

REPUBLIC OF KENYA



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)

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

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C.O.S
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Rt. Hon. Speaker
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Speakers
5/1/17

5th January, 2017

TABLE OF CONTENTS

ANNEXES	iv
ABBREVIATIONS AND ACRONYMS	v
PREFACE	vi
Mandate of the Standing Committee on Legal Affairs and Human Rights.....	vi
Mandate of the Standing Committee on Information and Technology	vi
CHAPTER ONE	1
INTRODUCTION	1
1.1 Background.....	1
1.2 Overview of the Bill	3
(1) Amendments to the Elections Act, 2011	3
(2) Amendments to the Independent Electoral and Boundaries Commission Act, 2011	7
(3) Amendments to the Elections Campaign Financing Act, 2013	8
CHAPTER TWO	9
PUBLIC PARTICIPATION	9
2.1 Attendance by stakeholders	9
2.2 Submission Received by the Committee	10
(1) Adoption of a Bi-Partisan Approach.....	11
(2) Clarification on Technology to be used in the 2017 General Elections.....	11
(3) Use of Biometrics in the Identification of Voters	11
(4) Use of a Complementary Mechanism under Clause 19 of the Election Laws (Amendment) (No.3) Bill, 2015	12
(5) Network Coverage and Connectivity	23
(6) Definition of the term “biometric”	24
(7) Verification of Biometric Data.....	24
(8) Registration and Voting of Persons with Disabilities	26
(9) Verification of the Voter Register by an Independent Firm	26

(10) Inspection of the Register of Voters.....	27
(11) Number of Voters per Polling Station.....	27
(12) Procurement of Technology	28
(13) Definition of the term “Nomination Day”.....	28
(14) Conduct and Supervision of Nominations by the Independent Electoral and Boundaries Commission.....	29
(15) Educational Qualifications of Members of Parliament and Members of County Assemblies.....	30
(16) Regulations.....	31
(17) Lack of involvement of the Senate in the Delineation of Electoral Boundaries..	32
(18) Voting of Prisoners.....	33
(19) Run-off Procedures.....	33
(20) Capping of Campaign Finance.....	33
CHAPTER THREE	34
COMMITTEE OBSERVATIONS AND RECOMMENDATIONS.....	34

ANNEXES

- Annex 1** Minority Report
- Annex 2** Minutes
- Annex 3** Message from the Speaker of the Senate
- Annex 4** Advertisement for the Public Hearing and Submission of Memoranda
- Annex 5** Memoranda Submitted to the Committee

ABBREVIATIONS AND ACRONYMS

AG	Attorney General
CA	Communications Authority of Kenya
CORD	Coalition for Reform and Democracy
CSK	Computer Society of Kenya
EGH	Elder of the Order of the Golden Heart
ICTAK	Information Communication Technology Association of Kenya
IEBC	Independent Electoral and Boundaries Commission
IRDA	Inter-Regional Development Agency
KANU	Kenya African National Union
KDA	The Kenya Diaspora Alliance –
KiCTAnet	Kenya ICT Action Network
KNCHR	Kenya National Commission on Human Rights –
KNNCI	Kenya National Chamber of Commerce and Industry
MoICT	Ministry of Information, Communications and Technology
MP	Member of Parliament
NCPD	National Council for Persons with Disabilities
PeaceNet	Peace and Development Network Trust — Kenya
Sen	Senator
TUC-Ke	Trade Unions Congress of Kenya

PREFACE

Mr. Speaker Sir,

Honourable Members will recall that on 28th December, 2016, the Speaker of the Senate relayed a message from the Speaker of the National Assembly to the House regarding the passage of the Election Laws (Amendment) (No.3) (National Assembly Bill No. 63 of 2015).

The Bill was read a first time in the Senate on 28th December, 2016 and, pursuant to Standing Order 130(1), it stood committed to the Standing Committee on Legal Affairs and Human Rights for consideration and public participation. Further, during the Special Sitting held on 28th December, 2016, and taking cognisance of the technological issues that may arise during the consideration of the Bill, the Speaker ruled that the Standing Committee on Information and Technology should join the Committee on Legal Affairs and Human Rights in the consideration of the Bill.

Mandate of the Standing Committee on Legal Affairs and Human Rights

The Standing Committee on Legal Affairs and Human Rights is established pursuant to the Senate Standing Order 208 and mandated to “*consider all matters related to constitutional affairs, the organization and administration of law and justice, elections, promotion of principles of leadership, ethics and integrity; and implementation of the provisions of the Constitution on human rights.*”

Mandate of the Standing Committee on Information and Technology

The Senate Standing Committee on Information and Technology (IT) was also constituted pursuant to the provisions of Senate Standing Order No.208 and is mandated, under the Second Schedule of the Senate Standing Orders, to “*consider all matters related to technology, engineering and electronic research, information broadcasting and Information Communications Technology development.*”

Mr. Speaker Sir,

The Committee on Justice and Legal Affairs, pursuant to Article 118 of the Constitution and Standing Order 130 (4), invited submissions from the public and stakeholders in an advertisement in the Daily Nation and Standard Newspapers dated 30th December, 2016 (**Annex 4**). The Committee on Legal Affairs and Human Rights together with the Committee on Information and Technology thereafter held public hearings and called for

submission of written memoranda from the public and stakeholders between 28th December, 2016 and 3rd January, 2017. The Committees received a total of fifty four (54) oral presentation and written memoranda from members of the public, the business community, the media, civil society, religious groups, political parties, county governments among other stakeholders on matters relating to the Election Laws (Amendment) (No.3) (National Assembly Bill No. 63 of 2015).

Acknowledgement

The Standing Committee on Legal Affairs and Human Rights and the Standing Committee on Information and Technology wishes to thank the Offices of the Speaker and the Clerk of the Senate for the support extended to it during the consideration of this critical Bill especially in the conduct of public hearings and preparation of this report.

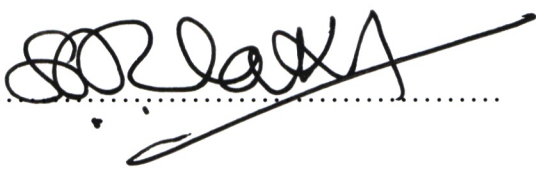
The Committees also wishes to extend its appreciation for the overwhelming attendance by the members of the public, institutions and organisations who appeared before the Committees or submitted Memoranda.

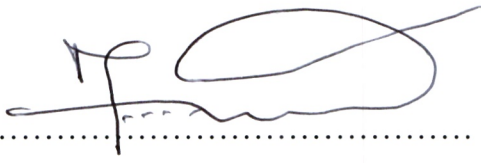
The Committees also acknowledges with gratitude the members of the public who have keenly followed the deliberations of the Senate on this important Bill and the media who ensured that the country was informed on the proceedings.

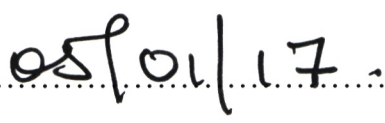
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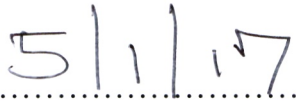
Mr. Speaker Sir,

It is now our pleasant duty, pursuant to Standing Order 201, to present the Report of the Standing Committee on Legal Affairs and Human Rights and the Standing Committee on Information and Technology on the consideration of the Election Laws (Amendment) (No.3) (National Assembly Bill No. 63 of 2015) and an appended Minority Report pursuant to Standing Order 203 (5).

Signed.....

Signed.....

Date.....

Date.....

SEN. AMOS WAKO, EGH, MP

SEN. MUTAHI KAGWE, MP

CHAIRPERSON

CHAIRPERSON

**STANDING COMMITTEE ON LEGAL
AFFAIRS AND HUMAN RIGHTS**

**STANDING COMMITTEE ON
INFORMATION AND
TECHNOLOGY**

Membership of the Standing Committee on Justice and Legal Affairs-

- | | | |
|-----------------------------------|-------------------------|---|
| Sen. Stephen Sang' | -Vice-Chairperson |  |
| Sen. Kembi Gitura | -Member |  |
| Sen. Kiraitu Murungi | -Member |  |
| Sen. Fatuma Dullo | -Member |  |
| Sen. Kipchumba Murkomen | -Member |  |
| Sen. Hassan Omar Hassan | -Member |  |
| Sen. Mutula Kilonzo Junior | -Member | |
| Sen. Judith Sijeny | -Member |  |

Membership of the Standing Committee on Information and Technology-

- | | | |
|-----------------------------------|-------------------------|--|
| Sen. Mutula Kilonzo Junior | -Vice-Chairperson | |
|-----------------------------------|-------------------------|--|

Sen. Boy Juma Boy -Member

Sen. Danson Mwazo -Member

Sen. Isaac Melly -Member

Sen. Daisy Kanainza Nyongesa -Member

Sen. Joy Gwendo -Member

Sen. Paul Njoroge Ben -Member

Sen. Aaron Cheruiyot -Member

CHAPTER ONE

INTRODUCTION

1.1 Background

1. The Election Laws (Amendment) (No.3) Bill (National Assembly Bills No. 63 of 2015) sponsored by Hon. Samuel Chepkong'a, MP was published on 27th November, 2015 and was first read in the National Assembly on 10th February, 2016 and passed on 22nd December, 2016.
2. It is noteworthy that the Election Laws (Amendment) (No.3) Bill (National Assembly Bills No. 63 of 2015) is as a result of two unrelated processes which sought to review the shortcomings of the current electoral laws. The process leading up to the Election Laws (Amendment) (No.3) Bill (National Assembly Bills No. 63 of 2015), commenced in 2014 and sought to address concerns raised after the 2013 elections. On the other hand, the Elections Laws (Amendment) Act, 2016 and the Elections Offences Act, 2016 which both came into force on 4th October, 2016 were the culmination of a negotiated process and wide-ranging stakeholder consultation of electoral reforms led by the Joint Parliamentary Committee on Matter Relating to the Independent Electoral and Boundaries Commission. It is worth noting that most of the amendments proposed in the Election Laws (Amendment) (No.3), 2015 (National Assembly Bills No. 63 of 2015) were considered by the Joint Parliamentary Committee on Matters Relating to the Independent Electoral and Boundaries Commission and passed under the Elections Laws (Amendment) Act, 2016. However, there are provisions in the proposed Elections (amendment) Bill, 2015 that were not addressed by the Elections Laws (Amendment) Act, 2016.
3. On 28th December, 2016, the Speaker of the Senate, Hon. Ekwee Ethuro communicated to the Senate a Message from the Speaker of the National Assembly, received on 23rd December, 2016 (**Annex 3**), regarding the passage of the Election Laws (Amendment) (No.3) Bill (National Assembly Bills No. 63 of 2015) as follows-

“PURSUANT to the provisions of Standing Orders 41 and 144 of the National Assembly Standing Orders, I hereby convey the following Message from the National Assembly –

***WHEREAS**, the Election Laws (Amendment) (No. 3) Bill (National Assembly Bill No. 63 of 2015) was published vide Kenya Gazette Supplement No. 189 of 27th November 2015 to give effect to Article 99 of the Constitution, amend the Elections Act, 2011, the Independent Electoral and Boundaries Commission Act, 2011 and the Election Campaign Financing Act, 2013 and to make other provisions relating to the electoral processes;*

***AND WHEREAS**, on Thursday, 22nd December 2016, the National Assembly considered and **passed** the said Bill **with amendments** and in the form attached hereto;*

***NOW THEREFORE**, in accordance with the provisions of Article 110(4) of the Constitution and Standing Order 142 of the National Assembly Standing Orders, I hereby refer the said Bill to the Senate for consideration.”*

4. After the Bill was read a first time in the Senate on 28th December, 2016, it stood committed, pursuant to Standing Order 130(1), to the Standing Committee on Legal Affairs and Human Rights for facilitation of public participation. Further, during the Special Sitting held on 28th December, 2016, consequent to the discussions in the House regarding the technical nature of the Bill, the Speaker ruled that the Standing Committee on Information and Technology be enjoined in the consideration of the Bill.
5. The Committee on Legal Affairs and Human Rights, pursuant to Article 118 of the Constitution and Standing Order 130 (4), invited submissions from the public and stakeholders in an advertisement in the Daily Nation and Standard Newspapers dated 30th December, 2016 (**Annex 4**). The Committee on Legal Affairs and Human Rights and the Committee on Information and Technology thereafter held public hearings and called for submission of written memoranda from the public and stakeholders between 28th December, 2016 and 3rd January, 2017.
6. The Committees received a total of fifty four (54) oral presentations and written memoranda from members of the public, the business community, civil society, religious groups, political parties, Kenya National Commission on Human Rights, county governments among other stakeholders on matters relation to the Election Laws (Amendment) (No.3) (National Assembly Bill No. 63 of 2015) attached at **Annex 5**.

1.2 Overview of the Bill

7. Election Laws (Amendment) (No.3) Bill (National Assembly Bills No. 63 of 2015) seeks 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 in 2013. The Bill proposes various amendments to the Elections Act, 2011, the Independent Electoral and Boundaries Bill, 2011 and the Elections Campaign Financing Act, 2013 as follows-

(1) Amendments to the Elections Act, 2011

Definition of the term “returning officer”

8. Clause 2 of the Bill seeks to amend the Elections Act by rectifying the definition of the term “returning” officer by providing that there is no returning officer for purposes of the referendum.

Registration of voters

9. 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

10. 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

11. 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

12. 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

13. 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 by the Speaker 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

14. 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.

15. 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

16. 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.

17. This clause further requires that an amendment of those rules should have effect ninety days after notification to the Registrar.

Submission of party lists

18. Clause 10 of the Bill seeks to amend 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 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

19. Clause 11 of the Bill proposes to amend section 30 of the Elections Act, 2011 to allow registered referendum committees to appoint one agent at each polling station.

Nomination of political party candidates

20. Clause 12 of the Bill seeks to amend section 31 of the Elections Act, 2011 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.

21. The provision further states that Parliament shall appropriate monies for the effective implementation of this section.

Approval of symbol for independent candidate

22. Clause 13 of the Bill seeks to amend section 32 of the Elections Act, 2011 to provide for the submission of 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

23. Clause 14 of the Bill seeks to amend section 33 of the Elections Act, 2011 to ensure that an independent candidate not only presents their name but also their symbols for purposes of nomination.

Nomination of party lists members

24. Clause 15 seeks to amend 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

25. Clause 16 of the Bill seeks to amend section 38A the Elections Act,2011 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

26. Clause 17 seeks to amend section 43 of the Elections Act, 2011 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

27. Clause 18 of the Bill seeks to amend section 44 of the Elections Act,2011 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

28. Clause 19 of the Bill seeks to amend the Elections Act, 2011 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

29. Clause 20 of the Bill seeks to amend section 46 of the Elections Act,2011 to require that a petition for recall should be accompanied by, among other particulars, thumb prints.

Dispute resolution by the Commission

30. Clause 24 of the Bill seeks to amend section 74 of the Elections Act, 2011 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

31. Clause 25 of the Bill 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.

Operation of declared result of issue submitted to referendum

32. Clause 26 of the Bill seeks to amend 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

33. Clause 27 of the Bill seeks to amend the Second Schedule of the Elections Act, 2011 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

34. 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

35. Clause 34 of the Bill seeks to suspend the operation of the Elections Campaign Financing Act, 2013 and to further provide that the Act shall come into force immediately after the general elections to be held in the year 2017.

36. Clause 35 of the Bill seeks to amend section 6 (5) of the Elections Campaign Financing Act by deleting the word “eight” appearing in paragraph (a) and substituting therefor the word “two” to reduce the period within which an authorised person is to be registered with the Commission for purposed of monitoring of campaign financing.

CHAPTER TWO

PUBLIC PARTICIPATION

2.1 Attendance by stakeholders

37. The Committees, under the auspices of the on Legal Affairs and Human Rights, pursuant to Article 118 of the Constitution and Standing Order 130 (4), invited submissions from stakeholders. The Committees received oral submissions and written memoranda from various stakeholders, attached at *Annex 5*. The Joint Sitting of the Committees of Legal Affairs and Human Rights and Information and Communication Technology received oral submissions and/or submitted written memoranda between 28th January, 2016 and 3rd January, 2017 from several key stakeholders including -

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
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

2.2 Submission Received by the two Committees

38. The issues raised by the public and stakeholders were as follows-

(1) Adoption of a Bi-Partisan Approach

39. The Independent Electoral and Boundaries Commission, through the Chief Executive Officer, Mr. Ezra Chiloba noted that it was important to resolve the issues raised through a bi-partisan approach and called for a bi-partisan spirit in the Senate when considering the Bill. Further, they were pleased to observe that the Senate was cognisant of the need for bi-partisanship and looked forward to resolutions that would meet the expectations of Kenyans.

(2) Clarification on Technology to be used in the 2017 General Elections

40. The Independent Electoral and Boundaries Commission stated that it planned to deploy an integrated electronic system that consisted of voter registration, voter identification and results transmission. In this integrated system, there was no electronic voting. The Commission clarified that by voting, it meant “*the act of casting a ballot.*”

41. The Commission further informed the Committee that it had already developed the specifications and advertised the tender for the supply of what has been christened, the Kenya Integrated Election Management System (KIEMS). By doing so, it planned for 100% success in deployment and not 100% failure as some stakeholders have indicated.

42. Several stakeholders observed that there were misconceptions by the public of the type of technology that will be used in the electoral processes in the 2017 General Elections. The stakeholders noted that the technology supported under the law will be limited to registration, identification and transmission of results while the actual voting process and counting will still be manual. Further, the amendments proposed under proposed section 44A of the Elections Act, 2011 refer to electronic identification and transmission of results.

(3) Use of Biometrics in the Identification of Voters

43. The Independent Electoral and Boundaries Commission proposed that Section 10 of the Elections Act, 2011 that 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.

44. The Commission observed that Persons are registered using the National Identity Card and/or Valid Passport and their biometric data captured. 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. 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. Further, 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.

45. The Commission proposes to delete the words biometric data 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.

46. It was noted that 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.

(4) Use of a Complementary Mechanism under Clause 19 of the Election Laws (Amendment) (No.3) Bill, 2015

47. Stakeholders raised several issues with regard to the amendment to Clause 19 of the Election Laws (Amendment) (No.3) Bill, 2015 which seeks to introduce a new clause 44A of the Election Laws Act, 2011 to introduce 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 Independent Electoral and Boundaries Commission complied with Article 38 of the Constitution.

(a) Delete proposed Clause 44A

48. The Law Society of Kenya submitted that the backup system contemplated in the draft Regulations on Election Technology by the Independent Electoral and

Boundaries Commission is adequate as the issue is adequately addressed in clause 44 (5), (6) and (8) and the draft Elections (Technology) Regulations, 2016.

(b) Lack of a Clear Definition of the Term “Complementary” as Used Under Section 44A

49. The National Chamber of Commerce and Industry, the Law Society of Kenya, the Council of Governors, *Bunge la Wananchi*, the Coalition of Reform and Democracy among other stakeholders were of the view that the clause is not specific as to what the ‘complementary mechanism’ meant.
50. The National Chamber of Commerce and Industry was of the view that the proposed amendment under Section 44A to introduce a complementary mechanism for the identification of voters and transmission of results has created an atmosphere of mistrust. Firstly, because of lack of a clear definition of the term “complementarity” and secondly, because the amendment does not provide for the procedure and the circumstances under which the complementary system may be invoked. Further, the suggested system must be clearly defined in law as a result of public participation and political consensus.
51. Similarly, the Law Society of Kenya, through its President, observed that the Bill does not define the term “complementary”. He submitted that the term “complementary” is defined in the Oxford Dictionary as “*combining in such a way as to enhance or emphasize the qualities of each other*” while the Merriam-Webster Dictionary defines the term as “*servicing to fill out or complete*” or “*mutually supplying each other’s lack*”. He further submitted that in view of these definitions, introducing the term ‘complementary mechanism’ without properly defining it would lead to suspicion as to what it means and whether it can run parallel to the technology provided for under section 44 of the Elections Act, 2011. He was therefore opposed to the introduction of “*an undefined mechanism other than the integrated electronic system stipulated by section 44 of the Act to run concurrently with the said system with the discretion left to the Commission as to what this mechanism is and to when it is deployed*”. On the question of whether the ambiguity could be cured through regulations, he submitted that the question of back-up should be addressed substantively in a manner similar to the details in section 44 of the Elections Act.

52. The Council of Governors proposed that Legislation should specify what this complimentary mechanism is and that the complimentary mechanism is not a manual system. It can be an electronically supporting system- for example, satellite transmitter as standby alternative or as was in Nigeria where the BVR was supplemented by chip cards. Similarly, *Bunge la Wananchi* proposed that clause 44A should be amended to provide a specific definition on what a complementary system is.

(c) Use of the term 'notwithstanding' in the proposed section 44A (Clause 19)

53. The Council of Governors, Sen. James Orengo and the Civil Society Network disagreed with the use of the term “notwithstanding” used in Clause 19 of the Bill which seeks to amend the proposed clause 44A of the Elections Act, 2011. Sen. James Orengo noted that the term was mischievous. Similarly, the Civil Society Network submitted that the use of the term “notwithstanding” was nugatory and waters down the provisions while the Council of Governors noted that in essence, it defeats sections 39 and 44 of the Elections Act, 2011.

54. The Council of Governors recommended that the word ‘notwithstanding’ should be deleted and the legislation should specify the circumstances when and at whose instance the complementary system is to be used while Sen.Orengo proposed that the term “subject to” may be used instead.

(d) Definition of Circumstances which may trigger the invoking of a Complementary System

55. The Independent Electoral and Boundaries Commission, the Council of Governors, the Attorney General, the Kenya National Chamber of Commerce and Industry, *Mkenya Daima* among others noted that there was need to identify circumstances in which the complimentary mechanism could be triggered or invoked.

56. The Independent Electoral and Boundaries Commission was of the view that 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. 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?

57. The Independent Electoral and Boundaries Commission made reference to the Administration and Cost of Elections (ACE) Network as follows-

“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.”

58. The Council of Governors observed that presently, there is no framework in the legislation indicating the circumstances when the complementary mechanism will be resorted to and at the instance of whose decision. In this regard, the Council of Governors recommended that the 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.

59. The Attorney General noted that the fallibility 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; and
- (e) Inadequate infrastructural capacity to support electronic voting.

60. *Mkenya Daima* noted that while it was not possible to legislate on all aspects of technology failure, there was need to set some rules on when to revert to the back-up system and that there was need to clarify that the electronic system was the principal system and also to stipulate conditions upon which it would be necessary to revert to the back-up system. The process should clearly stipulate when a switch ought to be made, by whom, and the steps to follow. Further, that a full proof electronic voter identification and transmission system was ideal. However, in the unlikely event of failure of the electronic voter identification and transmission system, Parliament should provide for alternative pre-agreed workable and acceptable process for the IEBC to follow.

61. Similarly, the Kenyan Nation Chamber of Commerce and Industry was of the view that any system including the integrated electronic systems is vulnerable to unforeseen circumstances such as poor network coverage, criminal attacks, terrorism, cybercrime, acts of God among others. In the unfortunate event that the above state risks come into play, it would be necessary an 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 systems fails. Further, the Chamber held the position that stakeholders should agree on the procedure for invoking the complementary system.

(e) Manual Complementary System

62. Several stakeholders proposed that a manual complementary system may be used a contingency plan in the event that technology fails. The Ministry of Information and Communication Technology, the Jubilee Party, Rev. Peter Kivuvi Makau, the Attorney General among other stakeholders proposed a manual complementary system based on the fact that voting is still a manual process in Kenya at present..

63. The Attorney General submitted that 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

64. Further, the Attorney General held the position that whereas 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, its application is predicated on the fulfillment of the conditions prescribed by the law and therefore in his considered view, the scheme of electoral laws and the regulations does not envisage an electoral process conducted solely by electronic means. He further submitted that the proposed amendment to the Elections Act, in his 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 Hon. **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 voters 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;*

65. The Attorney General held the view that 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 contents Philippines in cases of **GR Number 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”

66. In this regard, the Attorney General held the position that 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.
67. Similarly, the Ministry of Information and Technology proposed that there should be a manual backup to electronic system at the next general election. The manual back up is necessary because even if the electronic system was 99.9% successful, 25,000 registered voters would be disenfranchised. Further, the tender specification needs to be reviewed before it is closed on 9th January, 2017 as it calls for total electronic Information Technology based solutions for voter registration, verification and results transmission. He clarified that the review of the tender specifications would be to include the manual option. The Ministry also proposed that human factors and risks should be mitigated. This would include device risks such as data errors, equipment loss, equipment malfunction and uncharged devices.
68. While recounting his experience, the Rev. Peter Kivuvi Makau noted that failure of technology especially in arid areas necessitates the need to have a manual system available. The reverend reiterated the need for professionalism, ethics and integrity in electoral processes arguing that there still exists good people in Kenya who can do what is right.
69. The Jubilee Party submitted that the amendments to section 10 of the Elections Act, 2011 requiring identification of voters on polling day to be exclusively electronic are inappropriate and unconstitutional , in that, this requirement whereas it is well-meaning, disenfranchises eligible voters. The Jubilee party proposed that section 10 of the Elections Act, 2011 be amended to make manual identification available as a back up to the electronic voter identification on polling day without any need for any notice to be published in advance by the Independent Electoral and Boundaries Commission. 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. The Jubilee Party further proposed that technology should be rolled back to the point where it is no longer a

hindrance to a voters constitutional right to vote and provided a examples where technology had failed.

70. The Civil Society Reference Group called upon the Senate to “demand that Biometric Voter Registration, Electronic Voter Identification and Electronic Transmission of Results be retained as the primary mechanism capable of guaranteeing fidelity to the high threshold of electoral integrity as set out in Article 81 of the Constitution. They further called upon the Senate to note that while there was need for a manual voter register, the manner in which this is resorted to was necessary to be clearly stipulated ensure that it is not exploited to the advantage of any side.
71. *Mkenya Daima* submitted that in the corporate sector, the back-up systems which are employed include mirroring of the parent system at an off-site location. However, they noted that even in the corporate sector, manual systems are sometimes employed. They therefore submitted that the critical issue in respect of employment of an electoral system and the necessary back-up system would be the need to create trust. On the question of how to create trust in the systems, they submitted that a pre-agreed process would ensure confidence and transparency in the system.
72. The National Council for Persons with Disability noted that there are persons with disabilities, such as fire victims, who are incapable of using all BVR methods. As such it would be necessary to have manual system in case their members are not able to use the BVR and EVID system.

(f) Electronic Complementary System

73. On the contrary, the Law Society of Kenya, the Civil Society Network, the Kenya National Commission on Human Rights, *Bunge la Wananchi* and the Council of Governors, submitted that the complementary system ought not be manual but electronic. The Council of Governors was of the view that there is a general fear that there will be a failure in technology but it is concerned that technology cannot fail unless it is preconditioned to fail or it is recklessly used. The Council of Governors recommended that there should be a mechanism of addressing the unforeseeable failures in specific technology (for example, EVID) and this mechanism should primarily be an electronic alternative.

74. The Coalition for Reform and Democracy (CORD) was of the view that the physical print-out should not be used because it presents opportunity for voting on behalf of persons in the register who did not present themselves to the polling stations. The CORD Coalition recommended that the amendment proposed under clause 19 to 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. Further, the CORD Coalition proposed the following steps to mitigate failure-

- (1) Redundant power supply(extra batteries , generators and solar)
- (2) Proper software testing an running with technical support systems in place
- (3) Higher specifications can reduce error rates to significant levels

75. The CORD Coalition further proposed the option of an electronic card be issue to voters at the time of registration of the elector. The cards would capture voter details of the elector and the card readers would be deployed on Election Day to assist with the identification of the elector at that polling station in the event the electronic device fails. The card reader should be integrated with the biometric registers and voter identification devices.

76. The CORD Coalition further held the position that where technology has totally failed despite digital backups, the Independent Electoral and Boundaries Commission should consider postponing the election in those specific areas as per section 55B (1) (b) of the Election Laws Act, 2011 which allows the Commission to postpone elections as a result of a natural disaster or an emergency such as an unexpected technology failure.

(g) Hybrid of Electronic and Manual Systems

77. The Independent Electoral and Boundaries Commission noted that most stakeholders were 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 Commission proposed the Ghanaian model. In its submissions, the Commission made reference to the Ghanaian Public Elections Regulations, 2016 which provides as follows-

32. 1) Identification and verification of voters

(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.

78. Essentially, the Independent Electoral and Boundaries Commission noted that Ghana's Electoral Commission stated that voters in the 2016 elections can verify their eligibility both manually and biometrically to prevent the high numbers of people disenfranchised on voting day¹.

79. The Kenya Diaspora Alliance was of the view that there can be more than one layer of back-up and that the more they are, the greater the reliability. However, no single system (even with a cascade of back-ups) is 100% reliable. The Alliance noted that manual back-ups are needed, but are not enough of themselves. Further, no single country that we are aware of, whether Ghana, The Gambia, USA, UK, doesn't have

¹ Refer to Memorandum by IEBC at *Annex 5* <http://3news.com/election-2016-voters-can-verify-both-manually-and-biometrically-ec/>

a manual back-up, should the electronic version/s fail. However, there must be clearly defined, credible, transparent and documented processes to convert from an electronic system to a manual back-up, in the unlikely case it is necessary.

(h) Verification of the Identified Complementary System

80. The Kenya National Chamber of Commerce and Industry was of the view that stakeholders should agree on a mode of verification of the identified Complementary System. The Chamber proposed 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. 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.

(i) Timelines within which Verification of the identified Complementary System should be implemented

81. The Kenya National Chamber of Commerce Industry noted that there was need to agree on reasonable timelines within which verification of the identification complementary systems can be undertaken.

(j) Use of a Complementary Mechanism for the Transmission of Results

82. With regard to results transmission, Attorney General, the Ministry of Information and Communication Technology, Jubilee, Christian Churches, Communications Authority Coalition proposed the manual back up is necessary because electronic systems fail. The backup would not be replacing the electronic system but that it provides an alternative should the electronic system fail.

83. The National Chamber for Commerce and Industry was of the view that without a doubt, electronic transmission of results is the fastest, most convenient and most reliable method of communicating results from one point to another. They submitted that 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. They submitted that they 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.

84. The Independent Electoral and Boundaries Commission noted that 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.

85. The Commission noted that 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. 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. Further, it recommended that 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.

86. The CORD Coalition held the position that the declaration of electronic results should be devolved to constituencies and polling stations. The media, observers and party agents should be able to publicise the results declared at the polling stations and constituencies. This avoids the collapse of a centralised national tallying centre.

87. The Jubilee Party proposed that the deployment of technology is dependent on availability of a certain quality of mobile network which is not available throughout the country. To create statutory dependency for the transmission of presidential results to the current quality of mobile network is unwise and manifestly unconstitutional.

(5) Network Coverage and Connectivity

88. The Independent Electoral and Boundaries Commission noted that 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 far away from their polling

stations to transmit results. In this regard, it recommended that the Communication Authority of the Kenya to provide data and briefing to Parliament on the coverage and suggest recommendations aimed at increasing network.

89. The Ministry of Information and Communication Technology was of the view that the Integrated Electoral Management System is complex and involves many organisations as therefore has lower reliability. Further, the Independent Electoral and Boundaries Commission has no network of its own and has to procure from third parties thus limiting control and creating multiple vulnerabilities. He also noted that there was a risk of system configuration errors. He also submitted that 22% of the Kenyan population is not covered by 3G network.
90. However, the Kenya Diaspora Alliance disagreed with the Ministry of Information and Communication Technology to the Committee to a large extent stating that it did not see why 3G is a major issue in the 2 segments (of voter identification and results transmission). If it is Internet/data transmission that is needed, even 2.5G (GPRS) is good enough; if it is SMS, then even 1G is adequate.

(6) Definition of the term “biometric”

91. The Independent Electoral and Boundaries Commission noted that Clause 2 of the Bill seeks to amend the Section 2 of the Elections Act, 2011. Section 2(e) of the Election Laws (Amendment) Act, 2016 inserted the definition of the “biometric”, however, it does not include “facial” features. The current BVR system captures only “facial” and “finger prints”. They therefore proposed that for purposes of standardization of the register of voters, it is important to have the definition of biometrics including facial features. The IEBC further indicated that this proposal had been made to the National Assembly but it has not been taken on board.
92. The Independent Electoral and Boundaries Commission proposed to 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.

(7) Verification of Biometric Data

93. The Independent Electoral and Boundaries Commission noted that Clause 5 of the Bill sought to amend section 6A (1) of the Election Laws Act, 2011 to provide 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. The Commission noted that the verification of biometric data assumes that the Independent Electoral and Boundaries Commission shall avail verification kits at polling stations across the country 120 days before the election, that is, April 10, 2017. The IEBC projection shows that the new system might not be fully in place by April 10, 2017.

94. The Independent Electoral and Boundaries Commission 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? The Commission also stated that past 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.

95. Based on the foregoing, the Commission recommended the following amendments-

(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’. This approach will provide Kenyans alternative mechanisms such as SMS and web portal to confirm their registration details.

(3) 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.

96. The Commission recommended that Section 8A(3) be amended 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.

97. The Council of Governors submitted that the ninety days (90) period should be reinstated because the sixty (60) day period does not provide adequate time for rectification of errors.

(8) Registration and Voting of Persons with Disabilities

Several stakeholders including the Kenyan National Commission on Human Rights among other raised concern about the right to vote for persons with disabilities who might not be catered for by the Voter Identification System.

(9) Verification of the Voter Register by an Independent Firm

98. The Independent Electoral and Boundaries Commission noted that Section 8A(30) of the Elections Act, 2011 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

99. The Independent Electoral and Boundaries Commission raised concern that the 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. Further, 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 law does not make reference to the procurement law.

100. The Commission therefore recommended that Section 8A(3) be amended 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.

(10) Inspection of the Register of Voters

101. The Council of Governors noted that Clause 4 deletes ‘polling station’ and ‘Biometric data’. It also limits the period for inspection of the register to 30 days and gives the Commission further powers to make a determination on the timelines. The Council of Governors 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 (hence eligibility to vote) and by limiting the time within which members of the public can access and inspect the register.
102. The Council of Governors therefore proposed that 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 basis of biometric data provided during registration.
103. With regard to the period of verification of the Register of Voters, the Council of Governor noted that the new amendment under clause 5 reduces the period to sixty days .The Council was of the view that 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. Therefore the ninety day period should be reinstated.

(11) Number of Voters per Polling Station

104. The Independent Electoral and Boundaries Commission noted that 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.
105. The Commission submitted that it 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. The number of polling stations will increase by almost 100% if the Commission achieves its targeted 22 million voters. Current projection is at 57,331 polling stations. There are certain voting areas that do not have space for expansion to accommodate additional polling stations. This is based on Commissions own analysis of the facilities in over 200 polling stations which had more than 5,000 voters. The Commission noted that the Bill has proposed to revise the law to ensure that the number of voters per polling station does not exceed 700.

(12) Procurement of Technology

106. The Independent Electoral and Boundaries Commission noted that pursuant to the provisions of section 44(4) of the Elections Act, 2011, the Public Procurement and Assets Disposal Act 2015 governs all procurement in the public sector and that the new law does not make reference to the procurement law. Further, the timelines set out under the new law are inconsistent with those set out in PPAD Act of 2015. 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.

107. The Commission proposed to 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.

108. The Commission noted that the 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.

109. Dr. Shailesh Patel and Mr. Okiya Omtata Okoiti both alleged that there were irregularities within the procurement processes by the Independent Electoral and Boundaries Commission processes and specifically, that the tendering process was designed to favour certain parties.

(13) Definition of the term “Nomination Day”

110. The Independent Electoral and Boundaries Commission noted that Section 13(1) of the Elections Act , 2011 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. This new section may be 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.

111. The Commission observed that previously, party primaries would end forty five (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. Further, section 74 of the Elections Act, 2011 gave 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. Further the National Assembly did not take IEBC proposal into consideration.

112. Based on the foregoing, the Commission recommended that Section 2 (c) be amended 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.

(14) Conduct and Supervision of Nominations by the Independent Electoral and Boundaries Commission

113. The Independent Electoral and Boundaries Commission noted that a 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. The Commission observed that political parties are given the discretion to ask the Commission to conduct party primaries. If the Commission accedes to party requests, then the question of financing must be addressed. In addition, the Commission has no discretion to reject such requests.

114. Based on the foregoing, the Commission recommended that Section 31 be amended 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.*

115. It is noted that the National Assembly has now provided that Government shall fund party primaries if more than two political parties request IEBC and that the proposal to allow IEBC discretion was not taken on board.

116. The Council of Governors was 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 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. The Council recommended that the provisions should be deleted.

(15) Educational Qualifications of Members of Parliament and Members of County Assemblies

117. Several stakeholders disagreed with the decision of the National Assembly to suspend the provisions regarding educational qualifications for the Members of Parliament and Members of County Assembly. The Council of Governors and the Kenyan National Commission on Human Rights held the position that there was no justification for the delay of invoking requirements on academic qualifications and that the requirements should be applied in the next elections. The Council of Governors averred that 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.
118. Similarly, the Rev.Peter Kikuvi Makau was of the view that educational standards for Members of Parliament and Members of County Assembly we must be established in law.
119. The Kenya National Commission on Human proposed to have a diploma for MCAs and a degree for MPs, Senators and Governors.
120. Similarly, the Kenya Diaspora Alliance KDA held the position that the degree and diploma requirements for MPs and MCAs respectively are reasonable and justifiable requirements that should not be deleted from the Bill. They should be retained even if to be implemented only after the 2017 elections. The Alliance stated that they did not believe non-degree holders can effectively perform the function of a legislator.
121. Mr.Okiya Omtata Okoiti proposed that considering that the law gives universal suffrage to any person over 18 years old, as such the law can only set educational standards that are attainable by an 18 year old which is the Kenya Certificate of Primary Education (KCPE) as the standard requirement for electoral offices and responsibilities.

122. On the other hand, a number of stakeholders including Mr.Gwada S. Ogot, Ms.Nazlin Omar, the Civil Society Network, submitted that the law should not set any educational requirements because it does not determine a good leader. They cited many renowned world leaders who had little or no formal academic qualifications.
123. Mr.Gwada S. Ogot submitted to the Committee his views that a university degree principally indicates an individual's capacity to consume and memorise processed knowledge and that it is not a measure of productive competence. It provokes and justifies an inordinate sense of entitlement. He noted that Ernst & Young, one of UKs biggest recruiters removed the degree qualification from its entry criteria in August 2015 and held the position that there was no evidence that the success at university correlates with achievement later in life and it is a grossly overrated sign of intellectual proficiency just as university is not the only place where knowledge and the knowledgeable persons are found. Mr.Ogot further held the position that the inequalities and failures in Kenyas education system and the current demand for degrees for jobs are behind the mushrooming of universities and mediocre training. He also pointed out that degrees are awarded in colonial languages and directly stifles local languages. In his conclusion, he stated that no law or lawman can purport to quantify the elasticity of human ability or potential through academic qualifications.

(16) Regulations

124. The Independent Electoral and Boundaries Commission noted that 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 to be made under subsection (4) within a period of thirty days from the date of commencement of this section. The Commission does not have comprehensive regulations on the use of ICT in elections. This is a fairly technical area that requires adequate professional in-put. The time allocated may not be adequate to provide quality input to the Regulations including consultation with stakeholders. Further, parliament has not set timelines to approve the regulation which may imply non-operationalisation of the Act.
125. The Commission proposed that Section 44(6) be amended 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 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.

126. Also with regard to regulation, the Council of Governors disagreed with proposals by the Attorney General that proposes that these amendments should be set out in 'regulations,' which regulations can be a subject of stakeholder consultations. The Council of Governors was of the view that the procedural aspects of the complementary mechanism should not be set out in subsidiary legislation (regulations) but must be in the substantive law

(17) Lack of involvement of the Senate in the Delineation of Electoral Boundaries

127. The Council of Governors submitted that Clause 32 of the proposed amendments sets out a procedure for delineation of electoral Boundaries. They noted that although the amendment affects devolution, there is no involvement of the Senate in the procedure for approval for reviewing the recommendations of the Commission on electoral boundaries. The Council held the position that failure to involve the Senate in the process is unconstitutional for the following reasons:

- (1) 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;
- (2) The provisions are unconstitutional to the extent that they disregard the provisions of article 96 (1) which bestows upon Senate the responsibility of representing counties and their interests.
- (3) The provision would also be unconstitutional as it appropriates legislative powers of the Senate donated by section 96 (2) towards legislation on matters concerning counties.

128. Further, the Council of Governors, noted 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.

(18) Voting of Prisoners

129. The Council of Governors was 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.

(19) Run-off Procedures

130. The Council of Governors noted that there was 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 avert a crisis in the event of a run-off.

(20) Capping of Campaign Finance

131. Kenya Diaspora Alliance was on the view that a major thing that robs Kenya of good/better leaders it deserves is over-glorification of money, often ill-gotten, in the electoral process. The Alliance therefore supported, in principal, the capping of campaign finance even for the 2017 elections, and ensuring full compliance and enforcement. The Alliance therefore supported the amendment that seeks to delay effective date of this law to after the elections. However, they noted that the thresholds currently in the Bill are artificially too high for the ordinary Kenyan who may want to run for office and supported much lower limits, informed and backed by scientific, empirical evidence – not arbitrary..

CHAPTER THREE

COMMITTEE OBSERVATIONS AND RECOMMENDATIONS

132. The Committee on Legal Affairs and Human Rights and the Committee on Information and Technology made the observations and recommendations based on the deliberations of the Bill and stakeholder input. The Committees reached consensus on twenty six (26) clauses of the Bill. There was no consensus on nine (9) clauses of the Bill. Consequently, the Committees voted on the contentious issues which were carried by the majority.

(1) Amendment to Clean up Clause 2

133. Clause 2 of the Bill seeks to amend Section 2 of the Elections Act, 2011 by deleting the words “or a referendum” appearing in the definition of “returning officer.”

Recommendation

134. The Committee reached consensus on Clause 2 of the Bill and proposed to approve this amendment.

(2) Registration of voters

135. 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.

Recommendation

136. The Committee reached consensus on Clause 3 of the Bill and proposed to approve this amendment.

(3) Inspection of the Register of Voters

137. Clause 4 of the Bill seeks to amend section 6 of the Elections Act by 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 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.

Recommendation

138. The Committee did not reach a consensus on the clause and took a vote. On voting, by a majority of ten (10) against six (6), clause 4 was carried.

(4) Verification of biometric data

139. 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.

Recommendation

140. The Committee did not reach a consensus on the clause and took a vote. On voting, by a majority of ten (10) against six (6), clause 5 was carried.

(5) Nomination of candidates by a Political Party

141. Clause 6 of the Bill seeks to amend section 13 of the Elections Act, 2011 by 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. Further, it introduces 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 amending the period within which the Commission would require parties to nominate their candidates for any other election

Recommendation

142. The Committee did not reach a consensus on the clause and took a vote. On voting, by a majority of ten (10) against six (6), clause 6 was carried.

(6) Initiation of Election of Members of Parliament

143. 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.

Recommendation

144. The Committee did not reach a consensus on the clause and took a vote. On voting, by a majority of ten (10) against six (6), clause 7 was carried.

(7) Qualifications for Nomination of Candidates

145. 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.

Recommendation

146. The Committee reached consensus on Clause 8 of the Bill and recommended that the new requirements for educational qualifications should be suspended and would apply to elections held after the 2017 General Elections. The Committee reached consensus on Clause 8 of the Bill and approved the amendment.

(8) Submission of Party Nomination Rules

147. 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.

Recommendation

148. The Committee did not reach a consensus on the clause and took a vote. On voting, by a majority of ten (10) against six (6), clause 9 was carried

(9) Submission of Party Lists

149. Clause 10 of the Bill seeks to amend 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 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.

Recommendation

150. The Committee did not reach a consensus on the clause and took a vote. On voting, by a majority of ten (10) against six (6), clause 10 was carried.

(10) Appointment of Agents

151. Clause 11 of the Bill proposes to amend section 30 of the Elections Act, 2011 to allow registered referendum committees to appoint one agent at each polling station.

Recommendation

(10) Appointment of Agents

151. Clause 11 of the Bill proposes to amend section 30 of the Elections Act, 2011 to allow registered referendum committees to appoint one agent at each polling station.

Recommendation

152. The Committee reached consensus on clause 11 of the Bill and proposed to approve this amendment.

(11) Nomination of Political Party Candidates

153. Clause 12 of the Bill seeks to amend section 31 of the Elections Act, 2011 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.

Recommendation

154. The Committee did not reach a consensus on the clause and took a vote. On voting, by a majority of ten (10) against six (6), clause 12 was carried

(12) Approval of Symbol for Independent Candidate

155. Clause 13 of the Bill seeks to amend section 32 of the Elections Act, 2011 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.

Recommendation

156. The Committee reached consensus on Clause 13 of the Bill and proposed to approve this amendment.

(13) Nomination of Independent Candidates

157. Clause 14 of the Bill seeks to amend 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.

Recommendation

158. The Committee reached consensus on Clause 14 of the Bill and proposed to approve this amendment.

(14) Nomination of Party Lists Members

159. Clause 15 seeks to amend 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.

Recommendation

160. The Committee reached consensus on Clause 15 of the Bill and proposed to approve this amendment.

(15) Numbers of Voters per Polling Station

161. Clause 16 of the Bill seeks to amend section 38A the Elections Act,2011 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).

Recommendation

162. The Committee did not reach a consensus on the clause and took a vote. On voting, by a majority of ten (10) against six (6), clause 16 was carried.

(16) Participation in Elections by Public Officers

163. Clause 17 seeks to amend section 43 of the Elections Act, 2011 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.

Recommendation

164. The Committee reached consensus on Clause 17 of the Bill and proposed to approve this amendment.

(17) Use of Technology in the 2017 General Elections

165. Clause 18 of the Bill seeks to amend section 44 of the Elections Act,2011 by 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 (8) months before such elections to at least one hundred and twenty (120) days before such elections;

and 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 (120) days before such elections.

166. During deliberations, the Committees considered several options with a view to amending clauses 18 and 19 of the Bill. Some of the options considered were

- (1) That clause 18 of the Bill be amended by providing for an electronic backup system for identification of voters during an election or a referendum. Further, that if the electronic mechanism fails, the presiding officer at a polling station in consultation with presiding officers and party agents would use a verified printed version of the electronic register for the identification of voters. The proposal also required that conditions and circumstances under which the printed version of the register would be reverted to be provided for in the regulations. The proposal meant that clause 19 would be deleted.
- (2) That the current new proposed clause 44A be amended to provide for an electronic backup system for identification of voters during an election or a referendum. Further, that if the electronic mechanism fails, the presiding officer at a polling station in consultation with presiding officers and party agents would use a verified printed version of the electronic register for the identification of voters. The proposal also required that conditions and circumstances under which the printed version of the register would be reverted to be provided for in the regulations. The proposal meant that clause 19 would be deleted.

Recommendation

160. The Committee did not reach a consensus on the clause and took a vote. On voting, by a majority of ten (10) against six (6), clause 18 was carried.

(18) Complementary mechanism for identification of voters.

167. Clause 19 of the Bill seeks to amend the Elections Act, 2011 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.

168. The Committees made the following observations -

- (a) The Committees noted that there was need to clarify to the public that the technology that is supported by law is Biometric Voter Registration (BVR), Electronic Voter Identification Devices (EVID) and Electronic Transmission of Results (RTS) and that the actual casting of the ballot and the counting of votes remains manual. The contention is therefore on the technology to be used for the identification of voters at the polling station on polling day as well as transmission of results.
- (b) There was consensus that the use of technology in elections should be used in the 2017 General Elections and that a backup mechanism would only be triggered where there was a failure in technology in exceptional cases. However, the Committee observed that there was need to define the type of backup system that would be used noting that most stakeholders submissions supported the need for a backup system but differed on the type of backup system to be deployed which could be manual, electronic, a hybrid, or a layered system.
- (c) There is need to clearly define the circumstances which may trigger the use of a backup mechanisms.
- (d) Establishment of a multi-layered system whereby the primary electoral system should be electronic and the back-up system should also be electronic and only in exceptional circumstances could the manual register of the verified electronic copy be used.
- (e) Section 44A may be unnecessary because it is catered for under section 44 of the Elections Act, 2011 and the regulations should be anchored in section 44 of the Elections Act, 2011. It was observed that the proposed new 44A be deleted and add a new section on exceptions for persons with disabilities and those who cannot be identified via biometric voter identification
- (f) It was proposed that the proposed clause 44A to be subject to section 44(5) on the regulations. Additionally, that the use of the word “notwithstanding” denoted the creation of a parallel system and proposes that it should be replaced by “subject to”.
- (g) The term “complementary” should not refer to the primary mechanism but a fall-back plan.
- (h) Regulations contemplated under section 44 of the Elections Act should be considered and approved by both houses of Parliament
- (i) Clause 25 of the of the draft Technology Regulations caters for electronic backup

Recommendation

169. The Committees could not reach a consensus on clause 18 and 19 of the Bill. The Committee did not reach a consensus on the clause and took a vote. On voting, by a majority of ten (10) against six (6), clause 19 was carried.

(19) Petition for Recall

170. Clause 20 of the Bill seeks to amend section 46 of the Elections Act, 2011 to require that a petition for recall should be accompanied by, among other particulars, thumb prints.

Recommendation

171. The Committee reached consensus on clause 20 of the Bill and proposed to approve this amendment.

(20) Dispute resolution by the Commission

172. Clause 24 of the Bill seeks to amend section 74 of the Elections Act, 2011 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).

Recommendation

173. The Committee did not reach a consensus on the clause and took a vote. On voting, by a majority of ten (10) against six (6), clause 24 was carried.

(21) Certificate of Court as to Validity of Election

174. Clause 25 of the Bill 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.

Recommendation

175. The Committee reached consensus on Clause 25 of the Bill and proposed to approve this amendment.

(22) Operation of Declared Result of Issue Submitted to Referendum

176. Clause 26 of the Bill seeks to amend 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.

Recommendation

177. The Committee reached consensus on Clause 26 of the Bill and proposed to delete this amendment.

(23) Code of conduct

178. Clause 27 of the Bill seeks to amend the Second Schedule of the Elections Act, 2011 to clarify that the Electoral code of conduct is applicable to both general and by-elections.

Recommendation

179. The Committee reached consensus on Clause 27 of the Bill and proposed to approve this amendment.

(24) Submission of Annual Report

180. Clause 30 of the Bill seeks to amend section 24 of the Independent Electoral and Boundaries Commission is transitional provision.

Recommendation

181. The Committee did not reach a consensus on the clause and took a vote. On voting, by a majority of ten (10) against six (6), clause 30 was carried.

(25) Role of the Senate in the Delimitation of Boundaries

182. Clause 32 of the Bill does not include the Senate in the approval of the recommendation of the Commission with regard to the delimitation of boundaries.

Recommendation

183. The Committee did not reach a consensus on the clause and took a vote. On voting, by a majority of ten (10) against six (6), clause 32 was carried.

(26) Amendments to the Elections Campaign Financing Act, 2013

184. 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.

Recommendation

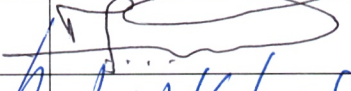
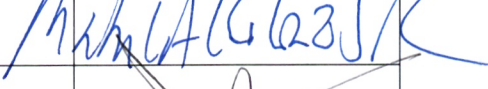

185. The Committee reached consensus on Clause 34 of the Bill and proposed to approve this amendment.

ADOPTION OF REPORT THE STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS AND THE STANDING COMMITTEE ON INFORMATION AND TECHNOLOGY ON THE ELECTION LAWS (AMENDMENT) (NO.3) BILL (NATIONAL ASSEMBLY BILLS NO. 63 OF 2015)

1. STANDING COMMITTEE ON LEGAL AFFAIRS & HUMAN RIGHTS

NAME	DESIGNATION	SIGNATURE
Sen. Amos Wako	Chairperson	
Sen. Stephen Sang	Vice Chairperson	
Sen. Kembi Gitura	Member	
Sen. Kipchumba Murkomen	Member	
Sen. Kiraitu Murungi	Member	
Sen. Fatuma Dullo	Member	
Sen. Hassan Omar	Member	
Sen. Judith Sijeny	Member	

2. STANDING COMMITTEE ON INFORMATION & TECHNOLOGY

NAME	DESIGNATION	SIGNATURE
Sen. Mutahi Kagwe	Chairperson	
Sen. Mutula Kilonzo Jr	Vice Chairperson	
Sen. Boy Juma Boy	Member	
Sen. Paul Njoroge	Member	
Sen. Isaac Melly	Member	
Sen. Daisy Kanainza	Member	
Sen. Aaron Cheruiyot	Member	
Sen. Joy Gwendu	Member	
Sen. Dan Mwazo	Member	

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ANNEX 1

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

REPUBLIC OF KENYA



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 MINORITY REPORT ON THE ELECTION LAWS (AMENDMENT) (NO. 3)
BILL, 2015 (NATIONAL ASSEMBLY BILL NO. 63 OF 2015)**

5th January, 2017

1.0 INTRODUCTION

The Minority Report is a dissent from the observations/findings and recommendations of the majority opinion on public participation on the Election Laws (Amendment) (No. 3) Bill, 2015 following the committal of the Bill to the Senate Standing Committee on Legal Affairs and Human Rights and the Standing Committee on Information and Technology.

The Minority Report is anchored on five fundamental observations/findings which the Senators who are party to this minority report believe should guide the Senate in making a final decision, which observations were repeatedly areas of opinion, discussion and input during the hearings of members of the public on the Bill.

Public participation is not democratic aesthetics, antiques or mere optics for the public gallery. It is a demand of the Constitution which we have promulgated unto ourselves and binding upon us. The view of participating citizens and institutions is the collective wisdom that must meaningfully guide the discussions and/or resolutions of any committee or the house. In fact some of the participating stakeholders forewarned us not to use the forums as mere mediums of public relations and rubberstamping of preconceived positions.

Our independent media has become one of our most important auditors of the conduct and practice of state and public officers and in particular the politicians. In light of the impressive audacity of Kenya's media and imbibing part of their duty to inform, the public hearings on The Election Laws (Amendment) (No. 3) Bill, 2015 were broadcast live in almost all leading television stations without fail or manual back-up. Call that the electronic or the digital age.

The digital *mwananchi* is no fool. They followed the proceedings and participated in other digital platforms trending through effective input the discussions of the joint committee hearings. At the end of it, they formed their perspectives and made their observations/findings. We regard our duty to represent these observations accurately, as sacred. In the circumstances therefore, we find it necessary to respectfully dissent from the majority opinion as part of our calling to accurately, honestly and fearlessly represent and reflect the true record of the public participation which overwhelmingly supported the under mentioned viewpoints.

2.0 OBSERVATIONS/FINDINGS

Our observations/findings on the contentious provisions are as follows:

(1) Parliament should seek a bi-partisan approach in amending fundamental provisions that came into force through The Election Laws (Amendment) Act, 2016 as an act of fidelity to political settlement

The Election Laws (Amendment) Act, 2016 is a political settlement that came into force following a negotiated process in and out of Parliament to avert the increasing tensions and political polarisation following the Coalition for Reforms and Democracy (CORD) repeated campaign for the removal of commissioners of the Independent Electoral and Boundaries Commission (IEBC)

To restore credibility to the elections management process as a guarantor of a free and fair election as enshrined in Articles 81 and 86 of the Constitution; and a free and fair election as a guarantor of peace and nationhood, The Elections Laws (Amendment) Act, 2016 was enacted following the recommendations of a Joint Select Committee of Parliament.

If fundamental agreements as expressed by the said Act required review, good faith would require or demand that the same process of bi-partisanship be adopted in amending fundamental provisions of the said Act that would fundamentally alter critical timelines and the nature in which the August 2017 elections will be conducted.

This view was expressed by almost all groups and individuals that appeared before the Standing Committees and more particularly by the clergy who were instrumental in brokering the political settlement that led to the establishment of the Senators Kiraitu Murungi and James Orengo – led Joint Select Committee leading to the enactment of The Election Laws (Amendment) Act, 2016.

(2) Electronic as a cure for manual and not manual not as a cure for electronic

Taking cognisance of Kenya's journey through grave electoral malpractices largely emanating from a purely manual voting system, an integrated electronic electoral system was adopted for the purposes of biometric voter registration, electronic voter identification and electronic transmission of results to cure the prevalent fraud of the manual system. It therefore defeats logic that a manual system can be a cure to the electronic system.

A wide array of stakeholders including the Kenya National Chambers of Commerce and Industry (KNCCI), the Law Society of Kenya (LSK), the Council of Governors (CoG),

religious groups, members of the civil society among others were unequivocal that suspicion can only be eliminated and a credible electoral process secured through the integration of the electronic electoral system.

Views were expressed that a back-up system in the event of failure must also be technology-based. Whereas various IT experts expressed various opinions stating that only a manual system can back-up an electronic system, we are guided and persuaded by the experts who advise that it is possible to back-up an electronic system through technology-based mechanism.

(3) The ambiguity and/or lack of specificity of the proposed section 44 (A) of The Election Laws (Amendment) (No. 3) Bill, 2015 and the adequacy of section 44 and in particular section 44 (5) of The Election Laws (Amendment) Act, 2016

The proposed new section 44A is superfluous and ultra vires to Article 86 of the Constitution which envisages one system of managing elections. It is retrogressive and its effect it to be used to overthrow the electronic system in favour of the manual.

Various individuals and institutions were of the opinion that the provision of a 'complementary mechanism' through the proposed section 44 (A) created ambiguity in its interpretation or definition, was not specific in its implementation, negates the requirement for inclusivity of stakeholders while providing broad and unqualified discretion to the IEBC hence leaving room for abuse and mischief.

Views were also expressed about the adequacy or sufficiency of regulations developed or to be developed pursuant to section 44 (5) of The Election Laws (Amendment) Act, 2016 to provide for a back-up mechanism through a mandatory consultative process with relevant agencies, institutions and stakeholders, including political parties.

(4) The Technical Issues

The technical issues are two-fold-

a) Drafting

The poor manner in which The Election Laws (Amendment) (No. 3) Bill, 2015 was drafted points to the lack of legislative diligence and/or the haste in which the National

Assembly's Justice and Legal Affairs Committee and National Assembly was in to pass a Bill which we believe the intentions go beyond the mere provisions of the Bill.

Clauses 4(b), 23 and 28 of the Bill purport to amend provisions of the Elections Act which are in effect repealed and/or non-existent.

Secondly, The Elections Laws (Amendment) (No.3) Bill, 2015 purporting to amend The Elections Laws (Amendment) Act, 2016 is mischievous and an act of bad faith.

b) The Constitutionality of The Election Laws (Amendment) (No. 3) Bill, 2015

A number of stakeholders observed that the acrimonious manner and haste in which the Bill was passed through the National Assembly omitting the constitutional requirement to subject the Bill to public participation raises questions as to the constitutionality of the Bill. The Senate and all of us as respective Senators have an obligation to uphold the Constitution.

(5) Removal of the Senate in the review of boundaries

Clause 32 seeks to amend section 36 of the Independent Electoral and Boundaries Commission Act, 2011 and intends to exclude the Senate from the next review of boundaries.

This is not the first time the National Assembly has sought to exclude the role of the Senate through legislation. The National Assembly passed a similar provision during the debate and acrimonious passage of The Security Laws (Amendment) Act, 2015 excluding the National Intelligence Service (NIS) from the oversight of Parliament and limiting the NIS to merely the oversight of the National Assembly in contravention of the Constitution. They have equally excluded the role of the Senate from the Treaty Making and Ratification Act, 2015.

How can the Senate in its commonsense allow itself to be subjected to such travesty? How can the Senate allow itself to these levels of provocation? What do the Members of the National Assembly take us for? What do they think of you? Why would the Members of the National Assembly stretch and test our will to this extent?

3.0 RECOMMENDATIONS

- (1) **Re-establish a Joint Select Committee of Parliament on Matters Relating to the IEBC (the JPSC) to review all matters fundamental to the political settlement**

All matters that fundamentally attempt to alter the agreements of the political settlement must follow a similar procedure for review. The arbitrary review as contained in The Election Laws (Amendment) (No. 3) Bill, 2015 continues to tense the political environment and creates unnecessary suspicion. The Senate must therefore vote against this Bill and propose a motion that establishes a Joint Select Committee of Parliament for the period leading to the general elections to resolve and settle all matters of contention that might arise from time to time particularly with reference to The Election Laws (Amendment) Act, 2016.

- (2) **Reject in total, all amendments to Section 44 and its sub clauses of The Election Laws (Amendment) Act 2016 and develop regulations pursuant to Section 44 (5) of the said Act.**

The Election Laws (Amendment) Act, 2016 provide for a mandatory electronic voting system through biometric voter registration, electronic voter identification and electronic transmission of results. Section 44 (5) of the said Act provides for a consultative process for the development of the regulations. The provisions of Section 44 (5) make adequate provisions for a back-up system as 44 (5) (i) provide for “development, publication and implementation of a disaster recovery and operations continuity plan:”

- (3) **Cure the technical issues which are not part of the amendments with respect to The Election Laws (Amendment) Act, 2016**

The Senate cannot pass as law sections that have been repealed and/or are non-existent. The Senate must therefore delete by way of amendments clauses 4 (b), 23 and 28.

- (4) **Delete Clause 32 that Excludes the Senate’s Role in the Next Review of Boundaries**

The proposal to exclude the Senate from the review of boundaries is an assault to the Senate, an affront to the Constitution and an unacceptable attempt to further undermine devolution. The Senate must therefore delete clause 32 from the Bill.

(5) In the alternative, negate The Election Laws (Amendment) (No. 3) Bill, 2015 for want of constitutionality

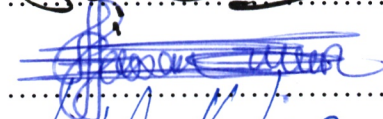
The unconstitutional passage of the said Bill in the National Assembly requires a tough and decisive statement from the Upper House to right the wrong. The Senate must therefore vote out the Bill for want of constitutionality and refer any review to the JSPC as proposed in Recommendation (i) above.

Dated this 5th day of January, 2017

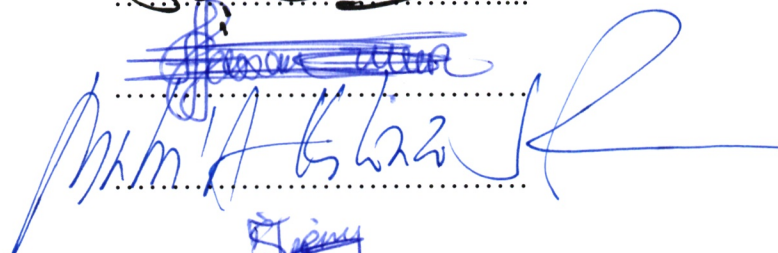
Sen. Amos Wako



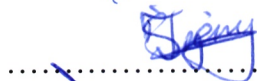
Sen. Hassan Omar Hassan



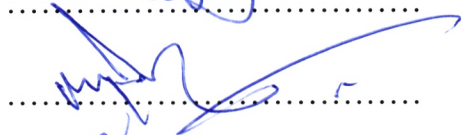
Sen. Mutula Kilonzo Junior



Sen. Judith Sijeny



Sen. Boy Juma Boy



Sen. Daisy Kanainza Nyongesa



5th January, 2017

The Clerk of the Senate
Parliament Buildings
NAIROBI

**RE: COMMITTEE STAGE AMENDMENTS TO THE ELECTIONS LAWS
(AMENDMENT)(NO.3) BILL, NATIONAL ASSEMBLY BILLS, NO. 63 OF 2015**

NOTICE is given that Sen. Mutula Kilonzo Junior, intends to move the following amendments to the Election Laws (Amendment)(No. 3) Bill, 2015, at the Committee Stage-

CLAUSE 2

THAT the Bill be amended by deleting clause 2 and substituting therefor the following clause-

2. Section 2 of the Elections Act is amended by -

- (a) deleting the words “or referendum” appearing in the definition of the word “returning officer”; and
- (b) by inserting the word ‘facial’ immediately after the word “fingerprints” in the definition of the word ‘biometric’.

CLAUSE 4

THAT Clause 4 of the Bill be amended by deleting paragraph (b).

CLAUSE 16

THAT the Bill be amended by deleting clause 16.

CLAUSE 18

THAT the Bill be amended by deleting clause 18.

CLAUSE 19

THAT the Bill be amended by deleting clause 19.

CLAUSE 23

THAT the Bill be amended by deleting clause 23.

CLAUSE 28

THAT the Bill be amended by deleting clause 28.

CLAUSE 32

(a) THAT the Bill be amended by deleting clause 32.

NEW CLAUSE

THAT the Bill be amended by inserting the following new clause immediately after clause 26-

Amendment of
section 109 of
No. 24 of 2011

26A. Section 109 of the elections Act is amended-

- (a) in subsection (1)(a) by deleting the word “prisoner” appearing immediately after the word “abroad” and substituting therefor the words “and prisoners”;
- (b) by deleting subsection (3) and substituting therefor the following new clause-

(3)The power to make regulations shall be exercised only after a draft of the proposed regulations has been approved by the National Assembly and the Senate, at least four months preceding a general election;

- (c) by inserting the following new subsection immediately after subsection (3)-

(3A) Where any of the Houses of Parliament fails to approve the regulations within twenty eight days after the date of receipt of the regulations under subsection (3), or such other period as the House may, by resolution approve, the regulations shall be deemed to have approved by that House of Parliament.

- (d) in subsection (4) by inserting the words “and the Senate” immediately after the word “National Assembly”.

NEW CLAUSE

THAT the Bill be amended by inserting the following new clause immediately after clause 28-

Amendment of section 2
of No. 9 of 2011

28A. section 2 of the Independent Electoral and Boundaries Commission Act is amended by deleting the definition of the word “Parliamentary Committee” and substituting therefor the following new definition-

“Parliamentary Committee” means the relevant Committee of the National Assembly or the Senate, as the case may be, responsible for matters relating to the Commission;

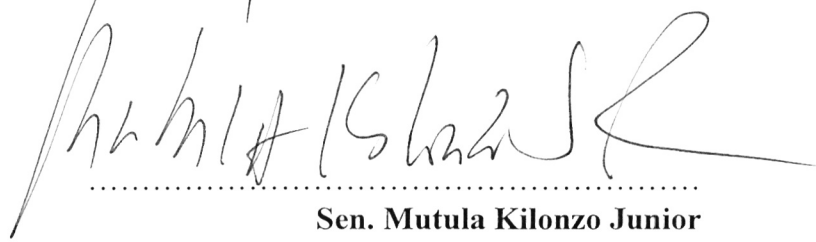
NEW CLAUSE

THAT the Bill be amended by inserting the following new clause immediately after clause 35-

Amendment of section 29 of No. 42 of 2013

36. Section 29 of the Election Campaign Financing Act is amended in subsection (1) by inserting the words “and the Senate” immediately after the words “National Assembly”.

Dated 5th January 2017


.....
Sen. Mutula Kilonzo Junior

ANNEX 2

**MINUTES OF THE STANDING COMMITTEE ON LEGAL AFFAIRS AND
HUMAN RIGHTS**

AND

**JOINT SITTINGS OF THE THE STANDING COMMITTEE ON LEGAL
AFFAIRS AND HUMAN RIGHTS AND THE STANDING COMMITTEE
ON INFORMATION AND TECHNOLOGY**

MINUTES OF THE 31ST SITTING OF THE STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON WEDNESDAY, 28TH DECEMBER, 2016 AT 4.00 P.M IN COUNTY HALL MINI-CHAMBER ON 1ST FLOOR, COUNTY HALL BUILDING

PRESENT

1. Sen. Amos Wako - **(Chairperson)**
2. Sen. Stephen Sang - **(Vice Chairperson)**
3. Sen. Kembi Gitura
4. Sen. Kiraitu Murungi
5. Sen. Fatuma Adan Dullo
6. Sen. Hassan Omar.
7. Sen. Judith Sijeny
8. Sen. Mutula Kilonzo Junior

ABSENT WITH APOLOGY

1. Sen. Kipchumba Murkomen

IN ATTENDANCE

SENATE SECRETARIAT

- | | | |
|-----------------------------|---------|---|
| 1. Mr. Vimal Shah | - Chair | Mkenya Daima |
| 2. Ms. Gloria Ndekei | - | ” ” |
| 3. Ms. Lucy Muchoiu | - | ” ” |
| 4. Mr. John Ngumi | - | ” ” |
| 5. Mr. Daniel Juma | - | ” ” |
| 6. Mr. Keli Kiilu | - | ” ” |
| 7. Mr. Isaac Okero | - | President, Law Society of Kenya |
| 8. Mr. Ezra Chiloba | - | CEO, Independent Electoral and Boundaries Commission (IEBC) |
| 9. Mr. Abednego Ominde | - | IEBC |
| 10. Mr. Andrew Limo | - | IEBC |
| 11. Mr. Adan Wachu | - | SUPKEM/IRCK |
| 12. Mr. Dr. Francis Kariuki | - | Executive Director, IRCK |
| 13. Mr. Juma Kandie | - | Communication Authority of Kenya (CAK) |
| 14. Mr. Francis Sitati | - | CAK |
| 15. Mr. Suba Churchill | - | Civil Society Reference Group (CSRG) |
| 16. Mr. Tony Wambua | - | World Cares Association (WCA) |

IN ATTENDANCE

SENATE SECRETARIAT

- | | | |
|-----------------------|---|-----------------|
| 1. Mr. Mohamed Hassan | - | Clerk Assistant |
| 2. Ms. Judy Ndegwa | - | Legal Counsel |
| 3. Ms. Gloria Wawira | - | Clerk Assistant |

Min. No.0181/2016 PRELIMINARIES

The meeting was called to order at 4.20 p.m followed by a word of prayer.

Min. No.0182/2016 ADOPTION OF THE AGENDA

The Agenda was adopted after it was proposed by Sen. Judith Sijeny and Seconded by Sen. Fatuma Adan as follows;

AGENDA

1. Prayer
2. Adoption of the Agenda
3. **Consideration of the Election Laws (Amendment) (No. 3) Bill, 2015 (National Assembly Bills No. 63 of 2015)**
4. Any Other Business
5. Adjournment

Min. No.0183/2013 CONSIDERATION OF THE ELECTION LAWS (AMENDMENT) (NO. 3) BILL, 2015 (NATIONAL ASSEMBLY BILLS NO. 63 OF 2015)

After a brief introduction, the Chair invited stakeholders to make submissions on the Bill as follows;

- (a) Mkenya Daima/KEPSA
- (b) Law Society of Kenya (LSK)
- (c) Inter-Religious Council of Kenya (IRCK)

The chair also requested other stakeholders (CAK, IEBC, WCA, and CSRG) to make their submission on Thursday 29th December, 2016 due to time constraints.

1. Submission by the Law Society of Kenya (LSK)

The Law Society of Kenya represented by Mr. Isaac Okero made submissions as follows; The abandonment of bi-partisan approach by the National Assembly in the presentation and passage of the Election Laws (Amendment) (No.3) Bill, 2015 has created public mistrust and suspicion. This has previous set the stage for elections that are perceived to be unfair and marked with hostility and violence. In order to have a free and fair elections, the electoral laws must reflect the spirit of the Constitution which includes fairness to all parties demonstrated by dialogue and building consensus. It must also encompass unambiguous legislation and regulations which result in universal franchise and a true and fair results.

The absence of dialogue and building of consensus in the introduction of Section 44A in the Bill which reads, "...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 Bill does not define the term, “*complementary*”.

The term is defined by the Oxford Dictionary as “*combining in such a way as to enhance or emphasize the qualities of each other or another*”. The Merriam-Webster Dictionary defines the term as, “*serving to fill out or complete*” or “*mutually supplying each other’s lack*”.

According to the definition, this provision purports to introduce an unidentified mechanism other than the **integrated electronic electoral system** stipulate by section 44 of the Elections Act, 2011 to run concurrently with the said system with the discretion of the Commission to determine what the mechanism is and as to when to deploy.

Given the history and the absence of Bi-partisan approach in the passage of the Bill at the National Assembly, the ambiguity in the Bill sets the stage for suspicion to arise of the use of a parallel system for voter registration, voter identification and election results transmission. The presenter therefore, recommended restoration of bipartisan approach to remove any suspicion and ambiguity in the proposed legislation.

2. Submission by Mkenya Daima/KEPSA

The Mkenya Daima/KEPSA represented by Mr. Vimal Shah made submissions as follows;

The Country (Kenya) needs a truly independent Electoral institution (IEBC) and it is necessary to build political consensus on the credibility, impartiality and efficiency of the electoral process.

It is also paramount for each and every person to uphold and exercise the dictates of Article 81 of the Constitution and in particular Article 81 (e) (ii). In order to achieve the above proposition Mkenya Daima/KEPSA proposed the following;

1. The ideal scenario is full proof electronic voter identification and transmission system but, in the unlikely event of failure of such an agreed system, Parliament should provide for an alternative pre-agreed workable and acceptable process for IEBC to follow. The process should clearly stipulate a detailed procedure to follow if such electronic failure occurs. The political parties should also understand and appreciate that, it is in their interest to put in place an alternative plan to ensure all eligible Kenyan voters exercises their constitutional rights to cast and have their votes counted and tallied.
2. Parliament should also constitute a committee that periodically scrutinize and review the procedures that can jeopardize the conduct of election especially during the general elections.

The Committee requested the presenter to clarify the following issues;

- (a) What is the pre-agreed alternative plan that Parliament should provide? Does it mean legislation?
- (b) How do you deal with suspicion and mistrust in electoral process?
- (c) How does the private sector build backup and establish multiple redundancy in their electronic business models?

The presenter informed the Committee that Mkenya Daima/KEPSA is not proposing a prescriptive procedure to cure the current misunderstanding, but rather to inform that it is necessary to have a backup system which can be electronic or otherwise. Parliament or the Senate cannot legislate on trust. Trust comprises of integrity, intent, competence and results. The integrity and intent is the character that determines the competence and results. In the business sector backup is established for any data by mirroring the various electronic platform that takes care of multiple redundancy. However elections are not like business enterprises. In conclusion IEBC shall enjoy the requisite independence to conduct free and fair elections.

Min. No.0184/2016

ANY OTHER BUSINESS

1. The committee discussed the viability of reporting to the house on 4th January, 2017 given that there will be a public hearing on 3rd January, 2017. After considering the magnitude of the presentation from various stakeholder and need for the Committee to consider the contentious issues, the committee resolved to request speaker to gazette the Senate Special sitting on Thursday 5th January, 2017 and not 4th January, 2017 as earlier communicated. This will allow the Committee to prepare and adopt the report and also build consensus on the various issues raised in the Bill.
2. The Committee directed the Secretariat to invite Mr. Felix Odhiambo, an election technology expert from the Electoral Institute for Sustainable Democracy in Africa (EISA).

Min.No. 0185/2016

ADJOURNMENT

There being no any other business in the agenda, the meeting was adjourned at 7.30 p.m.

Signed


.....
(Chairperson)

Date

05/01/17.

**MINUTES OF THE 32ND SITTING OF THE STANDING COMMITTEE ON
LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON THURSDAY 29TH
DECEMBER, 2016 AT 10.00 A.M IN COUNTY HALL MINI-CHAMBER ON 1ST
FLOOR, COUNTY HALL BUILDING**

PRESENT

1. Sen. Amos Wako - **(Chairperson)**
2. Sen. Stephen Sang - **(Vice Chairperson)**
3. Sen. Kembi Gitura
4. Sen. Kiraitu Murungi
5. Sen. Fatuma Adan Dullo
6. Sen. Hassan Omar.
7. Sen. Judith Sijeny
8. Sen. Mutula Kilonzo Junior

ABSENT WITH APOLOGY

1. Sen. Kipchumba Murkomen

IN ATTENDANCE

- | | SENATE SECRETARIAT |
|----------------------------|---|
| 1. Joseph Mucheru | - Cabinet Secretary, Ministry of ICT |
| 2. Victor Kyalo | - Principal Secretary, Ministry of ICT |
| 3. Nyambura Kariuki | - Ministry of ICT |
| 4. Juma Kandie | - Communication Authority of Kenya (CAK) |
| 5. Francis Sitati | - CAK |
| 6. Cathrine Ngahu | - CAK |
| 7. David Ole Sankok | - National Council of Persons with Disabilities (NCPWD) |
| 8. Peter Chebii | - NCPWD |
| 9. Joseph Mutie | - IRCK/ |
| 10. Dr. Francis Kariuki | - Executive Director, IRCK |
| 11. Connie Kivuti | - Evangelical Alliance of Kenya |
| 12. Mark Kariuki | - Evangelical Alliance of Kenya |
| 13. Tony Wambua | - World Cares Association (WCA) |
| 14. Ezra Chiloba
(IEBC) | - CEO, Independent Electoral and Boundaries Commission |
| 15. Abednego Ominde | - IEBC |
| 16. Andrew Limo | - IEBC |
| 17. Christopher Msando | - IEBC |
| 18. Ibrahim Juma | - IEBC |
| 19. Cosmos Kioko | - IEBC |
| 20. Michael Ouma | - IEBC |
| 21. Benjamin Kimwei | - IEBC |
| 22. Suba Churchill | - Civil Society Reference Group (CSRG) |
| 23. Josephat Waema | - CSRG |
| 24. Boaz Waruku | - Africa Network Campaigning on EFA (ANCEFA) |

- | | |
|----------------------------|--|
| 25. Kamotho Njenga | - ICT Association of Kenya |
| 26. Mathew Ashers | - Proudly Kenya |
| 27. Edwin Mbiyu | - Proudly Kenya |
| 28. Eric Ayieye
(VINEA) | - Voter Information Network and Education – Africa |
| 29. Wahu Kaara | - Kenyan |
| 30. Martin Nkari | - International Policy Group (IPG) |
| 31. AhmedKadar Ali | - International Conference on Great Lakes Region (ICGLR) |
| 32. Bernard Murage | - ICGLR |
| 33. Mwangi Kanegi | - NGO Council |
| 34. Siyat Osman | - Nomad Link Kenya |
| 35. AbdiRahman Hassan | - Nomad Link Kenya |
| 36. Oluoch Ogolla | - University of Columbia, NY, PAC Univ and USIU |
| 37. Paul Mutembei | - Jisirungu and Independent Auditors |
| 38. Kenyatte Mwangi | - Coalition for Credible Polls 2017 |
| 39. James Mwamboleo | - Coalition for Credible Polls 2017 |
| 40. Arnold Maliba | - Coalition for Credible Polls 2017 |

IN ATTENDANCE

SENATE SECRETARIAT

- | | | |
|------------------------|---|-----------------------------|
| 1. Mr. Njenga Njuguna | - | Director, Committee Service |
| 2. Mr. Mohamed Hassan | - | Clerk Assistant |
| 3. Ms. Judy Ndegwa | - | Legal Counsel |
| 4. Ms. Gloria Wawira | - | Clerk Assistant |
| 5. Ms. Farida Ngarsura | - | Audio Supervisor |
| 6. Mr. Ian Otieno | - | Audio Officer |
| 7. Ms. Sarah Rukwaro | - | Serjeant-At-Arm |

Min. No.0186/2016 PRELIMINARIES

The meeting was called to order at 10.00 a.m followed by a word of prayer.

Min. No.0187/2016 ADOPTION OF THE AGENDA

The Agenda was adopted after it was proposed by Sen. Hassan Omar and Seconded by Sen. Kembi Gitura as follows;

AGENDA

1. Prayer
2. Adoption of the Agenda
3. **Consideration of the Election Laws (Amendment) (No. 3) Bill, 2015 (National Assembly Bills No. 63 of 2015)**
4. Any Other Business
5. Adjournment

After a brief introduction, the Chair invited stakeholders to make submissions on the Bill starting with the CS, Ministry of ICT and the CAK

1. Submission by the Ministry of ICT

~~The Law Society of Kenya represented by~~ *The Cabinet Secretary* Mr. Joseph Mucheru made submissions as follows;

There should be a manual backup to electronic system at the next general election. In support of the proposal, the Cabinet Secretary relied on a Joint Statement from the Department of Homeland Security and Office of National Intelligence which has convened an Election Infrastructure cyber security Working Group to raise awareness of cyber security risks potentially affecting election infrastructure.

The tender specification need to be reviewed before it is closed on 9th January, 2017 as it calls for total electronic IT based solutions for voter registration, verification and results transmission. He clarified that the review of the tender specifications would be to include the manual option.

Election experts must scrutinize the new tender specifications before it is re-advertised so that 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 re-use results of the system that will be used in the elections; explore the use of Public Key Infrastructure and Block Chain technology with local companies: creating transparency and integrity of the process, immediately after the elections.

The Cabinet Secretary also stated the following grounds in support of the Ministry's proposal-

1. Electoral process guarantees – on this, he noted that soon there would be an audit of the register, followed by a the voter registrations process that would result in an augmented BVR, there after there would be verification of the BVR and finally electronic verified register of voters would be ready by 10th May, 2017 a paper copy of the verified register of voters would be prepared. He therefore explained that the backup would not be replacing the electronic system but that it provides an alternative should the computer device fail, without loss of data.
2. Reliability and dependability – on this, he explained that the more complex the system and the larger the number of organizations involved in operations, the lower the reliability. In this regard, he stated that the Integrated Electoral Management System is complex and involves many organisations as therefore has lower reliability. He also indicated that should the electronic system be 99.9% successful, 25,000 voters would still be disenfranchised.
3. Network coverage- on this issue, the Cabinet Secretary submitted that the IEBC has no network of its own and has to procure from third parties thus limiting control and creating multiple vulnerabilities. He also noted that there was a risk of system configuration errors. He also submitted that 22% of the Kenyan population is not covered by 3G network.
4. Human factors and risks to be mitigated – this would include device risks(data errors, equipment loss, equipment malfunction and uncharged devices), supplier risks (late delivery,

defective equipment, improper integration, warranty and support, closed source resources), logistical risks (matching device to polling station, missing devices, damaged devices etc), operator risks (skills gap and inability to solve problems), denial of service (network jamming, device theft, hacking and attacks),

5. IEBC system procurement factors – the Cabinet Secretary submitted that the Kenya Integrated Electoral Management System (KIEMS) tender has multiple issues including technical mandatory requirements which limit the tender to a European supplier, hardware weight specifications which will limit the solution to an integrated tablet device and extra battery, specifications on the anti-virus program which limit the solution to one vendor, the timing of deliveries (60 days after contract sign off) is unattainable, the transfer of data to devices (2 weeks) using SD cards cannot be attained
6. IEBC tendering oversight – the Cabinet Secretary submitted that the tender has no provision of securing the manual election result forms that are sealed in special secure envelopes that can be tracked and used for final verification.
7. On the question of equipment leasing the Cabinet Secretary submitted that the law as currently structured does not allow IEBC to lease equipment and that the challenge of equipment specifications was still present. However, a hybrid system of the purchased and leased equipment may be considered.

2. Submission by the Communication Authority of Kenya (CAK)

The CAK represented by Mr. Juma Kandie made submissions as follows;

Considering other systems of voting that may not be electronic and therefore a manual back-up is necessary where we do not have 3G coverage.

On the question whether it was possible to employ satellite technology in areas without 3G coverage such as Marsabit, the Communications Commission submitted that Satellite transmission was one of the possibilities that could be explored but with additional costs and further indicated that the technical committee established under section 44 of the Elections Act was considering this option. The challenges would however be the cost, procurement and the deployment period noting the fast approaching general election. The Committee is expected to produce its report on this issue by January, 2017.

They indicated that the manual system of voting would be the applicable mode of voting for the 6% of the country which has no 3G coverage. With respect the 22% that has 2G coverage, it was indicated that it would not be possible to obtain 3G coverage before the next general election and therefore alternative methods were being considered.

As to whether the current telecom operators were reliable for purposes of service provision in the areas with network coverage, the Commission submitted that they were licensed and had met the requirements for offering the required services.

They proposed the option of multiple back-ups including a manual back-up system.

They also submitted that the Universal Service Fund was being utilized to enable coverage in areas with no internet connectivity. The fund is meant to serve the unserved and underserved because the operators consider them to be commercially unviable. The aim is to ensure that the unserved go down 2.8% to 2018. These projects are however focused on voice services first but all this would be achieved in a progressive manner. As to whether it was possible to achieve 3G coverage all over the country before the next election, it was indicated that this would not be

possible for the forthcoming election but it would be possible to have adequate coverage by the general election following the 2022 general election.

3. Submission by the National Council of Person with Disabilities (NCPWD)

The NCPWD represented by Dr. David Ole Sankok made submissions as follows;
The Council indicated that it represents about six million Kenyans, who support a manual backup system. They stated that there are persons with disabilities, such as fire victims, who are incapable of using all BVR methods s. As such it would be necessary to have manual system incase their members are not able to use the BVR and EVID system.

They cited section 30 of the Persons With Disabilities Act which provides that persons with disabilities should be facilitated to enable them to exercise their right to vote and Article 4(1)(b) of the Convention on the Rights of Persons With Disabilities, which Kenya has ratified, requires state parties to take all measures to modify or abolish all laws that constitute discrimination against persons with disabilities.

They also gave examples of other systems that a backed-up by a manual system. The cited standing order 75 of the Senate Standing Orders which provides for manual voting in the event of technical failure, confusion or error. He also gave examples of airplanes landing systems which have manual landing gears.

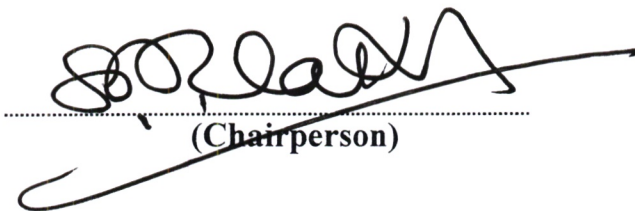
Min. No.0189/2016 ANY OTHER BUSINESS

Due to the large of stakeholder awaiting to make submission and the prolonged sitting hours, the Committee resolved to break for lunch and continues with the sitting in the afternoon at 2.30 p.m

Min.No. 0190/2016 ADJOURNMENT

There being no any other business in the agenda, the meeting was adjourned at 1.30 p.m.

Signed


.....
(Chairperson)

Date

05/01/17
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MINUTES OF THE 33RD SITTING OF THE STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON THURSDAY 29TH DECEMBER, 2016 AT 2.30 P.M IN COUNTY HALL MINI-CHAMBER ON 1ST FLOOR, COUNTY HALL BUILDING

PRESENT

1. Sen. Amos Wako - **(Chairperson)**
2. Sen. Stephen Sang - **(Vice Chairperson)**
3. Sen. Kembi Gitura
4. Sen. Kiraitu Murungi
5. Sen. Fatuma Adan Dullo
6. Sen. Hassan Omar.
7. Sen. Judith Sijeny
8. Sen. Mutula Kilonzo Junior

ABSENT WITH APOLOGY

1. Sen. Kipchumba Murkomen

IN ATTENDANCE SENATORS

1. Sen. Mutahi Kagwe - Chairperson, Senate Committee on IT

IN ATTENDANCE SENATE SECRETARIAT

1. Joseph Mutie - IRCK
2. Dr. Francis Kariuki - Executive Director, IRCK
3. Connie Kivuti - Evangelical Alliance of Kenya
4. Mark Kariuki - Evangelical Alliance of Kenya
5. Tony Wambua - World Cares Association (WCA)
6. Ezra Chiloba - CEO, Independent Electoral and Boundaries Commission (IEBC)
7. Abednego Ominde - IEBC
8. Andrew Limo - IEBC
9. Christopher Msando - IEBC
10. Ibrahim Juma - IEBC
11. Cosmos Kioko - IEBC
12. Michael Ouma - IEBC
13. Benjamin Kimwei - IEBC
14. Suba Churchill - Civil Society Reference Group (CSRG)
15. Josephat Waema - CSRG
16. Boaz Waruku - Africa Network Campaigning on EFA (ANCEFA)
17. Kamotho Njenga - ICT Association of Kenya
18. Mathew Ashers - Proudly Kenya
19. Edwin Mbiyu - Proudly Kenya

- 20. Eric Ayieye - Voter Information Network and Education – Africa (VINEA)
- 21. Wahu Kaara - Kenyan
- 22. Martin Nkari - International Policy Group (IPG)
- 23. AhmedKadar Ali - International Conference on Great Lakes Region (ICGLR)
- 24. Bernard Murage - ICGLR
- 25. Mwangi Kanegi - NGO Council
- 26. Siyat Osman - Nomad Link Kenya
- 27. AbdiRahman Hassan - Nomad Link Kenya
- 28. Oluoch Ogolla - University of Columbia, NY, PAC Univ and USIU
- 29. Paul Mutembei - Jisirungu and Independent Auditors
- 30. Kenyatte Mwangi - Coalition for Credible Polls 2017
- 31. James Mwamboleo - Coalition for Credible Polls 2017
- 32. Arnold Maliba - Coalition for Credible Polls 2017

IN ATTENDANCE

SENATE SECRETARIAT

- 1. Mr. Njenga Njuguna - Director, Committee Service
- 2. Mr. Mohamed Hassan - Clerk Assistant
- 3. Ms. Judy Ndegwa - Legal Counsel
- 4. Ms. Gloria Wawira - Clerk Assistant
- 5. Ms. Farida Ngarsura - Audio Supervisor
- 6. Mr. Ian Otieno - Audio Officer
- 7. Ms. Sarah Rukwaro - Serjeant-At-Arm

Min. No.0191/2016 PRELIMINARIES

The meeting was called to order at 2.40 p.m followed by a word of prayer.

Min. No.0192/2016 ADOPTION OF THE AGENDA

The Agenda was adopted after it was proposed by Sen. Hassan Omar and Seconded by Sen. Kembi Gitura as follows;

AGENDA

- 1. Prayer
- 2. Adoption of the Agenda
- 3. **Consideration of the Election Laws (Amendment) (No. 3) Bill, 2015 (National Assembly Bills No. 63 of 2015)**
- 4. Any Other Business
- 5. Adjournment

Min. No.0193/2013 CONSIDERATION OF THE ELECTION LAWS (AMENDMENT) (NO. 3) BILL, 2015 (NATIONAL ASSEMBLY BILLS NO. 63 OF 2015)

After a brief introduction, the Chair invited stakeholders to make submissions on the Bill starting with the IRCK, Evangelical Societies, IEBC and if time allows the rest of the stakeholders.

1. Submission by the Inter-Religious Council of Kenya (IRCK)

The IRCK represented by Father Joseph Mutie made submissions as follows;

The previous diplomatic interventions by the IRCK culminated into the establishment of the Joint Parliamentary Select Committee co-chaired by Sen. Orenge and Sen. Karaitu which came with a number recommendations and a draft to implement the same. The Bill was passed by the National Assembly and the Senate in a Bi-Partisan manner without an iota of acrimony contrary to the current Bill before the Committee.

The IRCK emphasizes the need to adopt a Bi-Partisan approach to address the contentious issues in the proposed law. If there any challenge in the use of technology in elections as per the current laws, IEBC is well placed to come with the necessary regulation with the approval of parliament to address such a challenge instead raising tension and creating acrimony across the political divide.

Where there a technological challenge that necessitates amending the law, IEBC should inform all the stakeholder the challenges the Commission is facing to implement use of technology in elections and through a Bi-partisan approach the necessary amendment shall be done in line with the recommendation of the Commission. It is the recommendation of IRCK that the Senate Committee on Legal Affairs and Human Rights to build consensus before the Bill is passed.

2. Submission by the Evangelical Alliance of Kenya

The Evangelical Alliance of Kenya represented by Bishop Mark Kariuki made submissions as follows;

It is the recommendation of the Evangelical Association of Kenya that Parliament reconstitutes the Joint Parliamentary Select Committee on matters relating to the IEBC by 4th January 2017 to create a mechanism for purposes of consensus building on the content of the Bill.

Upon the reconvening of the Committee, the Multi-Sectoral Forum and its Dialogue Reference Group would be able to make their submissions on the issue of the manual back-up, the ampleness and limitation of the 3G network and network failure, the sufficiency, readiness and competence of the BVR system and equipment, the challenges and operation of the EVID system and lessons from 2013, matters on the RTS and how it should be handled and other contingent administrative issues.

There is also, need to hear the incoming Commission to make substantive recommendations on the Bill.

3. Submission by the World Cares Association

The World Cares Association represented by Dr. Tony Wambua made submissions as follows;

The Senate in passing this Bill shall consider the thinking of the ordinary Kenya voter. The World Cares Association also recommends the words “manual voting” be deleted from the Bill.

4. Submission by the Independent Electoral and Boundaries Commission

The IEBC by Mr. Ezra Chiloba made submissions as follows;

1. 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. N.A Bill No. 63 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.
2. 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.
3. 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

4. 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.
5. The IEBC as implementing agency, 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.
6. 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.
7. During all these 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

8. 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

9. 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

10. The 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.
11. The IEBC 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.
12. 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.
13. Similarly, when it comes to transmission of results, there were several factors that could lead to failure. The question was what IEBC would do in such a situation.
14. Having observed the debate on the use of ICT in elections, IEBC took note that most players were 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.

15. The IEBC highlighted some of its positions with respect to certain amendments on what the National Assembly had 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.

Min. No.0194/2016 ANY OTHER BUSINESS

Due to time constraints following a day long sitting, the Committee resolved that the remaining stakeholders would be given priority in submitting their views on 3rd January, 2017 when the Bill will come up for public hearing before the Committee.

Min.No. 0195/2016 ADJOURNMENT

The Chair adjourned the meeting at 8.10 p.m.

Signed 
.. (Chairperson)

Date 05/01/17

MINUTES OF THE FIRST JOINT SITTING OF THE STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS AND STANDING COMMITTEE ON INFORMATION AND TECHNOLOGY HELD ON TUESDAY 3RD JANUARY, 2017 AT 9.00 A.M IN SENATE CHAMBER, GROUND FLOOR, MAIN PARLIAMENT BUILDING

PRESENT

1. Sen. Amos Wako - Chairperson, Standing Committee on Legal Affairs and Human Rights (SCLAaHR)
2. Sen. Mutahi Kagwe - Chairperson, Standing Committee on Information and Technology (SCIT)
3. Sen. Stephen Sang - Vice Chairperson, Standing Committee on Legal Affairs and Human Rights
4. Sen. Mutula Kilonzo Jr - Vice Chairperson Standing Committee on Information and Technology
5. Sen. Kembi Gitura - Member, SCLAaHR
6. Sen. Fatuma Adan Dullo - Member, SCLAaHR
7. Sen. Hassan Omar - Member, SCLAaHR
8. Sen. Judith Sijeny - Member, SCLAaHR
9. Sen. Boy Juma Boy - Member, SCIT
10. Sen. Ben Njoroge - Member, SCIT
11. Sen. Joy Gwendu - Member, SCIT
12. Sen. Aaron Cheruiyot - Member, SCIT

ABSENT WITH APOLOGY

1. Sen. Kipchumba Murkomen - Member, SCLAaHR
2. Sen. Kiraitu Murungi - Member, SCLAaHR
3. Sen. Dan Mwazo - Member, SCIT
4. Sen. Daisy Kanainza - Member, SCIT
5. Sen. Isaac Melly - Member, SCIT

IN ATTENDANCE

STAKEHOLDERS

1. Dr. S. K. Macharia - Media Owners Association (MOA)
2. Prof Githu Muigai - Office of the Attorney General and Department of Justice (OA&DJ)
3. Mr. Tom Odede - OA & DJ
4. Mr. Hussein Abdullahi - OA&DJ
5. Mr. Joshua Kiraiti - OA&DJ
6. Mr. Kiprono Kittony - Kenya National Chamber of Commerce and Industry (KNCCI)
7. Mr. Laban Onditi Rao - KNCCI
8. Mr. Edward - KNCCI
9. Mr. Stephen Mulenga - KNCCI

10. Mr. George Kiendo - KNCCI
11. Ms. Betty Kwamboka - KNCCI
12. Hon Isaac Ruto - Council of Governors (CoG)
13. Hon Prof Kivutha Kibwana - CoG
14. Hon (Eng) John Mruttu - CoG
15. Mr. George Morara - Kenya National Commission on Human Rights (KNCHR)
16. Mr. Victor Kamau - KNCHR
17. Mr. John Gathairu - KNCHR
18. Ms. Rosemary Kirui - KNCHR
19. Mr. Isaac E. N. Okero - Law Society of Kenya
20. Mr. Stephen Osewe - CSoK
21. Mr. Ronnel Onchagwa - IEBC
22. Mr. Wafula Wakoko - IEBC
23. Mr. Richard Otolo - Fintech Kenya
24. Mr. Thomas Kaberi - Tech-Prenuers Kenya
25. Mr. Joseph Towett - KANU
26. Mr. Collins Odwor - KANU
27. Mr. Fredrick Adero - KANU
28. Mr. Edwin Ng'ong'a - CORD Coalition
29. Mr. John Walubengo - CORD Coalition
30. Mr. Derrick Davis - CORD Coalition
31. Ms. Veronica Maina - Jubilee Party
32. Mr. Frank Mwendani - Jubilee Party
33. Mr. Nixon korir - Jubilee Party
34. Mr. Joseph Mutahi - Jubilee Party
35. Ms. Nazlin Omar Rajput - Presidential Candidate
36. Mr. Gwada S. Ogot - Star Alliance
37. Mr. John Kanya - Sabasaba/ODM
38. Mr. Michael Mungai - Ford-Kenya Embakasi District
39. Mr. Juliua Ogony - Computer Society of Kenya (CSoK)
40. Mr. Kamotho Njenga - ICT Association of Kenya
41. Mr. Suba Churchill - Civil Society Reference Group (CSRG)
42. Mr. Josephat Waema - CSRG
43. Mr. Edward Kichu - NDUC
44. Mr. Okiyah Omtatah - Kenyans for Justice and Development
45. Mr. Boaz Waruku - Africa Network Campaigning on EFA (ANCEFA)
46. Mr. James Kipsang Ngetich - Newtonian Era Public Participation
47. Rev. Peter Kikivi Makau - Lutheran Church of East Africa
48. Hon. (Dr). Misoi - MODAN
49. Hon. Mutuvi - KNA
50. Mr. John Mbugua - MEGA
51. Ms. Mary W. Kanyi - IRDA
52. Ms. Olive Achieng - Fountain of Life Church
53. Mr. Eric Ayieye - Voter Information Network and Education – Africa (VINEA)

- 54. Mr. Oluoch Ogolla - University of Columbia, NY, PAC Univ and USIU
- 55. Mr. Kenyatta Mwangi - Coalition for Credible Polls 2017
- 56. Mr. James Mwamboleo - Coalition for Credible Polls 2017
- 57. Mr. Moses Ogero - Coalition for Credible Polls 2017
- 58. Mr. Arnold Maliba - Coalition for Credible Polls 2017
- 59. Mr. Robert Kiberenge - Bunge La Wananchi
- 60. Mr. Kimanzi Nicholas - Bunge La Mzalendo
- 61. Mr. Chekai Musa - Bunge La Mzalendo
- 62. Mr. Muranbwa Odari - Murabwa Foundation
- 63. Mr. Felix O. Owuor - Electoral Law Institute – Africa
- 64. Mr. Gerryson Nandwa - Accountability
- 65. Ms. Anne Kathurima - APRM Youth Working Group
- 66. Hon (Dr.) Shem Ochuodho - Kenya Diaspora Association (KDA)
- 67. Mr. Njoroge Waweru - Citizen
- 68. Mr. Daniel Njuguna - Citizen
- 69. Ms. Marilyn M. Kimuru - Citizen

IN ATTENDANCE

SENATE SECRETARIAT

- a) Mr. Njenga Njuguna - Director, Committee Service
- b) Dr. Johnson Okello - Ag. Director, Legal Services
- c) Mr. Mohamed Hassan - Clerk Assistant
- d) Mr. Christopher Gitonga - Clerk Assistant
- e) Ms. Judy Ndegwa - Legal Counsel
- f) Ms. Clare Kidombo - Research Assistant
- g) Ms. Farida Ngarsura - Audio Supervisor
- h) Mr. Ian Otieno - Audio Officer
- i) Mr. Wilson Bosmet - Serjeant – At – Arm
- j) Mr. Reuben Kimosop - Serjeant – At – Arm
- k) Ms. Sarah Rukwaro - Serjeant-At-Arm

Min. No.0001/2017 PRELIMINARIES

The meeting was called to order at 9.30 a.m followed by a word of prayer.

Min. No.0002/2017 ADOPTION OF THE AGENDA

The Agenda was adopted after it was proposed by Sen. Judith Sijeny and seconded by Sen. Mutula Kilonzo Junior as follows;

AGENDA

1. Prayer
2. Adoption of the Agenda

3. **Public Hearing (Oral presentation and submission of Memoranda) on the Election Laws (Amendment) (No. 3) Bill, 2015 (National Assembly Bills No. 63 of 2015)**
4. Any Other Business
5. Adjournment

Min. No.0003/2017 PUBLIC HEARING (ORAL PRESENTATION AND SUBMISSION OF MEMORANDA) THE ELECTION LAWS (AMENDMENT) (NO. 3) BILL, 2015 (NATIONAL ASSEMBLY BILLS NO. 63 OF 2015)

After self-introduction by Senators, the Chairman, Legal Affairs and Human Rights Committee, invited stakeholders to make submissions on the Bill starting with the Media Owners Association (MOA), Attorney General, KNCCI, LSK, KNCHR, CoG and the rest of the stakeholders.

1. Submission by the Media Owners Association (MOA)

The MOA represented by Dr. S. K. Macharia made submissions as follows;

In the history of Kenya, there have been several elections disputed by the political aspirants starting with the 1992 General Election. In all the elections (1992, 1997, 2002, 2007), MOA and specifically, Royal Media Services tracked the results of the general elections for presidential candidates from every polling station via satellite phones and the data was available. It is only in 2002 where the actual winner of the general election was declared as such and sworn in as the president.

In 2013 General Elections, MOA relied on the result transmission system of Independent Electoral and Boundaries Commission (IEBC) which later failed and MOA did not have a parallel vote tallying and results transmission. It is therefore, possible to use technology in the forthcoming general election and there is no need for a manual voter identification and result transmission backup.

He retaliated that it was possible to conduct registration, identification of voters and transmission of results electronically.

2. Submission by the Office of the Attorney General and Department of Justice (OAG & DJ)

The OAG and DJ represented by Prof. Githu Muigai made submissions as follows;

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 his brief was 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 results.

Current position of law

3. The Section 39 of the Elections Act governed determination and declaration of results. and
4. Section 44 of the Act governed 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 at least eight months 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 Hon. **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 voters 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 seriously considered 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; and
 - 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 Philippines in cases of **GR Nंबर 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, they 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, they advised that the Committee 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.

3. Submission by the Kenya National Chamber of Commerce and Industry (KNCCI)

The KNCCI represented by Mr. Kiprono Kittony made submissions as follows;

1. KENYA NATIONAL CHAMBER OF COMMERCE & INDUSTRY

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.

KNCCI and its membership were aware of The Election Laws (Amendment) Bill 2016 and the current political and social developments in the country. KNCCI had an opportunity to study the bill and the opinions and reservations expressed by various stakeholders. He thanked the Senate and all stakeholders for the maturity with which the issue had been handled and particularly for granting them the opportunity to contribute to the matter of grave National importance. In that regard they were of the opinion hereunder;

2. WHAT IS KNCCI INTEREST?

As The Kenya National Chamber of Commerce and Industry, they know the importance of every vote. They 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 was 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. KNCCI'S VIEW ON THE SUGGESTED AMENDMENTS

While they recognized all the amendments to the election laws, among other amendments, they noted that Section 44A had 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. They 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,”

The 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 agreed 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 agreed 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 previous 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.

They noted that the following areas were 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

They suggested 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.

They observed 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. They also observed that statements which incite violence and hostility must be avoided at all cost.

The Chamber was 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.

4. Submission by the Council of Governors (CoG)

The CoG by Hon. Isaac Ruto, Hon. (Prof.) Kivutha Kibwana and Hon. John Mruttu they presented their memoranda and made the following submissions;

1. Background and introduction

The passage of the amendment law by the National Assembly, generated acrimonious debates over the political divide and the main issue was surrounding the use of 'complementary mechanism' alongside the electronic system. They broadened the scope of their comments and recommendations to address other problematic aspects of the law beyond the complimentary mechanism aspect.

They recommended as follows:

- Clause 19 - There should be mechanism of addressing the unforeseeable failures in specific technology (e.g EVID) and this mechanism 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 amended to reflect the substance of the provision. 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.

- Clause 4 - 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 basis of biometric data provided during registration.
- Clause 5 - Ninety days period should be reinstated
- Clause 12 - This provision should be deleted.

2. Other important aspects

2.1. Delineation of electoral Boundaries

Clause 32 of the proposed amendments sets out a procedure for delineation of electoral Boundaries. 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.

2.2. 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. However, most, if not all, of them appeared not to have been registered.

2.3. 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 was meant to serve. If it cannot be enforced as it is now, it is better be deleted altogether. though there was a need for mature and informed debates over legislation and oversight in counties and this would require 'reasonable academic qualifications.'

2.4. Run-off procedures

There was need for legislation to set out the parameters for a run-off to avert a crisis in the event of a run-off.

3. Concluding observations

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 was emphasized.

5. Submission by the Law Society of Kenya (LSK)

The LSK by Mr. Isaac E. N. Okero made submissions as follows;
He made a second presentation after he was referred to study Report of the Joint Parliamentary Select Committee on Matters Relating to the IEBC and make further presentations. He had made earlier representations on 28th December, 2016.

Section 44 and the question of 'back up'

It was 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, or on account of poor lighting which slowed down or complicated the manual process of counting votes, or on account of challenges in the electronic transmission of results including technical hitches, network failures and the suspicion of system hacking.

Recommendations were made by the JPSC on the legislative framework required to address these concerns, the acceptance of which recommendations was demonstrated by their verbatim reproduction as Sections 44(5) of the Elections Act.

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 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 was clear that it considered 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. The request was not considered.

Nonetheless, there is a draft Elections Technology Regulations (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 had 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 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 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 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 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. 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.

6. Submission by the Kenya National Commission on Human Rights (KNCHR)

The KNCHR represented by Mr. George Morara made submissions as follows;

A. CONTEXTUAL BACKGROUND

1. 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, he quoted Article 38 of the Constitution which guaranteed political rights;
2. In the past, elections in Kenya were 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;
3. 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.

B. REVIEW OF THE PROPOSED AMENDMENTS

4. 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 and presented their Memorandum for consideration to the Senate in relation to the following:

Clause 4 should be deleted

Clause 5 they supported reduction of days from 90 to 60.

Clause 6 it was good 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.

Clause 8 should be deleted as there was no justification for any further delays or postponement of the academic qualifications requirements for Members of Parliament and Members of the County Assembly.

Clause 12 be deleted and retain the provision in the principal Act

Clause 13 they recommend that the amendment be expanded to include all the other elective posts

Clause 15 the clause should be duplicated in Section 34(2) and (3)

Clause 16 was agreeable

Clause 19 the wording of the section was too broad and vague. There was need to provide for clear parameters that resorts to manual back-up as a last resort in all parts of the country.

C. THE LAW ON THE USE OF ICT AND ELECTIONS

5. With regard to the use of technology, he quoted Section 44 of the Election Act, 2011
6. The KNCHR took cognizance of the fact that the section provided 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 concern the way in which the current amendments were brought to the National Assembly. They were of the view that highly acrimonious manner which characterized the passage of the said amendments by the National Assembly was retrogressive and negates the spirit of dialogue that had resulted to the Elections Laws (Amendment) Act, 2016.
7. The biggest born of contention had been on the use/role of technology in the upcoming general election slated for August. 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.”

D. COMPARATIVE ANALYSIS ON THE USE OF ICT AND ELECTIONS

8. It was 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. 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 set 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 improving Ghana’s electoral reputation, but also providing a more cost-effective approach.”*

9. Back home, the KNCHR noted 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.
10. KNCHR also noted that it is not the voting that is electronic but 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 they had attained 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

11. The KNCHR strongly recommended that embracing technology in the electoral management was 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.

12. 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.
13. The KNCHR however notes that 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. They 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.
14. The KNCHR further calls on the IEBC to put in place measures aimed at mitigating the challenges 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

15. KNCHR concluded 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 the electoral management body is allow space to conduct its constitutional duties without interferences from any person.
16. In addition, the KNCHR took the opportunity to commend the Senate for the leadership it showed in previous week's (Wednesday) deliberations of the delicate matter. The approach taken by the Senate averted an immediate crisis. Ultimately, and within the spirit 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!

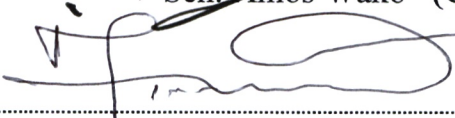
Min. No.0004/2017 ANY OTHER BUSINESS

The Committee resolved to take a lunch break and resume public hearing at 3.00 p.m.

Min.No. 0005/2017 ADJOURNMENT

The meeting was adjourned at 2.15 p.m.

Signed  Date 25/01/17
Sen. Anos Wako (Co- Chairperson)

Signed  Date 25/01/17
Sen. Mutahi Kagwe (Co- Chairperson)

MINUTES OF THE SECOND JOINT SITTING OF THE STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS AND STANDING COMMITTEE ON INFORMATION AND TECHNOLOGY HELD ON TUESDAY 3RD JANUARY, 2017 AT 3.00 P.M IN SENATE CHAMBER, GROUND FLOOR, MAIN PARLIAMENT BUILDING

PRESENT

1. Sen. Amos Wako -Chairperson, Standing Committee on Legal Affairs and Human Rights (SCLAaHR)
2. Sen. Mutahi Kagwe - Chairperson, Standing Committee on Information and Technology (SCIT)
3. Sen. Stephen Sang - Vice Chairperson, Standing Committee on Legal Affairs and Human Rights
4. Sen. Mutula Kilonzo Jr - Vice Chairperson Standing Committee on Information and Technology
5. Sen. Kembi Gitura – Member, SCLAaHR
6. Sen. Kipchumba Murkomen – Member, SCLAaHR
7. Sen. Fatuma Adan Dullo – Member, SCLAaHR
8. Sen. Hassan Omar – Member, SCLAaHR
9. Sen. Judith Sijeny – Member, SCLAaHR
10. Sen. Boy Juma Boy - Member, SCIT
11. Sen. Ben Njoroge - Member, SCIT
12. Sen. Joy Gwendo - Member, SCIT
13. Sen. Aaron Cheruiyot - Member, SCIT

ABSENT WITH APOLOGY

1. Sen. Kiraitu Murungi – Member, SCLAaHR
2. Sen. Dan Mwazo - Member, SCIT
3. Sen. Daisy Kanainza - Member, SCIT
4. Sen. Isaac Melly - Member, SCIT

IN ATTENDANCE

1. Mr. Suba Churchill
2. Mr. Josephat Waema
3. Mr. Shem Ochuodho
4. Mr. Gwada S. Ogot
5. Mr. Juliua Ogony
6. Mr. Stephen Osewe
7. Mr. Peter Kikuvi Makau
8. Ms. Marilyn M. Kimuru

STAKEHOLDERS

- Civil Society Reference Group (CSRG)
- CSRG
- Kenya Diaspora Association (KDA)
- Star Alliance
- Computer Society of Kenya (CSoK)
- CSoK
- Lutheran Church of East Africa
- Citizen

9. Mr. Kenyatte Mwangi - Coalition for Credible Polls 2017
10. Mr. James Mwamboleo - Coalition for Credible Polls 2017
11. Mr. Moses Ogero - Coalition for Credible Polls 2017
12. Mr. Arnold Maliba - Coalition for Credible Polls 2017
13. Mr. Joseph Towett - KANU
14. Mr. Collins Odwor - KANU
15. Mr. Fredrick Adero - KANU
16. Mr. Edwin Ng'ong'a - CORD Coalition
17. Mr. John Walubengo - CORD Coalition
18. Mr. Derrick Davis - CORD Coalition
19. Ms. Veronica Maina - Jubilee Party
20. Mr. Frank Mwendani - Jubilee Party
21. Mr. Nixon korir - Jubilee Party
22. Mr. Joseph Mutahi - Jubilee Party
23. Mr. Shilesh Patel - Citizen
24. Mr. Okiyah Omtatah - Kenyans for Justice and Development
25. Ms. Nazlin Omar Rajput - Presidential Candidate
26. Mr. Kamotho Njenga - ICT Association of Kenya
27. Mr. Robert Kiberenge - Bunge La Wananchi
28. Mr. Fred odhiambo - Bunge La Wananchi
29. Mr. Michael Mungai - Ford-Kenya Embakasi District
30. Mr. James Kipsang Ngetich – Newtonian Era Public Participation
31. Mr. John Mbugua - MEGA
32. Mr. Ronnel Onchagwa - IEBC
33. Mr. Wafula Wakoko - IEBC
34. Mr. Richard Otolo - Fintech Kenya
35. Mr. Thomas Kaberi - Tech-Prenuers Kenya
36. Mr. John Kanya - Sabasaba/ODM
37. Mr. Edward Kichu - NDUC
38. Mr. Boaz Waruku - Africa Network Campaigning on EFA (ANCEFA)
39. Hon. Dr. Misoi - MODAN
40. Hon. Mutuvi - KNA
41. Ms. Mary W. Kanyi - IRDA
42. Ms. Olive Achieng - Fountain of Life Church
43. Mr. Eric Ayieye - Voter Information Network and Education – Africa (VINEA)
44. Mr. Oluoch Ogolla - University of Columbia, NY, PAC Univ and USIU
45. Mr. Kimanzi Nicholas - Bunge La Mzalendo
46. Mr. Chekai Musa - Bunge La Mzalendo
47. Mr. Muranbwa Odari - Murabwa Foundation
48. Mr. Felix O. Owuor - Electoral Law Institute – Africa
49. Mr. Gerryson Nandwa - Accountability
50. Mr. Anne Kathurima - APRM Youth Working Group
51. Mr. Njoroge Waweru - Citizen
52. Mr. Daniel Njuguna - Citizen

IN ATTENDANCE

SENATE SECRETARIAT

1. Mr. Njenga Njuguna - Director, Committee Service
2. Dr. Johnson Okello - Ag. Director, Legal Services
3. Mr. Mohamed Hassan - Clerk Assistant
4. Mr. Christopher Gitonga - Clerk Assistant
5. Ms. Judy Ndegwa - Legal Counsel
6. Ms. Clare Kidombo - Research Assistant
7. Ms. Farida Ngarsura - Audio Supervisor
8. Mr. Ian Otieno - Audio Officer
9. Mr. Wilson Bosmet - Serjeant – At – Arm
10. Mr. Reuben Kimosop - Serjeant – At – Arm
11. Ms. Sarah Rukwaro - Serjeant-At-Arm

Min. No.0006/2017 PRELIMINARIES

The meeting was called to order at 3.20 p.m.as followed by a word of prayer.

Min. No.0007/2017 ADOPTION OF THE AGENDA

The Agenda was adopted after it was proposed by Sen. Judith Sijeny and Seconded by Sen. Mutula Kilonzo Junior as follows;

AGENDA

1. Prayer
2. Adoption of the Agenda
3. **Public Hearing (Oral presentation and submission of Memoranda) on the Election Laws (Amendment) (No. 3) Bill, 2015 (National Assembly Bills No. 63 of 2015)**
4. Any Other Business
5. Adjournment

Min. No.0008/2017 PUBLIC HEARING (ORAL PRESENTATION AND SUBMISSION OF MEMORANDA) THE ELECTION LAWS (AMENDMENT) (NO. 3) BILL, 2015 (NATIONAL ASSEMBLY BILLS NO. 63 OF 2015)

After a brief introduction, the Chair invited stakeholders to make submissions on the Bill in the following order;

1. Submission by the Civil Society Reference Group (CSRG)

The CSRG represented by Mr. Suba Churchill made submissions as follows;

The Civil Society for the first time in history is working under intense fear and intermediation in Kenya. The SCRG oppose the proposal to have a complementary mechanism for voter identification and result transmission in the general election for reasons that;

- (a) The Complementary mechanism is not defined in the Bill and is therefore, susceptible to abuse,
- (b) The new clause 44A which introduces complementary mechanism is repealing Section 44 of the Elections Act on the use technology in election.
- (c) The new clause 44 A introduces a parallel alternative mechanism to electronic voter identification and results transmission hence is reintroducing use of manual registers where dead and non-existent voters can vote.

Mr. Suba noted that the National Assembly did not conduct public participation on the bill especially the contentious issues. He recommended that the Senate should refer the Bill back to the National Assembly since the process of which it was passed is flawed.

For the above reason the CSRG opposes amendment to the election laws.

2. Submission by the Office of the Kenya Diaspora Alliance (KDA)

The KDA represented by Hon. Shem Ochuodho made submissions as follows;

He noted that was not necessary to overemphasize on the use of technology on election and instead there is need to look at human interface such as the IEBC ICT department and its capacity to handle the technology in place.

KDA supports the use of a backup to the electronic voter identification and result transmission system. Every electronic data has to have a backup, even technology giants like google, youtube, yahoo prepare for technology failure and they set up backup mechanism. It is therefore the recommendation of KDA to put in place a fall mechanism for use in the event there is electronic devices failure during the election.

The essence of using technology in election was to ensure transparent, free and fair elections, the same can achieve if there is a bi-partisan approach to whole issue of creating a manual fall back mechanism to the electronic system in the event of a systemic failure.

KDA also recommends parliament to provide for mechanism for Diaspora voting in all the elections in a general election.

3. Submission by the Star Alliance

The Star Alliance represented by Mr. Gwada S. Ogot made submissions as follows;
Star Alliance recommends that the requirement of educational qualification for elective position should be removed from the law.

4. Submission by the Computer Society of Kenya (CSoK)

The CSoK represented by Mr. Julius Ogony made submissions as follows;

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 had advantages as below.

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.

Thus, they recommended:

- 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) had advantages as below.

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 would 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.

Thus, they recommended:

- 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 give 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 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.

The advantage were as below:

- 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.

Thus, they recommended:

- i) IEBC to 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).

5. Submission by the Inter-Regional Development Agency (IRDA)

The IRDA represented by Ms. Mary Wambui Kanyi made submissions as follows;

It was the aspiration of the people of Kenya to live harmoniously and have a free and fair election. It is therefore necessary to amend the law to provide complementary and not alternative mechanism for voter identification and transmission of results in the general election in case the EVID and ERT system malfunctions or failures.

6. Submission by the Lutheran Church of East Africa

The Lutheran Church of East Africa represented by Rev. Peter Kikuvi made submissions as follows;

The Lutheran Church support conduct of free and fair election and such election can conduction only by use of technology.

7. Submission by Ms. Marilyn Muthoni Kimuru

The Marilyn Muthoni Kimuru made submissions as follows;

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 the he proposed 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. This would 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.

4. Submission by Coalition for Credible Polls 2017

The Coalition for Credible Polls represented by Mr. Arnold Maliba made submissions as follows;

A. The key questions to reflect upon, and which guided their presentation is;

1. If there was a failure of 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 or any other day, the Elections thus held would be unconstitutional. What would happen then?
 - a. Would it be a by election when there was no primary election?
 - b. Would the release of the elections for rest of the nation wait until that area voted and what would the implications of that be in a highly volatile electoral season?
 - 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?
2. And in the event there is a network failure that stops or prevents results transmission on time, what would happen.

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

3. Article 38(3) guarantees every citizen the right to vote.
4. The right to vote under article 38(3) is buttressed by Article 81(a) which states that;
5. Further to the foregoing Article 83 (3) stresses it further.
6. By virtue of the a foregone there was 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.
7. Where the electoral management body makes administrative arrangements, which would include the infrastructure through which voters cast their ballots, these arrangements must be such as to facilitate, not to hinder an eligible voter from casting their ballot.
8. 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
9. 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

10. 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) negative impact on confidence in the process if the electronics fail, or are compromised;
- ii) security of the voting and counting process;
- iii) cost of introducing and maintaining the technology over the lifecycle of the equipment;
- iv) potentially losing control over the process to outside technology vendors; recruitment of staff with specialized IT skills;
- v) added complexity in the electoral process and the ability of the EMB to deal adequately with this complexity; and
- vi) Consequences in the event of equipment or system malfunction.
- vii) 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.

11. Technology is not intended to fail. However, there are many documented instances where technology in elections and electoral processes has failed.

12. 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 may render the whole election a nullity

13. 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 may be interpreted as an attempt at legalizing voter suppression

14. 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 was 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.

15. One of the key security and reliability standards in an election process is an optional specification for a voter-verified paper audit trail.
16. 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.
17. For example, in 2009, the German Federal Constitutional Court 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.
18. 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 trust the fate of our democracy to technology that's not ready yet.
19. 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.
20. 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 that can be done is to have a back-up manual system in case the electronic system fails.

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

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

D. 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 IEBC 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.

E. Conclusion

25. 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.
26. Everything points to the fact that there was need for 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
27. 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.
28. 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.

29. 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 .
30. 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.
31. They urged 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.

5. Submission by the Kenya African National Union (KANU)

The KANU represented by Mr. Joseph Towett made submissions as follows;

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 had raised countrywide uproar target Section 44 of the Act, which section addresses itself to the use of technology in the electoral system.

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.

Their 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 was for this glaring lack of consistency that they 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 they moved 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.

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

- a) will ensure elimination of duplicate voter registration;
- b) will provide a simple and user friendly interface for registering and identifying voters;
- c) will be easily scalable;
- d) will ensure quick and precise biometric voting; and
- e) 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.

They submitted 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 than allowing democracy to prevail.

It was their 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.

Submission by CORD Coalition

The CORD Coalition represented by Mr. Edwin Ong'ong'a and Mr. John Walubengo made submissions as follows;

Background

It was 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, he stated Mr. Ongong'a stated that 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 was 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)

They highlighted 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 EVID 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 was 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 was 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

They acknowledged 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 19 - Revise and provide for an electronic back up to the voter identification infrastructure.

Results Transmission System - 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.

Conclusions & Recommendations

- They recommended that rather than planning for failure, they 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, they proposed to have digital backup as opposed to manual backups.as enacted in the Elections Laws (Amendment Act 2016).

- They felt 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.

6. Submission by Jubilee Party

The Jubilee Party represented by Ms. Veronica Maina made submissions as follows;

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. They said that it was insufficient because for the Electoral Commission to deploy a manual alternative to electronic voter identification, the IEBC is required to give 48 hours notice of this. They believed it 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: they proposed 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 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 urged 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.

7. Submission by Dr. Shilesh Patel

Dr. Shilesh Patel, an individual citizen, made submissions as follows;

1. The Ballot Form tender as was issued and is proposed to be placed with AL Ghurair, is not appropriate to KIEMS in that it is technically deficient in its requirements and should be set aside and re-issued after the requirements of the KIEMS tender have been evaluated fully in terms of this document and the Kriegler report.
2. The Ballot Form Tender being a framework tender to be re-issued and should be designed to be specific for the National Election on the one hand, and comprise a section for bi-elections.

2.1 The Ballot Form tender for the National Election to be reconfigured to comply with KIEMS which it currently is not in terms of the specification relevant to the ballot forms, declaration forms and the polling register.

2.2 The ballot printing organizations need to be evaluated in terms of their capacity to print within the time lines required in terms of "The Road Map to the 2017 Polls: re proposed time lines following the enactment of the Amendments to Electoral Laws."

2.3 An independent consultant to be appointed to evaluate capacity in terms of whether there is in fact a single printer with the capacity to deliver 135 million ballot forms within the time frame specified.

2.4 If no single printer has in fact the capacity and packing capability then the tender should be revised and re-issued for a consortium of printers with a centralized pick and pack capability being established.

2.5 This would establish that only a consortium of South African Print organizations are geographically favourably located to add enough presses to print within the limited time frame as a coordinated team. This is how the SA IEC conducts its tenders for ballot printing.

3. The KIEMS Tender as it is currently drafted should be re-visited as the tender appears to be written for a specific product emanating from the failed 2013 Election Process.

- 3.1 The KIEMS tender is costly and could fail, and does not provide sufficient flexibility for a manual system to be integrated with the currently proposed electoral process.
 - 3.2 The KIEMS tender eliminates competing solutions now available from other suppliers and is an uncompetitive document. (Similar to the Ballot Form tender.)
 - 3.3 Other Vendors should be encouraged to submit solutions.
4. With an incoming and technically inexperienced IEBC Chairman and team of Commissioners, the requirement exists for a consulting team to assist this Commission with this landmark Election Project.
 - 4.1 Without an independent consult available, the new IEBC will be somewhat handicapped to understand the complexities of the electoral technologies and solutions and it would help them greatly to engage international experts.
 - 4.2 What would be the role of the UNDP Team invited to assist these elections?
 5. The time frame is exceptionally short and the technology required should be simplified from the complex proposal suggested by the KIEMS tender.

8. Submission by Mr. Okiya Omtatah Okoiti

Mr. Okiya Omtatah Okoiti, an individual citizen, made submissions as follows;

The only valid mode of elections under the Constitution

1. At the onset, he posited that the manual electoral system had no jurisdiction in Kenya, and cannot legitimately be resorted to at any elections. An objective reading of Articles of 81, 83, and 86 of the Constitution of Kenya 2010 reveals a contemplation of elections and referenda conducted solely by electronic means.
2. Since the Constitution anticipates free and fair elections anchored on a tamperproof electoral system, He submit that only an electronic/digital electoral system can ensure the tamperproof electoral structure required to realise the mandatory constitutional threshold of free and fair elections.
3. To be legitimate elections and referenda under the Constitution of Kenya 2010 must be tamperproof – a condition that is only possible under electronic/digital voting technologies and not on the manual platform.
4. The requirement in Article 86 that at every election, the Independent Electoral and Boundaries Commission shall ensure that— whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent; the votes cast are counted, tabulated and the results announced promptly; the results from the polling

stations are openly and accurately collated, and appropriate structures and mechanisms to eliminate electoral malpractice are put in place, requires the deployment of electronic/digital voting technologies.

5. The requirement in Article 140 that questions as to validity of a presidential election must be filed, heard, and determined in the Supreme Court within 21 days after the date of the declaration of the results of the presidential election is only possible with the deployment of electronic/digital voting technologies, and anticipates a digital platform. The timelines are otherwise unrealistic under manual electoral system.
6. The technologies for setting up an electronic/digital electoral system which is tamperproof are readily available.
7. The deployment of an electronic/digital voting system will eliminate the possibility of human tampering with elections since, in the event there is such tampering, the gadgets themselves will provide irrefutable evidence of the same.
8. Technology does not fail and has never failed, except where it encounters negligence, incompetence, and/or outright sabotage.
9. There are absolutely no circumstances, when a manual paper system can provide checks and balances to match or equal or rival digital technology, and it is totally false and perverse for the National Assembly or anybody to claim otherwise.
10. He contended that, being prone to tampering and susceptible to manipulation and corruption, the introduction of the manual paper system at any stage of the electoral process cannot deliver a tamperproof election. Hence, there was no liberty to derogate from the Constitutional threshold, and/or exercise any discretion to deploy the discredited manual system.
11. The plenary powers available to the IEBC vide Article 86(a) to use —whatever voting method is not a licence given to the public entity to use voting methods that derogate from the requirements in Articles 81, 83 and 86.
12. There are no circumstances where a manual paper system, which is cumbersome and primitive, will replace and/or outperform digital technology.
13. There is no manual paper system that can meet the very high constitutional threshold in Articles 81, 83, and 86 of the Constitution.
14. If an electoral process is not tamperproof, the election results will have no sanctity or integrity or credibility and, consequently, will not inspire the confidence and trust of the people of Kenya.
15. The Petitioner avers further that, the policy and constitutional framework regarding the use of technology is not that technology should be utilised in the elections as a mere check-and-control mechanism built into the manual (paper) electoral process.
16. It is industrial standard practice that an electronic system is the primary tamperproof election process with a voter verified paper audit trail (VVPAT) as a check and balance for the electronic system.
17. He submitted that tamperproof technology is a replacement or an alternative to the outdated paper system of manual registration of voters, manual identifying voters on Election Day, manual casting of votes, manual tallying of votes, and manual transmitting the results, all of which are not voter verified and which, definitely, are not tamperproof.

18. The use of tamperproof digital technology is the essence of a tamperproof electoral system, to ensure free and fair elections, meaning accurate, transparent, verifiable, credible, and tamperproof elections, at all elections and referenda.
19. The use of tamperproof digital technology has a significant advantage because it does away with the need for human intervention which is the principle cause of malpractice, election fraud, corruption, and election crimes.
20. The rights in Article 38 of the Constitution were not to be realised progressively.
21. The Senate should intervene and ensure that the IEBC makes it possible to hold elections and referenda in strict adherence to the clear and elaborate threshold spelt out in the Constitution in Articles 38(2) & (3)(b), 47, 81(d) & (e), 82(1)(d) & (2)(a)(b), 83(3), and 86.
22. The IEBC must comply with the Constitution; the next general elections must deploy full electronic/digital voting technologies.
23. The IEBC is duty bound to ensure that the standards, spirit, values and principles enshrined in the Constitution are respected, upheld and defended.

Sabotage through the procurement process compromised the 2013 elections

24. The failures experienced in the deployment of electoral technologies at the 2013 general elections was a direct result of the IEBC, at best, mishandling the election process, from the outset with the flawed and irregular procurement of the BVR (Biometric Voter Registration), EVID (Electronic Voter Identification Device), ballot papers and even general electoral materials such as indelible marker pens, solar powered lanterns, polling station banners, etc.
25. The Appeals numbered 5) brought by aggrieved parties (i.e. bidders) before the Public Procurement Administration and Review Board were dismissed out of hand on the basis of the **overriding public interest** or **compelling state interest** since the elections were —around the corner, with the exception of the case of the supply of solar lanterns, where the appeal was allowed as there was a clear element of impropriety and fraud involved, concerning the company which had been awarded the tender.
26. There was inordinate and inexcusable delay by the Courts in the finalisation of the appeals and then used the same excuse of public/state interest as was in the case of the appeal by AVANTE INTERNATIONAL (USA) for the supply of EVID and in the case of the supply of ballot papers.
27. A Judicial Review (JR) application was dismissed on grounds that the matter had been overtaken by events, namely delivery orders being placed by IEBC while the JR proceedings were on-going. This was contrary to the law which requires that procurement proceedings come to a halt once a JR application is filed by the aggrieved party. Indeed such was the case involving the supply of general electoral materials, including supply of indelible marker pens, solar lanterns, tally printers, polling station banners, etc.
28. In June 2012, he brought proceedings vide Nairobi Constitutional Petition No. 311 of 2012, *Okiya Omtatah Okiiti v. The Attorney General and Another* (which was still pending at the High Court at Nairobi) to challenge the fraudulent supply of BVR kits.

29. Since the IEBC deliberately sabotaged the deployment of technology, it is inappropriate to use the technology failures experienced at the 2013 elections as yardstick for anything, including the reliability of electoral technologies.

Sabotage in the procurement of the Results Transmission System (RTS)

30. The RTS, the system for transmitting provisional results was procured in a rush through IFES (and which procurement was funded by USAID) and the process was done at the last moment around Christmas 2012/New Year 2013 with a bidding period of less than 5 working days, without going on a proper international open tender. Other more credible and well known systems (e.g. from AVANTE TECHNOLOGY of the USA) were flagrantly disregarded despite having been successfully used in Uganda.
31. The IEBC failed to deploy in the election transmission system, satellite phones whose procurement (under IEBC TENDER NO 1/2012-2013) was cancelled at the last moment when the item was surreptitiously removed from the list of items without IEBC giving any reasons. Had the satellite phones been procured from Thuraya or Immarsat, the results could have been transmitted through the satellite system (as was successfully done in the 2005 Referendum) using the satellite phones without being dependent on Safaricom or terrestrial mobile telephony networks.

Sabotage in the procurement of the Electronic Voter Identification Device (EVID)

32. The procurement of EVID was marred with irregularities. IEBC bought the device from FACE TECHNOLOGIES of South Africa which had never been used or proven and despite the fact that the sample given by FACE was completely different at the time of tendering from what was supplied – this was irregular and the tender awarded despite the fact that the device did not properly work at the time of demonstration.
33. There is no objective reason why FACE was again being favoured by IEBC.
34. The Committee should note that FACE was previously favoured by the IEBC Tender Committee for the procurement of the BVR Kits, to the detriment of the more qualified and lower priced Indian bidder (4G Identity Solutions), which was the frontrunner that was initially shortlisted as a potential supplier and the other South African bidder, Lithotech, which was knocked out without any explanation.

Sabotage in the procurement of the Biometric Voter Register (BVR) Kit

35. The BVR kit supplied by SAFRAN MORPHO, the French manufacturer, was not powered by a proper solar power backup system. There was no explanation for the failure during the registration process. The delayed procurement and hiked prices compounded the problems, causing a delay in the voter registration process and disenfranchised many voters due to the short time allocated for the process. Moreover, some of the BVR KITS ordered from Safran Morpho were supposed to be supplied with diesel powered generators but that was never done and supplies came from France and not originating from Canada as per Canadian rules applicant to projects funded by Canada.
36. Even though Article 35 of The Constitution of Kenya, 2010, entitles citizens the right to know how many bidders participated and what system was procured and from whom, the IEBC refused to divulge the information.

37. Whereas Safaricom Limited supplied the mobile phones and the VPN it remains undisclosed who supplied the software system and who was the Systems Administrator (SA), and the Database Administrator (DBA).

Sabotage in the procurement of the Biometric Voter Register (BVR)

38. The IEBC's claim that the BVR was biometric is totally false. During the Presidential Petition, *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR*, the IEBC made full disclosure on portable disk drives, containing the Provisional BVR and the Principle BVR used at the general election on March 4, 2013. There is no biometric data on either register. That is, there are no finger print records. This staggering fact proves that IEBC knowingly misled 40 million Kenyans and the Courts that it had a biometric register of voters.

39. The EVID could not and did not work without biometric data i.e. the finger prints.

Specific sabotage at the 2014 Elections

40. That the IEBC's handling of the election was not only flawed due to technology failures; it was a complete fraud because of the wild claims made by the IEBC which he summarised as follows: That, during the Presidential Petitions, IEBC claimed:

- i) that the Principle BVR was divided into 1,450 parts, one for each Ward. IEBC says that each part was loaded onto an SD Card (digital memory card) and that this card was then loaded into the EVID laptop or handset. However, there was no evidence of the same.
- ii) that 45% of the RTS handsets worked and successfully transmitted results for the presidential election. However, there was no evidence of the same.
- iii) that the failure of the EVID system was due to the SD Card for the wrong wards being inserted in the EVID laptop or handset. However no evidence to proof that was produced.
- iv) that the RTS mobile phone handset failure was due to wrong handsets being sent to some of the polling stations. However, no proof was provided.
- v) that the 55% failure of the EVID technology and failure of 78% of the RTS technology had no adverse impact on the elections and therefore had 0% impact on the mandate. In fact, the IEBC unbelievably claimed that 45% success of the EVID and 22% success of the RTS meant that the IEBC had met 100% of its mandate.
- vi) that the discredited manual election process is equal to the electronic system and acts as a checks and control mechanism for the electronic system. IEBC did not explain how it has power to disregard both the intention of Parliament and the intention of the Kriegler Report. What was the essence of spending tax payers money on equipment that were not of any importance.
- vii) that 78% of RTS failed but the electronic Result Presentation System (RPS) display at Bomas of Kenya continued to work despite claims that the electronic system failed in its entirety. That is EVID and RTS had failed due to one reason or another.

IEBC did not explain fully:

- i) that Google Kenya provided the technology for the RPS display and this was set up by Lantech.

- ii) how the results which were being read out at Bomas of Kenya, were entered into the RPS database which was feeding the electronic display?
- iii) whether the results were read out before or after being entered into the database. There was no disclosure of evidence of which scenario is correct. If they were entered afterwards, how were the errors corrected, for example, for Constituency 057 where results were read out as 51,000 for Uhuru Kenyatta instead of 15,000?
- iv) produce any documents or material which was ferried to the workstations where the results were entered into the database

Sabotage in the IEBC's undeclared relationship with Kencall

41. That the most damning revelation during the Presidential Petition was the admission by IEBC of its undeclared relationship with Kencall.
- i) IEBC admitted that Kencall hosted their database but denied that it was at Kencall premises.
 - ii) Kencall admitted hosting the TNA database on a server provided by TNA.
 - iii) Kencall admitted that the staff of Kencall had access to the TNA database. Kencall admitted that the staff of Kencall had access to the IEBC database.
 - iv)

This arrangement was clandestine and not disclosed to the public or any of the candidates by IEBC, TNA or Kencall.

42. That the final tally of votes eventually released by IEBC are unacceptable as they were released with IEBC partially disclosing important information

Proposed amendments prepare the way for further sabotage

43. He stated that he had analysed the TENDER NO IEBC/32/2016-2017: Supply, Delivery, Installation, Testing, Commissioning and Support of the Kenya Integrated Elections Management Systems (KIEMS) and it seems to be tailored to lock out all the other manufacturers and to suit a particular vendor, SAFRAN MORPHO (<http://www.morpho.com/>), the French manufacturer who was at the heart of the failure of technology at the 2013 general elections. SAFRAN MORPHO also suffers from credibility and integrity crises having been involved in corrupt practices in Nigeria and further having been penalised in 2012 by a Paris Criminal Court for being corrupt.
44. The whole flawed tender (which practically locks out all the equipment vendors) needs to be scrutinized further by being subjected to independent evaluation by independent and patriotic election experts and IT engineers.
45. The procurement is also being rushed. On 28th December 2016, at 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.
46. Is it any wonder that those who stand to benefit from a flawed electoral process are pushing for a legal framework to do just that? Fortunately, Article 93(2) of the Constitution states categorically that, *The National Assembly and the Senate shall perform their respective functions in accordance with this Constitution.*

47. The Supreme Court, at paragraph [234] of its judgment in *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR*, directed that there be a public enquiry (of sorts) into the IEBC, with a view to restoring public confidence and improving the management of future elections in Kenya.
48. There should be no repeat of the same fraud on the Kenyan people.

9. Submission by Ms. Nazlin Omar Rajput

Ms. Nazlin Omar Rajput, an individual citizen, made submissions as follows; Section 44A which introduces a complementary mechanism be deleted from the Bill; and There should be no minimum educational qualification for elective offices.

10. Submission by Information Communication and Technology Association of Kenya (ICTAK)

The ICTAK represented by Mr. Kamotho Njenga made submissions as follows;

There should be a bi-partisan approach to develop an alternative agreeable mechanism in the event of elections technology failure.

If there is no fall back mechanism for the current system in law there will be a challenge which might create chaos. Therefore, ICTAK supported the amendment to the law.

11. Submission by Newtonian Era Public Participation

The Newtonian Era Public Participation represented by Mr. Ngetich made submissions as follows;

There should a civic education system on election which compatible with the Newtonian era education.

12. Submission by Rev. John Mbugua

Rev. John Mbugu, an individual citizen, made submissions as follows;

The law should provide for an alternative mechanism of voting for persons with disability whose bio-metric data might not be detected by the election's technology during the general election. Person with disabilities form 2.5 million voters in the country and hence the need to consider their plight in voting.

Technology anywhere in the world is prone to failure or fault and there, should a fall back mechanism to ensure free and fair elections.

13. Submission by Sen. James Orengo

Senator James Orengo made submissions as follows;

1. In the select committee Mr. Okiya Omtatah guided the committee in his presentation that it is only by use of technology in election that the threshold set in Art. 81 of the Constitution can be achieved which threshold is election to be simple, accurate, transparent, and verifiable.

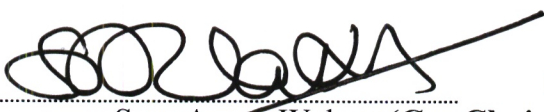
2. On the use of ICT in election the experts agreed in principle and in the Krigler report at page (x) it was observed that in 2007 general election close 1.2 million dead people were in the register of voter.
3. The Krigler report at page 310 recommended that Result transmission in a general election should be done through electronic platform to enhance integrity, transparent and accountability in the administration of elections.
4. Section 19 of the Bill which proposed to introduce Section 44A after Section 44 in the Elections Act, 2011 uses the word “notwithstanding” which is a non obstante clause and which brings serious implication like amending the entire Section 44 on the use of technology in election. The words “subject to” would have been use if it was meant to amend Section 44.
5. Before 2013 the Company that supplied the BVR and EVID kits supplied faulty prototype which is illegal but the procuring entity went further to procure the KITs in mass since the date for the election was very close.
6. The Senator appealed for the use of technology which shall be backed up electronically and not manual register backup.

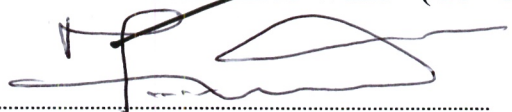
Min. No.0009/2017 ANY OTHER BUSINESS

The Co-Chairperson directed the Committee member to remain behind for a house keeping meeting as members of the public leave at their pleasure.

Min.No. 0010/2017 ADJOURNMENT

There being no any other business in the agenda, the meeting was adjourned at 7.30 p.m.

Signed  Date 05/1/17
 Sen. Amos Wako (Co- Chairperson)

Signed  Date 5/1/17
 Sen. Mutahi Kagwe (Co- Chairperson)

MINUTES OF THE THIRD JOINT SITTING OF THE STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS AND STANDING COMMITTEE ON INFORMATION AND TECHNOLOGY HELD ON TUESDAY 3RD JANUARY, 2017 AT 8.00 P.M IN SENATE CHAMBER, GROUND FLOOR, MAIN PARLIAMENT BUILDING

PRESENT

1. Sen. Amos Wako - Chairperson, Standing Committee on Legal Affairs and Human Rights (SCLAaHR)
2. Sen. Mutahi Kagwe - Chairperson, Standing Committee on Information and Technology (SCIT)
3. Sen. Stephen Sang - Vice Chairperson, Standing Committee on Legal Affairs and Human Rights
4. Sen. Mutula Kilonzo Jr - Vice Chairperson Standing Committee on Information and Technology
5. Sen. Kembi Gitura - Member, SCLAaHR
6. Sen. Kipchumba Murkomen - Member, SCLAaHR
7. Sen. Fatuma Adan Dullo - Member, SCLAaHR
8. Sen. Hassan Omar - Member, SCLAaHR
9. Sen. Judith Sijeny - Member, SCLAaHR
10. Sen. Boy Juma Boy - Member, SCIT
11. Sen. Ben Njoroge - Member, SCIT
12. Sen. Joy Gwendu - Member, SCIT
13. Sen. Aaron Cheruiyot - Member, SCIT

ABSENT WITH APOLOGY

1. Sen. Kiraitu Murungi - Member, SCLAaHR
2. Sen. Dan Mwazo - Member, SCIT
3. Sen. Daisy Kanainza - Member, SCIT
4. Sen. Isaac Melly - Member, SCIT

IN ATTENDANCE

SENATE SECRETARIAT

1. Mr. Njenga Njuguna - Director, Committee Service
2. Dr. Johnson Okello - Ag. Director, Legal Services
3. Mr. Mohamed Hassan - Clerk Assistant
4. Mr. Christopher Gitonga - Clerk Assistant
5. Ms. Judy Ndegwa - Legal Counsel
6. Ms. Clare Kidombo - Research Assistant
7. Ms. Farida Ngarsura - Audio Supervisor
8. Mr. Ian Otieno - Audio Officer
9. Mr. Wilson Bosmet - Serjeant – At – Arm

10. Mr. Reuben Kimosop - Serjeant – At – Arm
11. Ms. Sarah Rukwaro - Serjeant-At-Arm

Min. No.0015/2017 PRELIMINARIES

The meeting was called to order at 8.05 p.m. followed by a word of prayer.

Min. No.0012/2017 ADOPTION OF THE AGENDA

The Agenda was adopted after it was proposed by Sen. Judith Sijeny and Seconded by Sen. Mutula Kilonzo Junior as follows;

AGENDA

1. Prayer
2. Adoption of the Agenda
3. **House keeping**
4. Any Other Business
5. Adjournment

Min. No.0013/2017 HOUSE KEEPING

The Committee was brief on the retreat by the secretariat as follows;

1. The venue for the retreat is Windsor Golf Hotel and Country Club and not Hemmingway Hotel as earlier resolved by the Committee due to limited accommodation facility at Hemmingway Hotel.
2. The accommodation is available as from that night and Senators were advised to confirm availability to save on cost.
3. The draft report and set of minute was to be availed for consideration by next day, 4th January, 2017 at 12.00 noon.

After the brief the Committee resolved to hold the first meeting at 12 noon to consider the draft report on 4th January, 2017.

The Members also resolved to have an informal meeting at 12 noon prior to official meeting to agree on the rules of engagement.

Min. No.0014/2017 ADJOURNMENT

There being no any other business the meeting was adjourned at 8.45 p.m.

Signed  Date 
.....
Sen. Amos Wako (Co- Chairperson)

Signed  Date 
.....
Sen. Mutahi Kagwe (Co- Chairperson)

MINUTES OF THE FOURTH JOINT SITTING OF THE STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS AND THE STANDING COMMITTEE ON INFORMATION AND TECHNOLOGY HELD ON WEDNESDAY 4TH JANUARY, 2017 AT 12 NOON IN THE WINDSOR GOLF HOTEL AND COUNTRY CLUB

PRESENT

1. Sen. Amos Wako - Chairperson, Standing Committee on Legal Affairs and Human Rights (SCLAaHR)
2. Sen. Mutahi Kagwe - Chairperson, Standing Committee on Information and Technology (SCIT)
3. Sen. Stephen Sang - Vice Chairperson, Standing Committee on Legal Affairs and Human Rights
4. Sen. Mutula Kilonzo Jr - Vice Chairperson Standing Committee on Information and Technology
5. Sen. Kembi Gitura - Member, SCLAaHR
6. Sen. Kipchumba Murkomen - Member, SCLAaHR
7. Sen. Kiraitu Murungi - Member, SCLAaHR
8. Sen. Fatuma Adan Dullo - Member, SCLAaHR
9. Sen. Hassan Omar - Member, SCLAaHR
10. Sen. Judith Sijeny - Member, SCLAaHR
11. Sen. Boy Juma Boy - Member, SCIT
12. Sen. Ben Njoroge - Member, SCIT
13. Sen. Daisy Kanainza - Member, SCIT
14. Sen. Isaac Melly - Member, SCIT
15. Sen. Aaron Cheruiyot - Member, SCIT

ABSENT WITH APOLOGY

1. Sen. Dan Mwazo - Member, SCIT
2. Sen. Joy Gwendu - Member, SCIT

IN ATTENDANCE

SENATE SECRETARIAT

- a) Mr. Njenga Njuguna - Director, Committee Service
- b) Dr. Johnson Okello - Ag. Director, Legal Services
- c) Mr. Mohamed Hassan - Clerk Assistant
- d) Mr. Christopher Gitonga - Clerk Assistant
- e) Ms. Judy Ndegwa - Legal Counsel
- f) Ms. Clare Kidombo - Research Assistant
- g) Mr. Ian Otieno - Audio Officer
- h) Mr. Reuben Kimosop - Serjeant – At – Arm
- i) Mr. Philemon Okinda - Serjeant – At – Arm

Min. No.0015/2017 PRELIMINARIES

The meeting was called to order at 12.30 p.m followed by a word of prayer.

Min. No.0016/2017 ADOPTION OF THE AGENDA

The Agenda was adopted with amendments after it was proposed by Sen. Judith Sijeny and Seconded by Sen. Isaac Melly as follows;

AGENDA

1. Prayer
2. Adoption of the Agenda
3. **Brief on the Election Laws (Amendment)(No.3) Bill, 2015 (National Assembly Bills No. 63 of 2015)**
4. **Consideration of Memoranda submitted by stakeholders on the Election Laws (Amendment)(No.3) Bill, 2015 (National Assembly Bills No. 63 of 2015)**
5. Any Other Business
6. Adjournment

Min. No.0193/2013 BRIEF ON THE ELECTION LAWS (AMENDMENT) (NO.3) BILL, 2015 (NATIONAL ASSEMBLY BILLS NO. 63 OF 2015)

The Co-Chairperson reiterated the need to have a bi-partisan discussion for the sake of the Country and should as much as possible overlook individual interest and party position. The Co-Chairperson invited the secretariat to brief the Committee on the salient feature of the Bill. Upon invitation the Legal Counsel briefed the Committee on the salient feature of the Bill as follows;

The Election Laws (Amendment) (No. 3) Bill, 2015, 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 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 of the Bill seek to make amendments to the Independent Electoral and Boundaries Commission Act to—

- (a) provide for the procedure and criteria for the delimitation of electoral boundaries including the approval of the National Assembly;
- (b) provide for the involvement of the public in delimitation boundaries;
- (c) provide for the resolution of disputes arising from delimitation of boundaries; and
- (d) 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. The Counsel also informed the Committee key issues on the Bill as follows;

1. Provisions touching on the role of Parliament

The Bill and the Act which are sought to be amended exclude the Senate from various process relating to the electoral cycle and the boundaries delimitation process as follows-

- (a) Clause 32 of the Bill which amends section 36 of the IEBC Act does not give the Senate a role in the process of delineation of electoral boundaries.
- (b) Clause 2 of the IEBC Act, in the definition of the term “parliamentary committee” does not recognize the relevant Senate Committee.
- (c) Section 31 of the IEBC Act is silent on whether regulations made pursuant to the Act are to be tabled in the Senate.
- (d) Section 29 of the Election Campaign Financing Act requires that regulations relating to elections campaign financing be tabled in the National Assembly only.
- (e) Section 109 (3) and (4) requires that regulations made by the IEBC to give effect to various provisions of the Act be tabled in the National Assembly only.

2. Non-existent provisions of the Act

Clauses 4(b), 23 and 28 of the Bill seek to amend provisions of the Elections Act which are non-existent.

**Min. No.0018/2017 CONSIDERATION OF MEMORANDA SUBMITTED BY
STAKEHOLDERS ON THE ELECTION LAWS
(AMENDMENT) (NO.3) BILL, 2015 (NATIONAL
ASSEMBLY BILLS NO. 63 OF 2015)**

The Committee resolved to take a health break and postpone agenda item No. 4 to the next meeting.

Min.No. 0019/2017 ADJOURNMENT

There being no any other business in the agenda, the meeting was adjourned at 4.00 p.m.

Signed  Date 05/01/17
.....
Sen. Amos Wako (Co- Chairperson)

Signed  Date 5/1/17
.....
Sen. Mutahi Kagwe (Co- Chairperson)

MINUTES OF THE FIFTH JOINT SITTING OF THE STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS AND THE STANDING COMMITTEE ON INFORMATION AND TECHNOLOGY HELD ON WEDNESDAY 4th JANUARY, 2017 AT 4.00 P.M AT THE WINDSOR GOLF HOTEL AND COUNTRY CLUB

PRESENT

1. Sen. Amos Wako - Chairperson, Standing Committee on Legal Affairs and Human Rights (SCLAaHR)
2. Sen. Mutahi Kagwe - Chairperson, Standing Committee on Information and Technology (SCIT)
3. Sen. Stephen Sang - Vice Chairperson, Standing Committee on Legal Affairs and Human Rights
4. Sen. Mutula Kilonzo Jr - Vice Chairperson Standing Committee on Information and Technology
5. Sen. Kembi Gitura - Member, SCLAaHR
6. Sen. Kipchumba Murkomen - Member, SCLAaHR
7. Sen. Kiraitu Murungi - Member, SCLAaHR
8. Sen. Fatuma Adan Dullo - Member, SCLAaHR
9. Sen. Hassan Omar - Member, SCLAaHR
10. Sen. Judith Sijeny - Member, SCLAaHR
11. Sen. Boy Juma Boy - Member, SCIT
12. Sen. Ben Njoroge - Member, SCIT
13. Sen. Daisy Kanainza - Member, SCIT
14. Sen. Isaac Melly - Member, SCIT
15. Sen. Aaron Cheruiyot - Member, SCIT

ABSENT WITH APOLOGY

1. Sen. Dan Mwazo - Member, SCIT
2. Sen. Joy Gwendo - Member, SCIT

IN ATTENDANCE

SENATE SECRETARIAT

- a) Mr. Njenga Njuguna - Director, Committee Service
- b) Dr. Johnson Okello - Ag. Director, Legal Services
- c) Mr. Mohamed Hassan - Clerk Assistant
- d) Mr. Christopher Gitonga - Clerk Assistant
- e) Ms. Judy Ndegwa - Legal Counsel
- f) Ms. Clare Kidombo - Research Assistant
- g) Mr. Ian Otieno - Audio Officer
- h) Mr. Reuben Kimosop - Serjeant – At – Arm
- i) Mr. Philemon Okinda - Serjeant – At – Arm

Min. No.0020/2017 PRELIMINARIES

The meeting was called to order at 4.15 p.m followed by a word of prayer.

Min. No.0021/2017 ADOPTION OF THE AGENDA

The Agenda was adopted after it was proposed by Sen. Judith Sijeny and Seconded by Sen. Isaac Melly as follows;

AGENDA

1. Prayer
2. Adoption of the Agenda
3. **Consideration of Memoranda submitted by stakeholders on the Election Laws (Amendment)(No.3) Bill, 2015 (National Assembly Bills No. 63 of 2015)**
4. Any Other Business
5. Adjournment

Min. No.0022/2017 CONSIDERATION OF MEMORANDA SUBMITTED BY STAKEHOLDERS ON THE ELECTION LAWS (AMENDMENT) (NO.3) BILL, 2015 (NATIONAL ASSEMBLY BILLS NO. 63 OF 2015)

The Committees considered the memoranda on the Bill and the Bill clause by clause to differentiate contentious clauses from non-contentious clauses. Members made the following observations:-

1. There were no views submitted on clause 3 and the committees adopted on this section without amendment since it resolved as a non-contentious clause;
2. There were no views submitted with respect to clause 4 (a) and (b) however, the Committee classified it as a contentious clause that needs further deliberation;
3. There were various views received from stakeholder on clause 5 and the Committees classified it as a contentious clause that needs further deliberation;
4. The Kenya National Committee on Human Rights submitted views on clause 6 and the Committees classified it as a contentious clause that needs further deliberation;
5. There were no views submitted on clause 7 and the committees adopted on this section without amendment since it resolved as a non-contentious clause;
6. There were views submitted on clause 8 however, the committees adopted on this section without amendment since it resolved as a non-contentious clause;
7. There were no views submitted with respect to clause 9 however, the Committees classified it as a contentious clause that needs further deliberation;
8. There were no views submitted with respect to clause 10 and the Committees classified section 10 as a contentious clause that needs further deliberation;

9. There were no views submitted with respect to clause 11 and the Committees adopted section 11 without amendment since it is a non-contentious issue
10. There were views submitted with respect to clause 12 and the Committees classified section 12 as a contentious clause that needs further deliberation;
11. There were views submitted with respect to clause 13 and the Committees classified section 13 as a contentious clause that needs further deliberation;
12. There were no views submitted with respect to clause 14 however, the Committees classified section 14 as a contentious clause that needs further deliberation;
13. There were views submitted with respect to clause 15 however, the Committees adopted Section 15 without amendment since it is a non-contentious issue
14. There were no views submitted with respect to clause 16 however, the Committees classified section 16 as a contentious clause that needs further deliberation;
15. There were views submitted on clause 17 however, the committees adopted on this section without amendment since it resolved as a non-contentious clause;
16. There were no views submitted with respect to clause 18 however, the Committees classified section 18 as a contentious clause that needs further deliberation;
17. There were no views submitted with respect to clause 19 however, the Committees classified section 19 as a contentious clause that needs further deliberation;
18. There were views submitted on clause 20 however, the committees adopted on this section without amendment since it resolved as a non-contentious clause;
19. There were views submitted on clause 21 however, the committees adopted on this section without amendment since it resolved as a non-contentious clause;
20. There were views submitted on clause 22 however, the committees adopted on this section without amendment since it resolved as a non-contentious clause;
21. There were no views submitted with respect to clause 23 however, the Committees classified this section as a contentious clause that needs further deliberation;
22. There were no views submitted on clause 24 and the committees adopted on this section without amendment since it resolved as a non-contentious clause;
23. There were no views submitted on clause 25 and the committees adopted on this section without amendment since it resolved as a non-contentious clause;
24. There were no views submitted on clause 26 and the committees adopted on this section without amendment since it resolved as a non-contentious clause;
25. There were no views submitted on clause 27 and the committees adopted on this section without amendment since it resolved as a non-contentious clause;
26. There were no views submitted with respect to clause 28 however, the Committees classified this section as a contentious clause that needs further deliberation;

27. There were no views submitted on clause 29 and the committees adopted on this section without amendment since it resolved as a non-contentious clause;
28. There were no views submitted with respect to clause 30 however, the Committees classified this section as a contentious clause that needs further deliberation;
29. There were no views submitted on clause 31 and the committees adopted on this section without amendment since it resolved as a non-contentious clause;
30. There were no views submitted with respect to clause 32 however, the Committees classified this section as a contentious clause that needs further deliberation;
31. There were no views submitted with respect to clause 33 however, the Committees classified this section as a contentious clause that needs further deliberation;
32. There were no views submitted on clause 34 and the committees adopted on this section without amendment since it resolved as a non-contentious clause;
33. There were no views submitted on clause 35 and the committees adopted on this section without amendment since it resolved as a non-contentious clause;

Min. No.0023/2017

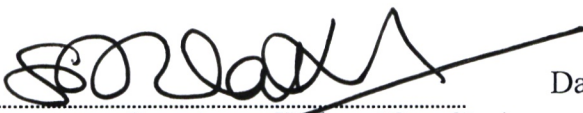
ANY OTHER BUSINESS

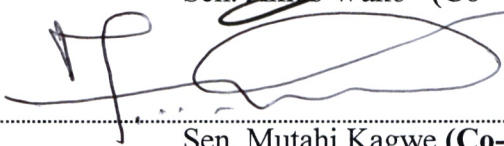
The Co-Chairpersons informed the Committees that there are 16 contentious clauses that need further deliberation and committee resolved to take a health break and resume after 30 minutes

Min.No. 0024/2017

ADJOURNMENT

The meeting was adjourned at 7.20 p.m.

Signed  Date 05/01/17.
 Sen. Amos Wako (Co- Chairperson)

Signed  Date 5/1/17
 Sen. Mutahi Kagwe (Co- Chairperson)

MINUTES OF THE SIXTH JOINT SITTING OF THE STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS AND THE STANDING COMMITTEE ON INFORMATION AND TECHNOLOGY HELD ON WEDNESDAY 4TH JANUARY, 2017 AT 8.30 P.M IN THE WINDSOR GOLF HOTEL AND COUNTRY CLUB

PRESENT

1. Sen. Amos Wako -Chairperson, Standing Committee on Legal Affairs and Human Rights (SCLAaHR)
2. Sen. Mutahi Kagwe - Chairperson, Standing Committee on Information and Technology (SCIT)
3. Sen. Stephen Sang - Vice Chairperson, Standing Committee on Legal Affairs and Human Rights
4. Sen. Mutula Kilonzo Jr - Vice Chairperson Standing Committee on Information and Technology
5. Sen. Kembi Gitura – Member, SCLAaHR
6. Sen. Kipchumba Murkomen – Member, SCLAaHR
7. Sen. Kiraitu Murungi – Member, SCLAaHR
8. Sen. Fatuma Adan Dullo – Member, SCLAaHR
9. Sen. Hassan Omar – Member, SCLAaHR
10. Sen. Judith Sijeny – Member, SCLAaHR
11. Sen. Boy Juma Boy - Member, SCIT
12. Sen. Ben Njoroge - Member, SCIT
13. Sen. Daisy Kanainza - Member, SCIT
14. Sen. Isaac Melly - Member, SCIT
15. Sen. Aaron Cheruiyot - Member, SCIT

ABSENT WITH APOLOGY

1. Sen. Dan Mwazo - Member, SCIT
2. Sen. Joy Gwendo - Member, SCIT

IN ATTENDANCE

SENATE SECRETARIAT

1. Mr. Njenga Njuguna - Director, Committee Service
2. Dr. Johnson Okello - Ag. Director, Legal Services
3. Mr. Mohamed Hassan - Clerk Assistant
4. Mr. Christopher Gitonga - Clerk Assistant
5. Ms. Judy Ndegwa - Legal Counsel
6. Ms. Clare Kidombo - Research Assistant
7. Mr. Ian Otieno - Audio Officer
8. Mr. Reuben Kimosop - Serjeant – At – Arm
9. Mr. Philemon Okinda - Serjeant – At – Arm

Min. No.0025/2017 PRELIMINARIES

The meeting was called to order at 8.35 p.m followed by a word of prayer.

Min. No.0026/2017 ADOPTION OF THE AGENDA

The Agenda was adopted after it was proposed by Sen. Stephen Sang and Seconded by Sen. Isaac Melly as follows;

AGENDA

- 1.** Prayer
- 2.** Adoption of the Agenda
- 3.** **Consideration of contentious clauses in the Election Laws (Amendment) (No. 3) Bill, 2015 (National Assembly Bills No. 63 of 2015)**
- 4.** Any Other Business
- 5.** Adjournment

Min. No.0027/2017 CONSIDERATION OF CONTENTIOUS CLAUSES IN THE ELECTION LAWS (AMENDMENT) (NO.3) BILL, 2015 (NATIONAL ASSEMBLY BILLS NO. 63 OF 2015)

The Co-Chairpersons informed the Committee that the following 16 clauses are the contentious clauses that require further deliberation. They also reiterate the need to consider the interest of the Nation before any other political or individual interest and where the members disagreed it should be done in a dignified manner to safe the image of the institution of Parliament in general and The Senate in particular from public ridicule.

1. There were no views submitted with respect to
2. clause 4 (a) and (b) however, the Committee classified it as a contentious clause that needs further deliberation;
3. There were various views received from stakeholder on clause 5 and the Committee classified it as a contentious clause that needs further deliberation;
4. The Kenya National Committee on Human Rights submitted views on clause 6 and the Committee classified it as a contentious clause that needs further deliberation;
5. There were no views submitted with respect to clause 9 however, the Committee classified it as a contentious clause that needs further deliberation;
6. There were no views submitted with respect to clause 10 and the Committee classified section 10 as a contentious clause that needs further deliberation;
7. There were views submitted with respect to clause 12 and the Committee classified section 12 as a contentious clause that needs further deliberation;
8. There were views submitted with respect to clause 13 and the Committee classified section 13 as a contentious clause that needs further deliberation;
9. There were no views submitted with respect to clause herein, however, the Committee classified them as contentious clauses and needed further deliberation:
 - a) clause 14;
 - b) clause 16;

- c) clause 18;
- d) clause 19;
- e) clause 23;
- f) clause 28;
- g) clause 30;
- h) clause 32;
- i) Clause 33;

After thorough deliberations the Committee agreed to adopt clause 13 and clause 14 without any amendment. The Committee noted that the main contentious clause that need further deliberations and consensus is clause 18 and clause 19 which are proposing to amend Section 44 and introducing new Section 44A to the Elections Act, 2011 respectively.

The Chairpersons suggested a compromise option that needs consideration, by members across the political divide, as follows;

- 1- The language of complementary mechanism should be revisited to allow for phraseology that is clearer. Like Ghana, the Senate should take the position that the details of how the alternative method of identification of voters should be the domain of regulations.
- 2- Take note that IEBC has developed Regulations pursuant to Section 44 of the Elections Act 2011 as amended, which had earlier been discussed at the Legal Affairs and Human Rights Committee of the Senate. The Regulations are yet to be adopted. This gives the opportunity to IEBC to include the step-by-step process of an alternative method of voter identification in the event that the first options does not work. The step-by-step process must ensure adequate checks and balances.
- 3- Accordingly, Clause 19 of the Bill should be deleted and a new amendment under Section 44 (5) be included by inserting a new paragraph (j) which read to read as follows:

alternative mechanisms for voter identification and elections results transmission in the event of non-functionality of the deployed technology; and
- 4- What this means is that the Commission shall develop regulations to provide for the process of invoking alternative mechanisms for voter identification and results transmission in the event of non-performance of the integrated system.
- 5- When it comes to Regulations, the following steps should be considered:
 - (i) Where a voter cannot be identified using the fingerprints on the biometric system, the presiding officer will make the second attempt to identify the voter using biometric features of the voters.
 - (ii) Where the presiding officer fails to identify the voter using biometric features on the second attempt, the Presiding officer shall alert the political party or candidate agents.
 - (iii) Political party and candidate agents at the polling station shall be notified about the voter who could not be identified using biometric features.

- (iv) The presiding officer shall then proceed to search the voter's details in system using the National Identification Number or Passport number in an open and transparent manner.
- (v) If the details of the voter including the photo image show up on the screen, the presiding officer shall show the details to party or candidate agents present at the polling station.
- (vi) If satisfied that the person whose photo image as shown on the screen is the voter, the presiding officer shall allow the voter to proceed to voting.
- (vii) The presiding officer shall fill a form indicating why the voter could not be identified biometrically. The form shall be countersigned by at least a party or candidate agent present at the polling station.
- (viii) The presiding officer shall also strike out the name of the voter on the printed register of voters indicating that the voter was not identified biometrically at the time of voting.
- (ix) At the end of the polling, the presiding officer shall file a report indicating the number of voters who could not be identified using biometric features.

6- The Commission shall put in place mechanism that will ensure not more than 15% of voters are identified without biometrics.

After thorough deliberation the Committee resolved that the matter be considered in the next meeting on 5th January, 2017 at 8.00 a.m


It was also resolved that the Committee adopts the report after those contentious clauses are resolved.

Min. No.0028/2017 ANY OTHER BUSINESS

The Co-Chairperson instructed the Secretariat to redraft various options suggested for clause 19 and present it to Committee in the next meeting.

Min.No. 0029/2017 ADJOURNMENT

The meeting was adjourned at 11.30 p.m. until 5th January, 2017 at 8.00 a.m.

Signed  Date 05/01/17
 Sen. Amos Wako (Co- Chairperson)

Signed  Date 5/1/17
 Sen. Mutahi Kagwe (Co- Chairperson)

MINUTES OF THE SEVENTH JOINT SITTING OF THE STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS AND THE STANDING COMMITTEE ON INFORMATION AND TECHNOLOGY HELD ON THURSDAY 5TH JANUARY, 2017 AT 8.30 A.M IN COMMITTEE ROOM 4, 1ST FLOOR, MAIN PARLIAMENT BUILDING

PRESENT

1. Sen. Amos Wako -Chairperson, Standing Committee on Legal Affairs and Human Rights (SCLAAHR)
2. Sen. Mutahi Kagwe - Chairperson, Standing Committee on Information and Technology (SCIT)
3. Sen. Stephen Sang - Vice Chairperson, Standing Committee on Legal Affairs and Human Rights
4. Sen. Mutula Kilonzo Jr - Vice Chairperson Standing Committee on Information and Technology
5. Sen. Kembi Gitura – Member, SCLAAHR
6. Sen. Kipchumba Murkomen – Member, SCLAAHR
7. Sen. Kiraitu Murungi – Member, SCLAAHR
8. Sen. Fatuma Adan Dullo – Member, SCLAAHR
9. Sen. Hassan Omar – Member, SCLAAHR
10. Sen. Judith Sijeny – Member, SCLAAHR
11. Sen. Boy Juma Boy - Member, SCIT
12. Sen. Ben Njoroge - Member, SCIT
13. Sen. Daisy Kanainza - Member, SCIT
14. Sen. Joy Gwendu - Member, SCIT
15. Sen. Isaac Melly - Member, SCIT
16. Sen. Aaron Cheruiyot - Member, SCIT

ABSENT WITH APOLOGY

1. Sen. Dan Mwazo - Member, SCIT

IN ATTENDANCE

SENATE SECRETARIAT

1. Mr. Njenga Njuguna - Director, Committee Service
2. Dr. Johnson Okello - Ag. Director, Legal Services
3. Mr. Mohamed Hassan - Clerk Assistant
4. Mr. Christopher Gitonga - Clerk Assistant
5. Ms. Judy Ndegwa - Legal Counsel
6. Ms. Clare Kidombo - Research Assistant
7. Mr. Ian Otieno - Audio Officer
8. Mr. Reuben Kimosop - Serjeant – At – Arm
9. Mr. Philemon Okinda - Serjeant – At – Arm

Min. No.0030/2017 PRELIMINARIES

The meeting was called to order at 9.00 a.m followed by a word of prayer.

Min. No.0030/2017 ADOPTION OF THE AGENDA

The Agenda was adopted after it was proposed by Sen. Judith Sijeny and Seconded by Sen. Boy Juma Boy as follows;

AGENDA

1. Prayer
2. Adoption of the Agenda
3. **Consideration and Adoption of the Report on the Election Laws (Amendment) (No. 3) Bill, 2015 (National Assembly Bills No. 63 of 2015)**
4. Any Other Business
5. Adjournment

Min. No.0031/2017 CONSIDERATION AND ADOPTION OF THE REPORT ON THE ELECTION LAWS (AMENDMENT) (NO.3) BILL, 2015 (NATIONAL ASSEMBLY BILLS NO. 63 OF 2015)

The Co-Chairpersons informed the Committee that the Secretariat circulated an E-mail copy of the draft report and a hard copy is in the files. The Chairpersons further requested the Committee members to take time to read the report and suggest to the Secretariat the observations and recommendations to be incorporated into the report.

On the advice of the Chairman, SCLAAHR, the secretariat had been tasked to prepare options on redrafting of Clause 18 and 19. The two compromise options on the redrafting of clause 18 and 19 were presented to the Committee. However, the Committees did not agree on any of the options.

The Committee further noted there are still pending contentious clauses and it was resolved that the contentious issues be subjected to a vote.

The conduct of the voting on the contentious clauses was as follows;

Voting rules: **Voting Yes** – means adopting the contentious clauses of the Bill without amendment;

Voting No – means amending the contentious clauses in the Bill;

Abstain – means abstaining from voting on the contentious clauses of the Bill.

After the conduct of the vote on contentious clauses and tally of the votes, the results were as follows;

1. The total votes cast were **16 (sixteen) votes;**
2. There was no spoilt votes

3. The total votes for **YES** was **10 (Ten) Votes**;
4. The total votes for **NO** was **6 (six) votes**;
5. There was no abstention.

After announcement of the results of the vote on the contentious clauses of the Bill, it was declared that the YES vote had carried the day.

Sen. Hassan Omar informed the Committees that he had a Minority report that he wished appended to the main report, pursuant to standing order 203(5) of the Senate Standing Orders.

The Committee finally adopted the entire Report with the Minority Report as addendum to the Majority report.

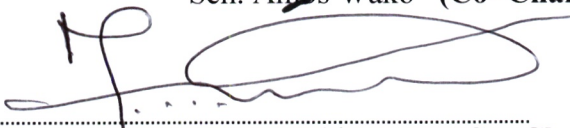
Min. No.0032/2017 ANY OTHER BUSINESS

The Co-Chairpersons informed the Committee that the Committee had up to 12. 00 noon to table the Report and thereafter directed the Secretariat to incorporate the necessary recommendation and prepare all the annexures for signing by the Member.

Min.No. 0033/2017 ADJOURNMENT

The meeting was adjourned at 11.00 a.m.

Signed  Date 05/01/17
Sen. Amos Wako (Co- Chairperson)

Signed  Date 5/1/17
Sen. Mutahi Kagwe (Co- Chairperson)

ANNEX 3

MESSAGE FROM THE SPEAKER OF THE SENATE



REPUBLIC OF KENYA

ELEVENTH PARLIAMENT – (FOURTH SESSION)

THE SENATE

MESSAGE FROM THE NATIONAL ASSEMBLY

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

Hon. Senators,

I wish to report to the Senate that, pursuant to standing order 40 (3) and (5), I received the following Message from the Speaker of the National Assembly, on 23rd December, 2016, regarding the passage of the Election Laws (Amendment) (No. 3) Bill (National Assembly Bill No. 63 of 2015)-

“PURSUANT to the provisions of Standing Orders 41 and 144 of the National Assembly Standing Orders, I hereby convey the following Message from the National Assembly –

WHEREAS, the Election Laws (Amendment) (No. 3) Bill (National Assembly Bill No. 63 of 2015) was published *vide* Kenya Gazette Supplement No. 189 of 27th November 2015 to give effect to Article 99 of the Constitution, amend the Elections Act, 2011, the Independent Electoral and Boundaries Commission Act, 2011 and the Election Campaign Financing Act, 2013 and to make other provisions relating to the electoral processes;

AND WHEREAS, on Thursday, 22nd December 2016, the National Assembly considered and **passed** the said Bill **with amendments** and in the form attached hereto;

NOW THEREFORE, in accordance with the provisions of Article 110(4) of the Constitution and Standing Order 142 of the National Assembly Standing Orders, I hereby refer the said Bill to the Senate for consideration.”

Hon. Senators,

This Message was received at a time when the Senate was on recess and pursuant to standing order 40 (5), I transmitted the Message to every Senator, vide letter Ref. SEN/L&P/MSG.2016 (65) dated 23rd December, 2016.

Hon. Senators,

Pursuant to standing order 148 which requires that a Bill originating in the National Assembly be proceeded with by the Senate in the same manner as a Bill introduced in the Senate by way of First Reading in accordance with standing order 129, and following a request by the Senate Majority Leader, I approved the consideration of the said Bill during today’s Special Sitting. As you may note, the Bill has been listed for First Reading at Order No. 5.

Hon. Senators,

Standing order 130 requires a Bill, which has been read a First Time, to be committed to a relevant Standing Committee for scrutiny and to facilitate public participation.

Hon. Senators,

In compliance with the provisions of standing order 130, after the First Reading of the Bill at Order No. 5, the Bill will stand committed to the Standing Committee on Legal Affairs and Human Rights. As Hon. Senators are aware, this Bill has been the subject of some contention. It is also not lost on us that we are counting down to the General Elections now due in just eight months. For

these reasons, it is imperative that any legislation concerning the manner in which the elections shall be conducted be disposed off and concluded well ahead of time so that the public and all players are clear about the rules that shall apply. The urgency of the Senate proceeding with and concluding work on the Election Laws (Amendment) (No. 3) Bill (National Assembly Bill No. 63 of 2015), cannot therefore be overemphasized. There is no time to be lost.

Hon. Senators,

I accordingly direct that the Standing Committee on Legal Affairs and Human Rights, in accordance with Articles 117 and 118 of the Constitution, scrutinizes the Bill and undertakes public participation commencing immediately today after the First Reading of the Bill in the Senate and prepares its Report. The Committee should engage all stakeholders in the election process and take into consideration all issues that have been raised regarding the contents of this Bill.

Hon. Senators,

I wish to draw your attention that pursuant to standing order 29, the Senate Majority Leader has intimated to me that he will be requesting that two Special Sittings be held on Wednesday 4th January, 2017. The Senate Majority Leader requests that the Election Laws (Amendment) (No. 3) Bill (National Assembly Bill No. 63 of 2015) be considered at Second Reading, Committee of the Whole and Third Reading in the said Special Sittings. I will be issuing a Gazette Notice to this effect.

The Standing Committee on Legal Affairs and Human Rights must therefore proceed with dispatch and be ready to table its Report on 4th January, 2017 when the Senate is expected to assemble for the morning Special Sitting.

Hon. Senators,

As we process this Bill, I would like to make a special appeal to you to display the same level of maturity and sobriety that this country has come to expect from the Senate. The people of Kenya are looking up to the Senate. They expect from the Senate nothing less than a sober reflection and circumspection on the issues before us. Debate robustly. Hold different views. It is your prerogative. But please do so with decency and decorum and in accordance with the Constitution, the laws and the rules of this House. To do otherwise is to subvert our democracy and our constitutional order which establishes Parliament as the place where the representatives of the people meet peacefully and unarmed and make the laws that govern the Nation. This must always be so.

I thank you.

SEN.EKWEE ETHURO, EGH, EBS, MP
SPEAKER OF THE SENATE

28th December, 2016

ANNEX 4

ADVERTISEMENT FOR PUBLIC HEARINGS

All ears

Kilifi > Some of the residents recruited into the National Youth Service (NYS) youth empowerment programme listen to speeches at Ganze yesterday. The exercise was witnessed by area MP Peter Shehe and NYS deputy director Sospeter Mabea.

STORY ON PAGE 25
KAZUNGU SAMUEL | NATION



Nairobi > CS assures community of safety

Team set up to rein in land grabbing cartels

Taskforce to probe deals in the last six years in war on corruption

BY FAITH NYAMAI
@faithnyamai
fnyamai@ke.nationmedia.com



Recently, we transferred all security personnel over allegations they were compromised by cartels and unwilling to assist in investigations." **Lands CS Prof Jacob Kaimenyi**

A taskforce has been set up to investigate the processing and renewal of leases in the last six years to rein in land grabbers and cartels.

Lands Cabinet Secretary Prof Jacob Kaimenyi said the team will investigate if proper procedures were followed and identify people who signed, registered and issued the leases.

He was speaking at a meeting with members of the Asian community in Nairobi.

"The taskforce will make recommendations on how to prevent fraud and the action to be taken against culprits," he said.

The CS said they were cartels in the ministry thwarting investigations into irregularities.

"We have transferred staff in

nine land registries where the public has constantly alleged corruption. Recently, we transferred all security personnel over allegations they were compromised by cartels and unwilling to assist in investigations or arrest people found with fake land papers," he said.

Prof Kaimenyi said the ministry had invited the Ethics and

Anti-Corruption Commission (EACC) to audit its systems for weaknesses.

On the recent eviction in Nairobi's Westlands, Prof Kaimenyi said an internal investigation had identified the people involved.

"We handed over the matter to the CID and EACC," he said. Interior CS Joseph Nkaissery promised to provide security against hired goons from demolishing people's property.

National Land Commission vice chairperson Abigail Mbagaya-Mukoilwe said the agency was dealing with cases of reallocation of title deeds. "The courts should give us time to respond to cases of land grabbing before issuing restriction orders," she said.

EACC boss Halakhe Waqo said cartels had been under investigation and would be dealt with starting next month.

Nairobi County Secretary Robert Ayisi told the gathering the city was not consulted in the current lease renewals.

A representative of the Asian community, Nitin Malde, said they should be treated like all other Kenyans and action should be taken against land grabbers.

REPUBLIC OF KENYA



PARLIAMENTARY SERVICE COMMISSION

INTERVIEW NOTICE

Notice is hereby given to all persons who applied for the positions of **Director, Administrative Services, PSC 15** and **Director, Legal Services (Senate), PSC 15** advertised by the Parliamentary Service Commission in The Standard and The Daily Nation on **12th February, 2016** and **1st July, 2016**, that the candidates listed below are hereby invited for **Oral Interviews** on **11th and 12th January, 2017** at the 1st Floor, Commission Board Room, County Hall Building, Parliament Road on the dates and at the time indicated in this advertisement.

1. POSITION: DIRECTOR, ADMINISTRATIVE SERVICES (PSC 15)

NO.	NAME OF CANDIDATE	ID/PP NO.	DATE	TIME
1.	Ben Bett Tuwai	A2132126	11 th January, 2017	9.00 am
2.	Boya Molu	22253516	11 th January, 2017	9.00 am
3.	Douglas Ng'ang'a	0024195	11 th January, 2017	9.00 am
4.	Elphas Kipchirchir Choge	3936991	11 th January, 2017	10.00 am
5.	Emmanuel Mulwa	9240518	11 th January, 2017	10.00 am
6.	Esther Wandai Mugo	5596420	11 th January, 2017	10.00 am
7.	Joan Andisi Machayo	8717928	11 th January, 2017	11.00 am
8.	Joan Awinja Anduro	8621807	11 th January, 2017	11.00 am
9.	Joel Kipkemoi Kemei	5452861	11 th January, 2017	11.00 am
10.	Kabale Tache Arero	12754074	11 th January, 2017	12.00 pm
11.	Kennedy Juma Mulunda	14541076	11 th January, 2017	12.00 pm
12.	Maasai Lekipaika	9842082	11 th January, 2017	12.00 pm
13.	Rhoda G. Wairioko	21703382	12 th January, 2017	9.00 am
14.	Stephen Gikonyo Cheche	9152413	12 th January, 2017	9.00 am
	Timothy Gutettah James	8720753	12 th January, 2017	9.00 am

2. POSITION: DIRECTOR, LEGAL SERVICES- SENATE, (PSC 15)

NO	NAME OF CANDIDATE	ID/PP NO.	DATE	TIME
1.	Dennis Osiemo Abisai	14533181	12 th January, 2017	10.00 am
2.	Elizabeth Wanjiru Muhia	22271597	12 th January, 2017	10.00 am
3.	James Kiplagat Sitienei	10747179	12 th January, 2017	10.00 am
4.	Johnson Okoth Okello	11618967	12 th January, 2017	11.00 am
5.	Sheriffsam Mwangangi Mwendwa	13783886	12 th January, 2017	11.00 am
6.	Sophia Kaindi Sitati Muchangi	13717361	12 th January, 2017	11.00 am
7.	Vane Nyaboke Akama	16600655	12 th January, 2017	12.00 pm
8.	Winnie N. Malonko	21762119	12 th January, 2017	12.00 pm

Important Notice:

- (a) Candidates are advised to carry their original National Identity Card or Passport and, original plus copies of their certificates/testimonials.
- (b) Candidates who do not appear for the oral interviews will be deemed to have forfeited their interest in these positions.
- (c) Applicants whose names do not appear on the list were not successful.

CLERK OF THE SENATE/SECRETARY,
PARLIAMENTARY SERVICE COMMISSION.

REPUBLIC OF KENYA



ELEVENTH PARLIAMENT
THE SENATE

STANDING COMMITTEE ON LEGAL AFFAIRS & HUMAN RIGHTS

PUBLIC HEARINGS/ RECEIPT OF MEMORANDA

Following the introduction of the Election Law (Amendment No. 3) Bill, (National Assembly Bills No. 63 of 2015) in the Senate, the Bill was committed to the Standing Committee on Legal Affairs & Human Rights for consideration pursuant to standing order 130 of the Senate Standing Orders.

Pursuant to the provisions of Article 118 of the Constitution and standing order 130 (4) of the Senate Standing Orders, the Standing Committee on Legal Affairs & Human Rights now invites interested members of the public and organizations to submit any representations that they may have on the Bill.

The representations may be made orally or by submission of Written Memoranda in the following manner-

- 1. Public Hearings shall be held on **Tuesday, 3rd January, 2017 from 9:00 a.m. to 12:00 noon in the Old Chamber, 1st Floor County Hall Building;** or
- 2. Written Memoranda may be forwarded to the **Clerk of the Senate/ Secretary Parliamentary Service Commission, P.O. Box 41842-00100, Nairobi**, hand-delivered to the **Office of the Clerk of the Senate/ Secretary Parliamentary Service Commission, First Floor, Main Parliament Buildings, Nairobi** or emailed to csenate@parliament.go.ke, to be received on or before **Tuesday, 3rd January, 2017, at 2:00 p.m.**

A copy of the Bill can be found in the Senate portal of the Parliament website: www.parliament.go.ke/senate.

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

