




MINISTRY OF FOREIGN AFFAIRS

PARLIAMENT MEMORANDUM

ON

KENYA'S ACCESSION TO

**THE AFRICAN CHARTER ON DEMOCRACY, ELECTIONS
AND GOVERNANCE**

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 15 JUL 2020	DAY: WEDNESDAY
TABLED BY:	MW (DR) AMOS KIMUNYA (LEADER OF MAJORITY)
CLERK-AT THE-TABLE:	IMZORU MWALE

MEMORANDUM ON THE ACCESSION TO THE AFRICAN CHARTER ON DEMOCRACY, ELECTIONS AND GOVERNANCE

1. OBJECTIVE OF THE MEMORANDUM

- 1.1 The purpose of this Memorandum is seek Parliament's approval for Kenya's accession to the African Charter on Democracy, Elections and Governance (ACDEG), *hereinafter referred to as the Charter*, pursuant to Section 8 of the Treaty Making and Ratification Act No 45 of 2012 (Rev. 2018).
- 1.2 The commencement of the treaty-making and ratification process of the Charter was approved by Cabinet during its **2nd Meeting of 2020**, held on **19th March 2020**.

2. BACKGROUND

- 2.1 The Charter was adopted on **30th January, 2007** as the African Union's (AU) main normative instrument to set standards for better governance across the Continent.
- 2.2 The Charter, an initiative by African leaders to provide African solutions to African challenges, is a component of The African Governance Architecture (AGA). The principle objective of AGA is the implementation of AU Shared Values and in particular the African Charter on Democracy, Elections and Governance (ACDEG). Shared Values are a means of accelerating Africa's integration agenda through values and principles that are embodied in the various instruments, decisions and declarations that have been adopted by the Union.
- 2.3 The Charter expounds upon the Constitutive Act of the AU by committing Member States to the adherence of universal values and principles of

democracy and respect for human rights. It promotes the respect of the rule of law, periodic free and fair elections, consolidation of democratic institutions and the rejection of unconstitutional changes of government.

2.4 The Charter came into force on **15th February 2012** after ratification by fifteen (15) States. As of March 2020, **thirty-four (34)** and **forty-six (46)** States had ratified and signed the Charter, respectively. Kenya signed the Charter on **28th June 2008**.

2.5 The commencement of the accession process of the Charter was approved by Cabinet during its **2nd Meeting of 2020**, held on **19th March 2020**.

3. OBLIGATIONS IMPOSED BY THE CHARTER

3.1 The Charter combines, in a holistic manner, the key elements of democracy, human rights and governance. Additionally, it is a yardstick that measures the democratic governance progress of Member States.

3.2 The Charter restates the principle of transparency and accountability in government and provides for the independence of the judiciary.

3.3 The Charter requires State Parties to implement programmes that promote democratic principles and practices, adopt legislative and administrative measures that guarantee the rights of women, ethnic minorities and migrants, persons with disabilities, refugees and displaced persons including marginalized and vulnerable social groups and set up institutions to fight corruption.

3.4 The Charter condemns the unconstitutional change of government and provides for possible framework for international prosecution of people who forcefully take over government through domestic legal channels. Regional mechanisms to prosecute such individuals may be invoked upon the failure of domestic judicial mechanisms to prosecute such individuals.

4. JUSTIFICATION FOR RATIFICATION

- 4.1 Kenya has made tremendous strides in establishing a mature democracy by adherence to universal values and principles of democracy, respect for human rights, the establishment of an independent judiciary and democratic institutions, enactment of electoral legislation, the respect for the rule of law and separation of powers.
- 4.2 The ratification of the Charter would therefore cement Kenya's democratic credentials, demonstrate its Afro-centric foreign policy and support of the AU Agenda 2063, in particular **Aspiration 3** which aims for an Africa of good governance, democracy, and respect for human rights and the rule of law.
- 4.3 The Charter encourages Member States to promote and deepen democratic governance by implementing the principles and core values of the African Peer Review Mechanism (APRM) where applicable. Kenya is a main supporter of the APRM and has played an active role in the APRM under the leadership of H.E. President as Chairman of the APR Forum from January 2015 to January 2018. Additionally, it is on record that Kenya was the first country to have a second APRM review in 2017. Ratification will therefore enunciate Kenya's support for the APRM.
- 4.9 Upon accession, Kenya will benefit from the Democracy and Electoral Assistance Fund and the Democracy Assistance Unit, platforms mandated to assist State Parties in the strengthening of electoral institutions. Such assistance would be vital in ensuring that Kenya remains progressive in its efforts to provide democratic leadership within the Continent.
- 4.10 The periodic reporting of two (2) years as enshrined in the Charter will provide an opportunity for Kenya to continually improve its legal framework, strengthen the institutional capacity of democratic institutions as well as

implement programmes meant to achieve optimum levels of democracy respect to human rights and good governance.

4.12 Accession to the Charter will build up on Kenya's adherence to regional democratic and human rights principles and eliminate the risk of unconstitutional changes of government.

4.13 The provisions of the Charter including any mechanisms/remedies provided therein remain subordinate to the provisions of the Kenyan Constitution.

5. CONSTITUTIONAL IMPLICATIONS

5.1 The Charter does not propose any amendment to the Constitution. It also contains provisions which are consistent with constitutional values and objectives.

6. POLICY AND LEGISLATION CONSIDERATIONS

6.1 State Obligations as enshrined in the Charter have been domesticated by various Laws and Institutions in Kenya, notably; The Constitution of Kenya 2010, The Elections Act, 2011, The Political Parties Act, 2011, The Independent Electoral and Boundaries Commission Act, 2011 and the County Governments Act, 2012 and the Independent Electoral and Boundaries Commission and an Independent Judiciary. In addition, Kenya holds periodic elections as provided for in the Charter.

6.2 To further supplement domestic legislation on democracy and human rights, Kenya has ratified and domesticated various treaties that have a bearing on the obligations enshrined in the Charter such as the promotion and protection of human rights. Among such treaties are the International Covenant on Civil and Political Rights, International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD).

6.3 Kenya has also adopted and institutionalized a decentralized governance structure of County Governments, an obligation imposed on State Parties by the Charter.

7. PUBLIC PARTICIPATION

7.1 The Charter was subjected to public participation by the Office of the Attorney General and Department of Justice and the Ministry of Foreign Affairs. Additional public participation will be conducted by Parliament in accordance with the Treaty Making and Ratification Act.

8. FINANCIAL IMPLICATIONS

8.1 Since provisions of the Charter have been domesticated within the domestic legal framework, financial obligations will continuously be catered for through normal budgetary estimates of the relevant institutions.

9. MINISTERIAL RESPONSIBILITY

9.1 Implementation of the Charter will be under the collective responsibility of the Office of the Attorney General and Department of Justice, the Ministry of Foreign Affairs and the Ministry of Interior and Coordination of National Government.

10. IMPLICATIONS ON MATTERS RELATING TO COUNTIES

10.1 The Charter mandates State Parties to decentralize power to democratically elected local authorities as provided for in national laws. The ratification and implementation of the Charter will, therefore, enhance and strengthen devolution in Kenya.

11. RESERVATIONS

11.1 The Charter does not permit reservations. However, Member States can propose amendments to any provision of the Charter through the laid down procedures of the African Union.

12. RECOMMENDATION TO PARLIAMENT

In consideration of the aforementioned facts, Parliament is invited to:

1. Note the contents of the Memorandum;
2. Consider and approve Kenya's accession to the African Charter on Democracy Elections and Governance; and
3. Direct the Cabinet Secretary of Foreign Affairs to prepare and deposit the instrument of ratification to the relevant depository.

SIGNED..........DATED 24th..... JUNE, 2020

**AMB. RAYCHELLE OMAMO, SC, EGH
CABINET SECRETARY
MINISTRY OF FOREIGN AFFAIRS**