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THE ELECTION LAWS (AMENDMENT) BILL, 2017

A Bill for

AN ACT of Parliament to amend election-related laws and for connected purposes

ENACTED by the Parliament of Kenya, as follows—

1. This Act may be cited as the Election Laws (Amendment) Act, 2017 and shall come into force upon publication in the Gazette.

Short title.

2. The Independent Electoral and Boundaries Commission Act, 2011 is amended in section 2 by deleting the definition of the term “chairperson” and substituting therefor the following new definition—

Amendment of section 2 of No. 9 of 2011.

“chairperson” means the chairperson of the Commission 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.

3. The Independent Electoral and Boundaries Commission Act, 2011 is amended in section 6 by—

Amendment of section 6 of No. 9 of 2011.

(a) deleting subsection (1) and substituting therefor the following new subsection—

“(1) A person shall be qualified for appointment as the chairperson of the Commission if the person—

- (a) holds a degree from a recognized university in public administration, public finance, governance, electoral management, social science, or law;
- (b) has proven experience in any of the fields specified in paragraph (a) of not less than fifteen years;
- (c) meets the requirements of Chapter Six of the Constitution”;

(b) inserting the following new subsections immediately after subsection (1)—

“(1A) In the absence of the chairperson for any reason, the vice-chairperson shall assume the duties of the chairperson and exercise the powers and responsibilities of the chairperson until such time that another chairperson shall be appointed.

(1B) In the absence of the chairperson and the vice-chairperson, members of the Commission shall elect from amongst themselves one of their number to act as the chairperson and exercise the powers and responsibilities of the chairperson until such time that another chairperson shall be appointed”.

4. The Independent Electoral and Boundaries Commission Act, 2011 is amended in the Second Schedule, by—

Amendment of the Second Schedule to No. 9 of 2011.

- (a) deleting the word “five members of the Commission” appearing in paragraph 5 and substituting therefor the words “half of the existing members of the Commission, provided that the quorum shall not be less than three members”;
- (b) deleting paragraph 7 and substituting therefor the following new paragraph 7—

“7. Unless a unanimous decision is reached, a decision on any matter before the Commission shall be by a majority of the members present and voting”.

5. The Elections Act, 2011 is amended by deleting section 29.

Deletion of section 29 of No. 24 of 2011.

6. Section 39 of the Elections Act, 2011 is amended by—

Amendment of section 39 of No. 24 of 2011.

- (a) deleting subsection (1C) and substituting therefor the following new subsection—

“(1C) For purposes of a presidential election, the Commission shall—

- (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;

- (b) tally and verify the results received at the constituency tallying centre and the national tallying centre;
- (c) publish the polling result forms on an online public portal maintained by the Commission;

(b) inserting the following new subsections immediately after subsection (1C)—

“(1D) Where there is a discrepancy between the electronically transmitted and manually transmitted results, the manually transmitted results shall prevail.

“(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.

“(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”;

- (c) renumbering subsection (1D) as subsection (1G);
- (d) in subsection (2), by deleting the words “may announce the provisional results of an election” appearing immediately after the word “Commission” and substituting therefor the words “shall have received the results transmitted in accordance with this Act”;
- (e) in subsection (3), by deleting the words “provisional and” appearing before the words “final results”.

7. The Elections Act, 2011 is amended in section 44 by—

Amendment of section 44 of No. 24 of 2011.

- (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”;

- (b) deleting subsection (6);
- (c) deleting subsection (7);
- (d) deleting subsection (8).

8. The Elections Act, 2011 is amended by deleting section 44A and substituting therefor the following new section—

Deletion of section 44A of No. 24 of 2011.

Complementary mechanism for identification of voters.

44A. 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 the provisions of Article 38 of the Constitution.

9. The Elections Act, 2011 is amended in section 83 by—

Amendment of section 83 of No. 24 of 2011.

- (a) renumbering the existing provision as subsection (1);
- (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”;
- (c) inserting the following new subsection immediately after the renumbered subsection (1)—

“(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”.

10. The Elections Act, 2011 is amended by inserting the following new section immediately after section 86—

Insertion of new section 86A in No. 24 of 2011.

Procedure at fresh presidential election.

86A. (1) Where, pursuant to Article 140(3) of the Constitution, a presidential election is invalidated by the Supreme Court on a petition, the Commission shall publish a notice in the Gazette, within seven days from the determination of the Court—

- (a) indicating that the presidential election has been invalidated and that no candidate has been elected as president;
- (b) announce the date for fresh election pursuant to Article 140(3) of the Constitution;
- (c) publish the names and political parties of the candidates to participate in the fresh election.

(2) The candidates to participate in the fresh election pursuant to Article 140(3) shall be determined by the nature of the petition that invalidated the original election, as follows—

- (a) where the petition challenging the election was filed by the runner-up, candidates for the fresh election shall be confined to the petitioner and the president-elect whose election was annulled;
- (b) where the petition was filed by more than one candidate who had participated in the original election, the petitioning candidates and the president-elect may participate in the fresh election;
- (c) where the petition was filed by a person or persons who were not candidates in the original election, then each of the candidates in the original election may participate in the fresh election;
- (d) no other candidate other than those envisaged in paragraph (a), (b) or (c) shall be eligible to participate in the fresh election.

(3) The Commission shall not conduct fresh nominations for a fresh election pursuant to Article 140(3) of the Constitution.

(4) An eligible candidate for an election pursuant to Article 140(3) of the Constitution may withdraw from the election by notice in writing to the Commission, and—

- (a) where there are more than two remaining candidates in the election after the withdrawal, the election shall proceed as scheduled;
- (b) where only one candidate remains after the withdrawal, the remaining candidate shall be declared elected forthwith as the President-elect without any election being held.

11. The Election Offences Act, 2016 is amended by inserting the following new section immediately after section 6—

Insertion of new section in No. 37 of 2016.

Failure or refusal to sign results.

6A. Notwithstanding any other provision in this Act or any other written law, a presiding or returning officer in an election who, in relation to the prescribed document containing the results of the election—

- (a) knowingly fails or refuses to sign the document;
- (b) knowingly fails to complete the document; or
- (c) willfully submits an incomplete document;
- (d) willfully alters or falsifies a document,

commits an offence and shall be liable, upon conviction, to imprisonment for a term not exceeding five years;

MEMORANDUM OF OBJECTS AND REASONS

The principal object of this Bill is to amend the Independent Electoral and Boundaries Commission Act, 2011 (No. 9 of 2011), the Elections Act, 2011 (No. 24 of 2011) and the Election Offences Act, 2016 (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.

This Bill is a Bill concerning county governments within the meaning of Article 110 of the Constitution.

The enactment of this Bill shall not occasion additional expenditure of public funds.

This Bill is a Majority Party-sponsored Bill.

Dated the 27th September, 2017.

FATUMA ADAN DULLO,
Senator.

Section 2 of No. 9 of 2017 which it is proposed to amend—

(1) In this Act, unless the context otherwise requires—^{Interpretation.}

“**Cabinet Secretary**” means the Cabinet Secretary appointed under Article 152 of the Constitution;

“**chairperson**” means the chairperson of the Commission appointed in accordance with Article 250(2) of the Constitution;

“**Commission**” means the Independent Electoral and Boundaries Commission established by Article 88 of the Constitution;

“**first review**” means the review conducted by the former Boundaries Commission taking into account any outstanding work of that Commission and issues arising from that review;

“**former Boundaries Commission**” means the Interim Independent Boundaries Review Commission established under section 41B of the former Constitution;

“**former Constitution**” means the Constitution in force immediately before the 27th of August, 2010;

“**Fund**” means the Independent Electoral and Boundaries Commission Fund established by section 18;

“**issues arising**” means the issues specified in paragraph 1 of the Fifth Schedule;

“**member**” means a member of the Commission and includes the chairperson;

“**Parliamentary Committee**” means the relevant Departmental Committee of the National Assembly responsible for matters relating to the Commission;

“**principal office**” means the headquarters of the Commission;

“**Registrar of Persons**” means the office in charge of identification, registration and issuance of identity cards to all Kenyan citizens;

“**Salaries and Remuneration Commission**” means the Salaries and Remuneration Commission established under Article 230(1) of the Constitution;

“**secretary**” means the secretary to the Commission appointed under Article 250(12) of the Constitution;

“vice-chairperson” means the vice-chairperson of the Commission elected under Article 250(10) of the Constitution.

(2) Despite subsection (1), until after the first election under the Constitution, references in this Act to the expression “Cabinet Secretary” shall be construed to mean “Minister”.

Section 6 of No. 9 of 2017 which it is proposed to amend—

6. (1) 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.

Qualifications for appointment as chairperson or member of the Commission.

(2) A person is qualified for appointment as a member of the Commission if such person—

- (a) *deleted by Act No. 36 of 2016, s. 32;*
- (b) holds a degree from a recognised university;
- (c) has proven relevant experience in any of the following fields—
 - (i) electoral matters;
 - (ii) management;
 - (iii) finance;
 - (iv) governance;
 - (v) public administration;
 - (vi) law; and
- (d) meets the requirements of Chapter Six of the Constitution.

The Second Schedule to No. 9 of 2017 which it is proposed to amend—

SECOND SCHEDULE

PROVISIONS AS TO THE CONDUCT OF THE BUSINESS AND AFFAIRS OF THE COMMISSION

1. The Commission shall meet as often as may be necessary for the carrying out of its business but it shall meet at least once every calendar month.

2. A meeting of the Commission shall be held on such date and at such time as the chairperson shall decide.

3. The chairperson shall, on the written application of one-third of the members, convene a special meeting of the Commission.

4. Unless the majority of the total membership of the Commission otherwise agree, at least fourteen days' written notice of every meeting of the Commission shall be given to every member of the Commission.

5. The quorum for the conduct of business at a meeting of the Commission shall be at least five members of the Commission.

6. The chairperson shall preside at every meeting of the Commission at which he is present and in the absence of the chairperson at a meeting, the vice-chairperson, shall preside and in the absence of both the chairperson and the vice-chairperson, the members present shall elect one of their number who shall, with respect to that meeting and the business transacted thereat, have all the powers of the chairperson.

7. 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.

8. Subject to paragraph 5, no proceedings of the Commission shall be invalid by reason only of a vacancy among the members thereof.

9. (1) The secretary shall be the secretary at all meetings of the Commission.

(2) The Commission shall, subject to subparagraph (3), establish a committee for liaison with political parties and may establish committees of its members for any other purpose.

10. The Commission shall cause minutes of all proceedings of meetings of the Commission to be entered in books for that purpose.

11. Except as provided by this Schedule, the Commission may regulate its own procedure.

12. (1) If any person is present at a meeting of the Commission or any committee at which any matter is the subject of consideration and in which that person or that directly or indirectly interested in a private capacity, that person shall as soon as is practicable after the commencement of the meeting, declare such interest and shall not, unless the Commission or committee otherwise directs, take part in any consideration or discussion of, or vote on any question touching such matter.

(2) A disclosure of interest made under subsection (1) shall be recorded in the minutes of the meeting at which it is made.

(3) A person who contravenes subsection (1) commits an offence and upon conviction is liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding seven years or to both such fine and imprisonment.

(4) A member or employee of the Commission shall not transact any business or trade with the Commission.

Section 29 of No. 24 of 2011 which it is proposed to delete—

29. (1) The persons who nominate a presidential candidate shall be members of the candidate's political party. Power to nominate.

(2) The persons who nominate an independent presidential candidate shall not be members of any political party.

Section 39 of No. 24 of 2011 which it is proposed to amend—

39. (1) The Commission shall determine, declare and publish the results of an election immediately after close of polling. Determination and declaration of results. (1A) The Commission shall appoint constituency returning officers to be responsible for—

- (i) tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly; collating and announcing the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly; and submitting, in the prescribed form, the collated results for the election of the President

to the national tallying centre and the collated results for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county returning officer.(1B) The Commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the county Governor, Senator and county women representative to the National Assembly.(1C) For purposes of a presidential election the Commission shall—

(a) 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;tally and verify the results received at the national tallying centre; and

(c) publish the polling result forms on an online public portal maintained by the Commission.(1D) The chairperson of the Commission shall declare the results of the election of the President in accordance with Article 138(10) of the Constitution.

(2) Before determining and declaring the final results of an election under subsection (1), the Commission may announce the provisional results of an election.

(3) The Commission shall announce the provisional and final results in the order in which the tallying of the results is completed.

Section 44 of No. 24 of 2011 which it is proposed to amend—

44. (1) Subject to this section, there is established an ^{Use of technology.} integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.

(2) The Commission shall, for purposes of subsection (1), develop a policy on the progressive use of technology in the electoral process.

(3) The Commission shall ensure that the technology

in use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent.

(4) The Commission shall, in an open and transparent manner —

- (a) procure and put in place the technology necessary for the conduct of a general election at least one hundred and twenty days before such elections; and
- (b) test, verify and deploy such technology at least sixty days before a general election.

(5) The Commission shall, for purposes of this section and in consultation with relevant agencies, institutions and stakeholders, including political parties, make regulations for the implementation of this section and in particular, regulations providing for—

- (a) the transparent acquisition and disposal of information and communication technology assets and systems;
- (b) testing and certification of the system;
- (c) mechanisms for the conduct of a system audit;
- (d) data storage and information security;
- (e) data retention and disposal;
- (f) access to electoral system software source codes;
- (g) capacity building of staff of the Commission and relevant stakeholders on the use of technology in the electoral process;
- (h) telecommunication network for voter validation and result transmission;
- (i) development, publication and implementation of a disaster recovery and operations continuity plan; and
- (j) the operations of the technical committee established under subsection (7).

(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.

(7) The technology used for the purpose of the first general elections upon the commencement of this section shall—

- (a) be restricted to the process of voter registration, identification of voters and results transmission; and
- (b) be procured at least one hundred and twenty days before the general election.

(8) For the purposes of giving effect to this section, the Commission shall establish a technical committee of the Commission consisting of such members and officers of the Commission and such other relevant agencies, institutions or stakeholders as the Commission may consider necessary to oversee the adoption of technology in the electoral process and implement the use of such technology.

Section 44A of No. 24 of 2011 which it is proposed to amend—

44A. Notwithstanding the provisions of section 39 and section 44, the Commission shall put in place a complementary mechanism for identification of voters and transmission of election results that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the Constitution.

Complementary mechanism for identification of voters.

Section 83 of No. 24 of 2011 which it is proposed to amend—

83. 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.

Non-compliance with the law.