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PARLIAMENT OF KENYA



THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT-FOURTH SESSION

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JOINT MEETING BETWEEN THE CONSTITUTIONAL IMPLEMENTATION OVERSIGHT COMMITTEE AND THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

REPORT ON THE CONSIDERATION OF THE REFERENDUM BILL, (NATIONAL ASSEMBLY BILLS NO 11), 2020 AND THE REFERENDUM (NO.2) BILL (NATIONAL ASSEMBLY BILLS NO. 14),

Directorate of Committee Services
The National Assembly,
Parliament Buildings,
NAIROBI

2020

THE NATIONAL ASSEMBLY PAPERS LAID

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CHAPTER 1

1.0. INTRODUCTION AND BACKGROUND

1.1. Background

The Referendum Bill, 2020, (National Assembly Bills No. 11) of 2020 is a Bill prepared and sponsored by the Constitutional Implementation Oversight Committee (CIOC) through its Chairperson, Hon. Jeremiah Kioni, M.P. The Bill was published in the Kenya Gazette on 8th May, 2020 as (National Assembly Bills No. 11 of 2020). It was introduced in the National Assembly through First Reading on 2nd June of, 2020 and was subsequently committed to the CIOC for consideration, facilitation of public participation and reporting to the House, pursuant to provisions of Standing Order 127(6). The Committee tabled its report in the House on 17th September, 2020.

The Referendum (No.2) Bill, 2020 (National Assembly Bills No. 14) on the other hand is a Bill sponsored by the Departmental Committee on Justice and Legal Affairs, through its former Chairperson, Hon. William Cheptumo, M.P. The Bill was published in the Kenya Gazette on 29th May, 2020. It was introduced in the National Assembly for First reading on 18th June, 2020 and was subsequently committed to the Departmental Committee for consideration, facilitation of public participation and reporting to the House. The Committee tabled its report in the House on 15th October, 2020.

Following the tabling of the two reports in the House, the Speaker of the National Assembly directed the Chairpersons of the two Committees to meet and consider the two Committee reports on the Referendum Bills with a view to harmonizing the two Bills. The Chairpersons of the Departmental Committee on Justice and Legal Affairs and the Constitutional Implementation Oversight Committee held consultations on Wednesday 17th November, 2020 with regard to the two referendum bills before the House. They resolved to nominate five members from each of the two committees to look at the Reports tabled by the committees on the two Bills with a view to developing a harmonized version to be considered by the House.

1.2. Joint Committee Members

The Joint Committee that was nominated consisted of the following Members:

1. Hon.Jeremiah Kioni, M.P – **Chairperson , CIOC (Co-chair)**
2. Hon.(Dr).Otiende Amolo,M.P-**Vice-Chairperson, JLAC (Co-chair)**
3. Hon.Peter Kaluma, M.P - **Vice-Chairperson, CIOC**
4. Hon. Jennifer Shamalla, M.P.-JLAC
5. Hon.Olago Aluoch, M.P.- JLAC
6. Hon.Anthony Aluoch,M.P - CIOC
7. Hon. Zuleikha Hassan, M.P. -JLAC
8. Hon. Japheth Mutai, M.P. - JLAC
9. Hon.Tom Kajwang,M.P - CIOC
10. Hon.Christine Ombaka,M.P – CIOC
11. Hon. Yusuf Hassan Abdi, M.P. – CIOC

1.3. Joint Committee secretariat

The Joint Committee was facilitated by a secretariat consisting of the following:

1. Mr. Dennis Abisai - Principal Legal Counsel I
2. Mr. Abenayo Wasike - Principal Clerk Assistant II
3. Mr. Edward Libendi - Senior Legal Counsel
4. Ms. Christine Odhiambo - Legal Counsel I
5. Ms. Gituto Mugure - Legal Counsel I

CHAPTER 2

2.0. MEETING OF THE JOINT COMMITTEE

The Joint Committee resolved and held a retreat at the Pride Inn Hotel in Mombasa from 19th to 22nd November, 2020 and deliberated on the Referendum Bill, 2020 (N.A Bill No.11) by the Constitutional Implementation Oversight Committee (CIOC) and the Referendum Bill (No.2) Bill, 2020 (N.A Bill No.14) by the Departmental Committee on Justice and Legal Affairs (JLAC).

Members of the joint Committee observed that the two Bills had no fundamental differences but identified five substantive divergent issues that they needed to discuss and develop a consensus over. The Five issues identified and the resolutions of the Joint Committee on the Bills are as follows:

2.1. Consideration of the Divergent Issues in the Bills

No.	CIOC BILL	JLAC BILL	JOINT COMMITTEE RESOLUTION
1.	Redrafting of Bill in the case of a popular initiative- The proposed new Clause 4 of the CIOC Bill provides a role for the Clerks of the Houses and the Kenya Law Reform Commission to review and redraft a Bill submitted by the promoters of a popular initiative under Article 257 of the Constitution.	It did not provide for re-drafting of Bill	The Committee noted that Article 257(3) requires the Promoters themselves to convert the general suggestions into a Bill. Thus it was agreed that there should be no room for redrafting of the proposed constitutional amendment under a popular initiative and therefore the CIOC proposal on the same be deleted. .
2.	Procedure of considering the Popular initiative Bill at the County Assemblies- The proposed new Clause 5 of the CIOC Bill provided for the procedure of processing the constitutional amendment Bill at the County Assemblies.	The Bill did not provide the procedure	It was agreed that the CIOC proposals may be adopted as amended by the Joint Committee

3.	Parliamentary Initiative in Article 256 Does not give details on Parliamentary Initiative especially timelines for President to forward Bill to IEBC	Parliamentary Initiative in Article 256 Provides procedure for an amendment by Parliamentary Initiative e.g. Gives President 14 days to forward Bill to the IEBC to conduct a referendum after passage by Parliament following a Parliamentary initiative	It was agreed that the JLAC proposals may be adopted as amended by the Joint Committee
4.	Framing of Referendum Question: Clause 6 gives the IEBC authority to frame and publish the Question(s)	Framing Referendum Question: Clause 9 requires the Commission after framing the Referendum Question to refer the Question or Option to Parliament for approval	It was agreed that Parliament should not be involved in approving the referendum question and therefore CIOC proposal be adopted.
5.	Referendum petition- Clause 29 of the Bill provides for hearing of petition to be by a bench of 3 judges and to be heard within six months	Referendum petition- Clause 21 of Bill provides for hearing of petition to be by a bench of 3 judges and to be heard and determined within six months	The Joint Committee proposed filing to be done within 14 days and hearing and determination within 30 days.
6.	Right of appeal following the High Court decision on a Referendum petition- Clause 41(5) of Bill proposes that the High Court decision is final	Right of appeal following the High Court decision on a Referendum petition- Clause 21 of Bill proposes that parties aggrieved by the decision of the High Court had a right of appeal to the Court of Appeal.	It was agreed that a right of appeal be allowed thus the <u>JLAC proposal</u> was <u>adopted but with amendments limiting time for filing appeal to 7 days</u> and the <u>hearing and determination of appeal to 21 days</u> .
7.	Application of the Elections Act and Regulations to the referendum New Clause 44A provides for the general application of the Elections Act, 2011 and regulations made thereunder with necessary modifications to a referendum	Application of the Elections Act and Regulations to the referendum Clause 3 of the Bill sets out a list of situations and events where the Elections Act, 2011 may be applied to the referendum, with necessary modifications	It was agreed that to avoid the danger of not listing all provisions that may need to be applied, the CIOC proposal be adopted.
8.	Regulations – Clause 45 of Bill gives IEBC power to make regulations	Clause 40 of Bill gives IEBC power to make regulations	The Joint Committee resolved that the provision on power to make regulations vested in IEBC be deleted so as not to

			cause any delay in processing the referendum
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CHAPTER 3

3.0. RECOMEMDED AMENDMENTS

Having agreed on the divergent issues in the two Bills, members made recommendations as per the below attached proposed amendments. It was resolved that further discussions will be held between the two Chairpersons on the Bill to be taken up and once agreed, then the proposed amendments below be incorporated into one Bill and to be seconded by the Chairperson of the Committee whose Bill will have been dropped.

3.1. Recommendations relating to the Referendum Bill, 2020 (National Assembly Bills No. 11) (CIOC BILL).

PROPOSED CLAUSE 4

THAT the Bill be amended by –

(a) deleting sub-clause (2) and substituting therefor the following new sub clauses-

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

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

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

(5) The Commission shall within thirty days of receipt of the draft Bill verify that the initiative is supported by at least one

million registered voters and if satisfied that the initiative meets the requirements of Article 257 of the Constitution and this section submit the draft Bill to each county assembly for consideration.”

- (b) deleting sub clause (3);
- (c) deleting sub clause (4); and
- (d) deleting sub clause (5).

Justification

The amendment seeks to align the procedure under popular initiative with the provisions of Article 257 of the Constitution.

PROPOSED CLAUSE 5

THAT the Bill be amended by-

- (a) deleting sub clause (1);
- (b) deleting sub clause (2);
- (c) deleting the word “jointly” appearing in sub clause (4);
- (d) deleting sub clause (6);
- (e) deleting the words “under section 4 (5)” appearing in sub clause (7);
- (f) deleting sub clause (12); and
- (g) deleting the words “six months” appearing in sub clause (13) and substituting therefor the words “thirty days”;

Justification

The amendments seek to remove detailed procedures on how the county assemblies should process a Bill to amend the constitution under the popular initiative (Article 257). It was agreed that the Bill should be processed in accordance with the County Assemblies Standing Orders and the provisions in the Referendum Bill. The amendments also propose to reduce the period within which a county assembly must consider the Bill from six months to thirty days.

CLAUSE 45

THAT the Bill be amended by deleting clause 45.

Justification

The amendment seeks to reduce the unnecessary impediments that may arise out of the need to draft regulations on the referendum. It further buttresses the application of the already existing Elections Act and the applicable subsidiary legislation under the Elections Act.

3.2. Recommendations relating to the Referendum Bill (No. 2), 2020, (National Assembly Bills No. 14) (JLAC).

CLAUSE 3

THAT, the Bill be amended by deleting Clause 3 and substituting therefor the following new Clause –

Application of the Elections Act No. 24 of 2011. **3.** Except as may be provided in this Act, the provisions of the Elections Act and the regulations made thereunder shall apply, with necessary modifications, to a referendum.

Justification

The current provision tends to limit the application of the Elections Act to the matters specified in Clause (1)(a)-(p) which may not be exhaustive of all the circumstances where there may be need to apply the Elections Act when conducting a referendum. The amendment thus seeks to expand the application of the Elections Act and the subsidiary legislation thereunder to a referendum, with the necessary modifications.

CLAUSE 9

THAT the Bill be amended by deleting clause 9 and substituting therefor the following new clause-

“9. Where the Commission—

- (a) receives a notification from the President under Article 256 (5)(a) of the Constitution; or
- (b) a draft Bill from the promoters of a popular initiative under Article 257 of the Constitution,

the Commission shall, within twenty one days, frame the question to be determined during the referendum.”

Justification

The amendment seeks to provide for an effective and efficient procedure to be undertaken by the Commission before the conduct of a referendum under the parliamentary initiative. The amendments also seek to provide that the Independent Electoral and Boundaries Commission shall only frame a referendum question and not any other options for approval by the people at a referendum.

CLAUSE 16

THAT the Bill be amended—

- (a) by deleting sub clause (2) and substituting therefor the following sub clause—

“(2) A petition—

- (a) to question the validity of the referendum; or

(b) to seek a declaration concerning any matter relating to the referendum,
shall be filed within fourteen days after the date of the declaration of the results.”

(b) by deleting the words “six months” appearing in sub clause (3) and substituting therefor the words “thirty days”

Justification

The amendment seeks to set reasonable timelines for filing and hearing of referendum petitions at the High Court cognizant of the fact that time is an essential resource.

CLAUSE 21

THAT clause 21 of the Bill be amended in sub clause (2) by—

- (a) deleting the word “thirty” appearing in paragraph (a) and substituting therefore the word “seven”; and
- (b) deleting the words “six months” appearing in paragraph (b) and substituting therefor the words “twenty one days”

Justification

The amendment seeks to set reasonable timelines for filing and hearing of referendum petition appeals at the Court of Appeal cognizant of the fact that time is an essential resource.

CLAUSE 40

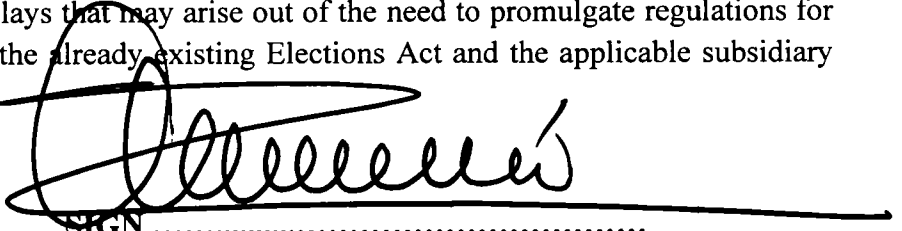
THAT the Bill be amended by deleting clause 40.

Justification

The amendment seeks to reduce the unnecessary impediments and delays that may arise out of the need to promulgate regulations for the conduct of a referendum. It further buttresses the application of the already existing Elections Act and the applicable subsidiary legislation under the Elections Act.


SIGN.....

THE HON. JEREMIAH KIONI, M.P.
CHAIRPERSON, CIOC


SIGN

HON. MUTURI KIGANO, M.P.
CHAIRPERSON, JLAC

DATED THIS.....^{16th}.....DAY OF^{Feb}.....2020

Hon Otiende Amollo
Vice Chair JLAC