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REPUBLIC OF KENYA



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Tuesday 25/10/2018

THE NATIONAL ASSEMBLY

TWELTH PARLIAMENT – SECOND SESSION, 2018

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THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL  
AFFAIRS

REPORT ON THE PETITION BY MR. GEOFFREY OTIENO OGOLA  
TO AMEND THE CONSTITUTION TO ESTABLISH AN ELECTED JURY  
SYSTEM AND END THE EXERCISE OF SOVEREIGN POWER OF  
THE PEOPLE BY JUDICIAL OFFICERS IN CONTRAVENTION OF  
ARTICLE 1 CLAUSE 2 OF THE CONSTITUTION

DIRECTORATE OF COMMITTEE SERVICES  
CLERK'S CHAMBERS  
PARLIAMENT BUILDINGS  
NAIROBI

OCTOBER, 2018



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## **CHAIRMAN'S FOREWORD**

This petition was conveyed to the House by the Speaker Hon. Justin Muturi, MP on 1<sup>st</sup> August 2018. This is in accordance with the provisions of Standing Order No. 225 (2) (b). The Petitioner prays that the National Assembly proposes amendments to the Constitution to establish an elected jury system to take over the role of rendering verdicts and setting penalties from judges and judicial officials of subordinate courts in order to fulfil the requirements of Article 1 (2) of the Constitution and makes such other amendments as it may deem fit to ensure that aspirations of the people of Kenya as enshrined in the Constitution prevail within the institution of the Judiciary.

The Petition was thereafter referred to the Departmental Committee on Justice and Legal Affairs for consideration and preparation of a report within sixty days in line with the requirements of Standing Order 227.

In considering the Petition, the Committee, during its sitting on 28<sup>th</sup> August 2018, held a meeting with the petitioner Mr. Geoffrey Otieno Ogola. The meeting was aimed at inquiring into the issues raised in the Petition.

The Committee appreciates the assistance provided by the Office of the Speaker and the Clerk of the National Assembly that enabled it to discharge its functions in considering the petition.

On behalf of the Committee, and pursuant to Standing Order, 227 it is my duty to table the Report of the Committee on the Petition on....

**Hon. William Cheptumo, MP**

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

## CHAPTER ONE

### **1.0 PREFACE**

#### **1.1. Mandate of the Committee**

The Departmental Committee on Justice and Legal Affairs derives its mandate from Standing Order No. 216(5) which provides for the functions of Departmental Committees as follows-

- (a) investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;*
- (b) study the programme and policy objectives of ministries and departments and the effectiveness of their implementation;*
- (c) study and review all legislation referred to it;*
- (d) study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;*
- (e) investigate and enquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House;*
- (f) vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments);*
- (g) examine treaties, agreements and conventions;*
- (h) make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;*
- (i) consider reports of Commissions and Independent Offices submitted to the House pursuant to provisions of Article 254 of the Constitution; and*
- (j) examine any questions raised by Members on a matter within its mandate.*

The Second Schedule of the Standing Orders on Departmental Committees further outlines the Subjects of the Committee, as follows-

- (a) Constitutional affairs;
- (b) The administration of law and Justice
- (c) The Judiciary;

- (d) Public prosecutions;
- (e) Elections;
- (f) Ethics, integrity and anti-corruption; and
- (g) Human rights.

### **1.2. Committee Membership**

The Committee was constituted on Thursday, 14<sup>th</sup> December, 2017 and comprises the following Honourable Members-

Hon. William Cheptumo, M.P.	–	<b><i>Chairperson</i></b>
Hon. Alice Muthoni Wahome, M.P.	–	<b><i>Vice Chairperson</i></b>
Hon. John Olago Aluoch, M.P.		
Hon. Roselinda Soipan Tuya, M.P.		
Hon. Charles Gimose, M.P.		
Hon. Johana Ng'eno, M.P.		
Hon. William Kamoti Mwamkale, M.P.		
Hon. Ben Orori Momanyi, M.P.		
Hon. Peter Opondo Kaluma, M.P.		
Hon. Jennifer Shamalla, M.P.		
Hon. Beatrice Adagala, M.P.		
Hon. Gladys Boss Shollei, CBS, M.P.		
Hon. John Munene Wambugu, M.P.		
Hon. George Gitonga Murugara, M.P.		
Hon. Anthony Githiaka Kiai, M.P.		
Hon. John Kiarie Waweru, M.P.		
Hon. Japheth Mutai, M.P.		
Hon. Adan Haji Yussuf, M.P.		
Hon. Zuleikha Hassan, M.P.		

### **1.3. Committee Secretariat**

Mr. George Gazemba	-	Principal Clerk Assistant II
Mr. Denis Abisai	-	Principal Legal Counsel I
Ms. Doreen Karani	-	Legal Counsel II
Ms. Halima Hussein	-	Clerk Assistant III
Ms. Fiona Musili	-	Research Officer III
Mr. Omar Abdirahim	-	Fiscal Analyst III
Mr. James Macharia	-	Media Liaison Officer
Ms. Roselyne Ndegi	-	Serjeant-at-Arms

## CHAPTER TWO

### **2.0 CONSIDERATION OF THE PETITION**

The Committee commenced its consideration of the Petition by meeting the Petitioner on 28<sup>th</sup> August 2018. During the meeting, written and oral evidence was adduced as noted hereunder: -

### **2.1 Submissions by the Petitioner Mr. Geoffrey Otieno Ogola**

In his petition, Mr. Geoffrey Otieno Ogola, sought to draw the attention of the House to the need to amend the Constitution to establish an Elected Jury System to take over the role of rendering verdicts and setting penalties from judicial officers [judges and judicial officials of subordinate courts] on the following grounds:

(1) Judicial officers were not subjected to democratic elections pursuant to Clause 2 of Article 1, and are therefore exercising the sovereign power of the people in contravention of the Constitution;

(2) Noting that it is unfeasible to subject judicial officers to democratic elections, it would be more practical to subject a jury to democratic elections and thus fulfil the requirements of Article 1 (2) in the Judiciary.

**1. THAT** Article 1 of the Constitution of Kenya 2010 explicitly and unequivocally delineates who sovereign power belongs to, how it is exercised, the process through which a representative becomes legitimately entitled to exercise it and how it is delegated to the three organs of State:

Article 1 on **Sovereignty of the people** provides that-

(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution;

(2) The people may exercise their sovereign power either directly or through their democratically elected representatives;

(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.

(4) The sovereign power of the people is exercised at—

- (a) the national level; and
- (b) the county level

2. **THAT** Clause 2 of Article 1 clearly and unequivocally dictates that only representatives democratically elected by the people are mandated by the Constitution to exercise the sovereign power of the people on behalf of the people;
3. **THAT** judicial power is one of the three elements that constitute sovereignty. Judicial power/authority therefore belongs to the people of Kenya and must also therefore be exercised in accordance with the dictates of Article 1 Clause (2), that is, either directly by the people themselves or through their democratically elected representatives;
4. **THAT** judges and judicial officers of subordinate courts, as representatives of the people in the exercise of judicial power, were not subjected to democratic elections as dictated by Clause 2 of Article 1 of the Constitution of Kenya, and are therefore exercising the sovereign power of the people illegally as they are not elected representatives of the people;
5. **THAT** the New Constitution radically changed the Kenyan legal landscape and in the case of the judicial system, the introduction of Article 1 (2) invalidated the

previous constitutional order that empowered judicial officers to exercise judicial power solely by virtue of the delegation or vesting of sovereign power in the institution of Judiciary;

*The Constitution of Kenya 2010 in Article 1 (2) is exceedingly clear that the sovereign power of the people of Kenya can only be exercised by representatives elected democratically by the people. The constitutional requirements for the representation of the people in the exercise of sovereign power are also clearly stipulated in Chapter Seven of the Constitution [Representation of the People]*

6. **THAT** it is a fact that in the context of Chapter 1 of the Constitution of Kenya 2010, Clause 3 of Article 1 is basically about establishing the three organs of State and dividing sovereign power among them for the purpose of creating a system of checks and balances- it is hardly about empowering individuals/representatives in the exercise of sovereign power of the people;

*In accordance with Article 260 [interpretation of the Constitution] “State organ” is interpreted to mean a commission, office, court, agency or other body established under the Constitution and therefore, for all intents and purposes, this provision of the law is basically for the division and delegation of sovereign authority to the three State organs in accordance with the principle of separation of powers vital for the purpose of creating a system of checks and balances*

*The Constitution in its wisdom leaves no room for the exploitation of ambiguities as to the meaning of "State organ" and therefore endeavours to give an unequivocal interpretation of the meaning thereof in Article 260 which is clear in its exclusion of judicial officers in the definition of "State organ".*

7. **THAT** in the same context, Articles 1 (3) (c) and 159 (1), are primarily for the purpose of establishing the judicial arm of government in line with the principle of separation of powers and not for the purpose of empowering judicial officers to exercise judicial authority;

*How judges and all other representatives are empowered to exercise sovereign authority of the people is explicitly and comprehensively delineated and provided for in Article 1 (2) of the Constitution and therefore if judicial officers are exercising judicial authority under Articles 1 (3) (c) or 159 (1) or any other provisions apart from the provisions of Article 1 (2), they are doing so in disguise, fraudulently and unconstitutionally and must be stopped*

8. **THAT** despite the radical changes ushered in by the Constitution of Kenya 2010; the script of the provision vesting judicial power in the Judiciary remained more or less the same as in the old Constitution. Nevertheless, it must be conceived that the new Constitution added more provisions that further delineated the vesting of sovereign power that, when put into context, limited the meaning and application of the term "*vesting of judicial power in the Judiciary*" and therefore we must be careful not to allow hangovers from the previous Constitution obscure our conception, interpretation and application of the new laws that were ushered in by the New Constitution;

Similarly, we must emphasize on the exercise of due diligence when interpreting and applying the new laws that were ushered in by the New Constitution and especially desist from blindly mimicking [as could be the case] other countries on how they apply laws that are similar in script to our laws, as shown below;

*The one outstanding character of Article III of the Constitution of the United States of America is that by virtue of the vesting of judicial power in the Judiciary, United States judges are empowered to exercise judicial authority: it is worth noting that the said United States law is in every practical sense similar to Articles 1 (3) (c) and 159 (1) of the Constitution of Kenya 2010. However, it must be conceived that the application in the Kenyan situation is made different by the fact that, unlike the United States situation, the Kenyan Constitution has other*

*provisions that further delineate the exercise of sovereign power that must also be put into consideration*

**Article III Section 1 of the United States Constitution** - *"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."*

**Article 159 Clause 1 of the Constitution of Kenya**- *"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."*

**Article 1 Clause 3 (c) of the Constitution of Kenya** - *"Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—  
(c) the Judiciary and independent tribunals."*

**Article 1 Clause 2 of the Constitution of Kenya**

*"The people may exercise their sovereign power either directly or through their democratically elected representatives."*

*It is worth noting that the United States law does not explicitly empower judges to exercise judicial power but rather implicitly. The unspoken application thereof is absolutely justifiable because of the absence of any other provision in the United States Constitution that expressly empowers judges to exercise judicial authority.*

*On the other hand, Articles 1 (3) (c) and 159 (1) of the Constitution of Kenya, similar in script and significance to Article III Section 1 of the United States Constitution, explicitly establishes the judicial branch of the government of Kenya and vests judicial authority therein. However, like the United States law, it does not explicitly empower judicial officers to exercise judicial power.*

*However, the notion [like in the United States case] to seek inferred application of the two Kenyan laws in the empowerment of judicial officers to exercise judicial power is in this case null and void as the Constitution of Kenya [like its German counterpart] has a provision that expressly provides for the empowerment of judicial officers in the exercise of judicial power [Article 1 (2)] - **and thus the difference in application of two virtually identical laws between the United States and Kenya***

*Compare the German situation that demonstrates the concept that the vesting of power in the institution of the judiciary fails to expressly empower judicial officers to exercise judicial power and therefore is technically deficient in as much as it is ambiguous and need for further delineation is justified and wherefore the German Constitution in Article 92 [like its Kenyan counterpart in Article 1 (2)] finds it prudent to include a provision that expressly empowers German judges to exercise judicial power instead of relying on running the Judiciary on the ambiguities of a grossly amorphous law.*

***Article 92 of the German Constitution [Court organisation]** - "The judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the Länder."*

9. **THAT** it is indeed very strange that notwithstanding the dictates of Article 1 (2), judicial officers are in office and are exercising the sovereign power of the people courtesy of provisions of the very same constitution. Provisions of Articles 1 (3) (c), 159 (1), 166 and 172 illustrated below, seem to be the source of the controversy:

Article 1 (3) (c):

Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—

(c) the Judiciary and independent tribunals:

Article 159 (1):

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:

Article 166 (1):

(1) The President shall appoint—

(a) the Chief Justice and the Deputy Chief Justice, in accordance with the **recommendation** of the Judicial Service Commission, and subject to the approval of the National Assembly; and

(b) all other judges, in accordance with the **recommendation** of the Judicial Service Commission [JCS]:

Article 172 (1) (c):

(1) The Judicial Service Commission shall—

(c) **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:

*It is important to note that interpretations of Articles 166 (1) and 172 (1) (c) in their exclusive contexts could appropriately mean that the mere "**recommendation**" and "**appointment**" by the Judicial Service Commission (JSC) is enough to legally install and empower judicial officers to exercise the judicial power vested in the Judiciary by the Constitution.*

*However, that is not the case and must never be the case as interpretation of the law in their exclusive contexts can be fatal to the text of the Constitution as is clearly the case herein.*

*Therefore, and undoubtedly so, it is either the inaccurate or expedient interpretation of ambiguous provisions of Articles 1 (3) (c), 159 (1), 166 (1) and 172 (1) (c) that are the source of the misconception, misinterpretation and misapplication of the law to the effect that judicial officers got installed in office contrary to the dictates of Article 1 (2).*

**10. THAT** the terms "**recommendation**" and "**appoint**" as employed in Articles 166 (1) and 172 (1) (c) are grossly ambiguous and if interpreted in their exclusive contexts can give meanings ranging from the most plausible to the utterly ridiculous with the latter having the potential for producing serious consequences on other provisions of the law- a situation that in turn has the potential for precipitating a constitutional crisis as is clearly the case herein:

*The terms "**recommendation**" and "**appoint**" do not lend themselves automatically to single, rigid definitions and that the meaning of the verb "**to recommend**" runs the range from to communicate or report or to advice or guide or counsel or to propose or even **to nominate**:*

*While the meaning of the verb "**to appoint**" runs the gamut from commission to name or designate to assign or delegate or choose to select or nominate or even **to elect**.*

**11. THAT** in matters of interpretation of the Constitution, the general principle is that where there is ambiguity as to the precise meaning, reach or extent of a constitutional provision, it should be interpreted and applied in a manner so as not to contradict the text of the Constitution itself.

**12. THAT** therefore the terms "**recommendation**" and "**appoint**" must not be interpreted in isolation. They must be interpreted in the context of other provisions of the law that further delineate the exercise of sovereign power, and in this case, certainly the most appropriate definition of the terms "**to recommend**" and "**to appoint**" are found in the context of Clause (2) of Article 1 and should therefore be "**to nominate**" and "**to elect**" respectively.

*It is also worthy to note that "to nominate" and "to elect" any individual to an office established by the Constitution in the context of Clause 2 of Article 1 and the relevant constitutional provisions on elections, inherently require that a democratic election conducted and supervised by the IEBC take place.*

**13. THAT** negligent or expedient application of the law could be the only plausible reason why judicial officers have been allowed to exercise judicial power in total contravention of Article 1(2) since even the provisions of Articles 1 (3) (c), 159 (1), 166 and 172 neither expressly exempt judicial officers from being subjected to elections nor bar the JSC from holding elections in the process of recommending and appointing judicial officers for appointments:

**14. THAT** the Constitution is clear in Clause (2) of Article 1 that the only available mechanism for the transfer of sovereign power from the people to the representative is democratic elections and therefore any individual exercising sovereign authority that does not have its origins in a democratic election is essentially exercising that authority illegally and, like judges in the Judiciary, are under an expedient acceptance of a situation that is legally untenable:

**15. THAT** separately, Article 159 (1) could also have been grossly misconceived and misinterpreted [negligently or expediently] to exempt judges and Judicial officers from the dictates of Clause 2 of Article 1 while in the real sense Article 159 (1) is analogous and unanimous to the provisions of Clauses (1) and (3) of Article 1 which in turn do not exempt judicial officers or any other representative of the

people in the exercise of sovereign authority from the dictates of Clause 2 of Article 1.

**16. THAT** for the avoidance of contradiction, the meaning of the terms "**derived from**", "**vests in**" and "**shall be exercised**" as employed in Article 159 (1) should be read, understood, and interpreted in the context of Article 1 of the Constitution. "**Derived from**" should be interpreted in the context of Clause (1) of Article 1 that describes the origins of judicial sovereign authority [*where it is derived from*] and "**vests in**" should be interpreted in the context of Clause (3) of Article 1 that describes how it is delegated to [*vested in*] the judicial organ of State. "**Vests in**" should also in this case be understood in the context of power being delegated to [*vested in*] an organ [institution] [office] and not an individual/representative while "**shall be exercised by the courts**" should be interpreted and conceptualized in the context of both Clauses (2) & (3) of Article 1 that explicitly describe the manner in which sovereign power of the people shall be exercised by representatives and institutions to which it is delegated to in the principle of separation of powers.

*It is worth noting once again that the Constitution in Article 260 [interpretation of the Constitution] "**State organ**" is interpreted to mean an institution - commission, office, court, agency or other body established under the Constitution: the meaning is not extended to include individuals, representatives, State officers or judicial officers.*

**17. THAT** certainly no individual representing the people in the exercise of sovereign power is exempt from the all-inclusive, across-the-board, unequivocal dictates of Article 1 (2) of the Constitution of Kenya 2010 that fundamentally dictate that no individual can exercise the sovereign power of the people unless democratically elected to do so by the people themselves, and therefore judges and judicial officials of subordinate courts must be stopped from exercising the sovereign power of the people unconstitutionally.

**18. THAT** the Constitution of Kenya 2010 is the supreme law of the land and the letter and spirit of its provisions must be strictly followed in the application of the law as stipulated in the following Articles:

**Supremacy of the Constitution:**

Article 2:

(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government:

(2) No person may claim or exercise State authority except as authorized under this Constitution:

Article 3:

(2) Any attempt to establish a government otherwise than in compliance with this Constitution is unlawful.

**19. THAT** despite the law being unequivocally clear that only democratically elected representatives are allowed to exercise sovereign power on behalf of the people, we all must be cognizant and appreciative of the fact that, though ideal for democracy, it is simply inconceivable, flawed and unfeasible to subject judges to democratic elections.

**20. THAT** a judge's work in the corridors of justice is like that of a doctor or engineer. It is more the subject of application of specialized skill rather than the populist wishes or opinions of the public. A judge must also be fully impartial in the discharge of justice and therefore the position of a judge is simply not suited to be subjected to the highly partisan, polarizing and often controversial nature of democratic elections;

**21. THAT** it is the input of professional judges that ensures the professional, sound, creditable and estimably efficient running of judicial systems worldwide and

therefore, the input of professional judges in the justice system is extremely essential and therefore indispensable;

**22. THAT** despite the fact that it is inconceivable to subject judges to democratic elections, due process of the law must be followed to the letter.

Unfortunately, in this case the law dictates that judges must be subjected to democratic elections yet they are not. It is my humble submission to the honourable house that a modified jury system in the form of elected jury is ultimately the best answer for the application of the requirements of Article 1(2) in our Judiciary:

*Under such a structure, the ultimate judicial power is vested in the elected jury and also majorly because the composition of the jury can generally be conveniently subjected to democratic elections; besides, for all intents and purposes, a jury system is implied and intended by our Constitution.*

**23. THAT** the jury system is not a stranger to our Constitution. An amorphous version of the jury system is already provided for in the Constitution pursuant to Article 10 which requires judges and judicial officials of subordinate courts to engage the public whenever they apply [that is, make judgements] or interpret the law as illustrated below:

Article 10:

**National values and principles of governance**

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them:

(a) Applies or interprets this constitution:

(2) The national values and principles of governance include:

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.

**24. THAT** though short of establishing a jury system in our judicial system, in the writing of Article 10 of the Constitution, it is clearly evident that the people of Kenya recognized the fact that the participation of the people in judicial processes is key to achieving justice, freedom and democracy in our judicial system;

**25. THAT** basically, the idea of a single judge arbitrarily giving opinions goes against the basic values and tenets of democratic governance: besides, fact-finding is a matter of common sense and does not require any specialized legal training hence must not be the exclusive preserve of judges and magistrates;

**26. THAT** when writing the new Constitution, the people of Kenya knew from history and experience that it was essential to protect the people against arbitrary action thus we inserted a clause that provided for the participation of the people:

*In the case of the Judiciary, the purpose was certainly to protect the people against compromised judges and judges that are too responsive to higher authority. We strove to create an independent Judiciary but insisted upon further protection against biased judges and thus came up with a provision requiring the participation of the people in the judicial processes.*

**27. THAT** the opinion of several jurors is better than the single opinion of a judge since it is more likely to prevent individual biases; that trial by jury is more than an instrument of justice and a provision of the Constitution; it is the most vivid indicator that freedom, impartiality and democracy are alive in the judicial system of a country;

**28. THAT** the jury system gives the public a real chance to actively participate in the judicial arm of the government where elected representatives are absent;

29. **THAT** ideally, in the Kenyan situation an elected jury would be a perfect cure for the controversial role currently being played by judges in the exercise of judicial authority and also would go far in giving the positive effect of removing judges from being targets for compromise and therefore should be adopted;
30. **THAT** it is possible for Kenya to have an elected jury elected every five years from each county alongside Members of the County Assemblies (MCAs) with their number being equivalent or even more than the number of MCAs elected in the respective counties to act as representatives of the people in the exercise of judicial authority countrywide, and that can easily be achieved without necessarily putting further strain on the exchequer;
31. **THAT** from the provisions of Article 10, it is abundantly clear that, when writing the new Constitution, it was in the interest of the people of Kenya to have a structure quite similar to a jury system established in our judicial system and that therefore the establishment of a jury system is in perfect harmony with the purpose and intent of the Constitution;
32. **THAT** in making a new Constitution, the objective of the people of Kenya was to protect their God-given inalienable right to freely govern themselves based on the rule of law and democratic principles and therefore we came up with a good number of new constitutional safeguards that if implemented would lead to the fulfilment of our objectives;
33. **THAT** your petitioner petitioned the Chief Justice to initiate for changes that would bring the Judiciary to full compliance with Articles 1(2) and 10 of the Constitution. However, the Chief Justice opined that the matters raised were political in nature and therefore advised your petitioner to instead petition the National Assembly for constitutional amendments.

The petitioner confirmed that the issues in respect of which the petition was made were not before any court of law or any legal body.

**The petitioner therefore prays** that the National Assembly propose amendments to the Constitution to establish an elected jury system to take over the role of rendering verdicts and setting penalties from judges and judicial officials of subordinate courts in order to fulfil the requirements of Article 1 (2) of the Constitution and make such other amendments as it may deem fit to ensure that aspirations of the people of Kenya as enshrined in the Constitution prevail within the institution of the Judiciary.

## CHAPTER THREE

### 3.0 COMMITTEE FINDINGS AND RECOMMENDATIONS

#### 3.1 Committee Findings

The Committee made the following observations from the evidence adduced in the meetings-

1. The contention by the Petitioner that since judicial officers are not subjected to democratic elections pursuant to Article 1(2), and are therefore exercising the sovereign power of the people in contravention of the Constitution is misconceived as it does not take into consideration the provisions of Article 1(3) which delegates sovereign power to State organs including the Judiciary and independent tribunals;
2. The Chief Justice and Deputy Chief Justice are appointed with the approval of the National Assembly hence the people's elected representatives are afforded an opportunity to vet those judicial officers who head the institution;
3. As evidenced from submissions presented by Kenyans on the Judicial Service Commission and contained in the Report of the Constitution of Kenya Review Commission, Kenyans desired that the Commission should:
  - a) have its membership drawn from the legal fraternity, the judiciary, professional bodies, the clergy and interest groups;
  - b) appointments to the Commission will be made by the President, **after Parliament, in the form of a parliamentary judicial committee, approves;**
  - c) deal with disciplinary matters.

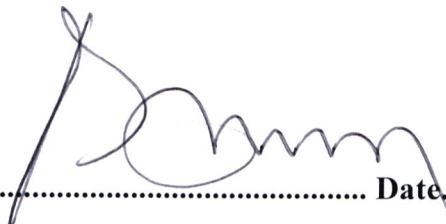
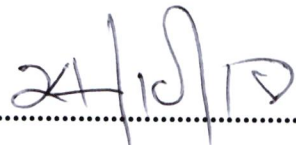
This vetting by Parliament would offer an opportunity for public participation in the appointment of judicial officers as the people's representatives would vet and approve the body responsible for overseeing the human resource function in the Judiciary. It was envisioned that the Commission, having been approved by Members of Parliament, would in turn vet the judges appointed to the

Judiciary. Indeed once appointed, judicial officers personally discharge their duties and have no way of delegating those duties. It is evident that during the review of the Constitution, there were no discussions on election of judicial officers by the people of Kenya.

4. The election of judges is discouraged as it takes away impartiality of judges who may be seen to be biased against those who may not have elected them or to return favours to those who elect them. It may also take away from the longstanding practice of making appointment on the basis of merit and shift to persons holding office by virtue of political affiliation or popularity. The electoral process would require judges to carry out campaigns, make pledges, raise funds and such other incidental acts that judges should not be seen to participate to obtain votes.

### **3.2 Committee Recommendations**

In response to the prayers by the Petitioner, the Committee recommends that **the petition be rejected.**

Sign.......... Date..........

**Hon. William Cheptumo, MP**

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

**ANNEXURE A**  
**ADOPTION LIST**

1  
2  
3



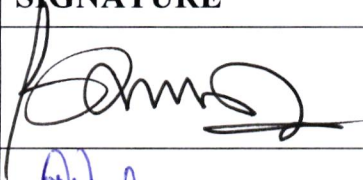
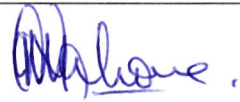
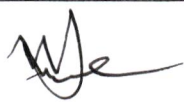
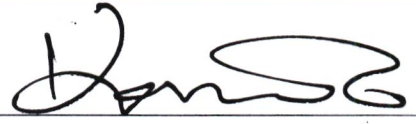
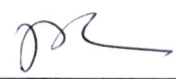
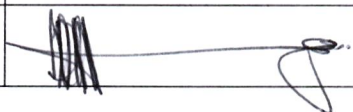
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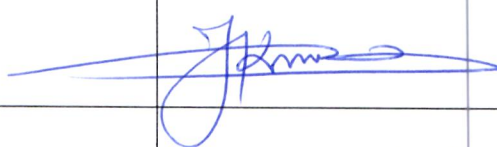





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DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

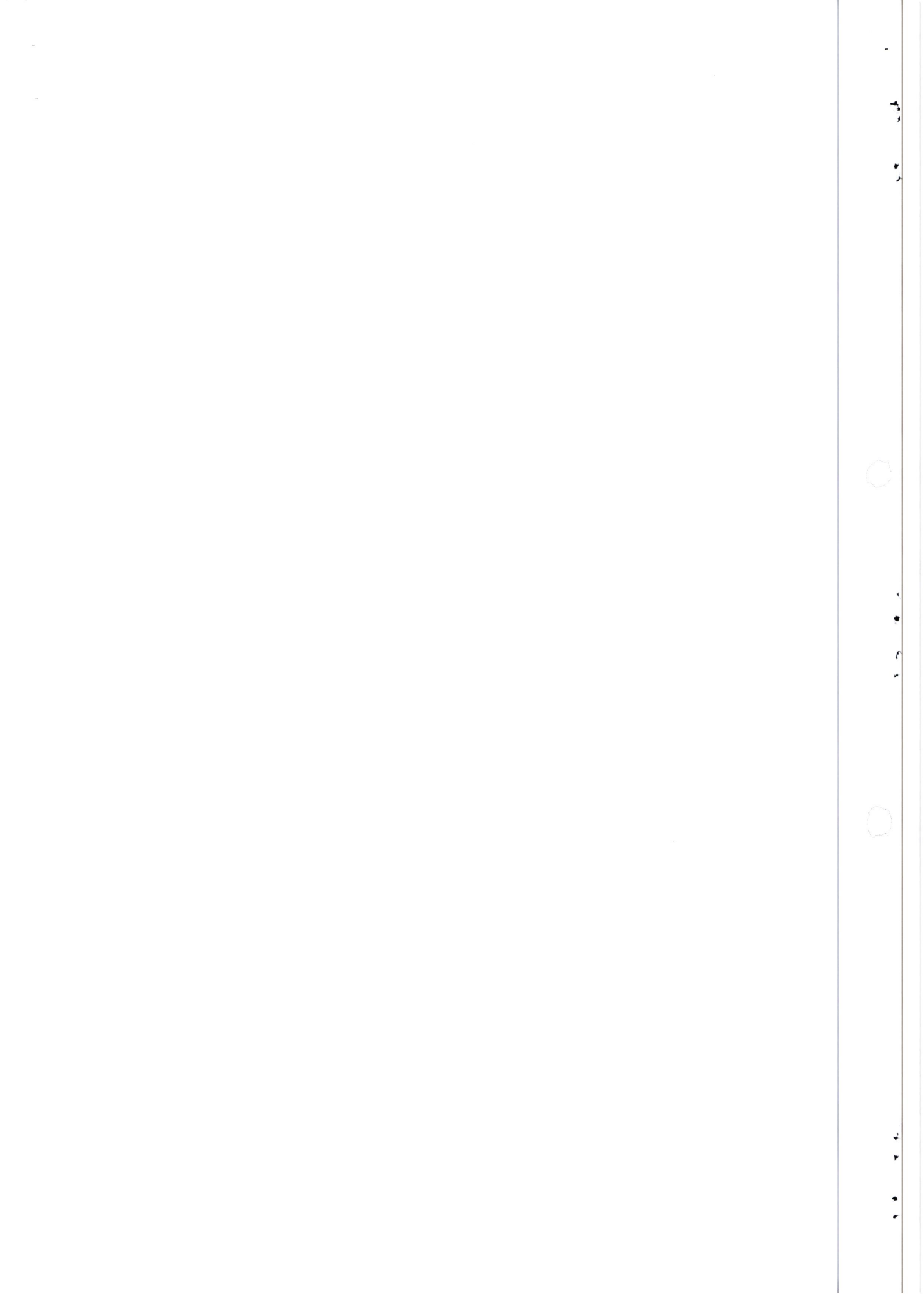
ADOPTION LIST FOR THE REPORT ON PUBLIC PETITION BY MR. GEOFFREY OTIENO OGOLA REGARDING AMENDMENT OF THE CONSTITUTION OF KENYA TO ESTABLISH AN ELECTED JURY

NO.	NAME	SIGNATURE
1.	Hon. William Cheptumo, M.P. - <b>Chairperson</b>	
2.	Hon. Alice Wahome, MP. - <b>Vice Chairperson</b>	
3.	Hon. John Olago Aluoch, MP.	
4.	Hon. Roselinda Soipan Tuya, MP.	
5.	Hon. Ben Momanyi, MP.	
6.	Hon. William Kamoti, MP.	
7.	Hon. Peter Opondo Kaluma, MP.	
8.	Hon. Zuleikha Hassan, MP.	
9.	Hon. Johana Ngeno Kipyegon, MP.	
10.	Hon. Charles Gimose, MP.	
11.	Hon. John Kiarie Waweru, MP.	
12.	Hon. George Gitonga Murugara, MP.	
13.	Hon. Adan Haji Yussuf, MP.	

14.	Hon. Japheth Kiplangat Mutai, MP.		
15.	Hon. Anthony Githiaka Kiai, MP.		
16.	Hon. Jennifer Shamalla, MP.		
17.	Hon. Beatrice Adagala, MP.		
18.	Hon. John Munene Wambugu, MP.		
19.	Hon. Boss Shollei, CBS, MP.		

**ANNEXURE B**

**COMMITTEE MINUTES**



**MINUTES OF THE SIXTY- SIXTH SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON TUESDAY, 28<sup>TH</sup> AUGUST, 2018 AT 10:00A.M. IN THE COMMISSION BOARDROOM, FIRST FLOOR,COUNTY HALL, PARLIAMENT BUILDINGS**

**PRESENT**

1. Hon. William Cheptumo, M.P. - **Chairperson**
2. Hon. Alice Muthoni Wahome, M.P. - **Vice Chairperson**
3. Hon. Ben O. Momanyi, MP.
4. Hon. George G. Murugara, M.P
5. Hon. John Olago Aluoch, M.P.
6. Hon. William K. Mwamkale, M.P.
7. Hon. Peter O. Kaluma, M.P.
8. Hon. Beatrice Adagala, M.P
9. Hon. Gladys Boss Shollei, CBS, M.P
10. Hon. Jennifer Shamalla, M.P.
11. Hon. Anthony G. Kiai, M.P.

**ABSENT WITH APOLOGIES**

1. Hon. Charles Gimose, M.P.
2. Hon. Johana Ng'eno, M.P.
3. Hon. Adan Haji Yussuf, M.P.
4. Hon. Japheth Mutai, M.P.
5. Hon. John M. Wambugu, M.P.
6. Hon. Zuleikha Hassan, M.P.
7. Hon. Roselinda Soipan Tuya, M.P.
8. Hon. John Kiarie Waweru, M.P.

**IN ATTENDANCE**

**COMMITTEE SECRETARIAT**

1. Mr. George Gazemba - Principal Clerk Assistant II
2. Ms. Doreen Karani - Legal Counsel II
3. Ms. Halima Hussein - Third Clerk Assistant
4. Ms. Fiona Musili - Research Officer III
5. Mr. Omar Abdirahim - Fiscal Analyst III

**PETITIONERS**

1. Mr. Geoffrey Otieno Ogola - Petitioner
2. Dr. Gibson Maachanga Mareko - Petitioner

**MIN No. 239 /2018**

**PRELIMINARIES**

The Chairperson called the meeting to order at 10:23 a.m. which was followed by a word of prayer from himself.

The Chairperson informed the meeting as follows-

- (i) The Independent Electoral and Boundaries Commission (IEBC) was scheduled to appear before the Committee on Thursday, 30<sup>th</sup> August, 2018 at 10.00 a.m. to discuss; the aftermath of the court case which declared the resignation of three (3) Commissioners as irregular, enhancing accountability and public confidence restoration by the Commission following the 2017 general elections among other issues;
- (ii) The Independent Electoral and Boundaries Commission had invited the Committee to accompany it on election observation missions as follows-

No	COUNTRY	ELECTION	DATE
1.	Rwanda	Legislative elections	2 <sup>nd</sup> to 4 <sup>th</sup> Sept, 2018
2.	Sweden	General election	9 <sup>th</sup> Sept, 2018
3.	Canada-New Brunswick	General election	24 <sup>th</sup> Sept, 2018
4.	Canada-Quebec	General election	1 <sup>st</sup> Oct, 2018
5.	Brazil	General election	28 <sup>th</sup> Oct, 2018
6.	Thailand	General election	Nov, 2018
7.	United States of America (USA)	Gubernatorial elections	6 <sup>th</sup> November, 2018
8.	South Sudan	Presidential, National Assembly and Local elections	By 31 <sup>st</sup> Dec, 2018
9.	India	Lok Sabha	May, 2018

The Committee considered the invitation and resolved to send three (3) Members each to Canada-Quebec and United States of America (USA) elections. The meeting tasked the Chairperson and Vice Chairperson to determine which Members to travel and advise the Committee.

- (iii) The Committee also resolved to send three (3) Members to the International Bar Association (IBA) Annual Conference scheduled for 7<sup>th</sup> to 12<sup>th</sup> October, 2018 in Rome, Italy and tasked the Chairperson and Vice Chairperson to determine which Members to attend.

**MIN No.240 /2018:-**

**CONFIRMATION OF MINUTES**

Minutes of the sixty-fourth sitting held on 14<sup>th</sup> August, 2018 at 10.00 a.m. in the Mini Chamber, County Hall were confirmed as true record of proceedings and signed by the Chairperson after

being proposed by Hon. John Olago Aluoch, M.P. and seconded by and Hon. Beatrice Adagala, MP. There were no matters arising from the minutes.

**MIN No.241/2018:-**                      **CONSIDERATION OF PETITIONS BEFORE THE COMMITTEE**

**(i) Petition by Mr. Geoffrey Otieno Ogola**

The Petition sought to amend the Constitution to establish an elected jury system to take over the role of rendering verdicts and setting penalties from the judges and judicial officials of subordinate courts to fulfil the requirements of Article 1 (2) with a view to ending the unconstitutional exercise of sovereign power of the people by the judicial officials.

The Petitioner Mr. Geoffrey Otieno Ogola, a physiotherapist by profession appeared before the Committee and made submissions in support of his Petition as follows-

- a) Article 1 (2) of the Constitution states that all the judicial officers currently exercising judicial authority in the Judiciary are doing so as representatives of the people of Kenya and them having not been democratically elected, were exercising the sovereign power of the people illegally;
- b) That Parliament should amend Chapter 10 of the Constitution to remove the ambiguities that have led to gross misinterpretation and misapplication of the Constitution;
- c) That if an elected jury system is introduced, it would complement the dictates of clause 2 Article 1 and 10 of the Constitution as this will ensure that judicial officers exercise the will of the people.

**(ii) Petition by the Law Society of Kenya (LSK)**

The Petition sought to remove the 15 years' experience limit for eligibility to contest for election as representative of the Society at the Judicial Service Commission. The Law Society of Kenya did not appear before the Committee but wrote stating that its written submissions accompanying the petition were enough for the Committee to decide on the Petition.

The Committee resolved to use the written submissions as presented in determining the fate of the Petition during the retreat scheduled for 30<sup>th</sup> August to 4<sup>th</sup> September, 2018 in Mombasa.

**(iii) Petition by Dr. Gibson Maachanga Mareko**

He submitted the following amendments to various Articles of the Constitution;

- a) Article 81 of the Constitution to ensure no person holds same elective post for than two terms to prevent persons from being in the same office for prolong period of time.
- b) Article 138 of the Constitution to ensure that in a presidential election the winner must garners more than 70% of all the valid votes cast and if no candidates get the 70% plus

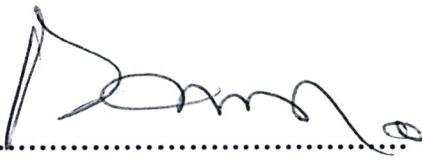
the two leading candidates be declared first and second presidents. He submitted this will reduce election tension and promote political tolerance in the country.

- c) Article 144 (3) (a) to include psychiatrists in the medical panel that examines presidential candidates to ensure the mental and capabilities of the person is assessed by the right doctors.
- d) Amending Article 144 (8) to provide options
- e) Article 145 (6) (b) to ensure after have been substantiated the president cease to hold office to prevent the voting stage.
- f) Article 148 by inserting 148 (9) to ensure a person does not hold office as president if he or she has served as Deputy President for two terms this will ensure that the country's governance is not dominated by one person for twenty years.

**MIN No.242/2018:-**

**ADJOURNMENT**

There being no other business to transact, the Chairperson adjourned the meeting at 11.30 a.m. to a date to be communicated later.

Signed.....  
  
Chairperson

Date..... 07.10.18 .....

**MINUTES OF THE SEVENTY-FOURTH SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON TUESDAY, 4<sup>TH</sup> SEPTEMBER, 2018 AT 10:00 A.M. IN MUDUGUNI ROOM, PRIDE INN PARADISE HOTEL, MOMBASA**

**PRESENT**

- |                                    |   |                         |
|------------------------------------|---|-------------------------|
| 1. Hon. William Cheptumo, M.P.     | - | <b>Chairperson</b>      |
| 2. Hon. Alice Muthoni Wahome, M.P. | - | <b>Vice Chairperson</b> |
| 3. Hon. George G. Murugara, M.P.   |   |                         |
| 4. Hon. John Olago Aluoch, M.P.    |   |                         |
| 5. Hon. William K. Mwamkale, M.P.  |   |                         |
| 6. Hon. Charles Gimose, M.P.       |   |                         |
| 7. Hon. Peter O. Kaluma, M.P.      |   |                         |
| 8. Hon. Beatrice Adagala, M.P.     |   |                         |
| 9. Hon. Jennifer Shamalla, M.P.    |   |                         |
| 10. Hon. Anthony G. Kiai, M.P.     |   |                         |
| 11. Hon. Adan Haji Yussuf, M.P.    |   |                         |
| 12. Hon. Japheth Mutai, M.P.       |   |                         |
| 13. Hon. John Kiarie Waweru, M.P.  |   |                         |

**ABSENT WITH APOLOGIES**

1. Hon. Ben Momanyi, MP.
2. Hon. Gladys Boss Shollei, CBS, M.P
3. Hon. John M. Wambugu, M.P.
4. Hon. Roselinda Soipan Tuya, M.P.

**ABSENT**

1. Hon. Zuleikha Hassan, M.P.
2. Hon. Johana Ng'eno, M.P.

**IN ATTENDANCE**

**COMMITTEE SECRETARIAT**

- |                       |   |                              |
|-----------------------|---|------------------------------|
| 1. Mr. George Gazemba | - | Principal Clerk Assistant II |
| 2. Ms. Doreen Karani  | - | Legal Counsel II             |
| 3. Ms. Halima Hussein | - | Third Clerk Assistant        |
| 4. Ms. Fiona Musili   | - | Research Officer III         |
| 5. Mr. Omar Abdirahim | - | Fiscal Analyst III           |

**MIN No. 272/2018:**

**PRELIMINARIES**

The Chairperson called the meeting to order at 10:00 a.m. which was followed by a word of prayer from Hon. Adan Yussuf MP.

**MIN No. 273/2018:**                    **DRAFT REPORT ON A PETITION BY MR. GEOFFREY OTIENO OGOLA**

The Committee considered the draft report on the petition regarding amendment to the Constitution of Kenya to establish an Elected Jury System to take over the role of rendering verdicts and setting penalties from judicial officers.

The Committee observed that vetting by Parliament would offer an opportunity for public participation in the appointment of judicial officers as the people's representatives would vet and approve the body responsible for overseeing the human resource function in the Judiciary.

**MIN No. 274/2018:**                    **DRAFT REPORT ON A PETITION BY DR. GIBSON MACHANGA MAREKO**

The Committee considered the draft report on the petition regarding amendment to various Articles of the Constitution of Kenya and observed as follows-

- a. The amendment the petitioner proposed could be provided in enabling legislation and not Constitutional amendment
- b. The proposed amendment to Article 148(9) (*on election and swearing in of Deputy President*) was undemocratic as the right to seek for elective posts had been clearly provided for in the Constitution.

**MIN No. 275/2018:**                    **ADJOURNMENT**

There being no other business to transact, the Chairperson adjourned the meeting at 1.20 p.m.

Signed.....

Chairperson

Date.....24-10-18.....

**MINUTES OF THE EIGHTIETH SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON TUESDAY, 16<sup>TH</sup> OCTOBER, 2018 AT 10.30 A.M. IN COMMITTEE ROOM 5<sup>TH</sup> FLOOR, CONTINENTAL HOUSE, PARLIAMENT BUILDING**

**PRESENT-**

- |                                    |   |                         |
|------------------------------------|---|-------------------------|
| 1. Hon. William Cheptumo, M.P.     | - | <b>Chairperson</b>      |
| 2. Hon. Alice Muthoni Wahome, M.P. | - | <b>Vice Chairperson</b> |
| 3. Hon. John Olago Aluoch, M.P.    |   |                         |
| 4. Hon. Peter O. Kaluma, M.P.      |   |                         |
| 5. Hon. William K. Mwamkale, M.P.  |   |                         |
| 6. Hon. Adan Haji Yussuf, M.P.     |   |                         |
| 7. Hon. Jennifer Shamalla, M.P.    |   |                         |
| 8. Hon. Japheth Mutai, M.P.        |   |                         |
| 9. Hon. Beatrice Adagala, M.P.     |   |                         |
| 10. Hon. Anthony G. Kiai, M.P.     |   |                         |

**ABSENT WITH APOLOGIES**

1. Hon. Ben Momanyi Orori, M.P.
2. Hon. Charles Gimose, M.P.
3. Hon. George G. Murugara, M.P.
4. Hon. Roselinda Soipan Tuya, M.P.

**ABSENT**

1. Hon. Johana Ngeno, M.P.
2. Hon. Zuleikha Hassan, M.P.
3. Hon. John M Wambugu, M.P.
4. Hon. Gladys B. Shollei, CBS, M.P.
5. Hon. John Kiarie Waweru, M.P.

**IN ATTENDANCE**

1. Ms. Doreen Karani
2. Ms Halima Hussein

**COMMITTEE SECRETARIAT**

- |   |                     |
|---|---------------------|
| - | Legal Counsel II    |
| - | Clerk Assistant III |

**MIN No.294/2018:**

**PRAYERS AND PRELIMANARIES**

The Chairperson called the meeting to order at 10.30 a.m. with a word of prayer from himself

**MIN No.295/2018:**

**CONFIRMATION OF MINUTES OF PREVIOUS SITTINGS**

- a. Minutes of the Seventy-Eight Sitting held on Tuesday 9<sup>th</sup> October, 2018 at 10.50 am in Committee Room 4<sup>th</sup> Floor, Continental House were confirmed as true record of the proceedings and signed by the Chairperson after being proposed by Hon. Japheth Mutai, M.P and seconded by Hon. John Olago, MP.
- b. Minutes of the Seventy-ninth Sitting held on Thursday 11<sup>th</sup> October, 2018 at 10:30 am in Committee Room 4<sup>th</sup> Floor, Continental House were confirmed as true record of the proceedings and signed by the Chairperson after being proposed by Hon. John Olago MP and seconded by Hon. Beatrice Adagala, MP

**MIN No.296/2018:**

**MEETING THE ATTORNEY GENERAL TO RESPOND TO QUESTION No. 060/2018 BY MEMBER FOR KIHARU CONSTITUENCY (HON. NDINDI NYORO, MP.)**

The Attorney General was invited to appear before the Committee to respond to Question No. 060/2018 by Member for Kiharu Constituency (Hon. Ndindi Nyoro, MP.) however, the Attorney General sent his apology and the meeting was rescheduled to Thursday 25<sup>th</sup> October, 2018.

**MIN No.297/2018:**

**ADOPTION OF REPORTS ON LEGISLATIVE PROPOSALS AND PETITIONS**

The Committee adopted the reports of six legislative proposals and two petitions as follows

- a. The report on the petition to amend Articles 8, 138, 144, 145 and 148 of the Constitution of Kenya by Dr. Gibson Machanga was adopted on a proposal by Hon. Jeniffer Shamalla, MP and seconded by Hon. Alice Wahome, MP.
- b. The report on the petition to amend the Constitution of Kenya to establish an elected jury system by Mr. Geoffrey Otieno Ogola was adopted on a proposal by Hon. Jeniffer Shamalla, MP and seconded by Beatrice Adagala, MP
- c. The report on the Legislative Proposal for Elections (Amendment) Bill, 2018 that proposes to amend section 35 of the Election Act No. 24 of 2011 to change the time for submission of party lists by Political Parties for persons elected under Article 90 of the Constitution from “at least forty-five (45) days from the date of the General Election to “within twenty-one (21) days after the General Election by Hon. Florence Mutua, MP was adopted on a proposal by Hon. William Kamoti, MP and seconded by Hon. Japheth Mutai, MP.
- d. The report on the Legislative Proposal on the Constitution of Kenya (Amendment) Bill, 2018 that seeks to amend the Constitution of Kenya, 2010 in Article 140 clause (2) by increasing the timeline for the hearing of the presidential election petition by the Supreme Court from fourteen (14) to thirty (30) days by Hon. Christopher Aseka Wangaya was adopted on a proposal by Hon. William Kamoti, MP and seconded by Hon. John Olago, MP.

- e. The report on the Legislative Proposal on the Constitution of Kenya (Amendment) Bill, 2018 that proposes to amend the Constitution of Kenya, 2010 in Article 137 BY Hon. Zuleikha Hassan, MP was adopted on a proposal by Hon. Alice Wahome, MP and seconded by Hon. Japheth Mutai, MP.
- f. The report on the Legislative Proposal for Constitution of Kenya (Amendment) Bill, 2018 that seeks to guide the president on the age limit when nominating or appointing persons to the offices of Principal Secretaries, Ambassadors, High Commissioners, Diplomatic and Consular Representatives and other State and Public Officers by Hon. Benjamin Mwangi, MP was adopted on a proposal by Hon. Japheth Mutai, MP and seconded by Hon. Beatrice Adagala, MP
- g. The report on the Legislative Proposal for Parliamentary Service (Amendment) Bill, 2018 that seeks amend the Parliamentary Service Act to ensure that during recruitment and appointment of staff by Hon.Julius Melly, MP was adopted on a proposal by Hon. William Kamoti, MP and seconded by Hon.John Olago, MP.

**MIN No.298/2018:**

**ANY OTHER BUSINESS**

The Committee discussed an article that appeared in the Daily Nation on Friday 12<sup>th</sup> October, 2018 where Chief Justice was reported accusing the National Assembly for failing the Judiciary during the budget-making process. The Committee was concerned with the report and noted that during its joint retreat held in Mombasa with Judiciary in September, 2018 issues regarding judiciary budget cut were resolved.

**MIN No.299/2018:**

**ADJOURNMENT**

There being no Any Other Business to transact, the Chairperson adjourned the meeting at 12.00 pm.

Signed.....

**Chairperson**

Date.....24.10.18.....

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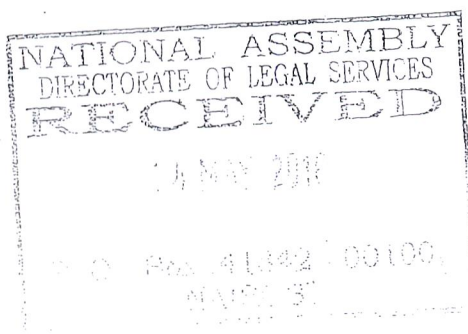
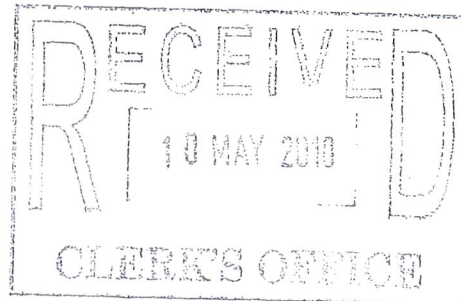
**ANNEXURE C**  
**COPY PETITION**



PETITION TO AMEND THE CONSTITUTION OF KENYA  
TO ESTABLISH AN ELECTED JURY AND END THE  
EXERCISE OF SOVEREIGN POWER OF THE PEOPLE  
BY JUDICIAL OFFICERS IN CONTRAVENTION OF  
ARTICLE 1 CLAUSE 2 OF THE CONSTITUTION

7TH MAY 2018.

TO:  
THE NATIONAL ASSEMBLY,  
REPUBLIC OF KENYA,  
MAIN PARLIAMENT BUILDING,  
NAIROBI - KENYA.



## PETITION TO THE NATIONAL ASSEMBLY:

[Pursuant to Articles 37 and 119 of the Constitution of Kenya]

**BACKGROUND:** Kenya is unique in that probably it is the only country in the world that has a provision in its constitution that is specially dedicated to the explicit description of who sovereign power belongs to, how it is exercised and how it is transferred to the individual/representative for exercise through representation:

**THIS IS A PETITION** calling for amendments to the Constitution to establish an ELECTED JURY SYSTEM to take over the role of rendering verdicts and setting penalties from judicial officers [judges and judicial officials of subordinate courts] on the following grounds:

- (1). That judicial officers were not subjected to democratic elections pursuant to Clause 2 of Article 1, and are therefore in the exercise of sovereign power of the people in CONTRAVENTION OF THE CONSTITUTION:
- (2). That while it is feasible to subject the jury to democratic elections and thus fulfil the requirements of Article 1 (2) in the Judiciary, it is simply inconceivable, flawed and unfeasible to subject judicial officers to democratic elections:

**I, THE UNDERSIGNED**, a citizen of the Republic of Kenya, a Human Rights activist, a member of Homa-Bay County Citizens' Association [also known as Homa-Bay Bunge La Wenyenchi] and a resident of Ndhiwa Constituency of Homa-Bay County, Kenya ...

**Draw the attention of the House to the following:**

1. **THAT** Article 1 of the Constitution of Kenya 2010 explicitly and unequivocally delineates who sovereign power belongs to, how it is exercised, the process through which a representative becomes legitimately entitled to exercise it and how it is delegated to the three organs of State:

Article 1:

### **Sovereignty of the people**

(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution:

(2) The people may exercise their sovereign power either DIRECTLY or THROUGH THEIR DEMOCRATICALLY ELECTED REPRESENTATIVES:

(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

**PETITION TO AMENDMENT THE CONSTITUTION TO ESTABLISH AN ELECTED JURY AND END THE UNCONSTITUTIONAL EXERCISE OF SOVEREIGN POWER OF THE PEOPLE BY JUDICIAL OFFICERS**

---

(c) the Judiciary and independent tribunals:

(4) The sovereign power of the people is exercised at—

(a) the national level; and

(b) the county level:

**2. THAT** Clause 2 of Article 1 clearly and unequivocally dictate that ONLY representatives democratically elected by the people are authorized by the Constitution to exercise sovereign power of the people on the behalf of the people:

**3. THAT** judicial power defines and is one of the three elements that constitute sovereignty: judicial power/authority therefore BELONGS TO THE PEOPLE OF KENYA and MUST also therefore be exercised in accordance with the dictates of Article 1 Clause (2): that is, it must be exercised either directly by the people themselves or through their DEMOCRATICALLY ELECTED REPRESENTATIVES:

**4. THAT** judges and judicial officers of subordinate courts, as representatives of the people in the exercise of judicial power, were not subjected to DEMOCRATIC ELECTIONS as dictated by Clause 2 of Article 1 of the Constitution of Kenya: are not elected representatives of the people and are therefore exercising the sovereign power of the people ILLEGALLY:

**5. THAT** the New Constitution radically changed our legal landscape and in the case of the judicial system, the introduction of Article 1 (2) invalidated the previous constitutional order that empowered judicial officers to exercise judicial power solely by the virtue of the delegation or vesting of sovereign power in the institution of Judiciary:

*The Constitution of Kenya 2010 in Article 1 (2) is exceedingly clear that sovereign power of the people of Kenya can only be exercised by representatives elected democratically by the people and the constitutional requirements for the representation of the people in the exercise of sovereign power are also clearly stipulated in Chapter Seven of the Constitution [Representation of the People]:*

**6. THAT** it is a fact that in the context of Chapter 1 of the Constitution of Kenya 2010, Clause 3 of Article 1 is basically about establishing the three organs of State and dividing sovereign power among them for the purposes of creating a system of checks and balances: it is hardly about empowering individuals/representatives in the exercise of sovereign power of the people:

**PETITION TO AMENDMENT THE CONSTITUTION TO ESTABLISH AN ELECTED JURY AND END THE UNCONSTITUTIONAL EXERCISE OF SOVEREIGN POWER OF THE PEOPLE BY JUDICIAL OFFICERS**

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*In accordance with Article 260 [interpretation of the Constitution] "State organ" is interpreted to mean a commission, office, court, agency or other body established under the Constitution and therefore, for all intents and purposes, this provision of the law is basically for the division and delegation of sovereign authority to the three State organs in accordance with the principle of separation of powers vital for the purposes of creating a system of checks and balances:*

*The Constitution in its wisdom leaves no room for the exploitation of ambiguities as to the meaning of "State organ" and therefore endeavours to give an unequivocal interpretation of the meaning thereof in Article 260: and the interpretation is as clear as daylight in its exclusion of judicial officers in the definition of "State organ":*

*It is abundantly clear that in the context of Chapter 1, the purpose and intent of Article 1 (3) is all about the principle of separation of powers: that it is hardly about empowering representatives in the exercise of the sovereign power of the people: how representatives are empowered to exercise sovereign power of the people is expressly and comprehensively provided for in the preceding clause:*

**7. THAT** in the same context, Articles 1 (3) (c) and 151 (1), are primarily for the purposes of establishing the judicial arm of government in line with the principle of separation of powers and not for the purposes of empowering judicial officers to exercise judicial authority:

*How judges and all other representatives are empowered to exercise sovereign authority of the people is explicitly and comprehensively delineated and provided for in Article 1 (2) of the Constitution and therefore if judicial officers are exercising judicial authority under Articles 1 (3) (c) or 151 (1) or any other provisions apart from the provisions of Article 1 (2), they are doing so in disguise, fraudulently and unconstitutionally and MUST be stopped:*

**8. THAT** despite the radical changes ushered in by the New Constitution, the script of the provision vesting judicial power in the Judiciary remained more or less the same as in the old Constitution: NEVERTHELESS, it must be conceived that the new Constitution added more provisions that further delineated the vesting of sovereign power that, when put into context, limited the meaning and application of the term "vesting of judicial power in the Judiciary" and therefore we must be careful not to allow hangovers from the previous Constitution obscure our conception, interpretation and application of the new laws that were ushered in by the New Constitution:

PETITION TO AMENDMENT THE CONSTITUTION TO ESTABLISH AN ELECTED JURY AND END THE UNCONSTITUTIONAL EXERCISE OF SOVEREIGN POWER OF THE PEOPLE BY JUDICIAL OFFICERS

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Similarly, we must emphasize on the exercise of due diligence when interpreting and applying the new laws that were ushered in by the New Constitution and especially desist from blindly mimicking [as could be the case] other countries on how they apply laws that are similar in script to our laws [see illustration in italics below]:

*The one outstanding character of Article III of the Constitution of the United States of America [US] is that by virtue of the vesting of judicial power in the Judiciary, US judges are empowered to exercise judicial authority: it is worth noting that the said US law is in every practical sense similar to Articles 1 (3) (c) and 151 (1) of the Constitution of Kenya 2010: however, it must be conceived that the application in the Kenyan situation is made different by the fact that, unlike the US situation, the Kenyan Constitution has other provisions that further delineate the exercise of sovereign power that must also be put into consideration:*

*Article III Section 1 of the US Constitution - "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."*

*Article 151 Clause 1 of the Kenya Constitution - "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."*

*Article 1 Clause 3 (c) of the Constitution of Kenya - "Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—  
(c) the Judiciary and independent tribunals."*

*Article 1 Clause 2 of the Constitution of Kenya - "The people may exercise their sovereign power either directly or through their democratically elected representatives."*

*Article III Section 1 of the US Constitution establishes and empowers the judicial branch of the US government: solely, it vests judicial power of the US in one Supreme Court and empowers judges to exercise judicial authority:*

*It is worth noting that the US law does not explicitly empower judges to exercise judicial power but rather IMPLICITLY and the tacit application thereof is absolutely justifiable because of the absence of any other provision in the US Constitution that expressly empowers judges to exercise judicial authority:*

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*On the other hand, Articles 1 (3) (c) and 151 (1) of the Constitution of Kenya, similar in script and purport to Article III Section 1 of the US Constitution, also explicitly establish the judicial branch of the government of Kenya and vests judicial authority therein: and quiet like the US law, does not explicitly empower judicial officers to exercise judicial power:*

*However, the notion [like in the US case] to seek tacit application of the two Kenyan laws in the empowerment of judicial officers to exercise judicial power is in this case null and void as the Constitution of Kenya [like its German counterpart] has a provision that expressly provide for the empowerment of judicial officers in the exercise of judicial power [Article 1 (2)] - **and thus the difference in application of two virtually identical laws between the US and Kenya:***

*COMPARE the German situation that exemplifies and demonstrates the concept that the vesting of power in the institution of the judiciary fails to expressly empower judicial officers to exercise judicial power and therefore is technically deficient in as much as it is ambiguous and need for further delineation is justified and wherefore the German Constitution in Article 92 [like its Kenyan counterpart in Article 1 (2)] finds it prudent to include a provision that expressly empower German judges to exercise judicial power instead of relying on running the Judiciary on the ambiguities of a grossly amorphous law:*

*Article 92 of the German Constitution [Court organisation] - "The judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the Länder."*

*It is important to note that in matters of interpretation of the Constitution, where another provision exist that expressly provide for [as in this case] the empowerment of judicial officers in the exercise of judicial power, it takes precedence:*

**9. THAT** it is indeed VERY STRANGE that notwithstanding the dictates of Article 1 (2), judicial officers are in office and are exercising the sovereign power of the people COURTESY OF PROVISIONS OF THE VERY SAME CONSTITUTION: and on the face of it, provisions of Articles 1 (3) (c), 151 (1), 166 and 172 illustrated below, seem to be the source of the controversy:

Article 1 (3) (c):

Sovereign power under this Constitution is delegated to the following State organs which shall perform their functions in accordance with this Constitution—

(c) the Judiciary and independent tribunals:

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Article 151 (1):

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:

Article 166 (1):

(1) The President shall appoint—

(a) the Chief Justice and the Deputy Chief Justice, in accordance with the **recommendation** of the JSC, and subject to the approval of the National Assembly; and

(b) all other judges, in accordance with the **recommendation** of the Judicial Service Commission [JCS]:

Article 172 (1) (c):

(1) The Judicial Service Commission shall—

(c) **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:

10. THAT from the above, it is needless to belabor the point that Articles 166 (1) and 172 (1) (c) with the justification of Articles 1 (3) (c), 151 (1) are precisely the laws that have been applied to install judicial officers in office to exercise judicial power of the people contrary to the dictates of Article 1 (2): NEVERTHELESS, it is worthy to note that the provisions of the four articles are fraught with AMBIGUITIES and do not in any express terms exempt judges and other judicial officials from the dictates of Article 1 (2):

*Ambiguities can be misleading and can also be exploited if it were expedient [politically or otherwise] to do so and therefore it is possible that the ambiguities in Articles 1 (3) (c), 151 (1), 166 (1) and 172 (1) (c) were either negligently or expediently misconceived and misinterpreted to exempt judges and judicial officials from the dictates of Article 1 (2) of the Constitution:*

*It is also important to note that interpretations of Articles 166 (1) and 172 (1) (c) in their EXCLUSIVE CONTEXTS could appropriately mean that the mere "recommendation" and "appointment" by the JSC is enough to LEGALLY install and empower judicial officers to exercise the judicial power vested in the Judiciary by the Constitution:*

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*However, that is not the case and must never be the case as interpretation of the law in their exclusive contexts can be fatal to the text of the Constitution as is clearly the case herein:*

*Therefore, and undoubtedly so, it is either the inaccurate or expedient interpretation of ambiguous provisions of Articles 1 (3) (c), 151 (1), 166 (1) and 172 (1) (c) that are the source of the fatal misconception, misinterpretation and misapplication of the law to the effect that judicial officers got installed in office contrary to the dictates of Article 1 (2):*

**11. THAT** the terms "**recommendation**" and "**appoint**" as employed in Articles 166 (1) and 172 (1) (c) are grossly ambiguous and if interpreted in their exclusive contexts can give meanings ranging from the most plausible to the utterly ridiculous with the latter having the potential for producing fatal consequences on other provisions of the law: a situation that in turn has the potential for precipitating a constitutional crisis as is clearly the case herein:

*The terms "**recommendation**" and "**appoint**" do not lend themselves automatically to single, rigid definitions and that the meaning of the verb "**to recommend**" runs the range from to COMMUNICATE or REPORT to ADVICE or GUIDE or COUNSEL to PROPOSE or even to **NOMINATE**:*

*While the meaning of the verb "**to appoint**" runs the gamut from COMMISSION to NAME or DESIGNATE to ASSIGN or DELEGATE or CHOOSE to SELECT or NOMINATE or even to **ELECT**:*

**12. THAT** in matters of interpretation of the Constitution, the general principle is that where there is ambiguity as to the precise meaning, reach or extent of a constitutional provision, it should be interpreted and applied in a manner so as not to CONTRADICT the text of the Constitution itself:

**13. THAT** therefore the terms "**recommendation**" and "**appoint**" MUST NOT be interpreted in isolation: they must be interpreted in the context of other provisions of the law that further delineate the exercise of sovereign power, and in this case, certainly the most appropriate definition of the terms "**to recommend**" and "**to appoint**" are found in the context of Clause (2) of Article 1 and should therefore be "**to nominate**" and "**to elect**" respectively:

*It is also worthy to note that "**to nominate**" and "**to elect**" any individual to an office established by the Constitution in the context of Clause 2 of Article 1 and the relevant constitutional provisions on elections, inherently require that a democratic election conducted and supervised by the IEBC take place:*

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14. **THAT** negligent or expedient application of the law could be the only plausible reason why judicial officers have been allowed to exercise judicial power in total contravention of Article 1(2) since even the provisions of Articles 1 (3) (c), 151 (1), 166 and 172 neither expressly exempt judicial officers from being subjected to elections nor bar the JSC from holding elections in the process of recommending and appointing judicial officers for appointments:

15. **THAT** the Constitution is crystal clear in Clause 2 of Article 1 that the only available mechanism for the transfer of sovereign power from the people to the representative is democratic elections and therefore any individual exercising sovereign authority that does not have its origins in a democratic election is essentially exercising that authority **ILLEGALLY** and, like judges in the Judiciary, are under an expedient acceptance of a situation that is legally untenable:

16. **THAT** separately, Article 151 (1) could also have been grossly misconceived and misinterpreted [negligently or expediently] to exempt judges and Judicial officers from the dictates of Clause 2 of Article 1 while in the real sense Article 151 (1) is **ANALOGOUS** and **UNANIMOUS** to the provisions of Clauses (1) and (3) of Article 1 which in turn do not in whichever way whatsoever exempt judicial officers or any other representative of the people in the exercise of sovereign authority from the dictates of Clause 2 of Article 1:

Article 151:

(1) 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:

17. **THAT** for the avoidance of contradiction, the meaning of the terms "**derived from**", "**vests in**" and "**shall be exercised**" as employed in Article 159 (1) should be read, understood, and interpreted in context of Article 1 of the Constitution:

"**Derived from**" should be interpreted in the context of Clause (1) of Article 1 that describes the origins of judicial sovereign authority [*where it is derived from*] and "**vests in**" should be interpreted in the context of Clause (3) of Article 1 that describes how it is delegated to [*vested in*] the judicial organ of State: "**vests in**" should also in this case be understood in the context of power being delegated to [*vested in*] an organ [institution] [office] and NOT an individual/representative WHILE "**shall be exercised by the courts**" should be interpreted and conceptualized in the context of both Clauses (2) & (3) of Article 1 that explicitly describe the manner in which sovereign power of the people shall be exercised by representatives and to which institutions it is delegated to in the principle of separation of powers:

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*It is worth noting once again that the Constitution in Article 260 [interpretation of the Constitution] "State organ" is interpreted to mean an institution - commission, office, court, agency or other body established under the Constitution: the meaning is not extended to include individuals, representatives, State officers or judicial officers:*

**18. THAT** certainly no individual representing the people in the exercise of sovereign power is exempt from the all-inclusive, across-the-board, unequivocal dictates of Article 1 (2) of the Constitution of Kenya 2010 that fundamentally dictate that no individual can exercise the sovereign power of the people unless democratically elected to do so by the people themselves: and therefore judges and judicial officials of subordinate courts MUST be stopped from exercising the sovereign power of the people UNCONSTITUTIONALLY:

**19. THAT** the Constitution of Kenya 2010 is the SUPREME LAW OF THE LAND and its provisions must be strictly followed to the letter and spirit in the application of the law as unequivocally stipulated in the following Articles:

**Supremacy of the Constitution:**

Article 2:

- (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government:
- (2) No person may claim or exercise State authority except as authorized under this Constitution:

Article 3:

- (2) Any attempt to establish a government otherwise than in compliance with this Constitution is unlawful:

**20. THAT** despite the law being unequivocally clear that only democratically elected representatives are allowed to exercise sovereign power on behalf of the people, we all must be cognizant and appreciative of the fact that, though ideal for democracy, it is simply inconceivable, flawed and unfeasible to subject judges to democratic elections:

**21. THAT** a judge's work in the corridors of justice is like that of a doctor or engineer: it is more the subject of application of specialized skill than the populist wishes or opinions of the public: a judge must also be fully impartial in the discharge of justice and therefore the position of a judge is simply not suited to be subjected to the highly partisan, polarizing and often controversial nature of democratic elections:

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**22. THAT** notwithstanding, it is the input of professional judges that ensures the professional, sound, creditable and estimably efficient running of judicial systems worldwide and therefore, the input of professional judges in the justice system is extremely essentially and therefore indispensable:

**23. THAT** nevertheless, despite the fact that it is inconceivable to subject judges to democratic elections, due process of the law must be followed to the letter:

Unfortunately, in this case the law dictates that judges must be subjected to democratic elections yet they are not and therefore A SOLUTION TO THIS POTENTIAL CONSTITUTIONAL CRISIS SITUATION MUST BE SOUGHT AND FOUND:

**24. THAT** fortunately, there is a way out of our unique situation as exemplified in jurisdictions that allow for citizens to exercise judicial authority through a structure known as the JURY SYSTEM and also as envisaged in Article 10 of our Constitution:

**25. THAT** it is my HUMBLE SUBMISSION TO THE HONORABLE HOUSE that a modified jury system in the form of ELECTED JURY is ultimately the best answer for the application of the requirements of Article 1(2) in our Judiciary:

*It is arguably the best answer because under such a structure, the ultimate judicial power is vested in the elected jury and also MAJORLY because the composition of the jury can generally be conveniently subjected to democratic elections: BESIDES, for all intents and purposes, a jury system is implied and intended for by our Constitution:*

**26. THAT** the jury system is not a stranger to our Constitution: an amorphous version of the jury system is already here with us provided for in the Constitution pursuant to Article 10: however, due to the poor implementation and sometimes the complete lack of it, the people of Kenya are yet to fully realize its impact:

**27. THAT** though never applied, the dictates of Article 10 require judges and judicial officials of subordinate courts to engage the participation of the people whenever they apply [that is, making judgements] or interpret the law as illustrated below:

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Article 10:

**National values and principles of governance**

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them:

(a) APPLIES OR INTERPRETS THIS CONSTITUTION:

(2) The national values and principles of governance include:

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and PARTICIPATION OF THE PEOPLE:

28. THAT though short of establishing a jury system in our judicial system, in the writing Article 10 of the Constitution, it is clearly evident that the people of Kenya recognized the fact that the participation of the people in judicial processes is key to achieving justice, freedom and democracy in our judicial system:

29. THAT basically, the idea of a single judge arbitrarily giving opinions goes against the basic values and tenets of democratic governance: besides, fact-finding is a matter of common sense and does not require any specialized legal training hence must not be the exclusive preserve of judges and magistrates:

30. THAT when writing the new Constitution, the people of Kenya knew from history and experience that it was essential to protect the people against arbitrary action thus we inserted a clause that provided for the participation of the people:

*In the case of the Judiciary, the purpose was certainly to protect the people against compromised judges and judges that are too responsive to higher authority:*

*We strove to create an independent Judiciary but insisted upon further protection against biased judges and thus came up with a provision requiring the participation of the people in the judicial processes:*

31. THAT the opinion of several jurors is better than the single opinion of a judge since it is more likely to prevent individual biases: that trial by jury is more than an instrument of justice and a provision of the Constitution: it is the most vivid indicator that freedom, impartiality and democracy are alive in the judicial system of a country:

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32. **THAT** the jury system as practiced in many developed democracies is a perfect reflection and exemplification of what was envisaged by Article 10 of the Constitution as the kind of justice system that is most appropriate for the people of Kenya:

33. **THAT** the jury system gives the public a REAL CHANCE to ACTIVELY participate in the judicial arm of the government where elected representatives are absent:

*Conceivably, the jury system present the BEST OPPORTUNITY AND MECHANISM available through which sovereign authority in the Judiciary of Kenya can be exercised by democratically elected representatives and therefore should be explored, studied, customized and ADOPTED:*

34. **THAT** ideally, in the Kenyan situation an ELECTED JURY would be a PERFECT CURE for the controversial role currently being played by judicial officers in the exercise of judicial authority and also would also go further into giving the positive effect of removing judicial officers from being targets for compromise and therefore SHOULD BE ADOPTED:

35. **THAT** it is possible for Kenya to have an elected jury elected to act as representatives of the people in the exercise of judicial authority elected every five years from each county alongside MCAs with their number being equivalent or even more that of MCAs elected in the respective counties: and that can easily be achieved without necessarily putting further strain on the exchequer:

36. **THAT** from the provisions of Article 10, it is abundantly clear that, when writing the new Constitution, it was in the interest of the people of Kenya to have a structure quite similar to a jury system established in our judicial system and that therefore the establishment of a jury system is in perfect harmony with the purpose and intent of the Constitution:

37. **THAT** basically, this country is not realizing the full benefits of the new Constitution because of poor implementation of the law and at many times, the complete lack of it:

That it is high time the people of Kenya got all what they were looking for when they wrote adopted and enacted the new Constitution:

38. **THAT** in making a new Constitution, the objective of the people of Kenya was to protect their God given inalienable right to freely govern themselves based on supremacy of sovereignty, constitutionalism, the rule of law and democratic principles and therefore we came up with a good number of new constitutional safeguards that if implemented to the letter and spirit would lead to the fulfilment of our objective:

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**39. THAT** your petitioner petitioned the Chief Justice to initiate for changes that would bring the Judiciary to full compliance with Articles 1(2) and 10 of the Constitution: however, the Chief Justice opined that the matters raised were political in nature and therefore advised your petitioner to instead petition the National Assembly for constitutional amendments:

**40. THAT** your petitioner hereby confirms that the issues herein under which this petition is made are not pending before any court of law or constitutional or legal body:

**REASONS WHEREFORE YOUR PETITIONER HUMBLY PRAYS THAT:**

(a). The Honorable House amends the Constitution to establish an ELECTED JURY SYSTEM to take over the role of rendering verdicts and setting penalties from judges and judicial officials of subordinate courts in order to fulfill the requirements of Article 1 (2) in the Judiciary and thereby end the unconstitutional exercise of sovereign power of the people by judicial officers:

(b). The Honorable House be pleased to make such other amendments as it shall deem fit in this regard in ensuring that the aspirations of the people of Kenya as encapsulated in the Constitution [supremacy of sovereignty, constitutionalism, the rule of law and democratic governance] prevail within the institution of the Judiciary.



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