



International Governance Institute

...building integrity in acquiring and exercising public duty ...

3RD OCTOBER, 2017

**THE CLERK OF THE SENATE,
SECRETARY,
PARLIAMENTARY SERVICE COMMISSION,
PARLIAMENT BUILDINGS,
P.O BOX 41842 – 00100, NAIROBI.**

Dear Sir/Madam,

**RE: MEMORANDUM TO THE JOINT PARLIAMENTARY SELECT
COMMITTEE ON MATTERS RELATING TO THE ELECTION LAWS
(AMENDMENT) BILL, 2017.**

Introduction

International Governance Institute is an international charity registered by the Charity Commission of England and Wales and registered in Kenya as a not-for-profit organization with the principle mandate of engaging local communities in monitoring the exercise of public authority and ensuring the maintenance of integrity in public transactions. The organization is a member-driven association running local citizens' initiatives in different parts of the country; empowering the communities and building their capacity to demand public accountability.

Background

Since the advent of multi-partyism in the 1990s, Africa has witnessed both progress and reversals in electoral administration and management. Several Electoral Management Bodies (EMBs), for example those in Benin, Botswana, Ghana, Mauritius, Sierra Leone and South Africa, have performed creditably in a relatively professional, non-partisan and efficient manner. They have built public confidence in electoral administration and management. Electoral Management Bodies, being the fulcrum around which electoral administration and management revolves still, however, face daunting challenges around the continent. If political institutions and processes lack transparency and accountability, general confidence in the EMBs tends to be low, although the fault usually lies in contradictions in the political architecture and in the societal ethical values within which the EMBs operate.

When an election yields a close vote between parties and particularly between presidential candidates, there is a likelihood of an explosive situation that must be carefully managed. The flare-up can assume the form of a violent conflagration of ethnic, ethno-regional conflict, as it did in the aftermath of close and highly contentious presidential elections in Kenya in 2007 and Côte d'Ivoire in 2010. For such eruptions to be contained, it requires established legal, policy and institutional mechanisms for election dispute adjudication, which impel aggrieved parties to seek recourse to, and accept, court decisions as final arbitration.



Following your notice published in the national dailies, requesting for submission of memoranda, we hereby humbly make our written submissions in regard to the above referenced matter under The Elections Laws (Amendment) Bill, 2017 itemized below:-

1. In the proposed changes, there is a clear attempt at legally legitimizing illegalities, irregularities and misdemeanors; for instance:-

(a). In Sec 6 (a) (a), the Commission is required to transmit results electronically, but that responsibility is quickly removed in Sec 6 (a) (b) IE where it is stated that "Any failure to transmit or publish the said results electronically shall not result into the nullification of results...."

This is meant to encourage the Commission staff not to relay results electronically by any means including deliberate refusal, jamming the system, hacking the system, not entering data into the system or not availing the electronic gadgets at all. There's no incentive for electoral officials to meticulously deploy electronic equipment, fit for purpose and successfully transmit results electronically. In fact ANY failure (intended or unintended) is encouraged instead.

(b). In Sec 6 (a) (b) IF, live-streaming of results is encouraged but the results so streamed need not necessarily be authentic, it is restricted to be purely for public relations and public information and such streamed results shall not be used as the basis for the declaration of final results.

This is meant to encourage rogue Commission staff to fabricate artificial figures for public consumption as the election goes on, for purposes of creating a certain public perception of a certain candidate being on a winning streak and/or another being on a losing trip – but at the moment of declaration, those results being viewed on television screens and IEBC portal don't need to be authentic, and no one should be held accountable for them, as the Commission will still come up with other results to be announced as final.



(c). In Sec 9 (c) of the Bill, falsification, transference, distortion, prevarication, forgery and misrepresentation of results transmission Forms 34As, 34Bs and 34C of results is encouraged and legally protected.

No teacher/examiner would morally/legitimately/validly admit an exam answer sheet as valid even if the student being a known "A" grade material, had scored an A in the said examination, if the "A" is scored on a falsified sheet or paper from a back-street photocopier not supplied by the examiner and where no responsibility is put on the student to explain what happened to the genuine exam answer sheet supplied by the examiner. This law is meant to allow crooked electoral officers to replace results transmission forms with fake ones, bearing no security features and no serial numbers, off course with altered results.

2. In the proposed law, the absence of the Chairperson being contemplated in Sec 3 is suspicious, chary and wary, considering that the Chairperson is the only Commission officer contemplated in the Constitution to (i) announce presidential results as the National Returning Officer, and (ii) submit the results to the Chief Justice.

It is not lost to many that during the turbulent 2007 Presidential Elections, the then Chairman of the Commission Samuel Kivuitu mysteriously vanished from the scene and was said to be having a bed rest after a sudden bout of infection where foul play by Government agencies was highly suspected. We all know what followed! In the same vein, the sudden 'absence/ disappearance' of Chris Msando on the eve of Elections on August 8th at the Commission IT nerve center led to his 'replacement'. We all know what followed! In our humble view therefore, either this law is meant to threaten the Chairman of the Commission to toe a certain official line or he may surely be missing in action come October 26th and another officer with a pre-determined script takes charge to execute a heinous plan. In short, given the current circumstances and previous experience with presidential elections in Kenya (2007, Aug 2017), we must tread cautiously with such schemes coming just a few days to a highly polarized and contentious election, especially bearing in mind that these



amendments are being religiously bulldozed through by one side of the political divide with no regard for what the other side thinks.

3. In the proposed law, putting the quorum of the Commission at 3 Commissioners out of 7 as contemplated in Sec 4 of the proposed Bill and going further to state that a binding decision of IEBC could be reached by a majority of those 3 – implying 2 members - is not only callous but extremely treacherous to the proper management of elections in Kenya.

This makes it further injurious to public interest when we consider that is Sec 3 of the said Bill, any Commissioner can act as Chairman and have all the powers of the Chairman including declaration of presidential results - so long as the Chairman 'fails to be in action'.

4. In Sec 6 (b) of the proposed Bill, the world-acclaimed democratic standard of electronic voter registration, electronic voter identification and electronic results transmission – what is now commonly referred to as the Kenya Integrated Electronic Elections Management System which works well in conformity with our Constitutional threshold of a simple, accurate, verifiable, secure, accountable and transparent system has been bastardized.

In this Bill, manual transmission of results is elevated above electronic transfer of results. Off course the manual transmission includes Presiding and Returning Officers carrying Presidential Results Forms in their pockets, briefcases and handbags; being rained on or their cars getting stuck in mud, spending nights in lodges or forests with presidential results on their bodies, getting attacked, kidnapped or bribed along the way, disappearing from the Commission radar at some point, re-appearing with torn or mutilated results forms. Considering also that the Bill states that it will not matter what kind of paper carries the results, whether from a photocopy bureau or street vendor; what will matter will be the figures so affixed on the sheet and the signature of the bearer.

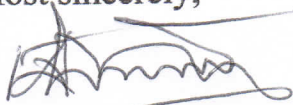
In conclusion, we believe this Bill is clearly meant to **sanitize** the messes in the August 8th Elections, make them agreeable and legitimate – as if they are meant to



be repeated - and tie the hands of the Supreme Court in declaring them 'illegalities, irregularities and invalidities' - as they are now well captured in the Election Laws (Amendment) Bill, 2017 and protected. We hold that the proposed changes to the election laws are ill-advised, untimely, unwarranted and with high possibilities of plunging the country into a failed state.

We believe our submission has merit and therefore warrants your consideration and we are ready to appear before you to defend this position for your further consideration and possible adoption.

Most sincerely,

A handwritten signature in black ink, appearing to read 'Sakwa Buliba', with a horizontal line drawn through it.

SAKWA BULIBA

SECRETARY, International Governance Institute