

REPUBLIC OF KENYA



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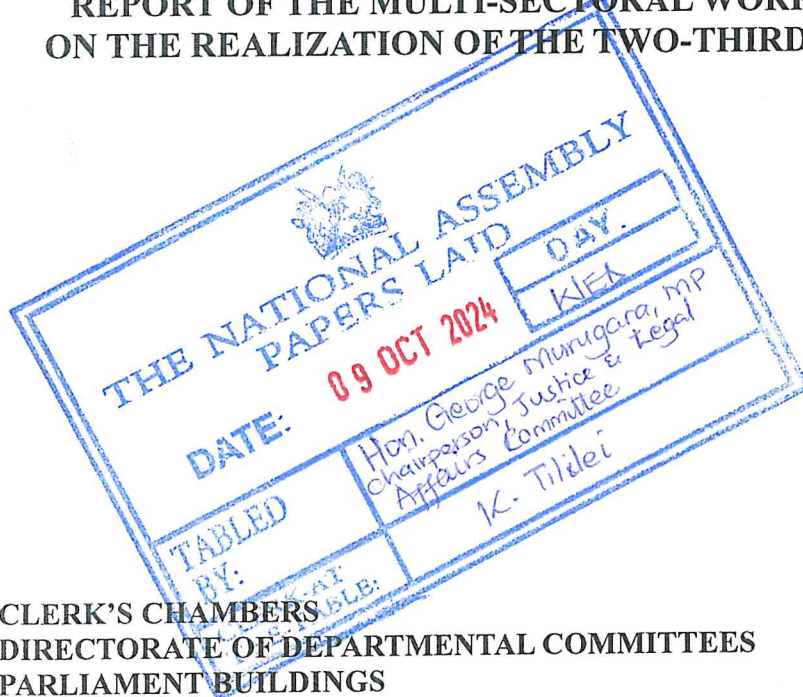
THE NATIONAL ASSEMBLY
THIRTEENTH PARLIAMENT – THIRD SESSION – 2024

DIRECTORATE OF DEPARTMENTAL COMMITTEES

DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

REPORT ON-

THE CONSIDERATION OF THE
REPORT OF THE NATIONAL DIALOGUE COMMITTEE (NADCO) AND
REPORT OF THE MULTI-SECTORAL WORKING GROUP (MSWG)
ON THE REALIZATION OF THE TWO-THIRDS GENDER PRINCIPLE



CLERK'S CHAMBERS
DIRECTORATE OF DEPARTMENTAL COMMITTEES
PARLIAMENT BUILDINGS
NAIROBI

OCTOBER, 2024



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LIST OF ABBREVIATIONS AND ACRONYMS

CBS	Chief of the Order of the Burning Spear
CWR	County Women Representative
EBS	Elder of the Order of the Burning Spear
Hon.	Honourable
FORD	Forum for the Restoration of Democracy
MCCP	Maendeleo Chap Chap Party
MP	Member of Parliament
MSWG	Multi-Sectoral Working Group
ODM	Orange Democratic Movement
SC	Senior Counsel
NADCO	National Dialogue Committee
UDA	United Democratic Alliance
WDM	Wiper Democratic Movement

ANNEXURES

- Annexure 1a Communications of the Speaker of the National Assembly dated 5th March 2024
- Annexure 1b Communication of the Speaker of the Senate dated 5th March
- Annexure 1c Communication of the Speaker of the National Assembly dated 31st July 2024 and the JLAC Chairperson's letter
- Annexure 2a NADCO Proposed Constitution of Kenya (Amendment) Bill, 2024
- Annexure 2b Proposed Leader of Opposition Bill, 2024
- Annexure 2c Proposed National Government Coordination (Amendment) Bill, 2024
- Annexure 3a MSWG Proposed Constitution of Kenya (Amendment) Bill, 2024 with their Report and Speaker's communication
- Annexure 3b Proposed Political Parties (Amendment) Bill, 2024
- Annexure 3c Proposed Election (Amendment) Bill, 2024
- Annexure 4a IEBC (Amendment) Bill, 2024
- Annexure 4b Report of the Departmental Committee on Justice and Legal Affairs on its Consideration of the IEBC (Amendment) Bill tabled on 23rd April 2024
- Annexure 4c Report of the Departmental Committee on Justice and Legal Affairs on Senate Amendments to the IEBC (Amendment) Bill tabled on 19th June 2024
- Annexure 5a EACC (Amendment) Bill, 2024
- Annexure 5b Report of the Departmental Committee on Justice and Legal Affairs on its Consideration of the EACC (Amendment) Bill tabled on 6th August 2024
- Annexure 6 Adoption Minutes and Schedule
- Annexure 7 NADCO Report

CHAIRPERSON'S FOREWORD

This report contains the proceedings of the Departmental Committee on Justice and Legal Affairs on the consideration of the recommendations to amend the Constitution by National Dialogue Committee and Multi-Sectoral Working Group on the Realization of the Two-Thirds Gender Principle.

The National Assembly and the Senate established NADCO vide resolutions passed on 16th August 2023 and 29th August 2023, respectively to, among other things, “*facilitate dialogue and consensus building and recommend appropriate constitutional, legal and policy reform on issues of concern to the people of Kenya, in line with the Constitution and the laws of the Republic of Kenya and respecting the functional and institutional integrity of state organs.*”

To this end, NADCO submitted its report to Parliament with proposals to amend the Constitution and various statutes. The National Assembly and the Senate adopted the NADCO Report on 22nd and 21st February 2024, respectively. Following adoption of the NADCO Report by the two Houses, the Speakers and the Leaders of the Majority and Minority Parties of both Houses deliberated on the modalities for implementing the recommendations of the Report.

Consequently, by concurrent Communications issued on Tuesday, 5th March, 2024 and pursuant to the National Assembly Standing Order 202A and the Senate Standing Order 230, the Speakers of both Houses directed the Departmental Committee on Justice and Legal Affairs of the National Assembly and the Senate Standing Committee on Justice, Legal Affairs and Human Rights to hold joint sittings. The two Speakers further directed the two Committees to expeditiously consider the proposals to amend the Constitution and submit a report recommending the manner of actualizing the recommendations of the NADCO Report, within forty-five (45) days.

Due to unavailability of requisite quorum to commence the joint sittings, the Chairperson of the National Assembly Departmental Committee on Justice and Legal Affairs, on 23rd July 2024, requested the Speaker of the National Assembly to extend the time for consideration of the NADCO Report by another 45 days; and to authorize the National Assembly Committee to conduct sittings independent of the Senate Committee. The Rt. Honourable Speaker acceded to the request of the Committee for extension of time by another forty-five days (45). The Speaker also acceded to the Committee’s request to hold sittings independently and report back to the National Assembly within the stipulated timelines.

The Committee held sittings on 19th and 24th September 2024 where they deliberated on the NADCO Report in detail, and considered the proposed Constitution of Kenya (Amendment) Bills by NADCO and MSWG. While considering the proposals, the Committee observed that—

- (a) the procedure of amending the Constitution is provided under Chapter Sixteen of the Constitution. Article 255(1) provides that a proposed amendment to the Constitution, shall be enacted in accordance with Article 256 or 257 and approved by a referendum, if the amendment relates to matters such as the supremacy of the Constitution; the territory of Kenya; the sovereignty of the people; the national values and principles of governance; the functions of Parliament; and the objects, principles and structure of devolved governments, among others.

- (b) Article 256 of the Constitution provides for amendments to the Constitution by parliamentary initiative. This process involves consideration and approval by Parliament through a vote endorsed by at least two-thirds of all members of each House at the second and third readings.
- (c) Article 257 of the Constitution provides for amendment of the Constitution by popular initiative. This process involves collection of at least one million signatures from registered voters by the promoters; approval of the initiative by a majority of the county assemblies and passage of the Bill by a majority of the members of each House of Parliament.
- (d) Based on the foregoing, the proposed amendments to the Constitution by NADCO and MSWG constitute amendment by parliamentary initiative and shall be guided by the provisions of Article 256.

The Committee thereafter adopted this Report on Tuesday, 1st October 2024.

I take this opportunity to thank and commend the Committee Members for their devotion and commitment to duty, the Speaker and the Clerk of the National Assembly for providing leadership and direction, and finally the Committee Secretariat for its technical and logistical support.

Hon. Speaker, on behalf of the Departmental Committee on Justice and Legal Affairs, it is my pleasant privilege and honor to present the Report of the Committee on its consideration and recommendations to the House on the manner of actualization of the Report of the National Dialogue Committee.



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

PART 1

1 PREFACE

1.1 Establishment and Mandate of the Committee

1. The Departmental Committee on Justice and Legal Affairs is one of twenty departmental committees of the National Assembly established under Standing Order 216 whose mandate pursuant to the **Standing Order 216 (5)** is as follows:

- i. *To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;*
- ii. *To study the programme and policy objectives of ministries and departments and the effectiveness of the implementation;*
- iii. *To, on a quarterly basis, monitor and report on the implementation of the national budget in respect of its mandate;*
- iv. *To study and review all legislation referred to it;*
- v. *To study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;*
- vi. *To investigate and inquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House;*
- vii. *To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments);*
- viii. *To examine treaties, agreements and conventions;*
- ix. *To make reports and recommendations to the House as often as possible, including recommendations of proposed legislation;*
- x. *To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and*
- xi. *To examine any questions raised by Members on a matter within its mandate.*

1.2 Mandate of the Committee

2. In accordance with the Second Schedule of the Standing Orders, the Committee is mandated to consider matters regarding: -

- a) The Judiciary;
- b) Tribunals;
- c) Access to Justice;
- d) Public prosecutions;
- e) Ethics, Integrity and Anti-corruption;
- f) Correctional services;
- g) Community service orders and witness protection;
- h) Constitutional Affairs;
- i) Sovereign immunity;
- j) Elections including referenda;
- k) Human rights;
- l) Political parties; and

m) The State Law Office, including insolvency, law reform, public trusteeship, marriages and legal education.

3. In executing its mandate, the Committee oversees the following Ministries/Departments:

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

1.3 Committee Membership

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

Chairperson

Hon. Murugara George Gitonga, CBS, MP
Tharaka Constituency

UDA Party

Vice-Chairperson

Hon. Mutuse Eckomas Mwengi, OGW, MP
Kibwezi West Constituency

MCCP Party

Members

Hon. Maalim Farah, MP
Dadaab Constituency
WDM-Kenya

Hon. Muriu Wakili Edward, MP
Gatanga Constituency
UDA Party

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

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

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

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

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

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

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

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

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

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

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

1.4 Committee Secretariat

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

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

Mr. Ronald Walala
Senior Legal Counsel

Mr. Abdikafar Abdi
Clerk Assistant III

Ms. Jael Ayiego
Clerk Assistant III

Mr. Isaac Nabiswa
Legal Counsel II

Mr. Omar Abdirahim
Fiscal Analyst II

Ms. Vivienne Ogega
Research Officer III

Ms. Calvin Karungo
Media Relations Officer II

Mr. John Nduaci
Serjeant-At-Arms

Ms. Mary Kamande
Public Communication Officer III

Mr. Meldrick K. Sakani
Audio Officer III

PART 2

2 OVERVIEW OF THE NATIONAL DIALOGUE REPORT

2.1 Background

6. The National Assembly and the Senate established the National Dialogue Committee (NADCO) vide Resolutions passed on 16th August 2023 and 29th August 2023, respectively to, among other things, *“facilitate dialogue and consensus building and recommend appropriate constitutional, legal and policy reform on issues of concern to the people of Kenya, in line with the Constitution and the laws of the Republic of Kenya and respecting the functional and institutional integrity of state organs.”*
7. To this end, the NADCO submitted its report to Parliament and the leadership of the *Kenya Kwanza* and the *Azimio* One Kenya Coalition with proposals to amend the Constitution and various statutes. The National Assembly and the Senate adopted the NADCO Report on 22nd and 21st February 2024, respectively.
8. Following adoption of the NADCO Report by the two Houses, the Speakers and the Leaders of the Majority and Minority Parties of both Houses deliberated on the modalities for implementing the recommendations of the Report, and agreed as follows:
 - a) To refer the proposals to amend the Constitution to the Departmental Committee on Justice and Legal Affairs of the National Assembly and the Senate Standing Committee on Justice, Legal Affairs and Human Rights for consideration.
 - b) To introduce the following legislative proposals in the National Assembly:
 - i. The Independent Electoral and Boundaries Commission (Amendment) Bill, 2024;
 - ii. The Ethics and Anti-Corruption Commission (Amendment) Bill, 2024;
 - iii. The Leader of Opposition Bill, 2024; and
 - iv. The National Government Coordination (Amendment) Bill, 2024.
 - c) To introduce the following legislative proposals in the Senate:
 - i. The Elections Offences (Amendment) Bill, 2024;
 - ii. The Elections (Amendment) Bill, 2024;
 - iii. The Statutory Instruments (Amendment) Bill, 2024; and
 - iv. The Political Parties (Amendment) Bill, 2024.
 - d) The Clerks of the Houses of Parliament to communicate to other entities, the recommendations that require action by the said entities.
9. Consequently, vide concurrent Communications issued on Tuesday, 5th March, 2024, the Speakers of both Houses directed that the Departmental Committee on Justice and Legal Affairs of the National Assembly and the Senate Standing Committee on Justice, Legal Affairs and Human Rights hold joint sittings to –
 - a) expeditiously consider the proposals to amend the Constitution and recommend to the Houses the manner of actualizing the recommendations of the NADCO on amendment of the Constitution;

- b) consider any proposed amendments to statutes or enactment of new statutes that may be consequential to the proposed amendments to the Constitution;
 - c) ensure strict adherence to the due process in considering the proposed amendments; and
 - d) submit a report within **forty-five (45) days** to the Houses recommending the manner of actualizing the recommendations of the NADCO.
10. Copies of the Communications issued by the Speaker of the National Assembly and the Speaker of the Senate are attached to this Report as *Annexures 1a and 1b*, respectively. Copies of the Proposed NADCO Constitutional (Amendment) Bill, 2024, the Proposed Leader of Opposition Bill, 2024 and the Proposed National Government Coordination (Amendment) Bill, 2024 are attached to this Report as *Annexures 2a, 2b and 2c*, respectively.
11. The joint sittings of the two Committees were to be held in accordance with National Assembly Standing Order 202A and the Senate Standing Order 230.
12. While the framework for implementation of the two-thirds gender principle in Parliament was one of the issues that the National Dialogue Committee had been tasked to address, the Committee, in its report, recommended that the Multi-Sectoral Working Group (MSWG) on the Realization of the Two-Thirds Gender Principle to recommend to Parliament a framework for the implementation of the two-thirds gender principle.
13. The MSWG therefore submitted its Report to Parliament, including a proposed Bill to amend the Constitution as well as proposed amendments to the Political Parties Act, Cap7D and the Elections Act, Cap 7. Copies of these proposed Bills are attached to this Report as *Annexures 3a, 3b and 3c*, respectively.
14. The Committees were thereafter to consider the framework for implementation of the two-thirds gender principle and the legislative proposals submitted to Parliament by the MSWG, alongside the recommendations contained in the NADCO Report.

2.2 Summary of the NADCO Recommendations

15. The Recommendations contained in the Report of the National Dialogue Committee were categorized under six thematic areas, namely:
- a) electoral justice and related matters;
 - b) outstanding constitutional matters;
 - c) fidelity to the law on multiparty democracy;
 - d) entrenching funds into the Constitution;
 - e) establishment and entrenchment of State offices; and
 - f) other issues that arose from public participation relating to devolution and the Judiciary.

PART 3

3 CONSIDERATION OF THE NATIONAL DIALOGUE REPORT

16. Vide the Communication made by the Speakers of the National Assembly and that of the Senate on Tuesday, 5th March 2024, the Committees were given forty-five (45) days to consider the proposals to amend the Constitution and recommend to the two Houses, the manner of actualizing the recommendations of the National Dialogue Committee.
17. Due to challenges associated with conducting joint meetings, the two Committees were unable to complete the task within the stipulated 45 days. This was despite the unswerving commitment and several attempts from both Committees of the two Houses regarding the task.
18. Consequently, the Chairperson of the Departmental Committee on Justice and Legal Affairs of the National Assembly vide letter dated 23rd July 2024 requested the Speaker of the National Assembly to extend the time for consideration of the NADCO Report by another 45 days; and to authorise the National Assembly Committee to conduct sittings independent of the Senate Committee. In his appeal to the Rt. Honourable Speaker, the Chairperson assured the Speaker that the Justice and Legal Affairs Committee was determined to expedite the process, hence the request to allow the Committees to sit independently of each other.
19. Vide Communication dated 31st July 2024, the Rt. Honourable Speaker acceded to the request of the Committee for an extension of time by another forty-five days (45). The Speaker also acceded to the Committee's request to hold sittings independently and report back to the National Assembly within forty-five (45) days. A copy of the Communication is attached to this Report as *Annexure 1c*.
20. The National Assembly proceeded on recess from 16th August 2024 to 16th September 2024. Upon resumption of the sittings, the Committee held sittings on 19th and 24th September 2024, where they deliberated on the NADCO Report in detail and made a number of observations. The Committee thereafter adopted this Report on Tuesday, 1st October 2024.
21. The Committee noted that out of the four legislative proposals that were to be introduced through the National Assembly, namely:
 - i. The Independent Electoral and Boundaries Commission (Amendment) Bill, 2024;
 - ii. The Ethics and Anti-Corruption Commission (Amendment) Bill, 2024;
 - iii. The Leader of Opposition Bill, 2024; and
 - iv. The National Government Coordination (Amendment) Bill, 2024.
22. Out of the four, two proposals were published as Bills, read a first time and committed to the Departmental Committee on Justice and Legal Affairs for consideration. The Committee dispensed with the first two as enumerated in paragraph 23 and 24 of this Report.

The Independent Electoral and Boundaries Commission (Amendment) Bill, 2024

23. The Independent Electoral and Boundaries Commission (Amendment) Bill (*National Assembly Bill No. 10 of 2024*) was published on 4th April 2024 and read a First Time in the House on 5th March 2024. It was thereafter committed to the Committee in line with the provision of Standing Order 127 (3). The Committee considered the Bill and tabled its Reports on 23rd April 2024 and 19th June 2024 (Report on Senate Amendments). The Bill was passed by both Houses and subsequently assented to by the President on 9th July 2024. A copy of the Bill and Committee Reports are attached to this Report as *Annexures 4a, 4b and 4c*.

The Ethics and Anti-Corruption Commission (Amendment) Bill, 2024

24. The Ethics and Anti-Corruption Commission (Amendment) Bill (*National Assembly Bill No. 11 of 2024*) was published on 4th March 2024 and read a First Time in the House on 25th June 2024. It was thereafter committed to the Committee in line with the provision of Standing Order 127 (3). The Committee considered the Bill and tabled its Report on 6th August 2024. A copy of the Bill and Committee Report are attached to this Report as *Annexures 5a and 5b*.

The Leader of Opposition Bill, 2024

25. The Legislative Proposal on the Leader of Opposition Bill, 2024 is yet to be published because it would require a constitutional amendment to be effected. The Committee's views and observations regarding the proposal are contained in Part 4 of this Report.

The National Government Coordination (Amendment) Bill, 2024

26. The National Government Coordination (Amendment) Bill, 2024 is also yet to be published because it would require a constitutional amendment to be effected. The Committee's views and observations regarding the proposal are contained in Part 4 of this Report.

27. Observations of the Committee on the Proposed **Constitution of Kenya (Amendment) Bills** as contained in the NADCO Report and as proposed by the MSWG on the Realization of the Two-Thirds Gender Rule are contained in Part 4 of this Report.

28. The Committee, at the time of adopting this Report, was yet to receive feedback regarding the four Bills under consideration by the Senate.

PART 4

4 COMMITTEE OBSERVATIONS

4.1 The Proposed Constitution of Kenya (Amendment) Bill, 2024 by NADCO

29. The Proposed Constitution of Kenya (Amendment) Bill 2024 addresses three broad issues including elections, entrenchment of State offices and Funds into the Constitution, and other issues not touching on the three issues. On election issues, the proposal provides for delimitation of electoral boundaries, basic requirements for political parties, the election of Members of Parliament (term of the Senate), vacation of office by a member of Parliament and a member of a county assembly; declaration of presidential election results; and timelines for determination of a question as to the validity of presidential elections.
30. The Committee considered the Proposed Constitution of Kenya (Amendment) Bill 2024, clause by clause and made observations as follows:

Clause 2

31. **Clause 2** of the Bill seeks to amend Article 75 of the Constitution, which provides for the conduct of State officers, to oblige State officers and public officers to promptly obey and act in accordance with a court order and empower the court to impose sanctions on any officer who fails to obey a court order.

Committee Observations

32. The Committee observed that the proposal contradicts the doctrine of separation of powers as envisaged by the Committee of Experts on Constitutional Review when drafting the 2010 Constitution. The Committee was of the view that the proposal would interfere with the independence of the three arms of government including the Judiciary. Furthermore, willful disobedience of court orders is already provided for in section 4 of the Contempt of Court Act, Cap 8F.

Minority Opinion

33. The **Hon. Aden Daud, MP**, supported the proposal, noting that it seeks to ensure that State officers comply with court orders.

Clause 3

34. **Clause 3** of the Bill seeks to amend Article 88(4) of the Constitution by deleting paragraph (e) to remove the settlement of electoral disputes, including those related to nominations, from the mandate of the Independent Electoral and Boundaries Commission (IEBC).

Committee Observations

35. The Committee supported the proposal, stating that it seeks to streamline the settlement of disputes as a means of expediting the resolution of electoral disputes. Despite the IEBC promptly resolving electoral disputes on previous occasions, the Committee noted that the power to settle these disputes is sufficiently provided for in section 40 as read with section 41(2) of the Political Parties Act, Cap 7D. The provisions confer this power to the Political Parties Disputes Tribunal, allowing appeals to the High Court on points of law and facts and further appeals to the Court of Appeal on points of law, with decisions of the Court of Appeal being final.

Clause 4

36. **Clause 4** of the Bill seeks to amend Article 89 of the Constitution on the delimitation of electoral units to empower Parliament to extend the period of reviewing the names and boundaries of constituencies beyond the prescribed period. The extension is to be made through a resolution passed by a majority of all Members of the National Assembly and a majority of the county delegations in the Senate. Under Article 89(2) of the Constitution, IEBC is required to 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.

Committee Observations

37. Reiterating the importance of boundary delimitation in any election cycle, the Committee observed that empowering Parliament to extend the period of reviewing the names and boundaries of constituencies beyond the prescribed period will ensure flexibility, promote fair representation and accommodate unforeseen circumstances that may hinder the delimitation process.

Clause 5

38. **Clause 5** of the Bill seeks to amend Article 91 of the Constitution on basic requirements for political parties to strengthen party democracy, promote party discipline, through the deregistration of a person from a political party and the consequences of such deregistration, and adherence to the values and principles of the Constitution in the nomination of persons to appointive or elective.

Committee Observations

39. The Committee observed that political party discipline is an essential concept of constitutional and political frameworks. The proposal had considerable merit as it seeks to strengthen the structure and procedures within political parties.

Clauses 6 and 15

40. **Clause 6** of the Bill seeks to introduce a new Part 4 to Chapter Seven of the Constitution to establish the office of the Leader of the Opposition and two deputies. It provides for the person to occupy the office, funding of the office and further empowers Parliament to enact legislation. On its part, **Clause 15** of the Bill seeks to amend Article 137(3) of the Constitution on qualifications and disqualifications for election as President to exempt the Prime Minister, the Leader of the Opposition and the Deputy Leader of the Opposition from being disqualified from nomination as a presidential candidate

Committee Observations

41. The Committee observed that the proposal to entrench the Office of the Leader of Opposition in the Constitution fundamentally relates to the supremacy of the Constitution, the sovereignty of the people, the national values and principles of governance hence requires a referendum as prescribed in Article 255 of the Constitution. It was the Committee's view that must be subjected to a referendum for the following reasons:
- (a) There is no clear institutional framework for the Office of the Leader of Opposition. Further, it is not clearly provided whether the office will be a public or State office and in which arm of government it will be domiciled. The establishment of such an

office in Kenya's current system of government must be clearly defined in terms of its institutional framework and role.

- (b) The proposal undermines the system of governance in Kenya having adopted the presidential system of government. The Constitution does not envisage a member of the Executive sitting in Parliament as implied in the proposed NADCO Leader of Opposition Bill. This will result in a change in the system of government, a decision reserved for the people.
- (c) Article 108 of the Constitution provides for party leaders in the National Assembly to include the Leader of the Minority Party who is essentially the leader of the opposition in Parliament. Therefore, introducing the Office of the Leader of Opposition profoundly alters the functions of Parliament. Hence, the proposal must be subjected to a referendum in accordance with Article 255(1)(h) of the Constitution.
- (d) To ensure inclusivity and cohesion after general elections and prevent political instability caused by the winner-takes-it-all system, Kenya should reconsider the presidential system. A parliamentary system is more inclusive as argued in the findings of the Committee of Experts as captured in the Report of the Committee of Experts on Constitutional Review.

Clauses 7, 8, 13, 14, 23 and 24

- 42. **Clauses 7 and 8** of the Bill seek to amend Articles 101 and 102 of the Constitution on the election of Members of Parliament and the term of Parliament, respectively, to increase the term of the Senate to seven years. **Clause 7** provides that a general election is to be held every second Tuesday of August in every fifth year in case of election to the National Assembly and every second Tuesday of August in every seventh year in case of election to the Senate. **Clause 8** provides for the expiry of the term of a House of Parliament upon general elections being held in the fifth year for the National Assembly and the seventh year for the Senate.
- 43. **Clause 13** of the Bill seeks to amend Article 132 of the Constitution on the functions of the President to provide that the President shall address the opening of each newly elected House of Parliament, separately, as the dates for the general election for each House will be different, as opposed to the current joint opening address. It also seeks to amend Article 132(2) to empower the President to appoint and dismiss the Prime Minister.
- 44. **Clause 14** of the Bill seeks to amend Article 136(2)(a) on the election of the President to provide that the election of the President is to be held on the same day as a general election of the members of the National Assembly.
- 45. **Clauses 23 and 24** of the Bill seeks to amend Articles 177(1) and 180(1) of the Constitution to provide that election of members of county assemblies and county governor shall be done on the same day as that of the members of the National Assembly.

Committee Observations

- 46. The Committee noted that the implementation of the proposal will create both legal, practical and administrative challenges for the following reasons:
 - (a) Kenya's general elections are among the world's most expensive. This is attributed to, among others, foreign printing of ballot papers and the high cost of administrative infrastructure. Conducting two general elections will double the cost

of elections and therefore, to ensure cost effectiveness, the elections should be conducted on one day.

- (b) The Constitution envisages one general election as stipulated in Articles 90(3), 98(2) and 136(2) that provide for the allocation of political party list seats, election of Senators representing youth and persons with disabilities and election of the President, respectively. The proposal does not take this into account. Altering the term and date of election of members of the Senate would require a complete overhaul of the Constitution.
- (c) Paying regard to Kenya's constitutional history, the Senate was established to protect devolution. However, fourteen years down the line, devolution is highly entrenched thus the need to reconsider the sustainability of two Houses of Parliament and whether there is a duplication of roles between the Senate and the National Assembly; and the Senate and County Assemblies.

Clauses 9, 25 and 26

- 47. **Clause 9** of the Bill seeks to amend Article 103 of the Constitution on vacation of office of a Member of Parliament to include resignation or deregistration from a political party as one of the circumstances through which the office of a member of Parliament may become vacant. It also deletes Article 103(3), which previously empowered Parliament to enact legislation to provide for the circumstances under which a person may be deemed to have resigned from a political party.
- 48. **Clauses 25 and 26** of the Bill seek to amend Articles 181(1) and 194 of the Constitution to provide for the removal of a county governor from office and vacation of office of a member of a county assembly if the governor or member of a county assembly, having being elected while a member of a political party, resigns from the party or is deregistered by the party.
- 49. Additionally, **Clause 26** deletes provisions which empowered Parliament to enact legislation to provide the circumstances under which a member of a county assembly is deemed to have resigned from a political party.

Committee Observations

- 50. The Committee observed that:
 - a) The proposal is an affront to democracy because political parties are not as democratic as envisaged by the framers of the Constitution. Considering that members of Parliament are elected by the people, the Committee was of the view that the proposal gives party leaders excessive powers prone to abuse. This would breed dictatorship and subvert the will of the people as the right of recall should only be exercised by the people and not political parties.
 - b) The current provisions adequately regulate political party discipline. Article 103 of the Constitution empowers Parliament to enact legislation to promote fidelity to political parties, procedures for registration and deregistration of members of political parties, and mechanisms of crossing over from one political party to another.
 - c) The proposal has no considerable merit.

Minority Opinion

51. The **Hon. (Dr.) Otiende Amollo, SC, MP** and **Hon. Francis Kajwang' Tom Joseph, MP** were of the opinion that:

- a) The term 'deemed' used in Article 103(1)(e)(i) of the Constitution has hindered realization of true party discipline as envisaged by drafters of the Constitution. As a result, the existing provisions of law have not adequately prevented Members from associating themselves with other parties after general elections thereby undermining the opposition and in turn weakening democracy. The proposal seeks to cure the high indiscipline within political parties enabling them to adhere to the values and principles of the party and conduct their affairs in a manner that promotes democracy.
- b) The proposal has considerable merit.

Clause 10

52. **Clause 10** of the Bill seeks to introduce a new Article 108A to empower Parliament to enact legislation to provide for the recognition and status of representatives in international legislative bodies of which Kenya is a member.

Committee Observations

53. The Committee observed that the Constitution does not explicitly define the terms 'international legislative bodies' used in the proposal. Furthermore, the Constitution does not provide for the specific recognition and status of other leaders. The proposal is therefore not feasible.

Clauses 11, 12, 18, 19, 29 and 30

54. **Clauses 11 and 12** of the Bill seek to amend Articles 130(1) and 131(1) of the Constitution on the national Executive and authority of the President, respectively, so as to include the Prime Minister as part of the national executive, and as one of the persons who assists the President in the exercise of the executive authority of the Republic.

55. **Clause 18** of the Bill seeks to introduce a new Article 151A which sought to establish the Office of the Prime Minister. The Prime Minister was to be nominated by the President and appointed by the President upon approval by the National Assembly.

56. **Clause 19** of the Bill seeks to amend Article 152 (Cabinet) of the Constitution to include the Prime Minister as a member of the Cabinet and the appointment of the Prime Minister shall require approval of the National Assembly.

57. **Clause 29** of the Bill seeks to amend Articles 240(2) and 260 of the Constitution to include the Prime Minister as a member of the National Security Council.

58. **Clause 30** of the Bill sought to amend the definition of the term "state officer" to include the Prime Minister.

Committee Observations

59. Noting that the proposal requires some amendments, the Committee recommended as follows:

- (a) The functions prescribed for the office under the proposed new clause 151A(4) qualify the office as that of a Cabinet Secretary provided for in Article 152(1)(d). Furthermore, the term ‘Minister’ used in the proposal does not exist in the Constitution and should therefore, be substituted with ‘Cabinet Secretary’.
- (b) Further, the proposal should be domiciled in Article 152 instead of Article 151 of the Constitution.

Minority Opinion

60. **Hon. (Dr.) Otiende Amollo, SC, MP** and **Hon. John Makali, MP** recorded a dissenting opinion on the proposal citing as follows:
- (a) There is no need for the proposed Office of Prime Minister. The mischief the proposal seeks to cure is not clearly established. Furthermore, the Office of the Prime Minister does not fit the existing governance structure.
 - (b) The Office of the Prime Minister will likely result in a conflict or clash with the Office of the Deputy President. It would also unnecessarily result in a bloated wage bill, a matter of concern to Kenyans.
 - (c) The proposal seeks to introduce a parliamentary system into Kenya’s presidential system. Seeking to change the system of government touches on Article 255(1)(c) and (d) of the Constitution and is a decision reserved for the people. The proposal, therefore, requires a referendum.

Clause 16

61. **Clause 16** of the Bill seeks to amend Article 138(10) of the Constitution on the procedure to be observed during presidential elections to provide that declaration of the results of a presidential election by the chairperson of IEBC is to be done after verification of the results by IEBC.

Committee Observations

62. Noting the distinction between an independent office and a commission, the Committee observed that the proposal is in line with the court’s finding that decisions of a Commission must be made by the absolute majority and not individual members.

Clause 17

63. **Clause 17** of the Bill seeks to amend Article 140(2) of the Constitution on questions as to the validity of the presidential election to increase the timeline for hearing and determination of the presidential elections from 14 days to 21 days.

Committee Observations

64. The Committee observed that the proposal sought to increase the number of days to determine disputes arising from the presidential election by the Supreme Court, from 14 days to 21 days due to constraints imposed by the strict timelines. On several occasions the Court has delivered judgements and reserved reasons thereto. The Committee was in support of the proposal.

Clauses 20, 21 and 22

65. **Clauses 20 and 21** of the Bill seek to amend Articles 162 and 165 of the Constitution which provides for system of courts and the High Court, respectively, so as to make the Environment and Land Court and the Employment and Labour Relations Court part of the High Court.

66. **Clause 22** of the Bill seeks to amend Article 169(1)(d) of the Constitution to remove reference to the Employment and Labour Relations Court and Environment and Land Court.

Committee Observations

67. Taking into account the versatility of judges in Kenya's judicial changing landscape, the Committee noted that the proposal simply ensures an administratively tidier court system.
68. Additionally, the Committee observed that clauses 21 and 22 are consequential amendments to clause 20 and serve as a cleanup.

Clause 27

69. **Clause 27** of the Bill seeks to amend Article 203(2) of the Constitution to increase the minimum equitable share of national revenue allocated to county governments from fifteen percent to twenty per cent.

Committee Observations

70. The Committee agreed with the proposal.

Clause 28

71. **Clause 28** of the Bill seeks to introduce new Articles 204A, 204B and 204C which seek to entrench the National Government Constituency Development Fund, the Senate Oversight Fund and the National Government Affirmative Action Fund, respectively, in the Constitution.

Committee Observations

72. The Committee observed that the amendments do not relate to the matters outlined in Article 255 of the Constitution and would therefore not require to be approved at a referendum.

Minority Opinion

73. **The Hon. Francis Kajwang' Tom Joseph, MP** recorded a dissenting opinion relating to the establishment of the Senate Oversight Fund. In his view, Members of Parliament are facilitated by the Parliamentary Service Commission to discharge their oversight roles. Unlike the NGCDF which is administered by the National Government Constituencies Development Fund Board, the proposal seeks to establish a Senate Oversight Fund to finance an oversight role that is already catered for by the Parliamentary Service Commission. The Senate Oversight Fund would contravene the principles of public finance.

Clauses 31 and 32

74. **Clause 31** of the Bill provides that Parliament shall enact all legislation required to be enacted as a consequence of the amendment of the Constitution within six months of the coming into force of the Act.

75. **Clause 32** of the Bill provides transition in respect of any person serving as a judge of the Employment and Labour Relations Court and the Environment and Land Court to continue

serving as High Court judges without loss of benefits or status. This is as a consequence of the proposal to merge the two courts with the High Court.

Committee Observations

76. The Committee observed that clause 31 and 32 are transitional and consequential provisions whose implementation shall be under the Bill. It was the Committee's view that it would be untidy to amend the Fifth and Sixth Schedules to the Constitution.

Minority Opinion

77. The **Hon. (Dr.) Otiende Amollo, SC, MP** noted that the proposed amendments in Clause 31 relate directly to the Constitution and not the Bill. In his view, an Act of Parliament cannot instruct the Constitution, rather the Constitution instructs itself. As such, all relevant legislation requiring to be enacted as a consequence of the proposed amendments to the Constitution should be provided for in the Fifth Schedule to the Constitution. In addition, he noted that clause 32 was a transitional amendment and should be incorporated by amending the Sixth Schedule of the Constitution.

4.2 The Proposed Constitution of Kenya (Amendment) Bill, 2024 by MSWG

78. The Committee noted that as part of the NADCO recommendations, the Multi-Sectoral Working Group on the Realization of the Two-Thirds Gender Principle was to finalize its work and recommend a framework of implementation of the two-thirds gender principle and submit its report to Parliament for consideration. To this end, the MSWG submitted to Parliament a Proposed Constitution of Kenya (Amendment) Bill, 2024.
79. The principal object of the proposal is to amend the Constitution to implement the recommendations of the MSWG Report that Article 27(8) and 81(b) of the Constitution, in respect of Parliament, be implemented by way of gender top-up of party lists. Article 27(8) of the Constitution requires the State to take legislative and other measures to implement the principle that no more than two-thirds of members of elective or appointive shall be of the same gender. Article 81(b), on its part, provides that the electoral system shall comply with the principle that no more than two-thirds of members of elective public bodies shall be of the same gender.
80. The Committee considered the Proposed Constitution of Kenya (Amendment) Bill 2024, clause by clause and made its observations as follows:

Clauses 2, 3 and 4

81. **Clause 2** of the Bill seeks to amend Article 90 of the Constitution which provides for allocation of party list seats as a consequence of the amendment to Articles 97 and 98 of the Constitution. It also provides that members of a political party shall be democratically involved in preparation of the party list, and that the party list shall reflect the representation of the marginalized groups provided for under Article 100 of the Constitution. Further, it seeks to introduce a term limit of two years for persons nominated to Parliament by political parties.
82. **Clauses 3 and 4** of the Bill proposes to amend Articles 97 and 98 of the Constitution to ensure that no more than two-thirds of members of the National Assembly and the Senate are of the same gender. New clauses are inserted to provide that where after a general

election the two-thirds gender principle is not met in the National Assembly and the Senate, there shall be additional special seats to be filled by way of nominations.

Committee Observations

83. The Committee observed that the creation of gender-top up seats through party lists will guarantee the attainment of the two-thirds gender principle. The Committee added that the need to include a provision to require Parliament to enact legislation to give effect to the proposals.
84. Further, the Committee noted that the amendment of Articles 97 and 98 to accord with the two-thirds gender of the Constitution was already approved by Kenyans in promulgating the Constitution and was ideally meant to have been done through parliamentary initiative by the first Parliament under the Constitution. For that purpose, the amendments would not require to be approved at a referendum.

Minority Opinion

85. The **Hon. (Dr.) Otiende Amollo, SC, MP** noted the difficulty in striking a balance between the cost of representation and the realization of the two-thirds gender principle.
86. To prioritize realization of the two-thirds gender principle, he agreed with the proposal for the top-up method as the most viable. He, however, stated that the gender top-up method disadvantages women aspirants.
87. It was his view that pursuant to Article 255(1)(c) and (h) of the Constitution, the amendment must be subjected to a referendum as it relates to the sovereignty of the people and indirectly affects the functions of Parliament by enlarging the membership of the two Houses through top-up seats.

Clause 5

88. **Clause 5** of the Bill introduces a new Article 98A to provide for transition. It is proposed that within thirty days of the coming into force of the Act, IEBC shall require political parties to submit lists for purposes of filling the additional seats to comply with the principle.

Committee Observations

89. The Committee noted that the proposal was overly ambitious and would pose significant implementation challenges during the term of the current Parliament. It was the Committee's view that it would be neater to implement the proposals after the term of the current Parliament.

PART 5

5 COMMITTEE RECOMMENDATIONS

90. The Committee recommends to the House that—

(a) The proposed Constitution of Kenya (Amendment) Bill by NADCO be revised by deleting the following proposals—

(i) requirement of State and public officer to promptly obey court orders;

Justification: The proposal would interfere with the independence of the three arms of government.

(ii) the enlargement of the term of the Senate;

Justification: The proposal fails to take into account that the Constitution envisages one general election as stipulated in Articles 90(3), 98(2) and 136(2). Altering the term and date of election of members of the Senate would require a complete overhaul of the Constitution. Additionally, paying regard to Kenya's constitutional history, the Senate was established to protect devolution. However, fourteen years down the line, devolution is highly entrenched thus the need to reconsider the sustainability of two Houses of Parliament and whether there is a duplication of roles between the Senate and County Governments.

(iii) the entrenchment of the Office of Leader of Opposition;

Justification: The proposal undermines the system of governance in Kenya. The system of governance is a presidential system of government. Article 108 of the Constitution provides for party leaders in the National Assembly to include the Leader of the Minority Party who is essentially the leader of the opposition in Parliament.

(iv) The requirement for resignation and deregistration from a political party as a way in which the office of a member of Parliament, Senator, Governor or Member of County Assembly may become vacant;

Justification: The proposal is an affront to democracy because political parties are not as democratic as envisaged by the framers of the Constitution. Considering that members of Parliament are elected by the people; the proposal gives party leaders excessive powers prone to abuse. This would breed dictatorship and subvert the will of the people as the right of recall should only be exercised by the people and not political parties.

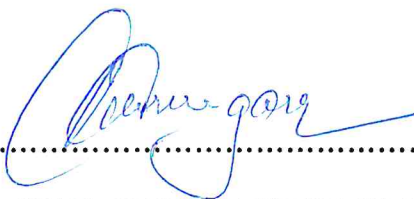
(v) the provision on the recognition and status of representatives in international legislative bodies of which Kenya is a member.

Justification: The Constitution does not expressly define the term 'international legislative bodies'. Furthermore, the Constitution does not provide for the specific recognition and status of other leaders. The proposal is therefore not feasible.


- (b) The proposed Constitution of Kenya (Amendment) Bill by MSWG be revised by deleting clause 5;

Justification: The proposal is too ambitious and cannot be implemented in the current Parliament. It would be neater to implement the proposals during the next general election.

- (c) The revised Constitution of Kenya (Amendment) Bill by NADCO be published separately as one Bill noting that several of its proposals may require a referendum, if enacted; and
- (d) The amended Constitution of Kenya (Amendment) Bill by MSWG be published separately noting that its proposals may not require approval at a referendum, if enacted.

SIGNED..........DATE.....2.10.2024.....

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

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 09 OCT 2024	DSV WFB
TABLED BY:	Hon. George Murugara, MP Chair, Justice & Legal Affairs Committee
BY:	K. Tilioti