REPUBLIC OF KENYA

Rt. Hon. Speaker
You may approve
for tabling.
26/04/21

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EC 26/04/21

Approved
26/04/2021

TWELFTH PARLIAMENT | FIFTH SESSION

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*)

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

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

APRIL, 2021

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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 be 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 Mũturi Kigano, MP	**Sen. Erick Okong'o Mogeni, SC, MP**
Chairperson, National Assembly Departmental Committee on Justice and Legal Affairs	**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 MuneneWambugu,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, FCIArb, 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 Odhowa	- 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 Sittings of the two Committees in considering the Constitution of Kenya (Amendment) Bill, 2020 are attached to this Report collectively as ***Annex 1***.

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	
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	
Hon. Shamalla, Jennifer, MP	Member	
Hon. John Kiarie Waweru, MP	Member	ABSTAINED
Hon. John Munene Wambugu, MP	Member	
Hon. Anthony Tom Oluoch, MP	Member	
Hon. Robert Gichimu Githinji, MP	Member	(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	
Sen. Amos Wako, EGH, SC, FCIArb, MP	Member	
Sen. James Orengo, EGH, SC, MP	Member	
Sen. Fatuma Dullo, CBS, MP	Member	
Sen. Mutula Kilonzo Junior, CBS, MP	Member	
Sen.(Dr.) Irungu Kang'ata, CBS, MP	Member	ABSTAINED
Sen. Johnson Sakaja, CBS, MP	Member	(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 opportunity[1]. 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

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[1] Report of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce, October, 2020, available on http://kenyalaw.org/kl/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 'vettable 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 Article10(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 Article257(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, and151D 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'arishe 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. Misoi
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 severe 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 severe 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 sated 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. The 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. The 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 interference with the independence of the Judiciary by introducing an additional watchdog. The 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 state 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 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. The 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 sated 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 Kiio 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 *Kimanthi 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. The 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. The 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: NGEC, 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.

I) Petition No E282 of 2020; David Ndii & 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.

283. The Petition and the Supporting Affidavit pleaded facts and pointed out the law necessary to enable the making of the orders sought therein. The ultimate reliefs sought in this Petition were fourfold-

(a) A declaration that the basic structure of a Constitution which precludes amendments thereto is applicable in Kenya;

(b) A declaration that the basic structure doctrine applies to the Structure of the Republic, the Bill of Rights, the Executive, Parliament and the Judiciary and the Articles in respect thereto in the Constitution of Kenya cannot be amended by parliamentary or popular initiative;

(c) A declaration that Parliament's power of amendment of the Articles of the Constitution of Kenya is limited and does not relate to alteration of the basic structure thereof; and

(d) A declaration that the Constitution of Kenya (Amendment) Bill, 2020 is an unconstitutional attempt at amendment of the Constitution of Kenya in so far as the same relates to the Executive, Parliament, and the Judiciary.

2) ***Petition E397 of 2020; Kenya National Union of Nurses vs. Steering Committee of BBI & Others***

284. The main issue raised in this Petition was whether the Taskforce on Building Bridges to Unity Advisory was duty bound to include an independent and constitutional Health Service Commission in its October, 2020 Report. Arising from this, the Kenya National Union of Nurses sought –

(a) A declaration that the omission of the Petitioner's proposal for an independent and constitutional Health Service Commission in the October, 2020 Report of the Taskforce on Building Bridges to Unity Advisory offends Articles 10, 27, 41, 43 and 47 of the Constitution of Kenya and the Taskforce on Building Bridges to Unity Advisory be compelled to publish a fresh Amendment Bill to include the same;

(b) A declaration that the Independent Electoral and Boundaries Commission (IEBC) be prohibited from conducting the preparatory process towards the approval of the Amendment Bill and submission of the same to a referendum; and

(c) An order that Parliament be restrained from receiving and passing the Amendment Bill.

3) *Petition No E400 of 2020; Third Way Alliance Kenya vs. Steering Committee of BBI & Others*

285. The question raised by Thirdway Alliance Kenya and two others was whether a popular initiative for the amendment of the Constitution of Kenya can be commenced by State actors in particular, the President of the Republic of Kenya. A further question was whether a popular initiative in the amendment of the Constitution can be commenced and undertaken without a legal framework for the same.

286. The reliefs sought in the Petition were –
   (a) A declaration that the Constitution of Kenya (Amendment) Bill, 2020 was not a popular initiative towards the amendment of the Constitution of Kenya;
   (b) A declaration that there is no legal framework to undertake an amendment by way of a popular initiative to wit: collection of signatures and their verification and conduct of a referendum; and
   (c) A declaration that County Assemblies have the power to amend the Amendment Bill.

4) *Petition No E401 of 2020; 254 Hope vs. Attorney General & IEBC*

287. The question sought to be answered in the Petition by 254HOPE was whether the National Executive or any State organ or entities can commence a popular initiative for the amendment of The Constitution of Kenya and utilize public funds in the initiation and pursuit of the process.

288. In that case, the Petitioners sought the invalidation of the entire process resulting in the publication, approval and passing of The Constitution of Kenya (Amendment) Bill, 2020.

5) *Petition No E402 of 2020; Justus Juma & Isaac Ogola vs. Attorney General & Others*

289. The Petition by Justus Juma and another raised the question of whether the creation of seventy (70) constituencies of the National Assembly in the Constitution of Kenya (Amendment) Bill, 2020 was unconstitutional, the function of delimitation of constituencies being constitutionally vested in the Independent Electoral and Boundaries Commission.

290. The petitioners prayed that the Court declares as unconstitutional and annul the creation of seventy (70) constituencies of the National Assembly in the Amendment Bill.

6) Petition No E416 of 2020; Morara Omoke vs. Raila Odinga & Others

291. The Petition by Morara Omoke raised the following issues –

(a) Whether the Constitution of Kenya (Amendment) Bill, 2020 can be submitted to County Assemblies for consideration, tabled in Parliament for passing or rejection and transmitted to a referendum in the absence of a legal framework for facilitating the same;

(b) Whether the Amendment Bill can be transmitted to a referendum before a nationwide voter registration exercise;

(c) Whether the use of public funds by the President and Hon. Raila Odinga in the initiation and facilitation of the process culminating in the tabling of the Amendment Bill in Parliament is unconstitutional; and

(d) Whether Parliament has power to act upon the Amendment Bill following the declaration of its unconstitutionality for want of enactment of the two-thirds gender laws and the advisory by the Chief Justice to the President for its dissolution.

292. The Petitioner prayed that the Court declares as unconstitutional and invalidates the entire process culminating in the publication of the Constitution of Kenya (Amendment) Bill, 2020.

7) Petition No E426 of 2020; Isaac Aluochier vs. Steering Committee of BBI & Others

293. In this Petition, the key question raised was whether the President has power to initiate an amendment to the Constitution of Kenya in the manner relating to the Constitution of Kenya (Amendment) Bill, 2020 and to use public funds in such a process.

294. The Petitioner sought a declaration on unconstitutionality and the invalidation of the entire process culminating in the publication of the Constitution of Kenya (Amendment) Bill, 2020.

8) Petition No E2 of 2021; MUHURI vs. IEBC & Others (formerly Mombasa Pet. E01 of 2020)

295. The Petitioners in this suit questioned whether the verification of signatures of the promoters of the Constitution of Kenya (Amendment) Bill, 2020 could be undertaken without an enabling legal framework in place.

296. A declaration was therefore sought to invalidate the verification of signatures of the promoters of the Amendment Bill.

D. Consideration of the Petitions filed at the High Court

297. While the said Petitions were filed separately, each of the Petitions was found to raise substantial questions of law to warrant the empanelment of a bench of no less than three judges to hear and determine it. Consequently, the Honourable Chief Justice empanelled a Bench comprising the following Judges to hear and determine all the eight Petitions-

a) Justice (Prof.) Joel Ngugi - Presiding
b) Justice George Odunga
c) Justice Jairus Ngaah
d) Lady Justice Janet Mulwa (*later replaced by Lady Justice Matheka*).
e) Justice Chacha Mwita

298. All the Petitions were mentioned before the above bench on 21st January, 2021 and, with the concurrence of the Parties, the Petitions were consolidated, with *Petition E282 of 2020* being the lead file. The court further issued directions on the hearing and determination of the consolidated Petitions, with the substantive Hearing scheduled for 17th, 18th and 19th March, 2021.

299. However, liberty was granted to the parties to move the Court if circumstances arose which were not in the contemplation of the Court at the time it issued the said directions.

300. It is pursuant to the foregoing that the *25th Interested Party in Petition E400 of Petition E282 of 2020 (consolidated),* the County Assembly of Turkana filed a Motion dated 28th January, 2021 seeking an order that pending the hearing of these Petitions, the Court do issue a conservatory order barring the 3rd to 49th interested parties, the County Assemblies, from considering the Constitutional Amendment Bill submitted to them by the IEBC pursuant to Article 257(5) of the Constitution.

301. Apart from the above motion, the Petitioners in *Petition No E400 of 2020, Thirdway Alliance, Miruru Waweru and Dr Angela Mwikali,* by way of a certificate of urgency dated 26th January, 2021, drew the court's attention to the fact that there had been significant developments. The alleged developments, according to the said Petitioners, culminated in a press statement from the IEBC on 26th January, 2021, confirming that it was satisfied that the Constitutional Amendment Bill had met the requisite threshold having been supported by 1,140,845 registered voters and it was submitting the Constitutional Amendment Bill to each of the 47 County Assemblies for consideration pursuant to Article 257(5) and (6) of the Constitution.

302. The said Petitioners were apprehensive that, with the Bill being transmitted to the County Assemblies for their consideration, and subsequently to the National Assembly and the Senate, it was possible for the Bill to have been debated and passed before the Court heard the consolidated Petitions in March, 2021, which would render the Petitions moot and nugatory.

303. The said applications were canvassed by way of written submissions and the Court delivered its Ruling on 8th February, 2021 (*Annex 23*), where it held that –

(a) Without deciding with finality the issues raised in these Petitions and while we do not agree that the processes intended to be taken by the County Assemblies and Parliament will render these petitions superfluous, we are of the view and find that...it is in the public interest that appropriate conservatory orders be granted.

(b) Consequently, we hereby order that a conservatory order be and is hereby issued restraining the Independent Electoral and Boundaries Commission from facilitating and subjecting the Constitution (Amendment) Bill, 2020 to a referendum, or taking any further action to advance the Constitution (Amendment) Bill, 2020, pending the hearing and determination of these Consolidated Petitions.

304. The consolidated Petition was subsequently heard on 17th, 18th, and 19th March, 2021 where the consolidated Petition. The Court directed that Judgment shall be delivered on Notice.

305. After the hearing, the Petitioner in *Petition No E400 of 2020; Third Way Alliance Kenya* made an oral Application to vary, modify and/or enhance the conservatory orders issued on 8th February, 2021 to include an order against the 1st and 2nd Interested Parties, that is, the Speakers of the Houses of Parliament, restraining

them, upon the passing of the Constitution of Kenya (Amendment) Bill, 2020, from submitting to the President;

i) The Constitution of Kenya (Amendment) Bill 2020 for assent and publication; and
ii) A certificate that the Bill has been passed by Parliament.

306. The Application was based on the grounds that with the Constitution of Kenya (Amendment) Bill, 2020 having been approved by a majority of County Assemblies and transmitted to the National Assembly and the Senate for approval, there was a real possibility that the two Houses would pass the Bill and transmit it to His Excellency the President who may assent to the Bill without subjecting it to a referendum. In that case, the consolidated Petitions would be rendered nugatory, moot, obsolete and an academic exercise.

307. By a Ruling issued on 26th March, 2021 (*Annex 24*), the Court issued orders barring His Excellency the President from assenting to the Constitution of Kenya (Amendment) Bill, 2020, should it be approved by the two Houses of Parliament. The Court further directed that, should the President proceed to assent to the Bill, the amendments shall not come into force until the determination of the petitions challenging the process.

E. Observations of the Committees on the implications of the various court cases relating to the Building Bridges Initiative (BBI) and the Constitution of Kenya (Amendment) Bill, 2020

308. A conservatory order was granted in the consolidated Petitions before the High Court (*Petition E282 of 2020* being the lead file) restraining the Independent Electoral and Boundaries Commission from facilitating and subjecting the Constitution of Kenya (Amendment) Bill, 2020 to a referendum, or taking any further action to advance the Constitution of Kenya (Amendment) Bill, 2020, pending the hearing and determination of the Consolidated Petitions. This order remains in force until the judgment is delivered. Therefore, should the Houses pass the Constitution of Kenya (Amendment) Bill, 2020, the IEBC would be unable to subject the Bill to a referendum.

309. There is also in place an order in the consolidated Petitions before the High Court barring His Excellency the President from assenting to the Constitution of Kenya (Amendment) Bill, 2020, should it be approved by the two Houses of Parliament. The order further provides that, should the President assent to the Bill, the

amendments shall not come into force until the determination of the Petitions challenging the process.

310. There are however no orders that have been issued barring consideration of the Constitution of Kenya (Amendment) Bill, 2020 by Parliament.

CHAPTER FIVE: EMERGING ISSUES CONSIDERED BY THE COMMITTEES

311. In the process of considering the Constitution of Kenya (Amendment) Bill, 2020 and while conducting public participation on the Bill, the Committees identified several weighty constitutional, legal and procedural issues for consideration which were clustered under the following thematic areas-

(a) nature of the Bill;
(b) public participation on the Bill;
(c) processing of the Bill;
(d) substantive issues on the Bill;
(e) referendum issues;
(f) 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
(g) the status of litigation relating to consideration of the Bill.

312. The sixth thematic area, the status of litigation relating to consideration of the Bill, has been considered in the preceding Chapter. This Chapter therefore considers the first six thematic areas.

A. The Nature of the Bill

(a) Background

313. The nature of the Bill was the subject of a number of submissions made to the Committees, with the question being whether the Bill is one that is sought to be introduced by popular initiative or one by parliamentary initiative. The question that further arises is whose role it is to determine this question and what implications would then flow from the answer to that question. Various submissions were received by the Committees from the public on this matter. These submissions can be grouped into three categories: those of the view that the Bill was one by popular initiative, those of the view that it was not by popular initiative and those pointing out that the Bill was brought through a pathway that traversed both popular and parliamentary initiatives as detailed below.

(b) Submissions that the Bill is a popular initiative

314. The Kenya Law Reform Commission submitted that it participated in the drafting of the Bill and stated that the enacting formula in the Bill indicates that the Bill is one by popular initiative. KLRC further submitted that they had benchmarked the enacting formula from Ireland which is a country that has had success in amendment of the Constitution through popular initiatives. He submitted that a Bill by a popular initiative must go to its meaningful end and should not be hijacked on the way.

315. The Jubilee Party submitted that BBI is a bottom-up, people-led approach to solving challenges facing our country. The party submitted that BBI gives Kenyans a chance to fix pressing national challenges and that BBI prioritizes the needs of Wanjiku by entrenching socio-economic rights in the Constitution.

(c) **Submissions that the Bill is not a popular initiative**

316. Linda Katiba submitted that while the Bill purports to be the product of a popular initiative, public funds had been expended in its preparation, including the financing of the Building Bridges Initiative (BBI) Taskforce that prepared it, collection of signatures and verification of the same by the IEBC. They further submitted that 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 submitted that the Bill was a State initiative masquerading as a popular initiative and should follow the constitutional pathway as set out in Article 255, as the Constitution does not provide for a State-led popular Constitution amendment initiative.

317. The President of the LSK and four members of the LSK Council submitted that the Bill did not get to Parliament by way of popular initiative but rather, it is an initiative of the Executive. They opined that Parliament should interrogate the manner in which the Bill was processed and submitted to Parliament.

318. ICJ-K submitted that the BBI process and approach cannot be compared to the people-driven approach taken towards the development of the Constitution in 2010 and as such, the document is not reflective of the views of a majority of Kenyans but rather those of political elites.

319. Mr. Jonathan Kisia submitted that a popular initiative should be reserved for the people and the two leaders (His Excellency the President and the former Prime

Minister) ought to have used the parliamentary initiative through their political parties to amend the Constitution.

320. Mr. Isaac Aluochier submitted that the process leading to the processing of the Bill was initiated and promoted by the Presidency through a Steering Committee on the Implementation of the Building Bridges Initiative to a United Kenya Taskforce Report in contravention of the Constitution. Under Article 131(2)(a) and 256 of the Constitution, the President is required to uphold, respect and safeguard the Constitution and to assent to a constitutional amendment Bill.

321. Mr. Aluochier further submitted that the Constitution had given only the national Parliament and county assemblies and the people the power to amend the Constitution. He thus submitted that a constitutional amendment by way of popular initiative should be proposed by a registered voter or voters, devoid of State support prior to the submission of at least one million registered voter supporters to the IEBC and if it is by way of parliamentary initiative, it should follow the law and Standing Orders of Parliament.

(d) Submissions that the Bill was brought through a pathway that traversed both popular and parliamentary initiatives

322. The National Women Steering Committee (NWSC) submitted that while the Constitution of Kenya has clear provisions on amendments, the pathways for constitutional amendments are clearly stipulated in Articles 255 and 256 of the Constitution, being parliamentary initiative and popular initiative, respectively. In their view, the manner in which the proposed amendments had been processed out raised questions of legality and constitutionalism of the whole process. The NWSC opined that the process used was apparently a mongrel of the two pathways, which is a means not provided for in the Constitution.

323. To determine whether the Bill is by parliamentary or popular initiative, it is important to look at Chapter Sixteen of the Constitution, which addresses the issue of amendment of the Constitution, specifically Articles 256 and 257.

324. The Constitution provides for two modes of amending the Constitution: amendment by parliamentary initiative (Article 256) and amendment by popular initiative (Article 257).

325. The procedure for the amendment of the Constitution by parliamentary initiative is set out under Article 256 of the Constitution, as follows-

256. (1) A Bill to amend this Constitution—

(a) may be introduced in either House of Parliament;
(b) may not address any other matter apart from consequential amendments to legislation arising from the Bill;
(c) shall not be called for second reading in either House within ninety days after the first reading of the Bill in that House; and
(d) shall have been passed by Parliament when each House of Parliament has passed the Bill, in both its second and third that House.

(2) Parliament shall publicise any Bill to amend this Constitution and facilitate public discussion about the Bill.

(3) After Parliament passes a Bill to amend this Constitution, the Speakers of the two Houses of Parliament shall jointly submit to the President—
(a) the Bill, for assent and publication; and
(b) a certificate that the Bill has been passed by Parliament in accordance with this Article.

(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 mentioned 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.

326. The procedure for the amendment of the Constitution of Kenya by way of popular initiative is provided under Article 257 of the Constitution 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).

327. The Constitution of Kenya not only makes provision for a referendum, but also lays out the constitutional right of the people to participate in the referendum. Article 255(2) of the Constitution provides that a proposed amendment shall be approved by a referendum if at least twenty percent of the registered voters in each of at least half of the counties vote in the referendum and the amendment is supported by a simple majority of the citizens voting in the referendum.

328. An examination of the two modes of amending the Constitution under Articles 256 and 257 of the Constitution reveals the following three key differences-

(a) Article 256(1)(d) provides that a constitutional amendment Bill under Article 256 (parliamentary initiative) must obtain the support of not less than two-thirds of all the Members of both the National Assembly and the Senate for it to be passed at the Second and Third Readings. On the contrary, a Bill to

amend the Constitution under Article 257 (popular initiative) only requires the support of a majority of the Members of each House of Parliament for it to be passed (Article 257(8);

(b) Article 256(1)(c) provides that a Bill to amend the Constitution under parliamentary initiative shall not be called for Second Reading in either House within 90 days after the First Reading of the Bill in that House. Article 257 has no such provision regulating the time for consideration of a Bill to amend the Constitution under popular initiative;

(c) Article 257(10) provides that if either House of Parliament fails to pass a Bill to amend the Constitution under popular initiative, or the Bill relates to a matter specified in Article 255(1), the proposed amendment shall be submitted to the people in a referendum. This provision may be contrasted with Article 256(1)(d) where a Bill to amend the Constitution under parliamentary initiative dies if it does not obtain the required two-thirds support in both Houses of Parliament.

329. It would appear that the purpose of including the Article 257 in the Constitution was to give the people a route of initiating and processing through a constitutional amendment that may not be popular or acceptable to one or both of the Houses of Parliament or the Executive. This may explain why Article 257(8) provides that an amendment by popular initiative only requires the support of a majority of the Members of each House as compared to Article 256(1) where a Bill to amend the Constitution through parliamentary initiative requires the support of two-thirds of the Members of both Houses.

330. The CKRC Technical Working Group "K" which dealt with Constitutional Commissions and Constitutional Offices and Amendment to the Constitution, observed that Kenyans had submitted that there was need for a provision to enable citizens and the civil society to initiate constitutional amendments through a process called *"popular initiative"*[5].

331. Robert Podolnjak, writing on Constitutional Reforms of Citizen-Initiated Referendum: Causes of Different *Outcomes in Slovenia and Croatia* notes that –

"Given ...differences between the popular referendum and the popular initiative, I would like to point to two essential characteristics that bind them. They are both forms of citizen-initiated referendums. The essential pre-

[5] CKRC Final Report 2005, pg 436

condition for such referendums is that the initiators must collect a specified number of signatures within a set period of time, both of which are prescribed in the constitution or the statute. The second characteristic that binds the two forms of citizen-initiated referendums is that they occur against the wishes of either government or parliament."[6]

332. Comparatively, citizens can initiate amendments in Switzerland and Croatia, while in Slovenia, the Opposition can also initiate amendments. The idea is to allow citizens to engage in amendments of the Constitution irrespective of the wishes of the political elite.

333. The above interpretation of a popular initiative accords with the expansive principle of interpretation of human rights, acknowledged worldwide. For example-

> *"The European Court of Human Rights applies a series of interpretive techniques that systematically expand states' human rights obligations far beyond the obligations states took upon themselves by ratifying the Convention for the Protection of Human Rights and Fundamental Freedoms... . Second, in situations where democratic failures lead states to misrepresent the interests of individuals affected by their human rights policies, expansive interpretation can help align the policies of states with the true interests of the citizens they represent."*[7]

334. In Kenya, in *University Academic Staff Union (UASU) v Attorney General & Chief of Staff & another*[8] the Court held that:

> "38. *In the words of the Court of Appeal, "Article 20 is couched in wide and all-pervasive terms, declaring the Bill of Rights to apply to all law and to bind all state organs and all persons. None is exempt from the dictates and commands of the Bill of Rights and it is not open for anyone to exclude them when dealing with all matters legal," The Court was clear that "rights and fundamental freedoms are to be enjoyed by every person to the greatest extent possible."- The theme should be "maximization and not minimization; expansion, not constriction," ((Attorney General v Kituo Cha Sheria & 7 Others (supra) The Court*

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[6] 26, Journal for Constitutional Theory and Philosophy of Law,(2015), 129-149

[7] Shai Dothan, *In Defence Of Expansive Interpretation In The European Court Of Human Rights*, Cambridge Journal of International and Comparative Law (3)2: 508–531 (2014)

[8] *[2018] eKLR,*

advised that when interpreting the Bill of Rights, Courts should adopt a pro-rights realization and enforcement attitude and mind set calculated to the attainment as opposed to the curtailment of rights and fundamental freedoms."

(e) Observations of the Committees

335. With regard to the Constitution of Kenya (Amendment) Bill, 2020, the Committees observed that pursuant to the provisions of Article 257(5), the IEBC was required to determine the question as to whether a Bill is a popular initiative Bill or not using the provisions of the Constitution. On this matter, the Committees observed that the IEBC had proceeded with the processing of the Bill under Article 257(5) as one by popular initiative. The Committees further observed that the IEBC and the Speakers of the Houses had, through their Communications, confirmed that various provisions of Article 257 on popular initiative had been complied with, as follows-

a) *An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters [Article 257(1)]:* IEBC confirmed that this requirement had been met – see IEBC's Press Release issued on 22nd February, 2021 *(Annex 10)*;

b) *A popular initiative for an amendment to the Constitution may be in the form of a general suggestion or a formulated Bill [Article 257(2)]:* the amendment was received by the IEBC in the form of a formulated bill under Article 257 (2) - see IEBC's Press Release issued on 22nd February, 2021 *(Annex 10);*

c) *The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the IEBC, which shall verify that the initiative is supported by at least one million registered voters [Article 257(4)]:* this was done - see IEBC's Press Release issued on 22nd February, 2021 *(Annex 10);*

d) *If the IEBC is satisfied that the initiative meets the requirements of Article 257, the Commission shall submit the draft Bill to each county assembly for consideration within three months of the date it was submitted by the Commission [Article 257(5)]:* this was done – see IEBC's Press Release issued on 26th January, 2021 *(Annex 24);*

e) *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 [Article 257(6)]:* the Speakers of both Houses received

returns from the forty-seven County Assemblies, indicated that forty-three (43) County Assemblies approved the draft Bill, six (6) County Assemblies rejected the draft Bill while one County Assembly abstained - see the Communications of the Speakers of the National Assembly and the Senate *(Annexes 15, 16, 17 and 18);*

f) *If a draft Bill has been approved by a majority of county assemblies it shall be introduced in Parliament without delay [Article 257(7)]:* The Bill was introduced in the National Assembly and in the Senate, by way of First Reading, on 4th March, 2021 – see the Communications of the Speakers of the National Assembly and the Senate *(Annexes 15, 16, 17 and 18).*

336. The Committees further observed that in the process at hand, the Houses of Parliament had not been moved either by a Member or by a Committee of the respective Houses, as provided for under Article 256 on amendment by parliamentary initiative, but by popular initiative under Article 257 of the Constitution. Consequently, Parliament had processed the Bill as a Bill by popular initiative. Further, the Committees noted that neither of the Houses of Parliament had, in their consideration of the Bill thus far, required adherence to Article 256 generally and in particular to Article 256(1)(c) which requires that a Bill to amend the Constitution by parliamentary initiative *"shall not be called for second reading in either House within ninety days after the first reading of the Bill in that House"*.

(f) Findings of the Committees

337. **Arising from the above, on the question of whether the Bill is one by parliamentary or popular initiative under Articles 256 and 257 of the Constitution, respectively, the Committees found that the Constitution of Kenya (Amendment) Bill, 2020 is one by popular initiative, under Article 257 of the Constitution.**

338. **There is need for Parliament to enact legislation setting out the procedure for processing a constitutional amendment under Article 257.**

B. The Role of Parliament in processing a Bill to amend the Constitution by Popular Initiative

(a) Background

339. Under Article 94(1) of the Constitution, legislative authority is derived from the people of Kenya and, at the national level, is vested in and exercised by Parliament. Parliament, by dint of this authority, may consider and pass amendments to the Constitution. With respect to a Bill by popular initiative, Parliament is required under Article 257 to either approve or reject a Bill by popular initiative. To pass such a Bill, in terms of Article 257(8), it must be supported by a majority of the Members of each of the Houses.

340. Besides the requisite numbers to pass the Bill, the role of Parliament in dealing with a popular initiative Bill is not elaborated in the Constitution. The question arises on the nature of that role. Is it merely perfunctory or ceremonial? The Committees observed that taking into account the legislative authority of Parliament under Article 94 of the Constitution, the role cannot be ceremonial. The Committees however, noted Article 257(10) which provides that "*if either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in 255 (1), the proposed amendment shall be submitted to the people in a referendum*" and which therefore implies that Parliament cannot replace the people's views on a popular initiative with its own. Thus, the ultimate authority regarding a popular initiative Bill rests with the people.

341. Various submissions were made on the role of Parliament in dealing with a popular initiative Bill.

342. Mr. Nelson Havi submitted that in the discharge of its functions under the Constitution, Parliament is enjoined to *"protect this Constitution and promote the democratic governance of the Republic."*. The protection of *"this Constitution"* in the context of considering amendments to the Constitution of Kenya requires Parliament to ask itself whether the document before it has been processed in a manner consistent with the Constitution. This obligation requires that Parliament becomes the sentry at the entrance scrutinizing that no creature in the name of a constitutional amendment is admitted unless it has been processed regularly. In the case of an amendment to the Constitution of Kenya by popular initiative, Mr. Havi submitted that Parliament is under an obligation to examine the propriety of each step of the process prescribed by Article 257 of The Constitution of Kenya.

343. Kenya Law Reform Commission advised the Committees that Parliament cannot make amendments on the substance of a constitutional amendment Bill introduced by way of popular initiative. He made reference to the Constitutional amendment by popular initiative in Ireland as a benchmark for the Bill. He however opined that Parliament may amend errors that are not substantive and that do not go to the root of the substance of the Bill.

344. On the other hand, the Chairperson of the International Commission of Jurists, Mr. Kelvin Mogeni, advised the Committees that Parliament had the power to amend the Bill. He made reference to Article 257(7) and (8) of the Constitution and noted that whereas the document considered by county assemblies was a draft Bill, the document introduced in Parliament is a Bill and should therefore be considered as any other Bill, including by making amendments to it. Mr. Kelvin Mogeni stated that having received views from the public, it follows that the Committees "*have to consider the views, debate them and where necessary, propose amendments to the Bill for adoption by the respective Houses*" and that Parliament cannot "*rubberstamp the document as received*".

345. Similarly, Mr. Kibe Mungai, in advising the Committees that Parliament has the power to amend the Bill, stated that prior to the Bill's introduction in Parliament, it had been a draft Bill. It only became a Bill when introduced in Parliament. He further stated that whereas the draft Bill is the property of its promoters, the Bill (after introduction in Parliament) is the property of Parliament and has to be dealt with like any other Bill before Parliament. Mr. Kibe Mungai further advised the Committees that "*Parliament has a constitutional obligation to confirm whether the Bill complies with the Constitution or not*" and that it would "*be an act of abdication of the duties of Parliament if Parliament were to take the position that its role is a conveyor belt ... and (that) there is nothing that it can do with the Bill for purposes of ensuring that it is constitutional*".

346. The key rationale given during the public hearings to support the submissions that the Bill cannot be amended included the fact that this being a popular initiative, the only adjustments would be those that are not substantive and which are necessary to ensure harmony in the document. It was also noted, during the public hearings that there was no threshold regarding the nature of amendments that can be made and how far Parliament could go in amending the Bill, if at all. It was also observed that amendments that could be considered minor, including commas, could change the essence of a document or vary its interpretation. It was observed that opening the window for amendment could change the very substance of the

Bill as initiated by the promoters and approved by the majority of the county assemblies.

347. Article 255(3)(b) of the Constitution provides that an amendment to the Constitution through a popular initiative under Article 257 is enacted *'by the people and Parliament"*. The role of Parliament in the consideration of the Bill to amend the Constitution under popular initiative is set out under Article 257(7)-(10), which provide 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.

(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.

348. In addressing the role of Parliament in processing a Bill by popular initiative, two issues arose: the role of Parliament regarding errors of form and the role of Parliament in unconstitutional constitutional amendments.

Errors of Form

349. The Committees observed that the Constitution does not give specific guidance on how to deal with errors of form in a constitutional amendment.

350. The 2008(2001) Constitution (repealed) was explicit on the role of Parliament, but it only dealt with amendments by Parliament and had no provision on amendments by popular initiative. Section 47(4) provided that-

> *"When a Bill for an Act of Parliament to alter this Constitution has been introduced into the National Assembly, no alterations shall be made in it before it is presented to the President for his assent, except alterations which are certified by the Speaker to be necessary because of the time that has elapsed since the Bill was first introduced into the Assembly."*

351. This provision was omitted in the 2010 Constitution. The issue that then arises is whether under the current Constitution it is possible to correct errors of form.

352. Before the promulgation of the 2010 Constitution, the Attorney General had powers to make revisions to laws to address issues of form and typographical errors. After 2010, by dint of standing orders 152 and 162 of the National Assembly and Senate Standing Orders, respectively, formal errors or oversights may only be corrected by the respective Speaker before certification of a Bill. However, a reading of these standing orders indicates that the corrections contemplated in these provisions extend to corrections relating to Bills originating in the respective Houses and would not extend to a Bill for the amendment of the Constitution by popular initiative since such a Bill does not originate in Parliament.

353. Switzerland's constitutional text may be of interest from a comparative perspective. Article 139 of Federal Constitution of the Swiss Confederation addresses the issue of a request for a partial revision of the Federal Constitution in specific terms through a popular initiative and provides as follows-

> *1. Any 100,000 persons eligible to vote may within 18 months of the official publication of their initiative request a partial revision of the Federal Constitution.*
> *2 A popular initiative for the partial revision of the Federal Constitution may take the form of a general proposal or of a specific draft of the provisions proposed.*
> ***3 If the initiative fails to comply with the requirements of consistency of form, and of subject matter, or if it infringes mandatory provisions of international law, the Federal Assembly shall declare it to be invalid in whole or in part.***
> *4 If the Federal Assembly is in agreement with an initiative in the form of a general proposal, it shall draft the partial revision on the basis of the initiative and submit it to the vote of the People and the Cantons. If the Federal Assembly rejects the initiative, it shall submit it to a vote of the People; the People shall decide whether the initiative should be adopted. If they vote in favour, the Federal Assembly shall draft the corresponding bill.*
> ***5 An initiative in the form of a specific draft shall be submitted to the vote of the People and the Cantons. The Federal Assembly shall recommend whether the initiative should be adopted or rejected. It may submit a counter-proposal to the initiative.***

354. Although Switzerland's law allows Parliament to declare a Bill either wholly or partly invalid or present a counter-proposal, Parliament is however not allowed to

amend a popular initiative Bill. The Swiss Federal Act on the Federal Assembly, 2002 further provides as follows at Article 99 on prohibition of the amendment of popular initiatives and the extent of any amendments to be made-

> *1 Popular initiatives, or all the valid parts thereof, must be submitted to the vote of the people as they stand.*
> *2 The Drafting Committee reserves the right to correct obvious translation errors and to make any formal adjustments necessary to incorporate the proposed constitutional amendment into the Constitution. The Committee shall give the initiative committee the opportunity to express its opinion.*

355. The validity of a popular initiative is dealt with at Article 98 of the Swiss Federal Act on the Federal Assembly, 2002 which provides that –

> *1 The Federal Assembly shall declare a popular initiative wholly or partly invalid if it holds that the requirements of Article 139 paragraph 3 of the Federal Constitution have not been fulfilled.*
> *2 If the decisions of the two chambers in relation to the validity of the popular initiative or of parts thereof diverge from each other and the chamber that has approved the validity of the initiative confirms its decision, the popular initiative or, depending on the case, its disputed part, shall be held to be valid.*
> *3 If the compromise motion on the voting recommendation is rejected, in derogation from Article 93 para. 2 only the provision concerned shall be deleted.*

356. Switzerland therefore has detailed provisions allowing Parliament to reject or approve a Bill in whole or in part, or to present a counter-proposal, but limits the power of Parliament to amend such a Bill to correcting obvious translation errors and making any formal adjustments necessary to incorporate the proposed constitutional amendment into the Constitution.

357. The implicit message is the need to protect the sovereign will of the people. Therefore, the question is one of whether Parliament can correct typographical errors and issues of form and not whether it can amend the substantive provisions of an amendment Bill.

358. While making its submissions before the Committees, KLRC, highlighted the following matters for consideration by the Committees-

(b) They observed that Article 101(2) required to be corrected in order to provide drafting clarity, consequent on the amendments to Article 98 of the Constitution as set out under clause 14 of the Bill, which made changes to the composition of the Senate;

(c) They further submitted that following the amendment made at clause 23(b) of the Bill which seeks to delete the words "Cabinet Secretaries" and substitute these with the words "Cabinet Ministers", there was need to also make corrections with regard to various provisions of the Constitution which had remained unchanged and which therefore still make reference to "Cabinet Secretaries". These, KLRC stated, include Article 133(2)(b), 240(2)(c), (d) and (e) and 241(6)(a);

(d) KLRC submitted that there was also need for the Houses to handle clause 51(a) of the Bill in so far as it had failed to mention the specific clause of the Bill that it sought to amend, which is clause (6); and

(e) Finally, they drew the attention of the Committees to the discrepancy in paragraph 1(1) of the Second Schedule of the Bill and stated that the Schedule made reference to Article 87(7) of the Constitution, which does not exist, rather than Article 89(7) of the Constitution. KLRC invited the Committees to adjust the Bill accordingly so as to read Article 89(7).

359. KLRC observed that Parliament may "*amend some elements which are not substantive or do not go to the root of the substance (of the Bill) ... to bring a constitutional drafting harmony*".

(b) Observations of the Committees

360. The Committees further observed the copies of the Bill submitted by the IEBC and introduced in the Houses had the following inadvertent errors - -

	Clauses	National Assembly Bill	Senate Bill	Remarks
1.	Clause 13(b)	The Bill makes reference to clause (2).	The Bill makes reference to clause (3).	The correct reference is clause (2) as there is no clause (3) in Article 97 of the Constitution.
2.	Clause 48	The provisions in the Bills as submitted to the Houses are similar but there is an error, in the marginal		The correct reference in the marginal note is Article 188.

		note as cited in both Bills which makes reference to Article 189.		
3.	Paragraph 1(1) of the Second Schedule	Paragraph 1(1) makes reference to Article 89(7).	Paragraph 1(1) makes reference to Article 87(7).	The correct reference is Article 89(7) as Article 87(7) does not exist in the Constitution.

361. The Committees further observed that some of the copies of the Bill submitted by the County Assemblies to the Speakers also contained the same inadvertent errors noted above.

362. Upon scrutiny, the Committees observed that the inadvertent errors were typographical in nature and did not in any way affect the meaning or substance of any of the provisions of the Bill.

363. The Committees further observed that the error noted by the Kenya Law Reform Commission with regard to Clause 51(a) of the Bill was also a typographical error.

(c) **Findings of the Committees**

364. **On the question of whether the role of Parliament in considering a Bill for the amendment of Constitution by popular initiative is merely perfunctory or ceremonial, the Committees found that taking into account the legislative authority of Parliament under Article 94 of the Constitution, the role cannot be ceremonial. The Committees however, found that pursuant to Article 257(10) of the Constitution, Parliament cannot replace or usurp the people's views on a popular initiative with its own. Thus, the ultimate authority regarding a popular initiative Bill rests with the people.**

365. **The Committees found that pursuant to Article 94 of the Constitution, the legislative authority of the Republic is vested in the Houses of Parliament and that they have the mandate to take any legislative action, in appropriate circumstances, required to ensure that a constitutional amendment initiated under Article 257 of the Constitution achieves its objectives, so as to protect the sovereignty of the people as guaranteed under Article 1 of the Constitution. This legislative action includes correcting any errors of form or typographical errors that do not go to the substance of the Bill, and that bring drafting harmony to the Bill.**

366. In this regard, upon scrutiny, the Committees found that the following inadvertent errors in the copies of the Bill were typographical in nature and did not in any way affect the meaning or substance of any of the provisions of the Bill -

	Clauses	National Assembly Bill	Senate Bill	Remarks
1.	Clause 13(b)	The Bill makes reference to clause (2).	The Bill makes reference to clause (3).	The correct reference is clause (2) as there is no clause (3) in Article 97 of the Constitution.
2.	Clause 48	The provisions in the Bills as submitted to the Houses are similar but there is an error, in the marginal note as cited in both Bills which makes reference to Article 189.		The correct reference in the marginal note is Article 188.
3.	Clause 51(a)	The provision is similar in both Bills however there is no reference to the clause in the Constitution that it seeks to amend.		Reference should be made to clause (6) of Article 204.
4.	Paragraph 1(1) of the Second Schedule	Paragraph 1(1) makes reference to Article 89(7).	Paragraph 1(1) makes reference to Article 87(7).	The correct reference is Article 89(7) as Article 87(7) does not exist in the Constitution.

367. **In respect of the other errors noted in the Bill by the Kenya Law Reform Commission, the Committees found that although Parliament may correct such errors, this may entail the addition of new clauses to the Bill which may eventually go to the substance of the Bill.**

368. **The Committees also found that such corrections may pave way for the introduction of similar proposals for correction on the floors of the respective Houses and that this may eventually run the risk of offending the overriding principle of protection of the sovereign will of the people in an amendment by popular initiative, as initiated by the promoters and approved by the majority of the county assemblies.**

C. Unconstitutional Constitutional Amendments

(a) Background

369. The question arises as to the role of Parliament in dealing with unconstitutional constitutional amendments. There is a lot of literature on the matter.[9] The unanimity of the literature is that an amendment to the Constitution can actually be unconstitutional where the amendment either offends the basic structure or the core tenets of the Constitution, or where it is enacted in contravention of the amendment procedure in the Constitution.

370. The power to amend the Constitution (also referred to as the constituted power) is different from the constituent power and is not the power to destroy the system constituted by the Constitution. Parliament is not to usurp the constituent power, which belongs to the people. It must also be noted that the issue of amendment of the Constitution must take cognizance of the sovereignty of the people of Kenya under Article 1 of the Constitution, which provides as follows-

> *(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.*
>
> *(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.*
>
> *(3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—*
>
> *(a) Parliament and the legislative assemblies in the county governments;*
> *(b) the national executive and the executive structures in the county governments; and*
> *(c) the Judiciary and independent tribunals.*
>
> *(4) The sovereign power of the people is exercised at—*
> *(a) the national level; and*

[9] Barak, Aharon. "Unconstitutional Constitutional Amendments." Israel Law Review, vol.44, no. 3, 2011, p. 321-342; Yaniv Roznai, " Toward a Theory of Unamendability" PUBLIC LAW & LEGAL THEORY RESEARCH PAPER SERIES WORKING PAPER NO. 15-12, 2015; &Albert, Richard. "Non-constitutional Amendments." Canadian Journal of Law and Jurisprudence, vol. 22, no. 1, January 2009, p. 5-48.

(b) the county level.

371. The Constitution of Kenya Review Commission, in its Final Report, stated that the purpose of including Article 1 in the Constitution was to *'acknowledge in the Constitution, the fact that ultimately, the Constitution is a product of and must serve the aspirations of the people'.*[10] In *Rev. Njoya versus Attorney General,* the Court considered the issue of *"the constituent power of the people"* and its implications. Justice Ringera observed that the constituent power of the people essentially derives from their sovereignty and is the basis for the creation of the Constitution. He opined that-

> *"the sovereignty of the people necessarily betokens that they have a constituent power -- the power to constitute and/or reconstitute, as the case may be, their framework of Government. That power is a primordial one. It is a basis of the creation of the Constitution and it cannot therefore be conferred or granted by the Constitution."*

372. Professor B.O. Nwabueze in his book "*Ideas and Facts in Constitution Making"* summarizes the constituent power of the people as *"the authority to approve and adopt a Constitution."*[11] He further writes that-

> *"But the notion of the people as a constituent power is only an integral part of the wider concept of the people as the repository of the totality of a country's sovereignty, constituent power being the crowning point of sovereignty"*

373. Various literature and Court Cases provide guidance on the role of the Courts in dealing with unconstitutional constitutional amendments. For example, Richard notes that-

> *It is squarely within the German, South African and Indian judicial power to declare a constitutional amendment unconstitutional - even if that constitutional amendment fulfils the amendment procedures mandated by the constitutional text as a condition for entrenchment."*[12]

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[10] CKRC 2005 Final Report pg 77

[11] B.O. Nwabueze, *Ideas and Facts in Constitution Making* (Ibadan, Spectrum Books Limited, 1993) p. 7

[12] Albert, Richard. "Nonconstitutional Amendments." Canadian Journal of Law and Jurisprudence, vol. 22, no. 1, January 2009, p. 5-48. at page 6.

374. In the Indian cases of *Kesavananda Bharati v. State of Kerala*[13], *Minerva Mills Ltd. v. Union of India,*[14] courts held that they could strike down constitutional amendments by Parliament if they interfered with the basic structure of the Constitution.

375. In the South African case of *Premier of Kwazulu-Natal v. President of the Republic of South Africa,*[15] it was stated that-

> *"It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and re-organizing the fundamental premises of the Constitution, might not qualify as an 'amendment' at all."*

376. In Kenya, the same principle is recognised in *Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others*[16] where it was stated

> *"Secondly, I have done so, so as to demonstrate that where the basic structure or the design and architecture of our Constitution is under threat, this Court can genuinely intervene and protect the Constitution" para 71"*

(b) Observations of the Committees

377. Arising from the above, it is evident that an unconstitutional amendment becomes constitutional if it is approved by the people in a referendum. However, the Courts can declare a constitutional amendment to be unconstitutional where it offends the basic structure or tenets of the Constitution.

378. The role of Parliament in dealing with unconstitutional constitutional amendments is not as clear as that of the Courts. Like all branches of Government, Legislatures have a role to protect and uphold the Constitution. Therefore, they must have a role to play in dealing with unconstitutional constitutional amendments. This will be determined by the powers granted to them by the Constitution, in particular under Article 257.

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[13] *AIR 1973 SC 1461,*
[14] *AIR 1980 SC 1789,*
[15] *1996 (1) SA 769* (29 November 1995)
[16] *[2013] eKLR*

(c) Finding of the Committees

379. The Committees found that the Houses of Parliament can vote to reject a Bill to amend the Constitution by popular initiative on account of unconstitutional constitutional amendments, but that even if Parliament does so, pursuant to Article 257(10) of the Constitution, the final say on such a Bill lies with the people in a referendum.

D. Public Participation

(a) Background

380. Public participation is a key component of Kenya's constitutional architecture. Article 10 of the Constitution requires public participation as part of every public policy, law making and governance process in the country. Public participation is also a requirement of the legislative process under the Constitution. Article 118(1)(b) mandates Parliament to *"facilitate public participation and involvement in the legislative and other business of Parliament and its committees."*

381. In addressing the issue of public participation, three questions were particularly pertinent-

a) Whether Parliament is required to undertake public participation on the Bill and, if so, the extent of such public participation;
b) Whether county assemblies are required to undertake public participation on the draft Bill and, if so, the extent of such public participation; and
c) The effect of public participation in the processing of the Bill.

(b) **Whether Parliament is required to undertake public participation on the Bill and, if so, the extent of such public participation**

382. On the question of whether Parliament is required to undertake public participation on the Bill, it is to be observed that public participation is an important part of the legislative process in Parliament. This is underscored by Article 118 of the Constitution and the Standing Orders of the Houses of Parliament. In addition, comparative case law and Kenyan case law have demonstrated that undertaking public participation is a mandatory component of the legislative process, in the absence of which the process is invalid and can be struck down by the Courts.

383. The most informative case in the issue, one that has informed a lot of the litigation and pronouncement by Courts in Kenya is that of *Doctors for Life International*

v Speaker of the National Assembly and 11 others[17]. In the case, the South African constitutional court was asked to determine three questions, one of which related to the nature and scope of the obligation to facilitate public involvement in the legislative process, a responsibility similar to that in Kenya's Constitution.

384. The Court held that public participation is a core necessity to any law-making process and declared that any legislation which did not comply with the requirement of public participation would be invalid. On the scope of public participation, the court was unequivocal that "*there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as "a continuum that ranges from providing information and building awareness, to partnering in decision-making.*"

385. The Court also considered the threshold required to undertake a meaningful public participation process. In particular, the Court stated that the Legislature would only be considered to have discharged the burden of ensuring public participation if it ensured that in each of its processes, it availed a genuine opportunity for members of the public to make their input into the process. In his concurring judgment in the case, Justice Sachs reinforced the import of meaningful public participation in the legislative process in the following words:

> "*All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws. An appropriate degree of principled yet flexible give-and-take will therefore enrich the quality of our democracy, help sustain its robust deliberative character and, by promoting a sense of inclusion in the national polity, promote the achievement of the goals of transformation.*"

386. From the foregoing, there are certain elements of the duty of the legislature to facilitate public participation that emerge. The first element encompassed by this

[17] [2006] ZACC 11

duty is the requirement that the legislature must provide meaningful opportunities for public participation in its legislative processes. The converse, therefore, is that where it is demonstrable that no such meaningful opportunities for public participation was available to the public, then the legislature would be considered to have failed to discharge the burden of facilitating public participation in its legislative processes.

387. The second element is the requirement that the legislature ought to ensure that the people have the ability to take advantage of the opportunities that are availed for public participation. In other words, the constitutional obligation on the Legislature to facilitate public participation is not supposed to be in vain. A legislation enacted or even amended without taking into consideration the constitutional obligations of public participation would be considered invalid as per Article 2(4) of the Constitution provides that "any law including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid".

388. The above case has influenced Kenyan courts in dealing with the above issue. One of the most exhaustive expositions on the issue is the case of *Robert N. Gakuru & Others v Governor Kiambu County & 3 others*[18]. In this case, the Kiambu Finance Act of 2013 was challenged in court for non-compliance with the constitutional requirement of public participation. The case revolved around what the nature and scope of public participation in the legislative process. The court reiterated that "*public participation plays a central role in both legislative and policy functions of the Government whether at the National or County level. It applies to the processes of legislative enactment, financial management and planning and performance management.*"

389. In determining what amounted to public participation, the court reiterated that it was important to rely on the interpretation from the South African Constitutional Court due to the similarities between the Kenyan Constitution and that of South Africa. It held that the legislature must ensure that the legislature must facilitate genuine and real involvement of the public in the legislative process. In the words of Justice Odunga in the case:

> "*In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County*

[18] [2014] eKLR

Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action."

390. The judge further observed that *"(i)n my view to huddle a few people in a 5-star hotel on one day cannot by any stretch of imagination be termed as public participation for the purposes of meeting constitutional and legislative threshold. Whereas the magnitude of the publicity required may depend from one action to another a one day newspaper advertisement in a country such as ours where a majority of the populace survive on less than a dollar per day and to whom newspapers are a luxury leave alone the level of illiteracy in some parts of this country may not suffice for the purposes of seeking public views and public participation."*

391. Public submissions reinforced the above general position on the place of public participation in the legislative process. As to the value and impact of public participation on the proposed bill, Mr. Kibe 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 are given inadequate time to study the Bill, consider their stance and formulate representations to be made.

392. On whether public participation is necessary and whether the public views submitted by the public should inform the contents of the Bill and decision of Parliament and its Committees, he stated that it must be an opportunity capable of influencing the decision to be taken.

393. He further submitted that public participation is a necessary tool of good governance to ensure that our democracy is both quantitative and qualitative. Secondly, public participation enables the people to participate in the decision-making process for the reason that our Constitution establishes a democratic government which is both representative and participatory and makes provision for the public to participate in the law-making process.

394. On whether Parliament should use the public participation input to inform decision to amend the Bill, he was of the view that Constitution expects that Parliament can and should change the contents of the Bill upon considering the views submitted by the public. He argued that law enacted without or with inadequate public participation that considers and incorporates the views of the public submitted has the risk of being declared as null and void by the High Court. Mr. Kibe was of the view that it would be difficult to contemplate a popular initiative for amendment of the Constitution that does not take into account the views of the public on the amendment Bill.

395. Similarly, the ICJ was of the view that public participation should not be cosmetic. It should be used to resolve important matters by the Legislature.

396. Having considered the above constitutional directives as interpreted by courts in Kenya, comparative case law and submissions from the public, the Committees are of the view that it was under a constitutional duty to and did facilitate public participation. However, a reading of Article 256 and 257 of the Constitution demonstrates two variances. First is the explicit requirement for publicization and public discussions of Bills being processed under parliamentary initiative. Article 256(2) of the Constitution specifically mandates Parliament to "*publicise any Bill to amend (the) Constitution and facilitate public discussion about the Bill.*" Secondly is the timeline for processing such a Bill with Article 256(1)(c) directing that such a Bill "shall *not be called for a second reading in either House within ninety days after the first reading of the Bill in that house.*"

397. The above differences do not depart from the general requirement for public participation. All they do is to contextualize the circumstances and scope. Under parliamentary initiative through Article 256, the Constitution is more explicit due to the fact that the amendment is conceived in Parliament and members of the public may be strangers to its provisions. In this case, and noting the significance of a Constitutional amendment, it is important to ensure that the public is informed of the existence of the Bill and given adequate time to discuss it and give their views to Parliament. On the other hand, a Bill by popular initiative gives the public

more opportunities to engage with and input into its provisions before it reaches Parliament. It is conceived by members of the public, requires support of at least one million registered voters, needs approval of at least twenty-four (24) county assemblies and provides a timeline of ninety days for that approval process. All of these provide opportunity for public participation.

398. Consequently, Parliament is therefore required to undertake public participation in accordance with the general principles of public participation and engagement in legislative business under Articles 118 and 119 of the Constitution for processing the Bill. That requirement for public participation is meaningful as it helps Parliament to exercise its authority to either pass or reject the Bill. It would also help Parliament to identify any unconstitutional amendments for noting and corrections of typographical errors or errors of form.

399. While there is clarity that public participation generally and in the legislative process must be genuine and not perfunctory, what this really means in practice remains a point of debate. It is therefore important that Parliament enacts a law on public participation, with specific provisions on public involvement in the legislative process. In addition, provisions should be included in the Standing orders in public participation in the processing of constitutional amendment Bills by popular initiative, noting the silence in Article 257 of the Constitution.

(c) Whether county assemblies are required to undertake public participation on the draft Bill and, if so, the extent of such public participation

400. On the question of whether county assemblies are required to undertake public participation on the draft Bill and, if so, the extent of such public participation, the Committees observed the mandate of Parliament under the Constitution. Articles 257 (5) and (6) of the Constitution gives county assemblies up to ninety (90) days to undertake public participation and consider the constitutional amendment. In addition, Article 196(1)(b) of the Constitution requires county assemblies to "*facilitate public participation and involvement in the legislative and other business of the assembly and its committees.*" It is therefore clear that public participation at the county assembly level was necessary.

401. The High Court has also weighed in in the matter explicitly providing that county assemblies were under a duty to facilitate public participation in the process of considering the Constitutional amendment Bill. In the case of **Abi Semi Bvere v County Assembly of Tana River & another; Speaker of the National**

Assembly & another (Interested Parties)[19] the High Court declared the process of approving the Bill by Tana River County Assembly invalid for not adhering to requirements for public participation. The Court held that the resolution to adopt the Constitutional amendment Bill to "*be tainted with procedural illegality and due process and for being fatally defective and unconstitutional.*"

402. On the question of public participation, the Court argued that:

> "*In designing public participation procedures, the claim should be to ensure that the potentially affected part of the citizens are given an opportunity to input into the Constitutional making or amendment process. However, the perceived role of the legislature as elected representative should not be a substitute of the public voice to undermine their authority in Constitutional discourse.*
>
> *The ultimate role of the Constitutional amendment rests in the hands of the Kenyan people who would decide in a referendum whether it makes legal sense to amend certain provisions. However, notwithstanding that in the steps leading up to the plebiscite, public participation and inclusivity of the grass root masses is indispensable. One of these ways is for the county assembly to strive for the initiation of a constitutional making process in Tana River County of engaging the residents with meaningful enlightening processes on issues covered in the BBI document.*"

403. Further the Court stated that:

> "*Article 196 (b) requires the county assembly to facilitate public participation and involvement in the legislation and other business of the assembly and its committees. The County Assembly therefore has a constitutional obligation to facilitate public participation on policy formulation, legislative process and any other decision affecting residents of the county.*
>
> ...
>
> *The respondents aver that in compliance with Article 196 (1) (a) & (b), they did not lock the members of the public from giving their views and contributions, that they gave them a safer alternative by putting up a notice in their website inviting people to give their views through their website. This assertion leaves a lot of questions in the mind of this court. The position of Tana River County in the geographical terrain means that*

[19] [2021] eKLR

the majority of the populations are disadvantaged in terms of knowledge, ICT Skills and internet hardware and software connectivity making it impossible for any practical accessibility to the alleged website put in place by the county government. To demand of the citizens to present the memorandum or submissions through the website was an uphill task even to the leaders of that assembly themselves in view of inadequate optic fiber or internet facilities. In this county one is not able to access a website at the touch of a button. To this court, the action taken by the Respondent only means that the people of Tana River were locked out of in the involvement in the crafting of the constitution which is a lifetime opportunity lost to contribute to the constitutional amendment process.

Public participation ensures that when an individual actively takes part in forming the constitution, she/he learns its content more fully and she/he is also more likely to defend the provisions enshrined in it. Similarly, involvement and participation in constitutional building assert that involvement creates trust, which contributes to the growth of social capital, it bolsters democratic attitudes, the people become more open to listening to and respecting the views of others. The Respondents' action of relying on the website to get views from the citizens leave one to wonder what percentage of the population of the county of Tana River are able to access the said website.

...

It is the view of this Court that the requirement for the respondent to serve adequate notice on public participation was never observed as demonstrated by the annexures of the Daily Nation newspaper extract of 25th February, 2021. It is impossible to disregard in retrospect, this strict constitutional requirement of due process and natural justice as a precursor to the notion of legality of the character of County assembly proceedings to debate and consider the draft bill. At the very least, the assumption by the Assembly adopting the bill as representatives of the people without any public participation derogated from the fundamental principles of governance and national values on public participation and inclusivity of the people of Tana River under Article 10 of the Constitution.

...

I take the view that the draft bill failed to give sufficient notice to the public and discriminately enforcement of it by the County Assembly mistakenly was a misrepresentation and a violation of the Constitution. The statutes with a Constitutional foundation must be drawn, debated, understood and passed by the Kenya people to operate as a balance

between the state and the governed. There can be no rational governance for a man to be governed by a Constitution that was kept secret from him in complete violation of the rules of natural justice.

404. The question on whether county assemblies should have conducted public participation can only be answered in the affirmative. The next issue is what the role of Parliament in determining that issues is. It is a concept of constitutional democracy and law that one should assume constitutionality of laws and legislative processes. Article 257(6) of the Constitution provides that "if *a county assembly approved 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.*" Parliament is moved by the county assemblies through a certificate under the hand of each respective speaker signifying their decision under Article 257 of the Constitution. Once the respective Speakers have issued certificates under Article 257(6), Parliament has no locus to inquire into the sufficiency of public participation by the County Assemblies. This is in support of the doctrine of comity of Legislatures. Although process may be questioned in Courts, Parliament cannot undertake its own inquiry into the public participation processes at the County Assembly stage.

(d) <u>Findings of the Committees</u>

405. **The Committees found that although Article 257 is silent on the matter of the conduct of public participation by Parliament, it does not oust the application of Articles 10 and 118 of the Constitution which requires Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its Committees.**

406. **Public participation is critical to the processing of a constitutional amendment Bill by Parliament as it is through this process that Parliament would identify any unconstitutional amendments for noting and errors for correction. The public participation process would also enable Members to harvest the views of members of the public on the Bill and to ultimately decide whether to vote to approve or reject the Bill.**

407. **The Committees therefore found that pursuant to Article 118 of the Constitution Parliament was required to undertake public participation on the Constitution of Kenya (Amendment) Bill, 2020, and had indeed done so.**

408. **The Committees further found that County Assemblies are similarly required under Articles 10 and 196 of the Constitution and in accordance with their respective Standing Orders to conduct public participation on an amendment to the Constitution by popular initiative.**

409. **The Committees also observed that there was need for Parliament to put in place a legislative framework on public participation at both the national and county levels of Government. The Committees further observed that in the absence of specific provisions under Article 257 of the Constitution, provisions should be included in the proposed law or in the Standing Orders of the Houses to provide for public participation in the processing of a constitutional amendment Bill by popular initiative.**

E. Processing of the Bill

(a) Should the Constitution of Kenya (Amendment) Bill, 2020 have been Published Prior to its Introduction in Parliament?

410. The publication of information in the Kenya *Gazette* is meant to serve as a means of notifying the public of any decision that may have been taken, or is intended to be taken, by a public office or entity and where required, to allow for the public to participate in the decision-making process regarding the issue at hand. The process of publication of a Bill requires the printing and publication of the document by the Government Printer in the Kenya *Gazette* supplement and the assignment of a Bill number to the Bill as published.

411. From the copy of the Bill that was submitted to the County Assemblies by the IEBC, it is indicated on the cover page that it was printed by the Government Printer on 25th November, 2020. There is, however, no indication of its publication in the Kenya *Gazette* supplement or assignment of a Bill number as is the case with Bills published for introduction either in Parliament or in a county assembly.

412. During the public hearing, submissions were made regarding the nature of the document that was considered by the County Assemblies and that which was to be considered by Parliament. In particular, it was noted that the document that was before the County Assemblies was a draft Bill which was different from the document that was before Parliament which was a Bill.

413. Article 257(2) and (3) of the Constitution requires the promoters of a popular initiative that have proposed an amendment to the Constitution in the form of a general suggestion to formulate the suggestion into a draft Bill as follows –

> *(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.*

414. When the draft Bill is approved by a majority of the County Assemblies, it is then required to be introduced in Parliament in accordance with Article 257(7) of the Constitution which provides 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.*

415. Article 257(8) of the Constitution goes on to provide that a Bill is passed by Parliament under Article 257 of the Constitution "*if it is supported by a majority of the members of each House*".

416. It is noted that the Bill that is required to be introduced in Parliament is that which was approved by the County Assemblies. However, whereas Article 257(7) of the Constitution makes reference to a draft Bill, the subsequent provisions which require the introduction of and passage of the Bill by Parliament refer to the document as a Bill which were noted to be two distinct documents. In addition, the Constitution is silent regarding any intervening process required to be undertaken between the approval and submission of the draft Bill by the County Assemblies and the introduction of the Bill in Parliament to warrant the difference in the reference to the Bill at the County Assembly and at the Parliament levels.

417. Standing order 120 of the National Assembly Standing Orders requires a legislative proposal to be published prior to introduction in the National Assembly as follows –

> *No Bill shall be introduced unless such Bill together with the memorandum referred to in standing order 117 (Memorandum of Objects and Reasons), has been published in the Gazette (as a Bill to be originated in the Assembly), and unless, in the case of a Consolidated Fund Bill, an Appropriation Bill or a Supplementary Appropriation Bill, a period of seven days, and in the case of any other Bill a period of fourteen days,*

beginning in each case from the day of such publication, or such shorter period as the House may resolve with respect to the Bill, has ended.

418. Standing order 134 of the Senate Standing Orders provides a corresponding provision as follows –

> *No Bill shall be introduced unless such Bill together with the memorandum referred to in standing order 131 (Memorandum of Objects and Reasons), has been published in the Gazette (as a Bill to be originated in the Senate), and unless, in the case of a Division of Revenue Bill or a County Allocation of Revenue Bill, a period of seven days, and in the case of any other Bill a period of fourteen days, beginning in each case from the day of such publication, or such shorter period as the Senate may resolve with respect to the Bill, has ended.*

419. The Standing Orders of the respective Houses therefore impose a requirement that any Bill to be introduced in the respective House be published prior to introduction in that House.

420. Article 257(7) of the Constitution requires the introduction of the draft Bill in Parliament without delay if that "*draft Bill has been approved by a majority of the county assemblies*". A reading of this provision would seem imply that –
    (a) the Bill that is to be introduced in Parliament is that which was approved by the majority of the county assemblies; and
    (b) no amendments can be undertaken with respect to the draft Bill prior to its introduction in Parliament as the Bill that is to be considered is that which has been approved by the county assemblies.

421. While Article 257(2) to (7) of the Constitution makes reference to the introduction of the draft Bill in Parliament where it has been approved by a majority of the County Assemblies, clause (8) departs from this and makes reference to the passage of a Bill "*if supported by a majority of the members of each House*". Clause (9) further provides for the submission of a Bill passed under clause (8) for assent by the President as follows –

> *(9) If Parliament passes the Bill, it shall be submitted to the President for assent in accordance with Articles 256(4) and (5) of the Constitution.*

422. This therefore means that a Bill that is introduced in Parliament ought to be a Bill that is capable of introduction and passage in Parliament in line with the legislative

process that is set out under the standing orders of the respective Houses of Parliament. It further implies that the document that is passed is one that is capable of being assented to by the President if it is found not to require a referendum.

423. Whereas most jurisdictions require the publication of a Bill prior to introduction in the Legislature, a few exceptions exist to this rule with the standing orders or rules of the legislature providing for the exemption of specified Bills from publication before introduction. However, it was noted that the standing orders or rules providing for this exemption further require that the Bill be published after the Bill is read a First Time and, in cases where a determination is made that the Bill be proceeded with in the legislature, such approval is given by the legislature.

424. The Ghana Parliamentary Standing Orders provide for the introduction of a Bill without publication in the Gazette where the appropriate Committee determines that a Bill is urgent. In particular, Order 118 of the Ghana Parliamentary Standing Orders provides as follows -

> *118. Where it is determined and certified by the appropriate Committee of the House appointed in that behalf that a particular Bill is of an urgent nature, that Bill may be introduced without publication. Copies of the Bill shall be distributed to members and may be taken through all its stages in one day.*

425. Copies of the Bill are then distributed to Members and Parliament may pass the Bill through all the stages in one day. However, the standing orders further provide that the Bill must be published in the *Gazette* within twenty-four hours of the first reading or as soon as practicable thereafter as follows –

> *123. Where the Bill under Order 118 (Urgent Bills) or under 121 (Bills Regarding Settlement of Financial Matters), has been read the First Time without prior publication in the Gazette, it shall be so published within twenty four hours or as soon as practicable after that.*

426. In Uganda, the Rules of Procedure of the Parliament of Uganda contain similar provisions as those of the Parliament of Ghana. In particular, rule 130 of the Rules of Procedure provides as follows with respect to the introduction of urgent Bills –

> *(1) Where the House determines upon the recommendation of the appropriate Committee of the House appointed for the purpose, that a*

particular Bill is of an urgent nature, that Bill may be introduced without publication.

(2) Copies of a Bill referred to in sub rule (1) shall be distributed to Members, and the Bill may be taken through all its stages in a day, notwithstanding anything in these rules.

427. Rule 112 of the Rules of Procedure further provides as follows with respect to the publication of the Bill –

(4) Where a Bill under rule 103, has been read a First Time without prior publication in the Gazette, it shall be so published within twenty-four hours or as soon as practicable after its being read.

428. In Canada, the Canada Standing Orders provide for the publication of a Bill after the First reading and before the second reading in English and French languages. In particular, order 70 of the Canada Standing Orders provide as follows –

All bills shall be printed before the second reading in the English and French languages.

429. In all these instances, whereas a Bill may be read a first time prior to publication, the Bill must be subsequently published for it to be considered and passed by the respective House of Parliament. It is also instructive to note that the standing orders of the Parliaments make specific provision for the publication of Bills after First Reading of the bill.

430. In Switzerland, the Constitution requires the publication of the initiative, and not a Bill, at least eighteen months prior to the submission of the initiative to a vote in the case of a complete revision or submission to the general proposal or specific draft to the Federal Assembly. If the Federal Assembly is in agreement with the initiative which is in the form of a general proposal, it then proceeds to draft the revision and submit it to a referendum. However, if the Federal Assembly rejects the initiative, this is submitted to the people and it is only when the people vote in favour of the initiative that the Federal Assembly drafts the corresponding Bill. A majority vote by the people is required in the referendum for the initiative to be considered as having been accepted. The Constitution only requires the Federal Assembly to either approve or reject prior to submission of the drafting of the proposal or submission to the people for a referendum and does not provide in the

Constitution or the Federal Act of the Assembly, a similar procedure as that of an ordinary Bill.

431. In India, the Rules of Procedure and Conduct of Business in Lok Sabha provide for the introduction of Bills prior to publication save for instances where the approval of the Speaker has been sought for the prior publication of the Bill before introduction. In particular, the Rules provide as follows –

> *64. The Speaker, on request being made, may order the publication of any Bill, (together with the Statement of Objects and reasons, the memorandum regarding delegation of legislative power and the financial memorandum accompanying it) in the Gazette, although no motion has been made for leave to introduce the Bill. In that case, it shall not be necessary to move for leave to introduce the Bill, and, if the Bill is afterwards introduced, it shall not be necessary to publish it again.*

432. Leave is sought from the respective House to introduce the Bill. Where granted, the Bill is subsequently introduced in the House. The Rules of Procedure make further provision for the objection or opposition of a motion for leave to introduce a Bill in which case, the Speaker gives an opportunity to the person to give a brief statement regarding the opposition.

433. Rule 73 of the Rules further goes on to provide as follows –

> *73. As soon as may be after a Bill has been introduced, the Bill, unless it has already been published, shall be published in the Gazette.*

434. Rule 159 of the Rules goes on to provide for the application of the procedure that applies to other Bills to the processing and consideration of a Bill to amend the Constitution save for the voting procedures as follows –

> *159. In all other respects, the procedure laid down in these rules with respect to other Bills shall apply.*

Findings of the Committees

435. **On the question as to whether the Constitution of Kenya (Amendment) Bill, 2020 should have been published prior to its introduction in Parliament, the Committees found that the Bill contemplated under Article 257 is a Bill *sui generis*. This is evident from the manner in which the Bill is processed to Parliament from the County Assemblies as set out in Articles 257(5) to (7).**

Article 257(5) requires IEBC to submit the draft Bill to each County assembly for consideration. Article 257(6) provides that once a County assembly approves a draft Bill, the Speaker of a County Assembly delivers the draft Bill to the Speakers of the two Houses of Parliament with a certificate that the County Assembly has approved it. Article 257 (7) then requires that once a draft Bill has been approved by a majority of County Assemblies it shall be introduced in Parliament without delay. The Bill as introduced in the Houses of Parliament is therefore the Bill as received by the Speakers from the County Assemblies.

436. The Committees noted that the Speakers of the Houses had pronounced themselves on the matter. The Committees observed that in their Communications to the respective Houses, the Speakers had informed the Houses that in order to protect the integrity of the Bill as proposed to the County Assemblies as well as the process as contemplated under Article 257 of the Constitution, Parliament would not proceed to publish the Bill afresh.

437. The Committees however observed that in order to avoid any question arising on the authenticity of a Bill for an amendment of the Constitution by popular initiative during the processing of the Bill at the various stages, a legislative framework ought to be provided for the publication of the Bill. For the Houses of Parliament, there is need to amend the Standing Orders of the Houses to provide for a mechanism for publication of the Bill before introduction in the Houses.

(b) Whether the Bill should be Processed in Parliament in the Same Manner as an Ordinary Bill

438. Article 257(7) of the Constitution provides as follows with respect to the passing of a Bill by Parliament –

> *(7) A Bill under this Article is passed by Parliament if supported by a majority of the members of each House.*

Clause (8) further goes on to provide as follows with respect to the assent of the Bill –

> *(8) If Parliament passes the Bill, it shall be submitted to the President for assent in accordance with Articles 256(4) and (5).*

439. While the Constitution imposes an obligation on Parliament to introduce a Bill which would be considered to have been passed if it is supported by a majority of the members of each House, the Constitution does not elaborate on the procedure regarding how a Bill, initiated under Article 257 of the Constitution may be introduced, processed and passed in Parliament and in particular, whether it is required to undergo the various stages of the passage of an ordinary Bill in Parliament.

440. Standing order 124 of the National Assembly Standing Orders provides as follows with respect to the stage-by-stage consideration of Bills –

> *(1) Except with the leave of the House, not more than one stage of a Bill may be taken at any one sitting.*
> *(2) Paragraph (1) shall not apply to or in respect of –*
> *(a) An Appropriation Bill, a Consolidated Fund Bill, a County Allocation of Revenue Bill, a Division of Revenue Bill and an Equalization Fund Bill; or*
> *(b) A Bill to amend the Constitution in respect of its Second and Third Reading.*

441. In addition, standing order 129 of the National Assembly Standing Orders provides as follows with respect to the Second Reading of a Bill to amend the Constitution –

> *A Bill to amend the Constitution shall not be called for the Second Reading in the National Assembly within ninety days after the First Reading of the Bill in the National Assembly.*

442. Whereas standing order 129 of the National Assembly Standing Orders is not specific regarding whether it is to be applied to the consideration of a Bill to amend the Constitution by way of Parliamentary Initiative and Popular Initiative, it is instructive to note that Article 256 of the Constitution imposes the ninety-day time frame between the First and Second Reading of a Bill to amend the Constitution in Parliament while Article 257 is silent on the applicable timeframe.

443. On the other hand, standing order 135 of the Senate Standing Orders only makes specific provision for the consideration of Bills to amend the Constitution under Article 256 of the Constitution with no reference to the manner in which Bills under Article 257 of the Constitution are to be processed as follows –

(1) A Bill to amend the Constitution may be introduced in the Senate, and pursuant to Article 256 of the Constitution-
(a) may not address any other matter apart from consequential amendments to legislation arising from the Bill;
(b) shall not be called for Second Reading within ninety days after the First Reading of the Bill; and
(c) shall be passed at both Second and Third Readings, by not less than two-thirds of all Senators.

444. With regard to the stage-by-stage consideration of Bills in the Senate, the Senate Standing Orders do not provide for a procedure that is distinct for a Bill to amend the Constitution. It provides as follows –

(1) Except with the leave of the Senate, not more than one stage of a Bill may be taken at any one sitting.
(2) Paragraph (1) shall not apply to or in respect of a County Allocation of Revenue Bill or the Division of Revenue Bill.

445. The lack of a clear framework regarding the procedure applicable with respect to the consideration of a Bill to amend the Constitution by way of popular initiative was noted by the Speaker of the National Assembly who stated as follows –

The constitutional imperative to introduce and consider the Bill and the lack of an express procedure in the Standing Orders for the same informed my previous Guidance on the manner and form in which the Bill is to be introduced in this House. By extension, and pursuant to Standing Order No. 1 which allows the Speaker discretion to prescribe procedure where none is applicable, I do note that the work of the House is largely executed by its Committees which recommend various actions to the House and inform debate on matters under its consideration.

446. Regarding the processing of the Bill after First Reading, the Speaker of the National Assembly directed that the Departmental Committee on Justice and Legal Affairs facilitate public participation on the Bill and move the various stages of the Bill on behalf of the House. This was owing to the unique nature of the Bill which was not sponsored by either the Leader of the Majority or Minority Party or a Committee or Member of the House and the fact that the promoters of the Bill who were the "sponsors" to the Bill are strangers to the House.

447. On the other hand, the Speaker of the Senate, in his Communication to the House on 3rd March, 2021, while noting his previous observations that the rules of procedure in the Senate were deficient with respect to fully actualizing the parliamentary process contemplated under Article 257, stated that he would continue to issue guidelines regarding the parliamentary process as necessary to ensure that the Bill is disposed of seamlessly.

448. It is noteworthy, that unlike in the case of a county assembly which is required, pursuant to Article 257(5) and (6) of the Constitution, to consider and approve a draft Bill submitted to it by the IEBC, a distinct requirement is imposed on Parliament under Article 256(8) and (9) of the Constitution for the passage of a Bill and subsequent submission to the President for assent in accordance with Article 256(4) and (5) of the Constitution.

449. **Whereas the standing orders of the two Houses of Parliament do not expressly provide for the application of the standing orders regarding the passage of an ordinary bill to the passage of a bill to amend the Constitution, it is noted that the processing and passage of any legislation can only be carried out in line with the procedures for the passage of a Bill set out under the Constitution and the respective Standing Orders of Parliament.** The procedure for enacting legislation is provided for under Part 4 of Chapter Eight of the Constitution. In Particular, Article 109(1) of the Constitution provides that "*Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President*". The Part goes on to elaborate on the manner in which Bills are to be considered and passed by Parliament.

450. The procedure for the passage of a Bill as outlined in Part 4 of Chapter of the Constitution and the Standing Orders requires the consideration of a Bill at First, Second, Committee of the Whole and Third Reading Stages and subsequent submission of the Bill to the President for assent. A bill is not considered to have been passed and capable of being submitted for assent unless it has gone through the stages prescribed in the Constitution and the Standing Orders of the respective House of Parliament.

451. An analysis of other jurisdictions revealed that while the Constitutions in various jurisdictions have in place a provision for the amendment of the Constitution, most did not provide an elaborate procedure regarding the processing of the amendments in the respective Parliaments and the courts in India considered the shortcomings of the legislative framework on this. However, it was noted that the rules of procedure or standing orders of Parliaments in some jurisdictions did

contain express provision for the application of process pertaining to ordinary bills or draft laws to laws to amend the Constitution.

452. Article 368 of the Constitution of India provides for the procedure for the amendment of the Constitution by Parliament as follows –

> *(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.*
>
> *(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill:*
>
> *Provided that if such amendment seeks to make any change in:*
> *(a) article 54, article 55, article 73, article 162 or article 241, or*
> *(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or*
> *(c) any of the lists in the Seventh Schedule, or*
> *(d) the representation of States in Parliament, or*
> *(e) the provisions of this article,*
>
> *the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States17... by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.*
>
> *(3) Nothing in article 13 shall apply to amendment made under this article.*
>
> *(4) No amendment of this Constitution (including the provisions of Part III made or purporting to have been made under this article [whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act,1976] shall be called in question in any court on any ground.*

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

453. Whereas the Constitution of India sets out the procedures for the amendment of a Constitution, it has been recognised that it did not outline a specific legislative procedure that is to apply with respect to the consideration and passage of a Bill to amend the Constitution in Parliament.

454. The Supreme Court of India considered this issue In *Shankari Prasad Sing Deo vs. Union of India, A.I.R. 1951 S.C. 458.* In this case, the Petitioner sought to challenge the Constitution (First Amendment) Act, 1951 arguing that the amendments sought to take away fundamental rights of citizens to property by the introduction of Articles 31A and 31B to the Constitution. After the independence of India a number of States enacted legislation which sought to bring about agrarian land reforms and which would result in the loss, by Zamindars, of their respective landholdings. The Zamindars filed a petition in the High Courts in the respective States. The Patna High Court invalidated the reforms while the High Courts in Allahabad and Nagpur upheld the validity of the legislation. In order to address this issue in totality and bring an end to the various litigation regarding this issue, the Government sought to amend the Constitution through the Constitution (First Amendment) Act, 1951. The petitioners then petitioned the Court arguing, inter alia, that the Constitution (First Amendment) Act, 1951 was not passed in conformity with the procedure laid out under Article 368 of the Constitution as several amendments were made to it during its passage in Parliament. In considering the legislative process to be followed, the Supreme Court observed as follows –

> *In the first place, it is provided that the amendment must be initiated by the introduction of a "bill in either House of Parliament", a familiar feature of parliamentary procedure (of article 107(1) which says "A bill may originate in either House of Parliament"). Then, the bill must be "passed in each House"-just what Parliament does when it is called upon to exercise its normal legislative function [article 107(2)]; and finally, the bill thus passed must be "presented to the President'" for his "assent", again a parliamentary process through which every bill must pass before it can reach the statute-book (article 111). We thus find that each of the component units of Parliament is to play its allotted part in bringing*

about an amendment to the Constitution... Assuming that amendment of the Constitution is not legislation even where it is carried out by the ordinary legislature by passing a bill introduced for the purpose and that articles 107 to 111 cannot in terms apply when Parliament is dealing with a bill under article 368, there is no obvious reason why Parliament should not adopt, on such occasions, its own normal procedure, so far as that procedure can be followed consistently with statutory requirements.

455. In this case, the Court alluded to the fact that since the Constitution required a Bill to be amended by the Constitution to be passed by each House, then the term "passed" would be construed to mean the legislative process that follows in the exercise of its legislative function. Further, in noting that the procedure for amendment of the Constitution was not in itself complete, the Court stated as follows –

> *There are gaps in the procedure as to how and after what notice a bill is to be introduced, how it is to be passed by each House and how the President's assent is to be obtained. Evidently, the rules made by each House under article 118 for regulating its procedure and the conduct of its business were intended, so far as may be, to be applicable...Having provided for the constitution of a Parliament and prescribed a certain procedure for the conduct of its ordinary legislative business to be supplemented by rules made by each House (article 118), the makers of the Constitution must be taken to have intended Parliament to follow that procedure, so far as it may be applicable consistently with the express provisions of Article 368, when they entrusted to it power of amending the Constitution.*

456. Hence, the Court found that a Bill to amend the Constitution was to follow the procedure set out in the Rules of Procedure and the Conduct of Business in Parliament subject to the requirements of the Constitution regarding the special majority required for passage, ratification by State Legislatures where applicable and the requirement for assent by the President.

457. It is also instructive to note that rule 155 of the Rules of Procedure and Conduct of Business of the Lok Sabha currently provides for the separate clause by clause and schedule by schedule consideration of a Bill to amend the Constitution and a vote taken on each of the clauses and schedules. Rule 159 of the Rules of Procedure further provide for the consideration of Bills seeking to amend the Constitution in the same manner as other Bills as follows –

In all other respects, the procedure laid down in these rules with respect to other Bills shall apply.

458. Hence, the only distinction in the processing of a Bill to amend the Constitution applies to the voting on the clauses and schedules to a Bill to amend the Constitution. In this case, the clauses or schedules are considered in the same manner and form part of the Bill if passed by a majority of the total membership of the House and by a majority of not less than two thirds of the members present and voting. However, the Short and Long Title and the Enacting Formula are adopted by a simple majority.

459. Article XVII of the Philippines Constitution provides for the amendment or revision of the Constitution by Congress, a constitutional convention or by way of a proposal by the people as follows –

> *Section 1. Any amendment to, or revision of, this Constitution may be proposed by:*
> *(1) the Congress, upon a vote of three-fourths of all its Members; or*
> *(2) a constitutional convention.*
>
> *Section 2. Amendments to this Constitution may likewise be directly proposed by the people through initiative upon a petition of at least twelve per centum of the total number of registered voters, of which every legislative district must be represented by at least three per centum of the registered voters therein. No amendment under this section shall be authorized within five years following the ratification of this Constitution nor oftener than once every five years thereafter.*
>
> *The Congress shall provide for the implementation of the exercise of this right.*

460. Section 145 of the Rules of the House of Representatives provides as follows with respect to the procedure applicable for the adoption of an amendment to or revision of the Constitution –

> *Proposals to amend or revise the Constitution shall be by resolution which may be filed at any time by any Member. The adoption of resolutions proposing amendments to or revision of the Constitution shall follow the procedure for the enactment of bills.*

461. Article 78 of the Constitution of Latvia allows at least one tenth of the electorate to initiate an amendment to the Constitution. Whereas the Constitution does not set out the procedure regarding how a draft to amend the Constitution under Article 78 of the Constitution is to be processed in the legislature, this procedure is set out under the Rules of Procedure of the Saeima further provide as follows with respect to the processing of a draft law to amend the Constitution which undergoes a similar legislative process as that of an ordinary draft law as follows–

> *79. (1) Draft laws may be submitted to the Saeima by 1) the President, 2) the Cabinet, 3) Saeima committees, 4) at least five Members, or 5) one-tenth of the electorate (Article 65 of the Constitution). Legislative initiatives must be drawn up in the form of draft laws.*
> *(2) The President shall be entitled to submit legislative initiatives which do not have to be in the form of draft laws.*
> *(3) The Cabinet shall prepare an explanatory note to the draft law and shall submit the text of the draft law and of the explanatory note in electronic form.*
> *80. (1) Each draft law must be signed by the persons submitting it.*
> *(2) If a draft law concerns the ratification of an international instrument, it shall be accompanied by the official text of the international instrument and its Latvian translation unless the official text of the instrument is in Latvian.*
> *(3) If the submitter has disregarded the requirements of this Article, the Presidium shall be entitled to return the draft law to the submitter.*
> *81. A draft law submitted to the Saeima in accordance with the procedure set forth by the Law on National Referendums and Legislative Initiatives shall be put to a referendum, provided that the Saeima has rejected its forwarding to Saeima committees, has rejected it in corpore, or has adopted it with alterations of its contents.*
> *82. (1) The Presidium shall report to the Saeima on the draft laws received and on its opinion regarding their further processing. The Saeima shall rule (Article 54) whether to forward the draft law to the committees and to appoint a responsible committee or to reject it.*
> *(2) Before a vote is taken on the opinion of the Presidium, the Saeima may rule (Article 54) to amend it as follows:*
> *1) to forward the draft law for consideration also to a Saeima committee not referred to in the opinion;*
> *2) not to forward the draft law for consideration to a committee referred to in the opinion;*
> *3) to appoint another responsible committee.*

(3) The amendments mentioned in paragraph 2 of this Article may be submitted by a Saeima committee or a Member in writing or verbally. Written amendments shall be considered before verbal amendments. Representatives of committees requesting the floor to propose the said amendments shall be given the floor in the order they have signed up but before other speakers who wish to speak on the said draft law.

(4) The submitted draft laws shall be made available to Members at least seven days before the Presidium reports on them to the Saeima. If necessary, the Presidium may shorten this term.

(5) All the submitted draft laws, alternative draft laws prepared for the first reading (Article 85), draft laws prepared for second and third readings, as well as the opinions of the Presidium and committees concerning these draft laws, shall be forwarded to the President and the Prime Minister.

83. Deleted

84. Upon forwarding the same draft law to two or more committees, the Saeima may rule (Article 54) on the deadline by which the committees must consider the draft law and submit proposals to the responsible committee or the Presidium.

85. (1) The committees to which the Saeima has forwarded a draft law may prepare their alternative draft law to be considered in the first reading.

(2) If a committee has received a draft on amendments to a law for which the respective committee as the responsible committee has already received another draft on amendments, the committee may:

1) combine the drafts and make one alternative draft law and submit it for the first reading;

2) incorporate the draft law submitted later into the draft law submitted earlier as proposals for the second or third reading

3) submit each of the said draft laws for separate consideration.

(3) Subparagraphs 1 and 2 of paragraph 2 of this Article shall not apply to draft laws which contain amendments to the Constitution of the Republic of Latvia.

(4) If the responsible committee, guided by the provisions of subparagraph 2, paragraph 2 of this Article, decides to incorporate a draft law submitted later into a draft law submitted earlier, the status of a proposal shall also be accorded to those articles (paragraphs) of the incorporated draft law which the responsible committee has rejected or proposed to change.

462. On the question of whether the Bill should be processed in Parliament in the same manner as an ordinary Bill, the Committees observed that whereas the Standing Orders of the two Houses do not expressly provide for the application of the Standing Orders regarding the consideration of an ordinary Bill to the consideration of a Bill under Article 257 of the Constitution, the processing of such a Bill can only be undertaken in line with the procedures for the passage of a Bill as set out under the Constitution and the respective Standing Orders of the Houses.

463. It was further observed that the directions given by the Speakers of the Houses in their Communications had extended the application of the procedure for the consideration of ordinary Bills, with respect to the First Reading of the Bill and the committal of the Bill to the Committees, to the consideration of the Amendment Bill.

464. Noting that Article 257 of the Constitution does not give a clear procedure on how to process such Bills, the Committees found that it will be necessary for the Speakers of the Houses to give guidance on the processing of the Bill through the subsequent stages.

F. Whether the Substantive Provisions of the Bill can be Processed in a Different Manner from the Provisions in the Schedule

465. A Schedule is considered as a part of a Bill or an Act of Parliament consisting of material or information which may form part of a Bill or an Act but which, for convenience and in order to provide clarity, provides a part that houses technical or more detailed that would otherwise interrupt the flow of information in the body of a Bill or an Act. The weight attached to the schedules contained in a Bill or an Act is the same weight that is attached to the main body of a Bill or Act.

466. The removal of certain matters to schedules allows the provisions in the body of a Bill or an Act to be presented more prominently and in a sequence that flows more easily. Schedules can contain secondary, minor material, or material equal in importance to, or of even greater importance than, that in the body of the Act such formulas, administrative processes.

467. The framework for the consideration of the various parts of a Bill is found in the National Assembly Standing Orders and the Senate Standing Orders. Standing order 132 of the National Assembly Standing Orders provides as follows –

> *In considering a Bill in Committee, the various parts thereof shall be considered in the following sequence –*
>
> *(a) clauses as printed, excluding the clauses providing for the citation of the bill, the commencement, if any, and the interpretation;*
>
> *(b) new clauses;*
>
> *(c) schedules;*
>
> *(d) new schedules*
>
> *(e) interpretation;*
>
> *(f) preamble, if any;*
>
> *(g) long title;*
>
> *(h) the clauses providing for the citation of the Bill and the commencement.*

468. Standing order 146 of the Senate Standing Orders provides a corresponding provision on the sequence to be observed in the consideration of a Bill in Committee of the Whole in the Senate.

469. The standing orders do not provide a distinct procedure for the consideration of the various parts of a Bill and all are considered using the same procedure and along the same legislative process. It is therefore noted that the procedure to be observed with respect to the consideration and any amendment to a schedule to a Bill follows a similar process to that of the other parts of a Bill.

470. In addition, in terms of parliamentary practice and the commonwealth jurisdictional style that applies to the consideration of amendment Bills (including a Bill to amend the Constitution) in Kenya, the rules that apply with respect to the amendment of the main body of a Bill and the parliamentary process that follows in its consideration also applies to that of a Schedule. This is particularly in view of the fact that the same importance or weight is attached to a schedule as that of the body of a Bill or an Act.

471. As noted, in most jurisdictions, the Schedule is considered to be and is usually treated as a part of a Bill in the legislative process. Hence, in the case of the Constitution of Kenya (Amendment) Bill, 2020, the rules that would apply to the consideration of the main body also applies to the Schedules contained in the Bill. This therefore means that if the rule not to amend the main body of the Bill applies,

the same rule would apply to the consideration of the Schedules allied to the Constitution of Kenya (Amendment) Bill, 2020.

472. In this case, if the rule that applies to the consideration of body of a Bill requires that the Bill cannot be amended, it therefore follows that the same rule would apply to the consideration of the schedules to the Bill.

473. It should be noted however that there are some instances to which exceptions to this rule apply. These are as follows:

    (a) the Act may contain an express provision for the amendment of a Schedule by the regulation making authority in the Act. In such instances, the Act will confer on either the Cabinet Secretary or the respective authority on whom delegated authority is conferred, the power to amend the schedule by way of either an Order or such delegated legislation as may be considered appropriate e.g. in the case of the Income Tax Act; and

    (b) the Schedule may contain a Treaty, Convention or other international instrument which is sought to be implemented through the Act. In this case, the Treaty, Convention or international instrument cannot be amended as this relates to an already existing and ratified document. Hence, any amendment to the Schedule in this case can only be undertaken to conform to any amendments that may have been made to the instrument and ratified accordingly.

474. An analysis of experience from comparative jurisdictions on rules of law-making point to the status of the schedule being the same as that of the bill and an integral part of the Bill. The United Kingdom; Canada and Australia regard schedules as a part of a Bill or a part of an Act. Bills may have a number of Schedules that appear after the main clauses in the text of the bill. They are often used to spell out in more detail how the provisions of the Bill are to work in practice. If a Bill becomes an Act of Parliament, its Schedules become Schedules of that Act.

475. In the House of Commons in the United Kingdom, an amendment to a schedule may generally be moved, and it is also possible to propose new schedules. This is usually done during the consideration of the Bill and the process and procedures that apply to the amendment of the main body of a Bill also apply to the Schedule. However, there is an exception in the case of a bill to give effect to an agreement

(a treaty or convention) that is within the prerogatives of the Crown. If the schedule to such a bill contains the Agreement itself, the schedule cannot be amended. However, amendments may be proposed to the clauses of the bill, as long as they do not affect the wording of the Agreement in the schedule, and even if the consequence of the amendments is to withhold legislative effect from the Agreement or its parts.

Finding of the Committees

476. **The Committees found that the Schedules to the Constitution of Kenya (Amendment) Bill, 2020 are part of the Bill. It therefore follows that the rules that apply to the consideration of the Bill also apply to the Schedules.**

G. Referendum Issues

477. The Committees received views on and considered several legal issues regarding the referendum. These stem from the provisions of Article 255, 256 and 257 of the Bill as concerns the link between referendum issues as captured in Article 255 and non-referendum issues in the Constitutional amendment Bill. The Committees isolated the questions requiring its determination into three, namely:

a) Whether a referendum on the Bill is required;
b) Whether, for purposes of the referendum, various provisions or portions of the Bill may be severed so that some of the provisions are subjected to a referendum;
c) Whether the referendum should comprise a single question on the Bill as a whole or multiple questions on each of the clauses of the Bill?

478. The issues flow from the wording of Article 255 and 257 of the Constitution. Article 255 provides as follows –

> *255. Amendment of this Constitution*
> *(1) A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendment relates to any of the following matters—*
> *(a) the supremacy of this 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.

(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.

(3) An amendment to this Constitution that does not relate to a matter specified in clause (1) shall be enacted either—

(a) by Parliament, in accordance with Article 256; or

(b) by the people and Parliament, in accordance with Article 257.

479. From the above provisions an amendment that contains any of the issues included in Article 255(1) requires a referendum to come into effect. Article 255(3), on the other hand stipulates that if the amendment does not relate to issues protected under Article 255(3) then it is to be processed under either Article 256 or 257 depending on whether it is Bill by parliamentary initiative or popular initiative.

480. The Committees determined earlier in this report that the Bill is by popular initiative. Consequently, the relevant provision of the Constitution is Articles 257. That provision is clear on one instance in which the Bill must go to a referendum. That is under Article 257(10), which provides that-

> *257(10) If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in 255(1), the proposed amendment shall be submitted to the people in a referendum."*

481. Once the Senate and the National Assembly votes on the Bill, depending on the outcome of the vote in either house, Article 257(10) provides that a referendum would be necessary.

482. The above is fairly straight forward and clear from the stipulations in the Constitution. The more critical issue is the second aspect as provided for in Article 255(9) of the Constitution, which provides as follows----

"257 (9) If Parliament passes the Bill, it shall be submitted to the President for assent in accordance with Article 256(4) and (5)."

483. Article 256(4) and (5) of the Constitution provides 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.*

484. The question that required to be answered next is whether the Bill contains matters listed in Article 255 of the Constitution thus requiring a referendum. While the Bill itself does not explicitly state whether it has issues that fall within the purview of Article 255 of the Constitution, a review of the Bill clearly reveals that there are several clauses that touch on some of the matters in Article 255 of the Constitution, including the Bill of Rights, independence of the Judiciary, functions of Parliament; objectives, principles and structures of devolved government and Chapter fifteen on Commissions and independent Offices. The relevant clauses are: clause 5 touching on Bill of Rights), clauses 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 28, 29, 32, 33, 48 (touching on the functions of Parliament), clauses 41, 42, 43, 44 (touching on the independence of the Judiciary), clauses 45, 46, 47 (touching on the objects, principles and structures of devolved government), clauses 68 and 69 (touching on Chapter Fifteen).

485. It is thus clear that in terms of containing Article 255 issues, a referendum is necessary whether Parliament passes the Bill or not. The other question for the Committees was how to deal with the Bill if it contained both referendum and non-referendum issues. The Committees posed this question to several participants, while others addressed it in their oral submissions. There were varied views on the matter. Majority of the participants expressed their views that the Bill is a single unit, even though focusing on some provisions that they were more interested in.

They, however on the whole expressed their view either supporting or opposing the Bill as a whole. Some, participants were of the view that Parliament could severe some parts of the Bill and enact it through the traditional parliamentary procedure and have the President assent to it without the need for a referendum while only taking the parts that touch on Article 255 issues for referendum.

486. 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 severe provisions of a Constitution Amendment Bill so that those which do not fall under Article 255 can be assented to forthwith. In their view, the Bill contains so many provisions that are not protected under Article 255(1) and that can be dealt with by the Houses exclusively without the requirement for a referendum.

487. Mr. Nelson Haviof the view that since Parliament was yet to enact law to guide the referendum process most of the proposed amendments in the Amendment Bill could still be realized- properly and regularly- through parliamentary initiative. On the question though of whether you can separate these from those that require a referendum, they took the position that the Bill was not severable.

488. The IEBC in discussions with the Committees took the view that Parliament can and should separate the parts of the Bill that do not require a referendum and deal with them, while separating those that touch on Article 255(1) issues to be taken to a referendum.

489. Mr. Samuel L. Mwaniki, in making his submission, submitted that a reading of the Bill reveals that it has proposals that require approval by a referendum and also clauses that can be enacted by Parliament without the need for a referendum. He further submitted that Article 255(3) (b) of the Constitution provides that a proposed amendment that does not require a referendum shall be enacted by the people and Parliament in accordance with Article 257. In terms of Article 257(8) and (9), if a Bill originated by a way of a popular initiative is passed by a simple majority of the members of each House, it shall be submitted to the President for assent, either without the need for a referendum or after the holding of a referendum.

490. Mwaniki further stated that Article 256(5) provides that the President shall refer a Bill to the Independent Electoral and Boundaries Commission to organize a referendum only if the Bill proposes an amendment to any of the ten entrenched items in Article 255(1).

491. Mwaniki submitted that from the above-mentioned clauses of the Constitution (which are couched in mandatory terms), it was evident that it would be unprocedural— and therefore unconstitutional— to take to a plebiscite matters that do not require the holding of a referendum. Consequently, Mwaniki proposed that Parliament should separate those proposals that require a referendum from those that do not. He argued that there was nothing in the Constitution to suggest that doing such separation is not permissible.

492. In determining this issue, the Committees addressed three issues. First the Bill is by popular initiative and comes to Parliament on the back of support by at least one million signatures and approval of over-half of the county assemblies. Article 257(3) and (4) puts the responsibility of preparing the draft Bill on the promoters of the Bill. Having developed the draft Bill, who would then have the responsibility for determining which provisions relate to Article 255 and which ones do not and thus severing the Bill into the two parts? Would it be Parliament before they debate the Bill? Would each of the Houses, as they separately consider thei Bill, each sever it on their own? And if their decisions contradicted each other on which parts are referendum issues and which are not? Or would that be the President by virtue of Article 255 (5)(a) which provides that if the Bill relates to Article 255(1) issues, the President would request IEBC to conduct a referendum before assenting to it? Or would that be the responsibility of IEBC?

493. The second question relates to the wording of Article 255 and 256. Throughout the two Articles, the Constitution uses the word "Bill" and not "Bills". This use of the term in its singular form from plain and literal meaning would mean that the Constitution contemplated that the entire Bill would go to a referendum. There would be one Bill and not several Bills. Additionally, there are no provisions providing for nor procedures on how to undertake severance in the Constitution. However, there is the contrary issue that under the Interpretations and General Provisions Act, singular connotes plural.

494. The third question is that of the doctrine of unity of issues. Discussed in detail under the question of whether to have a multiple question or single question referendum, it has a bearing on this question of severance too. At the heart of the doctrine is the requirement that there be a linkage between the issues being considered in the referendum. There is debate as to whether this requires that a referendum should only contain one issue at a time or not. The guidance that the principle gives to the current question is the need to ensure a linkage between the different clauses of the Bill. A Bill may have several clauses but are interrelated.

Attempting to separate them at the tail end of the process and not at the drafting stage would suffer the practical challenge and possibility of dismembering the Bill and separating clauses that relate to each other only on the basis that some are Article 255(1) and others are not.

495. In the Code of Good Practice of Referendums,[20] adopted by the Council for Democratic Elections on 16th December 2006 and thereafter by the European Commission for Democracy Through Law (The Venice Commission) at its meeting on 16-17 March 2007 to guide the conduct of referendums in European member states, the question of what unity of content means and its implication in the conduct of referendums was discussed. The Guidelines provide that:

> *"unity of content: except in the case of total revision of a text (Constitution, law), there must be an intrinsic connection between the various parts of each question put to the vote, in order to guarantee the free suffrage of the voter, who must not be called to accept or refuse as a whole provisions without an intrinsic link; the revision of several chapters of a text at the same time is equivalent to a total revision."*

496. Further it guided that:

> *"An even more stringent requirement of free suffrage is respect for unity of content. Electors must not be called to vote simultaneously on several questions without any intrinsic link, given that they may be in favour of one and against another. Where the revision of a text covers several separate aspects, a number of questions must therefore be put to the people. However, total revision of a text, particularly a Constitution, naturally cannot relate solely to aspects that are closely linked. In this case, therefore, the requirement for unity of content does not apply. Substantial revision of a text, involving a number of chapters, may be regarded as being equivalent to total revision; clearly, this does not mean the different chapters cannot be put separately to the popular vote."*

497. However, the guidelines opine that while the above is true, it warns that "t*he option of classifying several chapters as a total revision may seem like a means of circumventing the unity of content rule. This overlooks the fact that a total constitutional revision often involves a more complicated process than a partial revision."*

[20] CDL-AD(2007)008rev-cor. Available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)008rev-cor-e.

498. This principle is critical in the discourse on how to draft referendum Bills. However, it also gives guidance to the determination on whether to separate the current Bill into non-referendum and referendum parts. Based on a consideration of the above three questions, the Committees determine that the entire Bill should be subjected to a referendum without severing some parts of it, since severing would raise constitutional, legal and procedural difficulties.

499. The last question under this issue is whether the referendum question should be a single question or whether it should have multiple questions with each clause being a question on its own. There are varied opinions on this issue. On the one hand is the argument that single question referendum makes the choice for citizens easy and straightforward. On the other hand, are concerns that to proceed in such a manner has the effect of "reducing complex policy complex policy decisions to two maximally opposed options."[21] As raised in public discussions in Kenya this can lead to people throwing away the entire Bill even if they liked some proposals.

500. Across the world, there have been held single-question or binary referendums and multiple option referendums[22] with successes and criticisms for both options. The Elections Act, for example provides some guidance on the issue in Section 49. It stipulates as follows-

> *49. Initiation of a referendum*
>
> *(1) Whenever it is necessary to hold a referendum on any issue, the President shall by notice refer the issue to the Commission for the purposes of conducting a referendum.*
>
> *(2) **Where an issue to be decided in a referendum has been referred to the Commission under subsection (1), the Commission shall frame the question or questions to be determined during the referendum.***
>
> *(3) The Commission shall, in consultation with the Speaker of the relevant House, lay the question referred to in subsection (2) before the House for approval by resolution.*
>
> *(4) **The National Assembly may approve one or more questions for a referendum.***

[21] Charlotte L. Wagenar, "Lessons from International Multi-Option Referendum Experiences" Vol 91(1), *The Political Quarterly* , January-March, 2020, 192-200 at 192
[22] Ibid.

(5)The Commission shall publish the question approved under subsection (4) in the Gazette and in the electronic and print media of national circulation.

(6) The Commission shall conduct the referendum within ninety days of publication of the question.

(7) The Commission may assign such symbol for each answer to the referendum question or questions as it may consider necessary.

(8) A symbol assigned under subsection (7) shall not resemble that of a political party or of an independent candidate

501. The reading of the above would indicate that it is possible to have multiple question referendum under the current legislative framework. There is also the converse argument that singular means plural and vice versa under the Interpretations and General Provisions Act of Kenya thus the final determination is for the process. There is no mandatory requirement either way.

502. Comparative case law on this issue demonstrates the inextricable link between this issue and that of unity of issues. Discussed earlier in this report. The case law speak about the need to ensure unity of issues in the design of a referendum In the Lithuania case of The Compliance Of The Provisions Of The Republic Of Lithuania's Law On referendums With The Constitution Of The Republic Of Lithuania pointed out at;

> *"Thus, the aforementioned legal regulation disregards the imperative, stemming from Paragraph 1 of Article 9 of the Constitution, that preconditions must be created for determining the actual will of the nation in a referendum, as well as the requirement, implied by the latter imperative, that the actual will of the nation must be determined separately regarding each most significant issue concerning the life of the state and the nation, which is submitted to a referendum;* ***in addition, this legal regulation disregards the duty of the legislature, stemming from the Constitution inter alia, Paragraphs 1 and 3 of Article 9 thereof, to establish by law the requirement that several issues unrelated by their content and nature, or several unrelated amendments to the Constitution, or several unrelated provisions of laws may not be put to a referendum as a single issue.***"

503. Based on the above the Court concluded that:

"In the light of the foregoing arguments, the conclusion should be drawn that Article 6 of the Law on Referendums, insofar as it does not establish the requirement that several issues unrelated by their content and nature, or several unrelated amendments to the Constitution, or several unrelated provisions of laws may not be submitted as a single issue in a decision proposed to be put to a referendum, is in conflict with Paragraphs 1 and 3 of Article 9 of the Constitution."

504. Similarly, the High Court of Kenya in the case of ***Titus Alila and 2 others (Suing on their own Behalf and as the Registered Officials of the Sumawe Youth Group) V Attorney General and Another***[23] Held that:

"Section 49 of the Elections Act gives to the IEBC the mandate to frame the question or questions to be determined through a referendum.

In the exercise of the said mandate it is definitely open to the IEBC to determine whether or not they would have a "nonseparable preference"; or an "Issue by Issue" question; or "sequential voting.

If the court were to give generalized directions to the IEBC, when it had not been shown that the Commission had strayed from the path established by law, that would constitute a blatant interference by the Judiciary in the Constitutional mandate of an Independent Commission.

Meanwhile, I note that it may be logical to have a referendum which addresses one specific issue, rather than an omnibus question. That could result in the people of Kenya having a clear picture of the exact issue they were being called to vote upon.

Such a process would avoid a situation in which a voter was compelled to throw out the baby with the bath water, simply because the omnibus issue contained one or more objectionable matters, which had been lumped together with good amendments.

Nonetheless, it must be acknowledged that the process of conducting either Issue by Issue referenda or Sequential Voting would most probably be more expensive compared to instances where there was one composite question.

[23] (2019) eKLR.

As the Petitioners were already bemoaning the large expense that the country has to go through in a referendum, I hold the view that it is the body tasked with formulating the structure of the referendum which is best suited to determine how best to go about their task."

505. The upshot of the above discussion is that the question of single question or multiple question referendum is one that will continue to vex the Kenyan referendum process until a comprehensive referendum law is put in place. The current Referendum Bill when debated and enacted by Parliament should settle the issue either way.

Findings of the Committees

506. **On whether a referendum on the Bill is required, the Committees found that there are provisions in the Bill that touch on some of the matters provided for under Article 255(1) of the Constitution. Consequently, pursuant to Articles 255(3) and 257 (10) of the Constitution, the Bill is one on which a referendum is required.**

507. **On whether, for purposes of the referendum, various provisions or portions of the Bill may be severed so that only some of the provisions are subjected to a referendum, the Committees found that the Bill should, in accordance with Article 257(10) of the Constitution, be submitted to a referendum as one Bill. In this regard, the Committees found that in accordance with the doctrine of unity of issues, there ought to be a linkage between the issues being considered in a referendum. There is therefore need to ensure a linkage between the different clauses of the Bill. A Bill may have several clauses but which are interrelated. Attempting to separate them at the tail end of the process and not at the drafting stage would suffer the practical challenge and possibility of dismembering the Bill and separating clauses that relate to each other only on the basis that some are referendum provisions and others are not.**

508. **On whether the referendum should comprise a single question on the Bill as a whole or multiple questions on each of the clauses of the Bill; the Committees found that, although the Constitution of Kenya (Amendment)Bill, 2020 deals with multiple issues, these issues are interrelated and that it would be impractical to ask Kenyans to vote one way or the other on multiple questions. As such the Bill should be subjected to the Referendum based on a single question. Proceeding otherwise through the**

route of multiple questions, would present, constitutional, legal, and practical difficulties in the identification of those questions.

H. Substantive Issues in the Bill

509. During Public Participation on the Constitution of Kenya (Amendment) Bill, 2020, stakeholders raised several issues on the substance of the Bill. Both those who supported and those who opposed the amendment asked Parliament to consider and provide answers to several substantive issues. The issues raised have been categorised and considered by the Committees under the following broad themes-

(i) *The creation of an additional seventy (70) constituencies and their distribution among twenty-eight (28) counties;*

(ii) *The position of the Judiciary Ombudsman as an ex-officio member of the JSC, the mode of appointment and reporting, and whether he/she can vote on matters before the JSC;*

(iii) *Whether persons appointed as Ministers should be vetted by Parliament prior to their appointment by the President;*

(iv) *Whether the harmonization of professional fees paid to consultants hired by the national and county governments is a constitutional matter and whether it restricts freedom of contract;*

(v) *The framework for compliance with the two-thirds gender principle in Parliament; and*

(vi) *Whether provision should be made for synchronizing the financial calendar and the framework for submission of audit reports to Parliament.*

1) The Creation of Additional Seventy (70) Constituencies

510. The Constitution of Kenya (Amendment)Bill, 2020 provides in clause 10 as follows-

> *"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".*

511. The provision proposes to increase the number of constituencies from two hundred and ninety to three hundred and sixty. To operationalize this proposal, the Bill sets out detailed transition and consequential provisions in the Second Schedule anchored on Clause 74 of the Bill. The Second Schedule provides as follows:

1. Delimitation of number of Constituencies

(1) Within six months from the commencement date of this Act, the Independent Electoral and Boundaries Commission shall, subject to subsection (2), 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).

(2) The additional seventy constituencies shall be spread among the counties set out in the first column in a manner specified in the second column.

County	Additional Constituencies
Mombasa	Three
Kwale	Three
Kilifi	Four
Mandera	One
Meru	Two
Embu	One
Machakos	Three
Makueni	One
Kirinyaga	One
Murang'a	One
Kiambu	Six
Turkana	One
West Pokot	One
Trans Nzoia	Two
Uasin Gishu	Three
Nandi	One
Laikipia	One
Nakuru	Five
Narok	Three
Kajiado	Three
Kericho	One
Bomet	Two
Kakamega	Two
Bungoma	Three

Siaya	One
Kisumu	Two
Nyamira	One
Nairobi City	Twelve

(3) The allocation of additional constituencies among the counties specified under subsection (2) shall —

(a) prioritise the constituencies underrepresented in the National Assembly on the basis of population quota;

and

(b) be made in a manner that ensures the number of inhabitants in a constituency is as nearly as possible to the population quota.

(4) The creation of additional constituencies in Article 89 (1) shall not result in the loss of a constituency existing before the commencement date of this Act.

(5) For greater certainty, any protected constituency in the counties of Tana River, Lamu, Taita Taveta, Marsabit, Isiolo, Nyandarua, Nyeri, Samburu, Elgeyo/Marakwet, Baringo, Vihiga and Busia shall not have their protected status impaired by the delimitation of additional constituencies mentioned in this schedule.

(6) The requirement in Article 89 (4) does not apply to the review of boundaries for the additional constituencies preceding the first general election from the commencement date of this Act.

Stakeholders Submissions

512. The above provisions elicited a lot of submissions from stakeholders as summarized below. The submissions raise the following substantive issues for the Committees' consideration—

i. What data was relied upon in determination of the new constituencies and their allocation among the 28 Counties.
ii. The designation of new constituencies in the Bill vis-à-vis the role of the IEBC under Article 89 of the Constitution.
iii. Whether paragraph 1(6) of the Second Schedule to the Bill can oust the provisions of Article 89(4) of the Constitution, and its effect on section 36 of the Independent Electoral and Boundaries Commission Act (No. 9 of 2011)?
iv. The implications of the proposed new constituencies as set out in the Bill on Nairobi City County?

v. Demarcation of the new constituencies six months ahead of the 2022 General Elections.

513. Majority of the submissions on the proposal to create seventy (70) new constituencies in the twenty-eight (28) counties were of the view that Promoters of the Bill were usurping the powers of the Independent Electoral and Boundaries Commission (IEBC) while others argued that it was an opportunity to address the component of universal suffrage that each vote counts.

514. The promoters of the Bill submitted that the Steering Committee and Taskforce of BBI reviewed a lot of materials to arrive at the decision to create the 70 additional constituencies in the specified 28 Counties. The principles that guided the process of delimitation was to be found in in the ***Revised Preliminary Report of the Proposed Boundaries of Constituencies and wards published in 2012***.[24] The other principle arose from court cases that were filed and decided, with one such case being that of *John Kimanthi Maingi V Andrew Ligale & 4 others*[25]. Other considerations were based on equity in resource allocation and boundary delimitations based on population and the need to retain the protected constituencies. Finally, the process was guided by the history of disputed elections and the need to build consensus on the issue. In summary, the Promoters pointed out that the BBI decision was guided by the documents that would ordinarily be used by the IEBC as provided by law to arrive at a just decision.

515. The Promoters further submitted that the allocation of the 70 additional constituencies to the specific 28 Counties was informed by extensive consultations including representations, town hall meetings held all over the country, consultative meetings and even rallies.

516. The Promoters also submitted that the period of six months to delimit the electoral boundaries was adequate. They argued that their estimation was based on models. Using the models, the Promoters submitted that it was possible to delimit the 70 constituencies within the six months period and that the requirement under Article 89(4) does not apply to this particular process.

517. The Independent Electoral and Boundaries Commission (IEBC) submitted that it is bestowed with the constitutional mandate of conducting delimitation as outlined in Article 88(4)(c) and 89, upon creation of additional constituencies. Article 89 provides a method and formula for doing so. The Commission was of the view

[24] https://www.iebc.or.ke/uploads/resources/WHXao7x83D.pdf.
[25] [2010] eKLR

that the role of allocating any proposed additional constituencies should be left to the Commission in line with the Constitution and as the case has been of the previous delimitation processes. In their submission, they pointed out that a constitutional amendment process can only determine the number of constituencies but should not assign the same to respective counties as is the case in the BBI Constitution of Kenya (Amendment)Bill, 2020, as this would contradict the existing Articles of the Constitution thereby presenting legal challenges to the delimitation process.

518. The Commission further submitted that the timeline of six month's period proposed in paragraph 1(1) of the Second Schedule for delimitation of boundaries was not adequate based on past experience and practice. During delimitation under the Constitution of Kenya, 2010, the Interim Independent Boundaries Review Commission undertook data collection and first round of public hearings from May, 2009 to November, 2010. Thereafter IEBC took over from January, 2012 and conducted the second round of public hearings, delimitation, publication of the first and second drafts of the delimitations of boundaries of constituencies and wards and publication of the National Assembly Constituencies and County Assemblies Order, 2012.

519. The Commission further submitted that the process of delimiting electoral units is 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 litigation. 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.

520. They further submitted that they needed the help of the KNBS to validate their shapefiles. To help the commission achieve this objective the KNBS is expected to provide the data to IEBC which would be used to populate the electoral units. 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

521. The IEBC also submitted that section 36 and the Fifth Schedule of the Independent Electoral and Boundaries Commission Act, 2011 which guides the boundaries delimitation process was due for review and stands spent and hence there exists a

legislative gap on the process. They pointed out that they had proposed an amendment Bill, which was yet to be processed by Parliament.

522. On their part, The KNBS submitted that in preparation to conduct census, they undertake cartographic mapping which takes care of every village- the smallest unit that can be covered on the ground. Part of the information generated at that point, other than the population figures, is also to get to know which administrative unit a village (enumeration area) belongs so as to identify from sub-location, location, division, up to the national level. As part of this process, they are also able to inquire where a particular village falls in in a political unit making it possible to get the specific ward.

523. They pointed out that a number of reports were generated from the information gathered from the exercise which are compiled and may be categorized into a number of volumes. Although they had produced several reports arising from the 2019 Census process, one volume of the report covering distribution of population by geopolitical units and giving the population up to the ward level was still missing. They pointed that that the delay was due to the boundary delimitation process regarding wards.

524. In order to finalize the production of this volume the Kenya National Bureau of Statistics requires the shapefiles that are officially held by the Independent Electoral and Boundaries Commission (IEBC) defining every ward. Once availed by the Commission KNBs would be able to superimpose the maps on them and provide the population which will be distributed will be distributed by the geopolitical units up to the ward level. The IEBC was hesitant to share the soft copy of the shapefiles with KNBs so that KNBs could use to validate its data on electoral units and release the report officially. Consequently, KNBs does not have a validated data on electoral units.

525. KNBS further submitted that, based on the data obtained during the 2019 Kenya Population and Housing Census, and applying the IEBC population threshold of 133,000 per constituency, then –

    a) the number of new constituencies that should have been established was 68 and not 70; and
    b) six counties ought to have received more constituencies than they were allocated in the Second Schedule to the Bill, as follows –

No.	County	No. of new Constituencies that should have been allocated	Number of new constituencies allocated in the Bill	Variation
1.	Meru	2	1	-1
2.	Kitui	1	0	-1
3.	Bungoma	4	3	-1
4.	Homa Bay	1	0	-1
5.	Kisii	1	0	-1
6.	Nairobi City	16	12	-4

526. On the other hand, eight counties would have lost one constituency each if the population threshold criteria were applied, had the constituencies not been protected and thus retained. These were Tana River, Lamu, Taita Taveta, Marsabit, Samburu, Elgeyo Marakwet, Baringo, and Vihiga.

527. The Hon. Innocent Obiri Momanyi, MP, Bobasi Constituency, raised concerns with the distribution of the 70 new constituencies among 28 counties. He noted that the Gazette Notices establishing the Building Bridges to Unity Advisory Taskforce and the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report did not include constituency review in their terms of reference. Further, that the first version of the Constitution of Kenya (Amendment) Bill published on 21st October, 2020 did not contain any clause dealing with constituencies.

528. The Member stated that no public participation was invited or undertaken on the matter as stipulated under Article 89 of the Constitution. Using the example of his constituency, which had a population of 190,077, the Honourable Member stated that some counties which were undeserving had been allocated new constituencies, while those that were deserving had been omitted. Lastly, the Member submitted that the power to delimit electoral units is vested on the IEBC and that any other process to allocate constituencies, as in the present case, would be unconstitutional.

529. Senator Enoch Kiio Wambua, MP, Senator for Kitui County submitted that Clause 10 and the Second Schedule to the Bill should be amended to provide for two additional constituencies in Kitui County. These would be situated 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.

530. Mr. Nelson Havi argued that the role of creating and delimiting of new constituencies rests with IEBC hence the inclusion of that provision makes the bill unconstitutional. He submitted that the provisions of the Second Schedule to the Amendment Bill proposing to create seventy new constituencies and purporting to allocate them to different counties is a usurpation of the constitutional role of the IEBC and amounts to an act of constitutional gerrymandering. To support his position, he pointed out that Article 88(2) of the Constitution of Kenya allocates the function of delimitation of constituencies and wards to the IEBC. Article 89(1) establishes two hundred and ninety constituencies of the National Assembly. The said Article empowers the IEBC to review the names and boundaries of constituencies with directions on the principles to be taken into account.

531. Mr. Havi pointed out that the legal term 'delimitation' is defined as "fixing of limits of boundaries". The People of Kenya mandated the IEBC with the function of increasing the number of constituencies beyond two hundred and ninety which they created on promulgation of the Constitution of Kenya. It would be manifestly unconstitutional for this function to be arrogated in this case through an act of the President disguised as a popular initiative to amend the Constitution of Kenya.

532. The Pastoralist Stakeholders Forum also submitted that the Commission was the only entity vested with the Constitutional mandate delimit electoral units. 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.

533. The Pastoralist Stakeholders Forum was also of the view that the issue of creating and delimiting constituencies is emotive in nature and needs extensive public participation to avert litigation and resolve disputes amicably. They stated that the last census figures are being contested by some parts of the region and cannot be relied upon and that population should not be the only factor to be considered while ignoring the land mass of the country.

534. The FORD Kenya Party while submitting the additional 70 counties to be timely for purposes of equity argued that their delimitation was the role of the Independent Electoral and Boundaries Commission (IEBC).

535. 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.

536. The Nairobi Mashinani Women Caucus and the Gema Cultural Association argued that the additional constituencies will address underrepresentation in populous areas while the Jubilee Party submitted 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 NG-CDF.

537. It was the view of many stakeholders that the period of six months as proposed in the provision to delimit the constituencies and complete the exercise is inadequate, based on past experience and practice.

Basis for Determination

538. In dealing with the submissions and addressing the issues that they raise as captured earlier in the report, the Committees first considered the issue of designation of the 70 constituencies vis-a vis the role of IEBC. The Guiding basis for the determination is the provision of Article 89 of the Constitution, titled, ***determination of electoral units.*** The Article provides as follows,

> *1. There shall be two hundred and ninety constituencies for the purposes of the election of the members of the National Assembly provided for in Article 97(1)(a).*
>
> *2. The Independent Electoral and Boundaries Commission shall review the names and boundaries of constituencies at intervals of not less than eight years, and not more than twelve years, but any review shall be completed at least twelve months before a general election of members of Parliament.*
>
> *(3)The Commission shall review the number, names and boundaries of wards periodically.*
>
> *(4) If a general election is to be held within twelve months after the completion of a review by the Commission, the new boundaries shall not take effect for purposes of that election.*
>
> *(5) The boundaries of each constituency shall be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the*

population quota, but the number of inhabitants of a constituency may be greater or lesser than the population quota in the manner specified in clause (6) to take account of—

(a) geographical features and urban centres;

(b) community of interest, historical, economic and cultural ties; and

(c) means of communication.

(6) The number of inhabitants of a constituency or ward may be greater or lesser than the population quota by a margin of not more than—

(a) forty per cent for cities and sparsely populated areas; and

(b) thirty per cent for the other areas.

(7) In reviewing constituency and ward boundaries the Commission shall—

(a) consult all interested parties; and

(b) progressively work towards ensuring that the number of inhabitants in each constituency and ward is, as nearly as possible, equal to the population quota.

(8) If necessary, the Commission shall alter the names and boundaries of constituencies, and the number, names and boundaries of wards.

(9) Subject to clauses (1), (2), (3) and (4), the names and details of the boundaries of constituencies and wards determined by the Commission shall be published in the Gazette, and shall come into effect on the dissolution of Parliament first following their publication.

(10) A person may apply to the High Court for review of a decision of the Commission made under this Article.

(11) An application for the review of a decision made under this Article shall be filed within thirty days of the publication of the decision in the Gazette and shall be heard and determined within three months of the date on which it is filed.

(12) For the purposes of this Article, "population quota" means the number obtained by dividing the number of inhabitants of Kenya by the number of constituencies or wards, as applicable, into which Kenya is divided under this Article.

539. The Committees observed that Article 89 sets out the number of constituencies and vest the power to determine the names and boundaries of constituencies on the IEBC. Consequently, the people of Kenya can determine that they would desire to increase the numbers of constituencies and thus make changes to Article 89(1) that sets the current numbers at two hundred and ninety. A review of the history of boundary delimitation reveals that this increase has happened over the

years, from 117 constituencies in 1963, to 158 following the Constitutional amendments in 1964 and 1966 which led to the abolition of the seven regional assemblies and the Senate; to 188 in 1986; to 2010 in 1996 and finally to the current figure of 290.

540. Consequently, the increase in numbers of constituencies has precedent in the past and is Constitutional. Article 89(1) sets the number of Constituencies at 290, while clause 10 of the Bill seeks to increase the number to 360 by providing as follows:

> "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".*

541. The question, however, is who should increase the numbers and what procedure should be followed in doing so. The promoters of the Bill have not only set the number of constituencies through an amendment to Article 89(1) of the Constitution but have also detailed where the additional constituencies shall be located and stipulated this in the Second Schedule of the Constitution of Kenya (Amendment) Bill, 2020. The Committees noted that the problem with this approach is that Constitutionally, that power to allocate and designate constituencies is vested on the IEBC under Article 89(2) of the Constitution, following a very elaborate procedure. IEBC has the exclusive constitutional mandate to determine the names and boundaries of constituencies. The Constitutional (Amendment) Bill, 2020, circumscribes this power since the location of these constituencies have been determined by the Bill.

542. Additionally, Article 89(5) of the Constitution requires that in reviewing the boundaries of constituencies, they adhere to the population quota. The rationale for the inclusion of this provision was to ensure that the internationally accepted principle of equality of the vote is respected and past complaints of gerrymandering in the creation of constituencies is constitutionally prevented. One scholar, James Raley has pointed out that "*one of the greatest abuses of a citizen's voting rights is gerrymandering.*"[26]

543. The term gerrymandering refers to the process of "dividing political units in ways that deliberately create advantages for incumbents or their political allies, by placing voters based on their predicted behaviour at the polls in districts that dilute

[26] Ruley, James. "One Person, One Vote: Gerrymandering and the Independent Commission, A Global Perspective." Indiana Law Journal, vol. 92, no. 2, Spring 2017, p. 783-816, at page 783.

the vote of some voters and consolidate the votes of others."[27] The term was coined in the United States from the name of Elbridge Gerry, the eighth governor of Massachusetts. Gerry participated in the Constitutional Convention in the USA and refused to sign the Constitutional draft without a Bill of Rights. While he lost at the Convention the Bill of Rights was essentially included two years later. However, later as Governor, the State Party of Massachusetts "came up with an electoral map that packed the federalists into a handful of areas to maximise the gains of the Democratic republicans in the state senate.

> *.... The district boundaries were so distorted, however, that the people noticed. The 26 March 1812 edition of the Boston Gazette featured a carton of one newly created district in the form of a fork-tongued, winger salamander, captioned 'THE GERRY-MANDER: A new species monster."*[28]

544. The danger with gerrymandering is that it impairs the credibility of the boundary delimitation exercise and the eventual election process and outcome. As captured in a paper by the International Foundation of Election Systems (IFES)

> "*Electoral abuses such as malapportioned constituencies (electoral districts that vary substantially in population) and electoral districts that have been "gerrymandered" (constituency boundaries intentionally drawn to advantage one political group at the expense of others) can have profound effects on the outcome of an election and the composition of a parliament. If voters and other stakeholders suspect that the electoral boundaries have been unfairly manipulated to produce a particular political outcome, this will affect the credibility of the delimitation process. The legitimacy of the electoral outcome itself could be questioned.*"[29]

545. In adopting the 2010 Constitution, Kenyans sought to address its past challenges with gerrymandering. The Kriegler report pointed out in this regard, that:

> "*The delimitation of boundaries in Kenya as presently established does not respect the basic principle of the equality of the vote. The differences are unacceptable in terms of international standards. The Kenyan legal framework does not establish, as is accepted international practice, the*

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[27] Gerrymandering, BOUVIER LAW DICTIONARY (Stephen Michael Sheppard ed., 2012).
[28] Nick Cheeseman and Brian Klaus, *How to Rig an Election* (Yale University Press, 2018) page 36.
[29] Lisa Handley, "Challenging the Norms and Standards of Election Administration: Boundary Delimitation" in *Challenging the Norms and Standards of Election Administration* (IFES, 2007), p. 59-74.

maximum possible departure from the principle of equality of the vote. The delimitation of constituencies is left to the ECK, which has not performed its role adequately, ascribing its non-performance to Parliament's reluctance to increase the number of constituencies."[30]

546. The above is the context within which Article 89 of the Constitution was included into the Constitution and against which the issues on the creation of the seventy additional constituencies should be considered.

547. The Committees further observed that the Constitutional mandate of delimitation of boundaries is vested on the Independent Electoral and Boundaries Commission as stipulated in Article 89(2). Subsequently clauses (5), (6) and (7) outlines the matters that should be taken into consideration in delimitation of boundaries. It can be observed that the Constitution envisages that certain administrative processes ought to take place before delimitation of boundaries as set out in clause Article 89(7) such as consultation of all interested parties and "population census" for purposes of ensuring that the number of inhabitants in each constituency and ward is, as nearly as possible, equal to the population quota. This Article has not been proposed for amendment. Nobody else can therefore create new constituencies or determine their location, except the IEBC.

548. Case law from the courts following the first boundary delimitation after the adoption of the 2010 Constitution underscores the centrality of the IEBC in boundary delimitation, whose rationale is to guarantee professionalism, impartiality and consultation in the delimitation exercise. Following the delimitation exercise several applicants filed cases seeking under a review of the decision of the IEBC Article 89(10) of the Constitution. The High Court consolidated all the complaints and made a decision on them. One of the decisions it made was to change the name of two constituencies in Homa Bay County as had been proposed by IEBC. There were Mbita and Gwasi constituency to Suba North and Suba South respectively.

549. Following that decision an appeal was filed in the case of *Peter Odoyo Ogada & 9 others v Independent Electoral and Boundaries Commission of Kenya & 14 others.*[31] The Court of Appeal held that the High Court could not replace the decision of the IEBC with its own as this would be a violation of the powers vested

[30] Republic of Kenya, *Report of the Independent Review Commission on the General Elections Held in Kenya on 27th December, 2007*(2008), page 77.
[31] (2013) eKLR.

on the institution under Article 89 of the Constitution. It stated as follows, in this regard:

> *"Our reading of Article 89 does not yield or point to authority or jurisdiction of the High Court, while exercising the power of review under that Article to substitute the decision of the IEBC with its own. With due respect to the High Court, we hold that it was in error to substitute its own opinion, as a decision to supplant the decision of the IEBC, which had been lawfully and procedurally arrived at following the public hearings, consideration and adoption by Parliament, all the way to the publication in the Gazette. All that lies within the province of IEBC and no other organ. It has been given that mandate by the Constitution as other organs like the High Court has been given under Article 165, except that the High Court has also been given the power to review a decision of the IEBC. That power of review, according to us, is limited to the prayers in the application under Article 89 (10), if the applicants demonstrate that indeed a fault featured in the manner IEBC went about delimiting electoral boundaries. And as we have stated earlier, in the event the High Court should so find, it should direct the IEBC to go back and do the correct and proper thing."*[32]

550. The Committees notes that it is within the powers of the people of Kenya as already discussed in this report to take a different route on how to undertake boundary delimitation. That is envisaged in the concept of sovereignty. However, that requires amending Article 89 of the Constitution. That is the step that the Constitution of Kenya (Amendment) Bill, 2020 proposes by making changes to Article 89(1) of the Constitution by increasing the number of constituencies from two hundred and ninety to three hundred and sixty.

551. The Committees further observe that there are other proposals made through the Schedule seeking to: (i) distribute the constituencies within the counties; (ii)protect constituencies from being lost; and (iii) naming of the constituencies from being protected.

552. The Committees observed that there are several problems with the Schedule. By protecting some constituencies in the Schedule, these constituencies will be protected in perpetuity yet the provisions of Article 89(6) of the Constitution giving IEBC responsibility to adhere to the constitutional quota has not been amended.

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[32] (2013) eKLR.

553. In addition, the Second Schedule proposes to oust the application of Article 89(4) which provides that "(4) If a General election is to be held within twelve months of completion of a review by the Commission, the new boundaries shall not take effect for purposes of those election." The ouster is undertaken in the following words —

> *"(6) The requirement in Article 89 (4) does not apply to the review of boundaries for the additional constituencies preceding the first general election from the commencement date of this Act."*

554. The Committees observed that the attempt to oust the application of Article 89(4) in the Schedule could only be possible if the Article was amended expressly and not by having separate provisions in a schedule. This is because the Schedule does not amend Article 89(4) of the Constitution. It took the drafting approach of developing the 2010 Constitution which had a similar provision. Even with the provision, Article 89(4) would still exist and operate.

555. The Committees observe that the unconstitutionality of the Schedule is due to the fact that it seeks to do what is constitutionally vested in the IEBC without amending Article 89(4) of the Constitution. Nothing bars IEBC from continuing with its work under Article 89 irrespective of the Schedule as the Constitution of Kenya mandates it to do so between 8-12 years from the last review.

<u>Observations of the Committees</u>

556. **The Committees having considered the Constitution of Kenya (Amendment) Bill, 2020, and submissions from the public, found that clause 10 of the Bill that proposes to amend Article 89(1) of the Constitution by increasing the number of constituencies from "two hundred and ninety" to "three hundred and sixty" is constitutional.**

557. **The Committees, however, found that the Second Schedule to the Bill is unconstitutional, for the following reasons –**

a) **The attempt to oust the application of Article 89(4) of the Constitution, as proposed in the Second Schedule of the Bill, could only be possible if the Article was amended expressly and not by having separate provisions in the schedule. This is because the Schedule does not amend Article 89(4) of the Constitution. Even with**

the provision, Article 89(4) would still exist and operate. As such, this would create parallel and conflicting mandates to review the names and boundaries of constituencies.

b) The Schedule is predicated on clause 74 of the Bill, which deals with transitional and consequential provisions in the Bill. There is no substantive provision of the Bill dealing with delimitation of constituencies, on which the Second Schedule would be anchored.

558. Sen. Johnson Sakaja, CBS, MP held a minority position on the matter and, pursuant to standing order 213(6) of the Senate Standing Orders, submitted a minority report. The report is attached to this report as Annex 26.

2) The Judiciary Ombudsman

559. From the submissions by stakeholders, the issues raised related to the position of the Judiciary Ombudsman as an ex-officio member of the JSC, the mode of appointment and reporting, and whether he/she can vote on matters before the JSC. The participants took varying positions in relation to these matters.

560. 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 that because, part of the executive will be drawn from the National Assembly. The Ombudsman is independent of the Judiciary, so that Judiciary is not supervising the person who is supposed to oversee complaints against them. There is a legislative proposal to give full effect to the proposed Article 172.

561. The KLRC held the view that even though the courts have held otherwise, the position of the Commission was that the Judiciary Ombudsman is ex officio and therefore has no voting right.

562. Common Women Agenda was of the view that the establishment of the office of the Judiciary Ombudsman will facilitate receiving and hearing of complaints from members of the public on the Judiciary.

563. Concerns were raised by several stakeholders in relation to the appropriateness of the establishment of the office of the Judiciary Ombudsman. They included: the JSC, Youth Serving Organizations Consortium, the Pan-African Leadership Foundation, the National Women Steering Committee, Professor Lumumba, Mr.

564. The JSC's concern was on the manner of appointing the Ombudsman (nomination by the executive and approval by the legislature) which they believed poses the danger of interference with the Judiciary and which may erode the gains in judicial independence under the current Constitution. They also raised concern on the roles vested in the proposed Office of the Ombudsman (accountability and disciplining of judicial officers) which they submitted that were in direct conflict and contradiction with the constitutional roles that are vested in the Judicial Service Commission and finally that the office already exists an office of the Judiciary Ombudsman, which only requires restructuring for full effectiveness rather than radical new proposals that ignore the current operations and activities.

565. 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 that 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.

566. On the issue of the Judiciary Ombudsman as proposed in the Bill, they held the view 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. By 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.

567. They proposed the strengthening of the Judicial Service Commission (JSC) rather than clawing back on the gains that have so far been achieved in the last 10 years. They submitted that there was no need to create a new body to start investigating and disciplining Judges when there was one that exists which just needs to be strengthened and given the necessary mandate to do so, such as adequate funding.

568. Similar views were expressed by the Pan-African Leadership Foundation which submitted that there already exists the Office of the Ombudsman with clear functions, while the introduction of the new office will undermine the independence of the Judiciary.

569. The Youth Serving Organizations Consortium supported this view. They submitted that the proposed clause 41 of the Bill that proposes to amend 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 would interfere with the independence of the Judiciary by introducing an additional watchdog which demeans the source of justice of the people and the Sovereignty of the people as envisioned in the second liberation that led to the Constitution of Kenya, 2010.

570. 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.

571. Professor 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 and which enables the Judiciary Ombudsman to prosecute complaints received against a judge in the Judicial Service Commission, was completely unnecessary and ought to be abandoned.

572. 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. In addition, the functions of the proposed office of Judicial Ombudsman are already provided for in Articles 168 and 172 of the Constitution. Having this 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.

573. On his part, Mr. Jonathan Kisia opposed the amendments to introduce Judiciary Ombudsman which submitted that it would 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.

574. 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, the proposed appointment procedures where the President

appoints the ombudsman through the approval of the Senate is still a threat to the doctrine of separation of powers. Their proposal was that the appointment done through a competitive process.

575. The Committees observed that the rationale for the creation of the office of the Judiciary Ombudsman was to enhance accountability in the Judiciary. The Committees further observed the establishment of the office is not unconstitutional.

576. Questions have arisen as to whether the Judiciary Ombudsman would have a right to vote in the proceedings of the JSC. Whereas it was submitted by the promoters that the Ombudsman would not have a right to vote, there does not appear to be an express provision in the bill that bars the Ombudsman from voting. It is also to be observed that there are several provisions in the constitution where the term *ex-officio* is used. For example, Articles 97(1)(d) and 98(1)(e) provide that the Speaker of the National Assembly and the Speaker of the Senate, shall, respectively, be ex officio members of the National Assembly and the Senate. Article 122(2)(a) of the Constitution provides that on a question proposed for decision in either House of Parliament, the Speaker has no vote and in the case of a tie, the question is lost. Similarly, there are some *ex officio* members of the SRC appointed under Article 230(1)(d) and (e) of the Constitution and Article 230(3) of the Constitution stipulates that the *ex officio* members of the Commission shall have no right to vote.

577. The term ex officio is Latin, meaning 'from the office' or 'by right of office'. Black's Law Dictionary[33] has the following narrative on the interpretation of the term-

> *Ex officio is Latin for by virtue or because of an office; by virtue of the authority implied by office. The term is often misused as a synonym for 'non-voting'. Some meetings mistakenly label their regularly invited guests as 'ex officio members' when in fact they are not members at all, others mistakenly refer to the non-voting members as 'ex officio members' even though some non-voting members are present only in an individual capacity and not by virtue of office., or even though some voting members also serve ex officio. But an ex officio member is a voting member unless the applicable governing document provides otherwise (emphasis supplied).*

[33] 8th Edition, pg 616

578. It may thus be observed that the term *ex officio* denotes only how one becomes a member of a body. Accordingly, the rights of an *ex officio* member are exactly the same as other members unless otherwise stated in the enabling statute, regulations or by-laws.

Findings of the Committees

579. **The Committees found that the establishment of the office of Judiciary Ombudsman as set out in clause 44 of the Bill is not unconstitutional.**

580. **The Committees further found that the operational aspects of the office will be provided for in the legislation to be enacted by Parliament as contemplated in the First Schedule to the Bill. The legislation, when enacted, should clarify that the Judiciary Ombudsman is a non-voting member of the Judicial Service Commission as envisaged by the Promoters of the Bill.**

3) **Vetting of Cabinet Ministers, Secretary to the Cabinet, and Principal Secretaries**

581. The Committees observed that the Bill sought, at Clause 29, 32 and 33, to remove the requirement for vetting by the National Assembly of Cabinet Ministers, Secretary to the Cabinet and Principal Secretaries. Clause 31 further proposes to introduce the position of Deputy Ministers with no requirement as to vetting.

582. The views of stakeholders on this issue revolved around the hybrid nature of the executive and its implications on accountability.

583. The Promoters of the Bill submitted that the proposed Bill is intended to do away with the pure presidential system and replace with hybrid system, where the offices of the Prime Minister, Deputy Prime Minister, Cabinet Ministers and Attorney General and Leader of Opposition will be also offices in parliament. This arrangement, they stated, is seen as an autochthonous, home grown, home based, and our own historical experience being brought to bear. The Jubilee party and Maendeleo Chap Chap party were of a similar view.

584. 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. Similarly, to enhance political stability and accountability by government, the office of the Leader of the Official Opposition is established.

585. The Maendeleo Chap Chap party submitted that the amendment of Article 130 of the Constitution which provides for the introduction of the Prime Minister and the Deputy Prime Minister 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.

586. A number of participants were of contrary view. Mr. 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. They further stated that the People of Kenya opted for a presidential system when they promulgated the Constitution of Kenya, a reversal of the system amounts to the creation of a new constitution.

587. The ICJ also opposed the hybrid system specifically raising concern on the issue of 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. The proposed re-introduction of the Executive in Parliament would not advance oversight and accountability hence not achieve transparency. The reintroduction of Executive in Parliament will claw back on the separation of powers.

588. Eliud K. Matindi held similar view. He submitted that having a hybrid system where some Cabinet Ministers are members of the National Assembly and others are not will make it almost impossible for Parliament to hold the Executive to account.

Finding of the Committees

589. **The Committees found that whereas the proposed deletion of the requirement to vet Cabinet Ministers, Secretary to the Cabinet and Principal Secretaries is not unconstitutional, it is highly undesirable. This is a matter that may however require reconsideration at the appropriate time.**

4) Harmonization of Professional Fees

590. Stakeholders also raised submissions that went to the question whether the harmonization of professional fees paid to consultants hired by the national and

county governments is a constitutional matter and whether it restricts freedom of contract.

591. Mr. Nelson Havi and the AAK both objected to this proposal 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.

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

593. On his part, Mr. Nelson Havi argued that the action would limit the professional rights of Advocates guaranteed under the UN Basic Principles on the Role of Lawyers, 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.

594. The Promoters of the Bill, however, were of a contrary opinion. They submitted that proposal deals with professionals, not just lawyers. The SRC is already mandated to do this job. It has to consult just like Parliament must consult when passing laws on the Advocates Remuneration Order. There is no impeachment of the contractual right or basis upon which lawyers and their clients agree on fees.

595. The Committees observed that the mandate of the Salaries and Remuneration Commission under Article 230(4) of the Constitution should, as is the present case, be restricted to the determination of the remuneration and benefits of State officers and advising the national and county governments on the remuneration and benefits of public officers. This mandate should not be expanded to determining and harmonizing the rates paid by national and county governments to professional consultants for services rendered, as proposed in the Bill.

Finding of the Committees

596. **The Committees found that, although the matter of determining and harmonizing the rates paid by the national and county governments to professional consultants may be objectionable, it is not unconstitutional. This is a matter that may however require reconsideration at the appropriate time.**

5) Compliance with Two Thirds Gender Principle in Parliament

597. The two thirds gender rule with respect to Parliament is contained at Article 81(b) of the Constitution, which is in line with Article 27 (equality and freedom from discrimination) of the Constitution. While the principle has been realized with respect with to county assemblies, it has remained elusive with respect to Parliament. Clause 13 of the Constitution of Kenya (Amendment) Bill, 2020 seeks to amend Article 97 of the Constitution to ensure that no more than two-thirds of the membership of Parliament are of the same gender.

598. The proposed new Article 97(1) (ca) on the number of special seats members necessary to ensure compliance with the two-thirds gender rule refers to 'membership of Parliament'. This is a departure from Article 97 of the Constitution which deals with 'membership of the National Assembly'.

599. The issue is whether to consider Parliament as a whole or to consider Senate and National Assembly separately. This is not an error of form or a typo. It is an issue of intent.

600. Clause 13(b) (4) of the Bill requiring filling of special seats based on those who had participated in nominations, helps to meet the two-thirds gender rule and it encourages both genders to offer themselves for elective politics.

601. Clause 13(b) (5) of the Bill providing for a sunset clause to end the topping up of seats to ensure compliance with the two-gender rule borrows from international best practice that requires affirmative action provisions to be temporary special measures. However, there is no clarity why the period is three elections for the National Assembly while the amendment to Article 177 as captured in clause 45 provides for two elections. Thirdly, there is need to think of measures to be put in place over the transition period to ensure that the two-thirds gender principle becomes a permanent feature of our elective politics after the sunset period.

602. Article 97 of the Constitution deals with membership in the National Assembly. Clause 13(a)(iii) (ca), by substituting the words 'National Assembly' with 'Parliament', raises interpretation issues. One can argue that it is intended to treat Parliament (National Assembly and Senate) as one. The other argument can be that each House is to be treated separately. This latter argument is supported by clause 14 of the Bill, which deals with the Senate. Clause 14 amends Article 98 of the Constitution which deals with Membership of the Senate. This implies that the

intention was not to treat the National Assembly and Senate together. It is instructive in this regard to note that in considering the gender representation in parliaments in different countries around the world, the Interparliamentary Union treats different Houses of parliament differently. For instance, in the Report on Women in Parliament :1995-2020[34] it provided figures for single and lower houses.

Finding of the Committees

603. **The Committees found that, with the proposed new composition of the Senate under clause 14 of the Bill, the issue of the Senate not complying with the two third gender rule will not arise. The Senate is proposed to be comprise of 94 Members being one woman and one man from each County thus resulting in a 50:50 gender representation in the Senate. It is thus clear the proposed filling of the special seats as provided for under clause 13 of the Bill is intended to ensure that the National Assembly complies with the two third gender principle.**

604. **The Committees further found that the procedure for the filling of special seats shall be addressed in legislation as contemplated in the First Schedule to the Bill.**

6) **Synchronizing Financial Calendar with Audit Report Submission to Parliament**

605. The Committees also grappled with the question whether provision should be made for synchronizing the financial calendar and the framework for submission of audit reports to Parliament.

606. While this is a germane issue, it is not currently in the Bill before the National Assembly and Senate. The Committees cannot, therefore, consider it or express an opinion about it. It can only be the basis for a future constitutional initiative either under Article 256 or 257 of the Constitution.

[34] ipu.org?resources/publications/reports/2020-03/women-in-prliaments-1995-2020-25-years-in-review.

7) **Implications of the proposed amendment to Article 203(1) of the Constitution on criteria for determining the equitable share of national revenue allocated to the county governments**

607. Clause 50 of the Constitution of Kenya (Amendment) Bill, 2020 proposes to amend Article 203 (*Equitable share and other financial laws*) in paragraph (1) so as to expand the criteria for determining the equitable share of national revenue to be allocated to each of the counties. Article 203(1) provides as follows –

> *(1) The following criteria shall be taken into account in determining the equitable shares provided for under Article 202 and in all national legislation concerning county government enacted in terms of this Chapter—*
>
> *(a) the national interest;*
>
> *(b) any provision that must be made in respect of the public debt and other national obligations;*
>
> *(c) the needs of the national government, determined by objective criteria;*
>
> *(d) the need to ensure that county governments are able to perform the functions allocated to them;*
>
> *(e) the fiscal capacity and efficiency of county governments;*
>
> *(f) developmental and other needs of counties;*
>
> *(g) economic disparities within and among counties and the need to remedy them;*
>
> *(h) the need for affirmative action in respect of disadvantaged areas and groups;*
>
> *(i) the need for economic optimisation of each county and to provide incentives for each county to optimise its capacity to raise revenue;*
>
> *(j) the desirability of stable and predictable allocations of revenue; and*
>
> *(k) the need for flexibility in responding to emergencies and other temporary needs, based on similar objective criteria.*

608. Clause 50 of the Bill provides as follows –

> *50. Article 203 of the Constitution is amended—*
>
> *(a) in clause (1) by inserting the following new paragraphs immediately after paragraph (k)—*
>
> *"(l) the need to eradicate corrupt practices and wastage of public resources;*

(m) the need to ensure the attainment of the economic and social rights guaranteed under Article 43; and
(n) the need to ensure that the average amount of money allocated per person to a county with the highest allocation does not exceed three times the average amount per person allocated to a county with the lowest allocation"

609. The Committees observed that this amendment seeks to expand the criteria for determining the equitable share allocated to the counties. In particular, paragraph (*n*) provides a new criterion on the need to ensure that the average amount of money allocated per person to a county with the highest allocation does not exceed three times the average amount per person allocated to a county with the lowest allocation.

610. The Committees observed that Article 217 (1) of the Constitution provides that, once in every five (5) years, the Senate shall by resolution determine the basis for allocating among the counties the share of national revenue that is annually allocated to the county level of government. Article 217 (8) further provides that the Senate may only amend the resolution if supported by at least two-thirds of its Members. However, the Committee noted that the proposed amendment of Article 203 under Clause 50 of the Bill makes no reference to Article 217.

611. The Committees also noted that, on 17th September, 2020, the third basis for revenue allocation among the counties was adopted by the Senate, pursuant to Article 217(1) of the Constitution. The Division of Revenue Bill, 2021, which is currently before Parliament, was drafted taking into account the third basis for revenue sharing. In accordance with Article 217(1), this basis is to remain in force until the year 2025.

612. The Committees observed that the amendment to Article 203 did not pronounce itself on the fate of the third basis for revenue sharing which was developed on the basis of Article 203 as presently rendered in the Constitution. As a result, if the Bill is passed while the Third Basis for revenue sharing among the Counties remains in place there will be two conflicting constitutional provisions on revenue sharing.

613. The Committees found that Clause 50 of the Bill is inconsistent with the principles under Article 203 (1) of the Constitution, particularly paragraphs (d), (f), (g), (h) and (j), which provide as follows –

> *(1) The following criteria shall be taken into account in determining the equitable shares provided for under Article 202 and in all national legislation concerning county government enacted in terms of this Chapter—*
>
> *(a) ...*
> *(b) ...*
> *(c) ...*
> *(d) the need to ensure that county governments are able to perform the functions allocated to them;*
> *(e) ...*
> *(f) developmental and other needs of counties;*
> *(g) economic disparities within and among counties and the need to remedy them;*
> *(h) the need for affirmative action in respect of disadvantaged areas and groups;*
> *(i) ...*
> *(j) the desirability of stable and predictable allocations of revenue; and*
> *(k) ...*

614. **The Committees therefore recommend that, should the Bill be passed, the Executive and the Legislature will need to put in place mechanisms to ensure that no Counties are disadvantaged as a result of the application of the new criteria as proposed in the Bill.**

I. Additional Issues Considered by the Committees

1) Clause 43 of the Bill on amendments to the functions of the Judicial Service Commission

615. The Committees considered clause 43 of the Bill which seeks to amend Article 172 of the Constitution by providing that in addition to the functions set out in Article 172, the Judicial Service Commission shall also be responsible for receiving complaints against judges, investigating and discipling judges by warning, reprimanding, or suspending a judge".

616. The Committees observed that the provision empowers the Judicial Service Commission to take disciplinary action against judges even before any investigations have been conducted.

617. **The Committees found that this is a claw-back provision in light of the current provisions on the Judiciary particularly those that guarantee the independence of the Judiciary and also provide for security of tenure for judges. For these reasons, the Committees found that the proposed amendment to Article 172 is unconstitutional and will require urgent re-consideration at the appropriate time.**

2) **Clauses 66 and 67 of the Bill on amendments to the functions of the National Police Service Commission**

618. The Committees considered the proposed amendment to clause 66 which, among other things, seeks to amend Article 245 of the Constitution by providing the following additional functions to the Inspector of the National Police Service-

(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.

619. The Committees observed that clause 67 of the Bill seeks to amend Article 246 of the Constitution on the National Police Service Commission by transferring the powers of the Commission with respect to confirmation of appointments, promotions and transfers of officers serving in the National Police Service from the National Police Service Commission to the Inspector General.

620. **The Committee found that the removal of these functions from the National Police Service Commission to the Inspector General which constitute the principle mandate of the Commission would be tantamount to declaring the Commission redundant. Consequently, the Committees found that the proposed amendments at clauses 66 and 67 of the Bill is undesirable and will require urgent re-consideration at the appropriate time.**

CHAPTER SIX: COMMITTEE RECOMMENDATIONS

1. Having considered the Constitution of Kenya (Amendment) Bill, 2020 and the submissions received thereon, the National Assembly Departmental Committee on Justice and Legal Affairs and the Senate Standing Committee on Justice, Legal Affairs and Human Rights recommend that, pursuant to Article 257(8) of the Constitution, the National Assembly and the Senate **pass the Bill.**

2. Further, in addition to the Legislation proposed to be enacted under the First Schedule to the Constitution of Kenya (Amendment)Bill, 2020 the Committees recommend that Parliament enacts Legislation to provide a framework on the processing of a Bill to amend the Constitution by popular initiative. The Bill should provide for among other things –
   (i) Unity of issues in developing a draft Bill;
   (ii) Publication of the Bill;
   (iii) Public participation; and
   (iv) Roles and obligations of various actors.

Annexes

Minority Report on the matter of the additional seventy constituencies – Sen. Sakaja Johnson, CBS, MP.

I take a different view in respect of the constitutionality of the Second Schedule to the Bill, regarding the proposed distribution of the additional seventy constituencies among the counties. The use of the word "unconstitutional" in the main report is extremist. The issues raised are really of technical drafting and not substantive. The essence of a popular initiative is the substance of the decision Kenyans are being asked to approve or reject. Therefore, I hold the view that the Second Schedule was constitutional for the reasons cited below.

1. The provision to amend the Constitution as enumerated in Article 257 recognizes the sovereignty of the people of Kenya and their right to propose amendments to the Constitution, including the right to propose a different manner in which boundary delimitation may be undertaken. The allocation of constituencies as set out in the proposed Second Schedule to the Bill remains the proposal or idea of the promoters and there can be no justification for Parliament to purport to oust this proposal on grounds of legal technicalities. This would amount to usurpation of the constituent sovereign power, which belongs to the people.

2. Section 27 (3) and (4) to the Sixth Schedule to the Constitution of Kenya, 2010 provides a useful precedent in this matter, in so far as it provided for the protection of existing constituencies and ousted the requirements of Article 89(4) of the Constitution for purposes of review of boundaries preceding the first election under the new Constitution. In this regard, the provisions of Clause 74 of Bill, as read together with the Second Schedule to the Bill, is not a novel idea and borrows heavily from the provisions of the 2010 Constitution.

3. Although the drafting of the Second Schedule may be unclear, the intentions of the Promoters cannot be misconstrued. It is clear that clause 10 of the Bill proposes an additional seventy constituencies through an amendment to Article 89(1) Constitution and subsequently allocates the Constituencies to various Counties as set out in the Second Schedule to the Bill. The Second Schedule is thus properly anchored under clause 10 of the Bill.

"Delimitation" may be defined as the act of marking-off or describing the limits or boundary line of a territory or country. However, the African Union Border Programme[1] has put forth the argument that although the terms

"delimitation" and "demarcation" are taken together in order to emphasize their close relationship, they are not, strictly, inter-changeable – at least so far as land boundaries are concerned. Delimitation is generally accepted as being the term applicable to the description of a boundary line while demarcation refers to the physical application of that line on the ground. This is a convenient distinction, but one that has not always been observed and can lead to argument. Some form of delimitation may precede a demarcation, but after demarcation is completed, often the reports and results are then accepted as the delimitation.

4. In view of the above definition, what the Promoters of the Constitution of Kenya (Amendment) Bill, 2020 have proposed in the Second Schedule cannot be conclusively defined as delimitation. This is an allocation of constituencies and in order for the same to take effect the provisions of Article 89 of the Constitution apply save for clause (4) which has been proposed to be ousted. Consequently, the IEBC still retains its power to delimit.

5. In a proposed amendment to the Constitution by popular initiative the burden to conduct public participation as required by Article 89(7) in the review of boundaries, does not fall on the Promoters of the Bill. However once the Bill is passed, in the actual delimitation, the IEBC shall conduct public participation as constitutionally required.

6. As observed earlier in the Report, a schedule is considered as part of a Bill in the legislative process. Hence, in the case of the Constitution of Kenya (Amendment) Bill, 2020, the rules that would apply to the consideration of the main body also applies to the Schedules contained in the Bill. Further as regards the Constitution of Kenya (Amendment) Bill, 2020 many of people amongst the one million who signed in support of the Bill pursuant to Article 257(1) did so based on the entirety of Bill, including the Second Schedule. Any purported severance of the Second Schedule would result in a material alteration of the Bill as supported by over three million supporters and approved by majority of the County Assemblies.

7. Concerns was also raised about implications of the number of constituencies being created in Nairobi City County and the practicality of IEBC creating additional constituencies within six months. While these may be legitimate

[1] AUBP (2014). *Delimitation and Demarcation of Boundaries in Africa: General Issues and Case Studies*. Addis Ababa, African Union Commission.

questions, they have no constitutional bearing. As long as the proposed constituencies comply with the criteria on population quota in Article 89(5) and (6), it is immaterial how many constituencies Nairobi has.

8. In addition, the practicality question of the six-month period for IEBC to create the additional seventy constituencies, from a constitutional standpoint, would fall within IEBC's constitutional responsibility of 8 to 12 years under Article 89(2) of the Constitution. In any case, IEBC boundary review process should ideally be ongoing.

9. In my view, therefore -
   a) **The proposal for the creation of an additional seventy constituencies and their distribution amongst the counties, as set out in the Second Schedule, was within the powers of the people of Kenya when proposing an amendment to the Constitution pursuant to Article 257 of the Constitution;**
   b) **The proposals contained in the Second Schedule to the Bill comprised an allocation and not delimitation of constituencies. Upon enactment of the Bill, the IEBC is not estopped and will be required to conduct delimitation including the conduct of public participation and processes as set out in Article 89 of the Constitution; and**
   c) **the Second Schedule to the Constitution of Kenya (Amendment) Bill, 2020 is part of the Bill. It therefore follows that the rules that apply to the consideration of the other provisions of the Bill also apply to the Second Schedule. As such, it cannot be amended or severed from the Bill.**

Savaje Arthur Johnson, CBS, M.P.

The following Members support the Minority Report by Sen. Sakaja Johnson, CBS, MP on the Matter of the addition seventy constituencies

DATE: FRIDAY 23RD APRIL, 2021

VENUE: OAK ROOM, WINDSOR HOTEL

NAME	SIGNATURE
Jennifer Shamalla	
Hon. John Mbadi Ng'ong'o, MP	
Hon. Anthony G. Kiai, MP	Kiai
Hon. Robert Gichimu Githinji, MP	
Hon Zuleikha J. Hassan	
Hon. Emmanuel Wanjala	