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TWELFTH PARLIAMENT | FIFTH SESSION

26/04/2021

THE NATIONAL ASSEMBLY AND THE SENATE

JOINT REPORT OF THE NATIONAL ASSEMBLY
DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL
AFFAIRS AND THE SENATE STANDING COMMITTEE ON
JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

ON

THE CONSTITUTION OF KENYA (AMENDMENT) BILL, 2020
(A Bill to Amend the Constitution by Popular Initiative)

Clerks' Chambers,
First Floor,
Parliament Buildings,
NAIROBI.

PAPERS LAID	
DATE	28/04/2021
TABLED BY	Chair, JLAHC
COMMITTEE	JLAHC/JLAC
CLERK AT THE TABLE	N. Jorja

APRIL, 2021

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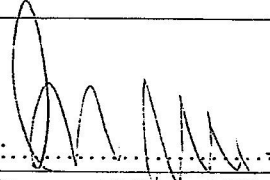
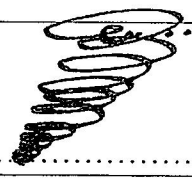
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FOREWORD BY THE CHAIRPERSONS

1. The Constitution of Kenya (Amendment) Bill, 2020, a Bill to amend the Constitution by popular initiative, was read a First Time in the National Assembly and the Senate on Thursday, 4th March, 2021. Pursuant to Standing Orders 127(1) and 202A of the National Assembly Standing Orders and Standing Orders 140(1) and 224 of the Senate Standing Orders, the Bill was committed by the respective Speakers to the National Assembly Departmental Committee on Justice and Legal Affairs and the Senate Standing Committee on Justice, Legal Affairs and Human Rights for consideration for consideration by the Committees.
2. In the Memorandum of Objects and Reasons of the Bill, the promoters of the Bill, the Building Bridges Initiative, indicate that the Bill seeks to address issues arising from implementation of the Constitution of Kenya, 2010. Specifically, the need to resolve issues of divisive elections and promote gender equity in governance, strengthen the structure of devolution and increase resource allocation to the counties, broaden mechanisms for all the people of Kenya to benefit from economic growth, harmonize certain roles and functions of the bicameral legislature, fortify national ethos by specifying the responsibilities of citizens and strengthen accountability on public resources and the fight against corruption.
3. Pursuant to Article 118 of the Constitution, Standing Order 127(3) of the National Assembly Standing Orders and Standing Order 140(5) of the Senate Standing Orders, the two Committees, by way of an advertisement published in the Daily Nation and Standard newspapers on Friday, 5th March, 2021, invited interested organizations and members of the public to submit any views or make representations regarding the Constitution of Kenya (Amendment) Bill, 2020. The representations were received by post, hand delivery to the Office of the Clerk, or by electronic mail.
4. The Committees further held public hearings on the Bill on Thursday, 11th March, 2021, Tuesday, 16th March, 2021 and Wednesday, 17th March, 2021, during which the Committees received submissions from diverse organizations and members of the public. In total, the Committees received written and oral submissions from the Promoters of the Bill, as well as sixty-five (65) organizations and individuals. Nine (9) other organizations attended the public hearings on the Bill but did not present any submissions or did so as part of an umbrella organization or consortium.
5. Thereafter, the Committees retreated to consider the Bill and the public submissions received thereon. In so doing, the Committees identified several weighty constitutional, legal, and procedural issues for consideration by the Committees, which were clustered under thematic areas, namely: nature of the Bill, public

participation on the Bill, processing of the Bill, substantive issues on the Bill, referendum issues, and the status of litigation relating to consideration of the Bill.

6. The Committees have now adopted this Joint Report, which is structured into six Chapters, as follows: Chapter 1 contains a background on the process leading to and following publication of the Bill, until its introduction in Parliament. Chapter 2 contains a detailed analysis of the provisions contained in the Bill and also makes reference to the other legislation proposed in the Report of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report ('the BBI Report').
7. Chapter 3 of the Report is an overview of the submissions received from stakeholders and members of the public on the Bill. Chapter 4 reviews the litigation filed in various courts relating to the BBI Report and the Constitution of Kenya (Amendment) Bill. Chapter 5 contains the detailed deliberations of the Committees on various matters, clustered into the six thematic areas mentioned above and the observations made by the Committees on each of these areas. Lastly, Chapter 6 contains the recommendations of the Committees to the two Houses in respect of the Bill.
8. We take this opportunity to commend the Committee Members for their devotion and commitment to duty which made the consideration of the Bill successful. We also express gratitude to the Offices of the Speakers of both Houses of Parliament for providing direction to the Committees and the Clerks of the two Houses for providing technical and logistical support to the Committees.
9. On behalf of the National Assembly Departmental Committee on Justice and Legal Affairs and the Senate Standing Committee on Justice, Legal Affairs and Human Rights, and pursuant to the provisions of Standing Order 199 (6) of the National Assembly Standing Orders and Standing Order 213 (6) of the Senate Standing Orders, it is now my pleasant privilege and duty to present to the House the Joint Report of the two Committees on consideration of the Constitution of Kenya (Amendment) Bill, 2020.

 Signed:.....	 Signed:.....
Hon. Clement Muturi Kigano, MP Chairperson, National Assembly Departmental Committee on Justice and Legal Affairs	Sen. Erick Okong'o Mogeni, SC, MP Chairperson, Senate Standing Committee on Justice, Legal Affairs and Human Rights

PREFACE

1. The National Assembly Departmental Committee on Justice and Legal Affairs is established pursuant to standing order 216(5) of the National Assembly Standing Orders. Under the Second Schedule to the said Standing Orders, the Committee is mandated to consider all matters relating to –

Constitutional affairs, the administration of law and justice, including the Judiciary, public prosecutions, elections, ethics, integrity and anti-corruption, and human rights.

2. The Committee is comprised of the following Members: –

- 1) Hon. Clement Muturi Kigano,MP - Chairperson
- 2) Hon. (Dr.) Paul Otiende Amollo, EBS, SC, MP - Vice Chairperson
- 3) Hon. Emmanuel Wangwe, CBS, MP - Member
- 4) Hon. Junet Sheikh Nuh, CBS, MP - Member
- 5) Hon. John Olago Aluoch, CBS, MP - Member
- 6) Hon. George Peter Opondo Kaluma,MP - Member
- 7) Hon. Roselinda Soipan Tuya, CBS, MP - Member
- 8) Hon. William Kamoti Mwamkale,MP - Member
- 9) Hon. Zuleikha Hassan, MP - Member
- 10) Hon. Josephine Naisula Lesuuda, MP - Member
- 11) Hon. George Gitonga Murugara, MP - Member
- 12) Hon. Adan Haji Yussuf, MP - Member
- 13) Hon. Japheth Kiplangat Mutai,MP - Member
- 14) Hon. Anthony Githiaka Kiai, MP - Member
- 15) Hon. Shamalla, Jennifer,MP - Member
- 16) Hon. John Kiarie Waweru, MP - Member
- 17) Hon. John Munene Wambugu,MP - Member
- 18) Hon. Anthony Tom Oluoch,MP - Member
- 19) Hon. Robert Gichimu Githinji, MP - Member

3. The Senate Standing Committee on Justice, Legal Affairs and Human Rights is established pursuant to standing order 218(3) of the Senate Standing Orders. Under the Second Schedule to the said Standing Orders, the Committee is mandated to consider all matters relating to –

Constitutional affairs, the organization and administration of law and justice, elections, promotion of principles of leadership, ethics, and integrity; agreements, treaties, and conventions; and implementation of the provisions of the Constitution on human rights.



4. The Committee is comprised of the following Members: -

- 1) Sen. Erick Okong'o Mogeni, SC, MP - Chairperson
- 2) Sen. (Canon) Naomi Jilo Waqo, MP - Vice Chairperson
- 3) Sen. Amos Wako, EGH, SC, FCI Arb, MP - Member
- 4) Sen. James Orengo, EGH, SC, MP - Member
- 5) Sen. Fatuma Dullo, CBS, MP - Member
- 6) Sen. Mutula Kilonzo Junior, CBS, MP - Member
- 7) Sen. Irungu Kang'ata, CBS, MP - Member
- 8) Sen. Johnson Sakaja, CBS, MP - Member

5. The Secretariat of the National Assembly Departmental Committee on Justice and Legal Affairs comprises: -

- 1) Mr. Abenayo Wasike - Principal Clerk Assistant (*Lead Clerk*)
- 2) Mr. Denis Abisai - Principal Legal Counsel
- 3) Mr. Ahmed Hassan Odhwa - Principal Research Officer
- 4) Ms. Roselyne Ndegi - Serjeant-at-Arms
- 5) Ms. Halima Hussein - Clerk Assistant
- 6) Mr. Omar Abdirahim - Fiscal Analyst
- 7) Mr. Joseph Okong'o - Media Relations Officer
- 8) Ms. Lynette Otieno - Legal Counsel

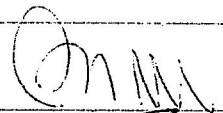

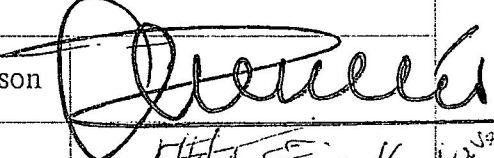
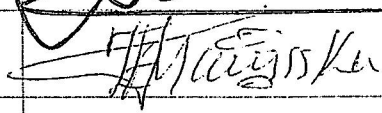

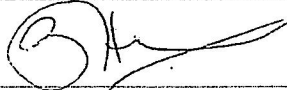

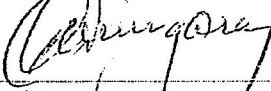

6. The Secretariat of the Senate Standing Committee on Justice, Legal Affairs and Human Rights comprises: -

- 1) Mr. Charles Munyua - First Clerk Assistant (*Lead Clerk*)
- 2) Mr. Moses Kenyanchui - Legal Counsel
- 3) Mr. Said Osman - Research Officer
- 4) Ms. Sylvia Nasambu - Clerk Assistant
- 5) Ms. Lucianne Limo - Media Relations Officer
- 6) Mr. James Ngusya - Serjeant-at-Arms
- 7) Mr. James Kimiti - Hansard Officer

7. The Minutes of the Joint Sitzings of the two Committees in considering the Constitution of Kenya (Amendment) Bill, 2020 are attached to this Report collectively as *Annex I*.

**ADOPTION OF THE JOINT REPORT ON THE CONSTITUTION OF KENYA
(AMENDMENT) 2020**

We, the undersigned Members of the National Assembly Departmental Committee on Justice and Legal Affairs and the Senate Standing Committee on Justice, Legal Affairs and Human Rights do hereby append our signatures to adopt the Report on consideration of the Constitution of Kenya (Amendment) Bill, 2020 –

Co-Chairpersons		
Hon. Clement Muturi Kigano, MP	Co-Chairperson	
Sen. Erick Okong'o Mogeni, SC, MP	Co-Chairperson	
Members of the National Assembly Departmental Committee on Justice and Legal Affairs		
Hon. (Dr.) Paul Otiende Amollo, EBS, SC, MP	Vice Chairperson	
Hon. Emmanuel Wangwe, CBS, MP	Member	 <i>Senate 5/2</i> <i>Amollo</i>
Hon. Junet Sheikh Nuh, CBS, MP	Member	
Hon. John Olago Aluoch, CBS, MP	Member	
Hon. George Peter Opondo Kaluma, M.P	Member	
Hon. Roselinda Soipan Tuya, CBS, MP	Member	
Hon. William Kamoti Mwamkale, M.P	Member	
Hon. Zuleikha Hassan, MP	Member	
Hon. Josephine Naisula Lesuuda, M.P	Member	
Hon. George Gitonga Murugara, MP	Member	
Hon. Adan Haji Yussuf, MP	Member	

Hon. Japheth Kiplangat Mutai, M.P	Member	
Hon. Anthony Githiaka Kiai, MP	Member	<i>KIAI</i>
Hon. Shamalla, Jennifer, MP	Member	<i>Shamalla</i>
Hon. John Kiarie Waweru, MP	Member	ABSTAINED
Hon. John Munene Wambugu, MP	Member	John Munene Wambugu
Hon. Anthony Tom Oluoch, MP	Member	Anthony Tom Oluoch
Hon. Robert Gichimu Githinji, MP	Member	<i>Robert Gichimu Githinji</i> (SAVE FOR PARAGRAPH 557)
Members of the Senate Standing Committee on Justice, Legal Affairs and Human Rights		
Sen. (Canon) Naomi Jilo Waqo, MP	Vice-Chairperson	Naomi Jilo Waqo
Sen. Amos Wako, EGH, SC, FCI Arb, MP	Member	
Sen. James Orengo, EGH, SC, MP	Member	<i>James Orengo</i>
Sen. Fatuma Dullo, CBS, MP	Member	
Sen. Mutula Kilonzo Junior, CBS, MP	Member	<i>Mutula Kilonzo Junior</i>
Sen. (Dr.) Irungu Kang'ata, CBS, MP	Member	ABSTAINED
Sen. Johnson Sakaja, CBS, MP	Member	Johnson Sakaja (Save for Paragraph 557 as expressed in minority report)

CHAPTER ONE: INTRODUCTION

A. The Process leading to the Formulation of the Constitution of Kenya (Amendment) Bill, 2020

1. On 9th March, 2018, His Excellency, President Uhuru Kenyatta and the former Prime Minister, Hon. Raila Odinga came together with the aim of uniting the country in what has commonly come to be referred to as the 'handshake'. This set in motion a process to identify comprehensive changes that would strengthen the rule of law, unite Kenyans, deepen constitutionalism and launch a comprehensive reform process to consolidate [the] momentous opportunity¹. This gesture of reconciliation between the two leaders has been hailed as having ended a period of political tension occasioned by the polarized and disputed 2017 general elections.
2. His Excellency, the President and the former Prime Minister released a joint communique on "*Building Bridges to a New Kenyan Nation*"² (*Annex 2*). The Communique contained nine issues that affected our society that were identified as relevant public agenda issues by the two leaders which were to be addressed as national priority issues through formulation of public policies and legislation. These issues were ethnic antagonism and competition, lack of a national ethos, inclusivity, devolution, divisive elections, safety and security, corruption, shared prosperity and responsibilities and rights of citizens. The two leaders agreed to roll out a programme to implement their shared objectives to address these issues.³
3. To actualize these objectives His Excellency, the President, vide Legal Notice No. 5154 of 2018 published on 31st May, 2018, appointed the BBI Taskforce - the Building Bridges to Unity Advisory Taskforce - to document and recommend practical policy and administrative reform proposals that would build Kenya's lasting unity and the implementation modalities for each identified challenge area (*Annex 3*). The BBI Taskforce was chaired by the late Senator Mohamed Yusuf Haji. The terms of reference of the BBI Taskforce were to –
 - (a) evaluate the national challenges outlined in the Joint Communiqué of "Building Bridges to a New Kenyan Nation" and having done so, make practical recommendations and reform proposals that build lasting unity;
 - (b) outline the policy, administrative reform proposals and implementation modalities for each identified challenge area; and

¹Report of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce, October, 2020, available on <http://kenyalaw.org/ki/fileadmin/pdfdownloads/BBIFinalVersion.pdf>>

² <https://www.president.go.ke/2018/03/09/building-bridges-to-a-new-kenyan-nation>>.

³ Supra note 1.

- (c) conduct consultations with citizens, the faith-based sector, cultural leaders, the private sector and experts at both the county and national levels.
4. On 26th November, 2019, the BBI Taskforce released its report on “Building Bridges to a United Kenya: *from a Nation of Blood Ties to a Nation of Ideals*” (the BBI Taskforce Report) which was unveiled to the public on 27th November, 2019 for public engagement (*Annex 4*). The BBI Taskforce Report identified nine core challenges that threaten the unity of Kenya. These challenges are lack of a national ethos, responsibilities and rights of citizens, ethnic antagonism and competition, divisive elections, inclusivity, shared prosperity, corruption, devolution, and safety and security.
5. In coming up with report, the BBI Taskforce visited the 47 counties and collected views from more than 7,000 citizens from all ethnic groups, genders, cultural and religious practices, and different social and economic sections. The persons who presented their views to the BBI Taskforce included more than 400 elected leaders past and present, prominent local voices from the community, the youth, 123 individuals representing major institutions including constitutional bodies and major stakeholders in the public and private sectors, 261 individuals and organizations who sent memoranda via (e)mail and 755 citizens who offered handwritten submissions during public forums in the Counties.⁴
6. The BBI Taskforce Report made policy and administrative reform recommendations for each of the identified challenge areas that the BBI Taskforce was to address. These recommendations include constitutional amendments, policy reforms, statutory enactments, institutional reforms as well as behavioural and ethical changes amongst the citizens. More broadly, the BBI Taskforce Report envisaged a fundamental shift in the governance system of the country, the management of the economy and the interaction of families and invited every Kenyan to revisit the societal fabric and foundation.
7. On 10th January, 2020, His Excellency, the President vide Legal Notice No. 264 of 2020, appointed a Steering Committee, the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report (*Annex 5*). The mandate of the Steering Committee was to –
- (a) conduct validation of the BBI Taskforce Report through consultations with citizens, civil society, faith-based organizations, cultural leaders, the private sector and experts; and

⁴ Supra note 1.



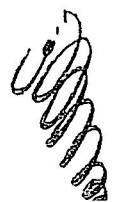
- (b) propose administrative, policy, statutory or constitutional changes necessary for the implementation of the recommendations contained in the BBI Taskforce Report taking into account any relevant contributions made during the validation period.
8. In order to achieve its objectives, the Steering Committee held a total of 93 stakeholder consultation meetings in Nairobi where representatives from civil society, faith-based organizations, women's groups, youth groups, PWD groups, cultural leaders and Government presented their views. Additionally, regional delegates meetings and public meetings were held across the country to discuss and validate the BBI Taskforce Report, and the Steering Committee received written validation submissions from these meetings. Finally, the Steering Committee received a total of 347 written memoranda from members of the public and different organizations and invited external experts and drafters to provide technical information, expertise on various issues and drafting.
9. The Steering Committee completed its task and on 26th October, 2020 and presented its Report, the Report of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report (*Annex 6*). In line with its mandate, the Steering Committee made constitutional, legislative, policy and administrative recommendations on the implementation of the BBI Taskforce Report.
10. On constitutional reforms, the Steering Committee proposed amending the Constitution in –
- (a) Chapter Two to address regional integration, cohesion, shared prosperity and the centrality of the economy in order to harness regional trade, investment and people-to-people links to increase our prosperity, opportunities for investment and enhance our security;
 - (b) Chapter Three to strengthen the national ethos by outlining the responsibilities of citizens;
 - (c) Chapter Four to provide a constitutional underpinning for the privacy of citizens' personal data as an emerging area in human rights owing to significant technological developments in this area;
 - (d) Chapter Six to intensify the fight against corruption by strengthening the relevant institutions;
 - (e) Chapter Seven to resolve issues of divisive elections arising from electoral processes;

- (f) Chapter Eight to remodel the Parliamentary system by bringing the Executive arm of Government back into the Parliament and establishing the office of the Leader of the Official Opposition;
- (g) Chapter Nine by the introduction of the office of the Prime Minister and two Deputy Prime Ministers, and that Cabinet Ministers may be appointed from among members of the National Assembly in order to promote greater inclusivity, and mitigate the drawbacks of the “winner-take-all” electoral formula; and
- (h) Chapter Ten to introduce the independent office of the Judiciary Ombudsman, who shall sit on the Judicial Service Commission so as to enhance judicial accountability to the people of Kenya;
- (i) Chapter Eleven by increasing the resources to the Counties from the current 15% to at least 35% of the last audited accounts and ensuring that the focus is on service delivery in the settled and serviced areas including for people living near the furthest boundaries of each County, creating a County Ward Development Fund and ensuring greater inclusivity, fairness, equity and accountability in the distribution of resources;
- (j) Chapter Twelve to streamline public finance principles and processes to promote efficiency and ensure expenditures are directed to maximizing utility;
- (k) Chapters Thirteen, Fourteen and Fifteen to ensure that the Public Service, National Security agencies and Commissions and Independent Offices are not only strengthened but also accountable to the people of Kenya, have internal accountability systems that clearly and transparently separate the power of appointment and promotion from that of interdiction and censure, carry out rigorous audits that inquire into value for money and ensure that sound principles of public finance management apply to every arm of Government and every public institution., and facilitate, promote and enable ethical conduct and responsibility in public resource management;
- (l) Chapter Sixteen on General Provisions to define new terms introduced by the proposed amendments; and
- (m) Third Schedule to make provision for the oaths to be administered in respect of State officers for whom such requirements had been omitted.

11. Regarding legislative proposals, the Steering Committee proposed the following legislative proposals –

- (a) the Public Finance Laws (Amendment) Bill, 2020, to amend –

- (i) the Public Finance Management Act, No. 18 of 2012, to provide for offences relating to the handling of public monies by Public Officers or Accounting Officers, and liability arising out of loss of public money;
- (ii) the Public Procurement and Asset Disposal Act, No. 33 of 2015, to obligate accounting officers to ensure that procurement of goods, works and services is done transparently and with strict adherence to the approved procurement plans and that money is available for payment of goods or services being procured;
- (iii) the Public Audit Act, No. 34 of 2015, to empower the office of the Auditor General to recruit its own staff;
- (iv) the Controller of Budget Act, No. 26 of 2016, to require the Controller of Budget to carry out due diligence on all ongoing projects, to ascertain whether money previously approved for the project has been utilised prudently, before the Controller authorises release of more funds for the projects; and
- (v) the Higher Education Loans Board Act, No. 33 of 1995, to give loanees a grace period of four years from the date of completion of their studies before they can commence repayment of loans advanced to them, and also exempt loanees without a source of income from paying interest on the loans advanced to them until they start earning an income;
- (b) the Prompt Payment Bill, 2020, to provide a legal framework for the payment of invoices for goods and services procured by public entities within thirty days and mechanisms for settling disputes over invoices;
- (c) the Micro and Small Enterprises (Amendment) Bill, 2020, to amend the Micro and Small Enterprises Act to give youth-owned enterprises a seven-year tax break, and to establish business incubation centres across the country for the purposes of providing business advisory services, including access to capital and Government contracts;
- (d) the County Wards Development Fund Bill, 2020, to provide a legal framework for the operationalisation of the Ward Development Fund;
- (e) the Health (Amendment) Bill, 2020, to amend the Health Act so as to establish the Health Services Commission responsible for making recommendations to the national government on national policies for management of health care workers; monitoring implementation of national policies for management of health care workers by county governments and recommending appropriate action; and setting and regularly reviewing norms and standards on health matters;
- (f) the Election Laws (Amendment) Bill, 2020, to amend the Elections Act, the Political Parties Act, the Independent Electoral and Boundaries Commission, Election Campaign Financing Act, and the Election Offences Act so as to



- deliver an electoral system that is transparent, accountable and democratic and promotes the will of the people;
- (g) the Anti-Corruption and Economic Crimes (Amendment) Bill, 2020, to enhance penalty for economic crimes and corruption offences, expedite the hearing and determination of economic crimes and corruption cases, and also to provide for the duty to report any knowledge or suspicion of instances or acts of corruption or economic crimes;
 - (h) the Ethics and Integrity Laws (Amendment) Bill, 2020, to amend the Leadership and Integrity Act to provide a framework for dealing with public funds and personal wealth, and making financial declarations by state officers, and prohibit public officers from engaging in business with a public entity or engaging in public collection of funds. It also proposes to amend the Public Officer Ethics Act (No. 4 of 2003 to bar public officers from participating in public collections;
 - (i) the Contribution to Charity Bill, 2020, to repeal the Public Collections Act and put in place a framework which is line with the Constitution for the regulation public collections or *harambees* and provide a clear demarcation between public collection for charitable purposes and public collection for private benefit;
 - (j) the Devolution Laws (Amendment) Bill, 2020, to amend the County Governments Act, 2012 and the intergovernmental Relations Act, 2012, to align various provisions of the Acts with court decisions on matters relating to devolution, to incorporate lessons learnt in the implementation of the Acts, and to require County Governors to designate to Deputy Governors County executive committee portfolios;
 - (k) the Public Participation Bill, 2020, to provide a framework for effective public participation framework both at both levels of government;
 - (l) the National Economic and Social Council Bill, 2020 to provide a comprehensive legal framework on the identification of Kenya's socio-economic development priorities will be done and to provide for a body that shall be in charge of general coordination of national planning;
 - (m) the Persons with Disabilities Act, No. 14 of 2003, so as to reflect the rights declared under Article 54 of the Constitution of Kenya;
 - (n) the Statute Law (Miscellaneous Amendments) Bill, 2020, to the Interpretation and General Provisions Act to harmonise the definition of 'Cabinet Minister' with the proposed Constitutional Amendment amongst others, the Judicial Services Act to harmonise with the proposed amendments of the Constitution on the Secretary of the Commission, the National Intelligence Service Act to expand the definition of the word 'vetttable position' to ensure the Service vets all applicants to public offices, the Mutual

Legal Assistance Act to harmonise the list of mainstream competent authorities with the provisions of section 7(2) of the Act and to provide for clear legal basis for innovative ways of direct cooperation between competent authorities, and the Commission on Administrative Justice Act to provide that after having concluded an investigation or inquiry and found a public officer guilty of gross violation of the Constitution or the law, the Commission shall be able to make a recommendation that such an officer is unfit to hold public office.

12. Upon the launch of the Report by the Steering Committee, various stakeholders and members of the public raised concerns on the manner in which their interests had been captured in the draft Constitution of Kenya (Amendment) Bill, 2020. Some of the concerns related to the manner of recruitment of the IEBC commissioners, the recruitment of the judiciary ombudsman, the judiciary fund, the national police service, national government constituencies development fund, implementation of the two-thirds gender rule in Parliament, gender requirements for the deputy governor, the role of the Senate in county allocation of Revenue and term limits for Governors.

13. As a result of the concerns raised, the draft Constitution of Kenya (Amendment) Bill, 2020 was reviewed to incorporate the concerns and the final Constitution of Kenya (Amendment) Bill, 2020, was printed by the Government Printer on and dated 25th November, 2020 as a Bill for the amendment of the Constitution by popular initiative. The Memorandum of Objects and Reasons indicates the promoters of the Bill as the Building Bridges Initiative. (*Annex 7*).

B. The Process for the Amendment of the Constitution by Popular Initiative

14. The Constitution of Kenya, 2010, outlines the procedure for the amendment of the Constitution by way of parliamentary initiative and popular initiative. With regard to the amendment of the Constitution by way of popular initiative, Article 257 of the Constitution provides as follows—

(1) An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters.

(2) A popular initiative for an amendment to this Constitution may be in the form of a general suggestion or a formulated draft Bill.

(3) If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill.



- (4) *The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters.*
- (5) *If the Independent Electoral and Boundaries Commission is satisfied that the initiative meets the requirements of this Article, the Commission shall submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission.*
- (6) *If a county assembly approves the draft Bill within three months after the date it was submitted by the Commission, the speaker of the county assembly shall deliver a copy of the draft Bill jointly to the Speakers of the two Houses of Parliament, with a certificate that the county assembly has approved it.*
- (7) *If a draft Bill has been approved by a majority of the county assemblies, it shall be introduced in Parliament without delay.*
- (8) *A Bill under this Article is passed by Parliament if supported by a majority of the members of each House.*
- (9) *If Parliament passes the Bill, it shall be submitted to the President for assent in accordance with Article 256(4) and (5).*
- (10) *If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in Article 255(1), the proposed amendment shall be submitted to the people in a referendum.*
- (11) *Article 255(2) applies, with any necessary modifications, to a referendum under clause (10).*

15. Where the Bill makes provision for amendment of a matter specified under Article 255 of the Constitution requiring a referendum or where one House fails to pass the Bill, the Bill is required to be submitted to the people in a referendum. Article 255 of the Constitution provides for the conduct of a referendum where a Bill to amend the Constitution contains amendments relating to –

- (a) the supremacy of the Constitution;
- (b) the territory of Kenya;
- (c) the sovereignty of the people;
- (d) the national values and principles of governance referred to in Article 10(2)(a) to (d);
- (e) the Bill of Rights;
- (f) the term of office of the President;
- (g) the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies;
- (h) the functions of Parliament;



- (i) the objects, principles and structure of devolved government; or
- (j) the provisions of this Chapter.

16. Article 256(4) and (5) of the Constitution with respect to the submission of the Bill for assent and the referral of the Bill to the IEBC for the purposes of the conduct of a referendum provide as follows –

(4) Subject to clause (5), the President shall assent to the Bill and cause it to be published within thirty days after the Bill is enacted by Parliament.

(5) If a Bill to amend this Constitution proposes an amendment relating to a matter specified in Article 255(1) –

(a) the President shall, before assenting to the Bill, request the Independent Electoral and Boundaries Commission to conduct, within ninety days, a national referendum for approval of the Bill; and

(b) within thirty days after the chairperson of the Independent Electoral and Boundaries Commission has certified to the President that the Bill has been approved in accordance with Article 255(2), the President shall assent to the Bill and cause it to be published

17. Article 255(2) of the Constitution provides as follows with respect to the approval of a Bill to amend the Constitution in a referendum –

(2) A proposed amendment shall be approved by a referendum under clause (1) if –

(a) at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum; and

(b) the amendment is supported by a simple majority of the citizens voting in the referendum.

C. Previous Proposals to Amend the Constitution by way of Popular Initiative

18. The proposed Constitution of Kenya (Amendment) Bill, 2020, is the second proposal for the amendment of the Constitution by way of popular initiative. The first proposal was the Punguza Mizigo (Constitution Amendment) Bill, 2019, the promoters of which were Thirdway Alliance Kenya and which, upon verification by the IEBC, was submitted to the county assemblies for approval in line with Articles 257(4) of the Constitution. At the expiry of the three months period for consideration by the county assemblies –

(a) twenty-six county assemblies had delivered the draft Bill together with a certificate of the resolution to either approve or reject the draft Bill; and

(b) out of the twenty-six county assemblies –

(i) three approved the draft Bill, these being Machakos, Turkana and Uasin Gishu county assemblies; and

(ii) twenty-three rejected the draft Bill, these being Kwale, Kilifi, Tana River, Wajir, Mandera, Marsabit, Isiolo, Meru, Tharaka-Nithi, Kitui, Makueni, Nyeri, Murang'a, Samburu, Trans Nzoia, Nandi, Laikipia, Narok, Kajiado, Kericho, Bomet, Bungoma and Busia county assemblies.

19. It was therefore found that the threshold required for the introduction of the Bill to Parliament under Article 257(7) of the Constitution had not been met. This information was published in the Kenya Gazette on 22nd November, 2019 as Gazette Notice No. 11014 of 2019 (*Annex 8*).

20. It was during the process of receiving the draft Bill and resolutions from the county assemblies that various administrative gaps were noted which were not addressed by the Constitution or any other legislation. In particular, it was noted that–

(a) there was no provision for the timeline within which county assemblies should deliver the draft Bill and the resolution of the assembly to Parliament after the expiry of the three-month period for consideration set out under Article 257 of the Constitution;

(b) there was no standard framework for the manner in which county assemblies were to consider and either approve or reject the Bill;

(c) there was no provision for the verification of the documents received from a county assembly and the process to be followed where a county assembly did not adhere to Article 257(6) of the Constitution; and

(d) the Constitution did not impose an obligation on a county assembly which rejects a draft Bill to submit the Bill and its resolution to Parliament.

21. For this reason, the Speakers of the National Assembly and the Senate published guidelines: *Guidelines for the Delivery by the County Assemblies to the Speakers of the Two Houses of Parliament of a Draft Bill for the Amendment of the Constitution by Popular Initiative*, which were published in the Kenya Gazette on 18th November, 2019 as Legal Notice No. 175 of 2019 (*Annex 9*). These Guidelines provide for –

(a) the submission, by a Speaker of a county assembly, of the draft Bill and certificate of either approval or rejection in the form prescribed in the Schedule

- and the manner in which such documents shall be delivered to the Speakers of Parliament;
- (b) the format of the certificate of approval or rejection;
 - (c) the verification of the documents received;
 - (d) the return of documents, by the Speakers of the National Assembly and the Senate, where a county assembly fails to adhere to Article 257(6) of the Constitution and the issuance of such directions as the Speakers by consider necessary to allow for compliance by the county assembly;
 - (e) a reporting mechanism to the respective Houses, by the Speaker of the National Assembly and the Senate on the submissions received from the county assemblies and whether the threshold for introduction of the Bill in Parliament under Article 257(7) of the Constitution has been met.

22. It was however noted that whereas the Guidelines were able to cure some of the administrative gaps relating to the process, there may be need to provide further clarity regarding the process, including the time within which county assemblies should submit their documents after approval or rejection by the respective assembly.

D. Processing of the draft Constitution of Kenya (Amendment) Bill, 2020

(1) Printing of the draft Constitution of Kenya (Amendment) Bill, 2020

23. Article 257(2) and (3) of the Constitution provides as follows regarding the formulation of an amendment to the Constitution of Kenya, 2010 –

(2) A popular initiative for an amendment to this Constitution may be in the form of a general suggestion or a formatted draft Bill.

(3) If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill.

24. The Bill was printed by the Government Printer on 25th November, 2020. The promoters of the Bill subsequently submitted the draft Bill together with the details of the supporters of the draft to the IEBC on 10th December, 2020, pursuant to Article 257(4) of the Constitution which provides as follows –

(4) The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission which shall verify that the initiative is supported by at least one million registered voters.

(2) Verification of Signatures in Support of the draft Constitution of Kenya (Amendment) Bill, 2020

25. Article 257(4) of the Constitution requires the IEBC to verify that the initiative is supported by at least one million registered voters. The IEBC, through a press release issued on 22nd February, 2021 (*Annex 10*), confirmed having received the draft Bill and the details of the supporters in soft and hard copies. The IEBC also confirmed that it had undertaken a verification exercise to confirm whether the initiative was supported by at least one million registered voters and had completed the verification process on 18th February, 2021. Its findings were as follows –

No.	Description of the activity/process	Record Count
1.	Supporters records captured	4,352,037
2.	Supporters records with incomplete details (invalid names/IDs and missing ID/Passport numbers)	31,829
3.	Supporters records appearing more than once	456,079
4.	Supporters records with no signature	7,549
5.	Supporters not in the Register of Voters	668,578
6.	Supporters who objected	1
7.	Total verified supporters records in the Register of Voters	3,188,001

Source: IEBC press release, 22nd February, 2021

26. IEBC further confirmed that upon verification of the records, the draft Bill had been supported by a total of 3,188,001 registered voters. Hence, the draft Bill met the threshold required for its transmission to the forty-seven county assemblies by IEBC.

(3) Consideration of the draft Constitution of Kenya (Amendment) Bill, 2020 by the County Assemblies

27. Article 257(5) of the Constitution requires the IEBC, upon carrying out the verification process, to submit the draft Bill to each county assembly for their consideration as follows –

(5) If the Independent Electoral and Boundaries Commission is satisfied that the initiative meets the requires of the Article, the Commission shall submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission.



28. The Clerk of the National Assembly and the Clerk of the Senate wrote to the Ag. Commission Secretary/ Chief Executive Officer vide a letter Ref. DLS(S) GEN-CORR.VOL dated 8th February, 2020 (*Annex 11*) requesting for information regarding the submission of the draft Bill, 2020 by the IEBC to the forty-seven county assemblies. The Ag. Commission Secretary/CEO wrote back to the Clerk of the National Assembly and the Clerk of the Senate vide a letter ref. IEBC/DLPA/JLAC/2021 dated 16th February, 2020, (*Annex 12*) stating that the Commission had submitted the draft Bill to each of the 47 county assemblies on 26th January, 2021 for their consideration. The IEBC also submitted a copy of the letter submitting the Bill to the county assemblies (*Annex 13*) and the schedule of proof of delivery and date of receipt of the Bill by the county assemblies (*Annex 14*).
29. Article 257(5) of the Constitution requires each county assembly to consider the draft Bill within a period of three months after the date it was submitted to each by IEBC. Article 257(6) of the Constitution further requires the county assemblies to submit a copy of the draft Bill to the Speakers of the National Assembly and the Senate within the said three months period as follows –
- (6) If a county assembly approves the draft Bill within three months after the date it was submitted by the Commission, the Speaker of the county assembly shall deliver a copy of the draft Bill jointly to the Speakers of the two Houses of Parliament, with a certificate that the county assembly has approved it.*
30. Paragraphs (1) and (2) of the Guidelines provide the procedure for the delivery of the draft Bill to the Speakers of the National Assembly and the Senate as follows –
- (1) Upon approval by a County Assembly of a draft Bill to amend the Constitution by popular initiative, the Speaker of the County Assembly shall notify the Speakers of the two Houses of Parliament of the approval of the draft Bill by the County Assembly by delivering, to each Speaker, during official working hours, the following documents-*
- (a) a copy of the draft Bill; and*
- (b) a certificate, as prescribed in the First Schedule certifying that the County Assembly has approved the draft Bill.*
- (2) Where upon consideration of a draft Bill to amend the Constitution by popular initiative, a County Assembly rejects the Bill, the Speaker of the County Assembly shall notify the Speakers of the two Houses of Parliament*

of the rejection by the County Assembly of the draft Bill by delivering, to each Speaker, during official working hours, the following documents-

- (a) a copy of the draft Bill; and
- (b) a certificate, as prescribed in the Second Schedule certifying that the County Assembly has rejected the draft Bill.

31. The county assemblies submitted From the schedule of deliveries submitted by the IEBC to the Clerk of the National Assembly and the Clerk of the Senate (*Annex 14*), the first set of county assemblies received the draft Bill on the 27th January, 2021, while Elgeyo Marakwet County Assembly received the draft Bill last, having received it on 2nd February, 2021. Consequently, the last date by which Elgeyo Marakwet County Assembly ought to make a resolution after its consideration of the draft Bill pursuant to the provisions of Article 257(5) of the Constitution is 3rd May, 2021.

32. The certificates of approval and rejection together with the draft Bills as received from the respective county assemblies by the Speakers of the National Assembly and the Senate as at 11th March, 2021, were as follows-

NAME OF COUNTY ASSEMBLY	COPY OF THE BILL DELIVERED (Tick appropriately)	CERTIFICATE OF APPROVAL (Tick appropriately)	CERTIFICATE OF REJECTION (tick appropriately)	DATE DELIVERED (DD/MM/YY)
MOMBASA	✓	✓	Not applicable	24/2/2021
	✓	✓		24/2/2021
KWALE	✓	✓	Not applicable	26/2/2021
	✓	✓		26/2/2021
KILIFI	✓	✓	Not applicable	3/3/2021
	✓	✓		3/3/2021
TANA RIVER	✓	✓	Not applicable	24/2/2021
	✓	✓		25/2/2021
LAMU	✓	✓	Not applicable	2/3/2021

NAME OF COUNTY ASSEMBLY	COPY OF THE BILL DELIVERED (Tick appropriately)	CERTIFICATE OF APPROVAL (Tick appropriately)	CERTIFICATE OF REJECTION (tick appropriately)	DATE DELIVERED (DD/MM/YY)
	✓	✓		2/3/2021
TAITA TAVETA	✓	✓	Not applicable	24/2/2021
	✓	✓		24/2/2021
GARISSA	✓	✓	Not applicable	24/2/2021
	✓	✓		24/2/2021
WAJIR	✓	✓	Not applicable	01/3/2021
	✓	✓		01/3/2021
MANDERA	✓	✓	Not applicable	5/3/2021
	✓	✓		5/3/2021
MARSABIT	✓	✓	Not applicable	25/2/2021
	✓	✓		25/2/2021
ISIOLO	✓	✓	Not applicable	25/2/2021
	✓	✓		25/2/2021
MERU	✓	✓	Not applicable	24/2/2021
	✓	✓		24/2/2021
THARAKA-NITHI	✓	✓	Not applicable	24/2/2021
	✓	✓		24/2/2021
EMBU	✓	✓	Not applicable	24/2/2021
	✓	✓		24/2/2021
KITUI	✓	✓	Not applicable	23/2/2021

NAME OF COUNTY ASSEMBLY	COPY OF THE BILL DELIVERED (Tick appropriately)	CERTIFICATE OF APPROVAL (Tick appropriately)	CERTIFICATE OF REJECTION (tick appropriately)	DATE DELIVERED (DD/MM/YY)
	✓	✓		23/2/2021
MACHAKOS	✓	✓	Not applicable	24/2/2021
	✓	✓		24/2/2021
MAKUENI	✓	✓	Not applicable	23/2/2021
	✓	✓		23/2/2021
NYANDARUA	✓	✓	Not applicable	25/2/2021
	✓	✓		25/2/2021
NYERI	✓	✓	Not applicable	24/2/2021
	✓	✓		24/2/2021
KIRINYAGA	✓	✓	Not applicable	24/2/2021
	✓	✓		24/2/2021
MURANG'A	✓	✓	Not applicable	24/2/2021
	✓	✓		24/2/2021
KIAMBU	✓	✓	Not applicable	24/2/2021
	✓	✓		24/2/2021
TURKANA	✓	✓	Not applicable	01/3/2021
	✓	✓		01/3/2021
WEST POKOT	✓	✓	Not applicable	18/2/2021
	✓	✓		18/2/2021
SAMBURU	✓	✓	Not applicable	25/2/2021

NAME OF COUNTY ASSEMBLY	COPY OF THE BILL DELIVERED (Tick appropriately)	CERTIFICATE OF APPROVAL (Tick appropriately)	CERTIFICATE OF REJECTION (tick appropriately)	DATE DELIVERED (DD/MM/YY)
	✓	✓		25/2/2021
TRANS NZOIA	✓	✓	Not applicable	17/2/2021
	✓	✓		17/2/2021
UASIN GISHU				17/3/2021
				17/3/2021
ELGEYO/ MARAkwET		Not applicable	✓	11/3/2021
			✓	11/3/2021
NANDI		Not applicable	✓	25/2/2021
			✓	25/2/2021
BARINGO		Not applicable	✓	15/2/2021
			✓	15/2/2021
LAIKIPIA	✓	✓	Not applicable	18/2/2021
	✓	✓		19/2/2021
NAKURU	✓	✓	Not applicable	24/2/2021
	✓	✓		24/2/2021
NAROK	✓	✓	Not applicable	23/2/2021
	✓	✓		23/2/2021
KAJIADO	✓	✓	Not applicable	19/2/2021
	✓	✓		18/2/2021
KERICHO	✓	✓	Not applicable	25/2/2021
	✓	✓		25/2/2021

NAME OF COUNTY ASSEMBLY	COPY OF THE BILL DELIVERED (Tick appropriately)	CERTIFICATE OF APPROVAL (Tick appropriately)	CERTIFICATE OF REJECTION (tick appropriately)	DATE DELIVERED (DD/MM/YY)
BOMET	✓	✓	Not applicable	25/2/2021
	✓	✓		25/2/2021
KAKAMEGA	✓	✓	Not applicable	23/2/2021
	✓	✓		23/2/2021
VIHIGA	✓	✓	Not applicable	23/2/2021
	✓	✓		23/2/2021
BUNGOMA	✓	✓	Not applicable	24/2/2021
	✓	✓		24/2/2021
BUSIA	✓	✓	Not applicable	18/2/2021
	✓	✓		18/2/2021
SIAYA	✓	✓	Not applicable	8/2/2021
	✓	✓		8/2/2021
KISUMU	✓	✓	Not applicable	16/2/2021
	✓	✓		16/2/2021
HOMA BAY	✓	✓	Not applicable	19/2/2021
	✓	✓		12/2/2021
MIGORI	✓	✓	Not applicable	2/3/2021
	✓	✓		3/3/2021
KISII	✓	✓	Not applicable	23/2/2021
	✓	✓		19/2/2021

NAME OF COUNTY ASSEMBLY	COPY OF THE BILL DELIVERED (Tick appropriately)	CERTIFICATE OF APPROVAL (Tick appropriately)	CERTIFICATE OF REJECTION (tick appropriately)	DATE DELIVERED (DD/MM/YY)
NYAMIRA	✓	✓	Not applicable	23/2/2021
	✓	✓		24/2/2021
NAIROBI	✓	✓	Not applicable	18/2/2021
	✓	✓		19/2/2021

Key:

✓	Received by the Speaker of the National Assembly
✓	Received by the Speaker of the Senate
	Abstained

33. Paragraph (3) of the Guidelines provides as follows with respect to the verification, by the National Assembly and the Senate, of the documents received from the county assemblies pursuant to Article 257(6) of the Constitution as follows –

- (3) *The Speakers of the two Houses of Parliament shall, upon receipt of the documents specified in paragraph (1) or paragraph (2), verify that the documents are in the prescribed form and enter the details of the documents in a register to be kept for that purpose.*
- (4) *Where the Speakers of the two Houses of Parliament are of the opinion that the documents submitted by a County Assembly under paragraph (1) or paragraph (2) do not meet the requirements set out under Article 257(6) of the Constitution and these Guidelines, the Speakers may–*
 - (a) *direct that the documents be returned to the County Assembly and inform the County Assembly of the reasons for the return; and*
 - (b) *give such directions as are necessary to ensure compliance by the County Assembly with Article 257(6) of the Constitution and these Guidelines.*

34. The documents received from the county assemblies were as follows –

- a) forty-seven county assemblies submitted their decision on the draft Bill in accordance with Article 257(6) of the Constitution, read together with paragraphs (1) and (2) of the Guidelines;
- b) forty-three county assemblies submitted certificates of approval of the draft Bill together with the draft Bill in line with Article 257(6) of the Constitution and paragraph (1);
- c) three county assemblies submitted certificates of rejection of the draft Bill together with the draft Bill in line with Article 257(6) of the Constitution and paragraph (2); and
- d) One county assembly abstained from voting on the Bill.

35. A verification of the documents received from the county assemblies found that –

- (a) Baringo County Assembly only submitted the certificate of rejection without submitting the draft Bill contrary to Article 257(6) of the Constitution and paragraph (4) of the Guidelines. The County Assembly subsequently submitted the draft Bill on the same day; and
- (b) the draft Bill submitted by Nyamira County Assembly differed from the one that was submitted to it by the IEBC as it was dated 21st October, 2020, while that which was submitted to the assembly by the IEBC was dated 25th November, 2020. Nyamira County Assembly subsequently withdrew the draft Bill earlier submitted and submitted the correct version of the Bill on 24th February, 2021.

(4) Communications by the Speakers of the National Assembly and the Senate to the respective Houses of Parliament

36. The Guidelines impose a requirement on the Speakers of the National Assembly and the Senate to report to the House on the submissions by the county assemblies upon the expiry of the three months period under Article 257(5) of the Constitution as follows –

(5) Upon the expiry of the period specified under Article 257(5) of the Constitution for the consideration of a draft Bill by a County Assembly, the Speakers of the two Houses of Parliament shall-

(a) report to their respective House of Parliament –

- (i) the County Assemblies that have submitted the draft Bill and the certificate approving the Bill;*



- (ii) *the County Assemblies that have submitted the draft Bill and the certificate rejecting the Bill;*
- (iii) *the County Assemblies that did not submit the draft Bill and the certificate;*
- (iv) *whether or not the threshold required under Article 257(7) of the Constitution has been met; and*
- (v) *such other information as the Speakers of the two Houses of Parliament may consider necessary; and*

(b) submit to the Independent Electoral and Boundaries Commission and publish, by notice in the Gazette, the information specified under subparagraph (a).

(6) The Speakers of the two Houses of Parliament shall not receive any draft Bill and certificate where the Bill was considered by the County Assembly after the expiry of the period specified under Article 257(6) of the Constitution.

37. On Thursday, 25th February, 2021, the Speakers of the National Assembly and Senate issued a Communication to the respective Houses on the Status of Resolutions of County Assemblies on the Draft Constitution of Kenya (Amendment) Bill, 2020 (*Annexes 15 and 16*).

38. In particular, the Speakers notified the Houses of –

- (a) the submission of the draft Bill to amend the Constitution by the Building Bridges Initiative Steering Committee to the IEBC and the subsequent submission of the Bill to the forty-seven county assemblies for consideration;
- (b) the requirement imposed on county assemblies under Article 257(6) of the Constitution to consider the draft Bill within a period of three months and deliver to the Speakers of the National Assembly and the Senate, the resolution of the assembly together with a copy of the draft Bill;
- (c) the requirement imposed upon the Speakers of the Houses of Parliament under paragraphs (5) and (6) of the Guidelines to report to the respective Houses of Parliament on the submissions made by the county assemblies;
- (d) the approval, at the time, by over thirty county assemblies of the draft Bill and the rejection by one county assembly;
- (e) the fact that the threshold required for the approval of the draft Bill by county assemblies in order for it to be introduced in Parliament under Article 257(7) of the Constitution had been met, with over half of the county assemblies having approved the Bill;



- (f) the resolution arrived at through consultations by the Speakers, to commence the consideration of the Bill in Parliament without further delay and further, that the draft Bill be forwarded to the Government Printer for publication on 26th February, 2021, for purposes of introduction in Parliament;
- (g) the fact that the Bill would be considered in the respective Houses of Parliament concurrently in line with their respective Standing Orders; and
- (h) further information regarding the parliamentary process in due course.

39. On Tuesday, 3rd March, 2021, the Speaker of the Senate issued a further Communication on the Status of Resolutions of County Assemblies on the Draft Constitution of Kenya (Amendment) Bill, 2020 (*Annex 17*). In particular, the Speaker of the Senate –

- (a) made reference to the Communication issued to the House on Thursday, 25th February, 2021, on the status of draft Bills delivered by county assemblies to the Speakers of the National Assembly and the Senate and the fact that the threshold required under Article 257(7) of the Constitution had been met;
- (b) observed that the Guidelines were deficient with respect to fully actualizing the parliamentary process contemplated under Article 257 of the Constitution;
- (c) informed the House that whereas the initial view held by the Speakers of both Houses was that the Bill should be republished before its introduction with minor changes to reflect the current year and a footnote indicating its approval by a majority of the county assemblies, it was subsequently agreed by the two Speakers and the leadership of both Houses of Parliament that the Bill be introduced simultaneously and follow as much as possible a similar process;
- (d) further informed the House that the Senate Business Committee had resolved that the Bill be introduced in the Senate and read a First Time on Thursday, 4th March, 2021;
- (e) directed as follows –
 - (i) that, the draft Constitution of Kenya (Amendment) Bill, 2020 be introduced in the Senate for First Reading on Thursday, 4th March, 2021;
 - (ii) that, the Clerk of the Senate urgently obtains sufficient copies of the Bill from the IEBC in the format that it was presented to the forty-seven (47) County Assemblies by the Independent Electoral and Boundaries Commission, to enable introduction of the Bill in the Senate;
 - (iii) that, the Standing Committee on Justice, Legal Affairs and Human Rights holds joint sittings with the National Assembly counterpart Committee on the Bill and undertake public participation jointly pursuant to Standing Order 224; and
 - (iv) that, the Clerk of the Senate publishes an advert on Friday, 5th March inviting members of the public to submit memoranda on the Bill; and




- (v) guidelines would continue to issue regarding the parliamentary process as necessary to ensure that it is disposed of seamlessly.
40. On Wednesday, 4th March, 2021, the Speaker of the National Assembly also issued a further Communication on the Draft Constitution of Kenya (Amendment) Bill, 2020 (*Annex 18*). In particular, the Speaker of the National Assembly –
- (a) notified the House that forty-two county assemblies had submitted their resolutions on the draft Bill and that two county assemblies had rejected the Bill;
 - (b) informed the House that the Bill would be read a First Time on 4th March, 2021 after which it would be referred to the Departmental Committee on Justice and Legal Affairs and the Senate Standing Committee on Justice, Legal Affairs and Human Rights to jointly undertake public participation on the Bill and report back to the Houses of Parliament before Tuesday, 23rd March, 2021;
 - (c) observed that the standing orders did not make provision for the process regarding the moving of the Second Reading of a Bill initiated by way of popular initiative whose sponsors were strangers to the House as they did not sit in the National Assembly;
 - (d) stated that as a result of the procedural gap the Speaker would exercise his discretion under standing order 1 of the National Assembly Standing Orders, and further directed that the Departmental Committee on Justice and Legal Affairs move the various stages of the Bill on behalf of the House but without ascribing ownership of the Bill to the Committee;
 - (e) directed that –
 - (i) upon its First reading, the Bill stood committed to the Departmental Committee on Justice and Legal Affairs for consideration and facilitation of public participation and that the Committee hold joint sittings with the Senate's Standing Committee on Justice, Legal Affairs and Human Rights;
 - (ii) the Clerk of the National Assembly release an invitation for public participation on the Bill, immediately and invite the promoters of the Bill as key participants;
 - (iii) when the time comes, the Motion for the Second Reading and the Third Reading of the Bill shall be moved by the Departmental Committee on Justice and Legal Affairs; and
 - (iv) at the appropriate time, the House Business Committee will propose a Motion for the limitation of debate on the Bill before its Second Reading.

(5) Introduction and Consideration of the Bill by the National Assembly and the Senate

41. Article 257(7) of the Constitution requires a draft Bill, which has been passed by a majority of the county assemblies to be introduced in Parliament as follows –

(7) If a draft Bill has been approved by a majority of the county assemblies, it shall be introduced in Parliament without delay.

42. The Bill was read a First Time in the National Assembly on 4th March, 2021, in line with the Communication by the Speaker of the National Assembly read on 4th March, 2021. In addition, following the Communication issued by the Speaker of the Senate, the Constitution of Kenya (Amendment) Bill, 2020 was also read a First Time on 4th March, 2021.

43. Upon the First Reading of the Bill in the respective Houses, the Bill was referred to the National Assembly Departmental Committee on Justice and Legal Affairs and the Senate Standing Committee on Justice, Legal Affairs and Human Rights for consideration and the conduct of public participation.

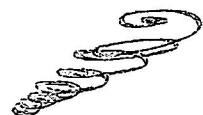
44. In considering the Bill, the two Committees engaged experts pursuant to standing order 203 and 217 of the National Assembly and the Senate Standing Orders, respectively. The Report of the consultants is attached as *Annex 25*.

(6) Public Participation

45. The National Assembly Departmental Committee on Justice and Legal Affairs and the Senate Standing Committee on Justice, Legal Affairs and Human Rights held joint sittings for the conduct of public participation in line with the directions issued by the Speakers of the National Assembly and the Senate in their Communication to the respective Houses.

46. The Committees held the public participation forums on Thursday, 11th March, 2021, Tuesday, 16th March, 2021 and Wednesday, 17th March, 2021. The Committees further invited and held meetings with the Independent Electoral and Boundaries Commission (IEBC), Kenya National Bureau of Statistics (KNBS) and the Kenya Law Reform Commission on their respective mandates and views regarding the proposals contained in the Constitution of Kenya (Amendment) Bill, 2020 and what this portends in as far as implementation is concerned.

47. The submissions received from members of the public and invited stakeholders are discussed at Chapter Three of this Report.



CHAPTER TWO: OVERVIEW OF THE BILL

A. Objective of the Bill

48. In the Memorandum of Objects and Reasons of the Bill, the promoters of the Bill indicate that the object of the Bill is to amend the Constitution of Kenya in order to address issues that have arisen from its implementation. The promoters further state that the Bill specifically addresses the following—
- a) the need to resolve issues of divisive elections;
 - b) promotion of gender equity in governance;
 - c) strengthening of the structure of devolution and increase resource allocation to the counties;
 - d) the broadening of mechanisms for all the people of Kenya to benefit from economic growth;
 - e) harmonization certain roles and functions of the bicameral Parliament;
 - f) fortification of national ethos by specifying the responsibilities of citizens; and
 - g) the strengthening of accountability on public resources and the fight against corruption.
49. As stated under Chapter 1, the Bill originated from the Report of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report (BBI Steering Committee Report). Through the Building Bridges initiative, citizens throughout the country shared their concerns and views on various issues including citizen responsibilities and rights, national ethos, corruption, productivity, shared prosperity, devolution, divisive elections, ethnic antagonism, inclusivity, security, among others. The principal object of the Bill is to address these issues.
50. The Bill is supported by draft Bills that were prepared by the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report. These Bills were annexed to the Report as Annex E. The Committee however notes that whereas the BBI Steering Committee Report indicated that the Steering Committee had drafted fourteen Bills, Annex E of the report only contains eleven Bills. The following draft Bills were indicated to have been drafted but were not contained in Annex E—
- a) County Wards Development Fund Bill, 2020;
 - b) Contribution to Charity Bill, 2020; and
 - c) Persons with Disabilities (Amendment) Bill.

B. Provisions of the Bill

51. **Clause 2** of the Bill proposes to insert a new Article 10A on regional integration and cohesion in the Constitution so as to recognise the integration and cohesion of the eastern Africa region and African unity as integral towards achieving sustainable development, stability and prosperity for all. The provision obligates the State to take policy and legislative measures for the attainment of these ideals.
52. The aim of clause 2 of the Bill is to enhance Kenya's standing and leadership in the region and to enhance Kenya's prosperity, standing and security. The provision originated from the objective of the Steering Committee to put in place measures to enhance regional and continental trade and investment. The BBI Steering Committee Report provided that constitutional policy ought to seek to further the fundamental aims of independence and sovereignty, upholding the dignity of the African identity, uniting Africa, promoting national security and shaping the global economy to further the hopes and dreams of all Kenyans
53. **Clause 3** of the Bill proposes to insert a new Article 11A on economy and shared prosperity into the Constitution so as to anchor the aspiration of a new economic model that provides equitable opportunities for all the people of Kenya to benefit from economic growth in a comprehensive, fair and sustainable manner. The clause mandates the state to promote—
- a) productivity through protection of intellectual property rights;
 - b) investment, enterprise and industrialization for sustainable economic development;
 - c) sustainable sources of livelihood including agriculture, pastoralism and the blue economy;
 - d) an economic system that supports small and micro enterprises;
 - e) an infrastructure that supports the digital economy; and
 - f) application of science and technology in the production system.
54. The aim of clause 3 of the Bill is to balance production and sharing in order to harness trade, investment and people-to-people links. The clause originated from the doctrines and principles intended to guide public policy formulation to implement the BBI reforms as identified by the BBI Steering Committee Report. The report noted that to have a productive economy and shared prosperity, every facet of policy must further the creation and sustaining of an eco-social market economy. In this economy, every citizen would have the rights, opportunities, and responsibilities to work, innovate, create and preserve wealth. Policy makers would be expected to design and deploy policies that incentivize value addition, involve stakeholder

consultation and consideration, lead to the creation of decent jobs, protect labour rights, and conserve nature.

55. The BBI Steering Committee Report identified the following policy objective and guiding principles with regard to productivity and shared prosperity—

Objective: to incentivize private enterprise throughout the country, while progressively eliminating the discriminative dichotomies of formal and informal economy.

Guiding principles: every part of the country, and every Kenyan, should be enabled to participate fully in the economy.

56. Clause 4 of the Bill proposes to insert a new Article 18A on the responsibilities of a citizen into the Constitution to enshrine in it the principles of national ethos and set out moral principles to be adhered to by every citizen, and where applicable, by non-citizens. These responsibilities are—

- a) cultivation of national unity and respect for Kenya's ethnic, intellectual, economic and cultural diversity;
- b) promotion and protection of the well-being of the family, including respect for parents and elders;
- c) practising ethical conduct and combating corruption;
- d) fulfilling parental responsibilities;
- e) development of abilities and skills for the advancement of self, community and country;
- f) honest declaration of income to lawful agencies and payment of taxes;
- g) respect for private property and protection of public property from waste and misuse; and
- h) promotion of the unity and dignity of Africa and her people.

57. Clause 4 of the Bill aims to strengthen the national ethos by outlining the responsibilities of citizens and to some extent, non-citizens residing in Kenya. The amendment was informed by the understanding that the current Constitution has rightly imposed various socio-economic duties on the state but does not envision any responsibilities on the part of the citizen. This amendment seeks to give life to the words of the national anthem that when the individual thrives, the country thrives.

58. This clause emanated from the observation by the Steering Committee that citizen obligations need to be linked to the development of the desired economy. The BBI Steering Committee Report noted that Kenyans must be prepared, as a fundamental

citizen duty, to report their incomes to lawful institutions and pay the taxes and duties as defined in law to enable the State to have the means to deliver the social protection and Article 43 rights that Kenyans are anxious to realise. The report also noted that all citizens have a personal responsibility for just treatment of others and the environment, to be civically aware and to adhere to the rule of law.

59. **Clause 5** of the Bill proposes to amend Article 31 of the Constitution on privacy to include in the Constitution the right of people not to have their personal data infringed. The provision amends Chapter Four of the Constitution on the Bill of Rights to provide a constitutional underpinning for privacy of personal data of citizens as an emerging area in human rights. The amendment protects personal data of citizens in view of the advancement and adoption of digital technology by a large percentage of the population and boosts the taming of surveillance capitalism.
60. **Clause 6** of the Bill proposes to amend Article 80 of the Constitution which makes provisions on legislation on leadership to mandate Parliament to enact legislation that will facilitate expeditious investigation, prosecution and trial of cases relating to corruption and integrity.
61. **Clause 7** of the Bill proposes to amend Article 82 of the Constitution on legislation on elections, in order to mandate Parliament to enact legislation imposing sanctions on a political party that fails to ensure that not more than two-thirds of the party's candidates are of the same gender. This will compel political parties to facilitate the actualization of the two-thirds gender rule in the electoral process from the nomination stage.
62. **Clause 8** of the Bill proposes to amend Article 87 of the Constitution which makes provisions on electoral disputes to mandate Parliament to enact legislation to establish mechanisms for the timely settling of disputes arising from party nominations. The amendment also broadens the modes of service of a petition relating to an election or a party nomination to include electronic media to take cognizance of advancements in technology.
63. **Clause 9** of the Bill proposes to amend Article 88 of the Constitution which makes provisions on the Independent Electoral and Boundaries Commission to provide that persons who have in the preceding five years held office or stood for election as President, Deputy President, county governor, deputy county governor, member of Parliament or member of a county assembly will not be eligible for appointment as members of the Independent Electoral and Boundaries Commission. The amendment includes some offices which are currently not part of this list, that is the

President, the Deputy President, the county governor and the deputy county governor.

64. **Clause 9** of the Bill further amends Article 88 to mandate the Independent Electoral and Boundaries Commission to ensure that not more than two-thirds of the candidates of a political party are of the same gender. The amendment also removes the jurisdiction of handling electoral disputes arising from nomination of candidates by political parties from the Independent Electoral and Boundaries Commission and vests it in the Political Parties Disputes Tribunal so as to achieve speedy adjudication of such disputes and streamline the mandate of the Commission.
65. **Clause 10** of the Bill proposes to amend Article 89 of the Constitution which makes provisions on delimitation of electoral units to increase the number of constituencies from the current two hundred and ninety to three hundred and sixty with the objective of facilitating the attainment of equitable representation in the National Assembly and actualizing the aspiration of the equality of the vote principle.
66. **Clause 11** of the Bill proposes to amend Article 90 of the Constitution on allocation of party list seats to align its provisions with the proposed amendments to Articles 97 and 98 of the Constitution (clauses 13 and 14 of the Bill). The amendment also stipulates that that nomination seats in the National Assembly and in County Assemblies be allocated on the basis of the total votes received by respective political parties as opposed to the current provision where such allocation is based on the number of seats won by a political party. This aims to promote the principle of equality of the vote and entrench ideals of a transparent electoral process.
67. **Clauses 7-11** of the Bill amends Chapter Seven of the Constitution on representation of the people to enhance equity, transparency and fairness of the electoral system and to give effect to the principles set out in Articles 81(d) and 89(7)(b) of the Constitution. The aim is to foster electoral competition hinged on ideologies and values and to ensure that every vote cast by a citizen counts. The amendment also aims to resolve issues of divisive elections arising from electoral processes and supports the attainment of the two-thirds gender principle.
68. The above constitutional amendments were initiated after the Steering Committee noted that women have not achieved the promises contained in the Constitution of Kenya, 2010 and that the two-thirds gender rule has not been fully implemented in electoral outcomes, or in leadership and decision-making arenas. The BBI Steering Committee report noted that a number of submissions regarding the lack of inclusivity for women were received during the validation process. The report went

on to state that the Steering Committee was struck by the deep and widespread feeling of exclusion and marginalisation among the women of Kenya, who felt that mainstream socio-cultural and political arrangements prevent them from fully accessing their rights under the Constitution. A specific concern of stakeholders was the entrenched political marginalisation and particularly the lack of implementation of the two-thirds gender rule.

69. **Clause 12** of the Bill proposes to amend Article 96 of the Constitution which makes provisions on the role of the Senate to extend the oversight role of the Senate to all matters relating to county revenues and expenditures. The existing provision only empowers the Senate to oversight national revenue allocated to county governments and does not extend such mandate to counties' own source revenue, borrowings and expenditures. The amendment is therefore aimed at enhancing accountability of counties in matters of public finance and ensuring service delivery to the people.
70. **Clause 13** of the Bill proposes to amend Article 97 of the Constitution on the membership of the National Assembly to increase the number of the members of the National Assembly elected from constituencies from the current two hundred and ninety to three hundred and sixty. This is a consequence of the proposed increase in the number of constituencies by seventy. The amendment further proposes to include the Leader of the Official Opposition, Cabinet Ministers who are not members of the National Assembly and the Attorney General in the membership of the National Assembly, with the latter two being *ex officio* members. The amendment also provides for the nomination of four persons with disabilities and two youth to the National Assembly. The amendment further creates in the National Assembly special top-up seats necessary to ensure that the two-thirds gender principle is actualized. However, in filling the special top up seats, it is provided that a first priority in the nomination shall be given to candidates who contested for the constituency seats and were not elected. The affirmative action for top-up has been capped at fifteen years.
71. **Clause 14** of the Bill proposes to amend Article 98 of the Constitution on the membership of the Senate to provide that the Senate shall comprise ninety-four members with each county represented by a woman and a man elected by voters in the counties. This is aimed at achieving gender parity in the Senate.
72. **Clause 15** of the Bill proposes to amend Article 99 of the Constitution which makes provisions on qualifications and disqualifications for election as member of Parliament to remove the provisions preventing members of county assemblies from qualifying to be elected as members of Parliament.



73. **Clause 16** of the Bill proposes to insert a new Article 107A on the Leader of Official Opposition in the Constitution. The provision proposes that the Leader of Official Opposition be the person who received the second greatest number of votes in a presidential election and whose political party or coalition of parties has at least twenty-five per cent of the members of the National Assembly. The provision further stipulates that the Leader of Official Opposition and the Prime Minister shall not be members of the same political party or coalition of parties.
74. **Clause 17** of the Bill proposes to repeal Article 108 of the Constitution on Party Leaders and replace it with a new Article 108 on the Order of precedence in the National Assembly to provide for the new order of precedence in the National Assembly to include the Prime Minister and the Leader of Official Opposition.
75. **Clause 18** of the Bill proposes to insert a new Article 108A on Party Leaders in the Senate into the Constitution to constitutionalize the party leadership structure and order of precedence in the Senate.
76. **Clause 19** of the Bill proposes to amend Article 113 of the Constitution which ~~makes provisions on mediation committees to expand the period within which a Bill shall be referred to the President for assent from the current seven days to fourteen days.~~ The aim of this is to allow for adequate time for consultations and refining of bills by the institutions involved in the legislative process before the President assents to the same. The Bill also clarifies the process of reference of bills to the President to stipulate that such reference be made by the House of Parliament that originated the bill.
77. **Clause 20** of the Bill proposes to amend Article 115 of the Constitution on presidential assent and referral to remove reference to voting by delegation in the Senate. This is a consequential amendment flowing from the proposed repeal of Article 123 (clause 21).
78. **Clause 21** of the Bill proposes to repeal Article 123 of the Constitution which makes provisions on decisions of the Senate in order to do away with the principle of voting by delegation in the Senate. This consequently results in members of the Senate having an equal vote. The aim of the amendment is to equalize representation of Senators noting the proposed amendment to Article 98 that provides that the Senate is to comprise ninety-four Senators, all elected from the forty-seven counties (each county electing one man and one woman).

79. **Clauses 12-21** of the Bill amend Chapter Eight of the Constitution on the Legislature to remodel the parliamentary system by including the National Executive in the National Assembly and to enhance the oversight powers of Parliament. The amendments propose that the Executive be represented in the National Assembly by the Prime Minister, Deputy Prime Ministers, Cabinet Ministers, Deputy Ministers and the Attorney-General. The amendments further establish the office of the Leader of the Official Opposition to arrest the issue of winner takes all elections. The amendments further propose to expand the composition of Parliament to give effect to the two-thirds gender principle and equality of the vote principle.
80. **Clauses 12-21** of the Bill were initiated due to the issue of divisive elections. The BBI Steering Committee Report noted that in the Taskforce Report, it was noted that in our rush to adopt, and even mimic, foreign models, particularly from the west, we have forged a politics that is a contest of us versus them. And we have chosen our 'us' and 'them' on an ethnic basis, especially in competing for the Presidency, which is the highest office in Kenyan politics. The report noted that lack of inclusivity is the leading contributor to divisive and conflict-causing elections. The report further noted Kenyans associate the winner-take-all system with divisive elections and want an end to it.
81. The Steering Committee observed that stakeholders engaging with it affirmed these findings and reiterated that Kenya is yet to attain consistent and satisfactory levels of electoral tranquillity. The Steering Committee noted that with a few exceptions, many elections in the recent past have been bitterly contested, divisive, violent and generally destructive.
82. The Steering Committee further observed that submissions received by the Steering Committee confirmed the widely held view that divisive elections emerge because of the cutthroat competition for the Presidency and other elective political seats. Rather than retain the current presidential system, a majority of Kenyans supported the adoption of a hybrid between the presidential and parliamentary systems. They supported the BBI Report's recommendation for a national Executive comprising a President, Deputy President and Prime Minister. They also supported the addition of two Deputy Prime Ministers.
83. **Clause 22** of the Bill proposes to amend Article 130 of the Constitution on the National Executive to include the Prime Minister and the Deputy Prime Ministers in the composition of the national executive.

84. **Clause 23** of the Bill proposes to amend Article 131 of the Constitution which makes provisions on the authority of the President to include the Prime Minister and Deputy Prime Ministers in the list of persons who assist the President in the exercise of executive authority. The amendment also proposes to rename the office of Cabinet Secretary as Cabinet Minister to reflect a profile change of this office noting that some holders may be appointed from among the members of the National Assembly.
85. **Clause 24** of the Bill proposes to amend Article 132 of the Constitution on functions of the President to mandate the President to report on the progress made towards achieving the economic and social rights guaranteed under Article 43 by submitting a report for debate to the National Assembly.
86. **Clause 25** of the Bill proposes to amend Article 134 of the Constitution on the exercise of presidential powers during temporary incumbency as a consequential amendment of renaming the office of Cabinet Secretary as Cabinet Minister.
87. **Clause 26** of the Bill proposes to amend Article 138 of the Constitution which provides for the procedure at a presidential election to remove the condition that requires a presidential election to be cancelled and a new election held where a person nominated as a deputy president dies on or before a scheduled election. The aim of this is to ensure that a presidential election is held despite the death of a running mate to avoid uncertainty and minimize tension in a presidential election.
88. **Clause 27** of the Bill proposes to amend Article 140 of the Constitution which makes provisions on questions as to validity of a presidential election to increase the period during which the Supreme Court is required to hear and determine a petition challenging the validity of a presidential election from fourteen days to thirty days. This is aimed at providing a more realistic period of finalizing presidential election petitions and is informed by past experience on the process.
89. **Clause 28** of the Bill proposes to insert new Articles 151A, 151B, 151C, and 151D on the Office of the Prime Minister and Deputy Prime Ministers to provide for the mode of appointment of the Prime Minister and the two Deputy Prime Ministers. The key function of the Prime Minister shall be to coordinate and supervise government functions. The Prime Minister is to be nominated by the President from among the elected Members of the National Assembly from a political party having a majority of members in the National Assembly through a stipulated procedure. The proposal provides that a nominee for Prime Minister shall not assume office until their nomination is confirmed by a resolution of the National Assembly

supported by a simple majority of members. If the second nominee for a Prime Minister proposed by the President is not confirmed, the President will be required to appoint the Prime Minister without reference to the National Assembly. The Prime Minister may be dismissed by the President or through a vote of no confidence in the National Assembly. The amendment further provides for the Deputy Prime Ministers to be appointed from among the Cabinet Ministers.

90. **Clause 29** of the Bill proposes to amend Article 152 of the Constitution which makes provisions on the Cabinet to provide for a mixed cabinet with some members of the Cabinet being appointed from amongst the members of National Assembly. The amendment further provides for the membership of the Prime Minister and Deputy Prime Ministers in the Cabinet. The amendment also provides the tenure of office of the Cabinet, stipulating that the Cabinet remains in office until the President-elect assumes office.
91. **Clause 30** of the Bill proposes to amend Article 153 of the Constitution on decisions, responsibility and accountability of the Cabinet as a consequential amendment to the renaming of the office of the Cabinet Secretary as Cabinet Minister. The amendment further provides that the term of office of the Cabinet lapses when the President-elect assumes offices.
92. **Clause 31** of the Bill proposes to insert a new Article 153A on Deputy Ministers into the Constitution to establish the office of Deputy Ministers whose functions shall be to deputise Cabinet Ministers in the execution of the functions of the Cabinet Ministers. The Deputy Ministers may be appointed from the membership of the National Assembly and are accountable to the President and the National Assembly.
93. **Clause 32** of the Bill proposes to amend Article 154 of the Constitution on the Secretary to the Cabinet to remove the requirement for the vetting of the Secretary to the Cabinet by the National Assembly.
94. **Clause 33** of the Bill proposes to amend Article 155 of the Constitution which makes provisions on Principal Secretaries to remove the requirement for the vetting of the Principal Secretaries by the National Assembly. This is aimed at ensuring that the public service remains impartial and ready to serve the people under governments of any political formation and to ensure that their accountability is administrative and technical.
95. **Clause 34** of the Bill proposes to amend Article 156 of the Constitution which makes provisions on the Attorney General to specify that as a member of the



Cabinet, the Attorney General may be assigned by the President to perform the functions of a Cabinet Secretary.

96. **Clause 35** of the Bill proposes to amend Article 157 of the Constitution on the Director of Public Prosecutions to enhance the qualification for appointment as the Director of Public Prosecution to be the same as that of a judge of the Court of Appeal as follows-
- a) at least ten years experience as a superior court judge; or
 - b) at least ten years experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or
 - c) held the qualifications mentioned in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.
97. **Clause 36** of the Bill proposes to repeal Article 158 of the Constitution on the removal and resignation of the Director of Public Prosecutions to align the removal and resignation of the Director of Public Prosecutions with that provided for constitutional commissions and independent offices under Article 51 of the Constitution..
98. **Clause 37** of the Bill proposes to amend Article 164 of the Constitution which makes provisions on the Court of Appeal to provide for the finality of the determination by the Court of Appeal on the validity of any appeal relating to an election, other than a presidential election. The amendment further seeks to limit the tenure of the president of the Court of Appeal to a single term of five years.
99. **Clause 38** of the Bill proposes to amend Article 165 of the Constitution on the High Court to limit the tenure of the president of the High Court to a single term of five years.
100. **Clause 39** of the Bill proposes to amend Article 166 of the Constitution which makes provisions on the appointment of Chief Justice, Deputy Chief Justice and other Judges to enhance the qualifications of the judges of the Supreme Court and the Court of Appeal relating to their experience. The amendment provides the qualification of a judge of the Supreme Court to be twenty years, a judge of the Court of Appeal to be fifteen years and that of a judge of the High Court to be ten years.
101. **Clause 40** of the Bill proposes to amend Article 167 of the Constitution which makes provisions on the tenure of office of the Chief Justice and other judges to



provide for the tenure of office of the Deputy Chief Justice and harmonise it with the tenure of office of the Chief Justice.

102. **Clause 41** of the Bill proposes to amend Article 168 of the Constitution which makes provisions on the removal from office of judges to allow the Judiciary Ombudsman to initiate a motion to remove a judge from office on account of complaints received from the members of the public. This enables the Judiciary Ombudsman to prosecute complaints received against a judge in the Judicial Service Commission.
103. **Clause 42** of the Bill proposes to amend Article 171 of the Constitution which makes provisions on the establishment of the Judicial Service Commission to include the Judiciary Ombudsman as a non-voting member of the Judicial Service Commission. The amendment further provides that elected advocates in the Commission shall not practise in the courts and tribunals in order to minimize potential instances of conflict of interest.
104. **Clause 43** of the Bill proposes to amend Article 172 of the Constitution on the functions of the Judicial Service Commission to provide a mechanism to enable the Judicial Service Commission to discipline judicial officers, including judges.
105. **Clause 44** of the Bill proposes to insert a new Article 172A of the Constitution which makes provisions on the office of the Judiciary Ombudsman into the Constitution to establish the Office of the Judiciary Ombudsman which shall be responsible for handling complaints on the judicial process from members of the public.
106. The amendments to clauses 37-44 of the Bill originated from the observations of the Steering Committee on the judiciary. The Steering Committee observed that citizens generally look upon the judiciary to protect them by upholding their rights. The Steering Committee observed that citizens emphasized the need to protect the independence of the judiciary while holding it accountable to the people of Kenya, which will build the people's confidence in the system and enable it to effectively carry out its functions. The Steering Committee noted that stakeholders agreed with the BBI Report's proposal to create the position of a judiciary ombudsman and specialised courts to address the increasing volume of cases and special crimes, such as corruption and terrorism. The Steering Committee further noted that stakeholders also agreed with the proposal to expand the mandate of the Judicial Service Commission to discipline judges.



107. **Clause 45** of the Bill proposes to amend Article 177 of the Constitution on the membership of county assemblies by changing the nomination of candidates from being based on seats won by a political party to being based on the votes received by a political party in an election. The proposal seeks to align the term of county assemblies to the election cycle and provides that the provision on the special seats shall lapse after ten years since affirmative action measures ought to have time limitations.
108. **Clause 46** of the Bill proposes to amend Article 179 that provides for County Executive Committees by deleting the existing sub-Article (7) which requires that when a vacancy arises in the office of county governor, the members of the county executive committee in office automatically cease to hold office. In its place, the Bill provides that a county governor has powers to dismiss or re-assign their county executive committee members. Further, the amendment enables the county governor to appoint members of a county assembly into the county executive committee. Lastly, it provides that the county governors shall be accountable to their respective assemblies in the performance of their functions.
109. **Clause 47** of the Bill proposes to amend Article 180 that provides for the election of a county governor and deputy county governor. The amendment seeks to enhance gender parity in the governance of counties by providing that the candidate for the position of the county governor, in nominating a deputy governor, shall consider a person of the opposite gender.
110. This amendment further seeks to promote the provisions of Article 27 (3) and (8) of the Constitution.
111. **Clause 48** of the Bill proposes to amend Article 188 on boundaries of counties to remove the voting by delegation in the Senate as a consequential amendment flowing from the proposed repeal of Article 123 at clause 21.
112. **Clause 49** of the Bill proposes to amend Article 202 on equitable sharing of national and other financial laws to provide that where any revenue sharing in the Constitution is to be based on audited accounts and the National Assembly has not approved such accounts, the most recent audited accounts of revenue submitted by the Auditor General shall be used as the basis of revenue sharing. This amendment seeks to reduce delays in revenue sharing as result of delay in approval of audited accounts.

113. **Clause 50** of the Bill proposes to amend Article 203 on equitable share and other financial laws to expand the criteria for determining equitable share to include—
- (i) the need to eradicate corrupt practices and wastage of public resources;
 - (ii) the need to ensure the attainment of the economic and social rights guaranteed under Article 43; and
 - (iii) the need to ensure the average amount of money allocated per person to a county with highest allocation does not exceed three times the average amount per person allocated to a county with the lowest allocation.
114. The amendment further increases the percentage of funds allocated to county governments from fifteen to thirty-five per cent in order to strengthen devolution and ensure that county governments have adequate funds to carry out their operations.
115. **Clause 51** of the Bill proposes to amend Article 204 that provides for the Equalization Fund to increase the life span of the Fund from twenty years to thirty years from the effective date.
116. **Clause 52** of the Bill proposes to insert a new Article 206A to anchor the Constituencies Development Fund in the Constitution. The Constituencies Development Fund shall be used to facilitate the performance of national government functions within the constituencies. An Act of Parliament is to be enacted to provide for the management of the Fund including public participation by residents in the constituency.
117. The promoters of the Bill in their report and submissions to the Committees observed that Kenyans wanted further decentralization of the national government to the grassroots and provision of resources at the constituency level to support the rights provided for under Article 43 of the Constitution. They further observed that citizens wanted the Fund to be secured through establishment of the same in the Constitution, hence the proposed amendment.
118. **Clause 53** of the Bill proposes to amend Article 207 on Revenue Funds for county governments to provide for an Act of Parliament to establish a county assembly fund as one of the funds in a county.
119. The current financial arrangement gives county governors more control over funds disbursed to counties and by extension control over county assembly budgets. Lack of financial autonomy has affected the work of county assemblies and the amendment seeks to address the issue.



120. **Clause 54** of the Bill proposes to insert a new Article 207A in the Constitution to establish the Ward Development Fund. The Ward Development Fund shall comprise of at least five per cent of all the county government's revenue in each financial year and ensures equitable distribution and development in the wards of money allocated or collected by the county government. An Act of Parliament is to be enacted to provide for the management of the Fund, criteria for disbursement of the funds to each ward and identification of development projects.
121. The promoters of the Bill in their report and submissions to the Committees observed that Kenyans wanted counties to remain as they were but with services further decentralised to the ward level and provision of resources made at ward level to support Article 43 rights.
122. **Clause 55** of the Bill proposes to amend Article 215 on the Commission on Revenue Allocation to reduce the number of members nominated by political parties represented in the Senate from five to two so as to balance the representation from the two Houses. The amendment also provides for two members to represent county governors and one person nominated by members of a statutory body responsible for professional regulation of accountants.
123. **Clause 56** of the Bill proposes to amend Article 218 on the Annual Division of Revenue Bill and the County Allocation of Revenue Bill to mandate the Controller of Budget to authorise the withdrawal of up to fifty per cent of the minimum amount of the equitable share guaranteed to county governments based on the Division on Revenue Act of the immediately preceding financial year, where the County Allocation of Revenue Act for a financial year has not been passed by Parliament before the beginning of that financial year.
124. **Clause 57** of the Bill proposes to amend Article 220 on the form, content and timing of budgets to require the proposed budgets of national and county governments to contain an explanation of the previous, current or proposed budgetary measures for the attainment of social and economic rights. Further, the amendments seek to impose a requirement, which will be set out in legislation, for the making of structure and development plans by national government. Currently, such an obligation is only imposed on counties. The amendment seeks to increase accountability and value for money while entrenching prudence and efficiency in the use of public resources.

125. **Clause 58** of the Bill proposes to amend Article 224 on County Appropriation Bills to free the preparation of county annual budgets from being based on the Division of Revenue Bill. This is in light of the fact that a county government can prepare its budget based on its own source revenue. The proposal also seeks to address delays in disbursement of funds to county governments where there is an impasse in Parliament on the Division of Revenue Bill.
126. **Clause 59** of the Bill proposes to amend Article 225 on financial control to empower the Cabinet Minister responsible for finance to stop the transfer of funds to a state organ or other public entity or a county government where there are serious and persistent material breaches of the set out financial control measures, and to table the matter before the relevant House of Parliament for approval. The amendment is in line with submissions made by the public to the BBI taskforce that recommended for greater enforcement in regulation of public money disbursed to national government entities and county governments.
127. **Clause 60** of the Bill proposes to amend Article 228 on the Controller of Budget to shift the approval for the nomination of the Controller of Budget from the National Assembly to the Senate.
128. **Clause 61** of the Bill proposes to amend Article 230 that provides for the Salaries and Remuneration Commission to restructure the membership of the Commission to make it lean and effective. It proposes that the Commission shall consist of a chairperson and six other members who have extensive professional experience in human resource and economic matters, nominated by the President and approved by the National Assembly.
129. Further, the Bill proposes to give the Commission the added mandate of determining and harmonizing the rates paid by national and county governments to professional consultants for services rendered.
130. **Clause 62** of the Bill proposes to amend Article 234 on the Functions and Powers of the Public Service Commission to remove the national security organs as one of the offices in the public service to which the Public Service Commission has no mandate.
131. **Clause 63** of the Bill proposes to insert a new Articles 237A into the Constitution to provide for the Youth Commission. The amendment proposes to establish and provide for the functions of the Youth Commission to, among others, promote the implementation of the rights of the youth under Article 55. The Commission shall



consist of a chairperson and six members with equal representation of both genders, at least four of whom shall be youth. The members of the Commission shall hold office for a single term of four years.

132. Most young people speaking to the BBI Taskforce during the validation period of the BBI report exhibited frustration with the job market. They complained of having met the educational goals to get employment but when they applied for jobs, there were persistent demands for them to have experience, among other unattainable requirements for a new entrant in the job market. They proposed that entry requirements for jobs in the public and private sector, at least at the entry levels, be made more accessible for those entering the job market for the first time. Youth representatives made proposals for the development of policy, legal and administrative structures to give young people greater consideration in employment, elective and appointive leadership positions and business opportunities, they also submitted on the difficulty in accessing the 30% public procurement provision that was allocated for women and youth, and the existing youth funds. They communicated a widespread conviction that there was something not working effectively in existing legislative and policy intervention. In this regard, they called for changes including the establishment of a Youth Commission, reflecting their conviction that their priorities needed to be much more seriously engaged with by the State and national leadership, hence the proposed amendment.

133. **Clauses 62 and 63** of the Bill amend Chapter Thirteen of the Constitution on the Public Service to remove the national security organs from the ambit of the Public Service Commission. The national security organs as outlined in Article 239(1) are—

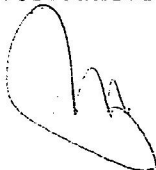
- (i) the Kenya Defence Forces;
- (ii) the National Intelligence Service; and
- (iii) the National Police Service.

134. **Clause 64** of the Bill proposes to amend Article 240 on Establishment of the National Security Council to include the Prime Minister as a member of the National Security Council. This is consequential amendment in view of the establishment of the office of the Prime Minister.

135. **Clause 65** of the Bill proposes to amend Article 243 that provides for the Establishment of the National Police Service to include the Directorate of Criminal Investigations as a third arm of the National Police Service. The National Police

Service presently consist of the Kenya Police Service and the Administration Police Service.

136. **Clause 66** of the Bill proposes to amend Article 245 on Command of the National Police Service to provide clarity on the centrality of command by the Inspector General of Police of the National Police Service. The amendment provides that the Inspector General shall-
- (i) exercise independent command over the Service;
 - (ii) determine promotions and transfers within the Service;
 - (iii) exercise disciplinary control through suspension of officers in the Service; and
 - (iv) perform any other functions prescribed by legislation.
137. The amendment further provides that the Directorate of Criminal Investigations shall be headed by a Deputy Inspector-General.
138. **Clause 67** of the Bill proposes to amend Article 246 on the National Police Service Commission to harmonize certain functions of the Commission with the function of centrality of command by the Inspector-General of the National Police Service.
139. **Clauses 64-67** of the Bill amend Chapter Fourteen of the Constitution on National Security to provide clarity on the unity of command in the Service.
140. **Clause 68** of the Bill proposes to amend Article 248 on Commissions and Independent Offices to include the Director of Public Prosecutions as an independent office to enhance the independence and budgetary autonomy of the office.
141. **Clause 69** of the Bill proposes to amend Article 250 on composition, appointment and terms of offices to reduce the number of members of the commissions whose membership is not specified in the main text of the Constitution, from nine to seven. This is to create lean commissions and reduce the recurrent expenditures of the commissions in line with public submissions on the need to reduce the public wage bill.
142. **Clauses 68 and 69** of the Bill amends Chapter Fifteen of the Constitution on commissions and independent offices to require constitutional commissions to enhance corporate governance practices in managing the affairs of the commissions and independent offices and to include the Director of Public Prosecutions as an independent office.



143. **Clause 70** of the Bill proposes to amend Article 259 on Construing the Constitution to provide for the filling of a vacancy of an appointive office under the Constitution, and requires that the process of replacing the holder of that office shall commence at least six months before the lapse of the term of the office holder and conclude before the lapse of the term of that office holder. This is to ensure seamless transition and fewer disruptions in the running of appointive constitutional state offices.
144. **Clause 71** of the Bill proposes to amend Article 260 on Interpretation to include the offices of the Prime Minister, Deputy Prime Minister, Deputy Minister and Judiciary Ombudsman in the definition of the term “state office”. This is a consequential amendment in view of the proposed establishment of mentioned state offices.
145. **Clause 72** of the Bill proposes to amend the Third Schedule to include the Prime Minister and Deputy Prime Minister as state officers who should take the oath or make a solemn affirmation as prescribed in the Schedule. Similarly, the amendment seeks to include the Deputy Chief Justice in the Oaths for the Chief Justice/President of the Supreme Court, Judges of the Supreme Court, Judges of the Court of Appeal and Judges of the High Court.
146. **Clause 73** of the Bill provides that Parliament shall enact any legislation required by this Act to be enacted to govern a particular matter within the period specified in the First Schedule. It provides that the Kenya Law Reform Commission and the Attorney General shall prepare the relevant Bills for tabling before Parliament as soon as is reasonably practicable to enable Parliament to enact the legislation within the specified period in the First Schedule commencing on the date this Act comes into force.
147. **Clause 74** of the Bill provides for transitional and consequential provisions which are set out in the Second Schedule. The Second Schedule outlines the transitional and consequential provisions on various aspects including saving terms of office of various institutions re-structured in the Bill. The Schedule further guides on the manner of delimitation in respect of the additional seventy constituencies that have been proposed and offers further savings to the protected constituencies.



CHAPTER 3: PUBLIC PARTICIPATION IN THE PROCESSING OF THE CONSTITUTION OF KENYA (AMENDMENT) BILL, 2020

(a) Call for Public Participation on the Bill

147. On Thursday, 4th March, 2020, the Constitution of Kenya (Amendment) Bill, 2020 was read a first time in both Houses of Parliament. The Speaker of the National Assembly and the Speaker of the Senate approved joint sittings on for public participation and consideration of the Bill between the National Assembly Departmental Committee on Justice and Legal Affairs and the Senate Standing Committee on Justice, Legal Affairs and Human Rights, pursuant to the provisions of the respective Standing Orders of each House.

148. Pursuant to Article 118 of the Constitution, Standing Order 127(3) of the National Assembly Standing Orders and Standing Order 140(5) of the Senate Standing Orders, the two Committees, by way of an advertisement published in the Daily Nation and Standard Newspapers on Friday, 5th March, 2021 (*Annex 19*) invited interested organizations and members of the public to submit views or make representations regarding the Bill. The representations were to be received by post, hand delivery to the Office of the Clerk or by electronic mail. The Committees further invited interested organizations and members of the public to appear before the Committees at a public hearing to be held in Parliament on Thursday, 11th March, 2021 from 8.00 am to 5.00 pm. The period for public hearings was later extended to include Tuesday, 16th and Wednesday, 17th March, 2021.

(b) Receipt of submissions and public hearing on the Bill

149. Following the call for public submissions, the Committees received the views of the stakeholders and general public on 11th, 16th and 17th March, 2021. In total, the Committees received written and oral submissions from the representatives of the promoters of the Bill, as well as sixty-three (63) organizations and individuals. Nine (9) other organizations attended the public hearings on the Bill but did not present any submissions or did so as part of an umbrella organization or consortium.

150. The distribution of the participants were as follows –

(a) Promoters of the Bill-BBI team (*on invitation by the Committees*)

- 1) Represented by Hon. Junet Mohamed, CBS, MP, and Hon. Dennis Waweru

(b) Constitutional commissions and independent offices

- 2) Judicial Service Commission
- 3) Independent Electoral and Boundaries Commission (*on invitation by the Committees*)
- 4) National Gender and Equality Commission
- (c) **Statutory Organizations**
 - 5) Council of Governors
 - 6) Kenya Law Reform Commission (*on invitation by the Committees*)
 - 7) Kenya National Bureau of Statistics (*on invitation by the Committees*)
- (d) **Members of Parliament**
 - 8) Sen. Enoch Wambua, MP
 - 9) Hon. Innocent Obiri, MP
 - 10) Sen. (Arch.) Sylvia Kasanga, MP
- (e) **Political Parties**
 - 11) Jubilee Party
 - 12) Maendeleo Chap Chap
 - 13) Orange Democratic Movement (ODM)
 - 14) Wiper Democratic Movement
 - 15) FORD Kenya
- (f) **Special Interest Groups (Women)**
 - 16) African Women Studies Centre, University of Nairobi
 - 17) Common Women Agenda
 - 18) FCDC Women Caucus
 - 19) National Women Steering Committee
 - 20) Women Political Alliance
- (g) **Special Interest Groups (Youth)**
 - 21) Former Student Leaders Caucus
 - 22) Kenya University Students Association
 - 23) Mt. Kenya Colleges and Universities Students Association
 - 24) Pan African Leadership Forum
 - 25) Young Women for Kenya
 - 26) Youth 4 Building Bridges Initiative
 - 27) Youth Advocacy Africa
 - 28) Youth Now Kenya
 - 29) Youth Serving Organizations Consortium
- (h) **Special Interest Groups (PWDs)**
 - 30) Consortium of Disabled Persons Organization
 - 31) Disability Mainstreaming Foundation of Kenya
- (i) **Special Interest Groups (Minorities)**



32) Endorois Welfare Council and Network of Indigenous Communities of Kenya

(j) Civil Society Organizations

33) Advocate Kibe Mungai and Ufungamano Forum

34) Boda Boda Association of Kenya

35) Companionship of Works Association

36) Dandora-Kayole-Kibra Residents Welfare Group

37) Former Mayors and Councilors Association

38) GEMA Community Association

39) I'm Worth Defending

40) Kariobangi South Jua Kali Association

41) Kenya National Federation of Jua Kali Associations, Kenya Livestock Producers Association and Kenya Agribusiness Alliance Kenya Public Sector Alliance

42) Kenya Section of the International Commission of Jurists

43) Kenya Voters Alliance

44) Lifeguard Kenya

45) Linda Katiba

46) Mau Mau War Veterans Association

47) Nairobi Market Traders Society

48) Nairobi Mashinani Women Caucus

49) Nakuru Pamoja Initiative

50) National Coalition of Sustainable Development Organization

51) Pastoralist Stakeholder Forum

52) ROTA Foundation

53) The Kenya Legend

54) The National Council of NGOs

55) Tung'arisha Kenya

(k) Religious Organizations

56) Kenya Conference of Catholic Bishops

(l) Individuals

57) Mr. Nelson Havi, Mr. George Omwanza, Ms. Caren Mureu and Ms. Esther Ang'awa

58) Benson Mutuva

59) Bernard Mwanzia

60) Eliud K. Matindi

61) Isaac Aluochier

62) Jonathan Kisia

63) Joseph Owuondo

64) Justice (Rtd) A. B. Shah

- 65) Kimaru Kimotho
- 66) Kiplagat J. Misoj
- 67) Michael Saina
- 68) Odhiambo K'Otieno Jabura
- 69) Phillip Olella
- 70) Prof. PLO Lumumba
- 71) Samuel L. Mwaniki
- 72) Yvonne Gacheri
- 73) Muthoni Kamuru

151. A list indicating the nature of their submissions of each of the groups (whether oral, written or both) is attached as *Annex 20*.

152. A matrix that compiles and summarizes all the submissions received by the Committees on each clause of the Bill and on general matters relating to the Bill is also attached as *Annex 21*.

(c) Key issues arising from the views received from the participants on the Bill

153. The following key issues can be gleaned from the submissions received by the committees-

(1) Whether the bill is one by popular initiative

154. Majority of the stakeholder who made submissions on this issue were of the opinion that in terms of Articles 255 and 257 the Bill addressed issues that required approval by referendum. Some participants expressed very strong opinions on this issue. They included the representatives of the Promoters, ICJ, KLRC and Mr. Kibe Mungai.

155. The representatives of the promoters submitted that the process that originated the bill was participatory and its validation was achieved through consultation with the citizens, civil society, faith based organizations, cultural leaders, private sector and experts. They stated that the objective of the initiative was to unite the country and strengthen the rule of law, unite Kenyans, deepen constitutionalism, launch a comprehensive reform process and consolidate the momentous opportunity that came with it.

156. The ICJ submitted that the Bill contained provisions that are protected under Article 255(1) which should be subjected to a referendum. They however, faulted

the BBI process and approach indicating that it could not be compared to the people driven approach taken towards the development of the Constitution 2010, and as such, the document was not reflective of the views of a majority of Kenyans but rather those of political elites. They indicated that for Kenya to move forward, there must be a meaningful and deliberate implementation of the Constitution 2010.

157. KLRC was of the view that the enacting formula for the Constitution of Kenya (Amendment) Bill, 2020 was that of a popular initiative. They held the view that a Bill by a popular initiative must go to its meaningful end and should not be hijacked on the way.
158. Mr. Kibe Mungai submitted that a serious scrutiny of the Bill would reveal that it proposes some amendments that relate to the matters set out in Article 255(1) of the Constitution which must be subjected to approval by way of a referendum.
159. On this issue, a number of participants, however, held a contrary opinion. They included: Mr. Nelson Havi, the Linda Katiba, The National Women steering Committee and Mr. Isaac Aluochier.
160. Mr. Nelson Havi submitted that the Bill had contested genesis. Its formulation was unstructured, non-transparent, non-participatory and executive-driven. He urged parliament to reject *in toto* the amendments to the Constitution contained in the Bill. He further submitted that parliament must process only such a Bill whose content and tenor are consistent with its role of protecting the Constitution of Kenya and promoting democratic values. He also argued that the corpus of amendments proposed in the Bill was so extensive that it alters the basic structure of the Constitution of Kenya in particular on the framework of Government which can only be effected by way of promulgation of a new Constitution.
161. On their part, Linda Katiba expressed a similar view to that voiced by the Mr. Nelson Havi contending that the Bill was a State initiative masquerading as a popular initiative and should follow the constitutional pathway as set in Article 255. They averred that the Constitution of Kenya 2010 does not provide for a State-led popular Constitutional amendment initiative. They further stated that while the Bill purports to be the product of a popular initiative, public funds have been expended in its preparation including the financing of the Building Bridges Initiative (BBI) Task Force that prepared it, collection of signatures, and verification of the same by the IEBC. The previous popular initiatives, notably the OKOA Kenya initiative mounted by CORD and the Punguza Mizigo by Third

Way Alliance party were not funded by public resources. They therefore contend that this is a State initiative masquerading as a popular initiative and should follow the constitutional pathway as set in Article 255. The Constitution of Kenya 2010 does not provide for a State led popular Constitution amendment initiative.

162. The National Women Steering Committee submitted that while the Constitution of Kenya 2010 does indeed provide for amendments, the manner in which the current proposed amendments have been carried out raises questions as to the legality and constitutionalism of the whole process. They argued that while pathways for amendments are clearly stipulated in Articles 257 and 256, being Parliamentary Initiative and Popular Initiative respectively, the current process was apparently a mongrel of the two pathways, a means not provided for in the Constitution raising the legality and constitutionality of the entire process.

163. Mr. Isaac Aluochier was of the view that a proposed constitutional amendment qualified to be termed a popular initiative if it was proposed by a registered voter or voters devoid of State support prior to the submission of the required number of signatures in support to the Independent Electoral and Boundaries Commission.

(2) Proposal to increase shareable revenue to Counties from fifteen percent (15%) to thirty-five percent (35%), entrenchment of the CDF in the Constitution and establishment of the Ward Development Fund

164. These three issues recurred amongst majority of the participants and were addressed together. The participants were of the view that these funds were necessary for local development.

165. The representatives of the promoters submitted that the entrenchment of CDF in the Constitution was to solve the legality issue and resolve the many litigations in court over Constituency Development Fund (CDF).

166. The COG submitted that amendment to Article 203 of the Constitution which seeks to increase the percentage of funds allocated to county governments from fifteen (15%) to thirty-five (35%) would strengthen devolution and ensure that county governments have adequate funds to carry out their operations and development.

167. The GEMA Cultural Society on their part submitted that it would promote equitable sharing of national revenue, entrenching a formula that will ensure the "one man one shilling" is progressively realized.

168. The Jubilee Party submitted that the increase of allocation from 15% to 35% meant each county and region, regardless of which political party would be in power, would not suffer economically or be underdeveloped with the passage of the Bill.
169. LIFEGUARD Kenya submitted that through the CDF, Ward Development Fund and the 35% of the shareable revenue allocation to counties as proposed in the Bill, women and girls will be provided with more secure rescue homes and centers in every ward.
170. Nairobi Market Traders Society stated that the funds were increased resources to the people while the Jua Kali Association held the view that it will avail more funds to support their sectors.
171. A number of participants held the view that the funds will have impact to spur grass-root development and bring development closer to the people. They included: The Kenya National Council of NGOs, The Boda Boda Safety Association, The Nairobi Mashinani Women Causcus, Former Mayors International, Kenya Former Councilors Association, FORD Kenya, Common Women Agenda, The National Gender and Equality Commission, Senator Wambua and the National Coalition of Sustainable Development Organization.
172. Similar views were expressed by the ODM party which submitted that these additional resources will spur development at the grassroots level particularly support to matters devolution.
173. On these issues, opposing viewpoint, were held by a number of participants. They included: Youth Now Kenya, Benson Mutuva and Eliud K. Matindi.
174. Youth Now Kenya submitted that the establishment of the Ward Development Fund whereas it may have been a good thing there is likelihood of misappropriation of these funds. They further stated it was clear that Auditor General is not able to audit over 1000 wards, counties, CDF Committees, state corporations, agencies and commissions due to underfunding. The 35% allocation to counties, whereas this was a good idea, it seemed not attainable as the country pays almost a trillion as debt remaining with around Ksh. 600 billion.
175. Mr. Benson Mutuva called for NG-CDF to be abolished arguing that, since the funds to Counties would be increased and the Ward Development Fund could serve the needs of the constituencies better. He recommended that the Ward



Development Fund be increased to at least 10% of the total funds received from National Government. He proposed that the CDF portion of the funds be factored into the revenue allocation to counties.

176. On his part, Mr. Eliud K. Matindi opposed the amendment of the Constitution to provide for these funds arguing that they could all be achieved by statutory enactments.

(3) Whether some part of the bill should be severed and not subjected to approval by referendum

177. Majority of the participants expressed their views on various provisions of the bill as a unit, however, some participants were of the view that parliament could sever some parts of the bill and enact it through the traditional parliamentary procedure.

178. The ICJ was of the view that parliament should isolate those provisions that do not require a referendum and leave those provisions that are protected under Article 255(1) to be subjected to a referendum. They stated that it was possible to sever provisions of a constitution amendment bill so that those that did not fall under Article 255 could be assented to forthwith after they are processed by the House.

179. Mr. Nelson Havi was of the view that since parliament was yet to enact a law to guide the referendum process most of the proposed amendments in the Bill could still be realized- properly and regularly- through parliamentary initiative.

(4) Parliament's authority to amend the Bill

180. A number of participants submitted proposed amendments with justifications to the Bill suggesting that they believed parliament could amend the Bill and improve as per their suggestions. The ICJ and Mr. Kibe Mungai expressed the view that parliament could accede their suggestions and amend the Bill.

181. Mr. Kibe Mungai submitted that the Parliament could amend or modify a Bill tabled before it pursuant to Article 257 of the Constitution because the Constitution provides that the law-making body is either Parliament or the People voting in a Referendum. He argued that the promoters of the popular initiative were not vested with any law-making power by the Constitution. Consequently, the argument that Parliament cannot amend the Bill amounted to elevating promoters of the draft Bill into a law-making body. He termed this insinuation as

patently unconstitutional proposition. He further argued that parliament could not abdicate the sovereign powers it exercises on behalf of the people in law-making.

182. The ICJ was of the view that the House could not be seen as rubberstamp and should consider the submissions received from the public, debate and make the necessary adjustments and present for adoption.

183. The KLRC held a different viewpoint to that expressed by Mr. Kibe Mungai and the ICJ. It was of the view that that parliament could only institute minor adjustments to graduate the Bill from draft Bill to a Bill but had no other role. Even though the power to enact legislation is vested in Parliament, under CAP One on revision of laws, the Attorney-General can make a few changes such as a change in title, heading, amend typographical errors, the formatting and the numbering. They stated that parliament in this case, had the same scope like that of the Attorney-General in relation to a bill originated by popular initiative. They averred that it was the only extent the Parliament can go by making minor adjustments while graduating the draft bill to a bill.

(5) The proposal to establish the Office of the Judiciary Ombudsman

184. A number of participants expressed their views in relation to the proposal to establish the office of Judiciary Ombudsman. The participants took varying positions in relation to issue.

185. The representatives of the promoters of the Bill submitted that, on the issue of vetting of the Judiciary Ombudsman, the Senate was seen to be the appropriate House to carry out the vetting because part of the executive will be drawn from the National Assembly. They argued that the Ombudsman would be independent of the Judiciary, so that Judiciary was not supervising the individual who is expected to oversee complaints against the judges. They stated that there was a legislative proposal to give full effect to the proposed Article 172 (a) (7) (b) in the Bill.

186. On the issues of whether the Judiciary Ombudsman as an *ex officio* would have a voting right, the KLRC held the view that even though the courts have held otherwise, the Judiciary Ombudsman is an *ex officio* and therefore will have no voting right.



187. The Common Women Agenda was of the view that the establishment of the office of the Judiciary Ombudsman will facilitate to receiving and hearing of complaints from members of the public on the judiciary
188. Concerns were raised by a number of stakeholder in relation to the appropriateness of the establishment of the office of the Judiciary Ombudsman. These included: The JSC, Youth Serving Organizations Consortium, The Pan-African Leadership Foundation, The National Women Steering Committee, Professor Lumumba, Mr. Eliud K. Matindi , Mr. Jonathan Kisia, Ms. Yvone Gacheri and Endorois Welfare Council and Network of Indigenous Communities of Kenya.
189. JSC concern was on the manner of appointing the Ombudsman (nomination by the executive and approval by the legislature) which they believed posed the danger of interference with the Judiciary which may erode the gains in judicial independence under the current Constitution. They also raised concerns on the roles vested in the proposed Office of the Ombudsman (accountability and disciplining of judicial officers) which they submitted that these were in direct conflict and contradiction with the constitutional roles that are vested in the Judicial Service Commission. They further submitted that the office already exists as an office of the Judiciary Ombudsman and only required restructuring for full effectiveness rather than instituting a radical new proposals that ignored the current operations and activities of the JSC.
190. Consequently, the JSC recommended that the structure and functions of the Ombudsman, as proposed in the BBI report, be abandoned. Specifically, the Judiciary recommended that: (1) The Office of the Ombudsman be established by the JSC and the Ombudsman to report to the JSC, through the Chief Justice; (2) The Judicial Service Commission be granted power to deal with minor disciplinary matters concerning judges and whose threshold may not warrant the formation of a tribunal.
191. The JSC further submitted that there was a risk in introducing two similar constitutional offices with overlapping functions which was not going to help in the administration of justice. They averred that creating a constitutional office parallel with the JSC will create a *lacuna* and some issues that may not be freed in terms of administration of justice.
192. They proposed the strengthening the Judicial Service Commission (JSC) rather than clawing back on the gains that were achieved in the last 10 years. They stated that there would be no need to create a new body to start investigating and

disciplining Judges when there is one that exists which just needed to be strengthened and given the necessary mandate to do so, including adequate funding.

193. Similar views to those of the JSC were expressed by the Pan-African Leadership Foundation who submitted that there already exists the Office of the Ombudsman with clear functions. They stated that the introduction of the Judiciary Ombudsman will undermine the independence of the Judiciary.
194. The Youth Serving Organizations Consortium supported the above view. They submitted that the proposed clause 41 of Bill that proposes to amend Article 168 (Removal from Office) which provides that the Judiciary Ombudsman may initiate a motion to remove a judge from office on account of complaints received from the members of the public will interfere with the independence of the Judiciary by introducing an additional watchdog. They stated this would demean ten sources of source of justice for the people and the Sovereignty of the people as envisioned in the second liberation that led to the birth of the Constitution of Kenya 2010.
195. On their part, the National Women Steering Committee submitted that the Amendment of Article 171 that proposes the introduction of the Judiciary Ombudsman appointed by the President who can initiate investigations against judges was a clear attempt at bringing the Judiciary under the power and control of the Executive.
196. Professor PLO Lumumba held the view that the proposed amendment to Article 168(Removal from Office) to provide that the Judiciary Ombudsman may initiate a motion to remove a judge from office on account of complaints received from the members of the public which enables the Judiciary Ombudsman to prosecute complaints received against a judge in the Judicial Service Commission as completely unnecessary and ought to be abandoned
197. Mr. Eliud K. Matindi expressed similar views. He was of the opinion that the creation of the office of the Judicial Ombudsman would have the effect of compromising the independence of the Judiciary. He stated that, in addition, the functions of the proposed office of Judicial Ombudsman are already provided for under Articles 168 and 172 of the Constitution. He averred that having the new office creates unnecessary conflict between the Judicial Service Commission and the Judiciary Ombudsman to the detriment of the Constitution and the people of Kenya.



198. On his part, Mr. Jonathan Kisia opposed the amendments to introduce Judiciary Ombudsman by submitting that it will interfere with the independence and operation of the Judiciary. This view was also held by Ms. Yvonne Gacheri who submitted that the executive and the Judiciary should be independent of each other.
199. The Endorois Welfare Council and Network of Indigenous Communities of Kenya similarly raised concern on the proposed establishment of office of Judiciary ombudsman to be part of the membership of JSC. They submitted that it was a critical office, however they stated that the proposed appointment procedures of the Judiciary Ombudsman where the President appoints the Judiciary ombudsman through the approval of the Senate was still a threat to separation of powers. They submitted that the appointment be done through a competitive process.

(6) The value and impact of public participation on the Bill

200. As to the value and impact of public participation on the proposed Bill, Mr. Kibe Mungai held the view that the invitation for public participation must give those wishing to participate sufficient time to prepare. He argued that members of the public cannot participate meaningfully if they were given inadequate time to study the Bill, consider their stance and formulate representations to be made.
201. On whether public participation is necessary on the first part and whether the views submitted by the public should inform the contents of the Bill and decision of Parliament and its committee, he stated that it must be an opportunity capable of influencing the decision to be taken.
202. He further argued that public participation was a necessary tool of good governance to ensure that our democracy is both quantitative and qualitative. He averred that public participation enables the people to participate in the decision-making process for the reason that the Constitution establishes a democratic government which is both representative and participatory and makes provision for the public to participate in the law-making process.
203. On whether parliament should use the public participation input to inform decision to amend the bill, he was of the view that the Constitution expects that Parliament can and should change the contents of the Bill upon considering the views submitted to it by the public. He argued that any law enacted without or with inadequate public participation that does not consider and incorporate the views of the public was at the risk of being declared null and void by the High Court. He stated that the incorporation of the views of the public should serve the best

interests of the BBI process for the Committees to take the position that Parliament has the mandate to change the contents of the Bill based on the submissions received from the public. He argued that it would be difficult to contemplate a popular initiative for amendment of the Constitution that did not take into account the views of the public on the Bill.

204. Similarly the ICJ was of the view that public participation was not intended and should not be cosmetic but should be used to resolve important matters by the legislature.

(7) Proposal to harmonize the rates paid by the national and county Governments to professional consultants for services rendered

205. Mr. Nelson Havi and Mr. George Omwanza and Architectural Association of Kenya both objected to the proposal to harmonize the rates paid by county and national government for professional fees for the reason that it was a claw back on professionalism and the growth of professionals in the country. They also stated it would interfere with contractual freedom between parties. They were of the view that professionals should be allowed to be regulated by their own professional bodies and there was likelihood of creating a disproportionate determination of fees especially between private and public projects.

206. The AAK submitted that the proposal interferes with the agreement of parties to a contract. They stated that considering the composition of the Commission, it was be rather limited in terms of professional diversity.

207. Mr. Nelson Havi and Mr. George Omwanza further argued that the action would limit the professional rights of advocates guaranteed under the UN Basic Principles on the Role of Lawyers. He stated that the Salaries and Remuneration Commission excludes regulation of remuneration on account of fees payable to advocates in private practice and that the remuneration of advocates is already regulated by legislation.

208. The representatives of the promoters of the Bill, however, were of a contrary opinion. They submitted that the proposal deals with professionals, not just lawyers. They stated the Salaries and Remunerations Commission (SRC) was already mandated by law to undertake this task. They averred that the SRC has a responsibility to consult just like Parliament must consult when passing laws on the Advocates Remuneration Order. They further stated that there was no

impeachment of the contractual right or the basis upon which lawyers and their clients agree on fees.

(8) The proposed establishment of the Youth Commission

209. A number of submissions were received concerning the proposed Youth Commission. Majority of the participants who made submission on this issue were of the view that the establishment of the Youth Commission will advance the participation of the youth in all spheres of public and private life. They stated that it will also ensure mainstreaming of the youth perspective in planning and decision-making. This view was expressed by Boda Boda Safety Association, National Gender Commission and the COG. The COG further stated that the Commission will advise the national and county governments on the design, implementation and evaluation of policies and programs to secure sustainable livelihoods for the youth.
210. Other participants were of the view that it will enhance inclusion in the state affairs and the economy. This view was expressed by the Nairobi Market Traders Society, African Women Studies Centre (AWSC) -University of Nairobi, Kenya University Student Leaders Caucus and Youth for Building Bridges Initiatives.
211. In addition the Youth Serving Organizations Consortium submitted that the proposed amendment to establish and to provide for the functions of the Youth Commission to, among others, promote the implementation of the rights of the youth under Article 55 will reduce the youth over-reliance on political power (Executive).
212. Mr. Joseph Owuondo submitted that the proposal will fix the gray areas like the youths funds, violation of rights of the youth by the police, bias job recruitment, good jobs and better remuneration by youth employers.
213. Some participants were however critical of the proposed establishment of the Youth Commission. They included: The Youth Advocay Africa, Youth Now Kenya , Professor PLO Lumumba, Eliud K. Matindi and Benson Mutuva.
214. The Youth Advocacy Africa submitted that there was need to implement certain provisions of the constitution and Acts of Parliament that were yet to be actualized before proposing amendments. The proposal to have a Youth Commission made no sense when certain youth agencies such as the National Youth Council remained underfunded and not well coordinated.

215. Youth Now Kenya was of a similar opinion arguing that there was an organization called National Youth Council which has been poorly funded over and over. They stated the National Youth Council was an organization which was supposed to take care of the issues the proposed Youth Commission was being established to undertake.
216. Professor PLO Lumumba, on his part, stated the amendment that proposes to, among others, promote the implementation of the rights of the youth under Article 55. He found this superfluous stating that the rights of the youth in Kenya are already provided for under Article 55 of the Constitution. He stated that what was being proposed could be achieved through legislation as opposed to a Constitutional Amendment.
217. Eliud K. Matindi and Benson Mutuva opposed the establishment of the Youth Commission. Mr. Mutuva submitted that there are too many Commissions and so there was no need to add more. He averred that the issues of youth will in future be addressed through the new education system which is competency base as it was not possible to have a commission for each class of people.
218. On his part, Mr. Matindi, stated that Article 59(4) and (5) already empowered Parliament to enact an Act to establish a Youth Commission as a constitutional commission within the meaning of Chapter Fifteen of the Constitution.
219. The Endorois Welfare Council and Network of Indigenous Communities of Kenya-called for more scrutiny of the proposed appointment of the commissioners to avoid a scenario of further consolidation of power by the president. They stated that the appointment process should be competitive and through a Public Service Commission where people are given equal opportunity and their membership should be increased to include regional representatives and representation of Special Interest Groups.

(9) The proposed hybrid System of government

220. The representatives of the Promoters of the Bill submitted that the proposed bill was intended to do away with the pure presidential system and replace it with a hybrid system of government where the offices of the Prime Minister, Deputy Prime Ministers, Cabinet Ministers, the Attorney General and the Leader of the Opposition will be also offices in parliament. This arrangement, they stated, was seen as an autochthonous, home grown, home based and the Kenyan society historical experience being brought to bear.

221. The Jubilee Party submitted that the proposed new provisions of Article 130(2), on the composition of the National executive shall reflect the regional and ethnic diversity of the people of Kenya and thus enhance inclusivity. They further state that to enhance political stability and accountability by government the office of the Leader of the Official Opposition was being proposed to be established.
222. The Maendeleo Chap Chap party submitted that the amendment of Article 130 of the Constitution which provides for the introduction of the position of a Prime Minister and the Deputy Prime Ministers in the composition of the National Executive will ensure that the composition of the National Executive shall be all inclusive and represents the interest of all Kenyans regardless of their ethnic and political inclination
223. A number of participants were of contrary view. Nelson Havi submitted that in regard to clauses 23, 28, 29 and 31, the architecture of the Executive in the Constitution of Kenya is presidential with delegated executive authority of Head of State and Government vested in the President. That the People of Kenya opted for a presidential system when they promulgated the Constitution of Kenya. He concluded that a reversal of the system amounts to the creation of a new Constitution.
224. The ICJ also opposed the proposed hybrid system of government raising concerns related to the principle separation of powers. They submitted that separation of powers is a cardinal principle of governance that the constitution of Kenya 2010 dealt with by separating the executive and parliament. They further stated that the proposed re-introduction of the executive in parliament was not going to be good for oversight and accountability hence not achieve transparency. They averred that the reintroduction of the Executive in Parliament will claw back on the separation of powers.
225. Eliud K. Matindi held a similar view. He submitted that having a hybrid system of government where some Cabinet Ministers were members of the National Assembly and others were not will make it almost impossible for Parliament to hold the Executive to account.



(10) Creation of additional counties and constituencies

226. Sen. Enoch Kiiro Wambua, MP, Senator for Kitui County submitted that an additional county could be added to correct anomalies that happened during the constitution review process. He proposed as follows-

- (i) establishment of Mwingi County comprising the three Mwingi constituencies and Kitui East excluding Nzambani Ward which should revert to Kitui Central;
- (ii) Amendment of Clause 10 and the Second Schedule to the Bill to provide for two additional constituencies for Kitui County, one constituency to be in Mwingi North to take care of the marginalized Tharaka/Thagicu Sub-County and the other constituency in Kitui South to address the challenges of marginalization in the vast constituency;
- (iii) Change of the headquarters of Eastern region from Embu to Machakos for ease of service delivery for the people of lower Eastern region who constitute the largest population of former Eastern Province; and
- (iv) The Provision of Sub-County Codes for Mutito North and Tharaka/Thagicu sub-counties since the two sub-counties cannot access services and opportunities for development and employment.

227. The Hon. Innocent Obiri Momanyi, MP, Bobasi Constituency raised his concerns on clause 10 and the Second Schedule to the Bill, noting that the Bill has introduced new constituencies in twenty eight counties leaving nineteen which includes Bobasi Constituency in Kisii County.

228. The Member indicated that the Building Bridges Initiative was established under Gazette Notice No. 264 of 10th January 2020 and in that Gazette Notice the Terms of Reference did not include constituency review. Further, the first version of the Constitution of Kenya (Amendment) Bill published on 21st October 2020 did not contain any clause dealing with constituencies.

229. The Member stated that there was no public participation on the issue and that he was not aware of any such invitation as stipulated under Article 89 of the Constitution.

230. The Member informed the Committees that Bobasi Constituency that he represents has eight wards, two hundred and eleven public schools, an area of 260.6 Sq.km, two sub counties (Nyamache and Sameta), a population of 190,077 and 89,130 registered voters. Noting that the Second Schedule to the Bill had provided for an additional constituency to Nyamira County whose largest



constituency had six wards, the Member lamented that Kisii County had not been provided with an additional constituency yet the Member's Constituency had eight wards.

231. The Member held the view that the power to delimit electoral units was vested on IEBC and not a Taskforce and that a contrary position would be unconstitutional.

232. A similar proposal was made by Mr. Kibe Mungai who submitted that the Bill should be amended to elevate the former districts of Mwingi District, Gucha District and Kuria District created after 1992 into Counties based on geographical size, population and community or ethnic factors. He further stated that there was no magic to number 47 besides being the number of districts created under the Districts and Provinces Act, 1992. He averred that since the process of creation of districts was always based on political rather their merit considerations, there was no reason why Kenyans should continue to be held hostage by the said Act for purposes of determination of the number of counties.

(11) Proposal to create seventy (70) additional constituencies in the specified 28 counties and actualizing and delimiting their boundaries within a period of 6 months after referendum

233. The proposal to create seventy (70) new constituencies in the specified twenty-eight (28) counties attracted notable submissions from the participants. A number of them were of the view that the Promoters of the Bill were usurping the powers of the Independent Electoral and Boundaries Commission (IEBC) while others argued that it provided an opportunity to address the component of universal suffrage that each vote counts.

234. On the issue of the additional 70 constituencies, the representatives of the promoters submitted that the Steering Committee and Taskforce reviewed a lot of materials to arrive at the decision. They further stated that with regard to the boundary delimitations one of the principles that guided the process was to be found in in the Revised Preliminary Report of the Proposed Boundaries of Constituencies and wards published in 2012. The other guiding principle arose from court cases that were filed and decided specifically the case of *Kimathi Maingi versus Andrew Ligale*. The other guiding factors were identified at the time of making the decision were also to be found in the 2012 report stated above. They further submitted that other guiding factors were on based on the need for equitable resource allocation and consideration of the population data. They averred that the history of disputed elections in the country and the need to build

consensus were important consideration to reach the determination. They concluded that the whole process was guided by the documents that would ordinarily be used by the IEBC as provided by law to arrive at a just decision.

235. In addition the representatives of the promoters further submitted that the allocation of the 70 additional constituencies to the specific 28 Counties was also informed by extensive consultations including, representations, town hall meetings held all over the country, consultative meetings and even rallies.

236. On the issues of the adequacy of the six months period to delimit the electoral boundaries, they submitted that their estimation of the period was based on models. They stated that the model they used showed that six months period was adequate to delimit the proposed 70 additional constituencies. They further stated the requirement of a period of 12 months provided under Article 89(4) would not apply to this particular review.

237. On their part, the Independent Electoral and Boundaries Commission (IEBC) submitted that it was bestowed with the constitutional mandate of conducting boundary delimitation as outlined under Article 88(4) (c) and 89, upon the creation of additional constituencies in the law. They stated that Article 89 of the Constitution provides a method and formula for boundary delimitation. They stated that

238. The Commission acknowledged the mandate of parliament, through a referendum, to create additional constituencies. It, however, held the view that it had the exclusive jurisdiction to conduct the delimitation and allocation of constituencies pursuant to Article 88(4) (c) and 89 of the Constitution. It was its view that the role of allocating and delimiting any proposed additional constituencies once created should be its exclusive mandate in line with the provisions of the Constitution as the case has been in the previous delimitation processes. The Commission further submitted that the process of delimiting electoral units was highly emotive and if done improperly and hurriedly, may fail to comply with the constitutional requirements set out in Article 89 thus, potentially resulting in numerous boundary disputes and litigations.

239. For the above reason, the commission submitted that clause 10 of the Constitution of Kenya (Amendment) Bill, 2020, which states : “Article 89 (1) of the Constitution is amended by deleting the words “two hundred and ninety” and substituting therefor the words “three hundred and sixty” with the resultant effect to create additional 70 constituencies to be proper. However, it should not assign



the same to respective counties as proposed in the Constitution of Kenya (Amendment) Bill, 2020 as this will be inconsistent with the provisions of Article 88(4)(c) and 89 of the Constitution, thereby, presenting possible legal challenges to the delimitation process

240. The Commission further submitted that the period of six months after the commencement of the Act, provided under the second schedule of the Bill to determine the boundaries of the additional seventy constituencies created in Article 89(1) using the criteria provided for in Articles 81 (d) and 87 (7) to be insufficient. The commission was of the view that the period of six months to complete the exercise to be inadequate, based on past experience and practice. The commission further stated that the first delimitation under the Constitution of Kenya, 2010, the IIBRC undertook data collection and first round of public hearings from May, 2009 to November, 2010 and handed over to IEBC after the promulgation of the new Constitution, who took over the work from January, 2012. They then conducted public hearings, delimitation and publication of the first and second drafts of the delimitation of boundaries of constituencies and wards for publication of the National Assembly constituencies and County Assemblies Order, 2012 which eventually ended on 6th March, 2012. A period of two and a half years which was undertaken by the two teams.
241. They further submitted that auxiliary activities related to the delimitation such fresh voter registration for the newly created constituencies and fresh voter roll need to be undertaken, this, coupled with the Commission's preparation for the 2022 general election
242. The IEBC acknowledged the centrality of public participation, dispute resolution and litigation in the process, stating that in the previous exercise they had two sets of public hearings, preparation of reports and dispute resolution.
243. The Commission informed the committee that Section 36 of the Fifth Schedule of the IIBC Act guides the boundaries delimitation process in line with the law. The Fifth Schedule was meant for the first review and stands spent. To remedy this gap, the Commission prepared and submitted to the National Assembly, the draft IEBC (Amendment) Bill, 2020 for its consideration. The Commission is awaiting progress on in that area. The Commission further urged Parliament to legislate and pass the Bill to address the gaps in the law relating to boundary review. The draft is expected to provide the process in which the review can be done, including how to conduct public hearings and dispute resolution that may arise and capping the periods required for those activities

244. They further submitted that they needed the help of the KNBS to validate their shapefiles. They argued that to help them achieve this objective the KNBS was expected to provide the relevant data to Commission which would then be used to populate the electoral units. They confirmed that the exercise was already completed at constituencies' level.
245. They further submitted that the Commission will be seeking to validate this data with the KNBS. The KNBS does not require the shapefiles since they lack the mandate to populate electoral units, instead, the KNBS should help the Commission finalize the validation process of the data for the electoral units.
246. A number of stakeholders held the view that the Independent Electoral and Boundaries Commission was the only entity vested with the Constitutional mandate to delimit electoral units and the BBI Taskforce had no role to play. This argument was advanced by Mr. Nelson Havi, ROTA Foundation, Hon. Innocent Momanyi, FORD Kenya party and the Pastoralist Stakeholders Forum.
247. The Pastoralist Stakeholders Forum submitted that the additional constituencies should not be based on the census numbers (that are being contested in court) alone. Furthermore, the distribution of land and people in Kenya is highly skewed, with Pastoralists occupying eighty per cent (80%) of Kenya's landmass, therefore both land and people must be given equal consideration when designing systems of political representation and resource allocation. They further observed that the distribution of additional constituencies on the basis of the population quota assumes that citizens have equal access to their political representatives and vice versa. They thus recommended that the 70 additional constituencies be equitably distributed in consultation with IEBC; and that the responsibility of IEBC under Article 89 BE to review constituency boundaries, something they have never done since 2013.
248. The FORD Kenya Party while submitting on the issue of the additional 70 constituencies stated that although the decision to create them was timely for purposes of equity, their delimitation was the role of the Independent Electoral and Boundaries Commission (IEBC).
249. Mr. Nelson Havi argued that the role of creating and delimiting of new constituencies rested with the IEBC hence the inclusion of that provision rendered the bill unconstitutional.



250. The Youth Now Kenya and Youth Serving Organizations Consortium argued that the proposed additional constituencies will burden the country as concerns has already been raised by the National Treasury and Salaries and Remuneration Commission on the ballooning wage bill.

251. The Nairobi Women Mashinani Caucus and the GEMA Cultural Association argued that the additional constituencies will address underrepresentation in populous areas while the Jubilee Party was of the view that the proposed creation of the additional 70 new constituencies will address under- representation in constituencies with large populations and bring about equity in allocation of additional resources such as CDF.

(12) The framework for compliance with the two-thirds gender principle

252. A number of participants who made submissions on this issue were in support of the proposed provisions in the bill to attain the 2/3 gender principle. Those who made submission on this issue include: NGEK, Lifeguard Kenya, Africa Women Studies Centre of University of Nairobi, Common Women Agenda, Women Political Alliance, Young Women for Kenya, National Women Steering Committee, and Professor PLO Lumumba.

253. On the issue of the 2/3rd Gender principle the representatives of the promoters submitted as follows-

- (i) The total of 360 electoral constituencies was informed by 2019 census data, where a member of parliament will represent about 132,000. In the 360, every party must submit a candidates list that is two-thirds gender compliant. During the general elections, the sovereign will of the people will reign- electorates will be free to elect men and women, but the parties' present men and women for the elections.
- (ii) There are additional seat such as that of the Leader of official opposition, the four persons with disabilities; two are women, the youth; one man and one woman.
- (iii) The National Assembly membership is 367. The Senate is 47 men and 47 women, which is 94 members. In terms of the computation of the 2/3 for the bicameral parliament, there are already 47 women in Senate.
- (iv) In terms of the numbers, parliament with 461 member (367 NA and 94 Senate) to meet the 2/3rd gender requirement, 153 women would be required. To bridge this gap, there are already, 50 women in position, 47 in the Senate, the women with disabilities and one woman representing the youth.

- (v) In the worst-case scenario, candidates have been presented and Kenyans have not elected any woman from the 360 electoral constituencies, a nomination of extra 103 women would be required. The practice indicates a different trajectory, as the case is today, there are 24 women out of 290 elected Members of Parliament, which is 8.2 per cent.
- (vi) The requirement that political parties ensure the candidates list meets the 2/3rd threshold and the nomination of women based on numbers of votes garnered in a competitive elections, there is likelihood that the country would not get to the worst- case scenario situation
- (vii) In any case, this is a 15-year mechanism. In 15 years, men and women must be elected within the 360 constituencies and from there on; there will be no need for any further nominations.

254. The National Gender and Equality Commission submitted that part of implementing the Constitution of Kenya 2010 to achieve the 2/3rd gender rule with consequence to bridge the gender gap necessitated the amendments to the Constitution. They stated that proposed amendment will cure unconstitutionality of parliament emanating from the advisory of the Chief Justice that if Parliament does not give a formula to attain the 2/3rd gender rule, the parliament should be dissolved.

255. The African Women Studies Centre (AWSC) -University of Nairobi submitted that Clause 7 of the bill (Legislation on elections) to provide for Parliament to enact legislation imposing sanctions on a political party that fails to ensure that the party's list of nominated candidates comply with the principle that not more than one-thirds of such candidates are of the same gender. This is to compel political parties to facilitate the actualization of the gender rule in the electoral process from the nomination stage. They argued that the provision leaves the implementation of the gender rule to Political Parties and Parliament and there is no guarantee parliament will implement particularly given the fact that the Politicians are the very "owners" of the Political Parties.

256. The ICJ was however raised concern on the denial of representation of women in the National Assembly by stating that the Senate, as important as it is, cannot become the refuge of ensuring that there is gender balance as is suggested in Article 27. They further submitted that there was risk of having a bloated parliament in the case where all the elected leaders are almost of the same gender and whether to limit the principle for appointive positions and not elective.

257. Mr. Nelson Havi submitted that in regard to the two-thirds principle, the Bill proposes nebulous amendments to the Constitution of Kenya the implementation of which may not attain gender parity and equity. The Society stated that the proposed amendment was unconstitutional in so far as it seeks to reverse four decisions of the Court on the matter and the Advisory by the Chief Justice for the dissolution of Parliament for failure of implementation of the two-thirds gender principle. Further, the fact that Parliament and the Attorney-General had challenged the Advisory for Parliament's dissolution in Court and obtained an Order of stay was of itself a militating factor against the pursuit of amendments to ameliorate Parliament's failure to pass legislation to implement the two-thirds gender principle until said challenge is heard and determined.
258. The Common women Agenda submitted that the Independent Electoral Boundaries Commission (IEBC) mandate is enhanced to ensure that the political parties' candidate's lists comply with the two third gender rule. Resolution of nomination disputes is now a function of IEBC that is vested in the Political Parties Disputes Tribunal for speedy adjudication and resolution. They further submitted that Affirmative action serves its purpose well if it was time bound. The draft introduces a sunset close of 15 years for the national assembly and 10 years for the county assembly. This will give women an opportunity to ensure that they set their agenda to facilitate direct election without the affirmative action. The further argued that the Senate will now be a house of equal men and women and equal vote. Gender parity will be achieved at the Senate with 50/50 percent representation. This will cure the challenge nominated members continue to suffer when they have to vote through delegate system. Majority of elected senators now are men with only 3 female senators. The interest of the counties will very well be monitored by one man and one women elected from a county.
259. The Frontier County Development Council(FCDC) Women Caucus was of the view that the proposal to amend Article 82 (Legislation on elections) to provide for Parliament to enact legislation imposing sanctions on a political party that fails to ensure that the party's list of nominated candidates comply with the principle that not more than one-thirds of such candidates are of the same gender was timely to facilitate the actualization of the gender rule in the electoral process from the nomination stage.
260. Women Political Alliance submitted that clause 7 of the Bill proposes to amend Article 82 (Legislation on elections) to provide for Parliament to enact legislation imposing sanctions on a political party that fails to ensure that the party's list of nominated candidates comply with the principle that not more than one-thirds of

such candidates are of the same gender. The party primaries should adhere to all rules because they are very crucial to determining who gets to what office and women should not be left behind at this stage as it has always happened.

261. Young Women for Kenya submitted that Amendment of Article 98 on composition of the Senate increasing the number of senators from the 47 Senators representing each county to 94 Senators will five women platform in decision making. They further submitted that the amendment of Article 82 on the two-thirds gender rule in party lists provides for parliament to enact legislation imposing sanctions on a political party that fails to ensure that the party list of nominated candidates comply with the principle that not more than one-thirds are of the same gender.
262. National Women Steering Committee submitted that Parliament as presently constituted is in violation of the Constitution with regards to the two-thirds gender principle and is in violation of several court orders to put in place the necessary mechanism to ensure that it is properly constituted. In recognition of this, and in compliance with Article 261 (5), (6) (a & b), and (7) the Chief Justice Emeritus, the Hon. David Maraga issued an advisory to the President on the 21st of September 2020 to dissolve Parliament.
263. Mr. Kibe Mungai was of the view that whilst section 9 of the Bill was a major step to help in realization of the two-thirds gender principle further amendment should be made In order to reduce the number of nominated women on account of the two thirds gender principle. He proposed that-
- i) Articles 88 and 90 of the Constitution should be amended to provide that IEBC must ensure that the party lists submitted by each political party complies with the two-thirds gender principle at the County level. This will ensure for instance that if Siaya and Kiambu have 9 and 15 constituencies respectively ODM and Jubilee will have high chances of complying with this principle in their respective strong holds. Otherwise there is no value in Jubilee submitting a list consisting of 8 women in Siaya County and only three in Kiambu County and vice-versa.
 - ii) Article 91(1) of the Constitution should be amended to make it an express obligation of political parties to comply with the two thirds gender principle in nominating candidates at the county and national levels.
 - iii) Article 92 of the Constitution should be amended to provide that in allocating funds from the Political Parties Fund the number of votes garnered by elected women shall be multiplied by two in order to give additional incentives for political parties to nominate women for elective positions.



264. The National Women Steering Committee voiced a contrary opinion. They submitted that the amendment by providing for sanctions for a political party that fail to comply with the principle that not more than two-thirds of the party's candidates are of the same gender, the proposal seeks to institutionalize impunity and corruption. It is unconstitutional as it writes into the supreme law of the land, a contradiction and is therefore void in light of the contradiction
265. Professor Lumumba was of the view that the amendment was unnecessary as the Constitution already provides for the two-thirds (2/3) gender rule which only requires implementation and should not form the basis for constitutional change.

(13) Over representation and wage bill

266. The representatives of the promoters submitted that an empirical data from the study carried out by the auditor general in 2016, including consulting the Inter-Parliamentary Union (IPU) as to the average number of people within the category where Kenya was situated, that the representation was within the normal range. They stated that considering, Article 81(3) (d), the principles on universal suffrage and equality of the vote, the conclusion was that the Kenya parliament was not a bloated Parliament.
267. The Pan-African Leadership Foundation submitted that the proposal to amend Article 98 to change the composition of the Senate to two senators per county, a man and woman, thus raising the composition of senate by about 40% was coming at a time when Kenyans feel the pinch of being over represented and burdened by heavy taxation. The further submitted that considering the size of the country the found there were already too many members of parliament and adding more members adds no other than a heavy tax burden on the people. They argued that the existing numbers of members of parliament needed to be reduced.
268. Youth Now Kenya submitted that the proposed additional constituencies will burden the country as concerns has already been raised by the National Treasury and Salaries and Remuneration Commission on the ballooning wage bill.
269. Yvone Gacheri was of the view that the expansion of Parliament would increase the wage bill and should therefore be rejected.

(14) Court cases

270. The Linda Katiba submitted that parliament should also be aware of the fact that the High Court had issued conservatory orders against the BBI Constitutional amendment process pending determination of petitions presently before the Court seeking inter alia, a declaration of the BBI process as unconstitutional, and protection of the “basic structure of the Constitution. The argued that the Court has put all public institutions, including Parliament on notice that it is imprudent to spend public money BBI in the intervening period because the decision of the Court could render the entire exercise nugatory.

(15) Basic structure of the Constitution

271. Mr. Nelson Havi submitted that the corpus of amendments proposed in the Amendment Bill, was so extensive that it alters the basic structure of the Constitution of Kenya in particular on the framework of Government which can only be effected by way of promulgation of a new Constitution.

(16) Implication of the proposed amendment to Article 203 on prioritization of per capita allocation and capping

272. The Pastoralists Stakeholder Forum submitted that with respect to Clause 50 of the Bill that amends Article 203 of the Constitution by inserting additional criteria in the form of paragraphs (l), (m) and (n), the forum proposes that paragraph (n) be deleted. They stated that one of the objects of devolution under Article 174(f) of the Constitution of Kenya is to promote social and economic development and provision of proximate, easily accessible services throughout the country, and therefore the prioritization of per capita allocation and capping under paragraph (n) negates the gains made so far and the purpose and objects of devolution. They gave the example of the cost of delivering polio vaccine to a child in Turkana County from the KEMSA warehouses in Nairobi shall definitely not cost the same as a delivering such services within Nairobi.

- Issues for determination

273. From the submissions received, the Committees noted a number of recurring matters of concern to the public and stakeholders which the Committees banded into the following thematic areas-

- (1) nature of the Bill;
- (2) public participation on the Bill;



- (3) processing of the Bill;
- (4) substantive issues on the Bill;
- (5) referendum issues;
- (6) implications of the proposed amendment to Article 203(1) of the Constitution on the criteria for determining the equitable share of national revenue allocated to the county governments; and
- (7) the status of litigation relating to consideration of the Bill.

274. These thematic areas are considered in Chapters Four and Five of the Report.



**CHAPTER FOUR: STATUS OF LITIGATION ON THE CONSTITUTION OF
KENYA (AMENDMENT) BILL, 2020**

A. Introduction

275. There are two (2) Petitions that have been filed at the Supreme Court of Kenya and eight (8) Petitions at the High Court of Kenya regarding the Building Bridges Initiative (BBI) process and the Constitution of Kenya (Amendment) Bill, 2020.

276. The Petitions seek to challenge the content of and the processes by which the Constitution of Kenya (Amendment) Bill, 2020 was formulated and the steps that have been and that are intended to be taken in seeking to amend the Constitution. They contend that the said contents and processes violate the Constitution.

B. Advisory Opinion Sought at the Supreme Court of Kenya

277. By a reference dated 25th November, 2020, the County Assemblies of Nandi and Kericho requested for an opinion on interpretation of Articles 255 and 257 of the Constitution regarding procedures for amendment of the Constitution. By a reference dated 2nd December, 2020, the Governor, Makueni County also requested for an opinion on the same issues.

278. The two references were consolidated and heard together as follows –

*Supreme Court Advisory Opinion Reference Numbers 3 and 4 of 2020
(Consolidated):*

Applicants: The County Assembly of Kericho County, The County Assembly of Nandi County and the Governor, Makueni County

Interested Parties: The Speaker of The National Assembly, The Speaker of the Senate, The Hon. Attorney General, The Independent Electoral and Boundaries Commission, The Law Society of Kenya And Others

279. The Applicants sought the Advisory Opinion of the Supreme Court on the following questions –

(a) Interpretation of “*approves*” under Article 257(6) of the Constitution. Whether approval by County Assemblies of a constitutional amendment Bill through a popular initiative under Article 257 of the Constitution-

i) Requires a County Assembly to process the Bill under its standards for processing and passing Bills, including mandatory number of times for reading Bills of the Assembly and attending processes;



- ii) Requires a County Assembly to do public participation for the Bill under Articles 10 and 118 of the Constitution before approval;
- iii) Permits a County Assembly to amend a constitutional amendment Bill to align it with the contribution by Members of the County Assembly and to incorporate views received from public during public participation; and
- iv) Requires passage by simple majority of MCAs present at the time of voting or by a vote of not less than ½ of all MCAs; or through a vote supported by not less than 2/3 of all MCAs.

(b) What is the constitutional process for Parliament to consider consideration of a constitutional amendment Bill presented under Article 257? Is the procedure stipulated in Article 256 (256(1) through 256(3)) the proper and correct procedure that Parliament must use to consider in the passage of the Bill on the popular initiative under Article 257 of the Constitution?

(c) What is the requirement of the Constitution in regard to referendum and specifically -

- i) If a constitutional amendment Bill contains a mixture of matters/issues some requiring referendum under Article 255(1) and others not requiring referendum:
 - Is the entirety of the Bill presented to the people for a vote at a referendum?
 - If only those issues implicating Article 255(1) are presented for referendum, is the entirety of the Bill defeated if some or all the issues presented for referendum fail?
- ii) If a single Bill proposes to amend numerous provisions of the Constitution, does the Constitution require a single or multiplicity of questions to be presented for a vote at the referendum, especially delineated on the basis of:
 - Each provision sought to be amended;
 - grouped on the basis of subject matter implicated; or
 - On the basis of other objectively articulable criteria that aligns with the constitutional amendment principle of “*unity on of content*”?

(d) What is meant by “*a proposed amendment*” in Articles 255(1) and 255(2):

- i) Does the Constitution require that a “Bill” to amend the Constitution, referred to severally in Articles 256 and 257 should only contain one matter/issue on amendment of the Constitution?
- ii) Relatedly, can “*a Bill to amend*” the Constitution referred to in Article 256(1) or the “*draft Bill*” to amend the Constitution under Article 257(3)

be in the form of an omnibus Bill to amend various unrelated constitutional matters?

- (e) Can a government at the national or county level, a state organ, a state or public officer -
- i) Initiate a constitutional amendment through popular initiative under Article 257 of the Constitution?
 - ii) If the answer to the above is yes, is it constitutionally permissible under Articles 257, 201(d) and (e), 174, 73, 75 and 10 for the government, state organ, the state or public officer to-
 - Use government or state resources to support and or finance the process of initiating (or incidental processes) a popular initiative contemplated in Article 257(1) through (4) and 257(10) & (11) of the Constitution?
 - Deploy state and public officers for purposes of collecting or facilitating the collection of signatures referred to in Article 257(4) of the Constitution?

280. By a Ruling issued on 16th March, 2021 (*Annex 22*), the Supreme Court declined to give an advisory opinion on the two consolidated References, holding that -

- (a) *The High Court has been moved by the parties under Article 165 (d) of the Constitution. They seek a number of far-reaching declarations which in our view, can only be made after a rigorous and extensive interpretation, of the relevant provisions of the Constitution whose meaning has been called into question.*
- (b) *We also note that the High Court petitions were filed before the two References seeking this Court's advisory opinion. Coming to the critical question as to whether the issues pending before the two courts, bear any substantive similarity as to put us on a trajectory of restraint, we have come to the conclusion that, indeed this is the case.*
- (c) *We do not see how the High Court can determine the issues before it without venturing into similar questions now pending before us in the two References. Given the timing of the proceedings before the two courts, there is a distinct possibility that the advisory opinion and declarations from the Supreme Court and High Court respectively, could issue at the same time. Such a scenario is likely to cause confusion and anxiety in the public mind, not to mention the potential threat, to the principles of certainty and finality in judicial pronouncements.*
- (d) *We have already noted that the matters before the two courts, are of great public importance, requiring urgent resolution. Yet we do not think that the issues before the High Court, have been lodged in an adversarial posture, such*

as would embolden this Court to proceed and render an opinion as signalled in the quoted Paragraph above.

(e) On the contrary, the High Court is being called, with attendant tones of urgency, to exercise one of the most important aspects of its original jurisdiction, i.e., to interpret the Constitution. In the circumstances, we see no justification to usurp that Court's role as clearly constructed in our constitutional set-up.

C. Constitutional Petitions filed before the High Court of Kenya

281. A total of eight (8) Petitions have been filed at the High Court of Kenya, as discussed below.

1) Petition No E282 of 2020; David Ndi & Others vs. Attorney General & others

282. Three main issues were raised in this Petition, namely –

- a) Whether the legal and judicial doctrine of the “*basic structure*” of a Constitution, the doctrines of “*constitutional entrenchment clauses*” “*un-amendable constitutional provisions*”, “*unconstitutional constitutional amendments*”, “*the theory of un-amendability of the Constitution*”, “*essential features in a Constitution*”, and the “*implied limitations of the amendment power in a Constitution*” are applicable in the Republic of Kenya;
- b) Whether Chapter One on Sovereignty of the People and Supremacy of the Constitution, Chapter Two on the Republic, Chapter Four on the Bill of Rights, Chapter Nine on the Executive and Chapter Ten on the Judiciary and the provisions therein form part of the “*basic structure*”, “*entrenchment clauses*” and “*eternity*” provisions of the Constitution and therefore cannot be amended either under Article 256 by Parliament or through popular initiative under Article 257 of the Constitution; and
- c) Whether, taking guidance from the doctrine of the “*basic structure*” of the Constitution, “*the constituent power*” and the doctrines of “*unconstitutional constitutional amendments*”, “*the limits of the amendment power in the Constitution*” and the theory of un-amendability of “*eternity*” clauses, there is an implied or implicit limitation to powers of constitutional amendments under Articles 256 and 257 of the Constitution.