



MEMORANDUM

**to the National Assembly and Senate Select Committees on Election Laws
(Amendment) Bill, 2017**

Submitted by

The Kenya ICT Action Network (KICTANet)

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Signed by Grace Githaiga on behalf of KICTANet.

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Introduction

The Kenya ICT Action Network (KICTANet) is a multi stakeholder ICT policy forum that brings together individuals and organizations interested in, and working on ICT policy and regulation in Kenya. Established in 2005, KICTANet's overall objective is to act as a catalyst for reform in the ICT sector. Therefore it supports national objectives towards ensuring ICT enabled growth and development to improve the livelihoods of Kenyans by ensuring the availability of accessible, efficient, reliable and affordable ICT services.

As the authoritative ICT policy platform in the country, KICTANet focuses on how ICTs can be used effectively for a better society. This is achieved through bringing the stakeholders together, or crowdsourcing for ideas to monitor and suggest the best policy options that support ICT growth and development. This approach promotes cooperation and collaboration among its diverse membership of academia, business, government, civil society, media and technical experts.

In the run-up to the August 2017 elections, KICTANet contributed to the process in a number of ways. In 2016, KICTANet contributed to a national discussion on election laws through the submission of a Memorandum on the Election law (Amendment) Bill) 2016 to the Senate Committee. Further, the Network made several recommendations among them the need for IEBC to develop a system that safeguards the integrity of the vote as well as efficiency of transmission.

During the August 8, 2017 elections, the Network also observed the use of ICT in areas such as the registration of voters, verification of voter details in the register, the use of online spaces for electioneering, election policy and legal processes, IEBC engagement with ICT community, deployment and implementation of the Kenya Integrated Elections Management Systems (KIEMS) in voter identification and in the transmission of results.

In the preliminary, we noted that the use of technology in voter identification and transmission of results from the polling stations enhanced the efficiency of the election.

It is our position therefore that since technology was already deployed on August 8, the spirit should be to enhance and move with it, as it is the present and the future.

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A few examples of technology deployment in critical sectors in our society

1. We have trusted our economy on technology through mobile money transactions. According to the CBK, Kenyans transact an average of KES 300 billion monthly, through mobile payments. This technology allows us to not only conduct personal and business transactions, but to also making payments on essential services.
2. Technology is now key to service delivery. For government through IFMIS, eCitizen, iTax, TIMS, ePassports, Tablets for Primary Schools etc. & M-Akiba, which is a Government of Kenya issued retail bond; and also, several businesses e.g. banks, schools, traders, are also utilizing technology.
3. Institutions across the country are deploying technology to enhance the efficiency, transparency, accountability and effectiveness of their services.

Initially, there was fear of unknown in use of technology for money services, but it has now been proven that it has enhanced efficiency in people's lives.

Moving forward and in light of the August 8th elections, it is our considered view that technology will continue to enhance efficiency in elections if proper safeguards are put in place. Technology is innocent, and efforts should therefore focus on putting systems that work, systems that will not automatically be prone to human interference.

We would therefore recommend that there is sufficient time between now and 2022 for IEBC to develop a 100% voting system that will allow people to vote from the comfort of their homes and offices. This will mean that there will be no need for long queues, people travelling to vote, and therefore no interruption of people's schedules. Upon voting, the results would be recorded, tallied and transmitted as soon as a voter casts their vote, similar to the Estonian model. In fact, the current KEIMS device is capable of a fully automated voting.

In addition, we should trust Kenyans to develop and maintain our infrastructure, including having the servers hosted locally. This will create job opportunities and will allow us to put to task the providers of cloud services locally. Further, as we continue to adopt ICTs, we urge Parliament to consider reviewing the draft ICT Policy 2016 to enhance growth in the sector. In addition enact the Data Protection Bill, 2012 and the Computer and Cybercrimes Bill, 2017, to guarantee the privacy of personal information collected in Kenya and the security of

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information systems in the country, respectively. KICTANet will endeavour to present to Parliament its proposals for reforms on these critical areas.

Comments on Technology aspects of the Election Laws, 2017

Observations made during the August 8, 2017 exercise, and research carried out by stakeholders inform the proposals herein.

KICTANet submits as follows:

1. Elections have always been contentious and the Constitution attempted to reduce contentions by creating institutions and systems that would build public trust in electoral processes. We observed that election technology improved efficiency of electoral processes and urge leaders to enhance this public trust by withdrawing this Bill in good faith as it affects preparedness for the elections.
2. Changing the legislative framework 20 days to the election date is not advisable and as such, it is opposed. The current legal framework provided under the Constitution and the various Election Acts are sufficient to ensure that the upcoming election is administered in a manner that is impartial, neutral, transparent, verifiable, credible, efficient, accurate and accountable.
3. In order to conduct elections that are in line with these constitutional standards, the onus is on the IEBC to operate within the existing legal framework and ensure its structures, policies and processes, including those relating to ICTs, comply with existing laws. Changing the law now, may result in confusion and pose challenges for IEBC, by requiring it to review all its technology structures, policies and processes to comply with the new law. This creates an unpredictable legal environment, which is not advisable.
4. Amendments to these laws might necessitate amendments to the regulations which in itself is a complex process that calls for extensive stakeholder engagement. Making these amendments therefore, inherently prejudices the conduct of elections.
5. Let us not blame the technology for the failures of human beings. In order to have a credible election, it is important to insist that officers handling critical aspects of the electoral process, including ICTs, comply with the values and principles espoused under

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Chapter 6 of the Constitution. Officers who violate electoral laws should be held to account and charged where culpable, for the commission of electoral offences.

6. All the institutions involved in electoral processes ought to use the remaining period strengthening the structures, based on the lessons learnt and the recommendations from the August election. For instance, ensuring the system to be used has redundancy, use of alternative technologies in areas without network and several options for electronic transmission of results. So far, the country has spent a lot of resources to procure electoral systems in accordance with the existing laws. It is important that these resources do not go to waste.

KICTANet has carefully considered the individual proposals in the Election Laws (Amendment) Bill, and would like to make the following submissions on some of the clauses relating to technology:

	Current Clause in the Election Laws (Amendment) Bill, 2017	Proposed Amendment	Rationale and Justification
1	<p>Clause 6 (Amending Section 39 of the Elections Act, 2011)</p> <p>Section 39 of the Elections Act, 2011 is amended by—</p> <p>(a) Deleting subsection (1C) and substituting therefor the following new subsection—</p> <p>“(1C) For purposes of a presidential election, the Commission shall—‘</p> <p>(a) electronically and manually transmit the tabulated results of an election for the President from a polling</p>	<p>Delete Clause.</p> <p>Section 39(1C) should remain as it is currently:</p> <p>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;</p>	<ul style="list-style-type: none"> • The Kriegler Commission proposed the use of technology to curb electoral fraud that has caused violence in past elections. • The use of technology in elections ensures the efficiency, integrity, accountability, accuracy and credibility of the election, given the weaknesses of the manual system. • A better approach would be to fortify the existing electronic transmission process by ensuring that all transmitted results (image or

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<p>station to the Constituency tallying centre and to the national tallying centre;</p>		<p>text) have a unique ID, and can be traced to the officer, the specific device, prescribed form, location, time and date they were entered.</p> <ul style="list-style-type: none"> • Also, penalties for officers who manipulate, or wilfully enter and transmit wrong results in the KEIMS kits should be introduced.
<p>(1D) Where there is a discrepancy between the electronically transmitted and manually transmitted results, the manually transmitted results shall prevail.</p>	<p>Delete Clauses to be introduced as 1D, 1E and 1F</p>	<ul style="list-style-type: none"> • Krielglar Commission also recommended use of technology to improve efficiency • Making the manual system superior to the electronic one allows for and endorses irregularities. This erodes the accountability, accuracy and verifiability of the process. • As such, there is no incentive to strictly adhere to the law. For instance, an officer could feed the accurate result into the system but manually transmit a falsified result • The KEIMS cures the risk of fraud. • Undermining the electronic transmission, renders the other elements of the system redundant.
<p>(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.</p> <p>(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</p>		

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	only and shall not be the basis for a declaration by the Commission		
2	<p>Clause 7 (Amending Section 44 of the Elections Act, 2011)</p> <p>(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.</p>	<p>Delete Clause 7.</p> <p>Section 44(5) should remain as is.</p>	<ul style="list-style-type: none"> • Subsection 5 details the areas that require regulation. IEBC is required to consult with various stakeholders in the process of coming up with these regulations. It is through this consultation process that organizations such as KICTANet, which has in its membership experts in various fields in IT, can give their input on how to improve some areas for optimal performance. • Constitutional bodies must carry out their functions in a transparent manner and in consultation with the public. This amendment undermines such transparency.
3	<p>Clause 7 (Amending Section 44 of the Elections Act, 2011)</p> <p>(b) Deleting subsection (6)</p>	<p>Delete Clause 7.</p> <p>Section 44(6) should remain as is:</p> <p>(6) Notwithstanding the provisions of section 109(3) and (4), the Commission shall prepare and submit to Parliament, the regulations required made under</p>	<ul style="list-style-type: none"> • Parliamentary scrutiny and oversight of regulations is an important check on the exercise of functions by the executive and independent commissions. • This provision takes away the oversight role of Parliament.

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		subsection (4) within a period of thirty days from the date of commencement of this section.)	
4	<p>Clause 8 (Amending Section 44A of the Elections Act, 2011)</p> <p>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 provisions of Article 38 of the Constitution.</p>	<p>Notwithstanding the provisions of section 44, the Commission may 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 provisions of Article 38 of the Constitution.</p>	<ul style="list-style-type: none"> • Section 44A as it provides for a complementary system for both identification of voters and transmission of results. That aspect should be retained. • The complementary system should still be an electronic system.
5	<p>Clause 9 (Amending Section 83 of the Elections Act, 2011)</p> <p>The Elections Act, 2011 is amended in Section 83 by– (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”;</p>	<p>Delete Clause. Section 83 should remain as is:</p> <p>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.</p>	<ul style="list-style-type: none"> • Emphasis should be on adherence to the principles in the Constitution and applicable laws. • The result of an election is the product of every decision taken throughout the electoral process. It follows therefore that contravening the law would inevitably affect the result. • This Clause creates a loophole for fraudulent conduct and blatant disregard of the law with no recourse.

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	<p>(c) inserting the following new subsection immediately after the renumbered subsection (1)–</p> <p>(2) Pursuant to section 72 of the Interpretations 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 requirement of that form, as long as the deviation is not calculated to mislead”</p>	Delete Clause	<ul style="list-style-type: none"> • Lack of uniform forms fails to meet the constitutional requirement for a transparent and accountable electoral process
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6	Proposal to Insert New Clause: Storage of Information	KICTANET proposes the following text - The Commission shall ensure that information collected during voter registration, voting and transmission of results is processed and stored in Kenya.	<ul style="list-style-type: none"> ● As a nation, we should take very seriously the privacy of the information we collect from the citizenry. ● Data like biometric information should not be under the control of foreign agents, and access of such data should be restricted through a classification system. Someone with your biometric can plant them in a crime scene, use them for impersonation, steal information, etc. That is why in countries like Canada, biometric information can NOT be transported out of the country
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