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**THE NATIONAL ASSEMBLY**

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**TWELFTH PARLIAMENT – FOURTH SESSION – 2020**  
**DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS**

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**REPORT**  
**ON THE CONSIDERATION OF THE REFERENDUM (NO. 2) BILL**  
**(NATIONAL ASSEMBLY BILL NO. 14 OF 2020)**

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CLERK'S CHAMBERS  
DIRECTORATE OF COMMITTEE SERVICES  
PARLIAMENT BUILDINGS.  
NAIROBI

OCTOBER, 2020

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## **LIST OF ANNEXURES**

- Annexure 1:** Minutes of Committee sittings on consideration of the Bill
- Annexure 2:** Adoption list
- Annexure 3:** Copy of the newspaper advertisement inviting the public to present written submissions on the Bill.
- Annexure 4:** Copies of written submission received from stakeholders

## **CHAIRPERSON'S FOREWORD**

The Referendum (No.2) Bill, 2020 (National Assembly Bill No.14) underwent First Reading on 18<sup>th</sup> June, 2020 and was immediately committed to the Departmental Committee on Justice and Legal Affairs for review and report to the House pursuant to the provisions of Standing Order 127(1) of the National Assembly Standing Orders..

The Bill seeks to consolidate the law relating to the conduct of referenda, to provide for a transparent and fair process in order to obtain a clear expression of the will of the people by establishing the procedures for the conduct of referenda ,providing for the referendum committees and establishing a level playing field for the opposers and supporters of a referendum question, by providing for equal public funding and by limiting expenditure in a reasonable manner for the public good, to afford the people an opportunity to make decisions based on information from both points of view.

Pursuant to the provisions of Article 118 of the Constitution and Standing Order 127 (3) the Committee through an advertisement in the local daily newspapers of 30<sup>th</sup> June, 2020 invited the public to make representations on the Bill and further resolved to seek the views of the following institutions; Office of the Attorney-General and Department of Justice, Kenya Law Reform Commission, Law Society of Kenya (LSK), Council of Governors and the County Assemblies Forum. The Committee received submissions from the Kenya Christian Professionals Forum, the Council of Governors and the National Council of Churches of Kenya.

May I take this opportunity to commend the Committee Members for their devotion and commitment to duty which made the consideration of the Bill successful. May I also express gratitude to the Offices of Speaker and Clerk of the National Assembly for providing direction and the Committee secretariat for providing technical and logistical support.

On behalf of the Departmental Committee on Justice and Legal Affairs and pursuant to the provisions of Standing Order 199 (6), it is my pleasant privilege and duty to present to the House the report of the Committee on the Referendum (No.2) Bill, 2020.

**Hon. Muturi Kigano, M.P.**

## CHAPTER ONE

### **1.0 PREFACE**

#### **1.1 Establishment and Mandate of the Committee**

1. The Departmental Committee on Justice and Legal Affairs derives its mandate from Standing Order No. 216(5) which provides for the functions of Departmental Committees as follows-
  - (a) investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
  - (b) study the programme and policy objectives of ministries and departments and the effectiveness of their implementation;
  - (c) study and review all legislation referred to it;
  - (d) study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;
  - (e) investigate and enquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House;
  - (f) vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments)
  - (g) examine treaties, agreements and conventions;
  - (h) make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
  - (i) consider reports of Commissions and Independent Offices submitted to the House pursuant to provisions of Article 254 of the Constitution; and
  - (j) Examine any questions raised by Members on a matter within its mandate.
  
2. The Second Schedule of the Standing Orders on Departmental Committees further outlines the Subjects of the Committee, as follows-
  - (a) Constitutional affairs;
  - (b) The administration of law and Justice
  - (c) The Judiciary;
  - (d) Public prosecutions;
  - (e) Elections;
  - (f) Ethics, integrity and anti-corruption; and
  - (g) Human rights.

### **1.3 Committee Secretariat**

4. The Committee secretariat is as follows-

Mr. Abenayo Wasike  
**Senior Clerk Assistant**  
**Lead Clerk**

Mr. Denis Abisai  
**Principal Legal Counsel I**

Ms. Halima Hussein  
**Clerk Assistant II**

Mr. Ahmed Hassan Odhawa  
**Principal Research Officer**

Mr. Omar Abdirahim  
**Fiscal Analyst III**

Ms. Roselyne Ndegi  
**Serjeant-at-Arms I**

Mr. Joseph Okongo  
**Media Liaison Officer**

5. Minutes of sittings of the Committee on the consideration of the Bill. (**Annexure 1**)

## CHAPTER TWO

### **2.0 BACKGROUND ON THE REFERENDUM (NO.2) BILL, 2020**

#### **2.1 Memorandum of Objects and Reasons**

6. The principal object of this Bill is to consolidate the law relating to conduct of referenda, to provide for a transparent and fair process in order to obtain a clear expression of the will of people, by establishing the procedures for the conduct of referenda, providing for the referendum committees and establishing a level playing field for the opposers and supporters of a referendum question, by providing for equal public funding and by limiting expenditure in a reasonable manner for the public good, to afford the people an opportunity to make decisions based on information from both points of view.
7. Clauses 1 to 3 provide for preliminary matters including the short title, interpretation and the application of the Elections Act to referendum.
8. Clause 4 provides for the proclamation of a referendum to amend the Constitution in relation to matters specified in Articles 255 (1) and 257 (10) of the Constitution. Upon proclamation, the Independent Electoral and Boundaries Commission shall conduct a referendum in 90 days and if the Bill is approved, the President assents to it within seven days,
9. Clause 5 provides conduct of referendum by popular initiative while clause 6 provides for the manner of preparing the Bill to amend the Constitution
10. Clause 7 provides for other forms of referendum including county referendums.
11. Clause 8 provides that a referendum could also be initiated through an Act of Parliament. This section contemplates separate law for a specific referendum. Such law shall specify the wording of the referendum question or option.
12. Clause 10 provides for the referendum notice. The notice shall contain key particulars including the nature and purpose of the referendum, the referendum question(s) or options, the symbols assigned for each answer, the date of the referendum, polling time, date of registration of referendum committees the campaign period for the referendum.
13. Clause 11 provides for formation and registration of referendum committees.
14. Clause 12 provides for the appointment of the chief agent for every referendum committee.
15. Clause 13 provides for costs of referendum committees and invokes the relevant sections of the Election Campaign Financing Act, 2013.
16. Clause 14 provides for the approval threshold in a referendum which is at least twenty percent of the registered voters in each of at least half of the counties vote in the referendum and the majority of the citizens voting in the referendum.
17. **Clause 15** provides for a general power of the Commission to take administrative measures to ensure successful conduct of a referendum.
18. **Clauses 16 to 32** provide for referendum petitions including application procedures, persons who may present petitions, respondents, composition of the Court, security for costs, hearing of petitions, examination of votes and petition expenses.

19. **Clauses 33 to 40** provides for general provisions including dealing with the documents, offences and general penalty, application of the Election Offences Act, 2016, duty to cooperate, prosecutions and arrests and regulations.
20. **Clauses 41 to 71** deal with consequential amendments.
21. The Bill does not limit fundamental rights and freedoms.
22. The Bill concerns county governments in terms of Article 110(1) (a) of the Constitution.
23. The Bill is not a money Bill within the meaning of Article 114 of the Constitution.



## CHAPTER THREE

### **3.0 PUBLIC PARTICIPATION IN THE REVIEW OF THE BILL**

24. The Committee undertook public participation on the Bill in compliance with the provision of Article 118 (1) (b) of the Constitution as read together with Standing Order 127 (3). Adverts inviting the public to make any submission regarding the Bill were put in local daily newspapers of Tuesday 30<sup>th</sup> June, 2020. (**Annexure 3**).
25. The Committee received written submissions on the Bill from the Kenya Christian Professional Forum (KCPF), the Council of Governors (COG) and the National Council of Churches of Kenya (NCKK) as per the matrix below; (**Annexure 4**)

### **3.1 MATRIX OF STAKEHOLDERS SUBMISSIONS**

#### **3.1.1 National Council of Churches of Kenya**

<b>Stakeholder</b>	<b>Clause</b>	<b>Provision in the Bill</b>	<b>Stakeholder Proposal</b>	<b>Rationale</b>	<b>Committee observations</b>	<b>Committee Recommendation</b>
NCKK	2	“referendum” means a poll held under this Act	Expand definition so as to read: Referendum is a direct and universal vote in which an entire electorate is invited to vote on a proposed constitutional amendment or any other matter of national or county importance	There is need for the law to provide for the different types of referendums	The proposed definition contains substantive provisions which may conflict with specific clauses in the Bill	Retain definition contained in Bill
2	3(1)(a)	Provides that eligibility to vote is guided by the Elections Act 2011	Amend to provide that the voter can vote in any polling station in the country ( during a national level referendum) or in the county ( during a county level referendum)	The Constitutional, legislative or policy changes effected by the referendum would affect the voter wherever they are within the geographical scope of the proposed	The proposed amendment may lead to logistical problems in the conduct of a referendum including the determination of number of ballot papers required in a polling station	Proposed amendment

				amendment as opposed to election of representatives which is geographical sensitive		
3	3(2)	Provides that necessary modifications are to be done to the procedure of elections to provide Procedures for conducting referendums	Expand to provide for: a) who undertakes the modifications b)in which document will the modifications be recorded c) provision of public participation in the process of modification d) Timelines for the modifications	Considering that the procedures for conducting referendums are essential to the outcome, it is necessary to specifically allocate the task to a specific person with specific timelines and to allow other stakeholders to contribute	The proposal seeks to provide greater certainty and may be considered	Amend B be a Regulation provide f details.
4	4	Provide timeline of 14 days for the president to publish a notice directing the IEBC to conduct a referendum	Amend to provide guidelines on what is to happen should president fail to direct the IEBC to conduct the referendum within 14 days. Also provide for what happens should the president find that the bill from parliament is defective or if the proposed amendment would offend another section of the constitution	The laws need to have clear provisions to avoid: a) A referendum process aborted due to inaction by the president b) presentation of a defective or unconstitutional bill to the people for a referendum	It is not possible for the law to contemplate and provide for every eventuality. The Act may assume that the President will act in accordance with the provisions of the Constitution and the law.	Amend B be a Regulation provide f details.
5	5(2)and 5 (3)	5(2)refers to signatures	Reconcile the language, stick to	This would avoid any resultant	Proposal seeks to provide	Amend B be a Regulation provide f details.

		being delivered to the commission, while 5(3) refers to the list of supporters submitted in 5(2)	the word signatures	confusion as to the intention of the drafters.	greater certainty and may be considered.	Regulations provide for details.
6	5(3)(c)	Provides that the IEBC is to submit the draft Bill to each Assembly for consideration	Amend to include a timeline by which the IEBC is to submit the draft bill to the county Assemblies. We propose three months. Remove the provision giving county assemblies three months to consider the Bill and insert it as a new article 5(6) then renumber	This is necessary to avoid unnecessary delay or frustration of promoter due to failure by the IEBC to undertake the verification in a timely manner	The timeline of three months is already provided for in Clause 5 of the Bill.	The timeline of three months is already provided for in Clause 5 of the Bill.
7	5(4)	Provides that the Bill and supporters are to be made public	Amend to provide for the manner in which the bill and supporting names and signatures are to be made public and the timeframe for the same. Provision should also be made for appeal by any individual whose name and signature appear on the list but they do not support the	This will provide guidelines for the IEBC regarding when to make the Bill and supporting names and signatures public and how. The appeal will prevent fraudulent use of individual's signatures to support a proposed amendment.	Proposal seeks to provide greater certainty and may be considered.	Amend Bill to be applicable Regulations provide for details.

			proposed amendments			
8	5(5)	Where the commission finds that the provision of Article 257 have not been met, it shall be declared that the draft Bill has failed	Amend to provide for an appeal by the promoters of the Bill. The timelines for the appeal should be reasonable ( we propose 30 days)	This will accord the promoters their constitutional right to fair hearing and fair administrative action	The requirements of Article 257 of the Constitution are rigid and there is no room for appeal	Proposal Bill reject
9	5(6)	Provides that if the bill is approved by more than half of the county Assembly	Provide a timeline within which the Bill should be heard and determined by both houses of parliament. We propose three months	This will ensure that there is no undue delay in processing the Bill. A referendum is a serious issue of national importance and should be dispensed with speedily	Proposal seeks to provide a timeline and may be considered.	Amend Bi be appropri
10	5(7)	Provides that the speakers of both houses of parliament are to receive the responses from the county Assemblies	Amend to provide that where a county Assembly communicates to only one speaker of parliament, then they will be deemed to have communicated to both	The communication from the county Assembly to parliament should be treated as one entity.	Proposal is progressive and may be considered	Amend Bi be appropri
11	5(8)(a)	Provides that the Bill shall lapse if it does not relate to matters specified in Article 255(1) of the constitution	Remove the provision	This provision contravenes the constitution which in article 257(10) provides that if either houses fail to pass the bill OR if the bill relates to matters specified in	Proposal may be considered to protect the right of the people to amend the constitution through a popular initiative for issues that are not specified in	Amend Bi be appropri

				Article 255(1), the proposed amendment is to be passed to the people in a referendum. This is to ensure that the people's choice on a proposed amendment is not blocked by parliament	Article 255(1)	
12	5(8)(b)	Provides that the proposed amendment if relates to article 255(1) of the constitution , shall be submitted to the people in referendum	Amend to provide that if one or both houses of parliament fail to pass the bill , it is passed to the people in a referendum	This is to ensure that the Act is in tandem with the Constitution	This is a legislative drafting issue which may be considered	Amend Bill be appropriate
13	5(9)	Provides that the president will proclaim and direct the commission to conduct a referendum	Amend to indicate that the president it to give notice to the IEBC through a publication in the Gazette requiring them to conduct the referendum	To specify how the president is to communicate to the IEBC	Proposal seeks to provide greater certainty and may be considered.	Amend Bill be appropriate
14	5(9)	Provides that the president will proclaim and direct the commission to conduct a referendum.	Amend to provide timelines( we suggest 14 days) within which the president is to publish the Gazette and to provide what is to happen should the president fail to direct the IEBC to conduct	This is to ensure that the presentation of the bill to the people in a referendum is not delayed due to inaction on the part of the president	Proposal seeks to provide greater certainty and may be considered.	Amend Bill be appropriate

			the referendum. Also provide for what happens should the president find that the bill is defective or if the proposed amendment should offend another section of the constitution			
15	5(11)	Provides that the IEBC is to certify to the president whether the Bill was passed or not within 7 days after conclusion of referendum	Amend to reduce the number of days to two	There is no administrative process expected to be conducted after the results of the referendum has been declared so that IEBC should certify to the president <b>within 48 hours</b>	Proposal seeks to expedite the declaration of the referendum results and may be considered	Amend B be approp
16	6(1) and 6(2)	Provides that the Bill to amend article 255(1) elements is to be formulated in a participatory and inclusive manner and that non-divergent proposals to be contained in a single Bill	Remove the provision	This provision add a hurdle to promoters of an amendment in that: a) participatory and inclusive are not defined b) There is no procedure provided to assess the development of the bill to ensure its development was participatory c) There are no provisions to safeguard promoters of an amendment from perpetual delays	Public participation is a national value under Article 10 and Article 118 of the Constitution.	Proposal Bill reject

				during attempts to contain “ non divergent” recommendations into one bill d) No framework is provided for consultations and unification of proposals into one bill		
17	7(1)	Introduces possibility of holding a referendum for any other National issue , and provides that the president shall proclaim and direct the commission to conduct the referendum	Expand to provide for: a) who can initiate a national referendum b) how petition is made c) Procedure followed for the petition to reach the president d) Elements to determine whether the requests in the petition qualify for a referendum e) outline of the national issues that may need a referendum	This is necessary for as drafted it seems it is only the president who may call for the referendum. Provisions should be included for clarity and to do away with ambiguity.	Proposal seeks to provide greater certainty and may be considered.	Amend B other legisl may be appi
18	7(2)	Provides that a county government can conduct a referendum	Amend to read that ‘A’ referendum can be held at county level on local issues. Then expand to provide for: a) who can initiate a request for a national referendum b) How the petition is made	This is necessary for as drafted it is ambiguous as to the process of building up to and conducting the county level referendum. Since provisions on this are not included in the constitution they need to be included in the	Section 90 of the County Governments Act provides for the conduct of a local referendum	Amend Bi other legisla may be appr

			<p>c) procedure followed for the petition to reach the Governor</p> <p>d) Elements to determine whether the requests in the petition qualify for a referendum</p> <p>e) outline the county issues that may need a referendum</p> <p>f) How the petition/guideline for referendum is presented to the IEBC</p> <p>g) Timelines for the process</p>	Act		
19	7(2)(b)	Provides that a petition and investment decisions shall be signed by at least 25% of the voters registered where the referendum is to take place	<p>Remove in view of the opinion made under 7(2) above.</p> <p>Where a petition is to be made provide that the petition be signed by at least 10% of the registered voters</p>	Provide that petitions to be signed by 25 percent of the registered voters is punitive considering that a petition to amend the constitution is signed by 1 million registered voters which in 2010 was 8.3% of the registered voters	Proposal is reasonable and may be considered	Amend other legislation may be appropriate
20	7(3)	Provides that the Elections Act 2011 shall apply, with necessary modifications, during local referendum	<p>Expand to provide for</p> <p>a) Who undertakes the modifications</p> <p>b) In which document will the modifications be recorded</p> <p>c) Provision for</p>	It is necessary to specifically allocate the task of developing the modifications to ensure that elections act applies to a local referendum.	Proposal seeks to provide greater certainty and may be considered.	Amend other legislation may be appropriate



			public participation in the process of modifications d) Timelines for the modifications			
21	9(1)	Procedure upon the commission receiving directions from the President to conduct a referendum under Article 256 and 257 of the constitution	Amend to include notifications for referendums covered under clause 7 of this bill	To provide the same procedure for handling of the different types of referendums.	Clause 7(2) provides that a local referendum shall be conducted by the county government. It is, therefore, not necessary for the President to notify the Commission of the same.	Proposal to Bill rejected
22	9(8)	Provides that the commission shall subject the question to parliamentary approval.	Provide that parliament can reject the proposed question only twice after which the question as drafted by the IEBC shall be presented to the voters in a referendum. Also provide that parliament is to take only 3 days to deliberate on the question and notify the IEBC within 3 days after that	This is to preempt a perpetual back and forth cycle between parliament and the IEBC on the referendum question considering that such will eat into the 90 days provided for holding of the referendum from the time the bill is received by the IEBC.	Proposal seeks to provide greater certainty and may be considered.	Amend Bill be appropriate
23	10(2) (d)	Provides that the notice shall specify the day for referendum	Review to indicate that the notice shall provide the day and date the referendum is to happen.	Clauses 5(9) and (10) provide that the referendum must be conducted and concluded within 90 days of the	Proposal seeks to provide greater certainty and may be considered.	Amend Bill be appropriate

			Review to indicate that the number of days between publication of the notice and the referendum shall be held within 90 days from when the IEBC received the Bill and notification from the President.	proclamation. This should be respected so that the processes between IEBC and parliament don't extend that timeline.		
24	11	Provide for Referendum committees	Reconsider the requirement that persons campaigning for or against the referendum question form one national referendum committee. Change to indicate that persons intending to support or oppose the referendum question will form national and constituency referendum committees.	The promoters of referendum should not be obligated to form a single committee with others who claim they will support the bill which would open them to subversive elements. Different groups whether opposing or supporting should be allowed to form their own committees and have them registered by IEBC. There should be no limit to the number of referendum committees that the IEBC registers.	The proposal is reasonable and also in accordance with Article 36(2) of the Constitution which provides that a person shall not be compelled to join an association of any kind.	Amend B be approp
25	13(2)	Provides that public money may be used to finance activities of a	Delete this provision	Since the activities of referendum committees are not prescribed in	Election Campaign Financing Act, No 42 of 2013, would apply to	Amend B be approp

		referendum		law, accountability for the same would be problematic and open to injustice against some committees	the referendum committees	
26	13-14	Provides for referendum committees	Insert a new clause to provide for referendum committees during county level referendums	Guidelines are required for referendum committees during county level referendums	Proposal is reasonable and may be considered	Amend B. other legislation may be appropriate
27	16	Provides for petitions after a referendum	There is need for a provision on the legal status of the amended Articles of the Constitution pending the determination of the petitions	This is to address the potential contradictions that could arise where amendments have been implemented for six months then the court finds that the referendum was not valid. Reference can be made to Article 141 of the Constitution	The Court which finds that the referendum was invalid has the discretion to make appropriate and relevant pronouncements	Proposal to Bill rejected
28	18 (3)	Provides that a petitioner shall publish their petition in the Gazette and at least one news paper	Delete the requirement	This is a punitive measure on the part of the petitioner considering that similar requirement is not made during other petitions touching on elections	Proposal is reasonable and may be considered	Amend Bill be appropriate
29	18(4)	Provides for personal service or service by	Provide for electronic service	The judiciary has embraced electronic filing and service of	Proposal seeks to increase the methods of service and may	Amend Bill be appropriate

		advertisement		documents	be included.	
30	24(2) and (3)	Provides that a petitioner must deposit 1Million as security for costs, failing which the petition may be struck off	Delete this provision	Setting a requirement for security for costs, is a barrier to access to justice and therefore unconstitutional	The Committee was of the view that the deposit of Ksh 1 million was reasonable in the circumstances since a referendum costs Billions to conduct	Proposal Bill reject
31	25	Provides for what happens when a petitioner dies before the final order is given	Add provision for where there was only one petitioner, and such petitioner dies before the final order is given.	This is necessary to remove the ambiguity	Proposal seeks to provide greater certainty and may be considered.	Amend B be approp
32	30 (3)(4) and (5)	Provides that the registrar shall within 7 days of send a certified copy of the decision of the High Court to the commission and issue a certificate that the hearing is concluded, upon which the commission shall declare and publish the result of the referendum, in accordance with the finding of the high court. It further	This contradicts the provisions of the clause 21(2) which permits appeals to the high court within 30 days of the decision. There is need to reconcile the two contradictory provisions of the bill by deleting clause 21 that provides for appeal. Also reduce the time provided for the registrar of the court to communicate to IEBC to 2 days.	This will provide clarity and enable finality in determination of the petition	There is indeed need to harmonize the provisions of Clause 21(2) and Clause 30(5) of the Bill	Amend B be approp

		provides that the declaration by the commission shall be final and shall not be subject to change.				
33	17 (3)(a) 19(1) 31 (2)	“Corruption practices” Mentioned as grounds for petition	Expand to encompass the wide range of election malpractices as defined in law	Other election malpractices beyond corrupt practices should serve as grounds for petitions	Proposal is reasonable and may be considered	Amend Bill be appropriate
34	31(2)	Provides that a person who appears to have been guilty of any corrupt practice in the referendum may be ordered to pay costs related to the trial	Remove the provision	This provision would deny such persons the right to be presumed innocent until proved guilty since they would not have been tried for the suspected corrupt practices. There would therefore be an unjust punishment.	The provision infringes upon the presumption of innocent as set out in Article 50(2)(a) of the Constitution	Amend Bill be appropriate
35	33(1)	Provides for the destruction of referendum documents six months after the referendum is concluded.	Remove the provision	The referendum is a key process for the nation and the records therefore should not be destroyed until all court process (petition and appeal) are concluded. Where destruction of materials is necessary the law should define which materials are to be retained and which can be	Proposal is reasonable and may be considered	Amend Bill be appropriate

		committees, it shall be distributed Equally among the registered referendum committees.		1. It is responsibility of the promoters of the bill to settle the costs.		
	16(2) (a)	(2) A petition — (a) to question the validity of a referendum shall be filed within twenty eight days after the date of declaration of the results of the referendum and served within fifteen days of presentation;			Petition should be served within 7 days to enable parties prepare before hand	Amend Bill as may be appropriate
	16(2) (b)	(b) to seek a declaration concerning any matter relating to the referendum shall be presented within twenty-eight days after the proclamation of the referendum or occurrence	to seek a declaration concerning any matter relating to the referendum shall be presented within twenty-eight days after the proclamation of the referendum or occurrence of	Petition should be served within 7 days to enable parties prepare before hand	Proposal is reasonable and may be considered	Amend Bill as may be appropriate

		of the event complained against whichever is later.	the event complained against whichever is later. The petition should be served within seven days of presentation			
	18 (1) (c)	(1) A referendum petition may be presented in the High Court by — (c) the Commission	Delete clause	In the conduct of a referendum the commission should act as a neutral arbiter and as such should not be allowed to file a petition	The Committee has already proposed amendments to Clause 18 (2) to clarify on the issue.	Amend Bill as may be appropriate
	20(2)	(2) Whenever a referendum petition is presented under this section, the Registrar of the High Court shall, in writing, inform the Commission of the filing of the petition	Whenever a referendum petition is presented under this section, the Registrar of the High Court shall <b>within 3 days in writing,</b> inform the Commission of the filing of the petition	Timelines should be stipulated within which the registrar should inform the commission in writing to enable adequate preparation	The Committee has already proposed amendments to Clause 20 to clarify on the issue.	Amend Bill as may be appropriate
	27 (3)	All reasonable expenses incurred by any person in attending at or appearing before the High Court to give evidence as a	All reasonable expenses incurred by any person in attending at or appearing before the High Court to give evidence as a witness at the	It is prudent for the bill to specify who is supposed to pay the cost of the witnesses to attend the meeting.	Proposal is reasonable and may be considered	Amend Bill as may be appropriate

		witness at the trial of a referendum petition shall be paid to such person according to the scale of allowances and expenses appropriate in civil proceedings before the High Court.	trial of a referendum petition shall be paid to such person by the petitioner according to the scale of allowances and expenses appropriate in civil proceedings before the High Court.			
	30(6)	(6) Where the High Court declares a referendum void, the Commission shall conduct a fresh referendum within sixty days of the declaration	(6) Where the proceedings relate to the conduct of the referendum and the High Court declares a referendum void, the commission shall conduct a fresh referendum within sixty days of the declaration.	Referendum should only be held of the nature of the petition was challenging the conduct of the person. If the petition was challenging the legality/ validity of the petition then it would be unnecessary to conduct the same.	Proposal is reasonable and may be considered	Amend Bill as may be appropriate



30(6)	(6) Where the High Court declares a referendum void, the Commission shall conduct a fresh referendum within sixty days of the declaration	(6) Where the proceedings relate to the conduct of the referendum and the High Court declares a referendum void, the commission shall conduct a fresh referendum within sixty days of the declaration.	Referendum should only be held of the nature of the petition was challenging the conduct of the person. If the petition was challenging the legality/ validity of the petition then it would be unnecessary to conduct the same.	Proposal is reasonable and may be considered	Amend Bill as may be appropriate
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## CHAPTER FOUR

### 4.0 CONSIDERATION OF THE BILL BY THE COMMITTEE

26. The Committee considered the Bill clause by clause and proposed amendments as follows;
27. **CLAUSE 2: THAT** the Bill be amended in clause 2 by deleting the expression “Cabinet Secretary.”
28. **Justification:** To clean up the Bill because the term “Cabinet Secretary” is not used in the Bill.
29. **CLAUSE 5: THAT** clause 5 of the Bill be amended—
- a) In sub-clause (3) by deleting the words “after the date it was submitted by the Commission” appearing in paragraph (c);
  - b) By deleting the expression “for” appearing in sub-clause (10).
30. **Justification:** To clarify that the Commission should submit the Draft Bill to each county assembly within three months of verifying that the Bill meets the requirements of Article 257 of the Constitution.
31. **CLAUSE 7: THAT** the Bill be amended by deleting clause 7.
32. **Justification:** The Committee was of the view that it is not necessary to provide for local referenda in the Bill. The local referenda may be held under Section 90 of the County Governments Act, No.17 of 2012, as currently provided for.
33. **CLAUSE 8: THAT** the Bill be amended by deleting clause 8.
34. **Justification:** The Committee was of the view that it is not necessary to provide for other referenda in the Bill. The Bill should be restricted to provide for the referenda contemplated under the Constitution.
35. **CLAUSE 9: THAT** clause 9 of the Bill be amended-
- a) in sub-clause (1) by deleting the words “or option” appearing immediately after the word “question” appearing in the closing paragraph;
  - b) in sub-clause (2) by deleting the words “or option, refer the question or option to the relevant House for approval” and substituting therefor the words “refer the question to the Houses of Parliament for approval”;
  - c) in sub-clause (3) by deleting the words “or option” appearing immediately after the word “question”;
  - d) in sub-clause (4) by deleting the words “or option” wherever it appears;
  - e) in sub-clause (5) by deleting the words “or option” appearing at the end of the sub-clause;

- f) in sub-clause (6) by deleting the words “or option” wherever it appears;
  - g) in sub-clause (7) by deleting the words “or option” wherever it appears;
  - h) in sub-clause (8) by deleting the words “or option” wherever it appears;
  - i) in sub-clause (9) by deleting the words “or option” appearing immediately after the word “question”;
  - j) in sub-clause (10) by deleting the word “option” wherever it appears and substituting therefor the word “question”;
  - k) in sub-clause (11) by deleting the words “or option” appearing immediately after the word “question”;
36. **Justifications:** The Committee was of the view that the Commission should not provide voters with other options other than approving or rejecting the referendum question. The Committee noted that providing other options to voters may complicate the referendum voting process and will also offend Article 82(2) of the Constitution which provides that legislation enacted by Parliament on the conduct of elections and referenda shall ensure that the voting is simple and transparent. The proposed amendment to sub-clause (2) also seeks to remedy the ambiguity in the provision caused by the use of the term “relevant House”. The amendment clarifies that the question shall be referred to both Houses of Parliament for approval.
37. **CLAUSE 10: THAT** clause 10 of the Bill be amended in sub-clause (2) by deleting the words “or option” appearing in paragraph (g).
38. **Justifications:** The Committee was of the view that the Bill should not provide voters with other options other than approving or rejecting the referendum question. The Committee noted providing other options to voters may complicate the referendum voting process and will also offend Article 82(2) of the Constitution which provides that legislation enacted by Parliament on the conduct of elections and referenda shall ensure that the voting is simple and transparent.
39. **CLAUSE 11: THAT** the Bill be amended by deleting clause 11.
40. **Justifications:** The Committee noted that Clause 11 of the Bill required persons intending to campaign for or against the referendum to form one national referendum committee and one referendum committee in every constituency. The Committee was of the view that there is no need for the Bill to limit the number of referendum committees which may be formed to support or oppose a referendum question. The Committee was also of the view that requiring all persons supporting or opposing a referendum question to form one committee was impractical to implement because people may be supporting or opposing the referendum question for different reasons. The Committee thus resolved that Clause 11 of the Bill be deleted.
41. **CLAUSE 12: THAT** the Bill be amended by deleting clause 12.
42. **Justifications:** The Committee noted that Clause 12 of the Bill provided for the registration of every referendum committee. The Clause also provides for the registration

55. **CLAUSE 19: THAT** the Bill be amended by deleting clause 19.

56. **Justification:** Clause 19 was found to be superfluous. The petitioners should be free to decide who the respondents to the referendum petition should be.

57. **CLAUSE 20: THAT** the Bill be amended by deleting clause 20.

58. **Justification:** The proposed deletion of clause 20 is a consequential amendment to the insertion of a new Clause 17A in the Bill which provides that a referendum petition shall be signed by all the petitioners, if more than one.

59. **CLAUSE 21: THAT** clause 21 of the Bill be amended in sub-clause (2) by —

a) deleting the words “thirty days” appearing in paragraph (a) and substituting therefor the words “fourteen days”;

b) deleting the words “six months” appearing in paragraph (b) and substituting therefor the words “thirty days.”

60. **Justification:** The Committee was of the view that the timelines within which an appeal in a referendum petition must be filed in the Court of Appeal be reduced from thirty days to fourteen days. Similarly, the Committee resolved that the appeal should be heard and determined within thirty days instead of the six months proposed in the Bill.

61. **CLAUSE 22: THAT** the Bill be amended by deleting clause 22 and substituting therefor the following new clause—

Coming to force.      **22.** (1) The Commission shall publish the result of the referendum in the Gazette within one day of the holding of the referendum.

(2) If no petition is filed challenging the conduct or result of the referendum within the time limit for making such petitions, the result of the referendum shall be final upon the expiry of that time limit.

(3) Where a petition is filed challenging the conduct or result of the referendum within the time limits for filing such petitions, the result of the referendum shall not be final until such petitions are finally disposed of.

(4) The Commission shall, consequent upon the results of the referendum becoming final, by notice in the Gazette confirm the results as the final results of the referendum.

62. **Justification:** The amendment requires the Commission to publish the results of the referendum within one day of holding the referendum. The amendment also seeks to provide certainty that the results of the referendum shall not be final until any referendum petition filed has been heard and determined by the Courts.

63. **CLAUSE 23: THAT** clause 23 of the Bill be amended by deleting sub-clause (2).

64. **Justification:** The amendment seeks to remove the discretion conferred on the Registrar to determine the order in which referendum petitions should be heard. The Committee was of the view that clause 23(2) was an unnecessary encroachment on the independence of the Courts to decide the order in which referendum petitions may be heard.

65. **CLAUSE 25: THAT** clause 25 of the Bill be amended—

- a) by deleting the words “two or more” appearing in sub-clause (1) and substituting therefor the words “more than one”.
- b) by deleting the words “under subsection (1)” appearing in clause (2).

66. **Justification:** This amendment seeks to clarify that where there are more than one petitioners and some petitioners die before the final determination of the petition, the surviving petitioners are entitled to continue with the petition.

67. **INSERTION OF NEW CLAUSE 25A: THAT,** the Bill be amended by inserting the following new clause immediately after clause 25—

Joinder of interested parties. of **25A.** (1) A court hearing a referendum petition may, upon application allow, the joinder of amicus curiae and other interested parties.

(2) The Court shall before allowing the joinder of amicus curiae or other interested parties, take into consideration the public interest, the expertise, independence and impartiality of the person in question or any other relevant factors.

68. **Justification:** The amendment seeks to empower a court hearing a referendum petition to allow the joinder of amicus curiae and other interested parties, taking into consideration the public interest, the expertise of the applicants and any other relevant factors.

69. **CLAUSE 30: THAT** clause 30 of the Bill be amended—

- a) by deleting sub-clause (2);
- b) by deleting sub-clause (3);
- c) by deleting sub-clause (4);
- d) by deleting sub-clause (5);

#### **Justifications**

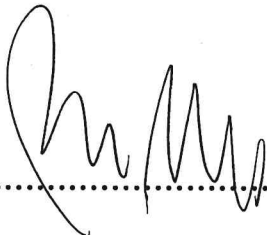
- a) The proposed deletion of sub-clause (2) seeks to remove the powers of the High Court to declare a referendum void for contravention of the Act or the Regulations. The Committee was of the view that a referendum should only be nullified on known and pleaded grounds and not on general grounds as proposed in sub-clause (2).

- b) The proposed deletion of sub-clauses (3) and (4) removes administrative procedures by the Registrar of the High Court from the Bill. Issues relating to the delivery of a certified copy of the decision by the High Court to the Commission need not be legislated upon.
  - c) The proposed deletion of sub-clause (5) seeks to uphold the right of a petitioner to appeal to the Court of Appeal as provided for in Clause 21 of the Bill.
70. **CLAUSE 31: THAT** clause 31 of the Bill be amended in sub-clause (3) be deleting the words “which may be made upon motion after notice and proof that all just claims have been satisfied or otherwise sufficiently provided for as the High Court may require” appearing immediately after the word “the High Court.” where it first appears.
71. **Justification:** The amendment seeks to delete superfluous and ambiguous words in Clause 31(3) of the Bill which provides for reimbursement of money deposited as security for costs.
72. **CLAUSE 32: THAT** clause 32 of the Bill be amended in sub-clause (2) be deleting the word “report” appearing immediately after the words “Upon receipt of the” and substituting therefor the word “judgement”.
73. **Justification:** The amendment seeks to clarify that the Director of Public Prosecutions should take action after receiving the “Judgement” of the court rather than the “Report” contemplated in sub-clause (1).
74. **CLAUSE 68: THAT** the Bill be amended by deleting clause 68.
75. **Justification:** The amendment seeks to rescind the proposed repeal of section 104 of the Elections Act, 2011. The Committee noted that the section provides for the facilitation of persons with special needs to realize their right to vote and should be retained in the Elections Act, 2011.

CHAPTER FIVE

**5.0 COMMITTEE RECOMMENDATION**

76. The Committee having facilitated public participation and considered the Referendum (No.2) Bill, 2020 recommends to the House that the Referendum (No.2) Bill, 2020 (National Assembly Bill No.14) should be proceeded with, subject to the inclusion of the amendments proposed in Chapter four of this Report.

Signed..........Date.....15/10/2020.....

**Hon. Muturi Kigano, M.P.**

**Chairperson, Departmental Committee on Justice and Legal Affairs**





# **ANEEXURE 1**

## **MINUTES**



Annexure I

**MINUTES OF THE THIRTIETH SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON FRIDAY 9<sup>TH</sup> OCTOBER, 2020 AT 10:00 AM IN WELDONE ROOM, TAMARIND VILLAGE HOTEL, MOMBASA**

**PRESENT**

1. Hon. Clement Muturi Kigano, M.P.
2. Hon. John Olago Aluoch, M.P.
3. Hon. Peter Opondo Kaluma, M.P.
4. Hon. William K. Mwamkale, M.P.
5. Hon. Zuleikha Hassan, M.P.
6. Hon. Robert Gichimu Githinji, M.P.
7. Hon. Adan Haji Yussuf, M.P.
8. Hon. Jennifer Shamalla, M.P.
9. Hon. George G. Murugara, M.P.
10. Hon. Anthony G. Kiai, M.P.
11. Hon. Japheth Mutai, M.P.
12. Hon. Anthony Oluoch, M.P.
13. Hon. John M. Wambugu, M.P.
14. Hon. John Kiarie Waweru, M.P.

- Chairperson

**ABSENT WITH APOLOGIES**

1. Hon. (Dr.) Paul Otiende Amollo, M.P.
2. Hon. Junet Sheikh Nuh Mohamed, M.P.
3. Hon. Emmanuel Wangwe, M.P.
4. Hon. Roselinda Soipan Tuya, M.P.
5. Hon. Josephine Naisula Lesuuda, M.P.

- Vice Chairperson

**IN ATTENDANCE-**

1. Abenayo Wasike
2. Mr. Denis Abisai
3. Mr. Ahmed Odhowa
4. Ms. Halima Hussein
5. Ms. Roselyn Ndegi

**COMMITTEE SECRETARIAT-Mr.**

- Senior Clerk Assistant
- Principal Legal Counsel
- Principal Research Officer
- Second Clerk Assistant
- Sergeant At Arms

**MIN No. 01/2020:-**

The meeting commenced at 10:00 am with a word of prayer from Chairperson and the program was adopted as filed.

**PRELIMINARIES**

**MIN No.02/2020:-**

Agenda was deferred.

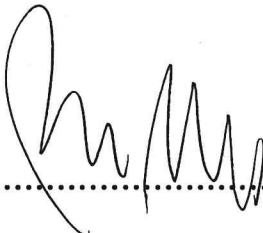
**CONFIRMATION OF MINUTES**



## CHAPTER FIVE

### 5.0 COMMITTEE RECOMMENDATION

76. The Committee having facilitated public participation and considered the Referendum (No.2) Bill, 2020 recommends to the House that the Referendum (No.2) Bill, 2020 (National Assembly Bill No.14) should be proceeded with, subject to the inclusion of the amendments proposed in Chapter four of this Report.

Signed..........Date.....15/10/2020.....

**Hon. Muturi Kigano, M.P.**

**Chairperson, Departmental Committee on Justice and Legal Affairs**



# **ANEEXURE 1**

## **MINUTES**





# Annexure I

## MINUTES OF THE THIRTIETH SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON FRIDAY 9<sup>TH</sup> OCTOBER, 2020 AT 10:00 AM IN WELDONE ROOM, TAMARIND VILLAGE HOTEL, MOMBASA

### PRESENT

1. Hon. Clement Muturi Kigano, M.P. - Chairperson
2. Hon. John Olago Aluoch, M.P.
3. Hon. Peter Opondo Kaluma, M.P.
4. Hon. William K. Mwamkale, M.P
5. Hon. Zuleikha Hassan, M.P.
6. Hon. Robert Gichimu Githinji, M.P
7. Hon. Adan Haji Yussuf, M.P
8. Hon. Jennifer Shamalla, M.P.
9. Hon. George G. Murugara, M.P
10. Hon. Anthony G. Kiai, M.P.
11. Hon. Japheth Mutai, M.P.
12. Hon. Anthony Oluoch, M.P.
13. Hon. John M. Wambugu, M.P.
14. Hon. John Kiarie Waweru, M.P.

### ABSENT WITH APOLOGIES

1. Hon. (Dr.) Paul Otiende Amollo, M.P. - Vice Chairperson
2. Hon. Junet Sheikh Nuh Mohamed, M.P
3. Hon. Emmanuel Wangwe, M.P.
4. Hon. Roselinda Soipan Tuya, M.P.
5. Hon. Josephine Naisula Lesuuda, M.P.

### IN ATTENDANCE-

- |                       |   |                            |
|-----------------------|---|----------------------------|
| 1. Abenayo Wasike     | - | Senior Clerk Assistant     |
| 2. Mr. Denis Abisai   | - | Principal Legal Counsel    |
| 3. Mr. Ahmed Odhowa   | - | Principal Research Officer |
| 4. Ms. Halima Hussein | - | Second Clerk Assistant     |
| 5. Ms. Roselyn Ndegi  | - | Sergeant At Arms           |

### COMMITTEE SECRETARIAT-Mr.

### MIN No. 01/2020:-

The meeting commenced at 10:00 am with a word of prayer from Chairperson and the program was adopted as filed.

### PRELIMINARIES

### MIN No.02/2020:-

Agenda was deferred.

### CONFIRMATION OF MINUTES

**MIN No.03/2020:- CONSIDERATION AND ADOPTION OF THE REPORT ON THE REFERENDUM (NO.2) NATIONAL BILL NO.14 OF 2020**

The Committee considered and unanimously adopted its report on the Referendum Bill, 2020 (National Assembly Bill No.) with the following recommendations. The adoption was proposed by Hon. William Kamoti and seconded by Hon. Wambugu Munene.

**CLAUSE 2: THAT** the Bill be amended in clause 2 by deleting the expression “Cabinet Secretary.” to clean up the Bill because the term “Cabinet Secretary” is not used in the Bill.

**CLAUSE 5: THAT** clause 5 of the Bill be amended in sub-clause (3) by deleting the words “after the date it was submitted by the Commission” appearing in paragraph (c) and by deleting the expression “for” appearing in sub-clause (10). The proposed amendment was meant to clarify that the Commission should submit the Draft Bill to each county assembly within three months of verifying that the Bill meets the requirements of Article 257 of the Constitution.

**CLAUSE 7: THAT** the Bill be amended by deleting clause 7. The Committee was of the view that it is not necessary to provide for local referenda in the Bill. The local referenda may be held under Section 90 of the County Governments Act, No.17 of 2012, as currently provided for.

**CLAUSE 8: THAT** the Bill be amended by deleting clause 8. The Committee was of the view that it is not necessary to provide for other referenda in the Bill. The Bill should be restricted to provide for the referenda contemplated under the Constitution.

**CLAUSE 9: THAT** clause 9 of the Bill be amended-

- in sub-clause (1) by deleting the words “or option” appearing immediately after the word “question” appearing in the closing paragraph;
- in sub-clause (2) by deleting the words “or option, refer the question or option to the relevant House for approval” and substituting therefor the words “refer the question to the Houses of Parliament for approval”;
- in sub-clause (3) by deleting the words “or option” appearing immediately after the word “question”;
- in sub-clause (4) by deleting the words “or option” wherever it appears;
- in sub-clause (5) by deleting the words “or option” appearing at the end of the sub-clause;
- in sub-clause (6) by deleting the words “or option” wherever it appears;
- in sub-clause (7) by deleting the words “or option” wherever it appears;
- in sub-clause (8) by deleting the words “or option” wherever it appears;
- in sub-clause (9) by deleting the words “or option” appearing immediately after the word “question”;
- in sub-clause (10) by deleting the word “option” wherever it appears and substituting therefor the word “question”;
- in sub-clause (11) by deleting the words “or option” appearing immediately after the word “question”;

The Committee was of the view that the Commission should not provide voters with other options other than approving or rejecting the referendum question.

The Committee noted that providing other options to voters may complicate the referendum voting process and will also offend Article 82(2) of the Constitution which provides that legislation enacted by Parliament on the conduct of elections and referenda shall ensure that the voting is simple and transparent.

The proposed amendment to sub-clause (2) also sought to remedy the ambiguity in the provision caused by the use of the term "relevant House". The amendment clarifies that the question shall be referred to both Houses of Parliament for approval.

**CLAUSE 10: THAT** clause 10 of the Bill be amended in sub-clause (2) by deleting the words "or option" appearing in paragraph (g).

The Committee was of the view that the Bill should not provide voters with other options other than approving or rejecting the referendum question. The Committee noted providing other options to voters may complicate the referendum voting process and will also offend Article 82(2) of the Constitution which provides that legislation enacted by Parliament on the conduct of elections and referenda shall ensure that the voting is simple and transparent.

**CLAUSE 11: THAT** the Bill be amended by deleting clause 11.

The Committee noted that Clause 11 of the Bill required persons intending to campaign for or against the referendum to form one national referendum committee and one referendum committee in every constituency. The Committee was of the view that there is no need for the Bill to limit the number of referendum committees which may be formed to support or oppose a referendum question. The Committee was also of the view that requiring all persons supporting or opposing a referendum question to form one committee was impractical to implement because people may be supporting or opposing the referendum question for different reasons. The Committee thus resolved that Clause 11 of the Bill be deleted.

**CLAUSE 12: THAT** the Bill be amended by deleting clause 12.

The Committee noted that Clause 12 of the Bill provided for the registration of every referendum committee. The Clause also provides for the registration of referendum leaders, chief agents and committee members. The Committee was of the view that there is no need for the Bill to provide for the registration of referendum committees whose lifespan is very short, probably about three months. The Committee also noted that Clause 12(3) proposes to hold the chief agent of a referendum committee to be responsible for the affairs of the registered referendum committee which imposes an unfair burden on the chief agent without giving him or her the mechanisms for holding such responsibility. The Committee thus resolved that Clause 12 of the Bill be deleted.

**CLAUSE 13: THAT** the Bill be amended by deleting clause 13.

The Committee noted that Clause 13 of the Bill contained contradictory provisions. Whereas Clause 13(1) provides that each referendum committee shall bear its own costs during its existence, Clause 13(2) provides that if public money is used to finance a referendum, such money must be distributed equally among the registered referendum committee. The Committee was of the view that under no circumstances

should public money be used to support or oppose a referendum question. The Committee noted that Article 201(d) of the Constitution provides that public money shall be used in a prudent and responsible way and spending such money to support or oppose a referendum question would be unconstitutional. The Committee thus resolved that Clause 13 of the Bill be deleted.

**CLAUSE 14: THAT** clause 14 of the Bill be amended by deleting sub-clause (2).

The Committee was of the view that the Bill should not provide voters with other options other than approving or rejecting the referendum question. The Committee noted providing other options to voters may complicate the referendum voting process and will also offend Article 82(2) of the Constitution which provides that legislation enacted by Parliament on the conduct of elections and referenda shall ensure that the voting is simple and transparent.

**CLAUSE 16: THAT** clause 16 of the Bill be amended—

- a) in sub-clause (2) by—
  - (i) deleting the words “twenty eight days” appearing in paragraph (a) and substituting thereof the words “twenty one days”; and
  - (ii) deleting the words “twenty eight days” appearing in paragraph (b) and substituting thereof the words “twenty one days.”
- b) by deleting the words “six months” appearing in sub-clause (3) and substituting thereof the words “thirty days.”

The Committee was of the view that petitions questioning the validity of a referendum should be filed within 21 days instead of 28 days as appears in the Bill. The Committee noted 21 days from the date of the declaration offered any potential petitioner ample time to prepare and file their petitions. The Committee was also of the view that referendum petitions should be concluded within 30 days of filing instead of the six months as proposed in the Bill. The Committee noted that it is important that referendum petitions to be heard and determined expeditiously since they involved serious and sensitive constitutional issues.

**CLAUSE 17: THAT** clause 17 of the Bill be amended—

- a) in sub-clause (2) by deleting paragraph (d);
- b) in paragraph (3) by deleting sub-clause (3) and substituting thereof with the following new sub-clause—
- c) “(3) A referendum petition shall be heard in open court.”
- d) by inserting the following new sub-clauses immediately after sub-clause (3) —
  - “(4) The High Court may, in respect of the trial of a referendum petition, exercise such powers within its civil jurisdiction as it may deem appropriate.”
  - “(5) A referendum petition may be withdrawn by the petitioner on notice to the other parties and the High Court, subject to any order of the Court as to costs.”

The Committee resolved to delete sub-clause (3) which sets out the grounds upon which a referendum petition may be presented. The Committee was of the view that the grounds of the referendum petition should remain as provided for in the Elections Act, 2011. It is also proposed that the Clause be amended to clearly stipulate that a referendum petition shall be heard in open court.

**INSERTION OF NEW CLAUSE 17A: THAT,** the Bill be amended by inserting the following new clause immediately after clause 17—

Filing of a 17 A. A referendum petition shall be signed by the referendum petitioner or by all the petitioners, if more than one.

The amendment seeks to clarify that a referendum petition shall be signed by all the petitioners, if more than one

**CLAUSE 18: THAT** clause 18 of the Bill be amended—

- a) in sub-clause (1) by —
  - (i) deleting paragraph (a); and
  - (ii) deleting paragraph (c).
- b) in sub-clause (3) by deleting the words “A petitioner” and substituting thereof with the words “The Commission”;

The proposal to delete paragraph (a) seeks to remove the provision enabling a petitioner to challenge the referendum results in only one constituency. The Committee was of the view that the referendum voting results should be challenged as a whole in order to avoid numerous and inconsequential petitions. The Committee resolved that it is not feasible that the Commission can be a petitioner in a referendum it conducted and thus proposes that paragraph (c) of the clause be deleted.

**CLAUSE 19: THAT** the Bill be amended by deleting clause 19.

Clause 19 was found to be superfluous. The petitioners should be free to decide who the respondents to the referendum petition should be.

**CLAUSE 20: THAT** the Bill be amended by deleting clause 20.

The proposed deletion of clause 20 is a consequential amendment to the insertion of a new Clause 17A in the Bill which provides that a referendum petition shall be signed by all the petitioners, if more than one.

**CLAUSE 21: THAT** clause 21 of the Bill be amended in sub-clause (2) by —

- a) deleting the words “thirty days” appearing in paragraph (a) and substituting therefor the words “fourteen days”;
- b) deleting the words “six months” appearing in paragraph (b) and substituting therefor the words “thirty days.”

The Committee was of the view that the timelines within which an appeal in a referendum petition must be filed in the Court of Appeal be reduced from thirty days to fourteen days. Similarly, the Committee resolved that the appeal should be heard and determined within thirty days instead of the six months proposed in the Bill.

**CLAUSE 22: THAT** the Bill be amended by deleting clause 22 and substituting therefor the following new clause—

Coming to force.

**22.** (1) The Commission shall publish the result of the referendum in the Gazette within one day of the holding of the referendum.

(2) If no petition is filed challenging the conduct or result of the referendum within the time limit for making such petitions, the result of the referendum shall be final upon the expiry of that time limit.

(3) Where a petition is filed challenging the conduct or result of the referendum within the time limits for filing such petitions, the result of the referendum shall not be final until such petitions are finally disposed of.

(4) The Commission shall, consequent upon the results of the referendum becoming final, by notice in the Gazette confirm the results as the final results of the referendum.

The amendment requires the Commission to publish the results of the referendum within one day of holding the referendum. The amendment also seeks to provide certainty that the results of the referendum shall not be final until any referendum petition filed has been heard and determined by the Courts.

**CLAUSE 23: THAT** clause 23 of the Bill be amended by deleting sub-clause (2).

The amendment seeks to remove the discretion conferred on the Registrar to determine the order in which referendum petitions should be heard. The Committee was of the view that clause 23(2) was an unnecessary encroachment on the independence of the Courts to decide the order in which referendum petitions may be heard.

**CLAUSE 25: THAT** clause 25 of the Bill be amended—

- a) by deleting the words “two or more” appearing in sub-clause (1) and substituting therefor the words “more than one”.
- b) by deleting the words “under subsection (1)” appearing in clause (2).

This amendment seeks to clarify that where there are more than one petitioners and some petitioners die before the final determination of the petition, the surviving petitioners are entitled to continue with the petition.

**INSERTION OF NEW CLAUSE 25A: THAT,** the Bill be amended by inserting the following new clause immediately after clause 25—

Joinder of interested parties. **25A.** (1) A court hearing a referendum petition may, upon application allow, the joinder of amicus curiae and other interested parties.

(2) The Court shall before allowing the joinder of amicus curiae or other interested parties, take into consideration the public interest, the expertise, independence and impartiality of the person in question or any other relevant factors.

The amendment seeks to empower a court hearing a referendum petition to allow the joinder of amicus curiae and other interested parties, taking into consideration the public interest, the expertise of the applicants and any other relevant factors.

**CLAUSE 30: THAT** clause 30 of the Bill be amended—

- a) by deleting sub-clause (2);
- b) by deleting sub-clause (3);
- c) by deleting sub-clause (4);
- d) by deleting sub-clause (5);

The proposed deletion of sub-clause (2) seeks to remove the powers of the High Court to declare a referendum void for contravention of the Act or the Regulations. The Committee was of the view that a referendum should only be nullified on known and pleaded grounds and not on general grounds as proposed in sub-clause (2).

The proposed deletion of sub-clauses (3) and (4) removes administrative procedures by the Registrar of the High Court from the Bill. Issues relating to the delivery of a certified copy of the decision by the High Court to the Commission need not be legislated upon.

The proposed deletion of sub-clause (5) seeks to uphold the right of a petitioner to appeal to the Court of Appeal as provided for in Clause 21 of the Bill.

**CLAUSE 31: THAT** clause 31 of the Bill be amended in sub-clause (3) be deleting the words “which may be made upon motion after notice and proof that all just claims have been satisfied or otherwise sufficiently provided for as the High Court may require” appearing immediately after the word “the High Court.” where it first appears.

The amendment seeks to delete superfluous and ambiguous words in Clause 31(3) of the Bill which provides for reimbursement of money deposited as security for costs.

**CLAUSE 32: THAT** clause 32 of the Bill be amended in sub-clause (2) be deleting the word “report” appearing immediately after the words “Upon receipt of the” and substituting therefor the word “judgement”.

The amendment seeks to clarify that the Director of Public Prosecutions should take action after receiving the “Judgement” of the court rather than the “Report” contemplated in sub-clause (1).

**CLAUSE 68: THAT** the Bill be amended by deleting clause 68.

The amendment seeks to rescind the proposed repeal of section 104 of the Elections Act, 2011. The Committee noted that the section provides for the facilitation of persons with special needs to realize their right to vote and should be retained in the Elections Act, 2011.

**MIN No. 04/2020:**

No matter arose

**ANY OTHER BUSINESS**

**MIN No. 04/2020:**

There being no other business to transact, the meeting was adjourned at 1:10pm

Signed.....

**Chairperson**

Date.....15/10/2020





**ANEEXURE 2**  
**ADOPTION LIST**



KENYA NATIONAL ASSEMBLY

Annexure 2

2



DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS


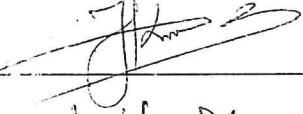


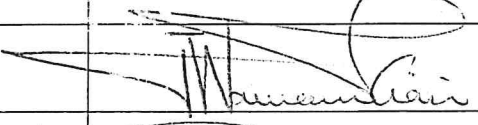

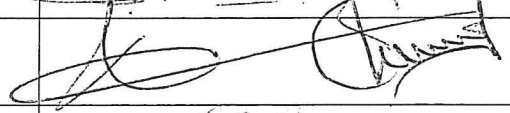
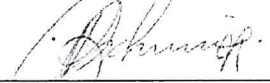
ATTENDANCE REGISTER FOR MEMBERS

DATE: 9/10/2020 START TIME: 10:00 AM END TIME: 1:00 PM

VENUE: TAMARIND VILLAGE

AGENDA: ADOPTION OF REFERENDUM BILL, 2020  
(REPORT)

NO.	NAME	SIGNATURE
..	Hon. Clement Muturi Kigano, M.P. -Chairperson	
..	Hon. (Dr.) Paul Otiende Amollo, M.P -Vice-Chairperson	
..	Hon. Emmanuel Wangwe, M.P.	
..	Hon. Junet Sheikh Nuh Mohamed, M.P	
..	Hon. John Olago Aluoch, MP.	
..	Hon. Peter Opondo Kaluma, MP.	
..	Hon. Roselinda Soipan Tuyu, MP.	
..	Hon. Mwamkale Kamoti, MP.	
..	Hon. Zuleikha Hassan, MP.	
0.	Hon. Josephine Naisula Lesuuda, M.P.	
1.	Hon. George Gitonga Murugara, MP.	

12.	Hon. Adan Haji Yussuf, MP.	
13.	Hon. Japheth Kiplangat Mutai, MP.	
14.	Hon. Anthony Githiaka Kiai, MP.	
15.	Hon. Jennifer Shamalla, MP.	
16.	Hon. John Kiarie Waweru, MP.	
17.	Hon. John Munene Wambugu, MP.	
18.	Hon. Anthony Oluoch, M.P.	
19.	Hon. Robert Gichimu Githinji, M.P	



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COMMITTEE CLERK

**ANEEXURE 3**

**NEWSPAPER ADVERTISEMENT**



NEWS GENERAL

ECONOMIC CRIMES ACT

# Former KRA manager arrested over Sh38.7 million tax evasion

## EACC probes couple over unexplained wealth and assets of Sh600m in five years

MOSES ODHIAMBO  
@TheStarKenya



The Ethics and Anti-Corruption Commission yesterday arrested a former top KRA manager for allegedly evading tax amounting to Sh38.7 million.

The anti-graft agency has also been investigating Joseph Gikonyo over unexplained wealth and assets of about Sh600 million in five years.

CEO Twalib Mbarak in a statement said the commission has been probing the former KRA official alongside his wife Lucy Kangal and their company trading as Giche Limited.

The probe revealed that the officer - who is the director of Giche Limited, and his wife - accumulated the unexplained assets between 2010 and 2015.

"A civil suit was filed at the Anti-Corruption and Economic Crimes Division of the High Court for for-

feiture of the assets," the statement reads.

Director of Public Prosecutions Noordin Haji granted EACC consent to first prosecute the two on the tax evasion charge.

They will be charged with contravening taxation laws as well as violation of the Anti-Corruption and Economic Crimes Act.

"The suspects will be arraigned today to take plea," Twalib said in the statement to the press. The KRA manager's arrest came barely days after the EACC successfully prosecuted Sirisia MP John Waluke over a Sh300 million fraud at the National Cereals and Produce Board.

The lawmaker and his co-accused Grace Wakhungu were handed 67 years and 69 years in jail respectively. Waluke's case came in the wake of the state bolstering the anti-graft fight with a proposal which technically spares only a sitting president

from prosecution for graft.

The government has put before Parliament a proposal which would require all state officers charged with graft to vacate office for at least two years.

The amendments to ACEGA are contained in the Statutes Law (Amendment) Bill, 2020, which is at the committee stage.

EACC has restated that it will not relent in the fight against corruption and unethical conduct, more so by public and state officers.

"A clear demonstration of this is where we have arrested state and public officers irrespective of the positions they hold," Dr Dabir Masim said.

In his address to a virtual training of Corruption Prevention Committees of the University of Nairobi, the commissioner asked public officers to adhere to the law governing their work.

"The war against corruption must



Joseph Gikonyo, COURTESY

start from the top and be extended and felt at all levels of our society," he said.

"The values enshrined in Chapter Six of the Constitution should be inculcated in the minds and demonstrated in the actions and behaviour of all staff."

### WAS IN GOVERNOR'S PRESS UNIT

## Journalist Kemel succumbs to asthma attack

STAR REPORTER/ A Journalist working for Kericho county government died on Sunday after an acute attack of asthma.

Timothy Kemel was a Nation Media Group correspondent in the county before he joined the governor's press unit as a director.

He died on arrival at Siloam Hospital in Kericho town where he was rushed by fellow director in the press service Leonard Korir from his residence in Kericho.

Journalists mourned Kemel saying the county had lost a hard-working journalist.

The scribe hails from Fort Ternan in Kipkellon West constituency, Kericho.

An orphan, Kemel started his childhood education at Bethel Children's Home in Londiani in Kipkellon East constituency.

He attended Kericho High School for his secondary education.

He later joined Egerton University where he graduated with a bachelor's degree in communication.

His body lies at Siloam Hospital mortuary pending burial arrangements.

### PUBLIC PARTICIPATION

## Macharia at pains to explain new construction regulations

ALLAN KISIA/ Transport CS James Macharia yesterday struggled to convince senators that views of the public were incorporated in the National Construction Authority (Defects Liabilities) Regulations, 2020.

Macharia appeared before the Senate's Roads and Transport Committee where he said his ministry held discussions with institutions in the construction industry during the formulation of the regulations.

However, committee chair Khamani Wamatangi said the meetings could have been convened exclusively for professional bodies and not necessarily for wananchi.

"Was there public participation? If it was there, was it adequate? Was there an advert in the local dailies inviting people to give views on the regulations?" Wamatangi asked.

Meru Senator Mithika Linturi said

wananchi have been complaining that they were never consulted before the regulations were gazetted. "We want the ministry to explain how the regulations were effected without following due process."

The CS, however, said his ministry held meetings with institutions last year in December when it was formulating the regulations.

"We had meetings with the various institutions and I believe they represented a broad spectrum of stakeholders," he said.

The National Construction Authority (Defects Liability) Regulations introduced a defects liability period for commercial buildings that gives owners up to seven years to recall contractors to the sites for rectifications. The defects' liability period was also increased to a minimum of 12 months.



Transport CS James Macharia /FILE

### REPUBLIC OF KENYA



## NATIONAL ASSEMBLY TWELFTH PARLIAMENT - FOURTH SESSION

In the matters of consideration by the National Assembly:-

1. The Referendum (No.2) Bill (National Assembly Bill No.14 of 2020)
2. The County Law Compliance and Enforcement Bill (Senate Bill No.25 of 2018)

### SUBMISSION OF MEMORANDA

Article 118(1)(b) of the Constitution provides that, "Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees". Further, the National Assembly Standing Order 127(3) provides that, "the Departmental Committee to which a Bill is committed shall facilitate public participation and take into account the views and recommendations of the public when the Committee makes its report to the House".

The Referendum (No.2) Bill (National Assembly Bill No.14 of 2020) seeks to consolidate the law relating to conduct of referenda, to provide for a transparent and fair process in order to obtain a clear expression of the will of people, by establishing the procedures for the conduct of referendums, providing for the referendum committees and establishing a level playing field for the opposers and supporters of the referendum question, by providing for equal public funding and by limiting expenditure in a reasonable manner for the public good, to afford the people an opportunity to make decisions based on information from both points of view.

The County Law Compliance and Enforcement Bill (Senate Bill No. 25 of 2018) seeks to provide for the establishment of law enforcement and inspectorate units in each county and to provide for the administration and management of the units. Further, it will provide for a legal framework for the appointment, functions and a uniform code of conduct for the enforcement officers to ensure compliance with laws enacted by County Assemblies.

The above mentioned Bills have undergone First Reading pursuant to Standing Order 127(3) and stands committed to the Departmental Committee on Justice and Legal Affairs for consideration and thereafter report to the House.

Pursuant to the provisions of Article 118(1)(b) of the Constitution and Standing Order 127(3), the Committee invites interested members of the public to submit any representations they may have on the said Bills. The Bills can be accessed from the parliamentary website at [www.parliament.go.ke/the-national-assembly/news-business/bills](http://www.parliament.go.ke/the-national-assembly/news-business/bills).

The representations or written submissions may be forwarded to the Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi; hand-delivered to the Office of the Clerk, Main Parliament Buildings, Nairobi; or emailed to [clerk@parliament.go.ke](mailto:clerk@parliament.go.ke); to be received on or before Monday, 6th July, 2020 at 5.00 pm.

MICHAEL R. SIALAI, EBS  
CLERK OF THE NATIONAL ASSEMBLY





# **ANEEXURE 4**

## **STAKEHOLDERS SUBMISSIONS**





0791 801 536

info@kcpf.or.ke  
info.kcpf@gmail.com

www.kcpf.or.ke

14945 - 00800 Nairobi, Kenya  
Waumini House(New) 5th Floor,  
Waiyaki Way, Westlands

Tuesday, 21 July 2020

**Mr. Michael R. Sialai**  
Clerk of the National Assembly  
Parliament Buildings.  
P.O Box 4182 00100  
Nairobi, Kenya.

D/counts / DLS

21/7/20

Dear Sir,

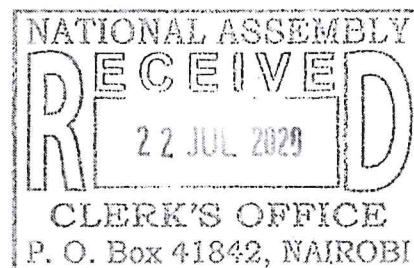
**REF: THE REFERENDUM BILL 2020 AND THE REFERENDUM BILL (NO.2) 2020**

The Kenya Christian Professionals Forum (KCPF) brings together Christian Professionals from various denominations sharing common values on Life, Family, Religion, Value- Based education and Governance. We provide professional and technical support in influencing the development of a legal and social environment that is supportive of biblical values. Our key partners are the Kenya Conference of Catholic Bishops (KCCB), National Council of Churches of Kenya (NCCCK) and the Evangelical Alliance of Kenya (EAK).

Attached to this letter, kindly find our concerns on the Referendum Bill 2020 and the Referendum Bill (No.2) 2020 Bill, 2019 and our Memorandum.

Yours Sincerely,

**VINCENT KIMOSOP**  
**SECRETARY**



Cc

**Chairperson,**  
Constitutional Implementation Committee.  
Parliament Buildings.  
P.O Box 4182 00100  
Nairobi, Kenya.

**Chairperson,**  
Departmental Committee on Justice & Legal Affairs  
Parliament Buildings.  
P.O Box 4182 00100  
Nairobi, Kenya.

## RECOMMENDATIONS TO THE NATIONAL ASSEMBLY

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### PART I:

**“A Bill for AN ACT of Parliament to provide for the procedure of the approval of an amendment to the Constitution by a referendum, the conduct of a referendum, referendum petitions and for connected purposes.”**

### INTRODUCTION

The Kenya Christian Professionals Forum (KCPF) is an organization that brings together Christian Professionals and Faith Based Institutions with shared values in Life, Family, Religion and Governance. We provide technical support to various institutions that share in our values in the country and beyond working on developing a society and culture that is based on biblical values. Our key partners include the umbrella bodies like Kenya Conference of Catholic Bishops (KCCB); National Council of Churches of Kenya (NCCK) and the Evangelical Alliance of Kenya (EAK).

Constitutions in developing countries are thoroughly transformative documents by necessity; no developing country wants to stay as it is.<sup>1</sup> We also have to remember that electoral regimes affect democratic performance by influencing popular perceptions of the political process, by shaping the party system and by determining the composition of governing organs.<sup>2</sup> Thus, elections are an integral part of democracies as instruments for delegation of authority from citizens to their representatives. This is the route that the country has taken, and it must be respected.

Currently, before the National Assembly, there are two Proposed Referendum Bills. Our observation of them indicates that there are few major differences between them. They are ideologically similar and have proposed little less divergent constitutional amendment provisions in relation to the Elections Act. It is noteworthy to point out that they are not a duplicate of each other.

We have reviewed the two Bills and we seek to make our comments on the same;

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<sup>1</sup> C Sustain, *Designing Democracy: What Constitutions Do*, Oxford, Oxford University Press (2001) p68.

<sup>2</sup> Walter Khobe Ochieng, *Journal of Law and Ethics*: Vol. 3, Kabarak Law School (2018) p2.

## **THE REFERENDUM BILL 2020 AND THE REFERENDUM BILL (NO.2) 2020**

These are two Bills were introduced by Members of Parliament Hon. Jeremiah Kioni (Member of the Constitutional Implementation and Oversight Committee) as a private member's Bill and Hon. William Cheptumo, who serves as the Chair of the Departmental Committee of Justice and Legal Affairs (JLAC) herein referred to as the "Referendum Bill 2020 and The Referendum Bill (No. 2) of 2020" respectively.

The principal objects of the Bills are to provide for the procedure of the approval of an amendment to the Constitution by way of a referendum, the conduct of a referendum, referendum petitions and consequential amendments to the Elections Act, No. 24 of 2011 which currently provide for the conduct of referendum procedures in Kenya.

The two Bills separately propound common amendments to the Elections Act number 24 of 2011, by repealing some sections and amending some sections.

We are concerned by the qualities of accountability, professionalism and governance in these two Bills. There are six (6) areas of divergence in the two Bills and the need to be harmonized or a common ground established, and they are;

- 1 Time frame for procedural processes;
- 2 Framing of referendum questions;
- 3 Annunciation of referendum results;
- 4 Security for costs in referendum petitions;
- 5 Multiple referendum questions; and
- 6 IEBC Voter registration, voter detail verification, voter details storage and back up.

## **PART II**

### **SUMMARY OF ISSUES AND OUR RECOMMENDATIONS**

The wording of the two Bills are inherently different in timeframes and procedural provisions in relation to when one process has to start and when it should end, how long it should take and what steps should the process go through.

Secondly, we have noted the difference as regards parallel referendum questions. One Bill provides for the procedure in case of multiple referendum questions while the other is silent on the issue. We appreciate the probability of a parallel referendum questions being fronted by the referendum

committees and thus, it will be our recommendation to have the position on the issue provided clearly by the referendum Bill.

Thirdly, KCPF is concerned about the IEBC signature collection, verification and back-up processes as concerns the referendum Bills. There is no set regulation published by IEBC on how they will verify signatures collected for this purpose and other connected purposes.

Lastly, KCPF is concerned with the timing of the referendum. Developed economies combine their referendum with general elections, for political and economic reasons. The economic aspect is to save on the national budget and politically, to attain stability within the countries.

The two Bills have different positions as regard the issues. The table below provides a summary of these issues;

THE REFERENDUM BILL 2020	THE REFERENDUM BILL(NO.2) 2020
<b>1 Annunciation of poll results</b>	
<p><b>Section 27 (1)</b> The Commission shall, on receipt of the results of the referendum from all constituencies and <b>within forty eight (48) hours</b> from close of the final polling in the referendum;</p> <ul style="list-style-type: none"> <li>a Announce to the public the total number of valid votes cast, supporting or opposing the referendum question</li> <li>b Declare whether the amendment to the constitution has been ratified by-:               <ul style="list-style-type: none"> <li>i At least twenty percent (20%) of the registered voters in each of at least half of the counties vote in the referendum;</li> <li>ii The amendment is supported by a simple majority of the citizens voting in the referendum;</li> </ul> </li> <li>c Publish a notice in the gazette indicating the results of the referendum in each constituency and;</li> <li>d Publish in the Gazette a certificate declaring the results of the referendum and confirming whether or not the amendment to the constitution has been</li> </ul>	<p><b>Section 5(11)</b> Upon conclusion of the referendum, the chairperson of the Commission shall certify to the president <b>within seven (7) days of declaration of referendum</b> results whether the Bill has been approved in the referendum.</p> <p><b>Section 5(12)</b> The president shall within 30 days of approval of the Bill assent to the Bill.</p>

ratified in accordance with the provisions of the Act and the Constitution.	
<p><b>Discussions on the part</b></p> <p>The time factor, as to when should the official results of a referendum poll be released and published to the public, is a great integrity issue. Delay of poll results have historically hinted at inconsistency in the final result. Having a clear set out time frame to which such volatile information is conveyed to the general public is the rubric of the entire poll process.</p> <p>The Constitutional Amendment Bill, 2020, gives a way straightforward approach in relation to time bound annunciation and publication of the poll results to the public, up to gazettelement of the same as final, to be finalized within 48 hours from receipt of the official results from all the constituencies.</p> <p>On the other hand, The Constitutional Amendment Bill (No.2) 2020 does not provide for an ambitious time frame to which poll results are to be announced and declared as final by the Commissioner responsible. It gives a rough timeline of seven (7) days, where within this time, the Chairperson of the Commission should declare whether the referendum question was approved or not. Further, the certification of the results of the poll, as per the Bill is to the President.</p> <p>There is need to harmonize the timeframes provided by the two Bills to a reasonably effective time frame. The competing inconsistencies on the two Bills, relating to the annunciation and gazettelement of the outcome of the polls should be brought back to a common ground, since the responsibility of all such processes and actions percolate back to the citizenry, who will be on the receiving end of the effect of the parliamentary decision in this matter.</p> <p><b>Recommendations</b></p> <p>The competing inconsistencies on the two Bills, relating to the annunciation and gazettelement of the outcome of the polls should be harmonized and thus;</p> <ol style="list-style-type: none"> <li>1. We recommend that the timeline for annunciation of referendum results should be not more than <b>48 hours</b> since close of polling.</li> </ol>	
<p><b>2 Framing of the referendum question</b></p>	
<p><b>Section 6 (2)</b> The Commission shall <b>within seven days</b> of receipt of the notice under subsection (1)<sup>3</sup> publish a question to be determined during a referendum in the Gazette and in electronic and print media of national circulation.</p>	<p><b>Section 9.</b></p> <p>8 Where the Commission —</p> <p>a receives a notification from the President under Article 256(5)(a) of the Constitution or</p> <p>(b) a draft Bill from the promoters of a popular</p>

<sup>3</sup> Section 6. (1) Of the Constitution Amendment Bill, 2020. The Commission shall conduct a referendum within ninety days of receipt of a notice under Article 256(5) (a) and Article 257(10) of the Constitution.

	<p>initiative under Article 257 of the Constitution, The Commission shall, <b>within twenty-one days</b>, frame the question or option to be determined during the referendum.</p>
<p><b>Discussions on the part</b></p> <p>The Constitutional Amendment Bill, 2020 gives the Commission seven (7) days after receipt of notice pursuant to Article 256 (5) or Article 257, within which they should frame the referendum question to be determined during the referendum and gazette the same for public information and knowledge.</p> <p>On the other hand, The Constitutional Amendment Bill (No. 2) 2020 gives the Commission a time frame of twenty-one (21) days within which they should formulate the referendum question.</p> <p><b>Recommendation</b></p> <p>The parity in defining and coming up with a referendum question is a matter of diligence and pro-activity in the wordings of the two Bills.</p> <p>1. We recommend having the Commission define and come up with a suitable referendum question within <b>twenty-one (21) days</b>. This will be in contemplation of a possibility of a referendum question review and approval by the relevant House of parliament, and the probability of parallel referendum questions.</p> <p>The timeline gives the Commission enough time to review the referendum question(s) before being gazetted.</p>	
<p><b>3 The procedure for a referendum question</b></p>	
<p><b>Section 6. (1)</b> The Commission shall conduct a referendum within ninety days of receipt of a notice under Article 256(5) (a) and Article 257(10) of the Constitution. (2) The Commission shall <b>within seven days of receipt</b> of the notice under subsection (1) publish a question to be determined during a referendum in the Gazette and in electronic and print media of national circulation.</p>	<p><b>Section 9. (1)</b> Where the Commission — 8 receives a notification from the President under Article 256(5)(a) of the Constitution or (b) a draft Bill from the promoters of a popular initiative under Article 257 of the Constitution, the Commission shall, <b>within twenty-one days</b>, frame the question or option to be determined during the referendum. (2) The Commission shall, within seven days after framing the question or option, refer the question or option to the relevant House for approval. (3) If the Parliament approves the question or option submitted under subsection (2), the</p>



	<p>Speakers of the two Houses shall jointly, within seven days, notify the Commission of the decision of the relevant House.</p> <p>....</p> <p>(8) Upon receiving the decision of the relevant House approving the question or option, the Commission shall, within seven days, publish the question or option in the Gazette and the electronic media and two newspapers of national circulation.</p>
<p><b>Discussions on the part</b></p> <p>The Constitutional Amendment Bill (No. 2) of 2020 provides under Section 9, the procedure before gazettment of the referendum question and publication to the public. It provides for reference of the referendum question to the relevant house of Parliament by the Commission, where the question will either be approved or sent back to the Commission for review before being published in the gazette. This is not silent in The Constitution Amendment Bill, 2020.</p> <p>There should be a harmony of processes between the two Bills. Whether the referendum question should be reviewed and approved by the relevant House of Parliament or will the Commission have the final say on the referendum question. The best democratic practice would be to have the referendum question reviewed by the relevant House before approval and publication on the Kenya Gazette.</p> <p>Further, Part 6(1)<sup>4</sup> of the Bill provides for a <b>90-Day</b> time period within which the Commission should conduct a referendum after receipt of Notice under Articles 256(5)(a) or Article 257(10) of the Constitution of Kenya 2010.</p> <p><b>Recommendations</b></p> <p>It is our recommendation that the <b>90-Day</b> period is short and should be amended to reflect the proposals we have put forth on the questions of;</p> <ul style="list-style-type: none"> <li>i      <b>Parallel referendum questions</b> – <i>There is need to create time and resources to satisfy the occurrence of concurrent referendum questions and the much-needed public participation.</i></li> <li>ii     <b>Costs and budgeting issues</b> -<i>The process and hurdles of setting aside funds and resources for the referendum should be factored in alongside the public participation timelines provided under the two Bills. These are aimed at reducing the costs of the process and proper election budgeting.</i></li> <li>iii    <b>Need to match the referendum with the next coming General Election.</b></li> </ul>	

<sup>4</sup> The Referendum Bill, 2020.

The Council of Governors,

**In recognition** of Article 1(4) of the Constitution of Kenya, that sovereign power of the people is exercised at the national level and the county level;

**In further recognition** of Article 6 (2) that Governments at the national and county levels are distinct; and

**Aware** of the need for coordination and consultation between the National Government and County Governments to ensure that legislation responds to the key issues facing devolution, and further reflects the spirit and objects of devolution.

The Council hereby makes the following proposals on the Referendum Bill, 2020:

**A. GENERAL COMMENTS**

The Council of Governors supports the Bill in view of the fact that it seeks to consolidate the law relating to the conduct of referenda as currently there exists no legal framework to govern the same. The Council however notes that the bill fails to address the following key issues;

1. The threshold required of the signature verification exercise.
2. The Bill does not give timelines for the preliminary processes like collection of signatures and signature verification by the Commission
3. The format for the submission of signatures
4. Redress mechanisms for persons who collect signatures that do not meet the required threshold.
5. Modalities for processing the Bill at the County Assembly i.e public participation and involvement of the public.
6. What happens where a County Assembly fails to introduce and consider the Bill after it has been submitted to it?
7. The bill fails to give a framework for conducting a local referendum in the Counties.

**B: SPECIFIC COMMENTS**

Section of the Bill	Provision of Clause in the Bill	Proposed Amendment	Rationale for Amendment and Recommendation
Clause 5(1)	<p>5(1) For purposes of a referendum to amend the Constitution by popular initiative pursuant to Article 257 of the constitution, the promoters of the popular initiative shall collect not less than one million signatures of registered voters, of whom-</p> <p>(a) not more than one third shall be from one County</p> <p>(b) voters in at least twenty four counties shall be represented.</p>	<p>5(1) For purposes of a referendum to amend the Constitution by popular initiative pursuant to Article 257 of the constitution, the promoters of the popular initiative shall collect not less than one million signatures of registered voters from at least twenty four counties.</p>	<p>To enable representation from more than half of the Counties.</p>
Clause 5(3)(a)	<p>(3) Upon receipt of the list of supporters under subsection (2), the commission shall-</p> <p>(a) verify that the initiative is supported by at least one million registered voters and meets the criteria set out under subsection (1).</p>	<p>(3) Upon receipt of the list of supporters under subsection (2), the commission shall-</p> <p>(a) <b>within a period of 3 months</b>, verify that the initiative is supported by at least one million registered voters and meets the criteria set out under subsection (1).</p>	<p>It is imperative to have timelines within which the Commission has to verify signatures.</p>
Clause 9(2)	<p>(2) the commission shall, within seven days after framing the question or option refer the question or option to the relevant house for approval.</p>	<p>Amend to provide clarity on which is the relevant house.</p>	<p>It is important to define which is the relevant house to avoid confusion as to whether it is the National Assembly or the Senate.</p>

<p>Procedure before conduct of a referendum</p>		<p>Delete sub clause.</p>	
<p>Clause 13(2) Costs of referendum Committee</p>	<p>Where public money is used to finance the activities of the referendum committee, it shall be distributed equally amongst the registered referendum committees</p>		<p>Costs of financing the committees has already been provided under sub clause 1. It is the responsibility of the promoters of the bill to settle the costs.</p>
<p>Clause 16(2)a Election petition procedures to apply to referendum petition.</p>	<p>(2) A petition- (a) to question the validity of a referendum shall be filed within twenty eight days after the date of declaration of the results of the referendum and served within fifteen days of presentation.</p>	<p><b>Amend to read as follows:</b> 2) A petition- (a) to question the validity of a referendum shall be filed within twenty eight days after the date of declaration of the results of the referendum and served within <b>seven</b> days of presentation.</p>	<p>Petition should be served within 7 days to enable sufficient time for parties to prepare for the case.</p>
<p>Clause 16(2) (b)</p>	<p>(b) to seek a declaration concerning any matter relating to the referendum shall be presented within twenty eight days after the proclamation of the referendum or occurrence of the event complained against whichever is later.</p>	<p><b>Amend to read as follows:</b> b) to seek a declaration concerning any matter relating to the referendum shall be presented within twenty eight days after the proclamation of the referendum or occurrence of the event complained against whichever is later. The petition should be served within <b>seven</b> days of presentation</p>	<p>Petition should be served within 7 days to enable parties prepare before hand</p>
<p>Clause 18(c)</p>	<p>18(1)a referendum petition may be presented in the high court by- (c)the Commission</p>	<p><b>Delete clause</b></p>	<p>In the conduct of a referenda the commission should act as a neutral</p>

Persons who may present referendum petition			arbitrator and as such should not be allowed to file a petition.
Clause 20(2) Filing of a referendum petition	20(2) Whenever a referendum petition is presented under this section, the Registrar of the High Court shall in writing, inform the commission of the filing of the petition.	<b>Amend (c) to read as follows:</b> 20(2) Whenever a referendum petition is presented under this section, the Registrar of the High Court shall <u>within 3 days</u> in writing, inform the commission of the filing of the petition	Timelines should be stipulated within which the Registrar should inform the commission in writing to enable adequate preparation.
Clause 27 Powers of the court to summon witnesses in a referendum petition.	All reasonable expenses incurred by a person attending at or appearing before the High Court to give evidence as a witness at the trial of a referendum petition shall be paid to such person according to the scale allowances and expenses appropriate in civil proceedings before the High Court.	All reasonable expenses incurred by a person attending at or appearing before the High Court to give evidence as a witness at the trial of a referendum petition shall be paid to such person <b>by the petitioner</b> according to the scale allowances and expenses appropriate in civil proceedings before the High Court.	It is prudent for the bill to specify who is supposed to pay the cost of the witnesses to attend the meeting.
Clause 30(6) Powers of the court	(6) where the High Court declares a referendum void, the Commission shall conduct a fresh referendum within sixty days of the declaration.	(6) where the proceedings relate to the conduct of the referendum and the High Court declares a referendum void, the Commission shall conduct a fresh referendum within sixty days of the declaration.	Referendum should only be held of the nature of the petition was challenging the conduct of the petition. If the petition was challenging the legality/validity of the petition then it would be unnecessary to conduct the same.



Annexure 4



# INTER-RELIGIOUS COUNCIL of KENYA

MEMORANDUM TO THE  
CONSTITUTIONAL IMPLEMENTATION OVERSIGHT COMMITTEE  
THE NATIONAL ASSEMBLY  
ON  
THE REFERENDUM BILL (NATIONAL ASSEMBLY BILL NO 11 OF 2020)

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16<sup>TH</sup> JULY 2020

## Memorandum on The Referendum Bill No. 11 of 2020

### A. Preamble

The Inter-Religious Council of Kenya (IRCK) appreciates the opportunity to present this memorandum making input on the Referendum Bill No. 11 of 2020. This follows the publication of the call for public participation in line with Article 118(1)(b) of the Constitution of Kenya 2010.

### B. Dialogue Reference Group

Established in 1983 and registered as a society in 2005, the Inter-Religious Council of Kenya (IRCK) is a coalition of the main faith communities in Kenya that mobilizes their joint efforts to address shared concerns through inter-faith dialogue and collaboration.

The Inter-Religious Council of Kenya is constituted by the following faith communities:

- Evangelical Alliance of Kenya (EAK)
- Hindu Council of Kenya (HCK)
- Kenya Conference of Catholic Bishops
- National Council of Churches of Kenya (NCCK)
- National Muslim Leaders Forum (NAMLEF)
- Organisation of African Instituted Churches (OAIC)
- Seventh Day Adventist Church (SDA)
- Shia Community
- Supreme Council of Kenya Muslims (SUPKEM)

The IRCK appreciates the development and processing of the Referendum Bill No 10 of 2020 since it provides a framework for effecting constitutional reforms that require referenda. IRCK is pleased to present the following observations and recommendations on the Referendum Bill No 11 of 2020.



**C. SPECIFIC COMMENTS ON THE REFERNDUM BILL NO. 11 OF 2020**

From the foregoing, the Inter-Religious Council of Kenya requests that these proposal be reconsidered urgently before enactment of the law.

Clause	Subject matter	Proposal	Rationale
2	Definition of "referendum"	Expand as follows:  Referendum is a direct and universal vote in which an entire electorate is invited to vote on a proposed constitutional amendment or any other matter of national or county importance.	The proposal is very narrow. Referendums can be held for issues other than Constitutional Amendments
4(4)	Verification of signatures	Propose that the period for verification of signatures be shortened to thirty (30) days.	90 days is too long, and only serves to delay the process unnecessarily. The extra 60 days can be allotted to civic education.
5(7)	Threshold for passing of the bill in the County Assemblies	The draft bill reads "The threshold for voting in a County Assembly in respect of a draft bill shall be a majority of the members of the County Assembly".  We propose the word "threshold for voting in a County Assembly in respect of a draft bill" be deleted and be replaced with the words "threshold for passing of the draft bill in the County Assembly".	Threshold for voting can be interpreted to mean "those necessary to form a quorum for a vote to be taken" and therefore does not give clarity to the threshold for passing of the draft bill.

Clause	Subject matter	Proposal	Rationale
35(2)(3) & (4).	Security for costs of a petition	Delete these provision.	Setting a requirement for security for costs of a petition, is a barrier to access to justice and therefore unconstitutional.
38(1)(b)	Hearings in open court	Amend to include virtual hearings.	The Covid-19 pandemic has introduced virtual hearings as the new normal in Kenya. It also speeds up hearings and reduces costs for the petitioners.
38(3)	Witnesses	Delete provisions requiring witnesses to tender evidence that incriminates them.	<p>This provision is unconstitutional. One cannot be forced to give self-incriminating evidence. Article 50 provides adequate protections and gives one the right to refuse to give self-incriminating evidence.</p> <p>The proposed certificate of indemnity is also illegal. Why should the law shield a criminal?</p>
41(3) & (4)	Transmission of judgment and certificate of conclusion of petition by registrar of the High Court.	<p>The Bill should provide a timeline within which the Registrar is to transmit the certified copy any decisions made by the High Court as well as the certificate at the conclusion of the proceedings.</p> <p>We propose a timeline of not more than 3 days.</p>	This will enhance efficiency and avoid unnecessary delays.

Clause	Subject matter	Proposal	Rationale
42	Costs following the petition.	We propose the inclusion of a rider that the costs should not be punitive, and in any event should not exceed Kenya Shillings Five Hundred Thousand. (Kshs. 500,000/-)	Election petition costs have been very punitive in the past, to the extent that it becomes a deterrent. There is need to control the amounts awardable. The high costs awarded have become a barrier to access to justice.
43	Voting by persons with special needs.	This seems misplaced, it should be moved to the part of the Act that deals with voting.	It improves the flow and structure of the Act.
45	Regulations	We propose that the Bill provides timelines for enacting regulations.	It would be unfortunate to have a referendum in the absence of regulations. Trends confirm that regulations usually take far too long to be enacted. Timelines would instill a sense of urgency and cure such delay.
5(d) Code of Conduct	Campaigning in Churches and funerals	It should be clarified that religious leaders may address their flock on the issues in the referendum, and that such addresses will not amount to an infraction of the Code.	The pulpit is a religious leader's domain, and the main place for addressing their members on matters of import in their lives including such as would be addressed through a referendum.
10 Code of Conduct	Peace Committees.	This is a good inclusion however it should be provided for in the Act, which shall clarify the composition and powers of the peace committees.	It is a substantive provision, and needs to draw validity from the statute itself, and not derive its origin in the Code.

Feedback or request for additional information regarding this memorandum may be channeled to the IRCK Executive Director **Dr. Francis Kuria** through **fkuria@interreligiouscouncil.or.ke**

**Signed**

**For Inter-Religious Council of Kenya**

**Rev. Fr. Joseph Mutie**

A handwritten signature in black ink, appearing to be 'J. Mutie', written over a horizontal line.

**Chairman**

**IRCK Executive Committee**