AN ADVISORY OPINION ON THE PROPOSED ELECTION LAWS (AMENDMENT) BILL, 2017

PRESENTED TO:
THE NATIONAL ASSEMBLY
MAIN PARLIAMENT BUILDING
NAIROBI

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS
5th OCTOBER 2017
A. Introduction

1. The Kenya National Commission on Human Rights (KNCHR or ‘the Commission’) is an independent Constitutional Commission established pursuant to Article 59 of the Constitution of Kenya 2010 and operationalized by the Kenya National Commission on Human Rights Act, No. 14 of 2011(Revised 2012). The Commission is an autonomous institution whose operations are guided by the United Nation’s Principles on establishment and functioning of independent national human rights institutions commonly referred to as the Paris Principles.\(^1\) KNCHR is accredited by the International Coordinating Committee of National Human Rights Institutions as an ‘A status’ institution and is a member of the Network of African National Human Rights Institutions (NANHRI). KNCHR has also been granted affiliate status by the African Commission on Human and Peoples’ Rights (ACHPR) since 2004.

2. The Commission implements two key broad mandates: key leadership role in advising and promoting a culture human rights and acts as a watchdog to ensure human rights compliance by the various government organs. The Commission receives complaints, monitors, investigates, redress, audits and reports on the observance of human rights by both public and private institutions in all spheres of life in Kenya. Further, KNCHR reviews or proposes legislation, policy and regulations; partners with both State and non-State actors, monitors State’s fulfilment of its national, regional and international human rights obligations.

3. Pursuant to Article 249(1) of the Constitution, the Commission jointly with other Constitutional Commissions and Independent Offices is mandated to inter alia secure the observance of the democratic values and principles stipulated under Article 10 by all state organs, promote constitutionalism and the rule of law in the country. One of the key strategies that the Commission invokes in discharging this mandate is through the issuance of advisories. As the national human rights institution, the Commission has been at the

\(^1\) Principles relating to the Status of National Institutions (The Paris Principles); Available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx.
forefront of issuing advisories and formulating human rights based policies aimed at facilitating/enabling different state organs/entities at both the national and county levels to comply with the Constitutional as well as regional and international human rights obligations.

4. Notably in exercising its powers under Article 251, the Commission is empowered to act on its own motion or upon a request by a particular state organ or person. It is in this regard that the Commission reviews the proposed Elections Laws (Amendment) Bill 2017 and issues this advisory opinion.

B. Background: The 2017 Electoral Cycle

5. The Country held its 2nd General Election on Tuesday 8th August 2017 under the Constitution of Kenya 2010 against a backdrop of key legal, policy and institutional reforms in the electoral sector. The electoral reforms were necessitated by a number of issues raised concerning the disputed 2013 presidential election2.

6. Notably, the legal, policy and institutional reforms were midwifed by a Joint Parliamentary Select Committee (JPSC)3 which comprised of members from both the Senate and the National Assembly. The JPSC adopted a bipartisan and an all-inclusive process that involved receiving memoranda from a cross-section of stakeholders drawn from Constitutional Commissions, independent offices, political parties, the civil society, professional bodies, religious bodies, county governments, the business community and members of public, which resulted in the enactment of critical pieces of legislations such as the Elections Laws (Amendment) Act 2016, the Election Offences Act 2016 and key subsidiary legislation such as the Elections Technology (Regulations) 2017 that entrenched an array of electoral reforms in law on 4th October 2016.

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2 Supreme Court (Consolidated) Petition No. 5 of 2013. Some of the general issues fronted included; perceived lack of credibility, lack of trust and confidence, perceived partiality, complaints of incompetence, claims of impropriety in the procurement process of key electoral equipment and mishandling of the elections during the disputed 2013 General Election and the need to entrench in the law & guarantee the use of technology in the election process.

3 The Joint Parliamentary select committee established in July 2016 vide a unanimous parliamentary motion and was co-chaired by Hon. Kiraitu Murungi and Hon. James Orengo comprising of 14-members drawn from both the Senate and National Assembly.
7. These electoral reforms sought to strengthen the Independent Electoral and Boundaries Commission (IEBC) and quite importantly, provide the requisite legal safeguards to guarantee that the General Election 2017 were **free, fair** and administered in an **impartial, efficient, simple, accurate, verifiable, secure, accountable and transparent** manner as envisaged under Article 83 of the Constitution.

8. It is instructive to note that some of the legal reforms adopted were informed to a greater extent by the main recommendations contained in the Report of the Independent Review Commission on the General Elections held in Kenya on 27 December, 2017 (IREC) of 2008 otherwise referred to as the **Kriegler Commission report of 2008**. Among the major recommendations proposed by the Kriegler Commission was the call for the electoral body to develop and adopt an **integrated and secure electoral management system** that would allow **computerized data entry and tallying at constituencies, secure simultaneous transmission from the polling station level to the national tallying centre and the integration of the results-handling system in a progressive election result announcement system**. This was intended at addressing the deep seated concerns on the counting, tallying, transmission and announcement of final results especially in respect to the presidential elections.

9. Notably, 2013 marked the 1st General Election that saw the electoral management body embrace technology that comprised of the **Biometric Voter Registration System (BVR)**, the **Electronic Voter Identification System (EVID)**, the **Political Party Nominations System (PPNS)** and the **Results Transmission System (RTS)** for the simultaneously of transmission of election results centres at the constituency, county and national level. In the 2017 election, IEBC in compliance with the law embraced the **Kenya Integrated Electoral Management System (KIEMS)** that notably sought to integrate the Biometric Voter Registration (BVR), Electronic Voter Identification Devices (EVID), Results Transmission System (RTS) and Candidate Registration Systems that had initially been used during the 2013 general elections but had not worked properly at all.

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4 Report of the Independent Review Commission (IREC) on the General Elections of 2007 which was established in February 2008 to inquire into the issues that arose out of the disputed 2007 general elections.
10. Upon conclusion of the August 2017 election, the Opposition filed a presidential petition at the Supreme Court which by a majority decision annulled the presidential election on 1st September 2017 on account of **illegalities and irregularities** committed during the transmission of presidential results. By dint of this annulment, the Supreme Court directed **IEBC to conduct a fresh presidential election within 60 days** as stipulated under Article 140 (3) of the Constitution.

11. The president elect, together with his party agents and supporters were aggrieved by this decision of the Supreme Court and have been vocal in echoing this disappointment with the decision by the judges. It is therefore from this decision and that fact of having a majority of MPs in the National Assembly that the party through its elected members decided to sponsor this proposed bill to amend the election laws.

**C. National Values and Principles**

12. The Election Laws (Amendment) Bill 2017 were introduced into the National Assembly on 28th October 2017 by Baringo North MP William Cheptumo. A number of sections of the Bill are intended to rearrange the managerial architecture of the IEBC.

13. The proposed Bill, according the Memorandum of Objects seeks to amend the IEBC Act No. 9 of 2011, the Elections Act 2016 and the Elections Offences Act 2016 for purposes of providing for the **proper conduct of affairs and business of IEBC** and for **effective management of elections** related to; management of IEBC, chairpersons qualifications, meetings quorum and leadership, use of both technology and the manual systems in results transmission, the courts’ role in determining the outcome of an election, the procedure in conducting a fresh election, electoral offences, among others.

14. The Constitution of Kenya 2010 establishes the Republic of Kenya as a **multi-party democratic** state founded on the **national values and principles** of governance stipulated under Article 10 which bind all State organs, State and public officers and all persons in governance, Constitution interpretation, enactment of law, and implementation of public policy. Courts have pronounced themselves and given legal impetus to the national values
and principles of governance as broad, all-inclusive and mandatory principles of immediate realization that bind all in executive, legislative and judicial.  

15. Under Article 94, the legislative authority is derived from the people and vested in Parliament (both National Assembly and Senate) which must protect the Constitution and promote democratic governance. A core/fundamental national value and principle of good governance is public participation. Article 118 obligates Parliament to facilitate participation and involvement of the public in legislation and other business of the House and its committees. This participation must be direct and constructive to get their opinions and views not merely through their representative (MPs, Senators and County Woman Representative). We appreciate that fact that this ad hoc parliamentary has invited different stakeholders and the public at large to give their views on the proposed Bill within one week.  

16. The draft Bill is a matter of public interest and also very emotive especially in light of the upcoming repeat of the presidential elections on Thursday 26th October 2016. The 10-day period is not adequate to constructively and comprehensively engage and gather views from diverse members of the republic of Kenya beyond Nairobi. These proposed amendments are bound and are already receiving mixed reactions from diverse members of the Republic. Further, electoral reforms in the past since 2008 have been managed through bipartisan and all-inclusive processes due to their political sensitivities and potential to balkanize the country even more on partisan, ethnic, regional and class lines.  

D. Good Governance practice and Supreme Court Directive on electoral legislation  

17. Legislative reform especially when it is intended to inform an ongoing or to upcoming process, indicates that all legal amendments and/or proposals must be enacted at least six (6) months before the envisaged occurrence. The ECOWAS Protocol on democracy

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5 George Bala vs AG in [HC PET No. 238 of 2016].
and Good Governance supplementary to the Protocol relating to the Mechanism for Conflict prevention, Management, Resolution, Peace keeping and Security, 2001 in Article 2. Which provides that ‘… no substantial modifications shall be made to the electoral laws in the 6 months before the elections except with the consent of a majority of the political actors’. This is critical to ensure consensus, peace and security, appreciation and substantive implementation of the electoral body (in this case IEBC) and the citizens of the new legislative position and its impact on the electoral management.

18. The timing of the Bill is suspect in that it seeks to introduce fundamental changes to the conduct of a presidential election less than 21 days to the fresh presidential election. The making of legislative amendments in the electoral laws closer to the elections has in the past elections been a key issue of contestation as witnessed during the disputed 2013 presidential election. This was also a major key issue noted in the Kriegler report. An election is a process that undergoes different phases from voter registration, voter education up to the final results declaration.

19. Further, in the current situation, the 26th October 2017 elections, this is not a new election but a repeat election of the presidential position. Therefore, the rules of engagement must remain unless the Supreme Court has given specific change of directions. In this situation the Supreme Court directive was simple and specific. The repeat election must be done by IEBC and IEBC must conduct the same in compliance with the Constitution, electoral jurisprudence and the electoral process is free, fair, transparent and credible. Not new laws. This will be changing the rules and will have a significant impact on the presidential candidates, their parties or agents and the IEBC administratively in its preparation. These amendments timing is wrong. What is currently required for IEBC is to readjust themselves administratively (improved results transmission, increased security features, training of personnel in the digital system), involve all critical parties and communicate to the general public what their plans are before the election date to ensure compliance with the current electoral law fully and deliver a free, fair and credible presidential election.
E. The Proposed Elections Laws (Amendment) Bill 2017

Redefining Chairperson and roles

20. The Bill in Section 2 redefines ‘Chairperson’ to include vice –chairperson or such other. There is no need to change the definition as this is not good practice. The issue of alternative is taken care of by the definition and presence of the ‘Vice-Chairperson’. It’s important to note that the status of the Chairperson is – a judge of the Supreme Court unlike in the other Constitutional Commissions [Section 6(1)] – Chapter 15.

21. In the context of elections management, the Constitution, Article 138 (10) expressly and specifically assigns the role of declaring the results of a presidential election to the Chairperson of IEBC. The framing of the Constitution is in the mandatory nature and as hence, such role cannot be delegated. Under the law, the office of the chairperson especially of Constitutional Commissions and Independent offices is established as a distinct office with a different set of qualifications, mode of appointment and roles clearly stipulated.

22. The IEBC Act envisions a situation or grounds under which a vacancy may arise in the office of the chair or member of IEBC. These include; death, resignation or removal from office on account of contravention of Chapter Six or any law. Notably, the IEBC Act further stipulates that in case of a vacancy in the office of chair or member of commission there will still be continuity while the president kick-start the replacement process. This clause seeks to provide for a new criteria ‘absence from office’ which does not fall within any of the 3 grounds stipulated under the IEBC Act that may lead to a vacancy in the office of the Chair or a member of the commission.

23. The KNCHR strongly submits that this clause is inimical to the specific/distinct role assigned to the Chairperson of IEBC by the Constitution to the extent that it seeks to introduce an ambiguous ground of ‘absence from office’ and re-assigning this role to other commissioners. This is a potential recipe of causing divisions and conflict within the management of the electoral body especially with respect to the presidential election. Therefore, Clause 1 must be withdrawn.
Chairperson’s qualifications

24. The Bill in Section 3(a) changes Section 6(1) from being Supreme Court judge. It lowers the qualifications of the chairperson being 15 years’ experience as a superior judge (Court of Appeal) or distinguished academic, judicial officer or legal practitioner.

(i) Currently, and in the past, the Chairperson MUST be a lawyer and in the 2011 amendments MUST be of the rank of a Supreme Court judge. The new amendment opens this position to other disciplines similar to the other commissioners.

(ii) The impact is that seniority will be lost and expertise on the critical interpretation and application of the law which is integral to the IEBC compliance and there may be no senior lawyer appointed to assist the entire IEBC including directing policy, strategy and oversight. The constitutional and statutory functions of IEBC naturally point to the need to have a serious legal mind heading the Commission. IEBC matters especially in respect to the presidential elections which is the critical role of the chair, are adjudicated by the Supreme Court. Hence the focus of a legal mind and of the status of a Supreme Court judge.

(iii) It is therefore imperative that the chair must possess certain skills and qualities and a vast comprehension of the law should be of paramount importance. The chairperson must be well versed in the interpretation of election laws, regulations and constitutional provisions so as to ensure that the commission is in compliance as it carries out its mandate.

25. Finally, it should be noted administratively, the Chair of IEBC earns more than any other Chair in the other Constitutional Commission by virtue of this delicate, sensitive and additional national responsibility that would have ramifications beyond the Republic of Kenya if things were to go wrong. Therefore Clause 3 must be withdrawn.

Change of the Chairpersons Powers in all affairs of IEBC

26. The Bill in Section 3 (1A) and 1B, intends to change the modus operandi of IEBC for vice chairperson or another to deputize and perform all the functions of the chair. The purpose is to usurp the entire powers, roles and responsibilities of the Chairperson both within meetings and also outside meetings (general operations – policy, strategy and oversight).

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6 SRC Gazette Notice, 11th August 2017
(i) This is a dangerous trend where the Vice Chairperson or another commissioner elected can usurp the powers of the Chairperson beyond meetings. In respect to the 2nd Schedule on ‘Business and Affairs of the Commission’, the interim power arrangement is only recognized in meetings and NOT beyond which is good cooperate governance practice.

(ii) Further for whatever reason the Chairperson is unable to exercise his/her powers, then Section 7A is effective enough to replace.

27. The Constitution Article 138(10) only the Chairperson can declare the presidential results and deliver a written notification to the Chief Justice. The Vice Chairperson no other Commissioner cannot play this very critical national role. An Act of Parliament cannot supersede the supreme law – the Constitution. Therefore Clause 4 must be withdrawn

IEBC Quorum

28. On quorum, the draft proposes to reduce the quorum from the current 5 members to a quorum of three (3) members of the Commission. Clause 4 para.7 provides that unless a unanimous decision is reached, a decision on any matter before IEBC shall be by a majority of members present and upon voting. Essentially, this provision means that a decision can be made by only two(2) commissioners which is binding on the institution.

Deleting Section 29, Elections Act on nomination of presidential candidates by party or independent.

29. Why is this deletion necessary?

(i) It’s important that a presidential appointment who is a member of a political party is nominated by their members and if not by someone who is not a member of any political party. This would cause certainty of political allegiance and purpose.

(ii) The Constitution Article 137(1) (c) provides this as a minimal criterion and therefore unconstitutional. Therefore, clause 5 must be withdrawn.
Technology Vs Manual Transmission

30. The Bill in clause 6 (1C), the Bill seeks to provide for and entrench in law the concurrence use of the electronic and manual systems of transmission of presidential results from the polling station to the constituency tallying centre and finally to the national tallying centre. Notably, the Bill proposes under Clause 6 (1D) that in case of a discrepancy between the two systems of transmission, the manually transmitted results shall prevail. It should be noted that during the bipartisan negotiation, the issue of electronic transmission and manual were the most contentious issues.

31. This section was extensively deliberately upon and amended based on the IEBC vs Maina Kiai & 5 others Civil Appeal No. 105 of 2017 in which the Court declared that a polling station is the true locus of the free exercise of the will of the voter and as such, results declared by a presiding officer at the polling station are final. Notably, the role of the IEBC’s chairperson was interpreted within the confines of Article 86 of the Constitution of Kenya 2010 to be limited to tallying and verifying the results received from the constituency level in respect to the presidential elections. The new amendments on final results, use of technology and results transmission came into operation on 4th October 2016. Further, the Supreme Court made the following comments in respect to technology and transmission of results;

(i) Elections are not only about numbers or events but process is important, and
(ii) Polling station result in Form 34A must be shared with all and transmission simultaneously to both the Constituency and National Tally centers to facilitate both verification and bar against any electoral malpractice like human interventions. Such failure is fatal to the elections, and
(iii) Forms 34A, B and C must have all the security features, signed off and filled accordingly with no changes,

32. This is a clear departure from the electoral reforms adopted and entrenched in the Elections Act in 2016 through a bipartisan and all-inclusive process spearheaded by the joint PSC. One of the fundamental issues that was underscored in the 2016 and 2017 amendments to the Elections Act was the use of technology in order to guarantee the
accuracy of results and safeguard the integrity of the election process. These proposals claw back on the electoral reforms the country had adopted in terms of entrenching in law and utilizing technology as an integral part in the entire management of elections including in the transmission of results which has always been a key and potential trigger of elections disputes.

33. This amendment is misconceived and arguably unconstitutional in three cardinal respects.

i) It ignores the historical context for the use of technology in our elections set out in the Kriegler Report. In 2007, the Late Samuel Kivuitu lamented that some returning officers had disappeared with the manual results. Kriegler report\(^7\) stated; 

Use of technology should also be implemented in order to enhance, not only integrity' and accuracy of results, but to increase speed of transmission, storage, and further analysis and audits by the ECK...

IREC recommends that, without delay ECK start having developed an integrated and secure tallying and data transmission system, which will allow computerized data entry and tallying at constituencies, secure simultaneous transmission (of individual polling station level data too) to the national tallying centre, and the integration of this results handling system in a progressive election result announcement system.

ii) It assumes that the manual election results are incapable of manipulation, contrary to what we painfully learnt in 2007. Put differently, a mischievous presiding or returning officer could electronically transmit a fraudulent result, making a complete mockery of this amendment.

iii) It runs afoul of the provisions of the Constitution Article 86 (d), which requires the IEBC to put in place appropriate structures and mechanisms to eliminate electoral malpractice. In deed the infusion of technology into our electoral processes was largely informed by this constitutional imperative. Giving the manual system precedence over the electronic transmission system does not enhance nor promote the spirit envisaged under the constitutional tenet of verifiable, transparency and accountability in all public affairs.

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iv) It will be **expensive, insecure and cumbersome** to expect all Presiding Officers and Constituency Returning Officers to manually deliver the results at the Constituency, County and national tallying centers in good time. The experience in 2007 created a situation where the whereabouts of certain POs and CROs was unknown.

v) **Why invest billions in technology only to overlook it** in the final results confirmation. It is cheaper to ensure that the technology is full proof and devoid of human manipulation and capacity weakness.

vi) The use of **manual as the superior option, legitimates substantial irregularities** on the part of IEBC where an official willingly refuses to electronically transmit the results which may have substantial impact on the final results. This may also be used by officials and candidates to claim different results than those declared in a polling station. Inconsistencies on the manual system may be upheld just by virtue of this being a legal requirement. This therefore means that the will of the people would not have been met.

vii) From KNCHR experience, the challenge was not technology by the **absence of 3G or 4G technology**, minimal or no use of the satellite phones provided, the **poor training capacity of the POs, CROs and clerks** which was done during the last month and the **absence of specific party agents and observers** to monitor the electronic system.

34. The Commission remains cognizant of the fact that **irregularities and illegalities committed during the results transmission system** was one of the main grounds that led to the annulment of the presidential election of August 8th 2017 as pointed out in the Supreme Court decision. However, the Commission holds the view that the underlying problem on the transmission system was largely due to **failure by IEBC personnel to strictly comply and adhere to the requirements and the requisite procedure** under the relevant Constitutional provisions, the Elections Act and subsidiary legislation such as the Elections Technology Rules of 2016 and not legislative.

35. The bill further requires that results from the public portal on their own cannot be a basis for the declaration of the final result and are merely public information only. Why would IEBC which is a state institution project information that is not correct? This would cause
unnecessary emotional and political tensions as there is no way of informing the public otherwise should the figures change. This goes against Article 35 which provides that all should have access to information held by the state which it **MUST publish and publicize, be correct and not misleading.** There must be emphasis on consistency of the results with Kenya’s political climate and in the interest of justice and fairness, consistency in results is integral to peace and security.

36. The Commission strongly recommends that embracing technology is **not an option but a forgone fact and integral in the entire electoral management cycle** is crucial and critical to ensuring and guaranteeing a free, fair and credible 2017 general Elections. **Therefore clauses 6, 7, and 8 must be withdrawn**

**Non-compliance; Constitutional Compliance and Law Vs Effects on results**

37. The proposed amended to the Elections Act, Section 83 is informed by the Supreme Court interpretation that for elections to be annulled, a petition only needs to prove; **whether there has been noncompliance with the Constitution and the law OR whether the noncompliance had an effect on the final results and not both.**

38. It therefore means that with the current amendment of including ‘and’, **no election from MCA to presidential level shall be declared invalid on account of non-compliance because you must prove both aspects of noncompliance.** The lower courts will find it difficult to annul any elections where there are glaring violations of the Constitution or the law. This lowers the standards and values in respect to IEBC conducting ‘an impartial, neutral, efficient, accurate and accountable manner’ and for candidates complying with the rule of law and Code of Conduct. The rules of constitutional interpretation demand that the Constitution must be interpreted in a manner that advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights.

39. This **reduces the electoral parameters in respect to the principles of noncompliance.** That is instead of using two compliance principles, it limits it to one compliance principle.
This is a very dangerous amendment especially in respect to special, vulnerable and/or marginalized candidates like women, youth or persons with disabilities who will most likely have a much more difficult engagement with the electoral process due to an uneven playing ground. Courts in discharging their functions determine matters based on the merits and having two principals gives the courts more latitude on the best principle to use to invalidate any elections.

40. Further the bill also provides that a form provided for under the Act will not be invalid by the fact that there was a deviation from the requirements of that form as long as the deviation is not calculated to mislead. This would mean that a form with irregularities would still be used in calculating the final results of an election and in effect legitimizing irregularities. Therefore clause 9 must be withdrawn

Technology Transparency, Complementary mechanism and the stake of Political Parties

41. The Bill proposes to remove political parties and technical Committee from any consultations, due diligence test of the electronic system, regulations not to be presented to Parliament and no time deadline. It should be noted that if there was a Section in law that was violated or had limited public participation and Parliamentary knowhow it was the new Section 44. This is the most elaborate section in respect to building confidence, information, transparency and accountability in respect to the entire electronic system. There was noncompliance in respect to the electronic system procurement, audit, certification, security of data, access to the system software codes, capacity building of staff, non-submission of regulations to parliament and the late timing. Had all these things worked through full engagement with all state holders including political parties and a robust Technical Committee then the results transmission issues would have been resolved way before the elections.

42. Indeed even as we proceed to the presidential elections, this Technical Committee needs to be put together urgently and all issues raised by all political parties discussed and
sorted out. This is the way to go not legislative. The law on paper has not even been fully utilized more tested to appreciate whether it works to enhance our electoral process or not.

43. The Supreme Court directed that a **complementary system** must be **developed, simple and known** before this fresh elections under Section 44A which seeks to ensure that the technology is **simple, accurate, verifiable, secure, accountable and transparent**. This is the most specific directive given by the Court on Para 392 and does not require any legislative reform. This is particularly important in respect to the 11,000 polling stations that cannot access the 3G or 4G networks. **Therefore Clauses 7 and 8 must be withdrawn.**

**Procedure of conducting fresh presidential election**

44. The draft Bill seeks to prescribe the procedure for conducting a fresh presidential election in the event of annulment of a preceding presidential election as envisaged under Article 140(3) of the Constitution. The intention here is difficult to state because the subsection goes ahead to state that, however, if the **petition is made by a third party** who was not a candidate in the election, then **all the candidates** in the presidential election which is invalidated would be candidate in the repeat poll.

45. While this section builds clarity on who should be on the repeat ballot paper, it however locks out potential presidential candidates who were in the first round permanently. This is a **disenfranchisement to voters on their preferred choice** to the other candidates. This process overlooks the fact that presidential elections are a **public and national interest affair** and that is why in interpreting the **Kituo Cha Sheria Case**\(^8\), the **prisoners were allowed to vote for the presidential election**.

46. Further, the Supreme Court also made it **difficult for third parties to join the petition as amici curia**\(^9\) or as **interested parties**\(^10\). This means that in future it may be difficult for other third parties to be enjoyed in any presidential petition. Participation in the next elections should be left at the **discretion of the candidate to inform IEBC** of their lack

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8 Petition 574 of 2012  
9 Advocate Charles Kanjama and Information Communication Technology Association  
10 Benjamin Watula Barasa and Isaac Alouch Alouchier
of interest to participate again. At the moment one of the presidential candidates Dr. Ekuru Aukot is in court questioning this position.

47. The Clause also assumes that all presidential candidates have political party affiliation. In the 2017 elections out of the eight (8) presidential candidates, there were three (3) independent\textsuperscript{11} candidates. The third winner was Hon. Joseph William Thiga Nyaga who was an independent candidate. \textbf{Therefore Clause 10 must be withdrawn.}

\textbf{Electoral Offences}

48. The Amendment in Section 11 (6A) seeks to make it a crime for any presiding or returning officer who fails or refuse to fill in or sign in the election documents an offence punishable with 5 years upon conviction with no option of a fine. It’s ironical that this amendment bill, intends to punish yet the same errors and omissions cannot invalidate an election.

49. However, what may be envisaged is already taken care of in Section 6(j) and therefore the only objective here could be to \textbf{enhance the penalty to 5 years without the option of a fine} instead of 3 years with an option of a fine of 1m. \textbf{Therefore review Clause 11 must be reviewed.}

\textbf{F. CONCLUDING REMARKS}

50. In view of the foregoing, the Commission STRONGLY URGES this Committee of the House to shelve these proposed amendments and instead seek to \textbf{build political consensus} between Jubilee Party and the NASA Coalition parties to ensure that we are able to move forward together with a mutual agreement in respect to \textbf{IEBC management of the 26th October 2017 elections.}

51. While it is indisputable that Parliament has the constitutional mandate to legislate on any matter, nor is it disputable that Jubilee has the majority in Parliament and therefore these amendments would sail through, we need to reflect on where we are coming from since 2007/8 chaos which were triggered by the results of the presidential elections. Currently

\footnote{\textsuperscript{11} Japheth Kavinga Kaluyu, Micheal Wainiana Mwaura and Joseph William Nthiga Nyagah}
there is minimal consensus among the various political divides. WE urge this Honorable House to take a human rights based approach to policy and legislation, which requires by building consensus and full participation of all political parties.

52. Let’s all focus on the guidelines given by the Supreme Court on what is expected of a transparent, accountable, simple, secure, accurate, efficient and verifiable electoral process;

i. Ballots are *properly counted and tabulated* which give correct totals with mathematical precision,

ii. Proper and verified records which are made in the *prescribed forms and executed by the authorized officials*

iii. Records *published in the appropriate media*,

iv. The electoral process and materials *are protected from manipulation, interference, loss and damage*,

v. Polling Stations, Constituency and National Tally Centers, and ballot papers are *capable of being audited*,

vi. Polling, counting, tallying process, announcement of results and copies of documents are *open to observations and accessible* to polling agents, election observers, stakeholders and the public, and

vii. Prompt publication of polling results forms in a *public portal*.

Finally, the Commission is quick to caution that no amount of consensus building could cure a constitutionally defective law. Suspension of debate would afford ample time, devoid of emotions or political exhibitions to incisively analyze the need to amend or review any electoral law and have comprehensive electoral reforms necessary in preparation for the 2022 General Election.

Commissioner Kagwiria Mbogori,

Chairperson, KNCHR.