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Parliament passes Election Law (Amendment) Act 2016 despite an opposition Coalition for Reforms and Democracy (CORD) boycott of the parliamentary session and the threat of street protests. The contentious amendment provides for the use of manual voting in the 8 August general election. President Uhuru Kenyatta (2013-present) nominates Wafula Chebukati as Independent Electoral and Boundaries Commission (IEBC) chairman. Kenyatta signs into law the Bribery Act 2016, increasing criminal prosecution and regulatory censures for individuals and companies involved in corrupt activities. A Nairobi criminal court drops charges against Iranian nationals accused of planning a terror attack against the Israeli embassy.

Opposition threatens protests over election amendments

The political situation in **Kenya** is deteriorating ahead of the 8 August general election. The election will dominate the political landscape for the next eight months, hindering effective policymaking and implementation. Parliament on 22 December passed the **Election Law (Amendment) Act 2016**.¹ The ruling **Jubilee Party**, which has a majority in parliament and the senate, secured the passage of the amendments in the face of the opposition **Coalition for Reforms and Democracy (CORD)** boycott of the special parliamentary session that passed the amendments.² The amendments allow for the **Independent Electoral and Boundaries Commission (IEBC)** to use manual voting if electronic voting and biometric voter identification (BVI) kits fail. During the 2013 general election, some BVI equipment failed, forcing the IEBC to resort to manual counting.³

A separate amendment revises the limit on campaign spending by individual candidates and political parties as provided for in the **Election Campaigns Finance Regulations**.⁴ However, the manual voting issue is the most contentious and will increase the risk of violent opposition protests ahead of the election.⁵

"Political temperatures in Kenya are rising [over the law] that will allow for the use of manual voting, a hotly contested issue."⁶

The legislation providing for the use of electronic voting is controversial for two reasons. Firstly, there is tension over the way in which parliament drafted and passed the amendments.⁷ A special bipartisan joint parliamentary committee agreed the electoral reform framework on 17 August (see *ARC Briefing Kenya September 2016*). The inclusion of members of both the ruling Jubilee Party and the opposition CORD on the committee ensured broad political backing and ended violent street protests against the IEBC. The national assembly approved the electoral reform package on 25 August. However, some opposition lawmakers alleged that the police prevented them from accessing parliamentary chambers during discussion of the amendments:

¹ Standard, 22 Dec 2016.

² Standard, 22 Dec 2016.

³ Standard, 22 Dec 2016.

⁴ Standard, 22 Dec 2016.

⁵ Standard, 22 Dec 2016.

⁶ Source, journalist, Nairobi

⁷ Source, journalist, Nairobi

“While there is a valid argument for having a manual backup, it is the manner in which the amendments were made that is raising tension. Police cordoned parliament [during the debate] and some opposition lawmakers accused the police of blocking them from accessing parliamentary chambers.”⁸

Secondly, advocates of electronic voting over manual voting cite the increased risk of electoral fraud. Former **South African** judge **Johann Kriegler** recommended in an election report to the government in 2008 that Kenya use electronic voting.⁹ Proponents of electronic voting say that such a system will remove ‘ghost voters’, enable the transmission of results in real time, and reduce the risk of ballot stuffing.¹⁰ Senate minority leader **Moses Wetang’ula** has alleged that BVI would stop the Jubilee Party benefiting from 1.2 million underage voters on the election register.¹¹ Wetang’ula provided no evidence to substantiate this allegation. The IEBC released a statement on 22 December that it is “concerned”¹² about the amendments. The Jubilee Party, however, has claimed that manual recounts will reduce logistical challenges in rural areas.¹³ Additionally, the government argues that an electronic voting system is susceptible to political or terror-related hacking, and that a manual backup is a sensible backstop.¹⁴

CORD initially threatened to hold nationwide demonstrations against the amendments beginning 4 January.¹⁵ However, CORD suspended the planned protests after senate speaker **Ekwee Ethuro** on 28 December opened the proposed amendments to public discourse.¹⁶ The senate standing committee on legal affairs and human rights began to hear testimony on 30 December from relevant public parties including the **Law Society of Kenya (LSK)**.¹⁷ LSK president **Isaac Okero**, in a submission to the senate committee, criticised the lack of clarity in the proposed amendments over the use of manual voter identification and results transmission.¹⁸ CORD leaders **Kalonzo Musyoka**, **Moses Wetang’ula** and **James Orendo** confirmed that they will wait on the senate’s response to the committee’s report before determining their next steps.¹⁹

*“The opposition has in the meantime told Kenyans to brace themselves for the weekly riots that resulted in a section of Nairobi’s **Central Business District (CBD)** shutting down on Mondays in mid-2016, should Jubilee have its way.”²⁰*

CORD has also filed a judicial review seeking to prohibit president **Uhuru Kenyatta** (2013-present) from signing the amendments into law.²¹ The case received its first hearing on 9 January.²² CORD leader **Raila Odinga** had previously threatened to boycott the election if the amendment passed.²³

There is still a high risk that CORD will resume protests ahead of the general election. The opposition has criticised Kenyatta’s nomination of **Wafula Chebukati** as the new chairman of the IEBC.²⁴ Chebukati is reportedly close to deputy president **William Ruto**, having worked with his legal adviser, **Korir Sing’oei**.²⁵

⁸ Source, journalist, Nairobi

⁹ Source, journalist, Nairobi

¹⁰ Source, election official, East Africa

¹¹ East African, 25 Dec 2016.

¹² East African, 25 Dec 2016.

¹³ East African, 25 Dec 2016.

¹⁴ East African, 25 Dec 2016.

¹⁵ East African, 25 Dec 2016.

¹⁶ Capital FM, 29 Dec 2016.

¹⁷ Capital FM, 29 Dec 2016.

¹⁸ Capital FM, 29 Dec 2016.

¹⁹ Capital FM, 29 Dec 2016.

²⁰ Source, journalist, Nairobi

²¹ Capital FM, 29 Dec 2016.

²² Capital FM, 29 Dec 2016.

²³ Capital FM, 21 Dec 2016.

²⁴ Daily Nation, 29 Dec 2016.

²⁵ www.kenya-today.com

“Fears are that an election that is not seen as fair has the potential to stir violence similar to 2008 post-election violence.”²⁶

Chebukati is a commercial lawyer with Nairobi-based **Cootow and Associates Advocates**.²⁷ Chebukati is an ethnic **Bukusu** from **Trans-Nzoia County**.²⁸ This may force the resignation of IEBC CEO **Ezra Chibola** as he is from the same county, which could encourage allegations that the IEBC is geographically imbalanced.²⁹ The opposition has raised a number of concerns about Chebukati, which may derail his appointment. Chebukati is a half-brother and lawyer to former **Ethics and Anti-Corruption Commission (EACC)** chair **Philip Kinisu** who resigned in August 2016 due to alleged links to companies that benefited from the **National Youth Service** corruption.³⁰ Kinisu is married to the sister of **Nancy Gitau**, head of Kenyatta’s political advisory unit and coordinator of the Jubilee Party general election campaign.³¹ If parliament approves the appointment of Chebukati, his first duty will be to oversee county assembly by-elections in **Baringo** and **Migori Counties** on 22 March.³² These polls will signal the readiness of the IEBC to hold the general election five months later, and the likely conduct of the political parties.³³

The contention about manual voting and the nomination of Chebukati has exacerbated broader opposition concerns about electoral transparency. The government has instructed the **United States**-based non-governmental organisation (NGO) **International Foundation for Electoral Systems (IFES)** to end its \$20m voter education programme.³⁴ The **NGO Coordination Board**, a state agency that regulates civil society organisations, declared unspecified activities of IFES as illegal.

“Additionally the government has since denied a senior IFES official entry into Kenya.”³⁵

Kenyatta signs into law Bribery Act 2016

Kenyatta on 27 December signed into law the **Bribery Act 2016**.³⁶ If enacted efficiently and effectively, anti-bribery legislation will reduce corruption risks for investors in Kenya. The Bribery Act is especially focused on interactions between private sector companies and government agencies and state-owned enterprises.³⁷ The national assembly forwarded the Bribery Act to Kenyatta on 15 December. **Nairobi Securities Exchange**-listed **Safaricom Ltd** CEO **Bob Collymore**, representing the **Kenya Private Sector Alliance**, originally presented the draft bill to Kenyatta in November 2015.³⁸ The Bribery Act aims to extend to the private sector government efforts to curb state corruption, and to establish an effective coordination and accountability framework for the prevention, investigation and prosecution of acts of bribery.

Although the newly passed Bribery Act is based on the **United Kingdom Bribery Act 2010**, it does not specifically define bribery. In line with the United Kingdom Bribery Act, the term “bribery” can be generally construed to mean an:

“offer or request, promise or agreement to receive, or the giving or receiving of, a financial or other advantage to a person whether directly or indirectly through third parties who know or

²⁶ Source, journalist, Nairobi

²⁷ www.cootowlaw.com

²⁸ Daily Nation, 29 Dec 2016.

²⁹ Daily Nation, 29 Dec 2016.

³⁰ www.kenya-today.com

³¹ www.kenya-today.com

³² Capital FM, 29 Dec 2016.

³³ Capital FM, 29 Dec 2016.

³⁴ Source, journalist, Nairobi

³⁵ Source, journalist, Nairobi

³⁶ Business Daily, 27 Dec 2016.

³⁷ Business Daily, 27 Dec 2016.

³⁸ The Star, 15 Dec 2016.

*believe such acceptance or giving would constitute the improper performance of a function or activity”.*³⁹

The Kenyan Bribery Act will affect how the private sector – both international and domestic-owned companies – conducts business in Kenya. It obliges private sector companies to introduce specific internal bribery prevention procedures. The size and activities of the company determine the internal mechanisms. Executives who fail to implement appropriate mechanisms face jail sentences of 12 months.⁴⁰ Additionally, the Bribery Act can hold companies liable for the activities of individuals associated with them if they are engaged in illegal activities to obtain or retain business on their behalf.

The Bribery Act provides for fines of 1m Kenya shillings (KSh) (\$9,784) and 10-year prison sentences for individuals convicted of giving, soliciting, receiving or agreeing to receive a bribe.⁴¹ Convicted individuals additionally face asset seizures. Directors can face a 10-year disqualification on holding a directorship or partnership at any Kenya-based company. Companies engaged in bribery face KSh5m (\$48,769) fines and 10-year bans on conducting business with both the national and county governments.⁴² The Bribery Act provides for fines five times the amount of benefit gained by a person or company, or five times the loss suffered by another party, or both. Additionally, the Bribery Act encourages courts to impose any other deterrent sentence that it deems appropriate.

Apart from criminalising the giving and receiving of bribes, the Bribery Act imposes reporting obligations on any person who becomes aware or suspects an instance of bribery has occurred. The Bribery Act imposes a duty on individuals to report to the Ethics and Anti-Corruption Commission (EACC) any instance of bribery within 24 hours of suspecting bribery has occurred.⁴³

The EACC will be responsible for implementing the Bribery Act. Kenyatta on 20 December nominated retired **Anglican Church of Kenya** archbishop **Eliud Wabukala** as head of the EACC.⁴⁴ Parliament is expected to complete the vetting of Wabukala by mid-January.⁴⁵ Wabukala is the current chair of the **National Anti-corruption Steering Committee**, a government agency formed in November 2004 to raise awareness about the risks and costs of corruption.

Court drops terrorism charges against Iranians

A Nairobi criminal court on 14 December dropped charges against and deported **Iranian** nationals **Sayed Nasrollah Ebrahimi** and **Abdolhosein Gholi Safafe** accused of planning a terror attack against the **Israeli** embassy.⁴⁶ A successful attack on a foreign embassy would prove diplomatically embarrassing, show up the limited capacity of Kenya’s intelligence and security services, and result in potential litigation against the Kenyan government. A court had on 1 December charged Ebrahimi and Safafe with filming the heavily guarded Israeli embassy in the **Upper Hill District** in Nairobi.⁴⁷ The Iranian government has claimed that Ebrahimi and Safafe are justice ministry employees in Nairobi to visit imprisoned Iranian nationals **Ahmad Mohammed** and **Sayed Mousavi**.⁴⁸ Ebrahimi and Safafe were reportedly in a diplomatic vehicle at the time of their detention on 29 November.⁴⁹ Iranian deputy foreign minister **Hassan Qashqavi** travelled to Nairobi to secure the release of Ebrahimi and

³⁹ www.lawsociety.org.uk

⁴⁰ The Star, 15 Dec 2016.

⁴¹ Business Daily, 27 Dec 2016.

⁴² Business Daily, 27 Dec 2016.

⁴³ Business Daily, 27 Dec 2016.

⁴⁴ Daily Nation, 20 Dec 2016.

⁴⁵ Daily Nation, 20 Dec 2016.

⁴⁶ The Star, 15 Dec 2016.

⁴⁷ The Star, 15 Dec 2016.

⁴⁸ The Star, 15 Dec 2016.

⁴⁹ Reuters, 15 Dec 2016.

Safafe.⁵⁰ The court reportedly dropped the charges following an agreement between prosecutors and the Iranian embassy.⁵¹

Mohammed and Mousavi were charged in 2013 with possessing 15 kilograms of high-grade plastic explosive. Police arrested the two Iranians, allegedly members of Iran's elite **Islamic Revolutionary Guards Corps Quds Force**,⁵² after receiving information they planned an attack in **Mombasa**.⁵³ Israeli security forces were involved in the detention of Mohammed and Mousavi.⁵⁴ The Iranian government claimed that Israel was also behind the detention of Ebrahimi and Safafe. Intelligence sources in Kenya indicated Israel's intelligence network was allegedly tracking the two Iranians, who are believed to have had powerful RDX military explosives.⁵⁵

*"It was not the Kenyan intelligence security services that tracked the two Iranians down, but rather **American** and Israeli operatives deployed to Kenya due to the stepping up of threats by Islamists."⁵⁶*

Islamist terrorists in 2002 bombed an Israeli-owned luxury hotel near Mombasa, killing 13 people. They also tried unsuccessfully to shoot down an Israeli **El Al** passenger aircraft at Mombasa airport in a simultaneous attack. **Al Qaeda** operatives were linked to both those attacks.⁵⁷ **Al Shabaab** and **al Qaeda in East Africa (AQEA)** have not traditionally used Iranian operatives.⁵⁸

Implications

The senate and Kenyatta still need to approve the electoral amendments. If they do so, CORD is likely to resume protests that are liable to turn violent. The new IEBC must convince opposition parties and the electorate that it can be trusted to oversee the election on a non-partisan basis. Unless it does so, there is a risk that defeated candidates and parties will reject the results, increasing the possibility of post-election violence. Increased potential for instability and violence will offer headwinds to inward flows of foreign investment, especially portfolio, over 2017.

The passing of the Bribery Act means that companies engaging in corruption in Kenya will face increased risks to profits, brand and share prices. However, the new criminal prosecution and regulatory censures will only deter corrupt activities if the law results in meaningful investigations and prosecutions.

Islamist militants, including al Shabaab, would consider an embassy a high-value target. It is unlikely, however, that any group has the capacity to conduct such an attack. Kenya's longer-term security picture is positive. International counter-terrorism assistance will improve the training and coordination of Kenyan security forces, and this combined with stronger government efforts will over time consolidate Kenya's ability to prevent attacks.

⁵⁰ Reuters, 15 Dec 2016.

⁵¹ Reuters, 15 Dec 2016.

⁵² Reuters, 15 Dec 2016.

⁵³ Source, security analyst, East Africa

⁵⁴ Source, Western intelligence officer, Nairobi

⁵⁵ Source, Western intelligence officer, Nairobi

⁵⁶ Source, foreign journalist, Nairobi

⁵⁷ Source, security analyst, East Africa

⁵⁸ Source, security analyst, East Africa