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REPUBLIC OF KENYA

KENYA NATIONAL ASSEMBLY

TENTH PARLIAMENT – THIRD SESSION, 2009

THE REPORT OF
THE PARLIAMENTARY SELECT COMMITTEE
ON
THE REVIEW OF THE CONSTITUTION

ON
THE NOMINATION OF JUDGES OF THE INTERIM
INDEPENDENT CONSTITUTIONAL DISPUTE RESOLUTION
COURT (IICDRC)

OCTOBER 2009

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PREFACE

Mr. Speaker, Sir,

The Interim Independent Constitutional Dispute Resolution Court (IICDRC) is established pursuant to the provisions of Section 60A of the Constitution introduced following the enactment of the Constitution of Kenya (Amendment) Act (No. 10 of 2008). The establishment of IICDRC is part of the constitutional and electoral reforms which were proposed by the National Dialogue and Reconciliation Committee that was formed to facilitate mediation talks after the political crisis triggered by the disputed 27 December 2007 General elections.

The urgent need to complete the comprehensive review of the Constitution which stalled after the November 2005 referendum was ranked high in the strategies to address underlying causes of the post-election conflict in the country. Subsequently the Coalition Government established after the signing of the National Accord and Reconciliation Agreement fast tracked the implementation of the review of the Constitution by enacting the Constitution of Kenya Review Act (No. 9 of 2008) and the Constitution of Kenya (Amendment) Act (No. 10 of 2008).

The Acts provide for the framework for the completion of the constitutional review process through setting up of organs to effect it, and the time frames for which the various activities of the review process should be undertaken.

The Constitution of Kenya Review Act (2008) provides for the establishment of the Parliamentary Select Committee on the Review of the Constitution and the Committee of Experts as organs of the constitutional review process.

The Constitution of Kenya (Amendment) Act (2008) provides for the setting up of other bodies of the review process, namely, the Interim Independent Electoral Commission (IIEC), the Interim Independent Boundaries Review Commission (IIBRC) and the Interim Independent Constitutional Dispute Resolution Court (IICDRC).

The Parliamentary Select Committee was constituted through a resolution of the House on Wednesday, 17 December 2008, and consists of the following twenty seven (27) members-

The Hon. Mohammed Abdikadir, M.P. - Chairperson
The Hon. Ababu Namwamba, M.P. - Vice-Chairperson
The Hon. Martha Karua, M.P.
The Hon. Uhuru Kenyatta, M.P.
The Hon. Mutula Kilonzo, M.P.
The Hon. David Musila, M.P.
The Hon. Moses Wetangula, M.P.

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The Hon. Danson Mungatana, M.P.
The Hon. Wilfred Moriasi Ombui, M.P.
The Hon. Kambi Kazungu, M.P.
The Hon. Amina Abdallah, M.P.
The Hon. Peter Munya, M.P.
The Hon. Mwangi Kiunjuri, M.P.
The Hon. Jeremiah Kioni, M.P.
The Hon. Ekwee Ethuro, M.P.
The Hon. Isaac Ruto, M.P.
The Hon. Musalia Mudavadi, M.P.
The Hon. Chachu Ganya, M.P.
The Hon. Najib Balala, M.P.
The Hon. Omingo Magara, M.P.
The Hon. Sally Kosgei, M.P.
The Hon. William Samoei Ruto, M.P.
The Hon. James Orengo, M.P.
The Hon. Millie Odhiambo, M.P.
The Hon. Sophia Abdi, M.P.
The Hon. Joseph Nkaisery, M.P.
The Hon. Charity Ngilu, M.P.

The functions of the Parliamentary Select Committee include: recommendation of qualified persons for nomination to the four bodies to give effect to the constitutional review process.

Mr. Speaker Sir, the reports of the Parliamentary Select Committee on the nomination of members of the Committee of Experts, the IIEC and the IIBRC have been discussed and approved by the House.

Pursuant to the provisions of section 60A (2) (b) of the Constitution, the Parliamentary Select Committee advertised for applications for the positions of Judges of the IICDRC which were published in the daily newspapers on Friday, 9 January 2009 and on Wednesday, 14 January 2009. The deadline for receiving the applications was Friday, 30 January 2009.

The Parliamentary Select Committee received 141 applications which it processed with the assistance of a human resource firm, M/S Manpower Services (K) Ltd. The Committee shortlisted sixteen candidates who undertook a written and an oral interview. The written interview was administered with the assistance of three law lecturers from the School of Law, University of Nairobi.

After consideration of the applications, the Committee nominated the following six (6) candidates for appointment as judges pursuant to the provisions of Section 60A (2)(b) of

the Constitution. The decision to nominate the six candidates was arrived at by consensus:-

1. Mr. S.N. Mukunya
2. Ms. Violet Khadi Mavisi
3. Ms. Scholastica Omondi
4. Ms. Jamilla Mohamed
5. Mr. Sankale ole Kantai
6. Mr. Mburugu M'Nkanata Kioga

Pursuant to the provisions of section 60A (2) (a) of the Constitution, the Committee requested and received five names of nominees as Judges from the Panel of Eminent African Personalities. The Committee recommended the following three persons for appointment as Judges of the IICDRC.

1. Mr. Michel Bastarache
2. Ms. Unity Dow
3. Mr. John Alistair Cameron, Lord Abernethy

The Committee therefore recommends the following nine (9) individuals to be appointed as Judges of the Interim Independent Constitutional Dispute Resolution Court-

1. Mr. S.N. Mukunya
2. Ms. Violet Khadi Mavisi
3. Ms. Scholastica Omondi
4. Ms. Jamilla Mohamed
5. Mr. Sankale ole Kantai
6. Mr. Mburugu M'Nkanata Kioga
7. Mr. Michel Bastarache
8. Ms. Unity Dow
9. Mr. John Alistair Cameron, Lord Abernethy

Mr. Speaker Sir, let me take this opportunity to thank the Members of the Select Committee for their commitment, sacrifice, hard work and cooperation. I applaud their endurance when they had to work tirelessly and for long hours during the selection process of the candidates and to complete other tasks necessary for the successful production of this report.

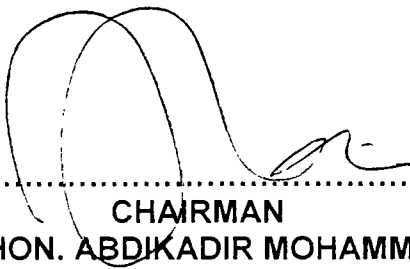
I also take this opportunity to sincerely thank the offices of the Speaker and the Clerk of the National Assembly for the necessary support, guidance and co-operation that have enabled the Parliamentary Select Committee to efficiently execute its mandate and functions.

Similarly, I wish to sincerely thank Manpower Services (K) Ltd for the assistance which has enabled the Committee to work efficiently in processing the applications and contributed immensely to the timely production of this report.

Mr. Speaker, Sir, on behalf of the Parliamentary Select Committee, I now have the honour and pleasure to present this Report on the recommendations of nominees to the Interim Independent Constitutional Dispute Resolution Court for consideration and adoption by the House.

Thank You.

Signed



CHAIRMAN
(HON. ABDIKADIR MOHAMMED, MP)

Date:

26th Oct 2009.

1.0 INTRODUCTION

1. The National Dialogue and Reconciliation Committee that was formed to spearhead mediation talks following the post-election violence experienced in Kenya in early 2008 deliberated under Agenda Item Four on the underlying root causes of the post-election conflict and the periodic ethnic clashes in the country and particularly during election time. The post-election crisis was sparked off by the General Elections of 27 December 2007 and the subsequent disputed presidential election results.
2. The National Dialogue and Reconciliation Committee noted that the long-standing unresolved issues and historical injustices caused the post-election turmoil in the country. Subsequently, the Reconciliation Committee underscored the critical need to complete the comprehensive review of the Constitution to address the problems behind the violence. The comprehensive constitutional review process stalled after the referendum of November 2005.
3. To provide the framework for the completion of the review of the Constitution, the Coalition Government formulated for enactment the Constitution of Kenya Review Act (No. 9 of 2008) and the Constitution of Kenya (Amendment) Act (No. 10 of 2008). The two Acts provide for the setting up of bodies to give effect to the completion of the review of the Constitution, namely-
 - i) the Parliamentary Select Committee on the Review of the Constitution;
 - ii) the Committee of Experts;
 - iii) the Interim Independent Electoral Commission (IIEC);
 - iv) the Interim Independent Boundaries Review Commission (IIBRC); and
 - v) the Interim Independent Constitutional Dispute Resolution Court (IICDRC).

The PSC has already nominated members to other bodies related to the review process, namely, the COE, the IIEC and the IIBRC.

This report relates to the functions of the Parliamentary Select Committee on the Review of the Constitution on the nomination of judges to the IICDRC pursuant to section 60A of the Constitution. The IICDRC is provided for by the Constitution of Kenya (Amendment) Act (No. 10 of 2008).

The Interim Independent Constitutional Dispute Resolution Court was established to adjudicate matters emanating from the constitutional review process. The function was formerly undertaken by the High Court of Kenya.

2.0 THE ESTABLISHMENT OF THE INTERIM INDEPENDENT CONSTITUTIONAL DISPUTE RESOLUTION COURT (IICDRC)

1. The Interim Independent Constitutional Dispute Resolution Court (IICDRC) is a temporary court established pursuant to the provisions of section 60A which was introduced in the Constitution following the enactment of the Constitution of Kenya (Amendment) Act (No. 10 of 2008). The establishment of the IICDRC follows recommendations of the National Dialogue and Reconciliation Committee that mediated the political crisis occasioned by the disputed December 2007 General elections and by the Independent Review Commission (IRC).
2. Section 60A (2) of the Constitution empowers the Parliamentary Select Committee to nominate persons to be appointed Judges to the IICDRC based on the qualifications stipulated in section 60A (4) which states as follows-

A person shall be qualified to be appointed a judge of the Court if he-

- a) is, or has been, a judge of a court having unlimited jurisdiction in civil and criminal matters within the Commonwealth; or***
 - b) is an advocate of the High Court of Kenya of not less than ten years standing; and***
 - c) is a person of high moral character and integrity.***
3. Section 60A (2) of the Constitution also requires that the IICDRC comprises nine judges consisting of three non-citizens of Kenya nominated from Commonwealth countries and six Kenya citizens. All the judges are to be nominated by the Select Committee for approval by the National Assembly and to be appointed by the President in consultation with the Prime Minister.
 4. The function of the IICDRC, pursuant to the provisions of Section 60A (1) is **‘to hear and determine all and only matters arising from the constitutional review process’**.
 5. Pursuant to the provisions of section 60A (2) of the Constitution the Parliamentary Select Committee advertised for applications for the position of judges in the daily newspapers of Friday, 9 January 2009 and Wednesday, 14 January 2009. Interested candidates were required to submit their applications by Friday, 30 January 2009.
 6. The Parliamentary Select Committee deliberated on applications for nomination to the Committee of Experts, the IIEC and the IIBRC in that order. The reports of

the Committee relating to the three bodies have already been adopted by the House and the nominees appointed to the respective bodies by the President after consultation with the Prime Minister.

7. At its sitting of Tuesday, 19th May 2009, the Committee shortlisted sixteen candidates from a total of one hundred and forty one (141) who had applied to be considered for positions of judges of the IICDRC. The candidates undertook a written interview conducted on 5th October 2009 followed by oral interviews on 12th October 2009. The written interview was administered with the assistance of three law lecturers from the School of Law at the University of Nairobi.
8. After consideration of the results of both components of the interview, on 12th October, 2009 the Parliamentary Select Committee nominated, by consensus, the following persons for appointment as judges of the Interim Independent Constitutional Dispute Resolution Court-

1. Mr. S.N. Mukunya
2. Ms. Violet Khadi Mavisi
3. Ms. Scholastica Omondi
4. Ms. Jamilla Mohamed
5. Mr. Sankale ole Kantai
6. Mr. Mburugu M'Nkanata Kioga
7. Mr. Michel Bastarache (Canada)
8. Ms. Unity Dow (Botswana)
9. Mr. John Alistair Cameron, Lord Abernethy (United Kingdom)

9. The Parliamentary Select Committee on the Review of the Constitution therefore presents to the House this report on recommendation of nominees to the Interim Independent Constitutional Dispute Resolution Court (IICDRC) for consideration and approval pursuant to section 60A (2) of the Constitution.

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