

**KNCHR ADVISORY BRIEF ON THE ELECTION OFFENCES
(AMENDMENT) BILL, 2017**



Kenya National Commission on Human Rights

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Introduction

The Kenya National Commission on Human Rights (KNCHR) submits this advisory brief pursuant to its constitutional function under Article 59(d) which mandates the Commission to monitor investigate and report on the observance of the human rights in all spheres of life in the Republic including protecting constitutionalism.

The KNCHR is committed to the furtherance of the national values and principles articulated under Article 10 of the Constitution. KNCHR is of the view that a credible election process is key to safeguarding democratic gains. KNCHR therefore has been involved in ensuring that electoral reforms are in consonance with democratic and governance ideals enumerated in the constitution. The Constitution emphasizes that public resources must always be used only for the public good.

The Election Offences (Amendment) Bill, 2017 seeks to amend Section 14 of the Election Offences Act, by deleting (2) thereof

The following are the KNCHR submissions on the Proposed Amendments.

1. The proposed Election Offences (Amendment) Bill of 2017 seeks to amend the Elections Offences Act 2016 by deleting Section 14(2) of the Act, it provides

'No government shall publish any advertisements of achievements of the respective government either in the print media, electronic media, or by way of banners or hoardings in public places during the election period'.

2. The proposer of the amendment suggests that the proposed deletion is necessary since Section 14(2) serves to limit the constitutional right of access to information, contrary to Article 35 of the Constitution of Kenya, 2010, to the extent that it prohibits the state from giving out information during the election period.
3. By virtue of Article 35 of the Constitution every citizen has a right of access to information, the state is further obliged to publish and publicize all important information concerning the nation. Notably, the framing of Article 35 is in the mandatory nature and hence, the state is duty bound to relay all information within its custody subject to the limitation parameters stipulated under Article 24 of the Constitution.

4. There is therefore need to interrogate the proposed amendment in the light of the existing legal framework on access to information. These include the Constitution, the ICCPR¹ and *Access to Information Act 2016*.
- (a) It is a requirement that the Constitution ought to be interpreted in a manner that promotes its purposes, values and principles enshrined under Article 10 which include good governance and promotion of *accountability and transparency* in the exercise of power. The spirit and letter of the supreme law in giving access to information held by the government be it at national or county level was intended to empower the citizenry to be in a position to hold the government to account.
- (b) Further, it was intended to have a twin-effect of promoting the tenet of *public participation* in governance affairs and by so doing help entrench the spirit of inclusive, transparent and accountable manner of exercising power and conduct in public affairs.
- (c) The *Access to Information Act 2016* which is the parent statute that breathes life to Article 35 explicitly provides for the manner and framework of *realizing this fundamental right*. Under Section 2, the Act defines information to include:
- ‘all records held by a public entity, regardless of the form in which the information is stored, its source or the date of production’.**
- (d) Section 3(d) of the Act also provides that one of the principal objects of the Act is to require the *proactive disclosure of information* held by a public entity and further promote the routine and systematic disclosure by both public and private service especially with regard to the constitutional principles relating to accountability, transparency and public participation and access to information.
5. A proper reading of the law therefore suggests that the intention of the law is to prohibit the use of public resources (by advertisement) during the election period on the various media platforms.

¹ Article 19(2) which provides for the freedom to seek information.

6. It is evident therefore that the law does not restrict the publication and dissemination of information but rather seeks to restrict the use of public resources in a manner that benefits the political campaigns of incumbents. Under these circumstances advertisements that are run by incumbents highlighting the projects and programmes implemented during its tenure and urging the electorate to support them would necessary be flouting the law.
7. The proposed amendment is contrary to the provisions of the *Access to Information Act* which expressly requires the proactive disclosure of all records held by the government. The information envisaged under Article 35 and the Act is all inclusive and ought not to be limited to information relating to ‘achievements’ only. This means therefore that the law as exists does not in any way bar or limit the government from sharing and publicizing information.
8. The misuse of public resources is the mischief that *Section 14 (2) of the Election Act 2016* sought to cure given that it strictly prohibits a sitting government from publishing its achievements in the stipulated modes during the election period.
9. The specificity of the Section is instructive in that it only applies during the electioneering period. It sought to ensure a level playing field between the parties in an election and preventing the sitting government from using state resources to gain undue advantage over the competitors.

10. OPINION

- (a) We hold the opinion that *Section 14(2) of the Election Act 2016* does not in any way limit or serve to limit the realization of the constitutional right of access to information held by the government be it at the national or county level.
- (b) We are of the view that Section 14(2) regulates the misuse of public resources and public information by incumbents for political gain and political mileage and only during an election period.
- (c) The introduction of the Bill is mistimed as it may be interpreted that the intention is to influence the ongoing campaigns.

11. RECOMMENDATION

In view of the foregoing the Commission advises that the proposed amendment violates the provisions of Chapter 12 of the Constitution that govern Public Finance. In the circumstances we urge that it be withdrawn.