



KICTANET'S STAKEHOLDER PARTICIPATION ON THE ELECTION LAWS AMENDMENT BILL 2017

On the 29th September 2017 Parliament embarked on tabling the election laws amendment bill of 2017 which seeks according to some legislators, remedy or reduce the irregularities identified by the Supreme Court while nullifying the elections.

Among the amendments on the elections bill one the controversial amendments include the putting in place of a complimentary mechanism under section 44A. This is in line with the identification of voters ensuring that it is simple, accurate, verifiable and secure. This is as prescribed by the Supreme Court to have a complimentary system in case technology failed. This is in compliance of article 38 of the constitution.

An elaborate feature of the bill is that in the event that there will be a discrepancy with the electronically transmitted results the manual results shall prevail. Ultimately equalizing the manual system and the electronic system.

On the 2nd -5th October the Joint select committee of the National Assembly and Senate committees on Election Laws (Amendments) Bill 2017 put in place public participation from the different stakeholders to submit proposals towards the Elections Laws Bill before the President Assents to it, as The Constitution requires citizen participation a central part of Kenya's governance according to .Article 10(2)(a) that states "participation of the people" is one of our country's values and principles of governance, and Article 232(1)(d),instructs public servants to include citizens "in the process of policy making."

The Kenya ICT Action Network (KICTANet) was invited to participate and present a memorandum at the select committee meeting on Thursday 5th October in respect to the rule of law. As the authoritative ICT policy platform in the country, that focuses on how ICTs can be used effectively for a better society, which is achieved through bringing the stakeholders together, or crowdsourcing for ideas to monitor and suggest the best policy options that support ICT growth and development.

In the run-up to the August 2017 elections, KICTANet contributed to the Election process in a number of ways. In 2016, KICTANet contributed to a national discussion on election laws through the submission of a Memorandum on the Election law (Amendment) Bill) 2016 to the Senate Committee. Further, the Network made several recommendations among them the need for IEBC to develop a system that safeguards the integrity of the vote as well as efficiency of transmission.

During the August 8, 2017 elections, the Network also observed the use of ICT in areas such as the registration of voters, verification of voter details in the register, the use of online spaces for electioneering, election policy and legal processes, IEBC engagement with ICT community, deployment and implementation of the Kenya Integrated Elections Management Systems (KIEMS) in voter identification and in the transmission of results.

RECOMMENDATIONS TO THE COMMITTEE

- The use of technology in voter identification and transmission of results from the polling stations enhanced the efficiency of the election. It is therefore KICTAnet's position that since technology was already deployed on August 8, the spirit should be to enhance and move with it, as it is the present and the future.
- IEBC to develop a 100% voting system that will allow people to vote from the comfort of their homes and offices. Which will mean that there will be no need for long queues, people travelling to vote, and therefore no interruption of people's schedules. Upon voting, the results would be recorded, tallied and transmitted as soon as a voter casts their vote, similar to the Estonian model. The current KIEMS device is capable of a fully automated voting.
- Continued adoption of ICTs, by parliament reviewing the draft ICT Policy 2016 to enhance growth in the sector, through enacting the Data Protection Bill, 2012 and the Computer and Cybercrimes Bill, 2017, to guarantee the privacy of personal information collected in Kenya and the security of information systems in the country, respectively.

KICTAnet also developed and presented a memorandum which carefully considered the individual proposals in the Election Laws (Amendment) Bill, and made submissions on some of the clauses relating to technology.

	Current Clause in the Election Laws (Amendment) Bill, 2017	Proposed Amendment	Rationale and Justification
1	<p>Clause 6 (Amending Section 39 of the Elections Act, 2011)</p> <p>Section 39 of the Elections Act, 2011 is amended by—</p> <p>(a) Deleting subsection (1C) and substituting therefor the following new subsection—</p> <p>“(1C) For purposes of a presidential election, the Commission shall—</p> <p>(a) electronically and manually transmit the tabulated results of an election for the President from a polling station to the Constituency tallying centre and to the national tallying centre;</p>	<p>Delete Clause.</p> <p>Section 39(1C) should remain as it is currently:</p> <p>electronically transmit, in the prescribed form the tabulated results of an election for the President from a polling station to the Constituency tallying centre and to the national tallying centre;</p>	<ul style="list-style-type: none"> ● The Kriegler Commission proposed the use of technology to curb electoral fraud that has caused violence in past elections. ● The use of technology in elections ensures the efficiency, integrity, accountability, accuracy and credibility of the election, given the weaknesses of the manual system. ● A better approach would be to fortify the existing electronic transmission process by ensuring that all transmitted results (image or text) have a unique ID, and can be traced to the officer, the specific device, prescribed form, location, time and date they were entered. ● Also, penalties for officers who manipulate, or wilfully enter and transmit wrong results in the KEIMS kits should be introduced.

<p>(1D) Where there is a discrepancy between the electronically transmitted and manually transmitted results, the manually transmitted results shall prevail.</p>	<p>Delete Clauses to be introduced as 1D, 1E and 1F</p>	<ul style="list-style-type: none"> ● Krielglar Commission also recommended use of technology to improve efficiency ● Making the manual system superior to the electronic one allows for and endorses irregularities. This erodes the accountability, accuracy and verifiability of the process. ● As such, there is no incentive to strictly adhere to the law. For instance, an officer could feed the accurate result into the system but manually transmit a falsified result ● The KEIMS cures the risk of fraud. ● Undermining the electronic transmission, renders the other elements of the system redundant.
<p>(1E) Any failure to transmit or publish the election results in an electronic format shall not invalidate the result as announced and declared by the respective presiding and returning officers at the polling station and constituency tallying centre, respectively.</p>		
<p>(1F) The Commission shall, to facilitate public information, establish a mechanism for the live-streaming of results as announced at polling stations, and the results so streamed shall be for purposes of public information only and shall not be the basis for a declaration by the Commission</p>		

2	<p>Clause 7 (Amending Section 44 of the Elections Act, 2011)</p> <p>(a) Deleting subsection (5) and substituting therefor the following new subsection— “(5) The Commission shall, in consultation with the relevant agencies, institutions and stakeholders, make regulations for the better carrying into effect the provisions of this section.</p>	<p>Delete Clause 7.</p> <p>Section 44(5) should remain as is.</p>	<ul style="list-style-type: none"> ● Subsection 5 details the areas that require regulation. IEBC is required to consult with various stakeholders in the process of coming up with these regulations. It is through this consultation process that organizations such as KICTANet, which has in its membership experts in various fields in IT, can give their input on how to improve some areas for optimal performance. ● Constitutional bodies must carry out their functions in a transparent manner and in consultation with the public. This amendment undermines such transparency.
3	<p>Clause 7 (Amending Section 44 of the Elections Act, 2011)</p> <p>(b) Deleting subsection (6)</p>	<p>Delete Clause 7.</p> <p>Section 44(6) should remain as is:</p> <p>(6) Notwithstanding the provisions of section 109(3) and (4), the Commission shall prepare and submit to Parliament, the regulations required made under Subsection (4) within a period of thirty days from the date of commencement of this section.)</p>	<ul style="list-style-type: none"> ● Parliamentary scrutiny and oversight of regulations is an important check on the exercise of functions by the executive and independent commissions. ● This provision takes away the oversight role of Parliament.
4	<p>Clause 8 (Amending Section 44A of the Elections Act, 2011)</p>	<p>Notwithstanding the provisions of section 44, the Commission may put in place a complementary mechanism for</p>	<ul style="list-style-type: none"> ● Section 44A as it is provides for a complementary system for both identification of voters and

	<p>Notwithstanding the provisions of section 44, the Commission may put in place a complementary mechanism for identification of voters that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with provisions of Article 38 of the Constitution.</p>	<p>identification of voters and transmission of election results that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with provisions of Article 38 of the Constitution.</p>	<p>transmission of results. That aspect should be retained.</p> <ul style="list-style-type: none"> ● The complementary system should still be an electronic system.
5	<p>Clause 9 (Amending Section 83 of the Elections Act, 2011)</p> <p>The Elections Act, 2011 is amended in Section 83 by— (b) deleting the word “or” appearing immediately before the words “that the non-compliance” in the renumbered subsection (1) and substituting therefor the word “and”;</p>	<p>Delete Clause. Section 83 should remain as is:</p> <p>No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.</p>	<ul style="list-style-type: none"> ● Emphasis should be on adherence to the principles in the Constitution and applicable laws. ● The result of an election is the product of every decision taken throughout the electoral process. It follows therefore that contravening the law would inevitably affect the result. ● This Clause creates a loophole for fraudulent conduct and blatant disregard of the law with no recourse.

	<p>(c) inserting the following new subsection immediately after the renumbered subsection (1)—</p> <p>(2) Pursuant to section 72 of the Interpretations and General Provisions Act, a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirement of that form, as long as the deviation is not calculated to mislead”</p>	Delete Clause	<ul style="list-style-type: none"> • Lack of uniform forms fails to meet the constitutional requirement for a transparent and accountable electoral process
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6	<p>Proposal to Insert New Clause: Storage of Information</p>	<p>KICTANET proposes the following text - The Commission shall ensure that information collected during voter registration, voting and transmission of results is processed and stored in Kenya.</p>	<ul style="list-style-type: none"> ● As a nation, we should take very seriously the privacy of the information we collect from the citizenry. ● Data like biometric information should not be under the control of foreign agents, and access of such data should be restricted through a classification system. Someone with your biometric can plant them in a crime scene, use them for impersonation, steal information, etc. That is why in countries like Canada, biometric information can NOT be transported out of the country
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