

ARTICLE 19

Kenya: Publication of Electoral Opinion Polls Bill

February 2012

Legal analysis

Executive summary

In January 2012, ARTICLE 19 analysed the Kenyan Publication of Electoral Opinions Bill, 2011 (the Bill) from the perspective of international and comparative standards on freedom of expression and freedom of information. The analysis draws upon standards of international law, as well as best practices of other states regarding these rights.

Regulation of opinion polls and election projection is very important from a freedom of expression perspective to the democratic processes. Opinion polls can exercise particular influence on the outcome of elections and can also be quite distorting. This is particularly true of polls and projections commissioned or conducted by a biased source. Polls and projections may have an effect on the vote itself, rather than simply reflect public sentiment. For these reasons, broadcast coverage of opinion polls and projections warrants special attention to ensure balance, fairness and objectivity so that the public are able to accurately assess and understand the poll's significance. At the same time, existing laws do not address this issue in a uniform fashion but provisions range from bans on the publication of election poll results from a certain date onward to general prohibitions on opinion polls or the use of certain questions in polls.

ARTICLE 19's conclusion is that the Bill contains comprehensive requirements for information required for electoral opinion polls. This is a positive feature of the Bill as it ensures the validity of the polls and also serves to counter situations in which electorates may place undue reliance on the results of the polls.

At the same time, ARTICLE 19's analysis highlights several negative features of the Bill, in particular the time period for the ban on electoral opinion poll publication and the severe sanctions for violation of the Bill.

Key recommendations:

- The Bill should highlight that its underlying aim is to ensure that freedom of expression, in particular the freedom of media, is respected during the election periods. It should also underscore the importance of media, their editorial independence during election periods and their contribution to free and democratic elections;
- The Bill should specify the date when it enters into force;
- The Bill should clarify whether the electoral period is meant to cover the campaign period during which voters are exposed to competing campaign messages. The length of the electoral period under the Bill should be shortened accordingly;
- An amendment should be made to Section 6 that the fee for persons requesting a copy of a report should not exceed a certain amount;
- Section 7 of the Bill should be revised to make the period of prohibition of results of electoral opinions 24 hours;
- Section 8 of the Bill should be revised to substantially lower the proposed penalties to ensure their proportionality to the offences. The Bill should also state that any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.



Table of Contents

- About ARTICLE 19 Law Programme **4**
- Introduction **5**
- International Standards on Freedom of Expression and Information and Elections **7**
 - Freedom of expression and elections 7
- Analysis of the Bill **11**
 - General comments and objectives of the Bill..... 11
 - Definitions 12
 - Information required on publication 12
 - Fees charged 13
 - Prohibition of publication..... 13
 - Penalties..... 14
- Annex: the Publication of Electoral Opinion Polls Bill, 2011 **16**

About ARTICLE 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year, comments on legislative proposals, as well as on existing laws that affect the right to freedom of expression, and develops policy papers and other documents. This work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All materials developed by the Law Programme are available at <http://www.article19.org/resources.php/legal>.

If you would like to discuss this policy brief further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org. For more information about this analysis, please contact Stephanie Muchai, Legal Officer for East Africa at muchai@article19.org.

Introduction

In February 2012, ARTICLE 19 reviewed the Kenyan Publication of Electoral Opinion Bill, 2011 (the Bill) for its compliance with international standards on freedoms of expression and freedom of information, in particularly those related to media and elections.

ARTICLE 19's core mandate is to promote and protect the right to freedom of expression and information globally. In the past, the Law Programme has analysed numerous election-related laws in various countries for their compliance with freedom of expression standards, lending our expertise to establishment and reform processes worldwide. We have also produced three standard-setting documents relevant to the use of media during elections, *Guidelines for Election Broadcasting in Transitional Democracies*,¹ *Reporting Elections Broadcast Guidelines* (ARTICLE 19 Guidelines),² and *Comparative Study of Laws and Regulations Restricting the Publication of Electoral Opinion Polls*.³ These publications represent a broad international consensus on best practices regarding electoral opinion legislation and broadcasting guidelines during election periods. They therefore provide a useful framework in which to discuss the features of this Bill.

This analysis also builds upon ARTICLE 19's previous analyses of Kenyan draft laws and adopted legislation in the area of freedom of expression and information. These previous analyses have included commentaries on legislation such as the Media Council of Kenya Bill 2006, the Communications (Broadcasting) Regulations 2009 and 2011, the harmonised Draft Constitution and most recently, the analysis of the draft Freedom of Information Bill 2012 and the Data Protection Bill 2009.⁴

Regulation of opinion polls and election projection is very important from a freedom of expression perspective for democratic processes. Opinion polls can exercise particular influence on the outcome of elections and can also be quite distorting. This is particularly true of polls and projections commissioned or conducted by a biased source. Polls and projections may have an effect on the vote itself, rather than simply reflecting public sentiment. For these reasons, broadcast coverage of opinion polls and projections warrants special attention to ensure balance, fairness and objectivity so that the public are able to accurately assess and understand the poll's significance. At the same time, existing laws do not address this issue in uniform fashion, but provisions range from bans on the publication of election poll results from a certain date onward to general prohibitions on opinion polls or the use of certain questions in polls.

This analysis consists of two parts. The first part outlines international and regional standards

¹ ARTICLE 19, *Guidelines for Election Broadcasting in Transitional Democracies*, August 1994 (re-printed in 1997); available at <http://www.article19.org/data/files/pdfs/tools/electionbroadcastingtrans.pdf>.

² *Reporting Elections Broadcast Guidelines*, produced by ARTICLE 19 in collaboration with Index for Free Expression, Reuters Foundation and UNESCO; available at http://webworld.unesco.org/download/fed/iraq/english/broadcast_guidelines_en.pdf.

³ ARTICLE 19, *Comparative Study of Laws and Regulations Restricting the Publication of Electoral Opinion Polls*, January 2003; available at <http://www.article19.org/data/files/pdfs/publications/opinion-polls-paper.pdf>.

⁴ The text of all analyses of Kenyan legislation produced by ARTICLE 19 is available at <http://www.article19.org/resources.php?tagid=259>.

on freedom of expression, freedom of information and elections with reference to the respective obligations that Kenya has when implementing domestic legislation in this area. Legitimate limitations on freedom of expression of opinion and the right to information during electoral periods are discussed. The second part contains an analysis of the Bill, pointing to both positive and problematic areas contained therein. The text of the Bill is reproduced in the appendix to this analysis.

Since the Bill is the first of its kind in Kenya, ARTICLE 19 hopes that this analysis will be useful to the Government and other stakeholders in the process of implementing the Bill and addressing its shortcomings. ARTICLE 19 stands ready to provide further comments and assistance in this process.

International Standards on Freedom of Expression and Information and Elections

Freedom of expression and elections

International human rights law enshrines the rights to freedom of expression and the rights of citizens to participate in government via free and fair elections. The Universal Declaration of Human Rights (UDHR), adopted in 1948, enshrines the right to freedom of expression in Article 19, which states:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 21 of the UDHR states in part:

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
-
- (3) The will of the people shall be on the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

While the UDHR is not directly binding on States, parts of it, including Article 21, are widely regarded as having acquired legal force as customary international law.

Similarly, Articles 19 and Article 25 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Kenya on 1 May 1972, enshrine these rights in terms similar to the UDHR.

As a state party to the African Union, Kenya is also bound by the African Charter on Human and Peoples' Rights (the Charter),⁵ which guarantees the right to freedom of expression in Article 9. Moreover, Article 13 states in part:

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

These instruments also highlight the right of the public to receive information and ideas, as well as the right of the mass media to impart information and ideas. Governments have an obligation not to interfere with these rights.

⁵ African Commission on Human and Peoples' Rights, *African [Banjul] Charter on Human and Peoples' Rights*, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986; available at http://www.achpr.org/english/_info/charter_en.html.

Respect for human rights, including the freedoms of expression, association and assembly, as well as the right to be free from intimidation, are central to an effective electoral exercise. Elections, therefore, provide an occasion to evaluate how other institutions are functioning in a country to ensure and promote a spectrum of civil and political rights.

The African Charter on Democracy, Elections and Good Governance (ACDEG) provides further guidance on these issues.⁶ Although Kenya is not among the 15 states that have ratified the ACDEG, its principles and objectives provide good direction. The ACDEG aims, among its objectives, to:

[p]romote the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs.

Finally, the right to seek, receive or impart information or ideas is constitutionally guaranteed in Kenya under Article 33 of the Constitution of Kenya 2010. Additionally, Article 34(4)(c) places responsibility on the media to give a fair opportunity for divergent views.

Limitations on freedom of expression and information during electoral periods

It is uncontroversial to state that democracy depends on the fair and equitable communication of all contesting points of view so that the people may make informed choices. As noted by the European Court of Human Rights in the case of *Bowman v. United Kingdom*, the right to free elections (under Article 3 of the European Convention on Human Rights (ECHR)) and freedom of expression (under Article 10 of the ECHR) operate to reinforce one another and “together form the bedrock of any democratic system.” Freedom of expression, the Court continued:

is one of the “conditions” necessary to “ensure the free expression of the opinion of the people in the choice of the legislature. For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely.⁷

Courts all over the world have made similar statements. Nevertheless, there are circumstances in which the two rights may come into conflict, and international law recognises that certain restrictions on freedom of expression in order to ensure that the political debate prior to an election is not distorted may be legitimate. Most countries have imposed some restrictions of this sort.

The publication of opinion polls is one such area where limitations on freedom of expression have been legitimately imposed in order to protect the integrity and fairness of the electoral process. There is a lot of potential for controversy in media publication of electoral polls if these polls are subject to manipulation or conducted by a biased source. Additionally, the

⁶ The African Charter on Democracy, Elections and Governance, adopted by the 8th Ordinary Session of the African Union Assembly, on January 30, 2007; available at <http://www.africa-union.org/root/au/Documents/Treaties/text/Charter%20on%20Democracy.pdf>.

⁷ *Bowman v. United Kingdom*, decision of 19 February 1998, application No. 24839/94.

manner in which questions are asked or framed, as well as the sample of persons used for the poll, can also distort poll results.

It is well recognized under international law that any limitation placed on freedom of expression must remain within strictly-defined parameters. The universally accepted standard for restrictions is set in Article 19(3) of the ICCPR, which states:

The exercise of the rights [to freedom of expression and information] may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

This article subjects any restriction on the right to freedom of expression to a strict three-part test, requiring that any restriction must: 1) be provided by Act; 2) be for the purpose of safeguarding a legitimate public interest; and c) be necessary to secure this interest. The third part of this test means that even measures which seek to protect a legitimate interest must meet the requisite standard established by the term “necessity”. Although absolute necessity is not required, a “pressing social need” must be demonstrated; the restriction must be proportionate to the legitimate aim pursued, and the reasons given to justify the restriction must be both relevant and sufficient.

The application of this test is crucial when analysing limits on the freedom of expression in relation to the regulation of electoral poll opinions. Guideline 12 of ARTICLE 19’s Guidelines states:

If a broadcaster publishes the result of an opinion poll or election projection, it should strive to report the results fairly and, in particular, to publish all readily available information that would assist the listeners in understanding the poll’s significance.

12.1. Opinion polls should be accompanied by information to assist viewers/listeners to understand the poll’s significance, such as who conducted, commissioned and paid for the poll, the methodology used, the sample size, the margin of error, and the fieldwork dates.

Similarly, from the comparative perspective, it is useful to note that the Recommendations of the Council of Europe Concerning Media Coverage of Election Campaigns,⁸ provides:

[S]elf-regulatory frameworks should ensure that the media, when disseminating the results of opinion polls, provide the public with sufficient information to make a judgement on the value of the polls. Such information could, in particular:

- name the political party or other organisation or person which commissioned and paid for the poll;
- identify the organisation conducting the poll and the methodology employed;
- indicate the sample and margin of error of the poll;
- indicate the date and/or period when the poll was conducted.

⁸ Recommendation No. R(99)15 of the Committee of Ministers of the Council of Europe on Measures Concerning Media Coverage of Election Campaigns, adopted 9 September 1999; available at <https://wcd.coe.int/ViewDoc.jsp?id=419411&Site=CM>.

In general, there are two ways in which any risk of distortion from pre-election polls can be minimised, and both means have been employed in countries around the world.

- First, many countries prohibit the publication of such polls in the period immediately preceding the vote. A controversial issue here is the timeframe over which such a prohibition applies, and whether this prohibition can be justified as a restriction on freedom of expression. In practice, the length of such prohibitions range from the entire election period to no restriction at all. For example, in Singapore, a country not known for respecting freedom of expression, polls are prohibited during the entire election period, while countries such as Australia, South Africa and the United States do not impose such restrictions. In some countries, such as Canada and France, constitutional decisions have helped clarify the legitimacy of such prohibitions and, in particular, the timeframe of a legitimate prohibition. In both of these cases, the prohibitions were shortened, respectively, to the polling day and to 24 hours prior to the vote, following challenges to longer prohibitions based on the guarantee of freedom of expression.
- Second, some countries require the publication or broadcasting of polls, both pre-election and exit, to be accompanied by certain information, such as the source of the poll, the margin of error, the date on which the poll was conducted and so on. This requirement can help serve as a ‘health warning’ about the validity of the poll and can help avoid situations in which electors place undue reliance on the poll.

In the next section, ARTILCE 19 reviews how the Bill meets these standards.

Analysis of the Bill

General comments and objectives of the Bill

The Draft Bill is divided into 8 clauses and is accompanied by a Memorandum of Objects and Reasons. The memorandum states that the Bill is drafted based on the reality that the publication of the results of electoral opinion polls influences voters to vote in one way or another. As such the Bill seeks to provide a law which ensures that electoral opinion polls are conducted in a “scientific” and “transparent” manner and that all relevant information is made available to the public.

ARTICLE 19 finds this proclaimed aim positive. However, in light of international standards, we believe that it would be useful if the Bill highlighted the key freedom of expression implications of this sort of regulation. In particular, the Bill should underscore the importance of media and editorial independence during election periods and media’s contribution to free and democratic elections.

ARTICLE 19 also notes that the Bill does not distinguish between the print and broadcast media and the different framework for their regulation during the election. Hence, we believe that the Bill should also recognize the differences between the print and broadcast media in this respect and stress the need to ensure that the coverage of elections by the broadcast media should be fair, balanced and impartial.

We also observe that the Bill contains no reference to the commencement date of the law. Kenya is currently in a unique situation with regard to the date of the next election, arising from a conflict between the Constitution and the National Accord agreement. Therefore the next election date has not been finalized, with most recent developments placing the date in either December 2012 or March 2013. Despite those proposed dates, we note that the two principals – the President and the Prime Minister – may select another date by dissolving the coalition Government.

ARTICLE 19 thus recommends that the Bill include an express provision stating when the Bill comes into the force. Noting that national circumstances prevent the specification of a precise date, we also note that the Bill seeks to cover the 12 months prior to an election period (see below). Therefore it is highly likely that the Bill will come into force during an “election period”.

Therefore, as a matter of legislative prudence to give those who will be bound by the Bill notice as to how soon they will be required to comply with its provisions, the Bill should specify how soon after enactment the Bill will come into force.

Recommendations:

- The Bill should highlight that its underlying aim is to ensure that freedom of expression, in particular the freedom of media, is respected during election periods. It should also underscore the importance of the media, editorial independence during election periods and the media’s contribution to free and democratic elections;
- The Bill should specify the date on which it enters to force.

Definitions

Section 2 of the Bill contains definitions of key terms of the Bill. Among them, the term “electoral period” is defined as a period of twelve months prior to an election held under the Constitution of Kenya or any other written law.

ARTICLE 19 notes that the proposed electoral period is rather long in comparison to other laws. We assume that the political landscape in Kenya and a history of pre- and post-election violence are major factors for this length. We observed that during the 2007-2008 period, there was no regulation of the broadcasting of opinion polls or of the announcing of election results prior to their being ratified by the then Electoral Commission of Kenya. It was argued that the media’s unregulated role greatly influenced the perception of voters about which candidates should have won, leading in part to confrontations between various supporters. Additionally, a number of incumbent Members of Parliament declared themselves winners prior to official announcements. The media broadcasted “acceptance” speeches by the incumbents, a number of whom were later taken to court and proven not to have won a majority of votes.

It is also not clear whether the electoral period is meant to represent the “campaigning period” when voters are exposed to sample of campaign messages from which they can accurately estimate the true positions of candidates on important issues.

Recommendations:

- The Bill should clarify whether the electoral period is meant to cover the campaigning period, during which voters are exposed to competing campaign messages. The length of the electoral period under the Bill should be shortened accordingly.

Information required on publication

Section 4 of the Bill sets up requirements for the first person who publishes the results of an electoral opinion poll during an electoral period and any other person who transmits those results to the public within twenty four hours after they are first transmitted to the public. The Bill requires that these individuals provide the following information: the name of the sponsor of the opinion poll, the name of the person or organization that conducted the opinion poll, the date on which or the period during which the opinion poll was conducted, the population from which the sample of respondents was drawn, the number of people who were contacted to participate in the opinion poll, the methodology used, the education levels of the participants and, if applicable, the margin of error with respect to the data obtained.

Section 5(1) of the Bill requires additional information if the polls are published via means other than broadcasting: the wording of the opinion poll questions from which the data was obtained, the name and address of the sponsor of the opinion poll, the name and address of the person or organization that conducted the opinion poll, information about the methodology used to collect the data (including the sampling method, the population from which the sample was drawn and the size of the initial sample), the number of individuals asked to participate, any refusals to participate, the dates and times of the interviews, the method of recording ‘undecided’ or ‘no opinion’ answers, any weighing factors, the wording of the opinion and where applicable, the margin of error with respect to the data obtained.

Failure to provide this information constitutes a violation of the Bill and is punishable as an offence.

ARTICLE 19 notes that these requirements are in the line with the international standards in this area, as well as with comparative legislation. The text of the Bill in this respect is very similar to the Canada Elections Act, 2000.⁹

ARTICLE 19 makes no recommendations to these provisions.

Fees charged

Section 6 provides that a sponsor may charge a reasonable fee to provide a copy of a report under section 5.

The provision for a reasonable fee is good, as it ensures that cost is not a hindrance to a person's right to access information of public interest. ARTICLE 19 recommends that, in order to provide parameters for 'reasonable' and ensure that the cost remains a non-hindrance, the section include a provision stating that the fee for the report will not exceed a certain amount.

Recommendations:

- Section 6 should include a provision stating that the fee for persons requesting a copy of a report should not exceed a certain amount.

Prohibition of publication

Section 7(1) of the Bill provides that results of electoral opinion polls shall not be published for 48 hours immediately preceding the date of an election. Subsection 2 creates an offence for any person who contravenes these provisions.

Generally, international practice is not consistent with regard to the time period for bans on the publication of electoral opinion polls prior to elections. However, a 2003 ARTICLE 19 survey demonstrated that from among the established democracies, only Italy imposes a ban of more than 24 hours and that there is a clear trend towards shorter bans. Courts in these countries have questioned the assumption implicit in bans that voters are uninformed and naïve, as well as the implications of bans of this nature – which prevent the media from disseminating true, factual material – for freedom of expression. These courts have also noted that in the modern world, where access to the Internet and satellite television is becoming evermore commonplace, bans of this sort may no longer be viable.

For example, the Supreme Court of Canada in 1998 found that a 72-hour ban on the publication of opinion survey results prior to elections violated freedom of expression as protected by the Canadian Charter of Rights and Freedoms, and could not be justified as necessary to protect the integrity of the electoral process.¹⁰ The Court applied a necessity test very similar to the three-part test contained in the ICCPR. The Canadian government argued that the three-day ban was required to protect against the threat to freedom of choice by inaccurate polls and to protect some voters from being excessively influenced by polls. The Supreme Court stated that the government “cannot take the most uninformed and naïve voter

⁹ S.326, Canada Elections Act, 2000.

¹⁰ *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; available at: http://www.lexum.umontreal.ca/cscscc/en/pub/1998/vol1/html/1998scr1_0877.html.

as the standard by which constitutionality is assessed.” Rather, the ban sends the message to voters that the media can be constrained by government from publishing factual information. The Supreme Court was of the view that the tangible harms to freedom of expression caused by the ban were not outweighed by the intangible benefits and that less restrictive measures are available to protect the population from inaccurate polls, including by requiring that the media publish information on the survey’s methodology. Notably, the Supreme Court alluded to circumstances, for example, in the context of unfettered paid political advertising, in which the nature of the interests of the speakers could make the expression “inimical to the exercise of free and informed choice by others.” However, the court concluded that no such systemic or structural dangers existed in Canada.

When considering prohibition of publication and whether a country’s law meets the requirements of the three part test described above, a vital factor is the degree of independence exercised by the national media and whether or not the media will accept voluntary restrictions on polls.

In the case of Kenya, the media market is owned wholly, or in significant part, by politicians or former politicians and businessmen, some with known political ties. Therefore, because important parts of the national media are controlled by political figures, the risk of bias in opinion polls is increased.

However, it is ARTICLE 19’s position that where restrictions on publications that are longer than 24 hours are applied, a state must prove that the restriction meets the three-part test for limitations on freedom of expression described above. This would involve demonstrating that the right of the electorate to freely choose representatives is undermined by the polls. In addition, a state must demonstrate that other less intrusive measures, such as the “health warning” approach of this Bill, are ineffective in addressing the potential distorting influence of polls.

In light of this discussion, it is clear that the 48-hour ban on the publication of opinion polls proposed in this Bill is not justified. ARTICLE 19 recommends that section 7(1) be revised to reduce the prohibition period to 24 hours.

Recommendations:

- Section 7 of the Bill should be revised to limit the period of prohibition of electoral opinion poll results to 24 hours.

Penalties

Under Section 8, all offences committed under the Bill may be penalized by a fine not exceeding 500,000 shillings (USD 5900¹¹), or imprisonment for a period not exceeding one year or both.

Like any restriction on freedom of expression, sanctions for violations of the provisions on publication of the opinion polls must be “necessary”; that is, they must be proportionate so that their interference with the right does not go beyond what is needed. It is the responsibility of the Kenyan authorities to establish remedies for violation of the provisions of

¹¹ As at the time of this report

the Bill which, while redressing possible harms caused by violations, does not exert a chilling effect on freedom of expression.

In the light of these standards, ARTICLE 19 finds the penalties imposed by the Bill excessive with regard to both the monetary fine and proposed imprisonment period. Although reflected as maximum provisions, we recommend that the penalties be lowered substantially. Otherwise, they remain extremely punitive and disproportionate to the offences. The Bill should be revised accordingly, and any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.

Recommendations:

- Section 8 of the Bill should be revised to lower substantially the proposed penalties, ensuring that they are proportionate to the offences. The Bill should also state that any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.

Annex: the Publication of Electoral Opinion Polls Bill, 2011

THE PUBLICATION OF ELECTORAL OPINION POLLS BILL, 2011

A Bill for AN ACT of Parliament to provide for the manner of publication of electoral opinion polls and for connected purposes

ENACTED by the Parliament of Kenya, as follows□

Short title.

1. This Act may be cited as the Publication of Electoral Opinion Polls Act, 2011.

Interpretation

2. In this Act, unless the context otherwise requires-

“broadcasting” means the unidirectional conveyance of sounds or television programmes, whether encrypted or not, by radio or other means of telecommunications, for reception by the public;

“electoral period” means the period of twelve months immediately preceding an election under the Constitution of Kenya or any other written law;

“electoral opinion poll” means a survey of the public opinion or a sample of the public opinion to assess the views of the electorate on various matters relating to an election, political candidates or political issues.

Application

3. This Act shall apply to all electoral opinion polls published during an electoral period.

Information required on publication

4. (1) The first person who publishes the results of an electoral opinion poll during an electoral period and any other person who transmits those results to the public within twenty four hours after they are first transmitted to the public must provide the following information together with the results:

- a) the name of the sponsor of the opinion poll;
- b) the name of the person or organization that conducted the opinion poll;
- c) the date on which or the period during which the opinion poll was conducted;
- d) the population from which the sample of respondents was drawn;
- e) the number of people who were contacted to participate in the opinion poll;
- f) the methodology used;
- g) the educational levels of the participants; and
- h) if applicable, the margin of error in respect of the data obtained.

(2) A person who contravenes any of the provisions of sub-section (1) commits an offence.

Additional information required in published opinions

5. (1) In addition to the information referred to in section 4, the following information must be provided in the case of a publication by means other than broadcasting:

- a) the wording of the opinion poll questions in respect of which data is obtained;
- b) the name and address of the sponsor of the opinion poll;
- c) the name and address of the person or organization that conducted the opinion poll;
- d) information about the methodology used to collect the data from which the opinion poll results were derived, including:
 - (i) the sampling method;
 - (ii) the population from which the sample was drawn;
 - (iii) the size of the initial sample;
- e) the number of individuals who were asked to participate in the opinion poll and the numbers and respective percentages of them who participated in the opinion poll, refused to participate in the opinion poll or were ineligible to participate in the opinion poll;
- f) the dates and time of the day of the interviews;
- g) the method used to recalculate the data to take into account in the opinion poll the results of participants who expressed no opinion, were undecided or failed to respond to any or all of the opinion poll questions;
- h) any weighting factors or normalization procedures used in deriving the results of the opinion poll; and
- i) the wording of the opinion poll questions;
- j) where applicable, the margins of error in respect of the data obtained.

(2) A person who contravenes any of the provisions of sub-section (1) commits an offence.

Fee may be charged

6. A sponsor may charge a reasonable fee for a copy of a report provided under section 5.

Prohibition of publication

7. (1) A person shall not publish the results of any electoral opinion poll during the period of forty eight hours immediately preceding the date of an election.

(2) A person who contravenes sub-section (1) commits an offence.

Penalties

8. A person who commits an offence under this Act is liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a period not exceeding one year, or to both.

MEMORANDUM OF OBJECTS AND REASONS

This Bill is borne of the reality that the publication of the results of electoral opinion polls influences voters to vote in one way or the other. As such there is need for a law to ensure that such electoral opinion polls are conducted in a scientific and transparent manner and all the relevant information disclosed to the public.

Clause 4 of the Bill requires any initial publisher of the results of an electoral opinion poll to provide sufficient information to the public including: the name of the sponsor of the opinion poll, the name of the person who conducted the opinion poll and the population sample from which the respondents were drawn.

Clause 5 of the Bill obligates the publisher to provide more information in case of publication other than through broadcasting. The required information includes the wording of the opinion

poll questions, the sampling methodology deployed and normalization procedures used in deriving the results of the opinion poll.

Clause 8 provides that a violation of the Act is an offence punishable by a fine not exceeding five hundred thousand shillings or imprisonment for a period not exceeding one year, or both. The enactment of this Bill shall not occasion additional expenditure of public funds.

Dated the 25th October, 2011.

BONI KHALWALE,

Member of Parliament