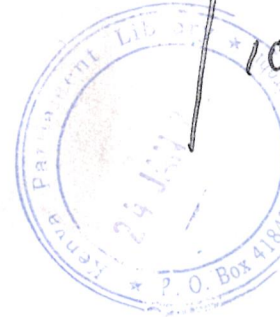


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THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT (FIRST SESSION)

THE SELECT COMMITTEE ON ELECTION LAWS, 2017

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

VOLUME 1

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

October, 2017

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ABBREVIATIONS AND ACRONYMS

AIC	African Inland Church
CA	Communications Authority of Kenya
CBK	Central Bank of Kenya
CEO	Chief Executive Officer
CISA	Certified Information Systems Auditor
CMD	Centre for Multi- Party Democracy
CPA	Certified Public Accountant
CTC	Constituency Tallying Center
EGH	Elder of the Order of the Golden Heart
ENG.	Engineer
FORD	Forum for Restoration of Democracy
HCK	Hindu Council of Kenya
ICPAK	Institute of Certified Public Accountants of Kenya
ICT	Information and Communication Technology
ICTAK	Information Communication Technology Association of Kenya
ID	Identification
IEBC	Independent Electoral and Boundaries Commission
IFMIS	Integrated Financial Management Information Systems
IRCK	Inter- Religious Council of Kenya
HON	Honourable
KANU	Kenya African National Union

KCCB	Kenya Conference of Catholic Bishops
KICTA-Net	Kenya ICT Action Network
KIEMS	Kenya Integrated Elections Management Systems
KNCHR	Kenya National Commission on Human Rights
KNNCI	Kenya National Chamber of Commerce and Industry
MAWE	Maendeleo ya Wanaume
MP	Member of Parliament
MYWO	Maendeleo ya Wanawake Organization
NARC	National Rainbow Coalition
NASA	National Super Alliance
NCCK	National Council of Churches of Kenya
NMLF	National Muslim Leaders Forum
NTC	National Tallying Centre
SDA	Seventh Day Adventists
SEN.	Senator
SUPKEM	Supreme Council of Kenya Muslims
UKAI	Ukambani Agricultural Institute

PREFACE

Mr. Speaker Sir,

Honourable Members will recall that on 28th September, 2017, the National Assembly approved a Motion that established a Select Committee on Election Laws, 2017 pursuant to Standing Order 127 to deliberate on the Election Laws (Amendment) Bill, (National Assembly Bills No. 39 of 2017).

The Bill was read a first time in the National Assembly on 28th September, 2017 and, pursuant to Standing Order 127 stood committed to the Select Committee on the Election Laws, 2017 for consideration and public participation.

Mandate of the Select Committee on the Election Laws, 2017

The Select Committee on the Election Laws, 2017 is mandated to examine and undertake public participation on the Election Laws (Amendment) Bill (National Assembly Bills No. 39 of 2017) and any other related Bills and report to the House on or before Tuesday, 10th October, 2017.

Joint Sitting with the Senate Select Committee on Election Laws (Amendment) Bill, 2017

In a sitting held on 30th September, 2017, the Select Committee resolved to hold joint sittings with the Senate Select Committee on Election Laws (Amendment) Bill, 2017. Standing Order 202A of the National Assembly Standing Orders and Standing Order 218 of the Senate Standing Orders provide for Joint Sittings. Noting that the two select committees have a similar mandate, the select committees of the Houses deemed it fit to hold Joint Sittings.

Mr. Speaker Sir,

The Select Committee on the Election Laws, 2017, pursuant to Article 118 of the Constitution and Standing Order 127 of the National Assembly Standing Orders, invited submissions from the public and stakeholders in an advertisement in the Daily Nation and Standard Newspapers dated 29th September 2017 (*Annex 4*). Following the resolution to hold a joint sitting, the Select Committees of the National Assembly and Senate on the Election Laws (Amendment) Bill, 2017, pursuant to Article 118 of the Constitution, Standing Order 127 of the National Assembly Standing Orders and Standing Order 134 of

the Senate Standing Orders, invited submissions from the public and stakeholders in an advertisement in the Daily Nation and Standard Newspapers dated 1st October 2017 (*Annex 4*). In addition the proceedings of the Select Committees were aired live by various media houses with nation-wide coverage.

The Select Committees of the National Assembly and the Senate on the Election Laws (Amendment Bill), 2017 thereafter held public hearings and received submissions of written memoranda from the public and stakeholders between 3rd October, 2017 and 5th October, 2017. A total of one hundred and eighty five (185) oral presentations and written submissions, and a further sixty (60) memoranda were received from members of the public, constitutional commissions, the business community, civil society, religious groups, political parties, among other stakeholders through the Offices of the Clerks of the National Assembly and the Senate.

Thereafter, the Select Committee proceeded for a report writing retreat which provided the opportunity to consider the submissions of the public and stakeholders and to further draft, consider and approve its Report.

Acknowledgement

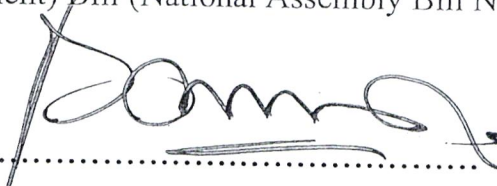
The Select Committee on the Election Laws, 2017 wishes to thank the Offices of the Speaker and the Clerk of the National Assembly for the support extended to it during the consideration of these critical Bills especially in the conduct of public hearings and preparation of this report.

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

The Select Committee also acknowledges the members of the public who have keenly followed the deliberations of the Select Committee on these important Bills and the media who ensured that the country was informed on the proceedings.

Mr. Speaker Sir,

It is now my pleasant duty, pursuant to Standing Order 199, to present the Report of the Select Committee on the Election Laws, 2017 on the consideration of Election Laws (Amendment) Bill (National Assembly Bill No. 39 of 2017).

Signed..........Date.....10.10.2017.....

HON. WILLIAM CHEPTUMO, M.P.

CHAIRPERSON

ADOPTION OF THE REPORT OF THE SELECT COMMITTEE ON THE
ELECTION LAWS, 2017

We, the undersigned Members of the Select Committee on the Election Laws,
2017 do hereby append our signatures to adopt the Report.

NAME		SIGNATURE
Hon. William Cheptumo, MP	-Chairperson	
Hon. Alice Muthoni Wahome, MP	-Member	
Hon. Isaac Waihenya Ndirangu, MP	-Member	
Hon. Gladys Boss Shollei, MP	-Member	
Hon. Ali Wario, MP	-Member	
Hon. Jennifer Shamalla, MP	-Member	
Hon. Adan Haji Yussuf, MP	-Member	
Hon. George Gitonga Murugara, MP	-Member	
Hon. Stanley Muthama, MP	-Member	

CHAPTER ONE

INTRODUCTION

1.1 Background

1. The Election Laws (Amendment) Bill (National Assembly Bills No. 39 of 2017) sponsored by Hon. William Cheptumo, MP was published on 27th September, 2017 and were first read in the National Assembly on 28th September, 2017.
2. On 28th September 2017 the National Assembly resolved to establish a Select Committee to be known as the Select Committee on Election Laws, 2017 to examine and undertake public participation on the Election Offences (Amendment) Bill (National Assembly Bill No. 38 of 2017) and the Election Laws (Amendment) Bill, (National Assembly Bills No. 39 of 2017). The Motion was as follows-

ESTABLISHMENT OF A SELECT COMMITTEE ON ELECTION-RELATED LAWS

(The Leader of the Majority Party)

*THAT, aware that the country is still in an election cycle, arising out of the requirement for a fresh Presidential Election in October, 2017; further aware that there is need to legislate on and address certain legal lacunas and in compliance with judicial decisions asking Parliament to legislate on certain matters to ensure that the elections conform with the provisions of Article 81 of the Constitution on general principles for the electoral system; noting that such election-related matters would ordinarily require consideration by the relevant Committee of the House which is yet to be established; further noting the limited period of time before the date of the said fresh election; cognizant of the urgent need to consider and conclude with all matters relating to the elections to allow the Independent Electoral and Boundaries Commission ample time to implement any changes related to the review of the election related laws; **NOW THEREFORE**, pursuant to the provisions of Standing Order 127(2), this House resolves –*

*(a) to establish a Select Committee to be known as the **Select Committee on the Election Laws, 2017** comprising of not more than fifteen Members, to examine and undertake public participation on the Election Laws (Amendment) Bill, (National Assembly Bill No.39 of 2017) and **any other** related Bills;*

(b) that, the Committee comprise of the following Members-

Select Committee on Election Laws

1. *The Hon. William KipkirorCheptumo, MP- Chairperson*
2. *The Hon. Gladys Jepkosgei-Boss Shollei, MP*
3. *The Hon. Isaac Waihenya Ndirangu, MP*
4. *The Hon. Ali Wario, MP*
5. *The Hon. Jennifer Shamalla, MP*
6. *The Hon. Adan Haji Yusuf, MP*
7. *The Hon. George GitongaMurugara, MP*
8. *The Hon. Stanley Muthama, MP*
9. *The Hon. Alice MuthoniWahome, MP*

(c) that, the quorum of the Committee be the Chairperson and four other Members; and,

*(d) that, the Committee considers the matters under its mandate and reports to the House on or before **Tuesday, October 10, 2017.***

3. After the Bill was read a first time in the National Assembly on 28th September, 2017, it stood committed to the Select Committee on Election Laws, 2017 pursuant to Standing Order 127, for facilitation of public participation.
4. The Speaker of the National Assembly, Hon. Justin Muturi, E.G.H., MP issued a communication in response to a question raised with regard to whether the Election Laws (Amendment) Bill, 2017 (National Assembly No. 39 of 2017) is a Bill concerning county governments and whether the Bill will be transmitted to the Senate. Jointly, with the Speaker of the Senate, the Speaker of the National Assembly determined that the Bill concerns county governments, as it seeks to amend several Statutes, among them the Elections Act, 2011 which makes the Bill fall squarely within the definition set out at Article 110 (1)(b) to the extent that it relates to “*the election of members of a county assembly*”. If passed by the House, the Bill shall be forwarded to the Senate for consideration. The Communication from the Speaker of the National Assembly is attached at **Annex 3**.
5. The Select Committee on the Election Laws, 2017, pursuant to Article 118 of the Constitution and Standing Order 127 of the National Assembly Standing Orders, invited submissions from the public and stakeholders in an advertisement in the Daily Nation and Standard Newspapers dated 29th September 2017 (**Annex 4**). Following a resolution to hold a Joint Sitting with the Senate Select Committee on Election Laws (Amendment) Bill, 2017 and pursuant to Article 118 of the Constitution and Standing Order 127 of the National Assembly Standing Orders and Standing Order 134 of the Senate Standing Orders, the Select Committees of the National Assembly and the Senate on the Election Laws (Amendment) Bill,

2017 invited submissions from the public and stakeholders in an advertisement in the Daily Nation and Standard Newspapers dated 1st October 2017 (*Annex 4*).

6. The Select Committees of the National Assembly and the Senate on the Election Laws (Amendment) Bill, 2017 thereafter held public hearings and received submissions of written memoranda from the public and stakeholders between 3rd October, 2017 and 5th October, 2017. A total of one hundred and eighty five (185) oral presentations and written submissions, and a further sixty (60) memoranda were received from members of the public, constitutional commissions, the business community, civil society, religious groups, political parties, among other stakeholders through the Offices of the Clerks of the National Assembly and the Senate.

1.2 Brief History of Electoral Law Reforms in Kenya (1991-2017)

7. The former Constitution had provisions on the manner in which elections should be conducted in Kenya. In particular, section 41 established the Electoral Commission of Kenya (ECK) which was mandated to conduct elections in Kenya. Apart from the Constitution, the National Assembly and Presidential Elections Act Cap. 7 also governed the registration of voters and holding of elections to the office of President and to the National Assembly and the conduct of the Electoral Commission and of political parties participating in elections in Kenya.
8. In 1997 there were negotiations between the political parties (Democratic Party, Forum for Restoration of Democracy- Kenya (FORD Kenya), Forum for Restoration of Democracy- Asili (FORD Asili) and Safina) and the government on the reform of the Electoral Commission of Kenya which then gave rise to the Inter-Parliamentary Political Parties Group (IPPG) agreement. Notably, the agreement provided that each of the Parliamentary Parties would be allocated seats in the Commission in accordance with the number of seats each of the Parties had in Parliament and subject to appointment by the President. However, the Inter-Parliamentary Political Parties Group agreement was never entrenched in law.
9. In 2008, following the post-election violence, there were negotiations for a brokered settlement which gave rise to the National Accord. The National Accord and Reconciliation Act, 2008 provided for, among other things, the setting up of a commission which was mandated to examine the country's electoral process and propose possible electoral reforms to prevent future electoral disputes. During the same period, the Independent Electoral Review Committee (Kriegler Commission) which was established to look into the election processes in Kenya observed major

weaknesses in the electoral laws and recommended a myriad of reforms including the need to amend the law to have more detailed provisions on the Electoral Commission of Kenya institutional aspects and review of the term of office of Commissioners.

10. In 2009, Parliament implemented the recommendations of the Kriegler report by establishing the Interim Independent Electoral Commission (IIEC) consisting of nine commissioners who were nominated through a competitive process by Parliament and appointed by the President in consultation with the Prime Minister. The Interim Independent Electoral Commission, established under section 41 of the former Constitution, continued in office until 2011 when the Independent Electoral and Boundaries Commission (IEBC) was established under the new Constitution.
11. Following the promulgation of the new Constitution in 2010, Parliament enacted the Elections Act (No. 24 of 2011) to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assembly among other provisions, the IEBC Act (No. 9 of 2011) to provide a framework for appointment and effective operation of the Independent Electoral and Boundaries Commission established under Article 88 of the Constitution; and the Political Parties Act (Cap 7B) which provides for the regulation of political parties.
12. Pursuant to a Joint Resolution passed by the Senate on Tuesday, 5th July 2016 and the National Assembly on Wednesday, 6th July 2016 Parliament established a Joint Select Committee to inquire into allegations against Independent Electoral and Boundaries Commission Commissioners and the Secretariat, recommend legal mechanisms for the vacation from office of the Commissioners and Secretariat in accordance with the Constitution; and recommend legal, policy and institutional reforms to strengthen Independent Electoral and Boundaries Commission and improve the electoral system and processes so as to ensure the August, 2017 elections were free and fair and administered in an impartial, efficient, simple, accurate, verifiable, secure, accountable and transparent manner. The recommendations of the Joint Select Committee included, among other things, the replacement of the then Commissioners of the Independent Electoral and Boundaries Commission and the establishment of a Selection Panel to oversee the appointment of new Commissioners comprising largely of religious leaders.
13. The Committee also forwarded two Bills to Parliament namely the Election Offences Bill, 2016 which sought to consolidate the offences relating to elections

into one Act in order to enhance the administration of elections and prosecution of offences relating to elections and the Elections Laws (Amendment) Bill, 2016 which sought to amend the Elections Act, 2011, the Independent Electoral and Boundaries Commission Act, 2011, the Political Parties Act, 2011, the Supreme Court Act, 2011 and the Registration of Persons Act, Cap 106, in order to address concerns noted by the Joint Committee on matters relating to Independent Electoral and Boundaries Commission and the conduct of elections. The Bills were enacted into law and the Elections Act and the Independent Electoral and Boundaries Commission Act as amended now form the legal framework governing the conduct of elections in Kenya.

1.3 Overview of the Bill

14. The Election Laws (Amendment) Bill (National Assembly Bills No. 39 of 2017) seeks to amend the Independent Electoral and Boundaries Commission Act, 2011 (No. 9 of 2011), the Elections Act, 2011 (No. 24 of 2011) and the Election Offences Act, 2016 (No. 37 of 2016) to provide for the proper conduct of the affairs and business of the Independent Electoral and Boundaries Commission, for effective management of elections and in order to address the concerns that resulted following the General Election in 8th August 2017. The amendments are as follows-

1.4 Amendments to the Independent Electoral and Boundaries Commission Act, 2011

Definition of the term “chairperson”

15. Clause 2 of the Bill seeks to amend Section 2 of the Independent Electoral and Boundaries Commission Act, 2011 to provide that the term “chairperson” means the chairperson of the commission, and in the absence of the chairperson, the vice-chairperson, or such other person acting as the chairperson in the absence of both the chairperson and vice-chairperson.

Qualification for appointment as Chairperson and Chairing of commission meetings in the absence of the Chairperson

16. Clause 3 of the Bill seeks to amend section 6 of the Independent Electoral and Boundaries Commission Act, 2011 to provide for, among other things, the expansion of the qualifications for appointment as chairperson; and that in the absence of the chairperson, the vice-chairperson shall assume the duties and

responsibilities of the chairperson. Further, the Bill provides that in the event of the absence of the chairperson or the vice-chairperson, the members of the Commission shall elect from amongst themselves one of their Members to act as chairperson and exercise the duties and responsibilities of the chairperson.

Quorum for Commission meetings and decision- making

17. Clause 4 of the Bill seeks to amend paragraph 5 and 7 of the Second Schedule to the IEBC Act, 2011 to provide that the quorum for the conduct of business at a meeting of the Commission shall be at least half of the existing members of the Commission, provided that the quorum shall not be less than three members. Further, the amendment seeks to provide that a decision on any matter before the Commission shall be by a majority of the members present and voting, unless a unanimous decision is reached.

1.5 Amendments to the Elections Act, 2011

Nomination of presidential candidates

18. Clause 5 of the Bill seeks to delete section 29 of the Elections Act, 2011 to remove the requirements that persons who nominate a presidential candidate shall be members of the candidate's political party and further that the persons who nominate an independent presidential candidate shall not be members of any political party.

Transmission of results

19. Clause 6 of the Bill seeks to amend section 39 of the Elections Act, 2011 to provide for, among other things the electronic and manual transmission of tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre. The amendment also seeks to place an obligation on the Independent Electoral and Boundaries Commission to facilitate public information by establishing a mechanism for the live-streaming of results as announced.

Use of technology

20. Clause 7 of the Bill seeks to amend section 44 of the Elections Act, 2011 to clarify the regulation making powers of the Independent Electoral and Boundaries Commission with respect to the use of technology to ensure compliance with the

provisions of Article 38 of the Constitution, which espouses the right to free and fair elections and the free expression of the will of the electorate.

Complementary mechanism for identification of voters

21. Clause 8 of the Bill seeks to delete and replace section 44A of the Elections Act, 2011 to clarify the role of the Independent Electoral and Boundaries Commission in putting up a complementary mechanism for identification of voters.

Nullification of election

22. Clause 9 of the Bill seeks to amend section 83 of the Elections Act, 2011 to provide that no election shall be declared void by reason of non-compliance with any written law relating to that election, if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law and that the non-compliance did not affect the result of the election.

Procedure to be followed at a fresh election

23. Clause 10 of the Bill seeks to amend the Elections Act, 2011 to provide for the procedure for the conduct of a fresh election where a presidential election is invalidated by the Supreme Court.

1.6 Amendments to the Election Offences Act, 2016

Failure or refusal to sign election results

24. Clause 11 of the Bill seeks to insert a new section in the Election Offences Act, 2016 to prescribe an offence for a presiding or returning officer who among other things knowingly fails or refuses to sign or complete the prescribed document or willfully submits an incomplete document containing the results of an election.

CHAPTER TWO

PUBLIC PARTICIPATION

Introduction

25. Pursuant to Article 118 of the Constitution and Standing Order 127 of the National Assembly Standing Orders and Standing Order 134 of the Senate Standing Orders, the Select Committees of the National Assembly and the Senate on the Election Laws (Amendment) Bills, 2017 invited submissions from the public and stakeholders. During the joint sittings held between 3rd October, 2016 and 5th October, 2017, the Select Committees received oral submissions and/or written memoranda from individual members of the public and several key stakeholders. The written memoranda are attached at *Annex 6*. The Select Committees took into consideration proposals from stakeholders and individual members of the public on specific clauses of the Bills, as follows:

2.1 Amendments to the IEBC Act, 2011

2.1.1 Clause 2: Definition of the term “chairperson”

(a) Submissions from institutions and organizations

26. The Independent Electoral and Boundaries Commission (IEBC) submitted that the amendment implies that the commission may appoint anyone to act as the Chairperson in the absence of the Chairperson and the Vice- Chairperson. The Commission proposed to replace the word “person” with the word “member”.
27. The Jubilee Party agreed with the amendment and submitted that the law does not provide any succession procedure regarding the above unique role of the Chairperson before a new Chairperson is appointed, and that such a lacuna especially during an election year would throw the country into an unprecedented crisis.
28. The Council of Imams and Preachers of Kenya represented by Mr. Bakari Shaban from the Mt. Kenya Region Chapter submitted that the Council supported the amendment as it ensures that there was no vacuum in the Independent Electoral and Boundaries Commission (IEBC) should the Chairperson of the Commission for whatever reason be absent or unable to discharge his duties.

29. The Law Society of Kenya (LSK) submitted that the composition of a commission and the identification, selection and appointment of each of its members are provided for by the Constitution. No vice-chair or member not having been selected and appointed as chairperson under the Constitution can legally purport to exercise by statutory authority derived from the proposed legislation any constitutional functions and powers of the office of the Chairperson except upon an amendment of the Constitution. Parliament cannot purport to amend the Constitution by conferring the obligation to discharge a constitutional mandate on a member of the committee.
30. The Institute for Social Accountability (TISA) suggested that the proposed amendment poses a conflict in view of the Constitutional process of appointment (requirement of approval of Parliament and appointment by the President) of a Chairperson. The bill proposes to amend the architecture of the Independent Election and Boundaries Commission (IEBC) by conflating the qualifications and powers of the Chairperson and the members of the IEBC, contrary to the constitutional requirements on the same.
31. The Chalvins Law Consulting Group submitted that the proposed amendment expands the definition of the term chairperson contrary to what is provided for in the Constitution.
32. The Kenya National Commission on Human Rights (KNCHR) recommended that the amendment was not good practice and furthermore the definition and presence of 'Vice-Chairperson' takes care of an alternate for the Chairperson. The framing of Article 138(10) is mandatory and this role cannot be delegated.
33. Catholic Justice and Peace Commission Parliamentary Liaison Desk submitted that the amendment violates Article 250(2) of the Constitution as Parliament as the representative of the people will not have the opportunity to vet the person replacing the Chairperson. Further since the term "absence" has not been explained, it is bound to create confusion.
34. Centre for Minority Rights Development proposed that Clause 2 be amended to make reference to Article 259(3)(b) of the Constitution for clarity as the Constitution already contemplates the role of a successor in State or public offices, the Chairperson of IEBC being one of them.

(b) Submissions from individual members of the public

35. Mr. ZethOumaOmollo submitted that the Vice-Chairperson automatically assumes the duties of the Chairperson in the absence of the latter. This simple and traditional legal-administrative principle suffices.
36. Ms. Florence Gicheru stated that the Vice-Chairperson is elected by the members from amongst themselves, therefore, until the Constitution allows for the appointment of a vice chairperson, the powers of the Chairperson cannot be delegated.
37. Mr. David Wati stated that the proposed amendment will render the Chairperson redundant and powerless and exposes the Chairperson to danger as he/she may be prevented from accessing the National Tallying Centre.
38. Johnson MoriasiNyandika proposed that clause 2 be amended to provide reasons for the absence of the chairperson such as: fatigue; incapability to write; or as the Constitution of Kenya puts it in the case of the President, resigns in writing or dies because the current proposal does not provide for any reasons for the absence.
39. Njimuwa Kaiya and Ngiriwa Wangui opposed the amendment on grounds that the definition of a chairperson conflates the meaning of chairperson and member.
40. Ms. VellahKadeiza opposed the proposed amendment because, in her opinion, the likelihood of the chairperson and the vice-chairperson to be absent at the same time are low.

2.1.2 Clause 3: Qualification for appointment as Chairperson and Chairing of Commission meetings in the absence of the Chairperson

(a) Submissions from institutions and organizations

41. The Independent Electoral and Boundaries Commission (IEBC) submitted that Elections are managed through a complex web of legal procedures that require the head of the institution to be competent in Law. The Commission suggested that a good intervention should balance between the need for continuity and relevant qualifications. The Commission, therefore, proposed the maintaining of the qualifications of the Chairperson as set out in the current law.

42. On the Chairing of Commission meetings in the absence of the Chairperson, the Independent Electoral and Boundaries Commission asserted that it would be useful to have a provision that provides for the exercise the powers of the Chairperson in acting capacity and proposed that the provisions of 1A and 1B should be seen within the context of Article 259(3)(b) of the Constitution.
43. The Jubilee Party was of the opinion that the expansion of the qualifications for the Chairperson would promote inclusiveness, equity and equality.
44. The Stewards Revival Pentecostal Church supported the proposed amendment as it removes the risk of paralysis in the absence of both the Chairperson and Vice-Chairperson of Independent Electoral and Boundaries Commission.
45. The Law Society of Kenya (LSK) proposed that there was logic in the requirement of the Chairperson of the Independent Electoral and Boundaries Commission to be a lawyer and to have Supreme Court qualifications as the Chair of the Independent Electoral and Boundaries Commission had auxiliary duties to sit on appeal over petitions of aggrieved persons during party primaries. Further the Law Society of Kenya was of the opinion that the proposed amendment will assign the role and function of the Chairperson to the Vice-Chairperson and other members who have not been selected or appointed in accordance with the constitutional requirement. The Law Society of Kenya in its submissions recommended that the amendment can only be effected constitutionally and not statutorily, and that unless the Vice Chairperson has similar qualifications as the Chairperson that office cannot fall under the contemplation of Article 259(3)(b) in regard to the constitutional functions of the Chairperson.
46. The Kenya National Commission on Human Rights submitted that:
- (i) For qualifications of a Chairperson, the impact in the seniority and expertise on the critical interpretation and application of the law will be lost yet the constitutional and statutory functions of Independent Electoral and Boundaries Commission naturally point to the need to have a serious legal mind to head the Commission. As such the Chairperson must be well versed in the interpretation of election laws, regulations and constitutional provisions.
 - (ii) The Independent Electoral and Boundaries Commission Act envisions a vacancy arising in the office of chairperson or member as under Section 7A of Independent Electoral and Boundaries Commission Act which is effective enough.

(iii) Clauses 1A and 1B are hostile to the distinct role of the Chairperson as provided for by the Constitution to the extent that it seeks to introduce an ambiguous ground "absence from office".

47. The Catholic Justice and Peace Commission Parliamentary Liaison Desk submitted that the amendment reduces the qualifications required for the appointment of the Chairperson yet the Constitution deals with constitutional and legal issues which requires somebody who is trained in law.

48. The Office of Registrar of Political Parties offered that the electoral process is a highly legal process and the Chairperson is constantly interpreting the law, as such, the academic requirement of Chairperson to be a lawyer should be retained. Also, clauses 1A and 1B deal with matters that are covered under the second schedule therefore they should be deleted.

49. The Lamu Students Association proposed the amendment of the clause to reduce the fifteen years' experience to ten years to accommodate the youth.

50. The Centre for Multi-party Democracy of Kenya through its Chairman Hon. Omingo Magara suggested that the change of the qualifications for appointment as Independent Electoral and Boundaries Commission chairperson was not necessary in view of paragraph 8 of the Second Schedule to the Independent Electoral and Boundaries Commission Act.

51. The National Rainbow Coalition (NARC) Kenya offered that there is need to reconsider the reasoning behind the current requirement that the Chairperson of the Independent Electoral and Boundaries Commission should be a lawyer qualified to be a Supreme Court Judge because a non-lawyer would have to fully rely on advice and interpretation of others in order to strictly adhere to the election laws as required.

(b) Submissions from individual members of the public

52. Mr. Abel Onchario supports the proposed amendments as they seek to ensure continuity by dealing with the issues of absence in the office of the Chairperson and expands the qualifications for persons eligible to serve as Chairperson of the Independent Electoral and Boundaries Commission and opens it up to all other professions.

53. Mr. Elijah Ole Metiang from Kajiado County supports the proposed amendments as it ensures that there is no vacuum in the Office of the Chairperson.
54. Mr. Wilson Mwai agreed with the amendment and proposed an expansion of the qualification to include additional professional qualifications such as ICT, CISA, CRIST and CPA because auditors and accountants have a better understanding of the computer systems that work with numbers.
55. Mr. Johnson Moriasi Nyandika proposed that the Chairman or other Commissioners should be well versed in statistics too as the Independent Electoral and Boundaries Commission duties are mainly about numbers.
56. Mr. Fwamba NC Fwamba supported the amendments but submitted that there was need to define the term "absence" that would occasion the chairing of the commission by the Vice- Chairperson or any another person.
57. Ms. Mburu Nice Muthoni supports the proposed amendments to the Bill as it removes the risk of paralysis in the absence of both the Chairperson and vice-chair of the Independent Electoral and Boundaries Commission.
58. Mr. Eliud Kinuthia proposed that clause 3 (a) be amended to include experience in management of people and transformative leadership because the position of the Chairperson of the Commission requires one to have proven experience on how to manage people and offer leadership especially within our electoral system.
59. Eng. Paul Mboga asserted that "Chairperson" is a very important position whose functions should not be delegated to the deputy or any other member.
60. Dr. Duncan Ojwang, Dean African Nazarene Law School proposed that the use of the word "in the absence" is too broad and vague, as such there was need to clarify the circumstances that would lead to the absence of the Chairperson of the Independent Electoral and Boundaries Commission.
61. Njimuwa Kaiya and Ngiriwa Wangui opposed the amendment on grounds that the qualifications for a chairperson to be a lawyer are necessary noting the functions a chairperson is required to perform.
62. Mr. Kenneth Mavale opposed the amendment in stating that it dilutes the definition of the term "chairperson".

2.1.3 Clause 4: Quorum for Commission meetings and decision- making

(a) *Submissions from institutions and organizations*

63. The Independent Electoral and Boundaries Commission (IEBC) submitted that the proposed amendment affects the quorum of the commission plenary to make decisions, it also reiterates mandatory voting in the procedure of making decisions where there is no unanimous decision at plenary as already provided for under Independent Electoral and Boundaries Commission Act Schedule II. The Commission, therefore, offered that in order to enhance majority decision-making the current quorum of 5 should be retained. Also, the Commission proposed that Paragraph 7 be amended to read:

*“Unless a unanimous decision is reached, a decision on any matter before the Commission shall be by concurrence of a **simple majority** of all the members.”*

64. The Law Society of Kenya (LSK) opposed the amendment, as three members could constitute a quorum, meaning that a minority composition of the Independent Electoral and Boundaries Commission could make decisions that would bind the majority. The proposed amendments shall have the effect of undermining the structure and authority of the Commission by creating an authority for the proffered quorum of three which is not only unconstitutional but creates an inbuilt structure for a dead lock with the consequential constitutional ramification. The magnitude and gravity of the Independent Electoral and Boundaries Commission’s constitutional mandate requires that its decisions are made by a quorum of an odd number of not less than half of the full complement of its members which can only be five. The LSK recommended that the proposed amendment to reduce the quorum from 5 to 3 offends the spirit of the Constitution and ought therefore to be discarded with the current provisions being retained as they are.

65. The Jubilee Party supported the amendment, as they noted that the current law that set the quorum for the conduct of business at five members was flawed as it assumed that the Commission would always have the Constitutional maximum of nine members which might not always be the case.

66. The Kenya Private Sector Alliance submitted that the quorum should be at least 50 percent of all the Members and decisions should be made by a simple majority of members present in line with the principles of corporate governance.

67. The Catholic Justice and Peace Commission Parliamentary Liaison Desk submitted that the amendment lowers the quorum threshold. Considering that the Independent Electoral and Boundaries Commission deals with weighty matters this may cause tension if not handled well. There may be a situation where three of the Commissioners meet and make a decision and then the other three also meet and make another different decision that leads to a stalemate. The amendment will also create competing groupings, conflicts and tensions.
68. The Kenya Law Reform Commission agrees with the proposed amendments in the Bill save for clause 4 which reduces quorum to three since it may occasion unintended consequences including parallel meetings and creates the possibility of the minority deciding for the majority. Further, a vacancy in the membership of the Independent Electoral and Boundaries Commission would not invalidate the proceedings of Independent Electoral and Boundaries Commission so long as the majority of the Members support the decision.
69. The Non-Governmental Organizations Council through its Chairman Mr. Stephen Cheboi, was of the opinion that a quorum of four Members would better ensure accountability.
70. Hon. Omingo Magara, Chairman of the Centre for Multiparty Democracy Kenya, offered that a quorum of not less than half of the members of the Commission would be more appropriate.
71. Kenya Law Reform Commission proposed that clause 4 be amended to provide as follows-
- 4. *The Independent Electoral and Boundaries Commission Act, 2011 is amended by-*
 - (a) *deleting the phrase "at least five" appearing in paragraph 5 and substituting therefor the words "a majority of the";*
 - (b) *deleting paragraph (7) and substituting therefor the following new paragraph-*
 - 7. *Unless a unanimous decision is reached, a decision on any matter before the Commission shall be by a majority of the Members.*

77. Eng. Paul Mboga proposed that the quorum to be two-thirds (2/3) of the membership to ensure fairness and accountability.
78. Mr. John Kisigwa proposed that the quorum should be a simple majority plus one commissioner.
79. Mr. Kenneth Mavale the opposed the amendment stating that the quorum was too simplified.

2.2 Amendments to the Elections Act, 2011

2.2.1 Clause 5: Nomination of Presidential Candidates

(a) Submissions from institutions and organisations

80. The Independent Electoral and Boundaries Commission supported the amendment that Section 29 of the Elections Act be deleted on the grounds that the section was declared unconstitutional in *Peter Solomon Gichira vs Independent Electoral and Boundaries Commission. Petition No 243 of 2017eKLR [2017]*.
81. Conversely, several organisations and institutions opposed the deletion of section 29 of the Elections Act including the Law Society of Kenya (LSK), Institute of Public Accountants of Kenya (ICPAK), Chalvins Law Consulting, and the Office of the Registrar of Political Parties.
82. Specifically, the Institute of Certified Public Accountants of Kenya submitted there was no justification for the amendment and that it contravened Article 137(1) (d) of the Constitution. They stated that Section 29 grants powers to members of the Presidential candidate political party to nominate him. They stated that the democratic rights of members should not be infringed.
83. Chalvins Law Consulting were of the opinion that the amendment negates the concept of discipline of members by political parties.
84. The Office of the Registrar of Political Parties was of the view that Clause 5 should be deleted. They submitted that the political system in Kenya enshrined under Article 38 and Article 88(4)(d) of the Constitution underscores that the duty of a political party, through its members, to nominate candidates for election. Removal of this provision will have adverse effects on the procedure for nominations as strangers to the party will be able to nominate candidates.

72. The Kenya Law Reform Commission was of the opinion that reducing the quorum to three may occasion unintended consequences including parallel meetings and creating the possibility of the minority deciding for majority. Further, a vacancy in the membership of the *Independent Electoral and Boundaries Commission* would not invalidate the proceedings of Independent Electoral and Boundaries Commission so long as the majority of the Members support the decision.

73. The Institute of Certified Public Accountants of Kenya submitted that a quorum of three members would be too low for purposes of making binding decisions and it poses a challenge in case of a tie. Also, amendment to section 4(b) undermines the powers of the Commission if the members present and voting are three. The institute was of the opinion that best practices dictate that quorum for decision-making be 50% or more. Further, some decisions should be decided by all commissioners particularly if they relate to the delivery of a presidential vote which is a crucial point towards the establishment of Kenya's governance systems.

74. The Institute for Social Accountability (TISA) submitted that the amendment would result in a minority number of the Commission members making binding decisions on behalf of the majority. The institute was of the opinion that usually legislative drafting principles require that quorum for meetings and decision-making must be half or more because if the quorum is less than half then there could be two parallel meetings by the same commission and two conflicting binding decisions over the same issue at the same time. The existing Independent Electoral and Boundaries Commission Act on the Second Schedule part 7 provides that the Chairperson has an obligation to ensure that the Commission makes a decision on the basis of concurrence of a majority of all the members.

(b) Submissions from individual members of the public

75. Mr. Abel Onchario supports the amendment as it aligns the Second Schedule of the Independent Electoral and Boundaries Commission Act with Article 250 of the Constitution which provides that constitutional commissions shall consist of at least three Members of

76. Mr. Samuel Githaiga supported the amendments save for the amendment on the issue of quorum which may give rise to disunity in the Commission where three commissioners may oust a chairperson.

85. This position was further supported by the Catholic Justice and Peace Commission Parliamentary Liaison Desk stating that the amendment disempowers political party members as it removes their powers to nominate Presidential and Independent candidates. The amendment further violates Article 38 of the Constitution.

86. The Kenya National Commission on Human Rights were of the opinion that deletion of section 29 is in contravention of Article 137(1)(d) of the Constitution. They averred that it is important that a presidential appointment who is a member of a political party is nominated by their members and if independent, by persons who are not members of any political party.

(b) Submissions from individual members of the public

87. Mr. John Kisigwa was of the view that Section 29 should not be deleted as Article 85 is silent on the criteria for nomination.

88. Njimuwa Kaiya and Ngiriwa Wangui opposed the amendment noting that the deletion of section 29 is unconstitutional as it renders the political party system nugatory.

2.2.2 Clause 6 : Determination and Declaration of Results

(a) Submissions from institutions and organisations

89. Noting that the amendment gives credence to the original statutory forms, the Independent Electoral and Boundaries Commission proposed to replace the amendment in Clause 6 (a) to section 39 (1C) (a) as follows-

Electronically transmit and physically deliver the tabulated results for an election for the president from a polling station to the constituency tallying centre and national tallying centre.

90. The Institute of Certified Public Accountants of Kenya submitted that the Clause amends the Principle Act by deleting "in the prescribed form" which is vital for consistency and authenticity of the formats used in transmission of election results. They proposed that the Committee retain the current provisions as stipulated in the Elections Act. The Certified Institute of Public Accountants of Kenya were also of the view that the essence of electronic transmission of results was to curb against election malpractices associated with manual transmission of results. This was also to fast-track collating and transmitting results whilst making the declared figures

verifiable. It means securing the spirit of Article 86 of the Constitution in as far as defining the verifiability of declared results.

91. The Law Society of Kenya opposed the amendment and proposed that the Clause be deleted on the grounds that first, the Clause ignores the historical context of the use of technology in our elections as set out in the Kriegler Report. The following are some of the reasons why electronic transmission of results was introduced: Ballot stuffing, physical alteration of results forms, violence leading to destruction of voting materials and erasing of all possible physical footprints. It was their opinion that a mischievous presiding or returning officer could electronically transmit the correct result but manually transmit a fraudulent result or vice versa. Secondly, the proposed amendment assumes that manual election results are incapable of manipulation, contrary to the widely acknowledged conclusion of the Kriegler Report. Thirdly, the amendment runs afoul of the Constitution which requires the Independent Electoral and Boundaries Commission to put in place appropriate structures and mechanisms to eliminate electoral malpractice. It was their submission that the proposed amendments set up a legislative framework that falls far short of the constitutional standards and therefore ought to be discarded with the current legislation retained unchanged.
92. Kenya ICT Action Network (KICTAnet) proposed the deletion of clause 6 noting that Kriegler commission recommended use of technology to curb electoral fraud. The network proposed that the use of technology in elections ensures efficiency, accountability, accuracy, credibility. It was their opinion that it is better to fortify the existing electronic transmission. Further, making the manual system superior to the electronic one allows for and endorses irregularities hence eroding accountability, accuracy and verifiability. There is also no incentive to observe strict adherence to the law because an officer could feed the system with correct information and forward a falsified document.
93. The Kenya Private Sector Alliance submitted that the electronic and manual systems should complement each other and that the forms for transmission of results should be official, uniform and verifiable.

(b) Submissions from individual members of the public

94. Mr. Edward Githaiga, Chairman, Nairobi Branch, National Youth Council of Kenya, supported the amendments and stated that technology/ electronic transmission of results could be compromised/manipulated therefore supports that

the Bill grants similar prominence to both transmission mechanisms and applauds the attendant provisions criminalising any tampering.

95. Mr. Paul Gichuki proposed that Clause 6 be amended by deleting the word 'shall' in paragraph (a) and use the words 'appropriate technology' in relation to electronic transmission. It should not be mandatory to use technology.

96. Njimuwa Kaiya and Ngiriwa Wangui opposed the amendment on the grounds that section 39 ignores the historical context for the use of technology as set out in the Kriegler report, manual results can be manipulated and further negates the provisions of Article 86(d) of the Constitution.

97. Mr. Kenneth Mavale the opposed the amendment stating that we should stick to electronic transmission and that manual system should be secondary to electronic.

98. Mr. Michael Odiembo opposed the proposed amendments as, in his opinion it gives room for fraud through alteration of results.

99. Hon. KalembeNdile observed that the manual system is a better system than the use of technology due to the systemic failure of technology.

Clause 6 (b): Where there is a discrepancy between electronically transmitted and manually transmitted results (391C and 1D)

(a) Submissions from institutions and organisations

100. The Kenya Law Reform Commission proposed that the section 39 1D be redrafted as follows-

(1D) Where there is a discrepancy between the electronically transmitted and manually transmitted results, the Commission shall, despite any other legal requirement order the returning officer to recount and declare the results within such period as the Commission may prescribe, but such period shall not exceed any period prescribed by the Constitution and the Elections Act within which the results must be declared.

101. Several stakeholders opposed the amendment including the Institute of Certified Public Accountants of Kenya and the Catholic Justice and Peace Commission Parliamentary Liaison Desk. Specifically, the Institute of Certified Public Accountants of Kenya submitted that the amendments be deleted and that the Committee retain the current the current provision as stipulated in the Elections Act. They were of the view that the results transmitted electronically should be an image of the manually transmitted results. Further, that the forms transmitted

electronically form the basis for authenticating the print copies of the results declared at the National Tally Centre. Additionally, they were of the opinion that the amendment aims to legalize an electoral malpractice which should be considered as an electoral offence liable to punishment as stipulated under the Election Offences Act, 2016.

102. Catholic Justice and Peace Commission Parliamentary Liaison Desk were of the opinion that Electronic transmission was meant to ensure integrity of the process and faster transmission of results. The proposed amendment to include manual will contribute to increased electoral malpractice as results may be manipulated easily in a manual transmission. Further, that the proposed section 39(1D) will create conflicts arising from differences between the figures transmitted electronically and manually. The results management especially in areas considered as political strongholds is likely to be manipulated.

(b) Submissions from individual members of the public

103. Mr. Patrick O. Onyango-Paddy proposed that new sections 1C and 1D in clause 6 be deleted because for the manually transmitted results to prevail over the electronically transmitted results, the manually transmitted results must be verified against data entries in the forty thousand eight hundred and eighty-three (40,883) Kenya Integrated Election Management Systems (KIEMS) kits and the IEBC Server. The KIEMS are the primary data taken together with Forms 34As and Form 34Bs. Relying solely on manual transmission is retrogressive and will be prone to fraudulent manipulation of the transmission forms.

104. Mr. John Nyakway opposed the amendment stating that the proposed new subsection (1D) if allowed, will give way to the easy manipulation of results through Ballot stuffing as that is the mischief that was intended to be cured by the adoption of electronic transmission.

105. Mr. Paul Mutisya submitted that polling stations shall be the origin and end of the tallying of the polls while the National Tallying Center (NTC) shall be for the purposes of communicating to the public what each polling station has announced as the final polls. It was his opinion that the transfers of results from polling centers to the Constituency Tallying Center (CTC) and from the Constituency Tallying Center to the National Tallying Center are the most risky activities where manipulation, omissions, hacking and distortion of results can occur. Direct transmission of results from the polling stations will eliminate the crafty loopholes likely to occur when the existing transmission process is being used. Also, votes

should be counted and tallied at the polling station and transmitted electronically and manually by Form 34As from the polling stations directly to the National Tallying Centers without being taken to the Constituency Tallying Centers. The amendment to this law should aim to curb any loophole on transmission of the results from the original polling station to the final National Tallying Center. The IEBC should ensure that proper authentication, validation and accuracy of the poll results in Form 34A and in electronic form are done at the original polling station and at the National Tallying Center. This way the poll results will have a trail up to the polling station and any dispute arising will be easy to handle by tracking activities from the specific polling station.

106. Mr. Paul Mutisya further proposed that all the agents must be given copies of the results as in the Form 34As and must obtain an electronic copy through mobile phones or cameras which they can forward to their candidates. No results shall be made public and transmitted where the agents have not signed form 34A and obtained copies and photos of the results at the polling station. The NTC shall announce results from each polling station and cumulative poll results simultaneously as the polling station results stream in one by one from each polling station.

107. Mr. Haron Nyandika opposed the proposed amendment on grounds that neither electronic nor manual systems can supersede the other. Mr. Haron also submitted that the electronic system of voting is safe and reliable and that the Independent Electoral and Boundaries Commission should allow access to servers.

108. Mr. Paul Kithuke proposes that until the government and by extension the Independent Electoral and Boundaries Commission are able to stand on their own in terms of technology, electronic transmission should only remain as an option to be used by the Independent Electoral and Boundaries Commission when appropriate.

Clause 6 (b): Failure to transmit results in an electronic format shall not invalidate the results (391E)

(a) Submissions from institutions and organisations

109. The Kenya Law Reform Commission proposed that Clause 1E be amended to delete the words "to facilitate public information" noting that the words are superfluous.

110. The Institute of Certified Public Accountants of Kenya submitted that the amendment be deleted on the grounds that it may open the transmission and publication of electronic results to manipulation. They were of the opinion that there has been heavy investment in ICT infrastructure around voter identification and results transmission which the IEBC must be obligated to operate at the most functional level.

(b) Submissions for individual members of the public

111. Ms. Sheila Githaiga representing, Mothers United for Peace, while supporting the amendment submitted that the entire voting process that falls under the responsibility of the voter is manual in nature. This includes going to the polling centre, presenting oneself for identification as a voter, ticking the ballot paper, and dropping the ballot paper in the ballot box. She questioned why the Chief Justice ruled that her vote did not count just because there was a problem in the way it was transmitted. She felt disenfranchised because the court relied on another process “electronic transmission” that she did not fully understand to decide that her vote did not count. It was her opinion that, Article 86 requires the Independent Electoral and Boundaries Commission to ensure that the voting method is simple, verifiable, secure, accountable and transparent- all which the manual process is but the electronic is not. Therefore, manual voting should be supreme.

112. Mr. John Nyakway opposed the amendment stating that the proposed clause 1E should be deleted because if allowed, it would enable those in authority to use state machinery to rig elections and malicious individuals could compromise the elections results.

Clause 6 (b): Live-streaming of results (39 1F)

(a) Submissions from institutions and organisations

113. The Independent Electoral and Boundaries Commission held the view that the amendment directs the Commission to provide and establish mechanisms for the live streaming of results as announced at polling stations which shall not be used as a basis for declaration by the Commission. They proposed that it should include definition for provisional results to mean electronically transmitted text results. Experience shows that human error in data entry is likely to occur when entering text data into the KIEMS.

114. The Commission proposed to amend Section 39 (1F) as follows-

Election Results. It is a necessary consequence of the amendment to Section 39, which makes the manual form to be the results.

125. The Information Communication and Technology (ICT) Authority submitted that all measures should be put in place to ensure that the election technology is secure and reliable. The Acting CEO of the Authority submitted that it was imperative to provide that manual systems be deployed in parallel with technology in the event of failure of technology.
126. The Communication Authority supported the amendment because it is imperative that manual systems be deployed in parallel with technology and in the event of a failure, the manual system should be considered as final. They averred that while electronic systems backed by technology are efficient and dependable, they are prone to having downtimes due to unforeseeable reasons and therefore it is prudent to have a redundancy mechanism in place in the event of such an occurrence. A manual mechanism is a viable backup plan due to, among other reasons, the turnaround time for transmitting and announcing election results and the fact that it is difficult to predict the time it would take an electronic system to recover in the event of a failure.
127. Further, the Authority submitted that the Independent Electoral and Boundaries Commission is dependant on third parties for infrastructure and therefore does not have absolute control of the electronic systems that are relied on for transmission of results. Also of note was that a considerable area of the country does not have 3G and 4G coverage. Currently 3G land coverage is 17% and population coverage is 78%. Absence of a manual system of transmitting election results in areas which do not have 3G coverage would pose a major challenge in the transmission of electronic results.
128. The Law Society of Kenya proposed that Clause 8 be deleted because this provision on complimentary mechanism is vague as it does not disclose any specific complementary mechanism. This lacuna opens the entire process to machinations and malpractice that may not foster electoral integrity. It was their opinion that it is clearly an affront to values and principles under article 10 of the Constitution. Further, it also offends article 232 of the Constitution- both the letter and the spirit and has utterly nothing to do with article 38 which has been thrown under memorandum and objects to justify its existence. It is retrogressive as it seeks to undo the previous progress amendments undertaken through a bipartisan approach. The imperative word "SHALL" has been replaced with the optional word "MAY" leaving the IEBC with no mandatory obligation to set up a

complementary system that is simple, accurate, verifiable, accountable and transparent to identify voters and transmit results.

129. The Kenya National Commission on Human Rights proposed that clause 8 be deleted since the complementary system must be developed, and known before the fresh elections.

(b) Submissions from individual members of the public

130. Mr. Harun Nyandika observed that both electronic and manual system can be manipulated and none therefore supersedes the other.

131. Eng. Paul Mboga proposed that section 44A be deleted(remove complimentary mechanism) to adhere to the letter and spirit of the Constitution since Kenyans agreed to the electronic transmission system.

132. Mr. John Kisigwa proposed that clause 8 be amended to replace the word “may” with “shall” because there is need to have a ready back up always in place.

2.2.5 Clause 9: Nullification of Election

(a) Submissions from institutions and organisations

133. In support of the amendment, the Jubilee Party submitted that on the issue of lack of clarity in section 83 the proposed amendment will create clarity and further align the Act with the existing section 72 of Cap. 2. Further, the Party submitted that the amendment should be broadened to provide that where there has been substantial compliance with constitutional principles and the written law, and where it is shown that the non-compliance did not affect the results substantially, then the results in question shall not be nullified.

134. The Independent Electoral and Boundaries Commission noted that the proposal suggests that where there is deviation from the law, which deviation is not calculated to mislead, then the process will not be void by reason of that deviation. The Commission agreed with the proposed amendment on the grounds that not all infractions to the regulations should result in nullification of the elections. The burden should be placed on a person challenging an election to prove that there was a breach of the law and that that breach affected the results.

135. The Catholic Justice and Peace Commission Parliamentary Liaison Desk proposed that section 83 be deleted as the section gives room for the commission of illegalities and irregularities so long as the results are not impacted.
136. Chalvins Law Consulting proposed that clause 9(c) be deleted since the errors and omissions which would cause an officer jail term cannot invalidate an election which is contradictory. Further, the proposed amendments to section 83 of the Elections Act are unconstitutional as they offend the provisions of Articles 2,(4), 10, 38, 81 and 86 of the Constitution.
137. Kenya ICT Action Network (KICTAnet) recommended that clause 9 be deleted because emphasis should be placed on adherence to the principles in the constitution. The result of the election is the product of every decision and applicable laws therefore contravention of any law does affect the result of an election. It was their opinion that the lack of uniformity of the forms fails to meet the constitutional requirement for an accountable and transparent electoral process.
138. The Centre for Minority Rights Development proposed that clause 9 be deleted since the proposed amendments to section 83 are unconstitutional and upset Article 2(4), 10, 38, 81 and 86 of the Constitution. Current provision should be upheld to ensure that the fresh election and subsequent elections are held by its high standard and that IEBC and the political leadership gains the trust of the people of Kenya.
139. The Institute for Social Accountability (TISA) suggested that clause 9(b) be deleted because Section 83 provides that no election shall be declared to be void because of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the results of the election.
140. The Ethics and Anti-Corruption Commission (EACC) submitted that there was need to review clause 9 as the amendment does not cure the ambiguity in section 83 of the Elections Act.
141. The Law Society of Kenya proposed that clause 9 be deleted because Election forms are generated in advance of elections and are uniform. This is so that any form that does not correspond is deemed invalid and so that all players know what a genuine form looks like in order to spot the fraudulent ones. Further, this amendment is ambiguous. First, it purports to require persons who file an election

petition to prove both noncompliance with the principles set out in the Constitution and that such noncompliance affected the results. This offends the provisions of Article 2 (4) of the Constitution. It also offends the provisions of Articles 10, 38, 81 and 86 of the Constitution. Second, the amendments purport to excuse all irregularities in election declaration forms as long as they are not calculated to mislead. The amendments would also permit the situation we saw at the Supreme Court, where one could not tell the official Forms from the unofficial or forged ones.

142. The Kenya National Commission on Human Rights proposed that clause 9 be deleted as it reduces the electoral parameters in respect of the principles of non-compliance. It is a dangerous amendment especially in respect to special, vulnerable and/or marginalized candidates.

(b) Submissions from individual members of the public

143. Mr. David Wati proposed that clause 9 be deleted as it will allow for the use of illegal materials including foolscaps or cardboards etc.

144. Mr. Silas Asaka proposed that clause 9 be deleted as the proposal would enable the use of forged forms. Further the proposal serves no purpose if the returning officer is accountable for defective forms.

145. Mr. Isaiah Waweru Ngumi proposed that clause 9 be amended to provide that the presidential election shall not be invalidated if court is convinced that the results are in accordance with article 138(1) and 138(7).

146. Hon. Priscilla Nyokabi, Hon. Florence Kajuju and Hon. Samuel Gichigi while supporting the amendments proposed that clause 9 (c) be amended by inserting the words “and has in fact misled” immediately after the words “to mislead” because the mere intention to mislead should not lead to nullification of results.

147. Njimuwa Kaiya and Ngiriwa Wangui opposed the amendment on the grounds that the proposed amendments to section 83 are unconstitutional as they offend the provisions of Articles 2, 10, 38, 81 and 86 of the Constitution.

148. Mr. Haron Nyandika opposed the proposed amendment on grounds observing that the removal of the word “or” in section 83 of the Elections Act as in the proposed amendment is injurious to free, fair, and credible elections.

2.2.6 Clause 10: Procedure to be followed at a Fresh Election

(a) Submissions from institutions and organisations

149. The Independent Electoral and Boundaries Commission noted that the provision provides that: The Commission will Gazette the new election date on 7 days; who will be the candidates participating in a fresh election depending on the parties to a presidential petition; whether or not there will be fresh nominations after nullification of an election; instances where a candidate(s) withdraw; and the effects of the withdrawal and the procedure thereof. Of importance to note is that one of the candidates withdraws the other will be declared as the president elect and no election will be held.
150. The Commission accepted the proposal by the Committee but further proposed that there was need to provide for the procedure for elections under Article 138 (5) and 138 (8). Further, that the Committee considers a proposal to include the procedure where a candidate dies before the election is held.
151. The Institute for Social Accountability proposes that clause 10 be deleted as the proposed clause 10 lowers the threshold for transparent and accountable elections contrary to the provisions of Article 86 (a). The provision is calculated to raise the threshold for cancelling an election by limiting the Supreme Court ability to nullify, as the court is required to consider both the qualitative and quantitative aspects of the election.
152. The Kenya National Commission on Human Rights was of the opinion that the proposed amendment locks out potential presidential candidates and is a disenfranchisement to voters on their preferred choice among the other candidates. As such, the Commission proposed that the clause be deleted.
153. The Catholic Justice and Peace Commission Parliamentary Liaison Desk proposed that clause 10 be deleted as the section will limit the rights of potential candidates, which is in violation of Article 38 of the Constitution.
154. Jubilee Party proposed that the wording in section 86 (4)(b) be amended considering that the presidential election preceding the fresh elections will have been nullified by the Supreme Court. The question arises as to whether the

withdrawal of one candidate should have the effect of having the remaining candidate declared president-elect automatically without an election.

155. The Party also proposed to insert an additional clause immediately after section 86A (5)(b) in the following wording:

“For the avoidance of doubt, an election shall be deemed to have occurred in any Constituency if the Commission has provided all the polling officials and all the material necessary to facilitate the elections and shall not be invalidated by reason of any voters not participating in the election.”

156. The Law Society of Kenya proposed that clause 10 be deleted as the proposed clause 86A of the Elections Laws (Amendment) Bill, 2017 (the Bill) purports to say who can and who cannot run in a fresh election in the event a presidential election is nullified by the Supreme Court. The Law Society of Kenya was of the view that there is no constitutional basis for purporting to restrict who can and who cannot run in the fresh election.

157. Further, the LSK submitted that the proposed amendment is based on *obiter dicta* from the decision in Presidential Election Petition No. 5 of 2013. Of the various types of “fresh election” envisioned in article 138 to 140 of the Constitution, only one has a constitutional limitation on who can run and who cannot run and the proposed amendment is not in relation to such an election. It is unreasonable for Parliament to purport to change the rules of an electoral contest mid-stream and thereby deny a candidate an opportunity to offer themselves to the electorate in a repeat poll. The right to participate in any elections is granted by the Constitution subject only to such qualifications as is prescribed by the Constitution and to any order of the Court in accordance with the Constitution. That cannot be limited by legislation. The proposed amendment contravenes the constitutional provisions on ‘political rights.

158. The Kenya Law Reform Commission submitted that there was need to relook at section 86A (2) and (3) as there was need to distinguish between a fresh election under Article 140 (3) and Article 138 of the Constitution with a view to clarifying who can participate.

(b) Submissions from individual members of the public

159. While supporting the amendment, Mr. Eliud Kinuthia proposed that the Committee should make provisions for circumstances such as absence, death and incapacitation of a candidate.

160. Mr. Edward Nyakeriga supported the amendments save that there is need to differentiate between afresh, a repeat and a run-off election.
161. Mr. S.M. Njihia proposed that repeat elections should only be done in the constituencies whose results were in contention and asked the committee to refer to the decision in *Gore vs Bush*.
162. Mr. Paul Gichuke proposed that clause 10 be amended to provide for a mechanism through which a candidate gives a formal indication of his/ her willingness and readiness to participate in a repeat election.
163. Hon. Priscilla Nyokabi, Hon. Florence Kajuju and Hon. Samuel Gichigiding during their submissions proposed that clause 10 be amended by deleting the term president-elect and replacing with the word "candidate" and insert at the end of paragraphs (b) and (c) the words "provided that any candidate intending to participate in the fresh election shall give written notice to the Commission of the intention to participate within seven days of the nullification by the Court". It was his opinion that after nullification of elections there is no president-elect. The *Raila Odinga case of 2013* at Supreme Court restricting the competition to 1st and 2nd leading candidates is wrong in law.
164. Njimuwa Kaiya and Ngiriwa Wangui opposed the amendment on grounds that the proposed section 86(A) has no constitutional basis.

2.3 Amendments to the Election Offences Act, 2016

2.3.1 Clause 11:- Failure or refusal to sign election results

(a) Submissions from institutions and organisations

165. In support of the amendment, the Jubilee Party submitted that the Supreme Court judgment made it mandatory that forms must be signed necessitating the amendments including the offences by returning officers failure to sign forms.
166. The Independent Electoral and Boundaries Commission disagreed with the amendment proposed because that this proposal places an obligation on the Returning Officers and Presiding Officers to sign, completely fill election materials including statutory forms and lays criminal liability in case of failure to do any duties. The Commission submitted that the amendment amounted to over

legislation considering that; firstly, the mischief sought to be cured never occurred, and secondly, the facts which would constitute an offence under this Section are provided for under Section 6 of the Election Offences Act. The Commission further noted that persons employed by the Commission were only for a contract of three weeks hence the amendment would deter people from working for the Commission.

167. The Institute of Certified Public Accountants of Kenya submitted that the current provision under the Election Offences Act adequately caters for offences and penalties. They proposed that the Committee retain the current provisions as stipulated in the Election Offences Act, 2016.

168. The Kenya Private Sector Alliance submitted that the offence should be expanded to include Commissioners and any other officers with responsibility in electoral process.

(b) Submissions from individual members of the public

169. Mr. Eliud Kinuthia supported the amendment and proposed that Clause 11 be amended to add the option of a fine and an increase the jail term prescribed to over six (6) years.

170. Similarly, Mr. Tommy Randall and Mr. Vitalis Njoroge supported the proposal that the penalties be enhanced for electoral officials who commit malpractices.

171. Mr. Hillary Bidanye from Lamu County supported the proposed amendment as it will deter Independent Electoral and Boundaries Commission (IEBC) officials from failing to discharge their lawful duties.

172. Mr. Fwamba NC Fwamba supported the amendments and further proposed that the Committee enhance the clause by prescribing a minimum sentence of for instance two years.

173. Ms. Dahabo Darro representing Women of Kenya Initiative from Marsabit County supported the Bill in its entirety as it introduces the penal provisions.

174. Hon. Kalembe Ndile supported the amendment and observed that the penalty under clause should be enhanced.

2.2.3 Clause 7: Use of Technology

(a) *Submissions from institutions and organisations*

119. The Independence Electoral and Boundaries Commission agreed with the amendment which requires the Commission to consult with relevant agencies, institutions and stakeholders, and make regulations for the implementation of this section. They noted that political parties were covered as stakeholders under the amendment. Further, subsection 6 is a spent proviso; it can be repealed while Subsection 7 applied for the first General Election where the Commission was required to deploy technology which is restricted to the process of voter registration, identification of voters and results transmission.

120. The Commission noted that Subsection 7 could also be spent, if one interprets “general election” to mean the elections of 8th August, 2017. The Committee further noted that Subsection 8 was declared unconstitutional in the *Kenneth Otieno and another vs Attorney General of 2017*.

121. Kenya ICT Action Network (KICTAnet) proposed that Clause 7 be deleted and that IEBC should undertake public participation while making regulations for the sake of transparency. Further, they submitted that Parliamentary scrutiny of regulations is necessary hence subsection (d) should not be deleted.

(b) *Submissions from individual members of the public*

122. Njimuwa Kaiya and Ngiriwa Wangui opposed the amendment on the grounds that the proposed amendment to section 44 will ‘make it possible to hold sham elections’.

123. Mr. Hillary Bidanye from Lamu County supports the proposed amendments as they among other things seeks to deal with eventualities of failure of technology in transmission of election results.

2.2.4 Clause 8: Complementary Mechanism for Identification of Voters

(a) *Submissions from institutions and organisations*

124. The Independent Electoral and Boundaries Commission held the view that the proposed amendment does not tie complimentary mechanism to section 39. The Commission noted that the amendment further removes the mandatory requirement to provide for a complimentary mechanism for Transmission of

“The Commission MAY, establish a mechanism for the electronic display of provisional results, and the results so displayed shall be for purposes of public information only and shall not be the basis for a declaration by the Commission.”

115. The Centre for Minority Rights Development also proposed an amendment to section 39(1F) as follows:

“The Commission shall, to facilitate public information, establish a mechanism for livestreaming of results at polling stations, by the media, and while the results streamed shall be for public information only and shall not be the basis for a declaration by the Commission, the Commission shall have the discretion to investigate and determine any major discrepancy between such streamed results and the official verified results in its possession before making a final declaration, and in so doing shall be under obligation to explain the cause of such discrepancy to the public.”

116. The provision will ensure that results are accessible to the Kenyan public as they are announced at the respective polling stations and Constituency Tallying Centres.

117. The Centre for Minority Rights Development further proposed that a provision be inserted under section 39 for all agents of any candidate to keep a copy of the final results form that has been duly signed by all parties and stamped by the Independent Electoral and Boundaries Commission for verification purposes, with Independent Electoral and Boundaries Commission keeping the original form, in case of a dispute arising as to the actual announced results. This would ensure the integrity of the manual result and hence its superiority over any other result.

118. The Institute of Certified Public Accountants of Kenya submitted that the amendment be deleted on the grounds that it contravenes Section 39 of the Elections Act No.24 of 2011 where the results streamed should be the tallied and verified results. It contravenes provisions of Article 35 of the Constitution on timely and accurate information. Besides, punitive measures have been proposed to deal with rogue returning officers. The Clause restricts the realisation of the right to information as laid out under Article 35 of the Constitution. Institute of Certified Public Accountants of Kenya further reiterated that the entire Clause 6 of the Bill in the current forms shall serve to defeat the integrity of the electoral process.

175. Njimuwa Kaiya and Ngiriwa Wangui opposed the amendment on the grounds that the proposed section 6A of the Elections Offences Act seeks to punish returning officers yet the same errors and omissions cannot invalidate an election.

176. Mr. Charles TabuOkumu of the Bunge la Wazalendo opposed the amendment citing that severe punishment proposed on electoral officials who refused to sign the election declaration result forms was political mischief.

2.4 The Election Offences Amendment Bill, 2017 (National Assembly Bill. No.38)

177. The Ethics and Anti-Corruption Commission while supporting the amendment submitted that an informed public is more likely to report corruption and economic crimes. It was their opinion that this remains true before, during, or after the election period.

178. The Independent Electoral and Boundaries Commission preferred not to comment on the amendment to section 14(2) of the Elections Offences Act, 2016 noting that the matter was pending in court in *Petition Number 468 of 2017 – Katiba Institute vs. Presidency Delivery Unit and 3 Others*.

179. The Institute for Certified Public Accountants proposed that the provisions as provided for in Section 14 of Act be retained. It was their submission that the Bill proposes to delete an important provision guiding the conduct of the government in place during an election, thus creating a level playing field for candidates participating in the election.

2.5 General Submissions on the Bill

2.5.1 Comments on Legal and Constitutional Challenges

180. Several stakeholders and individual members of the public made general submissions on the legal and constitutional challenges arising out of the Bills as follows-

181. Ms. Mary Waruguru submitted that Parliament is properly constituted to consider the Bill as proposed and that there was nothing unconstitutional about the Bill.

182. The Small Traders Women Self Help Group supports the amendments in the Bill as they seek to simplify and ease the management of elections by providing clarity.
183. Mr. Mark Too Kibiwott supports the Bill in its entirety, for the reason that it will protect the will of the voter in future.
184. Mr. Kamuri Gachoki Alex supports the proposed amendments as they will enhance the existing laws and ensure free, fair and credible elections.
185. Ebby Wangatia from Bungoma County supported the amendments in totality and in particular amendments criminalizing non-performance of duty by Independent Electoral and Boundaries Commission staff. It was her submission that any action taken against the Independent Electoral and Boundaries Commission staff should be within the provisions of the Constitution.
186. Stewards Revival Pentecostal Church supports the proposed amendments to the Bill as it among other things removes the risk of paralysis in the absence of both the chair and vice-chair of Independent Electoral and Boundaries Commission, seeks to implement the High Court decision in Solomon Gichira case, Maina Kiai case and Kenneth Otieno case, addresses uncertainty of conducting a fresh election and enhances the penalties for willful or deliberate failure to sign election.
187. Mr. Clement Nyamongo supported the amendments in the Bill by observing that among other things Parliament was lawfully exercising its legislative role.
188. Yabbesh Onyancha Geke observed that the period given for public participation was limited.
189. In his comments against the amendment Mr. Zeth Ouma Omollo proposes-
- (a) that the Bill be deferred and re-introduced after the repeat polls owing to the timing and the prevailing political environment;
 - (b) that the existing legal infrastructure on the management of elections in Kenya suffices as all the matters arising from the Supreme Court Ruling (2017) could be cured exclusively by upholding fidelity to the existing laws, and fixing administrative issues at IEBC; and
 - (c) that the elections scheduled for 26th October 2017 are by letter and spirit of the Supreme Court Ruling “a repeat election” and this implies that the “rules of the game” must remain unchanged for purposes of the said repeat poll.

190. Mr. Daniel Ashman expressed concerns on the constitutionality of the amendments and opposed them citing that in his view; the amendments proposed in the Bill are unreasoned, untimely and unfair.
191. Eng. Kiiva Yosef Timothy opposed the amendments noting that, in its judgement, the Supreme Court did not quote the existing election law as lacking. He also expressed concern on the timing of the amendments and questioned the capacity of the President to assent to the Bill at this “transitional period”. He also expressed concern that change in law may cause confusion and that the ordered repeat election should be conducted under the prevailing law.
192. Mr. Timothy Kanda opposed the proposed amendments because, in his opinion, they undermine fundamental rights and challenge the free will of the people of Kenya.
193. Mr. Dalmas Olumasi opposed the Bill noting that it has negative effects, the timing is mischievous, Kenyans are past manual systems, the Independent Electoral and Boundaries Commission chairperson should be the only person in charge of declaration of results, the Supreme Court is independent and the Legislature should not attempt to criticize it or reduce powers bestowed on it by the Kenyan people.
194. Mr. Benji Ndolo opposed the Bill on grounds that the amendments were tantamount to changing the rules of the game in the middle of the game and hence mischievous in the prevailing circumstances. He observed that the reduction of the publication period of the Bill is inappropriate and the offences in the Bill are not of any consequence as what the Committee should address are the root causes of irregularities in the electoral system.
195. Mr. Michael Odiembo opposed the proposed amendments as, in his opinion it gives room for fraud through alteration of results. He further proposed that the quorum should be maintained at five, identification of voters should only be through KIEMS and the penalty for election offences by the presiding officers and returning officers should be enhanced to ten years. He observed that there is need for consensus between the political players and suggested that there is need to amend the law to: Prescribe an offence for any person who excludes agents at polling stations, define stray ballots and how to account for them, among other things.

196. Mr. Joseph Vekya opposes the Bill for the sake of future generations on the grounds that it is taking us back after a long fight to have a good Constitution.

197. In a written letter dated 5th October 2017, the International Commission of Jurists (ICJ) notified the Committee that it would neither appear nor present memorandum to the Committee. The International Commission of Jurists informed the Joint Committee that the unilateral decisions taken by Parliament to amend the laws governing the elections in the middle of the Electoral Process is not well conceived or in good faith but an attempt to subvert the electoral architecture for short-term political gain. Further, that proposed amendments backtrack on the reforms that have been made to strengthen democracy and seek to legitimise illegalities and irregularities that the court found were not adhered to in the 8th August, 2017 Presidential elections. They observed that they did not find fault with the current law save for the fact that the Election Management Body did not comply with the law.

198. The National Rainbow Coalition (NARC Kenya) observed that the laws that the committee sought to amend were arrived at through consensus by a bipartisan committee. As such any changes to them should be negotiated by a bipartisan committee and further enriched by public participation. Further, effecting amendments without a consensus will amount to shifting of goalposts by one team before a rematch thereby tainting the process. They also stated that the lack of a bipartisan approach will polarize the nation and undermine our nationhood.

199. Mr. Ahmed Ali proposed that the vice-chairperson should also be a lawyer, the quorum should be clear and that the electronic system should prevail over the manual system.

200. Mr. Edward Githaiga, Chairman, Nairobi Branch, National Youth Council of Kenya, supports the amendments and opposes extra-constitutional methods to bring reforms.

2.5.2 Comments on the Timing of the Bill

201. Noting that Kenya was still in an election cycle with the fresh election expected to take place on 26th October, 2017, the matter of whether it was the right time for Parliament to propose the amendments drew varied reactions from the public and stakeholders. Some members of the public were as follows-

202. Some stakeholders were of the opinion that the amendments were timely and necessary before the elections of 26th October, 2017. The Jubilee Party observed that six months to 28th August, 2017 there were at least forty cases filed in court which repealed numerous sections of electoral law creating the need for amendments. It was also noted that this was not the first time that new requirements have been put in place for the Independent Electoral and Boundaries Commission close to the election. It was noted by several stakeholders that the decision in the *Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others*, Civil Appeal No.105 of 2017 [Maina Kiai Case] a ruling was given that affected the electoral process thirty five (35) days before the election.
203. Other stakeholders including the Political Parties Liaison Committee, the Inter-religious Council of Kenya among others were of the opinion that the amendments are ill-timed and that even though the amendments were necessary in the future, the political temperatures were high and they should be carried out in a bi-partisan process after the 26th October, 2017.
204. The Baraka Women Center Community Based Organization a woman's group through Teresia Mwangi observed that Parliament should change the law before the next election to protect women against gender based violence which is usually rampant whenever there are election disputes.
205. Cecilia Nyokabi from League of Kenya Women Voters and Family Organization for Empowerment (FOREM) supported the amendments and that it was appropriate that the same should be done before the fresh elections to avoid the same outcome.
206. UNIK Women self-help group observed that it supports Parliament to make the necessary changes to close all loopholes that may lead to the nullification of 26th October, 2017 elections.
207. Other stakeholders and members of the public supported the Bill in its entirety. They emphasized that the timing was appropriate as it would help the country resolve the current political impasse. They were: Mr. Benard Macharia, Mr. Christopher Muraguri from Tharaka Nithi County, Mr. Kenneth Orengo of the Africa Electoral Organization Group, Mr. Kamuri Gachoki Alex, Mr. Danson Mwangangi, Ms. Stacy Saida Chepkemoi, Mr. Washington Makodingo, Mr. Gabriel Muthuma, Mr. Jackson Mwalulu, Mr. Peter Amunga, Mr. Oliver Kipchumba, Mr. John Muthaka, Bishop Stephen Muketha, Ms. Janet Iminza Wanjohi, Mr. James Kipsang Ngetich, Ms. Geoffrey Mwaviso Muchawia, Bishop Stephen Muketha, Dr.

Robert Kagiri, Ms. Sandra Ochola , Ms. Marion Njoroge on behalf of WazalendoHuru

208. Mr. Lewis Bucheche, Mr. Oyugi Lawi, Reverend Khayo, supported the amendments and its noble intention but disagreed with the timing of the amendments noting the prevailing political situation in the country and urged the committee to proceed with the amendments after the 26th October , 2017 elections.

209. Similarly, Mr. Evans Migiro from Nyamira County supported the proposed amendments save that he did not agree with the timing of making the amendments in light of the fresh elections scheduled for 26th October, 2017. He suggested that the proposed amendments if enacted should apply in the next General Elections.

210. The Institute of Certified Public Accountants of Kenya noted that the Bill should be shelved until after the upcoming fresh elections. The Institute indicated that the current laws are adequate and guarantee free, fair and credible elections as per Article 81(e) of the Constitution.

211. The Political Parties Liaison Committee recommended that the Bill be shelved and the Independent Electoral and Boundaries Commission be allowed to conduct the fresh presidential election after which there should be a national discourse on the relevant changes needed for our electoral laws. In their submission, they stated that conformity of an electoral process with the principles of the Kenyan Constitution cannot be judged on the basis of legislation alone. Though it is important for the country to audit recurrent challenges and problematic issues resulting from both legislation and practice that cannot be done now.

212. The National Rainbow Coalition (NARC Kenya) observed that the amendments, however meritorious, are ill-timed and should be shelved in the interest of the nation till after the 26th October, 2017 elections and even then be handled by a bipartisan committee.

213. The United Disabled Persons of Kenya submitted that without prejudice to the merits or demerits of the Bill the same be put on hold until after the fresh Presidential election. While they appreciated Parliament's legislative mandate, it was their opinion that the timing of the Bill could polarize the country.

214. Mr. Charles Tabu Okumu of the Bunge La Wazalendo opposed the amendments on the grounds that the current political climate was unpredictable and polluted and therefore it was not the right time to undertake amendments to the Elections

law, also there was no hurry in making the amendments. Instead, dialogue between the two contesting political parties should be encouraged. He further maintained that there was no time to address the issue of an acting Chairperson of the Independent Electoral and Boundaries Commission and there should be no speculation on his absence.

215. Similar opinions were shared by Mr. Alex Otunga, Mr. Lewis Bucheche, Mr. Boniface F. Makau, Ms. Catherine Watuka, Mr. Ledama Lee, Ms. Laureen Amateshe, Mr. Mohammed Abdulahi and Mr. John Kunga Magige who generally opposed the amendments noting the limited time to the repeat election and the attendant tension in the country as reasons.

2.5.3 Comments relating to other areas of the law that require amendments

216. Some stakeholders and individual members of the public also made additional proposals and comments to the Committee on other areas of the law that did not touch on the provisions of the law but would require amendments. They included:

(1) Functions of the Independence Electoral and Boundaries Commission

217. Mr. Benson M. Karanja proposed the following range of amendments touching on the functions of the Independent Electoral and Boundaries Commission-

- (a) That all returning officers should have qualification on human resource management, project management capabilities and skills required in high pressure environments
- (b) Deputies in the counties and constituencies be recruited six (6) months to the Presidential Election
- (c) The Presiding and Deputy Presiding Officers be recruited thirty (30) days before the Presidential Election
- (d) The responsibility of hiring, training and payment of wages and allowances of Presiding and Deputy Presiding Officers be that of the County Returning Officers and not the Constituency Returning Officer as is the case today
- (e) In the case where the Presiding Officer is required to attend Court as a witness, IEBC County Returning should be compelled to facilitate payment of allowances and other legal assistance to the Presiding Officer
- (f) All IEBC returning officers, IEBC Commissioners, IEBC Secretariat Staff, part time staff including but not limited to deputies at the counties, deputies at the constituencies, ICT officials, Presiding and Deputy

Presiding Officers, be subject to and fully comply with the Public Officer Ethics Act.

(2) Use of Technology

218. Wilson Mwai requested the committees to look into the issue of exposure, for example, the database of voters being leaked by insiders, creation of logic bombs (which are like computer viruses), etc.
219. The Kenya Private Sector Alliance proposed that section 2 be amended on the definition of the term “*integrated electronic system*” to include a computer based system.

(3) Transmission of Results

220. The Kenya Private Sector Alliance proposed that the law be amended to permit media to announce elections once they are announced by constituency returning officers since results announced at the constituency are final.
221. Mr. Johnson Moriasi Nyandika presented a revised version of Forms 34A, 34B and 34C showing-
- (a) the time and date of signing;
 - (b) customized rubber stamps;
 - (c) Ballots allocated, issued and their balance; and
 - (d) Ballots data, signature of the Presiding Officers, Valid votes, objected to votes, rejected votes and disputed votes.
222. Mr. Nyandika further proposed that the election should provide for localized cancellation or repeat of voting from only polling station, constituency or county where the irregularities or illegalities are identified in order to save the taxpayers an additional burden. Additionally, the IEBC should pay the two agents per polling station for the major parties or coalitions to ensure a strengthened agent base as in a referendum;
223. Mr. David Ngumi observed that electronic transmission cannot be the single measure of a successful election and forms 34A should also be physically submitted to the Constituency Tallying Centre for collation. As such, the Independent Electoral and Boundaries Commission should develop a logistics plan that can expedite and facilitate delivery. Further, he stated that the role of Parliament is to legislate, look at the gaps in law and correct them.

224. Mr. Kenneth Mavale proposed that the Committee should legislate on timelines within which results should be transmitted which, in his opinion, should be within a day.
225. Mr. Isaiah Ngumi proposed that the Presiding Officers and Returning Officers should have deputies. He also wants the Independent Electoral and Boundaries Commission to hire two agents in every constituency to act for the main political parties. The agents should also countersign the result transmission forms.
226. Mr. Phillip Magona submitted that the KIEMS should scan forms 34A and that the server should be monitored by among others Human Rights bodies and the Police. Also, media houses should give alerts of results received. It was his opinion that the declaration of results should be done after all the forms 34B are received and all party agents have signed form 34C.

(4) Legal Process

227. The Jubilee Reforms Lobby Group while supporting the amendments, proposed several legal and constitutional amendments relating to elections as follows-
- (a) amendment of Article 138(2) of the Constitution to delete the word “shall” and insert “will”;
 - (b) the Independent Electoral and Boundaries Commission should record number of voters in constituencies that do not vote;
 - (c) where the gap between the leading candidate and the runners-up is wide, to the extent that even if the votes of areas where people did not vote are added to the candidate with the second highest votes, it would not alter the result of the election, the leading candidate should be declared President.
 - (d) where the gap between the leading candidates and the runners-up is narrow to the extent that the votes of areas where people did not vote if added can alter the result of the election, an election shall only be held in such areas;
 - (e) Article 140 should be amended to substitute 14 with 30 days;
 - (f) Supreme Court cannot invalidate an election unless the irregularities can alter the final result;
 - (g) Require two thirds out of the seven judges can nullify an election;
 - (h) Within 30 days judges should give their reasoned ruling;
 - (i) Judges to identify persons responsible for irregularities and the Director of Public Prosecutions should investigate such cases;

- (j) Supreme Court judgements nullifying the Presidential Election should be subject to judicial review where false evidence was given, or there was conflict of interest of a judge;
- (k) Fresh elections should be held within sixty days from the date of the judgement;
- (l) Article 138(4) be amended to prescribe a threshold for majority of votes.

228. Hon. KalembeNdile observed that there is need to review the powers of the Court so that it can order a recount following an election petition.

229. Mr. Ngachuche observed that there is need to enhance the penalties for witnesses who swear false affidavits in court, elevate burden of proof in presidential election petitions to proof beyond reasonable doubt and provide for appeal against court decisions on president elections at the Senate.

230. Apostle Joe Kamau suggested that the three arms of Government should review their perspectives on the entire electoral law and processes.

231. The Non-governmental Organisations Council urged the Committee to among other things observe the independence of the three arms of government and ensure the laws debated and passed by Parliament are for posterity and can stand the test of time.

232. Mr. Mark Too sought clarification on what would happen if the Chief Justice refused to attend the swearing in ceremony of a President-elect.

233. Hon. Samuel Gichigi requested the Committee to look into the issue of gazetting of judges to hear and determine election petitions relating to elections of members of county assemblies contrary to section 75 of the Elections Act.

234. Mr. Nkeissery Kamau Christopher proposed that an election should be an event and not a process.

235. Mr. NderituNjoka, Chairperson of Maendeleo yaWanaume, proposed that polling stations should not be in schools but may be public grounds to avoid affecting the academic calendar. Also, he proposed that the voting age be lowered to sixteen (16) years.

236. Mr. WanjohiNyambu submitted that the swearing-in of the President should be conducted by the Speaker of the National Assembly and the Senate.

237. Bishop Stephen Muketha spoke to the issue of providing an age limit during demonstrations/protests and on conduct of protests and demonstrations.

(5) National Unity and Peace

238. Several stakeholders and individual members of the public made calls for national unity and peace. They include-

239. Tom Shivachi, Chairman of Kakamega Forum, Anticorruption committee in Kakamega who asked for sobriety among all stakeholders as they address the challenges facing elections in Kenya for the sake of posterity and the best interests of the country.

240. Prophet Paul Mwangi, from House of Prophets supported all amendments as they would avert the likelihood of any crisis befalling the nation.

241. Mr. Robert Owango from Homa Bay County observed that the proposed amendments are in order but urged the Members of Parliament to ensure that peace prevails in the country.

242. Ms. VellahKadeiza proposed consensus-building by the two major political parties as a way forward.

2.5.4 General Observations of the Committee

243. The Committee took into account the views of the public and considered at length all concerns expressed on various issues relating to the Bills. The Committee was also conscientious of international best practices on electoral reforms in the review of the amendments.

244. With regard to the issue of the timing of the Bill, the Committee noted that the Supreme Court ruling pointed out irregularities in the election transmission process that had to be addressed before the next elections so as to avoid the same irregularities. The Committee noted that Parliament has a constitutional mandate to make laws, an obligation to solve the current political impasse and address the legal issues raised by the Supreme Court. Of note was that the Supreme Court

asserted in its majority judgement in the case of *Raila Odinga and another vs IEBC and 2 others*, *Presidential Petition No.1 of 2017* in para 402 (pg.176) as follows-

“It ought to lead IEBC to soul-searching and to go back to the drawing board. If not, this Court, whenever called upon to adjudicate on a similar dispute will reach the same decision if the anomalies remain the same, irrespective of who the aspirants may be”

245. While noting the concerns of various members of the public on the reduced period of publication of the Bills, the Select Committees observed that the Standing Orders of both Houses provide for this, subject to the resolution of the Houses. Standing Order 120 of the National Assembly Standing Orders provides that:

“No Bill shall be introduced unless such Bill together with the memorandum referred to in Standing Order 117 (Memorandum of Objects and Reasons), has been published in the Gazette (as a Bill to be originated in the Assembly), and unless, in the case of a Consolidated Fund Bill, an Appropriation Bill or a Supplementary Appropriation Bill, a period of seven days, and in the case of any other Bill a period of fourteen days, beginning in each case from the day of such publication, or such shorter period as the House may resolve with respect to the Bill, has ended.”

246. Similarly Standing Order 128 of the Senate Standing Orders provides that:

“No Bill shall be introduced unless such Bill together with the memorandum referred to in Standing Order 125 (Memorandum of Objects and Reasons), has been published in the Gazette (as a Bill to be originated in the Senate), and unless, in the case of a Division of Revenue Bill or a County Allocation of Revenue Bill, a period of seven days, and in the case of any other Bill a period of fourteen days, beginning in each case from the day of such publication, or such shorter period as the Senate may resolve with respect to the Bill, has ended.”

247. Further, the Parliament of Kenya has on various occasions, following the adoption of procedural motions on the same, resolved to shorten the period for publication of various Bills. These include:

Bill	Reduction of Publication Period	Rationale
The Constitution (Amendment) Bill, 2008	From 14 days to 5 days	To facilitate the power sharing agreement following the post-election violence of 2007/8. The amendment Bill sought to establish the posts of Prime Minister and Deputy Prime Minister.
The National Accord and Reconciliation Bill, 2008	From 14 days to 5 days	To provide legal basis for the terms of the power-sharing arrangement in 2008
Security Laws (Amendment) Bill, 2014	From 14 days to 1 day	To facilitate the nation's security apparatus to address the security crisis occasioned by sustained attacks by Al Shabab terrorist group
Anti- Doping (Amendment) Bill, 2016	From 14 days to 7 days	To meet the World Anti- Doping Agency (WADA) deadline for adoption of guidelines to align the Anti-Doping Act, 2016 with the UNESCO Convention Against Doping in Sport.

CHAPTER THREE

COMMITTEE OBSERVATIONS AND RECOMMENDATIONS

248. The Select Committee on the Election Laws, 2017 made the observations and recommendations based on the deliberations of the Bill and stakeholder input as listed below-

3.1 Clause2: Definition of the term Chairperson

249. Clause 2 of the Bill seeks to amend the definition of the term “Chairperson” in Section 2 of the IEBC Act. It provides that the Chairperson of the Commission means the Chairperson appointed in accordance with Article 250(2) of the Constitution and, in the absence of the Chairperson, the Vice-Chairperson, or such other person acting as the Chairperson in the absence of both the Chairperson and Vice-Chairperson.

Observations

The Committee observed that-

250. There is need to provide expressly for the manner in which the affairs of the Commission will be run to ensure there is no vacuum in leadership and continuity in the affairs of the Commission. The mischief that the Bill seeks to cure is not simply in the definition of the term “chairperson” but to also consider the exercise of the powers of the Chairperson such as the powers of the chairperson being the Returning Officer in the presidential election. The functions of the Chairperson are not ordinary and therefore there must be an express provision for the vice-chairperson or a member elected by other members, to act for the chairperson.

251. Providing for the vice chairperson or any other member of a Commission to deputize the Chairperson is a standard practice and is also provided for in law with respect to other state and public offices. For instance, Article 147 (3) of the Constitution provides that, “*Subject to Article 134, when the President is absent or is temporarily incapacitated, and during any other period that the President decides, the Deputy President shall act as the President*”.

252. Article 259(3)(b) of the Constitution provides that, “*every provision of this constitution shall be construed according to the doctrine of interpretation that the law is always speaking and therefore among other things... any reference in this constitution to a state or other public office or officer, or a person holding such an*

office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time”.

253. With respect to the structure of other Constitutional Commissions, the Committee observed that for example, in the Parliamentary Service Act No. 10 of 2000, the term “**Chairman**” is defined to include the vice-chairman or any other member of the Commission when discharging the functions of the chairman. Similarly, in the Judicial Service Act, No. 1 of 2011, the term “**Chairperson**” is defined to include the Vice Chairperson or any other member of the Commission when discharging the functions of the Chairperson. The proposed new definition of “chairperson” therefore is in line with the general organization structure of other Constitutional Commissions.

254. Further the Interpretation and General Provisions Act Cap 2 Laws of Kenya (which provides for construction, application and interpretation of written law) provides, at section 45, that “*in this Act and in any other written law, instrument, warrant or process of any kind, a reference to a person holding an office shall include a reference to any person for the time being lawfully discharging the functions of that office*”. The Constitution and the Interpretation and General Provisions Act therefore provide for the continuity in the leadership and management of state and public offices.

255. Where the vice-chairperson or a member of the Commission acts in the stead of the Chairperson as a temporary measure to ensure that there is no impediment to the efficient running of the affairs of the Commission.

256. The use of the words “such other person” in definition of the term Chairperson, as proposed in the Bill, implies that anyone else apart from the members of the Commission could possibly act as Chairperson.

Recommendation

257. The Committee therefore recommends:

Delete the proposed definition of chairperson and substituting therefor the following new definition—

“Chairperson” means the chairperson of the Commission appointed in accordance with Article 250(2) of the Constitution or the vice-chairperson or a Member of the Commission when discharging the functions of the chairperson.”

3.2 Clause 3: Qualification for appointment as Chairperson and chairing of Commission meetings in the absence of the Chairperson

258. Clause 3 of the Bill seeks to amend Section 6 of the IEBC Act to-

- (a) provide for new qualifications for the chairperson of the Commission. Presently Section 6(1) of the Act provides that "*the chairperson of the Commission shall be a person who is qualified to hold the office of judge of the Supreme Court under the Constitution*". The Bill however proposes that the Chairperson shall hold a degree in public administration, public finance, governance, electoral management, social science or law and have at least fifteen years' experience in the aforementioned fields;
- (b) provide that in the absence of the chairperson, the vice-chairperson shall assume the duties and responsibilities of the chairperson. Further in the event of an absence of the chairperson or the vice-chairperson, members of the Commission shall elect from amongst themselves a person to act as chairperson and exercise the duties and responsibilities of the chairperson;

Observations

259. The Committee noted that there is a standard practice with regards to assumption of the Chairperson's role in his/her absence and the law also provides for it. For example, Article 147 of the Constitution provides that "*.....when the President is absent or is temporarily incapacitated, and during any other period that the President decides, the Deputy President shall act as the President*". In the same vein, standing order 196 and 188 of the Senate Standing Orders and the National Assembly Standing Orders respectively provide that in the absence of the chairperson and vice-chairperson at any meeting, the members present shall elect one of them to take the Chair.

260. As to the proposed changes to the qualifications of the chairperson, the Committee observed that because of the nature of the duties of the chairperson, qualifications in law would be essential to the discharge of the duties of the chairperson. The electoral process is tempered by numerous legal instruments and processes. For instance, under the Second Schedule to the Elections Act the Electoral Code of Conduct Enforcement Committee requires that the chairperson of the committee be a person qualified to hold the office of a judge of the High Court. In the present composition of the Commission only the chairperson of the Commission is qualified to be the Chairperson of the Committee.

261. Therefore while the Committee appreciates that the secretariat to the commission would give the Chairperson guidance on legal matters, it is an added advantage that the Chairperson has extensive experience in the practice of law.
262. The Committee, however, proposes that it would be appropriate to expressly provide in law that while the Chairperson of the Commission must be a person qualified to be a Judge of the Supreme Court, the vice-chairperson or a member who acts in the stead of the chair need not have similar qualifications as those of the Chairperson.
263. Further comparable Constitutional Commissions provide for higher qualifications for the chairperson *vis-à-vis* the other members of the Commission. The Ethics and Anti-Corruption Commission, Teachers Service Commission, Commission on Administrative Justice, National Gender and Equality Commission, Kenya National Human Rights Commission and the National Land Commission provide for the chairperson to have at least fifteen years' experience in the applicable field and members to have ten years' experience.
264. As to the proposed insertion of new 1A and 1B on who may act in the absence of the Chairperson, the Committee observed that there must be a clear distinction between the terms "absence" and "vacancy". Section 7A of the Act presently provides for the situations in which a vacancy arises and the procedure for the filling of the vacancy. However, it does not speak to who may act as the Chairperson before the filling of the vacancy. This would potentially lead to the same vacuum as that created during the absence of the Chairperson.

Recommendation

The Committee therefore recommends that-

265. Clause 3 (1) be deleted and recommended that

The proposed new sections 1A and 1B be redrafted to provide for persons who shall act as Chairperson in the event of –

(a) the absence of the Chairperson; or

(b) a vacancy in the office of the chairperson pending the filling of the vacancy under section 7A.

- (c) Notwithstanding the qualifications in section 6(1) of the Elections Act, 2011 when acting as chairperson, the vice chairperson or a member does not have to possess similar qualifications as the Chairperson

3.3 Clause 4: Quorum for Commission meetings and decision-making

266. Clause 4 seeks to amend the Second Schedule to the Act to-

- (a) provide that the quorum for the conduct of business at a meeting of the Commission shall be at least half of the existing members of the Commission, provided that the quorum shall not be less than three members. Presently, paragraph 5 of the Second Schedule to the Act provides that "*the quorum for the conduct of business at a meeting of the Commission shall be at least five members of the Commission*"; and
- (b) insert a new paragraph 7 to provide for the procedure through which decisions of the Commission shall be taken. The Bill proposes that a decision on any matter before the Commission shall be by a majority of the members present and voting, unless a unanimous decision is reached. Presently, paragraph 7 of the Second Schedule provides that "*unless a unanimous decision is reached, a decision on any matter before the Commission shall be by concurrence of a majority of all the members*".

Observation

The Committee observed that-

267. Article 250(1) contemplates that a constitutional commission may consist of at least three and not more than nine members. Section 5 of the Independent Electoral and Boundaries Commission Act provides that the Commission consists of seven members of the Commission. Presently under paragraph 5 of the Second Schedule to the Elections Act provides that "*the quorum for the conduct of business at a meeting of the commission is stipulated as at least five members*". The Committee therefore observes that it may be possible for the Commission to be comprised of three members. Further, and in the alternative, certain members of the Commission may be unavailable to attend meetings of the Commission. In both these instances, the work of the Commission would be seriously impeded.

Recommendation

268. The Committee therefore recommends that clause 4 of the Bill be retained in the form it is.

3.4 Clause 5: Nomination of Presidential Candidates

269. Clause 5 of the Bill proposes to delete Section 29 of the Elections Act. This Section provides for the persons eligible to nominate a presidential candidate in the following terms-

(1) The persons who nominate a presidential candidate shall be members of the candidate's political party.

(2) The persons who nominate an independent presidential candidate shall not be members of any political party;

Observation

270. Deletion of section 29 of the Elections Act as proposed in clause 5 of the Bill is a legislative expression of the findings of the court in *Peter Solomon Gichira v Independent Electoral and Boundaries Commission & Attorney-General (Petition No. 234 of 2017)* where the court found that-

(1) by enacting that the persons who nominate an independent presidential candidate shall not be members of any political party, section 29 of the Elections Act contravened the letter and the spirit of Article 38 as read with Article 137(1)(d) of the Constitution. Similarly, by enacting that the persons who nominate a presidential candidate shall be members of the candidate's political party, the same section contravened the letter and the spirit of Article 38 as read with Article 137(1)(d) of the Constitution;

(2) by restricting section 29 of the Elections Act to presidential candidates, the said section contravened Article 27 of the Constitution that enshrines freedom from discrimination;

(3) by providing that all presidential candidates submit their list of 2000 supporters from at least 24 counties to the Commission by Excel, the Independent Electoral and Boundaries Commission went overboard and purported to unlawfully and unjustifiably restrict or limit the rights of such candidates to exercise their political rights under the Constitution. I further find that the said requirement does not meet the fairness and reasonability test as provided for under Article 24 of the Constitution.

Recommendation

271. The Committee recommends that clause 5 be retained in the form it is.

3.5 Clause 6: Mode of transmission of results

272. Clause 6 of the Bill proposes to amend Section 39 of the Elections Act to provide that-

- (a) the Independent and Electoral Boundaries shall transmit electronically and manually the results of a presidential election from a polling station to the constituency tallying centre and to the national tallying centre;
- (b) in the event of a discrepancy, manually transmitted results shall prevail over electronically transmitted results;
- (c) failure to transmit or publish election results electronically shall not invalidate the results as announced and declared;
- (d) the Independent and Electoral Boundaries Commission shall establish a mechanism for live-streaming of results; and
- (e) live-streamed results shall not form the basis of a declaration by the Independent and Electoral Boundaries.

Observations

273. The phrase “manually transmit” is not clear as to the type of additional transmission of results required under the Act. Inclusion of the phrase “physically deliver” properly obligates the Commission to ensure the delivery of the physical copies of the results to the National Tallying Centre in addition to the electronic transmission of results. The proposed new sub-sections (ID) and (IDA) also seek to clarify the role of the Chairperson in verifying results in light of Articles 86(b) and 138(3)(c) of the Constitution and the decisions of the High Court, the Court of Appeal in the *Independent Electoral and Boundaries Commission versus Maina Kiai and five others* and the Supreme Court. The amendment also seeks to create an obligation on the Independent Electoral and Boundaries Commission to establish a mechanism for the live streaming of results as announced at the polling stations but the results so streamed shall be for purposes of public information. As it is presently, section 39(IC)(c) of the Elections Act, 2011 provides that the Commission shall publish the polling result forms on an online public portal. This mechanism of informing the public on presidential results is not adequate as

accessibility of information may be limited due to unavailability of internet technology in certain areas of the country. In this regard the amendment is meant to add to the public portal in terms of ensuring access to information by the members of the public.

274. The amendment also seeks to delete paragraph (d) as it would not be possible in light of Article 138(10) of the Constitution for the Chairperson to have received all the results before declaring the presidential election results. Article 138(10) of the Constitution requires the Chairperson to declare results within seven days after the presidential election. The amendment therefore allows the chairperson of the Commission to declare a candidate elected as the President before all the constituencies have transmitted their results if the Commission is satisfied the results that have not been received will not affect the result of the election

Recommendation

275. The Committee therefore recommends that-

Amend clause 6 —

(a) in paragraph (a) by deleting the words “and manually transmit” and substituting therefor the words “transmit and physically deliver”;

(b) by deleting the proposed new subsection (1D) and substituting therefor the following new sub-sections—

“(1D) The Commission shall verify that the results transmitted under this section are an accurate record of the results tallied, verified and declared at the respective polling stations.”

“(1DA) Where there is a discrepancy between the electronically transmitted and the physically delivered results, the Commission shall verify the results and the result which is an accurate record of the results tallied, verified and declared at the respective polling station shall prevail.

(c) deleting paragraph (d) and substituting therefor the following new paragraph—

“(d) by deleting sub-section (2) and substituting therefor the following new subsection—

(2) The Chairperson may declare a candidate elected as the President before all the constituencies have transmitted their results if the

Commission is satisfied the results that have not been received will not affect the result of the election.

3.6 Clause 7: Use of Technology

276. Clause 7 of the Bill proposes to amend Section 44 of the Elections Act to-

- (a) clarify the regulation making powers of the Commission with respect to the use of technology. Presently, Section 44(5) of the Act provides that the Commission shall, in consultation with relevant agencies, institutions and stakeholders, including political parties, make regulations relating to transparent acquisition and disposal of information and communication technology assets and systems; testing and certification of the system; mechanisms for the conduct of a system audit; data storage and information security; data retention and disposal; access to electoral system software source codes; capacity building of staff of the Commission and relevant stakeholders on the use of technology in the electoral process; telecommunication network for voter validation and result transmission; and development, publication and implementation of a disaster recovery and operations continuity plan. The Bill proposes to delete this particular provision and provide for a general power to make regulations for the use of technology;
- (b) delete certain subsections under Section 44 which applied to regulations for the use of technology in reference to the first general election after the commencement of the section.
- (c) delete subsection (8) which presently provides for the establishment of a technical committee of the Commission consisting of such members and officers of the Commission and such other relevant agencies, institutions or stakeholders to oversee the adoption of technology in the electoral process and implement the use of such technology.

Observations

277. The Committee observes that clause 7 of the Bill proposes to-

- (a) amend subsection (5) of section 44 of the Elections Act to exclude political parties as a specifically identified category of stakeholders and to give the Commission the general power to make regulations with respect to the use of technology. This is to ensure that the Commission has the discretion to provide for the most appropriate mechanisms for the use of technology in the electoral

process. Further the amendment does not preclude the Commission from consulting political parties, as they are relevant stakeholders.

- (b) delete subsection (6) and (7) of section 44 of the Elections Act as these provisions were to be applicable to the election held on 8th August, 2017 and have ceased to have effect;
- (c) delete subsection (8) of section 44 which required the establishment of the technical committee on the use of technology, in line with the following findings of the court in *Kenneth Otieno v Attorney-General & Another (Petition No. 127 of 2017)*. That-
 - (i) the use of general words such as “relevant agencies, institutions or stakeholders” leaves room for inclusion of people expressly excluded by Article 88(2) of the Constitution from running the affairs of IEBC, and the composition of the committee and the functions given to it threatens the structural independence of IEBC that is guaranteed by the Constitution;
 - (ii) section 44(8) may be used to involve governmental, political or other partisan influences in the implementation of the electronic electoral processes contrary to Article 249(2) of the Constitution. Our finding therefore is that the effect of section 44(8) contravenes Articles 88 and 249(2) of the Constitution with respect to the independence of IEBC, and is therefore unconstitutional.

Recommendation

278. The Committee therefore recommends that Clause 7 of the Bill be retained.

3.7 Clause 8: Complementary Mechanism for Identification of Voters

279. Clause 8 of the Bill proposes to amend section 44A of the Elections Act by removing the reference to section 39 and further by making it discretionary for the Commission to put in place a complementary mechanism for identification of voters.

Observation

280. The proposed amendment to section 39 provides for both electronic and manual transmission (through physical delivery of forms tabulating results). It is therefore

necessary to make it mandatory for the independent Electoral and Boundaries Commission to set up a complementary mechanism to ensure that no eligible voter who is registered is left out of voting

Recommendation

281. The Committee therefore recommends that-

Clause 8 of the Bill be amended in the proposed amendment to section 44A of the Elections Act by deleting the word “may” and substituting therefor the word “shall”.

3.8 Clause 9: Nullification of Elections

282. Clause 9 of the Bill proposes to amend section 83 by providing that-

- (a) no election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law **and** that the non-compliance did not affect the result of the election;
- (b) a form prescribed by the Act shall not be void by reason of a deviation from the requirements of the form as long as the deviation is not calculated to mislead;

Observations

The Committee observed that-

283. It is necessary to amend section 83 of the Elections to provide that for an election to be invalidated, a petitioner must prove that there was non-compliance with the written law and the Constitution and that the non-compliance did not substantially affect the result of the election.

284. The Supreme Court (*in Raila Odinga & Another v IEBC & 2 others Presidential Petition No. 1 of 2017*), found that the use of “or” is disjunctive and therefore an election may be invalidated if a petitioner proves either that there was non-compliance with the law and need further demonstrate that the non-compliance affected the result of the election. In reaching this decision the court observed that—

“the Legislature in its wisdom chose the words in Section 83 of the Elections Act and in keeping to our oath, we cannot, to placate any side of the political divide, alter, amend, read into or in any way affect the meaning to be attributed to that section”.

285. It is therefore within Parliament’s purview to amend section 83 to render the two conditions conjunctive.

286. The proposed amendment renders the two conditions conjunctive. In effect, a petitioner would be required to demonstrate non-compliance with the law as well as the substantial effect of the non-compliance on the outcome of the result. Indeed a conjunctive rendering of the provisions of section 83 is replicated across the Commonwealth including in Nigeria, Ghana, Zambia, Tanzania and Uganda.

Recommendation

287. The Committee therefore recommends that-

Clause 9 be amended by deleting the proposed new Section 83 and substituting therefor the following new section—

83. (1) A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that—

(a) the election was conducted in accordance with the principles laid down in the Constitution and in that written law; **and**

(b) the non-compliance did not substantially affect the result of the election

(2) Pursuant to section 72 of the Interpretation and General Provisions Act, a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead.

3.9 Clause 10: Procedure at fresh elections

288. The Bill proposes to insert a new section 86A in the Elections Act to-

(a) provide that the Commission shall publish, within seven days, a notice in the Gazette indicating that a presidential election has been invalidated, the date for fresh elections and the names and political parties of the candidates to participate in the fresh elections;

- (b) set out persons eligible to participate in a fresh presidential election in the event that the Supreme court invalidates a presidential election. In this respect, the Bill proposes that-
- (i) where the petition was filed by the runner-up candidate, the fresh election shall be confined to the petitioner and the president-elect;
 - (ii) where the petition was filed by more than one candidate who participated in the original election, the petitioning candidates and the president-elect may participate in the election;
 - (iii) where the petitions was filed by a person who was not a candidate in the original election, then each of the candidates in the election may participate in the fresh election;
- (c) preclude the commission from conducting fresh nominations for an election arising out of an invalidated election; and
- (d) provide for the conditions applicable where an eligible candidate withdraws from an election.

Observation

289. From the public participation exercise conducted, various individuals and organisations highlighted the issue that the proposed provision limits the rights of persons to vie for elective office contrary to Article 38 of the Constitution which provides—

- (1) *Every citizen is free to make political choices, which includes the right—*
 - (a) *to form, or participate in forming, a political party;*
 - (b) *to participate in the activities of, or recruit members for, a political party; or*
 - (c) *to campaign for a political party or cause.*
- (2) *Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—*
 - (a) *any elective public body or office established under this Constitution; or*
 - (b) *any office of any political party of which the citizen is a member.*
- (3) *Every adult citizen has the right, without unreasonable restrictions—*
 - (a) *to be registered as a voter;*

- (b) to vote by secret ballot in any election or referendum; and*
- (c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.*

Recommendation

290. The Committee therefore recommends that-

Clause 10 be amended by deleting subsection (2) in the proposed new section 86A.

3.10 Clause 11: Failure or refusal to sign election results

291. Clause 11 of the Bill proposes to amend the Elections Offences Act to penalize a presiding or returning officer who knowingly fails or refuses to sign or complete a document containing the results of an election. The Bill further proposes to penalize a presiding or returning officer who wilfully submits an incomplete document or wilfully alters or falsifies a document. The Bill proposes a penalty of imprisonment for a term not exceeding five years upon conviction.

Observations

292. The Committee observed that the offences proposed in the Bill, to be introduced through an amendment of the Elections Offences Act, are already adequately couched in Section 6 of the Elections Offences Act that provides for offences by members and staff of the Commission in the following terms-

A member of the Commission, staff or other person having any duty to perform pursuant to any written law relating to any election who—

(a) makes, in any record, return or other document which they are required to keep or make under such written law, an entry which they know or have reasonable cause to believe to be false, or do not believe to be true;

(b) permits any person whom they know or have reasonable cause to believe to be able to read or write to vote in the manner provided for persons unable to read or write;

(c) permits any person whom they know or have reasonable cause to believe not to be visually impaired or a person with disability to vote in the manner provided for persons who are visually impaired or persons with disability, as the case may be;

- (d) wilfully prevents any person from voting at the polling station at which they know or have reasonable cause to believe such person is entitled to vote;
- (e) wilfully rejects or refuses to count any ballot paper which they know or have reasonable cause to believe is validly cast for any candidate in accordance with the provisions of such written law;
- (f) wilfully counts any ballot paper as being cast for any candidate which they know or have reasonable cause to believe was not validly cast for that candidate;
- (g) interferes with a voter in the casting of his vote in secret;
- (h) where required under the Elections Act (No. 24 of 2011) or any other law to declare the result of an election, fails to declare the results of an election;
- (i) except in the case of a member, officer or person authorised to do so, purports to make a formal declaration or formal announcement of an election result;
- (j) without reasonable cause does or omits to do anything in breach of his official duty;
- (k) colludes with any political party or candidate for purposes of giving an undue advantage to the political party or candidate;
- (l) wilfully contravenes the law to give undue advantage to a candidate or a political party on partisan, ethnic, religious, gender or any other unlawful considerations; or
- (m) fails to prevent or report to the Commission or any other relevant authority, the commission of an electoral offence committed under this Act,

commits an offence and is liable on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both”.

293. The Supreme Court in ***Raila Odinga & Another v IEBC & 2 others Presidential Petition No. 1 of 2017*** made the following observations with regard to certain prescribed forms-

The Court notes further that from the report on Forms 34B, the Registrar out rightly made an observation that some of the forms were photocopies, carbon copies and not signed. And out of the 291 forms, 56 did not have the watermark feature while 31 did not bear the serial numbers. A further 5 were not signed at all and 2 were only stamped by the returning officers but not signed. In addition, a further 32 Forms were not signed by agents. The above incidences are singled out since they are incidences where the accountability and transparency of the forms are in question.

294. There is need to enhance the penalty as it will act as deterrent for members of the Commission, staff of the Commission and any other person who has a legal obligation to perform certain duties with respect to the electoral process from failing to discharge their duties.

Recommendation

295. The Committee recommends that-

The Bill be amended by deleting Clause 11 and substituting therefor the following new clause-

11. Section 6 of the Election Offences Act, 2016 is amended in the closing statement by deleting the words “one million shillings or to imprisonment for a term not exceeding three years” and substituting therefor the words “two million shillings or to imprisonment for a term not exceeding five years”.

FIRST SCHEDULE

PROPOSED AMENDMENTS TO THE ELECTION LAWS (AMENDMENT) BILL, NATIONAL ASSEMBLY BILL NO. 39 OF 2017

CLAUSE 2

THAT clause 2 of the Bill be amended by deleting the proposed definition of chairperson and substituting therefor the following new definition—

“Chairperson” means the chairperson of the Commission appointed in accordance with Article 250(2) of the Constitution or the vice-chairperson or a Member of the Commission when discharging the functions of the chairperson.

CLAUSE 3

THAT the Bill be amended by deleting clause 3 and substituting therefor the following new clauses—

Amendment 3. The Independent Electoral and Boundaries Commission Act, 2011 is of section amended in section 7A by inserting the following new subsections 7A of No.9 immediately after sub-section (3) —
of 2011.

“(4) Whenever a vacancy occurs in the office of the chairperson, the vice-chairperson shall act as the chairperson and exercise the powers and responsibilities of the chairperson until such time as the chairperson is appointed.

(5) Where the positions of chairperson and vice-chairperson are vacant, a member elected by members of the Commission shall act as the chairperson and exercise the powers and responsibilities of the chairperson until such time as the chairperson is appointed.

(6) The provisions of section 6(1) shall not apply to the vice-

chairperson or a member acting as chairperson under this section.

Insertion of 3A. The Independent Electoral and Boundaries Commission Act, 2011 is a new amended by inserting the following new section immediately after section section in 7A —

No. 9 of 2011.

Absence of chairperson. 7B. “(1) Whenever the chairperson is absent, the vice-chairperson shall assume the duties of the chairperson and exercise the powers and responsibilities of the chairperson.

(2) Where the chairperson and the vice-chairperson are absent, members of the Commission shall elect from amongst themselves a member to act as the chairperson and exercise the powers and responsibilities of the chairperson.

(3) The provisions of section 6(1) shall not apply to the vice-chairperson or a member acting as chairperson under this section.”

CLAUSE 6

THAT clause 6 of the Bill be amended —

- (a) in paragraph (a) by deleting the words “and manually transmit” and substituting therefor the words “transmit and physically deliver”;

(2) The Chairperson may declare a candidate elected as the President before all the constituencies have transmitted their results if the Commission is satisfied that the results that have not been received will not affect the result of the election.”

CLAUSE 8

THAT clause 8 of the Bill be amended in the proposed amendment to section 44A by deleting the word “may” and substituting therefor the word “shall”.

CLAUSE 9

THAT the Bill be amended by deleting clause 9 and substituting therefor the following new clause —

**Nullification
of an
election.**

83. (1) A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that—

- (a) the election was conducted in accordance with the principles laid down in the Constitution and in that written law; and
- (b) the non-compliance did not substantially affect the result of the election.

Cap. 2

(2) Pursuant to section 72 of the Interpretation and General Provisions Act, a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead.

CLAUSE 10

THAT clause 10 of the Bill be amended in the proposed amendment to section 86A by deleting subsection (2).

CLAUSE 11

THATthe Bill be amended by deleting clause 11 and substituting therefor the following new clause—

Amendment of section 6 of No. 37 of 2016. 11. Section 6 of the Election Offences Act, 2016 is amended in the closing statement by deleting the words “one million shillings or to imprisonment for a term not exceeding three years” and substituting therefor the words “two million shillings or to imprisonment for a term not exceeding five years”.

Hon. William Cheptumo,MP
Chairperson of the Select Committee on Election Laws, 2017

MINUTES OF THE SIXTEENTH SITTING OF THE SENATE SELECT COMMITTEE ON ELECTION HELD ON TUESDAY, 10TH OCTOBER, 2017 IN COMMITTEE ROOM 9, MAIN PARLIAMENT AT 9.15 AM.

NATIONAL ASSEMBLY

PRESENT

1. Hon. William Kipkiror Cheptumo, MP - Co-Chairperson
2. Hon. Gladys Jepkosgei-Boss Shollei, MP
3. Hon. Isaac Waihenya Ndirangu, MP
4. Hon. Jennifer Shamalla, MP
5. Hon. Adan Haji Yusuf, MP
6. Hon. Ali Wario, MP
7. Hon. George Gitonga Murugara, MP
8. Hon. Stanley Muthama, MP
9. Hon. Alice Muthoni Wahome, MP

SENATE

PRESENT

1. Sen. Fatuma Adan Dullo, MP Co- Chairperson
2. Sen. Paul Kimani Wamatangi, MP
3. Sen. Johnson Arthur Sakaja, MP
4. Sen. Aaron Cheruiyot, Mp
5. Sen. Naomi Jillo Waqo, MP

IN ATTENDANCE

1. Ms. Mary Chesire - Deputy Director, Senate Committee Services
2. Mr. Dan Mutunga - Principal Clerk Assistant, National Assembly
3. Ms. Kavata Musyoka - Clerk Assistant II, Senate
4. Mr. Jeremy Chabai - Legal Counsel II, Senate
5. Ms. Lucy Radoli - Legal Counsel II, Senate
6. Ms. Jemimah Waigwa - Legal Counsel II, National Assembly
7. Mr. Ronald Walala - Legal Counsel II, National Assembly
8. Mr. Salem Lorot - Legal Counsel II, National Assembly
9. Ms. Halima Hussein - Clerk Assistant III, National Assembly
10. Mr. James Ngusya - Sergeant-At-Arms, Senate
11. Ms. Faith Makena - Sergeant At Arms, National Assembly

MIN.NO. JSCEL/057/2017

PRELIMINARIES

Sen. Fatuma Dullo called the meeting to order at 9.15 am and she recited a word of prayer.

MIN.NO. JSCEL/058/2017**ADOPTION OF THE AGENDA**

The agenda was proposed by Sen. Aaron Cheruiyot and seconded by Hon. Jennifer Shamalla.

MIN.NO. JSCEL/059/2017**CONFIRMATION OF MINUTES**

The minutes of the 1st to 15th Sittings were confirmed as a true record of the proceedings as outlined below-

- 1st Sitting confirmed by Sen. Aaron Cheruiyot and seconded by Sen. Jennifer Shamalla
- 2nd Sitting confirmed by Hon. Alice Wahome and seconded by Sen. Paul Wamatangi
- 3rd Sitting confirmed by Sen. Paul Wamatangi and seconded by Hon. Adan Yussuf
- 4th Sitting confirmed by Sen. Johnson Sakaja and seconded by Hon. Isaac Waihenya
- 5th Sitting confirmed by Hon. George Gitonga and seconded by Sen. Aaron Cheruiyot
- 6th Sitting confirmed by Sen. Johnson Sakaja and seconded by Hon. Gladys Shollei
- 7th Sitting confirmed by Sen. Naomi Jillo and seconded by Hon. Jennifer Shamalla
- 8th Sitting confirmed by Hon. Gladys Shollei and seconded by Sen. Aaron Cheruiyot
- 9th Sitting confirmed by Sen. Aaron Cheruiyot and seconded by Hon. Isaac Waihenya
- 10th Sitting confirmed by Sen. Johnson Sakaja and seconded by Hon. Adan Yussuf
- 11th Sitting confirmed by Hon. Isaac Waihenya and seconded by Sen. Naomi Jillo
- 12th Sitting confirmed by Sen. Aaron Cheruiyot and seconded by Hon. Jennifer Shamalla
- 13th Sitting confirmed by Sen. Aaron Cheruiyot and seconded by Hon. Gladys Shollei
- 14th Sitting confirmed by Sen. Naomi Jillo and seconded by Hon. Jennifer Shamalla
- 15th Sitting confirmed by and seconded by Sen. Johnson Sakaja and Hon. Gladys Shollei

MIN.NO. JSCEL/060/2017**MATTERS ARISING**

On the 9th of October, 2017 minutes Members recommended that provisions of Article 2 of the Constitution of Kenya be included.

MIN.NO. JSCEL/061/2017**CONSIDERATION AND ADOPTION OF
THE DRAFT REPORT ON THE
ELECTION LAWS (AMENDMENT) BILL,
NATIONAL ASSEMBLY BILLS NO. 39 OF
2017 AND THE ELECTIONS LAWS
(AMENDMENT) BILL, SENATE BILLS
NO. 3 OF 2017**

Members were taken through the report and confirmed that the amendments done to Clauses 6, 8 and 9 were correctly captured in the report.

The report was adopted having been proposed by Hon. Jennifer Shollei, MP and seconded by Sen. Johnson Sakaja, MP

MIN.NO. JSCEL/062/2017

ANY OTHER BUSINESS


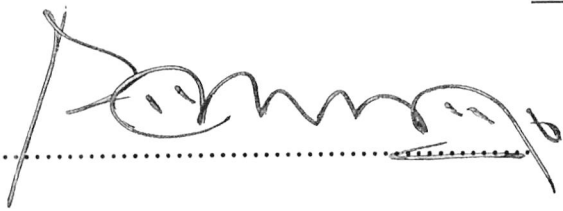
There was no any other business.

MIN.NO. JSCEL/063/2017: DATE OF THE NEXT MEETING

The Joint Sittings were concluded.

10/10/2017

DATE:



HON. WILLIAM CHEPTUMO, MP
CO-CHAIRPERSON

SEN. FATUMA ADAN DULLO, MP
CO-CHAIRPERSON

MINUTES OF THE 15TH JOINT SITTING OF THE SELECT COMMITTEE ON ELECTION RELATED LAWS OF THE NATIONAL ASSEMBLY AND THE SENATE HELD ON MONDAY, 9TH OCTOBER, 2017 IN COMMITTEE ROOM 9, MAIN PARLIAMENT AT 12.21 PM

NATIONAL ASSEMBLY

PRESENT

1. Hon. William Kipkiror Cheptumo, MP - Co-Chairperson
2. Hon. Gladys Jepkosgei-Boss Shollei, MP
3. Hon. Isaac Waihenya Ndirangu, MP
4. Hon. Jennifer Shamalla, MP
5. Hon. Adan Haji Yusuf, MP

SENATE

PRESENT

1. Sen. Fatuma Adan Dullo, MP - Co-Chairperson
2. Sen. Paul Kimani Wamatangi, MP
3. Sen. Johnson Arthur Sakaja, MP
4. Sen. Aaron Cheruiyot, MP
5. Sen. Naomi Jillo Waqo, MP

APOLOGIES

1. Hon. Stanley Muthama, MP

IN ATTENDANCE

1. Ms. Mary Chesire - Deputy Director, Senate Committee Services
2. Mr. Dan Mutunga - Principal Clerk Assistant, National Assembly
3. Ms. Kavata Musyoka - Clerk Assistant II, Senate
4. Mr. Jeremy Chabai - Legal Counsel II, Senate
5. Ms. Lucy Radoli - Legal Counsel II, Senate
6. Ms. Jemimah Waigwa - Legal Counsel II, National Assembly
7. Mr. Ronald Walala - Legal Counsel II, National Assembly
8. Mr. Salem Lorot - Legal Counsel II, National Assembly
9. Ms. Halima Hussein - Clerk Assistant III, National Assembly
10. Mr. James Ngusya - Sergeant-At-Arms, Senate
11. Ms. Faith Makena - Sergeant At Arms, National Assembly
12. Mr. James Macharia - Media Officer, National Assembly
13. Mr. Washington Otiato - Media Officer, Senate
14. Mr. Roche Mariko - Office Attendant

MIN.NO. JSCEL/052/2017

PRELIMINARIES

The sitting's proceedings commenced at 12.21 pm with a word of prayer from Senator Fatuma Dullo.

MIN.NO. JSCEL/053/2017 ADOPTION OF THE AGENDA

The agenda was adopted by consensus.

MIN.NO. JSCEL/054/2017 CONSIDERATION OF THE REPORT OF THE JOINT SITTING

The Sitting was taken through the report and made the following observations-

1. That in addition to the reference to a newspaper advert having been placed in the newspapers there was need to include that proceedings of the Select Committees were aired live by various media houses with nation-wide coverage.
2. Quantify the number of oral presentations and written memoranda submitted including which categories of stakeholders.
3. Add submissions made by Hon. Priscilla Nyokabi, Hon. Florence Kajuju, Hon. Samuel Gichigi and Hon. Kalembe Ndile.
4. Refer to *Petition Number 468 of 2017 – Katiba Institute vs. Presidency Delivery Unit and 3 other* case that was still pending in court, in paragraph 179 of the report.
5. Add submissions by Ms. Ebby Wangatia from Bungoma County on the reference to any action being taken against IEBC staff should be within the provisions of the constitution.
6. Add submissions by Mr. Edward Githaiga, Chairman, Nairobi Branch, National Youth Council of Kenya that supports the amendments and opposes extra-constitutional methods to bring reforms.
7. Amend paragraph 202 as follows: *Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others, Civil Appeal No.105 of 2017 [Maina Kiai Case]* a ruling was given that that affected the electoral process thirty five (35) days before the election.
8. In Paragraph 203 include the submissions made about the temperatures being high
9. In Paragraph 204 include submissions made by the Baraka Women Center Community Based Organization a woman's group through Teresia Mwangi on protection of women against gender-based violence which is usually rampant whenever there are election disputes.
10. Recast paragraph 253 as follows: With respect to the structure of other constitutional commissions, the Committee observed that for example, in the Parliamentary Service Act No. 10 of 2000, the term "chairman" is defined to include the vice-chairman or any other member of the Commission when discharging the functions of the chairman. Similarly, in the Judicial Service Act, No. 1 of 2011, the term "Chairperson" is defined to include the Vice Chairperson or any other member of the Commission when discharging the functions of the Chairperson. The proposed new definition of "chairperson" therefore is in line with the general organization structure of other Constitutional Commissions.

definition of "chairperson" therefore is in line with the general organization structure of other Constitutional Commissions.

11. Amend clause 3 recommendation (c) as follows: notwithstanding the qualifications in section 6(1) of the Elections Act, 2011, the Vice-Chairperson or a member does not have to possess similar qualifications as the chairperson.

12. Amend clause 6 observations to include

(i) delivery of the tabulated results to the Constituency Tallying Centre and National Tallying Centre.. Inclusion of the phrase "physically deliver" properly obligates the Commission to ensure the physical delivery of tabulated results to the National Tallying Centre in addition to the electronic transmission of results.

(ii) Further, the committee observed that there is need to provide for the Commission to verify that the results transmitted under section 39 are an accurate record of the results counted, tabulated and announced at the respective polling station. In addition, there is need to give discretion to the Commission to establish a mechanism for the live streaming of results as announced at polling stations for purposes of public information.

13. Amend Clause 6 of the observation as follows: Chairperson of the Commission needs to be empowered

14. Amend clause 8 of the bill by deleting the clause hence retaining section 44A as it is in its present form in the Elections Act.

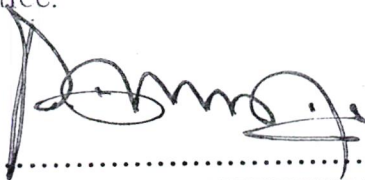
15. In Clause 11 include the following: There is need to enhance the penalty so as to deter members or staff of the Commission and any other person who has a legal obligation to perform certain duties with respect to the electoral process from failing to discharge their duties in law.

MIN.NO. JSCEL/055/2017 CONSIDERATION MINUTES

This was deferred to the following day.

MIN.NO. JSCEL/056/2017 DATE OF THE NEXT MEETING

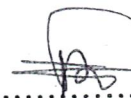
The meeting was adjourned at 2.58 pm. Date of the next meeting will be communicated by notice.



.....
**HON. WILLIAM CHEPTUMO, MP,
CO-CHAIRPERSON.**

.....
DATE

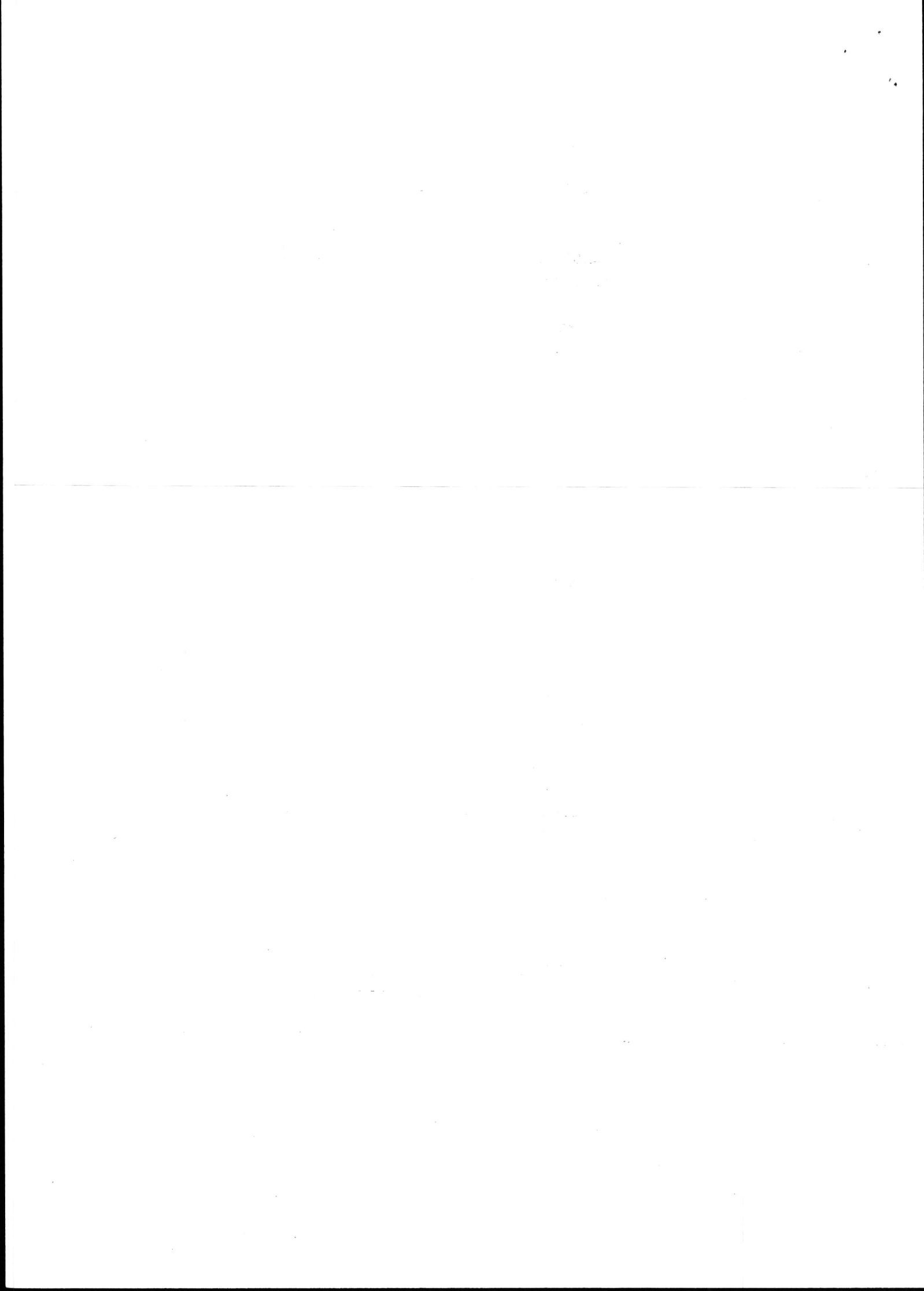
10-10-2017



.....
**SEN. FATUMA ADAN DULLO, MP
CO-CHAIRPERSON/ DEPUTY
MAJORITY LEADER.**

.....
DATE

10-10-2017



MINUTES OF THE FOURTEENTH JOINT SITTING OF THE SELECT COMMITTEES ON ELECTION LAWS, 2017 OF BOTH THE NATIONAL ASSEMBLY AND THE SENATE HELD ON SUNDAY 8TH OCTOBER, 2017 IN THE OAK ROOM, WINDSOR GOLF HOTEL & COUNTRY CLUB AT 6.10 PM

PRESENT - NATIONAL ASSEMBLY

1. Hon. William Kipkiror Cheptumo, MP Co- Chairperson
2. Hon. Gladys Jepkosgei-Boss Shollei, MP
3. Hon. Isaac Waihenya Ndirangu, MP
4. Hon. Jennifer Shamalla, MP
5. Hon. Adan Haji Yussuf , MP
6. Hon. Ali Wario, MP
7. Hon. George Gitonga Murugara, MP
8. Hon. Stanley Muthama, MP
9. Hon. Alice Muthoni Wahome, MP

PRESENT- SENATE

1. Sen. Fatuma Adan Dullo, MP Co- Chairperson
2. Sen. Aaron Cheruiyot, Mp
3. Sen. Naomi Jillo Waqo, MP
4. Sen. Paul Kimani Wamatangi, MP
5. Sen. Johnson Arthur Sakaja, MP

IN ATTENDANCE

PARLIAMENT

- | | |
|------------------------|--|
| 1. Ms. Florence Abonyo | Director Committee Services, National Assembly |
| 2. Dr. Johnson Okello | Director Legal, Senate |
| 3. Mr. Daniel Mutnga | Principal Clerk Assistant, National Assembly |
| 4. Ms. Emmy Chepwony | Principal Clerk Assistant |
| 5. Mr. Samuel Kalama | First Clerk Assistant, National Assembly |
| 6. Ms. Kavata Musyoka | Clerk Assistant, Senate |
| 7. Ms. Halima Hussein | Clerk Assistant, National Assembly |
| 8. Ms. Jemimah Waigwa | Legal Counsel, National Assembly |
| 9. Ms. Lucy Radoli | Legal Counsel, Senate |
| 10. Mr. Jeremy Chabari | Legal Counsel, National Assembly |
| 11. Mr. Ronald Walala | Legal Counsel, National Assembly |
| 12. Ms. Doreen Karani | Legal Counsel, National Assembly |
| 13. Salem Lorot | Legal Counsel, Senate |

14. Ms. Fiona Musili	Research Officer, National Assembly
15. Ms. Faith Makena	Sergeant At Arms, National Assembly
16. Mr. James Ngusya	Sergeant At Arms, Senate
17. Mr. John Mungai	Sergeant At Arms, National Assembly
18. Mr. John Mungai	Sergeant At Arms, National Assembly
19. Mr. Rodgers Kilugya	Audio officer
20. Mr. Eugene Luteshi	Audio officer
21. Mr. Simon Maina	Support Staff
22. Mr. Mariko Roche	Support Staff
23. Mr. Lawrence Kasungi	Support Staff
24. Ms. Dinnah M. Munene	Support Staff

MIN.NO. JSCEL/048/2017

PRELIMINARIES

The meeting commenced with a word of prayer from Senator Fatuma Dullo and the agenda of the meeting was adopted

MIN.NO.JSCEL/049/2017: CONSIDERATION AND ADOPTION OF THE

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

The Committee considered and adopted the following amendment to the Elections (Amendment) Bill, 2017.

Clause 2

The Committee proposed an amendment to clause 2 as follows

That Clause 2 of the bill be amended by deleting the proposed definition of chairperson and substituting therefor the following new definition—

“Chairperson” means the chairperson of the Commission appointed in accordance with Article 250(2) of the Constitution or the vice-chairperson or a Member of the Commission when discharging the functions of the chairperson.”

Rationale: There is need to provide expressly for the manner in which the affairs of the Commission will be run to ensure there is no vacuum in leadership and continuity in the affairs of the Commission. The mischief that the Bill seeks to cure is not simply in the definition of the term “chairperson” but in light of the powers of the chairperson as the returning officer in the presidential election. The functions of the chair are not ordinary

and, therefore, there must be an express provision for the vice-chairperson or a member elected by other members, to act as the chairperson.

Article 259(3)(b) of the Constitution provides that—

“every provision of this constitution shall be construed according to the doctrine of interpretation that the law is always speaking and therefore among other things... any reference in this constitution to a state or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time”.

Further, section 45 of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya which governs the construction, application and interpretation of written law provides as follows—

“in this Act and in any other written law, instrument, warrant or process of any kind, a reference to a person holding an office shall include a reference to any person for the time being lawfully discharging the functions of that office”.

Both the Constitution and the Interpretation and General Provisions Act therefore provide for the continuity in the leadership and management of state and public offices.

The structure of other constitutional Commissions also supports the amendment. With respect to the Parliamentary Service Act the term “chairman” is defined to include the vice-chairman or any other member of the Commission when discharging the functions of the chairman. Similarly, under the Judicial Service Act, the term “Chairperson” is defined to include the Vice-Chairperson or any other member of the Commission when discharging the functions of the Chairperson. The proposed new definition of “chairperson” therefore is in line with the general organization structure of other constitutional Commissions.

It is important to note that the Vice-chairperson is acting and is not the substantive holder of the office. It is a temporal measure to ensure that there is no impediment to the efficient running of the affairs of the Commission. The proposed new definition uses the word “member” instead of the word “person” with respect to who else may act as chairperson in the absence of both the chairperson and the vice-chairperson. The term “member” is a more appropriate and clear term as it has been defined in the Act to mean “a member of the commission”

Clause 3

The Committee proposed an amendment to clause 3 as follows-

That clause 3 of the bill be deleted and substituted therefor the following new clauses

3. The Independent Electoral and Boundaries Commission Act, 2011 is amended in section 7A by inserting the following new subsections immediately after sub-section (3)

“(4) Whenever a vacancy occurs in the office of the chairperson, the vice-chairperson shall act as the chairperson and exercise the powers and responsibilities of the chairperson until such a time as the chairperson is appointed.

(5) Where the positions of chairperson and vice-chairperson are vacant, a member elected by members of the Commission shall act as the chairperson and exercise the powers and responsibilities of the chairperson until such a time as the chairperson is appointed.

(6) The provisions of section 6(1) shall not apply to the vice-chairperson or a member acting as chairperson under this section.

3A. The Independent Electoral and Boundaries Commission Act, 2011 is amended by inserting the following new section immediately after section 7A

7B. “(1) Whenever the chairperson is absent, the vice-chairperson shall assume the duties of the chairperson and exercise the powers and responsibilities of the chairperson.

(2) Where the chairperson and the vice-chairperson are absent, members of the Commission shall elect from amongst themselves a member to act as the chairperson and exercise the powers and responsibilities of the chairperson.

(3) The provisions of section 6(1) shall not apply to the vice-chairperson or a member acting as chairperson under this section.”

Rationale: Because of the nature of the duties of the chairperson, qualifications in law would be essential. The electoral process is tempered with numerous legal instruments and processes. For instance the Second Schedule to the Elections Act which establishes the Electoral Code of Conduct Enforcement Committee requires that the chairperson of the committee be a person qualified to hold the office of a judge of the High Court. In the present composition of the Commission, only the Chairperson of the Commission is qualified to be the chairperson of that Committee.

While the secretariat to the commission may give the chairperson guidance on legal matters, it is an added advantage for the chair to have extensive experience in the practice of law. Comparable constitutional commissions provide for higher qualifications for the chairperson *vis-à-vis* the other members of the Commission. In the Ethics and Anti-Corruption Commission, Teachers Service Commission, Commission on Administrative Justice, National Gender and Equality Commission, Kenya National Human Rights Commission and the National Land Commission provide for the chairperson to have at least fifteen years' experience in the applicable field and members to have ten years' experience.

While it is appropriate to expressly provide for the chairperson of the Commission to be a person qualified to be a Supreme Court justice, the vice-chairperson or a member who acts in the stead of the chair need not have similar qualifications as the chairperson.

With regard to who may act in the absence of the chairperson, there must be a clear distinction between the term "absence" and "vacancy". Section 7A of the IEBC Act presently provides for the situations in which a vacancy arises and the procedure for the filling of the vacancy. It however does not speak to who may act as the chairperson before the filling of the vacancy. This would potentially lead to the same vacuum as that created during the absence of the chairperson. There is need therefore to redraft the proposed new sections 1A and 1B to provide for persons who shall act as chairperson in the event of the absence of the chairperson the existence of a vacancy in the office of the chairperson pending the filling of the vacancy.

Clause 6

The Committee proposed an amendment to clause 6 as follows-

That clause 6 of the bill be amended—

- (a) in paragraph (a) by deleting the words "and manually transmit" and substituting therefor the words "transmit and physically deliver";

(b) by deleting the proposed new subsection (1D) and substituting therefor the following new sub-section—

“(1D) The Commission shall verify that the results transmitted under this section are an accurate record of the results counted, tabulated and announced at the respective polling station.”

(c) in the proposed new subsection (1F) by deleting the word “shall” appearing immediately after the words “The Commission” and substituting therefor the word “may”;

(d) deleting paragraph (d) and substituting therefor the following new paragraph—

“(d) by deleting sub-section (2) and substituting therefor the following new subsection—

(2) The chairperson may declare a candidate elected as the President before all the constituencies have transmitted their results if the Commission is satisfied the results that have not been received will not affect the result of the election.”

Rationale: The phrase “manually transmit” is not clear as to the type of additional transmission of results required under the Act. Inclusion of the phrase “physically” deliver properly obligates the Commission to ensure the delivery of the physical copies of the results to the National Tallying Centre in addition to the electronic transmission of results. Further, the amendment to delete the proposed subsection (1D) to provide that the Commission shall verify the results transmitted under section 39 are an accurate record of the results counted, tabulated and announced at the respective polling station. The amendment further seeks to give discretion to the Commission to establish a mechanism for the live-streaming of results as announced at polling stations for purposes of public information.

The amendment also seeks to allow the chairperson of the Commission to declare a candidate elected as the President before all the constituencies have transmitted their results if the Commission is satisfied the results that have not been received will not affect the result of the election.

Clause 8

The Committee proposed an amendment to clause 8 as follows-

That clause 8 of the Bill be amended by deleting clause 8.

Rationale: Though the proposed amendment to section 39 provides for both electronic and manual transmission (through physical delivery of forms tabulating results), it is still necessary to provide for the setting up of a complementary mechanism to ensure that no eligible voter who is registered is left out of voting or results cannot be transmitted because of an electronic failure of a system.

Clause 9

The Committee proposed an amendment to clause 9 as follows-

That clause 9 of the bill be amended by deleting the Section 83 and substituting therefor the following new section—

83. (1) A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that—

(a) the election was conducted in accordance with the principles laid down in the Constitution and in that written law; **and**

(b) the noncompliance did not affect the result of the election

(2) Pursuant to section 72 of the Interpretation and General Provisions Act, a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead.

Rationale: It is necessary to amend section 83 of the Elections to provide that for an election to be invalidated, a petitioner must prove that there was non-compliance with the written law and the constitution and that the non-compliance affected the result of the election.

The Supreme Court (*in Raila Odinga & Another v IEBC & 2 others Presidential Petition No. 1 of 2017*), found that the use of “or” is disjunctive and therefore an election may be invalidated if a petitioner proves either that there was non-compliance with the law and need further demonstrate that the non-compliance affected the result of the election. In reaching this decision the court observed that—

“the Legislature in its wisdom chose the words in Section 83 of the Elections Act and in keeping to our oath, we cannot, to placate any side of

the political divide, alter, amend, read into or in any way affect the meaning to be attributed to that section”.

It is therefore within Parliament’s purview to amend section 83 to render the two conditions conjunctive.

The proposed amendment renders the two conditions conjunctive. In effect, a petitioner would be required to demonstrate non-compliance with the law as well as the effect of the non-compliance on the outcome of the result. Indeed a conjunctive rendering of the provisions of section 83 is replicated across the commonwealth including in Nigeria, Ghana, Zambia, Tanzania and Uganda.

Clause 10

The Committee proposed an amendment to clause 10 as follows-

That clause 10 be amended in the proposed new section 86A by deleting subsection (2).

Rationale: From the public participation exercise conducted, individuals and organisations such as the Kenya National Commission on Human Rights, the Law Society of Kenya and the Catholic Justice and Peace Commission Parliamentary Liaison Desk highlighted the issue that the proposed provision limits the rights of persons to vie for elective office contrary to Article 38 of the Constitution which provides—

- (1) *Every citizen is free to make political choices, which includes the right—*
 - (a) *to form, or participate in forming, a political party;*
 - (b) *to participate in the activities of, or recruit members for, a political party;*
or
 - (c) *to campaign for a political party or cause.*
- (2) *Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—*
 - (a) *any elective public body or office established under this Constitution; or*
 - (b) *any office of any political party of which the citizen is a member.*
- (3) *Every adult citizen has the right, without unreasonable restrictions—*
 - (a) *to be registered as a voter;*
 - (b) *to vote by secret ballot in any election or referendum; and*

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

Clause 11

The Committee proposed an amendment to clause 11 as follows-

That clause 11 of the bill be amended and substituting therefor the following new clause—

11. Section 6 of the Election Offences Act, 2016 is amended in the closing statement by deleting the words “one million shillings or to imprisonment for a term not exceeding three years” and substituting therefor the words “two million shillings or to imprisonment for a term not exceeding five years”.

Rationale: The offences proposed to be introduced through an amendment of the Elections Offences Act are already couched in section 6 of the Elections Offences Act which provides for offences by members and staff of the Commission. The amendment proposed only enhances the penalty as set out in section 6 of the Act. The Supreme Court in *Raila Odinga & Another v IEBC & 2 others Presidential Petition No. 1 of 2017* made the following observations with regard to certain prescribed forms-

The Court notes further that from the report on Forms 34B, the Registrar out rightly made an observation that some of the forms were photocopies, carbon copies and not signed. And out of the 291 forms, 56 did not have the watermark feature while 31 did not bear the serial numbers. A further 5 were not signed at all and 2 were only stamped by the returning officers but not signed. In addition, a further 32 Forms were not signed by agents. The above incidences are singled out since they are incidences where the accountability and transparency of the forms are in question.

Enhancement of the penalty therefore will act as a deterrent for members of the Commission, staff of the Commission and any other person who has a duty to perform certain duties with respect to the electoral process from failing to discharge their duties.

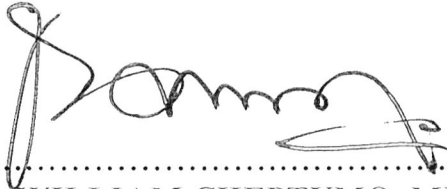
of a system.

MIN.NO. JSCEL/050/2017: COMMITTEES' RESOLUTIONS

The Committee approved all the amendments and directed the secretariat to include the same in the final Committee report on the consideration of the Electoral Laws (Amendment) bill, 2017 for consideration on Monday, 9th October, 2017 at 10.00am.

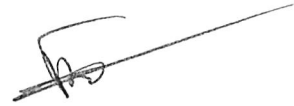
MIN.NO. JSCEL/051/2017: ADJOURNMENT AND DATE OF NEXT MEETING

There being no any other business the meeting was adjourned at 7:30 pm to be convened on Monday, 9th October, 2017 at 10.00am.



.....
HON. WILLIAM CHEPTUMO, MP,
CO-CHAIRPERSON.

DATE: 10/10/2017
.....



.....
SEN. FATUMA ADAN DULLO, MP
CO-CHAIRPERSON/ DEPUTY
MAJORITY LEADER.

DATE: 10/10/2017
.....

MINUTES OF THE THIRTEENTH JOINT SITTING OF THE SELECT COMMITTEES ON ELECTION LAWS, 2017 OF BOTH THE NATIONAL ASSEMBLY AND THE SENATE HELD ON SUNDAY 8TH OCTOBER, 2017 IN THE OAK ROOM, WINDSOR GOLF HOTEL & COUNTRY CLUB AT 2.00 PM

PRESENT - NATIONAL ASSEMBLY

1. Hon. William Kipkiror Cheptumo, MP Co- Chairperson
2. Hon. Gladys Jepkosgei-Boss Shollei, MP
3. Hon. Isaac Waihenya Ndirangu, MP
4. Hon. Jennifer Shamalla, MP
5. Hon. Adan Haji Yussuf, MP
6. Hon. Ali Wario, MP
7. Hon. George Gitonga Murugara, MP
8. Hon. Stanley Muthama, MP
9. Hon. Alice Muthoni Wahome, MP

PRESENT- SENATE

1. Sen. Fatuma Adan Dullo, MP Co- Chairperson
2. Sen. Aaron Cheruiyot, Mp
3. Sen. Naomi Jillo Waqo, MP
4. Sen. Paul Kimani Wamatangi, MP
5. Sen. Johnson Arthur Sakaja, MP

IN ATTENDANCE

PARLIAMENT

- | | |
|------------------------|--|
| 1. Ms. Florence Abonyo | Director Committee Services, National Assembly |
| 2. Dr. Johnson Okello | Ag. Director Legal, Senate |
| 3. Mr. Daniel Mutnga | Principal Clerk Assistant, National Assembly |
| 4. Ms. Emmy Chepwoy | Principal Clerk Assistant, Senate |
| 5. Mr. Samuel Kalama | First Clerk Assistant, National Assembly |
| 6. Ms. Kavata Musyoka | Clerk Assistant, Senate |
| 7. Ms. Halima Hussein | Clerk Assistant, National Assembly |
| 8. Ms. Jemimah Waigwa | Legal Counsel, National Assembly |
| 9. Ms. Lucy Radoli | Legal Counsel, Senate |
| 10. Mr. Jeremy Chabari | Legal Counsel, National Assembly |
| 11. Mr. Ronald Walala | Legal Counsel, National Assembly |
| 12. Ms. Doreen Karani | Legal Counsel, National Assembly |
| 13. Mr. Salem Lorot | Legal Counsel, Senate |

14. Ms. Fiona Musili	Research Officer, National Assembly
15. Ms. Faith Makena	Sergeant At Arms, National Assembly
16. Mr. James Ngusya	Sergeant At Arms, Senate
17. Mr. John Mungai	Sergeant At Arms, National Assembly
18. Mr. John Mungai	Sergeant At Arms, National Assembly
19. Mr. Rodgers Kilugya	Audio officer
20. Mr. Eugene Luteshi	Audio officer
21. Mr. Saimon Maina	Support Staff
22. Mr. Mariko Roche	Support Staff
23. Mr. Lawrence Kasungi	Support Staff
24. Ms. Dinnah M. Munene	Support Staff

IN ATTENDANCE

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC)

- | | |
|-----------------------|----------------------------|
| 1. Ms. Ruth Makuthu | Senior Legal Counsel, IEBC |
| 2. Mr. Moses Kipkogei | Legal Counsel, IEBC |

MIN.NO. JSCEL/045/2017: PRELIMINARIES

The meeting commenced with a word of prayer from Hon. Gladys Shollei, MP and the agenda of the meeting was adopted.

MIN.NO. JSCEL/046/2017: MEETING WITH THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC)

The Co-chairperson informed the meeting that, the Committee was considering the various proposed amendment to the Elections (Amendment) Bill after a successful public hearing conducted on the Bill. In particular the Committee would like to get some clarification on a clause 6 and 8 of the Bill from the IEBC before it could make decision.

In their submission IEBC proposed the following amendments;

Clause 6

That clause 6 be amended—

- (a) in paragraph (a) by deleting the words “and manually transmit” and substituting therefor the words “transmit and physically deliver”;

Rationale: The phrase "manually transmit" is not clear as to the type of additional transmission of results required under the Act. Inclusion of the phrase "physically" deliver properly obligates the Commission to ensure the delivery of the physical copies of the results to the National Tallying Centre in addition to the electronic transmission of results.

The Committee deliberated on this amendment and agreed to it.


Clause 8

The Committee deliberated on clause 8 and observed that there is need to delete the proposed clause 8 for the following reasons-


Though the proposed amendment to section 39 provides for both electronic and manual transmission (through physical delivery of forms tabulating results), it is still necessary to provide for the setting up of a complementary mechanism to ensure that no eligible voter who is registered is left out of voting or results cannot be transmitted because of an electronic failure of a system.

MIN.NO. JSCEL/047/2017: ADJOURNMENT AND DATE OF NEXT MEETING

There been no any other business the meeting was adjourned at 5.50 pm and to be convened on Sunday, 8th October, 2017 at 6.10 PM.



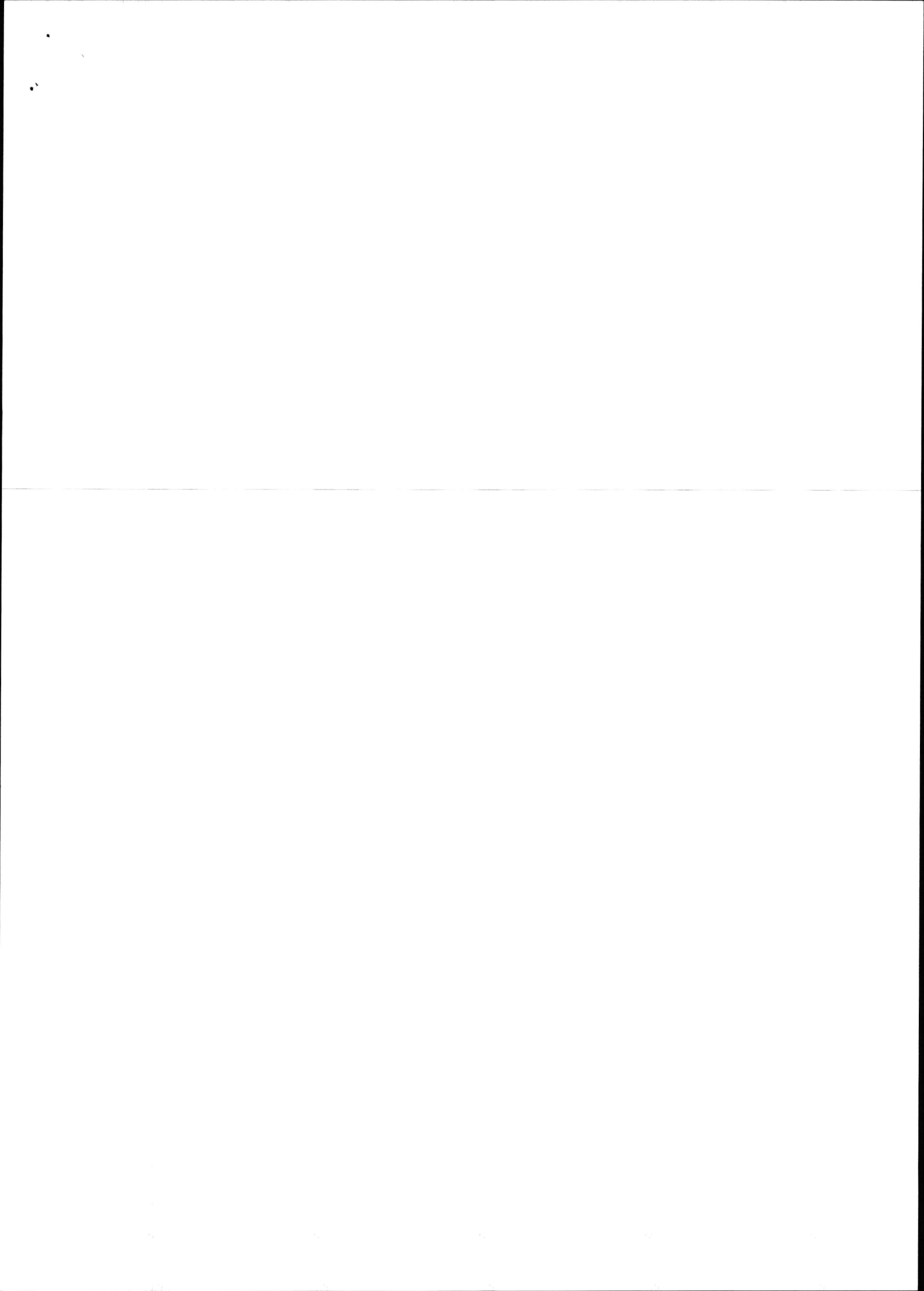
.....
**HON. WILLIAM CHEPTUMO, MP,
CO-CHAIRPERSON.**



.....
**SEN. FATUMA ADAN DULLO, MP
CO-CHAIRPERSON/ DEPUTY
MAJORITY LEADER.**

DATE: 10/10/2017
.....

DATE: 10/10/2017
.....



MINUTES OF THE TWELFTH JOINT SITTING OF THE SELECT COMMITTEES ON ELECTION LAWS, 2017 OF BOTH THE NATIONAL ASSEMBLY AND THE SENATE HELD ON SUNDAY 8TH OCTOBER, 2017 IN THE OAK ROOM, WINDSOR GOLF HOTEL & COUNTRY CLUB AT 9.00 AM

PRESENT - NATIONAL ASSEMBLY

1. Hon. William Kipkiror Cheptumo, MP Co- Chairperson
2. Hon. Gladys Jepkosgei-Boss Shollei, MP
3. Hon. Isaac Waihenya Ndirangu, MP
4. Hon. Jennifer Shamalla, MP
5. Hon. Adan Haji Yussuf, MP
6. Hon. Ali Wario, MP
7. Hon. George Gitonga Murugara, MP
8. Hon. Stanley Muthama, MP
9. Hon. Alice Muthoni Wahome, MP

PRESENT- SENATE

1. Sen. Fatuma Adan Dullo, MP Co- Chairperson
2. Sen. Aaron Cheruiyot, Mp
3. Sen. Naomi Jillo Waqo, MP
4. Sen. Paul Kimani Wamatangi, MP
5. Sen. Johnson Arthur Sakaja, MP

IN ATTENDANCE

1. Ms. Florence Abonyo
2. Dr. Johnson Okello
3. Mr. Daniel Mutnga
4. Ms. Emmy Chepwony
5. Mr. Samuel Kalama
6. Ms. Kavata Musyoka
7. Ms. Halima Hussein
8. Ms. Jemimah Waigwa
9. Ms. Lucy Radoli
10. Mr. Jeremy Chabari
11. Mr. Ronald Walala
12. Ms. Doreen Karani
13. Salem Lorot

PARLIAMENT

- Director, Committee Services, National Assembly
- Ag. Director, Legal Services Senate
- Principal Clerk Assistant, National Assembly
- Principal Clerk Assistant, Senate
- First Clerk Assistant, National Assembly
- Clerk Assistant, Senate
- Clerk Assistant, National Assembly
- Legal Counsel, National Assembly
- Legal Counsel, Senate
- Legal Counsel, National Assembly
- Legal Counsel, National Assembly
- Legal Counsel, National Assembly
- Legal Counsel, Senate

14. Ms. Fiona Musili	Research Officer, National Assembly
15. Ms. Faith Makena	Sergeant At Arms, National Assembly
16. Mr. James Ngusya	Sergeant At Arms, Senate
17. Mr. John Mungai	Sergeant At Arms, National Assembly
18. Mr. John Mungai	Sergeant At Arms, National Assembly
19. Mr. Rodgers Kilugya	Audio officer
20. Mr. Eugene Luteshi	Audio officer
21. Mr. Saimon Maina	Support Staff
22. Mr. Mariko Roche	Support Staff
23. Mr. Lawrence Kasungi	Support Staff
24. Ms. Dinnah M. Munene	Support Staff

MIN.NO. JSCEL/042/2017 : PRELIMINARIES

The meeting commenced with a word of prayer from Senator Fatuma Dullo and the agenda of the meeting was adopted.

**MIN.NO. JSCEL/043/2017: CONSIDERATION OF THE SUBMISSION FROM
THE PUBLIC HEARING ON THE ELECTIONS
LAWS (AMENDMENT) BILL, 2017**

The Committee considered matrix on the submission from the public on the Elections laws (Amendment) Bill, 2017 and made the following observations and recommendations.

Clause 10

The Committee agreed to delete section 86 A (2) of clause 10 of the amendments.

Rationale: From the public participation exercise conducted, individuals and organisations such as the Kenya National Commission on Human Rights, the Law Society of Kenya and the Catholic Justice and Peace Commission Parliamentary Liaison Desk highlighted the issue that the proposed provision limits the rights of persons to vie for elective office contrary to Article 38 of the Constitution which provides—

- (1) Every citizen is free to make political choices, which includes the right—*
- (a) to form, or participate in forming, a political party;*

- (b) to participate in the activities of, or recruit members for, a political party;*
or
- (c) to campaign for a political party or cause.*

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—

- (a) any elective public body or office established under this Constitution; or*
- (b) any office of any political party of which the citizen is a member.*

(3) Every adult citizen has the right, without unreasonable restrictions—

- (a) to be registered as a voter;*
- (b) to vote by secret ballot in any election or referendum; and*
- (c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.*

Clause 11

The Committee agreed that clause 11 of the bill be amend by deleting clause 11 and substituting therefor the following new clause-

Section 6 of the Election Offences Act, 2016 is amended in the closing statement by deleting the words “one million shillings or to imprisonment for a term not exceeding three years” and substituting therefor the words “two million shillings or to imprisonment for a term not exceeding five years.

Rationale: The offences proposed to be introduced through an amendment of the Elections Offences Act are already couched in section 6 of the Elections Offences Act which provides for offences by members and staff of the Commission. The amendment proposed only enhances the penalty as set out in section 6 of the Act. The Supreme Court in *Raila Odinga & Another v IEBC & 2 others Presidential Petition No. 1 of 2017* made the following observations with regard to certain prescribed forms-

The Court notes further that from the report on Forms 34B, the Registrar out rightly made an observation that some of the forms were photocopies, carbon copies and not signed. And out of the 291 forms, 56 did not have the watermark feature while 31 did not bear the serial numbers. A further 5 were not signed at all and 2 were only stamped by the returning officers but not signed. In addition, a further 32 Forms were not signed by agents. The above incidences are singled out

since they are incidences where the accountability and transparency of the forms are in question.

MIN.NO. JSCEL/044/2017: ADJOURNMENT DATE OF NEXT MEETING

There being no any other business the meeting was adjourned at 12.30pm and to reconvened on Sunday, 8th October, 2017 at 2.00PM



.....
**HON. WILLIAM CHEPTUMO, MP,
CO-CHAIRPERSON.**

DATE:

..... 10/10/2017



.....
**SEN. FATUMA ADAN DULLO, MP
CO-CHAIRPERSON/ DEPUTY
MAJORITY LEADER.**

DATE:

..... 10/10/2017

MINUTES OF THE ELEVENTH JOINT SITTING OF THE SELECT COMMITTEES ON ELECTION LAWS, 2017 OF THE NATIONAL ASSEMBLY AND THE SENATE HELD ON SATURDAY 7TH OCTOBER, 2017 IN THE OAK ROOM, WINDSOR GOLF HOTEL & COUNTRY CLUB AT 2.30 PM

PRESENT - NATIONAL ASSEMBLY

1. Hon. William Kipkiror Cheptumo, MP Co- Chairperson
2. Hon. Gladys Jepkosgei-Boss Shollei, MP
3. Hon. Isaac Waihenya Ndirangu, MP
4. Hon. Jennifer Shamalla, MP
5. Hon. Adan Haji Yussuf, MP
6. Hon. Ali Wario, MP
7. Hon. George Gitonga Murugara, MP
8. Hon. Stanley Muthama, MP
9. Hon. Alice Muthoni Wahome, MP

PRESENT- SENATE

1. Sen. Fatuma Adan Dullo, MP Co- Chairperson
2. Sen. Johnson Arthur Sakaja, MP
3. Sen. Aaron Cheruiyot, MP
4. Sen. Naomi Jillo Waqo, MP
5. Sen. Paul Kimani Wamatangi, MP

IN ATTENDANCE

1. Ms. Florence Abonyo Director, Committee Services, National Assembly
2. Dr. Johnson Okello Director Legal Services, Senate
3. Mr. Daniel Mutunga Principal Clerk Assistant, NA
4. Mrs. Emmy Chepwony Principal Clerk Assistant
5. Mr. Samuel Kalama First Clerk Assistant, National Assembly
6. Ms. Kavata Musyoka Clerk Assistant, Senate
7. Ms. Halima Hussein Clerk Assistant, National Assembly
8. Ms. Jemimah Waigwa Legal Counsel, National Assembly
9. Ms. Lucy Radoli Legal Counsel, Senate
10. Mr. Jeremy Chabari Legal Counsel, Senate
11. Mr. Ronald Walala Legal Counsel, National Assembly
12. Ms. Doreen Karan Legal Counsel, National Assembly
13. Mr. Salem Lorot Legal Counsel, National Assembly

14. Ms. Fiona Musili	Research Officer, National Assembly
15. Ms. Faith Makena	Sergeant At Arms, National Assembly
16. Mr. James Ngusya	Sergeant At Arms, Senate
17. Mr. John Mungai	Sergeant At Arms, National Assembly
18. Mr. John Mungai	Sergeant At Arms, National Assembly
19. Mr. Rodgers Kilugya	Audio officer
20. Mr. Eugene Luteshi	Audio officer
21. Mr. Simon Maina	Support Staff
22. Mr. Mariko Roche	Support Staff
23. Mr. Lawrence Kasungi	Support Staff
24. Ms. Dinnah M. Munene	Support Staff

MIN.NO. JSC/039/2017 : PRELIMINARIES

The meeting commenced with a word of prayer from Sen. Fatuma Dullo, MP and the agenda of the meeting was adopted.

MIN.NO. JSC/040/2017: CONSIDERATION OF THE MATRIX ON THE SUBMISSIONS FROM THE PUBLIC ON THE ELECTION LAWS (AMENDMENT) BILL 2017

The Committee considered the submission from the public on the Bill and made the following observations:-

Clause 7

The Committee observed that clause 7 of the Bill -

- (a) Proposes to amend subsection (5) of section 44 of the Elections Act to political parties as a specifically identified category of stakeholder and to give the Commission a general power to make regulations with respect to the use of technology. This is to ensure that the Commission has the discretion to provide for the most appropriate mechanisms for the use of technology in the electoral process. Further the amendment does not preclude the Commission from consulting political parties as they are relevant stakeholders.
- (b) Subsection (6) and (7) of section 44 of the Elections Act be deleted as since these provisions were to be applicable to the election held on 8th August, 2017 and have ceased to have effect.;
- (c) Subsection (8) of section 44 of the Election Act which required the establishment of the technical committee on the use of technology be deleted, in line with the

following findings of the court in *Kenneth Otieno v Attorney-General & Another (Petition No. 127 of 2017)*. That-

- (i) the use of general words such as “relevant agencies, institutions or stakeholders” leaves room for inclusion of people expressly excluded by Article 88(2) of the Constitution from running the affairs of IEBC, and the composition of the committee and the functions given to it threatens the structural independence of IEBC that is guaranteed by the Constitution;

- (ii) Section 44(8) may be used to involve governmental, political or other partisan influences in the implementation of the electronic electoral processes contrary to Article 249(2) of the Constitution. Our finding therefore is that the effect of section 44(8) contravenes Articles 88 and 249(2) of the Constitution with respect to the independence of IEBC, and is therefore unconstitutional.

Clause 8

The Committee deliberated on Clause 8 but did not make conclusive observations or recommendations and resolved to revisit it at a later date.

Clause 9

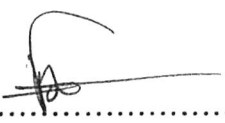
The Committee deliberated on Clause 9 and agreed to retain the provision that seeks to amend section 83 of the Election Act, 2011 as contained in the Bill.

The Committee resolved to invite the Independent Electoral and Boundaries to appear before it on Sunday 8th at 2pm for further engagement regarding the proposed amendments.

MIN.NO. JSEL/041 /2017: ADJOURNMENT AND DATE OF THE NEXT MEETING

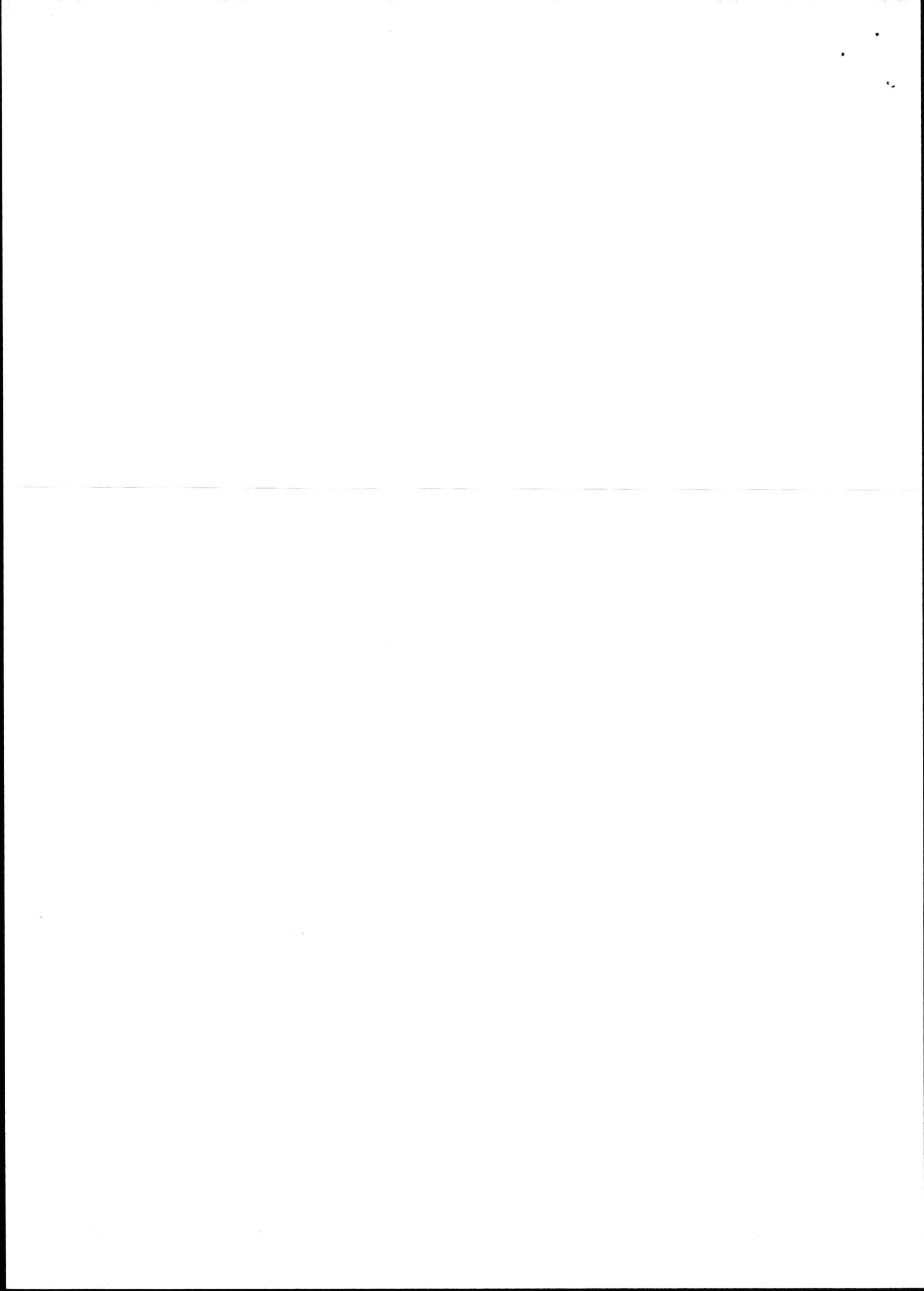
There been no any other business the meeting was adjourned at 6:30 pm to be convened on Sunday, October 08, 2017 at 9.00am.


.....
HON. WILLIAM CHEPTUMO, MP,
CO-CHAIRPERSON.


.....
SEN. FATUMA ADAN DULLO, MP
CO-CHAIRPERSON/ DEPUTY MAJORITY
LEADER.

DATE: 10/10/2017

DATE: 10/10/2017



MINUTES OF THE TENTH JOINT SITTING OF THE SELECT COMMITTEES ON ELECTION LAWS, 2017 OF BOTH THE NATIONAL ASSEMBLY AND THE SENATE HELD ON SATURDAY 7TH OCTOBER, 2017 IN THE OAK ROOM, WINDSOR GOLF HOTEL & COUNTRY CLUB AT 9.00 AM

PRESENT - NATIONAL ASSEMBLY

1. Hon. William Kipkiror Cheptumo, MP Co- Chairperson
2. Hon. Gladys Jepkosgei-Boss Shollei, MP
3. Hon. Isaac Waihenya Ndirangu, MP
4. Hon. Jennifer Shamalla, MP
5. Hon. Adan Haji Yussuf , MP
6. Hon. Ali Wario, MP
7. Hon. George Gitonga Murugara, MP
8. Hon. Stanley Muthama, MP
9. Hon. Alice Muthoni Wahome, MP

PRESENT- SENATE

1. Sen. Fatuma Adan Dullo, MP Co- Chairperson
2. Sen. Johnson Arthur Sakaja, MP
3. Sen. Aaron Cheruiyot, Mp
4. Sen. Naomi Jillo Waqo, MP
5. Sen. Paul Kimani Wamatangi, MP

IN ATTENDANCE

1. Ms. Florence Abonyo Director, Committee Services NA
2. Dr. Johnson Okello Ag. Director, Legal Services, Senate
3. Mr. Daniel Mutunga Principal Clerk Assistant, NA
4. Ms. Emmy Chepwony Principal Clerk Assistant
5. Mr. Samuel Kalama First Clerk Assistant, National Assembly
6. Ms. Kavata Musyoka Clerk Assistant, Senate
7. Ms. Halima Hussein Clerk Assistant, National Assembly
8. Ms. Jemimah Waigwa Legal Counsel, National Assembly
9. Ms. Lucy Radoli Legal Counsel, Senate
10. Mr. Jeremy Chabari Legal Counsel, Senate
11. Mr. Ronald Walala Legal Counsel, National Assembly
12. Ms. Doreen Karan Legal Counsel, National Assembly
13. Mr. Salem Lorot Legal Counsel, National Assembly

14. Ms. Fiona Musili	Research Officer, National Assembly
15. Ms. Faith Makena	Sergeant At Arms, National Assembly
16. Mr. James Ngusya	Sergeant At Arms, Senate
17. Mr. John Mungai	Sergeant At Arms, National Assembly
18. Mr. John Mungai	Sergeant At Arms, National Assembly
19. Mr. Rodgers Kilugya	Audio officer
20. Mr. Eugene Luteshi	Audio officer
21. Mr. Simon Maina	Support Staff
22. Mr. Mariko Roche	Support Staff
23. Mr. Lawrence Kasungi	Support Staff
24. Ms. Dinnah M. Munene	Support Staff

MIN.NO. JSECEL/036/2017 PRELIMINARIES

The meeting commenced with a word of prayer from Senator Fatuma Dullo and the agenda of the meeting was adopted.

MIN.NO. JSECEL/037/2017: CONSIDERATION OF THE MATRIX ON THE
SUBMISSION FROM THE PUBLIC HEARING

The Committee considered the submission from the public and made the following observations:-

Clause 2

1. There is need to provide for the manner in which the affairs of the Commission will be run to ensure there is no vacuum in leadership and continuity. The functions of the chair are not ordinary and therefore there must be an express provision for the vice-chairperson or a member elected by other members, to act for the chairperson. Committee observed that Article 259(3)(b) of the Constitution provides that-
“every provision of this constitution shall be construed according to the doctrine of interpretation that the law is always speaking and therefore among other things... any reference in this constitution to a state or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise

performing the functions of the office at any particular time". Further the Interpretation of General Act Cap 2 Laws of Kenya (which provides for construction, application and interpretation of written law) provides, at section 45, that "*in this Act and in any other written law, instrument, warrant or process of any kind, a reference to a person holding an office shall include a reference to any person for the time being lawfully discharging the functions of that office*". The Constitution and the Interpretation and General Provisions Act therefore provide for the continuity in the leadership and management of state and public offices.

2. The Committee further took into consideration the structure and trend of other constitutional commissions and observed that with respect to the Parliamentary Service Act the term "**chairman**" is defined to include the vice-chairman or any other member of the Commission when discharging the functions of the chairman. Similarly in the Judicial Service Act, the term "**Chairperson**" is defined to include the Vice Chairperson or any other member of the Commission when discharging the functions of the Chairperson. The proposed new definition of "chairperson" therefore is in line with the general organization structure of other constitutional Commissions.
3. The Vice Chair is acting and is not the substantial holder of the office. It is a temporal measure to ensure that there is no impediment to the efficient running of the affairs of the Commission.
4. The Committee however observed that the proposed new definition of the term chairperson includes "*such other person acting as chairperson in the absence of both the chairperson and the vice-chairperson*". This implies that anyone else apart from the members of the Commission could possibly act as chairperson. The committee therefore recommends that clause 2 be amended by deleting the word "*person*" and substituting therefor the word "*member*". The term "member" is a more appropriate and clear term as it has been defined in the Act to mean "member of the commission and includes the chairperson".

Clause 3

1. In regards to the proposed changes to the qualifications of the chairperson, the Committee observed that because of the nature of the duties of the chairperson, qualifications in law would be essential to the discharge of the duties of the chairperson. The electoral process is tempered by numerous legal instruments and processes. For instance under the Second Schedule to the Elections Act the Electoral Code of Conduct Enforcement Committee requires that the chairperson of the committee be a person qualified to hold the office of a judge of the High Court. In the present composition of the Commission only the chairperson of the Commission is qualified to be the chairperson of the committee.
2. The Committee recommended that the clause 3 of the Bill be amended by deleting paragraph (a) with the effect that the qualifications of the chairperson be retained in their present form in the Elections Act. The Committee however proposes that while the chairperson of the Commission must be a person qualified to be a Supreme Court justice, the vice-chairperson or a member who acts in the stead of the chair need not have similar qualifications to the chairperson.
3. In regards to the proposed insertion of new 1A and 1B on who may act in the absence of the chairperson, the Committee observed that there must be a clear distinction between the the term “absence” and “vacancy”. Section 7A of the Act presently provides for the situations in which a vacancy arises and the procedure for the filling of the vacancy. The Committee therefore recommended that the proposed new sections 1A and 1B be redrafted to provide for persons who shall act as chairperson –
 - a. in the event of the absence of the chairperson ; or
 - b. in the event of a vacancy in the office of the chairperson pending the filling of the vacancy under section 7A.

Clause 4

1. Article 250(1) contemplates that a constitutional commission may consist of at least three and not more than nine members. Section 5 of the Independent Electoral and Boundaries Act provides that the Commission consists of seven members of the Commission. The quorum for the conduct of business at a meeting of the commission is stipulated as at least five members. The Committee therefore observed that it may be possible for the Commission to be comprised of three members and recommends that clause 4 be retained in the form it is.

Clause 5

1. Clause 5 is a legislative expression of the findings of the court in *Peter Solomon Gichira v IEBC & Attorney-General (Petition No. 234 of 2017)* where the court found that-

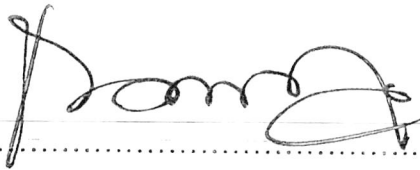
- a. *by enacting that the persons who nominate an independent presidential candidate shall not be members of any political party, section 29 of the Elections Act contravened the letter and the spirit of Article 38 as read with Article 137(1)(d) of the Constitution. Similarly, by enacting that the persons who nominate a presidential candidate shall be members of the candidate's political party, the same section contravened the letter and the spirit of Article 38 as read with Article 137(1)(d) of the Constitution;*
- b. *by restricting section 29 of the Elections Act to presidential candidates, the said section contravened Article 27 of the Constitution that enshrines freedom from discrimination;*
- c. *by providing that all presidential candidates submit their list of 2000 supporters from at least 24 counties to the Commission by Excel, the Independent Electoral and Boundaries Commission went overboard and purported to unlawfully and unjustifiably restrict or limit the rights of such candidates to exercise their political rights under the Constitution. I further find that the said requirement does not meet the fairness and reasonability test as provided for under Article 24 of the Constitution.*

Clause 6

Members of the Committee considered the submission from the public on this clause but they did not make any concrete observations but they tasked the secretariat to look at the submission from the public and best practice and advise the Committee at a later stage.

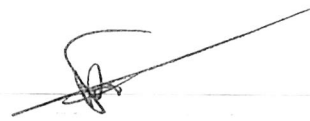
MIN.NO. JSC/038/2017: Adjournment and Date of next meeting

There been no any other business the meeting was adjourned at 1:30 pm to be convened on Saturday 7th October, 2017 at 2.30 PM.



HON. WILLIAM CHEPTUMO, MP,
CO-CHAIRPERSON.

DATE: 10/10/2017



SEN. FATUMA ADAN DULLO, MP
CO-CHAIRPERSON/ DEPUTY MAJORITY
LEADER.

DATE: 10/10/2017

MINUTES OF THE NINTH JOINT SITTING OF THE SELECT COMMITTEES
ON ELECTION LAWS, 2017 OF BOTH THE NATIONAL ASSEMBLY AND
THE SENATE HELD ON THURSDAY, 5TH OCTOBER, 2017 IN COUNTY
HALL, MINI CHAMBER AT 9.00PM

PRESENT - NATIONAL ASSEMBLY

1. Hon. William Kipkiror Cheptumo, MP Co- Chairperson
2. Hon. Gladys Jepkosgei-Boss Shollei, MP
3. Hon. Isaac Waihenya Ndirangu, MP
4. Hon. Jennifer Shamalla, MP
5. Hon. Ali Wario , MP

6. Hon. George Gitonga Murugara, M.P.
7. Hon. Alice Muthoni Wahome, MP
8. Hon. Stanley Muthama, M.P.
9. Hon. Adan Haji Yussuf, MP.

PRESENT- SENATE

1. Sen. Fatuma Adan Dullo, MP Co- Chairperson
2. Sen. Paul Kimani Wamatangi, MP
3. Sen. Johnson Arthur Sakaja, MP
4. Sen. Aaron Cheruiyot, MP
5. Sen. Naomi Jillo Waqo, MP

IN ATTENDANCE

1. Ms. Emmy Chepkwony
2. Mr. George Gazemba

MEMBERS OF THE GENERAL PUBLIC

(Attendance list is annexed)

SECRETARIAT

- Principal Clerk Assistant, Senate
- Senior Clerk Assistant, National Assembly

3. Mr. Samuel Kalama	Clerk Assistant, National Assembly
4. Ms. Kavata Musyoka	Clerk Assistant, Senate
5. Ms. Halima Hussein	Clerk Assistant, National Assembly
6. Mr. Victor Bett	Clerk Assistant, Senate
7. Mr. Charles Ngatia	Clerk Assistant, Senate
8. Ms. Jemimah Waigwa	Legal Counsel, National Assembly
9. Ms. Lucy Radoli	Legal Counsel, Senate
10. Mr. Jeremy Chabari	Legal Counsel, National Assembly
11. Mr. Salem Lorot	Legal Counsel, National Assembly
12. Ms. Fiona Musili	Research Officer, National Assembly
13. Ms. Clare Kidombo	Research Officer, Senate

MIN.NO. JSSCEL/ 032/2017

PRELIMINARIES

The meeting was called to order at 9:30pm. Thereafter the Chairpersons asked for a round of introductions.

The Co-chairs made welcomed all members of the public to feel free and make their contributions on the bill.

MIN.NO. JSSCEL/033 /2017 **SUBMISSION OF MEMORANDA FROM THE
IEBC ON THE ELECTION LAWS
(AMENDMENT) BILL, 2017**

The Chairperson of the Commission submitted as follows;

That-

- a) Clause 2- be amended by replace the word "Person" appearing immediately after the word 'such other' with the word "Member"
- b) Clause3 - Maintain the qualifications of the Chairperson as set out in the current law. The provision of 1A and 1B should be seen within the context of Article 259(3) (b) of the Constitution.

c) Clause 4- Paragraph. 5 - Retain the quorum at 5 members.

Amend Paragraph. 7 - to read: *"Unless a unanimous decision is reached, a decision on any matter before the Commission shall be by concurrence of a simple majority of all the members."*

d) On Clause 5 of the bill the Commission accepted the Proposal

e) Clause 6-need to replace the Amendment of 39(1C) (a) as follows:

"Electronically transmit and physically deliver the tabulated results for an election for the president from a polling station to the constituency tallying centre and national tallying centre."

Section 39 (2) of the Election Act amended by replacing it as follows:

"Before determining and declaring the final results of an election under subsection 1, the Commission shall have received the physically delivered results in accordance with the Act."

Amend 39 (1F) as follows:

"The Commission MAY, establish a mechanism for the electronic display of provisional results, and the results so displayed shall be for purposes of public information only and shall not be the basis for a declaration by the Commission."

f) Clause 7- Use of Technology Section 44- No comment.

g) Clause 8- Complimentary mechanism for identification of Voters – section 44A- Maintain complementary mechanism for results transmission.

h) Clause 9- Non Compliance with the law (section 83) - Proposal accepted.

i) Clause 10- Certificate of court as to validity of election Section 86- Proposal accepted however there is need to provide for the procedure for elections under Article 138 (5) and 138 (8). Proposal to include the procedure where a candidate dies before the election is held.

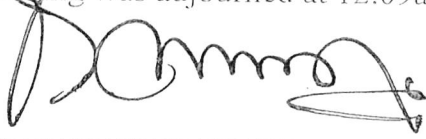
j) Clause 11 on criminalization of failure or refusal to sign results the IEBC. The IEBC accepted the proposal.

- Members advised the IEBC to list all the polling stations that are only covered by 2G so that it will be clear that the GPS location where transmission occurs as officials move in search of network is clear.
- The Chairperson of the IEBC urged the Committee to consider making a provision for display of provisional results on the screens.
- The IEBC was then invited on a date to be communicated to them as the Committee writes its report so as to shade more clarity to the Committee on certain issues during report writing.

MIN.NO. JSSCEL/035 /2017

DATE OF THE NEXT MEETING
ADJOURNMENT

The meeting was adjourned at 12.09am. The next meeting will called on notice.



.....
HON. WILLIAM CHEPTUMO, MP,
CO-CHAIRPERSON.



.....
SEN. FATUMA ADAN DULLO, MP
CO-CHAIRPERSON/ DEPUTY
MAJORITY LEADER.

DATE:

10/10/2017

DATE:

10/10/2017

MINUTES OF THE NINTH JOINT SITTING OF THE SELECT COMMITTEES
ON ELECTION LAWS, 2017 OF BOTH THE NATIONAL ASSEMBLY AND
THE SENATE HELD ON THURSDAY, 5TH OCTOBER, 2017 IN COUNTY
HALL, MINI CHAMBER AT 9.00PM

PRESENT - NATIONAL ASSEMBLY

1. Hon. William Kipkiror Cheptumo, MP Co- Chairperson
2. Hon. Gladys Jepkosgei-Boss Shollei, MP
3. Hon. Isaac Waihenya Ndirangu, MP
4. Hon. Jennifer Shamalla, MP
5. Hon. Ali Wario, MP
6. Hon. George Gitonga Murugara, M.P.
7. Hon. Alice Muthoni Wahome, MP
8. Hon. Stanley Muthama, M.P.
9. Hon. Adan Haji Yussuf, MP.

PRESENT- SENATE

1. Sen. Fatuma Adan Dullo, MP Co- Chairperson
2. Sen. Paul Kimani Wamatangi, MP
3. Sen. Johnson Arthur Sakaja, MP
4. Sen. Aaron Cheruiyot, MP
5. Sen. Naomi Jillo Waqo, MP

IN ATTENDANCE

1. Ms. Emmy Chepkwony
2. Mr. George Gazemba

MEMBERS OF THE GENERAL PUBLIC

(Attendance list is annexed)

SECRETARIAT

- Principal Clerk Assistant, Senate
- Senior Clerk Assistant, National Assembly

3. Mr. Samuel Kalama	Clerk Assistant, National Assembly
4. Ms. Kavata Musyoka	Clerk Assistant, Senate
5. Ms. Halima Hussein	Clerk Assistant, National Assembly
6. Mr. Victor Bett	Clerk Assistant, Senate
7. Mr. Charles Ngatia	Clerk Assistant, Senate
8. Ms. Jemimah Waigwa	Legal Counsel, National Assembly
9. Ms. Lucy Radoli	Legal Counsel, Senate
10. Mr. Jeremy Chabari	Legal Counsel, National Assembly
11. Mr. Salem Lorot	Legal Counsel, National Assembly
12. Ms. Fiona Musili	Research Officer, National Assembly
13. Ms. Clare Kidombo	Research Officer, Senate

MIN.NO. JSSCEL/ 032/2017

PRELIMINARIES

The meeting was called to order at 9:30pm. Thereafter the Chairpersons asked for a round of introductions.

The Co-chairs made welcomed all members of the public to feel free and make their contributions on the bill.

MIN.NO. JSSCEL/033 /2017

**SUBMISSION OF MEMORANDA FROM THE
IEBC ON THE ELECTION LAWS
(AMENDMENT) BILL, 2017**

The Chairperson of the Commission submitted as follows;

That-

- a) Clause 2- be amended by replace the word "Person" appearing immediately after the word 'such other' with the word "Member"
- b) Clause3 - Maintain the qualifications of the Chairperson as set out in the current law. The provision of 1A and 1B should be seen within the context of Article 259(3) (b) of the Constitution.

c) Clause 4- Paragraph. 5 - Retain the quorum at 5 members.

Amend Paragraph. 7 - to read: *"Unless a unanimous decision is reached, a decision on any matter before the Commission shall be by concurrence of a simple majority of all the members."*

d) On Clause 5 of the bill the Commission accepted the Proposal

e) Clause 6-need to replace the Amendment of 39(1C) (a) as follows:

"Electronically transmit and physically deliver the tabulated results for an election for the president from a polling station to the constituency tallying centre and national tallying centre.

Section 39 (2) of the Election Act amended by replacing it as follows:

"Before determining and declaring the final results of an election under subsection 1, the Commission shall have received the physically delivered results in accordance with the Act."

Amend 39 (1F) as follows:

"The Commission MAY, establish a mechanism for the electronic display of provisional results, and the results so displayed shall be for purposes of public information only and shall not be the basis for a declaration by the Commission.

f) Clause 7- Use of Technology Section 44- No comment.

g) Clause 8- Complimentary mechanism for identification of Voters – section 44A- Maintain complementary mechanism for results transmission.

h) Clause 9- Non Compliance with the law (section 83) - Proposal accepted.

i) Clause 10- Certificate of court as to validity of election Section 86- Proposal accepted however there is need to provide for the procedure for elections under Article 138 (5) and 138 (8). Proposal to include the procedure where a candidate dies before the election is held.

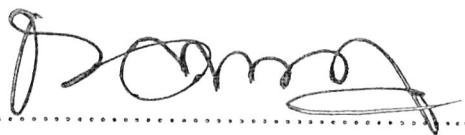
j) Clause 11 on criminalization of failure or refusal to sign results the IEBC. The IEBC accepted the proposal.

- Members advised the IEBC to list all the polling stations that are only covered by 2G so that it will be clear that the GPS location where transmission occurs as officials move in search of network is clear.
- The Chairperson of the IEBC urged the Committee to consider making a provision for display of provisional results on the screens.
- The IEBC was then invited on a date to be communicated to them as the Committee writes its report so as to shade more clarity to the Committee on certain issues during report writing.

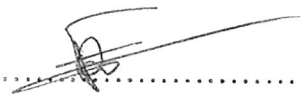
MIN.NO. JSSCEL/035 /2017 DATE OF THE NEXT MEETING

ADJOURNMENT

The meeting was adjourned at 12.09am. The next meeting will called on notice.



.....
 HON. WILLIAM CHEPTUMO, MP,
CO-CHAIRPERSON.



.....
 SEN. FATUMA ADAN DULLO, MP
CO-CHAIRPERSON/ DEPUTY
MAJORITY LEADER.

DATE:

..... 10/10/2017

DATE:

..... 10/10/2017

MINUTES OF THE EIGHTH JOINT SITTING OF THE SELECT COMMITTEES ON ELECTION LAWS, 2017 OF BOTH THE NATIONAL ASSEMBLY AND THE SENATE HELD ON THURSDAY, 5TH OCTOBER, 2017 IN COUNTY HALL, MINI CHAMBER AT 3.00PM.

PRESENT - NATIONAL ASSEMBLY

1. Hon. William Kipkiror Cheptumo, MP Co- Chairperson
2. Hon. Gladys Jepkosgei-Boss Shollei, MP
3. Hon. Isaac Waihenya Ndirangu, MP
4. Hon. Jennifer Shamalla, MP
5. Hon. Ali Wario , MP
6. Hon. George Gitonga Murugara, M.P.
7. Hon. Alice Muthoni Wahome, MP
8. Hon. Stanley Muthama, M.P.
9. Hon. Adan Haji Yussuf, MP.

PRESENT-SENATE

1. Sen. Fatuma Adan Dullo, MP Co- Chairperson
2. Sen. Paul Kimani Wamatangi, MP
3. Sen. Johnson Arthur Sakaja, MP
4. Sen. Aaron Cheruiyot, MP
5. Sen. Naomi Jillo Waqo, MP

IN ATTENDANCE

MEMBERS OF THE PUBLIC

(Attendance list is annexed)

SECRETARIAT

- | | |
|------------------------|---|
| 1. Ms. Emmy Chepkwony | Principal Clerk Assistant, Senate |
| 2. Mr. George Gazemba | Senior Clerk Assistant, National Assembly |
| 3. Mr. Samuel Kalama | Clerk Assistant, National Assembly |
| 4. Ms. Kavata Musyoka | Clerk Assistant, Senate |
| 5. Ms. Halima Hussein | Clerk Assistant, National Assembly |
| 6. Mr. Victor Bett | Clerk Assistant, Senate |
| 7. Mr. Charles Ngatia | Clerk Assistant, Senate |
| 8. Ms. Jemimah Waigwa | Legal Counsel, National Assembly |
| 9. Ms. Lucy Radoli | Legal Counsel, Senate |
| 10. Mr. Jeremy Chabari | Legal Counsel, National Assembly |
| 11. Mr. Salem Lorot | Legal Counsel, National Assembly |
| 12. Ms. Doreen Karani | Legal Counsel, National Assembly |

13. Ms. Fiona Musili
14. Ms. Clare Kidombo

Research Officer, National Assembly
Research Officer, Senate

MIN.NO. JSSCEL/ 30/2017

PRELIMINARIES

The meeting was called to order at 3:14pm with a word of prayer from Sen. Fatuma Adan Dullo, M.P. Thereafter the members introduced themselves.

MIN.NO. JSSCEL/031 /2017 **SUBMISSION OF MEMORANDA FROM THE
PUBLIC ON THE ELECTION LAWS
(AMENDMENT) BILL, 2017**

1. Mercy Wanjau, Principal Legal Officer, Communications Authority of Kenya

She informed the Committee that;

a) On the amendment of Section 39 of the election she observed that :-

- i. The country is largely covered by 2G network at 70% of the land coverage and population coverage of 80%. 3G network land coverage is 17 % and population coverage is 78%. 4 G network coverage is only available in major towns. For success transmission of image and text data, there is need for at least 3G network coverage.
 - ii. Noting the inadequacies of 3 G network coverage and the fact that electronic systems are prone to have downtimes due to unforeseen, it is prudent to have a redundancy mechanism put in place.
 - iii. Realizing that IEBC is dependent on third parties for infrastructure and therefore does not have absolute control of the electronic systems that are relied on for transmission, such redundant mechanism should manual.
- b) On the proposal to amend Sect. 44A of the election Act, she proposed replacement of the word 'may' with 'shall' where it appears immediately after the word 'Commission'.

2. Arch Bishop Eliud Wabukhala-Chairperson, Ethics and Anti-Corruption Commission

The EACC made the following interventions that:

- a) On Clause 2 of the Bill the Commission concurred with it and hence ensure the continuity of the office.

- b) Clause 3: was in concurrence since it opened up the possibility of people from other professions other than law being the chair of the IEBC so long as there would be at least two (2) Commissioners who would be lawyers since there are some situations where you need Commissioners with a legal background.
- c) Clause 4: proposed that at least 2/3rd of Commissioners make a quorum to sit.
- d) On the amendment to Sect 34 EACC Concurred since the amendment treats all parties in equal footing.
- e) On the amendment to Sect. 39 of the election Act: EACC concurred with the amendment stating that it offers an alternative method in verification of documents physically.
- f) On the proposed amendment to Section 44 of the election Act the Commission was of the view that stated that it was desirable.
- g) The proposed amendment to Section 83 of the election Act was not clear.

3. Ms. Kagwiria Mbogori,-Chairperson, Kenya National Commission of Human Rights

In her submission, she made reference to the Kreigler Report and stated that;

- a) There is need for a provision in law to prevent change of elections laws 6 months to an election.
- b) Clause 3- Qualifications of the IEBC chairperson were deliberate because some of the responsibilities performed by the Chairperson require someone with a background in Law.
- c) The role of the Vice chairperson should be limited since that office holder was not recruited as the substantive chairperson.
- d) On Clause 4 of the bill there is need for the Quorum to be increased

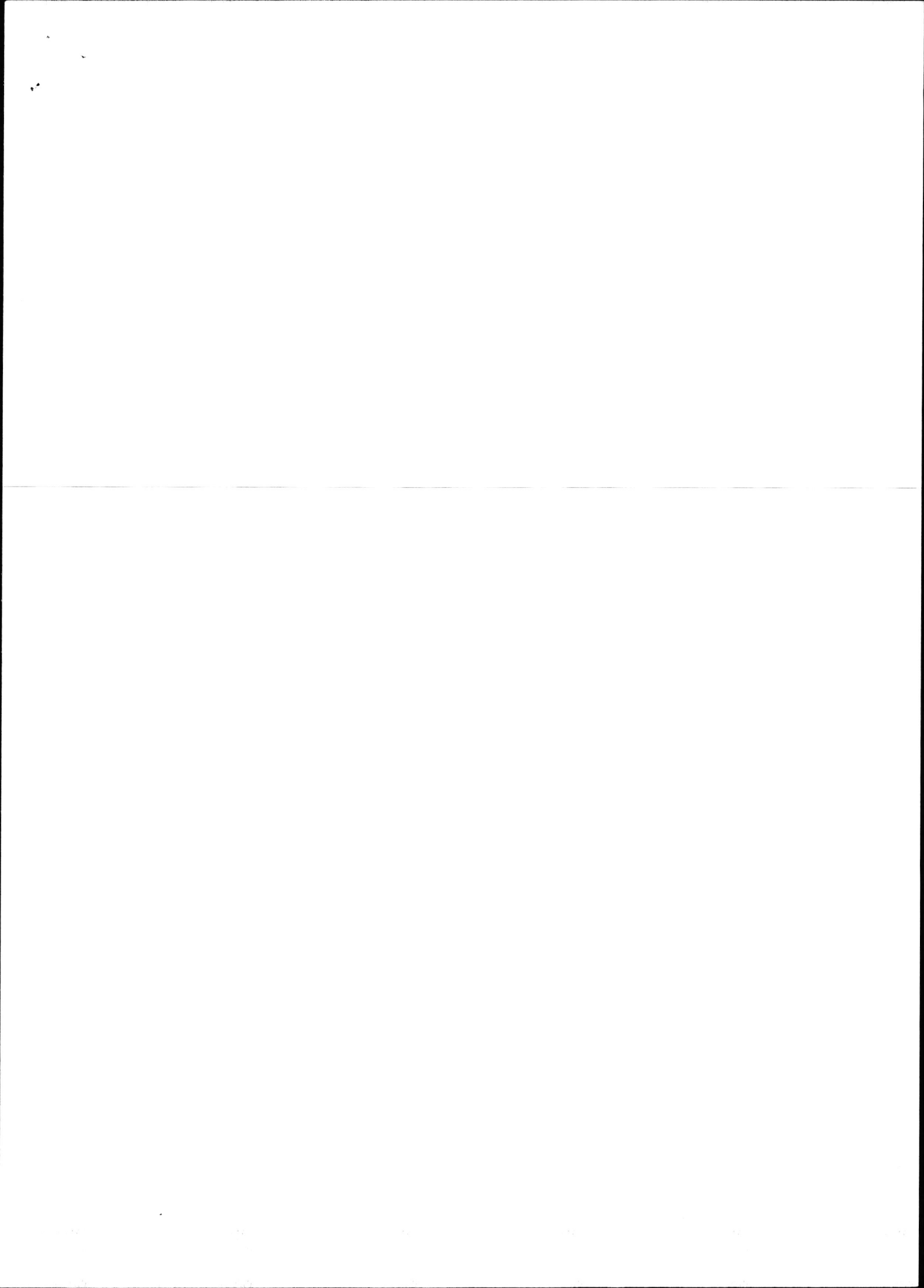
4. Mr. Wafula Chebukati- Chairperson, Independence Electoral and Boundary Commission

Members were concerned on the procedure in which the Chairperson appeared before the Committee without other commissioners or a member of the secretariat of the Commission.

The Chairperson of the IEBC informed the Committee that they held a meeting in which the amendments to the Bill were discussed and the submissions tabled is what the Commissioners had agreed on.

The Committee Chairperson ruled that since the submission had only been done by the Chairperson of the IEBC, it was not reflective of the collective decision of the





Commission and ruled that the Chairperson of the IEBC appear before the Committee accompanied by other Commissioners and secretariat. The IEBC was given upto 7 p.m. Thursday, 5th October, 2017 to appear before the Committee.

5. Hon. Rafael Tuju- JUBILEE PARTY

He submitted as follows;

- a) The Maina Kiai & others case was judged 35 days to the elections and it had a direct implication on the management of the elections and so it was not fair for those who claimed that there was no time for Parliament to amend the election law.
- b) Clause 2-Concurred with the amendment since it clears a lacuna in the succession of procedure.
- c) Clause 3-it ensures and manifests the diversity of the country.
- d) Clause 4-Cocurred with the amendment because it cures a situation where the commissioners may be less than five and thereby quorum hitches would cripple the operations of the Commission.
- e) Clause 6- concurred with these amendments because cleared the ambiguity in case of a dispute of the results.
- f) Clause 7- was in agreement with the amendment because it aligned the law with the Court of Appeal judgement
- g) Clause 8- gives clarity and upholds the provision of 44 (3) that technology used must be simple, accurate, verifiable, secure, accountable and transparent.
- h) Clause 9-gives further clarity and therefore gives accuracy and unambiguity.
- i) Clause 10-the amendment cures a lacuna regarding the procedure to be followed by IEBC in organizing fresh elections.
- j) Clause 11-the amendments seeks to tame errant returning officers and cure mischief exercised where some may refuse to sign forms willingly and therefore sabotage the entire elections.

6. Mr. Jacob Musiori Muchira

He submitted that accessibility to polling stations for persons living with disability was a challenge and called for address of the matter. He further observed that the election laws Need to be done as soon as practicable.

7. Dr. Ambrose Nzomo - NARC KENYA

They informed the Committee that the Amendments are ill timed and should be shelved until after the 26th October, 2017 Elections for the following reasons;

- a.) The Electoral Amendment Bill, 2017 needs to be discussed by a bipartisan Committee.

- b.) Clause 3: He informed the Committee that the Chairpersons qualifications of being a Lawyer should remain as it is.
- c.) Clause 4: He informed the Committee that on quorum there is no reason in his view why the Bill seeks to interfere with quorum yet the Commission hasn't complained of quorum hitches.
- d.) Clause 6: He informed the Committee that the KIEMS kit can keep footprints which can help in detecting malpractices and therefore electronic transmission should remain superior.

8. Mr. Paul Gichuki Rabathi-Advocate

He informed the Committee that he supported the amendments but with the following proposals, that-

- a) In Clause 6 of the bill to make it mandatory for IEBC to embrace technology. He further observed manual system should be used to transmit election results since in most cases electronic system is bound to fail. In Clause 10 of the bill to Include a provision to allow IEBC to require written confirmation from candidates on participation in a repeat election and where only one candidate has shown interest in participation, then that candidate be declared the winner.

9. Mr. Simon Mwangi Gakuya-Rastafarai Community

He questioned the constitutionality of the current IEBC Commissioners noting that the previous commissioners were hounded out of office unconstitutionally.

He could not understand how Members of Parliament were constitutionally in office yet the Supreme Court had annulled the Presidential elections as a result of anomalies in transmission of results in which case the results of elections of Members of Parliament were also transmitted using the same system.

10. Mr. John WaGatua- Motivational Speaker

He submitted that he supported the amendments with the following proposals;

- a) Clause 4: have the quorum be 5 instead of three as provided for in the amendments; and
- b) Provide that one of the requirements for appointment of the Chairperson of IEBC should be for to undergo personal counselling sessions to ascertain proper functionality and productivity of the candidate for that position.

11. Rev. Shadrack Mulumbi Khayo- Chairperson, Youth for Christ Nairobi

He informed that Committee that he supported the amendments but pleaded with members to shelve the consideration of the amendments until after the elections scheduled for 26th October, 2017 when the political temperature in the country will have subsided.

12. Mr. Ahmed Rashid Abdi – Student & Youth, Garissa County

He submitted as follows;

Clause 2: he supported the amendment. On Clause 3 he proposed a reduction to the requirement of experience for the position of Chairperson from 15 years to 10 years so as to give the youth an opportunity to apply and be considered for the position of the Chairperson of IEBC.

Clause 6: Disagreed with the provision of a manual complementary system of transmission of results and recommends that only electronic system be used.

He recommended reconciliation of the two leading coalitions of parties.

13. Bishop Gichuki Mwangi - Global Ministries

He submitted that;

- a) The law must be followed as it is.
- b) The timing of the amendments was appropriate and the enactment of the Bill ought to be done before the elections.

14. Ms. Agnes Mwikali - Single Mothers

She informed the Committee that;

Businesses of common citizens had been affected negatively as a result of the continued heightened political environment; she supported the amendments and especially clause 11. The elections of 26th October, 2017 should proceed as scheduled and should not be postponed.

15. Ms. Nelly - Political Activist

She informed the Committee that she supported the amendments.

16. Mr. Boniface Kalikwa-Chairperson, Young Alert Foundation

He informed the Committee that he supported the amendments and especially Clause 11 would help improve performance of work of the Presiding and Returning officers.

17. Mr. Martin Njoroge- Jubilee Lobby Group For Reforms

He informed the Committee that the lobby group is supporting the amendments but was perturbed that the will of people was not considered by the Supreme Court of Kenya when they annulled the presidential elections of 8th August, 2017.

18. Mr. Christopher Kamau- My Vote, My Choice

He submitted that;

- a) There was no stipulated time to address emergencies and therefore there was adequate time to amend the election laws before the presidential election scheduled for 26th October, 2017
- b) Need to provide for maximum number of times that an election petition can be taken to court; and
- c) Provide for the number of times that a candidate can perpetually vie for an election.

19. Mr. Omondi- Rarieda Constituency

He informed the Committee that he supported the amendments as contained in the Bill.

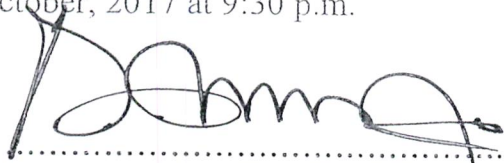
20. Mr. John Kanyi Maina- Chairperson Youth, Presbyterian Church of East Africa, Nakuru

He submitted in support of the amendments noting that there was need for parliament to fill every legal lacuna so as to ensure that the forthcoming presidential elections were not nullified- situation which could plunge the country to chaos.

MIN.NO. JSSCEL/031 /2017

ADJOURNMENT AND DATE OF THE NEXT MEETING

The meeting was adjourned at 8.48p.m. The next meeting was scheduled for Thursday, 5th October, 2017 at 9:30 p.m.



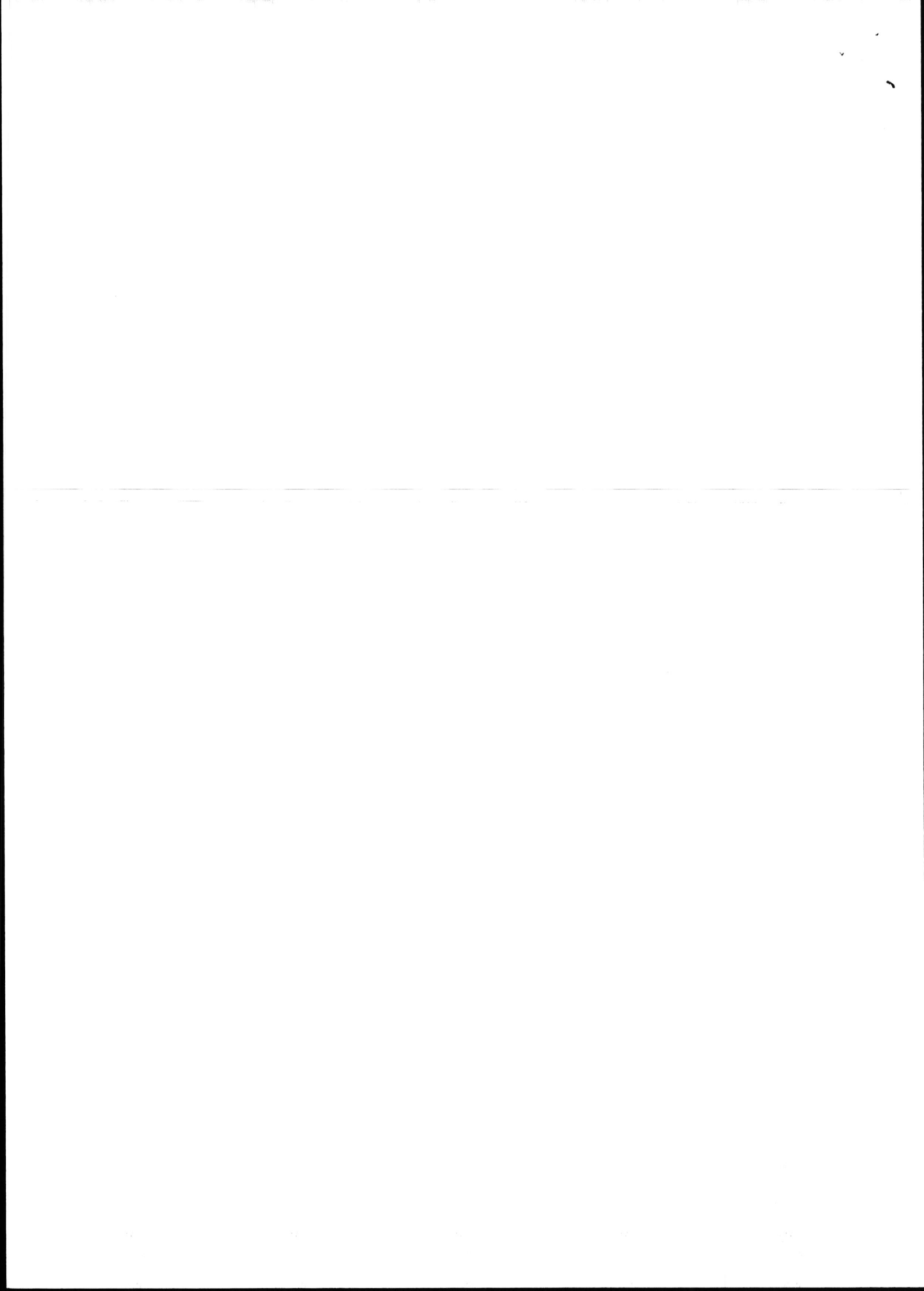
HON. WILLIAM CHEPTUMO, MP,
CO-CHAIRPERSON.



SEN. FATUMA ADAN DULLO, MP
CO-CHAIRPERSON/ DEPUTY MAJORITY LEADER.

DATE: 10/10/2017

DATE: 10/10/2017



MINUTES OF THE SEVENTH JOINT SITTING OF THE SELECT COMMITTEES ON ELECTION LAWS, 2017 OF BOTH THE NATIONAL ASSEMBLY AND THE SENATE HELD ON THURSDAY, 5TH OCTOBER, 2017 IN COUNTY HALL, MINI CHAMBER AT 10.00 AM.

PRESENT - NATIONAL ASSEMBLY

1. Hon. William Kipkiror Cheptumo, MP Co- Chairperson
2. Hon. Gladys Jepkosgei-Boss Shollei, MP
3. Hon. Isaac Waihenya Ndirangu, MP
4. Hon. Jennifer Shamalla, MP
5. Hon. Ali Wario , MP
6. Hon. George Gitonga Murugara, M.P.
7. Hon. Alice Muthoni Wahome, MP
8. Hon. Stanley Muthama, M.P.
9. Hon. Adan Haji Yussuf, MP.

PRESENT- SENATE

1. Sen. Fatuma Adan Dullo, MP Co- Chairperson
2. Sen. Paul Kimani Wamatangi, MP
3. Sen. Johnson Arthur Sakaja, MP
4. Sen. Aaron Cheruiyot, MP
5. Sen. Naomi Jillo Waqo, MP

IN ATTENDANCE

MEMBERS OF THE GENERAL PUBLIC

(Attendance list is annexed)

SECRETARIAT

- | | |
|------------------------|---|
| 1. Ms. Emmy Chepkwony | Principal Clerk Assistant, Senate |
| 2. Mr. George Gazemba | Senior Clerk Assistant, National Assembly |
| 3. Mr. Samuel Kalama | Clerk Assistant, National Assembly |
| 4. Ms. Kavata Musyoka | Clerk Assistant, Senate |
| 5. Ms. Halima Hussein | Clerk Assistant, National Assembly |
| 6. Mr. Victor Bett | Clerk Assistant, Senate |
| 7. Mr. Charles Ngatia | Clerk Assistant, Senate |
| 8. Ms. Jemimah Waigwa | Legal Counsel, National Assembly |
| 9. Ms. Lucy Radoli | Legal Counsel, Senate |
| 10. Mr. Jeremy Chabari | Legal Counsel, National Assembly |
| 11. Mr. Salem Lorot | Legal Counsel, National Assembly |

12. Ms. Doreen Karani
13. Ms. Fiona Musili
14. Ms. Clare Kidombo

Second Legal Counsel, National Assembly
Research Officer, National Assembly
Research Officer, Senate

MIN.NO. JSSCEL/027 /2017

PRELIMINARIES

The meeting was called to order at 10:14 am and commenced with a word of prayer from Hon. Isaac Waihenya Ndirangu, MP

The chairperson gave welcoming remarks, and thanked members of the public for submitting their memoranda and also members of the 4th estate (Media).

Thereafter the Chairpersons asked for a round of introductions.

MIN.NO. JSSCEL/028 /2017

**SUBMISSION OF MEMORANDA FROM THE
PUBLIC ON THE ELECTION LAWS
(AMENDMENT) BILL, 2017**

1.) Kenya ICT Action Network (KICTANET) – Represented by Grace Githaiga, Hussein & Barack Otieno

They informed the Committee that they were observers in the 8th August, 2017 Elections. Further, they alluded to the fact that ICT in voter identification and transmission made the process efficient. They said that it is time now to have voting at 100 percent ICT compliance in preparedness for 2022.

The following were the interventions made on the Bill;

They informed the Committee that they supported the proposed amendments;

- a) Clause 6 of the Bill - be deleted and remain as it is currently in the Act since the Kriegler Commission report suggested that ICT be used during elections.
- b) Proposing a new clause on storage of Information - they proposed that, Storage of back up data be done in Kenya and shouldn't be under the control of a foreign agency.
- c) Supported the proposed penalties against those who interfere with the system and management of election results. Finally they recommended that a specially designed form be used which can only be picked up by the KIEMS Kit for transmission of election results.

2.) Kenya Young Voters Alliance – Mr. Fwamba NC Fwamba, Trustee

He informed the Committee that he supports the amendments as contained in the Bill. He observed that Clause 2 of the Bill needs to be amended to ensure continuity in the office of the Chairperson. Similarly Clause 3 of the Bill need to be amended as proposed

in the bill to allow other professionals other than lawyers to be eligible to be considered and appointed as chairperson of IEBC as well. Clause 4 of the Bill proposes to reduce the quorum, and in this regard he supported the amendment since it pre-empts any situation of a crisis. Lastly on Clause 11 of the Bill, Mr Fwamba supported the proposed jail term of a maximum of five years and further suggested that the maximum jail term be increased.

3. Lamu University Students Association -Messrs. John Kingara, David Njogu, Stanley Yaya & Ms. Amina Abdirahman

The students informed the Committee that the aforementioned Electoral Laws have a direct impact on them since it divides students along political lines.

They informed the Committee that they supported the following amendments with the following reasons;

- a) ~~Clause 2 of the Bill – The provision for this will assist in management of the Commission and avoid chances of vacuum incase the chair is absent.~~
- b) Clause 3 of the Bill - The 15 years of the Chairpersons experience as a requirement for the post of the Chairperson's minimum qualifications, be reduced to 10 years to accommodate the Youth.
- c) They further suggested to the Committee that the Vice Chairpersons' position be reserved for the youth since they are the majority of Voters.

4. Youth Leader Represented by Eshuichi Litunya George

He submitted in opposition of the Bill and in particular emphasized on:

As regard to Clause 3 of the Bill. Mr. Litunya observed that the intention of the Bill is to do away with the minimum requirements of the Chairperson being an individual with a Law Background.

5. Kikuyu Council of Elders Represented by Lilian Wairimu Mathenge, Vice Chair, Nyandarua County -

She supported the proposed amendments to the election laws and streamline election management. Clause 11 of the Bill - whereas the intention of the Bill is to have a Maximum Jail term of 5 years, she requested that the same be extended to 15 years.

6. Mr. Isaiah Waweru Ngumi - Citizen and Voter

He submitted in favour of the Bill and in particular emphasized on Clause 3 of the Bill – by suggesting that the Chairperson of the IEBC need not to be an advocate. The Presiding officers and Returning officers should have deputies.

In order to ensure Accountability, and in line with Article 88(h) of the Constitution of Kenya 2010, in every Presidential Election, the IEBC should pay and facilitate at least 2 polling agents in every constituency who are registered voters within the Constituency they are to be deployed and who shall act for 2 major political parties in participating elections.

7. Ukamba Agricultural Institute (UKAI) Jonathan Nzioka - Technical Expert on Telecommunication

His submitted in favour of the bill urged members of Parliament to a introduced to provide for an Electronic Voting System. This system will be used for voter identification, voting/casting of the ballot and counting.

In response to the Electoral Amendment Bill, 2017 he singled out Clause 6 of the bill and disagreed with the Clause since its intention was to negate technology. He further informed the Committee that IEBC should procure servers internally.

8. Hon. P. M. Njoroge, MCA Morendat, Nakuru County

He supported the proposed amendments with the following reasons which include but not limited to

- a) That as a contestant in the last concluded General Elections; he finds that the voting and transmission process was indeed free and fair.
- b) That there are loop holes and ambiguities in the current election law that the proposed bill seeks to address them.

9. Political Parties Liaison Committee, Mr. Julius Wambua & Prof. George Wajackoya

Requests that the Amendments cannot be done now, and be shelved to be discussed later after the political temperatures are reduced.

Their feeling is that the Amendments mutilates the Constitution.

10. Maendeleo ya Wanaume, Mr. Njoka Nderitu - Chairperson

He supports the amendments for the following reasons;

- Manual Tallying can't be avoided totally.
- Suggesting that voting can be done by the use of an Identification Card to increase the number of voters.
- Lowering the voting age to 16 could help empower the youth.

11. Mr. David Kiama, Laikipia County

He supported the proposed amendments to with the following reasons;

On Clause 11 of the Bill, he suggests that the Maximum Jail term for all election officials who fails to complete election declaration forms for whatever reason be extended from 5years to life imprisonment. Further he proposed that the culpability of election offences be extended to all election officials.

12. Inter-Religious Council of Kenya Represented by Mr. Al Haji Yusuf Murigu & Dr. Nelson Makhanga

They submitted in opposition of the Bill and urged members of the Committee to shelve the consideration of the bill until after the presidential election of 26th October, 2017.

MIN.NO. JSSCEL/029 /2017

ADJOURNMENT AND DATE OF THE NEXT MEETING

The meeting was adjourned at 2.15pm to be convened on Thursday, 5th October, 2017 at 3pm



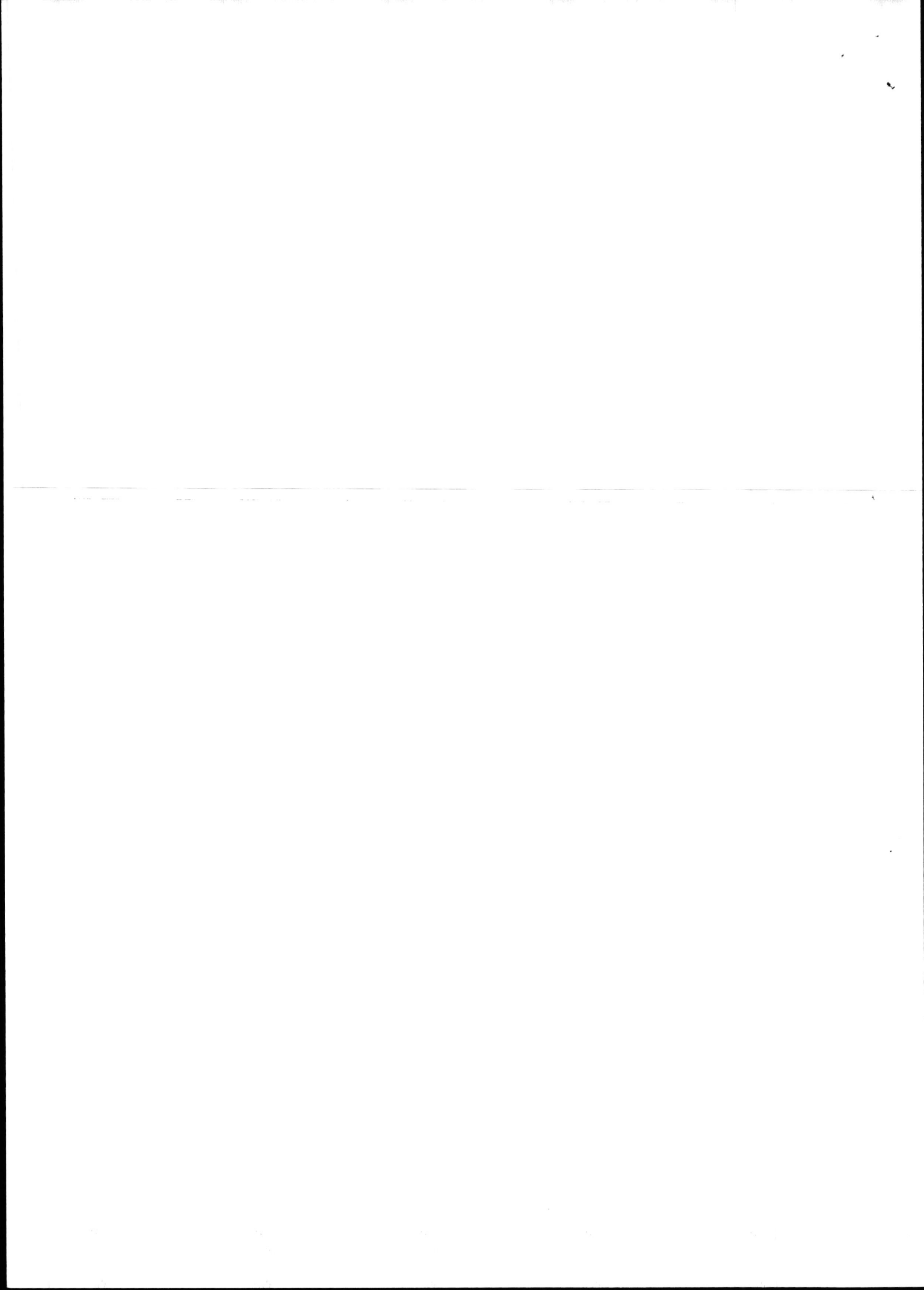
.....
HON. WILLIAM CHEPTUMO, MP,
CO-CHAIRPERSON.



.....
SEN. FATUMA ADAN DULLO, MP
CO-CHAIRPERSON/ DEPUTY MAJORITY
LEADER.

DATE: 10/10/2017

DATE: 10/10/2017



MINUTES OF THE SIXTH JOINT SITTING OF THE SELECT COMMITTEES
ON ELECTION LAWS, 2017 OF BOTH THE NATIONAL ASSEMBLY AND
THE SENATE HELD ON WEDNESDAY, 4TH OCTOBER, 2017 IN COUNTY
HALL GROUND FLOOR BOARDROOM, PARLIAMENT BUILDINGS AT 2.30
PM.

PRESENT - NATIONAL ASSEMBLY

1. Hon. William Kipkiror Cheptumo, MP Co- Chairperson
2. Hon. Gladys Jepkosgei-Boss Shollei, MP
3. Hon. Isaac Waihenya Ndirangu, MP
4. Hon. Jennifer Shamalla, MP
5. Hon. Alice Muthoni Wahome, MP
6. Hon. Ali Wario, MP
7. Hon. George Gitonga Murugara, MP
8. Hon. Stanley Muthama, MP
9. Hon. Adan Haji Yusuf, MP

PRESENT- SENATE

1. Sen. Fatuma Adan Dullo, MP Co- Chairperson
2. Sen. Paul Kimani Wamatangi, MP
3. Sen. Johnson Arthur Sakaja, MP
4. Sen. Aaron Cheruiyot, Mp
5. Sen. Naomi Jillo Waqo, MP

IN ATTENDANCE

MEMBERS OF THE GENERAL PUBLIC

(Attendance list is annexed)

SECRETARIAT

- | | |
|-----------------------|--|
| 1. Ms. Mary Chesire | Deputy Director, Senate Committee Services |
| 2. Ms. Emmy Chepkwony | Principal Clerk Assistant, Senate |
| 3. Mr. George Gazemba | Senior Clerk Assistant, National Assembly |
| 4. Ms. Halima Hussein | Clerk Assistant, National Assembly |
| 5. Ms. Kavata Musyoka | Clerk Assistant, Senate |
| 6. Mr. Charles Ngatia | Clerk Assistant, Senate |
| 7. Mr. Victor Bett | Clerk Assistant, Senate |
| 8. Ms. Jemimah Waigwa | Legal Counsel, National Assembly |
| 9. Ms. Lucy Radoli | Legal Counsel, Senate |

10. Mr. Jeremy Chabari	Legal Counsel, National Assembly
11. Ms. Fiona Musili	Research Officer, National Assembly
12. Mr. James Ngusya	Sergeant At Arms, Senate
13. Mr. Stanley Langat	Sergeant At Arms, National Assembly
14. Mr. John Mungai	Sergeant At Arms, National Assembly
15. Mr. Rodgers Kilugya	Audio officer
16. Mr. Eugene Luteshi	Audio officer

MIN.NO. JSSCEL/023/2017

PRELIMINARIES

The meeting commenced with a word of prayer from Senator Fatuma Dullo followed by a round of introductions.

MIN.NO. JSSCEL/024/2017

REMARKS FROM THE CO-CHAIRS

The Co-chair welcomed the members of the public to the meeting. He reminded the members of the public to feel free to make their comments on the Electoral Law amendments Bill.

MIN.NO. JSSCEL/025/2017

PUBLIC SUBMISSIONS ON THE ELECTION LAWS (AMENDMENT) BILL, NATIONAL ASSEMBLY BILLS NO. 39 OF 2017 AND THE ELECTIONS LAWS (AMENDMENT) BILL, SENATE BILLS NO. 3 OF 2017

1. Centre for Multiparty Democracy –Hon. Omingo Magara, Chairperson

The Chairperson for Centre for Multi-Party Democracy induced the following contributions-

He informed the meeting that best international practices in electoral reforms advise that electoral reforms are not done close to elections because reforms take time to percolate down to all levels.

With regards to clause 3 (1) of the Bill seeking to amend the qualification for the appointment of the Chairperson of IEBC was not necessary and as such the Centre for Multiparty Democracy opposed it since schedule 8 to the Independent Electoral and Boundaries Commission already provides that in the absence of Commissioner in a meeting does not invalidate proceedings of the Commission. .

With regards to Clause 3 (1A, and 1B) he informed the meeting that the Centre supports the amendment regarding IEBC vice Chair or any Commissioner can act as Chair in the absence of the Chair and Vice Chair.

As regards to clause 4 of the bill seeking to Change the Quorum for the IEBC he suggested that quorum be not less than half of the Members of the Commissioners. On Clause 11 of the Bill on the amendment of section 6 of the Election offences Act, he urged the Committee to change the jail term against any election official who fails to complete any election form to read not exceeding three years instead of not exceeding five. Lastly on the question on who to participate in a presidential election following a nullification of a presidential election, the Centre supports the proposed amendment to section 83 of the Election Act.

2. Ms. Emily Mungari - First Opportunies Community Initiatives

She submitted in support of the proposed bill. In particular she supported clause 11 of the bill seeking to provide for penalty against any IEBC official who fail to sign the electoral forms to be jailed as prescribed in the bill.

Clause 3 of the bill regarding Chairing of Commission Meetings in the absence of the Chairperson will help avoid vacuum and make the Commission more effective in terms of running its business.

3. Ms. Juliet Njeri Ngunguru – Unik Women Self Help Group

She informed the meeting that there is nothing unconstitutional or retrogressive about the bill and it's self-executing. She Urged the Committee to finalize it to secure the upcoming election and seal any loophole that would put the country into crisis.

4. Ms. Teresia Mwangi – Baraka Women Centre

She informed the meeting that Women suffer most during election period and when disputes arise during and after elections. To ensure the security of women and the Kenyan people at large, the proposed amendments to the existing Election Laws should be considered and passed by parliament.

5. Ms. Mary Waruguru

She submitted in Support of the amendments since they seek to streamline the electoral process in the country and avoid nullifications of presidential elections based on technicality.

6. Maendeleo Ya Wanawake Organization – Ms. Purity Ngunjiri

She submitted as follows:-

That Parliament has powers to enact amend or legislate on anything including the election laws.

Regarding Section 6 she urged the meeting that the IEBC Chair does not exercise quasi-judicial powers and the present limitations has no justifications and other professionals deserve to be given a chance to lead the IEBC.

Regarding Section 4 on Changing the Quorum for conduct of meeting by the IEBC the proposed amendments of reducing the quorum to a minimum of 3 is appropriate for IEBC to run its affairs efficiently..

She further observed that the proposed amendments on manual transmission of election results will ensure that in the event of a failure of technology and or deliberate mischief the voice of the people as expressed by the voters will be heard, counted and given weight.

The Chairperson further observed that clause 11 of the bill regarding the jail term arising from failure or refusal to sign election results will enhance accountability on the side of the election officials.

7. ICT Authority Represented –Mr. Robert Mugo (Ag. Ceo)

The Chief Executive officer submitted as follows that -

Measures should be put in place to ensure that the technology deployed in management of election is secure, reliable and of sufficient capacity to handle the required electoral functions including voter identification, results transmission and information display.

Technology cannot guarantee 100% functioning and it is therefore imperative that manual system be deployed in parallel with technology and in the event of a failure then the manual system should be considered as final.

Contingency plans should be put in place to ensure that all persons involved in the electoral process are available when and where required and in the event they are not then other authorised persons can handle their functions.

8. Jubilee Lawyer-MPs Forum (Justice And Legal Affairs Members Of The 11th Parliament)

The group presented their contributions as below;

1. The Amendments are in pursuit of compliance with the Supreme Court Decision that nullified the election of 8th August 2017 requiring a fresh election to be held within 60 as stipulated in the Constitution.
2. The amendments are necessary to secure the repeat election before the expiry of 60 days which run out on 31st October.
3. The Supreme Court in its decisions points out some legal gaps and areas needing clarification and improvement. Law is written based on certain circumstances and events.
4. The proposed amendments are necessary and helpful to development of electoral law in Kenya. For instance:-

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

9. Centre For Minority Rights Development Presented By Nyangori Ohenjo

He submitted as follows:-

That the proposed amendment of Section 2 of the Elections Act, 2011 provides for a succession solution should there be a vacancy in the office of the Chairperson of the IEBC.

There is no provision in the Constitution that the Chairperson of IEBC must be a lawyer. In view of the fact the main function of the IEBC chairperson is to nominate presidential aspirants and declare the winners, which functions are performed for other electoral positions at the Constituencies and Counties by returning officers who are not necessarily lawyers, it is therefore discriminatory that the IEBC chairperson's position should be reserved for a specific profession. The person contemplated in the amendment for Chairperson requires at 15 years' experience in seven diverse backgrounds amongst other qualifications. This provision will go a long way in promoting inclusiveness, equity and equality.

On the question of quorum of the Commission, the proposed amendment seeks to protect the IEBC, which plays a very critical role from being held hostage for any unforeseen reason by anyone and it by no means necessarily reduces the quorum to three. This amendment simply places more onus on the IEBC commissioners at any one given time to ensure that they are available to transact business of the commission as their absence may and should not impede the commission from transacting business especially during an electioneering period, which is critical to our democracy.

The proposed amendment is clearly in line with *Article 250 (1) of the Constitution* provides that each commission shall consist of at least three, but not more than nine, members. In this case, the requirement under the current law that the quorum for conduct of business be five members of the IEBC is ill thought out.

However, he differed with the proposed amendments to section 83 of the Elections Act are unconstitutional and upset Article 2(4), 10, 38, 81 and 86 of the Constitution. The proposed amendment will require persons who file an election petition to prove not only the non-compliance with the principles set out in the Constitution but that such non-compliance affected the results to make an arguable case before the Supreme Court.

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

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

Lastly he proposed deletion of section 29 of the Elections Act as it negates the requirement for a presidential candidate to be nominated solely by the members of his political party. The Constitution under Article 38 underscores the political party as a basic institution through which Kenyans exercise their political right and as such this cannot be substituted in any way.

10. National IDP Network Presented by Mr. Patrick Githinji

He submitted as follows-

The proposed amendments do not affect the Chairperson's role but instead makes it easier for him to conduct his/her business.

The Election Act to provide the electronic and manual transmission of presidential election results and both the system are to be used to transmit results. Electronic transmission cannot be relied on as it can fail when there is no network coverage or where transmission communication mast can deliberately sabotage and therefore manual transmission as proposed in the amendment will assist securing the voters will.

The manual system cannot be tempered with as there are many other ways of verifying the results as declared at the polling station or constituency tallying centre e.g video recording of announcement taken, copies of results with agents of presidential candidates, the results posted on the polling/constituency centres and the scanned images of the forms as transmitted electronically.

The amendment to include a procedure for holding of fresh elections and the candidates to participate in a fresh election ensures that election process comes to an end so as to allow the country focus on development. Therefore this amendment brings to final conclusion of the election and reduces the risk of a continued cycle of elections.

The amendment on the Election Offences Act will enhances the penalties for rogue presiding officers and returning officers who wilfully and deliberately refuse to the forms or fill incorrectly.

Parliament is mandated to amend law and its role is not restrained on consideration such as timing and parliament does not require any authorization from anyone to amend law.

11. Mr. Tommy Rendail

He argued the Committee to process the Bill amending the Election Law to secure the country and seal legal gaps.

12. The Republican Liberty Party Presented by Edward Nyakeriga

He submitted that:-

The Proposed amendment to the IEBC Act, 2011 is necessary and further proposed that “the quorum should not be less than four members;

The current provision in section 10 of the of the draft Bill amending section 86 of the Elections Act, 2011 and appearing under Section 86A (2) where the candidates to participate in the fresh election pursuant to section 140 (3) shall be determined , to be amended to read as follows that candidates shall be determined by-

- I. *Where “fresh election” pursuant to section 140 (3) are directed after president-elect whose election has been annulled and he commission shall publish a notice in the Gazette for candidates to submit nomination papers in line with 138 of the Constitution” and that eligibility is restricted to the provisions of Article 138 of the Constitution of Kenya*
- II. *Where its directed for “Repeat Election” the Commission shall publish a notice in the Gazette confined for only candidates who participated in the annulled election” to submit Nomination papers, strictly in line with Article 138 of the Constitution and the Commission shall conduct fresh nomination where he conduct is for “Fresh Election” to confirm eligibility in line with Article 138 of the Constitution.*

There is need to make a distinction in law between “Fresh Elections” “Repeat Elections” and “Re-run” and in case of a “Fresh Election” the Commission should not conduct fresh nomination pursuant to Article 140 (3) of the Constitution.

He further observed that while amendment in Section 2 of the Draft Bill expands the meaning of the “Chairperson” caution should be made to restrict persons acting as such from presuming “absence of the Chairperson” to arbitrarily duplicate roles. The absence should be restrictive to avoid situations where more than one person is performing the same duty.

The Bill needs to make provisions to allow deputy returning officer or presiding officers to be allowed required to sign a prescribed document in case the Returning Officers or Presiding Officer fails to sign them.

13. Mr. Isaiah Waweru Ngumi

Mr. Ngumi submitted that:-

- i. There is need to Include in the Bills that, a Presidential Election shall not be invalidated unless the Supreme Court of Kenya is convinced that the election results are not in accordance with Article 138 (4) and (7) of the Constitution of Kenya 2010.
- ii. Given that it is only the Chairperson of IEBC who is mandated by Article 138 (10) (a) of the Constitution of Kenya 2010 to declare the results of a Presidential Election held under Article 138 (9) of the Constitution of Kenya 2010, the Returning Officer's declaration at the Polling Station can only be final for all the other election results save for the Presidential ones.
- iii. The Presiding Officers and the Returning Officers should have deputies.
- iv. In order to ensure accountability, and in line with Article 88 (h) of the Constitution of Kenya 2010, in every Presidential election, the IEBC shall pay and facilitate at least two (2) Poll Agents in every Constituency within the Republic of Kenya who are registered voters within the Constituency they are to be deployed and who shall act for the two (2) major Political Parties in the Elections.
- v. The above-stated Poll Agents shall sign the mandatory Election documents where they are needed to sign and in default they shall suffer similar penal sanctions as the Presiding Officers.
- vi. The Chairperson of the IEBC need not be an advocate given that the mess we are now in is a result of lawyers- one being the Chairperson of IEBC and the other being the Supreme Court Judges.

14. Former members of the Justice And Legal Affairs Committee of the National Assembly in the 10th Parliament and Kamunye Gichigi Co. Advocates Presented By Hon Samuel Gichigi, Hon. Florence Kajuju and Hon. Priscilla Nyokabi

They jointly submitted in support of the Bill but further proposed further amendment to the bill.

- i.
 - I. Amend clause 2 to include the definition of the term “vote cast” to mean valid votes cast and do not include spoilt or rejected votes. This is clarifying on what the Supreme Court has been grappling with whether spoilt and rejected votes should count.
 - II. Amendment of clause 3(1)(B) to insert the words “and or vice-chairperson” immediately after the words “another chairperson” or become available” immediately after the words “be appointed”.
 - III. Amend clause 6(1)(E) by deleting the words “and” immediately after the words “polling station” and substitute therefore the a comma
 - IV. Amend clause 10 (86A, (2)(a) by deleting the term president elect and replacing with the word “candidate”.
 - V. Amend clause 10 (86A, (2)(b) by inserting at the end of paragraphs (b) and (c) the words “ provided that any candidate intending to participate in the fresh election shall give written notice to the Commission of the intention to participate within seven days of the nullification by the Court
 - VI. Amend clause 10 (86A, (2)(a) by deleting the term president elect and replacing with the word “candidate”.
 - VII. Amend clause 10 (86A, (2)(b) by inserting at the end of paragraphs (b) and (c) the words “ provided that any candidate intending to participate in the fresh election shall give written notice to the Commission of the intention to participate within seven days of the nullification by the Court.
 - VIII. Amend clause 11 and insert a new paragraph (e) to provide as follows-

“(e) Willfully fails to transmit the document as required or to deliver the document to the Constituency or National Tallying Centre.”

15. Nairobi Business Community – Mr. John Njoroge

Mr. Njoroge submitting on behalf of the Nairobi Business Community submitted as follows, that Parliament’s role in amending the law is constitutional mandate and requires no authorization to perform its mandate. Parliament’s current actions to amend the Election Law is based on the decision of the Supreme Court’s observation of 2107 General Election and the recommendations in both the majority and dissenting opinions on the need to ensure that there is clarity simplicity and verifiability in the process of transmission

In conclusion he submitted that the proposed amendments do not impose any extra burden on IEBC as they only seek to simplify and ease the management of elections.

16. Mr. Benson Karanja

supports the proposed amendments and recommends experience of at least fifteen years for all returning officers, and invoke Article 234(2)(j) to specify qualifications for returning officers and the National Returning Officer should have served for a minimum five years as a constituency and country returning officers.

17. Wazalendo Huru - Marion Njoroge

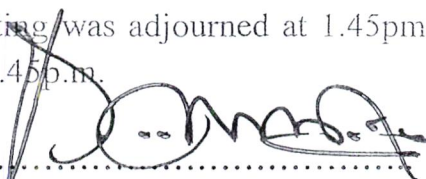
She submitted in support of the proposed bill and urged parliament to consider it and pass it.

18. Ms. Sheila Githaiga

He submitted that the manual system of voting should be supreme as it is simple, transparent, secure, verifiable and accountable.

MIN.NO. JSSCEL/026/2017 : Adjournment and date of the Next meeting

The meeting was adjourned at 1.45pm and to be convened on Wednesday, 4th October, 2017 at 2.45p.m.


.....
**HON. WILLIAM CHEPTUMO, MP,
CO-CHAIRPERSON.**


.....
**SEN. FATUMA ADAN DULLO, MP
CO-CHAIRPERSON/ DEPUTY**

MAJORITY LEADER.

DATE: 10/10/2017

DATE: 10/10/2017

MINUTES OF THE FIFTH JOINT SITTING OF THE SELECT COMMITTEES ON ELECTION LAWS, 2017 OF BOTH THE NATIONAL ASSEMBLY AND THE SENATE HELD ON WEDNESDAY, 4TH OCTOBER, 2017 IN COUNTY HALL GROUND FLOOR BOARDROOM, PARLIAMENT BUILDINGS AT 9.30 AM.

PRESENT - NATIONAL ASSEMBLY

1. Hon. William Kipkiror Cheptumo, MP Co- Chairperson
2. Hon. Gladys Jepkosgei-Boss Shollei, MP
3. Hon. Isaac Waihenya Ndirangu, MP
4. Hon. Jennifer Shamalla, MP
5. Hon. Alice Muthoni Wahome, MP
6. Hon. Ali Wario, MP
7. Hon. George Gitonga Murugara, MP
8. Hon. Stanley Muthama, MP
9. Hon. Adan Haji Yussuf, MP

PRESENT- SENATE

1. Sen. Fatuma Adan Dullo, MP Co- Chairperson
2. Sen. Paul Kimani Wamatangi, MP
3. Sen. Johnson Arthur Sakaja, MP
4. Sen. Aaron Cheruiyot, MP
5. Sen. Naomi Jillo Waqo, MP

IN ATTENDANCE

MEMBERS OF THE GENERAL PUBLIC

(Attendance list is annexed)

SECRETARIAT

- | | |
|------------------------|---|
| 1. Mr. Nicholas Emején | Deputy Director, National Assembly |
| 2. Ms. Emmy Chepkwony | Principal Clerk Assistant, Senate |
| 3. Mr. George Gazemba | Senior Clerk Assistant, National Assembly |
| 4. Mr. Samuel Kalama | First Clerk Assistant, National Assembly |
| 5. Ms. Halima Hussein | Clerk Assistant, National Assembly |
| 6. Ms. Kavata Musyoka | Clerk Assistant, Senate |
| 7. Mr. Charles Ngatia | Clerk Assistant, Senate |
| 8. Mr. Victor Bett | Clerk Assistant, Senate |
| 9. Ms. Jemimah Waigwa | Legal Counsel II, National Assembly |
| 10. Ms. Doreen Karani | Legal Counsel II, National Assembly |
| 11. Mr. Ronald Walala | Legal Counsel II, National Assembly |
| 12. Mr. Salem Lorot | Legal Counsel II, National Assembly |
| 13. Ms. Lucy Radoli | Legal Counsel II, Senate |
| 14. Mr. Jeremy Chabari | Legal Counsel II, National Assembly |

15. Ms. Fiona Musili	Research Officer III, National Assembly
16. Ms. Clare Kidombo	Research Officer III, National Assembly
17. Mr. James Macharia	Media Relations Officer
18. Mr. James Ngusya	Sergeant At Arms, Senate
19. Mr. Stanley Langat	Sergeant At Arms, National Assembly
20. Mr. John Mungai	Sergeant At Arms, National Assembly
21. Ms. Faith Makena	Sergeant At Arms, National Assembly

MIN.NO. JSSCEL/019/2017

PRELIMINARIES

The meeting commenced with a word of prayer from Hon. Adan Haji Yussuf, MP followed by a round of introductions.

MIN.NO. JSSCEL/020/2017

REMARKS FROM THE CO-CHAIRS

The Chairs briefed the meeting that the two Select Committees was convened to receive submissions from institutions that were invited by the Committee on the election laws Amendment bill that seeks to amend the election Act, 2011 and the Independent Electoral and Boundaries Commission Act. However, the Co-chairs indicated that members of the public who were present on Tuesday 3rd October, 2017 but did not get an opportunity to make their submission will be accorded an opportunity to present their comments. The Co-Chairs urged the organization represented to be free to make their views and comments before the Committee. They assured members of the public that all views that will be presented before the Committee will be considered by the Committee during its report writing exercise.

MIN.NO. JSSCEL/021/2017

PUBLIC SUBMISSIONS ON THE ELECTION LAWS (AMENDMENT) BILL, NATIONAL ASSEMBLY BILLS NO. 39 OF 2017 AND THE ELECTIONS LAWS (AMENDMENT) BILL, SENATE BILLS NO. 3 OF 2017

1. Mr. Michael Ogembo (finance Consultant/Bank)

He submitted as follows-

He opposes the proposed amendments as it gives room for fraud through alteration of results, the quorum should be maintained at five, identification of voters should only be through KIEMS and the penalty should be enhanced to ten years.

He further observed there is need for consensus between the political players and suggested that there is need to amend law to among other things prescribe an offence for any person who excludes agents at polling stations and define stray ballots and how to account

He informed the Committee that there is need to expand the definition of the Chairperson of the Independent Electoral and Boundaries Commission to allow other commissioners discharge the role of the Chairperson in his or her absence. This will help avoid vacuum.

2. Mr. Johnson Nyandiga (Teacher and Voter Kisii County)

He submitted in support of the proposed amendment of the election laws. On the qualification for appointment, he submitted that the Chairperson of the Independent Electoral and Boundaries Commission does not necessarily to be a lawyer but allow other professionals preferable statistics to be eligible for appointment as Chairperson as IEBC. He further observed that the definition of Chairperson be expanded to allow the vice Chairperson and any other commissioner in the absence of the Chairperson. He further submitted that presiding officers should be made to sign form 34B and not by the returning officer only.

Lastly he proposed a redesign of Forms 34A and 34B to include the time when forms are signed.

3. Mr. Eliud Kinuthia (Advisor on Public Sector Reforms & Police reforms)

He submitted as follows-

The timing for introduction of proposed amendments and the bill is timely. He supported the expansion of the definition of the Chairperson for IEBC to allow any other Commissioner to act as the Chairperson in the absence of the Chairperson.

On the qualification of the Chairperson of IEBC, he supported the proposed amendment to allow any other professionals other than lawyers are eligible for consideration as the Chairperson of the Commission, the deletion of clause 7 of the bill gives power to the regulation making authority room to make regulations to fix any problem. He further suggested that the chairperson of the Commission to be people's manager and transformative leader supported the manual transmission of election results because it is simple, verifiable and accountable. On the proposed penalty for election officials who fails to complete and sigh election documents is lenient and be maintained at five but an option for fine be

4. Mr. Kenya Private Sector Alliance

The Kenya Private sector Alliance was represented by the Chief Executive Officer, Ms. Caroline kariuki. She submitted that-

- (a) On clause 4 of the Bill on Quorum; the quorum should be at least 50 percent of all the Members and decisions should be made by a simple majority of members present in line with the principles of corporate governance.
- (b) on clause 6 the electronic and manual systems should complement each other.

- (c) on clause 9 the forms for transmitting should be official, uniform and verifiable
- (d) on clause 11 the offence should be expanded to include Commissioners and any other officers with responsibility in electoral process.
- (e) amend law to permit media to announce elections once they are announced by constituency returning officers since results announced at the constituency are final;
- (f) amend section 2 on the definition of the term integrated electronic system to include a computer based system.

5. Mr. Alex Otunga Barasa, Teacher, a Nairobi Resident

He submitted in opposition of the proposed the amendment bill on the account that the time for the introduction of the bill is not appropriate. In particular on the proposed amendment to the qualification of the chairperson that seeks to allow non lawyers to be eligible for appointment as chairperson, he opposed it. He opposed the proposal to reduce the quorum of the Commission from five to three. He suggested that the Quorum be retained at five as it is. He further submitted in opposition of according prominence to manual mechanism over the electronic mechanism in case of variance between the two and lastly he opposed the proposal to expand the definition of the Chairperson to allow the vice Chairperson or any other commissioner act in the absence of the chairperson is not necessary since Article 138 Of the constitution only authorize the Chairperson of the IEBC to act as the returning officer for the purpose of presidential elections.

6. Kenya Chamber of Commerce

The organization was represented by the vice Chairperson, Mr. James Mureu. He submitted as follows.

That Chamber of Commerce supports the proposed amendment

- a.) On Clause 2 of the Bill, the definition be expanded to allow the vice chairperson or any other commissioner to act as the chairperson in case of his or her absence.
- b.) On clause 5 of the bill on variance between electronic and manual transmission of election results, he supported the proposal and buttressed the need to have manual mechanism prevail since the electronic results are generated from the manual forms countersigned by all poll agents.
- c.) On clause 8 of the bill, he proposed that section 44 A be amended by deleting the may and substitute the word shall thereof.

7. Ms. Ebby Wanjala Nangatia, Voter in Webuye constituency

She submitted in support of the penalty prescribed for election officials who fails to complete and sign election documents..

8. Ms. Janet Iminji. (Mombasa County)

She informed the Committee that there is need to jail all election officials who fail to sign election documents and supported the prescribed penalty under clause 11 Of the Bill.

On clause 2 on the definition of the Chairperson to allow the vice Chairperson or any other Commissioner of IEBC to act as chairperson of the Commission in case of the absence of the Chairperson of the Commission, she supported the proposal fully.

9. The Kenya Interreligious Aids Consortium, Bishop Stephen Muketha

Bishop Muketha submitted in support of the proposed amendment in its current form. On Clause 11 of the Bill, on penalty for malpractices during the electioneering period be enhanced. In addition, he requested Parliament to come up with a law to regulate demonstration in the country. He also noted that they have observed that there is much interference on the work of Parliament by Judiciary.

10. Women of Kenya Initiative- Ms. Dhababu Dado (Former Banker Marsabit County)

Ms. Dhababu submitted in support of the proposed amendment in its current form. On Clause 11 of the Bill, on penalty against election officials who fail to complete or sign an election document be severe.

11. Youth Council of Kenya- Mr. Edward Githaitha

Mr. Githaitha submitting on behalf of the youth Council supported the proposed bill before parliament. On Clause 5 he supported the proposed amendment on prominence of manually transmitted results over electronically transmitted in case of discrepancy between the two because it meets the test of simplicity. It is cheaper to manage election through the manual system.

12. Mr. Geoffrey Morris Mwavidzo- Evangelist, Editor

He submitted as follows-

That he supported the efforts made by parliament with a view to streamline election management in the country. The proposed amendment to the election law was prompted by the judgement of the Supreme Court.

13. Ms. Cecilia Nyokabi- Gospel Artist

She submitted in support of the proposed amendment to the elections laws.

On clause 11 on penalty for election officials who fails to complete election documents should be jailed for five years as proposed in the bill. She further submitted that the definition of the Chairperson in clause be expanded to allow the vice chairperson or any other commissioner to perform the duties of a Chairperson in case of the absence of the substantive Chairperson.

14. Prophetic prayers Network- Prophet Paul Mwangi

He submitted in support of the proposed amendment to election laws. On clause 3 of the bill on Qualification of the Chairperson, he indicated that the Chairperson need not to be a lawyer but any other qualified person can be appointed as chairperson of the Commission.

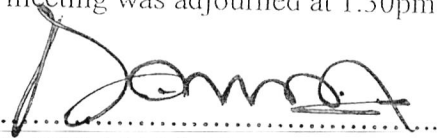
15. Kakamega County Forum- Mr. Tom Chivachi, Chairperson

He submitted in opposition of the proposed amendment on the election laws. He singled out that the proposed amendment on the definition of the Chairperson of IEBC to allow the vice chairperson or any other Commission. He urged Parliament to shelve the Bill until after election.

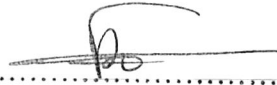
MIN.NO. JSSCEL/022/2017

DATE OF THE NEXT MEETING

The meeting was adjourned at 1.30pm so as to resume shortly after at 2.30pm.



.....
HON. WILLIAM CHEPTUMO, MP,
CO-CHAIRPERSON.



.....
SEN. FATUMA ADAN DULLO, MP
CO-CHAIRPERSON/ DEPUTY MAJORITY
LEADER.

DATE: 10/10/2017

DATE: 10/10/2017

MINUTES OF THE FOURTH JOINT SITTING OF THE SELECT COMMITTEES ON ELECTION LAWS, 2017 OF BOTH THE NATIONAL ASSEMBLY AND THE SENATE HELD ON TUESDAY, 3RD OCTOBER, 2017 IN COUNTY HALL, MINI CHAMBER AT 3.00 PM.

PRESENT - NATIONAL ASSEMBLY

1. Hon. William Kipkiror Cheptumo, MP Co- Chairperson
2. Hon. Gladys Jepkosgei-Boss Shollei, MP
3. Hon. Isaac Waihenya Ndirangu, MP
4. Hon. Jennifer Shamalla, MP
5. Hon. Ali Wario, MP
6. Hon. George Gitonga Murugara, M.P.
7. Hon. Alice Muthoni Wahome, MP
8. Hon. Stanley Muthama, M.P.

PRESENT- SENATE

1. Sen. Fatuma Adan Dullo, MP Co- Chairperson
2. Sen. Paul Kimani Wamatangi, MP
3. Sen. Johnson Arthur Sakaja, MP
4. Sen. Aaron Cheruiyot, MP
5. Sen. Naomi Jillo Waqo, MP

APOLOGIES

Hon. Adan Haji Yussuf, MP

IN ATTENDANCE

MEMBERS OF THE PUBLIC

(Attendance list is annexed)

SECRETARIAT

- | | |
|------------------------|--|
| 1. Ms. Mary Chesire | Deputy Director, Senate Committee Services |
| 2. Ms. Emmy Chepkwony | Principal Clerk Assistant, Senate |
| 3. Mr. George Gazemba | Senior Clerk Assistant, National Assembly |
| 4. Mr. Samuel Kalama | Clerk Assistant, National Assembly |
| 5. Ms. Kavata Musyoka | Clerk Assistant, Senate |
| 6. Ms. Halima Hussein | Clerk Assistant, National Assembly |
| 7. Mr. Victor Bett | Clerk Assistant, Senate |
| 8. Mr. Charles Ngatia | Clerk Assistant, Senate |
| 9. Ms. Jemimah Waigwa | Second Legal Counsel, National Assembly |
| 10. Ms. Lucy Radoli | Second Legal Counsel, Senate |
| 11. Mr. Jeremy Chabari | Second Legal Counsel, National Assembly |

12. Mr. Salem Lorot
13. Ms. Doreen Karani
14. Ms. Fiona Musili
15. Ms. Clare Kidombo

Second Legal Counsel, National Assembly
Second Legal Counsel, National Assembly
Research Officer, National Assembly
Research Officer, Senate

MIN.NO. JSSCEL/015 /2017

PRELIMINARIES

The meeting was called to order at 3:01 p.m. and commenced with a word of prayer from Sen. Naomi Jillo Waqo, M.P.

MIN.NO. JSSCEL/ 016/2017

SUBMISSIONS OF MEMORANDA FROM
THE PUBLIC ON THE ELECTION LAWS
(AMENDMENT) BILL, 2017

1) **Mr. Bakari Shaban- Council of Imams and Preachers of Kenya**
(Mt. Kenya Region)

He submitted that the Council supports the amendments for the following reasons;

- a) Clause 2 of the Bill ensures that there was no vacuum in the Independent Election and Boundaries Commission (IEBC) should the Chairperson of the Commission for whatever reason be absent or unable to discharge his duties.
- b) Clause 6 of the Bill provides an opportunity for non-lawyers to chair the Commission.
- c) Clause 11 provides for severe deterrent punishment to IEBC officials who bungle elections.
- d) Amendment of Section 39 of the Bill ensures that the failure of technology during the transmission of election results will not deny Kenyan voters their sovereign will.
- e) Amendment of Section 83 of the Election Act, 2011 ensures that global standards of nullifying an election and those set by the Supreme Court of Kenya in 2013 are not diluted.

2) **Mr. Kamori Gachoki**

He supported the amendments for the following reasons;

- a) The amendments seek to seal the loop holes that led to the cancellation of the Presidential elections of 8th August, 2017.
- b) Ensures that due diligence will followed by officials who manage elections.

3) **Mr. Danson Mwangangi**

He supported the amendments for the following reasons;

- a) Where there is a dispute on electronic transmission of election results, then the manual documents should be used.
- b) The election officials who cause nullification of an election because of their acts of omission or commission should be jailed.

4) Dr. Duncan Ojwang-Dean, African Nazarene Law School

He submitted as follows-

- a) The rights protected by Article 38 of the Constitution of Kenya are actualized through the electoral system as set out Chapter Seven of the Constitution.
- b) Under the democratic form of the Kenyan Government an election is the ultimate expression of sovereignty of the people and the electoral system is designed to ascertain and implement the will of the people.
- c) The bedrock principle of election dispute resolutions is to ascertain the intent of the voters and to give effect whenever possible while upholding the principles that underlie a free and fair election.
- d) There is need to clarify the circumstances that would lead to the absence of the Chairperson of the IEBC
- e) A requirement be put in the Bill that in case of a nullification of an election, there was need for a confirmation from the candidates that they will participate in the repeat election.
- f) There was no need of punishing electoral officials who refuse to sign the declaration forms yet such omissions were regarded a nullity in the same Bill.

5) Ms. Stacy Saida Chepkemoi- citizen of Bomet

She submitted in support of the proposed amendments to the election laws and the Bill. She further observed that manual transmission of election results should take precedence in case of discrepancy between the manual system and electronic system.

6) Dr. Washington Makodingo

He submitted in support of the proposed amendments and indicated that the amendments are fundamental and critical. He supported the amendment that seeks to expand the definition of Chairperson in Clause 2 to allow the vice Chairperson or any other Commissioner to assume the role of the Chairperson. In addition he observed that there is need to uphold the supremacy of the manual transmission of election results. Lastly he submitted in support of the proposed amendment to Section 83 of the Election Act.

7) Mr. Gabriel Muthuma, Telecommunication Engineer

He submitted in support of the proposed amendments. However, he proposed that section 39 of the election Act, 2011 be amended to provide for electronic transmission of election results only and do away with the manual transmission of election results.

8) Hon. Jackson Mwalulu, former Member of Parliament

He submitted in support of all the proposed amendments to the election laws since they are progressive in nature and seeks to affirm the sovereign will of the people. He further proposed that the committee should consider coming up with a provision in the Bill to compel the IEBC to train electoral officials adequately.

9) Mr. Charles Tabu Okumu-Chairman, Bunge la Wazalendo

He disagreed with the proposed amendments for the following reasons-

- a) The current political climate was unpredictable and polluted and therefore was not the right time to undertake amendments to the elections law. Instead, dialogue between the two contesting political parties should be encouraged.
- b) There was no time to address the issue of an acting Chairperson of the IEBC and there should be no anticipation of his absence.
- c) The severe punishment proposed on electoral officials who refuse to sign election declaration result forms was political mischief.

10) Ms. Nice Muthoni Mburu-Student Leader, Kenyatta University

She submitted in support of the proposed amendments to the elections laws for the following reasons;

- a) Clause 6 of the Bill
 - provides an opportunity for persons from other professionals to be appointed Chairperson of IEBC;
 - Removes the risk of paralysis of the IEBC;
 - Ensures that the decisions of IEBC are unanimous to avoid internal disagreement.
- b) Clause 11 that seeks to amend the Election Offences Act, 2016
 - seeks to raise the profile of the role played by presiding and returning officers.
 - enhances penalties for willful or deliberate failure to sign election documents or falsify election documents by election officials.
- c) Section 29 implements a Constitutional Court's directive in the case of Peter Solomon Gichira vs IEBC & another [2017] eKLR.
- d) Amendment of Section 39 of the Elections Act, 2011 ensures that the failure of technology during the transmission of election results will not deny Kenyan voters their sovereign will, since the manual results will be considered.
- e) Amendment to Section 44 of the election Act seeks to delete subsection (8) which had established Elections Technology Committee which was declared unconstitutional by the High Court in Kenneth Otieno vs Attorney General & another [2017] eKLR.
- f) Amendment to Section 83 of the election Act will ensure that technical considerations do not override the substance of the vote and therefore upholds the will of the people.
- g) Amendment to Section 86 gives effect to Article 138 (1) of the Constitution of Kenya.

11) Mr. Peter Amunga-Kenya National Union of Teachers (KNUT)

He supported the proposed amendment to the election laws. In particular he supported clause 2 to expand the definition of the chairperson to allow the vice chairperson or any other commissioner to assume the role of the Chairperson.

12) Mr. Oliver Kipchumba Mutai

He submitted in support of the proposed amendment of the election laws as contained in the bill because they seek to protect the sovereign will of the people. He

further observed that there is need to prescribe punitive measures against election officials who fail to discharge their duties as required by law. Finally he urged Kenyans not view the proposed amendments through the democratic lenses or constitution and not political lenses.

13) Mr. Mohammed Abdulahi

He submitted in opposition to the proposed amendments noting that the timing was bad because of the prevailing political divisions in the Country and urged the Committee the halt the process.

14) Ms. Velah Kadeiza, Engineering student at Kenyatta

She submitted in opposition to the amendments because she read malice especially on the amendment in Clause 2 of the Bill which proposes to allow the Vice Chairperson of the Commission responsibility to act as Chairperson in the event of absence of the Chairperson of the Independent Electoral and Boundaries Commission.

She urged the Committee to consider consensus building by the two political parties as the way forward.

Mr. MIN.NO. JSSCEL/ 017/2017

ANY OTHER BUSINESS

Members observed that there were five people who did not get an opportunity to present their submissions and it was resolved that they were to be accorded the opportunity to present their memoranda on Wednesday, 4th October, 2017 from 9:00 a.m.

MIN.NO. JSSCEL/018 /2017

ADJOURNMENT AND DATE OF THE NEXT MEETING

The meeting was adjourned at 5.48pm. The next meeting was scheduled for Wednesday, 4th October, 2017 at 9:00 a.m.

.....
**HON. WILLIAM CHEPTUMO, MP,
CO-CHAIRPERSON.**

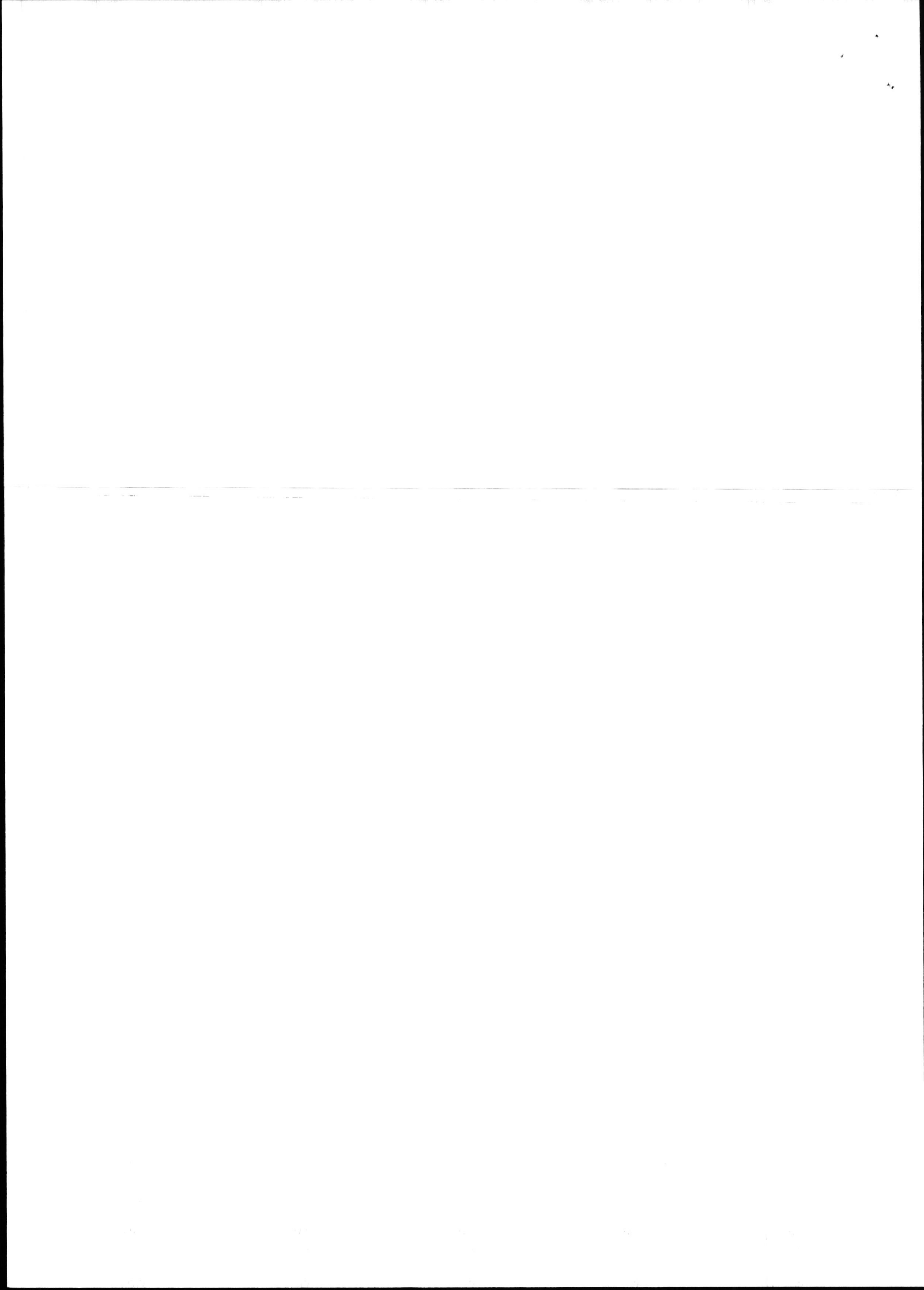
.....
**SEN. FATUMA ADAN DULLO, MP
CO-CHAIRPERSON/ DEPUTY
MAJORITY LEADER.**

DATE:

..... 10/10/2017

DATE:

..... 10/10/2017



MINUTES OF THE THIRD JOINT SITTING OF THE SELECT COMMITTEES ON ELECTION LAWS, 2017 OF BOTH THE NATIONAL ASSEMBLY AND THE SENATE HELD ON TUESDAY, 3RD OCTOBER, 2017 IN COUNTY HALL GROUND FLOOR BOARDROOM, PARLIAMENT BUILDINGS AT 8.30 AM.

PRESENT - NATIONAL ASSEMBLY

1. Hon. William Kipkiror Cheptumo, MP Co- Chairperson
2. Hon. Gladys Jepkosgei-Boss Shollei, MP
3. Hon. Isaac Waihenya Ndirangu, MP
4. Hon. Jennifer Shamalla, MP
5. Hon. Alice Muthoni Wahome, MP
6. Hon. Ali Wario, MP
7. Hon. George Gitonga Murugara, MP
8. Hon. Stanley Muthama, MP

PRESENT- SENATE

1. Sen. Fatuma Adan Dullo, MP Co- Chairperson, Deputy Leader of Majority Party
2. Sen. Paul Kimani Wamatangi, MP
3. Sen. Johnson Arthur Sakaja, MP
4. Sen. Aaron Cheruiyot, Mp
5. Sen. Naomi Jillo Waqo, MP

APOLOGIES

1. Hon. Adan Haji Yusuf , MP

IN ATTENDANCE

MEMBERS OF THE GENERAL PUBLIC

(Attendance list is annexed)

SECRETARIAT

- | | |
|-----------------------|--|
| 1. Ms. Mary Chesire | Deputy Director, Senate Committee Services |
| 2. Ms. Emmy Chepkwony | Principal Clerk Assistant, Senate |
| 3. Mr. George Gazemba | Senior Clerk Assistant, National Assembly |
| 4. Mr. Samuel Kalama | Clerk Assistant, National Assembly |
| 5. Ms. Kavata Musyoka | Clerk Assistant, Senate |
| 6. Ms. Halima Hussein | Clerk Assistant, National Assembly |
| 7. Mr. Victor Bett | Clerk Assistant, Senate |
| 8. Mr. Charles Ngatia | Clerk Assistant, Senate |

9. Ms. Jemimah Waigwa	Legal Counsel, National Assembly
10. Ms. Lucy Radoli	Legal Counsel, Senate
11. Mr. Jeremy Chabari	Legal Counsel, National Assembly
12. Mr. Salem Lorot	Legal Counsel, National Assembly
13. Ms. Doreen Karani	Legal Counsel, National Assembly
14. Ms. Fiona Musili	Research Officer, National Assembly
15. Ms. Clare Kidombo	Research Officer, Senate

MIN.NO. JSSCEL/12/2017

PRELIMINARIES

The meeting commenced at 9.30am with a word of prayer from Sen. Fatuma Dullo, MP followed by a round of introductions.

MIN.NO. JSSCEL/13/2017

REMARKS FROM THE CO-CHAIRS

The Chairs briefed the meeting that the country is preparing for a fresh presidential election following the nullification of the presidential election by the majority judgement of the Supreme Court. The bill before the two Select Committees is the Electoral law (Amendment) bill that seeks to amend sections of the Election Act, 2011, IEBC Act and the Election Offences Act, 2016. Pursuant to Article 118 of the constitution requires parliament to undertake comprehensive public participation on all business before it. They further reiterated that the two Select Committees are legally constituted pursuant to standing order 127 (2) of the National Assembly Standing Orders and standing order 134 of the Senate Standing Orders to consider the Election laws (amendment) Bill, 2017.

They further informed the meeting that the Committees have ten (10) days to consider the Bills and present its report to Houses of Parliament and urged Members to take note of the limited timelines and remain committed.

The Co-Chairs emphasized on the importance of public participation as enshrined in Article 118 of the constitution and informed the members of the public that they will be accorded an opportunity to present their views to the Committee.

MIN.NO. JSSCEL/14/2017

PUBLIC SUBMISSIONS ON THE ELECTION LAWS (AMENDMENT) BILL, NATIONAL ASSEMBLY BILLS NO. 39 OF 2017 AND THE ELECTIONS LAWS (AMENDMENT) BILL, SENATE BILLS NO. 3 OF 2017

The Co-Chairpersons of the Committees welcomed Mr. Stephen Cheboi representing the Non-Governmental Organizations Council to make his presentation. He consequently submitted as follows:-

1) The Non-Governmental Organizations Council(NGO Council) Presented by Stephen Cheboi, Chairman

He urged the Committee to observe independence of the three arms of Government and work to ensure accountability of the Independent Electoral and Boundaries Commission (IEBC) as an independent institution with the mandate to spearheading elections.

He further informed the Committee that the NGO Council supports the proposed amendments. In particular he submitted in support of Clause 2 of the Bill that seeks to amend section 2 of the Independent Electoral and Boundaries Commission Act 2011 by deleting the definition of the term ‘‘chairperson’’ and substituting therefore to mean, ‘‘chairperson means the chairperson of the Commission appointed in accordance with Article 250(2) of the Constitution and in absence of the chairperson, the vice chairperson, or such other person acting as the chairperson in absence of both the chairperson and vice chairperson.

In Clause 4 of the Bill on quorum the Council proposed that quorum for the purpose of conducting business of the Commission is raised from 3 to 4 of the members. On the timing of introduction of the Bill, the Council was of the view the timing was appropriate and hence parliament should fast track the consideration of the Bill.

2) Mr. Elijah Ole Metyan- Businessman (Kajiado County)

He expressed concern on the power being vested on the will of Kenyans and that Independent institutions should not interfere with the sovereign will of the people..

He submitted in support of the proposed amendment bill. On Clause 2 of the Bill, Mr. Elijah indicated his fully support of proposed amendment as currently contained in the Bill and buttressed that point that the definition of the Chairperson needs to expanded to make reference the Vice Chairperson or any other Commissioner to act and discharge the functions of the Chairperson in case of the Chairperson’s absence.

3) Mr. Hillary Juma Vidonyi (Youth and Voter from Lamu West Constituency, Trained Conservationist on Wildlife Matters)

He submitted to the Committee as follows:-

That he was in support of Clause 2 of the Bill as contained in the Bill. On Clause 6 of the Bill, he emphasized the use manual system in the election management especially in places like Lamu with challenge of network connectivity and poor transport infrastructure. In addition he observed that persons to participate in fresh presidential elections should be the ones who successfully petitioned the Supreme Court. Lastly he proposed to the Committee that Clause 11 of the Bill dealing with penalty against any election official who fails to complete or sign an election document be jailed for a period of five years without the option of fine in order to deter election officials from making such mistakes.

4) Mr. Christopher Muraguli, a Lawyer

He submitted in support of the amendment bill. In particular, he supported clause 2 of the bill on the definition of the Chairperson to allow the Vice Chairperson or any other Commissioner to act as Chairperson in case of his or her absence. This will ensure smooth running of business of the Commission.

On the issue of qualifications of the Chairperson of the IEBC, Mr. Muraguli supported the amendment to allow other professionals who are not lawyers by profession but qualified in other professions be considered to chair the Commission. On the transmission of election results, he was observed that it can be done both manually and electronically but what matters most is that the votes of the people should count. Lastly on clause 11 of the Bill, he underscored the need to criminalize failure by elections officials who fail to complete or sign election documents. In this regard he indicated that the jail term proposed is enough to serve as deterrent by anyone who is appointed as an election official.

5. Mr. Evans Bitange, Auditor

He submitted in support of the proposed bill however he expressed concerns as to the timings of the introduction of the Bill. He further observed Parliament should wait and introduce the amendments at later stage for future elections.

6. Mr. Abel Onchari, Policy Researcher

He submitted in support of the Bill. The following were the Clauses he fully supported,

- a.) Clause 2 of the Bill, by informing the Committee that the Clause would evade a crisis;
- b.) Clause 3 of the Bill, by informing the Committee that the move is welcomed as it does not limit chairmanship to a certain profession and instead opens it up to all the other professions.
- c.) On clause 6 of the Bill, he observed that the manual transmission of election results should prevail over electronic transmission of results in case of discrepancy. Manual system provides a primary source of all documents.

7. Clause 11 of the Bill on penalty against election officials who fails to complete or sign election documents is good and will serve as deterrence to election officials who could fail to complete election documents

8. African Electoral Observation Group, Dr. Kenneth Orengo, Regional Coordinator

He submitted in favour of the proposed Bill as follows:-

- a.) Clause 6 of the Bill, by informing the Committee that the insertion of the term manually transmission of election results will address the issues raised in the past election.
- b.) On clause 9 of the Bill that seeks to amend Section 83 of the election Act, by informing the Committee that the Supreme Court in its ruling only focused on the Act and the Constitution and did not consider whether the non-compliance part really affected the elections results as announced by the IEBC. He informed the committee that the phrasing of the word “or” be replaced with “and” is a welcomed move.
- c.) Clause 11 of the Bill on penalty prescribed in the Bill is too lenient.

9. Charlvin's law Consulting, Presented by Mr. Charles Kalya

Mr. Charles submitted in the opposition of the proposed bill. In particular he disagreed with the following clauses

- a.) Clause 2 of the Bill, by informing the Committee that their question was on whether Parliament can enact a law that permits an ordinary member of a commission to perform a function which the Constitution vests in the Chairperson of the Commission.
- b.) Clause 4 of the Bill seeking to reduce quorum for conduct of business on the basis that this is not be well advised since a minority could be make decisions that bind the majority. He further proposed that the Quorum be half of the members of the Commission.
- c.) Amendment of Section 6(1) of the IEBC, by informing the Committee that there is need for a Lawyers background in the task of a chairperson as envisioned in the Constitution and as compared to the norm in other countries.
- d.) Amendment of Section 29 of the Election Act, that deletion of this section will enable a presidential candidate to be nominated by persons from different political parties. It wrongfully interprets the politically party system in canvassing of political offices and erodes the loyalty within political parties.
- e.) Amendment of Section 39(1D) of the Election Act 2011, by informing the Committee that this proposed amendment ignores the historical context for the use of technology as set out in the Kriegler Report. Further they informed the Committee that the amendment may be abused by manual tempering with the results and is further contrary to Article 86(d) of the Constitution of Kenya.
- f.) Amendment to Section 44(5) of the Election Act, by informing the Committee that it will make it possible for IEBC to hold un-authentic elections in that IEBC cannot audit the ICT system.
- g.) Amendment of Section 83 of the Election Act is unconstitutional since it offends Article 2 (4) of the Constitution.
- h.) Clause 11 of the Bill seeking to amend section 6(A) of the Election Offences Act, by informing the Committee that on punishing presiding and returning officers who are responsible for errors and omissions in election result declaration forms would be ironical in that those same errors which would land one in jail for 5 years cannot invalidate an election.

**10. Kenya Livestock Marketing Body, Presented by Mr. Duba Ali Amey,
Chairperson**

He submitted in support of the Bill

- a.) Clause 2 of the Bill, by informing the Committee that this is a welcomed and acceptable move.
- b.) On the qualification of the Chairperson of the IEBC, he submitted that any other qualified person who is not necessarily lawyers be appointed a chairperson of the Commission.

However, on Clause 11 of the Bill, which proposes to prescribe a penalty of five years jail term against an election official who fails to complete an election document, is too punitive and consequently he proposed a reduction of the jail term. He further observed that there is need stagger the election and hold at least two elections on different dates.

11. Organization of National Empowerment, Presented by Benji Ndolo

He observed that the timing for the introduction of the Bill is not appropriate. He further observed that jailing election officials who fails to complete election documents will not help but challenged the legislators to address the root cause of mismanagement of the electoral process.

12. Mr. Robert Owango, Rtd Civil Servant (Homabay County)

He submitted in opposition of the Bill. He emphasized the need for Parliament to ensure peace and unity prevails in the Country.

13. Hon. Kalembe Ndile, Former M.P Kibwezi

He submitted in support of the proposed bill. He fully agreed with the following Clauses -

- a.) Clause 11 of the Bill, by informing the Committee that penalty for malpractices during the electioneering period should be severe.
- b.) Clause 3 of the bill that seeks to amend Section 6(1) of the Election Act, by informing the Committee that one need not to be a Lawyer to be appointed as a chairperson of the IEBC.
- c.) Amendment of Section 39(1D) of the Election Act, by informing the Committee that he supported the manual system of transmission by sharing his experience on a petition he had on his quest for a parliamentary seat and that petitions on recount should be provided for and the winner of the recount declared instead of going back to election.


MIN. NO. JSSCE/14/2017

DATE OF THE NEXT MEETING

The meeting was adjourned at 1.45pm to resume shortly after at 2.45p.m after the Lunch Break.



.....
HON. WILLIAM CHEPTUMO, MP,
CO-CHAIRPERSON.



.....
SEN. FATUMA ADAN DULLO, MP
CO-CHAIRPERSON/ DEPUTY MAJORITY
LEADER.

DATE: 10/10/2017

DATE: 10/10/2017

MINUTES OF THE SECOND JOINT SITTING OF THE SELECT COMMITTEES ON ELECTION LAWS, 2017 OF BOTH THE NATIONAL ASSEMBLY AND THE SENATE HELD ON MONDAY, 2ND OCTOBER, 2017 IN COMMITTEE ROOM 7, MAIN PARLIAMENT BUILDINGS AT 3.00 PM

PRESENT - NATIONAL ASSEMBLY

1. Hon. William Kipkiror Cheptumo, MP Co- Chairperson
2. Hon. Gladys Jepkosgei-Boss Shollei, MP
3. Hon. Isaac Waihenya Ndirangu, MP
4. Hon. Jennifer Shamalla, MP
5. Hon. Adan Haji Yussuf , MP
6. Hon. Ali Wario, MP
7. Hon. George Gitonga Murugara, MP
8. Hon. Stanley Muthama, MP

PRESENT- SENATE

1. Sen. Fatuma Adan Dullo, MP Co- Chairperson , Deputy Leader Majority Party
2. Sen. Johnson Arthur Sakaja, MP
3. Sen. Aaron Cheruiyot, MP
4. Sen. Naomi Jillo Waqo, MP

APOLOGIES

1. Hon. Alice Muthoni Wahome, MP
2. Sen. Paul Kimani Wamatangi, MP

IN ATTENDANCE

- | | |
|------------------------|--|
| 1. Ms. Mary Chesire | Deputy Director, Senate Committee Services |
| 2. Mr. George Gazemba | Senior Clerk Assistant, National Assembly |
| 3. Mr. Samuel Kalama | First Clerk Assistant, National Assembly |
| 4. Ms. Kavata Musyoka | Clerk Assistant, Senate |
| 5. Ms. Jemimah Waigwa | Legal Counsel, National Assembly |
| 6. Ms. Lucy Radoli | Legal Counsel, Senate |
| 7. Mr. Jeremy Chabari | Legal Counsel, National Assembly |
| 8. Mr. Ronald Walala | Legal Counsel, National Assembly |
| 9. Mr. Salem Lorot | Legal Counsel, National Assembly |
| 10. Ms. Halima Hussein | Clerk Assistant, National Assembly |
| 11. Ms. Doreen Karan | Legal Counsel, National Assembly |
| 12. Ms. Fiona Musili | Research Officer, National Assembly |

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|-------------------------|-------------------------------------|
| 13. Ms. Clare J Kidombo | Research Officer, Senate |
| 14. Mr. James Macharia | Media Relations Officer |
| 15. Mr. James Ngusya | Sergeant At Arms, Senate |
| 16. Mr. John Mungai | Sergeant At Arms, National Assembly |
| 17. Mr. Rodgers Kilugya | Audio officer |
| 18. Mr. Eugene Luteshi | Audio officer |

MIN.NO. JSCEL/06/2017

PRELIMINARIES

The meeting commenced with a word of prayer from Sen. Aaron Cheruiyot and the agenda of the meeting was adopted after having been proposed by Sen. Aaron Cheruiyot, M.P and seconded by Hon. Jennifer Shamalla, MP

MIN.NO. JSCEL/07/2017:

REMARKS BY CO-CHAIRS

The meeting was briefed on the upcoming public hearing scheduled for Tuesday 3rd to Thursday 5th October and the memoranda received from the public.

MIN.NO. JSCEL/08/2017: CONFIRMATION OF PREVIOUS MINUTES

The Minutes of the first Joint Sitting held on Saturday 30th September, 2017 were confirmed as a true record of the deliberations of the meeting having been proposed by the Hon. Yussuf Haji, MP and seconded by the Hon. Gladys Jepkosgei-Boss Shollei, MP

MIN.NO. JSCEL/09/2017

MATTERS ARISING

Under the minutes of the first sitting held on Saturday 30th September, 2017, on the list of the members present, the name of the Hon. Adan Haji Yussuf was inadvertently recorded as the Hon. Adan Haji Yusuf, MP and lastly the name of the Hon. Johnson Arthur Sakaja, MP as Hon. Johson Arthur Sakaja, MP.

MIN.NO. JSCEL/010/2017: BRIEF ON THE ELECTION LAWS (AMENDMENT) BILL, NATIONAL ASSEMBLY BILLS NO. 39 OF 2017 AND THE ELECTIONS LAWS (AMENDMENT) BILL, SENATE BILLS NO. 3 OF 2017

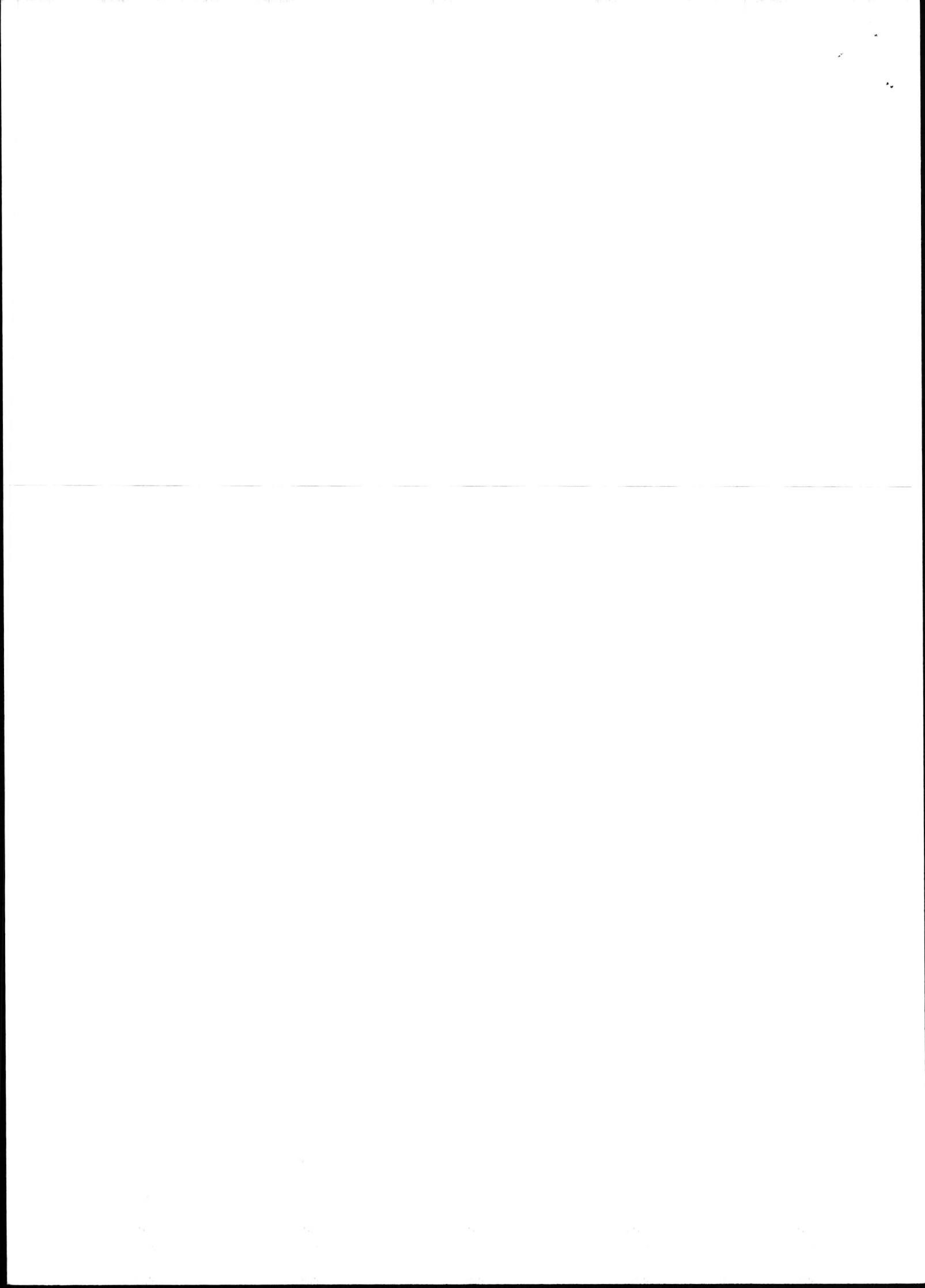
The Legal team took the members through a history of the Electoral Laws in the country from 1991 to 2017. The members were also taken through the proposed amendments clause by clause as tabulated below;

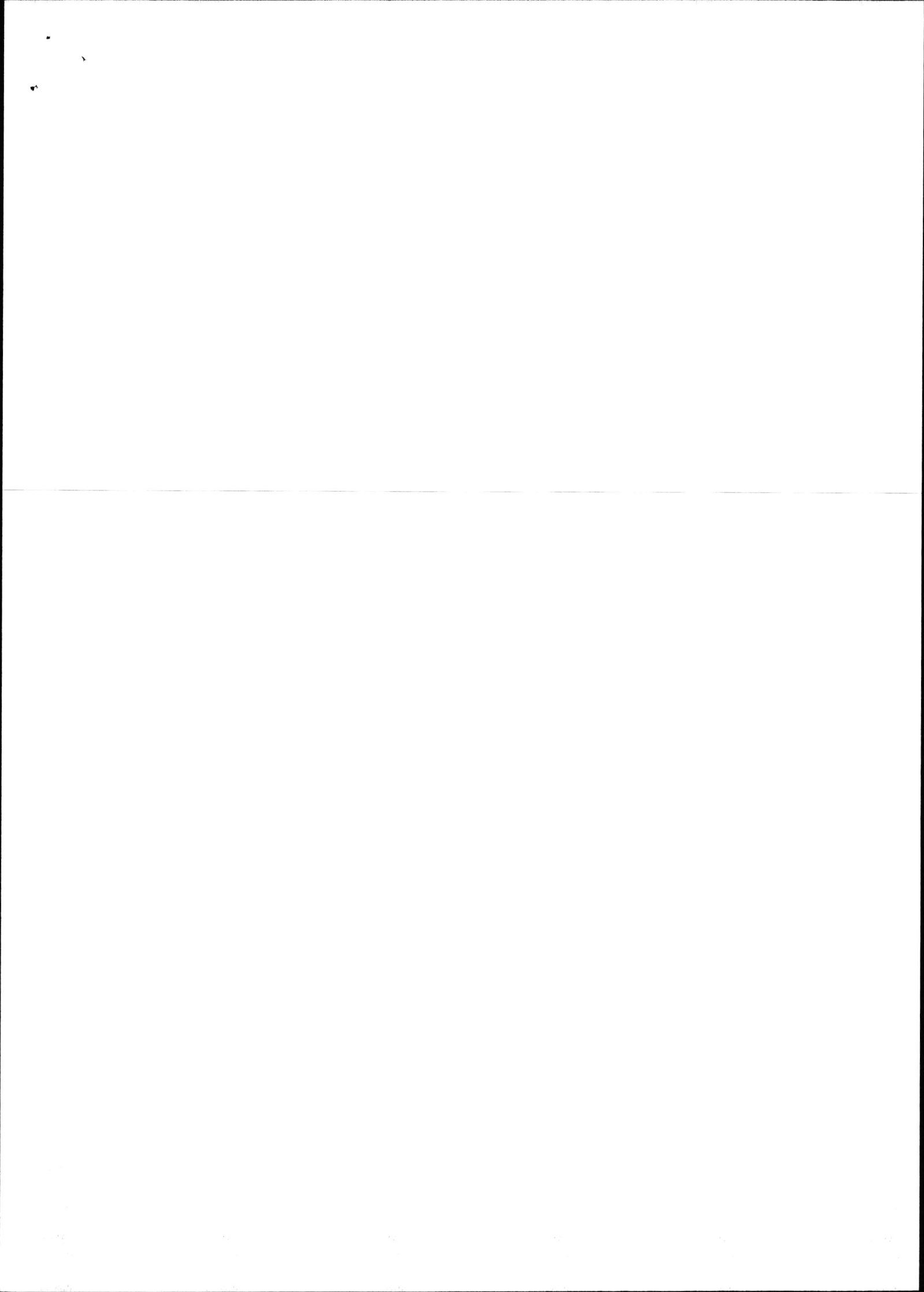
Clause.	Issue	Proposed amendment	Justification/Rationale for the proposed amendment

2	Definition of the term Chairperson	<p>This clause seeks to amend the definition of the term "Chairperson" in section 2 of the IEBC Act as follows—</p> <p>"chairperson" means the chairperson of the Commission appointed in accordance with Article 250(2) of the Constitution and, in the absence of the chairperson, the vice-chairperson, or such other person acting as the chairperson in the absence of both the chairperson and vice-chairperson.</p>	<p>The proposed amendment will ensure that any other commissioner can act as the Chairperson in the event the substantive Chairperson is indisposed. This is in line with Article 259 (3) (b) of the Constitution. This will help to avoid vacuum and make the Commission more effective</p>
3	Qualification for appointment as Chairperson	<p>This clause seeks to amend section 6 of the IEBC Act by deleting subsection (1) and substituting therefor a new subsection (1) as follows—</p> <p>"(1) A person shall be qualified for appointment as the chairperson of the Commission if the person—</p> <ul style="list-style-type: none"> (a) holds a degree from a recognized university in public administration, public finance, governance, electoral management, social science, or law; (b) has proven experience in any of the fields specified in paragraph (a) of not less than fifteen years; (c) meets the requirements of Chapter Six of the Constitution" 	<p>The proposed amendment will allow persons who are not necessarily lawyers to be eligible to serve as Chairperson of the IEBC</p>
3	Chairing of Commission Meetings in the absence of the Chairperson	<p>This clause seeks to amend section 6 of the IEBC Act by two new subsections immediately after subsection (1) as follows—</p>	<p>To avoid vacuum and make the Commission more effective in terms</p>

		<p>“(1A) In the absence of the chairperson for any reason, the vice-chairperson shall assume the duties of the chairperson and exercise the powers and responsibilities of the chairperson until such time that another chairperson shall be appointed.</p> <p>(1B) In the absence of the chairperson and the vice-chairperson, members of the Commission shall elect from amongst themselves one of their number to act as the chairperson and exercise the powers and responsibilities of the chairperson until such time that another chairperson shall be appointed”.</p>	of running the business of the Commission
4	Quorum for Commission meetings and decision-making	<p>This clause seeks to amend Paragraph 5 and 7 of the Second Schedule to the IEBC Act to read as follows—</p> <p>5. The quorum for the conduct of business at a meeting of the Commission shall be at least five members of the Commission half of the existing members of the Commission, provided that the quorum shall not be less than three members.</p> <p>7. Unless a unanimous decision is reached, a decision on any matter before the Commission shall be by concurrence of a majority of all the members a majority of the members present and voting.</p>	The proposed amendment is to enhance effectiveness in decision making by the Commission

6	Nomination of Presidential candidates	This clause proposes to delete Section 29 of the Elections Act.	
6	Determination and declaration of results	<p>proposes to amend Section 39 by deleting and replacing subsection (1C); Inserting three new subsections after subsection (1C) and amending subsections (2) and (3) as follows—</p> <p>(1C) For purposes of a presidential election the Commission shall—</p> <p>(a) electronically and manually transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;</p> <p>(b) tally and verify the results received at the national tallying centre; and</p> <p>(c) publish the polling result forms on an online public portal maintained by the Commission.</p> <p>(1D) Where there is a discrepancy between the electronically transmitted and manually transmitted results, the manually transmitted results shall prevail.</p> <p>(1E) Any failure to transmit or publish the election results in an electronic format shall not invalidate the result as announced and declared by the respective presiding and returning officers at the polling station and constituency tallying centre, respectively.</p> <p>(1F) The Commission shall, to facilitate public information,</p>	Aligning with Kriegler report that recommended the use of an integrated system in the identification of voters and transmission of results.





		<p>establish a mechanism for the live-streaming of results as announced at polling stations, and the results so streamed shall be for purposes of public information only and shall not be the basis for a declaration by the Commission</p> <p>(1G) The chairperson of the Commission shall declare the results of the election of the President in accordance with Article 138(10) of the Constitution.</p> <p>(2) Before determining and declaring the final results of an election under subsection (1), the Commission shall have received the results transmitted in accordance with this Act.</p> <p>(3) The Commission shall announce the final results in the order in which the tallying of the results is completed.</p>	
7	Use of technology	<p>This clause proposes to amend Section 44 of the Elections Act by deleting and replacing subsection (5) and deleting subsections (6), (7) and (8).</p> <p>New subsection (5) (5) The Commission shall, in consultation with the relevant agencies, institutions and stakeholders, make regulations for the better carrying into effect the provisions of this section.;</p>	Aligning with Kriegler report that recommended the use of an integrated system in the identification of voters and transmission of results.
8	Complementary Mechanism for identification of voters	Clause 8 of the Bill proposes to delete and replace section 44A of the Election Act as follows—	The proposed amendment will obligate the IEBC to

		<p>44A. Notwithstanding the provisions of section 44, the Commission may put in place a complementary mechanism for identification of voters that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the Constitution.</p>	<p>put in place complementary mechanism for voter identification of voters only.</p>
9	Nullification of election	<p>proposes to amend Section 83 of the Election Act as follows—</p> <p>83. (1) No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or and that the non-compliance did not affect the result of the election.</p> <p>(2) Pursuant to section 72 of the Interpretation and General Provisions Act, a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead”.</p>	
10	Procedure at fresh election	<p>In light of the decision of the Court in the recent Presidential Petition, Clause 10 proposes a procedure by amending the Elections Act to insert a new Section 86A immediately after section 86 as follows—</p> <p>86A. (1) Where, pursuant to Article 140(3) of the</p>	

		<p>Constitution, a presidential election is invalidated by the Supreme Court on a petition, the Commission shall publish a notice in the Gazette, within seven days from the determination of the Court—</p> <ul style="list-style-type: none"> (a) indicating that the presidential election has been invalidated and that no candidate has been elected as president; (b) announce the date for fresh election pursuant to Article 140(3) of the Constitution; (c) publish the names and political parties of the candidates to participate in the fresh election. 	
		<p>(2) The candidates to participate in the fresh election pursuant to Article 140(3) shall be determined by the nature of the petition that invalidated the original election, as follows—</p> <ul style="list-style-type: none"> (a) where the petition challenging the election was filed by the runner-up, candidates for the fresh election shall be confined to the petitioner and the president-elect whose election was annulled; (b) where the petition was filed by more than one candidate who had participated in the original election, the petitioning candidates and the president-elect may participate in the fresh election; (c) where the petition was filed by a person or persons who were not candidates in the original 	

		<p>election, then each of the candidates in the original election may participate in the fresh election;</p> <p>(d) no other candidate other than those envisaged in paragraph (a), (b) or (c) shall be eligible to participate in the fresh election.</p> <p>(3) The Commission shall not conduct fresh nominations for a fresh election pursuant to Article 140(3) of the Constitution.</p> <p>(4) An eligible candidate for an election pursuant to Article 140(3) of the Constitution may withdraw from the election by notice in writing to the Commission, and—</p> <p>(a) where there are more than two remaining candidates in the election after the withdrawal, the election shall proceed as scheduled;</p> <p>(b) where only one candidate remains after the withdrawal, the remaining candidate shall be declared elected forthwith as the President-elect without any election being held.</p>	
11	Failure or refusal to sign election results	<p>Clause 11 of the Bill amends the Election offences Act to provide for failure or refusal to sign election results as an offence in a new Section 6A as follows—</p> <p>6A. Notwithstanding any other provision in this Act or any other written law, a presiding or returning officer in an election who, in relation to the prescribed document containing the results of the election—</p>	

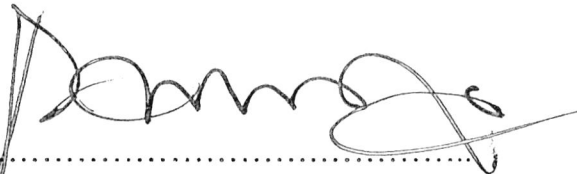
		(a) knowingly fails or refuses to sign the document; (b) knowingly fails to complete the document; or (c) willfully submits an incomplete document; (d) willfully alters or falsifies a document, commits an offence and shall be liable, upon conviction, to imprisonment for a term not exceeding five years;	
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The Committee resolved to put an advert to be signed by the Co-chairperson in the print media on a simplified version of the bills for ease of reference by the public.

The meeting noted that the Committee was in receipt of thirteen (13) memoranda from the public and one a confirmation by the National Council of NGOs to attend the public hearings scheduled for Tuesday, 3rd October, 2017.

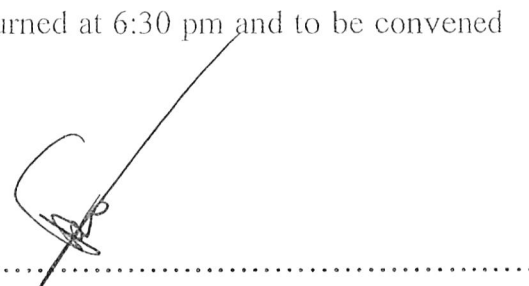
MIN.NO. JSCEL/011/2017: ADJOURNMENT

There being no other business the meeting was adjourned at 6:30 pm and to be convened on Tuesday, 3rd October 2017 at 9.00 a.m.



.....
**HON. WILLIAM CHEPTUMO, MP,
 CO-CHAIRPERSON.**

DATE: 10/10/2017



.....
**SEN. FATUMA ADAN DULLO, MP
 CO-CHAIRPERSON/ DEPUTY
 MAJORITY LEADER.**

DATE: 10/10/2017

MINUTES OF THE FIRST JOINT SITTING OF THE SELECT COMMITTEES ON ELECTION LAWS, 2017 OF BOTH THE NATIONAL ASSEMBLY AND THE SENATE HELD ON SATURDAY, 30TH SEPTEMBER, 2017 IN COMMITTEE ROOM 9, MAIN PARLIAMENT BUILDINGS AT 10.00 AM.

PRESENT - NATIONAL ASSEMBLY

1. Hon. William Kipkiror Cheptumo, MP Co- Chairperson
2. Hon. Gladys Jepkosgei-Boss Shollei, MP
3. Hon. Isaac Waihenya Ndirangu, MP
4. Hon. Jennifer Shamalla, MP
5. Hon. Adan Haji Yusuf, MP
6. Hon. Alice Muthoni Wahome, MP

PRESENT- SENATE

1. Sen. Fatuma Adan Dullo, MP Co- Chairperson
2. Sen. Paul Kimani Wamatangi, MP
3. Sen. Johson Arthur Sakaja, MP
4. Sen. Aaron Cheruiyot, Mp
5. Sen. Naomi Jillo Waqo, MP

APOLOGIES

1. Hon. Ali Wario, MP
2. Hon. George Gitonga Murugara, MP
3. Hon. Stanley Muthama, MP

IN ATTENDANCE

- | | |
|------------------------|--|
| 1. Ms. Mary Chesire | Deputy Director, Senate Committee Services |
| 2. Dr. Johnson Okello | Ag. Director, Legal Services |
| 3. Mr. George Gazemba | Senior Clerk Assistant, National Assembly |
| 4. Ms. Kavata Musyoka | Clerk Assistant, Senate |
| 5. Ms. Jemimah Waigwa | Second Legal Counsel, National Assembly |
| 6. Ms. Lucy Radoli | Second Legal Counsel, Senate |
| 7. Mr. Jeremy Chabari | Second Legal Counsel, National Assembly |
| 8. Ms. Fiona Musili | Research Officer, National Assembly |
| 9. Ms. Halima Hussein | Third Clerk Assistant, National Assembly |
| 10. Mr. James Ngusya | Sergeant At Arms, Senate |
| 11. Mr. Stanley Langat | Sergeant At Arms, National Assembly |
| 12. Mr. John Mungai | Sergeant At Arms, National Assembly |

13. Mr. Rodgers Kilugya

Audio officer

14. Mr. Eugene Luteshi

Audio officer

MIN.NO. JSSCEL/01/2017

PRELIMINARIES

The meeting commenced with a word of prayer from Senator Fatuma Dullo followed by around of introduction.

MIN.NO. JSSCEL/02/2017

REMARKS FROM THE CO-CHAIRS

The Chairs briefed the meeting that the two Select Committees are legally constituted pursuant to standing order 127 (2) of the National Assembly Standing Orders and standing order 134 of the Senate Standing Orders to consider the Election laws (amendment) Bill, 2017.

The Committees have ten (10) days to consider the Bills and present its report to Houses hence the need for Members to take note of the limited timelines.

The Chairs emphasized on the importance of public participation as enshrined in the constitution in the process and agreed to give a lot of time to the public to give their views to the Committee.

MIN.NO. JSSCEL/03/2017

CONSIDERATION OF THE COMMITTEE PROGRAMME

(a) Programme

The meeting considered the proposed programme and adopted is as tabulated below-

NO.	ITEM	ACTIVITY	TIMELINES
1.	First joint sitting of the two Committees	To draw a road map for the process	Saturday, 30 th September, 2017
2.	Public Participation	Publication of advert for public participation	Sunday, 1 st October, 2017
3.	Public participation	Public hearing	Tuesday 3 rd to Thursday 5 th October, 2017
4.	Report of the Committees	Report writing retreat Reviewing of the received memoranda Adoption of the report	Friday, 6 th to Monday, 9 th October, 2017
5.	Tabling of the report in both Houses of Parliament	Tabling of the report	Tuesday, 10 th October, 2017

(b) List of Stakeholders

The meeting reviewed the list of proposed stakeholders and resolved that apart from the general public, the following stakeholders be invited to give their views:-

A. Business Community

1. Kenya Private Sector Alliance (KEPSA)
2. Mkenya Daima
3. Kenya National Chamber of Commerce and Industry (KNCCI)
4. Kenya Association of Manufactures (KAM)
5. Kenya Horticulture Association
6. Nairobi business community
7. Matatu Owners Association
8. Jua Kali Association
9. Association of Kenya Tea Farmers
10. Kenya Livestock Marketing Council

B. Civil Society

11. Centre for Multi-Party Democracy (CMD)
12. Kenya Human Rights Commission (KHRC)
13. Federation of International Women Lawyers (FIDA)
14. International Commission of Jurists (ICJ)
15. Katiba Institute
16. Kituo cha Sheria
17. Article 19
18. The Institute of Social Accountability (Tisa)
19. East African Centre for Human Rights (EACHR)
20. Society for International Development (SID)
21. Transparency international
22. Elections Observations Group (ELOG)
23. Electoral institute of East and Southern Africa
24. Kura Yangu Sauti Yangu
25. Youth Council of Kenya
26. Diaspora
27. National Parliamentary Initiative
28. Association of Persons Living With Disabilities
29. Maendeleo Ya Wanawake

- 30. League of Women Voters
- 31. Law Society of Kenya
- 32. AFRICOG
- 33. Other interested civil society organization

C. Religious Groups

- 34. National Council of Churches of Kenya (NCCCK)
- 35. Supreme Council of Kenya Muslims (Supkem)
- 36. Kenya Episcopal Conference
- 37. Kenya Evangelical Alliance
- 38. Hindu Council
- 39. Other religious groups

D. Coalition/ Political Parties and Related Institutions

- 40. The Registrar of Political Parties
- 41. Political Parties Liaison Committee
- 42. Political Parties Disputes Tribunal
- 43. Judiciary Committee on Elections
- 44. Jubilee Party
- 45. NASA Coalition

E. County Governments

- 46. Council of Governors (CoG)
- 47. County Assemblies Forum (CAF)

F. Media

- 48. Editor's Guild
- 49. Media Council
- 50. Media Owners Association
- 51. Other interested media entities

G. Independent Commissions and Offices

- 52. The Kenya Law Reform Commission
- 53. Central Organization of Trade Unions (COTU)
- 54. The National Gender and Equality Commission (NGEC)
- 55. Kenya National Commission on Human Rights (KNCHR)
- 56. Federation of Kenya Employees (FKE)

- 57. Commission on Administrative Justice (CAJ)
- 58. National Council of Persons with Disability
- 59. Independent Electoral Boundaries Commission (IEBC)
- 60. Ethics and Anti-Corruption Commission

(c) Newspaper Advertisement

The meeting also considered the draft advertisement for the public hearing and it resolved as follows-

- (i) That the newspapers advert inviting all interested Kenyans to submit memoranda, be placed in at least two daily newspapers for the following day, Sunday 1st October, 2017.
- (ii) That key stakeholders be invited to appear before the Joint Sitting to submit their views on the Bills from Tuesday, 3rd October, 2017 to Thursday, 5th October, 2017.

MIN.NO. JSSCEL/04/2017

ANY OTHER BUSINESS

(a) Report writing Retreat

Members resolved to retreat for report writing from Friday, 6th October, 2017 to Monday, 9th October, 2017 and present the report for tabling on Tuesday, 10th October 2017. Check into the retreat venue would be on Friday evening.

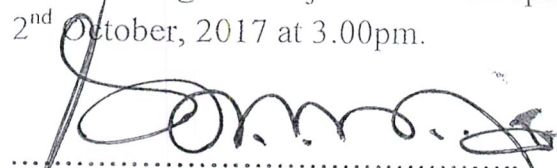
(b) Media briefing

The meeting further agreed on the need to brief the media on a daily basis to keep Kenyans up to date on activities of the Joint Sitting.


MIN.NO. JSSCEL/05/2017

DATE OF THE NEXT MEETING

The meeting was adjourned at 1.00pm. The date of the next meeting would be Monday, 2nd October, 2017 at 3.00pm.



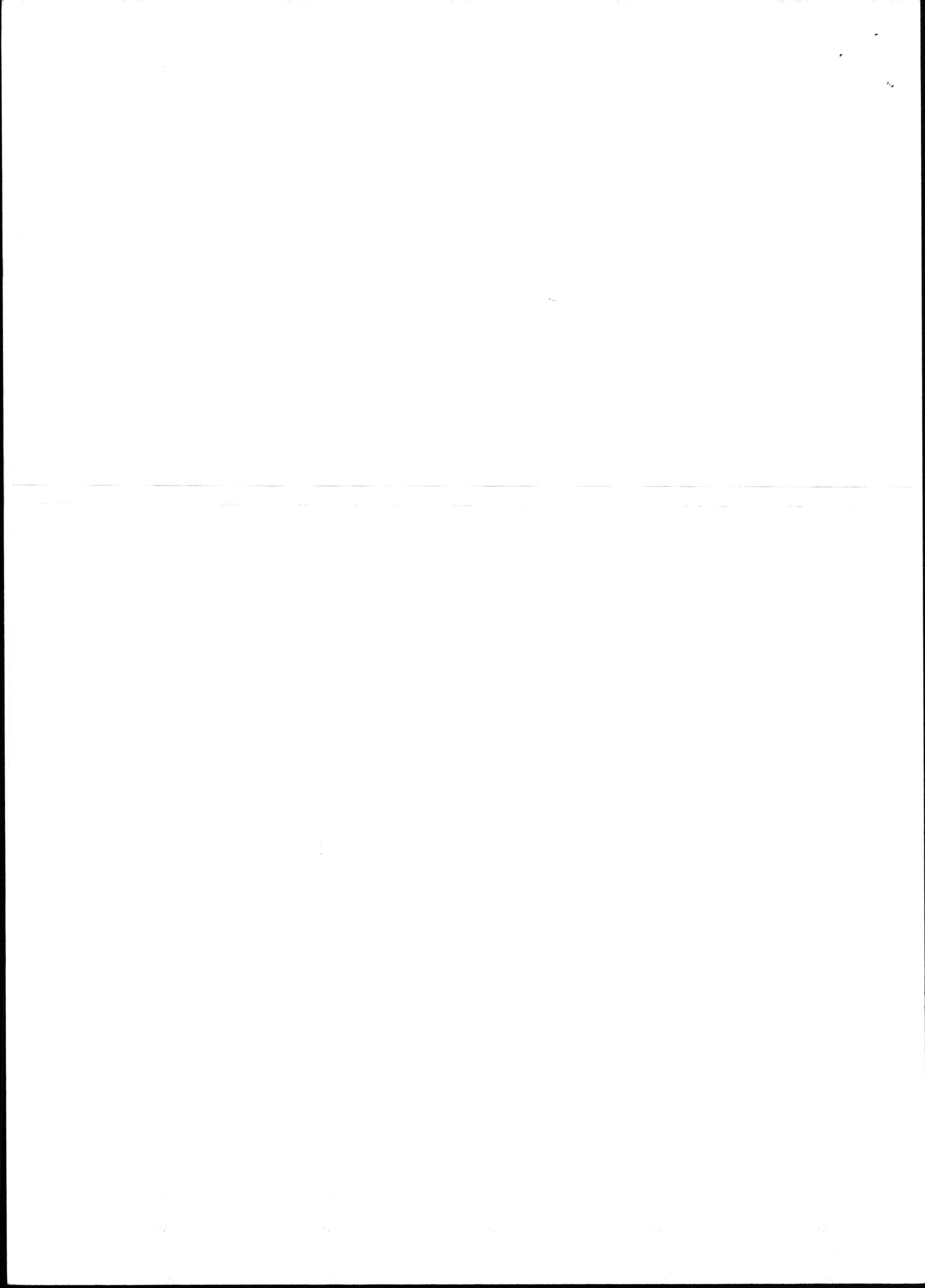
HON. WILLIAM CHEPTUMO, MP.
CO-CHAIRPERSON.



SEN. FATUMA ADAN DULLO, MP
CO-CHAIRPERSON/ DEPUTY MAJORITY
LEADER.

DATE: 10/10/2017

DATE: 10/10/2017





REPUBLIC OF KENYA

TWELFTH PARLIAMENT- (FIRST SESSION)
THE NATIONAL ASSEMBLY

COMMUNICATION

ON WHETHER THE ELECTION LAWS (AMENDMENT) BILL, 2017 (NATIONAL ASSEMBLY BILLS NO. 39) IS A BILL CONCERNING COUNTY GOVERNMENTS

Honourable Members, a question has been raised this afternoon, in my office, with regard to whether the Election Laws (Amendment) Bill, 2017 (National Assembly Bills No. 39) is a Bill concerning county governments and whether the Bill will be transmitted to the Senate for concurrence if passed by this House.

Honourable Members, Article 110 of the Constitution defines a Bill concerning county government and outlines the procedure applicable whenever a question arises as to whether a Bill concerns County governments. Under Article 110(1) a Bill concerning county governments is defined as follows, and I quote—

“(1) In this Constitution, “a Bill concerning county government” means—

- (a) a Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule;*
- (b) a Bill relating to the election of members of a county assembly or a county executive; and*
- (c) a Bill referred to in Chapter Twelve affecting the finances of county governments.”*

Further, Hon. Members, Article 110(3) provides as follows, with regard to any questions on the issue, and I quote—

“(3) Before either House considers a Bill, the Speakers of the National Assembly and the Senate shall jointly resolve any question as to whether it is a Bill concerning counties, and, if it is, whether it is a special or an ordinary Bill.”

Honourable Members, Consideration of a Bill happens at any second reading onwards, and the Question may arise at anytime. In this regard, I wish to inform the House that I have this afternoon consulted with the Speaker of the Senate on the question raised with regard to the Election Laws (Amendment) Bill, 2017. Accordingly, Hon. Members, pursuant to the provisions of Article 110(3) of the Constitution and in answer to the question raised, the Speaker of the Senate and I have jointly determined that the Election Laws (Amendment) Bill, 2017 (National Assembly Bills No. 39) is a Bill concerning county governments. Members will note that the Bill seeks to amend several statutes, among them the Elections Act, 2011 which makes the Bill fall squarely within the definition set out at Article 110(1)(b) to the extent that it relates to *“the election of members of a county assembly”*. If passed by this House, the Bill shall be forwarded to the Senate for consideration.

The House is guided accordingly.

I Thank you!

THE HON. JUSTIN B. N. MUTURI, E.G.H, MP
SPEAKER OF THE NATIONAL ASSEMBLY

Thursday, 28th September, 2017

REPUBLIC OF KENYA



**NATIONAL ASSEMBLY
TWELFTH PARLIAMENT – FIRST SESSION**

In the Matters of consideration by the National Assembly –

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

SUBMISSION OF MEMORANDA

Article 118(1)(b) of the Constitution provides that, "*Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees*". Standing Order 127(3) and (5(A)) states that, "*the Departmental Committee to which a Bill is committed shall facilitate public participation and shall take into account views and recommendations of the public when the Committee makes its report to the House*".

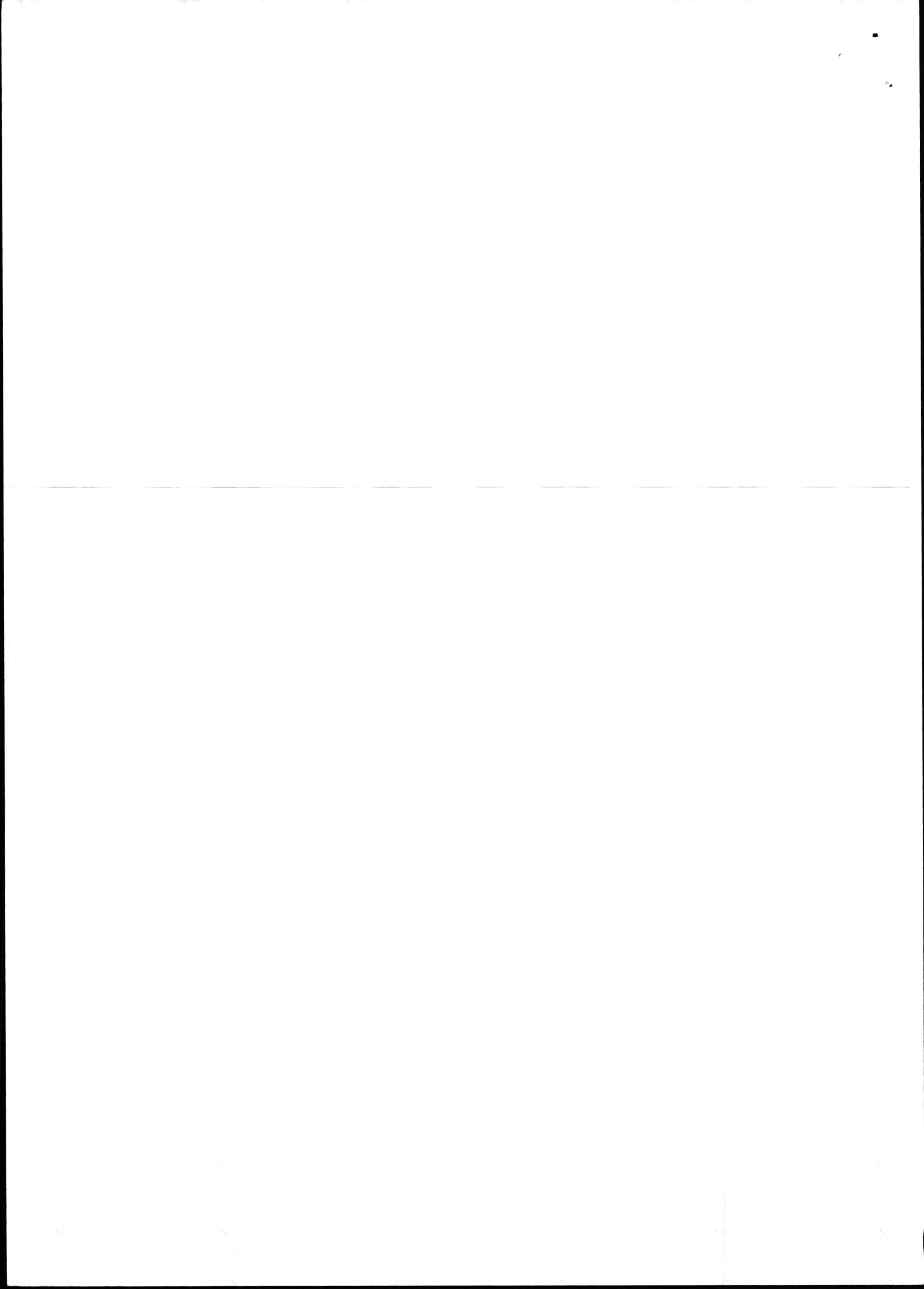
The Election Offences (Amendment) Bill (National Assembly Bill No. 38 of 2017) seeks to amend section 14 of the Election Offences Act, 2016 to ensure that the section conforms to Article 35 of the Constitution. The Bill seeks to delete subsection (2) of section 14 which limits the right of access to information held by the State as specified in that Article during the election period.

The Election Laws (Amendment) Bill National Assembly Bill No. 39 of 2017 seeks to amend the Independent Electoral and Boundaries Commission Act 2011; the Elections Act, 2011; and the Elections Offences Act, 2016 to provide for the proper conduct of the affairs and business of the Independent Electoral and Boundaries Commission and for the effective management of elections.

Pursuant to Standing Order 127(2), the House established a Select Committee on the Election Laws, 2017 to examine and undertake public participation on the Election Bills. The two Bills have undergone First Reading pursuant to Standing Order 127(1) and are now committed to the Select Committee on Election Laws for consideration and thereafter report to the House.

Pursuant to Article 118(1)(b) and Standing Order 127(3), the Committee invites members of the Public to submit any representations they may have on the said Bills. The representations may be forwarded to the Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi; hand-delivered to the Office of the Clerk, Main Parliament Buildings, Nairobi; or emailed to clerk@parliament.go.ke; to be received on or before Thursday 5th October, 2017 at 5.00 pm.

MICHAEL R. SIALAI, EBS
CLERK OF THE NATIONAL ASSEMBLY



REPUBLIC OF KENYA



TWELFTH PARLIAMENT

PUBLIC HEARINGS/ RECEIPT OF MEMORANDA

The Election Laws (Amendment) Bill, National Assembly Bills No. 39 of 2017

The Election Laws (Amendment) Bill, Senate Bills No. 3 of 2017

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

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

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

In this respect, pursuant to the provisions of Article 118(1)(b) of the Constitution and standing order 127 of the National Assembly Standing Orders and standing order 134 of the Senate Standing Orders, respectively, the Select Committees hereby invite interested members of the public and organizations to submit any representations that they may have on the Bills. In addition, Parliament has invited representations from the Judiciary, Law Society of Kenya, religious groups, civil society organizations, members of the business community (formal and informal sector), information communication and technology organizations, the media, political parties and related institutions, county governments, the Independent Electoral and Boundaries Commission, among others.

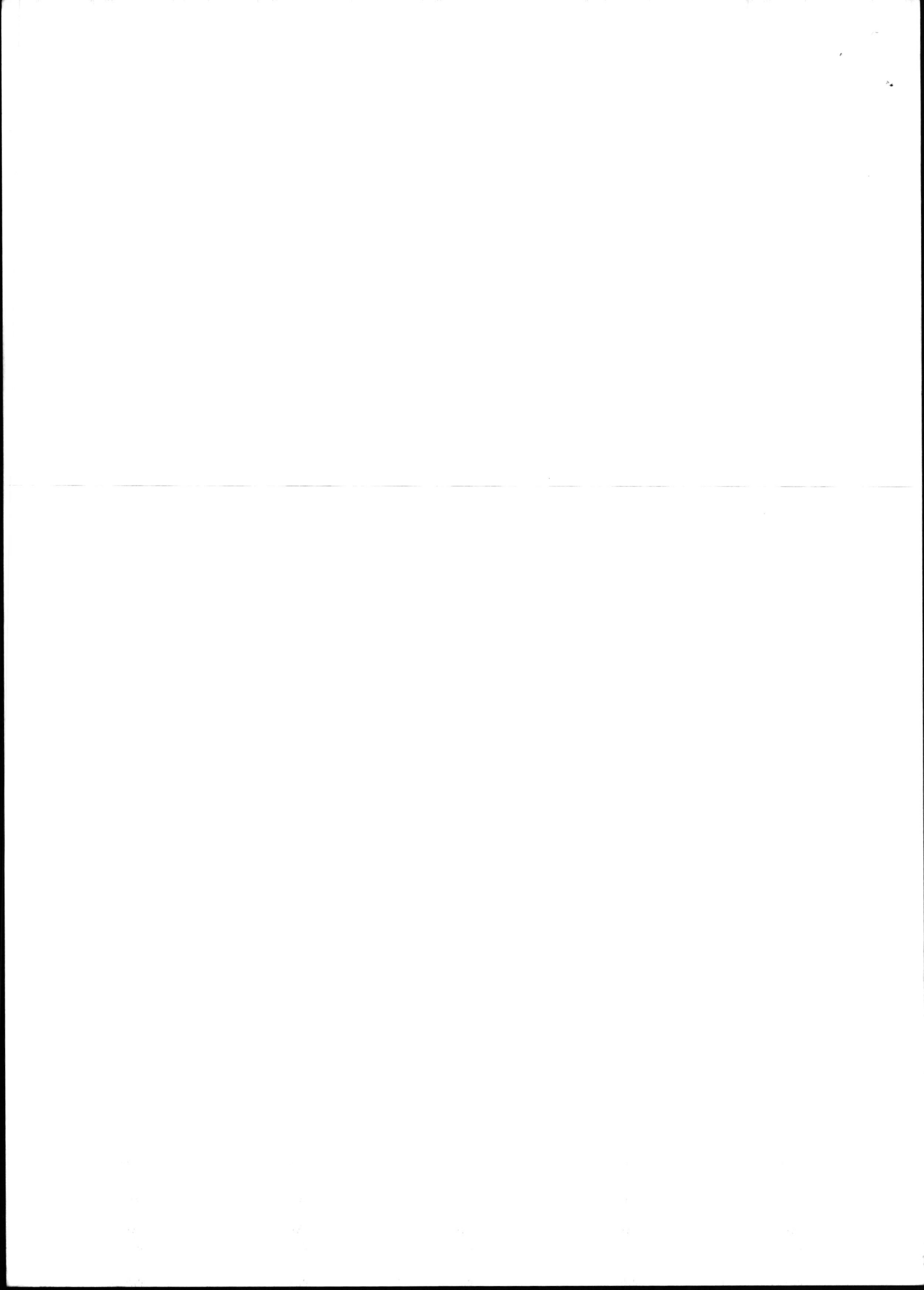
The representations may be made orally or through submission of written memoranda in the following manner:-

1. Public Hearings shall be held from Tuesday, 3rd October, 2017 to Thursday, 5th October, 2017 starting from 9:00 a.m. at the Mini Chamber, First Floor, County Hall, Parliament Buildings, Nairobi; or
2. Written Memoranda may be forwarded to the Clerk of the National Assembly or 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 National Assembly, or the Office of the Clerk of the Senate/Secretary, Parliamentary Service Commission, First Floor, Main Parliament Buildings, Nairobi, or emailed to clerk@parliament.go.ke or cSenate@parliament.go.ke, to be received on or before Thursday, 5th October, 2017.

The Bills may be found on the Parliament website at <http://www.parliament.go.ke>.

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

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



REPUBLIC OF KENYA



TWELFTH PARLIAMENT

THE NATIONAL ASSEMBLY

(FIRST SESSION)

NOTICE OF MOTION – ESTABLISHMENT OF A SELECT COMMITTEE ON ELECTION-RELATED LAWS

(Leader of the Majority Party)

Hon. Speaker, I beg to give notice of the following motion-

THAT, aware that the country is still in an election cycle, arising out of the requirement for a fresh Presidential Election in October, 2017; further aware that there is need to legislate on and address certain legal lacunas and in compliance with judicial decisions asking Parliament to legislature on certain matters to ensure that the elections conform with the provisions of Article 81 of the Constitution on general principles for the electoral system; noting that such election-related matters would ordinarily require consideration by the relevant Committee of the House which is yet to be established; further noting the limited period of time before the date of the said fresh election; cognizant of the urgent need to consider and conclude with all matters relating to the elections to allow the Independent Electoral and Boundaries Commission ample time to implement any changes related to the review of the election-related laws; **NOW THEREFORE**, pursuant to the provisions of Standing Order 127(2), this House resolves -

- a) to establish a Select Committee be known as the *Select Committee on the Election Laws, 2017* comprising of not more than fifteen Members, to examine and undertake public participation on the Election

Laws (Amendment) Bill, (National Assembly Bill No.39 of 2017) and any other related Bills;

- b) that, the Committee comprise of the following Members-
- (i) The Hon. William Cheptumo Kipkiror, MP- Chairperson
 - (ii) The Hon. Gladys Jepkosgei-Boss Shollei, MP
 - (iii) The Hon. Isaac Waihenya Ndirangu, MP
 - (iv) The Hon. Ali Wario, MP
 - (v) The Hon. Jennifer Shamalla, MP
 - (vi) The Hon. Adan Haji Yusuf, MP
 - (vii) The Hon. George Gitonga Murugara, MP
 - (viii) The Hon. Stanley Muthama, MP
 - (ix) The Hon. Alice Muthoni Wahome, MP
- c) that, the quorum of the Committee be the Chairperson and four other Members; and,
- d) that, the Committee considers the matters under its mandate and reports to the Houses on or before Tuesday, October 10, 2017.

The Hon. Aden Duale, EGH, MP

Leader of the Majority Party

September 27, 2017