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THE NATIONAL ASSEMBLY

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ELEVENTH PARLIAMENT – FOURTH SESSION  
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CONSTITUTIONAL IMPLEMENTATION OVERSIGHT COMMITTEE (CIOC)

**Report of the Constitutional Implementation Oversight Committee (CIOC) on  
Consideration of Petition by Major (Rtd.) Joel Kiprono Rop concerning the need for  
Parliament to harmonize all existing Draft Proposals for amending the Constitution into  
One Hybrid Draft Bill for National Referendum**

Clerk's Chambers,  
National Assembly  
Parliament Buildings  
NAIROBI-KENYA

MAY, 2016

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## **LIST OF ABBREVIATIONS**

AG	Attorney-General
CDF	Constituency Development Fund
CIC	Commission for the Implementation of the Constitution
CIOC	Constitutional Implementation Oversight Committee
CoG	Council of Governors
EACC	Ethics and Anti-Corruption Commission
JMVB	Judges and Magistrates Vetting Board
JSC	Judicial Service Commission
MGDAs	Ministries, Government Departments and Agencies
NLC	National Land Commission
IEBC	Independent Electoral Boundaries Commission
KLRC	Kenya Law Reform Commission
WDF	Ward Development Fund



## FOREWORD BY THE CHAIRMAN

Major (Rtd.) Joel Kiprono Rop of Identification Number 1375007 and a resident of Bomet County petitioned the National Assembly through the Speaker of the National Assembly pursuant to Standing Order 220(1)(a) to take over the process of amending the Constitution by using all existing draft proposals and produce one comprehensive hybrid draft for National Referendum. The Petition was forthwith committed to the Constitutional Implementation Oversight Committee for consideration and the Committee was required to a report to the House and to the Petitioner in accordance with the National Assembly Standing Order 227(2).

From the onset, the Committee was alive to the provisions of Articles 256 and 257 of the Constitution initiating amendments to the Constitution either through a "parliamentary initiative" "popular initiative" respectively.

The Committee developed a work-plan on the consideration of the Petition. The Committee resolved to invite the petitioner (Major (Rtd) Joel Kiprono Rop) to an "Open Consultative Forum" where all the key proponents of proposals to amend the Constitution namely: the Council of Governors (*Pesa Mashinani Referendum Campaign*), the Okoa Kenya Secretariat, "*Punguza Mzigo Referendum Campaign*", "*Boresha Katiba Initiative*" and the general public were invited both by way of newspaper adverts and sending of correspondences to the key institutions. The Committee also asked any member of the public to submit memoranda.

The Committee hosted a "Open Consultative Forum" with interested Members of the Public on 23rd March, 2016 in the County Hall Mini-Chamber. The Committee received presentations from the Petitioner, (Major (Rtd.) Joel Kiprono Rop/Tunza Kenya Initiative), Punguza Mzigo Initiative (The Hon. Moses Kuria, MP) and Mr. Njoroge Waweru (a Member of the Public). The Committee also met with the Boresha Katiba Initiative on Tuesday 12th April, 2016. Though the Committee invited the Okoa Kenya Secretariat and the Council of Governors, they did not honour the Committee's invitation. However, the Committee relied on documented evidence of the issues being canvassed by the two forums.

After extensive deliberations by the Committee and based on the presentations made by the Petitioner on the Tunza Kenya Initiative, the Punguza Mzigo Initiative, Mr. Njoroge Waweru, (a

member of the public) and the Boresha Katiba Initiative and findings from the research on the proposed amendments to the Constitution by the Okoa Kenya Initiative and the Pesa Mashinani Initiative, the Committee observed that: the constitutional reform agenda is alive; the proposed amendments to the Constitution although are variant, converge in principle that some amendments are required to the Constitution, to highlight just but a few: on the reduction of the number of counties and constituencies; increase of the county revenue allocation; basis for calculating the revenue allocations to county governments; the sharing of natural resources between the national government, county government and the community from which the natural resources have been extracted; increase of retirement age of judges; and, establishment of the Constituency Development Fund and Ward Development Fund. The Committee further observed there is need to develop a hybrid consolidated Bill noting the convergence on many of the proposals for amendment of the Constitution by the Petitioner and the various Initiatives to amend the Constitution. The Committee also observed that indeed there are provisions in the Constitution that require to be reviewed. However, the Committee is of the view that this should be done once an audit and review on the Constitution has been undertaken.

In view of the foregoing, and taking into account the provisions of the Constitution, the Petition to Parliament (Procedure) Act and the Standing Orders of the National Assembly, the Committee recommends that a legislative mechanism be established to review and audit the Constitution of Kenya, 2010; a copy of this Report be forwarded to the Petitioner as provided for under the National Assembly Standing Order 228; and, a referendum law be developed expediently to provide for a legal/statutory framework for undertaking and governing the referendum process under Article 255(2) of the Constitution.

The Committee acknowledges the support of the office of the Speaker of the National Assembly, and that of the Clerk in facilitating the committee's operations

It is my pleasant duty and privilege, on behalf of the Committee, to present this Report to the House for consideration and approval.

**The Hon. Njoroge Baiya, MP,**  
**Chairperson, Constitutional Implementation Oversight Committee**



## EXECUTIVE SUMMARY

The Committee was tasked to consider a Petition concerning the need for Parliament to harmonize all existing proposals for amending the Constitution. The Committee was alive to the provisions of Articles 256 and 257 of the Constitution initiating amendments to the Constitution either through a "parliamentary initiative" or "popular initiative" respectively. The Committee resolved to have an "Open Consultative Forum" where all the major proponents of proposals to amend the Constitution namely: Pesa Mashinani Referendum Campaign (the Council of Governors), the Okoa Kenya (Okoa Kenya Secretariat), Punguza Mzigo Referendum Campaign (led by Hon. Moses Kuria), Boresha Katiba Initiative (led by Hon. Asman Kamama) and the general public were invited. The Committee also asked any member of the public to submit memoranda. The Committee observed that: most of the proposed amendments to the Constitution although they vary, they converge in principle for example the proposals to:- reduce the number of counties and constituencies; increase county revenue allocation; alter the basis for calculating the revenue allocations to county governments; increase the retirement age of judges; provide for Constituency Development Fund and Ward Development Fund in the Constitution; and review the number of constitutional commissions and their membership among others. A key finding of the Committee is that most of the proposed amendments to the Constitution by the various Initiatives relate to the matters listed in Article 255 of the Constitution and therefore would require to be approved by a referendum. however, some of the proposed amendments by the various proponents may not necessarily require constitutional amendments but would pass for policy formulation. Notwithstanding the above observations, the Committee notes that constitutional reform agenda is alive. In view of this, the National Assembly should undertake a review of the Constitution with a special reference to the proposals highlighted by the various proponents of the amendment proposals to the Constitution. The review should be the basis of whether amendments to the Constitution would be necessary or not. For an effective, review, it should be guided by a legislative framework.

## **MANDATE OF THE COMMITTEE**

The Constitutional Implementation Oversight Committee (CIOC) is a constitutional parliamentary Select Committee constituted under section 4 of the Sixth Schedule to the Constitution. The Committee is responsible for overseeing the implementation of this Constitution. The Committee also used to get reports from the Commission on the Implementation of the Constitution Commission on the preparation of the legislation required by the Constitution and on any impediments to the process of implementing this Constitution.

In discharging this mandate, the Committee coordinates with the Office of the Attorney-General, Kenya Law Reform Commission, concerned Ministries, Government Departments and Agencies (MGDAs) and relevant parliamentary committees to ensure the timely introduction and passage of the legislation required by the Constitution within the specified constitutional time frame. The Committee also takes appropriate action on the reports including addressing any problems in the implementation of the Constitution.

## MEMBERS OF THE COMMITTEE

<b>Chairperson</b>	Hon. Njoroge Baiya, MP,
<b>Vice Chairperson</b>	Hon. Moitalel Ole Kenta, MP
<b>Members</b>	Hon. Ababu Namwamba EGH, MP
	Hon. Samuel K. Chepkonga, MP
	Hon. Sabina Wanjiru Chege, MP
	Hon. Manson Nyamweya, MP
	Hon. Benson M. Kangara, MP
	Hon. Omulele Christopher, MP
	Hon. Grace Jemutai Kiptui, MP
	Hon. Rose Rwamba Mitaru, MP
	Hon. David Kangogo Bowen, MP
	Hon. Protus Akuja, M.P.
	Hon. Sakwa J. Bunyasi, MP
	Hon. Abdul Rahim Dawood, MP
	Hon. Peter N. Gitau, MP
	Hon. Humphrey K. Njuguna, MP
	Hon. James Lomenen, MP
	Hon. Mahamud, M. Maalim, MP
	Hon. Shakila Abdalla, MP
	Hon. Alice Muthoni Wahome, MP
	Hon. (Dr.) Dahir Duale Mohammed, MP
	Hon. Boniface O. Otsiula, MP
	Hon. Mary Wambui Menene, M.P
	Hon. Aramat Lemanken, MP
	Hon David Gikaria, MP
	Hon. John Lodepe Nakara, MP
	Hon. Steven Kariuki, MP



## LIST OF RECOMMENDATIONS

1. a review and audit of the Constitution be undertaken with a special reference to the provisions and issues highlighted by the respective proponents of the amendment proposals outlined in this Report and the recommendations of the Working Group on Social Economic Audit of the Constitution of Kenya 2010, and that the review and audit be used to guide amendments to the Constitution.
2. in view of paragraph (a) above, a legislative framework be developed to guide the review process.
3. the Constitutional Implementation Oversight Committee oversight the review and audit in line with its constitutional mandate on oversight over implementation of the Constitution
4. a copy of this Report be forwarded to the Petitioner in line with the provisions of the National Assembly Standing Order 228.

## INTRODUCTION

### 1.1 Presentation and Committal of the Petition to the Committee

On 8<sup>th</sup> December, 2015, Major (Rtd.) Joel Kiprono Rop of ID Number 1375007 a resident of Bomet County petitioned the National Assembly pursuant to Standing Order 220(1)(a) and prayed that Parliament takes over the process of amending the Constitution by using all existing draft proposals to consolidate and produce one comprehensive hybrid draft for National Referendum.

On 10<sup>th</sup> February 2016, the Speaker of the National Assembly presented to the House the said Petition by Major (Rtd.) Joel Kiprono Rop on the above subject matter pursuant to Article 119 of the Constitution, Standing Order 225(2)(a) and section 5 of the Petitions to Parliament (Procedure) Act No. 22 of 2012. The Petition was forthwith committed to the Constitutional Implementation Oversight Committee for consideration and the Committee was required to a report to the House and to the Petitioner in accordance with the National Assembly Standing Order 227(2).

### 1.2 Methodology of the Consideration of the Petition

On 25<sup>th</sup> February, 2016, the Committee held a Meeting to deliberate on methodology to use while considering the Petition. The Committee observed that Parliament was obligated by the Constitution<sup>1</sup> to facilitate public participation and involvement in the legislative and other business of Parliament and its committees". The Committee concluded that matter Petitions would qualify to fall under "*other business*". Subsequently, the Committee observed that there was need to invite interested members of the public to an open consultative forum. The Committee felt that the public should be given ample notice to attend the forum and or send memoranda.

The Committee observed that there are two ways of initiating amendments to the Constitution: either through a "parliamentary initiative"<sup>2</sup> or through a "popular initiative"<sup>3</sup>.

Under the parliamentary initiative, an amendment Bill is introduced to either House of Parliament and must be supported by at least two-thirds of the members in both Houses to sail through.

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<sup>1</sup> Article 118(1)(b) of the constitution of Kenya

<sup>2</sup> Article 256 of the Constitution of Kenya

<sup>3</sup> Article 256 of the Constitution of Kenya

Under the popular initiative, any person may propose amendments to the Constitution if he/she is supported by at least one million registered voters. In that event, the person presents a Petition to the IEBC supported by one million signatures and accompanied by a draft Bill. Upon verification of the signatures, the IEBC then sends the Bill to the forty-seven County Assemblies in Kenya for consideration. If the draft Bill is approved by a majority of the County Assemblies (i.e. at least twenty four County Assemblies), it is then introduced to Parliament. The Bill would pass if supported by the majority of members in both Houses. However, if either Houses of Parliament fail to pass the Bill, the Constitution provides that the Bill shall then be submitted to the people for approval through a referendum.

Article 255 of the Constitution however provides that there are constitutional amendments which must be passed through a referendum (whether they are initiated through the parliamentary or popular initiatives). These include matters touching on the;

- (a) Supremacy of the Constitution;
- (b) Territory of the Kenya;
- (c) Sovereignty of the people;
- (d) National values and principles of governance;
- (e) Bill of Rights;
- (f) Term of office of the President;
- (g) Independence of the Judiciary and the Commissions and the Independent Offices;
- (h) Functions of parliament; and,
- (i) Objects, principles and structure of devolved governments.

From the foregoing, the Committee agreed that:-

- a) a draft work-plan on the consideration of the Petition be developed and that the petitioner (Major (Rtd) Joel Kiprono Rop) be invited to appear before the Committee to expound more on his prayers;
- b) communications be made to the following institutions: the Council of Governors (sponsoring "*Pesa Mashinani Referendum Campaign*"), the Okoa Kenya Secretariat, "*Punguza Mzigo Referendum Campaign*" spearheaded by Hon Moses Kuria, MP, the Member for Gatundu South Constituency, "*Boresha Katiba Initiative*" spearheaded by Hon Asman Kamama, MP, the Member for Tiati Constituency, the Office of the Attorney General and Department of Justice and the Kenya Law Reform Commission; and,



- c) an advert on request for submission of memoranda and invitation of the public to an "Open Consultative Forum" be run in dailies with nation-wide circulation and that the "Open Consultative Forum" be slated for Wednesday, 23<sup>rd</sup> March, 2016 at the County Hall Mini-Chamber, Parliament Buildings from 10.00am.

### **1.3 Open Consultative Forum**

The Committee hosted a "Open Consultative Forum" with interested Members of the Public on 23<sup>rd</sup> March, 2016 in the County Hall Mini-Chamber. The following persons/ institutions made their presentations:-

#### **1.3.1 The Tunza Kenya Initiative**

Major (Rtd.) Joel Kiprono Rop, the Petitioner in the matter under consideration representing the "Tunza Kenya Initiative" made the following proposals for amendment of the Constitution-

- (1) **THAT**, the number of Counties be reduced from forty seven to three namely the East Coast County (comprising the former North Eastern and Coast Provinces), the Central Mount County (comprising the former Central and Eastern Provinces), and West Valley County (comprising the former Rift Valley, Western and Nyanza Provinces). The justification given for this proposal was that, the reduction in number of counties will foster effectiveness and efficiency in service delivery.
- (2) **THAT**, Kiswahili be made the national language of study and instruction of all subjects, except study and instruction of subjects of other languages, at all levels of education. The justification given was that a national language is the most important form of cultural expression and independence.
- (3) **THAT**, the Constitution be amended to ensure that traditional medicine is developed and encouraged and adequate public resources are allocated to research institutions for development of traditional medicine. This is because many Kenyans rely on tradition medicine.
- (4) **THAT**, the Chapter in the Constitution relating to land be amended as follows-

- (a) Article 62 (2) of the Constitution be re-drafted to provide that public land shall vest in and be held by a county government in trust for the people resident in the county and shall be administered by the County Government;
  - (b) Article 63(2) of the Constitution be amended by inserting a new sub-paragraph (iv) to provide that all land including property therein from the British white settlers and foreign investors should be classified as public land and that on leasehold tenure should be re-classified as Community Land and held by the relevant County Government in trust for the affected community;
  - (c) That private land under freehold tenure in Kenya should not be for more than ninety nine (99) acres. Any individual Kenyan or organization holding land in excess of that figure may hold it on leasehold tenure, from the relevant county government, for a period not exceeding nineteen (19) years; and
  - (d) That a person who is non-citizen or organization that is not wholly owned by Kenyans may not hold land for farming in Kenya on the basis of any arrangement, including freehold and leasehold.
- (5) **THAT**, Chapter Seven of the Constitution relating to representation be amended to among other things provide that-
- (a) there shall be three political parties in Kenya; men's party, women's party and youth's party;
  - (b) there shall be three members of the Senate (One Man, One Woman and One Young Person) from each county;
  - (c) the existing forty seven counties shall be equated as forty seven constituencies with three members in each constituency giving rise to a total of 141 members of the National Assembly; and
  - (d) the Senate be modeled as a hybrid of the current system and an arrangement similar to the House of Lords of the UK.
  - (e) the education requirements in Article 99 (1) (b) of the Constitution be expunged.
- (6) **THAT**, Chapter Nine of the Constitution be amended to provide for a rotating presidency in Kenya and a two-five year limit for each ethnic community. The justification given for this proposal is that the amendments will ensure sustained peace, harmony, stability and development in Kenya.



- (7) **THAT**, the Constitution be amended by inserting a new chapter on National Economy to ensure among other things that the Salaries and Remuneration Commission reviews the minimum wages for all workers in both private and public sectors. The justification given for this proposal is that the National Economy is the most important societal engines and as such it should be recognized in the Constitution.
- (8) **THAT**, a National Revolution Council be established consisting of among other persons the President of Kenya, the Chief Justice of Kenya, the National Leader of Political Opposition, the Speaker of the Senate and the Chairperson of the Commission for Science, Technology and Innovation. The justification given for this proposal was that Kenya requires a peaceful, nationalist and non-confrontational process that occurs within the Constitution and the laws of the land. As such, there is need to entrench the Revolution Council in the Constitution.
- (9) **THAT**, a mandatory National Military Service of not less than two years for all secondary school leavers be a constituent part of the Kenya Defence Forces. This will allow increased participation in national development projects.
- (10) **THAT**, provision(s) on tourism be entrenched in the Constitution to foster tourism as a national source of income. In particular, the provisions should require primary and secondary school students to visit tourist destinations in the country.
- (11) **THAT**, the Constitution be amended to entrench a revolutionary approach to farming which proposes among other things that all process-able farm produce intended for external markets are fully processed, branded and packaged to international standards before export and that there is no importation of all types of farm produce that are similar to those produced in Kenya. This proposal will foster the agriculture sector in the country.

### **1.3.2 Presentation by Hon. Moses Kuria on the “Punguza Mzigo Initiative”.**

The Hon. Moses Kuria representing the “Punguza Mzigo Initiative” made the following proposals for amendment of the Constitution-



- (1) **THAT**, the number of Counties be reduced from 47 to 16 (*Amendment of the First Schedule to the Constitution*);
- (2) **THAT**, the number of single member constituencies be reduced from 290 to 200 (*Amendment of Article 89 of the Constitution*);
- (3) **THAT**, the institution of the Senate be abolished and the functions of the Senate be re-designated to the National Assembly (*deletion of Article 96 of the Constitution*);
- (4) **THAT**, the 12 positions of nominated members of the National Assembly be abolished (*Amendment of Article 97(1)(c) of the Constitution*); and,
- (5) **THAT**, the positions of the 47 women representatives positions be abolished (*Amendment of Article 97(1)(b) of the Constitution*).

The justification for the proposals for amendment of the Constitution by the *Punguza Mzigo Initiative* is geared towards reducing the public wage bill and in line with the government's austerity measures. The amendments are also anchored the need to realign the provision with two-third gender rule requirement under Article 27(8) of the Constitution.

### **1.3.3 Presentation by Mr. Njoroge Waweru - A Member of the Public**

Mr. Njoroge Waweru while making his presentation to the Committee, observed that there was need for a comprehensive referendum law to be developed to address the ambiguities that exist as evidenced in the process of verification of signatures by IEBC for the Okoa Kenya Initiative. He requested the Committee to expedite on the process of the development of the law.

## **1.4 Meeting with the Boresha Katiba Initiative**

The Boresha Katiba Initiative which is a parliamentary initiative advocating for constitutional reform led by the Member of Parliament for Tiaty Constituency, Hon. Asman Kamama appeared before the Committee on Tuesday 12th April, 2016 and made the following proposals for amendment of the Constitution-

- (1) **THAT** Article 27 of the Constitution be amended to put a time limit of ten years to the affirmative action clause. This is informed by the fact that the disadvantages suffered by the individuals or groups are contemplated to have been eliminated at the end of this

period. The amendment also abolishes the two-third gender rule so as to allow for election of candidates through a competitive electoral process.

- (2) **THAT** clause 59 of the Constitution be amended by deleting the provision allowing for the restructuring of the Kenya National Human Rights and Equality Commission into two or more separate commissions. This will help reduce the number of commissions established under the Constitution, a move that will help avoid duplication of roles and a sustainable public wage bill.
- (3) **THAT** the Constitution be amended by introducing a new Article 71A to deal with the sharing of natural resources between the national government, county governments and the community from which the natural resources have been extracted. The new clause will also requires that county governments should receive not less than eighteen (18) per cent of the revenue derived from the extraction of the natural resources and that the community from which the natural resource is derived should receive not less than seven (7) per cent of the said revenue.
- (4) **THAT** the Constitution be amended by introducing a new Article 75A to provide that crimes relating to economic sabotage, corruption, terrorism, and drug trafficking be capital offences. This amendment will elevate the levels of integrity in the Kenyan leaders.
- (5) **THAT** Article 81 of the Constitution be amended to abolish the two-third gender rule in the electoral system to allow for elections of candidates through a competitive electoral process. This amendment will also reduce the cost of funding salaries and benefits of the nominees.
- (6) **THAT** Article 88 of the Constitution be amended by deleting sub-clause (e) to abolish the Independent Electoral and Boundaries Commission's role of settling disputes relating to or arising from nominations. This is geared towards ensuring that the Political Parties Tribunal and the courts handle issues of electoral disputes and leave the Independent Electoral and Boundaries Commission to concentrate on running elections.



- (7) **THAT** Article 89 of the Constitution be amended to reduce the number of constituencies to two hundred and ten as opposed to two hundred and ninety. This will help in the formation of a lean and functional government while cutting down the public wage bill.
- (8) **THAT** Article 97(1)(a) of the Constitution be amended as a further the amendment to Article 89. This will reduce the number of the constituencies to two hundred and ten.
- (9) **THAT** Article 152(3) of the Constitution be amended to provide for the selection of Cabinet Secretaries from among the Members of Parliament.
- (10) **THAT** Article 167 of the Constitution be amended to set the retirement age of judges at seventy four years. Also the Supreme Court judges tenure be reduced to seven years from ten years.
- (11) **THAT** Article 168 of the Constitution be amended to introduce a new sub clause which provides for the vetting of judges after every five years. The judges will be vetted by a board whose establishment and composition is to be legislated by Parliament. The board will examine the suitability of the judges to continue serving. The amendment also provides for a right of appeal to any judge aggrieved by the vetting board's decision to the High Court and bench of five consisting of senior counsels not serving shall hear the appeal, and their decision shall be final.
- (12) **THAT** Article 203 of the Constitution be amended to increase the devolved funds from fifteen per cent to forty six percent to the county governments. This will ensure that county governments have adequate funds to carry out their functions. The base for calculating the funds is based on "the preceding financial year" as opposed to the "most recently audited and approved account" which may not reflect the current economic realities.
- (13) **THAT** the Constitution be amended to introduce a new Article 204A to establish the Constituency Development Fund which constitutes five per cent of the revenue collected by the national government.



- (14) **THAT** the Constitution be amended to introduce a new Article 204B which establishes the Ward Development Fund which constitutes five percent of the equitable share of the funds allocated to county governments. The Members of County Assemblies will manage the fund as the patrons and further legislation is to be made by Parliament on the management of the fund.
- (15) **THAT** Article 230(4) of the Constitution be amended to ensure that the expenditure on wages, salaries and other benefits, paid to state officers is not more than twenty per cent of the national revenue.
- (16) **THAT** Article 232 of the Constitution be amended to ensure that all communities are effectively represented in all public service appointments by restricting appointments in all state and county agencies, departments, and organs to twenty per cent based on the population of any one ethnic group. It also entrenches affirmative action in favor of ethnic minorities in public appointments. This duty is also imposed on all private entities contracted by both the National and County Governments.
- (17) **THAT** Article 250 of the Constitution be amended to ensure that the composition of members of any commission is limited to a maximum of five as opposed to nine members. This will reduce duplication of roles and duties in the commissions. The commissioners are also required to work part time. The amendment also introduces a retirement age of sixty to all permanent workers in the commissions and independent offices.
- (18) **THAT** the First Schedule to the Constitution be amended to reduce the number of counties to ten as opposed to forty seven. This helps in alignment of a leaner, efficient and manageable government.

*(See attached in Appendix 1 the proposed Draft Constitution of Kenya (Amendment) Bill as proposed by the Boresha Katiba Initiative espousing the proposals as already discussed in detail).*