

Hon. Speaker
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PARLIAMENT OF KENYA

THE SENATE

TWELFTH PARLIAMENT – THIRD SESSION

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REPORT OF THE
STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND
HUMAN RIGHTS

ON

THE CONSTITUTION OF KENYA (AMENDMENT) BILL
(SENATE BILLS NO. 16 OF 2019)

PAPERS LAID	
DATE	21/11/2019
TABLED BY	vice-chain
COMMITTEE	JLAC
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Clerk's Chambers,
The Senate,
Parliament of Kenya,
Main Parliament Buildings,
NAIROBI.

November, 2019

Preface

1. **Mr. Speaker Sir**, the Standing Committee on Justice, Legal Affairs and Human Rights is established pursuant to standing order 218(3) of the Senate Standing Orders. According to the said standing order and the Second Schedule to the Senate Standing Orders, the Committee has a mandate to-

Consider all matters related 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.

2. **Mr. Speaker Sir**, the Standing Committee on Justice, Legal Affairs and Human Rights comprises the following Members -

Sen. Samson Kiprotich, MP	-	Chairperson
Sen. Mithika Linturi, MP	-	Vice Chairperson
Sen. Amos Wako, MP	-	Member
Sen. James Orengo, MP	-	Member
Sen. Fatuma Dullo, MP	-	Member
Sen. Susan Kihika, MP	-	Member
Sen. Mutula Kilonzo Junior, MP	-	Member
Sen. Faki Mohamed, MP	-	Member
Sen. Irungu Kang'ata, MP	-	Member

Background

3. **Mr. Speaker Sir**, the Constitution of Kenya (Amendment) Bill (Sen. Bills No. 16 of 2019), sponsored by Senator Farhiya Ali Haji and Senator Mutula Kilonzo Junior, was published on 9th August, 2019 and read a First Time in the Senate on 17th September, 2019. Following this, it was committed to the Senate Standing Committee on Justice, Legal Affairs and Human Rights for consideration and facilitation of public participation as per standing order 140(1) and (5).
4. **Mr. Speaker Sir**, the key purpose of this Bill is to amend the Constitution to give effect to the two-thirds gender principle. The Bill seeks to achieve this through the creation of special seats that will ensure that the gender principle is realised in both Houses of Parliament, and further that the state takes legislative, policy and other measures, including the setting of standards, to achieve the realization of the constitutional principle.

5. **Mr. Speaker Sir**, Article 27(8) of the Constitution mandates the State to “...take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.” The current membership of Parliament offends this provision of the Constitution. Men represent 80.3% of the Members of the National Assembly and 73.5% of Senators. The law therefore comes to remedy this breach of the Constitution by ensuring that members of Parliament representing the gender with less than one third of the elected membership are nominated to the respective House of Parliament to comply with Article 27.

Public Participation and Submissions by Stakeholders

6. **Mr. Speaker Sir**, as per the provisions of Article 118 of the Constitution and standing order 140 (5), the Committee sought the participation of interested members of the public by inviting them, through newspaper advertisements, to make oral submissions or submit written memoranda on the Bill. The Committee, by advertisement in the *Star Newspaper* dated 18th October, 2019, invited members of the general public to a public hearing forum on Thursday 24th October, 2019 between 9:00 am and 1:00 pm at Shimba Hills Hall, First Floor, KICC, with the aim of discussing the Bill. The participants included the Committee and representatives from the Media, the Independent Electoral and Boundaries Commission and the Kenya National Commission on Human Rights.
7. **Mr. Speaker Sir**, the participants were in support of the Bill and lauded the Senate for addressing the issue of the two-thirds gender rule that has yet to be addressed since the promulgation of the Constitution.
8. **Mr. Speaker Sir**, the Independent Electoral and Boundaries Commission however proposed that the Committee inserts a provision that nomination of Members to the Senate be conducted in accordance with Article 90 of the Constitution. The rationale given by the Commission was that, noting that the proposed amendments are aligned to Article 90 of the Constitution, it will also require additional provisions for the Senate as reflected for the National Assembly to emphasize that members contemplated under the proposed Article 98(1)(d) and (da) be nominated by political parties in proportion to the Senate seats received by the political parties at the General Election.

9. **Mr. Speaker Sir**, the Committee, in response to the proposed amendment, noted that clause 4 of the Bill already addressed the concern as it amends Article 90(1) of the Constitution to include nominations in both the Senate and the National Assembly in the criteria for the allocation of party lists under Article 90. Another amendment would therefore not be necessary.

Committee Observations

10. **Mr. Speaker Sir**, the Standing Committee on Justice, Legal Affairs and Human Rights scrutinised the Constitution of Kenya (Amendment) Bill, (Sen. Bills No. 16 of 2019) and made the following observations-

- (a) Women represent the largest segment of the population of Kenya. This translates to more female voters compared to male voters. The realisation of Article 27(8) of the Constitution is therefore achievable with the cooperation of women in elections.
- (b) There may be need to find another way to achieve the two-thirds gender rule. Leaving nominations to political parties without clear guidelines may lead to abuse, with those nominated not being representative of the population. This has seen parties being accused of nominating fellow elites who are out of touch with the problems facing *mwananchi* on the ground. A system of nominating members could involve the inclusion of the candidate of the opposite gender with the highest number of votes so as to have the top two candidates of each gender elected.
- (c) Other statutory and policy measures should be employed to address this issue before resorting in the nuclear option that is a Constitutional amendment. There is also need to address the issue in appointive positions before trying to address elective posts, especially noting that one cannot dictate to the public on whom they should elect.
- (d) Political parties should also embrace more women in their ranks to assist in addressing the issue of less women vying for elective posts and further address the challenges women in such endeavours face, challenges which are for the most part alien to their male counterparts.
- (e) There has been hue and cry by Kenyans on the ballooning wage bill of the country, especially with the ever increasing public debt. The expansion of the membership of Parliament will lead to an expanded


wage bill and other related costs, occasioning a heavier burden on taxpayers.

- (f) A lot of progress has been made in Kenya on affirmative action in regard to women. It may be argued that women are no longer marginalised and that attention needs to be shifted to other segments of society which still face acute marginalisation. There may therefore be need to amend the Constitution, not to enshrine the two-thirds gender rule but rather to do away with it altogether, especially in respect of elective posts.

Recommendation(s)

11. **Mr. Speaker Sir**, the Committee recommends that the House votes to reject the Bill until such a time as relevant stakeholders agree on a solution to the issue that will address the concerns raised by the Committee in its observations on the Bill.

12. **Mr. Speaker Sir**, it is therefore my pleasant duty and privilege, on behalf of the Standing Committee on Justice, Legal Affairs and Human Rights, to table its report on the Constitution of Kenya (Amendment) Bill (Sen. Bills No. 16 of 2019), pursuant to standing order 143(1) of the Senate Standing Orders.

Signed.......... Date..... 20/11/19.....

SEN. SAMSON CHERARKEY, MP
CHAIRPERSON, JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS
COMMITTEE

**ADOPTION OF THE REPORT OF THE JUSTICE, LEGAL AFFAIRS
AND HUMAN RIGHTS COMMITTEE OF THE SENATE**

**We, the undersigned Members of the Justice, Legal Affairs and Human
Rights Committee of the Senate, do hereby append our signatures to adopt
the Report-**

Sen. Samson Cherarkey, MP Chairperson



Sen. Mithika Linturi, MP Vice-Chairperson



Sen. Fatuma Dullo, MP Member



Sen. James Orengo, MP Member



Sen. Amos Sitswila Wako, MP Member

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Sen. Kilonzo Mutula Jnr., MP Member

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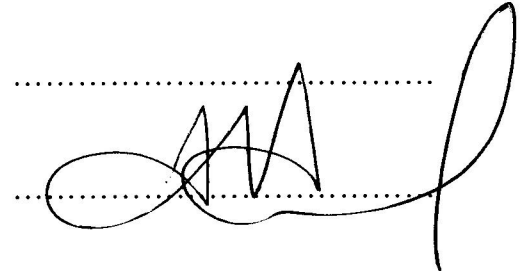
Sen. Irungu Kang'ata, MP Member

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Sen. Susan Wakarura Kihika, MP Member

.....

Sen. Faki Mohamed, MP Member



ANNEXES

1. Minutes
2. Advertisement for public hearing

MINUTES OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON WEDNESDAY, 20TH NOVEMBER, 2019 IN GROUND FLOOR BOARDROOM, RED CROSS BUILDING, PARLIAMENT BUILDINGS AT 10.02 AM.

PRESENT

- | | |
|----------------------------|-------------------|
| 1. Sen. Samson Cherarkey | -Chairperson |
| 2. Sen. Mithika Linturi | -Vice Chairperson |
| 3. Sen. James Orengo | -Member |
| 4. Sen. Mutula Kilonzo Jr. | -Member |
| 5. Sen. Fatuma Dullo | -Member |
| 6. Sen. Mohamed Faki | -Member |

ABSENT WITH APOLOGY

- | | |
|-------------------------|---------|
| 1. Sen. Amos Wako | -Member |
| 2. Sen. Susan Kihika | -Member |
| 3. Sen. Irungu Kang'ata | -Member |

IN-ATTENDANCE

- | |
|------------------------|
| 1. Ms. Kavata Musyoka |
| 2. Mr. Mitch Otoro |
| 3. Mr. Humprey Ringera |

SENATE SECRETARIAT

- | |
|--------------------|
| - Clerk Assistant |
| - Legal Counsel |
| - Research Officer |

MIN NO. 272/2019

The Chairperson called the meeting to order at 10.02 a.m. and commenced the meeting with a word of prayer.

PRELIMINARIES

MIN NO. 273/2019

The agenda of the meeting was adopted as presented having been proposed by Sen. Mutula and seconded by Sen. Faki.

ADOPTION OF THE AGENDA.

MIN NO. 274/2019

The agenda of the meeting was adopted as presented having been proposed by Sen. Linturi and seconded by Sen. Faki.

CONFIRMATION OF MINUTES OF THE 38TH TO 41ST SITTINGS

MIN NO. 275/2019

None

MATTERS ARISING

MIN NO. 276/2019

CONSIDERATION OF REPORTS PENDING BEFORE THE COMMITTEE

The Committee adopted the following reports for tabling by consensus-

- (i) the Constitution of Kenya (Amendment) Bill (Sen. Bills No. 40 of 2018);

- (ii) the Constitution of Kenya (Amendment) Bill (Sen. Bills No. 2 of 2019);
- (iii) the Constitution of Kenya (Amendment) Bill (Sen. Bills No. 16 of 2019);
- (iv) the Independent Electoral and Boundaries Commission (Amendment) Bill (NA Bills No. 35 of 2019); and
- (v) the Statute Law (Miscellaneous Amendments) (No. 2) Bill (NA Bills No. 13 of 2018).

MIN NO. 279/2019

There was no other business

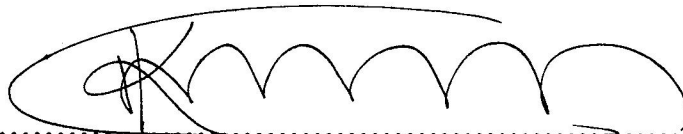
ANY OTHER BUSINESS

MIN NO. 280/2019

**DATE OF THE NEXT MEETING AND
ADJOURNMENT**

The meeting was adjourned at 12.06 pm. Date of the next meeting will be communicated through a notice.

Signed



SEN. SAMSON CHERARKEY (CHAIRPERSON)

Date:

29/11/19

MINUTES OF THE 41ST SITTING OF THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON TUESDAY, 12TH NOVEMBER, 2019, COMMITTEE ROOM 5, MAIN PARLIAMENT BUILDINGS, 4.43 P.M.

MEMBERS PRESENT

- | | |
|------------------------------|--------------------|
| 1. Sen. Samson Kiprotich, MP | - Chairperson |
| 2. Sen. Mithika Linturi, MP | - Vice-Chairperson |
| 3. Sen. James Orengo, MP | - Member |
| 4. Sen. Mohamed Faki, MP | - Member |

ABSENT WITH APOLOGIES

- | | |
|-----------------------------------|-------------|
| 1. Sen. Amos Wako, MP | - Member |
| 2. Sen. Susan Kihika, MP | - Member |
| 3. Sen. Mutula Kilonzo Junior, MP | - Ag. Chair |
| 4. Sen. Fatuma Dullo | -Member |
| 5. Sen. Irungu Kang'ata, MP | - Member |

IN ATTENDANCE

- | | |
|-----------------------|-------------------|
| 1. Ms. Kavata Musyoka | - Clerk Assistant |
| 2. Mr. Mitch Otoro | - Legal Counsel |

MIN. NO.260/2019

PRELIMINARIES

The Chairperson called the meeting to order at 4.43 pm followed by a word of prayer.

MIN. NO.261/2019

ADOPTION OF THE AGENDA

The Agenda of the meeting was adopted after being proposed by Sen. Mohamed Faki, MP and being seconded by Sen. James Orengo, MP.

MIN. NO.262/2019

CONSIDERATION OF SUBMISSIONS ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) (NO. 2) BILL (NA BILLS NO. 13 OF 2018)

Members considered the Bill clause by clause and they made the following recommendations-

The National Hospital Insurance Fund Act, 1998 (No. 9 of 1998)

- (i) In Section 10 include a new clause to provide for the qualifications of the CEO namely a university degree, minimum of 5 years' experience at senior level of management and meet the requirement of chapter 6 of the Constitution of Kenya on leadership and integrity;

- (ii) In Section 15 (2) (c) include the word “national” before the word government. This is to ensure that if a voluntary fund is not provided by the county governments that the national government is obliged to provide one; and
- (iii) In Sections 26, 27, 28 and 29 amend to provide that the regulations must be made in consultation with Parliament (Senate and National Assembly).

The Micro and Small Enterprise Act, 2012, (No. 55 of 2012)

- (i) Amend Section 29 (3) to include the phrase, “...in consultation with county governments”, after the words deem appropriate.

The Crops Act, 2013 (No. 16 of 2013)

- (ii) Amend section 9 (4) (e) & (f), collapse (e) & (f) to provide that four persons to be appointed, of which three will be appointed by the Council of Governors; and
- (iii) Amend 9 (A) to provide for the qualifications of the managing trustee as minimum of a degree in any discipline, 5 years’ experience and must fulfill the requirements in chapter 6 of the Constitution of Kenya on leadership and integrity.

The Technical and Vocational Education and Training Act, 2013 (No. 29 of 2013)

- (i) Amend Section 46 (1) to provide for two members to be nominated by the Council of Governors

The Public Procurement and Asset Disposal Act, 2015, (No. 33 of 2015)

- (ii) The Committee noted that where more than 50% of shareholders are Kenyans, that’s referred as a local contractor;
- (iii) Amend Section 80 (1) (6) by retaining the 30 days provided for in the principal Act;
- (iv) Amend Section 87 A to reduce the 90 days to 45 days and provide that failure to adherence to the 45 days will attract an interest equivalent to the central bank of Kenya base rate at the time of payment;
- (v) Amend Section 87 B by reducing the number of days to 12 months and provide that failure to adherence to the 45 days will attract an interest equivalent to the central bank of Kenya base rate. Further provide that the procuring entity must provide a promissory note valid for the period of the contract;
- (vi) Amend Section 94 (1) by retaining 14 days as outlined in the Principal Act;
- (vii) Delete Section 135 (4) and retain as per the Principal Act due to the fact that it’s the contract that will assist in determining the contractual obligations of each party as needs/issues arise;
- (viii) Amend Section 142 (1) by deleting the phrase, “...a period of ten years from the close out date of the contract,” and replace with “...the tender period and the defect liability period depending on the contract.” This is because the proposal for ten years is too punitive and it is likely to discourage business;

- (ix) Delete Section 142 (3) (3) and retain as provided in the principal Act. This is because the provisions proposed will disadvantage the groups referred to in the section economically;
- (x) Clarify Section 143 by referring to Section 142 (1) and 142 (1) (a);
- (xi) Amend Section 144 (2) & (3) by providing a notice of seizure of 7 days to the issuer of the performance security; and
- (xii) Delete Section 172

The National Employment Authority Act, 2016 (No. 3 of 2016)

- (i) Provide for definition of the term “Kenyan migrant workers”;
- (ii) Amend Section 8A (i) to provide that the legal and other necessary assistance for Kenyan migrant workers who are in distress will be provided for by the Authority in consultation with the Ministry of Foreign Affairs; and
- (iii) Retain Section 17 (2) as outlined in the Principal Act.

The Fisheries Management and Development Act, 2016 (No. 35 of 2016)

- (i) Amend Section 6 to replace (f) with the Kenya National Maritime Fisheries Institute, which is the principal body on matters fisheries in Kenya;
- (ii) Amend Section 6 (h) to include 2 nominees from the Council of Governors; and
- (iii) Amend Section 6 to include the Kenya Maritime Authority in the membership of the Council;
- (iv) Amend Section 84 (4) (g) by retaining as is in the principal Act. This is a devolved function; and
- (v) In Section 91, include the role of the Kenya Maritime Authority in the making of regulations.

MIN. NO.263/2019

ANY OTHER BUSINESS

The Secretariat brought to the attention of the Members present that the Chief Justice had invited representation from the Committee to attend a half day meeting on the financial autonomy of the judiciary that Friday at Safari Park Hotel.

MIN. NO.264/2019

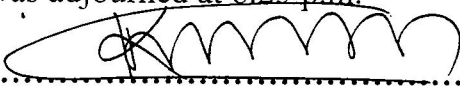
DATE OF NEXT MEETING

The date of the next meeting would be communicated by notice.

MIN. NO.265/2019

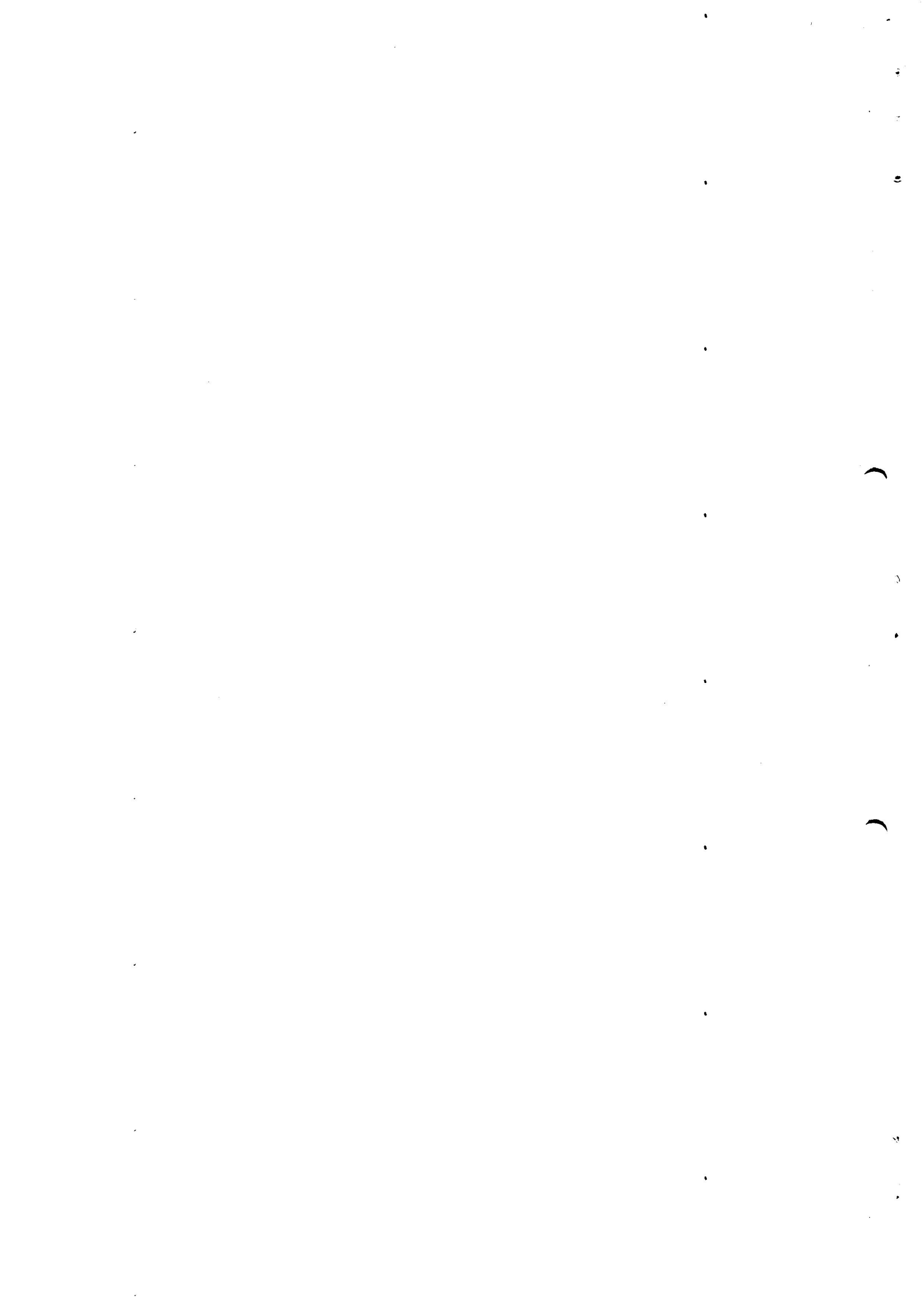
ADJOURNMENT

The meeting was adjourned at 8.25 p.m.

SIGN 

(CHAIRPERSON)

DATE 19/11/2019



MINUTES OF THE 40TH SITTING OF THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON THURSDAY, 7TH NOVEMBER, 2019, MEDIA CENTER, MAIN PARLIAMENT BUILDINGS, 10.39 A.M.

MEMBERS PRESENT

- | | |
|------------------------------|---------------|
| 1. Sen. Samson Kiprotich, MP | - Chairperson |
| 2. Sen. James O'engo, MP | - Member |
| 3. Sen. Susan Kihika, MP | - Member |
| 4. Sen. Mohamed Faki, MP | - Member |

ABSENT WITH APOLOGIES

- | | |
|-----------------------------------|--------------------|
| 1. Sen. Mithika Linturi, MP | - Vice-Chairperson |
| 2. Sen. Amos Wako, MP | - Member |
| 3. Sen. Mutula Kilonzo Junior, MP | - Ag. Chair |
| 4. Sen. Fatuma Dullo | -Member |
| 5. Sen. Irungu Kang'ata, MP | - Member |

IN ATTENDANCE

- | | |
|-----------------------|-------------------|
| 1. Ms. Kavata Musyoka | - Clerk Assistant |
| 2. Mr. Mitch Otoro | - Legal Counsel |

MIN. NO.253/2019

PRELIMINARIES

The Chairperson called the meeting to order at 10.39 a.m followed by a word of prayer.

MIN. NO.254/2019

ADOPTION OF THE AGENDA

The Agenda of the meeting was adopted after being proposed by Sen. Susan Kihika, MP and being seconded by Sen. Mohamed Faki, MP.

MIN. NO.255/2019

CONSIDERATION OF SUBMISSIONS ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) (NO. 2) BILL (NA BILLS NO. 13 OF 2018)

Members considered the Bill clause by clause and recommended as follows-

The Betting Lotteries and Gaming Act (Cap 131)

- (i) Delete reference to the term 'permanent secretary' in the entire Act and replace the same with the term 'principal secretary'. The Bill only replaces the term 'permanent secretary' in the interpretation section. The Committee recommends that the term be replaced in the whole Act.
- (ii) In the proposed amendment to section 3(2A), insert the words 'of three years' immediately after the words 'one further term'. This will align it with the language of the Constitution and give the provision more clarity.

- (iii) In the proposed amendment to section 5(4), delete the words 'one million' appearing immediately after the words 'therefor the expressions' and substitute therefor with the words 'five hundred thousand'. The penalty of one million shillings under the Bill is too harsh and does not fit the crime of making a false statement.
- (iv) In the proposed amendment to section 6(1), delete the word 'twenty' appearing immediately after the words 'therefor the expression' and substitute therefor with the word 'five'. The security amounting to twenty million shillings under the Bill is too high and will lock out some businesses, leaving the field to the wealthiest companies. This will therefore be tantamount to unfair trade practices.
- (v) Delete the proposed amendment to section 10(2), and replace with the following:
Delete subsection (2) and substitute therefore with the following—
 - (2) A licensee who contravenes subsection (1) shall be guilty of an offence and shall be liable, if convicted, to a fine not exceeding fifty thousand shillings or imprisonment for a term not exceeding six months or to both.
 - (3) A licensee who knowingly or recklessly keeps any book, record or account required to be kept under this section which is false in any material particular, or who makes or causes to be made in any such book an entry which is false in a material particular, shall be guilty of an offence and liable, if convicted, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding one year or to both.

This will separate the two offences whose gravity is not comparable. The proposed offences and penalties are fairer and reflect the gravity of the offences.
- (vi) In the proposed amendment to section 11(4), delete the words 'one million and five years' appearing immediately after the words 'therefor the expressions' and substitute therefor with the words "fifty thousand" and "one year". The penalty of one million shillings and/or five years under the Bill is too harsh and does not fit the crime of refusing or failing to submit a statement of accounts or knowingly submitting a false or misleading statement of accounts.
- (vii) In the proposed amendment to section 53(1), delete the words 'two million and two years' appearing immediately after the words 'therefor the expressions' and substitute therefor with the words "fifty thousand" and "one year". The penalty of two million shillings and/or two years under the Bill is too harsh and does not fit the crime of using, permitting the use or acquiescing to the use of unauthorized gaming machines.
- (viii) In the proposed amendment to section 54(2)(b), delete the words 'fifty thousand' appearing immediately after the words 'therefor the expression' and substitute therefor with the words 'ten shillings'. The maximum stake hazarded per game of fifty thousand shillings is too high.
- (ix) In the proposed amendment to section 55(1), delete the words 'one hundred thousand and one year' appearing immediately after the words 'therefor the expressions' and substitute therefor with the words "fifty thousand" and "six months". The penalty of one hundred thousand shillings and/or one year under the Bill is too harsh and does not fit the crime of taking part in gaming in an area accessible to the public.

- (x) In the proposed amendment to section 59(2), delete the words 'one million and five years' appearing immediately after the words 'therefor the expressions' and substitute therefor with the words "fifty thousand" and "six months". The penalty of one million shillings and/or five years under the Bill is too harsh and does not fit the crime of prohibition competitions or prizes involving no skill.
- (xi) In the proposed amendment to section 61, delete the words 'five hundred thousand and two years' appearing immediately after the words 'therefor the expressions' and substitute therefor with the words "twenty thousand" and "three months". The penalty of five hundred thousand shillings and/or two years under the Bill is too harsh and does not fit the crime of cheating in gaming.

The Dairy Industry Act (Cap. 336)

- (i) Amend Section 3 by deleting the phrase "...whether in liquid, solid or any other form...";
- (ii) Amend Section 19 (w) by addition the words "county government" after the words "other dairy produce". This is because agriculture is a devolved function;
- (iii) Delete Section 20. This is because a Cabinet Secretary should not be given powers to determine an offense. It should be provided for in statute;
- (iv) Delete the new Section 23 A (1) & (2). These provisions introduce double taxation to poor Kenyans in an economy that is not expanding; and
- (v) Amend Section 33 deleting the phrase "one million shillings or imprisonment for a term not exceeding one year or both" and replace with the phrase "five thousand".

MIN. NO.256/2019

**STATEMENT ON THE FINANCIAL
AUTONOMY AND
INDEPENDENCE OF THE
JUDICIARY**

The Committee considered the revised Statement and approved it to be issued by the Chairperson of the Committee that afternoon during plenary.

MIN. NO.257/2019

ANY OTHER BUSINESS

None

MIN. NO.258/2019

DATE OF NEXT MEETING

The date of the next meeting would be communicated by notice.

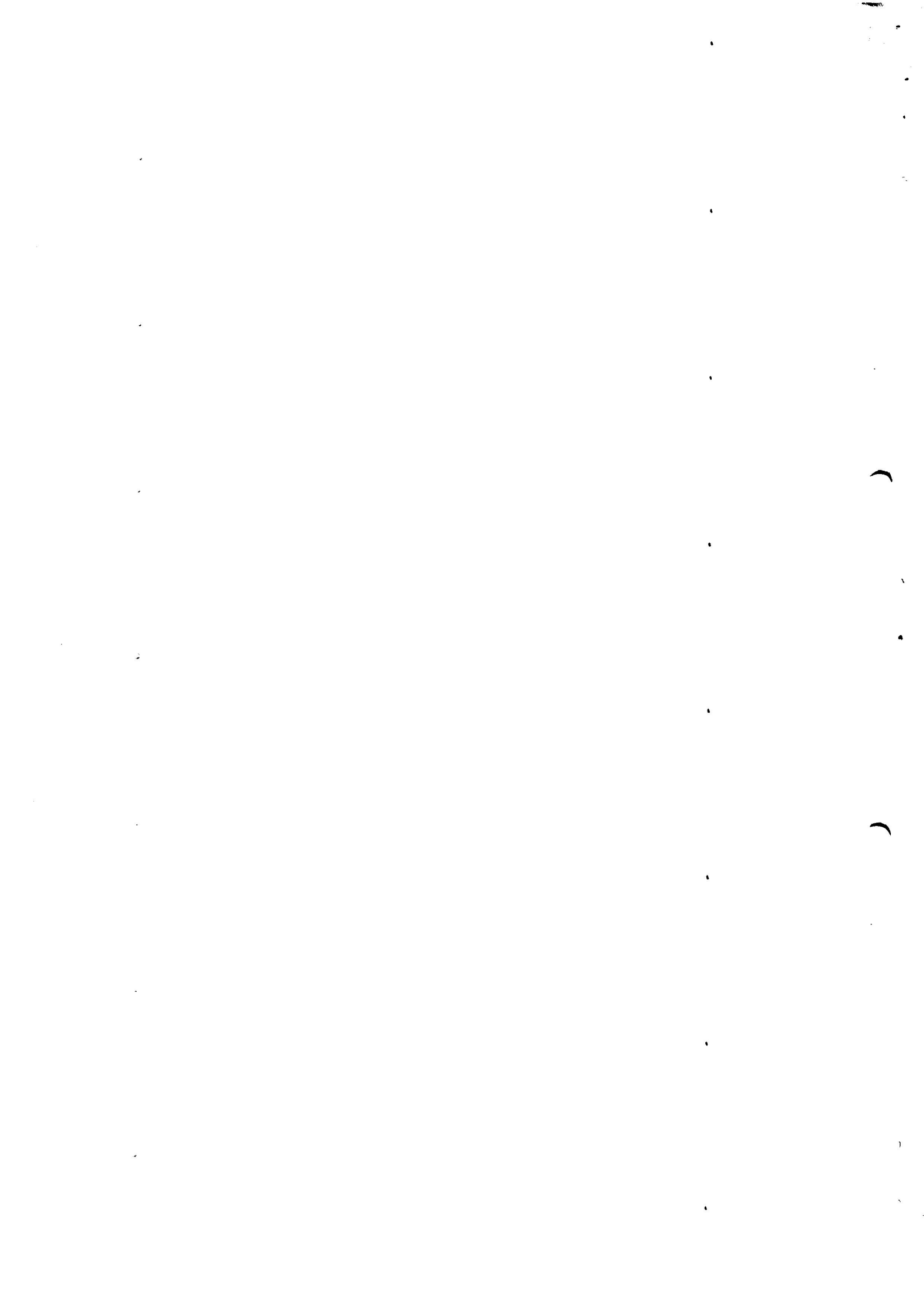
MIN. NO.259/2019

ADJOURNMENT

The meeting was adjourned at 11.45 a.m.

SIGN 
(CHAIRPERSON)

DATE 17/11/2019



MINUTES OF THE 39TH SITTING OF THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON WEDNESDAY, 6TH NOVEMBER, 2019, SMALL DINING, NEW WING, MAIN PARLIAMENT BUILDINGS, 10.39 A.M.

MEMBERS PRESENT

- | | |
|------------------------------|--------------------|
| 1. Sen. Samson Kiprotich, MP | - Chairperson |
| 2. Sen. Mithika Linturi, MP | - Vice-Chairperson |
| 3. Sen. James Orengo, MP | - Member |
| 4. Sen. Susan Kihika, MP | - Member |
| 5. Sen. Mohamed Faki, MP | - Member |
| 6. Sen. Irungu Kang'ata, MP | - Member |

ABSENT WITH APOLOGIES

- | | |
|-----------------------------------|-------------|
| 1. Sen. Mutula Kilonzo Junior, MP | - Ag. Chair |
| 2. Sen. Fatuma Dullo | -Member |
| 3. Sen. Amos Wako, MP | - Member |

IN ATTENDANCE

- | | |
|-----------------------|-------------------|
| 1. Ms. Kavata Musyoka | - Clerk Assistant |
| 2. Mr. Mitch Otoro | - Legal Counsel |

MIN. NO.247/2019

The Chairperson called the meeting to order at 10.39a.m followed by a word of prayer.

PRELIMINARIES

MIN. NO.248/2019

The Agenda of the meeting was adopted after being proposed by Sen. Susan Kihika, MP and being seconded by Sen. Mohamed Faki, MP.

ADOPTION OF THE AGENDA

MIN. NO.249/2019

CONSIDERATION OF SUBMISSIONS BY VARIOUS STAKEHOLDERS VARIOUS LEGISLATIONS-

The Committee considered the submissions on the various Bills by stakeholders as follows-

1) the Constitution of Kenya (Amendment) Bill (Sen. Bills No. 40 of 2018);

- (i) there is lack of clarity on how the Commission is expected to delimit administrative structures except by reference of national legislation which would be devoid of constitutional principles as provided for under Art 89 of the Constitution of Kenya;
- (ii) there is need to clearly distinguish what constitutes administrative structures as envisioned in the Bill in distinction to the already existing Executive Administrative structures and or units;

- (iii) the Committee noted that the Senate is mandated with protecting devolution thus counties thus it should not spearhead an agenda to reduce the number of counties; and
- (iv) the Committee recommended that the Bill be rejected.

2) the Constitution of Kenya (Amendment) Bill (Sen. Bills No. 2 of 2019)

- (i) political interference in the matter of delimitation of boundaries should be avoided at all costs;
- (ii) the procedure on parliament's role in reporting on delimitation of boundaries, as stipulated in the Constitution of Kenya be retained; and
- (iii) the Committee recommended that the Bill be rejected.

3) the Statute Law (Miscellaneous Amendments) (No. 2) Bill (NA Bills No. 13 of 2018)

Deferred to the next Sitting

4) the Constitution of Kenya (Amendment) Bill (Sen. Bills No. 16 of 2019)

The Committee noted that-

- (i) there are more women as per the preliminary results of the census exercise however women's representation was lacking;
- (ii) that the Bill has been introduced in both Houses severally but it keeps on failing. There is thus need for a better strategy to be put in place to ensure that the Bill passes as Parliament is required to have the law in place;
- (iii) there is lack of support from male parliamentarians to pass the Bill;
- (iv) nominated women are not a representation of "*wanjiku*" therefore factors such as qualifications and contribution in society should be taken into consideration when making such nominations;
- (v) there is a constitution provision that already provides for equal representation of both sexes therefore perhaps there is need to explore other options other than a constitution amendment;
- (vi) the Bill infringes on the political rights of the public by imposing that women be voted for;
- (vii) there is a clear demonstration that women can compete in elective politics and win like their male counterparts for instance there are currently 3 duly elected women senators and 3 duly elected women governors;
- (viii) the impact of women nominated is not felt; and
- (ix) other marginalized groups such as the youth and persons with disabilities face the same challenges as women.

The Committee recommended that the Bill be rejected.

5) the Elections (Amendment) Bill (Sen. Bills No. 18 of 2019)

The Committee noted that determination of the popular name would be difficult. Therefore the Committee proposed that the sponsor of the Bill be invited for a meeting the following week.

6) the Alternative Dispute Resolution Bill (Sen. Bills No. 19 of 2019)

Deferred to the next sitting

7) the Independent Electoral and Boundaries Commission (Amendment) Bill (NA Bills No. 35 of 2019)

The Committee noted that-

- i) that the number of Commissioners were too many thus they should be reduced to seven (7);
- ii) some of the persons proposed to constitute the panel do not have a role therefore they should be removed thus delete clauses (b), (c), (e) and (f); and
- iii) that qualifications of the panelists should be provided for, if they are not provided for.

The Committee noted that there was need for an urgent review of the elections and IEBC laws.

MIN. NO.250/2019

ANY OTHER BUSINESS

- i) The Chairperson brought to the attention of the Committee that a Petition of the Senate concerning the arbitrary cancellation of the Kimwarer Dam and scaling down of Aror Dam had been referred to the Committee thus the Committee needed to expedite. The Committee directed that a meeting be scheduled with the Petitioners, National Treasury, Attorney General, Director of Criminal Investigations, Director of Public Prosecution, Ethics and Anti-Corruption Commission and the Cabinet Secretary In charge Of Water and Irrigation.
- ii) The Committee considered the draft Statement on the financial autonomy and independence of the judiciary and directed that it needed to be improved on further by including facts from the constitution review processes.

MIN. NO.251/2019

DATE OF NEXT MEETING

The date of the next meeting would be communicated by notice.

MIN. NO.252/2019

ADJOURNMENT

The meeting was adjourned at 11.45 a.m.

SIGN 
(CHAIRPERSON)

DATE 19/11/2019

MINUTES OF THE 38TH SITTING OF THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON THURSDAY 24TH OCTOBER, 2019, SHIMBA HALL, KICC, 10.18 A.M.

MEMBERS PRESENT

- | | |
|--------------------------|-------------------|
| 1. Sen. Susan Kihika, MP | - Member (Ag. Ch) |
| 2. Sen. Fatuma Dullo | - Member |
| 3. Sen. Mohamed Faki, MP | - Member |

ABSENT WITH APOLOGIES

- | | |
|-----------------------------------|--------------------|
| 1. Sen. Samson Kiprotich, MP | - Chairperson |
| 2. Sen. Mithika Linturi, MP | - Vice-Chairperson |
| 3. Sen. Mutula Kilonzo Junior, MP | - Ag. Chair |
| 4. Sen. James Orengo, MP | - Member |
| 5. Sen. Amos Wako, MP | - Member |
| 6. Sen. Irungu Kang'ata, MP | - Member |

IN ATTENDANCE

- | | |
|-------------------------|--------------------|
| 1. Ms. Kavata Musyoka | - Clerk Assistant |
| 2. Mr. Moses Kenyanchui | - Legal Counsel |
| 3. Ms. Carol Cheruiyot | - Legal Counsel |
| 4. Ms. Ann Kigoro | - Research Officer |

MIN. NO.240/2019

PRELIMINARIES

The Ag. Chairperson called the meeting to order at 10.18 a.m followed by a word of prayer. Thereafter she invited stakeholders to the public hearing on the following bills that had been read a first time and referred to the Standing Committee on Justice, Legal Affairs and Human Rights for public participation-

- 1) the Constitution of Kenya (Amendment) Bill (Sen. Bills No. 40 of 2018);
- 2) the Constitution of Kenya (Amendment) Bill (Sen. Bills No. 2 of 2019)
- 3) the Statute Law (Miscellaneous Amendments) (No. 2) Bill (NA Bills No. 13 of 2018)
- 4) the Constitution of Kenya (Amendment) Bill (Sen. Bills No. 16 of 2019)
- 5) the Elections (Amendment) Bill (Sen. Bills No. 18 of 2019);
- 6) the Alternative Dispute Resolution Bill (Sen. Bills No. 19 of 2019); and
- 7) the Independent Electoral and Boundaries Commission (Amendment) Bill (NA Bills No. 35 of 2019)

MIN. NO.241/2019

ADOPTION OF THE AGENDA

The Agenda of the meeting was adopted after being proposed by Sen. Fatuma Dullo, MP and being seconded by Sen. Mohamed Faki, MP.

The public made their submissions on the various Bills as follows-

Nairobi International Institute of Arbitration

The Institute made the following submissions with respect to the Alternative Dispute Resolution Bill (Sen. Bills No. 19 of 2019)-

- (i) The Bill lacks a clear scope;
- (ii) The Bill as currently drafted will be difficult to implement and more so in the settlement of certain civil disputes;
- (iii) Consideration should be given to have various institutions conduct training on alternative dispute resolution;
- (iv) Consideration should be taken to include standards set in various UN conventions and treaties on ADR;
- (v) Noting that Kenya has diverse cultures, determination of a suitable dispute resolver will be difficult thus the application of the Bill/ law in instances where multiple cultures are involved will be difficult;
- (vi) The interface between the Intergovernmental Relations Act and the Bill needs to be clearly stipulated;
- (vii) The Bill envisions signing of an agreement to conclude the end of a dispute but in some communities exchange of artifacts marks the end of a dispute. This should be factored in the Bill;
- (viii) The Bill contravenes Art. 48 of the Constitution of Kenya, on access to justice; and
- (ix) In view of the budgetary constraints, establishment of councils at the county level may not be feasible.

Chartered Institute of Arbitrators

The Institute made the following submissions with respect to the Alternative Dispute Resolution Bill (Sen. Bills No. 19 of 2019)-

- (i) the definition of the term "arbitration", is not sufficient as words such as arbitration and adjudication are not included;
- (ii) there is need to differentiate between the formal and informal forms of ADR;
- (iii) the proposed arbitration body should be established outside of the judiciary and not an appendage of the judiciary;
- (iv) there is no enforcement mechanism for decisions arrived at after the dispute resolution;
- (v) a description on the relationship between the court and ADR processes such as judicial review processes must be included. Furthermore, decisions arrived at must be in line with existing law and the Constitution of Kenya, and must protect human rights;

- (vi) the Bill ought to address issue of overlap with existing laws, hierarchy in other existing laws and demonstrate the relationship that various bodies that promote ADR have; and
- (vii) the bill proposes blanket registration for all institutions yet there are other existing laws such as the ADR Act that caters for its own processes.

Mr. Kukebe Kelvin- ICMC

Mr. Kukebe made the following submissions with respect to the Alternative Dispute Resolution Bill (Sen. Bills No. 19 of 2019)-

- (i) The Bill does not have a clear scope; and
- (ii) There is need for a stand-alone Bill on mediation.

Mediation Training Institute

The Institute made the following submissions with respect to the Alternative Dispute Resolution Bill (Sen. Bills No. 19 of 2019)-

- (i) There is need for a stand-alone Bill on mediation;
- (ii) There is need to embrace early dispute resolution;
- (iii) The Bill does not address the existing needs; and
- (iv) The Bill address more of arbitration as opposed to ADR and traditional dispute resolution mechanisms in entirety.

Judiciary

The Judiciary made the following submissions with respect to the Alternative Dispute Resolution Bill (Sen. Bills No. 19 of 2019)-

- (i) The Bill is more regulatory as opposed to be facilitative. There is need to bring all ADR mechanisms together;
- (ii) For the Bill to implemented, resources will be required hence the Bill is a money Bill and should provide for the requisite infrastructure and resources;
- (iii) The Bill does not incorporate others courts that participate in ADR such as kadhi court, labor and environment court etc;
- (iv) The Bill as currently crafted leaves room for a lot of litigation as the agreements are open and there is no clear implementation mechanism;
- (v) The Bill limits traditional dispute resolution; and
- (vi) The parameters for registering disputes resolvers should be clear and affordable.

Wasilianahub Mediators Africa

They made the following submissions with respect to the Alternative Dispute Resolution Bill (Sen. Bills No. 19 of 2019)-

- (i) There is need for a stand-alone Bill on mediation;
- (ii) Financial sustainability of the Bill is lacking;

- (iii) There is need to define the following terms in the Bill- mediator, elder and council of elder;
- (iv) ADR is a process that should take place outside the court process; and
- (v) There is need to establish a national agreement settlement registry.

Mr. Kaira Nabasenge, Advocate/ Student At University of Nairobi

He made the following submissions with respect to the Alternative Dispute Resolution Bill (Sen. Bills No. 19 of 2019)-

- (i) There is need to embrace traditional justice systems too;
- (ii) Define the term “*customary law*”
- (iii) There is need to review the Bill and borrow best practice from a country like South Africa and Rwanda that has “*gachacha courts*” ; and
- (iv) Determine the qualifying factor for one to be called a conciliator, mediator etc.

Ms. Lydia Kahu, Mediation, Accreditation Committee

She made the following submissions with respect to the Alternative Dispute Resolution Bill (Sen. Bills No. 19 of 2019)-

- (i) Have a stand-alone bill on traditional dispute resolution, mediation and conciliation like in countries like Italy and USA; and
- (ii) Establish an institution to regulate ADR and or TDR.

Mr. Joshua Gwara

He made the following submissions with respect to the Alternative Dispute Resolution Bill (Sen. Bills No. 19 of 2019)-

- (i) The Bill as drafted hinders access to justice;
- (ii) The role of religious and faith based organizations is not covered sufficiently in the Bill; and
- (iii) Regulate training, certification and accreditation of training institutions as there is a proliferation of such training institutions currently.

Mr. Muramati, Mediator

He made the following submissions with respect to the Alternative Dispute Resolution Bill (Sen. Bills No. 19 of 2019)-

- (i) ADR is a critical tool for building peace. The proposal by the Senate was a noble idea.

Independent Electoral and Boundaries Commission

They made the following submissions on the following Bills-

1) the Constitution of Kenya (Amendment) Bill (Sen. Bills No. 40 of 2018);

- (i) there is lack of clarity on how the Commission is expected to delimit administrative structures except by reference of national legislation which

would be devoid of constitutional principles as provided for under Art 89 of the Constitution of Kenya; and

- (ii) there is need to clearly distinguish what constitutes administrative structures as envisioned in the Bill in distinction to the already existing Executive Administrative structures and or units.

2) the Constitution of Kenya (Amendment) Bill (Sen. Bills No. 2 of 2019)

- (i) the Bill infringes of the constitutional rights of the IEBC to delimit boundaries of the constituencies and wards; and
- (ii) provide a clear procedure on parliament's role in reporting on delimitation of boundaries.

3) the Statute Law (Miscellaneous Amendments) (No. 2) Bill (NA Bills No. 13 of 2018)

- (i) Clause 126 (3) proposes to reduce the timeline for evaluation of proposals from 21 to 7 days... the IEBC does not support this amendment and proposes the retention of the 21 days. As it is, the 21 days are not sufficient and have posed a challenge during an election period which by itself attracts a high number of tenderers.

4) the Constitution of Kenya (Amendment) Bill (Sen. Bills No. 16 of 2019)

- (i) noting that the proposed amendments are aligned to Article 90 of the Constitution, it will also require additional provisions for the Senate as reflected for the National Assembly to emphasize that- the Members contemplated in Clauses (1) (d) and (da) shall be nominated by political parties in proportion to the Senate seats received by the political party at the General Election.

5) the Elections (Amendment) Bill (Sen. Bills No. 18 of 2019)

- (i) review the definition of the term "popular name";
- (ii) there is need to determine the number of acceptable popular names;
- (iii) review the registration of persons act to conform to the proposals in the Bill;
- (iv) determine where the popular name will be placed; and
- (v) provide for instances where two people have a similar name.

6) the Alternative Dispute Resolution Bill (Sen. Bills No. 19 of 2019)

- (i) IEBC are in support of the Bill in its entirety.

7) the Independent Electoral and Boundaries Commission (Amendment) Bill (NA Bills No. 35 of 2019)

- (i) IEBC is in agreement with all the proposals in their entirety.

MIN. NO.244/2019
None

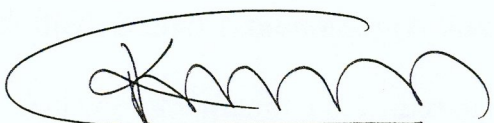
ANY OTHER BUSINESS

MIN. NO.245/2019
The date of the next meeting would be communicated by notice.

DATE OF NEXT MEETING

MIN. NO.246/2019
The meeting was adjourned at 10.17 a.m.

ADJOURNMENT

SIGN 
(CHAIRPERSON)

DATE 19/11/2019