



MEMORANDUM ON THE CONSTITUTION OF KENYA (AMENDMENT) BILL 2020

PRESENTED TO

THE NATIONAL ASSEMBLY AND THE SENATE
THE TWELFTH PARLIAMENT (FIFTH SESSION)

SUBMITTED TO

CLERK OF THE NATIONAL ASSEMBLY AND CLERK OF THE SENATE
PO BOX 41842-00100, NAIROBI

IN THE MATTER OF CONSIDERATION BY THE JOINT COMMITTEE OF THE NATIONAL ASSEMBLY AND THE
SENATE: THE CONSTITUTION OF KENYA (AMENDMENT) BILL, 2020

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SUBMITTED BY:

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1.0 INTRODUCTION

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) is a non-governmental, non-profit, and member-based organisation whose objectives include development, protection of the rule of law, democracy, governance, promotion human rights, and safeguard of independence of the Judiciary and the legal profession.

ICJ Kenya has reviewed and interrogated the Constitution of Kenya (Amendment) Bill 2020. It submits this memorandum in line with its mandate. Further, it responds to the invitation for public participation and submission of memoranda by the National Assembly and the Senate - The Twelfth Parliament (Fifth Session) dated 5 March 2021. This memorandum highlights ICJ Kenya's select views of the proposals included in the Bill.

2.0 BACKGROUND/CONTEXT

In 2017, Kenya held its second general election under the 2010 Constitution, which was sharply contested. The country witnessed deepened political polarisation between the two factions that supported His Excellency Uhuru Kenyatta and the Rt's presidential candidacy. Hon. Rail Odinga. In 2018 and amid calls to lower the political temperatures amongst the divergent factions, the two principals met and agreed to work together. A handshake symbolised the partnership, which birthed the Building Bridges Initiative (BBI) process spearheaded by the two principals to build national discussion and consensus towards uniting Kenya.

The national discussions and subsequent report by the Steering Committee on Implementing the Building Bridges to a United Kenya Taskforce Report culminated into the Constitution of Kenya (Amendment) Bill 2020, which was considered at the County Assemblies and later presented at the National Assembly and Senate for deliberation.

This memorandum provides observations on select proposed amendments contained in the Bill. , Our views are informed not only by public dialogue forums that ICJ Kenya convened and on thematic discussions on constitutional, legal, and policy reform proposals but also ICJ Kenya's mandate. In this regard, the ICJ Kenya conclusions are premised on the fact that the 2010 Constitution is relatively young and more is required towards its implementation and embedding of constitutionalism; thus, we take the position that any attempt to change its contents at this stage would be premature.

3.0 THE ISSUES

3.1. Chapter 7 of the Constitution – Representation of the People

3.1.1. Clause 7 of the Bill

Clause 7 of the Bill proposes to amend Article 82 (Legislation on elections) to provide for Parliament to enact legislation imposing sanctions on a political party that fails to ensure that the party's list of nominated candidates comply with the principle that not more than one-thirds of such candidates are of the same gender. This is to compel political parties to facilitate the actualisation of the gender rule in the electoral process from the nomination stage.

Observations: This can be effected through a legislative amendment in either the subsisting Elections Act or Political Parties Act. Therefore, it should not require a Constitutional amendment.

3.1.2. Clause 10 of the Bill

Clause 10 of the Bill proposes to amend Article 89 (Delimitation of electoral units) to increase the number of constituencies from the current two hundred and ninety constituencies to three hundred and sixty constituencies. This is to facilitate attainment of fair representation in the National Assembly and to actualise the aspiration of the equality of the vote principle, especially in the currently underrepresented electoral areas.

Observations: The rationale for increasing the number of constituencies and, subsequently, the number of representatives in parliament is ambiguous and untenable. By implication, the potential financial burden on the current colossal wage bill will be unsustainable. Further, the Constitutional mandate of the Independent Electoral and Boundaries Commission (IEBC) is to conduct review and delimitation of electoral units based on a process already proscribed in the Constitution.

3.2. Chapter 8 of the Constitution – The Legislature

3.2.1. Chapter 8

The Bill seeks to amend Chapter Eight of the Constitution on the Legislature to remodel the parliamentary system by including the government in the National Assembly and to enhance the oversight powers of the Houses of Parliament. It is proposed that the Executive will be represented in the National Assembly by the Prime Minister, Deputy Prime Ministers, Cabinet Ministers Deputy Ministers and the Attorney-General. The office of the Leader of the Official Opposition is established. The existing disqualifications for the members of the county assemblies from being qualified to be elected as members of Parliament are removed.

Observations: The prime minister, deputy prime ministers, and the attorney-general sitting in Parliament subverts the doctrine of separation of powers. This will claw back on the people-driven discussions held during the constitutional review process. A majority expressed the view of the need to move from an autocratic state that was heavily executive-driven. Further, the benefit of technocratic skills and knowledge rather than politicians heading ministries will be significantly lost.

3.2.2. Clause 13

Clause 13 of the Bill proposes to amend Article 97 (Membership of the National Assembly) to increase the number of the members of the National Assembly elected from constituencies from the current 290 members to 360 members. This is a consequence of the proposed increase in the number of constituencies. Further, the amendment provides for the nomination of persons with disabilities and the youth to the National Assembly. Lastly, special top up seats are created to ensure the gender principle is actualised.

However, in the filling of the special top-up seats, it is provided that a first priority in the nomination shall be given to candidates who contested for the constituency seats and were not elected. The affirmative action for top-up will only last for fifteen years.

Observations: Noting the increase of the National Assembly members to 360 and given the past experiences on election patterns including violence against women, it is likely that we will require a large number of nominated top-up members to meet the two-thirds gender constitutional requirement. Several civil society reports have documented these experiences by women in the political process.

Consequently, this will further increase the number of representatives to an unknown number which will have a substantial negative impact on the wage bill. Similarly, it beats the rational representation rationale and creates an over-representative scenario with a significant burden on the Kenyan citizen. Equally, the proposed sunset clause is potentially problematic; Kenya is predominantly a patriarchal society and to cap the period is ambitious and presumptions. It would be best to achieve gender parity through incremental gains and implementing the affirmative action principle.

3.2.3. Clause 14

Clause 14 of the Bill proposes to amend Article 98 (Membership of the Senate) to structure the membership of the Senate to achieve gender parity. It is proposed for the Senate to have ninety-four members, each county represented by a woman and a man elected by voters in the counties.

Observations: Having women representatives at the national assembly provides an opportunity for equitable representation at the national level. Placing the women representatives at the Senate limits their contribution to county-related matters. It would have been ideal and meaningful to scale up women's representation at the Senate while making provisions to retain the National Assembly numbers.

3.3. Chapter 9 of the Constitution – The Executive

3.3.1. Clause 28 of the Bill

The Bill seeks to amend Chapter Nine of the Constitution on the Executive to broaden the executive structure to achieve inclusivity, cohesiveness, and unity for the benefit of the people. This Chapter introduces the office of the Prime Minister and two Deputy Prime Ministers, with leadership roles in the Executive and Parliament. It also provides that Cabinet Ministers may be appointed from among members of the National Assembly.

Clause 29 of the Bill proposes to amend Article 152 (Cabinet) to provide for a mixed cabinet with some members of the Cabinet being appointed from the members of National Assembly. The amendment further provides for the membership of the Prime Minister and Deputy Prime Ministers into the Cabinet. Lastly, the tenure of office of the Cabinet is provided, outlining that the Cabinet remains in office until the President-elect assumes office.

Observations: The creation of the three offices will have financial implications on the public wage bill. Also, the positions are unnecessary as they do not address or change

the "winner takes it all" problem as the prime minister's appointment. The two deputy prime ministers are done at the discretion of the President. The Bill allows the President to bypass the National Assembly's approval where the National Assembly fails to confirm the appointments. Similarly, the appointment of the two deputy prime ministers from amongst cabinet ministers and the fact that the prime minister sits in Parliament contradicts the doctrine of separation of powers.

3.4. Chapter 10 of the Constitution – Judiciary

3.4.1. Clause 37 to 41 of the Bill

The Bill seeks to amend Chapter Ten of the Constitution on the Judiciary to provide for more transparency in the judicial processes. The proposed amendments provide for the finality of the decisions of Court of Appeal in petitions concerning an election and limits the tenure of the President of the Court of Appeal and High Court to five years. The amendments further provide for the tenure of the Deputy Chief Justice and aligns it with that of the Chief Justice. The Bill further seeks to introduce the Judiciary Ombudsman as a non-voting member of the Judicial Service Commission.

Clause 39 of the Bill proposes to amend Article 166 (Appointment of Chief Justice, Deputy Chief Justice and other Judges) to enhance the qualifications of the judges of the Supreme Court and the Court of Appeal relating to their experience. The amendment provides the qualification of a judge of the Supreme Court to be twenty years, a judge of the Court of Appeal to be fifteen years and that of a judge of the High Court to be ten years.

Clause 40 of the Bill proposes to amend Article 167 (Tenure of office of the Chief Justice and other judges) to provide for the tenure of office of the Deputy Chief Justice and harmonise it with the tenure of office of the Chief Justice.

Clause 41 of the Bill proposes to amend Article 168 (Removal from Office) to provide that the Judiciary Ombudsman may initiate a motion to remove a judge from office on account of complaints received from the members of the public. This enables the Judiciary Ombudsman to prosecute complaints received against a judge in the Judicial Service Commission.

Clause 43 of the Bill proposes to amend Article 172 (Functions of the Judicial Service Commission) to provide a mechanism to enable the Judicial Service Commission to discipline judicial officers, including judges.

Clause 44 of the Bill proposes to insert a new Article 172A (The Office of the Judiciary Ombudsman) into the Constitution to establish the Office of the Judiciary Ombudsman which shall be responsible for handling complaints on the judicial process from the members of the public.

Observations: While the intention to enhance the Judiciary's accountability is noble, in ICIJ Kenya's view, the introduction of the Judiciary Ombudsman (JO) is a blatant attack on the principle of judicial independence. In essence, the JO will have the power to initiate disciplinary proceedings and prosecute complaints received against a Judicial officer, including Judges. It is already the Judicial Service Commission's (JSC) mandate to discipline judicial officers and receive complaints about judges. The proposal that the JO

will report to the President and parliament contraventions international and regional judicial standards such as the Commonwealth Latimer House Principles on the separation of powers. Therefore, the proposals are ill-conceived and fail to address the root cause in the weakens of judicial accountability, the need to strengthen the JSC.

The proposal states that the JO will be a non-voting member of the JSC. The Executive has four representatives to the Commission; the Attorney General, Public Service Commission representative, and two public representatives who the President has direct influence over. The inclusion of the JO will therefore be an over-representation of the Executive in the JSC.

The increase of years of experience required of Judges of the Supreme Court and the Chief Justice to 20 years limits the judges' period within the apex Court. This will cause instability in the leadership of the Judiciary as an arm of government. In our view, the proposal is informed by the intention of the political class to influence the Constitution of the bench in anticipation of every general election. This compromises the independence of the Judiciary and rule of law in the country.

3.5. Article 203 of the Constitution – Equitable share and other financial laws

3.5.1. Clause 50 of the Bill

Clause 50 of the Bill proposes to amend Article 203 (Equitable share and other financial laws) to expand the criteria for determining equitable share to include the need to eradicate corrupt practices and wastage of public resources the need to ensure the attainment of the economic and social rights guaranteed under Article 43 and ensure the average amount of money allocated per person to a county with highest allocation does not exceed three times the average amount per person allocated to a county with the lowest allocation. It further increases the percentage of funds allocated to county governments from fifteen to thirty-five to strengthen devolution and ensure that county governments have adequate funds to carry out their operations.

Observations: This proposal is geared to strengthen devolution; however, the proposed increase from 15% to 35% is ambitious owing to the documented challenges experienced in implementing the current framework. Further, ICJ Kenya has always associated itself with the view that 'money follows' functions. The situation as it currently stands is a complete departure from the Constitution's intentions on devolution to Kenyans' lived realities. Our humble submission is that the government should focus on strengthening the oversight mechanisms on the distribution, allocation, and utilisation of county governments' public resources. Therein, in our view, lies the problem.

4.0 CONCLUSION AND RECOMMENDATION

Considering the above observations, ICJ Kenya acknowledges that the Constitutional (Amendment) Bill 2020 has presented important reform questions on issues of law. However, the selected and highlighted proposed amendments presented directly take away fundamental gains made by the Constitution 2010 which is relatively young and still embedding its constitutionalism roots. Further, the Constitution's basic tenets or pillars, namely, popular sovereignty, separation of powers, limited

government, checks, and balances, have been severely compromised through these proposed amendments.

Further, the BBI process and approach remains concerning; it cannot be compared to the people driven approach taken towards the development of the Constitution n 2010, and as such, the document is not reflective of the views of a majority of Kenyans but rather those, in our opinion, political elites.

It is important to note that proposals to alter the current Constitution should be a people-driven and people-centered process that aligns with principles of the rule of law, democracy, and human rights. Any attempt to change the fundamental contents of the Constitution 2010 on governance, judicial independence, and representation at this instance would be premature. Therefore, upon several reflections, we retain the position that for Kenya to move forward, there must be a meaningful and deliberate implementation of the Constitution 2010.

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