

REPUBLIC OF KENYA

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by the Co-Chairperson of
the Committee.
(Sen. Adan Duino)*



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PARLIAMENT OF KENYA

THE SENATE

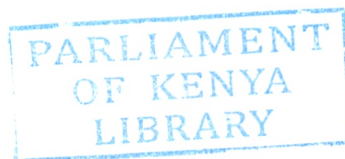
TWELFTH PARLIAMENT
(FIRST SESSION)

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THE SELECT COMMITTEE ON THE ELECTION LAWS (AMENDMENT
BILL), 2017

A REPORT ON THE CONSIDERATION OF THE ELECTION LAWS
(AMENDMENT) BILL, (SENATE BILLS NO. 3 OF 2017)

VOLUME 1



Clerks Chambers'
Parliament Buildings
NAIROBI

October, 2017

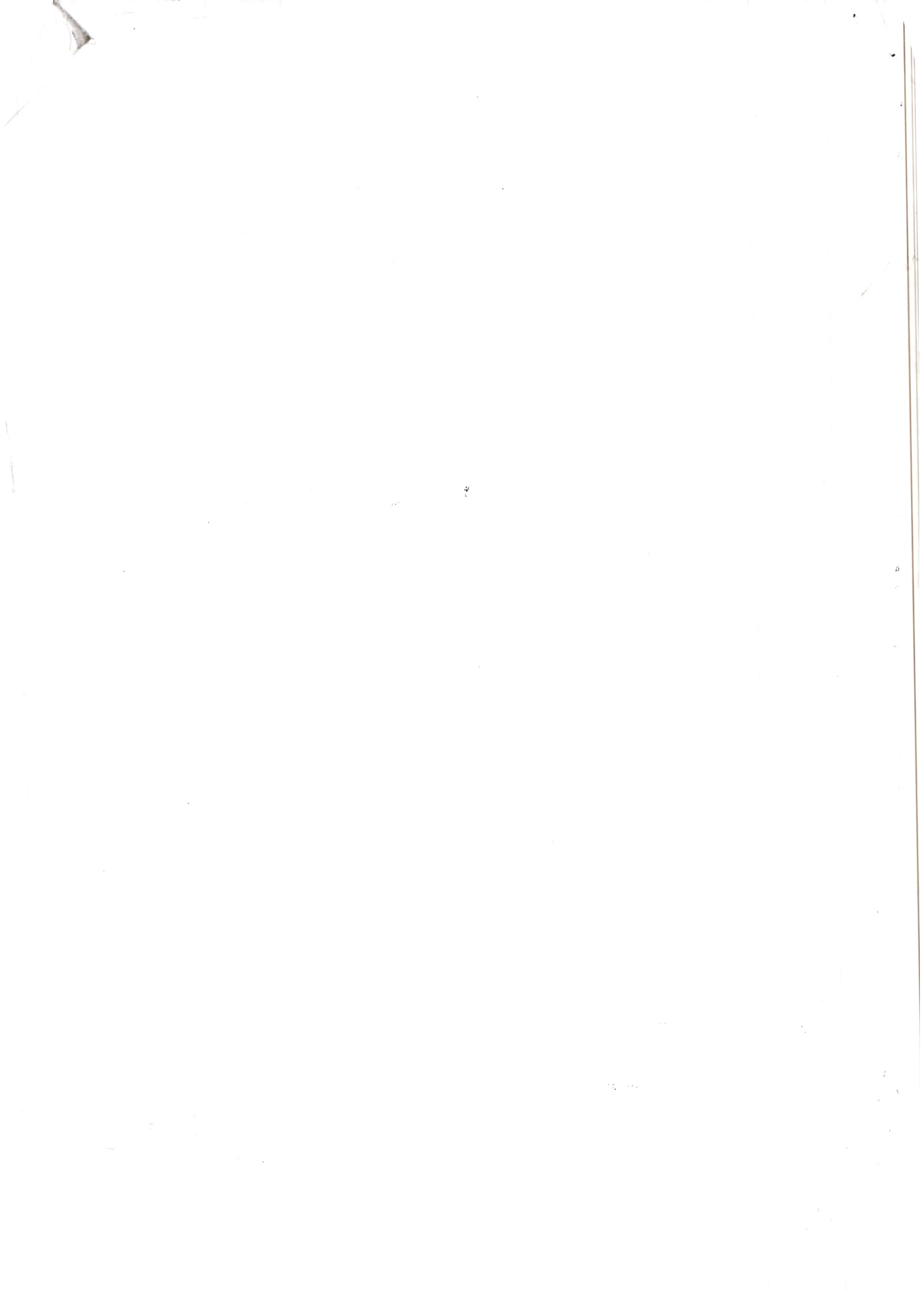


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VOLUME II

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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
CMD	Centre for Multi- Party Democracy
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
NCKK	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 Senators will recall that on 28th September, 2017, the Senate approved a Motion that established a Select Committee on the Election Laws (Amendment) Bill, 2017 pursuant to Standing Order 134(3) to deliberate on the Election Laws (Amendment) Bill, Senate Bills No. 3 of 2017.

The Bill was read a first time in the Senate on 28th September, 2017 and, pursuant to Standing Order 130 it stood committed to the Select Committee on the Election Laws (Amendment) Bill, 2017 for consideration and public participation.

Mandate of the Select Committee on the Election Laws (Amendment Bill), 2017

The Select Committee on the Election Laws (Amendment) Bill, 2017 is mandated to examine and undertake public participation on the Election Laws (Amendment) Bill, (Senate Bills No. 3 of 2017) and any other related Bills and report to the House on or before Tuesday, 10th October, 2017.

Joint Sitting with the National Assembly Select Committee on Election Laws, 2017

In a sitting held on 30th September, 2017, the Select Committee resolved to hold joint sittings with the National Assembly Select Committee on Election Laws, 2017. Standing Order 218 of the Senate Standing Orders and Standing Order 202A of the National Assembly 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 Committees of the National Assembly and the Senate on the Election Laws (Amendment) Bill, 2017, 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, invited submissions from the public and stakeholders in an advertisement in the Daily Nation and Standard Newspapers dated 1st October 2017

(Annex 8). 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 called for submission of written memoranda from the public and stakeholders between 3rd October 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 working retreat which provided the opportunity to consider the submissions of the public and stakeholders and to further draft, consider and approve its Report.

Acknowledgment


The Select Committee on the Election Laws (Amendment) Bill, 2017 wishes to thank the Offices of the Speaker and the Clerk of the Senate for the support extended to it during the consideration of this critical Bill especially in the conduct of public hearings and preparation of this report.

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

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

Mr. Speaker Sir,

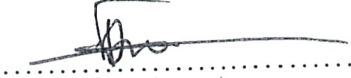
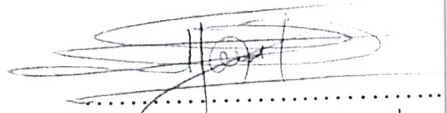
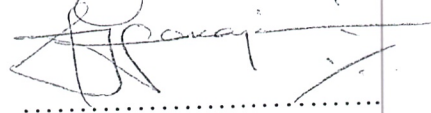
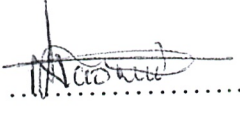
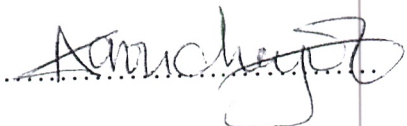
It is now our pleasant duty, pursuant to Standing Order 203, to present the Report of the Select Committee on the Election Laws (Amendment) Bill, 2017 on the consideration of the Election Laws (Amendment) Bill, Senate Bills No. 3 of 2017.

Signed.......... Date 10/10/2017.....

SEN. FATUMA DULLO, MP & DEPUTY SENATE MAJORITY LEADER
CHAIRPERSON

**ADOPTION OF THE REPORT OF THE SELECT COMMITTEE ON THE
ELECTION LAWS (AMENDMENT) BILL, 2017**

**We, the undersigned Members of the Select Committee on the Election Laws
(Amendment) Bill, 2017, do hereby append our signatures to adopt the Report-**

NAME		SIGNATURE
Sen. Fatuma Adan Dullo, MP Deputy Senate Majority Leader	Chairperson	
Sen. Paul Kimani Wamatangi, MP Vice-Chairperson	Member	
Sen. Johnson Arthur Sakaja, MP	Member	
Sen. Naomi Jillo Waqo, MP	Member	
Sen. Aaron Cheruiyot, MP	Member	

CHAPTER ONE

INTRODUCTION

1.1. Background

1. The Election Laws (Amendment) Bill (Senate Bill No.3 of 2017) sponsored by Sen. Fatuma Dullo, MP (Deputy Senate Majority Leader) was published on 28th September, 2017 and was first read in the Senate on 28th September, 2017.
2. On 28th September, 2017, the Senate resolved to establish a Select Committee to be known as the Select Committee on the Election Laws (Amendment) Bill 2017 to examine and undertake public participation on the Election Laws (Amendment) Bill, Senate Bills No. 3 of 2017. The Motion was as follows-

THE ELECTION LAWS (AMENDMENT) BILL (SENATE BILLS NO.3 OF 2017)

(The Senate Majority Leader)

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 134 (3), (4), (5) and Standing Order 136 of the Senate, the Senate resolves –

- (a) *to establish a Select Committee to be known as the Select Committee on the Election Laws (Amendment Bill) 2017 comprising of not more than nine Senators;*

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 134 (3), (4), (5) and Standing Order 136 of the Senate, the Senate resolves –*

*(a) to establish a Select Committee to be known as the **Select Committee on the Election Laws (Amendment Bill) 2017** comprising of not more than nine Senators;*

(b) that, the following Senators be appointed to the Select Committee on the Election Laws (Amendment) Bill (Senate Bills No. 3 of 2017);

- 1. Sen. Fatuma Adan Dullo;*
- 2. Sen. Paul Kimani Wamatangi;*
- 3. Sen. Johnson Arthur Sakaja;*
- 4. Sen. Naomi Jillo Waqo; and*
- 5. Sen. Aaron Cheruiyot.*

(c) that, the Election Laws (Amendment) Bill (Senate Bills No. 3 of 2017) be committed to the Select Committee on the Election Laws (Amendment Bill) 2017;

(d) that, the Committee considers the Election Laws (Amendment) Bill (Senate Bills No. 3 of 2017) and reports to the Senate on or before Tuesday, October 10, 2017.

5. After the Bill was read a first time in the Senate on 28th September, 2017, it stood committed to the Select Committee on Election Laws (Amendment) Bill, 2017 pursuant to Standing Order 130, for facilitation of public participation.

6. On 29th September, 2017, Sen. Fatuma Dullo, MP (Deputy Senate Majority Leader) wrote to the Speaker of the Senate requesting for a joint sitting with the Select Committee on Election Laws, 2017 of the National Assembly

noting that the two Select Committees have a similar mandate (*Annex 6*). On the same day the Speaker of the Senate approved the request (*Annex 7*).

7. Following a resolution to hold a Joint Sitting with the Select Committee on Election Laws, 2017 of the National Assembly, the Select Committees of the Senate and the National Assembly on the Election Laws (Amendment) Bill, 2017, pursuant to Article 118 of the Constitution and Standing Order 134 of the Senate Standing Orders 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 1st October 2017 (*Annex 8*).
8. The Select Committees of the Senate and the National Assembly 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)

9. The former Constitution had provisions on the manner in which elections should be conducted in Kenya. In particular, section 41 of the Constitution 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.
10. 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 was never entrenched into law.

11. In 2008, following the post-election violence, there were negotiations for a brokered settlement which gave rise to 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.
12. 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.
13. Following the promulgation of the new Constitution, 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 Independent Electoral and Boundaries Commission 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.
14. 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 the 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.

15. 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 Bills

16. The Elections Laws (Amendment) Bills, 2017 seeks to amend the Independent Electoral and Boundaries Commission Act No. 9 of 2011, the Elections Act No. 24 of 2011 and the Election Offences Act No. 37 of 2016 to provide for the proper conduct of the affairs and business of the Independent Electoral and Boundaries Commission, and for effective management of elections. In particular, the Bills seeks to amend various sections of the Elections Related laws as follows-

1.4 Amendments to the IEBC Act, 2011

Definition of the term "chairperson"

17. 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

18. 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 the qualification 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

19. 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

20. 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.

Mode of transmission of results

21. Clause 6 of the Bill seeks to amend section 39 of the Elections Act, 2011 to provide for among other things for 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

22. 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

23. 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

24. 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

25. 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

26. 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

2.1 Introduction

27. 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 public attendance schedule (*Annex 4*) and the written memoranda are attached at *Annex 9*. The Select Committees took into consideration proposals from stakeholders and individual members of the public on specific clauses of the Bills, as follows-

2.2 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 Council supported the amendment as it 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.

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-chairperson or member not having been selected and appointed as chairman under the Constitution can legally purport to exercise by statutory authority derived from the proposed legislation any constitutional functions and powers of the office of the chairman except upon an amendment of the Constitution. Parliament cannot purport to amend the Constitution by conferring the obligation to discharge a constitutional mandate on a member of the committee.
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 Electoral and Boundaries Commission by conflating the qualifications and powers of the chairperson and the members of the Independent Electoral and Boundaries Commission, contrary to the constitutional requirements on the same.
31. The Chalvins Law Consulting Group averred 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 Independent Electoral and Boundaries Commission being one of them.

(b) Submissions from individual members of the public

35. Zeth Ouma Omollo 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 Moriasi Nyandika 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. Njimu wa Kaiya and Ngiri wa Wangui opposed the amendment on grounds that the definition of a chairperson conflates the meaning of chairperson and member.
40. Ms. Vellah Kadeiza 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 on 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 chairman to the vice chair and other members who have not been selected or appointed in accordance with the constitutional requirement. The Law Society of Kenya in its submission recommended that the amendment can only be affected 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 Multiparty 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 Kenya (NARC) 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 chair of Independent Electoral and Boundaries Commission and opens it up to all other professions.

53. Mr. Elijah Ole Metiang from Kajiado County supports the proposed amendment 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-chairperson 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 management 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. Njimu wa Kaiya and Ngiri wa 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. However, 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 Law Society of Kenya 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 IEBC 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 Multi-Party 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.*

72. The 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 decisions 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 chair has an obligation to ensure that the Commission make 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.
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.

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 found that the section was declared unconstitutional in *Peter Solomon Gichira vs Independent Electoral and Boundaries Commission and another*¹
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 Certified Public Accountants of Kenya (ICPAK), Chalvins Law Consulting, and the Office of the Registrar of Political Parties opposed the amendment.
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 were 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

¹ Petition No.243 of 2017] eKLR

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.

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. Njimu wa Kaiya and Ngiri wa 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. A contrary opinion was held by several stakeholders who opposed the amendment in Clause 6 of the Bill. Specifically, the Institute of Certified Public Accountants of Kenya submitted that the Clause amends the Principles 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 Institute of Certified 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.
92. 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.
93. 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.
94. 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

95. 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.
96. 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.
97. Njimu wa Kaiya and Ngiri wa 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.
98. Mr. Kenneth Mavale the opposed the amendment stating that we should stick to electronic transmission and that manual system should be secondary to electronic.
99. Mr. Michael Odiembo opposed the proposed amendments as, in his opinion it gives room for fraud through alteration of results.
100. Hon. Kalembe Ndile observed that the manual system is a better system than the use of technology due to the systemic failure of technology.

(1) Clause 6 (b): Where there is a discrepancy between electronically transmitted and manually transmitted results (39 1C and 1D)

(a) Submissions from institutions and organisations

101. 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.

102. 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, which is liable to punishment as stipulated under the Election Offences Act, 2016.

103. 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

104. 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) and the Independent Electoral and Boundaries Commission 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.

105. 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.

106. 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.

107. He further noted that 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 Independent Electoral and Boundaries Commission 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.
108. 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 National Tallying Center 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.
109. 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.
110. 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.

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

(a) Submissions from institutions and organisations

111. 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.

112. 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 Independent Electoral and Boundaries Commission must be obligated to operate at the most functional level.

(b) Submissions from individual members of the public

113. 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.

114. 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.

(3) Clause 6 (b): Live-streaming of results (391F)

(a) Submissions from institutions and organisations

115. 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.

116. The Commission proposed to amend Section 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.”

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

118. 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.

119. 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.

120. 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 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.

2.2.3 Clause 7: Use of Technology

(a) Submissions from institutions and organisations

121. 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.

122. 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*.

123. 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

124. Njimu wa Kaiya and Ngiri wa Wangui opposed the amendment on the grounds that the proposed amendment to section 44 will make it possible to hold sham elections.

125. 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

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

127. 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.

128. 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, then 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.

129. Further, the Authority submitted that the Independent Electoral and Boundaries Commission is dependent 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.

130. 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 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.

131. 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

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

133. 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.

134. 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

135. In support of the amendment, the Jubilee Party submitted that , on the issue of lack of clarity in section 83 the Jubilee Party submitted that 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 so as 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.

136. 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.
137. 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.
138. 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.
139. Kenya ICT Action Network (KICTAnet) proposed 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.
140. 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.
141. The Institute for Social Accountability (TISA) proposed that clause 9(b) be deleted because Section 83 provides that no election shall be declared to be

void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the results of the election.

142. 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.
143. 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.
144. 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*
145. Mr. David Wati proposed that clause 9 be deleted as it will allow for the use of illegal materials including foolscaps or cardboards.
146. 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.
147. 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).

148. 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.
149. Njimu wa Kaiya and Ngiri wa 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.
150. 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

151. 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; as well as 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.
152. 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.
153. 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.
154. 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.

155. 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.

156. 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.

157. 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.”

158. The Law Society of Kenya proposed that clause 10 be deleted as the proposed section 86A of the Elections Act purports to say who can and who cannot run in a fresh election in the event a presidential election is nullified by the Supreme Court. The problem here is that there is no constitutional basis for purporting to restrict who can and who cannot run in the fresh election.

159. Further, the Law Society of Kenya 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.

160. 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 as to who can participate.

(b) Submissions from individual members of the public

161. While supporting the amendment, Mr. Eliud Kinuthia proposed that the Committee should provide for the amendment to include circumstances such as absence, death and incapacitation of a candidate.

162. Mr. Edward Nyakeriga supports the amendments save that there is need to differentiate between a fresh, a repeat and a run-off election.

163. 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 *Bush v Gore*

164. 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.

165. Hon. Priscillah Nyokabi, Hon. Florence Kajuju and Hon. Samuel Gichigi 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.

166. Njimu wa Kaiya and Ngiri wa 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

167. 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.

168. The Independent Electoral and Boundaries Commission disagreed with the amendment proposed on the grounds that this proposal places an obligation on to the Returning Officers and Presiding Officers to sign, completely fill election materials including statutory forms and lays criminal liability in failure thereof. 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.

169. 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.

170. 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

171. 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.

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

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

174. 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.

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

176. Hon. Kalembe Ndile observed that the penalty under clause should be enhanced.

177. Njimu wa Kaiya and Ngiri wa 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.

178. Mr. Charles Tabu Okumu of the Bunge La Wazalendo opposed the amendment citing that severe punishment proposed on electoral officials who refuse to sign election declaration result forms was political mischief.

2.4 General Submissions on the Bill

2.4.1 Comments on the use of public resources

179. 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*.

2.4.2 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 wilful 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. Kiiwa 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, to him, 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 will neither appear nor present memorandum to the Committee. The International Commission of Jurists informed the Joint Committee that the unilateral decisions taken by Parliament amend the laws governing the elections in the middle of the Electoral Process is in not well conceived or in good faith but in 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, the 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 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.

2.4.3 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 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, temperatures were high and they should be carried out in a bi-partisan process and other stakeholders 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 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 Orenge 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, Geoffrey

Mwaviso Muchawia, Janet Iminza Wanjohi, Mr. James Kipsang Ngetich, , Dr. Robert Kagiri Sandra Ochola , Marion Njoroge on behalf of Wazalendo Huru.

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 proposed 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 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 was allowed to conduct the fresh Presidential election after which there should be a national discourse on the relevant changes needed to 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 national interest 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, 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. Instead, dialogue between the two contesting political parties should be encouraged. He further averred 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, further, that there was no hurry in making the amendments.

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.

2.4.4 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 Independent 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 exposures , for example, the database of voters being leaked by insiders, creation of logic bombs(which are like computer viruses).
219. The Kenya Private Sector Alliance proposed to amend section 2 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. He 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 burden. in his opinion, the IEBC should further pay the two agents per polling station for the major parties or coalition to ensure a strengthened agent base as in a referendum;
223. Mr. David Ngumi observed that the electronic transmission cannot be a single measure of a successful election and further stated that the role of Parliament is to legislate and look at the gaps and correct them. The physical submission of Form 34A should also be submitted to the constituency tallying centre for

collation. The Independent Electoral and Boundaries Commission should also develop a logistic plan that can expedite and facilitate delivery

224. Mr. Kenneth Mavale proposed that the Committee should legislate on timelines within which results should be transmitted which 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, the server should be monitored by among other things human rights bodies and the police, media houses to give alert of results received and the declaration of results should be done after all the forms 34Bs are received and all party agents have signed form 34C.

(4) Legal Process

227. The Jubilee Reforms Lobby Group supports the proposed several legal and constitutional amendment 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 candidates 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, 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 30days judges should give their reasoned ruling;

- (i) Judges to identify persons responsible for irregularities and DPP should investigate such cases;
- (j) Supreme court judgment nullifying the presidential election should be subject to judicial review where false evidence was given, conflict of interest of a judge;;
- (k) Fresh election should be held within sixty days from the date of the judgment;
- (l) Article 138(4) be amended to prescribe a threshold of majority of votes.

228. Hon. Kalembe Ndile observed that there is need to review the powers of the Court so that it can order a recount.

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 president election decision at the Senate.

230. Apostle Joe Kamau believes that the three arms of Government 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 is 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 swearing in ceremony of a President-elect.

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

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

235. Mr. Nderitu Njoka, Chairperson of Maendeleo ya Wanaume, proposed that polling stations should not be in schools but may be public grounds. Also, he proposed that the voting age be lowered to sixteen (16) years.

236. Mr. Wanjohi Nyambu 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 among others 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 supports all amendments so as to 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. Vellah Kadeiza proposed consensus building by the two major political parties as a way forward.

2.5 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 Bill. The Committee was also conscientious of international best practices on electoral reforms in the review of the amendments.

244. With regard to the issues of the timing of the Bill, the Committee noted that the Supreme Court ruling pointed out irregularities in the election transmission process that have to be addressed before the next elections so as to avoid the same irregularities. The Committee pointed out that Parliament has a constitutional mandate to make laws, and an obligation to solve the current impasse and address the legal issues raised by the Supreme Court. Of note was that the Supreme Court averred 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 concern of the public on the reduced period of the publication of the Bill, the Select Committees observed that the Standing Orders of both Houses provides for this subject to the resolution of the House. Standing Order 120 of the National Assembly Standing Orders² on Publication 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 Orders³ 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. 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 Bill. These include:

² The National Assembly Standing Orders. (3rd Edition) As adopted by the National Assembly on 9th January, 2013 during the Fourth Session of the Tenth Parliament and amended on 15th June, 2017 during the Fifth Session of the Eleventh Parliament

³ The Senate Standing Orders. As adopted by the Senate on 14th June, 2017 pursuant to Article 124 of the Constitution and Standing Orders 248 and 249 of the Senate Standing Orders

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
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 (Amendment) Bill, 2017 made the observations and recommendations based on the deliberations of the Bill and stakeholder input as listed below-

3.1 Clause 2: 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

250. The Committee observed that 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 chairpersons 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. The vice-chairperson or a member of the Commission acts in the stead of the chair 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 that-

Delete the proposed definition of chairperson and substitution 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 Chairperson need not have similar qualifications as those of the Chairperson.

263. Further comparable Constitutional Commissions provide for higher qualifications for the Chairperson *vis a 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.

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

265. The Committee therefore recommends that-

Clause 3 (1) be deleted and retain as it appears in Section 6 of the Elections Act.

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

(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.

- (c) notwithstanding the qualifications in section 6(1) of the Elections Act , 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

267. The Committee observed that 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. 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 of the Bill 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 seeks 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.

274. 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.

275. 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

276. The Committee recommends that-

Amend clause 6—

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

- a. (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

277. 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

278. 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

279. The Committee therefore recommends that clause 7 of the Bill be retained.

3.7 Clause 8: Complementary Mechanism for Identification of Voters

280. 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

281. 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

282. The Committee 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

283. 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

284. The Committee observed that 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.

285. 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”.

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

287. 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

288. The Committee 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 election

289. 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

290. From the public participation exercise conducted various individuals and organisations highlighted that the proposed provision would limit 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—*

b. (a) *any elective public body or office established under this Constitution; or*

c. (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. (a) *to be registered as a voter;*

b. (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

291. The Committee therefore recommends that clause 10 be amended by deleting subsection (2) of the proposed new section 86A.

3.10 Clause 11: Failure or refusal to sign election results

292. 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

293. 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-

6. *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”.

294. 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.

295. 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.

Recommendation

296. 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”.