*

45. Jubilee leaders have stated more than once that though they firmly disagree with the Supreme Court judgement, which they believe was deeply flawed, they will respect its authority and submit themselves to the fresh election called for by the court and Article 140 of the Constitution.

46. Mass action and demonstrations, at least in the Kenyan context, are the direct opposite of *"orderly and objective relationships "as* the Kriegler Report and at least one judge of the High Court observed when NASA (then known as CORD) called for demonstrations in 2015 to, yet again, force out IEBC Commissioners though the law makes more than adequate provision for their orderly and peaceful removal.

47. As regards the powers of parliament to make laws, Articles 118 and 119 now require parliament to involve the public in the process of enacting law. Parliament has already invited memorandum from the public regarding the proposed amendments. NASA will also have opportunity to raise whatever concerns it has with the proposed amendments through its members of parliament.

48. Further room for orderly engagement is provided for by Section 5 of the Statutory Instruments Act which deals with consultation of stakeholders before the making of statutory instruments. Demonstrations and picketing are thus contemplated as the remedy of last resort. But clearly NASA has no intention of submitting itself to the mechanisms established by law for the orderly management of national matters.
49. In other words, Jubilee is being asked to cede its parliamentary strength, secured through a legitimate and constitutional election process, and transfer the power , under threat of violent demonstrations, to a rule-by-committee or baraza system of governance that neither the people of Kenya nor our constitution contemplated or sanctioned when the constitution was passed in 2010.

50. NASA's insincerity is demonstrated by the fact that in the 6 months to the 8th August election, they and other groups filed at least 40 cases in court by which they sought amendments or outright repeal of numerous sections of electoral law. The most notable

of this cases is of course the Maina Kiai case which is in many ways responsible for the Majority decision of the Court.

51. The Supreme court cited noncompliance with the provisions of Section 39(1) (C) of the Elections Act regarding verification of electronically transmitted form 34A's as one of the key reasons for annulling the election, thereby departing from the essence of the Maina Kiai decision in the Court of Appeal where the court had made a major alteration in electoral law when it struck down Sections 39(2) and (3) of the Elections Act and Regulation 87(2) of the Elections (General) Regulations.

52. In the said appeal case, the court declared the law in terms that: *"Of course before he makes that declaration his role is to accurately tally all the results exactly as received from the 290 returning officers country-wide, without adding, subtracting, multiplying or dividing any number contained in the two forms from the constituency tallying center. **If any verification or confirmation is anticipated, it has to relate only to confirmation and verification that the candidate to be declared elected president has met the threshold set under Article 138(4), by receiving more than half of all the votes cast in that election; and at least twenty- five per cent of the votes cast in each of more than half of the counties."***

53. The following is a summary of cases filed in the 6 months leading to the election in which parties sought the striking down, with varying degrees of success, of electoral statutes:

SECTIONS OF LAW SOUGHT TO BE REPEALED BY JUDICIAL ACTION	CASE PARTICULARS	STATUS
Sections 2, 6, 7, 8 and 14 of the Election Laws (Amendment) Act 2016	Petition No. 399 of 2016, Mugambi Imanyara and Another v IEBC & 3 others	Orders denied
Section 28 of the Election Act, 2011 as amended by Section 10 of the Election Laws (Amendment) Act, 2017	Petition No. 56 of 2017, Council of Governors v Attorney General and Another	Orders denied
Section 10 of the Elections (Amendment) Act, 2017	Petition No. 179 of 2017, Maendeleo Chap Chap Party	Orders denied
Section 39(2) and (3) of the Elections Act and Regulation 87(2) of the Elections (General) Regulations	Court of Appeal NO. 105 of 2017, Maina Kiai and 2 others v IEBC and Another	Sub-Sections 39(2) and (3) of the Elections Act and Regulation 87(2) of the Elections (General) Regulations declared unconstitutional
Article 177(1) & Article 177(4) of the Constitution	Petition NO. 576 of 2015 (consolidated with Petition NO. 148 of 2016) , Andrew Kiplimo Sang Muge & others v the IEBC and another	Orders granted interpreting the two Articles of the Constitution
Declaration that Sub - Sections 43(5) and (6) of Elections Act are Unconstitutional	Kericho Petition No. 1 of 2017 as consolidated with Kericho Petition NO. 2 of 2017, Eric Cheruyiot and another.	Section 43 (5) of the Elections Act declared unconstitutional
Part IV of the Elections Act and Part IV of the County Government Act	Nairobi Petition NO. 219 of 2016, Katiba Instutute and Another V AG & Parliament	

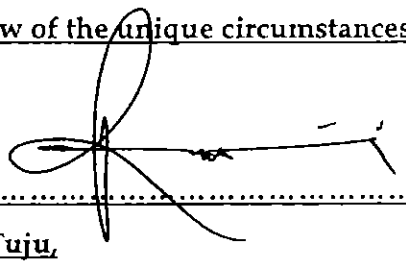
Section 3 of the Election Laws (Amendment) Act 2016	Petition No. 47 of 2015, Okiya Omtata v IEBC and 2 others	Orders denied
Section 22(1)(b) of the Elections Act	Petition NO. 161 of 2016, Okiya Omtata	Status unclear
A declaration that Section 44A of the Elections Act violates Article 86 of the Constitution	Petition No. 16 of 2017, Bado Mapambano Trust	Case still pending
Section 44A of the Elections Act	Judicial Review No. 647 of 2016, CORD v AG & National Assembly	Orders denied
A declaration that Section 44(8) of the Elections Act is unconstitutional	Dr Kenneth Otieno vs IEBC	Section 44(8) of Elections Act declared unconstitutional
Declaration that Section 22 of the Elections Act is Unconstitutional	Joseph Ngacha Karani vs Attorney General & others	Orders denied
Functional repeal of Section 44A of the Elections Act by declaring that election should be conducted exclusively through electronic means to exclusion of complementary mechanism.	Petition No 328 of 2017 : NASA vs IEBC & others	Orders denied

54. Subsequently, in the last three weeks, more cases have been filed in court challenging various sections of law including one in which Section 11 of the Parliamentary Powers and Privileges Act, 2017 has been suspended. It is incongruous to argue that parliament cannot discharge its constitutional role of

making law while other state bodies can challenge, modify or entirely repeal existing laws during the same period

CONCLUSION

55. We support the proposed amendments and invite all Kenyans , including our colleagues in NASA , to take time to read through them objectively and in view of the unique circumstances that confront us.



Signed:.....

Raphael Tuju,

Secretary General, Jubilee Party

ATTACHED SUMMARY.



PROPOSED AMENDMENTS TO THE ELECTION LAWS (AMENDMENT) BILL, 2017

1. Nullification of results of an election

The proposed amendment to the current section 83 of the Elections Act will require a Petitioner wishing to annul any election to prove <u>both</u> non-compliance with the Constitutional principles and the applicable written law, **<u>AND</u>** that such non-compliance affected the result of the election.

In the initial proposal the bill intended to amend section 83 of the Elections Act by substituting the word "or" with "and" and to read as follows:

> *"No election shall be declared to be void by reason of noncompliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution <u>and</u> in that written law and that the non-compliance did not affect the result of the election."*

<u>Objective</u>:. To raise the bar as far as the threshold for nullification of elections is concerned, primarily to accord with internationally entrenched principles that election results ought not to be annulled on flimsy or shaky grounds.

<u>Comment on this amendment</u>

The amendment should be broadened so as to provide that where there has been <u>substantial compliance</u> with constitutional principles and the written law, and

where it is shown that the non-compliance did not affect the results substantially, then the results in question shall not be nullified. The amendment should therefore be broadened to read as follows:

> ***"No election shall be declared to be void by reason of noncompliance with any written law relating to that election if it appears that the election was substantially conducted in accordance with the principles laid down in the Constitution and in that written law and that the non-compliance did not substantially affect the result of the election."***

2. Offences

The Bill introduces new offences on account of failure or refusal to sign the document containing results, submitting incomplete document and altering or falsifying a document. The penalty that is proposed under the Bill is imprisonment for a term not exceeding five years. It states as follows:

> ***Notwithstanding any other provision in this Act or any other written law, a presiding officer or returning officer in an election who, in relation to the prescribed document containing the results of the election—***
>
> ***a) Knowingly fails or refuses to sign the document;***
> ***b) Knowingly fails to complete the document; or***
> ***c) Willfully submits an incomplete document;***
> ***d) Willfully alters or falsifies a document, commits an offence and shall be liable, upon conviction, to imprisonment for a term not exceeding five years."***

Objective: To criminalize and impose serious sanctions against persons who would interfere with the process of compilation of results.

Comments on this amendment

1. There does not seem to be any justification for the application of this amendment to Presiding Officers and Returning Officers only. Ideally, the section should apply to all Commission officers who commit any of the offences referred to in section 6A of the Bill. This will ensure that all

such officers who commit a crime under this section could be punished under the said section.

The new proposal intends to substitute the words *"a presiding or returning officer"* with *"any officer"* which should therefore read as follows:

"6A. Notwithstanding any other provision in this Act or any other written law, <u>any officer</u> in an election who, in relation to the prescribed document containing the results of the election —

e) knowingly fails or refuses to sign the document;
f) Knowingly fails to complete the document; or
g) Willfully submits an incomplete document;
h) Willfully alters or falsifies a document, commits an offence and shall be liable, upon conviction, to imprisonment for a term not exceeding five years."

ii. Having regard to the consequences of the offences covered under this section, consideration should be given to more severe punishment eg. Increasing the imprisonment term from five to ten years.

Section 10 of the Bill creates a new section 86A immediately after section 86 which provides that:

1) Where, pursuant to Article 140(3) of the Constitution, a presidential election is invalidated by the Supreme Court on a petition, the Commission shall publish a notice in the Gazette, within seven days from the determination of the Court—

a) Indicating that the presidential election has been invalidated and that no candidate has been elected as president;
b) Announce the date for fresh election pursuant to Article 140(3) of the Constitution;
c) Publish the names and political parties of the candidates to participate in the fresh election.

2) The candidates to participate in the fresh election pursuant to Article 140(3) shall be determined by the nature of the petition that invalidated the original election, as follows—

a. Where the petition challenging the election was filed by the runner-up, candidates for the fresh election shall be confined to the petitioner and the president-elect whose election was annulled;
b. Where the petition was filed by more than one candidate who had participated in the original election, he petitioning candidates and the president-elect may participate in the fresh election;
c. Where the petition was filed by a person or persons who were not candidates in the original election, then each of the candidates in the original election may participate in the fresh election;
d. No other candidate other than those envisaged in paragraph (a), (b) or (c) shall be eligible to participate in the fresh election.

3) The Commission shall not conduct fresh nominations for a fresh election pursuant to Article 140(3) of the Constitution.
4) An eligible candidate for an election pursuant to Article 140(3) of the Constitution may withdraw from the election by notice in writing to the Commission, and—
a) Where there are more than two remaining candidates in the election after the withdrawal, the election shall proceed as scheduled;
b) Where only one candidate remains after the withdrawal, the remaining candidate shall be declared elected forthwith as the President-elect without any election being held.

Effect of the new Section 86A

- ***Commission to publish in the Gazette within 7 days where invalidation of presidential election has been ordered by the Supreme Court;***
- ***The notice shall indicate that no president has been elected as president, announce the date of fresh elections and publish names and political parties of the candidates to participate in the fresh election;***
- ***The sections defines candidate in the fresh election to include:***
  - ***Where the petition is by the Runner up it shall be the Runner-up and President elect;***
  - ***Petitioning candidates where there are more than one; and***
  - ***All candidates who participated in the original election if the petitioner was not a candidate.***

Comment and proposal for further amendments

The wording of the proposed section 86A (4) (b) needs serious re-consideration.

Considering that the presidential election preceding the fresh elections will have been nullified by the Supreme Court, the question arises as to whether the withdrawal of one candidate should have the effect of having the remaining candidate declared president-elect automatically without an election.

Article 138(2) provides that if two or more candidates for president are nominated, an election shall be held in each constituency.

We propose an additional clause immediately after section 86A (5)(b) in the following wording:
For the avoidance of doubt, an election shall be deemed to have occurred in any Constituency if the Commission has provided all the polling officials and all the material necessary to facilitate the elections and shall not be invalidated by reason of any voters not participating in the election.

16

Received
Written Submission
on 5/10/2017

OFFICE OF THE REGISTRAR OF POLITICAL PARTIES
ORPP

Republic of Kenya

Telephone: +254(0)204022000
Email: registrar@orpp.or.ke
Website: www.orpp.or.ke
When replying please quote

Lion Place, 1st Floor
Off Waiyaki Way
P.O Box 1131-00606
Sarit Centre, Nairobi.

Ref: RPP/LGM/012 (48)

Date: 5th October, 2017

Clerk of the National Assembly,
Clerk's Chambers,
Mini Chamber, 1st Floor,
County Hall, Parliament Buildings,
P.O. Box 41842-00100,
NAIROBI.

RECEIVED
05 OCT 2017
CLERK'S OFFICE

Dear Sir,

RE: PUBLIC HEARING OF THE JOINT SITTINGS OF THE SELECT COMMITTEES OF THE NATIONAL ASSEMBLY AND THE SENATE ON ELECTIONS LAWS, 2017

This is to acknowledge receipt of your letter Ref: JSCEL/CORR/2017 dated 2nd October, 2017 on the above subject matter.

Forwarded herein please find Memorandum for submission to the Joint Parliamentary Select Committees of the National Assembly and the Senate on the Election Laws (Amendment) Bill, 2017 from the Office of the Registrar of Political Parties.

Yours faithfully,

Lucy K. Ndungu, EBS
Registrar of Political Parties

REPUBLIC OF KENYA

Telegraphic Address
'Bunge', Nairobi
Telephone 2848000
Fax: 2243694
E-mail: csenate@parliament.go.ke

Clerk's Chambers
Parliament of Kenya
Parliament Buildings
P. O. Box 41842 –00100
Nairobi, Kenya.

PARLIAMENT

OFFICE OF THE CLERK OF THE NATIONAL ASSEMBLY AND CLERK OF THE SENATE/ SECRETARY, PARLIAMENTARY SERVICE COMMISSION

REF: JSCEL/CORR/2017 **DATE: 2nd October, 2017**

OFFICE OF THE REGISTRAR OF POLITICAL PARTIES
RECEIVED
04 OCT 2017
P. O. Box 1131 – 00606, NAIROBI

Ms. Lucy Ndung'u
Registrar of Political Parties,
P.O. Box
NAIROBI.

Dear Madam,

RE: INVITATION TO A PUBLIC HEARING OF THE JOINT SITTINGS OF THE SELECT COMMITTEES OF THE NATIONAL ASSEMBLY AND THE SENATE ON ELECTION LAWS, 2017.

On 28th September, 2017, the National Assembly resolved to establish a Select Committee to be known as the Select Committee on the Election Laws, 2017 to examine and undertake public participation on the Election Laws (Amendment) Bill, National Assembly Bills No. 39 of 2017.

On the same day, the Senate resolved to establish a Select Committee to be known as the Select Committee on the Election Laws (Amendment) Bill 2017. The Elections Laws (Amendment) Bill, Senate Bills No. 3 of 2017 was committed to the Committee on 28th September, 2017.

The Select Committees of the National Assembly and the Senate shall hold joint sittings to consider this matter.

The purpose of this letter is to invite you to a meeting with the Select Committees that is scheduled to be held on **Thursday, 5th October, 2017** in the **Mini Chamber, First Floor, County Hall, Parliament Buildings, Nairobi** between **10.00 am and 1.00 pm** to submit your representations on this matter.

Ms. Kavata Musyoka, a Clerk Assistant (0707 165 221) (kavata.musyoka@gmail.com), is available for any further liaison on this matter.

Yours

MICHAEL R. SIALAI, EBS,
CLERK OF THE NATIONAL ASSEMBLY.

J.M. NYEGENYE, CBS,
CLERK OF THE SENATE/
SECRETARY OF THE PARLIAMENTARY SERVICE COMMISSION.

OFFICE OF THE REGISTRAR OF POLITICAL PARTIES
ORPP

Republic of Kenya

MEMORANDUM FOR SUBMISSION TO THE JOINT PARLIAMENTARY SELECT COMMITTEES OF THE NATIONAL ASSEMBLY AND THE SENATE ON THE ELECTION LAWS (AMENDMENT) BILL, 2017

Submitted by Registrar of Political Parties

5th October, 2017

Office of the Registrar of Political Parties –ORPP
Telephone: +254(0)204022000,0772 281357
Email: registrar@orpp.or.ke
Website: www.orpp.or.ke

@ORPPKenya
Lion Place, 1st Floor
Off Waiyaki Way
P.O. Box 1131-00606
NAIROBI

General Opening Statement

The Office of the Registrar of Political Parties (ORPP) participated in the 8th August 2017 General Elections. The ORPP undertook various activities in the run up to the elections including;

1. Political Parties Leadership Training in partnership with UN Women & UNDP
2. Monitoring Political parties' nominations
3. Development of a manual of promoting gender balance in political parties with Ministry of Devolution & planning
4. Development of political party strategic plans with IDEA and CMD
5. Member of the Chapter Six Working Group with AG's Office, EACC, CUE, HELB, IEBC,PSC
6. Stake holder Partnerships and Peace Building Forums (UWIANO platform) with NCIC and IEBC
7. Elections Security Arrangement Project (ESAP)
8. Elections Technology (Interfacing ORPP database with IEBC)
9. Election (polling) day activities - Training of the Political Parties' and Candidates' Agents; and Election Observation at national, county and constituency levels

Submissions on the Election Laws (Amendment) Bill, 2017

The ORPP humbly submits as follows

A. Section 2 of the Bill

Parliament has the powers under Article 250 of the Constitution to make laws that govern the composition and establishment of any Commission or Independent Office.

B. Section 3

It is our proposal that the Chairperson of the Independent Electoral and Boundaries Commission (IEBC) should be one who is a lawyer and has mastery of law as the electoral process is a highly legal process and the Chairperson of the Commission is constantly interpreting the law in the day to day carrying out of duties. In addition to this, one other commissioner should be a lawyer in order to head the legal committee.

The addition of new subsections 1A and 1B are bringing to the Act what had already been provided for under clause 6 of Second Schedule to the IEBC Act therefore there is no objection to this amendment. Please note where the substantive holder of the office is absent, and the person called upon to carry out the duties and does not have the requisite qualifications for substantive appointment of the post, the person can be called upon to perform the duties.

C. Section 4

There are no objections on this as Parliament has power to make laws that govern the establishment and procedures of any Commission.

D. Section 5

We object to the deletion of section 29 (1) of the Elections Act, 2011. The political system in Kenya as enshrined under Article 38 and Article 88 (4) (d) of the Constitution underscores the duty of the political party, through its members, to nominate its candidates for elections. Under the Political Parties Act, 2011 political parties are established as corporate entities with their autonomous structures and party constitutions. All political parties conduct their own party nomination processes and therefore candidates are nominated by members of their respective political parties.

The deletion of this section therefore would have adverse effects on the procedure for nominations as strangers to the party will have power to nominate candidates for the party. All political parties will then be required to amend their constitutions before the conduct of the next election to regularize this new nomination procedure.

E. Section 6

There is no objection to the amendment of section 39 of the Elections Act. However, the procedure should be clearly outlined to eliminate any discrepancies

F. Section 7 and 8

There are no objections to these amendments.

G. Section 9

We are in support of this amendment as there is need for both qualitative and quantitative analysis of the election processes and results before the nullification of elections.

H. Section 10 and 11

There are no objections to these amendments

Submitted by:-

Lucy K. Ndungu, EBS
Registrar of Political Parties

Signature: ..... Date: 5/12/2017

Received 5/10/2017

17

LETTER TO PARLIAMENTARY COMMITTEE SITTING FOR PUBLIC PARTICIPATION ON BILL OF AMENDMENT OF ELECTORAL LAWS DATE 5&6OCTOBER 2017 MY PROPOSAL AS CHAIRMAN YA AFRICA ART GROUP.

1] I Support parliament amend this law, and even to go deeper and and#president can be sworn in by speaker of national assembly deputized by speaker of senate, because , they are elected by elected leaders and as annotative of arms of government
2] court should only seek advice from .IEBC. in case of poll malpractice because election are seasonal.
3] election should not be ever nullified blanketly , only where there was anomaly because IEBC, had breakdown of poll to 700 voters, that is where election should be repeated and transmitted
4] judge sitting to hear the case must use kiswahili language when delivering judgement because i find mistake happening when delivering judgement in English example when chief justice Hon Malaga calling election as processes. he was wrong. election is not processes and will never be. what is processes?, it is example when delemonte tarn pineapple in juice, or when kimani Rugendo turn passion fruits in to sweet afya juice or when wanjiku turn maize into , and flower into ugali
or when computer using processes plain paper to become document
[a]election are projections of leadership, and it is event of gamble-ling where there are winners and losers. in Kenya we elect 6 leaders, in jack port when you score 6 numbers you win, any dictionary explaining that election are processes should be deleted after all they are written by human being and can commits errors
5] electronic transmission should not be used to determine leader, because if hacker direct email traffic of heavy internet road to IEBC saver it will crush. There can be exchange of democracy with devalcrazy
6] Any IEBC presiding officer refusing to sign forms should be prosecuted with intention to stage crisis that can cost tax payer time and money
7] i there for ask parliamentary committee to go back with motion in parliament of laws and patriotism to be introduced in primary schools, cause we are facing repercussion of break down of laws where corruption is piloting Kenya in to flight-pass of devalcrazy to an extent of rejecting bill passed by national assembly elected democratically by majority kenyan

wanjohi nyamu chairman ya africa art group 0722324168

sign

18

Received
5/10/2017

GEMA CULTURAL ASSOCIATION

THE POSITION OF GEMA CULTURAL ASSOCIATION ON THE ELECTION LAWS AMENDMENT 2017

INTRODUCTION

Gema Cultural Association is a duly registered body under the laws of Kenya as a Society since 2008.Gema believes in a peaceful, cohesive and prosperous Kenya where all citizens lives as brothers and sisters.

a) THE WILL OF THE PEOPLE

Gema notes that Article 1 of the Constitution states:

(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.

(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.

Article 38 of the Constitution gives the people of Kenya the right to exercise their political rights and particularly the rights of universal suffrage. These rights should never be taken by any institution, including those created by our constitution.

b) MANDATE OF PARLIAMENT

Kenyan people should be able to exercise their right to vote as envisaged in the Constitution. It is the duty of Parliament to make laws to ensure the right to vote is enjoyed by every citizen of the Republic of Kenya. If the existing laws are inadequate, then Parliament is duty bound to amend such laws.

PURVI HSE. WING B, 2ND FLOOR, WESTLANDS.
P.O. Box 6540 - 00100 Nairobi. Tel: (020) 2397163, (020) 4443526
Email: gcakenya@gmail.com

Article 94(4) of the Constitution states that Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty.

Parliament is duly mandated by the Constitution under ***Article 94(3) and (4)*** to consider and make amendments to the Constitution as well as make laws. The National Assembly under ***Article 95 (5) (c)*** exercises oversight of State organs. In exercising this oversight, the National Assembly is then expected by law to ensure that State organs operate within the Provisions of the aforementioned Articles 10, 73 and 259 of the Constitution.

The Supreme Court in Raila Odinga and Another vs IEBC and 2 others [2017]acknowledged that indeed, the mandate to make laws in Kenya lies with the Legislature. As such, the legislature as provided under ***Articles 95 and 96 of the Constitution*** should make laws to not only reflect the will of the people but in exercise of their sovereign power.

c) **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION(IEBC)**

We also note that Article 249 (2) of the Constitution states that IEBC is:

i) subject only to the Constitution and the law; and

ii) it is independent and not subject to direction or control by any person or authority.

The office of the Chairperson of IEBC

The Chairperson of the IEBC is the official returning officer for presidential elections pursuant to ***Article 138 (10) and 39 (D) of the Elections Act.*** As such, only the Chairperson may declare the final results in a Presidential election.

Article 259 (3b) of the Constitution contemplates the role of a successor in a state or public office. However, Should there be a vacancy in the office of the Chairperson of the IEBC, the law as it is currently does not provide any

succession procedure regarding who would perform the above unique role of the Chairperson before a new Chairperson is appointed.

It is also noteworthy that the process of appointment of a Chairperson of any Commission isn't straight forward and such a lacuna especially during an election year would throw the country into an unprecedented crisis. Parliament ought to address that lacuna before we go to Presidential Polls on 26th October 2017.

One of the key National Values and Principles that guide all public and state officers in Kenya is good governance. Having an effective succession plan is one of the main principles of good governance for all the Independent Commissions and other Public bodies.

The Elections Act spells out the requirements for one to qualify to be the Chairperson of IEBC. One of those requirement is that you should be qualified to hold the office of a Judge. This provision is discriminatory in nature. It would be best if professionals from diverse backgrounds would be given a chance to serve our country in that capacity bearing in mind that Parliament in exercise of its roles is tasked with promoting inclusiveness, equity, equality.

THE COMMISSION AND CONDUCT OF MEETINGS

The Elections Act stipulates that the quorum for the conduct of business at a meeting of the Commission shall be at least five members of the Commission.

It is important to note that ***Article 250 (1) of the Constitution*** provides that each commission shall consist of at least three, but not more than nine, members. In this case, the requirement under the current law that the quorum for conduct of business be five members of the IEBC is ill thought out. The assumption that the Commission will always have the Constitutional maximum of nine members is flawed and lacks basis. In the event that there are less than nine IEBC Commissioners in total or even where for reasons unknown the Commission may not reach the number of five then the Commission's operations would be crippled.

A failure of the IEBC to make decisions, to hold meetings, to pass resolutions and generally to conduct business due to this unreasonable quorum demands is in clear contravention of the Constitution and an obstacle in the furtherance of the people's will and Constitutional rights.

d) **COMPLEMENTARY SYSTEM**

Parliament should amend section 44A to ensure that the IEBC complies with the Supreme Court's ruling of putting in place a complementary system for identification of voters that is simple, accurate, verifiable, secure, accountable and transparent in line with simple, accurate, verifiable, secure, and accountable and transparent.

Amendments to Section 44 seeks to bring clarity and uphold the provisions of *Section 44 (3)* that technology used must be simple, accurate, verifiable, secure, accountable and transparent. The citizenry's fundamental political rights under *Article 38* are encapsulated in the principles of free and fair elections in *Article 81(e)* and IEBC's obligation to conduct elections in a simple, accurate, verifiable, secure, and accountable and transparent manner as stated in *Article 86 of the Constitution.*

The Supreme Court in Raila Odinga 2017 ordered *"we hereby direct that in conducting the fresh election IEBC must put in place a complementary system that accords with the provisions of Section 44(A) of the Elections Act. It goes without saying that such a system as held by the High Court, in the case of the National Super Alliance (NASA)Kenya v. TheIndependent Electoral and Boundaries Commission & 2 Others, only comes into play when technology fails"*

The complementary system will also come in handy for those voters whose biometrics are not captured as quoted in the Supreme Court ruling in the Raila Odinga (2017) case *"IEBC has a constitutional duty of balancing all the rights and ensuring all voters, especially those whose biometrics are not be picked by KIEMS are accorded an opportunity to vote if they are genuinely registered voters."*

Gema believes that Parliament has an excellent opportunity of providing leadership to this great nation by remaining firm to the dictates of the Constitution.

Signed:

Bishop Lawi Imathiu

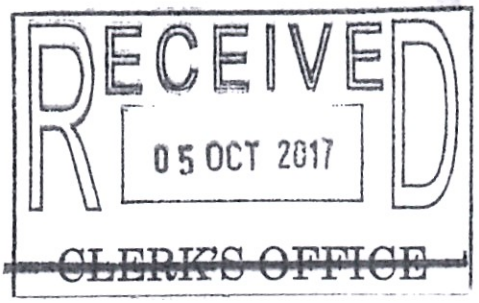
Gema Chairman.

Gazunda-pdf.

Our Ref: ICPAK/CEO/10/04/2017

4th October 2017





19

Mr. Michael R. Sialai, EBS
Clerk of the National Assembly
Clerks' Chambers
National Assembly
Parliament Buildings
P.O Box 41842-00100
NAIROBI

Dear Mr. Sialai,

RE: SUBMISSION OF MEMORANDA–THE ELECTION LAWS (AMENDMENT) BILLS, 2017

The Institute of Certified Public Accountants of Kenya (ICPAK) is the statutory body of accountants established by the Accountants Act of 1978, and as repealed under the Accountants' Act Number 15 of 2008, mandated to develop and regulate the Accountancy Profession in Kenya. It is also a member of the International Federation of Accountants (IFAC), the global umbrella body for the accountancy profession.

Your public notice inviting interested members to submit Written Memorandum on the Election Laws (Amendment) Bills, 2017 refers.

The Institute of Certified Public Accountants of Kenya (ICPAK) is of the considered opinion that the proposed amendments to the Independent Electoral and Boundaries Commission Act 2011, the Elections Act 2011 and the Election Offences Act 2016 be put on hold until after the 26th October 2017 Presidential Elections, to allow room for more consultations.

Nonetheless, the Institute has reviewed the proposed amendments and developed a position paper detailing its proposals for your consideration. Attached herein, please find a copy of the Institute's submission.

In case of need for clarification, please do not hesitate to contact the undersigned on ceo@icpak.com or CPA Fredrick Riaga on fredrick.riaga@icpak.com

We look forward to your response and appearance before the Joint Select Committee if accorded an opportunity.

Yours Sincerely,

CPA Edwin Makori
CHIEF EXECUTIVE OFFICER

Institute of Certified Public Accountants of Kenya
CPA Centre, 10th Floor, Ruaraka, Thika Road
P.O. Box 59963 - 00200
Nairobi Kenya

Tel: +254 (020) 2304226, 2304227
Cell: +254 727 531006 / 733 856262
+254 721 469796 / 721 469169

Web: www.icpak.com
Drop in box no. 164
Revlon Professional Plaza

P1

ICPAK SUBMISSION

ELECTION LAWS (AMENDMENT) BILL, 2017 & ELECTION OFFENCES (AMENDMENT) BILL, 2017

1. ICPAK's Mandate

The Institute of Certified Public Accountants of Kenya (ICPAK) is the statutory body of accountants established by the Accountants Act of 1978, and as repealed under the Accountants' Act Number 15 of 2008, mandated to develop and regulate the Accountancy Profession in Kenya. It is also a member of the International Federation of Accountants (IFAC), the global umbrella body for the accountancy profession. Section 8 of the Accountants Act stipulates the functions of the Institute as follows:

a) promote standards of professional competence and practice amongst members of the Institute
b) promote research into the subjects of accountancy and finance and related matters, and the publication of books, periodicals, journals and articles in connection therewith;
c) promote the international recognition of the Institute;
d) advise the Examinations Board on matters relating to examinations standards and policies;
e) advise the Minister on matters relating to financial accountability in all sectors of the economy;
f) carry out any other functions prescribed for it under any of the other provisions of this Act or any other written law; and
g) do anything incidental or conducive to the performance of any of the preceding functions

2. Introduction

The Institute of Certified Public Accountants of Kenya (ICPAK) joins other stakeholders in urging for the shelving of the proposed amendments to the Independent Electoral and Boundaries Commission Act 2011, the Elections Act 2011 and the Election Offences Act 2016 until after the 26th October 2017 Presidential Elections to allow room for more consultations.

Moreover, the Institute is of the view that any proposed amendments to election laws and on election management should aim at strengthening the current systems by identifying any loopholes within the electoral process and proposing measures to tighten controls. Equally, in the process of amending electoral laws, there is need to refer to the Kriegler Commission Report which gave a wide range of recommendations generally touching on reform of the electoral process in Kenya and the Report of the Joint Parliamentary Select Committee on Matters Relating to the Independent

Electoral Boundaries Commission (IEBC). The report recommended actions to streamline voter registration, delimitation, tallying, recording, transcribing and transmitting results.

We hold the view that the letter and spirit of the proposed amendments, aim not to strengthen the accountability systems as laid out under Article 86 of the Constitution. We further hold the opinion that the political environment is not conducive for an objective debate on the subject matter. In the circumstances, the Institute urges Parliament and political leaders to suspend discussions on the proposed amendments to allow for a more objective analysis, input and concurrence on electoral reforms.

Nonetheless, the Institute has reviewed the proposed amendments and developed a set of recommendations for your consideration.

3. ICPAK Comments on Election Laws (Amendment) Bill 2017

Table: Summary of the proposals on the Election Laws (Amendment) Bill, 2017

Clause		Provision in the Clause	Issue of Concern/Comment	ICPAK Proposal	Justification
1.	**Clause 3: Amendment of section 6 of No. 9 0f 2011**	Amending provisions on qualifications for appointment of the chairperson	▪ The proposal is in order. The Provision in **section 6 of No. 9 of 2011** ring-fences the position of Chairman to legal professionals leaving other competent Kenyans and professionals.	The Institute supports the proposed amendment as currently worded in the Bill.	This proposal is consistent with the earlier ICPAK proposal to the Joint Parliamentary Select Committee on matters relating to IEBC in August 2016. ICPAK's submission is captured in Paragraph 139 of the Select Committee's Report.
2.	**Clause 3(1)(A)**	The amendments give Vice-Chairperson or any other member of the Commission (elected amongst themselves, in absence of both Chair and Vice-Chair) to assume powers and responsibilities of the Chair.	Lack of clarity on the extend of the powers and responsibilities of the vice-chairperson in instances he/she assumes responsibilities of the chairperson.	Amend by adding the following sub-clause "For avoidance of doubt, the Vice-chairperson appointed to assume the responsibilities of the chairperson, may undertake all the powers and functions including the powers vested on the	To provide clarity

Clause		Provision in the Clause	Issue of Concern/Comment	ICPAK Proposal	Justification
				chairperson under Article 138 (10) of the Constitution"	
3.	**Clause 3(1)(B)**	In the absence of the Chairperson and the Vice-chairperson, members of the Commission shall elect from amongst themselves one of their number to act as the chairperson and exercise the powers and responsibilities of the chairperson until such time that another chairperson shall be appointed	We do not anticipate instances where both the Chairperson and Vice-chairperson will be absent, especially on matters related to Article 138(10) of the Constitution in regard to duties of the Chairperson to declare presidential results.	Delete the proposed amendment	We do not anticipate instances where both the Chairperson and Vice-chairperson will be absent, especially on matters related to Article 138(10) of the Constitution regarding duties of the Chairperson to declare presidential results.
4.	**Clause 4(a)**	Amends the Second Schedule of No. 9 of 2011 on the quorum for discharge *Deleting the word "five members of the Commission" appearing in paragraph 5 and substituting therefore the words, "half of the existing members of the Commission provided that the quorum shall not be less than three members"*	▪ This creates instances where the quorum may be three members of the Commission. It is too low for purposes of making binding decisions for the Commission. ▪ In addition, it may not be practical in case of a tie (after voting by Commissioners) on an issue within/of concern to the Commission. ▪ Conduct of business for the Commission is sufficiently provided in paragraph 1, 2, 3 and 4 of the Second Schedule of the Act. In case of any emergency, a special meeting can be called. Hence this amendment does not suffice.	Amend to read as follows: "The quorum for the conduct of business at a meeting of the Commission shall be at least four members of the Commission"	For proper discharge of the mandate of the Commission.

Clause		Provision in the Clause	Issue of Concern/Comment	ICPAK Proposal	Justification
5.	**Clause 4(a)**	Deletes paragraph 7 in the Second Schedule of the IEBC Act and replaces with, "unless a unanimous decision is reached, a decision on any matter before the Commission shall be by a majority of the members present and voting"	▪ This undermines the powers of the Commission. What if the majority present are three? Is this a sufficient to make a binding decision? ▪ This provision contradicts Paragraph 3, 4 and 5 of Second Schedule of the Act on the quorum and rules for a special meeting. *Provisions of the Act* *3. The chairperson shall, on the written application of one-third of the members, convene a special meeting of the Commission.* *4. Unless the majority of the total membership of the Commission otherwise agree, at least fourteen days' written notice of every meeting of the Commission shall be given to every member of the Commission.* *5. The quorum for the conduct of business at a meeting of the Commission shall be at least five members of the Commission.*	Delete the proposed Amendment Retain the provisions as stipulated in Paragraph 7 of the second schedule of the IEBC Act, 2011 that read, "Unless a unanimous decision is reached, a decision on any other matter before the Commission shall be by concurrence of a majority of all the members:	The decisions of the Commission is as far as delivery of presidential vote is a crucial point towards establishment of our governance systems and should be decided upon by all the Commissioners. Best practice dictates that quorum for decision making should be 50% plus one. This proposed amendment negates this important corporate governance tenet.
6.	**Clause 5**	Amends by deleting Section 29 of the Elections Act **29. Power to nominate**	The rationale for this amendment is not provided. This proposal undermines Article 137 (1)(d)	Delete the proposed amendment.	No justification for the amendment. It further contravenes Article 137(1)(d) of the

Clause		Provision in the Clause	Issue of Concern/Comment	ICPAK Proposal	Justification
		(1) The persons who nominate a presidential candidate shall be members of the candidate's political party. (2) The persons who nominate an independent presidential candidate shall not be members of any political party.		Retain the Section as provided for under Section 29 of Elections Act 2011	Constitution. Section 29 grants powers to members of Presidential Candidate's political party to nominate him. The democratic rights of members should not be infringed.
7.	**Clause 6(a)**	(1C) For purposes of a presidential election, the Commission shall (a) Electronically and manually transmit the tabulated results of an election for the President from a polling station to Constituency Tallying Centre and to the National Tallying Centre	The Clause amends the Principal Act by deleting "in the prescribed form" which is vital for consistency and authenticity of the formats used in transmission of election results	Retain the current provision as stipulated in the Elections Act	The essence of electronic transmission of results was to curb against election malpractices associated with manual transmission of results. This was also to fast-track collating and transmitting results whilst making the declared figures verifiable. It is a means of securing the spirit of Article 86 of the Constitution in as far as defining the verifiability of the declared results.

Clause		Provision in the Clause	Issue of Concern/Comment	ICPAK Proposal	Justification
8.	**Clause 6(b)**	Amends Section 39 of the Elections Act No. 24 of 2011 (1C) For purposes of a presidential election, the Commission shall (b)Inserting a new sub-section after 1C 1D) Where there is a discrepancy between electronically transmitted and manually transmitted results, the manually transmitted results shall prevail	There should not be any discrepancy or variation given that the same has already been tallied and verified at polling centre, the Constituency Tallying Centre and National Tallying Centre.	Delete the amendment Retain the current provision as stipulated in the Elections Act.	The results transmitted electronically should be an image of the manually transmitted results. The forms transmitted electronically form the basis for authenticating the print copies of the results declared at the National Tallying Centre. The proposed amendment aims to legalize an electoral malpractice which should be considered as an electoral offence which is liable to punishment as stipulated under the Election Offences Act 2016 ~~(as the proposed amendments under Clause 11 of this Bill)~~
9.	**Clause 6(b)**	Amends Section 39 of the Elections Act No. 24 of 2011 1E) Any failure to transmit or publish election results in an electronic format shall not	This may open the transmission and publication of electronic results to manipulation.	Delete the amendment	This may open the transmission and publication of electronic results to manipulation.

Clause		Provision in the Clause	Issue of Concern/Comment	ICPAK Proposal	Justification
		invalidate the result as announced and declared by the respective presiding and returning officers at the polling station and constituency tallying centre, respectively		Retain the current provision as stipulated in the Elections Act	We have invested heavily in ICT infrastructure around voter identification and results transmission which the IEBC must be obligated to operate at the most functional level.
10.	**Clause 6(b)**	Amends Section 39 of the Elections Act No. 24 of 2011 1F) The Commission shall, to facilitate public information, establish a mechanism for the live-streaming of results as announced at polling stations, and the results so streamed shall be for purposes of public information only and shall not be the basis for a declaration by the Commission	It contravenes Section 39 of the Elections Act No. 24 of 2011. where the results streamed should be the tallied and verified results. It contravenes provisions of Article 35 of the Constitution on timely and accurate information. Besides, punitive measures have been proposed to deal with rogue returning officers	Delete the amendment.	The entire of the Clause 6 of the Bill in the current forms shall serve to defeat the integrity of the electoral process. Restricts realization of the right to information as laid out under Article 35 of the CoK 2010.
11.	**Clause 6A**	Amends the Election Offences Act, 2016 by inserting a new Section 6a on failure or refusal to sign results	The current provision adequately caters for offences and penalties	Retain the current provision as stipulated in the Election Offences Act 2016.	Current provisions adequate.

1. ICPAK Comments on Election Offences (Amendment) Bill 2017

Table 1: Summary of Proposals on the Election Offences (Amendment) Bill 2017

Clause		Provision in the Clause	Issue of Concern/Comment	ICPAK Proposal	Justification
12.	**Clause 2: Amendment of Section 14 of No. 37 of 2016**	The Bill amends section 14 of the Election Offences Act, 2016 by deleting subsection(2). It proposes to deletes the following subsection, *" 14(2) No government shall publish any advertisements of achievements of the respective government either in the print media, electronic media, or by way of banners or hoardings in public places during the election period"*	The Bill deletes an important provision guiding the conduct of the government in place(respective government) during an election year.	Retain the provision as provided for in Section 14 of No. 37 of 2016	The provision as currently worded creates a level playing field for candidates participating in an election.

4. Conclusion

The Institute is of considered opinion that the current laws are adequate to guarantee free, fair and credible elections as stipulated under Article 81(e) of the Constitution. The events informing the nullification of the Presidential election pointed to internal administrative weaknesses of the systems as employed by the IEBC. The identified challenges would not necessitate a change of law, but institution of stringent accountability measures that will not only deliver on this provision but also engender public confidence in the electoral process. The accountability measures include but not limited to:

(i) Roll-out biometric voter-identification and results transmission system with appropriate backups in the unlikely event of failure of the principal system. The biometric voter-identification should be the basis for election results reconciliation.

(ii) Undertake post-election reconciliations of the voters identified by the BVR, number of votes cast and counted, against the number of registered voters in each polling station, printed ballot papers per polling station and unused ballot papers

(iii) Serialize all ballot papers and result declaration forms.

(iv) Provide unique security features on all electoral materials to safeguard against use of counterfeit materials.

Received
4/10/2017
20

NAIROBI BUSINESS OWNERS CBD
P.O BOX 9026-00300
NAIROBI

In as much as global best practice does not favour making changes to election laws so close to an election, the unique circumstances in Kenya, where an election has been nullified because of process with reference to result, makes it necessary for these amendments to be undertaken in priority.

Proposed amendment	Current status	Justification for amendment
IEBC Act, Section 6 and the Second Schedule	- Chairperson must be a lawyer of 15 years standing - There is currently no other lawyer in the commission - In the absence of the Chairperson for any reason, no other Commissioner can act as returning officer for the presidential election - Quorum is set at five members	- The amendment proposes that other professionals including lawyers can be appointed chairperson of the IEBC - It removes the risk of paralysis by allowing the Vice Chair or in the absence of both Chair and Vice, for a Commissioner to Act as chair in line with good corporate governance principles on succession. - Amends quorum to ½ of the commissioners present (rounding off to 4) but no less than 3. It ensures that at any point that the numbers are less than the prescribed number, there shall always be a quorum of ½ of the members present, but in any event never less than three. - The amendment ensures that the decisions of the commission are unanimous to avoid the risk of internal dissonance

SIMON MUKURIA
(CHAIRMAN)

4/10/17

0722470051

Gzmember PCA
24/10

21

SUBMISSION

ELECTION LAWS (AMENDMENT) BILL, 2017





Email: info@tukuka.co.ke

Mobile Telephone: 0721 874 098

www.tukuka.co.ke



BACKGROUND

The Constitution of Kenya 2010 espouses various civil and political rights including the right of every citizen to make political choices (38 (1)), to a vote by secret ballot in any election or referendum (38 (3) (b)) and to a free, fair and regular election (38 (2)). The institutions/organs to which citizens' sovereign power are delegated to are required to exercise their mandate in a manner that respects and upholds the values and principles of good governance, integrity, transparency and accountability amongst other ideals (art. 10)

The Independent Electoral and Boundaries Commission (IEBC), established at Chapter 15 of the constitution and buttressed by the IEBC Act, 2010 enhances the above provisions and demands from its officers the highest standards of integrity, transparency and accountability in exercise of its electoral mandate. Related individual criminal and civil responsibilities are provided for at Section 30 of the Act which states that, *"A member or employee of the Commission who knowingly subverts the process of free and fair elections...commits an offence"* The same is espoused in Section 4 of the Election offences Act, 2016 that renounces actions and commissions that disenfranchise voters. .

The Supreme Court of Kenya Judgement that was delivered in September 2017, nullified the August 8, 2017 presidential election on the premise of illegalities and irregularities around the election processes. Key to these illegalities and irregularities related to the falsification of election documents and the deliberate failure, refusal, and/or neglect by certain election officials to append their signatures to election documents. Paragraph 377 of the judgment specifically stated, *"Form 34C, which was the instrument in which the final result was recorded and declared to the public, was itself not free from doubts of authenticity. This Form, as crucial as it was, bore neither a watermark, nor serial number. It was instead certified as being a true copy of the original. Of the 4,229 Forms 34A that were scrutinized, many were not stamped, yet others, were unsigned by the presiding officers, and still many more were photocopies. 5 of the Forms 34B were not signed by the returning officers. Why would a returning officer, or for that matter a presiding officer, fail or neglect to append his signature to a document whose contents, he/she has generated? Isn't the appending of a signature to a form bearing the tabulated results, the last solemn act of assurance to the voter by such officer, that he stands by the "numbers" on that form?"*

It is in this background that the proposed amendments (on election related offences) are welcome. By demanding the accountability of the returning and presiding officers that handle election material, the amendments will enhance the accuracy and verifiability of the results at both the national and constituency levels and ensure that the appropriate structures and mechanisms are put in place to eliminate electoral malpractices.

RECOMMENDATION

- **Approve Section 11 of the Election Laws (Amendment) Bill, 2017**

TUKUKA approves the substantive amendments to the Election Offences Act, 2016 (the Principal Act)

Section 11 of the Bill seeks to amend section 6 of the Principal Act by inserting a new section (section 6A) to read;

"Failure or refusal to sign results.

6A. Notwithstanding any other provision in this Act or any other written law, a presiding or returning officer in an election who, in relation to the prescribed document containing the results of the election—

(a) Knowingly fails or refuses to sign the document;
(b) Knowingly fails to complete the document; or
(c) Wilfully submits an incomplete document;
(d) Wilfully alters or falsifies a document,

Commits an offence and shall be liable, upon conviction, to imprisonment for a term not exceeding five years"

The suggested amendments support article 86 of the constitution which stresses that results from the polling stations are openly and accurately collated and promptly announced by the returning officer. They are in line with the legal and constitutional requirements for a free, fair and credible election.

CONCLUSION

The Supreme Court has made the signing of election forms a mandatory requirement to a free and fair election. This requires that election offences must be treated with the enormity that they attract. The proposed amendments to the Act will therefore enhance the penalties for the wilful subversion of free and fair elections, expand the scope of election related offences, clarify areas of accountability for electoral malpractices and augment the role of presiding and returning officers before, during and after the election process.

Petition Submitted by;

Sandra Ochola,
TUKUKA
Email Address: info@tukuka.co.ke/ Sandra@tukuka.co.ke
Mobile Telephone: 0721 874 098

ABOUT TUKUKA

Tukuka is a knowledge-based institution that believes in the potential of young people to be great and widely known within their communities. It innovatively develops and disseminates information to teenagers and young adults with the aim of turning their acquired knowledge into tangible values that they can embrace and use to positively impact their surroundings. Its previous publications include the book, "Teens Guide to the Constitution of Kenya" that guides and educates young people on the Constitution of Kenya, 2010. More information on who we are and what we seek to achieve can be found at www.tukuka.co.ke

		but the amendments reduce the same to a minimum of three (3)	many other Laws, including for Tribunals and State Corporations. - A minimum must be low enough to allow matters to proceed. The current quorum threshold can trigger a crisis if two or more Members Resign.
2.	Election Act, Section 39(1)(C)	Amends the current provision which provides for only electronic transmission of results of the Presidential Election by allowing for both; with the electronic being a complementary system which is subordinate to the manual system in the event of any inconsistency between the	We find that this is a commonsense amendment that **ensures that in the event of a failure of technology and or deliberate mischief; the Voice of the**

	Section of Law Being Amended	Effect of the Amendment	Our Comments
1.	IEBC Act, Section 6 and the Second Schedule	- Currently, the Chairperson of the IEBC must be an Advocate of the High Court of Kenya of 15 years standing. However there is currently no other person with those qualifications amongst the rest of the Commissioners. The Proposed Amendment opens up the position of Chairperson to persons from other professions. - In the absence of the Chairperson, currently no other Commissioner can act as the National Returning Officer with regard to the Presidential Election. The amendments allow the Vice Chair to act as the Chairperson, or in the absence of both the Commissioners choose and action Chairperson from within their ranks. - Quorum of the Commission is set as Five Commissioners at present	- **Other professionals also deserve a chance to lead the IEBC. The IEBC Chair does not exercise quasi-judicial powers and so the present limitation has no justification.** - This is a commonsense amendment that prevents absence becoming paralysis. **We also note it features in**

Organization can achieve its goals. MYWO is particularly interested in enhancing the participation of women in political and electoral processes; through increasing the visibility, influence and presence of women in the Kenyan political arena.

D) Our Submissions

It is our submission that Parliament has the requisite power and authority to amend Election Laws at anytime. It is also our position that in light of the Judgement of the Supreme Court in Presidential Election Petition No. 1 of 2017 which nullified the declaration of a President-Elect that had been made pursuant to the Presidential Election held on 8th August 2017; it was incumbent on Parliament to examine the areas of weakness and statutory non-compliance on the part of the Independent Electoral and Boundaries Commission (IEBC) that had been highlighted in the Majority Judgement.

Thereafter, Parliament must take appropriate legislative action to fill in the gaps highlighted by our apex court as well as eliminating problematic areas in the electoral management framework; without compromising the quality of the Election in terms of it being free, fair, credible, simple, verifiable and accountable.

Below we list our specific comments on particular proposed amendments, as below:

Received
4/10/2017

22 MYWO

Maendeleo ya Wanawake Organization (MYWO) Memorandum to the Joint Committees of the National Assembly and the Senate on the Election Laws (Amendment) Bills, 2017

Memorandum to the Joint Committees of the National Assembly and the Senate on the Election Laws (Amendment) Bill 2017

A) Introduction

Honourable Co-Chairpersons and Honourable Members of the Joint Select Committee of the National Assembly and the Senate on the Election Laws (Amendment) Bill 2017; we *Maendeleo Ya Wanawake* Organization (MYWO) do humbly present before Parliament our Memorandum on the Election Laws (Amendment) Bill 2017, pursuant to the call for Public Participation and Submissions on the Bill.

B) Who We Are

We, Maendeleo Ya Wanawake Organization (MYWO), are a non-profit voluntary Women's Organization with our primary mission being to improve the status of Women's Rights and Gender Equity in Kenya. MYWO is managed from the Headquarters in Nairobi by an elected governing body and employed staff in our Secretariat, with branches in every administrative unit of the country, more than 25,000 group affiliates and, over 4 million individual members.

C) Our Interest in Electoral Affairs

Each and every Kenyan has an inalienable right to participate in political processes and electoral affairs. MYWO has an added interest in electoral matters as the same has a direct correlation with the extent to which our

		manual forms and electronically transmitted ones. -	**People as expressed by each individual vote is still heard, counted and given weight.**
3.	Section 86A (New Section) of the Elections Act	- Addresses uncertainty of conducting a fresh election - Defines who the candidates in a fresh election will be in line with SCOK 2013 decision - Defines the mechanisms for managing a fresh election	**We feel this is a necessary addition to the Elections Act; which codifies the position set out by the SCOK in 2013, which was approved by the SCOK in 2017.** This enhances clarity while upholding Article 138(1) of the Constitution.
4.	Section 14(2) of the Elections Offences Act	Eliminates the Campaign Period restriction on the publication by Government (whether national or county) of any Advertising on its achievements .	This change is very necessary. **Access to Information is an important constitutional right. Publication of Achievements is necessary for creating a culture of transparency and**

			accountability; which in turn will allow voters to make informed choices on policies, programmes and track-records.

E) Conclusion

Honourable Co-Chairpersons and Honourable Members of the Joint Select Committee; it is the position of the MYWO that the proposed amendments to the Election Laws of Kenya that we have highlighted above are well-thought out and necessary. We also support the other proposed changes which in the interest of brevity we have not submitted on.

Overall, we lend our hand in support of the Election Laws (Amendment) Bill 2017 in its entirety.

For the Chair Rahab Mugo.
MYWO

23

LEAGUE OF KENYA WOMEN VOTERS

Received
10/4/2017
4/10/2017

The following are our points as a women's organization, for supporting the change of election laws pending the repeat of the presidential elections on October 26th 2017:-

1. We insist the law of elections must be changed now to avoid problems on 26/10/2017.We support the work of our MPs to change this law of elections now.

2. We shall be very angry with Parliament if it does not change the law .What else do our MPs do. They MUST!

3. Why did people paid with our taxes refuse to sign the Forms 34A and 34B .That is a crime. Look at the problems they have put all of us into. We agree they should be jailed. If they will not sign, let then not take the IEBC work.

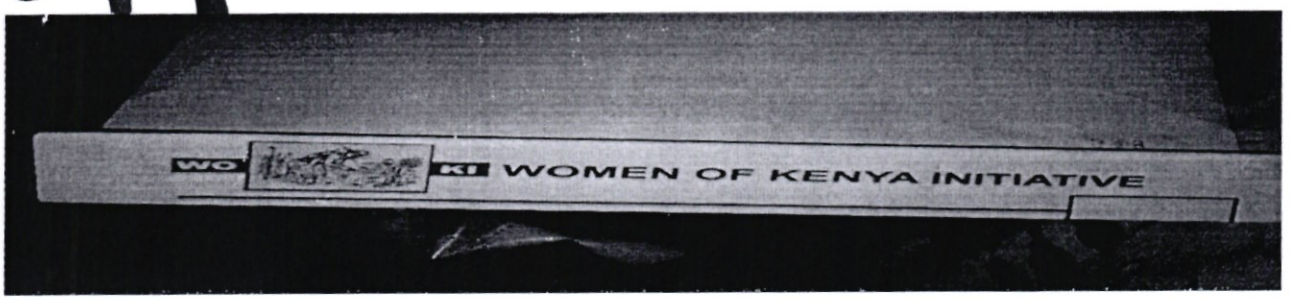
4. The Chairman of IEBC can fall sick or refuse to do something. Does that mean the President cannot be sworn in? Let the law be change and other Commissioners given power to announce elections.

5. We totally support the law to be change before next election. Why are foreigners telling us not to change the law to save our country from problems? Please change theses bad laws like the Supreme Court asked.

Cecilia Nyokabi
0717330021

24

Reemial
4/10/2017



WOMEN OF KENYA INITIATIVE
P.O. BOX 99, MARSABIT

Election Offences Act

- **Enhances the penalties for wilful or deliberate failure to sign election documents, or falsifies election documents by a presiding or returning officer to five years**
- **Specifies with clarity critical election offences committed by presiding and returning officers**
- **Raises the profile/criticality of the role played by presiding and returning officers**
- **Proposes the deletion of the restriction on government advertising in line with Art. 35 on Access to Information**

Secretary..

25 NOT NUMBERED

26 MISSING.

THE PROPHETIC PRAYERS NETWORK

27

Received
4/10/2017

re 4.10.2017

Election Laws Amendment Bills

Background:
The Jubilee party has introduced a bill in Parliament that seeks to amend a few sections of Kenya's electoral law to fill in a lacuna, align the law to emerging issues around the fresh presidential election and address issues raised by the Supreme Court judgement in its nullification of the presidential election. Our review of the amendment bill reveals the attempt by parliament to secure without fail the holding of the election on 26th October 2017.

We wish to submit as follows:

1. Parliament's role in amending law is a constitutional mandate. Its role is not fettered as regards timing and neither does Parliament require any authorization to amend laws.
    a. It is to be noted that some of the opposition rank challenging the current process of amending the law had no qualms about doing the same in early 2017, when they not only overhauled the entire constitution of commissioners of the IEBC,
    but introduced a new raft of laws and requirements with strict timelines for the conduct of the general elections of 8th August 2017.
    b. Further the same opposition occasioned additional changes to the laws through filing a plethora of legal cases, with the last and most impactful on the law/procedure being the Maina Kiai case whose judgement was delivered 3 weeks to the election.
2. Parliament's current actions are based on the Supreme Courts' observations of the 2017 General Election, and the recommendations in both the majority and dissenting opinions on the need to ensure that there is clarity, simplicity and verifiability in the process of transmission of presidential election results.
    a. The Supreme Court (SCOK) was particular that IEBC needed to define the complementary system envisioned in section 44A, and elaborate exactly how it is to work.
    b. Parliament has also found it necessary to define in exact terms the intention of section 83 of the Elections Act, so as not to leave the same open to misinterpretation. It is to be noted that the same SCOK has since 2013 and in all other cases that came before it, interpreted section 83 to the effect that invalidation of an election cannot be undertaken purely on qualitative considerations. However, in the 2017 petition, the SCOK decided to alter the meaning of the same section to argue the very opposite. The amendment seeks to cure this by defining without a doubt the meaning of section 83 as intended.

3. Parliament is properly constituted for the purpose of enacting the bill as proposed. The fact that the house has a majority of Jubilee members and affiliate parties is not illegal. It

is a reflection of the people's will and their endorsement of the Jubilee agenda. No member of NASA has refused to be sworn in, resigned, or refused to take a salary.

4. There is nothing unconstitutional or retrogressive about the bills. It does not take away any rights or freedoms. The provisions of the amendment are self-executing. No regulations are necessary.

5. The amendments do not impose any additional burden to IEBC as they only seek to simplify and ease the management of elections while providing clarity in case there are challenges.

6. The Supreme Court Ruling in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eklr* was the first opportunity to test the efficacy of the negotiated law that followed the recommendations of the Joint Parliamentary Select Committee on the Matters of the Independent Electoral and Boundaries Commission

7. In as much as global best practice does not favour making changes to election laws so close to an election, the unique circumstances in Kenya, where an election has been nullified because of process with reference to result, makes it necessary for these amendments to be undertaken in priority.

Proposed amendment	**Current status**	**Justification for amendment**
IEBC Act, Section 6 and the Second Schedule	- Chairperson must be a lawyer of 15 years standing - There is currently no other lawyer in the commission - In the absence of the Chairperson for any reason, no other Commissioner can act as returning officer for the presidential election - Quorum is set at five members	- The amendment proposes that other professionals including lawyers can be appointed chairperson of the IEBC - It removes the risk of paralysis by allowing the Vice Chair or in the absence of both Chair and Vice, for a Commissioner to Act as chair in line with good corporate governance principles on succession. - Amends quorum to ½ of the commissioners present (rounding off to 4) but no less than 3. It ensures that at any point that the numbers are less than the prescribed number, there shall always be a quorum of ½ of the members present, but in any event never less than three. - The amendment ensures that the decisions of the commission are unanimous to avoid the risk of internal dissonance

Election Act, Section 29	- Provides for nomination of presidential candidates to be undertaken by members of the candidate's political party. - Provides that nomination for independent presidential election candidates should be by persons who are not members of any political party.	- Amendment seeks to implement the constitutional court's directive that found the provision of section 29 unconstitutional following the case of ***Peter Solomon Gichira v Independent Electoral and Boundaries Commission & another [2017] eKLR.*** The court had found the restriction in section 29 was unconstitutional and at para. 98 declared: 1. ***...That to the extent that Section 29(1) of the Elections Act No. 37 of 2016 requires the persons who nominate a presidential candidate to be members of the candidate's political party, the section contravenes Articles 27(2) and (4) and Article 137(1)(d) of the Constitution of Kenya and is therefore null and void to the extent of the said inconsistency.*** 2. ***...That to the extent that Section 29(2) of the Elections Act No. 37 of 2016 requires the persons who nominate an independent presidential candidate shall not be members of any political party, the section contravenes Articles 27(2) and (4) and Article 137(1)(d) of the Constitution of Kenya and is therefore null and void to the extent of the said inconsistency.***
Election Act, Section 39(1)(C)	- Provides for only electronic transmission of results of the presidential election - Does not allow for a failsafe mechanism in the event of failure to have electronic transmission	- Provides for both electronic and manual transmission of results. Allows for the putting in place of a complementary mechanism that will facilitate verification of results, but also provides a failsafe mechanism in the event of failure of the electronic system - Establishes and clarifies the complementary system of transmission of presidential election results in line with Supreme Court recommendation - The amendment confirms that in the event there is a discrepancy between the electronically transmitted and manually transmitted results, the manually transmitted results shall prevail. This assures that the electronically transmitted information is verifiable through a comparison with the manual documentation as part of the

		accountability circle. Further, it elevates the place of the manual documentation which is a reflection of the manual vote of which the election is based. - The amendment ensures that any failure to transmit or publish the election results in an electronic format shall not invalidate the result as announced and declared by the respective presiding and returning officers at the polling station and constituency tallying centre, respectively. This ensures that the sanctity of the vote is protected, and that a failure to transmit the information does not invalidate the voter's will as expressed in the ballot. - The amendment provides for the Commission's publication of information through livestreaming of results as announced, but which results as published are not to deemed as the basis for declaration. This provision facilitates transparency, by ensuring that the information from the very basic polling station: i. Can be tracked as being correctly reflected by the voters in each polling station ii. Allows the National Tallying Center, observers, media and the public to keep track of the announcements and tallies at each step of verification iii. Reduces the public anxiety of waiting for the collated results iv. Enhances the overall integrity of the process
Elections Act Section 44	- Establishes an integrated electronic electoral system for biometric voter registration, electronic voter identification and electronic transmission of results. - Provides for the Commission to develop a policy on the progressive use of technology in the	- The amendment does not alter the provisic in subsection 44(1), (2), (3) and (4). Consequently, the Act retains the integrated electronic electoral system as is; retains the requirement for a policy on technology; retains the requirement for procurement of the technology as provided. - Deletes subsection (5) and (6) which unnecessarily repeats provisions on regulations, which are already anticipated in section 109 of the Act. It however does not repeal the already existing technology

	electoral process. - Requires the Commission to procure the technology at least one hundred and twenty days before the election - Requires the Commission to make a wide array of regulations for the technology - Establishes a technical committee to oversee the adoption of technology in the electoral process and implement the use of such technology.	regulations which will be deemed regulations under section 109 - Deletes subsection (7) whose application is redundant as the first elections under the section have already been held - Deletes subsection (8) which had established the Elections Technology Committee which was declared unconstitutional by the High Court in ***Kenneth Otieno v Attorney General & another [2017] eKLR*** in which the court declared that "...***We find and do hereby declare that section 44(8) of the Elections Act, 2011, that provides for the establishment of a technical committee comprising relevant agencies, institutions or stakeholders as IEBC may consider necessary to oversee the adoption and implementation of technology in the electoral process, violates Articles 88 and 249(2) of the Constitution, and is therefore unconstitutional.***"
Elections Act, Section 83	Provides that invalidation can be either due to qualitative errors OR quantitative errors (Section 83 - No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law **OR** that the non-compliance did not affect the result of the election)	- Amendment proposes to replace the word **"OR"** with **"AND"** - Creates harmony in the interpretation of Section 83 so that any election court is clearly guided on the considerations to apply when seeking to invalidate an election i.e. both qualitative and quantitative considerations - Ensures that technical considerations do not override the substance of the vote (upholds will of the people) - It requires invalidation of an election to be on the basis of an assessment of the totality of all the electoral processes including registration, voting, counting, tallying, transmission and announcement – and not one of the eight or so processes. - Introduces a re-emphasis of the current provision of section 72 of the Interpretation and General Provisions Act, that ***"a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead".***
Section 86A	New provision	- Gives effect to Art. 138(1)

		- Addresses uncertainty of conducting a fresh election - Defines who the candidates in a fresh election will be in line with SCOK 2013 decision - Defines the mechanisms for managing a fresh election
Election Offences Act		- Enhances the penalties for wilful or deliberate failure to sign election documents, or falsifies election documents by a presiding or returning officer to five years - Specifies with clarity critical election offences committed by presiding and returning officers - Raises the profile/criticality of the role played by presiding and returning officers - Proposes the deletion of the restriction on government advertising in line with Art. 35 on Access to Information

Prophet Paul Mwanga

Chairman

Received
4/10/2017

28

National Youth Council

Nairobi Branch

Chalbi Drive, Lavington, Nairobi
P.O.BOX 57774-00200
Tel: 0705227255
Email: nairobibranchnyc@gmail.com

Mr. Michael Sialai,
Clerk
National Assembly
Parliament of the Republic of Kenya
1st Floor, Main Parliament Buildings
P.O Box 41842-00100
NAIROBI

2nd October, 2017

Dear Sir,

MEMORANDUM ON THE ELECTION LAWS (AMENDMENT) BILL 2017

The National Youth Council is established pursuant to Section 3(1) of the National Youth Council Act No. 10 of 2009 with the mandate of *inter alia* acting as a voice and bridge to ensure that the Government and other policy makers are kept informed of the views and aspirations of the youth.

The Council has 64,956 Delegates across all the 47 counties of the country.

The purpose of this Memorandum is to present our comments and views to Parliament pursuant to its recently published advert calling for memoranda on the Election Laws (Amendment) Bill 2017.

1. GENERAL VIEWS AND COMMENTS

- **The Sanctity of Parliament**

The Council appreciates and acknowledges that the need to amend the election laws has arisen due to great contestation relating to our electoral system and against the reform and compliance questions that arose from the recent Supreme Court Ruling.

It rightfully behooves Parliament to keep the daily occurrences in the Republic of Kenya under constant review and take such legislative and oversight action as is necessary and mandated under our Constitution to safeguard the sovereignty of the Republic as well as ensure the continued respect of the will of the people. Indeed, Article 94(5) of the Constitution of Kenya directs that *"no person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation"*.

As a representative of youths that bear the brunt of violence, the Council rejects attempts to delegitimize the authority of Parliament as well as the use of violence and other extra-constitutional means to determine the course of this country.

- **Technology has failed the Constitutional test**

In the run up to the 2013 and the 2017 elections, technology was presented to the country as the panacea to our result transmission challenges. It was packaged as the sole answer for an electoral system that was simple, accurate, verifiable, secure, accountable and transparent.

However, political propaganda and the recent Supreme Court ruling have proved beyond peradventure that the deployment of technology is nothing close to what it was purported to be. The shenanigans and noise surrounding the electronic transmission of results has led us to conclude that the system is opaque, unsecure and needlessly complex to the ordinary *mwananchi*.

It is on this account that the Council supports the broad objective of granting manual transmission of results same prominence as electronic transmission with the attendant criminalization of the tampering or willful incompletion of the manual result transmission forms. It is the Council's view that unlike electronic systems which call upon advanced expertise to secure and verify, manual transmission meets the test of simplicity in transmission and verification.

- **The Cost- Benefit analysis of Technology does not favor Kenyan Youth**

The country has spent billions of shillings acquiring and maintaining technology for the purpose of transmitting results. It is however evident that the technology has clearly not benefitted the country as had been envisaged. Instead of election related standoffs and disputes subsiding, the country is now witnessing an upsurge of technology related disputes as well as technology related monikers such as *"computer generated leaders"* and *"vifaranga vya kompyuta"*.

Had the billions of shillings been otherwise spent on youth related initiatives and Programmes such as combating unemployment, the benefits would have been far more tangible for our Kenyan youth regardless of political affiliation.

2. SPECIFIC VIEWS AND COMMENTS

2.1. Amendments to the IEBC Act No 9 of 2011

- *Amendment to Section 2 of No 9 of 2011*

The Chairperson of the IEBC is the official returning officer for presidential elections pursuant to *Article 138 (10 of the Constitution and 39 (D) of the Elections Act*. As such, only the Chairperson may declare the final results in a Presidential election.

Article 259 (3b) of the Constitution provides:

> *"any reference in this Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time;*

This provision of the Constitution contemplates the role of a person acting in State or Public offices. It is noteworthy that the Chairperson of the IEBC is a State Officer within the meaning of *Article 260 of the Constitution.*

Should there be a vacancy in the office of the Chairperson of the IEBC, the law as it is currently does not provide any mechanism regarding who would act/perform the above unique role of the Chairperson before a new Chairperson is appointed. It is also noteworthy that the process of appointment of a Chairperson of any Commission isn't straightforward and such a lacuna especially during an election period that must conclude in now less than 60 days would throw the country into an unprecedented crisis. **The law should always mitigate such potential crisis.**

Authority assigned to a State officer under ***Article 73 of the Constitution*** is a public trust to be exercised in a way that is consistent with the objects and principles of the Constitution and demonstrates respect for the people of Kenya. ***Good governance*** is one of the key National Values and Principles that guide all public and state officers in Kenya.

Having an effective succession plan may be termed as one of the main principles of good governance not just for independent Commissions such as the IEBC but also any statutory body, institution or organization within the Republic of Kenya.

Parliament is duly mandated by the Constitution under ***Article 94(3) and (4)*** to consider and make amendments to the Constitution as well as make laws. The National Assembly under *Article 95 (5) (c)* exercises oversight of State Organs. In exercising this oversight, the National Assembly is then expected by law to ensure that State organs operate within the Provisions of the aforementioned Articles 10, 73 and 259 of the Constitution.

Section 45 Interpretation and General Provisions Act provides that:

> *"the powers and duties of holder of office where a written law confers a duty on the holder of office as such, unless a contrary intention appears, the power may be exercised and the duty performed by the person for the time being holding that office."*

The import of this Section then covers the role of the Vice Chairperson of IEBC in the event that s/he succeeds the Chairperson and holds such office as is covered in the proposed amendment. The Council finds nothing unconstitutional about it

- *Amendment to Section 6 of No 9 of 2011*

The intentions behind the amendments to this Section are the same as the ones above. It is important to add however that the requirement for the Chairperson of the IEBC to be a person who is qualified to hold the office of judge of the Supreme Court under the Constitution has been amended to include diversity in terms of professional qualifications. The person contemplated in the amendment for Chairperson requires at 15 years' experience in seven diverse backgrounds amongst other qualifications. Parliament in exercise of its roles is tasked with promoting inclusiveness, equity, equality. Creating diversity in qualifications for public officers such as the office of the IEBC Chairperson may be seen as one of the ways Parliament effectively exercises this function. Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty *(Article 94 (4) of the Constitution).*

It is instructive to note that *Article 250(2) (a) of the Constitution* leaves the matter of qualifications of the Chairperson of the IEBC wholly under the hands of the IEBC Act

- *Amendment of the Second Schedule to No. 9 of 2011*

The quorum for the conduct of business at a meeting of the IEBC shall be at least five members of the IEBC as per the current provision. *Article 250 (1) of the Constitution* provides that each commission shall consist of at least three, but not more than nine, members In this case, the requirement under the current law that the quorum for conduct of business be five members of the IEBC is ill thought out. The assumption that the IEBC will always have the Constitutional maximum of nine members is flawed and lacks basis In the event that there are less than nine IEBC Commissioners in total in future or even where for reasons unknown the IEBC may not reach the number of five then IEBC's operations would be crippled.

This is a clear contravention of the will of the people of Kenya who have a right to exercise their political rights as under *Article 38* and particularly that of universal suffrage and free expression of will of the electors. It is important to appreciate the unique role of the IEBC in conducting or supervising referenda and elections under *Article 88 of the Constitution.*

A failure of the IEBC to make decisions, hold meetings, pass resolutions etc due to this unreasonable quorum demands is in clear contravention of the Constitution and an obstacle in the furtherance of the people's will and Constitutional rights. Parliament must then enact legislation to cure such defects as mandated more so noting that the people of Kenya may

exercise their sovereign power either directly or through their democratically elected representatives (*Article 2 of the Constitution).*

2.2. Amendments to the Elections Act No 24 of 2011

- *Amendment of Sections 39, 44 and deletion of 44A of No. 24 of 2011*

Due to confusion as to IEBC's exact mandate under the above provisions, there was a lot of litigation on these issues before the general election.

The Court of Appeal in the case of ***Independent Electoral & Boundaries Commission v MainaKiai, Khelef Khalifa, Tirop Kitur,Attorney-General, Katiba Institute& Coalition for Reforms & Democracy [2017] eKLR,*** declared the law to be as follows:

> *"It cannot be denied that the Chairperson of the appellant has a significant constitutional role under Sub-Article (10) of Article 138 as the authority with the ultimate mandate of making the declaration that brings to finality the presidential election process. Of course before he makes that declaration his role is to accurately tally all the results exactly as received from the 290 returning officers country-wide, without adding, subtracting, multiplying or dividing any number contained in the two forms from the constituency tallying center. If any verification or confirmation is anticipated, it has to relate only to confirmation and verification that the candidate to be declared elected president has met the threshold set under Article 138(4), by receiving more than half of all the votes cast in that election; and at least twenty- five per cent of the votes cast in each of more than half of the counties."*

As contrasted with the above, the findings at Paragraph 293 of the Majority judgment in ***Raila Odinga and Another vs IEBC and 2 others [2017]*** the Supreme Court stated that: *"We have already held that we find little or nothing in this decision to suggest that, by deciding the way it did, the Appellate court restrained or barred the 1st Respondent from verifying the results before declaring them, or that it was relieving the former the statutory duty of electronically transmitting the results. What the 2nd Respondent was barred from doing by the Court of appeal and High Court was to vary, alter or change the results relayed to the National Tallying Centre from the polling stations and constituency".*
From a reading of the above paragraph of the Supreme Court's Judgment, it is clear that the IEBC is supposed to verify results before releasing them and also electronically transmit them. Electronic results are generated from a manual form. Parliament seeks to then ensure that the IEBC, in the transmission of presidential election results, transmits both the manual and electronic results to ensure accuracy as it required by the law and also by the Supreme Court standard.

The position taken by Parliament in the proposed amendment is in line with the opinion of Justice Njoki Ndungu in her dissenting opinion in the *Raila Odinga 2017 case* under paragraph 161 where she states:

> *"Article 39(1C) mandates that for purposes of a presidential election, the Commission shall electronically transmit, in the prescribed form, the tabulated results of an*

election for the President from a polling station to the Constituency tallying centre. Technology however, per Section 44, is used SUBJECT to the provisions of the entire section, meaning, that there are prerequisites to be met, before technology can be employed. Parliament was keen to introduce conditions preceding the use of technology in elections."

Further, the Court of Appeal No. 258 of 2017 in ***National Super Alliance (NASA) Kenya vs Independent Electoral and Boundaries Commission, The Attorney General & Jubilee Party of Kenya***: The appeal arose from a petition filed by NASA in the High Court seeking orders that would essentially repeal *Section 44A of the Elections Act* which makes provision for a complementary mechanism. The essence of the decision is set out at paragraphs 22, 23 and 27 of the judgment which is set out hereunder in extensu:

"[22] In our considered view, the High Court judges properly appreciated the meaning of Section 44A when they posited as follows at paragraph 80-82 of the impugned Judgment:

> *"80.A plain interpretation of section 44A shows that the legislature intended the establishment of a mechanism that is complementary to the one set out in section 44 of the Act. The system under section 44 is an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results. It places emphasis on the use of technology.*
>
> *81.In the Concise Oxford English Dictionary, Oxford University Press, 12thEdition 2011, the word Complementary "Means forming a complement or addition... combining in such a way as to form a complete whole or enhance each other" while complement means "a thing that contributes extra features to something else so as to enhance to improve it..." that being the plain and literal meaning of the word complementary, our view is that section 44A of the Act presupposes a mechanism that will compliment, add enhance or improve the mechanism already set out in section 44 of the Act.*
>
> *82. It follows therefore that the complimentary mechanism in section 44 A need not be similar, same, akin or parallel to the one set out in section 44 of the Act. All that is required for that mechanism is that it should add to or improve the electronic mechanism in section 44 of the Act. But at the same time, be simple accurate, verifiable, secure, accountable and transparent. It should allow the citizens to fully exercise their political rights under Article 38 of the Constitution. This complimentary mechanism only sets in when the integrated electronic system fails"*

[23]Counsel for the appellant urged us to consider the Hansard report on the detailed debate on the amendment of section 44 A which in his view envisaged an electronic backup and not a manual register which in his view was alternative and not complimentary. To us, the plain and literal meaning of a complimentary mechanism which was envisaged was a system that would ensure no eligible voter who is registered was left out of voting because the voters biometrics could not be identified

or the results could not be transmitted because of an electronic failure of a system as enshrined in Article 38 (2 and (3) of the Constitution. It is common ground that even the best technology can fail; it was also admitted that in the conduct of the 2013 general elections it largely failed; it can also be interfered with through criminal and human elements; for these reasons we sought to know, from counsel for the appellant what would happen if technology failed in the process of voter identification and result transmission and it resulted to some voters being disenfranchised. Sadly, counsel did not provide a solution that would be in line with the provisions of Article 83(3) which provides:

> *"Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny an eligible citizen the right to vote or stand for election"*

[27]Moving away from the experiences of the 2013 general election and in order to improve on electoral process, the Legislature directed under Section 44A of the Elections Act, that IEBC do develop a 'complementary mechanism'. This came in the form of the enactment of Regulations 69, 82 and 83 so as to operationalize the provisions of the said section 44A which in turn is supposed to give full effect to the provisions of Article 38 (2) (3) and 81, 86(a) and 87 (1) of the constitution. There was no allegation that the complementary procedure in the aforesaid regulations contradicted the provisions of the Constitution. Therefore, just like the learned trial judges of the High Court, we dispose of the grounds of appeal challenging the provisions of the aforesaid regulations as a non- starter as the greatest danger lies in withdrawing those regulations that are supposed to back electronic voter identification and result transmission and thereby leaving IEBC with no alternative fall back system of ensuring the dictates of the Constitution are fulfilled in the charge of its mandate. In so doing, we underscore the fact that the IEBC has a constitutional duty of balancing all the rights and ensuring all voters, especially those whose biometrics are not be picked by KIEMS are accorded an opportunity to vote if they are genuinely registered voters who can be traced from the register of voters and who can be identified by their identification card or passport."

The amendment to Section 44 seeks to bring clarity and uphold the provisions of *Section 44 (3)* that technology used must be simple, accurate, verifiable, secure, accountable and transparent. The citizenry's fundamental political rights under *Article 38* are encapsulated in the principles of free and fair elections in *Article 81(e)* and IEBC's obligation to conduct elections in a simple, accurate, verifiable, secure, and accountable and transparent manner as stated in *Article 86 of the Constitution.*

The majority decision in *Raila Odinga 2017* stated:

> [392] *Having taken note of Mr. Nyamodi's submissions, which appeared to suggest that IEBC had put in place a complimentary system for the transmission of results; a system that was neither simple nor known to the petitioners, we hereby direct that in conducting the fresh election IEBC must put in place a complementary system that accords with the provisions of Section 44(A) of the Elections Act. It goes without saying that such a system as held by the High Court, in the case of the National Super*

Alliance (NASA) Kenya v. The Independent Electoral and Boundaries Commission & 2 Others, only comes into play when technology fails.

Through the amendment to Section **44A**, Parliament seeks to ensure that the IEBC complies with the Court's findings by putting in place a complementary system for identification of voters that is simple, accurate, verifiable, secure, and accountable and transparent in line with simple, accurate, verifiable, secure, and accountable and transparent *Article 38 of the Constitution.*

- *Amendment of Section 83 of No 24 of 2011*

The Majority Judgment of the Supreme Court (*Raila Odinga 2017*) pronounced itself as hereunder regarding *Section 83 of the Elections Act of 2011*. In fact, it termed this as (its) the final pronouncement regarding the import of said provision.

> *[386] Regarding prayer (h), the evidence before us cannot lead to a certain and firm decision regarding the specific number of votes affected by the irregularities and illegalities and it is our position that a concise reading of Section 83 of the Elections Act would show that the results of the election need not be an issue where the principles of the Constitution and electoral law have been violated in the manner that we have shown above. Prayer (h) to the extent that it refers to votes to be struck off cannot therefore be allowed.*
>
> *[385] Regarding prayer (i), we have shown beyond peradventure that In this judgment, we have settled the law as regards Section 83 of the Elections Act, and its applicability to a presidential election. We have shown that contrary to popular view, the results of an election in terms of numbers can be overturned if a petitioner can prove that the election was not conducted in compliance with the principles laid down in the Constitution and the applicable electoral law. Never has the word 'OR' been given such a powerful meaning. Why did we do that?*
>
> *[390] We did so because as Judges we have taken an oath (as advocates first and as Judges later). In the two oaths, the fundamental words are fidelity to the Constitution without fear or favour. The constitutional principles that we have upheld in this judgment were embedded and became a critical part of our electoral law. The Legislature in its wisdom chose the words in Section 83 of the Elections Act and in keeping to our oath, we cannot, to placate any side of the political divide, alter, amend, read into or in any way affect the meaning to be attributed to that Section.*

The Supreme Court acknowledged that indeed, the mandate to make laws in Kenya lies with Parliament. As such, Parliament as provided for under *Articles 95 and 96 of the Constitution* should make laws to not only reflect the will of the people but in exercise of their sovereign power.

This amendment to Section 83 is legal and seeks to bring further clarity to the provision. A provision such as Section 83 is and has been at the heart of election disputes in Kenya since

2013. **It is therefore paramount that it is clear, unambiguous and most importantly accurate as to the intention that Parliament had when initially enacting it.**

- *Insertion of Section 83 (2)*

This seeks to introduce the provision of **Section 72 of the Interpretation and General Provisions Act (Cap 2)** which states as follows:

> *"Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead."*

The issue of electoral forms was the subject of litigation at the Supreme Court where the Court found itself in a rather awkward situation as it was forced to determine on validity and intention behind electoral forms. Parliament in exercise of its legislative function under ***Article 94 and 95 of the Constitution*** seeks to render clarity of the same through this amendment. Section 72 is not a new/strange provision/amendment as it has been the existing position in Kenyan law under Cap 2.

Further, this amendment is bolstered by the provisions of ***Section 26 of the Statutory Instruments Act, 2013*** **which states as follows:**

> *" (1) Where an enabling legislation confers power on any person to prescribe any form, then unless that person prescribes such form, any form approved for the purpose by that person may be used.*
>
> *(2) Where any form has been prescribed by or under any legislation, a document or statutory instrument which purports to be in such form shall not be void by reason of any deviation there from which does not affect the substance thereof or which is not calculated to mislead.*

In addition, the Constitution itself sets the tone that substance is to take precedence over technicalities and form at ***Articles 23 (3) (b) and (c) and Article 159(2)(d)*** which respectively state as follows:

> **"Articles 22 (3) (b) and (c)** *The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—*
>
> *(b) Formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;*
>
> *(d) The court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; "*
>
> *"Article 159(2) (d) 2) in exercising judicial authority, the courts and tribunals shall be guided by the following principles—*

(d) Justice shall be administered without undue regard to procedural technicalities"

At paragraph 403 of the Majority decision, the Court highlights the fact there wasn't sufficient time to conduct a proper scrutiny or re-count of votes due to tight constitutional timelines. We set out the said paragraph in full

> [483] *One other peripheral but important matter requires our attention; the timeframe for hearing and determining a presidential election petition in Kenya. The Court is able to bear all manner of criticisms but one would be extremely unfair; alleged inability to deliver on time. Where is that time? Between the decision in the 2013 Raila Odinga case and the present petition, it was a matter of agreement across Kenya that 14 days is not enough for parties and the Court to fully deliver on their respective mandates not because they cannot (in fact they all have) but because there may be the need to conduct exercises such as a recount of votes or scrutiny which require substantial amounts of time. Yet the Legislature ignored pleas to rethink the timeframe. It is time they did so. The reasons for doing so are obvious and need no extrapolation here.*

It is our view that the above amendments seek to make the work of the Supreme Court easier in its delivery of justice given the rigid time frames in determination of presidential petitions

- *Insertion of new Section 86A of 2011*

The Constitution of Kenya provides that a fresh election shall be held within sixty days after the determination *(Article 140 (3))* invalidating a presidential election. Following the invalidation of the Presidential election, there has been a lacuna regarding procedure to be followed by the IEBC in organizing a fresh election after such invalidation. We hold the view that Parliament is therefore by law as stated before mandated to make laws to fill such lacunas.

Further, *Article 82 (1) (d)* provides that Parliament shall enact legislation to provide for the conduct of elections and referenda..." This new amendment aims to cure this lacuna which had not been previously contemplated in the Elections Act. The import of this amendment is to ensure that he Kenyan people are able to exercise their right to vote as envisaged in the Constitution which right cannot and should not be contravened by failure by Parliament to make laws or by any purported administrative gaps or lapses by the IEBC.

2.3. Amendments to the Elections Offences Act No. 37 of 2016

- *Insertion of new Section in No. 37 of 2016*

In its findings, the Majority judgment in *Raila Odinga 2017* found that a number of forms 34A, 34B and 34C had not been signed by returning officers This was one of the reasons in the Supreme Court's judgment for the invalidation of the presidential election based on irregularities by the IEBC and that compromised the integrity of the elections Paragraph 377 states:

> *"[377] Form 34C, which was the instrument in which the final result was recorded and declared to the public, was itself not free from doubts of authenticity. This Form, as crucial as it was, bore neither a watermark, nor serial number. It was instead certified as being a true copy of the original. Of the 4,229 Forms 34A that were scrutinized, many were not stamped, yet others, were unsigned by the presiding officers, and still many more were photocopies. 5 of the Forms 34B were not signed by the returning officers. Why would a returning officer, or for that matter a presiding officer, fail or neglect to append his signature to a document whose contents, he/she has generated? Isn't the appending of a signature to a form bearing the tabulated results, the last solemn act of assurance to the voter by such officer, that he stands by the "numbers" on that form?"*

With the Supreme Court making signing of forms an issue in gauging whether the IEBC conducted the elections in a manner than safeguarded its integrity in future; it is paramount that this amendment is made. Returning Officers in their work are agents of the IEBC and must therefore be above board as the new standard set by the Court. They are therefore by extension answerable to the Kenyan people in ensuring that they uphold their right to universal suffrage. This amendment seek to tame errant returning officers and cure mischief exercised where some may refuse to sign forms willingly and therefore sabotage the entire election. In the exercise of its mandate as agents of the IEBC, they must therefore be held to the same high standards.

The Constitution also envisages a voting to be transparent *(Article 82 (2))* and this requirement must extend to all staff and agents of the IEBC. *Article 86* also encapsulates the role of the IEBC to ensure *inter alia* that:

> ***c) The results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.***

This amendment will surely capture the will of the drafters of the Constitution, Supreme Court and Kenyan people regarding electoral malpractices.

For further information please contact us at:
National Youth Council
Nairobi Branch
Chalbi Drive, Lavington, Nairobi
P.O.BOX 57774-00200
Tel: 0705227255

Yours faithfully,

EDWARD GITHAIGA MUITO
NATIONAL YOUTH COUNCIL, NAIROBI BRANCH

The Kenya Inter-Religious Aids Consortium (KIRAC)

EASTLIEGH SECTION III, 17TH STREET, P. O. BOX 17528-00500, NAIROBI
TEL: 020 244 1824, CELL: 0733 976 634 0722234072

Received 4/10/2017

28

Election Laws Amendment Bills

Background:

The Jubilee party has introduced a bill in Parliament that seeks to amend a few sections of Kenya's electoral law to fill in a lacuna, align the law to emerging issues around the fresh presidential election and address issues raised by the Supreme Court judgement in its nullification of the presidential election. Our review of the amendment bill reveals the attempt by parliament to secure without fail the holding of the election on 26th October 2017.

We wish to submit as follows:

1. Parliament's role in amending law is a constitutional mandate. Its role is not fettered as regards timing and neither does Parliament require any authorization to amend laws.
    a. It is to be noted that some of the opposition rank challenging the current process of amending the law had no qualms about doing the same in early 2017, when they not only overhauled the entire constitution of commissioners of the IEBC,
    but introduced a new raft of laws and requirements with strict timelines for the conduct of the general elections of 8th August 2017.
    b. Further the same opposition occasioned additional changes to the laws through filing a plethora of legal cases, with the last and most impactful on the law/procedure being the Maina Kiai case whose judgement was delivered 3 weeks to the election.
2. Parliament's current actions are based on the Supreme Courts' observations of the 2017 General Election, and the recommendations in both the majority and dissenting opinions on the need to ensure that there is clarity, simplicity and verifiability in the process of transmission of presidential election results.
    a. The Supreme Court (SCOK) was particular that IEBC needed to define the complementary system envisioned in section 44A, and elaborate exactly how it is to work.
    b. Parliament has also found it necessary to define in exact terms the intention of section 83 of the Elections Act, so as not to leave the same open to misinterpretation. It is to be noted that the same SCOK has since 2013 and in all other cases that came before it, interpreted section 83 to the effect that invalidation of an election cannot be undertaken purely on qualitative considerations. However, in the 2017 petition, the SCOK decided to alter the meaning of the same section to argue the very opposite. The amendment seeks to cure this by defining without a doubt the meaning of section 83 as intended.

3. Parliament is properly constituted for the purpose of enacting the bill as proposed. The fact that the house has a majority of Jubilee members and affiliate parties is not illegal. It

is a reflection of the people's will and their endorsement of the Jubilee agenda. No member of NASA has refused to be sworn in, resigned, or refused to take a salary.

4. There is nothing unconstitutional or retrogressive about the bills. It does not take away any rights or freedoms. The provisions of the amendment are self-executing. No regulations are necessary.

5. The amendments do not impose any additional burden to IEBC as they only seek to simplify and ease the management of elections while providing clarity in case there are challenges.

6. The Supreme Court Ruling in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eklr* was the first opportunity to test the efficacy of the negotiated law that followed the recommendations of the Joint Parliamentary Select Committee on the Matters of the Independent Electoral and Boundaries Commission.

7. In as much as global best practice does not favour making changes to election laws so close to an election, the unique circumstances in Kenya, where an election has been nullified because of process with reference to result, makes it necessary for these amendments to be undertaken in priority.

Proposed amendment	**Current status**	**Justification for amendment**
IEBC Act, Section 6 and the Second Schedule	- Chairperson must be a lawyer of 15 years standing - There is currently no other lawyer in the commission - In the absence of the Chairperson for any reason, no other Commissioner can act as returning officer for the presidential election - Quorum is set at five members	- The amendment proposes that other professionals including lawyers can be appointed chairperson of the IEBC - It removes the risk of paralysis by allowing the Vice Chair or in the absence of both Chair and Vice, for a Commissioner to Act as chair in line with good corporate governance principles on succession. - Amends quorum to ½ of the commissioners present (rounding off to 4) but no less than 3. It ensures that at any point that the numbers are less than the prescribed number, there shall always be a quorum of ½ of the members present, but in any event never less than three. - The amendment ensures that the decisions of the commission are unanimous to avoid the risk of internal dissonance

Election Act, Section 29	- Provides for nomination of presidential candidates to be undertaken by members of the candidate's political party. - Provides that nomination for independent presidential election candidates should be by persons who are not members of any political party.	- Amendment seeks to implement the constitutional court's directive that found the provision of section 29 unconstitutional following the case of ***Peter Solomon Gichira v Independent Electoral and Boundaries Commission & another [2017] eKLR.*** The court had found the restriction in section 29 was unconstitutional and at para. 98 declared: 1. ***...That to the extent that Section 29(1) of the Elections Act No. 37 of 2016 requires the persons who nominate a presidential candidate to be members of the candidate's political party, the section contravenes Articles 27(2) and (4) and Article 137(1)(d) of the Constitution of Kenya and is therefore null and void to the extent of the said inconsistency.*** 2. ***...That to the extent that Section 29(2) of the Elections Act No. 37 of 2016 requires the persons who nominate an independent presidential candidate shall not be members of any political party, the section contravenes Articles 27(2) and (4) and Article 137(1)(d) of the Constitution of Kenya and is therefore null and void to the extent of the said inconsistency.***
Election Act, Section 39(1)(C)	- Provides for only electronic transmission of results of the presidential election - Does not allow for a failsafe mechanism in the event of failure to have electronic transmission	- Provides for both electronic and manual transmission of results. Allows for the putting in place of a complementary mechanism that will facilitate verification of results, but also provides a failsafe mechanism in the event of failure of the electronic system - Establishes and clarifies the complementary system of transmission of presidential election results in line with Supreme Court recommendation - The amendment confirms that in the event there is a discrepancy between the electronically transmitted and manually transmitted results, the manually transmitted results shall prevail. This assures that the electronically transmitted information is verifiable through a comparison with the manual documentation as part of the

		accountability circle. Further, it elevates the place of the manual documentation which is a reflection of the manual vote of which the election is based. - The amendment ensures that any failure to transmit or publish the election results in an electronic format shall not invalidate the result as announced and declared by the respective presiding and returning officers at the polling station and constituency tallying centre, respectively. This ensures that the sanctity of the vote is protected, and that a failure to transmit the information does not invalidate the voter's will as expressed in the ballot. - The amendment provides for the Commission's publication of information through livestreaming of results as announced, but which results as published are not to be deemed as the basis for declaration. The provision facilitates transparency, by ensuring that the information from the very basic polling station: i. Can be tracked as being correctly reflected by the voters in each polling station ii. Allows the National Tallying Center, observers, media and the public to keep track of the announcements and tallies at each step of verification iii. Reduces the public anxiety of waiting for the collated results iv. Enhances the overall integrity of the process
Elections Act Section 44	- Establishes an integrated electronic electoral system for biometric voter registration, electronic voter identification and electronic transmission of results. - Provides for the Commission to develop a policy on the progressive use of technology in the	- The amendment does not alter the provisions in subsection 44(1), (2), (3) and (4). Consequently, the Act retains the integrated electronic electoral system as is; retains the requirement for a policy on technology; retains the requirement for procurement of the technology as provided. - Deletes subsection (5) and (6) which unnecessarily repeats provisions on regulations, which are already anticipated in section 109 of the Act. It however does not repeal the already existing technology

	electoral process. - Requires the Commission to procure the technology at least one hundred and twenty days before the election - Requires the Commission to make a wide array of regulations for the technology - Establishes a technical committee to oversee the adoption of technology in the electoral process and implement the use of such technology.	regulations which will be deemed regulations under section 109 - Deletes subsection (7) whose application is redundant as the first elections under the section have already been held - Deletes subsection (8) which had established the Elections Technology Committee which was declared unconstitutional by the High Court in ***Kenneth Otieno v Attorney General & another [2017] eKLR*** in which the court declared that "...***We find and do hereby declare that section 44(8) of the Elections Act, 2011, that provides for the establishment of a technical committee comprising relevant agencies, institutions or stakeholders as IEBC may consider necessary to oversee the adoption and implementation of technology in the electoral process, violates Articles 88 and 249(2) of the Constitution, and is therefore unconstitutional.***"
Elections Act, Section 83	Provides that invalidation can be either due to qualitative errors OR quantitative errors (Section 83 - No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law **OR** that the non-compliance did not affect the result of the election)	- Amendment proposes to replace the word **"OR"** with **"AND"** - Creates harmony in the interpretation of Section 83 so that any election court is clearly guided on the considerations to apply when seeking to invalidate an election i.e. both qualitative and quantitative considerations - Ensures that technical considerations do not override the substance of the vote (upholds will of the people) - It requires invalidation of an election to be on the basis of an assessment of the totality of all the electoral processes including registration, voting, counting, tallying, transmission and announcement – and not one of the eight or so processes. - Introduces a re-emphasis of the current provision of section 72 of the Interpretation and General Provisions Act, that ***"a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead".***
Section 86A	New provision	- Gives effect to Art. 138(1)

		- Addresses uncertainty of conducting a fresh election - Defines who the candidates in a fresh election will be in line with SCOK 2013 decision - Defines the mechanisms for managing a fresh election
Election Offences Act		- Enhances the penalties for wilful or deliberate failure to sign election documents, or falsifies election documents by a presiding or returning officer to five years - Specifies with clarity critical election offences committed by presiding and returning officers - Raises the profile/criticality of the role played by presiding and returning officers - Proposes the deletion of the restriction on government advertising in line with Art. 35 on Access to Information

Chairman Kirac 03/10/2017

Bishop Stephen Mutello

29

Received
4/10/2017

29

KEPSA
KENYA PRIVATE SECTOR ALLIANCE
The Voice of the Private Sector in Kenya

Memorandum to be submitted by the Kenya Private Sector Alliance (KEPSA) on the Election Laws (Amendment) Bill, 2017 to the National Assembly and Senate Select Committees on Electoral Laws, 2017 on 4th October, 2017

Part I: About KEPSA

1. KEPSA is the voice of the private sector and the apex body for the private sector associations and corporates that includes MSMEs, Multinationals, trade associations and corporates represented through different Business Membership Organizations as well as direct corporate members. Our membership reach is over 500,000 members.

2. KEPSA's mandate as the voice of private sector in Kenya is fulfilled by providing a platform for its members to engage in high-level public policy dialogue. We work closely with the government at all levels; from the counties to the national and regional levels to spearhead implementation of key reforms and strategies which are key to improving the country's doing business environment and competitiveness. We also work in partnership with other strategic partners and like-minded stakeholders with whom we share common goals, and who have a positive agenda for growth and development of business and the economy of Kenya at large.

3. Our policy dialogue agenda is built into the National Business Agenda which is aligned to Kenya's Vision 2030. The National Business Agenda has five thematic areas, among them Promoting Human Capital Development and Entrepreneurship, Infrastructure Development and Enhancing Trade and Investment. Under the Infrastructure Development thematic area, KEPSA advocates for the cascading of ICT gains for private sector development.

4/10/17

Part II: Specific Amendments

	Current Clause in the Election Laws (Amendment) Bill, 2017	Recommendation
1.	**Clause 3 (Amending Section 6 of the IEBC Act)** The Independent Electoral and Boundaries Commission Act, 2011 is amended in section 6 by— (a) Deleting subsection (1) and substituting therefor the following subsection— "A person shall be qualified for appointment as the chairperson of the Commission if the person— (a) holds a degree from a recognized university in public administration, public finance, governance, electoral management, social science or law; (b) has proven experience in any of the field specified in paragraph (a) of not less than fifteen years; (c) meets the requirements of Chapter Six of the Constitution;	In implementing this proposal, we note that there is a need to consider the mix of skills among the Commissioners needed to manage a complex process such as an election. So that whoever substitutes the chair incase the Chair is indisposed has the relevant skills as per the act on who can be a chair.
2.	**Clause 4** **(Amending the Second Schedule to the IEBC Act)**	• We propose that the quorum be at least 50 percent of all the members.

	The Independent Electoral and Boundaries Commission Act, 2011 is amended in the Second Schedule by— Deleting the word "five members of the Commission" appearing in paragraph 5 and substituting therefor the words "half of the existing members of the Commission, provided that the quorum shall not be less than three members."	• Decisions should be made by a simple majority of members present. This is in line with the principles of corporate governance.
3.	**Clause 6** **(Amending Section 39 of the Elections Act, 2011)** Section 39 of the Elections Act, 2011 is amended by— (a) Deleting subsection (1C) and substituting therefor the following new subsection— "(1C) For purposes of a presidential election, the Commission shall—' (a) Electronically and manually transmit the tabulated results of an election for the President from a polling station to the Constituency tallying centre and to the national tallying centre; (1D) Where there is a discrepancy between the electronically transmitted and manually transmitted results, the manually transmitted results shall prevail.	• These two systems need to complement each other without any superseding the other. • The key consideration is that the announcement at the constituency level should remain final.

4.	**Clause 7** **(Amending Section 44 (6) of the Elections Act, 2011)** The Elections Act, 2011 is amended in section 44 by— (a) Deleting subsection (6) *(Subsection 6:* *Notwithstanding the provisions of section 109(3) and (4), the Commission* *shall prepare and submit to Parliament, the regulations required made under* *subsection (4) within a period of thirty days from the date of commencement of* *this section.)*	• Our proposal is to align this procedure with the existing law governing subsidiary legislation.
5.	**Clause 9** **(Amending Section 83 of the Elections Act, 2011)** The Elections Act, 2011 is amended in Section 83 by— (c) inserting the following new subsection immediately after the renumbered subsection (1)— (2) Pursuant to section 72 of the Interpretations and General Provisions Act, a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the	• All the forms used in transmitting results should be official and verifiable. We therefore propose that ~~this clause be deleted~~. the forms are uniform

	requirement of that form, as long as the deviation is not calculated to mislead"	
6.	**Clause 11** **(Amending Section 6 of the Election Offences Act, 2016)** 6A. Notwithstanding any other provision in this Act or any written law, a presiding or returning officer in election, who, in relation to the prescribed document containing the results of the elections— (a) knowingly fails or refuses to sign the document; (b) knowingly fails to complete the documents; or (c) willfully submits an incomplete document; (d) willfully alters or falsifies a document commits an offence and shall be liable, upon conviction, to imprisonment for a term not exceeding five years	• The offence should be expanded to include Commissioners and any other officers with responsibility in the electoral process.
7.	**Amend Elections Act to permit media to announce elections once they are announced by the Constituency Returning Officers**	• Since the elections results are now deemed final once announced at the Constituency, media should not be restricted from announcing the same once they are declared
8.	**Elections Act** **Amendment to Section 2**	• The definition of computer system adopted is the same as that proposed in the Computer and Cybercrimes Bill, 2017 which is extensive

		and anticipates all forms of technology. • Reference to a computer system encompasses all forms of technology and provides for dynamism in the ICT sector. • The existing definition of an integrated electronic system leaves out a key component; that the system should be computer based.
9.	**New Proposal** **Elections Act** **Amendment to Section 44(1)** Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.	• This is to streamline Section 44(1) with the amendments effected in Section 2 changing the definition of integrated electronic electoral system and including the definition of computer system. (See No. 10 above). • This is also to clean up the Section to avoid repetition as the aspects of the system are captured in the definitions clause.

29

Received
4/10/2017

KEPSA MEMBERSHIP

	BUSINESS MEMBERSHIP ORGANIZATION
	African Women Agribusiness Networkwork (K)
	Agricultural Employers' Association
	Agricultural Industry Networks Limited
	Agrochemicals Association of Kenya
	American Chamber of Commerce (K) Limited
	Aquacultural Association of Kenya
	Architectural Association of Kenya
	Association of Chartered Certified Accountants
	Association of Consulting Engineers of Kenya
	Association of Gaming Operators Kenya
	Association of Insurance Brokers of Kenya
	Association of Kenya Insurers
	Association of Practitioners in Advertising
	Association of Public Relations and Communication Management Firms
	Association of Small and Medum Energy Contractors
	Automobile Association of Kenya
	British Chambers of Commerce Kenya
	Chartered Institute of Arbitrators
	Clean Cookstoves Association of Kenya
	Courier Industry Association of Kenya
	Delegation of German Industry & Commerce Kenya
	Domain Registrars Association of Kenya
	East African Tea Trade Association
	East African Venture Capital Association
	Eastern Africa Grain Council
	Environment Institute of Kenya
	Federation of Kenya Employers
	Federation of Women entrepreneur Associations
	FEWA SACCO

	Global Innovations Society of Kenya
	Institute of Certified Public Accountants of Kenya
	Institute of Certified Public Secretaries of Kenya
	Institute of Quantity Surveyors of Kenya
	Institution of Engineers of Kenya
	Institution of Surveyors of Kenya
	Intercounty Young Entrepreneurs and Professionals Association
	Kenya Agribusiness and Agroindustry Alliance
	Kenya Association of Air Operators
	Kenya Association of Independent International Schools
	Kenya Association of Manufacturers
	Kenya Association of Pharmaceutical Industry
	Kenya Association of Tour Operators
	Kenya Association of Travel Agents
	Kenya Association of Women Business Owners
	Kenya Association of Women in Tourism
	Kenya Auto Bazaar Association
	Kenya Bankers Association
	Kenya Biogas Stakeholders Network
	Kenya Biogas Stakeholders Network
	Kenya Chamber of Mines Company
	Kenya Flower Council
	Kenya Forex & Remittance Association
	Kenya Healthcare Federation
	Kenya Institute of Supplies Management
	Kenya International Freight & Warehousing Association
	Kenya IT & Outsourcing Services
	Kenya Miners Marketing Cooperative Society
	Kenya Motor Industry Association
	Kenya Motor Repairers Association
	Kenya Oil & Gas Association

	Kenya Private Schools Association
	Kenya Property Developers Association
	Kenya Renewable Energy Association
	Kenya Security Industry Association
	Kenya Ships Agents Association
	Kenya Tea Growers Association
	Kenya Water Industry Associatin
	Laikipia Farmers Association 2014
	LIWA Programme Trust
	Marketing & Social Research Association
	Marketing Society of Kenya
	Matatu Owners Association
	Matatu Welfare Association
	Micro& Small Enterprises Federation
	Motorcycle Assemblers Association of Kenya
	Music Associations Alliance of Kenya
	National Association of Private Universities in Kenya
	National Potato Council of Kenya
	Oil and Gas Contractors Association of Kenya
	Organization of Women in International Trade
	Outdoor Advertising Association (K)
	Petroleum Institute of East Africa
	Private Sector Youth Federation
	Producers' Guild of Kenya
	Protective Security Industry Association
	Pyrethrum Growers Association
	Responsible Alcohol Drinks Companies Association
	Retail Trade Association of Kenya
	Roads & Civil Engineering Consulting Association
	Safaricom Dealers Association
	Seed Trade Association of Kenya

	Shippers Council of Eastern Africa
	Social Enterprise Society of Kenya
	Society of Crop Agribusiness Advisors of Kenya (SOCAA)
	Technology Service Providers Association of Kenya
	TEEP Kenya Chapter
	Town & County Planners Association of Kenya
	United Business Association
	Wide Vision Investors and Business
	CORPORATE ORGANIZATIONS
	Accurite Diagnostics
	Actis Africa Limited
	Advantage Financial S.A.
	AEA Limited (Avery)
	Africa Practice East Africa Limited
	African Banking Corporation
	Agri Experience Limited
	AIG Kenya Limited
	Airtel Networks Kenya Limited
	Akiira Geothermal Limited
	Aldwych Africa Development Limited
	Amotech East Africa Limited
	Apec Consortium Limited
	Ascent Capital Advisory Services
	Ashleys Kenya Limited
	Astral Aviation Limited
	Atlas Copco East Africa Limited
	Avenue Group Limited
	Azuri Technologies Kenya Limited
	Bamburi Cement Limited
	Base Titanium Limited

	BAT Kenya Limited
	Bidco Africa Limited
	Bio Food Products Limited
	Biogas Power Holdings (EA) Limited
	Blackberry Investments
	Blue Nile Rolling Mills Limited
	Blue Sky Films (EPZ) Limited
	Bollore Africa Logistics (K) Limited
	Bonjour Institute
	Brands and Beyond Limited
	Bridgenet Global Consulting Limited
	Bright Vision Media Limited
	Brookside Dairy Limited
	Capricon Group Limited
	Cardno Emerging Markets EA Limited
	Centum Investment Company Limited
	CFC Stanbic Bank
	Chase Bank Limited
	Citibank N.A. Kenya
	Civicon Limited
	CMC Motors Group Limited
	Coca Cola East & Central Africa
	Control Risks East Africa Limited
	Cooper-K Brand Limited
	CPF Financial Services Limited
	Dalberg Global Development Advisors
	Davis & Shirtliff Limited
	Deacons Kenya Limited
	Deloitte Limited
	Desbro Engineering Limited
	DHL Worldwide Express (K) Limited

	Dorion Associates
	Dow Chemical East Africa
	Eagle Africa Insurance Brokers Limited
	East African Breweries Limited
	Eastern Produce Kenya Limited
	E-cart Services Kenya Limited (Jumia)
	Engen Kenya Limited
	English Press Limited
	Esri Eastern Africa Limited
	Eveready East Africa Limited
	Express Communications Company Limited
	Fairmont Hotels and Resorts Kenya
	Financial and Property Consultants Limited
	Fincom Technologies
	Flowmatics Limited
	Freight Forwarders Kenya Limited
	Frontier Investment Management Africa Limited
	Fusion Capital
	G4S Kenya Limited
	Galana Oil Kenya Limited
	GAPCO Kenya Limited
	GE East Africa Services Limited
	Gems Skills Kenya Limited
	General Motors East Africa Limited
	Genghis Capital Limited
	Geonet Communications Limited
	Gertrude Childrens Hospital
	Global Primetime Solutions Limited
	Globeleq Africa Holdings Limited
	Good Testimony Junior School
	Google Kenya Limited

	Grain Industries Limited
	Grant Thornton Consulting Limited
	Gumbo & Associates
	HACO Tiger Brands (E.A) Limited
	Harmony Sounds
	Heineken East Africa
	HEVA Fund Limited
	Hewlett Packard E.A. Limited
	HF Group
	Home Afrika Limited
	Hospitality Systems Consultants
	Human Capital Synergies Africa Limited
	I.S.C. Holdings Limited
	IBM East Africa Limited
	ikapamedia East Africa Limited
	Infinity Industrial Park Limited
	Inforparts Limited
	INIIT-Kenya
	Intercity Secure Homes Limited
	Interconsult Engineers Limited
	Interconsumer Products Limited
	International School of Advertising
	Ipsos Limited
	iWay Africa Kenya Limited
	Jamii Telecommunications Limited
	Jungle Group Holdings Limited
	K.K. Services Limited
	Kaluworks Limited
	Kenergy Renewables Limited
	Kengas Link Limited
	Kenwest Cables Limited

	Kenya Bus Service Management Limited
	Kenya Markets Trust
	Kenya Pipeline Company Limited
	Kenya Power & Lighting Company Limited
	Kenya Toner & Ink Suppliers Limited
	Kenya Tourism Federation
	Kenya Tourism Investment Company
	Kenyatta International Convention Centre
	Keroche Breweries Limited
	Kinangop Wind Park Limited
	KN Associates LLP
	KPMG Kenya
	Kroll Associates UK Limited
	KTDA Management Limited
	Kuguru Food Complex Limited
	KUSCCO Limited
	Kwale International Sugar Company Limited
	Lantech (Africa) Limited
	Lee Consruction Limited
	Liaison Group (I.B) Limited
	Liquid Telecommunications
	Longitude Finance
	Lukenya High School Limited
	Mabati Rolling Mills
	Madison Group Limited
	Maersk Kenya Limited
	Marubeni Corporation
	Mathara Holdings Limited
	Mckinsey and Company
	MEA Limited
	Media Owners Association

	Microsoft East Africa
	M-KOPA Limited
	Mobius East Africa Limited
	Monsanto Kenya Limited
	MTN Business (Kenya) Limited
	Multichoice Kenya Limited
	Mwangi & Kamwara Associates
	Nairobi Bottlers Limited
	Nairobi Securities Exchange
	Nanika Limited
	NIC Bank Limited
	Nicky Consultants Limited
	Oakar Services Limited
	OBG Company Limited
	Octagon Pension Services Limited
	Oil & Energy Services Limited
	Ol Pejeta Ranching Limited
	Olx Limited
	Omnex Trading Company Limited
	One Acre Fund
	Optiven Limited
	Oracle Corporation
	Osho Chemical Industries Limited
	Oxford Business Group
	Oxford University Press East Africa Limited
	Panari Hotel
	PDM Kenya Limited
	Pevans East Africa Limited
	Pewin Cabs Limited
	PKF Kenya
	Preferred Personnel Africa Limited

	PricewaterhouseCoopers Limited
	Prideinn Hotels & Investment Limited
	Prime Bank Limited
	Procter & Gamble Services Limited
	Quest Holdings Limited
	Questworks Limited
	Rentworks E.A. Limited
	Rescom Development Group Limited
	Resolution Health Limited
	responsAbility Africa Limited
	Riara Group of Schools
	Rift Valley Railways (Kenya) Limited
	Riverside Place Limited
	RSM Eastern Africa
	Ruthiej Platinum Events
	Safari Park Hotel & Casino
	Safaricom Limited
	Sameer Africa Limited
	SAP East Africa Limited
	Sarova Hotels Limited
	Sasini Limited
	Savannah Cement Limited
	Scania East Africa Limited
	Scion Real Estate Limited
	Senaca East Africa Limited
	Serano Africa Limited
	Seven Seas Technologies Limited
	SGS Kenya Limited
	Shop It Store Limited
	Shreeji Development Company
	Siera Trading

	Signum Company Limited
	Simba Corporation Limited
	SNC-LAVALIN
	Social Performance Advisory Limited
	Sodexo Pass International
	Sowitec Kenya Limited
	Space and Style
	Stan Consulting Group Limited
	Standard Chartered Bank
	Standard Group Limited
	Steam Plant Limited
	Stima Sacco Society Limited
	Stratostaff East Africa Limited
	Sunesis Consulting Limited
	Suraya Property Limited
	Synergy Industrial Credit Limited
	Tanolope Consultancy
	Tata Chemicals Magadi Limited
	Telkom Kenya Limited
	The Copy Cat Limited
	The Helios Group Limited
	The Nairobi Hospital
	TIFA Research Limited
	Toyota Kenya Limited
	Transcend Media Group Limited
	Transcentury Limited
	Transpower Energy Solutions Limited
	Tsusho Capital Kenya Limited
	Tullow Kenya
	Tusker Matresses Limited
	Twiga Chemical Industries Limited

	UAP Insurance Company Limited
	Uber Kenya Limited
	Ultravetis East Africa Limited
	Unilever Kenya Limited
	Vera Beauty College
	Verve K.O. Limited
	VISA International Service Association
	Vivo Energy Kenya Limited
	Wells Fargo Limited
	WildlifeDirect Kenya Limited
	Wrigley Company Limited

KEPSA MEMBERSHIP

	BUSINESS MEMBERSHIP ORGANIZATION
	African Women Agribusiness Networkwork (K)
	Agricultural Employers' Association
	Agricultural Industry Networks Limited
	Agrochemicals Association of Kenya
	American Chamber of Commerce (K) Limited
	Aquacultural Association of Kenya
	Architectural Association of Kenya
	Association of Chartered Certified Accountants
	Association of Consulting Engineers of Kenya
	Association of Gaming Operators Kenya
	Association of Insurance Brokers of Kenya
	Association of Kenya Insurers
	Association of Practitioners in Advertising
	Association of Public Relations and Communication Management Firms
	Association of Small and Medum Energy Contractors
	Automobile Association of Kenya
	British Chambers of Commerce Kenya
	Chartered Institute of Arbitrators
	Clean Cookstoves Association of Kenya
	Courier Industry Association of Kenya
	Delegation of German Industry & Commerce Kenya
	Domain Registrars Association of Kenya
	East African Tea Trade Association
	East African Venture Capital Association
	Eastern Africa Grain Council
	Environment Institute of Kenya
	Federation of Kenya Employers
	Federation of Women entrepreneur Associations
	FEWA SACCO

	Global Innovations Society of Kenya
	Institute of Certified Public Accountants of Kenya
	Institute of Certified Public Secretaries of Kenya
	Institute of Quantity Surveyors of Kenya
	Institution of Engineers of Kenya
	Institution of Surveyors of Kenya
	Intercounty Young Entrepreneurs and Professionals Association
	Kenya Agribusiness and Agroindustry Alliance
	Kenya Association of Air Operators
	Kenya Association of Independent International Schools
	Kenya Association of Manufacturers
	Kenya Association of Pharmaceutical Industry
	Kenya Association of Tour Operators
	Kenya Association of Travel Agents
	Kenya Association of Women Business Owners
	Kenya Association of Women in Tourism
	Kenya Auto Bazaar Association
	Kenya Bankers Association
	Kenya Biogas Stakeholders Network
	Kenya Biogas Stakeholders Network
	Kenya Chamber of Mines Company
	Kenya Flower Council
	Kenya Forex & Remittance Association
	Kenya Healthcare Federation
	Kenya Institute of Supplies Management
	Kenya International Freight & Warehousing Association
	Kenya IT & Outsourcing Services
	Kenya Miners Marketing Cooperative Society
	Kenya Motor Industry Association
	Kenya Motor Repairers Association
	Kenya Oil & Gas Association

	Kenya Private Schools Association
	Kenya Property Developers Association
	Kenya Renewable Energy Association
	Kenya Security Industry Association
	Kenya Ships Agents Association
	Kenya Tea Growers Association
	Kenya Water Industry Associatin
	Laikipia Farmers Association 2014
	LIWA Programme Trust
	Marketing & Social Research Association
	Marketing Society of Kenya
	Matatu Owners Association
	Matatu Welfare Association
	Micro& Small Enterprises Federation
	Motorcycle Assemblers Association of Kenya
	Music Associations Alliance of Kenya
	National Association of Private Universities in Kenya
	National Potato Council of Kenya
	Oil and Gas Contractors Association of Kenya
	Organization of Women in International Trade
	Outdoor Advertising Association (K)
	Petroleum Institute of East Africa
	Private Sector Youth Federation
	Producers' Guild of Kenya
	Protective Security Industry Association
	Pyrethrum Growers Association
	Responsible Alcohol Drinks Companies Association
	Retail Trade Association of Kenya
	Roads & Civil Engineering Consulting Association
	Safaricom Dealers Association
	Seed Trade Association of Kenya

	Shippers Council of Eastern Africa
	Social Enterprise Society of Kenya
	Society of Crop Agribusiness Advisors of Kenya (SOCAA)
	Technology Service Providers Association of Kenya
	TEEP Kenya Chapter
	Town & County Planners Association of Kenya
	United Business Association
	Wide Vision Investors and Business
	CORPORATE ORGANIZATIONS
	Accurite Diagnostics
	Actis Africa Limited
	Advantage Financial S.A.
	AEA Limited (Avery)
	Africa Practice East Africa Limited
	African Banking Corporation
	Agri Experience Limited
	AIG Kenya Limited
	Airtel Networks Kenya Limited
	Akiira Geothermal Limited
	Aldwych Africa Development Limited
	Amotech East Africa Limited
	Apec Consortium Limited
	Ascent Capital Advisory Services
	Ashleys Kenya Limited
	Astral Aviation Limited
	Atlas Copco East Africa Limited
	Avenue Group Limited
	Azuri Technologies Kenya Limited
	Bamburi Cement Limited
	Base Titanium Limited

	BAT Kenya Limited
	Bidco Africa Limited
	Bio Food Products Limited
	Biogas Power Holdings (EA) Limited
	Blackberry Investments
	Blue Nile Rolling Mills Limited
	Blue Sky Films (EPZ) Limited
	Bollore Africa Logistics (K) Limited
	Bonjour Institute
	Brands and Beyond Limited
	Bridgenet Global Consulting Limited
	Bright Vision Media Limited
	Brookside Dairy Limited
	Capricon Group Limited
	Cardno Emerging Markets EA Limited
	Centum Investment Company Limited
	CFC Stanbic Bank
	Chase Bank Limited
	Citibank N.A. Kenya
	Civicon Limited
	CMC Motors Group Limited
	Coca Cola East & Central Africa
	Control Risks East Africa Limited
	Cooper-K Brand Limited
	CPF Financial Services Limited
	Dalberg Global Development Advisors
	Davis & Shirtliff Limited
	Deacons Kenya Limited
	Deloitte Limited
	Desbro Engineering Limited
	DHL Worldwide Express (K) Limited

	Dorion Associates
	Dow Chemical East Africa
	Eagle Africa Insurance Brokers Limited
	East African Breweries Limited
	Eastern Produce Kenya Limited
	E-cart Services Kenya Limited (Jumia)
	Engen Kenya Limited
	English Press Limited
	Esri Eastern Africa Limited
	Eveready East Africa Limited
	Express Communications Company Limited
	Fairmont Hotels and Resorts Kenya
	Financial and Property Consultants Limited
	Fincom Technologies
	Flowmatics Limited
	Freight Forwarders Kenya Limited
	Frontier Investment Management Africa Limited
	Fusion Capital
	G4S Kenya Limited
	Galana Oil Kenya Limited
	GAPCO Kenya Limited
	GE East Africa Services Limited
	Gems Skills Kenya Limited
	General Motors East Africa Limited
	Genghis Capital Limited
	Geonet Communications Limited
	Gertrude Childrens Hospital
	Global Primetime Solutions Limited
	Globeleq Africa Holdings Limited
	Good Testimony Junior School
	Google Kenya Limited

	Grain Industries Limited
	Grant Thornton Consulting Limited
	Gumbo & Associates
	HACO Tiger Brands (E.A) Limited
	Harmony Sounds
	Heineken East Africa
	HEVA Fund Limited
	Hewlett Packard E.A. Limited
	HF Group
	Home Afrika Limited
	Hospitality Systems Consultants
	Human Capital Synergies Africa Limited
	I.S.C. Holdings Limited
	IBM East Africa Limited
	ikapamedia East Africa Limited
	Infinity Industrial Park Limited
	Inforparts Limited
	INIIT-Kenya
	Intercity Secure Homes Limited
	Interconsult Engineers Limited
	Interconsumer Products Limited
	International School of Advertising
	Ipsos Limited
	iWay Africa Kenya Limited
	Jamii Telecommunications Limited
	Jungle Group Holdings Limited
	K.K. Services Limited
	Kaluworks Limited
	Kenergy Renewables Limited
	Kengas Link Limited
	Kenwest Cables Limited

	Kenya Bus Service Management Limited
	Kenya Markets Trust
	Kenya Pipeline Company Limited
	Kenya Power & Lighting Company Limited
	Kenya Toner & Ink Suppliers Limited
	Kenya Tourism Federation
	Kenya Tourism Investment Company
	Kenyatta International Convention Centre
	Keroche Breweries Limited
	Kinangop Wind Park Limited
	KN Associates LLP
	KPMG Kenya
	Kroll Associates UK Limited
	KTDA Management Limited
	Kuguru Food Complex Limited
	KUSCCO Limited
	Kwale International Sugar Company Limited
	Lantech (Africa) Limited
	Lee Consruction Limited
	Liaison Group (I.B) Limited
	Liquid Telecommunications
	Longitude Finance
	Lukenya High School Limited
	Mabati Rolling Mills
	Madison Group Limited
	Maersk Kenya Limited
	Marubeni Corporation
	Mathara Holdings Limited
	Mckinsey and Company
	MEA Limited
	Media Owners Association

	Microsoft East Africa
	M-KOPA Limited
	Mobius East Africa Limited
	Monsanto Kenya Limited
	MTN Business (Kenya) Limited
	Multichoice Kenya Limited
	Mwangi & Kamwara Associates
	Nairobi Bottlers Limited
	Nairobi Securities Exchange
	Nanika Limited
	NIC Bank Limited
	Nicky Consultants Limited
	Oakar Services Limited
	OBG Company Limited
	Octagon Pension Services Limited
	Oil & Energy Services Limited
	Ol Pejeta Ranching Limited
	Olx Limited
	Omnex Trading Company Limited
	One Acre Fund
	Optiven Limited
	Oracle Corporation
	Osho Chemical Industries Limited
	Oxford Business Group
	Oxford University Press East Africa Limited
	Panari Hotel
	PDM Kenya Limited
	Pevans East Africa Limited
	Pewin Cabs Limited
	PKF Kenya
	Preferred Personnel Africa Limited

	PricewaterhouseCoopers Limited
	Prideinn Hotels & Investment Limited
	Prime Bank Limited
	Procter & Gamble Services Limited
	Quest Holdings Limited
	Questworks Limited
	Rentworks E.A. Limited
	Rescom Development Group Limited
	Resolution Health Limited
	responsAbility Africa Limited
	Riara Group of Schools
	Rift Valley Railways (Kenya) Limited
	Riverside Place Limited
	RSM Eastern Africa
	Ruthiej Platinum Events
	Safari Park Hotel & Casino
	Safaricom Limited
	Sameer Africa Limited
	SAP East Africa Limited
	Sarova Hotels Limited
	Sasini Limited
	Savannah Cement Limited
	Scania East Africa Limited
	Scion Real Estate Limited
	Senaca East Africa Limited
	Serano Africa Limited
	Seven Seas Technologies Limited
	SGS Kenya Limited
	Shop It Store Limited
	Shreeji Development Company
	Siera Trading

	Signum Company Limited
	Simba Corporation Limited
	SNC-LAVALIN
	Social Performance Advisory Limited
	Sodexo Pass International
	Sowitec Kenya Limited
	Space and Style
	Stan Consulting Group Limited
	Standard Chartered Bank
	Standard Group Limited
	Steam Plant Limited
	Stima Sacco Society Limited
	Stratostaff East Africa Limited
	Sunesis Consulting Limited
	Suraya Property Limited
	Synergy Industrial Credit Limited
	Tanolope Consultancy
	Tata Chemicals Magadi Limited
	Telkom Kenya Limited
	The Copy Cat Limited
	The Helios Group Limited
	The Nairobi Hospital
	TIFA Research Limited
	Toyota Kenya Limited
	Transcend Media Group Limited
	Transcentury Limited
	Transpower Energy Solutions Limited
	Tsusho Capital Kenya Limited
	Tullow Kenya
	Tusker Matresses Limited
	Twiga Chemical Industries Limited

	UAP Insurance Company Limited
	Uber Kenya Limited
	Ultravetis East Africa Limited
	Unilever Kenya Limited
	Vera Beauty College
	Verve K.O. Limited
	VISA International Service Association
	Vivo Energy Kenya Limited
	Wells Fargo Limited
	WildlifeDirect Kenya Limited
	Wrigley Company Limited

30

ICT AUTHORITY PRESENTATION TO THE NATIONAL ASSEMBLY COMMITTEE ON ELECTORAL LAW CHANGES

By Robert Mugo,
Ag. Chief Executive Officer

4/10/2017

4TH OCTOBER 2017
THE NATIONAL ASSEMBLY
NAIROBI

CONTENTS

1. WHO WE ARE
2. CONSIDERATIONS IN USE OF TECHNOLOGY IN ELECTIONS
3. RECOMMENDATIONS

1. WHO WE ARE

Establishment

- The Information and Communication Technology Authority is a State Corporation under the Ministry of Information Communication and Technology (MOICT), established in August 2013 through Legal Notice no. 183
- Merged the 3 previous Government ICT departments namely:
  - Government Information Technology Services (GITS) based at Treasury and established in 2003,
  - The e-Government Directorate (e-Gov) based at the Office of the President and established in 2004,
  - The Kenya ICT Board (KICTB) based in the Ministry of Information, Communications & Technology and established in 2007



Functions

1. Set and enforce ICT standards & guidelines for the human resource, infrastructure, processes and systems and technology for the public office and public service
2. Deploy and manage all ICT staff in the public service
3. Facilitate and regulate the design, implementation and use of ICTs in the public service
4. Promote ICT literacy and capacity
5. Promote e-Government services
6. Facilitate optimal electronic, electronic form, electronic record and equipment use in public service
7. Promote ICT innovation and enterprise
8. Facilitate the establishment, development & maintenance of secure ICT Infrastructure & Systems
9. Supervise the design, development and implementation of critical ICT projects across the public service



2. CONSIDERATIONS IN USE OF TECHNOLOGY IN ELECTIONS

1. HUMAN FACTORS

- For a complex system to work it requires people, processes and technology to work well individually and collectively
- The key risks to be mitigated include:
  - unavailability of key people in the entire process would impact the electoral process e.g. lack of technical support staff to resolve technology issues would delay or stall electoral processes
  - lack of basic ICT skills by electoral staff may hamper their ability to use the various election technologies e.g. inaccuracy in data entry could cause someone to key in wrong data vs manual forms



2. RELIABILITY & DEPENDABILITY OF SYSTEMS

- Reliability or dependability of a system is its ability to function under stated conditions for a specified period of time
- Reliability is reported in nines. 1 nine = 90%, 2 nines = 99%, 3 nines = 99.9%. Acquisition and maintenance price grows exponentially with nines.
- The more complex (more parts) the system and the larger the number of organizations involved in operations the lower the reliability
- The Integrated Electoral Management System is complex and involves many organizations
- Reliability of technology is dependant on external enabling factors such as electric power and physical environment (heat, humidity, etc)



IMPACT OF RELIABILITY ILLUSTRATED

40,000 Polling Station each of **500 Voters**

90% Reliability	⇨	10% failure	⇨	**4,000 Polling Stations will fail** **2.0M Voters disenfranchised**
99% Reliability	⇨	1% failure	⇨	**400 Polling Stations will fail** **200,000 Voters disenfranchised**
99.9% Reliability	⇨	0.1% failure	⇨	**40 Polling Stations will fail** **20,000 Voters disenfranchised**

ICT Authority

3. NETWORK COVERAGE

- IEBC has no network of its own and has to procure connectivity services from 3rd parties, limiting control and creating multiple vulnerabilities
- System configuration errors by a vendor could render the services to become unavailable thus affecting transmission of results. This actually happened during a by-election in Kenya
- Over 11,000 polling stations do not have 3G/4G coverage which means transmission of scanned images of forms which require sufficient speed and capacity is not possible unlike text messages which can work with the low speed and capacity of 2G networks
- In order for KIEMS kits to transmit they would need to be moved to areas where 3G/4G coverage is available or provided with an alternative high speed and capacity connection e.g. satellite which is expensive and not practical when required in the thousands let alone tens of thousands



4. CYBERSECURITY

- Cybersecurity threats on elections infrastructure and process is becoming more frequent. This was manifest in the recent USA and French elections.
- Key actors in Cyberthreats include Nation States, Terrorists, Activists and Insiders
- There exist many effective tools and techniques to ensure the security of systems therefore the mere existence of threats shouldn't prevent technology use
- Well designed and configured systems rarely get breached and when they do the impact outside of the organisation is minimal as they are ways to ensure continuity and full recovery



3. RECOMMENDATIONS



RECOMMENDATIONS

1. All measures should be put in place to ensure that the elections technology is secure, reliable and of sufficient capacity and capability to handle the required electoral functions including voter identification, results transmission and information display.
2. Given that it is impossible to guarantee 100% functioning of technology it is imperative that manual systems be deployed in parallel with technology and in the event of a glitch or failure then the manual system should be considered as final.
3. Contingency plans should be put in place to ensure that all persons involved in the electoral process are available when and where required and in the event they are not then other authorised persons can handle their functions



31

Received
4/10/2017

UNIK WOMEN SELF HELP GROUP

On the Election Laws Amendment Bill, we on behalf of other women, wish to support the amendments especially because of the following,

1. Parliament is properly constituted for the purpose of enacting the bill as proposed. The fact that the house has a majority of Jubilee members and affiliate parties is not illegal. It is a reflection of the people's will and their endorsement of the Jubilee agenda. No member of NASA has refused to be sworn in, resigned, or refused to take a salary.

2. There is nothing unconstitutional or retrogressive about the bills. It does not take away any rights or freedoms. The provisions of the amendment are self-executing. No regulations are necessary.

Received 4/10/2017

32

STEWARDS REVIVAL PENTECOSTAL CHURCH

HEADQUARTERS: Outering Road next to Outering Total Petrol Station, Pioneer Estate
P.O. Box 8550-00100 G.P.O., Nairobi. Tel: 020-8164060 0722 518166
E-mail: stewardschurch@yahoo.com

E-mail: info@stewardsrevivalpchurch.org **Website:** stewardsrevivalpchurch.org

Our Ref: SRPC/140/04/10/2017 Date: 04/10/2017

Your Ref:

Election Laws Amendment Bills

Office of the Bishop

Background:

The Jubilee party has introduced a bill in Parliament that seeks to amend a few sections of Kenya's electoral law to fill in a lacuna, align the law to emerging issues around the fresh presidential election and address issues raised by the Supreme Court judgement in its nullification of the presidential election. Our review of the amendment bill reveals the attempt by parliament to secure without fail the holding of the election on 26th October 2017.

We wish to submit as follows:

1. Parliament's role in amending law is a constitutional mandate. Its role is not fettered as regards timing and neither does Parliament require any authorization to amend laws.
    a. It is to be noted that some of the opposition rank challenging the current process of amending the law had no qualms about doing the same in early 2017, when they not only overhauled the entire constitution of commissioners of the IEBC,
    but introduced a new raft of laws and requirements with strict timelines for the conduct of the general elections of 8th August 2017.
    b. Further the same opposition occasioned additional changes to the laws through filing a plethora of legal cases, with the last and most impactful on the law/procedure being the Maina Kiai case whose judgement was delivered 3 weeks to the election.
2. Parliament's current actions are based on the Supreme Courts' observations of the 2017 General Election, and the recommendations in both the majority and dissenting opinions on the need to ensure that there is clarity, simplicity and verifiability in the process of transmission of presidential election results.
    a. The Supreme Court (SCOK) was particular that IEBC needed to define the complementary system envisioned in section 44A, and elaborate exactly how it is to work.
    b. Parliament has also found it necessary to define in exact terms the intention of section 83 of the Elections Act, so as not to leave the same open to misinterpretation. It is to be noted that the same SCOK has since 2013 and in all other cases that came before it, interpreted section 83 to the effect that invalidation of an election cannot be undertaken purely on qualitative considerations. However, in the 2017 petition, the SCOK decided to alter the meaning of the same section to argue the very opposite. The amendment seeks to cure this by defining without a doubt the meaning of section 83 as intended.

3. Parliament is properly constituted for the purpose of enacting the bill as proposed. The fact that the house has a majority of Jubilee members and affiliate parties is not illegal. It

is a reflection of the people's will and their endorsement of the Jubilee agenda No member of NASA has refused to be sworn in, resigned, or refused to take a salary

4 There is nothing unconstitutional or retrogressive about the bills It does not take away any rights or freedoms The provisions of the amendment are self-executing No regulations are necessary

5 The amendments do not impose any additional burden to IEBC as they only seek to simplify and ease the management of elections while providing clarity in case there are challenges

6 The Supreme Court Ruling in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eklr* was the first opportunity to test the efficacy of the negotiated law that followed the recommendations of the Joint Parliamentary Select Committee on the Matters of the Independent Electoral and Boundaries Commission

7 In as much as global best practice does not favour making changes to election laws so close to an election, the unique circumstances in Kenya, where an election has been nullified because of process with reference to result, makes it necessary for these amendments to be undertaken in priority

Proposed amendment	**Current status**	**Justification for amendment**
IEBC Act, Section 6 and the Second Schedule	- Chairperson must be a lawyer of 15 years standing - There is currently no other lawyer in the commission - In the absence of the Chairperson for any reason, no other Commissioner can act as returning officer for the presidential election - Quorum is set at five members	- The amendment proposes that other professionals including lawyers can be appointed chairperson of the IEBC - It removes the risk of paralysis by allowing the Vice Chair or in the absence of both Chair and Vice, for a Commissioner to Act as chair in line with good corporate governance principles on succession - Amends quorum to ½ of the commissione present (rounding off to 4) but no less than 3 It ensures that at any point that the numbers are less than the prescribed number, there shall always be a quorum of ½ of the members present, but in any event never less than three - The amendment ensures that the decisions of the commission are unanimous to avoid the risk of internal dissonance

Election Act, Section 29	- Provides for nomination of presidential candidates to be undertaken by members of the candidate's political party - Provides that nomination for independent presidential election candidates should be by persons who are not members of any political party	- Amendment seeks to implement the constitutional court's directive that found the provision of section 29 unconstitutional following the case of ***Peter Solomon Gichira v Independent Electoral and Boundaries Commission & another [2017] eKLR.*** The court had found the restriction in section 29 was unconstitutional and at para 98 declared *1.* ***...That to the extent that Section 29(1) of the Elections Act No. 37 of 2016 requires the persons who nominate a presidential candidate to be members of the candidate's political party, the section contravenes Articles 27(2) and (4) and Article 137(1)(d) of the Constitution of Kenya and is therefore null and void to the extent of the said inconsistency.*** 2 ***...That to the extent that Section 29(2) of the Elections Act No. 37 of 2016 requires the persons who nominate an independent presidential candidate shall not be members of any political party, the section contravenes Articles 27(2) and (4) and Article 137(1)(d) of the Constitution of Kenya and is therefore null and void to the extent of the said inconsistency.***
Election Act, Section 39(1)(C)	- Provides for only electronic transmission of results of the presidential election - Does not allow for a failsafe mechanism in the event of failure to have electronic transmission	- Provides for both electronic and manual transmission of results Allows for the putting in place of a complementary mechanism that will facilitate verification of results, but also provides a failsafe mechanism in the event of failure of the electronic system - Establishes and clarifies the complementary system of transmission of presidential election results in line with Supreme Court recommendation - The amendment confirms that in the event there is a discrepancy between the electronically transmitted and manually transmitted results, the manually transmitted results shall prevail. This assures that the electronically transmitted information is verifiable through a comparison with the manual documentation as part of the

		accountability circle Further, it elevates the place of the manual documentation which is a reflection of the manual vote of which the election is based - The amendment ensures that any failure to transmit or publish the election results in an electronic format shall not invalidate the result as announced and declared by the respective presiding and returning officers at the polling station and constituency tallying centre, respectively This ensures that the sanctity of the vote is protected, and that a failure to transmit the information does not invalidate the voter's will as expressed in the ballot - The amendment provides for the Commission's publication of information through livestreaming of results as announced, but which results as published are not to be deemed as the basis for declaration The provision facilitates transparency, by ensuring that the information from the very basic polling station i Can be tracked as being correctly reflected by the voters in each polling station ii Allows the National Tallying Center, observers, media and the public to keep track of the announcements and tallies at each step of verification iii Reduces the public anxiety of waiting for the collated results iv Enhances the overall integrity of the process
Elections Act Section 44	- Establishes an integrated electronic electoral system for biometric voter registration, electronic voter identification and electronic transmission of results - Provides for the Commission to develop a policy on the progressive use of technology in the	- The amendment does not alter the provisio in subsection 44(1), (2), (3) and (4,. Consequently, the Act retains the integrated electronic electoral system as is, retains the requirement for a policy on technology, retains the requirement for procurement of the technology as provided - Deletes subsection (5) and (6) which unnecessarily repeats provisions on regulations, which are already anticipated in section 109 of the Act It however does not repeal the already existing technology

	electoral process. - Requires the Commission to procure the technology at least one hundred and twenty days before the election - Requires the Commission to make a wide array of regulations for the technology - Establishes a technical committee to oversee the adoption of technology in the electoral process and implement the use of such technology.	regulations which will be deemed regulations under section 109 - Deletes subsection (7) whose application is redundant as the first elections under the section have already been held - Deletes subsection (8) which had established the Elections Technology Committee which was declared unconstitutional by the High Court in ***Kenneth Otieno v Attorney General & another [2017] eKLR*** in which the court declared that "...***We find and do hereby declare that section 44(8) of the Elections Act, 2011, that provides for the establishment of a technical committee comprising relevant agencies, institutions or stakeholders as IEBC may consider necessary to oversee the adoption and implementation of technology in the electoral process, violates Articles 88 and 249(2) of the Constitution, and is therefore unconstitutional.***"
Elections Act, Section 83	Provides that invalidation can be either due to qualitative errors OR quantitative errors (Section 83 - No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law **OR** that the non-compliance did not affect the result of the election)	- Amendment proposes to replace the word **"OR"** with **"AND"** - Creates harmony in the interpretation of Section 83 so that any election court is clearly guided on the considerations to apply when seeking to invalidate an election i.e. both qualitative and quantitative considerations - Ensures that technical considerations do not override the substance of the vote (upholds will of the people) - It requires invalidation of an election to be on the basis of an assessment of the totality of all the electoral processes including registration, voting, counting, tallying, transmission and announcement – and not one of the eight or so processes. - Introduces a re-emphasis of the current provision of section 72 of the Interpretation and General Provisions Act, that ***"a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead".***
Section 86A	New provision	- Gives effect to Art. 138(1)

		- Addresses uncertainty of conducting a fresh election - Defines who the candidates in a fresh election will be in line with SCOK 2013 decision - Defines the mechanisms for managing a fresh election
Election Offences Act		- Enhances the penalties for wilful or deliberate failure to sign election documents, or falsifies election documents by a presiding or returning officer to five years - Specifies with clarity critical election offences committed by presiding and returning officers - Raises the profile/criticality of the role played by presiding and returning officers - Proposes the deletion of the restriction on government advertising in line with Art 35 on Access to Information

04/10/2017

KENYA LAW REFORM COMMISSION

"A vibrant Agency for responsive Law Reform"

Telegrams: "LAWREFORM" NAIROBI
Telephone: Nairobi, +254-20-2241186/2241201
Fax: +254-20-2225786
www.info@klrc.go.ke.
When replying please quote
Ref. No. KLRC/RES/5
and Date

KENYA LAW REFORM COMMISSION
REINSURANCE PLAZA
3RD FLOOR
TAIFA ROAD
P.O. Box 34999-00100
NAIROBI, KENYA

3rd October, 2017

Mr. Michael R. Sialai, EBS
Clerk of the National Assembly
Parliament Buildings
NAIROBI

Mr Jeremiah Nyegenye
Clerk of the Senate
Parliament Building
NAIROBI

RECEIVED
04 OCT 2017
CLERK'S OFFICE

Dear Mr Sialai

RE: KLRC'S COMMENTS ON THE ELECTIONS LAWS (AMENDMENT) BILL, 2017

The Kenya Law Reform Commission is a Statutory Commission established under the Kenya Law Reform Commission Act, 2013.

Its mandate includes among others to keep under review all the law and recommend its reform to ensure that the law conforms to the letter and spirit of the Constitution, that the law systematically develops in compliance with the values and principles enshrined in the Constitution and that it is consistent, harmonized, just, simple, accessible, modern and cost-effective in application.

The Commission further has the mandate to provide advice technical assistance and information to the National and County Governments with regard to the reform or amendment of any branch of the law and to advise the National or County Governments on the review and reform of their legislation.

In the discharge of its mandate, the Commission has studied the proposed Election Laws (Amendment) Bill, 2017 and taken into account the social and political environment within which the amendments have been proposed.

Attached is a matrix of comments relating to the Bill.

We thank you for the continued cooperation and support.

Yours Sincerely

Mbage Ng'ang'a
CHAIRMAN

KLRC's comments on the Election Laws (Amendment) Bill, 2017

1. The proposed amendment to section 2 of the Independent Electoral and Boundaries Commission Act. (the interpretation of the term "chairperson" of the IEBC)	1. The Elections Act, 2011 does not define the term "chairperson" of the Commission, which means that the definition of the "chairperson" under the IEBC Act applies to every legislation where the term is used. This includes the Elections Act. 2. The Commission agrees with the proposed amendment to section 2 of the Independent Electoral and Boundaries Commission Act on the interpretation of the term "chairperson" of the IEBC for the following reasons— (A) The proposed amendment seeks to address any situation where the sitting chairperson may, for any reason, be absent from making a decision. (B) Whereas Article 138 (10) of the Constitution requires the chairperson of the Commission declares the result of the Presidential election, this Article is further qualified by Article 259 (3) which demands that every Article of the Constitution be construed according to the doctrine that law is always speaking and in particular: a) a function or power conferred by the Constitution on an office may be performed or exercised as occasion requires, by the person holding the office; b) any reference in the Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time; c) a reference in the Constitution to an office, State organ or locality named in this Constitution shall be read with any formal alteration necessary to make it applicable in the circumstances; and d) a reference in the Constitution to an office, body or organisation is, if the office, body or organisation has ceased to exist, a reference to its successor or to the equivalent office, body or organisation. (C) Corporate governance and organizational leadership demand that an organization should never contemplate a scenario where the organization is unable to function under whatever reason. (D) Indeed the Interpretation and General Provisions Act

	(Cap 2) laws of Kenya provides as follows: a) *Section 43: Where a written law confers a power or imposes a duty on the holder of an office as such, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed by the person for the time being holding that office.* *b) Section 45: In this Act and in any other written law, instrument, warrant or process of any kind, a reference to a person holding an office shall include a reference to any person for the time being lawfully discharging the functions of that office.* (E) In view of the above, the proposed amendment enhances certainty where, the substantive chairperson of the Commission may, for any reason be unable or unavailable to dispense any of the functions assigned to that office.
(F) The proposed amendment to section 6 (1) of the Independent Electoral and Boundaries Commission Act (Qualification for appointment as chairperson)	The Commission agrees with the proposed amendment to section 6 (1) of the Independent Electoral and Boundaries Commission Act on the qualification for appointment as chairperson for the following reasons— 1. The amendment enlarges the fields from which the chairperson may qualify to include not just law, but also public administration, public finance, governance, electoral management or law. 2 This amendment is in line with Article 232 of the Constitution which provides for among other things, equal opportunities, fair competition and merit as basis of appointments to public office. 3. Further both Articles 88 (establishing the IEBC) and 250 (Composition of Constitutional Commissions) do not require the chairperson to possesses specific qualifications The Constitution leaves the qualifications open and allows Parliament to determine the qualifications through legislation on case by case basis. 4 Al though it would be ideal to have a lawyer as the chairperson of the Commission, the core business of the IEBC is not legal.
5. The proposed amendment to paragraphs 5 and 7 of the Second Schedule to the Independent	The Commission proposes to recast the proposed amendments as follows:

Electoral and Boundaries Commission Act (Quorum and decision making)	*4. The Independent Electoral and Commission Act, 2011 is amended in the Second Schedule, by—* *(a) deleting the phrase "at least five" appearing in paragraph 5 and substituting therefor the words "a majority of the";* *(b) deleting paragraph 7 and substituting therefor the following new paragraph 7—* *"7. Unless a unanimous decision is reached, a decision on any matter before the Commission shall be by a majority of the members ".* Reasons: i. Reducing the quorum to three in a Commission with seven members may occasion unintended consequences including parallel meetings; ii. Creates the possibility of minority deciding for majority. iii. The proposal by the KLRC (re-casted clause above) will ensure that the IEBC would execute its mandate as long as the majority of the members support the decision. iv. Further, a vacancy in the membership of the IEBC would not invalidate the proceedings of the IEBC so long as the majority of the members support the decision.
6. The proposed deletion of section 29 of the Elections Act (power to nominate)	In view of the decision of the High Court in Constitutional Petition No. 234 of 2017 (Case of *Peter Solomon Gichira v Independent Electoral and Boundaries Commission & another [2017]* eKLR), the Commission agrees with this amendment.
7. The proposed section 39 of the Elections Act (Determination and declaration of results)	1 The Commission appreciates the philosophy behind the proposed section 6 (a) i.e. (1C) (a) to (c) of the Amendment Bill (requiring both electronic and manual transmission of results). 2 With regard to the proposed section 6 (b) the Commission proposes to redraft section (1D) to read as follows: *"(1D) Where there is a discrepancy between the electronically transmitted and manually transmitted results, the Commission shall, despite any other legal requirement order the retuning officer to recount and declare the results within such period as the Commission may prescribe, but such period shall not exceed any period prescribed by Constitution and the Elections Act within which the results must be declared.*

	3 The Commission agrees with the proposed amendment to insert subsection 1E and 1F save for the deletion of the phrases "to facilitate public information" appearing after the word "shall"- this is because the words are superfluous and unnecessarily repetitive. 4 The Commission recommends that the proposed amendment under paragraphs (d) and (e) be dropped since it may be impracticable for the Commission to receive all the results within the seven days within which the results must be declared. Requiring the Commission to announce final results within the timelines provided under Article 138 and after receiving all results may prove impracticable given the conduct of past elections.
8. The proposed amendment to section 44 (5) of the Elections Act9Use of technology)	The Commission agrees with the proposed amendment.
9 Deletion of section 44A of the Elections Act.	The Commission agrees with the proposed amendment.
10. The proposed amendments to section 83 of the Elections Act (Non-compliance with the law)	The Commission agrees with the proposed amendment.
11. The proposed section 86A of the Elections Act (procedure at fresh presidential election)	1. The proposed 86A (1) is proper and the Commission agrees with the proposal. 2. With regard to the proposed section 86A (2) and (3), the Commission is of the view that a distinction needs to be drawn with regard to a fresh election contemplated under Articles 138 and 140 both of which may have different requirements pertaining to candidates who may participate. 3. Section 86A (4) is proper and the Commission agrees with the proposal.
4 The proposed section 6A of the Election Offences Act (offence of failure or refusal to sign results)	The proposed amendment is proper.

		process of nomination of a presidential candidate. In essence this means that minority political parties' decision may not be free and fair since the majority can infiltrate and vote for the least popular candidate to be the Presidential candidate. We propose that it be dropped
6 Amendment of section 39 of the Elections Act	For purposes of a presidential election, the amendment seeks to: • remove the requirement for transmission of tabulated results to the constituency and national tallying centres **in the prescribed form**	It should be the general rule that results be transmitted in the prescribed forms. This is because they are pre-supplied to the presiding and returning officers before the election takes place not for them to make them. If there are deviations from the standard form, section 72 of the Interpretation and General Provisions Act is clear that those deviations may not invalidate the results so long they are not calculated to mislead and which is a matter of evidence. We therefore propose that the amendment be dropped.
	• Introduce a requirement that <u>where there is a discrepancy between the electronically transmitted and manually transmitted results, the manually transmitted results shall prevail.</u>	The reason why the electronic system was proposed (Kriegler Report) and eventually introduced was to ensure transparency, credibility and verifiability of the outcome of the election process. Ideally, an entirely electronic system is better and would have less challenges than a manual system. We appreciate that as a country we still have certain challenges and therefore the reason why our voting system is both manual and electronic however we urge that the two systems continue to be applied to complement each other and not to override each other. Any discrepancies between the manual and electronic system only points to an anomaly. To buttress our point, recently, the Communications Authority of Kenya

NATIONAL GENDER AND EQUALITY COMMISSION
CHAIRPERSON
TEL: 2727778
FAX: 2727776
P.O BOX 27512-00506, NAIROBI.

	The amendment further provides that; • In the absence of the chairperson for any reason, the vice-chairperson shall assume the duties of the chairperson and exercise the powers and responsibilities of the chairperson until such time that another chairperson shall be appointed. • In the absence of the chairperson and the vice-chairperson, members of the Commission shall elect from amongst themselves one of their number to act as the chairperson and exercise the powers and responsibilities of the chairperson until such time that another chairperson shall be appointed"	the amendment would effectively/potentially enable an ordinary member of the IEBC to declare presidential election results when article 138 (10) of the constitution reserves this function to the chairperson of the Commission which is unconstitutional
4 Amendment of the second Schedule of the IEBC Act	Seeks to amend the quorum for the conduct of business of the commission from **five** members to **three** in the **Second Schedule.** The amendment further proposes to change the requirement that a decision on any matter before the commission shall be, unless it is unanimous, by concurrence of **all the members** of the commission to **majority of the members present and voting.**	The amendment makes it possible for 2 members to make binding decisions in a commission of 7 members. Whereas there's nothing unconstitutional in the proposed amendment, it is not wise to reduce quorum of IEBC with its very sensitive mandate Our view is that the law should remain as it is that majority of the commissioners (4) must agree on an issue before it can be binding decision
5 Amendment of Section 29 of the Elections Act	Seeks to delete section 29 of the Elections Act Section 29 provides; **29. Power to nominate** (1) The persons who nominate a presidential candidate shall be members of the candidate's political party. (2) The persons who nominate an independent presidential candidate shall not be members of any political party.	This amendment enables a presidential candidate to be nominated by persons from different political parties. If enacted, it will allow independent candidates to be nominated by persons who are members of political parties. This amendment is unconstitutional to the extent that it makes nonsensical the political party system as the mainstream mechanism for canvasing for elective offices. It will also erode the idea of discipline and loyalty to and within political parties. Further, section 29 safeguards against infiltration by non-party members in the

NATIONAL GENDER AND EQUALITY COMMISSION
CHAIRPERSON
TEL: 2727778
FAX: 2727776
P.O.BOX 27512-00506, NAIROBI.

election laws should not be undertaken close to an election. It is ideal if the amendments are not undertaken at least a year to an election. As a country, we should strive to adhere to this principle for predictability and stability as well as giving the Elections Management Body IEBC ample time to put in place systems and preparations to deliver a free, fair and credible elections.

2. If parliament proceeds with the amendments, we advise that they be for future elections and not the repeat presidential elections slated for 26th October, 2017, which is barely 20 days away. The repeat presidential elections ought to be based on the law that was in force on 8th August 2017.
3. Lastly, elections are a process and not an event. Introducing new legal provisions at this stage to apply in the repeat presidential elections would be akin to purporting to apply the law retrogressively which is illegal in itself.

Nevertheless, we have looked at the amendments and have comments on specific clauses therein. Please find a table below with our comments per clause.

SPECIFIC COMMENTS

CLAUSE	PROPOSED AMENDMENT	COMMENTS
2 Amendment of section 2 of the IEBC Act	Seeks to introduce a new definition of the term "chairperson" in **section 2** of the IEBC Act "chairperson" means the chairperson of the Commission appointed in accordance with Article 250(2) of the Constitution and, in the absence of the chairperson, the vice-chairperson, or such other person acting as the chairperson in the absence of both the chairperson and vice-chairperson. The current definition of the term "chairperson" provides "chairperson" means the chairperson of the Commission appointed in accordance with Article 250(2) of the Constitution;	the amendment conflates "chairperson" with "member" of the IEBC when article 250 (2) of the Constitution envisions that every constitutional commission shall have a chairperson and members
3 amendment of section 6 of the IEBC Act	Seeks to introduce/change the qualifications of the chairperson in **section 6** of the IEBC Act. Specifically the amendment seeks to **remove** the requirement that the chairperson must be a **lawyer** and a person who is qualified to **hold the office of judge of the Supreme Court** under the Constitution.	The IEBC's constitutional and statutory functions naturally point to the need to have legal mind heading the Commission.

NATIONAL GENDER AND EQUALITY COMMISSION
CHAIRPERSON
TEL: 2727778
FAX: 2727776
P.O.BOX 27512-00506, NAIROBI.

34

NGEC
National Gender and Equality Commission

"Kutetea usawa wa jinsia na haki za waliobaguliwa na kupuuzwa"

The National Gender And Equality Commission,
Solution Tech Place, Longonot Road, Upperhill, 1st Flr.
P.O Box 27512-00506 Nairobi-Kenya
Landline: 020 321 3199/ 020 272 77 78
Mobile: 0718 999 721 / 0732 228 869

THE SENATE CLERK'S OFFICE
RECEIVED
06 OCT 2017
P.O. BOX 41842-00100 NAIROBI

When replying please quote
NGEC/OC/NAS/VOL.II/(36)
Ref No: .....

6th October, 2017

Michael Rottich Sialai, **EBS.**
Clerk of the National Assembly
Parliament Building
Nairobi

J. M. Nyengenye, **CBS.**
Clerk of the Senate/Secretary
Parliament Building
Nairobi

RE: MEMORANDUM ON THE ELECTION LAWS (AMENDMENT) BILL, 2017, NATIONAL ASSEMBLY BILLS NO. 39 OF 2017 FOLLOWING INVITATION FOR PUBLIC HEARING OF THE JOINT SITTINGS OF THE SELECT COMMITEES OF THE NATIONAL ASSEMBLY AND THE SENATE

We make reference to the invitation to appear before the Select Committee on the Election Laws, 2017 to examine and undertake public participation on the Election Laws (Amendment) Bill, National Assembly Bills No. 39 of 2017. The National Gender and Equality Commission (NGEC) wishes to file a written memorandum for the committee's consideration as follows.

The NGEC has reviewed the the Election Laws (Amendment) Bill, National Assembly Bills No. 39 of 2017 and has the following general comments;

1. We are of the opinion that the proposed amendments are not timely and should have been considered after the fresh presidential election ordered by the Supreme Court. It is a well established international best practice that amendments to

NATIONAL GENDER AND EQUALITY COMMISSION

		issued a statement urging Kenyans not to lose faith and confidence in technology. The statement states in part "ICTs have been successfully deployed and are embraced in all facets of life in the country including banking, business, education, health, agriculture and government services just but to mention a few. Election are no exception and the authority is confident that ICTs can be deployed successfully to support this important national activity. The country stands to benefit in a tremendous big way if the current levels of investment and adoption of ICT are sustained. " We fully support this position taken by the Communications Authority of Kenya that use of technology in elections be sustained.
	• Introduce a further requirement that any failure to transmit or publish the election results in an electronic format shall not invalidate the result as announced and declared by the respective presiding and returning officers at the polling station and constituency tallying centre, respectively.	As per our comments in the above proposed amendment, we proposed that electronic system continue to have the same significance with the manual, if not more. ICTs are designed by human beings who are capable of making it sure and able to work. We are aware that the IEBC in the August 8th Elections had deployed 3 service providers of network (Safaricom, Telecom and Airtel) to ensure coverage of the entire country to the greatest extent possible. In areas where these 3 companies have not reached, the IEBC had deployed used of satellite phones. We are of the view that in at least every constituency, we have areas with 3G or 4G network which was required to send the images of the forms to the Constituency and National Tallying centres. We propose that the amendment be that transmission of the results be at the nearest locations with 3G and 4G network rather than removing the obligation altogether. It will take a matter of hours to find these locations rather than travelling all the way to the

NATIONAL GENDER AND EQUALITY COMMISSION
CHAIRPERSON
TEL: 2727778
FAX: 2727776
P.O.BOX 27512-00506, NAIROBI.

		national tallying centre to present the manual forms
	• Introduce a requirement that the commission shall establish a mechanism for the live-streaming of results as announced at polling stations, and the results so streamed shall be for purposes of public information only and shall not be the basis for a declaration by the Commission	Live-streaming is good but the results so streamed should have a meaning They are to verify the submitted physical forms before announcement of the final result
	• Remove the discretionary obligation on the IEBC to announce provisional results and make it mandatory for the commission, before determining and declaring the final results, to have received **the results transmitted in accordance with this Act**	The public should continually be informed of the results being received to avoid developing tension and anxiety The proposal that before declaring the final results, the IEBC to have received all the manual forms is good.
	• Remove the requirement for the IEBC to announce provisional results in the order in which the tallying of the results is completed	We reiterate our comment above that the public should continually be informed of the results being received to avoid developing tension and anxiety
7 Amendment of Section 44 of the Elections Act	• Remove the reference to political parties as one of the key stakeholders to be consulted in the making of regulations and better carrying into effect of the section	Political parties are the key stakeholders in election processes Instead of removing them, the amendment should be to the effect of including even independent candidates as part of the stakeholders

NATIONAL GENDER AND EQUALITY COMMISSION
CHAIRPERSON
TEL: 2727778
FAX. 2727776
P.O.BOX 27512-00506, NAIROBI.

on use of Technology	• Removing the prescription of the specific issues the regulations under the section. The current provision provides that the regulations shall specifically provide for; (a) the transparent acquisition and disposal of information and communication technology assets and systems; (b) testing and certification of the system; (c) mechanisms for the conduct of a system audit; (d) data storage and information security; (e) data retention and disposal; (f) access to electoral system software source codes; (g) capacity building of staff of the Commission and relevant stakeholders on the use of technology in the electoral process; (h) telecommunication network for voter validation and result transmission; (i) development, publication and implementation of a disaster recovery and operations continuity plan; and (j) the operations of the technical committee established under subsection (7).	The prescription of what should be in the regulations on use of technology was good to guide the IEBC and should be retained. This amendment should be dropped.
	• Remove the requirement to submit regulations on technology within 30 days. Generally the commission in compliance with section 109(3) and (4), should submit to parliament any regulations for enactment 4 months before a general election and the publish in *kenya gazette* all approved regulations by parliament at least 3 months before a general election. • Remove the requirement that for purposes of the 1st general election, the technology used shall be restricted to voter	This is a good amendment because it was a transitional clause for the amendments done in December and January 2017. The applicable provision should continue being section 109.

NATIONAL GENDER AND EQUALITY COMMISSION
CHAIRPERSON
TEL: 2727778
FAX: 2727776
P.O.BOX 27512-00506, NAIROBI.

	registration, identification of voters and results and procured at least 120 days before the election	
	• Remove the requirement for IEBC to establish a committee, consisting of member(s) of the commission, relevant agencies institutions and stakeholders as the commission considers necessary, to oversee adoption and use of technology	This should be retained We propose that the amendment be dropped
8 Amendment of section 44A of the Elections Act on complementary mechanism for identification of voters	Seeks to remove the requirement for a complimentary mechanism **in transmission of results** The proposed amendment now only provides for a complementary mechanism in identification of voters	In our view, this amendment should be dropped Complementary mechanisms should continue being used for backup in the event one fails. There is no justification for an exception in transmission of results.
9 Amendment of section 83 of the Elections Act on Non-compliance with the law	The current section 83 provides; **83. Non-compliance with the law** No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law **or** that the non-compliance did not affect the result of the election The proposed amendment seeks to replace the disjunctive word **"or"** with a conjunctive word **"and"** effectively to make to two requirements in the section (non-compliance with the principles in the constitution and law on election and the non-compliance did not affect the result of the election) not to be a reason to void an election.	We propose that the amendment be dropped. Both aspects should be a ground for voiding an election When an election is not conducted accordance with the law, it beats logic why it should be upheld despite the result pointing to a winner In any case, election is the most legislated subject in this country and those laws must mean something Similarly, where there substantial compliance with the law, the little non-compliance if it affects the result should also be a ground for nullification In this second scenario, if the little non-compliance does not affect the result, then the election should be upheld

NATIONAL GENDER AND EQUALITY COMMISSION
CHAIRPERSON
TEL: 2727778
FAX: 2727776
P.O BOX 27512-00506, NAIROBI.

	The amendment further proposes a new subsection, pursuant to section 72 of the Interpretation and General Provisions Act, that a **Form prescribed by the elections act and the regulations** shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead	This reiterates a section another Act (the Interpretation and General Provisions Act) having force of a law. It is therefore unnecessary
10 Amendment of the Elections Act by introducing a new section 86A	Introduce the requirement, in the event of a nullification of a presidential election by the supreme court, that IEBC publishes a notice in the gazette within 7 days; • indicating that the presidential election was nullified • announce the date of the fresh election, and • publish the names and political parties of the candidates to participate in the fresh election	This is a good provision.
	the proposed amendment further seeks to prescribe which candidates to participate in a fresh election which is depended **on the nature of the petition filed in the supreme court as follows;** (a) where the petition challenging the election was filed by the runner-up, candidates for the fresh election shall be confined to the petitioner and the president-elect whose election was annulled; (b) where the petition was filed by more than one candidate who had participated in the original election, the petitioning candidates and the president-elect may participate in the fresh election; (c) where the petition was filed by a person or persons who were not candidates in the original election, then each of the candidates in the original election may participate in the fresh election; (d) no other candidate other than those envisaged in paragraph (a), (b) or (c) shall be eligible to participate in the fresh election.	This proposal is unnecessary. If an election is declared null and void, all candidates who participated in the nullified election should be at liberty to vie. The nature of the election petition cannot be the basis for who to participate in the fresh election. Locking out some candidates on the basis that they did not file a petition in court will be tantamount to discrimination which we stand against. We propose that it be dropped
	The proposed amendment further provides that IEBC shall not conduct fresh nominations for a fresh election	In view of our comment above, nominations, unless they are nullified in the election petition, would ordinarily not

NATIONAL GENDER AND EQUALITY COMMISSION
CHAIRPERSON
TEL: 2727778
FAX: 2727776
P.O.BOX 27512-00506, NAIROBI.

	pursuant to Article 140(3) of the Constitution	be repeated under the current legal framework
	The proposed amendment further provides that an eligible may withdraw from an election under Article 140(3) and if the remaining candidates are more than 2, the election shall proceed as scheduled. If only one candidate remains, no election shall be held and the remaining candidate shall be declared president-elect forthwith.	This is the obtaining position under the current legal framework, that one cannot be forced to participate in an election and that if a candidate is unopposed, he or she shall be declared elected So in our view, the amendment is unnecessary
11 Amendment of the Election Offences Act by inserting a new section 6A on failure to sign results	The proposed amendment provides that a presiding officer or returning officer who in relation to the prescribed document containing results knowingly fails or refuses to sign the document, knowingly fails to complete the document, willfully submits an incomplete document, willfully alters or falsified a document commits an offence and is liable on conviction to imprisonment of for a terms not exceeding 5 years	Section 6A should have a proviso that the officer "without justifiable reason". This is to safeguard officers who may be coerced into signing documents which may be false in their judgment. Secondly, the penalty is a bit high especially for presiding officers and should be revised downwards We also propose that you consider an option for a fine in the sentence

Yours

Comm. Winfred O. Lichuma, **EBS.**

Chairperson

NATIONAL GENDER AND EQUALITY COMMISSION
CHAIRPERSON
TEL: 2727778
FAX. 2727776
P O BOX 27512-00506, NAIROBI

FAMILY ORGANIZATION FOR EMPOWERMENT (FOREM)

P.O.BOX 8450-00300 NAIROBI TEL: 0717 330 021

Email: familyorgforepowerment@gmail.com Website: www.forem.or.ke

Received 4/10/2017

35

3rd September, 2017

The following are our points as a women's organization, for supporting the change of election laws pending the repeat of the presidential elections on October 26th 2017:-

1. We insist the law of elections must be changed now to avoid problems on 26/10/2017.We support the work of our MPs to change this law of elections now.

2. We shall be very angry with Parliament if it does not change the law .What else do our MPs do. They MUST!

3. Why did people paid with our taxes refuse to sign the Forms 34A and 34B .That is a crime. Look at the problems they have put all of us into. We agree they should be jailed. If they will not sign, let then not take the IEBC work.

4. The Chairman of IEBC can fall sick or refuse to do something. Does that mean the President cannot be sworn in? Let the law be change and other Commissioners given power to announce elections.

5. We totally support the law to be change before next election. Why are foreigners telling us not to change the law to save our country from problems? Please change theses bad laws like the Supreme Court asked.

Signed:

Cecilia Nyokabi .....
CHAIRLADY

Julliet Ngunguru .....
SECRETARY

CMD KENYA
www.cmd-kenya.org

CENTRE FOR MULTIPARTY DEMOCRACY - KENYA

Sixth Floor, International House,
P.O. Box 9903-00100 Nairobi, Kenya.
Tel. +254-020 2215731 / 2215782 / 2216118
Fax. +254-020 2216119
Email. info@imd-cmd.co.ke

37

Received
4/10/2017

4th October 2017

To the Co- Chairs
Joint Parliamentary Committee
On Electoral Reforms

REPRESENTATIONS ON THE PARLIAMENTARY ELECTORAL LAWS (AMENDMENT) BILLS 2017

1. PREAMBLE

We first express our appreciation for the invitation from the Joint Committee extended to us to submit our representations.

The Centre for Multiparty Democracy (CMD) – Kenya was founded in 2004 to perpetuate multiparty democracy, constitutionalism, good governance, and rule of law working with political parties. For the last 13 years we have been at the forefront of reforms and specifically electoral reforms in this county. We were at the core of the creation of both *The Political Parties Acts* of 2007 and 2011, and made immense contributions to the realizing of The Constitution of Kenya 2010 (being one of the National 4 "Yes" Committees formed as organs of the process), the *Elections Act 2011*, the *IEBC Act 2011*, and the *Election Offences Act 2011*. We have also been instrumental to the most recent reforms of electoral laws in 2016- 2017.

Founding Trustees
Forum for the Restoration of Democracy - Asili (FORD-A). Forum for the Restoration of Democracy - People (FORD-P) Kenya National African Union - (KANU), National Rainbow Coalition (NARC), National Labour Party of Kenya (NLP), Social Democratic Party (SDP), SAFINA, Shirikisho Party of Kenya, Sisi Kwa Sisi Party of Kenya, FORUM

It is in similar vein that we thus make our presentations on the proposed reforms to the electoral laws, at what we believe is a very critical phase of our country's history.

1. **TIME FRAME**: The first ground on which we urge caution is that of time. We are only 3 weeks away from a repeat presidential election. We believe that due to constraints of time, effort is likely to be more productive if priority is given to putting in place the logistical and administrative requirements for a free, fair, and credible election, taking into account, among other things directives from the Supreme Court ruling.

Best international practices in the reform of electoral legal frameworks advice that these are best not done close to elections. A major reason is that for any new law designed to change the electoral system, the reforms take time to percolate down to all levels. Time is also required to comprehensively inform citizens of the new mechanisms for elections, and for conveying how citizens' votes will be translated into meaningful representation. However in the history of the country we have done quick fixes that has seen this country navigate through crisis. Exceptional situation call for swift and extraordinary actions.

In the past where leadership has put the country first we have achieved the following **BROAD CONSENSUS** and our country stood strong:

a. The Inter- Parliamentary Parties Group (IPPG) Accord of 1997, actually a gentleman' s agreement, that secured a peaceful general election in that year;
b. The National Accord and Reconciliation Agreement (NARA) of 2008: that resulted in the creation of the *Constitution of Kenya 2010*, one of the most progressive in the world. We also go the *Political Parties Act 2011*, the *Elections Act 2011*, and the *IEBC Act 2011* among others;
c. To the contrary when we as a country have bucked of broad consensus, for example, in the Bomas constitutional Review process, this has tended to set us up for difficulties. The 2005 constitutional referendum and the minimal electoral reforms of 2006 – 2007 set us up for the post election crisis of 2008.

2. OVERVIEW OF THE PROPOSED REFORMS

On scrutiny, many of the proposals in the Bills are in principle worthy of consideration and discussion with a view to the reform of our electoral system. We can briefly comment on some of the merits and demerits of the proposed changes:

a. With regard to the proposal in Clause 3 (1) concerning change to the qualifications for appointment as IEBC Chair, we are of the view that this is not crucial at this juncture. (Refer to Schedule Para 8)

b. With regard to the proposal in Clause 3 (1A, and 1B) that the IEBC Vice- Chair or any Commissioner can act as Chair in the absence of the Chair and Vice – Chair, we believe this can be considered.

c. On the proposals for changing the quorum in the IEBC in Section 4 to "...half of the members of the Commission or not less than 3....", we feel that stipulation should instead simply read that the quorum be "not less than half of the members of the Commission".

d. The proposal in Clause 5 to remove the requirement for independent presidential candidates to be nominated by members of a party seems to be straightforward.

e. Clause 11propsed amendment to Election Offences Act to prescribe on the punishment proposed on convicted PO/ROs is hereby agreed upon with the sentence being changed from a term not exceeding five years to 'a minimum of three years'

f. With regards amendment under clause 86A we agree with the clarification

CONCLUSION

Hon members this country is likely to be at crossroads in a few days unless we all drop the grand standing chest thumping and embrace dialogue as a means of resolving contentious issues. We need this country in one piece now and after 26th Oct 2017. As stated earlier exceptional circumstance call exceptional action for the wellbeing of this great nation.

Elections must be done and the environment in which it is to be done need to be set clear and remove all the uncertainties.

Thank You



Omingo Magara MGH
Chairperson CMD-Kenya

FIISRT OPPORTUNITIES COMMUNIITY INITIATIVE

37

We as the women of Meru under the above registered organization wish to express our strong sentiments in total support of electoral reform laws in readiness for the repeat presidential n election scheduled to held on the 26th of October 2017

1. Why did people paid with our taxes refuse to sign the Forms 34A and 34B .That is a crime. Look at the problems they have put all of us into. We agree they should be jailed. If they will not sign, let then not take the IEBC work

2. We insist the law of elections must be changed now to avoid problems on 26/10/2017.We support the work of our MPs to change this law of elections now.

3. The Chairman of IEBC can fall sick or refuse to do something. Does that mean the President cannot be sworn in? Let the law be change and other Commissioners given power to announce elections

4. We shall be very angry with Parliament if it does not change the law .What else do our MPs do. They MUST!

5. We totally support the law to be change before next election. Why are foreigners telling us not to change the law to save our country from problems? Please change theses bad laws like the Supreme Court asked.

6. The annulment of the presidential results by the Supreme Court has a negative effect on the economy of Kenya , and if the laws are not change problems will arise that will further affect our economy negatively

Signed:

Emily Nungari _____ 3rd/Oct/2017
CHARLADY

GraceNjora_____
TREASURER

38

BARAKA women's center

Received 4/10/2017

BARAKA WOMEN CENTER COMMUNITY BASED ORGANIZATION.

TO THE ELECTION LAWS [AMENDMENT] BILL 2017.

WOMEN ABUSE /SEX AND GENDER BASED VIOLENCE.

To the Kenyan parliament, on behalf of Baraka women center and Kenyan women, we would wish that,, **The Election Laws [Amendment] Bill 2017** to be amended before 26th October 2017. This is because.

1. Kenyan women fought for independent and they are not ready to go back to that stage.
2. Our women have been violated for a long time, any time we have been having election disputes.
3. Most of Kenyan women have experienced rape through violence, resulting to sexual intercourse diseases, unwanted pregnant and death.
4. Most women have been abused physically through election disputes and suffered depression and mental trauma, losing their body parts and would wish not to experience this again.
5. As a result of disputed 2017 election, most women died while saving their families while others became internally displaced hence leaving a very big trauma whereby most of them fear to relocate to their former homes for the fear of election violence.
6. Lastly, Baraka women center programs for adult learning and other programs will be destabilized if we keep on changing dates whereby women fear to continue with programs because they do not know what will result after Election.
7. **IEBC –Alternative to the presidential election Returning officer.;** The women would wish if there can be an alternative presiding officer who can swear in the president. This is because, the **IEBC CHAIRMAN** might be sick or absent which is obvious to everyone, we would wish that the commission appoints an alternative officer who can swear in the president on his behalf.
8. The women of Kenya are Kenyans, and Kenya is a sovereign country which fought for their independent and we cannot allow any law from outside.
9. We need the amendment to be done, to ensure the security of the women even after the election, their lives will have to continue safely.
10. Why did people paid with our taxes refuse to sign the forms34 A and34B? That is a crime, look at the problems they have put all of us into. We agree they should be jailed, if they will not sign, lrt them not take the IEBC work. Many other people will do it for free to save our country.

TERESIA MWANGI
0721381008



39

Received
3/10/17

(1)

MEMORANDUM BY AFRICAN ELECTORAL OBSERVATION GROUP SUBMITTED TO THE CLERK OF THE NATIONAL ASSEMBLY

PRELUDE

African Electoral Observation Group (AEOG) is a nonprofit, nonpartisan, nongovernmental organization that has supported democratic institutions and practices in every region of the Africa for over two decades. AEOG together with its local partners, have worked to establish and strengthen political and civic organizations, safeguard elections, and promote citizen participation, openness and accountability in government.

At AEOG we believe that democracy is a principle enshrined in the Universal Declaration of Human Rights, but it's a human right that many around the world still struggle to attain.

SUBJECT: KENYAN ELECTORAL LAWS (AMENDMENT BILL) (NATIONAL ASSEMBLY BILL No. 39 of 2017)

AEOG deployed a sizeable number of electoral observers in Kenya before, during and after the Kenyan elections. Further, it released both pre- and post-observer reports which were widely circulated and quoted both in Kenya and outside the country. The reports are available at http://electionsafrica.org.

Therefore, AEOG would like to submit the following memorandum that is before the Kenyan Parliament in light of the fact that it monitored the elections at all its critical processes.

1. **AEOG supports amendment of Sections 39; Requirement for verification and the place of manual and electronic transmission**

Our reason of supporting this amendment is because it aims at erasing the confusion surrounding the issue of the use of technology in the elections which was eminent before the elections and during the Supreme Court proceedings.

The Court of Appeal in the Maina Kiai case declared the law to be as follows;

"It cannot be denied that the Chairperson of the appellant has a significant constitutional role under Sub-Article (10) of Article 138 as the authority with the ultimate mandate of making the declaration that brings to finality the presidential election process. Of course before he makes that declaration his role is to accurately tally all the results exactly as received from the 290 returning officers country- wide, without adding, subtracting, multiplying or dividing any number contained in the two forms from the constituency tallying center. If any verification or confirmation is anticipated, it has to relate only to confirmation and verification that the candidate to be declared elected president has met the threshold set under Article 138(4), by receiving more than half of all the votes cast in that election; and at least twenty- five per cent of the votes cast in each of more than half of the counties."

On its part, the Majority judgment of the Supreme Court stated that:

"We have already held that we find little or nothing in this decision to suggest that, by deciding the way it did, the Appellate court restrained or barred the 1st Respondent from verifying the results before

declaring them, or that it was relieving the former the statutory duty of electronically transmitting the results. What the 2nd Respondent was barred from doing by the Court of appeal and High Court was to vary, alter or change the results relayed to the National Tallying Centre from the polling stations and constituency".

An analysis of the Supreme Court Majority Decision and proposed amendment shows that the amendments merely realign the law with the Decision and are paramount if Kenya wants a successful election on 26th October. The proposal is not retrogressive and neither does it alter the electoral process as claimed by some people. Its advantages can be summed up as follows;

- Parliament seeks to ensure that the Presiding Officers transmit both the manual and electronic results to ensure accuracy as it required by the law and also by the Supreme Court standard.
- It provides that where there is a discrepancy between the electronic form and the manual form the latter will prevail. This ensures that the primary document which is signed by agents, posted outside polling stations and physically delivered to Constituency Tally centers where final results are declared (pursuant to the Maina Kiai case), becomes the basis of any results verification in the event that any discrepancies are noted with the scanned and electronically transmitted documents
- It provides that failure to transmit results electronically shall not invalidate an election. This provision recognizes technology is not

available or reliable in all parts of the country and therefore having a manual system is paramount.

- Finally, it clarifies that "results" beamed in the live portal are merely for public information and for any declaration of results.

2. **AEOG supports Amendment of Section 83 of No 24 of 2011: Effect of irregularities on invalidation of election**

From our reading of both the Majority and the Majority Decision, Section 83 of the Elections Act, 2011 was extensively discussed and we foresee it will remain a thorny issue in Kenya. The discussion remains largely the same in similar jurisdictions and we therefore are satisfied that the proposed amendments on this section are for the greater good of the Kenyan state. This sections currently reads as follows,

"No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election".

The proposed amendment seeks to bring further clarity to the provision by ensuring that the overriding question in any election petition will be *(i) what violations have occurred but fundamentally (ii) the consequence of those violations on the results of the elections. Without this* conjunctive application of these two aspects in reviewing of an election petition,

Kenyan Supreme Court will void future elections as it warned though in our view that statement was in bad taste. Worst of all, minor and petty irregularities will usurp the Kenyan people's sovereignty in exercising their right to vote as the results are voided for reasons that do impact the exercise of the sovereignty.

Therefore, we support this amendment as the disjunctive application of Section 83 opens a floodgate of nullification of presidential petitions for very minor irregularities which would ordinarily not merit such a move. In a nutshell, the conjunctive application ensures that the Supreme Court does not lower the bar of the nullification of the presidential petition.

Further, AEOG supports the insertion of Section 83 (2); Effect of Forms.

This seeks to introduce the provision of Section 72 of the Interpretation and General Provisions Act (Cap 2) into the Elections Act. The said Section states as follows:

"Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead."

In our view, this insertion is critical as it will address potential mischief of sabotaging elections by some electoral officials as the issue of how filling of forms was done was a contested issue during the Supreme Court hearings. Further, this insertion is in line with the Constitution which sets the tone that substance is to take precedence over technicalities.

Article 159(2)(d) states as follows:

" In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(d) justice shall be administered without undue regard to procedural technicalities.

3. **AEOG supports the proposal to Insert New Section in No. 37 of Election Offences Act, 2016: Election offences**

From our interaction with various electoral officials right from the polling stations, we met officers who are fairly trained and educated and therefore we were also surprised to later see some forms 34As and Bs which were clearly wrongly filled despite that such an action is not complex at all. Putting in mind that nullifying an election due to wrongly filled forms and not the actual results is a very expensive judicial decision, harsh penalty for electoral officers who fill such forms either by commission or omission should be supported.

4. AEOG invites the Select Committee to read its proposals in both the pre- and post-election reports as they are largely in tandem with the draft bills and will help Kenya in having better and reliable electoral laws and practices.



Dr. Kenneth Orengo

Regional Coordinator

AFRICA ELECTORAL OBSERVATION GROUP

Dated 3rd October 2017 in Nairobi, KENYA

STATEMENT OF THE BUNGE LA WAZALENDO ORGANIZATION ON ELECTIONLAW AMMENDMENT BILL 2017

AO

5

TO:
THE CLERK OF THE NATIONAL ASSEMBLY OF KENYA
PARLIAMENT BUILDINGS

Received
3/10/17

FROM:
CHAIRMAN
BUNGE LA WAZALENDO ORGANIZATION

SUBJECT: ELECTION LAW AMMENDMENT BILL 2017

INTRODUCTIONS

Pursuant to the above subject matter as dominance in the social media and the need for public participation as enshrined in constitution under article 118(i) (b) & 119, we as Bunge la Wazalendo organization playing a very impartial role in the whole electoral process do hereby re-act as follows.

Given the unpredictable political climate and its continuous pollution, the whole world is watching and it all plays upon us to re-arrange our house in the most appropriate manner. There is need for the **TWO PARTIES** to open up a **DIALOGUE**.

Touching on the IEBC chairperson's **QUALIFICATIONS**, there is no time left to address the matter before the forthcoming repeat presidential election. We should stop a speculation of **FATE** to have the vice-chair assume the duties of the chairperson.

Talk of returning officers and other officials who refuse to sign the relevant electoral forms to be severely punished, we quiet disagree with this statement and read a lot of political mischief in it. How do you anticipate a mistake at the back yard even before the actual **EVENT**? What is the hurry for? Remember most of these officers are just on a brief contract with a merger wages of Kshs.2, 000 per person per day. Unless you are scaring away certain ethnic groups' in order to accommodate others for your safety landing; this move is unconstitutional in its true sense.

In view of the above observations, it's now our submission that this bill be postponed till the forthcoming repeat presidential elections.

May the almighty God bless Kenya.

Signed: ..... **Date:** 3rd Oct 2017

Tabu Okumu Charles

Chairman

Bunge la Wazalendo organization

COUNCIL OF IMAMS AND PREACHERS OF KENYA

MT. KENYA REGION

مجلس الأئمّة والدعاة

P.O. Box 85130 – 801000, MOMBASA
TEL: (041) 2220807 / 2317923
MOBILE: 0726 288 7[illegible] / 0722 532 135
0726 837 2[illegible]
EMAIL: gakerebakari@gmail.com

ص.ب. ٨٥١٣٠ ممباسا
تلفون: (٠٤١) ٢٢٢٠٨٠٧
فاكس: (٠٤١) ٢٢٢١٧٨٣
البريد الألكتروني: conofimams@yahoo.com

AI

6

Our Ref: CIPK/MKR/VOL 1.42
Your Ref: .....

Date: 3rd October 2017

Received 3/10/17

THE CLERK OF THE NATIONAL ASSEMBLY,

KENYA

Dear Sir,

REF: THE ELECTION LAWS (AMEMDMENT) BILL NATIONAL ASSEMBLY BILL NUMBER 39 OF 2017

The above matter refers.

In accordance with Article 118 (i) (b) of the Constitution, you advertised a call for submission of memoranda on the above subject matter.

The Council of Imams and Preachers of Kenya, which has a strong presence in all the 47 counties of Kenya and a wide international linkage with various religious groups having monitored the 8th August general elections would like to submit as follows;

I. That Kenyans voted peacefully on 8th August and therefore would like to extend calls for peace and resolution of disputes without violence, intimidation and harassment of both private citizens and public officers.

II. That the fresh elections must be conducted within sixty days as outlined by our Constitution and any calls for boycott of the elections or disruption must be stopped as this will plunge the country into a constitutional crisis if not further ethnic division as we are currently experiencing.

III. That all lawful attempts to ensure that IEBC conducts the 26th October fresh in line with the Constitution, electoral laws and the Supreme Court decision must be supported by all not castigated. In any case, the

current bills in the National Assembly only clarifies conflicts and vagueness in some electoral laws that led to nullification of President Kenyatta's win and also punishing any attempts by public officials to defeat the will of the voters. Although CIPK supports in entirety the bills, it would like to highlight the following sections of the bills which it finds very instrumental in ensuring that the fresh will be successfully conducted;

a) The proposal to amend Section 2 of the IEBC Act, 2011 is very critical as it ensures there is no vacuum in IEBC should the chairperson be absent or unable to discharge his duties for whatsoever reasons. It also ensures that even in the absence of the Vice-Chairperson the Commission is able to discharge its constitutional mandate especially when confronted with strict constitutional deadlines.

b) CIPK also supports the proposal to allow non-lawyers to have an opportunity to chair the commission through the amendment of Section 6 of the IEBC Act. As you all aware, Kenya has become a very legalistic society and this has in many cases caused further division and confusion in the country and therefore allowing other professions to chair the commission is very prudent. However, please note that our support on this propose does not in any way mean that we don't support the rule of law only that we believe that sometimes the lawyers have used the law to destroy instead of building the country.

c) The proposal to amend Section 39 is critical as it will ensure that the failure of technology in an electoral process will not whitewash the sovereign will of a Kenyan voter. Having manual transmission of votes is critical as the use of technology though good is prone to so much risks that sometimes cannot be mitigated during an election. In addition, the amendment ensures that the sovereign will of a voter right from the polling station is heard unlike the current systems where the 'servers' have more say than one's ballot. Finally, having a complimentary mechanism as contained in the proposal to add a new Section 44A only aims at ensuring that elections are held and in a very simple, fair and credible process.

d) CIPK also supports the amendment of Section 83 of the Elections Act, 2011 as it aims at ensuring that the global standards of

nullifying a presidential election and also those that were set by our Supreme Court in 2013 are not diluted. Our view on this is based on our conviction that if a petitioner cannot demonstrate that the irregularities or illegalities necessitates the nullification of an elections, all future elections including the 26th one will also be nullified as the bar has now been set very low.

e) Finally, CIPK strongly support insertion of a new section in Section 37 of the Elections Offences Act, 2016 as its primary aim is to punish IEBC officers who bungle an election. We find this proposal quite deterrent and will help to end impunity among the electoral officials in Kenya which we have experienced since the time of the disbanded Electoral Commission of Kenya. In any case, the sentence of 5 years jail term in our view is too low as compared to the economic and political cost of nullifying an election due to mischief by an electoral official and therefore this Committee should consider increasing this jail term.

We hope you will consider our views.

Yours Sincerely,

(Al- Hajj Shaban Gakere Bakari)
THE REGIONAL CO-ODINATOR
COUNCIL OF IMAMS AND REACHERS OF KENYA
Mt KENYA REGION

KAMUNYE GICHIGI & CO.ADVOCATES

S.K. Gichigi L.L.B. (Hons) NBI; Diploma in Law
Associate
E. Gitau L.L.B.(Hons) MOI; Diploma in Law

Consolidated Bank House
5th Floor, Room 520
Koinange Street
P.O. BOX 6509-0010
NAIROBI.
Email:info@kamunyegichigiadvocates.com
Tel: 020-3317025
PIN NO: A003226667Z
V.A.T NO: O194057Y

(12)

Our Ref: KG/N/61/15
Your Ref: T.B.A.

42

3rd October, 2017

Received
3/10/17

THE CLERK
NATIONAL ASSEMBLY
PARLIAMENT BUILDING
NAIROBI.

Dear Sir,

RE: MEMORANDUM ON ELECTION LAWS (AMENDMENT) BILL, 2017

I am a Citizen of Kenya and registered voter at Kamagoko Polling Station, Kipipiri Constituency.

On the morning of 8th August, 2017 like many other Kenyans I spent a substantial time and money to travel from Nairobi to the Polling Station to vote for my preferred candidates. I fulfilled my civic duty without any hitch.

Out of the Six (6) votes I cast only the presidential election was challenged in an election Court.

After the Supreme Court's decision, I took time to peruse the judgement and concluded that no issue was raised about the voting process yet the Court nullified the presidential election based on omissions and commissions of officers of IEBC in the transmission of results to the Constituency and the National tallying centers.

No complain was raised in the Petition on the number of votes cast and received by the various candidates. From the contents of the majority's judgement, I concluded that unless the Elections Act was amended then any election held under the current law was bound to be nullified because the Court lowered the bar of proof needed to impeach an election.

Paragraph 377 of the Judgement starting on page 164 caught my attention It reads;

"of the 4229 forms 34 A that were scrutinized, many were not stamped, yet others, were unsigned by the presiding officers, and still many more were photocopies. 5 of the forms 34B were not signed by the returning officers. Why would a returning officer, or for that matter a presiding officer, fail or neglect to append his signature to a document whose contents, he/ she has generated? Isn't the appending of a signature to a form bearing the tabulated results, the last solemn act of assurance to the voter by such officer, that he stands by the "numbers" on that form"

The implication is that the judges are demanding that of the 40,833 presiding officers and 290 returning officers no errors intended or unintended would be entertained

Only supernatural beings would be capable of achieving what the Supreme Court demanded of IEBC.

Indeed it only requires several presiding and or returning officers to make deliberate mistakes and the election will be nullified.

I therefore support the proposed amendments but propose the following changes to the indicated clauses of the Bill

PROPOSED CHANGES TO THE BILL

Clause 3 (1B)

(i) Inserting the words **"and or vice – chairperson"** immediately after the words **"another chairperson"**
(N/B Both the Chairperson and Vice-chairperson may cease being in office simultaneously)

(ii) Inserting the words **"or become available"** immediately after the words **"be appointed"** at the end of the paragraph
(N/B The two officials may be away temporarily and may resume duties at same point)

Clause 6 (1E)

(i) Deleting the word **"and"** immediately after the words **"Polling Station and substituting therefore a comma"**

(ii) Inserting the words **"and national" immediately after the word constituency"**

(N/B Failure to transmit or publish the results can happen at the National Tallying Centre as well)

Clause 9 (C)

(i) Inserting the words **"and has in fact misled"** immediately after the words **"to mislead"**

(N/B Mere intention to mislead should not lead to nullification of results unless there was actual misleading.)

Clause 10 (86, 2 (a))

(i) The term **"president elect"** should be deleted and be replaced with the term **"Candidate"**

(N/B upon nullification of the election there is no president elect)

(ii) (86, 2 (b)) Shouldn't the runner's up be involved as well?

I believe the Supreme Court's 2013 Raila judgement restricting the competition to the 1st and 2nd leading candidates is bad law

(iii) (86, 2 (b) and (c)

Insert at the end of both paragraphs the words **"provided that any candidate intending to participate in the fresh election shall give written notice to the Commission of the intention to participate within Seven (7) days of the nullification by the Court".**

Clause 11

Insert a new paragraph (e) immediately after paragraph (d) as follows:-

"(e) Willfully fails to transmit the document as required or to deliver the document to the Constituency or National Tallying Centre".

NEW CLAUSES

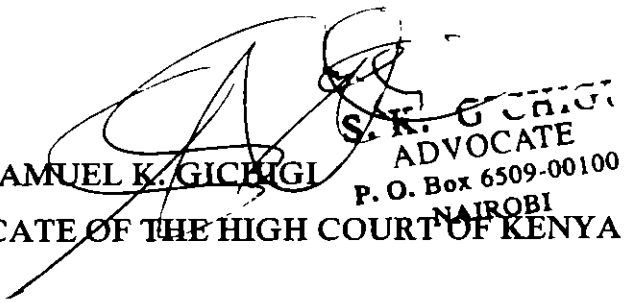
The Elections Act is amended in Section 2 by inserting a new definition of the term "**votes cast**" as follows:-

"votes cast; means valid votes cast and do not include spoilt or rejected votes"

The Elections Act is amended by inserting the following new Section immediately after Section 38.

(N/B The Supreme Court has been graphing with the issue of whether spoilt and rejected votes should count when arriving at the 50 plus 1 threshold.)

"The Commission shall provide, facilitate an opportunity to voters at all polling stations but no election shall be invalidated by reason that voters failed to turn up or that a voter or voters failed to vote by a reason of a boycott"



HON. SAMUEL K. GICHIGI
ADVOCATE OF THE HIGH COURT OF KENYA

S. K. GICHIGI
ADVOCATE
P. O. Box 6509-00100
NAIROBI

3/10/17

15

MEMORANDUM BY CENTRE FOR AFRICAN PROGRESS SUBMITTED BEFORE THE SELECT COMMITTEE ON ELECTIONS, 2017

1. The Centre for African Progress (CAP) is a think-tank that consists of distinguished academics and public policy analysts and is based in Nairobi, Kenya. It has presence in 34 African countries and dwells on social-economic and political analysis and above all tracks all major political events not just in Africa but in the world. In this regard, CAP tracked the Kenyan electoral process since May 2016 and continues to do so even after the 1st September 2017 Supreme Court judgement and therefore would like to submit as follows on the matter of the Electoral Laws (Amendment Bill) (National Assembly Bill No. 39 of 2017).
2. That we congratulate Kenyan voters who peacefully exercised their democrat right of choosing their preferred leaders on 8th August 2017 and in the same breath congratulate IEBC for holding an election which was indisputably held by the majority of local and international stakeholders as one of the most free and fair elections in the history of multi-party democracy not just in Kenya but in all African countries.
3. That following the nullification of President Kenyatta's win by the Kenyan Supreme Court, CAP has read both the majority and minority decisions and together with various issues learnt during the tracking of the Kenyan 2017 elections, CAP submits as follows about the two Bills that are before the Select Committee on Elections 2017.

a) *Proposals to Amend Sections 2 and 6 of No. 9 of Independent and Electoral Boundaries Commission Act, 2011 (Provision for Acting Chair in the absence of Chair and Qualifications for the IEBC Chairperson)*

CAP supports the proposal to amend Section 2 in order to allow the Vice-Chairperson or any other person acting as the chairperson to act as the chairperson in absence of the chairperson or both the chairperson and the vice-chairperson. In our considered opinion this amendment is critical and well thought out as the current law does not provide any other person who would perform the role of the Chairperson before a new Chairperson is appointed or until the Chair is available This is risky as the process of appointing another chairperson is lengthy if not impossible and especially when a country is faced by strict constitutional timelines of holding an election in 60 days like the one we face today.

Further, our view is that this proposal does not compromise the fact that the chairperson is the Returning Officer for the purpose of the presidential poll as the ***Maina Kiai*** case held that the results declared by the Constituency Returning Officers are final and therefore what the commission does at the National Tallying Centre is merely a formality of collating and verifying results from the 290 constituencies. Finally, we are convinced that Article 259 (b) of the Constitution allows for an acting Chairperson in IEBC unlike what some people are saying and therefore this proposal is not unconstitutional. This Article reads as follows, ***"any reference in this Constitution to a State or other public office or officer, or a person holding***

such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time;"

On proposal to amend Section 6 of the Act, CAP being a think-tank of persons drawn from various professions fully supports it. The proposal only expands the professions from which the chairperson of IEBC can come from and this should be supported by all as the post 2010 constitutional phase deliberately isolated many professions except the legal one from many national reconstruction opportunities despite that there is no empirical or anecdotal evidence that only lawyers can serve best in some institutions.

b) ***Proposal to Amend the Second Schedule to No. 9 of 2011 (Quorum of IEBC meetings)***

Article 9 provides that the quorum for conducting business in the commission is five members. The supreme of the country provides in *Article 250 (1)* that each commission shall consist of at least three, but not more than nine members. Therefore, from a plain interpretation of the Constitution, the drafters envisaged that a commission could even have only three members and thus the desire to have a quorum of five members in the decision-making organ of IEBC is unnecessary if not a roadblock that should be avoided. In fact, a quorum of five members in the commission will hamper not aid the commission as during a busy electoral season where some commissioners are oversighting critical activities in the field it's hard to get such a quorum.

c) ***Proposal to Amend Section 44 (Making of Regulations by IEBC)***

CAP supports this amendment as its made in good faith. It only ensures that the process of making regulations to the Act is regularized by giving the Commission the right to make the regulations subject to consulting all relevant stakeholders and agencies.

d) ***Proposal to Amend Section 44 by adding a new Section 44A (Complimentary mechanism)***

CAP supports this amendment as it only seeks to legislate the position of the majority decision in ***Raila Odinga 2017*** and thus streamline the transmission process. It stated;

[392] Having taken note of Mr. Nyamodi's submissions, which appeared to suggest that IEBC had put in place a complimentary system for the transmission of results; a system that was neither simple nor known to the petitioners, we hereby direct that in conducting the fresh election IEBC must put in place a complementary system that accords with the provisions of Section 44(A) of the Elections Act. It goes without saying that such a system as held by the High Court, in the case of the National Super Alliance (NASA) Kenya v. The Independent Electoral and Boundaries Commission & 2 Others, only comes into play when technology fails".

Therefore, CAP hold that this proposal is progressive and made in good faith as seeks to ensure that the IEBC complies with the Court's findings by putting in place a complementary system for identification of voters

that is simple, accurate, verifiable, secure, and accountable and transparent in line with Article 38 of the Constitution.

e) ***Finally, proposal to Insert New Section in No. 37 of Election Offences Act, 2016: Election offences***

One of the major reason why the Majority nullified Kenyatta's win was because of the irregularities which they apparently found in forms 34As, Bs and C. They stated as follows in paragraph 377

"Form 34C, which was the instrument in which the final result was recorded and declared to the public, was itself not free from doubts of authenticity. This Form, as crucial as it was, bore neither a watermark, nor serial number. It was instead certified as being a true copy of the original. Of the 4,229 Forms 34A that were scrutinized, many were not stamped, yet others, were unsigned by the presiding officers, and still many more were photocopies. 5 of the Forms 34B were not signed by the returning officers. Why would a returning officer, or for that matter a presiding officer, fail or neglect to append his signature to a document whose contents, he/she has generated? Isn't the appending of a signature to a form bearing the tabulated results, the last solemn act of assurance to the voter by such officer, that he stands by the "numbers" on that form?"

This therefore means that the importance of having properly filled and signed forms cannot be ignored and also using the right forms altogether and therefore to avoid mischief by agents of the commission, this proposal is very important. The nullification of a presidential elections because of unsigned or unfilled forms due to either commission or omission has a huge

social-economic cost to the country and should be heavily punished. In fact, we propose that if one is found to have committed the offence, the imprisonment should be ten years not five as proposed.

4. CAP fully supports the proposed Bills as they aim at addressing some gaps in the electoral processes that were highlighted in the Majority Decision and also in streamlining the workings of the Commission. As a think-tank, we urge Kenyans and other international stakeholders to support the Bills as they will ensure that the 26th October elections will be held through a free, fair and credible process.

5. Finally, we propose that the Committee to consider inserting a clause in the Bill that will state that as long as IEBC organizes a presidential election in all the 290 constituencies, elections shall be deemed to have been held in that election regardless of whether voters turn-up to vote or not and in case of any disruption of the election, the necessary electoral laws will apply.

OYIEYO ONCHARI

CENTRE FOR AFRICAN PROGRESS

3RD October 2017

Gitanga Road, Opposite Valley Arcade
P.O. Box 41079 - 00100
Nairobi, GPO Kenya
Tel: +254 - 020 - 2044545 / 2106763
Office Cell: 0733 629034, 0722 264497
Email: admin@khr[illegible].ke
Website: www.kh[illegible].ke

THE SENATE CLERK'S OFFICE
RECEIVED
06 OCT 2017
P.O. BOX 41842 - 00100, NAIROBI

Pamoja Tutetee Haki

KENYA HUMAN RIGHTS
COMMISSION

44

Dir. Comm
for the attention of the committees
EF
06/10/17

The Cle[illegible]to the Ke[illegible]a National Assembly and the Clerk of the Senate
Parliam[illegible] of Keny[illegible]
P.O. Bo[illegible]1842
NAIROBI

5th October 2017

Dear Sirs,

INVITATION TO A PUBLIC HEARING OF THE JOINT SITTINGS OF THE SELECT COMMITTEES OF THE NATIONAL ASSEMBLY AND THE SENATE ON ELECTION LAWS, 2017

Thank you for your letter dated 2nd October 2017, and which we received at 11.a.m. on 4th October, an hour after the start of the relevant session of the Joint Sittings of the Select Committees of the National Assembly and the Senate on Election Laws, 2017.

The Kenya Human Rights Commission notes with concern the rush with which the proposed laws are being handled. It is our view that the rush will undermine any meaningful public participation, which your invitation to us is supposed to serve. Even if your letter had been received in time, we do not consider to be reasonable, the notice given to us to make representations to the Committees. We suspect that many other stakeholders to whom a similar invitation may be sent by the Committees will probably also find the notice unreasonable under the circumstances.

Secondly, we note that the subject matter of the legislative amendments concerns laws that govern the country's electoral processes and institutions, and that are being considered for enactment at a time that the country is also preparing for a fresh presidential election — which is a continuation of the August elections — in terms of a judgement of the Supreme Court in the case of *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others*.

Legally, the fresh election as ordered by the Supreme Court is a legal continuum of the election held on 8th August, which having been annulled must now be repeated. The fresh election on 26th October is, therefore, not a new election, but a fresh election in terms of the Constitution. The order of the Supreme Court was directed to IEBC (not to Parliament) to hold a fresh election in strict compliance with the Constitution and the law. The law in reference is the law under which the impugned election was held and as it stood on 1st September, when the Supreme Court delivered its judgment. It is difficult to avoid the conclusion that a decision to change the law midstream is based on endeavor to circumvent the decision of the Supreme Court. A court of law is likely to regard a change of law procured under such circumstances as unconstitutional and the purported exercise of legislative power under these circumstances offends the separation of powers.

Thirdly, the lack of a process that would have resulted in a broad political agreement as to the need for, and parameters of a new law on elections remains a source of concern for us. The lack of prior political consultation, in our view, makes it difficult for the legislative process that is now underway, and to which you invite our participation, to be viewed as legitimate. While it would have been an honor to assist the Kenyan Parliament to arrive at the best legislative outcome for the country, we regret that the perception about a lack of legitimacy in the process has made us arrive at the difficult decision not to engage with it.

Fourthly, there is also a problem regarding the timing of the process and the effect that this has on relevant developments elsewhere. We note that, under very challenging circumstances, the Independent Electoral and Boundaries Commission is currently engaged in preparations for the fresh presidential election that must be held within 60 days as required by the Constitution. One of the challenges that the IEBC must confront is the extremely limited amount of time into which its preparations must fit. The legislative process, in which you now seek our participation, compounds the challenges that the IEBC is facing, because it introduces uncertainty regarding the law applicable to its preparations, at a time there is little time for recovery and adjustment. Whatever its claimed merits, the legislative process is, therefore, a threat to the preparations by the IEBC.

For the reasons given above, we will not make an appearance before or representations to Select Committees of the National Assembly and the Senate on Election Laws, 2017. While we are greatly honoured by your invitation, we hope you will understand our position on the matter, and we regret any embarrassment that our decision may cause. However, we remain hopeful for a continuation of engagement with the Kenyan Parliament in other ways.

Yours faithfully

KENYA HUMAN RIGHTS COMMISSION
Valley Arcade, Gitanga Road
P. O. Box 41079
00100, Nairobi GPO. Kenya
Tel: 020-2044545 / 2106709 / 2106763

GEORGE KEGORO

EXECUTIVE DIRECTOR

DIALOGUE REFERENCE GROUP

Securing Elections 2017

Memorandum to the Joint Parliamentary Select Committee on the Proposed Amendments to the Electoral Laws

A. Preamble:

Religious leaders under the auspices of the Dialogue Reference Group recognize the legislative mandate of Kenya's Parliament as enshrined in Article 94 of the Constitution of Kenya 2010. And as such, DRG appreciates the invitation to submit our views on the proposed Election Laws Amendment Bill 2017.

Having taken time to go through the proposed amendments, we wish to make the following proposal.

B. Shelve the Amendments

While we recognize that some of the amendments proposed are useful, the DRG is of the opinion that the country is currently in a very toxic and polarized political environment that could further deteriorate if the grand standing by both Jubilee and NASA is allowed to fester any longer.

Given that the Independent Electoral and Boundaries Commission has assured the country that the current regime of electoral laws is sufficient for a free, fair and credible election, we urge this Parliamentary Select Committee to consider shelving the proposed amendments for now, and if need be, revisit the matter even more comprehensively after the fresh presidential election is behind us.

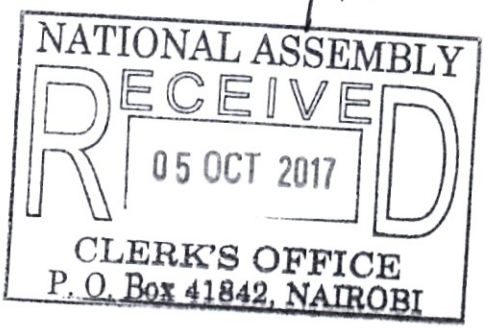
It is crucial that all political actors work together in a by-partisan process that not only fosters national unity but also enables us to hold elections as stipulated in law.

C. Conclusion

We conclude by expressing our commitment to continue being the conscience of the nation and working together with Parliament and other stakeholders for the good of our nation. We urge all actors and stakeholders to engage in a sober manner to enable the country focus on the Fresh Presidential Election.

47 Gazetted PCA S/10

OUR REF: NECA LTD 1/10/2017/3
From: James Ngetich, Post Office Box 71-00517
UHURU- GARDENS, Nairobi, Kenya. Cell: 0714026729
Email: ngetichjames84@gmail.com
DATE 1-10-2017.



MR. MICHAEL R. SIALAI, EBS
CLERK OF THE NATIONAL ASSEMBLY
NAIROBI KENYA Clerk @ Parliament.go.ke

MR. J.M. NYEGENYE, CBS CLERK OF THE SENATE ASSEMBLY AND SECRETARY PARLIAMETARY SERVICE COMMISSION NAIROBI, KENYA> C SENATE @PARLIAMENT.GO.KE.

RE: PUBLIC PARTICIPATION AND SUBMISSION OF MEMORANDA ON ELECTION (AMENDMENT) BILL AS PER DAILY NATION OF 01.10.2017 UNDER NEWTONIAN ERA.

1. The Election (Amendment) Bill before you is constitutional. It is compulsory because propaganda is yet to be eliminated following the impact of end of cold war in 1989 and technology cannot be fully embraced until we have blessed our youth under new-Era.
2. Jubilee Party to take the issue based politics and put democracy in the right place where 40 million of Kenyans are binded and accessed. (ii). Article 4(2) abolish opposition parties and Article 1(3) (a) (b) and (c) is to comply with binding and accessing all people of Kenya through Media, Provincial Administration and Court user committees
3. Binding Article is Article 118 public Access and Participation Bill yet to be enacted but petition to be revisited and submitted through Hon. Nixon Korir MP. Langata Constituency
4. Media has totally failed Kenyans by refusing to open doors for reforming. Current formula for policy formulation is use of Applied Research whose source of ideas is practical problems. Do we need to go for post-graduate studies to know our problems? Which university did God of Israel attend?.
5. Media should only be enjoyed by the President and Deputy until binding the Kenyan population. The news currently being aired is Fake news and Media coverage should be suspended immediately and political analyst be sent back to Universities to continue lecturing till the Media has fully compiled with the constitution, Law and fear of God(Action by communication Authority of Kenya urgently required) with support from you.
6. LSK is a professional body of lawyers and currently are yet to be binded by the Constitution 2010. All professionals, Civil society Organization, N.G.O's Religious Leaders, not a

parliament –are strangers, Article 59 Kenya National Human Rights and Equality Commission is entry point.

7. Petition of 2015 to both houses to be revisited by Hon. NIXON KORIR MP Langata and HON.SAKAJA, SENATOR Nairobi County whose content was to Transition-Transformation Bill under New-Era which is scientific for this Country to move forward.
8. **Judiciary:** When chief justice and president of supreme Court annulled the presidential election 2010 basing on fidelity to constitution adherence to rule of law and fear of God, he was absolutely right. The president is supposed to be the only presidential candidate. If the constitution 2010 is used the way it is, the efforts and processes which had taken to formulate it rendered is meaningless
9. **Harmonized 2015 Kenya Constitution 2010**. This version is in the petition and it contains a long story of modernization/industrialization, post and pre independent era and cold war impacts and effects all taken into account from 1st century to 21st century and beyond, any body who perfectly knows the God of Israel can easily understand that he is the only God we are to worship. Therefore, parliamentarians who have been in opposition have to go along the standards to be set in regard to implementation of the constitution 2010 through Harmonized version.
10. **Technology**: Mistrust can be eliminated gradually through use of Affirmative action programs contained in Article 27 equality and freedom from discrimination and Article 55 youth. Opposition, basing on timeframe should come in but the protocol for timelines are to be fully specified.
11. **Technology**: Countries that had been major victims of cold war such as U.S.A and North Korea, U.S.A and Russia, U.S.A and Iran are two separate entities while Kenya is unique in that Luos and Kikuyu are just like conjoin twins. They are in the government, provincial Administration and in the constitutional and independent commission and as such Luos have not been Marganized. New Era eliminates all these obstacles even the developed countries are to use this formula since the entire global family are torn top-down, people are frustrated and hopeless as witnessed by the number of suicides and various disasters.

12. Way forward

1. Kenya turning point was after **2007/2008** disputed presidential election and Hague six final liberation, a title connecting Kenya with entire world was not taken seriously.
2. Pre-trial conference, the sociology of law and theories of law. (supreme court of Kenya Article **163(7)(8) and (9).** Pre-trial conference in judiciary hopefully is an equivalent of the current public participation which implies the entire 40 million population comprised of slaves, slave drivers, poor, homeless, illiterate and literate are fully considered by all leaders. In regard to any development decisions.

i. Theories of Law: The cornerstone of the formal control system is the law. Generally, Law is seen as serving three major functions; it provides formal sanctions to encourage conformity and discourage deviance, it helps settle disputes, and it may be an instrument for social change (Vago 1989).

ii. Most citizens, and probably even most sociologists', take a general structural – functional approach to law (Rich 1977). By clearly spelling out expected behaviours and punishing violators, the law helps maintain society.
Conflict theorists, take a somewhat different position: They suggest that the legal apparatus was designed to maintain and reproduce the system of inequality Law, in this view is a tool used by elites to dominate and control others (Chamblis1978).

iii. The pre-trial phases of prosecution are often more crucial to arriving at judicial decisions of guilt or innocence than are court trials themselves.

iv. **Conclusion to follow**

Submitted for your consideration

Yours slave and God's spokesman

James Kipsang Ngetich
Prophet- Correction/Product- Innovator/ Transformational Consultant
Newtonian Era Consulting Angencies Ltd.
Newtonianera@gmail.com

C.C –HON JUSTICE DAVID MARAGA

- HON. NIXON KORIR MP. LANGATA
- HON. SAKAJA SENATOR NAIROBI COUNTY
- MR. FRANCIS WANGUSI, DIRECTOR GENERA CAK
- FATOU BENSOUDA - ICC

REPUBLIC OF KENYA

Telegraphic Address
'Bunge', Nairobi
Telephone 2221291
Fax: 243694
E-mail: bunge@swiftkenya.com

Clerk's Chambers
National Assembly
Parliament Buildings
P. O. Box 41842 –00100
Nairobi, Kenya

When replying please quote
Our Ref: **DLS/Petitions/2015**
Your Ref: **TBA**

Date: 13th January, 2016

James Kipsang Arap Ngetich,
P.O. Box 27666-00506,
Nairobi.

Dear Sir,

RE: PETITION TO PARLIAMENT CONCERNING THE ENACTMENT OF THE TRANSITION TRANSFORMATION BILL "ARTICE 119 AND AMENDMENT OF THE CONSTITUTION ARTICLE 255 (1) AND ARTICLE 256 UNDER THE NEWTONIAN ERA

The above matter and your Petition delivered on 9th November, 2015 refer.

Kindly note that all petitions to the National Assembly are governed by the Petitions to Parliament (Procedure) Act, 2012 and the National Assembly Standing Orders.

We have considered your petition against provisions of the Petitions to Parliament (Procedure) Act and the Standing Orders and wish to advise as follows:

1. Contrary to section 3 of the Petitions to Parliament (Procedure) Act and Standing Order No. 223, the Petition is not in the prescribed form as outlined in the Act and Standing Orders;

2. Contrary to section 3 (e) of the Petitions to Parliament (Procedure) Act and Standing Order No. 223 (e), the Petition does not have its subject-matter indicated on every sheet if it consists of more than one sheet;

3. Contrary to section 3 (f) of the Petitions to Parliament (Procedure) Act and Standing Order No. 223 (f), the Petition does not indicate whether any efforts have been made to

Garsen Sub PCA
5/10/17

48





4 OCTOBER 2017

Memorandum on the Election Laws (Amendment) Bill, 2017

About TISA

The Institute for Social Accountability (TISA) is a civil society organization committed towards the achievement of sound policy and good governance in local development, to uplift livelihoods of, especially, the poor and marginalized in Kenya.

Background

Political background

The Kenyan Supreme Court on the 1st of September 2017, annulled the Presidential elections as conducted during the August 8 General Elections. Accordingly, Article 140 (3) provides that a fresh Presidential Elections shall be held within 60 days after the Supreme Court determines that the election of a President Elect is invalid.

In the aftermath of the Supreme Court ruling, the President made rather unfortunate remarks and referred to the Supreme Court Chief Justice Maraga and the majority bench that annulled the elections as wakora (crooks) and stated that he and the Jubilee elected leaders shall revisit the issue upon conclusion of the fresh elections. In efforts to affirm the Presidents unfortunate position, the Presidential Strategic Communication Unit, launch a social media attack on the Chief Justice and the majority bench judges, the respective researchers attached to them and civil society organizations known to support the judiciary in terms of technical capacity using the hashtag #WakoraNetwork. It is noteworthy, that majority of the members of both the Senate and the National Assembly were elected on a Jubilee ticket whose head is the President.

Unfortunately, the proposed amendments in this bill by Jubilee Parliamentarians are a reflection of the contempt by President and the Jubilee Party with regard to the Supreme Court ruling that nullified the Presidential elections.

Constitutional and legislative background

Kenyans enjoy a progressive democratic system of government that is embodied in the Constitution of Kenya 2010. Among the hallmarks of the Constitution is the recognition of the supremacy of the Constitution over the sovereignty of Parliament. Article 2 of the Constitution provides that the Constitution is the supreme law of the Republic and binds all persons and all State organs at both

levels of government. The principle of Separation of Powers is also a prominent feature of the Constitution, which provides for a system of checks and balances between the three arms of government which are to exercise their mandates independent of each other in the protection of the public good.

On matters of electoral management, the Independent Electoral Boundaries Commission (IEBC) is charged with the responsibility, among other, facilitate free and fair elections Article 88 and 250 of the Constitution provides for the architecture to be observed in setting up Constitutional commissions such as IEBC, with article 88 providing for the establishment of the Independent Electoral Boundaries Commission (IEBC) and Article 250 (1) providing that independent commissions shall have a minimum of 3 and a maximum of 9 members and article 250 (2) providing for the distinction between the commission chair and the other members of a commission

Article 81 of the Constitution provides for the general principles of electoral system with part (e) (v) providing that free and fair elections are those that are administered in an impartial, neutral, efficient, accurate and accountable manner. Article 86 provides for principles IEBC should observe during voting and states, that at every election, the Independent Electoral and Boundaries Commission shall ensure that (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent, (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station, (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials

In compliance with, among other articles of the constitution, Article 86 of the Constitution a Bi-Partisan Joint Parliamentary Committee of the 11th Parliament made amendments to the election law geared towards enhancing the conduct of free and fair elections The amendments sought to require the electoral commission to put in place a complementary mechanism for identification of voters and transmission of election results that is simple, accurate, verifiable, secure, accountable and transparent The amendments included section 39 and 44 of the Elections Act which were amended to provide for the manner in which Presidential elections results would be declared and published after close of polling and the introduction of the use of technology in transmission of results (Electronic Transmission of Results) Regulation 79 of the Elections (General) Regulations as amended by L/N No 72/2017 also introduced forms 34 A, B and C for the purposes for declaration of Presidential election results while regulation 83 was amended to introduce Regulation 83 (2) which provides that the Chairperson of the Commission shall tally and verify the results at the National Tallying Centre in compliance with the *Maina Kiai Case* The Kenya Integrated Electoral Management System (KIEMS) introduced under section 44 further had a complementary manual system a position upheld by the court in National Super Alliance (NASA) Kenya v The Independent Electoral and Boundaries Commission & 2 Others These reforms were introduced to ensure that technology limited to

Biometric Voter Registration (BVR), Electronic Voter Identification Devices (EVID) and Electronic Transmission of Results (RTS) while the casting of votes and vote counting was still manual.

Political and Constitutional background as an indicator of legislative intent

Legislative intent, is a principle in statutory interpretation that functions by placing the plain text of a statute within the context of drafting the statute to support interpretation of the literal meaning of the statute. In order to determine the intentions of Parliament, another principle of statutory interpretation is the mischief rule. Under this rule, courts in their analysis of statutes made by Parliament would reasonably ask themselves the mischief or the defect in existing laws the house sought to correct in the introduction of a new statute or an amendment of an existing one. Noteworthy, the court annulled the Presidential elections in the Presidential Petition No. 1 of 2017 because the above outlined Constitutional and election laws on the conduct of the Presidential elections were flouted. **Curiously, this amendment bill seeks to legitimise the illegalities and irregularities that the court found were not adhered to in the August 8 Presidential elections.**

Analysis of the substance of the Elections Laws (Amendment) Bill, 2017

1. **The Architecture of the Independent Electoral and Boundaries Commission**

As noted earlier, Article 88 of the Constitution provides for the establishment of the IEBC and Article 250 provides for the composition and the general architecture of constitutional commissions providing that each commission shall have a chairperson and members. Article 250 (2) provides for process of appointment of the Chair of the Commission providing that the person needs to be approved by Parliament and appointed by the President. Article 138 (10) provides on the role of the chair is to declare results.

The proposed amendment Clause 2 and 3, poses a conflict in view of the Constitutional process of appointment (requirement of approval of Parliament and appointment by the President) of a Chair and the provisions of the bill that the Vice Chair and an ordinary members of the Commission can take up the role of the Chair. The bill proposes to amend the architecture of the IEBC by conflating the qualifications and powers of the Chair and the members of the IEBC, contrary to the constitutional requirements on the same.

2. **Conduct of business of the IEBC**

The bill reduces the quorum for conducting business of the Commission from a minimum of 5 to a minimum of 3, out of a total of 7 commissioners. This means that a minority number of the Commission member will make binding decisions to behalf of the majority. Usually legislative drafting principles require that quorum for meetings and decisions making must be half or more because if the quorum is less than half then we could have two parallel meetings by the same commission and two conflicting binding decisions over the same issue at the same time.

The existing IEBC Act on the Second Schedule part 7 provides that the chair has an obligation to ensure that the Commission make a decision on the basis of concurrence of a majority of **all the members.**

It is also noteworthy that this proposal comes against a back drop where the credibility of the Chair and CEO have been called to question by the court ruling. The National Assembly appear intent of circumventing dialogue to resolve the credibility challenges of the leadership of the IEBC by using the ruling party majority to entrench them as the sole decision makers in the forthcoming election.

3. Transmission of electoral results in the conduct of Presidential Elections

The Bi Partisan Parliamentary Committee made reforms to the electoral laws that provided the basis for the conduct of the August 8 elections and the annulment of the same elections by the Supreme Court. The proposed section 1D provide that the where a discrepancy occurs between electronically transmitted and manually transmitted results, the manually transmitted results shall prevail. The elections should be managed that there are no discrepancies between the manual and the electronic results. The house should not legislate to legitimize irregularities in the transmission of results. The scan image of the input should be similar to the output image. To say if technology fails the manual system supersedes is just to say that the election is manual. Instances of technology failure should be addressed on a case by case basis.

Proposed section 1E proposes that any failure to transmit or publish elections results in an electronic format shall not invalidate the results as announced and declared by the respective presiding and returning officers at the polling station and constituency tallying centre respectively. The system should work as a complete whole thus whereas there is no objection in constituency and polling station declared results not being invalidated, the electronic transmission is important because the system gives greater credence to the electronic process and not the manual. The election transmission was proposed by the Kriegler report to enhance the audit of the process. Thus this provision undermines the intention of the use of technology.

These amendments completely destroy the threshold provided by Article 86 (a) (that the voting system should be accurate, verifiable, secure, accountable and transparent) and achieved in the Elections Act 2011 as amended by the 11th Parliament.

4. Independence of the IEBC

In the proposed amendment to section 44 of the Elections Act, by requiring that the Commission fulfils their constitutional mandate in consultation with relevant agencies is an ambiguous and an unconstitutional proposal. The Commission bears the sole responsibility to conduct free and fair elections through the use of technology.

5. Non-compliance with the Law

Deletion of the Word 'or' in the section 83. Section 83 provides that no election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that

written law or that the non-compliance did not affect the results of the election. This proposed clause 10 lowers the threshold of transparent and accountable elections contrary to the provisions of Article 86 (a). This provision is calculated to raise the threshold of cancelling an election by limiting the Supreme Court ability to nullify as the court is required to consider both qualitative and quantitative aspect of the election.

Conclusion

The amendments backtrack on the reforms that have been made to strengthen the democracy of Kenya and the legitimacy of a Presidential elections.

It is our strongest recommendation is that these amendments be thrown out in their totality. Parliament should instead focus on ensuring that there is a smooth carrying out of elections in October 26 to avert a constitutional crisis. Jubilee Parliamentarians in particular should exercise their role in a way that fosters national unity and upholds the integrity of institutions, and should not subvert the electoral architecture for short-term political gain.

For further information, please contact us at
P.O. Box 48353 -00100 Nairobi
Tel: +254 20 4443676
www.tisa.or.ke

49

THE CATHOLIC JUSTICE AND PEACE COMMISSION PARLIAMENTARY LIASON DESK SUBMISSION TO ELECTION AMENDMENT BILL 2017

Section	The Amendment proposed	Effect / Impact	CJPC –PLD Recommendation
S 2 of the Independent Electoral and Boundaries Commission Act	The Bill seeks to amend the definition of the term "chairperson" to mean in the absence of the Chairperson, the vice chairperson or such other person acting as chairperson acting as chairperson in the absence of both the chairperson and vice chairperson	- By expanding the meaning of the term it means that whoever will be serving as chairperson will be taken as the substantive holder of the office. - This violates Art 250 (2) as parliament as the representative of the people will not have been given the opportunity to vet the person. - Since the term absence has not been explained, it is bound to create confusion.	The definition of the term "Chairperson" in the Act should not be changed.
S 6 (1) of the Independent Electoral and Boundaries Commission Act	The bill seeks to change the qualification requirement for the appointment of the chairperson	- The amendment reduces the qualifications required for the appointment of the Chairperson - The elections deals with constitutional and legal issues as such it requires	The Section should not be amended.

NATIONAL ASSEMBLY
RECEIVED
06 OCT 2017
CLERK'S OFFICE
P. O. Box 41842, NAIROBI

THE CATHOLIC JUSTICE AND PEACE COMMISSION PARLIAMENTARY LIASON DESK SUBMISSION TO ELECTION AMENDMENT BILL 2017

		somebody who is trained in law. That is why the law required the chair to posses qualification equivalent to that of a judge of a superior court (see Art 166 (2))	
Second schedule paragraph 5 of the Independent Electoral and Boundaries Commission Act		- This lowers the threshold of the quorum - The IEBC deals with weighty matters that may cause tension if not handled well and that is why there was a need for concurrence by the supermajority of the commissioners. - We may have a situation where three of the commissioners meet and make a decision and then the other three also meet and make another different decision that leads to	The Paragraph should not be amended.

THE CATHOLIC JUSTICE AND PEACE COMMISSION PARLIAMENTARY LIASON DESK SUBMISSION TO ELECTION AMENDMENT BILL 2017

		stalemate.	
Second schedule paragraph 7 of the Independent Electoral and Boundaries Commission Act		- This will create competing groupings conflicts and tensions	- Should not be amended
S 29 of the Elections Act	Deleted	- This dis-empowers political party members as it removes the powers of the members to nominate Presidential and independent candidates. - The deletion violates Article (38) of the Constitution. - If the members will not nominate the presidential candidate then who will?	This section should not be deleted.
S 39 (1 C) of the Elections Act	The amendment seeks to include Manual Transmission of results	- After the Post Election Violence 2008, the Krigler Commission identified poor transmission of results as one of the causes of conflict, - Parliament in its wisdom appointed a joint select Committee led by Senator	The section should not be amended.

THE CATHOLIC JUSTICE AND PEACE COMMISSION PARLIAMENTARY LIASON DESK SUBMISSION TO ELECTION AMENDMENT BILL 2017

		James Orengo and Kiraitu Murungi The Committee came up with the electronic transmission of results sections (including section 44). This was meant to ensure integrity of the process and faster transmission of results - The Supreme Court in its ruling faulted IEBC for failing to ensure that the results were transmitted as required under S 39 (1C) - This proposed amendment to include manual will contribute to increased electoral malpractices as results may be manipulated easily in a manual transmission.	
S 39 (1 D) of the Elections Act	This is a new sub section that is proposed	- This section has elevated the manual transmission	This section should not be included

THE CATHOLIC JUSTICE AND PEACE COMMISSION PARLIAMENTARY LIASON DESK SUBMISSION TO ELECTION AMENDMENT BILL 2017

		over the electronic transmission - There will be many conflicts arising from differences between the figures transmitted electronically and manually - The results management especially in the strongholds is likely to be manipulated	
S 39 (1 E) of the Elections Act	This is a new proposed sub section that seeks to bar courts from invalidating elections if the results were not transmitted electronically or published.	- This further seeks to ensure that only the manually transmitted results are taken into account	This section should not be included.
S 39 (1 F) of the Elections Act	This is a new proposed subsection		
S 39 (2) of the Elections Act		The Provision had been declared unconstitutional by the High Court and the same position affirmed the Court of Appeal in the Maina Kiai Case	This amendment is okay as it is in line with the decision of the Maina Kiai case
S 39 (3) of the Elections Act		The Provision had been declared unconstitutional by the High Court and the same position affirmed the Court of Appeal in the Maina Kiai Case	This amendment is okay as it is in line with the decision of the Maina Kiai case
S 44 of the Elections Act	The proposed	- Amending	- Subsection 6

THE CATHOLIC JUSTICE AND PEACE COMMISSION PARLIAMENTARY LIASON DESK SUBMISSION TO ELECTION AMENDMENT BILL 2017

	amendments are meant to do away with sections of the regulations that deal with the area of technology	subsection 5 will remove the regulations in areas of technology - deleting subsection 6 will remove the requirements for such regulations to be approved by Parliament - The deletion of S 44 (8) shall not allow the commission to establish a technical committee	should not be amended as parliament should be involved in checking the regulations developed by the IEBC - Deleting subsection 7 is okay as the subsection has already lapsed - Subsection 8 should not be deleted as the technical committee is important in matters of technology
S 44 A of the Elections Act	- This is a newly amended subsection It seeks to remove complimentary mechanism on electronic transmission of results	- This is meant to ensure that only a manual complimentary mechanism is available	- This subsection should not be amended as proposed.
S 83 of the Elections Act	The amendment seeks to make the section conjunctive.	- This section was one of the key areas that were considered by the supreme court in their ruling - The sections as amended will allow illegalities and	- The whole section should be removed from the statute as it allows commission of illegalities and irregularities so long as the results are not

THE CATHOLIC JUSTICE AND PEACE COMMISSION PARLIAMENTARY LIASON DESK SUBMISSION TO ELECTION AMENDMENT BILL 2017

		irregularities to be committed - This is meant to justify the end (results) rather than the process	impacted.
S 86 A	This is a new section that is proposed	- S 86 A (2) seeks to limit the number of candidates to participate in a presidential election after nullification.	- S 86 A (2) should not be enacted as it will limit the rights of potential candidates in violation of Art 38 - S 86 A (3) should not be enacted as it will interfere with the rights of members of a political party to nominate their candidates
S 6 of the Election Offences Act 2016	The amendment seeks to provide for penalties for any election officials who fails to abide by the requirement with regard to signing, stamping of the forms		The amendment of S 6 is okay.

Prepared by Eusebius Atamallo

Catholic Justice and Peace Commission,

Parliamentary liaison Program Officer

50

NYAMBENE MUSLIM ASSOCIATION

P.O. BOX 11978 – 00400
NAIROBI
Email: baltawi@gmail.com; Tel: 0722 -849066

04th October 2017

MEMORANDUM TO THE JOINT SELECT COMMITTEE OF NATIONAL ASSEMBLY AND THE SENATE ON THE ELECTION LAWS OF 2017

NYAMBENE MUSLIM ASSOCIATION INPUT ON THE ELECTIONS AMENDMENT ACT

We thank the Select Committee of the National Assembly and the senate on Election Laws, 2017 for inviting us to submit our views to this Honorable Select COMMITTEE.

NYAMBENE MUSLIM ASSOCIATION is a faith based organization registered under the Society's Act in 1996.

We wish to suggest as follows;

OUR INFORMED Opinion.

1. Section 2 of the amendment seeks to delete the definition of a '**chairperson**' as defined at section2 of the IEBC Act. Over and above the chairperson appointed under Article 250(2), in the event where there is an absence in the position, the vice chairperson shall be considered as the chairperson. If the office of both the chairperson and vice-chair is vacant, any such person may act as a chairperson. The observation of the amendment is as follows:-

a. First, the amendment is problematic in the sense that it does not provide an alternative procedure as to the appointment of any other person acting as chairperson outside the ambit of Article 250(2).

b. Second, it is in conflict with the constitutional requirements as to the appointment of a chairperson. The constitution is clear as to the procedure of appointment of a chairperson and clearly, the amendment does not consider the provision and;

c. Third, prior to the amendment, both the constitution (Art. 250) and the IEBC Act (Section 7A) did not make provisions taking into account the leadership of the commission during a new recruitment process. It can be therefore argued that the amendment seeks to fill in the lacunae.

2. Last, in a much as the argument in 1(c) above can be plausible, Section 3 of the amendment provides that the trustee office holder in absence of the chairperson is delegated the powers and responsibilities that a chairperson would have. This amendment does cure the the missing link as to the extent which the trustee office holder can execute the mandate of the commission acting as chairperson. However, there is a limit in so far as the constitution is concerned. The trustee office holder cannot execute the responsibility under Article 138(10) which is only reserved for the chairperson. Constitutional interpretation would demand that the chairperson in this sense shall be a chairperson appointed under Article 250(2) and not any other definition of chairperson.

3. Section 3 also expands the eligibility criteria for the office of the chairperson. Previously only a person with the same eligibility for a Supreme Court judge could occupy office. Under the amendment, any person with a university degree in public administration, public finance, governance, electoral management, social science, or law; with experience not less than 15 years in the fields mentioned and fulfills the requirements under chapter 6 of the constitution.

Objectively, the amendment does not violate the constitution in any way. Opening up the position to different professions is a moot point. In our case we argue that the responsibilities of the IEBC

chairperson do not necessarily require legal prowess given that the position is majorly governance oriented save for the understanding of the legal procedures during elections. It is therefore not an unsound amendment.

4. The quorum of conducting the business and affairs of the commission has been reduced from at least 5 members to half of the members but not less than 3 by virtue of section 4 of the amendment Act. Further, paragraph 7 of the second schedule is amended to the effect that a decision in the matters of the commission can be passed by majority voting or unanimously. Technically, if a quorum of 3 members was to meet, a majority of two votes would pass. But then the membership of the IEBC is 7 therefore, it will be a minority decision. The uncanny thing about this amendment is that it goes against democratic systems that are founded on the utilitarian principle that is, the greater good for the greater number. In so far as protection of minority rights in any organization goes, their protection is made possible by elementary rules of rights. There is a reason why laws in institutions that offer public service or any other institution for that matter operate on majority voting. The thinking is that the majority represents the greater will that should augur well with the greater number. Further, minority is prone to infiltration by external influence as opposed to the majority. It would be for example not plausible if laws were to be passed in parliament by one-third of supporters.
5. Section 5 amends Section 29 of the Elections Act by removing the requirement that a presidential candidate need be nominated by his/her political party and an independent candidate need not be nominated by people not in political parties. It opens the nomination process to any one in any political party or otherwise. In as much as it opens up the nomination process, it would only undermine the role of political parties in that unity within parties would not be regarded.
6. Section 6 amends section 39 of the Elections Act in four steps:
    a. 1(C) of the Elections Act to the effect that it introduces the manual transmission (together with electronic) of tabulated results

b. it introduces a provision for the supremacy of the manual results in case of a discrepancy with the electronic results.

c. Provides that failure to transmit or publish results in an electronic format does not invalidate announced results at the polling and constituency level.

d. That the live streaming of polling stations' results is not to be considered as basis for the results to be declared by the commission. Consequently, announcement of provisional results is to be done away with.

The argument against these amendments is that it undermines the credibility of the elections. Electronic voting and tallying systems were introduced to achieve the ends of a free, fair and credible election as per the Kriegler report. . On the other hand, as is with technology, it is bound to fail and also subject to manipulation. The European Union observers during the 2013 elections noted the failure of the electronic technology. The recently concluded presidential election petition cast doubt as to the security of the electronic servers. In essence, the amendment does not bring about unconstitutionality given that the constitution does not specify the method of tallying and verification of votes but only requires the placing of appropriate structures and mechanisms to curb electoral malpractice. The question therefore is which of the two methods should have overriding powers against the other? Whereas manual transmission would seem an irony to a country that embraces technology, it should not mean that technology is always secure as it has had its faults. For example, the analysis of the 2013 poll revealed that there was an error with the results transmission system source code that multiplied the actual number of invalid ballots by 8 (an '8x error'). The ultimate end of any election should capture the will of the people. It is therefore an argument that given the uncertainties of technology, both methods should be crucial in transmission but where electronic failure can be ascertained, manual tallying should then be resorted to.

7. The amendment of Section 44(5) is not clear as to whether it deletes the sub-section together with its subsequent sub sections. However from what is certain, it removes political parties from the list

of institutions that the IEBC should consult. Political parties would not have say in implementation of matters touching on the technology to be used during elections. Elimination of political parties as players does not constitute an illegality as they are not statutory stake holders.

8. Section 83 of the Elections Act is amended by the addition of a subsection that strikes out the possibility of an election being invalidated by a non-compliance of a form prescribed under the Act to the requirements of the standard forms. The reasoning may be placed on cases of honest mistakes that are not meant to deceive. But then, the issue is that this should not be a reflection of a democracy where elections are the sine qua non. The only way to ascertain credibility and transparency in elections is by ensuring that the forms that are required to transmit elections adhere strictly to law. This way, one is able to ascertain genuine forms from forgeries. There can be no room for a democratic process that is not well secured by law and by the elementary structures meant to safeguard universal suffrage.

9. A further amendment to Section 83 increases a threshold of filing election petitions. Previously, an election could only be invalidated if the non-compliance offended principles of the constitution or if that non-compliance affected the result of the election. The amendment joins the two requirements such that an election petition based on non-compliance is only invalidated when both elements of offending the constitution and affecting the results are proven. This amendment may seek to protect institutional structures that give effect to democracy by making it difficult to attack their credibility. This will be an attack on the constitution because it is based on values and if those values are offended, any process must lose its legitimacy whether an outcome has been affected or not. Offences against the constitution should be judged *prima facie* in order to protect the integrity of the constitution which need not be stressed that it is the supreme law of the land.

10. Section 86A of the Elections Act is to be amended by listing the candidates eligible to run for election once an election has been nullified. The parties to the petition determine who is to run for election. Whereas the constitution is obscure when it comes to who may run after a successful presidential petition, it is arguable that restricting the number of candidates is illegal. However, in

as much as the obiter dicta in the election petition case of 2013 is was partly discredited by the 2017 petition; the part on who can vie for election in case of a successful petition cannot be completely dispelled as contributing to law. The judiciary is charged with developing the law through constitutional interpretation as per Article 259(1)(c). There can never be a legal void where the court rules that it has no jurisdiction as per the court of appeal. Therefore, it is submitted that that amendment was is appropriate and timely. Moreso it is the prerogative of the legislatures to enact any laws at any time they deem fit. Nyambene Muslim Association strongly believes the intended amendment are meant to seal loopholes that is bound to create uncertainty in the chain of elections.

In conclusion Nyambene Muslim Association prayers that an amicable solution will be found so that the national fabric will remain intact and that national cohesion will be foremost in our mind and no action will take kenya to the brink of precipice again

Thank you all and MAY ALMIGHTY GOD BLESS THE GREAT PEOPLE OF KENYA AND OUR COUNTRY KENYA



ABDALLA M. KAMWANA

CHAIRMAN

NYAMBENE MUSLIM ASSOCIATION

0722849066

51

Institute of
Economic Affairs

OCTOBER 05, 2017

Memorandum on the Election Laws (Amendment) Bill, 2017

About the Institute of Economic Affairs (IEA-Kenya)

The Institute of Economic Affairs is a public policy think tank that seeks to promote pluralism of ideas through open, active and informed public debates on key policy issues, and to propose feasible policy alternatives. It provides research back up to policy makers including Members of Parliament through research and advocacy. IEA's mandate in public affairs is centrally based on economic affairs but includes the social and political realms within which the national economic policy is formed, implemented, monitored and accounted for.

Constitutional and Legislative background of the Bill

Kenyans enjoy a progressive democratic system of government that is embodied in the Constitution of Kenya 2010. Among the hallmarks of the Constitution is the recognition of the supremacy of the Constitution over the sovereignty of Parliament. Article 2 of the Constitution provides that the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government. The principle of Separation of Powers is also a prominent feature of the Constitution, which provides for a system of checks and balances between the three arms of government which are to exercise their mandates independent of each other in the protection of the public good.

On matters of electoral management, the Independent Electoral Boundaries Commission (IEBC) is charged with the responsibility, among other, facilitate free and fair elections. Article 88 and 250 of the Constitution provides for the architecture to be observed in setting up Constitutional commissions such as IEBC, with article 88 providing for the establishment of the Independent Electoral Boundaries Commission (IEBC) and Article 250 (1) providing that independent commissions shall have a minimum of 3 and a maximum of 9 members and article 250 (2) providing for the distinction between the commission chair and the other members of a commission.

Article 81 of the Constitution provides for the general principles of electoral system with part (e) (v) providing that free and fair elections are those that are administered in an impartial, neutral, efficient, accurate and accountable manner. Article 86 provides for principles IEBC should observe during voting and states, that at every election, the Independent Electoral and Boundaries Commission

shall ensure that (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent; (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

In compliance with, among other articles of the constitution, Article 86 of the Constitution a Bi-Partisan Joint Parliamentary Committee of the 11th Parliament made amendments to the election law geared towards enhancing the conduct of free and fair elections. The amendments sought to require the electoral commission to put in place a complementary mechanism for identification of voters and transmission of election results that is simple, accurate, verifiable, secure, accountable and transparent. The amendments included section 39 and 44 of the Elections Act which were amended to provide for the manner in which Presidential elections results would be declared and published after close of polling and the introduction of the use of technology in transmission of results (Electronic Transmission of Results).

Regulation 79 of the Elections (General) Regulations as amended by L/N No. 72/2017 also introduced forms 34 A, B and C for the purposes for declaration of Presidential election results while regulation 83 was amended to introduce Regulation 83 (2) which provides that the Chairperson of the Commission shall tally and verify the results at the National Tallying Centre in compliance with the *Maina Kiai Case*. The Kenya Integrated Electoral Management System (KIEMS) introduced under section 44 further had a complementary manual system a position upheld by the court in National Super Alliance (NASA) Kenya v The Independent Electoral and Boundaries Commission & 2 Others. These reforms were introduced to ensure that technology limited to Biometric Voter Registration (BVR), Electronic Voter Identification Devices (EVID) and Electronic Transmission of Results (RTS) while the casting of votes and vote counting was still manual.

Political and Constitutional background as an indicator of legislative intent

Legislative intent, is a principle in statutory interpretation that functions by placing the plain text of a statute within the context of drafting the statute to support interpretation of the literal meaning of the statute. In order to determine the intentions of Parliament, another principle of statutory interpretation is the mischief rule. Under this rule, courts in their analysis of statutes made by Parliament would reasonably ask themselves the mischief or the defect in existing laws the house sought to correct in the introduction of a new statute or an amendment of an existing one. Noteworthy, the court annulled the Presidential elections in the Presidential Petition No. 1 of 2017 because the above outlined Constitutional and election laws on the conduct of the Presidential elections were flouted. Certain clauses in this Amendment Bill appear to legitimise the illegalities and irregularities pointed out by the Supreme Court, following the August 8 Presidential elections.

Analysis of the substance of the Elections Laws (Amendment) Bill, 2017

1. The Architecture of the Independent Electoral and Boundaries Commission

As noted earlier, Article 88 of the Constitution provides for the establishment of the IEBC and Article 250 provides for the composition and the general architecture of constitutional commissions providing that each commission shall have a chairperson and members. Article 250 (2) provides for process of appointment of the Chair of the Commission providing that the person needs to be approved by Parliament and appointed by the President.

The proposed amendment poses a conflict in view of the Constitutional process of appointment (requirement of approval of Parliament and appointment by the President) of a Chair and the provisions of the Bill that the Vice Chair and any other members of the Commission can take up the role of the Chair. The Bill proposes to amend the architecture of the IEBC by conflating the qualifications and powers of the Chair and the members of the IEBC, contrary to the constitutional requirements on the same.

2. Conduct of business of the IEBC

The amendment Bill reduces the quorum for conducting business of the Commission from a minimum of 5 to a minimum of 3, out of a total of 7 commissioners. This means that a minority number of the Commission can make binding decisions on behalf of the majority. With the quorum being 3, a decision of 2 Commissioners would be binding on the Commission. It is noteworthy that this proposal comes against a back drop where the credibility of the Chair and CEO have been called to question by the court ruling. The existing IEBC Act on the Second Schedule part 7 provided that the chair had an obligation to ensure that the Commission made a decision on the basis of concurrence of a majority of **all the members.**

3. Transmission of electoral results in the conduct of Presidential Elections

The Bi Partisan Parliamentary Committee made reforms to the electoral laws that provided the basis for the conduct of the August 8 elections and the annulment of the same elections by the Supreme Court. The proposed section 1D provides that the where a discrepancy occurs between electronically transmitted and manually transmitted results, the manually transmitted results shall prevail. The elections should be managed to ensure that No discrepancies arise between the manual and the electronic results. The house should not legislate to legitimize irregularities in the transmission of results. However, in view of likely human error, the discrepancies anticipated by the clause should be clearly spelt out.

Proposed section 1E proposes that any failure to transmit or publish elections results in an electronic format shall not invalidate the results as announced and declared by the respective presiding and returning officers at the polling station and constituency tallying centre respectively. The system should work as a complete whole and whereas there is no objection in constituency and polling station declared results not being invalidated, the electronic transmission is important

because the system gives greater credence to the electronic process and not the manual. The election transmission was proposed by the Kriegler report to enhance the audit of the process.

These amendments completely destroy the threshold provided by Article 86 (a) (that the voting system should be accurate, verifiable, secure, accountable and transparent) and achieved in the Elections Act 2011 as amended by the 11th Parliament.

4. Independence of the IEBC

In the proposed amendment to section 44 of the Elections Act, by requiring that the Commission fulfils their constitutional mandate in consultation with relevant agencies is an ambiguous and an unconstitutional proposal. The Commission bears the sole responsibility to conduct free and fair elections through the use of technology or other legal mechanisms.

5. Non-compliance with the Law

Deletion of the Word 'or' in the section 83: Section 83 provides that no election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the results of the election. This proposed clause 10 lowers the threshold of transparent and accountable elections contrary to the provisions of Article 86 (a). Parliament's intent with this proposal is not clear. Infractions to the law must bear clear consequences. It is not helpful to draft laws then by the same laws allow for non-compliance.

6. Implications for withdrawal of an eligible candidate

While seemingly a sensible proposal, the current political context makes the implementation of this proposed amendment difficult. A bipartisan approach should instead be adopted in addressing such a challenge.

Conclusion

The proposed amendments backtrack on the reforms that have been made to strengthen the democracy of Kenya and the legitimacy of Presidential elections. Given Kenya's current context, Parliament should focus on ensuring that there is a smooth carrying out of the oncoming elections. Parliamentarians in particular should exercise their role in a way that fosters national unity and upholds the integrity of institutions, and should not subvert the electoral architecture envisioned by the Constitution.

52

OFFICE OF THE REGISTRAR OF POLITICAL PARTIES
ORPP

Republic of Kenya

Telephone: +254(0)204022000
Email: registrar@orpp.or.ke
Website: www.orpp.or.ke
When replying please quote

Lion Place, 1st Floor
Off Waiyaki Way
P.O Box 1131-00606
Sarit Centre, Nairobi.

Ref: RPP/LGM/012 (48)

Date: 5th October, 2017

RECEIVED
05 OCT 2017
CLERK'S OFFICE

Clerk of the National Assembly,
Clerk's Chambers,
Mini Chamber, 1st Floor,
County Hall, Parliament Buildings,
P.O. Box 41842-00100,
NAIROBI.

Dear Sir,

RE: PUBLIC HEARING OF THE JOINT SITTINGS OF THE SELECT COMMITTEES OF THE NATIONAL ASSEMBLY AND THE SENATE ON ELECTIONS LAWS, 2017

This is to acknowledge receipt of your letter Ref: JSCEL/CORR/2017 dated 2nd October, 2017 on the above subject matter.

Forwarded herein please find Memorandum for submission to the Joint Parliamentary Select Committees of the National Assembly and the Senate on the Election Laws (Amendment) Bill, 2017 from the Office of the Registrar of Political Parties.

Yours faithfully,

Lucy K. Ndungu, EBS
Registrar of Political Parties

REPUBLIC OF KENYA

Telegraphic Address
'Bunge', Nairobi
Telephone 2848000
Fax: 2243694
E-mail: csenate@parliament.go.ke

Clerk's Chambers
Parliament of Kenya
Parliament Buildings
P. O. Box 41842 –00100
Nairobi, Kenya.

PARLIAMENT

OFFICE OF THE CLERK OF THE NATIONAL ASSEMBLY AND CLERK OF THE SENATE/ SECRETARY, PARLIAMENTARY SERVICE COMMISSION

REF: JSCEL/CORR/2017 **DATE: 2nd October, 2017**

OFFICE OF THE REGISTRAR OF POLITICAL PARTIES
RECEIVED
04 OCT 2017
P. O. Box 1131 – 00606, NAIROBI

Ms. Lucy Ndung'u
Registrar of Political Parties,
P.O. Box
NAIROBI.

Dear Madam,

RE: INVITATION TO A PUBLIC HEARING OF THE JOINT SITTINGS OF THE SELECT COMMITTEES OF THE NATIONAL ASSEMBLY AND THE SENATE ON ELECTION LAWS, 2017.

On 28th September, 2017, the National Assembly resolved to establish a Select Committee to be known as the Select Committee on the Election Laws, 2017 to examine and undertake public participation on the Election Laws (Amendment) Bill, National Assembly Bills No. 39 of 2017.

On the same day, the Senate resolved to establish a Select Committee to be known as the Select Committee on the Election Laws (Amendment) Bill 2017. The Elections Laws (Amendment) Bill, Senate Bills No. 3 of 2017 was committed to the Committee on 28th September, 2017.

The Select Committees of the National Assembly and the Senate shall hold joint sittings to consider this matter.

The purpose of this letter is to invite you to a meeting with the Select Committees that is scheduled to be held on **Thursday, 5th October, 2017** in the **Mini Chamber, First Floor, County Hall, Parliament Buildings, Nairobi** between **10.00 am and 1.00 pm** to submit your representations on this matter.

Ms. Kavata Musyoka, a Clerk Assistant (0707 165 221) (kavata.musyoka@gmail.com), is available for any further liaison on this matter.

Yours

MICHAEL R. SIALAI, EBS,
CLERK OF THE NATIONAL ASSEMBLY.

J.M. NYEGENYE, CBS,
CLERK OF THE SENATE/
SECRETARY OF THE PARLIAMENTARY SERVICE COMMISSION.

OFFICE OF THE REGISTRAR OF POLITICAL PARTIES
ORPP

Republic of Kenya

MEMORANDUM FOR SUBMISSION TO THE JOINT PARLIAMENTARY SELECT COMMITTEES OF THE NATIONAL ASSEMBLY AND THE SENATE ON THE ELECTION LAWS (AMENDMENT) BILL, 2017

Submitted by Registrar of Political Parties

5th October, 2017

Office of the Registrar of Political Parties –ORPP
Telephone: +254(0)204022000,0772 281357
Email: registrar@orpp.or.ke
Website: www.orpp.or.ke

@ORPPKenya
Lion Place, 1st Floor
Off Waiyaki Way
P.O. Box 1131-00606
NAIROBI

General Opening Statement

The Office of the Registrar of Political Parties (ORPP) participated in the 8th August 2017 General Elections. The ORPP undertook various activities in the run up to the elections including;

1. Political Parties Leadership Training in partnership with UN Women & UNDP
2. Monitoring Political parties' nominations
3. Development of a manual of promoting gender balance in political parties with Ministry of Devolution & planning
4. Development of political party strategic plans with IDEA and CMD
5. Member of the Chapter Six Working Group with AG's Office, EACC, CUE, HELB, IEBC,PSC
6. Stake holder Partnerships and Peace Building Forums (UWIANO platform) with NCIC and IEBC
7. Elections Security Arrangement Project (ESAP)
8. Elections Technology (Interfacing ORPP database with IEBC)
9. Election (polling) day activities - Training of the Political Parties' and Candidates' Agents; and Election Observation at national, county and constituency levels

Submissions on the Election Laws (Amendment) Bill, 2017

The ORPP humbly submits as follows:

A. Section 2 of the Bill

Parliament has the powers under Article 250 of the Constitution to make laws that govern the composition and establishment of any Commission or Independent Office.

B. Section 3

It is our proposal that the Chairperson of the Independent Electoral and Boundaries Commission (IEBC) should be one who is a lawyer and has mastery of law as the electoral process is a highly legal process and the Chairperson of the Commission is constantly interpreting the law in the day to day carrying out of duties. In addition to this, one other commissioner should be a lawyer in order to head the legal committee.

The addition of new subsections 1A and 1B are bringing to the Act what had already been provided for under clause 6 of Second Schedule to the IEBC Act therefore there is no objection to this amendment. Please note where the substantive holder of the office is absent, and the person called upon to carry out the duties and does not have the requisite qualifications for substantive appointment of the post, the person can be called upon to perform the duties.

C. Section 4

There are no objections on this as Parliament has power to make laws that govern the establishment and procedures of any Commission.

D. Section 5

We object to the deletion of section 29 (1) of the Elections Act, 2011. The political system in Kenya as enshrined under Article 38 and Article 88 (4) (d) of the Constitution underscores the duty of the political party, through its members, to nominate its candidates for elections. Under the Political Parties Act, 2011 political parties are established as corporate entities with their autonomous structures and party constitutions. All political parties conduct their own party nomination processes and therefore candidates are nominated by members of their respective political parties.

The deletion of this section therefore would have adverse effects on the procedure for nominations as strangers to the party will have power to nominate candidates for the party. All political parties will then be required to amend their constitutions before the conduct of the next election to regularize this new nomination procedure.

E. Section 6

There is no objection to the amendment of section 39 of the Elections Act. However, the procedure should be clearly outlined to eliminate any discrepancies.

F. Section 7 and 8

There are no objections to these amendments.

G. Section 9

We are in support of this amendment as there is need for both qualitative and quantitative analysis of the election processes and results before the nullification of elections.

H. Section 10 and 11

There are no objections to these amendments.

Submitted by:-

Lucy K. Ndungu, EBS
Registrar of Political Parties

Signature: ..... Date: 5/12/2017

S3

DAGORETTI DISTRICT LANDOWNERS WELFARE ASSOCIATION

TEL: 0722 418 407/0721 455 185

Email: dagorettilandowners@gmail.com

P.O BOX 59908-00200NAIROBI



4/10/2017

CLERK OF THE NATIONAL ASSEMBLY
P.O. BOX 41842 – 00100,
NAIROBI.

Dear Sir,

RE: MEMORANDUM FROM THE DAGORETTI LANDOWNERS WELFARE ASSOCIATION ON THE ELECTION LAWS (AMENDMENTS) BILL 2017

We the stakeholders, wish to thank the twelve parliament – first session on the recently amended Bills on the recently amended election laws (amendment) Bill 2017 which was published on 27th September and 28th September 2017 respectively.

Following our community stakeholder meeting held on the 3rd October 2017 at Kabiro School complex in Dagoretti North,we hereby present our memorandum on the above amendments hoping our input and memorandum will be considered

- We are alive to the fact that the role of the National Assembly is to represents the people of the constituencies and special interests in the National Assembly
- The National Assembly deliberates on and resolves issues of concern to the people
- The National Assembly enacts Legislation in accordance with part 4 of Article 95 of the constitution.
-

In view of the above, we are in agreement with the National Assembly to amend the elect I.E.B.C Act 9 of 2011, the election Act 24 of 2011 and the Election Offences Act. No 037 of 2016

With the dictates of its Motto "for the Welfare of Society and the just Government of the people" having interrogated the amendments we are in agreement as stakeholders that the alignment of:-

A. Meaning of the "chairperson" and in the absence of the chairperson in relation to section 2 of the I.E.B.C Act 2011 and section 2 of the I.E.B.C Act 2011. The amendment concern operations of the I.E.B.C and the conduct of the business at hand in that it amends the quorum of I.E.B.C chairperson and in the absence of the Chairperson , the members of the commission shall select one amongst themselves to transact the business of I.E.B.C to exercise the duties of the Chairperson and the responsibilities thereof.
B. The quorum for the conduct at a meeting of the commission, the amendment provide that a decision on any matter before the commission shall be a meeting of the members present and voting unless a unanimous decision reached.

C. The nominations of a presidential candidate section 29 has been deleted in effect removing a requirement of that the person who nominate a presidential candidate not be a member of any political party to align it with the High Court decision in the matter of Peter Solomon Gichira vs I.E.B.C and another. The latitude given is in line with fundamental freedom rights of the constitution.

D. The use of technology, the constitution provides a highbred of both manual and electronic voting in line with the demands of the constitution in that it responses the right to free elections and free expressions of the will of the voters.

E. The complementary mechanism amends section 44A of the election Act 2011 in an Endeavour to clarify the role of the I.E.B.C in putting up a complementary mechanism for the identification of voters. We are in agreement in that it's clearly allows voting as a right of an electorate.

F. The nullification of an election and the procedure to be followed at a fresh election. The bill seeks to amend section 83 of the Election Act 2011 to align the provision of the Act with decision of the Supreme Court judgment delivered on 20th September 2017 in that it provides formally on election shall be nullified for non-compliance with written law relating to the election if it followed the constitution.

G. The offence for a presiding or returning officer who among other things knowingly fails or refuses to sign or complete a document containing the results of an election, the bills seeks and inserts a new section in the election offences Act 2016 to prescribe an offence for a residing or returning officer who among other things knowingly fails containing the results of an election. We are in total agreement with the new section in that it provides deterrent measure to be taken to such callous and uncouth officers entrusted with the results and tallying the votes. We believe this is the way forward

We the undersigned officials of various wards representing the stakeholders and mandated to sign for and behalf of the Association forward this written memorandum to your good office in the hope that it will be accorded the necessary attention it deserves.

Sincerely yours,

1. Mr Njuguna Manyara — Chairman Ruthimitu Ward
2. Mr Jackson Gichere — Chairman Mutuini Ward
3. Mr David Kirumba — Chairman Waithaka Ward
4. Mr Francis Migwi — Chairman Riruta Ward
5. Mr Paul Maina — Chaiurman Ngando Ward
6. Mr David Marenga — Chairman Kangemi/ Mountain view Wards
7. Mr Solomon.K.Thiongo — Chairman Kabiro Ward
8. Mr James Makinye — Chairman Gatina Ward
9. Mr Elishavan Gichoya — Chairman Kawangware Ward
10. Mr Peter Njoroge — A.g. Chairman Uthiru Ward
11. Pius Njogu wa Nguo — Secretary General

THIRDWAY HEADQUARTERS
Chaka Place, Suite No. 2, Chaka
Road, P.O. Box 4781-00100 Nairobi,
Email. leader@thirdwayalliance.org
Website. www.thirdwayalliance.org
Tel.+254 798 013750/49/48/47

154

Ref. TAKE/GEN/2017/10/006 **5/10/2017**

To : The Joint Committee on Election Laws Amendment

Thro'
The Clerk of The National Assembly
Parliament Building
Nairobi
Kenya

RE: PROPOSED AMENDMENTS TO THE ELECTIONS ACT 2011 (AMENDED 2016)

(The Election Laws (Amendment) Bill (National Assembly Bill No. 39 of 2017) and the Election Offences (Amendment) Bill (National Assembly Bill No. 38 of 2017))

The principal object of the Election Laws (Amendment) Bill (National Assembly Bill No. 39 of 2017) is to amend the Independent Electoral and Boundaries Commission Act, 2011, the Elections Act, 2011 (No. 24 of 2011), and the Election Offences Act, 2016 (No. 37 of 2016) to provide for the proper conduct of the affairs and business of the Independent Electoral and Boundaries Commission, and for effective management of elections.

On the other hand, the principal object of the Election Offences (Amendment) Bill (National Assembly Bill No. 38 of 2017) is to amend section 14 of the Election Offences Act, 2016 to ensure that the section conforms to Article 35 of the Constitution. Article 35(1) (a) provides that every citizen has a right of access to information held by the State. Article 35(3) further provides that the State shall publish and publicize any important information affecting the nation. The Bill seeks to delete subsection (2) of section 14 which limits the right to access to information held by the State as specified in that Article during the election period.

OBSERVTIONS ON LEGALITY OF COMMITTEE

1. The constitution of this committee is against the intentions of the Constitution of Kenya 2010

2. The standing orders of parliament do not envisage the creation of amendments to the law without having representative committees from all Parliamentary Parties

3. The exhaustive time length usually associated with the stages through which the bill undergoes before it is enacted as law has been shortened purposely to ensure that the proposed amendments become law before the repeat presidential election.

OBSERVATIONS ON INTENTIONS OF AMENDMENTS

The facts as known by every Kenyan are that:

1. That there was a general election on 8.8.2017
2. That IEBC made the final presidential declaration in the absence of about 10,000 form 34As.
3. The Elections were annulled by the Supreme Court citing illegalities and irregularities
4. IEBC has scheduled a new election on 26.10.2017 which is barely 20 days away

It is common knowledge that Jubilee is a stakeholder in the coming elections and a majority at the moment in both houses of parliament. In this light, the impression being created by the amendment to the laws is that:

1. Jubilee is using its majority in parliament to create "diaper" laws for one time use for October 26, 2017
2. Jubilee is deliberately watering down sections of the law that it considers too tight specifically section 7A of IEBC Act 2011 which provides for no acting of the position of
3. That Jubilee is getting back at the Supreme Court and in effect implementing threats made by its leaders after the annulment of their election victory by the Supreme Court.
4. That Jubilee is essentially disempowering independent offices created by the Constitution in order to perpetuate personal and party tyranny
5. Jubilee appears determined to amend laws that will guarantee and safeguard a particular predetermined presidential election result.

AMENDMENT AGAINST LEGAL PRINICIPLES

There is a principle in law that states that you cannot "kill your mother and inherit her". In this case the law cannot be made for specific person's interest especially when the person's amending the law suffer conflict of interest. Jubilee Party cannot make laws by themselves in which all other stakeholders in the elections are against it and purport to use the same laws for an election. This is against global best practices in management and administration of electoral processes.

PARLIAMENT ACTING IN VAIN

The law making function of parliament cannot be exercised in vain. Laws that are against the wording, spirit or intentions of the Constitution of Kenya 2010 will be thrown out by the Courts. Knowingly making such laws is acting in vain. Parliament must not act in vain.

SPECIFIC COMMENTS OF AMENDMENTS

1. The amendment to Section 6 by inserting sub section 1A and 1B lacks clarity and creates confusion on various issues:

a. The word **Absence** is not defined in the Act. Absence can be created for the convenience of individuals and groups.

b. How will the commissioners determine **absence** of Chairperson and deputy Chairperson? If they both go to the washroom at the same time, are they absent?

c. Subsection 1B seems to give other commissioners unconstitutional powers to **sack** the chairperson and the deputy chair person

d. The proposals in 1A and 1B will encourage divisions and infighting in the commission. It is possible that in the said absence the remaining commissioners may break into more than one group of three commissioners each. In such a scenario, the commission may hold two binding meetings and also have two legally elected chair persons. This will create confusion and disharmony in the commission. In fact it is possible for any splinter groups in the commission to announce two presidential candidates as winners. The law cannot be vague and uncertain as it may lead this nation into a grave electoral and humanitarian crisis. This proposal is setting up Kenyans for anarchy.

2. Amendment under section 39 1D

The proposed subsection seems to give room to legalization of fraud. By asserting that results on physical forms will prevail over the electronically transmitted results the section in effect is compelling the commission to rely on manual results irrespective of the authenticity. This proposal does not conform to the provisions of constitution. The proposal seems to defeat transparency and the obligation to conduct credible, free and fair elections. It is possible that a presiding officer may fraudulently fill in and sign a different form 34A after transmitting the correct copy. In such an instance, how do the results on the physical form prevail over the earlier electronically transmitted results? In the just concluded elections we presented to the IEBC evidence of scanned copies of forms 34B from same constituency bearing same serial numbers but showing different details. This proposal is inconsistent and is a recipe for chaos

3. Section 39 (1E)

The suggested amendment seems to completely negate the need for transmission of results electronically As stated above we find it callous that the commission is bound to announce results based on physical forms whether forged or not. The proposal to compel courts of law not to invalidate results on the basis that electronic results are not transmitted is not only callous but suspect. The proposal seems to suggest that all the billions of tax payer funds that were invested in the KIEMS should go to waste. The drafters of these proposals seem to be protecting the actions of the individuals who failed to transmit results in the just concluded elections.

It is important to note that IEBC does not maintain a database of sample signatures of the presiding officers. How then will the commission be able to verify the genuine and forged forms, given that there is also the introduction of subsection 2 under section 83 which seems to defeat standardization of electoral forms?

4. Section 39 1(F)

The proposal is authorizing display of misleading results. Why would IEBC display numbers that are not binding results? What mischief is the amendment meant to create or to cure? This amendment is not in good faith What purpose will display of the said numbers serve? Will this not shape public opinion and create grounds for discontentment if results turnout to be different? Is this not a recipe for chaos?

5. Introduction of section 44A

There is no evidence that the current voter identification via EVIDs has failed or is difficult to use. In fact all parties in the SCOK case no 1 of 2017 were in agreement that voter identification was not in any way part of the irregularities that led to the nullification of the presidential elections. The current system is far much better than manual identification. There is no compelling empirical evidence that the current EVID system has failed. This proposal introduces uncertainties and seems to authorize other methods which may include manual identification which was blamed for multiple voting by some individuals in 2017. This proposal gives room to electoral fraud

6. Introduction of subsection 2 under section 83

What is the intention, rational or justification to legalise non-standardization of electoral forms? Taking into account the proposals under proposed section 39(1E), it is now clear that a fraudulent official can change the electoral forms legally and the fraudulently changed form will prevail over the original genuine result. Why would law authorize use of non standardized forms? Would the same proposal stand in the case of ballot papers?

The qualification that "as long as the deviation is not meant to mislead" does not in any way counter any possibility of forgeries by POs and ROs as proposed section 39(1F) suggest that the results on physical forms prevail over electronically transmitted results.

7. **New Section 86A**

Subsection 2 is simply unconstitutional and misleading as it proposes to defeat the rights of Kenyans to choose a candidate of their choice after presidential election nullification.

With Very Kind Regards,

Martin Gavole A. Mwenesi



Secretary General,
Thirdway Alliance Kenya

55

5TH October 2017

Michael R. Sialai CBS
Clerk of the National Assembly
Parliament Buildings

icj International Commission of Jurists
KENYAN SECTION | Since 1959

J.M Nyegenye EBS
Clerk of the Senate & Secretary to the Parliamentary Service Commission
Parliament Buildings,

NAIROBI

Dear Sirs,

INVITATION TO A PUBLIC HEARING OF THE JOINT SITTINGS OF THE SELECT COMMITTEES OF THE NATIONAL ASSEMBLY AND THE SENATE ON ELECTION LAWS, 2017.

Thank you for your letter dated 2nd October 2017 inviting the Kenyan Section of the International Commission of Jurists (ICJ Kenya) to appear before the joint sitting of the National Assembly and Senate Committees on Election Laws.

Regrettably, this letter is to formally notify you that ICJ Kenya will neither appear nor present memorandum of views to the Committees due to various concerns outlined hereunder.

ICJ Kenya is extremely concerned at the timing, process and content of the amendment laws before the Joint Committee. We are of the considered opinion that the amendments are unconstitutional, not premised on good faith and do promote the rule of law in Kenya.

ICJ Kenya notes that through a Bi- Partisan Joint Parliamentary Committee process of the 11th Parliament, Kenya adopted various amendments to the election laws 2016. These amendments were aimed at enhancing the conduct of free and fair elections and more for the preparation of the August 2017 General elections. The election was held based on these amendments and the pre-existing legal framework. Noteworthy, the court annulled the Presidential elections because the election was not conducted in accordance with constitutional principles and relevant electoral laws.

Kenya is set to hold a fresh election in accordance within the provisions of Article 140(3). On this basis, ICJ Kenya is of the considered view that the election that began in August 2017 has not ended and a fresh election must be held within the same legal framework as the August 8th elections. The unilateral decision taken by Parliament to amend laws governing elections in the middle of an electoral process is in not well conceived or in good faith but an attempt to subvert the electoral architecture for short-term political gain.

In addition, the proposed amendments backtrack on the reforms that have been made to strengthen democracy and seek to legitimize illegalities and irregularities that the court found were not adhered to in the August 8 Presidential elections. ICJ Kenya further observes that the court did not find any fault with the existing legal framework save for the fact that the election management body did not comply with the law. In light of the foregoing, ICJ Kenya recommends that the proposed amendments should be withdrawn in totality to allow for a smooth running of the upcoming elections.

ICJ Kenya is fully committed to supporting Parliament promote constitutionalism, justice, democracy and the rule of law as has been the case previously. In this regard, ICJ Kenya is willing to engage in a process that comprehensively reviews the electoral framework upon finalization of the ongoing electoral process.

We thank you for your kind consideration and for choosing ICJ Kenya as a strategic partner.

Should you have any questions or require further clarification, please do not hesitate to contact me on samwel.mohochi@icj-kenya.org or info@icj-kenya.org.

Yours Sincerely,

THE KENYAN SECTION OF THE ICJ
SAMWEL MOHOCHI
EXECUTIVE DIRECTOR
P.O. BOX 59743 - 00200, NAIROBI

Samwel Mohochi
EXECUTIVE DIRECTOR

CC. Chair Joint Parliamentary Select Committee

204

56



LAW SOCIETY OF KENYA

Ms Cherrie, SS Comm.

Kindly bring to the attention of the Committees.

05/10/17

MEMORANDUM TO THE SELECT COMMITTEES OF THE NATIONAL ASSEMBLY AND SENATE ON THE ELECTION LAWS (AMENDMENT) BILLS 2017

THURSDAY 5TH OCTOBER 2017

Isaac Okero (President), Faith Waigwa (Vice-President)
Manthi Masika, Alex Gatundu, Alan Kosgey (General Membership Representatives)
Edwin Sifuna, Harriette Chiggai, Jemator Dorothy, (Nairobi Representatives)
Godfrey Kitiwa, Annet Nyukuri, David Njoroge, Jane Masai, (Upcountry Representatives)
Grace Okumu (Coast Representative)

The Honourable Chairmen and Members of the Select Committees of the National Assembly & the Senate,

The Law Society of Kenya is a body corporate established by the Law Society of Kenya Act No.21 of 2014. One of the statutory roles of the Law Society is to assist the government and the public in all matters affecting legislation and the administration and practice of the law.

In pursuit of the above mandate and honouring the invitation extended by the letter dated the 2nd October, 2017 I do hereby tender this memorandum on the **Election Laws (Amendment) Bills 2017,** by which are raised the following concerns:

This process of making laws is discharged by the houses of Parliament in their exercise of a delegated sovereign power belonging to the people of Kenya[1] which must be performed in accordance with the Constitution[2] which itself must be interpreted in a manner to promote its purposes values and principles, to advance the rule of law, and the human rights and fundamental freedoms in the Bill of Rights, to permit the development of the law and to contribute to good governance.[3]

The proposed amendments are patently unconstitutional. They go against the text, the spirit and the substance of the Constitution. The very purpose of establishing independent commissions was to create a check and balance on the other organs of the state and that cannot therefore permit parliament to now oversight such constitutional organ by way of legislation

1. Amendment of section 2 and 9 of the IEBC Act 2011- Meaning of Chairperson and Absence of Chairperson

The composition[4] of a commission and the identification, selection and appointment of each of its members[5] are both provided for by the constitution. The establishment of the chairperson and of the minimum number of its Commissioners is set out in the framework of our Constitution The returning officer for presidential elections is

[1] Art 1(1) of the Constitution *"All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution"*

[2] Art 1(3)(a) of the Constitution "Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution— (*a*) Parliament and the legislative assemblies in the county governments"

[3] Art 259(1) of the Constitution

[4] Art 250(1) of the Constitution "Each commission shall consist of at least three, but not more than nine, members "

[5] Art 250(2) of the Constitution "The chairperson and each member of a commission, and the holder of an independent office, shall be— (*a*) identified and recommended for appointment in a manner prescribed by national legislation, (*b*) approved by the National Assembly, and (*c*) appointed by the President "

prescribed by the Constitution[6] and cannot be the subject of preference by Parliament. It is therefore only the people through a referendum who can circumscribe their right to determine the composition of any commission including the IEBC or who it is that must be the returning officer for presidential elections.

Logic for requirement of the Chair of IEBC to be a lawyer and to have Supreme Court judge qualifications has been ignored in this amendment that informed the initial architect of the drafting. Taking away this qualification is mischievous as it ignores the auxiliary duties of the Chair to sit on appeal over petitions of aggrieved persons during party primaries. It convolutes matters as it inhibits the efficient and effective provision of public service required by Part 1 of Chapter 13 of the Constitution[7] including the imperative for fair competition and merit as the basis of appointments and promotions[8]. The current chairman was selected and appointed in a process that accorded with the Constitutional imperative. The proposed amendment will assign the role and function of the chairman to the vice chair and other members who have not been selected or appointed in accordance with the constitutional standard required which is a violation of the will of the people. The proposed amendment further violates the obligation of Parliament to effect the constitutional values and principles of public service in legislation it enacts[9].

No vice chair or member under the proposed legislation not having been selected and appointed as chairman under the Constitution can legally purport to exercise by statutory authority derived from the proposed legislation any constitutional functions and powers of the office of the chairman except upon an amendment of the Constitution. Parliament cannot purport to amend the constitution by conferring the obligation to discharge a constitutional mandate on a member of the committee.

Recommendation:

1. The amendment can only be effected constitutionally and not statutorily.
2. Unless the Vice Chairperson has similar qualifications as the Chairperson that office cannot fall under the contemplation of Article 259(3)(b) in regard to the constitutional functions of the Chair person.

2. Quorum as to conduct of the business and affairs of the commission

The proposed amendment to paragraph 5 of the Second Schedule to the Independent Electoral and Boundaries Commission Act will reduce the quorum for transacting

[6] Art. 138(10) of the Constitution *"Within seven days after the presidential election, the chairperson of the Independent Electoral and Boundaries Commission shall—(a) declare the result of the election; and (b) deliver a written notification of the result to the Chief Justice and the incumbent President."*

[7] Art. 232 of the Constitution ***"Values and principles of public service."***

[8] Art. 232(1)(g) of the Constitution *"The values and principles of public service include— (g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions."*

[9] Art. 232(3) of the Constitution *"Parliament shall enact legislation to give full effect to this Article."*

business at the IEBC from five to three members. The total membership of the IEBC is seven. If three constitute a quorum, it means a minority composition of the IEBC will make decisions that bind the majority. In practical terms, with the quorum reduced to three, it means a majority of two of the three commissioners present and forming the quorum could make binding decisions for the IEBC when the law provides for a membership of seven. With the proposed amendment to paragraph 7 of the same schedule, which allows a majority of the members present and voting to make binding decisions for the IEBC, this presents a recipe for confusion, disorder and instability. The proposed amendments shall have the effect of undermining the structure and authority of the commission by creating an authority for the proffered quorum of three which is not only unconstitutional but creates an inbuilt structure for a dead lock with the consequential constitutional ramification. Furthermore the proposed amendments to the schedule do not foster high standards espoused by the Constitution[10].

The magnitude and gravity of the IEBC's constitutional mandate requires that its decisions are made by a quorum of an odd number of not less than half of the full complement of its members which can only be five.

Recommendation:

1 The PROPOSED amendment to reduce the quorum from five to three offends the spirit of the Constitution and ought therefore to be discarded with the current provisions retained as they are.

3. Nomination of presidential candidate

The proposed amendment removing the requirement that a person who nominates a presidential candidate shall be a member of the candidate's political party shall erode the current legislative framework that is designed to foster and nurture multi-party democracy which is the anticipation of the Constitution[11]. Riding on the back of multipartism, nominations and contestation must be party based and should promote multipartism. The proposed deletion of section 29 of the Flections Act will enable a presidential candidate to be nominated by persons from different political parties. It

[10] Art 232(1) of the Constitution (1) *"The values and principles of public service include— (a) high standards of professional ethics, (b) efficient, effective and economic use of resources, (c) responsive, prompt, effective, impartial and equitable provision of services, (d) involvement of the people in the process of policy making, (e) accountability for administrative acts, (f) transparency and provision to the public of timely, accurate information, (g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions, (h) representation of Kenya's diverse communities, and (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of— (i) men and women, (ii) the members of all ethnic groups, and (iii) persons with disabilities "*

[11] Art 4(2) of the Constitution *"The Republic of Kenya shall be a multi-party democratic State founded on the national values and principles of governance referred to in Article 10 "*

will also allow independent candidates to be nominated by persons who are members of political parties. This amendment is unconstitutional to the extent that it makes nonsensical the political party system as the mainstream mechanism for canvassing for elective offices. It will also erode the principles of discipline within and loyalty to political parties both cardinal in the promotion of a healthy and vibrant multiparty democracy.

Recommendation:

1. The proposed amendments would violate the spirit and substance of the Constitution and specifically Article 4(2) and ought to be discarded with the current provisions retained as they are.

4. Electronic and Manual Transmission of Results

The proposed amendments states that in the event of a discrepancy between electronically transmitted and manually transmitted results, the manually transmitted results shall prevail. The amendment is misconceived and arguably unconstitutional in three cardinal respects.

First, the amendment clause ignores the historical context of the use of technology in our elections as set out in the Kriegler Report. The following are some of the reasons why electronic transmission of results was introduced:

- Ballot stuffing, physical alteration of results forms, violence leading to destruction of voting materials and erasing of all possible physical footprints.

- A mischievous presiding or returning officer could electronically transmit the correct result but manually transmit a fraudulent result or vice versa

Secondly, the proposed section assumes that manual election results are incapable of manipulation, contrary to the widely acknowledged conclusion of the Kriegler Report. The proposed amendment could conceivably encourage the alternation of physical forms by of for a preferred candidate who realizes that in the electronic transmission which will be the first to arrive he is losing the elections.

Thirdly, the amendment runs afoul of the Constitution which requires the IEBC to put in place appropriate structures and mechanisms to eliminate electoral malpractice[12]. Indeed, the infusion of technology into our electoral processes was largely informed by this constitutional imperative.

[12] Art. 86(d) *"At every election, the Independent Electoral and Boundaries Commission shall ensure that— (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials."*

The proposed amendments relegating the significance of electronic transmission would undermine fair process provisions of the Constitution[13] if where there is a discrepancy a preference is granted to one process irrespective of the available evidence. It is quite possible that the physical forms may be altered once a preferred candidate realizes that in the electronic transmission which will be the first to arrive he is losing the elections.

The Proposed amendment is in conflict with Constitution which defines "free and fair" elections[14]. Further the section undermines the Constitution which obligates the IEBC to put in place appropriate structures and mechanisms to eliminate electoral malpractice[15]

Recommendation

1. The proposed amendments are unconstitutional and ought to be discarded with the existing legislation retained unchanged

5. Use of technology

The proposed amendment to Section 44 (5) of the Elections Act, removing the obligation on the part of the IEBC to (inter alia) test, certify and audit its ICT system and removing the obligation to grant access to the electoral system software source codes, opens up the possibility of sham elections. This is all the more a likelihood with certificates of Penetration, Tests, Server codes etc. not needing to be discussed with opponents in the political race and with deadlines for compliance also not needing to be followed. Critical constitutional requirements[16] of an accessible, transparent, accurate impartial, neutral, efficient, accurate and accountable election are being whittled down.

A lacuna arises in the requirement for accountability, accuracy, access, transparency and fairness in the use of technology in the elections. From the wording of the law, the application of technology was to be progressive, that is, in subsequent elections, more aspects would be incorporated in the electronic management.

---

[13] Art 47 of the Constitution *"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall— (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal, and (b) promote efficient administration "*

[14] Art 81 of the Constitution *"The electoral system shall comply with the following principles— (e) free and fair elections, which are— (i) by secret ballot, (ii) free from violence, intimidation, improper influence or corruption, (iii) conducted by an independent body, (iv) transparent, and (v) administered in an impartial, neutral, efficient, accurate and accountable manner "*

[15] Art 86(d) of the Constitution

[16] Art 86(e) of the Constitution

That the proposal is for this entire section to be scrapped, points to a step to retrogressively diminish technology use in our elections. Further, deleting these subsections ousts the role of stakeholders from this important national process. Without the Committee of Information & Technology, the officers in charge are vaguely accountable, but neither to the stakeholders nor to the electorate.

6. Complementary Mechanism

This provision on complimentary mechanism is vague as it does not disclose any specific complementary mechanism; this lacuna opens the entire process to machinations and malpractice that may not foster electoral integrity. It is clearly an affront to values and principles under article 10 of the Constitution. It also offends article 232 of the constitution both the letter and the spirit. It has utterly nothing to do with article 38 which has been thrown under memorandum and objects to justify its existence. It is retrogressive as it seeks to undo the previous progress amendments undertaken through a bipartisan approach.

The imperative word "SHALL "has been replaced with the optional word "MAY" leaving the IEBC with no mandatory obligation to set up a complementary system that is simple, accurate, verifiable, accountable and transparent to identify voters and transmit results.

Recommendation

The proposed amendments set up a legislative framework that falls far short of the constitutional standards and therefore ought to be discarded with the current legislation retained unchanged.

7. Nullification of an election

The proposed amendments to section 83 of the Elections Act are unconstitutional in multiple respects.

Election forms are generated in advance of elections and are uniform. This is so that any form that does not correspond is deemed invalid and so that all players know what a genuine form looks like in order to spot the fraudulent ones. This amendment seeks to create an avenue for ambiguity and to take advantage of it. It should not be accepted.

First, they purport to require persons who file an election petition to prove both non-compliance with the principles set out in the Constitution and that such non-compliance affected the results. This offends the provisions of Article 2 (4) of the Constitution. It also offends the provisions of Articles 10, 38, 81 and 86 of the Constitution.

Secondly, the amendments purport to excuse all irregularities in election declaration forms as long as they are not calculated to mislead. Only the respective presiding or returning officers would know whether or not the irregularities were designed to mislead.
The amendments would also permit the situation we saw at the Supreme Court, where one could not tell the official Forms from the unofficial or forged ones

Recommendation

Since the amendment is manifestly repugnant to several constitutional provisions it should be discarded with the current legislation retained unchanged.

8. Procedure to be followed at a fresh elections

The proposed section 86A of the Elections Act purports to say who can and who cannot run in a fresh election in the event a presidential election is nullified by the Supreme Court. The problem here is that there is no constitutional basis for purporting to restrict who can and who cannot run in the fresh election Further, the proposed amendment is based on *obita dicta* from the decision in Presidential Election Petition No. 5 of 2013. Of the various types of "fresh election" envisioned in article 138 to 140 of the Constitution, only one has a constitutional limitation on who can run and who cannot run[17] and the proposed amendment is not in relation to such an election.

It is unreasonable for parliament to purport to change the rules of an electoral contest mid-stream and thereby deny a candidate an opportunity to offer themselves to the electorate in a repeat poll.

The right to participate in any elections is granted by the constitution subject only to such qualifications as is prescribed by the constitution and to any order of the Court in accordance with the constitution. That cannot be limited by legislation. The proposed amendment contravenes the constitutional provisions on 'political rights'[18]

Recommendation

---

[17] Art 138(5) and (6) of the Constitution

[18] Art 38 of the Constitution *"(1) Every citizen is free to make political choices, which includes the right— (a) to form, or participate in forming, a political party, (b) to participate in the activities of, or recruit members for, a political party, or (c) to campaign for a political party or cause (2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for— (a) any elective public body or office established under this Constitution, or b) any office of any political party of which the citizen is a member (3) Every adult citizen has the right, without unreasonable restrictions— a) to be registered as a voter, (b) to vote by secret ballot in any election or referendum, and (c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office "*

The proposed amendment shall violate the political rights conferred by the constitution and ought therefore to be discarded.

9. Offence for presiding or returning officer who among other things knowingly fails to or refuses to sign or complete documents containing the results of an election

The proposed section 6A of the Election Offences Act seeks to punish presiding and returning officers who are responsible for errors and omissions in election result declaration forms. The penalty is imprisonment for a term of five years. The irony is that according to the amendment bill, those errors and omissions that constitute the ingredients of the election offence attracting a sentence upon conviction of a jail term of five years, cannot invalidate the election to which they relate.

Recommendation

The proposed amendment opens a real possibility of deliberate errors and omissions that leave unaffected the election result will result in an election that falls short of the constitutional standards

Thank you.

ISAAC N. OKERO
PRESIDENT LAW SOCIETY OF KENYA.

Received
4/10/2017

57

NATIONAL IDP NETWORK
P.O. Box 17940-20100 NAKURU, KENYA.

NATIONAL IDP NETWORK
04 OCT 2017
P.O. BOX 17940 NAKURU

Memorandum
To the National Assembly
Bills 2017

On the Election Laws (amendments) Bills 2017

Presented by The National Internally Displaced Persons (IDP) Network

Through the Clerk – National Assembly
on 4th October,2017.

NATIONAL IDP NETWORK

P.O. Box 17940-20100 NAKURU, KENYA.

Date: 04th OCT.2017

To:

The Clerk

National Assembly

Parliament of the Republic of Kenya

NAIROBI.

RE; MEMORANDUM ON THE ELECTION LAWS (AMENDMENT) BILL 2017.

National Internally Displaced Persons (IDPs) Network is a non-political / partisan advocacy group whose mission is to ensure prevention, protection and assistance to all victims and survivors of Internal Displacement in Kenya through collaborative approach. It was incorporated in the year 2003 and has an elaborate countrywide representation from the national to the grassroots level.

The Network has been closely working with state and non-state actors, on matters of policy and information sharing with regard to displacement in the country with an ultimate goal of achieving durable solutions to victims of internal displacement.

We, the victims of the post-election violence in 2007/2008, have been following with great dismay and concern the political developments in our country since the Supreme Court's nullification of the Presidential Election on 1st September 2017.

We strongly believe that the Supreme Court was wrong in nullifying the election on the basis of technical considerations such as unstamped forms, documents without watermarks, and failed transmission of results. In our view, these technical issues did not affect the votes as cast by the voters, who queued for more than eight hours on the 8th of August 2017 to vote for their presidential

candidates and in which votes still remain in the ballot boxes. In our opinion, the Supreme Court majority decision did not follow the Constitutional provision in Article 159(2)(d) which says *"justice shall be administered without undue regard to procedural technicalities"*, and their actions have put this country at great risk of sliding into violence which we dread to return to.

We wish to remind Kenyans, that during the 2007 - 2008 post-election violence, the country was rocked by an orgy of violence, which led to massive displacements, destruction of property, sexual and gender based violence, and loss of lives. Among the areas most affected by violence were some parts of Rift Valley Province, Nyanza, Coast, Western and Nairobi among other areas. Over 600,000 Kenyan citizens were displaced. Over 350,000 citizens were displaced, and these citizens sought refuge in IDP camps in Kenya and Uganda. Other IDPs sought refuge from friends or relatives occasioning burdens. Kenya has not healed from the trauma of the 2007-2008 post-election violence and this poses a danger for the next election. We as victims of election related violence live in fear and feel we are not safe in Kenya especially when we hear political incitement being uttered by top leadership of this country as we sense, displacement, death among other sorrowful disasters. It is only when the rule of Law is well constituted, respected and water tight to help protect its Citizens.

We therefore support the efforts of the Kenyan Parliament to amend the Elections Act and the Elections Offences Act, and make amendments to provisions that will make this country conclude the presidential elections without risk of disruption, paralysis, tension or violence. In our opinion, these amendments are going a long way in securing the holding of fresh election on 26th October 2017, and bringing to close the election cycle which cannot go on and on to infinity as the NASA opposition candidates would wish us to do.

We wish to point out that the NASA opposition strategy which is supposedly meant to bring about reforms to the Independent Electoral and Boundaries Commission (IEBC), focuses on violence and disruption – with regular and continued calls and actions through demonstrations, destruction of property, loss of lives, unconstitutional and illegal removal of commissioners and independent office holders, threats of boycott and economic sabotage, intimidation and threats. All these disruptive actions, are supposedly meant to be an attempt to bring about reforms, but unfortunately only serve to cause tension, fears and actual violence amongst Kenyan citizens, and an even greater

fear amongst our membership who have only just managed to settle back to their lives after the 2007/8 post-election violence events

We fear that if country is not well managed, will go the 2007/2008 way where some residence of this country were dumped as foreigners, enemies of certain communities and forced to flee their own land by their own countrymen/ women When elections come, with the current elections law, to us it means ;death, displacement, fear, trauma, lack of education to idps children hence urgent need to amend our Laws as it is. We feel NASA coalition is not for good course as they were primary cause of our displacement in 2007 as ODM Party, five years down the line refused to settle us neither make Laws that could discourage the recurrence There is no effort whatsoever being realized from NASA side to settle or protect victims, it is only through amendments in parliament that can help us avoid crisis such as what we have now.

We therefore fully support the amendments to

1. The Independent Electoral and Boundaries Commission Act, which seeks to provide a succession framework for the position of the Chairperson, so that the Commission is not paralyzed when the Chairperson is away for any reason. We believe that this omission in the law was potentially fatal, as there is no institution, not even in a family, which does not have a succession plan We do not believe that the amendment affects the Chairperson's job, but instead, makes it easier for him to conduct his business, knowing that he is not under pressure. Knowing how difficult the position of Chairperson of the IEBC position is, the safety net created by the amendment will only serve to improve the performance of the Chairperson and his team

   We know that if the Chairperson was to be unavailable for any reason, the election will not be held on 26th October 2017 as there will be no one else to act as returning officer This situation can lead to violence, destruction of property and loss of lives.

2. The Elections Act, to provide for the electronic and manual transmission of presidential election results. We expect that both mechanisms are to be used to transmit the results, but with both being used to support the other We know that it is not possible to rely fully on electronic transmission of results, as these can fail when there is no network coverage, or where transmission communication masts are deliberately sabotaged. A secondary system

of transmission of results as proposed will therefore assist in securing the voters will, and giving meaning to the efforts of voters to cast their votes for the president of their choice.

We do not believe that the manual system can be tampered with, as there are many other ways of verifying the results as declared by the polling station or constituency tallying center officials. These include any video recordings of announcements taken, the copies of results with agents of presidential candidates, the results posted on the polling/constituency centers, and the scanned images of the forms as transmitted electronically. All these alternate means can be used to confirm the manually transmitted results.

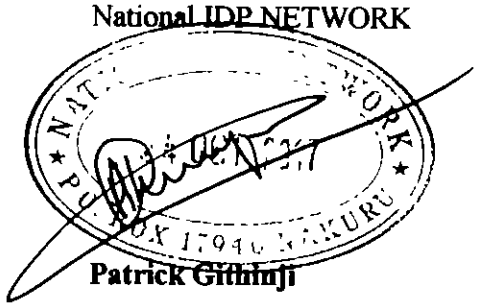
3. The Elections Act amendment to include a procedure for the holding of fresh elections and the candidates to participate in the fresh election. We strongly believe that the election process must ultimately come to an end so as to allow the country to focus on development. The proposed amendment brings to final conclusion the election, and reduces the risk of a continued cycle of elections as some people in the NASA opposition would want. Elections cost a lot of money, which could be spent compensating IDPs and facilitating their re-integration into society.

4. The Election offences Act amendment, which enhances the penalties for rogue presiding and returning officers who willfully and deliberately refuse to sign forms, or fill them incorrectly so as to cause an election to be nullified. We believe that the penalties should be punitive to prevent such occurrences, so that persons who engage in such acts are punished.

Parliament's role in amending law is a constitutional mandate. Its role is not restrained on considerations such as "timing" and neither does Parliament require any authorization to amend laws. Parliament is the only legitimate body in which to anchor any reforms of the IEBC and the Elections in general, not through the streets where violence and destruction is meted on innocent Kenyans. Parliament's actions are also based on the Supreme Courts' observations of the 2017 General Election, and the recommendations in both the majority and dissenting opinions on the need to ensure that there is clarity, simplicity and verifiability in the process of transmission of presidential election results.

We commend Parliament for this initiative, and for the Government for their steadfast resolve to follow the law and the Constitution. We the Internally Displaced Persons fully and unequivocally support the amendments as contained in the Election Laws (Amendment) Bill 2017 and the Election Offences (Amendment) Bill 2017.

Yours faithfully
For and on behalf of the
National IDP NETWORK



Patrick Githinji
Phone: 0722611262
Email:patrickgithinji@hotmail.com
Chairperson, IDPs

REPUBLICAN LIBERTY PARTY

Republican House, Githurai 45
Mwihoko road,
+254 722 167811,
+254 733 288086
info@rlibertyparty.org

P.O. Box 20148-00100
Telfax: +254-20-310524,
Nairobi-Kenya
www.rlibertyparty.org

S8

Received
4/10/2017

MEMORANDUM
THE PARLIAMENTARY ELECTION LAWS (AMENDMENT) BILL, 2017

To: The Chairperson,
The Parliamentary Election Laws (Amendment) Bill, 2017

RE: RECOMMENDATION ON SPECIFIC AREAS TO BE AMENDED

We write to provide our analysis of the "**ELECTION LAWS (AMENDMENT) BILL, 2017**"draft Bill, which is currently before Parliament and before being enacted.

Our input seeks to provide a standardized perspective to the draft Bill, taking into account Supreme Court of Kenya's decision on the August 8th, 2017 Presidential Election.

Summary of our Position on specific items:

Based on our analysis of the draft Bill, we present and propose the following changes:

1. In the proposed amendment to the Independent Electoral and Boundaries Commission Act, 2011 and appearing under section 4(a), provide that "the quorum not be less than four members".
2. Replace the current provision in section 10 of the Draft Bill amending section 86 of the Elections Act, 2011 as section 86A(2) where the Candidates to participate in the fresh elections pursuant to section 140(3) shall be determined, to read that the candidates shall be determined by:
    a) where "Fresh Elections" pursuant to section 140(3) are directed after president-elect whose election has been annulled, "the Commission shall publish a notice in the Gazette for candidates to submit nomination papers in line with Article 138 of the Constitution" and that eligibility is restricted to the provisions of Article 138 of the Constitution of Kenya.
    b) where it is directed for "Repeat Elections," the Commission shall publish a notice in the Gazette confined for "only candidates who participated in the annulled election" to submit Nomination Papers, strictly in line with Article 138 of the Constitution.
    c) The Commission shall conduct fresh nomination where the conduct is for "Fresh Election" to confirm eligibility in line with Article 138 of the Constitution.
3. Distinction between "Fresh Elections" "Repeat Elections" and "Re-run" should be made and in each case, other than a "Fresh Election" the commission shall not conduct fresh nomination pursuant to Article 140(3) of the Constitution.

4 While the amendment in section 2 of the Draft Bill expands the meaning of the "Chairperson" caution should be made to restrict persons acting as such from presuming "absence of the Chairperson" to arbitrarily duplicate roles. The absence should be restrictive to avoid situations where more than one person is performing the same duty.

a) The functioning of the Chairperson or another person acting as such, should be restricted to a gazette location;
b) For purposes of elections, where a Returning Officer or Presiding Officer is required to sign a prescribed document, the same can be alternatively signed by their Deputies.

5. In section 11 of the Draft Bill, for the amendment to the Election Offences Act, 2016 and replace section 6A that where a presiding officer or Returning Officer in relation to the prescribed document containing results:

a) Fails or refuses to sign the document;
b) Fails to complete the document;
c) Submits an incomplete document; or
d) Knowingly and willfully alters or falsifies a document

Commits an offence and shall be liable, upon conviction, to imprisonment for a term of fifteen years

As stated earlier, we are obliged to promote, protect, and respect the sanctity of an election We refer, in particular to the provisions of the 2010 Constitution of Kenya which affirms the right to participate in an election

Conclusion

Our analysis of the draft Bill has shown that the Bill does meet just a fraction of our obligations under the constitution to promote, protect, and respect elections. The draft Bill needs a comprehensive review and considering the speed with which the promoters of the Bill intend to rush it through Parliament. Therefore, we submit our recommendations for necessary changes but that Parliament can decide to go forward with the Bill, then recourse will have to be had to the aforesaid recommended changes to the draft Bill

Respectfully submitted,

EDWARD O NYAKERIGA
(Legal Secretary)

REPUBLICAN LIBERTY PARTY

59

COMMUNICATIONS AUTHORITY OF KENYA

Received
by
5/10/2017

Our Ref: CA/LS/050/017(700)

5th October, 2017

The Clerk of the Kenya National Assembly
NAIROBI

RE: SUBMISSIONS MADE AT THE PUBLIC HEARING ON THE ELECTION LAWS (AMENDMENT BILL), 2017 ON OCT. 5, 2017

1. INTRODUCTION

The Communication Authority of Kenya (CA) is established under the Kenya Information and Communication Act, 1998 with the mandate to regulate telecommunications, postal and courier and broadcasting subsectors. The evolution of technology over the past decade or so has led to unprecedented innovation, and pushed the deployment of the technology platform from the periphery to the centre. In this regard, technology is a veritable platform for deployment of business and commerce in the public as well as the private sectors.

The use of technology in the conduct of elections is anchored in the Elections Act, 2011 to which amendments are proposed. The profound impact of technology has been evidenced through the capability to deliver results with great efficiency. Having said this, technology is still evolving and remains vulnerable to failure.

It would therefore be a prudent strategy to recognise this and cater for complimentary mechanisms and this way ensure that critical processes such as elections can proceed with adequate backup and this way, ultimately preserve the rule of law. Given that Kenya does not have 100% of 3G and 4G coverage, the requisite speed and capacity that would be required to transmit results optimally is not present, hence the need for alternative failsafe mechanisms. In areas where 3G and 2G is available, the transmission of images and texts respectively, was successful.

The Authority, in discharge of its mandate has regulatory purview over the transmission systems. These systems were deployed by 3rd party service providers, which even with the best endeavours would be vulnerable to human interference, inadequate human capacity and more fundamentally systemic challenges owing to the standards of the devices deployed in the network.

The Authority would wish to now make submission to the Bill in view of the proposed amendments impacting the use of technology in this Bill.

2. CA VIEWS ON THE BILL

(i) Focus is mainly on the sections making direct reference to the use of technology i e proposed amendment to section 39 with the new proposal being to introduce a new section IC, ID, IE and IF as follows :-

*"**(1C)** For purposes of a presidential election, the Commission shall-*

(a) electronically and manually transmit the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre,

(b) tally and verify the results received at the constituency tallying center and the national tallying centre

(c) publish the polling result forms on an online public portal maintained by the commission.

(a) Inserting the following new subsections immediately after subsection (1C)-

***"(1D)"** Where there is a discrepancy between the electronically transmitted and manually transmitted results, the manually transmitted results shall prevail*

***"(1E)** Any failure to transmit or publish the election results in an electronic format shall not invalidate the results as announced and declared by the respective presiding and returning officers at the polling station and constituency tallying centre, respectively*

***"(1F)** The commission shall, to facilitate public information, establish a mechanism for the live-streaming of results as announced at polling stations, and the results so streamed shall be for purposes of public information only and shall not be the basis for a declaration by the Commission*

While electronic systems that are backed by technology are efficient and dependable they are prone to have downtimes due to unforeseeable reasons and therefore it is prudent to have a redundancy mechanism in place in the event of such an occurrence. A manual mechanism is therefore a viable back up plan due to, among other reasons, the turn around time for transmitting and announcing election results and also the fact that it is difficult to predict the time it would take an electronic system to recover in the event of failure.

Additionally, IEBC is dependant on Third parties for infrastructure and therefore does not have absolute control of the electronic systems that are relied on for transmission of results.

A considerable area of the country does not have 3G and 4G coverage. Currently the 3G-land coverage is 17% and population coverage is 78%. The 3G is the technology required to transmit images on the cyberspace, therefore, the absence of a manual system of transmitting election results in areas which do not have 3G coverage would pose a major challenge in the transmission of such results.

(ii) The Bill also proposes to amend the Elections Act, 2011 by deleting section 44A and substituting therefore the following new section-

44A. Notwithstanding the provisions of section 44, the Commission may put in place a complementary mechanism for identification of voters that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the commission complies with the provisions of Section 38 of the Constitution.

The amendment of section 44A proposes a complementary mechanism, which is the manual mechanism.

The amendment of the word "shall" to replace it with "may" gives the Commission room to evaluate whether a complementary mechanism is necessary depending on various circumstances. In order to preserve the rule of law and enable a seamless election, all reasonable measures should be anticipated and articulated in enabling legislation in order to ensure that the elections technology is secure, reliable and sufficient. A robust legislation should anticipate the entire breadth of the electoral spectrum, starting from voter identification to results transmission and eventually display of the election outcome.

3. CONCLUSION

The Authority, while promoting and advocating for the increasing adoption of the technology platform for the delivery of services, advises on the need for a redundancy mechanism in the event of a lapse. Given that Kenya does not have countrywide coverage for 3G and 4G technology, it is imperative that manual systems be deployed in parallel with technology and in the event of a glitch or failure then the manual system should be considered as final.

for:

Francis W Wangusi, MBS
DIRECTOR GENERAL

60 Received 5/10/2017

ETHICS AND ANTI- CORRUPTION COMMISSION

COMMENTS ON THE PROPOSED AMENDMENTS TO ELECTION LAWS

Submitted to the National Assembly/Senate Select Committee on Election Laws, 2017

5th October 2017

COMMENTS BY EACC ON THE PROPOSED AMENDMENTS TO ELECTION LAWS

1. Background

The National Assembly has introduced the two Bills namely Election Laws (Amendment) Bill, 2017 and the Election Offences (Amendment) Bill, 2017 seeking to amend various laws relating to the electoral process in Kenya. The laws targeted for amendment are threefold – the Independent Electoral and Boundaries Commission Act, No. 9 of 2011; the Elections Act, No. 24 of 2011 and the Election Offences Act, No. 37 of 2016.

Parliament in the exercise of its legislative mandate has called for comments and input from stakeholders on the proposed amendments. The Ethics and Anti-Corruption Commission is a stakeholder in the election process and has been called to give input to the Committee of Parliament on Thursday 5th October 2017. This paper highlights the input of the Commission in respect of the proposed amendments.

2. Mandate of the Commission and its Role in Elections

The Ethics and Anti-Corruption Commission is established under Section 3 of the Ethics and Anti-Corruption Commission, 2011 pursuant to Article 79 of the Constitution. The mandate of the Commission is to combat and prevent corruption and economic crime in Kenya through law enforcement, preventive measures, public education and promotion of standards and practices of integrity, ethics and anti-corruption. The Commission is mandated to enforce and oversee implementation of Chapter Six of the Constitution on Leadership and Integrity. In addition, it is mandated to enforce other laws such as; Leadership and Integrity Act 2012, Anti-corruption and Economic Crimes Act, 2003, Bribery Act 2016 and the Election Offences Act, 2016 among others. It closely liaises with IEBC and other stakeholders in the discharge of this function.

3. Comments on the Proposed Amendments to Election Laws

From the perspective of the EACC and its mandate, laws pertaining to the election, and any amendments thereto should of essence be geared towards the following objectives, *inter-alia*-

i. Safeguard the integrity of the electoral process
ii. Promote the openness and transparency of the process

iii. Enhance public confidence

iv. Diffuse potential tensions in society

v. Deter improper and unethical practices

vi. Ensure election of leaders of integrity

vii. Increase political credibility

viii. Contribute to acceptable election results

ix. Incorporate international standards and electoral best practices

We have closely looked at the proposed amendments to the existing election laws. A number of the proposed amendments do not have a direct bearing on the exercise of the mandate of EACC in as far as the same relates to or touches on the election process. However, the same may have a bearing on the EACC's mandate in the event of an investigation into the conduct of public officers in the electoral process

The following are the comments of EACC on the proposed amendments:

Proposed Amendments to the Independent Electoral and Boundaries Commission Act, No. 9 of 2011		
	Proposed Amendment	**Comment by EACC**
1.	Amendment in **section 2** on the definition of "Chairperson" so that it includes, in his absence, a vice chairperson or such other person acting as chairperson on absence of both.	The provision will ensure continuity of the business of the IEBC by addressing the challenge of a vacuum that may arise in the position of the Chairperson, by whatever means.
2.	Amendment in **section 6** to provide for a new qualification requirements for the Chairperson of the Commission, which seeks to remove the requirement that he/she should have the qualification to hold office of the judge of the Supreme Court	The amendment opens up the position of chair of the IEBC to qualified persons from other professions in addition to lawyers. The wider base of potential applicants makes the position of IEBC chair more competitive. This is desirable. However, it is necessary to have **at least two (2)** Commissioners with a legal background in the IEBC for the following reason: The IEBC has two important functions: Registering candidates for

		election (see Article 88(4) (f) of the Constitution) and resolution of pre-election disputes (see Article 88(4)(e) of the Constitution). The performance of these functions involves the exercise of quasi-judicial powers through committees of the IEBC presided over by Commissioners. This raises the demand for Commissioners with a legal background in the IEBC to a minimum of two (2).
3.	Amendment in **Paragraph 5** of the 2nd Schedule of the Act to delete the quorum requirement of **at least five** members, and to provide that the quorum for the Commission to transact business shall be **at least half** of the existing members of the Commission	It is desired that instead of "at least half"; the amendment should provide for "at least two thirds". This will place a higher threshold of integrity in decision making, which is a corporate governance best practice.
4.	Amendment in **Paragraph 7** of the 2nd Schedule of the Act to delete the provision that a decision may be made by a majority of all the Commissioners; and instead provide that a decision shall be by a majority of the members present and voting.	This is desirable as it addresses the challenge of absence of a Commissioner or Commissioners by whatever means, in the business of the IEBC.
Proposed Amendments to the Elections Act, No. 24 of 2011		
	Proposed Amendment	**Comment by EACC**
1.	Amendment in **Section 39** by deleting subsection 1C and inserting new sections 1C, 1D, 1E and 1F. The effect of these amendments is to make the hard copy forms as the primary sources of information to the national tallying centre and the manual transmission	This provision takes care of electronic system failures by offering an alternative in manual transmission. It also elevates the original documents as the primary source of evidence. From an investigative perspective, it is easier to investigate a physical

	process as the authoritative process as opposed to electronically transmitted forms.	environment as opposed to a digital environment. However, at least in theory, there is an equal possibility of manipulating the hard copies and manual transmission process as there are in digital copies and electronic transmission.
2.	Amendment of **section 44** by deleting subsection 5 and substituting with a new subsection 5 whose effect is to remove political parties as mandatory stakeholders in the development of regulations for implementation of the section. The amendment also removes the limitation of the regulations to the areas provided for under subsection 5 (a) to (j).	The amendment reinforces the independence of the IEBC and removes the predominance of political parties by treating all stakeholders on an equal footing. The scope of regulations has been expanded by removing the constraining provisions.
3.	Amendment of **section 44A** substituting with a new section 44A which makes no reference to section 39. The effect of this amendment is to remove the mandatory requirement for IEBC to put in place complementary mechanism for electronic identification of voters and do away with the requirement for putting in place complementary mechanism for electronic transmission of election results.	Electronic transmission of results is still identified by other sections of the Act (see the new section 39 for example). It is therefore desirable to obligate the IEBC to put in place appropriate mechanisms for electronic transmission of election results, even if not in the same mandatory terms as in the existing provision.
4.	Amendment of **section 83** of the Election Act 2011 by deleting the word 'or' appearing immediately before the words 'that the non-compliance' in the renumbered subsection (1) and substituting therefore the word 'and'.	This section is confusing. The effect of replacing the word "or" with the word "and" as proposed in the amendment is not clear. Indeed, the interpretation of this section in the Majority Decision of the Supreme Court at Paragraph 211 does not help to make it clear. There is need for

		further interrogation of this section or possible reframing to make it clear.
5.	By insertion of a new section 86A to provide for the procedure to be employed when a presidential election is invalidated by the Supreme Court.	These provisions brings certainty to the consequences of nullification of a presidential election.
Proposed Amendments to the Election Offences Act, No. 37 of 2016.		
	Proposed Amendment	**Comment by EACC**
1.	Deletion of section 14(2) to remove the provision which bars a government from advertising its achievements during the election period.	An informed public is more likely to report corruption and economic crimes. This remains true before, during, or after the election period.
2.	Insertion of a new section 6A to provide for offences by a presiding or returning officer in an election, in relation to a prescribed document.	The proposed offences touch on the conduct of public officers in charge of an election. These provisions will raise the threshold of personal integrity of the officers in performance of the functions of their public offices by making wilful transgressions of an election process punishable.

4. Concerns on the Timing of the Amendments

EACC is aware that concerns have been raised by a cross section of Kenyans and the international community on the timing of the proposed amendments, when the country is just about to hold the repeat presidential election as ordered by the Supreme Court in its judgment issued on 20th September 2017. However, it is important for all concerned to understand the basis upon which the amendments are proposed. As we have stated earlier, one of the cardinal principles of election laws is to guarantee and safeguard the integrity of the electoral process and the outcome thereof. We take this opportunity to remind Kenyans that just prior to the August 2017 election, the electoral law underwent rapid transformation through judicial pronouncements. Some of the landmark decisions that affected the landscape in which the election was organized include the following-

1) **Maina Kiai & 2 Others vs IEBC and Another**

The High Court declared sections 39(2) and (3) of the Elections Act of 2011; and Regulations 83(2) 84(1) and 87 (2)(c) of the Elections (General) Regulations 2012 to be contrary to the provisions of Articles 86 and 138(2) of the Constitution hence unconstitutional. The decision was affirmed by the Court of Appeal on 23rd June 2017, this being just 43 days to the general election.

2) **Peter Solomon Gichira vs IEBC and Another**

This High court decision was issued on 26th May 2017, and it declared that section 29 of the Elections Act on nomination of presidential candidates was contrary to Articles 27 and 137 of the Constitution, hence unconstitutional and void. The section provided that persons who nominate a presidential candidate shall be members of the candidate's political party and persons who nominate an independent presidential candidate shall not be members of any political party.

In this context, Kenyans should also be cognisant of the fact that the Supreme Court in the decision annulling the result of the presidential election held on 8th August, in Supreme Court Petition No.1 of 2017 (**Raila Odinga and Another vs IEBC and 2 Others**), made a case for the Legislature to review the election laws with a view to address the shortcomings or inconsistencies which had been observed.

5. Conclusion

Amendments to the law that promote transparency, accountability, simplicity, security, accuracy and especially verifiability of the election process and have long term positive effect to the election process should be encouraged and supported by all.

SECTION 83 OF THE ELECTIONS ACT

The current section 83 of the Elections Act is worded as follows-

Section 83 Non-compliance with the law
No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the constitution and in that written law **or** that the non-compliance did not affect the result of the election.

The proposed amendment in Election Laws (Amendment) Bill

Section 83 Non-compliance with the law
No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the constitution and in that written law **and** that the non-compliance did not affect the result of the election.

However, EACC advises that the section be worded as follows-

Section 83 Election not to be voided in certain circumstances
Where a court finds that an election was not conducted in compliance with any written law relating to that election, it shall not declare the election to be void if it appears that-

a. the election was conducted in accordance with the principles laid down in the constitution and in that written law; or
b. the non-compliance did not affect the result of the election.

61

WAZALENDOHURU

Received
4/10/2017

Email: WazalendoHURU2017@gmail.com

Contact: +254 726 693 138 or +254 726 479 235

THE PROPOSED ELECTIONS LAWS (AMENDMENTS) ACT 2017

As a consortium under the umbrella of Wazalendo HURU we find the proposed amendments to Election Laws Act 2017 to have come at the right time.

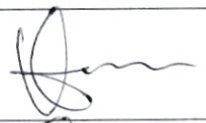
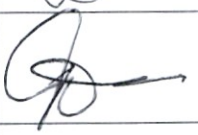
It is very important for us to remind our fellow Kenyans that the law is made for man, not man for the law. When a law ceases to serve its purpose, it is either amended or changed. As Wazalendo HURU we have learnt a lot with Supreme Court ruling.

We see no sinister motives in the following proposed amendments. The Elections Laws should be amended to keep up with the call of the times.

- The new amendments Anchor manual counting and delivery of election results as the primary mode of conducting the poll.
- The electronic system as a complementary measure.
- Elections will only be nullified if a petitioner is able to prove the conduct of election substantially violated the principles laid down in the Constitution and other written Laws
- Elections will be annulled only if it was fraught with irregularities or illegalities that affected the results.

Signed by,

This document has be endorsed by the following officials of Wazalendo HURU affiliated organizations

No.	ORGANIZATIONS	NAME	SIGNATURE
1	Concern Citizens Kenya	Bradley Orwa	
2	Kenyan Young Patriots	Livingstone Mgugi	
3	Social Reforms Centre	Marion Nyongo	
4	LuhyaHURU	Chris Kudmchi	
5	Kenya Leadership And Integrity Network	Nelson Otieno	
6	Bunge La Akina Mama Mashinani	Beatrice Karua	
7	Youth Traforming For Change	Evans Asefo	

Received
4/10/2017

62

PARLIAMENTARY 2017 ELECTION AMENDMENT BILL

SPONSORED BY JUBILEE

- All members of parliament are employed by parliamentary Service Commission to make laws which assist the country citizens who elected them. Being sponsored by a party to enable them to be elected, doesn't mean they ignore the electorate and serve the party.

- The bills before parliament to amend election laws which put the electorate in darkness so that they can be denied their sovereignty for the sake of enabling an individual to win presidency using technology is an abuse of the electorate. Therefore, the amendment is necessary to give the electorate power to choose their president .

- It is also necessary to amend laws which remove mischieve to technology and official duty of people who may use these powers to impose their preferred President to Kenyans.

- Therefore it is also necessary to make laws which will allow parliamentary service commissions punish parliamentarians who suspend their duties of serving the country to serve their party political leaders.

- We are given our boundaries by the world and by God to protect us and preserve our life we should not all allow the political class involve us in their effort to destroy this country. Let us all be ready to support whichever law is put in place to secure our life from whoever is out to destroy us.

- Finally the same way we demand for professional integrity we should also demand for political integrity which can secure this country by all who we pay to legistrate laws which govern the way we transact our businesses.

By Elijah Ratemo Nyakiongana

E Ratemonyana 4th October 2017

0721364297

Assistant Secretary

REPUBLICAN LIBERTY PARTY

CHAIRMAN/CHIEF SHEPHERD PARENTING

BLESSED HOPE ASSEMBLY

Received
4/10/2017

MEMORANDUM TO THE JOINT SELECT PARLIAMENTARY COMMITTEE ON ELECTION-RELATED LAWS

63

FROM NAIROBI BUSINESS COMMUNITY

4th October, 2017

SUBJECT: ELECTION LAWS (AMENDMENT) BILL, 2017

We, the undersigned organization, and concerned citizens of Nairobi County, hereby submit this memorandum to the joint select parliamentary committee on election-related laws drawing your attention to the several urgent and key concerns that should be addressed, in light of the election laws (amendment) bill, 2017

Background:

The Jubilee party has introduced a bill in Parliament that seeks to amend a few sections of Kenya's electoral law to fill in a lacuna, align the law to emerging issues around the fresh presidential election and address issues raised by the Supreme Court judgment in its nullification of the presidential election. Our review of the amendment bill reveals the attempt by parliament to secure without fail the holding of the election on 26th October 2017.

We wish to submit as follows:

1. Parliament's role in amending law is a constitutional mandate. Its role is not fettered as regards timing and neither does Parliament require any authorization to amend laws.
    a) It is to be noted that some of the opposition rank challenging the current process of amending the law had no qualms about doing the same in early 2017, when they not only overhauled the entire constitution of commissioners of the IEBC, but introduced a new raft of laws and requirements with strict timelines for the conduct of the general elections of 8th August 2017.
    b) Further the same opposition occasioned additional changes to the laws through filing a plethora of legal cases, with the last and most impactful on the law/procedure being the Maina Kiai case whose judgement was delivered 3 weeks to the election.

2. Parliament's current actions are based on the Supreme Courts' observations of the 2017 General Election, and the recommendations in both the majority and dissenting opinions on the need to ensure that there is clarity, simplicity and verifiability in the process of transmission of presidential election results.
    a) The Supreme Court (SCOK) was particular that IEBC needed to define the complementary system envisioned in section 44A, and elaborate exactly how it is to work.
    b) Parliament has also found it necessary to define in exact terms the intention of section 83 of the Elections Act, so as not to leave the same open to misinterpretation. It is to be noted that the same SCOK has since 2013 and in all other cases that came before it, interpreted section 83 to the effect that invalidation of an election cannot be undertaken purely on qualitative considerations. However, in the 2017 petition, the SCOK decided to alter the

meaning of the same section to argue the very opposite. The amendment seeks to cure this by defining without a doubt the meaning of section 83 as intended.

3. Parliament is properly constituted for the purpose of enacting the bill as proposed. The fact that the house has a majority of Jubilee members and affiliate parties is not illegal. It is a reflection of the people's will and their endorsement of the Jubilee agenda. No member of NASA has refused to be sworn in, resigned, or refused to take a salary.

4. There is nothing unconstitutional or retrogressive about the bills. It does not take away any rights or freedoms. The provisions of the amendment are self-executing. No regulations are necessary.

5. The amendments do not impose any additional burden to IEBC as they only seek to simplify and ease the management of elections while providing clarity in case there are challenges.

6. The Supreme Court Ruling in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eklr* was the first opportunity to test the efficacy of the negotiated law that followed the recommendations of the Joint Parliamentary Select Committee on the Matters of the Independent Electoral and Boundaries Commission.

7. In as much as global best practice does not favour making changes to election laws so close to an election, the unique circumstances in Kenya, where an election has been nullified because of process with reference to result, makes it necessary for these amendments to be undertaken in priority.

Proposed amendment	**Current status**	**Justification for amendment**
IEBC Act, Section 6 and the Second Schedule	- Chairperson must be a lawyer of 15 years standing - There is currently no other lawyer in the commission - In the absence of the Chairperson for any reason, no other Commissioner can act as returning officer for the presidential election - Quorum is set at five members	- The amendment proposes that other professionals including lawyers can be appointed chairperson of the IEBC - It removes the risk of paralysis by allowing the Vice Chair or in the absence of both Chair and Vice, for a Commissioner to Act as ch in line with good corporate governance principles on succession. - Amends quorum to ½ of the commissioners present (rounding off to 4) but no less than 3. It ensures that at any point that the numbers are less than the prescribed number, there shall always be a quorum of ½ of the members present, but in any event never less than three. - The amendment ensures that the decisions of the commission are unanimous to avoid the risk of internal dissonance

Election Act, Section 29	- Provides for nomination of presidential candidates to be undertaken by members of the candidate's political party. - Provides that nomination for independent presidential election candidates should be by persons who are not members of any political party.	- Amendment seeks to implement the constitutional court's directive that found the provision of section 29 unconstitutional following the case of ***Peter Solomon Gichira v Independent Electoral and Boundaries Commission & another [2017] eKLR.*** The court had found the restriction in section 29 was unconstitutional and at para. 98 declared: 1. ***...That to the extent that Section 29(1) of the Elections Act No. 37 of 2016 requires the persons who nominate a presidential candidate to be members of the candidate's political party, the section contravenes Articles 27(2) and (4) and Article 137(1)(d) of the Constitution of Kenya and is therefore null and void to the extent of the said inconsistency.*** 2. ***...That to the extent that Section 29(2) of the Elections Act No. 37 of 2016 requires the persons who nominate an independent presidential candidate shall not be members of any political party, the section contravenes Articles 27(2) and (4) and Article 137(1)(d) of the Constitution of Kenya and is therefore null and void to the extent of the said inconsistency.***
Election Act, Section 39(1)(C)	- Provides for only electronic transmission of results of the presidential election - Does not allow for a failsafe mechanism in the event of failure to have electronic transmission	- Provides for both electronic and manual transmission of results. Allows for the putting in place of a complementary mechanism that will facilitate verification of results, but also provides a failsafe mechanism in the event of failure of the electronic system - Establishes and clarifies the complementary system of transmission of presidential election results in line with Supreme Court recommendation - The amendment confirms that in the event there is a discrepancy between the electronically transmitted and manually transmitted results, the manually transmitted results shall prevail. This assures that the electronically transmitted information is verifiable through a comparison with the manual documentation as part of the

		accountability circle. Further, it elevates the place of the manual documentation which is a reflection of the manual vote of which the election is based. - The amendment ensures that any failure to transmit or publish the election results in an electronic format shall not invalidate the result as announced and declared by the respective presiding and returning officers at the polling station and constituency tallying centre, respectively. This ensures that the sanctity of the vote is protected, and that a failure to transmit the information does not invalidate the voter's will as expressed in the ballot. - The amendment provides for the Commission's publication of information through livestreaming of results as announced, but which results as published are not to be deemed as the basis for declaration. This provision facilitates transparency, by ensuring that the information from the very basic polling station: i. Can be tracked as being correctly reflected by the voters in each polling station ii. Allows the National Tallying Center, observers, media and the public to keep track of the announcements and tallies at each step of verification iii. Reduces the public anxiety of waiting for the collated results iv. Enhances the overall integrity of the process
Elections Act Section 44	- Establishes an integrated electronic electoral system for biometric voter registration, electronic voter identification and electronic transmission of results. - Provides for the Commission to develop a policy on the progressive use of technology in the	- The amendment does not alter the provisions in subsection 44(1), (2), (3) and (4). Consequently, the Act retains the integrated electronic electoral system as is; retains the requirement for a policy on technology; retains the requirement for procurement of the technology as provided. - Deletes subsection (5) and (6) which unnecessarily repeats provisions on regulations, which are already anticipated in section 109 of the Act. It however does not repeal the already existing technology

	electoral process. - Requires the Commission to procure the technology at least one hundred and twenty days before the election - Requires the Commission to make a wide array of regulations for the technology - Establishes a technical committee to oversee the adoption of technology in the electoral process and implement the use of such technology.	regulations which will be deemed regulations under section 109 - Deletes subsection (7) whose application is redundant as the first elections under the section have already been held - Deletes subsection (8) which had established the Elections Technology Committee which was declared unconstitutional by the High Court in ***Kenneth Otieno v Attorney General & another [2017] eKLR*** in which the court declared that "*...We find and do hereby declare that section 44(8) of the Elections Act, 2011, that provides for the establishment of a technical committee comprising relevant agencies, institutions or stakeholders as IEBC may consider necessary to oversee the adoption and implementation of technology in the electoral process, violates Articles 88 and 249(2) of the Constitution, and is therefore unconstitutional.*"
Elections Act, Section 83	Provides that invalidation can be either due to qualitative errors OR quantitative errors (Section 83 - No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law **OR** that the non-compliance did not affect the result of the election)	- Amendment proposes to replace the word **"OR"** with **"AND"** - Creates harmony in the interpretation of Section 83 so that any election court is clearly guided on the considerations to apply when seeking to invalidate an election i.e. both qualitative and quantitative considerations - Ensures that technical considerations do not override the substance of the vote (upholds will of the people) - It requires invalidation of an election to be on the basis of an assessment of the totality of all the electoral processes including registration, voting, counting, tallying, transmission and announcement – and not one of the eight or so processes. - Introduces a re-emphasis of the current provision of section 72 of the Interpretation and General Provisions Act, that ***"a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead".***
Section 86A	New provision	- Gives effect to Art. 138(1)

		- Addresses uncertainty of conducting a fresh election - Defines who the candidates in a fresh election will be in line with SCOK 2013 decision - Defines the mechanisms for managing a fresh election
Election Offences Act		- Enhances the penalties for wilful or deliberate failure to sign election documents, or falsifies election documents by a presiding or returning officer to five years - Specifies with clarity critical election offences committed by presiding and returning officers - Raises the profile/criticality of the role played by presiding and returning officers - Proposes the deletion of the restriction on government advertising in line with Art. 35 on Access to Information

WE therefore append our signatures in full support of the aforesaid amendments. Dated today 4th October, 2017

Endorsed by
NAIROBI BUSINESS COMMUNITY

NO	NAME	I.D. NUMBER	SIGN
	John Njoroge	6252935	
	Albert Karataca	12788852	
	MAINA NAWEDU	11061452	
	CLEMENT N. Kalenja	5V98196	
	SAMUEL MGANGA	20369531	
	Bernard Njoroge	23583142	
	CHARLES KARIUKI	25487588	
	CICILIAH WAIRIMU N.	9945681	
	SIMON WACHIRA	23669209	
	WILLIAM MAING	8583285	

64

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 159 OF 2017

IN THE MATTER OF: ARTICLES 22(1) & (2)(c) AND 258(1) & (2)(c) OF THE CONSTITUTION

IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE ENSHRINED IN ARTICLES 1; 2; 3(1); 10(2); 227(1), 232; AND 259(1) OF THE CONSTITUTION

IN THE MATTER OF: THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 24, 27, AND 47 OF THE CONSTITUTION

IN THE MATTER OF: THE ALLEGED VIOLATION OF SECTION 17 OF THE ELECTION LAWS (AMENDMENT) ACT (NO. 36 OF 2016), AND SECTIONS 102, 103 AND 104 OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT 2015

IN THE MATTER OF: THE LEGAL AND CONSTITUTIONAL VALIDITY OF ALTERING THE KENYA INTEGRATED ELECTIONS MANAGEMENT SYSTEMS BY REMOVING THE VOTER REGISTRATION COMPONENT

IN THE MATTER OF: THE LEGAL AND CONSTITUTIONAL VALIDITY OF THE DIRECT PROCUREMENT OF THE KENYA INTEGRATED ELECTIONS MANAGEMENT SYSTEMS

IN THE MATTER OF: THE ALLEGED CORRUPTION AND UNFAIR TRADE PRACTICES LEADING TO THE CANCELLATION OF TENDER NO. IEBC/32/2016-2017: SUPPLY, DELIVERY, INSTALLATION, TESTING,

NATIONAL ASSEMBLY
RECEIVED
05 OCT 2017
CLERK'S OFFICE
P. O. Box 41842, NAIROBI

COMMISSIONING AND SUPPORT OF THE KENYA INTEGRATED ELECTIONS MANAGEMENT SYSTEMS (KIEMS)

IN THE MATTER OF: **COMPROMISED PROCUREMENT RELATED TO ELECTIONS AND ITS IMPACT ON THE INTEGRITY OF THE ELECTORAL PROCESS**

IN THE MATTER OF: **THE ALLEGED ABUSE OF THE PRINCIPLE OF ECONOMY IN THE PROCUREMENT OF THE KENYA INTEGRATED ELECTIONS MANAGEMENT SYSTEMS**

BETWEEN

WYCLIFF KEN LUGWILI.....1ST PETITIONER

REUBEN KIDIMA MULAMA.....2ND PETITIONER

HEZRON MOMANYI OMBATI.....3RD PETITIONER

PETER SIMIYU MUKOYA.....4TH PETITIONER

GRACE WANJIKU MUGO.....5TH PETITIONER

HANNAH WANGUI MUGO.....6TH PETITIONER

~ VERSUS ~

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ..... RESPONDENT

AND

SAFRAN IDENTITY & SECURITY COMPANY ..... INTERESTED PARTY

PETITIONER/APPLICANT'S WRITTEN SUBMISSIONS

The matter before this Honourable court involves an application filed on the 19th Day of April 2017 by the Petitioners/Applicants seeking orders that:

1. **THAT** this application be certified as urgent and fit to be heard forthwith, and be granted *ex-parte*, and in priority to any other matter herein.

2. **THAT pending the *inter-partes* hearing and determination of this application and/or the petition herein** the Honourable Court be pleased to issue a conservatory order suspending the respondent's decision to single source or directly procure the Kenya Integrated Elections Management Systems (KIEMS) from the interested party.

3. **THAT pending the *inter-partes* hearing and determination of this Application and/or the Petition herein** the Honourable Court be pleased to issue a temporary order of prohibition prohibiting the respondent from proceeding to sign a contract with the interested party to give effect to the respondent's decision to single source or directly procure the Kenya Integrated Elections Management Systems (KIEMS) from the interested party.

4. **THAT pending the *inter-partes* hearing and determination of this Application and/or the Petition herein** the Honourable Court be pleased to issue a temporary order of prohibition prohibiting the respondent, whether by itself, or any of its employees or agents or any person claiming to act under its authority from proceeding to give effect, in any way whatsoever, to the respondent's decision to single source or directly procure the Kenya Integrated Elections Management Systems (KIEMS) from the interested party.

5. **THAT pending the *inter-partes* hearing and determination of this Application and/or the Petition herein** the Honourable Court be pleased to issue an interim order requiring the respondent to produce the following documents for inspection by the Court:

a. The interested party's original bid in Tender No. IEBC/32/2016-2017: Supply, Delivery, Installation, Testing, Commissioning and Support of the Kenya Integrated Elections Management Systems (KIEMS);

b. The tender document which is the basis of the direct procurement and the tender bid submitted by the interested party.

c. The report of the *ad hoc* evaluation committee which negotiated with the interested party;

d. The tender including the mandatory certificates and documents, demo samples, technical literature and specifications submitted by the interested party in both the cancelled KIEMS Tender No. IEBC/32/2016-2017 and also the NEW tender (excluding the voter registration component) and the respective technical evaluation reports in the latter case for the tender as well as the demo sample submitted by the interested party;

e. Approvals for the direct procurement made under the Public Procurement and Disposal Act 2015 and also the report submitted by the respondent to the Director General, Public Procurement Regulatory Authority for undertaking the direct procurement through single sourcing.

f. The demo samples and technical brochures submitted in the Tender No. IEBC/32/2016-2017 by all the bidders and at least including the interested party, GEMALTO, SMARTMATIC and INDRA,

g. The respective bid evaluation reports, including the corresponding technical evaluation reports in respect of the tender and demo sample submitted by the interested party for the NEW tender against which it was invited to tender via

direct sourcing and a copy of the resultant contract ,if any, entered into by it and the respondent.

6. **THAT** the petitioners be allowed to serve the interested party through its representative's email address at **francois.rothenburger@safrangroup.com** and by registered mail or by courier at **Safran Identity & Security Company, 11 Boulevard Gallieni, 92130 Issy-les-Moulineaux, FRANCE.**

7. **THAT** consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.

8. **THAT** the costs of this application be provided for.

BACKGROUND

The Respondent herein (IEBC) has been sued herein on allegations that, in order to single source the interested party to supply the same, the respondent colluded with the interested party to frustrate **TENDER NO. IEBC/32/2016-2017**: Supply, Delivery, Installation, Testing, Commissioning and Support of the Kenya Integrated Elections Management Systems (KIEMS).

The Interested Party – **SAFRAN IDENTITY & SECURITY COMPANY** – is a company incorporated under French law and domiciled in France. The company has been enjoined herein on allegations that, in order to be single sourced to supply the same, it colluded with the respondent to frustrate **TENDER NO. IEBC/32/2016-2017**: Supply, Delivery, Installation, Testing, Commissioning and Support of the Kenya Integrated Elections Management Systems.

BACKGROUND

On the 16th of December 2016 vide **TENDER NO. IEBC/32/2016-2017** the Respondent invited sealed bids from eligible candidates for the procurement of Kenya Integrated Elections Management Systems (KIEMS) which includes Biometric Voter Registration, Voter Identification,

Electronic Results Transmission and Candidate Registration Systems. In its objectives of the proposed system provided in its tender, the IEBC states

"The system to be deployed shall be simple, transparent, secure, verifiable, reliable and highly available during voter registration, candidate registration for elections, voter verification and results transmission. The specific objectives of the system shall include the following:-

1. ***The biometric registration of eligible voters.***
2. ***The biometric verification of registered voters.***
3. ***The electronic transmission of election results.***
4. ***The management of candidates for the elections."***

However, on 28th February 2017, the Respondent vide termination letter Ref. IEBC/PROC/10/Vol.1/2017/120, notified all bidders that it had terminated the tender on the following grounds:

- *Operation of law: the Election Law Amendment Act 2016 require that the technology should be in place by 10 April 2017 for preparation of the General Elections. Further, the Commission must have the technology in place by end of March 2017 for use on 10 May 2017 as per the law. The Commission will not be able to execute its mandate under the current tender.*

- *Substantial technological change: The Commission considered that the scope of technology requirements had changed following the recent conclusion of the mass voter registration drive. The requirement for voter registration module will only be relevant after the next boundary delimitation exercise in the year 2020. Therefore, the Commission considered that there would be no value for money to retain the voter registration component in KIEMS at present.*

To challenge the cancellation, one of the bidders, ***AVANTE INTERNATIONAL TECHNOLOGY*** filed Application No. 19 of 2017, ***Avante International Technology vs. Independent Electoral and Boundaries Commission,*** in the Public Procurement Administrative Review Board (hereinafter, "the PPARB") which thereafter dismissed the said termination letter and reinstated the tender. The Petitioner herein challenges the reasons given in the termination letter citing the following reasons:

1. The Respondent cannot rely on the reason of tight timelines, since all the potential and possible bidders, including the interested party, had participated in the said tender, and there was no other vendor known to the IEBC which could possibly have had the product available to meet the deadline.

2. The petitioners posit further that the second ground, of altering the scope of the technology requirements by removing the voter registration component, is moot as in the KIEMS device, which is basically a biometric ID tablet, the voter registration module is already a component of the hardware and does not fundamentally or substantially alter the technology since the voter registration function is basically software related in terms of capturing and saving the voter's data on the device and would not have affected the cost or delivery timelines in any way. And in fact it would have been prudent to include the voter registration component for future use rather than opting for procurement of a fresh device later on to carry out this function.

3. The petitioners posit further that it is also not true that *"The requirement for voter registration component will only be relevant after the next boundary delimitation exercise in the year 2020"* because Article 82(1)(c) of the Constitution requires *"***the continuous registration of citizens as voters**." In fact, Section 5(1)(a) of the Elections Act 2011 as amended by Section 3 of the Election Laws (Amendment) Act, 2017 provides for the continuous registration of voters except *"(a) in the case of a general election or an election under Article 138(5) of the Constitution, between the date of commencement of the sixty day period immediately before the election and the date of such election."*

The petitioners reiterate that the respondent's purported and arbitrary alteration of the KIEMS for purpose of adopting a direct sourcing method in favour of the interested party, is a nullity in law *ab initio* since Parliament, at **Section 44(1) of the Election Act 2011**, as amended by section 17 of the Election Laws (Amendment) Act, 2016, ***"established an integrated electronic electoral system that enables biometric voter, registration, electronic voter identification and electronic transmission of results."*** This requires the IEBC to procure an integrated device with the following three functionalities: **biometric voter registration, electronic voter verification,** and **electronic results transmission**. The IEBC does not have the discretion to drop any of the functionalities and depart from the prescription of the KIEMS which is in law. Further and in particular:

The Petitioners/Applicants' case

The Petitioner based his application on the grounds that:

1 The direct procurement by the respondent of the KIEMS from the interested party is laced with breaches of the law as the respondent has acted arbitrarily, capriciously, oppressively and unfairly.

2. The direct procurement by the respondent of the KIEMS from the interested party is a nullity in law *ab initio* to the extent that the system being procured does not have the *biometric voter registration* component yet Section 17 of the Election Laws (Amendment) Act (No. 36 of 2016), which amended Section 44 of the Elections Act 2011, states *inter alia* as follows: *(1) Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.*

3. The respondent has deliberately violated Section 17 of No. 36 of 2016 by removing the voter registration component from the KIEMS.

4. That the respondent has acted unlawfully and illegally and in contravention of Section 17 of the Election Laws (Amendment) Act 2016 by altering the integrated electronic electoral system that enables biometric voter registration, electronic voter identification, and electronic transmission of results.

5. The respondent's decision to alter the KIEMS, by removing the voter registration component, is ultra vires the Constitution and the Elections Act.

6. Whereas the respondent justifies the direct procurement on the basis of urgency and compatibility, the reasons given by the respondent for the single sourcing are not convincing.

7. Vide its Press Statement of 5th April 2017, the respondent informed the public that the interested party has undertaken to deliver all the 45,000 kits in time for testing and certification 60 days before the elections, being by **8th June 2017**.

8. Given that the deadline for the interested party to make deliveries is the **8th June 2017**, being 60 days to the elections, there is no emergency justifying the rush to directly procure the KIEMS by single sourcing fit rom the interested party.

9. The Press Statement of 5th April 2017, has given away the lies in the respondent's earlier communication (i.e., the cancellation letter of 28th February 2017, the termination letter of 21st March 2017, and the Press Statement of 24th March 2017), that the rush to procure was justified the Elections Act 2016, which requires the technology to be in place by 10th April 2017, being four months to the election date. However, the respondent then contradicts this by stating, in both letters, that the technology must be in place by the end of March 2017, for use on 10th May 2017 as per the law.

10. The petitioners/applicants is aggrieved that in its Press Statement of 24th March 2017, the respondent states falsely that *"the Commission will use the Kenya Integrated Elections*

Management System (KIEMS) for the August 8th elections as provided for in the law," yet in the cancellation and termination letters it is clearly stated that the Commission had removed the voter registration component from the *KIEMS*.

11. On 23rd March 2017, or thereabouts, the respondent announced that discussions had been concluded and the tender had been awarded to the interested party through direct procurement (single sourcing), which development is indicative of the staggering fact that discussions between the respondent and the interested party (a bidder in the KIEMS tender who had already been disqualified) had been on-going secretly during the technical and financial evaluation stages of the tender, since this was finalised on 21st February 2017.

12. The right to access information is also enshrined in the Fair Administrative Action Act 2015, which allows information to be sought and supplied at any stage before and during proceedings. For completeness and the avoidance of doubt, Section 6(1) of the Act provides:

> ***(1) Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with section 5.***

13. The direct procurement is itself has been carried out in a manner that is violative of **Sections 102, 103 and 104** of the **Public Procurement and Asset Disposal Act, 2015,** given that:

    a. There is no valid basis in law or fact for the respondent's decision to select the interested party as the only bidder which had the devices and could meet the IEBC's strict timelines for delivery of the KIEMS by **8th June 2017**. There still is ample time to comply with sections 102, 103 and 104 of the Act.

    b. The issue of the quoted price by the bidder who was successful at the technical evaluation stage, GEMALTO SA, being outside the respondent's budget limits should

not arise. The respondent ought to have requested GEMALTO SA to submit a fresh offer in line with the new specifications under direct procurement, since it had already offered a technically compliant bid.

c. Since the financial bids of other bidding firms including the interested party were not opened and prices compared, the petitioners wonders how the respondent got to know that the interested party could supply within its budget provisions, unless the bidding process was a sham that had been compromised by secretive insider dealings between the respondent and the interested party.

d. Other bidders who were on a better footing than the interested party, having been disqualified on fewer grounds than the interested party (as indicated at Table 2, on page 5 of the Tender Evaluation Report), ought to have been considered before or on equal footing with the interested party. The two bidders (Bidder No. B7 (Smartmatic International Holding B.V), and Bidder No. B10 Indra Sistemas SA), who are UNDP recognised and approved world leaders specialised in providing election technology solutions of the type the respondent was seeking via the KIEMS, outperformed the interested party and ought to have been invited to provide their offers for single sourcing / restricted tendering / quotations as appropriate. At the very least their financial bids ought to have been opened along with that of the interested party, and the prices quoted compared to see what each bidder had quoted and to ascertain if they fell within the budgetary allocations and to determine if they were lower than that offered by the interested party. In all fairness, and in the spirit of protecting the public interest through competitive procurement, they ought to have been invited to bid for the direct procurement say through restricted tendering as per the revised tender specification (i.e. excluding the voter registration component) and also confirm the prices they offered in the tender.

e. The excuse by the respondent that the interested party was selected owing to compatibility of the devices with the existing BVR system supplied by the interested party is deliberately fraudulent since according to the Evaluation Report (at item B1 on page 18, and item G1 on page 22 of the report) GEMALTO also offered a fully compliant solution where the system they offered seamlessly integrated with the current BVR. Further, the issue of compatibility did not come into play in case of the EVID devices supplied by FACE TECHNOLOGIES for use at the 2013 general elections, so the IEBC cannot just have the luxury of assuming that the other bidders, including world leaders like INDRA and SMARTMATIC, were offering non-compliant devices!!

f. In order to ascertain the competitiveness of the bid submitted by the interested party vis a vis those submitted by the other two bidders (i.e.SMARTMATIC and INDRA) their financial bids ought to be opened to make a fair assessment and comparison of the respective offers for the original KIEMS device so that, if the offers fell within the respondent's budget limits, then it would make more sense to procure the same from the lowest priced bidder offering a compliant KIEMS which met respondents delivery timelines without having to resort to calling for a fresh tender process and excluding the voter registration component. As SMARTMATIC had already confirmed its bid price of US$ 35.68 million (equivalent to K.Shs. 3,675,040,000/= @ exchange rate US$ = K.shs 103/- and which amount falls within the IEBC budget ot K.shs. 3.9 billion) and which is much lower than the award price of US$ 39,964,42/= made to the Interested Party in the KIEMS tender vide its letter of 29th. March, 2017 and if necessary INDRA could have been asked to also confirm its bid price though since SMARTMATICS tender offer fell well within the IEBC budget it may not have been necessary to request INDRA to confirm its bid price or even to conduct the restricted tender exercise if was not feasible to do so due to time constraints.

g. To make matters worse, the respondent unfortunately and blatantly ignored the letter dated 29th March 2017, from SMARTMATIC to the respondent, stating that SMARTMATIC's offering for the KIEMS and its end to end solution was fully compliant, its bid price of US$ 35.68 million was within the IEBC budget limit of Kshs. 3.9 billion, and that it could deliver within the IEBC timelines.

h. Similarly, the respondent also ignored the letter addressed to it dated 22nd March, 2017, from GEMALTO challenging the grounds for termination of the KIEMS tender and seeking to provide an offering in accordance with the new revised requirements which shows bad faith and lack of transparency and openness on part of the respondent and demonstrating that it was adamant on procuring the systems solely from the interested party.

i. The respondent has not made public the revised specifications for the NEW tender against which the interested party was invited to bid and same has not been compared and evaluated against the bid it made in the KIEMS tender. Further, the demo samples of the interested party have not been compared to those of other bidders. Doing so at least in case of the two bidders (SMARTMATIC and INDRA) would easily have enabled the respondent to determine the suitability of the devices offered for the intended purpose and allowed it to identify and select the lowest priced vendor offering a compliant KIEMS for consideration of its offering

j. The respondent has not made public the revised tender specifications for the NEW tender against which the interested party was ostensibly invited to bid and the same offering has not been compared and evaluated against the bid it made in the KIEMS tender. Further, the demo samples of the interested party as submitted in the KIEMS tender have not been evaluated and compared to those of other bidders especially the two recognised world leaders (INDRA SMARTMATIC) and who are providers of the election technology as sought by the respondent and at the very least preference

and priority should have been given to SMARTMATIC INTERNATIONAL HOLDINGS BV which in its above mentioned letter had fully committed to provide the within the set timelines an end to end totally compliant KIEMS solution and within the respondent's budgeted allocation and on its own without relying or involving any other third parties or partners for providing any of the three components making up KIEMS and further based on its world wide experience in this field of election technology ought to have been favourably considered by the respondent as it enhanced (placement) of trust and reliability of the solution offered and which made it a front runner in case of direct procurement rather than the respondent selecting the interested party (which understandably does not have an end to end KIEMS solution). Doing so would easily have enabled the respondent to determine the suitability of the devices for the intended purpose and allowed it to identify and select the appropriate vendor(s) for consideration of their offerings.

k. The interested party has no experience of its own in having developed or provided the Electronic Results Transmission System, and the Candidate Management and Election Management systems which are critical components of the KIEMS necessary for conducting a credible , free , fair and transparent election process and the respondent has not disclosed the details of the provider of these project components .The applicant reasonably suspects it to be SCYTL (of Spain) , a company which has litigation issues linking it to mal-performance and unreliability its election technology supplied in several countries, including ECUADOR. The applicant demands that the respondent and the interested party be put to strict proof on the bona-fides of the said components of their impugned transaction. The applicant demands that the respondent and the interested party be put to strict proof on the bona-fides of this component of their impugned transaction.

14. The petitioners demand that the respondent be put to strict proof on the bona-fides of its decision to lockout other qualified bidders and especially the front runner , namely,

SMARTMATIC INTERNATIONAL HOLDINGS BV from making offers to be considered for direct procurement and its failure to even to its tender offer for the fully compliant KIEMS , including the Biometric Voter Registration component as narrated in its letter of 29th.March, 2017.

15. The petitioners are also aggrieved that, contrary to the law and the principles of natural justice, the interested party and its partner/collaborator, namely, SCYTL were involved in developing the specifications for **TENDER NO. IEBC/32/2016-2017** as was alleged and demonstrated by, Mr. Jackson Nduati, Director of the Applicant, namely, DITTEL LTD., while adducing evidence during the hearing of its Appeal No 110 of 2016 lodged before the Appeals Board and which demonstrated the links between these two firms and also further as per his Affidavit showing the involvement of the interested party in tender specifications and the scenario was a repeat of the manner in which the interested party had done so similarly in case of the procurement of the BVR kits as per the Special Audit Report.

16. The petitioners are aggrieved further that it was recently confirmed by the respondent that the Biometric Voter Register developed by the interested party using its AFIS solution which was supposed to detect duplicate voters (by a process of de-duplication) contained errors including multiple registrations, pointing to the fact that the interested party failed to deliver on its mandate in 2013.

17. The paper trail supporting this petition points to the fact that the entire procurement process was manipulated and rigged from the very beginning to culminate in an artificial crisis that would then be used to justify the single sourcing.

18. The petitioners are aggrieved that alleged corrupt business practices involving the respondent and the interested party made it impossible for other bidders to have a fair chance in the tender.

19. The matter is also extremely urgent given that the general elections are set for 8th August 2016 and, as held by this Court (Odunga J.) at paragraph 195 of its decision in ***Republic v Independent Electoral and Boundaries Commission & another Ex Parte Coalition for Reform and Democracy & 2 others [2017] eKLR***, *"... elections are a process as opposed to a one off event. All the processes leading to the elections are subject of scrutiny and may well be grounds for nullification of elections. Therefore to avoid such an eventuality, the preparations leading to the elections must meet the minimum standards articulated in Article 81 of the Constitution that election system must be free and fair; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner."*

20. At paragraph 197 in in ***Republic v Independent Electoral and Boundaries Commission*** (supra), the Court held that, *"...Article 227 of the Constitution provides the minimum threshold when it comes to public procurement and asset disposal. Being the minimum threshold, the starting point must necessarily be the Constitution. Any procurement must therefore, before considering the requirements in any legislation, rules and regulations, meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness. In other words any other stipulation whether in an enactment or in the tender document can only be secondary to the said Constitutional dictates."*

21. The Court also held at paragraph 203 that, *"In my view, whereas public interest is a factor to be considered by the Court in arriving at its decision, where the alleged public interest is not founded on any legal provision or principle and runs contrary to the Constitution and the law, such perceived public interest will not be upheld by the Court. Under Article 10 of the Constitution, all State organs, State officers and all persons tasked with inter alia the making and implementation of public policy decisions are bound by the national values and principles of governance one of which is the rule of law. Consequently, any alleged public policy or interest that is contrary to the rule of law cannot be upheld."*

22. The material placed before the Court confirms that the respondent has acted arbitrarily, capriciously, oppressively and unfairly.

23. This Honourable Court is enjoined to hold the respondent accountable by restraining or curbing arbitrariness, checking abuse of power and generally enhancing the rule of law in government business and other public entities.

24. Ordering the discovery and production of the documents is also provided for under **Section 24** of the **Government Proceedings Act (CAP. 40)**, as follows:

> *(1) Subject to and in accordance with rules of court,*
>
> *(a) in any civil proceedings in the High Court or a subordinate court to which the Government is a party, the Government may be required by the court to make discovery of documents and produce documents for inspection; and*
>
> *(b) in any such proceedings as aforesaid, the Government may be required by the court to answer interrogatories.*

Respondent's case

The Respondent on the other hand, vide the replying affidavit of Ezra Chiloba sworn on the 15th day of May 2017 and filed on the 16th day of May 2017 explicitly denies the allegations made by the Petitioners/Applicants. Curiously, the Respondent does not deny the statements of facts as adduced by the Petitioners/Applicants in their Application. The Respondent admits that it has on numerous occasions been challenged by potential bidders due to their mishandling of the tendering and procurement process.

The Respondents also blame the PPAR Board's issuance of suspension orders for the failure to meet statutory mandated timelines. The Respondent also contends that the change in specifications of the tender was altered since voter registration had already been carried out and hence rendered superfluous. The Respondent however does not disclose why the same is the case since the voter registration exercises would be needed in future electoral processes and the same came attached by other bidders in the same process. Also note that when IEBC issued the tender to procure KIEMS with a closing date of 9th.January, 2017 it was fully aware that the mass voter registration exercise was to be commenced on January, 16, 2017 and to end on 14th.February, 2017 and therefore it was evident that the KIEMS to be procured against TENDER NO. IEBC/32/2016-2017 would not have been availed within this period as tender evaluation (allowing 30 days) it would not have been completed until 9th February, 2017 and then time would have to be given for notification of award, then another 14 days to allow for any Request for Review , then 14 days for hearing and getting a ruling of the PPARB in case of a Request for Review , then allow at least 6 weeks for manufacture and delivery of the KIEMS – and therefore the earliest the KIEMS could have been procured would be under ideal conditions would be around 13 weeks from the tender closing date and that would mean 14th.April, 2017 and which was far beyond the expected date of completion of the mass voter registration exercise. Hence, this clearly shows that this point of substantial change of technology was invalid and one can infer that this was a ploy to enable the interested party to deliver as a lower price the modified KIEMS that excluded the voter registration component instead of one it tendered for in the cancelled KIEMS device.

The Respondent also admits that the top bidder was Gemalto SA and that following their lawful success in the tender exercise, the Respondent proceeded to cancel the tender and opted for the less successful bidder i e the interested party through a direct procurement process The reasons set out by the Respondent in their Affidavit include that the Respondent would not be able to meet the operational and legal timelines. It is unclear how the cancellation of the tender would

aid in fast tracking the process and why the Respondent opted for the interested party instead of Gemalto SA.

The Respondent also admits to having prior contractual relationships with the interested party with regard to the electoral process. The Respondent seemingly blames the use of different vendors during the 2013 elections for the problems faced on election day. The Respondent claims that integration of new systems with the existing system would take too much time. It is unclear why the same was not considered during the tender specification process and why they bothered to have a tender in the first place. This response shows a clear bias towards the interested party. The Respondent also alleges that the Petitioners/Applicants cannot challenge the decisions of the Public Procurement Administrative Review Board through a Petition. It is unclear why and on what grounds the Respondent presumes that the matter before this Honourable Court is an appeal. The Applicants herein have every right to approach the Honourable Court for the enforcement of their rights and in the interest of the public.

ISSUES FOR DETERMINATION

1. Is the removal of biometric voter registration component legal with regards to the rule in section 17 of Election Laws (Amendment) Act (No. 36 of 2016).
2. Was the single sourcing of the interested party legal in the circumstances?
3. Should the tender process be invalidated in the circumstances?

Is the removal of the **biometric voter registration component** legal with regards to the rule in section 17 of Election Laws (Amendment) Act (No. 36 of 2016), which amended Section 44 of the Elections Act 2011, states *inter alia* as follows: *(1) Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.*

The law in section 17 of Election Laws (Amendment) Act (No. 36 of 2016), which amended Section 44 of the Elections Act 2011, states *inter alia* as follows: *(1) Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results*. By removing a critical

component such as voter identification, the Respondents in this case were in clear violation of the law. While the Petitioners are fully aware of the gravity of the matter before the court, they also wish to bring to the awareness of the court that laws are not meant to be applied selectively. Vide their termination letter dated 28th February 2017, Ref. IEBC/PROC/10/Vol.1/2017/120, the Respondent notified all bidders that it had terminated the tender on the following grounds:

- *Operation of law: the Election Law Amendment Act 2016 require that the technology should be in place by 10 April 2017 for preparation of the General Elections. Further, the Commission must have the technology in place by end of March 2017 for use on 10 May 2017 as per the law. The Commission will not be able to execute its mandate under the current tender.*

- *Substantial technological change: The Commission considered that the scope of technology requirements had changed following the recent conclusion of the mass voter registration drive. The requirement for voter registration module will only be relevant after the next boundary delimitation exercise in the year 2020. Therefore, the Commission considered that there would be no value for money to retain the voter registration component in KIEMS at present.*

To challenge the cancellation, one of the bidders, ***AVANTE INTERNATIONAL TECHNOLOGY*** filed Application No. 19 of 2017, ***Avante International Technology vs. Independent Electoral and Boundaries Commission,*** in the Public Procurement Administrative Review Board (hereinafter, "the PPARB") which thereafter dismissed the said termination letter and reinstated the tender The Petitioner herein challenges the reasons given in the termination letter citing the following reasons:

a. The Respondent cannot rely on the reason of tight timelines, since all the potential and possible bidders, including the interested party, had participated in the said tender, and

there was no other vendor known to the IEBC which could possibly have had the product available to meet the deadline.

b. The petitioners posit further that the second ground, of altering the scope of the technology requirements by removing the voter registration component, is moot as in the KIEMS device, which is basically a biometric ID tablet, the voter registration module is already a component of the hardware and does not fundamentally or substantially alter the technology since the voter registration function is basically software related in terms of capturing and saving the voter's data on the device and would not have affected the cost or delivery timelines in any way. And in fact it would have been prudent to include the voter registration component for future use rather than opting for procurement of a fresh device later on to carry out this function.

c. The petitioners posit further that it is also not true that *"The requirement for voter registration component will only be relevant after the next boundary delimitation exercise in the year 2020"* because Article 82(1)(c) of the Constitution requires *"***the continuous registration of citizens as voters**." In fact, Section 5(1)(a) of the Elections Act 2011 as amended by Section 3 of the Election Laws (Amendment) Act, 2017 provides for the continuous registration of voters except *"(a) in the case of a general election or an election under Article 138(5) of the Constitution, between the date of commencement of the sixty day period immediately before the election and the date of such election."*

The petitioners reiterate that the respondent's purported and arbitrary alteration of the KIEMS for purpose of adopting a direct sourcing method in favour of the interested party, is a nullity in law *ab initio* since Parliament, at **Section 44(1) of the Election Act 2011**, as amended by section 17 of the Election Laws (Amendment) Act, 2016, ***"established an integrated electronic electoral system that enables biometric voter, registration, electronic voter identification and electronic transmission of results."*** This requires the IEBC to procure an integrated device with the following three functionalities: **voter registration**, **voter verification**, and **results transmission**. The IEBC does not have the discretion to drop any of the functionalities and depart from the prescription of the KIEMS which is in law. The process by which tis crucial component was considered obsolete

is then a farce and intended to deliberately fit the specifications of the interested party's technology to the tender itself whilst breaking the rules, founded in Kenyan law, of the exact requirements of election technology.

The reason given for the departure from the law was as follows:

- *Substantial technological change: The Commission considered that the scope of technology requirements had changed following the recent conclusion of the mass voter registration drive. The requirement for voter registration module will only be relevant after the next boundary delimitation exercise in the year 2020. Therefore, the Commission considered that there would be no value for money to retain the voter registration component in KIEMS at present.*

However, the KIEMS device, which is basically a biometric ID tablet, the voter registration module is already a component of the hardware and does not fundamentally or substantially alter the technology since the voter registration function is basically software related in terms of capturing and saving the voter's data on the device and would not have affected the cost or delivery timelines in any way. And in fact it would have been prudent to include the voter registration component for future use rather than opting for procurement of a fresh device later on to carry out this function.

The PPARB on hearing the matter, nullified the termination and ordered a financial evaluation of **GEMALTO,** which was the only successful bidder at the technical evaluation stage.

Evidence is also adduced of the interested parties involvement in the preparations of the tender specifications of electoral material with regard to the tender in question. It is clear that the Interested Party played a very significant role in spelling out and framing the tender specifications of the technology in question. This discredits them from any participation in the tender process and hence renders the single sourcing illegal.

Whether IEBC's nullification of the tender and single souring of the interested party just and equitable in the circumstances

It is clear from the evidence adduced before this Honourable court that the Interested Party was not best qualified for this tender. Evidence adduced before this Court clearly shows that the Interested Party was disqualified from the tender. The evaluation report provided in the Petitioner's affidavit shows other bidders who were on a better footing than the interested party, having been disqualified on fewer grounds than the interested party (as indicated at Table 2, on page 5 of the Tender Evaluation Report), ought to have been considered before or on equal footing with the interested party. The two bidders (Bidder No. B7 (Smartmatic International Holding B.V, hereinafter referred to as SMATMATIC), and Bidder No. B10 Indra Sistemas SA, hereinafter referred to as INDRA), who are UNDP recognised and approved world leaders specialised in providing election technology solutions of the type the respondent was seeking to procure via the KIEMS tender, outperformed the interested party and ought to have been invited to provide their offers for single sourcing / restricted tendering / quotations. At the very least their financial bids ought to have been opened along with that of the interested party, and the prices quoted compared to see what each party was quoting and to ascertain if any of the offerings fell within the budgetary allocations and to determine if they were lower than that offered by the interested party. In all fairness, and in the spirit of protecting the public interest through competitive procurement, they ought to have been invited to bid for the modified KIEMS tender (i.e. excluding the voter registration component) and also confirm the prices they offered in the original tender.

Furthermore, the Respondent has no basis for arbitrarily eliminating top notch international vendors of the devices and election technology solution providers which participated in the KIEMS tender , including GEMALTO, SMARTMATIC and INDRA who are well known world leaders with the requisite experience in this field and UNDP approved and the respondent ought to have conducted market research and done due diligence on the capabilities of the latter two bidder as GEMALTO was already technically qualified but unfortunately offered a tender bid that was " overpriced" and exceeded the respondents budget which the latter had failed to disclose.

Moreover, the interested party has no experience of its own in having developed or provided the Electronic Results Transmission System, and the Candidate Management and Election Management systems which are critical components of the KIEMS necessary for conducting a

credible , free , fair and transparent election process and the respondent has not disclosed the details of the provider of these project components .The applicants reasonably suspect it to be SCYTL (of Spain) , a company which has litigation issues linking it to mal-performance and unreliability its election technology supplied in several countries, including ECUADOR. The Petitioner further provides evidence where the interested party has failed to provide free, fair and credible elections, further evidence of their unsuitability as candidates let alone finalists in the single sourcing considerations in the Kenyan context.

Should the tender process be invalidated in the circumstances?

I refer you to Odunga JA in ***REPUBLIC V IEBC & OTHERS MISC 637 OF 2016***

"In this case there are two competing public interests. The first is the necessity to comply with the timelines while the second is the constitutional requirement that the election system must be free and fair; and administered in an impartial, neutral, efficient, accurate, verifiable, secure, accountable and transparent manner. It has not been contended that if this Court was to grant the orders sought herein it would be impossible to conduct the elections on 8th August, 2017. To the contrary the Public Procurement and Asset Disposal Act, itself provide for circumstances under which restricted and direct tendering processes may be resorted to where applicable as long as the law if complied with. Although the IEBC alluded to the post -election violence of 2008, it was not the failure to conduct the elections that led to the same but the manner in which the same were conduct which rightly or wrongly aggrieved some of the contestants therein. Whereas the Court agrees with the IEBC that it owes Kenyans a duty to ensure that unnecessary obstacles are not permitted to prevent the IEBC from preparing and carrying out the general elections of 8th August 2017, this Court's mandate is to ensure that the elections are conducted in accordance with the Constitution and the law, and will not allow itself to be a rubberstamp for a process that is clearly flawed and whose result is unlikely to meet the constitutional and legal threshold. In opposing the application the 1st interested party referred this Court to clause 7.15.2 (ii) of the Special Conditions of Contract for the provision that the agreement entered into between itself and the IEBC "cannot under any circumstances be terminated for convenience" and proceeded to issue veiled threats that it would pursue redress for any improper termination to safeguard its interests asserting that the consequences

of such termination will also interfere with the legally set elections timelines and occasion hefty losses to the Kenyan taxpayer. I, with due respect wish to clarify to the 1st interested party that termination of a procurement contract by this Court for failure to adhere to the Constitution and the law cannot under any circumstances be termed as a convenience and where this Court finds that the procurement process does not meet the constitutional and legal threshold, this Court will not hesitate to terminate the same notwithstanding the terms of the contract that was crafted between the IEBC and the 1st interested party. This Court will not partake in a ritual in which the democratic rights of Kenyans are sacrificed on the altar of financial interests especially where the interested party itself avers that materials will be supplied only when the IEBC puts in an order to the 1st Interested Party and as long as the said delivery is as per the order and the same in undertaken within specific timelines..... the decision in Kinyanjui vs. Kinyanjui [1995-98] 1 EA 146 where it was held that: "For a Court of law to shirk from its constitutional duty of granting relief to a deserving suitor because of fear that the effect would be to engender serious ill will and probable violence between the parties or indeed any other consequences would be to sacrifice the principle of legality and the dictates of the rule of law at the altar of convenience as would be to give succour and sustenance to all who can threaten with sufficient menaces that they cannot live with and under the law." 213. In my view the sentiments expressed by the 1 st interested party in these proceedings were rather unfortunate considering the magnitude of the issue at hand. I will say no more on the issue. 214. In my view the 1st interested party's assertion that because the IEBC is an independent constitutional commission which must be allowed to execute its constitutional mandate without undue and extraneous interferences is a manifestation of the failure by the 1st interested party to appreciate the nature of the country's constitutional dispensation. This submission calls for an insight as to the jurisdiction of this Court. Article 165(6) of the Constitution provides that: The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court."

It is hence clear that despite the overbearing consequences of any decision held by this court, the court has a duty and responsibility to the people of the Republic of Kenya to do that which is

just and equitable to them. The Petitioners in this matter are aware of the grave consequences of their pursuit, they are however, also aware of the consequences of an electoral process that is short of the threshold set out in law The Petitoners herein are well meaning members of the public who are desirous of an unimpeachable electoral process. The court must not shrink from this responsibility.

That is all.

DATED at **NAIROBI** this.....day of..... . . ..2017.

KINYUA NJAGI & CO.
ADVOCATES FOR THE PETITIONERS/APPLICANTS

DRAWN & FILED BY:

KINYUA NJAGI & CO.

ADVOCATES

NGINYO TOWERS, SUB-BASEMENT FLOOR

KOINANGE STREET

P.O. BOX 16418 - 00100

NAIROBI.

TO BE SERVED UPON:

1. **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION**
   6TH FLOOR, ANNIVERSARY TOWERS,
   UNIVERSITY WAY,
   P. O. BOX 45371 – 00100,
   NAIROBI.

2. **SAFRAN IDENTITY & SECURITY COMPANY**
   11 Boulevard Gallieni,
   92130 Issy-les-Moulineaux,
   FRANCE.

65

Name: BENEDICT MULE MWANZA

FROM MACHAKOS COUNTY,
YATTA CONSTITUENCY
NDALANI WARD

DATE: 04/10/2017

Election Laws Amendment Bills

Background:

The Jubilee party has introduced a bill in Parliament that seeks to amend a few sections of Kenya's electoral law to fill in a lacuna, align the law to emerging issues around the fresh presidential election and address issues raised by the Supreme Court judgement in its nullification of the presidential election. Our review of the amendment bill reveals the attempt by parliament to secure without fail the holding of the election on 26th October 2017.

We wish to submit as follows·

1. Parliament's role in amending law is a constitutional mandate Its role is not fettered as regards timing and neither does Parliament require any authorization to amend laws.
    a. It is to be noted that some of the opposition rank challenging the current process of amending the law had no qualms about doing the same in early 2017, when they not only overhauled the entire constitution of commissioners of the IEBC, but introduced a new raft of laws and requirements with strict timelines for the conduct of the general elections of 8th August 2017
    b Further the same opposition occasioned additional changes to the laws through filing a plethora of legal cases, with the last and most impactful on the law/procedure being the Maina Kiai case whose judgement was delivered 3 weeks to the election.

2. Parliament's current actions are based on the Supreme Courts' observations of the 2017 General Election, and the recommendations in both the majority and dissenting opinions on the need to ensure that there is clarity, simplicity and verifiability in the process of transmission of presidential election results.
    a. The Supreme Court (SCOK) was particular that IEBC needed to define the complementary system envisioned in section 44A, and elaborate exactly how it is to work.
    b. Parliament has also found it necessary to define in exact terms the intention of section 83 of the Elections Act, so as not to leave the same open to misinterpretation It is to be noted that the same SCOK has since 2013 and in all other cases that came before it, interpreted section 83 to the effect that invalidation of an election cannot be undertaken purely on qualitative considerations. However, in the 2017 petition, the SCOK decided to alter the meaning of the same section to argue the very opposite. The amendment seeks to cure this by defining without a doubt the meaning of section 83 as intended

3. Parliament is properly constituted for the purpose of enacting the bill as proposed. The fact that the house has a majority of Jubilee members and affiliate parties is not illegal. It

is a reflection of the people's will and their endorsement of the Jubilee agenda. No member of NASA has refused to be sworn in, resigned, or refused to take a salary

4. There is nothing unconstitutional or retrogressive about the bills It does not take away any rights or freedoms The provisions of the amendment are self-executing. No regulations are necessary.

5 The amendments do not impose any additional burden to IEBC as they only seek to simplify and ease the management of elections while providing clarity in case there are challenges.

6. The Supreme Court Ruling in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eklr* was the first opportunity to test the efficacy of the negotiated law that followed the recommendations of the Joint Parliamentary Select Committee on the Matters of the Independent Electoral and Boundaries Commission.

7. In as much as global best practice does not favour making changes to election laws so close to an election, the unique circumstances in Kenya, where an election has been nullified because of process with reference to result, makes it necessary for these amendments to be undertaken in priority

Proposed amendment	**Current status**	**Justification for amendment**
IEBC Act, Section 6 and the Second Schedule	- Chairperson must be a lawyer of 15 years standing - There is currently no other lawyer in the commission - In the absence of the Chairperson for any reason, no other Commissioner can act as returning officer for the presidential election - Quorum is set at five members	- The amendment proposes that other professionals including lawyers can be appointed chairperson of the IEBC - It removes the risk of paralysis by allowing the Vice Chair or in the absence of both Chair and Vice, for a Commissioner to Act as chair in line with good corporate governance principles on succession. - Amends quorum to ½ of the commissioners present (rounding off to 4) but no less than 3 It ensures that at any point that the numbers are less than the prescribed number, there shall always be a quorum of ½ of the members present, but in any event never less than three - The amendment ensures that the decisions of the commission are unanimous to avoid the risk of internal dissonance - We had the death of an official (P.C) Michael Kuselesi on reaching the tallying Centre Yatta Constituency Machakos County.

Election Act, Section 29	- Provides for nomination of presidential candidates to be undertaken by members of the candidate's political party - Provides that nomination for independent presidential election candidates should be by persons who are not members of any political party	- Amendment seeks to implement the constitutional court's directive that found the provision of section 29 unconstitutional following the case of ***Peter Solomon Gichira v Independent Electoral and Boundaries Commission & another [2017] eKLR.*** The court had found the restriction in section 29 was unconstitutional and at para. 98 declared *1.* ***...That to the extent that Section 29(1) of the Elections Act No. 37 of 2016 requires the persons who nominate a presidential candidate to be members of the candidate's political party, the section contravenes Articles 27(2) and (4) and Article 137(1)(d) of the Constitution Kenya and is therefore null and void to the extent of the said inconsistency.*** 2 ***...That to the extent that Section 29(2) of the Elections Act No. 37 of 2016 requires the persons who nominate an independent presidential candidate shall not be members of any political party, the section contravenes Articles 27(2) and (4) and Article 137(1)(d) of the Constitution of Kenya and is therefore null and void to the extent of the said inconsistency.***
Election Act, Section 39(1)(C)	- Provides for only electronic transmission of results of the presidential election - Does not allow for a failsafe mechanism in the event of failure to have electronic transmission	- Provides for both electronic and manual transmission of results. Allows for the putting in place of a complementary mechanism that will facilitate verification of results, but a provides a failsafe mechanism in the event o failure of the electronic system - Establishes and clarifies the complementary system of transmission of presidential election results in line with Supreme Court recommendation - The amendment confirms that in the event there is a discrepancy between the electronically transmitted and manually transmitted results, the manually transmitted results shall prevail This assures that the electronically transmitted information is verifiable through a comparison with the manual documentation as part of the

		accountability circle. Further, it elevates the place of the manual documentation which is a reflection of the manual vote of which the election is based. - The amendment ensures that any failure to transmit or publish the election results in an electronic format shall not invalidate the result as announced and declared by the respective presiding and returning officers at the polling station and constituency tallying centre, respectively. This ensures that the sanctity of the vote is protected, and that a failure to transmit the information does not invalidate the voter's will as expressed in the ballot. - The amendment provides for the Commission's publication of information through livestreaming of results as announced, but which results as published are not to be deemed as the basis for declaration. This provision facilitates transparency, by ensuring that the information from the very basic polling station: i. Can be tracked as being correctly reflected by the voters in each polling station ii. Allows the National Tallying Center, observers, media and the public to keep track of the announcements and tallies at each step of verification iii. Reduces the public anxiety of waiting for the collated results iv. Enhances the overall integrity of the process
Elections Act Section 44	- Establishes an integrated electronic electoral system for biometric voter registration, electronic voter identification and electronic transmission of results. - Provides for the Commission to develop a policy on the progressive use of technology in the	- The amendment does not alter the provisions in subsection 44(1), (2), (3) and (4). Consequently, the Act retains the integrated electronic electoral system as is; retains the requirement for a policy on technology; retains the requirement for procurement of the technology as provided. - Deletes subsection (5) and (6) which unnecessarily repeats provisions on regulations, which are already anticipated in section 109 of the Act. It however does not repeal the already existing technology

	electoral process. - Requires the Commission to procure the technology at least one hundred and twenty days before the election - Requires the Commission to make a wide array of regulations for the technology - Establishes a technical committee to oversee the adoption of technology in the electoral process and implement the use of such technology.	regulations which will be deemed regulations under section 109 - Deletes subsection (7) whose application is redundant as the first elections under the section have already been held - Deletes subsection (8) which had established the Elections Technology Committee which was declared unconstitutional by the High Court in ***Kenneth Otieno v Attorney General & another [2017] eKLR*** in which the court declared that "...***We find and do hereby declare that section 44(8) of the Elections Act, 2011, that provides for the establishment of a technical committee comprising relevant agencies, institutions or stakeholders as IEBC may consider necessary to oversee t' adoption and implementation of technolo in the electoral process, violates Articles 88 and 249(2) of the Constitution, and is therefore unconstitutional.***"
Elections Act, Section 83	Provides that invalidation can be either due to qualitative errors OR quantitative errors (Section 83 - No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law **OR** that the non-compliance did not affect the result of the election)	- Amendment proposes to replace the word **"OR"** with **"AND"** - Creates harmony in the interpretation of Section 83 so that any election court is clearly guided on the considerations to apply when seeking to invalidate an election i.e. both qualitative and quantitative considerations - Ensures that technical considerations do not override the substance of the vote (upholds will of the people) - It requires invalidation of an election to be the basis of an assessment of the totality of the electoral processes including registration, voting, counting, tallying, transmission and announcement – and not one of the eight or so processes. - Introduces a re-emphasis of the current provision of section 72 of the Interpretation and General Provisions Act, that ***"a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead".***
Section 86A	New provision	- Gives effect to Art. 138(1)

		- Addresses uncertainty of conducting a fresh election - Defines who the candidates in a fresh election will be in line with SCOK 2013 decision - Defines the mechanisms for managing a fresh election
Election Offences Act		- Enhances the penalties for wilful or deliberate failure to sign election documents, or falsifies election documents by a presiding or returning officer to five years - Specifies with clarity critical election offences committed by presiding and returning officers - Raises the profile/criticality of the role played by presiding and returning officers - Proposes the deletion of the restriction on government advertising in line with Art. 35 on Access to Information

NAME: BENEDICT MULE MWANZA

SIGN:.....

DATE: 04.10.2017 :

0722-325611

benedict.mwanza@yahoo.com

I SUPPORT

1/10/2017

66

I do propose the amendment of the bill.

1. The opposers should tell Kenyans the reason as to why one should not be held accountable for his illegalities during his duty.
2. One should be fined equal amount to that being used during the fresh re-elections.
3. Those who will be held with illegalities should not hold or work in any public institution.

HAWKER GITHURAI 45

VITALIS M.NJOROGE

TEL: 0725819202



Received written Submission
MJ
5/10/2017

67

Fw: Fwd: ELECTION LAWS (AMENDMENT)BILLS.2017

Inbox x

MARY JEBET CHESIRE 15:18 (17 hours ago)

to me, Emmy

----- Forwarded Message -----
From: The Clerk Senate <csenate@parliament.go.ke>
To: Directorate of Legal Services <dlssenate@parliament.go.ke>; kavata musyoka <kavata.musyoka@gmail.com>; MARY JEBET CHESIRE <mjchesire@yahoo.com>
Sent: Wednesday, October 04, 2017 10:13:58 AM
Subject: Fwd: ELECTION LAWS (AMENDMENT)BILLS.2017

From: "LEWIS BUCHECHE" <lewisbucheche@yahoo.com>
To: clerk@parliament.go.ke
Cc: csenate@parliament.go.ke
Sent: Wednesday, 4 October, 2017 9:26:06 AM
Subject: ELECTION LAWS (AMENDMENT)BILLS.2017

Having satisfactorily read the new election laws yet to be amended,i hereby write to give my opinion. The laws mean well but i object its implimendation due to limited time frame to election and the state of the country.please lets do this after election to proof that we mean well and we love our country.

68

5th October 2017

Received
5/10/2017

Charles Chege Gitau
Kabete Constituency,
P.o Box 1450 -00902.
Telephone 0720944984

To
Chairman
Parliamentary Select Committee on electoral Laws
Parliament Building

Ref: Amendement to the electoral lwas

Please include a clause on the amendment to the effect that,

"Upon gazettement of a fresh election date the chairman of IEBC must invite the person who the court directed to be on the ballot paper t for the rerun (in this case Uhuru and Odinga) to represent their nomination papers again to the commission".

This clause will ensure that the person who the court directs to be on the ballot paper shows their willingness to participate

This will avoid the current situation where one participant Mr Raila Odinga says that he will boycott the elections how do we tell that a candidate is willing or not to participate in the elections.

Yours faithfully,

Charles Chege
0720944984

Received written Submission
5/10/2017
69

THE ELECTION LAWS (AMENDMENT) BILL (NATIONAL ASSEMBLY) BILL NO. 39 AND 38 OF 2017

3rd October, 2017

SEN. FATUMA ADAN DULLO, M.P.
CO-CHAIRPERSON/DEPUTY MAJORITY LEADER
SELECT COMMITTEE ON ELECTION LAWS
THE SENATE
PARLIAMENT BUILDINGS
NAIROBI.

RE: SUBMISSION OF MEMORANDA ON THE ELECTION LAWS (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 39 OF 2017 AND THE ELECTION OFFENCES (AMENDMENT) BILL (NATIONAL ASSEMBLY) BILL NO. 38 OF 2017 IN ACCORDANCE WITH ARTICLE 118

I have read the The Election Laws (Amendment) Bill (National Assembly) Bill No. 39 of 2017 and Election Offences Amendment Bill No. 38. The Principal object of the Election Laws (Amendment) Bill is to provide for the proper conduct of the affairs and business of the Independent Electoral and Boundaries Commission (IEBC) and for effective management of elections.

The Constitution of Kenya 2010 Chapter 8 has established a Parliament of Kenya which shall consist of the National Assembly and the Senate.

ROLE OF PARLIAMENT

ARTICLE 94 (1): The legislative authority of the Republic is derived from the people and, at the national level is vested in and exercised by Parliament. **(5):** No person or body other than Parliament has the power to make provision having the force of law in Kenya except under authority conferred by the Constitution or by legislation. **(6):** An Act of Parliament or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.

EXERCISE OF LEGISLATIVE POWERS

ARTICLE 109 (1): Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President, **(2)** Any Bill may originate in the National Assembly, **(5)** A Bill may be introduced by any member or committee of the relevant House of Parliament.

PUBLIC ACCESS AND PARTICIPATION

ARTICLE 118 (1) (b): Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its committees.

VOTING IN PARLIAMENT

ARTICLE 122 (1): Except as otherwise provided in this Constitution, any question proposed for decision a majority of the members in either House of Parliament shall be determined by a majority of the members in that House, present and voting.
On Wednesday 27th September, 2017 the **National Assembly voted 83 -37** to hold a sitting on Thursday morning of 28th September, 2017 whose main agenda was for the formation of special Committees to consider the Supplementary Budget and amendment to the Elections Laws

SUBMISSION OF MEMORANDA IN SUPPORT OF AMENDMENTS

In response to the Clerk of the National Assembly advertisement that appeared in the Daily Nation of Friday 30th September, 2017 inviting public participation in submitting of Memoranda on the Elections Laws (Amendment) Bill National Assembly Bill No 39 of 2017 which seeks to amend the Independent Electoral and Boundaries Commission Act 2011, and the Election Offences Act 2016 to provide for the proper conduct of the affairs and business of the Independent Electoral and Boundaries Commission and for the effective management of elections

I hereby wish to submit my memoranda in support of the proposed Elections Laws (Amendment) Bill National Assembly Bill No. 39 of 2017 and the Election Offences (Amendment) Bill National Assembly Bill No.38 of 2017 for the following reasons:

1. **The Parliamentary legislative procedure has been properly followed in accordance with Article 94.**
2. **Parliament is rightfully exercising its own legislative powers in accordance with Article 109.**
3. **Parliamentary Select Committee on Election Laws has invited public participation in accordance with Article 118 through submission of Memoranda as advertised in the Daily Nation of 30th September, 2017.**
4. **Parliament voted on 27th Septembr,2017 with majority 83 -37 to establish a Select Committee on Elections Laws to examine and undertake public participation in the amendment of the Independent Electoral and Boundaries Commission Act 2011 and Election Offences Act 2016 in accordance with Article 122**

I therefore here wish to respectfully submit my Memoranda to the Senate Select Committee on Election Laws for your consideration.

{Memoranda Submitted by Clement Nyamongo –Nairobi City County - Makadara Sub-County –P.O.Box 41396 – 00100 Nairobi –Tel: +254-725926595 –Email: cnyamongo@yahoo.com}

70

Received
5/10/2017

Charity Wanjiku Ndungo
Tel. 0711693045.
Email: Charitywanjiku20@gmail.

5th Oct 2017 - Thur

To the house of
parliament
Countyhall

Dear Ref: Ammendment of the electra, Law.

Dear/Sirs/Madams,

I greet you all in the of our Lord Jesus Christ. Thank you for giving us this chance to be involved in the welfare of our nation- The law should be ammended to say - If it be the presiding officer who does not sign or stamp the forms, he should be held accountable. If The jail term is appropriate, so that the law will deter ~~it~~ mischief.

9) If the electric way does not work, let the manual way be found appropriate

anything can happen to the Chair who announces the result, So there should be 1 alternative plan B, C - all these are to stop what happened on the Judgement day - about irregularities and irregularities This our country we are all stakeholders, also the foreign envoys should not tell what to do, we're a Sovereign state.

also the returning officer should be held accountable We should also pray for

Our nation, our anthem
~~sto~~ Says we stand firm
and defend our homeland
all by all am saved, born
again believing on the
Lord Jesus Christ as
my Lord and Saviour.
We all should pray for
us our nation. Amen.
God bless
Yours faithfully
Charity Wanjiku

My views -

To

House of Parliament
County-Hall

MEMORANDA
(1)

5/10/2017

71

NAME: ABBY WANJIRU THUKU
ID NO. 16884579
Cell no. 0723 608 636
~~AD~~. P.O. Box 129-00902 KIKUYU

PUBLIC PERTSPATION

(1) I am a Kenyan Registered as a Voter at - Kasarani - Gituamba Primary Polling station

(2) I was employed by the Kenyan Government - but Retrenched through the Program in year 2000.

(3) I fully support the minimum changes for the law - but why?

(1) We need clear and understable laws for ordinary Kenyan like Me - to understand

- - - 2 -

(vi) These Laws will help me understand why the Court might call of an election - or why I should continue suffering due to prolonged campaigns - and un-necessary delays.

(vii) Calling for IEBC officials to Resign or to be kicked out of office is Unfair. The suffering I have gone through ever since I was laid off my employment - I won't like a fellow to suffer the same.

(iv) The Law of Moses - said anybody caught Commiting adultory - he/she was to be stonned to death.
But what did Jesus Jesus do when a woman caught Red-Handed was brought before Him?
= Any human being is capable

Making mistakes - so lets forgive those in Instutional Offices = for our country to Continue Operating - normaly.

(v) These changes should be able to clear a way that my vote which I will cast will matter (matter) more than anything else.

(vi) After this - make ways and means of Evaluating the whole Constitution - for us to Rectifie or Ammend the Many mistakes and wrongs contained in it.

(vii) Before Kicking someone out of a Public Office - First, First - put your-self in his shoes and imagine how it feels.

viii) Inform those entrusted with any kind of Public Office - to stop mis-using their position to bring suffering to their fellow citizens.

Even those of us - like me - who are ordinary Kenyans - make clear laws for each citizen to be held accountable for wrongs committed deliberitly.

But at the same time Lets consider situations as they come with sober Minds - Even what Our Parliament is doing right now. God bless you God bless Kenya

Name: Abby Wanjiru Thuku yes.
Signature: AWKM

End.

Received written submission
5/10/2017

72

MR J.M. NYENGENYE CBS
CLERK OF THE SENATE/SECRETARY
PARLIAMENTARY SERVICE COMM.

KEBIRO
4.10.2017

REF: THE TWELFTH PARLIAMENT: PUBLIC HEARINGS/RECEIPT OF MEMORANDA

Reference is hereby Made to the above On THE Election Laws (Amendment) Bill National Assembly Bills No 39 of 2017 And The Election Laws (Amendment) Bill, Senate Bills NO. 3 of 2017.

So in this respect, and Pursuant to the Provisions of Article 118 (1) (b) of the Constitution and Standing order 127 of the National Assembly and Standing Orders 124 of the Senate Orders

" I t is my humble submissions to Submit my represted representations that I have on a specific item on the election Laws. This comes about because of the Stale-Mates of the Post of the PRESIDENCY and Governorships, and Senators Members of Parliament; Women Representative and Member of County Assemblies.

I) I look at Both the 3 ARMS of Government. That is the I) PRESIDENCY, II) The JUDICIARY & III) PARLIAMENT.

" WHoever COMES and Occupies the Office goes through a process OR Procedure (Period)". There is the Electives who require Votes and Voters i.e. The COMMON citizenry of all Cadres

Mostly the JUDICIARY.)

I look at other Tetiary Arms of Government - This is the Armed Forces Civil Servants and Civil Society and Even the CORPORATE WORLD. The Most Important ARM of Government is THE COMMON Citizenry and We should not forget plants and non-Living Things.

The Most Important aspect on Whe we go through this processes and VERY PARAMOUNT IS PEACE, LOVE, UNITY and CONTINUITY - This involves having a future focused VISION and MISSION

I will not forget Religiosty of all Shades AND This is to Target those Electoral LAWS.

CHAOS, PROTESTS, EXTREMISM and funny Unbecoming beliefs Throug Modern Technological Gizmos.

*1) There should be a very Strict Code on Tenure of Offices.

2) This Mahend of Petitions Whether through COMMUNICATION Channels OR Real Legal Redress Should be Addressed Critically by All Houses and When you give 10-Day period of Public participation - I deem to see a lapse of Seriousness. We Kenyans of all types are a lazy-Lot. We Should be serious and Work on 6 Days 18 to 20 Hours a

Kenyan Citizens WALIJITOLEA"

3) Mr. William CHEPTUMO the Chairman of the Joint Parliamentary Committee, I Yabbesh Onyancha Geke of the Above address ask/you a One Million Question and Mr. Michael R. Sialai and Mr. J.M. Nyegeye - I am in a Remote Village in Nyamira County known as Nyakeore and IN GODs Name, I have Communicated to Your Institutions on the Same - It is Pure Shame that no One gets intouch With Just a Simple Acknowledgement on the Same - But any-way lives Must be Continued to be lived. It is pure Bad-Manners that the Ones who are in Newspapers, T.V.s, Radios have Nit-witts Ideas on how our Nation should be RUN. Mere Verbosity and RAW-POWER

4) I would have liked to physically participated in your FORUMS and also give my Stupid Ideas But my economic and pecunary Embarassements I am unable.

Thanking You in Advance

Yours Sincerely, faithful, Hopeful Kenyan patriot:

Yabbesh Onyancha Geke

Received
4/10/2017
73

Memorandum on Elections Laws(Amendment) Bill No.39 of 2017

Objective: Guide the IEBC Chairperson as the Presidential Election Returning Officer on the documents to use in generating form 34C

Proposal

1. The NTC/Chairperson should receive BOTH 34A and 34B,but only use 34B (results from CTC) in generating 34C
2. There should not be any form of verification at NTC because as per Kiai case this makes the previously declared results provisional yet they are final,which is contrary to the proposed amendment section 39(1C)(a)

Grounds for the Proposal

Judiciary Manufactured Confusion

Kiai Case(Civil Appeal 105 of 2015)

Before Maina Kiai Case, votes were counted at each polling station,and results declared. These were accompanied by the Presiding Officer(PO) to the Constituency tallying center(CTC) where the Returning Officer(RO) tallied and declared the Constituency results. From here, the RO took their declared results as well as those of the polling station to national tallying center(NTC). At the NTC,the chairperson tallied and verified the results before declaring the final results. This essentially meant that all results declaration/announcement at the lower levels,especially at CTC,was provisional, 'subject to confirmation'

Kiai case determined that the chairperson could not verify or confirm the results in any way other than confirming the constitutional threshold meaning the Constituency results were final and not subject to further confirmation or verification;

> **"...If any verification or confirmation is anticipated, it has to relate only to confirmation and verification that the candidate to be declared elected president has met the threshold set under Article 138(4), by receiving more than half of all the votes cast in that election; and at least twenty- five per cent of the votes cast in each of more than half of the counties."**

It also held that results declared at the polling station are final and can only be challenged by an election petition in court. Any other results declared beyond the polling station were mere tallies.

> **"...The lowest voting unit and the first level of declaration of presidential election results is the polling station. The declaration form containing those results is a primary document and all other forms subsequent to it are only tallies of the original and final results recorded at the polling station."**

The case marked the end of provisional results

The case declared as unconstitutional all Elections Act clauses that sought to verify results at NTC,

> **"...Ultimately we find no fault in the determination of the High Court that to the extent that section 39(2) and (3) of the Act and regulation 87(2)(c) provide that the results declared by the returning officer are provisional, and to the extent that regulation 83(2) provides that the results of the retuning officer are subject to confirmation by the appellant, these provisions are inconsistent with the Constitution and therefore null and void."**

Equally important, it read mischief into the Elections Regulation Amendments that IEBC gazetted subsequent to the High Court determination and before the Appeal, amendments which dealt with verification at NTC;

"...the appellant issued a gazette supplement, being Legal Notice No. 72 of 21st April, 2017, making drastic amendments to the Elections (General) Regulations 2012, whose effect was clearly to render impotent and circumvent the declaration by the High Court of the inconsistency with the Constitution of section 39(2) and (3) of the Act and regulations 83(2) and 87(2)(c). For instance, Form 34 which was headed.....

...The new regulation 87 specifies that upon receipt of Form 34A from the constituency returning officers the Chairperson of the appellant shall "verify the results against Forms 34A and 34B received from the constituency returning officer at the national tallying centre".
The controversial regulations 83(2) and 87(2) were not affected by the amendments, and the object is not difficult to see. The High Court having found those regulations to be inconsistent with the Constitution, it was in bad faith for the appellant to re-enact them while pursuing this appeal."

The confusion in the Kiai Case

The chairperson/NTC by Elections Act is required to receive all the 40K+ forms 34A which are final. He also receives 290 forms 34B generated from the forms 34A which are also final.

The Kiai case having taken away verification power from the chairperson, and maintaining that results declared at CTC and polling stations are final leaves the chairperson with two sets of results which can't be amended,yet which may have discrepancies among themselves making them potentially mutually contradictory.

On what basis does he compile the 34C? From the final 34Bs or 34As?

In August elections, the chairperson believing the 34B to be final and the only documents required for generating forms 34C, went ahead and declared the results without all forms 34A. This is evidenced by Kassait Affidavit;

"....7. THAT in response to Paragraph 6, the correct position is that the Court of Appeal in Civil Appeal No. 105 of 2017: Independent Electoral and Boundaries Commission v. Maina Kiai, & 5 Others, ruled that the electronically transmitted image of Form 34B is the final result for the Presidential Election with respect to each Constituency and it is therefore erroneous and incorrect to say, as alleged in the Supporting Affidavit, that Forms 34A from the polling station were the final results.

Supreme Court Presidential Election Petition

The Supreme Court Petition judgement charged that the declared final results were unverifiable partly they were unaccompanied by all forms 34A. It held there was nothing in Kiai case forbade the chairperson from receiving the forms 34A. They also held that the chairperson had a duty to verify;

[289]...It has been established that at the time the 2nd respondent(Chairperson) declared the final results for the election of the President on 11th August, 2017, not all results as tabulated in Forms 34A, had been electronically and simultaneously transmitted from the polling stations, to the National Tallying Centres. The 2nd respondent cannot therefore be said to have verified the results before declaring them.

[290] The said verification could only have been possible if, before declaring the results, the 2nd respondent had checked the aggregated tallies in Forms 34B against the scanned Forms 34A as transmitted in accordance with Section 39 (1C) of the Elections Act. Given the fact that all Forms

34 B were generated from the aggregates of Forms 34A, there can be no logical explanation as to why, in tallying the Forms 34B into the Form 34C, this primary document (Form 34A), was completely disregarded.

Supreme Court Confusion
First, by requiring the chairperson to verify results, it went against Kiai Case.

Secondly, declaring the results unverifiable merely because they were generated without all forms 34A is illogical. One can also argue that the the 34As at NTC are unverifiable since they are unaccompanied by the respective sealed ballot boxes!

Way Forward
If the chairperson generates 34C from 34A, then there exists a risk that the results may be different than the contents of 34Bs. But further, if he did so, then the results declared at CTC are not final,and are irrelevant in declaring the final results.

Again if the chairperson attempts to use both 34A and 34B and runs into errors he will have to sacrifice the finality of one of the final results.

Generating 34C from 34Bs therefore appears to me the most consistent ad practical way of navigating this. If there be data entry or arithmetical errors on the form,they should only be challenged by an election petition.

Conclusion
Going forward into the fresh election ordered and set for 26th October, it is clear there is serious ambiguity on the finality of results declared at polling station and CTC,as well as the duty of the chairperson to verify final results.

That the ambiguity is part of the *ratio decidendi* of the invalidation of August 8th Elections means it ought to be addressed urgently.

The necessity of both polling stations and CTC results in generating the final results seems to be a carryover from the days of provisional results. Since Kiai Case decisively did a way with these, I maintain polling station results are not necessary for generating 34C. NTC May receive these for any other reason apart from generating 34C. Else we may as well do away with CTCs

Ndùng'ù Kiriga

4th September 2017
ID-22749987
Phone-0720961135

Gazette Part 4/10

74

RECEIVED
04 OCT 2017
CLERK'S OFFICE

03/10/2017

KENNETH MAVALE MEMORANDUM

P.O BOX 736

KITALE

CLERK OF NATIONAL NATIONAL ASSEMBLY :

Allow me to air my views on the on the going hurried Election Laws (amendment) Bill 2017. As a peace loving Kenyan, I am deeply disturbed with·

1 The anger with which the Jubilee side of the house is turning into a rubberstamp
2 The feeling among opposition followers that they need not be involved in bipartisan dialogue as the one that produced the very laws that you seek to amend- without their input
3 The intolerance exhibited that numbers are everything right- might is right attitude.

My take is as follows:

1.Meaning of Chairperson:

The person who can stand in for chairperson should have similar qualifications as the chairperson. The intended changes seem to dilute this and I do not support it. Let vice/Deputy chair have similar power in clear circumstances that he/she can stand in for chairperson and should be clearly known, not letting members choose among themselves

2.Quorum

We need at least 50% of the whole commission to form a quorum. For a body dealing with such sensitive matter as could have burned us in 2007/2008, we cannot afford to simplify things

3.Electronic and Manual transmission of results:

Stick to electronic transmission as the primary means

4.Use of technology

We cannot whittle down the need for free,fair, simple, verifiable and transparent to only free and fair when we can already see how free and fair you are rushing the bill to the exclusion of other Kenyans (Gget the sarcasm?). We cannot be moving backwards from electronic mode to manual In deed where there is conflict, manual should be secondary to electronic. Jubilee is digital. Right?

5.Nullification of election:

Breaking of laws cannot be sanitized by your intended amendment. Where an election is not held under the laws, it should not stand To me you are legalizing illegalities and we citizens will be saying that if we

break into a bank and steal some few millions, the judges should find out if the stolen funds would significantly alter the profitability of the bank! Retain` or ` and do away with `and`

Addition:

Legislate on timelines within which results must be transmitted after voting is completed a day should be enough after polling day

KENNETH MAVALE TEL 0722590200

CITIZEN OF KENYA

75

Gruber-PCA

SAMUEL GITHAIGA MWANGI - 0722745769
P.O BOX 45-10202
KANGEMA
MURANG'A,

5TH OCTOBER, 2017

TO THE CLERK
NATIONAL ASSEMBLY
P.O BOX 41842-00100
NAIROBI

Dear Sir,

REF MEMORANDA ON ELECTIONS LAWS (AMENDMENT) BILLS, 2017.

Please, reference is made to your advert in the daily Nation dated Tuesday, the 3rd day of October, 2017 regarding the above subject.

I am a Kenyan citizen, holder of ID number 7224988 at the age of 52 years and would like to seek clarification on the following:-

a) Although I am in full support of any effort which is aimed at ensuring that Kenya will be able to conduct a free and fair credible Elections, I am hesitant to endorse the Amendment on the issue of Chairmanship of I.E.B.C due to the following reasons.
   - The amendment does not clarify what would happen if the Commission is divided down the middle and we end up in having more than one

- Supposing three commissioners disagree with the Chairma and opts to appoint one of them as a chairperson, is it not possible for such a group to declare different results?
- Should the commissioners be inclined towards different Political parties (which is possible in Kenya), is it not possible for two or more different candidates to be declared as winners in a constitutional manner?
- I am deeply worried because for the first time in Kenya if the commissioners decided to throw this country into anarchy, they can do so without breaking the constitution in that, the Chairman or vice chair can declare the results separately and differently or even worse, a faction within the commission chose to go it alone and declare results differently.
- Should the above happen, no Law will have been broken because they will all be acting within the Constitution and can further be compounded by the fact that we intend to amend our Laws to allow any Supreme Judge to Swear-in the winner as president. This will give room for us to have a situation where two or more different people can to be declared and Sworn-in as Presidents in the Republic of Kenya without breaking any Law.

In view of the above, I am kindly requesting that you allay my fears because I stand to be deeply affec if this Country is thrown into anarchy by our own Constitution because I firmly believe that there was also of wisdom in leaving the declaration and Swearing-in of the president as it is currently in the Constitution

Received
4/10/2017

76

SUBMISSION FOR THE ELECTION LAWS AMENDMENT BILL 2017
BY
ELIUD KINUTHIA, HSC
(2017 GOVERNOR CANDIDATE FOR LAMU COUNTY UNDER JUBILEE AFFILIATE PARTY- PNU)

PREAMBLE

- Hon Chairperson, Honorable Members of this Committee of Parliament and Distinguished Citizens
- (Name) I am a citizen of this Country of Sound mind, a registered voter of Lamu County and a Leader who vied for Lamu County Governorship under Jubilee Affiliate Party of PNU ticket.
- I make this submission on behalf of myself, my supporters and members of public from my county whom I reached, and on behalf of Lamu Professionals Organizations and Balozi social welfare group where I am a member and a leader together with my Member of Parliament for Lamu West Hon. Stanley Muthama
- I wish to thank my MP whom I voted for extending this invitation and ensuring information about this proceedings has reached professionals and members of public from Lamu West Constituency

NOW THEREFORE, I wish to submit as follows:

1. **OBJECTIVE AND CONNECTED PURPOSE**
   - Principal Objective in page header no. 987 states; - Provide for proper conduct of affairs and business of IEBC and for effective management of election.
   - Is this objective relevant to the problem and current situation in Kenya?. A law must aim a solving a real and not imaginary problem.
   - The Answer is Yes. Majority ruling by Honourable Judges of Supreme Court blamed IEBC for 3 things:
     i) Irregularities
     ii) Illegalities
     iii) Shambolic conduct of IEBC Affairs in management of election.

iv) Further, we have observed situations where IEBC official documents are leaking to the media and political leaders who explain them with such high level of masterly and eloquence as if they authored them.

- My submission therefore is that this Bill solves a real problem that was clearly stated in the Supreme Court Judgement
- I agree that Political temperatures are high – But I ask If a house is on fire do we stop the rescue mission of a innocent child inside just because we fear the temperatures coming from the furnace?
- NO. Our Country is caught is this hot fires and Parliament must do what it takes to rescue the country even as political fire burns. (Mwiko haugopi maji ya moto and Parliament Must not fear)
- On Issue of right Time, I ask when is the right time? Is it when we have a bigger crisis than we have? I don't think so.
- On structure, I propose that we bring the section for object and reasons early in the bill possibly after the short title.

2. CHAIRPERSON – section 2

- Provision for the absence of Chairperson seals an important loophole in the previous law where only one person could declare presidential results
- Its good wisdom to envisage situations of sickness, un disposed or mysterious and deliberate disappearance and absences as such incidences have happened in this Country.
- It is best management practice to provide for command structures in all other Commissions, Boards, Committees to have the position of a vice chair or alternatives in extreme circumstances where both are absent.
- Its only in wedding and burial events that the primary character is not replaceable. – on the wedding day you cannot replace the bride or the deceased during burial if they are missing.
- However its good to add the word unexplained absence capable of rendering functioning of commission ineffective

3. QUALIFICATIONS OF CHAIRPERSON – SECTION 3

- Remove the word qualified to hold the office of a judge of supreme Court – This requirement has become very common in majority of Chapter 15 Commissions.
- I submit that this requirement has been misused in various legislations to over glorify one profession at the expense of others. I don't see rationale for this requirement though I do recognize that Judges is the only Profession that was allowed to have a book in the Holy Bible called Judges which accounts for their historical wisdom and rulings in the ancient days.
- I therefore propose that we admit other professions as eligible as Engineers who in recent management have shown a lot of capability for reforms and transformation, Educationalists, Theologians and Priests like Bishops and Chief Kadhi, former law maker like MP and senators as eligible professions for the Chairperson position
- On relevant experience I submit that we add People management and Transformational leadership as a co-competency requirement.

4. MANUAL TO PREVAIL OVER ELECTRONIC – SECTION 6

- Providing for discrepancies will seal an important loophole in the previous law
- If this loophole never existed perhaps Supreme Court would have ordered a consideration of all hardcopies of Forms 34s or better still a recount of the votes other than fresh election
- Providing for discrepancy ensure upholding of principles of simplicity, accurate and verifiable as per Article 38 of the Constitution
- Manual allows Traditional methods of counting which are never controversial and are open for public eyes to see.
- Counting votes should be as simple as counting dowry or herds a cattles that a person has. Its simple not controversial and easy to follow and verify.
- Computer algorithms happens in a hidden box somewhere away, are opaque and outside the domain of public eyes so its difficult to see transparency.

- Electronic systems excludes participation by majority of citizens who do not understand computer languages and therefore according to many citizens its not simple and its only good if it leads to no controversy

5. **DANGER OF OVER REGULATION AND TOO PRESCRIPTIVE - SECTION 7**
   - Removes the danger of over regulation of IEBC by becoming too prescriptive and administrative
   - Over regulation and prescriptive ties the hands of the Commission in exercising their management competencies which was a co competency during their recruitment.

6. **INVALIDATION**
   - Sec. 1E – The event of failure to electronically transmit the result shall not invalidate election where manual system has been done.
   - This has raised the threshold for invalidation hence preventing crisis based on administrative errors.
   - People commit m-pesa errors regularly but it is very easy to verify whether you received or withdraw money by checking the money in the pocket.
   - There is no contradiction with allowing failure and severely punishing deliberate errors as key words used is knowingly, willingly meaning a person has chosen to do the wrong things.

7. **CAN ONOTHER CANDIDATES DECLARE HIMSELVE A WINNER AFTER NULLIFICATION – SECTION 86A**
   - Invalidation of presidential election shall include indication that none was properly elected so that no other candidate declares himself a winner because invalidation did not indicate that none won .
   - Invalidating the one who was declared the winner does not mean any other candidate won.

8. **WITHDRAWAL – SECTION 86 A - 4**
   - Question of withdrawal of a candidate after nomination.

- Please add withdrawal or absence to provide for absence for other reason other than withdrawal e.g. death, mysterious absence and incapacitation.
- Close the gap by stating that the two candidate remaining runs or the one remaining is declared president unopposed to avoid multiple re-nominations.
- Previous law allowed a loophole where it assumed after nominations all candidates will automatically be there during polling.
- This avoids deliberate absence or withdrawal purely to postpone election or cause repeat of nominations

9. PENALTY SECTION 11

- Add the option of appropriate fine and increase jail term to over six (6) years to prevent the person from being free in the next election
- The omissions being punished are those committed knowingly and willingly

Received
4/10/2017

77

VIEWS ON ELECTION AMENDMENTS BILL TO SELECT COMMITTEE OF NATIONAL ASSEMBLY

Introduction

The honourable chairman, honourable members of national assembly and senate. My name is Michael Odiembo, I have a background in Engineering and Finance with experience spanning over two decades in various fields mainly in Banking and manufacturing. I am immediate council member of ICIFA for the last 10 years.

It is a great honour to appear before you. I hope this exercise will lead to national understanding and consensus. This forum provides the best opportunity for our country to pause, stop digging and reason together.

I am in support of amendments bill that strengthens our electoral processes; however we must never base it on we have numbers or majority will have their way. Majority decision alone cannot promote national cohesion. It must be remembered that one of the responsibilities of our president is that he is the symbol of national unity hence his election should never be allowed to occur under controversial circumstances. If you strictly pursue this spirit of our constitution, we will avoid what is happening in Spain or what happened in Yugoslavia or the Enabling Act of 1933 in Germany. Let us leave no Kenyan behind.

I request that through parliamentary mechanisms approach your colleagues from NASA without tiring with a view to get their views on what their preference would be relating to this bill or what their solution to the present situation would be.

Looking at the proposed amendments bill, they are reacting to a lacuna in law created by the SCOK however we are mute on the ills identified by the SCOK that led to the nullification of the presidential elections and the institution responsible for those ills. I have identified some of the obvious ills and made suggestions for consideration by the Honourable members in this proposal.

A few statements have made in public that they have become Kenyan proverbs namely Kenya is greater than all of us and peace is not negotiable.

Honourable members allow to add that these statements are great but are largely quoted out of context for the following reasons:

a) Kenya is defined by her people, hence in the absence of her people, it will be invaded by foreigners and named differently hence the people must be at the centre of decisions and actions not the geographical land surface named Kenya by her occupants. Noting that the people living in Kenya today came from other geographical locations and renamed this land. Let us never lose focus on who we are making laws for and to what end.
b) Peace is a result of justice and justice emanates from many discussions, agreements, disagreements and compromises.

Where are we

Honourable members of NA and senate we are at crossroads as a country hence need for deep meditation and reflection.

It is incorrect for some Kenyans to claim that presidential election results have not been nullified elsewhere; other countries like Maldives, Ukraine and Austria did it and in 2010 Cote d'Ivoire.

In my understanding the IEBC conducted the elections and hence owes the rest of us Voters, parties and candidates an explanation on what went right and wrong as a constitutional obligation since their mandate originate from the sovereign will of the people through the constitution. Unfortunately we have viciously turned on each other with hate and name calling.

The people of Kenya using their sovereign will created the Supreme Court to hear and determine disputes relating to the presidential elections Honourable members the Supreme Court discharged her constitutional mandate.

The question then, what did they identify as the weakness within/out IEBC? The court identified irregularities and illegalities, which points to failure to comply with internal operational procedures and controls and the law. Honourable members when you call an auditor to look at your books of accounts, once they make a query you respond with fact and evidence. The question is, did IEBC respond to SCOK with fact and evidence on all its queries? In my view NO and those issues should be the basis of the election amendments bill before the Honourable members, if not I further request that they be considered as you move the bill forward.

CHALLENGES

Honourable members allow me to quote American Musician, Frank Ocean.

When you're happy, you enjoy the music but when you're sad, you understand the lyrics."

Let us not fall victim to confirmation bias, a type of cognitive bias that involves favouring information which confirms previously existing beliefs or biases or the tendency to interpret new evidence as confirmation of one's existing beliefs or theories.

Never shy away from a challenge, yes it's tough but fulfilling once you've conquered and mastered it Kenya will triumph if we overcome the challenges.

Today the Honourable members find themselves in a similar situation where you may be the last hope for the people of Kenya to engage in a well guided discourse.

I implore Honourable members to avoid the famous joke that during the space race Americans were researching on what kind of pen would write in the moon while the Soviets just carried a pencil. Honourable members I humbly request you to be critical but lateral thinkers by not wrecking the boat but also enhancing its hull to make it stronger and steady for the winds and tides a head.

Honourable members there are several electoral frauds that break the power of democracy entirely and hence undermine the sovereign will of the people despite a candidate getting the greatest number of votes. These frauds occur at polling, counting and tallying centres and announcement of election results. They may also occur at pre-electoral stage where government may interfere with the planning process by

- Deliberately underfunding activities and civil voter education that leads to a level playing field
- Incumbent governments may interfere with the voter registration process by deliberately failing to fund it on time and/or by interfering with the procurement of appropriate systems

As a result of the above reasons the sovereign will of the people can validly be exercised when electoral fraud is minimised to immaterial levels by strict adherence to the constitution, laws and regulations. For this to happen we must invest our energies in enforcement. The SCOK has led by example and I hope the National assembly and Senate will lend their energies by ensuring that individuals within IEBC found to be have been negligent punished to deter a repeat.

Negligence of national duty must never be excused under any circumstance in order to progress as a nation with cohesion and stability.

I wish to turn my attention to some areas the amendment bill have addressed and those it has not:

ISSUES ADDRESSED BY THE BILL

1) **Should there be a conflict between hard copy form 34A and electronically submitted results then the hardcopy takes precedence.**
   This proposal should not be allowed since it opens window for alteration of results which is a fraud. There is a better way of resolving the same.
2) **Creating a continuity plan for the absence of the Chairman and that the chairman must not be a lawyer**
   This is in my view is in order however in the absence of both the Chair and Vice Chair, the quorum for decision making must be the remaining commissioners in this case 5 and before this action is taken, the commission must communicate and explain this to the political parties and the public The position of the chair in my view must be given a little more authority over the secretariat and other commissioners due to the responsibility bestowed upon the position by the constitution and to ensure unity of command.
3) **The bill proposes that in case a voter cannot be identified by their biometrics, then the alternative means be used.**
   In my view all voters must be identified by KIEMS. In case a voter cannot be identified via the kits but registered as a voter, their national ID cards should be scanned by the kit on both sides as proof of presentation. If this is not done then the process will be open to abuse leading to dead voters voting. In future these voters should have their IRIS captured and IEBC can map the regions of prevalence to help remedy the issue.
4) **The bill recommends a jail term of 5 years for the election related offences**

   My view is that this is too lenient, considering the impact of their actions or inactions It will undermine the sovereign will of the people hence ten (10) years without the option of a fine and black list such persons from ever holding any public office. IEBC must be compelled to ballot the posting of regional and constituency coordinators, returning and presiding officers to mitigate any chance of premeditated bias in posting.

5) **The bill attempts to advise the SCOK on what to base their decision on.**

Even in our constitution we never attempted to offer this guidance hence in my opinion it may not be in order, hence I propose the Honourable members consider dropping it

Technology can fail however technology stores data for audit trail hence easy to validate the results in case of any query

Important to note: KIEMS can carry data without being hacked only their server is at risk hence the information captured in it is secure and can be audited. Further KIEMS drives can be partitioned into two, one of them dedicated to backing up data and another operational.

The timing of the bill may not be a problem in my view consensus between the political players especially Jubilee and NASA is important in national interest.

SUGGESTED SOLUTIONS DURING VOTING, COUNTING, TALLYING AND TRANSMISSION OF RESULTS FROM POLLING STATIONS

1. AGENTS

Listening to the proceedings of the SCOK and political leaders what comes out clearly is the pivotal role party agents play in the credibility of our elections, thus need to protect them.

There are claims that agents were excluded or chased away from polling stations during, counting, tallying and transmission, I propose that this be made an offence with 5 years' imprisonment for any person proved to have done so. As a standard practice before polling stations are opened, the presiding officer should be required to communicate to the IEBC election management team that their polling station does not have an agent from a given party and the same noted and communicated to the party through pre-approved email addresses between IEBC and the party officials. Parties should be allowed to have a reserve agent for every polling station in case a replacement might be required However this will not stop the opening of a polling station when the time is due. I propose IEBC can set up a call centre to manage electoral related challenges during the elections.

2. COUNTING AND TALLYING

I propose that the counting clerks be mandated to sign off the results for ownership and since they are the ones who counts they should tally. The presiding officer should verify the count and tally while the agents and election monitors/observers should just witness This will ensure accountability at every stage on the generator of numbers (counting clerk) and the verifier (presiding officer). This process should be in the presence of the public.

3. TRANSMISSION

Once counting and tallying is complete the presiding officer and the deputy presiding officer should scan form 34A via KIEMS and the image should appear on the one half of the screen, so that one half has the image and the other half has similar input fields for data to be keyed in. The deputy presiding officer will key in data, then verified against the original form 34A before it is sent to the constituency

tallying centre and both will enter different passwords to complete the process of transmission. ***Use KIEMS kit to record video of result announcement which is encrypted and stored for reference capturing the agents, observers, counting clerks and presiding officer.***

This process will take place in the presence of the agents and observers. This should be in public. Copies of form given to agents.

KIEMS kit become the primary data source to the entire result transmission system.

4. CONSTITUENCY TALLYING CENTRE (CTC)

The data received by the returning officer (RO) be tabulated automatically by the computer and printed for use in filling form 34B. Before printing the RO and deputy verify the results as written on the scanned form and what is keyed in KIEMS, if okay they print and proceed with process if not OK call PO to avail original.

As the PO's return the voting materials the commission should create and ensure a result handing over certificate is issued to the PO certifying all is well, if not the reasons must be indicated on the certificate. This form must be signed by the RO and the PO even where there is a disagreement with space to state the disagreement

Once all the PO's have submitted their results and cleared the RO should print the system tabulated results in the presence of agents and monitors, this generated result be signed by the RO, agents and the observers. It is at this stage that the deputy RO will fill in the form 34B similarly signed by RO and witnessed by agents and observers as form 34A. Copies of the forms given to the agents. The RO will scan the two forms result tabulation and form 34B and act in a similar manner to the polling station transmission.

Every constituency KIEMS kit should be configured to all its polling stations only to ensure it receives results from only the configured kits equal to the number of polling stations.

By eliminating data input at this stage we are eliminating data input errors at this stage

5. NATIONAL TALLYING CENTRE

There should be no data input but data derived from CTC tabulated by NTC RO, verified and printed as CTC

WHY TWO PEOPLE PUTTING PASSWORDS

Password management

It is harder for two people to collude hence duality in KIEMS data custody

Password given to PO, DPO, RO and DRO for each kit and must be changed on receipt to a secret password only known to each of them and later reset to old password before handover. There after the KIEMS kits should not allow any login unless you are an authorised admin.

Ensure officials are trained for at least seven (7) days on how to use the kits and the entire voting electoral process using mock elections to gain hands on feel and experience at least ten days before the elections.

Since IEBC proved that they cannot comply with their own internal procedures and control, the amendment bill should make non-compliance to these internal policies an election offence.

Case in point, is the famous Chairman's internal memo, demonstrated a clear breach when chairs user rights created and used to fraudulently delete data. This fraudulent action should compel honourable members to interrogate IEBC to know what action has been taken on the persons involved.

Define stray ballots and how to account for them

Since the KIEMS kits have GEOIP location, let them be switched on to ensure location validation of KIEMS kits

Understandably, there is a high risk to using electronic transmission of results. Security issues such as widespread hacks, lack of data integrity, and loss of data could greatly cripple an election if an incident were to occur. However the electronic gadgets will leave audit trails which can be used in authentication as opposed to manual result transmission.

It is good practice to audit the IEBC systems including the server before and after elections to ensure full compliance with the law and constitution. The result of this audit should be made public 30 days after every general election.

PROSECUTION

Our greatest weakness as a country is failure to focus on punishing the offenders instead covering up for them In other societies they punish swiftly IEBC officials should be on the radar of the honorable members

In the United States one such case was in Pennsylvania in 1993 where Bill Stinson won an election based on fraudulent absentee ballots. The courts ruled that his opponent Bruce S Marks be seated in the state Senate as a result in April 28, 1994

In the Philippines, former President Gloria Macapagal-Arroyo in 2011 following the filing of criminal charges against her for electoral sabotage, in connection with the Philippine general election, 2007. She was accused of conspiring with election officials to ensure the victory of her party's senatorial slate in the province of Maguindanao through the tampering of election returns

Failure to comply with internal controls, procedures, laws and constitution will always guarantee Lawyers handsome payoff after every election and lost economic opportunities

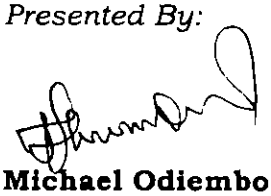
In conclusion national elections, any successful electoral fraud can have the effect of a coup d'état or corruption of democracy. In a narrow election, a small amount of fraud may be enough to change the result. Even if the outcome is not affected, revelation of fraud can have a damaging effect, if not punished, as it can reduce voters' confidence in democracy.

Honourable members I encourage you with another quote from Frank Ocean, I quote

We all know we have a finite period of time. I just feel if I'm going to be alive, I want to be challenged - to be as immortal as possible The path to that isn't an easy way, but it's a rewarding way.

Frank Ocean

Presented By:



Michael Odiembo
Citizen No. 11498274
Mobile: 0721599134
modiembo@gmail.com

Received
4/10/2017
MJ

78

Proposed Improvement To Form 34A

PRESIDENTIAL ELECTION AT THE POLLING STATION

Name of polling Centre_____Code_____

Name of polling Centre_____Code_____

Name of polling Ward_____Code_____

Name of Constituency_____Code_____

Name of County_____Code_____

Declared Number of Votes cast in favour of each candidate

NO	Name of Candidate	No of Valid Votes Obtained	Agent Name	Agent ID & Party	sign
1	*Jared*	*78*	*sakara*	*126666-pdf*	*uiyffi*
2	**Toivo**	**10**	**macho**	**7899-sdl**	**khfddgh**
3					
4					
5					
6					
Total Number of Votes Cast		88			

Polling station Counts

No	Particulars	Total
1	Total Number of Registered Voters in the Polling Station	
2	**Total Number of Ballot Papers issued**	
3	**Total Number of Unused Ballot Papers**	
4	Total Number of Rejected Ballot Papers	
5	Total Number of Rejection Objected To Ballot Papers	
6	Total Number of Disputed Votes	
7	Total Number of Valid Votes Cast	

Decision(s) on disputed votes if any

No	Serial Number of ballot paper(s) with disputed Vote	Name of Candidate assigned Vote
1		
2		
3		
4		
5		
6		
7		

Declaration

We, the undersigned, being present when the results of the count were announced, do hereby declare that the results shown above are true and accurate count of the ballots in

Anyandicah Di

4/10/2017

Johnson Mandika

_____Polling Station of _____Constituency

Presiding officer_____Siganature_____Date_____Time_____

Deputy Presiding officer_____Siganature_____Date_____Time_____

Official stamp and Date

Official Stamp	Date and Presiding Officer Left Thump Print

Agents or Candidates (if Present)

No	Name of Candidate or agent	ID/Passport No	Party Name/independent Candidate	Tel. Contact	Signature	Date	Time

Physical Security (at least Two agents Must affix their Left hand Thump Prints/ Altanative Finger with notes)

1st Agent's Left Hand Thump Print	Name, Signature, Date and Time	2nd Agent's Left Hand Thump Print	Name, Signature, Date and Time

4/10/2017

PROPOSED IMPROVEMENT TO FORM 34B

COLLATION OF PRESIDENTIAL ELECTION RESULTS AT THE CONSTITUENCY TALLYING CENTRE

Constituency_____Code

County_____Code

POLLING STATION CODE	POLLING STATION NAME	VOTERS PER POLLING STATION	BALLOTS PAPERS ISSUED	UNUSED BALLOT PAPERS	CANDIDATE A	CANDIDATE B	CANDIDATE C	CANDIDATE D	CANDIDATE E	Total Valid Votes	Total Disputed Votes	Total Objected Votes	Total Rejected Votes	Total Votes Casted	Presiding officer Name	Presiding officer signature	Date	Time
1																		
2																		
3																		
4																		
5																		
6																		
7																		
8																		
9																		
11																		
12																		
13																		
14																		
15																		
16																		
17																		
18																		
19																		
20																		

4/8/2017

21																		
22																		
23																		
24																		
25																		
26																		
27																		
28																		
29																		
Total																		

Agents or Candidates (if Present)

No	Name of Candidate or agent	ID/Passport No	Party Name/Independent Candidate	Tel. Contact	Signature	Date	**Time**

Physical Security (At least Two agents Must affix their Left hand Thump Prints/ Alternative Finger with notes in case of Disability)

1st Agent's Left Hand Thump Print	Name, Signature, Date and Time	2nd Agent's Left Hand Thump Print	Name, Signature, Date and Time

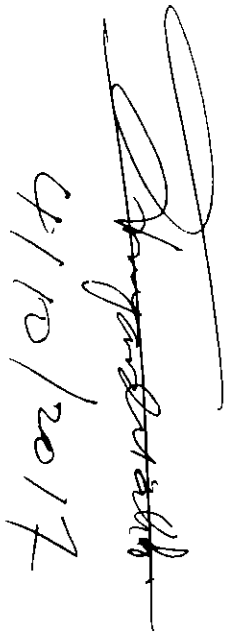
4/10/2017

Name of the Constituency Returning officer_____

ID Number_____

Signature_____Date_____Time_____

Official Stamp	Returning Officer Left Thump Print, Date, Signature and Time



Received
5/10/2017

79

My names are Paul Gichuke Ribathi I.D. Card Number [redacted]

I have degree in Economics(B.A.Economics Nrb), Computer Science(PGDCS Nrb) and Law(LLB Nrb) from university of Nairobi. Have worked as I.T. expert in data processing and data communication in various institutions including banks and government institutions. I am now a practicing Advocate of 10 years standing. As regards the proposed amendments in electoral laws I wish to state as follows:

1. I want to thank the Honorable Members for coming up with these proposals that are geared towards curing the mischief as witnessed in the Petition Number. 1 of 2017 which totally ignored the wishes of the ordinary persons and nullified the presidential election purely on the basis of the work by IEBC as an institution. The Decision has made Kenyans suffer a lot of untold agonies which should not be allowed to be recur. It is important to cure this by clarifying issues and ensure no such decision takes place in future. Kindly but urgently facilitate the legislation because if this country kneels down during your time you will be judged harshly both by history and the future generation.
2. Amendment Number 2 where definition of Chairperson is expanded to include vice and any others person is welcome. In Information Technology we call it backup which helps in spreading risk. Chairperson is a human being with all the weaknesses associated with a human being by nature. Widening and broadening the definition is good for the chairperson and also to the country. This avoids situations where the chairperson has to work even when he or she is in disposable.
3. Amendment number 3 qualifications of a chairperson does not restrict the position to the legal profession. It is desirable to open up the position to other professions because IEBC is not a Court of law. This Institution is a multifaceted one requiring a multidimensional approach to issues for example the emerging Information Technology. It is difficult to get a chair qualified in all the professional areas the IEBC requires. What is required is any profession with ability to bring together all the resources make them work for IEBC. Among the resources required include legal profession. Opening up the position is a welcome move.
4. Amendment number 6 provides for mandatory use of both electronic and manual system in transmission. Man was created manually by God and it is my feeling that man finds himself very comfortable in a manual environment. As a computer expert I wish to note that Kenya's election is purely manual. Manual transmission is a welcome move.

   Electronic transmission means that one computer is placed at the polling station and the other at constituency tallying center and the other one at the national tallying center. Data is sent from polling station to the constituency tallying center and to the national tallying center. This is a redundant process because polling officer at a polling station can send both constituency and national tallying centers at the same time by simply copying.

   Amendment 6 makes it mandatory for IEBC to use electronic and manual transmission methods. This means that election results could be nullified if IEBC does not adhere to both transmission methods. Problems that may arise include:

   i) IEBC relies on external service providers for electronic transmission. These service providers are not under direct control of IEBC or the Kenya Government. If such service

5/10/17

interest would be to make profit. My recommendation is that until such time when the **Kenyan Government and by extension IEBC will be able to stand on their own in terms of technology, electronic transmission should only remain as an option to be used by IEBC when it is appropriate.**

ii) In my view the amendment is attempting to replace human functions with machines functions. I wish to state here that computer application should be taken as an application of working tools that is to mean that this should not be taken like it is changing the work but only to make work easy. Computer like other machines are prone to breakdown. A rainy day may cause a power surge that may affect even the server. What would happen in such situation? Would IEBC council the election purely because an act of God destroyed the computers.

iii) The amendment is equal to legislating technology. Technology by its very nature is very dynamic and legislating it is tantamount make law that is difficult to implement. Simple analogy would be if we legislate and provide that "any person who gets malaria infection must be treated with a specific medicine. What happens when other treatments come in play. A good legislation would be treat with appropriate medicine as circumstances dictates.

iv) The amendment as it is, is open to legal challenge as it is not simple and verifiable by the Kenyan standard. Electronic transmission is not simple even to experts like me as it involves a lot of complex player equipments. The Electronic transmission method is even more difficult to "Wanjiku" the person targeted by law. The electronic transmission method can only be verified by experts and not "Wanjiku" who is presumed to be an ordinary person. The use of electronic transmission as a mandatory provision can be legally challenged not being simple and verifiable.

My recommendation in this section should untie the hands of IEBC and by extension ourselves and provide "**IEBC to use Appropriate Technology for transmission as circumstances dictates**".

Amendment number 10 is welcome save for a repeat fresh election. I feel the IEBC should be allowed by law to check the election positions of the candidates before an election takes place. I note that from the time the court directed IEBC to hold a fresh election within 60 days a lot of things could have changed. Even the views and willingness of candidates may have changed. Candidates should be given an opportunity to indicated their willingness and readiness towards the repeat poll. I am aware there is a situation where a candidate can withdraw. But I wish there is a formal way of prodding candidates by requiring the candidates to formally acknowledge their willingness and readiness for the election. Such a formal way will make it mandatory for candidates to sign an acknowledgement his/her willingness to proceed in the repeat poll. Failure

acknowledge by candidate IEBC will be at liberty to declare the other candidate as el
osed. This puts finality in a repeat poll

ctive date. These amendments are meant to cure the mischief in law and Judgment c
eme Court and therefore are meant to address this election. In my view this is the o
iave and these amendments should take effect before the 26th October 2017. I know
me cry here and there but Kenya like a sick child should be treated with the right me
ever biter. Avoid prescribing sweets to malaria victim while avoiding the biter malari
ts just to make the child happy in the short term. You will only make the matters wo
ly you are fully mandate by law and Kenyans to legislate. If you abscond your legislat
and this country kneels down during your time history, Kenyans and the future gene
udge you harshly. Remember in parliament there are no Jubilee or NASA MPs as wha
ers is patriotism and good faith to the people, soil, land and country called Kenya

l well as you as undertake this noble duty.

3

uke Ribathi

of the High Court of Kenya

80

Zimbra **csenate@parliament.go.ke**

AMENDMENT 2017

From : Jose Mwanzia <mwanzia2030@gmail.com> Tue, Oct 03, 2017 08:27 AM

Subject : AMENDMENT 2017

To : clerk@parliament.go.ke,
csenate@parliament.go.ke

Hs Chesvic, SS.comm

for the attention of the Committee

Good morning parliament,

Following the publication of amendment of constitution on 3rd October 2017 in daily nation. 03/10/17

I wish to participate and statement that am NOT supporting the bill because it taking us back after a long fight to have our good constitution. We should not pass the bill for our future generation.

Kind Regards,
Joseph M. Vekya.

Received
4/10/2017

Zimbra **csenate@parliament.go.ke**

Electoral Law Reforms

From : Vincent Ogero <vgogero@gmail.com> Mon, Oct 02, 2017 07:23 PM

Subject : Electoral Law Reforms

To : clerk@parliament.go.ke,
csenate@parliament.go.ke

In my considered and according to the Majority decision in the Supreme Court Petition on the Presidential results the most crucial amendment is the extending of time to hear and determine the petition from two weeks to at least one month thirty days .This according to the learned Judges would allow the Court and the Parties enough time to scrutinize all the forms from the Polling Stations and arrive at a considered and reasonable conclusion on the final results despite the actual process used in transmitting the results and to resolve beyond any reasonable shadow of doubts the accuracy and veracity of the final total .For in the learned Judges position the method used or processes used to arrive at the final figures are equally important if not more important than the final tally that is to say the ends do not justify the means .Another very crucial amendment would do with the determination of the validity of the results would be to increase the threshold of the winning Candidate to at least 51% of the Valid votes cast up from the 50% + 1 which is open to ambiguity as It does not state If it is of the total or valid votes cast .This amendment would also have the desired effect of getting rid of the so called tyranny of numbers and promoting National Cohesion and reconciliation since the winning candidate will have to garner a convincing majority across the Board and therefore no part of the Country will feel excluded or marginalized .With this few remarks I conclude my submission .
Regards
Vincent G Ogero
Nairobi

Ms. Chesire, DD. Comm

Please bring to the attention of the Committee

EG 03/10/17

Received 4/10/2017

Received
31/10/17

TO,
THE CHAIR,
THE JOINT SELECT COMMITTEE
ON ELECTION RELATED LAWS,

RE: THE ELECTION LAWS (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 39 OF 2017).

Chair,

Humble Petition on the Election Laws (Amendment) Bill that is currently before Parliament

1 The proposed amendment to the definition of "chairperson" of the IEBC (as read with the proposed amendment to section 6 of the Independent Electoral and Boundaries Commission Act) offends the Constitution in two ways. First, the amendment conflates "chairperson" with "member" of the IEBC when article 250 (2) of the Constitution envisions that every constitutional commission shall have a chairperson and members Secondly, the amendment would effectively/potentially enable an ordinary member of the IEBC to declare presidential election results when article 138 (10) of the constitution reserves this function to the chairperson of the Commission. The question here is whether Parliament can enact a law that permits an ordinary member of a commission to perform a function which the Constitution vests in the chairperson of the Commission

2. The proposed amendment to section 6 (1) of the Independent Electoral and Boundaries Commission Act will remove the requirement for the IEBC chairperson to be a lawyer who is qualified to be a Judge of the Supreme Court The amendment will also permit persons who are not lawyers to be appointed chairperson of the IEBC While there is nothing patently wrong about allowing other professionals to head the IEBC, its constitutional and statutory functions naturally point to the need to have a serious legal mind heading the Commission The amendment also departs from established norm not just in Kenya but in most countries with a common law legal system

3 The proposed amendment to paragraph 5 of the Second Schedule to the Independent Electoral and Boundaries Commission Act will reduce the quorum for transacting business at the IEBC from five to three members While this may be technically tenable, there is a problem The total membership of the IEBC is seven If three constitute a quorum, it means a minority composition of the IEBC could make decisions that bind the majority In practical terms, with the quorum reduced to three, it means two commissioners could make binding decisions for the IEBC when the law provides for a membership of seven Matters get even more interesting with the proposed amendment to paragraph 7 of the same schedule, which allows a majority of the members present and voting to make binding decisions for the IEBC Whether this is unconstitutional, democratic or even logical is debate for another day

4. The proposed deletion of section 29 of the Elections Act will enable a presidential candidate to be nominated by persons from different political parties It will also allow independent candidates to be nominated by persons who are members of political parties This amendment is unconstitutional to the extent that it makes nonsensical the political party system as the mainstream mechanism for canvasing for

elective offices It will also erode the idea of discipline and loyalty to and within political parties

5 The proposed section 39 (1D) of the Elections Act (and the related amendments) states that in the event of discrepancy between electronically transmitted and manually transmitted results, the manually transmitted results shall prevail The amendment is misconceived and arguably unconstitutional in three cardinal respects First, it ignores the historical context for the use of technology in our elections as set out in the Kriegler Report Remember the late Samuel Kivuitu lamenting that some returning officers had disappeared with the manual results in 2007, including returning officers just a stone's throw from the national tallying centre? Secondly, the proposed section assumes that the manual election results are incapable of manipulation, contrary to what we painfully learnt in 2007. Put differently, a mischievous presiding or returning officer could electronically transmit the correct election result but manually transmit a fraudulent result, making a complete mockery of this amendment Thirdly, the amendment runs afoul of the provisions of article 86 (d) of the Constitution, which requires the IEBC to put in place appropriate structures and mechanisms to eliminate electoral malpractice Indeed, the infusion of technology into our electoral processes was largely informed by this constitutional imperative

6 The proposed amendment to section 44 (5) of the Elections Act will make it possible to hold sham elections In particular, it will remove the obligation on the part of the IEBC to (inter alia) test, certify and audit its ICT system It will also remove the obligation to grant access to the electoral system software source codes It is not hard to see what inspired this proposed amendment. It stems from dissatisfaction with the orders made by the Supreme Court granting the Petitioner partial access to the IEBC's electronic systems and platforms I don't know why anyone who believes in free, fair and transparent elections would want to make the amendment, but that is a debate for another day

7 The proposed amendments to section 83 of the Elections Act are unconstitutional in multiple respects First, they purport to require persons who file an election petition to prove both non-compliance with the principles set out in the Constitution and that such non-compliance affected the results This offends the provisions of Article 2 (4) of the Constitution It also offends the provisions of Articles 10, 38, 81 and 86 of the Constitution In short, it creates room for the holding of sham elections, such as those we have witnessed in Uganda, Burundi, Rwanda etc. Secondly, the amendments purport to excuse all irregularities in election declaration forms as long as they are not calculated to mislead. The thing is, only the respective presiding or returning officers would know whether the irregularities were designed to mislead The amendments would also permit the situation we saw at the Supreme Court, where one could not tell the official Forms from the unofficial or forged ones

8 The proposed section 86A of the Elections Act purports to say who can and who cannot run in a fresh election in the event a presidential election is nullified by the Supreme Court The problem here is that there is no constitutional basis for purporting to restrict who can and who cannot run in the fresh election. Further, the proposed amendment is based on obita dicta from the discredited decision in Presidential Election Petition No. 5 of 2013 The thing is, of the various types of

"fresh election" envisioned in article 138 to 140 of the Constitution, only one has a constitutional limitation on who can run and who cannot run The one addressed by the proposed amendment is not one of them

9 The proposed section 6A of the Election Offences Act seeks to punish presiding and returning officers who are responsible for errors and omissions in election result declaration forms The penalty is imprisonment for a term of five years The ironical bit is that according to the amendment bill, those same errors and omissions, which would land one in jail for five years, cannot invalidate an election

10. That's our humble petition.

Dated at Nairobi this 2nd Day of October 2017

Drawn and Submitted by

1 Njimu wa Kaiya

2 Ngiri wa Wangui

RECEIVED
3/10/17
(3)
82

MY MEMORANDUM TO THE PARLIAMENTRY SELECT COMMITTEE ON ELECTIONS LAW

I, CHRISTOPHER MURAGURI of ID NO. 29831291 and being a registered voter at Mukothima Market Polling Station in Tharaka Nithi County do hereby submit my Memorandum to you and to support the proposed amendments to the election law.

1. I support that the chairman of Independent Electoral and Boundaries Commission (IEBC) be any qualified professional with the necessary experience and not just a lawyer only. Any one with qualifications can competently chair IEBC.

2. I support the proposal that a Presidential Candidate be nominated by any voter whether a member of a political party or not. This simplifies the nomination process and I do not have to belong to any party to nominate my candidate.

3. I really do not care whether results are relayed electronically or not. What I want to have is my vote to be counted properly. How it is relayed after that should not bother me at all. It can be electronically or manual or both.

4. I do not agree that the Supreme Court can just nullify a Presidential Election because of simple mistakes. It should be very difficult for the election to be nullified. I do not wish to see my vote not being counted but small mistakes being made to throw away my vote.

5. I agree that any election Officer who messes up with the election goes to jail. There is no point of me waking up very early to queue and vote only for a drunk, careless or reckless Officer to forget to sign some form and I am then told to repeat the election.

I therefore support the changes that are to be made to our election laws.

SIGNED: _____

CHRISTOPHER MURAGURI

3.10.2017

Received
31/10/2017

(7)

RECOMMENDED ELECTORAL LAW AMENDMENT AND THE NULLIFICATION OF PRESIDENTIAL ELECTION RESULTS OF 8.82017.

83

In my view, there is high need and urgency to amend the electoral law in order to seal loopholes that led to the nullification of the presidential election results for the general election held on 8th august 2017.

During its ruling the Supreme Court pronounced itself loud and clear without any contradiction. By the majority of the sitting judges of the Supreme Court, the results were annulled and declared void siting cases of irregularities and illegalities by the electoral commission of Kenya during the execution of its constitution mandate as delegated by the Kenyan people. Where us in my view the electoral and boundaries commission did outstanding job and ensured free, fare, credible and verifiable election all through. Many credible observers witnessed the people of Kenya express their supreme will and democratic right.

They praised the work done by IEBC. However the Supreme Court still found enough reason to proof the whole world and hundreds of observers both local and international wrong by proceeding to nullify the results a few days after.

In their ruling which forms basis of law as a precedent set by the highest court of the land the learned judges identified two grounds for their decision.

- Irregularities
- Illegalities

The court pronounced it's self on irregularities but failed to point out on the illegalities and identify the culpable persons within the electro process, thus giving me a reason to belief there was no single illegality they could put their

hands on. Looking at the irregularities identified most were to do with human error either knowingly or unknowingly which cannot be let to go un rectified. Wise man said madness is doing the same thing the same way and expecting different results and Kenya cannot be said to comprise of mad men/women only who would dare carry out another election under the same law the court pronounced as the cause of the illegalities that led to the nullification of the presidential results. The best gift the current house can give us as the people of Kenya is a very elaborate law that is in line with the interpretation of the Supreme Court ruling, in order to avoid a similar situation in the days to come. If the situation and the law remains as it is I for see a situation where criminals will take advantage and hold the state at ransom and never let the people of Kenya have a voice.

- For avoidance of doubt of what should form the basis and reference point for future presidential and other elections result there is need to clarify in such written law that would bide every player.

- In order to have people entrusted with executing electoral process in Kenya by Kenyan people exercise due diligence its necessary to have such written law with clear stipulation and punishment that would be met against any person found culpable with any electoral malpractices.

In the Supreme Court ruling the majority judge's opinion gave four outstanding guide lines

- The results were declared null and void
- Repeat election be held within 60 days
- IEBC to conduct another election as a body
- IEBC to put in place another complementally system for back up

The electoral law as it is presently IEBC are hands tied due to the element of time and if nothing is done to the law they would end up conducting another election that would be nullified on start. Thus there is need to

enable use of both manual and electronic means as modes of transmission with either as the acceptable complimentary means to the other.

We can't under estimate the Pronouncement of the Honorable Chief justice during the delivery of the judgment .....

If another election is held under similar circumstance or within the same frame work and a similar case is put before the supreme court they would not even need a hearing ...they would just nullify the election. In order to avoid history judging us bitterly there is need to amend the law in that statement the Chief justice politely invited us to look into the law and change what is necessary there is no any better way than that he would have put it for us to understand.

On IBEC Composition the number of Commission and qu. issue since they are only Policy makers guided by law

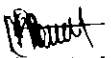
ON NULLIFICATION

In my own opinion the Supreme Court did not have enough reasons to nullify the presidential election results. However they took advantage of existing loop holes within the provision of the law to justify their cause and line of action and did a terrible mistake of undermining the supremacy of the people of Kenya as entrenched in article 1 of the constitution of Kenya. There is no other better way than ~~the voice of the vote would~~ that such a big number of persons way above 15million would make them self's heard by only six people than through the vote. Otherwise it would be noise and recipe for chaos.

Though the court may have identified a few irregularities such would have been used as lessons learnt to strengthen our electoral body and help us be a better state. There will never be a 100% correct way of conducting an election. Mistakes made for us long us the electorate are given a chance to express their supreme will in a free and fair manner

mistakes made by their servant should not be used to condemn their voice or put them in anxiety. Solomonic wisdom is necessary and should supersede our academic or scholarly knowledge if a state likes ours with over 42 tribes some with very fragile relationship is to live for any long.

Presented by



Kamuri Gachoki

Election Laws Amendment Bills

Background:

The Jubilee party has introduced a bill in Parliament that seeks to amend a few sections of Kenya's electoral law to fill in a lacuna, align the law to emerging issues around the fresh presidential election and address issues raised by the Supreme Court judgement in its nullification of the presidential election. Our review of the amendment bill reveals the attempt by parliament to secure without fail the holding of the election on 26th October 2017.

We wish to submit as follows:

1. Parliament's role in amending law is a constitutional mandate. Its role is not fettered as regards timing and neither does Parliament require any authorization to amend laws.
    a. It is to be noted that some of the opposition rank challenging the current process of amending the law had no qualms about doing the same in early 2017, when they not only overhauled the entire constitution of commissioners of the IEBC, but introduced a new raft of laws and requirements with strict timelines for the conduct of the general elections of 8th August 2017.
    b. Further the same opposition occasioned additional changes to the laws through filing a plethora of legal cases, with the last and most impactful on the law/procedure being the Maina Kiai case whose judgement was delivered 3 weeks to the election.

2. Parliament's current actions are based on the Supreme Courts' observations of the 2017 General Election, and the recommendations in both the majority and dissenting opinions on the need to ensure that there is clarity, simplicity and verifiability in the process of transmission of presidential election results.
    a. The Supreme Court (SCOK) was particular that IEBC needed to define the complementary system envisioned in section 44A, and elaborate exactly how it is to work.
    b. Parliament has also found it necessary to define in exact terms the intention of section 83 of the Elections Act, so as not to leave the same open to misinterpretation. It is to be noted that the same SCOK has since 2013 and in all other cases that came before it, interpreted section 83 to the effect that invalidation of an election cannot be undertaken purely on qualitative considerations. However, in the 2017 petition, the SCOK decided to alter the meaning of the same section to argue the very opposite. The amendment seeks to cure this by defining without a doubt the meaning of section 83 as intended.

3. Parliament is properly constituted for the purpose of enacting the bill as proposed. The fact that the house has a majority of Jubilee members and affiliate parties is not illegal. It

is a reflection of the people's will and their endorsement of the Jubilee agenda. No member of NASA has refused to be sworn in, resigned, or refused to take a salary.

4. There is nothing unconstitutional or retrogressive about the bills. It does not take away any rights or freedoms. The provisions of the amendment are self-executing. No regulations are necessary.

5. The amendments do not impose any additional burden to IEBC as they only seek to simplify and ease the management of elections while providing clarity in case there are challenges.

6. The Supreme Court Ruling in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eklr* was the first opportunity to test the efficacy of the negotiated law that followed the recommendations of the Joint Parliamentary Select Committee on the Matters of the Independent Electoral and Boundaries Commission.

7. In as much as global best practice does not favour making changes to election laws so close to an election, the unique circumstances in Kenya, where an election has been nullified because of process with reference to result, makes it necessary for these amendments to be undertaken in priority.

Proposed amendment	**Current status**	**Justification for amendment**
IEBC Act, Section 6 and the Second Schedule	- Chairperson must be a lawyer of 15 years standing - There is currently no other lawyer in the commission - In the absence of the Chairperson for any reason, no other Commissioner can act as returning officer for the presidential election - Quorum is set at five members	- The amendment proposes that other professionals including lawyers can be appointed chairperson of the IEBC - It removes the risk of paralysis by allowing the Vice Chair or in the absence of both Chair and Vice, for a Commissioner to Act as chair in line with good corporate governance principles on succession. - Amends quorum to ½ of the commissioners present (rounding off to 4) but no less than 3. It ensures that at any point that the numbers are less than the prescribed number, there shall always be a quorum of ½ of the members present, but in any event never less than three. - The amendment ensures that the decisions of the commission are unanimous to avoid the risk of internal dissonance

Election Act, Section 29	- Provides for nomination of presidential candidates to be undertaken by members of the candidate's political party. - Provides that nomination for independent presidential election candidates should be by persons who are not members of any political party.	- Amendment seeks to implement the constitutional court's directive that found the provision of section 29 unconstitutional following the case of ***Peter Solomon Gichira v Independent Electoral and Boundaries Commission & another [2017] eKLR.*** The court had found the restriction in section 29 was unconstitutional and at para. 98 declared: 1. ***...That to the extent that Section 29(1) of the Elections Act No. 37 of 2016 requires the persons who nominate a presidential candidate to be members of the candidate's political party, the section contravenes Articles 27(2) and (4) and Article 137(1)(d) of the Constitution of Kenya and is therefore null and void to the extent of the said inconsistency.*** 2. ***...That to the extent that Section 29(2) of the Elections Act No. 37 of 2016 requires the persons who nominate an independent presidential candidate shall not be members of any political party, the section contravenes Articles 27(2) and (4) and Article 137(1)(d) of the Constitution of Kenya and is therefore null and void to the extent of the said inconsistency.***
Election Act, Section 39(1)(C)	- Provides for only electronic transmission of results of the presidential election - Does not allow for a failsafe mechanism in the event of failure to have electronic transmission	- Provides for both electronic and manual transmission of results. Allows for the putting in place of a complementary mechanism that will facilitate verification of results, but also provides a failsafe mechanism in the event of failure of the electronic system - Establishes and clarifies the complementary system of transmission of presidential election results in line with Supreme Court recommendation - The amendment confirms that in the event there is a discrepancy between the electronically transmitted and manually transmitted results, the manually transmitted results shall prevail. This assures that the electronically transmitted information is verifiable through a comparison with the manual documentation as part of the

		accountability circle. Further, it elevates the place of the manual documentation which is a reflection of the manual vote of which the election is based - The amendment ensures that any failure to transmit or publish the election results in an electronic format shall not invalidate the result as announced and declared by the respective presiding and returning officers at the polling station and constituency tallying centre, respectively. This ensures that the sanctity of the vote is protected, and that a failure to transmit the information does not invalidate the voter's will as expressed in the ballot. - The amendment provides for the Commission's publication of information through livestreaming of results as announced, but which results as published are not to be deemed as the basis for declaration. This provision facilitates transparency, by ensuring that the information from the very basic polling station: i. Can be tracked as being correctly reflected by the voters in each polling station ii. Allows the National Tallying Center, observers, media and the public to keep track of the announcements and tallies at each step of verification iii. Reduces the public anxiety of waiting for the collated results iv. Enhances the overall integrity of the process
Elections Act Section 44	- Establishes an integrated electronic electoral system for biometric voter registration, electronic voter identification and electronic transmission of results. - Provides for the Commission to develop a policy on the progressive use of technology in the	- The amendment does not alter the provisions in subsection 44(1), (2), (3) and (4). Consequently, the Act retains the integrated electronic electoral system as is; retains the requirement for a policy on technology; retains the requirement for procurement of the technology as provided. - Deletes subsection (5) and (6) which unnecessarily repeats provisions on regulations, which are already anticipated in section 109 of the Act. It however does not repeal the already existing technology

	electoral process. - Requires the Commission to procure the technology at least one hundred and twenty days before the election - Requires the Commission to make a wide array of regulations for the technology - Establishes a technical committee to oversee the adoption of technology in the electoral process and implement the use of such technology.	regulations which will be deemed regulations under section 109 - Deletes subsection (7) whose application is redundant as the first elections under the section have already been held - Deletes subsection (8) which had established the Elections Technology Committee which was declared unconstitutional by the High Court in ***Kenneth Otieno v Attorney General & another [2017] eKLR*** in which the court declared that "…***We find and do hereby declare that section 44(8) of the Elections Act, 2011, that provides for the establishment of a technical committee comprising relevant agencies, institutions or stakeholders as IEBC may consider necessary to oversee the adoption and implementation of technology in the electoral process, violates Articles 88 and 249(2) of the Constitution, and is therefore unconstitutional.***"
Elections Act, Section 83	Provides that invalidation can be either due to qualitative errors OR quantitative errors (Section 83 - No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law **OR** that the non-compliance did not affect the result of the election)	- Amendment proposes to replace the word **"OR"** with **"AND"** - Creates harmony in the interpretation of Section 83 so that any election court is clearly guided on the considerations to apply when seeking to invalidate an election i.e. both qualitative and quantitative considerations - Ensures that technical considerations do not override the substance of the vote (upholds will of the people) - It requires invalidation of an election to be on the basis of an assessment of the totality of all the electoral processes including registration, voting, counting, tallying, transmission and announcement – and not one of the eight or so processes. - Introduces a re-emphasis of the current provision of section 72 of the Interpretation and General Provisions Act, that ***"a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead".***
Section 86A	New provision	- Gives effect to Art. 138(1)

		- Addresses uncertainty of conducting a fresh election - Defines who the candidates in a fresh election will be in line with SCOK 2013 decision - Defines the mechanisms for managing a fresh election
Election Offences Act		- Enhances the penalties for wilful or deliberate failure to sign election documents, or falsifies election documents by a presiding or returning officer to five years - Specifies with clarity critical election offences committed by presiding and returning officers - Raises the profile/criticality of the role played by presiding and returning officers - Proposes the deletion of the restriction on government advertising in line with Art. 35 on Access to Information

Mburu Nice Murithi,
0706504007
MMburu19@gmail.com
MM.

Paul Ngitte Karanja
0700820405
Paulpien65@gmail.com
Speaker - TUK.

985

COMMENTS TO PARLIAMENTARY SPECIAL COMMITTEE

Received 3/10/17

ON

The Election Laws (Amendment) Bill, 2017 and Election Offences Bill, 2017

To begin with the words of Judge Otieno Odeck, E. M. Githinji and W. Karanja, while ruling in the case of Mitubell 2014 ON Parliament role and Sovereignty is relevant; Further, it must be borne in mind that the United Nations and any other international or multilateral organization is neither a supplementary nor complementary legislature for Kenya. The external sovereignty of Kenya is not only political but legal and legislative and such sovereignty is internally subject to the Constitution of Kenya. Neither the UN nor any international organization legislates for Kenya

Elections are very emotive and tense. Just like Kenya, Many countries grapple with electoral reforms and different parliaments are doing their best to streamline elections so as to enhance the efficiency of the electoral system in ensuring free, transparent and fair elections. This will take examining and identifying shortcomings of legislations, institutions and structures to improve them.

The words democracies differ substantially in the ways in which they hold election. Some of the differences are mandated by electoral law, the electoral formula, the voting options available to citizens, the magnitude of the country, , are legally determined features have long been recognised as important parts of the "electoral system" under which a given polity's elections will be held.

The Constitution mandates the State to put in place mechanism to ensure proper free and fair elections. The rights protected by Article 38 of the constitutions are actualised through the electoral system set out in chapter seven titled; Representation of the people under article 81. Under our democratic form of Government, an election is the ultimate expression of sovereignty of the people and the electoral system is designed to ascertain and implement the will of the people. The bedrock principle of election dispute resolutions is to ascertain the intent of the voters and to give effect whenever possible while upholding the principles that underlie a free and fair election.

According to literature are a defining part of the democratisation process and they provide a means of starting a new, post-conflict political order, for stimulating the development of democratic po0litics, for choosing representatives for reforming Governments and for reforming Government and conferring legitimacy upon the new political order.

GENERAL COMMENTS ON THE BILL

-The use of the word in the Absence of the Chairperson for any reason in 1(a) is too broad and vague

-Article 86 (a) in case of validation of Presidential election and who should be able to run

African Nazarene Law School
Dr. Duncan Ojwang
Dean African Nazarene Law School
African Nazarene University, Ongata Rongai
(0728861806) Email: dojwang@anu.ac.ke

STATEMENT OF THE BUNGE LA WAZALENDO ORGANIZATION ON ELECTIONLAW AMMENDMENT BILL 2017

86

TO:
THE CLERK OF THE NATIONAL ASSEMBLY OF KENYA
PARLIAMENT BUILDINGS

FROM:
CHAIRMAN
BUNGE LA WAZALENDO ORGANIZATION

Received
3/10/17

SUBJECT: ELECTION LAW AMMENDMENT BILL 2017

INTRODUCTIONS

Pursuant to the above subject matter as dominance in the social media and the need for public participation as enshrined in constitution under article 118(i) (b) & 119, we as Bunge la Wazalendo organization playing a very impartial role in the whole electoral process do hereby re-act as follows.

Given the unpredictable political climate and its continuous pollution, the whole world is watching and it all plays upon us to re-arrange our house in the most appropriate manner. There is need for the **TWO PARTIES** to open up a **DIALOGUE**.

Touching on the IEBC chairperson's **QUALIFICATIONS**, there is no time left to address the matter before the forthcoming repeat presidential election. We should stop a speculation of **FATE** to have the vice-chair assume the duties of the chairperson.

Talk of returning officers and other officials who refuse to sign the relevant electoral forms to be severely punished. we quiet disagree with this statement and read a lot of political mischief in it. How do you anticipate a mistake at the back yard even before the actual **EVENT**? What is the hurry for? Remember most of these officers are just on a brief contract with a merger wages of Kshs.2. 000 per person per day. Unless you are scaring away certain ethnic groups' in order to accommodate others for your safety landing; this move is unconstitutional in its true sense.

In view of the above observations, it's now our submission that this bill be postponed till the forthcoming repeat presidential elections.

May the almighty God bless Kenya.

Signed: ..... **Date:** 3rd Oct 2017

Tabu Okumu Charles

Chairman

Bunge la Wazalendo organization

P.O. Box 46894-100 GPO, Email: disciplesbibleschool@gmail.com, Mobile phone. 0750933939
October 3, 2017

MEMORANDUM ON THE AMMENDMENT OF ELECTORAL LAWS

The Supreme Court's debacle in nullifying the August 8 Presidential Elections requires the three arms of State, The Executive, The Legislature and the Judicially to immediately review their perspectives on the entire electoral law and processes.

The case was supposed to be decided on numbers, even on the basis of the existing constitutional and statutory provisions, but it didn't. I have written to the judiciary and other arms of state accordingly.

The proposed amendments are therefore a welcome remedy in the meantime to ensure that the ballot takes precedence over the process. The constitution will have to be looked at in due course of time.

Public interest not only requires the application of relevant laws accurately, but also to look at the wider public good given the critical role presidential elections play on the well-being of a nation.

From a secular point of view, because this country (and possibly all public institutions) is divided right through the middle between the governing and opposition parties this will hopefully become apparent after investigations, opposition, upon seeing their man losing could have frustrated the integrity of the elections all over, especially in their strongholds and within IEBC itself through the forms and IT, respectively. The suppliers of the technology both equipment and software could also have been compromised.

This places technology as a prime target for manipulation in a manner that cannot be detected and hence the need for a completely separate mechanism, the manual system.

I write in my capacity as a clergyman and especially in light of the most powerful and important constitutional provision, Quote "PREAMBLE, We the people of Kenya-ACKNOWLEDGING the Supremacy of the Almighty God of all creation" Unquote, among other constitutional provisions such as the National Anthem and swearing by the Holy Bible, provisions whose full implementations I am pursuing.

Acknowledging the Supremacy of God means acknowledging the church and its servants, especially listening to its prophets, "We have not listened to your servants the prophets" (Daniel 9:6).

Accordingly, I have suggested elsewhere, that the government establishes formal religious consultative stratified groups of Christian Apostles/prophets from the apostolic and prophetic tradition, such as myself separately from other denominations the government has been working with, the Catholics, Pentecostals, evangelicals and Ecumenical NCCK. The government may wish to engage other religious groups separately.

What is clear to me as a Christian who follows the Holy Bible diligently as I continue to come to terms with both the malpractices and the nullification, is my prophetic experience that presidential elections and governance is fulltime high level spiritual warfare. Witchcraft, devil worship, tribalism, division in church etc. open the door to the devil as was the witchdoctor on TV 2007/8. "Our struggle is not against flesh and blood, but against the rulers, against the powers, against the world forces of this darkness, against the spiritual forces of wickedness in the heavenly places." (Ephesians 6:12). development, terrorism, this is familiar territory for me as explained in the 5 books I have written and the bible school I have established thereon. Therein, I am training people from certificate /diploma to PhD, which includes dealing with these sort of things, like happened in the Old Testament.

God's servant,

Apostle Dr. Joe Kamau, PhD.

88

Gmail George Jusa <ggazemba@gmail.com>

Fwd: Opposing Electoral Laws

2 messages

Clerk of the National Assembly <clerk@parliament.go.ke> Mon, Oct 2, 2017 at 4:58 PM
To: Florence Abonyo <abonyoflora@yahoo.com>, Peter Chemweno <pkc@parliament.go.ke>, nick eme <emejen@gmail.com>, George Jusa <ggazemba@gmail.com>

FL

From: "Laureen Amateshe" <lamateshe@gmail.com>
To: clerk@parliament.go.ke
Sent: Monday, October 2, 2017 4:08:29 PM
Subject: Opposing Electoral Laws

Halo,

I greatly oppose the new changes to the election laws. They will have dire repercussions for years to come and will also take us back to 2007 wars. Do not make these changes, it will come bite your future generations and those of the whole country.

---

nick eme <emejen@gmail.com> Mon, Oct 2, 2017 at 5:46 PM
To: ggazemba@gmail.com

Kindly ensure that all the comments sent via emails by the public are printed and brought to the attention of the committee.

Emejen
[Quoted text hidden]

89

Zimbra clerk@parliament.go.ke

opinion on the proposed bill

From : Daniel Ashman <danielnahshon621@gmail.com> Mon, Oct 02, 2017 09:21 AM

Subject : opinion on the proposed bill

To : clerk@parliament.go.ke

Thank you for the opportunity. as a law abiding and peace loving kenyan, who loves his country, loves democracy and respect for the law, i would like to differ with the proposed bill. the constitution, must be upheld and respected. i feel this amendment is unreasoned, untimely and unfair, not to the leaders, but to the common mwananchi. we must uphold the constitution, and stop unreasonable amendments. Thank you



1C1 90

Zimbra **clerk@parliament.go.ke**

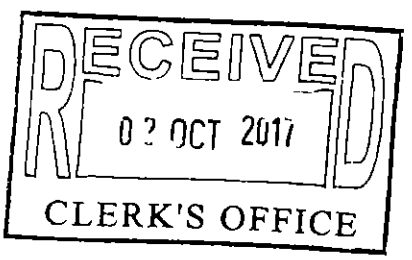
Kenya electoral laws

From : Stephen Ngugı <ngugis56@gmail.com> Mon, Oct 02, 2017 10:58 AM

Subject : Kenya electoral laws

To : clerk@parliament.go.ke

As as kenyan am concerned wıth retırement age in Kenya wich is currently 65years and judges 70 years,wıth regard to newly ınacted
elections rules ın kenya,i propose that Nobody wıll be allowed to present hım or herself to Kenyans to be elected as a President,Mp,senator,governor and hıs deputy or mca if he or she has
attained the retirement age of 65 or maximum 70 years.ı propose that
clause also added or considered



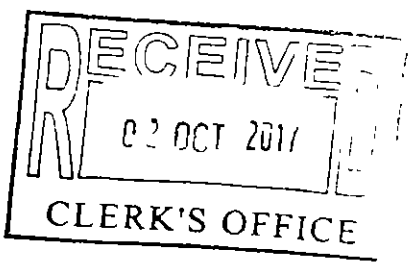
91

Zimbra **clerk@parliament.go.ke**

Amending of laws

From : ledama lee <ledamadammiee@gmail.com> Sun, Oct 01, 2017 09:08 PM
Subject : Amending of laws
To : clerk@parliament.go.ke

Shouldn't be changed at all. We're satisfied with the current laws.



92

Zimbra **clerk@parliament.go.ke**

Rejection of the amendment

21

From : john kunga <magigekungajohn@gmail.com> Sun, Oct 01, 2017 09:07 PM
Subject : Rejection of the amendment
To : clerk@parliament.go.ke

I am a Kenyan rejecting the amendments to our constitution Why changing it now? Timing is another problem



Gazamba Pet

93

Zimbra **clerk@parliament.go.ke**

2/10/17 2.2

The proposed election amendment laws

From : Timothy Kanda <timothy.kanda7@gmail.com> Sun, Oct 01, 2017 09:36 PM

Subject : The proposed election amendment laws

To : clerk@parliament.go.ke

Cc : csenate@gmail.com

Greetings, I would like to express my dissatisfaction and disappointment following the above subject. The proposed legislation undermines fundamental rights bestowed on the people by the great kenyan constitution. This further provokes the free will of the people of Kenya and sends strong signals as to whether it is based on good will. Please don't pass the amendments coz it stands strongly condemned and chaotic
Regards,
Timothy Kanda,
Eldoret



94

Zimbra Gazetted PCA clerk@parliament.go.ke

Electoral Laws amendments

21/10/17

From : kipngeno cheruiyot <kipngeno.philiph@gmail.com> Mon, Oct 02, 2017 09:25 AM

Subject : Electoral Laws amendments

To : clerk@parliament.go.ke

The proposed bill seeks to facilitate rigging. The Mps have failed to dissect the bill.
1. The IEBC shall not have prescribed form s 34 a and 34b. IEBC shall admit any form/ document without regard for the structure or format. Even if you write the results on a tissue paper, exercise book page., or any paper. Why would anybody say any results on whatever documents are valid results?
2. The Supreme Court can only invalidate results if at least 5 judges agree. The idea to remove simple majority rule seeks to make it practically impossible to nullify rigged elections.
3. Manual system is back. You can change results any time to fit the desired final results. Read this together with the clause that any document shall be admitted by the IEBC.
4. If differences between the electronically transmitted results and manual arise, manual prevails.
(a) Why would a variation between manual and electronic occur unless somebody changes the results, which the bill is preparing in advance?
(b) Remember the electronic requires that the scanned form 34 a be sent after scanning to secure the results. Now those results that also show the KIEMS kit GPS and IP, which any IT professional can look at to verify if the results came from the gazetted polling stations are null and void.
5. Any IEBC commissioner, not necessarily the chairman, can announce the winner. Is somebody preparing to have a preferred commissioner announce him/her the winner?
6. The Chief Justice and the Deputy Chief Justice are deprived off the power to swear in the president elect. Any judge can swear in the presidency as per the proposed bill. Read this together with the admission the clause stating any document is valid, any commissioner can announce the winner, any judge can swear in the president elect to see the big picture.
7. In short the proposed bill legalizes whatever document the rigging individuals print and author as results. It legalizes the results announced and declared by any commissioner. It makes lawful the swearing in of the "winner" by any judge. Ultimately, the fake winner insulates himself/herself from the Supreme Court by requiring 5 judges to nullify the fake results.
I don't support these amendments to the latter!!!



Mr. Ganeka PAPS 2/10

95

24

PUBLIC PARTICIPATION ON PARLIAMENT BILLS

SUBMISSION OF MEMORANDA

IN THE MATTERS OF CONSIDERATION BY NATIONAL ASSEMBLY

THE ELECTIONS LAWS (AMENDMENT)BILL(NATIONAL ASSEMBLY BILL NO. 39 OF 2017)

MEMORANDA

FROM: PAUL MUTISYA: P.O BOX 6535 00100 NAIROBI , 0722800891, ID 8990545

TO: CLERK OF THE NATIONAL ASSEMBLY P.O BOX 41842-00100 NAIROBI

RE:REPRESENTATION ON THE ELECTIONS (AMEMDMENT) BILL NO 39 OF 2019

Following the operational and system irregularities noted by the Supreme court of Kenya on the transmission of the presidential results from polling station to other tallying and pronouncing centres and which contributed to the nullification of 8th August ,presidential results and subsequent repeat of the same, I hereby make the following representation and contribution to the election laws amendment bill 39 of 2017 for consideration in debate by the members of the departmental committee of the national assembly.

1), The results of the counted and tallied votes at the polling station be transmitted electronically and manually by form 34As **from the polling stations direct to national tallying centers without being taken to the constituency tallying centers**. The transfer of results from polling centers to constituency tallying centers and from the transmission of the results from constituency centers to National tallying centers are the most risky activities where manipulation, omissions ,hacking and any sort of distortion of original casted votes can occur. Direct transmission of results from the polling stations will eliminate the crafty loopholes likely to occur when the existing transmission process is being used.

2) Before the results are transmitted from the polling station, the forms 34As should be signed by all the agents present, the RO, PO and authedicated electronically by the biometric kids to ensure all security features are in place, are correctly signed and properly completed. Any form which do not conform with these requirement shall not be accepted as a valid form to be used to announce the results at the poling station. All the agents **must** be given copies of the results as in the form34As and **must** obtain electronic copy through mobile phones or cameras which they

RECEIVED
02 OCT 2017
CLERK'S OFFICE

can forward to their candidates. Agents must confirm having obtained the copies of results as they were transmitted by signing a confirmation form provided by IEBC. No results shall be made public and transmitted where the agents have not signed form35A and obtained copies and photos of the results at the polling station.

3) Polling stations shall be the origin and end of the tallying of the polls while the national tallying center shall be for the purposes of communicating to the public what each polling station has announced as the final polls. The National tallying center shall announce individual polling station results and cumulative poll results simultaneously as the polling station results stream in one by one from each polling station.

The amendment to this law should aim to curb any loophole which may occur on the transmission of the results from the original polling station to the final national tallying center. The IEBC should ensure that proper authentication, validity and accuracy of the poll results in form 34A and in electronic form is done at the original polling station and is the final. This way the poll results will have a trail up to the polling station and any dispute arising will be easy to handle by tracking activities from the specific polling station.

Adhoc Cmtee Elections Law

96

2/10/17

Submission of Memoranda

From : WILSON MWAI <kanjawamwai@yahoo.com> Fri, Sep 29, 2017 04:31 PM

Subject : Submission of Memoranda

To : clerk@parliament.go.ke

No. 3 - Regarding qualifications- In order to prevent every dick & harry in applying to become a Chairperson to the commission, I recommend that on top of holding a degree, those with additional professional qualifications eg. in ICT like CISA, CRISC, CPA (K) should be considereddd as an advantage. This is because, for a long time I have wondered why only Legal Professionals are GIVEN priority for IEBC work. Elections is all a matter of working with NUMBERS and in my considered opinions, professional auditors and accountants should be given a priority when it comes to appointing the IEBC Chairperson. Professional Auditors and accountants have greater knowledge & understanding computerised systems that work with numbers, eg. carrying audit tests & performing audit trails to computerised systems that work with numbers, testing programs logic, performing audit trails and testing computer systems before they go live, eg. in Banks. Lawyers have got limited knowledge in this area.

The bill should address the following exposures, eg. the Database of voters - being leaked by insiders secretly, creation of logic bombs- are similar to computer viruses but it involves creating a computer program/some modification to the existing computer program for example to destroy or modify data at a specific time, eg, at the date/day and time elections commence and is very difficult to detect before it becomes active. It has the greatest potential for damage because when it detonates it causes maximum damage & takes place long after the departure of the perpetrator who may even have left the country.

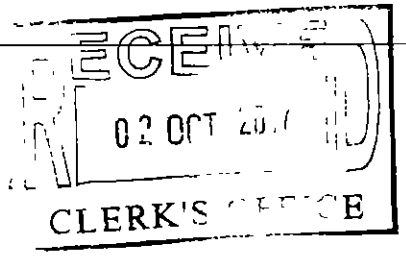
I would also recommend that any participating candidate in elections who organizes demonstrations to cause chaos before or during elections time, sabotages the economy through chaos, a petition should be filled for disqualification.

6A. add. (e) Submits a falsified document

(f) Makes or introduces his own document(s) purporting to be from IEBC that is detected during or after elections

(g) Prints or makes fake/false election materials & introduces secretly during the election day to discredit IEBC.

Thanks.





ZETH OUMA OMOLLO
P.O BOX 89-00618
NAIROBI
1ST OCTOBER, 2017

CLERK OF THE NATIONAL ASSEMBLY
PARLIAMENT OF KENYA
P.O BOX 41842-00100
NAIROBI

RECEIVED
02 OCT 2017
CLERK'S OFFICE

Dear Sir,

RE: ELECTION LAWS (AMMENDMENT) BILL, 2017

Article 118(1) (b) of the Constitution of Kenya provides that, "*Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees* " Pursuant to the foregoing Constitutional requirement, the Select Committee on the Election Laws (Amendment), 2017 invited members of the public to submit any representations on the above bill In this regard, I wish to present the following reservations as to the fidelity of the Election Laws (Amendment), 2017

1. The existing legal infrastructure on the management of Elections in Kenya suffices, and all the matters arising from the Supreme Court Ruling (2017) could be cured exclusively by upholding fidelity to the existing laws, and fixing administrative issues at IEBC In this respect, I suggest a withdrawal of the bill since it cures no real lacuna in the legal framework

2. The timing of the Election Laws (Amendment), 2017 is inappropriate since it is likely to attract (and it has actually attracted) political backlash and create an unnecessary wedge between the main protagonists in the repeat presidential poll slated for 26th October, 2017. To the extent that the bill has a great negative impact on national cohesion at least in the short-run, its introduction at this time actually militates against public policy In this regard, I propose that the bill be deferred, and probably be re-introduced after the repeat polls.

3. Consistent with the argument in (2) above, the elections scheduled for 26th October 2017 are by letter and spirit of the Supreme Court Ruling "a repeat election". This, from the face value, implies that the "rules of the game" must remain unchanged for purposes of the said repeat poll In this respect, what is intended to change is "fidelity to the rules"-fidelity to the legal and administrative systems as should have been on the 8th August, 2017 My recommendation accordingly, is as in (2) above

4. In retrospect, I pose this question what lacuna is proposed amendment item 2 intended to cure? Doesn't the Vice-Chairperson automatically assume the duties of the Chairperson in the absence of the latter? Doesn't this simple and traditional legal-administrative principle suffice? Consistent with my argument in (1) above, the matter purportedly addressed by the proposed amendment item 2 is already provided for in the existing legal framework, and is largely an administrative rather than legal issue. My recommendation is that even if the bill was to proceed, item 2 is certainly a candidate for exclusion (deletion)

5. Subjective as it may be, the sum-total of my opinion is that the very introduction of the bill at this time is *prima facie* mischievous and the sponsor(s) ought to be forward looking, and get guided by the true public interest All indicators are that the proposed amendments are a means to a transient political end, as transient as probably a month My appeal to the sponsor(s) of the bill is that laws are meant for posterity, not for personalities, and should as far as possible represent the will of the majority of citizens; if they (citizens) all were practically to vote on the matter on the floor of the house

Summarily, the pulse of the nation and the prevailing environmental indicators are that the bill is not well-intended, and should be withdrawn in totality ahead of the repeat polls However, if the sponsor(s), remaining true to the tenets and principles of legal reform, are convinced of the public utility of the bill, then it could probably be introduced after the planned repeat poll, taking into consideration all the arguments advanced in this representation

A representation without prejudice. Thank you, and God bless Kenya.

Yours Truly

Zeth Ouma Omollo
+254 722 313 835

98

Zimbra clerk@parliament.go.ke

Mr. Gazemba - PCA

-410 27

From : mark tookibiwot <marktookibiwot@gmail.com> Sun, Oct 01, 2017 07:51 PM

Subject : <No Subject>

To : clerk@parliament.go.ke

I am mark too kibiwot,from baringo county ,i support the bill totally, because it will protect the will of the voter in future, only If Chief Justice refuses to attend swearing in ceremony,what happens, advice me,thanks.



Mr. Gazemba - PCA

99

Zimbra clerk@parliament.go.ke

The Election Laws Amendment Bill 2017 2/10

From : Kiiva Timothy <kiivat@gmail.com> Sun, Oct 01, 2017 04:23 PM

Subject : The Election Laws Amendment Bill 2017

To : clerk@parliament.go.ke,
csenate@parliament.go.ke

Dear Clerk(s),

Kindly register my personal opposition to the subject proposed amendment in its entirety due to the following reasons:

1) In its judgement, the Supreme Court did not quote the existing election law as lacking
2) Given the timing of the amendment and its movers, it is not in the interest of the country per se but aimed at massaging personal ego.
3) Although the constitution is silent on the sitting president signing into law Bills passed by parliament during a transition period, any attempt to have this Bill signed into law will be contested in Court.
4) IEBC has warned against change of election law before the repeat elections and such changes will only serve to confuse.
5) In its ruling, the Supreme Court ordered repeat Presidential Elections under the then prevailing law and holding the elections under an amended law is open to litigation.

Best Regards,

Eng Kiiva Yosef Timothy, Esq.

RECEIVED
02 OCT 2017
CLERK'S OFFICE

MEMORANDUM TO PARLIAMENTARY COMMITTEE

AMENDMENTS TO THE ELECTIONS ACT, 2011

I have perused the above envisaged amendment to the Elections Act,2011 and have the following presentations to make:

- The amendments initiated are glaringly in bad faith given the timing and the political temperatures in the country and my reasons are:-

  i) The provisions contained in the Elections Act ,2011 served the Country well in 2013 elections. Why have the laws been found to be flawed midstream of an election when one party to the election had the results cancelled by the Supreme court and yet when the same Supreme Court ruled in favour of the Party now initiating amendments to the Elections while the party that lost in 2013 did not initiate such amendments in 2013.

  ii) Under item 6(b)-ID, of the amendment,it says in replacement:"**Where there is a discrepancy between the electronically transmitted and manually transmitted,the manually transmitted should prevail**".No reason has been advanced why the manual results should prevail.

This if allowed,will give way to the easy manipulation of results through Ballot stuffing.If this should be the case ,what was the reason for adopting electronic transmission?Electronic transmission was meant to minimize ballot stuffing in favour of a particular candidate.

RECEIVED
02 OCT 2017
CLERK'S OFFICE

In my view, this should be allowed as will encourage rigging/ stealing of votes.

Under item 6(b)-1E,of the amendment,it is stated that "any failure to transmit or publish the election results in an electronic format shall not invalidate the results announced".If this was to be allowed, it will be a recipe for chaos and will enable those in authority to use state Machinery to rig elections because it will allow malicious individuals to create an enabling environment to compromise the elections results.

iii)Under item 4,to want to reduce the no. of commissioners from 5 to 3,is intended to impair the independence of the Commission,because it is easier to compromise 3 commissioners than 5.This amendment should not be allowed.

Prepared by:CPA John Nyakway
02.10.2017

101 (10)

MY MEMORANDUM TO PARLIAMENT OF KENYA

ELECTION LAWS

I support the new election laws proposed.

1. I do not see any problem with the definition of Chairperson and who can act when the Chairperson is not there. Also quorum is not a problem.
2. I wish to see all registered voters, without any care to party affiliation nominate a presidential candidate. Why should Kenyans care about parties?
3. I agree that results go electronically and manually. Where they differ we look at the real documents.
4. I can never agree that presidential elections be thrown away by courts just like that. I support the changes being made and the process of conducting repeat elections as suggested.
5. In the last elections, people just messed the elections by not signing forms. If they refuse to do so now, I agree they go to jail.

Yours faithfully,

DANSON G. MWANGANGI

102

My name is Tommy Randall

I am a Citizen of Kenya

& a resident of Nairobi.

I support all the amendments 100%

As for political offenses

wish you would go even further &

~~As for elections offences~~

Penalize anyone involved in the election

process That is all IEBC employees including

Commissioners. all the way to party ~~officials~~ representatives

I cannot stress before the 26th Oct importance of passing this

bill

I voted at Kilelishwa primary,

I voted for Saitoti & after seeing

him in action he has validated my

vote for him

Thank you for the honor of addressing

this Committee.

God bless Kenya

Tommy Randall

the Commission shall upon receipt and considerations of the National Assembly and representations from the public, prepare the final report for publication in the *Gazette*.

(9) Where the National Assembly fails to make recommendations within the period specified in subsection (7), the Commission shall publish its report in accordance with subsection (8).

(10) A person who, being responsible for the publication in the *Gazette* of the final report submitted under this subsection fails to publish the report within the time required by the Commission after the report has been submitted to that person, commits an offence and is liable to imprisonment for a term of one year.

(11) Notwithstanding any other written law, where the final report is not published in accordance with the provisions of subsection (9) the Commission shall, within seven days of the submission of the said report, cause the report to be published in at least two dailies of national circulation and such publication shall have effect as if it were done in the Gazette.

Amendment of the Second Schedule to No 9 of 2011

31. The Second Schedule to the Independent Electoral and Boundaries Commission Act, 2011 is amended by deleting paragraph 9 (3).

Amendment of No 42 of 2013

32. The Elections Campaign Financing Act, 2013 is amended by inserting the following new section immediately after section 1—

Suspension of operation of Act

1A. The operation of this Act is suspended and the Act shall come into force immediately after the general elections to be held in the year 2017.

Amendment of section 6 of No 42 of 2013

33. Section 6 of the Elections Campaign Financing Act, 2013 is amended in subsection (5) by deleting the word "eight" appearing in paragraph (a) and substituting therefor the word "two".

Received
5/10/2017
103

Fwd: AMENDMENT TO ELECTION LAWS PERSONAL PRESENTATION

Inbox x

kavata musyoka 13:14 (40 minutes ago)

to Lucy, Clare, fiona, Emmy, me, Halimaa

Kavata Musyoka,
The Senate, Parliament of Kenya,
Clerk Assistant, Standing Committee on Legal Affairs and Human Rights.

---------- Forwarded message ----------
From. **The Clerk Senate** <csenate@parliament.go.ke>
Date: Fri, Oct 6, 2017 at 1:01 PM
Subject: Fwd: AMENDMENT TO ELECTION LAWS PERSONAL PRESENTATION
To: Directorate of Legal Services <dlssenate@parliament.go.ke>, kavata musyoka <kavata.musyoka@gmail.com>, MARY JEBET CHESIRE <mjchesire@yahoo.com>

From: "jonathan nzyoka" <nzyokajonathan@gmail.com>
To: csenate@parliament.go.ke
Sent: Thursday, 5 October, 2017 9:44:35 PM
Subject: AMENDMENT TO ELECTION LAWS PERSONAL PRESENTATION

My considered view on the national Parliamentary bill to amend sections of election laws of Kenya is based on my speciality in telecommunication engineering. I am a former employee of the Telkom Kenya corporation and my competency in data transmission permits me to assist this committee.
First, the irregularities and illigalities observed by the Supreme Court are man made in nature. They were not caused by power failure or natural disaster. The likely suspect in interfering with the transmission process is the personnel directly involved in elections. But I want to draw the committee on other areas of consideration.
We all know, in what we call political strongholds of political parties, in this case NASA and JUBILEE, they have people who are political diehards ready to do anything to achieve their mission. These people are ready to kill, to cospire
and to offer handouts at any level of election process. They mainly aim to attack manual transmission along the way or by conspiracy.
The only cure to election malpractice is to improve and advance electronic technology in our systems. I, therefore, suggest that Parliament introduce a bill to provide electronic

voting system. This system will require a voting machines equipped with bio identifier, photos of various candidates, a counter, a memory card and a modem.
It will be easier for a voter to walk in a polling station, be identified and blocked from repeating, vote and be counted, and walk out. But for record purposes casting ballot can also be conducted where counting in the polling stations is discouraged.
The personnel in charge of the station will only require to record the reading of the counter and press a button to send the figures wherever they are needed. This is simple logic, no body will require to take or offer any bribe because the system is tide proof.
On the other hand, the issue of the server of the IEBC must be secure and accessible to only authorised and trusted officer of the commission. The location of the server should not be known by any body other than the commissioners. They own the network and the entire connectivity and any any access should be strictly controlled. Foreign access can only be provided via remote password which is authorized locally.
My stake is therefore that, amendments that touch on overriding electronic technology application to favour manual transmission should not be allowed.

Thank you all and God bless you in your deliberations

Yours faithfully,

Jonathan Kithusi. Nzioka

Director, UKAI Association

- Click here to Reply, Reply to all or Forward

Received 104
5/10/2017

VERONICAH WANGARI WANJIKU

TELEPHONE NO.: 0703 486 158

I.D NO.: 25377179

REFERUNDUM AMENDMENTS 2017

I ma a voter from Dagoretti south in Nairobi Constituency. I support the amendments Bill 2017. Reasons why I support on date 23rd September 2017 Chief Justice withdrawn Uhuru Muigai Kenyatta as a winner of Presidential Election of 8th August 2017in the Supreme Court of Kenya, his reasons for withdrawing as said that the officials of I.E.B.C failed to sign forms 34B, my comments are that I.E.B.C Official handed not to sign any form to serve a sentence of 10 years in jail or a fine of two millions cash bail. I.E B.C Officials be independent because before being qualified to be an I.E.B.C Official must be a Kenyan aged 18 years and above.

He must be learned in laws of Kenya in a school of law, the Official be at least 5 who have at least 10 years experience in Law Firms so that if elections are done and the result are counted the two cannot announce the winner due to various reasons of individuals. Among the three can announce the winner in public?

I believe according to the constitution of Kenya the power lies in the hands of the people of Kenya and does not belong to the Judiciary of Kenya. I propose that the votes can be counted manually because we even go to the polling stations manually and vote manually. Any candidate may not get satisfied with the results of elections and can think to take a petition in court and the law allows. The Chief Justice or any other Judge in court of Supreme can do the case of elections and he/she must listen to the complaints of every Kenyan according to the constitution of Kenya. The Chief Justice or any other judge cannot declare a winner cause that is not their duty and if so then he is not work according to the constitution of Kenya

Millions of grownups take their time , energy and money to go and vote for the reason, people who vote are 18 and above and know the rights of their country. We will not allow the Supreme Court to make the people of Kenya shed blood through election violence, we love our country and we work harder for it and we are the ones who have employed Chief justice or any other magistrate of Kenya paying taxes of this country we are painful of this.

How can a judge not recognize a winner? ~~Hon~~ Uhuru Muigai Kenyatta was ~~wast~~ ed his time energy and effort to campaign for his presidential seat, the people of Keya recognize his work, we love him, we pray to God for him

Let him be given his rights or any other leader who has been selected by people, don't talk lies in front of the community cause nobody can get success through no sweating we cannot allow

this to happen in Kenya. We are serious about our country, it is not the responsibility for the Judiciary to declare a winner, it is through people going and voting. I propose if the Chief Justice is handed saying repeating elections without enough reasons a bill can be passed by parliament, he or she can pay the cost of that election from his own pocket. Citizens of Kenya have no time, energy and money to waste because of one person or another, failure to that you can leave the office, there are so many problems facing the people of Kenya like hunger, poverty sickness money to pay school fees single mothers orphans who have no parents to assist them unemployed youths, people without their own homes and are tenants and unemployed. They have nowhere to neither live nor stay. I am Kenya and one of them and have children The billions of repeating elections can be used in so many projects, there's no use of wasting the tax payer money, energy and time of Kenyans. If somebody want to apply to represent a seat, there are laws that I propose be made by parliament that before given that chance to go to the community to borrow votes be given a form of written laws to sign that no going to stand before the community using insults or abusive words to do campaign and if he is heard doing that be cancelled from the list and becomes the end of the story.

I also propose that the parliament select a committee of the 47 counties of Kenya who will be assessing the signing of the I.E.B.C Officials of forms election copies and making sure that there okay and if there is an I.E.B.C who has refused to sign form they must know him well and if a petition is taken to court they will already be knowing him and they will be the eyes of the public not the voters

I propose the parliament to pass a bill whereby the presidential winner can be assisted by any judge of the court of Kenya to take an oath of office. It is not the career of the I.E.B C Officials to declare a winner, their career is to conduct fair and free elections and to announce the winner. Let us fear God as we take our position well

Yours faithfully

Veronicah Wangari Wanjiku

Kenneth Orengo

105

MEMORANDUM BY AFRICAN ELECTORAL OBSERVATION GROUP SUBMITTED TO THE CLERK OF THE NATIONAL ASSEMBLY

PRELUDE

African Electoral Observation Group (AEOG) is a nonprofit, nonpartisan, nongovernmental organization that has supported democratic institutions and practices in every region of the Africa for over two decades. AEOG together with its local partners, have worked to establish and strengthen political and civic organizations, safeguard elections, and promote citizen participation, openness and accountability in government.

At AEOG we believe that democracy is a principle enshrined in the Universal Declaration of Human Rights, but it's a human right that many around the world still struggle to attain.

SUBJECT: KENYAN ELECTORAL LAWS (AMENDMENT BILL) (NATIONAL ASSEMBLY BILL No. 39 of 2017)

AEOG deployed a sizeable number of electoral observers in Kenya before, during and after the Kenyan elections. Further, it released both pre- and post-observer reports which were widely circulated and quoted both in Kenya and outside the country. The reports are available at http://electionsafrica.org.

Therefore, AEOG would like to submit the following memorandum that is before the Kenyan Parliament in light of the fact that it monitored the elections at all its critical processes.

1. **AEOG supports amendment of Sections 39; Requirement for verification and the place of manual and electronic transmission**

Our reason of supporting this amendment is because it aims at erasing the confusion surrounding the issue of the use of technology in the elections which was eminent before the elections and during the Supreme Court proceedings.

The Court of Appeal in the Maina Kiai case declared the law to be as follows;

"It cannot be denied that the Chairperson of the appellant has a significant constitutional role under Sub-Article (10) of Article 138 as the authority with the ultimate mandate of making the declaration that brings to finality the presidential election process. Of course before he makes that declaration his role is to accurately tally all the results exactly as received from the 290 returning officers country- wide, without adding, subtracting, multiplying or dividing any number contained in the two forms from the constituency tallying center. If any verification or confirmation is anticipated, it has to relate only to confirmation and verification that the candidate to be declared elected president has met the threshold set under Article 138(4), by receiving more than half of all the votes cast in that election; and at least twenty- five per cent of the votes cast in each of more than half of the counties."

On its part, the Majority judgment of the Supreme Court stated that:

"We have already held that we find little or nothing in this decision to suggest that, by deciding the way it did, the Appellate court restrained or barred the 1st Respondent from verifying the results before

declaring them, or that it was relieving the former the statutory duty of electronically transmitting the results. What the 2nd Respondent was barred from doing by the Court of appeal and High Court was to vary, alter or change the results relayed to the National Tallying Centre from the polling stations and constituency".

An analysis of the Supreme Court Majority Decision and proposed amendment shows that the amendments merely realign the law with the Decision and are paramount if Kenya wants a successful election on 26th October. The proposal is not retrogressive and neither does it alter the electoral process as claimed by some people. Its advantages can be summed up as follows;

- Parliament seeks to ensure that the Presiding Officers transmit both the manual and electronic results to ensure accuracy as it required by the law and also by the Supreme Court standard.
- It provides that where there is a discrepancy between the electronic form and the manual form the latter will prevail. This ensures that the primary document which is signed by agents, posted outside polling stations and physically delivered to Constituency Tally centers where final results are declared (pursuant to the Maina Kiai case), becomes the basis of any results verification in the event that any discrepancies are noted with the scanned and electronically transmitted documents
- It provides that failure to transmit results electronically shall not invalidate an election. This provision recognizes technology is not

available or reliable in all parts of the country and therefore having a manual system is paramount.

- Finally, it clarifies that "results" beamed in the live portal are merely for public information and for any declaration of results.

2. **AEOG supports Amendment of Section 83 of No 24 of 2011: Effect of irregularities on invalidation of election**

From our reading of both the Majority and the Majority Decision, Section 83 of the Elections Act, 2011 was extensively discussed and we foresee it will remain a thorny issue in Kenya. The discussion remains largely the same in similar jurisdictions and we therefore are satisfied that the proposed amendments on this section are for the greater good of the Kenyan state. This sections currently reads as follows,

"No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election".

The proposed amendment seeks to bring further clarity to the provision by ensuring that the overriding question in any election petition will be *(i) what violations have occurred but fundamentally (ii) the consequence of those violations on the results of the elections. Without this* conjunctive application of these two aspects in reviewing of an election petition,

Kenyan Supreme Court will void future elections as it warned though in our view that statement was in bad taste. Worst of all, minor and petty irregularities will usurp the Kenyan people's sovereignty in exercising their right to vote as the results are voided for reasons that do impact the exercise of the sovereignty.

Therefore, we support this amendment as the disjunctive application of Section 83 opens a floodgate of nullification of presidential petitions for very minor irregularities which would ordinarily not merit such a move. In a nutshell, the conjunctive application ensures that the Supreme Court does not lower the bar of the nullification of the presidential petition.

Further, AEOG supports the insertion of Section 83 (2); Effect of Forms.

This seeks to introduce the provision of Section 72 of the Interpretation and General Provisions Act (Cap 2) into the Elections Act. The said Section states as follows:

"Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead."

In our view, this insertion is critical as it will address potential mischief of sabotaging elections by some electoral officials as the issue of how filling of forms was done was a contested issue during the Supreme Court hearings. Further, this insertion is in line with the Constitution which sets the tone that substance is to take precedence over technicalities.

Article 159(2)(d) states as follows:

" In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(d) justice shall be administered without undue regard to procedural technicalities.

3. **AEOG supports the proposal to Insert New Section in No. 37 of Election Offences Act, 2016: Election offences**

From our interaction with various electoral officials right from the polling stations, we met officers who are fairly trained and educated and therefore we were also surprised to later see some forms 34As and Bs which were clearly wrongly filled despite that such an action is not complex at all. Putting in mind that nullifying an election due to wrongly filled forms and not the actual results is a very expensive judicial decision, harsh penalty for electoral officers who fill such forms either by commission or omission should be supported.

4. AEOG invites the Select Committee to read its proposals in both the pre- and post-election reports as they are largely in tandem with the draft bills and will help Kenya in having better and reliable electoral laws and practices.



Dr. Kenneth Orengo

Regional Coordinator

AFRICA ELECTORAL OBSERVATION GROUP

Dated 3rd October 2017 in Nairobi, KENYA

MEMORANDUM

106

4th.October, 2017
From:
SHAILESH PATEL
P.O.BOX 134-00606
NAIROBI, KENYA

Attention: Clerk of the National Assembly, P.O.Box 41842-00100, Nairobi
and Clerk to the Senate

MEMORANDUM SUBMITTED TO THE SELECT COMMITTEE ON THE ELECTION LAWS, 2017
In respect of The Election Laws (Amendment) Bill (National Assembly Bill No.39 of 2017)

Dear Committee Members

I make this humble submission as a citizen of Kenya, my beloved country and with a view to making a small contribution, which I believe could help in enabling a credible, transparent, accountable and peaceful election process.

As you may be well aware , I had made extensive submissions to the Joint Parliamentary Select Committee on matters relating to the IEBC in July 2016 and which need to be considered while deliberating on the current Bill as certain aspects would be useful to your selves this time round as well.

By and large I do support the initiative taken by the drafters of this BILL as it does serve to address, clarify and fill in certain "lacunas" and gaps existing in the current Law and as such I do not see any problems in terms of adopting the Bill , though my principal focus is confined and related to the deployment of election technology and would like to bring to your attention, various issues in this regard for your review and kind consideration while you fine tune and /or modify the Bill after having deliberated on the same.

Section 39 of the Election Act, 2011

1) You need to properly define in the Bill the meaning of the word "transmit" in context of its usage concerning the relaying of the election results as while results can be electronically transmitted by using the KIEMS device through the internet, however, in case of the manual method, where the relaying of the election results is effected manually (from the polling stations and the constituency tallying centre) , such a process is defined as one that entails the physical handing over /submission of the actual Forms 34 and Forms 34 B by the Presiding or Returning Officer and the terms transmission (applicable to electronic method) and submission (applicable to manual method) should be defined per se.

   In view of the foregoing I suggest that you consider substituting the words "manual transmission" with "manual submission" and "manually transmitted" with "manually submitted" or as you deem fit.

   It is also important that IEBC uses technology / method to ensure that the security and integrity of the election results forms are enabled such that the same cannot be tampered or mutilated since they are to be relied on and shall prevail in case of any dispute and it is therefore important and essential that the IEBC does employ such means and technology that will permit this to happen.

NATIONAL ASSEMBLY
RECEIVED
05 OCT 2017
CLERK'S OFFICE
P. O. Box 41842, NAIROBI

All the Forms 34 A , 34 B and 34C should firstly be standardized and have security features and be serially numbered and bar coded for each polling station , constituency tallying centre and national tallying centre as appropriate so that they can be tracked and allow an audit trail.

The Forms 34 should be the self –copying with the requisite number of copies (one set per every polling station and constituency, respectively) to enable distribution in the following manner after each form has been secured and sealed in a transparent security proof envelope with a unique security seal ("Bubble" seal technology, numbered and coded) that is specific to each polling station and constituency-tallying centre and also the national tallying centre

The Original form (the top one) can be submitted to either the national tallying centre (at Bomas) or preferably to the Supreme Court for preservation and is the one that shall prevail in case of a dispute arising.

The second copy can be submitted to the national tallying centre (at Bomas) in case the original is submitted to the Supreme Court.

In case the idea of the submission of the Forms 34 A and 34 B to the Supreme Court is considered as being unacceptable by you , then in that scenario , the Original one ought to be submitted to the national tallying centre

The other copies are distributed as follows·

One copy to the constituency-tallying centre

One copy is availed to the respective agent of each Presidential candidate and the delivery/receipt recorded appropriately

One copy is retained at the polling station.

Each copy (whether original or self-copy) that is distributed to the different parties as stipulated above (or as you deem fit) is done so in a transparent security envelope that is secured and sealed using a designated BUBBLE seal that cannot be replicated and one that can be tracked

In fact , it was on the basis of the recommendations and advise of Hon. Mutahi Kagwe the then Co-Chairman of the above mentioned Joint Parliamentary Select Committee , that a UNDP approved vendor of election technology , namely, PROOFTAG SAS of France (whose CEO , Mr. Kaiser had also appeared before the said Committee to submit his views and to present to it , the firm's secure manual election results transmission solution as described above) that IEBC finally gave him an opportunity to make a presentation of the same to its ICT officers . However, despite a positive acceptance of the concept and the solution (generally described as SECURITY POLLING STATION KIT) for use as a complimentary manual method for the secure transmission of election results , regrettably, IEBC was for some unknown reason chose not to adopt it for use during the August, 2017 elections and had it done so , then in every likelihood the scenario of the repeat of the Presidential elections could have possibly been averted

In fact, PROOFTAG in light of the Supreme Court judgement in case of Petition 1 of 2017 , took the initiative to revive the matter and has severally written to the top IEBC officials including the Chairman, CEO and Commissioners and this time round also to both the political parties, viz., JUBILEE and NASA about the availability of its technology and solution and conceptualized how it can be employed in the forthcoming repeat Presidential elections but unfortunately there has

been no feedback or response whatsoever from anybody as the minimum expectation was that at least IEBC would respond positively but which has remained silent and also totally inaccessible by its failure to grant any audience to PROOFTAG and nor has it even bothered to acknowledge receipt of the correspondences received from PROOFTAG. In this connection, please refer to the attached correspondences by letters (dated September 5, 13 and 21, of 2017 respectively, to IEBC) and emails sent by PROOFTAG to the mentioned parties.

It is my humble submission that your Committee does seriously look into the solution offered by PROOFTAG and see as to how it can be adopted to avoid and overcome the issues that were encountered in the last round as it affords a very secure method for protecting and preserving the authenticity, the integrity, security and enabling an audit trail of the election results forms (34) and can serve to enhance and improve the effectiveness of the management of the elections.

The amendments sought in the Bill under Sections 72 and 83 of the Elections Act, 2011 can take into account the above technology and be modified appropriately.

Finally, in terms of the electronic transmission of the election results, I would like to make a few observations in terms of the technology employed by IEBC and the opaque manner at which it has been procured both in case of the initial procurement of the KIEMS and now the subsequent so call reconfiguration of the same device owing to the failure of the RTS system to work in the manner that it was expected to.

Firstly, in the original procurement, IEBC blatantly ignored the lower compliant proposal for the KIEMS, which did include the RESULTS TRANSMISSION SOLUTION (RTS) component as availed to it by an international vendor, namely, SMARTMATIC INTERNATIONAL HOLDING B.V. (hereinafter , SMARTMATIC) which had offered the same at a cost of US$ 35.68 million compared to the higher priced KIEMS which IEBC contracted SAFRAN IDENTITY AND SECURITY SAS (otherwise known as SAFRAN MORPHO/OT-MORPHO and herein referred to as SAFRAN) at a cost of US$ 39,964,421/- (despite the fact that its product deviated from the original specification in that it excluded the voter registration component) and IEBC thereby incurred an un-necessary excess expenditure of public funds to the tune of US$ 4.284 million which is equivalent to about K.shs. 441 million. In this connection, refer to the letter ref. no. IEBC/PROC/10/Vol.I/2017/120 dated 29th.March, 2017 written to IEBC (addressed to its Chairman and CEO amongst others) by SMARTMATIC outlining its proposal but which was blatantly ignored by IEBC despite its only proven end-to-end election automation platform in the world and had IEBC employed it this additional expenditure of K.shs 2.4 billion for reconfiguration of the KIEMS as reported in the press would have been averted and as in the first place SAFRAN was required to offer a KIEMS that included the electronic results transmission solution (RTS) module and which is a customized software solution. The fact that the RTS module was dysfunctional and has to be "reconfigured" at an exorbitant price shows negligence and failure to perform on part of SAFRAN and which should in fact be surcharged for non –performance and IEBC should have invoked the enforcement of the performance bond and called upon SAFRAN to pay the penalty as per the procurement law and asked to rectify the failed RTS module free of any cost. Moreover, what did reconfiguration of the RTS module entail and if as reported in the media if the only modification required to be done (in the so called reconfiguration exercise) was that the KIEMS would allow results transmission to be effected only if the both the image (otherwise referred to as a scan) of the FORM 34 is taken by the in-built camera of the KIEMS (tablet computer) and the text of the election results as entered in the KIEMS are done simultaneously then there is little value for the above sum of colossal monies expended and in any case as per the Bill No 39 if it is the physical submission of the actual physical form which is to be the to be relied on for the relaying , verification and authentication of the

election results and the one which shall prevail , then the expenditure envisaged of K.shs 2.4 billion is totally unwarranted and unnecessary. And moreover the modification cited above cannot be that complex to warrant such a huge expenditure and has no value as the operators of the KIEMS are duty bound to electronically transmit the results both in text format as well as the image of the Form 34 and which objective as per the original contract entered with SAFRAN was supposed to be achieved in any event. IEBC was well aware that SAFRAN has never implemented the RTS solution in any other elections and yet it contracted SAFRAN for the supply of KIEMS and furthermore there has been a serious allegation to have conspired with its cohorts in IEBC by way of influencing and interfering in the framing of the tender specifications of the KIEMS to give it an undue advantage over other vendors. In this connection, please refer to the letter dated 29th.March, 2017 from M/s Kanuri Limited of Nairobi, addressed to their lawyers asking the latter to take up this issue with the French authorities concerning the involvement of SAFRAN in the alleged improprieties in respect of the KIEMS tender and calling for the latter to conduct investigations into the matter (as attached).

It would be prudent in the public interest that your committee does ask IEBC to submit both the contracts which it has entered into with SAFRAN /OT SAFRAN for a detailed scrutiny of the same in terms of specifications and functionality requirements and also ask for submission of the test approval certificates for the KIEMS and the reconfigured KIEMS (which is likely to involve a modified RTS module) as issued by IEBC and make a detailed interrogation and if necessary engage independent ICT experts to opine on the same. In fact, IEBC should have engaged an independent election technology consultant to audit the KIEMS as supplied by SAFRAN to establish the faults in the system and the modifications required before entering into a fresh contract with SAFRAN the party guilty of breaching the initial contract.

Please be informed that an independent international election technology firm, namely, DEMETECH of Denmark which is a UNDP approved vendor, had written to IEBC to carry out an audit of the KIEMS and the election technology employed by IEBC during the August 2017 elections with a view to establish the "faults/malfunction" and to offer a solution for curing the same but unfortunately, IEBC as usual did not bother to take up the offer and engage with this vendor as it ought to have done and had it done so there was every likelihood that IEBC could have saved the billions it used in the "reconfiguration" of the KIEMS. In this connection, refer to letter dated 6th. September 2017 written to IEBC Chairman, Commissioners and CEO, which has not elicited any response despite several reminders. DEMETECH had undertaken to conduct the audit process, within a period of 2 weeks, and which exercise IEBC ought to have prioritized as the very first step before engaging SAFRAN to "re-configure" the KIEMS through a fresh contract supposedly meant to remedy the faults/short-comings of the KIEMS as supplied per the initial contract . What a great pity!

Also, note that IEBC failed to seek public participation when deciding to engage SAFRAN for the so-called KIEMS reconfiguration exercise. This was a transgression of the law and constitution.

Owing to the well-publicized short comings experienced in the RTS as supplied by SAFRAN, note that a reputable South African election technology provider, namely, BIGRADAP GROUP TECHNOLOGIES (PTY) LTD. (hereinafter , Bigradap) did write to IEBC vide its letters dated 13th.September, 2017 addressed to IEBC Chairman, Commissioners and CEO expressing its interest with a view to assisting and rescuing it from the problems encountered in RTS and based on the information as reported in the press and offered a solution comprising of a system which consists of a number of verification steps:

(i) The first, and most important verification is the acceptance of Polling station result on the Result Form by the relevant agents (Political Party representatives, Presiding Officer, etc.)

(ii) During capture, a number of checks kick in:
- Total votes vs number of registered voters
- Spoiled votes
- Ballots counted vs votes counted

(iii) The second step takes place after the result is captured, when it is accepted by the Presiding Officer in the presence of the aforementioned officials.

(iv) The third step takes place at the collation center, where each result is verified against the form image, and again accepted by a senior official.

Other system advantages include:

- Immediate availability of the image of the result form
- Reports on result submission (which stations have/have not submitted results)
- Exception reports (issues)
- Rollups and tallies

Bigradap, had sought to be afforded an opportunity to make a presentation of its proposed solution to IEBC including its ICT experts to show case how it works to IEBC and other stake holders including the political parties (representatives of the Presidential candidates) and also clearly stated that they were ready to configure and customize according to the IEBC requirements. Unfortunately, to date the correspondence (by email and letter) has failed to elicit any response and which is shameful as the cost of configuration would have been effected at about one third of that charged by SAFRAN.

In conclusion, in respect of the issue of the KIEMS configuration contract given to SAFRAN /OT MORPHO , it should be voided in view of the current Bill since it will be the actual physical Forms 34 (containing the results) that will be prevail and further as nobody (SAFRAN or IEBC) have actually defined the actual cause of the failure of the RTS module installed in the KIEMS and which I understand has been attributed to network failure or lack of it or is it due to system failure or improper configuration .This needs to be clarified and resolved to know where the blame lies.

I would also like to inform the committee that had IEBC sought views from the stakeholders through the process of public participation, we would have presented and show cased RTS solutions and various modules that would have afforded various and diverse data presentation for election results including live streaming from all the polling stations and constituency tallying centre on the IEBC portal and also via television basically all parameters as described above and with mapping data in colours of the respective candidates.

I trust that the Committee shall prevail upon the IEBC to improve its image by responding to correspondence addressed to it and be open and considerate in its dealing with stake holders and not operate from an ivory tower and to take the necessary steps to consider the deployment of the SECURITY KIT FOR THE ELECTION DECLARATION RESULTS FORMS as described above in view of the above narration and also consider the RTS solutions available from BIGRADAP for the repeat Presidential election (or in the future) and also consider the proposal from DEMETECH for auditing the KIEMS and election technology. Finally, the Committee should consider including a provision in the Bill that all petition or suits filed in the Courts in relation to procurement of election technology /materials should be determined within a period not exceeding 14 days to

avoid creating a scenario that inadvertently or by design leads to single sourcing and inflated pricing.

I have mainly dwelt on the subject of the deployment of election technology and Forms 34 in terms of RTS and how it can be bettered as narrated and conceptualized herein and in my view it is therefore critical that the information is carefully deliberated upon for the sake of resultant public benefit that could be realized and with a view to improving the election process to enhance its credibility, transparency and accountability and elevate public trust

I have made this submission in good faith based on the information available at my disposal and I would like to thank you for the opportunity to submit this memorandum. Please do not hesitate to seek any clarifications if you deem it necessary as I shall always be at your disposal and avail myself I shall appreciate receiving your comments and feedback.

Yours faithfully,

S.Patel
Encl: as above.

Gmail

Shailesh Patel <dr.shaileshpatel@gmail.com>

RE: SUBMISSION OF MEMORANDUM RE: NATIONAL ASSEMBLY BILL NO 39 OF 2017

Shailesh Patel <dr.shaileshpatel@gmail.com> Thu, Oct 5, 2017 at 2:13 PM
To: clerk@parliament.go.ke
Cc: csenate@parliament.go.ke, kavata musyoka <kavata.musyoka@gmail.com>

ATTENTION: THE SELECT COMMITTEE ON THE ELECTION LAWS , 2017 ESTABLISHED BY THE HOUSE TO EXAMINE AND UNDERTAKE PUBLIC PARTICIPATION ON THE ELECTION BILLS

REPRESENTATIONS / SUBMISSION OF MEMORANDUM AND SUPPORTING DOCUMENTS SENT BY EMAIL THROUGH : THE CLERK OF THE NATIONAL ASSEMBLY ,P. O . BOX 41842-00100,NAIROBI

Dear All,

I am pleased to submit my six page memorandum setting out my views and recommendations / suggestions along with supporting documents in respect of my representations in accordance with your notice published in the Standard of 29th. September, 2017 for your kind consideration.

I would like to express my gratitude for being availed the opportunity by way of public participation to make representations and give my views in respect of the Bill No. 39 of 2017 for your information , perusal and consideration and which I have done in good faith and have relied upon facts that I believe are true to the best of my knowledge.

I shall appreciate to receive your feed back and should you require any clarifications, please do not hesitate to contact me as I am at your disposal.

Kindly acknowledge receipt of this communication and the attached documentation.

I shall endeavour to submit the hard copies of the above mentioned documents in case you deem it necessary - kindly advise the number of sets required and deadline.

On reflection , I would like to make one more point in that since it is contemplated that the physical submission of FORM 34 A shall prevail and which is to be submitted to the national tallying centre , then is it really necessary for the same form to be submitted to the Constituency Tallying Centre for collation as this exercise/task can be readily be carried out by the National Tallying Centre which will receive the physical FORMS 34 A and is better placed to collate and tally all the FORMS 34 A and prepare the FORMS 34 B as it has the required manpower and also has in its possession in image format the FORMS 34 A as well as the physical versions of the same which can be verified and easily done owing to the large manpower at its disposal. I think that it is worthwhile to consider this suggestion as it will also save time. Furthermore, IEBC should develop a logistics mechanism that can expedite and facilitate the delivery of the physical FORMS 34 A to the National Tallying Centre from the Polling Stations by employing a courier service that can guarantee delivery say within 24 hours and maximum 48 hours for remote located polling stations.

Best regards
Shailesh Patel
Encl:

A. Correspondence to IEBC from the following:

(i) PROOFTAG SAS (including letters dated 14th.November 2016, September 5, 13 and 21 September ,2017 , company profile and brochure presenting the PROOFTAG SECURITY KIT TO PROTECT ELECTORAL PROCESS and email dated 21st.September, 2017.

(ii) SMARTMATIC letter dated 29th.March, 2017

(iii) DEMETECH GROUP letter dated September, 6, 2017 - reminder dated 13th.September, 2017

(iv) BIGRADAP GROUP TECHNOLOGIES (PTY) LTD letter dated September , 13, 2017 and email dated 14th.September, 2017

B Letter of Kanun Ltd. dated 29th.March, 2017 - refer to paragraph 1 at page 4 of my MEMORANDUM

C. Petition 159 of 2017 dated 19th.April, 2017 filed in the High Court (in relation to KIEMS contract with SAFRAN) and which remains unheard to-date despite having been filed under certificate of urgency and submitted here is the Petition plus supporting affidavit and submissions filed by the Petitioners.

D. E-mails from myself and from POOFTAG CEO as appended here below:

From **Shailesh Patel** <dr shaileshpatel@gmail com>
Date Wed, Jan 4, 2017 at 12:48 PM
Subject Fwd: INTRODUCTION OF PROOFTAG AND ITS SOLUTIONS FOR ELECTIONS
To Mohamed Abdullahi <caqilmohamed@gmail com>, Amos Wako <samoswako@gmail com>
Cc: Clément Kaiser <C Kaiser@prooftag com>

Dear Hon Senator Wako and Mr. Abdullahi

Thank you for affording Mr Kaiser and myself to make our submissions yesterday before your committee. It is most appreciated though the time was too short to present the technology/solutions for manual back up for the RTS and which also secures the results election forms (which have to written in hand - ie manual in any case) and so they must also be secured to prevent from being tempered and the solution offered caters for such a problem and also allows scanning of the results for uploading to the tallying server and in case of any dispute arising the sealed copies can be used for verification.

Prooftag also has technology for " converting " the manual voters register ' to a " biometric voter register) using the prooftag security tags which would simply require that each identity card or voters card is made into a biometric card by attaching the tag and an image of which (ie the tag) can be printed against the voters name and photo in the manual voters register and on voting day the card now carrying the tag attached to is is checked against the image of the same tag appearing in the voters register and if they match then it validates the voter to proceed to cast his ballot. This is a simple effective method and does not require dependency on electronics

In this instance IEBC can issue the tags to all ID or Voter Cards holders or even passport holders and affix the tag and create a data base- the National Registry or Huduma centres can do this process as well - it can be done even for the forthcoming elections. Or at least the law can be changed to allow this supplementary of complementary technology (manual) so that the same can be used in future elections

Anyhow, unfortunately , Prooftag's attempt to obtain an audience with IEBC has hitherto not borne any fruit as confirmed by Mr Kaiser during his testimony as will be seen by the trailing email and correspondence sent by hi to IEBC which has not elicited any response despite reminders

Since , the Chairman gave directions and guidance to Mr. Kaiser that he takes up the matter with IEBC , we shall appreciate if your offices can intervene so that he does get audience with IEBC which unfortunately operates under a closed door policy despite being a public body and impossible to get access to and so far failed to give any appointments or any audience for making presentations of the election technology solutions which is very disturbing and a sad state of affairs.

Kindly let us have your guidance and assistance so that Mr. Kaiser is given an opportunity to have an audience with IEBC so that his trip is not wasted as it was prompted by the current debate on the issue of manual back up systems and at least IEBC can be made aware of the technology which would be useful in both ways as a manual back up and also to allow an audit trail by securing the election results forms and which will enhance the integrity and credibility of the elections process.

We look forward to your urgent feedback

Regards
Shailesh Patel
---------- Forwarded message ---------
From **Clément Kaiser** <C Kaiser@prooftag com>
Date Fri, Dec 23, 2016 at 11 43 AM
Subject: TR: INTRODUCTION OF PROOFTAG AND ITS SOLUTIONS FOR ELECTIONS
To: "ceosoffice@iebc or ke" <ceosoffice@iebc.or ke>
Cc Shailesh Patel <dr shaileshpatel@gmail com>

Attention: Mr. Ezra Chiloba

Dear Sir,

We refer to our letter dated 14th. November, 2016 and our accompanying brochures (comprising 17 pages) titled " SECURITY KIT FOR THE POLLING STATIONS " allowing the preservation of security ,authenticity and integrity and secure collection of the Election Results Forms (on self-copying paper) and that allow track and trace of results delivery and especially useful for Presidential elections results and this manual system would be the most reliable and efficient back up system in case electronic transmission system fails.

We shall appreciate if you can consider employing this solution for the forth coming general elections scheduled for August 2017.

We shall be more than pleased to meet you in person to demonstrate our product - " Security Polling Kit " and as well as our Manual Biometric Voter Register .

Kindly acknowledge receipt of this email communication and let us have your comments, views and advise on the way forward.

Yours sincerely,

Clément KAISER

Chief Executive Officer

Email : c.kaiser@prooftag.com– Skype : clement.kaiser

PROOFTAG SAS

1100, avenue de l'Europe - 82 000 Montauban (FR)

Bureau +33 (0)5 63 21 10 51- Mobile +33 (0)6 83 80 39 42

PROOFTAG LETTER OF NOV 14 2016 TO CEO IEBC.pdf

PROOFTAG LETTER TO IEBC DD 21 SEPT 2017.pdf

BROCHURE_PROOFTAG_en.pdf

MEMORANDUM DD OCT 4 2017.pdf

SUBMISSIONS BY PETITIONER RE PETITION 159 OF ...

PET 159 OF 2017.PDF

PET 159 OF 2017 AFFIDAVIT OF PETITIONER RE KIE...

De : Clément Kaiser
Envoyé : jeudi 21 septembre 2017 14:53
À : 'wchebukati@iebc.or.ke' <wchebukati@iebc.or.ke>
Cc : 'aguliye@iebc.or.ke' <aguliye@iebc.or.ke>; 'rakombe@iebc.or.ke' <rakombe@iebc.or.ke>; 'pkurgat@iebc.or.ke' <pkurgat@iebc.or.ke>; 'echiloba@iebc.or.ke' <echiloba@iebc.or.ke>; 'jbuekane@iebc.or.ke' <jbuekane@iebc.or.ke>; 'alimo@iebc.or.ke' <alimo@iebc.or.ke>; 'info@iebc.or.ke' <info@iebc.or.ke>; 'paul.anderson@eueomkenya2017.eu' <paul.anderson@eueomkenya2017.eu>
Objet : Security Kits

Dear Mr. Chebukati,

Herewith, you will find our letter concerning our Supplementary Election Technology in respect of forms 34A, B and C.

Please feel free to contact me for any additional information you may need.

Best regards,

Clément KAISER

Chief Executive Officer

Email : c.kaiser@prooftag.com – Skype : clement.kaiser

PROOFTAG SAS

1100, avenue de l'Europe – 82 000 Montauban (FR)

Bureau +33 (0)5 63 21 10 51- Mobile +33 (0)6 83 80 39 42

---

4 attachments

2017-10-05.zip
23106K

Letter Smartmatic - IEBC dated 29th.March 2017.pdf
504K

Kanuri_Limited_Complaint_Against_Safran.pdf
87K

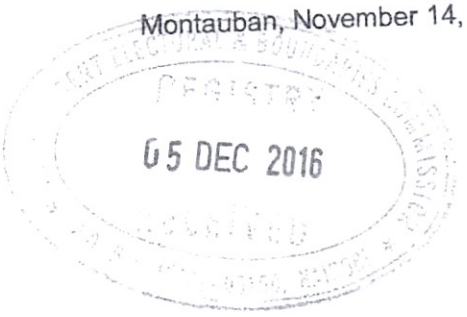
16 - Prooftag - Election EN_securityKit_Enveloppe_Forms.pdf
1782K

prooftag™
your unique proof of authenticity !

To: The Independent Electoral and Boundaries Commission (IEBC), Anniversary Towers, 6th. Floor, P.O.Box 45371-00100, Nairobi, Kenya

Attention: Mr. Ezra Chiloba, CEO, IEBC

Montauban, November 14, 2016



Our Ref: 07516-ACK

Subject: Supplement Election Technology

Dear Sir,

We are pleased to hereby inform you about our technical solution which could be advantageously implemented during the forthcoming general elections in Kenya (see attached presentation). Our solutions have previously been used, with success, in different African countries (e.g. Guinea, Central Africa, etc.). The proposed solution consists deployment of a security kit which will be delivered to each polling station. Thanks to the said security kit allowing the physical centralisation of the election result forms without any falsification or substitution, which will most definitely tremendously enhance the confidence, integrity,trasparency and credibility in the result collection process.

We would be happy to explain and demonstrate the simplicity and efficiency of our original solution which has been developed by our firm. This technology can be adopted per the Electoral Regulations that are being updated and which should allow for the adoption of our unique solution.

Please feel free to contact us for any further information required. We shall appreciate receiving your feedback through our local agents and guidelines on the way forward.

Yours faithfully,

PROOFTAG SAS
1100, Avenue de l'Europe
ZA ALBASUD
F-82000 MONTAUBAN
tél. : +33 5 63 21 10 50
www.prooftag.com
e-mail : prooftag@prooftag.com

Clément Kaiser
CEO, PROOFTAG SAS
C.c. Global Procurement Services, P.O. Box 13900606, Sarit, Nairobi, Kenya (Local Agent)

prooftag
your unique proof of authenticity !

TO: The Independent Electoral and Boundaries Commission (IEBC), Anniversary Towers, 6th Floor, P.O. Box 45371-00100, Nairobi, Kenya

Montauban, September 5, 2017

Réf: **05317-ACK**

Subject: **Supplement Election Technology**

Attention: Mr Wafula Chebukati, Chairman IEBC
Copy: Mr Wilfred O. LUSI PA/Manager

Dear Mr. Chebukati,

The present letter follows our meeting in Nairobi in January with Mr. Buyekane, organized as per recommendation made by the Chairman of the Senate ICT committee, and our different letters to the IEBC. The above-mentioned meeting and letters gave us the opportunity to present to the IEBC our original solution around the security kits for the polling stations in order to secure the results collection and centralization. Our impression was that IEBC saw our technology as a very efficient solution, but, probably for time constraints reasons, its implementation for the last elections was not decided.

In light of the recent development as per the Supreme Court judgment delivered on 1st september, 2017, so as to avoid the issues as cited therein in terms of the election declaration forms, I herewith request you to give me the opportunity to present you our solution in a face to face presentation. I'm therefore prepared to make a special trip to Kenya to meet you, the commissioners and the technocrats of the IEBC.

I'm looking forward for your feedback on the above.

Most obliged.

Yours sincerely,

PROOFTAG SAS
1100, Avenue de l'Europe
ZA ALBASUD
F - 82000 MONTAUBAN
Tél. : +33 5 63 21 10 50
www.prooftag.com
e-mail : prooftag@prooftag.com

Clément KAISER
CEO of PROOFTAG SAS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
6 SEP 2017
CHAIRMAN'S OFFICE
RECEIVED

PROOFTAG SAS
1100, avenue de l'Europe, ZI Albasud - F-82000 Montauban, France
☎ +33 (0)5 63 21 10 50 – Fax +33 (0)5 63 21 10 58
prooftag@prooftag.com – www.prooftag.net

prooftag™
your unique proof of authenticity !

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
1 AUG 2017
COMMISSIONER
PROF. ABDI YAKUB GULIYE'S OFFICE

TO: The Independent Electoral and Boundaries Commission (IEBC), Anniversary Towers, 6th Floor, P.O. Box 45371-00100, Nairobi, Kenya.

Montauban, September 13, 2017

Réf: 05417-ACK

Subject: Supplementary Election Technology in respect of FORMS 34 A, B and C

Attention: Mr. Wafula Chebukati, Chairman IEBC

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
14 SEP 2017
COMMISSIONER
DR PAUL KURGAT'S OFFICE

C.c.

IEBC Commissioners:

1) PROF. ABDI YAKUB GULIYE

2) DR. ROSELYN AKOMBE

3) DR. PAUL KIBIBOTT KURGAT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
13 SEP 2017
CEO'S OFFICE
RECEIVED

CEO, MR. EZRA CHILOBA

Head of ICT 14/9/17

Head of Elections Project Team

Mr. Wilfred O. Lusi

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
Copy
13 SEP 2017
CHIEF EXECUTIVE OFFICER'S OFFICE
RECEIVED

Mr. Andrew Limo

Dear All

The present letter follows my previous correspondences to the Chairman, resting in my letter dated September 5 and including earlier correspondences to the CEO and Head of ICT none of which have elicited any response.

The above-mentioned letters gave us an opportunity to present to the IEBC our original solution around the security kits for deployment at the polling

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
RECEIVED
14 SEP 2017
Comm. R. Akombe
COMMISSIONER

stations in order to secure the results collection and centralization with respect to Forms 34A.

To summarize, the solution we offer consists in providing a registered security kit to each polling station.
Each security kit for the polling stations contains the form 34A on self-copying paper, see-through security envelopes and Bubble Tag™ Seals.

Similarly, we can have security kits for Forms 34 B for each of the 290 constituencies.

We envisage deployment as follows:

Each copy of the form 34A and each security envelope is secured and registered with our unforgeable BubbleTag™ security technology. Once the form 34A is filled out and signed by the relevant parties, each copy will be placed into the security envelopes and sealed. One copy will be retained and displayed at the for the polling station, one copy will be availed to the respective agent of the 2 Presidential candidates, one copy would be sent to the constituency tallying center and one copy would be sent to the main tallying center at Bomas. The same process can be applied in relation to the form 34 B in which the results of all the Polling Stations in the said constituency are collated and counted and total stated for each candidate - the copies for this form can similarly be distributed in the same manner as the one for the Polling Station: One to the respective agent of each presidential candidate, one to to Bomas tallying center and one retained at the Constituency office. The same can be applied to the form 34 C which is completed at the main tallying center at Bomas after collating and totaling the count from each of the 290 constituencies. Again, one copy each can be given to the respective agent of the Presidential candidates and one retained at the Bomas and may be one availed to the Supreme Court.

Our solution, is based on our 100% resistant BubbleTag™ security solution which can't be duplicated even by us. Our solution has already been used in other Countries and helped to restore confidence in the electoral process and avoid violence. The implementation of our solution has notably been supported by the UN and the European Union.

I would be happy to present you our solution in a face to face presentation. Of course, it can be adapted and tailored according to your specific needs as you deem fit after evaluation and consultation. I am attaching for your ready reference our company profile and our standard solution for the

convey this letter and our presentation to them and I trust that you will share and deliberate with them our solution when you hold your pending meetings with them.

I look forward to receiving a positive response from you and shall appreciate if you can acknowledge receipt of this letter.

Yours sincerely,

Clément KAISER

CEO of PROOFTAG SAS

PROOFTAG SAS
1100, Avenue de l'Europe
ZA ALBASUD
F - 82000 MONTAUBAN
Tel. : +33 5 63 21 10 50
www.prooftag.com
e-mail : prooftag@prooftag.com

C.c.

1) PROF. ABDI YAKUB GULIYE (email - aguliye@iebc.or.ke)

2) DR. ROSELYN AKOMBE (email - rakombe@iebc.or.ke)

3) DR. PAUL KIBIBOTT KURGAT (email- pkurgat@iebc.or.ke)

4) MR. EZRA CHILOBA, CEO, IEBC (email - echiloba@iebc.or.ke)

5) Mr. JAMES MUHATI, Head of ICT, IEBC (email - jbuekane@iebc.or.ke)

6) Mr. ANDREW LIMO, IEBC (email - alimo@iebc.or.ke and info@iebc.or.ke)

7) Mr. PAUL ANDERSON, EU ELECTION OBSERVATION MISSION, KENYA 2017 (email - paul.anderson@eueomkenya2017.eu)

8) NASA (email-

9) JUBILLEE PARTY (email -

We envisage deployment as follows:

Each copy of the form 34A and each security envelope is secured and registered with our unforgeable BubbleTag™ security technology. Once the form 34A is filled out and signed by the relevant parties, each copy will be placed into the security envelopes and sealed. One copy will be retained and displayed at the the polling station, one copy will be availed to the respective agent of the 2 Presidential candidates, one copy would be sent to the constituency tallying center and one copy would be sent to the main tallying center at Bomas. The same process can be applied in relation to the form 34 B in which the results of all the Polling Stations in the said constituency are collated and counted and total stated for each candidate - the copies for this form can similarly be distributed in the same manner as the one for the Polling Station: One to the respective agent of each presidential candidate, one to to Bomas tallying center and one retained at the Constituency office. The same can be applied to the form 34 C which is completed at the main tallying center at Bomas after collating and totaling the count from each of the 290 constituencies. Again, one copy each can be given to the respective agent of the Presidential candidates and one retained at the Bomas and may be one availed to the Supreme Court.

Our solution, is based on our 100% resistant BubbleTag™ security solution which can't be duplicated even by us. Our solution has already been used in other Countries and helped to restore confidence in the electoral process and avoid violence. The implementation of our solution has notably been supported by the UN and the European Union.

I am attaching for your ready reference our company profile and our standard solution for the Security Kit which will be tailored according to the Kenyan requirements and basically as outlined and conceptualized above.

I trust that you will afford me an opportunity to meet you preferably along with the IEBC commissioners, the IEBC technocrats and possibly with the technical teams of both the Presidential Candidates so that I demonstrate the benefits and advantages as to how our solution can be effectively deployed in the repeat Presidential elections.

I shall appreciate if you can avail your urgent feedback so that I can make avail myself and make the necessary travel plans to visit Kenya. Also, please avail the contact details of the Jubilee and NASA election teams, respectively, and kindly

prooftag™
your unique proof of authenticity !

Montauban, September 21, 2017

Réf: 05817-ACK

Subject: Supplementary Election Technology in respect of FORMS 34 A, B and C

Attention: Mr.Wafula Chebukati, Chairman IEBC
(email - wchebukati@iebc.or.ke)

Dear Sir,

In light of the recent development as per the Supreme Court judgment which was read out in Court yesterday, on 20th September, 2017, so as to solve the issues and problems as cited therein as reported in the media concerning the election results declaration forms 34 , I shall appreciate that you share with both Jubilee and NASA our original solution configured around " the security kits for the polling stations" in order to secure the collection and centralization of the election results declaration forms and about which we have extensively written to your good self, the IEBC commissioners, the IEBC CEO and IEBC ICT head and in light of the foregoing, I am prepared to make a special trip to Kenya to meet you, the Commissioners and the technocrats of the IEBC and the respective Jubilee Party and NASA election teams, to present and show case our solution and deliberate and exchange ideas as to how it can help solve the issues narrated above to the satisfaction and mutual agreement of all the players mentioned above.

As you are well aware, we have already availed our presentation to the IEBC as directed by the Chairman of the Joint Parliamentary and Select Committee on IEBC and have subsequently written several follow up letters to the IEBC, but unfortunately, none of which have elicited any response yet.

To reiterate in summary, the solution we offer consists in providing a registered security kit to each polling station.

Each security kit for the polling stations contains the form 34A on self-copying paper, see-through security envelopes and Bubble Tag™ Seals.

Similarly, we can also have security kits for Forms 34 B for each of the 290 constituencies and one for Form 34C.

Security Kit which will be tailored according to your requirements and basically as outlined and conceptualized above.

I am therefore prepared to make a special trip to Kenya to meet you, the commissioners, the technocrats of the IEBC and the representatives of the Presidential Candidates to demonstrate as to how our solution can be effectively deployed in the forth coming Presidential elections and we shall appreciate if you can avail us the contact details of the political parties and the relevant officials of the two Presidential Candidates and trust that you will take the opportunity to avail a copy of this letter and the previous correspondence in order to enlighten them about this unique solution that will serve to overcome and avoid the pitfalls and issues that were encountered in the election just concluded. Finally, we would like to point out to you that as you may be already well aware, indeed, your technical team was fully appraised about our solution and that they were very much impressed about the same and were very positive in terms of its deployment after a presentation of the same had been made by me to the whole team in the offices of the Head of ICT as directed by the Chairman of the Joint Parliamentary Select Committee on Matters relating to IEBC.

I shall appreciate if you will discuss this matter with your team and let me have your feedback so that I can make avail myself to make a presentation of our solution to your team and all other concerned. I look forward to receiving a positive response.

Most obliged.

Yours sincerely,

PROOFTAG SAS
1100, Avenue de l'Europe
ZA ALBASUD
F - 82000 MONTAUBAN
Tél. : + 33 5 63 21 10 50
www.prooftag.com
e-mail : prooftag@prooftag.com

Clément KAISER

CEO of PROOFTAG SAS

De : Clément Kaiser
Envoyé : jeudi 21 septembre 2017 14:53
À : 'wchebukati@iebc.or.ke' <wchebukati@iebc.or.ke>
Cc : 'aguliye@iebc.or.ke' <aguliye@iebc.or.ke>; 'rakombe@iebc.or.ke' <rakombe@iebc.or.ke>; 'pkurgat@iebc.or.ke' <pkurgat@iebc.or.ke>; 'echiloba@iebc.or.ke' <echiloba@iebc.or.ke>; 'jbuekane@iebc.or.ke' <jbuekane@iebc.or.ke>; 'alimo@iebc.or.ke' <alimo@iebc.or.ke>; 'info@iebc.or.ke' <info@iebc.or.ke>; 'paul.anderson@eueomkenya2017.eu' <paul.anderson@eueomkenya2017.eu>
Objet : Security Kits

Dear Mr. Chebukati,
Herewith, you will find our letter concerning our Supplementary Election Technology in respect of forms 34A, B and C.
Please feel free to contact me for any additional information you may need.
Best regards,

Clément KAISER
Chief Executive Officer
Email : c.kaiser@prooftag.com – Skype : clement.kaiser
PROOFTAG SAS
1100, avenue de l'Europe – 82 000 Montauban (FR)
Bureau +33 (0)5 63 21 10 51- Mobile +33 (0)6 83 80 39 42

The information in this e-mail is confidential. The contents may not be disclosed or used by anyone other than the addressee. Access to this e-mail by anyone else is strictly unauthorized.
If you are not the intended recipient, please notify PROOFTAG SAS immediately and delete this e-mail.
PROOFTAG SAS cannot accept any responsibility for the accuracy or completeness of this e-mail as it has been sent over public networks. If you have any concerns over the content of this message or its Accuracy or Integrity, please contact PROOFTAG SAS immediately.
All outgoing e-mails from PROOFTAG SAS are checked using regularly updated virus scanning software but you should take whatever measures you deem to be appropriate to ensure that this message and any attachments are virus free.

SMARTMATIC

Your Ref: IEBC/PROC/10/Vol.I/2017/120

Mr. Wafula Chebukati - The Chairman

c.c Mr. Ezra Chiloba - Commission Secretary/CEO

c.c Prof Abdi Yakub Guliye - Commissioner

c.c Mr. Lawi Aura – Director of Supplies

Independent Electoral and Boundaries Commission (IEBC)
Aniversary Towers, off University Way
Nairobi, Kenya.

Amsterdam 29 Mar 2017

Ref: Tender No. IEBC/32/2016-2017: For Supply, Delivery, Installation, Testing. Commissioning and Support of the Kenya Integrated Elections Management Systems (KIEMS).

Dear Sir,

RE: Meeting Budget and Delivery Deadlines- Procurement/Lease options

Reference is made to aforementioned tender, the notification received from IEBC on February 28th, 2017 that the tender has been cancelled, and the recent announcement, on March 24th, of the award to Morpho/Safran in a direct negotiation.

We would like to take this opportunity to submit, to your kind attention, our offer and vision for the requested KIEMS systems. A permanent end-to-end solution for improving the whole elections cycle in Kenya, from voter registration, voter verification and identification, to electronic results transmission, operational support, and asset management. The key factors in our proposal are, the highest possible levels of accuracy, security, transparency, and fastest official results using a completely automated technology and processes platform. Smartmatic 's is the only proven, **end-to-end election automation platform in the world today,** that has been deployed successfully 100% of the time. We do provide an end to end and comprehensive solution portfolio, covering all KIEMS tender requirements and more, without the need to any other third party solution provider. Thus, bringing new levels of trust and reliability into the electoral processes worldwide.

With the very tight 2017 elections timeline in mind, we are very pleased to announce our commitment to meet (and beat) all the deadlines whilst delivering a professional, timely, a fully efficient and compliant offer. Below is a quick overview of our offer highlights:

1) **Immediate Devices Availability:** The reason given in your notification for cancellation of the above tender is in accordance with section 63 of the Public Procurement Asset Disposal Act as follows. *"The Electoral Law Amendment Act 2016 requires that the technology should be in place by April 10th, 2017 for preparation of the General Elections. Further, the Commission must have the*

technology in place by end of March, 2017 for use on 10th May, 2017. It is important to note that Smartmatic has roughly around 27,000 robust verification devices **in stock** in Dubai, that we utilized in Uganda. These devices are ready to be shipped overnight to Nairobi. Thus, allowing you to meet the very tight timing requirement for the required presence of verification exercise, in Kenya.

2) **Straight Procurement Pricing Competitiveness:** Since the KIEMS tender has already been cancelled, and therefore Smartmatic tender's financial envelope has not been opened, and given the fact that IEBC opted to do a direct negotiation, it is important to inform you that our fully compliant offer already submitted, in the financial envelope already in your possession, is priced aggressively at **$35.68M.** Our offer remains valid; with this offer, we can further provide the above-mentioned 27,000 verification devices for use on May 10th voter verification at no further cost, with IEBC taking care of Shipping and logistics.

3) **Leasing Option:** Smartmatic is more than willing to **lease** these verification devices to IEBC for the project. These systems can be deployed within 1-2 weeks and thus meet the technical requirements of IEBC. We hereby invite representatives of IEBC to visit our warehouse in Dubai and inspect the devices at their earliest convenience. These 27,000 verification devices along with our superb services and project management will allow IEBC to start the verification exercise on time before May 10th, 2017. Smartmatic is also open to lease these devices for the August 8th, 2017 elections. As such the total number of devices will be 46,215 as requested of which 27,000 lease and 19,215 purchase. If the IEBC opts for this lease **the total price of our fully compliant offer will go down to $28.7M** benefitting the people of Kenya. IEBC will do the field operations and assuming that the registration is now out of scope.

4) Further to the above we do confirm that we have all manufacturing activities underway and initiated to produce and deliver in time the equipment required for a perfectly functioning KIEMS system. We commit to deliver of new devices at 10,000-15,000 devices per week.

In this endeavor, we are committed and convinced that we can deliver within the stringent time constraints that the election cycle in Kenya imposes, and regardless of logistical and operational challenges in the different regions of the country, by closely partnering and working hand-in-hand with the IEBC and other institutions that may be involved.

Our technology has been deployed around the world, with a 100% success rate, never missing an election deadline or a voter registration target. We are committed to utmost transparency and work in strong partnerships with elections commissions to obtain the results citizens, political parties and institutions demand. Our most recent projects include

voters' authentication for Uganda (2016); voter registration in Zambia (2015); e- counting, transmission and consolidation in the Philippines (2016); fully automated voter authentication, e-voting, results transmission and consolidation in Venezuela (2015): Bulgaria (2016); Argentina (2015); Belgium (2014) and Ecuador (2014); internet-based voting in the United States (2016) and Estonia (2015) and pilots for results transmission and consolidation in the United Kingdom (2014) and in the United States (2016).

Allow me to once again highlight the main points:

- ✓ Smartmatic has 27,000 verification devices in stock that can be leased and deployed within 1-2 weeks. Available for inspection at our Dubai warehouse at anytime;
- ✓ Smartmatic can meet the May 10th, 2017 verification deadline with the current devices we have in stock;
- ✓ Smartmatic has started all necessary activities and investments to meet the April 10th delivery deadline;
- ✓ Smartmatic is the ONLY Company dedicated its business and experience 100% to elections business;
- ✓ Smartmatic is the ONLY company with 100% solutions, tested and proven in numerous election processes from voter education, voter registration, voter verification, Voter Identification, candidate & Political parties management, results Transmission and postelection audit;
- ✓ Smartmatic is a company with a strong track record on delivery and corporate governance. Smartmatic never failed an election;
- ✓ Smartmatic is the only company with an Integrated Elections Management System to manage end-to-end elections process including the management of the devices, people, polling stations, results, candidates etc.
- ✓ Smartmatic has successfully processed over 3.7 billion votes in the last 20 years with references in Zambia, Uganda, Phillipines (90,000 polling stations), Belgium, USA among others;
- ✓ Smartmatic's offer is very competitive, **within Budget**, as per the Press Release and will offer best value for Money for IEBC;
- ✓ We understand the challenges faced by the IEBC at the moment. Smartmatic can assist by providing end-to-end technology solution in the shortest time possible;
- ✓ Aboveall, **we commit to full compatibility and accessibility to IEBC existing Oracle-based Database and "WSQ" open standard Biometrics.**

We kindly ask to be given the opportunity to showcase to you and your team the end to end capabilities of our KIEMS system at your earliest convenience. No other supplier will be able to even come close to the functionalities and ruggedness of the proven system we will demonstrate to you. Functionalities that go way beyond what was required in the tender and reflect our many years of experience with end-to-end elections implementations. Nothing any 'ad-hoc' consortium can even dream of.

SMARTMATIC

We are very grateful for this opportunity to present our vision of end-to-end electoral automation and remain at your service to discuss it, with yourself and/or the team you see fit to appoint. It is with great excitement that we envision Kenya taking the lead, ahead of many of the African nations, in electoral automation; to enable the largest participation and most transparent elections in 2017 and look forward to a very fruitful cooperation with the Kenyan Governement in sharing ideas and experience for such an important undertaking.

This letter is written in goodfaith as an expression of our capabilities and IEBC is under no obligation to respond nor act on its contents.

Respectfully,

Chandler Molina
Managing Director
Smartmatic In

De : Clément Kaiser
Envoyé : jeudi 21 septembre 2017 14:53
À : 'wchebukati@iebc.or.ke' <wchebukati@iebc.or.ke>
Cc : 'agulive@iebc.or.ke' <agulive@iebc.or.ke>; 'rakombe@iebc.or.ke' <rakombe@iebc.or.ke>; 'pkurgat@iebc.or.ke' <pkurgat@iebc.or.ke>; 'echiloba@iebc.or.ke' <echiloba@iebc.or.ke>; 'jbuekane@iebc.or.ke' <jbuekane@iebc.or.ke>; 'alimo@iebc.or.ke' <alimo@iebc.or.ke>; 'info@iebc.or.ke' <info@iebc.or.ke>; 'paul.anderson@eueomkenya2017.eu' <paul.anderson@eueomkenya2017.eu>
Objet : Security Kits

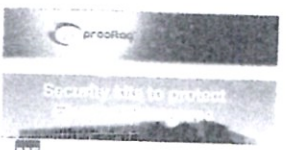
Dear Mr. Chebukati,
Herewith, you will find our letter concerning our Supplementary Election Technology in respect of forms 34A, B and C.
Please feel free to contact me for any additional information you may need.
Best regards,

Clément KAISER
Chief Executive Officer
Email : c.kaiser@prooftag.com – Skype : clement.kaiser
PROOFTAG SAS
1100, avenue de l'Europe – 82 000 Montauban (FR)
Bureau +33 (0)5 63 21 10 51- Mobile +33 (0)6 83 80 39 42

The information in this e-mail is confidential. The contents may not be disclosed or used by anyone other than the addressee. Access to this e-mail by anyone else is strictly unauthorized. If you are not the intended recipient, please notify PROOFTAG SAS immediately and delete this e-mail.
PROOFTAG SAS cannot accept any responsibility for the accuracy or completeness of this e-mail as it has been sent over public networks. If you have any concerns over the content of this message or its Accuracy or Integrity, please contact PROOFTAG SAS immediately.
All outgoing e-mails from PROOFTAG SAS are checked using regularly updated virus scanning software but you should take whatever measures you deem to be appropriate to ensure that this message and any attachments are virus free.

3 Attachments


2176_001.pdf


16 - Prooftag - El...


BROCHURE_PR...

URGENT REMINDER 13th.September, 2017

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
14 SEP 2017
COMMISSIONER
MARGARET MWACHANYA'S OFFICE

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
14 SEP 2017
COMMISSIONER
DR PAUL KURGAT'S OFFICE

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
14 AUG 2017
COMMISSIONER
BOYA MOLU'S OFFICE

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
14 AUG 2017
COMMISSIONER
PROF. ABDI YAKUB GULIYE'S OFFICE

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
Copy
13 SEP 2017
CHIEF EXECUTIVE OFFICER'S OFFICE
RECEIVED

Carsten Schürmann
Ribegade 19 4 th
2100 Copenhagen
Denmark

Reference: KEN-17-3

To
Chairman Wafula Chebukati
Independent Electoral and Boundaries Commission (IEBC),
Anniversary Towers, University Way, Fifth Floor
P O Box 45371-00100
Nairobi, Kenya

Copenhagen, September 6, 2017

EXPRESSION OF INTEREST AND UNSOLICITED PROPOSAL FOR UNDERTAKING AN AUDIT OF RESULT TRANSMISSION SYSTEM

Dear Chairman Wafula Chebukati,

In the light of the recent Supreme Court decision (September 1st, 2017) to require a new the Presidential Election, which is now scheduled for October 17, 2017, I would like to offer DemTech Group's expertise and services to the Independent Electoral and Boundaries Commission

1. to assess the quality and the security of the biometric voter verification, the KIEMS device/technology for implementing he result transmission system,
2. to develop a set of recommendations on how to reduce the attack surface of the different system,
3. to develop a plan on how to patch identified weaknesses of the system, and
4. to propose a mechanism for restoring (to the extent possible) the public trust in the election results.

DemTech Group is a consultancy firm based in Copenhagen, Denmark, that assists election commissions from around the world to cope with the difficulties of procuring, building, and running, complex voting solutions. DemTech Group is an approved and registered UNDP Vendor (with Vendor number 371260).

DemTech Group ApS
CVR: 35527052

www.demtechgroup.com
carsten@demtechgroup.com

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
14 SEP 2017
Comm R. Ahomba
COMMISSIONER

We evaluate requirements, designs, software implementations, security (technical and operational), assess risk and conduct penetration tests. Furthermore we help governments manage difficult situations that arise when things have gone wrong

We specialize in quality assurance of election technologies including biometric voter registers, voter verification and results transmission technologies and systems. DemTech Group was founded in 2013 by Prof. Carsten Schürmann. DemTech Group is working exclusive with governmental bodies and international organizations and is recognized by the UNDP.

Prof. Schürmann has extensive experience with quality assurance in the electoral domain. Together with his colleagues, Prof. Schürmann has conducted similar security analyses for the election commissions in Australia, Denmark and Switzerland, and international organizations, such as the world health organization (WHO).

DemTech Group has the capacity to conduct and complete such analysis within the next 1-2 weeks. We would gladly conduct such a project for the Independent Electoral and Boundaries Commission and shall appreciate if you can consider our firm for providing any of the services including and not limited to as described above in terms of election technology and in terms of availing solutions to the challenges that have been encountered and that you may require for the forthcoming election.

We look forward to hearing from you at the soonest and hope that we will be given an opportunity to assist and help you to enable a smooth election process that serves to enhance public trust and confidence in a fair, credible and transparent election.

Yours sincerely,
Carsten Schurmann

Copied for consideration, deliberation and necessary action:

1. **CEO, Mr. Ezra Chiloba**
2. **Commissioner, Dr. Roselyn Akombe**
3. **Commissioner, Prof. Abdi Yakub Guliye**
4. **Commissioner, Dr. Paul Kurgat**
5. **Commissioner, Ms. Margaret Mwachanya**
6. **Commissioner, Mr. Boya Molu**
7. **Head of ICT** 14/9/17
8. **Head of Elections Project Team**

DemTech Group ApS
CVR: 35527052

www.demtechgroup.com
carsten@demtechgroup.com

B. **Procedural Background**

1. On 16th December 2016, the IEBC announced and published a tender for the supply and delivery of Kenya Integrated Election Management System (KIEMS).

2. On 23rd December 2016, IEBC invited potential bidders for a pre-bidders conference where many bidders complained about the specifications of the required system because it was skewed in favor one bidder.

3. On 2nd January 2017, we were informed that a bidder by the name of Messrs. Dittel Limited, had filed a complaint against Safran/Morpho at the Public Procurement Administrative Review Board (PPARB).

4. On 6th January 2017, Kanuri Limited, applied to be enjoined in the matter as an interested party.

5. On 11th January 2017, Dittel availed evidence to the review board in the form of a Microsoft Word Document that had been leaked to them by a whistleblower, showing that the tender specifications had been edited by Adriane Bonhomie, Francois Rothenburger and Richard Bezis, between 15th September and 21st September 2016. These are officers of Safran Identity and Scytl. Refer to the Microsoft Word Document referred to as 'Annexures', which is attached herewith.

6. *Total Document changes demonstrated:*

    (a) Insertions: 50
    (b) Deletions: 149
    (c) Formatting: 42
    (d) Comments: 3

7. *Editors of the document as per tracking changes:*
    *(a) by **Bonhomme Adrien (MORPHO)** on 17-Sep-2016*
        (i) Insertions: 48
        (ii) Deletions: 149
        (iii) Formatting: 42
        (iv) Comments: 1
    *(b) by **Richard Bezis** made changes on 21-Sep-2016*
        (i) Comments: 2
    *(c) **Rothenburger Francois** made changes on 15-Sep-2016*
        Insertions: 2

8. *Possible Companies where the editors may be working based on first page search on Google:*
    *(a) **Bonhomme Adrien** Program Manager - BU MEA / Government Identity Solutions at SAFRAN MORPHO*
    *(b) **Richard Bezis** Senior Consultant at Scytl Secure Electronic Voting*
    *(c) **Rothenburger Francois** Manager Défense et Sécurité at SAFRAN MORPHO*

Kanuri Limited
P. O. Box 330-00621 Village Market Nairobi
Tel. +254 722 801318 Email. bk@kanuri.cc

29th March 2017

Dr. Ekuru Aukot
Ekuru Aukot & Company Advocates,
Roshanmaer Place, Ground Floor,
Lenana Road,
P.O. Box 4781-00100,
Nairobi, Kenya.
Email: *info@ealawconsulting.com*
Website: *http://www.ealawconsulting.com*

Dear Dr. Aukot,

OFFICIAL COMPLAINT AGAINST SAFRAN IDENTITY & SECURITY COMPANY OVER CORRUPTION AND UNFAIR TRADE PRACTICES IN TENDER NO. IEBC/32/2016-2017: SUPPLY, DELIVERY, INSTALLATION, TESTING, COMMISSIONING AND SUPPORT OF THE KENYA INTEGRATED ELECTIONS MANAGEMENT SYSTEMS (KIEMS)

A. **Instructions**

Kanuri Limited makes this formal complaint against Safran Identity, a company incorporated under the French laws and domiciled in France. Kanuri LTD is seeking the support of the French authorities in France in order to bring this complaint against Safran Identity and its officers in Kenya who corruptly influenced changes in the Kenya Integrated Elections Management System (KIEMS) tender. The tender was floated by Independent Electoral and Boundaries Commission (IEBC) of Kenya on 16th December 2016. Kanuri LTD is convinced that Safran Identity has offended both French and Kenyan Laws.

The Smith & Ouzman precedent

The French authorities may wish to recall a similar case concerning a British Company, Smith & Ouzman who had corruptly influenced Kenya's last election, the result of which was a jail term for its officers and a penalty on the company.

In summary, on 22 December 2014 Smith and Ouzman Ltd, a company specialising in printing security documents, together with its chairman, Christopher Smith and its sales and marketing manager, Nicholas Smith, were convicted at Southwark Crown Court of corruptly agreeing to make payments totalling nearly half a million pounds. These payments were used to influence the award of business contracts in Kenya and Mauritania. Other defendants were acquitted. This was the first SFO trial resulting in conviction of a corporate for foreign bribery.
For further information, please visit the following link to UK Serious Fraud Office:
https://www.sfo.gov.uk/cases/smith-ouzman-ltd/

We seek your advice on how we can officially and in the swiftest way, lodge the complaint and evidence to the authorities responsible for managing conduct of French registered companies with operations overseas. We believe the Kenyan election is at stake if the breaches on the law, as well as the conduct of this French company together with its officials are not addressed with the urgency it deserves.

BIGRADAP GROUP
TECHNOLOGIES
Intelligence Logic
A MEMBER OF THE BIGRADAP GROUP

Jayne Manjengwa
PA to CEO
+27 74 671 7854 jaynem@bigradap.co.za
+27 (0) 87 095 1200
+27 (0) 86 559 1543
info@bigradap.co.za
www.bigradap.com
Unit 31,Oxford Office Park, 3 Bauhinia Street
Highveld Techno Park, Centurion, South Africa

DELIVERING FOCUSED, RELIABLE AND INTELLIGENT IT BUSINESS SOLUTIONS

2nd Runner Up Award Winner for ITC. The innovation of ICT providers and transformation of service to large companies. SA GOVTECH of 2016

GovTech
Government Technology

Disclaimer: The information in this e-mail is intended only for the addressee and may contain information which is confidential and / or legally privileged. No person, other than the intended recipient so indicated by the sender, may use or disclose the contents of this e-mail hereto to any person unless permission is given by writing from the sender. If you are not the intended recipient, you are hereby notified that any disclosure, copying or distribution of the contents of this e-mail is strictly prohibited. Should you have received this e-mail in error, please advise Bigradap Group Technologies (PTY) LTD of the error and thereafter delete the mail immediately. The sender will not be liable to any party for any damages of any kind that could result from the sending of this email.

IEBC Kenya letter.pdf
194K

IECTO
Reg. DScm

Gmail

Expression of interest

Jayne Manjengwa <JayneM@bigradap.co.za> Thu, Sep 14, 2017 at 12:28 PM
To: "wchebukati@iebc.or.ke" <wchebukati@iebc.or.ke>
Cc: "info@iebc.or.ke" <info@iebc.or.ke>, "alimo@iebc.or.ke" <alimo@iebc.or.ke>, "echiloba@iebc.or.ke" <echiloba@iebc.or.ke>, "aguliye@iebc.or.ke" <aguliye@iebc.or.ke>, "pkurgat@iebc.or.ke" <pkurgat@iebc.or.ke>, "rakombe@iebc.or.ke" <rakombe@iebc.or.ke>, Bienvenu Ikaka <BienvenuM@bigradap.co.za>, "wogot@iebc.or.ke" <wogot@iebc.or.ke>

Dear Mr Chebukati

I hope this email find you well.

It is with great pleasure that we present to you our expression of interest for an opportunity to partner with the IEBC for a common cause. Attached herein is our letter to you, detailing our offering.

In view of the ongoing consultative meetings being held with the stakeholders and especially the respective political parties (Jubilee and NASA) of the two Presidential Candidates, we would greatly appreciate it if our proposal can also be brought to their attention and shared with them for a consensus way forward as our offering will be mutually beneficial for all the stakeholders and the country at large.

We sincerely hope our proposal will be found favourable and we are looking forward to an opportunity to meet and discuss the offering further.

Kind regards

SEP 2017

For the CEO

9. On 16th January 2017, we received communication that Dittel had abruptly and without logical explanation, withdrawn the complaint at PPARB.

10. On 17th January 2017, PPARB accepted the withdrawal of the complaint and left the matter hanging without fully investigating if there was any culpability on the side of Safran/Morpho.

11. On 17th January 2017, Kanuri Limited wrote a formal protest note to Mr. Benoit Gauthier, Economic Counselor at the French Embassy in Kenya to investigate the matter after Dittel withdrew the complaint.

12. On 21st March 2017, IEBC terminated the tender under mysterious circumstances after it emerged that Safran had been disqualified during the mandatory preliminary stage. This was after the technical and financial evaluation had been concluded. Safran did not qualify to be a bidder.

13. On 23rd March 2017, IEBC announced that discussions had been concluded and tender awarded to Safran Identity through direct sourcing despite the fact that the discussions between Safran Identity and IEBC were ongoing during the evaluation stage of the tender. Safran Identity was a bidder in the KIEMS tender who had already been technically disqualified.

C. **Conclusion**

Kanuri Limited was an interested bidder but the corrupt business practices of Safran Identity made it impossible for other bidders to have a fair chance in the tender.

We have attached all the evidence that has been submitted to us for your consideration and our interest is to ensure Safran is punished at its local jurisdiction in France for corruption which has impacted negatively on other bidders in the tender in Kenya.

With Kind Regards,

Bildad Kagai
Managing Director
Kanuri Limited

Gmail

Shailesh Patel <dr.shaileshpatel@gmail.com>

RE: SUBMISSION OF MEMORANDUM RE: NATIONAL ASSEMBLY BILL NO 39 OF 2017

Shailesh Patel <dr.shaileshpatel@gmail.com> Thu, Oct 5, 2017 at 2:26 PM
To: clerk@parliament.go.ke
Cc: csenate@parliament.go.ke, kavata musyoka <kavata.musyoka@gmail.com>

PLEASE RECEIVE PART 1 WITH ATTACHMENTS LISTED UNDER A (i)

On Thu, Oct 5, 2017 at 2:13 PM, Shailesh Patel <dr.shaileshpatel@gmail.com> wrote:

ATTENTION: THE SELECT COMMITTEE ON THE ELECTION LAWS , 2017 ESTABLISHED BY THE HOUSE TO EXAMINE AND UNDERTAKE PUBLIC PARTICIPATION ON THE ELECTION BILLS

REPRESENTATIONS / SUBMISSION OF MEMORANDUM AND SUPPORTING DOCUMENTS SENT BY EMAIL THROUGH : THE CLERK OF THE NATIONAL ASSEMBLY ,P. O . BOX 41842-00100,NAIROBI

Dear All,

I am pleased to submit my six page memorandum setting out my views and recommendations / suggestions along with supporting documents in respect of my representations in accordance with your notice published in the Standard of 29th. September, 2017 for your kind consideration.

I would like to express my gratitude for being availed the opportunity by way of public participation to make representations and give my views in respect of the Bill No. 39 of 2017 for your information , perusal and consideration and which I have done in good faith and have relied upon facts that I believe are true to the best of my knowledge.

I shall appreciate to receive your feed back and should you require any clarifications, please do not hesitate to contact me as I am at your disposal.

Kindly acknowledge receipt of this communication and the attached documentation.

I shall endeavour to submit the hard copies of the above mentioned documents in case you deem it necessary - kindly advise the number of sets required and deadline.

On reflection , I would like to make one more point in that since it is contemplated that the physical submission of FORM 34 A shall prevail and which is to be submitted to the national tallying centre , then is it really necessary for the same form to be submitted to the Constituency Tallying Centre for collation as this exercise/task can be readily be carried out by the National Tallying Centre which will receive the physical FORMS 34 A and is better placed to collate and tally all the FORMS 34 A and prepare the FORMS 34 B as it has the required manpower and also has in its possession in image format the FORMS 34 A as well as the physical versions of the same which can be verified and easily done owing to the large manpower at its disposal. I think that it is worthwhile to consider this suggestion as it will also save time. Furthermore, IEBC should develop a logistics mechanism that can expedite and facilitate the delivery of the physical FORMS 34 A to the National Tallying Centre from the Polling Stations by employing a courier service that can guarantee delivery say within 24 hours and maximum 48 hours for remote located polling stations.

Best regards
Shailesh Patel
Encl:

A. Correspondence to IEBC from the following:

(i) PROOFTAG SAS (including letters dated 14th.November 2016, September 5, 13 and 21 September ,2017 , company profile and brochure presenting the PROOFTAG SECURITY KIT TO PROTECT ELECTORAL PROCESS and email dated 21st.September, 2017.

(ii) SMARTMATIC letter dated 29th.March, 2017

(iii) DEMETECH GROUP letter dated September, 6, 2017 - reminder dated 13th.September, 2017

(iv) BIGRADAP GROUP TECHNOLOGIES (PTY) LTD letter dated September , 13, 2017 and email dated 14th.September, 2017

B. Letter of Kanuri Ltd. dated 29th.March, 2017 - refer to paragraph 1 at page 4 of my MEMORANDUM

C. Petition 159 of 2017 dated 19th.April, 2017 filed in the High Court (in relation to KIEMS contract with SAFRAN) and which remains unheard to-date despite having been filed under certificate of urgency and submitted here is the Petition plus supporting affidavit and submissions filed by the Petitioners.

D. E-mails from myself and from POOFTAG CEO as appended here below:

From: **Shailesh Patel** <dr.shaileshpatel@gmail.com>
Date: Wed, Jan 4, 2017 at 12:48 PM
Subject: Fwd: INTRODUCTION OF PROOFTAG AND ITS SOLUTIONS FOR ELECTIONS
To: Mohamed Abdullahi <caqilmohamed@gmail.com>, Amos Wako <samoswako@gmail.com>
Cc: Clément Kaiser <C.Kaiser@prooftag.com>

Dear Hon. Senator Wako and Mr. Abdullahi

Thank you for affording Mr. Kaiser and myself to make our submissions yesterday before your committee. It is most appreciated though the time was too short to present the technology/solutions for manual back up for the RTS and which also secures the results election forms (which have to written in hand - ie manual in any case) and so they must also be secured to prevent from being tempered and the solution offered caters for such a problem and also allows scanning of the results for uploading to the tallying server and in case of any dispute arising the sealed copies can be used for verification.

Prooftag also has technology for " converting " the manual voters register ' to a " biometric voter register) using the prooftag security tags which would simply require that each identity card or voters card is made into a biometric card by attaching the tag and an image of which (ie the tag) can be printed against the voters name and photo in the manual voters register and on voting day the card now carrying the tag attached to is is checked against the image of the same tag appearing in the voters register and if they match then it validates the voter to proceed to cast his ballot. This is a simple effective method and does not require dependency on electronics.

In this instance IEBC can issue the tags to all ID or Voter Cards holders or even passport holders and affix the tag and create a data base- the National Registry or Huduma centres can do this process as well - it can be done even for the forthcoming elections. Or at least the law can be changed to allow this supplementary of complementary technology (manual) so that the same can be used in future elections.

Anyhow, unfortunately , Prooftag's attempt to obtain an audience with IEBC has hitherto not borne any fruit as confirmed by Mr. Kaiser during his testimony as will be seen by the trailing email and correspondence sent by hi to IEBC which has not elicited any response despite reminders.

Since , the Chairman gave directions and guidance to Mr. Kaiser that he takes up the matter with IEBC , we shall appreciate if your offices can intervene so that he does get audience with IEBC which unfortunately operates under a closed door policy despite being a public body and impossible to get access to and so far failed to give any appointments or any audience for making presentations of the election technology solutions which is very disturbing and a sad state of affairs.

Kindly let us have your guidance and assistance so that Mr. Kaiser is given an opportunity to have an audience with IEBC so that his trip is not wasted as it was prompted by the current debate on the issue of manual back up systems and at least IEBC can be made aware of the technology which would be useful in both ways as a manual back up and also to allow an audit trail by securing the election results forms and which will enhance the integrity and credibility of the elections process.

We look forward to your urgent feedback.

Regards
Shailesh Patel
---------- Forwarded message ----------
From: **Clément Kaiser** <C.Kaiser@prooftag.com>
Date: Fri, Dec 23, 2016 at 11:43 AM
Subject: TR: INTRODUCTION OF PROOFTAG AND ITS SOLUTIONS FOR ELECTIONS
To: "ceosoffice@iebc.or.ke" <ceosoffice@iebc.or.ke>
Cc: Shailesh Patel <dr.shaileshpatel@gmail.com>

Attention: Mr. Ezra Chiloba

Dear Sir,

We refer to our letter dated 14th. November, 2016 and our accompanying brochures (comprising 17 pages) titled " SECURITY KIT FOR THE POLLING STATIONS " allowing the preservation of security ,authenticity and integrity and secure collection of the Election Results Forms (on self-copying paper) and that allow track and trace of results delivery and especially useful for Presidential elections results and this manual system would be the most reliable and efficient back up system in case electronic transmission system fails.

We shall appreciate if you can consider employing this solution for the forth coming general elections scheduled for August 2017.

We shall be more than pleased to meet you in person to demonstrate our product - " Security Polling Kit " and as well as our Manual Biometric Voter Register .

Kindly acknowledge receipt of this email communication and let us have your comments, views and advise on the way forward.

Yours sincerely,

Clément KAISER

Chief Executive Officer

Email : c.kaiser@prooftag.com– Skype : clement.kaiser

PROOFTAG SAS

1100, avenue de l'Europe - 82 000 Montauban (FR)

Bureau +33 (0)5 63 21 10 51- Mobile +33 (0)6 83 80 39 42

De : Clément Kaiser
Envoyé : jeudi 21 septembre 2017 14:53
À : 'wchebukati@iebc.or.ke' <wchebukati@iebc.or.ke>
Cc : 'aguliye@iebc.or.ke' <aguliye@iebc.or.ke>; 'rakombe@iebc.or.ke' <rakombe@iebc.or.ke>; 'pkurgat@iebc.or.ke' <pkurgat@iebc.or.ke>; 'echiloba@iebc.or.ke' <echiloba@iebc.or.ke>; 'jbuekane@iebc.or.ke' <jbuekane@iebc.or.ke>; 'alimo@iebc.or.ke' <alimo@iebc.or.ke>; 'info@iebc.or.ke' <info@iebc.or.ke>; 'paul.anderson@eueomkenya2017.eu' <paul.anderson@eueomkenya2017.eu>
Objet : Security Kits

Dear Mr. Chebukati,

Herewith, you will find our letter concerning our Supplementary Election Technology in respect of forms 34A, B and C.

Please feel free to contact me for any additional information you may need.

Best regards,

Clément KAISER

Chief Executive Officer

Email c.kaiser@prooftag.com – Skype clement.kaiser

PROOFTAG SAS

1100, avenue de l'Europe – 82 000 Montauban (FR)

Bureau +33 (0)5 63 21 10 51- Mobile +33 (0)6 83 80 39 42

7 attachments

- **MEMORANDUM DD OCT 4 2017.pdf**
  4582K
- **PROOFTAG LETTER TO IEBC DD 21 SEPT 2017.pdf**
  4269K
- **BROCHURE_PROOFTAG_en.pdf**
  2050K
- **16 - Prooftag - Election EN_securityKit_Enveloppe_Forms.pdf**
  1782K
- **PROOF TAG LETTER OF 13 SEP 2017.PDF**
  1913K
- **PROOF TAG LETTER OF 5 SEP 2017.PDF**
  575K
- **PROOFTAG LETTER OF NOV 14 2016 TO CEO IEBC.pdf**
  773K

Gmail

Shailesh Patel <dr.shaileshpatel@gmail.com>

RE: SUBMISSION OF MEMORANDUM RE: NATIONAL ASSEMBLY BILL NO 39 OF 2017

Shailesh Patel <dr.shaileshpatel@gmail.com> Thu, Oct 5, 2017 at 2:39 PM
To: clerk@parliament.go.ke
Cc: csenate@parliament.go.ke, kavata musyoka <kavata.musyoka@gmail.com>

Dear Sir,

We had to split the submissions under several parts due to large attachments .

FURTHER TO PART 1 JUST SENT , PLEASE RECEIVE PART 2 WITH ATTACHMENTS LISTED UNDER A (ii) , (iii) and (iv) and B.

Attachments listed under C to follow.

Kindly acknowlege receipt.

Regards
Patel

On Thu, Oct 5, 2017 at 2:26 PM, Shailesh Patel <dr.shaileshpatel@gmail.com> wrote:
PLEASE RECEIVE PART 1 WITH ATTACHMENTS LISTED UNDER A (i)

On Thu, Oct 5, 2017 at 2:13 PM, Shailesh Patel <dr.shaileshpatel@gmail.com> wrote:
ATTENTION: THE SELECT COMMITTEE ON THE ELECTION LAWS , 2017 ESTABLISHED BY THE HOUSE TO EXAMINE AND UNDERTAKE PUBLIC PARTICIPATION ON THE ELECTION BILLS

REPRESENTATIONS / SUBMISSION OF MEMORANDUM AND SUPPORTING DOCUMENTS SENT BY EMAIL THROUGH : THE CLERK OF THE NATIONAL ASSEMBLY ,P. O . BOX 41842-00100,NAIROBI

Dear All,

I am pleased to submit my six page memorandum setting out my views and recommendations / suggestions along with supporting documents in respect of my representations in accordance with your notice published in the Standard of 29th. September, 2017 for your kind consideration.

I would like to express my gratitude for being availed the opportunity by way of public participation to make representations and give my views in respect of the Bill No. 39 of 2017 for your information , perusal and consideration and which I have done in good faith and have relied upon facts that I believe are true to the best of my knowledge.

I shall appreciate to receive your feed back and should you require any clarifications, please do not hesitate to contact me as I am at your disposal.

Kindly acknowledge receipt of this communication and the attached documentation.

I shall endeavour to submit the hard copies of the above mentioned documents in case you deem it necessary - kindly advise the number of sets required and deadline.

On reflection , I would like to make one more point in that since it is contemplated that the physical submission of FORM 34 A shall prevail and which is to be submitted to the national tallying centre , then is it really necessary for the same form to be submitted to the Constituency Tallying Centre for collation as this exercise/task can be readily be carried out by the National Tallying Centre which will receive the physical FORMS 34 A and is better placed to collate and tally all the FORMS 34 A and prepare the FORMS 34 B as it has the required manpower and also has in its possession in image format the FORMS 34 A as well as the physical versions of the same which can be verified and easily done owing to the large manpower at its disposal. I think that it is worthwhile to consider this suggestion as it will also save time. Furthermore, IEBC should develop a logistics mechanism that can expedite and facilitate the delivery of the physical FORMS 34 A to the National Tallying Centre from the Polling Stations by employing a courier service that can guarantee delivery say within 24 hours and maximum 48 hours for remote located polling stations.

Best regards

Shailesh Patel
Encl:

A. Correspondence to IEBC from the following:

(i) PROOFTAG SAS (including letters dated 14th.November 2016, September 5, 13 and 21 September ,2017 , company profile and brochure presenting the PROOFTAG SECURITY KIT TO PROTECT ELECTORAL PROCESS and email dated 21st.September, 2017.

(ii) SMARTMATIC letter dated 29th.March, 2017

(iii) DEMETECH GROUP letter dated September, 6, 2017 - reminder dated 13th.September, 2017

(iv) BIGRADAP GROUP TECHNOLOGIES (PTY) LTD letter dated September , 13, 2017 and email dated 14th.September, 2017

B. Letter of Kanuri Ltd. dated 29th.March, 2017 - refer to paragraph 1 at page 4 of my MEMORANDUM

C. Petition 159 of 2017 dated 19th.April, 2017 filed in the High Court (in relation to KIEMS contract with SAFRAN) and which remains unheard to-date despite having been filed under certificate of urgency and submitted here is the Petition plus supporting affidavit and submissions filed by the Petitioners.

D. E-mails from myself and from POOFTAG CEO as appended here below:

From: **Shailesh Patel** <dr.shaileshpatel@gmail.com>
Date: Wed, Jan 4, 2017 at 12:48 PM
Subject: Fwd: INTRODUCTION OF PROOFTAG AND ITS SOLUTIONS FOR ELECTIONS
To: Mohamed Abdullahi <caqilmohamed@gmail.com>, Amos Wako <samoswako@gmail.com>
Cc: Clément Kaiser <C.Kaiser@prooftag.com>

Dear Hon. Senator Wako and Mr. Abdullahi

Thank you for affording Mr. Kaiser and myself to make our submissions yesterday before your committee. It is most appreciated though the time was too short to present the technology/solutions for manual back up for the RTS and which also secures the results election forms (which have to written in hand - ie manual in any case) and so they must also be secured to prevent from being tempered and the solution offered caters for such a problem and also allows scanning of the results for uploading to the tallying server and in case of any dispute arising the sealed copies can be used for verification.

Prooftag also has technology for " converting " the manual voters register ' to a " biometric voter register) using the prooftag security tags which would simply require that each identity card or voters card is made into a biometric card by attaching the tag and an image of which (ie the tag) can be printed against the voters name and photo in the manual voters register and on voting day the card now carrying the tag attached to is is checked against the image of the same tag appearing in the voters register and if they match then it validates the voter to proceed to cast his ballot. This is a simple effective method and does not require dependency on electronics.

In this instance IEBC can issue the tags to all ID or Voter Cards holders or even passport holders and affix the tag and create a data base- the National Registry or Huduma centres can do this process as well - it can be done even for the forthcoming elections. Or at least the law can be changed to allow this supplementary of complementary technology (manual) so that the same can be used in future elections.

Anyhow, unfortunately , Prooftag's attempt to obtain an audience with IEBC has hitherto not borne any fruit as confirmed by Mr. Kaiser during his testimony as will be seen by the trailing email and correspondence sent by hi to IEBC which has not elicited any response despite reminders.

Since , the Chairman gave directions and guidance to Mr. Kaiser that he takes up the matter with IEBC , we shall appreciate if your offices can intervene so that he does get audience with IEBC which unfortunately operates under a closed door policy despite being a public body and impossible to get access to and so far failed to give any appointments or any audience for making presentations of the election technology solutions which is very disturbing and a sad state of affairs.

Kindly let us have your guidance and assistance so that Mr. Kaiser is given an opportunity to have an audience with IEBC so that his trip is not wasted as it was prompted by the current debate on the issue of manual back up systems and at least IEBC can be made aware of the technology which would be useful in both ways as a manual back up and also to allow an audit trail by securing the election results forms and which will enhance the integrity and credibility of the elections process.

We look forward to your urgent feedback.

Regards
Shailesh Patel
--------- Forwarded message ---------
From **Clément Kaiser** <C Kaiser@prooftag com>
Date: Fri, Dec 23, 2016 at 11:43 AM
Subject TR· INTRODUCTION OF PROOFTAG AND ITS SOLUTIONS FOR ELECTIONS
To "ceosoffice@iebc or ke" <ceosoffice@iebc or ke>
Cc. Shailesh Patel <dr shaileshpatel@gmail com>

Attention. Mr. Ezra Chiloba

Dear Sir,

We refer to our letter dated 14th. November, 2016 and our accompanying brochures (comprising 17 pages) titled " SECURITY KIT FOR THE POLLING STATIONS " allowing the preservation of security ,authenticity and integrity and secure collection of the Election Results Forms (on self-copying paper) and that allow track and trace of results delivery and especially useful for Presidential elections results and this manual system would be the most reliable and efficient back up system in case electronic transmission system fails.

We shall appreciate if you can consider employing this solution for the forth coming general elections scheduled for August 2017.

We shall be more than pleased to meet you in person to demonstrate our product - " Security Polling Kit " and as well as our Manual Biometric Voter Register

Kindly acknowledge receipt of this email communication and let us have your comments, views and advise on the way forward.

Yours sincerely,

Clément KAISER

Chief Executive Officer

Email c kaiser@prooftag com– Skype clement kaiser

PROOFTAG SAS

1100, avenue de l'Europe - 82 000 Montauban (FR)

Bureau +33 (0)5 63 21 10 51- Mobile +33 (0)6 83 80 39 42

De : Clément Kaiser
Envoyé : jeudi 21 septembre 2017 14 53
À : 'wchebukati@iebc or ke' <wchebukati@iebc or ke>
Cc : 'aguliye@iebc or ke' <aguliye@iebc or ke>; 'rakombe@iebc or ke' <rakombe@iebc or ke>,

'pkurgat@iebc.or.ke' <pkurgat@iebc.or.ke>; 'echiloba@iebc.or.ke' <echiloba@iebc.or.ke>; 'jbuekane@iebc.or.ke' <jbuekane@iebc.or.ke>; 'alimo@iebc.or.ke' <alimo@iebc.or.ke>; 'info@iebc.or.ke' <info@iebc.or.ke>; 'paul.anderson@eueomkenya2017.eu' <paul.anderson@eueomkenya2017.eu>
Objet : Security Kits

Dear Mr. Chebukati,

Herewith, you will find our letter concerning our Supplementary Election Technology in respect of forms 34A, B and C.

Please feel free to contact me for any additional information you may need.

Best regards,

Clément KAISER

Chief Executive Officer

Email : c.kaiser@prooftag.com – Skype : clement.kaiser

PROOFTAG SAS

1100, avenue de l'Europe – 82 000 Montauban (FR)

Bureau +33 (0)5 63 21 10 51- Mobile +33 (0)6 83 80 39 42

5 attachments

- **SMARTMATIC LETTER DD 29 MARCH 17.pdf**
  504K
- **DEMTECH GROUP REMINDER LETTER DD 13 SEP 2017.pdf**
  1254K
- **BIGRADAP GROUP TECHNOLOGIES LETTER DD SEPT 13 AND EMAIL DD SEPT 14 2017.pdf**
  2180K
- **Kanuri_Limited_Complaint_Against_Safran.pdf**
  87K
- **MEMORANDUM DD OCT 4 2017.pdf**
  4582K

Gmail Shailesh Patel <dr.shaileshpatel@gmail.com>

RE: SUBMISSION OF MEMORANDUM RE: NATIONAL ASSEMBLY BILL NO 39 OF 2017

Shailesh Patel <dr.shaileshpatel@gmail.com> Thu, Oct 5, 2017 at 2:43 PM
To: clerk@parliament.go.ke
Cc: csenate@parliament.go.ke, kavata musyoka <kavata.musyoka@gmail.com>

Dear Sir,

Further to Parts 1 and 2 , please receive Part 3 with attachment listed under C.

Other 2 more parts to follow.

Kindly acknowledge receipt.

Regards
Patel

On Thu, Oct 5, 2017 at 2:39 PM, Shailesh Patel <dr.shaileshpatel@gmail.com> wrote:
Dear Sir,

We had to split the submissions under several parts due to large attachments .

FURTHER TO PART 1 JUST SENT , PLEASE RECEIVE PART 2 WITH ATTACHMENTS LISTED UNDER A (ii) , (iii) and (iv) and B.

Attachments listed under C to follow.

Kindly acknowlege receipt.

Regards
Patel

On Thu, Oct 5, 2017 at 2:26 PM, Shailesh Patel <dr.shaileshpatel@gmail.com> wrote:
PLEASE RECEIVE PART 1 WITH ATTACHMENTS LISTED UNDER A (i)

On Thu, Oct 5, 2017 at 2:13 PM, Shailesh Patel <dr.shaileshpatel@gmail.com> wrote:
ATTENTION: THE SELECT COMMITTEE ON THE ELECTION LAWS , 2017 ESTABLISHED BY THE HOUSE TO EXAMINE AND UNDERTAKE PUBLIC PARTICIPATION ON THE ELECTION BILLS

REPRESENTATIONS / SUBMISSION OF MEMORANDUM AND SUPPORTING DOCUMENTS SENT BY EMAIL THROUGH : THE CLERK OF THE NATIONAL ASSEMBLY ,P. O . BOX 41842-00100,NAIROBI

Dear All,

I am pleased to submit my six page memorandum setting out my views and recommendations / suggestions along with supporting documents in respect of my representations in accordance with your notice published in the Standard of 29th. September, 2017 for your kind consideration.

I would like to express my gratitude for being availed the opportunity by way of public participation to make representations and give my views in respect of the Bill No. 39 of 2017 for your information , perusal and consideration and which I have done in good faith and have relied upon facts that I believe are true to the best of my knowledge.

I shall appreciate to receive your feed back and should you require any clarifications, please do not hesitate to contact me as I am at your disposal.

Kindly acknowledge receipt of this communication and the attached documentation.

I shall endeavour to submit the hard copies of the above mentioned documents in case you deem it necessary - kindly advise the number of sets required and deadline.

On reflection , I would like to make one more point in that since it is contemplated that the physical submission of FORM 34 A shall prevail and which is to be submitted to the national tallying centre , then is it really necessary for the same form to be submitted to the Constituency Tallying Centre for collation as this exercise/task can be readily be carried out by the National Tallying Centre which will receive the physical FORMS 34 A and is better placed to collate and tally all the FORMS 34 A and prepare the FORMS 34 B as it has the required manpower and also has in its possession in image format the FORMS 34 A as well as the physical versions of the same which can be verified and easily done owing to the large manpower at its disposal. I think that it is worthwhile to consider this suggestion as it will also save time. Furthermore, IEBC should develop a logistics mechanism that can expedite and facilitate the delivery of the physical FORMS 34 A to the National Tallying Centre from the Polling Stations by employing a courier service that can guarantee delivery say within 24 hours and maximum 48 hours for remote located polling stations.

Best regards
Shailesh Patel
Encl:

A. Correspondence to IEBC from the following:

(i) PROOFTAG SAS (including letters dated 14th.November 2016, September 5, 13 and 21 September ,2017 , company profile and brochure presenting the PROOFTAG SECURITY KIT TO PROTECT ELECTORAL PROCESS and email dated 21st.September, 2017.

(ii) SMARTMATIC letter dated 29th.March, 2017

(iii) DEMETECH GROUP letter dated September, 6, 2017 - reminder dated 13th.September, 2017

(iv) BIGRADAP GROUP TECHNOLOGIES (PTY) LTD letter dated September , 13, 2017 and email dated 14th.September, 2017

B. Letter of Kanuri Ltd. dated 29th.March, 2017 - refer to paragraph 1 at page 4 of my MEMORANDUM

C. Petition 159 of 2017 dated 19th.April, 2017 filed in the High Court (in relation to KIEMS contract with SAFRAN) and which remains unheard to-date despite having been filed under certificate of urgency and submitted here is the Petition plus supporting affidavit and submissions filed by the Petitioners.

D. E-mails from myself and from POOFTAG CEO as appended here below:

From: **Shailesh Patel** <dr.shaileshpatel@gmail.com>
Date: Wed, Jan 4, 2017 at 12:48 PM
Subject: Fwd: INTRODUCTION OF PROOFTAG AND ITS SOLUTIONS FOR ELECTIONS
To: Mohamed Abdullahi <caqilmohamed@gmail.com>, Amos Wako <samoswako@gmail.com>
Cc: Clément Kaiser <C.Kaiser@prooftag.com>

Dear Hon. Senator Wako and Mr. Abdullahi

Thank you for affording Mr. Kaiser and myself to make our submissions yesterday before your committee. It is most appreciated though the time was too short to present the technology/solutions for manual back up for the RTS and which also secures the results election forms (which have to written in hand - ie manual in any case) and so they must also be secured to prevent from being tempered and the solution offered caters for such a problem and also allows scanning of the results for uploading to the tallying server and in case of any dispute arising the sealed copies can be used for verification.

Prooftag also has technology for " converting " the manual voters register ' to a " biometric voter register) using the prooftag security tags which would simply require that each identity card or voters card is made into a biometric card by attaching the tag and an image of which (ie the tag) can be printed against the voters name and photo in the manual voters register and on voting day the card now carrying the tag attached to is is checked against the image of the same tag appearing in the voters register and if they match then it validates the voter to proceed to cast his ballot. This is a simple effective method and does not require dependency on electronics.

In this instance IEBC can issue the tags to all ID or Voter Cards holders or even passport holders and affix the tag and create a data base- the National Registry or Huduma centres can do this process as well - it can be done even for the forthcoming elections. Or at least the law can be changed to allow this supplementary of complementary technology (manual) so that the same can be used in future elections.

Anyhow, unfortunately , Prooftag's attempt to obtain an audience with IEBC has hitherto not borne any fruit as confirmed by Mr. Kaiser during his testimony as will be seen by the trailing email and correspondence sent by hi to IEBC which has not elicited any response despite reminders.

Since , the Chairman gave directions and guidance to Mr. Kaiser that he takes up the matter with IEBC , we shall appreciate if your offices can intervene so that he does get audience with IEBC which unfortunately operates under a closed door policy despite being a public body and impossible to get access to and so far failed to give any appointments or any audience for making presentations of the election technology solutions which is very disturbing and a sad state of affairs.

Kindly let us have your guidance and assistance so that Mr. Kaiser is given an opportunity to have an audience with IEBC so that his trip is not wasted as it was prompted by the current debate on the issue of manual back up systems and at least IEBC can be made aware of the technology which would be useful in both ways as a manual back up and also to allow an audit trail by securing the election results forms and which will enhance the integrity and credibility of the elections process.

We look forward to your urgent feedback.

Regards
Shailesh Patel
---------- Forwarded message ----------
From: **Clément Kaiser** <C.Kaiser@prooftag.com>
Date: Fri, Dec 23, 2016 at 11:43 AM
Subject: TR: INTRODUCTION OF PROOFTAG AND ITS SOLUTIONS FOR ELECTIONS
To: "ceosoffice@iebc.or.ke" <ceosoffice@iebc.or.ke>
Cc: Shailesh Patel <dr.shaileshpatel@gmail.com>

Attention: Mr. Ezra Chiloba

Dear Sir,

We refer to our letter dated 14th. November, 2016 and our accompanying brochures (comprising 17 pages) titled " SECURITY KIT FOR THE POLLING STATIONS " *allowing the preservation of security ,authenticity* and integrity and secure collection of the Election Results Forms (on self-copying paper) and that allow track and trace of results delivery and especially useful for Presidential elections results and this manual system would be the most reliable and efficient back up system in case electronic transmission system fails.

We shall appreciate if you can consider employing this solution for the forth coming general elections scheduled for August 2017.

We shall be more than pleased to meet you in person to demonstrate our product - " Security Polling Kit " and as well as our Manual Biometric Voter Register .

Kindly acknowledge receipt of this email communication and let us have your comments, views and advise on the way forward.

Yours sincerely,

Clément KAISER

Chief Executive Officer

Email : c.kaiser@prooftag.com– Skype : clement.kaiser

PROOFTAG SAS

1100, avenue de l'Europe - 82 000 Montauban (FR)

Bureau +33 (0)5 63 21 10 51- Mobile +33 (0)6 83 80 39 42

De : Clément Kaiser
Envoyé : jeudi 21 septembre 2017 14:53
À : 'wchebukati@iebc.or.ke' <wchebukati@iebc.or.ke>
Cc : 'aguliye@iebc.or.ke' <aguliye@iebc.or.ke>; 'rakombe@iebc.or.ke' <rakombe@iebc.or.ke>; 'pkurgat@iebc.or.ke' <pkurgat@iebc.or.ke>; 'echiloba@iebc.or.ke' <echiloba@iebc.or.ke>; 'jbuekane@iebc.or.ke' <jbuekane@iebc.or.ke>; 'alimo@iebc.or.ke' <alimo@iebc.or.ke>; 'info@iebc.or.ke' <info@iebc.or.ke>; 'paul.anderson@eueomkenya2017.eu' <paul.anderson@eueomkenya2017.eu>
Objet : Security Kits

Dear Mr. Chebukati,

Herewith, you will find our letter concerning our Supplementary Election Technology in respect of forms 34A, B and C.

Please feel free to contact me for any additional information you may need.

Best regards,

Clément KAISER

Chief Executive Officer

Email : c.kaiser@prooftag.com – Skype : clement.kaiser

PROOFTAG SAS

1100, avenue de l'Europe – 82 000 Montauban (FR)

Bureau +33 (0)5 63 21 10 51- Mobile +33 (0)6 83 80 39 42

PET 159 OF 2017.PDF
14214K

Gmail

Shailesh Patel <dr.shaileshpatel@gmail.com>

RE: SUBMISSION OF MEMORANDUM RE: NATIONAL ASSEMBLY BILL NO 39 OF 2017

Shailesh Patel <dr.shaileshpatel@gmail.com> Thu, Oct 5, 2017 at 2:47 PM
To: clerk@parliament.go.ke
Cc: csenate@parliament.go.ke, kavata musyoka <kavata.musyoka@gmail.com>

Dear Sir,

Further to Parts 1, 2 and 3 , receive Part 4 with attachment listed under C , being the supporting affidavit filed by the Petitioners in respect of Petition No. 159 of 2017.

Kindly acknowledge receipt.

Regards
Patel

On Thu, Oct 5, 2017 at 2:43 PM, Shailesh Patel <dr.shaileshpatel@gmail.com> wrote:
Dear Sir,

Further to Parts 1 and 2 , please receive Part 3 with attachment listed under C.

Other 2 more parts to follow.

Kindly acknowledge receipt.

Regards
Patel

On Thu, Oct 5, 2017 at 2:39 PM, Shailesh Patel <dr.shaileshpatel@gmail.com> wrote:
Dear Sir,

We had to split the submissions under several parts due to large attachments .

FURTHER TO PART 1 JUST SENT , PLEASE RECEIVE PART 2 WITH ATTACHMENTS LISTED UNDER A (ii) , (iii) and (iv) and B.

Attachments listed under C to follow.

Kindly acknowlege receipt.

Regards
Patel

On Thu, Oct 5, 2017 at 2:26 PM, Shailesh Patel <dr.shaileshpatel@gmail.com> wrote:
PLEASE RECEIVE PART 1 WITH ATTACHMENTS LISTED UNDER A (i)

On Thu, Oct 5, 2017 at 2:13 PM, Shailesh Patel <dr.shaileshpatel@gmail.com> wrote:
ATTENTION: THE SELECT COMMITTEE ON THE ELECTION LAWS , 2017 ESTABLISHED BY THE HOUSE TO EXAMINE AND UNDERTAKE PUBLIC PARTICIPATION ON THE ELECTION BILLS

REPRESENTATIONS / SUBMISSION OF MEMORANDUM AND SUPPORTING DOCUMENTS SENT BY EMAIL THROUGH : THE CLERK OF THE NATIONAL ASSEMBLY ,P. O . BOX 41842-00100,NAIROBI

Dear All,

I am pleased to submit my six page memorandum setting out my views and recommendations / suggestions along with supporting documents in respect of my representations in accordance with your notice published in the Standard of 29th. September, 2017 for your kind consideration.

I would like to express my gratitude for being availed the opportunity by way of public participation to make representations and give my views in respect of the Bill No. 39 of 2017 for your information , perusal and

consideration and which I have done in good faith and have relied upon facts that I believe are true to the best of my knowledge.

I shall appreciate to receive your feed back and should you require any clarifications, please do not hesitate to contact me as I am at your disposal.

Kindly acknowledge receipt of this communication and the attached documentation.

I shall endeavour to submit the hard copies of the above mentioned documents in case you deem it necessary - kindly advise the number of sets required and deadline.

On reflection , I would like to make one more point in that since it is contemplated that the physical submission of FORM 34 A shall prevail and which is to be submitted to the national tallying centre , then is it really necessary for the same form to be submitted to the Constituency Tallying Centre for collation as this exercise/task can be readily be carried out by the National Tallying Centre which will receive the physical FORMS 34 A and is better placed to collate and tally all the FORMS 34 A and prepare the FORMS 34 B as it has the required manpower and also has in its possession in image format the FORMS 34 A as well as the physical versions of the same which can be verified and easily done owing to the large manpower at its disposal. I think that it is worthwhile to consider this suggestion as it will also save time. Furthermore, IEBC should develop a logistics mechanism that can expedite and facilitate the delivery of the physical FORMS 34 A to the National Tallying Centre from the Polling Stations by employing a courier service that can guarantee delivery say within 24 hours and maximum 48 hours for remote located polling stations.

Best regards
Shailesh Patel
Encl:

A. Correspondence to IEBC from the following:

(i) PROOFTAG SAS (including letters dated 14th.November 2016, September 5, 13 and 21 September ,2017 , company profile and brochure presenting the PROOFTAG SECURITY KIT TO PROTECT ELECTORAL PROCESS and email dated 21st.September, 2017.

(ii) SMARTMATIC letter dated 29th.March, 2017

(iii) DEMETECH GROUP letter dated September, 6, 2017 - reminder dated 13th.September, 2017

(iv) BIGRADAP GROUP TECHNOLOGIES (PTY) LTD letter dated September , 13, 2017 and email dated 14th.September, 2017

B. Letter of Kanuri Ltd. dated 29th.March, 2017 - refer to paragraph 1 at page 4 of my MEMORANDUM

C. Petition 159 of 2017 dated 19th.April, 2017 filed in the High Court (in relation to KIEMS contract with SAFRAN) and which remains unheard to-date despite having been filed under certificate of urgency and submitted here is the Petition plus supporting affidavit and submissions filed by the Petitioners.

D. E-mails from myself and from POOFTAG CEO as appended here below:

From: **Shailesh Patel** <dr.shaileshpatel@gmail.com>
Date: Wed, Jan 4, 2017 at 12:48 PM
Subject: Fwd: INTRODUCTION OF PROOFTAG AND ITS SOLUTIONS FOR ELECTIONS
To: Mohamed Abdullahi <caqilmohamed@gmail.com>, Amos Wako <samoswako@gmail.com>
Cc: Clément Kaiser <C.Kaiser@prooftag.com>

Dear Hon. Senator Wako and Mr. Abdullahi

Thank you for affording Mr. Kaiser and myself to make our submissions yesterday before your committee. It is most appreciated though the time was too short to present the technology/solutions for manual back up for the RTS and which also secures the results election forms (which have to written in hand - ie manual in any case) and so they must also be secured to prevent from being tempered and the solution offered caters for such a problem and also allows scanning of the results for uploading to the tallying server and in case of any dispute arising the sealed copies can be used for verification.

Prooftag also has technology for " converting " the manual voters register ' to a " biometric voter register) using the prooftag security tags which would simply require that each identity card or voters card is made into a biometric card by attaching the tag and an image of which (ie the tag) can be printed against the voters name and photo in the manual voters register and on voting day the card now carrying the tag attached to is is checked against the image of the same tag appearing in the voters register and if they

match then it validates the voter to proceed to cast his ballot. This is a simple effective method and does not require dependency on electronics.

In this instance IEBC can issue the tags to all ID or Voter Cards holders or even passport holders and affix the tag and create a data base- the National Registry or Huduma centres can do this process as well - it can be done even for the forthcoming elections. Or at least the law can be changed to allow this supplementary of complementary technology (manual) so that the same can be used in future elections.

Anyhow, unfortunately , Prooftag's attempt to obtain an audience with IEBC has hitherto not borne any fruit as confirmed by Mr. Kaiser during his testimony as will be seen by the trailing email and correspondence sent by hi to IEBC which has not elicited any response despite reminders.

Since , the Chairman gave directions and guidance to Mr. Kaiser that he takes up the matter with IEBC , we shall appreciate if your offices can intervene so that he does get audience with IEBC which unfortunately operates under a closed door policy despite being a public body and impossible to get access to and so far failed to give any appointments or any audience for making presentations of the election technology solutions which is very disturbing and a sad state of affairs.

Kindly let us have your guidance and assistance so that Mr. Kaiser is given an opportunity to have an audience with IEBC so that his trip is not wasted as it was prompted by the current debate on the issue of manual back up systems and at least IEBC can be made aware of the technology which would be useful in both ways as a manual back up and also to allow an audit trail by securing the election results forms and which will enhance the integrity and credibility of the elections process.

We look forward to your urgent feedback.

Regards
Shailesh Patel
---------- Forwarded message ----------
From: **Clément Kaiser** <C.Kaiser@prooftag.com>
Date: Fri, Dec 23, 2016 at 11:43 AM
Subject: TR: INTRODUCTION OF PROOFTAG AND ITS SOLUTIONS FOR ELECTIONS
To: "ceosoffice@iebc.or.ke" <ceosoffice@iebc.or.ke>
Cc: Shailesh Patel <dr.shaileshpatel@gmail.com>

Attention: Mr. Ezra Chiloba

Dear Sir,

We refer to our letter dated 14th. November, 2016 and our accompanying brochures (comprising 17 pages) titled " SECURITY KIT FOR THE POLLING STATIONS " allowing the preservation of security ,authenticity and integrity and secure collection of the Election Results Forms (on self-copying paper) and that allow track and trace of results delivery and especially useful for Presidential elections results and this manual system would be the most reliable and efficient back up system in case electronic transmission system fails.

We shall appreciate if you can consider employing this solution for the forth coming general elections scheduled for August 2017.

We shall be more than pleased to meet you in person to demonstrate our product - " Security Polling Kit " and as well as our Manual Biometric Voter Register .

Kindly acknowledge receipt of this email communication and let us have your comments, views and advise on the way forward.

Yours sincerely,

Clément KAISER

Chief Executive Officer

Email : c.kaiser@prooftag.com– Skype : clement.kaiser

PROOFTAG SAS

1100, avenue de l'Europe - 82 000 Montauban (FR)

Bureau +33 (0)5 63 21 10 51- Mobile +33 (0)6 83 80 39 42

De : Clément Kaiser
Envoyé : jeudi 21 septembre 2017 14:53
À : 'wchebukati@iebc.or.ke' <wchebukati@iebc.or.ke>
Cc : 'aguliye@iebc.or.ke' <aguliye@iebc.or.ke>; 'rakombe@iebc.or.ke' <rakombe@iebc.or.ke>; 'pkurgat@iebc.or.ke' <pkurgat@iebc.or.ke>; 'echiloba@iebc.or.ke' <echiloba@iebc.or.ke>; 'jbuekane@iebc.or.ke' <jbuekane@iebc.or.ke>; 'alimo@iebc.or.ke' <alimo@iebc.or.ke>; 'info@iebc.or.ke' <info@iebc.or.ke>; 'paul.anderson@eueomkenya2017.eu' <paul.anderson@eueomkenya2017.eu>
Objet : Security Kits

Dear Mr. Chebukati,

Herewith, you will find our letter concerning our Supplementary Election Technology in respect of forms 34A, B and C.

Please feel free to contact me for any additional information you may need.

Best regards,

Clément KAISER

Chief Executive Officer

Email : c.kaiser@prooftag.com– Skype : clement.kaiser

PROOFTAG SAS

1100, avenue de l'Europe – 82 000 Montauban (FR)

Bureau +33 (0)5 63 21 10 51- Mobile +33 (0)6 83 80 39 42

PET 159 OF 2017 SUPPORTING AFFIDAVIT OF PETITIONER.pdf
11456K

Gmail Shailesh Patel <dr.shaileshpatel@gmail.com>

RE: SUBMISSION OF MEMORANDUM RE: NATIONAL ASSEMBLY BILL NO 39 OF 2017

Shailesh Patel <dr.shaileshpatel@gmail.com> Thu, Oct 5, 2017 at 2:50 PM
To: clerk@parliament.go.ke
Cc: csenate@parliament.go.ke, kavata musyoka <kavata.musyoka@gmail.com>

Dear Sir,

Further to Parts 1,2,3 and 4 submitted via separate emails (due to large size of the attachments) , please receive the last Part 5, with attachment listed under C, being the submissions filed by the Petitioners in the High Court in respect of Petition No 159 of 2017.

This is the last and the final email.

Kindly acknowledge receipt.

Regards
Patel

On Thu, Oct 5, 2017 at 2:47 PM, Shailesh Patel <dr.shaileshpatel@gmail.com> wrote:
Dear Sir,

Further to Parts 1, 2 and 3 , receive Part 4 with attachment listed under C , being the supporting affidavit filed by the Petitioners in respect of Petition No. 159 of 2017.

Kindly acknowledge receipt.

Regards
Patel

On Thu, Oct 5, 2017 at 2:43 PM, Shailesh Patel <dr.shaileshpatel@gmail.com> wrote:
Dear Sir,

Further to Parts 1 and 2 , please receive Part 3 with attachment listed under C.

Other 2 more parts to follow.

Kindly acknowledge receipt.

Regards
Patel

On Thu, Oct 5, 2017 at 2:39 PM, Shailesh Patel <dr.shaileshpatel@gmail.com> wrote:
Dear Sir,

We had to split the submissions under several parts due to large attachments .

FURTHER TO PART 1 JUST SENT , PLEASE RECEIVE PART 2 WITH ATTACHMENTS LISTED UNDER A (ii) , (iii) and (iv) and B.

Attachments listed under C to follow.

Kindly acknowlege receipt.

Regards
Patel

On Thu, Oct 5, 2017 at 2:26 PM, Shailesh Patel <dr.shaileshpatel@gmail.com> wrote:
PLEASE RECEIVE PART 1 WITH ATTACHMENTS LISTED UNDER A (i)

On Thu, Oct 5, 2017 at 2:13 PM, Shailesh Patel <dr.shaileshpatel@gmail.com> wrote:
ATTENTION: THE SELECT COMMITTEE ON THE ELECTION LAWS , 2017 ESTABLISHED BY THE HOUSE TO EXAMINE AND UNDERTAKE PUBLIC PARTICIPATION ON THE ELECTION BILLS

REPRESENTATIONS / SUBMISSION OF MEMORANDUM AND SUPPORTING DOCUMENTS SENT BY EMAIL THROUGH : THE CLERK OF THE NATIONAL ASSEMBLY ,P. O . BOX 41842-00100,NAIROBI

Dear All,

I am pleased to submit my six page memorandum setting out my views and recommendations / suggestions along with supporting documents in respect of my representations in accordance with your notice published in the Standard of 29th. September, 2017 for your kind consideration.

I would like to express my gratitude for being availed the opportunity by way of public participation to make representations and give my views in respect of the Bill No. 39 of 2017 for your information , perusal and consideration and which I have done in good faith and have relied upon facts that I believe are true to the best of my knowledge.

I shall appreciate to receive your feed back and should you require any clarifications, please do not hesitate to contact me as I am at your disposal.

Kindly acknowledge receipt of this communication and the attached documentation.

I shall endeavour to submit the hard copies of the above mentioned documents in case you deem it necessary - kindly advise the number of sets required and deadline.

On reflection , I would like to make one more point in that since it is contemplated that the physical submission of FORM 34 A shall prevail and which is to be submitted to the national tallying centre , then is it really necessary for the same form to be submitted to the Constituency Tallying Centre for collation as this exercise/task can be readily be carried out by the National Tallying Centre which will receive the physical FORMS 34 A and is better placed to collate and tally all the FORMS 34 A and prepare the FORMS 34 B as it has the required manpower and also has in its possession in image format the FORMS 34 A as well as the physical versions of the same which can be verified and easily done owing to the large manpower at its disposal. I think that it is worthwhile to consider this suggestion as it will also save time. Furthermore, IEBC should develop a logistics mechanism that can expedite and facilitate the delivery of the physical FORMS 34 A to the National Tallying Centre from the Polling Stations by employing a courier service that can guarantee delivery say within 24 hours and maximum 48 hours for remote located polling stations.

Best regards
Shailesh Patel
Encl:

A. Correspondence to IEBC from the following:

(i) PROOFTAG SAS (including letters dated 14th.November 2016, September 5, 13 and 21 September ,2017 , company profile and brochure presenting the PROOFTAG SECURITY KIT TO PROTECT ELECTORAL PROCESS and email dated 21st.September, 2017.

(ii) SMARTMATIC letter dated 29th.March, 2017

(iii) DEMETECH GROUP letter dated September, 6, 2017 - reminder dated 13th.September, 2017

(iv) BIGRADAP GROUP TECHNOLOGIES (PTY) LTD letter dated September , 13, 2017 and email dated 14th.September, 2017

B. Letter of Kanuri Ltd. dated 29th.March, 2017 - refer to paragraph 1 at page 4 of my MEMORANDUM

C. Petition 159 of 2017 dated 19th.April, 2017 filed in the High Court (in relation to KIEMS contract with SAFRAN) and which remains unheard to-date despite having been filed under certificate of urgency and submitted here is the Petition plus supporting affidavit and submissions filed by the Petitioners.

D. E-mails from myself and from POOFTAG CEO as appended here below:

From: **Shailesh Patel** <dr.shaileshpatel@gmail.com>
Date: Wed, Jan 4, 2017 at 12:48 PM
Subject: Fwd: INTRODUCTION OF PROOFTAG AND ITS SOLUTIONS FOR ELECTIONS
To: Mohamed Abdullahi <caqilmohamed@gmail.com>, Amos Wako <samoswako@gmail.com>

Cc: Clément Kaiser <C.Kaiser@prooftag.com>

Dear Hon. Senator Wako and Mr. Abdullahi

Thank you for affording Mr. Kaiser and myself to make our submissions yesterday before your committee. It is most appreciated though the time was too short to present the technology/solutions for manual back up for the RTS and which also secures the results election forms (which have to written in hand - ie manual in any case) and so they must also be secured to prevent from being tempered and the solution offered caters for such a problem and also allows scanning of the results for uploading to the tallying server and in case of any dispute arising the sealed copies can be used for verification.

Prooftag also has technology for " converting " the manual voters register ' to a " biometric voter register) using the prooftag security tags which would simply require that each identity card or voters card is made into a biometric card by attaching the tag and an image of which (ie the tag) can be printed against the voters name and photo in the manual voters register and on voting day the card now carrying the tag attached to is is checked against the image of the same tag appearing in the voters register and if they match then it validates the voter to proceed to cast his ballot. This is a simple effective method and does not require dependency on electronics.

In this instance IEBC can issue the tags to all ID or Voter Cards holders or even passport holders and affix the tag and create a data base- the National Registry or Huduma centres can do this process as well - it can be done even for the forthcoming elections. Or at least the law can be changed to allow this supplementary of complementary technology (manual) so that the same can be used in future elections.

Anyhow, unfortunately , Prooftag's attempt to obtain an audience with IEBC has hitherto not borne any fruit as confirmed by Mr. Kaiser during his testimony as will be seen by the trailing email and correspondence sent by hi to IEBC which has not elicited any response despite reminders.

Since , the Chairman gave directions and guidance to Mr. Kaiser that he takes up the matter with IEBC , we shall appreciate if your offices can intervene so that he does get audience with IEBC which unfortunately operates under a closed door policy despite being a public body and impossible to get access to and so far failed to give any appointments or any audience for making presentations of the election technology solutions which is very disturbing and a sad state of affairs.

Kindly let us have your guidance and assistance so that Mr. Kaiser is given an opportunity to have an audience with IEBC so that his trip is not wasted as it was prompted by the current debate on the issue of manual back up systems and at least IEBC can be made aware of the technology which would be useful in both ways as a manual back up and also to allow an audit trail by securing the election results forms and which will enhance the integrity and credibility of the elections process.

We look forward to your urgent feedback.

Regards
Shailesh Patel
---------- Forwarded message ----------
From: **Clément Kaiser** <C.Kaiser@prooftag.com>
Date: Fri, Dec 23, 2016 at 11:43 AM
Subject: TR: INTRODUCTION OF PROOFTAG AND ITS SOLUTIONS FOR ELECTIONS
To: "ceosoffice@iebc.or.ke" <ceosoffice@iebc.or.ke>
Cc: Shailesh Patel <dr.shaileshpatel@gmail.com>

Attention: Mr. Ezra Chiloba

Dear Sir,

We refer to our letter dated 14th. November, 2016 and our accompanying brochures (comprising 17 pages) titled " SECURITY KIT FOR THE POLLING STATIONS " allowing the preservation of security ,authenticity and integrity and secure collection of the Election Results Forms (on self-copying paper) and that allow track and trace of results delivery and especially useful for Presidential elections results and this manual system would be the most reliable and efficient back up system in case electronic transmission system fails.

We shall appreciate if you can consider employing this solution for the forth coming general elections scheduled for August 2017.

We shall be more than pleased to meet you in person to demonstrate our product - " Security Polling Kit " and as well as our Manual Biometric Voter Register .

Kindly acknowledge receipt of this email communication and let us have your comments, views and advise on the way forward.

Yours sincerely,

Clément KAISER

Chief Executive Officer

Email : c.kaiser@prooftag.com– Skype : clement.kaiser

PROOFTAG SAS

1100, avenue de l'Europe - 82 000 Montauban (FR)

Bureau +33 (0)5 63 21 10 51- Mobile +33 (0)6 83 80 39 42

De : Clément Kaiser
Envoyé : jeudi 21 septembre 2017 14:53
À : 'wchebukati@iebc.or.ke' <wchebukati@iebc.or.ke>
Cc : 'aguliye@iebc.or.ke' <aguliye@iebc.or.ke>; 'rakombe@iebc.or.ke' <rakombe@iebc.or.ke>; 'pkurgat@iebc.or.ke' <pkurgat@iebc.or.ke>; 'echiloba@iebc.or.ke' <echiloba@iebc.or.ke>; 'jbuekane@iebc.or.ke' <jbuekane@iebc.or.ke>; 'alimo@iebc.or.ke' <alimo@iebc.or.ke>; 'info@iebc.or.ke' <info@iebc.or.ke>; 'paul.anderson@eueomkenya2017.eu' <paul.anderson@eueomkenya2017.eu>
Objet : Security Kits

Dear Mr. Chebukati,

Herewith, you will find our letter concerning our Supplementary Election Technology in respect of forms 34A, B and C.

Please feel free to contact me for any additional information you may need.

Best regards,

Clément KAISER

Chief Executive Officer

Email : c.kaiser@prooftag.com– Skype : clement.kaiser

PROOFTAG SAS

1100, avenue de l'Europe – 82 000 Montauban (FR)

Bureau +33 (0)5 63 21 10 51- Mobile +33 (0)6 83 80 39 42

SUBMISSIONS BY PETITIONER RE PETITION 159 OF 2017.pdf
284K

107

OUR REF: NECA LTD 1/10/2017/3
From: James Ngetich, Post Office Box 71-00517
UHURU- GARDENS, Nairobi, Kenya. Cell: 0714026729
Email: ngetichjames84@gmail.com
DATE 1-10-2017.

MR. MICHAEL R. SIALAI, EBS
CLERK OF THE NATIONAL ASSEMBLY
NAIROBI KENYA Clerk @ Parliament.go.ke

MR. J.M. NYEGENYE, CBS CLERK OF THE SENATE ASSEMBLY AND SECRETARY PARLIAMETARY SERVICE COMMISSION NAIROBI, KENYA> C SENATE @PARLIAMENT.GO.KE.

RE: PUBLIC PARTICIPATION AND SUBMISSION OF MEMORANDA ON ELECTION (AMENDMENT) BILL AS PER DAILY NATION OF 01.10.2017 UNDER NEWTONIAN ERA.

1. The Election (Amendment) Bill before you is constitutional. It is compulsory because propaganda is yet to be eliminated following the impact of end of cold war in 1989 and technology cannot be fully embraced until we have blessed our youth under new-Era.
2. Jubilee Party to take the issue based politics and put democracy in the right place where 40 million of Kenyans are binded and accessed. (ii). Article 4(2) abolish opposition parties and Article 1(3) (a) (b) and (c) is to comply with binding and accessing all people of Kenya through Media, Provincial Administration and Court user committees
3. Binding Article is Article 118 public Access and Participation Bill yet to be enacted but petition to be revisited and submitted through Hon. Nixon Korir MP. Langata Constituency
4. Media has totally failed Kenyans by refusing to open doors for reforming. Current formula for policy formulation is use of Applied Research whose source of ideas is practical problems. Do we need to go for post-graduate studies to know our problems? Which university did God of Israel attend?.
5. Media should only be enjoyed by the President and Deputy until binding the Kenyan population. The news currently being aired is Fake news and Media coverage should be suspended immediately and political analyst be sent back to Universities to continue lecturing till the Media has fully compiled with the constitution, Law and fear of God(Action by communication Authority of Kenya urgently required) with support from you.
6. LSK is a professional body of lawyers and currently are yet to be binded by the Constitution 2010. All professionals, Civil society Organization, N.G.O's Religious Leaders, not a

parliament –are strangers, Article 59 Kenya National Human Rights and Equality Commission is entry point.

7. Petition of 2015 to both houses to be revisited by Hon. NIXON KORIR MP Langata and HON.SAKAJA, SENATOR Nairobi County whose content was to Transition-Transformation Bill under New-Era which is scientific for this Country to move forward.
8. **Judiciary:** When chief justice and president of supreme Court annulled the presidential election 2010 basing on fidelity to constitution adherence to rule of law and fear of God, he was absolutely right. The president is supposed to be the only presidential candidate. If the constitution 2010 is used the way it is, the efforts and processes which had taken to formulate it rendered is meaningless
9. **Harmonized 2015 Kenya Constitution 2010**. This version is in the petition and it contains a long story of modernization/industrialization, post and pre independent era and cold war impacts and effects all taken into account from 1st century to 21st century and beyond, any body who perfectly knows the God of Israel can easily understand that he is the only God we are to worship. Therefore, parliamentarians who have been in opposition have to go along the standards to be set in regard to implementation of the constitution 2010 through Harmonized version.
10. **Technology**: Mistrust can be eliminated gradually through use of Affirmative action programs contained in Article 27 equality and freedom from discrimination and Article 55 youth. Opposition, basing on timeframe should come in but the protocol for timelines are to be fully specified.
11. **Technology**: Countries that had been major victims of cold war such as U.S.A and North Korea, U.S.A and Russia, U.S.A and Iran are two separate entities while Kenya is unique in that Luos and Kikuyu are just like conjoin twins. They are in the government, provincial Administration and in the constitutional and independent commission and as such Luos have not been Marganized. New Era eliminates all these obstacles even the developed countries are to use this formula since the entire global family are torn top-down, people are frustrated and hopeless as witnessed by the number of suicides and various disasters.

12. Way forward

1. Kenya turning point was after **2007/2008** disputed presidential election and Hague six final liberation, a title connecting Kenya with entire world was not taken seriously.
2. Pre-trial conference, the sociology of law and theories of law. (supreme court of Kenya Article **163(7)(8) and (9).** Pre-trial conference in judiciary hopefully is an equivalent of the current public participation which implies the entire 40 million population comprised of slaves, slave drivers, poor, homeless, illiterate and literate are fully considered by all leaders. In regard to any development decisions.

i. Theories of Law: The cornerstone of the formal control system is the law. Generally, Law is seen as serving three major functions; it provides formal sanctions to encourage conformity and discourage deviance, it helps settle disputes, and it may be an instrument for social change (Vago 1989).

ii. Most citizens, and probably even most sociologists', take a general structural – functional approach to law (Rich 1977) By clearly spelling out expected behaviours and punishing violators, the law helps maintain society.
Conflict theorists, take a somewhat different position They suggest that the legal apparatus was designed to maintain and reproduce the system of inequality Law, in this view is a tool used by elites to dominate and control others (Chamblis1978)

iii. The pre-trial phases of prosecution are often more crucial to arriving at judicial decisions of guilt or innocence than are court trials themselves

iv Conclusion

1 Article

Submitted for your consideration

Yours slave and God's spokesman

James Kipsang Ngetich
Prophet- Correction/Product- Innovator/ Transformational Consultant
Newtonian Era Consulting Angencies Ltd.
Newtonianera@gmail com

C.C –HON JUSTICE DAVID MARAGA

- HON. NIXON KORIR MP LANGATA
- HON. SAKAJA SENATOR NAIROBI COUNTY
- MR. FRANCIS WANGUSI, DIRECTOR GENERA CAK
- FATOU BENSOUDA - ICC

108

Gmail

Halimaa Absiye <halimabsiye@gmail.com>

Fwd: Submission on amendment of election laws 2017

2 messages

kavata musyoka <kavata.musyoka@gmail.com> Thu, Oct 5, 2017 at 2:05 PM
To: Lucy Radoli <lucyradoli@gmail.com>, Clare Jerotich <clare.jerotich@gmail.com>, fiona musili <fiona.musili@gmail.com>, Halimaa Absiye <halimabsiye@gmail.com>, George Jusa <ggazemba@gmail.com>

Kavata Musyoka,
The Senate, Parliament of Kenya,
Clerk Assistant, Standing Committee on Legal Affairs and Human Rights.

---------- Forwarded message ----------
From: **The Clerk Senate** <csenate@parliament.go.ke>
Date: Thu, Oct 5, 2017 at 1:31 PM
Subject: Fwd: Submission on amendment of election laws 2017
To: MARY JEBET CHESIRE <mjchesire@yahoo.com>, kavata musyoka <kavata.musyoka@gmail.com>, Directorate of Legal Services <dlssenate@parliament.go.ke>

From: "Boniface Makau" <bfmakau@gmail.com>
To: clerk@parliament.go.ke, csenate@parliament.go.ke
Sent: Thursday, October 5, 2017 12:51:24 PM
Subject: Submission on amendment of election laws 2017

Dear Sir/Madam,

The charged but peaceful recent elections in Germany is a worthwhile example of what we should aim at in Kenya. However, it is worthwhile looking at the historical background of how Germany arrived where they are today. Today's peaceful elections in Germany, and indeed most of Europe, is the result of extremely painful lessons learnt over centuries of revolutions, mayhem and human rights abuses, including two world wars.They have learnt their lessons and moved on to dispense justice and fair play, the bedrocks of peace, among their populations. This history tells how Germany and the West, including the USA, turned a blind eye to the highly toxic goings on and hate speeches of the day while Nazism, and eventually World War II, incipiently gripped Europe.

Fast forward, Germany has recently held its peaceful elections in which the winner, Angela Merkel received 34% of the vote. However, in order to have an inclusive government and be able to rule through a broad consensus of the population, she will form a coalition government with other parties which gained less votes. The process of arriving at such coalition in Germany is a bit complex but the point being made here is that it is a coalition government. We in Kenya should take advantage to learn from the tortured history of others and emulate them. Thus coalition government, which is unfortunately nicknamed "nusu mkate" here in Kenya, is about the only way out of our present political predicament and we should take steps to shape it to suit our needs. The current provision in our constitution for the winner to get 50% plus one and at least 25 counties was an attempt to bring in as many communities as possible into the formation of government. However, the reality is that because of the demographic structure of our population, this is in reality a winner takes it all formulation and it will never solve our political cohesion challenges, even for the next 100 years and beyond.

Further, note that Germany is a Federal Republic with strong federal governments. This, together with the coalition arrangement, reinforces the feeling of broad inclusivity in government/public affairs among its people, including the feeling of being in charge of their respective destinies. Here in Kenya, despite the initial teething challenges, devolution is working well and will go a long way in strengthening our togetherness in the sense of a fair sharing of resources and self-determination of the respective regions/communities. At the national level, let us complement the devolution efforts by fully embracing coalition government. At the moment, Parliament is making attempts at quick fixes to the election laws. However, we need to sit down to work with experts and communities to prepare long term proposals for coalition government arrangements which suit us and incorporate them into our constitution. In the long run after all else has been tried at great material and human cost, which cost we want to avoid, we will find that coalition is the only way out to contain our political governance challenges that have continued to pose great danger to the peace and unity that we so much want for our beloved country.

Consequently, I strongly urge that we get on with the elections without what I consider to be quick fixes to the law and get to re-work the constitution after the elections with a view to anchoring coalition governance in our constitution.

Boniface F. Makau,
Nairobi.

--

Office of the Clerk of the Senate/Secretary,
Parliamentary Service Commission
Main Parliament Buildings, 1st Floor
P.O. Box 41842 - 00100
NAIROBI
Tel: 254- 020-2848000

George Jusa <ggazemba@gmail.com> Fri, Oct 6, 2017 at 7:29 AM
To: Walala Ron <rwalala@gmail.com>, Halimaa Absiye <halimabsiye@gmail.com>, Doreen Karani <karanidoreen@gmail.com>, Salem Lorot <dicksalemlorot@gmail.com>, Lucy Radoli <lucyradoli@gmail.com>, mjchesire@yahoo.com

---------- Forwarded message ----------
From: **Clerk of the National Assembly** <clerk@parliament.go.ke>
Date: Thu, Oct 5, 2017 at 1:09 PM
Subject: Fwd: Submission on amendment of election laws 2017
To: Florence Abonyo <abonyoflora@yahoo.com>, Peter Chemweno <pkc@parliament.go.ke>, nick eme <emejen@gmail.com>, George Jusa <ggazemba@gmail.com>

From: "Boniface Makau" <bfmakau@gmail.com>
To: clerk@parliament.go.ke, csenate@parliament.go.ke
Sent: Thursday, October 5, 2017 12:51:24 PM
Subject: Submission on amendment of election laws 2017

Dear Sir/Madam,

The charged but peaceful recent elections in Germany is a worthwhile example of what we should aim at in Kenya. However, it is worthwhile looking at the historical background of how Germany arrived where they are today. Today's peaceful elections in Germany, and indeed most of Europe, is the result of extremely painful lessons learnt over centuries of revolutions, mayhem and human rights abuses, including two world wars.They have learnt their lessons and moved on to dispense justice and fair play, the bedrocks of peace, among their populations. This history tells how Germany and the West, including the USA, turned a blind eye to the highly toxic goings on and hate speeches of the day while Nazism, and eventually World War II, incipiently gripped Europe.

Fast forward, Germany has recently held its peaceful elections in which the winner, Angela Merkel received 34% of the vote. However, in order to have an inclusive government and be able to rule through a broad consensus of the population, she will form a coalition government with other parties which gained less votes. The process of arriving at such coalition in Germany is a bit complex but the point being made here is that it is a coalition government. We in Kenya should take advantage to learn from the tortured history of others and emulate them. Thus coalition government, which is unfortunately nicknamed "nusu mkate" here in Kenya, is about the only way out of our present political predicament and we should take steps to shape it to suit our needs. The current provision in our constitution for the winner to get 50% plus one and at least 25 counties was an attempt to bring in as many communities as possible into the formation of government. However, the reality is that because of the demographic structure of our population, this is in reality a winner takes it all formulation and it will never solve our political cohesion challenges, even for the next 100 years and beyond.

Further, note that Germany is a Federal Republic with strong federal governments. This, together with the coalition arrangement, reinforces the feeling of broad inclusivity in government/public affairs among its people, including the feeling of being in charge of their respective destinies. Here in Kenya, despite the initial teething challenges, devolution is working well and will go a long way in strengthening our togetherness in the sense of a fair sharing of resources and self-determination of the respective regions/communities. At the national level, let us complement the devolution efforts by fully embracing coalition government. At the moment, Parliament is making attempts at quick fixes to the election laws. However, we need to sit down to work with experts and communities to prepare long term proposals for coalition government arrangements which suit us and incorporate them into our constitution. In the long run after all else has been tried at great material and human cost, which cost we want to avoid, we will find that coalition is the only way out to contain our political governance challenges that have continued to pose great danger to the peace and unity that we so much want for our beloved country.

Consequently, I strongly urge that we get on with the elections without what I consider to be quick fixes to the law and get to re-work the constitution after the elections with a view to anchoring coalition governance in our constitution.

Boniface F. Makau,
Nairobi.

109

Gmail

Halimaa Absiye <halimabsiye@gmail.com>

Fwd: DEBATE ON ELECTORAL REFORMS

1 message

George Jusa <ggazemba@gmail.com> Fri, Oct 6, 2017 at 7:28 AM
To: Halimaa Absiye <halimabsiye@gmail.com>, Doreen Karani <karanidoreen@gmail.com>, Salem Lorot <dicksalemlorot@gmail.com>, Lucy Radoli <lucyradoli@gmail.com>, mjchesire@yahoo.com, Walala Ron <rwalala@gmail.com>, kavata.musyoka@gmail.com

---------- Forwarded message ----------
From: **Clerk of the National Assembly** <clerk@parliament.go.ke>
Date: Thu, Oct 5, 2017 at 1:08 PM
Subject: Fwd: DEBATE ON ELECTORAL REFORMS
To: Florence Abonyo <abonyoflora@yahoo.com>, Peter Chemweno <pkc@parliament.go.ke>, nick eme <emejen@gmail.com>, George Jusa <ggazemba@gmail.com>

From: "catherine watuka" <wcatherinem@gmail.com>
To: clerk@parliament.go.ke
Sent: Thursday, October 5, 2017 12:43:46 PM
Subject: DEBATE ON ELECTORAL REFORMS

Electoral reform has become a staple discussion in Kenya; much talked about but seldom implemented. The challenge of supporting a viable and independent IEBC needs to be assessed in the context of what has not worked well for us in the past. The just concluded August 8th elections involved industrial-scale fraud, the active collusion of senior IEBC staff, and incredibly strained Kenya's relationship with the international community that funded it and provided advisors to support it.

There are three primary issues affecting the IEBC: intimidation (in relation to it's independence), fraud and a declining turnout. These issues have plagued the IEBC since its creation. The notion of independence is not well entrenched or respected, and this issue continues to impede the functioning of the IEBC. Although the staff have generally been very experienced electoral managers in their own right, none has been able to adequately withstand interference. All members of the IEBC must be strictly apolitical; a partisan IEBC will not work in Kenya.

The voter registration method is flawed with glaring gaps in terms of using new technology in the voter registration database, or lack thereof. The IEBC is a permanent institution, and its daily activities and events are technically funded from the national budget. Consistency in funding continues to hinder its development, and directly affects its long-term sustainability. The Kenyan government lacks the fiscal capacity to sustain the IEBC to undertake significant programmes such as voter registration and elections, which means

the institution relies heavily on international donor support, which has been inconsistent in application and delivery.

Yes we need reforms but newly proposed reforms from the two major political parties may present opportunities for manipulation from either side, so there are risks to be managed. The first is that of trying to solve the wrong problems For example, what is the purpose of investing heavily in a sophisticated voter registration and vote transmission system if the real problem is that the polling officials are intimidated, suborned, or corrupted by parties and candidates, making the authenticity of the register itself largely irrelevant? Major reforms, especially those involving technological innovation, can be very expensive considering long-term maintenance costs. A decision to adopt a specific technological approach may well lock IEBC into maintaining a way of dealing with a problem that will be difficult, or increasingly expensive, to sustain in the long run. Thanks to Kenya's dire political culture, there may be little to gain from massive investment in technology, since even if it works it may simply displace fraud from one area of the system to another. On the other hand, if reforms are pursued without strong political support across the board, opponents of a particular side are likely to start looking for opportunities to characterize it as a failure, and to push for its abandonment The IEBC will continue to be an Achilles heel in electoral management in Kenya until the it is capable of handling complaints. It is likely that issues such as gender balance and engaging minorities including the disabled, will take a back seat until these core matters are resolved

110

CONTRIBUTION TO:

The Election Laws (Amendment) Bill, National Assembly Bills No. 39 of 2017

by Wycliffe Mutero (johnliffe@yahoo.com)

In his summary judgement, the Chief Justice stressed on the need for fidelity to Kenya's Constitution and Election laws. He went on to state that massive irregularities and illegalities had taken place.

During the detailed judgment, the above accusations were poorly substantiated. In view of this, I suggest that a quantitative dimension on fidelity be introduced into the Elections Act. A certain threshold of irregularities and illegalities must be reached before Presidential Elections can be annulled. This would require that any irregularities and illegalities cited be quantifiable. If they are not quantifiable, then they should be ignored.

For those irregularities and illegalities that are quantifiable, a blanket threshold of **75%** could for instance be set. This would work as follows (three potential areas of contention are considered here but there could be more).

1. **FORMS**: The Presidential Election shall be annulled if **75%** or more of the **physical** Forms (34A or 34B) are invalid. A form is considered to be **invalid** if it does not contain any or all of the information shown below.
    i. Name of Polling Station or Constituency;
    ii. Correct date;
    iii. Signature of appropriate officer;
    iv. Correct stamp;
    v. Number of votes cast;

2. **POLLING ENVIRONMENT**:

The Presidential Election shall be annulled if in **75%** or more of the polling stations in every county, the casting of votes is disrupted by factors such as violence. These factors must be proved using video evidence or other credible scientific method.

3. **VOTE RIGGING**:

The Presidential Election shall be annulled if in **75%** or more of the polling stations in every county, there has been rigging. The rigging must be proved using video evidence, quantitative data or other credible scientific method.

Gmail

Halimaa Absiye <halimabsiye@gmail.com>

Fwd: Proposed election amendment bill 2017

1 message

George Jusa <ggazemba@gmail.com> Fri, Oct 6, 2017 at 7:25 AM
To: Halimaa Absiye <halimabsiye@gmail.com>, Walala Ron <rwalala@gmail.com>, Salem Lorot <dicksalemlorot@gmail.com>, Doreen Karani <karanidoreen@gmail.com>, Lucy Radoli <lucyradoli@gmail.com>, mjchesire@yahoo.com, kavata.musyoka@gmail.com

---------- Forwarded message ----------
From: **Clerk of the National Assembly** <clerk@parliament.go.ke>
Date: Thu, Oct 5, 2017 at 11:05 AM
Subject: Fwd: Proposed election amendment bill 2017
To: Florence Abonyo <abonyoflora@yahoo.com>, Peter Chemweno <pkc@parliament.go.ke>, nick eme <emejen@gmail.com>, George Jusa <ggazemba@gmail.com>

From: "Gregory Mweu" <gregorymweu2015@gmail.com>
To: clerk@parliament.go.ke
Sent: Thursday, October 5, 2017 10:57:44 AM
Subject: Proposed election amendment bill 2017

I write this on my behalf and anyone else interested and who cares for this beautiful country of ours.

To begin with, the proposed amendments may be in good faith but the timing is very suspect.How do you expect the IEBC to comply with new laws passed within less than a month to an election,will the commission have time to internalize the new requirements?? In addition an election is not an event but a process,every step of the process is as important as any other.Management of results is as important as the the voting itself,otherwise it is in the forms 34As and 34Bs in which the will of the people is captured.Numbers are as much important as the procedure through which they were arrived at.

Secondly the proposal to legalize a government in office to air adverts on its achievements is illegal,should never be allowed.Let a government work and let the people see.

On the issue of quorum of the commission,that should be left to the independent commission to decide but should not be half of the total number of commissioners in my view.

The constitution provides for the requirements of one to qualify to be the chair of IEBC,anything else is unconstitutional thus null and void.

On the issue of manual results prevailing in case of a contradiction,we invested heavily on technology to cure ills brought about by the manual results,remember what happened to our country in the disputed 2007 elections, our country was at the brink of collapse.we should never go back there.

The quorum of the Supreme Court is provided for in the constitution.You can not raise the threshold for a majority in the Supreme Court.
Finally only the Chief Justice or the registrar of the judiciary are allowed by law to swear in a president,that should not change.

112

THE ELECTION LAWS (AMENDMENT) BILL 2017

Introduction

I, John Kisigwa, a citizen of the Republic of Kenya do hereby participate in giving my views on the Election Laws (Amendment) Bill 2017 that is currently before Parliament for debate.

I do so in full realization of my constitutional duty in accordance with Article 118 (1) (b) of the Constitution of Kenya 2010 that states, "*Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its committees.*"

My views on the amendment bill

1. Section 2 of the Amendment Bill
   a. Proposed statutory provision

It states that chairperson means the chairperson of the Commission appointed in accordance with Article 250 (2) of the Constitution and in the absence of the chairperson, the vice-chairperson, or such other person acting as the chairperson in the absence of both the chairperson and vice-chairperson.

   b. Personal views

Article 138 (10) (a) of the Constitution states that, "*Within 7 days after the presidential election, the chairperson of the Independent Electoral and Boundaries Commission shall declare the result of the election.*"

While this proposed provision caters for a contingency in the event of absence of the national retuning officer, it is not expressly stated in the Constitution hence an implication arises out of it.

It is thus subject to potential and intentional misinterpretation by the aggrieved candidate during a presidential election when not in agreement with the results and the acting Chairperson who steps in on behalf of the chairperson or vice-chairperson in the absence of the two as sanctioned by the commissioners to announce presidential results.

2. Section 4 of the Amendment Bill

    a. Proposed statutory provision

The Independent Electoral and Boundaries Commission Act No. 9 of 2011 is amended in the Second Schedule by deleting the words, "*five members of the Commission*" appearing in paragraph 5 and substituting therefore the words, "*half of the existing members of the Commission, provided that the quorum shall not be less than three members* "

    b. Personal views

The quorum for conducting business ought to be a simple majority meaning half of the members of the Commission plus one commissioner at the very least.

Article 250 (1) of the Constitution of Kenya states that, "*Each commission shall consist of at least three, but not more than nine, members.*"

Having a simple majority is to avoid scenarios of the Independent Electoral and Boundaries Commission, hereinafter referred to as IEBC, having an even number of commissioners such as eight, six or four and a decision made by half of the commissioners while the other half are absent.

3. Section 5 of the Amendment Bill

    a. Proposed statutory provision

Section 29 of the Elections Act 2011 is deleted. It previously stated that, "*Persons who nominate an independent presidential candidate shall not be members of any political party.*"

    b. Personal views

The problem is that an independent candidate will become free to receive nomination from members of a political party hence defeating the whole purpose of independence from any political party.

Section 29 should not be deleted just because Article 85 of the Constitution only states that, "*An independent candidate is not a member of a registered political party and has not been a member for at least three months immediately before the date of election.*" This constitutional provision is silent on the criteria used for nominators.

What will most likely happen is that an independent candidate will simply hire nominators from a political party and still claim to be an independent candidate making it prone to abuse.

4. Section 6 (b) of the Amendment Bill

    a. Proposed statutory provision

Section 39 of the Elections Act 2011 is amended by stating, "*The Commission shall tally and verify the results received at the constituency tallying centre and national tallying centre.*"

b. Personal views

It ought to read, "*The Commission shall tally and verify the results received at the polling station, constituency tallying centre and the national tallying centre.*"

Forms 34A from the polling station should be the very first point of reference and their cumulation should correctly generate Forms 34B for the constituency tallying centre which cumulatively should generate a correct and accurate Form 34C to announce the winner of the presidential election.

This will align the declaration of results with the judicial precedent set by the Court of Appeal in *Independent Electoral & Boundaries Commission v Maina Kiai, Khelef Khalifa, Tirop Kitur, Attorney-General, Katiba Institute & Coalition for Reforms & Democracy [2017] Civil Appeal 105 of 2017* commonly referred to as the Maina Kiai case. The precedent set by this case was that results announced at the polling station are final.

5. Section 8 of the Amendment Bill
   a. Proposed statutory provision

This provision states that, "*Notwithstanding the provisions of Section 44, the Commission* may *put in place a complementary mechanism for identification of voters that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the Constitution* "

The intention is to amend Section 44A in its entirety.

b. Personal views

The previous statutory provision should be retained as is.

It said that, "*Notwithstanding the provisions of Section 39 and Section 44, the Commission* shall *put in place a complementary mechanism for identification of voters and transmission of election results that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the Constitution.*"

The reasoning behind this is that in the event the biometrics systems fail, we must have a ready backup always in place or else the entire voting process on voting day will fail due to lack of a backup.

113

THE CHAIRPERSON,
PARLIAMENT AD HOC COMMITTEE,
ON ELECTION LAWS AMENDMENT BILLS,
COUNTY HALL,
NAIROBI – KENYA

ISAIAH WAWERU NGUMI
P.O. BOX 1343 – 00902
KIKUYU – KENYA
TEL: 0727553103
EMAIL:wayonda@yahoo.com

Dear Sir/Madam,

RE: MEMORANDUM ON THE ELECTION LAWS AMENDMENT BILLS NO. 39 OF 2017

The above matter refers.

Here below are my contributions to these Bills:

1. Include in the Bills that: A Presidential Election shall not be invalidated unless the Supreme Court of Kenya is convinced that the election results are not in accordance with Article 138 (4) and (7) of the Constitution of Kenya 2010.

2. Given that it is only the Chairperson of IEBC who is mandated by Article 138 (10) (a) of the Constitution of Kenya 2010 to declare the results of a Presidential Election held under Article 138 (9) of the Constitution of Kenya 2010, the Returning Officer's declaration at the Polling Station can only be final for all the other election results save for the Presidential ones.

3. The Presiding Officers and the Returning Officers should have deputies.

4. In order to ensure accountability, and in line with Article 88 (h) of the Constitution of Kenya 2010, in every Presidential election, the IEBC shall pay and facilitate at least two (2) Poll Agents in every Constituency within the Republic of Kenya who are registered voters within the Constituency they are to be deployed and who shall act for the two (2) major Political Parties in the Elections.

5. The above-stated Poll Agents shall sign the mandatory Election documents where they are needed to sign and in default they shall suffer similar penal sanctions as the Presiding Officers.

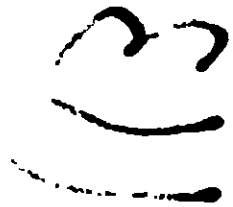
6. The Chairperson of the IEBC need not be an advocate given that the mess we are now in is a result of lawyers- one being the Chairperson of IEBC and the other being the Supreme Court Judges.

Kindly consider these proposals.

Thank You.

Yours faithfully,

ISAIAH WAWERU NGUMI – 05/10/2017



PROPOSED ELECTION AMENDMENT BILL

1.14

Gazetted POSA Draft. Out

5/10/17

Name : Philip Mogona
ID Number : 27011819
Voter number : 00917912120508041

1. Transmission

The kiems (Kenya integrated electro management system) should scan the forms 34As accompanied by text writings and send simultaneously to the server. Then the forms can be transported to the constituency tallying center then to the national tallying center but note this the forms on transit to the nation tallying center shall not supersede the electronically sent forms on simple reason it's more prone to alterations.

2. Server

During transmission, the server should be monitored by the following

1) Religious leaders, two from each religious group i.e Islamic, Christianity, Hinduism etc.
2) Human rights bodies recognized by Kenyan laws.
3) Election observers groups with non-partisan ground.
4) IT firms with excellent reputation.
5) Media houses.
6) And Police.

N/B All the above mentioned persons should have IT background, then the originals Forms received electronically from polling station uploaded to the public web portal for public viewing.

3. National tallying center & media house

At the constituency level after all the forms 34As are received from the polling station to the constituency center, all forms 34As transformed into form 34Bs, then send to the National tallying center, At the National tallying center & media houses, shall give an alert that results from e.g constituency Q Are yet to stream in, results shall not stream in without an alert from where the results are coming from.

4. Declaration of the results

Declaration of the results shall be done after all the forms 34Bs are received electronically and transformed into form 34C, And declaration of the result shall only be done by the presidential returning officer (the chair of the commission), after all party agents append their signatures against the form 34C.

١١

SUBMISSION BY LAMU UNIVERSITY STUDENTS ASSOCIATION ON THE ELECTION LAWS AMENDMENT BILL 2017

INTRODUCTION

We the university students from Lamu County wish to make the following general and specific submissions:-

GENERAL

1. This bill has a direct impact on our academic programmes at the University in that the current political debate in the country is finding its way into the university by dividing students along political lines and along those who support the bill and those who don't.
2. I wish to submit that university students from Lamu support the Bill and the proposed amendments thereof.
3. The problem that this bill intends to solve is the reason why some universities have been faced with incidents of strikes, leading to use of excessive force by police and ultimately closure of some universities.
4. Simply put if Hon. Bobu Owino of NASA did not utter insults he would not have been arrested, students would not have protested his arrest and university of Nairobi would not have been closed today.
5. Hon. Babu Owino of NASA made those utterances while advancing NASA proposed solution to the management problem at IEBC, which is the principal object of this bill. We therefore see a direct correlation between enacting this bill and ensuring calm returns to universities affected and continuity of learning programmes.

SPECIFICS

1. Chairperson Qualification

We propose that the 15years experience be reduced to 10 years. Reason is to accommodate youths who are 35 years such that if you leave university and begin your career at 25 years, 10 years later you will be 35 years which is age limit for youth definition.

2. Vice Chairperson

Provide for same qualification as chairperson but make it mandatory that he/she is a youth. The rationale is to ensure at no time youths lack in leadership of the commission given that they are the majority voters in this country and therefore the weight of the aggregated voter rights at risk is more on youths.

3. Absence of Chairperson and Vice Chairperson

Our submission is that this provision is on extreme circumstance and in normal practice it is quite unusual. The probability that both are missing is a tangent tending towards zero. This can be omitted to avoid suspicion and also to avoid situations where among commissioners they may also fail to agree on who becomes the chair. Providing for endless options could mean no option provided at best.

John Kingara

5/10/17

116

AMENDMENTS TO ELECTION LAWS

Comments on the Election Laws (Amendment) Bill,2017

By Fwamba NC Fwamba

Presentation to the Joint Parliamentary Committee

5th October 2017

The need to amend the elections laws before holding fresh elections by IEBC as instructed by the ruling of the Supreme Court in respect the Raila Odinga petition of 2017 is a welcome move.

The move is welcome because apart from serving the purposes of posterity, it seeks to address current concerns involving the two political formations; NASA and Jubilee.

At the end of the day, the role of these amendments is just to ensure the election is smooth and not affected by technicalities. In a democracy, victory will always be determined by the voters and not as famously quoted that

"It's not the people who vote that count. It's the people who count the votes." (Joseph Stalin).

History teaches us that Joseph Stalin was a dictator who led the communist Soviet Union with an iron fist and true democracy was a term alien to him.

In Kenya, where we have chosen to be ruled under democracy, the will of the people as expressed through the ballot must always prevail.

That is why it is advisable for the candidates in the October 26th Presidential poll to put more focus on their own campaigns for that decision of the voter at the ballot is the only determinant of victory in any democracy.

In ***the Republic***, according to philosopher Plato, just as there are five different regime types, there are also five corresponding characters of men, and they each give birth to the next: aristocracy, timocracy, oligarchy, democracy, and tyranny. These regime types can also be read in order of excellence.

An aristocracy is a regime ruled by well-educated people who mix prudence and experience to become superior leaders. The leaders of this regime channel their desire and ambition through reason. Considering Plato's tripartite theory of the soul, an aristocrat is a person in whom appetite, logic, and spirit work together properly.

A timocracy is a system where property replaces wisdom as the highest value. In this system, leaders are more "high-spirited" and simple-minded than in an aristocratic regime. A timocratic man's nature is primarily good, but reason's pre-eminence has been eclipsed by appetite and spirit, which are the new highest values in a timocracy

An oligarchy is the first regime in which an actual desire for wealth rules. It is not property in this system that is valued, but money. Money is desired for its own sake, whereas in previous regimes money was a means to acquire the materials necessary for the good life. In this way, money is prized over virtue or honor. The rulers in an oligarchy are warriors whose "spiritedness" dominates their souls. Oligarchs tend to be thrifty, hard-working, and possess a superficial honesty derived from self-interest. They may seem superior to the majority, but their souls are extremely fragile. Oligarchs retreat from a life of high ambition and

virtuous living. These men only appear to be good, while their desires are almost entirely self-referential and materialistic.

In Plato's Republic, a democracy is a regime where one can find the most variety, which is why every character type can be found in it. Again, as found in previous regimes, the aim of democracy is not virtue, but freedom. Democracy abhors restraint, so freedom for individuals to do as they wish is the highest value. In a democracy, the ordering of the rulers and the ruled is often reversed. In this way, the lower classes grow large and society begins to cater to the lowest common denominator. That is what happens in a democracy; that is what happened when the Chief Justice reversed President Uhuru's victory.

After democracy crumbles, tyranny emerges from combining a desire for freedom and a lack of discipline. A tyrant is the worst type of man and he is completely unjust. Naturally, he is also the man who leads the worst type of regime.

As a democracy, we must live to the expectations and principles that guide us in such a way that we put more respect and emphasis on the decision of the voter as opposed to procedural technicalities as it happened at the Supreme Court. Let our numbers always count and allow the voter to have the final say.

The amendments proposed in this Bill should be enacted in the interest of protecting democracy and ensuring we do not find ourselves in a situation like what the country is in now.

Sub-Section 2(d) of Article 159 of the constitution of Kenya states: Under Judicial authority, justice shall be administered without undue regard to procedural technicalities.

While the Supreme Court considered the above provision to admit late evidence by NASA into the Raila petition, the majority ruling of the same court applied double standards when they dwelt on procedural technicalities including electronic transmission of presidential results to nullify President Uhuru's victory.

Below are a few observations in relation to proposed amendments.

Amendment to Section 2 of no 9 of 2011: Provision for Acting Chair in the absence of Chair

In accordance to Article 138 (10) and 39 (D) of the Elections Act The Chairperson of the IEBC is the official returning officer for presidential elections and thus entrusted with the mandate to make the final declaration of the presidential poll

According to **Article 259 (3b)** of the Constitution of Kenya,

"any reference in this Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting

in or otherwise performing the functions of the office at any particular time;

Under Article 260 of the Constitution of Kenya, the chairperson of IEBC or a person acting in that position is considered a State Officer.

The current law as it is does not provide for any person other than that appointed to the office of the Chairperson to take up the responsibility in case a situation where the chairperson is unavailable or unable to perform the duties contemplated ***Article 138(10) and 39(d)*** of the Elections Act.

Appointment of a chairperson of any commission as provided for in the law is a process that includes many procedures before the appointment is done such that a quagmire can easily arise in case of an unprecedented vacancy occurring in the office of the chairperson. Given the circumstances like the ones under which

Kenya is now, there is need for a law to be in place to guarantee a continuous presence of a mandated returning officer of the presidential poll.

It is important for the Vice Chair of the Commission or a member appointed by the available Members to take up the duties of the Chair during the period when or if the Chair is unavailable to carry out his functions. It is imperative for the Vice Chair of the commission or any other commissioner appointed under the said circumstances to be able to carry out the electoral process without any hitch. **The Election Laws (Amendment) Bill ,2017** which seeks to address this issue is a timely intervention to this lacuna. **Circumstances too should be defined under which the chairperson will be legally unable or unavailable to execute his mandate as contemplated in article 138 of the constitution of Kenya.**

With the law as it is today, no person can be declared a winner of the presidential election if the chairperson is unavailable or unable to make the declaration. This was a risky act of omission in legislation. The current situation in the country has been a good eye opener and the proposed amendments by parliament to anticipate various case scenarios should be supported to avert any potential of a national crisis.

In the spirit of need for each and every commissioner to have capacity and qualifications to act in the position of the chairperson, it is my considered opinion that legislation be in place to have uniform qualification for all commissioners of IEBC. All Commissioners should have equal credentials as those of the person who qualifies to be the chairperson.

Amendment to Section 6 of no 9 of 2011; Qualifications in office of Chair

The amendment of this section to include people with other backgrounds other than legal is welcome. In any case, the main duty of the IEBC Chairperson is administrative and the ultimate announcement of the finally presidential tally and winner. Under the circumstances, it'd be easy to put integrity as the main

qualification apart with obvious credentials like a basic degree with good grades in Mathematics.

The diversity of professional qualifications to include other fields other than legal background is welcome and should even be widened to give other Kenyans out there with ability and the will to serve.

This is something that parliament should really address even in other legislations because there seems to have been some kind of professional conspiracy to make it look that only people with legal backgrounds can run certain institutions.

The Ethics and Anti-Corruption Commission is currently run by a clergyman Eliud Wabukala and it appears to be even more stable than when it was previously run by people with legal backgrounds. We must cast our net wider to have more willing Kenyans to serve the public. They are out there. The stringent need to have a mandatory qualification of the chairperson to be same as that of the Supreme Court Judge was unnecessary. That condition also denies upcoming (young) professionals from accessing such opportunity despite their ability and intention to serve Kenyans. The amendment in this clause has so far significantly addressed the issue of inclusivity in access to opportunities as opposed to what the current provision.

Amendment of the Second Schedule to No. 9 of 2011: Quorum of IEBC meetings

I support the amendment to the quorum of IEBC meetings to pre-empt any situation of a crisis. As is the law today, the Commission can be rendered easily un-operational in case some commissioners conspire to serve an external interest and end up rocking the boat from within. The proposal to have 3 as a quorum is meant to make the affairs of the commission to move with more ease just in case there arise situations of insubordination within the commission. The commission has a bigger mandate of serving the whole country and partisan interests should not get to a level of compromising the smooth running of the commission.

The nine member Constitutional maximum of members appointed to IEBC is baseless. Sometimes a smaller number is more effective when it comes to decision making.

A failure of the IEBC to make decisions, hold meetings, pass resolutions etc. due to this unreasonable quorum demands would greatly hamper critical national duties that it performs.

ELECTIONS ACT NO 24 OF 2011

- **Amendment of Sections 39; Requirement for verification and the place of manual and electronic transmission**

Technology was considered the main reason as to why the Supreme Court annulled President Uhuru's victory.

In the August 8th 2017 elections, forms 34A were the primary data and in case of any dispute, they are the documents that should prevail because they are supposed to be witnessed, filled, verified and signed by the polling station's presiding officer, deputy presiding officer, and the agents of various candidates.

Jubilee supporters are concerned that the use of technology and electronic transmission of results were the main excuses used by the majority ruling at the Supreme Court of Kenya to take away President Uhuru's well-deserved victory after garnering over 8.2 million votes against rival's 6.8 million. A margin of 1.4 million votes that represented a 10 percentage point gap.

On the NASA side, their supporters have been made to believe that over-reliance on technology cost them their victory. This is on the basis of the pronouncements by their leader to the effect that use of computer technology stole their victory.

The interventions presented through proposed amendments seek to give assurance to both sides that

1. In case of an Uhuru Kenyatta victory on the 26th October, 2017 , the Supreme Court will not revoke again the result on the basis of excuses relating to technology.

2. That since the NASA group believes technology was used to steal their victory, putting more value and focus on the manual methods of putting together the election results will take away their fears of election rigging.

. It is the duty and responsibility of every candidate to have his agents to ensure his votes are protected right from the source to the final tally.

Giving value to the manual forms 34A will create more transparency in the electoral process. We must also appreciate that Kenya is yet to get 100 % network coverage and there is no need to complicate simple matters.

Amendment of Section 44 by adding a new Section 44A: Complimentary mechanism

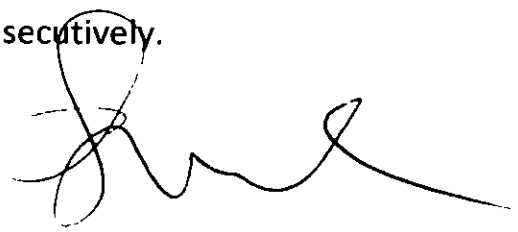
Through the amendment to Section 44 A, makes the electoral process simplified and avoids unnecessary reliance on sophisticated technology. I agree with the parliament's efforts to put in place complementary system for identification of voters that is simple, accurate, verifiable, secure, and accountable and transparent in line with Article 38 of the Constitution.

In conclusion, I'd like to state that under whatever circumstances, we must respect and work within the legally acceptable means of governance that we have

embraced through the constitution. Kenya is a democracy and we must always use democracy to deal with our issues.

Another major area of interest is the Elections Offences Act, 2016.

The amendment seeks to pronounce punitive measures to election offenders. My proposal about the amendment is to have offenders face a greater penalty and prescribe a minimum sentence **Section 6A** of the amendment (like of two years per count-depending on the veracity of the offence as opposed to prescribing a maximum sentence of five years. This kind of discretion can justify a person getting a one day jail term for committing an offence that has far reaching effects). Every offence should be dealt with separately because there could be situations where some poll officials who commit multiple offences may face multiple charges that should attract separate jail sentences which should run consecutively.



Fwamba Nc Fwamba

Trustee

Kenya Young Voters Alliance

5th Oct/2017
Received

ELECTION LAW AMENDMENT BILL 2017

PROPOSAL:-

1. Psychological evaluation
2. Personal counselling sessions

PSYCHLOGICAL EVALUATION

If companies /corporation in their process of selecting their executives do psychological assessment and testing, why not for a person who is in charge of a country?

This executive are in charge of millions or a few billions but a country leader is in charge of a trillion and over!

This executive are in charge of thousands people, a country leader is in charge of 45million people!

To reduce damages that can be caused by putting wrong person in office of the President and Deputy President there is need for psychological evaluation.

You tend to think that someone who has degrees is the best, but you can have the degrees and have a temperament or personality that disqualifies you from being a decision maker or a leader of such a big country.

Psychological evaluation test can be used to assess:-

1. Communication skills
2. People skills
3. Leadership skills
4. Critical thinking skills
5. Ability to deal with stress
6. Ability to resolve conflicts
7. Competency

Behavior assessment and psychometric assessment will help check whether a particular candidate is competent enough to take the highest office in the country.

No one can beat or lie in this test because lack of consistency will show it.

Looking at personal disorder you realize that they are ingrained in the character of a person, which present the resistance to change and becomes the guide of the person's agenda of life.

Government policies can be affected by having a person with personal disorder in the office of the President.

For example if someone has schizoid personality disorder may have disregard for people and inability to understand emotional cues. Avoidant personality disorder-fear of criticism and isolation tendencies .Narcissistic personality disorder which is the most likely to affect leaders lead to impulse and paranoid behaviors.

By quoting a study forms by Robert Hill and Gregory Yousey in 1998 reported on current psychology shows that, clergy members, politicians, state legislators scored highest on narcissism

Leaders with this disorder have no brakes on their behavior and when pursuing their agendas they can do it to the extreme which might end up hurting the people one is in charge of.

Conservative types of leaders place emphasis on respect, authority, loyalty whether personal or group. While libel type of leader emphasis caring for other people, fairness and reprocity dimensions of morality. Conservative leaders tend to have narcissism tendencies. This is a study done by Haidt Jonathan

Due to such negative results the leaders should pass through a psychological evaluation and get a certificate or letter from a certified psychologist to be given to the IEBC as one of parameters to allow one to run for Presidency and Deputy Presidency.

PERSONAL COUNSELLING SESSIONS

Because everyone has problems that they face which require someone who is trained to help them to navigate through such issues objectively. such issues includes;-childhood issues which are unresolved, present stressors, unfinished business, relationship issues, etc. which may be affecting the proper functionality and productively of the person involved .this is done in accordance with code of ethics set in place in practice of counselling i.e. confidentiality , fairness and justice, autonomy, etc.

→ The Person Shall Provide IEBC with a Certified of having done not Less than 5 Sessions or as advised by their Counsellor.

JOHN WAGATUA

0713318080

wagatuaj@gmail.com.

Received 5/10/2017 118

THE CHAIR, ELECTION SELECT COMMITTEE.

THE PROPOSED ELECTORAL AMENDMENT

SUBJ: DISSENTING OPINION

I .....Haron O. Njandika, NBI BUSINESS MEMBER.. Of ID Number: .....23597831..... hereby register my dissatisfaction with the said clauses and removal of others.

My opinion is based on the following pillars:

i. The genesis of technology in Kenya
ii. Three sources of election results, and
iii. The discrepancy thereof
iv. The prevalence/superiority of manual over electronic and the removal of the clause "....or...."

1. **Why technology in Kenya elections?**

   As a result of lack of **mutual trust** as well as transparency, resulting from manual result transmission from point of voting (polling stations) till national tallying center, electronic was a better option: it's safe, instant and the only way to challenge it is if access to servers are guaranteed and prove of hacking established, and that the readings on the electronic image is not what was announced, duly signed documents at the polling station.

   Technology works and Kenya is not backward IT state; we pride ourselves in technology as Africa giant. Only if there's no goodwill and integrity by operational staff in IT sector handling elections should we doubt technology

2. **Three source of results**

(I) Electronic – this is safe, reliable etc yet can be prone to hacking

As a result, a clause dictating the IEBC to guarantee access to servers could be a reflection of ***act in good faith*** to prove that if electronic should be superseded by manual, ***proof of 'hack'*** is established

Before we challenge electronic results, there must be evidence at the polling station in question that the posted results (both in IEBC servers and public portal) are variant from the announced results then.

(ii) Manual – manual results is as good as it can prove to be the authentic document not adulterated on way to national center However, since **lack of mutual trust** and conflicting interests, this physically delivered document need to be treated as 'foreign' material until it proves beyond reasonable doubt that it's the very results signed by PO, RO and all party agents

(iii) its thus my observation that, in event the three results don't tally, neither manual nor electronic dictates without asserting the announced results and servers integrity cross-checked, and image thereof cross-examined against the manual ballots presented

3. **Discripancy thereof: (as discussed in (2) above)**

What if the results of

- Electronic
- Manual
- Polling station as announced

All Don't Tally!!

4. **Prevalence/superiority of manual over electronic**

There's no guarantee that the manually presented ballot is free from alterations

Un-authenticated document, of dubious origin not the true/ original duly signed form at poll can be possible!!!

This manual paper remains a 'foreign' thing until proven to be a genuine, confirmed on public portal by party agent, etc in conformity with IEBC tabulated results

5. **The removal of the clause "..or.."**

In the suggested clause removal. this should be perceived to ***dictate/ fix the judiciary*** that the courts and the public should treat elections as a ***'mere event'*** not a ***'process in event'***. Thus. when the court is ordered to re-order a re-count (of manual ballot) presented. without another clause making it mandatory for the IEBC to guarantee access to servers: there's no logic that the so-expensively procured technology (electronic) proves its cost-benefits to the **voter who is supreme** – or is the amendment intended to lower cost of election.....??

Nay!

(It's thus in bad faith!)

In any case IEBC uses public funding and as a result access to servers by the public (not just petitioners. party. etc) guaranteed without query.

It's my submission that both the qualitative (process which is backed by clause "...or...." and quantitative which focuses on numbers not integrity of procedure/process) remain forever in one **inseparable matrimony.**

Thus removing this clause ***'..or..' is injurious to free, fair, credible, variable, transparent, just elections.*** Since this seems ***to lower the integrity threshold*** below the minimum standards: that a profuse neglect to process can't disqualify any figures presented.

I once again append my un-wavered opinion that forever elections remain ***'not an event'***. in fact ***'not a process'***. but ***'a clean process' to qualify the numbers***

Thanks Members

Thanks Kenya

Presented by:

Haron Nyandika		04TH OCTOBER, 2017.
Name	***Sign***	***Date***

NAIROBI BUSINESSMAN

Organization

Email:haronnyandika@gmail.com

Received
4/10/2017

46

MEMORANDUM TO JOINT SELECT COMMITTEE OF PARLIAMENT.

AMENDMENTS TO THE ELECTIONS ACT AND THE SUPREME COURT ACT

RECEIVED
18 OCT 2017
CLERK'S OFFICE

I am supporting the proposed amendments to the above acts because the amendments will cure loopholes used by the SUPREME COURT MAJORITY to nullify an otherwise free and fair election won by UHURU MUIGAI KENYATTA AND HIS RUNNING MATE WILLIAM RUTO. In particular let me say this by way of justification;

1.Our elections are primarily MANUAL. Consider this, Other than the voter identification which is by BVR or Biometric Voter Register the rest of the activities in voting are manual. forget the transmission of results. i)The BALLOT PAPER is MANUAL. ii) The FILLING of the ballot paper is MANUAL iii) The CASTING of the ballot is MANUAL. iv) The COUNTING of the votes is MANUAL v) The ENTRY of the results of the voting in FORM 34A is manual and so is the witnessing and signing. These steps are also subject to observation by independent observers and the observation is manual. WHAT HAPPENS AFTER THIS STEP is all TRANSMISSION of results.. The proposed amendment is to make the transmission of results both MANUAL and ELECTRONIC for comparison as they reach the Constituency and National Tallying Centers.. This is to protect the results of the election which has just happened from hacking AND FROM BEING NULLIFIED purely on the basis of failure of ICT technology which we know fails all the time . Any difference should result in a recount of the ballots and this again is where the SUPREME COURT Act is being amended to require the supreme court to order a recount of the votes should there be any discrepancies.During the last hearing of the petition on the presidential election the supreme court deliberately failed to order recounts.This amendment is making recounts mandatory.

2.The law is also being amended to provide for severe penalties for any IEBC official who fails to sign original forms. I would like to add that there should also be severe penalties for any one especially witnesses produced by the petitioner who give false information or affidavits under oath ie who commit perjury.It obvious that during the hearing several witnesses and officials of the court did give false information and swear false affidavits under oath.This offence should be included and meanwhile those who lied under oath should be arrested and charged with perjury.Remember that in 1953 the Kapenguria 6 comprising of Jomo Kenyatta and his 5 co accused were convicted on the false testimony of a witness under oath who had been promised rewards. He later retracted the information and was charged and convicted of perjury and jailed. As a result of the change Jomo and his co accused were acquitted of the crime and the 10 year jail term cancelled. Of course since the colonial government was after them they ended up being detained for 10 years under emergency powers. The recent ICC cases also collapsed for the same reason. False witness were used to get Uhuru and Ruto indicted at the Hague but when the time for hearings came the witnesses retracted largely because the promises they had been given were not honoured. Uhuru and Ruto had to be set free.The key thing to note is that the masterminds of the petition and the judgements were the same players who were behind the ICC cases.

3.As regards the SUPREME COURT I agree with the proposed amendments as they will protect the election from a rogue kangaroo court by making recount of votes mandatory. I would however like to add that the SUPREME COURT should be made to work like the AMERICAN FEDERAL JURY SYSTEM. The

decision of a JURY must be unanimous for a conviction to occur. This is because the burden of proof is on the prosecutor and also because of the doctrine of PROOF BEYOND REASONABLE DOUBT.ANY DISSENT IN THE JURY EVEN BY ONE JURIST is enough evidence of existence of reasonable doubt. SIMILARLY The SUPREME COURT in Kenya especially sitting on a presidential election petition and bearing in mind the cost and the great public interest must operate on this principle. That is the petitioner must prove his case beyond reasonable doubt. The Raila petition was full of doubts.The existence of even one dissenting judge is enough evidence of existence of reasonable doubt and petition must be dismissed.Therefore the SUPREME COURT should operate on the same principle as a JURY whose decisions must be UNANIMOUS.If there is dissent by even one judge then the petition must be dismissed.This is a very high standard and it is the only way to protect the country from rogue judges who may even have been bribed .

For the future when the constitution is revisited the TERM OF OFFICE FROM SWEARING TO SWEARING IN MUST BE CAST IN STONE. Similarly provision will have to be made for SUPREME COURT DECISIONS TO BE APPEALED in the SENATE especially where they relate to Presidential election petitions and where decisions of the SUPREME COURT can easily be political.

DICKSON GACHUCHE NGATIA

CHAIRMAN KONGONI TANDALA WATER COMPANY LTD A RESIDENTS ASSOCIATION IN NAIROBI.

2ND OCTOBER 2017.

BOX 51948-00200 NBI.

dngachuche@yahoo.com.

119

BIGRADAP GROUP TECHNOLOGIES (PTY) LTD

TECHNOLOGIES
Intelligence Logic
A MEMBER OF THE BIGRADAP GROUP

Unit 31, Oxford Office Park
3 Bauhinia Street
Highveld Techno Park
P.O.Box 67135
Highveld Park, 0169
Centurion
South Africa
Tel: +27 (0) 87 095 1200
Fax: +27 (0) 86 559 1543

2366, Av. Col Mondjiba, C/Gombe
Kinshasa/ DRC
Tel: +243 99 001 9154
Tel: +243 81 558 6729

www.bigradap.com
info@bigradap.co.za

O/REF: BGT/RSA/CEO/BI/0917/01

Y/REF:

CONCERN: Expression of interest- Unsolicited proposal to offer a solution for the results transmission system

GOVTECH Government Technology

Runner up Award Winner for ITC Innovation of ICT Providers and Transformation of Services for Large Enterprises, SA GOVTECH of 2016.

Exhibitor for Maritime Safety TOGO

Officially in partnership with the Diaspora African Forum

Centurion 9/13/2017

RECEIVED
10 OCT 2017
CLERK'S OFFICE
11 SEP 2017

Copy: Prof. Abdi Yakub Guliye- Commissioner
Dr Roselyn Akombe-Commissioner
Dr Paul Kibibott Kurgat- Commissioner
Mr. Ezra Chiloba -CEO

A: Mr.Wafula Chebukati
Chairman
IEBC
Nairobi, Kenya

Dear Mr Wafula Chebukati

We are writing to your organisation with a view to providing a solution to enable a working election results transmission system in light of the problems that have been encountered in the 8th August 2017 elections, which we are confident that the problem can be overcome by the deployment of our proposed solution.

This solution addresses some of the issues encountered during the 2017 Presidential Election, during which potentially inaccurate results were presented by the EMB. This offer encompasses purely Results Capture and Results Management components. The end result being transmission of reliable and transparent data providing accurate data.

Our solution comprises of a system which consists of a number of verification steps.

- The first, and most important verification is the acceptance of Polling station result on the Result Form by the relevant agents (Political Party representatives, Presiding Officer, etc.)

- During capture, a number of checks kick in:
  - Total votes vs number of registered voters
  - Spoiled votes
  - Ballots counted vs votes counted
- The second step takes place after the result is captured, when it is accepted by the Presiding Officer in the presence of the aforementioned officials.
- The third step takes place at the collation center, where each result is verified against the form image, and again accepted by a senior official.

Other system advantages include:

- Immediate availability of the image of the result form
- Reports on result submission (which stations have/have not submitted results)
- Exception reports (issues)
- Rollups and tallies

We would like to do a presentation of our proposed solution to you and your team of Commissioners and ICT experts so that you are able to see how it works. We can configure and customise it according to your specific needs. We are also ready to demonstrate the solution to the political parties and other stake holders so that they can also be appraised first hand.

We shall appreciate if you can revert at the earliest in view of the tight time lines before you embark on holding the fresh Presidential Election scheduled to take place on 17th October, 2017 as per your press release. We look forward to hearing from you at the earliest by return email.

Yours faithfully,

For Bigradap Group Technologies (Pty) Ltd

Mr EL Bienvenu M. Ikaka
Chief Executive Officer

120

PUBLIC PARTICIPATION PARLIAMENTARY COMMITTEE AT COUNTY HALL THIS DAY WEDNESDAY 4TH OF OCTOBER, 2017 NAIROBI

ELECTORAL AMENDMENTS PROPOSALS

I fully support the amendments as proposed by the Parliamentary Committee and wish to observe as follows:-

Jubilee should not look sideways or backwards but right ahead and streamline the current mongrel in the Electoral Law as per Justice Njoki Ndung'u dissenting Judgment in the Supreme Court.

I wish to note and observe as follows:-

1. Constitution Art 1-1,2 safeguard the Supreme will of the people pronounced by casting the Vote and taken away by the Supreme Court. This should be safeguarded in the new amendments to ensure votes cast are counted.

2. Anchor 8.8.17 Elections in the amended Law retroactively.

3. Call all 290 Returning Officers to swear on their Count and tallied results and forwarded to the National Tallying Center as per Form 34Bs (Ref. Maina Kiai case). Check the tally and confirm IEBC Chairman's count and tally and pronounced the winner.

4. The Supreme will of the people is exercised directly and it is above that of the Supreme Court. Guarantee people's choice of a leader and swear the President People's Sovereign Power is exercised directly or through their elected leaders. As in this Public Participation through Parliamentary Committee

5. Systemic flaws should never supersede physical votes cast. Therefore amend the Law so that the process does not supersede physical votes cast.

6. EVID machines recorded actual people who turned out to vote. Therefore no claim of vote stuffing n stealing.

7. If this procedure is followed, it would not be necessary to hold another election on 26.10.17. Supreme Power of the People Supersedes the Supreme Court. I therefore propose that the pronounced Winner on 11.9.17 declaration of final results be final. We should not waste time and money as already has happened following the Supreme Court decision to hold fresh Presidential elections.

Sincerely Yours,

Registered Voter – Kitengela St. Monica
Evans Njau Mungai
ID No. 2303737

Received
4/10/2017
by

121

VOTER'S VOICE

I VOTED MANUALLY, NOT ELECTRONICALLY

WHERE DID MY VOTE GO?

By Sheila Githaiga

Im **Mrs Sheila Githaiga** from my polling station **Ihithe Primary polling station, wamagana ward, Tetu constituency of Nyeri County.**

My first contact with my leaders on that day of 8th of August was the BALLOT PAPER. By 6 oclock in the morning, I was already at the polling station waiting to vote in my president and other leaders. I walked (manually), represented my ID to the election team(manually), presented my fingers for fingerprints (manually), picked the BALLOT PAPER (manually), ticked the name of my President and other leaders in the box provided (manually), proceeded to the ballot box and dropped the ballot paper in the ballot box (manually). This marked the end of my voting and I went home. My business and my responsibility as a citizen to express my right to choose my leaders was done and for me, any other process was not my business.

This is what every voter did on that day all over Kenya and this was purely a manual process.

The Chief Justice ruled that my vote did not matter because it was not transmitted according to the law and constitution although I voted

according to the law and the constitution. I was made to understand that after my business was done, another process called "Electronic Transmission"took over my vote and somewhere along this process inside machines called computers which I don't understand how they work, except that they are "manually" activated, my vote got lost. ***That is how I got disenfranchised as a voter! This 'electronic Transmission' disenfranchised me! This is why my country is in the volatile situation at present. I had hoped the Supreme Court would have wanted to trace my vote back to the ballot box. If they did that they would definitely have found it inside the ballot box where I dropped it, manually. This way my vote would have been made to count. This did not happen.***

Article 86 states " At every election, IEBC shall ensure that (a) whatever voting method is used (for me I voted by manual method), it must be SIMPLE, verifiable, secure, accountable and transparent".

Eectronic process **is not simple.** For the voter it is compex. I don't understand it. I don't understand how a commuter works.

Electronic transmission **is not verifiable.** As voter I cant verify what happened to my vote. I cannot physically touch it or see it.

Electronic transmission **is not accountable.** As a voter I cannot account for my vote. The Supreme Court could not either. That is why Iam asking where my vote went and the machines have not given me any answer neither can the judges

Electronic transmission **is not secure.** As a voter as long as I cannot see my vote I can only assume it got lost somewhere, therefore not secure and that is why we are all here. Our votes cannot be traced in the

machines so we voters don't know what happened our to 15 million+ votes

Electronic transmission **is not transparent.** At least not to me as a voter. I cannot see my vote. It is that simple.

Manual transmission is all what electronic transmission is not

I want to support my manual voting as described because if I was able to vote then it is ***simple***.

It is ***verifiable*** because my ballot paper can be physically seen and verified and traced back if need be.

It is ***secure*** because the ballot box is sealed and guarded by security personnel as I witnessed. It is ***accountable*** because I had been sensetised through civic education that IEBC team had been trained and vetted. It is ***transparent*** because my manual vote can be seen by me and everybody else.

As voter I have no control of my vote in the process of 'electronic transmission" nor do I understand it. The machines can and will fail. To this end my manual voting must become supreme to carry the day and not machines. I don't want my vote to get lost in computers this time round. I have surrendered my rights to my member of parliament to make laws in parliament that work for me and not against me. I support the amendments urgently.

Electronic process is not simple for me and it is my humble submission that Kenya is not ready for it to the extent that it can be the basis of nullifying a serious election like presidential election. MANUAL

VOTING SHOULD AND MUST BE SUPREME. If machines make the work easy, use them but they should not effect or affect my vote.

Other developed countries like German have found the electronic process wanting and reverted to manual process.

Kenya is a developing country and we dont need to prove to the world that we can do it by trying so hard thereby risking another bungled election that has the potential of plunging our country in the abyss of destruction.

Kenya is the 4th country in the world and the 1st in African to have a presidential election nullified. This is not an ordinary phenomena and so it requires extraordinary measures to make sure that the coming elections will not suffer the same fate. The urgent law amendments are such extraordinary interventions that must be applied to an extraordinary situation we find ourselves in.

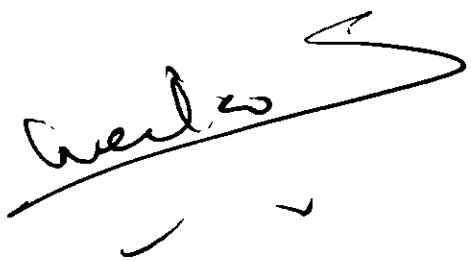
I would also want to debunk the "tyranny of numbers" narrative. This has been demonized to fit the whims of some people. Numbers is why we have members of parliament in the house and not their opponents. Numbers or majority is the fundamental process of democracy. That is the reality. The best the minority can do is to persuade the majority to join them so that they have the numbers. Numbers do not necessarily have to be used for bad or evil. Numbers can be used for "tyranny of good" especially for a time as this.

In conclusion I would like to state that our country is at crossroads. We must choose the good way for all of us, our children and the children of their chidren. Like on wise writer said

> *"Great men are dangerous. When their dreams fail, they bury them under ruble of cities where simple folks once lived". May God protect Kenya that this does not happen.*

Sheila Githaiga – Voter Contact: 0706553333 sheilak52@yahoo.com

2nd October, 2017



122

MEMORANDUM

THE JOINT PARLIAMENTARY SELECT COMMITTEE

IN RESPECT TO THE ELECTIONS LAWS (AMENDMENT) BILL, 2017

4th October 2017.

BENSON M. KARANJA

ONE PROPOSED STATUTORY AMENDMENT:

That ALL returning officers be subjected to the same minimum standards as the National Returning Officer:

(a)holds a degree from a recognized university in public administration, public finance, governance, electoral management, social science, or law;

(b)has proven experience in any of the fields specified in paragraph (a) of not less than fifteen years;

(c)meets the requirements of Chapter Six of the Constitution

(d) that the National RO MUST have served as County or Constituency RO for a period not less than 5 years

SEVEN PROPOSED SEVEN REGULATORY REQUIREMENTS:

1. That Parliament, in its wisdom, evokes Article 234 section (2), sub section (j) of the Constitution ORDERING the Public Service Commission to Recommend and Document the minimum operational competencies that all returning officers MUST have, including but not limited to inter alia Human Resource Management, Project Management capabilities and skills required working in high pressure environments.

2. That Deputies in the Counties and Constituencies be recruited 6 months to the Presidential Election

3. That the Presiding and Deputy Presiding Officers be recruited 30 days before the Presidential Election

4. That the responsibility of hiring, training and payment of wages and allowances of Presiding and Deputy Presiding Officers be that of the County RO, and NOT the Constituency RO as is the case today

5. That the responsibility of hiring, training and payment of electoral clerks be delegated to the the Constituency RO as is the case today

6. That in the case where the Presiding Officer, is required to attend Court as a Witness, IEBC County RO be compiled to facilitate the payment of allowances and any other LEGAL assistance the Presiding Officer may require.

7. That ALL IEBC Returning Officers, IEBC Commissioners, IEBC Secretariat Staff, Part time staff including but not limited to Deputies at the Counties, Deputies at the Constituencies, ICT officials, Presiding and Deputy Presiding Offices, be SUBJECT to and FULLY COMPLY with the Public Officers Ethics Act.

ONE SPIRITUAL BENCHMARK:

That the spirit of the KENYA Electoral statues and the subsequent regulations be to enable a VOTER - CENTRIC election process and electoral event, where the VOTER is enabled, encouraged, secured, and not dis enfranchised in any way

Received
5/10/17

123

Public Participation on Elections Laws

County Hall –Parliament Building

Nairobi.

5th October 2017.

We "MY VOTE MY CHOICE" a non registered forum of over 3 million members

Do hereby tender our proposal on the following,

1. **Can we have only one presidential petition per election?**

2. **Elections should be event not a process.**

3. **Each eligible presidential candidates with reference whom has ever tried from first election held in Kenya should be allowed only two times by law to vie for president if he/she fails should permanently not eligible again, but if an incumbent can defend his/her seat if elected on the second attempt.**

WE SUPPORT THIS BILL

Signed by

Nkeissarry Kamau Christopher (co-odinator)

P.O. Box 1015 - 05200 RUAI

Tel. 0796 974729

AO.

		NAME	ID.NO	SIGNATURE
1	14	Cardine Nyaku	28482918	
2	15	Hilbert omondi	28768291	
3	16	JOHN G NJENGA	10229595	
4	17	TRIZA NYATHUTA	3435363	
5	18	ELIZABETH N KARANJA	3509012	
6	19	Eunia nuke	13116017	
7	20	Shadreck Njoroge	28878884	
8	21	Joseph Gicheha	2299367	
9	22	JOHN WAHOME	2665041	
10	23	Paul Ndungu	9513261	
11	24	Hasan Wachira	25242153	
12	25	David Kamau K	13207445	
13	26	Samuel Makhapira	21642863	
14	27	Joel Mwangi	9704596	
15	28	Ephanra Kiwara	11434095	
16	29	DAVID KIMANI	52405551	
17	30	Geoffrey Karanja	20594505	
18	31	Monicah Njuguna	21416690	
19	32	GABRIEL MUAURA	20529973	
20	33	MARTIN Chege	9191170	
21	34	JOHN G NJOROGE	20295789	
22	35	James Karogo	23166656	
23	36	Peter Mwangi	25598227	
24	37	Zakaria NDUNG-U	11803480	
25	38	MOSES GACII	11191199	
26	39	paul Mithingo Thuku	22168680	
27	40	MICHAEL K KIARIE	13675067	
28	41	EDWARD KAMAU MUNGA	18810002	
29	42	Leonard mwangi kamau	7981893	
30	43	Gilbert mwangi Njoru	10140400	
31	44	Sarah Chebet Juma	23812960	
32	45	PHILIP GATHENGA MWANGI	11222990	

EXD

34	44	PETER MAINA KINGORI	1076873	
35	45	Antony Mburu Maina	24705116	
36	46	Irene wanjiru ndungu	23054601	
37	49	Joseph Kinyua maina	22104157	
38	50	JOHN MWANGI	10652932	
39	51	Benjamin Mainа	20285622	
40	52	Solomon kibe	23116348	
41	53	Ruben Njoroge	12759432	
42	54	JOHN KIARIE	22969243	
43	55	Stephen Kiarie	22342702	
44	56	patrick kinuthia	21970996	
45	57	Daniel mubonea	10967024	
46	58	MOSES MAINA	2385220	
47	59	Joseph karanja	22499521	
48	60	Paul KARIUKI	14718314	
49	61	charles m Wanyoike	23797877	
50	62	Gachuhi Mbugua	24857823	
51	63	Julius kamotho	12776637	
52	64	STEPHEN MUTHIA	22320167	
53	65	PETER KAMAU	22752415	
54	66	Simon Kinuthia	25720518	
55	67	Elelyn Wangechi	20304393	
56	68	SAMUEL WANJAU G	28933693	
57	69	SAMMY KIMANI	24050715	
58	70	Robert kingi Wanja	10877712	
59	71	Ruben Njoroge Njoki	27662316	
60	72	Peter Njuguna Gitika	13538333	
61	73	Patrick Wamuhi	24818624	
62	74	Mary Njeri Mbote	23630597	
63	75	Kelvin Githau Njoki	24036685	
64	76	Josphat kamau Mwangi	23222048	
65	77	Joseph Gakuru	29695955	
66	78	James Mwangi M	13395205	
67	80	HILAM KIMANI WAITHIRA	29652067	
68	81	Gabael Mutithi Kabati	24923850	
69	82	Francis Theuri Wabugu	23795838	
70	83	David Ndutumi Waehina	10967024	
71	84	SCHOLASTICA [illegible]	11955565	
72	85	ELIUD MAINA MWANGI	10865324	
73	86	BENSON MAINA MAINA	20191205	

END

124

Gmail Halimaa Absiye <halimabsiye@gmail.com>

Fwd: Election Laws (amendment)

1 message

George Jusa <ggazemba@gmail.com> Fri, Oct 6, 2017 at 10:51 AM
To: Halimaa Absiye <halimabsiye@gmail.com>, kavata.musyoka@gmail.com, Doreen Karani <karanidoreen@gmail.com>, Lucy Radoli <lucyradoli@gmail.com>, Salem Lorot <dicksalemlorot@gmail.com>, mjchesire@yahoo.com

---------- Forwarded message ----------
From: **Clerk of the National Assembly** <clerk@parliament.go.ke>
Date: Fri, Oct 6, 2017 at 8:42 AM
Subject: Fwd: Election Laws (amendment)
To: Florence Abonyo <abonyoflora@yahoo.com>, nick eme <emejen@gmail.com>, George Jusa <ggazemba@gmail.com>

From: "S.M Njihia" <smnjihia@nmr.co.ke>
To: clerk@parliament.go.ke, csenate@parliament.go.ke
Cc: "Samuel Njihia" <smnjihia3@gmail.com>
Sent: Thursday, October 5, 2017 9:20:22 PM
Subject: Election Laws (amendment)

With regard to above I propose:

Since presidential elections are held per constituency then it follows that a repeat election or vote recount should only be held in the constituency where a dispute has arisen, and not in the entire country. Refer to Al Gore vs Bush - recount of votes only done in Florida

This should save the country on both money and time.

From S. M Njihia
Registered Valuer
BA, MA.(NAIROBI)
Tel 0722516234

125

To the Parliamentary Select Committee

- I opine that if the qualifications of the chair are changed then, let us, have at least one commissioner in the substantive commission being a lawyer spare for exceptional circumstances the current commission resigns, for instance, when the chair It is primal to have a legal mind in the commission

For Quorum

- If they are 7 commissioners, let the quorum be 5 with decision being made by a simple majority (4/7)
- If chair resigns, let the vice chairperson pick up Quorum remains at 5 Decision simple majority (3/5) In case of tie, the vice chairperson breaks it
- With chairperson and vice chairperson absent, quorum goes to 3 with decision being made by a simple majority (3/5)

KIEMs' GPS

- Make provision for presiding officers moving with KIEMs kit due to changes in GPS coordinates To avoid citing of non-existent polling station in a Supreme Court petition

For the rest of the amendments, I support

Sincerely,

Amos Njuguna Ngugi

ID: 30848598

Registered voter: K U primary, Roysambu Constituency



PATRICK O. ONYANGO - PADDY

P O Box 5252 -00100 , P O, NAIROBI Kenya
Cell +254 720 784 952 Email paddyonyango@outlook.com

126

5Th October 2017

My Ref: PARL.MEM/VOL.4/9/2017

The Chairperson
Parliamentary Select Committee on
Election Laws (Amendment) Bill, 2017
County Hall, Parliament Buildings
NAIROBI

VIA EMAIL: clerk@parliament.go.ke

ATTN: Clerk of the National Assembly

MEMORANDUM ON THE ELECTION LAWS (AMENDMENT) BILL, 2017

The subject matter refers and I propose as follows: -

SUMMARY SUBMISSION

A. While it is not in doubt that we need a comprehensive reform of our electoral system, the timing of and speed with which the current amendment process is being handled is divisive and should be put on hold until after the fresh Presidential Election as directed by the Supreme Court.

B. The above not withstanding I have issues with Clause 6, which proposes that "Section 39 of the Elections Act, 2011 is amended by – (b) (this is a computer error, should be (d)) inserting the following new subsections immediately after subsection (IC) – (1D) "Where there is a discrepancy between the electronically transmitted and manually transmitted results, the manually transmitted results shall prevail." I am of the view that for the manually transmitted results to prevail over the

PATRICK O. ONYANGO - PADDY

P.O. Box 5252 -00100, G.P.O, NAIROBI, Kenya
Cell: +254 720 784 952 Email: paddyonyango@outlook.com

electronically transmitted results, the manually transmitted results MUST be verified against data entries in the 40,883 KIEMS kits and the IEBC Server. The KIEMS are the primary data taken together with Forms 34As and Form 34Bs. Relying solely on manual transmission is retrogressive and will take us back to the 2007 General Election where Presiding and Returning Officers fraudulently manipulated the transmission forms (16A) and also withheld them from the National Returning Officer of the then Electoral Commission of Kenya Chairman late Mr. Samuel Kivuitu.

C. Grounds

My submission is premised on the following : -

1. **THAT** I am a citizen of Kenya by birth and bearer of **Passport No. A 1652341** and a registered Voter **vide Elector No. 0091961211271129-8**

2. **THAT** I am part of the collectivity of the People of Kenya upon who the Constitution of Kenya 2010 vests Sovereign Power under Article 1 (1).

3. **THAT** in exercise of that sovereign power, I came out on Tuesday 8th August 2017 and cast my vote as provided for by Article 1 (2) of the Constitution.

4. **THAT** whereas it is not in doubt that law making is the preserve of Parliament at the National level and County Assemblies at the County level; I, as part of the collectivity of the people of Kenya '**DELEGATED**' but did '**NOT SURRENDER**' that mandate to these institutions under Article 1 (3) of the Constitution.

5. **THAT** I am submitting this Memorandum pursuant to Article 1 (2) to exercise the sovereign power directly and also to participate in legislative processes under Article 118 of the Constitution.

6. **THAT** while the proposed amendments are said to be informed by the Supreme Court decision in the Presidential Election Petition No.1 of

PATRICK O. ONYANGO - PADDY

P.O. Box 5252 -00100, G.P.O,
NAIROBI, Kenya
Cell: +254 720 784 952 Email:
paddyonyango@outlook.com

2017. I have read both the minority and majority decision of the Supreme Court and find that the court did not fault existing electoral laws; but rather fingered '**HUMAN FACTOR**' of commission and omission as causality for the illegalities and irregularities which led to the annulment of the Presidential Election results.

7. **THAT** while it is not in doubt that we need to have robust reform of our electoral system, the timing and speed of the current amendment process is divisive and should be put on hold until after the fresh Presidential Election as directed by the Supreme Court.

8. **THAT** while I am of the view that the process be differed to enable a more comprehensive review of the electoral system; I none the less wish to point out Clause 6, which proposes that "Section 39 of the Elections Act, 2011 is amended by – (b) inserting the following new subsections immediately after subsection (IC) – (1D) "**Where there is a discrepancy between the electronically transmitted and manually transmitted** re[illegible] manually [illegible] prevail." The manner of manual transmission of results is by Presiding Officers from Polling Stations and Centres physically delivering 40,883 form 34As to the Returning Officers at the Constituency Tallying Centres, who in turn generate 291 form 34Bs from the 34As and then proceed to physically deliver both form 34As and 34Bs to the National Tallying Centre where tallying and verification is done by the National Returning Officer who is Chairman of IEBC, Mr. Chebukati. Forms 34As and Bs from the Diaspora are incorporated at the National Tallying Centre.

   By giving precedence to manually transmitted results, we are going full cycle back to the risk of manipulation of the manual transmission mechanism. The late Mr. Samuel Kivuitu, then Chair of Electoral Commission of Kenya (ECK) was confronted with this reality and is on record as decrying the "microwaving of results by Presiding and Returning Officers" by tampering with then Form 16A, the predecessor to Form 34A. It is proposed that for the "... manually transmitted results shall prevail." To be validated, the manual results **MUST** be verified against data entries in the KIEMS kits and IEBC Server.

PATRICK O. ONYANGO - PADDY

P.O. Box 5252 -00100, G.P.O,
NAIROBI, Kenya
Cell: +254 720 784 952 Email:
paddyonyango@outlook.com

Yours sincerely,

Patrick O. Onyango – Paddy
PRESENTER