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REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY
THIRTEENTH PARLIAMENT – THIRD SESSION – 2024

DIRECTORATE OF DEPARTMENTAL COMMITTEES

DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

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REPORT ON:

THE CONSIDERATION OF THE TRIBUNALS BILL, 2023

(NATIONAL ASSEMBLY BILL NO. 45 OF 2023)

THE NATIONAL ASSEMBLY
PAPERS LAID
DATE: 31 JUL 2024
DAY
WEDNESDAY
TABLED BY: CHAIRPERSON, JLAC
HON. GEORGE MURUGARA
CLERK-AT THE-TABLE: TRACEY CHEBET

CLERK'S CHAMBERS
DIRECTORATE OF DEPARTMENTAL COMMITTEES
PARLIAMENT BUILDINGS
NAIROBI

JULY 2024

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LIST OF ABBREVIATIONS AND ACRONYMS

BPRT	-	Business Premises Rent Tribunal
CKRC	-	Constitution of Kenya Review Commission
CRJ	-	Chief Registrar of the Judiciary
JSC	-	Judicial Service Commission
KLRC	-	Kenya Law Reform Commission
LSK	-	Law Society of Kenya
ODM	-	Orange Democratic Movement
OAG	-	Office of the Attorney-General
PPARB	-	Public Procurement Administrative Review Board
PPDT	-	Political Parties Dispute Tribunal
PSC	-	Public Service Commission
TLB	-	Transport Licensing Board
UDA	-	United Democratic Alliance
WDM	-	Wiper Democratic Movement

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CHAIRPERSON'S FOREWORD

This report contains the proceedings of the Departmental Committee on Justice and Legal Affairs on its consideration of the Tribunals Bill *(National Assembly Bill No. 45 of 2023)* which was published on 11th August 2023. The Bill seeks to reform the Tribunal system in Kenya by rationalizing and regulating the administration and function of membership and administration of Tribunals.

In compliance with Article 118(b) of the Constitution and Standing Order 127(3), the Committee placed an advertisement in the print media on 6th October 2023 inviting the public to submit memoranda by way of written statements on the Bill.

In addition, the Committee vide letter Ref. No. *NA/DDC/JLAC/2023/105* dated 5th October 2023 invited key stakeholders to submit views on the Bill, and attend public participation forums on 12th October 2023, 19th October 2023 and 19th March 2024. By the close of the submission deadline, the Committee had received fourteen (14) memoranda.

The OAG, the Judiciary, the KLRC, the LSK, the National Council for Law Reporting, the BPRT and Land Acquisition Tribunal jointly, the Competition Tribunal, the PPARB, the Refugee Status Appeals Committee, the State Corporations Appeal Tribunal, the Transport Licensing Appeals Board, the Public Administrative Officers Caucus and the *Katiba* Institute gave their views on the Bill which the Committee considered in the preparation of this report.

The Cooperatives Tribunal, the Energy Tribunal, the Legal Education Appeals Tribunal and the PPDT attended the public participation forums and associated themselves with the views of the BPRT and Land Acquisition Tribunal as submitted by the Chairperson of the latter.

While considering the Bill, the Committee observed that following the promulgation of the Constitution, tribunals were incorporated into the mainstream administration of justice system. Article 169(1) provides a list of subordinate courts which includes local tribunals. Therefore, the affairs of the local tribunals ought to be managed by the Judiciary through JSC. In doing so, the constitutional dictates would be achieved.

The Committee is grateful to the Offices of the Speaker and Clerk of the National Assembly for the logistical and technical support accorded to it during its consideration of the Bill. The Committee further wishes to thank the OAG, the Judiciary, the KLRC, the LSK, the National Council for Law Reporting, the BPRT and Land Acquisition Tribunal, the Competition Tribunal, the Cooperatives Tribunal, the Energy Tribunal, the Legal Education Appeals Tribunal, the PPARB, the PPDT, the Refugee Status Appeals Committee, the State Corporations Appeal Tribunal, the Transport Licensing Appeals Board, the Public Administrative Officers Caucus and the *Katiba* Institute for submitting views on the Bill.

Finally, I wish to express my appreciation to the Honourable Members of the Committee and the Committee Secretariat who made useful contributions towards the preparation and production of this report.

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 honour to present to this House the Report of the Committee on its Consideration of the Tribunals Bill *(National Assembly Bill No. 45 of 2023)*.

It is my pleasure to report that the Committee has considered the Tribunals Bill *(National Assembly Bill No. 45 of 2023)* and have the honour to report back to the National Assembly with the recommendation that **the House approves the Bill with the amendments in the Schedule of Amendments forming Chapter Six of this report.**

Hon. Murugara George Gitonga, CBS, MP
Chairperson, Departmental Committee on Justice and Legal Affairs

CHAPTER ONE

1 PREFACE

1.1 Establishment of the Committee

1. The Departmental Committee on Justice and Legal Affairs is one of twenty departmental committees of the National Assembly established under Standing Order 216 whose mandate pursuant to the Standing Order 216 (5) is as follows:
    i. *To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;*
    ii. *To study the programme and policy objectives of ministries and departments and the effectiveness of the implementation;*
    iii. *To, on a quarterly basis, monitor and report on the implementation of the national budget in respect of its mandate;*
    iv. *To study and review all legislation referred to it;*
    v. *To study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;*
    vi. *To investigate and inquire 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;*
    vii. *To 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);*
    viii. *To examine treaties, agreements and conventions;*
    ix. *To make reports and recommendations to the House as often as possible, including recommendations of proposed legislation;*
    x. *To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and*
    xi. *To examine any questions raised by Members on a matter within its mandate.*

1.2 Mandate of the Committee

2. In accordance with the Second Schedule of the Standing Orders, the Committee is mandated to consider[1]:-
    a) The Judiciary;
    b) Tribunals;
    c) Access to Justice;
    d) Public prosecutions;
    e) Ethics, Integrity and Anti-corruption;
    f) Correctional services;
    g) Community service orders and witness protection;
    h) Constitutional Affairs;
    i) Sovereign immunity;
    j) Elections including referenda;

[1] National Assembly Standing Orders, 6th Edition.

k) Human rights;
l) Political parties; and
m) The State Law Office' including insolvency, law reform, public trusteeship, marriages and legal education.

3. In executing its mandate, the Committee oversights the following Ministries, Departments and Agencies:
   a) State Department of Correctional Services;
   b) State Law Office and Department of Justice;
   c) The Judiciary;
   d) Judicial Service Commission;
   e) Office of the Director of Public Prosecutions;
   f) Ethics and Anti-Corruption Commission;
   g) Independent Electoral and Boundaries Commission;
   h) Commission on Administrative Justice;
   i) Office of the Registrar of Political Parties;
   j) Witness Protection Agency;
   k) Kenya National Commission on Human Rights;
   l) Kenya Law Reform Commission; and
   m) Council of Legal Education.

1.3 Committee Membership

4. The Committee was constituted by the House on 27th October 2022 and comprises the following Members:

Chairperson
Hon. Murugara George Gitonga, MP
Tharaka Constituency
UDA Party

Vice-Chairperson
Hon. Mutuse Eckomas Mwengi, OGW, MP
Kibwezi West Constituency
MCCP Party

Members

Hon. Maalim Farah, MP
Dadaab Constituency
WDM-Kenya

Hon. Francis Kajwang' Tom Joseph, MP
Ruaraka Constituency
ODM Party

Hon. Junet Mohamed, CBS, MP
Suna East Constituency
ODM Party

Hon. (Dr.) Otiende Amollo, SC, MP
Rarieda Constituency
ODM Party

Hon. Onyiego Silvanus Osoro, CBS, MP
South Mugirango Constituency
UDA Party

Hon. Muchira Michael Mwangi, MP
Ol Jorok Constituency
UDA Party

Hon. Makali John Okwisia, MP
Kanduyi Constituency
FORD-Kenya

Hon. Muriu Wakili Edward, MP
Gatanga Constituency
UDA Party

Hon. Maina Jane Njeri, MP
Kirinyaga (CWR)
UDA Party

Hon. Gichohi Kaguchia John Philip, MP
Mukurweini Constituency
UDA Party

Hon. Mogaka Stephen M, MP
West Mugirango Constituency
Jubilee Party

Hon. Aden Daud, EBS, MP
Wajir East Constituency
Jubilee Party

Hon. Siyad Amina Udgoon, MP
Garissa Township (CWR)
Jubilee Party

1.4 Committee Secretariat

5. The Committee is well-resourced and facilitated by the following staff:

Mr. Ahmed Salim Abdalla
Clerk Assistant I /Head of Secretariat

Mr. Ronald Walala
Senior Legal Counsel

Ms. Jael Ayiego
Clerk Assistant III

Mr. Abdikafar Abdi
Clerk Assistant III

Mr. Omar Abdirahim
Fiscal Analyst II

Mr. Isaac Nabiswa
Legal Counsel II

Mr. Silas Opanga
Hansard Reporter III

Ms. Vivienne Ogega
Research Officer III

Ms. Mary Kamande
Public Communications Officer III

Mr. John Nduaci
Serjeant-At-Arms

Mr. Calvin Karung'o
Media Relations Officer III

Mr. Peter Mutethia
Audio Officer III

CHAPTER TWO

2 OVERVIEW OF THE TRIBUNALS BILL *(NATIONAL ASSEMBLY BILL NO. 45 OF 2023)*

2.1 Background

6. The Bill which is sponsored by the Leader of the Majority Party, Hon. Kimani Ichung'wah, EGH, MP, was published on 11th August 2023 and read a First Time in the House on 26th September 2023. It was thereafter committed to the Committee in line with the provision of Standing Order 127 (3).

2.2 Summary of Legal Provisions

7. The Tribunals Bill, 2023 seeks to give effect to Articles 1(3)(c), 20(4), 47(3), 159(1), and 169 of the Constitution regarding Tribunals; to establish the Office of the Registrar of Tribunals; to provide for the functions of the Registrar of Tribunals; and to rationalize and regulate the administration and operations of Tribunals. Additionally, the Bill sets appropriate qualifications for all Chairpersons and members of Tribunals

8. **Clause 5** of the Bill apportions the Judicial Service Commission (JSC) the additional functions of developing policies for the regulation of Tribunals; ensuring the enhancement of a fair, efficient, and accessible Tribunal system and jurisprudence; evaluating, rationalizing, and recommending to Parliament the Tribunals to be established, merged or abolished; regulate and oversee the functioning of Tribunals; set standards and monitor compliance with the standards by Tribunals; develop a Code of Conduct for Tribunals; ensure Tribunals adhere to the provisions of the law, regulations, policies, Code of Conduct, rules or guidelines; provide strategic direction to Tribunals; facilitate training programmes for members and staff of Tribunals; facilitate law reporting on decisions of Tribunals in consultation with the National Council for Law Reporting; and facilitate public education on the role of Tribunals.

9. The Clause further requires the JSC to, within two years, formulate and adopt guidelines for the evaluation and rationalization of Tribunals, undertake the first evaluation and rationalization exercise, and recommend to Parliament the Tribunals to be established, merged, or abolished.

10. **Clause 6** of the Bill establishes the office of the Registrar of Tribunals to be supported by an appropriate number of Deputy Registrars. To qualify for appointment as a Registrar or Deputy, a person must possess a law degree and have at least ten years post-qualification experience and at least five years post-qualification experience, respectively. Under Clause 7 of the Bill, the Registrar is to perform duties as directed by the Chief Registrar of the Judiciary.

11. **Clause 10** of the Bill establishes the Tribunals Secretariat, headed by the Registrar.

12. **Clause 11** of the Bill provides for the modalities of establishment of Tribunals. Under the Clause, a Ministry, Department, or Agency that intends to establish a Tribunal must submit a written request to the JSC accompanied by a statement of justification and a feasibility assessment report for consideration within sixty days of receipt of the information. Where

the JSC recommends the establishment of the Tribunal, the Cabinet Secretary must submit the request together with the views of the National Treasury on the financial implications of establishing the Tribunal and the decision of the JSC to the Cabinet for consideration and approval. Upon approval by the Cabinet, a Tribunal shall be established through an Act of Parliament.

13. **Clauses 12 and 13** of the Bill provide for the mode of appointment and qualifications required of Tribunal members. A Tribunal is to consist of a minimum of three members appointed through a competitive process. To be appointed Chairperson, a person must be a Kenyan citizen, hold a degree in law from a university recognized in Kenya, and be admitted as an advocate of the High Court of Kenya with not less than ten years' post-qualification experience. To be appointed as a member, a person must be a Kenyan citizen, hold a degree from a university recognized in Kenya, and have knowledge and experience of not less than five years in the respective field.

14. **Clause 15** of the Bill provides for the term of office for the Chairperson and members of a Tribunal as five years, renewable once. Their appointment is to be done in a staggered fashion to ensure continuity in the affairs of the Tribunal.

15. **Clause 39** of the Bill empowers the Chief Justice to make regulations, including measures to rationalization, clustering, or classification of Tribunals according to specialization; decentralization of services of Tribunals; terms of and conditions of service of staff of Tribunals; and procedural matters, among others.

16. **Clauses 43 to 48** of the Bill contain transitional provisions. Under **Clause 43**, every person who is currently a Chairperson or a Member of a Tribunal is to remain in office for their unexpired term or a period of eighteen months after the passage of the Bill, whichever is earlier.

17. **Clause 44** of the Bill requires the JSC to, within eighteen months of the enactment of the Bill, employ staff to Tribunals from amongst persons who, immediately before the commencement of the Bill, were public officers serving in Tribunals.

18. **Clause 48** of the Bill, as read together with the Third Schedule to the Bill, makes consequential amendments to the following **thirty-seven (37) Acts of Parliament** touching on provisions establishing Tribunals that have to be aligned to the provisions of the Bill—
    (1) The Rent Restriction Act with respect to the Rent Tribunals;
    (2) The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act with respect to the Tribunal under the Act;
    (3) The Standards Act is with respect to the Standards Tribunal;
    (4) The Seeds and Plant Varieties Act is with respect to the Tribunal under the Act;
    (5) The Insurance Act with respect to the Tribunal under the Act;
    (6) The State Corporations Act with respect to the Standards Tribunal;
    (7) The Capital Markets Act with respect to the Capital Markets Tribunal
    (8) The Retirement Benefits Act with respect to the Appeals Tribunal
    (9) The Co-operatives Societies Act with respect to the Co-operative Tribunal
    (10) The Kenya Information and Communications Act with respect to the Communications and Multimedia Appeals Tribunal;
    (11) The Environmental Management and Co-ordination Act with respect to the National Environment Tribunal;

(12) The Industrial Property Act is with respect to the Industrial Property Tribunal;
(13) The Copyright Act is with respect to the Copyright Tribunal;
(14) The Privatization Act with respect to the Privatization Appeals Tribunal;
(15) The HIV and AIDS Prevention and Control Act with respect to the HIV and AIDS Tribunal
(16) The Competition Act is with respect to the Competition Tribunal;
(17) The Political Parties Act with respect to the Political Parties Disputes Tribunal;
(18) The Tourism Act with respect to the Tourism Tribunal;
(19) The Kenya Citizens and Foreign Nationals Management Service Act with respect to the Kenya Citizenship and Immigration Service Appeals Tribunal;
(20) The National Construction Authority Act with respect to the Appeals Board under the Act;
(21) The Land Act with respect to the Tribunal under the Act;
(22) The Legal Education Act with respect to the Legal Education Appeals Tribunal;
(23) The Kenya National Examinations Council Act with respect to the National Examinations Appeals Tribunal;
(24) The National Transport and Safety Authority Act with respect to Transport Licensing Appeals Board;
(25) The Micro and Small Enterprises Act with respect to the Micro and Small Enterprises Tribunal;
(26) The Basic Education Act with respect to the Education Appeals Tribunal;
(27) The Public Benefits Organizations with respect to the Public Benefits Organizations Disputes Tribunal
(28) The Civil Aviation Act with respect to the National Civil Aviation Administrative Review Tribunal;
(29) The Sports Act with respect to the Sports Disputes Tribunal;
(30) The Tax Appeals Tribunal Act;
(31) The Water Act with respect to the Water Tribunal;
(32) The Public Procurement and Asset Disposal Act with respect to the Review Board under the Act;
(33) The Nairobi International Financial Centre Act with respect to the Financial Centre Tribunal;
(34) The Energy Act with respect to the Energy Tribunal;
(35) The Kenya Accreditation Service Act with respect to the Accreditation Appeals Tribunal;
(36) The Refugees Act with respect to the Refugee Status Appeals Committee; and
(37) The Public-Private Partnerships Act with respect to the Petition Committee under the Act.

CHAPTER THREE

3 PUBLIC PARTICIPATION AND STAKEHOLDER ENGAGEMENT ON THE BILL

3.1 Legal Framework on Public Participation

19. 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."

20. The National Assembly Standing Order 127 (3) and (3A) stipulates that:
"(3) The Departmental Committee to which a Bill is committed shall ***facilitate public participation on the Bill*** *through an appropriate mechanism including-*
(a) ***inviting submission of memoranda;***
(b) holding public hearings;
(c) consulting relevant stakeholders in a sector; and
(d) consulting experts on technical subjects.
(3A) The Departmental Committee shall take into account the views and recommendations of the public under paragraph (3) in its report to the House."

3.2 Memoranda Received on the Bill

21. Pursuant to the aforementioned provisions of law, the Committee placed an advertisement in the print media on 6th October 2023 inviting the public to submit memoranda by way of written statements on the Bill. Further, the Committee vide letters Ref. No. *NA/DDC/JLAC/2023/105 dated* 5th October 2023 invited key stakeholders to submit views on the Bill and attend public participation forums on 12th and 19th October 2023, and on 19th March 2024.

22. To this end, the Committee received fourteen (14) memoranda from the OAG, the Judiciary, the LSK, the National Council for Law Reporting, the BPRT and Land Acquisition Tribunal jointly, the Competition Tribunal, the PPARB, the PPDT, the Refugee Status Appeals Committee, the State Corporations Appeal Tribunal, the TLB, the Public Administrative Officers Caucus and the *Katiba* Institute. The memoranda are annexed to this report as *Annexure 6*.

23. The Committee received memoranda from the OAG and the Judiciary which were largely in agreement with the proposals referred to the Committee. However, the Committee received reservations from the KLRC, LSK, BPRT and Land Acquisition Tribunal, the Competition Tribunal, the Cooperatives Tribunal, the PPARB, the PPDT, the Refugee Status Appeal Committee, the State Corporations Appeal Tribunal, the TLB, the Public Administrative Officer Caucus and the *Katiba* Institute relating to the proposed amendments.

24. On 19th October 2023, the Cooperatives Tribunal, the Energy Tribunal, the Legal Education Appeals Tribunal, the Communications and the Multimedia Tribunal appeared before the Committee and indicated their association with the views of the BPRT and Land Acquisition Tribunal as submitted by the Chairperson of the Land Acquisition Tribunal vide letter dated 18th October 2023.

25. The stakeholders submitted as follows:

Long title

26. The **State Corporations Appeal Tribunal** submitted that Article 169 providing anchorage for local Tribunals should be cited in full as Article 169(1)(d) in the long title.

Committee Observation

27. The Committee observed that Article 169(1)(d) of the Constitution provides that any other courts or local tribunals as may be established by an Act of Parliament, other than the courts established by Article 162(2). Therefore, the long title may be amended to specifically state that the Bill seeks to give effect to Article 169(1)(d) of the Constitution.

Clause 1

28. The **Competition Tribunal** submitted that the title of the Bill be amended to Administrative Tribunals Support Serviced of Kenya Act as the Bill should be responsible for the provision of the support services and the facilities required by each of the administrative tribunals to exercise their powers and perform their duties and functions accordingly.

Committee Observation

29. The Committee observed that the Bill seeks to give effect to the tribunals referred in Article 169(1)(d) of the Constitution. These tribunals are subordinate courts that must be transited to the Judiciary as it was decided in the case of ***Okiya Omtatah Okoiti v Judicial Service Commission & 2 others [2021] eKLR***.

Clause 2

30. The **KLRC** submitted orally on Thursday, 12th October 2023, that the definition of a Tribunal as provided in the Bill is too broad. Thus, it recommended that it be amended to read, *"a body established through an Act of Parliament to settle disputes of a specific nature."*

31. The **State Corporations Appeal Tribunal** proposed the inclusion of the definition of 'Local Tribunal' since Article 169(1)(d) of the Constitution refers to a local tribunal. It added that there is a material distinction between a Tribunal and a Local Tribunal and raises fundamental questions as to the precise intent of the drafters of the Constitution to determine the place of domicile and nature of the Tribunal system in Kenya whether hybrid or not due to the ambiguity of the definition of Tribunal.

32. Furthermore, the State Corporations Appeal Tribunal noted that the Constitution mentions three typologies of Tribunal including independent Tribunals, local Tribunals and Tribunals established under the Constitution to investigate the conduct of State Officers as provided in Articles 158(4), 168(5)(a) and 251(4)(b) of the Constitution.

33. Additionally, it relied on the legal advisory of the Attorney General dated 23rd July 2020 that interpreted a local Tribunal in a very restrictive sense so as not to include all administrative Tribunals which should be domiciled in the Executive. Similarly, it referenced the KLRC's Inter-Agency Report on Review of the Rationale for Establishment of Tribunals in Kenya of 2015 where the Commission observed as follows:

> *"Discussions with some of the Tribunals during the stakeholder engagements revealed that there was the general perception that the technical nature and independence of the*

Tribunals would be threatened by bringing Tribunals under the ambit of the Judiciary..."

34. Moreover, the State Corporations Appeal Tribunal cited the draft 2002 CKRC Constitution that seemed to have been alive to the restricted interpretation of a local Tribunal. Similarly, by application of the rule of interpretation, *Noscitur a Sociis,* explained in G.P Singh's Principles of Statutory Interpretation (8th Edition Wadhwa and Company Nagpur), the meaning of a local Tribunal is to be given a restricted meaning:
    "associated words take their meaning from one another... the philosophy of which is that the meaning of the doubtful word may be ascertained by reference to the meaning of the words associated with it."

35. From the foregoing, it was the State Corporations Appeal Tribunal's view that a Local Tribunal may be construed as a Tribunal dealing with matters of local notoriety such as customary or land matters.

36. The State Corporations Appeal Tribunal also submitted that the Bill seeks to pre-empt the judicial cases awaiting determination of the proper domicile of the Tribunals in the case of ***Bernard Odero Okello & Another v Cabinet Secretary for Industrialization Trade and Enterprise Development & Another; Cyprian Mugambi Ngutari & 5 Others (Interested Parties) [2020] eKLR*** pending appeal at the Court of Appeal where the court stayed the High Court's decision and framed the following main question for determination:
    "Whether the appointment of members of the Tribunal is exclusively in the province of the Judicial Service Commission."

37. The State Corporations also quoted the case of ***Okiya Omtatah Okoiti v Judicial Service Commission and 2 Others; Katiba Institute (Interested Party) [2021] eKLR*** where the court held that all Tribunals under the Executive are local Tribunals within the meaning of Article 169(1)(d) of the Constitution and should, therefore, be transited to the Judiciary. The court further held that *"any new appointment or removal of a member of Tribunal should be undertaken by the Judicial Service Commission."* This decision is also subject to the pending appeal discussed above.

38. In addition, the State Corporations Tribunal cited the National Treasury's advice in a letter dated 6th October 2020 against the wholesome transfer of Tribunals to the Judiciary citing S.H Bailey on Cases, Materials and Commentary on Administrative Law (4th Edition):
    "Any wholesale transfer to the courts of the work of tribunals would be undesirable... this would make the Judiciary grossly overburdened...
    "We have not excluded from consideration whether the jurisdiction of any existing tribunal of any existing tribunal should be transferred to the ordinary courts, though we make no such recommendations. We therefore proceed to consider what improvements and safeguards, including appeals to the courts, should be introduced into the present structure."

39. From the foregoing, it was the State Corporations Appeal Tribunal's submission that the determination of the meaning of 'Local Tribunal' will help in ascertaining whether the drafters intended to introduce a hybrid Tribunal system domiciled in both the Executive and the Judiciary or not depending on the extent of judicial function.

Committee Observation

40. The Committee observed that Article 169(1)(d) of the Constitution lists local tribunals as subordinate courts. However, the Constitution does not define what a local tribunal is. In the case of ***Okiyah Omtatah Okoiti v. Judicial Service Commission & 2 others***, the court applied the *ejus dem generis* rule of interpretation which seeks to give effect to both specific and general words by treating particular words as indicating the class and general words as extending the provisions of statute to everything embraced in that class, though not specifically named by the particular words. Article 169(1) enumerated a class of entities as subordinate courts before mentioning the local tribunals. Subordinate courts were courts subordinate to the superior courts.

Clause 3

41. The **Refugee Status Appeals Committee** noted that the object of the Bill is to establish Tribunals contemplated under Article 47(3)(a) of the Constitution to ensure adherence to the constitutional requirements of the right to fair administrative action guaranteed under Article 47(1). Thus, it proposed the addition of a new paragraph (h) to read as follows:

    "enhance the public right to fair administrative action."

Committee Observation

42. The Committee observed that Article 47(3)(a) provides that Parliament shall enact legislation to give effect to the rights of fair administrative action and the legislation shall provide for the review of administrative action by a court or independent and impartial tribunal. In that regard, there exists the Fair Administrative Action Act (Cap. 7L) which applies to tribunals in their performance of administrative action.

Clause 5

43. The **KLRC** and **LSK** proposed the deletion of sub-clause (2)(b) because under Article 94, legislative power is unfettered, and Parliament does not need any recommendation from any source to determine which bodies, including Tribunals, are to be established.

Committee Observation

44. The Committee noted that the Bill's requirement that the JSC recommend the establishment, merger, and abolishment of tribunals to Parliament does not amount to fettering Parliament's legislative power. The legislative authority still remains with Parliament.

Clause 6

45. The **Competition Tribunal** proposed that the "Registrar of Tribunals" be amended to the "Registrar of Administrative Support Service". It further submitted that the qualifications for the position of Registrar be widened in scope to include other professionals in other fields, not necessarily in law.

46. The **Refugee Status Appeals Committee** submitted that the roles of the Deputy Registrar as contemplated in clause 8(1)(b) and (d) of the Bill require specific training and exposure as an advocate of the High Court including case management and other judicial functions. Further, clause 6(3)(b) provides for the requirement of post-qualification experience which ordinarily refers to qualifications post admission to the Bar. It, therefore, proposed amending clause 6(3)(b) to include 'is admitted as an Advocate of the High Court of Kenya.

Committee Observation

47. The Committee observed that under the Bill, the Registrar of Tribunals would be the person in charge of administering Tribunals, which includes overseeing support services for Tribunals.

48. The Committee observed that the exercise of functions of the Registrar and the Deputy Registrars, as contemplated under clauses 7 and 8 of the Bill, would require the expertise of an advocate of Kenya.

Clause 7

49. The **Competition Tribunal** proposed an amendment of sub-clause (1) to provide that the Registrar shall perform his/her duties as required by the Bill and as an independent office instead of as may be directed by the Chief Registrar.

50. On sub-clause (2), the Competition Tribunal proposed the deletion of "Deputy Registrars" and the substitution therefor with "directors".
51. The **National Council for Law Reporting** proposed the introduction of a provision establishing a framework for the management of Tribunals to allow the Tribunals to appoint a principal chairperson to coordinate judicial functions of the Tribunals because in their view, the functions of the Registrar appear to be just administrative.

Committee Observation

52. The Committee observed that, pursuant to Article 161(2)(c), the Chief Registrar of the Judiciary is the chief administrator of the Judiciary. Therefore, the CRJ has powers to delegate other duties to the Registrar of Tribunals.

Clause 8

53. The **Competition Tribunal** proposed the deletion of "Deputy Registrar" and the substitution therefor with "director".

54. Regarding cub-clause (1)(g), the **National Council for Law Reporting** noted that Tribunals are largely sector specific and with varying budgetary demands. It, therefore, proposed the introduction of a provision to provide for the preparation of Tribunals' budgets and forwarding to the Registrar for consolidation and further forwarding. It added that a secretary be appointed to head its secretariat and to manage and account for its budgetary allocation.

Committee Observation

55. The Committee observed that since the Chief Registrar is the accounting officer of the Judiciary, a deputy registrar responsible for administration of a tribunal should be responsible for planning, preparing, implementing and monitoring the budget and accounting for revenue of a tribunal.

Clause 10

56. The **Competition Tribunal** proposed deletion of sub-clause (2) and substitution therefor with the following—

"(2) The Secretariat under subsection (1) shall consist of—

" (a) such Directors as provided for in the organization structure of the Administrative Support Services of Kenya and a proposed scheme of service for Tribunals; and

(b) such technical, administrative and support staff as may be provided for in the organization structure who may be deployed from the Public Service Commission or the Judicial Service Commission."

Committee Observation

57. The Committee observed that the Chief Registrar of the Judiciary performs the administrative functions in the judiciary and that JSC may establish other offices of the registrar as may be necessary. Therefore, the appropriate nomenclature is the use of the "Deputy Registrars".

Clause 11

58. The **Competition Tribunal** proposed the deletion of sub-clause (1) and the substitution therefor with *"The Cabinet Secretary to write to the Attorney General who shall convene a committee consisting of the Attorney General, National Treasury, Public Service Commission or Office of the President, and the Judicial Service Commission who shall consider the assessment of establishing another Tribunal and the findings be presented before the Cabinet."*

59. The Competition Tribunal added that sub-clause (8) be amended to include the Public Service Commission to give a recommendation(s) for the establishment of a Tribunal.

60. The Cooperatives Tribunal proposed the deletion of sub-section 1 on the premise that the JSC will be exercising overriding powers over a ministry and this would be beyond their mandate. It also proposed the deletion of sub-section 6. It was its view that the provision is too open and can be subjected to abuse, it added that in the absence of a competent tribunal, there are courts of law that can handle matters of emergency.

61. The **KLRC** and **LSK** proposed the deletion of this clause on the premise that the procedure takes away Parliament's legislative authority as contemplated under Article 94 of the Constitution and that sub-clause 6 takes away the independence of Tribunals.

62. ***Katiba* Institute** was of the view that sub-clause (1) should not limit anyone from proposing the establishment of a Tribunal. It also submitted that sub-clause (2)(4) does not provide for public participation and involvement of other state and non-state actors on the proposal to form a Tribunal and proposed amendment to allow for Parliament to lead the process.

63. Additionally, *Katiba* Institute noted that sub-clause (6) is vague as there is no definition of what constitutes an emergency. Further, there is no justification for the creation of the panel since where there is no Tribunal of competent jurisdiction, the High Court has competent jurisdiction. It also noted that sub-clause (8), as drafted, is unconstitutional and ought to be struck out as it suggests that Parliament is to seek permission from the Commission which makes it subservient to the Commission in carrying out its mandate. Consequently, *Katiba* Institute proposed amending the sub-clause to provide for Parliament to seek out the opinion of the Commission as part of its consultative process on the viability of forming a Tribunal to address the vagueness

Committee Observation

64. The Committee took note of the High Court decision in ***Okiya Omtatah Okoiti v JSC & 2 Others*** which held that local tribunals are subordinate courts which ought to be managed by the Judiciary through JSC.

Clause 12

65. The **Competition Tribunal** proposed that sub-clause (2) be deleted and replaced with, *"The respective Cabinet secretaries through the Public Service Commission or Judicial Service Commission through a competitive process appoint the Chairpersons, the members of a Tribunal and Tribunals Administrator."*

66. The **KLRC** and **LSK** proposed harmonization of sub-clause (1) with paragraph 8 of the Second Schedule on the proposed composition of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Tribunal on the minimum number of members of a Tribunal.

67. The **National Council for Law Reporting** submitted that the Commission should determine the number of members of each Tribunal on a need basis.

68. ***Katiba* Institute** noted that while JSC is mandated to appoint all Chairpersons and members of Tribunals, the Bill should also have a harmonised list of requirements that incorporates the requirements under Article 27(6) of the Constitution for affirmative action measures to promote appointments of women, persons with disabilities, the youth, minorities and marginalized communities.

Committee Observation

69. The Committee observed that, pursuant to the decision of the High Court in the case ***Okiya Omtatah Okoiti v JSC & 2 others*,** since the local tribunals are subordinate courts, then their affairs, just like the other subordinate courts, ought to be managed by the Judiciary through JSC.

Clauses 13 and 14

70. The **KLRC** and **LSK** proposed the deletion of the clauses for not referring to the qualifications in the current statutes and the proposed amendments under the Second Schedule of the Bill.

Committee Observation

71. The Committee observed that most Acts of Parliament that establish tribunals do not exhaustively provide for the qualifications and disqualifications for appointment as a chairperson or member of the tribunals. Therefore, there is need to anchor these provisions in the Act that will regulate tribunals. Further qualifications may be provided for under the separate Acts of Parliament.

Clause 15

72. The **State Corporations Appeal Tribunal** submitted the need for a proper definition and cautious approach to the lateral transition of the Tribunals noting that most Tribunals are adjudicatory bodies dependent on the technical competence of experts in the areas of the Tribunals' jurisdiction and which is mostly lacking in the mainstream Judiciary except where specialized divisions have been created. Hence, the need to provide for the criteria for the appointment of members of a Tribunal.

Committee Observation

73. The Committee observed that, in appointing the chairperson and members of a Tribunal, the appointed persons by JSC ought to have knowledge and experience in the respective sector of the Tribunal.

Clause 16

74. The **BPRT** and the **Land Acquisition Tribunal** were of the view that sub-clause (1)(e) be deleted as the removal of any member of a Tribunal is adequately addressed under sub-clause (1)(f).

75. The **KLRC** and **LSK** proposed the deletion of the clause as it is drafted without any reference to the clauses on vacancy in the current statutes and the proposed amendments under the Second Schedule.

Committee Observation

76. The Committee noted that clause 12(4) already adequately provides that the discipline and removal of members of a Tribunal shall be conducted in accordance with the Judicial Service Act, Cap 8A.

Clause 18

77. The **Competition Tribunal** proposed amending sub-clause (1) to read, "The Chairperson shall be in charge of the designate Tribunal and shall be responsible for".

78. The **National Council for Law Reporting** stated that there is need for a provision on the general workings of the Tribunal by enacting a Third Schedule on Arrangement of Business to provide for the conduct of meetings, minutes and voting issues of the Tribunal.

79. The National Council for Law Reporting further noted drafting issues where sub-clause 2 should appear as an independent paragraph.

Committee Observation

80. The Committee observed that the marginal note sufficiently brings out the summary of the provision.

Clause 19

81. Concerning sub-clause (1), the **BPRT** and **Land Acquisition Tribunal** submitted the need to streamline the question of quorum with the specific parent Act to address the different needs of different tribunals. It added that the membership of tribunals varies with some at three thus the provision, as drafted, may occasion quorum hitches for such tribunals. Therefore, they proposed its deletion and substitution with the following:

    "Except as provided by law, the quorum of a Tribunal shall be three members provided that where a Tribunal consists of only three members, the quorum shall be two members."

82. ***Katiba* Institute** proposed to have the quorum of the Tribunal consist of at least one advocate for every decision made by the Tribunal. It was also its submission that quorum complies with the two-thirds gender principle.

Committee Observation

83. With respect to the submission by the BPRT and Land Acquisition Tribunal, the Committee noted that clause 12 of the Bill provides for three as the minimum number of members of a Tribunal. Hence, it noted that in such instances quorum should be two and that the provision on quorum should be provided for under the specific parent Acts.

Clause 20

84. ***Katiba* Institute** recommended a harmonised system of salaries, allowances and benefits for all Tribunal Chairpersons and members.

Committee Observation

85. The Committee observed that since the tribunals are being transited to the Judiciary, the remuneration of the members of the should be determined by the JSC in consultation with SRC.

Clause 27

86. The **KLRC** and **LSK** noted that no justification to limit an appeal to the High Court or court of equal status has been provided contrary to Article 164(3) of the Constitution hence, their proposals to delete the clause.

87. ***Katiba* Institute** noted that the provision infringes on the right to appeal to the Court of Appeal when there are legal and constitutional grounds to challenge a High Court judgement. Foreclosing such appeals violates Article 164(3) of the Constitution and will create judicial inefficiency and cause conflicting jurisprudence as a result of filling separate matters before the High Court. Resultantly, it proposed an amendment to sub-clause (2) to read as follows:

> *"The Court in subsection (1) shall within one year of the filing of the appeal, dispense with any appeal filed under this section and the decision of the Court shall be final regarding questions of fact but there shall be a right to appeal on legal and constitutional grounds.*

88. Additionally, ***Katiba Institute*** proposed that an appeal from the High Court must certify that the appeal arises from a legitimate dispute regarding a question of law that has not been settled by either the Court of Appeal or the Supreme Court and involves a misapplication of the law that is apparent from the record. This would allow the Court of Appeal to determine as a preliminary application, whether the appeals meet the criteria, ensuring that parties do the work upfront to justify the grounds of appeal rather than simply file appeals and make arguments later.

Committee Observation

89. The Committee observed that Article 165(5) grants the High Court supervisory powers over subordinate courts which includes tribunals.

Clause 29

90. The **Competition Tribunal** proposed the amendment of sub-clause (1) to read, *"The expenses of the Administrative Support Services and Tribunals shall be a charge from the Exchequer in line with the current allocation of each Tribunal."*

91. Regarding sub-clause (2), the Competition Tribunal proposed its amendment to read, *"At least three months before the commencement of each financial year, the Tribunal Chairs and the AI holder/Administrators of Tribunals shall prepare estimates of all expenditure required for their respective Tribunals for the next financial year, and submit them to Registrar Administrative Support Service to present it to Parliament."*

Committee Observation

92. The Committee observed that the Judiciary Fund, established under Article 173 of the Constitution, shall be used for administrative expenses of the Judiciary. By virtue of this Bill, the tribunals shall fall under the Judiciary and therefore, the expenses of the tribunals ought to be a charge on the Judiciary Fund.

Clause 30

93. The **Competition Tribunal** proposed an amendment to sub-clause (1) to read, "At the end of each financial year, the Registrar shall prepare and submit an annual report on the activities of Tribunals to Parliament.

Committee Observation

94. The Committee observed that the CRJ is the chief administrator of the Judiciary, which includes tribunals as subordinate courts.

Clause 31

95. The **Competition Tribunal** proposed the deletion and substitution therefor, *"In accordance with Public Finance Management Act, the administrative Support Service office and each fully constituted Tribunal shall be facilitated through the National Treasury to open a bank account and annual grants sent directly to the respective accounts of Administrative Support Services Office and to each Tribunals account."*

Committee Observation

96. The Committee observed that the CRJ is the chief administrator and accounting officer of the Judiciary. Since tribunals ought to be under the Judiciary, the CRJ ought to be responsible for opening bank accounts on behalf of tribunals.

Clause 32

97. The **Competition Tribunal** proposed an amendment of the clause to read, *"A Chairperson, a member or the Administrator of a Tribunal shall on appointment, subscribe to the oath contained in the First Schedule."*

Committee Observation

98. The Committee observed that the Bill seeks to regulate the appointment of a chairperson and members of a tribunal who are responsible for hearing and determining disputes.

Clause 35

99. ***Katiba* Institute** was of the view that sub-clause (1) should be balanced with the understanding that Tribunals are courts and that all court documents are public documents, unless sealed, and should be accessible to all. It, therefore recommended that the provision be amended to make it clear what information must be published and publicised.

Committee Observation

100. The Committee observed that the right of access to information is not an absolute right. Therefore, the right may be limited as contemplated under clause 35 of the Bill and in accordance with Article 24 of the Constitution.

Clause 36

101. The **Refugee Appeal Board** noted that compliance with directions and orders of the Tribunal is a fundamental and necessary duty of the parties for the effective and efficient

disposal of disputes. Consequently, it proposed the addition of a new paragraph (c) as follows:

"Comply with all such orders and directions as may be issued by the Tribunal for the purposes of the expeditious, efficient and just determination of the proceedings before the Tribunal."

Committee Observation

102. The Committee observed that Clause 38 of the Bill provides that for certain offences including disregard of an order of a Tribunal.

Clause 39

103. The **Competition Tribunal** proposed an amendment to sub-clause (1) to read, *"The Attorney General in consultation with key stakeholders may make regulations for the better carrying into effect of the provisions of this Act."*

104. The **KLRC** and **LSK** proposed merging clauses 39 and 40 since they both refer to Regulations and Rules which are both subsidiary instruments in accordance with the Statutory Instruments Act, Cap 2A.

Committee Observation

105. The Committee observed that the Chief Justice should be the one responsible for making rules for the better carrying into effect the provisions of the Act.

106. The Committee further observed that the provisions of clauses 39 and 40 are both on delegated powers. These clauses may not be merged as they contain separate and distinct ideas.

Clause 40

107. The **Competition Tribunal** proposed an amendment to sub-clause (1) to read, *"The Attorney General may make rules to govern the procedures of Tribunals generally."*

108. ***Katiba Institute*** submitted that the clause should clearly set out that even while each Tribunal may make rules to govern its procedures, the rules must undergo meaningful public participation.

Committee Observation

109. The Committee further observed that the provisions of clauses 39 and 40 are both on delegated powers. These clauses may not be merged as they contain separate and distinct ideas.

Clause 43

110. The **BPRT** and **Land Acquisition Tribunal** submitted that it is important to ensure continuity and institutional memory by allowing the current membership of tribunals to complete their terms. They proposed the deletion of the words "or a period of eighteen months whichever is earlier" immediately after the word 'term'.

111. For continuity and institutional memory, the **National Council for Law Reporting** proposed that the current Tribunal members and Chairpersons remain in office for their unexpired term rather than requiring them to leave office after eighteen months as the 18

months will come sooner than the expiry of their term of office. This will safeguard against grounding Tribunals to a halt pending recruitment of new tribunal members.

112. The **Refugee Appeal Board** stated that it is necessary to give the Chief Justice some discretion to mitigate hardship and undue delay of justice pending completion of the process of substantive appointments to the Tribunal. Hence, proposed the addition of the following proviso as follows:

"Provided that to avoid undue hardship to the parties or undue delay of justice the Chief Justice may by Gazette Notice extend the terms of the Chairman and members of the Tribunal for such further time as shall be necessary for the Commission to complete the substantive appointments to the Tribunal under Section 12."

Committee Observation

113. The Committee observed that a chairperson or a member of a Tribunal ought to remain until their respective terms of office expire.

Clause 44

114. The **Competition Tribunal** proposed an amendment to read, "The Attorney General may make Rules on the procedure to be followed with regard to pending cases before Tribunals.

Committee Observation

115. The Committee observed that it is important to provide for the fate of cases that are yet to be determined by a Tribunal.

Clause 45

116. The **Competition Tribunal** proposed an amendment to sub-clause (1) to read as follows—

"Subject to subsection (2), the Public Service Commission and Judicial Service Commission shall within eighteen months from the commencement of this Act recognize both Judiciary and Public Officers deployed in Tribunals including the current CEOs/Secretaries of Tribunals as permanent staff of their respective Tribunals but deployed from Judiciary and their respective Ministries. The disparities that exist between the Judicial staff and the Public Officers be addressed by the Public Service Commission within three months."

117. The **State Corporations Appeal Tribunal** proposed the deletion of sub-clause (2)(b) as it may be used to victimize and hound out of office present staff of the Tribunals. Instead, the current staff should be allowed to elect whether to join the Judiciary or be redeployed to MDAs.

Committee Observation

118. The Committee observed that the members of staff of a Tribunal ought to be given an opportunity to be re-employed by the JSC or re-deployed to the respective ministries, departments or agencies.

Clause 46

119. The **Competition Tribunal** proposed an amendment to read, *"A Committee to be chaired by the Attorney General and with membership from the National Treasury, Judicial Service Commission, Public Service Commission and Office of the President to oversee the*

creation of new Tribunals and its budget implications and merging or disbanding Tribunals."

Committee Observation

120. The Committee observed that it is the function of JSC to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice,

Second Schedule

Paragraphs 6, 11 and 28

121. The **KLRC** and **LSK** proposed the general harmonization of the paragraphs with the relevant clauses in the Bill.

Paragraph 8

122. The **BPRT and Land Acquisition Tribunal** stated that it is necessary to retain the current practice of the tribunal of sitting as a one-member panel in view of clearing the backlog and management of many applications filed per day approximated at fifty (50) and where a matter arises requiring a panel then the Chairperson can form such a panel. Consequently, they proposed the deletion of the new Section 11(7) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and substitution with the following to enhance the efficiency of the Tribunal:

"The quorum of the Tribunal shall be one member. Provided that where the Chairman deems appropriate, or upon application by a party, the Chairman may form a panel of three members to hear and determine a matter before the Tribunal."

Committee Observation

123. Section 11 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act establishes a Tribunal whose membership are persons appointed by the Cabinet Secretary in the ministry responsible for trade. Paragraph 8 of the Bill seeks to amend section 11 of the Act in line with the objective of streamlining the governance and operations of Tribunals.

Paragraph 26

124. The **State Corporations Appeal Tribunal** noted that the State Corporations Act, Cap 446 establishes the State Corporations Tribunal and not the Standards Tribunal. The latter is established under the Standards Act, Cap 496. Moreover, the proposal to amend Section 22 of the State Corporations Act to empower the Judicial Service Commission to deploy staff to the Tribunal is only applicable to a Local Tribunal. Moreover, it was the State Corporations Appeal Tribunal's view that it is a self-serving peculiar provision only applicable to populating the State Corporations Appeal Tribunal and does not apply to other existing Tribunals to which the Bill applies.

Committee Observation

125. The Committee noted that the proposed section 22(1) of the State Corporation Act is erroneously drafted and may be amended by deleting the word "Standard" and substituting therefor the words "State Corporations Appeal Tribunal".

Paragraph 50

126. The **BPRT and the Land Acquisition Tribunal** submitted that to avoid quorum hitches and streamline the composition of Tribunals as provided in clause 12(1) of the Bill, the new Section 44(2)(b) of the Privatization Act, Cap 485B be deleted and substituted therefor with *"not less than two persons who are holders of a degree from a university recognized in Kenya and have at least five years' experience and knowledge in matters related to privatization or management."*

Committee Observation

127. The Committee observed that the Privatization Act (Cap. 485B) was repealed by the Privatisation Act (No. 11 of 2023) which establishes the Privatisation Review Board. Therefore, paragraph 50 of the Bill may be re-drafted in light of the enactment of the Privatisation Act (No. 11 of 2023).

Paragraph 68

128. To avoid quorum hitches, the **BPRT and Land Acquisition Tribunal** proposed the deletion of the new Section 23(2)(b) of the Kenya Citizens and Foreign Nationals Management Service Act, Cap 171 and substitution therefor with "not less than two persons who are holders of a degree from a university recognized in Kenya and have at least five years' experience in matters relating to public administration, immigration and demography."

Committee Observation

129. The Committee observed that section 23 of the Kenya Citizens and Foreign Nationals Management Service Act provides for the establishment and membership of the Kenya Citizenship and Immigration Service Appeals Tribunal. Therefore, the proposed membership is in line with the provisions of the Act.

Paragraph 70

130. To avoid quorum hitches, the **BPRT and Land Acquisition Tribunal** proposed the deletion of the new Section 27(2)(b) of the National Construction Authority Act, Cap 118 and substitution therefor with "not less than two persons who are holders of a degree from a university recognized in Kenya and have at least five years' experience in architecture, quantity surveying, engineering, building surveying or project management".

Committee Observation

131. The Committee noted that the proposed membership of the Tribunal is in line with the provisions of the Act.

Paragraph 72

132. To avoid quorum hitches, the **BPRT and Land Acquisition Tribunal** proposed the deletion of the new Section 133A(2)(b) of the Land Act, Cap 280 and substitution therefor with "not less than two persons who are holders of a degree from a university recognized in Kenya and have at least five years' experience in the relevant field."

Committee Observation

133. The Committee noted that the proposed membership of the Tribunal is in line with the provisions of the Act.

Paragraph 142

134. The **Refugee Appeal Board** proposed the addition of the following new sub-paragraph (e) to delete the word 'Committee' and substitution therefor with the word 'Tribunal'. This is to maintain consistency with the description and definition of 'Tribunal' under clause 2 of the Bill as read with Articles 1(c), 47(3)(a) and 169(1)(d) of the Constitution.

135. Additionally, it proposed the addition of a new sub-paragraph (f) to the effect that Sections 11(10) and 14(1) of the Refugees Act, Cap 173 be amended by deleting the words 'of being notified' and substituting therefor the words 'from the date of such decision'. This is to maintain consistency with provisions of clause 27(1) of the Bill that the time to appeal to the High Court shall run from the date of the decision. Ordinarily, parties are duly notified of the date that the decision is delivered and time runs from the said date.

Committee Observation

136. The Committee observed that the Act establishes a Refugee Status Appeals Committee to hear and determine the appeals against a decision of the Commissioner for Refugee Affairs. The nomenclature of the entity may be maintained since the functions performed by the Refugee Status Appeals Committee are those contemplated to be performed by a Tribunal.

Paragraph 144

137. The **National Council for Law Reporting** noted the duplication under the new Section 76(b) and (c) and hence recommended correction of the paragraph to ensure clarity and conformity with the guidelines of legislative drafting.

Committee Observation

138. The Committee agreed with the submission on the amendment of the new section 76 to delete paragraph (c) which is similar to paragraph (b).

General Submissions and Consequential Amendments

139. The **BPRT** orally submitted on Thursday, 12th October 2023 recommending that the National Assembly amends Section 2(1)(c) of the Rent Restriction Act, Cap 296 through consequential amendments to increase the standard rent from two thousand five hundred shillings per month to a reasonable figure in line with the current economic landscape.

140. The **Competition Tribunal** stated that tribunals are administrative, autonomous and comprises shared responsibilities between the Executive and the Judicial Service Commission. It added that there ought to be a sectoral-based committee headed by the Attorney General and comprising members from the JSC, National Treasury, PSC, Office of the President and Cabinet to sanitize and oversee the creation of new tribunals and its budgetary allocation.

141. The Competition Tribunal also submitted that there is a need to ensure the seamless transition of staff from JSC and PSC in the tribunals. They, furthermore, informed the Committee that it should take note that some tribunals are still in their operationalization stage such as the Competition Tribunal hence the need to review the Competition Act, Cap 504 to include the emerging trends before the transition is done to the Judiciary or enactment.

142. The **KLRC** described Tribunals as statutory bodies established to deal with particular types of cases or a number of closely related types of cases on a permanent basis contrary to being set up for a one-off inquiry covering much wider range of subject matters like courts do. Further, that their members do not serve full-time and they adopt a procedure similar but more flexible and simpler than a court of law. Noting that the essence of Tribunals is to offer administrative justice to aggrieved citizens which may not be obtained from the regular courts, it submitted that there is a need for a clear demarcation between the Tribunals and the Judiciary on one hand and the Executive on the other.

143. The **Public Administrative Officers Caucus** and the **TLB** opposed the Bill in its entirety and recommended that the Committee withdraw it from the legislative process. It was the Caucus' view that the Bill is a backdoor amendment to the Constitution seeking to expand the JSC's mandate contrary to Articles 255, 256 and 257 of the Constitution.

144. The Public Administrative Officers Caucus and the TLB, further, stated that the Bill seeks to place all tribunals under one governance regime contrary to the historical understanding and contextual meaning of local tribunals under Article 169 of the Constitution as read with Article 1(3)(c) whose conjecture implies that independent tribunals are distinct from the Judiciary.

145. Additionally, the Public Administrative Officers Caucus and the TLB submitted that the Bill creates and prefers suitability for only degrees in law for the position of registrars and deputy registrars contrary to Article 234 (2)(a) and (g) of the Constitution.

146. The **State Corporations Appeal Tribunal** submitted that the Constitution contemplates a hybrid Tribunal system comprising local Tribunals domiciled in the Judiciary and administrative Tribunals domiciled in the Executive. Hence, the term Local Tribunal should be restricted in its application to matters of local notoriety involving rights determination including community land disputes, customary rights disputes and local disputes of an international nature governed by international legal instruments. Furthermore, administrative Tribunals should remain in the Executive governed by specific legislation governed by a Council of Tribunals, an advisory non-departmental public body, similar to the UK's administrative Justice and Tribunals Council established under the Tribunals Courts and Enforcement Act 2007.

147. The **PPARB** submitted that the Public Procurement Administrative Board is an independent administrative tribunal which does not fall under the ambit of Article 169(1)(d) of the Constitution. Therefore, the provisions of the Bill should not apply to the Tribunal

148. The **National Council for Law Reporting** proposed an amendment to the Judicial Service Commission Act, Cap 8A to allow Tribunals to have representation in the Commission just like the other cadres of courts from the Supreme Court to the Magistrates Courts. Moreover, it also proposed an amendment to Sections 19 and 20 of the National Council for Law Reporting Act, Cap 19A to include Tribunals and other quasi-judicial bodies to require them to supply their judgements, rulings and opinions to Kenya Law. It proposed the following section:

> *"(a) Tribunals shall, subject to the direction of the Chief Justice, as soon as practicable after delivering a judgement, ruling or an opinion cause to be furnished to the Editor of the National Council for Law Reporting (Kenya Law) a certified copy of the judgement, ruling or opinion.*

(b) Every Registrar of a Tribunal shall at the end of each month furnish the Editor with a list of all judgements, rulings or opinions delivered by the Tribunal."

149. Another proposal by the Council was to amend Section 3 of the National Council for Law Reporting Act to provide for the reporting of the decisions of Tribunals for publication and dissemination as follows:

*"**Functions of the Council***
The Council shall—
(a) be responsible for the preparation and publication of the reports to be known as the Kenya Law Reports, which shall contain judgements, rulings and opinions of superior courts of record, tribunals and other quasi-judicial bodies."

Committee Observation

150. The Committee noted that following the promulgation of the Constitution, tribunals were incorporated into the mainstream administration of justice system. Article 169(1) provides a list of subordinate courts which includes local tribunals. Therefore, the affairs of the local tribunals ought to be managed by the Judiciary through JSC.

CHAPTER FOUR

4 COMMITTEE OBSERVATIONS

151. Upon reviewing the Bill and the submissions received, the Committee made the following observations:

(1) Following the promulgation of the Constitution, tribunals were incorporated into the mainstream system of administration of justice. Article 159 provides that judicial authority is derived from the people. The judicial authority is vested in and shall be exercised by the courts and tribunals established by or under the Constitution.

(2) Article 169(1) provides that subordinate courts are the Magistrates' courts, the Kadhi's courts, the Courts Martial and any other court or local tribunal as may be established by an Act of Parliament.

(3) The Bill seeks to give effect to Articles 1(3)(c) 20(4), 47(3), 159(1) and 169 of the Constitution by regulating the administration of tribunals in Kenya. The Committee observed that Article 169 (2) gives Parliament the power to enact legislation conferring jurisdiction, functions and powers of subordinate courts which includes local tribunals. However, the Constitution does not define a local tribunal.

(4) In ***Okiyah Omtatah Okoiti v. Judicial Service Commission & 2 others***, the court applied the *ejus dem generis* rule of interpretation which seeks to give effect to both specific and general words by treating particular words as indicating the class and general words as extending the provisions of statute to everything embraced in that class, though not specifically named by the particular words. Article 169(1) enumerated a class of entities as subordinate courts before mentioning the local tribunals. Subordinate courts were courts subordinate to the superior courts.

(5) Pursuant to the court decision in ***Okiyah Omtatah Okoiti v. Judicial Service Commission & 2 others***, members of tribunals fall within the category of 'other judicial officers' under Article 172(1)(c) of the Constitution and shall be appointed by the JSC. In order to enable such appointments to be undertaken by JSC, there is no doubt that the Tribunals must be transited to the Judiciary. Therefore, this Bill aids in such transition.

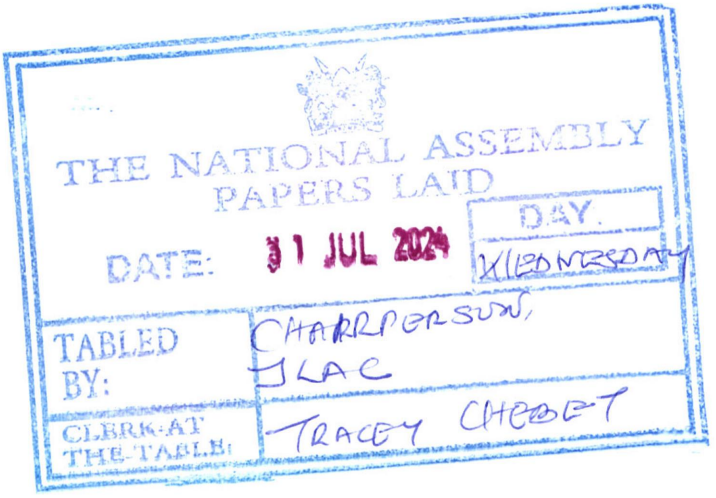
CHAPTER FIVE

5 COMMITTEE RECOMMENDATIONS

152. The Committee, having considered the Tribunals Bill *(National Assembly No. 45 of 2023)* recommends **that the House approves the Bill with the amendments in the Schedule of Amendments forming Chapter Six of this report.**

SIGNED..... DATE..31. 7. 024.....

HON. GEORGE GITONGA MURUGARA, CBS, MP
CHAIRPERSON
DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS



CHAPTER SIX

6 SCHEDULE OF AMENDMENTS

153. In view of the observations made, the Committee proposed the following amendments to the Bill:

154. **LONG TITLE**

THAT the Bill be amended by deleting the long title and substituting therefor the following new long title—

A Bill for

AN ACT of Parliament to give effect to Articles 159(1), 160(1), 161(1) and 169(1)(d) of the Constitution; to establish the Office of the Registrar of Tribunals; to provide for the functions of the Registrar of Tribunals; to rationalize and regulate the administration of Tribunals; and for connected purposes

Rationale:

(a) Delete reference to Article 1(3)(c) on independent tribunals which are not being transitioned to the Judiciary;

(b) Delete reference to Article 20(4) which provides for matters that a court or tribunal need to consider in interpreting the Bill of rights;

(c) Delete reference to Article 47(3) which provides that Parliament shall enact legislation to give effect to the right to fair administrative action and that legislation shall provide for the review of administrative action by a court or an independent and impartial tribunal. The Fair Administrative Action Act (Cap. 7L) was enacted for that purpose.

(d) Insert reference to Article 160(1) and 161(1) which provide for the independence of the judiciary and judicial offices and officers respectively. Pursuant to the judgement in the case of ***Okiyah Omtatah Okoiti v. Judicial Service Commission & 2 others,*** tribunals are part of the judiciary and members of the tribunals are judicial officers.

155. **CLAUSE 4**

THAT Clause 4 be amended by deleting subclause (2) and substituting therefor the following new subclause—

(2) This Act shall not apply to—

(a) a tribunal established by the Constitution;

(b) an arbitral tribunal established under the Arbitration Act; Cap. 49.

(c) an independent tribunal;

(d) an administrative tribunal; and

(e) an informal tribunal.

Rationale: This seeks to provide clarity on the application of the Act pursuant to the qualities of a tribunal referred to Article 169(1) as outlined in the case of ***Okiyah Omtatah Okoiti v. Judicial Service Commission & 2 others.***

156. **CLAUSE 6**

THAT clause 6 of the Bill be amended by inserting the following new paragraph after paragraph (a) in subclause (3)—

(aa) is an advocate of the High Court of Kenya;

Rationale: The function of the Registrar and the Deputy Registrars as contemplated in the Bill require a person who is admitted as an advocate of the High Court of Kenya.

157. **CLAUSE 43**

THAT clause 43 be amended by deleting the word "or a period of eighteen months whichever is earlier" appearing immediately after the word "term".

Rationale: The doctrine of legitimate expectation requires that a person who, immediately before the commencement date, held an office shall continue to hold office for the unexpired period of term.

158. **SECOND SCHEDULE**

THAT the Second Schedule to the Bill be amended by—

(a) deleting paragraph 26 and substituting therefor the following new paragraph—

26. The State Corporations Act is amended by deleting section 22 and substituting therefor the following new section— Amendment of section 22 of Cap. 446.

22. (1) There is established a Tribunal to be known as the State Corporations Appeal Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(2) The Tribunal is established for purposes of hearing appeals under this Act.

(3) The Tribunal shall consist of the following persons appointed by the Commission—

(a) a Chairperson who shall be an advocate of the High Court of Kenya with not less than ten years post qualification experience;

(b) an advocate of the High Court of Kenya of not less than five years standing; and

(c) a person who has a degree from a university recognised in Kenya and has practised as an accountant for not less than five years.

(4) The Commission shall deploy a Deputy Registrar to the Tribunal.

(5) The quorum of the Tribunal shall be three members.

(6) The Chairperson and the members of the Tribunal shall be appointed for a term of five years and shall be eligible for reappointment for one further term of five years.

(7) The Commission shall deploy such staff to the Tribunal for the proper discharge of the functions of the Tribunal under the Act.

(8) The chairperson and the members of the Tribunal shall be paid such

salaries, allowances and benefits as the Commission shall, in consultation with the Salaries and Remuneration Commission, determine.

(9) The expenses of the Tribunal shall be a charge on the Judiciary Fund.

(10) The members of the Tribunal shall not be personally liable for any act or default of the Tribunal done or committed in good faith in the course of exercising the powers conferred by this Act.

(b) deleting paragraph 50 and substituting therefor the following new paragraph—

Amendment of section 2 of No. 11 of 2023.

50. Section 2 of the Privatisation Act is amended by inserting the following new definition in proper alphabetic sequence—

"Commission" means the Judicial Service Commission established by Article 171 of the Constitution.

(c) inserting the following new paragraphs after paragraph 50—

Amendment of section 47 of No. 11 of 2023.

50A. The Privatisation Act is amended by deleting section 47 and substituting therefor the following new section—

Establishment of the Privatisation Review Board.

47. There is established a board to be known as the Privatisation Review Board which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

Amendment of section 48 of No. 11 of 2023.

50B. Section 48 of the Privatisation Act is amended by—

(a) in subsection (1) by deleting paragraph (a) and substituting therefor the following new paragraph—

(a) a Chairperson, who shall be an advocate of the High Court of Kenya with not less than ten years post-qualification experience; and

(b) in subsection (2) by deleting the word "three" appearing immediately before the word "years" in paragraph (b) and substituting therefor the word "five";

Amendment of section 50 of No. 11 of 2023.

50C. The Privatisation Act is amended by deleting section 50 and substituting therefor the following new section—

Deputy Registrar.

50. The Commission shall appoint a Deputy Registrar to the Review Board.

50D. The Privatisation Act is amended by deleting section 52 and substituting therefor the following new section— Amendment of section 52 of No. 11 of 2023.

52. (1) The Chairperson and members of the Review Board shall be paid such remuneration or allowances as the Commission may, in consultation with the Salaries and Remuneration Commission, determine.

(2) The expenses of the review Board shall be a charge in the Judiciary Fund.

50E. The Third Schedule to the Privatisation Act is amended in paragraph 8 by deleting the words "Cabinet Secretary" appearing immediately before the word "may" and substituting therefore the words "Chief Justice". Amendment of the Third Schedule to No. 11 of 2023.

Rationale: The Privatization Act, No. 2 of 2005 was repealed by the Privatisation Act, No. 11 of 2023. Therefore, this is to align the intended amendments to the provisions of the new Act.

(c) deleting paragraph 51;

Rationale: The Privatization Act, No. 2 of 2005 was repealed by the Privatisation Act, No. 11 of 2023. Therefore, this is to align the intended amendments to the provisions of the new Act.

(d) deleting paragraph 52;

Rationale: The Privatization Act, No. 2 of 2005 was repealed by the Privatisation Act, No. 11 of 2023. Therefore, this is to align the intended amendments to the provisions of the new Act.

(e) deleting paragraph 113;
(f) deleting paragraph 114;
(g) deleting paragraph 115;
(h) deleting paragraph 116;
(i) deleting paragraph 117;
(j) deleting paragraph 118;
(k) deleting paragraph 119;
(l) deleting paragraph 120;

Rationale: Section 27(1) of the Public Procurement and Asset Disposal Act (Cap. 412C) establishes the Public Procurement Administrative Review Board as an independent body. Therefore, transiting this body to the Judiciary would be going against the principle of independence.

(m) deleting paragraph 144 and substituting therefor the following new paragraph—

144. The Public Private Partnerships Act is amended by deleting section 76 and substituting therefor the following new section— Amendment of section 76 of Cap. 430.

Deputy Registrar. **76.** The Commission shall appoint a Deputy Registrar who shall have the following qualifications—

(a) holds a degree in law from a university recognised in Kenya;

(b) has at least five years post qualification experience; and
(c) satisfies the requirements of Chapter Six of the Constitution.

Rationale: This seeks to delete a repetition on the listed qualifications of the Deputy Registrar.

Annexure 1:

Adoption Schedule

THE NATIONAL ASSEMBLY
13TH PARLIAMENT (THIRD SESSION) - 2024
JUSTICE AND LEGAL AFFAIRS COMMITTEE

ADOPTION SCHEDULE

AGENDA: **Adoption of the report on Tribunals Bill, 2023 (National Assembly Bill No. 45 of 2023) by the Leader of the Majority Party, Hon. Kimani Ichung'wah, MP**

No.	HON MEMBER	SIGNATURE
1.	HON. MURUGARA GEORGE GITONGA, CBS, MP – ***Chairperson***	
2.	HON. MUTUSE ECKOMAS MWENGI, MP – ***Vice Chairperson***	
3.	HON. MAALIM FARAH, MP	
4.	HON. FRANCIS KAJWANG' TOM JOSEPH, MP	
5.	HON. JUNET MOHAMED, CBS, MP	
6.	HON. ONYIEGO SILVANUS OSORO, CBS, MP	
7.	HON. (DR.) OTIENDE AMOLLO, SC, MP	
8.	HON. MUCHIRA MICHAEL MWANGI, MP	
9.	HON. MAKALI JOHN OKWISIA, MP	
10.	HON. MURIU WAKILI EDWARD, MP	
11.	HON. MAINA JANE NJERI, MP	
12.	HON. GICHOHI KAGUCHIA JOHN PHILIP, MP	
13.	HON. MOGAKA STEPHEN M, MP	
14.	HON. ADEN DAUD, EBS, MP	
15.	HON. SIYAD AMINA UDGOON, MP	

Annexure 2:

Adoption Minutes

MINUTES OF THE FORTY SEVENTH (47TH) SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON TUESDAY, 30TH JULY 2024 AT 10:00AM IN ROOM 18&19, 3RD FLOOR, BUNGE TOWER, PARLIAMENT BUILDINGS

MEMBERS PRESENT

1. Hon. Murugara George Gitonga, CBS, MP - *Chairperson*
2. Hon. Mutuse Eckomas Mwengi, OGW, MP - *Vice Chairperson*
3. Hon. Francis Kajwang' Tom Joseph, MP
4. Hon. Muchira Michael Mwangi, MP - *virtually*
5. Hon. Makali John Okwisia, MP
6. Hon. Aden Daud, EBS, MP
7. Hon. Muriu Wakili Edward, MP
8. Hon. Gichohi Kaguchia John Philip, MP
9. Hon. Mogaka Stephen M, MP

MEMBERS ABSENT WITH APOLOGIES

1. Hon. Maalim Farah, MP
2. Hon. Onyiego Silvanus Osoro, CBS, MP
3. Hon. Junet Mohamed, CBS, MP
4. Hon. (Dr.) Otiende Amollo, SC, MP
5. Hon. Maina Jane Njeri, MP
6. Hon. Siyad Amina Udgoon, MP

SECRETARIAT

1.	Mr. Ahmed Salim Abdalla	-	Clerk Assistant I / Lead Clerk
2.	Mr. Walala Ronald	-	Ag. Deputy Director, Legal Services
3.	Mr. Abdikafar Abdi	-	Clerk Assistant III
4.	Mr. Omar Abdirahim	-	Fiscal Analyst II
5.	Mr. Isaac Nabiswa	-	Legal Counsel
6.	Ms. Vivienne Ogega	-	Research Officer III
7.	Mr. Calvin Karungo	-	Media Relations Officer
8.	Ms. Mary Kamande	-	Public Communication Officer
9.	Mr. Daniel Kamau	-	Audio Officer
10.	Mr. John Nduaci	-	Serjeant-at-Arms

AGENDA

1. Prayers
2. Preliminaries
3. Confirmation of the previous minutes
4. Legal briefing on the Whistleblower Protection Bill, 2023
5. Legal briefing on the County Boundaries Bill (Senate Bill no. 6 of 2023)
6. Legal briefing on the Senate Amendments to the Conflict-of-Interest Bill, 2023
7. Legal briefing on the EACC (Amendment) Bill, 2024
8. Adoption of the Report on the Tribunals Bill (National Assembly No. 45 of 2023)
9. Legal briefing on the reservations on the Penal Code (Amendment) Bill, 2024
10. Consideration and Adoption of the Report on Budget Implementation Monitoring for the FY 2022/2023
11. Way Forward on Actualization of the NADCO report considering that the Speaker directed the Committee to conclude within 30days
12. Any Other Business
13. Adjournment/ Date of the Next Meeting

MIN. NO/DDC/JLAC/236/2024: PRELIMINARIES

The meeting was called to order at twenty minutes past ten o'clock by the Chairperson followed by a word of prayer from the Chairperson and thereafter Members introduced themselves. The agenda of the meeting was adopted having been proposed by Hon. Aden Daud, MP and seconded by Hon. Philip Kaguchia, MP.

MIN.NO/DDC/JLAC/237/2024: CONFIRMATION OF MINUTES

The agenda was deferred.

MIN.NO/DDC/JLAC/238/2024: LEGAL BRIEFING ON THE WHISTLEBLOWER PROTECTION BILL, 2023

The Committee was briefed on the Whistleblower Protection Bill (National Assembly Bill No. 56 of 2023) sponsored by the Hon. Irene Muthoni Kasalu, MP. The Committee took note of a letter Ref: DOJ/CONF/ACE/12 VOL II, dated 2nd April 2024, from the Office of the Attorney General requesting Parliament to either withdraw the Bill or shelve the review of the Bill pending the consideration, finalization and submission of the Whistleblower Protection Bill by Government.

The Committee noted that although the request of the Attorney General was reasonable, but a lot of time has since passed yet no Bill has been forwarded to the National Assembly from the Attorney General. Therefore, it was high time that the Committee proceeded with public hearings in order to get more views from other stakeholders. The Committee was of the view that the Office of the Attorney General will still be given an opportunity during the hearings to provide more insight into their request.

MIN.NO/DDC/JLAC/239/2024: LEGAL BRIEFING ON THE COUNTY BOUNDARIES BILL (SENATE BILL NO. 6 OF 2023)

The Committee was taken through the County Boundaries Bill (Senate Bill No. 6 of 2023) and noted that, among others, the Bill was consistent with the principles enshrined under Article 188 of the Constitution of Kenya.

The Committee further noted that it was scheduled to meet various stakeholders on the Bill on Thursday, 1st August 2024. Some Members were of the view that more stakeholders ought to have been invited, and therefore a second round of public hearings may be necessary. Meanwhile, the Committee was hopeful that Kenyans will still respond to the advert dated 10th June 2024 calling for views from members of the public on the County Boundaries Bill.

MIN.NO/DDC/JLAC/240/2024: LEGAL BRIEFING ON THE SENATE AMENDMENTS TO THE CONFLICT-OF-INTEREST BILL, 2023

The Committee noted that the Senate Amendments to the Conflict of Interest Bill, 2023 (National Assembly Bill No. 12 of 2023) were considered in the House on Wednesday, 24th July 2024 and the Leader of the Majority Party, seconded by the Vice Chairperson of the Departmental Committee on Justice and Legal Affairs, moved the House to reject the Senate Amendments. The Bill was therefore referred to Mediation. The Committee noted that there was therefore, no need for further reporting to the House on the Bill.

MIN.NO/DDC/JLAC/241/2024: **LEGAL BRIEFING ON THE ETHICS AND ANTI-CORRUPTION COMMISSION (AMENDMENT) BILL, 2024 (N.A. BILL NO. 11 OF 2024)**

The Committee was taken through the Ethics and Anti-Corruption Commission (Amendment) Bill, 2024 (National Assembly Bill No. 11 of 2024). The Committee noted that the Bill was one of the bills to be enacted towards the actualization of the recommendations of the National Dialogue Committee Report.

The Committee further noted that it was scheduled to meet various stakeholders on the Bill on Wednesday, 31st July 2024.

MIN. NO/DDC/JLAC/242/2024: **ADOPTION OF THE REPORT ON THE TRIBUNALS BILL, *(NATIONAL ASSEMBLY NO. 45 OF 2023)***

The Committee, having considered the Tribunals Bill (National Assembly No. 45 of 2023) recommended that the House approves the Bill with amendments.

Adoption of the Report

The report was therefore adopted, having been proposed by Hon. Mogaka Stephen M, MP and seconded by Hon. Makali John Okwisia, MP.

MIN.NO/DDC/JLAC/243/2024: **LEGAL BRIEFING ON THE PRESIDENTIAL RESERVATIONS ON THE PENAL CODE (AMENDMENT) BILL, 2024**

The Committee was taken through the memorandum by the President on his reservations and his refusal to assent to the Penal Code (Amendment) Bill 2022 by Hon. David Gikaria, MP. The President was of the view that if the Bill was assented to in its present form without offering alternative offences or sanctions, the Bill will effectively render certain indecent, immoral or disruptive public conduct to be acceptable.

The President further noted that his position was the same position taken by the Justice and Legal Affairs Committee, and also advanced by other Members of Parliament on the floor of the House on various dates, including on 13th March 2024 during the Committee of the Whole House.

Way Forward

The Committee concurred fully with the President's reservations, noting that the same was the Committee's position from the onset. The Committee to prepare and adopt its report on consideration of the President's memorandum.

MIN.NO/DDC/JLAC/244/2024: **ADOPTION OF THE REPORT ON BUDGET IMPLEMENTATION MONITORING FOR THE FY 2022/2023**

The Committee was taken through the Report on Budget Implementation Monitoring for the Financial Year 2022-2023, and unanimously adopted the Report in readiness for tabling.

Adoption of the Report

The Report was adopted, having been proposed by Hon. Aden Daud, EBS, MP and seconded by Hon. John Makali, MP.

MIN.NO/DDC/JLAC/245/2024: ANY OTHER BUSINESS

The Committee noted all the pending business before the Committee and, considering the heavy agenda, resolved to seek approval from the Clerk of the National Assembly to proceed on a working retreat from 1st to 8th of September 2024 in Mombasa County. The Committee to therefore consider, all the pending business including:

1. The omnibus Bill from the National Council on the Administration of Justice (NCAJ) on amendments to the Penal Code;
2. Policy on Public Participation (Sessional Paper No.3, Dec. 2023);
3. Sessional Paper No. 4 of 2024 on Alternative Dispute Resolution Policy;
4. The Sessional Paper No. 4 on the Power of Mercy Policy;
5. The Whistleblower Protection Bill, 2023 sponsored by Hon. Irene Muthoni Kasalu;
6. The County Boundaries Bill (Senate Bill No. 6 of 2023) sponsored by Sen. Moses Otieno Kajwang', MP;
7. Consideration and actualization of the National Dialogue Committee Report;
8. Report of and the addendum on the Multi-Sectorial Working Group on the realization of the Two-Thirds Gender Principle, from the Ministry of Gender, Culture, Arts & Heritage; and
9. Virtual meeting with Kenyans in the Diaspora as per their request vide a letter dated 1st May 2024.

The Committee to invite all the relevant stakeholders including the Office of the Attorney General, the Judiciary and the NCAJ to the proposed retreat.

MIN.NO/DDC/JLAC/246/2024: ADJOURNMENT

The meeting was adjourned at thirty minutes past one o'clock. The next meeting shall be held on Wednesday, 31st July 2024 at ten o'clock.

SIGNED.....**DATE**.....31.7.2024.....

(CHAIRPERSON: HON. MURUGARA GEORGE GITONGA, CBS, MP)

Annexure 3:

Tribunals Bill, 2023

SPECIAL ISSUE

Kenya Gazette Supplement No. 131 (National Assembly Bills No. 45)

REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

NATIONAL ASSEMBLY BILLS, 2023

NAIROBI, 11th August, 2023

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THE TRIBUNALS BILL, 2023

ARRANGEMENT OF CLAUSES

Clauses

PART I — PRELIMINARY

1—Short title.

2—Interpretation.

3—Objects and purposes of the Act.

4—Application of the Act.

PART II —ESTABLISHMENT AND ADMINISTRATION OF TRIBUNALS

5—Functions and powers of the Judicial Service Commission.

6—Registrar of Tribunals.

7—Functions of the Registrar.

8—Functions of the Deputy Registrar.

9—Registrar's power to delegate.

10—Secretariat.

11—Procedure for establishment of Tribunals.

12—Appointment of Chairpersons and members of a Tribunal.

13—Qualifications for appointment of Chairpersons and members of a Tribunal.

14—Disqualifications.

15—Tenure of members of a Tribunal.

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19—Quorum.

20—Remuneration of Chairperson and members.

21—Tribunal may seek technical advice.

22—Jurisdiction of Tribunals.

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29—Budget and funding of Tribunals.
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PART III — GENERAL PROVISIONS

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FIRST SCHEDULE—OATH/AFFIRMATION OF THE OFFICES OF CHAIRPERSON AND MEMBERS OF TRIBUNALS

SECOND SCHEDULE—CONSEQUENTIAL AMENDMENTS

THE TRIBUNALS BILL, 2023

A Bill for

AN ACT of Parliament to give effect to Articles 1(3)(c), 20(4), 47(3), 159(1) and 169 of the Constitution regarding Tribunals; to establish the Office of the Registrar of Tribunals; to provide for the functions of the Registrar of Tribunals; to rationalize and regulate the administration and functions of Tribunals; and for connected purposes

ENACTED by the Parliament of Kenya as follows —

PART I — PRELIMINARY

Short title.

1. This Act may be cited as the Tribunals Act, 2023.

Interpretation.

2. In this Act, unless the context otherwise requires —

"Commission" means the Judicial Service Commission established by Article 171 of the Constitution;

"Chief Registrar" means the Office of the Chief Registrar of the Judiciary established in Article 161 of the Constitution;

Cap 21.

"decree" has the meaning assigned to it under the Civil Procedure Act;

"Deputy Registrar" means a Deputy Registrar deployed to a Tribunal by the Judicial Service Commission;

"Registrar" means the Registrar of Tribunals appointed pursuant to section 6; and

"Tribunal" means a Tribunal established by an Act of Parliament pursuant to Article 169(1)(d) of the Constitution.

Objects and purposes of the Act.

3. The purpose of this Act is to provide a legislative framework to —

(a) rationalize and regulate Tribunals;

(b) streamline the governance and operations of Tribunals;

(c) provide a reasonable standard for the establishment of Tribunals;

(d) set appropriate qualifications for Chairpersons and members of Tribunals;

(e) ensure expeditious settlement of disputes by Tribunals;

(f) enhance access to justice; and

(g) improve quality of service delivery by Tribunals.

Application of the Act.

4. (1) This Act shall apply to Tribunals established pursuant to Article 169(1)(d) of the Constitution.

No.4 of 1995.

(2) For the avoidance of doubt, this Act shall not apply to any Tribunal established by the Constitution or an arbitral Tribunal established under the Arbitration Act, 1995.

PART II – ESTABLISHMENT AND ADMINISTRATION OF TRIBUNALS

Functions and powers of the Judicial Service Commission.

5. (1) In addition to the functions of the Commission under Article 172 of the Constitution, the Commission shall —

(a) develop policies for the regulation of Tribunals;

(b) ensure the enhancement of a fair, efficient and accessible Tribunal system and jurisprudence;

(c) evaluate, rationalize and recommend to Parliament the Tribunals to be established, merged or abolished;

(d) regulate and oversee the functioning of Tribunals;

(e) set standards and monitor compliance with the standards by the Tribunals in their functioning and service delivery;

(f) develop a Code of Conduct for Tribunals;

(g) ensure Tribunals adhere to the provisions of the law, regulations, policies, Code of Conduct, rules or guidelines;

(h) provide strategic direction to Tribunals;

(i) facilitate training programmes for members and staff of Tribunals;

(j) facilitate law reporting on decisions of Tribunals in consultation with the National Council for Law Reporting;

(k) facilitate public education on the role of Tribunals; and

(l) perform any other function as may be necessary for the proper discharge of its responsibilities under this Act.

(2) Despite subsection (1), the Commission shall within two years of the commencement of this Act —

(a) formulate and adopt guidelines for evaluation and rationalization of Tribunals; and

(b) undertake the first evaluation and rationalization exercise and recommend to Parliament the Tribunals to be established, merged or abolished.

Registrar of Tribunals.

6. (1) There shall be a Registrar of Tribunals who shall, pursuant to Article 161(3) of the Constitution, be appointed by the Commission.

(2) There shall be such number of Deputy Registrars for Tribunals as the Commission may deem necessary.

(3) A person shall be qualified for appointment as Registrar or as a Deputy Registrar if the person —

(a) holds a degree in law from a university recognised in Kenya;

(b) has, in the case of the Registrar, at least ten years post qualification experience and, in the case of a Deputy Registrar, has at least five years post qualification experience; and

(c) satisfies the requirements of Chapter Six of the Constitution.

Functions of the Registrar.

7. (1) The Registrar shall perform such duties as the Chief Registrar may direct, and in particular shall be responsible for —

(a) the establishment of registries of Tribunals;

(b) the day to day administration and management of the Secretariat;

(c) overseeing support services for Tribunals including the planning, development and the organization of staff;

(d) the monitoring of administration and office procedures to uphold efficiency and quality of service;

(e) the planning, preparation and implementation of the budget of Tribunals;

(f) the preparation of reports and proposals on administrative issues as may be required from time to time;

(g) overseeing the procurement and disposal of assets;

(h) the acceptance, transmission, service and custody of documents in accordance with the law;

(i) the facilitation of the enforcement of the decisions of Tribunals;

(j) the certification of any order, direction or decision as an order, direction or decision of Tribunals;

(k) causing to be kept records of the proceedings and minutes of the meetings of Tribunals and such other records as Tribunals may direct;

(l) the management of the library of Tribunals;

(m)the facilitation of access to judgments and records of Tribunals; and

(n) undertaking any other duties, in relation to the regulation and management of Tribunals, assigned by the Commission under this Act or any other written law.

(2) The Registrar and Deputy Registrars shall work under the general direction of the Chief Registrar and shall have all the powers necessary for the execution of their functions under this Act.

Functions of the Deputy Registrar.

8. (1) A Deputy Registrar shall be responsible to the Registrar for —

(a) the administration and management of a Tribunal;

(b) case management within the Tribunal;

(c) efficient management of the day-to-day operations and administration of human resources in the Tribunal;

(d) performing judicial functions as may be assigned by the Chief Registrar pursuant to the provisions of any law;

(e) supporting the Registrar through supervision and coordination of the operations of the Tribunal's registry;

(f) accounting for any service in respect of which monies have been allocated and for which issues are made from the Judiciary Fund;

(g) planning, preparing, implementing and monitoring the budget and collecting and accounting for revenue in the Tribunal; and

(h) any other function as may be assigned by the Registrar.

(2) In relation to the proceedings before a Tribunal, a Deputy Registrar may consider and dispose of procedural or administrative matters in accordance with the Rules or on the direction of the Registrar.

Registrar's power to delegate.

9. Except as provided under this Act or any other law, the Registrar may in writing delegate to a Deputy Registrar, any of the powers or responsibilities vested in the Registrar.

Secretariat.

10. (1) There shall be a Tribunals Secretariat which shall be headed by the Registrar.

(2) The Secretariat under subsection (1) shall consist of —

(a) such Deputy Registrars as may be determined by the Commission;

(b) such technical, administrative and support staff as may be appointed by the Commission under this Act; and

(c) such public officers as may be seconded by the Public Service Commission upon a request by the Commission.

(3) The officers and staff under subsection (2) shall be appointed upon such terms and conditions of service as the Commission may determine.

Procedure for establishment of Tribunals.

11. (1) Where a Ministry, Department or Agency intends to establish a Tribunal, the responsible Cabinet Secretary shall submit to the Commission, a written request for the proposed establishment of the Tribunal.

(2) The request of the responsible Cabinet Secretary shall be accompanied by—

(a) a detailed statement justifying the proposed establishment of the Tribunal; and

(b) a feasibility assessment report for the purpose of ascertaining—

(i) the strategic viability of establishing the proposed Tribunal;

(ii) the practicability of the mandate of the proposed Tribunal being conducted by an existing Tribunal; and

(iii) whether or not there is need to establish a new Tribunal.

(3) The Commission shall consider the request and feasibility assessment report submitted to it under subsection (2) and shall submit its decision, in writing to the relevant Cabinet Secretary and to the Cabinet Secretary to the National Treasury, within sixty days of receipt of the report.

(4) Where the Commission recommends the proposed establishment of the Tribunal, the Cabinet Secretary shall submit the request together with the views of the National Treasury on the financial implications of establishing the Tribunal and the decision of the Commission to the Cabinet for consideration and approval.

(5) Upon approval by the Cabinet under subsection (4), a Tribunal shall be established through an Act of Parliament.

(6) Nothing under this section shall preclude the Commission from recommending the appointment of an ad hoc panel of experts to enquire into and determine a dispute

arising out of an emergency and in respect of which no Tribunal has competent jurisdiction.

(7) A panel constituted under subsection (6) shall subject to rules made under this Act have the powers of a Tribunal.

(8) Notwithstanding the provisions of any other law, no Tribunal shall be established without the recommendation of the Commission.

(9) The Commission may prescribe the manner and procedure for the evaluation under subsection (3).

Appointment of Chairpersons and members of a Tribunal.

12. (1) Every Tribunal shall consist of a minimum of three members, one of whom shall be the Chairperson.

(2) The Commission shall through a competitive process appoint the Chairperson and members of a Tribunal.

(3) The members of the Tribunal appointed under this section shall elect a Vice-Chairperson from amongst themselves and the Chairperson and the Vice-Chairperson shall not be of the same gender. No. 1 of 2011.

(4) The provisions of the Judicial Service Act relating to appointment, discipline and removal of judicial officers shall apply with necessary modifications to members of a Tribunal.

Qualifications for appointment of Chairpersons and members of Tribunal.

13. (1) A person shall be qualified for appointment as the Chairperson of a Tribunal if that person —

(a) is a Kenyan citizen;

(b) holds a degree in law from a university recognized in Kenya and is an advocate of the High Court of Kenya;

(c) has not less than ten years' post-qualification experience; and

(d) meets the requirements of Chapter Six of the Constitution.

(2) A person shall be qualified for appointment as a member of a Tribunal if that person —

(a) is a Kenyan citizen;

(b) holds a degree from a university recognized in Kenya;

(c) has knowledge and experience of not less than five years in the respective field; and

(d) meets the requirements of Chapter Six of the Constitution.

Disqualifications.

14. A person shall not be qualified for appointment as a Chairperson or a member of a Tribunal if the person —

(a) is of unsound mind;

(b) is an undischarged bankrupt;

(c) is convicted of an offence and is sentenced to a term of imprisonment for a period of six months or more;

(d) is an employee of a government agency whose decisions are a subject of appeal in the respective Tribunal; or

(e) has been removed from any office for gross violation of the Constitution or any other written law.

Tenure of members of a Tribunal.

15. (1) A Chairperson or a member of a Tribunal shall hold office for a term of five years and shall be eligible for re-appointment for one further term of five years.

(2) The Commission shall appoint members at different times to ensure continuity in the affairs of the Tribunal.

(3) A Chairperson or a member of a Tribunal shall serve on full or part time basis as determined by the Commission.

(4) A Chairperson or member of a Tribunal serving on a fulltime basis shall not hold any other public office.

Vacancy in the office of Chairperson or member of a Tribunal.

16. (1) The office of the Chairperson or member of a Tribunal shall become vacant if the holder —

(a) dies;

(b) resigns from office by notice in writing addressed to the Commission;

(c) is convicted of an offence and is sentenced to a term of imprisonment for a period of six months or more;

(d) completes their term of office;

(e) in the case of a member, is absent from three consecutive meetings of the Tribunal without the permission of the Chairperson of the Tribunal and in the case of the Chairperson, is absent from three consecutive meetings of the Tribunal without the permission of the Chief Registrar; or

(f) is removed from office on any of the following grounds —

(i) gross violation of the Constitution or any other written law;

(ii) gross misconduct or misbehaviour;

(iii) inability to perform functions of the office arising out of physical or mental infirmity;

(iv) incompetence or neglect of duty; or

(v) bankruptcy.

(2) The Commission shall fill any vacancy under this section within three months of the vacancy arising.

General principles.

17. Subject to this Act or any other law, a Tribunal seized of a matter shall —

(a) conduct its proceedings with minimum formality;

(b) hear and determine the matter expeditiously;

(c) not be bound by the rules of evidence and procedure;

(d) encourage mediation, arbitration and other forms of alternative dispute resolution;

(e) ensure the investigation of fact if the Tribunal is of the opinion that such investigation is necessary for the ends of justice; and

(f) act according to equity, good conscience and the substantial merits of the case without undue regard to legal technicalities.

Arrangement of business.

18. (1) The Chairperson shall be responsible for —

(a) ensuring the orderly and expeditious discharge of the mandate of the Tribunal; and

(b) constituting any panel to hear any matter before the Tribunal.(2) Notwithstanding the provisions of subsection (1), the Tribunal shall determine the place at which a panel may sit with a view to securing a reasonable opportunity for parties to appear before the Tribunal with as little inconvenience and expense as is practicable.

Quorum.

19. (1) The quorum of a Tribunal shall be three members.

(2) The Chairperson shall preside at all sittings of a Tribunal at which the Chairperson shall be present and in the absence of the Chairperson, the Vice–Chairperson shall preside and in the absence of the Vice- Chairperson, the members shall nominate one of their own to preside.

(3) Notwithstanding any other provision of this Act, the Chairperson of a Tribunal or a Vice- Chairperson acting alone shall have jurisdiction to deal with interlocutory matters

Remuneration of Chairperson and members.

20. The Chairperson and members of a Tribunal shall be paid such salaries, allowances and benefits as the Commission shall, in consultation with the Salaries and Remuneration Commission, determine.

Tribunal may seek technical advice.

21. (1) A Tribunal may seek technical advice from persons whose specialized knowledge or experience may assist the Tribunal in its proceedings.

(2) A person whose advice is sought under subsection (1) shall disclose any interest they may have in the matter before the Tribunal or any subsequent interest acquired relating to the matter in question.

(3) Any person who gives technical advice to the Tribunal in accordance with this section shall be paid such allowance as may be determined by the Commission.

Jurisdiction of Tribunals.

22. (1) Except as provided by law, every Tribunal shall have jurisdiction to hear and determine any matter provided under the law establishing the Tribunal.

(2) The jurisdiction of a Tribunal shall not include the trial of any criminal offence except as provided for under section 26 of this Act.

(3) A Tribunal shall have power to grant equitable relief including injunctions, penalties, damages and specific performance.

Act 4 of 2015.

(4) A Tribunal may in appropriate cases hear and determine a complaint before it arising under Article 47(3) of the Constitution, the Fair Administrative Action Act or any other written law.

(5) Despite subsection (1), disputes governed by dispute settlement mechanisms under international instruments to which Kenya is a party may only be settled under such instruments.

Power to review own decision.

23. Any person who is aggrieved by a decision of a Tribunal from which no appeal has been preferred, may apply for a review of the decision to the Tribunal which made the decision, and the Tribunal may make such order thereon as it thinks fit.

Enforcement of decisions.

24. A Tribunal may, on application by a decree-holder, order execution of the decree in the manner provided for in the Civil Procedure Act.

Cap. 21.

Award of costs.

25. (1) Where a Tribunal awards costs in any matter, it shall, on application by the person to whom the costs are awarded, issue to him a certificate stating the amount of costs.

(2) Every certificate issued under subsection (1) shall be deemed to be a decree and may be executed as such:

Provided that an order for costs against the Government shall not be enforced save in the manner provided for by the Government Proceedings Act.

Cap 40.

Contempt.

26. It shall be an offence for any person to engage in acts or make omissions amounting to contempt of the Tribunal and the Tribunal may punish such person for contempt in accordance with the provisions of this Act.

Appeals.

27. (1) A person aggrieved by a decision of a Tribunal may appeal to the High Court or Court of equal status, as the case may be, within thirty days from the date of such decision.

(2) The Court in subsection (1) shall within one year of the filing of the appeal, dispense with any appeal filed

under this section and the decision of the Court shall be final.

Period for determination of matters.

28. Every Tribunal shall determine any matter filed before it within six months of filing except where an Act establishing a Tribunal provides a shorter period.

Budget and funding of Tribunals.

29. (1) The expenses of Tribunals shall be a charge on the Judiciary Fund.

(2) At least three months before the commencement of each financial year, the Registrar shall prepare estimates of all expenditure required for purposes of this Act for the next financial year, and submit them to the Chief Registrar for inclusion in the annual estimates of the Judiciary.

(3) The Chief Registrar shall allocate adequate resources to facilitate the effective discharge of the functions of Tribunals.

Annual report.

30. (1) At the end of each financial year, the Chief Registrar shall prepare and submit an annual report on the activities of Tribunals to the Commission.

(2) The annual report shall contain —

(a) the financial statements of Tribunals;

(b) a description of the activities and outcomes of functioning of the Tribunals; and

(c) any other information that the Commission may consider relevant.

(3) The Commission shall ensure that the report submitted under subsection (1) is consolidated in the report that the Commission submits to Parliament under section 38 of the Judicial Service Act, 2011.

No. 1 of 2011

Bank accounts.

No. 18 of 2012

31. The Chief Registrar may in accordance with the Public Finance Management Act, open bank accounts on behalf of Tribunals and shall, as the accounting officer, be responsible for the proper management of the finances of Tribunals.

PART III— GENERAL PROVISIONS

Oath of office.

32. A Chairperson or member of a Tribunal shall on appointment, subscribe to the oath contained in the First Schedule.

Protection from personal liability.

33. Nothing done by a member of a Tribunal or by any person working under the instructions of the

Commission or a Tribunal, shall if done in good faith for the purpose of executing the powers, functions or duties of the Commission or Tribunal under the Constitution, this Act or any other relevant law, render such member or officer personally liable for any action, claim or demand.

Conflict of interest.

34. (1) The Chairperson or a member of a Tribunal who has a direct or indirect personal interest in a matter being considered or to be considered by the Tribunal shall as soon as reasonably practicable after the relevant facts concerning the matter have come to their knowledge, disclose the nature of such interest.

(2) A disclosure of interest made under subsection (1) shall be recorded in the minutes of the meeting and the Chairperson or member of the Tribunal shall not take part in the consideration or discussion on or vote during any deliberations on the matter.

(3) A member of the Tribunal shall recuse themselves from proceedings before the Tribunal in which they have apparent or perceived conflict of interest.

(4) A person who fails to make the requisite disclosure under this section commits an offence.

Confidentiality

35. (1) A member or staff of a Tribunal shall not without the consent in writing given by, or on behalf of, the Registrar, publish or disclose to any person otherwise than in the course of the person's duties the contents of any document, communication or information which relates to, and which has come to the person's knowledge in the course of the person's duties under this Act.

(2) The limitation on disclosure referred to under subsection (1) shall not be construed to prevent the disclosure of criminal activity by a member or staff of a Tribunal.

Duty to co-operate.

36. A person responsible for a matter in question before a Tribunal shall co-operate with the Tribunal and shall in particular —

(a) respond to any inquiry made by the Tribunal; and

(b) provide any other information that the Tribunal may require in the performance of its functions under the Constitution, this Act or any other written law.

Common seal.

37. (1) The common seal of a Tribunal shall be kept in such custody as the Tribunal shall direct and shall not be used except on the order of the Tribunal.

(2) The common seal of the Tribunal shall, when affixed to a document and duly authenticated, be judicially and officially noticed and unless and until the contrary is proved, any necessary order or authorization of the Tribunal under this section shall be presumed to have been duly given.

Offences.

38. (1) A person who —

(a) obstructs, hinders or threatens a member, officer, employee or agent of a Tribunal acting under this Act;

(b) disregards an order of a Tribunal;

(c) submits false or misleading information to a Tribunal; or

(d) makes a false representation to, or knowingly misleads a member, officer, employee or agent of a Tribunal acting under this Act,

commits an offence and shall be liable on conviction, to a fine of not less than two hundred thousand shillings or to imprisonment for a term of not less than one year, or to both such fine and imprisonment.

(2) Any person who commits an offence under this Act for which no other penalty is provided, shall be liable on conviction to a fine not exceeding two hundred and fifty thousand shillings or to imprisonment for a term not exceeding six months, or both.

Regulations.

39. (1) The Chief Justice may make regulations for the better carrying into effect of the provisions of this Act.

(2) The regulations made under this Act may provide for —

(a) rationalization, clustering or classification of Tribunals, including categorization of Tribunals in terms of specialization;

(b) decentralization of services of Tribunals, including their sitting anywhere in the country;

(c) terms of and conditions of service of staff of Tribunals;

(d) a framework for harmonization of standard procedures and rules for Tribunals;

(e) enhancement of access to justice and expeditious disposal of disputes including the use of technology;

(f) alternative dispute resolution mechanisms;

(g) the conduct of investigations;

(h) mechanisms that mandate the courts to refer cases to a Tribunal at initial stages if the Tribunal has jurisdiction to entertain a certain matter and vice versa;

(i) reporting modalities made in consultation with the National Council for Law Reporting and ensuring accessibility of those reports to the public;

(j) appointment and procedures of ad hoc panels of experts; and

(k) standards of training for members of Tribunals.

(3) The provisions of any regulations made under this Act may —

(a) apply generally or be limited in its application;

(b) apply differently according to different kinds and status of Tribunals;

(c) authorize any matter or thing to be done from time to time; or

(d) do any combination of (a), (b) and (c).

Rules.

40. (1) The Chief Justice may make rules to govern the procedures of Tribunals generally.

(2) Subject to subsection (1), each Tribunal may make rules to govern its procedures in the following areas —

(a) filing of cases;

(b) the standards for minimum filing fees and other fees pro- rated in accordance with the value of the subject matter;

(c) principles governing hearings;

(d) parties;

(e) representation;

(f) costs;

(g) appeals;

(h) power to cure irregularities;

(i) correction of mistakes;

(j) review of Tribunal decisions;

(k) authorizing someone to take evidence;

(l) enforcement of decisions and orders;

(m)accessibility of evidence; and

(n) any other relevant area.

Act to prevail.

41. Where the provisions of any Act under which a Tribunal is established conflicts with this Act, the provisions of this Act shall prevail.

Extension of time.

42. (1) A Tribunal may, for sufficient cause shown, extend the time prescribed for doing any act or taking any proceedings before the Tribunal upon such terms and conditions, if any, as may appear just and expedient.

(2) The Commission may, by notice in the *Gazette*, extend the period specified in respect of any matter under this Act by a period not exceeding thirty days.

PART IV —TRANSITIONAL PROVISIONS

Tenure of members of Tribunals.

43. Every person who, immediately before the commencement of this Act was a Chairperson or a member of a Tribunal, shall remain in office for their unexpired term or a period of eighteen months whichever is earlier.

Pending cases.

44. The Chief Justice may make Rules on the procedure to be followed with regard to pending cases or proceedings before Tribunals.

Transfer of staff.

45. (1) Subject to subsection (2), the Commission shall within a period of eighteen months from the commencement of this Act, employ staff to Tribunals from amongst persons who, immediately before the commencement of this Act were public officers serving in Tribunals.

(2) Before employing a person to whom subsections (1) or (3) apply, the Commission may —

(a) require such person to make an application for employment or appointment to the Commission; and

(b) using the criteria prescribed by the Commission, determine the suitability of the person to ensure that the person is fit and proper to serve in the position applied for.

(3) Notwithstanding subsection (1), the public officers shall upon the commencement of this Act, be given an option to elect whether to serve in the Judiciary or to be redeployed to their respective ministries, departments or agencies.

Disposal of assets.

46. The Commission may, where applicable, within a period of eighteen months from the date of commencement of this Act, with respect to existing Tribunals —

(a) conduct an assessment of assets and liabilities of Tribunals;

(b) in consultation with the relevant ministries, departments or agencies dispose of the assets not required by the Tribunals in accordance with the law relating to procurement and disposal of public assets; and

(c) require all ministries, departments or agencies to liquidate all debts of the Tribunals.

Existing laws.

47. Subject to section 41, any law establishing a Tribunal in force on or immediately before the commencement of this Act shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Act.

Consequential amendments to other Acts.

48. The Acts specified in the Second Schedule are amended in the manner specified in that Schedule.

FIRST SCHEDULE
(s. 32)

OATH/AFFIRMATION OF OFFICES FOR CHAIRPERSONS AND MEMBERS OF TRIBUNALS

I..... having been appointed (the Chairperson/Member) to the Tribunal do swear/ solemnly affirm that I will at all times obey, respect and uphold the Constitution of Kenya and all other laws of the Republic; that I will faithfully, fully and impartially and to the best of my knowledge and ability, discharge the trust, perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, or prejudice. (SO HELP ME GOD).

Sworn/Declared by the said

Before me this .....day of .....

CHIEF JUSTICE.

SECOND SCHEDULE (s.48)

CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

Amendment of section 2 of Cap. 296.

1. Section 2 of the Rent Restriction Act is amended by inserting the following new definition in proper alphabetical sequence —

"Commission" means the Judicial Service Commission established by Article 171 of the Constitution.

Amendment of Cap. 296.

2. The Rent Restriction Act is amended by repealing section 4 and replacing it with the following new subsection —

4. (1) There is established a Tribunal to be known as the Rent Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(2) The Tribunal shall consist of the following members appointed by the Commission —

(a) a Chairman who shall be an advocate of the High Court of Kenya with not less than ten years' post-qualification experience; and

(b) not less than three other persons who shall be persons who possess a degree from a university recognized in Kenya and at least five years' experience in a relevant field.

(3) The Commission shall deploy a Deputy Registrar and such staff as may be necessary for the proper discharge of the functions of the Tribunal under this Act.

(4) The Chairman may establish panels of the Tribunal as he deems appropriate.

(5) The quorum of the Tribunal shall be three members provided that the Chairman shall preside at all sittings of the Tribunal at which the Chairman shall be present and in the absence of the Chairman, the Deputy–Chairman shall preside and in the absence of

the Deputy–Chairman, the members shall nominate one of their own to preside.

(6) Any matter considered by a Tribunal shall be decided by the votes of the majority of the persons constituting the Tribunal and voting, and the person presiding shall have a casting vote.

(7) Notwithstanding any other provision of this Act, the Chairman of a Tribunal acting alone shall have jurisdiction to deal with all interlocutory applications which are not of such a nature as to effect a decision in any matter which is in issue between parties.

(8) The office of the Chairman or member of a Tribunal shall become vacant if the holder —

(a) dies;

(b) resigns from office by notice in writing addressed to the Commission;

(c) is convicted of an offence and is sentenced to a term of imprisonment for a period of six months or more;

(d) completes their term of office;

(e) in the case of a member is absent from three consecutive meetings of the Tribunal without the permission of the Chairman of the Tribunal and in the case of the Chairman is absent from three consecutive meetings of the Tribunal without the permission of the Chief Registrar; or

(f) is removed from office on any of the following grounds—

(i) gross violation of the Constitution or any other written law;

(ii) gross misconduct or misbehaviour;

(iii) inability to perform functions of the office arising out of physical or mental infirmity;

(iv) incompetence or neglect of duty; or

(v) bankruptcy.

Amendment of section 5 of Cap. 296.

3. Section 5 of the Rent Restriction Act is amended in subsection (2) by deleting the words "appoint and employ valuers, inspectors, clerks and other staff" and substituting therefor the words "engage registered valuers and rent inspectors on such terms and conditions as the Tribunal may, with the approval of the Commission, determine".

Amendment of Cap. 296.

4. The Rent Restriction Act is amended by repealing section 31 and replacing it with the following new section —

Enforcement of orders.

31. A Tribunal may, on application by a decree-holder, order execution of the decree in the manner provided for in the Civil Procedure Act.

Amendment of section 32 of Cap. 296.

5. Section 32 of the Rent Restriction Act is amended by deleting the words "chairman of the".

Amendment of section 36 of Cap. 296.

6. Section 36 of the Rent Restriction Act is amended by deleting subsection 2 and substituting therefor the following new subsections —

(2) Without prejudice to the generality of the powers conferred by subsection (1), the regulations under that subsection may prescribe the fees to be paid in respect of any matter or thing to be done under this Act.

(3) The Tribunal may make regulations prescribing —

(a) the procedure of the Tribunal; and

(b) the circumstances and manner in which a tenant may, notwithstanding any contractual obligation, elect to pay and pay to the Tribunal rent due to his

landlord, the manner in which rent so paid may be claimed from the Tribunal by the landlord or, if not so claimed, may be disposed of by the Tribunal, and the amount of commission which the Tribunal may retain out of rent so paid to it.

Amendment of section 2 of Cap 301.

7. Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act is amended by inserting the following new definitions in proper alphabetical sequence —

"Cabinet Secretary" means the Cabinet Secretary responsible for matters relating to land;

"Commission" means the Judicial Service Commission established under Article 171 of the Constitution.

Amendment of Cap 301.

8. The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act is amended by repealing section 11 and replacing it with the following new section —

Establishment of the Tribunal.

11. (1) There is established a Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(2) The Tribunal shall consist of the following members appointed by the Commission —

(a) a chairperson;

(b) not less than two persons who shall be persons who possess a degree from a university recognized in Kenya and at least five years' experience in a relevant field.

(3) A person shall be qualified for appointment as the Chairperson of the Tribunal if that person —

(a) holds a degree in law from a University recognized in Kenya and is an advocate of the High Court of Kenya; and

(b) has not less than ten years' post-qualification experience.

(4) The Chairperson and members shall be appointed for a term of five years and shall be eligible for reappointment for one further term of five years.

(5) The Chairperson and members shall serve on fulltime or part time basis as the Commission may determine.

(6) The members shall elect a Vice Chairperson from among themselves, provided that the Chairperson and Vice Chairperson shall not be of the same gender.

(7) The quorum of the Tribunal shall be three members.

(8) The Chairperson of the Tribunal shall preside at all sittings of the Tribunal at which the Chairperson shall be present and in the absence of the Chairperson, the Vice-Chairperson shall preside and in the absence of the Vice- Chairperson, the members shall nominate one of their own to preside.

(9) The Chairperson and members shall be paid such remuneration and allowances as the Commission may, in consultation with the Salaries and Remuneration Commission, determine.

(10) The Commission shall deploy a Deputy Registrar and such staff including valuers and inspectors as may be necessary for the proper discharge of the functions of the Tribunal under this Act.

(11) The expenses of the Tribunal shall be paid out of the Judiciary Fund.

Amendment of section 12 of Cap 301.

9. Section 12 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) is amended —

(a) in sub section (2) by deleting the words "or entertain any criminal proceedings for any offence whether under this Act or otherwise" and substituting therefor the words "except in contempt proceedings";

(b) by deleting subsection (3) and substituting there the following new subsection —

(3) Where a Tribunal has deployed a valuer, inspector, officer, or other person to inspect or view any premises, any report made in that behalf shall be communicated to the landlord or tenant or both.

Amendment of Cap 301.

10. The Landlord and Tenant (Shops, Hotels and Catering Establishments) is amended by repealing section 14 and replacing it with the following new section —

Enforcement of orders.

14. A Tribunal may, on application by a decree-holder, order execution of the decree in the manner provided for in the Civil Procedure Act.

Amendment of Cap 301.

11. The Landlord and Tenant (Shops, Hotels and Catering Establishments) is amended by repealing section 16 and replacing it with the following new section —

Regulations.

16. (1) The Cabinet Secretary may make regulations for the better carrying out of the provisions of this Act.

(2) The Tribunal shall make regulations prescribing the following —

(a) the manner in which the Tribunal shall conduct its business;

(b) the procedure in connexion with any reference to the Tribunal, or the determination of any matter by the Tribunal;

(c) matters which the Tribunal shall take into account in exercising its powers under this Act;

(d) the fees which shall be payable in respect of any matter or thing to be done under this Act; and

(e) the scale and taxation of costs and expenses of witnesses in proceedings before the Tribunal.

Amendment of section 2 of Cap 496.

12. Section 2 of the Standards Act is amended by inserting the following new definition in proper alphabetical sequence —

"Commission" means the Judicial Service Commission established under Article 171 of the Constitution.

Amendment of Cap. 496.

13. The Standards Act is amended by repealing section 16A and replacing it with the following new section —

Standards Tribunal.

16A. (1) There is established a Tribunal to be known as the Standards Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(2) The Tribunal shall consist of the following members appointed by the Commission —

(a) a Chairperson who is an advocate of the High Court of Kenya with not less than ten years' post-qualification experience;

(b) one person who shall be a holder of a degree from a university recognised in Kenya and who shall have at least five years' experience in customs and excise; and

(c) three persons who shall be holders of a degree from a university recognised in Kenya and who shall have at least five years' experience in standardisation.

(3) The Commission shall deploy a Deputy Registrar to the Tribunal.

(4) The Chairman and members of the Tribunal shall serve for a term of five years and shall be eligible for reappointment for one further term of five years.

(5) The office of the Chairman or member of the Tribunal shall become vacant if the holder —

(a) dies;

(b) resigns from office by notice in writing addressed to the Commission;

(c) is convicted of an offence and is sentenced to a term of imprisonment for a period of six months or more;

(d) completes their term of office;

(e) in the case of a member, is absent from three consecutive meetings of the Tribunal without the permission of the Chairperson of the Tribunal and in the case of the Chairperson, is absent from three consecutive meetings of the Tribunal without the permission of the Chief Registrar; or

(f) is removed from office on any of the following grounds —

(i) gross violation of the Constitution or any other written law;

(ii) gross misconduct or misbehaviour;

(iii) inability to perform functions of the office arising out of physical or

(iv) mental infirmity;

(v) incompetence or neglect of duty; or

(vi) bankruptcy.

(6) The Commission shall fill any vacancy under this section within three months of the vacancy arising.

Amendment of Cap. 496.

14. The Standards Act is amended by repealing section 16B and replacing it with the following new section —

16B. The Chairperson and members of the Tribunal shall be paid such salaries, allowances and benefits as the Commission shall in consultation with the Salaries and Remuneration Commission determine.

Amendment of section 16H of Cap. 496.

15. Section 16H of the Standards Act is amended by deleting the word "Minister" and substituting therefor the words "Chief Justice."

Amendment of section 20 of Cap. 496.

16. Section 20(2) of the Standards Act is amended by deleting paragraph (d).

Amendment of section 2 of Cap. 326.

17. Section 2 of the Seeds and Plant Varieties Act is amended by inserting the following new definition in proper alphabetical sequence —

"Commission" means the Judicial Service Commission established by Article 171 of the Constitution.

Amendment of section 28 of Cap. 326.

18. Section 28 of the Seeds and Plant Varieties Act is amended —

(a) in subsection (1) by inserting the words "which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution" immediately after the word "Tribunal";

(b) in subsection (2) by deleting the word "Minister" and substituting therefor the words "Chief Justice".

Amendment of section 29 of Cap. 326.

19. Section 29 of the Seeds and Plant Varieties Act is amended —

(a) by deleting subsection (1A) and substituting therefor the following new subsection —

(1A) A duly certified copy of any determination or order of the Tribunal shall be enforced as a decree of the court. ;

(b) by deleting subsection (1B).

Amendment of Cap. 326.

20. The Seeds and Plant Varieties Act is amended by repealing the Sixth Schedule and replacing it with the following new Schedule —

SIXTH SCHEDULE (s.28)

1.(1) The Tribunal shall consist of the following persons appointed by the Commission —

(a) a Chairman who shall be an advocate of the High Court of Kenya with not less than ten years' post-qualification experience;

(b) two other persons who have a degree from a university recognised in Kenya and have years' experience in agriculture, horticulture, forestry or specialized knowledge of particular species or groups of plants.

(2) The Chairman and members of the Tribunal shall be appointed for a term of five years and shall be eligible for reappointment for one further term of five years.

(3) The Chairman may at any time resign his office by notice in writing to the Commission.

(4) If the Commission is satisfied that the Chairman is unfit to continue in office or is incapable of discharging his duties, the Commission may revoke the appointment of the Chairman.

2. The Chairman may establish benches of the Tribunal as he deems appropriate.

3. The Chairman and members of the Tribunal shall be paid such salaries, allowances and benefits as the Commission shall, in consultation with the Salaries and Remuneration Commission determine.

4. For the purposes of hearing and determining any cause or matter under this Act, the quorum of the Tribunal shall be three members:

Provided that where for any reason the Chairman is absent, the Vice–Chairman shall preside and in the absence of the Vice- Chairman, the members shall nominate one of their own to preside.

5. (1) The Tribunal may order any party to the proceedings to pay to any other party either a specified sum in respect of the costs incurred by the second mentioned party, or the taxed amount of those costs, and any costs required to be taxed for that purpose shall be taxed in the same manner and on the same scale as costs in a subordinate court.

(2) The Chief Justice may make rules relating to the procedure and proceedings before the Tribunal and in particular the rules may make provision as to the —

(a) circumstances in which the Tribunal need not, or shall not, sit in public;

(b) form of any decision of the Tribunal;

(c) time within which such proceedings are to be instituted;

(d) evidence, and the form thereof, which may be required or admitted;

(e) examination of the parties and of witnesses;

(f) procedure for securing the attendance of witnesses and the production of documents; and

(g) fees chargeable in respect of those proceedings.

Amendment of section 2 of Cap 487.

21. Section 2 of the Insurance Act is amended by inserting the following new definition in proper alphabetical sequence —

"Commission" means the Judicial Service Commission established in accordance with Article 171 of the Constitution";

Amendment of Cap 487.

22. The Insurance Act is amended by repealing section 169 and replacing it with the following new section —

169. (1) There is established a Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(2) The Tribunal shall consist of the following members appointed by the Commission —

(a) a Chairman, who shall be an advocate of the High Court of Kenya with not less than ten years' post-qualification experience; and

(b) not less than two and not more than four members who shall be holders of a degree from a University recognised in Kenya and have five years' experience in the relevant field.

(3) The members of the Tribunal appointed under this section shall elect a

Vice-Chairman from amongst themselves and the Chairman and the Vice-Chairman shall not be of the same gender.

(4) For the purposes of hearing and determining any cause or matter under this Act, the quorum of the Tribunal shall be three members:

Provided that where for any reason the Chairman is absent, the Vice–Chairman shall preside and in the absence of the Vice- Chairman, the members shall nominate one of their own to preside.

(5) The members of the Tribunal shall be paid such allowances as the Commission shall in consultation with the Salaries and Remuneration Commission determine.

(6) The Cabinet Secretary may make rules—

(a) prescribing the manner in which an appeal shall be made to the Tribunal and the fees to be paid in respect of an appeal;

(b) prescribing the procedure to be adopted by the Tribunal in hearing an appeal and the records to be kept by the Tribunal;

(c) prescribing the manner in which the Tribunal shall be convened and the places where and the time at which sittings shall be held;

(d) prescribing a scale of costs which may be awarded by the Tribunal; and

(e) generally for the better carrying out of the provisions of this Act relating to the Tribunal and appeals thereto.

Amendment of section 170 of Cap 487.

23. Section 170 of the Insurance Act is amended in subsection (1) by deleting the words "of a Resident Magistrate's Court of the first class".

Amendment of section 171 of Cap 487.

24. Section 171 of the Insurance Act is amended in subsection (2) by deleting the words "may be filed in the court by the person in whose favour the costs have been awarded and, upon being so filed".

Amendment of section 2 of Cap. 446.

25. Section 2 of the State Corporations Act is amended by inserting the following new definition in proper alphabetical sequence —

"Commission" means the Judicial Service Commission established by Article 171 of the Constitution.

Amendment of Cap. 446.

26. The State Corporations Act is amended by repealing section 22 and replacing it with the following new section —

22. (1) There is established a Tribunal to be known as the Standards Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(2) The Tribunal is established for the purposes of hearing appeals under this Act.

(3) The Tribunal shall consist of the following persons appointed by the Commission —

(a) a Chairman who shall be an advocate of the High Court of Kenya with not less than ten years' post-qualification experience;

(b) an advocate of the High Court of not less than five years' standing; and

(c) a person who has a degree from a university recognised in Kenya and has practised as an accountant for a period of not less than five years.

(3) The Commission shall deploy a Deputy Registrar to the Tribunal.

(4) The quorum of the Tribunal shall be three members.

Provided that where for any reason the Chairman is absent, the Deputy-Chairman shall preside and in the absence of the Deputy-Chairman, the members shall nominate one of their own to preside.

(5) The Chairman and members of the Tribunal shall be appointed for a term of five years and shall be eligible for reappointment for one further term of five years.

(6) The Commission shall deploy such staff to the Tribunal as may be necessary for the proper discharge of the functions of the Tribunal under this Act.

(8) The Chairman and members of the Tribunal shall be paid such salaries, allowances and benefits as the Commission shall, in consultation with the Salaries and Remuneration Commission, determine.

(9) The expenses of the Tribunal shall be a charge on the Judiciary Fund.

(10) The members of the Tribunal shall not be personally liable for any act or default of the Tribunal done or committed in good faith in the course of exercising the powers conferred by this Act.

Amendment of section 2 of Cap 485A

27. Section 2 of the Capital Markets Act is amended by inserting the following new definition in proper alphabetical sequence —

"Commission" means the Judicial Service Commission established under Article 171 of the Constitution.

Amendment of section 35A of Cap 485A

28. Section 35A of the Capital Markets Act is amended —

(a) by deleting subsection (1) and substituting therefor the following new subsection —

(1) There is established a Tribunal to be known as the Capital Markets Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of

the Constitution and shall consist of the following members appointed by the Commission —

(a) a Chairman who shall be an advocate of the High Court of Kenya of not less than ten years standing;

(b) one lawyer having at least five years' experience in the commercial and corporate sector;

(c) an accountant who shall have been in practice for a period of not less five years; and

(d) two persons who are holders of a relevant degree from a University recognized in Kenya and five years' experience in the field of securities.

(b) by deleting subsection (2) and substituting therefor the following new subsection —

(2) The Chairman and members shall be appointed for a term of five years and shall be eligible for re-appointment for one further term of five years.

(c) by inserting the following new subsections immediately after subsection (2) —

(2A) The members of the Tribunal shall elect a Deputy-Chairman from among themselves, provided that the Chairman and Deputy Chairman shall not be of the same gender.

(2B) The Commission shall deploy a Deputy Registrar and such other staff as may be necessary for the performance of the functions of the Tribunal under this Act."

(d) in subsection (3)(a) by deleting the word "three" and substituting therefor the word "five";

(e) in subsection (3) (c) by deleting the word "Minister" and substituting therefor the word "Commission";

(f) by deleting subsection (14) and substituting therefor the following new subsection —

(14) The quorum of the Tribunal shall be three members:

Provided that where for any reason the Chairman is absent, the Deputy–Chairman shall preside and

in the absence of the Deputy- Chairman, the members shall nominate one of their own to preside.

(g) by deleting subsection (20) and substituting therefor the following new subsection —

(20) Every certificate issued under subsection (19) shall be deemed to be a decree of the Tribunal and may be executed as such.

(h) by deleting subsection (25) and substituting therefor the following new subsection —

(25)There shall be paid to the chairman and the members of the Tribunal, such remuneration and allowances as the Commission may, in consultation with the Salaries and Remuneration Commission, determine."

(i) in subsection (26) by deleting the words "general fund of the Authority" and substituting therefore the words "Judiciary Fund".

Amendment of section 2 of Cap. 496.

29. Section 2 of the Retirement Benefits Act is amended by inserting the following new definition in proper alphabetical sequence —

"Commission" means the Judicial Service Commission established under Article 171 of the Constitution.

Amendment of Cap. 496.

30. The Retirement Benefits Act is amended by repealing section 47 and substituting therefor the following new section —

47. (1) There is established a Tribunal to be known as the Appeals Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(2) The Tribunal shall consist of the following members appointed by the Commission —

(a) a Chairman who shall be an advocate of the High Court of Kenya with not less than ten years' post-qualification experience; and

(b) four persons who are holders of a degree from a university recognized in Kenya and

have at least five years' experience in the relevant field.

(3) The members of the Tribunal shall elect a Deputy-Chairman from among themselves and the Chairman and the Deputy Chairman shall not be of the same gender.

(4) The Chairman and members shall hold office for a period of five years and shall be eligible for re-appointment for one further term of five years.

(5) For the purposes of hearing and determining any cause or matter under this Act, the quorum of the Tribunal shall be three members:

Provided that where for any reason the Chairman is absent, the Deputy–Chairman shall preside and in the absence of the Deputy- Chairman, the members shall nominate one of their own to preside.

(7) Subject to subsection (5), all matters before the Tribunal shall, in the event of a difference of opinion, be decided by the votes of the majority of the members thereof.

Amendment of section 51 of Cap. 496.

31. Section 51 of the Retirement Benefits Act is amended in subsection (2) by deleting the words "may be filed in the High Court by the person in whose favour the costs have been awarded and upon being so filed."

Amendment of section 2 of No. 12 of 1997.

32. Section 2 of the Co-operatives Societies Act is amended by inserting the following new definition in proper alphabetical sequence —

"Commission" means the Judicial Service Commission established under Article 171 of the Constitution."

Amendment of Cap. 496.

33. The Co-operatives Societies Act is amended by repealing section 77 and replacing it with the following new section —

77. (1) There is established a Tribunal to be known as the Co-operative Tribunal which shall consist of the following members appointed by the Commission —

(a) a Chairman who shall be an advocate of the High Court of Kenya with ten years' post qualification experience;

(b) three persons who are holders of a law degree from a university recognized in Kenya and have at least five years' experience in co-operative law or management; and

(c) three persons who are holders of a degree from a university recognized in Kenya and have at least five years' experience in co-operative management and practice."

(2) The Tribunal shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(3) A Chairperson or a member of a Tribunal shall hold office for a term of five years and shall be eligible for re-appointment for one further term of five years.

(4) The office of the Chairperson or member of a Tribunal shall become vacant if the holder —

(a) dies;

(b) resigns from office by notice in writing addressed to the Commission;

(c) is convicted of an offence and is sentenced to a term of imprisonment for a period of six months or more;

(d) completes their term of office;

(e) in the case of a member, is absent from three consecutive meetings of the Tribunal without the permission of the Chairperson of the Tribunal and in the case of the Chairperson, is absent from three consecutive meetings of the Tribunal without the permission of the Chief Registrar; or

(f) is removed from office on any of the following grounds —

(i) gross violation of the Constitution or any other written law;

(ii) gross misconduct or misbehaviour;

(iii) inability to perform functions of the office arising out of physical or mental infirmity;

(iv) incompetence or neglect of duty; or

(v) bankruptcy.

(6) The Commission shall fill any vacancy under this section within three months of the vacancy arising.

Amendment of section 80 of Cap. 496.

34. Section 80 of the Co-operatives Societies Act is amended —

(a) by deleting subsection (1) and substituting therefor the following new subsection —

(1) For the purposes of hearing and determining any cause or matter under this Act, the quorum of the Tribunal shall be three members:

Provided that where for any reason the Chairman is absent, the Deputy–Chairman shall preside and in the absence of the Deputy- Chairman, the members shall nominate one of their own to preside;

(b) in subsection (3) by deleting the words "Provided that any point of law arising in any proceedings before the Tribunal shall be reserved to, and pronounced upon, by the person presiding exclusively;

(c) in subsection (4) by inserting the expression "or the Deputy-Chairman" immediately after the word "Chairman".

Amendment of section 84 of Cap. 496.

35. Section 84 of the Co-operatives Societies Act is amended by deleting the words "Minister shall" and substituting therefor the words "Commission shall in consultation with the Salaries and Remuneration Commission".

Amendment of Cap. 496.

36. The Co-operatives Societies Act is amended by repealing section 85 and replacing it with the following new section —

85. (1) The Commission shall deploy a Deputy Registrar to the Tribunal.

(2) A person shall be qualified for appointment as a Deputy Registrar if the person —

(a) holds a degree in law from a university recognised in Kenya;

(b) has at least five years post qualification experience; and

(c) satisfies the requirements of Chapter Six of the Constitution.

Amendment of No.2 of 1998.

37. The Kenya Information and Communications Act is amended by repealing section 102 and replacing it with the following new section —

102. (1) There is established a Tribunal to be known as the Communications and Multimedia Appeals Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(2) The Tribunal shall consist of not more than seven members appointed by the Commission, as follows —

(a) a Chairperson who shall be an advocate of the High Court of Kenya with ten years' post qualification experience;

(b) at least four persons who are holders of a degree from a University recognized in Kenya with five years' experience in media, telecommunications, postal, courier systems, radio communications, information technology, business practice or finance, and who are not in the employment of the Government, the Media Council or the Authority.

(3) The members shall elect a Vice Chairperson from among themselves, provided that the Chairperson and Vice Chairperson shall not be of the same gender.

(4) When appointing the members of the Tribunal, the Judicial Service Commission shall —

(a) ensure that the nominees to the Tribunal reflect the interests of all sections of the society;

(b) ensure equal opportunities for persons with disabilities and other marginalized groups; and

(c) ensure that not more than two-thirds of the members shall be of the same gender.

(5) The Chairperson and members of the Tribunal shall hold office for a term of five years and shall be eligible for reappointment for one further term of five years.

(6) The office of the Chairperson or member of a Tribunal shall become vacant if the holder —

(a) dies;

(b) resigns from office by notice in writing addressed to the Commission;

(c) is convicted of an offence and is sentenced to a term of imprisonment for a period of six months or more;

(d) completes their term of office;

(e) in the case of a member, is absent from three consecutive meetings of the Tribunal without the permission of the Chairperson of the Tribunal and in the case of the Chairperson, is absent from three consecutive meetings of the Tribunal without the permission of the Chief Registrar; or

(f) is removed from office on any of the following grounds —

(i) gross violation of the Constitution or any other written law;

(ii) gross misconduct or misbehaviour;

(iii) inability to perform functions of the office arising out of physical or mental infirmity;

(iv) incompetence or neglect of duty; or

(v) bankruptcy.

(6) The Commission shall fill any vacancy under this section within three months of the vacancy arising.

Amendment of section 102C of No.2 of 1998.

38. Section 102C (3) of the Kenya Information and Communications Act is amended by deleting subsection (3) and substituting therefor the following new subsection —

(3) For purposes of hearing and determining any cause or matter under this Act or the Media Council Act, the quorum of the Tribunal shall be three members:

Provided that where for any reason the Chairperson is absent, the Vice Chairperson shall preside and in the absence of the Vice Chairperson, the members shall nominate one of their own to preside."

Amendment of section 1021 of No.2 of 1998.

39. Section 1021 of the Kenya Information and Communications Act is amended by deleting the words "Salaries and Remuneration Commission may determine" and substituting therefor the words "Judicial Service Commission shall, in consultation with the Salaries and Remuneration Commission, determine."

Amendment of No.2 of 1998.

40. The Second Schedule to the Kenya Information and Communications Act is amended —

(a) in paragraph 2 by deleting the word "Minister" and substituting therefor the word "Judicial Service Commission";

(b) in paragraph 3 by deleting subparagraph (1) and substituting therefor the following new subparagraph —

(1) The office of the Chairperson or a member shall become vacant if the Chairperson or member is appointed to the Board or the Commission.;

(c) in paragraph 3(2) by deleting the word "Minister" and substituting therefor the word "Judicial Service Commission";

(d) by deleting paragraph 4 and substituting therefor the following new paragraph —

4. The Chairperson or a member of a Tribunal who has a direct or indirect personal interest in a matter being considered or to be considered by the Tribunal shall as soon as reasonably practicable after the relevant facts concerning the matter have come to their knowledge, disclose the nature of such interest.

(e) by deleting paragraph 5 and substituting therefor the following new paragraph —

5. The Judicial Service Commission shall fill any vacancy under this section within three months of the vacancy arising.

Amendment of section 125 of No. 8 of 1999.

41. Section 125 of the Environmental Management and Co-ordination Act is amended —

(a) by deleting subsection (1) and substituting therefor the following new subsection —

(1) There is established a Tribunal to be known as the National Environment Tribunal which shall consist of the following members appointed by the Judicial Service Commission —

(a) a Chairperson, who shall be an advocate of the High Court of Kenya with not less than ten years' post-qualification experience;

(b) an advocate of the High Court of Kenya;

(c) an advocate of the High Court of Kenya with not less than five years' experience in environmental law; and

(d) three persons who have a degree from a university recognized in Kenya and not less than five years' experience in environmental matters, including but not limited to land, energy, mining, water, forestry, wildlife and maritime affairs.

(b) in subsection (2) by deleting the words "issued by the Cabinet Secretary"

(c) in subsection (4)(a) by deleting the word "three" and substituting therefor the word "five";

(d) in subsection (4)(c) by deleting the words "Cabinet Secretary" and substituting therefor the word "Commission",

(e) by deleting subsection (5) and substituting therefor the following new subsection —

(5) The members shall elect the Vice Chairperson to the Tribunal from amongst the members.

Amendment of section 134 of No. 8 of 1999.

42. Section 134 of the Environmental Management and Co-ordination Act is amended —

(a) in subsection (1) by deleting the words "Cabinet Secretary" and substituting therefor the word "Commission";

(b) in subsection (2) by deleting the words "monies voted by Parliament for that purpose" and substituting therefor the words "Judiciary Fund".

Amendment of No. 8 of 1999.

43. The Environmental Management and Co-ordination Act is amended by repealing section 135 and replacing it with the following new section—

Deputy Registrar.

135. The Commission shall deploy a Deputy Registrar to the Tribunal for the performance of its functions under this Act.

Amendment of No. 8 of 1999.

44. The Environmental Management and Co-ordination Act is amended by repealing section 136.

Amendment of section 2 of No. 3 of 2001.

45. Section 2 of the Industrial Property Act is amended by inserting the following new definition in proper alphabetical sequence —

"Commission" means the Judicial Service Commission established by Article 171 of the Constitution.

Amendment of No. 3 of 2001.

46. The Industrial Property Act is amended by repealing section 113 and replacing it with the following new section —

113. (1) There is established a Tribunal to be known as the Industrial Property Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution."

(2) The Tribunal shall consist of the following members appointed by the Commission —

(a) a Chairman who shall be an advocate of the High Court of Kenya with not less than ten years' post-qualification experience; and

(b) two advocates of the High Court of Kenya who shall have at least five years' post qualification experience; and

(c) two other persons who are holders of a degree from a university recognized in Kenya and have at least five years' experience in industrial, scientific and technological fields.

(3) The Commission shall deploy a Deputy Registrar and such staff as are necessary for the performance of the functions of the Tribunal under this Act.

(4) The Chairman and members of the Tribunal shall hold office for a term of five years and shall be eligible for reappointment for one further term of five years.

(5) The office of the Chairman or member of the Tribunal shall become vacant if the holder —

(a) dies;

(b) resigns from office by notice in writing addressed to the Commission;

(c) is convicted of an offence and is sentenced to a term of imprisonment for a period of six months or more;

(d) completes their term of office;

(e) in the case of a member, is absent from three consecutive meetings of the Tribunal without the permission of the Chairman of the Tribunal and in the case of the Chairman, is absent from three consecutive meetings of the Tribunal without the permission of the Chief Registrar; or

(f) is removed from office on any of the following grounds —

(i) gross violation of the Constitution or any other written law;

(ii) gross misconduct or misbehaviour;

(iii) inability to perform functions of the office arising out of physical or mental infirmity;

(iv) incompetence or neglect of duty; or

(v) bankruptcy.

(6) The Commission shall fill any vacancy under this section within three months of the vacancy arising.

(7) The Chairperson and members of the Tribunal shall be paid such salaries, allowances and benefits as the Commission shall, in consultation with the Salaries and Remuneration Commission determine.

Amendment of section 117 of No. 3 of 2001.

47. Section 117 of the Industrial Property Act is amended by deleting the words "Cabinet Secretary" and substituting therefor the word "Tribunal".

Amendment of section 2 of Cap. 130.

48. Section 2 of the Copyright Act is amended by inserting the following new definition in proper alphabetical sequence —

"Commission" means the Judicial Service Commission established under Article 171 of the Constitution.

Amendment of section 48 of Cap. 130.

49. Section 48 of the Copyright Act is amended —

(a) by deleting subsection (1) and substituting therefor the following new subsection —

(1) There is established a Tribunal to be known as the Copyright Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.;

(b) by deleting subsection (2) and substituting therefor the following new subsection —

(2) The Copyright Tribunal shall consist of the following persons appointed by the Commission —

(a) a chairperson, who shall be an advocate of the High Court of Kenya of not less than ten years standing; and

(b) not less than two and not more than four members who shall be holders of a degree from a university recognised in Kenya and have five years' experience in the relevant field.

Amendment of No. 2 of 2005.

50. The Privatization Act is amended by repealing section 44 and replacing it with the following new section —

44. (1) There is established a Tribunal to be known as the Privatization Appeals Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(2) The Tribunal shall consist of the following members appointed by the Judicial Service Commission —

(a) a Chairman, who shall be an advocate of the High Court of Kenya with not less than ten years' post-qualification experience; and

(b) two persons who are holders of a degree from a university recognized in Kenya and have at least five years' experience and knowledge in matters related to privatization or management.

(3) A person is not qualified to be appointed as a member of the Tribunal if the person is an employee or member of the Commission or a member of the public service.

(4) The Chairman and members of the Tribunal shall be appointed for a term of five years and shall be eligible for reappointment for one further term of five years.

(5) The office of the Chairman or member of the Tribunal shall become vacant if the holder —

(a) dies;

(b) resigns from office by notice in writing addressed to the Commission;

(c) is convicted of an offence and is sentenced to a term of imprisonment for a period of six months or more;

(d) completes their term of office;

(e) in the case of a member, is absent from three consecutive meetings of the Tribunal without the permission of the Chairman of the Tribunal and in the case of the Chairman, is absent from three

consecutive meetings of the Tribunal without the permission of the Chief Registrar; or

(f) is removed from office on any of the following grounds —

(i) gross violation of the Constitution or any other written law;

(ii) (ii) gross misconduct or misbehaviour;

(iii) inability to perform functions of the office arising out of physical or mental infirmity;

(iv) incompetence or neglect of duty; or

(v) bankruptcy.

(6) The Commission shall fill any vacancy under this section within three months of the vacancy arising.

Amendment of No. 2 of 2005.

51. The Privatization Act is amended by repealing section 45 and replacing it with the following new section —

Deputy Registrar

45. The Commission shall appoint a Deputy Registrar to the Tribunal.

Amendment of No. 2 of 2005.

52. The Privatization Act is amended by repealing section 46 and replacing it with the following new section —

46. (1) The Chairperson and members of the Tribunal shall be paid such salaries, allowances and benefits as the Commission shall, in consultation with the Salaries and Remuneration Commission determine.

(2) The expenses of the Tribunal shall be a charge on the Judiciary Fund.

Amendment of the Schedule to No. 2 of 2005.

53. The Second Schedule to the Privatization Act is amended in paragraph 3(1) by deleting the word "secretary" and substituting therefor the word "Deputy Registrar".

Amendment of section 2 of No. 14 of 2006.

54. Section 2 of the HIV and AIDS Prevention and Control Act is amended by inserting the following new definition in proper alphabetical sequence —

"Commission" means the Judicial Service Commission established by Article 171 of the Constitution.

Amendment of No. 14 of 2006.

55. The HIV and AIDS Prevention and Control Act is amended by repealing section 25 and replacing it with the following new section —

25. (1) There is established a Tribunal to be known as the HIV and AIDS Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(2) The Tribunal shall consist of the following members appointed by the Commission —

(a) a chairman who shall be an advocate of the High Court of not less than ten years standing;

(b) two advocates of the High Court of not less than five years standing;

(c) two medical practitioners recognized by the Medical Practitioners and Dentists Board as specialists under the Medical Practitioners and Dentists Act (Cap. 253); and

Cap. 253

(d) two persons who have a degree from a university recognised in Kenya and five years' experience in a relevant field.

(3) At least two of the persons appointed under subsection (2) (a), (b) and (c) shall be women.

(4) The members of the Tribunal appointed under this section shall elect a Vice-Chairman from amongst themselves and the Chairman and the Vice-Chairman shall not be of the same gender.

(5) For the purposes of hearing and determining any cause or matter under this Act, the quorum of the Tribunal shall be three members:

Provided that where for any reason the Chairman is absent, the Vice-Chairman shall preside and in the absence of the Vice-Chairman, the members shall nominate one of their own to preside.

(6) All matters before the Tribunal shall be decided by the votes of a majority of the members present.

(7) The Chairperson and members of the Tribunal shall be paid such salaries, allowances and benefits as the Commission shall, in consultation with the Salaries and Remuneration Commission determine.

(8) The office of the Chairperson or member of a Tribunal shall become vacant if the holder —

(a) dies;

(b) resigns from office by notice in writing addressed to the Commission;

(c) is convicted of an offence and is sentenced to a term of imprisonment for a period of six months or more;

(d) completes their term of office;

(e) in the case of a member, is absent from three consecutive meetings of the Tribunal without the permission of the Chairperson of the Tribunal and in the case of the Chairperson, is absent from three consecutive meetings of the Tribunal without the permission of the Chief Registrar; or

(f) is removed from office on any of the following grounds —

(i) gross violation of the Constitution or any other written law;

(ii) gross misconduct or misbehaviour;

(iii) inability to perform functions of the office arising out of physical or mental infirmity;

(iv) incompetence or neglect of duty; or

(v) bankruptcy.

(9) The Commission shall fill any vacancy under this section within three months of the vacancy arising.

Amendment of section 29 of No. 14 of 2006.

56. Section 29 (2) of the HIV and AIDS Prevention and Control Act is amended —

(a) by deleting the words "may be filed in the High Court by the person in whose favour the damages or costs have been awarded and, upon being so filed;

(b) by deleting the words "High Court" and substituting therefor the word "Tribunal."

Amendment of section 35 of No. 2 of 2009.

57. Section 35 of the Biosafety Act is amended —

(a) by deleting subsection (1) and substituting therefor the following new subsection —

(1) There is established an Appeals Board which shall consist of members appointed by the Commission as follows —

(a) a chairperson, who shall be an advocate of the High Court of Kenya of not less than ten years standing; and

(b) four persons who are holders of a degree from a University recognized in Kenya and have at least five years' experience in biological, environmental or social sciences.

(c) by inserting the following new subsection immediately after subsection (1) —

(1A) The Tribunal shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(d) by deleting subsection (3) and substituting therefor the following new subsection —

(3) The Chairperson and members of the Appeals Board shall hold office for a term of five years and shall be eligible for reappointment for one further term of five years.

(e) in subsection (8) by deleting the word "Minister" and substituting therefor the words "Chief Justice".

Amendment of the Sixth Schedule to No. 2 of 2009 Amendment of No. 12 of 2010.

58. The Sixth Schedule to the Biosafety Act is amended by deleting paragraph 3.

59. The Competition Act is amended by repealing section 71 and replacing it with the following new section —

71. (1) There is established a Tribunal to be known as the Competition Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(2) The Competition Tribunal shall consist of the following members appointed by the Commission —

(a) a Chairman who shall be an advocate of the High Court of Kenya with not less than ten years' post-qualification experience;

(b) not less than two and not more than four members who shall be holders of a degree from a university recognised in Kenya and have five years' experience in the relevant field.

(3) The members of the Tribunal appointed under this section shall elect a Deputy Chairman from amongst themselves and the Chairman and Deputy Chairman shall not be of the same gender.

(4) The Chairman and members of the Tribunal shall hold office for a term of five years and shall be eligible for re-appointment for one further term of five years.

(5) The office of the Chairman or member of the Tribunal shall become vacant if the holder —

(a) dies;

(b) resigns from office by notice in writing addressed to the Commission;

(c) is convicted of an offence and is sentenced to a term of imprisonment for a period of six months or more;

(d) completes their term of office;

(e) in the case of a member is absent from three consecutive meetings of the Tribunal without the permission of the Chairman of the Tribunal and in the case of the Chairman is absent from three consecutive meetings of the Tribunal without the permission of the Chief Registrar; or

(f) is removed from office on any of the following grounds —

(i) gross violation of the Constitution or any other written law;

(ii) gross misconduct or misbehaviour;

(iii) inability to perform functions of the office arising out of physical or mental infirmity;

(iv) incompetence or neglect of duty; or

(v) bankruptcy.

(6) For the purposes of hearing and determining any cause or matter under this Act, the quorum of the Tribunal shall be three members:

Provided that where for any reason the Chairman is absent, the Deputy Chairman shall preside and in the absence of the Deputy Chairman, the members shall nominate one of their own to preside."

(7) The Chairperson and members of the Tribunal shall be paid such salaries, allowances and benefits

as the Commission shall, in consultation with the Salaries and Remuneration Commission determine.

(8) The Chief Justice may, in consultation with the Tribunal, make rules —

(a) prescribing the manner in which an appeal shall be made to the Tribunal and the fees to be paid in respect of all appeals;

(b) prescribing the procedure to be adopted by the Tribunal in hearing an appeal and the records to be kept by the Tribunal;

(c) prescribing the manner in which the Tribunal shall be convened and places where and the time at which the sittings shall be held;

(d) generally for the better carrying out of the provisions of this Act relating to the Tribunal and appeals thereto.

Amendment of No. 11 of 2011.

60. The Political Parties Act is amended by repealing section 39 and replacing it with the following new section —

39. (1) There is established a Tribunal to be known as the Political Parties Disputes Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(2) The Tribunal shall consist of the following members, appointed by the Judicial Service Commission —

(a) a chairperson who shall be an advocate of the High Court of Kenya with not less than ten years' post-qualification experience;

(b) three advocates of the High Court of five years standing; and

(c) three persons who hold a degree form a University recognised in Kenya and at least five years' experience in governance, administrative matters, political affairs, economic matters or other relevant field.

(3) The members of the Tribunal shall elect a vice chairperson from amongst the members who are Advocates of the High Court of Kenya.

(4) The Chairperson and members of the Tribunal shall serve on part-time basis.

(5) The Chairman and members of the Tribunal shall hold office for a term of five years and shall be eligible for re-appointment for one further term of five years.

(6) A person shall not be qualified to be appointed as a member of the Tribunal if that person is a member of the public service or takes an active part in the activities of a political party.

(7) A person shall not qualify for appointment under this section unless the person has met the requirement of Chapter Six of the Constitution.

(8) For the purposes of hearing and determining any cause or matter under this Act, the quorum of the Tribunal shall be three members:

Provided that where for any reason the Chairperson is absent, the Vice-Chairperson shall preside and in the absence of the vice-Chairperson, the members shall nominate one of their own to preside.

Amendment of section 39A of No. 11 of 2011.

61. Section 39A of the Political Parties Act is amended —

(a) in subsection (1) (a) by deleting the word "seven" and substituting therefor the word "five";

(b) in subsection (1) (b) by deleting the words "outstanding governance, administrative, social, political, economic and other record" and substituting therefor the words "a degree from a university recognised in Kenya and not less than five years' experience in governance, administrative matters, political affairs, economic matters or other relevant field"

Amendment of section 43 of No. 11 of 2011.

62. Section 43 of the Political Parties Act is amended by deleting the words "appoint the Secretary" and

substituting therefor the words "deploy a Deputy Registrar."

Amendment of No. 28 of 2011.

63. The Tourism Act is amended by repealing section 87 and replacing it with the following new section —

87. (1) There is established a Tribunal to be known as the Tourism Tribunal which shall consist of the following members appointed by the Judicial Service Commission —

(a) a Chairperson who is an advocate of the High Court of Kenya with not less than ten years' post-qualification experience;

(b) an advocate of the High Court of Kenya who has at least five years' post qualification experience;

(c) three persons who are holders of a degree from a university recognized in Kenya and have at least five years' experience in the tourism or hospitality sector.

(2) The Tribunal in subsection (1) shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(3) The members of the Tribunal shall be appointed at different times so that the respective expiry dates of their terms of office shall fall at different times.

(4) The appointment of members of the Tribunal under subsection (1) shall be through a competitive process taking into account regional balance and gender parity.

(5) The members of the Tribunal appointed under this section shall elect a Vice-Chairperson from amongst themselves.

Amendment of No. 28 of 2011

64. The Tourism Act is amended by repealing section 88 and replacing it with the following new section —

88. (1) A member of the Tribunal shall hold office for a term of five years but shall be eligible for re-appointment for one further term of five years.

(2) The office of a member of the Tribunal shall become vacant—

(a) at the expiry of five years from the date of appointment;

(b) if he accepts any office the holding of which, if he were not a member of the Tribunal, would make him not eligible for appointment to the office of a member of the Tribunal; or

(c) if he is removed from membership of the Tribunal by the Judicial Service Commission for reasons of physical or mental infirmity, or inability to exercise the functions of his office;

(d) if he resigns his office by writing under his hand addressed to the Chairperson of the Judicial Service Commission;

(e) under section 95(2); or

(f) upon his death.

(3) The Chairperson and members of the Tribunal shall be paid such salaries, allowances and benefits as the Commission shall, in consultation with the Salaries and Remuneration Commission determine.

65. The Tourism Act is amended by repealing section 89 and replacing it with the following new section —

Deputy Registrar

89. (1) The Commission shall deploy a Deputy Registrar to the Tribunal.

(2) A person shall be qualified for appointment as a Deputy Registrar if the person —

(a) holds a degree in law from a university recognised in Kenya;

(b) has at least five years post qualification experience; and

(c) satisfies the requirements of Chapter Six of the Constitution.

(3) The Deputy Registrar shall be responsible for the day to day affairs of the Tribunal and shall be answerable to the Tribunal in performance of his functions.

(4) The Deputy Registrar shall perform any other functions determined by the Tribunal.

Amendment of No. 2 of 2011.

66. The Tourism Act is amended by repealing section 94 and replacing it with the following new section —

94. For the purposes of hearing and determining any cause or matter under this Act, the quorum of the Tribunal shall be three members:

Provided that where for any reason the Chairperson is absent, the Vice–Chairperson shall preside and in the absence of the vice- Chairperson, the members shall nominate one of their own to preside.

Amendment of section 2 of No. 31 of 2011.

67. Section 2 of the Kenya Citizens and Foreign Nationals Management Service Act is amended by inserting the following new definition in proper alphabetical sequence —

"Commission" means the Judicial Service Commission established by Article 171 of the Constitution.

Amendment of section 23 of No. 31 of 2011.

68. Section 23 of the Kenya Citizens and Foreign Nationals Management Service Act is amended —

(a) by deleting subsection (1) and substituting therefor the following new subsection —

(1) There is established a Tribunal to known as the Kenya Citizenship and Immigration Service Appeals Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(c) by deleting subsection (2) and substituting therefor the following new subsection —

(2) The Tribunal shall consist of the following members appointed by the Judicial Service Commission —

(a) a Chairperson who is an advocate of the High Court of Kenya with not less than ten years' post-qualification experience;

(b) two persons who are holders of a degree from a university recognized in Kenya and have at least five years' experience in matters relating to public administration, immigration or demography.

(d) by deleting subsection (3) and substituting therefor the following new subsection —

(3) The Judicial Service Commission shall deploy a Deputy Registrar and such staff as shall be necessary for the Tribunal to perform its functions.

Amendment of section 2 of No. 41 of 2011.

69. The National Construction Authority Act is amended in section 2 by inserting the following new definitions in proper alphabetical sequence —

"Appeals Board" means the Appeals Board established under section 27 of this Act;

"Commission" means the Judicial Service Commission established under Article 171 of the Constitution."

Amendment of section 27 of No. 41 of 2011.

70. Section 27 of the National Construction Authority Act is amended —

(a) in subsection (1) by inserting the words "which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution" immediately after the words "the Appeals Board";

(b) by deleting subsection (2) and substituting therefor the following new subsection —

(2) The Appeals Board shall consist of the following members appointed by the Commission —

(a) a Chairperson who shall be an advocate of the High Court of Kenya of not less than ten years standing; and

(b) two persons who are holders of a degree from a university recognized in Kenya and

have at least five years' experience in architecture, quantity surveying, engineering, building surveying or project management.

Amendment of No. 41 of 2011

71. The National Construction Authority Act is amended by repealing section 29 and replacing it with the following new section —

29. The expenses of the Tribunal shall be a charge on the Judiciary Fund.

Amendment of section 133A of No. 6 of 2012.

72. Section 133A of the Land Act is amended —

(a) in subsection (1) by deleting the words "consist of three persons appointed by the Cabinet Secretary through a notice in the Gazette" and substituting therefor the expression "be a subordinate court pursuant to Article 169(1)(d) of the Constitution."

(b) by deleting subsection (2) and substituting therefor the following new subsection —

(2) The Tribunal shall consist of the following members appointed by the Judicial Service Commission —

(a) a Chairperson who shall be an advocate of the High Court of Kenya with not less than ten years' post-qualification experience;

(b) two persons who are holders of a degree from a university recognised in Kenya and have at least five years' experience in the relevant field.

Amendment of section 133B of No. 6 of 2012.

73. Section 133B of the Land Act is amended —

(a) in subsection (1) by deleting the word "four" wherever it appears and substituting therefor the word "five";

(b) in subsection (2) by deleting the word "three" wherever it appears and substituting therefor the word "five".

Amendment of section 133D of No. 6 of 2012.

74. Section 133D of the Land Act is amended by deleting subsection (2).

Amendment of section 29 of No. 27 of 2012.

75. Section 29 of the Legal Education Act is amended —

(a) by deleting subsection (1) and substituting therefor the following new subsection —

(1) There is established a Tribunal to be known as the Legal Education Appeals Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution and shall consist of the following members appointed by the Judicial Service Commission —

(a) a Chairperson who shall be an advocate of the High Court of Kenya of not less than ten years standing; and

(b) four persons who are holders of a law degree from a university recognized in Kenya and have at least five years' experience in the field of legal education.

(b) by inserting the following new subsection immediately after subsection (3) —

(4) The Judicial Service Commission shall appoint a Deputy Registrar who has the following qualifications —

(a) holds a degree in law from a university recognised in Kenya;

(b) has at least five years post qualification experience; and

(c) satisfies the requirements of Chapter Six of the Constitution.

Amendment of section 30 of No. 27 of 2012.

76. Section 30 of the Legal Education Act is amended

(a) in paragraph (b) by deleting the words "Cabinet Secretary" and substituting therefor the words "Judicial Service Commission";

(b) in paragraph (e) by deleting the word "Council" and substituting therefor the word "Tribunal";

(c) in paragraph (f) by deleting the word "Board" and substituting therefor the word "Tribunal".

Amendment of section 33 of No. 27 of 2012.

77. Section 33 of the Legal Education Act is amended by deleting subsection (4) and substituting therefor the following new section —

(4) For the purposes of hearing and determining any cause or matter under this Act, the quorum of the Tribunal shall be three members:

Provided that where for any reason the Chairperson is absent, the members shall nominate one of their own to preside.

Amendment of section 37 of No. 27 of 2012.

78. Section 37 of the Legal Education Act is amended in subsection (3) by deleting the words "may be filed in the High Court by the person in whose favour the costs have been awarded and upon filing, the certificate of costs".

Amendment of No. 27 of 2012.

79. The Legal Education Act is amended by repealing section 40 and replacing it with the following new section —

40. (1) There shall be paid to the Chairperson and the members of the Tribunal, such remuneration and allowances as the Judicial Service Commission shall, from time to time, upon the advice of the Salaries and Remuneration Commission determine.

Amendment of section 40B of No. 29 of 2012.

80. The Kenya National Examinations Council Act is amended by repealing section 40B and replacing it with the following new section —

40B. (1) There is established a Tribunal to be known as the National Examinations Appeals Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(2) The Tribunal shall consist of the following members appointed by the Judicial Service Commission —

(a) a Chairperson, who shall be an advocate of the High Court of Kenya of not less than ten years standing;

(b) four persons who are holders of a degree from a university recognised in Kenya and have at least five years' experience in education management, marking examinations or other relevant field.

(3) The Judicial Service Commission shall appoint the members of the Tribunal by notice in the *Gazette*.

(4) A person shall not be eligible for appointment under subsection (2) if at the time of appointment the person is an employee of the Council or was an employee of the Council five years before the date of appointment.

(5) In making appointments under subsection (2) the Judicial Service Commission shall—

(a) ensure that not more than two-thirds of the appointees are of the same gender; and

(b) have regard to the principle of regional balance.

Amendment of section 40C of No. 29 of 2012.

81. Section 40C of the Kenya National Examinations Council Act is amended —

(a) in subsection (1) by deleting the word "four" and substituting therefor the word "five";

(b) in subsection (2) by deleting the word "three" wherever it appears and substituting therefor the word "five";

Amendment of section 40D of No. 29 of 2012.

82. Section 40D of the Kenya National Examinations Council Act is amended by deleting the words "Cabinet Secretary" and substituting therefor the words "Judicial Service Commission".

Amendment of section 40E of No. 29 of 2012.

83. Section 40E of the Kenya National Examinations Council Act is amended —

(a) in paragraph (a) by deleting the words "Cabinet Secretary" and substituting therefor the words "Judicial Service Commission";

(b) by deleting paragraph (c) and substituting therefor the following new paragraph —

(c) fails to attend three consecutive meetings of the Tribunal without the permission of the Chairperson of the Tribunal and in the case of the Chairperson fails to attend three consecutive meetings of the Tribunal without the permission of the Chief Registrar.

Amendment of No. 29 of 2012.

84. The Kenya National Examinations Council Act is amended by repealing section 40I and replacing it with the following new section —

Deputy Registrar and staff.

40I. (1) The Commission shall deploy a Deputy Registrar and such other staff of the Tribunal as may be necessary for the performance of its functions under this Act.

Amendment of section 40N of No. 29 of 2012.

85. Section 40N of the Kenya National Examinations Council Act is amended by deleting subsection (2) and substituting therefor the following new section —

(2) A certificate issued under subsection (1), shall be deemed to be a decree of the Tribunal and may be executed as such.

Amendment of section 2 of No. 33 of 2012.

86. Section 2 of the National Transport and Safety Authority is amended by inserting the following new definition in proper alphabetical sequence —

"Appeals Board" means the Transport Licensing Appeals Board established under section 39 of this Act.

Amendment of section 39 of No. 33 of 2012.

87. Section 39 of the National Transport and Safety Authority is amended —

(a) in subsection (1) by inserting the expression "which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution" immediately after the word "Board";

(b) by deleting subsection (2) and substituting therefor the following new subsection—

(2) The Appeals Board shall consist of the following members appointed by the Judicial Service Commission—

(a) a Chairperson, who shall be an advocate of the High Court of Kenya of not less than ten years standing; and

(b) four other members who shall be holders of a degree from a university recognised in Kenya and have five years' experience in the relevant field.

(c) by inserting the following new subsection immediately after subsection (2) —

(2A) The members of the Appeals Board appointed under this section shall elect a Vice-Chairperson from amongst themselves;

in subsection (3) by deleting the words "such term and under such conditions as the Cabinet Secretary may determine" and

(d) substituting the following words "five years and shall be eligible for re-appointment for one further term of five years.";

(e) by deleting subsection (4) and substituting therefor the following new subsection —

(4) For the purposes of hearing and determining any cause or matter under this Act, the quorum of the Appeals Board shall be three members:

Provided that where for any reason the Chairperson is absent, the Vice–Chairperson shall preside and in the absence of the Vice-Chairperson, the members shall nominate one of their own to preside.

(f) in subsection (8) by deleting the words "Cabinet Secretary" and substituting therefor the words "Chief Justice."

Amendment of section 2 of No. 55 of 2012.

. Section 2 of the Micro and Small Enterprises Act nded by inserting the following new definition in alphabetical sequence —

ommission" means the Judicial Service ission established under Article 171 of the ution.

Amendment of section 11 of No. 55 of 2012.

. Section 11 of the Micro and Small Enterprises Act nded in subsection (2) by deleting the words "points

Amendment of section 54 of No. 55 of 2012.

. Section 54 of the Micro and Small Enterprises Act nded —

(a) by deleting subsection (1) and substituting therefor the following new subsection —

(1) There is established a Tribunal to be known as the Micro and Small Enterprises Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(b) by deleting subsection (2) and substituting therefor the following subsection —

(2) The Tribunal shall consist of the following members appointed by the Commission —

(a) a Chairperson who shall be an advocate of the High Court of Kenya of not less than ten years standing;

(b) two advocates of the High Court of Kenya who have at least five years' post qualification experience;

(c) two advocates of the High Court of Kenya who have at least five years' experience in micro and small enterprises matters; and

(d) two persons who are holders of a degree in the relevant field and have at least five years' experience in micro and small enterprises matters.

(c) by inserting the following new subsection immediately after subsection (2) —

(2A). The Commission shall appoint a Deputy Registrar who shall have the following qualifications —

(a) holds a degree in law from a university recognised in Kenya;

(b) has at least five years post qualification experience; and

(c) satisfies the requirements of Chapter Six of the Constitution.

(d) in subsection (5)(c) by deleting the words "Cabinet Secretary" and substituting therefor the word "Commission".

Amendment of section 58 of No. 55 of 2012.

91. Section 58 of the Micro and Small Enterprises Act is amended by deleting subsection (1) and substituting therefor the following new subsection —

(1) For the purposes of hearing and determining any cause or matter under this Act, the quorum of the Tribunal shall be three members:

Provided that where for any reason the Chairperson is absent, the Vice-Chairperson shall preside and in the absence of the Vice- Chairperson, the members shall nominate one of their own to preside.

Amendment of section 59 of No. 55 of 2012.

92. Section 59 (1) of the Micro and Small Enterprises Act is amended by inserting the words "may appeal to the Tribunal" immediately after paragraph (d).

Amendment of No. 55 of 2012.

93. The Micro and Small Enterprises Act is amended by repealing section 65 and replacing it with the following new section —

65. (1) The expenses of the Tribunal for the conduct of its business shall be met from the Judiciary Fund.

(2) There shall be paid to the Chairperson and the members of the Tribunal such remuneration and allowances as the Commission may, in consultation with the Salaries and Remuneration Commission, determine from time to time.

Amendment of No. 14 of 2013.

94. The Basic Education Act is amended by repealing section 93 and replacing it with the following new section —

93. (1) There is established an Education Appeals Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(2) The Education Appeals Tribunal shall consist of the following members appointed by the Judicial Service Commission —

(a) a Chairperson who shall be an advocate of the High Court of Kenya of not less than ten years standing; and

(b) six persons who are holders of a degree from a university recognized in Kenya and have at least five years' experience in the relevant field."

(3) The Commission shall deploy a Deputy Registrar and such staff as are necessary for the performance of the functions of the Tribunal under this Act.

(4) Any person aggrieved by the decisions of the County Education Board may appeal to the Education Appeals Tribunal.

(5) The Chief Justice may make Regulations for the better carrying into effect of the provisions of this Act.

Amendment of section 50 of No. 18 of 2013.

95. Section 50 of the Public Benefits Organizations Act is amended —

(a) by deleting subsection (1) and substituting therefor the following new section —

(1) There is established a Tribunal to be known as the Public Benefit Organizations Disputes Tribunal which shall consist of the following members appointed by the Judicial Service Commission —

(a) a Chairperson who shall be an advocate of the High Court of Kenya with not less than ten years' post-qualification experience;

(b) two advocates of the High Court of not less than five years standing; and

(c) two persons who are holders of a degree from a university recognised in Kenya and have at least five years' experience in a field relevant to the discharge of the functions of the Tribunal.

(b) by inserting the following new subsections immediately after subsection (2) —

(2A) The Tribunal shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(2B) The Chairperson and members shall be appointed for a term of five years and shall be eligible for reappointment for one further term of five years.

(c) by deleting subsection (4) and substituting therefor the following new subsection —

(4) For the purposes of hearing and determining any cause or matter under this Act, the quorum of the Tribunal shall be three members:

Provided that where for any reason the Chairperson is absent, the Vice-Chairperson shall preside and in the absence of the Vice-Chairperson, the members shall nominate one of their own to preside.

(b) in subsection (5) by deleting the words "Authority" and substituting therefor the words "Judicial Service Commission";

(c) in subsection (6)(a) by deleting the word "three" and substituting therefor the words "five";

(d) in subsection (6)(c) by deleting the words "Chief Justice" and substituting therefor the words "Judicial Service Commission";

Amendment of section 54 of No. 18 of 2013.

54. Section 54 of the Public Benefits Organizations Act is amended by deleting subsection (2) and substituting therefor the following new subsection —

(2) Every certificate issued under subsection (1), shall be deemed to be a decree of the Tribunal and may be executed as such.

Amendment of No. 55 of 2012.

55. The Civil Aviation Act is amended by repealing section 66 and replacing it with the following new section —

66. (1) There is established a Tribunal to be known as the National Civil Aviation Administrative Review Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(2) The Tribunal shall consist of the following members appointed by the Commission —

(a) a Chairperson who shall be an advocate of the High Court of Kenya of not less than ten years standing; and

(b) four persons who are holders of a degree from a university recognized in Kenya and have at least five years' experience in the field of civil aviation.

(3) The Commission shall appoint a Deputy Registrar who has the following qualifications —

(a) holds a degree in law from a university recognised in Kenya;

(b) has at least five years post qualification experience; and

(c) satisfies the requirements of Chapter Six of the Constitution.

(4) In appointing the Chairperson and members of the Tribunal under this section, the Judicial Service Commission shall take cognizance of the provisions of the Constitution relating regional and other diversities of the people of Kenya.

(5) The members of the Tribunal shall elect a Vice-Chairperson amongst themselves and the chairperson and the Vice-Chairperson shall be persons of the opposite gender.

Amendment of No. 55 of 2012.

98. The Civil Aviation Act is amended by repealing section 67 and replacing it with the following new section —

67. (1) A member of the Tribunal shall hold office for a term of five years but shall be eligible for re-appointment for one further term of five years.

(2) The office of a member of the Tribunal shall become vacant —

(a) at the expiration of five years from the date of his or her appointment;

(b) if he or she accepts any office the holding of which, if he or her were not a member of the Tribunal, would give rise to the existence of a conflict of interest with his or her membership to the Tribunal;

(c) if he or she is removed from membership of the Tribunal by the Commission upon findings of an inquiry determining his or her failure to discharge the functions of his or her office (whether arising from infirmity of body or mind or from any other lawful cause) or for misbehaviour;

(d) if he or she resigns the office of member of the Tribunal; or

(e) upon death.

(3) Members of the Tribunal shall be paid allowances as the Commission shall, in consultation with the Salaries and Remuneration Commission determine.

Amendment of No. 55 of 2012.

The Civil Aviation Act is amended by repealing section

Amendment of section 72 of No. 55 of 2012.

Section 72(4) of the Civil Aviation Act is amen by deleting the words "may be filed in the High Cou the person in whose favour the costs have been awa and upon being so filed",

Amendment of No. 55 of 2012.

The Civil Aviation Act is amended by repealing sect and replacing it with the following new section —

75. The quorum of the Tribunal shall be three members provided that where for any reason the Chairperson is absent, the Vice–Chairperson shall preside and in the absence of the Vice-Chairperson, the members shall nominate one of their own to preside.

Amendment of No. 55 of 2012.

The Civil Aviation Act is amended by deleting sect

Amendment of section 2 of No. 25 of 2013.

Section 2 of the Sports Act is amended by dele the definition of "sports institutions" and subs therefor the following new definition —

"sports institutions" means the Sports Kenya and the Ken Academy of Sports established under this Act".

Amendment of section 6 of No. 25 of 2013.

Section 6 (1) (h) of the Sports Act is amended by dele the word "Secretary" and substituting therefore the wor "Registrar."

Amendment of No. 25 of 2013.

105. The Sports Act is amended by repealing section 55 and replacing it with the following new section —

55. (1) There is established a Tribunal to be known as the Sports Disputes Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(2) The Tribunal shall consist of the following members appointed by the Commission —

(a) a Chairperson who shall be an advocate of the High Court of Kenya with not less than ten years' post-qualification experience; and

(b) two advocates of the High Court of Kenya who shall have at least five years' experience in legal matters relating to sports or have been involved in sport in any capacity; and

(c) at least two and not more than six other persons who are holders of a degree in the relevant field and have at least five years' experience in sports, in any capacity.

(3) The members of the Tribunal shall elect a Vice-Chairperson from among themselves, provided that the Chairperson and Vice-Chairperson shall not be of the same gender.

Amendment of section 60 of No. 25 of 2013.

106. Section 60 of the Sports Act is amended by deleting the words "appoint the Secretary" and substituting therefore the words "deploy a Deputy Registrar."

Amendment of section 2 of No. 40 of 2013.

107. Section 2 of the Tax Appeals Tribunal Act is amended by —

(a) inserting the following new definition in proper alphabetical sequence —

"Deputy Registrar" means the Deputy Registrar deployed to the Tribunal by the Commission under section 7";

(b) deleting the definition of the word "Secretary."

Amendment of section 3 of No. 40 of 2013.

108. Section 3 of the Tax Appeals Tribunal Act is amended by—

(a) renumbering the existing provision as subsection (1); and

(b) inserting the following new subsection immediately after subsection (1)—

(2) The Tribunal shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

Amendment of section 119 of No. 43 of 2016.

109. The Water Act is amended by repealing section 119 and replacing it with the following new section —

There is established a Water Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(2) The Water Tribunal shall consist of the following members appointed by the Judicial Service Commission —

(a) a Chairperson who shall be an advocate of the High Court of Kenya with not less than ten years' post-qualification experience; and

(b) two other persons who possess a degree from a university recognized in Kenya and at least five years' experience in a relevant field.

(3) The Chairperson and members of the Tribunal shall be appointed for a term of five years and shall be eligible for reappointment for one further term of five years.

(4) The Chairperson and members of the Tribunal shall be paid such remuneration and allowances as the Judicial Service Commission may, in consultation with the Salaries and Remuneration Commission, determine.

Amendment of No. 43 of 2016.

110. The Water Act is amended by repealing section 120 and replacing it with the following new section —

120. The Judicial Service Commission shall deploy a Deputy Registrar and such staff as are necessary for the performance of the functions of the Tribunal under this Act.

Amendment of section 124 of No. 43 of 2016.

111. Section 124 of the Water Act is amended by deleting the words "on an issue of law".

Amendment of the First schedule to No. 43 of 2015.

112. The First Schedule to the Water Act is amended —

(a) in paragraph 1(1)(f) of the First Schedule by deleting the words "or Tribunal";

(b) in paragraph 1 by deleting subparagraph (2) and substituting therefor the following new subparagraph —

(2) In this Schedule, unless the context otherwise requires —

"board" means a board to which this Schedule applies;

"Chairperson" means the Chairperson of a board or Committee;

"member" means a member of a board or committee.

(c) in paragraph 2(1) by deleting the words "the Tribunal".

Amendment of section 27 of No. 33 of 2015.

113. Section 27 of the Public Procurement and Asset Disposal Act is amended in subsection (1) by deleting the words "as an unincorporated Board" and substituting therefor the words "which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.";

Amendment of section 28 of No. 33 of 2015.

114. Section 28 of the Public Procurement and Asset Disposal Act is amended —

(a) in subsection (2) by deleting the words "Cabinet Secretary" and substituting therefor the words "Chief Justice";

(b) by deleting section (3) and substituting therefor the following —

(3) The Commission shall deploy a Deputy Registrar and such staff as may be necessary for the proper discharge of the functions of the Review Board under this Act.;

Amendment of No. 33 of 2015.

115. The Public Procurement and Asset Disposal Act is amended by repealing section 29 and replacing it with the following new section —

29. (1) The Review Board shall comprise of the following members who shall be appointed

by the Judicial Service Commission taking into account regional and gender balance —

(a) a Chairperson;

(b) fourteen other members who hold a degree from a university recognised in Kenya and not less than five years' experience in a relevant field.

(2) For the purposes of performing its functions under subsection 28(1)(a), the quorum of the Review Board shall be three members:

Provided that where for any reason the Chairperson is absent, the Vice-Chairperson shall preside and in the absence of the Vice-Chairperson, the members shall nominate one of their own to preside.

Amendment of section 30 of No. 33 of 2015.

116. Section 30 of the Public Procurement and Asset Disposal Act is amended —

(a) in subsection (1) (b) by deleting the word "seven" and substituting therefor the word "five"; and

(b) in subsection (2) by deleting the words "a person who qualifies to be a judge of the High Court" and substituting therefor the words "an advocate of the High Court of Kenya with not less than ten years' post qualification experience."

Amendment of No. 31 of 2015.

117. Section 31 of the Public Procurement and Asset Disposal Act is amended —

(a) in subsection (1) by deleting the word "three" and substituting therefor the word "five"; and

(b) in subsection (2) by deleting the words "on a staggered period of six months" and substituting therefor the words "done at different times."

Amendment of No. 32 of 2015.

118. Section 32 of the Public Procurement and Asset Disposal Act is amended by deleting the words "Cabinet Secretary in" and substituting therefor the words "Commission in consultation with".

Amendment of No. 32 of 2015.

119. The Public Procurement and Asset Disposal Act is amended by inserting the following new section immediately after section 32 —

Expenses of the Review Board.

32A. The expenses of the Review Board shall be a charge on the Judiciary

Amendment of section 168 of No. 33 of 2015.

120. Section 168 of the Public Procurement and Asset Disposal Act is amended by deleting the word "Secretary" and substituting therefor the words "Deputy Registrar".

Amendment of section 35 of No. of 20

121. Section 35 of the Nairobi International Financial Centre Act is amended —

(a) by deleting subsection (1) and substituting therefor the following new subsection —

(1) There is established a Tribunal to be known as the Financial Centre Tribunal which shall be a subordinate court pursuant Article 169(1)(d) of the Constitution and shall consist of the following members appointed by the Commission —

(a) a Chairperson who shall be an advocate of the High Court of Kenya of not less than ten years standing; and

(b) four other members who are holders of a degree from a university recognized in Kenya and five years' experience in the financial services sector.

(b) in subsection (3) by deleting the word "three" wherever it appears and substituting therefor the word "five".

(c) in subsection (5) by deleting paragraph (e) and substituting therefor the following paragraph—

(e) fails to attend three consecutive meetings of the Tribunal without the permission of the Chairperson of the Tribunal and in the case of the Chairperson fails to attend three consecutive meetings of the Tribunal without the permission of the Chief Registrar.

Amendment of No. 25 of 2017.

122. The Nairobi International Financial Centre Act is amended by deleting section 36.

Amendment of section 37 of No. 25 of 2017.

123. Section 37 (1) of the Nairobi International Financial Centre Act is amended by inserting the words "a Deputy Registrar and" immediately after the word "appoint".

Amendment of section 2 of No.1 of 2019.

124. Section 2 of the Energy Act is amended by inserting the following new definition in proper alphabetical sequence —

"Commission" means the Judicial Service Commission established under Article 171 of the Constitution.

Amendment of section 25 of No.1 of 2019.

125. Section 25 of the Energy Act is amended —

(a) by renumbering the existing provision as subsection (1); and

(b) by inserting the following new subsection immediately after the renumbered subsection (1) —

(2) The Tribunal shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

Amendment of No.1 of 2019.

126. The Energy Act is amended by repealing section 25 and substituting therefor the following new section —

25. (1) The Tribunal shall consist of not more than seven members as follows —

(a) a Chairperson who shall be an advocate of the High Court of Kenya with ten years' post qualification experience;

(b) six other persons who are holders of a degree from a University recognized in Kenya with at least five years' experience in law, petroleum and energy and who are not in the employment of the Agency or Authority.

(2) The members of the Tribunal shall elect a Vice-Chairperson who shall be an advocate of the High Court of Kenya and have at least five years' experience in energy and petroleum matters.

(3) In appointing the members of the Tribunal, the Commission shall —

(a) ensure that the members of the Tribunal reflect the interests of all sections of the society;

(b) ensure equal opportunities for persons with disabilities and other marginalized communities; and

(c) ensure that no more than two-thirds of the members shall be of the same gender.

(4) The members of the Tribunal shall hold office for a period of five years, but shall be eligible for reappointment for one further term of five years.

Amendment of No. 1 of 2019.

127. The Energy Act is amended by repealing section 27 and substituting therefor the following new section —

27. (1) The office of the Chairperson or member of a Tribunal shall become vacant if the holder —

(a) dies;

(b) resigns from office by notice in writing addressed to the Commission;

(c) is convicted of an offence and is sentenced to a term of imprisonment for a period of six months or more;

(d) completes their term of office;

(e) in the case of a member, is absent from three consecutive meetings of the Tribunal without the permission of the Chairperson of the Tribunal and in the case of the Chairperson, is absent from three consecutive meetings of the Tribunal without the permission of the Chief Registrar; or

(f) is removed from office on any of the following grounds —

(i) gross violation of the Constitution or any other written law;

(ii) gross misconduct or misbehaviour;

(iii) inability to perform functions of the office arising out of physical or mental infirmity;

(iv) incompetence or neglect of duty; or

(v) bankruptcy.

(2) The Commission shall fill any vacancy under this section within three months of the vacancy arising.

Amendment of section 30 of No.1 of 2019.

128. Section 30 of the Energy Act is amended —

(a) in the marginal note by deleting the word "Secretary" and substituting therefor the word "Deputy Registrar";

(b) by deleting subsection (1) and substituting therefor the following new subsection —

(1) The Commission shall deploy a Deputy Registrar to the Tribunal;

(c) by deleting subsection (2) and substituting therefor the following new subsection —

(2) A person shall be qualified for appointment as a Deputy Registrar if the person —

(a) holds a degree in law from a university recognised in Kenya;

(b) has at least five years post qualification experience;

(c) satisfies the requirements of Chapter Six of the Constitution; and

(d) in subsection (3) by deleting the word "Tribunal' and substituting therefor the word 'Commission'.

Amendment of No.1 of 2019.

129. The Energy Act is amended by repealing section 31.

Amendment of section 32 of No.1 of 2019.

130. Section 32 of the Energy Act is amended —

(a) by deleting subsection (2); and

(b) by deleting subsection (3) and substituting therefor the following new subsection—

(3) The Tribunal shall determine the place at which a panel may sit with a view to securing a reasonable opportunity for applicants to appear before the Tribunal with as little inconvenience and expense as is practicable.

Amendment of section 33 of No.1 of 2019.

131. Section 33 of the Energy Act is amended —

(a) by deleting subsection (1) and substituting therefor the following new subsection —

(1) The Chairperson of a Tribunal shall preside at all sittings of the Tribunal at which the Chairperson shall be present and in the absence of the Chairperson, the Vice–Chairperson shall preside and in the absence of the Vice-Chairperson, the members shall nominate one of their own to preside.

(b) in subsection (2) by deleting the words "including the Chairperson or the Vice-Chairperson as the case may be."

Amendment of section 35 of No.1 of 2019.

132. Section 35 of the Energy Act is amended by deleting subsection (1) and substituting therefor the following new subsection —

(1) The Chairperson and members of a Tribunal shall be paid such salaries, allowances and benefits as the Commission shall, in consultation with the Salaries and Remuneration Commission, determine.

Amendment of section 39 of No.1 of 2019.

133. Section 39 of the Energy Act is amended by deleting subsection (1) and substituting therefor the following new subsection —

(1) The expenses of the Tribunal shall be a charge on the Judiciary Fund.

Amendment of section 198 of No.1 of 2019.

134. Section 198 of the Energy Act is amended by deleting subsection 2(o).

Amendment of the Second Schedule to No.1 of 2019.

135. The Second Schedule to the Energy Act is amended —

(a) in the title by deleting the expression "Energy and Petroleum Tribunal (S.31);

(b) in paragraph 1 of the Second Schedule by deleting the word "Tribunal";

(c) in paragraph 2 of the Second Schedule by deleting the word "Tribunal,";

(d) in paragraph 6 of the Second Schedule by deleting the word "Tribunal,";

(e) in paragraph 7 of the Second Schedule by deleting the word "Tribunal" wherever it appears;

(f) in paragraph 8 of the Second Schedule by deleting the word "Tribunal" wherever it appears; and

(g) in paragraph 9 of the Second Schedule by deleting the word "Tribunal" wherever it appears.

Amendment of section 2 of No. 17 of 2019.

136. Section 2 of the Kenya Accreditation Service Act is amended by inserting the following new definition in proper alphabetical sequence —

"Commission" means the Judicial Service Commission established under Article 171 of the Constitution.

Amendment of No. 17 of 2019.

137. The Kenya Accreditation Service Act is amended by repealing section 16 and substituting therefor the following new section —

16. (1) There is established a Tribunal to be known as the Accreditation Appeals Tribunal which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(2) The Accreditation Appeals Tribunal shall consist of five members being —

(a) a Chairperson appointed competitively by the Commission; and

(b) four other persons who possess expertise and knowledge in matters relating to accreditation, conformity assessment, standardization or regulatory activities.

(3) A person shall be qualified for appointment under subsection (2)(a) if that person has —

(a) a degree in law from a University recognized in Kenya and is an advocate of the High Court of Kenya; and

(b) not less than ten years' post-qualification experience;

(4) The members under subsection (2)(b) shall be appointed competitively by the Commission from amongst persons who —

(a) hold a university degree in law or science and technology; and

(b) possess at least five years relevant experience in their areas of expertise.

(5) The Tribunal shall hear and determine appeals emanating from the decisions of the Service.

Amendment of No. 17 of 2019.

138. The Kenya Accreditation Service Act is amended by repealing section 17 and replacing it with the following new section —

17. An accredited body that is aggrieved by a decision of the Service may, appeal within twenty-one days of being notified of the decision.

Amendment of No. 17 of 2019.

139. The Kenya Accreditation Service Act is amended by inserting the following new section immediately after section 20 —

Remuneration of Chairperson and members of the Accreditation Appeals Tribunal.

20A. The Chairperson and members of the Accreditation Appeals Tribunal shall be paid such salaries, allowances and benefits as the Commission shall, in consultation with the Salaries and Remuneration Commission, determine.

Amendment of No. 17 of 2019.

140. The Kenya Accreditation Service Act is amended by repealing section 27 and replacing it with the following new section —

Remuneration of members of the Board and committees.

27. The Service shall pay such remuneration and allowances to the members of the Board and committees as approved by the Cabinet Secretary upon the recommendation of the Salaries and Remuneration Commission."

Amendment of the Third Schedule to No. 17 of 2019.

141. The Kenya Accreditation Service Act is amended by deleting paragraph 7 of the Third Schedule and substituting therefor the following new paragraph —

7. (1) The quorum of a Tribunal shall be three members.

(2) The Chairperson shall preside at all sittings of a Tribunal at which the Chairperson shall be present and in the absence of the Chairperson, the Vice–Chairperson shall preside and in the absence of the Vice- Chairperson, the members shall nominate one of their own to preside.

Amendment of section 11 of No. 10 of 2021.

142. Section 11 of the Refugees Act is amended —

(a) in subsection (1) by inserting the words "which shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution." immediately after the words "Appeals Committee";

(b) by deleting subsection (2) and substituting therefor the following new subsection —

(2) The Refugee Status Appeals Committee shall consist of the following members appointed by the Judicial Service Commission —

(a) a Chairperson who shall be an advocate of the High Court of Kenya with not less than ten years' post-qualification experience; and

(b) six persons who are holders of a degree in the relevant field and have at least five years' experience in refugee matters.;

(c) by deleting subsection (3) and substituting therefor the following new subsection —

(3) For the purposes of hearing and determining any cause or matter under this Act, the quorum of the Appeals Committee shall be three members:

Provided that where for any reason the Chairperson is absent, the vice–Chairperson shall preside and in the absence of the vice-Chairperson, the members shall nominate one of their own to preside.

(d) in subsection (5) by deleting the word "three" and substituting therefor the word "five";

(e) in subsection (7) by deleting the words "Public Service Commission" and substituting therefor the words "Judicial Service Commission".

Amendment of section 75 of No. 14 of 2021.

143. Section 75 of the Public Private Partnerships Act is amended —

(a) by inserting the following new subsection immediately after subsection (1) —

(1A) The Petition Committee shall be a subordinate court pursuant to Article 169(1)(d) of the Constitution.

(b) by deleting subsection (2) and substituting therefor the following new subsection —

(2) The Petition Committee shall consist of the following members appointed by the Commission —

(a) a Chairperson who shall be an advocate of the High Court of Kenya of not less than ten years standing;

(b) six persons who are holders of a law degree and have at least five years' relevant knowledge and experience;

(c) in subsection (3) by deleting the word "three" and substituting therefor the word "five";

(d) in subsection (9) by deleting the words "Cabinet Secretary" and substituting therefor the word "Commission".

Amendment of No. 14 of 2021.

144. The Public Private Partnerships Act is amended by repealing section 76 and replacing it with the following new section —

Deputy Registrar.

76. The Commission shall appoint a Deputy Registrar who has the following qualifications —

(a) holds a degree in law from a university recognised in Kenya;

(b) has at least five years post qualification experience; and

(c) has at least five years post qualification experience; and

(d) satisfies the requirements of Chapter Six of the Constitution.

Amendment of section 77 of No. 14 of 2021.

145. The Public Private Partnerships Act is amended in section 77 —

(a) by inserting the word "Petition" immediately after the words "members of the";

(b) by deleting the words "Cabinet Secretary" and substituting therefor the word "Commission" .

Amendment of No. 14 of 2021.

146. The Public Private Partnerships Act is amended by repealing section 78 and replacing it with the following new section —

Conflict of interest

78. A member of the Petition Committee who has a direct or indirect interest in a matter before the Petition Committee shall declare the interest and shall not participate in any proceedings of the Petition Committee on the matter.

Amendment of section 79 of No. 14 of 2021.

147. Section 79 of the Public Private Partnerships Act is amended by deleting subsection (1) and substituting therefor the following new subsection —

(1) A person shall not —

(a) without reasonable cause or lawful excuse, obstruct or hinder, assault or threaten a member of the Petition Committee acting under this Act;

(b) without justification, fail to provide information required by the Petition committee under this Act;

(c) without justification, fail to provide information within reasonable time that is required by the Petition committee under this Act;

(d) submit false or misleading information to the committee; misrepresent to or knowingly mislead a member of the Petition Committee acting under this Act; or

(e) interfere with or exert undue influence on any member of the Petition Committee.

148. Section 80 of the Public Private Partnerships Act is amended by section 80 by deleting the word "Committee" and substituting therefor the words "Petition Committee"

MEMORANDUM OF OBJECTS AND REASONS

Statement of objects and reasons

The principal object of this Bill is to give effect to Articles 1(3)(c), 20(4), 47(3), 159(1) and 169 of the Constitution in relation to the governance and administrative framework of Tribunals in Kenya. Pursuant to this objective, the Bill proposes to reform the Tribunal system in Kenya by inter alia, rationalizing and regulating the administration and functions of Tribunals, establishing the Tribunals Registry and providing for the structure, membership and administration of Tribunals.

Part I of the Bill contains the preliminary matters.

Part II of the Bill provides for the establishment and administration of Tribunals. **Clause 5** of the Bill provides for additional functions of the Judicial Service Commission. **Clause 6** provides for the establishment of the Office of the Registrar of Tribunals whilst **clause 7** sets out the functions of the Registrar to include the transmission and custody of documents in relation to Tribunals, the implementation of decisions of the Tribunals and causing to be kept records of the proceedings and minutes of the meetings of the Tribunals and such other records as the Judicial Service Commission may direct. This Part further seeks to create jurisprudence on the decisions of the Tribunals by requiring the Commission to have the decisions of Tribunals reported by the National Council for Law Reporting. In addition, **clause 11** provides for the procedure to be followed by the Executive, the Judiciary and Parliament in establishing Tribunals. The procedures seek to include all arms of government in the establishment of Tribunals in view of the specialized nature of Tribunals and also to ensure transparency in the process. **Clauses 12 and 13** provide for the procedure for the appointment of the chairpersons and members of Tribunals and the required qualifications for appointment. **Clause 23 and 24** sets out the power of a Tribunal to review its own decision and empowers Tribunals to enforce their decisions similar to other courts. **Clause 31** empowers the Chief Registrar to open bank accounts on behalf of Tribunals.

Part III of the Bill deals with the general provisions. **Clause 32** requires the members of Tribunals on appointment to subscribe to the oath of office. **Clause 34** requires members of Tribunals to disclose any conflict of interest with regards to any matter under consideration. **Clause 39** empowers the Chief Justice to develop Regulations for the effective discharge of the mandate of Tribunals.

Part IV of the Bill deals with the transitional provisions.

The **First Schedule** sets out the oath or affirmation for the offices of Chairperson and members of the Tribunals.

The **Second Schedule** provides for consequential amendments to several Acts of Parliament.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

Clauses 39 and 40 of the Bill delegate legislative powers to the Chief Justice for the purposes set out in the respective clauses. The Bill does not limit fundamental rights and freedoms.

Statement on whether the Bill concerns county governments

This Bill does not concern county governments in terms of Article 110(l) (a) of the Constitution as it does not affect the functions and powers of county governments as set out in the Fourth Schedule to the Constitution.

Statement as to whether the Bill is a money Bill within the meaning of Article 114 of the Constitution

The enactment of this Bill shall not occasion additional expenditure of public funds.

Dated the 26th July, 2023.

KIMANI ICHUNG'WA,
Leader of the Majority Party.

Annexure 4:

Advertisement inviting the public to submit memoranda on the Bill

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REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY

13TH PARLIAMENT-SECOND SESSION 2023

IN THE MATTER OF ARTICLE 118 (1)(b) OF THE CONSTITUTION
AND
IN THE MATTER OF CONSIDERATION BY THE NATIONAL ASSEMBLY OF:

1. **THE TRIBUNALS BILL (NATIONAL ASSEMBLY BILL NO. 45 OF 2023)**
2. **THE PRESERVATION OF PUBLIC SECURITY (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 48 OF 2023)**
3. **THE LEGAL AID (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 53 OF 2023)**
4. **THE PRISONS BILL (NATIONAL ASSEMBLY BILL NO. 54 OF 2023)**
5. **THE PENAL CODE (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 55 OF 2023)**
6. **THE LAND CONTROL BILL (NATIONAL ASSEMBLY BILL NO. 39 OF 2023)**
7. **THE NATIONAL TRANSPORT AND SAFETY AUTHORITY BILL (NATIONAL ASSEMBLY BILL NO. 36 OF 2023)**

INVITATION FOR PUBLIC PARTICIPATION AND SUBMISSION OF MEMORANDA

WHEREAS, Article 118(1) (b) of the Constitution requires Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its Committees and Standing Order 127(3) of the National Assembly Standing Orders requires House Committees considering Bills to facilitate public participation;

AND WHEREAS, the Tribunals Bill (National Assembly Bill No. 45 of 2023) and the Preservation of Public Security (Amendment) Bill (National Assembly Bill No. 48 of 2023), were read a First Time on **Tuesday, 26th September 2023**, the Legal Aid (Amendment) Bill (National Assembly Bill No. 53 of 2023), the Prisons Bill (National Assembly Bill No. 54 of 2023) and the Penal Code (Amendment) Bill (National Assembly Bill No. 55 of 2023) were read a First Time on **Tuesday, 3rd October 2023** while the Land Control Bill (National Assembly Bill No. 39 of 2022) and the National Transport and Safety Authority (Amendment) Bill (National Assembly Bill No. 36 of 2023) were read a First Time on **Wednesday, 4th October 2023** and thereafter referred to the relevant Departmental Committees for consideration and reporting to the House;

IT IS NOTIFIED that:

1. **The Tribunals Bill (National Assembly Bill No. 45 of 2023)** is a Bill sponsored by the **Leader of the Majority Party (The Hon. Kimani Ichung'wah, MP)** with the principal object being to give effect to Articles 1(3)(c), 20(4), 47(3), 159(1), and 169 of the Constitution in relation to governance and administrative framework of Tribunals in Kenya.
   The Bill also seeks to reform the Tribunal system in Kenya by *inter alia*, rationalizing and regulating the administration and functions of Tribunals, establishing the Tribunals Registry, and providing for the structure, membership and administration of Tribunals.
2. **The Preservation of Public Security (Amendment) Bill (National Assembly Bill No. 48 of 2023)** is a Bill sponsored by the **Leader of the Minority Party (The Hon. Opiyo Wandayi, MP)** with the principal object being to abolish the death penalty and the imposition of a death sentence in relation to offences related to the preservation of public security. Abolishing the death penalty is aimed at preserving the fundamental right to life as guaranteed under Article 26 of the Constitution of Kenya, 2010.
3. **The Legal Aid (Amendment) Bill (National Assembly Bill No. 53 of 2023)** is a Bill sponsored by the **Leader of the Minority Party (The Hon. Opiyo Wandayi, MP)** with the principal object being to amend the Legal Aid Act, No. 6 of 2016 in order to abolish the death penalty in order to preserve the fundamental right to life, to put an end to cruel, inhuman and degrading treatment and punishment of condemned persons occasions by the enforcement of the death penalty.
   The Bill further seeks to stop the psychological trauma brought about by the death sentence and to reflect the international commitment by Kenya to the abolition of the death penalty in accordance with the current position of the Supreme Court as pronounced in the case of Francis Karioko Muruatetu and another versus Republic (2017) eKLR which declared the mandatory death sentence unconstitutional.
   The Bill also seeks to amend section 43 by deleting subsection 4 of the Legal Aid Act, 2013 which provides for the provision of legal representation for accused persons charged with the offences punishable by death.
4. **The Prisons Bill (National Assembly Bill No. 54 of 2023)** is a Bill sponsored by the **Leader of the Minority Party (The Hon. Opiyo Wandayi, MP)** with the principal object being to amend the Penal Code Cap 90 Laws of Kenya in order to abolish the death penalty and the manner of its execution.
   The objectives of the Bill are to preserve the fundamental right to life, to put an end to cruel, inhuman and degrading treatment and punishment of condemned persons occasions by the enforcement of the death penalty.
   Further the Bill seeks to stop the psychological trauma brought about by the death sentence and to reflect Kenya's international commitment to abolition of the death penalty through ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights.
   The Bill seeks to repeal section 69 of the Prisons Act which contains provisions regulating the manner of execution of persons sentenced to death.
5. **The Penal Code (Amendment) Bill (National Assembly Bill No. 55 of 2023)** is a Bill sponsored by the **Leader of the Minority Party (The Hon. Opiyo Wandayi, MP)** with the principal object being to amend the Penal Code Cap 63 Laws of Kenya in order to abolish the death penalty.
   The objectives of the Bill are to preserve the fundamental right to life, to put an end to cruel, inhuman and degrading treatment and punishment of condemned persons occasions by the enforcement of the death penalty, to stop the psychological trauma brought about by the death sentence and to reflect the international commitment by Kenya to abolition of the death penalty in accordance with the current position of the Supreme Court as pronounced in the case of Francis Karioko Muruatetu & another versus Republic (2017) eKLR which declared the mandatory death sentence unconstitutional.
6. **The Land Control Bill (National Assembly Bill No. 39 of 2022)** is a Bill sponsored by **Hon. Wilberforce Oundo, MP** and seeks to repeal and replace the Land Control Act, Cap. 302 to align the law governing dealings in agricultural land with the provisions of the Constitution of Kenya 2010, the Environment and Land Court Act, 2011, the Land Registration Act, 2012 and the Land Act, 2012.
   The Bill further seeks to establish Land Control Committees in each constituency to replace the current Land Control Boards. The Land Control Committees are to comprise persons drawn from within the locality they serve and who are conversant with the traditions, customs, and way of life of the community in the area.
   The Bill also seeks to establish Land Control Appeals Committees to handle any appeals arising from the Land Control Committees.
7. **The National Transport and Safety Authority (Amendment) Bill (National Assembly Bill No. 36 of 2023)** is a Bill sponsored by **Hon. Didmus Wekesa Barasa, MP** and seeks to amend the National Transport and Safety Authority Act No. 33 of 2012 to introduce a new section which provides for the development of policy guidelines to regulate fares payable by passengers in the public service vehicles within the country and for the involvement of relevant stakeholders in the development of such policy guidelines.

NOW THEREFORE, in compliance with Article 118 (1) (b) of the Constitution and Standing Order 127(3), the Departmental Committees hereby invite the public and stakeholders to submit memoranda on the Bills as follows:

SCHEDULE

S/ NO.	BILL	COMMITTEE
1.	The Tribunals Bill (National Assembly Bill No. 45 of 2023)	Justice and Legal Affairs
2.	The Preservation of Public Security (Amendment) Bill (National Assembly Bill No. 48 of 2023)	Justice and Legal Affairs
3.	The Legal Aid (Amendment) Bill (National Assembly Bill No. 53 of 2023)	Justice and Legal Affairs
4.	The Prisons Bill (National Assembly Bill No. 54 of 2023)	Justice and Legal Affairs
5.	The Penal Code (Amendment) Bill (National Assembly Bill No. 55 of 2023)	Justice and Legal Affairs
6.	The Land Control Bill (National Assembly Bill No. 39 of 2023)	Lands
7.	The National Transport and Safety Authority (Amendment) Bill (National Assembly Bill No. 36 of 2023)	Transport and Infrastructure

Copies of the Bills are available at the National Assembly Table Office, Main Parliament Buildings or on www.parliament.go.ke/the-national-assembly/house-business/bills.

The memoranda 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 **cna@parliament.go.ke** to be received on or before **Monday 23rd October, 2023 at 5.00 p.m.**

S. NJOROGE
CLERK OF THE NATIONAL ASSEMBLY

6th October 2023

"For the Welfare of Society and the Just Government of the People"

Annexure 5:

Letter from the Clerk of the National Assembly inviting stakeholders to submit memoranda on the Bill

THE NATIONAL ASSEMBLY
OFFICE OF THE CLERK

P. O. Box 41842-00100
Nairobi, Kenya
Main Parliament Buildings

Telephone: +254202848000 ext. 3300
Email: cna@parliament.go.ke
www.parliament.go.ke/the-national-assembly

When replying, please quote

Ref: NA/DDC/JLAC/2023/105 **5th October, 2023**

Ms. Anne Amadi,
Chief Registrar Judiciary of Kenya / Secretary
Judicial Service Commission
Supreme Court Building
Taifa Road
NAIROBI

Hon. Shadrack Mose
Solicitor General
The State Law Office and Department of Justice
Sheria House, Harambee Avenue
NAIROBI

Dr. Bernard Mogesa, PhD, CPM
Chief Executive Officer,
Kenya National Commission on Human Rights
1st Floor, CVS Plaza, Lenana Road
NAIROBI

Mr. Joash Dache, MBS
Chief Executive Officer/Commission Secretary
Kenya Law Reform Commission,
Reinsurance Plaza, 3rd Floor, Taifa Road,
NAIROBI.

Ms. Florence Muturi,
Chief Executive Officer
Law Society of Kenya (LSK)
Lavington, Opposite Valley Arcade, Gitanga Road
NAIROBI

Ms. Christine Gakii Nkonge,
Executive Director
Katiba Institute,
House No.5 -the Crescent-Off Parklands Road
NAIROBI

Dr. Mshai Mwangola
Chairperson,
Uraia Trust
Jacaranda Avenue, off Gitanga Road
NAIROBI

Ms. Caroline Gaita
Executive Director,
Mzalendo Trust
ACK Garden House, 2nd Floor, Wing A,
1st Ngong Avenue
NAIROBI

Dr. Annette Mbogoh
Executive Director
Kituo cha Sheria
Ole Odume Rd, Off Argwings Kodhek Rd
NAIROBI

Mr. Irungu Houghton
Executive Director,
Amnesty International,
Riverside Studios,
NAIROBI

Ms. Sheila Masinde
Executive Director
Transparency International
Kindaruma Road, Off Ring Road, Kilimani
Next to Commodore Office Suites
NAIROBI

Ms. Chebet Koske
Chief Executive Officer,
Chartered Institute of Arbitrators
Flamingo Towers, Mezzanine 1
Upper hill
NAIROBI

Prof. Jack Mwimali
Chief Executive Officer,
National Council for Law Reporting
ACK Garden Annex
5th Floor, 1st Ngong Avenue
Ngong Road
NAIROBI

Dear D. Mbogoh

RE: MEETING WITH DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS TO DISCUSS THE TRIBUNALS BILL (NATIONAL ASSEMBLY BILL NO. 45 OF 2023)

The Departmental Committee on Justice and Legal Affairs is established pursuant to National Assembly Standing Order 216 and is mandated to *inter alia,* ***'study and review all legislation referred to it.'***

The Tribunals Bill, 2023 sponsored by the Leader of the Majority Party, Hon. Kimani Ichung'wah, CBS, MP is before the Committee for consideration and reporting to the House. The Bill seeks to give effect to Articles 1(3)(c), 20(4), 47(3), 159(1) and 169 of the Constitution in relation to governance and administrative framework of Tribunals in Kenya. The Bill also seeks to reform the Tribunal system in Kenya by *inter alia,* rationalizing and regulating the administration and functions of Tribunals, establishing the Tribunals Registry and providing for the structure, membership and administration of Tribunals.

Article 118(1)(b) of the Constitution of Kenya and National Assembly Standing Order 127(3) require Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its Committees.

Given the foregoing, the Committee has scheduled to meet you on **Thursday 12th October, 2023 at 9.30 am** at a venue to be communicated in due course to discuss the Bill and the purpose of this letter is to invite you to the meeting.

You are requested to prepare detailed written submissions in a matrix format that indicates the section of the Act, specific clause, proposed amendment and justification and submit twenty (20) hard copies to the Office of the Clerk, Main Parliament Building by **Monday, 9th October 2023 at 5.00 pm**. Soft copies may be emailed to cna@parliament.go.ke.

Hard copies of the Bill are available at the National Assembly Table Office, Main Parliament Building while an electronic copy may be accessed on the Parliament website: www.parliament.go.ke/the-natioanl-assembly/house-bills for reference.

Our Liaison Officers on this matter are **Mr. Douglas Katho** who may be contacted on tel. no. **0722333145** or email: douglas.katho@parliament.go.ke, **Ms. Jael Ayiego Kilaka**, tel. no. **0725385945** or email: jael.kilaka@parliament.go.ke and **Mr. Abdikafar Abdi Sheikh,** tel. no. **0715456503** or email: abdikafar.sheikh@parliament.go.ke.

Yours

JEREMIAH NDOMBI, MBS
For: CLERK OF THE NATIONAL ASSEMBLY

Copy to:- **Hon. Justin B. Muturi, EGH**
Attorney-General
Office of the Attorney-General and Department of Justice
State Law Office
Sheria House, Harambee Avenue
NAIROBI

Annexure 6:

Memoranda by Stakeholders

Ref: NA/DDC/JLAC/2023/124 **18TH OCTOBER 2023**

RECEIVED
19 OCT 2023
Directorate of Departmental Committees

OFFICE OF THE CLERK
THE NATIONAL ASSEMBLY
MAIN PARLIAMENT BUILDINGS
NAIROBI

ATTENTION: MR. JEREMIAH NDOMBI, MBS

Douglas Katho to facilitate 19/10/23

DEAR SIR,

RE: INVITATION BY THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS TO DISCUSS THE TRIBUNALS BILL. *(NATIONAL ASSEMBLY BILL NO. 45 OF 2023)*

We refer to the invitation conveyed to the Chief Registrar of the Judiciary through your letter dated 13th October 2023.

We are pleased to hereby present our memorandum outlining our comments and suggestions on the Bill before the Committee.

INTRODUCTION

The Tribunals Bill is a welcome legislation that seeks to rationalize and regulate the administration and functions of tribunals. This Bill is important in giving effect to the Judiciary vision of Social Transformation through Access to Justice in recognizing the important role of tribunals in contributing to access to justice.

The Bill is also useful in streamlining the operations of the tribunals within the judiciary structure and ensuring that the work of tribunals contributes effectively in ensuring that there is expeditious settlement of disputes. We are in full support of the proposed law and would like to propose a few revisions to strengthen it even as it is being considered by Parliament.

1. **TRANSITION**

As a transition mechanism, the Bill proposes in **Section 43** that current tribunal members and chairpersons to remain in office for their unexpired term or a period of eighteen months whichever is earlier. For continuity and institutional memory, our proposal is to let the terms of office of current tribunal members and chairpersons to run until expiry rather than requiring them to leave office after 18 months, if the 18 months will come sooner than expiry of their term of office. This will also safeguard against grounding tribunals to a halt pending recruitment of new tribunal members. It is important to note that current tribunal members have been appointed at different times and have developed useful expertise over time which can be useful to ensure continuity even as tribunal recruitment is streamlined.

2. **QUORUM**

We note that the Bill proposes at clause 19(1) to set the quorum at 3 members. Whereas this is a welcome proposal especially where the parent legislation has not provided for quorum, it may prove to be a challenge in the case of some tribunals which consist of only three members for

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instance The Privatization Appeals Tribunal, The Kenya Citizenship and Immigration Service Appeals Tribunal, The National Construction Appeals Board, and The Land Acquisition Tribunal.

Our proposal is to leave the question of quorum to the parent law and where the same is not provided for then an amended clause 19(1) would take care of it. We therefore propose that clause **Clause 19(1)** should be amended to read as follows:

19(1) Except as provided by law, the quorum of a Tribunal shall be three members provided that where a Tribunal consists of only three members, the quorum shall be two members.

We believe this amendment will help streamline the question of quorum which depends on the composition of tribunals and also the complexity of matters handled by those tribunals.

3. CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

In order to align the other Acts with the efficient operationalization of tribunals, it is proposed to take into consideration the following amendments:

1. Amendment of the proposed new **Section 11(7) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act** to provide for the quorum of the Tribunal to be one member. This proposal is necessitated by the nature of matters filed before this Tribunal which require urgent attention but are not of a complicated nature to require a quorum of three. Statistics from the Tribunal demonstrate that the Tribunal has managed to clear a huge backlog by operating as a panel of one member which would not have been possible were the quorum to be increased. Statistics from the Tribunal show that the Tribunal has managed to finalise 4,180 matters since march 2020 due to the fact that the members have been sitting as a one-member court. The requirement of three members as quorum will heavily affect the operations of this Tribunal.
2. We further propose a few amendments in regard to four Tribunals whose membership consists of three members in order to align with Section 12(1) of the Tribunals Bill, which sets the minimum number of Tribunal members at three. The said Tribunals are: *The Privatization Appeals Tribunal, The Kenya Citizenship and Immigration Service Appeals Tribunal, The National Construction Appeals Board, and The Land Acquisition Tribunal.*

Below, we have prepared a matrix as requested on these proposals:

SECTION/CLAUSE	PROPOSED AMENDMENT	JUSTIFICATION
S. 43 Tribunals Bill	Delete the words **"or a period of eighteen months whichever is earlier"** immediately after the word "term".	To ensure continuity and institutional memory, it is important to let the current members of tribunals to complete their terms.
S. 19 (1) Tribunals Bill	Delete the clause and replace with the following, **"Except as provided by law, the quorum of a Tribunal shall be three members provided that where a Tribunal consists of only three**	There is need to streamline the question of quorum with the specific parent Acts. Whereas the quorum may be high in some case due to the complexity of the

SECTION/CLAUSE	PROPOSED AMENDMENT	JUSTIFICATION
S. 43 Tribunals Bill	Delete the words **"or a period of eighteen months whichever is earlier"** immediately after the word "term".	To ensure continuity and institutional memory, it is important to let the current members of tribunals to complete their terms.
S. 19 (1) Tribunals Bill	Delete the clause and replace with the following, **"Except as provided by law, the quorum of a Tribunal shall be three members provided that where a Tribunal consists of only three members, the quorum shall be two members."**	There is need to streamline the question of quorum with the specific parent Acts. Whereas the quorum may be high in some case due to the complexity of the matters handled by the tribunals, some tribunals may be efficiently served well with a lower quorum. Some Tribunals consist of only three members and setting the quorum at three across board may occasion quorum hitches for such tribunals.
Section 16(e)	Delete the Clause.	Removal is addressed in Section 16(f) and these are matters that are handled by the Commission in order to ensure due process.
Consequential amendments: Clause 8: Second Schedule	Delete the new clause 11(7) of **Section 11(7) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act** and replace with the following, **"The quorum of the Tribunal shall be one member. Provided that where the Chairman deems appropriate, or upon application by a party, the Chairman may form a panel of three members to hear and determine a matter before the Tribunal."**	To enhance efficiency of the Tribunal, it is necessary to retain the current practice of the tribunal of sitting as a one-member panel which has assisted to clear backlog and to manage the many applications filed per day approximated to be 50. Whenever a matter arises that would require a panel, then the Chairperson can form such a panel.
Consequential amendments: Clause 50: Second Schedule	Delete the new Section **44(2)(b) of the Privatization Act** and replace with the following, **"not less than two persons who are holders of a degree from a university recognized in Kenya and have at least five years' experience and knowledge in matters related to privatization or management."**	To streamline composition of Tribunals as per Section 12 (1) of the Tribunals Bill which sets a minimum number of tribunal members at three. This is also in order to avoid quorum hitches.
Consequential amendments:	Delete the new Section **23(2)(b) of the Kenya Citizens and Foreign Nationals**	To streamline composition of Tribunals as per Section

Clause 68: Second Schedule	**Management Service Act** and replace with the following, **"not less than two persons who are holders of a degree from a university recognized in Kenya and have at least five years' experience in matters relating to public administration, immigration and demography."**	12 (1) of the Tribunals Bill which sets a minimum number of tribunal members at three. This is also in order to avoid quorum hitches.
Consequential amendments: Clause 70: Second Schedule	Delete the new Section **27(2)(b) of the National Construction Authority Act** and replace with the following, **"not less than two persons who are holders of a degree from a university recognized in Kenya and have at least five years' experience in architecture, quantity surveying, engineering, building surveying or project management."**	To streamline composition of Tribunals as per Section 12 (1) of the Tribunals Bill which sets a minimum number of tribunal members at three. This is also in order to avoid quorum hitches.
Consequential amendments: Clause 72: Second Schedule	Delete the new Section **133A(2)(b) of the Land Act** and replace with the following, **"not less than two persons who are holders of a degree from a university recognized in Kenya and have at least five years' experience in the relevant field."**	To streamline composition of Tribunals as per Section 12 (1) of the Tribunals Bill which sets a minimum number of tribunal members at three. This is also in order to avoid quorum hitches.

We thank you for the opportunity to present these suggestions and look forward to engage with the committee during its sittings on 19th October 2023.

Respectfully submitted,

CYPRIAN M. NGUTHARI, CHAIRPERSON, BUSINESS PREMISES RENT TRIBUNAL

DR. NABIL M. ORINA, CHAIRPERSON, LAND ACQUISITION TRIBUNAL

DOCHOO
8/24/10

CENTRE FOR HUMAN RIGHTS AND CIVIC EDUCATION
(CHRCE)

Haki House,
Off Bus Park Road
Along Ngiluni Street
P.O. Box 681-90400
Mwingi, Kenya

+254 719 260 720
+254 725 552 801
chrcekenya.org
chrcemgi@gmail.com / chrcemgi@yahoo.com
CHRCE centre

OUR REF: 145/03/2023

19TH OCTOBER, 2023

THE CLERK
NATIONAL ASSEMBLY
PARLIAMENT BUILDING
NAIROBI

Douglas Katho
to facilitate
25/10/23

Dear Sir,

RE: MEMORANDUM ON THE TRIBUNAL BILL 2023

Center for Human Rights Education is a Non-Profit making, Non-Governmental Organization engaged in Advocacy, Activism and Civic Education on human Rights and Constitutionalism.

It has is its operations within the Lower Eastern part of Kitui, Machakos, Makueni and Tharaka Nithi counties.

We do forward herewith a Memorandum expressing our opinion on the above Bill.

Kindly allow us to make our presentation where we wish to be represented by Mr. Wilfred Nyamu, the board Chairman and the undersigned.

Thank you

Yours faithfully

PETER MUTEMI
EXECUTIVE DIRECTOR/BOARD SECRETARY

DIRECTOR EXECUTIVE
RECEIVED
25 OCT 2023

NATIONAL ASSEMBLY
RECEIVED
23 OCT 2023
CLERK'S OFFICE
P. O Box 41842, NAIROBI

MEMORANDUM ON THE TRIBUNAL BILL 2023

PRESENTED TO

THE NATIONAL ASSEMBLY AND THE SENATE

THE THIRTEENTH PARLIAMENT

SUBMITTED TO

CLERK OF THE NATIONAL ASSEMBLY, PO BOX 41842-00100, NAIROBI

IN THE MATTER OF CONSIDERATION BY THE JUSTICE & LEGAL AFFAIRS COMMITTEE: THE TRIBUNAL BILL 2023

18TH OCTOBER, 2023

SUBMITTED BY:

CENTRE FOR HUMAN RIGHTS AND CIVIC EDUCATION

P.O BOX 681 MWINGI

THE TRIBUNALS BILL 2023: ADMINISTRATIVE JUSTICE DEATHBED?

INTRODUCTION

The Tribunal Bill 2023 seeks to vest the establishment, regulation and administration of tribunals in the purview of the Judiciary. While this may, at a cursory glance, seem innocuous, it portends the death of administrative law. Establishment of the tribunals was aimed at providing a catalyst in addressing issues of administrative justice, and alleviate the adjudication and resolution by the ordinary courts. It's not in question that tribunals are vital in providing alternative forum to the mainstream courts in quest for remedy of citizens' grievances towards addressing administrative justice issues. Tribunals are now a fact of life as they are more accessible to a large population where proceedings are much cheaper and speedier than in the ordinary courts. Tribunals must satisfy three fundamental principles of openness, fairness and impartiality. Their resilience is primarily attributable to their advantages over ordinary courts of law.

Administrative law is a division of law governing the activities of executive branch agencies of government. Administrative law includes executive branch rule making, adjudication, and the enforcement of laws. The Bill would be ill advised to pass through to enactment by Parliament for the following reasons:

ISSUES

1. Second Schedule

Politically, the Bill seeks to usurp the role of the Executive to appoint persons to administer tribunals. Further, the President and Deputy President are elected by the citizens of the country and therefore have the confidence of the people to effectively run the Executive arm of Government. Third, the sensitivities of some of these tribunals (especially those in the energy and procurement and Environment spheres), need to be supervised within the structure of the Executive and not the Judiciary. Fourth, the caliber

of the appointees under the proposed bill targeted to man these tribunals lend itself to persons who would be subject to the control of the Chief Justice and by extension, the JSC. We cannot stress enough that administrative law is best left to the Executive arm of Government. Fifth, not all matters of tribunals are for legal minds only. Some tribunals, such as those that entertain disputes touching on national security matters for example, cannot be ceded to the Judiciary.

Economically, the mechanics of setting up 60 or so tribunals under the aegis of the Judiciary is a gargantuan task that will lead to the creation of the Office of the Registrar of Tribunals and further increase burden on the Exchequer.

Strategically, the very nature of tribunals is to make administrative law responsive and quick. The Executive can deal with certain disputes emanating from practice quickly, this in turn allows the administration to deliver on its mandate to the public. It also grants the Government the leeway to stress on its priority areas of serviced delivery and strengthen those tribunals it deems necessary.

Article 47 (3)(a) of the constitution provides for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal. A reading of this Article gives the understanding that the Executive is deemed to have certain administrative leeway. A reading of this together with Article 169 clearly establishes that executive tribunals exist. The Judiciary's role of judicial review is also recognized.

It is not effective, and contravenes the doctrine of separation of powers to have the Judiciary sitting in its judicial capacity in matters that are within the purview of the Executive. The Universal Declaration of Human Rights enshrines in particular the

principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. Members of the Judiciary would be permanent employees, while membership of tribunals largely is for specific terms of office. This allows for the Executive to handpick expertise in certain matters of interest in various sectors. This ensures that these tribunals do not become mired in officialdom. The Executive would then determine (with appropriate consultation) the appointment of teams to run them for their designated periods.

The access to justice angle brings with it the emerging trends of Alternative Dispute Resolution methods that entail conciliation, mediation and arbitration. These afford participants speedy means of dispatching their grievances, leaving the Judiciary to step in during the review and/or appeal processes. These developments are a stark reality that traditional judicial systems are incapable of dealing with the complexities of a rapidly changing governance structure. Administrative law is the by-product of the growing socio-economic functions of the State.

It is important to stress that to entrust an administrative agency with the determination of individual rights and interests (such as the determination of the electricity tariff and cost of fuel) or the freedom to practice a profession, makes those rights more flexible and responsive to uncertain factors of discretion than when they are left to be defined by the more rigid processes of a court applying supposedly permanent rules of law.

Without removing from the already existing tribunals that have been placed under the aegis of the Registrar of Tribunals, profound thought must be given to the efficacy of ceding progress made in administrative law to the Judiciary.

As per the Second Schedule to the Bill, the following tribunals are to be placed under the Judiciary:

1. Rent Tribunal
2. Business Premises Rent Tribunal
3. Standards Tribunal
4. Seeds and Plant Varieties Tribunal
5. Insurance Tribunal
6. State Corporations Appeal Tribunal
7. Capital Markets Tribunal
8. Retirement Benefits Appeals Tribunal
9. Co-operative Tribunal
10. Communications and Multimedia Appeals Tribunal
11. National Environment Tribunal
12. Industrial Property Tribunal
13. Copyright Tribunal
14. Privatization Appeals Tribunal
15. HIV and AIDS Tribunal
16. Biosafety Appeals Board
17. Competition Tribunal
18. Political Parties Disputes Tribunal
19. Tourism Tribunal
20. Kenya Citizenship and Immigration Service Appeals Tribunal
21. National Construction Appeals Board
22. Land Acquisition Tribunal



23. Legal Education Appeals Tribunal
24. National Examinations Appeals Tribunal
25. National Transport and Safety Authority Appeals Board
26. Micro and Small Enterprises Tribunal
27. Education Appeals Tribunal
28. Public Benefit Organizations Disputes Tribunal
29. National Civil Aviation Administrative Review Tribunal
30. Sports Disputes Tribunal
31. Tax Appeals Tribunal
32. Water Tribunal
33. Public Procurement Administrative Review Board
34. Financial Centre Tribunal
35. Energy and Petroleum Tribunal
36. Accreditation Appeals Tribunal
37. Refugee Status Appeals Committee
38. Public Private Partnership Petition

It is for these reasons that we reiterate that it would be ill-advised to have this Bill enacted as it would lead to further conflicts regarding the structure and operation of the Government.it would cripple the Executive's grasp in areas where ADR has proven more effective when kept outside the purview of the Judiciary (a good example being the ADR system under The Public Procurement and Asset Disposal Act, 2015). Disputes of this nature would occasion great loss and even cripple the Government if left to the traditional legal system.

2. Clauses 119 and 120

Further to the foregoing, we wish to make special reference to the Public Procurement Administrative Review Board (the board), which to our opinion is an administrative tribunal which should not be under the mandate of the Judicial Service Commission. We rely on the case of ***Okoiti v Judicial Service Commission & 2 others; Katiba Institute (Interested Party) (Petition 197 of 2018) [2021] KEHC 461 (KLR),*** where the court, at paragraphs 63 and 64, held as follows:

> *63. The foregoing analysis, therefore, excludes the following class of Tribunals: -*
>
> *(a) The Tribunals formed under the Constitution;*
>
> *(b) All administrative and advisory tribunals;*
>
> *(c) All tribunals whose membership includes a Judge of the superior courts;*
>
> *(d) All other informal tribunals not formed under the Constitution} or any Act of Parliament.*
>
> *64. Examples of Tribunals which do not fall under article 169(1)(d) of the Constitution include: -*
>
> *(i) Tribunal created under article 144(3) and 150(2) of Constitution for the removal of the President or Deputy President on grounds of incapacity;*
>
> *(ii) Tribunal created under article 158(4) of the Constitution for the removal of the Director of Public Prosecutions;*
>
> *(iii) Tribunal created under article 168(5)(a) or (b) of the Constitution for the removal of the Chief Justice or other Judges of the superior courts;*
>
> *(iv) Tribunal created under article 251(4) of the Constitution for the removal of commissioners or holders of independent offices.*
>
> *(v) Any administrative Tribunal;*
>
> *(vi) Any informal tribunal.*

Based on the court's decision above, it is our view tribunals other than The Rent Tribunal and the Business premises Rent Tribunal be expunged from the Bill. Consequently, the proposed amendments to the Public Procurement and Asset Disposal Act No. of 2015, at clauses 119 and 120 of the Bill should also be expunged.

CONCLUSION

Considering the above observations, we acknowledge that the Tribunal Bill 2023 has presented important reform questions on issues of law. However, the selected and highlighted proposed amendments presented directly take away fundamental gains made in the alternative dispute resolution mechanism (ADRM) espoused under Article 159 of the Constitution 2010 and the realm of administrative law envisaged under Article 47 of the Constitution which is relatively young and still embedding its constitutionalism roots.

SIGNED BY:

.....

WILFRED NYAMU MATI

CHAIRMAN BOARD OF DIRECTORS

.....

PETER MAITHYA MUTEMI

EXECUTIVE DIRECTOR/ BOARD SECRETARY

NB: *Centre For Human Rights & Civic Education is a Non Governmental Organisation duly registered under the NGOs Co-ordination act,1990 with operations in the Lower Eastern Parts of Kenya whose headquarters is at Mwingi Township, Kitui County*

REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

Our Ref: AG/LDD/1101/1/52
Your Ref: NA/DDC/JLAC/2023/105

11th October, 2023

The Clerk of the National Assembly,
Main Parliament Buildings,
P.O. Box 41842-00100,
NAIROBI.

RE: MEETING WITH THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS TO DISCUSS THE TRIBUNALS BILL (NATIONAL ASSEMBLY BILL NO. 45 OF 2023)

Reference is made to your letter Ref. No. NA/DDC/JLAC/2023/105) dated 5th October, 2023 requesting detailed submissions in a matrix format on the above-captioned Bill.

Please find enclosed herewith the requisite matrix for your consideration.

Hon. Shadrack J. Mose
SOLICITOR-GENERAL

Copy to: Hon. J.B.N. Muturi, EGH
Attorney-General

Ms. L.M. Murila
Chief State Counsel

STATE CORPORATIONS APPEAL TRIBUNAL COMMENTS ON THE TRIBUNAL BILL 2023 BY HON. KIMANI ICHUNGW'A MP

No	Provision	Proposed Amendment	Justification
1	An ACT of Parliament to give effect to Articles ...and 169 of the Constitution regarding Tribunals (Preamble)	Article 169 providing anchorage for local Tribunals should be cited in full in the preamble to the Tribunal Bill as Article 169(1) (d) of the Constitution;	The other Constitutional provisions cited in the preamble of the as providing anchorage to the Tribunal Bill have been cited in full.
2	Definition of Tribunal (Clause 2)	Article 169 of the Constitution refers to "Local Tribunal" Hence the Bill ought to define "Local Tribunal".	There is a material distinction between Tribunal and Local Tribunal. The distinction raises fundamental questions as to precise intent of drafters of the Constitution 2010 for the purpose of determining the place of domicile and the nature of Tribunal system in Kenya, whether hybrid or not due to the ambiguity in the definition of Tribunal; First, the Constitution mentions three (3) typologies of Tribunal- a. Independent Constitution- Art. 1(3)(c); b. Local Tribunal-Art. 169 (1) (d) and; c. Tribunals established under the Constitution to investigate conduct of certain State Officers- Arts. 158(4); 168(5)(a); and 251(4)(b).

			The drafters of the Constitution must therefore have ascribed a particular meaning to the term "Local Tribunal. " Second, the Office Attorney General in a legal advisory dated 23rd July 2020 has also sought policy and legislative guidance on the interpretation of on "Local Tribunal" as stated in Article 169(1) (d). In the opinion of the Office of the Attorney General the term "Local Tribunal" is to be interpreted in a very restricted sense so as not to include all administrative Tribunals which should be properly domiciled in the Executive. Third, the Kenya Law Reform Commission (KLRC) also acknowledged the need for legislative guidance as to precise interpretation of Article 169(1)(d) in its **Inter-Agency Report on Review of the Rationale for Establishment of Tribunals in** Kenya (2015) The KLRC observed as follows; *"Discussions with some of the Tribunals during the stakeholder engagements revealed that there was the general perception that the technical nature and independence of the Tribunals would be threatened by bringing Tribunals under the ambit of the Judiciary...*

			The Committee submits further that there is need for policy guidance on the real interpretation of Article 169(1) (d)....." Fourth, the draft 2002 CKRC Constitution seem to have been alive to restricted interpretation of Local Tribunal. This is evident in clause 185 of the CKRC Constitution which defines *Subordinate Courts as;* *3(a)...* *(b)...* *(c). any <u>traditional or local tribunal</u> that may be established by the Act of Parliament.* The meaning of "Local Tribunal" has to be given a restricted meaning by the application of the rule of interpretation *Noscitur a Sociis* which as explained in **G. P. Singh's Principles of Statutory Interpretation (8th Edition Wadhwa and Company Nagpur)** "*associated words take their meaning from one another...the philosophy of which is that the meaning of the doubtful word may be ascertained by reference to the meaning of the words associated with it.*" In this regard, the meaning of "Local Tribunal" is

			circumscribed by the preceding term "traditional." Hence, "Local Tribunal" may be construed as a Tribunal dealing with matters of local notoriety such as customary or land matters etc. Fifth, the Tribunal Bill 2023 also seeks to pre-empt the judicial cases awaiting determination of the proper domicile of the Tribunals. In issue in the case of **Bernard Odero Okello & another v Cabinet Secretary for Industrialization Trade and Enterprise Development & another; Cyprian Mugambi Ngutari & 5 others (Interested Parties) [2020] eKLR** is whether the appointment of the Chairman and Members of the Business Rent Tribunal is a function of the Cabinet Secretary or the Judicial Service Commission (JSC). The Court held that the Chairman and Members of the Business Rent Tribunal are judicial officers within the meaning of Article 171 (2)(c) of the Constitution and the Judicial Service Act. Hence the appointments should be made by the JSC. This decision is, however, the subject of a pending appeal at the Court of Appeal in **Civil Application No. E345 of 2020 Cyprian Mugambi Ngutari & 5**

			Others v Bernard Odero Okello where the Court of Appeal stayed the High Court's decision and framed the following main question for determination; **"Whether the appointment of members of the Tribunal is exclusively in the province of the Judicial Service Commission."** In a separate case of **Okiya Omtatah Okoiti v Judicial Service Commission & 2 others; Katiba Institute (Interested Party) [2021] eKLR** the Court declared all Tribunals under the Executive are local tribunals within the meaning of Article 169(1)(d) of the Constitution and should therefore be transited to the Judiciary. The Court further held that "any new appointment or removal of a member of Tribunal should be undertaken by the Judicial Service Commission". This decision is also the subject of a pending appeal before the Court of Appeal in **Civil Appeal Application No. E 416 of 2021 between the Hon. Attorney General and Okiya Omtatah Okoiti** where the Court adopted the orders issued in appeal in **Cyprian Mugambi Ngutari & 5 Others v Bernard Odero Okello**

			Sixth, the National Treasury in a letter dated 6th October 2020 advised against wholesome transfer of Tribunals to the Judiciary citing **S.H. Bailey on Cases, Materials and Commentary on Administrative Law (4th Edition);** *"Any wholesale transfer to the courts of the work of tribunals would be undesirable"...this would make the judiciary grossly overburden...* *We have not excluded from consideration whether the jurisdiction of any existing tribunal should be transferred to the ordinary courts, though we make no such recommendations. We therefore proceed to consider what improvements and safeguards, including appeals to the courts , should be introduced into the present structure."* In consideration of the above, the determination of the meaning of "Local Tribunal" will help in the ascertaining whether the drafters intended to introduce a hybrid Tribunal System domiciled both in the Executive and the Judiciary ot not depending on the extent of judicial function.

3	Appointment of Tribunal Members (Clause 15)	The Bill has provided elaborate provision on the appointment of chairperson in Clause 12, 13, 14 and 15. However, there is no procedure in the Bill as to the criteria for appointment of members except for Clause 15 which merely describes the tenure of the chairperson and members of Tribunals.	The absence of a mechanism or criteria to appoint members of the Tribunal and the stated goal under the Bill to transit all existing Tribunals to the Judiciary proceeds on the quaint assumption that judicial officers are competent to determine any cause provided it is competently argued. Most of these Tribunal are adjudicatory bodies which is dependent to a large extent on the technical competence of experts in the areas of the Tribunals jurisdiction and which is mostly lacking in the mainstream judiciary except where specialized divisions have been created. Hence need for a proper definition and cautious approach to the lateral movement of the Tribunals.
3	Transfer of Staff (Clause 45 Transitional Provisions)	Clause 45(2)(b) should be deleted	This clause may be used to victimize and hound out of office present staff of the Tribunals. The proposal to give the staff an opportunity to elect whether to join the judiciary or be redeployed to the MDAs is sufficient.
4	Establishment of Standards Tribunal (Clause 26 under the Sixth Schedule)	The State Corporations Act establishes the State Corporations Tribunal and not the Standards Tribunal.	The Standards Tribunal is established under the Standards Act Cap 496.

		Clause 26 of the Tribunal Bill further proposes to amend section 22 of the State Corporations Act so as to empower the Judicial Service Commission to deploy staff to the Tribunal.	This a peculiar provision only applicable and meant to populate the State Corporations Appeal Tribunal with personnel identified solely by the judiciary. There is no similar provision as regards other existing Tribunals to which the Bill applies.

SUBMISSION OF THE REFUGEE APPEAL BOARD ON THE TRIBUNALS BILL, 2023

SECTION	CLAUSE	PROPOSED AMENDMENT	JUSTIFICATION
Section 3, Tribunals Bill 2023	**(h)(new)**	Add 3 (h): ***enhance the public right to fair administrative action.***	The object of the Bill is to establish Tribunals contemplated under **Articles 47(3)(a)** whose core objectives include to ensure adherence to the constitutional requirements of the right to fair administrative action guaranteed under Article **47(1).**
Section 6, Tribunals Bill 2023	**(3) (new)**	Include 3 (b): ***is admitted as an Advocate of the High Court of Kenya***	**Roles of the DR contemplated under Section 8(1) of the Bill require the specific training and exposure as an Advocate of the High Court e.g Case management(b), judicial functions (d)** Also note that currently (b) and (c) mention **post qualification** experience which would ordinarily refers to qualifications post admission to the Bar.
Section 36, Tribunals Bill 2023	**(c)(new)**	Add 36(c)- ***Comply with all such orders and directions as may be issued by the Tribunal for the purposes the expeditious, efficient and just determination***	Compliance with directions and orders of the Tribunal is a fundamental and necessary duty of the parties for the effective and efficient disposal of disputes.

		of the proceedings before the Tribunal .	
Section 43 Tribunals Bill 2023 (Transitional)	**(add proviso to Section 43)**	***Provided that to avoid undue hardship to the parties or undue delay of justice the Chief Justice may by Gazette Notice extend the terms of the Chairman and members of the Tribunal for such further time as shall be necessary for the Commission to complete the substantive appointments to the Tribunal under Section 12***	It is necessary to give the Chief Justice some discretion to mitigate hardship and undue delay of justice pending completion of the process of substantive appointments to the Tribunal. It will also preserve Asylum seekers right to appeal and access to justice that arise whilst the process of substantive appointments to Tribunal is pending completion as they have only 30 days to lodge appeals to the Board under Section 14(1) of the Refugees Act.
SECOND SCHEDULE OF THE BILL (S.142)			
Add Section 142 (b) of Second Schedule	**Add new as 142 (b)**	***Sections 2, 6(b),11(1), 11(2)(a), 11(3-10), 14(1-4), 1(3) of the Refugees Act 2021 are amended by deleting the word "Committee" and substituting therefor the word "Tribunal"***	To maintain consistency with the description and definition of *"Tribunal"* at the **Interpretation Clause at Section 2 of the Bill** as well as **Articles 1(c), 47(3)(a) and 169(1)(d) of Constitution.**

Add Section 142 (e) of Second Schedule	**Add new Section 142 (e)**	***Sub- Section 11(10) of the Act is amended by deleting the words "of being notified" and substituting therefor the words "from the date of such decision"***	This is to maintain consistency with the provisions of **Section 27(1) of the Bill** which provides that the time to appeal to the High court shall run **from the date of the decision.** Parties are usually duly notified of the date the decision is to be delivered and if they fail to avail themselves time shall still run from the date of the decision.
Add Section 142 (f) of Second Schedule	**Add new Section 142 (f)**	***Sub- Section 14(1) of the Act is amended by deleting the words "of being notified" and substituting therefor the words "from the date of such decision"***	This is to maintain consistency with the provisions of **Section 27(1) of the Bill** which provides that the time to appeal to the High court shall run **from the date of the decision.** Parties are usually duly notified of the date the decision

KATIBA Institute

Constitution as an Instrument of Change

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11 October 2023

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P. O. Box 41842 -00100, NAIROBI

The Clerk of the National Assembly
PO Box 41842-00100
Nairobi
cna@parliament.go.ke

Douglas Katho
to Saaltate
13/10/23

Sent via e-mail

Re: The Tribunals Bill (National Assembly Bill No. 45 of 2023)

Background

Katiba Institute (KI) is a research and litigation institution established in 2011 with the mission of supporting the implementation of Kenya's 2010 Constitution, helping to resist efforts to undermine that Constitution, and generally to assist in developing a culture of constitutionalism in Kenya.

KI received a request to comment on the the Tribunals Bill and participate in a discussion regarding the Bill. The timing for comments was too short to provide a comprehensive analysis of the Bill. This letter represents KI's preliminary comments on the Bill.

Summary and General Remarks

The Bill seeks to give effect to Articles 1(3)(c), 20(4), 47(3),159(1) and 169 of the Constitution in relation to the governance and administrative framework of Tribunals. The Bill also seeks to reform the Tribunal system in Kenya by inter alia rationalising and regulating the administration and functions of the Tribunal, establishing the Tribunals Registry, and providing for the structure, membership, and administration of Tribunals. We support this timely Tribunals Bill, in part, mainly because we do recognise that it was time for all Tribunals to be brought to be in conformity with the Constitution, especially the ones that pre-date the implementation of the Constitution. We regret that we have not had sufficient time to provide a comprehensive analysis and make more specific recommendations. We have attempted to set out our broad recommendations in the best way possible

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to allow us to participate in this process. We do wish that in future, we be given more time to prepare.

KI has the following concerns regarding the Bill:

a. Section 12 provides that the Judicial Service Commission (The Commission) shall appoint the Chairpersons and members of the Tribunal through a competitive process. This standardization is important. But the Bill should also have a harmonised list of requirements for all the Tribunals that incorporates the requirements under Article 27(6) for affirmative action measures to promote appointments of women, persons with disabilities, the youth, minorities, and marginalised communities.

b. Section 19 on Quorum states that the quorum for a Tribunal shall be three members. It is imperative that all the Tribunals have a harmonised provision that states that the quorum of three must comply with the two-thirds gender principle for any decision made. The Bill should also make it clear that the overall membership in a Tribunal must meet the two-thirds gender principle.

c. Section 27, which provides for appeals of Tribunal decisions, infringes on the right to appeal to the Court of Appeal when there are legal and constitutional grounds to challenge a High Court judgment. Foreclosing such appeals violates Article 164(3) which states that the Court of Appeal has broad jurisdiction to hear appeals from the High Court. It will also create judicial inefficiency and slow down the process for determining claims that initiate at the Tribunals. To ensure that legal and constitutional claims are fully vetted

by the Superior Courts, parties will likely file parallel claims at the High Court, which is unnecessarily costly for the Courts and the parties, time consuming and imposes a heavy burden for the Courts. Prohibiting appeals to the Court of Appeal create jurisprudential concerns, as well. Since the High Courts are not bound by judgments from other High Courts, it is likely that appeals from Tribunals would result in conflicting High Court judgments without any opportunity for the Court of Appeal to resolve the conflicts. Foreclosing the opportunity to resolve such conflicts jeopardises the legitimacy of Tribunal decisions and encourages parallel appeals.

d. Section 35 on confidentiality should be balanced with the understanding that Tribunals are adjudicative bodies. All court documents are public documents, unless sealed, and should be accessible to all. The Bill should take the opportunity to guide the tribunals on how to fulfil its duties under Article 35(3) to affirmative disclose information that is important to the public and to timely and efficiently respond to access to information requests.

e. Section 40 on Rules should clearly set out that even while each Tribunal may make rules to govern its procedures, the rules must undergo meaningful public participation, that includes a requirement to consult the Law Society of Kenya (LSK) and Tribunal court users. The Tribunal members will likely not have expertise in the difficult process of developing rules of procedure that effectively balance the need for efficiency and consistency while recognising the needs of its users and the constitutional requirements for a

fair hearing. As a result, any rules should be subject to review and approval by the Judiciary Rules Committee.

Although we have not had an opportunity to review the amendments to the implementing laws in context, we are concerned that the method of amending those laws may not be sufficient. Any amendment process should look closely at whether the laws contain provisions that may conflict with general requirements under the Bill or do not adhere to constitutional values and principles. The Bill presents an opportunity to harmonize the laws implementing Tribunals – some of which were passed decades before the implementation of the Constitution and are in need if an overhaul. It is essential that the legislature take the time to closely review the implementing laws. Doing so now will prevent disputes in the future and make it easier for the judiciary to handle the daunting task of overseeing the Tribunals.

Detailed review of the Bill and Recommendations

No.	Ref.	Comments	Recommendations
1	11(1)	Provides that where a Ministry, Department or Agency intends to establish a Tribunal, the responsible Cabinet Secretary shall submit to the Commission, a written request for the proposed establishment of the Tribunal. **Comment** This provision precludes independent commissions, any other state organs outside the Executive arm of Government and individuals from making proposals for establishment of a Tribunal.	This provision should not limit anyone from proposing establishment of a Tribunal.
	11(2)-(4)	These provisions provide that a written request for the	There should be a process of public participation.

		proposed establishment of the Tribunal by the Cabinet Secretary to the Commission (JSC) , the consideration of the request by the commission and that where the commission recommends the proposed establishment of the Tribunal, the Cabinet Secretary is to submit the request together with the views of the National Treasury on the financial implications of establishing the Tribunal to the cabinet for approval. **Comment** There is no provision for public participation and involvement of other state and non-state actors on the proposal to form the Tribunal. If the Bill is amended as will be proposed below to allow for Parliament to lead the process, then Parliament through public hearings and calls for public participation will not require the public be involved at this stage.	
	11(5)	This section provides that upon approval by the Cabinet under subsection (4), a Tribunal shall be established through an Act of Parliament. **Comment** We argue that Parliament must be allowed to go through the Constitutional process of law making, including conducting public hearings and calling for public participation.	We propose for further sections to be introduced to state that: 5(b) If Cabinet allows the proposal to form a Tribunal, then the proposal should be submitted to Parliament for consideration and approval. 5(c) If the Commission does not approve the proposal to establish a Tribunal, the Cabinet Secretary may submit the request for approval to Parliament.

		There should also be a process that allows the Cabinet Secretary to approach Parliament where the Commission does not approve the proposal.	
	11(6)-11(8)	These Sections provide that the commission may make a recommendation for appointment of an ad hoc panel of experts to inquire into and determine disputes arising out of an emergency and in respect of which no Tribunal has competent jurisdiction, and that the panel constituted subject to the rules have the powers of a Tribunal. This section also provides that no Tribunal shall be established without the recommendation of the Commission. **Comments** We submit that Section 11(6) is vague and there is no definition of what constitutes an emergency. In any case, there is no justification for the creation of the panel since where there is no Tribunal of competent jurisdiction, the High Court has competent jurisdiction. We argue that Section 11(8) is unconstitutional and ought to be stricken out because it suggests that Parliament is to seek permission from the Commission which makes it subservient to the Commission in carrying out its mandate.	We propose that this Section be amended to provide that Parliament seeks out the opinion of the Commission as part of its consultative process on the viability of forming a Tribunal.

	12(4)	This Section provides that the provisions of the Judicial Service Act relating to appointment, discipline and removal of judicial officers shall apply with the necessary modifications to members of a Tribunal. **Comment** This means that any of the consequential amendments to other Acts in the Second Schedule that provide a process that is different from the one provided for under the JSC Act conflicts with the Act and they need to be struck out. For instance, Section 4 of the Rent Restriction Act, Section 16A of the Standards Tribunal, Section 77 of the Cooperatives Societies Act, should all refer to the process outlined in the JSC Act.	
	13	This Section outlines the qualifications for appointment of Chairpersons and members of the Tribunal. **Comment** 1. We propose that requirements to be appointed as Chairpersons and members of the Tribunals have a harmonised list of requirements to avoid disparity on the qualifications and to have in mind the requirements of Article 27(6) which requires	

		the state to take legislative and other measures including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. These groups include women, persons with disabilities, youth, ethnic and other minorities as well as marginalised communities. For instance, Section 126 of the Second Schedule, Section 25(3) the Energy Act is proposed to be amended to provide that the Commission shall ensure that the members of the Tribunal reflect interests of all sections of the society, ensure equal opportunities for persons with disabilities and other marginalised communities and ensure that no more than two thirds of the members of the members shall be of the same gender. Unlike the proposed amendments to Section 137 of the Schedule which	

		proposes to amend by repealing Section 16 of the Accreditation Appeals Tribunals which states that 'the Tribunal shall consist of five members being the Chairperson appointed competitively by the Commission and four other persons who possess expertise and knowledge in matters relating to accreditation, conformity assessment, standardisation or regulatory activities.' The Act goes on to provide that a person shall be qualified to be appointed as a member of the Accreditation Appeals Tribunal if that person has a degree in law from a University recognized in Kenya and is an advocate of the High Court of Kenya and not less than ten years post qualification experience. There is no mention on the requirements under Article 27(4) of the Constitution.	
	19	This Section provides that the quorum of a Tribunal shall be three members.	We propose to have the quorum of the Tribunal consist of at least one

		Comment We propose that even while quorum of the Tribunals remains at three, there must always be at least one advocate who is qualified to issue an opinion on legal and procedural questions.	advocate for every decision made by the Tribunal.
	20	This Section provides that the Chairperson and members for a Tribunal shall be paid salaries, allowances and benefits as the Commission shall determine after consultation with the salaries and remuneration commission. **Comment** We applaud the inclusion of this section and encourage that there be a harmonised system of salaries, allowances, and benefits for all Tribunals to ensure equality, transparency, and accountability.	We recommend a harmonised system of salaries, allowances and benefits for all Tribunal Chairpersons and members.
	27	This Section provides for appeals and provides that a person aggrieved by the decision of a Tribunal may appeal to the High Court or Court of equal status within 30 days from the date of such decision. Section 27(2) states that 'the Court in subsection 1 shall within one year of filing of the appeal dispense with any appeal filed under this section and the decision of the Court shall be final.' **Comment**	We propose to amend Section 27(2) to read as follows: (2) The Court in subsection (1) shall within one year of the filing of the appeal, dispense with any appeal filed under this section and the decision of the Court shall be final regarding questions of fact but there shall be a right to appeal on legal and constitutional grounds. We propose that an appeal from the High Court must certify that the appeal arises from:

		We applaud the attempt to put a timeline of one year within which the Court shall have dispensed with the appeal. We argue that this provision on the decision of the High Court being final is problematic. Parties from the Tribunal have a right to appeal where there are subsisting unresolved legal and constitutional issues. We propose that this be changed to provide that decisions regarding disputed questions of fact are final but there should be a right to appeal on legal and constitutional grounds. This is because Article 164(3) does not have a limit on what type of claims can be raised on appeal and the Constitution at Article 164(3) grants the court of appeal jurisdiction to hear appeals from the High Court and any other court or tribunals as prescribed by an Act of Parliament which suggests that the Constitution envisages that mattes can rise from the Tribunals to the Court of Appeal. The second problem is one of judicial efficiency. If claims regarding the application of the Constitution or the law are not fully vetted, parties will have to file separate claims in the High Court raising those issues. That means there will be parallel claims in the courts which will ultimately end up being costly for court users,	1. A legitimate dispute regarding a question of law that has not been settled by either the Court of Appeal or the Supreme Court. 2. Involves a misapplication of the law that is apparent from the record. This would allow the Court of Appeal to determine as a preliminary application, whether appeals meet the criteria, ensuring that parties do the work upfront to justify the grounds of appeal rather than simply file appeals and make arguments later.

		time consuming and impose a heavy burden on the courts. The third issue is on jurisprudence. The High Court is not bound by decisions from other High Courts. This means that we might end up having multiple conflicting judgments from the High Court without any chance to get clarity from the court of appeal which would be detrimental to growth of jurisprudence from the Tribunals which deals with issues that are sector specific.	
	35(1)	This Section states that 'a member of a Tribunal shall not without the consent in writing given by, or on behalf of, the Registrar, publish or disclose to any person otherwise than in the course of the person's duties the contents of any document, communication or information which relates to, and which has come to the person's knowledge in the course of the person's duties under this Act.' **Comment** Section 35 should be balanced with the understanding that Tribunals are Courts and that all Court documents are public documents, unless sealed, and should be accessible to all.	This provision should make it clear what information must be published and publicised. All Tribunals must conduct its findings on the Judiciary e-filing portal and the information to be publicised and published should include all information that is accessible on the Judiciary e-filing portal, the names of all parties to a case, the claims, and the outcome. The documents should be available to non-parties to the proceedings to download for free.
	40(2)	This Section provides for Rules that govern the procedures of Tribunals. It	We propose that Section 40 should clearly set out that even while each Tribunal may

		states that 'each Tribunal may make rules to govern its procedures…' **Comment** Rules on procedure provide procedural fairness which is necessary to creates a uniform platform for review and application of the law. Rules are where most of the injustice happens and if they are not vetted by the public, practitioners and the Court, the likely result is that this diminishes the integrity of the process and will lead to multiple challenges to the outcomes of the Tribunal which slows down the process of dispensation of justice.	make rules to govern its procedures, the rules must undergo meaningful public participation, that includes a requirement to consult the Law Society of Kenya (LSK), among other Tribunal court users, and they should be subject to approval by the Judiciary Rules Committee as envisaged under Section 81 of the Civil Procedure Act.

Conclusion

For the reasons explained above, we believe that the Bill should be fundamentally revised to reflect our proposed amendments. In doing so now, we expect that it will prevent disputes in the future and make it easier for the judiciary to handle the daunting task of overseeing the Tribunals.

On behalf of Katiba Institute:

Eileen Imbosa
Chris Kerkering
Katiba Institute
House No. 5, The Crescent, Off Parklands Road
P.O. Box 26586-00100
Nairobi
info@katibainstitute.org

LAW SOCIETY OF KENYA
Lavington, Opposite Valley Arcade
Gitanga Road
P.O. Box 72219-00200
NAIROBI
Tel. 387 4664
0720 904983

MEMORANDUM TO PARLIAMENT ON

THE TRIBUNALS BILL OF 2023

OCTOBER 2023

Eric Theuri, President Law Society of Kenya
Lavington, opp Valley Arcade,
Gitanga Road P.O Box 72219 - 00200 Nairobi | Kenya
Tel: +254 111 045 300
Email: lskpresidenttheuri@gmail.com/ president@lsk.or.ke
Website: www.lsk.or.ke

THE TRIBUNALS BILL 2023

Introduction

The Law Society of Kenya is a professional statutory body established under the Law Society of Kenya Act, No. 21 of 2014 with a mandatory membership of all Advocates in Kenya currently numbering to over 21,000.

The organs of the Society are the General Membership, the Council, the Branches and the Secretariat. The Council is the governing body of the Law Society of Kenya. It comprises a President, a Vice- President and eleven other members, all of whom must be members of the Law Society of Kenya. Council members are elected every two years by the members of the Society by means of a secret ballot conducted in accordance with the Law Society of Kenya Act.

Currently, the Council is comprised of The President, The Vice-president and 11 Council members namely:

- **President**, Eric Theuri
- **Vice President**, Faith Mony Odhiambo
- **General Membership Representatives**, Chrysostom Akhaabi, Kabata Mwaura, Tom K'opere
- **Nairobi Representatives**, Cohen Amanya, Njoki Mboce, Ochieng Gor
- **Up-country Representatives**, Byron Menezes, Lindah Kiome, Michael Wabwile, Vincent Githaiga
- **Coast Representative**, Riziki Emukule
- **Secretary/CEO**, Florence W. Muturi

One of the Law Society of Kenya statutory objects as provided in section 4(a) of the Act is to assist the Government and the courts in all matters affecting legislation and the administration and practice of law in Kenya. Pursuant to the statutory mandate, the Law Society of Kenya makes the following submissions on the Tribunals Bill 2023.

SPECIFIC COMMENTS ON THE TRIBUNALS BILL, NATIONAL ASSEMBLY BILL NO. 45 OF 2023

Provision	Issue	Proposal
Clause 5- functions and powers of the Judicial Service Commission	The legislative authority under Article 94 of the Constitution is unfettered. Parliament does not need any recommendation from any source to determine which bodies including Tribunal are to be established.	We propose that this clause 5(2)(b)be deleted
Clause 11- Procedure for the establishment of Tribunals.	The procedure takes away Parliament's legislative authority as contemplated under Article 94 of the Constitution. Similarly, the procedure, particularly under clause 11(6) takes away the independence of the Tribunals.	We propose the Deletion of this clause
Clause 12- Appointment of chairperson and members of the Tribunal	Clause recommends that each Tribunal shall have a minimum of three whereas clause 8 provides that the Tribunal shall have a minimum of two members	We propose Harmonization of clause 12(1) with paragraph 8 of the second schedule to the Bill, on the proposed composition of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Tribunal.
Clause 13- qualifications for appointment as chairperson and member of the Tribunal.	The clause is drafted without any reference to the qualifications in the current statutes and the proposed amendments under the second schedule to the Bill	We propose the Deletion of this clause
Clause 14- Disqualifications.	The clause is drafted without any reference to the disqualifications in the current statutes and the proposed amendments under the second schedule to the Bill.	We propose the Deletion of this clause
Clause 16- vacancy in the office of the chairperson and member of the Tribunal.	The clause is drafted without any reference to the clauses on vacancy in the current statutes and the proposed amendments under the second schedule to the Bill.	We propose the Deletion of this clause
Clause 27- Appeals	There is no justification to limit an appeal under the proposed Bill to the High Court or court of equal status. Under Article 164(3), the Court of Appeal has the jurisdiction to hear appeal from the High Court and any other court or tribunal as prescribed by an Act of Parliament.	We propose the Deletion of this clause
Clause 39/ 40.	Regulations and Rules are all subsidiary legislation (statutory instrument) refer to the definition of a statutory instrument under the Statutory	We propose Merging of the two clauses.

	Instruments Act, 2013. Legislative authority should be expressly stated.	Delete the word Tribunal in sub clause 40(2) and substitute therefore the word "Chief Justice"
Second schedule- clause 6 power to make Regulations still vested in individual tribunals. Deputy chairman/ vice chairman. Clause 11. Proposed amendment to section 16 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, power to make regulations still vested in the CS/ Tribunal. Clause 28. The term lawyer.		We propose Harmonization of the clause with the relevant clause in the Bill.

In conclusion, we humbly submit that our comments be considered before enacting the Bill.

Yours faithfully,



Eric Theuri
President Law Society of Kenya

KENYA LAW
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ACK Garden Annex, 5th Floor, 1st Ngong Avenue, Off Ngong Road, Upper Hill
P.O Box 10443 - 00100, Nairobi - Kenya
t: +254 (0)20 271 2767 • c: +254 718 799 464 • info@kenyalaw.org • www.kenyalaw.org

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Our Ref: KL/CEO/23/102

12th October 2023

National Assembly

Office of the Clerk

P.O BOX 41842 – 00100

Main Parliament Buildings

Nairobi, Kenya

Douglas Katho
to facilitate
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13/10/23

NATIONAL ASSEMBLY
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P.O. Box 41842 - 00100, NAIROBI

Dear Sir/Madam,

RE: NATIONAL COUNCIL FOR LAW REPORTING SUBMISSIONS ON THE TRIBUNALS BILL (NATIONAL ASSEMBLY BILL NO. 45 OF 2023)

As per your letter Ref: NA/DDC/JLAC/2023/105 received on 9th October 2023. Please find attached 20 hard copies of detailed written submissions on the Tribunals Bills, 2023 in the requested format.

NATIONAL ASSEMBLY
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P O Box 41842, NAIROBI

Thank you.

Yours sincerely,

For: Prof. Busalile Jack Mwimali
Editor/CEO
jmwimali@kenyalaw.org

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REPUBLIC OF KENYA

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THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

THE NATIONAL COUNCIL FOR LAW REPORTING VIEWS ON THE TRIBUNALS BILL (NATIONAL ASSEMBLY BILL NO. 45 OF 2023)

Introduction

The National Council for Law Reporting (Kenya Law) is a Semi-Autonomous Government Agency or State Corporation established vide the National Council for Law Reporting Act No. 11 of 1994.

Mandate

Kenya Law's mandate is derived from the National Council for Law Reporting Act, section 3 and Legal Notice No. 29 of 2009. The overall mandate of Kenya Law is:

a) To monitor and report on the development of Kenyan jurisprudence through the publication of the Kenya Law Reports;

b) To revise, consolidate and publish the Laws of Kenya; and

c) To undertake such other related publications and perform such other functions as may be conferred by law.

The specific provisions of law underpinning the establishment of Kenya Law are:

i. **Section 3 of the National Council for Law Reporting Act:**

Functions of the Council of the National Council for Law Reporting

The Council shall –

a) be responsible for the preparation and publication of the reports to be known as the Kenya Law Reports, which shall contain judgments, rulings and opinions of the superior courts of record;

b) undertake such other publications as in the opinion of the Council are reasonably related to or connected with the preparation and publication of the Kenya Law Reports; and

c) perform any other functions conferred on the Council by or under the provisions of any other written law.

ii. Legal Notice No. 29 of 2009

IN EXERCISE of the powers conferred by section 38(1) of the Interpretation and General Provisions Act, the Attorney-General delegates to –

THE NATIONAL COUNCIL FOR LAW REPORTING

Established under the National Council for Law Reporting Act, 1994 (No. 11 of 1994), the powers of law revision conferred on the Attorney-General by sections 7 and 8 of the Revision of the Laws Act (Cap, 1), subject to such conditions as the Attorney-General may, by notice in writing to the Council, from time to time specify. This Notice shall be deemed to have come into operation on the October 15, 2007.

Background

The National Council for Law Reporting (NCLR) through the letter dated October 5, 2023 *Ref no. NA/DDC/JLAC/2023/105* was invited by the Departmental Committee on Justice and Legal Affairs to give views on the Tribunals Bill, 2023.

The NCLR makes the following submissions:

REPUBLIC OF KENYA

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THE NATIONAL COUNCIL FOR LAW REPORTING
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PART 1:

Section/Part of the Tribunal Bill	Specific clause	Proposed amendment	Justification
Section 7	*On functions of the Registrar*	Introduce a provision establishing a framework for the management of Tribunals. This would allow the Tribunals to appoint a president or principal chairperson to coordinate Judicial functions of the Tribunals.	The functions of the Registrar under Sec 7 appear to be mainly administrative in nature. However; a) Just like courts the Tribunals require a president to coordinate and help in the management of its judicial functions. b) Coordination of judicial functions between Tribunals and the Judicial Service Commission (JSC) would be easier and more efficient. c) Absence of this position would leave Tribunals in state of disarray with each Tribunal left to its own to coordinate its work with the JSC and other justice stakeholders.
Section 8 (1) (g) – Functions of the Deputy Registrar	*Planning, preparing, implementing and monitoring the budget and collecting and accounting for revenue in the Tribunal; and. . .*	Considering that Tribunals are largely sector specific and with varying budgetary demands, we propose a provision be	a) Each Tribunal knows its need and its better if each Tribunal prepares its own budget. b) Need to for the Tribunals to retain judicial independence by ensuring that the Registrar does not use the budget to stifle judicial independence or

		introduced allowing the Tribunals to: (a) Prepare their budgets from where the budgets could be forwarded to the Registrar for consolidation and forwarding. Appoint its Secretary to head its secretariat and also manage and account for its budgetary allocation.	operation of any Tribunal. c) Make it possible for the Tribunals to conduct their judicial functions like circuit hearing, service weeks and general dispensation of justice without being controlled and or stifled by the Registrar in this judicial function.
Section 12 (1) – Appointment of Chairpersons and members of a Tribunal	Every Tribunal shall consist of a minimum of three members, one of whom shall be the Chairperson.	The Commission shall determine the number of members of tribunals, on a need basis.	We note that the Bill has left the question of composition of Tribunals to the parent legislation that establishes the Tribunal. We propose that the Commission be given powers to determine the number of members of Tribunals, on a need basis. Whereas some Tribunals may be sufficiently served by the Tribunal membership as currently established, there may be need to increase membership especially when the quorum is set at three members. Some

			Tribunals like the Land Acquisition Tribunal only have three members which may lead to quorum challenges.
Section 18 Arrangement of Business	*The Chairperson shall be responsible for —* *(a) ensuring the orderly and expeditious discharge of the mandate of the Tribunal; and* *(b) Constituting any panel to hear any matter before the Tribunal.* *(2) Notwithstanding the provisions of subsection (1), the Tribunal shall determine the place at which a panel may sit with a view to securing a reasonable opportunity for parties to appear before the Tribunal with as little inconvenience and expense as is practicable.*	There is need to provide for the general workings of the Tribunal by enacting: **THIRD SCHEDULE - Arrangement of Business**	The third schedule on "Arrangement of Business" would include provisions on conduct of meetings of the tribunal, minutes of the tribunal, and issues of voting.
Section 43 - Tenure of Members of	Every person who, immediately before the	Every person who, immediately before	As a transition mechanism, the Bill proposes in section 43 that current Tribunal

Tribunals	commencement of this Act was a Chairperson or a member of Tribunal shall remain in office for their unexpired term or a period of eighteen months whichever is earlier.	the commencement of this Act was a Chairperson or a member of a Tribunal shall serve until expiry of their terms.	members and chairpersons remain in office for their unexpired term or a period of eighteen months whichever is earlier. For continuity and institutional memory, our proposal is to let the terms of office of current tribunal members and chairpersons, to run until expiry rather than requiring them to leave office after 18 months, if the 18 months will come sooner than expiry of their term of office. This will also safeguard against grounding Tribunals to a halt pending recruitment of new tribunal members. It is important to note that current Tribunal members have been appointed at different times and have developed useful expertise over time which can be useful to ensure continuity even as tribunal recruitment is streamlined.

Legislative drafting issues

Section of the Tribunal Bill	Specific clause	Proposed amendment	Justification
Section 144 — The Public Private Partnerships Act is	"***76. Deputy Registrar.*** *The Commission shall appoint a Deputy Registrar*	There is duplication or repetition of paragraphs (b) and (c)	As part of the NCLR delegated mandate of law revision, NCLR is tasked with law revision as per section 8 of the Laws of

amended by repealing section 76 and replacing it with the following new section —	*who has the following qualifications —* *(a) holds a degree in law from a university recognised in Kenya;* ***(b) has at least five years post qualification experience; and*** ***(c) has at least five years post qualification experience; and..."***	**There is need for clarity in the section by either deleting one or correcting one.**	Revision Act. This entails correcting grammatical and typographical mistakes, correct cross-reference, sin the existing copies of laws, alter the form or arrangement of any section of any law, recommending corrigenda/rectification orders in line with section 8(1)(d) of Revision of the Laws Act (Cap. 1) to be issued to correct the issue, and correct the punctuation in any law. Under this Section 144, a legislative drafting issue has been noted.
Section 18 ***Arrangement of Business***	Legislative drafting issue - section appears as: *"(1) The Chairperson shall be responsible for — (a) ensuring the orderly and expeditious discharge of the mandate of the Tribunal; and General principles.* *(b) constituting any panel to hear any matter before the Tribunal .(2) Notwithstanding the provisions of subsection (1),*	The appearance of subsection 2 should appear as an independent paragraph.	

the Tribunal shall determine the place at which a panel may sit with a view to securing a reasonable opportunity for parties to appear before the Tribunal with as little inconvenience and expense as is practicable."

PART 2: Consequential Amendments to the Bill

Section of the Act	Proposed Amendment	Justification
Consequential Amendment	Propose an amendment to the Judicial Service Commission Act to allow Tribunals to have a representative in the JSC.	a) All cadres of courts from the Supreme Court to the Magistracy have a representative in the JSC. It is thus fair to also allow the Tribunals in the JSC b) The control exercised by JSC over Tribunals requires that a member of the Tribunal is present in the JSC to assist the Commission appreciate the needs of Tribunals.
Consequential Amendment	Propose an amendment to Sections 19 and 20 of the National Council for Law Reporting Act to include Tribunals and other quasi-judicial bodies.	Sections 19 and 20 of the National Council for Law Reporting Act obliges judicial officers to supply their judgments, rulings or opinion to Kenya Law and also for returns to be made by registrars of those courts respectively.

		Therefore the inclusion of Tribunals and other quasi-judicial bodies to these sections will also be necessary.
Consequential Amendment	The need to amend section 3 of the National Council for Law Reporting Act No. 11 of 1994 to read as: ***"3.Functions of the Council*** *The Council shall—* *(a) be responsible for the preparation and publication of the reports to be known as the Kenya Law Reports, which shall contain judgements, rulings and opinions of <u>superior</u> courts of record, **<u>tribunals</u> <u>and other quasi-judicial bodies.</u>***	Section 3 of the *National Council for Law Reporting Act* gives Council the mandate to prepare and publish the Kenya Law Reports from judgments, rulings and opinions from the superior court. There is need to amend the NCLR Act to not only provide for reporting decisions from the superior courts but also provide for decisions from all the tribunals so as to re-align sections 5(1)(j) and 39 of Tribunals Bill, 2023 with the functions of the council. Also to include other quasi-judicial bodies. The Memorandum of Objects and Reasons for the Tribunals Bill, 2023 states that **Part II** of the **Bill** *"seeks to create jurisprudence on the decisions of the Tribunals by **requiring** the Commission to have the decisions of Tribunals reported by the National Council for Law Reporting."*

Part 3: General proposals outside the Bill

Section of the Bill	Proposed Amendment	Justification





New Proposed Section not In The Bill	(a) "Tribunals shall, subject to the direction of the Chief Justice, as soon as practicable after delivering a judgment, ruling or an opinion cause to be furnished to the Editor of the National Council for Law Reporting (Kenya Law) a certified copy of the judgment, ruling or opinion. (b) Every Registrar of a Tribunal shall at the end of each month furnish the Editor with a list of all judgments, rulings or opinions delivered by the Tribunal."	The National Council for Law Reporting (Kenya Law) is a Semi-Autonomous Government Agency established by section 3 of the National Council for Law Reporting Act, No. 11 of 1994. The agency is responsible for the preparation and publication of the official Kenya law reports. The institution is also responsible for undertaking the powers of revision outlined in section 7 and 8 of the Revision of the Laws Act (Cap. 1), a mandate vested in the AG and delegated to the Council by Legal Notice No. 29 of 2009. The justification for this proposal is therefore to provide a duty to the tribunals to furnish Kenya Law with their decisions for purposes of publication and dissemination. *Further this proposal is also in line with Section 5 (1) (j) of the Bill;* *"…. to facilitate law reporting on decisions of Tribunals in consultation with the National Council for L aw* *Reporting;" …*

REPUBLIC OF KENYA

THE JUDICIARY

OFFICE OF THE CHIEF REGISTRAR OF THE JUDICIARY

Our Ref: CRJ 48 **Your Ref: NA/DDC/JLAC/2023(105)** **Date:** Sept 9, 2023

Mr. Samuel Njoroge
Clerk of the National Assembly
Parliament Buildings
P. O. Box 41842-00100
NAIROBI

Dear Clerk

RE: COMMENTS ON THE TRIBUNALS BILL, 2023 (N.A. BILL NO. 45 OF 2023)

We refer to your letter Ref: NA/DDC/JLAC/2023(105) dated 5th October 2023 inviting comments on the above referenced Bill for consideration by the Justice & Legal Affairs Committee of the National Assembly.

As you are aware, Tribunals are established through various pieces of legislation, many of which were enacted before the promulgation of the Constitution of Kenya, 2010. We presently have an estimate of 38 Tribunals, each with its parent statute. Consequently, there are numerous gaps and disparities in the legal framework governing the Tribunals, and this has hampered access to justice for litigants and resulted in a number of challenges in their governance and administration.

The Judiciary has attempted to address these challenges by spearheading the transition of Tribunals from the Executive to the Judiciary as demanded by the Constitution, but has faced numerous challenges owing to the lack of a unified legislative framework expressly mandating such transition, and providing for the governance and administration of Tribunals under the Judiciary.

We therefore welcome Parliament's efforts to rationalize and regulate the functioning of Tribunals through the enactment of the Tribunals Bill 2023.

For the above reasons, we support the Tribunals Bill in its entirety, and have the pleasure to forward herewith a detailed memorandum with our comments on specific clauses of the Bill.

We appreciate the opportunity to provide feedback on the Bill and hope the Committee finds these comments useful to its deliberations.

Yours Sincerely,

ANNE A. AMADI, CBS
CHIEF REGISTRAR OF THE JUDICIARY

Copy to:- The Chief Justice & President of the
Supreme Court of Kenya
Supreme Court Building
Nairobi

The Attorney General,
Office of the Attorney General & Department of Justice
Sheria House
Nairobi

The Registrar, Tribunals
Forodha House,
Nairobi

naa/ko

COMMENTS FROM THE JUDICIARY ON THE TRIBUNALS BILL 2023

CLAUSE	COMMENTS
3 - Objects and purposes of the Act.	We support the clear statement of the purpose and objects of the Act as they speak to specific challenges we have experienced in recent years with the administration and operations of Tribunals.
4 - Application of the Act	There has been litigation on which statutory bodies qualify as Tribunals. We therefore support this clause that will clarify the application of the Act to adjudicatory bodies established pursuant to Article 169(1)(d) of the Constitution.
5 - Functions and powers of the Judicial Service Commission	One of the challenges in the legal framework governing Tribunals is that their administration has been vested in different bodies, including various Ministers and the Judicial Service Commission. We support statutory changes that will place Tribunals under the administration of the Judicial Service Commission which has constitutional mandate on the administration of justice, as this will bring greater accountability in line with the tenets of the Constitution. This will enhance trust and confidence in the tribunals dispute resolution mechanism. We also support the rationalization of Tribunals as this will result in the merger of certain Tribunals into bodies with wider mandate. For instance, Parliament is considering the Landlord & Tenant Bill which proposed the merger of the Business Premises Rent Tribunal and the Rent Tribunal into one Tribunal.
6, 7, 8 & 9 - Registrar & Deputy Registrars of Tribunals	The Judicial Service Commission has already designated a Registrar responsible for Tribunals in exercise of powers granted to it under Article 161 (3) of the Constitution. However, it is important that the office of the Registrar of Tribunals is anchored in specific legislation, and the mandate of the office clarified. We support these clauses of the Bill as they also provides for the qualifications of the Registrar, and the appointment of Deputy Registrars who will deputise and support the Registrar in the coordination of Tribunals. Presently, several statutes that establish Tribunals do not provide for the appointment of Deputy Registrars who are the only persons mandated in law to sign Tribunal orders. This has resulted in the difficulties experienced by litigants in extracting and enforcing Tribunal Orders.
10 - Secretariat	In 2017, the Judiciary established a Secretariat which provides administrative support to all Tribunals that have transited to the Judiciary through a shared services model that optimizes personnel and other resources. This works best given the low case load of a number of Tribunals, and the fact that many Tribunal members serve on

CLAUSE	COMMENTS
	part time basis and may not need dedicated facilities and other resources. Consequently, the shared services model ensures standardization of services for members, prudent and optimal use of resources and economies of scale for supply chain expenditure. We therefore support the clause that will anchor the Tribunals Secretariat in law.
11 - Procedure for establishment of Tribunals	The proposed procedure to be followed before the establishment of a Tribunal will address situations where Tribunals have been established by law but have remained dormant for years owing to lack of cases, and instances where Tribunals handle only a handful of cases per year. There are also instances where different Tribunals are established with a similar mandate (See, for instance, the Business Premises rent Tribunal and Rent Restriction Tribunal; the Water Tribunal and the National Environment Tribunal; the Copyright Tribunal and the Industrial Property Tribunal). The proposed procedure will ensure careful analysis of all existing Tribunals with a view to determining whether the nature of disputes to be handled by a proposed new Tribunal can be handled by an existing Tribunal or other dispute resolution body before the decision to establish a new Tribunal is taken.
12 - Appointment of Chairpersons and members of a Tribunal	**Composition of Tribunals –** There are disparities in the current legal framework on the composition of Tribunals, including instances where only one person is appointed to a Tribunal. This greatly undermines access to justice for Kenyans. We therefore support the proposal of a minimum of 3 Members per Tribunal, and a maximum number that is set in the establishing statute in consideration of the mandate of the Tribunal.
	Election of Vice Chairpersons – We support this proposal which will ensure continuity in the leadership and operations of all Tribunals in the absence of Chairpersons.
	Appointment of Chairpersons and Members by the JSC - Under the current legal framework, the power to appoint Chairpersons and Members of Tribunals is vested by their parent laws to different constitutional and statutory offices, including Cabinet Secretaries, the President, the Attorney General, the Judicial Service Commission, and the Chief Justice. Some parent statutes also bestow nominating powers on other bodies, including the Law Society of Kenya. Furthermore, there is presently no explicit requirement of competitive recruitment of Tribunal members by these appointing authorities, and this has resulted in litigation in recent years by civil society groups who have demanded transparency in the recruitment of tribunal members as required by the Constitution.

CLAUSE	COMMENTS
	Additionally, we have noted gaps in the law on the discipline and removal of Tribunal members, with some parent statutes silent on this important issue that touches on accountability of the Tribunal Members, and on their right to due process before removal from office. Given that Tribunals are subordinate courts established under Article 169(1)(d) of the Constitution, their Chairs and Members ought to be appointed **competitively** by the Judicial Service Commission in exercise of its constitutional mandate. The Judicial Service Act already has detailed provisions on the transparent and competitive recruitment of judicial officers, and we support the proposal to have the provisions of the Judicial Service Act apply to the appointment, discipline and removal of Tribunal Chairpersons and Members.
13 - Qualifications for appointment of Chairpersons and members of Tribunal	There is no uniformity in relation to qualifications for Chairperson and members of Tribunals in the current statutes. While some statutes are silent on the qualifications of a Chairperson, leaving it to the discretion of the appointing authority, others provide that a Chairperson is to be qualified for appointment as a Judge of the High Court. This language has been problematic as it appears to elevate Tribunal Chairpersons to the level of High Court Judges, yet they preside over subordinate courts. It has also created practical implications in the determination of the remuneration of Tribunal Chairpersons, with expectations that their remuneration would be the same as that of a High Court Judge. We support the clause that provides for legal qualifications and 10 years' experience for Tribunal Chairpersons given the adjudicatory role of Tribunals. We also support the proposed uniform qualifications for Tribunal Members who can be drawn from diverse fields relevant to the mandate of the Tribunal.
14 - Disqualifications	Majority of the current statutes are silent on disqualification of the Chairpersons and members of Tribunals. Its imperative to provide grounds of disqualification for a chairperson or a member to give clarity during the appointment process.
15 - Tenure of members of a Tribunal	**Duration of Appointment** - Different statutes provide for different tenure for Chairpersons and members of Tribunals. Some members serve for 3 years which has proven to be too short as the members spend the first year settling into office only to exit soon thereafter, despite heavy investment by the Judiciary in their training. Such

CLAUSE	COMMENTS
	quick exit also results in regular recruitment by the JSC which has several costs. Other statutes provide for a term of 6 years non-renewable, and others 5 years renewable. There are also cases where the parent statute is silent on the tenure of members, leaving this important question to the discretion of the appointing authority. In some cases, Members have enjoyed open ended appointments. There is no justification for this disparity. For these reasons, we support the proposal of a 5-year term that is renewable once.
	Staggered Appointments – We have had instances where the tenure of members of a Tribunal lapse at the same time, necessitating the simultaneous appointment of a new set of new members. This doesn't allow room for knowledge management and transfer, and it also results in instances where a Tribunal cannot handle disputes due to lack of members. We therefore support the clause requiring that the appointment of members be staggered.
	Terms of Service (Part time or full time) – Tribunals have different caseloads depending on the nature of their mandate. We support the clause allowing the JSC to determine whether to engage the members of a particular Tribunal on full time or part time basis so that this decision is dependent on the caseload.
16 - Vacancy in the office of Chairperson or member of a Tribunal	We support this clause given the need for clarity and uniformity on the grounds upon which a member of Tribunal may be removed from office. We also support the proposal mandating the JSC to fill all vacancies within 3 months as this will ensure continuity in service delivery and access to justice.
17 - General principles	The general principles proposed are a replica of Article 159 of the Constitution to guide tribunals whose establishing statutes are silent on general conduct of proceedings.
18 - Arrangement of business	Although parent statutes provide for Chairpersons of Tribunals, there are those that are silent on the role of the Chairperson. We therefore support this clause as it will bring clarity on the role of the Chairperson of each Tribunal. We also support the provision requiring Tribunals to ensure parties are able to appear before them with as little inconvenience and expense as is practicable.
19 - Quorum	This Clause cures the problem of quorum in Tribunals, especially for statutes that do not provide for quorum. Some establishing statutes provide for a large quorum incapacitating access to justice if those numbers are not

CLAUSE	COMMENTS
	available. Further, some statutes provide that a Chair must be present for the Tribunal to sit. Such Tribunals grind to a halt when the Chair is not available for any reason, including when the office of chair is vacant. The empowering of a Vice Chair or a member elected by others to Chair ensures that a Tribunal has quorum at all times to dispense justice.
20 - Remuneration of Chairperson and members	This clause is in conformity with Article 230 of the Constitution relating to the role of the Salaries and Remuneration Commission on giving advisory services to the Commission on remuneration of Chairpersons and Members to create optimal pay scales on allowances and create uniformity and harmonization based on objective job evaluation for Tribunals.
21 - Tribunal may seek technical advice	Tribunals are specialized bodies and may not have all encompassing expertise in the matters that come before them. To ensure quality in decision making, it's important for Tribunals to have power to seek service of experts when determining disputes. A similar clause exists in the statutes establishing certain Tribunals and it is vital that all Tribunals are similarly empowered to engage experts.
22 - Jurisdiction of Tribunals	We support this clause which is meant to preserve and enhance jurisdiction of Tribunals as enunciated in their respective statutes. Additionally, the clause empowers all Tribunals to grant equitable relief. We support the clause.
23 - Power to review own decisions	The power of a judicial body to review its own decisions is a vital component of access to justice as it allows parties to approach the same body to correct minor errors that need not be raised on appeal. Some Tribunals have this power in their establishing laws and it is important that all Tribunals are empowered to review their decisions.
24 - Enforcement of decisions	Court decisions are worthless unless there are mechanisms for their enforcement. In the current legal framework, only a handful of Tribunals have the power to enforce their decisions. Litigants in most Tribunals have to file the decision/decree before a Magistrate's Court or the High Court for adoption and execution. This takes long and defeats the foundation of speed for which the Tribunal is established. It also creates backlog in the said courts. This lacuna is one of the big barriers to access to justice in Tribunals, and we support the proposal to empower all Tribunals to enforce their own decisions.
25 - Award of costs	Litigation can be costly- - including litigation before Tribunals. It is important, therefore, that Tribunals are empowered to award costs, and that there are mechanisms for the enforcement of the award for costs.

CLAUSE	COMMENTS
26 - Contempt	The rule of law depends on respect for courts and their decisions. The Tribunal system cannot support the rule of law if there is no provision for contempt proceedings to be initiated against those who show willful disregard for the judicial system. We therefore support this clause.
27 - Appeals	Appeals are a vital component of any judicial system since it gives litigants who are not happy with the decision of a court to approach a higher judicial forum for resolution of their grievances. However, appeals can be abused to delay justice, particularly where there are no statutory timelines for the conclusion of appeals. Presently, some establishing statutes are silent on the right of appeal. Others provide open ended appeals while others limit the right of appeal, allowing only one appeal. Given the role of Tribunals as forums for the swift resolution of disputes, we support the proposal allowing parties one appeal to the High Court or courts of equal status, with a one-year timeline for the resolution of the appeal.
28 - Period for determination of matters	As already indicated, Tribunals are intended to serve as forums for the swift resolution of disputes. This is the case for several Tribunals whose parent statutes provide timelines for the conclusion of cases. However, such timelines are missing in other Tribunals, leaving it to the discretion of the Tribunal members. We support the proposed six-month timeline for the conclusion of cases, save for instances where the parent statute provides a shorter period. We recognize that such shorter period may be necessary in certain cases, and Parliament should enjoy the latitude to impose shorter timelines where necessary.
29 - Budget and funding of Tribunals	A number of statutes that establish Tribunals provide for the funding of Tribunals through Ministries and other bodies whose decisions are subject to appeal before the Tribunal. This undermines the independence and perception of independence of such Tribunals in the eyes of litigants. We therefore support the proposal that Tribunals are funded through the Judiciary Fund so they can access adequate funding for their operations in a manner that does not create an impression of lack of independence.
30 - Annual report	Annual reporting is an important aspect of accountability in the management of Tribunals and we support the clause.
31 – Bank accounts	For proper management of Tribunals funds and for accountability purposes we support the clause.
32 & First Schedule - Oath of office	While some parent statutes require that Tribunal Chairpersons and Members take an oath on appointment, others are silent on this important requirement under Chapter Six of the Constitution. We support this provision which will ensure all Tribunal members are held to high standards of ethics and integrity.

CLAUSE	COMMENTS
33 - Protection from personal liability	It is important to protect Chairperson and Members of Tribunals from personal liability when conducting Tribunals business hence we support the clause.
34 - Conflict of interest	In order to protect the integrity of the members as well as that of the Tribunals, it is important to guard against conflict of interest hence we support the clause. This is also a constitutional imperative.
35 - Confidentiality	Confidentiality is an important principle of public service hence the staff and Tribunal members should maintain confidentially as they work in Tribunals. We support the clause.
36 - Duty to co-operate	We consider it paramount for parties to co-operate with Tribunals and provide information that leads to fair determination of disputes hence we support the clause.
37 - Common seal	We support the clause on safe custody and recognition of the common seal of a Tribunal.
38 - Offences	We support this clause which safeguards the sanctity and authority of Tribunals.
39 & 40 – Rules & Regulations	Rulemaking power, which is best exercised within the ambit of the Judiciary, is presently donated to various entities, including Ministers who have an executive rather than adjudicatory mandate and expertise. We support the proposal for the Chief Justice to make Rules and Regulations governing Tribunals.
41 - Act to prevail	As already noted, Tribunals are presently established in some 38 Acts of Parliament which have disparate provisions on key issues including the appointment of members, qualification for appointment, quorum for proceedings, funding for Tribunals, et cetera. This Bill is intended to standardize the legal framework governing all Tribunals, save for select issues that may best be addressed by the parent statute. For harmony in the legal regime, we support the proposal that the Tribunals Bill, once enacted, becomes the supreme law governing Tribunals and takes precedence in the event of any conflict with the laws that establish Tribunals.
42 - Extension of time	Although time is of the essence in the workings of Tribunals, we acknowledge that there are instances where the statutory timelines proposed in the Bill may not be met despite the best efforts of concerned persons. Therefore, we support the clause giving the Tribunal and the Commission power to extend time for the ends of justice to be met.
43 - Tenure of members of Tribunals	Under the current legal framework, some Tribunal Members are appointees of the Judicial Service Commission while others have been appointed by Ministers, the President, etc. There is need for a framework for transition of ministerial appointees who will be serving in Tribunals at the moment the Bill is passed and signed into law.

CLAUSE	COMMENTS
	We note, however, that this clause provides that the term of office of all persons serving in Tribunals will expire within 18 months of the Act coming into law, regardless of whether the member was appointed by the JSC or by Ministers and other appointing authorities. We propose that the clause be revised to provide that all persons serving in Tribunals at the effective date will continue in office for the remainder of their term as if they had been appointed under the Act.
44 - Pending cases	This clause provides direction for continuity when the Bill is enacted into law to ensure litigants are not disadvantaged.
45 - Transfer of staff	Ministerial staff have been instrumental in the operations of Tribunals that have been under Ministries. As Tribunals are transited to the Judiciary with the passage of the Bill, there is need for a framework for the transition of such staff to be employees of the Judicial Service Commission. We support this clause which allows the staff a choice to return to their Ministries for redeployment, or to be absorbed into the Judiciary subject to a suitability test.
46 - Disposal of assets	Transition of Tribunals from Ministries to the Judiciary in the past has been marred by challenges arising from the lack of a legal framework mandating the settlement of liabilities and transfer of relevant assets. This is a welcome clause which will bring order in the transition, to ensure accountability for assets and the settlement of liabilities before transition.
47 - Existing laws	As already noted, Tribunals are presently established in some 38 Acts of Parliament which have disparate provisions on key issues including the appointment of members, qualification for appointment, quorum for proceedings, funding for Tribunals, et cetera. This Bill is intended to standardize the legal framework governing all Tribunals, save for select issues that may best be addressed by the parent statute. For harmony in the legal regime, we support the proposal that all laws establishing Tribunals will be read so as to conform with the Tribunals Act which will become the supreme law governing Tribunals and will take precedence in the event of any conflict with the laws that establish Tribunals.
48 & Second Schedule - Consequential	There are multiple statutes establishing Tribunals. Unless these laws are simultaneously amended as the Tribunals Bill is passed into law, there are likely to be inconsistencies that may result in unnecessary confusion in the law

CLAUSE	COMMENTS
amendments to other Acts	governing Tribunals. We therefore support the entire schedule of consequential amendments to the various statutes which are necessary so that these statutes conform to the new legal framework.

ANNE A. AMADI, CBS
CHIEF REGISTRAR OF THE JUDICIARY

REPUBLIC OF KENYA

POLITICAL PARTIES DISPUTES TRIBUNAL
"expeditiously adjudicate political party disputes"

THE JUDICIARY

Ref: JSC/PPDT/1/9/1081 **Date:** October 18, 2023

RECEIVED
19 OCT 2023

DD c/11037
& 19/10

The Clerk of the National Assembly
Main Parliament Building
P. O. Box 41842 – 00100
NAIROBI

Dear Sir/Madam,

REF: INVITATION BY THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS TO DISCUSS THE TRIBUNALS BILL *(NATIONAL ASSEMBLY BILL NO. 45 OF 2023)*

I make reference to the above subject matter.

Further reference is made to your letter **REF: NA/DDC/JLAC/2023/124** dated 13th October, 2023.

In that regard, please find attached written submissions of Memorandum of the Political Parties Disputes Tribunal (PPDT) on the Tribunals Bill, 2023 for your reference.

Kind regards,

Douglas Katho
to facilitate
19/10/23

Hon. Desma Nungo, HSC
Chairperson, PPDT

NATIONAL ASSEMBLY
RECEIVED
19 OCT 2023
CLERK'S OFFICE
P.O Box 41842, NAIROBI

Cc
The Chief Registrar of the Judiciary
Supreme Court Building
P. O. Box 30041-00100
NAIROBI

MEMORANDUM OF THE POLITICAL PARTIES DISPUTES TRIBUNAL ON THE TRIBUNALS BILL, 2023

PROVISION OF THE BILL	PROPOSAL	JUSTIFICATION/COMMENTARY
Clause 2 Interpretation	**Consider including definition for;** -Define **"sitting"** to include; a session, whether virtual or physical, of members of the Tribunal to transact any business of the tribunal	• The role of the tribunal is not limited to simply hearing and determining disputes. Most tribunals run with other programs that contribute towards institutional strengthening and enhanced access to justice. Accordingly, a definition that takes cognizance of these engagements enables tribunal members to engage more effectively.
Clause 19: on Tribunal Quorum. Provides that; (1) The quorum of a Tribunal shall be three members. (2) The Chairperson shall preside at all sittings of a Tribunal at which the Chairperson shall be present and in the absence of the Chairperson, the Vice-Chairperson shall preside and in the absence of the Vice-Chairperson, the members shall nominate one of their own to preside. (3) Notwithstanding any other provision of this Act, the Chairperson of a Tribunal or a Vice-Chairperson acting alone	-Consider recrafting clause 19 (i) to provide that; Clause 19(1); The quorum of a Tribunal shall be **at least** three members, **one of whom shall be an advocate**. Clause 19(2): The Chairperson shall preside at all sittings of a Tribunal at which the Chairperson shall be present and in the absence of the Chairperson, the Vice Chairperson shall preside **and provided further that in the case of the PPDT the Chairperson or in his absence the Vice Chairperson shall appoint Presiding**	• The use of the word 'at least' is to address the special circumstances when the Tribunal may require to have a quorum of more than 3 members in a sitting. • Allows for balancing the mix of skills and also ensuring that the advocates are distributed in various panels to guide legal proceedings and/or any complex legal issues arising out of the process of adjudication of disputes. • To bring clarity in operations during election dispute resolution period when the tribunal will be sitting in 8 or so panels at any one time and there is need for appointment of presiding members of other panels where the Chairperson or Vice Chairperson may not be sitting.

shall have jurisdiction to deal with interlocutory matters	**Members for any other tribunal panels**	
Clause 41 Provides that where the provisions of any Act under which a Tribunal is established conflicts with this Act, the provisions of this Act shall prevail.	Consider recrafting this provision to provide that; "Where the provisions of any Act under which a Tribunal is established conflicts with this Act **on administrative matters,** the provisions of this Act shall prevail."	• The mandate and jurisdiction of tribunals is set out in the parent statutes. Such should therefore not be subjected to Clause 41. • Tremendous strides have been taken in building public confidence in PPDT, including clothing the tribunal with express powers to punish for contempt in the same manner as the High Court as provided for in Section 41(3) of the PPA. This was informed by past injustice occasioned by blatant disregard of tribunal orders and conflicting court decisions on the power of the tribunal to punish for contempt. Maintaining Clause 41 implies that should contempt issues arise, the tribunal will be limited to the provisions of Clause 26 of the Tribunals Bill. This will drive the tribunal backwards. • The amendment is necessary to eliminate the eminent threat to the provisions of Section 39A of the PPA that provide for appointment of ad hoc members of the tribunal, which provision was meant to strengthen the capacity of the tribunal during the peak season of election dispute resolution.

Cause 43 provides that; every person who, immediately before the commencement of this Act was a Chairperson or a member of a Tribunal, shall remain in office for their unexpired term or a period of eighteen months whichever is earlier.	-Consider amending this clause to provide that; "Every person who, immediately before the commencement of this Act was a Chairperson or a member of a Tribunal, shall remain in office for their unexpired term."	• The provision will disenfranchise Chairpersons and members whose unexpired term exceeds the eighteen months as at the time the Act becomes operational.
SECOND SCHEDULE: CONSEQUENTIAL AMENDMENTS TO OTHER ACTS		
Clause 60(8) provides: For the purposes of hearing and determining any cause or matter under this Act, the quorum of the Tribunal shall be three members : Provided that where for any reason the Chairperson is absent, the Vice-Chairperson shall preside and in the absence of the Vice Chairperson, the members shall nominate one of their own to preside	To retain the current provisions of Section 39(7) of the PPA with slight modification and read thus:- The quorum of the Tribunal shall be at least three members **one of whom shall be an advocate** Provided that where for any reason the Chairperson is absent, the Vice-Chairperson shall preside and in the absence of the Vice Chairperson, the members shall nominate one of their own to preside **and provided further that the Chairperson or in his absence the Vice Chairperson shall appoint Presiding Members for any other tribunal panels**	• Allows for balancing the mix of skills and also ensuring that the advocates are distributed in various panels to guide legal proceedings and/or any complex legal issues arising out of the process of adjudication of disputes. • To bring clarity in operations during election dispute resolution period when the tribunal will be sitting in 8 or so panels at any one time and there is need for appointment of presiding members of other panels where the Chairperson or Vice Chairperson may not be present.

Clause 62 provides that; Section 43 of the Political Parties Act is amended by deleting the words "appoint the Secretary" and substituting therefor the words "deploy a Deputy Registrar."	-Consider retaining Section 43 of the Political Parties as it is	• The nature of PPDT mandate requires the support of a designated secretary to support various programs which are separate from the functions of a Deputy registrar. • The Secretary performs numerous roles that have enabled the tribunal to effectively and efficiently discharge its mandate at all times including during the heated political seasons. Abolishing this office and replacing it with the Deputy Registrar with limited functions will incapacitate the tribunal. • Focus should be on strengthening tribunals and making them independent.

OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

MATRIX ON THE TRIBUNALS BILL, 2023

No.	CLAUSE	PROVISION	JUSTIFICATION
1.	4—Application of this Act.	(1) The Act shall apply to Tribunals established under 169(l)(d) of the Constitution. (2) For the avoidance of doubt, this Act shall not apply to Tribunals established by the Constitution or an arbitral Tribunal under the Arbitration Act, 1995.	The local Tribunal is a subordinate Court under the Constitution and as determined in several court cases for instance *Okiya Omtatah Okoiti v Judicial Service Commission & 2 others; Katiba Institute (Interested Party) [2021] Eklr and* Bernard Odero Okello & Another V Cabinet Secretary for Industrialization, Trade and Enterprise Development &Another; Cyprian Mugambi Ngutari & 7 Others (interested parties) [2020] eKLR. The Arbitration Act provides for an Arbitral Tribunal which specifically determines matters between or amongst parties to commercial transactions and therefore does not constitute the tribunals envisaged under this Bill. This Office supports this clause because it

			clarifies the application of the Act to adjudicatory bodies established pursuant to Article 169(1)(d) of the Constitution.
2.	5—Functions and powers of the Judicial Service Commission.	(1) In addition to the functions of the Commission under Article 172 of the Constitution, the Commission shall— (a) develop policies for the regulation of Tribunals; (b) ensure the enhancement of a fair, efficient and accessible Tribunal system and jurisprudence; (c) evaluate, rationalize and recommend to Parliament the Tribunals to be established, merged or abolished; (d) regulate and oversee the functioning of Tribunals; (e) set standards and monitor compliance with the standards by the Tribunals in their functioning and service delivery; (f) develop a Code of Conduct for	This Bill transitions Tribunals to the Judiciary. There is therefore need for additional functions for the Judicial Service Commission in relation to the establishment and operationalization of Tribunals. This Office supports the rationalization of Tribunals through the development of a policy for the regulation of tribunals. This will provide necessary guidance on whether tribunals should be merged, abolished or new tribunals be established to deal with disputes that are not within the purview of existing tribunals. This proposal is in line with Constitutional principles on prudent use of resources. Further and linked to this, Parliament is considering the Landlord & Tenant Bill which proposes the merger of the Business Premises Rent Tribunal and the Rent Tribunal.

		Tribunals; (g) ensure Tribunals adhere to the provisions of the law, regulations, policies, Code of Conduct, rules or guidelines; (h) provide strategic direction to Tribunals; (i) facilitate training programmes for members and staff of Tribunals; (j) facilitate law reporting on decisions of Tribunals in consultation with the National Council for Law Reporting; (k) facilitate public education on the role of Tribunals; and (l) perform any other function as may be necessary for the proper discharge of its responsibilities under this Act. (2) Despite subsection (1), the Commission shall within two years of the commencement of this Act —	

		(a) formulate and adopt guidelines for evaluation and rationalization of Tribunals; and (b) undertake the first evaluation and rationalization exercise and recommend to Parliament the Tribunals to be established, merged or abolished.	
3.	6—Registrar of Tribunals.	(1) There shall be a Registrar of Tribunals who shall, pursuant to Article 161(3) of the Constitution, be appointed by the Commission. (2) There shall be such number of Deputy Registrars for Tribunals as the Commission may deem necessary. (3) A person shall be qualified for appointment as Registrar or as a Deputy Registrar if the person — (a) holds a degree in law from a university recognised in Kenya; (b) has, in the case of the Registrar, at least ten years post qualification experience and, in the case of a	This provision conforms with section 10 of the Judicial Service Act, 2011 on the qualification and appointment of Deputy Chief Registrars and such other Deputy Registrars and Assistant Registrars as maybe necessary for the discharge of judicial service.

		Deputy Registrar, has at least five years post qualification experience; and (c) satisfies the requirements of Chapter Six of the Constitution.	
4.	7—Functions of the Registrar.	(1) The Registrar shall perform such duties as the Chief Registrar may direct, and in particular shall be responsible for— (a) the establishment of registries of Tribunals; (b) the day to day administration and management of the Secretariat; (c) overseeing support services for Tribunals including the planning, development and the organization of staff; (d) the monitoring of administration and office procedures to uphold efficiency and quality of service; (e) the planning, preparation and implementation of the budget of Tribunals;	The Registrar shall be responsible for the overall administration and management of the Tribunals.

		(f) the preparation of reports and proposals on administrative issues as may be required from time to time; (g) overseeing the procurement and disposal of assets; (h) the acceptance, transmission, service and custody of documents in accordance with the law; (i) the facilitation of the enforcement of the decisions of Tribunals; (j) the certification of any order, direction or decision as an order, direction or decision of Tribunals; (k) causing to be kept records of the proceedings and minutes of the meetings of Tribunals and such other records as Tribunals may direct; (l) the management of the library of Tribunals; (m) the facilitation of access to judgments and records of Tribunals; and	

		(n) undertaking any other duties, in relation to the regulation and management of Tribunals, assigned by the Commission under this Act or any other written law. (2) The Registrar and Deputy Registrars shall work under the general direction of the Chief Registrar and shall have all the powers necessary for the execution of their functions under this Act.	
5.	8—Functions of the Deputy Registrar.	(1) A Deputy Registrar shall be responsible to the Registrar for— (a) the administration and management of a Tribunal; (b) case management within the Tribunal; (c) efficient management of the day-to-day operations and administration of human resources in the Tribunal; (d) performing judicial functions as may be assigned by the Chief Registrar pursuant to the provisions of any law;	There is need for a Deputy Registrar who shall be responsible for a Specific Tribunal and perform such other duties as shall be assigned by the Registrar. In addition, several statutes that establish Tribunals do not provide for the appointment of Deputy Registrars who are the only persons mandated in law to sign Tribunal orders. This has resulted in difficulties experienced by litigants in extracting and enforcing Tribunal Orders.

		(e) supporting the Registrar through supervision and coordination of the operations of the Tribunal's registry; (f) accounting for any service in respect of which monies have been allocated and for which issues are made from the Judiciary Fund; (g) planning, preparing, implementing and monitoring the budget and collecting and accounting for revenue in the Tribunal; and (h) any other function as may be assigned by the Registrar. (2) In relation to the proceedings before a Tribunal, a Deputy Registrar may consider and dispose of procedural or administrative matters in accordance with the Rules or on the direction of the Registrar.	
6.	9—Registrars power to delegate.	Except as provided under this Act or any other law, the Registrar may in writing delegate to a Deputy Registrar, any of the powers or responsibilities vested in the Registrar.	This provision is reflective of the need to ensure continuity in the provision of Government services in line with section 38 of the Interpretation and General Provisions Act on the delegation of powers. Deputy Registrars will therefore deputise and support the Registrar in the running of Tribunals.

7.	10—Secretariat.	(1) There shall be a Tribunals Secretariat which shall be headed by the Registrar. (2) The Secretariat under subsection (1) shall consist of — (a) such Deputy Registrars as may be determined by the Commission; (b) such technical, administrative and support staff as may be appointed by the Commission under this Act; and (c) such public officers as may be seconded by the Public Service Commission upon a request by the Commission. (3) The officers and staff under subsection (2) shall be appointed upon such terms and conditions of service as the Commission may determine.	There is need to provide for technical and administrative support to the Tribunals.
8.	11—Procedure for the establishment of the Tribunals.	(1) Where a Ministry, Department or Agency intends to establish a Tribunal, the responsible Cabinet Secretary shall submit to	This procedure will ensure a rational determination of the type of tribunals to be established. It is essential that going forward a critical analysis of all Tribunals is undertaken to

		the Commission, a written request for the proposed establishment of the Tribunal. (2) The request of the responsible Cabinet Secretary shall be accompanied by — (a) a detailed statement justifying the proposed establishment of the Tribunal; and (b) a feasibility assessment report for the purpose of ascertaining— (i) the strategic viability of establishing the proposed Tribunal; (ii) the practicability of the mandate of the proposed Tribunal being conducted by an existing Tribunal; and (iii) whether or not there is need to establish a new Tribunal. (3) The Commission shall consider the request and feasibility assessment report submitted to it under subsection (2) and shall submit its decision, in writing to the relevant	establish their need and effectiveness and also whether the nature of disputes to be handled by a proposed Tribunal can be dealt with by an existing Tribunal.

		Cabinet Secretary and to the Cabinet Secretary to the National Treasury, within sixty days of receipt of the report. (4) Where the Commission recommends the proposed establishment of the Tribunal, the Cabinet Secretary shall submit the request together with the views of the National Treasury on the financial implications of establishing the Tribunal and the decision of the Commission to the Cabinet for consideration and approval. (5) Upon approval by the Cabinet under subsection (4), a Tribunal shall be established through an Act of Parliament. (6) Nothing under this section shall preclude the Commission from recommending the appointment of an ad hoc panel of experts to enquire into and determine a dispute arising out of an emergency and in respect of which no Tribunal has competent jurisdiction. (7) A panel constituted under subsection (6) shall subject to rules made under this Act have the powers of a Tribunal. (8) Notwithstanding the provisions of any other law, no Tribunal shall be established	

		without the recommendation of the Commission. (9) The Commission may prescribe the manner and procedure for the evaluation under subsection (3).	
9.	12—Appointment of Chairpersons and members of the Tribunals.	(1) Every Tribunal shall consist of a minimum of three members, one of whom shall be the Chairperson. (2) The Commission shall through a competitive process appoint the Chairperson and members of a Tribunal. (3) The members of the Tribunal appointed under this section shall elect a Vice-Chairperson from amongst themselves and the Chairperson and the Vice-Chairperson shall not be of the same gender. (4) The provisions of the Judicial Service Act relating to appointment, discipline and removal of judicial officers shall apply with necessary modifications to members of a Tribunal.	There is need to harmonise the **composition** of Tribunals. The disparities evident in the various laws has impeded the Constitutional right to access to justice. This Office supports the proposal of a minimum of 3 Members for every Tribunal. The provision provides the necessary flexibility to appoint more members pursuant to the respective Tribunal's mandate and caseload. A few statutes that establish tribunals for instance the Energy Act provide for competitive recruitment of tribunal members. Article 232 of the Constitution mandates fair competition and merit as one of the key values for the basis for appointments in the public service. There is need to harmonise the **appointment** of tribunal members. The current legal framework relating to tribunals vests the power to appoint Chairpersons and Members of Tribunals to various appointing authorities including the President, Cabinet Secretaries, Attorney General and the Judicial Service Commission. This is in contradiction to Article 172(1)(c) of the Constitution that exclusively

			mandates the Judicial Service Commission the function of appointing judicial officers. In addition, the Judicial Service Act comprehensively provides for the transparent and competitive recruitment of judicial officers.
10.	13— Qualifications for appointment of Chairpersons and Members of the Tribunal.	(1) A person shall be qualified for appointment as the Chairperson of a Tribunal if that person — (a) is a Kenyan citizen; (b) holds a degree in law from a university recognized in Kenya and is an advocate of the High Court of Kenya; (c) has not less than ten years' post-qualification experience; and (d) meets the requirements of Chapter Six of the Constitution. (2) A person shall be qualified for appointment as a member of a Tribunal if that person — (a) is a Kenyan citizen;	There is need to harmonise the qualification of the Chairperson and members of Tribunals in order to ensure uniformity and to provide clarity on the administration of tribunals. There are numerous disparities in the current legal framework. Some statutes require that chairpersons possess qualifications similar to those necessary for appointment as judges of the High Court, others for instance the Landlord and Tenant (Shops, Hotels and Catering establishments) are silent on the qualifications of a Chairperson whilst others leave it to the discretion of the appointing authority. Due to the specialized nature of tribunals, it is critical that members possess a minimum qualification on the respective disciplines relevant to the mandate of the Tribunal. The minimum number of years of qualification and experience for appointment as chairperson or member of a tribunal is reflective of the

		(b) holds a degree from a university recognized in Kenya; (c) has knowledge and experience of not less than five years in the respective field; and (d) meets the requirements of Chapter Six of the Constitution.	views of the public in various stakeholder fora.
11.	Clause 14— Disqualifications.	A person shall not be qualified for appointment as a Chairperson or a member of a Tribunal if the person — (a) is of unsound mind; (b) is an undischarged bankrupt; (c) is convicted of an offence and is sentenced to a term of imprisonment for a period of six months or more; (d) is an employee of a government agency whose decisions are a subject of appeal in the respective Tribunal; or (e) has been removed from any	This provision complies with Constitutional and statutory requirements on public office holders to be persons of integrity in terms of Chapter Six of the Constitution and all other relevant laws. The provision also provides clarity and direction for the appointment process by setting out grounds of disqualification for a chairperson or a member.

		office for gross violation of the Constitution or any other written law.	
12.	15—Tenure of Members of a Tribunal.	(1) A Chairperson or a member of a Tribunal shall hold office for a term of five years and shall be eligible for re-appointment for one further term of five years. (2) The Commission shall appoint members at different times to ensure continuity in the affairs of the Tribunal. (3) A Chairperson or a member of a Tribunal shall serve on full or part time basis as determined by the Commission. (4) A Chairperson or member of a Tribunal serving on a fulltime basis shall not hold any other public office.	There is need to harmonise the term of office for members of tribunals. Different statutes provide for different tenure for chairpersons and members of Tribunals. Some members serve for 3 years, others 5 years and others 6 years. Some statutes such as the Landlord and Tenant (Shops, Hotels and Catering establishments) are silent on the tenure. This provision therefore cures the apparent inconsistencies. Tribunals have different caseloads depending on the nature of their mandate. The Judicial Service Commission should therefore be granted the discretion to determine whether to engage full time or part time members.
13.	16— Vacancy in the of Vice of Chairperson or Member of a Tribunal.	The office of the Chairperson or member of a Tribunal shall become vacant if the holder — (a) dies; (b) resigns from office by notice in writing addressed to the Commission;	This provision provides clarity and uniformity on the tenable grounds for removal from office for a chairperson or member of a tribunal. In order to ensure continuity in the operations of tribunals, it is critical that the Judicial Service Commission fills any vacancy in the composition of tribunals within 3 months of such vacancy.

		(c) is convicted of an offence and is sentenced to a term of imprisonment for a period of six months or more; (d) completes their term of office; (e) in the case of a member, is absent from three consecutive meetings of the Tribunal without the permission of the Chairperson of the Tribunal and in the case of the Chairperson, is absent from three consecutive meetings of the Tribunal without the permission of the Chief Registrar; or (f) is removed from office on any of the following grounds — (i) gross violation of the Constitution or any other written law; (ii) gross misconduct or misbehaviour;	

		(iii) inability to perform functions of the office arising out of physical or mental infirmity; (iv) incompetence or neglect of duty; or (v) bankruptcy. (2) The Commission shall fill any vacancy under this section within three months of the vacancy arising.	
14.	17— General Principles.	Subject to this Act or any other law, a Tribunal seized of a matter shall — (a) conduct its proceedings with minimum formality; (b) hear and determine the matter expeditiously; (c) not be bound by the rules of evidence and procedure; (d) encourage mediation, arbitration and other forms of alternative dispute resolution;	This provision complies with Article 159 of the Constitution.

		(e) ensure the investigation of fact if the Tribunal is of the opinion that such investigation is necessary for the ends of justice; and (f) act according to equity, good conscience and the substantial merits of the case without undue regard to legal technicalities.	
15.	18—Arrangement of Business.	(1) The Chairperson shall be responsible for — (a) ensuring the orderly and expeditious discharge of the mandate of the Tribunal; and (b) constituting any panel to hear any matter before the Tribunal. (2) Notwithstanding the provisions of subsection (1), the Tribunal shall determine the place at which a panel may sit with a view to securing a reasonable opportunity for parties to appear before the Tribunal with as little inconvenience and expense as is practicable.	This provision standardizes the operations of the Tribunals.
16.	19— Quorum	(1) The quorum of a Tribunal shall be three members. (2) The Chairperson shall preside at all	This provision is reflective of section 37 of the Interpretation and General Provisions Act on provision for execution of duties during temporary absence.

		sittings of a Tribunal at which the Chairperson shall be present and in the absence of the Chairperson, the Vice–Chairperson shall preside and in the absence of the Vice-Chairperson, the members shall nominate one of their own to preside. (3) Notwithstanding any other provision of this Act, the Chairperson of a Tribunal or a Vice- Chairperson acting alone shall have jurisdiction to deal with interlocutory matters.	
17.	20— Remuneration of Chairperson and Members.	The Chairperson and members of a Tribunal shall be paid such salaries, allowances and benefits as the Commission shall, in consultation with the Salaries and Remuneration Commission, determine.	The clause complies with Article 230 of the Constitution and section 11 of the Salaries and Remuneration Act, 2011 on the functions of the Salaries and Remuneration.
18.	21— Tribunal may seek technical advice.	(1) A Tribunal may seek technical advice from persons whose specialized knowledge or experience may assist the Tribunal in its proceedings. (2) A person whose advice is sought under subsection (1) shall disclose any interest they may have in the matter before the Tribunal or any subsequent interest acquired relating to the matter in question. (3) Any person who gives technical advice	Due to the specialized nature of tribunals for instance the National Civil Aviation Administrative Review Tribunal and Energy and Petroleum Tribunal, it is critical that tribunals have the power to seek the opinions of experts when discharging their mandate. There is also need to provide the manner in which such experts shall be remunerated for their professional services.

		to the Tribunal in accordance with this section shall be paid such allowance as may be determined by the Commission.	
19.	22—Jurisdiction of Tribunals.	(1) Except as provided by law, every Tribunal shall have jurisdiction to hear and determine any matter provided under the law establishing the Tribunal. (2) The jurisdiction of a Tribunal shall not include the trial of any criminal offence except as provided for under section 26 of this Act. (3) A Tribunal shall have power to grant equitable relief including injunctions, penalties, damages and specific performance. (4) A Tribunal may in appropriate cases hear and determine a complaint before it arising under Article 47(3) of the Constitution, the Fair Administrative Action Act or any other written law. (5) Despite subsection (1), disputes governed by dispute settlement mechanisms under international instruments to which Kenya is a party may only be settled under such instruments.	Since this is a general statute on tribunals, this provision enables individual statutes to provide for the jurisdiction of respective tribunals.
20.	23—Power to	Any person who is aggrieved by a	This provision complies with section 80 of the

	review own decision.	decision of a Tribunal from which no appeal has been preferred, may apply for a review of the decision to the Tribunal which made the decision, and the Tribunal may make such order thereon as it thinks fit.	Civil Procedure Act. The power of a judicial body to review its own decisions is a vital component of access to justice as it allows parties to a dispute to approach the same body to correct minor errors that need not be raised on appeal.
21.	24—Enforcement of decisions.	A Tribunal may, on application by a decree-holder, order execution of the decree in the manner provided for in the Civil Procedure Act.	This provision complies with Part III of the Civil Procedure Act. Very few tribunals have the power to enforce their decisions. This has impeded access to justice as parties to a dispute have to file the decree before a Magistrate's Court or the High Court for adoption and execution.
22.	25—Award of costs	(1) Where a Tribunal awards costs in any matter, it shall, on application by the person to whom the costs are awarded, issue to him a certificate stating the amount of costs. (2) Every certificate issued under subsection (1) shall be deemed to be a decree and may be executed as such: Provided that an order for costs against the Government shall not be enforced save in the manner provided for by the	This provision complies with section 27 of the Civil procedure Act. This provision sets out mechanisms for the enforcement of the award for costs.

		Government Proceedings Act.	
23.	26— Contempt.	It shall be an offence for any person to engage in acts or make omissions amounting to contempt of the Tribunal and the Tribunal may punish such person for contempt in accordance with the provisions of this Act.	The provision seeks to uphold and protect the dignity and authority of Tribunals.
24.	27— Appeals	(1) A person aggrieved by a decision of a Tribunal may appeal to the High Court or Court of equal status, as the case may be, within thirty days from the date of such decision. (2) The Court in subsection (1) shall within one year of the filing of the appeal, dispense with any appeal filed under this section and the decision of the Court shall be final.	This provision complies with Article 50 of the Constitution. There is need to address the disparities in the current legal framework by standardizing the right to appeal. Some statutes are silent on the right of appeal, other allow one appeal, others several appeals whilst other limit the right to appeal. The time limit of 1 year to dispense with an appeal is intended to enhance access to justice by allowing for the timely resolution of disputes.
25.	28— Period f or determination of matters.	Every Tribunal shall determine any matter filed before it within six months of filing except where an Act establishing a Tribunal provides a shorter period.	This provision complies with Article 159(2)(b) of the Constitution- Justice shall not be delayed. Under the current legal framework, different timelines obtain for the resolution of disputes.

			The proposed 6 month timeline for the conclusion of cases, save for instances where the parent statute provides a shorter period, provides clarity on this aspect.
26.	29— Budget and Funding of Tribunals.	(1) The expenses of Tribunals shall be a charge on the Judiciary Fund. (2) At least three months before the commencement of each financial year, the Registrar shall prepare estimates of all expenditure required for purposes of this Act for the next financial year, and submit them to the Chief Registrar for inclusion in the annual estimates of the Judiciary. (3) The Chief Registrar shall allocate adequate resources to facilitate the effective discharge of the functions of Tribunals.	This is in line with Article 173(2) of the Constitution that prescribes that the Judiciary Fund shall cater for administrative expenses of the Judiciary. Several statutes require Ministries and other entities that are subject to appeal before a tribunal to be funded by such ministries or entities. This creates a conflict of interest and is likely to interfere the independence of tribunals which is a critical tenet for any adjudicatory body. This provision therefore cures this conundrum.
27.	30— Annual report.	(1) At the end of each financial year, the Chief Registrar shall prepare and submit an annual report on the activities of Tribunals to the Commission. (2) The annual report shall contain — (a) the financial statements of Tribunals;	This report forms part of the report under section 38 of the Judicial Service Act, 2011 which requires the Chief Justice to prepare annual reports and submit to Parliament.

		(b) a description of the activities and outcomes of functioning of the Tribunals; and (c) any other information that the Commission may consider relevant. (3) The Commission shall ensure that the report submitted under subsection (1) is consolidated in the report that the Commission submits to Parliament under section 38 of the Judicial Service Act, 2011.	
28.	31— Bank accounts.	The Chief Registrar may in accordance with the Public Finance Management Act, 2012 open bank accounts on behalf of Tribunals and shall, as the accounting officer, be responsible for the proper management of the finances of Tribunals.	This is to facilitate the operations of the Secretariat and the various tribunals.
29.	32—Oath of office	A Chairperson or member of a Tribunal shall on appointment, subscribe to the oath contained in the First Schedule.	This provision is in line with section 74 of the Constitution on state officers taking oath before assuming office.
30.	33— Protection from Personal liability.	Nothing done by a member of a Tribunal or by any person working under the instructions of the Commission or a Tribunal, shall if done in good faith for the purpose of executing the powers, functions or duties of	This provision protects office holders from unnecessary litigation.

		the Commission or Tribunal under the Constitution, this Act or any other relevant law, render such member or officer personally liable for any action, claim or demand.	
31.	34—Conflict of Interest	(1) The Chairperson or a member of a Tribunal who has a direct or indirect personal interest in a matter being considered or to be considered by the Tribunal shall as soon as reasonably practicable after the relevant facts concerning the matter have come to their knowledge, disclose the nature of such interest. (2)A disclosure of interest made under subsection (1) shall be recorded in the minutes of the meeting and the Chairperson or member of the Tribunal shall not take part in the consideration or discussion on or vote during any deliberations on the matter. (3) A member of the Tribunal shall recuse themselves from proceedings before the Tribunal in which they have apparent or perceived conflict of interest. A person who fails to make the requisite disclosure under this section commits an offence.	This ensures the integrity of decision makers is not compromised by private interests.
31.	35—	(1) A member or staff of a Tribunal	This provision is reflective of the principles set

	Confidentiality	shall not without the consent in writing given by, or on behalf of, the Registrar, publish or disclose to any person otherwise than in the course of the person's duties the contents of any document, communication or information which relates to, and which has come to the person's knowledge in the course of the person's duties under this Act. (2) The limitation on disclosure referred to under subsection (1) shall not be construed to prevent the disclosure of criminal activity by a member or staff of a Tribunal.	out in section 3 of the Official Secrets Act.
32.	36— Duty to cooperate	A person responsible for a matter in question before a Tribunal shall co-operate with the Tribunal and shall in particular — (a) respond to any inquiry made by the Tribunal; and (b) provide any other information that the Tribunal may require in the performance of its functions under the Constitution, this Act or any other written law.	This provision will assist tribunals in discharging their mandate.
33.	37— Common seal	(1) The common seal of a Tribunal shall be kept in such custody as the Tribunal shall direct and shall not be used except on	This deals with administrative operations of the tribunal.

		the order of the Tribunal. (2) The common seal of the Tribunal shall, when affixed to a document and duly authenticated, be judicially and officially noticed and unless and until the contrary is proved, any necessary order or authorization of the Tribunal under this section shall be presumed to have been duly given.	
34.	38— Offences.	(1) A person who — (a) obstructs, hinders or threatens a member, officer, employee or agent of a Tribunal acting under this Act; (b) disregards an order of a Tribunal; (c) submits false or misleading information to a Tribunal; or (d) makes a false representation to, or knowingly misleads a member, officer, employee or agent of a Tribunal acting under this Act, commits an offence and shall be liable	This will enhance the authority of tribunals.

		on conviction, to a fine of not less than two hundred thousand shillings or to imprisonment for a term of not less than one year, or to both such fine and imprisonment. (2) Any person who commits an offence under this Act for which no other penalty is provided, shall be liable on conviction to a fine not exceeding two hundred and fifty thousand shillings or to imprisonment for a term not exceeding six months, or both.	
35.	39— Regulations	(1) The Chief Justice may make Regulations for the better carrying into effect of the provisions of this Act. (2) The Regulations made under this Act may provide for — (a) rationalization, clustering or classification of Tribunals, including categorization of Tribunals in terms of specialization; (b) decentralization of services of Tribunals, including their sitting anywhere in the country; (c) terms of and conditions of service of staff of Tribunals;	This provision allows for the better carrying out of the effect of the provisions of the Act.

		(d) a framework for harmonization of standard procedures and rules for Tribunals; (e) enhancement of access to justice and expeditious disposal of disputes including the use of technology; (f) alternative dispute resolution mechanisms; (g) the conduct of investigations; (h) mechanisms that mandate the courts to refer cases to a Tribunal at initial stages if the Tribunal has jurisdiction to entertain a certain matter and vice versa; (i) reporting modalities made in consultation with the National Council for Law Reporting and ensuring accessibility of those reports to the public; (j) appointment and procedures of ad hoc panels of experts; and (k) standards of training for members of	

		Tribunals. (3) The provisions of any Regulations made under this Act may — (a) apply generally or be limited in its application; (b) apply differently according to different kinds and status of Tribunals; (c) authorize any matter or thing to be done from time to time; or do any combination of (a), (b) and (c).	
36.	40—Rules.	(1) The Chief Justice may make rules to govern the procedures of Tribunals generally. (2) Subject to subsection (1), each Tribunal may make rules to govern its procedures in the following areas — (a) filing of cases; (b) the standards for minimum filing fees and other fees pro-rated in accordance with the	This provision allows for the better carrying out of the effect of the provisions of the Act.

		value of the subject matter; (c) principles governing hearings; (d) parties; (e) representation; (f) costs; (g) appeals; (h) power to cure irregularities; (i) correction of mistakes; (j) review of Tribunal decisions; (k) authorizing someone to take evidence; (l) enforcement of decisions and orders; (m) accessibility of evidence; and (n) any other relevant area.	
37.	41— Act to prevail.	Where the provisions of any Act under which a Tribunal is established conflicts with	The enactment of this Bill shall make this Act the overarching Act on matters Tribunals.

		this Act, the provisions of this Act shall prevail	This Bill is intended to standardize the legal framework governing all tribunals, save for certain issues that may be best addressed by the parent statute.
38.	42— Extension of time.	(1) A Tribunal may, for sufficient cause shown, extend the time prescribed for doing any act or taking any proceedings before the Tribunal upon such terms and conditions, if any, as may appear just and expedient. (2) The Commission may, by notice in the *Gazette*, extend the period specified in respect of any matter under this Act by a period not exceeding thirty days.	This provision complies with section 59 of the Interpretation and General Provisions Act that grants the Tribunal and the Commission power to extend time for the ends of justice and section 95 of the Civil Procedure Act on enlargement of time by the tribunal.
39.	43—Tenure of Members of Tribunals.	Every person who, immediately before the commencement of this Act was a Chairperson or a member of a Tribunal, shall remain in office for their unexpired term or a period of eighteen months whichever is earlier.	This provision seeks to prevent disruption of the operations of the Tribunals on the commencement of the Tribunals Act.
40.	44— Pending cases	The Chief Justice may make Rules on the procedure to be followed with regard to pending cases or proceedings before Tribunals.	This provision seeks to prevent disruption of the operations of the Tribunals on the commencement of the Tribunals Act.
41.	45— Transfer of staff.	Subject to subsection (2), the Commission shall within a period of eighteen	This provision seeks to prevent disruption of the operations of the Tribunals on the

		months from the commencement of this Act, employ staff to Tribunals from amongst persons who, immediately before the commencement of this Act were public officers serving in Tribunals. (2) Before employing a person to whom subsections (1) or (3) apply, the Commission may — (a) require such person to make an application for employment or appointment to the Commission; and (b) using the criteria prescribed by the Commission, determine the suitability of the person to ensure that the person is fit and proper to serve in the position applied for. (3) Notwithstanding subsection (1), the public officers shall upon the commencement of this Act, be given an option to elect whether to serve in the Judiciary or to be redeployed to their respective ministries, departments or agencies.	commencement of the Tribunals Act. This provision provides flexibility to staff of tribunals to opt to return to their parent Ministries for redeployment, or to be absorbed into the Judiciary subject to a suitability test.
42.	46— Disposal of assets.	The Commission may, where applicable, within a period of eighteen	This provision complies with Part XIV of the Public Procurement and Asset Disposal, 2015

		months from the date of commencement of this Act, with respect to existing Tribunals — (a) conduct an assessment of assets and liabilities of Tribunals; (b) in consultation with the relevant ministries, departments or agencies dispose of the assets not required by the Tribunals in accordance with the law relating to procurement and disposal of public assets; and (c) require all ministries, departments or agencies to liquidate all debts of the Tribunals.	which provides for disposal of assets. It will also ensure order in the transition, by ensuring transparency when accounting for assets and the settlement of liabilities before transition.
43.	47—Existing laws.	Subject to section 41, any law establishing a Tribunal in force on or immediately before the commencement of this Act shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Act.	The enactment of this Act shall, require all existing laws to be harmonized with this Act.
44.	48—Consequential amendments.	The Acts specified in the Second Schedule are amended in the manner specified in that Schedule.	The cited laws are proposed to be amended when the Tribunals Bill is passed into law, to address any inconsistencies that may hinder the effective application of this law.

	SECTION	SPECIFIC CLAUSE	PROPOSED AMENDMENT	JUSTIFICATION
1.	11 (6)	"Where a ministry, department or Agency intends to establish a Tribunal, the Responsible Cabinet Secretary shall submit to the Commission, a written request for the proposed establishment of the Tribunal"	Delete	JSC will be exercising overriding powers over a ministry and this is beyond its mandate.
	11 (6)	"Nothing under this section shall preclude the Commission from recommending the appointment of an ad hoc panel of experts to enquire into and determine a dispute arising out of an emergency and in respect of which no Tribunal has competent jurisdiction"	Delete	This section is too open and can be subject to abuse because it is too open. In the absence of a competent Tribunal, there are Courts of law that can handle matters of emergency.
2.	12 (2)	"The Commission shall through a competitive process appoint the Chairperson and members of a Tribunal"	"The Commission shall, through a competitive process appoint the Chairperson and Vice Chairperson of a Tribunal.	There is need for the ministry to take part in the recruitment of the members so that the membership can have the spirit of the sector.
	12		Insert a sub section to read: "The members of a tribunal shall be appointed competitively by the relevant sector ministry".	Tribunals are sector-based, hence the ministry or sector is more competent to appoint members on need basis.
3..	22 (4)	"A tribunal may in appropriate cases hear and determine a complaint arising under Article 47 (3) of the constitution, the Fair administrative Action Act or any other written law"	Delete	This may create conflict with Jurisdiction of other Courts and lead to duplication of roles.
4.	28	"Every Tribunal shall determine any matter filed before it within 6 months of filing except where an act	We propose deletion of six months and insertion of one year	Every case has its peculiarities and technicalities and six months may too short for

		establishing a Tribunal provides a shorter period"		conclusion of some of the cases.
5.	41	"Where the provisions of any Act under which a Tribunal is established conflicts with this Act, the provision of this Act shall prevail"	Delete	The establishing Act is specific to the sector and to bring an omnibus provision which has the effect of making this Act superior to the establishing Act defeats the spirit of the establishing Act. Care can be taken to ensure there are no gaps between the two Acts.

DD C-11001
&
18/10/23

REPUBLIC OF KENYA
COMPETITION TRIBUNAL

Telephone: 2221221
Our Ref: CT/2023/ADMIN/VOL. IV/35
Email:Cttr@court.go.ke
info@competitiontribunal.go.ke

KENYA RE TOWERS
10TH FLOOR, UPPERHILL
P.O BOX 30041-00100
NAIROBI

18th October, 2023

DIRECTOR RECEIVED
19 OCT 2023
Directorate of Departmental Committees

Douglas Katho
to facilitate
19/10/23

Clerk of the National Assembly
Parliament Building
Parliament Road
P.O. Box 41842 -00100
NAIROBI

Dear Sir;

REF: SUBMISSION OF COMMENTS ON THE TRIBUNAL BILL 2023.

Reference is made to the above subject matter.

Attached here in, please find 20 copies of our comments on the Tribunal Bill 2023, to be discussed on 19th October 2023. Submitted to you for your consideration and necessary action.

Yours Sincerely;

John Nderitu Mwangi
Secretary
COMPETITION TRIBUNAL

NATIONAL ASSEMBLY
RECEIVED
18 OCT 2023
CLERK'S OFFICE
P.O Box 41842, NAIROBI

MEMORANDUM SUBMISSION TO JLAC ON THE TRIBUNAL BILL 2023:

DATE: 19TH OCTOBER 2023:

By John Nderitu Mwangi-SECRETARY /CEO –Competition Tribunal & Economist-National Treasury and Planning.

1. The government works in terms of service delivery through Ministries and Departments; to this end, various sectoral laws create administrative Tribunals to settle disputes; A few are hereto enumerated:
    - Environment – Environment Appeals Tribunal,
    - Competitiveness and consumer protection in the economy-Competition Tribunal,
    - Financial Markets – Insurance Regulatory Tribunal, Capital Markets Tribunal, Retirement Benefit Tribunal among others.
2. In this regard, Sectoral Tribunals are key in unlocking sectors and ensure growth and effectiveness in the Economic development in a country as they ensure speedy resolution of disputes that ensure ease of business. Ideally, these Tribunals are deemed administrative in their procedures.

PROPOSED CHANGES TO THE TRIBUNAL BILL.

Key Highlights of the Amendments:

i. An autonomous office known as Administrative Tribunal Support Services.
ii. Headed by a Registrar and assisted by directors.

The Registrar position qualifications should also be widened in scope as other professionals with vast experience in other fields can also hold this position not necessarily law.

Section 7(1) of the Bill: To read: The Registrar shall perform such duties as required by this Bill and independently as this office shall enjoy full independence under the Law.
Annually, the registrar to give returns to Parliament, and the quarterly financial reports be sent to the National Treasury as with other semi-autonomous government agencies.

Section 7(2) of the Bill: The Registrar and Deputy Registrars-instead of **having Deputy Registrars- be deleted and replaced with directors.**

Section 8(1) of the Bill: A Deputy Registrar be deleted and replaced with Director.

Section 10(2) To read: The Secretariat under subsection (1) shall consist of

(a) Such Directors as provided for in the organization structure of the Administrative Support Services of Kenya and a proposed scheme of service for Tribunals.
(b) Such technical, administrative and support staff as may be provided for in the organization structure who may be deployed from the Public Service Commission or the Judicial Service Commission.
(c) Such public officers as may be seconded by the public service commission upon request by JSC-be deleted.

Section 30. To read: At the end of each financial year, the Registrar shall prepare and submit an annual report on the activities of Tribunals to Parliament.

Section 31. To read: In accordance with Public Finance and Management Act, the Administrative Support Service office and each fully constituted Tribunal shall be facilitated through the National Treasury to open a bank account and annual grants sent directly to the respective accounts of Administrative Support Services Office and to each Tribunals account.

Part 111-General Provisions

Section 32 To read: A chairperson, a member or the Administrator of a Tribunal shall on appointment, subscribe to the oath contained in the first Schedule.

Section 39(1) To read: The Attorney General in consultation with key stakeholders may make regulations for the better carrying into effect of the provisions of this Act.

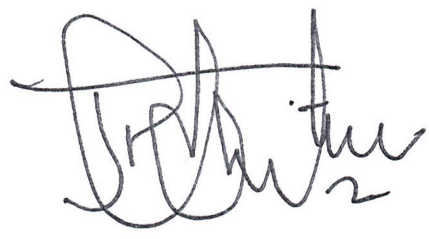
Section 40(1) To read: The Attorney General may make rules to govern the procedures of Tribunals generally.

PART IV: TRANSITIONAL PROVISIONS

Section 44. To read: The Attorney General may make Rules on the procedure to be followed with regard to pending cases before Tribunals.

A harmonized Scheme of service be developed to ensure that all staff working under Judicial Service Commission or the Public Service Commission have equity in terms of Salary and benefits.

The JLAC to take note that as we progress with the bill, some Tribunals are still in their operationalization stage **e. g** the Competition Tribunal. We need to come up with an effective model like the South African Model, which consider the empowerment of the local citizens by owning shares in international firms investing locally through mergers and acquisitions and use of local content in procurement. **It would be prudent** to review the competition act no.12 of 2010 to include the emerging trends before the transition is done to Judiciary. There could also be other Tribunals acts that require review before the transition is effected.



(2)

TO: THE OFFICE OF THE CLERK THE NATIONAL ASSEMBLY.

SUBJECT: MEMORANDUM ON THE TRIBUNALS BILL (NATIONAL ASSEMBLY BILL NO.45 OF 2023)

TO

THE NATIONAL ASSEMBLY

Presented to Departmental Committee on Justice and Legal Affairs by:

Lawrence Nyaguti
Co-convener
Public Administrative Officers Caucus
TEL: 0721299193
Email: lawrencenyaguti2@gmail.com

A) INTRODUCTION

The National caucus for Public Administrative Officers is a network of Public Administrative officers in in Kenya. The caucus's objective is to exploit the existing knowledge, experience and skills amongst administrative officers to support and promote good governance in Kenya.

POSITION ON THE TRIBUNALS BILL

B) HISTORICAL BACKGROUND

1. During the campaigns leading to the constitutional referendum 2010, National Government Administrative Officers, then coordinating the system of decentralization of government that was commonly known as Provincial administration were tasked to be responsible for disseminating and public education of the proposed constitution-2010.

2. As administrative officers, we were therefore fully briefed by the proponents of the various sections of the constitution on the meaning of 'words' and provisions of each article in the constitutional proposal

3. Further, we had the advantage of having a more detailed information on the drafting instructions to be able to relay the correct position to 'wanjiku' on the various provisions that were of public interest.

C) LOCAL TRIBUNALS TO BE ESTABISHED UNDER ARTICLE 169

- **Legislative history**

1. The term *'local tribunal'* was used during the Constitution making process to mean a court established locally to fulfil international obligation of dispensing justice.

2. Honorable members, in 2010, Kenyans wanted the constitution to include a tribunal of the international court under the Rome Statute to deal with what was perceived as crimes of international nature committed locally

3. This was after, a bill to establish a local tribunal to prosecute such suspects was rejected by the Kenyan Parliament in February 2009, even though it had the backing of both President Mwai Kibaki and Prime Minister Raila Odinga.

4. The rallying call was that we wanted a local justice system for international crimes or arbitration process to avoid the indignity of our sons and daughters are likely to face in a foreign land-(the Hague)

5. Thus, the proponents of the constitution 2010 included provision for a legislation of a local tribunal or a court of international nature locally constituted under the law.

6. The mention of 'tribunal' in any section of the judiciary was not intended to interfere with tribunals formed within the plain common understanding of the term 'tribunal' *which means a body that decides or determines*

7. Any bench of more by one judge in the judiciary or in court has a common meaning of the word 'tribunal'

D) INDEPENDENT TRIBUNALS UNDER ARTICLE 1(3) C

- **Process for establishment**

8. MDAs, while executing their service delivery mandates receive disputes on maladministration or mismanagement of processes

9. As administrators of service, it is incumbent upon the MDAs to form Dispute Resolution Mechanisms that are informed by procedure, agreed processes and expectation of the citizens

10. Where an MDA finds more disputes that require award, an independent tribunal is formed to deal with such disputes

11. Thus, each tribunal is established in fulfilment of a MDAs mandate and is unique to its guiding professional processes, norms and ethics established within each guiding profession.

- **Independence of the tribunals**

12. The laws establishing the various independent tribunals under article 1(3)c create autonomy from the mother MDA making them independent from the Executive

13. Article 159 requires the courts to promote Alternative Dispute Resolution Mechanisms.

14. **Independent Tribunals** are designed to be **ALTERNATIVES** to 'traditional' courts of law. Thus, they use simpler formats and less strict rules of evidence

and are guided by the legislation under article 47(3) of the Constitution. ie *The Fair Administrative Action Act of 2015.*

E) INTERPRETATION

15. **Article 1(3) of the constitution** highlights state organs through which the Sovereign power the Constitution is delegated as follows:

16. **The article reads as follows....**

> 3) *Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—*
>
> *(a) Parliament and the legislative assemblies in the county governments;*
> *(b) the national executive and the executive structures in the county governments; and*
> *(c) the Judiciary and independent tribunals.*

17. **"And"** typically signifies a conjunctive list, meaning each condition in the list must be satisfied. This in essence declassifies 'independent tribunals' from the judiciary.

18. Consideration should be made to the use of the word tribunal in different instances;

a. **Independent tribunal** under article 1(3)c
b. **Tribunal** in article 159 (1) likely making reference to judicial benches constituted by judges in courts and 168 formed for removal of a judge
c. **Local tribunals** under article 169 (d) which are supposed to be part of the subordinate court system in accordance to article 162 of the constitution.

19. Article 162 (4) classifies subordinate courts and includes the tribunals mentioned under article 169(1)

20. For the purpose of clarity article 162(4) states as follows;

> *The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article*

21. Based on the foregoing, if the tribunal bill does not intend to include the proposed *independent tribunals* into our court systems pursuant to article 162(4), then the bill lacks a basis for legislation under the circumstances.



22. However, even if the above proposition were to stand, then the room for the highest institution in the hierarchy of Alternative Dispute Resolution mechanisms would be altered thereby negating the principle in article 159(2) of the constitution

F) BACKDOOR AMENDMENT TO THE CONSTITUTION

- **Contrary to Article 255 of the constitution- Section 5 (1) of the bill**

23. The tribunals act attempts to amend the constitution against the provisions article 255,256 and 257 of the constitution

24. An additional role outside the functions provided for in the constitution to the judicial service commission constitutes backdoor constitutional amendment

25. Section 5(1) of the bill states as follows; *In addition to the functions of the Judicial Service Commission...*

26. It is our submission that nothing is to be added or implied to the text in the constitution if it was not covered in the text.

- **Professional expansionism and cannibalism (**Articles 234 (2)(a)i..& g and 232 (1) (a, b,c and g)- **Section 6,7 & 8 of the bill**

27. It is noted with concerns that the bill, which has been drafted by the Attorney General, creates and prefers suitability for only degrees in law for the position of registrars and deputy registrars;

28. The Public Service Commission is responsible for;
    a) under Article 234 (2) (a) establishing offices in public service and ;
    b) 234 (2) g to making recommendations on the qualifications of officers in the public service

29. The caucus notes that these are public service positions that ought to be established by the appropriate body mandated under the constitution

30. Furthermore, such functions which are assigned to the Registrars and deputy registrars under the legislative proposals are traditional functions of public administrative officers

31. For avoidance of doubt on the roles of National Government Administrative Officers in performance of the roles assigned to registrars and their deputies under the proposed bill, I invite honorable members to make reference the scheme of service for National Government Administrative Officers in

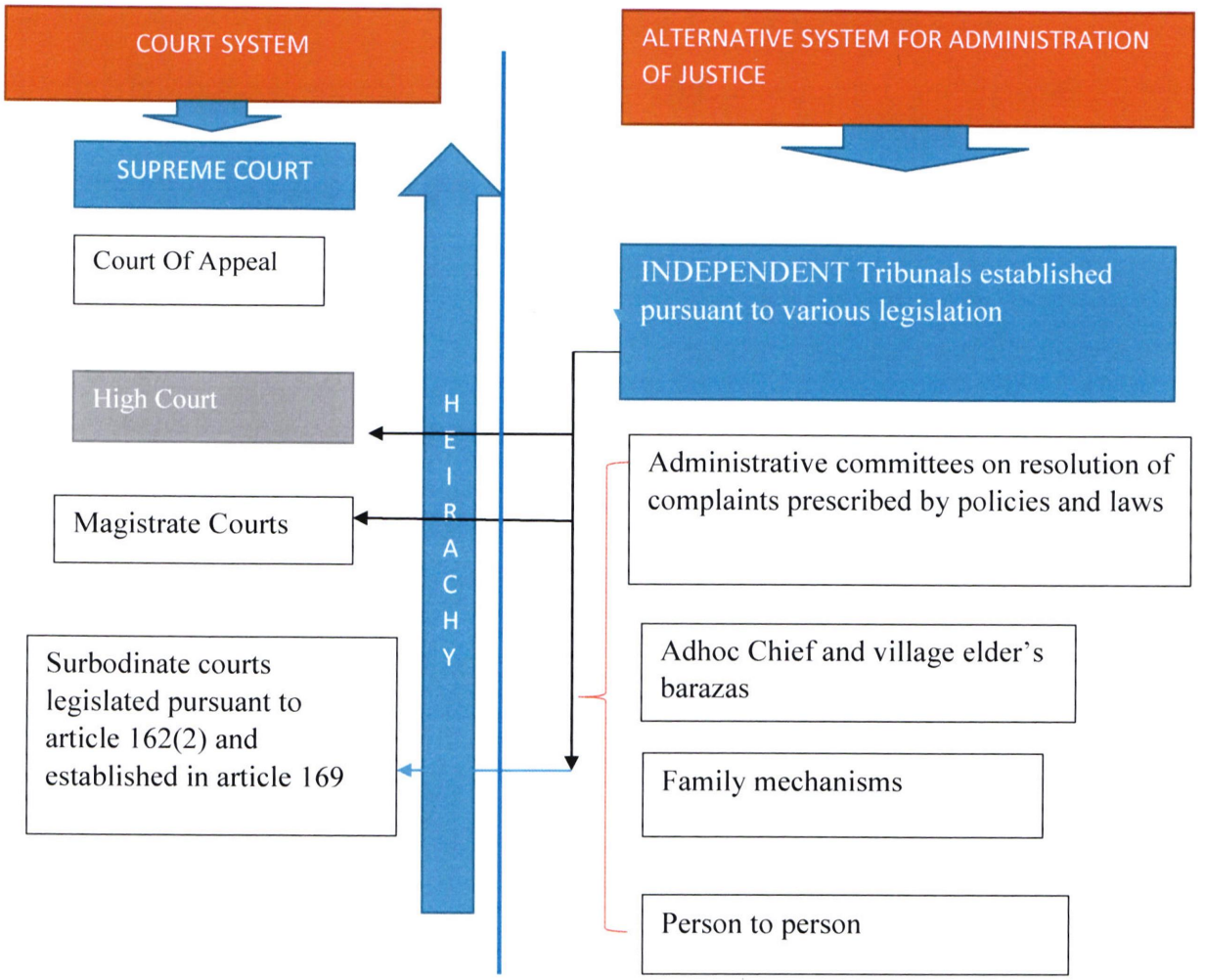


Ministries, which was approved by Public Service commission pursuant to the National Government Coordination act of 2013 and the Constitution.

32. We request this honorable house to stop the unprofessional behavior exhibited drafters of legislation who make preference to their professions thereby locking other professionals from fair competition, in this bill and any other future legislative propositions

G) HIERARCHY OF ADMINISTRATION OF JUSTICE

33. The table below is an illustration on the hierarchy of administration of justice;



Alteration of the hierarchy of Administration of Justice

34. Are chairs of commissions and tribunals a preserve of one profession in Kenya? And what is the professional course that results to credentials of a good chairperson?

35. The proposal to have a chair of the tribunal with qualifications of equivalence to a high court judge alters that heirachy logic of the administration of justice

36. If a chair with knowledge equivalent to a high court judge is to preside over a tribunal of an alternative dispute resolution, should the next level of redress be the court of appeal?

H) SUMMARY ANALYSIS OF OBJECTIVE

37. The objective of the bill is to effect sections of the constitution that already have adequate legislative provisions, or are already taken care of as demonstrated in the table below;

No	Articles proposed in the objective of the bill	Justification for rejection-Duplicity of the bill	Comment
1	**Articles 1 (3)(c),**	Various tribunals legislations already exist	**Each tribunal arises from need for independent mechanism for alternative dispute resolution by service delivery institutions therefore own legislations**
2	**20(4),**	-not applicable	**-Unrelated provision of the constitution. -requires doctrinal recognition not legislation**
3	**47(3),**	Fair Administrative Action Act of 2015 exists	**Legislated pursuant to article 47(3).**
4	**159(1)**	Already formed through administrative action	**-The mention of a tribunal in general terms allows the judiciary to form a bench (otherwise known as a tribunal) or more than one judge in adjudication of cases where there is likelihood to challenge the constitutional basis of a bench -It also includes a tribunal appointed under article 168 on the removal of a judge**
5	**169**	Unrelated to the tribunal bill proposed	**Article 169 mentions the local tribunal, which would require its own legislation in accordance with a ratified international statute, for example the Rome statute**

I) RECOMMENDATIONS

- **Request to parliament therefrom;**

38. I wish to invite Honorable members to exercise their professional discretion and due diligence, aware that Alternative Dispute Resolution is the only avenue for Kenyans to seek awards or justice without the encumbrances of the tedious procedures and formalities of the mainstream judicial system , to enforce the legitimate understanding of the meaning of the different tribunals mentioned in the various articles of the Constitution by considering;

a. The historical understanding and contextual meaning of ***local tribunals*** under article 169 as highlighted in this submission;

b. The professional logic communicated by the conjunctive list of state organs through which our sovereign powers are delegated- utilize the interpretive meaning of the word 'and' in article 1(3) a-c of the constitution;

c. Affirmation that the conjuncture in article 1(3)c of the constitution implies that ***independent tribunals*** are distinct ***from the judiciary*** as per the people of Kenya's aspirations;

d. Need therefore to allow for room legislating on ***local tribunals*** contemplated under article 169 of the Constitution since Kenya is still a signatory to many **international treaties** that may require specific local justice systems for arbitration.

e. In the alternative, legislate on a tribunals bill that offers lifeline to article 1(3)c as institutions that are distinct from the judiciary

f. Caucus proposal to present an alternative draft that has the implied drafting aspirations for a consolidated ***independent tribunals bill*** based on the benefit of institutional memory and impartial expression of patriotism

g. Your duty to end unfair professional prescription in this law and any other as a way of allowing fair competition by Kenyans interested in public service jobs.

39. Noting that whereas the bill is not a constitutional amendment bill yet it seeks to expand functions of the Judicial Service Commission, we recommend that the committee request for withdrawal of the bill from the legislative process to give room for correction of anomalies highlighted in this memorandum.



Signed .....

Lawrence Nyaguti
TEL; 0721299193



PPARB

PUBLIC PROCUREMENT
ADMINISTRATIVE REVIEW BOARD

KISM Towers, 6th Floor, Ngong Road, P.O Box 58535, Nairobi, Kenya

Telephone +254(020)3244300, Email: info@ppra.go.ke, website: www.ppra.go.ke

Our Reference: PPRA/ARB/01/VOL.1(155)

Your Reference: NA/DDC/JLAC/2024/59 18th March, 2023

The Clerk of the National Assembly

Parliament

NAIROBI

Dear Sir,

RE: INVITATION BY THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS TO SUBMIT VIEWS ON THE TRIBUNALS BILL (NATIONAL ASSEMBLY BILL NO. 45 OF 2023) BY THE HON. KIMANI ICHUNG'WAH, EGH MP

The Public Procurement Administrative Review Board is established under Section 27 of the Act as a central independent Procurement Review Board with the mandate to hear and determine Public Procurement and Asset Disposal Disputes.

It is in this regard, and pursuant to your invitation that we submit our Memorandum on the Tribunals Bill (National Assembly Bill No. 45 of 2023) together with the High Court Decision in the case of **Okoiti v Judicial Service Commission & 2 others; Katiba Institute (Interested Party) (Petition 197 of 2018) [2021] KEHC 461 (KLR) (Constitutional and Human Rights) (11 March 2021) (Judgment)** with the relevant paragraphs thereof highlighted.

Yours

George Murugu Muthui
CHAIRPERSON
Public Procurement Administrative Review Board

Encl.

MEMORANDUM ON THE TRIBUNAL BILL 2023

PRESENTED TO

THE NATIONAL ASSEMBLY AND THE SENATE

THE THIRTEENTH PARLIAMENT

SUBMITTED TO

CLERK OF THE NATIONAL ASSEMBLY AND CLERK OF THE SENATE

PO BOX 41842-00100, NAIROBI

IN THE MATTER OF CONSIDERATION BY THE JOINT COMMITTEE OF THE NATIONAL ASSEMBLY AND THE SENATE: THE TRIBUNAL BILL 2023

18th of February,2024

SUBMITTED By

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

THE TRIBUNALS BILL 2023: ADMINISTRATIVE JUSTICE DEATH KNELL?

INTRODUCTION

Establishment of the Public Procurement Administrative ReviewBoard as a central and Independent Administrative ReviewBoard

1. A Tribunal is defined under The Tribunals Bill,2023 as one that is established by an Act of Parliament pursuant to Article 169(1)(d) of the Constitution(see Clause 2 of The Tribunals Bill,2023).

2. It is instructive to note that Article 1(3)(c) of the Constitution provides that all sovereign power under the Constitution is delegated to the following state organs which perform their functions according to the Constitution, which at paragraph c of the said Article,sovereign power is delegated to the Judiciary and Independent Tribunals.The disjuncture between the Judiciary and the Independent Tribunals is deliberate and of Constitutional purpose.

3. Pursuant to parliament's exercise of its legislative mandate in accordance with Articles 1(3)(a),47(3)(a),94,109(1),169(2) and 227(2) of the Constitution, Parliament enacted into Law,The Public Procurement & Asset Disposal Act 2015 and there under established at Section 27 thereof, the Public Procurement Administrative Review Board as a Central and Independent Administrative Review Board to hear and determine tendering and asset disposal disputes as further provided under Section 28(1) of the Act.

4. A reading of Articles 1(3)(c) , 47(3) and 227 of the Constitution,(assuming a Tribunal and a Board, such as the Public Procurement Administrative Review Board in this case are synonymous), indeed demonstrates that the Public Procurement Administrative Review Board, as an Independent Administrative Tribunal, falls away from the definition of subordinate Court afforded under Article 169(1)(d) and remains distinct and independent as intended by the Constitution under Articles 1(3)(c),47(3) and 227 of the Constitution hence the provisions of The Tribunals Bill are inapplicable to it.

5. This position is further buttressed and indeed crystallized by findings of the Court in Okoiti v Judicial Service Commission & 2 Others; Katiba Institute (interested party)(Petition 197 0f 2018)[2021]KEHC 461(KLR) where at paragraphs 63(b), 64(v) and 113(e) the Honorable Courtwas categorical that any Administrative Tribunal(such as the Public Procurement Administrative Review Tribunal) does not fall under Article 169(1)(d) of the Constitution and indeed in the Courts disposition to be found at paragraph 113(e),this fact finds incontrovertible emphasis.

Administrative Justice and the Tribunals Bill 2023(A General Overview)

6. The Tribunal Bill 2023 seeks to vest the establishment, regulation and administration of tribunals in the purview of the Judiciary. While this may, at a cursory glance, seem innocuous, it portends the death of administrative law from a justice point of view. Establishment of the tribunals was aimed at providing a catalyst in addressing issues of administrative justice, and alleviate the adjudication

and resolution by the ordinary Courts. It's not in question that tribunals are vital in providing alternative forum to the mainstream Courts in quest for remedy of citizens' grievances towards addressing administrative justice issues. Tribunals are now a fact of life as they are more accessible to a large population where proceedings are much cheaper and speedier than in the ordinary Courts. Tribunals are enjoined to discharge their mandates in accordance with values and principles enunciated in the Constitution and germane law broadly and specifically under Article 159(2) as read together with Article 47 of the Constitution.

7. Tribunals find their resilience in the administration of justice due to s the advantages they hold over our conventional Court systems as highlighted above.

8. Administrative law is a division of law governing the Activities of executive branch agencies of government. Administrative law includes executive branch rule making, adjudication, and the enforcement of laws.

9. Administrative justice seeks to check the application of administrative law to ensure that the citizenry are afforded a first instance means of redress in cases of application ormal application of administrative law in a fair,transparent,timely,affordable and efficient manner that embraces the rule of law.

10. A question then that comes to mind and which is answer is not readily apparent in the Billis, what is the Bill meant to cure by way of its enactment. What is the

legislative or societal purpose of this Bill? What is the mischief that is being addressed by way of this Bill?

11. The Bill would be ill advised to pass through to enactment by Parliament for the following reasons:

POLITICALLY

12. Politically, the Bill seeks to usurp the role of the Executive to appoint persons to administer Tribunals (seeClause 12 of the Bill that rests this mandate now on the Judicial Service Commission) Further, the President and Deputy President are elected by the citizens of the country and therefore have the confidence of the people to effectively run the Executive arm of Government. Third, the sensitivities of some of these tribunals (especially those in the energy and procurement and Environment spheres which are partly National security issue), need to be supervised within the structure of the Executive and not the Judiciary. Fourth, the caliber of the appointees under the proposed Bill targeted to man these tribunals lend itself to persons who would be subject to the control of the Judicial Service Commission and by extension, the Chief Justice. We cannot stress enough that administrative law is best left to the Executive arm of Government. Fifth, not all matters of tribunals are for legal minds only. Some tribunals, such as those that entertain disputes touching on national security matters for example, cannot be ceded to the Judiciary.

ECONOMICALLY

13. Economically, the mechanics of setting up 60 or so Tribunals under the aegis of the Judiciary is a gargantuan task that will lead to the creation of the Office of the Registrar of Tribunals and further increase burden on the Exchequer.

14. Clauses 6,8 and 10 proposes the establishment of the offices of the Registrar, Deputy Registrar and Secretariat for all the tribunals that shall then fall under the administration of the judiciary by wat of the enactedBill.

15. This would naturally mean an additional fiscal burden on the exchequer to fund the judiciary fund(see Clause 29 of the Bill which renders expenses of the tribunals a charge on the judiciary fund) in Billions per year as it would then mean by reasonable deduction an increase of about 700 personnel to man the various offices of registrar, deputy registrars and secretariat of the 65 tribunals. Therefore, the enactment of the Bill shall have a definite and colossal impact on expenditure of public finds unlike, respectfully, what is stated in the memorandum of objects and reasons.

STRATEGICALLY AND SEPARATION OF POWERS

16. Strategically and the doctrine of separation of powers, the very nature of Tribunals is to make administrative law responsive, efficient affordable and quick. The Executive can deal with certain disputes emanating from practice quickly. This in

turn allows the administration to deliver on its mandate to the public. It also grants the Government the leeway to stress on its priority areas of service delivery and strengthen those Tribunals it deems necessary.

17. It must be respectfully pointed out, that by surrendering at first instance, disputes arising from administrative processes to the rigidity of conventional systems of Courts, now that the Bill seeks to define tribunals as subordinate Courts for purposes of Article 169(1)(d),we lose the advantages of flexibility(adversarial employed in normal Court setting v inquisitorial or hybrid system of dispute resolution employed by tribunals)timeliness(Clause 28 of the Bill proposes 6 months for hearing and determining a dispute{compare with section 171 of the Public Procurement&Assets Disposal ActSection 171 which provides for 21 days}Clause 27(2) of the Bill proposes 1year for disposal of an appeal to the High Court{compare with Section 175(3) of the Public Procurement & Asset Disposal Act which provides for 45 days for disposal of such appeals}.

18. Clause 11 of the Billfurther proposes that Ministries, Departments and Agencies through their line cabinet secretaries must seek the approval of the Judicial Service Commission when considering the establishment of any tribunal, and once approved by the commission and cabinet, Parliaments role shall simply be to convey the Bill into law in violation of the doctrine of separation of powers as the Judicial Service Commission shall have already legislated(See Clause 11(5) of the Bill).

19. Further, theJudicial Service Commission shall have assumed an executive role in the consideration and approval of executive agenda not available to it in further violation of the doctrine of separation of powers.

20. Article 1(3)(c) and Article 47 guarantee every Kenyan their right to dispute resolution before an impartial independent tribunal created under the Constitution or statute.By enacting the Bill, would this inviolable and non-derogable right disappear as the tribunals as we know them would acquire the character of a subordinate Court under Article 169(1)(d)?Are we then amending the Constitution?

21. Article 47 (3)(a) of the Constitutionprovides for the Review of administrative Action by a Court or, if appropriate, an independent and impartial tribunal. A reading of this Article gives the understanding that the Executive is deemed to have certain administrative leeway. A reading of this together with Article 169 clearly establishes that executive tribunals exist. The Judiciary's role of judicial Review is also recognized.

22. It is not effective, and contravenes the doctrine of separation of powers to have the Judiciary sitting in its judicial capacity in matters that are within the purview of the Executive. The Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. Members of the Judiciary would be permanent employees, while membership of tribunals largely is for specific terms of office. This

allows for the Executive to handpick expertise in certain matters of interest in various sectors. This ensures that these tribunals do not become mired in officialdom. The Executive would then determine (with appropriate consultation) the appointment of teams to run them for their designated periods.

23. The access to justice angle brings with it the emerging trends of Alternative Dispute Resolution methods that entail conciliation, mediation and arbitration. These afford participants speedy means of dispatching their grievances, leaving the Judiciary to step in during the Review and/or appeal processes. These developments are a stark reality that traditional judicial systems are incapable of dealing with the complexities of a rapidly changing governance structure. Administrative law is the by-product of the growing socio-economic functions of the State.

24. It is important to stress that to entrust an administrative agency with the determination of individual rights and interests (such as the determination of the electricity tariff and cost of fuel) or the freedom to practice a profession, makes those rights more flexible and responsive to uncertain factors of discretion than when they are left to be defined by the more rigid processes of a Court applying supposedly permanent rules of law.

25. Without removing from the already existing tribunals that have been placed under the aegis of the Registrar of Tribunals, profound thought must be given to the efficacy of ceding progress made in administrative justice to the Judiciary.

THE SECOND SCHEDULE TO THE BILL

26. As per the Second Schedule to the Bill, the following tribunals are to be placed under the Judiciary:

1. Rent Tribunal
2. Business Premises Rent Tribunal
3. Standards Tribunal
4. Seeds and Plant Varieties Tribunal
5. Insurance Tribunal
6. State Corporations Appeal Tribunal
7. Capital Markets Tribunal
8. Retirement Benefits Appeals Tribunal
9. Co-operative Tribunal
10. Communications and Multimedia Appeals Tribunal
11. National Environment Tribunal
12. Industrial Property Tribunal
13. Copyright Tribunal
14. Privatization Appeals Tribunal
15. HIV and AIDS Tribunal
16. Biosafety Appeals Board
17. Competition Tribunal
18. Political Parties Disputes Tribunal

19. Tourism Tribunal

20. Kenya Citizenship and Immigration Service Appeals Tribunal

21. National Construction Appeals Board

22. Land Acquisition Tribunal

23. Legal Education Appeals Tribunal

24. National Examinations Appeals Tribunal

25. National Transport and Safety Authority Appeals Board

26. Micro and Small Enterprises Tribunal

27. Education Appeals Tribunal

28. Public Benefit Organizations Disputes Tribunal

29. National Civil Aviation Administrative Review Tribunal

30. Sports Disputes Tribunal

31. Tax Appeals Tribunal

32. Water Tribunal

33. Public Procurement Administrative ReviewBoard

34. Financial Centre Tribunal

35. Energy and Petroleum Tribunal

36. Accreditation Appeals Tribunal

37. Refugee Status Appeals Committee

38. Public Private Partnership Petition

CLAUSES 113 TO 119 OF THE SECOND SCHEDULE TO THE BILL

27. As addressed in the introduction herein, The Public Procurement Administrative ReviewBoardis an Administrative Tribunal which should not be under the mandate of the Judicial Service Commission. We rely on the case of ***Okoiti v Judicial Service Commission& 2 others; Katiba Institute (Interested Party) (Petition 197 of 2018) [2021] KEHC 461 (KLR),*** where the Court, at paragraphs 63 and 64, held as follows:

> *63. The foregoing analysis, therefore, excludes the following class of Tribunals: -*
>
> *(a) The Tribunals formed under the Constitution;*
>
> *(b) <u>All administrative and advisory tribunals</u>;*
>
> *(c) All tribunals whose membership includes a Judge of the superior Courts;*
>
> *(d) All other informal tribunals not formed under the Constitution} or any Act of Parliament.*
>
> *64. Examples of Tribunals which do not fall under Article 169(1)(d) of the Constitution include: -*
>
> *(i) Tribunal created under Article 144(3) and 150(2) of Constitution for the removal of the President or Deputy President on grounds of incapacity;*
>
> *(ii) Tribunal created under Article 158(4) of the Constitution for the removal of the Director of Public Prosecutions;*
>
> *(iii) Tribunal created under Article 168(5)(a) or (b) of the Constitution for the removal of the Chief Justice or other Judges of the superior Courts;*

(iv) Tribunal created under Article 251(4) of the Constitution for the removal of commissioners or holders of independent offices.

(v) Any administrative Tribunal;

(vi) Any informal tribunal.

28. Based on the Court's decision above, we strongly advise that Public Procurement Administrative ReviewBoard should be expunged from the Bill. Consequently, the proposed amendments to the Public Procurement and Asset Disposal Act No. of 2015, at clauses 113and 119 of the Bill should also be expunged.

CONCLUSION

29. A question still remains in my mind and which is answer still eludes me – what is the Bill meant to cure by way of its enactment? What is the legislative or societal purpose of this Bill? What is the mischief that is being addressed by way of this Bill?

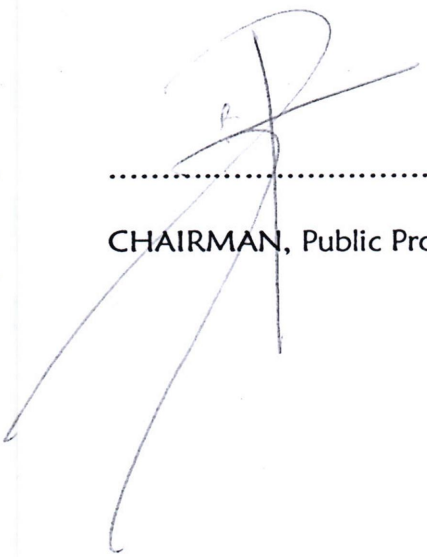
30. It is for these reasons that we reiterate that it would be ill-advised to have this Billenacted as it would lead to further conflicts regarding the structure and operation of the Government. It would cripple the Executive's grasp in areas where ADR has proven more effective when kept outside the purview of the Judiciary (a good example being the ADR system under The Public Procurement and Asset Disposal Act, 2015). Disputes of this nature would occasion great loss and even

cripple the Government if left to the traditional legal system of conventional Courts.

31. The Bill does not propose any societal,political,legislative,strategic or economic benefit and or the same is not apparent.

32. Considering the above observations, the proposed Bill as presented directly takes away fundamental gains made by the Constitution 2010 which is relatively young and still embedding its Constitutionalism roots.

SIGNED BY:



.....

CHAIRMAN, Public Procurement Administrative ReviewBoard

KENYA LAW
Where Legal Information is Public Knowledge

Okoiti v Judicial Service Commission & 2 others; Katiba Institute (Interested Party) (Petition 197 of 2018) [2021] KEHC 461 (KLR) (Constitutional and Human Rights) (11 March 2021) (Judgment)

Okiya Omtatah Okoiti v Judicial Service Commission & 2 others; Katiba Institute (Interested Party) [2021] eKLR

Neutral citation: [2021] KEHC 461 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 197 OF 2018

AC MRIMA, J

MARCH 11, 2021

BETWEEN

OKIYA OMTATAH OKOITI ..... PETITIONER

AND

THE JUDICIAL SERVICE COMMISSION ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

THE PARLIAMENT OF KENYA ..... 3RD RESPONDENT

AND

KATIBA INSTITUTE ..... INTERESTED PARTY

Local tribunals established under article 169(1)(d) of the Constitution are to be managed under the Judiciary and not the Executive.

Reported by Beryl Ikamari

Constitutional Law *- constitutional petitions - institution of constitutional petitions - justiciability - claim that local tribunals established under article 169(1)(d) of the Constitution should all be within the competence of the Judicial Service Commission and that it was necessary to pass legislation for the tribunals to be handled as subordinate courts within the Judiciary - whether a constitutional petition that sought reliefs requiring Parliament to pass legislation was justiciable.*

Constitutional Law *- interpretation of the Constitution - interpretation of the term 'local tribunal' as used in article 169(1)(d) of the Constitution - what were the qualities of local tribunals referred to under article 169(1)(d) of the Constitution - Constitution of Kenya 2010, article 169(1) and 172(1)(c).*

Constitutional Law *- separation of powers - separation of powers between the Executive and the Judiciary - exercise of judicial authority by local tribunals established under the Constitution - whether the appointment and*

removal of members of such tribunals by the Executive violated the principle of separation of powers - whether local tribunals established under article 169(1)(d) of the Constitution should be transited from the Executive to the Judiciary - Constitution of Kenya, 2010, article 169(1) and 172(1)(c).

Brief facts

The petitioner sought various reliefs from the court with respect to the constitution, composition and operations of tribunals established pursuant to article 169(1)(d) of the Constitution of Kenya, 2010 (Constitution). He explained that the tribunals should fall within the competence of the Judicial Service Commission and that the fact that some were under the Executive was a violation of the doctrine of separation of powers. The petitioner added that the members of the tribunals were appointed under varied terms of service with the tribunals having different rules of procedure. The petitioner felt aggrieved by the fact that some of the statutes establishing the tribunals did not provide for rights to appeal to superior courts.

In response, the Judicial Service Commission (JSC) explained that it did not have a role to play in tribunals established under articles 144(3), 150(2), 158(4), 168(5)(a) or (b) and 251(4) of the Constitution. It, however, stated that it had a role to play in the case of local tribunals established under article 169(1)(d) of the Constitution and that such tribunals were part of the Judiciary. The JSC added that there was no transitional legislation on local tribunals but it had managed to transition 20 local tribunals from the Executive to the Judiciary.

The 2nd respondent, the Attorney General, agreed that it was necessary to transition tribunals established under article 169(1)(d) of the Constitution to the Judiciary from various Ministries and Government Departments. The Attorney General stated that although the Tribunals Bill, 2017, which would have provided the legislative mechanism for the transition had been formulated, it was yet to be approved by the Cabinet. The 2nd respondent posited that a declaration of unconstitutionality of the various statutes constituting the tribunals in question, as sought by the petitioner, would deny persons serving in the tribunal a right to fair administrative action and fair hearing. He added that the 6 months transition, as sought by the petitioner, was too short as the financial cycle was midway through its implementation.

The 3rd respondent stated that it was not a mandatory requirement for Parliament to enact a law to govern tribunals in Kenya and that article 261 of the Constitution on the dissolution of Parliament for failure to enact laws was inapplicable to the circumstances. The 3rd respondent also stated that if the petitioner desired the enactment of such a law, he should petition Parliament.

Issues

i. Whether a petition seeking reliefs that required Parliament to pass legislation to transition local tribunals, established under article 169(1)(d) of the Constitution, from the Executive to the Judiciary was justiciable.
ii. What was the nature of local tribunals referred to under article 169(1)(d) of the Constitution?
iii. Whether the appointment and removal of members of the local tribunals under article 169(1)(d) of the Constitution by the Executive violated the principle of separation of powers and violated the right to a fair hearing under article 50 of the Constitution.
iv. Whether the local tribunals established under article 169(1)(d) of the Constitution should be transited to the Judiciary from the Executive.

Held

1. The dispute in question was within the mandate of the 3rd respondent (Parliament) and it could be handled by the 3rd respondent in liaison with the 2nd respondent (the Attorney General.) The petitioner wanted to compel the 2nd and 3rd respondent to take the necessary legislative action. An invitation made to a court to exercise powers with respect to constitutional roles reserved to other organs of Government was barred by the principle of separation of powers and the principle of non-justiciability. Nonetheless, there were constitutionally permissible situations in which the court could interfere. For example, in situations where fundamental rights and freedoms or other constitutional provisions were violated.

2. Pursuant to article 261(1) of the Constitution and the Fifth Schedule to the Constitution, any legislation whose timeline was not specified under the Constitution was to be passed within five years of the promulgation of the Constitution. Therefore, the laws which were contemplated to be passed under article 169 of the Constitution had to be so passed by August 2015. From the position taken by Parliament, it was clear that it was not keen on passing the necessary legislation. It was obvious that nothing could be forthcoming if the matter was left in the sole hands of Parliament. The petitioner could not, hence, be accorded the appropriate forum to adjudicate the dispute if the matter was left to Parliament.

3. The petitioner alleged a contravention of the constitutional provisions of article 169(2) of the Constitution by the 3rd respondent and the petitioner, therefore raised serious constitutional issues. The petition was not framed in the Bill of Rights language as a pretext to gain entry into court.

4. The petition was ripe for court determination and as such an exception to the principle of non-justiciability and the doctrine of exhaustion was applicable.

5. Article 169 of the Constitution provided a list of subordinate courts and it included local tribunals established by statute, other than the courts established as required under article 162(2) of the Constitution.

6. To understand the context in which the term 'local tribunals' was used in article 169(1)(d) of the Constitution it was necessary to consider the *ejus dem generis rule* of interpretation. That rule assisted the court in reconciling any incompatibility between specific and general words. The rule accomplished the purpose of giving effect to both specific and general words by treating the particular words as indicating the class and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words.

7. Article 169(1) of the Constitution enumerated a class of entities before mentioning the local tribunals. They were Magistrates Courts, the Kadhis' Courts, the Court Martial and any other court. Of much importance was that the title in article 169(1) described subordinate courts to include the local tribunals. Subordinate court were courts subordinate to the superior courts and they dealt with the formal settlement of disputes between parties. Therefore, the local tribunals referred to in the enumeration in article 169(1)(d) of the Constitution were courts of law and they possessed the following qualities; -

1. They were courts of law;
2. They were subordinate to the superior courts;
3. They were not advisory in nature;
4. They were not administrative tribunals;
5. They were not presided over by or they did not include a judge of the superior courts in their membership; and,
6. They were formed under an Act of Parliament.

8. The local tribunals under article 169(1)(d) of the Constitution excluded the following class of tribunals: -

1. the tribunals formed under the Constitution;
2. all administrative and advisory tribunals;
3. All tribunals whose membership included a judge of the superior courts; and
4. all other informal tribunals not formed under the Constitution or any Act of Parliament.

9. Most of the disputes handled by the local tribunals involved the Executive. As such, the Executive had an obvious advantage as it was responsible for the appointment and removal of the members. In such circumstances, the Executive ought not to be the appointing authority. Instead, that duty ought to be undertaken by an independent entity.

10. Local tribunals were subordinate courts and their affairs, just like the other subordinate courts, ought to be managed by the Judiciary through JSC. In doing so, the constitutional dictates would be achieved. It would create transparency in the appointment and removal of members of the tribunals which would be done in accordance with the law and the Constitution.

11. The appointment and removal of members of the local tribunals falling under article 169(1)(d) of the Constitution by the Executive contravened the principle of separation of power and was contrary to article 50(1) of the Constitution. That state of affairs also infringed on the independence of the Judiciary.

12. The local tribunals, which were subordinate courts, under the administration of the Executive ought to be transited to the Judiciary. The rationale for that was provided under article 160(1) of the Constitution which provided that the Judiciary would not be subject to the control or direction of any person in the exercise of judicial authority.

13. The Chief Justice was the head of the Judiciary courtesy of article 161(2)(a) of the Constitution. Article 171 of the Constitution established the JSC. One of the functions of JSC was to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice. JSC, therefore, was supposed to support the Judiciary in discharging its constitutional mandate. In doing so, JSC had to remain true to the Constitution.

14. Members of local tribunals, and in line with the *ejus dem generis rule*, fell within the category of 'other judicial officers' under article 172(1)(c) of the Constitution. Such officers had to be appointed by the JSC. For such appointments to be made by the JSC it was necessary to transition the tribunals to the Judiciary. Under article 169(2) of the Constitution, there was need for a statute to assist in the transition.

15. The 2nd respondent through the Kenya Law Reform Commission (KLRC) undertook steps towards achieving the transition. The KLRC established the Committee on Review of the Rationale for the Establishment of Tribunals in Kenya whose efforts resulted in the formulation of the Tribunals Bill, 2017 which was pending Cabinet approval. Through the JSC, the Judiciary constituted the Judiciary Working Committee on the transition and restructuring of the Tribunals Working Committee. The Committee eventually came up with a Draft Tribunals Bill, 2015. The JSC managed to transition 20 local tribunals from the Judiciary to the Executive. Further, the 3rd respondent engaged the JSC in discussions about the Tribunals Bill 2017.

16. The petitioner's prayer for a declaration of unconstitutionality of any law that did not vest the duty to appoint or remove any members of the local tribunals created under article 169(1)(d) of the Constitution in JSC, was not specific. There were many statutes constituting the tribunals. An order that lacked specificity could have effects that were too detrimental. For instance, those statutes made provision for matters other than the tribunals and annulling them would result in immense disruptions and confusion.

17. The petitioner's prayer for the court to annul all appointments to the tribunals under article 169(1)(d) of the Constitution which was not made by JSC could not be granted as the members it targeted were not parties to the petition. The grant of such an order would contravene articles 47 and 50(1) of the Constitution.

Petition partly allowed with no orders as to costs.

Orders

i. *The amended petition was justiciable and the court had the jurisdiction to deal with the issues therein.*

ii. *The local tribunals created under article 169(1)(d) of the Constitution were subordinate courts in Kenya.*

iii. *The appointment and removal of members of the local tribunals created under article 169(1)(d) of the Constitution by the Executive violated the principle of separation of powers, contravened the right to fair hearing under article 50 of the Constitution and infringed on the independence of the Judiciary.*

iv. *The local tribunals under article 169(1)(d) of the Constitution had to be transited to the Judiciary and the appointment and removal of their members be undertaken by the Judicial Service Commission.*

v. *A declaration that any new appointment or removal of a member of any of the tribunals under article 169(1)(d) of the Constitution had to be undertaken by the Judicial Service Commission.*

vi. *The Attorney General and Parliament, being the 2nd and 3rd respondents herein, were directed to take proactive steps within their respective dockets towards propagating the Tribunals Bill with a view of transiting the local tribunals under article 169(1)(d) of to the Judiciary. To that end, the Attorney General and Parliament were to file affidavits within 6 months of the judgment detailing the steps taken.*

vii. *Upon filing of the affidavits in (vi) above, the Deputy Registrar of the court was to schedule the matter for mention on the basis of priority.*

Citations

Cases

East Africa

1. *Commissioner for the Implementation of the Constitution v Attorney General & 2 others* Civil Appeal 351 of 2012; [2013] eKLR-(Followed)

2. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition No 14, 14A, 14B and 14C of 2014 (Consolidated); [2014] eKLR-(Explained)

3. *Francis Karioko Muruatetu another v Republic* Petition No 15 & 16 of 2015, [2017] eKLR –(Explained)

4. *Institute of Social Accountability & another v National Assembly & 4 others* Petition 71 of 2013;[2015] eKLR –(Explained)

5. *Judicial Service Commission v Mbalu Mutava & another* Civil Appeal 52 of 2014; [2015] eKLR)-(Explained)

6. *Kenya Ports Authority v William Odhiambo Ramogi & 8 others* Civil Appeal No 166 of 2018; [2019] eKLR-(Mentioned)

7. *Kiriro Wa Ngugi & 19 others v Attorney General & 2 others* Petition No 254 of 2019; [2020] eKLR –(Followed)

8. *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* Petition No 3 of 2018; [2021] eKLR –(Explained)

9. *Ramogi, William Odhiambo & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* Constitutional Petition 159 of 2018 & 201 of 2019 (Consolidated); [2020] eKLR –(Followed)

10. *Rangal Lemeguran & others v Attorney General &* Miscellaneous Civil Application 305 of 2004; [2006] eKLR- (Followed)

11. *Republic v Independent Electoral and Boundaries Commission (IEBC) Ex Parte National Super Alliance (NASA) Kenya and 6 others* Judicial Review 378 of 2017; [2017] eKLR- (Explained)

12. *Sakwa, John v Director of Public Prosecutions, Attorney General & 2 others* Constitutional Petition 67 of 2014;[2013] eKLR –(Explained)

South Africa

1. *Affordable Medicines Trust and others v Minister of Health & others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) -(Explained)

2. *Minister of Health and others v Treatment Action Campaign (No 2)* [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 -(Explained)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 1(1); (3)(c); 10(2); 20(4)(5); 23(3); 24(3); 27; 47; 50(1); 73(2)(a); 97(1)(c); 119; 144(3); 150(2); 158(4); 159(1) 2; 161(2)(c); 164(3)(b); 165; 168(5)(a) (b); 169(1)(d) (2); 171; 172(2)(a)(b)(c); 232(1)(g); 261(1)- (Interpreted)

2. Interpretation and General Provisions Act (cap 2) section 23(3)(b) –(Interpreted)

3. Magistrates Court Act, 2015 (Act No 26 of 2015) – In general (Cited)

4. Parliament Act, 2012 (cap 196) – In general (Cited)

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1. Garner, BA., (Ed) (2014) *Black's Law Dictionary* Thomson West 10th Edn para 1737

2. Burke, J., Allsop, P., (Eds) (1951-1953) *Stroud Judicial Dictionary* London: Sweets & Maxwell 3rd Edn

3. Garner, BA., (Ed) (2009) *Black's Law Dictionary* Thomson Reuters 9th Edn p 594

4. Sutherland, H., (Ed) (1948) *Sutherland Statutes & Statutory Construction* 3rd Edn para 4910

JUDGMENT

Introduction:

1. The gist of the amended petition subject of this judgment is the Constitution, composition and operation of the local tribunals in Kenya.

2. The petitioner, Okiya Omtatah Okoiti, posits that all tribunals in Kenya must be constituted and regulated by the Judicial Service Commission, the 1st respondent herein (hereinafter referred to as 'the 1st respondent or JSC').

The Petition:

3. It is the petitioner's case that Tribunals in Kenya suffer lack of unanimity in many aspects. Although the Tribunals fall under article 169(1)(d) of the *Constitution*, many of them are under the direct control and regulation of the Executive. To him, that infringes on the principle of separation of powers as, in most cases, the Executive is a party to the disputes before such Tribunals. The petitioner contends that the Tribunals as constituted have varied terms of service and different rules of procedure. That, whereas some adopt formal procedure akin to that of courts, others are informal thus impacting negatively on access to justice and equal justice to all.

4. The petitioner is further aggrieved that some of the Tribunals do not provide for, and as such, violate a litigant's right of appeal to superior courts. In addition, the petitioner contends that the respondents have, without any reasonable cause, failed and/or refused to transition the Tribunals from the Executive arm to the Judiciary in accordance to the Constitution.

5. In the main, the amended petition prays for the following: -

   (i) A declaration that:

      a) Tribunals established pursuant to article 169(1)(d) of the *Constitution of Kenya, 2010* are not part of the Executive machinery, nor are they independent adjudicatory bodies, but are subordinate courts which are an integral part of the Judiciary.

      b) The Judicial Service Commission is exclusively responsible for appointing and removing member of the tribunals established pursuant to article 169(1)(d) of the *Constitution of Kenya 2010*, for establishing their rules of procedure and for doing anything incidental thereto to ensure their smooth operations as courts of law.

      c) The doctrine of separation of powers under the Constitution of Kenya is an absolute bar to the Executive and its agencies, or any other entities who are not the Judicial Service Commission, being mandated by Parliament to appoint or remove any members of tribunals crated under article 169(1)(d) of the *Constitution of Kenya, 2010*.

      d) Any law which vests in the executive and its agencies, or in any other entities who are not the Judicial Service Commission, the mandate to appoint or remove any members of tribunals created under article 169(1)(d) of the *Constitution of Kenya 2010* is unconstitutional and, therefore, invalid, null and void *ab initio*.

e) The budget for tribunals should be a line budget in the Judiciary.

f) Parliament has failed to enact necessary legislation pursuant to article 169(2) to give effect to article 169(1)(d) within the time specified in the Fifty Schedule to the Constitution.

(ii) An Order

a. Annulling all appointments to tribunals created under article 169(1)(d) of the *Constitution* which were not made by the Judicial Service Commission through a competitive process.

a1. Compelling Parliament and the Attorney-General to enact legislation pursuant to article 169(2) to give effect to article 169(1)(d) of the *Constitution* within three months, and to report the progress to the Chief Justice.

a2. That if Parliament fails to enact legislation pursuant to article 169(2) to give effect to article 169(1)(d) of the *Constitution* within three months, the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament.

b. Compelling the Judicial Service Commission to immediately but not later than three months re-constitute all tribunals created under article 169(1)(d) of the Constitution upon Parliament enacting legislation pursuant to article 169(2) to give effect to article 169(1)(d).

c. Suspending order (a) above for a period of six months to allow for a smooth transition.

d. Compelling the respondent to bear the costs of this suit.

(iii) Any other relief the court may deem just to grant.

6. The Petitioner tendered oral submissions in the matter.

The Responses:

7. The amended petition is opposed and conceded to in equal measure.

8. The 1st respondent filed a replying affidavit sworn on August 30, 2028 by Anne Amadi, the Chief Registrar of the Judiciary and the Secretary to JSC.

9. JSC took the position that it has no role to play in respect of constitutional Tribunals created under articles 144(3), 150(2), 158(4), 168(5)(a) or (b) and article 251(4) of the *Constitution*. In the case of local tribunals as under article 169(1)(d) of the *Constitution*, JSC posits that the Tribunals are indeed subordinate courts within the Judiciary by virtue of articles 1(3)(c), 20(4) & (5) 24(3), 50(1), 159(1) &2 164(3)(b), 165, 169(1)(d), 171 and 172 of the *Constitution*. These Tribunals are, hence, subject to control by JSC.

10. Despite lack of transitional legislation on the local tribunals, JSC enumerated the efforts it has so far taken to ensure that those tribunals are transited into the Judiciary. It also acknowledges that its efforts led to the transitioning of 20 local tribunals from the Executive to Judiciary and that it is now JSC which deals with the appointment and removal of the members of those tribunals. JSC vehemently denied that it has failed to put in place the necessary legislative measures to transit the Tribunals since the legislative mandate is vested with the Parliament.

11. The 1st respondent also filed written submissions and a List of Authorities both dated May 18, 2020. It, *inter alia*, prayed for an order in the nature of structural interdict.

12. The 2nd respondent, the Hon. Attorney General, partly opposed the petition. It relied on the affidavit of Joash Dache, the Commission Secretary of the Kenya Law Reform Commission and Chairperson of the Committee on Review of the Rationale for the Establishment of Tribunals in Kenya.

13. The 2nd respondent agrees with the petitioner that under article 169(1)(d) of the *Constitution* local tribunals are classified as subordinate courts. It also agrees that the local tribunals need to be transited to the Judiciary from the various Ministries and Government Departments. However, to attain this, the 2nd respondent contends that an Act of Parliament pursuant to article 162(2) of the *Constitution* is to be enacted.

14. The concerted efforts taken by the 2nd respondent in liaison with the 1st respondent to come up with the Tribunal Bill, 2017 were enumerated. The Bill is about to be taken to the cabinet for approval.

15. On the remedies sought by the petitioner, the 2nd respondent posits that the declaration of unconstitutionality of the various statutes constituting the Tribunals will deprive persons serving in those tribunals their right to fair administrative action and fair hearing.

16. The period of 6 months prayed for the transition, is deposed to be too short since financial/fiscal cycle is mid-way its implementation and that the financing of the transition of the tribunals must be budgeted for. The 2nd respondent called for the dismissal of the petition, but added that if the declaration of unconstitutionality is issued, then the court ought to consider structural interdicts instead and allow for a period of 2 years to fastrack the passage of the Tribunals Bill into law.

17. The 2nd respondent further relied on the decisions in *John Sakwa v Director of Public Prosecutions, Attorney General & 2 others* [2013] eKLR and *The Institute of Social Accountability & another v National Assembly & 4 others* [2015 eKLR in urging the court to suspend any declaratory orders of unconstitutionality and instead give the parties time to regularize the transitional regime.

18. The 3rd respondent opposed the amended petition. It filed Grounds of Opposition on February 13, 2019.

19. The 3rd respondent posits that there is no mandatory requirement for Parliament to enact any specific or general law governing tribunals in Kenya. As such, the amended petition does not disclose any violation of the Constitution and ought to be dismissed.

20. It denied that article 261 providing for the dissolution of Parliament for failure to enact laws apply to this case because all such laws required to govern the Judiciary under schedule five to the Constitution have so far been enacted including the *Magistrates Court Act, 2015* as required under article 169(1) a-c of the *Constitution*.

21. The 3rd petitioner contends that if the petitioner is of the view that there should be a general codifying law regulating tribunals, then the right avenue would be, to first petition Parliament under article 119 of the *Constitution* and the *Petitions to Parliament Act, 2012* for the enactment of the said law.

22. It is also submitted that there is no need of any court supervision as Parliament is in the process of dealing with the Tribunals Bill and that the petition is caught up by the doctrine of exhaustion and ripeness.

23. The 3rd respondent denies that JSC has the mandate to appoint all the members of all Tribunals as alleged. It submits that the petition ought to be dismissed. However, in the event the petition is sustained, then the court is called upon to consider issuance of structural interdicts.

Issues for Determination:

24. Having carefully considered the material presented before court by the parties including the submissions and the decisions referred to, I discern the following issues for determination: -

    (i) Whether the Petition is Justiciable.

    (ii) The nature of the local tribunals under article 169(1)(d) of the *Constitution*.

    (iii) Whether the appointment and removal of members of the local tribunals under article 169(1)(d) of the *Constitution* by the Executive violate the principle of separation of powers and violates the right to fair hearing under article 50 of the *Constitution*:

    (iv) Whether the local tribunals under article 169(1)(d) of the *Constitution* should be transited to the Judiciary:

    (v) Remedies.

25. I will deal with the issues in seriatim.

(i) Whether the Petition is Justiciable:

26. The issue of non-justiciability is raised by the 3rd respondent. It is hinged on the doctrines of ripeness and exhaustion.

27. A three judge bench in Nairobi Constitutional Petition No 254 of 2019, *Kiriro Wa Ngugi & 19 others v Attorney General & 2 others* [2020] eKLR comprehensively addressed the entire concept of non-justiciability. The concept entails the doctrines of Political Question Doctrine, the Constitutional-Avoidance Doctrine; and the Ripeness Doctrine.

28. Speaking to Ripeness doctrine, the learned judgesstated as follows: -

> 107. The doctrine focuses on the time when a dispute is presented for adjudication. The *Black's Law Dictionary* 10th Edition, [*supra*] at page 1524 defines ripeness as:
>
> The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made
>
> 108. Courts should therefore frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies.
>
> 109. The Court of Appeal in *National Assembly of Kenya & another v Institute for Social Accountability & 6 others* Nairobi Civil Appeal 92 of 2015 [2017] eKLR, faulted the constitutional court for adjudicating upon hypothetical matters. The court held:
>
> > [72] The broad questions which were raised in the consolidated petitions, namely, – division of functions, powers and authority; the equitable sharing of revenue of national government,

whether the Amendment Bill concerned county government and the role of the Senate in the legislative process, are questions which relate to inter-governmental relations and which should have been raised by either government in the appropriate forum and in case of a dispute such a dispute should have been resolved by the designated institutions through the prescribed mechanism. This is one peculiar case where the Constitution stipulates that a dispute should be in essence be resolved by other institutions through a prescribed mechanism before the jurisdiction of the High Court can be invoked.

[74] Furthermore, questions such as division of functions, division of revenue, legislative process and budget process are essentially political questions which fall within the political question doctrine; and which the Constitution has assigned to other political institutions for resolution and created institutions and mechanisms for such resolution.

110. In *National Assembly of Kenya & another v The Institute for Social Accountability & 6 others* [*supra*] the Court of Appeal held:

[73] Since there was no actual live dispute between the national and county governments about CDF and if any, the mechanisms for resolving such disputes was not employed, the questions which were brought to High Court for determination had not reached constitutional ripeness for adjudication by the court. In reality, TISA and CEDGG invented a hypothetical dispute which was brought to court in the guise of unconstitutionality of CDFA.

111. In *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* Nairobi Constitutional Petition No 453 of 2015 [2016] eKLR, Onguto J stated:

[27] Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases..... The court is prevented from determining an issue when it is too early or is simply out of apprehension, hence the principle of ripeness. An issue before court must be ripe, through a factual matrix for determination.

29. On the doctrine of exhaustion, a 5-Judge Bench in Mombasa High Court Constitutional Petition No 159 of 2018 consolidated with Constitutional Petition No 201 of 2019 [2020] eKLR elaborately dealt with the doctrine. The court stated as follows: -

52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. This encourages alternative dispute resolution mechanisms

in line with article 159 of the Constitution and was aptly elucidated by the High Court in *R v Independent Electoral and Boundaries Commission* (IEBC) *Ex Parte* National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the court opined thus:

> 42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:
>
> Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.
>
> 43. While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.
>
> This is *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that:
>
> It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The ex parte applicants argue that this accords with article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.

30. The court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

> 59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R v Independent Electoral and Boundaries Commission* (IEBC) & others *ex parte* The National Super Alliance Kenya (NASA) (*supra*), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:
>
> What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive

analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited case (*supra*), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the *Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau & 9 others v Aelous (K) Ltd and 9 others.*)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and allow the suit to proceed before it. It is also essential for the court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics* (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.

62. In the instant case, the petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.

31. The foregoing was buttressed by the Court of Appeal in Mombasa Civil Appeal No 166 of 2018 *Kenya Ports Authority v William Odhiambo Ramogi & 8 others* [2019] eKLR.

32. There is no doubt that the dispute in the amended petition falls squarely within the mandate of the 3rd respondent which can be accomplished in liaison with the 2nd respondent.

33. It is also clear that the petitioner seeks to *inter-alia* to compel the 2nd and 3rd respondents to take steps to enact the necessary legislation towards the transitioning of the Tribunals.

34. Whereas an invitation of this court to exercise its powers against the constitutional roles reserved for two organs of government is barred by the principle of non-justiciability and is also an affront to the doctrine of separation of powers, there are constitutionally permissible situations where this court may interfere. It does so if there is actual or threatened violation of the rights and fundamental freedoms

guaranteed under the Constitution, or in instances where it is demonstrated that there are violations of other provisions of the Constitution whose enforcement are not mere 'bootstraps' or merely framed in Bill of Rights language as a pretext to gain entry to the court.

35. A careful reading of the parties' pleadings, submissions and decisions referred to reveal that there is consensus that the local tribunals under article 169(1)(d) of the *Constitution* are surbodinate courts. Under sub-article 2, Parliament shall enact legislation conferring jurisdiction, functions and powers on the surbodinate Courts.

36. Pursuant to article 261(1) of and the fifth schedule to the *Constitution*, any legislation whose timeline was not specified under the Constitution was to be passed within five years of the promulgation of the Constitution. It is common knowledge that the Constitution of Kenya was promulgated in August 2010. Therefore, constitutionally speaking, the laws which were contemplated to be passed under article 169 of the *Constitution* had to be so passed by August 2015. It is now 6 years post the calibrated constitutional timeline.

37. One of the petitioner's contention is that Parliament has not enacted the required legislation since the promulgation of the Constitution 11 years ago. Parliament on its part contends that there are no timelines set for such enactment. The Parliament's contention is, hence, settled by the express provisions of article 261(1) of and the Fifth Schedule to *Constitution* which provides for a maximum period of five years within which any other legislation required to be passed under the Constitution must be so passed. From the position taken by Parliament, it is clear that Parliament is not keen on passing the necessary legislation. It is obvious that nothing may soon be forthcoming if this matter is left in the sole hands of Parliament. The petitioner cannot, hence, be accorded the appropriate forum to adjudicate the dispute if the matter is left to Parliament.

38. The petitioner is in essence alleging contravention of article 169(2) of the Constitution. The petition raises serious constitutional issues and their resolution is not mere bootstraps. Further, the petition is not merely framed in Bill of Rights language as a pretext to gain entry to the court. In other words, the Petition is ripe for court's determination. As such, the exception to the principle of non-justiciability must be upheld.

39. This court will, therefore, not lend a deaf ear to a party who knocks on its legal doors alleging infringement or threat to infringement of its rights and fundamental freedoms as guaranteed under the Bill of Rights or contravention or threats of violation of the Constitution unless the applicability of the principle of non-justiciability is otherwise proved.

40. In the circumstances of this case, there are valid and holding exceptions to the principle of non-justiciability and the doctrine of exhaustion. This court is, hence, vested with the requisite jurisdiction to deal with the petition.

41. The issue is hence answered in the affirmative.

(ii)The nature of the Local Tribunals under Article 169(1)(d) of the Constitution:

42. The *Black's Law Dictionary*, 10th Edition at paragraph 1737 defines a Tribunal as follows: -

    1. A court of justice or other adjudicatory body.

    2. The seat, beat, or place where a judge sits.

43. The dictionary also defines an administrative tribunal as follows: -

> 1. A court-like decision-making authority that resolves disputes, esp. those in which one disputant is a government agency or department; an administrative agency exercising *quasi-judicial function.*
>
> 2. A government division established to implement legislative policy.

44. A committee was set-up by the 2nd respondent through the Kenya Law Reform Commission to undertake *inter alia* a comprehensive status analysis of the existing tribunals in Kenya. That was sometimes in June 2014. The committee tendered its report titled The Report of the Committee on the Review of the Rationale for the Establishment of Tribunals in Kenya (hereinafter referred to as 'the KLRC Report') sometimes in December, 2015. The KLRC Report noted that there are over 60 Tribunals in Kenya. These tribunals are variously created by Acts of Parliament.

45. According to article 1(1) of the *Constitution*, all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution. In sub-article 3 the sovereign power is delegated to the following organs: -

> (a) Parliament and the legislative assemblies in the county governments;
>
> (b) The National executive and the executive structures in the county governments; and
>
> (c) The Judiciary and independent tribunals.

46. Article 3 obligates every person to respect, uphold and defend the Constitution. In article 10, the Constitution creates the national values and principles of governance that bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets cases the Constitution, enacts, applies and interprets any law or makes or interprets public policy decisions.

47. Chapter 10 of the *Constitution* is on the Judiciary. Article 159(1) states as follows: -

> Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

48. Article 169 of the *Constitution* states as follows: -

> (1) The subordinate courts are-
>
> (a) the Magistrates courts
>
> (b) the Kadhis' courts
>
> (c) the Courts Martial; and
>
> (d) any other court or local tribunal as may be established by an act of parliament, other than the courts established as required by article 162(2)
>
> (2) Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause 1

49. The foregoing lists the surbodinate courts in Kenya. They are the Magistrates Courts, the Kadhis Courts, the Court Martial and any other court or local tribunal established by law.

50. In order to understand the context in which the term 'local tribunal' is used in article 169(1)(d) of the *Constitution*, there is need to look at one of the rules of interpretation. That is the *ejus dem generis* rule.

51. The *ejus dem generis* rule is an interpretational principle in law. It is a rule of construction that guides court in reconciling any incompatibility between specific and general words.

52. *Stroud's Judicial Dictionary* 3rd Edition, defines the principle as follows:

> Where a statute, or other document, enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces 'other' persons or things – the word 'other' will generally be read as 'other such like', so that the persons or things therein comprised may be read as ejus dem generis with, and not of a quality superior to, or different from, those specifically enumerated.

53. The *Black's Law Dictionary*, Garner A Bryan, 9th Edition, Thomson Reuters 2009 at page 594 defines the doctrine in the following manner: -

> A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items on the same class as those listed. For example, in the phrase horses, cattle, sheep, pigs, goats, or any other farm animals, the general language or any other farm animals –despite its seeming breadth- would probably be held to include only four-legged, hoofed mammals typically found on farms, and thus would exclude chickens.

54. Therefore, where general words follow specific words in an enumeration describing the legal subject, *ejus dem generis* principle requires that the general words are construed to embrace only objects similar in nature to those enumerated by the preceding specific words.

55. The rule, therefore, accomplishes the purpose of giving effect to both the specific and the general words by treating the particular words as indicating the class, and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words.

56. In his treatise titled *Sutherland Statutory Construction* 3rd Edition, 1984, Horrack Sutherland states at paragraph 4910 that for the doctrine to apply, the following conditions must exist: -

(i) That statute contains an enumeration by specific words;

(ii) The members of the enumeration constitute a class;

(iii) The class is not exhausted by the enumeration;

(iv) A general term follows the enumeration; and

(v) There is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires.

57. The Court of Appeal in Nairobi Civil Appeal 351 of 2012 *Commissioner for the Implementation of the Constitution v Attorney General & 2 others* [2013] eKLR clearly brought out the application of the doctrine. Before it was the question whether 'the marginalized' fell within the category of persons named in article 97(1)(c) of *the Constitution*. The said article is in respect of Membership of the National Assembly and states as follows: -

97.

(1) The national Assembly consists of-

(c) twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with article 90, to represent special interests including the youth, persons with disabilities and workers; and

58. The Learned Judges of Appeal spoke to *ejus dem generis* in reference to the High Court decision in *Rangal Lemeguran & others v Attorney General & others* & 2006 eKLR, where in interpreting the term special interests the High Court observed as follows: -

> Although the *Constitution* does not define special interests contemplated by section 33(1) [of the former Constitution] they include those interests which have not been taken care of by the election process and which are vital to the effectiveness of the democratic elections in terms of adequate representation for all-in a democracy. In other words, the special interests mean those interests which the normal electioneering process has failed to capture and represent.

59. The Judges then agreed with the proposition that 'the marginalized' fell into the group anticipated by the article 97(1)(c) of the *Constitution*. The Judges had the following to say on the doctrine: -

> .... there are some clear categories of people that qualify to be viewed as representing special interests, namely:
>
> (i) ethnic minorities
>
> (ii) the youth;
>
> (iii) the blind;
>
> (iv) the deaf;
>
> (v) the physically disabled.
>
> We can on our part add that religious minorities, linguistic or cultural minorities and racial minorities fall seamlessly into the category of special interests while the Constitution has also in the wisdom of the framers and the people of Kenya made inclusion of "workers" as a special interest group.
>
> From what we have said so far, it should be obvious that for a class of persons to qualify to be called a special interest worthy of special representation under our constitutional framework, they must be a class as can fairly be said to have suffered marginalization and disadvantage keeping them away from the centre of the political process. That, to us, is the logical, rational nexus that at once attracts and glues such a class into proper location in both section 34(9) of the Elections Actand article 97(1) (c) of the Constitution.
>
> That being our view of the matter, we agree with the appellant that an interpretation of article 97(1)(c) of the Constitution invites the application of the ejus dem generis rule. The youth, persons with disabilities and workers clearly fall in the category of the marginalized, the disadvantaged and the vulnerable-those not sufficiently empowered to muscle their way, generally speaking, into the inner sanctums of political and state power. They are the natural underdogs in the rough and tumble of the political jungle more likely than not to be elbowed

out of the centre and off the field unless special affirmative and protective measures be taken to aid them.

60. Back to this case, article 169(1) of the *Constitution* enumerates a class of entities before mentioning the local tribunals. They are Magistrates Courts, the Kadhis Courts, the Court Martial and any other court. Of much importance is that the title in article 169(1) describes surbodinate courts to include the local tribunals.

61. The entities Magistrates Courts, the Kadhis Courts, the Court Martial and any other court fall under a special class. They are surbodinate courts. These surbodinate courts are surbodinate to the superior courts and deal with formal settlement of disputes between parties. They are not advisory in nature and are set-up with the adversarial system of dispute resolution in mind. As such, the local tribunals referred to after the enumeration in article 169(1)(d) of the *Constitution* can only be courts in law.

62. The local tribunals, therefore, possess the following qualities: -

(i) They are courts of law;

(ii) They are surbodinate to the superior courts;

(iii) They are not advisory in nature;

(iv) They are not administrative tribunals;

(v) They are not presided over by or include a Judge of the superior courts in their membership;

(vi) They are formed under an Act of Parliament;

63. The foregoing analysis, therefore, excludes the following class of Tribunals: -

(a) The Tribunals formed under the Constitution;

(b) All administrative and advisory tribunals;

(c) All tribunals whose membership includes a Judge of the superior courts;

(d) All other informal tribunals not formed under the Constitution} or any Act of Parliament.

64. Examples of Tribunals which do not fall under article 169(1)(d) of the *Constitution* include: -

(i) Tribunal created under article 144(3) and 150(2) of *Constitution* for the removal of the President or Deputy President on grounds of incapacity;

(ii) Tribunal created under article 158(4) of the *Constitution* for the removal of the Director of Public Prosecutions;

(iii) Tribunal created under article 168(5)(a) or (b) of the *Constitution* for the removal of the Chief Justice or other Judges of the superior courts;

(iv) Tribunal created under article 251(4) of the *Constitution* for the removal of commissioners or holders of independent offices.

(v) Any administrative Tribunal;

(vi) Any informal tribunal.

65. From the above analysis, it is clear that the local tribunals created under article 169(1)(d) of the *Constitution* are subordinate courts and not advisory or administrative tribunals. These local tribunals are created under statutes.

(iii) Whether the Appointment and Removal of members of the Local Tribunals under Article 169(1)(d) of the Constitution by the Executive Violate the Principle of Separation of Powers and Violates the Right to Fair Hearing under Article 50 of the Constitution:

66. As stated above, the local tribunals contemplated under article 169(1)(d) of the *Constitution* must be anchored in Acts of Parliament or statutes. Such constituting statutes ought to provide for *inter alia* the constitution, appointment, removal and the term of the members of those tribunals.

67. The manner of appointment and removal of the members of the local tribunals is one of the disputes in this matter.

68. The petitioners posit that in most of the local tribunals, which are surbodinate courts, the members are appointed and removed by the Executive instead of the Judiciary through the JSC. The petitioner further posits that such state of affairs does not only infringe upon the doctrine of separation of powers, but also infringes the rights of those whose disputes are dealt with under those tribunals in terms of the right to fair hearing under article 50 and the right to a fair administrative action under article 47 of the *Constitution*. It is contended that the manner in which the members of the local tribunals are appointed further infringes upon the basic structure of the Constitution.

69. In buttressing the argument, the petitioner argues that in most cases the Executive is a party in those disputes hence the impartiality of the members of the local tribunals is always highly compromised. It is also contended that the members are also removed at the whim of the Executive or in instances where the members do not champion the interests of the appointing authority.

70. The petitioner also avers that the appointments are in breach of articles 73(2)(a), 172(2)(a) & (b) and 232(1)(g) as read with articles 10(2) and 27 of the *Constitution*, as they are not done through a competitive, objective and inclusive process thus stripping them of impartiality and independence. He posits that such appointments must be made by JSC.

71. In response, whereas JSC supports the transition of the local tribunals to the Judiciary, it submits that according to section 31 and 33 of the sixth schedule to the *Constitution* and section 23(3)(b) of the *Interpretation and General Provisions Act*, the statutes which govern the appointments made in the impugned Tribunals are yet to be repealed and as such the appointments would still be valid as a matter of law.

72. JSC further submits that the best way forward is that pending the regularization of the Local Tribunals, any appointments and removal of members of such tribunals be undertaken by itself.

73. The 2nd respondent did not respond to the issue. Instead, it threw its weight on the efforts made by the respondents towards transitioning of the local tribunals into the Judiciary.

74. The 3rd respondent maintained that the petition be disallowed.

75. From the pleadings and the parties' submissions, there is a general consensus that indeed the need for separation of powers between the Executive and the Judiciary in respect to the local tribunals is necessary. I echo the position.

76. There is no doubt that most of the disputes handled by the local tribunals involve the executive. As such, the executive has an obvious advantage given that it is the one responsible with the appointMent

and removal of the Members. In such circumstances, the executive ought not to be the appointing authority. Instead, that duty ought to be undertaken by an independent entity. As said, justice should not only be done, but should also be seen to be done.

77. It is worth-noting that such a state of affairs where the Executive overreaches and takes over the mandate of the Judiciary infringes on the independence of the Judiciary.

78. The converse is the remedy. Since the local tribunals are surbodinate courts, then their affairs, just like the other surbodinate courts, ought to be managed by the Judiciary through JSC. In doing so, the constitutional dictates shall be achieved. Needless to say, there will be transparency in the appointments of members. The removal of members will also be done in accordance withthe Constitution and the law. In sum, there will be compliance with the Constitution.

79. I must reiterate that any exercise of power must be in accordance with the Constitution. In *Affordable Medicines Trust and Others v Minister of Health and Others* [at para 18] [2005] ZACC 3; 2006 (3) SA 247 (CC) at paras 49, 75 and 77, Ncgobo CJ held thus: -

> The exercise of public power must therefore comply with the Constitution}}, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. In this sense the Constitution entrenches the principle of legality and proVides the foundation for the control of public power.

80. The South African Constitutional Court in *Minister of Health and others v Treatment Action Campaign and others* (2002) 5 LRC 216, 248 further held that: -

> and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by the Constitution itself.

81. In this case, it is clear that the appointment and removal of members of the local tribunals falling under article 169(1)(d) of the *Constitution* by the Executive contravenes the principle of separation of power and is contrary to article 50(1) of the Constitution. That state of affairs also infringes on the independence of the Judiciary.

(iv) Whether the Local Tribunals under Article 169(1)(d) of the Constitution should be Transited to the Judiciary:

82. Flowing from the foregoing issue, there is no dispute that the local tribunals, which are surbodinate courts, currently under the administration of the executive ought to be transited to the Judiciary.

83. The rationale thereof is in article 160(1) of the *Constitution*. The article states as follows: -

> In the exercise of judicial authority, the Judiciary, as constituted by article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.

84. The Chief Justice is the head of the Judiciary courtesy of article 161(2)(a) of the *Constitution*. Article 171 of the *Constitution* establishes the JSC. One of the functions of JSC is to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice. JSC, therefore, is supposed to support the Judiciary in discharging its constitutional mandate. In doing so, JSC must remain true to the Constitution. As stated in See the Court of Appeal in *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR) : -

> ... JSC is not part of the national executive as defined in article 130(1). Thus, although JSC is not a substructure of the national executive to which sovereign power is delegated, it is nevertheless subject to the Constitution and the law and like other independent commissions and independent offices, has the duty to protect the sovereignty of the people (see article 249(1)(a).

85. Another function of JSC is in article 172(1)(c) of the *Constitution*. It provides as follows: -

> appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament;

86. Having demonstrated that the local tribunals are part of the surbodinate courts, suffice to say that the members of such tribunals, and in line with the *ejus dem generis* rule, fall within the category of 'other judicial officers' under article 172(1)(c) of the *Constitution*. Such officers must, hence, be appointed by JSC.

87. In order to enable such appointments to be undertaken as commanded by the Constitution, there is no doubt that the local tribunals must be transited to the Judiciary. According to article 169(2) of the *Constitution*, there is need for an Act of Parliament to aid in the transition.

88. As said, the position is agreed upon by the respondents. Each of the respondents has undertaken steps towards achieving the transition. JSC has through the Judiciary constituted the Judiciary Working Committee on the transition and restructuring of the Tribunals Working Committee. The Committee eventually came up with a Draft Tribunals Bill, 2015. As at now, JSC has managed to spearhead the transition of 20 local tribunals from the executive to the Judiciary.

89. On its part, the 2nd respondent through the Kenya Law Reform Commission established the Committee on Review of the Rationale for the Establishment of Tribunals in Kenya. The effort resulted in the Tribunals Bill, 2017 which Bill is still in the deliberative stages and is scheduled to be presented to the Cabinet.

90. There is evidence that the 3rd respondent through its Justice and Legal Affairs Committee has had dealings with JSC towards discussing the Tribunals Bill, 2017.

91. Section 3 of the Tribunal Bill, 2017 provides as follows: -

> The purpose of this Act is to provide a legislative framework to-
>
> a. Rationalize and regulate Tribunals

b. Streamline the governance and operations of Tribunals;

c. Provide for a reasonable standard for establishment of Tribunals

d. Set appropriate qualifications for chairpersons and members of Tribunals;

e. Bring all Tribunals under a single administrative regime and coordinate the functions of Tribunals.

f. Enhance access to justice; and

g. Improve quality of service delivery by Tribunals.

92. The Bill further make many other provisions towards attaining the transition. Of particular importance is that section 20 of the Bill provides for the appointment of the Chairpersons and members of the Tribunals by JSC.

93. In sum, for the reason that the local tribunals established under article 169(1)(d) of the *Constitution* are surbodinate courts, then they must be transited to the Judiciary.

(v)Remedies:

94. This case presents a unique set of circumstances. Whereas this court appreciates the call to jolt into action the other arms of Government to fulfil their constitutional mandates, the court must be cautious not to overstep its bounds. In other words, this court should not take over the functions of the other constitutional organs in the name of upholding the Constitution.

95. The Petitioner prays for a declaration of unconstitutionality of any law that does not vest the duty to appoint or remove any members of the local tribunals created under article 169(1)(d) of the *Constitution* in JSC.

96. Currently, there are so many statutes constituting the tribunals. The prayer sought is not specific. The petitioner seeks an *omnibus* order. The danger of granting such an order is the lack of specificity whose effects may be too detrimental. For instance, the constituting statutes make provision for other matters and issues as well. Annulling the entire statutes and not the specific sections thereof, will result to immense disruptions and confusions. Further, the inevitable question is why should the sections which have nothing to do with the appointment and removal of the members of the tribunals in the various statutes be annulled? This court declines the invitation by the petitioner.

97. There is also a prayer to annul all appointments to the tribunals under article 169(1)(d) of the *Constitution* which were not made by JSC. I, as well, find some difficulty in granting the order. The reason is that those targeted members did not participate in this petition. Granting such an order will, hence, be in contravention of articles 47 and 50(1) of the *Constitution*.

98. The petitioner further prays for an order to compel Parliament and the Hon Attorney General to enact the necessary legislation under article 169(2) of the *Constitution* within 3 months.

99. Whereas JSC and the 2nd respondent posit for a longer period of 1 year and 2 years respectively due to the process involved in the law-making process, the 3rd respondent takes the position that the Constitution does not provide for the time within which such a legislation ought to be made. As such, the 3rd respondent contends that the process should be left in the hands of the respondents.

100. The 3rd respondent's argument is squarely countered by article 261(1) of and the fifth schedule to the *Constitution* which obligated Parliament to pass any legislation which no timelines had been set in the Constitution within 5 years of the promulgation of the Constitution.

101. The Constitution has by now been in place for the last 11 years. During that period, the progress, if any, has been very minimal. It is not clear, from the approach proposed by the 3rd respondent, how long it will take for the legislation to be put in place. This is, therefore, a case which, in my view, calls for the court's supervision in the nature of structural interdicts.

102. The Supreme Court of Kenya in Petition No 3 of 2018, *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] eKLR, considered the place of structural interdicts as an effective remedy in certain specific constitutional disputes.

103. In that case, the appellant, Mitu-Bell Welfare Association instituted a suit in the High Court on behalf of the residents of Mitumba village, who lived near Wilson Airport, Nairobi. It claimed violation of the rights to shelter and housing of the said residents when they were evicted and their houses destroyed by the Respondents.

104. Before the Supreme Court was the question whether the High Court was right in directing the Honourable Attorney General and The Commissioner for Lands to provide, 'by way of affidavit, within 60 days of judgment, the current state policies and programmes on provision of shelter and access to housing for the marginalized groups such as the residents of informal and slum settlements.'

105. In the Court of Appeal, the foregoing directive by the High Court was held to be erroneous on the ground that the court was *functus officio* upon rendering its judgment. The Court of Appeal faulted the High Court for delivering a judgment then reserving outstanding matters to be dealt with by the same court. It emphasized that, save for limited exceptions provided in law, delivery of judgments marked the end of litigation and jurisdictional competence of the court.

106. In resolving the above diametrically opposed findings, the Supreme Court delimited the place of structural interdicts. It first examined the powers of the High Court in respect of the orders it can issue pursuant to article 23(3) and 165(3)(d) of the *Constitution* and in so doing it made reference to its earlier decision in Petition No 14, 14A, 14B and 14C of 2014 (Consolidated), *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*; where it was observed that: -

> .... a close examination of these provisions (article 23(3) and 165 (3)(d) of the Constitution) shows that the Constitution requires the Court to go even further than the US Supreme Court did in the Marbury, and that article 23(3) grants the High Court powers to grant appropriate relief "including" meaning that this is not an exhaustive list....

107. The court further reproduced the findings in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* where orders in the nature of structural interdicts were issued as follows: -

(d) The 1st appellant shall, in exercise of its statutory powers, and within 90 days of the date hereof, consider the merits of applications for a BSD licence by the 1st, 2nd, and 3rd respondents, and of any other local private sector actors in the broadcast industry, whether singularly or jointly.

(e) The 1st appellant (CAK) shall, in exercise of its statutory powers, ensure that the BSD licence issued to the 5th appellant herein, is duly aligned to Constitutional and statutory imperatives.

(f) The 1st appellant (CAK), in exercise of its statutory authority, shall, in consultation with all the parties to this suit, set timelines for the digital migration, pending the International Analogue Switch-Off Date of June 17, 2015.

(g) Upon the course of action directed in the foregoing orders (d & e) being concluded, the 1st appellant (CAK) shall notify the court through the Registry; and the Registrar shall schedule this matter for mention on the basis of priority, before a full Bench.

108. To further buttress propriety of structural interdicts, the learned judges referred to its decision in Petition No 15 & 16 of 2015, [2017] eKLR; *Francis Karioko Muruatetu another v Republic* where the following orders were made: -

(b) This matter is hereby remitted to the High Court for re-hearing on sentence only, on a priority basis, and in conformity with this judgment.

(c) The Attorney General, the Director of Public Prosecutions and other relevant agencies, shall prepare a detailed professional review in the context of this judgment and Order made with a view to setting up a framework to deal with sentence-re-hearing of cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this court on the same.

109. The learned judges, however, gave a rider on the manner in which structural interdicts or supervisory orders must be exercised. It gave the following parameters: -

> (122) Having stated thus, we hasten to add that, interim reliefs, structural interdicts, supervisory orders or any other orders that may be issued by the courts, have to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other State Agency vested with a constitutional or statutory mandate to enforce the order. Most importantly, the court in issuing such orders, must be realistic, and avoid the temptation of judicial overreach, especially in matters policy. The orders should not be couched in general terms, nor should they be addressed to third parties who have no constitutional or statutory mandate to enforce them. Where necessary, a court of law may indicate that the orders it is issuing, are interim in nature, and that the final judgment shall await the crystallization of certain actions.

110. Taking cue from the foregoing findings and directions, it is clear that the High Court in *Mitu-bell* case (*supra*) was right in issuing orders for parties to report back to court post-judgment. Accordingly, this court is vested with jurisdiction to issue structural and supervisory interdicts in order to uphold the Constitution.

111. This petition being one of such instances, this court shall consider such a relief.

112. On costs, as the matter is a public interest litigation, there shall be no order as to costs.

Disposition:

113. Flowing from these findings and conclusions, the disposition of the amended petition dated December 18, 2018 is as follows:

(a) The amended petition is justiciable and this court has the jurisdiction to deal with the issues therein.

(b) The local tribunals created under article 169(1)(d) of *the Constitution* are surbodinate Courts in Kenya.

(c) The appointment and removal of members of the local tribunals created under article 169(1)(d) of *the Constitution* by the Executive violates the principle of separation of powers, contravenes the right to fair hearing under article 50 of the Constitution and infringes on the independence of the Judiciary.

(d) The local tribunals under article 169(1)(d) of the *Constitution* must be transited to the Judiciary and the appointment and removal of their members be undertaken by the Judicial Service Commission.

(e) A declaration hereby issues that any new appointment or removal of a member of any of the Tribunals under article 169(1)(d) of the *Constitution* must be undertaken by the Judicial Service Commission. For certainty, such local tribunals include: -

a) Board of Review established under the *Prisons Act*

b) Business Premises Tribunal established under the *Landlord and Tenant (Shops, Hotels & Catering Establishments Act*)

c) Provincial Land Control Appeals Board established under the *Land Control Act*.

d) Central land Control Appeals Board established under the *Land Control Act*

e) *Mines Development Loans Act*

f) Seed and Plants Tribunal established under *Seeds and Plant Varieties Act*

g) Sugar Arbitration Tribunal established under the *Sugar Act*

h) Water Resources Management Authority established under the *Water Act*

i) Water Appeal Board established under the Water Act

j) Water Service Board established under the Water Act

k) Wildlife Conservation and Management Services Appeals Tribunal established under the *Wildlife Conservation and Management Act*

l) Tourist Appeal Board established under the *Tourist Industry Licensing Act*

m) Transport Licensing Appeal Tribunal established under *Transport Licensing Act*

n) State Corporations Appeals Tribunal established under the *State Corporations Act*

o) Value Added Tax Appeals Tribunal established under *Value Added Tax Act*

p) Capital Markets Tribunal established under the *Capital Markets Authority Act*

q) Insurance Appeals Tribunal established under the *Insurance Act*

r) Co-operative Tribunal established under the *Co-operatives Act*

s) Hotels and Restaurants Appeals Tribunal established under the Hotels and Restaurants Act

t) Kenya Bureau of Standards established under the Standards Act

u) Restrictive Trade Practices Tribunal established under the *Restrictive Trade Practices, Monopolies and Price Controls Act*

v) Land Disputes Tribunals established under the Land Disputes Tribunal

w) Land Disputes Appeal Committee established under the *Land Disputes Tribunals Act*

x) Non-Government Organizations Co-ordination Board established under the *Non-Governmental Originations Co-ordination Act*

(f) The Hon. Attorney General and the Parliament, being the 2nd and 3rd respondents herein, are hereby directed to take proactive steps within their respective dockets towards propagating the Tribunals Bill with a view of transiting the local tribunals under article 169(1)(d) of the *Constitution* to the Judiciary. To that end, the Hon Attorney General and the Parliament shall file affidavits within 6 months of this judgment detailing the steps taken.

(g) Upon filing of the affidavits in (f) above, the Deputy Registrar of this court shall schedule this matter for mention on the basis of priority.

(h) There shall be no order as to costs.

114. Those are the orders of this Court.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF MARCH, 2021

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Okiya Omtatah Okoiti, the petitioner in person.

Miss Lipo, Counsel for the 1st respondent.

Mr. Moimbo, Counsel for the 2nd respondent.

Mr. Mbarak, Counsel for the 3rd respondent.

Mr. Dudley Ochiel, Counsel for the interested party.

Elizabeth Wamboi – Court Assistant.