

COMMUNIQUE ON THE ICJ KENYA MEMBERS FORUM

**STATUS OF THE 2017 GENERAL ELECTION: AUDITING THE STATE OF
ELECTORAL PREPAREDNESS IN KENYA**

Giraffe Ark Hotel, Nyeri

22nd – 25th February 2017

The International Commission of Jurists Kenyan Section (ICJ Kenya) in partnership with Kura Yangu Sauti Yangu (KYSY) held a members forum in Nyeri, Giraffe Ark Hotel on 23rd and 24th February 2017. The theme of the forum was “*Status of the 2017 General Election: Auditing the State of Electoral Preparedness in Kenya with a key focus on electoral dispute resolution.*”

The forum was officially opened by ICJ- Kenya Vice Chairperson- Kelvin Mogeni. The Secretary to the Council, Patrick Ngungiri set the context. The speakers for the forum were; Muthomi Thiankolu [Advocate], George Kegoro [Executive Director Kenya Human Rights Commission/KYSY co-convener, Hon Lady Justice Stella Mutuku [Judicial Committee on Elections] and Elsy Sainna [Deputy Director ICJ- Kenya]. The plenary sessions were led by Samwel Mohochi [Executive Director ICJ-Kenya] and Carol Werunga [Program Advisor Electoral Governance KHRC/KYSY secretariat] and Cecilia Mugo (Programme Officer, ICJ Kenya)

Following the 2013 General elections, ICJ-Kenya and other Civil Society Groups came together under the KYSY coalition to pro-actively support Kenya’s preparedness for the 2017 general elections. Events before and after the 2013 elections had revealed legal and institutional weaknesses among various bodies that were in charge of the electoral process. Some of the notable challenges were; election irregularities in the political party primaries, un-procedural procurement of election materials by the Independent Electoral and Boundaries Commission, failure of technology on voting day, ineffective

prosecution of electoral offences, contradictions among the elections laws and rules and an uncertain jurisprudence in election petitions.

The Speakers at the forum covered the following topics:

1. Electoral disputes-Litigation Process
2. Promoting political dialogue through stakeholder engagement
3. Institutional preparedness and the role of judiciary
4. Salient features and policy underpinnings of the Election Offences Act, 2016

A total of 35 lawyers were present in the forum with representation from the Office of the Director of Public Prosecutions DPP, the Ethics and Anti- Corruption Commission EACC, the Council of Legal Education CLE, the Judiciary, KYSY among other jurists.

On the basis of extensive discussions and contributions guided by the very able speakers, the participants adopted the following resolutions:

To electoral stakeholders listed below:

- (i) We urge you to give full effect to the right to vote and to take all necessary constitutional, legislative and administrative measures to prohibit discrimination and any distinction in the right to vote on the basis of race, colour, descent, national, ethnic or social origin, gender, language, religion, political or other opinion, property, disability, or other status which has the purpose or effect of nullifying or impairing equal and universal suffrage;

To the Judicial Committee on Elections (JCE)

- (i) We call on the JCE to fast track the revision of the Election Act 2011, the Supreme Court Presidential Election Petition Rules 2016 and the Elections Parliamentary and County Elections Petitions Rules 2016 so that the process of presenting and determining election disputes in court is an inquisitorial rather than an adjudicatory process.
- (ii) We further urge the JCE to consider an amendment to the effect that the election court has power to call for additional evidence or witnesses who can

assist the court determine whether the elections were conducted in accordance with the law.

- (iii) We call on the JCE to reconsider proposals to parliament that include an amendment to the election laws with regard to first appeals which are currently limited to '**matters of law only to include both matters of 'fact and law''** especially appeals arising from County Election Petitions.
- (iv) We call on the JCE to adequate and continuous training of judicial officers so as to ensure that the decisions and or precedents from the election courts are consistent and coherent to build a robust and predictable jurisprudence.
- (v) We urge the JCE to conduct adequate training for the court paralegal staff to ensure efficiency and adherence to the strict timelines set by the election laws.
- (vi) We call upon the JCE to work with the IEBC to establish a forum through which pertinent issues that arise from the jurisdiction of the courts and the import of the decisions of the court on the performance of the duties of the IEBC may be discussed

We call upon the JCE to standardize the rules on electronic service of presidential petitions to include those of Parliamentary and County Elections.

To the Independent Electoral and Boundaries Commission (IEBC)

- (i) We call upon the secretariat and the new commissioners to effectively co-ordinate among themselves and ensure that they are well prepared and have put in place all mechanisms that will ensure free, fair, transparent credible elections that will be conducted in an open and verifiable manner.
- (ii) We implore upon the IEBC to provide an unequivocal stand regarding their involvement in the party primaries and how this may or may not affect its preparedness to conduct the General Elections.
- (iii) We call upon the IEBC to work in co-ordination with other public agencies and form a multi-agency for the prosecution of election offences.

- (iv) In line with the right to vote under domestic and international legislation and in line with General Comment 25 to the International Convention on Civil and Political Rights 'ICCPR', we observe that the limitation on the right to vote placed on inmates, where they will only be allowed to vote in the presidential election, is not justified and provided in law in an open and democratic society. **We therefore call upon the** commission to allow inmates vote for the other respective seats i.e. Member of County Assembly, Member of Parliament, Women Representative, Senator and Governor.

To the Political Parties Dispute Tribunal 'PPDT'

- (i) **We call upon** the judiciary to ensure that the PPDT is properly constituted to effectively carry out their mandate.
- (ii) **We call upon the PPDT** to work with political parties and the Office of the Registrar of Political Parties to fast track the rules for internal dispute resolution mechanisms.

To the Office of the Director of Public Prosecution (DPP)

- (i) **We call upon** the office of the DPP to put in place an elaborate prosecution strategy on prosecution of election offences with sufficient man-power, this may include constituting a multi-agency team together with the IEBC, EACC and Police.

To Parliament

- (i) We call upon Parliament to amend the CoK 2010 to increase the timeframe for determination of the presidential election petitions from a maximum of 14 days to at least a maximum of 30 days. The current timelines are short and may deny parties the opportunity to ventilate all the issues and also give the court adequate time to consider all the issues.
- (ii)

- (iii) We call upon Parliament to speedily review and pass the elections campaign finance regulations 2016 which will level the playing ground for all candidates.
- (iv) We call upon Parliament to consider the provision on costs and extend the time lines on deposit of security of costs so as not to impede access to justice.

As Civil Society and Jurists

- (i) We shall enhance the political dialogue on the key electoral issues with emphasis on the implementation of Chapter 6 of the Constitution and the Leadership and Integrity Act as well as the accountability of the electoral process
- (ii) We shall monitor the elections including monitoring election offences and make recommendations with a view of ensuring that the elections are free, fair, transparent and credible.
- (iii) We shall develop strategies to ensure broad public participation and information sharing among stakeholders in the electoral process.
- (iv) We shall engage the media in undertaking advocacy, dissemination of electoral related information, civic and voter education.

Done in Nyeri, Giraffe Ark Hotel on 25th February 2017