REPUBLIC OF KENYA

PARLIAMENT OF KENYA LIBRARY

PARLIAMENT OF KENYA

THE SENATE

ELEVENTH PARLIAMENT

FOURTH SESSION

THE STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS AND THE STANDING COMMITTEE ON INFORMATION AND TECHNOLOGY

A REPORT ON THE ELECTION LAWS (AMENDMENT) (NO.3) BILL (NATIONAL ASSEMBLY BILLS NO. 63 OF 2015)

ANNEX 5

(MEMORANDA RECEIVED)

Clerk's Chambers,
First Floor,
Parliament Buildings,
NAIROBI.

5th January, 2017

List of Memoranda Submitted

1. Ministry of Information, Communications and Technology (MoICT)
2. Independent Electoral and Boundaries Commission (IEBC)
3. Communications Authority of Kenya (CA)
4. Coalition for Credible Polls 2017
5. Inter Religious Council of Kenya
6. Law Society of Kenya – President
7. National Council for Persons with Disabilities
8. Leadership of Christians Community Bodies
9. Quest for an Enabling Environment for Civil Society Organisations in Kenya
10. Mr. Paul Matheri Wamae, Sc
11. Dr. Shailesh Patel
12. Attorney General - AG
13. Col (Rtd) Nicholas Ruto
14. CORD Coalition
15. Dr. Oluoch Ogolla, Phd
16. Elections Observation Group
17. FORD Kenya - Embakasi District
18. Information Communication Technology Association of Kenya
19. Inter Faith Council of Kenya
20. Inter-Regional Development Agency – IRDA
21. Jubilee Party
22. Kenya African National Union – KANU
23. Kenya ICT Action Network - KiCTAnet
24. Kenya National Chamber of Commerce and Industry – KNNCI

25. Kenya National Commission on Human Rights – KNCHR
26. Law Society of Kenya Supplementary Presentation by the President
27. Mega Mashujaa Heroes Act 2014 and other Mau Mau Displaced Citizens
28. Mount Kenya Roads & Buildings Contractors Association
29. Mr. Benedict Ogutu – Finance & Legal Affairs Mukuru Makao Bora Trust
30. Mr. Boaz N.A.O. Waruku
31. Mr. Charles Karanja et al
32. Mr. Cosmas Kosgey Cherop Arap Cheberur
33. Mr. David Ochwangi
34. Mr. David Okello
35. Mr. Fred Oketch Jonam
36. Mr. Gwada S. Ogot
37. Mr. James Njendu
38. Mr. James Njoroge
39. Mr. John Kanya
40. Mr. John Nteere - Chairman, Meru County Professionals Forum
41. Mr. Philibert Vincent Oramisi
42. Mr. Pius O. Odhiambo
43. Ms. Marilyn M. Kamuru
44. Ms. Nazlin Omar Fazaldini Rajput
45. Peace and Development Network Trust – PeaceNet – Kenya
46. Rev. Peter Kikuvi Makau
47. The Computer Society of Kenya
48. The Kenya Diaspora Alliance – KDA
49. Trade Unions Congress of Kenya – TUC-Ke

50. Voter Information Network and Education – Africa
51. Draft IEBC Regulations on use of Technology
52. Senate Committee report on regulations
53. Mkenya Daima
54. Council of Governors

Other Documents in the Order they appear

1. Brief on the Elections Law Amendment Bill
2. Elections Law Amendment Bill no.3
3. Elections Act 24 0f 2011
4. Elections Campaign financing Act
5. IEBC Act

REPUBLIC OF KENYA

MINISTRY OF INFORMATION,
COMMUNICATIONS AND TECHNOLOGY

Electoral System Review

Joseph Mucheru, EGH
Cabinet Secretary Ministry of ICT

REPUBLIC OF KENYA

MINISTRY OF INFORMATION, COMMUNICATIONS AND TECHNOLOGY

CONCLUSION

There should be a manual backup to electronic systems at the next general election.

- **Joint Statement from the Department Of Homeland Security and Office of the Director of National Intelligence on Election Security**

  Release Date: October 7, 2016

  ...DHS has convened an Election Infrastructure Cybersecurity Working Group with experts across all levels of government to raise awareness of cybersecurity risks potentially affecting election infrastructure and the elections process. Secretary Johnson and DHS officials are working directly with the National Association of Secretaries of State to offer assistance, share information, and provide additional resources to state and local officials.

  https://www.dhs.gov/news/2016/10/07/joint-statement-department-homeland-security-and-office-director-national#

- **Kenya is at war with Al-Shabab!**

REPUBLIC OF KENYA

MINISTRY OF INFORMATION,
COMMUNICATIONS AND TECHNOLOGY

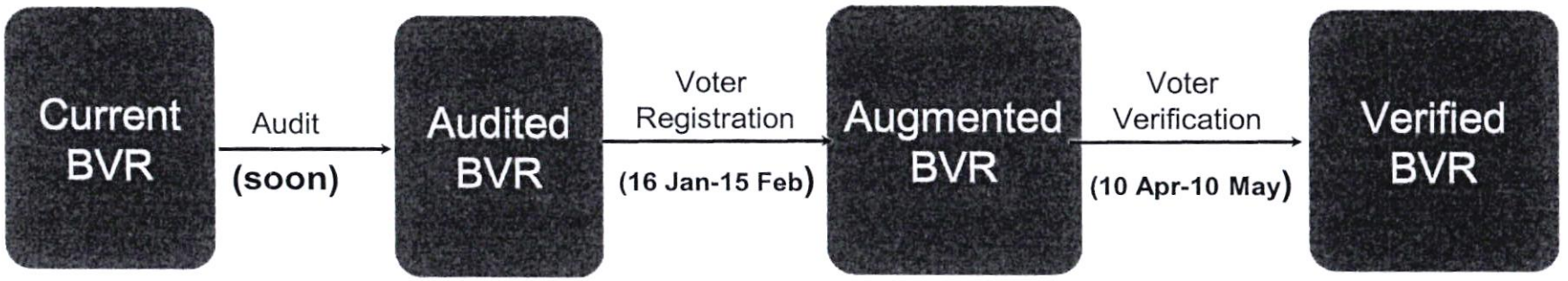
Five Reasons

1. Electoral Process Guarantees
2. Reliability and Dependability of Systems
3. Network Coverage
4. Human Factors – Risks to be Mitigated
5. IEBC System Procurement Factors

REPUBLIC OF KENYA

MINISTRY OF INFORMATION, COMMUNICATIONS AND TECHNOLOGY

1. Electoral Process Guarantees



- No Duplicates
- No Fake Voters
- Complete Records

+ Ineligible Voters

- **+ New Voters**
- **+ Diaspora**
- **+ Ineligible Voters**

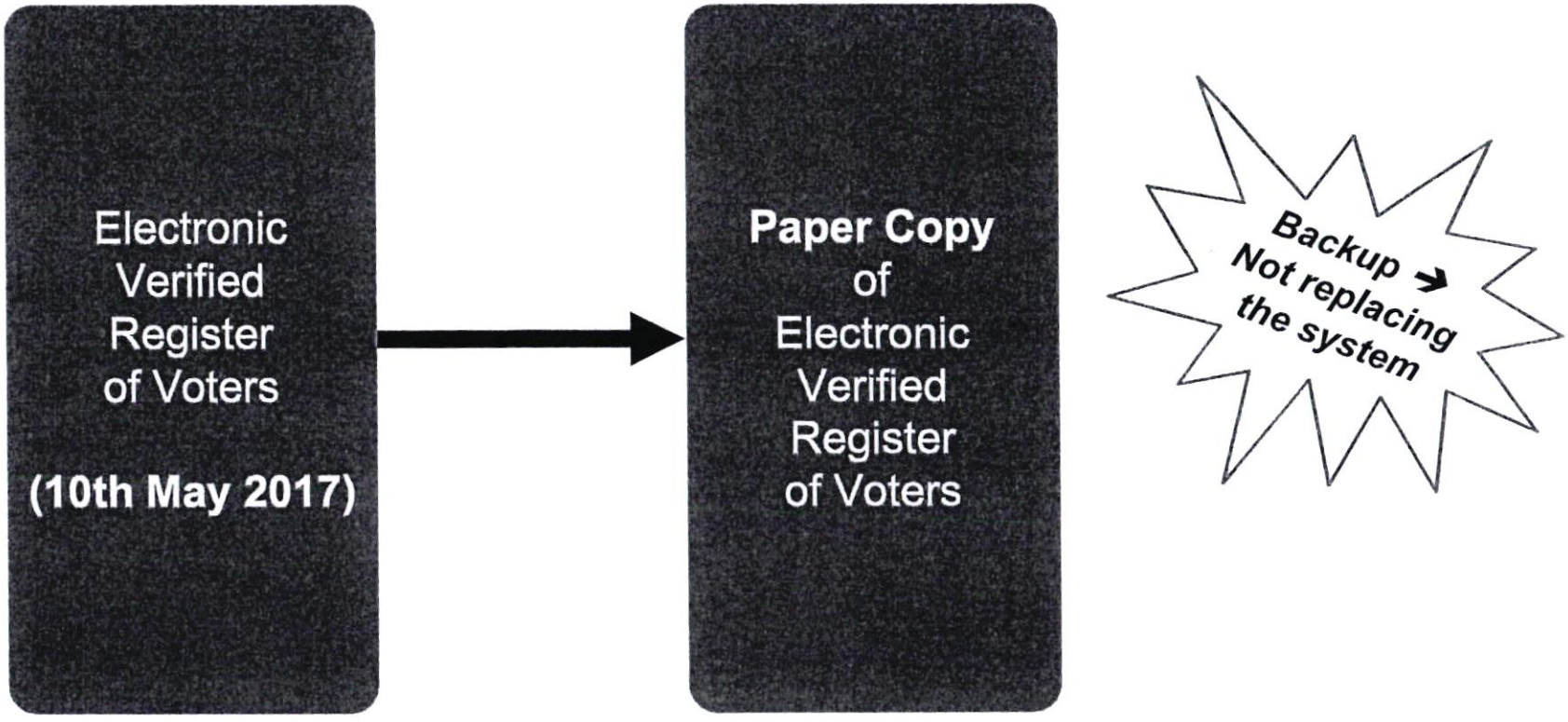
CLEAN REGISTER

- No Ineligible Voters
- No Fakes
- No Duplicates
- Voters Allocated to Stations

REPUBLIC OF KENYA

MINISTRY OF INFORMATION, COMMUNICATIONS AND TECHNOLOGY

Process Guarantees



The paper copy of the register is a verifiably **identical** copy of the **verified electronic** register of voters

It provides an alternative should the computer devices fail, without loss of data.

It provides resilience in the face of disaster

2. Reliability & Dependability

REPUBLIC OF KENYA

MINISTRY OF INFORMATION, COMMUNICATIONS AND TECHNOLOGY

- **Reliability or dependability** → the ability of a system to function under stated conditions for a specified period of time
  - This 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

Dimensioning the Challenge

REPUBLIC OF KENYA

MINISTRY OF INFORMATION, COMMUNICATIONS AND TECHNOLOGY

50,000 Polling Station each of **500 Voters**

90% Reliability	⇨	**10%** failure	⇨	**5,000 Polling Stations will fail** **2.5M Voters disenfranchised**
99% Reliability	⇨	**1%** failure	⇨	**500 Polling Stations will fail** **250,000 Voters disenfranchised**
99.9% Reliability	⇨	**0.1%** failure	⇨	**50 Polling Stations will fail** **25,000 Voters disenfranchised**

3. Network Coverage

REPUBLIC OF KENYA

MINISTRY OF INFORMATION, COMMUNICATIONS AND TECHNOLOGY

- It is not about the network coverage alone:
  - **IEBC has no network of its own** and has **to procure from 3rd parties,** limiting control and creating multiple vulnerabilities
  - System configuration errors by a vendor rendered the Safaricom network unavailable during a by-election ➔ yet the Safaricom network services were up and running

Currently, 17% of the country is 3G enabled which covers 78% of the population ➔ IEBC targets to use the network on August 8 to transmit scanned copies of results to constituency tallying centres.

4.Human Factors – Risks to be Mitigated

REPUBLIC OF KENYA

MINISTRY OF INFORMATION, COMMUNICATIONS AND TECHNOLOGY

- **Device Risks**: Data errors, Equipment loss, Equipment malfunction, Device uncharged
- **Supplier Risks**: Late delivery, defective equipment, improper integration, warranty and support, closed source solutions
- **Logistical Risks**: Matching device to polling station, Missing devices, damaged devices etc
- **Operator Risks**: Skills gap, unable to solve problem
- **Denial of Service**: Network jamming, device theft, hacking and attacks

5. IEBC System Procurement Factors

REPUBLIC OF KENYA

MINISTRY OF INFORMATION, COMMUNICATIONS AND TECHNOLOGY

The Kenya Integrated Electoral Management System (KIEMS) tender has multiple issues, namely

---

Under the: **Technical MANDATORY Requirements**
Only bidders who meet ALL the requirements for Step 1 will proceed to Step 2.

Step 1 states that amongst other onerous requirements the potential supplier must have a certificate of compliance with:
Page 19: B4: REACH - registration, evaluation, authorization and restriction of chemicals (EU)

Observation:
The REACH statute is reputedly one of the most complex pieces of European legislation, and is an odd 849 pages of dense technical specification on chemical registration and supply chain management. Other countries such as Korea etc have their own equivalent legislation

This limits the tender to a European supplier. There is no technical need for this restriction. (Excludes Kenyan companies)

Page 20:
A1: The hardware must be easily portable for easy movement by election officials without damage to internal circuitry and should not exceed 1.5kg including the internal battery and all supplied accessories.

Observation:
This limits the solution to an integrated tablet device and extra battery. There is no technical need for a 1.5Kg limit on weight since the device will be used in only one location on a table.

A2: The proposed Operating system should have the latest an anti-virus program
Page 49: Technical Skills of Project engineers: ICT Certifications e.g. MCP/MCSE/CCNA/CCNP

Observation:
Why does this limit the solution to one specific vendor?

5. IEBC System Procurement Factors

REPUBLIC OF KENYA

MINISTRY OF INFORMATION, COMMUNICATIONS AND TECHNOLOGY

The Kenya Integrated Electoral Management System (KIEMS) tender has multiple issues, namely

---

On the timing of deliveries:
The tender stipulates that
Page 74: Manufacturing, assembly and delivery lead-times to the IEBC warehouse (Maximum **60 days** after contract sign off).

Observation:
From our experience, this is unattainable.

On data transfer to devices:
On page 74, the Tender stipulates that:

1. Data export from the central system and import onto all the Integrated System indicating the timelines, infrastructure or other components required (this export should be completed within **2 weeks**).

Observation:
But the tender also requires the data to be stored on SD Cards. Assuming therefore that 22,000/(7*24* 60 minutes) = 2.18 SD cards per minute. It will be required to copy data to each SD card at a a rate of less than 30 seconds. This is simply not possible, given setup times, marking, insertion, commencement of copy, removal of SD card and location to the correct polling station etc. The requirement of 2 weeks, using SD cards **cannot** be met.

---

5. IEBC System Procurement Factors

REPUBLIC OF KENYA

MINISTRY OF INFORMATION, COMMUNICATIONS AND TECHNOLOGY

- **IEBC Tendering Oversight required:**
  - The tender has no provision of securing the manual election results forms that are sealed in special secure envelopes that can be tracked and used for final verification.
  - **Solution**:
    - The tender specifications **need to be reviewed before it is closed on Jan 9 2017** as it calls for a total electronic IT based solution for voter registration, verification and results transmission.
    - **Election experts must scrutinise the new tender specifications before it is re-advertised** so that it is open and transparent and fair and allows for an integrated system that caters for all conditions – electronic or otherwise
  - **Long-term Solution**: An independent team to Monitor tendering, append quality acceptance signatures and have access to the IEBC pre-use results of the system that will be used in the election.
    - Explore the use of Public Key Infrastructure and Block Chain technology with local companies: Creating transparency and integrity of the process – Start early: IMMEDIATELY AFTER THE ELECTIONS

REPUBLIC OF KENYA

MINISTRY OF INFORMATION,
COMMUNICATIONS AND TECHNOLOGY

Thank You!

D/COM. 2

BRIEFING TO THE SENATE STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS BY THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

The Election Laws (Amendment) Bill, (National Assembly Bill No. 3 of 2015)

December 29, 2016

IEBC = 800 Staff of which
ICT = 30 Pax.

Allow IEBC to gazette party nominations days.

INTRODUCTION

1. The IEBC wishes to thank the Senate Standing Committee on Legal Affairs and Human Rights for according us an opportunity to address some salient issues concerning the preparations for the next General Election, and in particular, on amendments as proposed by the National Assembly under the **Election Laws (Amendment) Bill, (National Assembly Bill No. 3 of 2015).**

2. It should be pointed out that the said Bill is as a result of two unrelated processes. The first, is a process that commenced way back in 2014 leading to the substantive bill on election amendments (i.e. Bill No. 3 of 2015). The second process relates to the aftermath of the negotiations leading to the enactment of the Elections Laws (Amendment) Act 2016 and the Elections Offences Act 2016.

3. The Elections Laws (Amendment) Act 2016 and the Elections Offences Act 2016 both came into force on 4th October 2016. These laws are an outcome of a negotiated process spearheaded by the Joint Parliamentary Select Committee. The IEBC has made adjustments to the earlier published election timelines as the first step towards the implementation of the new.

4. The key areas that we raised concerns about included: *the audit of the voter register, its methodology and procurement; size of polling station; inspection, verification and certification of the register of voters; the role of ICT in electoral processes and its procurement; party primaries and nominations; and the budgetary implications.*

STAKEHOLDER CONSULTATIONS

5. It should also be on record that when the new laws were enacted, the IEBC was never fully consulted after the Bill was drafted. We do not remember if there was any invitation for public participation on the draft bill. This is understood given the political context at the time the laws were negotiated.

6. As implementers, the IEBC has the duty to raise any concerns it might have with respect to the implementation of these laws. By so doing, the IEBC is discharging its constitutional mandate to protect the

sovereignty of the people of Kenya. It is unfortunate that the issues raised by the IEBC have been misrepresented to the extent that ordinary citizens may not distinguish facts from fiction.

7. Immediately after the laws were enacted, the IEBC made efforts to inform political parties through the Political Parties Liaison Committee (PPLC), civil society organisations, media, state actors, development partners and the Justice Legal Affairs Committee of the National Assembly. With respect to the JLAC, the IEBC appeared before it four times upon the Committee's invitation.

8. During all our engagements, there was unanimity among stakeholders that there are issues that needed to be looked into afresh for the smooth management of the electoral process. The only point of difference has been the preferred solutions. This can only be resolved if parties can have a honest and candid conversation on substance.

BI-PARTISANSHIP

9. It is important for the country to rally together as we embark on preparing for the coming general election. While meeting the JLAC, the IEBC emphasized the importance of resolving the issues raised through a bi-partisan approach. Now the Bill is before the Senate, the IEBC calls for the same bi-partisan spirit. We are pleased to observe that the Senate is cognisant of the need for bi-partisanship and we look forward to resolutions that will meet the expectations of Kenyans.

VOTING PRINCIPLES

10. Articles 38, 82, 83, 86 and 249 of the Constitution provide the framework for electoral governance in Kenya. When making proposals on electoral governance, the IEBC is motivated by nothing else, other than being faithful to the voting principles set out in the Constitution. This Committee must always remember that (1) Every adult citizen has the right, **without unreasonable restrictions** to be registered as a voter and to vote by secret ballot; and (2) that 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.

USE OF TECHNOLOGY AND CONTINGENCY IN ELECTIONS

11. We wish to put it on record that IEBC plans to deploy an integrated electronic system that consists of voter registration, voter identification and results transmission. In this integrated system, there is no electronic voting. By voting we mean the act of casting a ballot.

12. We have already developed the specifications and advertised the tender for the supply of what we have christened, the *Kenya Integrated Election Management System* (KIEMS). And by doing so, we are planning for 100% success in deployment and not 100% failure as some stakeholders have indicated.

13. However, in the unlikely event that technology fails in some areas, proper planning must ensure that eligible voters are allowed to vote after an agreed upon procedure is followed. This is best practice. For instance, in Ghana, the Public Elections Regulations of 2012, provide for a manual process of verifying the voter in the event that for whatever reasons, the biometric machines are unable to identify the voter using fingerprints. Annex II provides the Ghanaian case study.

14. Similarly, when it comes to transmission of results, there are several factors that could lead to failure. The question we should be asking ourselves is, what does the IEBC do in such a situation? We have read literature on this matter and the overriding instructions to EMBs is that we must have a contingency plan for any technology we deploy in elections. The quotation from ACE network below is apt:

> *"a contingency plan must be fully implemented and is fully tested prior to Election Day. Identification of a second telephone in close proximity to each voting station can be made prior to Election Day, and can represent an economical alternative in case of technology failure. Where mobile phones are used, technical support staff can be deployed with replacements for failed units. Where multiple mobile networks are available, local roaming or alternative SIM cards can be provided to presiding officers.*

Where transmission of data from devices at the polling station or perhaps from tallying centres is planned, devices can be configured with a number of target servers offering redundancy at the back end and increasing the likelihood that results will reach at least one of the configured servers..... Finally, a manual alternative to electronic transmission of results, such as the use of couriers or hand delivery, can be used as a final back-up plan.

The selection of a contingency plan is driven by local context and circumstances in that particular jurisdiction. In some circumstances.....partnership or collaboration with private companies to use their facilities can be made as a backup plan."

15. Having observed the debate on the use of ICT in elections, we noted that most players are agreeable that there is need for a backup, fall-back or contingency plan during the process of identification or transmission of election results. The issue at stake is what type of contingency plan we should have. On voter identification, the IEBC proposes the Ghanaian model. With respect to results transmission a modified approach could be designed.

16. In **Annex I**, the IEBC wishes to highlight some of its positions with respect to certain amendments and what the National Assembly has proposed to amend. IEBC's proposals were guided by experience and most importantly, by the constitutional principles that govern elections and in particular, Articles 38, 82, 83 and 88 of the Constitution. Further, the IEBC has also been informed by international best practices.

Annex I: IEBC POSITION AND AMENDMENTS			
SECTION OF THE ELECTIONS LAWS (AMENDMENT) ACT 2016	**IMPLICATIONS**	**RECOMMENDATIONS BY THE IEBC**	**RECOMMENDATIONS BY NATIONAL ASSEMBLY**
A. [Section 2] Section 2(e) inserts the following new definitions– "biometric" means unique identifiers or attributes including fingerprints, hand geometry, earlobe geometry, retina and iris patterns, voice waves, DNA, and signatures.	The definition of "biometric" does not include **"facial"**. The current BVR system captures only facial and fingerprints. The current voter register has only "facial" and "finger prints". For purposes of standardization of the register of voters, it is important to have the definition of biometrics to include "facial."	Amend definition to 'biometric ' by adding the word facial so as to read: *"biometric" means unique identifiers or attributes including facial ,fingerprints, hand geometry, earlobe geometry, retina and iris patterns, voice waves, DNA, and signatures.*	National Assembly did not take IEBC proposal into consideration.
B. [Section 5] Section 6A (1) states that the Commission shall, not later than ninety days before the date of a general election, open the Register of Voters for **verification of biometric data** by members of the public at their respective polling stations for a period of thirty days.	1. The verification of biometric data assumes that the IEBC shall avail verification kits at polling stations across the country 120 days before the election (i.e April 10, 2017). The IEBC projection shows that the new system might not be fully in place by April 10, 2017. 2. Previous experience shows that many voters prefer confirming their registration details via SMS/web portal. The law as currently crafted means that voters must physically	1. Amend Section 6A (1) by deleting the words **"ninety"** and replacing with **"sixty"**. This will allow the IEBC to avail the new kits for verification after procurement is complete. Meaning, the verification will now commence on May 10, 2017. 2. Amend Section 6A (1) by deleting the words **"biometric data"** before the words' by members' and replacing with **'registration'**.	1. The proposal to reduce the time from "ninety" to "sixty" was carried (i.e. Section 6A) 2. However, the IEBC notes that Section 6 is at cross-purpose with Section 6A since it provides timelines for inspection of the register and yet 6A is about almost a similar exercise. 3. The proposal to include alternative mechanism for verification of registration

	appear to confirm their biometric data. 3. The IEBC raised questions as to what happens to voters who for one reason or the other do not physically confirm their biometric data during between April 10, 2017 to May 10, 2017 verification period. Should the IEBC assume they are part of the register or not?	This approach will provide Kenyans alternative mechanisms such as SMS and web portal to confirm their registration details. The revised provision shall now read: *The Commission shall, not later than sixty days before the date of a general election, open the Register of Voters for verification of registration data by members of the public at their respective polling stations for a period of thirty days.*	details not considered by National Assembly.
C. [Section 6] The new Section 8A (3) states that for purposes of the first general election after the commencement of this section, the Commission shall, within thirty days of the commencement of this section, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of: (a) verifying the accuracy of the Register; (b) recommending mechanisms of enhancing the accuracy of the Register; and	1. Audit of the register of voters is a new requirement in the country's electoral process. The law did not define the procedure to be followed in auditing the register. The new section also impacts on elections operation timelines. 2. There are overlaps between the timelines for engaging the audit firm and the procurement law. However, the Public Procurement and Assets Disposal Act 2015 governs all procurement in the public sector. The new does not make reference to the procurement law.	Amend Section 8A(3) by deleting the words " within thirty days of the commencement of this section" before the word engage to read: *For purposes of the first general election after the commencement of this section, the Commission shall, engage a professional reputable firm to conduct an audit of the Register of Voters.*	National Assembly did not take IEBC proposal into consideration.

D. [Section 8] The new Section 13(1) states that a political party shall nominate its candidates for an election under this Act at least sixty days before a general election in accordance with its constitution and nomination rules. Read together with: The new Section 2 (c) which defines "nomination day" to mean the day gazetted, at least sixty days before an election, by the Commission as the day for the nomination of candidates for that election.	1. Previously party primaries would end 45 days before the election. The Commission had power to fix the date for nomination. But since the nomination day is now legislated, there is potential for conflict between the timelines for nomination of candidates by parties (party primaries) and the registration of candidates for election by the Commission. 2. Section 74 of the Elections Act gives the Commission 7 days to resolve dispute arising from party by tabulating the timelines leading to nominations, there is almost no time to handle disputes arising from both party primaries and Commission nomination.	Amend Section 2 (c) by deleting 'at least sixty days before an election, after the words 'gazetted to read: *"nomination day" to mean the day gazette by the Commission as the day for the nomination of candidates for that election.*	National Assembly did not take IEBC proposal into consideration.
E. [Section 10] The new Section 31 (2) states that the Commission shall, upon the request of a political party, conduct and supervise the nomination of candidates by the political party for presidential, parliamentary or county elections in accordance with Article 88 of the Constitution.	1. Political parties are given the discretion to ask the Commission to conduct party primaries. 2. If the Commission accedes to party requests, then the question of financing must be addressed. 3. In addition, the Commission has no discretion to reject such requests.	Amend Section 31 by deleting the word' shall' after 'commission ' and replacing with 'may' to read: *The Commission may, upon the request of a political party, conduct and supervise the nomination of candidates by the political party for presidential, parliamentary or county elections in accordance with Article 88 of the Constitution.*	1. National Assembly has now provided that Government shall fund party primaries if more than two political parties request IEBC. 2. Proposal to allow IEBC discretion was not taken on board.

F. Section 10 of the Elections Act, 2011 is amended in subsection (1) by deleting the word "is" and substituting therefor the words "and biometric data are" A person whose name and biometric data are entered in a register of voters in a particular polling station, and who produces an identification document shall be eligible to vote in that polling station.	1. Persons are registered using national Identity card and/or Valid Passport and their biometric data captured. 2. If biometric identification is mandatory, it is important to allow for the procedure for handling voters who for whatever reasons may not be identified using biometrics on the voting day. 3. Failure to identify a voter using biometrics could be as a result of no-fault on their part or the usual malfunctioning of the system. 4. Under the current practice, once the kit is unable to read the voter's fingerprint, the Presiding officer moves to the next level of verification by using the voter's "National ID number". Often, this process leads to having the voter details showing on the screen and then confirmed by the presiding officer before proceeding to vote.	Delete the words biometric data are appearing before the words 'entered" to read: *A person whose name is entered in a register of voters in a particular polling station, and who produces an identification document shall be eligible to vote in that polling station.* *In the alternative:* *Parliament should provide a procedure that requires the presiding officer to, before proceeding to the second option of verifying the voter, to consult with party agents and/or observers present and record in a form the reasons as to why the voter was not identified biometrically.*	The National Assembly has proposed for the Commission to a complementary mechanism in place as long as it complies with Article 38 of the Constitution.

G. [Section 13] Section 38A, states that for the efficient and effective conduct of elections, the Commission shall determine the number of voters per polling station but such number shall not exceed five hundred voters.	1. The Commission had made a similar proposal to have the number of voters per polling station capped at 700 but also allowing the Commission to determine any other number. 2. The number of polling stations will increase by almost 100% if the Commission achieves its targeted 22 million voters. Current projection – 57,331 polling stations. 3. There are certain voting areas that do not have space for expansion to accommodate additional polling stations. This is based on IEBC's own analysis of the facilities in over 200 polling stations which had more than 5,000 voters.	Amend section 38A by deleting the word 'five' after exceed and replacing with 700 to read: *For the efficient and effective conduct of elections, the Commission shall determine the number of voters per polling station but such number shall not exceed seven hundred voters.*	Parliament has proposed to revise the law to ensure that the number of voters per polling station does not exceed 700.
H. [Section 14] Section 39(1C) states that for purposes of a presidential election the Commission shall- (a) electronically 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 national tallying centre; and	1. The practice has been that provisional results are transmitted to the tallying centres from polling stations noting that the data being transmitted is transferred from manually written forms. 2. The ICT infrastructure must be upgraded to enable scanning of all results forms and making them available online. The Commission will have to change the operational procedure at polling station and	1. To reword 39(1C) by adding the word 'from the constituency returning officer' after the words received in (b). To read: (b) tally and verify the results received from the constituency returning	1. National Assembly recommended that IEBC should put in place complementary mechanism for results transmission as a fallback in the event the first option fails. 2. Communication Authority of Kenya to provide more data on alternative solutions found in the market.

(c) publish the polling result forms on an online public portal maintained by the Commission.	tallying centre to accommodate the scanning of Results Forms. 3. Not all areas in the country are covered by the required network (3G network) – more than 1200 sub-locations do not have this type of network. This may mean that unless there is adequate network, polling officials will have to travel away from their polling stations to transmit results.	officer' at the national tallying centre; In addition: 2. The law should provide clarity on the protocol to be followed in the transmission of the results should the first option not work. For instance, *Parliament should provide a procedure that requires the presiding officer to consult with party agents and/or observers present and record in a form the reasons as to why results cannot be transmitted electronically.* 3. The Communication Authority of the Kenya to provide data and briefing to Parliament on the coverage and suggest recommendations aimed at increasing network.	

I. [Section 17] Section 44(4) provides that the Commission shall, in an open and transparent manner – (a) procure and put in place the technology necessary for the conduct of a general election at least eight months before such elections; and (b) test, verify and deploy such technology at least sixty days before a general election.	1) The Public Procurement and Assets Disposal Act 2015 governs all procurement in the public sector. The new law does not make reference to the procurement law. 2) The timelines set out under the new law are inconsistent with those set out in PPAD Act of 2015. 3) Given that the law became operational on 4th October 2016, it means that the Commission had only 64 days to procure the new systems. Section 5 of the PPAD Act states that on matters procurement the procurement law takes precedence over any other law.	Delete Section 44(4) (a) and (b) and reword the section to read: The Commission shall, in an open and transparent manner – *procure, test, verify and deploy technology necessary for the conduct of a general election at least sixty days before such elections.*	National Assembly proposes to address the situation by stating that the technology should now be procured and put in place at least 120 days before the election.
J. [Section 17] Section 44(6) provides that 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	1) The Commission does not have comprehensive regulations on the use of ICT in elections. This is a fairly technical areas that requires adequate professional in-put. 2) The time allocated may not be adequate to provide quality input to the Regulations including consultation with stakeholders. 3) Parliament has no timelines to approve the regulation which may	Amend Section 44(6) by deleting the word "within a period of thirty days from the date of commencement of this section" after the word 'subsection' and replacing with four months to read: *Notwithstanding the provisions of section 109(3) and (4), the Commission shall prepare and submit to Parliament, the regulations required under*	National Assembly did not consider IEBC proposals.

	imply non-operationalisation of the Act.	*subsection (4) within four months to the election.* In the alternative, *The IEBC be given powers to gazette the regulations within a defined period in the event Parliament does not provide feedback on the draft regulations.*	

Annex II: Case Study: Ghana - Public Elections Regulations, 2016

1) Identification and verification of voters 32.

(1) A polling assistant may, before delivering a ballot paper to a person who is to vote at the election, require that person to produce a voter identification card in order to establish that the person is the registered voter whose name and voter identification number and particulars appear in the Register.

(2) In the absence of a voter identification card, the polling assistant shall identify the name and particulars of the voter as recorded in the name reference list.

(3) The polling assistant shall scan the barcode of the voter in order to establish by facial recognition the identity of the voter.

(4) The voter shall go through a biometric verification process through the use of the biometric verification device.

(5) Where the biometric verification device fails to verify a registered voter and the red light is shown with a voice message "REJECTED," the polling assistant shall

(a) inform the agents of the political parties present at the polling station;

(b) complete a Verification Form, as set out in Form Seven of the Schedule in the presence of the party,s candidate or agent; and

(c) hand over the completed Verification Form to the Verification Officer.

(6) The Verification Officer shall draw a horizontal line across the voter's barcode in the register to indicate that the voter has been manually verified.

(7) At the end of the voting and before counting of the ballots, the number of persons manually verified shall be entered in the second box in C6 on the Statement of the Poll and Declaration of Results Form as set out in Form Eight of the Schedule.

2) Ghana to Allow Manual Verification of Voters

Ghana's Electoral Commission says voters in the 2016 elections can verify their eligibility both manually and biometrically to prevent the high numbers of people disenfranchised on voting day. The chair of the commission, Madam Charlotte Osei addressing editors across the country in Accra said a few new modalities have been introduced for this year's elections to make it credible, fair and transparent.

She reiterated the Electoral Commission's readiness for the elections on December 7. "There is the introduction of manual verification as well as biometric verification. The reason why the EC has decided to introduce manual verification is because of the instances of false rejection.

"In the unlikely event that someone gets to the polling station, presents their card, they're found on the register, the barcode is signed, their details come up and you can see that they are validly registered voters however the biometric machine fails to

validate them, the EC was of the view that people should not be disenfranchised but should be allowed to vote" she added.

In the 2012 elections some voters were disenfranchised because the biometric machines could not verify them although they were validly registered and are known to be persons who live in their vicinities with them.

The key policy of 'No Verification, No Vote' was to be implemented to the letter in that election. The new laws have reviewed the no verification, no vote policy which according to the EC chair has been in consultation with the various political parties. She said "so in the law we put in a manual verification process, which was subject to agreement with all the political parties at the Inter-Party Advisory Committee (IPAC)."

Source: http://3news.com/election-2016-voters-can-verify-both-manually-and-biometrically-ec/

EZRA CHILOBA, CEO/CS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

BRIEFING TO THE SENATE STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS BY THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

The Election Laws (Amendment) Bill, (National Assembly Bill No. 3 of 2015)

December ~~28~~ 29, 2016

INTRODUCTION

INTRODUCTION

The IEBC wishes to thank the Senate Standing Committee on Legal Affairs and Human Rights for according us an opportunity to address some salient issues concerning the preparations for the next General Election, and in particular, on amendments as proposed by the National Assembly under the **Election Laws (Amendment) Bill, (National Assembly Bill No. 3 of 2015).**

It should be pointed out that the said Bill is as a result of two unrelated processes. The first, is a process that commenced way back in 2014 leading to the substantive bill on election amendments (i.e. Bill No. 3 of 2015). The second process relates to the aftermath of the negotiations leading to the enactment of the Elections Laws (Amendment) Act 2016 and the Elections Offences Act 2016.

The Elections Laws (Amendment) Act 2016 and the Elections Offences Act 2016 both came into force on 4th October 2016. These laws are an outcome of a negotiated process spearheaded by the Joint Parliamentary Select Committee. The IEBC has made adjustments to the earlier published election timelines as the first step towards the implementation of the new.

The IEBC did not hesitate to inform stakeholders the implications of the law and the challenges it poses to the electoral process. Indeed, immediately after the laws were enacted, the IEBC made efforts to inform political parties through the Political Parties Liaison Committee (PPLC), civil society organisations, media, state actors, development partners and the Justice Legal Affairs Committee of the National Assembly. With respect to the JLAC, the IEBC appeared before it four times upon the Committee's invitation.

During all our engagements, there was unanimity among stakeholders that there are issues that needed to be looked into afresh for the smooth management of the electoral process. The only point of difference has been

the preferred solutions. This can only be resolved if parties can have a honest and candid conversation on substance.

It should also be on record that when the new laws were enacted, the IEBC was never consulted, and indeed, neither was the general public. This is understood given the political context at the time the laws were negotiated.

However, as implementers, the IEBC has the duty to raise any concerns it might have with respect to the implementation of these laws. By so doing, the IEBC is discharging its constitutional mandate to protect the sovereignty of the people of Kenya. It is unfortunate that the issues raised by the IEBC have been misrepresented to the extent that ordinary citizens may not distinguish facts from fiction.

That said, it is important for the country to rally together as we embark on preparing for the coming general election. While meeting the JLAC, the IEBC emphasized the importance of resolving the issues raised through a bi-partisan approach. Now the Bill is before the Senate, the IEBC calls for the same bi-partisan spirit.

The table below, the IEBC wishes to highlight some of its positions with respect to certain amendments and what the National Assembly has proposed to amend. IEBC's proposals were guided by experience and most importantly, by the constitutional principles that govern elections and in particular, Articles 38, 82, 83 and 88 of the Constitution. Further, the IEBC has also been informed by international best practices.

SECTION OF THE ELECTIONS LAWS (AMENDMENT) ACT 2016	IMPLICATIONS	RECOMMENDATIONS BY THE IEBC	RECOMMENDATIONS BY NATIONAL ASSEMBLY
[Section 2] Section 2(e) inserts the following new definitions– "biometric" means unique identifiers or attributes **including fingerprints**, hand geometry, earlobe geometry, retina and iris patterns, voice waves, DNA, and signatures.	The definition of "biometric" does not include **"facial".** The current BVR system captures only facial and fingerprints. The current voter register has only "facial" and "finger prints". For purposes of standardization of the register of voters, it is important to have the definition of biometrics to include "facial."	Amend definition to 'biometric ' by adding the word facial so as to read: *"biometric" means unique identifiers or attributes including **facial** ,fingerprints, hand geometry, earlobe geometry, retina and iris patterns, voice waves, DNA, and signatures.*	National Assembly did not take IEBC proposal into consideration.
[Section 5] Section 6A (1) states that the Commission shall, not later than ninety days before the date of a general election, open the Register of Voters for **verification of biometric data** by members of the	1. The verification of biometric data assumes that the IEBC shall avail verification kits at polling stations across the country 120 days before the election (i.e April 10, 2017). The IEBC projection shows that the new system might not be fully in place by April 10,	1. Amend Section 6A (1) by deleting the words **"ninety"** and replacing with **"sixty"**. This will allow the IEBC to avail the new kits for verification after procurement is complete. Meaning, the ification	1. The proposal to reduce the time from "ninety" to "sixty" was carried. 2. The proposal to include alternative mechanism for

public at their respective polling stations for a period of thirty days.	2017. 2. Previous experience shows that many voters prefer confirming their registration details via SMS/web portal. The law as currently crafted means that voters must physically appear to confirm their biometric data. 3. The IEBC raised questions as to what happens to voters who for one reason or the other do not physically confirm their biometric data during between April 10, 2017 to May 10, 2017 verification period. Should the IEBC assume they are part of the register or not?	will now commence on May 10, 2017. 2. Amend Section 6A (1) by deleting the words "**biometric data**" before the words' by members' and replacing with '**registration**'. This approach will provide Kenyans alternative mechanisms such as SMS and web portal to confirm their registration details. The revised provision shall now read: *The Commission shall, not later than **sixty** days before the date of a general election, open the Register of Voters for verification of **registration** data by members of the public at their respective polling stations for a period of thirty days.*	verification of registration details not considered by National Assembly.
[Section 6] The new Section 8A (3) states that for purposes of the first general election after the commencement of this section, the Commission shall, within thirty days of	1. Audit of the register of voters is a new requirement in the country's electoral process. The law did not define the procedure to be followed in auditing the register. The new section also impacts on elections operation	Amend Section 8A(3) by deleting the words "within thirty days of the commencement of this section" before the word engage to read:	National Assembly did not take IEBC proposal into consideration.

the commencement of this section, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of: (a) verifying the accuracy of the Register; (b) recommending mechanisms of enhancing the accuracy of the Register; and	timelines. 2. There are overlaps between the timelines for engaging the audit firm and the procurement law. However, the Public Procurement and Assets Disposal Act 2015 governs all procurement in the public sector. The new does not make reference to the procurement law.	*For purposes of the first general election after the commencement of this section, the Commission shall, engage a professional reputable firm to conduct an audit of the Register of Voters.*	
[Section 8] The new Section 13(1) states that a political party shall nominate its candidates for an election under this Act at least sixty days before a general election in accordance with its constitution and nomination rules. Read together with: The new Section 2 (c) which defines "nomination day" to mean the day gazetted, at least sixty days before an election, by the Commission as the day for the nomination of	1. Previously party primaries would end 45 days before the election. The Commission had power to fix the date for nomination. But since the nomination day is now legislated, there is potential for conflict between the timelines for nomination of candidates by parties (party primaries) and the registration of candidates for election by the Commission. 2. Section 74 of the Elections Act gives the Commission 7 days to resolve dispute arising from party by tabulating the timelines leading to nominations, there is almost no time to handle disputes arising from both party primaries and Commission	Amend Section 2 (c) by deleting 'at least sixty days before an election, after the words 'gazetted to read: *"nomination day" to mean the day gazette by the Commission as the day for the nomination of candidates for that election.*	National Assembly did not take IEBC proposal into consideration.

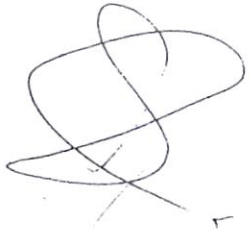
candidates for that election.	nomination.		
[Section 10] The new Section 31 (2) states that the Commission shall, upon the request of a political party, conduct and supervise the nomination of candidates by the political party for presidential, parliamentary or county elections in accordance with Article 88 of the Constitution.	1. Political parties are given the discretion to ask the Commission to conduct party primaries. 2. If the Commission accedes to party requests, then the question of financing must be addressed. 3. In addition, the Commission has no discretion to reject such requests.	Amend Section 31 by deleting the word' shall' after 'commission ' and replacing with 'may' to read: *The Commission may, upon the request of a political party, conduct and supervise the nomination of candidates by the political party for presidential, parliamentary or county elections in accordance with Article 88 of the Constitution.*	National Assembly has now provided that Government shall fund party primaries if more than two political parties request IEBC. Proposal to allow IEBC discretion was not taken on board.
Section 10 of the Elections Act, 2011 is amended in subsection (1) by deleting the word "is" and substituting therefor the words "and biometric data are" A person whose name and biometric data are entered in a register of voters in a particular polling station, and who produces an identification document shall be eligible to vote in that	1. Persons are registered using national Identity card and/or Valid Passport and their biometric data captured. 2. If biometric identification is mandatory, it is important to allow for the procedure for handling voters who for whatever reasons may not be identified using biometrics on the voting day. 3. Failure to identify a voter using biometrics could be as a result of no-fault on their part or the usual malfunctioning of the system. 4. Under the current practice, once the	Delete the words biometric data are appearing before the words 'entered" to read: *A person whose name is entered in a register of voters in a particular polling station, and who produces an identification document shall be eligible to vote in that polling station.* ***In the alternative:*** *Parliament should provide a procedure that requires the presiding officer to, before*	Proposed to have a complementary mechanism to be put in place by the Commission as long as it complies with Article 38 of the Constitution.

polling station.	kit is unable to read the voter's fingerprint, the Presiding officer moves to the next level of verification by using the voter's "National ID number". Often, this process leads to having the voter details showing on the screen and then confirmed by the presiding officer before proceeding to vote.	*proceeding to the second option of verifying the voter, to consult with party agents and/or observers present and record in a form the reasons as to why the voter was not identified biometrically.*	
[Section 13] Section 38A, states that for the efficient and effective conduct of elections, the Commission shall determine the number of voters per polling station but such number shall not exceed five hundred voters.	1. The Commission had made a similar proposal to have the number of voters per polling station capped at 700 but also allowing the Commission to determine any other number. 2. The number of polling stations will increase by almost 100% if the Commission achieves its targeted 22 million voters. Current projection – 57,331 polling stations. 3. There are certain voting areas that do not have space for expansion to accommodate additional polling stations. This is based on IEBC's own analysis of the facilities in over 200 polling stations which had more than 5,000 voters.	Amend section 38A by deleting the word 'five' after exceed and replacing with 700 to read: *For the efficient and effective conduct of elections, the Commission shall determine the number of voters per polling station but such number shall not exceed seven hundred voters.*	Parliament has proposed to revise the law to ensure that the number of voters per polling station does not exceed 700.

[Section 14] Section 39(1C) states that for purposes of a presidential election the Commission shall- (a) electronically 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 national tallying centre; and (c) publish the polling result forms on an online public portal maintained by the Commission.	1. The practice has been that provisional results are transmitted to the tallying centres from polling stations noting that the data being transmitted is transferred from manually written forms. 2. The ICT infrastructure must be upgraded to enable scanning of all results forms and making them available online. The Commission will have to change the operational procedure at polling station and tallying centre to accommodate the scanning of Results Forms. 3. Not all areas in the country are covered by the required network (3G network) – more than 1200 sub-locations do not have this type of network. This may mean that unless there is adequate network, polling officials will have to travel away from their polling stations to transmit results.	1. To reword 39(1C) by adding the word 'from the constituency returning officer' after the words received in (b). To read: (b) tally and verify the results received from the constituency returning officer' at the national tallying centre; **In addition:** 2. The law should provide clarity on the protocol to be followed in the transmission of the results should the first option not work. For instance, *Parliament should provide a procedure that requires the presiding officer to consult with party agents and/or observers present and record in a form the reasons as to why results cannot be transmitted electronically.* 3. The Communication	1. National Assembly recommended that IEBC should put in place complementary mechanism for results transmission as a fallback in the event the first option fails. 2. Communication Authority of Kenya to provide more data on alternative solutions found in the market.

		Authority of the Kenya to provide data and briefing to Parliament on the coverage and suggest recommendations aimed at increasing network.	
[Section 17] Section 44(4) provides that the Commission shall, in an open and transparent manner – (a) procure and put in place the technology necessary for the conduct of a general election at least eight months before such elections; and (b) test, verify and deploy such technology at least sixty days before a general election.	1) The Public Procurement and Assets Disposal Act 2015 governs all procurement in the public sector. The new law does not make reference to the procurement law. 2) The timelines set out under the new law are inconsistent with those set out in PPAD Act of 2015. 3) Given that the law became operational on 4th October 2016, it means that the Commission had only 64 days to procure the new systems. Section 5 of the PPAD Act states that on matters procurement the procurement law takes precedence over any other law.	Delete Section 44(4) (a) and (b) and reword the section to read: The Commission shall, in an open and transparent manner – *procure, test, verify and deploy technology necessary for the conduct of a general election at least sixty days before such elections.*	National Assembly proposes to address the situation by stating that the technology should now be procured and put in place at least 120 days before the election.
[Section 17] Section 44(6) provides that notwithstanding the provisions of section 109(3) and (4), the Commission shall prepare and submit to Parliament, the regulations required	1) The Commission does not have comprehensive regulations on the use of ICT in elections. This is a fairly technical areas that requires adequate professional in-put. 2) The time allocated may not be adequate to provide quality input to	Amend Section 44(6) by deleting the word "within a period of thirty days from the date of commencement of this section" after the word 'subsection' and replacing with four months to read:	National Assembly did not consider IEBC proposals.

made under subsection (4) within a period of thirty days from the date of commencement of this section	the Regulations including consultation with stakeholders. 3) Parliament has no timelines to approve the regulation which may imply non-operationalisation of the Act.	*Notwithstanding the provisions of section 109(3) and (4), the Commission shall prepare and submit to Parliament, the regulations required under subsection (4) within four months to the election.* **In the alternative,** *The IEBC be given powers to gazette the regulations within a defined period in the event Parliament does not provide feedback on the draft regulations.*	



28/12/2016

COMMUNICATIONS AUTHORITY OF KENYA

3

TELECOMMUNICATION NETWORK COVERAGE IN KENYA

1.0 BACKGROUND

The Communications Authority of Kenya (CA) is the regulatory authority for the communications sector in Kenya. Established in 1999 by the Kenya Information and Communications Act, 1998, the Authority is responsible for facilitating the development of the Information and Communications sectors including; broadcasting, multimedia, telecommunications, electronic commerce, postal and courier services. During the FY 2015/16, the Authority conducted an ICT Access Gaps study to identify ICT infrastructure and services gaps / high cost areas and estimate the appropriate financial subsidy amounts required from the Universal Service Fund (USF) to facilitate closing of the identified ICT gaps.

2.0 KEY FINDINGS OF THE ACCESS GAPS STUDY

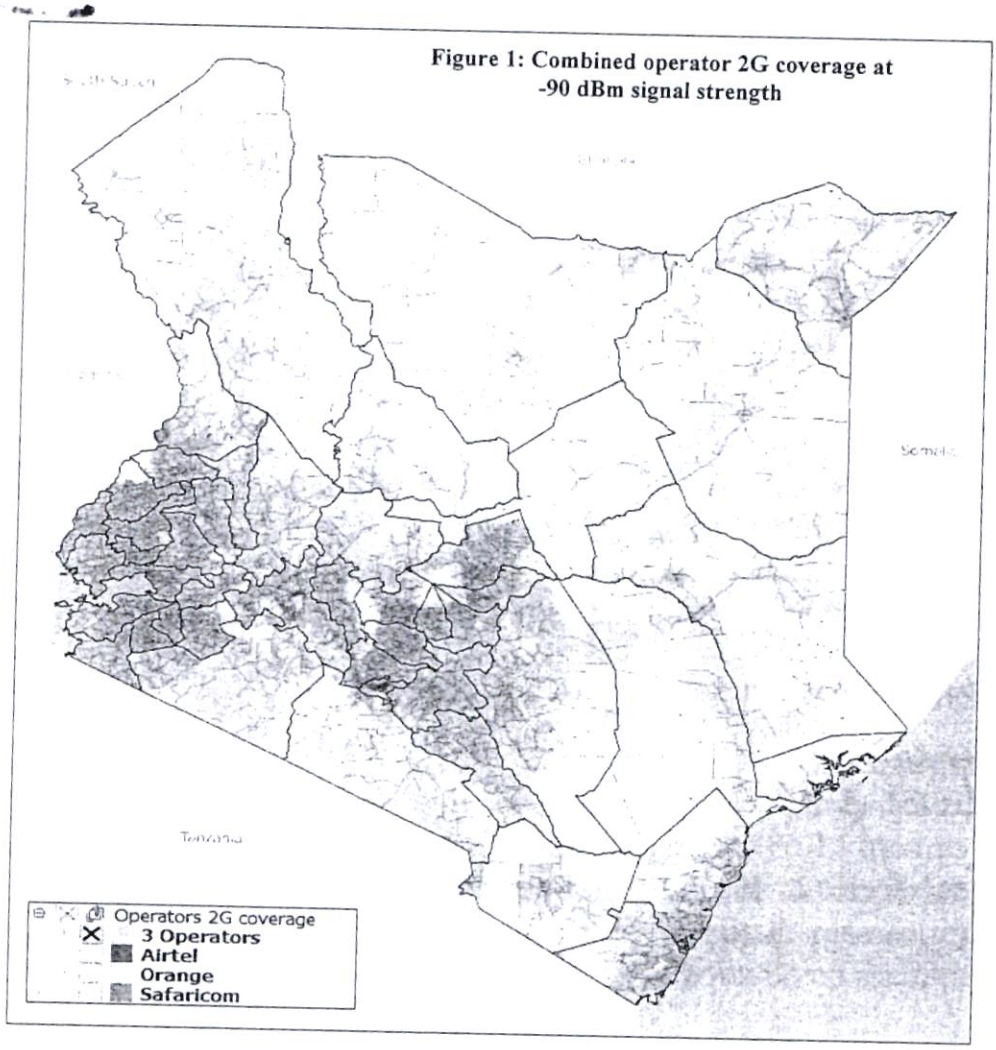
2.1 2 G Coverage

The study established that 94.4% of the Kenyan population is covered by 2G network, leaving out only 5.6% of the country's population without access to voice communications services. It was also established that only 164 out of a total of 7,149 sub-locations remain totally uncovered, while a further 418 have less than 50% of their populations covered by 2G.

Table 1: Sub-location population 2G coverage

Coverage	100%	>90%	50% - 90%	< 50%	0%
Sub-locations	5,655	487	425	418	164

Figure 1: Combined operator 2G coverage at -90 dBm signal strength



2.2 3G Coverage

78% of the population in Kenya are covered by 3G.

Table 2: Sub-location population 3G coverage

Coverage	100%	>90%	50% - 90%	< 50%	0%
Sub-locations	2,454	1,324	1,146	977	1,244

Figure 2: Combined operator 3G coverage at -90 dBm signal strength

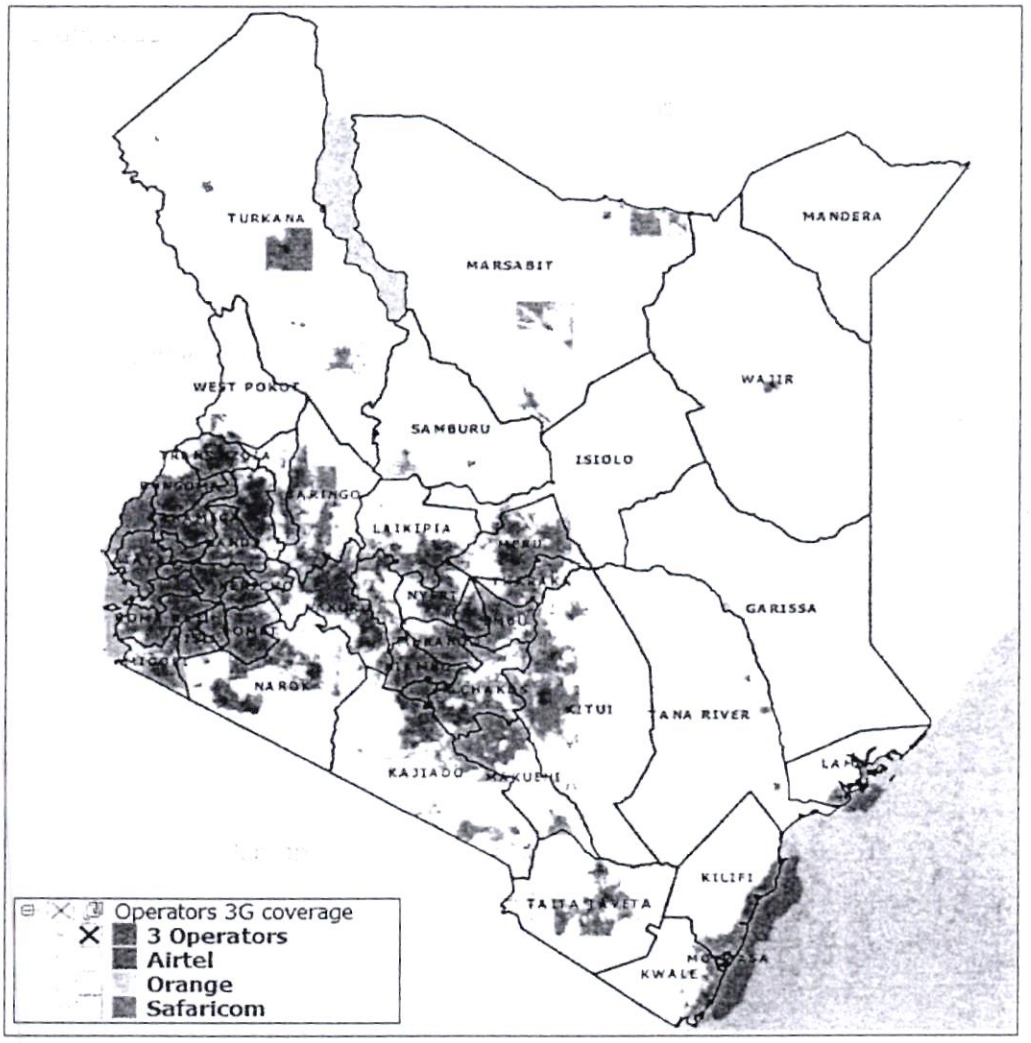


Table 3: Estimated 2G and 3G Network coverage by County

County	2G (%)	3G (%)
Baringo	87.7	49.1
Bomet	99.8	97.7
Bungoma	96.4	95.2
Busia	99.1	95.4
Elgeyo Marakwet	97.1	34.7
Embu	99.6	88.3
Garissa	58.1	4.6
Homa Bay	97.8	87.6
Isiolo	54.7	16.4
Kajiado	74.4	38.9
Kakamega	99.9	93.5
Kericho	99.6	87.7
Kiambu	99.8	98.3
Kilifi	91.9	51.5
Kirinyaga	100.0	98.5
Kisii	99.9	90.2
Kisumu	99.9	98.8
Kitui	89.2	49.8
Kwale	91.5	46.4
Laikipia	90.8	48.9
Lamu	82.4	34.4
Machakos	99.9	73.0
Makueni	99.6	68.7
Mandera	66.9	9.4
marsabit	56.6	25.2
Meru	99.8	85.4
Migori	99.1	69.5
Mombasa	99.7	99.8
Muranga	99.7	80.8
Nairobi	100.0	99.9
Nakuru	99.7	74.6
Nandi	99.6	85.9
Narok	86.7	29.9
Nyamira	99.9	96.2

Nyandarua	99.7	66.1
Nyeri	99.8	86.5
Samburu	55.5	14.0
Siaya	99.6	94.5
Taita-Taveta	96.4	43.4
Tana River	85.8	12.8
Tharaka Nithi	97.9	77.6
Trans Nzoia	99.9	81.1
Turkana	34.8	10.2
Uasin Gishu	99.8	76.2
Vihiga	99.9	99.0
Wajir	48.2	8.4
West pokot	69.0	13.3

COALITION FOR CREDIBLE POLLS 2017

P.O. BOX 25510 – 00100
NAIROBI, KENYA

MEMORUNDUM SUBMITTED BY COALITION FOR CREDIBLE POLLS 2017 IN RESPONSE TO REQUEST BY SENATE STANDING COMMITTEE ON ON LEGAL AFFAIRS & HUMAN RIGHTS ON ELECTORAL LAWS AMMENDMENT BILL, NATIONAL ASSEMBLY BILL NO. 3 OF 2016

29th December 2016

A. INTRODUCTION

1. This is a written memorandum on behalf of the **COALITION FOR CREDIBLE POLLS 2017**, in response to an invitation by the Senate to submit views on amendments recently enacted by the National assembly to the Elections Act.

B. THE WRITTEN MEMORANDUM

A. The key questions we all MUST reflect upon, and which guided our memorandum is;

2. If there was a failure of either the Electronic Voter Identification Device (EVID) in a particular area, meaning that the Elections in that specific area did not happen, or happened and spilled over into Wednesday 9th August 2017, the Elections thus held would be unconstitutional. What would happen then?

    a. Would we hold a by election when there was no primary election?
    b. Would the rest of the nation wait until that area voted?
    c. Would the courts allow a violation of the Constitution by allowing voting to begin on a day other than that set out in the Constitution?

3. And in the event there is a network failure that stops or prevents results transmission on time, what then happens?

B. Whether section 39 (1) (c) of the Election Act as amended by section 14 of the Election Laws (Amendment) Act, 2016 is unconstitutional?

4. Article 38(3) guarantees every citizen the right to vote; the said section states that;

   (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

5. The right to vote under article 38(3) is buttressed by Article 81(a) which states that;

   81. The ***electoral system*** *shall comply with the following principles –*

   (a) freedom of citizens to exercise their political rights under Article 38;

6. Further to the foregoing Article 83 (3) states that;

   (3) 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****.*

7. By virtue of the aforegoing there is a presumption in favor of enforcing every right of a citizen to be registered as a voter, to vote and to have every vote count.

8. The amendments sought to be introduced by Section 39(1)(C) of the Election Act as amended by section 14 of the Election Laws (Amendment) Act, 2016 and Section 10 of the Election Act as amended by section 7 of the Election Laws (Amendment) Act, 2016 rebut this presumption.

9. It is a known fact that electronic gadgets/ hardware suffer intermittent failure, even though the intent of manufacturer and persons procuring were that they work seamlessly

    a. In fact, even a failure rate of 0.01% will mean approximately 14,000 Kenyans will be denied the right to vote, which is against their fundamental right as enshrined in Sections 38, 81 and 83 of Kenya's constitution

10. Data available from the Communications Authority of Kenya confirms the fact that 10% of the country has no network coverage at all, while only 17% of the country has 3 G network coverage. It is therefore beyond argument that even before the election is held, a very significant number of polling stations run the risk of not transmitting their results

11. It is also a well-accepted fact internationally that the use of technology in elections and indeed in many other spheres of life poses numerous challenges including:

    i) lack of transparency;
    ii) negative impact on confidence in the process;
    iii) confusion for the illiterate, uneducated and elderly voters on process;
    iv) need to conduct widespread voter education, how to use it and its impact on the process;
    v) difficulties in auditing results;
    vi) secrecy of the ballot;
    vii) security of the voting and counting process;
    viii) cost of introducing and maintaining the technology over the lifecycle of the equipment;

ix) potentially losing control over the process to outside technology vendors; recruitment of staff with specialized IT skills;

x) added complexity in the electoral process and the ability of the EMB to deal adequately with this complexity; and

xi) Consequences in the event of equipment or system malfunction.

xii) In addition to these challenges, it is also vitally important that electronic voting and counting systems are implemented in such a way as to not violate core electoral standards.

12. Technology is not intended to fail. However, there are many documented instances where technology in elections and electoral processes have failed *(Appendix 1)*

13. If any component of the electronic system fails, the reading of section 39 (1)(C), as amended by section 14 of the Elections Laws (Amendment) Act, 2016 will render the whole election a nullity

14. Equally, the failure of Biometric Voter Registration systems and EVID systems should not be a basis of disenfranchising eligible Kenyan voters. Indeed, the insistence on exclusively employing electronic voter registration and identification systems which have in the past proved to be unreliable and imperfect should be seen as an attempt at legalizing voter suppression laws akin to those employed in the past in the United States of America to disenfranchise black and minority voters.

15. To ensure that the constitutionally required threshold of an accurate, verifiable, secure, accountable and transparent process is met, there should be manual process as a back-up in case there is failure in the

electronic transmission of results. This is a position that has been upheld by the Supreme court in the case of **RAILA ODINGA & 5 others v INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 3 others [2013] eKLR** at paragraph 233 where it was held that;

"...We take judicial notice that, as with all technologies, so it is with electoral technology: it is rarely perfect, and those employing it must remain open to the coming of new and improved technologies. Analogy may be drawn with the traditional refereeing methods in football which, as their defects became apparent, were not altogether abandoned, but were complemented with television-monitoring, which enabled watchers to detect errors in the pitch which had occurred too fast for the referees and linesmen and lineswomen to notice...

....But as regards the integrity of the election itself, what lawful course could IEBC have taken after the transmission technology failed? There was no option, in our opinion, but to revert to the manual electoral system, as was done. ...

.....From case law, and from Kenya's electoral history, it is apparent that electronic technology has not provided perfect solutions. Such technology has been inherently undependable, and its adoption and application has been only incremental, over time. It is not surprising that the applicable law has entrusted a discretion to IEBC, on the application of such technology as may be found appropriate. Since such technology has not yet achieved a level of reliability, it cannot as yet be considered a permanent or irreversible foundation for the conduct of the electoral process. This negates the Petitioner's contention that, in the instant case, injustice, or illegality in the conduct of election would result, if IEBC did not consistently employ electronic technology. It follows that the Petitioner's case, insofar as it attributes nullity to the Presidential election on grounds of failed technological devices, is not sustainable...."

16. One of the key security and reliability standards in an election process is an optional specification for a voter-verified paper audit trail.

17. In addition to the foregoing, concerns of restricted public participation in the verification of results have been raised in countries that sought to exclusively use electronic voting systems.

18. For example, in 2009, the German Federal Constitutional Court *(Appendix 2)* declared that when electronic voting systems are deployed, it must be possible for the citizen to check the essential steps in the election act and in the ascertainment of the results reliably and without special expert knowledge. The court found that it was not possible for a citizen or voter to independently verify the integrity of an election based entirely on electronic systems.

19. Electronic transmission of votes is susceptible to hackers, software bugs, badly trained poll workers or power outages could intentionally or accidentally erase or alter voting data captured by the machines. In the event of a close election, a recount would be impossible on machines that keep no proper record of votes cast. This will be in effect trusting the fate of our democracy to technology that's not ready yet.

20. The use of electronic transmission of results failed in the recently concluded elections in Ghana because the system was compromised and so they stopped using it and had to revert solely to the manual system.

21. The insistence of using electronic transmission as the only mode of transmission will be setting up the country on the reliance of an unreliable, insecure mode of transmission of Presidential results, the

least we could do is to have a back-up manual system in case the electronic system fails.

C. Whether Section 10 of the Election Act as amended by section 7 of the Election Laws (Amendment) Act, 2016 restricts the right to vote as guaranteed by Article 38(3) of the Constitution?

22. Kenya needs to be careful by virtue of the amendments that were brought into force by section 10 of the Elections Act as amended by Section 7 of the Election Laws (Amendment) Act, 2016. The said section made it a requirement that a person's biometric data must be verifiable on polling day and that this can only be done using an Electronic Voter Identification Device (EVID). As much as the intention is noble, the said EVID devices have not yet been procured and as demonstrated above, are susceptible to problems like all technology and IT systems.

23. The only biometric data captured are fingerprints until such time as the 1st Interested Party deploys technology to capture biometric data other than fingerprints.

24. The aforesaid requirements introduced by section 10 of the Elections Act as amended by Section 7 of the Election Laws (Amendment) Act, 2016 will disenfranchise registered voters;

    a. Whose details have been registered as voters but whose fingerprint cannot be captured by the Electronic Voter Identification Device (EVID) by virtue of the fact that the thumb prints have been disfigured due to age, injury or manual labour. This group of Kenyans constitute a significant number of voters on the voters register and the insistence by some stakeholders on exclusive electronic voter registration and identification must be seen in the context of an unconstitutional attempt to legitimize voter suppression.

b. Those registered voters whose fingerprints are captured in the voters register but who cannot produce finger prints on voting day e.g those people whose hands have been dismembered.

c. In-case there is a failure in the EVID machines.

D. Whether Elections can be extended beyond the provided for specific time and date stated by Articles 101, 136, 177, 180, of the Constitution?

25. There have been arguments that in the event of EVID failure, that Elections in the specific area be frozen until such a time that the equipment is fixed. This will be unconstitutional.

E. <u>Conclusion</u>

26. If envisioned electronic parts of the elections systems fail, then the Elections Laws (Amendment) Act 2016 as designed may lead to a denial of Kenyan citizens' rights to vote which is unconstitutional. **Article 83 (3) of the Constitution** states that:

> *"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 elections."*

27. Everything points to the fact that we need a Manual Back System of voter identification and results transmission, in the unlikely event the electronic systems fail
    a. These manual back-up systems MUST be credible, accurate, transparent, accountable and verifiable

    b. That all players MUST agree on the manner and method or events that would trigger the use of these back-up systems

28. The amendments of any statute should not become an instrument of voter suppression. Our electoral laws and systems should not undermine the right to be registered as voter, the right to vote and every vote should count.

29. Article 2(4) of the Constitution of Kenya 2010 states that;

"Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."

30. With respect to the interpretation of the Constitution, Article 259 provides the manner in which the Constitution is to be interpreted. It requires that the Constitution should be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, and that contributes to good governance.

31. With regard to provisions of legislation that limit or are intended to limit fundamental rights and freedoms, the Constitution itself qualifies the presumption. As was observed in the case of **Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10; others [2015] eKLR where it was stated;**

"[96.] However, we bear in mind that the Constitution itself qualifies this presumption with respect to statutes which limit or are intended to limit fundamental rights and freedoms. Under the provisions of Article 24 .... There can be no presumption of constitutionality with respect to legislation that limits fundamental rights: it must meet the criteria set in the said Article."

32. THAT the amendments sought to be introduced by Section 39((1)(c) of the Election Act as amended by section 14 of the Election Laws (Amendment) Act, 2016 and Section 10 of the Election Act as amended

by section 7 of the Election Laws (Amendment) Act, are inconsistent with the Constitution and are therefore void to the extent of the inconsistency.

33. We urge the Senate to uphold the recent amendments passed by the National Assembly to set the Elections Act in conformity with international best practice in the area of electronic electoral systems, with the Constitution of Kenya and perhaps most importantly, to avert a national crisis which may be potentially violent in the event electronic electoral systems fail or malfunction on election day as has happened in the past in Kenya and numerous other countries.

Dennis Nyakundi - Convenor

ARNOLD MALIBA — CONVENOR

KANYATTA MWANGI — CONVENOR

James Mambo — Convenor

COALITION FOR CREDIBLE POLLS 2017

Appendix 1

1. This issues are not academic or theoretical. The following examples, extracted from readily available public sources highlight some of the dangers of entrusting an exercise as important as national elections to exclusive mandatory electronic or IT electoral systems:

    - Fairfax County, Virginia, November 4, 2003. Some voters complained that they would cast their vote for a particular candidate and the indicator of that vote would go off shortly after.
    - During the Ghanian elections held in 2012, the Biometric Voter Registration (BVR) and EVID machines failed.
    - The recent 2016 national elections in Ghana where the electronic vote results transmission system failed.
    - The Kenyan General elections in 2013 when the Electronic Voter Identification Systems (EVID) failed leading to significant delays in many polling stations. Indeed, the CORD Presidential candidate Mr Raila Odinga could not be identified by the EVID machine at his polling station and was eventually identified by paper records.
    - The Premier Election Solutions (formerly Diebold Election Systems) TSx voting system disenfranchised many voters in Alameda and San Diego Counties during the March 2, 2004, California presidential primary due to non-functional voter card encoders.-On April 30 California's secretary of state Kevin Shelley decertified all touch-screen

machines and recommended criminal prosecution of Diebold Election Systems. The California Attorney-General decided against criminal prosecution, but subsequently joined a lawsuit against Diebold for fraudulent claims made to election officials. Diebold settled that lawsuit by paying $2.6 million. On February 17, 2006 the California Secretary of State Bruce McPherson then recertified Diebold Election Systems DRE and Optical Scan Voting System.[72]

- In Napa County, California, March 2, 2004, an improperly calibrated marksense scanner overlooked 6,692 absentee ballot votes.
- Omesh Saigal, an IIT alumnus and IAS officer, demonstrated that the 2009 elections in India when Congress Party of India came back to power might be rigged. This forced the election commission to review the current EVMs.
- On October 30, 2006, the Dutch Minister of the Interior withdrew the license of 1187 voting machines from manufacturer Sdu NV, about 10% of the total number to be used, because it was proven by the General Intelligence and Security Service that one could eavesdrop on voting from up to 40 meters using Van Eck phreaking.[75] National elections are to be held 24 days after this decision. The decision was forced by the Dutch grass roots organisation *Wij vertrouwen stemcomputers niet* ("We do not trust voting computers").
- Problems in the United States general elections, 2006:
  - During early voting in Miami, Hollywood and Fort Lauderdale, Florida, in October 2006 three votes intended to be recorded for Democratic candidates were displaying as cast for Republican. Election officials attributed it to calibration errors in the touch screen of the voting system.

- In Pennsylvania, a computer programming error forced some to cast paper ballots. In Indiana, 175 precincts also resorted to paper. Counties in those states also extended poll hours to make up for delays.
- Cuyahoga County, Ohio: The Diebold computer server froze and stopped counting votes then the printers jammed so paper copies could not be retrieved for many votes and there was no way to be sure of the accuracy of the votes when the votes were being counted.
- Waldenburg, Arkansas: The touch screen computer tallied zero votes for one mayoral candidate who confirmed that he certainly voted for himself and therefore there would be a minimum of one vote; this is a case of disappearing votes on touchscreen machines.

- Instances of faulty technology and security issues surrounding these machines were documented on August 1, 2001, in the Brennan Center at New York University Law School. NY University Law School released a report with more than 60 examples of e-voting machine failures in 26 states in 2004 and 2006. Examples included Spanish language ballots that were cast by voters but not counted in Sacramento in 2004.
- In Finland, the Supreme Administrative Court declared invalid the results of a pilot electronic vote in three municipalities, and ordered a rerun of the municipal elections (Karkkila, Kauniainen and Vihti). The system had a usability problem where the messages were ambiguous on whether the vote had been cast. In a total of 232 cases (2% of votes), voters had logged in, selected their vote but not confirmed it, and left the booth; the votes were not recorded. Following the failure of the pilot election, the Finnish government has abandoned plans to continue electronic voting based on voting machines. In the memo it was concluded, that the voting machine is not developed any more, and Finnish government will follow the

development of different electronic voting systems worldwide.

- 2008 United States elections:
  - Virginia, Tennessee, and Texas: Touch screen voting machines flipped votes in early voting trials.
  - Humboldt County, California: A security flaw erased 197 votes from the computer database.
- In 2010, graduate students from the University of Michigan hacked into the District of Columbia online voting systems during an online voting mock test run and changed all the cast ballots to cater to their preferred candidates. This voting system was being tested for military voters and overseas citizens, allowing them to vote on the Web, and was scheduled to run later that year. It only took the hackers, a team of computer scientists, thirty-six hours to find the list of the government's passwords and break into the system.
- iVote is a remote electronic voting system in New South Wales that allows eligible voters a chance to vote over the Internet. However, during the New South Wales state election in 2015, there were several reports that over 66,000 electronic votes could have been compromised. Although the iVote website is secure, security specialists believe that a third party website was able to attack the system. This was the first time a major vulnerability was discovered in the middle of an ongoing poll.

Appendix 2

In the case The German Federal Constitutional Court, the court thus declared the law requiring exclusive use of electronic electoral systems unconstitutional in the following terms:

> *"bb) In a republic, elections are a matter for the entire people and a joint concern of all citizens. Consequently, the monitoring of the election procedure must also be a matter for and a task of the citizen. Each citizen must be able to comprehend and verify the central steps in the elections reliably and without any special prior technical knowledge.*
>
> *cc) The public nature of the elections is also anchored in the principle of the rule of law. The public nature of the state's exercise of power, which is based on the rule of law, serves its transparency and controllability. It is contingent on the citizen being able to perceive acts of the state bodies. This also applies as to the activities of the election bodies.*
>
> *b) The principle of the public nature of elections requires that all essential steps in the elections are subject to public examinability unless other constitutional interests justify an exception. Particular significance attaches here to the monitoring of the election act and to the ascertainment of the election result.*
>
> *An election procedure in which the voter cannot reliably comprehend whether his or her vote is unfalsifiably recorded and included in the ascertainment of the election result, and how the total votes cast are assigned and counted, excludes central elements of the election procedure from public monitoring, and hence does not comply with the constitutional requirements.*

c) Despite the considerable value attaching to the constitutional principle of the public nature of elections, it does not ensue from this principle that all acts in connection with the ascertainment of the election result must take place with the involvement of the public so that a well-founded trust in the correctness of the elections can be created. For instance, activities of the district returning officer with which according to § 76.1 of the Federal Electoral Code the – public – ascertainment of the election result is prepared by the district election committee are not constitutionally obliged to be subject to the principle of the direct public nature of elections (see BVerfG, judgment of the Second Senate of 3 July 2008 – 2 BvC 1/07, 7/07 –, Neue Zeitschrift für Verwaltungsrecht 2008, p. 991 (992)).

d) The requirements as to the examinability of the election events apply to the implementation of parliamentary elections regardless of the responsibility of the state bodies which have a constitutional structure (see BVerfGE 20, 56 (113); 41, 399 (414); Seifert, Bundeswahlrecht , 3rd ed. 1976, p. 130).

It is primarily a matter for the legislature to regulate how the retraceability of the essential steps in the election procedure is ensured. Article 38.3 of the Basic Law empowers and obliges the legislature to determine the details of the structure of electoral law (in particular the election system and the election procedure) and compliance with the principles of electoral law (see Magiera, in: Sachs, GG , 5th ed. 2009, Art. 38 , marginal nos. 106 et seq. and 113 et seq.). The design of the technical aspects of the election events also falls within the regulatory mandate under Article 38.3 of the Basic Law (see Morlok, in: Dreier, GG , Vol. 2, 2nd ed. 2006, Art. 38 , marginal no. 127), and hence the decision on deployment of voting machines and the determination of the more detailed preconditions for their deployment. Details may be regulated by means of a legal ordinance on the basis of a statutory authorisation (see Magiera, in: Sachs, GG , 5th ed. 2009, Art. 38 , marginal no. 114).

The legislature is entitled to broad latitude when lending concrete shape to the principles of electoral law within which it must decide whether and to what degree deviations from individual principles of electoral law are justified in the interest of the uniformity of the entire election system and to ensure the state policy goals which they pursue (see BVerfGE 3, 19 (24-25); 59, 119 (124); 95, 335 (349)). The Federal Constitutional Court only reviews whether the legislature has remained within the boundaries of the latitude granted to it by the Basic Law, or whether it has violated a valid constitutional election principle by overstepping these boundaries. It is not a matter for the Court to find whether the legislature has found solutions which are expedient or desired in terms of legal policy within the latitude to which it is entitled (see BVerfGE 59, 119 (125)).

3. The deployment of voting machines which record the voters' votes in electronic form and ascertain the result of the election electronically is hence only compatible with the Basic Law subject to strict preconditions.

a) When electronic voting machines are deployed, it must be possible to check the essential steps in the election act and in the ascertainment of the results reliably and without special expert knowledge.

The necessity of such monitoring emerges not lastly from the susceptibility to manipulation of electronic voting machines and their amenability to error. In these, the acceptance of the voters' votes and the calculation of the election result is based on a calculation act which cannot be examined from outside or by persons without special computer knowledge. Errors in the voting machine software are hence difficult to recognise. Over and above this, such errors can affect not only one individual election computer, but all the devices used. Whilst manipulations or election falsifications are virtually impossible in classical elections with voting slips under the conditions of the valid provisions, including the provisions on the

public nature of elections – or at least are only possible with considerable effort and with a very high risk of discovery which has a preventive impact – a major impact may in principle be achieved with relatively little effort by encroachments on electronically controlled voting machines. Manipulations of individual voting machines can already influence not only individual voters' votes, but all votes cast with the aid of this device. The scope of the election errors which are caused by alterations and malfunctions of a single software program affecting multiple devices is even wider. The major scope of the effect of possible errors in the voting machines or targeted election falsifications requires special precautions to be taken in order to comply with the principle of the public nature of elections.

aa) The voter himself or herself must be able to verify – also without a more detailed knowledge of computers – whether his or her vote as cast is recorded truthfully as a basis for counting or – if the votes are initially counted with technical support – at least as a basis for a subsequent re-count. It is not sufficient if he or she must rely on the functionality of the system without the possibility of personal inspection. It is hence inadequate if he or she is exclusively informed by an electronic display that his or her ballot has been registered. This does not facilitate sufficient monitoring by the voter. Equal viability must also apply to the election bodies and to interested citizens.

The consequence of this is that the votes may not be stored exclusively on an electronic storage medium after the ballot. The voter may not be required to trust solely in the technical integrity of the system after the electronic ballot. If the election result is ascertained by computer-controlled processing of the votes stored in an electronic storage medium, it is not sufficient if only the result of the calculation process as implemented in the voting machine can be taken note of using a summary paper printout or an electronic display. By these means, voters and election bodies can only examine whether the voting machine has processed as many votes as voters

have been admitted to operate the voting machine in the elections. It is not easily recognisable in such cases whether there have been programming errors in the software or targeted election falsifications through manipulation of the software or of the voting machines.

bb) The legislature is not prevented from using electronic voting machines in the elections if the constitutionally required possibility of a reliable correctness check is ensured. In particular, voting machines are conceivable in which the votes are recorded elsewhere in addition to electronic storage. This is for instance possible with electronic voting machines which print out a visible paper report of the vote cast for the respective voter, in addition to electronic recording of the vote, which can be checked prior to the final ballot and is then collected to facilitate subsequent checking. Monitoring that is independent of the electronic vote record also remains possible when systems are deployed in which the voter marks a voting slip and the election decision is recorded simultaneously (for instance with a "digital election pen", see on this Schiedermair, Juristenzeitung 2007, p. 162 (170)), or subsequently (e.g. by a voting slip scanner; see on this Schönau, Elektronische Demokratie , 2007, pp. 51-52; Khorrami, Bundestagswahlen per Internet , 2006, p. 30) by electronic means in order to evaluate these by electronic means at the end of the election day.

It is certainly ensured in these cases that the voters are in charge of their ballot and that the result of the election can be reliably checked by the election authorities or by interested citizens without any special prior technical knowledge. Whether there are still other technical possibilities which create trust on the part of the electorate in the correctness of the proceedings in ascertaining the election result based on verifiability, and which hence comply with the principle of the public nature of elections, need not be decided here.

b) Restrictions on possibilities for citizens to monitor the election events cannot be compensated for by sample devices in the context

of the type approval procedure or in the selection of the voting machines specifically used in the elections prior to their deployment being subjected to verification by an official institution as to their compliance with certain security requirements and their proper technical performance. The monitoring of the essential steps in the election promotes well-founded trust in the correctness of the election certainly in the necessary manner that the citizen himself or herself can reliably verify the election event.

For this reason, a comprehensive bundle of other technical and organisational security measures (e.g. monitoring and safekeeping of the voting machines, comparability of the devices used with an officially checked sample at any time, criminal liability in respect of election falsifications and local organisation of the elections) is also not suited by itself to compensate for a lack of controllability of the essential steps in the election procedure by the citizen.

Accordingly, neither participation by the interested public in procedures of the examination or approval of voting machines, nor a publication of examination reports or construction characteristics (including the source code of the software with computer-controlled voting machines) makes a major contribution towards ensuring the constitutionally required level of controllability and verifiability of the election events. Technical examinations and official approval procedures, which in any case can only be expertly evaluated by interested specialists, relate to a stage in the proceedings which is far in advance of the ballot. The participation of the public in order to achieve the required reliable monitoring of the election events is hence likely to require other additional precautions.

c) The legislature can permit exceptions to the principle of the public nature of elections to a restricted degree in order to bring other constitutional interests to fruition, in particular the written principles of electoral law from Article 38.1 sentence 1 of the Basic Law. For instance, restrictions of public monitoring of the ballot with postal voting (§ 36 of the Federal Electoral Act) can be justified

with the aim of achieving as comprehensive participation in the elections as possible, thereby complying with the principle of generality of elections (see BVerfGE 21, 200 (205); 59, 119 (125)). When deploying computer-controlled voting machines, however, no contrary constitutional principles are recognisable which are able to justify a broad restriction of the public nature of elections and hence the controllability of the election act and the ascertainment of the results.

aa) Where the deployment of computer-controlled voting machines aims to rule out inadvertent incorrect markings on voting slips, unwanted invalid ballots, unintentional counting errors or incorrect interpretations of the voters' intention when votes are counted (see Schreiber, Handbuch des Wahlrechts zum Deutschen Bundestag , 7th ed. 2002, § 35 , marginal no. 2) which repeatedly occur in classical elections with voting slips, this serves the interest of the implementation of the equality of elections under Article 38.1 sentence 1 of the Basic Law. What weight attaches to this purpose can however be left open. It certainly does not justify by itself forgoing any type of verifiability of the election act. Unintentional counting errors or incorrect interpretations of the voters' intention can also be ruled out by voting machines if supplementary monitoring by the voter, the election bodies or the public is made possible in addition to electronic recording and counting of the votes. Corresponding monitoring is for instance possible with electronic voting machines which record the votes not only in electronic form in the voting machine, but at the same time in a form which is independent of this (see II. 3. a) bb above). Apart from this, user errors – such as pushing the "invalid" key presuming that this made it possible to correct an erroneous entry – cannot be ruled out in the voting machines approved for the elections to the 16th German Bundestag . "

Appendix 3: Ghana Case - Public Elections Regulations, 2016

1) Identification and verification of voters 32.

(1) A polling assistant may, before delivering a ballot paper to a person who is to vote at the election, require that person to produce a voter identification card in order to establish that the person is the registered voter whose name and voter identification number and particulars appear in the Register.

(2) In the absence of a voter identification card, the polling assistant shall identify the name and particulars of the voter as recorded in the name reference list.

(3) The polling assistant shall scan the barcode of the voter in order to establish by facial recognition the identity of the voter.

(4) The voter shall go through a biometric verification process through the use of the biometric verification device.

(5) Where the biometric verification device fails to verify a registered voter and the red light is shown with a voice message "REJECTED," the polling assistant shall

(a) inform the agents of the political parties present at the polling station;

(b) complete a Verification Form, as set out in Form Seven of the Schedule in the presence of the party's candidate or agent; and

(c) hand over the completed Verification Form to the Verification Officer.

(6) The Verification Officer shall draw a horizontal line across the voter's barcode in the register to indicate that the voter has been manually verified.

(7) At the end of the voting and before counting of the ballots, the number of persons manually verified shall be entered in the second box

in C6 on the Statement of the Poll and Declaration of Results Form as set out in Form Eight of the Schedule.

2) Ghana to Allow Manual Verification of Voters

Ghana's Electoral Commission says voters in the 2016 elections can verify their eligibility both manually and biometrically to prevent the high numbers of people disenfranchised on voting day. The chair of the commission, Madam Charlotte Osei addressing editors across the country in Accra said a few new modalities have been introduced for this year's elections to make it credible, fair and transparent.

She reiterated the Electoral Commission's readiness for the elections on December 7. "There is the introduction of manual verification as well as biometric verification. The reason why the EC has decided to introduce manual verification is because of the instances of false rejection.

"In the unlikely event that someone gets to the polling station, presents their card, they're found on the register, the barcode is signed, their details come up and you can

see that they are validly registered voters however the biometric machine fails to validate them, the EC was of the view that people should not be disenfranchised but should be allowed to vote" she added.

In the 2012 elections some voters were disenfranchised because the biometric machines could not verify them although they were validly registered and are known to be persons who live in their vicinities with them.

The key policy of 'No Verification, No Vote' was to be implemented to the letter in that election. The new laws have reviewed the no verification, no vote policy which according to the EC chair has been in consultation with the various political parties. She said "so in the law we put in a manual verification process, which was subject to agreement

with all the political parties at the Inter-Party Advisory Committee (IPAC)."

Memorandum from the Inter-Religious Council of Kenya to the Senate Legal Affairs and Human Rights Committee on the Matter of Election Laws Amendment Bill No.3, 2015

5

Introduction

The Inter-Religious Council of Kenya, the main colition of faith communities in Kenya welcomes this opportunity to present this memorandum to this esteemed committee of the Senate. Further the religious leaders congratulates the Senate for its maturity durin the debate on the motion of the Amendment Bill and its desire to ensure public participation in this matter which touches on a key aspect of our democracy and a matter that concerns many Kenyans and not just the political formations present in Parliament.

Background

The religious leaders in Kenya under the Inter-Religious Council of Kenya (IRCK) after several weeks of diplomatic efforts brokered the agreement that allowed the formation of the Joint Parliamentary Select Committee Co-Chaired by Hon. James Orengo and Hon. Karaitu Murungi. Soon thereafter and before the Select Committee commenced its seatings, the IRCK convened the Multi-Sectoral Forum on 19-20th July 2016 that brought together the religious, civil society, labour movement, private sector, women, youth and the disability sector. After lengthy deliberations, the Multi-Sectoral Forum developed a Memorundum and Draft Bills that they presented to the Select Committee on 25th July, 2016.

One of the key principles we emphasized in the memorandum is te need to maintain a bipartisan approach in the legislative process and in the reform of the IEBC that was to follow. We are glad that the reconstitution of the IEBC has proceeded well and the Selection Panel has finalized the nomination process. We hope that once those names are presented to Parliament, the same bipartisan approach will be embraced to ensure that the country gets a good IEBC that inspires confidence to all Kenyans and goes a long way in ensuring we have a credible, free and fair election in 2017.

Amendments to the Electoral Laws

It is thus regrettable that the current process to amend the laws passed in July this year has started in a manner that erodes this bipartisan approach and has put the country under unnecessary tension. As the IRCK, we wish to associates ourselves with the statements made by the Catholic Justice and Peace

chelobei

- Timing – August?
- Technical – area – comments before
- Wider: process of law change.

Commission and the Evangelical Alliance of Kenya decrying the manner in which this matter has been handled.

Whatever technological challenges that have come to light especially by the IEBC, we firmly believe can be overcome by looking at opportunities created by law as it currently stands and through the process of of creating the necessary regulations, which Parliament will have a chance to scrutinize and approve, instead of an acrimonious process that puts the country in the wrong footing as we go into the elections.

However, should a change in the law be required, it is incumbent on IEBC to communicate to all stakeholders the challenges they are facing and through a thoroughly bipartisan negotiated process develop the necessary amendments that will fill whatever legislative gaps. Such a process should be devoid of muscle flexing and a take-it or leave it approach. Instead it must be a process that addresses the deep mistrust and fears that are apparent in the political arena.

We also appeal to the IEBC and this Committee to consider the vast social assets of the religious communities and religious leaders in providing the atmosphere for such a consensus building process. This is not only for the current impasse but any other disagreements and issues that may arise. We are especially aware that the process of implementing the regulations on campaign financing may require such a broad consensus.

We note that there has been sentiments that in the absence of consensus, our democracy requires that we go for a vote where the majority is allowed to carry the day. We strongly urge this committee not to fall into that mind set. This matter is not that difficult to reach a consensus that will result in a win-win situation. Politicians must not always look at all issues as an avenue to show who has won and who is loosing. It is possible and we have done it many times that we have Kenyans winning without loosers.

Conclusion

In conclusion, we wish to urge members of this committee not to rush this process but to consider all the options available to build consensus. We must tone down the rhetoric and the language of hate and threats.

Thank you and God Bless us all.

6

Presentation to the Legal & Human Rights Committee of the Senate

On the Elections Laws (Amendment) (No.3) Bill, 2015

By the Law Society of Kenya President

The passage of the ELAB3 of 2015 through the NA on 22.12.2016 was a process marked by prior acrimony, reports of threats and actual violence within the chamber or precincts of the NA of Parliament; and by the eventual participation of only one side of the political divide.

This was a marked contrast to the atmosphere of conviviality and cooperation that saw the passage of the amendments to the Act that preceded the amendments now brought by the current bill.

Our history has shown that when there is dialogue and cooperation in the development of electoral laws the elections that succeed such a process are undertaken in an atmosphere of relative trust.

The IPPG process of 1997 saw two elections (1997 and 2002) that were largely undertaken with the confidence of the electorate and the trust by the public in the institutions that were charged with the responsibility of carrying out the elections. The absence of dialogue and cooperation in the constitution of the ECK in 2006 set the stage for an election process undertaken by an institution that did not carry public confidence. The consequences of that failure created an atmosphere of deep animosity and mistrust that led to the disputed elections of 2007 and the PEV that followed.

The 2013 Presidential elections led to a petition challenging the result of the Presidential elections the hearing of which placed into scrutiny the matter of the constitutional threshold for a free and fair election. This threshold is anchored on fair registration of voters. What must now be universally accepted is that electronic registration through biometric registration ~~verified electronically~~ is now the substitute for the registration, verification publication and confirmation of registers, verified electronically. Electronic back up is capable of being provided from remote centres to the cloud. Obviously security for this system and process is the main challenge. This challenge has been met successfully in India and Brazil, two of the largest democracies in the world. The use of biometric and electronic systems promotes trust and honesty in elected governments. And it is possible to achieve.

A growing sense of public mistrust in the IEBC Commissioners led to public demonstrations by the opposition parties and to violent interventions by the police. Kenyan lives were lost, many citizens were injured and damage was done to property and businesses. Through a process of bipartisan dialogue and cooperation a national crisis was averted. This led to the creation of a bipartisan committee of both houses of parliament chaired by Senator Kiraitu Murungi and Senator James Orengo. The work of this committee saw the amendment of the Elections Act passed with universal acceptance of all members of both houses. The sense of public confidence and trust in the process of the development of election laws began to be restored.

The abandonment of the bipartisan approach in the presentation and passage of the current Bill has unfortunately resulted in the ~~removal~~ erosion of a sense of public confidence and trust and replaced it with the mistrust and suspicion that we have seen in our recent past tends to set the stage for elections that are perceived to be unfair and marked with hostility and violence. For fair elections the electoral law must reflect the spirit of the Constitution which is to reflect fairness to all parties demonstrated by the spirit of consensus building. It must also encompass unambiguous legislation and regulations which result in universal franchise and a true and fair result.

It is the absence of bipartisan consensus that is leading to mistrust and suspicion in the proposed amendment to Section 44 of the Elections Act with the introduction of Section 44A that creates a *"...complementary mechanism for identification of voters and transmission of election results* [by the Commission] *that is simple, accurate, verifiable, secure, accountable and transparent..."* However the act does not define the term *"complementary"*.

The term is defined by the Oxford Dictionary[i] as *"Combining in such a way as to enhance or emphasize the qualities of each other or another."* The Merriam-Webster Dictionary[ii] defines the term as *"serving to fill out or complete"* or *"mutually supplying each other's lack"*.

According to the definition of the term this provision purports to introduce an undefined mechanism other than the ***integrated electronic electoral system*** stipulated by Section 44 of the Act to run concurrently with said system with the discretion left to the Commission as to what this mechanism is and to when it is deployed.

Given our history and given also the circumstances of the absence of bipartisan consensus in which the bill was passed by the NA this ambiguity sets the stage for suspicion to arise of the use of a parallel system for voter registration, for identification of voters and for transmission of election results. Unless these concerns are addressed there shall be, immediately and well before we reach the elections, suspicion of the absence of accountability which will put into question whether the elections will be free and fair.

A restoration of the process of bipartisan participation is the only solution to avoiding the manifestation of uncertainty that threatens to taint the preparation for the 2017 elections.

Isaac E. N. Okero

President, Law Society of Kenya

---

[i] https://en.oxforddictionaries.com/definition/complementary

[ii] https://www.merriam-webster.com/dictionary/complementary

7

National Council for Persons With Disabilities

WAIYAKI WAY, P.O. BOX 66577 – 00800, TEL. 2375994/2314621, NAIROBI
Email: director.ncpwd@africaonline.co.ke ;ncpwds@africaonline.co.ke

NCPWD/CHMN/2VOL.1 (123)

29th December, 2016

HONORABLE SPEAKER SIR, THIS IS MY PRESENTATION

NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES CHAIRMAN`S PRESENTATION TO THE SENATE ON THE VIEWS OF PERSONS WITH DISABILITIES ON THE USE OF BVR KITS ON 29TH DECEMBER, 2016 AT 11:00 A.M.

Honorable Speaker and Honorable members of the senate, I feel humbled and honored to stand before you because this is a rare opportunity which I can't take for granted.

Honorable Speaker, I'm too junior to stand before you but my message is bigger than all of us because I speak on behalf of six million Kenyans with Disabilities, let me make it very clear that Persons with Disabilities support digital voting systems but every digital system has manual back-up e.g. the digital voting system of this Honorable House is backed up by manual voting through standing order 75, the world`s most sophisticated mode of transport (the aeroplane) has an automatic landing gear which is backed up by a manual landing gear.

Both Honorable Houses of Parliament have cited various reasons to support or oppose BVR kits including technical failure, loss of network and power failure, but none of you has remembered the larger population of Persons with Disabilities who are directly affected by digital voting system, some of our Disabilities do not allow us to use BVR kits in any way, for example, fire victims who have lost both eyes and all fingers, there are also those affected by neurological conditions hence loss of sight as well as suffering from muscular atrophy.

A sizeable number of Kenyans voted using BVR kits in 2013 because they were able bodied then but through fires, diseases, road traffic accidents or violence are now persons with Disabilities therefore are no longer eligible voters if we go by the rigid election laws.

I am sorry to say that some members of this Honorable House are suffering from Me, Myself and I syndrome (a syndrome that allows us to think what is possible for us is possible for everybody), or how else can I explain the assumption given

ר

to Members of Parliament who acquired their Disability while serving this 11th Parliament. In 2013, they were voted in while they were able bodied now they are Persons with Disabilities who require assistance during voting in 2017 general elections.

Our election laws might have assumed these dynamics but;

1. Article 38 of our Constitution under sub-section (3))b) provides that "every adult citizen has the right, without unreasonable restrictions to vote by secret ballot in any election or referendum. "
2. Under section 30 of Persons with Disabilities Act number 14 of 2003 provides that " polling stations shall be made accessible to Persons with Disabilities during elections, and such Persons shall in addition be provided with the necessary devices and assistive devices and services to facilitate the exercise of these rights under this section. "
3. Mr. Speaker Sir, under the United Nations Convention on the Rights of Persons with Disabilities which Kenya ratified in 2008, under article 4 (1) (b)(general obligations), state parties are obligated " to take all appropriate measures, including legislation, **to modify or abolish existing laws**, regulations, customs and practices that constitute discrimination against Persons with Disabilities.
4. Article 5 (3) (equality and non-discrimination) state parties are obligated "in order to promote equality and eliminate discrimination, state parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
5. Honorable Speaker Sir, the same convention on the Rights of Persons with Disabilities under Article 29 (a) (i) participation in political and public life, state parties shall "ensure that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use.

I'm sure this Honorable House will not contravene Article 38 of our Constitution , Persons with Disabilities Act number 14 of 2003 and International instruments domesticated by Kenya by locking out a sizeable number of Kenyans from voting through the use of rigid election laws.

We, the six million Kenyans with Disabilities, request for a back-up or alternative means of voting in case our members are not able to use BVR Kits because this will not be the first scenario where digital systems have manual back-ups like the case I cited earlier of standing order 75 of this Honorable House which gives an alternative manual voting in case of technical failure.

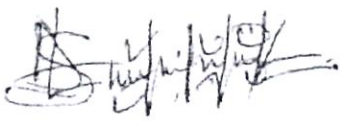
As a Kenyan Citizen, I was shocked to see how reason was thrown out of Parliament windows only to be replaced by dirty politics of patronage, abuses

and name-calling including the infamous abuse to our Head of State who is not even a member of Parliament hence had no power to debate nor vote.

If a section of Kenyans are denied their constitutional right of voting because of power failure, technical failure, lack of network or worse, are denied because of their Disabilities, then, I am worried that this might lead to another post-election violence of greater magnitude than the one witnessed in 2007/2008. Unfortunately, if such happens, it is Persons with Disabilities who will suffer the most.

Honorable Speaker Sir, my humble request is that this Honorable House listens to the voice of reason and joins us in advocating for peaceful elections by considering all scenarios and come up with a voting system that does not exclude any Kenyan.

Thank you and God bless you all, God bless Kenya.



Dr. David Ole Sankok,
Chairman, National Council for Persons with Disabilities.

8

Thursday December 29th, 2016

To the Senate Committee on Legal Affairs

Memorandum to the Senate Committee on Justice and Legal Affairs regarding the Matter of the Amendments to the Electoral Laws Act 2016

We the Leadership of the the Kenya Conference of Catholic Bishops (KCCB), The National Council of Churches of Kenya (NCCK), The Evangelical Alliance of Kenya (EAK), and the Organization of African Instituted Churches (OAIC) are seized with the matters surrounding the amendments that have recently been initiated to alter the negotiated Electoral Laws Amendment Act 2016.

We appreciate the Senate for opening up this process to the input and guidance of the people of Kenya regarding these amendments that have generated a lot heat in the country. While legislative power has been vested in Parliament (The Senate and National Assembly) by Article 94 of the Constitution, which same constitution has directed in Article 10 that every State organ, officer or citizen of Kenya must act in accordance with Kenya's National Values and Principles.

We therefore jointly submit to the Senate As follows

1. That the Leadership of Senate calls immediately for the reconvening of Senator Kiraitu Murungi and Senator James Orengo- led Joint Parliamentary Select Committee by 4th of January 2017 to create a mechanism for taking this national concern around electoral laws and framework to the next level. We the religious communities and leadership who played a role in the dialogue leading to the Joint Parliamentary Select Committee on electoral matters and reforms see that mechanism as a more inclusive and sober avenue for giving the country a chance to create bridges rather than walls across the various political divides.
2. [redacted]. The Amendments were introduced without consensus and in contravention of the laid out procedure. It is important that Senate guards its distinguished place in legislation and securing national interests in order to ensure that constitutionalism and the rule of law is given due consideration.
3. Senate also should appreciate that the incoming IEBC Chairperson and Commissioners need to be heard as regards this matter. In fact the IEBC Chief Executive Officer Mr. Ezra Chiloba has made it very clear that the National Assembly did not faithfully take on board the submission and request they presented to the National Assembly. There is therefore a

need for waiting upon the incoming Commissioners who substantively embody the IEBC to make substantive and extensive recommendations that will make our electoral framework more enabling and coherent.

4. We continue to call on the Head of State, as the guarantor of the Constitution, not to sign into law amendments that have not come through an inclusive and agreeable process. Elections are a highly emotive issue and we have only one nation Kenya, which we must secure at all times.
5. Once the Joint Parliamentary Select Committee is convened in earnest, we the Christian Communities and Religious Leaders convened under the Multi-Sectoral Forum and its Dialogue Reference Group will make extensive submissions of a technical nature as regards the following matters:
   i) The issue of manual back-up of the Election technology of elections as suggested in the amendments looking at the practice in other African countries and our situation as a country.
   ii) The ampleness and limitations of the 3G Network and Network failure and coverage across the country
   iii) The sufficiency, readiness and competence to do Biometric Voter Registration system and equipment
   iv) The Challenges and operating of the Electronic Voter Identification Devices (EVID) and System learning from the 2013 exposure and exercise.
   v) The matter Electronic Results Transmission Systems (ERTS) and how it should be handled if the position agreed on between the religious leaders and the JPSC is to be renegotiated.
   vi) Other contingent administrative matters relating to elections technology and the role of the IEBC and the line ministries in dealing with such challenges.
6. We wish to implore on Senate to be guided by Article 81 of the Constitution as relates to ensuring and guaranteeing a free and fair election for Kenya. Article 81 (e) particularly is non-negotiable and therefore a leading principle in all matters relating to legislation and policy.
7. Finally our focus at this stage is to secure reason, uphold the principle of participation, secure a framework for peaceful, free and fair elections and to ensure that the incoming IEBC starts on a firm and credible footing. We must not therefore be seen to be setting ourselves up for confrontations that divide our nation and denigrate institutions we have given ourselves as a nation.

We are available to work with the Senate Legal Affairs Committee, the Senate Leadership, the Leadership of the National Assembly and the Political Colaitions in order to ensure that we pass this test and avoid costly and acrimonious confrontations.

Thank you for according us the opportunity to make our input as the Leadership of the various Christian Communities and Bodies.

Signed

KCCB

NCCK

EAK

OAIC

Quest for an
ENABLING
ENVIRONMENT FOR
CIVIL SOCIETY ORGANISATIONS IN KENYA

9

The Right to Vote and the Promise of Biometric Voter Registration (BVR), Electronic Voter Identification (EVID) and Electronic Transmission of Results within the Context of the Constitution of Kenya 2010: Opportunities and Challenges Begging for our Leadership - as Presented before the Senate Standing Committee on Legal Affairs and Human Rights for Consideration During Debate on the Election Laws (Amendment) Bill 2016

This presentation before the Senate Standing Committee on Legal Affairs and Human Rights is predicated on the following relevant provisions of the Constitution of Kenya 2010, and universally accepted principles upon which we all agree as Kenyans:

I. All sovereign power belongs to the people of Kenya and shall be exercised ONLY in accordance with the Constitution;
II. The people may exercise their sovereign power either directly or through their DEMOCRATICALLY elected representatives;
III. That through such DEMOCRATIC elections, the people periodically delegate their sovereign power to the National Assembly and the Senate (Parliament) at the national level, and to the County Assemblies at the county level;
IV. That the people also DELEGATE their sovereign power through DEMOCRATIC elections to the National Executive and the Executives at the county levels of government;
V. That such sovereign power when DELEGATED to leaders as the case may be either through elections or appointments, must also be exercised ONLY in accordance with the Constitution;

VI. That the national values and principles of governance that form the edifice of our democracy in Article 10 of the Constitution are explicit and bind all State organs of which Parliament and the national Executive are integral part, State officers, public officers and all persons whenever any of them:

i. Applies or interprets the Constitution
ii. Enacts, applies or interprets any law
iii. Makes or implements public policy decisions

VII. That it is not for nothing that the national values and principles of governance are enumerated in the Constitution as national unity, the rule of law, good governance, integrity, transparency, accountability, democracy and participation of the people among others;

Having stated these facts and invaluable provisions of the supreme law over which we reached national consensus in 2010, it is also imperative to add that it is the right of every citizen (voting and non-voting) to free, fair and regular elections. This right is protected in Article 38 of the Constitution which goes farther to guarantee the rights of every adult citizen to register as a voter and to cast that vote in a secret ballot in any election or referendum.

The issue before this Committee as indeed before the National Assembly during its acrimonious and polarized passage of the Election Laws (Amendment) Bill 2016 is whether every adult citizen so registered to vote, and attempting to cast that vote should have to show that he or she is who they claim to be. That may sound silly a question to pose but it is what is at the crux of the dispute that the country is looking to the Senate to resolve.

It is unfortunate that barely a year before the second elections under the Constitution the right to vote, and to free and fair elections is once again under siege.

Article 81 of the Constitution describes free and fair elections as elections that are:

- Held by secret ballot
- Free from violence, intimidation, improper influence or corruption
- Conducted by an independent body
- Transparent, and
- Administered in an impartial, neutral, efficient, accurate and accountable manner

There are reasons why these prescriptive provisions were included in the Constitution and not left for ordinary legislation. We come from a past fraught with vote fraud. The 2007 elections are a case in point. In the period leading to the year's elections, Kenyans who had lost their loved ones unsuccessfully tried to obtain death certificates to enable them transit in the management of property left behind by their departed kith and kin. As it turned out, the government was not issuing death certificates for people who had died earlier in the year. There is reason to believe that all the dead for whom death certificates had not been issued ahead of the 2007 elections voted for one of the presidential candidates!

The questions before this Standing Senate Committee and the entire Senate as it seeks to resolve this national impasse are as follows: Between the manual and biometric voter registration, which one gives full meaning to the constitutional threshold for accurate, efficient and accountable elections,

ensuring in the process the integrity of the ballot? Between the manual and electronic transmission of election results, which one guarantees a more transparent and free elections devoid of violence, intimidation, improper influence or corruption? Should any changes to electoral laws be left to unilateral decisions of the government that itself is a competitor in the process?

Would that still be described as impartial and neutral? When the Independent Electoral and Boundaries Commission, and one that is already discredited beyond redemption decides to connive with a section of political actors, including the Justice and Legal Affairs Committee of the National Assembly to push through unpopular amendments to the election laws, can such election body pass the test of an independent referee?

The brinkmanship and chest-thumping witnessed in the last two weeks is a prelude to another 2007/8 scenario unless the Senate will rise above this partisan approach to this emotive issue that has the potential to once again, undermine our national pride, territorial integrity and reputation and put in jeopardy the future welfare of our country and her peace loving people

Process of Enacting the Election Laws (Amendment) Bill was flawed

Recent changes introduced to the election laws were done in an environment devoid of dialogue and the spirit of consensus building essential for the promotion and attainment of the much needed national unity, the rule of law, good governance, integrity, transparency, accountability, democracy and participation of the people among other national values and principles of governance as the country moves towards another general election.

There was no public participation during the process of consideration and passage of the Election Laws (Amendment) Bill by the National Assembly as envisaged in the Constitution. As such, the process was unconstitutional and undermined our collective desire for national unity and electoral integrity, putting in peril the future welfare of our country. The Senate must rise above this partisanship and save the National Assembly from itself.

The National Assembly violated the requirements of Article 118 of the Constitution requiring it to conduct its business in an open manner, and its sittings and those of its committees in public. There was no facilitation by the National Assembly of public participation and involvement during legislation on this amendment.

There were no justifiable reasons for excluding the public or the media from the sitting as contemplated in Article 118 (2) of the Constitution, yet that is what transpired during the heated debate on Election Laws (Amendment) Bill 2016.

Conclusion and Recommendations

Honourable members of the Senate Standing Committee on Legal Affairs and Human Rights, now is not the time to retreat in the face of a partisan assault on the most basic of our rights. The battle to ensure the voting rights of all Kenyans is a defining one. This is not only a legal issue; it is also a moral imperative. If we are to be the nation we claim to be, we must challenge, in every way possible, those who want to undermine our nascent democracy and who have lost faith with the covenant between government and the people. The right to vote is not only the cornerstone of our system of government — it is the lifeblood of our democracy. I am confident that with a focused citizenry and with leaders like those in this room today, this struggle for the right to free, fair and credible elections will be won.

If we are to remain true to those who sacrificed and died to ensure guarantee the right to vote, and to free and fair elections in the first, second and third liberation of our country, then failure on this is not an option.

It is against this backdrop that the Civil Society Reference Group (CSRG), a network of local, national and international civil society organizations makes the following recommendations to the Senate:

1) Urge the Senate not to pass the Election Laws (Amendment) Bill 2016 in the manner adopted and forwarded to it by the National Assembly;
2) Call upon the Senate to demand that the IEBC subjects any proposals to amend Elections Laws to public participation and stakeholder consultation;
3) Call upon the Senate to demand that such consultations by the IEBC, and relevant committees of the National Assembly and the Senate take into account the consultative nature and context within which the Elections Laws were generated and adopt similar approach in the event of any compelling need to review the laws;
4) Call upon the Senate to demand that Biometric Voter Registration, Electronic Voter Identification and Electronic Transmission of results that are already gaining traction with the Kenyan public be retained as the primary mechanisms capable of guaranteeing fidelity to the high threshoid of electoral integrity as set out in Article 81 of the Constitution;
5) Call upon the Senate to note that while there may be need for a manual voter register, the manner in which its necessity is being advanced by one side of the political divide has created the impression that its pursuit is not being done in good faith and that some elements are bent on exploiting its inherent loopholes for their own electoral advantage and success. This should not be the case;

6) Call upon the Senate and the National Assembly to consider getting interested parties to nominate a team of election technology experts in the interest of restoring public confidence in the electoral process to examine and independently verify the country's capacity to acquire or borrow some of the equipment that would be necessary for technology-based voter registration, identification and transmission of election results;
7) Call upon the Senate and the National Assembly, in exercise of their oversight role of the Executive, to urge the Presidency to avoid blurring the constitutional principle of separation of powers and avoid engaging in lobbying for sensitive legislations in a manner that has the potential to compromise national security and unity;
8) Call upon the Senate and the National Assembly to avoid acting in a manner that would undermine the sovereign power of the people and to always remain guided by the national values and principles of governance in the execution of their respective constitutional mandates and functions.

Thank you.

Presented on this 28th Day of December 2016 by:

Suba Churchill

Presiding Convener

Civil Society Reference Group

For and on Behalf of the Oversight Committee and Members

From: Paul Wamae paul@wamaeallen.com
Subject: The Chairman,
Date: Yesterday at 7:00 PM
To: Amos Wako samoswako@gmail.com
Cc: James Orengo jaborengo@wananchi.com

10

The Chairman,
The Senate Committee for Legal Affairs & Human Rights ,
Nairobi.

RE : PUBLIC PARTICIPATION IN THE AMENDMENT OF THE ELECTION LAWS ACT , 2016 .

INTRODUCTION.

The electronic or digital registration of voters , voting , tallying and transmission of the result of the election , in my humble view , is preferable to the manual mode of doing the same because of its efficiency , accuracy and credibility . This is what the current law before it was amended by the National Assembly had achieved for us Kenyans . The amended version of the electoral has now been passed on to the senate for enactment , if the senate deems it fit to do so.

I have been listening on TV and radio to the live proceedings in the senate this afternoon. As many of you have done , namely , to congratulate yourselves on the orderly and sober manner that you have conducted the proceedings , I hereby concur with you . The senate does deserve commendation & I too congratulate the senate.

The amended law has now been referred to your committee for consideration , after its deliberations thereon , taking into account the contributions from the public , and thereafter to report to the whole house , which is expected do the needful . As a member of the public , the following is my contribution .

MY HUMBLE VIEWS ON THE AMENDMENT OF THE LAW FOR THE ELECTRONIC OR DIGITAL REGISTRATION OF VOTERS , VOTING , TALLYING AND TRANSMISSION OF ELECTION RESULTS

1 . Let me start by posing a question . Granted that there is a probability of any machine electronic or manual to fail or to malefaction , what if the Electronic gadget fails to function , for whatever reason , at a crucial time of the electoral process , say, on the last day of the registration of voters or during or just

before the commencement of voting . What if the election results cannot be transmitted electronically within the prescribed time because the electronic transmitting machine has stalled , becomes defective or the polling station is without a network for transmission ?

2. In the circumstances of failure as described in paragraph one above , I humbly suggest that there should be some form of back-up as a substitute . What form that back-up takes , I regret that I do not have the technical know how to suggest . Nevertheless , I am aware that registration , voting or transmission of results manually has been suggested , and if that , manual substitute , is what it will take to proceed with the electoral process and to complete it within the time prescribed by the constitution and the electoral law , I think that those opposing it should be humble enough to change their minds and to accept it.

CONCLUSION

Of all the electoral processes that require careful handling , the election , which I understand to be voting by casting the ballot papers followed by counting and tallying the votes cast and transmitting the result of election , is the most important . The election must , under article 138 of the Constitution , be held on the prescribed date , at the place and time prescribed and also , particularly the presidential election , be declared within 7 days . If that time frame is not adhered to there will be a constitutional crises , particularly in the presidential election . It is the probability of the occurrence of such a constitutional crises that , in my humble opinion , the amendment by the National Assembly , to use a manual back-up , was intended to avoid . Will the senate pass the amendment or , if it does not , come up with some other means of averting such a crises , a means , which is practical and acceptable to all right thinking Kenyans ? That is challenge that your committee will have to confront successfully for the sake of our beloved country . I wish you well .

Paul Matheri Wamae Sc.

Sent from my iPad

From: **Shailesh Patel** dr.shaileshpatel@gmail.com
Subject: Fwd: VIEWS AND USEFUL INFORMATION ON USE OF ELECTION TECHNOLOGY IN REFERENCE TO 2017 GENERAL ELECTIONS AND ELECTION LAWS AMENDMENT FOR YOUR INFO AND CONSIDERATION
Date: Yesterday at 1:43 PM
To: Amos Wako samoswako@gmail.com

Dear Hon. Senator Amos Wako

Kindly review the below submission made to the Senate for your perusal,information and consideration in regards to the ELECTION ACT - AMENDMENTS LAW

Please acknowledge receipt.

Kind regards
Shailesh Patel
(CITIZEN OF KENYA AND STAKE HOLDER)
0726946000
---------- Forwarded message ----------
From: **Shailesh Patel** <dr.shaileshpatel@gmail.com>
Date: Wed, Dec 28, 2016 at 12:41 PM
Subject: VIEWS AND USEFUL INFORMATION ON USE OF ELECTION TECHNOLOGY IN REFERENCE TO 2017 GENERAL ELECTIONS AND ELECTION LAWS AMENDMENT FOR YOUR INFO AND CONSIDERATION
To: csenate@parliament.go.ke

To: CLERK TO THE SENATE

Dear Sir

Please convey this information / views to the Senate's Legal Committee for attention of Hon. Amos Wako who is reviewing the election law amendment matters and we are giving these views in light of the press article today as members of the public and vendors of the election technology (in partnership with manufacturers of the BVR and EVID kits):

Note that the tender floated by IEBC as attached is tailored to suit a particular vendor and locks out all the other manufacturers of the devices as per

observations made by one of the participants as highlighted below and as per queries raised by way of clarifications as attached to this email:

Today, we attended the Pre-Bidders Conference for the above mentioned Tender. Several bidders attempted to request for an extension which was not positively taken with IEBC citing the election date cannot be moved unless through a Constitutional Referendum.

We have however analyzed the tender and it seems to be specifically designed for Safran Morpho. http://www.morpho.com/

Our opinion is that, if the blocking points attached are not addressed and an extension given, there will be no point of submitting a bid. The existing biometrics data already sits on the Morpho platform.

As you may already e aware Safran Morpho through its Canadian subsidiary were awarded the controversial contract for the BVR KITS most of which failed due to power issues and only 8,000 are working.

In light of the aforementioned Tender and in consideration of its qualification as an open tender to all eligible tenderers, we would like to bring forward our observations mainly in respect of the required experience and capability of each potential bidder in election process. In fact, we understand that required experience and capability of each potential bidder in election process is considered as essential criteria for obtaining a technical scoring (obtaining a minimum of 64 points out of the maximum 80 points) that will allow to any of the potential bidder to proceed with the further financial evaluation under Step 3, as defined in the aforementioned Tender. Following our completed analysis, we came to a very solid and determined conclusion that the aforementioned qualification criteria for obtaining a technical scoring, as described in the Section V (Technical Specifications) of the Tender, would not plead in favour of the fair competition enabling different companies to participate and furthermore to obtain qualification and such result may affect achievement of the Tender's global objective being defined as an intention of the tendering authority to select a most competitive bidder. Therefore, in line with this

perspective, in compliance with the Public Procurement Law and more specifically basic procurement rules, the Procuring Entity should have a principle objective to secure an open competition among tenderers and to structure the tender documents in the manner that will allow fair competition among those who may wish to submit the offer. In addition to the foregoing, Article 60 (i) "Specific Requirement" of the Public Procurement and Asset Disposal Act is clearly highlighting such competitive principle being applicable for all potential bidders and stating that an accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works and services being procured that are clear, that give correct and complete description of what is to be procured and that allow for fair and open competition among those who may participate in the tender proceedings. In consideration to the foregoing, our expertise in analyzing the existing market, confirmed an important conclusion being based on the fact that qualification criteria for obtaining a technical scoring as described in the Section V (Technical Specifications) of the Tender is not pleading in favor of the fair and open competition and seriously breaches the principle of equality which must be guaranteed to all tenderers in the frame of the public tenders. Blocking points: • Experience in development, deployment, support and maintenance of an Election Results Transmission System in at-least 15,000 voting stations: 2 projects for maximum marks; • Experience in development, deployment, Support and maintenance of an Election Results Transmission System with similar environmental obstacles like Kenya: experience in 2 countries for maximum marks; • The bidder or consortium shall provide evidence of having implemented the Voter Registration, Voter identification and Electronic results Transmission solution proposed in their response to this tender in a national election of at least 10 million voters; • Experience in the implementation of an integrated electoral management system with capacity to handle at least 15,000 concurrent user sessions ; • The bidder must provide references in handling the biometric authentication of voters in a national election project in the past five (5) years. Only references with over 15,000 biometric System will be accepted: 3 references for maximum marks; • Provide evidence of capacity to deploy the system to migrate all voters' biometric data in less than two weeks (up to 22 Million voters should be considered) to equipment 44,000 and 290 constituencies across the country.

Another bidder is also being locked out .Refer to comments :We regret to inform you that we do not comply to the following sections of RFP:

Section II Experience and Capability in Elections Process: 70% (page 47, 48)

A: A1 , A2, A3 : Although we possess experience of biometric verification and enrollment for the last 4 years but we do not have specific experience of developing, deploying and implementing such a system for Elections in a country in last 5 years for 15,000 polling stations.

Moreover the delivery time of 2 months as per IEBC is impossible to achieve for this bespoke device as none exists in the market that has been developed , tested and implemented in any elections in any country and as such this product has to be designed and engineered and produced as per IEBC specs and submitted by Jan 9, 2107 makes it impossible to submit a compliant bid and the delivery period of 2 months cannot be complied as all components have to be available and be produced and therefore the amendments have to allow for reasons of practicality and realities on the ground delivery to made and solution tested at least 30 days before the election date and not 4 months before the election date.

The whole tender needs to be further scrutinized and subject to independent evaluation by UNDP election experts and IT engineers as it is flawed and locks out practically all the equipment vendors.

It is also important that there is a hybrid manual/IT back -up solution that allows security and integrity of the custody chain of the election results transmission forms - a solution

called a " SECURITY KITS FOR POLLING STATIONS" available in the market and which IEBC has been informed about and would solve the current problem.

Even after RTS done electronically , the election results have to be verified manually by checking the correctness of the election results forms at the central tallying centre and this has to be done manually and that is why the SECURITY KITS FOR POLLING STATIONS is

an ideal solution to utilise not only as a back up solution but one which guarantees the security and integrity of the results forms and allows an election dispute to be resolved immediately in the Supreme Court as one self copy of the election results form is delivered in a secure polling station kit to the Court besides the central tallying centre for safe keeping and only opened in case of a dispute.

Kindly acknowledge receipt.

Yours sincerely

Shailesh Patel

0726946000

PS:

USE OF OPEN SOURCE TECHNOLOGY IN ELECTIONS: IDEA PUBLICATION : SALIENT POINTS TO NOTE

IDEA

1. Electronic poll books There has been an increase in the use of information systems in polling stations, in particular connected to the more widespread use of tablet computers. Such information systems can be used for easier access to voter records and to verify voter eligibility. Particularly where electoral registers and eligibility checks are contentious, such systems can be put under particular scrutiny, which makes the use of OST even more useful.

The post-election phase 1. Result transmission, aggregation and tabulation software Apart from the EMB's website, one of the most common areas where ICT is used in an electoral process is the transmission, aggregation and tabulation of election results. Such systems facilitate the transmission of results from polling stations or counting centres, and their aggregation and tabulation in regional and/or national tabulation centres. Depending on the workflow, OST could be used, among other things, to allow for parallel tabulations and provide

the necessary amount of transparency and accountability for the public, who would want to be certain that their votes are tabulated and counted accurately.

The procurement of any new ICT to be used in the electoral process should be preceded by a feasibility study. The outcomes of the feasibility study should be an analysis of the potential of and threats posed by the proposed technology, and a thorough investigation of the basic assumptions and requirements or features required to facilitate decision-making and procuring the system. As the general area of feasibility studies is well understood, this Guide focuses on those elements which are relevant to the feasibility of adopting OST in elections, especially with respect to technical, legal, economic and political feasibility.

Technical feasibility If the use of a particular OST is required, for example, systems that are released under a GPL, the entire software system may also have to be released under a GPL. Conversely, if a vendor bases a system design on proprietary systems, 32 International IDEA then the entire system may have to be proprietary. Finally, the use of proprietary data formats, for example in the use of bar codes on voter cards, may lead to the undesirable situation in which an EMB is locked in with a particular vendor. Legal feasibility Although OST provides additional levels of transparency, it might still be incompatible with national law. Political feasibility It may require some additional education for political stakeholders to embrace OST. Economic feasibility As is noted above, vendors may charge an open source charge for publishing the source code online, due to the perceived loss of intellectual property.

Mapping needs IT is one of the main drivers of the design of new systems to be acquired for elections. Voter registration systems, for example, build on existing database technologies and technologies for capturing biometrics, such as fingerprints or iris scans. Internet voting technologies cannot simply be deployed in many nations, but require a legal framework that legitimizes their use. It is useful to consider the framework in which the feasibility study takes place. When computer systems are used in elections, it becomes harder for

election observation missions (EOMs) to evaluate internal processes and operational steps. Closed source systems, also referred to as black box systems, have to be trusted. OSTs, on the other hand, have some potential to be audited and for subsequent evaluation. Many countries, for example, Germany, are bound by constitutional law to allow any citizen to gain confidence in the accuracy of the election result, which means that the law plays an essential role when mapping needs or requirements. Countries that require this level of openness must not procure proprietary technology that would be in violation of the law. In addition, reports from EOMs can play an important role when assessing the need to improve an electoral process. For example, if an EOM final report recommends improving the voter registration system, there is obviously a need to be addressed. As a rule of thumb, when mapping needs it is useful to consider the role of OSTs as an alternative to proprietary systems, simply because OSTs provide higher levels of transparency. Mapping capacities If, while mapping needs, OSTs are identified as part of the solution, the EMB needs to map available capacities and existing infrastructures. Capacities include The Use of Open Source Technology in Elections 33 3. How Can OST Be Used? human, financial and logistical resources including transport and storage facilities. Mapping also needs to include technical capacities, such as access to the Internet, mobile phone networks, and access to servers to publish artefacts. Understanding the market Once needs and capacities have been mapped, it is recommended that the EMB collect information about the vendors and service providers available to implement the project. Vendors will include software and hardware vendors, supplemented by in-house capacities. Additional resources may also be available from intergovernmental organizations and non-governmental organizations (NGOs), which may already have built capacities or even made available OSTs that could be incorporated. Furthermore, we recommend that the EMB carefully evaluate the different tendering options. Some tendering options may fare better with the design of OSTs than others. Norway, for example, tendered its Internet voting platform using a competitive dialogue method (see Box 7).

Decision-making The final step in the feasibility study is decision-making. Decision-makers armed with the results of these analyses will have to weigh

the different concerns and arrive at a solution. It could be argued that the decision on whether to use OSTs, and more specifically which precise formulation of the licence to use, should be taken at this point, and neither presented to another committee nor left to the vendor. The results of the decision-making should provide clear and coherent recommendations intended to inform the procurement process. Ideally, this decision-making will be done in an inclusive way, involving all the electoral stakeholders. Procurement The procurement process for an election can be a very complex and long process. OST is only one, albeit important, component of the procurement process. This section focuses on the important issues to consider if the procurement includes OST. As procurement regulations are very different in different parts of the world, this section provides a brief description of a 'generic' method that can be adapted to different situations, allowing some flexibility and taking into consideration different laws and regulations. One of the main challenges in the procurement of OST for elections is that the vendor market is changing rapidly. This makes it difficult to know who is delivering what, and what is available under what conditions. Therefore, 34 International IDEA much valuable information will have to be collected before and during the procurement process. This is one of the reasons why the competitive dialogue method is recommended for such procurements, as it enables the EMB to have a dialogue and gather crucial information from the vendors before the official tendering process starts.

Competitive Dialogue is a European Union process introduced in 2006. It permits discussion of different options before choosing a particular solution. It can be used in complex contracts where technical solutions are difficult to define or where the development of the best solution is required. For more information see: .

Considerations ahead of the procurement process Demanding OST Software vendors tend to protect their intellectual property by avoiding open source licences. This means that it is up to the EMB or the relevant electoral body to propose the use of OST during tender processes and contract negotiations. Experience has shown that the advantages of OST justify efforts to identify vendors willing to produce open source products. Define the requirements as

early as possible in the process As the market for OST in elections is relatively new and immature, it is recommended that developing the procurement requirements should not be undertaken by EMBs, or the relevant electoral body, behind closed doors. If allowed by the relevant government procurement laws, competitive dialogue is recommended in order to define the necessary requirements as early as possible in the process. If this is not possible due to restrictions related to these laws, thorough market research and a wide consultation process are recommended.

Requirements for the solution—technical aspects, including security and functionality These requirements are usually decided on before the start of the procurement process either in a competitive dialogue process or through market research and consultations with key actors and stakeholders. If an agile software development strategy has been chosen, these requirements can be kept to a minimum in the contract. Otherwise, especially if a fixed software development strategy has been chosen, it will be important to go into detail regarding these requirements.

Vendors EMBs usually enter into a relationship with a vendor in order to procure professional services related to the provision of a technical solution that 'gets the job done', in part because they lack the required technical expertise and knowledge to manage a complex system in the long term, but also because they need an external partner that can take responsibility for the technical aspects of the system. Many commercial vendors use business models whose economics are based on paid, long-term licensing for the use of elections software and systems. Their systems are usually closed, often referred to as 'black box systems', mainly because the vendors believe that the source code is their IP and the basis of the advantage they have over their competitors. They are therefore often reluctant to provide full access to EMBs, political parties or relevant auditors. While the vendors' point of view is understandable to a certain extent, their reluctance to give full access to elections stakeholders often leads to a lack of trust in the elections technology, which can lead to a lack of trust in the electoral process as a whole. An important side effect of this is that an EMB might end up locked in, in a situation in which it is so dependent on a particular vendor and the vendor's particular solution that it can neither

maintain the system nor respond to changes in the political and social environment without that vendor

In sum, the Guide draws a number of conclusions on the use of OST in election administration. 1. Elections should be transparent. Thus, voting technology should be transparent, which in turn requires the source code of voting technologies to be accessible and transparent. 2. The decision on whether to adopt OST for elections should not be left to vendors or technical experts, but rest with the EMB, which is responsible for the transparency of the electoral process. 3. Intellectual property associated with voting technology can be protected without endangering the transparency of elections. The protection of intellectual property is not in violation of open source licences. 4. There is a need to define an open source licence for voting technology that is readily understandable, deployable and usable in the electoral context. Conclusions The Use of Open Source Technology in Elections 45 Conclusion 5. More widespread use of OST in elections would require vendors to adopt flexible business models that incorporate OST. 6. Awareness must be raised among EMBs. EMBs, decision-makers, political parties, civil society and the media should be encouraged to build capacity on the benefits of the use of OST in elections, which in turn will create increased demand for accessible and transparent source codes in election technologies. 7. OST considerations must play a more prominent role in feasibility studies, which weigh alternative options for voting technologies, and must subsequently be properly reflected in the procurement process. This will give the use and development of OSTs in elections a critically required impetus. 8. Open source voting technology would greatly benefit from the establishment of a global electoral OST community. Such a community would make releasing existing and newly developed voting technology under an open source licence more feasible.

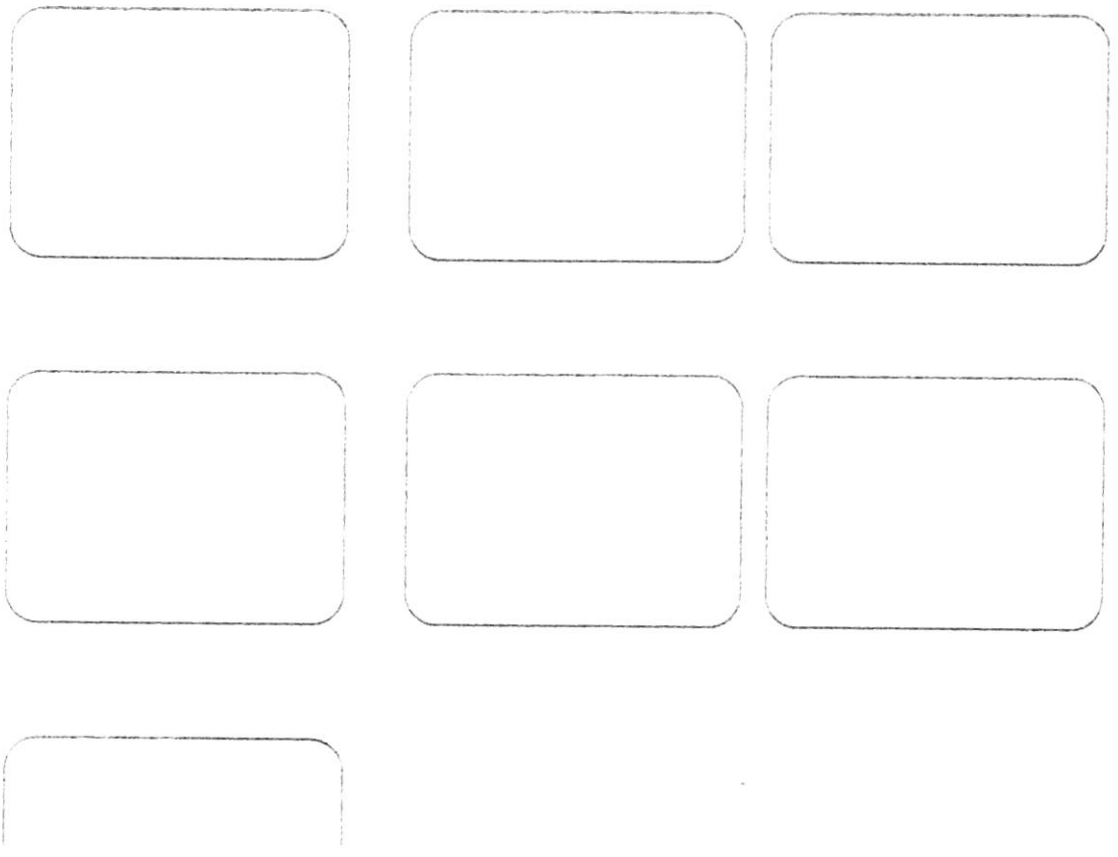
Vendors for-profit firms that sell proprietary voting systems to EMBs. These organizations may have other lines of business too, but for the purposes of this

Guide they sell electoral management systems.

Reliability: Reliability is often related to availability, but is a slightly different concept. Reliability can be considered as having two aspects; hardware and software reliability. Hardware reliability-Reliability engineering involves all aspects of design, development, and fabrication that minimize the chance of equipment breakdown. The success of complex missions such as space probes depends heavily on reliability engineering, since the failure of a single component, such as an O-ring on a space shuttle, can result and has resulted in total loss of the system. Software reliability is defined as the probability that a software fault that causes deviations from the required output by more than a specified tolerance, in a specified environment, does not occur during a specified exposure period • Robustness, the ability of a computer system to cope with errors during execution or the ability of an algorithm to continue to operate despite abnormalities in input, calculations, etc.

The concept of trust, adjusted to the case of two parties involved in a transaction, can be described as follows: "Trust occurs when parties holding certain favourable perceptions of each other allow this relationship to reach the expected outcomes" (Wheeless and Grotz 1977, 251). A trusting person, group or institution will be "freed from worry and the need to monitor the other party's behaviour, partially or entirely" (Levi and Stoker 2000, 496). "An entity A is considered to trust another entity B when entity A believes that entity B will behave exactly as expected and required" (DOD. 5200.28-SD) Therefore, an entity can be considered trustworthy, if the parties or people involved in transactions with that entity rely on its credibility. In general, the concept described above can be verbally represented by the term reliability, which refers to the quality of a person or entity E-Voting Analysis| 99 that is worthy of trust. Trust in the information society is built on various different grounds, based on calculus, on knowledge or on social reasons (Lekkas, 2003). The notion of trust in an organisation could be defined as the customer's certainty that the organisation is capable of providing the required services accurately and infallibly. A certainty which also expresses the customer's faith in its moral integrity, in the soundness of its operation, in the effectiveness of its security mechanisms, in its expertise and in its abidance by all regulations and laws,

while at the same time, it also contains the acknowledgement of a minimum risk factor, by the relying party. The notion of security refers to a given situation where all possible risks are either eliminated or brought to an absolute minimum (Giddens, 1991).



12

OFFICE OF THE ATTORNEY GENERAL AND
DEPARTMENT OF JUSTICE
OFFICE OF ATTORNEY GENERAL

ATTORNEY GENERAL'S STATEMENT SENATE COMMITTEE ON LEGAL AND JUSTICE COMMITTEE ON THE PROPOSED AMENDMENTS TO THE ELECTIONS LAWS NO. 24 OF 2011

1. The Election Laws (Amendment) Bill No. 3 of 2015 is a legislative reform proposal intended as follows;

    a. to give effect to Article 99 of the Constitution which prescribes the qualifications of members of Parliament;
    b. to amend the Elections and the Independent Electoral and Boundaries Commission Acts; and
    c. to provide for electoral processes.

2. The Bill contains a raft of amendments and this brief is limited to the contentious clause as contained in clause 19 of the Bill which seeks to amend sections 39 and 44 of the Elections Act No. 24 of 2011 so as to provide for a complementary mechanism for identification of voters and transmission of election.

Current position of law

3. The Section 39 of the Elections Act governs determination and declaration of results states in material terms as follows;

    (1)The Commission shall determine, declare and publish the results of an election immediately after close of polling;

(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 results forms on an online public portal maintained by the Commission*

(1D) The Chairperson of the Commission shall declare the results of the election of the President in accordance with Article 138(10) of the Constitution.

(2)Before determining and declaring the final results of an election under subsection (1), the Commission may announce the provisional results of an election.

(3) the Commission shall announce the provisional and final results in the order in which the tallying of the results is completed.

4. Section 44 of the Act governs use of technology and provides for an integrated electronic electoral system which shall be used solely for ;

a. Biometric Voter Registration;
b. Electronic Voter Identification; and
c. Electronic Transmission of Results

For this purpose, the law requires the Commission to undertake the following;

a. develop a policy on the progressive use of technology in the electoral process;
b. ensure that the Technology adopted by the Commission shall simple, accurate, verifiable, secure, accountable and transparent;
c. ensure that the technology is procured and put in place atleast eight month before the elections;

d. Test, verify and deploy the technology at least 60 days before the elections
e. make regulations to implement use of technology, in consultation with relevant agencies, institutions and stakeholders' including political parties;
f. transmit the Regulations to Parliament within 30 days of coming into force of the section;
g. establish a technical committee of the Commission comprising of such officers and members, such other relevant agencies, institutions or stakeholders as may be identified by the Commission to oversee the adoption and implementation of the technology.

5. Regulations 60 of the Elections (General) Regulations, 2012 provides that if elections are conducted by way of electronic means only, the Commission shall within 3 months of the elections publish the guidelines that shall apply in such voting;

6. Regulation 59 states that voting may take place either by marking of the ballot or electronically;

The Proposed amendment

7. The Elections Amendment Bill seeks to add a new section 44A which is designed to provide a complementary mechanism for identification of voters and transmission of election results and which proposal been interpreted as an attempt at mainstreaming manual voting method to supplant the electronic system provided by law.

The proposed section 44A states as follows;

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

Analysis

8. The critical question that requires determination is what the voting system is envisioned under the laws of Kenya.

9. The Constitution does not prescribe any electoral system but merely exhorts the Commission in Article 86 to ensure that whatever voting method is adopted the same is;

    a. Simple, accurate, verifiable, secure, accountable and transparent;
    b. The votes cast are counted, tabulated and results announce promptly;
    c. The results from polling stations are opening and accurately collated and promptly announced by the returning officer;
    d. Appropriate structures and mechanism to eliminate electoral malpractice including security of election materials

10. The case for use of technology is a statutory requirement anchored in sections 39 and 44 of the Elections Act and the regulations there under and its application is predicated on the fulfillment of the conditions prescribed by the law.

11. In our most considered view, the scheme of electoral laws and the regulations does not envisage an electoral process conducted solely by electronic means.

12. The Commission is clothed with plenary powers under the Constitution and the law to determine the appropriate voting method.

13. The proposed amendment to the elections Act, in our view, is only a complementary mechanism which is intended to address the concerns

associated with failure of an electronic system as illustrated in the case of **Raila Odinga & 2 Others Vs Independent Electoral Boundaries Commission & 3 Others (2013) eKLR** where examples were cited to show;

a. the electronic systems had failed in the Ghana General Elections and also in the 2000 US presidential elections;
b. political parties had registered concerns about difficulties experienced during the nomination exercise as some names of voter were missing from the electronic register;
c. there are persons whose biometric details had not been captured owing to bodily challenges or whose details were subsequently lost;

14. The question of application of technology and its efficacy in the general election is a very critical issue that ought to be serious consideration given that the election date is an inflexible event fixed by the Constitution and the crisis to the electoral process which would be occasioned by total failure of technology.

15. The infallibility of any technological system cannot be denied. There are many probable causes that may result to failure:

a. Negligence by persons handling the systems;
b. Sabotage;
c. Inadvertent technical hitches;
d. mistakes
e. inadequate infrastructural capacity to support electronic voting.

16. In principle, there is nothing inherently wrong with a manual voter register in any electoral process nor is the idea inconsistent with the existence of an electronic system provided it is a simple, accurate, verifiable, secure, accountable and transparent system and forms part of a single integrated system which is consistent with the electronic system intended to support each other as envisioned in the observations of the Supreme Court of the Philipnes in cases of **GR Nmber 188456, H.Haary L. Roque, JR and others v Commission on Election, 2009 and G.R No. 194139 Douglas R. Cagas v The Commission on Elections, 2012** which noted;

"If the machines failed for whatever reason, the paper ballots would still be there for hand counting, and manual tabulation and transmission of the ER's. Further, that the court would not guarantee as it cannot guarantee the effectiveness of the voting machines and the integrity of the counting and consolidation software embedded in them"

17. In order to ensure that the electoral law regime envisaged by the Constitution and articulated by the elections Act are efficacious, we recommend that regulations be promulgated by the Commission with the necessary parliamentary oversight to provide clarity in respect of the circumstances under which a complementary process would be applied.

18. In this regard, we may learn from the Ghanaian experience, as exhibited in the Public Elections Regulations, 2016, which provides for a mechanism for manual verification of voters in the event of failure of the electronic system.

Dated 3rd January 2017

GITHU MUIGAI, EGH, SC
ATTORNEY GENERAL

13

Col (Rtd) Nicholas Ruto

P.o Box 3385 – 0200

Nairobi

Tel: 0708875436

Per/1/2017

3rd January 2017

The Clerk to the Senate

Nairobi

Dear Sir,

RE: MEMORANDUM ON ELECTIONS (AMENDMENT) BILL BEFORE THE SENATE

Introduction

On the last day of the last mass voter registration exercise in March 2016, I visited a registration station at Kaiboi shopping centre, in Mosop Constituency, Nandi County to see how the registration was being conducted. When I arrived at the registration station, I was warmly received by two registration clerks who appeared eager to conclude the exercise which had been on-going for one month. Due to limited registration kits to cover all polling stations in the constituency, the clerks informed me that they had decided to deploy their registration kit at the shopping centre in order to capture as many voters as possible on last day of the registration. True to their word, I could see several people moving into and out of the station.

Even though I never intended to change my 2013 polling station from Embakasi Social Hall, Nairobi, to Kaiboi Polling Station, I wanted to find out whether the clerks would be able to find out whether I was a registered voter or not (this was done in good faith with no malice or embarrassment intended whatsoever). I gave them my national ID card as requested.

After a few clicks on a laptop, the clerks informed me that I was not a registered voter. I advised them to use my full three names in the ID cards instead of my ID number as an alternative method. They politely declined to do so on the reasoning that many Kenyans share similar names. In any case, my suggestion would take too much of their valuable time, they claimed. In reply, I retorted that, like most Kenyans I was registered biometrically in 2012. My belief was that they would be able to use the BVR kit in the station to confirmation my registration. In their parting defence they said they didn't have any online connection to the IEBC network or database.

Finally, I decided to let the cat out of the bag. Yes I was a registered voter, and indeed I had voted at the last elections in Embakasi East, Nairobi. I registered as a voter with my Kenyan passport whose names are similar to those in my ID card. But why the clerks, with the aid of a functioning laptop and complete IEBC data base, were unable to find out that I was a registered voter baffled me to the core. In this digital age, banks or telecoms service providers can easily flag your personal details instantly from their

computerised databases by using your full names only, if you wanted to be served anywhere in Kenya. Logically ID or passport numbers would make it easier for IEBC to hasten a voter's status, but they should not be the only options.

From this personal experience, it is possible to imagine that a potential voter who possesses both a national ID card and a passport could easily register as a voter, for example, in Nairobi by using his ID card and also in Kajiado with his passport. Given the proximity of the counties and the proposed reduced number of maximum voters (500/700) in each polling station in the next elections, double voting on the same day would be quite easy! Especially were biometric voter identification fail or made to fail.

Proposals

As the Senate grapples with the onerous task of trying to formulate an acceptable Elections (Amendment) Bill, it is imperative to ensure that the entire voting exercise is not narrowed to voter registration, voter identification and transmission of results. At this point in time in the country's 2017 election process, it is sad to note that the requisite elections gadgets have not been procured. To my mind voter registration, whether manual, biometric or combination of both, should only be done once all the necessary equipment have been acquired and deployed followed by establishment of polling stations and deployment of polling clerks. How foolish are we, then, to allow IEBC to begin a mass voter registration exercise in January 2017 before a complete integrated elections infrastructure has been deployed and audit of the voters' register (s) have been undertaken. To make matters even worse , IEBC has not acquired biometric and associated kit to cover all polling stations in accordance with the new ceiling of 500/700 voters per polling station. I believe new polling stations haven't been mapped out across Kenya.

It is, therefore, proposed that the following be done in order to ensure the forthcoming elections are free, fair and transparent:

- **Audit** of the voters' register(s) be carried out before the next mass voter registration exercise is conducted and results of all polling stations published and issued to all major shareholders for appraisal and observations. As a minimum, the audit report should show full names and other details, including but not restricted to ID cards and passport numbers of validly registered voters. Details of both biometric and manual registers need to be availed, if they exist. Similarly, names of those who have died or double registered (with actual supported documents showing actual double registration centres in question) from the voter registration exercise of 2012 to the last one must be clearly shown per polling station. The so called practice where IEBC only shows numbers of registered numbers in polling stations should be avoided. Actual names and ID or passport numbers must be shown. Obviously, the data is available in the IEBC database. How is it possible that many parts of Luo Nyanza were claimed by IEBC to have double registered over 17,000 voters in the last elections? Who were these voters, and why weren't they arraigned in court? Or were their names copied and transferred maliciously from one polling station to another by somebody with access to IEBC website in Nairobi. Surely, why wasn't double registration fiasco noted one or two weeks before the closure of the registration period in 2012? A serious audit would solve this puzzle.

- **An integrated Biometric network** be established through purchase of the necessary equipment to cover all polling stations in conformity with the proposed threshold of 500 or 700 voters per

station once the audit of the registers has been completed. The network can be established through a combination of terrestrial microwave, fibre optic, satellite, VSAT networks and other digital cost effective means so that all parts of the country are covered. The network could be set up by experts in such a way that alternative digital communication pathways are deployed automatically in case of failure. On other hand, two separate digital integrated networks could be created with one being a backup. Once established a countrywide test may be carried out preferably before registration takes place.

- **All polling stations with a ceiling of 500 or 700 voters and the serial numbers of all equipment** to be used must be gazetted before registration of voters commences. A sustained media campaign on the actual location of new polling stations must be conducted for all constituencies.

- **Contrary to what happened in the 2012 registration exercise, all registered voters need to be issued with voters' cards upon registration**. The voters' cards may be designed to have biometric data and other essential features. The voters' cards would greatly assist in voter identification and subsequent voting. In any case, a lot of Kenyans who registered as voters in 2012 may have even forgotten their polling stations because they weren't required to retain and use cards in future elections! On the other hand, it is possible that a voter's name may be found missing even in the manual register on voting day, necessitating the need to ensure that every voter must have a card as an aid. A case in point was witnessed in the elections of 2007 when Raila Odinga was nearly barred from voting in Langata. What saved him was not just the manual register, but his voting card as well.

- **Fresh Voter Registration** be carried out after completion of the audit of the voters' register. As can be observed in the IEBC website, hundreds of polling stations have voters in excess of 500/700. How will they be picked and transferred to stations of their choice if voter registration commences later in January 2017 in line with the new limit of 500/700 voters per station? The answer lies in carrying out a fresh comprehensive voter exercise. National ID cards, passports and waiting cards for passports and ID cards may be used to register voters. This proposal will also nullify the need to carry out an audit of the current voters' register. The registration may be done in at least two months, with the results of the first month audited by a reputable firm and published before a final registration of the final month follows. Once voter registration commences all elections officials SHOULD REMAIN IN THEIR STATIONS UNTIL ELECTIONS ARE HELD. Although this requirement is expensive, it would accord the officials an opportunity to master their respective roles and responsibilities, resulting in efficient, smooth elections.

Conclusion

As a retired Kenya Army officer with a background on telecommunications, I sometimes feel that we have not exploited the tremendous benefits provided by modern terrestrial and satellite communications networks. Our country has a fully developed, functioning telecommunications sector that can easily be exploited and harnessed for our collective use. Once IEBC has identified and mapped all polling stations

based on the agreed maximum figure for each polling station, the government should provide financial resources to meet the necessary budget.

Postponing the August 2017 elections may not be a bad idea if Kenyans truly believe credible elections would heal our nation. The hackneyed notion of winner-take-all should be erased from our national psyche for good. Go for it our gallant Senators! Your party loyalties should not blur your moral, democratic obligations. Fresh voter registration and use of voters' cards may be the pill that Dr. Democracy just ordered.

Yours faithfully,

Signature:

14

CORD COALITION

MEMORANDUM TO THE SENATE STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS ON THE ELECTION LAWS (AMENDMENT) (NO. 3) BILL, 2015

FROM

CORD COALITION

3RD JANUARY 2017

41

PROPOSALS ON THE ELECTIONS LAWS (AMENDMENT BILL) (NO.3) OF 2015

Background

It is the Coalition's considered opinion that gains and reforms recommended by both the Kriegler Report (2008) and the IEBC Post Evaluation Report on the 2013 General Election will be wiped out with this amendment bill.

Both reports rightly identify ICT technologies as the cornerstone for providing the public confidence and legitimacy of an open, transparent, free and fair election. The recommendations from these reports form the rationale behind the Election Laws Amendment Act 2016.

The Election Laws Amendment Act 2016 section 44 introduces the use of technology and progressive use of it in elections. It further goes ahead and compels the commission to develop regulations in consultation with various stakeholders including political parties. It is clear that the regulations must provide for:

a) Transparent acquisition of ICT equipment
b) Testing and certification parameters of the system
c) System Audit
d) Data storage and information security
e) Data retention and disposal
f) Access Electoral System Source codes
g) Telecommunication network for voter validation and Voter transmission
h) Development of a Disaster recovery and Operations Continuity plans
i) Establishment of a Technical Advisory Committee

Arising from the foregoing what parliament should have concerned itself with is the development of regulations to operationalize section 44 cited above.

Specifically three key electronic components are identified, namely the Biometric Voter Registration **(BVR),** the Biometric Voter Identification **(BVID**) and the Results Transmission System **(RTS).**

The BVR component is used to register voters based on their biometric attributes such as Fingerprint, Iris, Earlobe among others. The EVID is the electronic poll-book that is used on the polling day to verify and validate that only those who registered are allowed to vote. The RTS allows results and forms from the polling station to be promptly transmitted to the tallying centers.

1) Risks of Manual Interventions (Backups)

We wish to highlight the risks that arise when or if these electronic tools are not used:

Biometric Voter Registration: Lack of BVR in the registration process makes it impossible to identify and remove duplicate voter registrations. It is not humanly possible to crosscheck a voter register running into tens of millions of voters.

Biometric Voter ID: Lack of BVID on the polling day makes it easy to execute voter impersonation (dead voters can vote) as well as duplicate voting (registered voter can vote twice). A physical printout of valid voters from the BVR Kit does not cure this problem, since the manual control of physically crossing out voters is open to abuse.

Results Transmission System: Lack of the RTS on the polling day implies that the tabulation Forms and Results are ferried manually from the polling station to the Constituency, then to the County and finally to the National Tallying Center.

Each of this stage in the manual transmission process is prone to abuse. However and more critically, the instantaneous and random flow of incoming results provided by the RTS destroys the prerequisite stability that would otherwise enable parties to calculate the number of votes needed to cross the magic 50%+1.

2) Possible Failures & Digital Alternatives

We acknowledge that electronic systems may fail BUT recommend alternative digital backups rather than manual backup plans.

Digital alternatives to Mobile Network Failure would be Satellite Technologies (VSAT), Server and Database Failures would have Disaster Recovery Centers; Power Failure would have generators or solar interventions amongst others.

Clause	ISSUE	PROPOSAL	JUSTIFICATION
Clause 19	Complementary mechanism for voter identification and results transmission	Revise and provide for an electronic back up to the voter identification infrastructure. The law should define the complementary mechanisms to be adopted in the unlikely event that the electronic system fails. Mitigate failure by addressing;	Lack of BVID on polling day makes it easy to execute voter impersonation (dead voters can vote) as well as

		• Redundant power supply (extra battery, generator, solar) • Proper software testing and running with Tech Support systems in place • Higher specs can reduce error rates to significant levels Provide for electronic cards to be issued to voters at the time of registration of the elector. The cards to capture voter details of the elector. Deploy card readers on election day to assist identify elector in the event the electronic device fails. Electors to insert their cards in the card readers for identification and determining if the elector is registered in that polling station	duplicate voting. manual control of physical crossing out voters is open to abuse Card readers to be integrated with the biometric registers and voter identification devices and to store voter information for purposes of identification.
Results Transmission System	Electronic transmission of results	Devolve declaration of results to the polling station and constituencies. Use media, observers and party agents to liberally share the results declared at the polling stations and constituencies. Political parties, observers and media should be able to publicize constituency results once returning officers announce them. This takes care of a collapse in the centralized national tallying center.	Failure of RTS leads to manual transmission of results of results which is susceptible to manipulation

Conclusions & Recommendations

- We recommend that rather than planning for failure, we spend more time planning for success by providing digital interventions – in the event of failure.
- The Elections Laws (Amendment Act 2016) as currently enacted has outlined mechanisms aimed at reducing failure and should be adopted (e.g. Election Technology Committee, staff training, early deployment, verification and testing of technologies.)
- Further this Act anticipates the Election Technology Regulations that define how and what needs to be done to provide for alternative digital backups. These regulations should be adopted and operationalized.
- Both sides of the political divide agree on the need for a backup. However, we propose to have digital backup as opposed to manual backups.as enacted in the Elections Laws (Amendment Act 2016).
- We feel that where technology has totally failed (despite the digital backups), then the commission should consider postponing election in those specific areas as per the Act (Section 55B(1)(b) which allows IEBC to postpone elections as a result of a natural disaster or an emergency as such unexpected technology failure.

JOHN WALUBENGO
ICT Technical Committee
CORD COALITION
3rd jan 2017.

Electoral Electronic Systems: A Case for BVR, BVID, & RTS

Presented to SENATE by CORD ICT Technical Committee

3rd Jan 2017

1

Biometric Voter ID

4

Summary

- The 3Key electronic components (BVR, BVID, RTS)
- How they Work (in an Integrated way)
- The Risks of Manual Systems
- Possible Points of Failure and Digital Alternatives
- Recommendations

2

Biometric Voter ID (BVID)

- This is used at the polling station on the polling day.
- It allows voters who had previously been captured by the BVR to be verified and allowed to vote.
- It eliminates three things
  - Voter impersonation
  - Duplicate voting
  - Ballot Stuffing
- It DOES NOT require telecommunication network to function

5

Biometric Voter Registration(BVR)

- This is used to register voters based on their biometric (fingerprint, facial, retina, etc) details
- All voters registered biometrically are subsequently consolidated into the single voter register.
- The single voter register eliminates duplicate registrations.

3

Biometric Voter ID

6

Results Transmission System(RTS)

- The RTS allows presiding officers at the polling station to electronically transmit the prescribed Forms to an online public portal.
- The online portal is to be maintained by the commission (IEBC)
- A Display module can be used to show the public incoming results in real-time

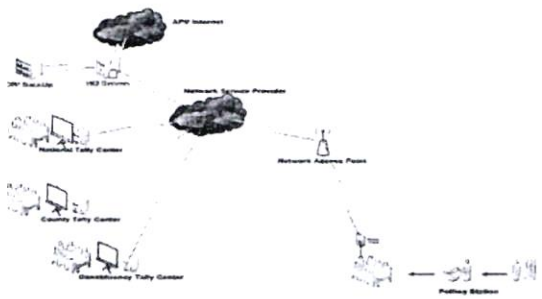
7

Risks of Manual Systems – If BVID is not used

- If the BVID fails, and the polling clerks allowed to use the manual printout from the BVR to identify voters. The following risks for manipulation are introduced,
- Manual printouts will have names of those who voted crossed out. Those who did not show up, their names will remain unmarked .
- After polling closes:-
  - Polling Clerks/Agents, especially in strongholds can conspire to 'vote' for the absentee and dead voters (impersonation).
  - Outright duplicate voting can also happen in the manual systems
- BVID is the electronic poll-book that electronically removes such risks since ONLY fingerprint verified voters can cast their votes and keeps the fingerprint tally that can be compared to total ballots casts. Any Discrepancies will relate to ghost voters.

10

Results Transmission System



8

Risks of Manual System – RTS Failure

- If the RTS fails, and the voting tabulation forms are transmitted manually to Constituency, County and eventually National Tallying Centers.
- The risk is that at each stage, an opportunity to manipulation or change the tabulation form occurs.
- Additionally, the random and simultaneous streaming in of results/forms denies mischievous parties the opportunity to mathematically establish the no of votes required to cross the magic 50%+1.
- A working RTS eliminates these two risks.

11

The Risks of Manual Systems- If BVR is not used

- The BVR System is used to register voters.
- If it at all it fails at the point of registration, the voter can always come back to register later since the registration time frame is not to constrained (30+days)
- No room for manual alternatives or interventions.

9

Points of Failure & Digital Backups

- BVR
  - Power failure, Battery failure
  - Software failure
- BVID
  - Power, Battery, Software failure
  - Finger print reader fails (False positive, False negatives)
- Redundant Power Supply should address this (extra Battery, Generator, Solar,)
- Proper software testing and running with Tech Support Systems in place
- Higher Specs can reduce error rates to insignificant levels. (Verify by fingerprint, iris and/or earlobe)
- Current Specs of 70% Accuracy very low

12

Points of Failure & Digital Backups

- Results Transmission
  - Mobile Network Failure(GSM)
  - Mobile handset failure (power, software, etc)
  - Server/Dbase failure
- Use of Satellite Technology (VSAT) can be used to overcome failure.
- Build Database redundancy to allow for automatic fail-over mechanisms

13

Ends

- Q&A

16

Recommendations -I

- The manual interventions are highly prone to manipulation as explained in previous slides.
- We recommend that rather than planning for failure, we spend more time planning for success by providing digital interventions – in the event of failure.
- The Elections Laws (Amendment Act 2016) as currently enacted has outlined mechanisms aimed at reducing failure and should be adopted (e.g. Election Technology Committee, staff training, early deployment, verification and testing of technologies.

14

John. WALUBENGO

Recommendations-II

- Further this Act anticipates the Election Technology Regulations that define how and what needs to be done to provide for alternative digital backups. These regulations should be adopted and operationalized.
- The Act (Section 55B(1) also allows IEBC to postpone elections in specific Wards, Constituency or County where they feel there has been unavoidable emergencies.
- We feel that technical failures beyond the intensive planning are candidates for postponement of the election in those specific wards, constituencies, county.

15

Dr. Enock Ogolla Ph,d.
University of Columbia Dept. of Mbch
0723214583

15

TYPES OF BACK-UPS

- Use a safe copy that has been prepared & agreed.
- Use of Satellite - back like the one used by mpesa from Kenya
- Use of "Huruma" satellite plant to transmit the results
- It is also possible to to negotiate with google Company or any Website company to help with "Cloudy store" so that you transmit result thy their website.
- In the U.S.A they allow Reputable media such as Fox News, NBS/C, VOA or CNN transmit provisional results with this nobody can change the results. In Kenya we can allow or consider this allowing Citizen MTV, ICTM to transmit provisional Results. That had happened before.

ON HACKERS

- Have a team of trained hackers to monitor the systems
- Buy a good soft wares, several of them to protect your Selp.
- Protect you machine from in-bred mechanisms of planting foreign data such as Virures, etc.

Dr. Enock Ogolla

Zimbra csenate@parliament.go.ke

16

ELOG Memo to Senate on Election Laws Amendments v03012017

Tue, Jan 03, 2017 01:26 PM

From : Regina Opondo <regina@crecokenya.org>

1 attachment

Subject : ELOG Memo to Senate on Election Laws Amendments v03012017

To : csenate@parliament.go.ke, Mulle Musau <mullemusau@gmail.com>, 'Beatrice Odera' <beatrice@catholicchurch.or.ke>, brian@iedafrica.org, Kennedy Masime <kmasime@cgd.or.ke>, Susie Ibutu <sibutu@ncck.org>, 'Susan' <susan@youthagenda.org>, ochiengc <ochiengc@fidakenya.org>, 'Shabaan' <lanshab@yahoo.com>, 'jephthah Kiara Gathaka' <jkiaragathaka@yahoo.com>, Anderson Gitonga <kiraithegk@gmail.com>, mulle@elog.or.ke, r u opondo <r.u.opondo@gmail.com>

Dear Hon. Nyegenye,

Greetings from The Elections Observation Group - ELOG

I am writing in response to the advert placed on the 30th December 2016 by the Senate Standing Committee on Legal Affairs and Human Rights; for Public Hearings and Submission of Memoranda on the Election Law (amendment No. 3) Bill 2015.

Please find attached Memoranda from ELOG on the same. Kindly confirm receipt.

Kind Regards

Regina Opondo
Chairperson ELOG/Executive Secretary CRECO

CRECO Secretariat
P.O. Box 2231
City Square, 00200
Gate 39, House No. 4
Upperhill, Matumbato Road, off Upperhill Road
NAIROBI
Tel: 020 3590735/0722 209779

www.crecokenya.org

CRECO: For a Just Society

ELOG Memo to Senate on Election Laws Amendments v03012017.pdf
276 KB

Elections Observation Group

CREDIBLE, PEACEFUL, FREE AND FAIR ELECTIONS

3rd January, 2017

The Chair,

Senate Standing Committee on Legal Affairs and Human Rights

MEMORANDUM TO THE SENATE STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS ON ELECTORAL LAWS AMENDMENTS

The Elections Observation Group (ELOG) is a long-term and permanent national election Observer platform that comprises of Civil Society Organizations and Faith Based Organizations, with a mandate of strengthening democracy in Kenya and the African Region through promotion of inclusive, transparent and accountable electoral processes. Since its inception in 2010, the Elections Observation Group (ELOG) has consistently monitored and observed the electoral process in Kenya and the African region with an aim of improving the entire electoral cycle processes for the realization of free, fair and peaceful elections.

ELOG successfully completed a comprehensive and structured 2013 election observation process, compiled and disseminated a report dubbed *'The Historic Vote, ELOG Observation Report of the 2013 General Elections.* Since the 2013 Elections, ELOG has continued to monitor all the electoral processes including, petitions, by-elections and electoral law reforms.

ELOG was also part of the Multi Sectoral Forum that spearheaded a broad-based CSO effort to contribute and participate in the Joint Parliamentary Select Committee (JPSC) processes that culminated in The Electoral Laws (Amendments) Act, 2016.

We, Election Observation Group (ELOG),

ACKNOWLEDGING, the fact that electoral management processes are critical to the realization of credible, peaceful, free and fair elections as outlined in Article 81 (1) (e) of the Constitution of Kenya,

OBSERVING, that the electoral environment is increasingly becoming intolerant and antagonistic in the run-up to the August 2017 elections,

RECOGNIZING, that the National Assembly on Thursday, 22nd December, 2016 rushed through amendments to the Elections Law (amendment No. 3) Bill (2015) that when effected will bring fundamental changes to the electoral legal framework

APPRECIATE, the Senate Standing Committee mandate to, among others, receive views from experts, members of the public, the business community, civil societies and others, on matters relating to the electoral law amendments,

SUBMITS AND PROPOSES the following:

1. **As regards amendments to Sections 39 and 44 of the Elections Act to**

introduce complementary systems for both identification of voters and transmission of results to the use of integrated electronic systems

ELOG notes as follows:

i. The proposal to use an integrated electronic system in the registration and identification of voters and the transmission of election results from the polling stations and the constiuency tallying centres came after a long protracted but consultative and inclusive process that included extra-parliamentary actors and experts. The amendments rushed through the national assembly under a cloud of partisan hostilities and lack of public participation does not augur well for an electoral process that should be consensus driven and guided by the rule of law.

ii. Use of technology was necessitated by the need to establish a much more accountable, accurate and efficient system as directed by Article 81(v) of the Constitution. This would address such mischief as double registration, multiple voting and manipulation of results transmission.

iii. While it acknowledges that such electronic systems should be complete with back up systems and also complimented by other systems where they fail, the same should be clearly defined for purposes of predictability, efficiency, transparency and accountability.

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

1. The word 'systems' as used in 'integrated electronic systems' be defined to include back up processes

2. That in the event of any need to establish complementary systems to the electronic process, these be clearly defined for purposes of transparency and be also based on the constitutional principles of accountability, efficiency and accuracy

3. For purposes of an EVID back-up, at registration, voters can be issued with smart cards with electronic chips that can be used to verify voters using card readers. The card readers can be deployed alongside the EVIDs and be used where the need for further verification is required. This model has been succesfully used in the recent Nigeria Elections and also in South Africa.

4. Physical results forms from the polling stations be used to verify all results from the elections

2: On the raft of other amendments by the National Assembly

i. The national assembly reduced the number of days for the procurement of electronic equipment from 8 months to 120 days before the General elections. While the change is desirable under the prevailing circumstances where the kits are yet to be procured, the laws also did stipulate timelines for testing and verifying them. This provision has not been addressed. ELOG feels that 120 days before elections would leave very little room for planning and implementation considering that IEBC staff/personnel would also have to be trained on the use of the equipment and replacement done for faulty kits.

ii. The National assembly also deferred the operationalization of the Campaign Financing Act (2013) to the next electoral period after 2017 General Elections. Again, ELOG notes mischief in this because the reasons cited was the lack of approval of the regulations thereof and this despite IEBC submitting the draft regulations to parliament within the given timelines. Lack of action by the House on the same therefore is an indictment for lack of commitment by parliament towards establishing a fair and level playing ground in our elections. It must be remembered that the Campaign Finance laws faced the same fate in the last electoral period, the Act itself coming into force after the 2013 elections despite valiant efforts by many actors to have the regime in place before then.

iii. ELOG also notes that the above fate has also befallen the requirement for academic qualifications for MPs and MCAs. ELOG feels that the national assembly acted in a prejudicial way to the spirit of impartiality and accountability critical to a credible, peaceful, free and fair elections.

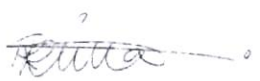
ELOG proposes the following;

1. Increase the number of days before E-day for procurement of electronic equipment to at least 160 days to cater for the issues raised above.
2. Action to suspend the operationalization of the Campaign Financing Laws in effect suspends a critical role of IEBC as stipulated by Article 88 (4) (i) '*the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect on any election*". In this regard, ELOG recommends that parliament approves the regulations submitted by IEBC to operationalize the Campaign Financing Act 2013. Requisite amendments to make the timelines for expenditure period and registration of authorized persons practical should be made. This was partially addressed by the National Assembly.

Concluding remark

Elections are an expression of all Kenya's sovereignty and democratic rights and not a preserve of the political class. Therefore decisions made about elections must be in the best interests of all where public participation, as enshrined in the constitution, is adhered to.

Yours Sincerely,



Regina Opondo

Chairperson - ELOG Steering Committee

On behalf of;

National Council of Churches in Kenya (NCCK)
Name: Susie Ibutu

United Disabled Persons of Kenya (UDPK)
Name: Anderson Gitonga

Ecumenical Center for Justice and Peace (ECJP)
Name: Ven. Jephthah Gathaka

Catholic Justice and Peace Commission (CJPC)
Name: Beatrice Odera

Federation of Kenya Women Lawyers (Kenya)
Name: Christine Ochieng

The Youth Agenda
Name: Susan Mwongera

Institute for Education in Democracy (IED)
Name: Brian Weke

Center for Governance and Development (CGD)
Name: Kennedy Masime

Supreme Council of Kenya Muslims (SUPKEM)
Name: Lattif Shaban

Constitution and Reform Education Consortium – CRECO

FORD KENYA EMBAKASI DISTRICT
P.O. BOX 56717-00200, NAIROBI.
TEL: 0725 934 931
E-MAIL: inducombs@gmail.com

17

Date: 3/1/2017

TO THE CHAIRMAN,
SENATE COMMITTEE FOR JUSTICE & CONSTITUTIONAL AFFAIRS
PARLIAMENT BUILDING,
NAIROBI.

THE SENATE CLERK'S OFFICE
RECEIVED
03 JAN 2017
P.O. BOX 7842 - 00100 NAIROBI

Dear Sirs,

MEMORANDUM

RE: UNFAIR AND UNCONSITUTIONAL / DISCRIMINATORY ELECTION LAWS THAT WERE AMMENDED BY THE PARLIAMENT.

We appreciate the opportunity that the senate has given to us and other members of the public, to contribute to the earlier laws that were discriminatory to the non-degree holders that are now being reviewed.

We urged the parliament and the senate to note that we had not been involved in the discriminatory laws (that are now being amended) that had been negotiated between the Cord and Jubilee representatives) as required by law.

Kindly therefore ensure that the laws that are being passed are fair to both degree holders and non-degree holders, as passed by the parliament in their special sitting.

We also urge you to take a realistic approach to what would happen if thousands of voters and IEBC officials, reported to the polling stations on the polling day, and they are chased away because BVR machines are not working.

Alternatively, please amend the laws to state that non degree holders should not register as voters or ballot in Kenya if they have no say on who should represent them.

Yours faithfully,

Michael Mungai,
Organizing Secretary – FORD KENYA, Embakasi District
CC: Honourable AG
CC: The Secretary General FORD KENYA Headquarters
CC: IEBC
CC: Honourable Speaker of the ~~Parliament, Nairobi~~. National Assembly

18

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

January, 3, 2017

The Chairman, Legal and Human Rights Committee,
Care of Clerk of the Senate,
Republic of Kenya,
Parliament Buildings,
P.O. Box 41842-00100,
Nairobi.

Dear Sir/Madam,

MEMORANDUM ON THE ELECTION LAWS (AMENDMENT) ACT 2016

Receive warmest compliments from the ICT Association of Kenya. We acknowledge with profound gratitude the great foresight and the commendable statesmanship of the Senate which has enormously contributed to the stability of our nation. In response to the call for public views on the Election Laws (Amendment) Act 2016, may it please you to consider this brief memorandum which summarizes our position with regard to various provisions in the Bill.

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 voter register
- Secure eligible voters while excluding non-eligible votes
- 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

BVR operates offline - Connectivity is not necessary

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 blackout possibilities

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, tea picking, milking, honey harvesting, mole catching etc. Repetitive impact on biometric surface diminishes the biometric clarity occasioning false negatives.

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 Question: How do we deal with potential system failures while eliminating possible system manipulation?

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 an alternative 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 mobile phones

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

a) Difficulty in network signal deficient areas
b) Transmission security risks (Physical, Programmed and non-Programmed risks)

- Interruption-Affects availability
- Interception- Affects Reliability
- Modification- Affects integrity
- Fabrication-Affects authenticity

Critical Considerations

- End to end Security- Virtual Private Network to minimize scope of potential vulnerabilities
- 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
- BACKUP? 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;

Concluding Remarks

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 BACKUP OPTION that naturally commends itself in the circumstances is a MANUAL BACKUP SYSTEM.

We urge the distinguished Senate committee on Legal Affairs and Human Rights to secure Kenya's electoral process by diligently enlightening the House and the entire nation on the foregoing issues which necessitate sound contingency plans. Most significant is the need for a complimentary mechanisms for identification of voters and transmission of results.

Sincerely,

Kamotho Njenga

Secretary General,
ICT Association of Kenya (ICTAK)

19

INTER-FAITH COUNCIL OF KENYA

P.O. Box 49578-00100 NAIROBI

2 January 2017

PRESENTATION OF MEMORANDUM TO THE SENATE COMMITTEE OF LEGAL AFFAIRS

The Pentecostal movement in Kenya, under the auspices of Inter-Faith Council of Kenya, after careful consideration and prayers in respect of the current trend of economic, political and social affairs in our country have the following to say:-

That on the economic arena, the new year 2017 shall be a new beginning towards total eradication of the demons and dragon of corruption in our country and that stern action shall be taken against those involved in this vise.

On the social arena, all Kenyans shall live together peacefully in love and unity as brethren of one mother called Kenya throughout this year, bearing in mind that it's our election year.

Our stand is that Kenyans shall be allowed to elect their leaders in a free, fair and democratic atmosphere devoid of any acrimony where the majority shall be allowed to have their way as the minority shall have their say as well.

On the political arena, we wish to observe and state that the acrimony that emanated from the voting in parliament two weeks ago where the electoral laws were changed to allow the simultaneous usage of both manual and electronic voting registers in case of signal failure wasn't informed from the truth and reality.

The truth is that all technological gadgets fail one time or another and therefore the idea of having a standby alternative would always be a wise decision, so as to be fair to every voter by not denying them a chance to elect leaders of their own choice.

We believe in the rule of law and parliamentary democracy as enshrined in our statutes including parliamentary standing orders and the constitution.

Parliament therefore acted in its wisdom to amend the electoral law to provide for manual register usage in case the BVR fails.

This to us was a fair approach to a scenario where man made machines fail to achieve intended objective.

This organization therefore supports the use of manual register as a back up to be used in case of technological failure by the BVR to avoid delayed electoral process.

Article 122(1) of our constitution provides, inter alia," Except as otherwise provided in this constitution, any question proposed for decision in either House of Parliament shall be determined by a majority of the members in that House, present and voting."

MPs were recalled from recess to go debate, deliberate and to determine the question of amending the law on elections in the country in respect to that unfortunate situation of technology failure which is a global phenomenon in several instances.

P1

Since the MPs present passed the amendment to the electoral law, which wasn't ultra vires to the constitution or any other law, the Senate also need to fast track the process before them so as to avoid more acrimony.

What the MPs did was both constitutional, lawful, legal and in conformity with the Standing Orders and Senators should likewise do their part.

If both Houses don't act in concurrence in this matter, their difference would cause anarchy and animosity that can compromise parliamentary democracy from thriving in the country at the detriment of peace.

Meanwhile, IFCK urges Kenyans to remain calm as the due process of law is applied as provided in our statutes and followed to the letter.

Signed:-

1. Archbishop Dr. Jerry Kibarabara - Chairman
2. Bishop Dr. James Kamata
3. Hon BSP Dr. Stephen Ndicho

On behalf of the IFCK Clergy

20

THE ELECTION LAWS (AMENDMENT) ACT, 2016
MOU PRESENTED
BY INTER-REGIONAL DEVELOPMENT AGENCY (IRDA)
TO: THE SENATE LEGAL AFFAIRS COMMITTEE (PSC)

Having reviewed the Election Act 2016 we have the following observations and recommendations to make in regard to the on-going debate on the use of an *integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results*:

We **ACKNOWLEDGE** that the key objective of **voting** in an election is to allow the electorate to *DIRECTLY* exercise their sovereign power to elect their representatives in an electoral unit may it be for the national, the county, constituency or ward seats. And, every Kenyan citizen aspires to enjoy this constitutional right.

CONSIDERING that all Kenyan citizens, men and women, young and old and including those with disability, have a fundamental right to participate in a free, fair and democratic electoral process;

GUIDED by the constitutional values and principles of good governance; that is the rule of law, democracy, participation of the people, equity and equality, social justice, inclusiveness, non-discrimination and protection of the marginalized, among others;

COMMITTED to the implementation of the constitution in letter and spirit;

We realize how Kenyans are highly polarized over the electoral system due to the cutthroat nature of our political campaign as the 2017 General Elections draws closer every minute and the political temperatures rise among our politicians and which infiltrates a majority of Kenyan electorate. To lower these temperatures we have to sober up and objectively dialogue on the best way that will see the implementation of our constitution in letter and spirit, including the following critical constitutional provisions:

Article 83(3): *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.*

Article 86(1): *Whatever voting method is used, the system is simple, accurate and verifiable, secure, accountable and transparent*

Article 86(4): *appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials* (NB A New clause – article 81(f) added to the Draft Constitution by a motion moved by Delegate 467 in the Technical Working Committee C on Representation of the People, on Thursday September 25th, 2003 (TWG C Final report pg 194).

These articles demonstrate that although Kenyan political election history has been characterized by examples of election malpractices and violence the makers of the constitution and Kenyans as a whole, particularly women who bear the greatest blunt of electoral violence would like to see a peaceful, free and fair election. Therefore, to ensure peace prevails before, during and after the elections, Kenyans must be assured that whatever system is adopted is a "good" voting system that:

i. Is comprehensible to and usable by the entire voting population, regardless of age, infirmity, or disability
ii. Guarantees every eligible Kenya citizen the right to vote in the coming 2017 General Election
iii. Is tamper-resistant to thwart a wide range of attacks, including ballot stuffing by voters and incorrect tallying by insiders
iv. Guarantees each voter that their vote is tallied and fairly allocated to the candidate of their choice
v. Guarantees each candidate that he/she receives the actual number of votes cast for him/her

Based on the foregoing we have the following observations to make:

Advantages of biometric voting system

The Biometric biometric voting system has multiple advantages as outlined below:

- The system is able to identify each unique individual man and/or women through the uniqueness imprinted in their fingerprints.
- The biometric fingerprint scanners provide a quick, easy, efficient, and secure measure through which, an individual can be authenticated.
- The system provide a simple and user-friendly interface for registering and identifying voters while the inbuilt memory records every time when an individual's print is scanned which is very important in:
    - Preventing duplicate voter registrations
    - preventing multiple voting
- Ensure quick and precise biometric voter identification
- Provide a clear and easily accessible audit trail

Challenges of biometric voting system

While appreciating the advantages of the biometric voting system, we also acknowledge the system has certain challenges, as realized by countries that have used the system in elections, and which could deny registered men and women the right to exercise their constitutional right enshrined in article 83 of the Constitution of Kenya 2010. Some of these challenges include the following:

Failure to recognize a registered voter:

Sometime the system fails to recognize a voter due to a number of factors such as:

- ***Dirty hands***: The system fails to identify voters with ***dirty or oily*** hands which is a major challenge as the majority of Kenyan voters, particularly women are hardworking folks who, perform roles such as farming and cooking which leave their hands not only dirty and oily but at times scars which may result in the failure to be identified
- ***Lose of fingers and/or arms***: As has been observed in the recent past, women lose their fingers and/or arms through gender based violence, for example Jackline Mwende, from Machakos County whose both arms were chopped off by her estranged husband. Many

women, like Mwende, cannot be recognized by the biometric system which would deny them their constitutional right to vote candidates of their choice.

- ***Network failure*** which may necessitate individuals having to wait a little longer till the system recognizes them which would disadvantage women most who may not have time to wait given multiple roles awaiting them.

Examples of biometric voter identification abound, such as the following:

Nigeria, where the system was marred by technical problems with electronic fingerprint readers, which are intended to verify voters' identities before being allowed to cast their ballot. Not even Jonathan was spared -- the card reader failed to recognize his identity and he had to wait nearly 50 minutes before he was able to vote. According to Nigeria's Independent National Electoral Commission (INEC) 0.25% of readers had malfunctioned. As a result the election had to be extended for a second day, Sunday, as so many voters had failed to cast their votes with the verification delays.

Ghana's last election in December 2012, where the biometric kits failed in many parts of the country, forcing voting to be extended to the second day.

Semi-autonomous region of **Somaliland** where a biometric register of voters was used in its presidential elections in 2010, but the final register was so contested that it was abandoned in subsequent local council elections.

These challenges are an illustration that that the biometric voting systems are not a "silver bullet" to the problems that plague elections. Many voters would be denied their constitutional right to vote the leaders of their choice if there is no complimentary voter identification system in the event the biometric voting system fails.

And, due to such and other challenges more mature democracies are *moving* away from electronic voting systems.

RECOMMENDATION

Given the advantages and challenges of biometric voting system discussed above we recommend the following:

Use of technology:

Article 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.

Is *amended* to provide a ***complimentary voter identification*** system that is simple, accurate, verifiable, secure, accountable and transparent in compliance with article 86(1) of the Constitution of Kenya 2010, to be used in the event that the biometric system fails to recognize a legible voter for reasons mentioned above, among others. The ***complimentary system*** could be a soft copy register in a laptop or a printed hand copy from the biometric voters' register. This will ensure that every registered Kenyan citizen desiring to exercise his/her right to vote is not denied their constitutional right to vote.

Presented by:

Name: Mary Wambui Kamy **Institution:** IRDA

Designation: Director **Signature:** [signature] **Date:** Jan/3/2017

Contact 0722868461
Email - wambui0308@yahoo.co.uk

THE SENATE
31 DEC 2016
SERJEANT-AT-ARMS

Jubilee Party 21

1. The amendments introduced to Section 10 of the Elections Act, requiring identification of voters on polling day to be exclusively electronic are inappropriate and unconstitutional, in that, for numerous well known reasons this requirement whereas it is well meaning disenfranchises eligible voters.

   The initiative to amend this provision of the Elections Act is well meaning however as presently drafted, it is insufficient. We say it is insufficient because for the Electoral Commission to deploy a manual alternative to electronic voter identification, the IEBC is required to give 48hours notice of this. This we believe does not give the IEBC sufficient statutory ability to deal with, and respond effectively to challenges encountered in the electronic identification of voters on polling day.

   Solution: We propose that Section 10 of the Elections Act be amended to make manual identification available as a back up to the electronic identification of voters on polling day without the need for any notice to be published in advance by the IEBC. The section should be amended to provide also that, where manual voter identification is used instead of electronic voter identification, the reason for this should be recorded in the polling day diary by the Presiding Officer concerned.

2. It should not be forgotten that in Kenya voting is and remains manual. Technology is merely introduced at the front end of voting to facilitate the registration and identification of voters and at the back end of voting to facilitate the collation and transmission of the result of the voting. In respect of elections, technology therefore is not an end in itself. The Elections Act as amended raises technology to a fetish that is an unconstitutional bar to a voters right to vote.

   Solution: Technology should be rolled back to the point where it is no longer a hindrance to a voter's constitutional right to vote. The experiences of India, Germany and more recently the United States of

Veronica Maina

America and closer to home Ghana, must be borne in mind when decisions about technology in elections are being taken. The Supreme Court of Kenya has pronounced itself regarding the use of manual voter identification in elections in Kenya and it found that the manual alternative to voter identification was constitutional in the attainment of a voter's right to vote.

3. The Election Managers view in respect of technology in elections must be taken on board. This is because the Election Manager, in our case the IEBC has the exclusive constitutional mandate to conduct elections in this Republic. The Election Manager is also the leading expert in this field and we urge that its views before this Committee be borne in mind when decisions about technology in elections are being made.

4. The deployment of technology is dependent on the availability of a certain quality of mobile data network. It is common knowledge that the desired quality of network is not available throughout the Country. To create statutory dependency for the transmission of the Presidential results to this quality mobile data network is unwise and manifestly unconstitutional.

Marie

Veronica

CONSTITUTIONAL ISSUES FOR CONSIDERATION REGARDING ELECTRONIC PROCESSES IN ELECTIONS

A. Issues for consideration

i) Whether the proposed amendments to section 39 (1) (c) of the Election Act are likely to violate constitutional provisions at Article 38 and Chapter 7 of the Constitution of Kenya.

ii) Whether the proposed amendments to Section 10 of the Election Act are likely to violate constitutional provisions.

iii) Whether the proposed amendments to Section 10 of the Election Act are likely to lead to vote suppression or restrict the right to vote as guaranteed by Article 38(3) of the Constitution.

B. Analysis

1. Article 38(3) guarantees every citizen the right to vote; the said section states that;

   *(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

2. The right to vote under article 38(3) is buttressed by Article 81(a) which states that;

   *81. The **electoral system** shall comply with the following principles –*

   (a) freedom of citizens to exercise their political rights under Article 38;

   (b) .....
   (c) .....

3. Further to the foregoing article 83 (3) states that;

   *(3) 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**.*

4. By virtue of the foregoing there is a presumption in favor of enforcing the right of every citizen to be registered as a voter, to vote and to have that vote count.

5. The amendments sought to be introduced to Sections 10 and 39((1)(c) of the Election Act have the potential of rebutting or negating this presumption.

6. 10% of the country has no network coverage at all while, only 17% of the country has 3 G network coverage. Hence , unless coverage is dramatically increased in the months leading to the election, which appears unlikely, voters in areas with no network coverage could be disenfranchised by the mandatory requirement of electronic voter transmission.

7. The mere fact that there may be failure in electronically transmitting results in some areas should not invalidate elections since manual transmission of results still meets the constitutionally required threshold of an accurate, verifiable, secure, accountable and transparent process.

8. The advantage provided by a manual voter-verified paper audit trail system is that it provides the voter with a paper printout or ballot when the vote is cast. This feature is intended to provide voters and/or election officials with an opportunity to check what is printed against what is recorded and displayed.

9. To ensure that the constitutionally required threshold of an accurate, verifiable, secure, accountable and transparent process is met, there should be manual process as a back-up in case there is failure in the electronic transmission of results. This is a position that has been upheld by the Supreme court in the case of **RAILA ODINGA & 5 others v INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 3 others [2013] eKLR** at paragraph 233 where it was held that;

"...We take judicial notice that, as with all technologies, so it is with electoral technology: it is rarely perfect, and those employing it must remain open to the coming of new and improved technologies. Analogy

may be drawn with the traditional refereeing methods in football which, as their defects became apparent, were not altogether abandoned, but were complemented with television-monitoring, which enabled watchers to detect errors in the pitch which had occurred too fast for the referees and linesmen and lineswomen to notice...

....But as regards the integrity of the election itself, what lawful course could IEBC have taken after the transmission technology failed? There was no option, in our opinion, but to revert to the manual electoral system, as was done. ...

.....From case law, and from Kenya's electoral history, it is apparent that electronic technology has not provided perfect solutions. Such technology has been inherently undependable, and its adoption and application has been only incremental, over time. It is not surprising that the applicable law has entrusted a discretion to IEBC, on the application of such technology as may be found appropriate. Since such technology has not yet achieved a level of reliability, it cannot as yet be considered a permanent or irreversible foundation for the conduct of the electoral process. This negates the Petitioner's contention that, in the instant case, injustice, or illegality in the conduct of election would result, if IEBC did not consistently employ electronic technology. It follows that the Petitioner's case, insofar as it attributes nullity to the Presidential election on grounds of failed technological devices, is not sustainable...."

10. As numerous incidents all over the world have demonstrated, most recently in the USA , electronic transmission of votes is susceptible to hackers, software bugs, badly trained poll workers or power outages could intentionally or accidentally erase or alter voting data captured by the machines. In the event of a close election, a recount would be impossible on machines that keep no proper record of votes cast. This will in effect be entrusting the fate of our democracy to technology that we all accept is not foolproof and in fact susceptible to failure and worse including external interference.

11. Transmission of results cannot be equated to actual voting and to predicate the outcome of a vote on an administrative requirement that

lacks constitutional underpinning is to undermine the provisions of chapter 7 of the Constitution of Kenya and the rights set out under Article 38 of the Constitution of Kenya.

12. The use of electronic transmission of results failed in the 2013 elections in Kenya and Ghana because the electronic system was compromised and so they stopped using it and had to revert solely to the manual system.

13. The insistence on using electronic transmission as the only mode of transmission will thus be setting up the country on the reliance of an unreliable, insecure mode of transmission of results, and the least we could do is to have provision for a back-up manual system incase the electronic system fails as has happened previously.

14. We need to be careful by virtue of the amendments proposed to be brought into force by section 10 of the Elections Act. makes it a requirement that a person's biometric data must be verifiable on polling day, and that this can only be done using an Electronic Voter Identification Device (EVID). As much as the intention is noble, the said EVID devices have not yet been procured and like all technology, are also susceptible to failure and numerous well documented problems that have undermined elections in Kenya and elsewhere previously.

15. The aforesaid requirements sought to be introduced by amendments to section 10 of the Elections Act could disenfranchise registered voters:

    a. Whose details have been registered as voters but whose fingerprint cannot be captured by the Electronic Voter Identification Device (EVID) by virtue of the fact that the thumb prints have been disfigured.

    b. Those registered voters whose fingerprints are captured in the voters register but who cannot produce finger prints on voting day e.g those people whose hands have been dismembered.

    c. In-case there is a failure in the EVID machines.

16. The amendments of any statute should not become an instrument of voter suppression. Our electoral laws and systems should not undermine the right to be registered as a voter; the right to vote and to have your vote count as contemplated by Chapter 7 of the Constitution of Kenya.

17. Article 2(4) of the Constitution of Kenya 2010 states that;

any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

18. A statute should not impose a limitation to the enjoyment of a right guaranteed under the bill of rights, as there is a general presumption that every Act of Parliament is constitutional, and the burden of proving the contrary rests upon any person who alleges otherwise.

72. However, with respect to provisions of legislation that limit or are intended to limit fundamental rights and freedoms, the Constitution itself qualifies the presumption. We cite the case of **Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10; others [2015] eKLR** where it was stated that;

"[96.] However, we bear in mind that the Constitution itself qualifies this presumption with respect to statutes which limit or are intended to limit fundamental rights and freedoms. Under the provisions of Article 24 .... there can be no presumption of constitutionality with respect to legislation that limits fundamental rights: it must meet the criteria set in the said Article."

19. The amendments sought to be introduced to Sections 10 and 39 of the Election Act may very well prove to be inconsistent with the Constitution and ought to be considered with caution.

Appendix 1

1. This issues are not academic or theoretical. The following examples, extracted from readily available public sources highlight some of the dangers of entrusting an exercise as important as national elections to exclusive mandatory electronic or IT electoral systems:

    - Fairfax County, Virginia, November 4, 2003. Some voters complained that they would cast their vote for a particular candidate and the indicator of that vote would go off shortly after.
    - During the Ghanian elections held in 2012, the Biometric Voter Registration (BVR) and EVID machines failed.
    - The recent 2016 national elections in Ghana where the electronic vote results transmission system failed.
    - The Kenyan General elections in 2013 when the Electronic Voter Identification Systems (EVID) failed leading to significant delays in many polling stations. Indeed, the CORD Presidential candidate Mr Raila Odinga could not be identified by the EVID machine at his polling station and was eventually identified by paper records.
    - The Premier Election Solutions (formerly Diebold Election Systems) TSx voting system disenfranchised many voters in Alameda and San Diego Counties during the March 2, 2004, California presidential primary due to non-functional voter card encoders. On April 30 California's secretary of state Kevin Shelley decertified all touch-screen

machines and recommended criminal prosecution of Diebold Election Systems. The California Attorney-General decided against criminal prosecution, but subsequently joined a lawsuit against Diebold for fraudulent claims made to election officials. Diebold settled that lawsuit by paying $2.6 million. On February 17, 2006 the California Secretary of State Bruce McPherson then recertified Diebold Election Systems DRE and Optical Scan Voting System.[72]

- In Napa County, California, March 2, 2004, an improperly calibrated marksense scanner overlooked 6,692 absentee ballot votes.
- Omesh Saigal, an IIT alumnus and IAS officer, demonstrated that the 2009 elections in India when Congress Party of India came back to power might be rigged. This forced the election commission to review the current EVMs.
- On October 30, 2006, the Dutch Minister of the Interior withdrew the license of 1187 voting machines from manufacturer Sdu NV, about 10% of the total number to be used, because it was proven by the General Intelligence and Security Service that one could eavesdrop on voting from up to 40 meters using Van Eck phreaking.[75] National elections are to be held 24 days after this decision. The decision was forced by the Dutch grass roots organisation *Wij vertrouwen stemcomputers niet* ("We do not trust voting computers").
- Problems in the United States general elections, 2006:
  - During early voting in Miami, Hollywood and Fort Lauderdale, Florida, in October 2006 three votes intended to be recorded for Democratic candidates were displaying as cast for Republican. Election officials attributed it to calibration errors in the touch screen of the voting system.
  - In Pennsylvania, a computer programming error forced some to cast paper ballots. In Indiana, 175 precincts also

resorted to paper. Counties in those states also extended poll hours to make up for delays.

- Cuyahoga County, Ohio: The Diebold computer server froze and stopped counting votes then the printers jammed so paper copies could not be retrieved for many votes and there was no way to be sure of the accuracy of the votes when the votes were being counted.
- Waldenburg, Arkansas: The touch screen computer tallied zero votes for one mayoral candidate who confirmed that he certainly voted for himself and therefore there would be a minimum of one vote; this is a case of disappearing votes on touchscreen machines.

- Instances of faulty technology and security issues surrounding these machines were documented on August 1, 2001, in the Brennan Center at New York University Law School. NY University Law School released a report with more than 60 examples of e-voting machine failures in 26 states in 2004 and 2006. Examples included Spanish language ballots that were cast by voters but not counted in Sacramento in 2004.
- In Finland, the Supreme Administrative Court declared invalid the results of a pilot electronic vote in three municipalities, and ordered a rerun of the municipal elections (Karkkila, Kauniainen and Vihti). The system had a usability problem where the messages were ambiguous on whether the vote had been cast. In a total of 232 cases (2% of votes), voters had logged in, selected their vote but not confirmed it, and left the booth; the votes were not recorded. Following the failure of the pilot election, the Finnish government has abandoned plans to continue electronic voting based on voting machines. In the memo it was concluded, that the voting machine is not developed any more, and Finnish government will follow the development of different electronic voting systems worldwide.
- 2008 United States elections:

- Virginia, Tennessee, and Texas: Touch screen voting machines flipped votes in early voting trials.
- Humboldt County, California: A security flaw erased 197 votes from the computer database.

- In 2010, graduate students from the University of Michigan hacked into the District of Columbia online voting systems during an online voting mock test run and changed all the cast ballots to cater to their preferred candidates. This voting system was being tested for military voters and overseas citizens, allowing them to vote on the Web, and was scheduled to run later that year. It only took the hackers, a team of computer scientists, thirty-six hours to find the list of the government's passwords and break into the system.
- iVote is a remote electronic voting system in New South Wales that allows eligible voters a chance to vote over the Internet. However, during the New South Wales state election in 2015, there were several reports that over 66,000 electronic votes could have been compromised. Although the iVote website is secure, security specialists believe that a third party website was able to attack the system. This was the first time a major vulnerability was discovered in the middle of an ongoing poll.

22

KANU'S MEMORANDUM TO THE SENATE OPPOSSING CHANGES TO THE ELECTIONS LAWS (AMMENDMENT) ACT 2016

In exercise of powers conferred by relevant provisions of the Constitution of Kenya 2010, the Senate of the Republic of Kenya invited views of the public and various stakeholders with regard to proposed changes to the Elections Laws (Amendment) Act 2016 (hereinafter referred to as the 'Act') as recommended and passed by the National Assembly. The proposed changes as passed by the National Assembly and which have raised countrywide uproar target Section 44 of the Act, which section addresses itself to the use of technology in the electoral system.

For clarity, we hereby reproduce section 44 of the Act for purposes of comparison with the proposed changes as passed by the National Assembly.

44. Use of technology

(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.

(2) The Commission shall, for purposes of subsection (1), develop a policy on the progressive use of technology in the electoral process.

(3) The Commission shall ensure that the technology in use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent.

(4) The Commission shall, in an open and transparent manner —

(a) procure and put in place the technology necessary for the conduct of a general election at least eight months before such elections; and

(b) test, verify and deploy such technology at least sixty days before a general election

(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 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).

(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 eight months 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.

The proposed changes to Section 44 as passed by the National Assembly read in part as follows:

> "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"

A comparison between what Section 44 provides for and the changes that the National Assembly seeks to effect mean that the Independent Electoral and Boundaries Commission (IEBC) can, on its own motion and wisdom, decide to ignore everything that Section 44 provides with regard to use of technology in conducting elections. In essence, the changes sought by the National Assembly with regard to the use of technology give IEBC a blank cheque. The term "notwithstanding" means that IEBC can choose to use technology or not as and when it deems fit. It is

this blank cheque provision which the changes seek to confer on IEBC that KANU is opposed to.

First and foremost, IEBC is yet to procure and test any technology as required by the Section 44 of the Act. It is, therefore, premature to seek changes to the law with regard to technology before IEBC procures and tests any technology. Our reading of Section 44 tells us that the provision is adequate and comprehensive enough to take care of any eventualities in case of technological failures. In this regard, there is no need to change the law as it is to take care of what has already been taken care of.

It is the position of KANU that the changes sought to the elections laws (amendment) Act 2016, in particular, the change that allows IEBC to use manual systems of identifying voters and transmitting results is a mischievous afterthought and is suspect.

It would be remembered that KANU rejected the results of the Kericho by-elections in March 2016 because the party leadership believed the elections systems, both electronic and manual, were manipulated to favour the jubilee candidate. The manual system, in particular, was used to inflate the number of voters who participated in the by-election in order to benefit the Jubilee candidate.

Our position was further strengthened by the fact that the systems completely lacked consistency because it appeared to work effectively in geographically larger **County** of Kericho by-election where the Jubilee Coalition candidate was announced the winner, while a totally different situation was experienced in comparatively smaller **Constituency** of Malindi where the Jubilee Coalition lost.

It is for this glaring lack of consistency that we joined those who participated in mass action to force for reforms in the electoral law to bring about a change that will guarantee transparency and reliability and to eliminate an environment where elections malpractices can happen. Hence, Section 44 as provided for is sufficient enough to guarantee transparency and prevent manipulation and should not be changed in any way.

Another issue that leads KANU to oppose the changes is the political circumstances that brought about the Election Laws (Amendment) Act 2016. The political context obtaining in the country today make the spirit of the amendments remain lost in the mischief and distrust among political players. It should not be lost to Kenyans that the law itself was as a result of political consensus whose main purpose was to progressively repair our electioneering process as we move towards the General Election.

The result of the mass action therefore, was a win-win situation for all parties because of the negotiated deal which was reached. It is our position that the changes made through consensus should not have been altered by parliament because the majority party position will take advantage of its numeric strength.

We believe as a party that technology (biometric system) that was agreed upon is the way to go and the government should not use its position to erect read blocks in the way of achieving a a viable and credible electronic voting system which:

- will ensure elimination of duplicate voter registration;
- will provide a simple and user friendly interface for registering and identifying voters
- will be easily scalable
- will ensure quick and precise biometric voting
- will provide clear and easy accessible audit trail.

Kenya is not the first country to deploy such a system. It is known to have worked in the recent US elections, India and Ghana among others.

In Kenya, a similar biometric system is used in e-passport, issuance of ID in registrations of persons, border controls, airports and in electronic money transfers by private business entities.

There is no valid reason therefore to insinuate that the system will fail while all along this government has rode on digital platform including availing its crucial services online such as procurement, filing of tax returns and payments of goods and

services through IFMIS (Intergrated Financial Management Information System).

It is possible to create network hotspot off grid.

If anything, Section 44 stipulates that the system will be tested and verified by all stakeholders before it is adopted. So, in case of any failures, then the failures should be addressed during the testing.

Above all, there is the option of pulling the WIFI signal in areas where there is no internet connectivity. Clear spot voyager wireless hot spot and T. mobile sonic 2.0 4G mobile hot spot combined with an external WIFI antenna and signal amplifier can increase the range of internet availability. With appropriate technical advice and sufficient human and financial resources, internet connectivity in all parts of the country during the election period is achievable.

Another option that can be explored is internet via Ham radio. It is our submission that it is possible to build a repeater network that allows access to internet through Ham radio. It is known to successfully work during emergencies in sending emails, data and files effectively.

We therefore submit that where there is will there is a way. It is this good will from the government that appears to be lacking. Instead, corruption and dishonesty is taking root and is likely to impact negatively on our elections if the political class continue to drive an agenda other that allowing democracy to prevail.

It is our humble submission that a credible system devoid of manipulation is the only option that will guarantee the will of the people in the 2017 general elections. Chest thumping and grandstanding coupled with tyranny of numbers will not guarantee free, fair and credible elections. The earliest this is realized by the powers that be, the better for peaceful elections this year.

Presented by: Dr. Fredrick O. Adan

Mr. Collins Odhiambo

MR. JOSEPH TOWETT
(Executive Director, KANU)

SUBMISSION OF TECHNICAL REVIEW OF THE ELECTION ACT 2016 BY KANU

This document explains the stand of KANU in regards to proposed bills on the amendment of election act 2016.

a) Electronic Electoral systems is the way to go

Historical information shows that the use of manual electoral system is prone to manipulation. Kriggler report demonstrates that manual electoral system has been the mainelection malpractices in the past. To avoid possible malpractices, it is important to have one clearly defined biometric register of voters.

b) Technological advancement in Kenya

Kenya boasts to be the Technology hub of Eastern Africa. It is therefore unfortunate to purport that the country is not ready to adopt the same technologies in electoral processes. Taking the country back to Manual electoral can only be equated to taking the country back to dark ages in true democracy.

c) The Election act and Technology

The Election Laws (Amendment) Act 2016 clearly stipulates the need to conduct elections using Integrated electronic systems. This implies that the integrated system should be able to support key functional areas, that is, five major electoral roles: Voter Registration, Data management, Vote Tabulation, Digital and Physical Ballot Counting, Vote Transmission and Display.

d) Technology creates a fair ground

Technology creates a fair ground for all players in the elections. This can only be achieved when regulations are developed and implemented by all stakeholders including political parties.

e) Integrated Election System

Per Section 2 of the Election Laws (Amendment) Act 2016:

"Biometric" means unique identifiers or attributes including fingerprints, hand geometry, earlobe geometry, retina and iris patterns, voice waves , DNA, and signatures and

"Integrated electronic electoral system" refers to a system that include biometric voter registration, biometric voter identification and electronic results transmission.

e.1 Biometric voter registration

Any biometric register has features and ability to hold voters with divergent primary key identifiers – such as fingerprints, hand geometry, earlobe geometry, retina and iris patterns, voice waves, DNA and signature

e.2 Electronic Voter Identification Devices

EVIDs can run multiple identification algorithms. EVIDs can operate for more than twenty-four hours hence there should be no any worry when it comes to functionality. To avoid possible malpractices, it is important to have one clearly defined biometric register of voters.

e.3 Results Transmission System

Elections Act 2016 provides an opportunity to securely transmit prescribed forms to an online public portal. The methodology for this transmission should be included in the regulations.

f) **Systems can fail but there are possible solutions**

To avoid failure, implementation of Election Laws (Amendment) Act 2016 provides mechanisms for averting failures. We therefore propose full implementation of the regulations of the election Law Act.

Conclusion

The manual system is highly prone to manipulation. Implementation of Election Laws(amendment acts) 2016 has capacity to prevent failures.

Presented by Dr. Fredrick Adono

Mr. Collins Oduor

Mr. Joseph Towett
(Executive Director, KANCO)

Zimbra **csenate@parliament.go.ke**

Fwd: Memorandum on Election law (Amendment) Bill 2016 from the Kenya ICT Action Network (KICTANet)

From : Grace Githaiga <ggithaiga@kictanet.or.ke> Tue, Jan 03, 2017 01:01 PM

Subject : Fwd: Memorandum on Election law (Amendment) Bill 2016 from the Kenya ICT Action Network (KICTANet) 2 attachments

To : csenate@parliament.go.ke

Cc : gloriaednah@gmail.com

23

Dear Mr / Ms,

Best regards

Githaiga, Grace

--- Original message follows ---
Subject: Memorandum on Election law (Amendment) Bill 2016 from the Kenya ICT Action Network (KICTANet)
From: "Grace Githaiga" <ggithaiga@kictanet.or.ke>
To: csenate@parliament.go.ke
CC: gloriaedna@gmail.com
Date: 03-01-2017 12:59

The Clerk

Senate

Main Parliament Buildings

Parliament Road

NAIROBI

Via email csenate@parliament.go.ke

Dear Sir

Greetings.

Kindly find attached a letter and a memorandum on **Memorandum on Election law (Amendment) Bill 2016** for your consideration.

With Kind Regards
Grace

For the Kenya ICT Action Network (KICTANet)

Memorandum on Election law.pdf
430 KB

Senate letter on electoral laws.pdf
220 KB

Memorandum on Election law (Amendment) Bill (Detailed Considerations)

Submitted to the Senate

January 3, 2017

Kenya ICT Action Network Comments for Submission to the Senate on use of technology in the 2017 General Election

Step	Event	Description
1	**Voter Registration** *Technology*	Biometric data is collected. These systems are off-grid hence no network connectivity is required.
2	**Register Clean Up and Distribution** *Technology*	After registration, all data should be collated by IEBC to check for redundancies and irregularities. Voters with problematic details should be contacted. Before the election, the complete voter register should be split per-polling station and each chunk copied onto a device. For now, let us call and picture this device as an "external hard disk". The "hard disk" shall contain the biometric data required to identify a voter at only one polling station – where they registered. After copying, the data on the disk should be hashed and compared with the hash on IEBC servers for integrity purposes. This will be useful on election day.
3	**Verify Voters on Election Day** *Technology*	Before election day, these "hard disks" should be securely distributed to their respective locations. Before the start of voting, the data on the disk should again be hashed and compared with the hash on IEBC servers. If the hashes are the same, the register is clean and voter verification can begin. If the hashes differ, they should try a backup disk. If the hashes still differ, that polling station will be on hold as they await a fresh voter register to be transmitted from IEBC HQ.
4	**Cast Vote** *Manual*	Voters pick ballot papers for the different posts and cast their secret ballot for each.
5	**Count Votes** *Manual*	The key here is that the total number of votes cast should not exceed the number of voters that the biometric devices verified.
6	**Transmission of Results** *Technology*	After all parties and agents agree on the results, they should be manually entered onto the "hard disk" for transmission. Again, once entered, this data should be hashed.

		If the polling station has network connectivity, the results should immediately be sent together with the hash. IEBC then verify the hash with the data received and if they match, they approve the results. If the polling station lacks network connectivity, the "hard disk" should be physically and securely transported to the nearest point with network connectivity for transmission from there. After all, the constitution speaks of polling station > constituency > county-level. Agents should be involved until they see "Successfully transmitted" on the screen confirming receipt of results by IEBC.

With proper testing (load testing, penetration testing, etc) staff training and sufficient voter education, the above should work seamlessly to deliver a free, fair and credible election. The most effective way to test is by carrying out at least two mock elections/simulations with dummy data to prepare all parties for any eventuality and equip them with the knowledge of how to react.

Comments from Washington Odhiambo

I have keenly considered this matter that seems to have divided the country down the middle: Manual Backup during the 2017 voting process. From the Jubilee government side this is a do or die and so it must be there. The government side seems hell-bent on confusing the masses, as well as the experts like the ICT Community. From the Opposition side, the agenda seems to be very clear - that of ensuring integrity of the Voters Register and stopping 'ghost voters' from ever casting their votes.

That brings us to the famous acronyms - BVR (Biometric Voter Register) / BVI (Biometric Voter Identification).

Having been to a Voter Registration Centre (later to become a Polling Station) to register as a voter, I did look at the equipment in use for the registration process. I saw the laptop which was fitted with a camera and fingerprints scanner. All these require power to run. I did not dwell on how they were powered, but probably there was a battery backup somewhere (besides the electricity) given that they needed to run for a whole day for several days during the voter registration process. When it comes to the Elections, they only need to run for about 11 hours. My point here is that of Backup Power should it be that there's electricity blackout and the built-in batteries can't last the whole day. That backup is very important.

However, I did not see any piece of equipment which could suggest that the equipment in use required any form of connectivity back to some central server in order to function! This now brings me to the currently national debate - Manual Backup during the Poll Day. What is it? Was the CS honest with his presentation before the Senate/Amos Wako committee yesterday? Does the CS himself really believe in the content of his presentation? I am asking that because I watched him and I don't believe him. I actually think he mislead the committee, and hence the nation at large.

Someone please prove me wrong. I am at that point where I believe that the BVR/BVI does NOT require any form of connectivity and so this Manual Backup being touted by the ruling coalition side, strongly supported by the ICT CS is a big lie. WHY?

My very first answer: Simply put, when there was no requirement for a manual backup during voter registration, it goes without saying that there is NO NEED for on the polling day.

1. For the issue that is in contention - BVR (used for BVI during polling) - this is a database that can be (and should be) statically stored on the equipment for each polling station. We are not supposed to rely on the Mobile Network to access this voters database. And every polling station can have two/three laptops/Biometrics scanner/Backup batteries to ensure that the voter identification doesn't fail.

Some excuse has been fronted about some voters being mechanics, such that their fingerprints wouldn't be recognized by the BVI systems hence need for manual identification. My take on that is that every voter must carry their voter's card on that day. The clerks can check that card number against the electronic system - enter it, and it will bring the person's picture, ID number, etc and let him cast his ballot.

2. For electronics results transmission (ERT), this is not even necessary in the first place. We can have the results collated/announced at the tallying centres after being certified - forms 36A, and such. However, if the ERT must be done, the data footprint is so tiny that a 2G network can be used. Besides, it can be an SMS based system, which doesn't require 3G or VSAT. The results data isn't that large - it can't be in Megabytes to be sincere. Well, VSAT can be used if they MUST, but this is after the voting process itself is complete, has nothing to do with BVI.

The ERT and the BVR/BVI are two distinct systems. That is what I want to believe. The ERT gets feedback from a manual process - of voters casting their vote, clerks/agents counting, verifying, and certifying, filling requisite forms then communicating the same via some customized phones which are programmed to communicate to a backend system. Am I right on that??

Now the big question here is, where do we need this much touted manual backup where network connectivity is being used as the major reason???

(a) Citing terrorism and the possibility of Al Shabaab knocking off base stations seems like well thought out lie meant to cover our eyes! If they attacked an area, I doubt there will be voting in the 1st place. And even so, the network connectivity is not required for BVI so there is no disenfranchising anyone if there is no manual backup (whatever that is).

(b) Citing hacking is neither here nor there for a BVR/BVI system because it's not being accessed live during the voting. It's a static database, unique to the polling station, resident on the laptop used by the clerks. The only hacking that can be done then can only be by an "insider". Quoting Victor Kapiyo from Social Media, "I guess it's a question of trust. Trust in systems and in trustworthy people to do the right thing. For M-Pesa, or KCSE results, we trust both. For IEBC, I guess the jury is still out."

The main issue is not allowing the dead voters to rise again to vote in the presidential vote, then

disappear. So the important component here is the BVR/BVI, the credibility of the register and hence the vote.

At what point does the BVI system require this connectivity they are talking about, which then necessitates the so called "manual backup"?

Did the CS ICT lie to the Senate?? Did the CAK lie to the Senate in supporting the lie from the CS??

There is insincerity in this whole debate about 'manual backup' and the ICT community seems to either support it or is simply lost in the pool of confusion being peddled by politicians.

You say "Conversely, if the RTS fails but the BVR and EVID work perfectly, there should be less cause for alarm. Essentially, the three subsystems have a symbiotic relationship that can be used to validate or cross-check each other."

=> I do not clearly get the symbiotic relationship between the three systems as far as the main issues of contention (EVID) are concerned.

If the systems are interconnected, then, looking at it from an SQL perspective, the RTS system borrows only one column from the BVR tables - Total Registered Voters in a particular Constituency, which I believe is just a factor for cross-checking the results (reminds me of Tiaty saga).

However, this isn't necessarily part of the critical system that is supposed to stop dead voters from resurrecting and voting! I therefore think that we can mentally (or even practically de-link the RTS from the EVID to stop this insistence on connectivity, which gives birth to the "manual backup", no?

You say "Sometime the failure is maliciously engineered, while other times it is a reflection of the genuine weakness inherent within man-made systems."

==> With specific reference to EVID, I am of the opinion that it is pretty easy to mitigate failure of the system by having 3 sets of the system, which is affordable. That would address the "technical failure", but not a human/maliciously engineered failure, because the humans can kill the three or even all of the equipment. If they do this (corrupt the static DB - as that is the only show-stopper), then really, there should be no voting. I hope that doesn't happen. We still don't need 3G/4G/VSAT for this.

You say "So Cord, just as prescribed for Jubilee, should be discussing what level of electronic failure is acceptable, beyond which the results can no longer be acceptable given the potential exposure to manipulation that would arise from the manual alternatives."

==> Jubilee are advancing/contemplating the imaginary failure of connectivity occasioned either by absence/failure of fast network (3G/VSAT) or Al Shaabab knocking off what is there. This is more like making a nightmare a reality instead of the dream that it is. CORD is insisting that EVID should be used without the option of the "manual backup" and we all know that EVID doesn't require this connectivity, which supports the CORD argument.

You say "On the other hand, electronic voter identification (EVID) and the results transmission system (RTS) are quite time-sensitive. If they failed, manual intervention may be the only option available"

==> I still insist that EVID has very little to do with RTS. EVID is being used statically. The equipment, at most, has the constituency register, not the whole national register, and at the least, has just the registration/polling centre register. RTS is a system that kicks in later, once EVID has completed its role. RTS waits for data from humans - clerks/agents/presiding/returning officers. They can all congregate at the County HQ and send this data. Most County HQ have 3G. If they don't, VSAT is something that can be set up in less than 1 hour!

Your other view go well with issue about addressing possible failures, but in no way support the "Manual Backup" for EVID. This manual backup thing is a red herring, visible immediately you de-link connectivity from the debate.

Which brings me to your conclusion: "So who is right and who is wrong? Unfortunately, both sides are right and at the same time, very wrong."

Comments from John Walubengo

Point1: Can we delink RTS from EVID?

Yes we can. From the perspective of functionality, EVID does NOT need RTS to work and vice versa.

However, from an audit perspective (e.g after potential rigging), the data in EVID can be compared to the data transmitted by RTS to identify ghost voters. Hence the symbiotic relationship - and the need for ensuring that at least one of these two systems MUST work. In cases where BOTH EVID and RTS fail, then voting exercise must be repeated since the exposure to rigging is far too high to the point where reliability of the results cannot be guaranteed as per the constitution (ref: secure, verifiable, transparent, accurate)

In other words, we must accept that failure may occur, but we must also reject that failure will occur in totality. Where failure occurs in totality, we must be willing to repeat the process in the specific constituency/county/country. That is the cost of democracy.

Point 2: Can EVID fail - Maliciously or otherwise?

True you dont need 3G/Satellite systems for the EVID component since it is simply comparing your fingerprint at the point of voting, to the fingerprint you digitally supplied at the point of biometric voter registration (BVR).

However, failure can occur in what we call false positives or false negatives arising from environmental conditions rather than technical (battery failure etc). Humidity, dust, temperature variations can make the fingerprint reader fail to recognise you (false negative). More advanced EVID can then identify you by your eyes (Iris), voice or other biometrics but I doubt the IEBC system will be this advanced.

Solution: allow for manual identification - ON CONDITION that the RTS will work within reasonable time. We must set time frames within which RTS should work, it cannot be acceptable that it works, 1, 2 or 3days later since this defeats the whole essence of RTS, which is to provide randomness in the elections results; making it difficult for parties to do the mathematics needed to pass the magic 50%+1. This mathematics only happens when their is a pause or stability in the results being released.

Point3: CORD insisting on pure electronic system vs Jubilee insisting on manual system.

Whereas electronic systems reduces chances of manipulation, CORD stubbornly refuses to appreciate Point2 above, which is that e-systems can fail. Jubilee on the other hand stubbornly refuses to accept that manual systems introduced are open to manipulation. There must be a middle ground that allows for failure, without necessarily allowing for rigging. Both sides do not want to spend time on that agenda. How to plan for failure, while reducing chances of rigging.

Point4: VSAT technology?

Ofcourse VSAT can work. Even if Alshabaab blew up the GSM masts, we can still transmit results via VSAT/satellite phones. Last time I checked, terrorists do not yet have technology or grenades that can blow out and bring down satellites from the skies.

==> That's because we are not there to talk to them and enlighten them.

Comments from Grace Mutungu

I remember a quote by the IEBC CEO during the Kenya IGF where he stated that being a Republic based on democracy, we have made elections the only means to access power. https://livestream.com/internetsociety2/kigf

He recalled the use of technology in the 2010 Referendum, 2013 elections and the various by-elections that have taken place. In the Referendum and most by-elections, there was not much contest about use of technology while for 2013 some issues were raised- these included multiple registers, voter impersonation and transparency.

The tech community has an important role to play in demystifying some of these concepts.

a) The wording of the amendment read "complimentary mechanism for identification of voters". It has now been expanded to include transmission of election results "where technology deployed initially fails". What would this mean, in the case of identification of voters and in the case of transmission of results? What complimentary systems were envisaged here? "Manual backup?" The ambiguity in the wording is a challenge as it leaves too room for interpretation in a system of high contests.

b) The mischief that technology was meant to cure in elections management was among others allegations of voter impersonation and transparency in management of elections. Tech is therefore supposed to achieve simplicity, accuracy, verifiability, security, accountability and transparency. Is the

conversation about a "complimentary" system a necessary one at this stage?

Outside of the amendment, has anyone come across the data that CA presented on network coverage in the counties? A visualization of that data besides the polling stations would be useful in helping us identify the specific polling stations/tallying centers that are not covered. I am asking this because the presenters spoke of areas not covered by network as opposed to polling stations/tallying centres not covered.

Comments from Collins Areba

Main issues in the debate:

1: Voter registration: collecting details, photos and fingerprints. (Multiple data types)

2: Verification: ascertaining that registered persons are in the system, and dead / expired ones are removed from the system. (Boolean: yes / No)

3: Voting: choosing from one of several options.

4: Tallying : counting the choices at the polling stations and recording the results on paper or device.

5: Transmission: sending this information to regional and national tallying centers.

Comments from Ngigi Waithaka in response to Collins Areba

The only areas that require Information Technology are 1, 2, 4, 5. 1 has already happened.

For 2, 4, 5, why would a backup have to be manual? Manual has to be the last resort. What worries / concerns me is how it seems that there is almost a quick rush to use a manual system!

Case in point, for verification; all the polling data should be local, hence on laptops at the polling station, if one laptop fails, then you can verify with another. Probability of say 5 laptops failing in a single polling station at the same time is close to nil, unless direct sabotage.

On transmission, if Safaricom fails, use Airtel, if Airtel fails use Orange, if Orange fails, use Satlink. All you need is to have 3 Phones with various SIM Cards and you good. If no network coverage, get Thuraya!

On most modern systems that we use and that provide for the fabled five 9s (99.999%) uptime, there is never an option of a manual backup.

Or is there a manual backup for MPESA? Anyone here whose bank has a manual backup? Does KRA have a manual backup for iTax?

We have more than 6 months to the Election date, enough time to query the IEBC's systems.

Comments from Jimmy Gitonga

I have the same concerns myself. I reached the conclusion that it would be nice if "ICT Experts" could lay their hands on a BVI machine and show the rest of us what the problem really is. The ERT issue is a red herring. It has worked flawlessly in the bi-elections that have happened ever since. With PKI and 2 factor authentication, this can be solved for Election Day.

Comments from Eddie Kiama

In the debates I have seen raging online and elsewhere about need for a non-IT based backup system, the ICT Ministry and Communications Authority are quoted talking about the 3G coverage in the country or lack thereof. No one is talking about 2G and Satellite phone coverage. Isn't most of the country covered by 2G? Does it mean we suddenly can't transmit data over 2G which we used to before 3G? Interesting that the same Safaricom whose Mpesa can't be hacked by Al Shabaab can have electoral results transmission hacked (According to CS Joe Mucheru)! Are we suddenly analogue because elections are approaching?

Could experts here appear before the senate committee on Elections Act next week and save this country from an impending calamity driven by ignorance around ICT?

Comments from John Kieti

In my understanding, the use of electronic means to identify voters and to transmit results is more about the integrity of the election than efficiency of the process.

Therefore, when we say we need a fall back system, we should look at a solution that not only safeguards fulfilment of the bill of rights as regards the right to vote. The solution should also have in itself a fallback mechanism that safeguards the integrity of the electoral process as envisaged by the notion of "electronic means".

Simply reverting to "manual" appears a little too simplistic. This is because the spirit behind the law's insistence on "electronic" is that of safeguarding the voter identification process by way of biometric technology for instance. As technologists we will easily have consensus that biometric person identification is much more fool proof as regards positive identification than its manual alternatives (therefore not letting in the so called ghosts.

Likewise, the spirit behind electronic transmission of presidential vote tallies from the polling station is to safeguard the integrity of the tallying and aggregation process. This ostensibly reduces chances of crooks tampering with signed tally forms (form 34s and form 36s) later on, after the tallies have been announced at the polling stations.

Therefore as we consider the matter of "what if the system fails?", it may be that to maintain the spirit

and intention of safeguarding the integrity of the vote, a fall back process needs to ensure that the integrity of the vote is not compromised.

For instance, why would we insist on a manual back up when both the primary system and the redundant system could be electronic. As it may have been said, in the case of presidential tally transmission, GSM technology could constitute the primary system. Then in areas where GSM connectivity is absent or doubtful, a small deployment of vsat or satellite phones could provide redundancy. It could even be a temporary Wimax arrangement in specific geographical locations. It could also be that a extra government supported investment in GSM for areas of doubt between now and June 2017 is possible. Of course commercial viability is an issue but the bill of rights argument also appears to invoke the essence of the Universal Access Fund. As one may argue, the general election is one of the crucial activities where every citizen can exercises article 1 and article two of the constitution, and it happens once every five years. Arguably there might be no better use of the Universal Access Fund than for facilitating the exercise of article 1 and article 2 of the constitution.

As regards voter identification (for EVIDs), there is people with very sweaty fingers. Others may have had accidents in the period preceding the election, causing amputation of the fingers linking them to the biometric register. Therefore such identification failure is plausible.

Notwithstanding the possibility of EVID failure, if incidences of such failure exceed 5% or say a certain threshold in a polling station, then something would be amiss and should raise a red flag. It could either be a cultural / environmental challenge in the geography of that polling station, or it could be a case of power issues with the gadgets, or as some would say, it might be "artificial" failure to facilitate "ghost" voters.

Regardless of the cause of EVID failure, and in the spirit of safeguarding the integrity of the election, it will help that every EVID failure instance triggers a sequence of well documented steps that can guarantee verifiability of a positive "manual" identification of the voter.

The easy one of EVID failures to solve is the instance of power (battery) failure. It should not be impossible to eliminate this through better training of IEBC staff and pre-charging devices. More so, increased rural electrification in the last 4 years might contribute more to alleviation of this challenge.

In conclusion, it seems important for those dealing with the Election Law Amendment to separate the two issues (1) The bill of rights and the right of every Kenyan (who has registered as a voter) to vote.

(2) Safeguarding the integrity of the vote through ensuring we have up non corruptible, verifiable and auditable electoral systems. More specifically, voter identification and presidential tally transmission appear to be areas of enhancement.

Comments from Ben Chege

Every 5 years Kenyans queue to vote, this is an exercise that we have engaged in passionately for as long as I can remember and when each round of elections is done and dusted we as a nation learn a couple of lessons which we then reuse in succeeding election cycles in an attempt to make them better.

However, looking at the current debate on the use of technology and witnessing what is happening, I suspect that there might have been an important lesson to be learnt in the 2007-08 when compared to the 2013 election cycle that has been missed and this lesson is that Having consensus among all players beforehand regarding the electoral process generally leads to widespread acceptance of the results of the process.

Electoral process should be seen as contests, where groups of people with various interests engage willingly in order to not only determine political representation but also wield the power of the state, and just like any reputable contest it has its rules. These rules are well known and understood by all players and are accepted from the onset. These rules are deterministic in that they are predictable and must be seen by all parties to be fair. For a country to have a credible election - we need everyone to feel like they have a chance in this contest since from the onset the rules of the game do not favour their opponent(s).

In 2007 ODM did not agree to the way the commissioners were picked after the terms of some expired as they felt it contravened the IPPG agreement and after the contest was done they did not accept the results announced by the commission. When the same commission asked them they refused! We all remember the situation the country found itself after the opposition refused to engage in a process they felt was flawed and disadvantageous to them. The 2017 election process is slowly mirroring the 2007 pre-election period especially when it comes to the role of technology on voting day. We are witnessing an emotive debate regarding the use of technology and the disregard of the voices of political players who hold contrary opinions. If lessons from the past hold true, this threatens the expectation of a peaceful electoral process and at the very least a credible one.

On voting day there are 4 core activities that happen within a polling station, these are:

1) Voter identification/Verification? This answers the question ? ?Are you registered to vote in this polling station??

2) Voting by secret ballot? You are given a ballot paper and then you mark it in secret and the cast the said ballot into a transparent ballot box.

3) Counting of results and declaration? Counting of all votes cast in the polling station for each race and the declaration of the votes cast in favour of each candidate.

4) Results transmission? Forwarding these results to the next level namely the constituency tally center for?tallying? and dispute resolution just in case there were any.

The? Manual? vs ?Electronic? Debate is really touching on activities 1) and 4) and therefore at the core of this debate are 2 questions namely:

1) Can we solely verify/identify voters electronically using biometrics that they submitted?

2) Can we solely transmit results to the next level using electronic means? Fortunately, these two are not really new initiatives as the IEBC has been using technology in these two areas over the last 4 years.

No one doubts the credibility boost that well executed technology has on elections. An example of this is the by-election in Kibwezi West where the winner won the race by the narrowest of margins - a paltry 175 votes and the loser did not file a petition challenging the results. This was unheard of in previous elections. Why then do we have a debate around it? Previously, the use of technology was not explicitly dictated by the Elections Act but rather the stipulation to use one form of it was found in regulations. Until now the official Electoral process has been manual where technology had been added for efficiency and confidence building. The latest Election Amendment Act 2016 has raised the profile of the said technologies from just being tools to be used in boosting confidence to be the exclusive means of conducting voter identification and results transmission.

They say once stung? Twice shy and thus it is s understandable that the IEBC is jittery in embracing technology full throttle without a fallback especially because it had technology failures in the said areas during the 2013 General elections. Technology is playing an increasing role in our lives and for us to move forward on the electoral field - I feel that this discussion needs to be informed by a mindset from big technology companies have when it comes to failure. Companies like Google, Yahoo and Facebook plan for failure more than they plan for success. They have a culture that says ?failure is OK?, a culture where people are encouraged to ask:

1) What do we do if our technology fails?

2) How do we continue fulfilling our core business that is serving our customers and users when the systems around us fail? So as Kenyans we need to ask ourselves the same set of questions and ask how it affects the core business of elections. But for that to happen we need to synthesize what our core business on Election Day is. It?s said that ?Election Day is still the one day when we strive to give equal voice to every eligible voter; the day when the woman working in the market stall has as much of a say as any wealthy banker, and the illiterate menial laborer has a voice that speaks as eloquently as any university professor. It is our shared responsibility to strive for processes and systems that ensure that every voter is given the opportunity to make their will known, and that every vote is counted? If we agree that this is the core business of elections and everything on Election Day must support this, we should ask ourselves a couple of questions, namely:

1) What happens WHEN we place a piece of technology as a prerequisite to the recording of this voice and the said technology fails and thus affects the ?core business?? What are the fallbacks available to us?

2) Since this is a contest, which out of the array of fallbacks available is most acceptable to all players?

The issues around the failure of technology have been well documented. The IEBC conducted an internal audit of the March 2013 election and rather candidly highlighted these failures. I will try and address them and possibly give recommendations in question form that should advise our choice of an acceptable fallback or perhaps a list of fallbacks to be executed in when certain scenarios playout. When it came to the identification of voters electronically, the issues fell broadly into 3 categories namely:

1) Technology problems ? some voters could not be found on some EVIDs but were present on the

manual register. Some devices run out of power, some even exploded during charging

2) Procurement problems ? getting the wrong device because procurement requirements were not met.

3) Rollout problems? Some devices were not charged, insufficient training due to late delivery and lack of manuals e.t.c. With proper planning and time to go through the procurement procedures most of these can be sorted out. The new Elections amendment act stipulates that the IEBC should have procured and set in place technology 8 months to an election and then have it tested 60 days to an election. Even with this in place some of the problems categorized as ?Technology problems? may not disappear or may only manifest themselves on polling day. In order to address them we need to ask ourselves what are the real risk factors related to technology? If the approach to voter verification is similar to what was employed in 2013 ? then the disruption of telecommunication is not a potential failure point ? why? The devices were self-contained? The register was loaded on the device and thus the device really had no need to communicate with external systems after rollout. If this is the model envisaged in the new KIEMs Rollout? We should not concern ourselves with telecommunication availability in the matters of voter verification. What should concern us is the issue of availability of power as the devices will be constantly in use throughout the day. The devices used for verification conduct a one-to-one match of voters against their biometrics? Computationally? It can be a costly affair especially if a potential voter has to submit multiple fingers to get identified if one fails and so we need to have devices that can work for 18 hours or have capability to accept external power in the form of portable power cells. Can the software be written in such a way that it alerts the users well beforehand that it has X number of hours of charge left and that the clerks at the polling station need to make arrangement to keep the electronic means working? Ghana deployed a solution that utilized dry cells and they put in place an operational plan to replace them within 4 hours.

The issue of some voters not being found on the EVIDs yet being found on the manual roll was puzzling, this may be aggravated in 2017 this is because the bulk of the current set of fingerprints were collected in 2013 and it will not be farfetched to expect that the quality of fingerprints submitted for verification in this election cycle by an eligible voter who work with their hands to be lower and thus this may require multiple passes. The current setup is one which a subset of the fingerprints collected is used to verify voters electronically. If we are to go full throttle, we will need to ensure that all fingerprints are available for matching on polling day to increase the chances of matching. An exercise to get fingerprints resubmitted for persons who fall in this category and also for all those that had their biometrics lost during the mass registration drive when BVR machines crashed and did not have backed up properly.

Another reason that could explain why some voters were not found on the EVIDs and were found on the printed register is data corruption during copying polling station data into the SD cards that the devices used. How can we ensure that databases are not corrupted during saving into the machines? I propose that each device should have a way of hashing a file and checking the hash against a verified hash of a working copy and where it differs transferring data to this device should be repeated. Backups of these registers on verified SD cards should also accompany each EVID to the field. We should explore how to keep the logs of the persons who have voted safe when devices get technology issues. There is also an inconvenient reality that in any given population there will always be some persons whose fingerprints

are difficult or impossible to capture or verify. This raises a fundamental ideological question of whether a person should be disenfranchised because of limitations of a technology. The issues around the provisional transmission of results were also well documented; these also fell into 3 broad categories namely:

1) Technology problems? the server? well documented issue with system logs and it running out of space due to server misconfiguration; The failover issues that followed this. Network coverage issues; Erroneous display of tallied votes due to late integration and limited retesting.

2) Procurement/Acquisition problems? there was no time to really develop the transmission application.

3) Rollout problems ? Late delivery of phones and specially configured simcards; issues with user credentials; versioning issues between server and phone; Lack of proper training.

As with electronic voter identification, most of these can be sorted out with proper planning and following procedures, why do I say so? The IEBC has transmitted 100% of the results from all the by-elections that it has conducted since 2013. While in terms of scale these by-elections pale when compared to the general election, it?s my considered opinion that there have been numerous lessons learnt ? these can be documented and used to inform the training and rollout process. What should happen in the event that result transmission fails for whatever reason? The IEBC still needs to have a fallback for electronic results transmission. Can some other technology offer a fallback? e.g. If results transmission from a primary device fails, should we have an electronic fallback using a different technology? Can the current election transmission system be used as a backup of whatever fancy results transmission system the IEBC procures? The IEBC has used satellite phones with success to transmit results for the Kalolol and Mosiro by-elections, why can this be used as a fallback on the telecommunication side. I think we can have all these fallbacks in place and these would be totally acceptable to all stakeholders. These questions are by no means comprehensive but should act as a starting point in deciding what the fallback(s) should be and when to fallback. It has always been my opinion that leaving the determination of important electoral matters at the polling station level to the discretion of people there without a trail of documentation that guides their decision making and a trail of accountability to why they took the action they did exposes the election operation to credibility questions. In 2012 Ghana went into their election with the NVNV (No [biometric] Verification, No Voting) mantra and they had to extend the voting period and also had many people disenfranchised because of the inadequacies of the technology they rolled out. In 2015 they rolled back and then introduced a manual verification fallback. The manual verification process required the presiding officer fill a manual verification form for each voter who is manually verified. The only way we can come up with this list of scenarios is if we carried out a proper and candid risk assessment and management process. This process should inform the IEBC on what to do to ensure that the ?core business? on election day remains unaffected. From my perspective, human beings should always play the role of final "exception handlers" to ensure that during electronic voter identification no voter is ever disenfranchised by technology malfunction or its limitation. Indeed, if the electoral process must err, then it must err on the side of inclusion. However, these errors must be accounted for and thus the most appropriate role of technology is to ensure a level of transparency and accountability that allows

for review of any of those human decisions on how to handle exceptions. As noted earlier on this paper, the process used for verification involves a one-to-one match of voters against their biometrics. The voter gets his ID No. captured by the verification device in a bid to? Identify? Them and once their records are loaded on the screen of the device an additional fingerprint scan is required to? Verify? This person i.e. answering the question? Are you really the person who you claim to be? So, for example, if the validation device is unable to verify the fingerprint of a voter who the presiding officer knows or strongly believes to be a legitimate voter, and his/her particulars are on the voter register, the presiding officer should have the authority to override the device and allow the person to vote. In order to trigger the manual verification process, the presiding officer should collect as much information about the person being excluded from being electronically verified as possible. This information should include a photo of this person and the Serial Number not ID No. found on their National Identity card. Manual verification should not be misconstrued to mean manual verification using the physically printed out register or green books. This process should be endorsed by all party agents present at the polling station. It is important to have this information both in physical and electronic form. At the end of the day, any final reconciliation should include the number of decisions the presiding officer made contrary to the technology. This allows for review of the decisions of the presiding officer, and provides a deterrent since that officer knows that there will be an accounting of how many decisions he made of this nature. It also allows for reporting on anomalies where a polling station or ward has an inordinately high number of human exceptions. This information can be transmitted periodically so that during the course of the day to all stakeholders and thus all players are able to identify polling stations that have inordinately high numbers of human exceptions and vigilance can be increased to ensure only legitimate cases are excluded from electronic verification. Once this discussion has been held and we have a product that this has the blessing of all players contesting in the election. When accepted by all stakeholders the post-election process of massaging bruised egos and selling peace i.e. the 'accept and move on' message will be much easier.

Kenya ICT Action Network,
P.O Box 278-00606,
Sarit Center,
Nairobi,
Tel: +254(020)4453671/2
www.kictanet.or.ke

January 3, 2017
The Clerk of the Senate
Main Parliament Buildings
Parliament Road NAIROBI

Via email: csenate@parliament.go.ke

Dear Sir,

Memorandum on Election law (Amendment) Bill 2016, from the Kenya ICT Action Network (KICTANet)

The Kenya ICT Action Network (KICTANet) is a multi-stakeholder platform for people and institutions interested and involved in ICT policy and regulation. The network aims to act as a catalyst for reform in the ICT sector in support of the national aim of ICT enabled growth and development.

Pursuant to the gazette notice requesting for public input into the Elections Law (Amendment) Bill 2016, and after intense consultation with our stakeholders, we propose the following:

As an ICT community, we acknowledge that there are many amendments necessary but our interest is in **the amendment to sections 39 and 44.**

This is the amendment in question:

14B.(1) Notwithstanding the provisions of sections 39 and 44, the Commission shall put in place a complementary mechanism for identification and transmission of election results that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with Article 38 (2) and (3) of the Constitution. (2)The Commission shall use the complementary mechanism referred to in sub-section (1) for identification and transmission of election results only where the technology initially deployed fails. (3)Before using the complementary mechanism referred to in subsection (1)for identification and transmission of election results, the Commission shall notify the public and all candidates and shall immediately cause the notification to be published in the electronic media and in at least

two daily newspapers of nationwide circulation detailing the reasons necessitating the use of the alternative mechanism.

We suggest that the amendment be revised to provide further clarity along the following lines:

a) The employment of technology in elections management is meant to address questions of integrity of the election and efficiency in transmission of the results. It is our submission that once the IEBC system has been procured, it is possible for the technical committee to come to a consensus on how to mitigate potential vulnerabilities of the system.

Good systems are built with inherent redundancy and it is possible to develop a system that safeguards the integrity of the vote as well as efficiency of transmission. It is possible to have the primary and redundant systems being electronic.

b) We acknowledge that for purposes of RTS, there are areas that do not have network coverage. However, these are few areas which can be covered by alternative technologies such as Wimax, VSAT, or satellite phones. It is our view that the costs associated with these technologies could comfortably be covered by the Universal Service Fund.

c) We further acknowledge that there is need to think of possible cases of failure. It is our view that the threshold of acceptable failure should be agreed beforehand. We therefore propose that the amendment be further amended to include:

i) Mitigatation instances of failure of EVID equipment through proper training, pre-charging devices and having a backup of devices. This should be captured in the Regulations on ICT.

ii) EVID devices should be local databases that do not require real time network connection. The databases should be audited post voter identification and results transmission.

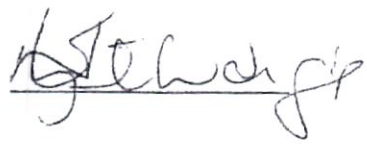
iii) Results transmission should also have redundancy. The centers transmitting results should have at least three different means of transmitting results so as to improve the efficiency of the system.

d) In line with Article 35, election information should be proactively disclosed to the public. With technology, information such as statistics of EVID and manual ID where it has occurred, results transmission as well as logs about the transmission should be proactively disclosed to enhance integrity and transparency of the vote.

For further reference, I also attached a detailed document which contains a verbatim collation of questions, issues and suggestions raised by our members during our consultations on the Bill.

Representatives of KICTANet would be available to further discuss this memorandum with your office. Grace Githaiga, the Co-convenor can be reached on phone number 0722701495 or on email ggithaiga@kictanet.or.ke, or ggithaiga@hotmail.com.

Sincerely,



Grace Githaiga,
Co-convener, KICTANet

Annex: Detailed Memorandum.

KNCCI
KENYA NATIONAL CHAMBER OF COMMERCE & INDUSTRY
Growing your Business together

Heritan House, Ground Floor,
Woodlands Rd, off Argwings Kodhek Rd,
Opp. Department of Defence Hq, Hurlingham,
Tel No: +254 20 3927000
Mobile: 0725 453376, 0739522563
Email: info@kenyachamber.or.ke
www.kenyachamber.or.ke

24

REF: KNCCI/MEM/001/2017 3rd January 2017.

The Chairperson,
Legal Affairs Committee,
The Senate,
Nairobi.

MEMORANDUM OF THE KENYA NATIONAL CHAMBER OF COMMERCE AND INDUSTRY ON THE ELECTION LAWS (AMENDMENT) BILL 2016.

1. WHAT IS KENYA NATIONAL CHAMBER OF COMMERCE & INDUSTRY?

The Kenya National Chamber Of Commerce & Industry (herein referred to as KNCCI) is a not-for-profit; autonomous private sector institution and a member based Organization (BMO) that was established in 1965. It's principle business objectives include; lobbying for the formulation of policies that support business development, the establishment and maintenance of a business friendly legal and regulatory framework, advocacy for commerce and promotion of welfare of business community in Kenya. The KNCCI was re-launched in 2014 and now has a countrywide Outreach with 47 County Chapters whose membership constitutes the small, medium and large enterprises.

The Kenya National Chamber Of Commerce & Industry and its membership are aware of The Election Laws (Amendment) Bill 2016 and the current political and social developments in the country. We have had an opportunity to study the bill and the opinions and reservations expressed by various stakeholders. We thank the Senate and all stakeholders for the maturity with which the issue has been handled and particularly for granting us the opportunity to contribute to this matter of grave National important. In that regard we opine as hereunder;

2. WHAT IS KNCCI INTEREST?

As The Kenya National Chamber of Commerce and Industry, we know the importance of every vote. We appreciate that our country has a rich history in elections decided on the narrowest of margins and unfortunate election outcome of violence that has rocked the country in the past particularly in the aftermath of the 2007 election.

It is not in doubt that whenever there is violence regardless of the cause, many people suffer. It is also not in dispute that the business community which forms the pivot of the economy suffers the double brunt of such violence wherein, individual businesses are affected in the short run, and the National economy is affected both before and after the elections. As a representative of all business units in the country, KNCCI takes keen interest in Kenya's political, social and economic affairs including matters of elections. This is mostly because whenever there is violence the economy takes a direct hit. When it comes to securing Kenya's future and peace, the stakes couldn't be higher.

In that regard, KNCCI commends the efforts of assigning personal responsibility of violence to individuals who trigger, cause, instigate, aid, abate and or participate in acts of violence

3. WHAT IS KNCCI'S VIEW ON THE SUGGESTED AMENDMENTS?

While we recognize all the amendments to the election laws, among other amendments, we note that Section 44A has attracted considerable contention.

3.1. Electronic Transmission of results.

Without doubt electronic transmission of results is the fastest, most convenient and most reliable method of communicating results from one point to another. Kenya prides itself as the Silicon Savana; it is a world leader in mobile technology and applications such as Mobile Money Transfer which enjoys a very wide coverage all over the country. We therefore have no doubt that given the experience and success that Kenya has enjoyed over the years, Kenya has the capacity to undertake the task of electronic transmission of results. And the same must not fail.

3.2. Electronic Voter Identification, and a complimentary mechanism

Section 44A as passed by the National Assembly proposes;

"a complimentary mechanism for identification of voters and transmission of election results (by the commission) that is simple, accurate, verifiable, secure, accountable and transparent,"

We believe that the suggested amendment has created an atmosphere of mistrust Firstly because of the lack of a clear definition of the term "complimentary." And secondly, because the amendment does not provide for the procedure and the circumstances under which the complementary system may be invoked.

This provision introduces a mechanism other than the integrated electronic electoral system stipulated by Section 44 of the Act to run in lieu of the said system in circumstances where the integrated electronic electoral fails. Certainly, the suggested system then must be clearly defined in law as a result of public participation and political consensus.

KNCCI agrees that the method of voter registration and result transmission must be accurate, timely, verifiable, secure, accountable and transparent in compliance with Section 38 of the constitution of Kenya, 2010 and all enabling provisions.

KNCCI further agrees that any system including the integrated electronic system is vulnerable to unforeseen circumstances such as poor network coverage, criminal attacks, terrorism, cybercrime, acts of God etc. In the unfortunate event that the above stated risks come into play, it would be necessary and in the best interest of the public to have an alternative backup/ contingent system in the affected areas to mitigate the circumstances where the electronic system fails.

Lack of consensus by Members of Parliament as witnessed when the amendments were presented before the National Assembly for consideration last week was evidence to the level of mistrust that needed to be addressed as a matter of urgency.

The Chamber observes that if the suggested amendments are not borne of political consensus and public participation then the intention of the amendments and the spirit thereof will remain lost in the mischief and mistrust among political players.

4. GREY AREAS IDENTIFIED.

We note that the following areas are still uncertain.

i) Definition of Complementary System as used under section 44A
ii) Identification of a Complementary system that is legally acceptable to all stakeholders
iii) Definition of the circumstance which may trigger the invoking of the complementary system.
iv) The procedure of invoking the complementary system.
v) Verification of the identified Complementary System.
vi) Timelines within which Verification of the identified Complementary System.

vii) Offences that flow from violation of the suggested law.

viii) Punishment

ix) Reliefs available to victims of.

x) Expert opinion.

5. SUGGESTED REMEDIES

It is our humble Suggestion that the stakeholders should;

a) Find consensus on the clear definition of the intended complementary system.

b) Seek Expert opinion on the different possible complementary systems available and what has been done so far to remedy the foreseeable flaws in the system

c) Identify a Complementary system that is legally acceptable within the parameters of electoral laws and the constitution.

d) Clearly identify the circumstance which under which the agreed complementary System may be invoked.

e) Agree on the procedure of invoking the complementary system.

f) Agree on the mode of verification of the identified Complementary System.

g) Agree on reasonable timelines within which Verification of the identified Complementary System can be undertaken.

h) Agree on and determine the offences that flow from violation of the suggested law.

i) Agree on and determine the sanctions and punishment that flows from violation of the suggested law.

j) Agree on the reliefs available to victims who suffer as a direct consequence of violation of the suggested law.

Given our history and the circumstances in which the Bill was passed by the National Assembly, this ambiguity should not set a stage for suspicion to arise over the use of a parallel system for voter registration, identification and transmission of election results.

We observe that it is the obligation of every stakeholder including the business community to refrain from acting irrationally, unreasonably or in bad faith but in accordance with the law. We also observe that statements which incite violence and hostility must be avoided at all cost.

The Chamber is grateful for the Senates' effort of engaging in further consultations on the suggested amendments which is a cardinal principle that underlines our constitution informed by participation by the people in whom the sovereignty of Kenya vests.

The chamber is glad that through a consultative approach, and the spirit of inclusion and consultation, the suggested Amendments discussion has now come to a place where certain clarities have been highlighted because of extraordinary sacrifices and discussions that have been going on among all stakeholders.

Signed: .....

NATIONAL CHAIRMAN

Kenya National Chamber of Commerce and Industry

Fatuma Dullo (Senator).

25

MEMORANDUM ON THE ELECTIONS LAWS (AMENDMENT) BILL, (NATIONAL ASSEMBLY BILL NO. 3 0F 2015)

PRESENTED TO:

THE STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS

SENATE

MAIN PARLIAMENT BUILDINGS

NAIROBI

GEORGE MORARA

VICE-CHAIRPERSON

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

JANUARY 2017

A. INTRODUCTION

1. The Kenya National Commission on Human Rights (KNCHR) is a constitutional body established under Article 59 of the Constitution of Kenya and Section 3 of the Kenya National Commission on Human Rights Act No 14 of 2011 (revised) 2012. It has the core mandate to develop a culture of human rights through the promotion and protection of rights and fundamental freedoms in the Republic of Kenya.

2. KNCHR is mandated to monitor state and non-state actors to ensure that they comply with both national and international laws and policies as well as human rights standards in all their undertakings. KNCHR further reviews legislation and policies to ensure compliance with the Constitution and international human rights standards and principles. In addition, KNCHR has the mandate to give advisories to the Kenyan government on issues of human rights.

3. The KNCHR submits this memorandum pursuant to the above mandate and upon the invitation by the Senate for the presentation of view from the public on the Election laws (amendment) Bill, (National Assembly Bill No. 3 of 2015). The submissions herein are also informed by KNCHR's role in the electoral process having monitored the 2005 referendum, the 2007 elections, the 2013 political primary nominations and General Election thereafter.

B. CONTEXTUAL BACKGROUND

4. Elections and the right to vote are fundamental human rights issues encapsulated by the Constitution of Kenya. The preamble paragraph of the Constitution of Kenya 2010 declares the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. Article 10 of the Constitution prescribes and entrenches the national values and principles of governance, while Chapter 6 of the Constitution is dedicated to defining the leadership that can be counted on to deliver on these national aspirations in terms of good governance. With regard to the elections, Article 38 of the Constitution guarantees political rights by providing;

    *1) Every citizen is free to make political choices, which include 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 the 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 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.

5. In the past, elections in Kenya have been traditionally marred by disputes and violence linked to the poll outcomes. The Independent Review Commission (Kriegler) held that in 2007, the disputed General Elections were not credible due to names of deceased voters appearing in the electoral register, impersonation of absent voters and defective planning of the voter registration system among other shortcomings in the electoral process.The Commission therefore recommended embracing technology to address these shortcomings. 2013 was the first General Election that saw the electoral management body embrace technology through the use of the following systems; The Biometric Voter Registration System (BVR) that was used for registering voters,the Electronic Voter Identification System (EVID) which was an electronic poll book that confirmed voters electronically, the Political Party Nominations System (PPNS) that was used to capture primary data on candidates and the Results Transmission System (RTS) for the simultaneous transmission of election results to election tallying centres at the constituency, county and national level.However these pieces of technology were cited to be some of the major sources of the electoral disputes of the

presidential results prompting the opposition party to move to court on allegations of tampering with the systems to rig the polls.[1]

6. The clamour for electoral reforms reached its climax in April 2016 as the CORD coalition called for mass action to seek the immediate removal of the IEBC commissioners and review of the electoral laws. The public demonstrations that lasted for six weeks resulted in the death of five persons, the injury of hundreds and destruction of millions worth of property. The situation was halted when the two main political parties agreed to dialogue and formed the Joint Parliamentary Committee on electoral reforms. This committee listened to a wide range of views from the public and key stakeholders on the use of technology and the consensus was that technology must be embraced to increase the credibility and efficiency of managing the elections. Subsequently, the joint committee proposed amendments to the electoral laws which were adopted and assented to in October 2016.

C. REVIEW OF THE PROPOSED AMENDMENTS

7. The KNCHR has reviewed the contents of the Election Laws (Amendment) (No.3) Bill, 2015 as passed by the National Assembly; The Elections Act No 24 of 2011; The Elections Law (Amendment) Act, 2016 and consulted with a number of stakeholders on electoral matters andwishes to present this Memorandum for consideration to the Senate in relation to the following:

Clause	Proposed Amendments	Implications/ Observations	Recommendation(s)
4.	Section 6 of the Elections Act, 2011 is amended— (a) by deleting subsection (2) and replacing it with the following— (2) The Commission shall, within ninety days from the date of the	This amendment proposes that the voter register be opened for inspection for a period of 90 days. However, retaining this amendment will be somewhat contradictory to the proposed amendments to Section 6 A of the Election Laws (Amendment) Act, 2016 where it is proposed to reduce the number of days for the	We propose that this amendment be deleted.

[1]Petition No. 3,4 and 5 of 2013

	notice for a general election, open the Register of Voters for inspection for a period of at least thirty days or such period as the Commission may consider necessary.	inspection of the Register of Voters from 60 to 90.	
5.	Section 6A of the Elections (Amendment) Act, 2016 is amended in subsection (1) by deleting the word "ninety" and substituting therefor the word "sixty."	This proposal reduces the number of days for biometric verification of the Register of Voters from 90 to 60 days for members of the public at **their respective polling stations for a period of thirty days** [emphasis in bold].	We support the proposal for the reduction of days from 90 to 60. This will enable the IEBC complete the procurement processes for purposes of effecting the same. However, and as part of ensuring progressive application of technology, we urge the IEBC to put in place mechanisms that will allow for the verification for the 2017 general election to take place at the Constituency level as opposed to the polling station level. It is our hope that by the time we go for the 2022 general election, we will have in place mechanisms for voter verification at the national level and that voters will simply have to walk to the nearest IEBC Centre to do so. Therefore, we propose that 6 A (1) is amended as follows: delete the words 'polling stations' immediately after the

			word 'respective' and substitute therefore the word 'Constituency'.
6.	Section 13 of the Elections Act, 2011 is amended— (a) in subsection (1) by deleting the word "sixty" after the words "at least" and substituting therefor the word "ninety "; (b) by inserting the following new subsection immediately after subsection (2)— (2A) A political party shall hear and determine all intra party disputes arising from political party nominations within thirty days. (c) in subsection (3) by deleting the words "forty-five" after the words "at least" and substituting therefor the words "fifty-five."	This proposed clause seeks to increase the time for political parties to nominate candidates from 60 days to 90 days before an election. It further provides that political parties shall hear intra party disputes within 30 days, which in our opinion, is ample time.	This is a welcome clause. It willcure the rush that was witnessed in 2013. However, there needs to be a clear provision on the role of the Political Party Dispute Tribunal and the internal mechanism for conflict resolution within the parties to avoid forum shopping.
8.	(b) by inserting the following new subsections immediately after subsection (1)— (1A) Notwithstanding subsection (1), this section shall come into force and shall apply to qualifications for candidates in the general elections to be held after the 2017 general	Delays/postpones the application of this provision. But what is the justification for this delay? Especially in light of the fact that this is the 2nd election post promulgation of the Constitution. We should be hesitant to lower the qualifications of leadership given the integrity challenges that plague the country. What is more, we want to associate ourselves with the earlier submissions made by the Parliamentary Initiatives on this issue by stating that, *'the*	There is no justification for any further delays or postponement of the academic qualifications requirements for Members of Parliament and Members of the County Assembly. We therefore call for the deletion of this amendment and the application of the academic qualifications requirement in the 2017 general election.

	elections. (1B) The provisions of this section apply to qualifications to nomination for a party list member under section 34.	*roles of oversight and legislation are technical roles that require Members with certain high levels of academic qualification....with the capacity to comprehend the technical aspects of oversight and legislation, e.g. drafting, understanding budget policy statements, et cetera'.* We also note that this recommendation has an element of *dejavu*. In the 2013 general election, the Elections Act provided for the initial non- application of a similar recommendation.	

12	Section 31 of the Elections Act, 2011 is amended by inserting the following new subsections immediately after subsection (2D)— (2F) Where the Commission receives multiple requests under subsection (2), the Commission shall conduct and supervise the nomination of candidates for presidential, parliamentary or county elections for all the requesting political parties— (a) on the same day; (b) in the same polling centres; and	Whoever came up with this amendment must have been subconsciously aware that they were recommending something that is terribly wrong. Hence 2F comes after 2E! But in a nutshell, this proposal seeks to compel the IEBC to conduct and supervise nominations for all requesting political parties. This proposal further states that parliament shall allocate monies for IEBC to supervise political primaries. This provision places an unjustifiable burden on the tax payer. It is not desirable that IEBC conduct the primaries for any party. And, it is unacceptable that the tax payer	We strongly object to this amendment and ask that it be deleted. We recommend that section 31 (2) of the Principal Act be retained. It is sufficient that the IEBC approves the party nomination rules. This way, the role of the IEBC is limited to enforcing compliance from political parties. Expecting the IEBC to officiate both the 'rehearsal' and the 'real game', is simply asking for too much from a referee who is already required to do a lot of preparations ahead of officiating the big march [2017 Elections] which is scheduled for August 2017.

	(c) in different polling streams for each participating political party." (2E) Parliament shall appropriate monies for the effective implementation of this section.	picks the tab. Especially as it will result in a tax payer paying for processes of party ideals that they do not subscribe to.	
13.	Section 32 of the Elections Act, 2011 is amended— (a) by inserting a new subsection immediately after subsection (1) — (1A) Where there is a vacancy in the office of the Governor, an independent candidate shall submit to the Commission, the symbol that the person intends to use during an election at least seven days before nomination.	This proposed amendment (1A) provides a mechanism for approval of symbols independent candidates intend to use where there is a vacancy….**in the office of the Governor.** It is not clear, however, why it only provides for the position of Governor and not the other elective positions.	We recommend that this amendment be expanded to include all the other elective posts.
15	Section 34 of the Elections Act, 2011 is amended— by inserting the following new subsection immediately after subsection (4)— (4A) In the case of a person nominated pursuant to Article 177(1) (c) of the	This is an important clause that provides that the party lists for the special seats at the county assemblies must be certified by IEBC that they comply with the minimum provisions. However there is no mention of the special seats for the Senate and National Assembly	This clause should be duplicated in Section 34(2) and (3)

	Constitution, the party list shall include a certification in the manner prescribed by the Commission.		
16	38A. For the purposes of providing efficient and effective conduct of elections, the number of voters per polling station shall not exceed seven hundred.	Increase the number of voters per polling station	This is desirable
19	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.	Allows for back-up in the event that technology fails Allows for back up in the event that technology fails	The wording of the section is too broad and vague. Need to provide for clear parameters that resorts to manual back-up as a last resort in all parts of the country.

D. THE LAW ON THE USE OF ICT AND ELECTIONS

8. With regard to the use of technology, Section 44 of the Elections Laws (Amendment) Act, 2016 currently provides for the following;

> ***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.*
> *(2) The IEBC shall, for purposes of subsection (1), develop a policy on the progressive use of technology in the electoral process.*
> *(3) The IEBC shall ensure that the technology in use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent.*
>
> *(4)The IEBC shall, in an open and transparent manner –*
>
> *(a) procure and put in place the technology necessary for the conduct of a general election at least eight months before such elections; and*
> *(b) test, verify and deploy such technology at least sixty days before a general election.*
> *(5) The IEBC 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 IEBC 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).

(6) Notwithstanding the provisions of section 109(3) and (4), the IEBC 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 eight months before the general election.

(8) For the purposes of giving effect to this section, the IEBC shall establish a technical committee of the IEBC consisting of such members and officers of the IEBC and such other relevant agencies, institutions or stakeholders as the IEBC may consider necessary to oversee the adoption of technology in the electoral process and implement the use of such technology.

9. The KNCHR takes cognizance of the fact that theabove-cited section provides elaborate measures to safeguard the use of technology in the management of elections. This was also as a result of the negotiated process across the political divide and was further informed by submissions from key stakeholders and experts in the industry. The Commission hence notes with concernthe way in which the current amendments were broughtto the National Assembly. We are of the view that highly acrimonious manner which characterized the passage of the said amendments by the National Assembly is retrogressive and negates the spirit of dialogue that had resulted to the Elections Laws (Amendment) Act, 2016.

10. But perhaps the biggest born of contention has been on the use/role of technology in the upcoming general election slated for August this year. The current proposed amendments in the new bill under clause 19 provides that *"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."* The implication of this new proposal is that the IEBC shall have the option of resorting to an alternative system in the event that the technology fails."

E. COMPARATIVE ANALYSIS ON THE USE OF ICT AND ELECTIONS

11. It is an international trend that technology is embraced in managing elections and this has had comparable success in voter participation and enhancing credibility of the exercise. In many sub-Saharan African countries, lack of official ID documentation makes it hard to authenticate the identity of voters reliably, increasing the risk of voter fraud on Election Day. As a result, Africa has become a global pioneer in biometric elections, in which fingerprints and other types of biometric data are used to register and verify voters. More than 25 sub-Saharan African countries have already held elections using biometric technology. [2]Notable countries in Africa that have embraced this technology include Ghana, Nigeria and Rwanda. In Ghana for instance, the 2016 elections was facilitated by biometric verification, developed and deployed by biometric experts GenKey for the third time running with high levels of success. According to the GenKey CEO Michiel van der Veen *"Ghana is setting the standard for biometric voter verification in terms of scale and frequency. The fact that Ghana has done it successfully three times in a row demonstrates that the right biometric technology, deployed in the right way, can deliver reliable and sustainable voter verification on Election Day. It's proof that biometric elections work. Biometrics is having a transformative impact on national elections. When global standards are followed, biometrics can be a sustainable solution for many years. That's what we're seeing in Ghana today, a voter verification that's being used for the third time, over four years. This is not only*

[2]http://www.genkey.com/news/ghana-uses-biometric-voter-verification-for-third-election-running/

improving Ghana's electoral reputation, but also providing a more cost-effective approach."[3]

12. Back home, the KNCHR notes that indeed technology has been embraced in other government mechanisms just to name but a few the Kenya Revenue Authority, the Kenya Commercial Bank, the Integrated Financial Management System(IFMIS), transmission of examination results and admission letters by the Ministry of Education, all which have posted high rates of success, increased efficiently and reduced fraud and irregularities. This is hence proof that indeed, technology if well managed can produce magnificent results which is what the country desperately needs in the 2017 General Elections. The BVR and EVID have also been successfully used by the IEBC in the recent by-elections.
13. With regards to the Kenya elections, KNCHR notes that it is not the voting that is electronic but that instead, it is the voter registration, identification and transmission of results that is aimed at reducing voter fraud, rigging and enhancing transparency. For the Electronic Voter Identification System (EVID) one does not need any network connectivity but rather the EVID machine and a fully charged battery which should last for at least 24hours. Indeed, statistics on electricity coverage in Kenya in schools which mostly double up as polling centres indicates that we have attained a 90% coverage. Results Transmission System (RTS) in our opinion is the easiest and simplest of the three systems and does not necessarily need 3G network but instead one can use Satellite in the remote areas.

RECOMMENDATIONS

14. The KNCHR strongly recommends that embracing technology in the electoral management is crucial and critical for the realization of a free, fair and credible 2017 general Elections. There is need to follow to the letter the provision of Section 44 of the Elections Act more specifically on the requirement that there shall be testing of the devises at least 60 days to the Election. This shall ensure that any hiccups and challenges are are diagnosed and competently addressed before the 8th of August. It is hence imperative that all efforts are undertaken to ensure that the system works just as they have in the by-elections in recent times by IEBC and other government systems cited herein above.

[3] http://www.genkey.com/news/ghana-uses-biometric-voter-verification-for-third-election-running/

15. The IEBC should further put in place measures to ensure that the system works to the highest possible degree of success and this should be in the form of operationalizing the regulations on ICT and involvement of the technical committee on ICT in the early procurement and audit of devices, recruitment and training of personnel and voter education to manage the expectation of the members of the public on the devices being utilized.

16. The KNCHR however notesthat there needs to be a backup system in the in the event of technology failure as was witnessed in 2013. The KNCHR proposes that the backup system should be electronic and only revert to manual as the last resort. We further recommend that where a voter cannot be identified electronically for whatever reason and where the said voter must be identified by other non-electronic means, the Presiding Officer, with the Party Agents present as witnesses, must:

    (i) Use the ID that the said voter presented to register biometrically as a voter for purposes of retrieving details captured in the EVID

    (ii) Capture the details of the voter in a special form to be designed by the IEBC for that purpose with a brief explanation as to why he/she could not be identified electronically.

    (iii) Scan all the forms of all the voters who could not be identified electronically and on an hourly basis, electronically transmit these forms to the Returning Officer and to the National Tallying Centre. The original of the scanned form should be placed in a sealed box at the polling station where the voter cast his or her vote.

17. The KNCHR further calls on the IEBC to put in place measures aimed at mitigating thechallenges that were faced in the 2013 elections while at the same time drawing vitals the lessons with regards to technology arising from the said elections. As a means of building public confidence, the IEBC should publicize the measures that it has put in place to ensure a higher success rate of for the technology it intends to deploy in the 2017 General Election. What is more, the KNCHR Specifically calls upon the IEBC to effectively involve stakeholders in the procurement of the devices, audit and pre-testing of the electronic devices it intends to use to ensure that in the event they fail, the decision to resort to a back-up system will arise out of a clear consensus backed-up with mutually agreed upon protocols.

CONCLUSION

18. KNCHR concludes by reiterating that the country is deeply polarized and the political actors must stop actions and utterances that are likely to divide the country further. ALL sides must stop heightened stocking tensions in an already polarized political environment. It is imperative that we allow the electoral management body space to conduct its constitutional duties without interferences from any person.

19. In addition, the KNCHR wishes to take this opportunity to commend the Senate for the leadership it showed in last week's (Wednesday) deliberations of this delicate matter. The approach taken by the Senate averted an immediate crisis. Ultimately, and within thespirit of continued bi-partisan consensus-building, the issues of electoral gadgets and other election issues will seem strangely small if viewed within our democratic desire as a country where our goal is to have credible elections where all of us—politicians and voters—conduct ourselves with a higher calling to integrity clothed in the mentality that after all, it is us the citizens of Kenya who must emerge as the ultimate winners of the upcoming 2017 general election!

SIGNED BY:

.....

GEORGE MORARA

VICE- CHAIRPERSON-KNCHR

26

Supplementary presentation
to the Legal & Human Rights Committee of the Senate
On the Elections Laws (Amendment) (No.3) Bill, 2015
By the Law Society of Kenya President

This second presentation is made after I have been accorded the opportunity of perusing the Report of the Joint Parliamentary Select Committee on Matters Relating to the IEBC and of consulting with the convener and members of the ICT Committee of the Council of the Law Society of Kenya and is in addition to the representations made on the 28th December, 2016.

Section 44 and the question of 'back up'

It is clear from the report of the Joint Parliamentary Select Committee on Matters Relating to the IEBC (the JPSC) that concerns were expressed as to the possibility of some degree of failure of the technology deployed in the management of an election.

The JPSC noted there were challenges during the 2013 general election, the first election in which technology was deployed: in over half of the polling stations, Electronic Voter Identification Devices (EVIDs) were not used on account of the limited timeframe in which they were received, configured or deployed; or on account of the inadequacy in the training of staff[1], or on account of poor lighting which slowed down or complicated the manual process of counting votes[2], or on account of challenges in in the electronic transmission of results including technical hitches, network failures and the suspicion of system hacking[3].

Recommendations were made by the JPSC on the legislative framework required to address these concerns[4], the acceptance of which recommendations is

[1] Paragraph 404 of the Report of the Joint Parliamentary Select Committee on Matters Relating to the IEBC
[2] Paragraph 453 of the Report of the Joint Parliamentary Select Committee on Matters Relating to the IEBC
[3] Paragraph 452 of the Report of the Joint Parliamentary Select Committee on Matters Relating to the IEBC
[4] paragraph 661(2)(b) & (c) of the Report of the Joint Parliamentary Select Committee on Matters Relating to the IEBC

demonstrated by their verbatim reproduction as Sections 44(5) of the Elections Act. The section is reproduced hereinbelow:

> *(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 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).*

Section 44(5)(i) stipulates regulations, made by the IEBC *in consultation with relevant agencies, institutions and stakeholders, including political parties,* [providing for] *development, publication and implementation of a disaster recovery and operations continuity plan.* This subsection addresses by a process that by law must be inclusive and consultative, the concerns that it is now proposed by the amendment bill be addressed by the new Section 44A, introducing a 'complementary mechanism' with no requirement for an inclusive and consultative process, which excludes relevant agencies, institutions and stakeholders including political parties, and leaves the discretion wholly to the IEBC to determine what this mechanism is, and whether and when it is to be deployed.

The questions therefore should be, has the IEBC been accorded reasonable opportunity to develop as required by the law, the legal framework for a disaster

recovery and continuity plan? And has the process for the procurement of the necessary equipment for the technology required for an election that is free and fair and is administered in an impartial, neutral, efficient, accurate and accountable manner been commenced with regard to the said legal framework? The answer to both questions are no.

Section 44(6) gave the IEBC 30 days within which to prepare and present regulations to parliament. From the IEBC representations to this committee it is clear it considered this time grossly inadequate and had sought for a period of 4 months when it approached the Justice & Legal Affairs Committee of the National Assembly with its proposals for amendments to the Elections Act. This request was not considered.

Nonetheless, there is a draft Elections Technology Regulations[5] (ETR) available on the IEBC website albeit they do not seem to have completed their legislative journey to have the force of law. The IEBC website did not indicate whether this journey has begun and at what stage it has reached.

Section 44(8) directs that to give effect to the section the IEBC creates a technical committee whose purpose is *to oversee the adoption of technology in the electoral process and to implement the use of such technology*. Its membership is to be drawn from officers of the commission, and such other relevant agencies, institutions or stakeholders as the Commission may consider necessary. The new Section 44A excludes this committee and its diverse membership from the alternative 'complementary mechanism' it proposes.

The draft ETR provides at Part IX thereof for the 'Data Recovery and Operations Continuity Plan' and directs[6] the IEBC to *establish an operations continuity plan, detailing both operational and technical processes, procedures and tools* which will provide *mitigation and contingency measures for potential technology failures, including power outages, external sources interference, or natural disasters* and to *test the operations continuity plan in a timely manner to ensure that all operational procedures are working as intended*. As the draft ETR has not the force of law there is no legal compulsion for the IEBC to have such a plan in

---

[5] http://www.iebc.or.ke/index.php/2015-01-15-11-10-24/research-publications/item/iebc-ict-regulations-on-use-of-technology-in-elections

[6] Regulations 24 of the Elections (Technology) Regulations, 2016 (draft)

force, and yet this is what the law commands. It is in the failure of all institutions and actors concerned to actuate the regulations giving them the force of the law and of the IEBC to develop the all-important operations continuity plan that there is created the sense of inadequate preparation, with the proposed solution – the new Section 44A and the 'complementary mechanism' with all its imprecision and ambiguity and its exclusion of stakeholders. The simple answer is the expeditious passage into law of the Regulations, and then the development and testing of an operations continuity plan. This will negate fears of potential system failure and will enhance public faith in the preparation process.

The draft ETR further provides at Part XI thereof for The Elections Technology and Advisory Committee (ETAC) which is described[7] as the Committee established under Section 44(8) of the Elections Act. Albeit Part XI is intended to frame the operational scope of the ETAC as required by Section 44(5)(j) of the Act, the draft regulations reduce the functions of the ETAC, anticipated by the main statute to be an overseeing and implementing committee, to an advisory committee. Stakeholder involvement in the overseeing of adoption of technology in the electoral process and in the implementation of the use of such technology has been diluted.

The result is that the IEBC has now been compelled to go to tender for equipment without the legislative framework in place for a disaster recovery and continuity plan as required by law, without such a plan informing or being taken into account in the consideration of the specifications of the equipment to be procured in order that the risks are minimized and without the process being overseen and implemented by the ETAC.

By the enactment of Section 44 of the Elections Act, Parliament has discharged its constitutional responsibility under Article 82(1)(d) to enact legislation providing for the conduct and efficient supervision of elections. The effect of the amendment proposed by the introduction of Section 44A shall be to undermine a process already created by the law as set out in Section 44(5)(i) that guides the development of a legislative framework for a disaster recovery and continuity plan in consultation with all stakeholders including experts, and all political parties. The proposed amendment substitute this process with a 'complementary mechanism' undefined and with no neutral, efficient, accurate and accountable

[7] Regulations 31 of the Elections (Technology) Regulations, 2016 (draft)

manner of determining its scope or application by the IEBC acting without the consultative input of stakeholders and political parties. Section 44A must therefore be seen against the requirements of the existing law (Section 44) as being superfluous, deficient, and a negation of the prior exercise by parliament of its constitutional mandate. It will allow the IEBC to administer the elections by a process that does not meet the constitutional threshold. A substitution of the constitutional threshold with a legislative threshold. It is the recommendation of the LSK that this proposed amendment be rejected.

The further recommendations of the LSK are: -

1) for the strict compliance with the law and in particular Section 44(5) of the Act – the law makes more than adequate provisions to address the concerns as to any of the challenges that the use of technology may present; and

2) for the expeditious passage into law of the ETR developed with the consultation of agencies, stakeholders and political parties, and which must empower the ETAC so that it functions as it is intended to do by law – the law requires it functions as an overseeing and implementing entity comprising of a membership that includes relevant agencies and stakeholders.

Isaac E. N. Okero
President, Law Society of Kenya

CLERK

From the Desk of John MbuguaThe Reverend
Mega Mashujaa Heroes Act 2014 Trust & Other MAU MAU Displaced Citizens
Box 1937700100
Nairobi Kenya Tel 0716929975
Email-megamashujaaheroesact2014trust@gmail.com------30th Dec 2016

Justice Be Our Shield the Natives to Defend us from Colonial Judicature

Our ref passbook No117576 issued 1956 Manyani Detention Camp. HCKM PT426 OF 2016

Your ref...

IN THE REPUBLIC OF KENYA
SUBMISSION OF MEMORANDA TO PARLIAMENT IN RELATION TO ELECTIONS AMENDMENT BILL 2016

TO THE HONOURABLE SPEAKER, SENATE

We John Mbugua the Reverend, Gilbert Mukabane (on wheel Chair),Erick Habwe (blind) and Njaramba Munuhe on behalf the Mashujaa Elderly Heroes, the Disabled in Kenya and the Independent candidates wish to state as follow;

1. **THAT** the Elections Laws Amendment Bill 2016 has completely failed to address the real issues as follows.
   a) Has the laws and the I.E.B.C have in place facilities for the blind, braille's, hearing aid and other facilities for the disabled in every county and every registration center country wide as the Constitution and the Disability Act 2003, Nairobi Disability 2015 , U.N Convention on Persons living with disabilities, Universal rights of political participation among others.
   b) The Independent Candidates are always marginalized in the change of election laws whereby the law should be at least a month before the elections and not three months the way it is now.
   c) The other matter is that to garner over 2000 supporters/signature from non-members of political parties is just unrealistic.
   d) The Heroes Elderly Mashujaa are never captured in the election laws and should be factored in this time around in nominations as Senators, M.Ps and M.C.As in all the 47 counties across the nation.
2. THAT the laws are just harassing citizens since all over the world all electronic and mechanical gadgets comes with user manual to guide you on how to use the gadgets without hazards.
3. IT is therefore my humble submission that we discuss the real issues that are affecting or will affect the citizens and the disabled community during registration to voting day and not side shows.

DRAWN AND FILLED BY:
JOHN MBUGUA THE REVEREND
GILBERT MUKABANE DISABLED ON WHEEL CHAIR
ERICJK HABWE BLIND
NJARAMBA MUNUHE
Box 1937700100 Nairobi Tel 0716929975

Investing in the people's talents and abilities by empowering them to eradicate Corruption
"Do business Till I Come Luke 19.13"

1. That what we have deponed herein is true to the best of knowledge, belief and understanding save to information resources whereof have been disclosed.

AT NAIROBI THIS DAY 30th DEC 2016 YEAR OF OUR LORD JESUS CHRIST THE MESSIAH

SWORN BY THE SAID:

JOHN MBUGUA (REV)

BEFORE ME COMMISSIONER OF OATHS/MAGISTRATE

DRAWN AND FILLED BY.
JOHN MBUGUA (REV)
GILBERT MUKABANE
ERIC HABWE
NJARAMBA MUNUHE
BOX 1937700100
NAIROBI
TEL 0716929975
Emails

nairobiamputeefootbbalclub@gmail.ocm

MOUNT KENYA ROADS & BUILDINGS CONTRACTORS ASSOCIATION

P.O Box 820, KARATINA
Mobile: 0723007512/0735734821
Tel: / Fax: 061 – 4572387
Email: mtkenyaroads@gmail.com

OFFICE: MATHIRA COFFEE SOCIETY BUILDING: KARATINA – NRB HIGHWAY: 1ST FLOOR RM NO: 1

28

1st January, 2017.

THE CLERK OF THE SENATE,
PARLIAMENT BUILDINGS
NAIROBI.

Dear Sir,

RE: WRITTEN MEMORANDUM BY MOUNT KENYA ROADS AND BUILDINGS CONTRACTORS ASSOCIATION ON THE CONTENTIOUS ELECTRAL LAWS

This is in response to the senate`s call for submission of written memorandum on the above referenced matter, that the Mount Kenya Roads and Building Contractors Association wish to make their representation as hereunder;

THAT the Senate`s Legal Affairs Committee be guided by the Senate Speakers statement that **"There was nothing greater than the Electoral Laws` dispute and should be resolved in the most sensitive way as the country prepares for elections in August 2017."**

The Senate Speaker fell short of saying sensitivity about the election is because every Kenyan expects the elections to be fair, free, transparent and devoid of violence which is the incumbents Governments to facilitate and the IEBC to ensure, promise and guarantee to all Kenyans.

THAT the Senate`s Legal Affairs Committee to be informed by the alarmist statements that have been made over this matter and the unnecessary acrimony it has triggered such as that **if the law is changed, even removing a coma, there would be national demonstrations; there would be no elections in 2017 e.t.c.** Is it not the work of the National Assembly which is representative of the Kenyan people that makes and amends these laws in the first place? What was the big deal to provide for an alternative back-up system that would ensure all Kenyan electorates exercise their right to vote which the select committee appears to have omitted and further that this is in the event that the electronic system failed, **the contractors` view is that; "There would be Chaos in the elections (violence if you like) in the event that the devices failed whether unintentionally or intentionally without a back-up system blaming the IEBC and the incumbent Government** which situation the amendment to include provision for a back-up system to take over in the event the electronic system failed intended to correct. The committee should see as much as the contractors that it is merely to cause stalemate which should be checked to avoid occurrence of violence.

The Legal Affairs Committee led by the able former Attorney General, Senator Amos Wako should be oblivious in their deliberations that majority are not always right. Party politics should be kept away from this matter.

The contractors forming this Association **are in defence of the amendment of the electoral Laws to provide for alternative back-up system to counter any unforeseeable failure of the BVR electronics.** What is at stake is what should inform the decision of the committee, **but not a give and take consideration derived from political party inclinations.**

Holding firm to the amendment of the electoral Law as passed by the National Assembly is the only sure way of delivering a free, fair, transparent and free from violence 2017 elections. The critics of this Law are not offering solution to what would happen in the event the BVRs failed and what would apply in areas without network connectivity? Would the end results of the elections be fair, free and transparent!

It is the Contractors` submission that Kenyans are only being **treated to a circus by the opposition – CORD**; The National Assembly passed the electoral Laws amendments when the opposition – CORD walked out in protest and headed to the High Court of Kenya at Nairobi to file for restraining orders which the Justice Odunga declined to grant this time round. **CORD has made the Nairobi High Court their new talking point which is de-meaning the authority and power of the Registrative arm of the Government.**

While the Senate Speaker Hon. Ekwee Ethuro was directing the Senate Legal Affairs Committee to collect views in engaging the public participation. **CORD through their Senior Counsel also a senator Hon. James Orengo was at the Nairobi High Court filing under Certificate of Urgency wanting the court quash the proceedings and orders stopping the bill being assented to if the senate passed it rendering the work of the parliament, National Assembly and senate useless and not biding to CORD.**

Where then is the Country headed to if the opposition has no confidence in the Parliament proceedings and the elected leadership of this country are they really committed to having peaceful free, fair and transparent elections indicating that the opposition in CORD have another card in their sleeves of plans of forced regime change through a flawed vote.

Everything should be done by the Legal Affairs Committee and the Hon. Speakers of National Assembly and Senate to avoid occurrence of violence in this country ever again.

The Mount Kenya Roads & Building Contractors Association **hope and pray that the Legal Affairs Committee will use due diligence to safe the country from eruption of violence during and after 2017 elections.**

Yours Faithfully,
For; MTKRBCA

Peter Karuiru Gachira (0735734821)
CHAIRMAN

Joram T. Kibicho(0723007512)
SECRETARY GENERAL

29

Zimbra csenate@parliament.go.ke

How to stop election theft.

Tue, Jan 03, 2017 02:31 PM

From : benedict ogutu <benedict.mukuruslums@yahoo.com>
Subject : How to stop election theft.
To : lsk@lsk.or.ke, info@iebc.or.ke, csenate@parliament.go.ke
Reply To : benedict ogutu <benedict.mukuruslums@yahoo.com>

Dear all,
It was my wish to present my opinion to the Senate Legal Affairs Committee, but i didn't know the procedure and place. I am also a physically person thus my movement is limited.
Kindly look at my contribution over the current raging debate, make amendments and see what can be done.
I am talking from experience. I ones worked as a clerk with the defunct ECK and have also worked as an observer for two international organizations. Some of the loopholes and anomalies stated below are facts that some i physically witnessed. These facts are not rocket science. I think the issue has been how to stop them.

HOW TO STOP DEAD VOTERS & ELECTION THIEVING.

The dead don't wake up, vote then return to their graves. We the living do it for them.We don't necessarily need biometric identification. Theft of votes is done right at that small class where we vote. That must be the focus point. Its a fact some voters are given two ballot papers for president in the party strongholds. If a party targets 5 extra ballot papers/votes in each class in a polling center with 30 classrooms, adds up to 150 stolen votes in one center alone. Forensic audits has exposed anomalies in figures in regard to presidential votes where you find some people only voted for president and left. Its a loophole created by IEBC policy makers and a few rotten staffs conniving with political parties. I also blame parliament for not seeing this lacuna.
How to stop this theft :-
1. Manually identify and mark by crossing the name of the voter in the register, as is the case.
2. After voting is complete, DO NOT start sorting and counting votes straight away. Hapa ndio shida iko. You are basically covering up.
3. The manually marked register in that class MUST be presented and each marked name counted openly in front of observers and party agents to ascertain how many people living souls entered that particular class. That figure will be the denominator all cross the respective seats-president, Governor, Senator,MP, WR, MCA.
4. The counterfoils of the ballot books MUST be presented and counted openly in front of the observers and party agents. The numbers MUST match that of the manually marked voters who entered that class.
5. Empty all the presidential votes from the ballot boxes but DO NOT start the sorting of each individual's votes.
6. Count all the votes in that class for the presidential together before sorting them out. The total number of votes in that class must definitely match the MARKED NAMES in the register and the BALLOT COUNTERFOIL books. The denominator remains constant. The total number of votes, say for the presidential, cannot surpass the number of persons who physically entered that class to vote. It can be less but not more. If more, then some mischief happened. The IEBC officer in charge be given powers to nullify the results in that particular class.
If the denominator matches across all the votes cast then proceed with:-
7. SORT the votes as per each candidate.
8. Count the votes as per each candidate.
9. Party agents and those responsible sign the result forms to which they have thoroughly gone through and physically witnessed.
END

Am very sure if this procedure, and any addition is put into law and strictly followed, theft of votes which begins in that small room, will be a thing in the past. Biometric identification is not a solution but another loophole in itself.
In a manual system, you leave a trail of hard copy documents that can be relied on for auditing or in a court of law in case the election is disputed.
The process may not be foolproof,but will cub theft.
Let counting be done beginning with the MARKED NAMES OF VOTERS, then BALLOT PAPER COUNTERFOILS, then ALL VOTES. The numbers will correspond in a free and fair election devoid of any rigging. Lastly, SORT OUT each individual vote and COUNT. Wanjiku is not disfranchised in case the machine fails at the voting. Wanjiku is not interested in the tallying and transmission of votes but to vote, go home, and her right to choose be respected.
To CORD mps: Be sincere. We Trust and only Believe in God not machines. But if that's your case, then don't be enslaved and over reliant on machines because they fail at some point. Machine won't stop theft. You must have a reliable backup. A hard copy backup is the best in our current situation. A manual backup to resort to when machines fails. Strength the manual system.

By Benedict OGUTU.
FINANCE & LEGAL AFFAIRS
MUKURU MAKAO BORA TRUST.

30

BOAZ N.A.O. WARUKU

Post Office Box
148 - 508, Kendu Bay, KENYA
1376 - 00100, Nairobi, KENYA
Email: boaz.waruku@gmail.com

PRESENTATION TO THE JOINT ICT & LEGAL AFFAIRS OF THE SENATE ON ELECTORAL LAWS AMENDMENTS

by Boaz WARUKU
January 3, 2017

Thank you Mr Chairman for the opportunity to present my views to the joint committee

I had a look at the Constitution of Kenya (2010) Article 81 and Article 82 on guiding principles for an electoral system, and mandatory requirements on legislation on elections. I understand that Parliament should not abrogate them but should instead promote them

I also had a look at Article 86 and specifically saw the call 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
Candidates for election and political parties to comply with code of conduct. Eligibility to stand as an independent candidate.
(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

In my reflections, I also reminded myself that Kenya is the home of MPESA, where the innovation of mobile money transfer through electronic system was done and exported all

over the world. Kenya, thus, can even go full electronic voting if political goodwill and willingness to abide by Article 10 of Kenya Constitution (2010) values and standards

I further took a little bit of time also to reflect on why do we push electoral reform agenda in a piece meal manner. I glanced at the opening statements of Prof Anyang' Nyon'go's opinion piece published by the Star Newspapers on December 31, 2016:

'Sometime in 1966 President Apollo Milton Obote, then President of Uganda, sent the military to the Ugandan Parliament as he entered that august House to present to the legislators a new constitution of Uganda. With the stroke of a pen, he had abrogated the independence constitution, removed the post of Prime Minister, created an executive President and abolished the kingdoms. Listening (obviously in fear) as Dr. Obote read on, the legislators were finally asked to pass the new constitution whose copies they were to pick up in their pigeon holes at the rise of the House

Today is the 28th of December. As my driver drove into Parliament Road so that I could enter the precincts of Parliament to attend a special session of the Senate called to discuss the amendment to the Election Laws, National Assembly Bill No. 63 of 2015, I was surprised to find Parliament barricaded by the armed forces. It reminded of Uganda of 1966. Were we supposed to pass a law under duress? Where on earth had the principle of separation of powers in a parliamentary democracy disappeared to?'

Then it occurred to me that the situation we are dealing with is that of flexing muscle by the Executive branch of government over parliament. I wonder why there is no mutual respect between these agencies created by the sovereign citizens to ensure that the public good prevails

The electoral reform agenda started as an inclusive, bipartisan process whose outcome was passed by both chambers of Parliament without amendments. Why would one partisan side be obsessed with pushing down the throat of the others the so called new amendments now? Senate Speaker did indicate in his opening statements to the Senate, that he had received the Bill from the National Assembly. The question I ask, is was the Bill that he received from the National Assembly a correct Bill in form of having met the constitutional threshold for its passage? Was it received as a recommendation of an inclusive body similar to the Select Committee before? How was the public participation as demanded by the constituion achieved by the NA? Is it right to say therefore that the Bill before the Senate is an UFO (Unidentified Foreign Object)? Can Senate proceed to VALIDATE a UFO?

I have further reflected on the report by Kenyans for Truth with Justice [KPTJ] and AfriCOG on analysis of the results declared by IEBC in March 2013. Several chilling things stand out, based on the manual process of voter identification and transmission of results:

- In April 2014, the Independent Electoral and Boundaries Commission (IEBC) released what it called its "final" results from the March 2013 general elections. This report was the third such published since the election. Sadly, despite the IEBC's assurance that

the report would provide an analysis of the "counting and tabulation to better understand the participation of the electorate," AfriCOG's review finds several worrying gaps in the information contained in this latest release of results.

- The report contains less detailed information than the previous ones.
- IEBC should release the data that is currently missing from the public record as soon as possible, along with an explanation as to why the results have been incomplete for well over a year since the election (and now well over 4 years).
- Kenyans have a right to a full record of election results, and a comprehensive record of the results is critical if the IEBC wishes to maintain public confidence and promote transparency and accountability.
- This data is also vital for purposes of self-reflection, for it can shed light on important trends and patterns in candidate and voter behaviour over time.
- For instance, why do we still have incomplete results from the 2013 Kenyan General Election Office Polling station level? incomplete constituency level results (valid, rejected and votes cast)? Incomplete county level results? Partial presidential results, for governors, for Member of National Assembly, for Women's Representative, for Senator, and for County Ward Representative levels?. Why are 2,585 polling station tallying forms still missing? Why do we still have unexplained discrepancy of more than 2 million votes tallied for the presidential elections?

My reflections took me further to the media reports and realisation that more than *four million* applicants for National Identification Cards from Homa Bay, Migori, Kisumu, Mombasa, Turkana, Kisii, Nyamira, Kitui, Machakos, Makueni, Siaya, Kakamega, Bungoma, Busia, Vihiga, Nairobi City and Kilifi counties are yet to be processed and returned to the applicants. Can the Senate take this matter up and ensure that the legible citizens of Kenya receive their IDs and hence are ready to register as voters come January 15, 2017 to February 15, 2017?

That not withstanding, I propose the following:

1. Move away from any process that is open for abuse like the manual identification of the voter and transmission of results through forms which have become the subject of alteration in the 2007 and 2013 general elections in Kenya
2. The decision you take here must ensure that Kenya moves forward on the path of Electoral Integrity
3. Senate should not to pass the Election Laws (Amendment) Bill 2016 in the manner adopted and forwarded to it by the National Assembly

4. Senate to demand that the IEBC subjects any proposals to amend Elections Laws to public participation and stakeholder consultation as was done in the initiation of the electoral reforms by the Joint Committee of parliament
5. Senate must ensure that Biometric Voter Registration, Electronic Voter Identification and Electronic Transmission of results be institutionalised
6. Parliament, comprising of the Senate and the National Assembly should consider getting interested parties to nominate a team of election technology experts in the interest of restoring public confidence in the electoral process to examine and independently verify the country's capacity to acquire or borrow some of the equipment that would be necessary for technology-based voter registration, identification and transmission of election results
7. In addition,
    a. Senate should cause the release of full audit report of 2013 elections of Kenya
    b. IEBC be compelled to release a complete set of results for all offices, including valid votes, rejected votes and votes cast per polling station and per constituency. They should explain how the number of votes cast can differ significantly between the elective offices, and explain why the latest release of results does not include rejected and cast votes. They should release the missing 2,585 Forms 34 so that there is a complete public record of the polling station-level presidential results. They should explain how and why final presidential results were announced without the results from ALL Forms 34 Explain why the figures for rejected votes are missing in so many areas
    c. I appeal to the Kenyan public to take up the call to demand a full and detailed account of the election results and to work for greater electoral integrity in 2017 and in the future.

Thank You

Boaz WARUKU
ID 12458205
January 3, 2017

31

From: Charles Karanja
Sent: Saturday, December 31, 2016 10:25 AM
To: samoswako@gmail.com; skbiego@yahoo.com; kembigitura@gmail.com; fatumadullo@gmail.com; Sen Hassan Omar Hassan; Sen Judith Sijeny; Sen. Kipchumba Murkomen
Cc: Clerk The Senate; Kinyua Kirubi; Muchene Kirumba
Subject: Fw: Amendments to the Electoral Laws - Our Views

Dear Senators,

The amendments to the electoral laws should ideally accomplish two broad objectives:

1. Protect the right to vote – for all registered voters
2. Protect the integrity of the voter register.

The above, we believe, can be accomplished by ensuring the following:

a) VOTER REGISTER – that upon the conclusion of the mass registration exercise, the voter register should be comprehensively examined. The purpose of this detailed examination is to expunge duplicate records & dead voter records from the register – both in poll book and the green book. A proper audit trail should be maintained for all such deletions made.

b) POLLING PROCEDURES – that there should be a two-step voter identification process. Step 1 should involve matching voter documentation to poll book data – using the EVID machine. A computer printout of the poll book data should be available, in the event of prolonged downtime due to system or power failure. Step 2 should involve matching facial features to ensure the person presenting the documents is the actual voter on record. For this step, a 2nd copy of the same computer printout of the poll book data should be used. This is because this printout also contains a photograph of the voter.

c) ELECTION OFFENCES – that the current legal framework is reviewed to ensure election offences are treated as serious criminal offences. This review should including setting minimum fines and mandatory prison sentences for anyone convicted of such offences. Furthermore, such sanctions should apply to poll officials, party agents, ALL aspirants and members of the public.

Finally, it may be important to distinguish between **systems-generated** documents and **manually-prepared** documents. Today, most individuals issue manually prepared cheques when making payments. However, large corporations issue system-generated cheques when making dividend payments. Today, some banks still stamp manually-prepared banking slips to officially acknowledge cheque or cash deposits. Other banks enter deposit details into the system and issue a system-generated bank deposit slip. In both examples, documents are issued. In both examples, one document is manual, while the other is system-generated. System-generated documents are part & parcel of an integrated computer-based information system. Such documents provide a much-needed paper trail, which in turn secures the audit trail.

Finally, we thank you for providing us with an opportunity to participate in this process. The same is sincerely appreciated and not taken for granted.

Submitted by:
Kinyua Kirubi (Kiambaa Constituency)
Muchene Kirumba, @Gachene, (Dagoretti South Constituency)
Charles K Karanja (Dagoretti North Constituency).

Best Regards,
Charles K. Karanja.
+254 788 593 010 | +254 729 862 579
http://ke.linkedin.com/in/CharlesMgmtConsultant/
https://charleskkaranja.wordpress.com/

------ Forwarded Message ------
From: "Charles Karanja" <charlesk.consult@gmail.com>
To: "Sen Hassan Omar Hassan" <hasswab@gmail.com>; "Sen Judith Sijeny" <Jsijeny@gmail.com>; "Sen. Kipchumba Murkomen" <omurkomen@yahoo.com>
Cc: "Clerk The Senate" <csenate@parliament.go.ke>; "Kinyua Kirubi" <kkirubi.kk@gmail.com>; "Muchene Kirumba" <muchenekir@gmail.com>
Sent: 31/12/2016 10:19:17
Subject: Amendments to the Electoral Laws - Our Views

Dear Senators,

The amendments to the electoral laws should ideally accomplish two broad objectives:

1. Protect the right to vote – for all registered voters
2. Protect the integrity of the voter register.

The above, we believe, can be accomplished by ensuring the following:

a) VOTER REGISTER – that upon the conclusion of the mass registration exercise, the voter register should be comprehensively examined. The purpose of this detailed examination is to expunge duplicate records & dead voter records from the register – both in poll book and the green book. A proper audit trail should be maintained for all such deletions made.

b) POLLING PROCEDURES – that there should be a two-step voter identification process. Step 1 should involve matching voter documentation to poll book data – using the EVID machine. A computer printout of the poll book data should be available, in the event of prolonged downtime due to system or power failure. Step 2 should involve matching facial features to ensure the person presenting the documents is the actual voter on record. For this step, a 2nd copy of the same computer printout of the poll book data should be used. This is because this printout also contains a photograph of the voter.

c) **ELECTION OFFENCES** – that the current legal framework is reviewed to ensure election offences are treated as serious criminal offences. This review should including setting minimum fines and mandatory prison sentences for anyone convicted of such offences. Furthermore, such sanctions should apply to poll officials, party agents, ALL aspirants and members of the public.

Finally, it may be important to distinguish between **systems-generated** documents and **manually-prepared** documents. Today, most individuals issue manually prepared cheques when making payments. However, large corporations issue system-generated cheques when making dividend payments. Today, some banks still stamp manually-prepared banking slips to officially acknowledge cheque or cash deposits. Other banks enter deposit details into the system and issue a system-generated bank deposit slip. In both examples, documents are issued. In both examples, one document is manual, while the other is system-generated. System-generated documents are part & parcel of an integrated computer-based information system. Such documents provide a much-needed paper trail, which in turn secures the audit trail.

Finally, we thank you for providing us with an opportunity to participate in this process. The same is sincerely appreciated and not taken for granted.

Submitted by:
Kinyua Kirubi (Kiambaa Constituency)
Muchene Kirumba, @Gachene, (Dagoretti South Constituency)
Charles K Karanja (Dagoretti North Constituency)

Best Regards,
Charles K. Karanja.
+254 788 593 010 | +254 729 862 579
http://ke.linkedin.com/in/CharlesMgmtConsultant/
https://charleskkaranja.wordpress.com/

32

COSMAS KOSGEY CHEROP ARAP CHEBERUR,
P.O.BOX 559-30700,
ITEN.
MOBILE NO. 0720961831
Email;kosgeycosmas@gmail.com

30TH DECEMBER, 2016

THE CHAIRMAN,
SENATE STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS,
PARLIAMENT BUILDING,
P.O.BOX 41842,
NAIROBI.

Dear Sir,

RE: PROPOSAL SEEK TO MAKE AN ELECTORAL SYSTEM IN KENYA AN EFFECTIVE

Following the ruling of the Senate Speaker Hon. David Ekwee Ethuro on 28th December 2016 to refer the Elections laws (Amendment) Bill 2016 to your very able Standing Committee on Legal Affairs and Human Rights and seek public opinion, I wish to kindly present a proposal or an idea for a debate in the committee and parliament.

Mr. Chair, my idea is not about coming general election but future elections and therefore seeks to provide long term solutions to the electoral challenges that our country is facing.

Considering public mistrust that is obvious out there on Independent Electoral and Boundaries Commission (IEBC),we (Kenyans) need to look beyond 2017 General Election which will definitely come and pass. It is therefore important to find ways of strengthening the electoral systems and processes. The idea I am sharing can solve these problems if it is turned into reality. It is expensive yes but I believe it will impact electoral processes positively and grow our democracy.

In this regard, with this letter I attached a concept for you to kindly look at it and may be consider to the senate for a debate.

Thanks and happy new year to you and your hon. members of the committee

Yours sincerely.

Cosmas Kosgey Cherop Arap Cheberur

Mobile number; 0720961831

MEMORANDA TO PARLIAMENT

PROPOSAL SEEK TO IMPROVE ELECTORAL SYSTEM IN KENYA

INTRODUCTION

I wish to kindly take this very rare opportunity to thank the Standing Committee on Legal Affairs and Human Right of the senate for this chance to give my opinion on this very great matter of electoral systems.

Mr. Chairman, let me also congratulate and appreciate the Senate of the republic of Kenya led by the Speaker Hon. David Ekwee Ethuro and the Political leadership of the house (Leader of Majority Hon. Kindiki Kithure and Leader of Minority Hon. Moses Masika Wetangula) for the sound and admirable conduct during the heated debate on Elections Laws (Amendment) Bill 2016.

BACKGROUND

This country has experienced political challenges range from tribal politics, failure of electoral systems and mistrust of electoral institutions. The country has sowed mistrust in the institutions that has been mandated to organize and supervises elections and therefore needs to be addressed in order the country elect their leaders in a fair and transparent manner.

During 2013 General Election, I had an opportunity to work as polling clerk. The experiences then are the basis in which I make this proposal to the Parliament and the government to take into consideration for the betterment of the Kenya's electoral system. Some of the challenges included;

- Confusion among officials in filling the Elections result declaration forms because of complicated designed nature and therefore putting the correct boxes various types of votes e.g. Rejected votes, Spoiled votes and Total votes casted.
- Some Voters wanted to vote only one position let us say Parliamentary position and leave others giving reasons that one concludes majority of the public do not know the importance of elections.
- Failures of the Result Transmission Systems (RTS) due to inadequate knowledge by temporary officials.
- Failure of the officials to operate the laptops (Three only of the clerks had basic knowledge of computer then)
- Shallow training as a result of time to cover the curriculum.
- The Electronic Voter Identification (EVID) kit failed due to power failure

- Inaccessibility of the polling station by vehicles; we carried elections on our shoulders for around six kilometers and ake into account that we went two trips for all the materials to be in the station.

With this regard I wish to propose and request this committee include in the report that the government through parliament establish a modern well equipped training centre to be owned by Independent Electoral and boundaries Commission (IEBC) and to be named **"INDEPENDENT ELECTORAL TRAINING & RESEARCH CENTRE" (IETRC)**- The name is subject to discussion and change

Proposed Mandate of the Training and Research Centre

1. Training of the IEBC staff (Both permanent and temporary staff)
2. Research on electoral systems and issues.
3. To permanently host National tallying centre (Presidential tallying centre)
4. To build capacity of public on the electoral and leadership matters.
5. Evaluation of Electoral processes every after General Election or By Elections for the Commissions to learn from previous mistakes improve next Elections.

OBJECTIVES

The objective of this idea or proposal is to strengthen our electoral institution and systems for the betterment of the country. The civic education will make Kenyans knowledgeable on electoral processes and hence improves trust of our institutions by the public. Also Kenyans will be able to make informed decisions when choosing their leaders and not based on tribal politics.

CONCLUSION

The idea of changing Commissioners of IEBC every after General Election year will never take this country forward in terms of democracy and development. This country must rise and define ways of regaining public trust of the commission by strengthening it. This can be done by trainings of human resource, research and capacity building of the voters or the public.

This idea is not mend for the coming Elections but to seek sustainable effective electoral system.

By; Cosmas Kosgey Arap Cheberur Sign.....

Email; kosgeycosmas@gmail.com Mobile number; 0720961831

33

Zimbra **csenate@parliament.go.ke**

WE ONLY NEED SENSIBLE ELECTION LAWS TO SAFEGUARD THE VOTE IN 2017

From : David ochwangi <dochwangi@yahoo.com> Tue, Jan 03, 2017 07:53 AM

Subject : WE ONLY NEED SENSIBLE ELECTION LAWS TO SAFEGUARD THE VOTE IN 2017 1 attachment

To : Wanakenya <wanakenya@googlegroups.com>

Reply To : David ochwangi <dochwangi@yahoo.com>

Maybe it is just me but the ongoing raucous theatrics regarding the latest attempts to amend the election laws in the country by the governing Jubilee coalition and their CORD protagonists in the opposition are just unnecessary; raising temperatures in the country for the flimsiest reasons is the epitome of dysfunction and greed that ails the country today and MUST come to an end immediately if we are going to have a country to call home. As one of the originators of the manual vote-counting campaign, my idea was simply to protect and preserve the integrity and sanctity of the vote. This wasn't meant to give an unfair advantage of candidates over their competitors nor was it to legalize election rigging and yet when you listen to Jubilee MPs and the two principles Kenyatta and Ruto, you would think they just hit an elections jackpot; it is as if the forthcoming elections is a matter of formality for them and their reelection might as well be a foregone conclusion if the bogus opinion polls recently released are anything to go by. I say hold up! Wait a minute.

MANUAL VOTE COUNTS DEMYSTIFIED:

I think there is a deep misconstruction on both sides what manual vote count is about with respect to 2017 elections. The Jubilee government appears to believe this is a sure license to manipulate or rig the election results and the opposition is right to be concerned. Why else

would Jubilee be gloating about a procedural change supposed to enhance the accuracy of the vote count? It is sinister to say the least. This is about the VOTE COUNT! Not voter registration or transmission of results but VOTE COUNT! Now if the parties want to expand the scope of the law to comprehensively address the entire process rather than piecemeal, I am supportive of that as I am sure most Kenyans are.

The intent and purpose of manual vote counting is to ensure that each cast vote is actually valid and is counted as the voter intended it to be counted. It is a "BACK-UP" to mitigate rigging and to avoid the effects of machine failures as it happened in 2013. It is not about BVRs or voter registration. Additionally it is to ensure that in the event that machines are hacked or manipulated or the candidates suspect shenanigans with the counts, everyone will have confidence that there is a credible manual tallying system in place with a complete audit/paper trail to ensure credible elections outcome. To that end, both the Jubilee government need to set aside their self-interests in this and strengthen the rules, CORD running wild like a bunch of rambunctious school yard bullies won't solve much neither's and this is what I would do if I were in charge of this process.

Legislatively: - Spell out the rules of engagement outright and codify them into law. Right now, too much discretion is left to IEBC and that's a recipe for disaster. It is an open secret that IEBC is not entirely independent and that Jubilee has great sway in how it is run, that gives Jubilee an unfair advantage over the opposition – the only way to clear that is via encoding procedures and processes that transcend parties' interests and then hold IEBC to account.

Third Party elections Administrator – This is one area I am very conflicted about but truth be told, IEBC is obviously a compromised entity and a lot of Kenyans have lost faith in the institution. It is in a worse state today in terms of credibility and preparedness for the 2017 elections than ever before because of the juvenile politics by CORD & Jubilee. Rather than spend Billions on a flawed process by distrusted entities, what if we instead get a truly independent outside third part to perform the mechanics of the elections? An outsider who has no vested interest in the outcome of the elections, a European or American entity whose role is simply to validate the ballots cast with the voter rolls and count them accordingly. IEBC will manage this entity. That will, in my opinion restore a lot of confidence that the process is open and fair. Think about that folks.

UPDATE IEBC PROCESS MAPS

The election process must be conducted with utmost sobriety and as meticulously as possible. No patchwork or leaving anything to chance. Methinks there should be a process map appended to revised laws that in effect become part of the election process, again it must not

be left to IEBC's discretion to decide what that process is, and it is too much of a gamble to risk. Some have argued that IEBC is independent, IEBC is ONLY independent from undue externally influence, not immune or exempt from the law, it is an important distinction. So what should the process maps cover? To some this might be common sense but you will be surprised how much is really left to chance so I am just going to the fundamentals. You ask, and here is what I envision.

a) Voter registration – This must be an ongoing exercise and NOT subject to arbitrary deadlines as IEBC has it now. Kids are turning 18 every day and no voter should be disenfranchised needlessly on account of restrictive deadlines. Should be open registration until at least 30 days before elections.

b) Diaspora Voter Registration –Kenyans outside Kenya must be included in the process, it just has to – period.

c) Voter Registry – Only ONE voter registry should be on file with the IEBC. Must be verified and certified. It must be available for inspection to avoid voter stuffing.

d) Biometrics – This is supposed to be common sense. A machine readable voter card must be issued to a voter at registration.

e) Ballots issued at Polling stations –The voter presents the voter card and his/her identity card at the polling station to vote. A ballot is issued to the voter which is scanned and tied to the voter card at the polling station. Once a voter card is scanned at the polling station, it cannot be used again elsewhere. **This will eliminate ghost voters or ballot stuffing.**

f) Ballots & Voter cards – All printed ballots MUST be sequentially pre-numbered with unique serial numbers, Just like a company that creates pre-numbered invoices, IEBC ballots should be pre-numbered.

g) One ballot One Voter – **Simply means a ballot issued to a voter MUST be traced to that voter,** simple as that. And since a voter must be physically present, there should be a question of anyone voting more than once much less an ineligible voter voting.

h) Data collection & Headcounts – We need an extra layer of confidence that votes tallied actually match the number of folks showing up at the polling stations. So as rudimentary and redundant as this sounds, we need a physical headcount – if 1000 ballots are cast at a polling center, our headcount must be 1000 voters, basic and effective.

i) Electronic Ballot casting –A ballot (vote) must be scanned and into the machine and a duplicate receipt issued to the voter, IEBC keeps a copy and the voter a copy. It is basic technology used at retail shops all over the world including Kenya. This is the surest way to ensure votes can be easily recounted if there is any dispute. This is where manual vote counting comes in, if for whatever reason there is a need to recount votes and validate the

returns from any polling station, it can be done timely.

j) Manual Ballot Casting – Same as above except perhaps in extremely remote areas where technology would be limited to batch processing, meaning votes may in fact need to be cast manually or provisional ballots are issued. Either way the vote should count in the same manner regardless of whether it is manually or electrically cast.

I think this is a good place to start and parliament would be wise to refocus their efforts away from partisanship to doing what's best for the country.

datauri-file.png
288 KB

34

Zimbra **csenate@parliament.go.ke**

Public Hearing-Legal Affairs Committee

From : David Okello <okellodg@yahoo.com> Fri, Dec 30, 2016 05:04 PM
Subject : Public Hearing-Legal Affairs Committee
To : csenate@parliament.go.ke
Reply To : okellodg@yahoo.com

I hereby submit my contribution.

1.By whatever means,identification must be foolproof to deter under age voters or resurrected ones. We have had instances in the past where ballot are pre-stuffed and counted.

2.Back up can still be done electronically.

3.Borrow from Countries like India,Nigeria where success was achieved.

4.Should there be a limitation as to budget,IEBC should should shout now so that friendly Countries can assist.Otherwise there should be no excuse.

5.Transmission of Presidential results should be open to other platforms though final announcements should come from IEBC.

6.Agents should be encouraged to report harassment by Police.This is a common occurrence.

7.Avoid a situation like last time when Bolas was cordoned off and Agents chased by armed forces.This brings about confusion and suspicion.

8.Cameras or pictures taken by phones should be allowed in polling stations.

9.Internet services/Whattsap should not be disrupted during elections to instill confidence and underscore openness /transparency.

10.There should be backup for power (Batteries etc)

11.Use satellite communication where local facilities are challenged.

Regards

David Okello.

Sent from Yahoo Mail on Android

35

Zimbra csenate@parliament.go.ke

PUBLIC CONTRIBUTION TO LEGAL AFFAIRS COMMITTEE ON PROPOSED ELECTION LAW AMMENDMENT

From : frederick oketch <fredoketch@yahoo.com> Sat, Dec 31, 2016 11:11 AM

Subject : PUBLIC CONTRIBUTION TO LEGAL AFFAIRS COMMITTEE ON PROPOSED ELECTION LAW AMMENDMENT

To : csenate@parliament.go.ke

Reply To : frederick oketch <fredoketch@yahoo.com>

FOR ATTENTION OF LEGAL AFFAIRS COMMITTEE ON PROPOSED ELECTION LAW AMENDMENT

PUBLIC PARTICIPATION

PLEASE RECEIVE MY CONTRIBUTION AS NUMERATED BELOW:

1. EXPLORE AND PUT IN PLACE COMPREHENSIVE I.T. DOUBLE AND TRIPLE BACKING-UP
2. PUT IN PLACE COMPREHENSIVE SECURITY FOR NETWORK SYSTEM OR SYSTEMS TO BE USED.
3. PUT IN PLACE COMPREHENSIVE MEASURES TO ELIMINATE LOOPHOLES FOR STUFFING BALLOT BOXES.
4. ALL BALLOT BOXES TO BE GIVEN SECURITY SERIAL NUMBERS FOR IDENTIFICATION AND LOCATION.
5. IF A MANUAL BACKUP REGISTER IS TO BE MADE, IT MUST BE ONE ONLY INSTEAD OF MANY OF SEVERAL SPECTRAL COLOURS LIKE THOSE NAMED AS IN THE PAST. AMPLE TIME MUST BE ALLOWED FOR SCRUTINY OF ALL REGISTERS.
6. ALL COMMUNICATION OF PRESIDENTIAL VOTE TO BE ELECTRONIC AND SATELLITE COMMUNICATION ARRANGED FOR USE IN THE VERY RARE CASES WHERE NORMAL NETWORK FAILS.
7. NETWORK PROVIDERS MUST BE VETTED AND MADE TO TAKE OATH THAT THEY WILL PUT THEIR ALL TO ENSURE NO FAILURE OF SYSTEMS. AFTER ALL THEY MUST BE IN THE KNOW OF POSSIBLE CAUSES OF SYSTEM FAILURES; HENCE THEY MUST KNOW WHAT

TO AVAIL.

REGARDS,

FRED OKETCH JONAM

3/1/2017

36

MEMORUNDUM TO THE SENATE STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS PROPOSING NECESSARY CHANGES TO THE ELECTIONS AMENDMENT BILL (2015) DUE TO THE IRRELEVANCE AND COST OF UNIVERSITY DEGREES IN LEADERSHIP

FROM: GWADA S. OGOT, INDEPENDENT PRESIDENTIAL ASPIRANT 2017 GENERAL ELECTIONS
THROUGH: THE CLERK OF THE SENATE ASSEMBLY

I, the undersigned, draw the attention of the Senate to the untenable and harmful consequences of legal statutes which uphold the myth that a university degree is a mandatory for effective political leadership.

I have raised the following 22 points to support this petition:

1. Since time, citizens have never ever contested just laws...
2. A university degree principally indicates an individual's capacity to consume and memorize processed knowledge, and is no measure of productive competence.
3. The question of whether a university degree is a leadership asset or danger self explains through the performance of our policies, civil servants and elected leaders at all levels.
4. In public service and governance, the university degree has efficiently defeated every stated purpose it set out to achieve.
5. Indeed, only a university degree can mislead persons into believing they deserve more, and know more than others at all times.
6. The largest numbers of individuals who trash or question the very existence of God Almighty are degree holders.

7. A university degree is a real threat to society that corrupts almost organically as well as provokes and justifies an inordinate sense of entitlement.
8. It is true that '*there is no evidence that success at university correlates with achievement in later life'* says Ernst & Young, one of the UK's biggest graduate recruiters who removed the degree classification from its entry criteria in August 2015.[1]
9. A university degree is grossly overrated as a sign of intellectual proficiency, just as a university is not the only place where knowledge and the knowledgeable are found.
10. Since education and knowledge are not synonymous- one is process and the other product- must a genius go to university to be a genius?
11. Intellectual hallow comes by producing knowledge to be consumed, not by consuming works of other scholars.
12. Systemic failures in Kenya result from an education system that rewards consumers, but that chokes the supra- talented and Gnostics who are inventors, pure producers.
13. The consumption orientation of a degree makes it counter productive, irrelevant and inappropriate for leaders particularly.
14. No scientific evidence exists proving non- university degree holders as impaired, or incapacitated or inept in leadership or vice versa.
15. Laws which demand a degree for jobs in the political, spiritual, public and private sectors are behind the wild mushrooming of universities and mediocre graduates.
16. The degree qualification in Kenya is solely awarded in colonial languages, meaning any laws which enforce degrees also directly stifle local languages.
17. Bad education is the primary root of all segregation in Kenya and Africa, not ethnicity.
18. Leadership does not belong to leaders; but to the people who own the right to determine who should or should not lead exclusively, individually and collectively.
19. Any law which blocks productive and skilful citizens, of sound minds and good conduct from leadership competition is bigoted and backward.
20. No science can calculate the cost of bad laws to a nation.
21. No law or lawman can purport to quantify the elasticity of human ability or potential.

---

[1] Ernst & Young Removes Degree Classification from Entry Criteria As There's 'No Evidence' University Equals Success The Huffington Post UK: 21st September 2015

22. Is the law justified in favouring the educated while condemning the uneducated?

THEREFORE, your humble petitioner prays that the Senate, in readiness for the 2017 general elections, promptly delete from the Elections Amendment Bill 2015 any parts demanding university degree qualification in order to run for presidential, gubernatorial, senatorial, and parliamentary, and also Members of County Assembly seats.

PETITIONER:

GWADA OGOT: ID.No.8060505: Sign: _____

P.O. Box 57 NGIYA: Tel: 0737 944 354: Email: Taokogot@gmail.com

37

From: James Njendu
Sent: Saturday, December 31, 2016 12:51 AM
To: kembigitura@gmail.com
Subject: Fwd: STANDING COMMITTEE ON LEGAL AFFAIRS& HUMAN RIGHTS--PUBLICHEARING / RECEIPT OF MEMORANDA

Sent from my iPhone

Begin forwarded message:

> **From:** James Njendu <jamesnjendu6@icloud.com>
> **Date:** December 31, 2016 at 12:34:17 AM GMT+3
> **To:** csenate@parliament.go.ke
> **Subject: STANDING COMMITTEE ON LEGAL AFFAIRS& HUMAN RIGHTS--PUBLIC HEARING / RECEIPT OF MEMORANDA**
>
> I am a 67 year old Kenyan Citizen, a Fellow of the Kenyan Institute of Architects and a Fellow of The Kenya Institute of Management. Being a practicing Architect and previously having been Chief Architect of Mombasa Municipal Council, I widely integrate with people of all walks of life.
>
> My memoranda is as follows:-
>
> 1) Any form of Electronic/ Biometric system of conducting or voting in elections MUST have a fair back-up and manual back-up stands out as the most practical back-up. Infact I fail to understand how the Kiraitu / Orengo negotiating team would have overlooked this. Let's remember that electronic/biometric systems could be prone to failure and these could read to a lot of misunderstandings and litigations in absence of manual back-up.
> If you have dishonest persons the electronic / biometric system could be exposed to a lot of abuse. Checks and balances can be achieved through manual back-ups. Those who are claiming that those in ruling system want to rig using manual system are dishonest. It is easier to rig by manupilating or hacking electronic systems or feeding thieving data into the system.
> This clause must be amended
>
> 2) Shortening period required for candidates to submit finances matters need not be necessary. There is no need to change this clause--a window must however be created for Public Servants required to resign by 8th February 2017 to be given a fair chance to participate.
>
> 3) Education criteria earlier inserted MUST be retained---Degree for Parliamentary candidates and Post- Secondary for MCA. No constituency in Kenya can miss scores of Kenyans with at least first degree and no Ward can miss hundreds of candidates for MCA with 2-Years post- secondary school education. Granted that higher education

does not necessarily make one a good leader, it is a painful fact that an educated person will generally make a more informed judgement.I am sure those who had made the decision had good intentions for our beloved country , otherwise why do parents or indeed the Government spend so much money on higher education .
Recently a doctor was telling me the frustration they are having of having spent over 7 years after form 4 and reporting to an MCA who schooled only up to Std 8 not to mention gross earnings of the MCA being more than 5 times that of the Doctor .
God bless Kenya
Arch. Kamau James Njendu

Sent from my iPad

38

Zimbra **csenate@parliament.go.ke**

PETITION

From : james njoroge <jnjorowandia@gmail.com> Mon, Jan 02, 2017 11:46 AM

Subject : PETITION

To : csenate@parliament.go.ke

The clerk, senate,
Parliament buildings,
P.o Box41842-00100,
Nairobi,Kenya.

James Njoroge Mwanji
P.o Box 626,
Kiambu, Kenya.
Tel 0716065497

Dear sir,
I am not familiar with how to petition the senate, but however am seeking help from the Kenya senate about a very pressing and disturbing issue.

For the last four years, I and my family have been under attack by members of the now defunct mungiki operatives, who have have,on a 24 hour basis, bombarded my home with chemical weapons.I am not sure what the composition of this chemicals are, but am very sure these chemicals are similar to the ones used by Hitler against the jews in the 1940s.I have sort help from Police, the chiefs office,Kiambu hospital department of public health,the county commisioners office ,kiambu, and the national police service, all to no avail.The criminals have now entered the fifth year as of last night 1st of january 2017.we have survived over the years by blockind all air ducts into my home including the chimney,breathing stale air. the chemicals are penetrating closed windows and doors and they are now using the roof also.I am the most affected because i am sick and recently travelled to India for surgery.Please do the needful and help this family before we all dye from cancer and other complications. I am retired aged 60.

39

To

SENATE COMMITTEE ON ELECTIONS LAW REVIEW AC PASSED BY NATIONAL ASSEMBLY CHAIRED Hon AMOS WAKO & Hon. MUTAHI KAGWE

From

JOHN KANYA I/D 7911294
TEL 0724888888
0764288888
Johnkanya77@Gmail.Com

My request to do an Oral Submission to this Seating in the Senate today Jan 3rd 2017.

→ Jan the forwarder of August 4 as date of conducting of the 2010 Constitution after the then electoral body IIEC asked for public participation.

(a) → It was 7th anniversary of registration of Hon Ken MATIBA party Saba Saba Asili It had (the party) been registered August 4, 2003

(b) In Concomitant with 2010 agreement, the duo Citizen Wilder BARACK HUSSEIN OBAMA Jr - the then Incumbent president of U.S.A was celebrating his (7x7) = 49th birthday. OBama had been born on August 4th 1961.

→ I was presidential votes fully aged at K.I.C.C Dec 29 - Dec 31st 2017 Sat by Presidential Candidate Hon MATIBA. He got Some respectable - again - RESPECTABLE 8,046 (0.081%) of the votes Cast and with Seal Correct. MATIBA had used the above quoted registered political party.

→ Article 263 of 2010 Constitution Says the actual day of Constitution is

PE

the day people voted. VOX POPULI. The promulgation was not a compulsory according to Article 263 — the 2010 constitutes was self-signing / self-operationalised upon following some expiry of days permissive for a dispute for some.

→ASTUTE — myself — Iám a product of missing marks in form 6 exam at Jamhuri high School 1986 — candidate index number: 41003/555 — and I fear the law asking for a post-secondary education will lock me out of participation as a Contender for UGANDA road-STREET NAIROBI — where again Jamhuri high School my former school is situated and I vote/polling station. I have a partial result slip for my form 6 exams but they put X in one paper of maths and the rest does not appear at all. Bonface Mwangi the PANDA 254 has just done KCSE and this people of 2016 exams will be locked out contesting parliamentary / civic / Senate which only CONSTITUTION of 2010 only requires a Secondary School certificate. The post Secondary Certificate is to achievable for them with the time span before the general election!!! I had AAA = 36 points in CPE (Index 24145001 — 1980 — GATUNDU 'A' PRIMARY SCHOOL — MURANG'A) I had DIV II 23 points (Kagumo high school — Nyeri — Index No 22003158 — 1984) I have School Leavers' certificate for all Schools. The Dec 3RD 2016 Saturday Nation highlight missing marks for 2016 KCPE. Purported Dec 3RD 1849 is the date our State got its name from Dr. Rev. Johann Ludwig Krapf escorted by Chief Kivoi of Kitui Sand Mt. Kenya and in 1926 the Border reverted to the missionary Dr. Rev. Krapf WRITS!!!

Dec 3rd 2002 is the date President KIBAKI - through conspiracy was to die at MAKUTANO junction going for Campaign trail in the same KIPUPU - so other can be made president. Dec 3rd is controversly featured in the years of general elections since 2002, 2007, 2013 (mandela place in South Africa) and 2017 August 4th will be featured by Nation Paul media and details how Kenya got its state name and expeditions of Rev. Dr Krapf and Chief KIVOTI.

I Support ELECTRONIC/DIGITAL voting and transmission of results. We have demised ourselves since at Independence we had a SPACE STATION at Coast which would have looked into Satellites - electronic gadgets - that would give Kenya telecommunications (not necessarily telephonic - but inclusive of it) network based on SATELLITES. Hon Mutahi Kagwe - an old boy of Kagumo high school like myself - FAILED - to implant Lawyer Johann Kriegler - who committee I appeared at IEBC views collectors - talked of electronic transmission of Presidential results. Mutahi Kagwe blood brother has electronic/Digital platform in Uganda - where my biological mother comes from - Central Uganda - MITYANA (Hoima road) and was featured in Marketing Africa magazine of Dec 2008 (during interchange of BUSH and OBAMA in America) and instead of working for STATE - MUTAHI KAGWE PERSONALISED his personal skills as minister and enslaved his brother - a Kikuyu - not a half caste of Buganda and Kikuyu like myself and plays Godfather the President of Uganda!!! BRENTY.

Yours KANYA JR

P.T.O

NB* Kenya Intelligence was putting under surveillance in 1986 - the year when Uganda was going to reality of President museveni late that year - and Buganda Kabaka was staying with Lawyers of mwanje and my father Bernard Kenya Bunyi - uncle of Hon. MATIBA - and early arrival to Nairobi in 1920 (nineteen twenty) and a pro-Independence BACKGROUNDSHIP - had been well known in dealing with Kabaka Freddie II of Uganda and indeed my Grandfather (Uganda grandfather) SSEMBEGEYA (NN yonyi nyonyo (white bird) clan are the guys of WANDEGEYA in 1922 to be built MAKERERE UNIVERSITY (in Uganda R is spelt 'l' - so makelele in Swahili pronunciation)
The Index-555- was very suspicious to this Urban farm Six x 16) Student - MYSELF. 2022 - details of how Makerere came to be will be featured as it celebrates its Centenary (100 years)
The Makerere University Vice chancellor - you can confirm - gave me / called me on August 3rd 2015 - a monday - RING there to confirm * * *!!
ODDS AGAINST @ FAVORITE @

* I have never acquired a post secondary certificate *
* KABAKA MWANGA MUTESA HELD HIS HONEYMOON IN WINDSOR OF KANGEMA!!

40

3/01/2017

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

TO THE CLERK OF THE SENATE

PARLIAMENT BUILDING

NAIROBI.

RE: MEMORANDA TO POSTPHONE A REQUIREMENT THAT AN ASPIRING MP AND MCA TO HAVE A DEGREE AND A DIPLOMA UP TO 2022

All the professionals in Meru have requested me to write on their behalf requesting all parliamentarians to postphone a requirement that aspiring MPS and MCAs have a Degree and a Diploma up to 2022.

This is because University Education in Kenya has until recently been too bottlenecked. Few people in Meru have got degrees and these few may not have good leadership qualities. We would like to broaden a catchment area so as to have good leaders.

Degrees and Diplomas will also obstruct us from voting in leaders of our choice.

Also, nobody has come up with an empirical evidence to prove that MPs with degrees in parliament perform better than those with Diplomas and vice versa.

If it is mandatory for MPs to have a degree and MCAs to have Diplomas in 2017 elections, we will go to court to prevent IEBC from implementing that law.

We will also mobilize the community to vote out jubilee from power and at the same time prevent CORD from getting votes in Meru.

JOHN NTEERE
CHAIRMAN, MERU COUNTY
PROFESSIONALS FORUM
0722646781

41

Zimbra **csenate@parliament.go.ke**

AG GITHU MUIGAI SUPPORTS MANUAL BACKUP FOR 2017 POLLS

From : vincent oramisi <phvincent2004@yahoo.com> Tue, Jan 03, 2017 02:24 PM

Subject : AG GITHU MUIGAI SUPPORTS MANUAL BACKUP FOR 2017 POLLS

To : Ag Go Info <info@ag.go.ke>, ag@ag.go.ke, clerk@parliament.go.ke, The Clerk Senate <csenate@parliament.go.ke>

Reply To : vincent oramisi <phvincent2004@yahoo.com>

Dear Sir Muigai
I am shocked at your presentation of using manual backup for 2017 polls.
1. Really you don't love this beloved country Kenya...my father we need total peace, am a victim of 2007/2008 P.E.V. Manual voting is a recipe for chaos in Kenya again
2. Use new technology of satellite phones....remember M-Pesa is working in every part of Kenya without a hitch
2. Today 03/01/2017 someone has said
"Equipment does break down. You have to stand by and replace them. You just need to plan properly and do what's right for the country,"
May God Almighty bless Kenya

Sincerely Kenyan citizen from Busia county
Philibert Vincent Oramisi

42

Zimbra **csenate@parliament.go.ke**

SUBMISSION ON USE OF TECHNOLOGY IN THE AUG 2016 ELECTIONS

From : poodhiambo3906@gmail.com Fri, Dec 30, 2016 08:43 PM

Subject : SUBMISSION ON USE OF TECHNOLOGY IN THE AUG 2016 ELECTIONS

To : csenate@parliament.go.ke

Cc : Daniel Juma Omondi <djuma@globalpeace.org>, danieljuma@gmail.com

IEBC should :-

1. Use only cloud technology for their servers (CLOUD SERVERS).The cloud company Contracted e.g. Amazon has to decide where to host the servers.One server can be hosted in the UK, another one in America and the last one in South Africa.It should not be the business of the IEBC to know where the servers are hosted.It should be confidential.

2.Voter Registration does not require any 3G network.Local electronic system can still be used.No ghost voters will be registered.Use of blackbook as in the past is sheer nonsense.Voters have to be registered electronically and data stored locally when network is down but when the network picks up it has to be transmitted to the server.

3.In areas where there are no 3G networks , the IEBC should deploy VSAT (Very Small Aperture Technology) which is a satellite internet technology used in areas where there is no network coverage.

4.IEBC needs to hire CHIEF DATA SCIENTIST / CYBER SECURITY ADVISOR stationed at the headauarters with 47 deputies stationed at each of the 47 counties.These I.T. experts should handle the technology component of the election especially TRANSMISSION OF THE ELECTORAL VOTES.

5.Tallying of votes MUST only be done at the polling station and then the results entered into the system directly in the presence of party agents.The system should add the votes automatically.

6.Nobody should change the votes tallied in a polling station except the presiding officer for the polling station.Presiding officer in a polling station should have the final say on the tallied votes.

6.The technology deployed should be smartphone /iPhone compatible so that the phones can also be used for the actual electronic transmission of votes.The phone will be a good backup incase the computer equipments fail

due to power outages.We need 2 of such phones per polling station.
7.Solar power / diesel powered generators should act as the IEBC power backup in each polling station.

8. IEBC should also introduce early voting in designated polling stations may be one per ward to decongest the network during voting day.This should be done 1 week in a advance to test for any malfunctioning of the system.It will also give a chance to the IEBC staff to have hands on experience with the technology.

9.If technology fails in one polling station then the presiding offi cer should go to the constituency headquarters to enter the data in the system.The presiding officer have to be accompanied by the party agents.

If Kenyans think that the use of technology in a general election is expensive then let them try civil war.Later they can compare the cost of technology and that of civil war.

If the IEBC is not ready to deploy technology then let the elections be postponed until that time when they will be ready.

PIUS O. ODHIAMBO
DATA SCIENTIST / CYBER SECURITY EXPERT
UNIVERSITY OF MARYLAND UNIVERSITY COLLEGE, U.S.A.
Sent from my T-Mobile 4G LTE device

42

Zimbra **csenate@parliament.go.ke**

SUBMISSION ON USE OF TECHNOLOGY IN THE AUG 2016 ELECTIONS

From : poodhiambo3906@gmail.com Fri, Dec 30, 2016 08:43 PM

Subject : SUBMISSION ON USE OF TECHNOLOGY IN THE AUG 2016 ELECTIONS

To : csenate@parliament.go.ke

Cc : Daniel Juma Omondi <djuma@globalpeace.org>, danieljuma@gmail.com

IEBC should :-

1. Use only cloud technology for their servers (CLOUD SERVERS).The cloud company Contracted e.g. Amazon has to decide where to host the servers.One server can be hosted in the UK, another one in America and the last one in South Africa.It should not be the business of the IEBC to know where the servers are hosted.It should be confidential.

2.Voter Registration does not require any 3G network.Local electronic system can still be used.No ghost voters will be registered.Use of blackbook as in the past is sheer nonsense.Voters have to be registered electronically and data stored locally when network is down but when the network picks up it has to be transmitted to the server.

3.In areas where there are no 3G networks , the IEBC should deploy VSAT (Very Small Aperture Technology) which is a satellite internet technology used in areas where there is no network coverage.

4.IEBC needs to hire CHIEF DATA SCIENTIST / CYBER SECURITY ADVISOR stationed at the headauarters with 47 deputies stationed at each of the 47 counties.These I.T. experts should handle the technology component of the election especially TRANSMISSION OF THE ELECTORAL VOTES.

5.Tallying of votes MUST only be done at the polling station and then the results entered into the system directly in the presence of party agents.The system should add the votes automatically.

6.Nobody should change the votes tallied in a polling station except the presiding officer for the polling station.Presiding officer in a polling station should have the final say on the tallied votes.

6.The technology deployed should be smartphone /iPhone compatible so that the phones can also be used for the actual electronic transmission of votes.The phone will be a good backup incase the computer equipments fail

due to power outages.We need 2 of such phones per polling station.
7.Solar power / diesel powered generators should act as the IEBC power backup in each polling station.

8. IEBC should also introduce early voting in designated polling stations may be one per ward to decongest the network during voting day.This should be done 1 week in a advance to test for any malfunctioning of the system.It will also give a chance to the IEBC staff to have hands on experience with the technology.

9.If technology fails in one polling station then the presiding offi cer should go to the constituency headquarters to enter the data in the system.The presiding officer have to be accompanied by the party agents.

If Kenyans think that the use of technology in a general election is expensive then let them try civil war.Later they can compare the cost of technology and that of civil war.

If the IEBC is not ready to deploy technology then let the elections be postponed until that time when they will be ready.

PIUS O. ODHIAMBO
DATA SCIENTIST / CYBER SECURITY EXPERT
UNIVERSITY OF MARYLAND UNIVERSITY COLLEGE, U.S.A.
Sent from my T-Mobile 4G LTE device

43

TO: Joint Legal Affairs & ICT Committee of the Senate

FROM: Marilyn M. Kamuru

RE: Election Laws (Amendment) Act 2016

DATE: January 3, ~~2017~~ 2017

In response to the request for public participation to the afore referenced bill hereby submit my comments.

1. IEBC Role in Political Party Nominations

Given the current timelines and the fact that the new Independent Elections and Boundaries Commission (IEBC) Commissioners are yet to be vetted and appointed, it would be prudent to give IEBC the discretion to decide whether or not to assist in political part nominations. This can be accomplished simply by replacing the word "shall" with the word "may" in the proposed amendments to Section 31 which introduced this new role for IEBC.

However, given the history of contentious history of party nominations and disputed elections, in my view the more appropriate position would be to limit the role of the national electoral management body to the conduct of elections only and to insulate them from the contentious political party nominations beyond what is envisioned in Article 90(2). This would require deleting the provisions of Section 10 of the Election Laws (Amendment) Act 2016.

2. Section 18 seeks to Amend the Constitution in Violation of Chapter 16 of the Constitution of Kenya 2010

Section 18 seeks to add new sections to the Elections Act. Section 18 as proposed would grant the IEBC powers to postpone an election by amending section 55B is unconstitutional in that it seeks to amend the Constitution of Kenya in a manner other than is prescribed in the Constitution specifically Articles 255 and 256.

Article 101(1) of the Constitution provides that "A general election of members of Parliament shall be held on the second Tuesday in August in every fifth year." In addition Article 177 (1)(a) also specifies the date of election of members of the county assemblies as the same day of the general election "being the ~~secibd~~ Tuesday in August, in every fifth year". In both Articles 101 & 177 the day, month and years are clearly provided and as such any change to the day, month or year would require an amendment of Article 101(1) and 177 (1) of the Constitution.

Second

The Constitution provides in Article 256 that any amendment to the Constitution by Parliamentary initiative (1) (b) "may not address any other matter" other than that arising from "consequential to legislation arising from the bill". The Election Laws Amendment Bill clearly addresses more than the right of IEBC to postpone elections. Additionally, Article 256 (1) (c) that a constitutional amendment bill "shall not be called for a second reading in either House within ninety days after the first reading of the Bill in that House." (emphasis mine) Further in 256(1)(d) that such bill "shall have been passed by Parliament when each house of Parliament has passed the Bill, in both its second and third readings, by not less than two thirds of all the members of that House." (emphasis mine)

3. Finally on the matter of manual verification of voters section 88, should that be accepted as an alternative then I would propose three steps:

a. First, IEBC be required to place in escrow the final database of biometric voter registration data before the elections preferably with a reputable company which has expertise in technology escrow. That that database be accessible for parties and persons seeking to challenge the use of manual verification.

b. Secondly, that a process is defined by which the manual voter verification is used including pictures, names and ID numbers of all voters who are manually verified. Thiswould limit the propensity for fraud and further ensure that any challenges would be definitive in terms of any double voting. In addition all such votes are cast in separate ballot boxes such that any challenges can be confined to a limited number of votes and not affect the majority of votes in each polling station.

c. That any polling station that manually identifies a voter shall designate the reason (disability, etc.) and further provide the number of individuals identified manually. Polling stations that do not use any manual voter identification must affirmatively assert that no manual verification was done.

Finally, in the future it would be prudent for all parties from the IEBC to Parliament to ensure that elections related legislation is not enacted less than a year to elections.

Zimbra **csenate@parliament.go.ke**

Election Laws (Amendment) Act 2016

From : Muthoni Kamuru <muthonikamuru@gmail.com> Tue, Jan 03, 2017 12:32 PM
Subject : Election Laws (Amendment) Act 2016
To : csenate@parliament.go.ke

> TO: Legal Affairs Committee of the Senate
>
> FROM: Marilyn M. Kamuru
>
> RE: Election Laws (Amendment) Act 2016
>
> DATE: January 3, 107
>
> In response to the request for public participation as published on ...., I hereby submit my comments.
>
> 1. IEBC Role in Political Party Nominations
>
> Given the current timelines and the fact that the new Independent Elections and Boundaries Commission (IEBC) Commissioners are yet to be vetted and appointed, it would be prudent to give IEBC the discretion to decide whether or not to assist in political part nominations. This can be accomplished simply by replacing the word "shall" with the word "may" in the proposed amendments to Section 31 which introduced this new role for IEBC.
>
>
>
> However, given the history of contentious history of party nominations and disputed elections, in my view the more appropriate position would be to limit the role of the national electoral management body to the conduct of elections only and to insulate them from the contentious political party nominations beyond what is envisioned in Article 90(2). This would require deleting the provisions of Section 10 of the Election Laws (Amendment) Act 2016.
>
>
>

> 2. Section 18 seeks to Amend the Constitution in Violation of Chapter 16 of the Constitution of Kenya 2010
>
> Section 18 seeks to add new sections to the Elections Act. Section 18 as proposed would grant the IEBC powers to postpone an election by amending section 55B is unconstitutional in that it seeks to amend the Constitution of Kenya in a manner other than is prescribed in the Constitution specifically Articles 255 and 256.
>
>
>
> Article 101(1) of the Constitution provides that "A general election of members of Parliament shall be held on the second Tuesday in August in every fifth year." Both the day, month and years are clearly provided in the Constitution and as such any change to the day, month or year would require an amendment of Article 101(1) of the Constitution.
>
>
>
> The Constitution provides in Article 256 that any amendment to the Constitution by Parliamentary initiative (1) (b) "may not address any other matter" other than that arising from "consequential to legislation arising from the bill". The Election Laws Amendment Bill clearly addresses more than the right of IEBC to postpone elections. Additionally, Article 256 (1) (c) that a constitutional amendment bill "shall not be called for a second reading in either House within ninety days after the first reading of the Bill in that House." (emphasis mine) Further in 256(1)(d) that such bill "shall have been passed by Parliament when each house of Parliament has passed the Bill, in both its second and third readings, by not less than two thirds of all the members of that House." (emphasis mine)
>
>
>
> 3. Finally on the matter of manual verification of voters, should that be accepted as an alternative then I would propose three steps:
>
> a. First, IEBC be required to place in escrow the final database of biometric voter registration data before the elections preferably with a reputable company which has expertise in technology escrow. That that database be accessible for parties and persons seeking to challenge the use of manual verification.
>
> b. Secondly, that a process is defined by which the manual voter verification is used including pictures, names and ID numbers of all voters who are manually verified. Thiswould limit the propensity for fraud and further ensure that any challenges would be definitive in terms of any double voting. In addition all such votes are cast in separate ballot boxes such that any challenges can be confined to a limited

number of votes and not affect the majority of votes in each polling station.
>
> c. That any polling station that manually identifies a voter shall designate the reason (disability, etc.) and further provide the number of individuals identified manually. Polling stations that do not use any manual voter identification must affirmatively assert that no manual verification was done.
>
> Finally, in the future it would be prudent for all parties from the IEBC to Parliament to ensure that elections related legislation is not enacted less than a year to elections.

Republic of ...

Submission of Memoranda to the Senate of the Republic of Kenya on the ~~Elections~~ Laws (Amendments) Bill 2016

44

FROM

WAZLIN (Mrs) FAZALBHAI RAJPUT

Presidential Candidate 2017 & 2007

& National chairperson of the National Muslim Council of Kenya, Global leader & Representing Wanjiku & public interest.

3rd January 2017

For the purpose of urgency as the Senate has just declared that it will not receive oral submissions I hereby highlight key areas I concern to be that I will expound upon during submission.

POINT ~~Point~~ (1) Education Qualification

The Constitution of Kenya 2010 upholds in its preamble paragraph

"We the people of Kenya (who do not hold degrees nor diplomas)

- paragraph 2 - Honoring those who heroicly struggled to bring freedom & justice to our land,

proud of our ethnic, cultural & religious diversity & determined to live in peace & unity as one indivisible nation

recognising the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice & the rule of Law

AND

Article 2(4) Any law that is inconsistent with this constitution is void to the extent of its inconsistency & any act or omission in contravention of this constitution is invalid

AND

Article 38 (1) Every citizen has the right to make political choices, which include the right to (2) Free fair & regular elections based on universal suffrage & the free will of the with expression of the will of the electors for: 2/11

by
office established under the Constitution
or

(3) Every adult citizen has the right, without unreasonable restrictions (c) to be a candidate for public office, or office within a political party & if elected to hold office.

Further to the above

Article 10, the National Values & principles of governance want to be the guiding principles to parliament when enacting laws to create qualification benchmarks, which are do not include degrees or diplomas

& (1) The national values & principles of governance in this Article bind ALL State organs, state officers, public officers & all persons whenever any of them (a) applies or interprets this constitution (b) enacts, applies or interprets any Law or makes or implements public policy decisions. This was not

3/11

[illegible] of IEBC when creating [illegible]
educational qualification which are
still far from the reach of the
common [illegible] is made specifically to
shut out popular & valid candidates.

Further to the above:-

Article 10 (2) (a) patriotism, national
unity, sharing & devolution of power,
the rule of law, democracy and participation
of the people (b) human dignity, equity,
social justice, inclusiveness, human right
non-discrimination & protection of the
marginalized (c) good governance
integrity, transparency & accountability
& sustained development WERE IGNORED
VIOLATED, CONTRAVENED & NOT HEEDED BY
ACCOUNT BY the IEBC or parliament.

Further to the above: I bring to the
attention of the Senate to take
[illegible] the appear of forgery, falsification
[illegible], corruption & fraud within the Senate
hence also Oversee education

4/11

a purchase [illegible] degrees. They are taken & have been for past several years. The presentation of a degree for any elective post is no longer valid or honorable & should be disallowed

The development, gender &, opportunity symmetry, or matrixes have largely been skewed. Until & unless our Nation is able to advance Quality education all the way through University level to every of its citizens, such laws are abusive & unfair & indeed inhumane. We are merely apeing the culture of the western first world democracies while we are still a struggling 3rd world nation yet to level the playing fields & taste true democracy. New Laws are for elites & a patriarchal society - not the majority & for us.

If there degree/diploma qualifications are made to any elective post in town, then a new electors/voters registry must be made & which

5/11

should constitute only those
who have degrees & diplomas to vote
& there elective offices which
require degrees or diplomas.
It would be total Ridiculed & shame
to expect the non degree & non-
diploma armongst to vote.

POINT 2) The Allowance of Re-
- Introduction of a manual Register/
transmission system.

Unfortunately we have a nation
that is Balkanised on tribal/ethnic
lines. This is a stark reality Active
must conside when making Laws &
public policy decisions that have
proved to be detrimental to public
interest, public safety & public opinion
(Here new rule to introduce
a manual transmission system, where
there the court lays waiting by new
new nation against it did
The Law makers first & foremost
failed to observe Article 10(1)(2)(a)(b)
as articulated above in point I.
Bypassing the

6/11

National values & principles of governance as upheld in Article 10 of the Constitution (b) when they enact, apply or interpret any law or make or implement public policy decisions. This has not been done. Hence that ~~Law~~ must not see the light of day.

The Nation is hurt, people were slaughtered, displaced, raped, looted, properties lost & destroyed pre 2008 Todate the perpetrators of that mayhem, caused by a manual vote & Rigging system or rather its weakness to manipulation & rigging by the two the respect & related to the Electoral Core, remain free.

We have had ample time from the date of purchase of our BVR system to correct it, to improve it & improve it. If this was not done, it can only be for the sole reason to leave room for mischief & mayhem.

7/11

hotline & video at the end of
burning already Balkanised
Nation. Again.

The Ruling Regime must not be
allowed to apply its superiority of
numbers in the Parliament home to
pose as its citizenry. What is ~~in the~~
seen as an election rigging
machinery masquerading under the
name of an Electoral transition
system.

India has a phenomenal
register of over 70,000,000.00
million voters. In comparison to our
pathetic figures - they have all expertly
run elections, why can't we?
We backup must only be
electronic - too. We live in an
advanced world & our government
cannot even put in place the
satellite technology & sufficient
battery backups, test & put in place
a Robust State of the Art BVR
exercise. Borrow it from
India. We can.

8/11

even ask India & Pak to send
experts to attend to ~~it~~ as our
here to ensure we have experts.

This opens room for rigging.
as that may be for now the truth.
But it will give fode to a
dispatsied base to cry foul
& bun the nation.

Secondly we cannot ignore
a nation with a Robust massive
opposition with over 5 million
voter. There are reports
of government will be
allowing & giving room to disrupt
& strife unseen by any of us.
This will only push the
Nation already teetering on the
edge of a precipice into a deep
bloody abyss that we cannot
dread to open.
Public interest must
prevail. We Kenyan voter
for transparency now.

9/11

he allowed to be removed from
the graveyard where it has buried
with all those citizens who lost
their lives & were burnt in churches.
History will judge us harshly
I beg upon this honorable senate.
Let us embrace the hopes of the Nation
& those PEV victims & say NO!
Let us move forward with building
our democracy & not going
backwards.
Let us move keys to rub
shoulders with the tigers & Ais
where we truly belong.
With this, I hereby submit
my humble statement reminding
this senate that I was the sole
Made Presidential Candidate in
2007. I a victim & gross
Malpractice & theft with the
2007 general election result was
declared a disputed
election. 10/11

I have suffered what was in the manual transmission system and do not wish to repeat the same again.

I will hope that with these 2 key points this article will allow my submission reach the rave way & provide me & the rest of this citizenry a dignified homicide credible election. If not, it will only be stamping continuing open violence that I foresee 2019 & with open eye. I remain the most politically, systematically, urged persecuted & oppressed citizen in the whole globe of unreasonable & proportions in modern history. God bless you. God bless America. May peace, sobriety & justice prevail.

Nazlin Urea
Fazaldin Report

Presidential Candidate
2007 & 2017, Kenya &
under public interest

2/1/2017
11/11.

PeaceNet-Kenya

PEACE AND DEVELOPMENT NETWORK TRUST
(PeaceNet - Kenya)

45

Swiss Cottages,
Ring Road off Riverside Drive
P.O Box 49806-00100
Nairobi, Kenya

Tel: 020 2037718 / 020 2699434
Mob: 0700 198 122
Email: peacenet@peacenetkenya.or.ke
Website: www.peacenetkenya.or.ke

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

30th December 2016

MEMORANDUM ON ELECTION LAW (AMENDMENT) 2016
To
THE CLERK OF THE SENATE/ SECRETARY PARLIAMENTARY SERVICE COMMISION,
P. O. BOX 41842-00100, NAIROBI

.....

WE MUST CHOOSE BETWEEN COUNTING VOTES OR LISTING DEAD HEADS OF THE VOTERS: PEACENET (AND PARTNER CSOs) STAND FOR A PROCESS THAT AVERTS ELECTORAL VIOLENCE

Introduction

PeaceNet Kenya is a networking organization for peace building organizations to promote nonviolent transformation of conflict among community groups in Kenya and entrench social stability by encouraging networking, collaboration and advocacy for peace.

On July 1st 2016 we made a statement to the effect that campaigns for next general elections in 2017 had started, albeit early, and we stated that this would intensify with time as the elections date gets closer. We have always pointed out that electoral violence and political intimidation are bad for democracy building and social stability, for election results are often skewed in favor of the perpetrators of violence who may not necessarily be the peoples' choice. Almost every election cycle in Kenya since 1992 has generally been characterized by politically instigated electoral violence (though at different scales), and it is the citizens' responsibility to change this trend.

PeaceNet urges political parties, the elected representatives and all contenders to conduct themselves honorably, advocate for peace and engage in violence free electoral process. How they conduct themselves and their utterances betrays the character, integrity and maturity of the persons involved as leaders. Hate speech especially in addition to its criminal aspects, is a product of negative ethnicity, which promotes ethnic politics, hatred and political polarization even where the systems are bound to be effective.

The issue at hand

Currently, tension is rising in Kenya after the government and the opposition have intentionally taken hard-line positions on amendment of laws that will govern next year's elections, as opposed to dialogue which had amicably resolved the same issue at hand.

A Peaceful and Stable Society that upholds Equity & Development.

It is clear that the Jubilee side of the National Assembly on Thursday voted for the amendment to the Election Law (Amendment) Act, 2016 after the Coalition for Reforms and Democracy (Cord) MPs walked out of Parliament Buildings, where a special sitting had been convened. This has set the stage for street protests and possible violence in the countdown to the elections, scheduled for August next year. Our collective position therefore is that: WE MUST CHOOSE BETWEEN COUNTING VOTES OR LISTING DEAD HEADS OF THE SAME VOTERS. We chose to intentionally avert whatever can trigger electoral violence at all cost, because we are a conscious nation.

The Election Law (Amendment) Act, 2016 had been passed in September after being drafted by a special joint parliamentary committee comprising Jubilee and Cord members.

Section 44 (1) of the Elections Laws Amendment Act, 2016, states that "There is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.

Section 38 (A) further states that "For the efficient and effective conduct of elections, the Commission shall determine the number of voters per polling station but such number shall not exceed five hundred voters."

Way forward

These are provisions that in our opinion should not be divisive at all. Honest engagement as a people of the same country (only paying allegiance to different parties) should be the drivers to open dialogue on what can work in the best interest of the citizens, whose only duty will be to make their choices for the leadership they desire. In this regard we propose the following as opposed to changing the law that brings unnecessary animosity:

- On voter verification and results transmission: the Independent Electoral and Boundaries Commission (IEBC) can budget and acquire adequate number of standby batteries and/or solar panels in all polling stations using biometric systems (and electronic gadgets). This will absolve the country from the fear of failure/shortage in electricity supply.
- Regarding the identification of people with disabilities, the (BVR/I) system should be adjusted to detect national identification (or passport) numbers and photo, to retrieve the voter details.
- On transmitting results electronically from a polling station: The government contracted Safaricom for the Virtual Private Network (VPN), which was later blamed for hacking. What should be done is to address the anomaly that might have been presented to court or as raised by the affected parties. The process of acquiring this VPN service could be done in a participatory and coordinated approach to ensure its credibility, reliability and trust by all parties. The VPN system can be enhanced by the service provider (Safaricom or Airtel) through satellite to cater for areas that don't have public network.

- On procurement and use of technology, the IEBC was expected to procure necessary technology at least eight months before the election; test, verify and deploy it at least sixty days before the election. The technology used for the election was restricted to the process of voter registration, identification of voters and results transmission. In case the time is too short for the procurement process, the IEBC could consider leasing the equipment from countries like India, as opposed to changing the law.

Among the changes sought to the law was to allow for manual voting in case of a failure of the Biometric Voter Identification kits, an increase in the maximum number of voters per polling station from 500 to 700, a change to clauses limiting spending by politicians and political parties; and removal of the clauses that require that MPs must have a university degree, while Members of County Assemblies to have a diploma.

These are not issues to bring fragility, which would lead to counting deaths in this country. The politicians should take at least a moment to listen to the voters. The idea of using BVR/BVI can be solved purely by adequate preparations and planning for the elections. The number of voters in a polling station violates no right if it increases to 700 for budgetary purposes. Genuine dialogue would resolve these issues even if the laws are changed or not. It should be a win win agreement to amend sections not contested and uphold the sections which have contentions.

Conclusion

Finally, as the chairman NCIC cautioned during the Kenya Peace Conference we held on 20th Of September 2016, "Prevention is better than cure hence the need for our elected leaders to embrace national peace and reconciliation matters. As partners we reiterate that, we have convinced communities and we shall not tire in forging for nonviolence methods in resolving conflicts. You will all agree that nonviolence is a powerful and just weapon. Indeed, it is a weapon unique in history which cuts without wounding and ennobles the man who wields it".

From the same conference, I will quote Professor Peter Ndege who indicated that: "The history of the world (and Kenya for that Matter) is none other than the progress of the consciousness of freedom". He added an equally important quote from Karl Marx that: "Men (and women) make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past. The tradition of all the dead generations weighs like a nightmare on the brain of the living". We refuse to go back to the past experience and we have open choice to make.

As PeaceNet-Kenya, we urge fellow Kenyans in general to control our emotions and avoid sensational politics to the point of behaving irresponsibly. Kenyans have a proven tradition of looking after each-others' welfare. In times of disaster (or in our religious circles) we see Kenyans coming together time and again to support the needy and

disadvantaged. We believe that is the true character of the Kenyan people. Let us therefore rally around with genuine dialogue to ensure that the next general elections rather than creating disunity among Kenyans will leave us convinced of the need to preserve our Nation Kenya as a united people in spite of our diversity, for the welfare and security of present and future generations. PEACENET (AND PARTNER) STAND FOR A PROCESS THAT AVERTS ELECTORAL VIOLENCE.

Signed

0721284772

Samwel Oando – Chief Executive Officer,
Peace and Development Network (PeaceNet-Kenya)

REV. PETER KIKUVI MAKAU
LUTHERAN CHURCH IN E. AFRICA
P.O BOX 335-00300
NAIROBI
Tel 0722270890
Email. Makaukikuvi@gmail.com

46

CLERK OF SENATE/
SECRETARY PARLIAMENTARY
SERVICE COMMISSION.

NAIROBI.

MEMORANDUM ON ELECTION LAW
(AMENDMENT 2016)

hanks to the Chairs of the Legal and justice/ICT committees and the entire senate all Protocals observed.

I have come here because it is common knowledge across the world that politics is a dirty game and it is becoming dirtier by the day. As a member of clergy I believe I do have the duty to say the Church is divided on the matters discussion and I will limit myself to the Church which is the Temple of the Lord and that is myself. The truth be told we must think twice before engaging church leaders to resolve Political problem

My name is Rev. Peter Kukuvi Makau, formerly of the Methodist Church in Kenya and was defrocked for being sincere and honest to things which are dishonest. I am now serving with a little known Church with fewer than twenty congregations in the country. The Tanzania based Lutheran Church in East Africa under the leadership of Bishop Jesse Kegovi with Headquarters in Moshi Tanzania. He has given a letter but we have not been able to register due to the embargo at the AG's office. We are preaching Christ who is the same yesterday today and forevermore. Amen!

I have served this nation as a teacher, a civil servant Jua Kali Development officer and Minister of the Gospel. a civil servant I knew very well that electronics can fail. served as a supplies staff in the Police Signal's department and on one occasion we were stuck in the desert between Habaweini and Wajir a place where we could not walk back or forwards because of the sand. Our radios could not for about four days Connect with any

of any financial system available. There was also none
we kept on trying to connect with anybody who would
ave us on the fourth day we connected with Kiunga
Station in the least expected end in Lamu. They then
alled Police Headquarters and we were rescued. If we had
u alternative we could not have suffered the risk of
ild life, thirst and hunger for four days.

My take for this matter is thus. is it is spiritual,
olitical, Ethical and Technical in many senses. So as
w look for a solution we must listen to the Kenyan
people in the four dimensions with a view to rising
the bar on matters of integrity in a context of fear
of the negative reprisals of the 2007 General Elections

The Senate and the parliament have a Social Contract
with the people of Kenya. My first observation is that
2 political parties are coming together but the
churches are divided. The Solution is difficult because
we are in a country where Christians are 80%. We
cannot thus import or impose the problems of the divided
church to the political system which for more
stable. We must be professional, Ethical in all
the fields and above in a manner which
will glorify God as He is acknowledged in
the first line of our national Constitution.

On qualification, I must say it is not just a problem in the political circles. We have it in the Church so as we embrace it here the problem which brought about the embargo in registration also touched on the tyranny of numbers and Academic qualifications. It must be dealt with because we are serving between 6 and Eight generations and it is rediculous for someone at this time to present himself for election without a clean Diploma or an excellent 'O' level result slightly above B for the earlier generation because Mr Matiangi has proved to the County we have Phony A's and the problem strides across the County for quite along time. It is everywhere even in the Church we are solving similar problems I am hopeful my Conscetious Senator will assist ~~me~~ ~~in~~ ~~it~~ us as a lawyer in the resolving of these qualification related problems.

In a nutshell we must establish as law the required Standards of Education a Standard which was beaten during the 1980's using the infamous Mlolongo. All what one needed was money and we must come out of that in the next general elections.

In conclusion and in light of the fears prevailing across the divide. We must truly rest our case before the Almighty God may he touch the heart of those who are in deep fear, to know even with a manual system as an alternative God will raise good men to borrow from the wisdom of the Hable Senator of Mombasa who said during the Clean and fairly Corruption free Tanzanian's "Watu wema wako Tuendelee Kuwatafuta"

ID 3039415

Rev. Peter Kikuni Makau.
Lutheran Church in East Africa.

47

THE COMPUTER SOCIETY OF KENYA
RING- ROAD, KILIMANI P.O BOX 70180-00400 NAIROBI
TELEPHONE: 020-5224365 MOBILE:0722 395 900, 0733 738 793, 0733 815 277, 0733 295 779
EMAIL: info@cskonline.org WEBSITE: www.cskonline.org FOLLOW US: twitter.com/csk_online FACEBOOK: cskonline

MEMORANDUM TO ELEVENTH PARLIAMENT THE SENATE

THE STANDING COMMITTEE ON LEGAL AFFAIRS & HUMAN RIGHTS

1. Registration of Voters for 2017 Elections
2. Identification of Voters During 2017 Elections
3. Voting During 2017 Elections
4. Transmission and Declaration of Election Results During 2017 Elections

Presented by:

1. **Julius Ogony** *BEd(Sc); MBA; PhD; CISA; FCSK; PTAK (Senior Counsel Member)*
2. **Stephen Osewe** *BSc (IT); MSc (CI); MSCT (ICT Technical Lead)*

3rd January 2017

1. Registration of Voters for 2017 Elections

The registration of voters for 2017 elections should be done using Biometric Voter Registration (BVR). This should be done upon a voter identifying him or herself by means of national identity card (ID) or valid passport.

Proposed Technology:

Biometric Voter Registration (BVR) kits.

Advantage(s):

i) There is no technology challenge(s) since data can be captured offline in areas with inadequate or no connectivity and later uploaded in IEBC central server(s).
ii) Biometric features are unique hence no possibility of duplicate voter registration.

Recommendation(s):

i) All laptops and BVR kits at the IEBC voter registration centers must have adequate power supply and/or backup power source to maintain required charge.
ii) All laptops must have batteries with minimum ten (10) hours of running off the power mains with a backup battery of the same specification. These gives a guarantee of twenty (20) hours of uninterrupted operation.

2. Identification of Voters During 2017 Elections

The voter identification should be through biometric features using Electronic Voter Identification Device (EVID). This will require no network or telecommunication connectivity. The final IEBC voter registration database (approved by all stakeholders) will be resident in the laptop(s) used by IEBC officers at all polling stations.

Proposed Technology:

Use of Electronic Voter Identification Device (EVID).

Advantage(s):

i) No technology challenge since the final IEBC voter registration database will reside in the laptop(s) used by IEBC officers at the polling stations. This offers the advantage of offline operation from the server and guarantees no authorized access for manipulation.
ii) No unregistered voter can take part in the elections.
iii) No dead registered voters can vote.
iv) This will eliminate use of national identity card (ID), passport and IEBC voters card as the only means of identifying a voter. A voter may lose his/her ID, passport or IEBC voters card prior to election date. Loss of these identification documents should **NOT** deny them their constitutional rights to participate in the general elections.
v) There is no technology challenge posed by this identification method because no network connectivity is required for the identification exercise.
vi) Positive or negative identification will be used to corroborate the total votes cast at each polling station.

Recommendation(s):

i) All laptops and EVID kits at the polling stations must have adequate power supply and/or backup power source to maintain required charge.

ii) All laptops must have batteries with minimum ten (10) hours of running off the power mains with a backup battery of the same specification. These gives a guarantee of twenty (20) hours of uninterrupted operation.

3. Voting During 2017 Elections

The voting in 2017 election will be manual by use of ballot papers and **NOT** electronically.

Proposed Technology:

None. Use of marked ballot papers cast in ballot boxes.

4. Transmission and Declaration of Election Results During 2017 Elections

The transmission of results from all polling stations should be done electronically through Results Transmission System (RTS) to the IEBC public web portal which can be accessed publicly through internet connection. This will be for purposes of verification and tallying by the public and interested parties. The transmission should be done immediately the IEBC returning officers, all political party agents and other stakeholders are in agreement that the results are correct and there is no dispute on election process, vote counting and vote tallying.

Proposed Technology:

i) Use of at least four (4) reputable telecommunication service providers (as opposed to one in 2013 elections) procured through competitive process. Each will act as a backup of the others. The service providers must show capability and competence of handling data traffic to be experienced during 2017 elections.

ii) Use of Very Small Aperture Terminals (VSATs) in areas with inadequate or no 3G band network coverage.

iii) Use of satellite telecommunication in areas with inadequate or no 3G band network coverage.

iv) Lease of SITA (Société Internationale de Télécommunications Aéronautiques) redundant lines to be activated in case of failure of all the above, or as need arises.

SITA is a multinational Information Technology company providing IT and telecommunication services to the air transport industry. It has its headquarters is in Geneva with a local office in Nairobi (I&M Bank House, 2nd floor, 2nd Ngong Avenue). SITA was the first company in the world to handle data traffic in real time via a packet switched network over common carrier leased lines.

Advantage(s):

i) No chance that all the four (4) telecommunication service providers will fail at the same time.
ii) SITA lines will **NEVER** be down.
iii) No delay in transmission of poll results. This will enhance accountability, transparency, and reduction of public anxiety and suspicion on 2017 election process.
iv) Increased public access to all polling stations results through the public web portal.
v) IEBC will achieve one-way transmission of encrypted poll results data. This will act as fool-proof to data manipulation.
vi) All electronic devices that will be used to conduct and transmit 2017 poll results will operate within the IEBC Virtual Private Network (VPN) and will have their unique global mac addresses for each device.

Recommendation(s):

i) IEBC can lease telecommunication services (e.g. VSATs, satellites, SITA lines, etc.) to be used during 2017 election period from reputable local telecommunication service providers and SITA company.
ii) All above proposed technologies will operate within IEBC secure Virtual Private Network (VPN).

NB.

CSK is ready and willing to help IEBC implement above technology proposals with other stakeholders.

48

Hello Bwana Director,

Wishing you all a Happy & Prosperous 2017!

The Kenya Diaspora Alliance (KDA) as a Federation of Registered Diaspora Organizations, wishes to make a formal presentation/submission to the Hon. Sen. Amos Wako Committee on:-

- ***Electronic vs Manual Back-up for Voter Identification and Results Transmission***
- ***Degree Requirements for Legislators & MCAs***
- ***Capping of Campaign Finance***

Is it possible to book a slot on Monday any time from 11am (or any other available slot the Hon Committee can avail) for us to also offer professional and Diaspora inputs?

Just for the record, KDA's Global Chairman introduced Internet in Kenya/Eastern Africa in 1995, is a Former Elected MP and has current research interests in "Cyber-security and Electoral Technologies", and is therefore well versed to offer competent technical information to the Committee, especially on the first item above. In 2000, he represented the ICT Sector in the Government-appointed National Y2K Committee that ensured Kenya smoothly managed transition of the "2000 Millennium Bug", and the same year was named by the Computer Society of Kenya (CSK) "Father of Internet in Kenya". He also served as Temporary Chair of the "Energy, Public Works & Communications Committee" of the 8th Parliament, through which he was instrumental in the passage of the National Communications Act (1998), among others.

As Global Chair of KDA, and having served several African governments in diverse, senior ICT Policy & Management positions, he is fairly conversant with not only electoral systems regionally, but globally. We are available to share these experiences with the Esteemed Committee, if an opportunity lends itself.

With kind regards,
Shem

Shem J. Ochuodho, MSc (Eng), PhD, LLD (Hon)
Senior Advisor
Ministry of Telecom & Postal Services
Republic of South Sudan (RSS), Juba
Author: ***Dawn of a Rainbow*** (2012)
Cell: +211-955-021040/+254-725-016679

Kenya Diaspora Alliance (KDA)

P.O. Box 58638 (00200)
NAIROBI, KENYA
Cell/KE: 0725-016679

P.O. Box 2805
WASHINGTON, DC, 20005, USA
E-mail: info@kenyadiasporaalliance.org

Our Ref: KDA/16/19

18th November, 2016

Mr Ezra Chiloba
CEO/Secretary
Independent Electoral & Boundaries Commission (IEBC)
NAIROBI

Dear Sir,

REF: PUBLIC/DIASPORA COMMENTS ON THE DRAFT REGULATIONS ON ELECTION TECHNOLOGIES

Thank you for proactivity in publishing the above referenced Draft Regulations. We are alive to the fact that you are operating with tight timelines, and accordingly apologize for slightly late submission of our comments.

As we have indicated before, Diaspora, being non-resident do not ordinarily see notices placed in Kenyan newspapers. While we encourage our members to regularly check the IEBC website, we are also aware most Diaspora don't even know about the site. As a pseudo-umbrella body of Diaspora organizations, we have established a 'one-stop' Diaspora Portal (www.thediasporaportal.com), owned and managed by the Diaspora themselves, that we would encourage you to in future copy/post any urgent important information you wish to reach Diaspora. Meanwhile, because we are aware Parliament is yet to discuss the Draft Regulations, we take the liberty to share our thoughts on the same.

Overall, KDA thinks it is great document your team has produced, if it can be implemented to the letter. For successful delivery and use of electoral technologies, proven professional management experience (of large ICT projects) is top priority. While there are several good senior ICT Project Managers within and outside the country, few have proven experience in managing

national or large scale elections. We are happy to extend references should you advertise for experts.

In the attached Memo, please find a summary of our comments on Article by Article basis. In general, we advocate for professionalism, ethics, inclusion and transparency. While we think the Draft Regulations and existing Electoral Laws on this topic may be sufficient for purposes of next year's elections, moving forward more robust arrangements for technology use are required. Most paramount is for Kenya to declare 'election technologies and systems' as '***critical national infrastructure***', and given the necessary attention, resource and protection that we give to military/defense installations, security/emergency response systems, aviation/key transport systems, etc. If not anything else, the experiences of 2007/08 should convince anyone that this is necessary.

In addition, below are a few more observations and suggestions:

- KDA would like to see the Public Key Infrastructure (PKI) which is already in place as per the ICT/Electoral Communications Laws, used to generate digital certificates and signatures as a clear, transparent, and accurate method of voting by eligible citizens.
- IEBC also has the duty to register all eligible voters from all the regions, not only in-country but also non-resident Kenyans (Diaspora). We are alive to the fact that some better endowed Office seekers take advantage of this to go beyond mobilization, and literally invest in registering voters. Registration of voters should transcend the traditional registration centers and embrace mobile voter registration, registration by e-mail and post, even a door-to-door campaign. If all the resources necessary are allocated in good time and put to proper use, this feat is tenable.
- Election is a right and a duty to all eligible citizens. All concerned government agencies and infrastructure like the national population registry and immigration data should be used to facilitate mobilization and registration of the voter population. Apart from IEB- initiated processes, the government should take an upper hand and push for this with the resources it has.
- IEBC's ICT & Research Directorates need to be more proactive at piloting, testing and introducing innovative electoral technologies. In the area of mobile voting, the world is looking at Kenya to provide leadership, given

its prowess in this domain. Kenya shouldn't fail to rise to the occasion to invent the 'Next Big Thing' in this rare, competitive space.

We remain available for any further necessary consultations. We acknowledge inputs of our Diaspora Members, Friends of Diaspora, and Partners like the IED.

Yours Sincerely,

Dr Shem J. Ochuodho
KDA's Global Chairperson

CC: Hon Speaker of National Assembly
Hon Speaker of Senate
Mr David Mathieson, London, UK
Dr Wilfred Odoyo, Seoul, Korea
Mr Mike Mills, Edinburgh, UK
Mr Joseph Muhoro, Institute of Education in Democracy (IED)
Prof Jason Githeko, Egerton University (Ex-USA)

Press (Open Letter)

ANNEX: COMMENTS BY AN EXPERT FRIEND OF KDA (MR DAVID MATHIESON, UK)

From: **David Mathieson** <DGIM@compuserve.com>

To: ictregulations@iebc.or.ke

CC: Shem Ochuodho

31 Oct at 4:39 PM

I have been asked by friends in Kenya to comment on the proposed ICT Regulations, based on my long experience as an IT Director, Programme Manager and Consultant, and my 17 years as Director / Treasurer of Electoral Reform International Services (ERIS) and advisor to electoral commissions in eastern and southern Africa.

I strongly commend both the proposed regulations and the motivation behind them. While the regulations may no doubt be adjusted or clarified in many ways, they describe exactly what I would do when asked to organise the ICT for an election commission, or would advise any commission to do when setting up its ICT functions and data centre. Documenting these as formal regulations also serves to commit non-technical Commissioners and other stakeholders to supporting what is required to successfully develop and implement such technologies and so deliver a successful election.

I have also developed and implemented similar rules for commercial clients in the UK and Europe.

The adoption of these regulations will highlight some of the problems facing the IEBC and the true scale of the work to be done, including:

- The need for a strong programme manager, able to develop and deliver the ICT programme, with the political support to be able to hold suppliers and other agencies to account, and to avoid being forced into unrealistic compromises and timescales;
- Experienced project and technical staff to support the programme manager;
- Sufficient funds and resources: the biometric voter registration is not cheap, but experience shows that the work to ensure that staff are trained, systems work, and the quality of the voter register is good enough, can cost as much again as the original hardware;
- Time to do the work. The requirement to do public testing and demonstrations, followed by formal certification, is absolutely the right way to work, but it implies that before the public testing the systems have been set up, staff trained, and there has been rigorous testing in private. Any public performance depends on everyone learning their part and rehearsing together before the public is invited.

I know little of the Secretariat and the ICT staff, but the what I have heard from contacts has been positive and I would have few fears there. The funding depends on Government and Donors. BUT: I would be very concerned at the time available. I would have planned for a year of work between agreeing the programme and starting full public biometric registration, and there are only months remaining to the election.

The new Commission and the Secretariat have an enormous challenge, and I can only wish them the best of good fortune.

Regards

David Mathieson, MA MBCS CITP
29 Chartwell Place
Epsom
Surrey KT18 5JH UK
Tel: +44 1372 724 206
Mob: +44 7785 254 720
DGIM@compuserve.com
Skype: David.G.I.Mathieson

COMMENTS BY KENYA DIASPORA ALLIANCE (KDA) ON THE DRAFT IEBC/ICT REGULATIONS

Article 4(2): Do 'special needs' here include Diaspora?

19: IEBC should rely on more than 1 telecom service provider for resilience

23: What penalty for telcos which fail to provide network security and availability?

Apart from Agreement with telcos, how about Agreements with other infrastructure service providers, especially power (possibly also more than 1 including back-up solar systems)

26: Suspension of technology – should be only after consultation with the Technical Committee

31(1)(d): How do we define 'Stakeholders'? Diaspora should be included.

31(2)(b): Not only receive updates, but also review and advise on corrective measures

33: I guess by Technology Service Provider, we mean 'Telecom' Service Provider (TESPOK)

We should also include Computer Society of Kenya (CSK) or any such comparative ICT/IT professional body

Also a Diaspora community representative, and a Representative of the subsidiary infrastructure service providers (e.g. KPLC)

We don't think all Commissioners should be members; perhaps only 1 or 2 representatives

36: I don't think the Commission should Chair the Committee. The Committee should elect its own Chair from among the Members, preferably a senior, respectable ICT/IT expert

37: Not Commission deciding meetings, but the Chair, in conjunction with the CEO IEBC, who should also be the Committee's Secretary

38: Allowances – add 'in line with Government's public service guidelines and regulations' in order to avoid possible abuse

41: Non-disclosure of technology info: why limited only to Commission Staff, but not also Committee Members?

Does Kenya have provision for election technology to be declared 'critical infrastructure'? If it does, we should consider declaring 'Voting/Electoral Technologies' Critical Infrastructure befitting the necessary cover and protection like other similar infrastructures (military/defence, power, aviation/transport, etc). See for instance: https://www.dhs.gov/critical-infrastructure-sectors.

ANNEX: COMMENTS BY AN EXPERT FRIEND OF KDA (MR DAVID MATHIESON, UK)

From: **David Mathieson** <DGIM@compuserve.com>

To: ictregulations@iebc.or.ke

CC: Shem Ochuodho

31 Oct at 4:39 PM

I have been asked by friends in Kenya to comment on the proposed ICT Regulations, based on my long experience as an IT Director, Programme Manager and Consultant, and my 17 years as Director / Treasurer of Electoral Reform International Services (ERIS) and advisor to electoral commissions in eastern and southern Africa.

I strongly commend both the proposed regulations and the motivation behind them. While the regulations may no doubt be adjusted or clarified in many ways, they describe exactly what I would do when asked to organise the ICT for an election commission, or would advise any commission to do when setting up its ICT functions and data centre. Documenting these as formal regulations also serves to commit non-technical Commissioners and other stakeholders to supporting what is required to successfully develop and implement such technologies and so deliver a successful election.

I have also developed and implemented similar rules for commercial clients in the UK and Europe.

The adoption of these regulations will highlight some of the problems facing the IEBC and the true scale of the work to be done, including:

- The need for a strong programme manager, able to develop and deliver the ICT programme, with the political support to be able to hold suppliers and other agencies to account, and to avoid being forced into unrealistic compromises and timescales;
- Experienced project and technical staff to support the programme manager;
- Sufficient funds and resources: the biometric voter registration is not cheap, but experience shows that the work to ensure that staff are trained, systems work, and the quality of the voter register is good enough, can cost as much again as the original hardware;
- Time to do the work. The requirement to do public testing and demonstrations, followed by formal certification, is absolutely the right way to work, but it implies that before the public testing the systems have been set up, staff trained, and there has been rigorous testing in private. Any public performance depends on everyone learning their part and rehearsing together before the public is invited.

I know little of the Secretariat and the ICT staff, but the what I have heard from contacts has been positive and I would have few fears there. The funding depends on Government and Donors. BUT: I would be very concerned at the time available. I would have planned for a year of work between agreeing the programme and starting full public biometric registration, and there are only months remaining to the election.

The new Commission and the Secretariat have an enormous challenge, and I can only wish them the best of good fortune.

Regards

David Mathieson, MA MBCS CITP
29 Chartwell Place
Epsom
Surrey KT18 5JH UK
Tel: +44 1372 724 206
Mob: +44 7785 254 720
DGIM@compuserve.com
Skype: David.G.I.Mathieson

CELL: 0723 926 734 / 0735 637 814
0725 712 538

KNUT BUILDING 4TH FLOOR
MFANGANO STREET, NAIROBI
P.O. BOX 30407 - 00100
TEL: 020-2220387 / 2223509 / 2223849
EMAIL: info@tuckenya.org
Website: www.tuckenya.org

49

TRADE UNIONS CONGRESS OF KENYA
(TUC-Ke)

All correspondence through the General Secretary

TUC-K/933/1/2017.

January 3, 2017.

Mr. Jeremiah M. Nyengenye,
Clerk to the Senate,
National Assembly of Kenya,
Parliament Buildings,
NAIROBI.

Attention:

Hon. Amos Wako, EBS.,
Chairman,
Judicial, Legal and Administrative Committee of Senate.

AMENDEMENT TO THE ELECTORAL LAW: OUR POSITION:

The Trade Unions Congress of Kenya (TUC-Ke), a federation of Trade Unions representing workers in the public sector of Kenya namely: Kenya National Union of Teachers (KNUT), Union of Kenya Civil Servants (UKCS), Kenya Universities Staff Union (KUSU), Universities Academic Staff Union (UASU), DOCK Workers Union (DWU) and Kenya Independent Commissions Workers Union (KICOWU) has unanimously considered the matter of amendment to electoral law that is before your committee and taken a position thus:-

Given technological advancement that Kenya has undergone and more so in this digital era, there is need to embrace technology and only allow electronic voter identification and transmission of votes in the forthcoming general elections.

The Government needs to do all that is possible to avail network including use of satellites to reach out to those areas perceived to have poor network coverage. It is our considered view that if the above is undertaken, the election results will be credible and trustworthy to all stakeholders and shall guarantee National PEACE.

We submit.

(WILSON SOSSION)
GENERAL SECRETARY
TUC-Ke.

The Secretary Generals of

Kenya National Union of Teachers,
Union of Civil Servants,
Kenya Universities Staff Union,
Universities Academic Staff Union,
DOCK Workers Union,
Kenya Independent Commissions Workers Union.

VOTER INFORMATION NETWORK AND EDUCATION - AFRICA
V . I . N . E - A f r i c a
P.O. Box 27017 - 00100, Nbi - Kenya Tel: (+254) 724 430621/ (+254) 733551527 Email:- info@vineafrica.com Web: www.vineafrica.org
1st Floor, Hermes House, Tom Mboya Street Next to Communications Workers Union

29th December 2016

The Justice and Human Rights Committee,
The Senate
County Hall
Nairobi.

NAIROBI.

DEAR SIR/MADAM,

REF: ELECTIONS AMEMDMENT LAWS 2016

Voter Information Network and Education –Africa (VINE –AFRICA) is a nonpartisan and nonprofit making civil society organisation registered in Kenya with focus on good governance .The organization advocates for election reforms, undertakes voter and civic education programmes, participates in electoral process monitoring as well as awareness campaigns on electoral and legislative processes aimed at consolidating democracy across Africa.

We propose the following;

1. A complimentary system to the electoral electronic system of Identification of voters which should be a printout in hard copy of the same details as in electronic voters identification device (EVID) to enable all citizens in a voter register to elect their leaders.
2. A polling station should have 800 voters because in some areas like highly densely populated urban areas there is likely hood of lacking enough space in public primary schools e.g Mathare 4A, Ngunyumu, Lindi primary school among others in Nairobi County.
3. Special features and attributes of identification of voters to include facial, name and identification numbers and to remove voice, DNA and hair attributes as IEBC registration system (BVR) do not capture those details.

Enclosed herewith are two election observation reports indicating the number of voters who could have been denied an opportunity to elect their leaders simply because they could not be identified by EVID and election officials had to resort to the printed register to realise their rights as provided for in Article 38 of the constitution.

Thank you in advance.

Yours faithfully,

ERIC OYWA AYIEYE
EXECUTIVE CHAIRMAN

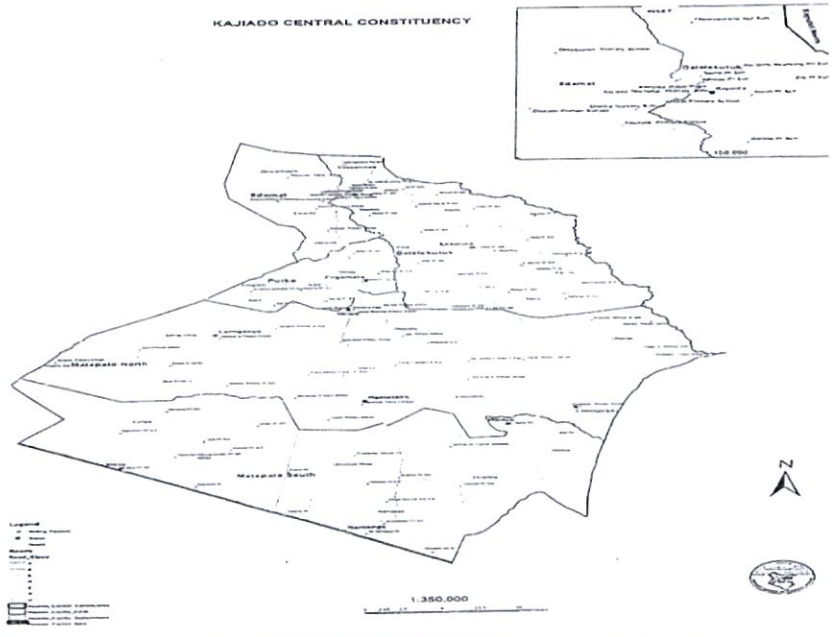
VOTER INFORMATION NETWORK AND EDUCATION-AFRICA

(VINE-AFRICA)

TEL: 0724430621/0733551527

ELECTION OBSERVERS REPORT

KAJIADO CENTRAL CONSTITUECY MEMBER OF NATIONAL BY-ELECTION CONDUCTED ON 16TH MARCH 2015



Team Leader
ERIC O.AYIEYE
EXECUTIVE CHAIRMAN

TABLE OF CONTENTS

I. EXECUTIVE SUMMARY..... 2
II. INTRODUCTION TO THE MISSION..... 2
III. POLITICAL BACKROUND..... 3
IV. ELECTION CAMPAIGN..... 3
V. PREPARATION FOR ELECTION DAY..... 5
i. MAPATO SOUTH ASSEMBLY WARD
Namanga AIC Pry School Polling Station..... 4
Namanga Township Primary School Polling Station.... 5
Olmanie Primary School Polling Station..... 6
ii. MAPATO NORTH COUNTY ASSEMBLY WARD
Ngatataek Primary School..... 6
iii. PURKO COUNTY ASSEMBLY WARD.....
Ilparua Primary School Polling Station..... 7
VI. RESULTS PROCESS..... 8
VII. ELECTION RESULTS..... 8
VIII. OBSERVATIONS..... 8
IX. RECOMMENDATIONS..... 10
X. CONCLUSION..... 11
XI. LIST OF ABBREVIATIONS..... 14

EXECUTIVE SUMMARY

The Kajiado Central Constituency by-election was marked by high voter turnout and overall voter awareness unlike other by-elections. The campaigns culminating into the polling day were very active from both ODM/CORD and JAP parties who were the main contestants and it was also practically free of any incidents of campaign violence.

There was generally feasible display of:

- The voters register did not have any problem as most voters were identified by EVID with negligible cases that were identified through printed register and were allowed to vote.
- All the polling stations opened at 6.00 o'clock as required and closed in time with no shortcomings in polling stations we covered in our scope.
- It would also escape notice that despite the fierce competition this by-election demonstrated there were overall acceptance of the results among the electorate even through the losing candidate/party raised certain reservations because of the narrow margin.
- In spite of this, election day proceeded smoothly without any major incident of note. Equally RTs auxiliary to the EVID did not disappoint not withstanding KCK of mobile phone transmission network in the constituency in some areas when it came to transmission of results after counting to the constituency tallying centre.

INTRODUCTION TO THE MISSION

VINE-AFRICA team formally applied for accreditation following an appeal by IEBC advert posted in the mainstream media and was duly accredited after meeting the requirements. We registered our first appearance in the constituency on Saturday 14th March 2015.

Our mission was primarily to make wide sweeping observations on the election process to see whether it's represents the wishes of the electorate.

VINE-AFRICA as a body charged with civic/voter education, did not reserve ourselves to any scope outside legitimate boundary provided and were thus seeking demographic information and

areas within the electorate that were in dire need of civic education in matters pertaining to voter awareness and education.

Our formal interaction with IEBC occurred on 14 March 2015 at Maasai Technical College in Kajiado Town during observers briefing where we had fruitful engagement with other accredited observers graced by IEBC Deputy CEO, Ms Betty Sungura, Acting Director Voter Education and Partnerships, Ms Ann Nderitu and Returning Officer Mr. Maurice Owino Ligulu among other secretariat staff.

Thereafter we took time to monitor the ongoing campaigns as this was the last day of campaigns.

POLITICAL BACKGROUND

Kajiado Central Constituency consist of five electoral assembly wards; namely Matapato South, Matapato North, Purko, Dalalekutuk and Ildamat. During last general and election held in March 2013, Hon. Joseph Nkaissery, ODM won the National Assembly seat. However, Hon Nkaissery resigned in December 2014 after being appointed as Cabinet Secretary to the Cabinet necessitating the subject by-election.

As at the close of clearance by the constituency returning officer, three candidates were validly nominated to run for the by-election.

1. ELIJAH MEMUSI KANCHORY - ODM
2. PAUL TUTUI - JAP
3. KUNTAI NKASHUMA - INDEPENDENT

ELECTION CAMPAIGN

As already mentioned above, we officially registered our presence in Kajiado Central constituency on 14th March 2015 when the electoral campaigns were coming to a close.

We thus had the opportunity to observe the last day of election campaign. We did not observe any ugly incident; however, what we observed of note was the use of government vehicle in political campaign by Mrs. Agnes Ndetei of National Drought Management Authority on behalf of Jubilee Alliance Party candidate Mr. Patrick Tutui.

This is blatant violation of electoral laws and code of conduct signed by all candidates and political parties participating in elections which can lead to disqualification of the said party and candidate from election.

The election campaigns saw a high level of participation on both sides of ODM/CORD and JAP candidates with JAP campaigns being led by none other than His Exellency, President Uhuru Kenyatta and Deputy President William Ruto on three occasion accompanied by Interior Cabinet Secretary Mr. Joseph Nkaissery while on the ODM/CORD led by Rt. Hon. Raila Odinga, Hon Kalonzo Musyoka and Hon. Moses Wetangula.

PREPARATION FOR ELECTION DAY

IEBC was well prepared for the by-election and this was seen in the orderly manner campaigns were conducted without violence in the vast constituency during the entire campaign period.
There were high levels of consultations among parties/candidates, agents, election officials and security officers.
This was evidenced by the manner in which political party agents at representative polling stations agreed easily on valid and invalid votes during counting with ease. In summary, there was generally high level of preparations in respect of the elections.

MATAPATO SOUTH ASSEMBLY WARD:

Namanga AIC Primary School

- We opened the polling day at AIC Namanga Primary School polling station number 077 with 567 registered voters.
- The presiding Officer, Mr. David Kuntai took all the political party agents
- The station opened polling at exactly 6.00 O'clock after sealing of all ballot box corners. At the time of opening, there were 5 agents, 3 for JAP and 2 for ODM.
- The first two voters were election officials registered at the centre and thereafter other voters followed suit.

At 6.50 o'clock a voter came with assistant voter. The PO administered oath of secrecy to the assistant voter before proceeding to the polling booth to mark the ballot for the voter. Around 15

minutes later another assistant voter came and the PO administered oath of secrecy before the duo proceeded to the polling booth.

At around 7:15 o'clock, the first assistant voter came back as a political party agent with appointment letter and JAP identification badge demanding to be an agent.

He was very arrogant to the PO and other agents and started making wild claims that election officials were rigging the elections on behalf of Mr. Memusi. Our team had to intervene during the melee and informed the PO that the person cannot be an assistant voter and an agent at the same time and so since he had sworn an oath of secrecy earlier he cannot be both so he has to leave the station.

A voter on the queue also informed the PO that the young man had previously offered them cash to come and vote for a particular candidate and at that time the PO declared him persona non grata and he was ejected out of the station forcefully by the security officers and told not to be seen around again.

There were no cases of voters missing in the EVID register by 7.30 O 'clock and two assistant voters were documented so far by the time we left the station.

Namanga Township Primary School

Thereafter we proceeded to Namanga Township Primary School polling centre number 073 with total of 3374 registered voters. In this centre there were 5 polling stations with 700 voters each.

All the stations opened at exactly 6.00 o'clock with two political agents each with one representing ODM and JAP.

AT 9.00 o'clock, a voter came who seemed to be unaware of her registration centre and was identified by EVID to be a registered voter at Namanga AIC Primary School and was directed accordingly.

At 10.00 o'clock 7 voters in all the 5 polling stations at the centre could not be identified however, they voted because their names were in the printed registered.

Political party agents for JAP displayed their political party badges and we notified the respective POs that this is equivalent to campaigning and displaying of political party colours inside the polling station and at the booths when assisting voters.

Olmanie Primary School Polling Station

Thereafter we proceeded to Olmanie Primary School polling station centre number 034 with 311 registered voters.

The presiding officer, Mr. Dickson Oitoi took us through the seals used in sealing the ballot box.

At the time of opening there were 4 agents representing both ODM and JAP equally.

Three voters were not identified by EVID but were allowed to cast their votes because their names were in the printed register.

All JAP political party agents displayed their political party badges while ODM had IEBC political party agents. We informed the PO of this anomaly and they were ordered to remove them and to display IEBC political party agents.

At 12 o'clock 220 voters had cast their ballots representing 70% of registered voters.

During our observation of polling by 20 voters, only 2 voters could mark ballot papers on their own, all the rest had to be assisted to mark ballot papers.

MATAPATO NORTH COUNTY ASSEMBLY WARD:

Ngatataek Primary School Polling Station

From Olmanie Primary School polling station our team preceded to Ngatataek Primary School polling station in Matapato North County Assembly ward with 760 registered voters.

At Ngatataek Primary School during our observation we noted a case of a voter with shared national identification card number who happened to be co-wives because they were known to the election officials and came from the same locality. At the time of our team ,she was yet to vote because the PO was still trying to consult with IT department on the matter.

EVID machine failed at around 1427 hrs and after several minutes of failed trials, lasting 15 minutes, the PO decided to use the printed register. After 3 voters had cast their votes using the printed register the machine came back to life and it's use continued thereafter smoothly without any problem.

2 voters were turned away because their names could not be identified in the EVID or printed register.

At around 3 o'clock, people who had cast their votes but wee within the school compound became rowdy and demanded ejection of a suspicious looking man wearing dark glasses inside a classroom next to the polling station on allegations that he was paying voters after casting their votes in favour of JAP candidate.

The man was said to have been inside that classroom since 9 o'clock in the morning and when challenged he claimed that he was a CID officer on duty a fact which was confirmed by one of the two election security officers on duty from Kenya Prisons Service. Our team informed the PO regarding the chaos and she denied knowledge of such security officer seconded to the polling station except the uniformed police officers under her authority. She intervened to calm the situation which was threatening to get out of control and the man was finally ejected out of the polling station and was driven out in a Land Rover registration KAJ 016Y which had been parked at the polling station all along.

After he left, the crowd became calm and continued watching from a distance as voters lined up to cast their ballots.

PURKO COUNTY ASSEMBLY WARD:

Ilparua Primary School Polling Station

VINE –Africa team closed the polling day at Ilparua Primary School polling station in Purko County Assembly Ward Centre number 004 with 228 registered voters.

The presiding officer gave us information on serial numbers of ballot box, ballot papers and seals in use. The polling station opened at exactly 6 o'clock in the morning and 4 political party agents were present representing ODM and JAP equally.

There was not a single case of a voter's information not captured in the EVID. No voter turned up to vote from 20 minutes past 4 o'clock as it seem they had all turned out to vote early enough and wait for the results.

Voting officially closed at 5 o'clock in the evening. The PO then closed the aperture and officially put a green IEBC seal and all took note of the serial number. She then invited the party agents and gave them a blue seal which one of them used in sealing the aperture

The presiding officer then ordered a 5 minute break after which the polling station was converted to a counting hall. Thereafter the presiding officer and the counting clerks sorted out all the votes according to candidate's names and all were counted and reported accurately and results accepted and signed by all the party agents without any complaint. Out of the 228 registered voters in the centre 213 voted in the election representing 93.4% of the voter turnout.

Elijah Memusi	-	83
Patrick Tutui	-	130
Kuntai Nkashuma	-	0
Total	-	213

The presiding officer then transmitted the results to the constituency tallying centre after all the political party agents signed the results declaration form.Despite the high number of assisted voters; there was not a single rejected vote in this particular polling station.

OBSERVATIONS

1. Opening Of Polling Stations

We officially opened AIC Primary School polling station at 6 o'clock in the morning and all other stations we visited reported opening at that particular time. In fact Presiding Officer, Namanga AIC Primary School was ready at 0545hrs and held prayers with all party agents and election officials and only waited for the official time for voters to start voting in which the first two voters were election officials registered at the centre.

2. Layout Of Polling Stations

In all the polling stations we visited, the station layouts were excellent allowing in the free entry and exit of voters into and out of the polling stations without any hindrance.

3. Secrecy Of The Vote

In all the polling stations we visited, with Olmanie Primary School Polling Station leading with up to 95% assisted voters there is no secrecy of the vote as the agents can take down statistics of the votes in the ballot box before counting with accuracy of up to 75% degree.

4. Voters Register

The EVID voters register functioned very well in all the polling stations with negligible malfunctioning but users still need adequate training on usage in order to reduce the time taken to identify each voter because in multiple elections as happens in Kenya during general election the time taken to process one voter may prolong the queues and make voters frustrated.

5. Order In Polling Stations

There was order in all the polling stations we visited except Ngatataek Primary School Polling Station in Matapato North Assembly ward where a crowd became unruly because of a man acting suspiciously.

6. Security Officers

In all the polling stations we visited the security officers on duty were very professional and diligent in their duty except at Ngatataek where an alleged criminal investigations officer had been operating from a classroom next to the polling station from 9 o'clock up to 3 o'clock without knowledge of the PO.

It is the rule of law that only voters and accredited people are allowed within the polling station and for a man to who is not a voter neither an election official nor accredited person to be stationed in a class adjacent to the room where voting is taking place for around six hours without knowledge of the presiding officer then definitely that is breach of election rules.

IEBC should liaise with Inspector General of Police in order to avoid such future occurances in deployment of covert security officers during elections so as to avoid integrity.

7. Assisted Voters

All the polling stations we visited the number of assisted voters were very high with Olmanie Primary Schooling polling station recording the highest percentage at 95% of assisted voters.

The service offered to assisted voters was friendly and good and made them leave the polling booths like satisfied customers after purchase of a long desired item or service and this probably reflected the high voter turnout and nil rejected votes in an area of low literacy levels.

8. Assistant Voters

We encountered two assistant voters during the polling. The Presiding officer administered to them oaths of secrecy before leading the voter to the booth and they both marked the ballots for their voters before the voters themselves cast them in into the ballot box.

IEBC should come up with a policy on assistant voters in order to prevent an occurance which took place AIC Namanga Primary school where a voter wants to wear two hats at the same time;that is of marking a ballot paper and a political party agent.

We commend the action of the presiding officer in stamping his foot and standing to such bullying tactic and provocation without disrupting the election process.

COUNTING, TALLYING AND ANNOUNCEMENT OF RESULTS

We must commend the election officials for the open and transparent manner in which vote counting, tallying and announcement of results was done both at the polling and the constituency tallying centres.

The presiding officer first confirmed the total votes cast from the EVID. Therefore they sorted all the votes cast and they were accurate and added up to the confirmed number of votes inside the ballot box before counting started, agents signed the results declaration form and then she transmitted the results to the constituency tallying centre. The agents then confirmed that the transmitted figures are the same as the ones they signed and they all left the polling station chatting together.

BALLOT BOXES

Ballot boxes used were all located at the centre of the room and all had serial numbers and were marked Member of National Assembly to avoid any ambiguities.

There was also another ballot box in the room which was not in use and was mostly placed at the periphery.

POLITICAL PARTY BADGES / SYMBOLS

We observed use of political party badges by Jubilee Alliance Party agents in all the polling stations we visited and notified the Presiding Officers that it is wrong because it is like voters coming to vote and queuing up in T-shirts and caps of their political party candidates which is prohibited. Under election rules.

We were happy that Presiding officers took heed of our advice and implemented the and the agents too did not take offence.

SHARED NATIONAL IDENTIFICATION CARD NUMBER

AT Ngatataek primary school polling school,we encountered a case of shared national identification card number by two women who happened to be co-wives.Though she was positively identified by the EVID and photograph, at the time we left the station she was not yet allowed to vote because someone else had voted using her id

RECOMMENDATION

As observed above, there are some issues which IEBC needs to come up with and ensure the secrecy of the vote is cardinal and paramount tenet of secret balloting.

The commission should roll out an awareness and voter education campaign to sensitize voters on how to mark ballot papers without leading to rejected votes.

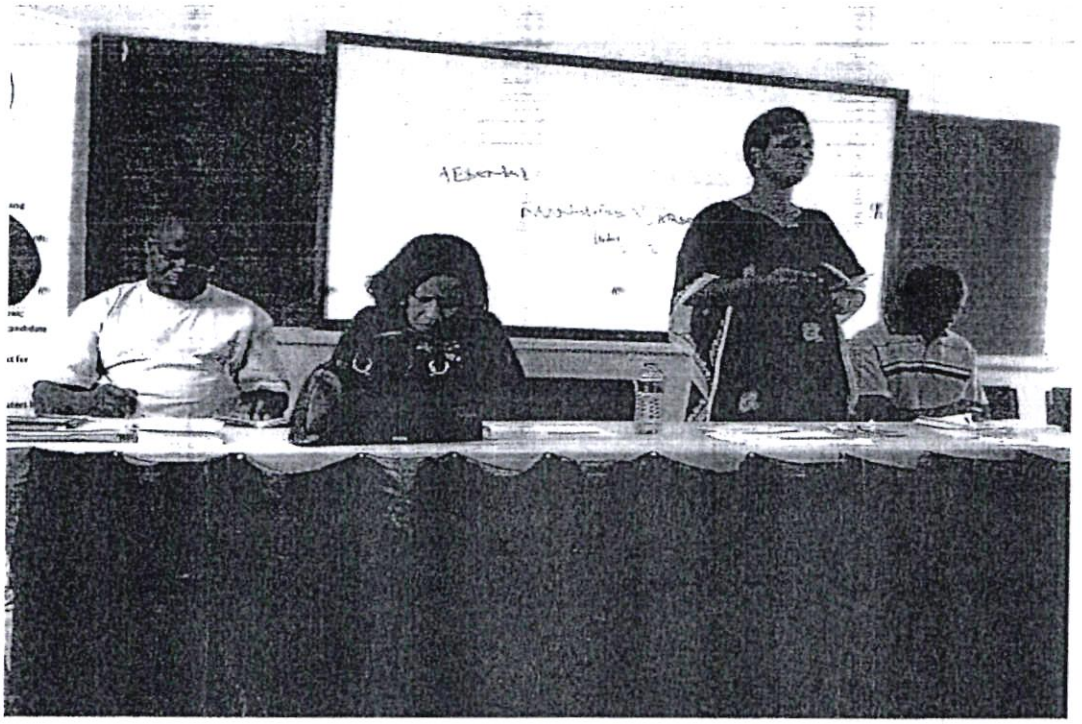
The commission should liaise with political parties to ensure that their agents do not display their badges inside the polling stations and insist only IEBC political party agents as the official badges inside polling stations.

The commission should also liaise with Inspector General of Police so that the elections officials are aware of all security officers attached each polling station and not to encourage cases like what happened at Ngatataek Primary school polling station. Should such an "officer" be found to be an imposter then such a person must be arrested in the polling station by officers on duty and handed over to the relevant authorities for appropriate action. The commission should also come up with a policy on penalizing use of public resources in political campaigns as happened when Mrs. Agnes Ndetei deployed a government vehicle to campaign for Mr. Patrick Tutui.

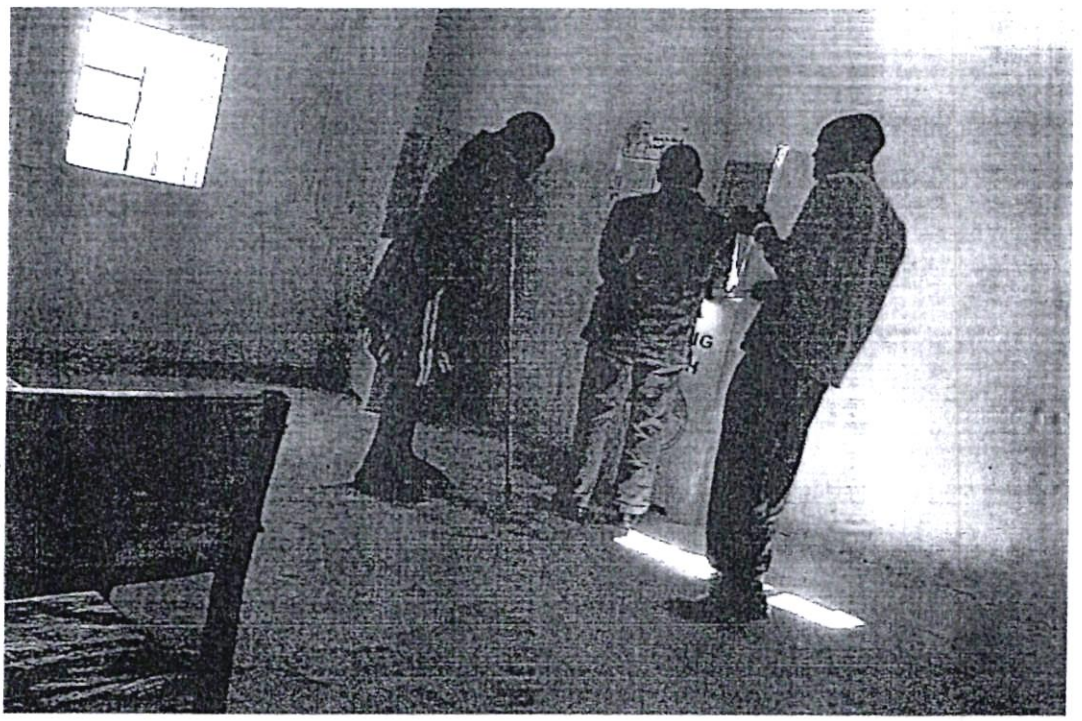
The commission should also be aware that we have shared id numbers and no one should be denied an opportunity to elect their leaders simply because someone has voted using their id number.it should work with National Registration Bureau on this matter.

CONCLUSION

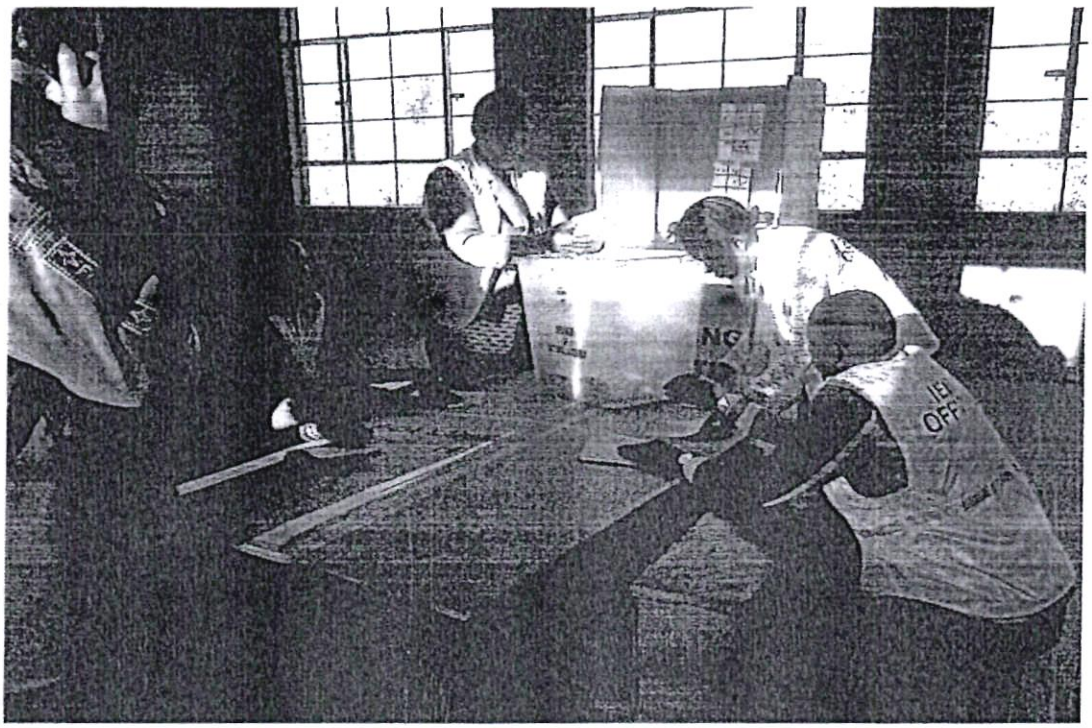
In conclusion we must submit that the electoral exercise and results was free and fair and reflected the wishes of electorate of Kajiado Central Constituency.



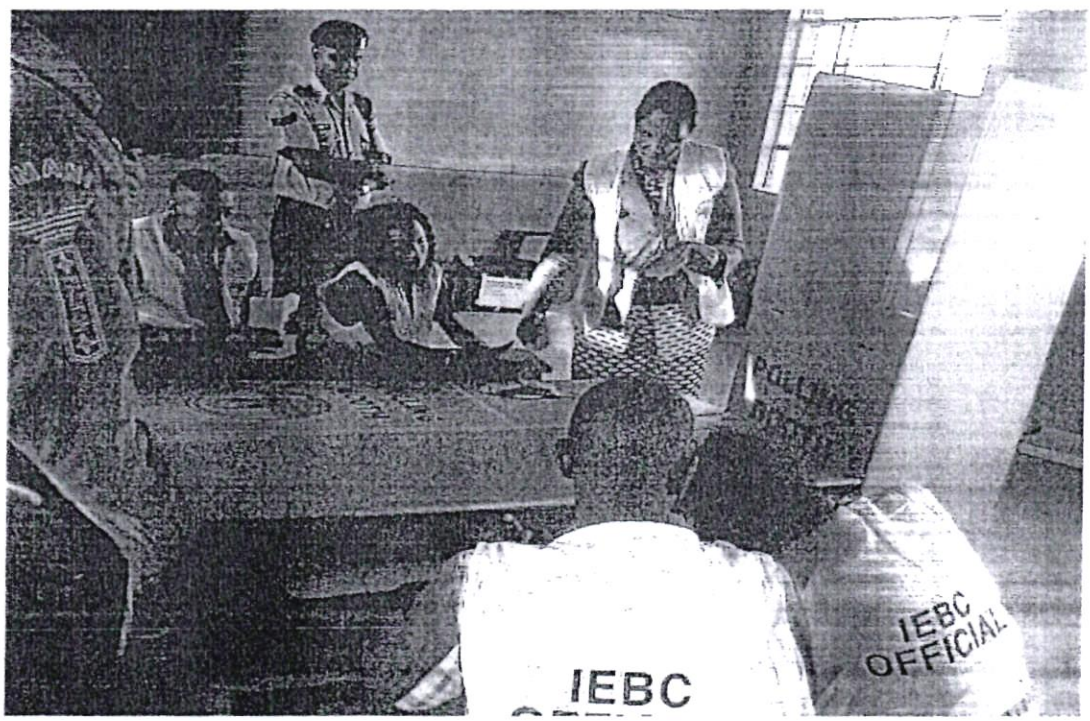
Photograph 1: IEBC Deputy CEO, Ms Betty Sungura (seated 2nd right),ag.Director Voter Education & Partnerships,Ann Nderitu (standing) during observers training.



Photograph 2: Presiding Officer,Olmanie Primary School polling station assisting a voter to mark a ballot paper.



Photograph 3. **Presiding Officer,Ilparua Primary school polling station sorting votes assisted by other election officials during counting.**



Photograph 4: Election officials counting votes at Ilparua primary school polling station.

XI. LIST OF ABBREVIATIONS

DPO	Deputy Presiding Officer
EVID	Electronic Voter Identification Device
IEBC	Independent Electoral Boundaries Commission
JAP	Jubilee Alliance Party
MTC	Maasai Technical College
ODM	Orange Democratic Movement
CORD	Coalition of Reforms for democracy
PO	Presiding Officer
RO	Returning Officer
RTS	Results Transmission System

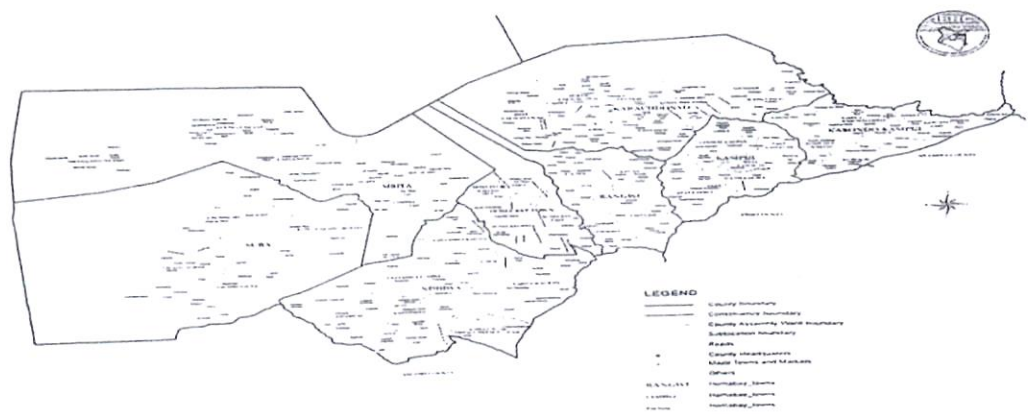
VOTER INFORMATION NETWORK AND EDUCATION-AFRICA

(VINE-AFRICA)

TEL: 0724430621/0733551527

ELECTION OBSERVERS REPORT

HOMA BAY COUNTY SENATORIAL BY-ELECTION CONDUCTED ON 12TH FEBRUARY 2015



Contact Person
ERIC O.AYIEYE
EXECUTIVE CHAIRMAN

TABLE OF CONTENTS

I.	EXECUTIVE SUMMARY.....	2
II.	INTRODUCTION TO THE MISSION.....	3
III.	POLITICAL BACKROUND.....	3
IV.	ELECTION CAMPAIGN.....	4
V.	PREPARATION FOR POLLING AND ELECTION DAY....	5
VI.	SCOPE AND METHODOLOGY OF OBSERVATION.....	7
	i. Ndhiwa Constituency.....	7
	ii. Mbita Constituency.....	8
	iii. Suba Constituency.....	9
	iv. Homabay Town Constituency.....	10
	v. Rangwe Constituency.....	10
	vi. Kasipul Constituency.....	11
	vii. Karachuonyo Constituency.....	12
VII.	RESULTS PROCESS.....	13
VIII.	ELECTION RESULTS.....	13
IX.	GENERAL OBSERVATIONS.....	19
X.	RECOMMENDATIONS.....	20
XI.	LIST OF ABBREVIATIONS.....	21

I. EXECUTIVE SUMMARY

The just concluded Homabay County Senatorial By-Elections was marked by an overall improvement of voter awareness. The campaigns culminating into the Polling day were relatively vibrant. Though sporadic but isolated pockets of violence were witnessed on the initial stages of the campaign process, this appeared to fizzle out as the polling day approached.

There was generally feasible display of professionalism amongst the IEBC staff and no shortages in material and equipment was witnessed.

Of increasing concern though but consistent with historical participation in By-Elections was markedly suppressed voter turnout.

This Senatorial By-Election, second post General Elections of March 2013, after the Makueni County By-Election saw a successful universal use of the EVID electronic system with insignificant incidents of failure.

Quite impressive too was few incidents of disruptions, where with wonderful weather permitting, most polling station were opened and closed in time with no notable procedural shortcomings in the Polling Stations we covered in our scope.

It would not also escape notice that despite the markedly high level of competition this election demonstrated, there was overall acceptance of the results amongst the electorate even though sections of the candidates raised certain reservations.

Of fundamental note too was the general lack of dispersal of the media who we noted chose to concentrate at townships as opposed to random locations at more interior polling stations. The same applied with security that apart from the regularly provided Police Officers stationed at each Poling station, we did not meet their equivalent backup patrolling the rural areas during our own traverses across the expansive County. On the contrary, there was considerably large number of security officers stationed mainly at Homabay Town, the County Headquarters.

In spite of this, Election Day proceeded smoothly than anticipated with no major incidents of violence reported. Equally, RTS auxiliary to the EVID did not disappoint in incidents observed when it came to transmitting and tallying the results.

II. INTRODUCTION TO THE MISSION

VINE- Africa team formally applied for accreditation following an appeal by IEBC advert posted in the mainstream media and was duly accredited after meeting the requirements. Our first appearance to the County was on Monday 9th February 2015 where we purposefully made efforts to acquaint ourselves with the on goings including the campaigns leading to the elections then scheduled for 12th February 2015.

Our mission primarily was to make wide sweeping observations on the trends and character of the elections including its impact on the electorate. VINE-Africa as a body charged with civic education, did not reserve ourselves to any scope outside legitimate boundary provided and were thus seeking enlightenment on areas within the electorate that were in dire need of civic education in matters pertaining to voter education and awareness.

Our first formal interaction with IEBC occurred on the 10th February 2015 at the Agricultural Training Centre in Homa Bay during observer's briefing where a fruitful engagement with other accredited observers and graced by IEBC Vice-Chair Lillian Mahiri Zaja alongside other Commissioners Akhule Godana, Amb. Yusuf Nzibo, Mohammed Ahlawi, Abdulahi Sharawe and Albert Bwire ensued. Thereafter we took the opportunity on the time preceding the elections to monitor the ongoing campaigns.

III. POLITICAL BACKGROUND

Homa Bay County consists of eight constituencies i.e. Homabay Town, Rangwe, Karachuonyo, Ndhiwa, Mbita, Suba, Kasipul and Kabondo Kasipul. During the March 2013 General Elections, Hon Gerald Otieno Kajwang won the Senate seat. However the Senator passed on suddenly on 18th November 2014 necessitating the subject by-election.

As at the close of submission of nomination papers, eight candidates tabulated as here were cleared to run for the ensuing election.

Name of candidate	Type (Party/Independent candidate	Symbol
1. Bernard Owuor Otieno	National Vision Party	Light House
2. Edwin Omondi Matete	Independent	Cheetah
3. Fred Rabongo	National Agenda Party Kenya	Teacher
4. Hilary Ochieng Alila	Independent	Buffalo
5. Innocent Otieno Masara	Independent	Cassava Plant
6. Medo Luke C. Misama	Independent	Cloud
7. Moses Otieno Kajwang	Orange Democratic Party	Orange
8. Philip Okoth Okundi	Maendeleo Democratic Party	Scissors

IV. ELECTION CAMPAIGNS

As already mentioned, we originally registered our presence in Homa Bay County on 9th February 2015, time by which the electoral campaigns were now reaching fever pitch. We thus had an opportunity to observe the campaign process by respective parties largely within Homabay Town where every candidate appeared to concentrate. We equally dispersed to the peripheries visiting Rodi Kopany (Homa Bay Town Constituency) Ogongo (Mbita Constituency, Imbo, Homa Bay Town Constituency and Olare of Rangwe Constituency.

We did not observe any incidents of note on the said 10th February 2015 where there was marked campaign activities and going by previous media reports, violence was generally anticipated considering the Orange Democratic Movement leader Raila Odinga was conducting a major campaign rally at the Homa Bay Stadium just as the other major contender Philip Okoth Okundi of Maendeleo Democratic Party had equally marshaled a large procession of youth who were making a procession through Homa Bay Town streets both groups barely 500 metres from each other.

This high tension scenario appeared to escalate when a section of ODM members came by to see off some of their luminaries fly off in Helicopters that had been parked at Homabay Tourist Hotel. At this point, a large group of MDP campaigners also got to the same location. With tensions rising, it took the wisdom of the Hotel's management to call for security and forestall an altercation and possible damage to their property. Police did respond swiftly and a large convoy of about six truck loads of anti riot police was dispatched to the hotel to flush out the trouble makers who by then were

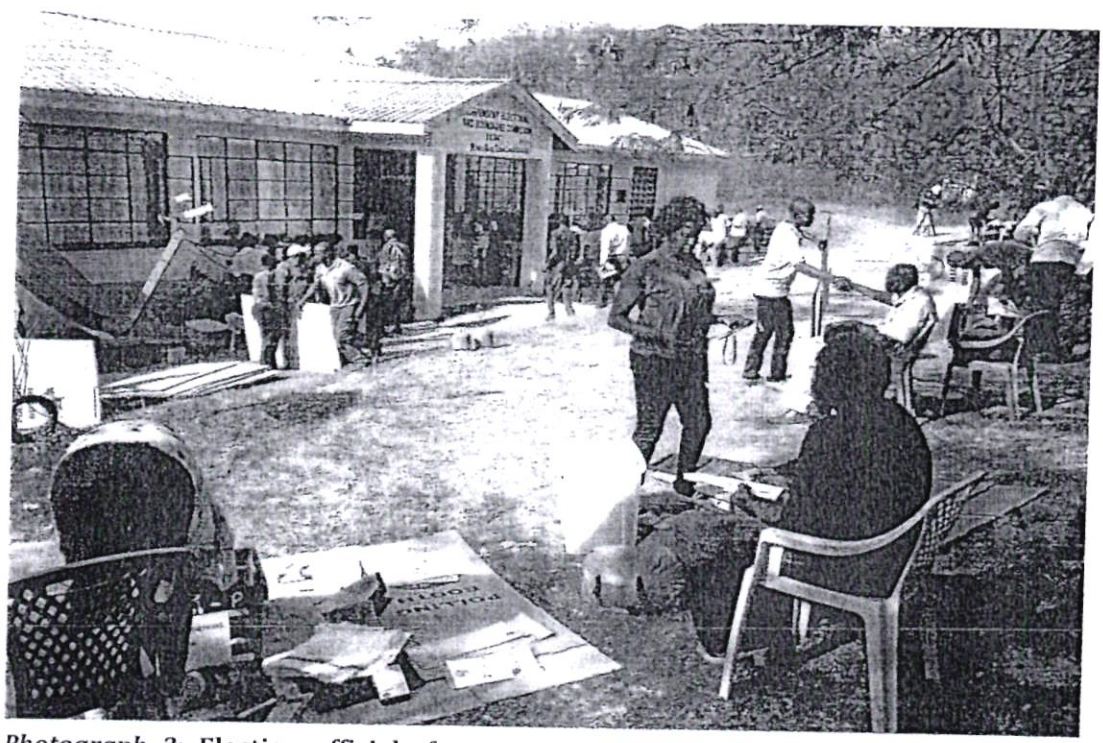
chiding at each other. This appeared to work only that the group appeared to unite in the show of force and quickly left the facility now taunting the security officers. Once back on the streets, the two groups interestingly proceeded to ran around the streets campaigning side by side with no incident of altercation observed.

Generally on the 11th February 2015 was suppose to experience cessation of all campaign activity but we had sporadic incidents of party chants with marked observation of MDP supporters raising a banner at Imbo market of Homa Bay Town constituency clearly in breach of electoral laws.

V. PREPARATION OF POLLING AND ELECTION DAY

Homabay County Senatorial By-Election did see a high level of attention from IEBC who apparently concerned with accusations on intent to rig from a section of the participants, set up a powerful delegation comprising of eight commissioners to oversee the elections each of who were assigned a constituency. There were equally high levels of amicable consultations between the interested parties like candidates, agents, observers, election officials etc. As part of our mission, we did visit two of the major tallying centers on 11th February 2015 starting off at the Rangwe CDF Hall where were met the Returning Officer Mr. Anthony Njoroge and were able in his company to evaluate the degree of preparedness to the elections. In our assessment, we thought that this was remarkable. Back in Homabay, we attended a security briefing for the P.Os and other election officials at the Homabay High School presided by Commissioner Ahkule Godana and top County Security Officers. Later that day, we converged at the IEBC offices at Homabay Town where we witnessed the distribution of election materials to respective P.Os. In summation, there was generally high level of preparedness in respect of the coming elections.

Photograph 1: The Rangwe Constituency Returning Officer Mr. Anthony Njoroge (left) demonstrates their level of preparedness to one of our observers.



Photograph 2: Election officials for respective polling stations collecting election materials at the Homa Bay IEBC offices. These processes were generally highly organized.

VI. SCOPE AND METHODOLOGY OF OBSERVATION

Considering the relatively large expanse coupled with demographic disparities that characterize Homa Bay County, we set out to carry out random visits in seven of the eight constituencies. Our mode of operation involved visits to randomly selected polling stations within each of the seven constituencies namely, Homa Bay Town, Ndhiwa, Mbita, Suba, Rangwe, Kasipul and Karachuonyo. We set out to workout with a sample 20 voters in each station whereupon we were to methodologically observe the age, gender, literacy and general awareness of the electoral processes as in whether they did seek assistance at any stage of the voting process. In addition, we evaluated the approximate time it took a voter to go through the entire process noting all challenges encountered while taking due care to avoid any interaction whatsoever with the voter. We were also not lost to the fact that we made traditional observations of the voter registers ballot issuance sequences and the overall set up of the polling station including the security arrangement eventually sampling on an actual opening, closing and counting process sequences of two polling stations before converging at the county tallying centre at the close of the exercise. Key amongst our observation in our traverses through the constituencies is thus captioned hereunder;

i. Ndhiwa Constituency

We opened the exercise at Dunga Primary School polling station in Ndhiwa Constituency centre code No 109 and constituency code no 250 with 300 registered voters.

The station opened at 6.15 o'clock in the morning which is 15 minutes late in the scheduled opening of polling stations. The presiding officer, a Mr. Martin Omondi took the agents through step by step procedure before officially declaring the station opened.

At the time of opening the station, two agents representing Mr. Moses Otieno Kajwang and Eng. Philip Okoth Okundi witnessed the process and appended their signatures to the presiding officer's polling day schedule

witnessing 5 seals used, properly marked ballot boxes and the ballot papers for use on that particular election.

The presiding officer used 5 seals to seal all four corners of the ballot box and the aperture and thereafter cut off the aperture seal to declare the polling opened. This particular station had a very serious problem on lighting as they used one lamp to mark the register and tear off the ballot paper and use the same lamp at the polling booth for the voters to mark their choices.

Voting generally went on smoothly at this station without any incident after natural day light into sight.

ii. Mbita Constituency

At 7 o'clock our team proceeded to Lambwe Primary School polling station in Mbita Constituency Centre Code No 111 and Constituency Code 251 with 591 registered voters. The Presiding Officer, Mr. Chrispine Ogutu gave us information on serial numbers of ballot box, ballot papers and 4 seals used in sealing the ballot box before polling. The PO informed us further that the station opened at 6.am without any delay. At the opening of the polling station there were 4 agents representing ODM and MDP equally. During the polling there were a lot of interruptions and the agents were very noisy by engaging voters in loud disruptive talks.

The PO appeared to lose control of the polling station to the party agents and looked helpless without stabilizing the scene by giving authoritative direction to them and security officers to enforce order. The worst incident occurred when a voter having cast his vote started talking loudly to someone apparently known to him in the queue asking him to visit him once he has voted for a particular candidate he called by name to the amusement of voters queuing to cast their ballots . In another incident, a voter walked in and after casting his vote said that he was an agent and without being asked for documentation of proof, was allowed to sit in with other agents where he started chatting with his colleagues without a bother. The station layout was also very poor as the PO sat together with agents and observers on one side. In fact we had to raise this issue with the PO when the new agent did not find a seat and had to sit on his seat carrying his official polling day schedule

on his lap and also informed him that the agent had to give him his appointment letter to prove his status as an agent. What's worse; a voter voted and walked away without his finger marked in indelible mark as proof of having voted. One voter was also turned away when he could not be identified in the handheld EVID, his name was also missing in the principal manual register neither could he also be identified through text yet he participated and voted in the last general election held on March 2013.

On the other hand, we did note that considerable number of voters at this particular station requested for assistance before they could vote. The assisted voters were largely women aged 35 years and above still denoting the great gender disparity on the overall number of voters observed.

iii. **Suba Constituency**

At 9 o'clock our team proceeded to Nyatoto Primary School polling station in Suba Constituency Centre Code No 084 and Constituency Code No 252 with 449 registered voters. The Presiding Officer here Ms Caren Awuor provided us with the list serial numbers of ballot box in use during polling, ballot papers and 4 seals used in sealing the ballot box.

She informed us that the station officially opened at 6.am. At the time of opening there was not a single political party or candidate agent present. During our visit the station had four agents, 2 agents for MDP, 1 agent for ODM and 1 for NAPK.

Voting generally proceeded here without any hitch till about 09.55Hrs when a female voter flatly refused to have her finger marked using indelible ink claiming no one had 'paid' her to come and vote but she had done so in her own volition and therefore no one had purchased for her soap to wash the same. The PO assisted by some of the agents implored upon her on that being a legal necessity whereupon she later consented halting the voting process considerably.

This polling station in Suba Constituency had the highest number of assisted voters in all the constituencies we visited during polling numbering 11 out of the sampled 20. By 10 o'clock 7 voters representing 1.88% had not been identified by EVID, however they were allowed to vote because their names were in principal manual register.

iv. **Homa Bay Town Constituency**

Our next move saw us proceed to Ogande Primary School polling station in Homa Bay Town Constituency Centre Code No. 049 Constituency Code No 249 with 494 registered voters. The Presiding Officer, Ms. Agnes Akinyi took us through the serial numbers of ballot box in use, ballot papers and 4 seals in use. The station opened at 6. O'clock and the agents were present during sealing of the ballot box and opening of the station representing ODM, MDP and Hillary Alila, an independent candidate

At the time of our visit 3 voters cast their votes using the principal register as they could not be identified by the EVID; however, the PO allowed them to vote because their names were in the manual register.

At this particular station, a voter actually sought assistance to vote and the candidates were read out to her. She then expressed her dismay on not having heard the name of in her current MP Hon Kaluma for who she intended to vote accusing the election of being compromised. The P.O explained to her that the by election was to replace the late Sen. Kajwang and that her MP was still validly in office and there was no election for that particular seat.

During the same time, another assisted voter also complained of being misled by the party agents and therefore marking a wrong choice for her candidate. The ballot had to be marked spoilt and she was given another ballot paper which was then correctly marked for her by the PO. During our observation there were five assisted voters out of the sampled twenty and all who happened to be female all aged above 35 years.

v. **Rangwe Constituency**

Our next stop saw our team visit Gul Kagembe Primary School Polling Station in Rangwe constituency Centre Code No. 031 Constituency Code No. 248 with 318 registered voters. The PO, Ms. Milka Juma informed us that she opened the station at 6.O'clock. At the time of opening there was only one political party agent representing Mr. Fred Rabongo of NAPK. She gave us information on the serial numbers ballot box, ballot papers and of the seals used in sealing the ballot box before opening the station. At 2 O'clock she had 6 cases of voters who could not be identified by EVID but

their names were in the principal manual register. They were however allowed to vote on this basis, this statistic then represented 1.9% of the registered voters in this centre.

At around 2.30 o'clock a female voter was turned away because her name was not in the voters register yet she is a registered voter. Upon further scrutiny and probing by PO, it was established that she had a registered as a voter in 2014 yet her name was not reflected in any of the registers.

During our observation, of all the 20 voters who cast their ballots 19 were females and one male with four female voters assisted to mark their ballots.

By 2.45 o'clock 180 voters had cast their votes.

vi. **Kasipul Constituency**

Our team proceeded to Ombek Primary School Polling Station Centre Code No. 006 Constituency Code No. 249 with 642 registered voters. The presiding officer took us through the serial numbers of the ballot box in use, ballot papers and seals used in sealing the ballot box at the beginning of the polling. She informed us that the polling station opened at 6.O'clock and at the time of opening there were two political party agents representing ODM and MDP. At Ombek primary school polling station, we experienced the first incidence of hostility when the Deputy Presiding Officer, on being consulted by the PO on our intent to carry out observations thereat, openly showed agitation at us stating that our presence was 'TRICKY' and we needed to show more documentation other than the IEBC provided badges accrediting us. We exercised much restraint in a situation where the DPO was now evidently pitting us against the equally curious party agents and it was incumbent upon them to query internally incase they doubted our validity as accredited observers. At that point the agents representing the various candidates also turned hostile and it was the wisdom of the PO that prevailed when she explained to them our role before they calmed down and we were let to proceed with our task.

This Polling Station registered remarkable awareness amongst the voters with none of the 20 voters sample requesting any form of assistance. Equally, we noted almost 50-50 gender parity with ages similarly encompassing all age groups.

During the time we were at this station, 3 voters had not been identified by EVID but were allowed to cast their ballots because their names were in the manual principal register.

vii. **Karachuonyo Constituency**

VINE-AFRICA team closed the polling at Wikondiek Primary School polling station in Karachuonyo constituency "Centre Code No." 075 Constituency Code No.247 with 425 registered voters.

The Presiding Officer gave us information on serial numbers of ballot box in use, ballot papers and seals in use. 3 agents were present at the opening of the polling station representing ODM, MDP and NVP. There were a total of 7 voters not being identified by EVID but they were allowed to vote because their names were in the principal manual register. Another voter was turned away because she could not be identified by EVID and neither was her name found in the principal register yet she had voted in the general election.

Voters not identified by EVID represented a total of 2.11% of the total voters registered in this centre.

Voting officially closed at 5.10 o'clock in this polling station implying that they opened at 6.10 o'clock in the morning. In the period we were there, we noted only four assisted voters. Here we were able to witness the closing procedure where the PO closed the aperture and officially put a green IEBC seal and we all took note of its serial number. He then invited the party agents and gave them a blue seal which one of them used in sealing the aperture.

The presiding officer then ordered a 10 minute break after which the polling station was converted to a counting hall. Thereafter the presiding officer sorted out with the counting clerks all the ballot papers according to candidates' names and all were counted and reported accordingly.

After that the presiding officer confirmed from the EVID total number of voters from machine and the ones from manual register and they all tallied up to the same number before agreeing with all agents present and they signed the results declaration form as a accurate and votes in that particular polling station.

The presiding officer then transmitted the signed results to the constituency, county and national tallying centre.

VII. RESULTS PROCESS

We must commend the election officials for the open and transparent manner in which vote counting, tallying and announcement of election results was done at polling centres.

In our case studies the PO first sat down all the parties and helped reached a consensus on how the counting process would ensue. Of key concern was on how a ballot would be declared rejected and what would entail a valid voter mark. They then confirmed the total votes cast from the electors roll both in the EVID and Manual Register. Thereafter they counted all the votes cast and they were accurate and added up to the confirmed number of votes inside the ballot box before counting started, at all times, he counterchecked with the agents ensuring there were no slip ups. Of particular interest at a polling station like Wikondiek Primary School was the presence of a number of locals who though were not allowed entry into the now closed Counting Hall , were allowed to glimpse the entire process through the unfinished classroom windows noting the overall transparency of the entire process. When all the results had been tabulated, all the parties once more concurred on the accuracy of the same after which the PO transmitted the confirmed results via RTS after signing results declaration form by all parties participating in the election present in the polling station. We were let as observers to loudly read out the acknowledgment of receipt at the respective IEBC servers.

VIII. FINAL RESULTS

Having finished out at our respective field stations, we converged at the Agricultural Training Centre where we were then privileged to witness the trickling in of and tallying of the results from respective polling stations. Finally with the entire result in, the ODM candidate Moses Otieno Kajwang was declared Senator Elect after leading in the final tabulation hereunder:

Valid votes cast		**160,610**	
Turnout		**49.19%**	
Disputed		**20**	
Rejected		**942**	
Moses Otieno Kajwang	**ODM**	**127,370**	**79.3%**
Philip Okoth Okundi	MDP	27,671	17.2%
Fred Rabongo	NAPK	2,829	1.8%
Bernard Owuor Otieno	NVP	1,333	0.8%
Hillary Ochieng Alila	Independent	525	0.3%
Medo Luke Calvins	Independent	305	0.2%
Edwin Omondi Matete	Independent	302	0.2%
Innocent Otieno Masara	Independent	275	0.2%

IX. GENERAL OBSERVATIONS

1. OPENING OF POLLING STATIONS;

Other than Dunga Primary School Polling station in Ndhiwa where we officially opened the station at 0615 Hrs, all other polling stations where we went to, and Presiding Officers asserted that they opened at 0600 Hrs. We can deduce this to be economical with truth regarding the official opening of each polling station by respective presiding officers

2. SECRECY OF VOTE;

In all the polling stations we visited, the secrecy of the vote for assisted voters was not guaranteed as in all cases we observed agents officially marking the ballot papers for a voter which is not procedurally proper as this is solely the responsibility of Presiding Officers.

3. **VOTERS REGISTER;**

The EVID voters register could not identify some voters and this was an average of 2% in all the constituencies we visited and chances were that the percentage could have risen owing to the fact that this data had been captured when most stations still had 3 or more hours to cast their ballots.

The machine also took long to identify voters with some people taking as long as three minutes to be identified after several trials and use of many fingers and this slowed down voting process. At Gul Kagembe Primary School Polling Station, a youthful voter who was registered last year could not vote because her name had not been incorporated in any of the registers. Such events could easily lead to voter disillusionment.

4. **ORGANIZATION AND ORDER IN POLLING STATIONS;**

There was order in all polling stations except in two stations where we visited that was in Lambwe Primary School in Mbita constituency and in Ombek Primary School in Kasipul constituency.

The disorder in Lambwe Primary School polling station was occasioned by the poor station layout and loud chit chat among election officials, agents and voters to an extent that at some point a voter voted and walked out without having the indelible ink marked on his finger only to be hailed back loudly as he walked away across the school's playground. Equally another voter could actually canvass for votes loudly on the queue without any form of reprimand from the PO

The disorder at Ombek Primary School polling station in Kasipul Constituency was occasioned by our arrival at around 3 pm when the Deputy Presiding Officer disputed our accreditation and was joined by party agents in questioning our status as observers to the extent of holding up voting for about several minutes.

Though we commend the presiding officer's conduct in bringing the situation to order by explaining the role of observers, the conduct of the deputy presiding officer together with agents was hasty. Had there been a long queue waiting to vote, the deputy presiding officer's conduct joined by party agents could have not only endangered our lives but lead to serious harm to our team.

5. SECURITY ARRANGEMENTS.

This was provided largely by the Kenya Police and augmented by the National Youth Service .In all the polling stations our team visited, the security officers were very professional and exceptional in exercise of restraint and thus ensured the good flow of the polling process without intimidating voters in any way. On the contrary, whereas it was a great idea to deploy a great number of security officers in the county, we noted that they were largely visible within Homa Bay Town where voters felt intimidated but none were seen patrolling the villages during our traverses. The net good result though is that no serious security breaches were experienced during the polling process.

6. ASSISTED VOTERS.

The service accorded to assisted voters was very poor and wanting. In all the stations our team visited, what we found queer was that it was the political party agents who were marking ballot contrary to regulations. It is our belief that the ballot papers are election materials that should only be handled by election officials and not any other person except the voter. IEBC should strictly ensure that agents only witness the marking of ballot papers and not do so the same themselves as that amounts to voting. Indeed in one polling station, a voter bitterly complained after an agent marked for her wrong candidate choice which she had given.

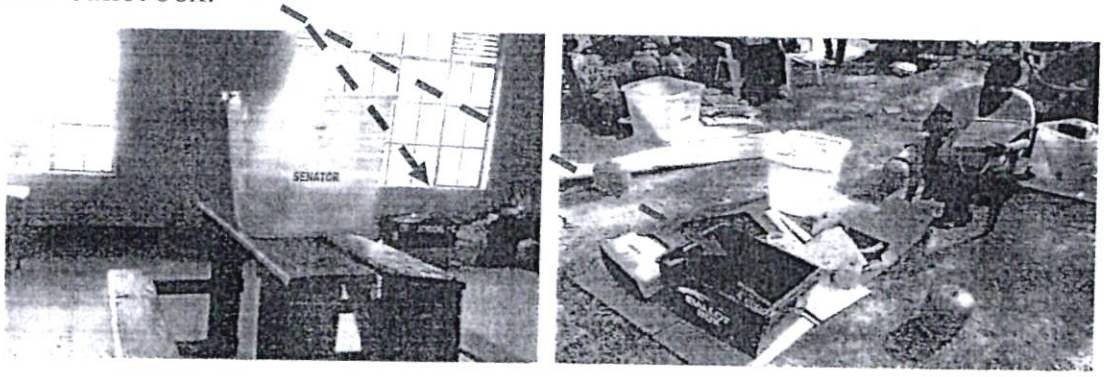
7. VOTER AWARENESS

One notable aspect in our mission was the widespread voter misinformation. This was demonstrated by the relatively high number of voters who sought assistance in spite of this being a single election. Whereas the professionalism of election officials was commendable, there was reciprocal failure on the voter's end evidenced by some of the scenarios witnessed and illustrated in parts of our report.

8. BALLOT BOXES

Of particular interest in our observations were the presences of an extra ballot box in all the polling stations visited despite there being only one election. The general explanation given was that these old generation opaque black ballot boxes have since been phased out of use and were provided to electoral teams to contain 'non-strategic' material as a cost saving move.

This in our observation is a breach as it negates both nationally and internationally approved election standards of having one ballot box for each election. The explanation of storing non strategic election materials do not really add up because ballot boxes are strictly meant for marked ballot papers and therefore votes and nothing else. In an election where other parties make claims of vote rigging and you have two ballot boxes for one election then the elections body must not on ly prove beyond reasonable doubt that the other ballot box did not carry marked ballot papers but must show the contents of said ballot box.



Notice the extra ballot boxes issued at the point of issue and later at the polling station

X. RECOMMENDATIONS

In as much as we would commend IEBC for conducting such a successful poll and widely observed to meet the international threshold for being free and fair, certain aspects need be addressed to make future elections much better if not perfect.

- As indicated in the above findings, IEBC must urgently come up with an official policy that categorically states that new voters registered after a general election are barred from participating in subsequent by-elections to forestall new voter disillusionment. This means the cardinal problem of registers still needs an urgent address.

- While great strides have in made in the training of Election Officials enhancing their professionalism, reciprocal measures ought to be carried out on educating voters. IEBC should embark on serious voter education exercises to enable voters fully acquaint themselves with the new devolution structures and elective offices. It is quite remorseful if a voter goes into a polling station not really knowing why and for who they are voting in such a highly publicized by-election. This was demonstrated by a voter who insisted she had come to vote for her current Member of Parliament in a Senatorial election.

- Similarly, we still note a greater gender disparity on the voter with majority of women actually turning out vote alongside fewer and older men. While this statistic would not be largely scientific based on our random sample and may vary from region to region, it certainly points to a problem that needs the commissioning of a scientific survey results of which would inform how voter education funds are channeled and to which particular groups of people to enable inclusive future elections.

- IEBC should equally develop a policy on assisted voters without taking advantage of their ignorance and this policy must ensure that ballot paper is not meant for an agent at any time but it is strictly their property under the custody of only authorized election officer and not agents. It means agents need to be educated on the perimeters of their roles and POs equally instructed to strictly implement election rules.

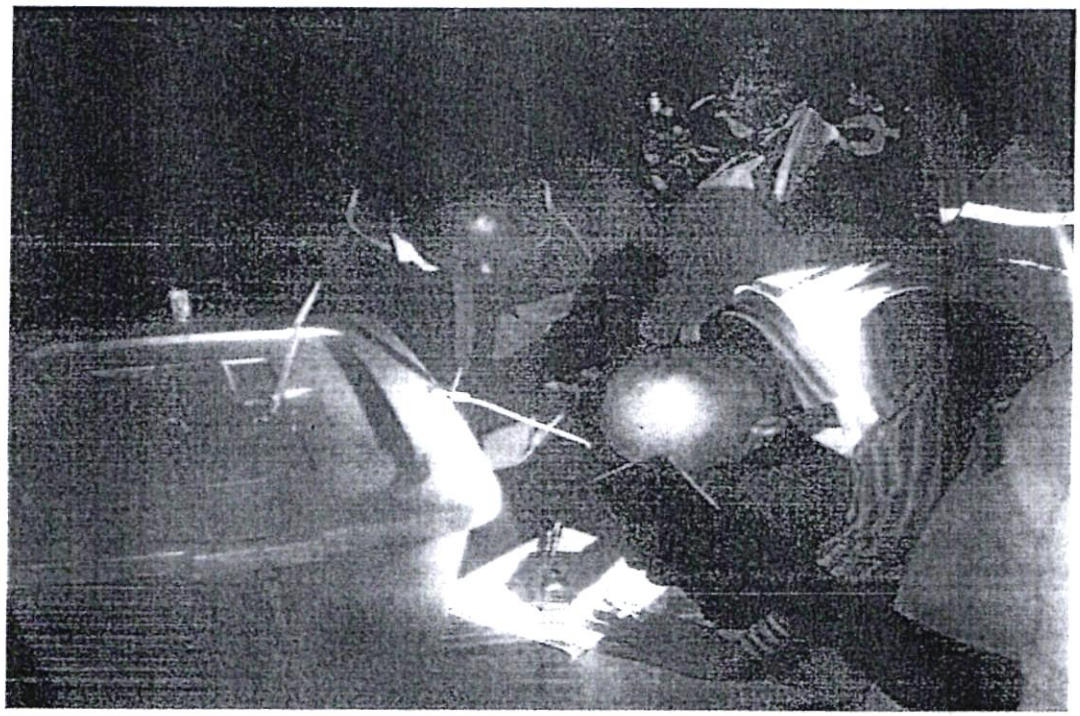
- As mentioned, the professionalism of Election Officials has great fully improved apart from few cases witnessed. However with the same officials being hired on subsequent elections just as agents and other participants at the same localities, a culture of familiarity is bound to hinder strict implementation of rules as observed in one polling station where the PO appeared to be friends with the agents and would often join them in chit chat as the polling proceeded. Adequate rotational deployment should be considered to avoid such scenarios.

- On a similar perspective, incidents like the one witnessed at a Poling Station where a D.P.O showed hostility towards an observer team in a move could have compromised the observer's safety. This should quickly be addressed to avoid ugly incidents in highly volatile regions during future elections. While observers are generally required to notify respective P.Os of their intended visit well in advance, this in our opinion negates the independent observer purpose as POs who become aware of our coming, would easily stage manage their polling stations to please the observer on their arrival concealing any election malpractice thereat until the observer exits. While on our side we also acknowledge that the risk of impersonation remains real, this can be prevented by providing the election officials with the full list of accredited observers identities and details to avoid such altercations disruptive to the electoral process.

XI. LIST OF ABBREVIATIONS

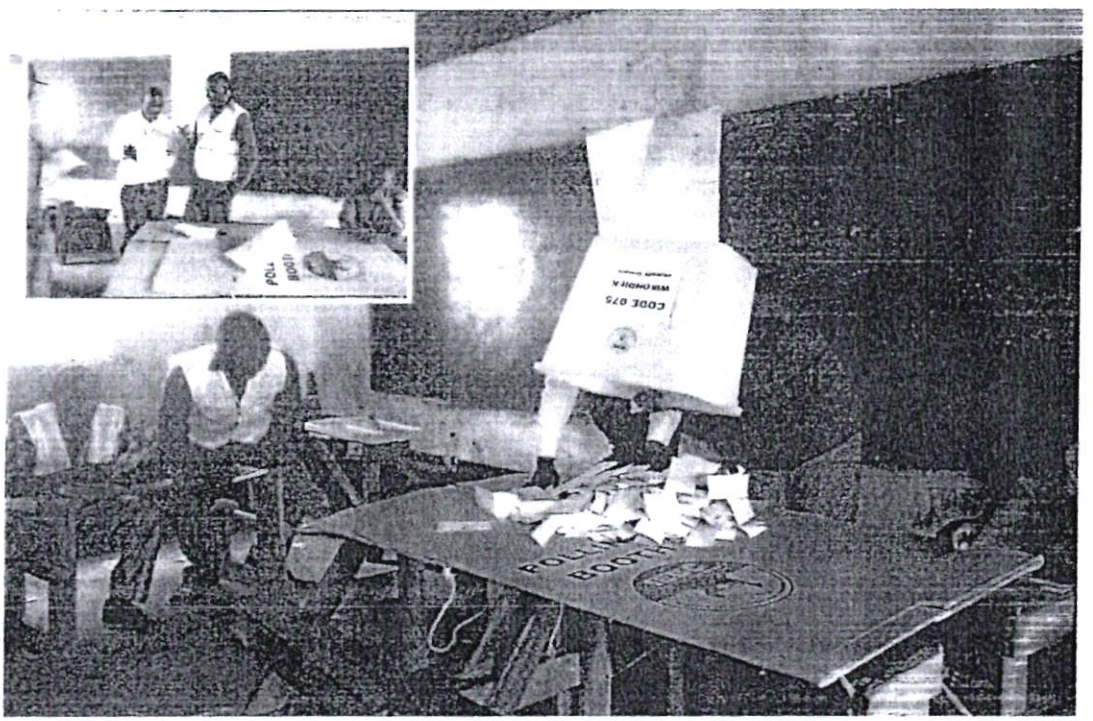
ATC	Agricultural Training Center
DPO	Deputy Presiding Officer
EVID	Electronic Voter Identification Device
IEBC	Independent Electoral Boundaries Commission
MDP	Maendeleo Democratic Party
NAPK	National Alliance Party of Kenya
NVP	National Vision Party
ODM	Orange Democratic Movement
PO	Presiding Officer
RO	Returning Officer
RTS	Results Transmission System

Photograph 3: The IEBC Vice-Chair Lillian Mahiri Zaja (Center) alongside fellow commissioners addresses the Observers induction session in Homabay Town shortly before the polls.



Photograph 4: Our first stop at Dunga Primary School Polling Station where we observed the P.O go through the processes with party agents.

Photograph 5: Ogande Primary School Polling Station where a voter is assisted by P.O and her Deputy. Considerable number of women voters had to be assisted to vote.



Photograph 6&7: Wikondiek Polling Station where we observed the vote counting process begin and insert the P.O finally transmit of results via RTS without any hitch.

51

THE ELECTIONS ACT, 2011

(No. 24 of 2011)

IN EXERCISE of the powers conferred by section 44(5) and section 109 of the Elections Act, 2011, the Independent Electoral and Boundaries Commission makes the following Regulations—

THE ELECTIONS (TECHNOLOGY) REGULATIONS, 2016

PART I – PRELIMINARY

Citation and commencement.

1. These Regulations may be cited as the Elections (Technology) Regulations, 2016.

Interpretation.

2. In these Regulations, unless the context otherwise requires–

"audit" means an information technology audit, information systems audit, or an examination of the internal controls within information technology systems and infrastructure.

"biometric" means unique identifiers or attributes including fingerprints, hand geometry, earlobe geometry, retina and iris patterns, voice waves, DNA, and signatures;

"Commission" means the Independent Electoral and Boundaries Commission established under Article 88 of the Constitution;

"data" means information recorded in a format in which it can be processed by equipment operating automatically in response to instructions given for that purpose, and includes representations of facts, information and concepts held in any removable storage medium, as defined in the Kenya Information and Communications Act;

Cap. 411A.

"election technology" means all electronic equipment or other hardware including peripheral devices, operating systems, networking or other communications capacity, or any other technological materials relating to voter registration, identification of voters and results transmission."

"internal controls" means standard operating procedures, security measures,

validation rules, best practices, and other procedures and policies put in place by the Commission to support the use of election technology.

PART II – ACQUISITION AND DEPLOYMENT

Assessment.

3. (1) The Commission shall regularly conduct a requirements analysis to determine the specific requirements to upgrade or supplement existing election technology, or to acquire new election technology with the purpose of enhancing the integrity, efficiency and transparency of the election process.

(2) The requirements analysis may utilize questionnaires, interviews, and cost-benefit analysis. Based on the requirements analysis, the Commission will prepare a feasibility report for any required upgrades or acquisitions.

Procurement.

4. (1) Based on the requirements analysis and feasibility report conducted under sub regulation 3(1), the Commission shall develop specifications for the procurement of new or updated election technology, in accordance with the Public Procurement and Asset Disposal Act, 2015 and its regulations.

No. 33 of 2015.

(2) The specifications developed under sub-regulation (1) shall ensure that the election technology is accessible and inclusive for all citizens, including persons with disabilities and persons with special needs, to participate in the election process.

Deployment.

5. Following the completion of the procurement process, the Commission shall initiate the deployment and implementation of the election technology according to the specifications and an approved deployment plan to be developed by the Commission. The deployment plan may include installation and configuration of the election technology, description of activities, timelines and responsible persons.

Maintenance.

6. The Commission shall carry out regular inspections and servicing of the election technology, as well as establish a support and maintenance contract with a service provider or providers to ensure the serviceability, reliability and availability of the election technology.

Disposal of Assets.

7. The Commission shall comply with the Public Procurement and Asset Disposal Act, 2015 and its regulations during the disposal of election technology assets.

PART III – TESTING AND CERTIFICATION

Testing.

8. The Commission shall carry out timely end-to-end testing of election technology before deployment for the election process.

Transparency.

9. (1) The Commission shall issue a public notice specifying the date, time and place of the testing and invite stakeholders to attend.

(2) The Commission may publish the information required under sub regulation (1)—

(a) on its official website;

(b) through electronic and print media of national circulation;

(c) by posting the notice outside of the Commission's offices; or

(d) through other easily accessible medium.

Certification.

10. (1) After the conduct of the necessary testing, the Commission shall prepare a certification report to determine that the election technology meets the user requirements and specifications developed under regulation 4, and is accessible.

(2) The Commission may request certification by a professional reputable firm to certify that the election technology meets user requirements and specifications developed under regulation 4.

PART IV – CONDUCT OF AN AUDIT

Regular Audit.

11. The Commission shall conduct regular audits of the election technology, or as may be required, to —

(a) guarantee data integrity;

(b) ensure that the technology functions effectively; and

(c) ensure that the internal controls of the technology are in place.

Body to Conduct Audit.

12. (1) The Commission may conduct internal audits or may contract a professional reputable firm to conduct an audit of the election technology.

(2) The Commission may conduct systems reviews to evaluate the confidentiality, integrity and availability of the election technology by assessing—

(a) the security access to the system;

(b) the vulnerability of the system configurations;

(c) the accuracy and the completeness of the data; and

(d) any other mechanisms that may be determined by the Commission.

(3) Where the Commission decides to engage a professional reputable firm, it shall present its audit findings to the Commission, which will be incorporated into a report as set out in regulation 13.

Audit Report.

13. The Commission shall prepare and publish an audit report which shall include—

(a) a statement on the principles set out in sub regulation 12 (2); and

(b) recommendations to reduce or eliminate any risks that could affect the functioning of the election technology.

PART V – INFORMATION SECURITY AND DATA STORAGE

Information security.

14. (1) The Commission shall put in place mechanisms to ensure data availability, accuracy, integrity, and confidentiality.

(2) For the purpose of sub regulation (1), the Commission will adopt intrusion prevention and detection systems to mitigate vulnerabilities in the election technology and breaches of security.

Data Storage and Access to Information.

No. 31 of 2016

15. The Commission shall store and classify data in accordance with the level of accessibility in line with the principles set out in the Access to Information Act, 2016.

Request for Information.

No.9 of 2011.

No. 31 of 2016

16. A person may request information from the Commission, in accordance with section 27 of the Independent Elections and Boundaries Commission Act, 2011.

PART VI – DATA RETENTION AND DISPOSAL

Data Retention and Archive.

17. All electronic data relating to an election shall be retained in safe custody by the Commission for a period of three years after the results of the elections have been declared, and shall then, unless the Commission or the court otherwise directs, be disposed of in accordance with procedures prescribed

by the Commission subject to the Public Archives and Documentation Service Act, 1990 and the Kenya Information and Communications Act, 1998.

PART VII – ACCESS TO SOFTWARE SOURCE CODES

Accessibility and Security.

18. (1) For proprietary software, the access to source codes shall be in accordance with the Industrial Property Act, 2001.

(2) For open source codes, the Commission shall ensure access to source code in accordance with procedures prescribed by the Commission.

PART VIII – TELECOMMUNICATION NETWORK

Disclosure of existing agreements.

19. (1) The Commission shall publish on its official website details of any telecommunication network service providers to be used during an election.

(2) A telecommunication network service provider who intends to provide services to the Commission pursuant to sub regulation (1) shall disclose to the Commission any existing agreements with political parties, agents, or candidates before engagement for telecommunication services in an election.

Delivery of services.

20. A telecommunication network service provider shall be under obligation to provide and deliver services as may be requested by the Commission.

Telecommunication network service availability.

21. (1) The Commission shall identify and communicate in a timely manner to all stakeholders the network service available at different polling stations.

(2) In areas where there is no telecommunication network, the Commission shall inform the stakeholders, publish this information in a timely manner.

(3) In order to enhance network availability during the election period, the Commission may engage the services of a consortium of all telecommunication service providers.

Appropriate infrastructure.

22. The Commission, in collaboration with a service provider or providers, shall put in place the appropriate telecommunication network infrastructure to facilitate the use of election technology for voter validation and results transmission.

Obligations for service providers.

23. The telecommunication network service providers shall ensure the security, traceability and availability of the network during the election period, or during any other period as may be required by the Commission.

PART IX – DATA RECOVERY AND OPERATIONS CONTINUITY PLAN

Operations continuity plan and testing.

24. (1) The Commission shall establish an operations continuity plan, detailing both operational and technical processes, procedures and tools.

(2) The operations continuity plan established under sub regulation (1) will provide mitigation and contingency measures for potential technology failures, including power outages, external sources interference, or natural disasters.

(3) The Commission shall test the operations continuity plan in a timely manner to ensure that all operational procedures are working as intended.

Data recovery.

25. The Commission shall —

(a) maintain a data recovery site for all electoral information systems;

(b) establish such data recovery processes as may be necessary to ensure quick and efficient systems and data recovery in the event of election technology malfunctions;

(c) maintain such physical documentation records to enable re-construction of the information in the event of data loss during transmission;

(d) ensure that such other failover technologies or procedures are in place to ensure operations continuity; and

(e) communicate failover technologies or procedures to stakeholders.

Suspension and termination and public notice.

26. (1) The Commission may suspend or terminate election technology if the reliability of a system cannot be assured according to the requirements of the Act and these Regulations.

(2) In case of suspension or termination of the technology, the Commission shall immediately notify the public and stakeholders of the suspension and of the measures put in place to restart the system, or of any failover

technologies or procedures to be used according to the operations continuity plan.

(3) The Commission shall, by notice in the Gazette, or through electronic or print media of national circulation, or any other easily accessible medium, notify the public of the suspension or termination, or of failover technologies or procedures to be used according to the operations continuity plan.

Notice by individuals.

27. (1) Any person or service provider who is or becomes aware of any election technology vulnerability, failure, or challenge shall immediately notify the Commission.

(2) The information provided under sub-regulation (1) shall be addressed to the Commission.

System support and maintenance agreement.

28. The Commission shall ensure that adequate and continuous support agreements with a service provider or providers are established for the effective and sustainable use of election technology.

PART X – CAPACITY BUILDING AND TRAINING

Capacity building.

29. The Commission shall implement a continuous and comprehensive training program on election technology for its staff and conduct training for stakeholders within sufficient time before Election Day.

Training Curriculum and Trainer

30. (1) The trainings on election technology shall utilize a detailed and comprehensive training curriculum approved by the Commission.

(2) The Commission shall ensure that the curriculum referred to in sub-regulation (1) includes both practical training as well as theoretical aspects for a period prescribed by the Commission.

(3) Such technical training under sub regulation (2) shall be conducted by—

(a) qualified personnel with adequate knowledge and experience on the subject matter; and

(b) service providers and vendors of such election technology.

PART XI – THE ELECTIONS TECHNOLOGY ADVISORY COMMITTEE

Establishment.

31. The Committee established under section 44 (8) of the Elections Act, 2011 shall be known as the Elections Technology Advisory Committee.

32. (1) The Committee will advise the Commission on adoption and implementation of election technology, which may include—

(a) the development of policies for the progressive use of election technology in the electoral process;

(b) the participation of stakeholders in the implementation and deployment of election technology;

(c) the development of an operations continuity plan, as set out in regulation 24.

(2) The Committee shall—

(a) regularly engage with stakeholders in order to sensitize them on the progress of adoption and use of election technology in the electoral process, and

(b) receive regular updates on the status of election technology.

Composition.

33. The Committee shall be composed of—

(a) at least three (3) members of the Commission and designated staff;
(b) the Attorney General;
(c) the Principal Secretary, National Treasury;
(d) the Registrar of Political Parties;
(e) a representative of—
  (i) Majority Party in the National Assembly,
  (ii) Minority Party in the National Assembly,
  (iii) the Communication Authority of Kenya,
  (iv) Information Communication Technology Authority,
  (v) the National Council for Persons with Disabilities,
  (vi) the Telecommunication service providers association,
  (vii) the National Registration Bureau,
  (viii) the Information Systems Audit and Control Association-Kenya Chapter,
(f) Such other persons as the Commission may in its discretion invite.

Engagement of experts, consultants.

34. The Commission may engage the services of experts or consultants in respect of any of the functions of the Committee.

Chairperson and secretariat

35. The Commission shall chair the Committee's meetings and provide secretariat services.

Meetings.

36. (1) The Committee shall hold meetings in such place, time, and manner as the Commission may consider necessary for the discharge of its functions under these Regulations.

(2) Decisions and recommendations from the Committee's meetings shall be recorded and made public on the IEBC website.

Code of Conduct.

No.9 of 2011.

37. The members of Committee shall subscribe to the Code of Conduct for staff set out in the Independent Electoral and Boundaries Commission Act, 2011, with any necessary modifications.

PART XII – MISCELLANEOUS PROVISIONS

Duty to cooperate.

38. Every public officer, public or private entity or political party has a duty—

(a) to co-operate with the Commission in its activities relating to election technology, and

(b) not to hinder the Commission in carrying out its functions.

Non-disclosure agreement.

39. A member of the Election Technology Advisory Committee established under Part X shall safeguard information relating to the election technology that comes into their possession and protect it from improper or inadvertent disclosure.

Voter education.
No.9 of 2011.

40. Pursuant to section 4 (g) of Independent Electoral and Boundaries Commission Act, 2011, the Commission shall carry out voter education related to election technology.

Procedures and guidelines.

41. The Commission may issue procedures and guidelines for purposes of implementing these Regulations.

52

REPUBLIC OF KENYA

PARLIAMENT OF KENYA

ELEVENTH PARLIAMENT

THE SENATE

FOURTH SESSION

SENATE STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS

RECOMMENDATIONS ON THE DRAFT ELECTIONS (TECHNOLOGY) REGULATION, 2016

DECEMBER, 2016

The Senate Standing Committee on Legal Affairs and Human Rights recommends the following amendments to the draft Elections (Technology)Regulations, 2016-

CLAUSE 1

THAT Clause 1 of the draft Regulations be amended by inserting the words "and shall come into force on such date as the Commission may, by notice in the Gazette, appoint" at the end of the clause.

CLAUSE 2

THAT clause 2 of the draft regulations be amended-

(a) in the definition of the word "audit" by deleting the word "internal" appearing immediately after the words "examination of the" and substituting therefor the word "all";

(b) by inserting the following new definition immediately after the definition of the word "Commission"-

"controls" means standard operating procedures, security measures, validation rules, best practices, and other procedures and policies put in place by the commission to guide and support use of election technology.

(c) by deleting the definition of the word "data" and substituting therefor the following new definition-

"data" means attribute to an entity recorded in a format in which can be processed to produce information by equipment in response to instructions given for that purpose, and includes representation of facts in form of quantities, characters, symbols and images, transmitted in the form of electrical signals and stored on magnetic, optical or mechanical recording media or as defined in the Kenya Information and Communications Act;

(d) by deleting the definition of the word "election technology" and substituting therefor the following new definition-

"election technology" refers to a system that includes biometric voter registration system, biometric voter identification system, a system that enables the nomination and registration of candidates and electronic result transmission system;

(e) by deleting the definition of the expression "internal controls".

PART II

THAT Part II of the draft Regulations be amended in the heading by inserting the word "STORAGE" immediately after the word "ACQUISITION".

CLAUSE 3

THAT clause 3 of the draft Regulations be amended by deleting sub-clause (2) and substituting therefor the following new sub-clause-

(2) Based on the requirements analysis, the Commission shall prepare a solution design and a feasibility report for any required upgrades or acquisitions.

CLAUSE 4

THAT Clause 4 of the draft Regulations be amended in sub-clause (1) by inserting the words "solution design" immediately after the words "requirements analysis".

NEW CLAUSE

THAT the draft Regulations be amended by inserting the following new clause immediately after clause 5-

5A. The Commission shall acquire and maintain proper facilities for the storage of equipment.

CLAUSE 6

THAT the draft Regulations be amended by deleting clause 6 and substituting therefor the following new clause-

Maintenance.

6. The Commission shall carry out regular inspections and servicing of the election technology, as well as establish a support and maintenance contract, with a Service Level Agreement, with a service provider or providers to ensure the serviceability, auditability, reliability and availability of the election technology.

CLAUSE 8

THAT the draft Regulations be amended by deleting clause 8 and substituting therefor the following new clause -

Testing

8. The Commission shall -

(a) carry out timely testing of election technology before deployment for the election process; and

(b) publish a detailed test plan at least sixty days before the election.

CLAUSE 9

THAT clause 9 of the draft Regulations be amended by deleting sub-clause (2) and substituting therefor the following new sub-clause-

(2) The Commission shall publish the information required under sub-regulation (1) –

(a) on its official website;
(b) through electronic and print media of national circulation; and
(c) by posting the notice outside of the Commission's offices.

CLAUSE 10

THAT clause 10 of the draft Regulations be amended-

(a) in sub-clause (1) by deleting the word "certification" appearing immediately after the words "shall prepare a"; and
(b) in sub-clause (2) by deleting the word "certification" appearing immediately after the word "request" and substituting therefor the word "assurance".

CLAUSE 11

THAT the draft Regulations be amended by deleting clause 11 and substituting therefor the following new clause-

Regular audit.

11. The Commission shall conduct biennial audits of the election technology, or as may be required, to —

(a) guarantee process and data integrity;
(b) ensure that the technology functions effectively as specified; and
(c) ensure that the internal controls of the technology are effective.

CLAUSE 12

THAT the draft Regulations be amended by deleting clause 12 and substituting therefor the following new clause-

Body to conduct audit.

12. (1) The Commission shall conduct internal audits of the election technology.

(2) The Commission shall, from time to time, contract a profession reputable firm, recognized in the field of information systems, to conduct an external audit of the election technology.

(3) The Commission shall develop and maintain a risk management framework.

(4) The Commission shall conduct systems reviews to evaluate the confidentiality, integrity and availability of the election technology by assessing—

(a) the security access to the system;
(b) the vulnerability of the system from the logs;
(c) the accuracy and the completeness of the data; and
(d) any other mechanisms that may be determined by the Commission.

(4) Where the Commission decides to engage a professional reputable firm, the firm shall present its audit finding to the Commission, which will be incorporated into a report as set out in

regulation 13.

CLAUSE 14

THAT clause 14 of the draft Regulations be amended by deleting sub-clause 2 and substituting therefor the following new sub-clause-

(2) All data collected by the Commission shall be under custody of the Commission.

CLAUSE 16

THAT the draft Regulations be amended by deleting clause 16 and substituting therefor the following new clause-

Request for information. No. 9 of 2011. No. 31 of 2016.

16. (1)A person may request for information from the Commission, in accordance with Access to Information Act and section 27 of the Independent Electoral and Boundaries Commission Act, 2011.

(2) All the Commission's data including election technology data shall be stored in Kenya.

PART VI

THAT PART VI of the draft Regulations be amended in the title by inserting the words "AND ASSET" immediately after the word "DATA".

CLAUSE 17

THAT the draft Regulations be amended by deleting clause 17 and substituting therefor the following new clause-

Data retention and archive.

17. (1)All electronic data relating to an election shall be retained in safe custody by the Commission for a period of three years after the results of the elections have been declared, and shall then, unless the Commission or a court otherwise directs, be archived, in accordance with procedures prescribed by the Commission subject to the Public Archives and Documentation Service Act, and the Kenya Information and Communications Act.

Cap. 19. Cap.411A.

(2) All assets shall be disposed of in accordance with the procedures set out under the Public Procurement and Asset Disposal Act.

No.33 of 2015

(3) The Commission shall ensure that all the data in all the equipment is erased before disposal under sub-regulation (2).

CLAUSE 18

THAT clause 18 of the draft Regulations be amended in sub-clause (1) by inserting the words "and section 44(3) of the Elections Act, 2011" immediately after the words "Industrial Property Act, 2001".

CLAUSE 19

THAT the draft Regulations be amended by deleting clause 19 and substituting therefor the following new clause-

Disclosure of existing agreements.

19.(1) The Commission shall publish, on its official website, details of any telecommunication network service providers to be used during an election.

(2) A telecommunication network service provider or a member of a consortium who intends to provide services to the Commission pursuant to sub-regulation (1) shall disclose to the Commission any existing agreements with political parties, agents, or candidates before engagement for telecommunication services in an election.

(3) A telecommunication network service provider or a member of a consortium of such service provider shall ensure that they hold a valid licence form the Communication Authority of Kenya

CLAUSE 24

THAT the draft Regulations be amended by deleting clause 24 and substituting therefor the following new clause-

Operations continuity plan and testing

24.(1) The Commission shall establish an operations continuity plan as per the risk management framework.

(2) The operations continuity plan established under sub-regulation (1) shall provide mitigation and contingency measures, including preparedness, prevention, response and recovery measures, for potential technology failures.

(3) The Commission shall test the operations continuity plan from time to time to ensure that all operational procedures are working as intended.

CLAUSE 25

THAT the draft Regulations be amended by deleting clause 25 and substituting therefor the following new clause-

Data recovery.

25. (1) The Commission shall –

(a) maintain a confidential, secured and protected offsite data recovery site, for all electoral information systems;

(b) establish such data recovery processes as may be necessary to ensure quick and efficient systems and data recovery in the event of election technology malfunctions;

(c) maintain such physical documentation records to enable re-construction of the information in the event of data loss during transmission or disaster;

(d) ensure that such other failover technologies or procedures are in place to ensure operations continuity; and

(e) communicate failover technologies or procedures to

stakeholders.

(2) Any person who, without the approval of the Commission, discloses the off-site location of the data recovery site commits an offence and is liable, upon conviction, to a fine of two million shillings or an imprisonment term of five years or to both.

CLAUSE 27

THAT clause 27 of the draft Regulations be amended by inserting the following new sub-clause immediately after sub-clause 2-

(3) The Commission shall share such information related to cyber security incidence with the Communications Authority of Kenya.

CLAUSE 28

THAT clause 28 of the draft Regulations be amended by inserting the words "service level" immediately after the word "continuous".

CLAUSE 29

THAT clause 29 of the draft Regulations be amended by deleting the word "sufficient" appearing immediately after the words "stakeholders within" and substituting therefor the word "adequate".

CLAUSE 32

THAT clause 32 of the draft Regulations be amended by deleting the word "will" and substituting therefor the words "shall oversee".

CLAUSE 33

THAT the draft Regulations be amended by deleting clause 33 and substituting therefor the following new clause-

Composition **33.** The Committee shall be composed of-

(a) at least three Members of the Commission and designated staff;
(b) the Attorney General;
(c) the Principal Secretary, National Treasury;
(d) the Principal Secretary in the ministry responsible for matters relating to technology;
(e) the Registrar of Political Parties;
(f) a representative of the -
    (i) Majority Party in the Senate;
    (ii) Minority Party in the Senate;
    (iii) Majority Party in the National Assembly;
    (iv) Minority Party in the National Assembly;
    (v) Political Parties Liaison Committee;

(vi) Communications Authority;

(g) three persons nominated by the Association of Information Technology Professionals and Service Providers; and

(h) such other persons as the Commission may, in its discretion, invite.

CLAUSE 41

THAT clause 41 of the draft Regulations be amended by deleting the expression "Part X" appearing immediately after the words "established under" and substituting therefor the expression "Part IX".

DATED THIS..... DAY OF **DECEMBER** 2016

.....

SEN. AMOS WAKO, EGH,
CHAIRPERSON,
SENATE STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS.

53

Mkenya Daima "Views on contested changes to poll laws"

1. Kenya needs a truly independent IEBC.

2. Kenya also needs political consensus on the credibility, impartiality and effectiveness of the elections process.

3. We as Mkenya Daima also stand for free fair and credible elections. All Kenyans want a non-violent stand and an encouragement for open dialogue and discussions without any intimidation of any sort within prescribed institutional framework.

1.Constitution – anchor everything in line with Article 81 (e) (i to v)

81. The electoral system shall comply with the following principles—

(a) freedom of citizens to exercise their political rights under Article 38;

(d) universal suffrage based on the aspiration for fair representation and equality of vote; and

(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.

2. We all agree that the ideal scenario today is a full proof electronic voter identification and transmission system. But in the unlikely event of failure of such an agreed system, we urge Parliament to provide for alternative pre-agreed workable and acceptable process for the IEBC to follow. This process should clearly stipulate when a switch ought to be made, by whom, and the steps to follow. We wish to impress upon all political parties to understand that it is in their interest to come up with an alternative plan to ensure that all Kenyans right to vote and right to have their vote count is attained as per the constitution.

3.Parliament should constitute a team that periodically sits together to look at unfolding situations and manage any amendments to the rules that could jeopardize the election process especially during an election year.

VIMAL SHAH - CHAIRMAN
MKENYA DAIMA

COUNCIL OF GOVERNORS

MEMORANDUM TO THE SENATE STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS ON THE ELECTION LAWS (AMENDMENT) (NO. 3) BILL

FROM

THE COUNCIL OF GOVERNORS

3ND JANUARY 2017

1. Background and introduction

This memorandum addresses the concerns of the proposed amendments to election law- The Amendments of December 2016. The last few weeks have seen these amendments generate acrimonious debates over the political divide the main issue surrounding the use of 'complementary mechanism' alongside the electronic system. We have broadened the scope of our comments and recommendations to address other problematic aspects of the law beyond the complimentary mechanism aspect.

The table below sets out the clause over which issues arise, a concern or comment by CoG and a recommendation(s) either on the proposal or the comment.

2. Table A: Concerns/recommendations on the proposed famous section 44 A on "Complimentary Mechanism"

Clause	Previous position being changed	New position introduced by the proposed amendments.	Concerns of CoG	Recommendation(s)
19	Section 44 of the Election Act. Following the politically	• Clause 44 A gives the discretion to the Commission to resort to a 'complimentary	• There is just a general fear that there will be a failure in technology but CoG is concerned	• There should be mechanism of addressing the unforeseeable failures in specific technology (e.g EVID) and this mechanism

	negotiated settlement that resulted into amendments of September 2016 (No. 36 of 2016) the law provided for a mandatory electronic voting system through three sets of technology (a) BVR (b) EVID and (c) Transmission System.	mechanism.'	that technology cannot fail unless it is preconditioned to fail or it is recklessly used. • The procedure for creating this amendment disregarded the political settlement that informed the introduction of section 44 on the use of electronic systems. • The marginal note of the proposed section 44 (A) makes reference to voter identification	should primarily be an electronic alternative. • The procedure for amending the legislation to introduce an aspect that was not part of the 'political settlement' is not legitimate and should follow the same (consultative) procedure in view of sensitivity of the subject matter. • The amendment should either concern- only- the voter identification process or the marginal note should be

			only while the substantive provisions extends to transmission of results.	amended to reflect the substance of the provision.
			• In any case, the clause is not specific as to what the 'complimentary mechanism is.'	• Legislation should specify what this complimentary mechanism is and CoG's position is that the complimentary mechanism is not a manual system. It can be an electronically supporting system- e.g, satellite transmitter as standby alternative or as was in Nigeria- the BVR was supplemented by the chip cards.
			• According to the Attorney General and in	• CoG's view is that the process is not manual or

			political circles well as the public domain, this complimentary mechanism is (mis) understood to be a "manual system" or that the voting system is manual with electronic support. • The Attorney General proposes that these amendments should be set out in 'regulations,' which regulations can be a subject of stakeholder	electronic, but an integrated system that combines manual with three electronic support system- voter registration, voter identification and electronic votes transmission system all of which must be used for free and fair elections. • CoG's view is that the procedural aspects of the complimentary mechanism should not be set out in subsidiary legislation (regulations) but must be in the substantive main law.

			consultations.	
			• The proposed section 44, uses the word, "notwithstanding" which in essence defeats sections 38 and 44.	• The word 'notwithstanding should be deleted' and the legislation should specify the circumstances when and at whose instance the complimentary system is to be used.
			• Previous amendments that had been proposed by IEBC had not been taken into account (Including CoG's previous comments).	• The public participation process should not be a rubberstamp (merely a formality) but must inform the outcome of the legislative processes.

			• Presently, there is no framework in the legislation indicating the circumstances when the complimentary mechanism will be resorted to and at the instance of whose decision.	• Amendment of the parent act should clearly stipulate the circumstances under which the complementary system should be resorted to, at whose instance or authorisations and by who and how it feeds into the other main (electronic) systems.

Table 2: Other aspects of the proposed amendments

Clause	Previous section and position being changed.	New position introduced	Concerns of CoG	Recommendations
4	Section 6 that required the Commission to open the register of	The clause deletes 'polling station' and 'Biometric data'. It also limits the period for inspection of the	CoG is concerned that this amendment does not assure the integrity of the register by depriving members of the public an opportunity to verify their data	The register should be opened at the polling stations to give voters an opportunity to inspect it and more importantly confirm their eligibility to vote on the

	voters at the polling station for verification of biometric data.	register to 30 days and gives the Commission further powers to make a determination on the timelines.	(hence eligibility to vote) and by limiting the time within which within which members of the public can access and inspect the register.	basis of biometric date provided during registration.
5	Section 6 A allowed for verification of biometric data 90 days before the elections period.	The new amendment reduces the period to sixty days.	If through the inspection members of the public see an issue that needs to be addressed, it is safer addressed way before the elections. 60 days means that if the inspection reveals serious anomalies, there will either be administrative chaos or the errors will be susceptible to being ignored.	Ninety days period should be reinstated.
12	Political parties were required to conduct their nominations.	Section 31 (2) (F) proposes to allow the Commission to conduct and supervise nominations of a political party.	CoG is concerned that this provision is unconstitutional because under the Constitution, the responsibility of nominating all candidates is vested in the political party. Furthermore, the responsibility of resolving disputes is vested in the	This provision should be deleted.

			Commission and it cannot discharge this role – impartially- if it participates in the nominations themselves. The Commission will also need to conduct over (perhaps) three elections and public funds should not be used for such ends.	

3. Other important aspects

3.1. Delineation of electoral Bounderies

Clause 32 of the proposed amendments sets out a procedure for delineation of electoral Bounderies. First, the amendment does affect devolution but there is no involvement of senate in the procedure of reviewing the electoral boundaries. CoG's position is that failure to involve Senate in the process is unconstitutional for the following reasons:

a. Electoral boundaries are a direct concern of devolution and under article 10, devolution of power and inclusiveness are listed as a national value that bind all state organs that implement the constitution or apply any law;
b. The provisions are unconstitutional to the extent that they disregard the provisions of article 91 (1) which bestows upon senate the responsibility of representing counties and their interests.
c. The provision would also be unconstitutional as it appropriates legislative powers of the senate donated by section 91 (2) towards legislation on matters concerning counties.

In any event, CoG notes that though section 89 (3) permits the Commission to review boundaries regularly for wards, article 89 (4) qualifies that the boundaries will not take effect if elections are to be held within twelve months- until a later day. There is therefore no compelling need to hastily set out criteria for reviewing of boundaries given that such a review will not affect voting in 2017. This should have been left and subjected to wider consultation – in view of the emotive nature of boundaries and the need to secure meaningful participation in the process.

3.2. Voting of prisoners

Governors were concerned about the realisation of the right to make political choices for prisoners. The High Court interpreted that they have the right to vote but most, if not all, of them appear not to have been registered yet.

3.3. Educational qualifications for MP's and MCA's

Though this issue requires further deliberations, the issue of suspending its operations is merely frustrating the purpose the provision is meant to serve. If it cannot be enforced as it is now, it is better of abolished altogether. But there is a need for mature and informed debates over legislation and oversight in counties and this would require 'reasonable academic qualifications.'

3.4. Run-off procedures

There is an overlook on the substantive and procedural law to govern run-offs. This could be the reason why main political actors are prepared to 'win' at the first instance. There is a need for legislation to set out the parameters for a run-off to a vert a crisis in the event of a run-off.

4. Concluding observations

The foregoing review has highlighted aspects of the proposals to amend the election legislation that might require further reflection which should, aim at ensuring that the electoral process is meaningful to citizens and gives effect to

their right to make political choices. The constitution requires that elections should be free and fair and consensus over the framework of elections by relevant political players is critical if this constitutional ideal is to be realized. More importantly the process of public participation, at whose behest CoG, submits this memorandum should inform the resultant legislation and should not just be shoved away to pave way for bare partisan majorities on the basis of 'tyranny of numbers.'

REPUBLIC OF KENYA

PARLIAMENT

NATIONAL ASSEMBLY BILLS
(Bill No. 189 of 2015)

THE ELECTION LAWS (AMENDMENT) (NO. 3) BILL, 2015

(A Bill published in the Kenya Gazette Supplement No.189 of 2015 and passed by the National Assembly, with amendments, on 22nd December, 2016)

N.A. /B/No. 63/2015

THE ELECTION LAWS (AMENDMENT) (No.3) BILL, 2015

A Bill for

AN ACT of Parliament to give effect to Article 99 (1) (b) of the Constitution, to amend the Elections Act, 2011 and the Independent Electoral and Boundaries Commission Act, 2011; to provide for electoral processes and for connected purposes

ENACTED by the Parliament of Kenya, as follows—

Short title.

1. This Act may be cited as the Election Laws (Amendment) (No. 3) Act, 2015.

Amendment of section 2 of No. 24 of 2011.

2. Section 2 of the Elections Act, 2011 is amended by deleting the words "or a referendum" appearing in the definition of "returning officer."

Amendment of section 5 of No. 24 of 2011.

3. Section 5 of the Elections Act, 2011 is amended in subsection (1) by—

(i) deleting the proviso to paragraph (a);

(ii) inserting the following new paragraph immediately after paragraph (b)—

"(ba) in the case of a referendum, between the date of the publication and the date of the referendum";

(iii) deleting paragraph (c).

Amendment of section 6 of No. 24 of 2011.

4. Section 6 of the Elections Act, 2011 is amended—

(a) by deleting subsection (2) and replacing with the following—

(2) The Commission shall, within ninety days from the date of the notice for a general election, open the Register of Voters for inspection for a period of at least thirty days or such period as the Commission may consider

necessary.

(b) in subsection (3) by deleting the word "fourteen" appearing immediately after the word "least" and substituting therefor the word "thirty".

Amendment of section 6A of No. 24 of 2011.

5. Section 6A of the Elections Act, 2011 is amended in subsection (1) by deleting the word "ninety" and substituting therefor the word "sixty."

Amendment of section 13 of No. 24 of 2011.

6. Section 13 of the Elections Act, 2011 is amended—

(a) in subsection (1) by deleting the word "sixty" after the words "at least" and substituting therefor the word "ninety ";

(b) by inserting the following new subsection immediately after subsection (2)—

(2A) A political party shall hear and determine all intra party disputes arising from political party nominations within thirty days.

(c) in subsection (3) by deleting the words "forty-five" after the words "at least" and substituting therefor the words "fifty-five."

Amendment of section 16 of No. 24 of 2011

7. Section 16 of the Elections Act, 2011 is amended by inserting the following new subsection immediately after subsection (3)—

(3A) For purposes of subsection (3), a vacancy in the office of a Member of Parliament shall be deemed to occur on the date of issuance of a notice to the Commission which shall not be later than twenty-one days from the date of the actual occurrence of the vacancy.

Amendment of section 22 of No. 24 of 2011.

8. Section 22 of the Elections Act, 2011 is amended—

(a) in subsection (1) by deleting paragraph (b) and substituting therefor the following new paragraph—

(b) holds—

(i) in the case of a Member of Parliament, a degree from a university recognized in Kenya; or

(ii) in the case of member of a county assembly, a degree from a university

recognized in Kenya.

(b) by inserting the following new subsections immediately after subsection (1)—

(1A) Notwithstanding subsection (1), this section shall come into force and shall apply to qualifications for candidates in the general elections to be held after the 2017 general elections.

(1B) The provisions of this section apply to qualifications to nomination for a party list member under section 34.

Amendment of section 27 of No. 24 of 2011.

9. Section 27 of the Elections Act, 2011 is amended—

(a) in subsection (1) by deleting the words "three months" and substituting therefor the words "six months";

(b) in subsection (2) by deleting the subsection and substituting therefor the following—

(2) An amendment to the nomination rules shall only be effective ninety days after submission of the amendments to the Commission.

(c) by inserting the following new subsections immediately after subsection (2)—

(2A) Upon receipt of the nomination rules from a political party under subsection (1), the Commission shall, within fourteen days, review the rules to ensure compliance with the prescribed regulations and—

(a) issue the political party with a certificate of compliance; or

(b) require the political party to amend the rules to ensure such compliance within fourteen days.

(2B) For purposes of subsection (2A), the Commission shall, by notice in the Gazette, issue Regulations prescribing guidelines to be complied with and the process by which political parties nominate candidates for nomination in

accordance with Article 88 (4) (d) of the Constitution failing which the rules shall become void.

Amendment of section 28 of No. 24 of 2011.

10. The Elections Act, 2011 is amended by deleting section 28 and substituting therefor the following section—

Submission of party membership lists

28. (1) A political party that nominates a person for an election under this Act shall submit to the Commission a membership list of the party—

(a) in the case of a general election, at least one hundred and twenty days before the date of the election; and

(b) in the case of a by-election, forty-five days before the date of the by-election.

(2) The Commission shall publicize the membership lists as received from political parties.

Amendment of section 30 of No. 24 of 2011.

11. Section 30 of the Elections Act, 2011 is amended by inserting the following new subsection immediately after subsection (3)—

(3A) A registered referendum committee may appoint one agent at each polling station.

Amendment of section 31 of No. 24 of 2011.

12. Section 31 of the Elections Act, 2011 is amended by inserting the following new subsections immediately after subsection (2D)—

(2F) Where the Commission receives multiple requests under subsection (2), the Commission shall conduct and supervise the nomination of candidates for presidential, parliamentary or county elections for all the requesting political parties—

(a) on the same day;

(b) in the same polling centres; and

(c) in different polling streams for each participating political party."

(2E) Parliament shall appropriate monies for the effective implementation of this section.

Amendment of section 32 of No. 24 of 2011.

13. Section 32 of the Elections Act, 2011 is amended—

(a) by inserting a new subsection immediately after subsection (1) —

(1A) Where there is a vacancy in the office of the Governor, an independent candidate shall submit to the Commission, the symbol that the person intends to use during an election at least seven days before nomination.

(b) in subsection (2) by deleting the words "subsection (1)" appearing immediately after the word "under" and substituting therefor the words "this section."

Amendment of section 33 of No. 24 of 2011.

14. Section 33 of the Elections Act, 2011 is amended in in subsection (1) by inserting the words "and symbol" immediately after the words "submitted to the Commission the name" appearing in paragraph (c).

Amendment of section 34 of No. 24 of 2011.

15. Section 34 of the Elections Act, 2011 is amended—

(a) by inserting the following new subsection immediately after subsection (4)—

(4A) In the case of a person nominated pursuant to Article 177(1) (c) of the Constitution, the party list shall include a certification in the manner prescribed by the Commission.

(b) by inserting the following new subsections immediately after subsection (6)—

(6A) Upon receipt of the party list from a political party under subsection (1), the Commission shall review the list to ensure compliance with the prescribed regulations and—

(a) issue the political party with a

certificate of compliance; or

(b) require the political party to amend the party list to ensure such compliance failing which the Commission shall reject the list.

(6B) For purposes of subsection (6A), the Commission may, by notice in the gazette, issue regulations prescribing guidelines to be complied with in preparation of party lists.

(c) by deleting subsection (9) and substituting therefore the following—

(9) The party list shall not contain a name of a candidate nominated for an election.

Insertion of new section 38A of No. 24 of 2011.

16. The Elections Act, 2011 is amended by inserting the following new section immediately after section 38—

Number of voters per polling station.

38A. For the purposes of providing efficient and effective conduct of elections, the number of voters per polling station shall not exceed seven hundred.

Amendment of section 43 of No. 24 of 2011.

17. Section 43 of the Elections Act, 2011 is amended by inserting the following new subsection immediately after subsection (5)—

Amendment of section 43 of No. 24 of 2011.

(5A) A public officer who intends to contest in a by-election under this Act shall resign from public office within seven days of the declaration of a vacancy.

Amendment of section 44 of No. 24 of 2011.

18. Section 44 of the Elections Act, 2011 is amended—

(a) in subsection (4) by deleting the words "eight months" appearing paragraph (a) and substituting therefor the words "one hundred and twenty days"; and

(b) in subsection (7) by deleting the words "eight months" appearing paragraph (b) and substituting therefor the words "one hundred

→ delimitation of ward boundaries
→ paper copy of the BVR
EVID
→

EVID

and twenty days".

Amendment of No. 24 of 2011.

19. The Elections Act, 2011 is amended by inserting the following new section immediately after section 44—

Complementary mechanism for identification of voters.

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 simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the Constitution.

Amendment of section 46 of No. 24 of 2011.

20. Section 46 of the Elections Act, 2011 is amended in subsection (3) by inserting the words "or thumb prints" immediately after the word "signature";

Amendment of section 50 of No. 24 of 2011.

21. Section 50 of the Elections Act, 2011 is amended in subsection (2) (b) by deleting the words "answers to the referendum question" and substituting therefor the words "answer or answers to the referendum question or questions."

Amendment of section 54 of No. 24 of 2011.

22. Section 54 of the Elections Act, 2011 is amended by deleting the words "255 and 256" appearing immediately after the word "Article" and substituting therefor the words "255, 256 and 257".

Amendment of section 56 of No. 24 of 2011.

23. Section 56 of the Elections Act, 2011 is amended by deleting the word "and" appearing immediately after the word "shillings" and substituting therefor the word "or".

Amendment of section 74 of No. 24 of 2011.

24. Section 74 of the Elections Act, 2011 is amended in subsection (2) by deleting the word "seven" appearing immediately after the word "within" and substituting therefor the word "ten".

Amendment of section 86 of No. 24 of 2011.

25. Section 86 of the Elections Act, 2011 is amended—

(a) in subsection (1) by deleting the words "which

shall then" appearing immediately after the word "Commissioner" and substituting therefor the word "and"; and

(b) by deleting subsection (2).

Amendment of section 91 of No. 24 of 2011

26. Section 91 of the Elections Act, 2011is amended—

(a) in subsection (1) (a) by the deleting the word "gazetted " appearing immediately after the words "results if" and substituting therefor the word "declared";

(b) in subsection (2) by—

(i) deleting the words "the votes of a majority of the persons entitled to vote in the referendum" appearing immediately after the words "supported by" in paragraph (a) and substituting therefor the words "a simple majority of the citizens voting in the referendum".

(ii) deleting the words "the votes of a majority of the persons entitled to vote in such referendum" appearing immediately after the words "Commission that" in paragraph (b) and substituting therefor the words "a simple majority of the citizens voting in such referendum".

Amendment of the Second Schedule to No. 24 of 2011.

27. The Second Schedule to the Elections Act, 2011 is amended by deleting paragraph 18 and substituting therefor the following paragraph—

"18. This Code shall apply—

(a) in the case of a general election, from the date of publication of a notice of election until the swearing in of newly elected candidates; and

(b) in the case of a by-elections, from the date of declaration of a vacancy until the swearing in of elected candidates."

Amendment of the Third Schedule to No. 24 of 2011.

28. The Third Schedule to the Elections Act, 2011 is amended by inserting the words "Commissioner for

Oaths/Magistrates" immediately before the words "Member/Secretary/Returning officer".

Amendment of section 3 of No. 9 of 2011.

29. Section 3 of the Independent Electoral and Boundaries Commission Act, 2011, is amended by deleting paragraph (e).

Amendment of section 24 of No. 9 of 2011.

30. Section 24 of the Independent Electoral and Boundaries Commission Act, 2011 is amended by deleting subsection (3) and substituting therefor the following subsection—

(3) The Commission shall publish and publicize the annual report.

Amendment of section 35 of No. 9 of 2011.

31. The Independent Electoral and Boundaries Commission Act, 2011 is amended by deleting section 35.

Amendment of section 36 of No. 9 of 2011.

32. The Independent Electoral and Boundaries Commission Act, 2011 is amended by deleting section 36 and substituting therefor the following new section—

Procedure for delimitation of electoral boundaries.

36. (1) The Commission shall discharge its mandate of the delimitation of boundaries of constituencies and wards in accordance with the Constitution, this Act and any other law.

(2) Subject to the Constitution, matters to be addressed in the delimitation of electoral boundaries are—

(a) review of the names and boundaries of constituencies;

(b) review of the number, names and boundaries of wards;

(c) re-distribution of wards affected by any changes in the boundaries of constituencies; and

(d) ensuring that the number of inhabitants in each constituency and ward is as nearly as possible, equal to

the population quota as provided for by Article 89(5) of the Constitution and that such a process—

(i) allows for variation of margin of not more than the limits provided under Article 89 (6) of the Constitution in relation to cities, sparsely populated areas and other areas;

(ii) takes into account the provisions of Article 89 (7) (b) of the Constitution that provides for the progressive realization of the requirement that the number of inhabitants in each constituency and ward to be as nearly as possible, equal to the population quota for the purposes of the each review;

(iii) is subject to the use of enumerated national census figures.

(3) The Commission shall prepare and publish a preliminary report outlining—

(a) the proposed delimitation of boundaries for constituencies and wards; and

(b) the specific geographical; and

(c) demographical details relating to such delimitation.

(4) The Commission shall ensure that the preliminary report is made available to the public for a period of

thirty days and invite representations from the public on the proposals contained in the report during that period.

(5) Upon the expiry of the period provided in subparagraph (4), the Commission shall, within fourteen days, review the proposed delimitation of boundaries considering the views received and submit the revised preliminary report to the Parliamentary Committee.

(6) The Parliamentary Committee shall, within fourteen days of receipt of the revised preliminary report, table the report in the National Assembly together with its recommendations.

(7) The National Assembly shall, within fourteen days of the tabling of the revised preliminary report, consider the report and forward its recommendations to the Commission.

(8) Within fourteen days of the expiry of the period provided for in subparagraph (7), 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 subparagraph (7), the Commission shall publish its report in accordance with subparagraph (8).

(10) A person who, being responsible for the publication in the *Gazette* of the final report submitted under this paragraph 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 subparagraph (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.

33. 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.

34. 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.

35. 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."

I certify that this printed impression is a true copy of the Bill passed by the National Assembly on the 22nd December, 2016.

Clerk of the National Assembly

Endorsed for presentation to the Senate in accordance with the provisions of Standing Order 142 of the National Assembly Standing Orders.

Speaker of the National Assembly

0716211110

10,700

PARLIAMENT OF KENYA

THE SENATE

BRIEF ON THE ELECTION LAWS (AMENDMENT)(NO.3) BILL, 2016

The Election Laws (Amendment)(No. 3) Bill, 2016, was passed by the National Assembly, with amendments, on 22nd December, 2016 and thereafter transmitted to the Senate for consideration.

The Bill proposes various amendments to the Elections Act, 2011 the Independent Electoral and Boundaries Bill, 2011 and the Elections Campaign Financing Act, 2013.

(1) Overview of the Amendments to the Elections Act, 2011

Registration of voters

Clause 3 of the Bill proposes to amend parts of section 5 of the Elections Act which relate to instances when the continuous registration of voters may be temporarily halted. In this regard, the Bill proposes an additional instance when the registration of voters may be terminated, namely, during a referendum, between the date of the publication and the date of the referendum.

Inspection of the register of voters

Clause 4 of the Bill seeks to amend section 6 of the Elections Act by-

(a) deleting subsection (2) which currently requires the Commission to maintain a public web portal for inspection of the register by members of the public; and

(b) providing that the Commission must open the register for inspection within ninety days from the date of the notice for a general election for a period of thirty days or such other period as the Commission may consider appropriate.

Verification of biometric data

Clause 5 of the Bill seeks to amend section 6A of the Elections Act by adjusting the date for opening of the Register of Voters for verification of biometric data by members of the public at their respective polling stations, from ninety to sixty days before the date of a general election.

Nomination of candidates by a political party

Clause 6 of the Bill seeks to amend section 13 of the Elections Act, 2011 by-

(a) amending the period within which parties are required to nominate their candidates for an election from at least sixty days before a general election to at least ninety days before a general election;
(b) introducing a new sub-clause which requires a political party to hear and determine all intra party disputes arising from political party nominations within thirty days; and
(c) amending the period within which the Commission would require parties to nominate their candidates for any other election from at least forty-five days before that election to at least fifty-five days before that election.

Initiation of election of Members of Parliament

Clause 7 of the Bill seeks to amend section 16 of the Elections Act, 2011 to clarify that a vacancy in the office of a Member of Parliament shall be deemed to occur on the date of issuance of a notice to the Commission which shall not be later than twenty-one days from the date of the actual occurrence of the vacancy.

Qualifications for nomination of candidates

Clause 8 seeks to amend section 22 of the Elections Act, to, require that a person seeking nomination for an election should possess, as minimum qualifications, a degree in the case of Parliamentary elections and a diploma in the case of county assembly elections.

This clause also contains a proviso to the effect that the new requirements would apply to elections held after the 2017 general elections.

Submission of party nomination rules

Clause 9 of the Bill amends section 27 of the Elections Act, to require that political parties submit, to the Commission, their party nomination rules at least six months before an election. The clause further empowers the Commission to issue political parties with compliance certificates after reviewing the rules and ascertaining that they comply with the prescribed regulations.

This clause further requires that an amendment of those rules should have effect ninety days after notification to the Registrar.

Submission of party lists

Clause 10 of the Bill amends section 28 of the Elections Act to require that a political party that nominates a person for an election shall submit to the Commission a party membership list in the case of a general election, at least one hundred and twenty days before the date of the election *(the law currently provides at least ninety days before the date of the election)*, and in the case of a by-election, forty-five days before the date of the by-election. The Commission is also required to publicize the membership lists as received from political parties.

Appointment of agents

Clause 11 of the Bill proposes to amend section 30 of the Elections Act to allow registered referendum committees to appoint one agent at each polling station.

Nomination of political party candidates

Clause 12 of the Bill amends section 31 of the Elections Act, to provide that where multiple parties request the Commission to preside over their nominations, the Commission shall conduct and supervise the nomination of candidates for presidential, parliamentary or county elections for all the requesting political parties—

(a) on the same day;
(b) in the same polling centres; and
(c) in different polling streams for each participating political party.

The provision further states that Parliament shall appropriate monies for the effective implementation of this section.

Approval of symbol for independent candidate

Clause 13 of the Bill amends section 32 of the Elections Act to provide for the submission of party symbol in the case of a vacancy in the office of the Governor. The amendment proposes that such symbol should be submitted to the Commission at least seven days before nomination.

Nomination of independent candidates

Clause 14 of the Bill amends section 33 of the Elections Act, 2011 to ensure that an independent candidate not only presents their name but also their party symbols for purposes of nomination.

Nomination of party lists members

Clause 15 amends section 34 of the Elections Act, 2011 to require that in the case of a person nominated pursuant to Article 177(1) (c) of the Constitution *(members of marginalised groups, including persons with disabilities and the youth)*, the party list shall include a certification in the manner prescribed by the Commission. This clause further requires the Commission to verify the list and issue a certificate of compliance. The Commission is to prescribe regulations on the standards to be complied with in developing party lists.

Numbers of voters per polling station

Clause 16 of the Bill amends section 38A the Elections Act to require that the number of voters per polling station in a general election shall not exceed seven hundred *(section 38A currently provides for a maximum of five hundred voters per polling station)*.

Participation in elections by public officers

Clause 17 seeks to amend section 43 of the Elections Act clarify that a public officer who intends to contest in a by-election under this Act shall resign from public office within seven days of the declaration of a vacancy.

Use of technology

Clause 18 of the Bill seeks to amend section 44 of the Elections Act by-

(a) reducing the period within which the Commission must put in place the technology necessary for the conduct of a general election from at least eight months before such elections to at least one hundred and twenty days before such elections; and

(b) reducing the period within which the Commission must put in place the technology necessary for the conduct of the next general election from at least eight months before the elections to at least one hundred and twenty days before such elections.

Complementary mechanism for identification of voters.

Clause 19 of the Bill seeks to amend the Elections Act by introducing a new section 44A which provides that 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.

Petition for recall

Clause 20 of the Bill amends section 46 of the Elections Act to require that a petition for recall should be accompanied by, among other particulars, thumb prints.

Dispute resolution by the Commission

Clause 24 of the Bill amends section 74 of the Elections Act to provide that electoral dispute, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results, shall be determined within fourteen days of the lodging of the dispute with the Commission *(the law currently provides for seven days)*.

Certificate of court as to validity of election

Clause 25 of the Bill seeks to amend section 86 of the Elections Act, to require an election court to notify the relevant Speaker of Parliament of its determination of the validity of any question raised with regard to an election.

Operation of declared result of issue submitted to referendum

Clause 24 of the Bill amends section 91 of the Elections Act, 2011 to make it a requirement that where no petition for the referendum result is filed within the time specified, the declared (not gazetted) result shall have effect.

Code of conduct

Clause 25 of the Bill amends the Second Schedule of the Elections Act to clarify that the Electoral code of conduct is applicable to both general and by-elections.

(2) Amendments to the Independent Electoral and Boundaries Commission Act, 2011

Clauses 29 to 33 seek to make amendments to the Independent Electoral and Boundaries Commission Act to—

(a) delete spent sections;
(b) provide for the procedure and criteria for the delimitation of electoral boundaries including the approval of the National Assembly;
(c) provide for the involvement of the public in delimitation boundaries
(d) provide for the resolution of disputes arising from &limitation of boundaries; and
(e) remove obsolete provisions of the Act.

(3) Amendments to the Elections Campaign Financing Act, 2013

Clause 34 of the Bill seeks to suspend the operation of the Elections Campaign Financing Act and to further provide that the Act shall come into force immediately after the general elections to be held in the year 2017.

Way Forward

The Committee is required to consider the Bill, undertake public participation and table its report in the House.

THE REPUBLIC OF KENYA

LAWS OF KENYA

ELECTIONS ACT

NO. 24 OF 2011

Revised Edition 2015 [2012]

Published by the National Council for Law Reporting
with the Authority of the Attorney-General

www.kenyalaw.org

NO. 24 OF 2011

ELECTIONS ACT

ARRANGEMENT OF SECTIONS

PART I – PRELIMINARY

Section

1. Short title.
2. Interpretation.

PART II – REGISTRATION OF VOTERS AND DETERMINATION OF QUESTIONS CONCERNING REGISTRATION

3. Right to vote.
4. Register of Voters.
5. Registration of voters.
6. Inspection of register of voters.
6A. Verification of biometric Data.
7. Transfer of registration
8. Updating of the Register of Voters.
8A. Audit of the Register of Voters.
9. Postponement of disqualification to enable appeal.
10. Eligibility to vote.

Determination of Questions Concerning Registration

11. Determination of questions as to registration.
12. Claims.

PART III – ELECTIONS

13. Nomination of candidates by a political party.

Presidential Elections

14. Initiation of presidential election.
15. Change of deputy president nominee candidate.

Parliamentary Elections

16. Initiation of election of member of Parliament.

County Governor Elections

17. Initiation of county governor election.
18. Change of deputy county governor nominee candidate.

County Assembly Elections

19. Initiation of country assembly elections.
20. Notification in electronic media.
21. Election of county assembly speaker.

Nominations and Elections Generally

22. Qualifications for nomination of candidates.
23. Qualifications and disqualifications for nomination as President.
24. Qualifications and disqualifications for nomination as member of Parliament.

Section

25. Qualifications for nomination as member of county assembly.
26. Additional disqualification.
27. Submission of party nomination rules.
28. Submission of party membership lists.
29. Power to nominate.
30. Appointment of agents.
31. Nomination of political party candidates.
32. Approval of symbol for independent candidate.
33. Nomination of independent candidates.

Nomination of Party List Members

34. Nomination of party lists members.
35. Submission of party lists.
36. Allocation of special seats.
37. Re-allocation of special seat.
38. Holding of elections.
38A. Number of voters per polling station.
39. Determination and declaration of results.
40. Voter education.
41. Access to and obligation of media.
42. Accreditation of observers, agents, reporters, etc.
43. Participation in elections by public officers.
44. Use of technology.

PART IV – RECALL OF MEMBER OF PARLIAMENT

45. Right of recall.
46. Petition for recall.
47. Recall elections.
48. Validity of recall election.

PART V – REFERENDUM

49. Initiation of a referendum.
50. Notice of holding referendum.
51. Referendum committees.
52. Costs of referendum committee.
53. Procedure for conduct of referendum.
54. Voting threshold.
55. General power of the Commission.
55A. Maintenance of secrecy at elections
55B. Postponement of elections by the Commission.
55C. General power of the Commission.

PART VI – ELECTION OFFENCES

56 – 73. *REPEALED*

PART VII – ELECTION DISPUTES RESOLUTION

Dispute Resolution by the Commission

74. Settlement of certain disputes.

Election Petitions

75. County election petitions.
76. Presentation of petitions.
77. Service of petition.
78. Security for costs.
79. Procedure of election court on receipt of petition.
80. Powers of election court.
81. Prohibition of disclosure of vote.
82. Scrutiny of votes.
83. Non-compliance with the law.
84. Costs.
85. Determination of election petition.
85A. Appeals to the Court of Appeal.
86. Certificate of court as to validity of election.
87. Report of court on electoral malpractices.

Referendum Petitions

88. Election petition procedures to apply to referendum petition.
89. Referendum petition.
90. Composition of Court.
91. Operation of declared result of issue submitted to referendum.
92. Persons who may present referendum petition.
93. Respondents to referendum petition.
94. Filing of referendum petition.
95. Duty of Registrar to make list of referendum petitions.
96. Practice procedure and security for costs.
97. Death of or delay by petitioner.
98. Hearing of referendum petition.

Section

99. Powers of a court to summon witnesses in a referendum petition.
100. Prohibition of disclosure of vote.
101. Examination of votes.
102. Powers of Court.
103. Petition expenses.
104. Facilitation of persons with special needs including persons with disabilities.

PART VIII – GENERAL PROVISIONS

105. Duty to co-operate.
106. General penalty.
107. Powers of arrest and prosecution.
108. Airtime by state radio and television for election campaign.
109. Regulations.
110. Electoral code of conduct.
111. Repeals.
112. Transitional provisions.

SCHEDULES

FIRST SCHEDULE – ELECTION OF SPEAKER OF COUNTY ASSEMBLY

SECOND SCHEDULE – ELECTORAL CODE OF CONDUCT

THIRD SCHEDULE – OATH OF SECRECY

NO. 24 OF 2011

ELECTIONS ACT

[*Date of assent:27th August, 2011.*]

[*Date of commencement:2nd December, 2011.*]

An Act of Parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes

[Act No. 24 of 2011, L.N. 142/2011, L.N. 182/2011, L.N. 19/2012, Corr. No. 18/2012, Act No. 12 of 2012, L.N. 19/2012, L.N. 76/2012, Act No. 31 of 2012, Act No. 32 of 2012, Act No. 47 of 2012, Act No. 48 of 2012, No. 36 of 2016, Act No. 37 of 2016.]

PART I – PRELIMINARY

1. **Short title**

This Act may be cited as the Elections Act, 2011.

2. **Interpretation**

In this Act, unless the context otherwise requires—

"adult" has the meaning assigned to it in Article 260 of the Constitution;

"agent" means a person duly appointed by—

(a) a political party or an independent candidate for the purposes of an election under this Act; or

(b) a referendum committee for the purposes of a referendum under this Act,

and includes a counting agent and a tallying agent;

"ballot box" means a transparent container with a slot on the top sufficient to accept a ballot paper in an election or in a referendum but which prevents access to the votes cast until the closing of the voting period;

"ballot paper" means a paper used to record the choice made by a voter and shall include an electronic version of a ballot paper or its equivalent for purposes of electronic voting;

"biometric" means unique identifiers or attributes including fingerprints, hand geometry, earlobe geometry, retina and iris patterns, voice waves, DNA, and signatures;

"campaign period" means the period specified as such in the notice issued by the Commission in relation to an election;

"candidate" means a person contesting for an elective post;

"Commission" means the Independent Electoral and Boundaries Commission established under Article 88 of the Constitution;

"constituency" means one of the constituencies into which Kenya is divided under Article 89 of the Constitution;

"constituency register" means the register of voters compiled in respect of each constituency by the Commission;

"county" means one of the counties into which Kenya is divided under Article 6(1) of the Constitution and specified in the First Schedule of the Constitution;

"county assembly" means a county assembly constituted in accordance with Article 177 of the Constitution;

"county election" means one of the election of a county governor or a member of a county assembly;

"disability" has the meaning assigned to it in Article 260 of the Constitution;

"election" means a presidential, parliamentary or county election and includes a by-election;

"electoral area" means a constituency, a county or a ward;

"election court" means the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163(3)(a) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165(3)(a) of the Constitution or the Resident Magistrate's Court designated by the Chief Justice in accordance with section 75 of this Act;

"election material" means ballot boxes, ballot papers, counterfoils, envelopes, packets statements and other documents used in connection with voting in an election and includes information technology equipment for voting, the voting compartments, instruments, seals and other materials and things required for the purpose of conducting an election;

"election offence" means an offence under this Act;

"elections officer" means a person appointed by the Commission for the purposes of conducting an election under this Act;

"election period" means the period between the publication of a notice by the Commission for a presidential, parliamentary or county election under sections 14, 16, 17 and 19 and the Gazettement of the election results;

"election results" means the declared outcome of the casting of votes by voters at an election;

"harambee" means the public collection of monies or other property in aid or support of a cause or a project;

"identification document" means a Kenyan national identification card or a Kenyan passport;

"illegal practice" means an offence specified in Part VI;

"independent candidate" means a candidate for presidential, parliamentary or county elections who is not a member of a political party;

"integrated electronic electoral system" refers to a system that includes biometric voter registration, biometric voter identification and electronic result transmission system.

"**nomination**" means the submission to the Commission of the name of a candidate in accordance with the Constitution and this Act;

"**nomination day**" in respect of an election, means the day gazetted at least sixty days before an election by the Commission as the day for the nomination of candidates for that election;

"**observer**" means a person or an organisation accredited by the Commission to observe an election or a referendum;

"**parliamentary election**" means the election of one or more members of Parliament;

"**party list**" means a party list prepared by a political party and submitted to the Commission pursuant to and in accordance with Article 90 of the Constitution and sections 28, 34, 35, 36 and 37;

"**petition**" means an application to the election court under the Constitution or under this Act;

"**political party**" has the meaning assigned to it in Article 260 of the Constitution;

"**polling station**" means any room, place, vehicle or vessel set apart and equipped for the casting of votes by voters at an election;

"**presidential election**" means an election of a President in accordance with Articles 136, 139(1)(b) and 146(2)(b) of the Constitution;

"**public officer**" has the meaning assigned to it in Article 260 of the Constitution;

"**public resources**" include—

(a) any vehicle, or equipment owned by or in the possession; or

(b) premises owned or occupied by,

any government, state organ, statutory corporation or a company in which the Government owns a controlling interest;

"**referendum**" means a poll held under Part V;

"**referendum committee**" means a national or a parliamentary constituency committee comprising of persons intending to support or oppose a referendum question;

"**referendum officer**" means a person appointed by the Commission for the purpose of conducting a referendum;

"**referendum question**" means a question upon which voters shall vote in a referendum as specified in section 49;

"**registration officer**" means a person appointed by the Commission for the purpose of preparing a register of voters;

" **Register of Voters**" means a current register of persons entitled to vote at an election prepared in accordance with section 3 and includes a register that is compiled electronically;

"**returning officer**" means a person appointed by the Commission for the purpose of conducting an election or a referendum under this Act;

"**supporter**" means a voter who supports the nomination of a candidate;

"**vessel**" includes any ship, boat or any other description of vessel used in navigation;

"**voter**" means a person whose name is included in a current register of voters;

"**voter's card**"*Deleted by Act No. 12 of 2012, Sch.*;

"**voting period**" means the period specified as such in the notice issued by the Commission in relation to an election;

"**ward**" means an electoral area within a county delimited in accordance with Article 89 of the Constitution.

[Act No. 12 of 2012, Sch., Act No. 47 of 2012, Sch, Act No. 36 of 2016, s. 2.]

PART II – REGISTRATION OF VOTERS AND DETERMINATION OF QUESTIONS CONCERNING REGISTRATION

3. Right to vote

(1) An adult citizen shall exercise the right to vote specified in Article 38(3) of the Constitution in accordance with this Act.

(2) A citizen shall exercise the right to vote if the citizen is registered in the Register of Voters.

[Act No. 36 of 2016, s. 26.]

4. Register of Voters

(1) There shall be a register to be known as the Register of Voters which shall comprise of—

(a) a poll register in respect of every polling station;

(b) a ward register in respect of every ward;

(c) a constituency register in respect of every constituency;

(d) a county register in respect of every county; and

(e) a register of voters residing outside Kenya.

(2) The Commission shall compile and maintain the Register of Voters referred to in subsection (1).

(3) The Register of Voters shall contain such information as shall be prescribed by the Commission.

[Act No. 36 of 2016, s. 26.]

5. Registration of voters

(1) Registration of voters and revision of the register of voters under this Act shall be carried out at all times 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:

Provided that this applies to the first general election under this Act;

(b) in the case of a by-election, between the date of the declaration of the vacancy of the seat concerned and the date of such by-election; or

(c) in any other case, between the date of the declaration of the vacancy of the seat concerned and the date of such election.

(2) Notwithstanding subsection (1), where an election petition is filed in respect of an electoral area, between the date of the filing of the petition and the date of the by-election, where a court determines that a by-election is to be held, a voter shall not be allowed to transfer his or her vote to the affected electoral area.

(3) Any citizen of Kenya who has attained the age of eighteen years as evidenced by either a national identity card or a Kenyan passport and whose name is not in the register of voters shall be registered as a voter upon application, in the prescribed manner, to the Commission.

(3A) *Deleted by Act No. 36 of 2016, s. 3.*

(3B) *Deleted by Act No. 36 of 2016, s. 3.*

(4) All applicants for registration under this section shall be registered in the appropriate register by the registration officer or any other officer authorised by the Commission.

(5) The registration officer or any other authorised officer referred to in subsection (3) shall, at such times as the Commission may direct, transmit the information relating to the registration of the voter to the Commission for inclusion in the Register of Voters.

[Act No. 31 of 2012, s. 2, Act No. 48 of 2012, s. 2, Act No. 36 of 2016, s. 3, 26.]

6. Inspection of register of voters

(1) The Commission shall cause the Register of Voters to be opened for inspection by members of the public at all times for the purpose of rectifying the particulars therein, except for such period of time as the Commission may consider appropriate.

(2) The Commission shall, for purposes of subsection (1), maintain a public web portal for inspection of the register of members of the public.

(3) *Deleted by Act No. 36 of 2016, s. 4.*

(4) The Register of Voters shall be kept at the headquarters of the Commission and copies of the part of the Register of Voters relating to the constituency for which the registration officer is responsible shall be kept at all the constituency offices of the Commission.

[Act No. 47 of 2012, Sch, Act No. 36 of 2016, s. 4, 26.]

6A. Verification of biometric data

(1) The Commission shall, not later than ninety days before the date of a general election, open the Register of Voters for verification of biometric data by members of the public at their respective polling stations for a period of thirty days.

(2) The Commission shall, upon the expiry of the period for verification under subsection (1), revise the Register of Voters to take into account any changes in particulars arising out of the verification process.

(3) The Commission shall, upon expiry of the period for verification specified under subsection (1) publish —

(a) a notice in the *Gazette* to the effect that the revision under subsection (2) has been completed; and

(b) the Register of Voters online and in such other manner as may be prescribed by regulations.

[Act No. 36 of 2016, s.5.]

7. Transfer of registration

(1) Where a voter wishes to transfer the voter's registration to an electoral area other than the one the voter is registered in, the voter shall notify the Commission, in the prescribed manner, of the intention to transfer the registration to the preferred electoral area not less than ninety days preceding an election.

(2) Upon receipt of the notification referred to in subsection (1), the Commission shall transfer the voter's registration particulars to the register of the preferred constituency not later than sixty days preceding the election.

8. Updating of the Register of Voters

(1) The Commission shall maintain an updated Register of Voters.

(2) For purposes of maintaining an updated register of voters, the Commission shall—

(a) regularly revise the Register of Voters;

(b) update the Register of Voters by deleting the names of deceased voters and rectifying the particulars therein;

(c) conduct a fresh voter registration, if necessary, at intervals of not less than eight years, and not more than twelve years, immediately after the Commission reviews the names and boundaries of the constituencies in accordance with Article 89(2) of the Constitution;

(d) review the number, names and boundaries of wards whenever a review of the names and boundaries of counties necessitates a review; and

(e) revise the Register of Voters whenever county boundaries are altered in accordance with Article 94(3) of the Constitution.

[Act No. 36 of 2016, s. 26.]

8A. Audit of the register of votes.

(1) The Commission may, at least six months before a general election, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of—

(a) verifying the accuracy of the Register;

(b) recommending mechanisms of enhancing the accuracy of the Register; and

(c) updating the register.

(2) The Kenya Citizens and Foreign Nationals Management Service established under section 3 of the Kenya Citizens and Foreign Nationals Management Service Act, No. 3 of 2011 shall make available to the Commission the information held by it in the national population register for the purpose of the conduct of an audit under subsection (1).

(3) For purposes of the first general election after the commencement of this section, the Commission shall, within thirty days of the commencement of

section, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of —

(a) verifying the accuracy of the Register;

(b) recommending mechanisms of enhancing the accuracy of the Register; and

(c) updating the register.

(4) The firm engaged under subsection (3) shall conduct the audit and report to the Commission within a period of thirty days from the date of engagement.

(5) The Commission shall, within fourteen days of receipt of the report under subsection (4), submit the report to the National Assembly and the Senate.

(6) The Commission shall implement the recommendations of the audit report within a period of thirty days of receipt of the report and submit its report to the National Assembly and the Senate.

[Act No. 36 of 2016, s. 6]

9. Postponement of disqualification to enable appeal

Where a person has been adjudged or declared to be of unsound mind, adjudged bankrupt or convicted of an election offence and is thereby disqualified from being registered as a voter, then, if that person is entitled to appeal against the decision, that person shall not be disqualified from being so registered until the expiration of thirty days after the date of the decision or such further period as the Commission may, at the request of the person, direct in order to enable the person to appeal against the decision.

10. Eligibility to vote

(1) A person whose name and biometric data are entered in a register of voters in a particular polling station, and who produces an identification document shall be eligible to vote in that polling station.

(2) The identification document produced in subsection (1) shall be the identification document used at the time of registration as a voter.

(3) Nothing in this section shall entitle a person who is prohibited from voting by any written law to vote or relieve that person from any penalties to which the person may be liable for voting.

[Act No. 36 of 2016, s. 7]

Determination of Questions Concerning Registration

11. Determination of questions as to registration

Any question whether a person is qualified to be registered as a voter shall be determined in accordance with this Part.

12. Claims

(1) A person who has duly applied to be registered and whose name is not included in the register of voters may submit a claim for the name to be included in the register to the registration officer in the prescribed form and manner and within the prescribed time.

(2) Subject to the Constitution, a claim under subsection (1) shall be determined by the registration officer in the prescribed manner, and an appeal shall lie in the prescribed manner, to the Principal Magistrates Court on matters of fact and law and to the High Court on matters of law.

PART III – ELECTIONS

13. Nomination of candidates by a political party

(1) A political party shall nominate its candidates for an election under this Act at least sixty days before a general election under this Act in accordance with its constitution and nomination rules.

(2) A political party shall not change the candidate nominated after the nomination of that person has been received by the Commission:

Provided that in the event of the death, resignation or incapacity of the nominated candidate or of the violation of the electoral code of conduct by the nominated candidate, the political party may after notifying the candidate that the party seeks to substitute, where applicable, substitute its candidate before the date of presentation of nomination papers to the Commission.

(3) Notwithstanding subsection (1), in the case of any other election, the Commission shall by notice in the prescribed form, specify the day or days upon which political parties shall nominate candidates to contest in a presidential, parliamentary or county election in accordance with its constitution or rules, which shall be at least forty-five days before such election.

[Act No. 12 of 2012, Act No. 36 of 2016, s. 8.]

Presidential Elections

14. Initiation of presidential election

(1) Whenever a presidential election is to be held, the Commission shall publish a notice of the holding of the election in the *Gazette* and in electronic and print media of national circulation—

(a) in the case of a general election, at least sixty days before the date of the election; or

(b) in the case of an election under Article 138(5) of the Constitution, at least twenty-one days before the date of the election;

(c) in any other case, upon the office of the President becoming vacant.

(2) The notice referred to in subsection (1) shall be in the prescribed form and shall specify—

(a) the nomination day for the presidential election; and

(b) the day or days on which the poll shall be taken for the presidential election, which shall not be less than twenty-one days after the day specified for nomination.

15. Change of deputy president nominee candidate

(1) A presidential candidate or a political party shall not at any time change the person nominated as a deputy presidential candidate after the nomination of that person has been received by the Commission:

Provided that in the event of death, resignation or incapacity of the nominated candidate or of the violation of the electoral code of conduct by the nominated candidate, the political party may substitute its candidate before the date of presentation of nomination papers to the Commission.

(2) Subsection (1) shall apply in the case of a fresh election under Article 138(5) of the Constitution.

Parliamentary Elections

16. Initiation of election of member of Parliament

(1) Whenever a parliamentary election is to be held, the Commission shall publish a notice of the holding of the election in the *Gazette* and in the electronic and print media of national circulation—

(a) in the case of a general election, at least sixty days before the date of the general election; or

(b) in any other case, upon the office of a member of Parliament becoming vacant and on receipt of a notice issued by the respective Speaker under subsection (2).

(2) The notice referred to under subsection (1) shall be in the prescribed form and shall specify—

(a) the day upon which political parties shall submit a party list in accordance with Article 90 of the Constitution;

(b) the day for the nomination of candidates for the parliamentary election; and

(c) the day or days on which the poll shall be taken for the election, which shall not be less than twenty-one days after the day specified for nomination under paragraph (b).

(3) Whenever a vacancy occurs in the National Assembly or the Senate, the respective Speaker shall issue a notice in accordance with Article 101 of the Constitution.

(4) The Commission shall within twenty one days of receipt of the notice issued under subsection (2), transmit the notice to the relevant returning officer.

County Governor Elections

17. Initiation of county governor election

(1) Whenever an election for a county governor is to be held, the Commission shall publish a notice of the holding of the election in the *Gazette* and in the electronic and print media of national circulation—

(a) in the case of a general election, at least sixty days before the date of the general election; or

(b) in any other case, upon the office of the county governor becoming vacant.

(2) The notice referred to in subsection (1) shall be in the prescribed form and shall specify—

(a) the day for the nomination of candidates for the county governor election; and

(b) the day or days on which the poll shall be taken for the county governor election, which shall not be less than twenty one days after the day specified for nomination.

18. Change of deputy county governor nominee candidate

A county governor candidate or a political party shall not at any time change the person nominated as a deputy county governor candidate after the nomination of that person has been received by the Commission:

Provided that in the event of death, resignation or incapacity of the nominated candidate or of the violation of the electoral code of conduct by the nominated candidate, the political party may substitute its candidate before the date of presentation of nomination papers to the Commission.

County Assembly Elections

19. Initiation of county assembly elections

(1) Whenever a county assembly election is to be held, the Commission shall publish a notice of the holding of the election in the *Gazette* and in the electronic and print media of national circulation—

(a) in the case of a general election, at least sixty days before the date of general election; or

(b) in any other case, upon the office of a member of a county assembly becoming vacant.

(2) The notice referred to under subsection (1) shall be in the prescribed form and shall specify—

(a) the day upon which political parties shall submit a party list in accordance with Article 90 of the Constitution;

(b) the day for the nomination of candidates for county elections; and

(c) the day or days on which the poll shall be taken for the county election, which shall not be less than twenty one days after the day specified for the nomination under paragraph (b).

(3) Whenever a vacancy occurs in a county assembly, the speaker of the county assembly shall within twenty one days after the occurrence of the vacancy issue a notice to the Commission in the prescribed form.

(4) The Commission shall within twenty one days of receipt of the notice issued under subsection (3), transmit the notice to the relevant returning officer.

20. Notification in electronic media

The Commission may in addition publicise the notices under sections 14, 16, 17 and 19 in the electronic and print media of national circulation.

21. Election of county assembly speaker

(1) The speaker of a county assembly shall be elected by each county assembly in accordance with the Standing Orders of the county assembly, from among persons who are qualified to be elected as members of a county assembly but are not such members.

(2) For the purpose of the election of the speaker of the county assembly after the first election under the Constitution, the procedure set out in the First Schedule shall apply.

(3) The deputy speaker of a county assembly shall be elected from among persons who are members of that county assembly.

(4) The First Schedule shall, with necessary modifications, apply to the election of the deputy speaker after the first election under the Constitution.

(5) The office of speaker of a county assembly shall become vacant—

(a) when a new county assembly first meets after an election;

(b) if the office holder vacates office;

(c) if the county assembly resolves to remove the office holder by a resolution supported by the votes of at least two-thirds of its members;

(d) if the office holder resigns from office in a letter addressed to the county assembly;

(e) where the office holder violates the Constitution;

(f) in the case of gross misconduct on the part of the office holder;

(g) where the office holder is incapable, owing to physical or mental infirmity, to perform the functions of the office;

(h) where the office holder is bankrupt;

(i) where the office holder is sentenced to a term of imprisonment of six months or more; or

(j) if the officer holder dies.

Nominations and Elections Generally

22. Qualifications for nomination of candidates

(1) A person may be nominated as a candidate for an election under this Act only if that person—

(a) is qualified to be elected to that office under the Constitution and this Act; and

(b) holds a certificate, diploma or other post secondary school qualification acquired after a period of at least three months study, recognized by the relevant Ministry and in such manner as may be prescribed by the Commission under this Act.

(2) Notwithstanding subsection (1)(b), a person may be nominated as a candidate for election as President, Deputy President, county Governor or deputy county Governor only if the person is a holder of a degree from a university recognised in Kenya.

(2A) For the purposes of the first elections under the Constitution, section 22(1)(b) and section 24(1)(b), save for the position of the President, the Deputy President, the Governor and the Deputy Governor, shall not apply for the elections of the offices of Parliament and county assembly representatives.

[Act No. 12 of 2012, Sch., Act No. 48 of 2012, s. 3.]

23. Qualifications and disqualifications for nomination as President

(1) A person qualifies for nomination as a presidential candidate if the person—

(a) is a citizen by birth;

(b) is qualified to stand for election as a member of Parliament;

(c) is nominated by a political party, or is an independent candidate; and

(d) is nominated by not fewer than two thousand voters from each of a majority of the counties.

(2) A person is not qualified for nomination as a presidential candidate if the person—

(a) owes allegiance to a foreign state; or

(b) is a public officer, or is acting in any State or other public office.

(3) Subsection (2)(b) shall not apply to—

(a) the President;

(b) the Deputy President; or

(c) a member of Parliament.

24. Qualifications and disqualifications for nomination as member of Parliament

(1) Unless disqualified under subsection (2), a person qualifies for nomination as a member of Parliament if the person—

(a) is registered as a voter;

(b) satisfies any educational, moral and ethical requirements prescribed by the Constitution and this Act; and

(c) is nominated by a political party, or is an independent candidate who is supported—

(i) in the case of election to the National Assembly, by at least one thousand registered voters in the constituency; or

(ii) in the case of election to the Senate, by at least two thousand registered voters in the county.

(2) A person is disqualified from being elected a member of Parliament if the person—

(a) is a State officer or other public officer, other than a member of Parliament;

(b) has, at any time within the five years immediately preceding the date of election, held office as a member of the Commission;

(c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;

(d) is a member of a county assembly;

(e) is of unsound mind;

(f) is an undischarged bankrupt;

(g) is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or

(h) is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened Chapter Six of the Constitution.

(3) A person is not disqualified under subsection (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.

25. Qualifications for nomination as member of county assembly

(1) Unless disqualified under subsection (2), a person qualifies for nomination as a member of a county assembly if the person—

(a) is registered as a voter;

(b) satisfies any educational, moral and ethical requirements prescribed the Constitution and this Act; and

(c) is either—

(i) nominated by a political party; or

(ii) an independent candidate supported by at least five hundred registered voters in the ward concerned.

(2) A person is disqualified from being elected a member of a county assembly if the person—

(a) is a State officer or other public officer, other than a member of the county assembly;

(b) has, at any time within the five years immediately before the date of election, held office as a member of the Commission;

(c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;

(d) is of unsound mind;

(e) is an undischarged bankrupt;

(f) is serving a sentence of imprisonment of at least six months; or

(g) has been found, in accordance with any law, to have misused or abused a State office or public office or to have contravened Chapter Six of the Constitution.

(3) A person is not disqualified under subsection (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.

26. Additional disqualification

(1) A person who directly or indirectly participates in any manner in any or public fundraising or harambee within eight months preceding a general election or during an election period, in any other case, shall be disqualified from contesting in the election held during that election year or election period.

(2) Subsection (1) shall not apply to a fundraising for a person who is contesting an election under this Act or to a fundraising for a political party.

27. Submission of party nomination rules

(1) A political party shall submit its nomination rules to the Commission at least three months before the nomination of its candidates.

(2) A political party which has submitted its nomination rules to the Commission pursuant to subsection (1) may amend the rules and submit the rules as amended to the Commission, at least seven days before nomination of candidates for elections.

[Act No. 12 of 2012, Sch., Act No. 48 of 2012, Sch.]

28. Submission of party membership lists

A political party that nominates a person for any election under this Act shall submit to the Commission a party membership list of the party at least ninety days before the date of the general elections.

[Act No. 12 of 2012, Sch., Act No. 47 of 2012, Sch., Act No. 36 of 2016, s. 9]

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.

[Act No. 47 of 2012, Sch., Act No. 48 of 2012, Sch.]

30. Appointment of agents

(1) A political party may appoint one agent for its candidates at each polling station.

(2) A candidate nominated by a political party may appoint an agent of the candidate's choice.

(3) An independent candidate may appoint his own agent.

30. Appointment of agents

(1) A political party may appoint one agent for its candidates at each polling station.

(2) Where a political party does not nominate an agent under subsection (1), a candidate nominated by a political party may appoint an agent of the candidate's choice.

(3) An independent candidate may appoint his own agent.

[Act No. 12 of 2012, Sch.]

31. Nomination of political party candidates

(1) A person qualifies to be nominated by a political party for presidential, parliamentary and county elections for the purposes of Articles 97, 98, 137, 177 and 180 of the Constitution if that person—

(a) is selected in the manner provided for in the constitution or rules of the political party concerned relating to members of that party who wish to contest presidential, parliamentary and county elections; and

(b) subject to subsection (4), the party certifies the nomination to the Commission.

(2) The Commission shall, upon the request of a political party, conduct and supervise the nomination of candidates by the political party for presidential, parliamentary or county elections in accordance with Article 88 of the Constitution.

(2A) Every political party shall submit the names of the party candidates who have been selected to participate in the general elections under this Act at least sixty days before the elections.

(2B) A political party shall, at least twenty-one days before the nomination day, submit to the Commission the names of the persons contesting in its party primary and the date of its party primary.

(2C) The Commission shall publish, in the *Gazette* the names of the persons contesting in a party primary under subsection (1) and the date of the party primary within seven days of receipt of the names of party candidates.

(2D) A candidate for a presidential, parliamentary or county election shall be selected by persons who are members of the respective political parties and whose names appear on the party membership list as submitted to the Commission under section 28.

(3) Every political party shall notify the Commission of the name of the person authorised by the party to certify to the Commission that a person has or persons have been selected by the party under subsection (1) and the person or persons so named shall deposit his or their specimen signature with the Commission in such manner as the Commission may require.

(4) The authorised person or persons referred to in subsection (4) shall, in writing, certify that a candidate has been nominated by the party.

[Act No. 36 of 2016, s. 10.]

32. Approval of symbol for independent candidate

(1) An independent candidate shall submit the symbol the candidate intends to use during an election to the Commission at least twenty-one days before nomination day.

(2) The Commission shall, upon receipt of the symbol submitted to it under subsection (1) approve or reject the symbol.

(3) The Commission may refuse to approve the symbol of an independent candidate if the symbol—

(a) is obscene or offensive;

(b) is the symbol of another candidate or of a political party; or

(c) so nearly resembles the symbol of another candidate or political party or any other legal entity registered under any other written law.

33. Nomination of independent candidates

(1) A person qualifies to be nominated as an independent candidate for presidential, parliamentary and county elections for the purposes of Articles 97, 98, 137, 177 and 180 of the Constitution if that person—

(a) has not been a member of any political party for at least three months preceding the date of the election;

(b) has submitted to the Commission, at least sixty days before a general election, a duly filled nomination paper in such form as may be prescribed by the Commission;

(c) has, at least ninety days before the date of a general election or at least twenty one days before the date appointed by the Commission as the nomination day for a by–election, submitted to the Commission the name that the person intends to use during the election.

(d) is selected in the manner provided for in the Constitution and by this Act.

(2) The Commission shall publish in the *Gazette*, the names of persons intending to contest in the election as independent candidates at least fourteen days before the nomination day.

[Act No. 36 of 2016, s. 11].

Nomination of Party Lists Members

34. Nomination of party lists members

(1) The election of members for the National Assembly, Senate and county assemblies for party list seats specified under Articles 97(1)(c) and 98(1)(b)(c) and (d) and Article 177(1)(b) and (c) of the Constitution shall be on the basis of proportional representation and in accordance with Article 90 of the Constitution.

(2) A political party which nominates a candidate for election under Article 97(1)(a) and (b) shall submit to the Commission a party list in accordance with Article 97(1)(c) of the Constitution.

(3) A political party which nominates a candidate for election under Article 98(1)(a) shall submit to the Commission a party list in accordance with Article 98(1)(b) and (c) of the Constitution.

(4) A political party which nominates a candidate for election under Article 177(1)(a) shall submit to the Commission a party list in accordance with Article 177(1)(b) and (c) of the Constitution.

(5) The party lists under subsections (2), (3) and (4) shall be submitted in order of priority.

(6) The party lists submitted to the Commission under this section shall be in accordance with the constitution or nomination rules of the political party concerned.

(7) The party lists submitted to the Commission shall be valid for the term of Parliament.

(8) A person who is nominated by a political party under subsections (2), (3) and (4) shall be a person who is a member of the political party on the date of submission of the party list by the political party.

(9) The party list may contain a name of any Presidential or Deputy Presidential candidate nominated for an election under this Act.

(10) A party list submitted for purposes of subsections (2), (3), (4) and (5) shall not be amended during the term of Parliament or the county assembly, as the case may be, for which the candidates are elected.

[L.N. 142/2011, Act No. 32 of 2012, s. 2.]

35. Submission of party lists

A political party shall submit its party list to the Commission at least forty-five days before the date of the general election.

[Act No. 36 of 2016, s. 12.]

36. Allocation of special seats

(1) A party list submitted by a political party under—

(a) Article 97(1)(c) of the Constitution shall include twelve candidates;

(b) Article 98(1)(b) of the Constitution shall include sixteen candidates;

(c) Article 98(1)(c) of the Constitution shall include two candidates;

(d) Article 98(1)(d) of the Constitution shall include two candidates;

(e) Article 177(1)(b) of the Constitution shall include a list of the number of candidates reflecting the number of wards in the county;

(f) Article 177(1)(c) of the Constitution shall include eight candidates, at least two of whom shall be persons with disability, two of whom shall be the youth and two of whom shall be person representing a marginalized group.

(2) A party list submitted under subsection (1)(a), (c), (d), (e) and (f) shall contain alternates between male and female candidates in the priority in which they are listed.

(3) The party list referred to under subsection (1)(f) shall prioritise a person with disability, the youth and any other candidate representing a marginalized group.

(4) Within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation.

(5) The allocation of seats by the Commission under Article 97(1)(c) of the Constitution will be proportional to the number of seats won by the party under Article 97(1)(a) and (b) of the Constitution.

(6) The allocation of seats by the Commission under Article 98(1)(b), (c) and (d) of the Constitution shall be proportional to the number of seats won by the party under Article 98(1)(a) of the Constitution.

(7) For purposes of Article 177(1)(b) of the Constitution, the Commission shall draw from the list under subsection (1)(e), such number of special seat members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.

(8) For purposes of Article 177(1)(c) of the Constitution, the Commission shall draw from the list under subsection (1)(f) four special seat members in the order given by the party.

(9) The allocation of seats by the Commission under Article 177(1)(b) and (c) of the Constitution shall be proportional to the number of seats won by the party under Article 177(1)(a) of the Constitution.

[Act No. 12 of 2012, Sch.]

37. Re-allocation of special seat

(1) If a representative from a political party list dies, withdraws from the party list, changes parties, resigns or is expelled from his or her party during the term of the representative, the seat of the representative shall be allocated to the next candidate of the same gender on the respective political party list.

(2) Notwithstanding the provision of section 34(10), if there are no more candidates on the same party's list, the Commission shall require the concerned political party to nominate another candidate within twenty-one days.

(3) A vacancy in any seat in a political party list shall not be filled three months immediately before a general election.

(4) Where a political party fails to comply with the provisions of subsection (2) the Commission shall not allocate the seat for the remainder of the term of Parliament or the county assembly.

38. Holding of elections

After a notice of an election has been published in the *Gazette* under section 14, 16, 17 and 19, every returning officer shall proceed to hold the election according to the terms of the notice and in accordance with the regulations relating to elections.

[Act No. 47 of 2012, Sch.]

38A. Number of voters per polling station

For the efficient and effective conduct of elections, the Commission shall determine the number of voters per polling station but such number shall not exceed five hundred voters.

[Act No. 36 of 2016, s.13]

39. Determination and declaration of results

(1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.

(1A) The Commission shall appoint constituency returning officers to be responsible for—

(i) tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly;

(ii) collating and announcing the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly; and

(iii) submitting, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county returning officer.

(1B))The Commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the county Governor, Senator and county women representative to the National Assembly.

(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.

(1D) The chairperson of the Commission shall declare the results of the election of the President in accordance with Article 138(10) of the Constitution.

(2) Before determining and declaring the final results of an election under subsection (1), the Commission may announce the provisional results of an election.

(3) The Commission shall announce the provisional and final results in the order in which the tallying of the results is completed.

[Act No. 36 of 2016, s. 14]

40. Voter education

(1) The Commission shall, in performing its duties under Article 88(4)(g) of the constitution establish mechanisms for the provision of continuous voter education and cause to be prepared a voter education curriculum.

(2) The mechanisms under subsection (1) shall include provision for partnership with other agencies and non-state actors in the provision of voter education.

[Act No. 36 of 2016, s. 15]

41. Access to and obligation of media

(1) Subject to subsection (2), a political party participating in an election shall have access to the state owned media services during the campaign period.

(2) The Commission shall, after consultations with the independent candidates, the political parties concerned and the officers responsible for the state owned media services, monitor the equitable allocation of air-time during the campaign period.

(3) Every state owned print or electronic media which publishes any information relating to the electoral process shall be guided by the principle of total impartiality and shall refrain from any discrimination in relation to any candidate.

(4) The Code of Conduct for the practice of journalism prescribed under the Media Act (No. 3 of 2007) shall be subscribed to and observed by every media house and every person who reports on any election and referendum under the Constitution and this Act.

(5) For the purpose of giving effect to this section, the Commission may, in writing, issue directives to the media.

(6) The Commission may prohibit a media house that contravenes the Code of Conduct prescribed under the Media Act from transmitting information related to an election under this Act.

[Act No. 12 of 2012, Sch.]

42. Accreditation of observers, agents, reporters, etc.

The Commission may at any election accredit—

(a) person as an observer, agent or media representative; or

(b) any person or institution to report on an election.

43. Participation in elections by public officers

(1) *Deleted by Act No. 36 of 2016, s. 14.*

(2) *Deleted by Act No. 36 of 2016, s. 14.*

(3) *Deleted by Act No. 36 of 2016, s. 14.*

(4) *Deleted by Act No. 36 of 2016, s. 14.*

(5) A public officer who intends to contest an election under this Act shall resign from public office at least six months before the date of election.

(6) This section shall not apply to—

(a) the President;

(b) *Deleted by Act No. 36 of 2016, s. 14;*

(c) the Deputy President;

(d) a member of Parliament;

(e) a county governor;

(f) a deputy county governor;

(g) a member of a county assembly.

[Act No. 12 of 2012, Sch, Act No. 36 of 2016, s. 16.]

44. Use of technology

(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.

(2) The Commission shall, for purposes of subsection(1), develop a policy on the progressive use of technology in the electoral process.

(3) The Commission shall ensure that the technology in use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent.

(4) The Commission shall, in an open and transparent manner —

(a) procure and put in place the technology necessary for the conduct of a general election at least eight months before such elections; and

(b) test, verify and deploy such technology at least sixty days before a general election.

(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 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).

(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 eight months 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.]

PART IV – RECALL OF MEMBER OF PARLIAMENT

45. Right of recall

(1) The electorate in a county or constituency may recall their member of Parliament before the end of the term of the relevant House of Parliament on any of the grounds specified in subsection (2).

(2) A member of Parliament may be recalled where the member—

(a) is found, after due process of the law, to have violated the provisions of Chapter Six of the Constitution;

(b) is found, after due process of the law, to have mismanaged public resources;

(c) is convicted of an offence under this Act.

(3) A recall of a member of Parliament under subsection (1) shall only be initiated upon a judgement or finding by the High Court confirming the grounds specified in subsection (2).

(4) A recall under subsection (1) shall only be initiated twenty-four months after the election of the member of Parliament and not later than twelve months immediately preceding the next general election.

(5) A recall petition shall not be filed against a member of Parliament more than once during the term of that member in Parliament.

(6) A person who unsuccessfully contested an election under this Act shall not be eligible, directly or indirectly, to initiate a petition under this section.

46. Petition for recall

(1) A recall under section 45 shall be initiated by a petition which shall be filed with the Commission and which shall be—

(a) in writing;

(b) signed by a petitioner who—

(i) is a voter in the constituency or county in respect of which the recall is sought; and

(ii) was registered to vote in the election in respect of which the recall is sought;

(c) accompanied by an order of the High Court issued in terms of section 45(3).

(2) The petition referred to in subsection (1) shall—

(a) specify the grounds for the recall as specified under section 45(2);

(b) contain a list of such number of names of voters in the constituency or county which shall represent at least thirty percent of the registered voters; and

(c) be accompanied by the fee prescribed for an election petition.

(3) The list of names referred to in subsection (2)(b) shall contain the names, address, voter card number, national identity card or passport number and signature of the voters supporting the petition and shall contain names of at least fifteen percent of the voters in more than half of the wards in the county or the constituency, as appropriate.

(4) The voters supporting a petition under subsection (3) shall represent the diversity of the people in the county or the constituency as the case may be.

(5) The petitioner shall collect and submit to the Commission the list of names under subsection (2)(b) within a period of thirty days after filing the petition.

(6) The Commission shall verify the list of names within a period of thirty days of receipt of that list.

(7) The Commission, if satisfied that the requirements of this section are met, shall within fifteen days after the verification, issue a notice of the recall to the Speaker of the relevant House.

(8) The Commission shall conduct a recall election within the relevant constituency or county within ninety days of the publication of the question.

47. Recall elections

(1) Where a member of Parliament is to be recalled under section 45, the Commission shall frame the question to be determined at the recall election.

(2) A question referred to in subsection (1) shall be framed in such a manner as to require the answer "yes" or the answer "no".

(3) The Commission shall assign a symbol for each answer to the recall question.

(4) The voting at a recall election shall be by secret ballot.

(5) A recall election shall be decided by a simple majority of the voters voting in the recall election.

(6) Where a recall election results in the removal of a member of Parliament, the Commission shall conduct a by-election in the affected constituency or county.

(7) A member of Parliament who has been recalled may run in the by-election conducted under subsection (6).

48. Validity of recall election

A recall election shall be valid if the number of voters who concur in the recall election is at least fifty percent of the total number of registered voters in the affected county or constituency.

PART V – REFERENDUM

49. Initiation of a referendum

(1) Whenever it is necessary to hold a referendum on any issue, the President shall by notice refer the issue to the Commission for the purposes of conducting a referendum.

(2) Where an issue to be decided in a referendum has been referred to the Commission under subsection (1), the Commission shall frame the question or questions to be determined during the referendum.

(3) The Commission shall, in consultation with the Speaker of the relevant House, lay the question referred to in subsection (2) before the House for approval by resolution.

(4) The National Assembly may approve one or more questions for a referendum.

(5) The Commission shall publish the question approved under subsection (4) in the *Gazette* and in the electronic and print media of national circulation.

(6) The Commission shall conduct the referendum within ninety days of publication of the question.

(7) The Commission may assign such symbol for each answer to the referendum question or questions as it may consider necessary.

(8) A symbol assigned under subsection (7) shall not resemble that of a political party or of an independent candidate.

50. Notice of holding referendum

(1) The Commission shall, within fourteen days after publication of the question referred to in section 49 publish a notice of the holding of the referendum and the details thereof in the *Gazette*, in the electronic and print media of national circulation.

(2) The notice shall specify—

(a) the referendum question or questions and the option of the answer or answers;

(b) the symbols assigned for the answers to the referendum question;

(c) the day on which the referendum is to be held which shall not be less than twenty one days after the date of the publication of the notice;

(d) the polling time of the referendum;

(e) the day by which the referendum committees shall have registered with the Commission; and

(f) the day and time by which campaign in support of or in opposition to the referendum question shall start and cease.

51. Referendum committees

(1) Where a referendum question requires a "yes" or "no" answer, persons intending to campaign for or against the referendum question shall form such national referendum committees and constituency referendum committees as are necessary.

(2) Where there is more than one referendum question, persons intending to campaign for or against each referendum question shall, on application to the Commission, form one national referendum committee each and one committee each in every constituency for each referendum question.

(3) A referendum committee shall apply to the Commission for registration in the prescribed form.

(4) An application under subsection (3) shall be accompanied by information showing that the applicant adequately represents persons campaigning for or against the referendum question.

(5) The national referendum committees shall control and regulate the constituency referendum committees.

(6) A member of a referendum committee shall subscribe to and abide by the Electoral Code of Conduct set out in the Second Schedule.

[L.N. 19/2012.]

52. Costs of referendum committee

(1) Each referendum committee shall bear its own costs during the campaign period of the referendum.

(2) The costs referred to in subsection (1) include payment of the agents of the respective referendum committees.

53. Procedure for conduct of referendum

The procedure for the conduct of an election shall apply with necessary modifications to the conduct of referendum.

54. Voting threshold

A referendum question on an issue other than that contemplated in Articles 255 and 256 of the Constitution shall be decided by a simple majority of the citizens voting in the referendum.

55. General power of the Commission

Nothing in this Act shall preclude the Commission from taking any administrative measures to ensure effective conduct of the referendum.

55A. Maintenance of secrecy at elections

(1) Every elections officer, candidate or agent authorized to take part in any proceedings relating to the issue or receipt of ballot papers or to attend at a polling station or at the counting of the votes shall, before so attending, make an oath of secrecy prescribed in the Third Schedule.

(2) Every officer, candidate or agent in attendance at a polling station shall-

(a) maintain and aid in maintaining the secrecy of the ballot; and

(b) not communicate, except for a purpose authorized by law before the poll is closed, any information as to the name or number on the register of voters, of any voter who has or has not applied for a ballot paper or voted at that station or as to the official mark.

(3) A presiding officer may, upon request, divulge to a candidate or to the agent of a candidate the total number of voters who have voted in the station at any time before the poll is closed.

[Act No. 36 of 2016, s.18.]

55B. Postponement of elections by the Commission

(1) The Commission may, where a date has been appointed for holding an election, postpone the election in a constituency, county or ward for such period as it may consider necessary where —

(a) there is reason to believe that a serious breach of peace is likely to occur if the election is held on that date;

(b) it is impossible to conduct the elections as a result of a natural disaster or other emergencies,

(c) that there has been occurrence of an electoral malpractice of such a nature and gravity as to make it impossible for an election to proceed.

(2) Where an election is postponed under subsection (1), the election shall be held at the earliest practicable time.

(3) Notwithstanding the provisions of this section, the Commission may, if satisfied that the result of the elections will not be affected by voting in the area in respect of which substituted dates have been appointed, direct that a return of the elections be made.

[Act No. 36 of 2016, s. 18.]

PART VI – ELECTION OFFENCES

56. *Repealed by Act No. 37 of 2016, s. 25.*

57. *Repealed by Act No. 37 of 2016, s. 25.*

58. *Repealed by Act No. 37 of 2016, s. 25.*

59. *Repealed by Act No. 37 of 2016, s. 25.*

60. *Repealed by Act No. 37 of 2016, s. 25.*

61. *Repealed by Act No. 37 of 2016, s. 25.*

62. *Repealed by Act No. 37 of 2016, s. 25.*

63. *Repealed by Act No. 37 of 2016, s. 25.*

64. *Repealed by Act No. 37 of 2016, s. 25.*

65. *Repealed by Act No. 37 of 2016, s. 25.*

66. *Repealed by Act No. 37 of 2016, s. 25.*

67. *Repealed by Act No. 37 of 2016, s. 25.*

68. *Repealed by Act No. 37 of 2016, s. 25.*

69. *Repealed by Act No. 37 of 2016, s. 25.*

70. *Repealed by Act No. 37 of 2016, s. 25.*

71. *Repealed by Act No. 37 of 2016, s. 25.*

72. *Repealed by Act No. 37 of 2016, s. 25.*

73. *Repealed by Act No. 37 of 2016, s. 25.*

PART VII – ELECTION DISPUTES RESOLUTION

Dispute Resolution by the Commission

74. Settlement of certain disputes

(1) Pursuant to Article 88(4)(e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

(2) An electoral dispute under subsection (1) shall be determined within seven days of the lodging of the dispute with the Commission.

(3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.

Election Petitions

75. County election petitions

(1) A question as to validity of an election of a county governor shall be determined by High Court within the county or nearest to the county.

(1A) A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.

(2) A question under subsection (1) shall be heard and determined within six months of the date of lodging the petition.

(3) In any proceeding brought under this section, a court may grant appropriate relief, including—

(a) a declaration of whether or not the candidate whose election is questioned was validly elected;

(b) a declaration of which candidate was validly elected; or

(c) an order as to whether a fresh election will be held or not.

(4) An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be—

(a) filed within thirty days of the decision of the Magistrate's Court; and

(b) heard and determined within six months from the date of filing of the appeal.

[Act No. 47 of 2012, Sch.]

76. Presentation of petitions

(1) A petition—

(a) to question the validity of an election shall be filed within twenty eight days after the date of declaration of the results of the election and served within fifteen days of presentation;

(b) to seek a declaration that a seat in Parliament or a county assembly has not become vacant shall be presented within twenty-eight days after the date of publication of the notification of the vacancy by the relevant Speaker; or

(c) to seek a declaration that a seat in Parliament or a county assembly has become vacant may be presented at any time.

(2) A petition questioning a return or an election upon the ground of a corrupt practice, and specifically alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned or by an agent of that person or with the privity of that person or his agent may, so far as respects the corrupt practice, be filed at any time within twenty-eight days after the publication of the election results in the *Gazette*.

(3) A petition questioning a return or an election upon an allegation of an illegal practice and alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned, or by an agent of that person, or with the privity of that person or his election agent in pursuance or in furtherance of the illegal practice alleged in the petition, may, so far as respects the illegal practice, be filed at any time within twenty-eighty days after the publication of the election results in the *Gazette*.

(4) A petition filed in time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with the leave of the election court within the time within which the petition questioning the return or the election upon that ground may be presented.

(5) A petition filed in respect of the matters set out in subsections (2) and (3) may, where a petition has already been presented on other grounds, be presented as a supplemental petition.

[Act No. 36 of 2016, s. 19.]

77. Service of petition

(1) A petition concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Commission.

(2) A petition may be served personally upon a respondent or by advertisement in a newspaper with national circulation.

78. Security for costs

(1) A petitioner shall deposit security for the payment of costs that may become payable by the petitioner not more than ten days after the presentation of a petition under this Part.

(2) A person who presents a petition to challenge an election shall deposit—

(a) one million shillings, in the case of a petition against a presidential candidate;

(b) five hundred thousand shillings, in the case of a petition against a member of Parliament or a county governor; or

(c) one hundred thousand shillings, in the case of a petition against a member of a county assembly.

(3) Where a petitioner does not deposit security as required by this section, or if an objection is allowed and not removed, no further proceedings shall be heard on the petition and the respondent may apply to the election court for an order to dismiss the petition and for the payment of the respondent's costs.

(4) The costs of hearing and deciding an application under subsection (3) shall be paid as ordered by the election court, or if no order is made, shall form part of the general costs of the petition.

(5) An election court that releases the security for costs deposited under this section shall release the security after hearing all the parties before the release of the security.

79. Procedure of election court on receipt of petition

Upon receipt of a petition, an election court shall peruse the petition and—

(a) if it considers that no sufficient ground for granting the relief claimed is disclosed therein may reject the petition summarily; or

(b) fix a date for the trial of the petition.

80. Powers of election court

(1) An election court may, in the exercise of its jurisdiction—

(a) summon and swear in witnesses in the same manner or, as nearly as circumstances admit, as in a trial by a court in the exercise of its civil jurisdiction and impose the same penalties for the giving of false evidence;

(b) compel the attendance of any person as a witness who appears to the court to have been concerned in the election or in the circumstances of the vacancy or alleged vacancy;

(c) examine a witness who is compelled to attend or any other person who has not been called as a witness in court, and examined by a party to the petition and after examination the witness may be cross examined by or on behalf of the petitioner and respondent or either of them; and

(d) decide all matters that come before it without undue regard to technicalities.

(2) A person who refuses to obey an order to attend court commits the offence of contempt of court.

(3) Interlocutory matters in connection with a petition challenging results of presidential, parliamentary or county elections shall be heard and determined by the election court.

(4) An election court may by order direct the Commission to issue a certificate of election to a President, a member of Parliament or a member of a county assembly if—

(a) upon recount of the ballots cast, the winner is apparent; and

(b) that winner is found not to have committed an election offence.

(5) The Commission shall, in writing, notify the relevant Speaker of the decision made under subsection (4).

81. Prohibition of disclosure of vote

A voter who has voted at an election shall not, in the proceedings of an election petition, be required to state whom they voted for.

82. Scrutiny of votes

(1) An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.

(2) Where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off—

(a) the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorised to vote at that station;

(b) the vote of a person whose vote was procured by bribery, treating or undue influence;

(c) the vote of a person who committed or procured the commission of personation at the election;

(d) the vote of a person proved to have voted in more than one constituency;

(e) the vote of a person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or

(f) the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts causing it were notorious.

(3) The vote of a voter shall not, except in the case specified in subsection (1) (e), be struck off under subsection (1) by reason only of the voter not having been or not being qualified to have the voter's name entered on the register of voters.

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.

84. Costs

An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.

85. Determination of election petition

An election petition under this Act shall be heard and determined within the period specified in the Constitution

85A. Appeals to the Court of Appeal

(1) An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be—

(a) filed within thirty days of the decision of the High Court; and

(b) heard and determined within six months of the filing of the appeal.

(2) An appeal under subsection (1) shall act as a stay of the certificate of the election court certifying the results of an election until the appeal is heard and determined.

[Act No. 47 of 2012, Sch, Act No. 36 of 2016, s. 20.]

86. Certificate of court as to validity of election

(1) An election court shall, at the conclusion of the hearing of an election petition, determine the validity of any question raised in the petition, and shall certify its determination to the Commission which shall then notify the relevant Speaker.

(2) Upon receipt of a certificate under this section, the relevant Speaker shall give the necessary directions for altering or confirming the return, and shall issue any notification which may be necessary.

87. Report of court on electoral malpractices

(1) An election court may, at the conclusion of the hearing of a petition, in addition to any other orders, make a determination on whether an electoral malpractice of a criminal nature may have occurred.

(2) Where the election court determines that an electoral malpractice of a criminal nature may have occurred, the court shall direct that the order be transmitted to the Director of Public Prosecutions.

(3) Upon receipt of the order under subsection (2), the Director of Public Prosecutions shall —

(a) direct an investigation to be carried out by such State agency as it considers appropriate; and

(b) based on the outcome of the investigations, commence prosecution or close the matter.

[Act No. 36 of 2016, s. 21.]

Referendum Petitions

88. Election petition procedures to apply to referendum petition

Unless specifically provided for in this Act, the procedure applicable to an election petition shall apply to a referendum petition.

89. Referendum petition

(1) The conduct, result and validity of a referendum may be challenged by petition to the High Court.

(2) A petition challenging the conduct, result or validity of a referendum shall—

(a) set out the facts relied on to invalidate the referendum;

(b) identify the specific matter or matters on which the petitioner relies as justifying the grant of relief;

(c) contain a request for the relief to which the petitioner claims to be entitled; and

(d) be filed in the High Court within twenty-one days of the publication of the notice of the results of the referendum in the *Gazette*.

(3) A referendum petition may be presented on any of the following grounds—

(a) in respect of the result of the voting in all the constituencies or in any one constituency, that corrupt practices prevailed at or in relation to the voting at the referendum in that constituency, or that there was an error or misconduct, whether by act or omission, on the part of a referendum officer; or

(b) in respect of the declared result of the referendum, that there was an error in the counting or tallying of the votes cast in the referendum.

90. Composition of Court

A referendum petition shall be heard and determined by a bench of three judges appointed by the Chief Justice.

91. Operation of declared result of issue submitted to referendum

(1) Where a referendum petition is not presented to the High Court within the time specified in section 89(2)(d), the declared result of referendum shall—

(a) have effect from the date on which the result is *gazetted*;

(b) be final and not be challenged in any court of law; and

(c) be conclusive evidence of the voting at the referendum and of the result of the referendum.

(2) Nothing in this section shall be construed as preventing or delaying the coming into operation of any law in respect of which a referendum is held pursuant to the provisions of the Constitution or any other written law if—

(a) it is stated in the declared result of the referendum that the provisions of the Act are supported by the votes of a majority of the persons entitled to vote in the referendum; and

(b) the question raised by any referendum petition or, if more than one, by all referendum petitions presented to the High Court in respect of such referendum would not, if decided in favour of the petitioner or petitioners, as the case may be, lead to a declaration by the Commission that the votes of a majority of the persons entitled to vote in such referendum did not support the provisions of the said law.

92. Persons who may present referendum petition

(1) A referendum petition may be presented in the High Court by—

(a) in the case of a petition in respect of the result of the voting in a constituency, a person who voted lawfully or had a right to vote in that constituency at the referendum;

(b) in the case of a petition in respect of the declared result of the referendum, a person who voted at the referendum or had a right to vote at the referendum; or

(c) in any other case, the Commission.

(2) A petitioner who presents a referendum petition shall serve all the respondents to the petition within seven days of filing the petition.

(3) A petitioner shall publish a notice of the petition in the *Gazette* and in at least one newspaper of national circulation, within fourteen days after the petition is filed.

(4) A petition may be served personally upon the respondent or by advertisement in a newspaper with national circulation.

[Corr. No. 18/2012.]

93. Respondents to referendum petition

(1) Where, at the hearing of a referendum petition, a person is alleged to have been guilty of a corrupt practice in relation to the referendum, or where a copy of a referendum petition is served on a particular person on the direction of the High Court, the High Court may, on the application of that person, add or name that person as a respondent to the petition.

(2) Where, at the trial of a referendum petition presented by the Commission, a question of law arises in relation to action or omission by a referendum officer, the High Court may, on the application of the Attorney-General, name the referendum officer as a respondent to the petition.

94. Filing of referendum petition

(1) A referendum petition shall be signed by the petitioner or by all the petitioners, if more than one.

(2) Whenever a referendum petition is presented under this section, the Registrar of the High Court shall, in writing, inform the Commission of the filing.

95. Duty of Registrar to make list of referendum petitions

(1) Subject to the provisions of subsection (2), the Registrar of the High Court shall make a list of all the referendum petitions filed under this Part in the order in which they are filed, and shall keep in the Registrar's office, a copy of the list which shall be open for inspection by any person who applies to inspect the list.

(2) A referendum petition shall, unless the High Court orders otherwise, be tried in the order in which it appears on the list made by the Registrar under subsection (1).

(3) Where more than one petition is presented relating to the same referendum, all such petitions shall be dealt with as one petition as far as the inquiry into the referendum is concerned.

96. Practice procedure and security for costs

(1) Subject to the provisions of section 98, the Rules Committee as constituted under the Civil Procedure Act (Cap. 21), may make rules generally to regulate the practice and procedure of the High Court with respect to the filing and trial of election and referendum petitions, including rules—

(a) specifying—

(i) the time within which any requirement of the rules is to be complied with;

(ii) the costs of and incidental to the filing and the trial of an election and referendum petition; and

(iii) the fees to be charged in respect of proceedings of an election and referendum petition; and

(b) generally with regard to any other matter relating to an election and referendum petition as the Chief Justice may deem necessary.

(2) A petitioner shall deposit one million shillings as security for costs of a petition presented under this Act, within ten days of presenting the petition.

(3) Where, a petitioner does not deposit security for costs as required under this section after presenting of a referendum petition, the referendum petition shall be struck out.

(4) The High Court may, make such order as to costs as it may deem fit and just in respect of any referendum petition dismissed under this section.

[Act No. 47 of 2012, Sch.]

97. Death of or delay by petitioner

Where there are two or more petitioners and one or more of the petitioners dies or die at any time before the final order of the court hearing the petition, the surviving petitioner or petitioners shall be entitled to continue with the petition.

98. Hearing of referendum petition

(1) A referendum petition shall be—

(a) heard and determined within six months from the date of presentation of a petition; and

(b) heard in open court.

(2) The High Court may, in respect of the trial of a referendum petition, exercise such powers within its civil jurisdiction as it may deem appropriate.

(3) A referendum petition may be withdrawn by the petitioner on notice to the other parties and the High Court, subject to any order of the Court as to costs.

99. Powers of a court to summon witnesses in a referendum petition

(1) A Court hearing a referendum petition may, at the hearing of the petition—

(a) order any person who appears to the court to be concerned in or affected by the referendum petition to attend as a witness at such hearing; and

(b) examine any witness or any person who is present at the hearing even if the witness or person is not called as a witness by any party to the proceedings:

Provided that after examination by the court, the witness or person may be cross-examined by or on behalf of the petitioner or the respondent.

(2) Where a person is ordered to attend as a witness under subsection (1), the Court may direct that a copy of the referendum petition be served on that person.

(3) A person who is called as a witness at the trial of a referendum petition shall not be excused from answering any question relating to any offence connected with the referendum on the ground that the answer thereto may incriminate them or on the ground of privilege.

(4) Notwithstanding subsection (3)—

(a) a witness who answers every question which they are required to answer under this section to the satisfaction of the court, and the answers to which may tend to incriminate them, shall not be liable to prosecution for any offence committed by them in connection with the referendum and in respect of which they are so examined, and shall be entitled to receive a certificate of indemnity issued by the Registrar stating that the person is discharged from liability and shall not be prosecuted for that offence; and

(b) an answer by a witness to a question before the Court under this section shall not, except in the case of any criminal proceedings for giving false evidence in respect of such evidence, be admissible as evidence in any civil or criminal proceedings against them.

(5) Where a person has received a certificate of indemnity under subsection (3), and legal proceedings are, at any time, brought against that person for an offence to which the certificate relates, the court having cognizance of the case shall, on proof of the certificate of indemnity, stay such proceedings.

(6) All reasonable expenses incurred by any person in attending at or appearing before the High Court to give evidence as a witness at the trial of a referendum petition shall be paid to such person according to the scale of allowances and expenses appropriate in civil proceedings before the High Court.

100. Prohibition of disclosure of vote

A voter who has voted at a referendum shall not, in proceedings to question the referendum be required to state how he voted.

101. Examination of votes

(1) The High Court on its own motion or on an application by a petitioner may, during the hearing of a referendum petition, order for a scrutiny of votes to be carried out in such manner as the High Court may determine.

(2) The provisions of section 82 shall apply with respect to scrutiny of votes under this section.

102. Powers of Court

(1) At the conclusion of the hearing of a referendum petition challenging the conduct or result of the referendum, the High Court may—

(a) dismiss the petition;

(b) declare the published result to be incorrect;

(c) declare the referendum to be void; or

(d) uphold the petition in whole or in part.

(2) Without limiting the generality of this section, the High Court may exercise its powers to declare a referendum void on the ground that this Act or the regulations made under this Act were contravened during the referendum, and such contravention has seriously affected the result of the referendum.

(3) The Registrar of the High Court shall deliver to the Commission a certified copy of any decision made by the High Court under subsection (1).

(4) The Registrar of the High Court shall, at the conclusion of the proceedings in respect of a referendum petition, submit to the Commission a certificate under the Registrar's hand, stating that the hearing of the referendum petition has been concluded, and the Commission shall, upon receipt of such certificate, declare and publish the result of the referendum in accordance with the findings of the High Court.

(5) A declaration made by the Commission under subsection (4) shall be final, shall not be challenged in any court, and shall be conclusive evidence of the voting at the referendum to which it relates and of the result of such referendum.

(6) Where the High Court declares a referendum void, the Commission shall conduct a fresh referendum.

103. Petition expenses

(1) Subject to the provisions of this section, all costs, charges and expenses of and incidental to the presentation and hearing of a referendum petition shall be borne in such manner and in such proportions as the High Court may order, and in particular, any costs which, in the opinion of the High Court, have been caused by any vexatious conduct or by any frivolous or vexatious allegations or objections on the part of the petitioner or of the respondent, may be ordered to be paid by the party by whom such costs have been caused.

(2) Where in the hearing of a referendum petition a person appears to the High Court to have been guilty of any corrupt practice relating to the referendum, the High Court may, after giving that person an opportunity to make a statement to show why the order should not be made, order the whole or a portion of the costs of or incidental to the trial of the referendum petition to be paid by that person to such person or persons as the High Court may determine.

(3) Money deposited as security shall, when no longer needed as security for costs, be returned to the person in whose name it is deposited or to any person entitled to receive the money by order of the High Court, which may be made upon motion after notice and proof that all just claims have been satisfied or otherwise sufficiently provided for as the High Court may require.

104. Facilitation of persons with special needs including persons with disabilities.

The Commission shall, for the purpose of ensuring that persons with special needs including persons with disabilities realise their right to vote —

(a) put in place appropriate infrastructure including special voting booths; and

(b) have in each polling station such officers as the Commission considers necessary to facilitate voting.

[Act No. 36 of 2016, s. 22.]

PART VIII – GENERAL PROVISIONS

105. Duty to co-operate

(1) It shall be the duty of every public officer and public or private entity to co-operate with the Commission in its activities during an election and not to hinder the Commission in carrying out its functions.

(2) It shall be the duty of police officers in their respective areas of operation, to take all necessary measures for the maintenance of law and order and stability necessary for the conduct of an election and to protect and uphold the rights of all persons under any written law relating to elections.

(3) Notwithstanding the provisions of the law relating to the National Police Service or any other written law, a police officer assigned duties during the conduct of an election or referendum shall be deemed to be an elections officer for purposes of this Act and subject to direction and instruction of the Commission.

(4) It shall be the duty of—

(a) all officers of the county administration, in their respective administrative units;

(b) all persons in charge of local authority facilities;

(c) persons in charge of facilities;

(d) all political parties and members of the public;

(e) all persons in charge of public utilities including teachers in charge of public schools;

(f) the Registrar of Persons; and

(g) the Registrar of Political Parties,

to give the Commission and its officers the support and collaboration necessary for the Commission to execute the activities relating to the conduct of an election.

106. *Deleted by Act No. 36 of 2016, s. 23.*

107. Powers of arrest and prosecution

(1) A member of the Commission or any officer designated by the Commission may order the arrest of a person who commits an offence under this Act.

(2) The Commission shall have the power to prosecute any offences under this Act and impose sanctions against a person who commits an offence under this Act pending the hearing and determination of the offence.

(3) A member of the Commission or any person designated by the Commission shall have the power to impound or to order the impounding of any state resources that are used in an election campaign.

108. Airtime by state radio and television for election campaign

All candidates and political parties participating in an election shall be allocated reasonable airtime on all broadcasting media during the campaign period.

[Act No. 12 of 2012, Sch.]

109. Regulations

(1) The Commission may make regulations generally for the better carrying out of the purposes and provisions of this Act, and in particular, but without prejudice to the generality of the foregoing, may make regulations to—

(a) prescribe the manner in which registers of voters shall be compiled and the manner in which they shall be revised;

(b) prescribe the procedure for registration and issuance of voters cards and provide for the progressive registration of Kenyan citizens living abroad prisoner;

(c) to provide for the regulation of the process by which parties nominate candidates for elections;

(d) to provide for the manner of nomination, allocation and re-allocation of special seats and mechanisms for resolving disputes arising out of such nomination, allocation and re-allocation;

(e) prescribe the procedure for making and determining claims to be registered and objections to registration;

(f) authorise any registration officer to consider or determine any application, claim, objection or appeal, to summon any person to appear before them and give evidence on oath, and to administer an oath for that purpose and to order the production of any document relevant to any issue which the officer is required to consider and determine;

(g) provide for the division of constituencies into units for the purpose of the registration of voters;

(h) prescribe the conditions under which elections may be held in accordance with the provisions of the Constitution, this Act or any other written law relating to elections;

(i) prescribe the amount of the deposit to be paid by or on behalf of candidates at all elections and the circumstances in which the deposit may be forfeited;

(j) provide for the appointment of officers to preside at polling stations;

(k) prescribe the facilities to be provided at polling stations and the persons who may be admitted to polling stations;

(l) prescribe the place and manner in which votes may be cast and the construction and scaling of ballot boxes and provide for the issue of ballot papers to voters;

(m) provide for the manner in which, and the person by whom any question as to the identity of any person claiming the right to vote shall be determined;

(n) provide for the manner in which a voter who is not able to read or write may vote or be assisted in voting;

(o) provide for the manner in which a voter with special needs including a person with a disability may vote or be assisted in voting;

(p) prescribe the procedure to be followed in the counting of votes and the circumstances in which votes may be rejected by a returning officer as being invalid;

(q) prescribe conditions for the use of private motor vehicles, vessels or buildings at elections;

(r) prescribe the facilities to be provided during the electoral process and in particular, for voting by electronic machines and the persons entitled so to vote and the circumstances in which persons may so vote;

(s) provide for the allocation by the Commission, in a just and equitable manner of the use of state owned radio and television broadcasting services during any election period;

(t) prescribe the procedure to be adopted by the public in making representations for the alteration of electoral area boundaries;

(u) prescribe the forms which may be used under this Act and the fees in respect of anything to be done under this Act;

(v) prescribe the procedure for advance voting for special categories including patients admitted in hospital, pastoralists, armed forces, elections officers and other citizens of Kenya providing essential services;

(w) prescribe the procedure for voting for citizens residing outside Kenya;

(x) provide for complaints resolution mechanisms and for the manner of settlement of electoral disputes;

(y) provide for the conduct of election observers, the media, monitors and evaluators and organisations carrying out civic and voter education;

(z) provide with reasonable grounds for the postponement of elections;

(aa) provide for mechanisms for carrying out effective voter education;

(bb) provide for the mode of declaration of the result of an election;

(cc) prescribe the manner of enforcing the Electoral Code of Conduct; or

(dd) provide for the conduct of campaigns during a referendum or an election;

(ee) provide for the financing of campaigns during a referendum or an election;

(ff) prescribe anything which is required to be prescribed or is necessary or desirable for the better giving effect to this Act.

(2) The power to make regulations conferred on the Commission under this Act shall be—

(a) for the purpose and objective of giving effect to the Constitution and this Act;

(b) limited to the nature and scope specifically stipulated in the Constitution and this Act; and

(c) based on the general principles and standards contained in the Constitution and this Act.

(3) The power to make regulations shall be exercised only after a draft of the proposed regulations has been approved by the National Assembly, at least four months preceding a general election:

Provided that this applies to the first general election under this Act.

(4) The Commission shall publish in the *Gazette*, not later than sixty days prior to the date of a general election, the regulations approved by the National Assembly under subsection (3).

[Act No. 31 of 2012, s. 3, Act No. 47 of 2012, Sch, Act No. 36 of 2016, s.24.]

110. Electoral code of conduct

(1) Every political party and every person who participates in an election or referendum under the Constitution and this Act shall subscribe to and observe the Electoral Code of Conduct set out in the Second Schedule in such manner as the Commission may, subject to paragraph 6 of that Schedule, determine.

(2) A political party that is eligible to nominate candidates under the Constitution, this Act or any other written law shall not be eligible to contest in any election unless the political party and the candidate have subscribed to the Electoral Code of Conduct referred to in subsection (1).

(3) *Deleted by Act No. 36 of 2016, s. 25.*

(4) *Deleted by Act No. 36 of 2016, s. 25.*

(5) The trial of an offence under this section shall be without prejudice to any proceedings in or consequent upon a petition.

(6) *Deleted by Act No. 36 of 2016, s. 25*

(Act No. 36 of 2016, s. 25)

111. Repeals

The National Assembly and Presidential Elections Act (Cap. 7) and the Election Offences Act (Cap. 66) are repealed.

112. Transitional provisions

(1) Notwithstanding the provisions of this Act—

(a) the register of voters prepared under the National Assembly and Presidential Elections Act (Cap. 7) shall be deemed to have been prepared under this Act;

(b) a voter's cards issued under the National Assembly and Presidential Elections Act shall be deemed to have been issued under this Act;

(c) an election official holding office immediately before the commencement of this Act shall be deemed to have been appointed in accordance with the provisions of this Act; and

(d) an election petition filed under the National Assembly and Presidential Elections Act (Cap. 7) shall be deemed to have been filed under this Act.

(2) For avoidance of doubt, until the final announcement of all results of the first elections for Parliament under the Constitution—

(a) a notice of commencement of the provisions of this Act under section 1 shall apply to the extent contemplated by section 2(1)(a) of the Sixth Schedule to the Constitution;

(b) any election held before the first elections for Parliament under the Constitution shall be held in accordance with the provisions of the former Constitution and the law applicable under that Constitution pursuant to section 3(2) of the Sixth Schedule to the Constitution:

Provided that the period prescribed for the issuance of any document or the doing of any other act or thing in respect of an election to which is due at the commencement of this subsection shall, notwithstanding the provisions of any other written law, be deemed to run with effect from the date of such commencement.

[Act No. 12 of 2012, Sch., L.N. 76/2012.]

FIRST SCHEDULE

[Section 21(2).]

ELECTION OF SPEAKER OF COUNTY ASSEMBLY

1. A speaker of a county assembly shall be elected when the county assembly first meets after a general election and before the county assembly proceeds with the dispatch of any other business.

2. If the office of speaker falls vacant at any time before the dissolution of the county assembly, another member of the assembly shall be elected to preside over the transaction of business until after the election of a new speaker.

3. The clerk of the county assembly shall preside over the election under paragraph (2).

4. The names of candidates for election to the office of speaker shall be entered upon nomination papers obtained from and handed to the clerk, at least forty-eight hours before the time appointed at which the county assembly is to meet to elect a speaker, and shall be accompanied in each case, by signatures of two members who support the candidate and a declaration by them that the candidate is willing to serve and that the candidate is qualified to be elected as a member of the county assembly under this Act.

5. The clerk shall maintain a register in which shall be shown the date and time when each candidate's nomination papers were received and shall ascertain that every such candidate for election to the office of speaker is qualified to be elected as such under this Act.

6. The election of the speaker shall be by secret ballot.

7. The clerk shall prepare, at least one hour before the meeting of the county assembly, ballot papers upon which shall be shown the names of all candidates validly nominated under paragraph (5) and shall issue not more than one such paper to each member who comes to the table to obtain it.

8. The clerk shall, at the commencement of each ballot, cause the ballot box, empty and unlocked, to be displayed to the county assembly and shall, in the presence of the county assembly, lock the box, which shall thereafter be kept in the full view of the county assembly until the conclusion of the ballot.

9. Each member of the county assembly who wishes to vote shall proceed to a booth or designated area provided by the clerk for that purpose and located next to and within reasonable distance of the ballot box and shall, whilst therein, mark the ballot paper by placing a mark in the space opposite the name of the candidate for whom the member wishes to vote, fold the marked ballot paper before leaving the booth or area and place the folded ballot paper in the ballot box:

Provided that a member who, before the conclusion of a ballot has marked a paper in error may, by returning it to the clerk, obtain another in its place and the clerk shall immediately cancel and destroy the paper so returned.

10. The clerk shall make such arrangements as may be necessary to enable any member with disability to vote.

11. When it appears to the clerk that all members who are present and who wish to vote have placed their ballot papers in the ballot box, the clerk shall unlock the box, examine the ballot papers and, having rejected those unmarked or spoilt, report the result of the ballot; and no member who has not already recorded his or her vote shall be entitled to do so after the clerk has unlocked the ballot box.

12. A person shall not be elected as speaker of a county assembly, unless supported by votes of two-thirds of all the members of the county assembly and if no candidate is supported by the votes of two-thirds of all the members, the candidate who in that ballot receives the highest number of votes and the candidate who in the ballot receives the next highest number shall alone stand for election in a further ballot and the candidate who receives the highest number of votes on the further ballot shall be elected speaker.

13. A candidate may, by written notice to the clerk, withdraw his or her name before a ballot is started, and in the event of such withdrawal, the clerk shall cross the name of that candidate off any ballot papers issued for that or any subsequent ballot.

14. Notwithstanding anything to the contrary in this Schedule, if there is only one candidate who has been duly nominated, that candidate shall be declared forthwith to have been elected speaker, without any ballot or minimum vote being required.

SECOND SCHEDULE

[Sections 51(6), 110(1).]

ELECTORAL CODE OF CONDUCT

(1) This Code shall be subscribed to by—

(a) every political party participating in the election of a president, a member of Parliament, a county governor, a member of a county assembly;

(b) every candidate; and

(c) every leader, chief agent, agent or official of a referendum committee.

(2) This Code shall, in so far as it is applicable, bind the Government and every political party, leader, office bearer, agent and member of a political party or a person who supports a political party, and every candidate nominated under the electoral laws for any election.

(3) All registered political parties and referendum committees shall execute this Code through the hand of their respective registered officials to signify their acceptance to be bound by the provisions of this Code and their commitment to strive to ensure that their members and any person who supports the political party abide by the code at all stages of elections and referendum.

2. In this Code, unless the context otherwise requires—

"**Committee**" means the Electoral Code of Conduct Enforcement Committee;

"**electoral area**" means a ward, county or constituency;

"**election court**" means the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163(3)(a), the High Court in the exercise of the jurisdiction conferred upon it by Article 165(3)(a) of the Constitution, or the High Court in the exercise of the jurisdiction conferred upon it by this Act;

"**electoral laws**" means the Constitution, the Elections Act and subsidiary legislation made thereunder as they relate to the presidential, parliamentary, county elections and the referendum.

3. The object of this Code is to promote conditions conducive to the conduct of free and fair elections and a climate of tolerance in which political activity may take place without fear, coercion, intimidation or reprisals.

4. All registered political parties and other persons bound by this Code shall endeavour to promote the object of the code to enable free political campaigning and open public debate to take place in all parts of Kenya during an election period.

5. Registered political parties, referendum committees, officials of political parties and referendum committees and candidates do, by subscribing to this Code, further commit themselves to—

(a) adhere to the values and principles of the Constitution;

(b) give wide publicity to this Code;

(c) promote voter education campaigns;

(d) condemn, avoid and take steps to prevent violence and intimidation;

(e) instruct their candidates, office-bearers, agents, members and persons who support the political party of their obligations under this Code;

(f) promote gender equality;

(g) promote ethnic tolerance;

(h) promote cultural diversity;

(i) promote the fair representation of special interest groups;

(j) generally affirm the rights of all participants in an election to–

(i) express divergent political opinions;

(ii) debate and contest the policies and programmes of other parties;

(iii) canvass freely for membership and support from voters;

(iv) subject to the Public Order Act (Cap. 56) hold public meetings;

(v) attend public meetings convened by others;

(vi) distribute non-offensive electoral literature and campaign materials;

(vii) publish and distribute non-offensive notices and advertisements;

(viii) erect non-offensive banners, placards and posters;

(ix) remove all banners, placards and posters erected during the election period;

(x) promote free electoral campaigns by all lawful means; and

(xi) co-operate with the Commission and the relevant Government agencies and other authorities in the investigation of issues and allegations arising during the election period.

6. All those bound by this Code shall, throughout an election period—

(a) publicly and repeatedly condemn violence and intimidation and avoid the use of hate speech, language or any kind of action which may lead to violence or intimidation, whether to demonstrate party strength, gain any kind of advantage, or for any other reason;

(b) refrain from any action involving violence or intimidation;

(c) ensure that no arms or weapons of any kind are carried or displayed at political meetings or any march, demonstration or other event of a political nature;

(d) refrain from campaigning in places of worship or during burial ceremonies;

(e) co-operate and liaise in good faith with other parties to avoid organizing public meetings, demonstrations, rallies or marches to take place at the same time and venue as similar political events organized by other parties;

(f) do nothing to impede the right of any party, through its candidates, canvassers and representatives, to have reasonable access to voters for the purposes of conducting voter education, fund raising, canvassing membership and soliciting support;

(g) avoid plagiarizing the symbols, colours or acronyms of other parties; and to discourage and, if possible, prevent the removal, disfigurement or destruction of political campaign materials of any party;

(h) refrain from offering any document or reward to any person in consideration of such person either joining or not joining any party; attending or not attending any political event; voting or not voting (either at all, or in any particular manner); or accepting, refusing or withdrawing such person's nomination as a candidate in the election;

(i) refrain from any attempt to abuse a position of power, privilege or influence, including parental, patriarchal, state or traditional authority for political purposes including any offer of reward or threat of penalty;

(j) avoid any discrimination based on race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth in connection with the election and political activity;

(k) in relation to the Commission—

(i) acknowledge the authority of the Commission in the conduct of the election or referendum;

(ii) ensure the attendance and participation of representatives at meetings of any party liaison committee and other forums convened by or on behalf of the Commission;

(iii) implement the orders and directions of the Commission;

(iv) facilitate the Commissions right of access through official observers and other representatives to all public political meetings or other electoral activities;

(v) co-operate in the official investigation of issues and allegations arising during an election period;

(vi) take all reasonable steps to ensure the safety of observers and other representatives of the Commission from exposure to insult, hazard or threat in the course of their official duties;

(vii) to establish and maintain effective lines of communication with the Commission; and

(viii) to abide by the provisions of this Code;

(l) reassure voters with regard to the impartiality of the Commission and the secrecy and integrity of the ballot, and to reaffirm that no one should know how any other person has voted;

(m) take reasonable steps to discipline and restrain their party office-bearers, employees, candidates, members and persons who support the political party who—

(i) infringe this Code;

(ii) engage in activities of commission or omission which constitute offences under the electoral laws or otherwise fail to observe this Code; and

(iii) contravene or fail to comply with any provision of the electoral laws;

(n) agree for party office bearers, employees, candidates members and persons who support the political party to submit to the disciplinary procedures of the Commission for any violation of this Code; and

(o) without prejudice to the right to present a petition to an election court, accept the final outcome of the election and the Commission's declaration and certification of the results thereof.

7. Where, in the opinion of the Commission, any political party or referendum committee participating in any election or referendum or the leader, office-bearer or member of a political party or person who supports the political party or referendum committee or any candidate at any election, in any way infringes any provision of this Code, the Commission may—

(a) in the case of a political party and, subject to sub-paragraph (b), and in the case of the leader, any office-bearer or member of a political party or person who supports the political party referendum committee or candidate, impose upon that political party one or more of the following penalties or sanctions which any or all may be suspended on specific conditions—

(i) a formal warning;

(ii) a fine determined by the Commission;

(iii) notwithstanding the provisions of any other written law, an order prohibiting the political party, whether permanently or for a specified period, from utilizing any public media time, through the television or radio broadcasting service of such media as have been or may be allocated to the political party for electoral purposes;

(vi) an order prohibiting the political party, referendum committee or candidate from—

(aa) holding particular public meetings, demonstrations or marches, or any kind of meeting, demonstration or march;

(bb) entering any specified electoral area for purposes of canvassing for membership, or for any other electoral purpose;

(cc) erecting placards or banners, or from publishing and distributing campaign literature;

(dd) publishing or distributing campaign literature and electoral advertising or limiting the rights of the political party to do so, and such prohibition or limitation shall be notified to the relevant regulating officers under the Public Order Act (Cap. 56) in the affected places or electoral areas for purposes of the Act;

(ee) in the case of the leader, candidate, an office-bearer or member of a political party or person who supports the political party or referendum committees impose any one or more of the penalties or sanctions referred to in sub-paragraph (a)(i) or (ii) of this paragraph;

(b) Where a political party, referendum committee, leader or any office bearer, member or person who supports the political party, referendum committee or any candidate at an election fails, neglects or refuses to comply with the orders of the Commission issued under paragraph 7(a), the Commission shall impose upon the defaulting party any of the following sanctions which may be suspended on specific conditions—

(i) in case of fine imposed, prohibit the defaulting party from participating in ongoing and future elections as candidates in case of a defaulting candidate or prohibit the political party or the referendum committee official from participating in ongoing elections and referendum, and future elections or referendum or any activity facilitated by the Commission until such fine has been paid;

(ii) in case of failure to comply with any other sanctions imposed, cancel the right of such political party or candidate to participate in the next election; and

(iii) file execution proceedings in the High Court to enforce the recovery of the fine.

8. A fine imposed by the Commission under this Code shall be registered in the High Court.

9. Without prejudice to the provisions of paragraph 7, the Commission may either of its own motion or in consequence of any report made to it, institute proceedings in the High Court as may be appropriate in the case of any alleged infringement of this Code by a political party or by the leader, any office-bearer or member of a political party or person who supports a political party or any candidate and where the Court finds the infringement of the provisions of this Code—

(a) in the case of a political party, any act or omission involving violence, intimidation or a gross or systematic violation of the rights of any political party, candidate or voter, the Court may, in addition to or in substitution for any other penalty or sanction specified in paragraph 7(a), make an order cancelling the right of such party to participate in the election concerned; or

(b) in the case of the leader, any office-bearer or member of a political party or person who supports the political party or of any candidate, that any act or omission involving violence or intimidation or gross or systematic violation of the rights of any political party candidate or voter, the Court may in addition to or in substitution of any other penalty or sanction specified in paragraph 7(a)(i) and (ii), make an order disqualifying, in the case of a person who is a candidate, that person from being a candidate or deleting the name of that candidate from the list or lists of candidates concerned.

10. In making its decision regarding appropriate penalties or sanctions, the Commission or, as the case may be, the High Court shall have regard to any other legal consequences that may result from civil or criminal proceedings instituted by reason of the same occurrence.

11. The High Court shall ensure that any proceedings initiated under paragraph 9 are dealt with in priority to all other matters brought before it, and that the decision of that Court is given before the date of the election concerned.

12. The procedure of the High Court in cases falling within the provisions of this Code shall, without prejudice to paragraph 9, be in accordance with such Rules of Procedure as shall from time to time be promulgated by the Chief Justice.

13. Every registered political party, referendum committee, candidate and agent—

(a) shall respect the role of the media before, during and after an election or referendum conducted under this Act;

(b) may not prevent access by members of the media to public political meetings, marches, demonstrations and rallies; and

(c) shall take all reasonable steps to ensure that journalists are not subjected to harassment, intimidation, hazard, threat or physical assault by any of their representatives or persons who supports the candidate or political party.

14. Every media house and its representative shall—

(a) adhere to the media professional ethics in its coverage of public meetings, campaign rallies and demonstrations;

(b) during the prescribed hours of polling, not publish or distribute the result of an exit poll taken in that election or referendum;

(c) adhere to any media regulations issued by the Commission; and

(d) abide by the provisions of this Act.

15. (1) The Commission shall set up the Electoral Code of Conduct Enforcement Committee which shall comprise of not less than five members of the Commission and shall be chaired by a member appointed by the Chairperson; the Commission may nominate a member of its staff to be the secretary to the Committee.

(2) The Chairperson of the committee shall be a person who is qualified to hold the office of Judge of the High Court.

(3) Every candidate, official and agent shall—

(a) acknowledge the authority of the Committee to enforce the provisions of this Code on behalf of the Commission;

(b) ensure compliance with summons issued to the party, its candidates or representatives by the Committee;

(c) co-operate in the official investigation of issues and allegations arising at election period; and

(d) respect and comply with the orders issued by the Committee.

(4) The Committee shall issue summons to the person, political party or referendum committee against whom a complaint has been received as having infringed the provisions of this Code and any other person who the Commission has reason to believe to have infringed the provisions of this Code to attend its meetings. The meetings will be convened at any place which the Committee may deem fit.

(5) In its proceedings, the Committee may examine the person summoned and may allow a person to have legal representation.

(6) The committee shall not be bound by the provisions of the Criminal Procedure Code (Cap. 75) or the Evidence Act (Cap. 80) in its proceedings.

(7) Every person who is summoned by the Committee and who attends the meetings of the Committee shall be accorded the right to be heard.

(8) The Committee shall exercise the powers provided under this Code to punish any person found to have infringed this Code.

(9) The Committee shall deliver its verdict expeditiously and inform the parties of the decision.

(10) Notwithstanding the provisions of this Code, any complaint submitted in writing alleging any irregularity with any establishment of the electoral process at any stage if not satisfactorily resolved by the peace committee shall be examined and determined by the Committee.

16. Every registered political party referendum committee, candidate and agent shall—

(a) ensure security and full participation of women and persons with disabilities as candidates and voters;

(b) respect the right of women to communicate freely with political parties, committees and candidates;

(c) facilitate the full and equal participation of women in political activities;

(d) ensure free access of women and persons with disabilities to all public political meetings, marches, demonstrations, rallies and other public political events; and

(e) take reasonable steps to ensure that women are free to engage in any political activity.

17. (1) The Commission may establish peace committees in every constituency during an election and referendum period.

(2) Every political party, referendum committee, candidate, official and agent shall—

(a) acknowledge the activity of peace committee established at the constituency level by the Commission;

(b) ensure attendance of the peace committee meetings convened at the constituency level on behalf of the Commission; and

(c) co-operate in the official investigation initiated by the peace committee on issues and allegation arising at the election period.

(3) The peace committee shall have power to—

(a) reconcile warring parties;

(b) mediate political disputes in the constituencies;

(c) liaise with government security agencies in the constituency and report suspected election malpractices; and

(d) report any violation of this Code to the Committee for appropriate action.

18. This Code shall take effect from the date of dissolution of parliament until polling day.

19. Any person may complain about the breach of this Code.

THIRD SCHEDULE

[Section 55A).]
[Act No. 12 of 2012, Sch, Act No. 36 of 2016, s. 27.]

OATH OF SECRECY

I, ... I.D./ Passport No..... swear that I shall maintain the secrecy of the ballot and shall not communicate, except for a purpose authorized by law before the poll is closed, any information as to the name or number on the register of voters, of any voter who has or has not applied for a ballot paper or voted at that station or as to the official mark with respect to the ..... constituency/county/ward or do anything that compromises the secrecy of the vote.

Signature of person taking the oath

Before me

.....

(Signature)

Commissioner for Oaths/Magistrate

Date: .....

THE REPUBLIC OF KENYA

LAWS OF KENYA

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT

NO. 9 OF 2011

Revised Edition 2015 [2012]

Published by the National Council for Law Reporting
with the Authority of the Attorney-General

www.kenyalaw.org

NO. 9 OF 2011

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT

ARRANGEMENT OF SECTIONS

PART I – PRELIMINARY

Section

1. Short title.
2. Interpretation.
3. Object and purpose of the Act.

PART II – ADMINISTRATION

4. Functions of the Commission.
5. Composition and appointment of the Commission.
6. Qualifications for appointment as chairperson or member of the Commission.
7. Term of office.
7A. Vacancy in the office of chairperson and members.
8. Conduct of business and affairs of the Commission.
9. Oath of office.
10. Secretary to Commission.
10A. Vacancy of office of secretary.
11. Employees of the Commission.
11A. Relationship between the Commissioners and Secretariat.
12. Units of the Commission.
13. Legal personality of the Commission.
14. Seal of the Commission.
15. Protection from personal liability.
16. Code of conduct.

PART III – FINANCIAL PROVISIONS

17. Funds of the Commission.
18. Independent Electoral and Boundaries Commission Fund.
19. Expenses of the Commission to be a charge on the Consolidated Fund.
20. Remuneration and allowances.
21. Annual estimates.
22. Financial year of the Commission.
23. Accounts and audit.
24. Annual report.

PART IV – MISCELLANEOUS PROVISIONS

25. General principles.
26. Independence of the Commission.
27. Management of information.
28. Publicity.
29. Legal advice.
30. Offences.
31. Regulations.

Section

PART V – SAVINGS AND TRANSITIONAL PROVISIONS

32. Interpretation of Part.
33. Transition.
34. Transfer of assets, etc.
35. Appointment of the first Commission.
36. Delimitation during first review.

SCHEDULES

FIRST SCHEDULE — PROCEDURE FOR APPOINTMENT OF CHAIRPERSON AND MEMBERS OF THE COMMISSION

SECOND SCHEDULE — PROVISIONS AS TO THE CONDUCT OF THE BUSINESS AND AFFAIRS OF THE COMMISSION

THIRD SCHEDULE — OATH OF OFFICE/SOLEMN AFFIRMATION OF CHAIRPERSON/MEMBER/SECRETARY OF THE COMMISSION/SELECTION PANEL

FOURTH SCHEDULE — CODE OF CONDUCT FOR MEMBERS AND EMPLOYEES OF THE COMMISSION

FIFTH SCHEDULE — PROVISIONS RELATING TO THE FIRST REVIEW

NO. 9 OF 2011

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT

[*Date of assent: 5th July, 2011.*]

[*Date of commencement: 5th July, 2011.*]

An Act of Parliament to make provision for the appointment and effective operation of the Independent Electoral and Boundaries Commission established by Article 88 of the Constitution, and for connected purposes

[Act No. 9 of 2011, Act No. 12 of 2012, Act No. 36 of 2016.]

PART 1 — PRELIMINARY

1. Short title

This Act may be cited as the Independent Electoral and Boundaries Commission Act, 2011.

2. Interpretation

(1) In this Act, unless the context otherwise requires—

"Cabinet Secretary" means the Cabinet Secretary appointed under Article 152 of the Constitution;

"chairperson" means the chairperson of the Commission appointed in accordance with Article 250(2) of the Constitution;

"Commission" means the Independent Electoral and Boundaries Commission established by Article 88 of the Constitution;

"first review" means the review conducted by the former Boundaries Commission taking into account any outstanding work of that Commission and issues arising from that review;

"former Boundaries Commission" means the Interim Independent Boundaries Review Commission established under section 41B of the former Constitution;

"former Constitution" means the Constitution in force immediately before the 27th of August, 2010;

"Fund" means the Independent Electoral and Boundaries Commission Fund established by section 18;

"issues arising" means the issues specified in paragraph 1 of the Fifth Schedule;

"member" means a member of the Commission and includes the chairperson;

"Parliamentary Committee" means the relevant Departmental Committee of the National Assembly responsible for matters relating to the Commission;

"principal office" means the headquarters of the Commission;

"**Registrar of Persons**" means the office in charge of identification, registration and issuance of identity cards to all Kenyan citizens;

"**Salaries and Remuneration Commission**" means the Salaries and Remuneration Commission established under Article 230(1) of the Constitution;

"**secretary**" means the secretary to the Commission appointed under Article 250(12) of the Constitution;

"**vice-chairperson**" means the vice-chairperson of the Commission elected under Article 250(10) of the Constitution.

(2) Despite subsection (1), until after the first election under the Constitution, references in this Act to the expression "Cabinet Secretary" shall be construed to mean "Minister".

3. Object and purpose of the Act

The object and purpose of this Act is to—

(a) provide for the operations, powers, responsibilities and functions of the Commission to supervise elections and referenda at County and National government levels;

(b) provide a legal framework for the identification and appointment of the chairperson, members and the secretary of the Commission pursuant to Article 88(1), (2) and (3) and 250(2) of the Constitution;

(c) provide for the manner of the exercise of the powers, responsibilities and functions of the Commission pursuant to Article 88(5) of the Constitution;

(d) establish mechanisms for the Commission to facilitate consultations with interested parties pursuant to Article 89(7) of the Constitution; and

(e) establish mechanisms for the Commission to address the issues arising out of the first review.

[Act No. 36 of 2016, s. 29.]

PART II – ADMINISTRATION

4. Functions of the Commission

As provided for by Article 88(4) of the Constitution, the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

(a) the continuous registration of citizens as voters;

(b) the regular revision of the voters' roll;

(c) the delimitation of constituencies and wards in accordance with the Constitution;

(d) the regulation of the process by which parties nominate candidates for elections;

(e) the settlement of electoral disputes, including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to the declaration of election results;

(f) the registration of candidates for election;

(g) voter education;

(h) the facilitation of the observation, monitoring and evaluation of elections;

(i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;

(j) the development and enforcement of a code of conduct for candidates and parties contesting elections;

(k) the monitoring of compliance with the legislation required by Article 82(1)(b) of the Constitution relating to nomination of candidates by parties;

(l) *deleted by Act No. 36 of 2016, s. 30;*

(m) the use of appropriate technology and approaches in the performance of its functions; and

(n) such other functions as are provided for by the Constitution or any other written law.

[Act No. 36 of 2016, s. 30.]

5. Composition and appointment of the Commission

(1) The Commission shall consist of a chairperson and six other members appointed in accordance with Article 250(4) of the Constitution and the provisions of this Act.

(2) The chairperson and members of the Commission shall be appointed in accordance with the procedure set out in the First Schedule.

(3) The process of replacement of a chairperson or a member of the Commission shall commence at least six months before the lapse of the term of the chairperson or member of the Commission.

(4) The procedure set out in the First Schedule shall apply, with the necessary modifications, whenever there is a vacancy in the Commission.

[Act No. 36 of 2016, s. 31.]

6. Qualifications for appointment as chairperson or member of the Commission

(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.

(2) A person is qualified for appointment as a member of the Commission if such person—

(a) *deleted by Act No. 36 of 2016, s. 32;*

(b) holds a degree from a recognised university;

(c) has proven relevant experience in any of the following fields—

(i) electoral matters;

(ii) management;

(iii) finance;

(iv) governance;

(v) public administration;

(vi) law; and

(d) meets the requirements of Chapter Six of the Constitution.

[Act No. 36 of 2016, s. 32.]

7. Term of office

(1) The members of the Commission shall be appointed for a single term of six years and shall not be eligible for re-appointment.

(2) The members of the Commission shall serve on a full-time basis.

(3) The Commission shall be properly constituted notwithstanding a vacancy in its membership.

7A. Vacancy in the office of chairperson and members

(1) The office of the chairperson or a member of the Commission shall become vacant if the holder—

(a) dies;

(b) resigns from office by notice in writing addressed to the President; or

(c) is removed from office under any of the circumstances specified in Article 251 and Chapter Six of the Constitution.

(2) The President shall publish a notice of a vacancy in the Gazette within seven days of the occurrence of such vacancy.

(3) Whenever a vacancy arises under subsection (1), the recruitment of a new chairperson or member, under this Act, shall commence immediately after the declaration of the vacancy by the President under subsection (2).

[Act No. 36 of 2016, s. 33.]

8. Conduct of business and affairs of the Commission

The conduct and regulation of the business and affairs of the Commission shall be as provided for in the Second Schedule but subject thereto, the Commission may regulate its own procedure.

9. Oath of office

The chairperson and members shall, before assuming office, take and subscribe to the oath or affirmation of office prescribed in the Second Schedule.

10. Secretary to the Commission

(1) The Commission shall, through an open, transparent and competitive recruitment process, appoint a suitably qualified person to be the secretary to the Commission.

(2) A person shall be qualified for appointment as the secretary if the person—

(a) is a citizen of Kenya;

(b) possesses a degree from a recognised university;

(c) has had at least five years' proven experience at management level;

(d) has proven relevant experience in either—

(i) electoral matters;

(ii) management;

(iii) finance;
(iv) governance;
(v) public administration;
(vi) law; or
(vii) political science; and

(e) meets the requirements of Chapter Six of the Constitution.

(3) The secretary shall, before assuming office, take and subscribe to the oath or affirmation of office prescribed in the Third Schedule.

(4) The secretary shall hold office for a term of five years but shall be eligible for re-appointment for one further term of five years.

(5) Where the Commission does not intend to reappoint the secretary, the Commission shall notify the secretary and shall cause the vacancy to be advertised at least three months before the expiry of the incumbent's term.

(6) The secretary shall, in the performance of the functions and duties of office, be responsible, answerable and report to the Commission.

(7) The secretary shall be—

(a) the chief executive officer of the Commission;
(b) head of the secretariat;
(c) the accounting officer of the Commission;
(d) custodian of all commission's records;
(e) responsible for—
(i) executing decisions of the Commission;
(ii) assignment of duties and supervision of all employees of the Commission;
(iii) facilitating, co-ordinating and ensuring execution of Commission's mandate;
(iv) ensuring staff compliance with public ethics and values; and
(v) the performance of such other duties as may be assigned by the law and Commission.

(8) The secretary may only be removed from office by the Commission on grounds of—

(a) inability to perform functions of the office arising out of physical or mental incapacity;
(b) gross misconduct;
(c) bankruptcy; or
(d) incompetence.

(9) Before removal under subsection (8), the secretary shall be—

(a) informed in writing of the reasons for the intended removal;
(b) given an opportunity to put in a defence against any such allegations, either in person or through an advocate.

10A. Vacancy of office of secretary

The office of the secretary shall become vacant if the holder—

(a) dies;

(b) resigns from office by notice in writing addressed to the Commission; or

(c) is removed from office under any of the circumstances set out under section 10.

[Act No. 36 of 2016, s. 34.]

11. Employees of the Commission

(1) There shall be a secretariat of the Commission which shall be headed by the secretary.

(2) The secretariat shall comprise of—

(a) such professional, technical and administrative officers and support staff, as may be appointed by the Commission in the discharge of its functions under this Act; and

(b) such public officers as may be seconded to the Commission upon its request.

(3) The employees of the Commission may be appointed, subject to its approved establishment.

(4) For purposes of this Act, a public officer who is seconded to the Commission under subsection (2)(b), shall be deemed to be an employee of the Commission and shall enjoy the same benefits and shall be required to comply with the Constitution, this Act and any other written law relating to elections and any instruction, orders and directions of the Commission in the same manner as an employee recruited directly by the Commission under this Act.

(5) The Commission shall ensure that in the appointment of employees, not more than two-thirds of the employees of the Commission shall be of the same gender and that the following are also taken into account—

(a) persons with disabilities; and

(b) regional and other diversity of the people of Kenya.

11A. Relationship between the Commissioners and Secretariat

For the effective performance of the functions of the Commission —

(a) the chairperson and members of the Commission shall perform their functions in accordance with the Constitution and in particular, shall be responsible for the formulation of policy and strategy of the Commission and oversight; and

(b) the secretariat shall perform the day-to-day administrative functions of the Commission and implement the policies and strategies formulated by the Commission.

[Act No. 36 of 2016, s. 35.]

12. Units of the Commission

(1) The Commission may create within itself such directorates, field offices, units, divisions or committees and appoint thereto such employees as it may determine.

(2) Every directorate, field office, unit, division or committee created by the Commission shall act in accordance with the mandate approved by the Commission and directives given in writing by the secretary.

13. Legal personality of the Commission

(1) The Commission shall be a body corporate with perpetual succession and a common seal and shall be capable, in its own name, of—

(a) acquiring, holding and disposing of movable and immovable property;

(b) suing and being sued; and

(c) doing or performing all such acts and things as a body corporate may by law do or perform.

(2) Any legal proceedings for execution of judgments against the Commission shall be subject to the Government Proceedings Act (Cap. 40).

14. Seal of the Commission

(1) The seal of the Commission shall be such device as may be determined by the Commission and shall be kept by the secretary.

(2) The affixing of the seal shall be authenticated by the chairperson and the secretary or any other person authorised in that behalf by a resolution of the Commission.

(3) Any document purporting to be under the seal of the Commission or issued on behalf of the Commission shall be received in evidence and shall be deemed to be so executed or issued, as the case may be, without further proof, unless the contrary is proved.

15. Protection from personal liability

Nothing done by a member of the Commission or by any electoral officer shall, if done in good faith for the purpose of executing the powers, functions or duties of the Commission under the Constitution or this Act, render such member or officer personally liable for any action, claim or demand.

16. Code of conduct

Members and the employees of the Commission shall subscribe to the code of conduct prescribed under the Fourth Schedule.

PART III – FINANCIAL PROVISIONS

17. Funds of the Commission

The funds of the Commission shall consist of—

(a) monies allocated by Parliament for purposes of the Commission;

(b) any grants, gifts, donations or other endowments given to the Commission;

(c) such funds as may vest in or accrue to the Commission in the performance of its functions under this Act or under any other written law.

18. Independent Electoral and Boundaries Commission Fund

(1) The funds of the Commission shall be held in a fund to be known as the Independent Electoral and Boundaries Commission Fund which shall be administered, on behalf of the Commission, by the secretary.

(2) There shall be paid from the Fund—

(a) the salaries, allowances and other remuneration of the employees of the Commission;

(b) such other remuneration to persons in its service as it may consider appropriate;

(c) such reasonable travelling and subsistence allowances for the employees and members of any committee of the Commission when engaged in the business of the Commission, and at such rates as may be approved by the Salaries and Remuneration Commission;

(d) any other operational and other expenses incurred by the Commission in the performance of its functions.

(3) The secretary shall manage the Fund subject to the provisions of all laws and regulations relating to public financial management.

19. Expenses of the Commission to be a charge on the Consolidated Fund

The administrative and other expenses of the Commission, including the salaries, allowances, gratuities and pensions of the members and employees of the Commission shall be a charge on the Consolidated Fund.

20. Remuneration and allowances

(1) Members of the Commission shall be paid such remuneration or allowances as the Salaries and Remuneration Commission shall determine.

(2) Pending the establishment of the Salaries and Remuneration Commission, the remuneration and allowances under subsection (1) shall be determined by the Public Service Commission in consultation with the Treasury.

[Act No. 12 of 2012, Sch.]

21. Annual estimates

(1) Before the commencement of each financial year, the secretary with the approval of the Commission, shall cause to be prepared estimates of the revenue and expenditure of the Commission for that year.

(2) The Cabinet Secretary responsible for finance shall present the estimates approved by the Commission for consideration and approval by the National Assembly.

22. Financial year of the Commission

The financial year of the Commission shall be the period of twelve months ending on the thirtieth June in each year.

23. Accounts and audit

(1) The Commission shall cause to be kept all proper books and records of account of the income, expenditure and assets of the Commission.

(2) Within a period of three months after the end of each financial year, the Commission shall submit to the Auditor-General, the accounts of the Commission together with—

(a) a statement of the income and expenditure of the Commission during that year; and

(b) a statement of the assets and liabilities of the Commission on the last day of that year.

(3) All accounts kept under this Act shall be audited by the Auditor-General at least once in every financial year.

(4) The Commission shall be entitled, upon application to the Cabinet Secretary responsible for finance, to exemption from duty chargeable under the Stamp Duty Act (Cap. 480) in respect of any instrument executed by or on behalf of, or in favour of the Commission which, but for this section, the Commission would be liable to pay.

(5) The Commission may establish, control, manage, maintain and contribute to pension and provident funds for the benefit of the members and employees of the Commission and may grant pensions and gratuities from any such fund to the said officers upon their resignation, retirement or separation from the service of the Commission or, as the case may be, to the dependants of any such officer upon such officer's death.

24. Annual report

(1) Within three months after the end of each financial year, the Commission shall present its annual report to the President and submit the same to Parliament.

(2) The annual report shall in respect of the year to which it relates, contain—

(a) the financial statements of the Commission;

(b) the activities the Commission has undertaken;

(ba) progress made in the continuous registration of citizens as voters and the progressive realisation of the right to vote of citizens residing outside Kenya and prisoners; and

(c) any other information, the Commission may consider relevant.

(3) The Commission shall publish the annual report in the *Gazette* and in at least one newspaper of national circulation.

[Act No. 36 of 2016, s. 36.]

PART IV – MISCELLANEOUS PROVISIONS

25. General principles

In fulfilling its mandate, the Commission shall, in accordance with the Constitution, observe the following principles—

(a) freedom of citizens to exercise their political rights under Article 38 of the Constitution;

(b) not more than two-thirds of the members of elective public bodies shall be of the same gender;

(c) fair representation of persons with disabilities and other persons or groups with special needs;

(d) universal and equal suffrage based on the aspiration for fair representation and equality of votes;

(e) free and fair elections, which are—

(i) by secret ballot;

(ii) free from violence, intimidation, improper influence or corruption;

(iii) conducted independently;

(iv) transparent; and

(v) administered in an impartial, neutral, efficient, accurate and accountable manner;

(f) undertake elections on a regular basis in accordance with the Constitution;

(g) ethical conduct; and

(h) fairness.

26. Independence of the Commission

Except as provided in the Constitution, the Commission shall, in the performance of its functions, not be subject to the direction or control of any person or authority but shall observe the principle of public participation and the requirement for consultation with stakeholders.

27. Management of information

(1) The Commission shall publish and publicise all important information within its mandate affecting the nation.

(2) A request for information in the public interest by a citizen—

(a) shall be addressed to the secretary or such other person as the Commission may for that purpose designate and may be subject to the payment of a reasonable fee in instances where the Commission incurs an expense in providing the information; and

(b) may be subject to confidentiality requirements of the Commission.

(3) Subject to Article 35 of the Constitution, the Commission may decline to give information to an applicant where—

(a) the request is unreasonable in the circumstances;

(b) the information requested is at a deliberative stage by the Commission;

(c) failure of payment of the prescribed fee; or

(d) the applicant fails to satisfy any confidentiality requirements by the Commission.

(4) The right of access to information under Article 35 of the Constitution shall be limited to the nature and extent specified under this section.

(5) Every member and employee of the Commission shall sign a confidentiality agreement.

28. Publicity

The Commission shall, in such manner as it considers appropriate, publish a notice for public information specifying—

(a) the location of all its offices; and

(b) its address or addresses, telephone numbers and other means of communication or contact with the Commission.

29. Legal advice

The Commission may request legal advice from the Attorney-General.

30. Offences

(1) A member or employee of the Commission who knowingly subverts the process of free and fair elections or who knowingly obstructs the Commission in the discharge of its functions or otherwise interferes with the functions of the Commission commits an offence and is liable, on conviction, to a term of imprisonment not exceeding three years or to a fine of not more than one million shillings or to both.

(2) A person who is convicted of an offence under subsection (1) shall not be eligible to hold public office for a period of ten years following the conviction.

31. Regulations

(1) The Commission may make regulations for the better carrying out of the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), such regulations may provide for—

(a) the appointment, including the power to confirm appointments of persons, to any office in respect of which the Commission is responsible under this Act;

(b) the disciplinary control of persons holding or acting in any office in respect of which the Commission is responsible under this Act;

(c) the termination of appointments and the removal of persons from any office, in respect of which the Commission is responsible under this Act;

(d) the practice and procedure of the Commission in the exercise of its functions under this Act;

(e) *deleted by Act No. 36 of 2016, s. 37;*

(f) the delegation of the Commission's functions or powers; and

(g) any other matter required under the Constitution, this Act or any other written law.

(3) The purpose and objective for making the rules and regulations under subsection (1) is to enable the Commission to effectively discharge its mandate under the Constitution and this Act.

[Act No. 36 of 2016, s. 37.]

PART V — SAVINGS AND TRANSITIONAL PROVISIONS

32. Interpretation of Part

In this Act, unless the context otherwise requires—

"Commission" means the Independent Electoral and Boundaries Commission established by Article 88 of the Constitution;

"first Commission" means the Commission first appointed under this Act;

"former Boundaries Commission" means the Interim Independent Boundaries Review Commission established under section 41B of the former Constitution;

"former Constitution" means the Constitution in force immediately before the 27th of August, 2010;

"former Electoral Commission" means the Interim Independent Electoral Commission established under section 41 of the former Constitution;

"Parliamentary Committee" means the relevant departmental Committee of the National Assembly responsible for matters relating to the Commission.

33. Transition

(1) The former Electoral Commission shall continue in office in terms of section 28(1) and (2) of the Sixth Schedule to the Constitution.

(2) A person who immediately before the commencement of this Act was an officer of the former Electoral Commission may, subject to the provisions of the Constitution, this Act and any other relevant law, be an officer of the Commission.

(3) A person who served as an officer of the former Boundaries Commission may be eligible, subject to the staff establishment of the Commission, for employment by the Commission.

34. Transfer of assets, etc.

(1) All property, assets, rights, liabilities, obligations, agreements and other arrangements existing at the commencement of this Act and vested in, acquired, incurred or entered into by or on behalf of the former Electoral Commission or the former Boundaries Commission shall upon the commencement of this Act, be deemed to have vested in or to have been acquired, incurred or entered into by or on behalf of the Commission to the same extent as they were enforceable by or against either of the former Commissions before the commencement of the Act.

(2) Where the transfer of any property transferred to or vested in the Commission under subsection (1) is required by any written law to be registered, the Commission shall, within three months from the commencement of this Act or within such other period as the written law may prescribe, apply to the appropriate registering authority for the registration of the transfer and thereupon the registering authority shall, at no cost to the Commission or any person by way of registration fees, stamp or other duties—

(a) make such entries in the appropriate register as shall give effect to the transfer;

(b) where appropriate, issue to the Commission a certificate of title or other statutory evidence of ownership of the property or make such amendments on such certificates or in the appropriate register as may be necessary; and

(c) make any necessary endorsements on such deeds or other documents as may be presented to such registering authority relating to the title, right or obligation concerned.

35. Appointment of the first Commission

(1) For purposes of the appointment of the first Commission under this Act, the Selection Panel shall have regard to the provisions of section 28(2) of the Sixth Schedule to the Constitution and in accordance with the procedure set out in the First Schedule to this Act.

(2) This section shall lapse upon the appointment of the first Commission under this Act.

36. Delimitation during first review

(1) The provisions of the Fifth Schedule shall have effect for the purposes of addressing issues arising from first review.

(2) This section shall lapse upon the gazettement of the final report in accordance with the Fifth Schedule.

FIRST SCHEDULE

[Section 5, Act No. 12 of 2012, Sch., Act No. 36 of 2016, 38.]

PROCEDURE FOR APPOINTMENT OF CHAIRPERSON AND MEMBERS OF THE COMMISSION

1. Selection Panel

(1) At least six months before the lapse of the term of the chairperson or member of the Commission or within fourteen days of the declaration of a vacancy in the office of the chairperson or member of the Commission under the Constitution or this Act, the President shall appoint a selection panel consisting of such persons as Parliament shall determine for the purposes of appointment of the chairperson or member of the Commission.

(2) For the purpose of the first appointment of commissioners upon the commencement of section 5, the selection panel shall consist of —

(a) four persons, being two men and two women, nominated by the Parliamentary Service Commission;

(b) one person nominated by the Kenya Conference of Catholic Bishops;

(c) one person nominated by the National Council of Churches of Kenya;

(d) one person nominated by the Supreme Council of Kenya Muslims, the National Muslim Leaders Forum and the Council of Imams and Preachers of Kenya;

(e) one person nominated by the Evangelical Alliance of Kenya; and

(f) one person nominated by the Hindu Council of Kenya.

(3) The respective nominating bodies under sub-paragraphs (2)(b) to (f) shall submit the names of their nominees to the Parliamentary Service Commission for transmission to the President for appointment.

(4) The selection panel shall, at its first sitting, elect a chairperson and vice-chairperson from amongst its number.

(5) Subject to the provisions of this Schedule, the selection panel shall determine its own procedure.

(6) The Parliamentary Service Commission shall provide the secretariat services and facilities required by the selection panel in the performance of its functions.

2. Oath or affirmation of office

The chairperson and members of the selection panel shall, before assuming office, take and subscribe the oath or affirmation of office prescribed in the Third Schedule.

3. Selection of nominees

(1) The selection panel shall, within seven days of its appointment, invite applications from qualified persons and publish the names of all applicants and their qualifications in the *Gazette*, two newspapers of national circulation and on the website of the Parliamentary Service Commission.

(2) The selection panel shall consider the applications, shortlist and interview the applicants.

(3) The interviews under subparagraph (2) shall be conducted in public.

(4) After conducting interviews under subparagraph (2), the selection panel shall select two persons qualified to be appointed as chairperson and nine persons qualified to be appointed as members of the Commission and shall forward the names to the President for nomination of one person for appointment as the chairperson and six persons for appointment as members.

(5) The President shall, within seven days of receipt of the names under sub-paragraph (4), forward the list of nominees to the National Assembly for approval in accordance with the Public Appointments (Parliamentary Approval) Act.

4. Appointment by the President

The President shall, within seven days of receipt of the names approved by the National Assembly, by notice in the *Gazette*, appoint the Chairperson and the members of the Commission.

5. Gender equity and regional balance

In short listing, nominating or appointing persons as chairperson and members of the Commission, the selection panel, the National Assembly and the President shall ensure that not more than two-thirds of the members are of the same gender and shall ensure regional balance.

6. Dissolution of Selection Panel

The selection panel shall stand dissolved upon the requisite appointments being made under paragraph 4.

SECOND SCHEDULE

[Section 8.]

PROVISIONS AS TO THE CONDUCT OF THE BUSINESS AND AFFAIRS OF THE COMMISSION

1. The Commission shall meet as often as may be necessary for the carrying out of its business but it shall meet at least once every calendar month.

2. A meeting of the Commission shall be held on such date and at such time as the chairperson shall decide.

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.

6. The chairperson shall preside at every meeting of the Commission at which he is present and in the absence of the chairperson at a meeting, the vice-chairperson, shall preside and in the absence of both the chairperson and the vice-chairperson, the members present shall elect one of their number who shall, with respect to that meeting and the business transacted thereat, have all the powers of the chairperson.

7. Unless a unanimous decision is reached, a decision on any matter before the Commission shall be by concurrence of a majority of all the members.

8. Subject to paragraph 5, no proceedings of the Commission shall be invalid by reason only of a vacancy among the members thereof.

9. (1) The secretary shall be the secretary at all meetings of the Commission.

(2) The Commission shall, subject to subparagraph (3), establish a committee for liaison with political parties and may establish committees of its members for any other purpose.

(3) The Political Parties Liaison Committee established under the Political Parties Act, 2011, consists of the designated members of the Commission and the representatives of every political party with one or more candidates validly nominated for the election; and the Commission shall consult with the committee on all matters relating to the election.

10. The Commission shall cause minutes of all proceedings of meetings of the Commission to be entered in books for that purpose.

11. Except as provided by this Schedule, the Commission may regulate its own procedure.

12. (1) If any person is present at a meeting of the Commission or any committee at which any matter is the subject of consideration and in which matter that person or that directly or indirectly interested in a private capacity, that person shall as soon as is practicable after the commencement of the meeting, declare such interest and shall not, unless the Commission or committee otherwise directs, take part in any consideration or discussion of, or vote on any question touching such matter.

(2) A disclosure of interest made under subsection (1) shall be recorded in the minutes of the meeting at which it is made.

(3) A person who contravenes subsection (1) commits an offence and upon conviction is liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding seven years or to both such fine and imprisonment.

(4) A member or employee of the Commission shall not transact any business or trade with the Commission.

THIRD SCHEDULE

[Section 10(3).]

OATH OF OFFICE/SOLEMN AFFIRMATION OF CHAIRPERSON/ MEMBER/SECRETARY OF THE COMMISSION/SELECTION PANEL

I, ... having been appointed (the chairperson/member of/secretary to) the Independent Electoral and Boundaries Commission/Selection Panel do solemnly (swear/declare and affirm) that I will at all times obey, respect and uphold the Constitution of Kenya and all other laws of the Republic; that I will faithfully and fully, impartially and to the best of my ability, discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice.

(So Help me God).

Sworn/declared by the said .....

Before me this ..... day of .....

.....

Chief Justice

FOURTH SCHEDULE

[Section 16.]

CODE OF CONDUCT FOR MEMBERS AND EMPLOYEES OF THE COMMISSION

1. Impartiality and independence of members

(1) Every member and employee of the Commission shall impartially and independently perform the functions of the Commission in good faith and without fear, favour or prejudice, and without influence from—

(a) any arm of the Government;

(b) any State officer;

(c) any public officer;

(d) any political party;

(e) candidate participating in an election; or

(f) any other person, authority or organisation.

(2) The provisions of subparagraph (1) shall apply withouvt prejudice to the principle of public participation and requirement for consultation with all stakeholders.

2. Independence from political or public office

(1) A member or employee of the Commission shall not, during tenure of office be eligible for—

(a) appointment or nomination to a political office; or

(b) appointment to another public office.

(2) A member of the Commission may not—

(a) whether directly or indirectly, in any manner support or oppose any party or candidate participating in an election or any side participating in a referendum, or any of the issues in contention between parties, candidates or sides;

(b) make private use of or profit from any confidential information gained as a result of being a member of the Commission; or

(c) divulge any information to any third party, save in the course of official duty.

3. Disclosure of conflicting interests

(1) If a member or an employee is directly or indirectly interested in any contract, proposed contract or other matter before the Commission and is present at any meeting of the Commission at which the contract, proposed contract or other matter is the subject of consideration, the member or employee shall, at the meeting and as soon as practicable after the commencement thereof, disclose the fact and shall not take part in the consideration or discussion of, or vote on, any questions with respect to the contract or other matter or be counted in the quorum of the meeting during consideration of the matter.

(2) A member or employee whose personal interest conflicts with their official duties shall—

(a) in writing, declare the personal interests to their supervisor or other appropriate person or body and comply with any directions given to avoid the conflict; and

(b) refrain from participating in any deliberations with respect to the matter.

4. Professionalism

A member or employee of the Commission shall—

(a) perform their duties in a manner that maintains public confidence in the Commission;

(b) treat the public and colleagues with courtesy and respect;

(c) discharge all their duties in a professional, timely and efficient manner and in line with the rule of law; and

(d) respect the rights and freedom of all persons that he may interact with.

5. Improper enrichment

A member or employee of the Commission shall not—

(a) use their office or organisation to improperly enrich themselves or others;

(b) accept or request gifts or favours from any person who may have a commercial interest with the Commission or any other interest that may be affected by the normal business of the Commission; or

(c) use information that is acquired during the course of their duties or connected to their duties for their benefit or for the benefit of others.

6. Integrity in private affairs

A member or employee shall conduct their private affairs in a manner that maintains public confidence in the integrity of their office and the Commission as a whole and shall—

(a) not evade paying taxes;

(b) not neglect their financial obligations;

(c) submit an annual declaration of their income, assets and liabilities to the Commission responsible for such declarations from public officers;

(d) not engage in political activity that may compromise or be seen to compromise the neutrality of their office, or the Commission; and

(e) not preside over or play a central role in the organisation of a fundraising activity.

7. Sexual harassment

A member or employee shall not sexually harass a member of the public or colleague. Sexual harassment includes—

(a) making a request or exerting pressure for sexual activity or favours;

(b) making intentional or careless physical contact that is sexual in nature; or

(c) making gestures, jokes or comments, including innuendoes regarding another person's sexuality.

8. Nepotism

A member or employee shall not practice favouritism on the grounds of tribe, race, kin, culture, sex or acquaintance or otherwise in performance of their duties.

9. Privileged information and security of interests of the State

A member or employee shall—

(a) not act for foreigners in a manner detrimental to the security interest of Kenya; and

(b) safeguard privileged information that comes into their possession and protect it from improper or inadvertent disclosure.

10. Application of the Public Officers Ethics Act

This Code is in addition to the provisions of the Public Officers Ethics Act and where there is a conflict between the Code and the Act, the provisions of the Act shall prevail.

11. Breach of code

Any breach of the Code by a member or an officer of the Commission shall be treated as misbehaviour for a member and misconduct for an officer.

FIFTH SCHEDULE

[Section 36, Act No. 12 of 2012, Sch.]

PROVISIONS RELATING TO THE FIRST REVIEW

1. Resolution of issues arising from the first review

The Commission shall resolve all issues arising from the first review relating to the delimitation of boundaries of constituencies and wards and publish its final report within a period of four months of the date of its appointment under this Act.

2. Reference materials

(1) The Commission shall, in addressing the issues arising out of the first review—

(a) use as its primary reference material the report of the former Boundaries Commission on the first review as adopted by the National Assembly; and

(b) use as its secondary reference material the report of the Parliamentary Committee on the report of the former Boundaries Commission on the first review.

(2) The issues arising out of the first review are—

(a) re-distribution of such wards or administrative units in the affected constituencies as may be appropriate;

(b) subject to the Constitution, addressing issues of new constituencies falling outside the population quota as provided for by Article 89(6) of the Constitution but at the same time ensuring that such a process shall—

(i) take into account the provisions of Article 89 (7)(b) of the Constitution that requires progressive efforts and not instant demographic equality of all towards attaining the population quota in each constituency and ward for the purposes of the first review;

(ii) not be subject to new definitions of cities, urban areas and sparsely populated areas or to new population figures;

(iii) be subject to the use of enumerated national census figures and not projected figures.

(c) addressing the issue of progressively advancing towards the population quota in protected constituencies in relation to neighbouring constituencies where appropriate.

3. **Delimitation of electoral units**

(1) The Commission shall prepare and publish a preliminary report outlining—

(a) the proposed delimitation of boundaries for constituencies and wards; and

(b) the specific geographical and demographical details relating to such delimitation.

(2) The Commission shall ensure that the preliminary report is made available to the public for a period of twenty-one days and invite representations from the public on the proposals contained in the report during that period.

(3) Upon the expiry of the period provided in subparagraph (2), the Commission shall, within fourteen days, review the proposed delimitation of boundaries considering the views received under that subparagraph and submit the revised preliminary report of proposed boundaries to the Parliamentary Committee.

(4) The Parliamentary Committee shall, within fourteen days of receipt of the revised preliminary report under subparagraph (3), table the revised preliminary report to the National Assembly together with its recommendations.

(5) The National Assembly shall, within seven days of the tabling of the revised preliminary report, consider the revised report and forward its resolutions to the Commission.

(6) Within fourteen days of the expiry of the period provided for in subparagraph (5), the Commission shall, taking into account the resolutions of the National Assembly under subparagraph (5), prepare and submit its final report outlining the matters set out in subparagraph (1)(a) for publication in the *Gazette*.

(7) Where the National Assembly fails to make a resolution within the period specified in subparagraph (5), the Commission shall proceed to publish its report in accordance with subparagraph (6).

(8) Any person who, being responsible for the publication in the *Gazette* of the final report submitted under this paragraph 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.

(9) Notwithstanding any other written law, where the final report is not published in accordance with the provisions of subparagraph (6) 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*.

4. Review of decision of Commission

A person may apply to the High Court for review of a decision of the Commission made under the Constitution and this Act.

5. Application for review

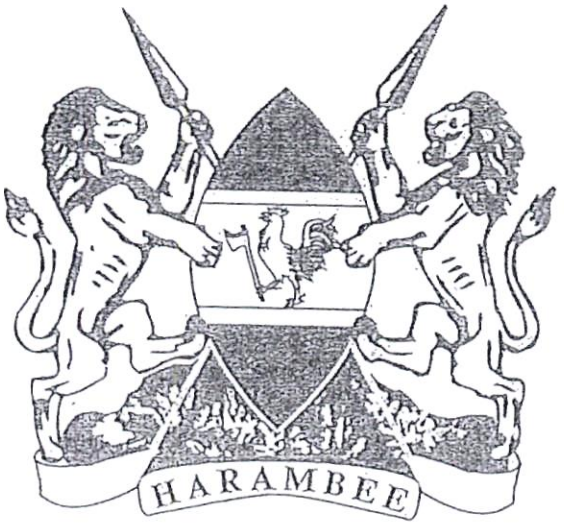
An application for the review of the decision made under paragraph 4 shall be made within thirty days of the publication of the decision in the *Gazette* and shall be heard and determined within three months of the date on which it is filed.

6. Sensitisation on the proposed boundaries

The Commission shall, upon publication of the boundaries referred to in paragraph 3 facilitate sensitisation of the public on the boundaries for a period of thirty days.

9. Maintenance of records

The Commission shall ensure that all documents, materials, publications, reports and recommendations arising from the delimitation process are maintained in a form that is accessible and usable by members of the public.



THE REPUBLIC OF KENYA

LAWS OF KENYA

ELECTION CAMPAIGN FINANCING ACT

No. 42 of 2013

Published by the National Council for Law Reporting
with the Authority of the Attorney-General

www.kenyalaw.org

No. 42 of 2013

ELECTION CAMPAIGN FINANCING ACT

ARRANGEMENT OF SECTIONS

PART I – PRELIMINARY

Section

1. Short title.
2. Interpretation.

PART II – FUNCTIONS OF THE COMMISSION

3. Functions of the Commission.
4. Powers of the Commission.

PART III – REGULATION OF EXPENDITURE

5. Election campaign financing rules.
6. Authorised persons.
7. Party expenditure committee.
8. Independent candidate expenditure committee.
9. Referendum expenditure committee.
10. Submission of expenditure reports.

PART IV – CONTRIBUTIONS AND DONATIONS

11. Sources of campaign finances.
12. Limits to contributions.
13. Anonymous contributions or contributions from an illegal source.
14. Prohibition on contributions.
15. Support by an organization.
16. Disclosure of funds.
17. Surplus campaign funds.
18. Spending limits.
19. Authorised expenditures.
20. Media coverage.

PART V – DISPUTE RESOLUTION AND OFFENCES

21. Dispute resolution.
22. Offences.
23. Offences by a candidate, a political party or a referendum committee.
24. General penalty.

PART VI – MISCELLANEOUS

25. Registration and dissolution of expenditure committees.
26. Records.
27. Audit of accounts.
28. Claims and objections.
29. Provisions on delegated powers.

NO. 42 OF 2013

ELECTION CAMPAIGN FINANCING ACT

[Date of assent: 24th December, 2013.]

[Date of commencement: 10th January, 2014.]

An Act of Parliament to provide for the regulation, management, expenditure and accountability of election campaign funds during election and referendum campaigns; and for connected purposes

PART I – PRELIMINARY

1. Short title

This Act may be cited as the Election Campaign Financing Act, 2013.

2. Interpretation

(1) In this Act, unless the context otherwise requires—

"anonymous donation" means a donation which the recipient is, unable to ascertain the identity of the donor;

"bank" means a bank as defined under the Banking Act (Cap. 488);

"candidate" means a person contesting for an elective post;

"campaign expenses" means expenses incurred by a candidate, a political party, a referendum committee or an organisation registered by the Commission to campaign in support of a candidate, a political party or a referendum committee during an election period;

"campaign financing" means resources spent by a candidate or a political party during an election period for purposes of campaign;

"campaign period" has the meaning assigned to it under the Elections Act (No. 24 of 2011);

"Commission" means the Independent Electoral and Boundaries Commission established under Article 88 of the Constitution;

"contribution" means monetary and non-monetary contributions including loans, donations, grants, gifts, property, services provided to a candidate or political party, and money spent on behalf of a candidate, political party or referendum committee in paying any expenses incurred directly or indirectly, but does not include volunteer services;

"election" means a presidential, parliamentary or county election, and includes a referendum and a by-election;

"**election expenses**" means all funds expended or expenses incurred in respect of the conduct and management of a nomination process, election campaign by a political party or a candidate or a referendum campaign and include—

(a) in relation to a nomination process, all expenses incurred by a political party or a candidate during the nomination process;

(b) in relation to an election campaign, all expenses incurred by a political party or candidate for the purpose of an election campaign; and

(c) in relation to a referendum, all expenses incurred by referendum committees for the purpose of a referendum campaign;

"**election period**" has the meaning assigned to it under the Elections Act;

"**expenditure account**" means a bank account opened by a candidate, a political party or a referendum committee for purposes of depositing contributions received by that candidate. political party or referendum committee during an election period or a referendum campaign period as the case may be;

"**expenditure committee**" means a committee established by a candidate, a political party or a referendum committee to regulate spending by a candidate, a political party or a referendum committee during an election or a referendum campaign period as the case may be;

"**expenditure period**" means the prescribed period for regulating election campaign financing;

"**expenditure report**" means a report of expenses incurred by a candidate, a political party, or a referendum committee during a nomination or election period or a referendum campaign period;

"**harambee**" means the public collection of monies or other property in aid support of an election or referendum campaign;

"**illegal source**" means a contribution from an unlawful source;

"**monetary contribution**" means a non-repayable amount of money contributed to a campaign financing account;

"**nomination day**", in respect of an election, means the day *gazetted* by the Commission as the day for the nomination of candidates for that election;

"**non-monetary contribution**" means the market value of a service, other than volunteer labour, or of property or of the use of property or money to the extent that they are provided without charge or at less than their market value;

"**organisation**" includes a club, group, foundation, business or a registered society;

"**party campaign expenditure rules**" means rules of a political party intended to guide the political party in matters related to campaign expenses during an election period;

"**party candidate**" means a candidate who is sponsored by a political party to contest in an election;

"**political party**" means a political party registered under the Political Parties Act (Act No. 11 of 2011);

"**party nomination**" means the process where a political party nominates candidates to be sponsored by that political party to contest in an election;

"**public resource**" includes—

(a) monies intended for public use;

(b) a vehicle or equipment owned by or in the possession of the State, a state organ, statutory corporation or a company in which the State owns a controlling interest; or

(c) premises owned or occupied by the State, a state organ, statutory corporation or a company in which the State owns a controlling interest;

"**referendum committee**" has the meaning assigned to it under the Elections Act;

"**Registrar**" means the Registrar of Political Parties appointed under the Political Parties Act (No. 11 of 2011);

"**spending limit**" means the maximum threshold of money a candidate, political party or referendum committee may expend during a nomination, election or referendum campaign and includes the expenditure incurred by any person or organization on behalf of a candidate, political party or referendum committee;

"**technical assistance**" means support in knowledge, skills and ideas provided to a candidate, political party or referendum committee in connection with an election or referendum campaign;

"**volunteer services**" means the rendering of personal services related to the campaign activities of a candidate, political party or a referendum committee during an election or referendum period, without compensation.

PART II – FUNCTIONS OF THE COMMISSION

3. Functions of the Commission

(1) Pursuant to Article 88(4)(i) of the Constitution and section 4(i) of the Independent Elecloral and Boundaries Commission Act, the Commission shall be responsible for the regulation and administration of campaign financing under this Act and shall—

(a) keep a register of authorised persons under this Act;

(b) supervise candidates, political parties, referendum committees and authorised persons in relation to campaign expenses;

(c) set spending limits and enforce compliance with such limits;

(d) set limits and verify sources of contributions to a candidate, a political party or a referendum committee;

(e) monitor and regulate campaign expenses;

(f) provide a framework for the reporting of campaign expenses;

(g) advise a candidate, a political party or a referendum committee on any matter relating to campaign expenses; and

(h) provide and enforce a framework for the regulation of media coverage;

(i) perform such other functions as may be necessary for the purposes of this Act.

(2) In performing its functions under subsection (1), the Commission may act in consultation with the Registrar.

4. Powers of the Commission

(1) The Commission shall have the power to investigate or examine all matters relating to the performance of its functions under this Act.

(2) For purposes of an investigation or examination under this Act, the Commission or a representative of the Commission authorised in writing may, at any reasonable time obtain a warrant and enter into any premises in which books, and documents of a candidate, a political party or a referendum committee or where material relevant to the subject matter of the investigation or examination is kept.

(3) The Commission may request for information relating to party nomination expenses and election campaign expenses of a candidate, a political party or a referendum committee that is reasonably required in respect of the functions of the Commission under this Act, and the Commission shall cite the provision of the written law under which the request is being made.

(4) Where a request for information is made pursuant to subsection (3), such information shall be furnished to the Commission by any person or organisation within such reasonable time as the Commission may determine.

(5) The Commission may take such other action as is necessary for purposes of carrying out its functions under this Act.

PART III – REGULATION OF EXPENDITURE

5. Election campaign financing rules

The Commission shall make rules to regulate election campaign financing—

(a) in the case of a general election, at least twelve months before the election; and

(b) in the case of a by-election or referendum, at such time as the Commission may determine.

6. Authorised persons

(1) For purposes of regulating election campaign financing during the expenditure period, the authorised persons shall be—

(a) a candidate;

(b) an agent of the candidate;

(c) political party campaign financing committee; and

(d) referendum campaign financing committee.

(2) The political party campaign financing committee referred to in sub-section (1)(c) shall consist of persons nominated by the governing body of that political party, three of whom shall be signatories to the party campaign financing account.

(3) The referendum campaign financing committee referred to in sub-section(1) (d) shall consist of persons nominated by the referendum committee established under section 51(1) of the Elections Act, three of whom shall be signatories to the referendum campaign financing account.

(4) A candidate, a political party or a referendum campaign financing committee shall, as soon as reasonable, notify the Commission of any changes in the authorised persons, the membership of the committee or in the details of such persons or such members.

(5) The authorised persons referred to in subsection (1) shall be registered by the Commission—

(a) for a general election, at least eight months before the general election; or

(b) for a by-election, within seven days after the notice of a vacancy issued by the relevant Speaker.

(c) for a referendum, within fourteen days after the publication of the referendum question by the Commission.

(6) Each of the authorised persons referred to in subsection (1) shall open a campaign financing account and shall submit details of that account to the Commission at the time of registration under subsection (2).

(7) There shall be deposited into the campaign financing account referred to in subsection (3)—

(a) contributions by a candidate;

(b) contributions by a political party;

(c) contributions received from any other lawful source.

7. **Party expenditure committee**

(1) A political party intending to contest in an election shall, in accordance with the constitution and rules of the political party, constitute a party expenditure committee which shall consist of nine members—

(a) three of whom shall be persons nominated by the governing body of that political party, of whom one shall be the secretary-general of the party;

(b) not more than one of whom shall be from one region; and

(c) not more than two-thirds of whom shall be of one gender.

(2) The appointment of members of the referendum expenditure committee referred to in subsection (1) shall take into account regional and other diversity of the people of Kenya.

(3) The members of a party expenditure committee shall not include members of a party candidate expenditure committee.

(4) The party expenditure committee referred to in subsection (1) shall—

(a) open a party expenditure committee account into which all the money in respect of the election campaign of that party shall be deposited;

(b) be signatories to the party expenditure committee account;

(c) advise the political party on all financial matters related to the party nomination or to the party campaign expenditure;

(d) manage the party expenditure committee account of the political party and keep the books of account updated and available for inspection; and

(e) receive party nomination and campaign expenditure reports from each party candidate;

(f) monitor the campaign expenditure of the party candidate and ensure that the party candidate complies with party nomination and campaign expenditure rules;

(g) compile the expenditure reports received from the party candidates and submit to the Commission the preliminary nomination expenditure report and the final campaign expenditure report; and

(h) submit to the Commission the final campaign expenditure report of the political party.

(5) A political party shall, as soon as reasonable, notify the Commission of any changes in the membership of the party expenditure committee.

8. **Independent candidate expenditure committee**

(1) An independent candidate intending to contest in an election, shall, constitute an independent candidate expenditure committee.

(2) The independent candidate expenditure committee referred to in subsection (1) shall consist of three members nominated by the candidate.

(3) The independent candidate expenditure committee shall—

(a) open an independent candidate expenditure committee account into which all the money in respect of the election campaign of that candidate shall be deposited;

(b) be signatories to the independent candidate expenditure committee account;

(c) advise the independent candidate on all financial matters related to the campaign expenditure; and

(d) manage the candidate expenditure committee account of the independent candidate and keep the books of account updated and available for inspection;

(e) receive expenditure reports from the independent candidate; and

(f) compile and submit to the Commission the final campaign expenditure report of the independent candidate with respect to the election period.

9. Referendum expenditure committee

(1) A national referendum committee intending to campaign in a referendum shall constitute a referendum expenditure committee which shall consist of nine members—

(a) three of whom shall be persons nominated by the national committee established under section 51 of thee Elections Act;

(b) not more than one of whom shall be from one region; and

(c) not more than two-thirds of whom shall be of one gender.

(2) The appointment of members of the referendum expenditure committee referred to in subsection (1) shall take into account regional and other diversity of the people of Kenya.

(3) The referendum expenditure committee referred to in subsection (1) shall—

(a) open a referendum expenditure committee account into which all the money in respect of the referendum campaign shall be deposited;

(b) be signatories to the referendum expenditure committee account;

(c) advise the national committee on all financial matters related to referendum campaign expenditure;

(d) manage the referendum expenditure committee account of the relevant national committee and keep the books of account updated and available for inspection; and

(e) receive campaign expenditure reports from each constituency committee;

(f) monitor the campaign expenditure of the national committee and the constituency committees and ensure that the committees comply with campaign expenditure rules; and

(g) compile and submit to the Commission the preliminary nomination expenditure report and the final campaign expenditure report.

(5) A national committee shall, as soon as reasonable, notify the Commission of any changes in the membership of the referendum expenditure committee.

10. Submission of expenditure reports

(1) A party candidate shall submit to the political party of that candidate and to the Commission—

(a) a preliminary nomination expenditure report, within twenty-one days of the political party nomination; and

(b) the final expenditure report within, three months after elections.

(2) A political party shall within three months after the elections submit a final expenditure report to the Commission.

(3) An independent candidate shall within three months after the election, submit the final expenditure report to the Commission.

(4) A referendum committee shall, within three months after the referendum submit the final expenditure report to the Commission.

(5) The expenditure reports submitted under subsections (1)(b), (2), (3), and (4) shall include records showing all transactions and income and expenditure statement.

PART IV – CONTRIBUTIONS AND DONATIONS

11. Sources of campaign finances

The sources of funds for purposes of financing party nomination, election or referendum campaign are—

(a) contributions received from any person, political party or any other lawful source;

(b) contributions from a lawful source, not being directly from a foreign government; and

(c) contributions from a harambee.

12. Limits to contributions

(1) The Commission shall, at least twelve months before a general election, by notice in the *Gazette*, prescribing limits on—

(a) total contributions;

(b) contributions from a single source;

(c) paid-up media coverage;

(d) loan forming part of a contribution,

which a candidate, political party or referendum committee may receive during the expenditure period.

(2) Except where contribution is from a candidate to that candidate's campaign financing account, or from a political party or a referendum committee to that political party's or referendum committee's campaign financing account, no contribution from a single source shall exceed twenty percent of the total contributions received by that candidate, political party or referendum committee.

(3) The Commission shall prescribe the limit beyond which contributions received by a candidate, a political party or a referendum committee from a single source may be disclosed.

13. Anonymous contributions or contributions from an illegal source

(1) A candidate, a political party or a referendum committee shall not receive and keep—

(a) anonymous contributions or support whether in cash or in kind; or

(b) contributions from an illegal source as specified by this Act or by any other law.

(2) A candidate who, a political party or a referendum committee which receives contributions referred to in subsection (1) shall, within fourteen days of the receipt, report such receipt and submit the contribution to the Commission.

(3) A candidate who or a political party or a referendum committee which fails to submit the contributions referred to in subsection (1) commits an offence.

14. Prohibition on contributions

(1) A candidate, a political party or a referendum committee shall not receive any contribution or donation, in cash or in kind from the State, a State institution or agency or any other public resource.

(2) A State, a state institution or a public officer shall not use any public resource to—

(a) support or to campaign in support of a candidate, a political party or a referendum committee; or

(b) support any organisation that is supporting or campaigning for a candidate, political party or a referendum committee.

(3) A candidate who or a political party or a referendum committee which receives any campaign support referred to in subsection (l) shall, within forty-eight hours of the receipt, report such receipt and submit the contribution to the Commission.

(4) A candidate who or a political party or a referendum committee which does not report receipt of support in accordance with subsection (2) shall be disqualified from contesting in that election or in the referendum, campaigning as the case may ›e.

(5) Public resources referred to under subsection (1) shall not include public funding provided for the Political Party Fund established under the Political Parties Act.

(6) A candidate who or a political party or a referendum committee which contravenes subsection (1) commits an offence.

15. Support by an organisation

(1) Any person who, or an organisation which contributes to a candidate, a political party or a referendum committee shall channel such contributions through the expenditure accounts specified under sections 7, 8, 9 and 10.

(2) An organisation which intends to campaign in support of a candidate, a political party or a referendum committee shall—

(a) in writing, seek consent to campaign from the candidate, the political party or the referendum committee as the case may be the organisation intends to campaign in support of;

(b) register with the Commission; and

(c) open a campaign financing account into which the contributions shall be deposited, in the case of—

(i) a candidate or a political party committee, at least eight months before the polling day; or

(ii) a referendum committee, at the time of registration of that committee.

(3) The money spent by an organisation to campaign in support of a candidate, a political party or a referendum committee shall be within the spending limits specified under this Act.

(4) An organisation which campaigns in support of a candidate or a political party contesting in an election or a referendum committee shall, within one month after the election, submit its final report to the respective authorised person.

16. Disclosure of funds

(1) A candidate who, or a political party or a referendum committee which, receives contributions under this Act shall issue a receipt for any contribution exceeding twenty thousand shillings.

(2) Where contributions are received from a harambee, the authorised person shall keep a record of the specific details of the harambee including the venue, date, organiser of the harambee and total contributions.

(3) A candidate, political party and a referendum committee shall disclose the amount and source of contributions received for campaign for a nomination, an election or a referendum, as the case may be.

(4) The disclosure of funds under this section shall, for purposes of this Act and in the absence of any other factors, be sufficient evidence that the candidate, political party or referendum committee has complied with the requirement for disclosure of funds.

(5) The disclosure of funds shall be confidential and details of such funds shall not be divulged except where such information is the subject of a complaint or an investigation, or is the subject of proceedings in a court of law.

(6) A candidate who, or a political party or referendum committee which fails to disclose funds or donations as required under this Act commits an offence.

17. Surplus campaign funds

(1) A candidate, political party or a referendum committee shall—

(a) within three months after the date of an election or referendum, notify the Commission of any surplus campaign funds held in the expenditure committee;

(b) within three months after the date of an election or referendum, submit the surplus campaign funds to—

(i) in the case of a political party campaign finance committee, to the political party;

(ii) in the case of a party candidate, to the political party that nominated the candidate for purposes of the activities of the youth, women and persons with disability;

(iii) in the case of an independent candidate or a referendum committee, to a charitable organisation preferred by that independent candidate or referendum committee, as the case may be;

(c) within three months after the date of an election or referendum, report to the Commission in respect of the action taken under this section.

18. Spending limits

(1) The Commission shall, at least twelve months before an election, by notice in the *Gazette*, prescribe the spending limits including the total amount that a candidate, political party or-referendum committee may spend during an expenditure period, including the limit for media coverage.

(2) Except for contribution by a candidate into his or her own campaign financing account, any contribution from a person, organisation or any other lawful source contributed to a candidate, a political party or a referendum committee campaign financing, account shall not exceed the limit of the total contribution prescribed under subsection (1).

(3) The Commission may, by notice in the *Gazette*, vary the spending limits prescribed under subsection (1).

(4) The Commission shall, in prescribing spending limits under subsection (1), take into consideration—

(a) geographical features and urban centres;

(b) the type of election;

(c) the population in an electoral area;

(d) the number of party members in an electoral area;

(e) the communication infrastructure in an electoral area.

(5) Subsection (4)(d) shall only apply with respect to party nomination expenditure of a party candidate.

(6) Where a candidate, political party or a referendum committee exceeds the spending limits prescribed under this section due to unforeseeable and extraneous circumstances, the candidate, political party or referendum committee shall file a report with the Commission specifying the reasons for exceeding the limit, with such time as the Commission may prescribe and the Commission shall determine if such spending was justifiable.

(7) A candidate who, or a political party or referendum committee which, exceeds the prescribed spending limits and fails to report this fact to the Commission commits an offence.

19. Authorised expenditures

The Commission shall, at least twelve months before an election, by notice in the *Gazette*, prescribe the nature of authorised items or activities for which campaign expenses may be incurred, including the cost of—

(a) venue where campaign activities may be undertaken;

(b) publicity material for campaigns;

(c) advertising for the campaigns;

(d) campaign personnel;

(e) transportation in respect of campaign activities; and

(f) any other justifiable expenses.

20. Media coverage

(1) The Commission shall, after consultations with political parties, the officers responsible for the state-owned media enterprises and authorities responsible for the regulation of media in Kenya, set out the limit of media coverage of a candidate, political party or a referendum committee, which shall include—

(a) paid-up advertisement; and

(b) free broadcasting spots or coverage in the print media.

(2) The Commission shall establish mechanisms to monitor media coverage for purposes of campaign as may be necessary to enforce the limits set out under subsection (1).

(3) A candidate, political party, referendum committee or a media enterprise which breaches the limits prescribed under this section commits an offence.

PART V – DISPUTE RESOLUTION AND OFFENCES

21. Dispute resolution

(1) Any person may lodge a complaint with the Commission alleging that a breach of this Act has been committed.

(2) The Commission may investigate a breach of this Act

(3) Where a complaint has been filed or a breach detected under this section, the Commission shall hear and determine that complaint—

(a) within seven days, if filed before an election;

(b) within fourteen days, if filed after an election.

(4) In determining a complaint, and subject to section 4, the Commission shall have the powers to—

(a) request for the attendance of any person believed to have information related to the complaint;

(b) call for any information believed to be relevant in the determination of the complaint.

(5) Where the Commission makes a finding that there is a breach of a provision of this Act, the Commission may make any of the following orders—

(a) order the rectification of any record;

(b) issue a formal warning;

(c) impose a fine as may be specified under the regulations;

(d) prohibit the errant candidate, political party or referendum committee from campaigning for a specified period or within a specified area;

(e) prohibit media coverage of the errant candidate, political party or referendum committee within a specified period;

(f) disqualify the errant candidate, political party or referendum committee from contesting in that election or referendum, as the case may be.

(6) Where the offence is discovered after an election and an order of disqualification is made, the candidate or the political party shall be disqualified from contesting in the subsequent by- election or general election.

(7) Where an order of disqualification is made under this section, the order shall be—

(a) registered in the High Court, in the case of presidential, parliamentary, governor elections or referendum; and

(b) registered in the resident magistrate's court in the case of county assembly elections.

22. Offences

A person who—

(a) obstructs the Commission or any representative of the Commission from exercising powers under this Act;

(b) refuses to produce books, reports and other documents when requested;

(c) knowingly produces false books, reports and other documents;

(d) knowingly gives false or incorrect information;

(e) knowingly makes false or incorrect statements in any returns or financial report required under this Act; or

(f) knowingly destroys any books, records or other documents or things related to the subject matter of investigation examination or inspection under this Act,

commits an offence and shall be liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding five years or to both.

23. Offences by a candidate, a political party or a referendum committee

(1) A candidate who or a political party or a referendum committee which—

(a) in the case of a party candidate or a political party, contravenes the party campaign expenditure rules;

(b) knowingly gives false or incorrect information;

(c) fails to submit the party expenditure reports to the Commission; or

(d) exceeds the spending limits prescribed without reasonable explanation,

commits an offence, and shall be liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding five years or to both.

(2) Where a political party or a referendum committee commits an offence under this Act, every member of the governing body of that political party or the referendum committee shall be liable for the offence.

(3) In addition to the penalty prescribed under subsection (1), a candidate, a political party or a referendum committee shall be disqualified from contesting in that election or that referendum, as the case may be.

24. General penalty

A person convicted of an offence under this Act for which no penalty is provided shall be liable to a fine not exceeding two million shillings or a term of imprisonment not exceeding live years or to both.

PART VI – MISCELLANEOUS

25. Registration and dissolution of expenditure committees

(1) The Commission shall prescribe the procedures for the registration and dissolution of expenditure committees.

(2) The expenditure committees shall stand dissolved on submission of the final expenditure reports referred to in section 10.

26. Records

(1) For purposes of financial accountability under this Act, a candidate, a political party, a referendum committee or an organization registered to campaign in support of a candidate, a political party or a referendum committee shall keep records of—

(a) funds received for campaign expenses indicating the amount and the nature of funds received;

(b) names, postal, physical and electronic addresses of contributors;

(c) funds spent for nomination expenditure and campaign expenditure, as the case may be; and

(d) in case of an organization registered to campaign in support of a candidate, a political party or a referendum committee, the name of the candidate, the political party or the referendum committee that the organization supported.

(2) The Commission shall on request, make available for inspection information submitted by a candidate, a political party or a referendum committee under this Act.

(3) A request for information referred to under subsection (2) shall be subject to confidentiality requirements of the Commission.

27. Audit of accounts

The Auditor-General may, on the request of the Commission, audit the accounts relating to the campaign expenses of a candidate, a political party or a referendum committee.

28. Claims and objections

(1) A person who objects to any matter related to campaign finance expenditures submitted by a candidate, political party or a referendum committee may file a claim to the Commission in the prescribed form and manner and within the prescribed time.

(2) The claim submitted under subsection (1), shall be determined within—

(a) seven days, if filed before an election; and

(b) fourteen days, if filed after an election.

29. Provisions on delegated powers

(1) The Commission may make regulations for the better performance of its functions under this Act, and such regulations shall be laid before the National Assembly for approval before they are published in the *Gazette*.

(2) In particular and without prejudice to the generality of the power conferred by subsection (1), the Commission may make regulations—

(a) providing for spending limits for the different elections;

(b) providing guidelines for expenditure rules for political parties and independent candidates;

(c) prescribing the manner in which contributions may be made;

(d) prescribing procedures for disclosure of the amount of contributions made to a candidate or to a party, the nature of these contributions and the intended expenditures by a candidate or a party;

(e) prescribing mechanisms and procedures for reporting on and monitoring the spending limits;

(f) prescribing the manner in which records shall be prepared and maintained;

(g) prescribing procedures for the determination of claims and objections; and

(h) prescribing anything which is required to be prescribed for purposes of this Act.

NATIONAL COUNCIL FOR
LAW REPORTING
LIBRARY

SPECIAL ISSUE

Kenya Gazette Supplement No. 189 (National Assembly Bills No. 63)

REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

NATIONAL ASSEMBLY BILLS, 2015

NAIROBI, 27th November, 2015

CONTENT

Bill for Introduction into the National Assembly—

PAGE

The Election Laws (Amendment) (No.3) Bill, 2015 2529

NATIONAL COUNCIL FOR LAW REPORTING
RECEIVED
19 JAN 2016
P.O. Box 10443 - 00100
NAIROBI, KENYA
TEL: 271231 FAX: 2712694

PRINTED AND PUBLISHED BY THE GOVERNMENT PRINTER, NAIROBI

THE ELECTION LAWS (AMENDMENT) (No.3) BILL, 2015

A Bill for

AN ACT of Parliament to amend the Elections Act, 2011 and the Independent Electoral and Boundaries Commission Act, 2011; to provide for electoral processes and for connected purposes

ENACTED by the Parliament of Kenya, as follows—

Short title.

1. This Act may be cited as the Election Laws (Amendment) (No. 3) Act, 2015.

Amendment of section 2 of No. 24 of 2011.

2. Section 2 of the Elections Act, 2011 is amended—

(a) by deleting the words "or a referendum" appearing in the definition of "returning officer";

(b) by inserting the following new definition in its proper alphabetical sequence—

"registration of voters" includes the registration of new voters, transfer of registration of voters, correction of particulars of voters and deletion of names of deceased voters from the register by the Commission;"

Amendment of section 5 of No. 24 of 2011.

3. Section 5 of the Elections Act, 2011 is amended—

(a) in subsection (1) by—

(i) deleting the proviso to paragraph (a);

(ii) inserting the following new paragraph immediately after paragraph (b)—

"(ba) in the case of a referendum, between the date of the publication and the date of the referendum";

(i) deleting paragraph (c);

(b) by deleting subsection (3A); and

(c) by deleting subsection (3B).

Amendment of section 6 of No. 24 of 2011.

4. Section 6 of the Elections Act, 2011 is amended—

(a) by deleting subsection (2) and replacing with the following—

"(2) The Commission shall, within ninety days from the date of the notice for a general election, open the Principal Register of Voters for inspection for a period of at least thirty days or such period as the Commission may consider necessary.";

(b) in subsection (3) by deleting the word "fourteen" appearing immediately after the word "least" and substituting therefor the word "thirty".

Amendment of section 13 of No. 24 of 2011.

5. Section 13 of the Elections Act, 2011 is amended—

(a) in subsection (1) by deleting the word "forty-five" after the words "at least" and substituting therefor the word "ninety ";

(b) by inserting the following new subsection immediately after subsection (2)—

"(2A) A political party shall hear and determine all intra party disputes arising from political party nominations within forty days.";

(c) in subsection (3) by deleting the words "forty-five" after the words "at least" and substituting therefor the words "fifty-five".

Amendment of section 16 of No. 24 of 2011.

6. Section 16 of the Elections Act, 2011 is amended by inserting the following new subsection immediately after subsection (3)—

"(3A) For purposes of subsection (3), a vacancy in the office of a Member of Parliament shall be deemed to occur on the date of issuance of a notice to the Commission which shall not be later than twenty-one days from the date of the actual occurrence of the vacancy."

Amendment of section 22 of No. 24 of 2011.

7. Section 22 of the Elections Act, 2011 is amended—

(a) in subsection (1) by deleting paragraph (b) and substituting therefor the following new paragraph—

"(b) holds—

(i) in the case of a Member of Parliament, a degree from a university recognized in Kenya; or

(ii) in the case of member of a county assembly, a post-secondary school diploma from an institution recognized in Kenya.

(b) by inserting the following new subsections immediately after subsections (1)—

(1A) Notwithstanding subsection (1), in the general elections after the 2017 general elections, a member of a county assembly may only be nominated for an election if the person is a holder of a degree from a university recognised in Kenya."

(1B) The provisions of this section apply to qualifications to nomination for of a party list member under section 34."

Amendment of section 27 of No. 24 of 2011.

8. Section 27 of the Elections Act, 2011 is amended—

(a) in subsection (1) by deleting the words "three months" and substituting therefor the words "six months";

(b) in subsection (2) by deleting the subsection and substituting therefor the following—

"(2) An amendment to the nomination rules shall only be effective ninety days after submission of the amendments to the Commission."

(c) by inserting the following new subsections immediately after subsection (2)—

"(2A) Upon receipt of the nomination rules from a political party under subsection (1), the Commission shall, within fourteen days, review the rules to ensure compliance with the prescribed regulations and—

(a) issue the political party with a certificate of compliance; or

(b) require the political party to amend the rules to ensure such compliance within fourteen days.

(2B) For purposes of subsection (2A), the Commission shall, by notice in the Gazette, issue Regulations prescribing guidelines to be complied with and the process by which political parties nominate candidates for nomination in accordance with Article 88 (4) (d) of the Constitution failing which the rules shall become void."

Amendment of section 28 of No. 24 of 2011.

9. The Elections Act, 2011 is amended by deleting section 28 and substituting therefor the following section—

Submission of party membership lists

28. (1) A political party that nominates a person for an election under this Act shall submit to the Commission a membership list of the party—

(a) in the case of a general election, at least one hundred and twenty days before the date of the election; and

(b) in the case of a by-election, forty-five days before the date of the by-election.

(2) The Commission shall publicize the membership lists as received from political parties.

Amendment of section 30 of No. 24 of 2011.

10. Section 30 of the Elections Act, 2011 is amended by inserting the following new subsection immediately after subsection (3)—

"(3A) A registered referendum committee may appoint one agent at each polling station."

Amendment of section 32 of No. 24 of 2011.

11. Section 32 of the Elections Act, 2011 is amended—

(a) by inserting a new subsection immediately after subsection (1) —

"(1A) Where there is a vacancy in the office of the Governor, an independent candidate shall submit to the Commission, the symbol that the person intends to use during an election at least seven days before nomination."

(b) in subsection (2) by deleting the words "subsection (1)" appearing immediately after the word "under" and substituting therefor the words "this section."

Amendment of section 34 of No. 24 of 2011.

12. Section 34 of the Elections Act, 2011 is amended—

(a) by inserting the following new subsection immediately after subsection (4)—

"(4A) In the case of a person nominated pursuant to Article 177(1) (c) of the Constitution, the party list shall include a certification in the manner prescribed by the Commission."

(b) by inserting the following new subsections immediately after subsection (6)—

"(6A) Upon receipt of the party list from a political party under subsection (1), the Commission shall review the list to ensure compliance with the prescribed regulations and—

(a) issue the political party with a certificate of compliance; or

(b) require the political party to amend the party list to ensure such compliance failing which the Commission shall reject the list.

(6B) For purposes of subsection (6A), the Commission may, by notice in the gazette, issue regulations prescribing guidelines to be complied with in preparation of party lists."

(c) by deleting subsection (9) and substituting therefore the following—

"(9) The party list shall not contain a name of a candidate nominated for an election."

Insertion of new section 38A of No. 24 of 2011.

13. The Elections Act, 2011 is amended by inserting the following new section immediately after section 38—

Number of voters per polling station.

38A. For the purposes of providing efficient and effective conduct of elections, the number of voters per polling station shall not exceed seven hundred or such other number as the Commission may determine.

Amendment of section 43 of No. 24 of 2011.

14. Section 43 of the Elections Act, 2011 is amended by deleting subsection (5) and substituting therefor the following—

"(5) A public officer who intends to contest an election under this Act shall resign or otherwise exit from public office—

(a) in the case of a general election, at least one year before the date of the general election; or

(b) in the case of a by-election, within seven days of the declaration of a vacancy."

Amendment of section 46 of No. 24 of 2011.

15. Section 46 of the Elections Act, 2011 is amended in subsection (3) by inserting the words "or thumb prints" immediately after the word "signature";

Amendment of section 50 of No. 24 of 2011.

16. Section 50 of the Elections Act, 2011 is amended in subsection (2) (b) by deleting the words "answers to the referendum question" and substituting therefor the words "answer or answers to the referendum question or questions."

Amendment of section 54 of No. 24 of 2011.

17. Section 54 of the Elections Act, 2011 is amended by deleting the words "255 and 256" appearing immediately after the word "Article" and substituting therefor the words "255, 256 and 257".

Amendment of section 56 of No. 24 of 2011.

18. Section 56 of the Elections Act, 2011 is amended by deleting the word "and" appearing immediately after the word "shillings" and substituting therefor the word "or".

Amendment of section 74 of No. 24 of 2011.

19. Section 74 of the Elections Act, 2011 is amended in subsection (2) by deleting the word "seven" appearing immediately after the word "within" and substituting therefor the word "ten".

Amendment of section 76 of No. 24 of 2011.

20. Section 76 of the Elections Act, 2011 is amended—

(a) in subsection (1) (a) by deleting the words "publication" appearing immediately after the words "date of" and substituting therefor the word "declaration"; and

(b) in subsection (1) (c) by inserting the words "or a county assembly" immediately after the word "Parliament".

Amendment of section 85A of No. 24 of 2011.

21. Section 85A of the Elections Act, 2011 is amended by renumbering the provision as subsection (1) and inserting the following new subsection—

"(2) An appeal under subsection (1) shall act as a stay of the certificate of the election court certifying the results of an election until the appeal is heard and determined."

Amendment of section 86 of No. 24 of 2011.

22. Section 86 of the Elections Act, 2011 is amended—

(a) in subsection (1) by deleting the words "which shall then" appearing immediately after the word "Commissioner" and substituting therefor the word "and"; and

(b) by deleting subsection (2).

Amendment of section 87 of No. 24 of 2011.

23. The Elections Act, 2011 is amended by deleting section 87 and substituting therefor the following section—

Report of Court on election offences.

87. (1) An election Court shall, at the conclusion of hearing of a petition, in addition to any other orders, send to the Director of Public Prosecution and the Commission a report in writing indicating whether an election offence is likely to have occurred in connection with the election.

(2) Upon receipt of the report, the Director of Public Prosecutions shall—

(a) direct investigation to be carried out by the Inspector General of the National Police Service; and

(b) based on the outcome of the investigations, commence prosecution or close the matter.

Amendment of section 91 of No. 24 of 2011.

24. Section 91 of the Elections Act, 2011is amended—

(a) in subsection (1) (a) by the deleting the word "gazetted " appearing immediately after the words "results if" and substituting therefor the word "declared";

(b) in subsection (2) by—

(i) deleting the words "the votes of a majority of the persons entitled to vote in the referendum" appearing immediately after the words "supported by" in paragraph (a) and substituting therefor the words "a simple

majority of the citizens voting in the referendum".

(ii) deleting the words "the votes of a majority of the persons entitled to vote in such referendum" appearing immediately after the words "Commission that" in paragraph (b) and substituting therefor the words "a simple majority of the citizens voting in such referendum".

Amendment of the Second Schedule to No. 24 of 2011.

25. The Second Schedule to the Elections Act, 2011 is amended by deleting paragraph 18 and substituting therefor the following paragraph—

"18.This Code shall apply—

(a) in the case of a general election, from the date of publication of a notice of election until the swearing in of newly elected candidates; and

(b) in the case of a by-elections, from the date of declaration of a vacancy until the swearing in of elected candidates."

Amendment of the Third Schedule to No. 24 of 2011.

26. The Third Schedule to the Elections Act, 2011 is amended by inserting the words "Commissioner for Oaths/Magistrates" immediately before the words "Member/Secretary/Returning officer".

Amendment of section 3 of No. 9 of 2011.

27. Section 3 of the Independent Electoral and Boundaries Commission Act, 2011, is amended by deleting paragraph (e).

Amendment of section 24 of No. 9 of 2011.

28. Section 24 of the Independent Electoral and Boundaries Commission Act, 2011 is amended by deleting subsection (3) and substituting therefor the following subsection—

"(3) The Commission shall publish and publicize the annual report."

Amendment of section 35 of No. 9 of 2011.

29. The Independent Electoral and Boundaries Commission Act, 2011 is amended by deleting section 35.

Amendment of section 36 of No. 9 of 2011.

30. The Independent Electoral and Boundaries Commission Act, 2011 is amended by deleting section 36 and substituting therefor the following new section—

Procedure for delimitation of electoral boundaries.

36. (1) The Commission shall discharge its mandate of the delimitation of boundaries of constituencies and wards in accordance with the Constitution, this Act and any other law.

(2) Subject to the Constitution, matters to be addressed in the delimitation of electoral boundaries are—

(a) review of the names and boundaries of constituencies;

(b) review of the number, names and boundaries of wards;

(c) re-distribution of wards affected by any changes in the boundaries of constituencies; and

(d) ensuring that the number of inhabitants in each constituency and ward is as nearly as possible, equal to the population quota as provided for by Article 89(5) of the Constitution and that such a process—

(i) allows for variation of margin of not more than the limits provided under Article 89 (6) of the Constitution in relation to cities, sparsely populated areas and other areas;

(ii) takes into account the provisions of Article 89 (7) (b) of the Constitution that provides for the progressive realization of the requirement that

the number of inhabitants in each constituency and ward to be as nearly as possible, equal to the population quota for the purposes of the each review;

(iii) is subject to the use of enumerated national census figures.

(3) The Commission shall prepare and publish a preliminary report outlining—

(a) the proposed delimitation of boundaries for constituencies and wards; and

(b) the specific geographical; and

(c) demographical details relating to such delimitation.

(4) The Commission shall ensure that the preliminary report is made available to the public for a period of thirty days and invite representations from the public on the proposals contained in the report during that period.

(5) Upon the expiry of the period provided in subparagraph (4), the Commission shall, within fourteen days, review the proposed delimitation of boundaries considering the views received and submit the revised preliminary report to the Parliamentary Committee.

(6) The Parliamentary Committee shall, within fourteen days of receipt of the revised preliminary report, table the report in the National Assembly together with its recommendations.

(7) The National Assembly shall, within fourteen days of the tabling of

the revised preliminary report, consider the report and forward its recommendations to the Commission.

(8) Within fourteen days of the expiry of the period provided for in subparagraph (7), 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 subparagraph (7), the Commission shall publish its report in accordance with subparagraph (8).

(10) A person who, being responsible for the publication in the *Gazette* of the final report submitted under this paragraph 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 subparagraph (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.

32. The Second Schedule to the Independent Electoral and Boundaries Commission Act, 2011 is amended by deleting paragraph 8 (3).

MEMORANDUM OF OBJECTS AND REASONS

The principal object of this Bill is to amend the Elections Act, 2011 and the Independent Electoral and Boundaries Commission Act, 2011, in order to address the concerns that resulted following the general election held on 4th March 2013, which was the first under the new constitutional dispensation. The elections laid the foundation for the transformation Kenya's electoral politics.

Central to the conduct of the elections are the constitutional role and responsibility of the Independent Electoral and Boundaries Commission (IEBC), and the Judiciary. However the delivery of the 2013 elections, like many aspects of public administration and management involved interplay of several agencies, both State and non-state actors. It is these aspects that this Bill seeks to redress.

Clause 2 seeks to amend section of the Elections Act, 2011 by rectifying the definition of the term "returning officer" to include all related processes.

Clause 3 proposes to amend section 5 of the Elections Act, 2011 to provide for the period during when the continuous registration of voters may be temporarily stopped during a referendum and removes entitlement for persons who have applied for national identification cards to register as voters before the issuance of actual identification documents.

Clause 4 seeks to amend section 6 of the Elections Act, 2011 by increasing, the period within which the Commission must open the register for inspection from sixty to ninety days before the date of a general election. It also increases from fourteen to thirty the number of days before a general election during which the Commission must publish a notice and transmit copies of the register to all registration officers.

Clause 5 seeks to amend section 13 of the Elections Act, 2011 by making it a requirement for political parties to nominate their candidates for general elections at least ninety days before the election. This section also requires a political party to hear and determine any disputes arising from the political party nominations within forty days.

Clause 6 seeks to amend section 16 of the Elections Act, 2011 to clarify that a vacancy in the office of a Member of Parliament shall be deemed to occur on the date of issuance of a notice to the Commission which shall not be later than twenty-one days from the date of the actual occurrence of the vacancy.

Clause 7 seeks to amend section 22 of the Elections Act, 2011 to require that a person seeking nomination for an election should possess, as minimum qualifications, a degree in the case of Parliamentary elections

and a diploma in the case of county assembly elections. This clause also contains a proviso to the effect that after the 2017 general elections, a member of a county assembly shall be required to possess a degree from a university recognised in Kenya.

Clause 8 amends sections 27 of the Elections Act, 2011 to require that political parties submit to the Commission party nomination rules six months before an election. This section further requires that an amendment of those rules should have effect ninety days after notification to the Registrar. The clause further empowers the Commission to issue political parties with compliance certificates.

Clause 9 amends section 28 of the Elections Act, 2011 to require that a political party that nominates a person for an election shall submit to the Commission a party membership list of the party at least sixty days before the date of the general elections and forty-five days before a by-election. This Clause further requires the Commission to publish a composite list of all persons nominated under party lists.

Clause 10 proposes to amend section 30 of the Elections Act, 2011 to allow registered referendum committees to appoint one agent at each polling station.

Clause 11 amends section 32 of the Elections Act, 2011 to require that where there is a vacancy in the office of the Governor, an independent candidate shall submit to the Commission the symbol that the person intends to use during an election at least seven days before nomination.

Clause 12 amends section 34 of the Elections Act, 2011 to require that in the case of a person nominated pursuant to Article 177(1) (c) of the Constitution, the party list shall include a certification in the manner prescribed by the Commission. This clause further requires the Commission to verify the list and issue a certificate of compliance. The Commission is to prescribe regulations on the standards to be complied with in developing party lists.

Clause 13 amends the Elections Act, 2011 by inserting a new section 38A to require that the number of voters per polling station in a general election shall not exceed seven hundred.

Clause 14 seeks to amend section 43 of the Elections Act, 2011 clarify the a public officer intending to stand for election must resign one year before general elections or within seven days of the declaration of a vacancy in a by-election.

Clause 15 amends section 46 of the Elections Act, 2011 to require that a petition for recall should be accompanied by, among other particulars, thumb prints.

Clause 19 amends section 74 of the Elections Act, 2011 to remove typographical errors.

Clause 20 amends section 76 of the Elections Act, 2011 to require that a petition questioning the validity of an election shall be filed within twenty eight days after the date of declaration (rather than publication) of the results of the election.

Clause 21 seeks to amend section 85A of the Elections Act, 2011 to provide that an appeal to the Court of Appeal against the determination of an election petition shall operate as an automatic stay of the certificate issued by an election Court.

Clause 22 seeks to amend section 86 of the Elections Act, 2011 to require an election court to notify the relevant Speaker of Parliament of its determination of the validity of any question raised with regard to an election.

Clause 23 seeks to delete section 87 of the Elections Act, 2011 to require an election court to send to the Director of Public Prosecution and the Commission a report in writing indicating whether an election offence is likely to have occurred in connection with the election. Based on the result of the investigations, the DPP is to then initiate prosecution or close the matter.

Clause 24 amends section 91 of the Elections Act, 2011 to make it a requirement that where no petition for the referendum result is filed within the time specified, the declared (not gazetted) result shall have effect.

Clause 25 amends the Second Schedule of the Act to clarify that the Electoral code of conduct is applicable to both general and by-elections.

Clause 27 amends the Third Schedule of the Act to correct typographical omissions.

Clauses 29 to 32 seek to make amendments to the Independent Electoral and Boundaries Commission Act to—

(a) delete spent sections;
(b) provide for the procedure and criteria for the delimitation of electoral boundaries;
(c) provide for the involvement of the public in delimitation of boundaries
(d) provide for the resolution of disputes arising from delimitation of boundaries; and
(e) remove obsolete provisions of the Act.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms.

This Bill delegates legislative powers to the Independent Electoral and Boundaries Commission to prescribe regulations on the standards to be complied with in developing party lists. It does not limit any fundamental rights or freedoms.

Statement that the Bill concerns county governments

The Bill is a Bill concerning County governments. It contains provisions affecting the election of members of a county assembly.

Statement that the Bill is a money Bill within the meaning of Article 114 of the Constitution

The enactment of this Bill shall occasion additional expenditure of public funds.

Dated the 17th November, 2015.

SAMUEL CHEPKONG'A,
Member of Parliament.

Section 2 of No. 24 of 2011 which it is proposed to amend

Interpretation

2. In this Act, unless the context otherwise requires—

"adult" has the meaning assigned to it in Article 260 of the Constitution;

"agent" means a person duly appointed by—

(a) a political party or an independent candidate for the purposes of an election under this Act; or

(b) a referendum committee for the purposes of a referendum under this Act, and includes a counting agent and a tallying agent;

"ballot box" means a transparent container with a slot on the top sufficient to accept a ballot paper in an election or in a referendum but which prevents access to the votes cast until the closing of the voting period;

"ballot paper" means a paper used to record the choice made by a voter and shall include an electronic version of a ballot paper or its equivalent for purposes of electronic voting;

"campaign period" means the period specified as such in the notice issued by the Commission in relation to an election;

"candidate" means a person contesting for an elective post;

"Commission" means the Independent Electoral and Boundaries Commission established under Article 88 of the Constitution;

"constituency" means one of the constituencies into which Kenya is divided under Article 89 of the Constitution;

"constituency register" means the register of voters compiled in respect of each constituency by the Commission;

"county" means the counties into which Kenya is divided under Article 6(1) of the Constitution and specified in the First Schedule of the Constitution; "county assembly" means a county assembly constituted in accordance with Article 177 of the Constitution;

"county election" means the election of a county governor or a member of a county assembly;

"disability" has the meaning assigned to it in Article 260 of the Constitution;

"election" means a presidential, parliamentary or county election and includes a by-election;

"electoral area" means a constituency, a county or a ward;

"election court" means the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163(3)(a) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165(3)(a) of the Constitution and the Resident Magistrate's Court designated by the Chief Justice in accordance with section 75 of this Act;

"election material" means ballot boxes, ballot papers, counterfoils, envelopes, packets statements and other documents used in connection with voting in an election and includes information technology equipment for voting, the voting compartments, instruments, seals and other materials and things required for the purpose of conducting an election;

"election offence" means an offence under this Act;

"elections officer" means a person appointed by the Commission for the purposes of conducting an election under this Act;

"election period" means the period between the publication of a notice by the Commission for a presidential, parliamentary or county election under sections 14, 16, 17 and 19 and the Gazettement of the election results;

"election results" means the declared outcome of the casting of votes by voters at an election;

"harambee" means the public collection of monies or other property in aid or support of a cause or a project;

"identification document" means a Kenyan national identification card or a Kenyan passport;

"illegal practice" means an offence specified in Part VI;

"independent candidate" means a candidate for presidential, parliamentary or county elections who is not a member of a political party;

"nomination" means the submission to the Commission of the name of a candidate in accordance with the Constitution and this Act;

"nomination day" in respect of an election, means the day gazetted by the Commission as the day for the nomination of candidates for that election;

"observer" means a person or an organisation accredited by the Commission to observe an election or a referendum; "parliamentary election" means the election of one or more members of Parliament;

"party list" means a party list prepared by a political party and submitted to the Commission pursuant to and in accordance with Article 90 of the Constitution and sections 28, 34, 35, 36 and 37;

"petition" means an application to the election court under the Constitution or under this Act;

"political party" has the meaning assigned to it in Article 260 of the Constitution;

"polling station" means any room, place, vehicle or vessel set apart and equipped for the casting of votes by voters at an election;

"presidential election" means an election of a President in accordance with Articles 136, 139(1)(b) and 146(2)(b) of the Constitution;

"Principal Register of Voters" means a current register of persons entitled to vote at an election prepared in accordance with section 3 and includes a register that is compiled electronically;

"public officer" has the meaning assigned to it in Article 260 of the Constitution;

"public resources" include—

(a) any vehicle, or equipment owned by or in the possession; or

(b) premises owned or occupied by, any government, state organ, statutory corporation or a company in which the Government owns a controlling interest;

"referendum" means a poll held under Part V;

"referendum committee" means a national or a parliamentary constituency committee comprising of persons intending to support or oppose a referendum question;

"referendum officer" means a person appointed by the Commission for the purpose of conducting a referendum;

"referendum question" means a question upon which voters shall vote in a referendum as specified in section 49;

"registration officer" means a person appointed by the Commission for the purpose of preparing a register of voters;

"returning officer" means a person appointed by the Commission for the purpose of conducting an election or a referendum under this Act;

"supporter" means a voter who supports the nomination of a candidate;

"vessel" includes any ship, boat or any other description of vessel used in navigation;

"voter" means a person whose name is included in a current register of voters;

"voter's card" *Deleted by Act No. 12 of 2012, Sch.*;

"voting period" means the period specified as such in the notice issued by the Commission in relation to an election;

"ward" means an electoral area within a county delimited in accordance with Article 89 of the Constitution.

Section 5 of No. 24 of 2011 which it is proposed to amend

Registration of voters

5. (1) Registration of voters and revision of the register of voters under this Act shall be carried out at all times 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:

Provided that this applies to the first general election under this Act;

(b) in the case of a by-election, between the date of the declaration of the vacancy of the seat concerned and the date of such by-election; or

(c) in any other case, between the date of the declaration of the vacancy of the seat concerned and the date of such election.

(2) Notwithstanding subsection (1), where an election petition is filed in respect of an electoral area, between the date of the filing of the petition and the date of the by-election, where a court determines that a by-election is to be held, a voter shall not be allowed to transfer his or her vote to the affected electoral area. (3) Any citizen of Kenya who has attained the age of eighteen years as evidenced by either a national identity card or a Kenyan passport and whose name is not in the register of voters shall be registered as a voter upon application, in the prescribed manner, to the Commission.

(3A) Despite subsection (3), a citizen who has attained the age of eighteen years and has registered for an identification card and is in the possession of an acknowledgement of registration certificate shall, upon application, be registered as a voter using the acknowledgement of registration certificate, but may only vote using an identification card.

(3B) For purposes of this section, an acknowledgement of registration certificate means a certificate issued by a registration officer under the Registration of Persons Act to a person who has applied for an identification card, pending the issuance of that card.

(4) All applicants for registration under this section shall be registered in the appropriate register by the registration officer or any other officer authorised by the Commission.

(5) The registration officer or any other authorised officer referred to in subsection (3) shall, at such times as the Commission may direct, transmit the information relating to the registration of the voter to the Commission for inclusion in the Principal Register of voters.

Section 6 of No. 24 of 2011 which it is proposed to amend

Inspection of register of voters

6. (1) The Commission shall cause the Principal Register of Voters to be opened for inspection by members of the public at all times for the purpose of rectifying the particulars therein, except for such period of time as the Commission may consider appropriate.

(2) The Commission shall, within sixty days from the date of the notice for a general election, open the Principal Register of Voters for inspection for a period of at least fourteen days or such period as the Commission may consider necessary.

(3) The Commission shall, upon expiry of the period for inspection specified under subsection (1), compile the amendments to the register of voters and as soon as practicable thereafter, being at least fourteen days before an election—

(a) publish a notice in the *Gazette* to the effect that such compilation has been completed; and

(b) cause to be transmitted to every registration officer, a copy of the part of the Principal Register of Voters relating to the constituency for which the registration officer is responsible to be kept in safe custody.

(4) The Principal Register of Voters shall be kept at the headquarters of the Commission and copies of the part of the Principal Register of Voters relating to the constituency for which the registration officer is responsible shall be kept at all the constituency offices of the Commission.

Section 13 of No. 24 of 2011 which it is proposed to amend

Nomination of candidates by a political party

13. (1) A political party shall nominate its candidates for an election under this Act at least forty-five days before a general election under this Act in accordance with its constitution and nomination rules.

(2) A political party shall not change the candidate nominated after the nomination of that person has been received by the Commission:

Provided that in the event of the death, resignation or incapacity of the nominated candidate or of the violation of the electoral code of conduct by the nominated candidate, the political party may after notifying the candidate that the party seeks to substitute, where applicable, substitute its candidate before the date of presentation of nomination papers to the Commission.

(3) Notwithstanding subsection (1), in the case of any other election, the Commission shall by notice in the prescribed form, specify the day or days upon which political parties shall nominate candidates to contest in a presidential, parliamentary or county election in accordance with its constitution or rules, which shall be at least forty-five days before such election.

Section 16 of No. 24 of 2011 which it is proposed to amend

Initiation of election of Member of Parliament

16. (1) Whenever a parliamentary election is to be held, the Commission shall publish a notice of the holding of the election in the Gazette and in the electronic and print media of national circulation—

(a) in the case of a general election, at least sixty days before the date of the general election; or

(b) in any other case, upon the office of a member of Parliament becoming vacant and on receipt of a notice issued by the respective Speaker under subsection (2).

(2) The notice referred to under subsection (1) shall be in the prescribed form and shall specify—

(a) the day upon which political parties shall submit a party list in accordance with Article 90 of the Constitution;

(b) the day for the nomination of candidates for the parliamentary election; and

(c) the day or days on which the poll shall be taken for the election, which shall not be less than twenty-one days after the day specified for nomination under paragraph (b).

(3) Whenever a vacancy occurs in the National Assembly or the Senate, the respective Speaker shall issue a notice in accordance with Article 101 of the Constitution.

(4) The Commission shall within twenty one days of receipt of the notice issued under subsection (2), transmit the notice to the relevant returning officer.

Section 22 of No. 24 of 2011 which it is proposed to amend

Qualifications for nomination of candidates

22. (1) A person may be nominated as a candidate for an election under this Act only if that person—

(a) is qualified to be elected to that office under the Constitution and this Act; and

(b) holds a certificate, diploma or other post-secondary school qualification acquired after a period of at least three months study, recognized by the relevant Ministry and in such manner as may be prescribed by the Commission under this Act.

(2) Notwithstanding subsection (1)(b), a person may be nominated as a candidate for election as President, Deputy President, county Governor or deputy county Governor only if the person is a holder of a degree from a university recognised in Kenya.

(2A) For the purposes of the first elections under the Constitution, section 22(1)(b) and section 24(1)(b), save for the position of the President, the Deputy President, the Governor and the Deputy Governor, shall not apply for the elections of the offices of Parliament and county assembly representatives.

Section 27 of No. 24 of 2011 which it is proposed to amend

Submission of party nomination rules

27. (1) A political party shall submit its nomination rules to the Commission at least three months before the nomination of its candidates.

(2) A political party which has submitted its nomination rules to the Commission pursuant to subsection (1) may amend the rules and submit the rules as amended to the Commission, at least seven days before nomination of candidates for elections.

Section 28 of No. 24 of 2011 which it is proposed to amend

Submission of party membership lists

28. A political party that nominates a person for any election under this Act shall submit to the Commission a party membership list of the party at least forty-five days before the date of the general elections.

Section 30 of No. 24 of 2011 which it is proposed to amend

Appointment of agents

30. (1) A political party may appoint one agent for its candidates at each polling station.

(2) A candidate nominated by a political party may appoint an agent of the candidate's choice.

(3) An independent candidate may appoint his own agent.

Section 34 of No. 24 of 2011 which it is proposed to amend

Nomination of party lists members

34. (1) The election of members for the National Assembly, Senate and county assemblies for party list seats specified under Articles 97(1)(c) and 98(1)(b)(c) and (d) and Article 177(1)(b) and (c) of the Constitution shall be on the basis of proportional representation and in accordance with Article 90 of the Constitution.

(2) A political party which nominates a candidate for election under Article 97(1)(a) and (b) shall submit to the Commission a party list in accordance with Article 97(1)(c) of the Constitution.

(3) A political party which nominates a candidate for election under Article 98(1)(a) shall submit to the Commission a party list in accordance with Article 98(1)(b) and (c) of the Constitution. (4) A political party which nominates a candidate for election under Article 177(1)(a) shall submit to the Commission a party list in accordance with Article 177(1)(b) and (c) of the Constitution.

(5) The party lists under subsections (2), (3) and (4) shall be submitted in order of priority.

(6) The party lists submitted to the Commission under this section shall be in accordance with the constitution or nomination rules of the political party concerned.

(7) The party lists submitted to the Commission shall be valid for the term of Parliament.

(8) A person who is nominated by a political party under subsections (2), (3) and (4) shall be a person who is a member of the political party on the date of submission of the party list by the political party.

(9) The party list may contain a name of any Presidential or Deputy Presidential candidate nominated for an election under this Act.

(10) A party list submitted for purposes of subsections (2), (3), (4) and (5) shall not be amended during the term of Parliament or the county assembly, as the case may be, for which the candidates are elected.

Section 43 of No. 24 of 2011 which it is proposed to amend

Participation in elections by public officers

43. (1) A public officer shall not—

(a) engage in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election;

(b) publicly indicate support for or opposition against any party, side or candidate participating in an election;

(c) engage in political campaigns or other political activity; or

(d) use public resources to initiate new development projects in any constituency or county for the purpose of supporting a candidate or political party in that constituency or county.

(2) A public officer who contravenes subsection (1) commits an offence and is liable on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or to both.

(3) A person who knowingly aids in contravention of subsection (1) commits an offence and is liable, on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or to both such fine and imprisonment.

(4) A candidate who knowingly aids in contravention of subsection (1) shall not be eligible to contest in the election.

(5) A public officer who intends to contest an election under this Act shall resign from public office at least six months before the date of election.

(6) This section shall not apply to—

(a) the President;

(b) the Prime Minister;

(c) the Deputy President;

(d) a member of Parliament;

(e) a county governor;

(f) a deputy county governor;

(g) a member of a county assembly.

Section 46 of No. 24 of 2011 which it is proposed to amend

Petition for recall

46. (1) A recall under section 45 shall be initiated by a petition which shall be filed with the Commission and which shall be—

(a) in writing;

(b) signed by a petitioner who—

(i) is a voter in the constituency or county in respect of which the recall is sought; and

(ii) was registered to vote in the election in respect of which the recall is sought;

(c) accompanied by an order of the High Court issued in terms of section 45(3).

(2) The petition referred to in subsection (1) shall—

(a) specify the grounds for the recall as specified under section 45(2);

(b) contain a list of such number of names of voters in the constituency or county which shall represent at least thirty percent of the registered voters; and

(c) be accompanied by the fee prescribed for an election petition.

(3) The list of names referred to in subsection (2)(b) shall contain the names, address, voter card number, national identity card or passport number and signature of the voters supporting the petition and shall contain names of at least fifteen percent of the voters in more than half of the wards in the county or the constituency, as appropriate.

(4) The voters supporting a petition under subsection (3) shall represent the diversity of the people in the county or the constituency as the case may be.

(5) The petitioner shall collect and submit to the Commission the list of names under subsection (2)(b) within a period of thirty days after filing the petition.

(6) The Commission shall verify the list of names within a period of thirty days of receipt of that list.

(7) The Commission, if satisfied that the requirements of this section are met, shall within fifteen days after the verification, issue a notice of the recall to the Speaker of the relevant House.

(8) The Commission shall conduct a recall election within the relevant constituency or county within ninety days of the publication of the question.

Section 49 of No. 24 of 2011 which it is proposed to amend

49. Initiation of a referendum

(1) Whenever it is necessary to hold a referendum on any issue, the President shall by notice refer the issue to the Commission for the purposes of conducting a referendum.

(2) Where an issue to be decided in a referendum has been referred to the Commission under subsection (1), the Commission shall frame the question or questions to be determined during the referendum.

(3) The Commission shall, in consultation with the Speaker of the relevant House, lay the question referred to in subsection (2) before the House for approval by resolution.

(4) The National Assembly may approve one or more questions for a referendum.

(5) The Commission shall publish the question approved under subsection (4) in the *Gazette* and in the electronic and print media of national circulation.

(6) The Commission shall conduct the referendum within ninety days of publication of the question.

(7) The Commission may assign such symbol for each answer to the referendum question or questions as it may consider necessary.

(8) A symbol assigned under subsection (7) shall not resemble that of a political party or of an independent candidate.

Section 50 of No. 24 of 2011 which it is proposed to amend

50. Notice of holding referendum

(1) The Commission shall, within fourteen days after publication of the question referred to in section 49 publish a notice of the holding of the referendum and the details thereof in the Gazette, in the electronic and print media of national circulation.

(2) The notice shall specify—

(a) the referendum question or questions and the option of the answer or answers;

(b) the symbols assigned for the answers to the referendum question;

(c) the day on which the referendum is to be held which shall not be less than twenty one days after the date of the publication of the notice;

(d) the polling time of the referendum;

(e) the day by which the referendum committees shall have registered with the Commission; and

(f) the day and time by which campaign in support of or in opposition to the referendum question shall start and cease.

Section 54 of No. 24 of 2011 which it is proposed to amend

54. Voting threshold

A referendum question on an issue other than that contemplated in Articles 255 and 256 of the Constitution shall be decided by a simple majority of the citizens voting in the referendum.

Section 55 of No. 24 of 2011 which it is proposed to amend

General power of the Commission

55. Nothing in this Act shall preclude the Commission from taking any administrative measures to ensure effective conduct of the referendum.

Section 56 of No. 24 of 2011 which it is proposed to amend

Offences relating to register of voters and voter's cards

56. A person who—

(a) without authority makes, prepares, prints or is in possession of a document or paper purporting to be a register of voters;

(b) Deleted by Act No. 12 of 2012, Sch.;

(c) Deleted by Act No. 12 of 2012, Sch.;

(d) Deleted by Act No. 12 of 2012, Sch.;

(e) Deleted by Act No. 12 of 2012, Sch.;

(f) Deleted by Act No. 12 of 2012, Sch.;

(g) knowingly makes any false statement on, or in connection with any application to be registered in any register of voters; or

(h) aids, abets, counsels or procures the commission of or attempts to commit any of the offences referred to in paragraphs (a) to (f), commits an offence and is liable on conviction, to a fine not exceeding one million shillings and to imprisonment for a term not exceeding six years, or to both.

Section 74 of No. 24 of 2011 which it is proposed to amend

Settlement of certain disputes

74. (1) Pursuant to Article 88(4)(e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

(2) An electoral dispute under subsection (1) shall be determined within seven days of the lodging of the dispute with the Commission.

(3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.

Section 76 of No. 24 of 2011 which it is proposed to amend

Presentation of petitions

76. (1) A petition—

(a) to question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the election in the *Gazette* and served within fifteen days of presentation;

(b) to seek a declaration that a seat in Parliament or a county assembly has not become vacant shall be presented within twenty-eight days after the date of publication of the notification of the vacancy by the relevant Speaker; or

(c) to seek a declaration that a seat in Parliament has become vacant may be presented at any time.

(2) A petition questioning a return or an election upon the ground of a corrupt practice, and specifically alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned or by an agent of that person or with the privity of that person or his agent may, so far as respects the corrupt practice, be

filed at any time within twenty-eight days after the publication of the election results in the *Gazette*.

(3) A petition questioning a return or an election upon an allegation of an illegal practice and alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned, or by an agent of that person, or with the privity of that person or his election agent in pursuance or in furtherance of the illegal practice alleged in the petition, may, so far as respects the illegal practice, be filed at any time within twenty-eighty days after the publication of the election results in the *Gazette*.

(4) A petition filed in time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with the leave of the election court within the time within which the petition questioning the return or the election upon that ground may be presented.

(5) A petition filed in respect of the matters set out in subsections (2) and (3) may, where a petition has already been presented on other grounds, be presented as a supplemental petition.

Section 85A of No. 24 of 2011 which it is proposed to amend

Appeals to the Court of Appeal

85A. An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be—

(a) filed within thirty days of the decision of the High Court; and

(b) heard and determined within six months of the filing of the appeal.

Section 86 of No. 24 of 2011 which it is proposed to amend

86. Certificate of court as to validity of election

(1) An election court shall, at the conclusion of the hearing of an election petition, determine the validity of any question raised in the petition, and shall certify its determination to the Commission which shall then notify the relevant Speaker.

(2) Upon receipt of a certificate under this section, the relevant Speaker shall give the necessary directions for altering or confirming the return, and shall issue any notification which may be necessary.

Section 87 of No. 24 of 2011 which it is proposed to amend

Report of court on election offences

87. (1) An election court shall, at the conclusion of the hearing of a petition, in addition to any other orders, send to the Director of Public Prosecutions, the Commission and the relevant Speaker a report in writing indicating whether an election offence has been committed by any person in connection with the election, and the names and descriptions of the persons, if any, who have been proved at the hearing to have been guilty of an election offence.

(2) Before a person, not being a party to an election petition or a candidate on whose behalf the seat is claimed by an election petition, is reported by an election court, the elections court shall give that person an opportunity to be heard and to give and call evidence to show why he should not be reported.

(3) The relevant Speaker shall publish a report made under this section in the *Gazette*, and the Commission shall consider the report and delete from the register of voters, the name of a person who is disqualified from being registered in that register of voters.

Section 91 of No. 24 of 2011 which it is proposed to amend

Operation of declared result of issue submitted to referendum

91. (1) Where a referendum petition is not presented to the High Court within the time specified in section 89(2)(d), the declared result of referendum shall—

(a) have effect from the date on which the result is *gazetted*;

(b) be final and not be challenged in any court of law; and

(c) be conclusive evidence of the voting at the referendum and of the result of the referendum.

(2) Nothing in this section shall be construed as preventing or delaying the coming into operation of any law in respect of which a referendum is held pursuant to the provisions of the Constitution or any other written law if—

(a) it is stated in the declared result of the referendum that the provisions of the Act are supported by the votes of a majority of the persons entitled to vote in the referendum; and

(b) the question raised by any referendum petition or, if more than one, by all referendum petitions presented to the High Court in respect of such referendum would not, if decided in favour of the petitioner or petitioners, as the case may be, lead to a declaration

by the Commission that the votes of a majority of the persons entitled to vote in such referendum did not support the provisions of the said law.

Section 3of No. 9 of 2011 which it is proposed to amend

Object and purpose of the Act

3. The object and purpose of this Act is to—

(a) provide for the operations, powers, responsibilities and functions of the Commission to supervise elections and referenda at County and National government levels;

(b) provide a legal framework for the identification and appointment of the chairperson, members and the secretary of the Commission pursuant to Article (12)(b) and 250(2) of the Constitution;

(c) provide for the manner of the exercise of the powers, responsibilities and functions of the Commission pursuant to Article 88(5) of the Constitution;

(d) establish mechanisms for the Commission to facilitate consultations with interested parties pursuant to Article 89(7) of the Constitution; and

(e) establish mechanisms for the Commission to address the issues arising out of the first review.

Section 24 of No. 9 of 2011 which it is proposed to amend

Annual report

24. (1) Within three months after the end of each financial year, the Commission shall present its annual report to the President and submit the same to Parliament.

(2) The annual report shall in respect of the year to which it relates, contain—

(a) the financial statements of the Commission;

(b) the activities the Commission has undertaken; and

(c) any other information, the Commission may consider relevant.

(3) The Commission shall publish the annual report in the *Gazette* and in at least one newspaper of national circulation.

Second Schedule to No. 24 of 2011 which it is proposed to amend

SECOND SCHEDULE

[Sections 51(6), 110(1).]

ELECTORAL CODE OF CONDUCT

1. (1) This Code shall be subscribed to by—

(a) every political party participating in the election of a president, a member of Parliament, a county governor, a member of a county assembly;

(b) every candidate; and

(c) every leader, chief agent, agent or official of a referendum committee.

(2) This Code shall, in so far as it is applicable, bind the Government and every political party, leader, office bearer, agent and member of a political party or a person who supports a political party, and every candidate nominated under the electoral laws for any election.

(3) All registered political parties and referendum committees shall execute this Code through the hand of their respective registered officials to signify their acceptance to be bound by the provisions of this Code and their commitment to strive to ensure that their members and any person who supports the political party abide by the code at all stages of elections and referendum.

2. In this Code, unless the context otherwise requires—

"Committee" means the Electoral Code of Conduct Enforcement Committee;

"electoral area" means a ward, county or constituency;

"election court" means the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163(3)(a), the High Court in the exercise of the jurisdiction conferred upon it by Article 165(3)(a) of the Constitution, or the High Court in the exercise of the jurisdiction conferred upon it by this Act;

"electoral laws" means the Constitution, the Elections Act and subsidiary legislation made thereunder as they relate to the presidential, parliamentary, county elections and the referendum.

3. The object of this Code is to promote conditions conducive to the conduct of free and fair elections and a climate of tolerance in which political activity may take place without fear, coercion, intimidation or reprisals.

4. All registered political parties and other persons bound by this Code shall endeavour to promote the object of the code to enable free political campaigning and open public debate to take place in all parts of Kenya during an election period.

5. Registered political parties, referendum committees, officials of political parties and referendum committees and candidates do, by subscribing to this Code, further commit themselves to—

(a) adhere to the values and principles of the Constitution;

(b) give wide publicity to this Code;

(c) promote voter education campaigns;

(d) condemn, avoid and take steps to prevent violence and intimidation;

(e) instruct their candidates, office-bearers, agents, members and persons who support the political party of their obligations under this Code;

(f) promote gender equality;

(g) promote ethnic tolerance;

(h) promote cultural diversity;

(i) promote the fair representation of special interest groups;

(j) generally affirm the rights of all participants in an election to–

(i) express divergent political opinions;

(ii) debate and contest the policies and programmes of other parties;

(iii) canvass freely for membership and support from voters;

(iv) subject to the Public Order Act (Cap. 56) hold public meetings;

(v) attend public meetings convened by others;

(vi) distribute non-offensive electoral literature and campaign materials;

(vii) publish and distribute non-offensive notices and advertisements;

(viii) erect non-offensive banners, placards and posters;

(ix) remove all banners, placards and posters erected during the election period;

(x) promote free electoral campaigns by all lawful means; and

(xi) co-operate with the Commission and the relevant Government agencies and other authorities in the investigation of issues and allegations arising during the election period.

6. All those bound by this Code shall, throughout an election period—

(a) publicly and repeatedly condemn violence and intimidation and avoid the use of hate speech, language or any kind of action which may lead to violence or intimidation, whether to demonstrate party strength, gain any kind of advantage, or for any other reason;

(b) refrain from any action involving violence or intimidation;

(c) ensure that no arms or weapons of any kind are carried or displayed at political meetings or any march, demonstration or other event of a political nature;

(d) refrain from campaigning in places of worship or during burial ceremonies;

(e) co-operate and liaise in good faith with other parties to avoid organizing public meetings, demonstrations, rallies or marches to take place at the same time and venue as similar political events organized by other parties;

(f) do nothing to impede the right of any party, through its candidates, canvassers and representatives, to have reasonable access to voters for the purposes of conducting voter education, fund raising, canvassing membership and soliciting support;

(g) avoid plagiarizing the symbols, colours or acronyms of other parties, and to discourage and, if possible, prevent the removal, disfigurement or destruction of political campaign materials of any party;

(h) refrain from offering any document or reward to any person in consideration of such person either joining or not joining any party, attending or not attending any political event, voting or not voting (either at all, or in any particular manner), or accepting, refusing or withdrawing such person's nomination as a candidate in the election;

(i) refrain from any attempt to abuse a position of power, privilege or influence, including parental, patriarchal, state or traditional

authority for political purposes including any offer of reward or threat of penalty;

(j) avoid any discrimination based on race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth in connection with the election and political activity;

(k) in relation to the Commission—

(i) acknowledge the authority of the Commission in the conduct of the election or referendum;

(ii) ensure the attendance and participation of representatives at meetings of any party liaison committee and other forums convened by or on behalf of the Commission;

(iii) implement the orders and directions of the Commission;

(iv) facilitate the Commissions right of access through official observers and other representatives to all public political meetings or other electoral activities;

(v) co-operate in the official investigation of issues and allegations arising during an election period;

(vi) take all reasonable steps to ensure the safety of observers and other representatives of the Commission from exposure to insult, hazard or threat in the course of their official duties;

(vii) to establish and maintain effective lines of communication with the Commission; and

(viii) to abide by the provisions of this Code;

(l) reassure voters with regard to the impartiality of the Commission and the secrecy and integrity of the ballot, and to reaffirm that no one should know how any other person has voted;

(m) take reasonable steps to discipline and restrain their party office-bearers, employees, candidates, members and persons who support the political party who—

(i) infringe this Code;

(ii) engage in activities of commission or omission which constitute offences under the electoral laws or otherwise fail to observe this Code; and

(iii) contravene or fail to comply with any provision of the electoral laws;

(n) agree for party office bearers, employees, candidates members and persons who support the political party to submit to the disciplinary procedures of the Commission for any violation of this Code; and

(o) without prejudice to the right to present a petition to an election court, accept the final outcome of the election and the Commission's declaration and certification of the results thereof.

7. Where, in the opinion of the Commission, any political party or referendum committee participating in any election or referendum or the leader, office-bearer or member of a political party or person who supports the political party or referendum committee or any candidate at any election, in any way infringes any provision of this Code, the Commission may—

(a) in the case of a political party and, subject to sub-paragraph (b), and in the case of the leader, any office-bearer or member of a political party or person who supports the political party referendum committee or candidate, impose upon that political party one or more of the following penalties or sanctions which any or all may be suspended on specific conditions—

(i) a formal warning;

(ii) a fine determined by the Commission;

(iii) notwithstanding the provisions of any other written law, an order prohibiting the political party, whether permanently or for a specified period, from utilizing any public media time, through the television or radio broadcasting service of such media as have been or may be allocated to the political party for electoral purposes;

(b) Where a political party, referendum committee, leader or any office bearer, member or person who supports the political party, referendum committee or any candidate at an election fails, neglects or refuses to comply with the orders of the Commission issued under paragraph 7(a), the Commission shall impose upon the defaulting party any of the following sanctions which may be suspended on specific conditions—

(i) in case of fine imposed, prohibit the defaulting party from participating in ongoing and future elections as candidates in case of a defaulting candidate or prohibit the political party or the referendum committee official from

participating in ongoing elections and referendum, and future elections or referendum or any activity facilitated by the Commission until such fine has been paid;

(ii) in case of failure to comply with any other sanctions imposed, cancel the right of such political party or candidate to participate in the next election; and

(iii) file execution proceedings in the High Court to enforce the recovery of the fine.

8. A fine imposed by the Commission under this Code shall be registered in the High Court.

9. Without prejudice to the provisions of paragraph 7, the Commission may either of its own motion or in consequence of any report made to it, institute proceedings in the High Court as may be appropriate in the case of any alleged infringement of this Code by a political party or by the leader, any office-bearer or member of a political party or person who supports a political party or any candidate and where the Court finds the infringement of the provisions of this Code—

(a) in the case of a political party, any act or omission involving violence, intimidation or a gross or systematic violation of the rights of any political party, candidate or voter, the Court may, in addition to or in substitution for any other penalty or sanction specified in paragraph 7(a), make an order cancelling the right of such party to participate in the election concerned; or

(b) in the case of the leader, any office-bearer or member of a political party or person who supports the political party or of any candidate, that any act or omission involving violence or intimidation or gross or systematic violation of the rights of any political party candidate or voter, the Court may in addition to or in substitution of any other penalty or sanction specified in paragraph 7(a)(i) and (ii), make an order disqualifying, in the case of a person who is a candidate, that person from being a candidate or deleting the name of that candidate from the list or lists of candidates concerned.

10. In making its decision regarding appropriate penalties or sanctions, the Commission or, as the case may be, the High Court shall have regard to any other legal consequences that may result from civil or criminal proceedings instituted by reason of the same occurrence.

11. The High Court shall ensure that any proceedings initiated under paragraph 9 are dealt with in priority to all other matters brought before it,

and that the decision of that Court is given before the date of the election concerned.

12. The procedure of the High Court in cases falling within the provisions of this Code shall, without prejudice to paragraph 9, be in accordance with such Rules of Procedure as shall from time to time be promulgated by the Chief Justice.

13. Every registered political party, referendum committee, candidate and agent—

(a) shall respect the role of the media before, during and after an election or referendum conducted under this Act;

(b) may not prevent access by members of the media to public political meetings, marches, demonstrations and rallies; and

(c) shall take all reasonable steps to ensure that journalists are not subjected to harassment, intimidation, hazard, threat or physical assault by any of their representatives or persons who supports the candidate or political party.

14. Every media house and its representative shall—

(a) adhere to the media professional ethics in its coverage of public meetings, campaign rallies and demonstrations;

(b) during the prescribed hours of polling, not publish or distribute the result of an exit poll taken in that election or referendum;

(c) adhere to any media regulations issued by the Commission; and

(d) abide by the provisions of this Act.

15. (1) The Commission shall set up the Electoral Code of Conduct Enforcement Committee which shall comprise of not less than five members of the Commission and shall be chaired by a member appointed by the Chairperson; the Commission may nominate a member of its staff to be the secretary to the Committee.

(2) The Chairperson of the committee shall be a person who is qualified to hold the office of Judge of the High Court.

(3) Every candidate, official and agent shall—

(a) acknowledge the authority of the Committee to enforce the provisions of this Code on behalf of the Commission;

(b) ensure compliance with summons issued to the party, its candidates or representatives by the Committee;

(c) co-operate in the official investigation of issues and allegations arising at election period; and

(d) respect and comply with the orders issued by the Committee.

(4) The Committee shall issue summons to the person, political party or referendum committee against whom a complaint has been received as having infringed the provisions of this Code and any other person who the Commission has reason to believe to have infringed the provisions of this Code to attend its meetings. The meetings will be convened at any place which the Committee may deem fit.

(5) In its proceedings, the Committee may examine the person summoned and may allow a person to have legal representation.

(6) The committee shall not be bound by the provisions of the Criminal Procedure Code (Cap. 75) or the Evidence Act (Cap. 80) in its proceedings.

(7) Every person who is summoned by the Committee and who attends the meetings of the Committee shall be accorded the right to be heard.

(8) The Committee shall exercise the powers provided under this Code to punish any person found to have infringed this Code.

(9) The Committee shall deliver its verdict expeditiously and inform the parties of the decision.

(10) Notwithstanding the provisions of this Code, any complaint submitted in writing alleging any irregularity with any establishment of the electoral process at any stage if not satisfactorily resolved by the peace committee shall be examined and determined by the Committee.

16. Every registered political party referendum committee, candidate and agent shall—

(a) ensure security and full participation of women and persons with disabilities as candidates and voters;

(b) respect the right of women to communicate freely with political parties, committees and candidates;

(c) facilitate the full and equal participation of women in political activities;

(d) ensure free access of women and persons with disabilities to all public political meetings, marches, demonstrations, rallies and other public political events; and

(e) take reasonable steps to ensure that women are free to engage in any political activity.

17. (1) The Commission may establish peace committees in every constituency during an election and referendum period.

(2) Every political party, referendum committee, candidate, official and agent shall—

(a) acknowledge the activity of peace committee established at the constituency level by the Commission;

(b) ensure attendance of the peace committee meetings convened at the constituency level on behalf of the Commission; and

(c) co-operate in the official investigation initiated by the peace committee on issues and allegation arising at the election period.

(3) The peace committee shall have power to—

(a) reconcile warring parties;

(b) mediate political disputes in the constituencies;

(c) liaise with government security agencies in the constituency and report suspected election malpractices; and

(d) report any violation of this Code to the Committee for appropriate action.

18. This Code shall take effect from the date of dissolution of parliament until polling day.

19. Any person may complain about the breach of this Code.

Third Schedule to No. 24 of 2011 which it is proposed to amend

THIRD SCHEDULE (s. 60(1))

OATH OF SECRECY

I.....I.D./Passport No. ..... swear that I will not at this election for the.....constituency/county/ ward do anything forbidden under Part VI of the Elections Act which has been read to me.

.....

Signature of person taking the oath

Before me

.....

(Signature)

Member/Secretary/Returning Officer

Date.....

Section 35 of No. 9 of 2011 which it is proposed to amend

Appointment of the first Commission

35. (1) For purposes of the appointment of the first Commission under this Act, the Selection Panel shall have regard to the provisions of section 28(2) of the Sixth Schedule to the Constitution and in accordance with the procedure set out in the First Schedule to this Act.

(2) This section shall lapse upon the appointment of the first Commission under this Act.

Section 36 of No. 9 of 2011 which it is proposed to amend

36. Delimitation during first review

(1) The provisions of the Fifth Schedule shall have effect for the purposes of addressing issues arising from first review.

(2) This section shall lapse upon the gazettement of the final report in accordance with the Fifth Schedule.

Second Schedule to No. 9 of 2011 which it is proposed to amend—

SECOND SCHEDULE

[Section 8.]

PROVISIONS AS TO THE CONDUCT OF THE BUSINESS AND AFFAIRS OF THE COMMISSION

1. The Commission shall meet as often as may be necessary for the carrying out of its business but it shall meet at least once every calendar month.

2. A meeting of the Commission shall be held on such date and at such time as the chairperson shall decide.

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.

6. The chairperson shall preside at every meeting of the Commission at which he is present and in the absence of the chairperson at a meeting, the vice-chairperson, shall preside and in the absence of both the chairperson and the vice-chairperson, the members present shall elect one of their number who shall, with respect to that meeting and the business transacted thereat, have all the powers of the chairperson.

7. Unless a unanimous decision is reached, a decision on any matter before the Commission shall be by concurrence of a majority of all the members.

8. Subject to paragraph 5, no proceedings of the Commission shall be invalid by reason only of a vacancy among the members thereof.

(1) The secretary shall be the secretary at all meetings of the Commission.

(2) The Commission shall, subject to subparagraph (3), establish a committee for liaison with political parties and may establish committees of its members for any other purpose.

(3) The Political Parties Liaison Committee established under the Political Parties Act, 2011, consists of the designated members of the Commission and the representatives of every political party with one or

more candidates validly nominated for the election; and the Commission shall consult with the committee on all matters relating to the election.

10. The Commission shall cause minutes of all proceedings of meetings of the Commission to be entered in books for that purpose.

11. Except as provided by this Schedule, the Commission may regulate its own procedure.

(1) If any person is present at a meeting of the Commission or any committee at which any matter is the subject of consideration and in which matter that person or that directly or indirectly interested in a private capacity, that person shall as soon as is practicable after the commencement of the meeting, declare such interest and shall not, unless the Commission or committee otherwise directs, take part in any consideration or discussion of, or vote on any question touching such matter.

(2) A disclosure of interest made under subsection (1) shall be recorded in the minutes of the meeting at which it is made.

(3) A person who contravenes subsection (1) commits an offence and upon conviction is liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding seven years or to both such fine and imprisonment.

(4) A member or employee of the Commission shall not transact any business or trade with the Commission.