ADVISORY ON THE PROPOSED CONSTITUTION OF KENYA (AMENDMENT) BILL 2018 ON THE TWO THIRDS GENDER PRINCIPLE

TO

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

DATED: 23RD MAY 2018
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. 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. 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.

3. It is in this regard, that the Commission issues this advisory on proposed amendment touching on the two thirds gender principle.

B. Background

4. In the quest to implement the 2/3(two thirds gender) principle, Majority Leader Hon. Aden Duale has proposed a Constitutional Amendment Bill to increase the number of current Members of Parliament. The Bill seeks to give effect to the two thirds gender principle through the creation of special seats.

5. The Bill states that the special seats will ensure that the two thirds gender principle is realized in Parliament. The Bill once enacted into Law shall have an operational period of twenty years effective from the next general election in this case 2022. It proposes that the number of special seats will be determined after the General Election and shall be shared out depending on the strength of political parties in Parliament.
6. The Bill seeks to address Article 81(b) of the Constitution which requires that NOT more than two thirds of the members of elective public bodies shall be of the same gender.

7. It is worth noting that the current Parliament as constituted has fallen short of the two-thirds gender principle. The National Assembly comprises 76 women out of which 47 are elected as women representatives, 23 elected as representatives of respective constituencies while 6 women are nominated. This means that the current National Assembly has fallen short by 41 women to make 117 or one-third of the 349 members of Assembly.

8. There are 21 women in the Senate (3 elected members and 19 nominated) and 46 men bringing the shortfall to 2 senators.

9. In essence, if the Bill was to be passed and immediately commenced, 43 additional women would be nominated to Parliament to meet the two thirds threshold.

10. In a bid to secure the two thirds gender principle, the Commission has previously pressed for the need to immediately work towards implementation of the principle including petitioning the Court in Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others [2017] eKLR (Petition Number 371 of 2016). In addition, the Commission has consistently raised the issue of securing the two thirds gender principle in its annual human rights reports under Article 132 of the Constitution.

11. The Commission has also been proactive in monitoring and reporting on state compliance with relevant international human rights obligations under the regional and international mechanism. In its concluding observations to Kenya, the UN Committee on the Elimination of Discrimination against Women expressed concern that seven years after the adoption of the new Constitution, the rule that no more than two thirds of elective public bodies are to be of the same gender

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(the two-thirds gender rule), is still not being implemented. The Committee recommended that Kenya ensures the application of the constitutional two-thirds gender rule. The Commission is also raising the issue of Kenya’s compliance with the two thirds gender principle in its reporting under the Universal Periodic Review process as well as under the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.

C. The Advisory

12. The Constitution binds Parliament to enact legislation to promote the representation in Parliament of women, persons with disabilities, youth, ethnic and other minorities as well as marginalised communities (Article 100). Notably, the Constitution (Fifth Schedule) gives a timeline of five years within which Parliament must have enacted the legislation. This, sadly, has never come to pass.

13. It is worth noting that the previous National Assembly had not enacted legislation as required under the fifth schedule of the Constitution which required Parliament to pass legislation within 5 years of its existence. This created a de jure constitutional crisis because the constitution provides that in Article 261(7), Parliament risked dissolution for failure to enact legislation within the set time frame.

14. Besides the express provisions of the Constitution and international human rights obligations, court decisions have clarified and elaborated on Parliament’s responsibility and obligation under the Constitution. The Supreme Court of Kenya in its Advisory Opinion, In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] e KLR, pronounced itself that the legislative measures for giving effect to the two thirds gender principle under Article 81(b) of the Constitution should have been taken in 27th August 2015.

15. Following the advisory opinion by the Supreme Court, the previous Parliament extended the period for enactment of legislation by one year to 27th August 2016.
16. As at 27th August 2016, Parliament had failed to enact legislation to implement two thirds gender principle. This prompted a petition to the High Court pursuant to Article 261 (5) and (6) of the Constitution. The High Court in *the Centre for Rights Education and Awareness and another Vs Speaker of National Assembly and 5 others* (2017) eKLR held that the failure of Parliament to enact legislation by 27th August 2016 to implement the two thirds gender principle was a violation of the obligation of the state under Article 21 to observe, respect, protect, promote, and fulfil the rights of men and women to equality under Article 27 of the Constitution. The Court issued an order of mandamus, compelling Parliament to enact legislation within 60 days of the order (29th May 2017) and report progress to the Chief Justice. The petitioners were at liberty at the time to petition the Honourable Chief Justice to advise the President to dissolve Parliament in the event Parliament failed to enact the said legislation in line with Article 261(7) of the Constitution. To date, Parliament has not enacted the legislation despite the constitutional dictates and several court orders.2

17. The current Parliament has an opportunity to enact the legislation giving effect to the two thirds gender principle pursuant to Article 261 (8) and (9) of the Constitution.

18. The Constitution binds Parliament to enact legislation to promote the representation in Parliament of women, persons with disabilities, youth, ethnic and other minorities as well as marginalised communities (*Article 100*). Notably, the Constitution (Fifth Schedule) gave a timeline of five years within which Parliament must have enacted the legislation. Article 81 on the principles of the electoral system is categorical that no more than two-thirds of the members of elective public bodies shall be of the same gender.

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2 Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others [2017] eKLR; Centre for Rights Education & Awareness (CREAW) v Attorney General & another [2015] eKLR; In the Matter of the Principle of Gender Representation in The National Assembly and the Senate [2012] eKLR.
19. Every person has an obligation to respect, uphold and defend the Constitution and ‘Any attempt to establish a government otherwise than in compliance with [the] Constitution is unlawful.’ (Article 3 of the Constitution). This therefore renders the current Parliament, as unduly constituted according to the dictates of the Constitution and therefore null and void in line with Article 2 of the Constitution that lays emphasis on the constitutional supremacy. The preamble to the Constitution recognizes the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.

20. The Commission submits that the legislation must be enacted as a matter of priority to avert a constitutional crisis as witnessed previously. The Commission particularly recommends that the implementation of the proposed amendment must not be postponed but should start with the current House to avoid a potential constitutional crisis and unnecessary cyclic delay. The demand for representation in elective and appointive posts can no longer be subject of postponement. Article 27 of the Constitution secures the right to equality and non-discrimination based on sex, disability, religion or other grounds. These commitments, Kenya has made by ratifying several subregional, regional and international Conventions that guarantee equality and equitable gender representation in governance.

21. The Commission recognises that the current parliamentary term already commenced and is running. This however, should not be a deterrent to compliance with the supreme law of the land. The Commission recommends that a legal safeguard be put in place to ensure that the nominees understand the elections cycle of the Republic of Kenya and that their term shall come to an end in 2022. As such the Commission recommends that the amendments expressly caps the term of the nominees that will come on board later to ensure that all Members of Parliament term comes to an end at the same time. This will save taxpayers the burden of having to compensate the incoming members as in the case of Andrew Kiplimo Sang Muge & 2 Others v Independent Electoral and Boundaries
In this petition, which judgment was read in April 2017, MCAs sought a declaration that their term of office ended on the 5th March 2018, being five (5) years from the date of the general elections held on the 4th March, 2013 in accordance with Article 177(4). Court approved payment of salaries for the eight months balance to the remainder of a five-year term.

22. The Commission submits that the constitutional amendment should take into account the need for the gender top up seats to be further disaggregated to ensure that youth, persons with disabilities and marginalised communities benefit from representation. This will greatly assist in the implementation of the provisions of Articles 54, 55 and 56 of the Constitution which calls for the representation of persons with disabilities, youth and minorities and marginalised communities in governance. This is in line with the principles of inclusiveness and diversity.

23. The criteria for determination of distribution of seats to ensure representation of the youth, persons with disabilities the minorities and marginalised communities can be tasked to the electoral management body; the Independent Electoral and Boundaries Commission through Regulations.

24. Parliament must also take cognizance of the High Court decision in the case of Katiba Institute Vs Independent Electoral & Boundaries Commission [2017] eKLR. In the ruling dated 20th April 2017, the High Court issued declarations to the effect that political parties are bound by the provisions of Articles 10 and 81(b) of the Constitution with respect to implementation of the two thirds gender principle. The Court further clarified that the IEBC has the power to reject any nomination list of a political party for its candidates for election under the Constituencies as well as the Senate on account of violating the two thirds gender principle. Political parties were ordered to come up with Rules and Regulations to actualise the two thirds gender principle during nominations, in default of which the IEBC is to device administrative mechanisms to ensure that the two thirds gender principle is realised during the nomination process. Political parties have a
duty to promote the representation in Parliament of women, persons with disabilities, youth, ethnic and other minorities and marginalised communities. Indeed, Article 91 of the Constitution stipulates basic requirements for political parties which include, ‘respect and promote human rights and fundamental freedoms, and gender equality and equity’ and promotion of the objects and principles of this Constitution and the rule of law.

25. The Commission has noted with serious concern that the Bill provides for an operational period of 20 years with a possible extension of 10 years in the realization of the 2/3 gender principle in the electoral process in Kenya. The Commission recommends that the timeframe for implementation be left open because the time-limit of 20 years amounts to a threatened unjustified limitation of the right to equality and non-discrimination. The proposed 20 year timeframe goes to the foundational principles of the Constitution and aspiration of all Kenyans for a Government based on essential values of human rights, equality, freedom, democracy and social justice.

D. Conclusion:

26. The Bill if enacted and implemented by the two Houses, will go a long way in addressing the 2/3 gender principle in line with the constitutional requirement. It will also put to rest questions on Parliament’s commitment to implement the said constitutional requirement.

27. The Commission recommends that the Bill takes into account disaggregation of the representatives to the special seats to further take care of the marginalised, the youth and persons with disabilities.

28. The Commission strongly recommends that the amendment takes effect beginning with the current House rather than waiting for the next General Election. While a review could be undertaken after the twenty years, the
Commission recommends the removal of the time cap of 20 years for implementation.

29. The Commission therefore urges the House to proceed with speed to enact the Bill into law. Once again, the Commission reiterates that the provisions of this Bill should be implemented immediately as opposed to waiting for 2022.

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KAGWIRIA MBOGORI
CHAIRPERSON