

**REPUBLIC OF KENYA**



**TWELFTH PARLIAMENT (FOURTH SESSION)**

**THE SENATE**

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

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**REPORT ON THE CONSTITUTIONAL AMENDMENTS PROPOSED IN  
THE REPORT OF THE STEERING COMMITTEE ON THE  
IMPLEMENTATION OF THE BUILDING BRIDGES TO A UNITED  
KENYA TASKFORCE REPORT**

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*Clerk's Chambers,  
First Floor,  
Parliament Buildings,  
**NAIROBI.***

**NOVEMBER, 2020**

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## PREFACE

**Mr. Speaker,**

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.*

The Committee is comprised of the following members: -

- 1) Sen. Erick Okong’o Mogeni, SC, MP - Chairperson
- 2) Sen. (Canon) Naomi Jilo Waqo, MP - Vice Chairperson
- 3) Sen. Amos Wako, EGH, SC, FCI Arb, MP - Member
- 4) Sen. James Orengo, EGH, SC, MP - Member
- 5) Sen. Mohamed Yusuf Haji, EGH, MP - Member
- 6) Sen. Fatuma Dullo, CBS, MP - Member
- 7) Sen. Mutula Kilonzo Junior, MP - Member
- 8) Sen. Irungu Kang’ata, MP - Member
- 9) Sen. Johnson Sakaja, CBS, MP - Member

**Mr. Speaker,**

On 26<sup>th</sup> October, 2020, the Report of the Steering Committee on the implementation of the Building Bridges to a United Kenya Taskforce Report (‘the BBI Report’) was launched. The highly anticipated Report proposed various Constitutional amendments that not only affect the Senate but also affect devolution in general. The Committee therefore resolved to study the proposed amendments to the Constitution and report to the Senate.

The Committee held substantive deliberations and has made various observations on the constitutional amendments proposed in the BBI Report, as set out in Chapter Two of this Report. Additionally, the Committee has made proposals with a view to further achieve the objectives of the BBI Report, to protect the interests of counties and the important role of the Senate. These are set out at Chapter Three of this Report.

**Mr. Speaker,**

The Committee wishes to thank the Offices of the Speaker and the Clerk of the Senate for the support extended to it in undertaking this important assignment.

**Mr. Speaker,**

It is now my pleasant duty, pursuant to standing order 213(6) of the Senate Standing Orders, to present a Report of the Standing Committee on Justice, Legal Affairs and Human Rights on the constitutional amendments proposed in the Report of the Steering Committee on the implementation of the Building Bridges to a United Kenya Taskforce Report.

I thank you, Mr. Speaker.



11<sup>th</sup> November, 2020

Signed.....


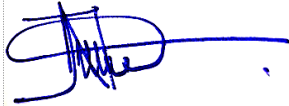


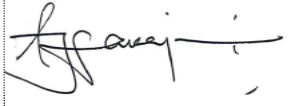
Date.....

**SEN. ERICK OKONG'O MOGENI, SC, MP,  
CHAIRPERSON,  
SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND  
HUMAN RIGHTS**

**ADOPTION OF THE REPORT ON THE CONSTITUTIONAL AMENDMENTS PROPOSED IN THE REPORT OF THE STEERING COMMITTEE ON THE IMPLEMENTATION OF THE BUILDING BRIDGES TO A UNITED KENYA TASKFORCE REPORT**

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**We, the undersigned Members of the Senate Standing Committee on Justice, Legal Affairs and Human Rights, do hereby append our signatures to adopt the Report on the constitutional amendments proposed in the Report of the Steering Committee on the implementation of the Building Bridges to a United Kenya Taskforce Report.**

|                                      |                   |   |
|--------------------------------------|-------------------|---|
| Sen. Erick Okong'o Mogeni, SC, MP    | -Chairperson      |    |
| Sen. (Canon) Naomi Jilo Waqo, MP     | -Vice-Chairperson |    |
| Sen. Amos Wako, EGH, SC, FCI Arb, MP | -Member           |   |
| Sen. James Orengo, EGH, SC, MP       | -Member           |   |
| Sen. Mohamed Yusuf Haji, EGH, MP     | -Member           |   |
| Sen. Fatuma Dullo, CBS, MP           | -Member           |  |
| Sen. Mutula Kilonzo Junior, MP       | -Member           |  |
| Sen. Irungu Kang'ata, MP             | -Member           |   |
| Sen. Johnson Sakaja, CBS, MP         | -Member           |  |

## **CHAPTER ONE: INTRODUCTION**

On 26<sup>th</sup> October, 2020, the Report of the Steering Committee on the implementation of the Building Bridges to a United Kenya Taskforce Report was launched. The highly anticipated Report proposed various Constitutional amendments that not only affect the Senate but also affect devolution in general. The Committee therefore resolved to study the proposed amendments to the Constitution and report to the Senate. A copy of the said Report, including the draft Constitution of Kenya (Amendment) Bill, is attached to this Report as ***Annex 2***.

The Committee held substantive deliberations and has made various observations on the constitutional amendments proposed in the Report of the Steering Committee on the implementation of the Building Bridges to a United Kenya Taskforce Report, as set out in Chapter Two of this Report. Additionally, the Committee has made proposals in Chapter Three of the Report of the Steering Committee on the implementation of the Building Bridges to a United Kenya Taskforce Report with a view to further achieve the objectives of the Report, to protect the interests of counties and the important role of the Senate.

## **CHAPTER TWO: COMMITTEE OBSERVATIONS**

### **The Committee made the following observations—**

#### **Article 90 of the Constitution**

This amendment proposed by the Steering Committee on the implementation of the Building Bridges to a United Kenya Taskforce Report (BBI Steering Committee) proposes to amend Article 90 to provide for the members of the National Assembly to be drawn from both single member and multiple member constituencies. It also provides that candidates to be nominated from a party list for county assemblies be allotted on the basis of the total votes received by their political party as opposed to the current practice where such allocation is based on seats won by the political party.

The Committee notes that the amendment is not clear on the selection process for the single and multiple member constituencies noting that, among others, population data is categorised in accordance with administrative units and boundaries and not constituencies.

The Committee further notes that the intention and rationale of the proposed amendment has not been made clear and the same ought to be clarified to ensure the intention is fully achieved. The Committee further notes that conversations around this issue tend to make a false equivalency between equality of votes and equality in allocation of resources.

#### **Article 96 of the Constitution**

This BBI Steering Committee did not propose any amendment to Articles 94, 95 and 96 of the Constitution, despite the various constitutional questions that have been raised in respect of the roles of each house of Parliament.

The Committee notes that Article 96 of the Constitution ought to be amended to clarify the roles of each house of Parliament. To this end, the Committee observes that there is need to enhance the Senate's legislative and oversight roles to ensure that it properly executes and discharges its mandate.

The Committee further notes that, in the event the proposal to have members of the Executive being drawn from or sitting in the National Assembly, the National Assembly cannot vet the said Members and other public officers. The function of vetting should therefore lie in the Senate.

## **Article 97 of the Constitution**

This amendment proposed by the BBI Steering Committee proposes to amend Article 97 to provide for the members of the National Assembly to be drawn from both single member and multiple member constituencies as discussed above. The amendment also removes the 47 elected women representatives from the National Assembly.

The Committee notes that women representatives play an important role in the National Assembly as that House directly represents people in constituencies. It is therefore prudent that they be retained in the National Assembly to continue performing their important representative role and have an opportunity to serve in the Cabinet.

The Committee further notes that the proposed amendment contradicts Article 89 of the Constitution as it does not properly address the issue of gender representation in the National Assembly.

The Committee also notes that in its report, the BBI Steering Committee did not provide the source of this proposal i.e. the stakeholders that made this proposal. The Committee further notes that removing these elected women representatives from the National Assembly will also affect the funds that reached women and other marginalised groups through the National Government Affirmative Action Fund.

## **Article 98 of the Constitution**

This amendment proposed by the BBI Steering Committee proposes to amend Article 98 to remove all nominated Senators and provide that the Senate comprise one man and one woman elected from every county.

The Committee notes that the election of two Senators to represent each county will create confusion especially noting that the key role of the Senate is to protect the interests of counties and distinct entities. The role of protection of counties may be compromised when, for instance, the two Senators disagree and therefore do not vote the same way on a matter.

The Committee further noted that jurisdictions that have more than one Senator per constituency e.g. the United States of America have far higher populations compared to Kenya.



### **Article 108 of the Constitution**

This amendment proposed by the BBI Steering Committee proposes to repeal and replace Article 108 to provide for the new order of precedence in the National Assembly to include the Prime Minister and the Leader of Official Opposition.

The Committee appreciates that the inclusion of the Prime Minister and the Opposition Leader are necessary as they will be senior members of the National Assembly. The Committee however notes with concern that there is no similar provision on the order of precedence in the Senate.

### **Article 123 of the Constitution**

This amendment proposed by the BBI Steering Committee proposes to repeal Article 123 of the Constitution on voting in the Senate, i.e. by delegations or otherwise. This has the implication that voting will be one vote per senator.

The Committee notes that this deletion ought to be removed, especially noting the Committee's proposal to only have 47 Senators from each of the Counties. This proposal therefore ought to be amended to retain Article 123 but amend it so that a vote in the Senate can only carry when supported by at least half the Counties i.e. 24 votes.

### **Article 153 of the Constitution**

This amendment proposed by the BBI Steering Committee proposes to replace the term "Cabinet Secretary" with the term "Cabinet Minister"

The Committee notes that this proposal ought to provide that all members of the Cabinet, except the President and Deputy President, report to both Houses of Parliament and, when called upon, attend sittings of both Houses of Parliament and their Committees. This is in recognition of the other members of the Cabinet who are not Cabinet Secretaries i.e. the Attorney General and the Prime Minister.

### **Article 171 of the Constitution**

This amendment proposed by the BBI Steering Committee proposes to amend Article 171 to include the Judiciary Ombudsman as a member of the Judicial Service Commission. The amendment further provides that elected advocates in the Commission shall not practise in the courts and tribunals for the purpose of minimising instances of conflict of interest.

The Committee notes that the judiciary ombudsman is an investigative office and should therefore be an *ex-officio* member of the Judicial Service Commission and further that her/his approval for appointment should be done by the Senate.

The Committee further notes that, to ensure judicial independence, and therefore independence of the Judiciary Ombudsman, the requirement for the ombudsman to report to the President and to Parliament should be removed.

### **Article 200 and the Fourth Schedule to the Constitution**

This amendment proposed by the BBI Steering Committee proposes to amend Article 200 and the Fourth Schedule to the Constitution to transfer key functions from the Nairobi City County to the National Government.

The Committee notes that this proposal flies in the face of devolution and is likely to be the first step in killing devolution. Devolution is the bedrock of the current Constitution and its benefits to Kenyans cannot be gainsaid. The Committee notes that if the Senate sits back when some county functions are transferred to the National Government then it will have abdicated its *ikigai* to protect counties and their interests.

The Committee further notes that Article 1(4) of the Constitution provides that the sovereign power of the people is exercised at both the national and county levels. Transferring these functions from the county government to the National Government in perpetuity therefore restricts the power of the people of Nairobi to exercise this sovereign power. The Committee also notes that the transfer is discriminatory against the people of Nairobi in contravention of Article 27 of the Constitution.

## **CHAPTER THREE: COMMITTEE RECOMMENDATIONS**

### **The Committee makes the following recommendations—**

- (a) The amendment to Articles 90 and 97 of the Constitution be further amended to clearly set out the modalities for identifying the multiple member constituencies to provide clarity on the matter and avoid contention after the amendment has been made law. The modalities should not only ensure that there is equality of votes but also clearly take cognizance of the fact that equality of votes is different from equality of resources.
- (b) Article 96 of the Constitution be amended to expand the legislative authority of the Senate to all legislation save that Money Bills only originate in the National Assembly. This will have the effect of amending Article 109 of the Constitution.
- (c) Article 96 of the Constitution be further amended to expand the Senate's oversight authority to all funds in counties (both nationally allocated and locally raised).
- (d) Article 96 of the Constitution also be amended to provide that the Senate vets and approves the appointment of state officers as opposed to the National Assembly where the Executive sit. This approval shall include the approval of Cabinet Secretaries (who are not elected members of the National Assembly) and Principal Secretaries under Articles 154 and 155, respectively.
- (e) The amendment to Article 97 of the Constitution be amended to retain the 47 women representatives in the National Assembly.
- (f) Article 98 of the Constitution be further amended to provide that the Senate only comprise 47 elected Senators and the Speaker.
- (g) The amendment to Article 108 of the Constitution be amended to provide for order of precedence and house leadership in both Houses of Parliament.
- (h) The amendment to Article 123 of the Constitution be deleted and Article 123 be amended to only provide that that a vote in the Senate can only carry when supported by at least half the Counties i.e. 24 votes.
- (i) The amendment to Article 153 of the Constitution be further amended under Article 153(3) and (4) to provide that all members of the Cabinet, except the

President and Deputy President, report to both Houses of Parliament and, when called upon, attend sittings of both Houses of Parliament and their Committees. This is in recognition of the other members of the Cabinet i.e. the Attorney General and the Prime Minister.

- (j) The amendment to Article 171 be amended to provide that the judiciary ombudsman be an *ex-officio* member of the Judicial Service Commission.
- (k) The new proposed Article 172A be amended to provide that the appointment of the judiciary ombudsman be approved by the Senate and to delete the stipulation that the ombudsman reports to the President and to Parliament.
- (l) The amendments to Article 200 and the Fourth Schedule be deleted as they are discriminatory against the people of Nairobi and are also against the spirit of devolution under the Constitution.
- (m) The proposed new Article 207A be amended to increase the percentage of county government revenue to be paid into the Ward Development Fund.
- (n) The amendment to Article 218 be deleted and the provision under the Constitution be retained.
- (o) The proposed new Article 218A be deleted.

## **ANNEXES**

**Annex 1:** Report of the Steering Committee on the implementation of the Building Bridges to a United Kenya Taskforce Report

**Annex 2:** Minutes of the 63<sup>rd</sup> Sitting of the Senate Standing Committee on Justice, Legal affairs and Human Rights



**TWELFTH PARLIAMENT | FOURTH SESSION**

**MINUTES OF THE SIXTY-THIRD SITTING OF THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON THE ZOOM VIRTUAL MEETING PLATFORM, ON WEDNESDAY, 11<sup>TH</sup> NOVEMBER, 2020, AT 12.15 P.M.**

**PRESENT**

1. Sen. Erick Okong'o Mogeni, SC, MP - Chairperson (**Chairing**)
2. Sen. (Canon) Naomi Jilo Waqo, MP - Vice Chairperson
3. Sen. Fatuma Dullo, CBS, MP - Member
4. Sen. Mutula Kilonzo Junior, MP - Member
5. Sen. Johnson Sakaja, CBS, MP - Member

**ABSENT WITH APOLOGY**

1. Sen. Amos Wako, EGH, SC, FCI Arb, MP - Member
2. Sen. James Orengo, EGH, SC, MP - Member
3. Sen. Mohammed Yusuf Haji, EGH, MP - Member
4. Sen. Irungu Kang'ata, MP - Member

**SECRETARIAT**

1. Mr. Charles Munyua - Clerk Assistant (**Taking Minutes**)
2. Mr. Mitchell Otoro - Legal Counsel
3. Ms. Sylvia Adera - Clerk Assistant
4. Mr. James Kimiti - Hansard/ Audio Officer

**MIN. NO. 347/2020**      **PRAYER**

The sitting commenced with a word of prayer by Sen. Johnson Sakaja, CBS, MP.

**MIN. NO. 348/2020**      **ADOPTION OF THE AGENDA**

The Committee adopted the agenda of the Sitting, having been proposed by Sen. (Canon) Naomi Jilo Waqo, MP and seconded by Sen. Johnson Sakaja, CBS, MP.

**MIN. NO. 349/2020**      **CONSIDERATION OF THE REPORT OF THE STEERING COMMITTEE ON THE IMPLEMENTATION OF THE BUILDING BRIDGES TO A UNITED KENYA TASKFORCE REPORT, AND THE PROPOSED CONSTITUTION OF KENYA (AMENDMENT) BILL, 2020**

The Committee resumed its consideration of the Report of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report, and

the proposed Constitution of Kenya (Amendment) Bill, 2020. The Committee was taken through the revised draft Report of the Committee, incorporating the amendments proposed by Members during the 62<sup>nd</sup> Sitting held earlier that morning.

Thereupon, the Committee adopted its Report on consideration of the proposals contained in the Report of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report, having been proposed by Sen. Johnson Sakaja, CBS, MP and seconded by Sen. Sen. (Canon) Naomi Jilo Waqo, MP.

**MIN. NO. 350/2020      ADJOURNMENT**

There being no other business, the Chairperson adjourned the meeting at 12.50 pm. The next meeting will be held on Thursday, 12<sup>th</sup> November, 2020 at 8.00 am.



**SIGNED:** .....  
**(CHAIRPERSON)**

11<sup>th</sup> November, 2020

**DATE:** .....