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Is there Necessity to Amend the Constitution of Kenya?

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1. Introduction

This International Center for Policy and Conflict (ICPC) position paper highlights the following policy issues relating to proposed constitutional amendments;

- Rationality and responsibility for constitutional amendment during transitional period.
- Sufficiency of the Constitution of Kenya Amendment Bill, 2011 on proposed changes.
- Alternatives to constitutional amendments.
- Appropriateness of August election date.

2. About International Center for Policy and Conflict

The International Centre for Policy and Conflict is a Nairobi-based Non-Governmental Organization registered in 2005 in Kenya under the Trustee (perpetual succession) Act. The Center is an affiliate of Africa Open Democracy Foundation and partner of Africa Rights and Democracy Institute.

It focuses and exists to stimulate and support informed policies dialogue, develop human capacities and research communications that promote and safeguard human dignity, freedom, justice and equality for all in line with universally recognized standards through building democratic, peaceful, secure and just societies.

Its core thematic programs consist of*: transitional justice, human rights and rule of law; human security, sustainable development and conflict; Gender Justice; capacity building, partnership and information; communication and public affairs; and Regional and International advocacy*.

3. Proposed Amendments

This position paper is necessitated by the proposed first amendment to the Constitution of Kenya. Through the Constitution of Kenya (Amendment) Bill, 2011, as recently published, the Government of Kenya vide Cabinet has identified three issues that it proposes to amend namely;

a) '*The not more than two thirds principle'* in elective positions: The proposal is to amend articles 97 (c) and 98 (1)(b), (c) and (d) to introduce additional seats to be filled by political parties based on their strength in National Assembly and Senate respectively. These additional seats are proposed to be allocated in such a manner until the principle is satisfied.

b) *Date of General Election:* The bill proposes to amend article 101 (1) by moving election date from August to December.

c) *Boundaries Review*: The bill also proposes to amend article 27 (1) (3) of Schedule VI on boundaries review as read with article 89 by 'tying' it to article 27 (1) (4) which preserves existing constituencies during the first review prior to the general election.

According to the memorandum to the Bill, the amendments are motivated by the need to bring clarity to the date of next general election and term of current Parliament, give effect to the 'not more than two thirds' gender requirement and finally to give clarity as to the time delimitation of boundaries shall take effect with regard to the first general elections under the constitution.

We shall address the issues in turn below.

4. Preliminary Constitutional Questions

a)Amendments During Transitional Period

As a preliminary matter it is important to revisit the question of the expected rationale and responsibility for amending the Constitution during the transitional period and whether the government has discretionary powers to initiate amendments as envisaged under article 256. The controversy surrounding this debate means that the government's move may be in violation of the constitution.

It is important to remember that the transitional period is largely guarded by sixth schedule which establishes the following institutions to supervise implementation including any suggested amendments at this stage;

(i) The Constitutional Implementation Oversight Committee (art.6)

(ii)Commission for Implementation of the Constitution (art. 5)

These organs have integral role to play in relation to any proposed amendments and the fact that they have invariably publicly disagreed wholly or in part with the proposals means that no structured initiation of these amendments was done. Such unilateral actions by the Executive run against the spirit of the Constitution and risk jeopardizing the implementation process.

We advise that any proposed amendments are exposed to constitutional challenge in court. Therefore, if the government insists on these amendments, it will be necessary to seek final constitutional interpretation on the process amendments during transitional period in accordance with Article 256.

The proposed amendments are a direct affront attack to the sovereign will of Kenya. It has taken Kenyans more than 20 years of protracted constitution-making process and if any person were to wake up and start mutilating such as a progressive Constitution then serious questions abound as to whether that person was part of that struggle and ever bothered to understand its vision, letter and spirit.

Further, there is clear separation of powers and functions of state organs. It is the responsibility of the Courts, specifically High Court and Supreme Court, to provide Constitution interpretation not the Executive and or Parliament. Kenyans fought for this separation with their blood.

b) Amalgamation of Items of Amendments

Secondly, the decision to amalgamate all the proposed amendments under one Bill is questionable considering the issues at hand. This is because, in principle, the issues of gender representation and election date are significantly different. Whilst there may be indeed legitimate reasons to debate the options available in trying to implement the gender principle that cannot be said of the election date considering that the Supreme Court is already seized of the matter.

We completely object to guillotine method of Constitutional amendment without rationality and advise withdrawal of the Bill. If amendments were to be introduced to the Constitution, there are well stipulated procedures and requirements set out in the Constitution.

c)Powers of Parliament to Propose Amendments to the Bill

The question of whether the Bill can be passed as it is or the House can move to amend it once it has been published and tabled in the House remains controversial. This is obviously exacerbated partly by lack of consensus on the amendments and the unilateral manner the Executive appears to have acted in moving these amendments (refer to no. 3(a) above). The lacuna apparently left by section 47 (7) of the old Constitution, which proscribed amendments to constitutional bills on the floor of the House has also been invariably cited. The next question is how Parliament can 'cure' anomalies in Constitutional Bills that have consolidated two different issues with contradictory objectives (for instance, the gender principle and elections date).

Sadly, Article 256 (c) interpreted alongside practices of Parliament proscribes second reading in relation to constitutional bills. It is at the second reading that amendments tend to be moved and adopted. It therefore means that Parliament possibly cannot amend the Bill.

We consider it dangerous in light of the amendments contained in the Bill for Parliament to pass it without serious interrogation and possible amendments. If that is the case, then it would be advisable to withdraw the Bill (and if it is necessary for amendments in the first place) and allow more consultations with all stakeholders including Members of Parliament and Civil Society Organisations (CSOs).

The next part considers the proposed amendments in turn.

5. Constitutional Amendments

a) The gender (not more than two thirds) Principle –vs- Electoral System

ICPC considers this principle to be inherently intertwined with the electoral system that the country adopts. As presently published, the bill takes an incremental approach but which is indeterminate on the issue of the actual number of members of the National Assembly and Senate. The failure to prescribe a specific and limited number of representatives for both houses is susceptible to abuse and risk burdening the country with disproportionately high number legislators. This combined with county assemblies and other devolved structures results into huge burden to the economy.

We instead propose that the amendments to articles 97 and 98 be put on hold at this stage pending a clear and unequivocal determination on the best electoral system that the country will implement to

give effect to the gender principle. At the moment, the bill proposes to amend, inter alia, articles 97 and 98 by adding the following;

> 1A The members contemplated in clause (1)(da) shall be nominated by political parties in proportion to the Senate seats received by the political party at the general election.

Literally construed, the article introduces a **'party list proportional system'** akin to the South African model. However, unlike in other jurisdictions including South Africa where the list is prepared prior to the elections, the bill is silent on this aspect. Rather it seems to introduce major determinations to be made 'after declaration of elected members of each constituency' (see articles 97 (1B) and 98 (1B) of the Bill). On the other hand, articles 97 (1) (a) and 98 (1) (b) of the constitution adopt on the **'first-past-the-post'** on the basis on single member constituency for elected membership to both Houses. This may present a dilemma in final implementation of this principle.

We are therefore, of the opinion that this principle will need a more structured, economically viable and sustainable way of implementing it. The challenge to fully adhere and uphold the gender parity lies in coming up with the correct electoral system. An outright constitutional amendment is unlikely to offer such a solution because at its core is what electoral system the country adopts that is truly representative, and inclusive. This will require a proper determination by the Supreme Court.

b) Election Date

The historical background of the August election period is well appreciated. The Kenyan people have severally identified the merits of this period including the likelihood of higher turnout, convenience to families during August as opposed to interruptions with December festivities and school terms amongst others. Further**, people of Kenya wanted a sufficient transitional period to ensure a well elaborate, institutionalized and structured process of interface between the incumbency and incoming Parliament and President**. These are legitimate reasons that should not be altered whimsically and without proper consultations as is the case now.

The reasoning adopted by the government based on life of present parliament, budget cycle and need for more time to prepare for elections are unjustified and should not be accepted for three reasons:

(i) Article 101 does not refer to the present Parliament as its term is expressly preserved under Article 10 of the Sixth Schedule for its 'unexpired term'. By providing for the August date the framers of the Constitution wanted to meet the historical legitimate expectation of the people of departing from the December elections. The framers had a clear intention of the establishing transitional mechanisms that took into account the incumbency exit process and continuity of state function until new President and MPs are sworn-in. Further the four month transitional period cater for all the attendant transitional issues including thorough induction and familiarisation of the MP-elects and handing over mechanisms as well as taking care of any possibility of a runoff and resolving election disputes.

(ii) The Supreme Court is already adjudicating on the matter in terms of 163(6) and the government itself is represented by the Office of the Attorney General in those proceedings. The proposed amendment is thus premature and risk being perceived as act of Executive political banditry and impunity.

(iii) The budget cycle argument is 'cured' by Article 222 and 223 which allow supplementary estimates to be approved. In any case, the referenda have previously been held in August and May. This reasoning does not simply meet test for constitutional amendment and ignores popular public desire.

c) Boundaries Review

ICPC is of the view that it is an unnecessary and diversionary proposal that is at best meant to hoodwink Members of Parliament to support the Bill. It is not controversial as it had been endorsed in the referendum and the mandate of IEBC post 2012 in reviewing the boundaries is clear. A simple reading of article 27 (3) reveals that it directly 'robes in' sub-article (4) as well. In fact, the IBRC (Ligale Commission), which shall form part of reference documents for IEBC, had preserved the current constituencies. We advise that it should not be considered as it lacks requisite threshold to contemplate a constitutional amendment.

6. Conclusion

From the foregoing, ICPC reiterates its opposition to the Bill and any amendment to the Constitution proposed therein and calls upon the government to withdraw it. We urge Members of Parliament to equally reject the Bill and instead call for more structured consultations and debate on alternative ways to give effect to the issues raised and specifically, the constitutional requirements on gender. As things stand, the Bill threatens constitutionalism in Kenya as it is brought in at a time the Supreme Court is seized of some of the issues it raises. Besides, it is apparent that no inclusive consultations have been undertaken by the Executive prior to introducing the Bill. We hold the view that this violates Article 256 as read together with Articles 4 and 5 of the Sixth Schedule.

We equally urge the government to adopt a more proactive approach during this implementation process and avoid hurrying into temptations to amend the Constitution. On the gender issue, ICPC reiterates its proposal that a final constitutional determination by the Supreme Court on the model of Kenya's electoral system will be a good starting point. It will give clear guidance to IEBC and other institutions, including Parliament, on the best and lasting way to approach the gender parity requirement. It will also avoid potential abuse that will arise if the Bill were to be adopted and parties left to whimsically nominate persons in purported fulfilment of the gender principle.

Finally, in addition to addressing and adjudicating on these pertinent national matters of concern we urge the Chief Justice to ensure that courts are adequately prepared to expeditiously and fairly resolve any election disputes during transition period and before the New Parliament is sworn-in.

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