

SPECIAL ISSUE

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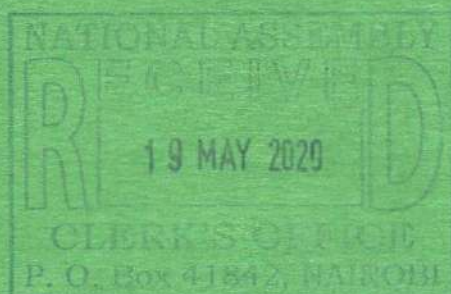
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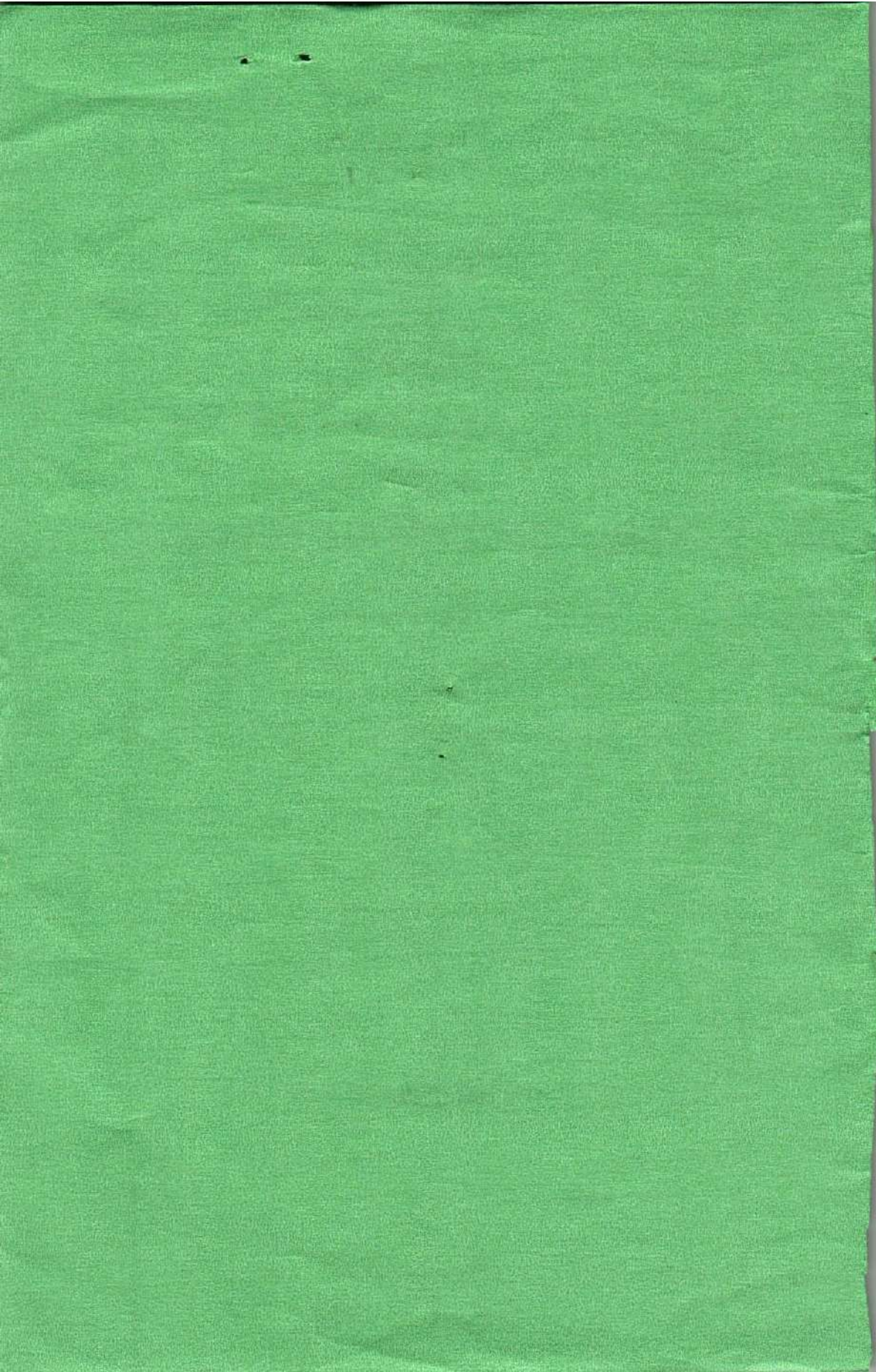
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THE REFERENDUM BILL, 2020

A Bill for

AN ACT of Parliament to provide for the procedure of the approval of an amendment to the Constitution by a referendum, the conduct of a referendum, referendum petitions and for connected purposes.

ENACTED by the Parliament of Kenya, as follows—

PART I—PRELIMINARY

1. This Act may be cited as the Referendum Act, 2020.

Short title.

2. In this Act, unless the context otherwise requires—

Interpretation.

“agent” means a person duly appointed by a referendum committee for the purposes of a referendum under this Act;

“chief agent” in respect of a registered referendum committee, means the person recorded in the register maintained by the Commission under section 17 as the person responsible for the affairs of the referendum committee;

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

“elector” means a person whose name is included in the current register of voters;

“elector’s card” means a card issued to an elector as evidence of the person’s registration in the register of voters;

“oppose” in respect of a referendum question means voting not to approve the referendum question specified in section 6 of the Act;

“polling area” means one of the areas into which a constituency is divided under section 12, or, if the Commission has declared a constituency to be a single polling area, that constituency;

“polling station” means any room, place, vehicle or vessel set apart and equipped for the casting of votes by electors at an election;

“polling time” means the period between seven o’clock in the morning and five o’clock in the afternoon of the polling day and includes the time taken to vote by voters who were present in a polling station by five o’clock;

“presiding officer” means a person appointed under section 8 to preside at a polling station;

“referendum” means a poll held under this Act;

“referendum committee” means any group of persons that intends to support or oppose the referendum question during the referendum period;

“referendum officer” means a returning officer, presiding officer and any other person appointed by the Commission to perform referendum duties under this Act;

“referendum period” means the period beginning on the day on which the text of the referendum question is published and ending on polling day of the referendum;

“referendum question” means the question upon which the people shall vote in the referendum as specified in section 6 of the Act;

“returning officer” means a person appointed under section 8 for the purpose of conducting the referendum in a constituency;

“support” in respect of referendum question, means voting to approve the referendum question specified in section 6 of the Act;

“voter” in relation to the referendum, means a person whose name is included in the current register of voters.

3. The object of this Act is to provide for—

Object of the Act.

- (a) the procedure for the approval of an amendment to the Constitution by a referendum;
- (b) the conduct of a referendum for the approval of an amendment to the Constitution; and
- (c) the procedure to challenge the conduct of a referendum.

PART II—AMENDMENT OF THE CONSTITUTION BY POPULAR INITIATIVE

4. (1) The Commission shall make regulations to govern the verification of registered voters and signatures.

Procedure under popular initiative.

(2) In determining whether the initiative meets the requirements of Article 257 of the Constitution, the Commission may redraft the draft Bill to conform with the Constitution and the format and style prescribed in the standing orders of Parliament without altering the substance of the Bill.

(3) The Commission may consult with the Attorney General or Parliament in the redrafting of a draft Bill under subsection (2).

(4) The Commission shall verify the registered voters, signature and the format of the draft Bill within ninety days of receipt of the draft Bill.

(5) If the Commission is satisfied that the initiative meets the requirements of the Constitution and this section, the Commission shall submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission.

5. (1) Upon receipt of a Bill submitted to a county assembly under section (4), the county assembly shall notify the public of the Bill by notice in the *Gazette* and in two newspapers of national circulation.

Procedure in a county assembly.

(2) The notification in subsection (1) shall contain all relevant details including—

- (a) a summary of the proposed amendments to the Constitution;
- (b) the timelines within which the public may submit views on the Bill; and
- (c) the timelines within which the county assembly shall consider the Bill.

(3) If a county assembly approves the draft Bill within three months after the date it was submitted by the Commission, the speaker of the county assembly shall deliver a copy of the draft Bill jointly to the Speakers of the

two Houses of Parliament, with a certificate that the county assembly has approved it.

(4) The Speakers of the two Houses of Parliament may designate officers to whom the speaker of a county assembly shall deliver a copy of the draft Bill jointly.

(5) A draft Bill referred to a county assembly under Article 257(5) of the Constitution shall be introduced for consideration by the county assembly by the chairperson of the relevant committee as a motion.

(6) The motion shall be debated and approved or rejected by a county assembly within three months after the date it was submitted by the Commission.

(7) The threshold for voting in a county assembly in respect of a draft Bill shall be a majority of the members of the county assembly.

(8) A county assembly shall not amend the draft Bill under its consideration.

(9) Where a county assembly fails to obtain a simple majority, the draft Bill shall fail and the Speaker of a county assembly shall communicate the failure to obtain a simple majority in writing.

(10) If a draft Bill has been approved by twenty four county assemblies it shall be introduced in the two Houses of Parliament within fourteen days of such approval.

(11) Where a county assembly fails to consider a draft Bill under this section, the draft Bill shall fail and the Speaker of a county assembly shall communicate the failure to consider the draft Bill in writing.

(12) A Bill referred to Parliament under Article 257(7) of the Constitution shall be introduced in Parliament by the chairperson of the relevant committee of each House of Parliament.

PART III—CONDUCT OF REFERENDUM

6. (1) The Commission shall conduct a referendum within ninety days of receipt of a notice under Article 256(5)(a) and Article 257(10) of the Constitution.

Initiation of a referendum.

(2) The Commission shall within seven days of receipt of the notice under subsection (1) publish a question to be

determined during a referendum in the *Gazette* and in electronic and print media of national circulation.

(3) The Commission may assign such symbol for each answer to a question to be determined during a referendum as it may consider necessary.

(4) A symbol assigned under subsection (3) shall not resemble that of a political party or of an independent candidate.

7. (1) The Commission shall, within fourteen days after publication of a question to be determined during a referendum publish a notice of the holding of a referendum and the details thereof in the *Gazette*, in the electronic and print media of national circulation.

Notice of holding referendum.

(2) The notice shall specify—

- (a) the question to be determined during a referendum;
- (b) the symbol assigned to each answer to the question to be determined during the referendum;
- (c) the day on which a referendum is to be held which shall not be less than twenty one days after the date of the publication of the notice;
- (d) the polling times during the referendum;
- (e) the day by which a referendum committee shall have registered with the Commission; and
- (f) the day and time by which campaigns in support of or in opposition to a question to be determined during a referendum shall start and cease.

(3) The Commission shall, on publication of the notice specified in subsection (1), suspend the registration of voters.

(4) The Commission shall conduct voter and civic education on the question to be determined during a referendum.

(5) Every question to be determined during a referendum shall require the voter to select an answer that is either “yes” or “no”.

PART IV—MATTERS PRELIMINARY TO REFERENDUM

8. (1) The Commission shall appoint a returning officer for each constituency and may appoint such deputy returning officers for the constituencies as it may consider necessary.

Returning Officers.

(2) A returning officer may preside at a polling station and in that case the officer shall, for the purposes of this Act, be deemed to be presiding officer of that station.

(3) The returning officer shall, in consultation with the Commission, appoint presiding officers and deputy presiding officers to preside at a polling station.

(4) A deputy returning officer shall, subject to the general direction and control of the returning officer to whom the officer is a deputy, have all the power, and may perform all the duties, of the returning officer under.

(5) A deputy presiding officer may perform any act which the presiding officer is required or authorized to perform under this Act, but no deputy presiding officer shall have power to order the arrest of any person or the exclusion or removal of any person from a polling station.

(6) Every appointment of a returning officer and a deputy returning officer under this section shall be published in the *Gazette* and in such other manner as the Commission may deem necessary.

9. (1) The Commission shall appoint such other referendum officers with such designations as it may deem necessary to assist in the conduct of the referendum and such referendum officers, may, subject to the general or special directions of the Commission, exercise any or all of the duties and powers conferred or imposed upon the Commission.

Appointment of other officers.

(2) The referendum officer shall take such oath of office as the Commission may specify.

(3) Referendum officers shall, in performing their duties and functions, act impartially and not in any way show favour to any side in a referendum.

10. The register of voters prepared under the Elections Act for the election of the President, members of

Register of voters.

Parliament, governors and members of county assemblies, as revised from time to time, shall be the register of voters for the purpose of the referendum.

11. (1) A registered voter in a particular constituency is entitled to vote at the referendum unless otherwise disqualified from voting by any other written law.

Right to vote and evidence of identity.

(2) A presiding officer shall require a person applying for a ballot paper to produce the person's identity card issued under the Registration of Persons Act or a valid Kenyan passport and the elector's card issued by the Commission.

12. (1) The Commission shall—

Polling areas and polling stations.

- (a) divide each constituency in which the referendum is to be held into polling areas or, if it thinks fit, declare any particular constituency to be a single polling area;
- (b) assign to each polling area a distinguishing number or letter or a combination of number and letter;
- (c) appoint a place or places or designate a vehicle or vehicles or a vessel or vessels at which the polling station or stations for each polling area shall be established; and
- (d) publish in the *Gazette* a notice specifying—
 - (i) the polling areas established for each constituency, which may be done by specifying the registration units which they respectively comprise;
 - (ii) the distinguishing number or letter, or combination thereof, assigned to each polling area; and
 - (iii) the place or places appointed or the vehicle or vehicles, vessel or vessels designated for the establishment of a polling station or stations for each polling area.

(2) In determining the boundaries of any polling area, the Commission shall have regard to geographical considerations and any other factors affecting the facility of

communication between various places within the polling area.

(3) Subject to subsection (2), the Commission may alter a division, an assignment or an appointment made under subsection(1) and shall thereupon publish a notice in the *Gazette* specifying the alteration.

(4) The Commission may, if it considers it desirable, appoint a single polling station for two or more polling areas.

13. (1) The Commission may use, free of charge, any public facility as a polling station.

Use of public facilities.

(2) Where any damage is caused to a public facility by reason of its being used as polling station under this section, the Commission shall either make good the damage or defray any expenses incurred by persons having control of the facility in making the damage good.

14. The Election Offences Act, 2016 shall apply with respect to the referendum as though it were an election within the meaning of the Act.

Application of Act No. 37 of 2016.

15. (1) A person intending to campaign for or against a question to be determined during a referendum shall, on application to the Commission, form one national referendum committee and one committee each in every constituency for a question to be determined during a referendum.

Referendum Committees.

(2) An application for registration shall be signed by the leader of the referendum committee and shall—

(a) set out—

- (i) the full name of the committee;
- (ii) the full name, address and telephone number of the leader of the committee;
- (iii) the name, address and telephone number and title of each officer of the committee;
- (iv) the address and telephone number of the office of the committee to which communication may be addressed; and
- (v) the name, address and telephone number of the chief agent of the committee;

- (b) indicate the electoral areas in which the committee intends to support or oppose the referendum question; and
- (c) be accompanied by a statement signed by the chief agent that the agent has accepted the appointment as chief agent.

(3) On receipt of an application for registration of a referendum committee, the Commission shall examine the application and determine whether the committee can be registered and shall—

- (a) if the committee can be registered, register it and inform the person who signed the application; or
- (b) if the committee cannot be registered, inform the person who signed the application that the committee cannot be registered and state the reasons thereof.

(4) A referendum committee shall not be registered if—

- (a) the application does not comply with this Act;
- (b) the name of the committee so resembles the name of a previously registered referendum committee that the committee is likely to be confused with that previously registered committee; or
- (c) the Commission is not satisfied that the applicant adequately represents those campaigning for a particular outcome.

(5) A referendum committee shall not be registered if the name or logo of the committee is the name or logo of a political party or so resembles such a name or logo that the committee is likely to be confused with the party.

(6) For the purpose of subsection (5), the name of a party means—

- (a) the full name of the party; or
- (b) any name, or abbreviation of a name, used to identify the party in election documents.

(7) Where a referendum committee is registered and any information given by the committee pursuant to subsection (2) ceases to be applicable or accurate, the

referendum committee shall forthwith send a report in writing, signed by the leader or chief agent of the committee, to the Commission setting out the information necessary to bring the information up to date.

(8) The registration of a referendum committee for the purposes of a referendum is valid only for that referendum.

(9) A member of a referendum committee shall subscribe to and abide by the Referendum Code of Conduct set out in the Schedule.

16. (1) A referendum committee shall bear its own costs during the campaign period of the referendum.

Costs of
referendum
committee.

(2) The costs referred to in subsection (1) include payment of the agents of the referendum committee.

17. (1) Every referendum committee that intends to apply for registration under section 15 shall, before applying, appoint a chief agent.

Appointment of
chief agent.

(2) The Commission shall maintain a register of the chief agents of registered referendum committees in which shall be recorded the name, address and telephone number of the chief agent of each such committee.

(3) The chief agent of a referendum committee appointed under subsection(1) shall be responsible for the affairs of the registered referendum committee and shall provide a sample signature to the Commission.

18. (1) The chief agent of a registered referendum committee in an electoral area or constituency may appoint not more than two agents to be present when voting is taking place at each polling area.

Appointment of
agents

(2) Each agent appointed under subsection (1) has, for the purposes of proceedings at the polling station all the rights and obligations of a candidate's agent for that polling station.

(3) Every person appointed pursuant to this section shall be appointed in writing and shall take such oath of office as the Commission may specify.

19. (1) An agent appointed under section 18 shall when present, be entitled to—

Rights and duties
of agents.

- (a) witness the opening and closing procedures and processes of a polling station;
- (b) examine the serial numbers of the ballot boxes before the commencement of the polling and after the close of the polling;
- (c) examine electors' registers;
- (d) verify whether a person who has applied for a ballot paper to vote is qualified to vote at a polling station;
- (e) be furnished with the names of the election officials at a polling station and constituency tallying centre;
- (f) put a security seal on the ballot box;
- (g) object, to the presence of any person, other than a person lawfully present at the polling station or tallying centre;
- (h) take note of all the activities taking place in a polling station including the conduct of the poll, the observance of prescribed polling regulations, the conduct of the count of the votes and the observance of the prescribed counting regulations and in that connection the agent shall be entitled to take notes, object to the relevant referendum officers preferably in writing, when the agent considers that to be appropriate; and
- (i) perform any other function or carry out any other responsibility conferred on an agent by the Act.

(2) An agent shall shall—

- (a) submit to the authority of the presiding officer and deputy presiding officer at the polling station and the returning officer and deputy returning officer at the constituency tallying centre;
- (b) comply with lawful orders given by the returning officer, deputy returning officer, presiding officer and deputy presiding officer;
- (c) not communicate with any voter in the polling station except as authorised by this Act;

- (d) not interfere with the poll or counting process in any manner which is not authorised by this Act and
- (e) not willfully damage, destroy or in any way endanger any document or other property of the Commission which comes into the agent's possession or which the agent is entitled to use, examine or handle.

(2) The returning officer, deputy returning officer, presiding officer, or deputy presiding officer may suspend for a period of time or expel completely an agent from the place the agent is attached to perform the agent's functions if the agent repeatedly flouts this Act in a manner which threatens to interfere or actually interferes with the voting process at that place:

(3) Despite subsection (2), a referendum officer shall alert the agent of a breach every time it occurs and offer the agent an opportunity to defend such conduct.

(4) Where a referendum officer suspends or expels an agent under this section, the referendum officer shall serve the agent with a written order to that effect and inform the relevant referendum committee of the action taken.

20. (1) Any person or referendum committee supporting or opposing the referendum question may carry out campaigns to support or oppose the referendum question within the referendum period.

Referendum
campaign period.

(2) All campaigns referred to in subsection (1) shall cease twenty-four hours before the start of polling.

PART V—VOTING AND REFERENDUM RESULTS

21. (1) Voting at the referendum shall be by secret ballot.

Voting procedure.

(2) No person shall vote in an area other than that in respect of which that person is registered as an elector.

(3) No person shall cast more than one vote at the referendum.

22. Every ballot paper for use at the referendum shall—

Ballot papers.

- (a) contain the question being voted on in English and Kiswahili languages;

- (b) be capable of being folded up;
- (c) have a number, or combination of letter and number, printed on the front;
- (d) have attached a counterfoil with the same number or combination printed thereon; and
- (e) contain a different and distinct symbol for each answer to the referendum question to be voted on.

23. The Commission may make special provisions for Kenyan citizens who are out of the country or who would not be able to vote on the voting day because of essential duties, patients in hospitals, persons admitted in sanatoria or homes for the aged and similar institutions, persons who lead nomadic life on account of vagaries of climate, physically disabled persons, expectant mothers and persons in lawful custody.

Voting under special circumstances

24. (1) An individual who, or an association, organization, or institution which intends to act as referendum observer, shall, not later than two months before the referendum date, apply to the Commission for accreditation.

Accreditation of referendum observers

(2) No person, association, organization or institution shall observe any referendum unless the person, association, organization or institution has been accredited by the Commission.

(3) The Commission may at the referendum accredit individuals who or officials of associations, organizations, or institutions which are manifestly non-partisan to act as referendum observers.

(4) The Commission shall issue guidelines for referendum observers, consistent with internationally accepted standards for free and fair referendum, which shall be binding on referendum observers upon accreditation by the Commission.

(5) Without prejudice to the generality of subsection (4), the guidelines may specify the procedures for the accreditation of referendum observers.

(6) The Commission may revoke the accreditation granted to any referendum observers where it is satisfied that the referendum observer is partisan.

(7) Each accredited referendum observer shall submit to the Commission a written report of their individual or group observation not later than six months after the date of the announcement of the referendum results in respect of the referendum observed.

25. (1) Immediately after the results of the poll for all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of registered agents of referendum committees and observers present—

Constituency
referendum results

- (a) examine the ballot papers marked “rejected”, “rejection objected to” and “disputed” and confirm or vary the decisions of the presiding officers with regard to the validity of those ballot papers;
- (b) publicly announce to persons present the total number of valid votes cast for each side in the referendum;
- (c) publicly declare to the persons present the side that has received the greater number of votes in the referendum and therefore the winning side;
- (d) declare the—
 - (i) name of the constituency;
 - (ii) total number of registered voters;
 - (iii) votes cast in support of and in opposition to the referendum question;
 - (iv) number of rejected votes cast in support of and in opposition to the referendum question in each polling station;
 - (v) aggregate number of votes cast in the constituency; and
 - (vi) aggregate number of rejected votes; and
- (e) sign and date the results in the prescribed form and—
 - (i) give a copy of the form to the registered referendum committee's agents; and
 - (ii) deliver the original to the Commission.

(2) The decision of the returning officer on the validity or otherwise of a ballot paper or vote under this section shall, subject to verification by the Commission, be final except, where a referendum petition has been filed.

26. (1) The returning officer shall as soon as practicable, forward to the Commission the results of the referendum.

Return of
referendum.

(2) Upon receipt of constituency referendum results the Commission shall hold the Constituency results until the results to the referendum in every constituency have been received:

(3) Despite subsection (2), the Commission may declare the results of the referendum before all the constituencies have delivered their results, if in its opinion the results that have not been received would not make a difference to the results of the referendum.

27. (1) The Commission shall on receipt of results of the referendum from all constituencies and within forty eight hours from the close of the final polling in the referendum—

Publication of
referendum results

- (a) announce to the public the total number of valid votes cast supporting or opposing the referendum question;
- (b) declare whether or not the amendment to the Constitution has been ratified by—
 - (i) at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum; and
 - (ii) the amendment is supported by a simple majority of the citizens voting in the referendum.
- (c) publish a notice in the *Gazette* indicating the results of the referendum in each Constituency; and
- (d) publish in the *Gazette* a certificate declaring the results of the referendum and confirming whether or not the amendment to the Constitution has been ratified in accordance with the provisions of the Act and the Constitution.

(2) The results published in the *Gazette* shall be the official results of the referendum.

PART VI—REFERENDUM PETITIONS

28. (1) The conduct, result and validity of a referendum may be challenged by petition to the High Court.

Referendum
petition.

(2) A petition challenging the conduct, result or validity of a referendum shall—

- (a) set out the facts relied on to invalidate the referendum;
- (b) identify the specific matter or matters on which the petitioner relies as justifying the grant of relief;
- (c) contain a request for the relief to which the petitioner claims to be entitled; and
- (d) be filed in the High Court within twenty-one days of the publication of the notice of the results of the referendum in the *Gazette*.

(3) A referendum petition may be presented on any of the following grounds—

- (a) in respect of the result of the voting in all the constituencies or in any one constituency, that corrupt practices prevailed at or in relation to the voting at the referendum in that constituency, or that there was an error or misconduct, whether by act or omission, on the part of a referendum officer; or
- (b) in respect of the declared result of the referendum, that there was an error in the counting or tallying of the votes cast in the referendum.

29. A referendum petition shall be heard and determined by a bench of three judges appointed by the Chief Justice.

Composition of
Court.

30. (1) Where a referendum petition is not presented to the High Court within the time specified in section

Operation of
declared result of
issue submitted to

28(2)(d), the declared result of referendum shall—

referendum.

- (a) have effect from the date on which the result is declared;
- (b) be final and not be challenged in any court of law; and
- (c) be conclusive evidence of the voting at the referendum and of the result of the referendum.

(2) Nothing in this section shall be construed as preventing or delaying the coming into operation of any law in respect of which a referendum is held pursuant to the provisions of the Constitution or any other written law if—

- (a) it is stated in the declared result of the referendum that the provisions of the Act are supported by at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum and the amendment is supported by a simple majority of the citizens voting in the referendum; and
- (b) the question raised by any referendum petition or, if more than one, by all referendum petitions presented to the High Court in respect of such referendum would not, if decided in favour of the petitioner or petitioners, as the case may be, lead to a declaration by the Commission that by at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum and the amendment is supported by a simple majority of the citizens voting in the referendum did not support the provisions of the said law.

31. (1) A referendum petition may be presented in the High Court by—

Persons who may present referendum petition.

- (a) in the case of a petition in respect of the result of the voting in a constituency, a person who voted lawfully or had a right to vote in that constituency at the referendum;
- (b) in the case of a petition in respect of the declared result of the referendum, a person who voted at the referendum or had a right to vote at the referendum; or

(c) in any other case, the Commission.

(2) A petitioner who presents a referendum petition shall serve all the respondents to the petition within seven days of filing the petition.

(3) A petitioner shall publish a notice of the petition in the *Gazette* and in at least one newspaper of national circulation, within fourteen days after the petition is filed.

(4) A petition may be served personally upon the respondent or by advertisement in a newspaper with national circulation.

32. (1) Where, at the hearing of a referendum petition, a person is alleged to have been culpable of a corrupt practice in relation to the referendum, or where a copy of a referendum petition is served on a particular person on the direction of the High Court, the High Court may, on the application of that person, add or name that person as a respondent to the petition.

Respondents to referendum petition.

(2) Where, at the trial of a referendum petition presented by the Commission, a question of law arises in relation to action or omission by a referendum officer, the High Court may, on the application of the Attorney-General, name the referendum officer as a respondent to the petition.

33. (1) A referendum petition shall be signed by the petitioner or by all the petitioners, if more than one.

Filing of referendum petition.

(2) Whenever a referendum petition is presented under this section, the Registrar of the High Court shall, in writing, inform the Commission of the filing.

34. (1) Subject to the provisions of subsection (2), the Registrar of the High Court shall make a list of all the referendum petitions filed under this Part in the order in which they are filed, and shall keep in the Registrar's office, a copy of the list which shall be open for inspection by any person who applies to inspect the list.

Duty of Registrar to make list of referendum petitions.

(2) A referendum petition shall, unless the High Court orders otherwise, be tried in the order in which it appears on the list made by the Registrar under subsection (1).

(3) Where more than one petition is presented relating to the same referendum, all such petitions shall be dealt

with as one petition as far as the inquiry into the referendum is concerned.

35. (1) Subject to section 22, the Rules Committee as constituted under the Civil Procedure Act, may make rules generally to regulate the practice and procedure of the High Court with respect to the filing and trial of election and referendum petitions, including rules—

Practice procedure and security for costs.

Cap. 21

(a) specifying—

- (i) the time within which any requirement of the rules is to be complied with;
- (ii) the costs of and incidental to the filing and the trial of an election and referendum petition; and
- (iii) the fees to be charged in respect of proceedings of an election and referendum petition; and

(b) generally with regard to any other matter relating to an election and referendum petition as the Chief Justice may deem necessary.

(2) A petitioner shall deposit one million shillings as security for costs of a petition presented under this Act, within ten days of presenting the petition.

(3) Where, a petitioner does not deposit security for costs as required under this section after presenting of a referendum petition, the referendum petition shall be struck out.

(4) The High Court may make such order as to costs as it may deem fit and just in respect of any referendum petition dismissed under this section.

36. Where there are two or more petitioners and one or more of the petitioners dies or die at any time before the final order of the court hearing the petition, the surviving petitioner or petitioners shall be entitled to continue with the petition.

Death of or delay by petitioner.

37. (1) A referendum petition shall be—

- (a) heard and determined within six months from the date of presentation of a petition; and

Hearing of referendum petition.

(b) heard in open court.

(2) The High Court may, in respect of the trial of a referendum petition, exercise such powers within its civil jurisdiction as it may deem appropriate.

(3) A referendum petition may be withdrawn by the petitioner on notice to the other parties and the High Court, subject to any order of the Court as to costs.

38. (1) A Court hearing a referendum petition may, at the hearing of the petition—

- (a) order any person who appears to the court to be concerned in or affected by the referendum petition to attend as a witness at such hearing; and
- (b) examine any witness or any person who is present at the hearing even if the witness or person is not called as a witness by any party to the proceedings:

(2) A witness or person examined by the court under subsection (1) (a) may be cross-examined by or on behalf of the petitioner or the respondent.

(3) Where a person is ordered to attend as a witness under subsection (1), the Court may direct that a copy of the referendum petition be served on that person.

(3) A person who is called as a witness at the trial of a referendum petition shall not be excused from answering any question relating to any offence connected with the referendum on the ground that the answer thereto may incriminate them or on the ground of privilege.

(4) Notwithstanding subsection (3)—

- (a) a witness who answers every question which they are required to answer under this section to the satisfaction of the court, and the answers to which may tend to incriminate them, shall not be liable to prosecution for any offence committed by them in connection with the referendum and in respect of which they are so examined, and shall be entitled to receive a certificate of indemnity issued by the Registrar stating that the person is discharged from liability and shall not be prosecuted for that offence; and

Powers of a court to summon witnesses in a referendum petition.

- (b) an answer by a witness to a question before the Court under this section shall not, except in the case of any criminal proceedings for giving false evidence in respect of such evidence, be admissible as evidence in any civil or criminal proceedings against them.

(5) Where a person has received a certificate of indemnity under subsection (3), and legal proceedings are, at any time, brought against that person for an offence to which the certificate relates, the court having cognizance of the case shall, on proof of the certificate of indemnity, stay such proceedings.

(6) All reasonable expenses incurred by any person in attending at or appearing before the High Court to give evidence as a witness at the trial of a referendum petition shall be paid to such person according to the scale of allowances and expenses appropriate in civil proceedings before the High Court.

39. A voter who has voted at a referendum shall not, in proceedings to question the referendum be required to state how he voted.

Prohibition of disclosure of vote.

40. (1) The High Court on its own motion or on an application by a petitioner may, during the hearing of a referendum petition, order for a scrutiny of votes to be carried out in such manner as the High Court may determine.

Examination of votes.

(2) Where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off—

- (a) the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorised to vote at that station;
- (b) the vote of a person whose vote was procured by bribery, treating or undue influence;
- (c) the vote of a person who committed or procured the commission of personation at the referendum;
- (d) the vote of a person proved to have voted in more than one constituency; or

- (e) the vote of a person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the referendum.

(3) The vote of a voter shall not, except in the case specified in subsection (1)(e), be struck off under subsection (1) by reason only of the voter not having been or not being qualified to have the voter's name entered on the register of voters.

41. (1) At the conclusion of the hearing of a referendum petition challenging the conduct or result of the referendum, the High Court may—

Powers of Court.

- (a) dismiss the petition;
- (b) declare the referendum to be void; or
- (c) uphold the petition in whole or in part.

(2) Without limiting the generality of this section, the High Court may exercise its powers to declare a referendum void on the ground that the Constitution, this Act or the regulations made under this Act were contravened during the referendum, and such contravention has seriously affected the result of the referendum.

(3) The Registrar of the High Court shall deliver to the Commission a certified copy of any decision made by the High Court under subsection (1).

(4) The Registrar of the High Court shall, at the conclusion of the proceedings in respect of a referendum petition, submit to the Commission a certificate under the Registrar's hand, stating that the hearing of the referendum petition has been concluded, and the Commission shall, upon receipt of such certificate, declare and publish the result of the referendum in accordance with the findings of the High Court.

(5) A declaration made by the Commission under subsection (4) shall be final, shall not be challenged in any court, and shall be conclusive evidence of the voting at the referendum to which it relates and of the result of such referendum.

(6) Where the High Court declares a referendum void, the Commission shall conduct a fresh referendum within ninety days.

42. (1) Subject to the provisions of this section, all costs, charges and expenses of and incidental to the presentation and hearing of a referendum petition shall be borne in such manner and in such proportions as the High Court may order, and in particular, any costs which, in the opinion of the High Court, have been caused by any vexatious conduct or by any frivolous or vexatious allegations or objections on the part of the petitioner or of the respondent, may be ordered to be paid by the party by whom such costs have been caused.

Petition expenses.

(2) Where in the hearing of a referendum petition a person appears to the High Court to have been guilty of any corrupt practice relating to the referendum, the High Court may, after giving that person an opportunity to make a statement to show why the order should not be made, order the whole or a portion of the costs of or incidental to the trial of the referendum petition to be paid by that person to such person or persons as the High Court may determine.

(3) Money deposited as security shall, when no longer needed as security for costs, be returned to the person in whose name it is deposited or to any person entitled to receive the money by order of the High Court, which may be made upon motion after notice and proof that all just claims have been satisfied or otherwise sufficiently provided for as the High Court may require.

43. The Commission shall, for the purpose of ensuring that persons with special needs including persons with disabilities realise their right to vote —

Facilitation of persons with special needs including persons with disabilities.

- (a) put in place appropriate infrastructure including special voting booths; and
- (b) have in each polling station such officers as the Commission considers necessary to facilitate voting.

PART VII—MISCELLANEOUS

44. A referendum officer or other person who, having a duty to perform under this Act fails to so perform, without reasonable cause, commits an offence, and shall on conviction be liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.

Offences by referendum officials.

PART VIII—PROVISIONS ON DELEGATED POWERS

45. (1) The Commission may make regulations for the better carrying into effect the provisions of this Act Regulations.

(2) The Commission may, without prejudice to the generality of the foregoing, may make regulations –

- (a) governing verification of registered voters and signatures;
- (b) governing the composition and registration of a referendum committee;
- (c) on the conduct of a referendum; and
- (d) generally for carrying out the provisions of this Act.

(3) For the purposes of Article 94(6) of the Constitution –

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- (a) the authority of the Commission to make regulations under this Act shall be limited to bringing into effect the provisions of this Act and for the fulfilment of the objectives of this Act;
- (b) the principles and standards applicable to the regulations made under this section are those set out in the Interpretation and General Provisions Act and the Statutory Instruments Act, 2013.

PART IX—CONSEQUENTIAL AMENDMENTS

46. The Elections Act is amended by deleting–

Amendment of
Act No. 24 of
2011.

- (a) section 49;
- (b) section 50;
- (c) section 51;
- (d) section 52;
- (e) section 53;
- (f) section 54;
- (g) section 55;
- (h) section 88;
- (i) section 89;

- (j) section 90;
- (k) section 91;
- (l) section 92;
- (m) section 93;
- (n) section 94;
- (o) section 95;
- (p) section 96;
- (q) section 97;
- (r) section 98;
- (s) section 99;
- (t) section 100;
- (u) section 101;
- (v) section 102;
- (w) section 103; and
- (x) section 104.

SCHEDULE

[s. 15(9)]

REFERENDUM CODE OF CONDUCT

1.(1) This Code shall be subscribed to by a leader, a chief agent, an agent or an official of a referendum committee.

(2) All registered referendum committees shall execute this Code through the hand of their respective registered officials to signify their acceptance to be bound by the provisions of this Code and their commitment to strive to ensure that their members and any person who supports the referendum committee abide by the code at all stages of a referendum.

2. In this Code, unless the context otherwise requires—

“Committee” means the Code of Conduct Enforcement Committee;

“electoral area” means a ward, county or constituency;

“referendum court” the High Court in the exercise of the jurisdiction conferred upon it by this Act;

3. A registered referendum committee and persons bound by this Code shall endeavour to promote the object of the code to enable free campaigning and open public debate to take place in all parts of Kenya during a referendum period..

4. A registered referendum committee and its officials, by subscribing to this Code, further commit to—

- (a) adhere to the values and principles of the Constitution;
- (b) give wide publicity to this Code;
- (c) promote voter education campaigns;
- (d) condemn, avoid and take steps to prevent violence and intimidation;
- (e) instruct their supporters of their obligations under this Code;
- (f) promote gender equality;
- (g) promote ethnic tolerance;

- (h) promote cultural diversity;
- (i) promote the fair representation of special interest groups;
- (j) generally affirm the rights of all participants in a referendum to—
 - (i) express divergent opinions;
 - (ii) canvass freely for support from voters;
 - (iii) subject to the Public Order Act (Cap. 56) hold public meetings;
 - (iv) attend public meetings convened by others;
 - (v) distribute non-offensive electoral literature and campaign materials;
 - (vi) publish and distribute non-offensive notices and advertisements;
 - (vii) erect non-offensive banners, placards and posters;
 - (i) remove all banners, placards and posters erected during the referendum period;
 - (ii) promote free electoral campaigns by all lawful means; and
 - (iii) co-operate with the Commission and the relevant Government agencies and other authorities in the investigation of issues and allegations arising during the referendum period.

5. All those bound by this Code shall, throughout a referendum period—

- (a) publicly and repeatedly condemn violence and intimidation and avoid the use of hate speech, language or any kind of action which may lead to violence or intimidation, whether to demonstrate wide support, gain any kind of advantage, or for any other reason;
- (b) refrain from any action involving violence or intimidation;
- (c) ensure that no arms or weapons of any kind are carried or displayed at meetings or any march, demonstration or other event of a political nature;

- (d) refrain from campaigning in places of worship or during burial ceremonies;
- (e) co-operate and liaise in good faith with other referendum committees to avoid organizing public meetings, demonstrations, rallies or marches to take place at the same time and venue;
- (f) do nothing to impede the right of others to have reasonable access to voters for the purposes of conducting voter education, fund raising, canvassing membership and soliciting support;
- (g) prevent the removal, disfigurement or destruction of political campaign materials of any party;
- (h) refrain from offering any document or reward to any person in consideration of such person attending or not attending any event; or voting or not voting (either at all, or in any particular manner)
- (i) refrain from any attempt to abuse a position of power, privilege or influence, including parental, patriarchal, state or traditional authority for political purposes including any offer of reward or threat of penalty;
- (j) avoid any discrimination based on race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth in connection with the referendum;
- (k) in relation to the Commission—
 - (i) acknowledge the authority of the Commission in the conduct of the referendum;
 - (ii) ensure the attendance and participation of representatives at meetings and other forums convened by or on behalf of the Commission;
 - (iii) implement the orders and directions of the Commission;

- (iv) facilitate the Commissions right of access through official observers and other representatives to all public meetings or other referendum activities;
- (v) co-operate in the official investigation of issues and allegations arising during a referendum period;
- (vi) take all reasonable steps to ensure the safety of observers and other representatives of the Commission from exposure to insult, hazard or threat in the course of their official duties;
- (vii) to establish and maintain effective lines of communication with the Commission; and
- (viii) to abide by the provisions of this Code;

(l) reassure voters with regard to the impartiality of the Commission and the secrecy and integrity of the ballot, and to reaffirm that no one should know how any other person has voted;

- (m) take reasonable steps to discipline and restrain their officials who—
 - (i) infringe this Code;
 - (ii) engage in activities of commission or omission which constitute offences under the electoral laws or otherwise fail to observe this Code; and
 - (iii) contravene or fail to comply with any provision of the electoral laws;
- (n) agree for officials and supporters to submit to the disciplinary procedures of the Commission for any violation of this Code; and
- (o) without prejudice to the right to present a petition to a referendum court, accept the final outcome of the referendum and the Commission's declaration and certification of the results thereof.

6. Every referendum committee—

- (a) shall respect the role of the media before, during and after a referendum conducted under this Act;

- (b) may not prevent access by members of the media to public meetings, marches, demonstrations and rallies; and
- (c) shall take all reasonable steps to ensure that journalists are not subjected to harassment, intimidation, hazard, threat or physical assault by any of their representatives or supporters.

7. (1) Every media house and its representative shall—

- (a) adhere to the media professional ethics in its coverage of public meetings, campaign rallies and demonstrations;
- (b) during the prescribed hours of polling, not publish or distribute the result of an exit poll taken in that referendum;
- (c) adhere to any media regulations issued by the Commission; and
- (d) abide by the provisions of this Act.

8. (1) The Commission shall set up the Code of Conduct Enforcement Committee which shall comprise of not less than five members of the Commission and shall be chaired by a member appointed by the Chairperson; the Commission may nominate a member of its staff to be the secretary to the Committee.

(2) The Chairperson of the committee shall be a person who is qualified to hold the office of Judge of the High Court.

(3) Every referendum committee, official and agent shall—

- (a) acknowledge the authority of the Committee to enforce the provisions of this Code on behalf of the Commission;
- (b) ensure compliance with summons issued to it, its officials or representatives by the Committee;
- (c) co-operate in the official investigation of issues and allegations arising during a referendum period; and
- (d) respect and comply with the orders issued by the Committee.

(4) The Committee shall issue summons to a person or a referendum committee against whom a complaint has been received as having infringed the provisions of this Code and any other person who the Commission has reason to believe to have infringed the provisions of this Code to attend its meetings. The meetings will be convened at any place which the Committee may deem fit.

(5) In its proceedings, the Committee may examine the person summoned and may allow a person to have legal representation.

(6) The Committee shall not be bound by the provisions of the Criminal Procedure Code (Cap. 75) or the Evidence Act (Cap. 80) in its proceedings.

(7) Every person who is summoned by the Committee and who attends the meetings of the Committee shall be accorded the right to be heard.

(8) The Committee shall exercise the powers provided under this Code to punish any person found to have infringed this Code.

(9) The Committee shall deliver its verdict expeditiously and inform the parties of the decision.

(10) Notwithstanding the provisions of this Code, any complaint submitted in writing alleging any irregularity with any establishment of the electoral process at any stage if not satisfactorily resolved by the peace committee shall be examined and determined by the Committee.

9. Every registered political referendum committee, and agent shall—

- (a) ensure security and full participation of women and persons with disabilities as supporters and voters;
- (b) respect the right of women to communicate freely during the referendum period;
- (c) facilitate the full and equal participation of women in referendum activities;
- (d) ensure free access of women and persons with disabilities to all public meetings, marches, demonstrations, rallies and other public events; and

- (e) take reasonable steps to ensure that women are free to engage in any political activity.

10. (1) The Commission may establish peace committees in every constituency during a referendum period.

(2) Every referendum committee, official and agent shall—

- (a) acknowledge the activity of peace committee established at the constituency level by the Commission;
- (b) ensure attendance of the peace committee meetings convened at the constituency level on behalf of the Commission; and
- (c) co-operate in the official investigation initiated by the peace committee on issues and allegation arising at the election period.

(3) The peace committee shall have power to—

- (a) reconcile warring parties;
- (b) mediate political disputes in the constituencies;
- (c) liaise with government security agencies in the constituency and report suspected malpractices; and
- (d) report any violation of this Code to the Committee for appropriate action.

11. Any person may complain about the breach of this Code.

MEMORANDUM OF OBJECTS AND REASONS**Statement of the Objects and Reasons for the Bill**

The principal object of the Bill is to provide for the procedure of the approval of an amendment to the Constitution by a referendum, the conduct of a referendum, referendum petitions and consequential amendments to the Elections Act, No. 24 of 2011 which currently provide for the conduct of a referendum.

Part I of the Bill provides for the preliminary provisions, which include short title, interpretation and object of the Act.

Part II of the Bill regulates the procedure to amend the constitution by popular initiative. It provides for detailed provisions regulating the procedure under popular initiative.

Part III of the Bill provides for the conduct of referendum. It provides for initiation of a referendum, notice of holding referendum, referendum committees, costs of referendum committee, procedure for conduct of referendum, voting threshold, and general powers of the Commission.

Part IV of the Bill provides for matters preliminary to a referendum such as the appointment of returning officers and other officers for the referendum, the applicable register of voters, requirements for voting, determination of polling areas and polling stations, the use of public facilities by the Commission, the application of the Election Offences Act, 2016 during the referendum period officers and the operations of referendum committees.

PART V of the Bill provides for procedures relating to voting during a referendum and the declaration of the results of the referendum.

PART VI of the Bill provides for referendum petitions. It provides for election petition procedures to apply to referendum petition, referendum petition, composition of court, operation of declared result of issue submitted to referendum, persons who may present referendum petition, respondents to referendum petition, filing of referendum petition, duty of Registrar to make list of referendum petitions, practice procedure and security for costs, death of or delay by petitioner, hearing of referendum petition, powers of a court to summon witnesses in a referendum petition, prohibition of disclosure of vote, examination of votes, powers of court, petition expenses, and facilitation of persons with special needs including persons with disabilities.

PART VII of the Bill contains provisions on the delegated powers to make regulations for the carrying into effect of the Bill.

PART VIII of the Bill contains miscellaneous provisions.

PART IX of the Bill provides for consequential amendments. This Part provides for the amendment to the Elections Act, No. 24 of 2011 to delete all provisions relating to the conduct of a referendum.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

This Bill delegates legislative powers to the Independent Electoral Boundaries Commission and does not limit fundamental rights and freedoms.

Statement of how the Bill concerns county governments

The Bill does not concern county governments in terms of Article 109(5) of the Constitution as it does not contain provisions that affect the functions and powers of the county governments as set out in the Fourth Schedule to the Constitution.

National elections which includes the conduct a referendum is a function of the national government.

Statement as to whether the Bill is a money Bill within the meaning of Article 114 of the Constitution

The enactment of this Bill may occasion additional expenditure of public funds.

Dated the 4th March, 2020.

JEREMIAH KIONI,
*Chairperson, Constitutional
Implementation Oversight Committee.*

Section 51 of the Elections Act, 2011 that is proposed to be amended—

Referendum committees

51. (1) Where a referendum question requires a “yes” or “no” answer, persons intending to campaign for or against the referendum question shall form such national referendum committees and constituency referendum committees as are necessary.

(2) Where there is more than one referendum question, persons intending to campaign for or against each referendum question shall, on application to the Commission, form one national referendum committee each and one committee each in every constituency for each referendum question.

(3) A referendum committee shall apply to the Commission for registration in the prescribed form.

(4) An application under subsection (3) shall be accompanied by information showing that the applicant adequately represents persons campaigning for or against the referendum question.

(5) The national referendum committees shall control and regulate the constituency referendum committees.

(6) A member of a referendum committee shall subscribe to and abide by the Electoral Code of Conduct set out in the Second Schedule.

Section 52 of the Elections Act, 2011 that is proposed to be amended—

Costs of referendum committee

52. (1) Each referendum committee shall bear its own costs during the campaign period of the referendum.

(2) The costs referred to in subsection (1) include payment of the agents of the respective referendum committees.

Section 53 of the Elections Act, 2011 that is proposed to be amended—

Procedure for conduct of referendum

53. The procedure for the conduct of an election shall apply with necessary modifications to the conduct of referendum.

Section 54 of the Elections Act, 2011 that is proposed to be amended—

Voting threshold

54. A referendum question on an issue other than that contemplated in Articles 255, 256 and 257 of the Constitution shall be decided by a simple majority of the citizens voting in the referendum.

Section 55 of the Elections Act, 2011 that is proposed to be amended—

General power of the Commission

55. Nothing in this Act shall preclude the Commission from taking any administrative measures to ensure effective conduct of the referendum.

Section 88 of the Elections Act, 2011 that is proposed to be amended—

Election petition procedures to apply to referendum petition

88. Unless specifically provided for in this Act, the procedure applicable to an election petition shall apply to a referendum petition.

Section 89 of the Elections Act, 2011 that is proposed to be amended—

Referendum petition

89. (1) The conduct, result and validity of a referendum may be challenged by petition to the High Court.

(2) A petition challenging the conduct, result or validity of a referendum shall—

- (a) set out the facts relied on to invalidate the referendum;
- (b) identify the specific matter or matters on which the petitioner relies as justifying the grant of relief;
- (c) contain a request for the relief to which the petitioner claims to be entitled; and
- (d) be filed in the High Court within twenty-one days of the publication of the notice of the results of the referendum in the *Gazette*.

(3) A referendum petition may be presented on any of the following grounds—

- (a) in respect of the result of the voting in all the constituencies or in any one constituency, that corrupt practices prevailed at or in relation to the voting at the referendum in that constituency, or that there was an error or misconduct, whether by act or omission, on the part of a referendum officer; or
- (b) in respect of the declared result of the referendum, that there was an error in the counting or tallying of the votes cast in the referendum.

Section 90 of the Elections Act, 2011 that is proposed to be amended—

Composition of Court

90. A referendum petition shall be heard and determined by a bench of three judges appointed by the Chief Justice.

Section 91 of the Elections Act, 2011 that is proposed to be amended—

Operation of declared result of issue submitted to referendum

91. (1) Where a referendum petition is not presented to the High Court within the time specified in section 89(2)(d), the declared result of referendum shall—

- (a) have effect from the date on which the result is declared;
- (b) be final and not be challenged in any court of law; and
- (c) be conclusive evidence of the voting at the referendum and of the result of the referendum.

(2) Nothing in this section shall be construed as preventing or delaying the coming into operation of any law in respect of which a referendum is held pursuant to the provisions of the Constitution or any other written law if—

- (a) it is stated in the declared result of the referendum that the provisions of the Act are supported by a simple majority of the citizens voting in the referendum; and
- (b) the question raised by any referendum petition or, if more than one, by all referendum petitions presented to the High Court in respect of such referendum would not, if decided in favour of the petitioner or petitioners, as the case may be, lead to a declaration by the Commission that a simple majority of the citizens voting in such referendum did not support the provisions of the said law.

Section 92 of the Elections Act, 2011 that is proposed to be amended—

Persons who may present referendum petition

92. (1) A referendum petition may be presented in the High Court by—

- (a) in the case of a petition in respect of the result of the voting in a constituency, a person who voted lawfully or had a right to vote in that constituency at the referendum;
- (b) in the case of a petition in respect of the declared result of the referendum, a person who voted at the referendum or had a right to vote at the referendum; or
- (c) in any other case, the Commission.

(2) A petitioner who presents a referendum petition shall serve all the respondents to the petition within seven days of filing the petition.

(3) A petitioner shall publish a notice of the petition in the *Gazette* and in at least one newspaper of national circulation, within fourteen days after the petition is filed.

(4) A petition may be served personally upon the respondent or by advertisement in a newspaper with national circulation.

Section 93 of the Elections Act, 2011 that is proposed to be amended—

Respondents to referendum petition

93. (1) Where, at the hearing of a referendum petition, a person is alleged to have been guilty of a corrupt practice in relation to the referendum, or where a copy of a referendum petition is served on a particular person on the direction of the High Court, the High Court may, on the application of that person, add or name that person as a respondent to the petition.

(2) Where, at the trial of a referendum petition presented by the Commission, a question of law arises in relation to action or omission by a referendum officer, the High Court may, on the application of the Attorney-General, name the referendum officer as a respondent to the petition.

Section 94 of the Elections Act, 2011 that is proposed to be amended—

Filing of referendum petition

94. (1) A referendum petition shall be signed by the petitioner or by all the petitioners, if more than one.

(2) Whenever a referendum petition is presented under this section, the Registrar of the High Court shall, in writing, inform the Commission of the filing.

Section 95 of the Elections Act, 2011 that is proposed to be amended—

Duty of Registrar to make list of referendum petitions

95. (1) Subject to the provisions of subsection (2), the Registrar of the High Court shall make a list of all the referendum petitions filed under this Part in the order in which they are filed, and shall keep in the Registrar's office, a copy of the list which shall be open for inspection by any person who applies to inspect the list.

(2) A referendum petition shall, unless the High Court orders otherwise, be tried in the order in which it appears on the list made by the Registrar under subsection (1).

(3) Where more than one petition is presented relating to the same referendum, all such petitions shall be dealt with as one petition as far as the inquiry into the referendum is concerned.

Section 96 of the Elections Act, 2011 that is proposed to be amended—

Practice procedure and security for costs

96. (1) Subject to the provisions of section 98, the Rules Committee as constituted under the Civil Procedure Act (Cap. 21), may make rules generally to regulate the practice and procedure of the High Court with respect to the filing and trial of election and referendum petitions, including rules—

(a) specifying—

- (i) the time within which any requirement of the rules is to be complied with;
- (ii) the costs of and incidental to the filing and the trial of an election and referendum petition; and
- (iii) the fees to be charged in respect of proceedings of an election and referendum petition; and

(b) generally with regard to any other matter relating to an election and referendum petition as the Chief Justice may deem necessary.

(2) A petitioner shall deposit one million shillings as security for costs of a petition presented under this Act, within ten days of presenting the petition.

(3) Where, a petitioner does not deposit security for costs as required under this section after presenting of a referendum petition, the referendum petition shall be struck out.

(4) The High Court may, make such order as to costs as it may deem fit and just in respect of any referendum petition dismissed under this section.

Section 97 of the Elections Act, 2011 that is proposed to be amended—

Death of or delay by petitioner

97. Where there are two or more petitioners and one or more of the petitioners dies or die at any time before the final order of the court hearing the petition, the surviving petitioner or petitioners shall be entitled to continue with the petition.

Section 98 of the Elections Act, 2011 that is proposed to be amended—

Hearing of referendum petition

98. (1) A referendum petition shall be—

(a) heard and determined within six months from the date of presentation of a petition; and

(b) heard in open court.

(2) The High Court may, in respect of the trial of a referendum petition, exercise such powers within its civil jurisdiction as it may deem appropriate.

(3) A referendum petition may be withdrawn by the petitioner on notice to the other parties and the High Court, subject to any order of the Court as to costs.

Section 99 of the Elections Act, 2011 that is proposed to be amended—

Powers of a court to summon witnesses in a referendum petition

99. (1) A Court hearing a referendum petition may, at the hearing of the petition—

(a) order any person who appears to the court to be concerned in or affected by the referendum petition to attend as a witness at such hearing; and

(b) examine any witness or any person who is present at the hearing even if the witness or person is not called as a witness by any party to the proceedings:

Provided that after examination by the court, the witness or person may be cross-examined by or on behalf of the petitioner or the respondent.

(2) Where a person is ordered to attend as a witness under subsection (1), the Court may direct that a copy of the referendum petition be served on that person.

(3) A person who is called as a witness at the trial of a referendum petition shall not be excused from answering any question relating to any offence connected with the referendum on the ground that the answer thereto may incriminate them or on the ground of privilege.

(4) Notwithstanding subsection (3)—

(a) a witness who answers every question which they are required to answer under this section to the satisfaction of the court, and the answers to which may tend to incriminate them, shall not be liable to prosecution for any offence committed by them in connection with the referendum and in respect of which they are so examined, and shall be entitled to receive a certificate of indemnity issued by the Registrar stating that the person is discharged from liability and shall not be prosecuted for that offence; and

(b) an answer by a witness to a question before the Court under this section shall not, except in the case of any criminal proceedings for giving false evidence in respect of such evidence, be admissible as evidence in any civil or criminal proceedings against them.

(5) Where a person has received a certificate of indemnity under subsection (3), and legal proceedings are, at any time, brought against that person for an offence to which the certificate relates, the court having cognizance of the case shall, on proof of the certificate of indemnity, stay such proceedings.

(6) All reasonable expenses incurred by any person in attending at or appearing before the High Court to give evidence as a witness at the trial of a referendum petition shall be paid to such person according to the scale of allowances and expenses appropriate in civil proceedings before the High Court.

Section 100 of the Elections Act, 2011 that is proposed to be amended—

Prohibition of disclosure of vote

100. A voter who has voted at a referendum shall not, in proceedings to question the referendum be required to state how he voted.

Section 101 of the Elections Act, 2011 that is proposed to be amended—

Examination of votes

101. (1) The High Court on its own motion or on an application by a petitioner may, during the hearing of a referendum petition, order for a scrutiny of votes to be carried out in such manner as the High Court may determine.

(2) The provisions of section 82 shall apply with respect to scrutiny of votes under this section

Section 102 of the Elections Act, 2011 that is proposed to be amended—

Powers of Court

102. (1) At the conclusion of the hearing of a referendum petition challenging the conduct or result of the referendum, the High Court may—

- (a) dismiss the petition;
- (b) declare the published result to be incorrect;
- (c) declare the referendum to be void; or
- (d) uphold the petition in whole or in part.

(2) Without limiting the generality of this section, the High Court may exercise its powers to declare a referendum void on the ground that this

Act or the regulations made under this Act were contravened during the referendum, and such contravention has seriously affected the result of the referendum.

(3) The Registrar of the High Court shall deliver to the Commission a certified copy of any decision made by the High Court under subsection (1).

(4) The Registrar of the High Court shall, at the conclusion of the proceedings in respect of a referendum petition, submit to the Commission a certificate under the Registrar's hand, stating that the hearing of the referendum petition has been concluded, and the Commission shall, upon receipt of such certificate, declare and publish the result of the referendum in accordance with the findings of the High Court.

(5) A declaration made by the Commission under subsection (4) shall be final, shall not be challenged in any court, and shall be conclusive evidence of the voting at the referendum to which it relates and of the result of such referendum.

(6) Where the High Court declares a referendum void, the Commission shall conduct a fresh referendum.

Section 103 of the Elections Act, 2011 that is proposed to be amended—

Petition expenses

103. (1) Subject to the provisions of this section, all costs, charges and expenses of and incidental to the presentation and hearing of a referendum petition shall be borne in such manner and in such proportions as the High Court may order, and in particular, any costs which, in the opinion of the High Court, have been caused by any vexatious conduct or by any frivolous or vexatious allegations or objections on the part of the petitioner or of the respondent, may be ordered to be paid by the party by whom such costs have been caused.

(2) Where in the hearing of a referendum petition a person appears to the High Court to have been guilty of any corrupt practice relating to the referendum, the High Court may, after giving that person an opportunity to make a statement to show why the order should not be made, order the whole or a portion of the costs of or incidental to the trial of the referendum petition to be paid by that person to such person or persons as the High Court may determine.

(3) Money deposited as security shall, when no longer needed as security for costs, be returned to the person in whose name it is deposited or to any person entitled to receive the money by order of the High Court, which may be made upon motion after notice and proof that all just claims have

been satisfied or otherwise sufficiently provided for as the High Court may require.

Section 104 of the Elections Act, 2011 that is proposed to be amended—

Facilitation of persons with special needs including persons with disabilities.

104. The Commission shall, for the purpose of ensuring that persons with special needs including persons with disabilities realise their right to vote—

- (a) put in place appropriate infrastructure including special voting booths; and
- (b) have in each polling station such officers as the Commission considers necessary to facilitate voting.

