



LEGAL AND HUMAN RIGHTS CENTRE

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LHRC'S POST-ENACTMENT ANALYSIS OF THE NEW ELECTORAL LAWS

Introduction

The Legal and Human Rights Centre (LHRC) is pleased to share its post-enactment analysis of three laws: the Presidential, Parliamentary, and Councillors Elections Act, 2024; the Independent National Electoral Commission Act, 2024; and the Political Parties Affairs Act, 2024. These laws were recently passed by the National Assembly on the 2nd day of February 2024 and later assented to by the President of the United Republic of Tanzania, gazetted in the Government Gazette on the 22nd of March 2024.

The basis of this statement lies in the involvement and full participation of LHRC in advocating for comprehensive policy and legal reforms on electoral and political party matters, aimed at enhancing democratic rights and civic space in Tanzania.

Background

The Parliamentary Standing Committee on Governance, Constitution and Legal Affairs convened stakeholders' meetings for public hearing regarding the tabled bills from 6th to 10th January 2024 which undisputedly, the tabling of the bills brought a new wave of hope amongst democracy stakeholders following a demand for a functional legal framework which assures the independence of political and electoral institutions. It is a fact that there was a huge expectation from the public on the need to table the Minimum Constitution Reforms Bill, parallel with the electoral bills to navigate reforms on the contentious electoral issues.

New Laws' Positives

The following are the topline positive areas addressed by the newly enacted laws.

1. The incorporation of a special offense on sexual harassment and violence during elections is a very positive gesture towards the protection of women's rights. The law states that any person who commits an act of violence or sexual violence against a candidate during election activities will be considered to have committed an

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offense. Once convicted, they will be punished according to the Electoral Code of Conduct. This measure has the potential to maximize women's involvement in politics by creating a safer environment for them to participate in the electoral process.

2. The removal of the mandatory requirement for District Executive Directors to act as returning officers during elections could enhance the independence of election activities.
3. The reform establishes specific criteria for the appointment of a Returning Officer:
 4. (i) The person should not have been convicted of misconduct allegations. (ii) They should not have been convicted of any criminal offenses punishable by more than six months. (iii) They should have never been a leader of any political party.
5. The removal of the clause concerning unopposed candidates for Presidential, Parliamentary, or Councilor seats represents progress that aligns with the High Court decision in the cases of Joram Lwehabura Bashange versus the Attorney General of Tanzania and the National Electoral Commission¹.
6. Establishment of the Nomination Committee purpose of recruiting the Chairperson, Vice Chairperson, and other members of the Electoral Commission.
7. The Local Government Election to be coordinated and supervised by the National Electoral Commission.
8. Removal of a fee for a renewal of a lost or destroyed voter identification card.
9. The determination of Parliamentary Election petitions at the High Court, as well as the Court of Appeal, will now occur within 6 months, compared to the original proposal of 12 months. However, Councilor's Election petitions will be determined within 12 months.

¹ Miscellaneous Civil Cause No. 19 of 2021/2023, High Court of the United Republic of Tanzania, Main Registry Dar es Salaam.

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Things which still need to be improved

The following issues need improvement.

1. Public servants are to remain an integral part of the National Electoral Commission in Tanzania.

Despite strong recommendations from LHRC and other stakeholders, the practice of utilizing public servants in the electoral process has been maintained. While section 6 of the Act has been amended to remove specific positions and replace them with the term "Senior Public Servants," sections 7 and 8 still permit City, Municipal, Town, and District Directors to serve as voter registration officers, and public servants can continue to act as regional election coordinators. This suggests that the electoral system in Tanzania may not yet have attained the stability desired.

2. The Mandatory application of technology in election

The mandatory application of technology in elections was proposed by LHRC to the Parliamentary Committee. It was suggested that technology should be mandatory in all election process cycles, including registration, nomination, voting, tallying of results, and announcement of results. Specifically, LHRC recommended amendments to sections 12, 16(5), 34(2), and 50(7) of the bill to allow for voters' registration and submission of nomination forms to be conducted in both physical and electronic formats.

However, the enacted provisions have left the use of technology during elections to the discretion of the Electoral Commission. The Act employs the term "may" instead of "shall," indicating that the application of technology during elections is not mandatory, as provided in section 166. LHRC had hoped that this recommendation would be instrumental in improving the electoral process and bringing positive changes to the country.

3. Independent Candidature

Despite judicial precedents from domestic and regional courts, including the decision of the African Court on Human and People's Rights in the application by Rev. Christopher Mtikila versus the Tanzanian Government, the issue of Independent Candidates remains unresolved. The court upheld the need for the Tanzanian Government to allow Independent Candidates; however, the government has not complied with the court's decisions to implement the same by amending the constitution. Article 39(1)(c) and Article 67(1)(b) of the Constitution of the United Republic of Tanzania, along with subsequent Acts of Parliament, collectively state that a person shall not qualify for nomination

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as Presidential, Parliamentary, and Councillor candidates unless they belong to a political party membership.

By Sections 32, 55, and 60 of the Presidential, Parliamentary, and Councilors Election Act No. 2 of 2024, a person shall not qualify for nomination as a Presidential, Parliamentary, or Councilor candidate unless they belong to a membership of a political party. This serves as proof that key recommendations from stakeholders were not taken on board, with the majority proposing the need for an independent candidate.

We hope that an Independent Candidate will serve as a catalyst for the growth of our democracy by expanding opportunities for Tanzania, allowing individuals especially Youths and Women not to be restricted by the requirement of being members of a political party to qualify to contest in a free, fair, and credible election.

4. The finality clause on the decisions of the National Independent Electoral Commission

LHRC and other stakeholders advocated and pushed for the right to challenge decisions made by the National Electoral Commission through a Constitutional Petition or Judicial Review. However, upon thorough review of the enacted law, it was noted that decisions made by the Electoral Commission regarding nominations are considered final and conclusive, and cannot be challenged in any court of law, as provided in sections 36(6), 53(6), and 65(7). This is contrary to Article 13(6) and 107A of the Constitution of the United Republic of Tanzania 1977.

In the case of Prisca Chogero versus the Attorney General of Tanzania, the High Court of the United Republic of Tanzania held that declaring decisions of independent government institutions is contrary to Article 13(6)(a) and 107A of the Constitution of the United Republic of Tanzania 1977.

5. The Role of the Media

The media plays a pivotal role in democratic societies, particularly during elections, by disseminating information, raising public awareness, and promoting accountability. Serving as a watchdog, it monitors the actions of government officials and political actors, exposing corruption and malpractice. Through its various platforms, the media facilitates dialogue, debate, and the exchange of ideas, fostering a robust democratic discourse. Additionally, it educates the public about electoral procedures and civic responsibilities, empowering citizens to participate actively in the democratic process. By providing a platform for candidates to communicate their

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messages and reflecting public opinion, the media influences electoral outcomes and contributes to the overall health of democracy.

However, among the aspects that stakeholders have long blamed is the unfair treatment of candidates by the media, including unequal allocation of airtime, coverage during campaigns, and program design. LHRC recommended the law to ensure fairness to both parties the media and candidates.

6. Special Seats for Women

Debates among stakeholders have been provoked by the procedures governing the nomination of women Members of Parliament and Councilors for special seats, including concerns about fairness, impartiality, and even their tenure. According to Articles 66, 67, 76(3), and 78 of the Constitution of the United Republic of Tanzania 1977, women MPs for special seats are nominated based on the threshold of votes attained by political parties in all constituencies, set at 5%.

However, this process is entirely controlled by political parties. Despite Article 81 of the Constitution allowing the National Electoral Commission to prescribe universal procedures for all parties, no such guidelines have been issued, leaving the process centralized and monopolized by political parties. Section 112 of the Act regarding the nomination of women MPs has remained unchanged, considered a constitutional matter. To enact reforms, constitutional amendments, particularly for women's representation using a quota system similar to Kenya's, must be tabled. Section 113 of the Act concerning women councilors mirrors the process for women MPs, with its position unchanged from the new laws.

7. Security for Costs

Despite a precedent set by the Tanzania Court of Appeal in the case of Julius Ishengoma Francis Ndyabo versus the Attorney General of Tanzania, Appeal No. 64 of 2001/2002, declaring that imposing costs on citizens' right to access justice is a denial of that right and is contrary to Article 13(6)(a) of the Constitution of the United Republic of Tanzania 1977, the mandatory requirement of security for the cost of parliamentary and councilors' election petitions remains unchanged in sections 140 and 150(2) of the Act. This implies that an election petition cannot be heard unless security for costs has been deposited.

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8. Challenging Presidential Results

According to Article 41(7) of the Constitution, presidential election results cannot be challenged in a court of law once the presidential candidate is declared a President-elect by the National Electoral Commission. While this requirement is constitutional, amending Article 41(7) would allow Tanzanians to challenge presidential election results in a court of law, necessitating a bill for constitutional minimum reform to be tabled in the National Assembly.

The National Independent Electoral Act No. 2. 2024

1. The Local Government Authorities Elections to be administered by the TAMISEMI.

Despite Section 10(1)(c) of the Act stipulating that the National Electoral Commission shall coordinate and supervise local government authorities' elections, subject to the enactment of a law by the Tanzania National Assembly, unfortunately, such a law has not yet been passed. Consequently, by implication, the elections shall proceed under the coordination and supervision of TAMISEMI until and unless an Act of Parliament enshrining procedures for this purpose is enacted.

2. The Chairperson, Vice-chairperson, and other members of the National Electoral Commission to serve their positions even after the operationalisation of the new law.

One of the areas that brought hope to stakeholders was the insertion of their long-term demand for an independent and impartial recruiting mechanism for officials of the electoral commission. Despite the introduction of a nomination committee under Section 9 of the Act, mandated with recruiting members of the commission, section 27 guarantees members of the commission to serve even after the enactment of the new law. Furthermore, the nomination committee, established under Section 9 of the Act, will not resume the recruitment process of commission members until the tenure of the serving members expires, approximately five years later. Therefore, the nomination committee is expected to resume its activities by 2028 or 2029.

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Political Parties Affairs Amendment Act, No. 2 of 2024

Inclusion of Women, People who are differently abled and the Youth.

Among the areas that LHRC and other stakeholders have been advocating for change is gender inclusion in the democratic process, aiming to actively involve women, People with Disabilities (PWDs), and youth in democratic processes. Section 10C of the Act, introduced after the amendment, mandates that political parties maintain certain documents, including a gender and inclusive policy. This policy should specify the establishment of a gender desk within the political party, capacity-building training to encourage women's participation in democratic rights, inclusion of PWDs, and involvement of youth.

Despite this positive step, LHRC is of the view that the attempt is not exhaustive and lacks descriptions of sanctions to be issued against political parties that fail to comply with Section 10C of the Act.

Conclusion and Recommendations

In conclusive remarks, LHRC provides the following recommendations for the improvement of electoral and political party laws:

1. LHRC appeals to the Tanzanian Government to table a special Bill on Minimum Constitution Reforms during the ongoing parliamentary sessions to demonstrate the political will of the current regime. These reforms, aligned with the 4R philosophy (Reconciliation, Resilience, Reforms, and Rebuild), as advocated by President Samia Suluhu Hassan, will intensify the implementation of recommendations from the Presidential Taskforce on Multiparty Democracy, as submitted by Professor Rwekaza Mukandala on October 21, 2022.
2. The Government should table a bill during the ongoing parliamentary sessions to pave the way for constitutional minimum reforms, ensuring meaningful and sustainable changes.
3. A bill on local Government elections should be tabled during the ongoing parliamentary sessions, mandating the National Electoral Commission to coordinate and supervise the local government authorities' elections in 2024, as outlined in section 10(1)(c) of the National Independent Electoral Commission Act.
4. To implement the decision of the High Court of the United Republic of Tanzania on the constitutional petition by Tito Elia Magoti versus the Attorney General and Others, which declared that inmates have the right to vote.

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5. The Government should reinstate its position by amending the law and making special arrangements for Tanzanians abroad (Diaspora) to vote, in accordance with what was agreed upon by the Parliamentary Standing Committee on Governance, Constitution, and Legal Affairs.
6. Amend the Presidential, Parliamentary, and Councilors Elections Act, 2024, to establish mandatory requirements for candidates to conduct debates at all levels.

These recommendations aim to enhance electoral processes, promote inclusivity, and strengthen democratic practices in Tanzania.

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