

H.E. Hon. Mwai Kibaki, EGH, MP
President, Republic of Kenya
Harambee House,
Harambee Avenue
Nairobi, Kenya

June 25, 2012

Dear Hon. Kibaki:

**RE: REQUEST TO DECLINE ASSENT ON MISCELLANEOUS AMENDMENT BILL
2012**

Purpose

We, members of a number of Civil Society Organizations (CSO's) under the umbrella of the Kenyans for Peace Truth and Justice (KPTJ) submit this memorandum to request that you do not assent to the Miscellaneous Amendment Bill 2012 (The Bill) as passed by Parliament on June 21, 2012. We are making this request as it is our strong opinion that that Bill in its current form contains a number of unconstitutional provisions. In view we would request that you decline assent and instead refer the Bill back to parliament with an advisory that parliament makes the necessary amendments to ensure that the Bill is compliant with the Constitution.

Overview

On May 10, 2012, the Attorney General, Hon. Githu Muigai (Hon. Muigai) introduced the Bill into the House. The long title of the Bill provides that it is "An Act of Parliament to make minor amendments to Statute Law." On the same day, the Bill was referred to the relevant department committee. The Second Reading of the Bill was done in varying days starting on May 15, 2012 and ending June 6, 2012. Subsequently the Bill was committed to the Committee of the whole house. During the Committee of the whole house, held on June 20th and 21st, 2012, a number of very controversial amendments were introduced. These amendments included the amendment of Section 14 of the Political Parties Act 2011 to allow that current Members of Parliament (MP) and local authorities are exempt from the prohibition to declare support of another political party separate from the one which they were elected in; and an amendment to Section 22 of the Elections Act to require that persons nominated to run for MP must be a holder of a degree from a recognized university.

We believe that the enumerated amendments are all unconstitutional. Our position is that these were substantive amendments not of the nature to be considered through a miscellaneous amendment bill. Importantly, we believe because of their substantive nature, proper public participation processes should have been followed before their

passage. This was not done, not even at parliament level as they were only introduced at the stage of the Committee of the whole house where public participation was not possible. Moreover, it is our contention that the requirement that a person be a holder of a degree in order to qualify as a candidate for the stated positions directly and in effect contradicts provisions of the Constitution.

The Nature and Purpose of a Miscellaneous Amendment Bill

Since the offending changes have been made through a miscellaneous amendment bill, it is important for us to briefly discuss the nature and purpose of miscellaneous amendments. In parliamentary procedure, miscellaneous amendments are used to correct errors, omissions and inconsistencies that have no policy implications in a speedy way.

The Constitution requirement for public participation in Kenya makes it extremely important that miscellaneous amendments are not used to effect amendments with major policy implications. Article 10 of the Constitution now requires that lawmaking be subjected to public participation process. Public participation is the tool that the Constitution puts in place to ensure that the public has a structured opportunity to inform the legislature of the policies it wishes to be put in place. If the legislature adopts a process that denies the public the opportunity to participate in enacting laws that have policy implications, such a process violates the Constitutional provisions on public participation and any provisions enacted through it are in effect unconstitutional. This, in our view, is the reasons why provisions passed under Miscellaneous Amendment Bill 2012, which had policy implications are unconstitutional.

The Provision Allowing Party Hopping

Section 14 of the Political Parties Act regulates resignation from political parties. It prohibits any person from belonging to more than one political party at the same time. Moreover, it provides that a person is deemed as having resigned from a political party if he/she forms or promotes the formation of another political party, or promotes the ideology, interests or policies of another political party.

On June 20, 2012, during the Committee of the whole House, parliament agreed to the amendment to Section 14 of the Political Parties Act. The amendment exempts the operation of that section in regard to the sitting MPs and members of local authorities until after the first general election held after the commencement of the Political Parties Act.

The Political Parties Act was enacted after a rigorous process of public participation. That participation included the participation of the political parties in the drafting of the initial law, participation by members of the public in providing comments on the draft bill, referral of the Political Parties Bill to the Commission on the Implementation of the Constitution (CIC) - which facilitated further public participation. Moreover, the Political Parties Bill was also considered by the relevant departmental committee of parliament

where more public participation was had. Records show that the provisions of Section 14 of the Political Parties Act were part of the content of the Act that were subjected to this rigorous public participation process. The specific provision was enacted in order to heighten party discipline which has been extremely elusive in the past.

It is our submission that party discipline is a significant policy issue. Parliament therefore erred significantly in amending Section 14 through a miscellaneous bill. Significantly, the amendment is unconstitutional because it was enacted without recourse to public participation, despite having significant policy implication.

Degree Requirement for MP's

Parliament also amended Section 22 of the Elections Act. The amendment requires that a candidate for a MP position must be a holder of a degree from a recognized university.

This change is unconstitutional on two grounds. The first is because it was not subject to public participation process despite being a major policy shift in law.

It is also unconstitutional because it directly or in effect violates the equality sections of the Constitution. Article 27 of the Constitution prohibits discrimination on the basis of age. Article 99 provides that a person is qualified for election as MP, among other requirements that he/she is registered as a voter. Article 83 provides that every adult citizen is qualified to be registered as a voter. Article 260 defines an adult as a person who has attained the age of 18 years.

It is a fact that hardly anyone of 18 years has attained a degree qualification. In fact, given the structure of our education system, most people complete their secondary education at age 17 or 18. To obtain an undergraduate degree requires three to four calendar years. It is obvious that while the Constitution allows 18 year old to contest for an MP position, the amendment to Section 22 of the Elections Act requiring a degree effectively takes away that right. Established legal principles do not allow a statute to annul a constitutional right. The amendment is therefore in violation and cannot stand.

Additionally, Article 27 disallows discrimination on the basis of social origin. Some Kenyans continue to suffer disproportionate hardships on the basis of their social origin. Such hardships have included inability to access higher education. We therefore believe that there is strong persuasive evidence that the amendment, in effect, discriminates on the basis of social origin since a significant number of Kenyans are unable to access higher education because of their social origin.

Conclusion

In view of the foregoing we request that you exercise your powers under Article 115(1)(b) and refer the Bill back to parliament for reconsideration on the basis that it contains various unconstitutional provisions which parliament must correct before it is allowed to become law.

We thank you for your kind consideration.

Yours sincerely,

for

Kenyans for Peace with Truth and Justice

MEMBER ORGANIZATIONS OF KPTJ

1. Africa Centre for Open Governance (AfriCOG)
2. Awaaz
3. Bunge la Mwananchi
4. Centre for the Development of Marginalised Communities (CEDMAC)
5. Centre for Law and Research International (CLARION)
6. Centre for Multiparty Democracy (CMD)
7. Centre for Rights, Education and Awareness for Women (CREAW)
8. Coalition on Violence Against Women
9. The Cradle-the Childrens Foundation
10. Constitution and Reform Education Consortium (CRECO)
11. East African Law Society (EALS)
12. Fahamu
13. Foster National Cohesion (FONACON)
14. Gay And Lesbian Coalition of Kenya (GALCK)
15. Haki Focus
16. Hema la Katiba
17. Independent Medico-Legal Unit (IMLU)
18. Innovative Lawyering
19. Institute for Education in Democracy (IED)
20. International Commission of Jurists (ICJ-Kenya)
21. International Centre for Policy and Conflict
22. Kenya Human Rights Commission (KHRC)
23. Kenya Leadership Institute (KLI)
24. Kenya National Commission on Human Rights (KNCHR)
25. Kituo cha Sheria
26. Mazingira Institute

27. Muslim Human Rights Forum
28. The National Civil Society Congress
29. National Convention Executive Council (NCEC)
30. RECESSPA
31. Release Political Prisoners Trust
32. Sankara Centre
33. Society for International Development (SID)
34. The 4 Cs Urgent Action Fund (UAF)-Africa