

August 2021

ADHERENCE AND FAST TRACKING OF ELECTIONS LAWS AHEAD OF THE 2022 GENERAL ELECTIONS

Background

Article 136 of the Constitution of Kenya 2010 requires that a General Election be held on the 2nd Tuesday in August, in every fifth year. This implies that the next general election is tentatively scheduled to take place on 9th August 2022 where registered voters will exercise their sovereign power by electing a president, the 13th Parliament, as well as County Government bosses and Members of County Assemblies.

The Elections Law (Amendment) Act 2017

The annulment of the August 8th 2017 presidential elections by the Supreme Court of Kenya triggered the introduction of the Election Laws Amendment Bill, 2017 in Parliament to amend various provisions of the Elections Act, the IEBC Act, the Election Offences Act.

The Bill was passed by Parliament, the Senate and finally transmitted to the President for assent. The President neither assented to the Bill nor returned it to Parliament and after fourteen (14) days of its passing, the Bill became law by virtue of the provisions of Article 116 of the Constitution. The law was published in the Kenya Gazette on 2nd November 2017 thus becoming effective as the Election Laws Amendment Act No. 34 of 2017 (the Election Laws Amendment Act).

The Elections Law (Amendment) Act 2017, under Section 13(1) requires political parties to nominate their candidates by May 9, 2022. Political parties are also required to hold their primaries by latest May 9, 2022.

Additionally, political parties are required to prepare their membership registers for submission to IEBC within the set timelines. Section 28 of the Elections Act requires that parties submit these lists to IEBC at least 120 days before the election.

Nomination rules for party primaries, on the other hand, must be with IEBC six months before the election day, in line with Section 27 of the Act. The rules should, accordingly, be with the commission by February 9. Besides, a political party that decides to amend its nomination rules will have to wait for 90 days to lapse, from the day when it submitted the amendments to IEBC, in line with Section 27(b) of the Act.

The law requires that IEBC undertakes mass voter registration and that registers be open for inspection, at least 90 days to the election day.

Laws that need to be fast tracked one year to the General Election

a) Referendum Bill, 2020

The Referendum Bill, 2020 is an Act of Parliament that provides for the procedures of the approval of an amendment to the Constitution by a referendum, referendum petitions and for connected purposes. Currently, there exist two versions of the referendum bill:

- i. The Referendum (No.2) Bill, 2020 that was tabled by the Justice and Legal Affairs Committee which is still at the Committee Stage.
- ii. The Referendum Bill, 2020 which was fronted by the Constitutional Implementation Oversight Committee (CIOC) which is still at the First Reading Stage.

b) IEBC (Amendment) Bill, 2020

This Bill seeks to amend section 36 of the Independent Electoral and Boundaries Commission Act to re-introduce the Fifth Schedule to guide the delimitation of electoral boundaries. By virtue of section 36 of Act No. 9 of 2011, the Fifth Schedule lapsed upon the publication of the final report of the delimitation of electoral boundaries. The Election Laws Amendment Act, 2017 introduced a new section 36 which contained some procedures for delimitation of electoral units. The purpose of the proposed amendment is to provide for a complete procedure for the delimitation of electoral boundaries and to address identified gaps.

The Bill also seeks to provide for a mechanism of appointing members of the Independent Electoral and Boundaries Commission. As it is, the selection panel that was established under the First Schedule to the Act stood dissolved upon appointment of the current members of IEBC and hence there existed a vacuum as to the mechanism of appointing members of IEBC in case of a vacancy or lapse of term of office of any member of the commission.

c) The Elections Campaign Financing (Amendment) Bill, 2020

This is an Act of Parliament that seeks to amend the Elections Campaign Financing Act, 2013 in order to remove the bottlenecks that have impeded its implementation since it was enacted in 2013. When the Act was enacted in 2013, the intention was to give full effect to Article 88 (4) (i) which provides that it shall be the responsibility of the Independent Electoral and Boundaries Commission to regulate the amount of money that may be spent by or on behalf of a candidate or party in respect of any election. In 2017 election year, Parliament suspended its operation until immediately after the general election and the IEBC seeks to push for its implementation in the 2022 general elections.

The IEBC pushed for the regulations and gazetting of this Bill. Unfortunately, JLAC, which has been in possession of this bill since 2016 has not acted upon it.

This Act requires political parties and candidates contesting in the 2022 General Elections to at least two months before the general elections open campaign financing accounts, establish campaign financing expenditure-committees and appoint authorized persons who will manage the campaign funds.

Pursuant to Article 88(4)(i) of the Constitution and section 4(i) of the Independent Electoral and Boundaries Commission Act, the Commission shall be responsible for the regulation and administration of campaign financing under this Act and shall -

- (a)keep a register of authorized persons under this Act;
- (b)supervise candidates, political parties, referendum committees and authorized persons in relation to campaign expenses;
- (c)set spending limits and enforce compliance with such limits;
- (d)set limits and verify sources of contributions to a candidate, a political party or a referendum committee;
- (e)monitor and regulate campaign expenses;
- (f)provide a framework for the reporting of campaign expenses;
- (g)advise a candidate, a political party or a referendum committee on any matter relating to campaign expenses; and
- (h)provide and enforce a framework for the regulation of media coverage;
- (i)perform such other functions as may be necessary for the purposes of this Act.

Additionally, these regulations are required to be in place 12 months before the general election.

This draft was also sent to the Committee of Delegated Legislation but was not acted upon.

The IEBC has already submitted regulations based on the Elections Law of 2013 that if fast tracked, then it will give the cap on how much people seeking elective positions can raise and spend. However, there is a standoff between the IEBC and Parliament on the mechanisms used to come up with these developments seemingly delaying the enacting of the amendment bill.

d) Election Offences Act, No. 37 of 2016

This is an Act of Parliament to Prevent election offences and corrupt and illegal practices at elections, and for matters incidental thereto and connected therewith. Parliament is required to effect the necessary changes by deleting the amended section 83 of the Act and restoring the initial disjunctive provision.

Conclusion

The fidelity to the Constitution that we gave unto ourselves should be maintained and upheld at all times. Properly defined laws will enable women and the electorate to exercise their political rights. If the election laws are fast-tracked and adhered to, the 2022 general election will guarantee the citizens 'predictable systems for unpredictable outcomes'. Moreover, when elections are free, fair and transparent, the will of the people will be expressed.