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KURA YANGU SAUTI YANGU PRESS STATEMENT ON IRREDUCIBLE MINIMUMS

Yesterday, the country woke up to news that the legislature intends to institute amendments to legislation affecting the conduct of elections, ahead of the fresh presidential election now slated for 26th October. The publication period of the proposed laws was truncated, with the result that these were tabled for the first reading, in both the Senate and the National Assembly, on the same day that they were published.

The rushed manner, in which the proposed laws are being processed, directly undermines the spirit of bipartisanship, further increasing political tensions in the country, which were already heavy high. The rationale for the laws remains poorly articulated, and media reports have also made it clear that the IEBC, a target of these changes, has not been consulted.

There are also questions about the content of the proposed amendments. The amendments seem to be a legislative attempt to circumvent the Supreme Court judgment. In this regard, the amendments are unconstitutional in their timing and content.

The country has witnessed the political leadership wage a campaign of threats and vilification against the Judiciary ever since the Supreme Court delivered its judgment in the presidential election petition. As part of that campaign, each of the four justices of the Supreme Court who delivered the majority judgment, have been insulted as crooks, have been the subject of orchestrated attacks from members of the public, and have also faced the threat of removal from office through petitions filed with the Judicial Service Commission. As part of this, the Registrar of the Supreme Court has become the target of a spurious criminal investigation.

The intimidation against the Judiciary has been extended to a number of their external partners, including bilateral donors and independent civil society organisations. These have falsely been portrayed as being involved, with the Judiciary, in a campaign to achieve an unlawful change of government in the country.

In addition to the vilification of the Judiciary, the country has also witnessed a rise in political tensions, arising from politically-directed sectarian threats. As part of these, the announcement by the political opposition that it will launch a campaign of street protests for the removal of named members of staff at the IEBC, have been met with threats of an ethnically-directed counteraction.

A country can only take so much by way of political mismanagement. It is clear that Kenya is headed for political violence, and that the leadership is deliberately walking the country down that path. The threat of violence is no doubt, based on an assumption that, with a police service that is now very well armed, and has already shown a readiness to employ unlawful forces against citizens, citizens will be too scared to demand their democratic rights. In effect, the government is currently implementing a programme of using the threat of violence, to defeat the possibility of a free and fair fresh election as ordered by the Supreme Court.

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The contextual difficulties that have been discussed above are compounded by unanswered technical questions which must be fully addressed to ensure that the conduct of the fresh election is indeed in keeping with the Constitution. The pending questions are as follows:

1. The number of registered voters changed since the certification of the **final** Register of Voters in June 2017 to when Wafula Chebukati announced the number of registered voters on 11 August 2017. Overall, the total number at the national level reflected 25,638 more voters than the certified number in June most of which came from Nyandarua County. What is the source of this increase? Every change/increase must be shown and explained at the county level
2. What are the differences, if any, between the copy register and the biometric register?
3. What is the IEBC's official complimentary mechanism for use in the event that the electronic results transmission fails **again**?
4. What is the IEBC doing to investigate and act on evidence that there were polling stations in which the number of votes cast exceeded registered voters?
5. What is the explanation for the differences between Forms 34A and Forms 34B and further for the inconsistencies between announced results, portal results and results recorded in the Forms?
6. Where are the ballots that account for the gap in total votes cast for the different elective offices?
7. When will the IEBC answer questions that were left unresolved by its noncompliance with the Supreme Court- ordered scrutiny of the Commissions IT systems given that it plans to conduct an election on 26 October 2017?

KYSY proposes that these questions and unresolved issues must be addressed before a fresh election. As part of the preparations for a fresh election, KYSY presents the following set of non-negotiable minimum standards for the conduct and administration of that election.

1. A new, clean and publicly verified Register of Voters must be created and published before the fresh election
2. The IEBC must conduct an independent public audit of its election technologies monitored by all key stakeholders and their technical experts, including civil society. Further, IEBC must publicly declare the properties of the data that will be transmitted from polling stations, the details of any complimentary systems, and commit to demonstrating the integrity of their systems over the entirety of the election exercise. During the annulled election IEBC officials asserted that their systems were secure, but the supreme court found they had not tested their systems properly.
3. The IEBC must develop a complementary mechanism that will be used if the results transmission system fails. This mechanism must be the result of consultation with and consensus of all parties.
4. The IEBC must develop a complementary mechanism that will be used if electronic voter identification fails or malfunctions. The copy register, which was meant to be the complementary mechanism in August, was inconsistently used. The new mechanism must be designed in a way that allows those who were transferred without their permission and those who registered but who are not in the Register to cast their votes.
5. The IEBC must clearly publish the list of security features that will be on every ballot and results form in the upcoming election, and the IEBC must publicly share a template of ballots and results forms before the printer begins working.

6. The IEBC must publish the total number of ballots that will be allocated to every polling station.
7. The IEBC must publish a list of all KIEMS kits to be used, along with serial numbers of those kits, and the GPS coordinates of the stations where the kits will be located.
8. The IEBC must display – in real time – the scanned and transmitted photos of Forms 34A to the public portal. When those forms are sent to IEBC tallying centres, they must also be sent to the portal. The IEBC must post Forms 34B to the public portal as soon as constituency-level results are announced.
9. The IEBC must create and publicly explain its plan to ensure that forms from areas with no network coverage are transmitted in a secure and timely way.
10. The IEBC must open its servers to public scrutiny if there are questions about the legitimacy of the results transmission system.
11. Final results must include polling station level tallies of valid votes for each candidates, rejected votes, rejected objected to votes, disputed votes, spoiled votes and stray ballots.
12. Investigations must commence into electoral illegalities committed in the last election and prosecutions be instituted for those found culpable for electoral offenses. Officers suspected of electoral offenses should be excluded from electoral processes until they are cleared.

KYSY has a more detailed list of standards aimed at strengthening the different stages and aspects of the electoral processes against which it will be assessing the quality of future elections.

Resolving the technical issues that have been outlined above will require consultation and negotiation in good faith. The timelines are extremely tight, and time must not be lost in unhelpful disagreements. Unfortunately, other than squandering the little precious time that is left, the political difficulties that have been experienced since the Supreme Court judgment have the effect of hardening positions and undermining the good faith necessary for achieving responsible preparations for the fresh election. It is difficult not to conclude that the political difficulties are contrived, and that the intention is to defeat a responsible approach towards elections. Sadly, if we cannot create conditions for credible elections to take place, we make it difficult to avoid a violent transition, which is what Kenya is staring at.

ENDS

THE SECRETARIAT

C/O KENYA HUMAN RIGHTS COMMISSION

P.O. BOX 41079-00100

NAIROBI.