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REPUBLIC OF KENYA



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THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – FOURTH SESSION – 2020

DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

REPORT

ON THE CONSIDERATION OF THE CONSTITUTION OF KENYA
(AMENDMENT) BILL 2019 (NATIONAL ASSEMBLY BILL NO.19) BY HON.
FLORENCE MUTUA, MP

12 MAR 2020 THURSDAY
HON. WILLIAM CHEPTUMO
CHAIRPERSON - J-LAC.

CLERKS CHAMBERS
DIRECTORATE OF COMMITTEE SERVICES
PARLIAMENT BUILDINGS
NAIROBI

MARCH, 2020

Contents

CHAIRPERSON'S FOREWORD	3
CHAPTER 1	4
1.0 PREFACE.....	4
Establishment and Mandate of the Committee	4
CHAPTER 2	7
2.0 BACKGROUND.....	7
Memorandum of objects and reasons.....	7
CHAPTER 3	9
3.0 PUBLIC PARTICIPATION IN THE REVIEW OF THE BILL	9
CHAPTER 4	13
4.0 CONSIDERATION OF THE PROPOSED AMENDMENTS BY THE COMMITTEE	13
Proposed amendment to Article 90 of the Constitution.....	13
CHAPTER 5	Error! Bookmark not defined.
5.0 RECOMMENDATION	Error! Bookmark not defined.

CHAIRPERSON'S FOREWORD

The Constitution of Kenya (Amendment) Bill 2019 (National Assembly Bill No.19) on amendment of Article 90 of the Constitution underwent First Reading on 3rd April, 2019. Thereafter, the Bill was committed to the Committee on Justice and Legal Affairs to review and report to the House pursuant to the provisions of Standing Order 216(5) (c).

During its Sitting held on 4th July, 2019, the Departmental Committee on Justice and Legal Affairs resolved to undertake public hearings on the Bill. Subsequently, the Committee through local daily newspapers of Monday 26th August and Monday 14th October, 2019 invited members of the public and organizations to attend public hearings and submit their views or make oral presentations regarding the Bill.

The Public hearings took place in the Counties of Nairobi, Machakos, Mombasa, Kisumu, Kakamega, Eldoret, Nakuru, Nyeri, Meru, Turkana and Wajir during which members of the public either individually or representing institutions and organizations made presentations and submitted memoranda which the Committee took into account while considering the Bill.

May I take this opportunity to express gratitude to Committee Members for their resilience and devotion to duty which made the consideration of the Bill successful. May I also appreciate the Speaker and Clerk of National Assembly for always providing guidance and direction to Committees in the discharge of their mandate. Finally, I commend the secretariat for exemplary performance in providing technical and logistical support to the Committee.

Hon. Speaker, on behalf of the Departmental Committee on Justice and Legal Affairs and pursuant to the provisions of Standing Order 199 (6), it's my pleasant privilege and duty to present to the House a report of the Committee on the Constitution of Kenya (Amendment) Bill, 2019 (National Assembly Bill No. 19)

Hon. William Cheptumo, M.P.

CHAPTER 1

1.0 PREFACE

1.1 Establishment and Mandate of the Committee

1. The Departmental Committee on Justice and Legal Affairs derives its mandate from Standing Order No. 216(5) which provides for the functions of Departmental Committees as follows-

- (a) Investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
- (b) Study the programme and policy objectives of ministries and departments and the effectiveness of their implementation;
- (c) Study and review all legislation referred to it;
- (d) Study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;
- (e) Investigate and enquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House;
- (f) Vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments)
- (g) Examine treaties, agreements and conventions;
- (h) Make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
- (i) Consider reports of Commissions and Independent Offices submitted to the House pursuant to provisions of Article 254 of the Constitution; and
- (j) Examine any questions raised by Members on a matter within its mandate.

1. The Second Schedule of the Standing Orders on Departmental Committees further outlines the Subjects of the Committee, as follows-

- (a) Constitutional affairs;
- (b) The administration of law and Justice
- (c) The Judiciary;
- (d) Public prosecutions;
- (e) Elections;
- (f) Ethics, integrity and anti-corruption; and
- (g) Human rights.

1.2 Committee Membership

3. The Committee was constituted on Thursday, 14th December, 2017 and comprises the following Honorable Members-

Chairperson

Hon. William Cheptumo, M.P.

MP Baringo North Constituency

Jubilee Party

Vice Chairperson

Hon. Alice Muthoni Wahome, M.P.

MP Kandara Constituency

Jubilee Party

Hon. John Olago Aluoch, M.P.
Kisumu West Constituency
FORD-Kenya

Hon. George Peter Kaluma, M.P.
Homa Bay Town Constituency
ODM-Party

Hon. Roselinda SoipanTuya, M.P.
Narok County
Jubilee Party

Hon. Charles Gimose, M.P.
Hamisi Constituency
FORD-Kenya

Hon. Johana Ng'eno, M.P.
Emurua Dikirr Constituency
KANU-Party

Hon. W. Kamoti Mwamkale, M.P.
Rabai Constituency
ODM-Party

Hon. Ben Orori Momanyi, M.P.
Borabu Constituency
WIPER-Party

Hon. Zuleikha Hassan, M.P.
Kwale County
ODM-Party

Hon. Jennifer Shamalla, M.P.
Nominated MP
Jubilee Party

Hon. Beatrice Adagala, M.P.
Vihiga County
ANC-Party

Hon. Gladys Boss Shollei, CBS, M.P.
Uasin Gishu County
Jubilee-Party

Hon. John Munene Wambugu, M.P.
Kirinyaga Central
Jubilee -Party

Hon. George Gitonga Murugara, M.P.
Tharaka Constituency
Jubilee-Party

Hon. Anthony Githiaka Kiai, M.P.
Mukurueni Constituency
Jubilee-Party

Hon. John Kiarie Waweru, M.P.
Dagoretti South Constituency
Jubilee-Party

Hon. Japheth Mutai, M.P.
Bureti Constituency
Jubilee-Party

Hon. Adan Haji Yussuf, M.P.
Mandera West Constituency
Economic Freedom Party

1.3 Committee Secretariat

4. The Committee secretariat comprises the following staff-

Mr. Abenayo Wasike
Senior Clerk Assistant
Lead Clerk

Mr. Denis Abisai
Principal Legal Counsel I

Ms. Halima Hussein
Clerk Assistant II

Ms. Fiona Musili
Research Officer II

Mr. Omar Abdirahim
Fiscal Analyst III

Ms. Roselyne Ndegi
Serjeant-at-Arms I

Mr. Joseph Okongo
Media Liaison Officer

5. Minutes of sittings of the Committee on the consideration of the Bill are attached to this report as **annexure 1**.

CHAPTER 2

2.0 BACKGROUND

2.1 Memorandum of objects and reasons

6. The principal object of the Bill Seeks to amend Article 90 of the Constitution to align it with the proposed amendment to Section 35 of the Election Act No. 24 of 2011 which seeks to change the timing for submission of party lists by Political Parties for persons elected under Article 90 of the Constitution from at least forty-five (45) days from the date of General Election to within twenty-one (21) days after the date of general election.

7. Article 90 of the Constitution which is proposed to be amended states that;

“Elections for the seats in Parliament provided for under Articles 97 (1) (c) and 98 (1) (b), (c) and (d), and for the Members of County Assemblies under 177 (1) (b) and (c) shall be on the basis of proportional representation by use of part lists.

1. The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that-

a. Each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;

b. Except the case of the seats provided under Article 98 (1) (b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and

c. Except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.

2. The seats referred to clause (1) shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election”

8. Section 35 of the Election Act No. 24 of 2011 on submission of party lists states that;

“A political party shall submit its party list to the Commission on the same day as the day designated for submission to the Commission by political parties of nominations of candidates for an election before the nomination of candidates under Article 97 (1) (a) and (b), 98 (1) (a) and 177 (1) (a) of the Constitution”

9. The Bill concerns county governments within the meaning of Article 110 of the Constitution. The enactment of this Bill will occasion additional expenditure of public funds.
10. The Bill does don't delegate legislative powers nor does it limit fundamental rights and freedoms.

3.0 PUBLIC PARTICIPATION IN THE REVIEW OF THE BILL

11. The Committee undertook public participation on the Bill in line with the provision of Article 118 (1) (b) of the Constitution read together with Standing Order 127 (3). Adverts inviting the public to make any submission regarding the proposed amendment were put on local daily newspapers of Monday 26th August and Monday 14th October, 2019 as attached to the report as Annexure 3.
12. In addition the Committee resolved to undertake public hearings for the bill in a number of counties where members of the public either individually or representing institutions and organizations made presentations and submitted memoranda which the Committee took into account while considering the Bill.
13. The Committee conducted public hearings in the following counties;
 - (i) Nairobi County to seek views from the capital city and its environs;
 - (ii) Machakos County to seek views from the lower Eastern region and environs;
 - (iii) Mombasa County to seek views from the Coastal region;
 - (iv) Kisumu County to seek views from the Nyanza region;
 - (v) Kakamega County to seek views from the Western region;
 - (vi) Meru County to seek views from the Eastern region;
 - (vii) Uasin Gishu County to seek views from the Central Rift Valley region;
 - (viii) Nakuru County to seek views from the Rift Valley region;
 - (ix) Nyeri County to seek views from the Central Kenya region
 - (x) Turkana County to seek views from the Rift Valley
 - (xi) Wajir County to seek views from North Eastern region
14. The Committee divided itself into three sub- committees to conduct public hearings in various counties as follows-

Nairobi-Machakos-Mombasa Counties

- (i) Hon. William Cheptumo, MP.- Chairperson
 - (ii) Hon. Japheth Mutai, MP.
 - (iii) Hon. John Kiarie, MP.
 - (iv) Hon. Beatrice Adagala, MP.
 - (v) Hon. Zuleikha Hassan, MP.
 - (vi) Hon. Charles Gimose, MP
15. The public hearings were held at County Hall, parliament precincts (Nairobi County), Youth Centre (Machakos County) and Kenya School of Government Meeting Hall (Mombasa County) 29th, 30th and 31st August, 2019 respectively

Uasin Gishu-Kakamega-Kisumu Counties

- (i) Hon John Olago, MP. –Team Leader
- (ii) Hon. Anthony Kiai, MP.
- (iii) Hon. Adan Yussuf Haji, MP.
- (iv) Hon. Jeniffer Shamalla, MP.
- (v) Hon. Peter Kaluma, MP.
- (vi) Hon. Ben Momanyi, MP.
- (vii) Hon. Gladys Boss Shollei, CBS, MP.

16. The public hearings were held at TAC Centre (Eldoret), Magharibi Hall (Kakamega County) and Tom Mboya College Labour (Kisumu County) on 29th, 30th and 31st August, 2019 respectively

Nakuru-Nyeri-Meru Counties

- (i) Hon. Alice Wahome, MP. –**Chair**
- (ii) Hon. Willaim Kamoti, MP.
- (iii) Hon. John Munene, MP.
- (iv) Hon. George Murugara, MP.
- (v) Hon. Gladys Boss Shollei, CBS, MP.

17. The public hearings were held at Old Town Hall (Nakuru County), PCEA Hall (Nyeri County) and Kifaru Hall (Meru County) on 29th, 30th and 31st August, 2019 respectively

Turkana-County

- (i) Hon. Alice Wahome, MP. –**Chair**
- (ii) Hon. Olago Alouch, MP
- (iii) Hon. Soipan Tuya, MP
- (iv) Hon. Johana Ng'eno, MP
- (v) Hon Jeniffer Shamalla, MP
- (vi) Hon. Japheth Mutai, MP.
- (vii) Hon. Peter Kaluma, MP.

18. The public hearings were held at Lowdar Vocational Training Centre (Turkana County) on 25th October, 2019

Wajir County

- (i) Hon. William Cheptumo, MP.- **Chairperson**
- (ii) Hon. John Munene, MP.
- (iii) Hon. Beatrice Adagala, MP.
- (iv) Hon. George Murugara, MP.
- (v) Hon. Adan Yussuf Haji, MP.
- (vi) Hon. Ben Momanyi, MP.
- (vii) Hon. Willaim Kamoti, MP.

19. The public hearing took place in County ICT Hall (Wajir County) on 1st November, 2019.
20. In compiling this report, the committee considered submissions by members of the public on the subject matter.
21. Several members of the public either individually or representing institutions and organizations submitted their views to the Committee by way of written and oral submissions.
22. A comprehensive list of members of the public who attended the public hearings in the various counties is attached to this report as annexure 4.
23. The matrixes noting the general comments in support or against the amendments are attached to the report as annexure 5.
24. The matrix also documents various proposed amendments to the Bills by members of the public and institutions.
25. 32 percent of the participants across the counties supported the amendment Bill. Highlights of supporting views were captured as follows;
 - (a) Mr. Benard Musyoki of Machakos County submitted that nomination lists should be submitted after elections.
 - (b) In Mombasa, Godfrey Mae, Joseph Mutue Nyamu, Village Elder, Mwasiri Sinangoa, Deputy County Registrar of Persons stated that nomination lists should be submitted before elections
 - (c) In Wajir, Mr. Abdullahi Mohamed and Mr. Abdi Gillow supported the amendments but proposed that those who contest and lose elections should not be considered for nomination and proposed that nomination positions to be reserved for minority groups.
 - (d) Moses Kendagor from Uasin Ngishu County supported the amendment as it will enable political parties to know the exact numbers of person they'll be entitled to nominate based on party strength after the election.
 - (e) Paul Lemiso from Soy sub-county supported the Bill as it will protect persons who had campaigned for a political party but lost at election as they will be able to be nominated.
 - (f) James Sirma from Uasin Ngishu County supported the Bill as all persons are entitled to be nominated including election losers.

(g) Charles Koisir, a village leader from Ainabkoi sub-county supported the Bill so that nomination lists are submitted after the election.

26. 68 percent of the participants across the counties opposed approval of the amendment Bill. Highlights of opposing views were captured as follows;

- (a) Political parties will misuse the opportunity and use it as a reward mechanism for undeserving persons and if passed the proposal would be subject to abuse.
- (b) The current provision of the Constitution was framed as it is to avoid political mischief and if passed the amendment would allow election losers to be nominated and to the exclusion of other deserving persons.
- (c) There was a good reason why the framers of the Constitution provided for party lists before elections.
- (d) There is no legitimate reason why nomination slots should be there in the first place as they are used as employment opportunities for a select group in the society.
- (e) **Jeff Abido from Nakuru** opposed the proposed amendments on grounds that nomination lists should be submitted before and not after election because political parties have been abusing chapter six of the Constitution through nomination lists.
- (f) The proposed amendment will undermine transparency and accountability in determining deserving cases on the party list for nominations.
- (g) **Daniel Wachira from Nyeri** opposed the amendment and proposed that the provision on nominated members should be done away with.
- (h) **Magaret Nanyoko** from Meru opposed the amendments because party loyalists are often deceived into putting all efforts in campaigning for the party with no assurance of getting nominated.
- (i) **Vincent Kihunju from Meru** opposed the amendment because it will give elected members an opportunity to influence the list.
- (j) **Ms. Fatuma Yusuf from Wajir** opposed the amendment stating that both the provision in force and the proposed law does not address current bedevilling the nomination process. An amendment to change time for submission of party lists will not address the prevailing challenges.
- (k) **Mr. Adan Salat from Wajir** opposed the amendment stating that that party secretaries are far away from the grassroots and are corrupt to the extent that change of time is not the panacea to the bigger problem on nominations. He further stated that all counties should concur for such an amendment Bill to be passed by Parliament.
- (l) **Mr. Khalif Omar from Wajir** opposed the amendment and proposed that there should be political parties' reforms to enhance transparency and accountability in their activities such as nominations and involvement of their party grassroots.

CHAPTER 4

4.0 CONSIDERATION OF THE PROPOSED AMENDMENTS BY THE COMMITTEE

4.1 Proposed amendment to Article 90 of the Constitution

Article 90 of the Constitution is amended in clause (2) (a) by deleting the words “*who would stand elected if the party were to be entitled to all seats provided for*”

27. The amendment seeks to align Article 90 with the proposed amendment to section 35 of the Elections Act to change the timing for submission of party lists by political parties for persons elected under Article 90 of the Constitution from at least forty – five days from the date of the general election to within twenty one days after the date of the general election.

Article constitution which is proposed to be amended provides for

On Allocation of party list seats;

28. Elections for the seats in Parliament provided for under Articles 97(1)(c) and 98(1)(b), (c) and (d), and for the members of county assemblies under article 177(1)(b) and (c), shall be on the basis of proportional representation by use of party lists.
29. The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that;
- (a) each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;
 - (b) Except in the case of th seats provided for under Article 98(1)(b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and;
 - (c) Except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.
30. The seats referred to in clause (1) shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election.

4.2 Committee observations

31. The Committee observed as follows;

- (a) The proposed amendment may lead to abuse of the process by parties and act as a reward to political cronies.
- (b) The amendment will enhance intra party competition at the electioneering period. The current position makes aspirants on the party list complacent and do not do much for the party in campaigns. Those who miss out on the party list tend to avoid engagement in party activities.
- (c) Based on presentations by members of the public it appears that the proposed amendment is not popular with a large portion of the electorate.

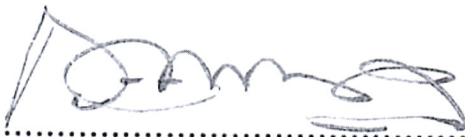
Committee Recommendation

32. The Committee recommended that the amendment should not be approved on grounds that during the drafting and public participation phase of the Constitution the matter on election was not a contentious and majority of Kenyans opposed the proposed amendment during the public hearings.

CHAPTER 5

5.0 RECOMMENDATION

The Committee having facilitated public participation and considered the proposed amendment to Article 90 of the Constitution recommends to the House that the Constitution of Kenya (Amendment) Bill, 2019 (National Assembly Bill No.19 should not be proceeded with.

Sign..........Date.....12th March 2020.....

Hon. William Cheptumo, M.P.

Chairperson, Departmental Committee on Justice and Legal Affairs