

SPECIAL ISSUE

Kenya Gazette Supplement No. 85 (National Assembly Bills No. 14)



REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

NATIONAL ASSEMBLY BILLS, 2020

NAIROBI, 29th May, 2020

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THE REFERENDUM (No. 2) BILL, 2020**A Bill for****AN ACT of Parliament to provide for the conduct of a referendum and for connected purposes****ENACTED** by the Parliament of Kenya, as follows—**PART I—PRELIMINARY**

1. This Act may be cited as the Referendum (No. 2) Act, 2020. Short title.

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

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

“Cabinet Secretary” means the Cabinet Secretary for the time being responsible for matters relating to the conduct of a referendum;

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

“constituency” means one of the constituencies into which Kenya is divided under Article 89 of the Constitution;

“petition” means an application to the election court under the Constitution or this Act;

“polling station” has the meaning assigned to it under the Elections Act; No. 24 of 2011.

“register of voters” has the meaning assigned to it under the Elections Act;

“referendum” means a poll held under this Act;

“referendum committee” means a national or a parliamentary constituency committee comprising of persons intending to support or oppose a referendum question;

“referendum officer” means a person appointed by the Commission for the purpose of conducting a referendum;

“referendum option” means one of the preferences upon which voters shall vote in a referendum under this Act;

“referendum question” means a question upon which voters shall vote in a referendum under this Act;

“voter” has the meaning assigned to it under the Elections Act.

3. (1) For purposes of conducting a referendum under this Act, the provisions of the Elections Act relating to the following shall apply as if a referendum were a general election —

Application of the Elections Act, 2011 to a referendum.

- (a) eligibility to vote;
- (b) registration of voters;
- (c) compilation and maintenance of the register of voters;
- (d) inspection of the register of voters;
- (e) updating of the register of voters;
- (f) transfer of registration;
- (g) determination of questions as to registration;
- (h) making and determining claims to be registered;
- (i) objections to registration;
- (j) appointment of officers to preside at polling stations;
- (k) designation of polling stations;
- (l) place and manner in which votes may be cast;
- (m) design and handling of ballot papers;
- (n) grounds for postponement of elections;
- (o) conduct of campaigns; and
- (p) election offences.

(2) The procedure for the conduct of an election under the Elections Act shall apply with necessary modifications to the conduct of a referendum.

PART II—CONDUCT OF REFERENDUM

4. Whenever it is necessary to hold a referendum to amend the Constitution by parliamentary initiative in relation to a matter specified in Article 255 (1) of the Constitution, the President shall within fourteen days of the

Referendum to amend the Constitution by parliamentary initiative.

receipt of the Bill from Parliament, by notice in the *Gazette*, direct the Commission to conduct a referendum.

5. (1) For purposes of a referendum to amend the Constitution by popular initiative pursuant to Article 257 of the Constitution, the promoters of the popular initiative shall collect not less than one million signatures of registered voters, of whom—

Referendum to amend the Constitution by popular initiative.

(a) not more than one third shall be from one county; and

(b) voters in at least twenty four counties shall be represented.

(2) The signatures shall be delivered to the Commission in the prescribed form and within the specified timelines.

(3) Upon receipt of the list of supporters under subsection (2), the Commission shall—

(a) verify that the initiative is supported by at least one million registered voters and meets the criteria set out under subsection (1);

(b) satisfy itself that the initiative meets the requirements of Article 257 of the Constitution; and

(c) submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission.

(4) The draft Bill formulated by the promoters of the popular initiative together with the list of names and signatures of the supporters shall be made public.

(5) If the Commission finds that the requirements of Article 257 of the Constitution have not been met, it shall declare that the draft Bill has failed and shall not submit the draft Bill to the county assemblies.

(6) If the draft Bill is approved by a majority of the county assemblies and introduced in Parliament pursuant to Article 257 (7) of the Constitution, Parliament shall publicize the Bill and facilitate public participation before enactment.

(7) If the Speakers of the two Houses do not receive a response from a county assembly within the three months stipulated under Article 257 (6) of the Constitution, the Bill

will be deemed as not approved in respect of that county assembly.

(8) If one or both Houses of Parliament fail to pass the Bill—

- (a) the Bill shall lapse if it does not relate to a matter specified in Article 255(1) of the Constitution; and
- (b) the proposed amendment shall be submitted to the people in a referendum if it relates to a matter specified in Article 255(1) of the Constitution.

(9) After passing of the Bill by both Houses of Parliament, the Speakers of the two Houses shall jointly submit the Bill to the President who shall, before assenting to the Bill, by proclamation direct the Commission to conduct within ninety days, a national referendum for approval of the Bill.

(10) The Commission shall conduct a referendum within ninety days for from the date of the proclamation.

(11) Upon conclusion of the referendum, the chairperson of the Commission shall certify to the President within seven days of declaration of the referendum results whether the Bill has been approved in the referendum.

(12) The President shall within thirty days of approval of the Bill, assent to the Bill.

6. (1) A Bill to amend the Constitution relating to a matter specified in Article 255(1) of the Constitution shall be formulated in a participatory and inclusive manner taking into consideration all opinions and recommendations.

Bill to amend the Constitution relating to a matter specified in Article 255(1) of the Constitution.

(2) To the extent possible, all opinions and recommendations that are not divergent shall be contained in a single Bill.

(3) Where, in the case of an amendment to the Constitution by popular initiative, there is a divergent general suggestion, the promoters of that initiative shall formulate it into a separate draft Bill.

(4) Where, in the case of an amendment to the Constitution by parliamentary initiative, there is a divergent draft Bill, Parliament shall consider all the draft Bills and may—

- (a) merge them into one draft Bill;
- (b) approve one draft Bill and disapprove the other; or
- (c) approve all the draft Bills for submission to the people in a referendum.

(5) Where more than one draft Bill is to be submitted to the people in a referendum, each of the draft Bills shall constitute an option with a separate symbol and answer.

(6) A voter in a referendum may only vote for one option.

7. (1) Whenever it is necessary to hold a national referendum on any issue, other than a referendum to amend the Constitution, the President may, by notice in the Gazette, proclaim and direct the Commission to conduct a referendum.

Other forms of referenda.

(2) A county government may conduct a local referendum on, among other local issues—

- (a) county laws and petitions; or
- (b) planning and investment decisions affecting the county for which a petition has been raised and duly signed by at least twenty five percent of the registered voters where the referendum is to take place.

(3) The Elections Act, 2011 shall apply, with necessary modifications, with regard to a local referendum.

(4) Where an issue to be decided in a referendum has been referred to the Commission under subsection (1), the Commission shall conduct a referendum in accordance with this Act.

8. (1) A referendum may be conducted on the basis of an Act of Parliament which shall specify—

An Act of Parliament for specific referendum.

- (a) nature and purpose of the referendum;
- (b) the referendum question or option;
- (c) persons eligible to vote in the referendum;
- (d) public education and sensitization;
- (e) use of public funds; and
- (f) any other matter specific to the referendum.

(2) Where Parliament enacts a law under subsection (1), it shall specify the wording of the referendum question or option.

(3) This section shall apply to a county assembly with necessary modifications.

9. (1) Where the Commission—

Procedure before
conduct of
referendum.

(a) receives a notification from the President under Article 256(5)(a) of the Constitution or

(b) a draft Bill from the promoters of a popular initiative under Article 257 of the Constitution,

the Commission shall, within twenty one days, frame the question or option to be determined during the referendum.

(2) The Commission shall, within seven days after framing the question or option, refer the question or option to the relevant House for approval.

(3) If the Parliament approves the question or option submitted under subsection (2), the Speakers of the two Houses shall jointly, within seven days, notify the Commission of the decision of the relevant House.

(4) Where Parliament fails to approve the question or option submitted by the Commission, the House shall, within seven days refer the question or option back to the Commission together with its recommendations.

(5) The Commission shall, after receiving the recommendations of the relevant House under subsection (4) within seven days, review the question or option.

(6) The Commission shall, within seven days after reviewing the question or option, resubmit the question or option to the relevant House for approval.

(7) If the relevant House approves the question or option or fails to approve the question or option submitted under subsection (6), the Speaker of the relevant House shall, within seven days, notify the Commission of the decision of the relevant House and the provisions under subsection (5) and (6) shall apply.

(8) Upon receiving the decision of the relevant House approving the question or option, the Commission shall,

within seven days, publish the question or option in the *Gazette* and the electronic media and two newspapers of national circulation.

(9) A referendum question shall be so worded that each voter may express an opinion on the question or option by making a mark after the word “yes” or “no” on the ballot paper.

(10) Where there are two or more Bills, a referendum option shall be so worded that each voter may express an opinion on the option by making a mark after the option on the ballot paper.

(11) The Commission may assign a symbol for each answer to the referendum question or option as it may consider necessary.

(12) A symbol assigned under subsection (11) shall not resemble that of a political party or of an independent candidate used in a preceding election.

10.(1) The Commission shall, within fourteen days after publication of the question or option referred to in section 9, publish in the *Gazette* and in the electronic media and two newspapers of national circulation, a notice of the holding of the referendum specifying the particulars set out in subsection (2).

Notice of holding a referendum.

(2) The notice shall contain the following particulars—

- (a) the nature of the referendum;
- (b) the referendum question, questions or option and the answer or answers;
- (c) the symbols assigned for each answer to the referendum question or option;
- (d) the day on which the referendum is to be held which shall be at least ninety days from the date of the publication of the notice;
- (e) the polling time of the referendum;
- (f) the day by which the referendum committees must have registered with the Commission; and
- (g) the day and time by which campaigns in support of or in opposition to the referendum question or option shall start and cease respectively.

11. (1) Persons intending to campaign for or against the referendum question shall form one national referendum committee and may form one referendum committee in every constituency.

Referendum committees.

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

(3) A referendum committee formed under subsection (1) or under subsection (2) 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 applicants adequately represent persons campaigning for or against the referendum question or option.

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

(6) The Schedule to this Act shall regulate the conduct of members of referendum committees, leaders, chief agents and members of referendum committees.

12. (1) Every referendum committee that intends to apply for registration under this Act shall, before applying, appoint a leader, a chief agent and the members of the committee.

Appointment of a leader, chief agent and members.

(2) The Commission shall maintain a register of the leaders, chief agents and committee members of the 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 sub section (1) shall be responsible for the affairs of the registered referendum committee and shall provide a sample signature to the Commission.

(4) The Commission may prescribe timelines for the appointment of chief agents and lodging of registration applications.

13. (1) Each referendum committee shall bear its own costs during its existence.

Costs of referendum committee.

(2) Where public money is used to finance the activities of referendum committees, it shall be distributed equally among the registered referendum committees.

(3) The provisions of the Election Campaign Financing Act, 2013 relating to formation of referendum expenditure committees, regulation of expenditure, contributions and donations and resolution of disputes shall apply to financing of referendums.

14. (1) A question shall be approved by a referendum if—

Voting threshold.

- (a) at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum; and
- (b) the amendment is supported by simple majority of the citizens voting in the referendum.

(2) If there is more than one option in a referendum and one option is approved and the other is not, the referendum process shall proceed as though the approved option were the only option and the disapproved option shall be disregarded.

15. Nothing in this Act precludes the Commission from taking any administrative measures to ensure effective conduct of a referendum.

General power of the Commission.

PART III—REFERENDUM PETITIONS

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

Election petition procedures to apply to referendum petition.

(2) A petition—

- (a) to question the validity of a referendum shall be filed within twenty eight days after the date of declaration of the results of the referendum and served within fifteen days of presentation;
- (b) to seek a declaration concerning any matter relating to the referendum shall be presented within twenty-eight days after the proclamation of the referendum or occurrence of the event complained against whichever is later.

(3) A referendum petition shall be heard and determined within six months of the date of lodging the petition.

17.(1) The conduct, result and validity of a referendum may be challenged by a 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 upon 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 declaration 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 other person; 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.

18.(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) 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.

(5) A petition that has not been served within the stipulated timelines shall be struck out.

19. (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.

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 an action or omission by a referendum officer, the High Court may, on the application of the Commission, name the referendum officer as a respondent to the petition.

20. (1) A referendum petition shall be signed by every petitioner or by an advocate acting on their behalf, if more than one.

Filing of a 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 of the petition.

21. (1) A referendum petition shall be heard and determined by a bench of three judges appointed by the Chief Justice.

Composition of Court.

(2) An appeal from the High Court in a referendum petition shall lie to the Court of Appeal on matters of law only and shall be—

- (a) filed within thirty days of the decision of the High Court; and
- (b) heard and determined within six months of the filing of the appeal.

(3) An appeal under subsection (2) shall act as a stay of the results of a referendum until the appeal is heard and determined.

22. (1) Where a referendum petition is not presented to the High Court within the time specified in section 16 (2), the declared result of referendum shall—

Operation of declared result of issue submitted to 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 law if—

- (a) it is stated in the declared result of the referendum that the provisions of the Act are supported by the votes of a majority of the persons entitled to vote 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 the votes of a majority of the citizens voting in the referendum did not support the provisions of the said referendum.

23. (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.

24. (1) Subject to the provisions of section 38, the Rules Committee 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 of 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 a referendum petition; and
- (iii) the fees to be charged in respect of proceedings of a referendum petition; and

(b) generally with regard to any other matter relating to a 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 subsection (2), 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.

25. (1) Where there are two or more petitioners and one or more of the petitioners dies 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
petitioner.

(2) Upon the death of a petitioner under subsection (1), any qualified person may apply to the court to be substituted as the petitioner.

26. (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.

Hearing of a
referendum
petition.

(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.

27. (1) A court hearing a referendum petition may, at the hearing of the petition—

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

- (a) order any person who appears to the court to be concerned with 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) 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.

28. A voter who has cast a ballot at a referendum shall not, in proceedings to question the referendum be required to state how he or she voted.

Secrecy of the ballot.

29. (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) The provisions of section 82 of the Elections Act shall apply with respect to scrutiny of votes under this section.

No. 24 of 2011.

(3) The Commission shall be responsible for the custody of all the ballot boxes.

30. (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 published result to be incorrect and direct the publication of the correct results;
- (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, within seven days, 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 sixty days of the declaration .

31.(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.

32. (1) A Court shall at the conclusion of hearing of a referendum petition in addition to any other orders, send to the Director of Public Prosecution and the Commission a report in writing indicating whether an election offence is likely to have occurred in connection with the referendum.

Certification of referendum

(2) Upon receipt of the report under subsection (1), the Director of Public Prosecutions shall—

- (a) direct that investigations be carried out by the Inspector General of the National Police Service; and
- (b) based on the outcome of the investigations, commence prosecution or close the matter.

PART IV—GENERAL PROVISIONS

33. (1) All documents relating to a referendum shall be forwarded to and retained in safe custody by the Commission for a period of six months after the results of the referendum have been declared and shall, subject to the provisions of the Public Archives and Documentation Service Act, and unless the Commission or the High Court otherwise directs, be destroyed.

Retention and public inspection of documents.
Cap. 19.

(2) Documents retained under this section, other than ballot papers and their counterfoils, shall be made available for inspection by any member of the public, upon request, at such time and subject to such conditions as may be prescribed by the Commission.

(3) For the purpose of an inspection under subsection (2), the referendum officer shall unseal the documents concerned in the presence of a witness, who shall not be the person making the inspection and the referendum officer and the witness shall keep the documents under their scrutiny until they are resealed by the referendum officer in the presence of the witness after the inspection is completed.

(4) The provisions of this section shall not apply to documents that concern a pending referendum petition unless there is a court order granting such authority.

34. 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 one million shillings or to imprisonment for a term not exceeding twelve months or to both.

Offences by referendum officials.

35. The provisions of the Election Offences Act relating to election offences, shall apply with necessary modifications to a referendum.

Application of the Elections Offences Act, No. 27 of 2016.

36. (1) It shall be the duty of every public officer and public or private entity to co-operate with the Commission in its activities during a referendum and not to hinder the Commission in carrying out its functions.

Duty to co-operate.

(2) It shall be the duty of a police officer in their respective area of operation, to take all necessary measures for the maintenance of law and order and stability necessary for the conduct of a referendum and to protect and uphold the rights of all persons under any written law relating to the referendum.

(3) Notwithstanding the provisions of the law relating to the National Police Service or any other written law, a police officer assigned duties during the conduct of a referendum shall be deemed to be a referendum officer for the purposes of this Act and shall be subject to the direction and instruction of the Commission.

(4) It shall be the duty of—

- (a) all officers of the county administration, in their respective administrative units;
- (b) all persons in charge of county government facilities;

- (c) all persons in charge of public facilities;
- (d) all referendum committees and members of the public;
- (e) all persons in charge of public utilities including teachers in charge of public schools used as polling centres;
- (f) the Registrar of Persons; and
- (g) the Registrar of Political Parties,

to give the Commission and its officers the support and collaboration necessary for the Commission to execute the activities relating to the conduct of a referendum.

37. A person who contravenes a provision in this Act for which a penalty has not been provided for, commits an offence and is liable, on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both.

General penalty.

38. (1) A member of the Commission or any officer designated by the Commission may order the arrest of a person who commits an offence under this Act.

Powers of arrest and prosecution.

(2) The Commission shall have the power to prosecute any offences under this Act and impose temporary sanctions against a person who commits an offence under this Act pending the hearing and determination of the offence.

(3) A member of the Commission or any person designated by the Commission shall have the power to impound or to order the impounding of any state resources that are unlawfully used in a referendum campaign.

39. (1) The Electoral Code of Conduct set out under section 110 of the Elections Act shall apply to a referendum under this Act.

Referendum Code of Conduct.

No. 24 of 2011.

(2) Every referendum committee and every person who participates in a referendum under the Constitution and this Act shall subscribe to and observe the Electoral Code of Conduct set out in the Second Schedule to the Elections Act.

(3) Any person who contravenes the Electoral Code of Conduct commits an offence.

(4) The trial of an offence under this section shall be without prejudice to any proceedings in or consequent upon a petition.

40. (1) The Commission may make regulations generally for the better carrying out of the purposes and provisions of this Act.

Regulations

(2) The regulations under subsection (1) may prescribe—

- (a) the forms required under this Act;
- (b) the manner of verification of signatures of persons supporting a referendum.
- (c) the conduct of a referendum generally; and
- (d) any other matter required to be prescribed under this Act.

PART V—CONSEQUENTIAL AMENDMENTS

41. Section 2 of the Elections Act, 2011 is amended by —

Amendment of section 2 of No. 24 of 2011.

- (a) deleting paragraph (b) in the definition of the term “agent”;
- (b) deleting the words “or in a referendum” appearing in the definition of the word “ ballot box”;
- (c) deleting the words “ or a referendum” appearing in the definition of the term “ observer”;
- (d) deleting the definition of the term “referendum”;
- (e) deleting the definition of the term “referendum committees”;
- (f) deleting the definition of the term “referendum officer”;
- (g) deleting the definition of the term “referendum question”;

42. Section 41 of the Elections Act, 2011 is amended by deleting the words “and referendum” appearing in subsection (4).

Amendment of section 41 of No. 24 of 2011.

43. Section 49 of the Elections Act, 2011 is repealed.

Repeal of section 49 of No. 24 of 2011.

44. Section 50 of the Elections Act, 2011 is repealed.

Repeal of section 50 of No. 24 of 2011.

45. Section 51 of the Elections Act, 2011 is repealed.

Repeal of section 51 of No. 24 of 2011.

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| 46. Section 52 of the Elections Act, 2011 is repealed. | Repeal of section 52 of No. 24 of 2011. |
| 47. Section 53 of the Elections Act, 2011 is repealed. | Repeal of section 53 of No. 24 of 2011. |
| 48. Section 54 of the Elections Act, 2011 is repealed. | Repeal of section 54 of No. 24 of 2011. |
| 49. Section 55 of the Elections Act, 2011 is repealed. | Repeal of section 55 of No. 24 of 2011. |
| 50. Section 55A of the Elections Act, 2011 is repealed. | Repeal of section 55A of No. 24 of 2011. |
| 51. Section 55B of the Elections Act, 2011 is repealed. | Repeal of section 55B of No. 24 of 2011. |
| 52. Section 88 of the Elections Act, 2011 is repealed. | Repeal of section 88 of No. 24 of 2011. |
| 53. Section 89 of the Elections Act, 2011 is repealed. | Repeal of section 89 of No. 24 of 2011. |
| 54. Section 90 of the Elections Act, 2011 is repealed. | Repeal of section 90 of No. 24 of 2011. |
| 55. Section 91 of the Elections Act, 2011 is repealed. | Repeal of section 91 of No. 24 of 2011. |
| 56. Section 92 of the Elections Act, 2011 is repealed. | Repeal of section 92 of No. 24 of 2011. |
| 57. Section 93 of the Elections Act, 2011 is repealed. | Repeal of section 93 of No. 24 of 2011. |
| 58. Section 94 of the Elections Act, 2011 is repealed. | Repeal of section 94 of No. 24 of 2011. |
| 59. Section 95 of the Elections Act, 2011 is repealed. | Repeal of section 95 of No. 24 of 2011. |
| 60. Section 96 of the Elections Act, 2011 is repealed. | Repeal of section 96 of No. 24 of 2011. |
| 61. Section 97 of the Elections Act, 2011 is repealed. | Repeal of section 97 of No. 24 of 2011. |
| 62. Section 98 of the Elections Act, 2011 is repealed. | Repeal of section 98 of No. 24 of 2011. |
| 63. Section 99 of the Elections Act, 2011 is repealed. | Repeal of section 99 of No. 24 of 2011. |
| 64. Section 100 of the Elections Act, 2011 is repealed. | Repeal of section 100 of No. 24 of 2011. |
| 65. Section 101 of the Elections Act, 2011 is repealed. | Repeal of section 101 of No. 24 of 2011. |
| 66. Section 102 of the Elections Act, 2011 is repealed. | Repeal of section 102 of No. 24 of 2011. |

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| 67. Section 103 of the Elections Act, 2011 is repealed. | Repeal of section 103 of No. 24 of 2011. |
| 68. Section 104 of the Elections Act, 2011 is repealed. | Repeal of section 104 of No. 24 of 2011. |
| 69. Section 105 of the Elections Act, 2011 is amended by deleting the words “or referendum” appearing in subsection (3). | Amendment of section 105 of No. 24 of 2011. |
| 70. Section 109 of the Elections Act, 2011 is amended in subsection (1) by— | Amendment of section 109 of No. 24 of 2011. |
| (a) by deleting the words “a referendum or” appearing in paragraph (dd); | |
| (b) by deleting the words “a referendum or” appearing in paragraph (ee). | |
| 71. Section 90 of the County Governments Act, 2012 is repealed. | Repeal of section 90 of No. 17 of 2012. |

MEMORANDUM OF OBJECTS AND REASONS

Statement of objects and reasons

The principal object of this Bill is to consolidate the law relating to conduct of referenda, to provide for a transparent and fair process in order to obtain a clear expression of the will of people, by establishing the procedures for the conduct of referenda, providing for the referendum committees and establishing a level playing field for the opposers and supporters of a referendum question, by providing for equal public funding and by limiting expenditure in a reasonable manner for the public good, to afford the people an opportunity to make decisions based on information from both points of view.

The structure of the Bill is as follows:

Clauses 1 to 3 provide for preliminary matters including the short title, interpretation and the application of the Elections Act to referendum.

Clause 4 provides for the proclamation of a referendum to amend the Constitution in relation to matters specified in Articles 255 (1) and 257 (10) of the Constitution. Upon proclamation, the Independent Electoral and Boundaries Commission shall conduct a referendum in 90 days and if the Bill is approved, the President assents to it within seven days,

Clause 5 provides conduct of referendum by popular initiative while clause 6 provides for the manner of preparing the Bill to amend the Constitution

Clause 7 provides for other forms of referendum including county referendums.

Clause 8 provides that a referendum could also be initiated through an Act of Parliament. This section contemplates separate law for a specific referendum. Such law shall specify the wording of the referendum question or option.

Clause 10 provides for the referendum notice. The notice shall contain key particulars including the nature and purpose of the referendum, the referendum question(s) or options, the symbols assigned for each answer, the date of the referendum, polling time, date of registration of referendum committees the campaign period for the referendum.

Clause 11 provides for formation and registration of referendum committees.

Clause 12 provides for the appointment of the chief agent for every referendum committee.

Clause 13 provides for costs of referendum committees and invokes the relevant sections of the Election Campaign Financing Act, 2013.

Clause 14 provides for the approval threshold in a referendum which is at least twenty percent of the registered voters in each of at least half of the counties vote in the referendum and the majority of the citizens voting in the referendum.

Clause 15 provides for a general power of the Commission to take administrative measures to ensure successful conduct of a referendum.

Clauses 16 to 32 provide for referendum petitions including application procedures, persons who may present petitions, respondents, composition of the Court, security for costs, hearing of petitions, examination of votes and petition expenses

Clauses 33 to 40 provides for general provisions including dealing with the documents, offences and general penalty, application of the Election Offences Act, 2016, duty to cooperate, prosecutions and arrests and regulations.

Clauses 41 to 71 deal with consequential amendments.

Statement on the limitation of fundamental rights and freedoms

The Bill does not limit fundamental rights and freedoms.

Statement on how the bill concerns county governments

This Bill concerns county governments in terms of Article 110(1) (a) of the Constitution.

Statement that the Bill is not a money Bill, within the meaning of Article 114 of the Constitution

The Bill is not a money Bill within the meaning of Article 114 of the Constitution.

Dated the 22nd May, 2020.

*William Kipkiror Cheptumo,
Chairperson,
Departmental Committee on Justice and Legal Affairs,
National Assembly.*

Section 2 of the Elections Act, 2011 which it is proposed to amend-

Interpretation

“agent” means a person duly appointed by—

- (a) a political party or an independent candidate for the purposes of an election under this Act; or
- (b) a referendum committee for the purposes of a referendum under this Act,

and includes a counting agent and a tallying agent;

“ballot box” means a transparent container with a slot on the top sufficient to accept a ballot paper in an election or in a referendum but which prevents access to the votes cast until the closing of the voting period;

“observer” means a person or an organisation accredited by the Commission to observe an election or a referendum;

“referendum” means a poll held under Part V;

“referendum committee” means a national or a parliamentary constituency committee comprising of persons intending to support or oppose a referendum question;

“referendum officer” means a person appointed by the Commission for the purpose of conducting a referendum;

“referendum question” means a question upon which voters shall vote in a referendum as specified in section 49;

Section 41 of the Elections Act, 2011 which it is proposed to amend-

Access to and obligation of media

(1) Subject to subsection (2), a political party participating in an election shall have access to the state owned media services during the campaign period.

(2) The Commission shall, after consultations with the independent candidates, the political parties concerned and the officers responsible for the state owned media services, monitor the equitable allocation of air-time during the campaign period.

(3) Every state owned print or electronic media which publishes any information relating to the electoral process shall be guided by the principle of total impartiality and shall refrain from any discrimination in relation to any candidate.

(4) The Code of Conduct for the practice of journalism prescribed under the Media Act (No. 3 of 2007) shall be subscribed to and observed by every media house and every person who reports on any election and referendum under the Constitution and this Act.

(5) For the purpose of giving effect to this section, the Commission may, in writing, issue directives to the media.

(6) The Commission may prohibit a media house that contravenes the Code of Conduct prescribed under the Media Act from transmitting information related to an election under this Act.

Sections 49 -55B of the Elections Act, 2011 which it is proposed to amend-

49. Initiation of a referendum

(1) Whenever it is necessary to hold a referendum on any issue, the President shall by notice refer the issue to the Commission for the purposes of conducting a referendum.

(2) Where an issue to be decided in a referendum has been referred to the Commission under subsection (1), the Commission shall frame the question or questions to be determined during the referendum.

(3) The Commission shall, in consultation with the Speaker of the relevant House, lay the question referred to in subsection (2) before the House for approval by resolution.

(4) The National Assembly may approve one or more questions for a referendum.

(5) The Commission shall publish the question approved under subsection (4) in the Gazette and in the electronic and print media of national circulation.

(6) The Commission shall conduct the referendum within ninety days of publication of the question.

(7) The Commission may assign such symbol for each answer to the referendum question or questions as it may consider necessary.

(8) A symbol assigned under subsection (7) shall not resemble that of a political party or of an independent candidate.

50. Notice of holding referendum

(1) The Commission shall, within fourteen days after publication of the question referred to in section 49 publish a notice of the holding of the referendum and the details thereof in the Gazette, in the electronic and print media of national circulation.

- (2) The notice shall specify—
- (a) the referendum question or questions and the option of the answer or answers;
 - (b) the symbols assigned for the answer or answers to the referendum question or questions;
 - (c) the day on which the 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 time of the referendum;
 - (e) the day by which the referendum committees shall have registered with the Commission; and
 - (f) the day and time by which campaign in support of or in opposition to the referendum question shall start and cease.

51. Referendum committees

(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.

52. Costs of referendum committee

(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.

53. Procedure for conduct of referendum

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

54. Voting threshold

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.

55. General power of the Commission

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

55A. Maintenance of secrecy at elections

(1) Every elections officer, candidate or agent authorized to take part in any proceedings relating to the issue or receipt of ballot papers or to attend at a polling station or at the counting of the votes shall, before so attending, make an oath of secrecy prescribed in the Third Schedule.

(2) Every officer, candidate or agent in attendance at a polling station shall—

- (a) maintain and aid in maintaining the secrecy of the ballot; and
- (b) not communicate, except for a purpose authorized by law before the poll is closed, any information as to the name or number on the register of voters, of any voter who has or has not applied for a ballot paper or voted at that station or as to the official mark.

(3) A presiding officer may, upon request, divulge to a candidate or to the agent of a candidate the total number of voters who have voted in the station at any time before the poll is closed.

55B. Postponement of elections by the Commission

(1) The Commission may, where a date has been appointed for holding an election, postpone the election in a constituency, county or ward for such period as it may consider necessary where—

- (a) there is reason to believe that a serious breach of peace is likely to occur if the election is held on that date;
- (b) it is impossible to conduct the elections as a result of a natural disaster or other emergencies,
- (c) that there has been occurrence of an electoral malpractice of such a nature and gravity as to make it impossible for an election to proceed.

(2) Where an election is postponed under subsection (1), the election shall be held at the earliest practicable time.

(3) Notwithstanding the provisions of this section, the Commission may, if satisfied that the result of the elections will not be affected by voting in the area in respect of which substituted dates have been appointed, direct that a return of the elections be made.

Sections 88 -105 of the Elections Act, 2011 which it is proposed to amend-

88. Election petition procedures to apply to referendum petition

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

89. Referendum petition

(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.

90. Composition of Court

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

91. Operation of declared result of issue submitted to referendum

(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.

92. Persons who may present referendum petition

(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.

93. Respondents to referendum petition

(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.

94. Filing of referendum petition

(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.

95. Duty of Registrar to make list of referendum petitions

(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.

96. Practice procedure and security for costs

(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.

97. Death of or delay by petitioner

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.

98. Hearing of referendum petition

(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.

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

(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.

100. Prohibition of disclosure of vote

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

101. Examination of votes

(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.

102. Powers of Court

(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.

103. Petition expenses

(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.

104. Facilitation of persons with special needs including persons with disabilities.

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.

105. Duty to co-operate

(1) It shall be the duty of every public officer and public or private entity to cooperate with the Commission in its activities during an election and not to hinder the Commission in carrying out its functions.

(2) It shall be the duty of police officers in their respective areas of operation, to take all necessary measures for the maintenance of law and order and stability necessary for the conduct of an election and to protect

and uphold the rights of all persons under any written law relating to elections.

(3) Notwithstanding the provisions of the law relating to the National Police Service or any other written law, a police officer assigned duties during the conduct of an election or referendum shall be deemed to be an elections officer for purposes of this Act and subject to direction and instruction of the Commission.

(4) It shall be the duty of—

- (a) all officers of the county administration, in their respective administrative units;
- (b) all persons in charge of local authority facilities;
- (c) persons in charge of facilities;
- (d) all political parties and members of the public;
- (e) all persons in charge of public utilities including teachers in charge of public schools;
- (f) the Registrar of Persons; and
- (g) the Registrar of Political Parties,

to give the Commission and its officers the support and collaboration necessary for the Commission to execute the activities relating to the conduct of an election.

Section 109 of the Elections Act, 2011 which it is proposed to amend-

109. Regulations

(1) The Commission may make regulations generally for the better carrying out of the purposes and provisions of this Act, and in particular, but without prejudice to the generality of the foregoing, may make regulations to—

- (a) prescribe the manner in which registers of voters shall be compiled and the manner in which they shall be revised;
- (b) prescribe the procedure for registration and issuance of voters cards and provide for the progressive registration of Kenyan citizens living abroad prisoner;
- (c) to provide for the regulation of the process by which parties nominate candidates for elections;
- (d) to provide for the manner of nomination, allocation and re-allocation of special seats and mechanisms for resolving disputes arising out of such nomination, allocation and re-allocation;

- (e) prescribe the procedure for making and determining claims to be registered and objections to registration;
- (f) authorise any registration officer to consider or determine any application, claim, objection or appeal, to summon any person to appear before them and give evidence on oath, and to administer an oath for that purpose and to order the production of any document relevant to any issue which the officer is required to consider and determine;
- (g) provide for the division of constituencies into units for the purpose of the registration of voters;
- (h) prescribe the conditions under which elections may be held in accordance with the provisions of the Constitution, this Act or any other written law relating to elections;
- (i) prescribe the amount of the deposit to be paid by or on behalf of candidates at all elections and the circumstances in which the deposit may be forfeited;
- (j) provide for the appointment of officers to preside at polling stations;
- (k) prescribe the facilities to be provided at polling stations and the persons who may be admitted to polling stations;
- (l) prescribe the place and manner in which votes may be cast and the construction and scaling of ballot boxes and provide for the issue of ballot papers to voters;
- (m) provide for the manner in which, and the person by whom any question as to the identity of any person claiming the right to vote shall be determined;
- (n) provide for the manner in which a voter who is not able to read or write may vote or be assisted in voting;
- (o) provide for the manner in which a voter with special needs including a person with a disability may vote or be assisted in voting;
- (p) prescribe the procedure to be followed in the counting of votes and the circumstances in which votes may be rejected by a returning officer as being invalid;
- (q) prescribe conditions for the use of private motor vehicles, vessels or buildings at elections;
- (r) prescribe the facilities to be provided during the electoral process and in particular, for voting by electronic machines and the

- persons entitled so to vote and the circumstances in which persons may so vote;
- (s) provide for the allocation by the Commission, in a just and equitable manner of the use of state owned radio and television broadcasting services during any election period;
 - (t) prescribe the procedure to be adopted by the public in making representations for the alteration of electoral area boundaries;
 - (u) prescribe the forms which may be used under this Act and the fees in respect of anything to be done under this Act;
 - (v) prescribe the procedure for advance voting for special categories including patients admitted in hospital, pastoralists, armed forces, elections officers and other citizens of Kenya providing essential services;
 - (w) prescribe the procedure for voting for citizens residing outside Kenya;
 - (x) provide for complaints resolution mechanisms and for the manner of settlement of electoral disputes;
 - (y) provide for the conduct of election observers, the media, monitors and evaluators and organisations carrying out civic and voter education;
 - (z) provide with reasonable grounds for the postponement of elections;
 - (aa) provide for mechanisms for carrying out effective voter education;
 - (bb) provide for the mode of declaration of the result of an election;
 - (cc) prescribe the manner of enforcing the Electoral Code of Conduct; or
 - (dd) provide for the conduct of campaigns during a referendum or an election;
 - (ee) provide for the financing of campaigns during a referendum or an election;
 - (ff) prescribe anything which is required to be prescribed or is necessary or desirable for the better giving effect to this Act.
- (2) The power to make regulations conferred on the Commission under this Act shall be—

- (a) for the purpose and objective of giving effect to the Constitution and this Act;
- (b) limited to the nature and scope specifically stipulated in the Constitution and this Act; and
- (c) based on the general principles and standards contained in the Constitution and this Act.

(3) The power to make regulations shall be exercised only after a draft of the proposed regulations has been approved by the National Assembly, at least four months preceding a general election:

Provided that this applies to the first general election under this Act.

(4) The Commission shall publish in the Gazette, not later than sixty days prior to the date of a general election, the regulations approved by the National Assembly under subsection (3).

Section 90 of the County Government Act, 2012 which it is proposed to amend-

Matters subject to local referenda

(1) A county government may conduct a local referendum on among other local issues—

- (a) county laws and petitions; or
- (b) planning and investment decisions affecting the county for which a petition has been raised and duly signed by at least twenty five percent of the registered voters where the referendum is to take place.

(2) The Elections Act (No. 24 of 2011) shall apply, with necessary modifications, with regard to a referendum referred to under subsection (1).

