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THE CONSTITUTION OF KENYA
REFUSAL TO ASSENT TO THE INSTITUTE OF DIRECTORS OF
KENYA BILL, 2017

MEMORANDUM

By His Excellency the Honourable Uhuru Kenyatta,
President and Commander – in – Chief of the Kenya Defence
Forces.

Submitted to the Speaker of the National Assembly.

WHEREAS a Bill entitled “AN ACT of Parliament to establish the Institute of
Directors of Kenya, the short title of which is “The Institute of Directors of
Kenya Bill, 2017” was passed by the National Assembly on the 1st of March,
2017;

AND WHEREAS the Institute of Directors of Kenya Bill, 2017 was presented
to me for assent, in accordance with the provisions of the Constitution, on
21st June, 2017:

NOW THEREFORE, in exercise of the powers conferred on me by Article
115(1)(B) of the Constitution, I refuse to assent to the Institute of Directors of
Kenya Bill, 2017, for the reasons set out hereunder:

NATIONAL ASSEMBLY
DIRECTORATE OF LEGAL SERVICES
RECEIVED
18 AUG 2017
P. O. Box 41842 - 00100,
NAIROBI

The Long Title

The Long Title reads as follows-

An Act of Parliament to establish the Institute of Directors of Kenya; to provide for the registration and regulation of the standards and practice of the profession and for connected purposes

The Bill does not define the terms “the profession” or “director”. The type of professionals that the Bill seeks to regulate is therefore not clear. The Bill does not expressly stipulate the category of professions to whom it applies.

RECOMMENDATION

In view of the foregoing reason I recommend that the Bill be amended in the interpretation section by defining the terms “**profession**” and “**director**”.

CLAUSE 6

Clause 6(d) and (e) of the Bill provide as follows-

The functions of the Institute shall be to-

- (a) determine, maintain and enhance the standards of professional practice and ethical conduct of directors;
- (b) set standards of professional competence and qualifications for directors.

The State Corporations Act as well as Acts of Parliament give the President the power to appoint a chairperson to the board of a state corporation and a Cabinet Secretary power to appoint other members of such Boards. The respective statutes specify the professional competence of the persons to be appointed.

The Institute would therefore have no part to play in setting the requisite attributes for the appointment of directors.

RECOMMENDATION

In view of the foregoing reason I recommend that clause 6 be amended by deleting paragraphs (d) and (e).

CLAUSE 7

Clause 7(1) of the Bill provides as follows-

- (1) The management of the Institute shall be vested in a Board known as the Board of the Institute which shall constitute of -
 - (a) a chairperson who shall be appointed from amongst the members elected under paragraph (b); and
 - (b) eight other members, who shall be persons with knowledge and experience of at least five years in corporate practice elected by members of the Institute.

Clause 7(1) the provision causes confusion with regard to the number of members of the Board. It also does not specify the person responsible for the appointment of the chairperson.

RECOMMENDATION

In view of the foregoing reason, I recommend that-

- (a) the Bill be amended by deleting paragraph (a) and substituting therefor the following new paragraph-
 - (b) a chairperson elected by members of the Institute;
- (c) paragraph (b) be amended by deleting the words "eight other" and replacing them with the word "nine",

CLAUSE 7(4)

Clause 7 (4) of the Bill provides as follows-

(4) A person appointed and elected as a member of the Board under this Act, other than an ex officio member, shall serve for a term of three years and shall be eligible for reappointment for a further and final term of three years.

The provision also refers to ex-officio members of the Board. The Bill does not provide for ex-officio members.

RECOMMENDATION

In view of the foregoing reason, I recommend that the Bill be amended by deleting clause 7(4) and substituting therefor the following-

(4) A person elected as a member of the Board shall serve for a term of three years and shall be eligible for re-election for a further and final term of three years.

CLAUSE 8

Clause 8 provides as follows-

- (8) A person becomes ineligible for appointment or election as a member of the Board if the Person-
- (a) is an undischarged bankrupt;
 - (b) has his or her name removed from the register; or
 - (c) has his or her certificate of competence suspended under section 28.

Clause 8 (1) of the Bill specifies that there are some members of the Board who are appointed and not elected. All members of the Board are elected, and not appointed.

RECOMMENDATION

In view of the foregoing reason, I recommend that clause 8(1) be amended by deleting the words "appointed or".

CLAUSE 12

Clause 12 of the Bill provides as follows-

(12) The Board may appoint such officers and other staff as necessary for the proper discharge of its functions under this Act, upon such terms and conditions of service as the Board may determine, upon the advice of the Salaries and Remuneration Commission.

The Institute is a self-regulating body and will not draw money from public funds. The remuneration of its staff should therefore not be regulated by the Salaries and Remuneration Commission.

RECOMMENDATION

In view of the foregoing reason, I recommend that clause 12 be amended by deleting the words "upon the advice of the Salaries and Remuneration Commission".

CLAUSE 13

Clause 13 of the Bill provides as follows-

The Board may, by resolution either generally or in any particular case, delegate to any committee or any member, officer, employee or agent of the Board, the exercise of any of the powers or the performance of any of the functions or duties of the Board under this Act or any other written law.

Clause 13 of the Bill makes provision for the delegation of the powers and the performance of any functions of the Board. The marginal note provides for Committees of the Board.

RECOMMENDATION

In view of the foregoing reason, I recommend that the marginal note of clause 13 be deleted and replaced with "Delegation of functions and powers of the Board".

CLAUSE 22

Clause 22 of the Bill provides as follows-

- (1) Subject to this section, a person is qualified to be registered as a director if the person holds a qualification approved under subsection (2) by the Board.
- (2) The Board may, by notice in the Gazette approve qualifications which it considers sufficient to allow a person to be registered, and may, in like manner, withdraw any such approval.

Sub clauses 22 (1) and (2) stipulate the qualifications for registration as a director as follows—

(1) Subject to this section, a person is qualified to be registered as a director if the person holds a qualification approved under subsection (2) by the Board.

(2) The Board may by notice in the Gazette approve qualifications which it considers sufficient to allow a person to be registered and

One of the functions of the Institute envisioned under the Act is to maintain and improve the director' professional conduct. Directorship is not a profession. Under the various statutes which provide for the appointment of Board members, qualifications are usually prescribed as conditions for the appointment. The directors are appointed to the

Board on the basis of their professional background and membership of their respective professional associations. This have nothing to do with the Institute of Directors.

The current Institute of Directors (Kenya), which is established as a membership institute under the Societies Act acts as a members' forum for people who are already directors in various bodies, and acts as an interactive forum for them and also as a training organization to improve their work.

Clause 22 creates uncertainty as to who is eligible to be registered as a director. The uncertainty is further heightened by the fact that the Board can at any time change the qualifications for membership. For the Act to be effectively implemented, the eligibility criteria must be set out in the Act because eligibility criteria is a substantive matter and lays the foundation for the regulation of any profession.

RECOMMENDATION

In view of the foregoing reason, I recommend that the Bill be amended by deleting Clause 22.

CLAUSE 25

Clause 25 (1) of the Bill provides as follows-

- (1) Subject to this Act, where a person is appointed to a Board of a public entity, organ, enterprise or corporation, such person shall-
 - (a) if not a member of the Institute, make an application for membership and undertake the prescribed training courses within three months of being appointed as a member to such Board; and
 - (b) maintain his or her membership to the Institute for the period of such appointment.

Clause 25 of the Bill provides for appointments to a public entity, organ, enterprise or corporation. The functions of the Institute conflict with provisions of various laws. The State Corporations Act as well as some Acts of Parliament gives the President the power to appoint a chairperson to the board of a state corporation and a Cabinet Secretary power to appoint other members of such Boards. Clause 25 of the Bill imposes an obligation on persons who are appointed to the board of a public entity, organ or corporation to register and maintain their membership with the Institute for the period of the appointment. Such persons are to be subjected to a vetting process before registration. Clause 22(3) provides that the Board may require a person making an application to satisfy the Board that his or her knowledge of corporate governance and public administration or professional conduct has been such as to make him or her a fit and proper person to be registered and unless that person satisfies the Board he shall not be registered.

Directors of state corporations are usually selected from various professional backgrounds, with priority being given to professionals in the sector in which the state corporation is established. This requirement would therefore encroach on executive powers and inhibit the work of the executive.

RECOMMENDATION

In view of the foregoing reason, I recommend that clause 25 be deleted.

CLAUSE 30

Clause 30 of the Bill provides as follows-

- (1) A member whose name has been removed from the register may appeal to the Board for restoration of his or her name in the register after the expiry of a period of three years from the date of such removal.
- (2) The Board may, after considering the appeal made under subsection (1), cause the name of the person appealing to

be restored in the register upon payment of the prescribed fee.

Clause 30 entitles a member who has been removed from the register to appeal for restoration. The application for restoration in the register may only be made after a member's name has been removed from the register for a period of three years and does not amount to the right of appeal. Clause 28(5) of the Bill provides that a member who is aggrieved by the decision of the disciplinary Committee of the Board may appeal to the High Court. Accordingly, a member should therefore "apply" and not "appeal" to the Board for restoration.

RECOMMENDATION

The intentions of the provisions of this Clause are not quite clear. The appointment of Board members is done independently of the Institute of Directors. The role of the Institute comes into play after their appointment. There is therefore no cause Institute to impose a mandatory requirement for registration.

In view of the foregoing I recommend that Clause 30 of the Bill be deleted.

CLAUSE 37

Clause 37 of the Bill provides as follows-

Carry-overs

- (1) The members who immediately before the enactment of this Act are members of the Board, shall conduct the first elections to the Board within twelve months after the commencement of this Act.
- (2) The members of the Board immediately preceding the first

elections under this Act shall be eligible for election in the first elections under subsection

- (3) For purpose of subsection (2), the Board refers to the Board to the Institute of Directors in place immediately before the enactment of this Act.

Clause 37 of the Bill makes provision for transition of members of the Board of the Institute yet does not specify the institute has been in existence. The Bill does not specify whether the Institute is a successor of a certain legal entity. It is not clear whether the Institute proposed in the Bill is intended to take over the functions of the existing Institute. If not, there may be two Institutes operating concurrently.

RECOMMENDATION

In view of the foregoing reason, I recommend that Bill be amended by deleting clause 37 and substituting therefor the following new clause-

Transitional provisions

37. (1) The members of the Board of the Institute of Directors (Kenya) existing before the enactment of this Act shall continue as members of the Board until the first election under this Act.

(2) The members of the Board referred to in sub-section (1) shall be eligible to be elected in the first elections carried out under sub-section (1).

Dated the th 4th of July....., 2017.

A handwritten signature in black ink, appearing to read 'Uhuru Kenyatta', written in a cursive style.

UHURU KENYATTA
President