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Memorandum on the Election Laws (Amendment) Bill, 2017

About TISA

The Institute for Social Accountability (TISA) is a civil society organization committed towards the achievement of sound policy and good governance in local development, to uplift livelihoods of, especially, the poor and marginalized in Kenya.

Background

Political background

The Kenyan Supreme Court on the 1st of September 2017, annulled the Presidential elections as conducted during the August 8 General Elections. Accordingly, Article 140 (3) provides that a fresh Presidential Elections shall be held within 60 days after the Supreme Court determines that the election of a President Elect is invalid.

In the aftermath of the Supreme Court ruling, the President made rather unfortunate remarks and referred to the Supreme Court Chief Justice Maraga and the majority bench that annulled the elections as wakora (crooks) and stated that he and the Jubilee elected leaders shall revisit the issue upon conclusion of the fresh elections. In efforts to affirm the Presidents unfortunate position, the Presidential Strategic Communication Unit, launch a social media attack on the Chief Justice and the majority bench judges, the respective researchers attached to them and civil society organizations known to support the judiciary in terms of technical capacity using the hashtag #WakoraNetwork. It is noteworthy, that majority of the members of both the Senate and the National Assembly were elected on a Jubilee ticket whose head is the President.

Unfortunately, the proposed amendments in this bill by Jubilee Parliamentarians are a reflection of the contempt by President and the Jubilee Party with regard to the Supreme Court ruling that nullified the Presidential elections.

Constitutional and legislative background

Kenyans enjoy a progressive democratic system of government that is embodied in the Constitution of Kenya 2010. Among the hallmarks of the Constitution is the recognition of the supremacy of the Constitution over the sovereignty of Parliament. Article 2 of the Constitution provides that the Constitution is the supreme law of the Republic and binds all persons and all State organs at both

levels of government. The principle of Separation of Powers is also a prominent feature of the Constitution, which provides for a system of checks and balances between the three arms of government which are to exercise their mandates independent of each other in the protection of the public good.

On matters of electoral management, the Independent Electoral Boundaries Commission (IEBC) is charged with the responsibility, among other, facilitate free and fair elections. Article 88 and 250 of the Constitution provides for the architecture to be observed in setting up Constitutional commissions such as IEBC, with article 88 providing for the establishment of the Independent Electoral Boundaries Commission (IEBC) and Article 250 (1) providing that independent commissions shall have a minimum of 3 and a maximum of 9 members and article 250 (2) providing for the distinction between the commission chair and the other members of a commission.

Article 81 of the Constitution provides for the general principles of electoral system with part (e) (v) providing that free and fair elections are those that are administered in an impartial, neutral, efficient, accurate and accountable manner. Article 86 provides for principles IEBC should observe during voting and states, that at every election, the Independent Electoral and Boundaries Commission shall ensure that (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent; (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

In compliance with, among other articles of the constitution, Article 86 of the Constitution a Bi-Partisan Joint Parliamentary Committee of the 11th Parliament made amendments to the election law geared towards enhancing the conduct of free and fair elections. The amendments sought to require the electoral commission to put in place a complementary mechanism for identification of voters and transmission of election results that is simple, accurate, verifiable, secure, accountable and transparent. The amendments included section 39 and 44 of the Elections Act which were amended to provide for the manner in which Presidential elections results would be declared and published after close of polling and the introduction of the use of technology in transmission of results (Electronic Transmission of Results). Regulation 79 of the Elections (General) Regulations as amended by L/N No. 72/2017 also introduced forms 34 A, B and C for the purposes for declaration of Presidential election results while regulation 83 was amended to introduce Regulation 83 (2) which provides that the Chairperson of the Commission shall tally and verify the results at the National Tallying Centre in compliance with the *Maina Kiai Case*. The Kenya Integrated Electoral Management System (KIEMS) introduced under section 44 further had a complementary manual system a position upheld by the court in *National Super Alliance (NASA) Kenya v The Independent Electoral and Boundaries Commission & 2 Others*. These reforms were introduced to ensure that technology limited to

Biometric Voter Registration (BVR), Electronic Voter Identification Devices (EVID) and Electronic Transmission of Results (RTS) while the casting of votes and vote counting was still manual.

Political and Constitutional background as an indicator of legislative intent

Legislative intent, is a principle in statutory interpretation that functions by placing the plain text of a statute within the context of drafting the statute to support interpretation of the literal meaning of the statute. In order to determine the intentions of Parliament, another principle of statutory interpretation is the mischief rule. Under this rule, courts in their analysis of statutes made by Parliament would reasonably ask themselves the mischief or the defect in existing laws the house sought to correct in the introduction of a new statute or an amendment of an existing one. Noteworthy, the court annulled the Presidential elections in the Presidential Petition No. 1 of 2017 because the above outlined Constitutional and election laws on the conduct of the Presidential elections were flouted. **Curiously, this amendment bill seeks to legitimise the illegalities and irregularities that the court found were not adhered to in the August 8 Presidential elections.**

Analysis of the substance of the Elections Laws (Amendment) Bill, 2017

1. The Architecture of the Independent Electoral and Boundaries Commission

As noted earlier, Article 88 of the Constitution provides for the establishment of the IEBC and Article 250 provides for the composition and the general architecture of constitutional commissions providing that each commission shall have a chairperson and members. Article 250 (2) provides for process of appointment of the Chair of the Commission providing that the person needs to be approved by Parliament and appointed by the President. Article 138 (10) provides on the role of the chair is to declare results.

The proposed amendment Clause 2 and 3, poses a conflict in view of the Constitutional process of appointment (requirement of approval of Parliament and appointment by the President) of a Chair and the provisions of the bill that the Vice Chair and an ordinary members of the Commission can take up the role of the Chair. The bill proposes to amend the architecture of the IEBC by conflating the qualifications and powers of the Chair and the members of the IEBC, contrary to the constitutional requirements on the same.

2. Conduct of business of the IEBC

The bill reduces the quorum for conducting business of the Commission from a minimum of 5 to a minimum of 3, out of a total of 7 commissioners. This means that a minority number of the Commission member will make binding decisions to behalf of the majority. Usually legislative drafting principles require that quorum for meetings and decisions making must be **more than half** because if the quorum is less than half then we would have two parallel meetings by the same commission and two conflicting binding decisions over the same issue at the same time.

The existing IEBC 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**.

It is also noteworthy that this proposal comes against a back drop where the credibility of the Chair and CEO have been called to question by the court ruling. The National Assembly appear intent of circumventing dialogue to resolve the credibility challenges of the leadership of the IEBC by using the ruling party majority to entrench them as the sole decision makers in the forthcoming election.

3. Transmission of electoral results in the conduct of Presidential Elections

The Bi Partisan Parliamentary Committee made reforms to the electoral laws that provided the basis for the conduct of the August 8 elections and the annulment of the same elections by the Supreme Court. The proposed section 1D provide that the where a discrepancy occurs between electronically transmitted and manually transmitted results, the manually transmitted results shall prevail. The elections should be managed that there are no discrepancies between the manual and the electronic results. The house should not legislate to legitimize irregularities in the transmission of results. To say if technology fails the manual system supersedes is just to say that the election is manual. Instances of technology failure should be addressed on a case by case basis.

Proposed section 1E proposes that any failure to transmit or publish elections results in an electronic format shall not invalidate the results as announced and declared by the respective presiding and returning officers at the polling station and constituency tallying centre respectively. The system should work as a complete whole thus whereas there is no objection in constituency and polling station declared results not being invalidated, the electronic transmission is important because the system gives greater credence to the electronic process and not the manual. The election transmission was proposed by the Kriegler report to enhance the audit of the process. Thus this provision undermines the intention of the use of technology.

These amendments completely destroy the threshold provided by Article 86 (a) (that the voting system should be accurate, verifiable, secure, accountable and transparent) and achieved in the Elections Act 2011 as amended by the 11th Parliament.

4. Independence of the IEBC

In the proposed amendment to section 44 of the Elections Act, by requiring that the Commission fulfils their constitutional mandate in consultation with relevant agencies is an ambiguous and an unconstitutional proposal. The Commission bears the sole responsibility to conduct free and fair elections through the use of technology.

5. Non-compliance with the Law

Deletion of the Word 'or' in the section 83. 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. This proposed clause

10 lowers the threshold of transparent and accountable elections contrary to the provisions of Article 86 (a). This provision is calculated to raise the threshold of cancelling an election by limiting the Supreme Court ability to nullify as the court is required to consider both qualitative and quantitative aspect of the election.

Conclusion

The amendments backtrack on the electoral reforms that have been made to strengthen the democracy of Kenya and the legitimacy of a Presidential elections.

It is our strongest recommendation is that these amendments be thrown out in their totality.

Parliament should instead focus on ensuring that there is a smooth carrying out of elections in October 26 to avert a constitutional crisis. Jubilee Parliamentarians in particular should exercise their role in a way that fosters national unity and upholds the integrity of institutions, and should not subvert the electoral architecture for short-term political gain.

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