

REPUBLIC OF KENYA



THE SENATE

TWELFTH PARLIAMENT

THIRD SESSION

THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND
HUMAN RIGHTS

.....

A REPORT ON THE PUBLIC PARTICIPATION ON
THE IMPEACHMENT PROCEDURE BILL
(SENATE BILLS NO.15 OF 2018)

.....

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

March, 2019

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PREFACE

Establishment of the Committee

The Standing Committee on Justice, Legal Affairs and Human Rights is established pursuant to the Senate Standing Order 212 and mandated to *consider all matters relating 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.*

Membership of the Committee

The Committee is comprised of the following members:-

1. Sen. Samson Cherarkey, MP - **Chairperson**
2. Sen. Mithika Linturi, MP - **Vice-Chairperson**
3. Sen. James Orengo, MP
4. Sen. Fatuma Dullo, MP
5. Sen. Kilonzo Mutula Jnr., MP
6. Sen. Susan Wakarura Kihika, MP
7. Sen. Amos Sitswila Wako, MP
8. Sen. Irungu Kang'ata, MP
9. Sen. Faki Mohamed, MP

Mr. Speaker,

The Impeachment Procedure Bill (Senate Bills No.15 Of 2018) seeks to provide for the procedure for the removal from office, by impeachment, of a President, Deputy President, Cabinet Secretary, Governor, Deputy Governor, and member of a county executive committee.

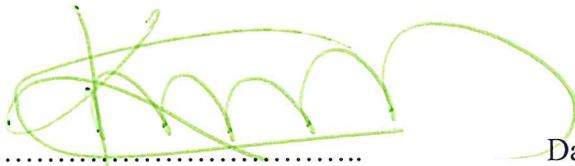
The Committee considered the Bill at length, conducted public participation and deliberated on the submissions received. Based on the deliberations and public participation, the Committee will present amendments with the view of strengthening the provisions of the Bill for consideration by this House.

Acknowledgement

The Committee wishes to thank the Offices of the Speaker and the Clerk of the Senate for the support extended to it in the conduct of the public hearings and in fulfilling its mandate. Further it wishes to thank stakeholders who made both written and oral submissions such as the- Council of Governors (CoG), County Assemblies Forum (CAF), Kenya Law Reform Commission (KLRC) and Mr. Samuel Nyatangi Ratemo.

Mr. Speaker,

It is now my pleasant duty, pursuant to Standing Order 137, to present a Report of the Standing Committee on Justice, Legal Affairs and Human Rights on the Impeachment Procedure Bill (Senate Bills No.15 Of 2018).



Signed.....

Date.....

SEN. SAMSON CHERARKEY, MP

CHAIRPERSON

STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

CHAPTER ONE

INTRODUCTION

1.0 Background

1. The Impeachment Procedure Bill (Senate Bills No.15 Of 2018) was sponsored by Sen. Samson Cherarkey, Chairperson, Committee on Justice and Legal Affairs of the Senate. It seeks to clearly set out impeachment procedures that would ensure procedural justice for every person who is sought to be impeached. It also proposes a period within which court matters relating to impeachment proceedings shall be concluded so as to minimize anxiety over prolonged undecided fate of the chief executive of the Nation or a County or other members of their cabinets.
2. The Bill was published on 24th May, 2018 and was read a First Time on 3rd July, 2018. Following the First Reading in the Senate, it stood committed, pursuant to Standing Order 134(1), to the Standing Committee on Justice, Legal Affairs and Human Rights for facilitation of public participation. Subsequently, the Committee, pursuant to Article 118 of the Constitution and Standing Order 134 (5), invited submissions from members of the public on the Bill via an advertisement on the Standard Newspaper and the Daily Nation Newspapers.

1.1 The Object of the Bill

3. The Bill seeks to provide for a harmonized procedure to be applied in considering a motion for the removal of a President, Governor, a Deputy Governor, a Cabinet Secretary or a County Executive Committee Member. It also proposes appropriate solutions to procedural gaps identified with respect to the provisions in the Constitution for the removal of a President, Deputy President or Cabinet Secretary.
4. During the 11th Parliament, the Senate held several impeachment proceedings for the removal of various Governors (Embu, Kericho, Nyeri, Murang'a) and a Deputy Governor (Machakos). The Bill was partly informed by challenges identified from the several proceedings for the removal of a governor and for the removal of a deputy governor that the

Senate has conducted and the court proceedings to which some of the impeachment proceedings have been subjected on the basis of the procedures followed.

1.2 Overview of the Bill

5. The Bill is divided into the following major parts:

Part II – Procedure for Removal from Office, By Impeachment, Of President and Deputy President

Removal of the Motion by Impeachment

6. Clause 2 of the Bill provides that the President may be removed from office, by Removal of the impeachment, in accordance with Article 145 of the Constitution and the provisions of the Act.

Impeachment Motion for the Removal of the President

7. Clause 3 restates that requirements of Article 145 (1) of the Constitution that Impeachment of the president are commenced in the National Assembly where a Member of the National Assembly submits a motion supported by at least a third of the Members of the National Assembly. The Member may move a motion of the on the ground of gross violation of a provision of the Constitution or of any other law; where there are serious reasons for believing that the President has committed a crime under national or international law; or for gross misconduct.

Procedure for the Removal of the President in the National Assembly

8. Clause 4 of the Bill proposes that a Member of the National Assembly, who intends to move a motion for the removal of the President, by impeachment, shall submit a copy of the proposed motion to the Clerk of the National Assembly together with a list of the Members of the National Assembly who support the motion, in the form prescribed in the Schedule.
9. The Clerk of the National Assembly shall confirm that the proposed motion specifies the grounds and particulars upon which the proposed motion is made; is signed by the Member; and is signed in support by at least a third of all the Members of the National Assembly. The

Clerk shall then submit the motion to the Speaker of the National Assembly who will examine the motion and if he is satisfied that it complies with the requirements, notifies the member within three (3) days.

10. The Member of the National Assembly who intends to move the motion under subsection (1) shall give notice of the approved motion within seven (7) sitting days of approval of the motion. The Member shall move the motion within fourteen (14) days of giving notice. The National Assembly is required to dispose of the matter within seven (7) days.
11. Clause 4 (2) of the Bill restates the provisions of Article 145 (2) which requires that if two-thirds of the members of the National Assembly vote in support of the motion, the Speaker of the National Assembly shall inform the Speaker of the Senate within two (2) days.

Proceedings in the Senate for Removal of the President by Impeachment

12. Clause 5(1) of the Bill restates that provisions of Article 145 (3) of the Constitution that within seven (7) days of receiving the notice of resolution of the National Assembly, the Speaker of the Senate is required to convene a meeting of the Senate to hear charges against the President and the Senate, by resolution, may appoint a special committee comprising eleven (11) of its members to investigate the matter.
13. Clause 5(2) of the Bill restates the provisions under Article 145 (4) that the special committee shall investigate the matter and report to the Senate within ten (10) days on whether it finds the particulars of the allegations against the President to have been substantiated.
14. Clause 5 (3) of the Bill provides that where the Senate does not appoint a special committee, the Senate shall make its determination within ten (10) days of its first meeting.
15. Clause 5 (4) further provides that within two (2) days of the meeting of the Senate, the Clerk of the Senate shall serve the President with a copy of the motion for removal by

impeachment; and invite the President to appear and be heard by the Senate or the special committee on a specified date, time and place.

16. Clause 5(5) of the Bill provides that the Senate or the special committee, as the case may be, may hear representations from the Member who moved the motion for removal by impeachment in the National Assembly and such other members of the National Assembly as it may consider necessary for the proper determination of the matter.
17. Clause 5 (6) of Bill provides that if the special committee reports that the particulars of any allegation against the President have not been substantiated, further proceedings shall not be taken in respect of that allegation; or have been substantiated, the Senate shall, after according the President an opportunity to be heard, vote on the impeachment charges.
18. Clause 5 (7) of the Bill restated that provisions of Article 145 (7) of the Constitution that if two-thirds of the members of the Senate vote to uphold the charges, the President shall cease to hold office.

President's Right to appear and be represented

19. Clause 6 of the Bill provided that the President shall have the right to appear and President's right be represented before the Senate or the special committee during its investigations. The president may appear in person or be misrepresented.

Removal of a Deputy President by Impeachment

20. Clause 7 of Bill provides Article 150 (2) of the Constitution, the President, shall apply, with necessary modifications, to the removal of a Deputy President, by impeachment, under Article 150(b) of the Constitution.

Part III – Procedure for Removal from Office of a Cabinet Secretary

Removal from Office of a Cabinet Secretary from Office

21. Clause 8 of the Bill provides that a Cabinet Secretary may be removed from office of in accordance with Article 152 of the Constitution.

Procedure for the Removal from Office of a Cabinet Secretary

22. Clause 9 of the Bill restates the provisions of Article 152 (6) of the Constitution which provides that a Member of the National Assembly, supported by at least one-quarter of all the members of the National Assembly, may propose a motion requiring the President to dismiss a Cabinet Secretary on the ground of a gross violation of a provision of the Constitution or of any other law; where there are serious reasons for believing that the Cabinet Secretary has committed a crime under national or international law; or for gross misconduct..
23. Clause 9 (2) of the Bill provides that a Member of the National Assembly who proposes a motion for the removal of a Cabinet Secretary shall submit to the Clerk of the National Assembly a copy of the proposed motion for the removal of the Cabinet Secretary together with a list of the Members of the National Assembly who support the motion, in the form prescribed in the Schedule.
24. Clause 9 (3) and (4) of the Bill further provides that once the Clerk of the National Assembly confirms the ground, particulars, signature of the Member proposing the motion and those in support, he shall submit the same to the Speaker to examine the motion.
25. Clause 9 (5) of the Bill provides that where the Speaker is satisfied with the motion he may approve it and inform the Member within three (3) days or decline to approve the motion and inform the member within three days.
26. Clause 9 (6) of the Bill provides that where the motion has been approved by the Speaker, the Member shall give notice of the approve motion within seven (7) days and thereafter under Clause 9(7) the Member shall move the motion within fourteen (14) days of giving notice.
27. Clause 9 (8) of the Bill proposes that the National Assembly shall dispose of the motion within seven (7) days from the day the motion was moved.
28. Clause 9 (9) of the Bill provides that if the motion is supported by at least one-third of the members of the National Assembly - the National Assembly shall appoint a select committee

comprising eleven of its members to investigate the matter; and the select committee shall, within ten (10) days, report to the National Assembly whether it finds the allegations against the Cabinet Secretary to be substantiated.

29. Clause 9 (10) of the Bill provides that the Clerk of the National Assembly shall invite the Cabinet Secretary to appear and be heard by the select committee giving the date, time and place where the Cabinet Secretary is to appear.

Report of the Select Committee of the National Assembly

30. Clause 10 of the Bill restates the provisions of Article 152 (9) of the report of the National Assembly which is that if the select committee reports that it finds any of the of the National allegations against the Cabinet Secretary unsubstantiated, no further proceedings shall be taken in respect of that allegation. However, where the allegations are substantiated, the National Assembly shall afford the Cabinet Secretary an opportunity to be heard; and vote on whether to approve the resolution requiring the Cabinet Secretary to be dismissed.

Resolution of the National Assembly

31. Clause 11 of the Bill restates Article 152 (10) of the Constitution which provides that the Spear shall deliver the resolution to the President and the President shall dismiss the Cabinet Secretary.

Cabinet Secretary's right to appear and be represented.

32. Clause 12 of the Bill provides that the Cabinet Secretary has the right to appear and be represented.

Part IV—Procedure for Removal from Office, By Impeachment, Of A Governor and A Deputy Governor

Motion for Removal of a Governor

33. Clause 13 of the Bill seeks to build up on the provisions of Article 181 of the Constitution, regarding the removal of County Governor by impeachment. The Bill also seeks to provide for the procedure to be followed when removing a Deputy Governor by impeachment.

Proceedings in a County Assembly for the Removal of a Governor

34. Clause 14 of the Bill provides that a member of the county assembly who intends to move a motion for the removal of the Governor is required to submit the motion, to the speaker of that county assembly, in a prescribed form. The Speaker shall examine the motion and if it does not comply with the requirements of the Bill, decline to approve the motion and inform the member of the reasons of such refusal within two days. If the Speaker finds the motion to be in compliance with the Bill, the Speaker is required to notify the member within two days.
35. The member then moves the motion within fourteen days. At least seven days before the motion is to be moved, the Clerk of the County Assembly is required to serve the Governor with a copy of the motion and invite the Governor to be heard. If the county assembly by two-thirds majority supports the proposed impeachment, the matter then proceeds to the Senate.

Transmission of Certificate and Report to the Senate

36. Clause 15 of the Bill provides that the speaker of the county assembly shall, within three days, submit a certificate under his hand confirming that the procedure outlined in the Bill has been complied with and attach evidence of that compliance, the notice of motion, a report of the special committee of the County Assembly, and any other necessary documentation.

Proceedings before the Senate

37. Clause 16 of the Bill provides that within ten days after receiving the resolution from the Speaker of the county assembly the Speaker of the Senate shall convene a meeting of the Senate to hear the charges against the Governor. The Senate may, by resolution, appoint a special committee comprising not more than eleven of its members to investigate the matter. Should the Senate find that the stated county assembly procedure has not been complied with, the Senate is to terminate its proceedings and the Speaker of the Senate is to notify the Speaker of the County Assembly of this fact.

Investigation by the Special Committee of the Senate

38. Clause 17 of the Bill provides that the special committee shall investigate the matter; and within fourteen days, report to the Senate on whether or not, it finds the particulars of the allegations against the Governor to have been substantiated.

Proceedings without a Special Committee

39. Clause 18 of the Bill provides that where the Senate does not appoint a special committee under clauses 16 (1) (b), clauses 16 (2) to 17 shall, with necessary modifications, apply to the Senate sitting in plenary

Decision of the Senate

40. Clause 19 of the Bill provides that if a majority of the county delegations of the Senate vote to uphold any impeachment charge the Governor shall cease to hold office; and the Speaker of the Senate shall notify the Speaker of the relevant county assembly accordingly. If a vote in the Senate fails to result in the removal of the Governor, the Speaker of the Senate shall notify the Speaker of the relevant county assembly accordingly

Right of the Governor to appear and be heard

41. Clause 20 of the Bill provides that the Governor shall have the right to appear and be represented before the Senate, a special committee of the Senate or the county assembly, as the case may be, during their investigations

Reintroduction of the motion

42. Clause 21 of the Bill provides that if the impeachment motion fails in the Senate, then a motion to impeach the Governor on the same charges may only be re-introduced in the county assembly ninety days from the date of the resolution of the Senate.

Vacancy in the office of Governor

43. Clause 22 of the Bill provides a vacancy in the office of the Governor arising under the proposed Bill shall be filled in the manner provided for in Article 182 of the Constitution

Removal of a Deputy Governor

44. Clause 23 of the Bill provides that the procedure for the removal of the Governor applies, with necessary modifications, to the removal of the Deputy Governor.

Vacancy in the Office of Deputy Governor

45. Clause 24 of the Bill provides within fourteen days of a vacancy arising in the office of Deputy Governor, by virtue of the incumbent Deputy Governor ascending to the office of Governor by operation of section 22, the Governor shall, with the approval of the county assembly, nominate a person to fill the vacancy in the office of Deputy Governor.

Simultaneous Vacancies

46. Clause 25 of the Bill provides that Article 182 (4) to (6) of the Constitution shall apply where a vacancy occurs in the office of a Governor and that of a Deputy Governor under the Act.

Questions as to validity of removal of Governor or Deputy Governor

47. Clause 26 of the Bill provides that a person may apply to the High Court for review within a period of fourteen days of the decision of the Senate under section 19.

Part V—Procedure for Removal from Office of A County Executive Committee

Member

Impeachment of a County Executive Committee Member

48. Clause 27 of the Bill provides that provides that a member of the County Assembly who wishes to move a motion to impeach a county executive committee member shall submit to the Speaker of the County Assembly a motion in a prescribed form supported by at least one-third of all the members of the County Assembly. If the motion complies with the procedure, the Member intending to move the motion is notified within two days. The member then moves the motion and, if supported by at least a third of all the members, the County Assembly shall appoint a select committee to investigate and report to the County Assembly within fourteen days.

49. If the select committee finds that the allegations against the member of County Executive Committee are unsubstantiated, no further proceedings shall be taken. If any of the allegations are however found to be substantiated, the County Assembly shall vote on the impeachment charges. If the motion is supported by two-thirds of the members of the County Assembly, the Speaker shall deliver the resolution to the Governor within three days. Clause 27(9) (b) provides that the Governor shall dismiss the member of the county executive committee within two days of receipt of the resolution. The member of the county executive committee has a right to appear and be represented before the select committee during investigations.

50. Clause 27(11) provides that if the county assembly resolves not to impeach the county executive committee member, a motion on the same charges may only be re-introduced in the county assembly six months from the date of the resolution.

Procedure for the Impeachment of a County Executive Committee Member

51. Clause 28 of the Bill provides that a member of the county assembly who proposes to move a motion under section 27 shall submit to the speaker of the county assembly the motion together with a list of at least one-third of the members of the county assembly who support the motion, in the form prescribed in the schedule.

Rights of the County Executive Committee Member to Appear and Be Heard

52. Clause 29 of the Bill provides that that the county executive committee member has the right to appear and be represented before the select committee during its investigations.

Part VI- Miscellaneous

Substantiation of Allegation

53. Clause 30 of the Bill provides that the Bill has not only made it a requirement that the claims against a person sought to be removed by impeachment be substantiated but has also set the parameters of what substantiation of allegations would entail. Under clause 29 of the Bill, an allegation is substantiated if it is established and meets the threshold contemplated under the Constitution or the Bill.

Service

54. Clause 31 of the Bill allows both personal service and substituted service in form of advertisement in newspapers of national circulation.

Public Notice and Access to Proceedings

55. Clause 32 of the Bill provides that the Court may only entertain a suit on matters of procedure and provides that the matter must be filed within fourteen days of the decision to impeach and shall be determined within forty-five days.

Court Proceedings

56. Clause 33 of the Bill provides that unless otherwise stated in this Act, a person may move to the High Court for review within fourteen days of the final decision on impeachment.

Transition

57. Clause 34 of the Bill seeks to amend sections 33 and 40 of the County Governments Act which make reference to procedure for impeachment, which have been expounded in several clauses within the Bill.

Schedule

58. The Schedule provides a prescribed Form for the list of members supporting an Impeachment Motion for the Offices covered under the Bill

1.3 Consequences of the Bill

59. The Bill fills in the procedural gaps in the Constitution and therefore provides a definite law on impeachment proceedings thus ensuring that removal of the officeholders contemplated in this Bill from their respective offices is done through the due process of the law.

60. The Bill also sets mandatory timelines for various stages in impeachment proceedings and thereby ensuring that the proceedings are expedited. Also, by proposing a period within which court matters relating to impeachment proceedings shall be concluded, the Bill will minimize anxiety over prolonged undecided fate of the chief executive of the Nation or a County or other members of their cabinets.

CHAPTER TWO

LEGAL FRAMEWORK

2.0 Legal Provisions and Previous Cases Relating To Impeachment Proceedings

2.1 Constitutional Provisions

61. The Constitution of Kenya, 2010 overhauled Kenya's governance system and for the first time the Parliament and the Senate were assigned the responsibility of conducting impeachment proceedings. The Senate has conducted several impeachment proceedings and being the first Senate under the Constitution, it has faced challenges in setting up fair processes and identified the legislative gaps regarding procedures. The Bill seeks to fill these gaps to ensure that there is procedural justice for every person who is sought to be impeached and that there is fairness in the impeachment process despite the outcome.

Removal of the President

62. The Constitution establishes the office of the President under **Article 131** while **Article 145** provides for the removal of the President as follows:

145. (1) A member of the National Assembly, supported by at least a third of all the members, may move a motion for the impeachment of the President—

(a) on the ground of a gross violation of a provision of this Constitution or of any other law;

(b) where there are serious reasons for believing that the President has committed a crime under national or international law; or

(c) for gross misconduct.

(2) If a motion under clause (1) is supported by at least two-thirds of all the members of the National Assembly—

(a) the Speaker shall inform the Speaker of the Senate of that resolution within two days; and

(b) the President shall continue to perform the functions of the office pending the outcome of the proceedings required by this Article.

(3) *Within seven days after receiving notice of a resolution from the Speaker of the National Assembly—*

(a) the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the President; and

(b) the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.

(4) *A special committee appointed under clause (3) (b) shall—*

(a) investigate the matter; and

(b) report to the Senate within ten days whether it finds the particulars of the allegations against the President to have been substantiated.

(5) *The President shall have the right to appear and be represented before the special committee during its investigations.*

(6) *If the special committee reports that the particulars of any allegation against the President—*

(a) have not been substantiated, further proceedings shall not be taken under this Article in respect of that allegation; or

(b) have been substantiated, the Senate shall, after according the President an opportunity to be heard, vote on the impeachment charges.

(7) *If at least two-thirds of all the members of the Senate vote to uphold any impeachment charge, the President shall cease to hold office.*

Removal of the Deputy President

63. The Constitution further provides for the Office of the Deputy President and the procedure for his removal under **Article 150** by way of impeachment as follows-

150. (1) *The Deputy President may be removed from office—*

(a) on the ground of physical or mental incapacity to perform the functions of the office; or

(b) on impeachment—

(i) on the ground of a gross violation of a provision of this Constitution or any other law;

(ii) where there are serious reasons to believe that the Deputy President has committed a crime under national or international law; or

(iii) for gross misconduct.

(2) The provisions of Articles 144 and 145 relating to the removal of the President shall apply, with the necessary modifications, to the removal of the Deputy President.

Removal of the Cabinet Secretary

64. Apart from the provisions on the removal of office of the President and the Deputy President, the Constitution also contemplates various ways in which other officer holders may be removed from office by way of impeachment. **Article 152(1) (d)** establishes the office of the Cabinet Secretary. Pursuant to **Article 152(6)**, a Cabinet Secretary may be removed from office where a member of the National Assembly, supported by at least a quarter of all the members, proposes a motion requiring the President to dismiss a Cabinet Secretary. **Article 152(6) to (10)** provides as follows:

(6) A member of the National Assembly, supported by at least one-quarter of all the members of the Assembly, may propose a motion requiring the President to dismiss a Cabinet Secretary—

(a) on the ground of a gross violation of a provision of this Constitution or of any other law;

(b) where there are serious reasons for believing that the Cabinet Secretary has committed a crime under national or international law; or

(c) for gross misconduct.

(7) If a motion under clause (6) is supported by at least one-third of the members of the National Assembly—

(a) the Assembly shall appoint a select committee comprising eleven of its members to investigate the matter; and

(b) the select committee shall, within ten days, report to the Assembly whether it finds the allegations against the Cabinet Secretary to be substantiated.

(8) The Cabinet Secretary has the right to appear and be represented before the select committee during its investigations.

(9) If the select committee reports that it finds the allegations

(a) unsubstantiated, no further proceedings shall be taken; or

(b) substantiated, the National Assembly shall—

(i) afford the Cabinet Secretary an opportunity to be heard; and

(ii) vote whether to approve the resolution requiring the Cabinet Secretary to be dismissed.

(10) If a resolution under clause (9) (b) (ii) requiring the President to dismiss a Cabinet Secretary is supported by a majority of the members of the National Assembly—

(a) the Speaker shall promptly deliver the resolution to the President; and

(b) the President shall dismiss the Cabinet Secretary.

Removal of the County Governor

65. **Article 179** establishes the County Executive Committee to be comprised of the County Governor, Deputy Governor and the members appointed by the Governor with the approval of the County Assembly. The impeachment of the County Governor, which is more familiar to the public and has garnered a lot of media and public interest, is provided for under **Article 181** of the Constitution. Under **Article 181(1)**, a County Governor can be removed from office. It provides as follows-

(1) A county governor may be removed from office on any of the following grounds—

(a) gross violation of this Constitution or any other law;

(b) where there are serious reasons for believing that the county governor has committed a crime under national or international law;

(c) abuse of office or gross misconduct; or

(d) physical or mental incapacity to perform the functions of office of county governor.

(2) Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds mentioned in clause (1).

Article 181(2) empowers the Parliament to make a legislation to provide for the procedure for the removal of the County Governor.

2.2 County Government Act, 2012

66. Section 33 of the County Governments Act provides as follows-

Removal of a governor

1. *A member of the county assembly may by notice to the speaker, supported by at least third of all the members, move a motion for the removal of the governor under Art 181 of the Constitution.*
2. *If a motion under subsection (1) is supported by at least two-thirds of all the members of the county assembly—*
 - (a) *the speaker of the county assembly shall inform the Speaker of the Senate of the resolution within two days; and*
 - (b) *the governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section.*
3. *Within seven days after receiving notice of a resolution from the speaker of the county assembly—*
 - (a) *the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and*
 - (b) *the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.*
4. *A special committee appointed under subsection (3)(b) shall—*
 - (a) *investigate the matter; and*
 - (b) *report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.*
5. *The governor shall have the right to appear and be represented before the special committee during its investigations.*
6. *If the special committee reports that the particulars of any allegation against the governor—*
 - (a) *have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or*

(b) have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the impeachment charges.

7. *If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.*
8. *If a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the speaker of the concerned county assembly accordingly and the motion by the assembly for the removal of the governor on the same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.*
9. *The procedure for the removal of the President on grounds of incapacity under Article 144 of the Constitution shall apply, with necessary modifications, to the removal of a governor.*
10. *A vacancy in the office of the governor or deputy governor arising under this section shall be filled in the manner provided for by Article 182 of the Constitution.*

2.3 Senate Standing Orders

67. The Senate Standing Orders has various provisions regarding impeachment proceedings in the Senate. **Standing Order 63 (b) (iii)- (v)** defines a Special Motion as one that is moved pursuant to Article 145 (*Impeachment of the President*); Article 150 (*Impeachment of Deputy President*); and Article 181 (*Impeachment of a County Governor*).

Removal of President

68. **Standing Order 67** sets out the procedure for the removal of President by impeachment as follows-

(1) Upon receipt of a resolution of the National Assembly pursuant to Article 145(2) of the Constitution, the Speaker shall within seven days convene a meeting of the Senate to hear the charges against the President, and the Senate, by resolution, may appoint a Special Committee comprising eleven of its members to investigate the matter.

(2) The Special Committee appointed under Article 145(3)(b) of the Constitution shall—

(a) investigate the matter; and

(b) report to the Senate within ten days whether it finds the particulars of the allegations against the President to have been substantiated.

(3) Members of the Special Committee shall take an Oath or Affirmation, as may be prescribed by the Speaker, submitting that they will perform their duties honestly and with due diligence.

(4) The President shall have the right to appear and be represented before the Special Committee during its investigations.

(5) The Special Committee may hear representation from the member who moved the motion in the National Assembly and other members of the National Assembly.

(6) If the Special Committee reports that the particulars of any allegation against the President—

(a) have not been substantiated, further proceedings shall not be taken under Article 145 of the Constitution in respect of that allegation; or

(b) have been substantiated, the Senate shall, after according the President an opportunity to be heard, vote on the impeachment charges.

(7) The Senate shall vote on each impeachment charge of the Motion.

(8) If at least two-thirds of all the Senators vote to uphold any impeachment charge, the President shall cease to hold office.

69. Standing Order 68 procedure for removal of Deputy President by impeachment in terms of Article 150 (1) (b) of the Constitution and the procedure set out under Standing Order 67.

Removal of a Governor

70. **Standing Order 69** sets out the Procedure for removal of a Governor as follows-

(1) Within seven days after receiving notice of a resolution from the speaker of a County Assembly supporting the removal of a governor of the county pursuant to Article 181 of the Constitution—

(a) the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and

(b) the Senate may-

(i) by resolution, appoint a Special Committee comprising eleven of its members to investigate the matter; or

(ii) investigate the matter in plenary.

- (2) *The Senate sitting in plenary or the Special Committee appointed under subsection (1) shall within ten (10) days -*
- (a) *investigate the matter; and*
 - (b) *in the case of the Special Committee, report to the Senate on whether it finds the particulars of the allegations against the Governor to have been substantiated.*
- (3) *The governor shall have the right to appear and be represented before the Senate or a Special Committee during the investigations.*
- (4) *If the special committee reports that the particulars of any allegation against the governor—*
- (a) *have not been substantiated, no further action shall be taken under this section in respect of that allegation; or*
 - (b) *have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the charges.*
- (5) *The provisions of paragraph (4) shall apply with necessary modifications to the findings of the Senate, while investigating the matter in plenary*
- (6) *If a majority of all the county delegations of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.*
- (7) *If a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the Speaker of the concerned County Assembly accordingly and the motion by the assembly for the removal of the governor on the same charges may only be re-introduced to the Senate after the expiry of three months from the date of such vote.*
- (8) *The rules of procedure to be followed by the Senate or a Special Committee of the Senate are set out in the Fifth Schedule of these standing orders.*
- (9) *The procedure set out in paragraphs (1) to (8) shall apply with the necessary modifications to impeachment of a Deputy Governor.*

Other Provisions

71. **Standing Order 70** sets out the right to be heard and entitlement to legal representations while **Standing Order 71** requires that impeachment motions shall be prioritised over other business on the Order Paper for the day.

72. **Standing Order 236** creates an exception with regard to restriction of access to the Chamber in when it comes to persons who are the subject of impeachment proceedings.

73. **The Fifth Schedule** of the Senate Standing Orders sets out the Rules of Procedure for the Hearing and Determination of the Proposed Removal from Office by Impeachment of a Governor pursuant to Standing Order 69. Part 1 of the Rules of Procedure clarified the procedure when considering the proposed removal in Plenary while Part 2 of the Rules of Procedure set out the procedure when considering the proposed removal by way of a Select Committee.

2.4 Procedural Gaps from Impeachment Proceedings in the 11th Parliament

74. The first Senate under the Constitution of Kenya, 2010 and the 11th Parliament adjudicated over various impeachment proceedings for the removal of various Governors (Embu, Kericho, Nyeri, Murang'a) and a Deputy Governor (Machakos).

75. Through judicial proceedings emanating from the impeachment process of county governors, various procedural gaps have been identified in the procedures set out in the County Governments Act. Some of the gaps identified include-

(1) The role of the Senate in ensuring that the county assembly adhered to the correct process when considering a motion to impeach the Governor. In the case of *Martin Nyaga Wambora and 4 others vs Speaker of the Senate and six others (2014) EKLK* the High Court held-

236. Our understanding of Section 33(4) of the Act, is that the Special Committee must investigate the matter. Investigate is defined in the Black's Law Dictionary 9th Edition as a 'systematic inquire into something'. Investigating here shall include the Committee satisfying itself that the Resolution presented to it was arrived at after due process was followed at the County Assembly. We agree with the Attorney General's submission that the design of Section 33 is meant to ensure that the process regarding impeachment is self-correcting. So that any errors that may have occurred at the County Assembly level

may be detected by the Special Committee of the Senate while performing its investigative role.....

237. Where the Senate finds that the resolution is not properly before it then it is not obliged to admit it....

(2) The Governor's right to be heard at the county assembly before the county assembly either approves or rejects the motion to impeach the Governor.

307... .. That even at the County Assembly the right to a hearing must be accorded to a Governor at any time that the motion proposing removal from office is being debated before it is approved or rejected.

76. This Bill therefore seeks to make further procedure for the removal of a President, Deputy President, Cabinet Secretaries, County Governors, Deputy County Governors and County Executive Committee Members, by impeachment, so as to address the gaps identified in the procedure set out in the County Governments Act.

CHAPTER THREE

PUBLIC PARTICIPATION

3.0 Attendance by Stakeholders

77. The Committee, pursuant to Article 118 of the Constitution and Standing Order 134 (1), invited submissions from members of the public on the Bill via an advertisement on the Daily Nation Newspaper and Standard Newspapers at Red Cross Building Conference Room, Ground Floor, Parliament Buildings, Nairobi on 31st July, 2018. The Committee received oral and written submissions from-

- (1) Council of Governors (CoG)
- (2) County Assemblies Forum (CAF)
- (3) Kenya Law Reform Commission (KLRC)
- (4) Mr. Samuel Nyatangi Ratemo

3.1 Submissions from Stakeholders

78. The Committees took into consideration proposals from stakeholders on specific Clauses of the Bills, as follows-

Clause 1- Short Title

79. The Kenya Law Reform Commission proposed to amend the Short title to read “*The Removal from Office and Impeachment Procedure Bill, 2018*” noting that the contents of the Bill imply more beyond the process of Impeachment.

Clause 2 - Removal of the Motion by Impeachment

80. The Kenya Law Reform Commission proposed to amend the Clause to include the definition of Impeachment. The Commission was of the view that the word as used in the Constitution is undefined. It is important to define it as the Bill now introduces the process of Impeachment.

81. The Commission also held the view that the entire clause includes the provisions of Article 145 of the Constitution and that the repetition was not necessary.

Clause 3- Impeachment Motion for the Removal of the President

82. The Kenya Law Reform Commission proposed to amend the Clause to define under sub-clause what gross violation entails; what are serious reasons for believing; and what gross misconduct entails. The Commission was of the view that without these, the Bill is repeating what is already in the Constitution and therefore, not adding value. It is important to set these thresholds.

Clause 4- Procedure for the Removal of the President in the National Assembly

83. The Kenya Law Reform Commission proposed to amend Clause 4(2) (a) to read “*specify in detail*” to set the thresholds within which the grounds should be laid out and the particulars of the grounds. Amend Clause 4(4) to include the criteria which the Speaker shall use to be satisfied to define the exercise of this discretion. Further, amend Clause 4(7) to review the 7days timeline that has been set out and for purposes of further clarification. This is because some of the grounds mentioned would need site visits and also because it is not clear whether it is seven days inclusive of weekends or not.

Clause 5- Proceedings in the Senate for Removal of the President by Impeachment

84. The Kenya Law Reform Commission proposed to amend Clause 5 as it recasts the provisions of Article 145(3), 145(4), 145(5) of the Constitution. The clauses should be removed or cross-referenced. The Bill should rather cross-reference than recast because this makes the new law look like it is part of the Constitution yet is meant to be a new law.

85. The Commission further proposed to amend Clause 5(4) (b) to read “*The Clerk of the Senate shall give the President ‘reasonable notice’ to appear and be heard by the Senate or the special committee on a specified date, time and place.*” This shall give the President reasonable time to prepare to appear before the Committee.

Clause 7- Removal of a Deputy President by Impeachment

86. The Kenya Law Reform Commission proposed to insert a new Clause after Clause 7 to invoke the provisions of Article 146 of the Constitution. There is need to connect the two for easy flow and so that there is no gap.

87. Mr. Samuel Nyatangi Ratemo proposed to amend the clause to read 150(1) (b) and not 150(b) as captured in the Bill. This will make it to be in line with the Constitution.

Clause 8- Removal from Office of a Cabinet Secretary from Office

88. The Kenya Law Reform Commission proposed that the clause should be cross-referenced to Article 156 of the Constitution for Specification.

Clause 9- Procedure for the Removal from Office of a Cabinet Secretary

89. The Kenya Law Reform Commission proposed to amend the clause to define under sub-clause what gross violation entails; what are serious reasons for believing; and what gross misconduct entails to avoid ambiguity. Amend Clause 9(3) to read “*specify in detail*” . This sets the thresholds within which the grounds should be laid out and the particulars of the grounds.

Clause 10- Report of the Select Committee of the National Assembly

90. Mr. Samuel Nyatangi Ratemo proposed to amend the clause to remove the word “*afford*” and replace it with the “*accord*”. This is so as to make it read “(i) *accord the Cabinet Secretary an opportunity to be heard; and*”.

91. The Kenya Law Reform Commission further proposed to amend the clause to include “*reasonable notice*” to give reasonable time for the Cabinet Secretary to prepare to appear before the Committee.

Clause 11- Resolution of the National Assembly

92. Mr. Samuel Nyatangi Ratemo was of the view that Article 152(10) (a) of the Constitution directs that “*the Speaker shall promptly deliver the resolution to the President*” as captured in Clause 11(a) of the Bill. The committee can consider the limit proposed in Section 28(9) (a) which mentions three days. It would be valuable if a time limit is set.

Clause 14- Proceedings in a County Assembly for the Removal of a Governor

93. Mr. Samuel Nyatangi Ratemo was of the view that the wordings of sub-clause 3 can be replicated and be used at the end of Clauses 4(4) and 9(5) of the Bill.

94. The County Assemblies Forum (CAF) proposed that the clause should be amended to correspond with clause 4 of the Bill. County Assemblies Forum was of the view that the motion should be first submitted to the Clerk who in turn submits to the Speaker. Excluding the head of the technical team from the process risks having the entire proceedings perceived as being politically motivated.

95. The Council of Governors (COG) proposed to amend clause 14(2) (b) to read “*does not comply with section 13, decline to approve the motion and inform the member within four days ‘in writing’*” for the refusal. The Council of Governors was of the view that the reasons for declining to approve the motion be done in writing for record purposes.

96. The Council of Governors proposed to amend 14(6) (b) to give more time for the public to submit the written memorandum. The Council of Governors proposed 30 days. It should be amended to read “*Calling for submission of written memoranda from the public in relation to the charges against the governor within 30 days*”. Further, it was proposed that Clause 14(6) (c) be added to call for oral submission from the public or any interest group. The amendment should read “*Calling for oral submission from the public or any interest groups in relation to the charges against the governor within 30 days*”. The timeline given for submitting the written memorandum is very short thus there is need to give members of the public at least 30 days to submit the same.

97. Further, insert new sub-clause 7(c) to provide for flexibility of the hearing of both parties. The sub-clause should read “*this dates may be altered based on the availability of both parties but may not exceed a period of 14 days after lapse of the first hearing date.*” This is to give flexibility of availability of both parties and to also give them adequate time to prepare.

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Clause 15- Transmission of Certificate and Report to the Senate

98. The County Assemblies Forum (CAF) proposed that the clause be amended to provide what exactly will constitute evidence of compliances. This clause needs to be clarified for purposes of effective interpretation.

Clause 17- Investigation by the Special Committee of the Senate

99. The Council of Governors (COG) proposed to amend Clause 17(1) (a) by deleting “*Investigating the matter*” to read “*Review and interrogate the Report by6 further calling upon the general public to provide additional information if any.*” The Council of Governors was of the view that matters of investigation cannot be done by a committee of parliament committee whose role has been clearly stipulated under Article 96 of the Constitution. Thus, investigating role can only be done through legally mandated institutions.

100. Further, amend Clause 17(2) (a) to read “*This dates may be altered based on the availability of both parties but may not exceed a period of 14 days after lapse of the first hearing date.*” This is to allow for concrete feedback from the other party in preparation of the hearing.

101. Mr. Samuel Nyatangi Ratemo was of the view that there is an overlap of days in sub-clause 2 if read together with clause 16(3) of the Bill. Since, the committee shall give its report to the Senate within three days from the date of its first meeting in order to determine whether the matter of impeachment process will proceed, the invitation of the governor should be done once the findings expected from clause 16(3) dictates otherwise. Therefore, Clause 17(3) should mention a period of at least three days and not two as given in the Bill for purposes of being in alignment.

102. The County Assemblies Forum (CAF) noted that Clause 17(6) provides for the Senate to hear representations from the MCA who moved the motion in the County Assembly and any other such members concerned County Assembly as it may consider necessary. The provisions are similar to Clause 5(5) in the case of impeachment of the President. Thus it

shall afford the Senate with an opportunity to assess the issues motivating the impeachment motion, and should it fail, allow other means of resolution.

Clause 19- Decision of the Senate

103. The Council of Governors (COG) proposed to amend the Clause to provide for 2/3 threshold of the members. The Clause should be amended to read:

(1) *If two thirds (2/3) of the county delegations of the Senate vote to uphold any impeachment charge-*

(c) *the Governor shall cease to hold office; and*

(d) *the Speaker of the Senate shall notify the Speaker of the relevant county assembly accordingly.*

104. The Council of Governors was of the view that it is important to raise the threshold for impeachment required at the Senate due to the gravity of the matter at hand.

Clause 24- Vacancy in the Office of Deputy Governor

105. The County Assemblies Forum (CAF) proposed that the clause should be amended to provide a clause that state clear timelines on the appointment of the Deputy Governor.

There is need to have clear timelines in nomination of Deputy Governor to avoid the office for being vacant for a long time.

Clause 28- Procedure for the Impeachment of a County Executive Committee Member

106. The County Assemblies Forum (CAF) proposed that the clause should be amended to correspond with Clause 9(2) on the procedure for impeachment of a Cabinet Secretary. Similarly, excluding the head of the technical arm from the process risks having the entire proceedings perceived as politically motivated.

107. Further, Mr. Samuel Nyatangi Ratemo was of the view that sub-clause 12 guards against repeated threats of impeachment and intimidation, the same should be applied to Cabinet Secretaries.

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Clause 33- Court Proceedings

108. Mr. Samuel Nyatangi Ratemo was of the view that the reviews for the decisions on impeachment of the President and the Deputy President should be directed to the Supreme Court. Thus Clause 33(1) of the Bill should be amended to capture this fact. The Constitution of Kenya, 2010 anticipates that disputes regarding the Presidency are applied to the Supreme Court.

CHAPTER THREE

COMMITTEE OBSERVATIONS AND RECOMMENDATIONS

109. The Committee on Legal Affairs and Human Rights made the following observations and recommendations based on the deliberations of the Bill and stakeholder input as follows-

Clause 10- Report of the Select Committee of the National Assembly

110. The Committee observed that as noted by stakeholders, the Cabinet Secretary should be accorded with sufficient notice to prepare and appear before the Parliamentary Committee to ensure a fair hearing.

Recommendation

111. **The Committee therefore recommends that- Clause 10 of the Bill be amended in sub clause (1) by deleting paragraph (b) (i) and substituting therefor the following new paragraph—**

(i) accord the Cabinet Secretary a reasonable opportunity to be heard.

Clause 11- Resolution of the National Assembly

112. The Committee observed that the Clause does not set a time limit within which the Speaker of the National Assembly should deliver the resolution of the National Assembly to the President. The Committee noted that it was necessary to set the time limit and proposed that this should be done within three (3) days.

Recommendation

113. **The Committee therefore recommends that- Clause 11 of the Bill be amended in paragraph (a) by deleting the word “promptly” appearing immediately after the words “the speaker shall” and substituting therefor the words “within three days,”**

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Clause 14- Proceedings in a County Assembly for the Removal of a Governor

114. The Committee observed that there is need to amend the clause so as to have uniformity in the Bill with regard to the procedure for removal for the Governor and that of the President. Clause 14 should therefore be aligned with Clause 4. The Committee further observed that the reasons for declining to approve the motion for the removal of a Governor by a Speaker should be done in writing for record purposes.

Recommendation

115. The Committee therefore recommends that-
Clause 14 of the Bill be amended—

(a) By deleting sub clause (1) and substituting therefor the following new sub clause—

(1) A member of a county assembly who intends to move a motion under section 13 shall submit to the Clerk of the county assembly the motion together with a list of the members of the county assembly who support the motion in the form prescribed in the Schedule.

(b) by inserting the following new sub clauses immediately after the new sub clause (1)—

(1A) The Clerk of the county assembly shall confirm that the proposed motion—

(a) specifies the grounds and particulars upon which the proposed motion is made;

(b) is signed by the member; and

(c) is signed in support by at least a third of all the members of the county assembly.

(1B) The Clerk of the county assembly shall, within three days of its receipt, submit the proposed motion to the Speaker advising the Speaker of the determination made under sub clause (1A).

(c) in sub clause (2) by inserting the words “in writing” immediately after the words “for the refusal” appearing in paragraph (b); and

- (d) in sub clause (6) by deleting the word “five” appearing immediately after the words “the governor within” in paragraph (b) and substituting therefor the word “seven”.

Clause 17- Investigation by the Special Committee of the Senate

116. The Committee observed that there was need to amend clause 17 (2) to clarify the special committee has the mandate to determine whether the motion for the removal of a governors complies with the requirements under clause 14.

Recommendation

117. The Committee therefore recommends that-

Clause 17 of the Bill be amended in sub clause (2) by deleting the words “appointment of a special committee” appearing immediately after the words “days of the” and substituting therefor the words “determination of the special committee under section 16 (2) that section 14 was complied with”;

Clause 28- Procedure for the Impeachment of a County Executive Committee Member

118. The Committee observed that there is need to amend the clause so as to have uniformity in the Bill with regard to the procedure for removal for the Governor and that of the President. Clause 28 should therefore be aligned with Clause 4 and the proposed Clause 14.

Recommendation

119. The Committee therefore recommends that-

Clause 28 of the Bill be amended—

(a) by deleting sub clause (1) and substituting therefor the following new sub clause—

(1) A member of a county assembly who intends to move a motion under section 27 shall submit to the Clerk of the county assembly the motion together with a list of the members of the county assembly who support the motion in the form prescribed in the Schedule.

(b) by inserting the following new sub clauses immediately after the new sub clause (1)—

(1A) The Clerk of the county assembly shall confirm that the proposed motion—

(a) specifies the grounds and particulars upon which the proposed motion is made;

(b) is signed by the member; and

(c) is signed in support by at least a third of all the members of the county assembly.

(1B) The Clerk of the county assembly shall, within three days of receipt of the proposed motion, submit the motion to the Speaker advising the Speaker of the determination made under sub clause (1A).

Clause 33- Court Proceedings

120. The Committee observed that the reviews for the decisions on impeachment of the President and the Deputy President should be directed to the Supreme Court. The Constitution of Kenya, 2010 already anticipates that disputes regarding the Presidency are applied to the Supreme Court.

Recommendation

121. The Committee therefore recommends that the Bill be amended by deleting clause 33.