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Memorandum on the Two-Thirds Gender Rule Laws (Amendment) bill, 2015 and Green Amendment Bill, 2015

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ABOUT TISA

The Institute for Social Accountability (TISA) is a civil society organization committed towards the achievement of sound policy and good governance in local development, to uplift livelihoods of, especially, the poor and marginalized in Kenya. TISA has been operational since March 2008, and is a locally registered Trust that has engaged with various relevant state and non-state actors in the quest to promote effective local governance in Kenya.

Achieving Gender Equity

TISA commends ongoing efforts towards the achieving gender equity in the membership elective bodies as articulated in Article 81(b) of the constitution and further safeguarding the principle of equality among sexes in terms of access to opportunities as indicated in article 27(b) of the constitution.

The court sought to shed light on the nature of the two-thirds principle observing that principles and policy declarations of this nature signify a *value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions*. The court further stated that their

ruling was inclined to pronounce an advisory in favour of an interpretation that *contributes to the development of both the prescribed norm and the declared principle or policy.*

It is in light of the foregoing that this memorandum on the options available for the realization of gender equity is written.

1. Two-Thirds Gender Rule Laws (Amendment) bill, 2015

General Overview

It is notorious for the bill to propose the progressive representation of women in the national and county assemblies contrary to constitutional provisions and the advisory of the court. The National Assembly should desist from legislating outside law.

Proposed amendments to the National Gender and Equality Commission Act, 2011

The proposed functions of the National Gender and Equality Commission in the bill are in line of international standards of government units of similar character in protecting not only the interest of women but also the interest of other marginalized entities in the society in elections and appointments of such groups into public bodies. Further to this, the strengthening of the commission ensures the culture of marginalization of women and other special interest groups is addressed. This is in order as it aligns to the Supreme Court Advisory.

Proposed amendments to the Political Parties Act, 2011

Definition of ethnic and other minorities is inadequate. According to International law, minorities are defined as:

“ A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.”¹

This means that for a group to be considered an ethnic minority there has to be a conscious attempt to protect their culture and traditions by the way they live.

Proposed amendment to the Elections Act, 2011

¹ Office of the high commissioner on Human Rights, Who are minorities under international Law? Retrieved from <<http://www.ohchr.org/EN/Issues/Minorities/Pages/internationallaw.aspx>>

Maintain the proposed amendment but delete the phrase “To progressively” to thus empower the commission to make recommendations on the realization of the 2/3 gender rule for subsequent elections.

1. The Constitutional Amendment Bill 2015- Formula 136 (The Green Amendment)

The bill seeks to amend the constitution through popular initiative as per Article 256 of the Constitution. It proposes formula 136 towards the fulfilment of the article 27 (8) and 54 (2) through the following amendments:

- a. Maintain the number of wards to the existing 1450 wards for the purposes of Article 177 (a) on election of Members of county assemblies.
- b. The creation of an additional 725 wards for the purposes of creation of special wards seats for women towards fulfilling the one-two-thirds gender rule and remove the post election gender top-up provisions. This is achieved by creating new special wards for the purpose of election of women by combining two wards in constituencies with an even number of wards and three wards in constituencies with an odd number of wards.
- c. Maintain the number of constituencies at 290 for the purposes of electing members of the National Assembly as per article 97 1 (a)
- d. Increase the number of women elected to parliament from 47 to 136. This is achieved by amending Article 97 1 (b) by creating new constituencies for the purposes of election of women by combining two constituencies in counties with an even number of constituencies and three in counties with an odd number of constituencies.
- e. An amendment of Article 89 to enable the Independent Electoral and Boundaries Commission to ensure that designate the adjacent constituencies and wards for the purposes of election of women to the county and national assemblies.
- f. The Independent Electoral and Boundaries Commission has to designate the special constituencies and wards not less than one year before the next general elections.
- g. Amend Article 90 to remove the reference to nominations under article 98 1 (b) and 177 (1) (b) to align to the elections proposal.
- h. Election of two members of the senate representing each gender and thus creation of multiple member constituencies for the purpose of Senatorial elections
- i. Nomination of four persons with disabilities and two youths into the senate

- j. A sunset of 10 years with a possibility of extension through a parliamentary legislation for a period of not more than an extra 10 years.

The bill supported by research² showing that parliament is among the least spending arm of government accounting for 1.5% of the national spending.

A transitional clause in the bill provides for the proposed amendments only take effect after the expired terms of the county assemblies and national assembly.

The Green amendment bill is the only bill in place that suggests a formula for meeting the constitutional deadline of August 27th According to the 4th schedule of the constitution and the court advisory.

² Institute of Economic Affairs (2015) *Implementing the Constitutional Two-Thirds Principle, The Cost of Representation*.

Retrieved on 20th July 2015 from

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CCUQFjABahUKEwiY7am4tefGAhVlvxQKHdF7AB0&url=http%3A%2F%2Fwww.ieakenya.or.ke%2Fpublications%2Fdoc_download%2F366-implementing-the-constitutional-two-thirds-gender-principle-the-cost-of-representation&ei=0LWrVZjFNcj-UtH3gegB&usg=AFQjCNGiD8ITFkc6YavzpjvCo_OqX17nTw&sig2=FuvTGMFaFdN2BSXMBRGrbQ&bvm=bv.98197061,d.d24>