COMMUNIQUE ON TECHNOLOGY AND ELECTIONS IN KENYA

10 June 2021

1. The Kenyan Section of the International Commission of Jurists (ICJ Kenya) held a webinar on June 8, 2021, to discuss the role of technology in elections in Africa, with a specific focus on the salient issues of electoral reforms and election management in Kenya ahead of the 2022 general elections.

2. ICJ Kenya sincerely appreciates the distinguished panellists and participants drawn from diverse fields of expertise representing all sectors, including the civil society, the legal fraternity, and the private sector. The participants and the general public joined the webinar through the ICJ Kenya social media platforms and online streaming services.

3. The discussions were informed by increased uptake of electoral technologies by countries in Africa to enhance transparency, efficiency, and effectiveness in electoral management. However, electoral technologies equally pose fundamental challenges, including security, costs, sustainability, integrity, and transparency.

4. ICJ Kenya notes that electoral technology will play a critical role in Kenya's general elections. We acknowledge that the COVID-19 pandemic will give Kenya the impetus to scale up electoral technologies in the upcoming 2022 general election.

5. In the past two election cycles, namely 2013 and 2017, Kenya invested heavily in technological solutions to improve the integrity of the electoral processes. These solutions include the Biometric Voters' Registration System (BVR) and the Kenya Integrated Election Management System (KIEMS) intended to address the perennial challenges of results management involved in counting tabulation, transmission, declarations, and publication of results.

6. In 2017, despite the massive investment in technology, the Independent Electoral and Boundaries Commission (IEBC) experienced significant challenges in managing presidential election results. The publication of inaccurate and false results and the Supreme Court's finding on irregularities and illegalities demonstrated the extent of the difficulties.

7. The objectives of the webinar were guided by the need to evaluate Kenya's past experiences on the use of electoral technologies against the lessons and reforms that are necessary ahead of the 2022 election cycle. Further, discussions were guided by regional and international best practices on using these technologies as a tool for achieving free and fair elections within the context of the COVID-19 pandemic.

8. **In the deliberations, the panellists and participants acknowledged THAT:**

   a. The Biometric Voter Registration (BVR) system failed to guarantee the integrity of the voter register, with challenges experienced with the manual register still being experienced. These included the existence of dead voters, movement of voters from constituency to constituency, the continued use of manual lists that were not consistent with the electronic lists, and the continued use of the black and green books;

   b. The Electronic Result Transmission System also failed. There were numerous inconsistencies between the results transmitted on the portal and the manually filled forms. This was further exacerbated by the lack of clarity on IEBC's internal mechanisms and processes of verification upon failure of the biometric identification - triggering of the alphanumeric searching and the use of the manual voter register;

   c. Infrastructural challenges hampering network connectivity in far-flung areas contributed to the failure of electoral technology. Although this was an anticipated challenge, there was no clear plan by the IEBC on how the same would be addressed on election day;

   d. Other challenges evident from the 2017 elections included: last-minute court decisions and legislative amendments, internal divisions within the Commission that played out publicly, concerns on the IEBC Commissioners' safety and security, and doubts on whether the electoral management body was ready to conduct the repeat elections;

   e. To date, polling station data from the 2013 and 2017 elections has not been made publicly available, which casts doubts on transparency and accountability in the electoral process;

   f. The effectiveness of a technology solution is still dependent on humans, with the long-standing principle in computing, '*Garbage In, Garbage Out*' still relevant in electoral technology systems. Consequently, some of Kenya's challenges in the past electoral cycles cannot be blamed on technology deployment, rather on the pre-existing socio-political challenges.

   g. It is unlikely that technology works a hundred percent. This has been demonstrated in other jurisdictions that are technologically advanced countries such as Estonia, Switzerland, Norway, and the USA, where concerns were raised regarding mistrust, internet vulnerabilities, and transparency. This is evident in other platforms that have been hugely invested in over many years, including social media platforms such as Twitter, which occasionally fail. Therefore, it is essential to define the criteria for determining the success of technological intervention to ensure a fair assessment after its use.

h. System testing and dry-runs are an essential part of enhancing their efficiency. Further, incremental implementation and innovation of electoral technologies and continuous auditing are important to ensure the sustainability and scalability of platforms.

i. However, the electoral systems in Kenya are procured too late in the electoral cycle, giving the developers little to no time to conduct the necessary tests to identify and address risks and vulnerabilities in time.

j. Public sensitisation and inclusion are also crucial components of ensuring that technological interventions serve their intended purposes.

k. From recent experiences in other countries, including Ghana, increasing access to electoral technological solutions by allowing various stakeholders to run parallel systems increases pressure on the electoral bodies to ensure their systems are accurate.

l. Demonstrated control of systems to guarantee security and integrity, prevent interference with systems, and ensure paper trails and auditing systems are essential to building confidence in the systems.

m. On electoral dispute resolution, the challenges to be anticipated will depend on the severity of the pandemic at the time. Courts have been adjusting depending on the changes in the situation on the ground.

n. The nature of politics and campaigns and the restriction measures necessitated by the Covid-19 pandemic , and the selective enforcement by the government are likely to raise issues around the infringement of human and civic rights and form grounds for successful electoral petitions.

o. Virtual court hearings are likely to face challenges arising from Kenya's evidence laws that do not sufficiently address modern-day evidential realities. Other foreseeable issues include securing witness attendance virtually, modes of process service. Recounting ballot papers in the context of Covid-19 also creates contact challenges that need to be taken into account.

p. Technology remains a means to an end, that is, the general principles for an electoral system as prescribed under Article 81 of the Constitution. But, despite its shortcomings, technological solutions can improve our electoral processes' accuracy, reliability, and efficiency.

q. Technology cannot replace human trust or human-induced interferences essential to the credibility of electoral processes. Agreeably, the utilisation of electoral technologies is highly dependent on the political context in which it is applied.

9. **Therefore, and given the foregoing, ICJ Kenya calls upon:**

    a. **The IEBC to:**

        i. Plan ahead of time and select technological solutions that are appropriate to the Kenyan context and which have been carefully considered against the Kenyan realities and challenges;

        ii. Develop a comprehensive technological system well in advance to allow adequate time for development, incremental innovation, and testing. This will ensure scalability, optimal performance, and security;

        iii. Ensure that the electoral systems in place allow for both internal and external audits to verify any arising issues, including inconsistencies and irregularities of results;

        iv. Take measures, in collaboration and consultation with relevant stakeholders as well as other governmental agencies, to address infrastructural and strategic challenges that inhibit the full utilisation of technological solutions in specific areas;

        v. Embrace and adopt openness and transparency as principles in the electoral process to enhance public confidence. IEBC should adopt open data principles that will ensure access to information at the lowest levels, to provide alternative means of verification, and in turn build credibility;

        vi. Develop a mechanism of ensuring an inclusive and consultative process of adopting technology and addressing electoral technology challenges in view of the findings of the High Court on the unconstitutionality of the previously established Elections and Technology Advisory Committee;

        vii. Ensure that internal wrangles and challenges are adequately addressed and do not compromise public confidence in the Commission;

    b. **The Legislature to:**

        i. Ensure that all election-related legislative and policy amendments are finalized at least six (6) months before the general election to avoid last-minute disruptions;

    c. **The Executive to:**

        i. Ensure that COVID-19 restrictions are applied fairly and in a non-discriminatory manner, to ensure equal opportunity for all to exercise their political rights during elections;

        ii. Ensure adequate resource allocation and support to key agencies involved at various stages of the electoral cycle, including the Office of the Registrar of Political Parties (ORPP), Political Parties Dispute Tribunal (PPDT), IEBC, the Judiciary, and other key agencies.

iii. Consider public-private partnerships to ensure that the development and expansion of telecommunication services are equitable across the country. This will provide a sustainable and dependable backbone for the implementation and operation of electoral technologies;

d. Private sector and Governmental Telecommunication entities

i. Ensure that development and expansion of telecommunication services is done equitably across the country to provide a sustainable and dependable backbone of operations to electoral technologies;

e. The Judiciary and related judicial organs to:

i. Assess and address the lessons learned on the use of technologies in elections thus far, from the hearing of cases in the context of the Covid-19 pandemic in anticipation of the scope and nature of election disputes.

ii. Adequately prepare and respond to technological challenges and develop solutions ahead of the 2022 election period.

f. The Political class to:

i. Ensure a conducive and fair environment for the implementation of electoral technologies towards a peaceful, free, and fair general election;

ii. Seek to be involved in building solutions to safeguard not only their political interests but the greater public interest;

g. Civil society actors and international observers to:

i. Play an active role in advocacy and oversight to ensure that the necessary legal and policy framework and systems essential to the conduct of free and fair elections are put in place, harnessing the lessons learned from past election cycles, recommendations of Commissions of Inquiry as well as lessons from other jurisdictions;

ii. Engage actively in the electoral process by collecting and documenting evidence that can be used to further justice in the electoral processes.

iii. Plan ahead of time and increase capacity to ensure electoral technology audit mechanisms, which could include target stages of the electoral management system;

h. All Kenyans to:

i. Introspect on our role in the realisation of constitutional values applicable to elections and how to address the perennial issues that plague our elections effectively;

    ii.   Demand and hold each other accountable in the electoral process to ensure we are learning from past experiences and making progress instead of digressing or reliving our past negative experiences;

  i.   **ICJ Kenya commits and undertakes to:**

    i.   Continue spearheading conversations on election management in Kenya ahead of the 2022 general elections;

    ii.   advocating for support and respect of the independence of key institutions by the political class to safeguard their role in election management;

    iii.   Ensure the enforcement of existing laws and support necessary reforms to ensure smooth electoral dispute resolution processes;

    iv.   Collaborate and engage with various stakeholders from across the region and the larger global community to draw lessons and best practices applied in electoral management in Kenya.

Dated this 10th Day of June 2021.

Signed,

Kelvin Mogeni
Chairman