



REPUBLIC OF KENYA

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SNA  
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**THIRTEENTH PARLIAMENT | THIRD SESSION  
THE NATIONAL ASSEMBLY AND THE SENATE**


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**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**

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

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 <b>THE NATIONAL ASSEMBLY PAPERS LAID</b>	
<b>DATE:</b> 16 JAN 2025	<b>DAY:</b> Thursday
<b>TABLED BY:</b>	Hon. George Mutogara (Chairperson, Justice and Legal Affairs Committee)
<b>CLERK-AT THE-TABLE:</b>	Anastacia

*Clerks Chambers  
National Assembly and Senate  
Parliament Buildings  
**NAIROBI***

*December 2024*

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## LIST OF ABBREVIATIONS AND ACRONYMS

CBS	Chief of the Order of the Burning Spear
EALA	East Africa Legislative Assembly
EBS	Elder of the Order of the Burning Spear
Hon.	Honourable
IEBC	Independent Electoral and Boundaries Commission
MP	Member of Parliament
MSWG	Multi-Sectoral Working Group on the Realization of the Two-Thirds Gender Principle
NADCO	National Dialogue Committee
NGAAF	National Government Affirmative Action Fund
NGCDF	National Government Constituency Development Fund
SC	Senior Counsel
SOF	Senate Oversight Fund

## LIST OF ANNEXURES

- Annexure 1: Communication issued by the Speaker of the National Assembly on Tuesday, 5<sup>th</sup> March, 2024
- Annexure 2: Communication issued by the Speaker of the Senate on Tuesday, 5<sup>th</sup> March, 2024
- Annexure 3: Communication issued by the Speaker of the National Assembly on 31<sup>st</sup> July 2024
- Annexure 4: The Draft Constitution of Kenya (Amendment) Bill, 2024 by the National Dialogue Committee
- Annexure 5: Communication issued by the Speaker of the National Assembly on 27<sup>th</sup> February 2024
- Annexure 6: Report of the Multi-Sectorial Working Group on the Realization of the Two-Thirds Gender Principle and proposed legislative instruments
- Annexure 7: Addendum to the Report of the Multi-Sectorial Working Group on the Realization of the Two-Thirds Gender Principle
- Annexure 8: The Revised Draft Constitution of Kenya (Amendment) Bill by the Multi-Sectorial Working Group on the Realization of the Two-Thirds Gender Principle
- Annexure 9: Communication No. 001 of 2022 issued by the Speaker of the National Assembly on Tuesday 4<sup>th</sup> October 2022
- Annexure 10: Communication No. 088 of 2023 issued by the Speaker of the National Assembly on Thursday 30<sup>th</sup> November 2023
- Annexure 11: The NADCO Report
- Annexure 12: Minutes of the joint sittings of the Committees and Adoption list



## FOREWORD BY THE CHAIRPERSONS

The National Assembly and the Senate established the National Dialogue Committee (NADCO) *vide* resolutions passed on 16<sup>th</sup> August 2023 and 29<sup>th</sup> 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 22<sup>nd</sup> and 21<sup>st</sup> February 2024, respectively. Following adoption of the NADCO Report by the two Houses, the Speakers of the two Houses issued concurrent Communications on 5<sup>th</sup> March, 2024 in which they directed the National Assembly Departmental Committee on Justice and Legal Affairs and the Senate Standing Committee on Justice, Legal Affairs and Human Rights to hold joint sittings to—

- a) 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; and
- c) submit a report to the Houses recommending the manner of actualizing the recommendations of the NADCO Report.

In undertaking the assignment, the Committees took note of the Report of the Multi-Sectoral Working Group on the Realization of the Two-Thirds Gender Principle (MSWG), and observed that the Report of and draft Constitution of Kenya (Amendment) Bill proposed by the MSWG should be read and considered as part of the NADCO Report. This was on the basis that the realization of the two-thirds gender principle was one of the areas that NADCO was mandated to address, and that NADCO deferred consideration of the matter to allow the MSWG to comprehensively address the issue, including proposing appropriate amendments to the Constitution and statutes.

This Report therefore contains the proceedings of the two Committees in considering both the NADCO and MSWG Reports as well as the Bills to amend the Constitution as proposed in the said Reports.

Chapter One of the Report entails the establishment, mandate and membership of the two Committees and the conduct of the joint sittings. Chapter Two contains an overview and consideration of the NADCO and MSWG Reports while Chapter Three Contains the


Committees' observations on consideration of the proposed Constitution of Kenya (Amendment) Bills proposed in the said Reports. Chapter Four details the roadmap for the actualization of the proposed constitutional amendments while Chapter Five sets out the recommendations of the two Committees regarding—

- i) textual amendments to the Bills;
- ii) the number of Bills to be published; and
- iii) the process to be followed in enacting the Bills.

We take this opportunity to commend the Committee Members for their devotion and commitment to duty which made the consideration of the Reports and the proposed Bills 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.

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, it is now our pleasant privilege and duty to present to the Houses the Joint Report of the two Committees on consideration of the Reports of the National Dialogue Committee and the Multi-Sectoral Working Group on the Realization of the Two-Thirds Gender Principle.

Signed:   
Hon. Murugara George Gitonga, CBS, MP

Signed:   
Sen. Wakili Hillary Sigei, MP

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

**Chairperson, Senate Standing Committee  
on Justice, Legal Affairs and Human Rights**

## CHAPTER ONE

### 1 PREFACE

#### 1.1 Establishment and Mandate of the Committees

2. The National Assembly Departmental Committee on Justice and Legal Affairs is established pursuant to Standing Order 216 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 –

*Judiciary, tribunals, access to justice, public prosecutions, ethics, integrity & anti-corruption, correctional services, community service orders and witness protection, Constitutional affairs, sovereign immunity, elections including referenda, human rights, political parties, the State Law Office, including, insolvency, law reform, public trusteeship, marriages and legal education.*

3. The Senate Standing Committee on Justice, Legal Affairs and Human Rights is established pursuant to Standing Order 228 of the Senate Standing Orders. Under the Second Schedule to the 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.*

#### 1.2 Membership of the Committees

4. The National Assembly Departmental Committee on Justice and Legal Affairs was constituted by the House on 27<sup>th</sup> October 2022 and comprises the following Members—

1)	Hon. Murugara George Gitonga, CBS, MP	-	Chairperson
2)	Hon. Mutuse Eckomas Mwangi, OGW, MP	-	Vice Chairperson
3)	Hon. Maalim Farah, MP	-	Member
4)	Hon. Francis Kajwang' Tom Joseph, MP	-	Member
5)	Hon. Mogaka Stephen M, MP	-	Member
6)	Hon. (Dr.) Otiende Amollo, SC, MP	-	Member
7)	Hon. Onyiego Silvanus Osoro, CBS, MP	-	Member
8)	Hon. Muchira Michael Mwangi, MP	-	Member
9)	Hon. Makali John Okwisia, MP	-	Member
10)	Hon. Muriu Wakili Edward, MP	-	Member
11)	Hon. Maina Jane Njeri, MP	-	Member
12)	Hon. Gichohi Kaguchia John Philip, MP	-	Member
13)	Hon. Mogaka Stephen M, MP	-	Member
14)	Hon. Aden Daud, EBS, MP	-	Member

- 15) Hon. Siyad Amina Udgoon, MP - Member
5. The Senate Standing Committee on Justice, Legal Affairs and Human Rights is comprised of—
- 1) Sen. Wakili Hillary Kiprotich Sigei, MP - Chairperson
  - 2) Sen. Raphael Chimera Mwinzagu, MP - Vice-Chairperson
  - 3) Sen. Fatuma Adan Dullo, CBS, MP - Member
  - 4) Sen. William Cheptumo Kipkiror, CBS, MP - Member
  - 5) Sen. Hamida Ali Kibwana, MP - Member
  - 6) Sen. Catherine Muyeka Mumma, MP - Member
  - 7) Sen. Veronica W. Maina, MP - Member
  - 8) Sen. Karen Njeri Nyamu, MP - Member
  - 9) Sen. Andrew Omtatah Okoiti, MP - Member

### 1.3 Conduct of Joint Sittings

6. In accordance with Standing Order 202A of the National Assembly Standing Orders and Standing Order 230 of the Senate Standing Orders and vide concurrent Communications (*Annexure 1 and 2*) issued by 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.
7. 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.
8. In the said Communications, the Committees were mandated to hold joint sittings to—
- ii) deliberate on actualization of the recommendations of the National Dialogue Committee (NADCO) on amendment of the Constitution;
  - iii) consider any proposed amendments to statute or enactment of new statutes that may be consequential to the proposed amendments to the Constitution; and
  - iv) submit a report to the Houses recommending the manner of actualizing the recommendations of the NADCO.
9. To this end, the Committees held joint sittings on 7<sup>th</sup> March and 16<sup>th</sup> April 2024. However, due to conflicting schedules of the two Houses, the Committees were unable to finalise the consideration of the NADCO Report within the initial forty-five days. Consequently, and vide letter dated 23<sup>rd</sup> July 2024, the Chairperson of the Departmental Committee on Justice and Legal Affairs of the National Assembly requested the Rt. Honourable 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.

10. Vide Communication dated 31<sup>st</sup> July 2024 (*Annexure 3*), the Rt. Honourable Speaker of the National Assembly acceded to the National Assembly's Committee's request for extension of time by another forty-five days and to hold sittings independently and report back to the National Assembly within the stipulated timelines. The National Assembly Committee, therefore, held sittings on 19<sup>th</sup> and 24<sup>th</sup> September 2024 where they deliberated on the NADCO Report and considered the proposed Constitution of Kenya (Amendment) Bills by NADCO and MSWG and tabled its Report in the National Assembly on 9<sup>th</sup> October, 2024.
11. Similarly, the Senate Standing Committee on Justice, Legal Affairs and Human Rights considered the NADCO and MSWG Reports but did not table its Report to pave way for harmonization of the recommendations of the two Committees on implementation of the NADCO and MSWG Reports.
12. Consequently, the two Committees, therefore, reconvened on 2<sup>nd</sup> December 2024 to deliberate on and harmonize the recommendations of both Committees on actualization of the proposals contained in the NADCO and MSWG Reports. Thereafter, the Committees adopted this Report on 4<sup>th</sup> December 2024.
13. This Report therefore contains the joint deliberations and recommendations 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 framework for actualization of the proposals for amendment to the Constitution as contained in the Reports of the National Dialogue Committee and the Multi-Sectoral Working Group on the Realization of the Two-Thirds Gender Principle for consideration by the Houses of Parliament.



## CHAPTER TWO

### 2 OVERVIEW AND CONSIDERATION OF THE NADCO AND MSWG REPORTS

#### 2.1 Background

14. The National Assembly and the Senate established the National Dialogue Committee (NADCO) vide Resolutions passed on 16<sup>th</sup> August 2023 and 29<sup>th</sup> 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.*”
15. 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 22<sup>nd</sup> and 21<sup>st</sup> February 2024, respectively.
16. Following adoption of the NADCO Report (*Annexure 11*) 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. The draft Constitution of Kenya (Amendment) Bill, 2024 by NADCO is attached to this Report as *Annexure 4*.
  - 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.

17. Furthermore, while the framework for realization of the two-thirds gender principle in Parliament was one of the issues that the National Dialogue Committee had been tasked to address, the NADCO, in its report, recommended that the MSWG finalizes its work and recommends to Parliament a framework for the implementation of the two-thirds gender principle.

18. Subsequently, vide a communication dated 27<sup>th</sup> February 2024 (*Annexure 5*), the Speaker of the National Assembly notified the House that he was in receipt of the Report of the Multi-Sectorial Working Group on the Realization of the Two-Thirds Gender Principle (*Annexure 6*), recommending amendments to the Constitution, the Elections Act and Political Parties Act through the following—

- (a) The proposed Constitution of Kenya (Amendment) Bill, 2024;
- (b) The proposed Elections (Amendment) Bill, 2024; and
- (c) The proposed Political Parties (Amendment) Bill, 2024.

19. On 14<sup>th</sup> March 2024, an Addendum to the Report of the Multi-Sectorial Working Group on the Realization of the Two-Thirds Gender Principle (*Annexure 7*) was submitted to Parliament. The Report contained a revised draft Constitution of Kenya (Amendment) Bill, 2024 (*Annexure 8*).

### **2.1.1 Status of the NADCO Bills before the National Assembly**

20. The Committees noted that four legislative proposals were to be introduced through the National Assembly, namely—

- (a) The Independent Electoral and Boundaries Commission (Amendment) Bill, 2024;
- (b) The Ethics and Anti-Corruption Commission (Amendment) Bill, 2024;
- (c) The Leader of Opposition Bill, 2024; and
- (d) The National Government Coordination (Amendment) Bill, 2024.

21. 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 22 and 23 of this Report.

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

22. The Independent Electoral and Boundaries Commission (Amendment) Bill (*National Assembly Bill No. 10 of 2024*) was published on 4<sup>th</sup> April 2024 and read a First Time in the National Assembly on 5<sup>th</sup> March 2024. It was thereafter committed to the Departmental Committee on Justice and Legal Affairs in line with the provision of Standing Order 127(3) of the National Assembly Standing Orders. The Committee considered the Bill and tabled its Reports on 23<sup>rd</sup> April 2024 and 19<sup>th</sup> June 2024 (Report on Senate Amendments). The Bill was passed by both Houses and subsequently assented to by the President on 9<sup>th</sup> July 2024.

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

23. The Ethics and Anti-Corruption Commission (Amendment) Bill (*National Assembly Bill No. 11 of 2024*) was published on 4<sup>th</sup> March 2024 and read a First Time in the National Assembly on 25<sup>th</sup> June 2024. It was thereafter committed to the Departmental Committee on Justice and Legal Affairs in line with the provision of Standing Order 127(3) of the National Assembly Standing Orders. The Committee considered the Bill and tabled its Report on 6<sup>th</sup> August 2024.

#### **2.1.1.3 *The Leader of Opposition Bill, 2024***

24. The Legislative Proposal on the Leader of Opposition Bill, 2024 is yet to be published as because it would require a constitutional amendment as contained in this Report.

#### **2.1.1.4 *The National Government Coordination (Amendment) Bill, 2024***

25. The National Government Coordination (Amendment) Bill, 2024 is yet to be published because it would require a constitutional amendment as contained in this Report.

#### **2.1.2 *Status of the NADCO Bills before the Senate***

26. The Committees noted that four legislative proposals were to be introduced through the Senate, namely—

- (a) The Elections Offences (Amendment) Bill, 2024;
- (b) The Elections (Amendment) Bill, 2024;
- (c) The Statutory Instruments (Amendment) Bill, 2024; and
- (d) The Political Parties (Amendment) Bill, 2024.

#### **2.1.2.1 *The Elections Offences (Amendment) Bill, 2024***

27. The Elections Offences (Amendment) (No. 2) Bill (*Senate Bill No. 28 of 2024*) was published on 7<sup>th</sup> May 2024 and read a First Time in the Senate on 4<sup>th</sup> July 2024. It was thereafter committed to the Senate Standing Committee on Justice, Legal Affairs and Human Rights. The Committee considered the Bill and tabled its Report on 26<sup>th</sup> November 2024. The Bill was thereafter passed by the Senate with amendments and referred to the National Assembly for consideration. The Bill was read a First Time in the National Assembly on 3<sup>rd</sup> December 2024.

#### ***2.1.2.2 The Elections (Amendment) Bill, 2024***

28. The Elections (Amendment) (No. 2) Bill (*Senate Bill No. 29 of 2024*) was published on 7<sup>th</sup> May and read a First Time in the Senate on 4<sup>th</sup> July 2024. It was thereafter committed to the Senate Standing Committee on Justice, Legal Affairs and Human Rights and is still under consideration by the Senate.

#### ***2.1.2.3 The Statutory Instruments (Amendment) Bill, 2024***

29. The Statutory Instruments (Amendment) Bill (*Senate Bill No. 10 of 2024*) was published on 7<sup>th</sup> March and read a First Time in the Senate on 17<sup>th</sup> April 2024. It was thereafter committed to the Senate Standing Committee on Justice, Legal Affairs and Human Rights and is still under consideration by the Senate.

#### ***2.1.2.4 The Political Parties (Amendment) Bill, 2024***

30. The Political Parties (Amendment) (No. 2) Bill (*Senate Bill No. 26 of 2024*) was published on 7<sup>th</sup> May 2024 and read a First Time in the Senate on 4<sup>th</sup> July 2024. It was thereafter committed to the Senate Standing Committee on Justice, Legal Affairs and Human Rights and is still under consideration by the Senate.

## CHAPTER THREE

### 3 COMMITTEES' OBSERVATIONS ON CONSIDERATION OF THE PROPOSED BILLS TO AMEND THE CONSTITUTION

#### 3.1 Introduction

31. The National Assembly Departmental Committee on Justice and Legal Affairs and the Senate Standing Committee on Justice, Legal Affairs and Human Rights held four joint sittings at which they deliberated on the framework for actualization of the proposals to amend the Constitution as contained in the Reports of the National Dialogue Committee and the Multi-Sectoral Working Group on Implementation of the Two-Thirds Gender Principle.

32. The Committees deliberated on all the clauses contained in the proposed Bills proposing amendments to the Constitution and made its observations—

#### 2.1 The Constitution of Kenya (Amendment) Bill, 2024 proposed by the National Dialogue Committee

33. 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.

34. The Committees considered the proposed Constitution of Kenya (Amendment) Bill, 2024 by NADCO and observed as follows:

##### Clause 2

35. **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 Observation

36. The Committees observed that, while there was merit in the proposed amendment, the issue of obedience of court orders was adequately addressed in existing legislation, including the Contempt of Court Act, Cap 8F, which provided for willful disobedience of court orders.

### **Clause 3**

37. **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 Observation**

38. The Committees supported the proposal noting that it seeks to streamline and expedite the resolution of electoral disputes. The Committees further observed 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**

39. **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 Observation**

40. The Committees observed that the proposed amendment had considerable merit. Reiterating the importance of boundary delimitation in any election cycle, the Committees observed that empowering Parliament to extend the period of reviewing the names and boundaries of constituencies beyond the prescribed period will ensure flexibility and accommodate unforeseen circumstances that may hinder the delimitation process.

### **Clause 5**

41. **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, including 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 Observation**

42. The Committees observed that political party discipline is an essential concept of constitutional and political frameworks.
43. The Committees however observed that the proposed new clauses 5 to 11 of Article 91 of the Constitution, which provided for deregistration of a member from a political party and

the loss of appointive or elective position arising from such deregistration, placed too much power in the hands of political parties and may be prone to abuse.

44. The Committees observed that, instead, legislation should be enacted to strengthen the existing provisions on deeming a member to have resigned from a political party, and to put in place sufficient safeguards to ensure the freedoms and rights guaranteed at Articles 33 (*freedom of expression*), 36 (*freedom of association*), 38 (*political rights*), 47 (*right of fair administrative action*) and 50 (*right to fair hearing*) of the Constitution were upheld.

#### **Clauses 6 and 15**

45. **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 Opposition and the Deputy Leader of Opposition from being disqualified from nomination as a presidential candidate

#### **Committee Observation**

46. The Committees expressed reservations with the proposed amendment on the grounds that—
- a) it was not clearly provided whether the office would be a public or State office and in which arm of government it will be domiciled;
  - b) it was not clear how the positions of the Leader of Opposition and the two deputies would align with that of the Leader of the Minority Party, as currently provided for in Article 108(3) of the Constitution;
  - c) further, introducing the Office of the Leader of Opposition would profoundly alter the functions of Parliament; and
  - d) the proposal would alter the country's system of governance and undermine the current presidential system. This is because the Constitution does not envisage a member of the Executive sitting in Parliament as implied in the proposed NADCO Leader of Opposition Bill.

47. The Committees further observed that the proposal relates to the supremacy of the Constitution, the sovereignty of the people, and national values and principles of governance. Consequently, it would need to be subjected to a referendum in accordance with Article 255 and 256(5) of the Constitution.

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

48. **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 from five 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.

49. **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.
50. **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.
51. **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 Observation**

52. The Committees observed that—
- a) no sufficient justification had been made for the proposed amendment;
  - b) implementation of the proposal would create significant legal, practical and administrative challenges;
  - c) conducting two general elections would further escalate the cost of elections, noting that the cost of elections in Kenya was already among the highest in the world;
  - d) the Constitution envisaged 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; and
  - e) altering the term and date of election of members of the Senate would require a complete overhaul of the Constitution.
53. The Committees further observed that the proposal touched on the sovereignty of the people and would thus need to be subjected to a referendum, in accordance with Article 255 and 256(5) of the Constitution.

#### **Clauses 9, 25 and 26**

54. **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.

55. **Clauses 25 and 26** of the Bill seeks to amend Articles 181(1) and 194 of the Constitution to provide for 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.
56. 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 Observation**

57. The Committees 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 Committees were 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 Political Parties Act and enabling legislation sufficiently and 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. The Committees suggested that the procedures of party discipline should be factual and meritorious.
  - c) The proposed amendment might not have the desired effect of promoting party discipline.
58. As with the amendments proposed at Clause 5 of the Bill, the Committees observed that, instead, legislation should be enacted to strengthen the existing provisions on fidelity to political parties, while putting in place sufficient safeguards to ensure the freedoms and rights guaranteed at Articles 33 (*freedom of expression*), 36 (*freedom of association*), 38 (*political rights*), 47 (*right of fair administrative action*) and 50 (*right to fair hearing*) of the Constitution were upheld.

#### **Minority Opinion**

59. The **Hon. Francis Kajwang Tom Joseph, MP** and **Sen. Catherine Mumma, MP** recorded their dissent to the position adopted by the Committees. They observed that the provisions on ‘deeming’ had not achieved the purpose of instilling discipline and fidelity to political parties, and that the same should be replaced with deregistration from a political party as proposed in the Bill under consideration. They further observed that, where a member of a political party was proposed for deregistration, they would still be entitled to due process and other safeguards already provided for in the Constitution, including recourse to the Courts.

### **Clause 10**

60. **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 Observation**

61. The Committees observed that –

- a) no clear justification had been made for the proposed amendment;
- b) in the case of Members of the East African Legislative Assembly, the status of Kenya's members to the legislative body is well addressed in the Treaty establishing the East African Community and the East Africa Legislative Assembly (Powers and Privileges) Act, 2003; and
- c) the proposed recognition of EALA members in the Constitution would interfere with the sovereignty of the people of Kenya, as the said members were not directly elected by the People of Kenya.

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

62. **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.

63. **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.

64. **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.

65. **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.

66. **Clause 30** of the Bill sought to amend the definition of the term “state officer” to include the Prime Minister.

### **Committee Observation**

67. The Committees observed that –

- a) the functions prescribed for the office in the proposed new Article 151A(4) qualify the office as that of a Cabinet Secretary in accordance with Article 152(1)(d) of the Constitution;

- b) the term ‘Minister’ used in the proposal does not exist in the Constitution and may therefore, be substituted with ‘Cabinet Secretary’; and
- c) it was not clear how the position would align with Kenya’s presidential system of government and with the functions of the office of the Deputy President.

68. The Committees further observed that –

- i) the President has the powers to organize his or her Cabinet, including designating a Cabinet Secretary as a Prime Cabinet Secretary, without the need for a constitutional amendment. Further, that enshrining the position in the Constitution would make it mandatory for a President to appoint a Prime Cabinet Secretary, which ought to be left to the discretion of the President; and
- ii) introducing the position of Prime Minister as proposed in the Bill would require a referendum, pursuant to Articles 255 and 256(5) of the Constitution.

#### **Clause 16**

69. **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 Observation**

70. Noting the distinction between an independent office and commission, the Committees observed that the proposal was in line with judicial pronouncements that decisions of a Commission must be made by the absolute majority and not individual members. It further sought to ensure clarity as regards the declaration of presidential election results.

#### **Clause 17**

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

#### **Committee Observation**

72. The Committees observed that, on previous occasions, the Supreme Court had delivered judgements and reserved the reasons for a later date, due to the constraints imposed by the existing timelines.

#### **Clauses 20, 21 and 22**

73. **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, to make the Environment and Land Court and the Employment and Labour Relations Court part of the High Court.

74. **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 Observation**

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

**Clause 27**

76. **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 percent.

**Committee Observation**

77. The Committees noted that it intends to ensure that county governments have adequate resources and that resources are taken closer to the people.

**Clause 28**

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

**Committee Observation**

79. The Committees observed that the proposed amendments would ensure that resources are taken closer to the people, and would further advance equity, inclusiveness, and protection of the marginalised in line with Article 10 of the Constitution.

80. The Committees further observed that—
- a) the proposed amendments did not relate to matters specified under Article 255 of the Constitution;
  - b) the National Government Constituency Development Fund and the National Government Affirmative Action Fund should be structured in a manner that upheld the separation of powers among the different arms of government, in line with various judicial pronouncements; and
  - c) the Senate Oversight Fund may be renamed the Parliamentary Oversight Fund, being a special fund to be administered by the Parliamentary Service Commission for facilitating members of the National Assembly to exercise oversight over national government projects and initiatives and for members of the Senate to oversight county government projects and initiatives, as well as projects funded through conditional allocations to the county governments.

### **Clauses 31 and 32**

81. **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.
82. **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 Observation**

83. The Committees observed that clauses 31 and 32 were transitional and consequential provisions.

### **2.3 The Constitution of Kenya (Amendment) Bill, 2024 proposed by the Multi-Sectoral Working Group on Implementation of the Two-Thirds Gender Principle (MSWG)**

84. The Committees observed that the Report of and draft Bill proposed by the MSWG should be read and considered as part of the NADCO Report, noting that this was one of the areas that NADCO was mandated to address, and that NADCO deferred consideration of the matter to allow the MSWG to comprehensively address the issue, including proposing appropriate amendments to the Constitution and statutes.
85. 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.
86. The Constitution of Kenya (Amendment) Bill, 2023 by the MSWG proposes to implement the two-thirds gender principle by way of gender top-up through party lists. The Committees considered the draft Bill and made its observations as follows:

### **Clauses 2, 3 and 4**

87. **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 terms for persons nominated to Parliament by political parties.



88. **Clauses 3 and 4** of the Bill propose to amend Articles 97 and 98 of the Constitution to ensure that not 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 Observation**

89. The Committees observed that the creation of gender-top up seats through party lists would guarantee the attainment of the two-thirds gender principle.
90. The Committees further observed that the principle was already approved by Kenyans in approving the Constitution, with Parliament directed to enact legislation to give effect to the principle. Consequently, the proposed amendments would not require a referendum.

**Clause 5**

91. **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 Observation**

92. The Committees 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.

## CHAPTER FOUR

### 4 THE ROADMAP FOR ACTUALIZATION OF THE PROPOSED AMENDMENTS

#### 4.1 Legal Framework on the Process for Amending the Constitution

93. Articles 255, 256 and 257 of the Constitution make provisions on the amendment of the Constitution. Article 255 provides that if the amendment relates to the following matters, the amendments shall be approved by a referendum—

- (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;
- (e) the Bill of rights;
- (f) the term of office of the President;
- (g) the independence of the judiciary, the commissions and independent offices;
- (h) the functions of Parliament;
- (i) the objects, principles and structure of devolved government; or
- (j) the provisions on amendment of the Constitution.

94. An amendment that does not relate to the matters specified above shall be enacted either by Parliament or through popular initiative in accordance with Article 256 and 257, respectively.

#### 4.1.1 Amendment by Parliamentary Initiative

95. Pursuant to Article 256 of the Constitution, a Bill to amend the Constitution—

- (a) may be introduced in either the National Assembly or the Senate;
- (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; and
- (d) shall have been passed by Parliament when each House has passed the Bill in both the second and third reading by not less than two-thirds of all members of that House.

96. It is required that Parliament shall publicise any Bill to amend the Constitution and facilitate public discussion on the Bill.

97. After Parliament passes the Bill, the Speakers of the Houses shall jointly submit to the President a Bill for assent and publication as well as a certificate that the Bill has been passed by Parliament.

98. Where the Bill does not require a referendum, the President shall assent to the Bill and cause it to be published within thirty days after the Bill is enacted by Parliament.

99. Where the Bill requires a referendum, the President shall before assent to the Bill, request the Independent Electoral and Boundaries Commission (IEBC) to conduct a national referendum within ninety days. Suppose the Bill is approved through a referendum, the President shall assent to the Bill and cause its publication within thirty days after the chairperson of IEBC has certified to the President that the Bill has been approved.

#### **4.1.2 Amendment by Popular Initiative**

100. Pursuant to Article 257, an amendment to the Constitution may be proposed by a popular initiative signed by at least one million registered voters.

101. If the form of the amendment is a general suggestion, the promoters shall formulate it into a draft Bill and deliver the draft Bill and the supporting signatures to IEBC for verification. The IEBC shall, after verification, submit the draft Bill to each county assembly for consideration within three months after it was submitted to the Commission.

102. Once a county assembly approves the draft Bill, the speaker of the county assembly shall deliver a copy of the draft Bill jointly to the Speakers of the National Assembly and the Senate with a certificate that the county assembly has approved it.

103. The draft Bill shall be introduced in Parliament if approved by a majority of the county assemblies.

104. Under a popular initiative, a Bill is passed by Parliament if supported by a majority of the members of each House. Once Parliament passes the Bill, it shall be submitted to the President for assent.

105. If either House fails to pass the Bill or the Bill relates to a matter that requires approval through a referendum, the proposed amendment shall be submitted to the people in a referendum.

#### **4.1.3 Introduction of a Bill to Amend the Constitution in Parliament**

106. While a Bill to amend the Constitution may be introduced in either House of Parliament, the procedure for the introduction of such a Bill differs in the Senate and the National Assembly.

#### ***4.1.3.1 Introduction of a Bill to Amend the Constitution in the Senate***

107. In the Senate, there is no special procedure for the introduction of a Bill to amend the Constitution, which means that the process does not significantly depart from that of other legislative proposals. This includes review to confirm whether the proposal conforms to the Constitution and the law, following which it is referred to the relevant Committee for pre-publication scrutiny.
108. Consequently, the Committee may examine the proposal and seek the views of the sponsor, the relevant Cabinet Secretary or any other person on the likely impact of the legislative proposal. The Committee may also suggest variations to improve the legislative proposal, but the sponsor is not bound to incorporate such variations.
109. Thereafter, the Committee submits its comments to the Speaker who may direct that the legislative proposal be published.

#### ***4.1.3.2 Introduction of a Bill to Amend the Constitution in the National Assembly***

110. On the other hand, Standing Order 114(7A) of the National Assembly Standing Orders provides that a proposal to amend the Constitution shall be accompanied by the signatures of at least fifty (50) other Members in support unless it is sponsored by the Majority Party or the Minority Party.
111. Where the Speaker approves the pre-publication scrutiny of the proposal, the Speaker shall notify the House of such approval and may—
- (a) allow the sponsor to make a statement on the objectives of the proposal.
  - (b) allow comments on the statement made by the Member.
  - (c) facilitates collation of views from the comments of Members at an appropriate forum; and
  - (d) invite Members with similar or related proposals to submit to the committee to which the proposal is referred.
112. Further, the forum or committee to which the legislative proposal is referred shall—
- (a) invite and consider submissions from the Attorney General, commissions and independent offices established under Chapter Fifteen of the Constitution, and the Kenya Law Reform Commission; and
  - (b) in consultation with the sponsor, develop and recommend a harmonized version of the proposal arising from the submissions received.

113. The Speaker of the National Assembly, vide Communication No. 001 of 2022 dated Tuesday 4<sup>th</sup> October 2022 (*Annexure 9*), directed that the introduction of a legislative proposal to amend the Constitution must comply with Standing Order 114(7A) of the

National Assembly Standing Orders. This is to enrich the legislative process and comply with Article 256(2) of the Constitution which obligates Parliament to publicize any Bill to amend the Constitution and facilitate public discussion.

114. Further, vide Communication No. 088 of 2023 dated Thursday 30<sup>th</sup> November 2023 (*Annexure 10*), the Speaker of the National Assembly reiterated the need to comply with Standing Order 114(7A) of the National Assembly Standing Orders as read with Article 256 of the Constitution, noting that the procedure aims to collate as many views as possible from stakeholders and experts as may be practicable before a proposal to amend the Constitution is published into a Bill.

#### **4.1.4 Publication and Public Discussion**

115. Article 256 (2) of the Constitution requires Parliament to publicise any Bill to amend the Constitution and facilitate public discussion on the Bill.

116. Public participation and collation of views is a fundamental constituent of the sovereignty of the people in constitution-making. As a principle of good governance and a constitutional right enshrined in Articles 10 and 33 of the Constitution, public participation must be meaningful and should follow the sensitization of the people on the subject matter.

117. In the *Attorney-General & 2 others vs David Ndi & others; Petition 12 of 2021 (Consolidated)* at the Supreme Court of Kenya, the Court was seized of the question on conducting public participation in respect of a Bill to amend the Constitution. In determining this question, the Court appreciated that while public participation is a foundational value and principle of good governance, it is even more crucial with respect to the processes that would lead to constitutional amendment.

118. The Court proceeded to lay down the following guiding principles for public participation—

- (a) *as a constitutional principle under Article 10(2) of the Constitution, public participation applies to all aspects of governance;*
- (b) *the public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation;*
- (c) *the lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means;*
- (d) *it must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfil' a constitutional requirement. There is a need for both quantitative and qualitative components in public participation;*

- (e) *it is not an abstract notion; it must be purposive and meaningful;*
- (f) *it must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case-to-case basis;*
- (g) *is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process; and*
- (h) *allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case-to-case basis.*

119. Parliament would thus, in seeking to implement the recommendations for amendment to the Constitution as contained in the NADCO and MSWG Reports, need to comply with the dictates of the Constitution to publicise any Bill to amend the Constitution and facilitate public discussion about the Bill.

#### **4.2 Committee Observations**

120. Pursuant to the directions given by the Speakers of the two Houses, the Committees proceeded to consider the manner of actualizing the recommendations of the National Dialogue Committee on amendment of the Constitution, under the following thematic areas –

- a) The number of Bills to be published; and
- b) The process to be followed in consideration of the Bills.

##### **4.2.1 The Number of Bills to be Published**

121. The Committees were of the considered view that, in such a case, three (3) Bills may be published for consideration by Parliament, being—

- a) a Bill to amend the Constitution to entrench the National Government Constituency Development Fund, the Parliamentary Oversight Fund and the National Government Affirmative Action Fund, respectively, in the Constitution;
- b) a Bill containing the other amendments that do not require to be subjected to a referendum, including implementation of the two-thirds gender principle in Parliament; and
- c) a Bill containing the amendments that would require to be subjected to a referendum, pursuant to Articles 255 and 256(5) of the Constitution.

##### **4.2.2 The Process to be Followed in Enacting the Bills**

122. The Committees considered three questions under this thematic area, namely—

- i) In which House of Parliament will the Bill(s) be introduced, and will they be considered sequentially or concurrently?



- ii) How and at what point will public participation on the Bill(s) be undertaken?
- iii) How will the referendum question be framed?

#### **4.2.2.1 Introduction of the Bill(s)**

123. The Committees observed that while a Bill to amend the Constitution by way of popular initiative may be considered by the two Houses of Parliament separately, and thus simultaneously, Article 256 of the Constitution required that a Bill to amend the Constitution by parliamentary initiative be considered sequentially, by being introduced in one House and then referred to the other.

#### **4.2.2.2 Conduct of Public Participation on the Bill(s)**

124. The Committees considered whether public participation would be undertaken on the draft Bill(s) prior to publication as provided for in Standing Order 114(7A) of the National Assembly Standing Orders, or upon publication, as contemplated under Standing Order 145(5) of the Senate Standing Orders.

125. In deliberating on the matter, the Committees considered, among others—

(a) the decision of the High Court in *Ndii & others v Attorney General & others (Petition E282, 397, E400, E401, E416 & E426 of 2020 & 2 of 2021 (Consolidated)) [2021] KEHC 9746 (KLR) (Constitutional and Human Rights)*, where the Court affirmed that public participation on a Bill to amend the Constitution takes place prior to publication and that, once published, any amendments to such a Bill must be discouraged; and

(b) the Communication by the Speaker of the National Assembly dated 20<sup>th</sup> August, 2015, where the Speaker noted that the Constitution sets out a distinct procedure for the consideration and passage of a Bill to amend the Constitution different from that prescribed for ordinary legislation. The Speaker ruled that a plain reading of Article 256 of the Constitution clearly reveals that, while the Constitution does not expressly disallow amendments to a Bill proposing to amend the Constitution, it deliberately discouraged amendments unless there is anything extraordinary in the proposed Bill that would require application of extraordinary measures.

126. The Committees thus observed that, once a Bill to amend the Constitution has been published and introduced in Parliament, any amendments to such a Bill is discouraged.

127. That being the case, the Committees observed that extensive civic education and public participation must precede the publication and introduction in Parliament of a Bill to amend the Constitution, in order to ensure compliance with Articles 10, 118 and 256 of the Constitution. This would allow an opportunity for the views, comments and input received

from stakeholders and members of the public to be considered and incorporated in the draft Bills, before the final versions are published and introduced in either House of Parliament.

128. This, the Committees noted, would necessitate amendments to the Senate Standing Orders to clarify the procedure for the introduction and consideration of a Bill to amend the Constitution, as distinguished from other ordinary Bills.

#### **4.2.2.3 Conduct of Referendum**

129. The Committee considered whether the public would be required to take single or multiple votes with respect to the proposed amendments that would need to be subjected to a referendum. The Committees observed that both Article 256 and 257 of the Constitution explicitly refer to a Bill being subjected to the referendum, and not multiple issues to be voted on separately.
130. The Committees further observed that—
- a) in voting to approve the 2010 Constitution, Kenyans took a single vote on the entire document and did not vote on it issue by issue; and
  - b) the Court of Appeal in *Civil Appeal No. E291 of 2021 (Consolidated), IEBC v David Ndii and Others*, affirmed that what is to be submitted to the people in a referendum is not a question or questions, it is a Bill, and that a Bill to amend the Constitution may contain more than one amendment.

## CHAPTER FIVE

### 5 COMMITTEE RECOMMENDATIONS

#### 5.1 Introduction

131. Having considered the Bills to amend the Constitution as proposed by the National Dialogue Committee and the Multi-Sectoral Working Group on Implementation of the Two-Thirds Gender Principle, the Committees make the following recommendations—

#### 5.2 Textual Amendments to the Bills

132. The Committee recommends that draft Constitution of Kenya (Amendment) Bill, 2024 proposed by the National Dialogue Committee be revised by deleting the following proposals—

- (i) Requirement for State and public officers to promptly obey court orders;

**Justification:** There are existing legislative provisions adequately cater for this.

- (ii) extension of the term of the Senate from five years to seven years;

**Justification:** No sufficient justification has been made for the proposed amendment. Additionally, altering the term and date of election of members of the Senate would require a complete overhaul of the Constitution.

- (iii) Entrenchment of the Office of Leader of Opposition;

**Justification:** The proposal undermines the presidential system of governance in Kenya. Further, 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, with the same provisions replicated in the Senate Standing Orders.

- (iv) Deregistration by a political party as one of the ways in which one would vacate the office of a Member of Parliament, county governor or member of county assembly.

**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. The current Political Parties Act and related legislation already regulate party discipline effectively. Article 103 of the Constitution allows Parliament to create laws promoting party fidelity and managing party membership changes. The Committee believes party discipline procedures should be based on facts and merit.

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

**Justification:** The proposed amendment could fit well in the current EALA Act as opposed in the Constitution of Kenya. The Committee provisions of the EALA Treaty do not contemplate incorporation of the proposed provisions to the Constitution of Kenya. The Constitution of Kenya does not provide for the specific recognition and status of other leaders. The proposed provision could interfere with the sovereignty of the people of Kenya since members of EALA are not directly elected by the people of Kenya.

133. The Committees further recommend that the draft Constitution of Kenya (Amendment) Bill, 2023 by the Multi-Sectoral Working Group on Implementation of the Two-Thirds Gender Principle 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.

### **5.3 Number of Bills to be Published**

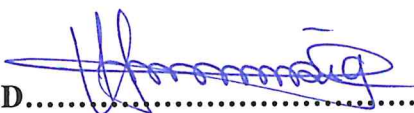
134. The Committees recommend that the proposals to amend the Constitution as contained in the NADCO and MSWG Reports be reduced to three Bills, as follows—
- (i) a Bill to amend the Constitution to entrench the National Government Constituency Development Fund, the Parliamentary Oversight Fund and the National Government Affirmative Action Fund, respectively, in the Constitution;
  - (ii) a Bill containing the other amendments that did not require to be subjected to a referendum, including implementation of the two-thirds gender principle in Parliament; and
  - (iii) a Bill containing the amendments that would need to be subjected to a referendum, pursuant to Articles 255 and 256(5) of the Constitution.

### **5.4 The Process to be Followed in Enacting the Bills**

135. The Committees recommend the following process for enactment of the Bills to amend the Constitution –

- (i) That the Bills be redrafted in the manner proposed herein and that the same be printed and circulated to the Members and the public for their comments;
- (ii) That Parliament publicizes and, through the two Committees, facilitates public discussion on the Bills, as contemplated under Article 256(2) of the Constitution; and
- (iii) That the two Bills not requiring a referendum, be introduced in either House of Parliament.

DATE..... 5/12/024 ..... DATE..... 5/12/024 .....

SIGNED.....  ..... SIGNED.....  .....

**HON. GEORGE GITONGA  
MURUGARA, CBS, MP**

**SEN. WAKILI HILLARY SIGEI, MP**

**CHAIRPERSON**

**CHAIRPERSON**

**DEPARTMENTAL COMMITTEE ON  
JUSTICE AND LEGAL AFFAIRS**

**SENATE STANDING COMMITTEE ON  
JUSTICE, LEGAL AFFAIRS AND  
HUMAN RIGHTS**

