KENYA NATIONAL COMMISION ON HUMAN RIGHTS

ADVISORY ON THE PROPOSED CONSTITUTION OF KENYA (AMENDMENT)(NO. 2) BILL, 2018 ON CHANGE OF GENERAL ELECTION DATE

TO

THE JUSTICE AND LEGAL AFFAIRS COMMITTEE THROUGH THE CLERK OF THE NATIONAL ASSEMBLY

DATED: 23RD MAY 2018

Kenya National Commission on Human Rights
1st Floor, CVS Plaza, Lenana Road
P.O. Box 74359-00200
NAIROBI, KENYA
Tel: 254-20-2717908 /2717256/2712664
Fax: 254-20-2716160
Website: www.knchr.org
Email: haki@knchr.org
A. Introduction

1. The Kenya National Commission on Human Rights is an independent National Human Rights Institution created under Article 59 of the Constitution with a broad mandate to promote the culture and the respect of human rights in the Republic of Kenya. The operations of the Commission are guided by the United Nations Paris Principles on the establishment and functioning of Independent National Human Rights Institutions commonly referred to as the Paris Principles.

2. The Commission under Article 249 of the Constitution also has a mandate to secure observance of all state organs of democratic values and principles and to promote constitutionalism. One of the strategies pursued by the Commission to secure observance of all state organs of democratic values and principles is through the issuance of advisories. It is in this regard, that the Commission issues this advisory on proposed amendment to change the election date from Tuesday of the Second week in August to the third Monday in December every fifth year.

3. Article 10 of the Constitution requires all state organs to ensure they uphold constitutionalism and the rule of law whenever they make public policy decisions or interpret the Constitution. Article 2 underscores the supremacy of the Constitution and declares as invalid any action contrary to its dictates.

4. The repealed Constitution of Kenya, provided the term of office for a President to be 5 years and (s)he could only serve for two terms.¹ Unlike the current Constitution, there was no certainty on the date of the General election and no legal provision setting the exact date when a General Election would be conducted; the presidency and Electoral Commission would then set the general election in December every five years; the dates however varied.

5. The Constitution of Kenya, 2010 (Article 101(1) of the Constitution) provides that, ‘A general election of members of Parliament shall be held on the second Tuesday in August in every fifth year; Articles 136(2)(a),177(1)(a) and 180(1) sets the same

¹ S 9 Constitution of Kenya (Repealed).
election date for the President, Members of the County Assembly and the Governor respectively.

6. Various matters have previously been filed before the Courts to seeking clarification on the election date.² In the first case challenging the first election under the new Constitution (John Harun Mwau & 3 others v Attorney General & 2 others [2012] eKLR and Center for Rights Education and Awareness & 2 others v John Harun Mwau & 6 others [2012] eKLR)), the Courts upheld the date set by the Independent Electoral and Boundaries Commission (IEBC) of 4th March 2013 which was within sixty days after dissolution of Parliament (14th January 2013).

B. The Proposed Bill

7. The proposed Constitution of Kenya (Amendment) (No. 2) Bill, 2018 seeks to amend Articles 101 (1), 136 (2) (a), 177 (1) (a) and 180 (1) of the Constitution of Kenya by changing the existing date for the General Election for Members of Parliament, the President, Member of County Assembly and the County Governors from second Tuesday of August in every fifth year to third Monday in December in every fifth year.

8. The proposed amendment raises serious constitutional questions concerning the exercise of the right of every citizen to vote as enshrined under Article 38(2) as well as the term of the President, Members of Parliament, Members of County Assemblies and the County Governors. The Amendment also raises a critical question on the process of effecting the amendment pursuant to Chapter Sixteen of the Constitution.

9. The Memorandum of Objects and Reasons states that the amendment seeks to ensure that the date of elections reflects the unique circumstances and tradition of Kenya; restores the tourism high season; clarify the exact date of the next general elections and the term of the current Parliament. The Bill’s Memorandum of Objects rationalises the proposed amendment as taking into account the challenges that most Kenyans face in trying to get time off their places of work and vote in their places of preference. Secondly, that the current date of conducting elections in August may

disrupt the normal learning schedule of school going children especially the final examinations in the event of a re-run or a fresh election as evidenced in the repeat presidential election of 2017.

C. Amendment to the Constitution

10. An amendment to the Constitution must be done in line with the provisions of Chapter sixteen of the constitution. Article 255 of the Constitution prescribes two ways in which the Constitution may be amended. The first method is by way of referendum if the amendments relate to:

(i) The supremacy of the Constitution
(ii) The territory of Kenya
(iii) The sovereignty of the people
(iv) The National Values and Principles of Governance referred to in Article 10 (2) (a) to (d)
(v) The Bill of Rights
(vi) The term of office of the President [Emphasis added]
(vii) The independence of the Judiciary and the Commission and Independent Offices to which Chapter Fifteen applies
(viii) The functions of Parliament
(ix) The object, principles and structure of devolved governments
(x) The provisions on amendment of the Constitution

11. Any other amendment relating to matters not listed within Article 255 (1) of the Constitution, may be amended through parliamentary initiative or by the people through a popular initiative.

12. The Constitution of Kenya (Amendment) (No.2) Bill, 2018 which seeks to amend the election date, from August to December effectively alters the term of office of Members of Parliament, the President, the County Governors and the Members of County Assemblies. In addition, the amendment has implication on the exercise of the right to vote as enunciated in Article 38 (2) of the Constitution- the Bill of Rights as the exercise of political rights is tied to the entire framework of participating in elections.

13. Article 255(1) of the Constitution prescribes that any amendment that has an effect on the term of the President, in this case extending the term (cumulatively to serve
five years and four months) must be subjected to a referendum. The Constitution must be read as a whole. The exercise of political rights should happen within the framework of the Constitution.

14. Moreover, the change of the election date to December will affect the ability of Kenyans to exercise their democratic right to vote. As stated in the statement of objects and reasons, ‘the amendment seeks to restore the aspirations of a section of Kenyans who are not able to get time out of their busy schedules to take part in the general elections at their place of preference.’ This is a right enshrined under the Bill of rights to which Article 255 should apply.

D. Conclusion

15. The Commission is neutral as to whether or not the election date should be changed and has no particular opposition to the change. However, and based on the foregoing, the Commission is categorical that the proposed amendment must be subjected to a referendum as required under the Constitution as it has implications on the term of the President and exercise of the right to free, fair and regular elections based on universal suffrage. This is what Article 255 demands.

16. In closing, the Commission further wishes to draw the attention of the House to the Court’s recommendation in the case of Andrew Kiplimo Sang Muge & 2 others v Independence Electoral and Boundaries Commission & another [2017] eKLR in which the Court at Paragraph 50 pointed out on the need ‘to amend the Constitution to align the tenure of the MCAs with that of the Members of Parliament and other elective state officers of the national and county governments, in order not only to remove the liability to pay for the remainder of the MCAs term of office that will always remain unexpired when elections are held as they must be on the second Tuesday of August of every fifth year’.

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KAGWIRIA MBOGORI
CHAIRPERSON