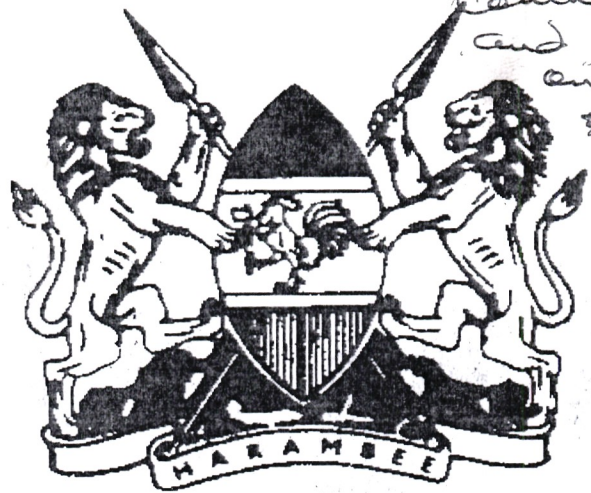


PAPER Laid
By the Chairperson of
the Departmental
Committee on Justice
and Legal Affairs
on Tuesday 15th
February 2011

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KENYA NATIONAL ASSEMBLY

TENTH PARLIAMENT - FOURTH SESSION (2011)

REPORT OF THE DEPARTMENTAL COMMITTEE
ON JUSTICE AND LEGAL AFFAIRS

ON THE VETTING OF JUDGES AND MAGISTRATES BILL,
2011

Clerk's Chambers
Parliament Buildings,
NAIROBI

February 2011

PREFACE

Mr. Speaker Sir,

The Departmental Committee on Justice and Legal Affairs derives its mandate from provisions of Standing Order No. 198(3) which defines functions of the Committee as being:

- a) To 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) To study the programme and policy objectives of ministries and departments and the effectiveness of their implementation;
- c) To study and review all legislation referred to it;
- d) To study, assess and analyze the relative success of the ministries and departments measured by the results obtained as compared with their stated objectives;
- e) To investigate and enquire into all matters relating to the assigned ministries and departments as may be deemed necessary, and as may be referred to it by the House or a minister; and
- f) To make reports and recommendations to the House as often as possible, including recommendations of proposed legislation.

In accordance with Schedule II of the Standing Orders, the Committee is mandated to consider:-

- a) Constitutional Affairs
- b) The administration of law and order (Judiciary, police, prisons department, and community service orders)
- c) Public prosecutions
- d) Elections
- e) Integrity
- f) Anti-corruption and human rights.

The Committee oversees the following Ministries/Departments:

- a) Ministry of Justice, National Cohesion and Constitutional Affairs
- b) State Law Office
- c) The Judiciary
- d) Kenya Anti-Corruption Commission
- e) Interim Independent Electoral Commission
- f) Interim Independent Boundaries Commission

The Committee also has the mandate to oversee all matters relating to political parties.

COMMITTEE MEMBERSHIP

The Committee comprises of the following members:

- i) Hon. Ababu Namwamba, M.P - Chairperson
- ii) Hon. Njoroge Baiya, M.P - Vice-Chairperson
- iii) Hon. Abdikadir Mohammed, M.P
- iv) Hon. Millie Odhiambo-Mabona, M.P
- v) Hon. Mutava Musyimi, M.P
- vi) Hon. George Omari Nyamweya, M.B.S., M.P
- vii) Hon. Amina Abdalla, M.P
- viii) Hon. Olago Aluoch, M.P
- ix) Hon. Isaac K. Ruto, E.G.H., M.P
- x) Hon. Sophia Noor Abdi, M.P
- xi) Hon. Eugene Wamalwa, M.P

Background of the matter

Mr. Speaker Sir,

The Vetting of Judges and Magistrates Bill, 2011 was read a First Time on 2nd February 2011 and subsequently referred to this Committee in accordance with the Standing Orders. The Committee held one sitting to deliberate on the Bill and received a memorandum from the Commission for the Implementation of the Constitution (CIC).

This Report contains the deliberations of the Committee on the proposed amendments to the Bill and the rationale behind the proposed amendments. In compiling this report, the Committee also took into consideration submissions by the Commission for the Implementation of the Constitution.

Acknowledgements

The Committee wishes to thank the Offices of the Speaker and the Clerk of the National Assembly for the support extended to it in the execution of its mandate.

Mr. Speaker, Sir,

It is my pleasant duty and privilege, on behalf of the Departmental Committee on Justice and Legal Affairs, to present and commend this report on the proposed amendments to the Vetting of Judges and Magistrates Bill, 2011, to the House for adoption pursuant to Standing Order No. 181.

Signed.....


Hon. Ababu Namwamba, MP

CHAIRPERSON

Date:

15/02/2011

PROPOSED AMENDMENTS TO THE VETTING OF JUDGES AND MAGISTRATES BILL, 2011 (BILL NO.1 OF 2011)

Clause 2: THAT the meaning of 'Judge or Magistrate' in Clause 2 be amended by inserting the words "Judges or" immediately after the words 'capacity as'.

Rationale: The word judge has been omitted. The Bill as titled refers both to judges and magistrates.

Clause 9: THAT Clause 9 be amended by deleting sub-Article 9 (14).

Rationale: The Section negates the very purpose for which the selection committee in section 9 (5) has been constituted by providing an alternative process by which persons who have not been subjected to the transparent competitive process may join the vetting Board.

Clause 12: THAT Clause 12 be amended by deleting sub-clause (5) and (6) and substituting therefore a new sub-clause (5) as follows:-

12 (5) Where a vacancy occurs the President in consultation with the Prime Minister shall select a a nominee from the list of candidates forwarded by the Public service Commission under section 9 (6).

Rationale: Pursuant to the deletion of clause 9(14) clause 12(5) is thereby rendered redundant. A new clause is put in place to make provisions for the filling of vacancies to the board. This process is to take into account the Constitution and the National Accord and Reconciliation Act thereby proposing that there shall be consultations between the two principals.

Clause 15: THAT Clause 15 be amended by:-

- i). Deleting sub-clause (1) and (2) and inserting a new sub-clause (1) as follows:-
15 (1) There shall be a secretariat of the Board which shall be headed by a Secretary who shall be competitively recruited and appointed by the Board in accordance with this section.
- ii). Deleting the words "joint secretaries" whenever they appear in this section and substituting therefor the word "**Secretary**".

Rationale: There should be only one secretary .This is to avoid possible wrangles and bureaucratic issues and that the Secretary need not be a lawyer.

Clause 18: THAT Clause 18 be amended:-

- i). In sub-clause (1) (e) by inserting the words “**or relevant information received**” immediately after the words “pending complaints”.
- ii). In sub-clause (1) (e) (iii) by inserting the word “**Advocate**” immediately before the words “Disciplinary Committee”.
- iii). In sub-clause (1) (e) (viii) by deleting the word “Security”.

Rationale: Clause 18(1)(e)-The sub-clause must also include the admittance of relevant information in determining the suitability of a judge or magistrate.

Clause 18(1)(e) (iii)-Use of the term ‘Disciplinary Committee’ is vague and should be amended to read Advocates Disciplinary Committee;

Clause 18(1)(e)(viii)-Reference should be made to National Intelligence Service (as renamed in Article 242 of the Constitution).

Clause 19: THAT Clause 19 be amended by:-

Deleting sub-clause (7) and substituting therefor a new sub-clause:-

(7) A judge or magistrate may choose to be represented by an advocate at their own cost.

Rationale: Clause 19(7)-The constitution under Article 50 provides for the right to a fair hearing. It enshrines the right for every person to choose to be represented by an advocate and to be informed of this right promptly.

Clause 21: THAT Clause 21 be deleted.

Rationale: The constitutional prescribed period cannot afford time to preliminary findings. Once commenced, the vetting process, on a judge or magistrate need to be completed and a decision made.

Clause 22: THAT Clause 22 be amended in sub-clause (1) by inserting the words “***within thirty days***” immediately after the word “magistrate” and also inserting the words “***of their unsuitability***” immediately after the words “final determination”.

Rationale: The object of the Bill is to establish mechanisms and procedures for the vetting of judges and magistrates pursuant to the requirements of Section 23 of the Sixth Schedule of the Constitution. The unsuitability of a judge or magistrate need to be communicated to the concerned judge or magistrate within a specified time.

Clause 25: THAT Clause 25 be amended by deleting sub-clause (2) and substitute therefor a new sub-clause:-

(2) A judge or magistrate who-

(a) elects to leave the judicial service voluntarily shall be entitled to a golden handshake and terminal benefits for early retirement;

(b) is found unsuitable after vetting shall be entitled to terminal benefits for early retirement.

Rationale: There ought to be a distinction between a judge or magistrate who elects to leave voluntarily and one who leaves because they have been found to be unsuitable.

Clause 31: THAT Clause 31 be amended by deleting the words “joint secretaries” and substituting therefore the word “*Secretary*”.

Rationale: There should be only one secretary to the Board .This is to avoid possible wrangles and bureaucratic issues.

Schedule: THAT the Schedule be amended by deleting the words “joint secretary” where they appear in the schedule and substituting therefore the word “*Secretary*”.

Rationale: There should be only one secretary to the Board .This is to avoid possible wrangles and bureaucratic issues.

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MINUTES OF THE 65TH SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS COMMITTEE HELD ON FEBRUARY 12TH 2011 AT THE WINDSOR GOLF HOTEL AND COUNTRY CLUB AT 3.45 P.M

PRESENT

Hon. Ababu Namwamba, M.P. (Chairperson)
Hon. Njoroge Baiya (Vice-Chairperson)
Hon. Millie Odhiambo-Mabona, M.P.
Hon. George Nyamweya, MBS, M.P.
Hon. Amina Abdalla, M.P.
Hon. Olago Aluoch, M.P.
Hon. Mutava Musyimi, M.P.

ABSENT WITH APOLOGY

Hon. Eugene Wamalwa, M.P.
Hon. Isaac Ruto, EGH, M.P,
Hon. Sophia Abdi Noor M.P,
Hon. Abdikadir Mohammed, M.P,

IN ATTENDANCE

Mr. Zakayo Mogere
Ms. Annette Bosibori

KENYA NATIONAL ASSEMBLY

Second Clerk Assistant
Parliamentary Intern

MIN.NO.224/2011: THE VETTING OF JUDGES AND MAGISTRATES BILL, 2011

The committee went through the Vetting of Judges and Magistrates Bill clause by clause and adopted it subject to the following amendments:-

Clause 1: Agreed to.

Clause 2: THAT the meaning of 'Judge or Magistrate' in Clause 2 be amended by inserting the words "**Judges or**" immediately after the words 'capacity as'.

Rationale: The word judge has been omitted. The Bill as titled refers both to judges and magistrates.

Clause 3: Agreed to.

Clause 4: Agreed to.

Clause 5: Agreed to.

Clause 6: Agreed to.

Clause 7: Agreed to.

Clause 8: Agreed to.

Clause 9: THAT Clause 9 be amended by deleting sub-Article 9 (14).

Rationale: The Section negates the very purpose for which the selection committee in section 9 (5) has been constituted by providing an alternative process by which persons who have not been subjected to the transparent competitive process may join the vetting Board.

Clause 10: Agreed to.

Clause 11: Agreed to.

Clause 12: THAT Clause 12 be amended by deleting sub-clause (5) and (6) and substituting therefor a new sub-clause (5) as follows:-

12 (5) Where a vacancy occurs the President in consultation with the Prime Minister shall select a a nominee from the list of candidates forwarded by the Public service Commission under section 9 (6).

Rationale: Pursuant to the deletion of clause 9(14) clause 12(5) is thereby rendered redundant. A new clause is put in place to make provisions for the filling of vacancies to the board. This process is to take into account the Constitution and the National Accord and Reconciliation Act thereby proposing that there shall be consultations between the two principals.

Clause 13: Agreed to.

Clause 14: Agreed to.

Clause 15: THAT Clause 15 be amended by:-

- i). Deleting sub-clause (1) and (2) and inserting a new sub-clause (1) as follows:-
15 (1) There shall be a secretariat of the Board which shall be headed by a Secretary who shall be competitively recruited and appointed by the Board in accordance with this section.
- ii). Deleting the words “joint secretaries” whenever they appear in this section and substituting therefor the word “**Secretary**”.

Rationale: There should be only one secretary .This is to avoid possible wrangles and bureaucratic issues and that the Secretary need not be a lawyer.

Clause 16: Agreed to.

Clause 17: Agreed to.

Clause 18: THAT Clause 18 be amended:-

- i). In sub-clause (1) (e) by inserting the words “**or relevant information received**” immediately after the words “pending complaints”.
- ii). In sub-clause (1) (e) (iii) by inserting the word “**Advocate**” immediately before the words “Disciplinary Committee”.
- iii). In sub-clause (1) (e) (viii) by deleting the word “Security”.

Rationale: Clause 18(1)(e)-The sub- clause must also include the admittance of relevant information in determining the suitability of a judge or magistrate.

Clause 18(1)(e) (iii)-Use of the term ‘Disciplinary Committee’ is vague and should be amended to read Advocates Disciplinary Committee;

Clause 18(1)(e)(viii)-Reference should be made to National Intelligence Service (as renamed in Article 242 of the Constitution).

Clause 19: THAT Clause 19 be amended by:-

- i). Deleting sub-clause (1);
- ii). Deleting sub-clause (7) and substituting therefor a new sub-clause:-
(7) A judge or magistrate may choose to be represented by an advocate at their own cost.

Rationale: Clause 19(1)-is vague and repetitive. Clause 18 has already made provisions for matters for consideration during the vetting process.

Clause 19(7)-The constitution under Article 50 provides for the right to a fair hearing. It enshrines the right for every person to choose to be represented by an advocate and to be informed of this right promptly.

Clause 20: Agreed to.

Clause 21: THAT Clause 21 be deleted.

Rationale: The constitutional prescribed period cannot afford time to preliminary findings. Once commenced, the vetting process, on a judge or magistrate need to be completed and a decision made.

Clause 22: THAT Clause 22 be amended in sub-clause (1) by inserting the words “*within thirty days*” immediately after the word “magistrate” and also inserting the words “*of their unsuitability*” immediately after the words “final determination”.

Rationale: The object of the Bill is to establish mechanisms and procedures for the vetting of judges and magistrates pursuant to the requirements of Section 23 of the Sixth Schedule of the Constitution. The unsuitability of a judge or magistrate need to be communicated to the concerned judge or magistrate within a specified time.

Clause 23: Agreed to.

Clause 24: Agreed to.

Clause 25: THAT Clause 25 be amended by deleting sub-clause (2) and substitute therefor a new sub-clause:-

(2) A judge or magistrate who-

(a) elects to leave the judicial service voluntarily shall be entitled to a golden handshake and terminal benefits for early retirement;

(b) is found unsuitable after vetting shall be entitled to terminal benefits for early retirement.

Rationale: There ought to be a distinction between a judge or magistrate who elects to leave voluntarily and one who leaves because they have been found to be unsuitable.

Clause 26: Agreed to.

Clause 27: Agreed to.

Clause 28: Agreed to.

Clause 29: Agreed to.

Clause 30: Agreed to.

Clause 31: THAT Clause 31 be amended by deleting the words “joint secretaries” and substituting therefore the word “*Secretary*”.

Rationale: There should be only one secretary to the Board .This is to avoid possible wrangles and bureaucratic issues.

MINUTES OF THE 66TH SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS COMMITTEE HELD ON FEBRUARY 15TH 2011 AT THE MEDIA CENTRE, PARLIAMENT BUILDINGS AT 12.30 P.M

PRESENT

Hon. Ababu Namwamba, M.P. (Chairperson)
Hon. Njoroge Baiya (Vice-Chairperson)
Hon. Millie Odhiambo-Mabona, M.P.
Hon. Amina Abdalla, M.P.
Hon. Isaac Ruto, EGH, M.P,
Hon. Eugene Wamalwa, M.P.
Hon. Olago Aluoch, M.P.

ABSENT WITH APOLOGY

Hon. Sophia Abdi Noor M.P,
Hon. Abdikadir Mohammed, M.P,
Hon. George Nyamweya, MBS, M.P.
Hon. Mutava Musyimi, M.P.

IN ATTENDANCE

Ms. Wanjiru Ndindiri
Mr. George Otieno

KENYA NATIONAL ASSEMBLY

Third Clerk Assistant
Third Clerk Assistant

MIN.NO.227/2011:

ADOPTION OF REPORT ON THE VETTING OF JUDGES AND MAGISTRATES BILL, 2011

The Committee reviewed the draft report on the Vetting of Judges and Magistrates Bill, 2011 adopted it subject to the following final amendment:-

That the proposed amendment to Clause 19 (i) in the draft report be deleted.

MIN.NO.228/2011:

ANY OTHER BUSINESS

The Committee deferred deliberations on the Judicial Service Bill, 2011 to later in the afternoon.

The Majority view also presented its submission towards the report on the nominations to the offices of Chief Justice, Attorney General and Director of Public Prosecutions, for inclusion in the report.

MIN.NO. 229/2011:

ADJOURNMENT

The Chairman adjourned the meeting at twenty five minutes past one o'clock until later in the afternoon.

Signed:

(Chairperson)

Date:

15/02/2011

