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KENYA NATIONAL ASSEMBLY

PAPER LAID BY
CHAIR, BAC HON
MUTAVIA MUYIMI,
CBS, MP ON
THURSDAY

16th MARCH 2017



ELEVENTH PARLIAMENT – FOURTH SESSION

THE BUDGET AND APPROPRIATIONS COMMITTEE

REPORT ON
THE SOCIO-ECONOMIC AUDIT OF THE 2010 CONSTITUTION

PARLIAMENT BUILDINGS
NAIROBI

MARCH, 2017

PREAMBLE

Mr. Speaker, on the 26th of February 2014, through a resolution of the House, the National Assembly established a working group to carry out a socio-economic audit of the Constitution of Kenya 2010. This was pursuant to the need to assess the impact of the implementation of Constitution in the economy and the social well-being of the citizenry. The main objective of the working group was to make recommendations to the National Assembly on potential measures that could enhance prudence in management of the country's public resources. This was necessary due to the perceived high cost in the implementation of the Constitution.

Specifically, the working group was required to:

- i. Assess the impact of the implementation of the Constitution on public institutions
- ii. Evaluate the social impact resulting from the implementation of the Constitution
- iii. Make recommendations to the National Assembly on potential measures that could enhance prudent management of the country's public resources
- iv. Investigate, determine and advise on any matter related to, relevant, consequential or incidental to the foregoing

Mr. Speaker, The working group was able to carry out the audit mainly through a review of existing documentation, consultations with different stakeholders as well as a national survey which was carried out in all the 47 counties. Subsequently, a report containing findings on the matters aforementioned was submitted to National Assembly on 13th October 2016 and was committed to the Budget and Appropriations Committee. The committee has reviewed and deliberated on the report and now presents its findings.

COMMITTEE'S MEMBERSHIP

The committee as currently constituted comprises of the following members:-

1. Hon. Mutava Musyimi, C.B.S. M.P. - Chairperson
2. Hon. Mary Emaase, M.P. - Vice Chairperson
3. Hon. Phillip Rotino, M.P.
4. Hon. Benjamin Langat, M.P.
5. Hon. Edick Omondi Anyanga, M.P.
6. Hon. John Mbadi, C.B.S. M.P.

7. Hon. Ferdinand Waititu, M.P.
8. Hon. Jackson Kiptanui, M.P.
9. Hon. Jamleck Kamau, E.G.H M.P.
10. Hon. Mohamed Shidiye, M.P.
11. Hon. Moses Lessonet, M.P.
12. Hon. Moses Ole Sakuda, M.P.
13. Hon. Nelson Gaichuhie, M.P.
14. Hon. Richard Onyonka, M.P.
15. Hon. Shakeel Shabbir, M.P.
16. Hon. Yusuf Hassan Abdi, M.P.
17. Hon. (Dr.) Makali Mulu Benson, M.P.
18. Hon. Abdulaziz Farah, M.P.
19. Hon. Abdullahi Diriye M.P.
20. Hon. Ahmed .I. Abass, M.P.
21. Hon. Alice Ng'ang'a, M.P.
22. Hon. Bady Bady Twalib, M.P.
23. Hon. Ben Momanyi, M.P.
24. Hon. Christopher Nakuleu, M.P.
25. Hon. Christopher Omulele, M.P.
26. Hon. Daniel Nanok, M.P.
27. Hon. Denittah Ghati, M.P.
28. Hon. Dennis Kariuki, M.P.
29. Hon. Francis Njenga, M.P.
30. Hon. Gideon Ochanda, M.P.
31. Hon. James Gakuya, M.P.
32. Hon. James K. Bett, M.P.
33. Hon. Jonathan Lelelit, M.P.
34. Hon. Jones Mlolwa, M.P.
35. Hon. Joseph Limo, M.P.
36. Hon. Kathuri Murungi, M.P.
37. Hon. Kenneth Okoth, M.P.
38. Hon. K.K Stephen Kinyanjui, M.P.
39. Hon. (Maj.) Marcus Muluvi, M.P.
40. Hon. Moses Kuria, M.P.
41. Hon. Muriuki Njagagua, M.P.
42. Hon. Nasra Ibrahim, M.P.
43. Hon. Njogu Barua, M.P.
44. Hon. Patrick Ole Ntutu, M.P.
45. Hon. Peter Weru, M.P.

- 46. Hon. Priscilla Nyokabi, M.P.
- 47. Hon. (Dr.) Reginalda Wanyonyi, M.P.
- 48. Hon. Richard Tongi M.P.
- 49. Hon. Samuel Gichigi, M.P.
- 50. Hon. Suleiman Kasuti, M.P.
- 51. Hon. Tiyah Galgalo, M.P.

This Report contains the deliberations of the Budget and Appropriations Committee and recommendations on the findings.

ACKNOWLEDGEMENTS

Mr. Speaker, the Committee would like to thank all the government entities for their submissions during the consultative meetings. Special thanks go to the members of the public who made the public hearings a success.

Mr. Speaker, the Committee wishes to sincerely thank the Offices of the Speaker and the Clerk of the National Assembly for the support and services extended to the Members of Parliament to enable the Committee complete the exercise smoothly. I am grateful for the Members of the Committee whose support enabled the Committee to accomplish this task. Special thanks to the Parliamentary Budget Office for their technical support.

On behalf of the Committee, I now have the honor and pleasure to present this Report on the Socio Economic Audit of the Constitution.

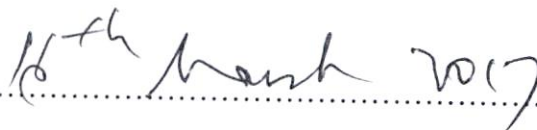
SIGNED



HON. MUTAVA MUSYIMI, C.B.S., M.P.
(CHAIRMAN)

BUDGET AND APPROPRIATIONS COMMITTEE

DATE.....



I. EXAMINATION OF THE REPORT

1. **Mr. Speaker**, the Committee held several sittings and two retreats to deliberate on the report and firm up on the recommendations. The Committee was able to go through the report, held in-depth review with the working group, and preliminary consultations with the National Treasury. However due to time constraints, the Committee was not able to consult other stakeholders such as the Council of Governors (CoG), and the Commission on Revenue Allocation (CRA) among other institutions.
2. In reviewing the report, the Committee aligned itself to the following key areas:
 - i. Devolved governance
 - ii. Constitutional Commissions and Independent Offices
 - iii. Legislature
 - iv. Judiciary
 - v. National Executive
3. The Committee identified key issues from the Audit report and made observations and recommendations which are included below:

A. DEVOLVED GOVERNANCE

4. **Mr. Speaker**, the aim of devolved governance in Kenya was to address imbalances in development as well as promote equitable distribution of resources and access to services. The Constitution created two levels of government; the National and County Governments. The following key concerns were raised in the Audit Report:
 - i. **Public participation:** A number of Kenyans felt that they have limited influence on decisions made by the two levels of government even though it should be noted that many still felt that decisions made by the two levels of government reflected their needs.
 - ii. **Structure and implementation of devolution:** concern was raised over the cost effectiveness of having 47 counties. This is deemed to have increased the cost of implementation of the Constitution.
 - iii. **Delineation of functions:** though the fourth schedule of the Constitution assigned functions to the two levels of government, the Transitional Authority did not exhaust the unbundling of functions. The fourth schedule

therefore requires further interpretation to clarify the functions of both levels of government and prevent confusion. The unclear roles include roads and infrastructure, gambling and betting control, management of water resources and water services, procurement in health services, outdoor advertising among others. Concurrent functions also need to be clarified.

- iv. **Prudence in use of public resources:** concern was raised over flagrant expenses of county assemblies, misuse and misapplication of resources by county executives and non-adherence to public procurement and the Public Finance Management laws. Majority of Kenyans felt that corruption has devolved to the counties.
- v. **Conditional funding:** currently, there is no policy or regulations to guide the provision of conditional grants to counties; specifically on how these grants should be applied or managed. Some grants are fully managed by the national government on behalf of counties and therefore do not qualify as grants.
- vi. **County own revenue:** counties are facing serious challenges on own revenue collection with some counties collecting less than what the defunct local authorities, municipal and/or county councils used to collect when combined. This inability to collect revenue and meet targets is a challenge to effective devolution. There is need for a discussion on how counties can address this.
- vii. **Determining the sharable revenue:** there is no consensus on what should constitute sharable revenue especially since the last audited national accounts have been the basis of the vertical sharing of the annual budget resources for the last three years. Others felt that the total resources in the budget including estimated revenues and external funds should be considered as sharable revenue. On the other hand, the national government argues that borrowed money, both domestic and external, or grants earmarked for projects cannot be included as sharable revenue.
- viii. **National planning priorities and county mandates:** there are concerns about inadequate institutional interaction between the two levels of government. The Inter-Governmental Relations Technical Committee is not yet fully functional and has not facilitated effective intergovernmental relations and harmony. Furthermore, there is evidence of fragmentation in service delivery with constituencies and wards implementing development funds though it isn't clear whether these plans are aligned with broader county development plans

- ix. Senate and representation of counties at the national level: the constitutional design of a directly elected senate has inadvertently undermined the objective of enabling the Senate to scrutinize the national government and to provide a link to the county level of government.
5. Mr. Speaker, the Committee was concerned that the Audit Report did not carry out an in-depth analysis on the governance issues in particular on the relationship between the two levels of government and between the National Assembly and Senate. The current governance structure based on presidential system whereby the Cabinet Secretaries are not members of the legislature has led to inability of the legislature to oversight and hold the executive to account.
6. Mr. Speaker, the Committee thus recommends the need to amend the Constitution to provide for the appointment of Cabinet Secretaries and County Executive Committee Members from the respective legislatures i.e. National and County levels. This may need to be supported by amendments of other pieces of legislations to ensure that qualifications of members of legislatures can lead to appointment of qualified members to these positions.
7. Mr. Speaker, the Committee noted that there was duplication in public participation and this creates lethargy among the citizenry as they are consulted on the same issue severally. For example, Article 221(5) of the Constitution provides for a Committee of National Assembly to conduct public hearing on the budget. However, the National Government has continued to do public hearings on the budget. The elected representatives of the people should be the ones who should carry out public hearings as per the Constitution.

B. LEGISLATURE

8. Mr. Speaker, the people are the source of legislative authority at both the national and county levels. The Constitution establishes and defines roles, membership and composition of the National Assembly, the Senate and the County Assemblies at the national and county levels of government. The following are some of the key concerns raised in the Audit Report:
 - i. **Structure and functions of parliament:** a notable weakness in the current structure of the national parliament is that there is no single head of the

- two chambers. Both chambers are led by the respective speakers, and the two chambers are perceived as co-equal chambers without any of them subjecting itself to the control of the other. This has led to legislative gridlock and causes delays in passing of certain important bills.
- ii. **Composition of the National Assembly:** there is concern that the number of MPs is too high which is not only costly but also hinders the quality of debate. Given 349 members of parliament, 67 senators and over 2200 MCAs, there is concern that Kenyans are over-represented.
 - iii. **Composition and role of the Senate:** the concerns with regard to the senate pertain to confusion in the oversight role given to the senate over the counties. It is not clear in the constitution whether the Senate can exercise oversight over the county executive in the same manner as the County Assembly. Indeed the Senate has no direct linkages with the County Assemblies and the County Executive. The process of impeachment should also involve the voters and not the county assembly and the senate alone.
 - iv. **Gender:** there is need for a proper framework on how the one third gender rule can be adhered to. The report suggests adoption of Mixed Member Proportional Representation.
 - v. **Law Making function of Parliament:** the shared legislative function between the National Assembly and the Senate has encountered challenges due to a lack of clear boundaries on the legislative role of the Senate and the National Assembly. Consultation between the two Houses on laws is facing challenges and has sometimes resulted in conflict.
 - vi. **Parliamentary accountability, leadership and organization:** members of the public are in support of a minimum of a degree in terms of educational qualifications for a Member of Parliament as well as Members of County Assemblies.
 - vii. **Electorate's right to recall:** as presently provided, the law on recall is not serving the purpose of the Constitution. Article 104 of the Constitution does not expressly provide grounds and procedures for effecting the right of recall.
 - viii. **Special seat members in county assemblies:** there seems to be a disproportionately high number of nominated representatives in the county assemblies. As such, even the final number of MCAs is hard to determine until after the elections because the number is determined by the gender composition of the MCAs
 - ix. **Legislative role of county assemblies:** counties seem to lack adequate capacity to develop laws and policies for county governance. Legislation and policy development requires counties to have capacity for legislative

and policy drafting as well as adequate human and financial resources. However, there isn't enough technical expertise to support counties to develop quality laws and policies.

- x. **County assembly leadership, organization and representation:** membership of the county assembly service boards does not facilitate professionalism and objectivity in the performance of its core functions. Members of these boards - speaker, two MCAs (majority and minority leader), a member of the public and the clerk – are involved in county politics by virtue of their position in the County Assembly structures. There is no space for professionalization of the board.
9. Mr. Speaker, the Constitution provided for several elective positions. At the same time, based on the report of the Interim Independent Boundaries and Review Commission and this resulted into the large number of representatives at the National level and County level. There is no doubt the administrative expenses to support this expanded structure are a burden to the exchequer. The budget for Parliament rose from Ksh 9 billion in FY2011/2012 to Ksh 31 billion in FY2016/2017 and you are aware for 2017/2018 the Parliamentary Service Commission has submitted a budget of more than Ksh 40 billion. Should these resources be granted, it will be an increase of over 300%.
10. These funds are not the individual allocation to each legislator but the amalgamation of total number of legislators times the remunerations. Infact, legislators are underpaid but we are too many hence the need to reduce the numbers. This is replicated over a number of sectors where new institutions were created through the 2010 Constitution.
11. Mr. Speaker, it is obvious that Parliament is now becoming very expensive and Kenyans are paying dearly for our upkeep. The only way we can deal with this issue is to decide whether having two chambers is contributing to our economic growth. Hard times call for difficult decisions to be made. In this regard, the Committee recommends a candid debate on whether this country can afford or sustain a Senate.
12. In addition, the Committee proposes that there is need to review downwards the number of constituencies and wards in particular after the next national population census of 2019. This will enable this country to create fiscal space and allocate resources to Agriculture and other productive sectors hence creating jobs and wealth for our future generations.

13. Mr. Speaker, the 2010 Constitution in the interest of ensuring equity when it comes to representation provided that at least a legislature must have one third of its membership from either gender. The level of socio-political-economic development that Kenya is in has made it very difficult to attain this target as per the Constitutional provision. This is despite the fact that the electorate is fifty percent (50%) equal yet there is a tendency to elect more from one gender. The Committee recommends that the target be made progressive through amendment of the Constitution. It may be important also to consider whether the ring-fenced position for County representatives is not counter-productive.

C. JUDICIARY

14. The constitution introduced fundamental changes aimed at securing an independent judiciary. Since then, the judiciary has made some notable changes to provide services to the people such as increasing the courts infrastructure. However, some challenges still exist. These are as follows:
- i. **Perception of corruption:** there are people who believe that courts cannot give a fair ruling and that they favour people based on their stature.
 - ii. **Separation of powers and oversight:** Parliament and the Executive has raised concern over what is perceived as judicial interference with courts sometimes ruling to halt parliamentary business on matters before the courts. The executive is also concerned about the use of judicial mechanisms to halt and/or delay executive programmes through issuance of ex-parte injunctions.
 - iii. **Role and jurisdiction of the Supreme Court:** one major problem with the jurisdiction of the Supreme Court is that many matters concerning the interpretation of the Constitution can only reach the Supreme Court through an appeal from the lower courts. This is expensive for the parties involved. Supreme Court should therefore pro-actively seize every opportunity and expand the jurisprudence.
 - iv. **Qualifications of Supreme Court judges:** there is concern that the technical requirements for appointment of Supreme Court judge are not enough for the court's role in interpreting and implementing the constitution in a progressive manner because they emphasize on technical qualifications rather than ability and competence to deliver the jurisprudence expectations of the court.

- v. **Specialized courts:** the manner in which the specialized courts are administered could potentially undermine fair administration of justice as it has the potential of making a few judges serve in these limited areas of law on a permanent basis. Thus if the judges are compromised or wrong in their line of thought, the litigants are stuck with them permanently with no option of alternative views on matters concerned.
15. Mr. Speaker, the Committee concurred with the recommendations of the Audit Report and in particular the issue of separation of powers and the need for the Judiciary to exercise caution when matters related to Parliamentary business is brought before the courts and rulings are given that interfere with the operation of Parliament.
16. Mr. Speaker, Kenyans are also paying dearly for the expanded Judiciary and hence there is the need to initiate discussions on the roles and functions of the Supreme Court in terms of its relevance and sustainability.

D. NATIONAL EXECUTIVE

17. According to the 2010 constitution, executive power is recognized as emanating from the people. However, there exists some key challenges with regard to the following:
- i. **Structure and functions of the National Executive:** though the number of Cabinet Secretaries is set at a minimum of 14 and a maximum of 22, the expected reduction in cost and bureaucracies is not apparent as most of the new ministries are a fusion of a number of old ministries
 - ii. **Effectiveness of the national executive:** the ambiguities in the division of functions are affecting the performance of the national government. Despite attempts to address these ambiguities through various policy drafts, these have never been completed. The taskforce on parastatals reforms gave recommendations which could have facilitated transition to current constitutional structures but these have not been implemented.
 - iii. **Restructuring of the provincial administration:** there is concern that the restructured provincial administration did not embrace public participation and there was no policy to guide the process. This has created challenges such as lack of linkages with ministries other than the ministry of interior yet the provincial administration is expected to oversee implementation of government programmes, there are no institutional structures for

cooperation between the two levels of administration. There is need for an institutional mechanism that would bring the Provincial administration and the two levels of government together. The restructuring process should also rationalize functions to cut unnecessary costs.

18. Mr. Speaker, the Committee noted with concern the duplication in the performance of mandates by National and County Institutions at the grassroots level. The provincial administration at the county level has remained unchanged despite the new administrative structures created by the county government. This creates duplication of services and sometimes leads to conflict of interest. The Committee recommends a review of Fourth Schedule of the Constitution and in particular address the issues of provincial administration.
19. Mr. Speaker, the Constitution provides a limitation of the number of Cabinet Secretaries. This has led to amalgamation of the old structures into one large organization which is proving difficult to manage. For example, the Ministry of Infrastructure has many former ministries merged into one and hence leadership (Cabinet Secretary) may not be fully in-charge of the operations of some of these merged departments. The Committee recommends the need to re-look at the structure of the executive with a view to making it operational while observing the need of efficiency and effectiveness in delivery of services.
20. Mr. Speaker, the allocation through the National Government Constituency Development Fund (NG-CDF) was one channel through which the elected representatives in a limited way addressed the basic developments of their constituents. This in itself contributed to schools, police stations, and bridges & drifts. In this regard, the Committee recommends that the NG-CDF be recognized in the Constitution and a County Government Ward Development Fund (CG-WDF) also be established.

E. CONSTITUTIONAL COMMISSIONS AND INDEPENDENT OFFICES

21. Mr. Speaker, the constitution establishes independent commissions and offices with a primary objective of protecting the sovereignty of the people. However, some challenges have emerged in implementation. These include the following:

- i. **Lack of clarity on roles and mandates of constitutional commissions and ministries:** this pertains to specific commissions such as the National Land Commission and the Ministry of Lands over their respective mandates with respect to administration of land matters; the Ministry of Education and the Teachers Service Commission and their conflict with regard to administration of teachers. Furthermore, there is ineffective service delivery between the Public Service Commission and County Public Service Boards.
- ii. **Limited capacity and inadequate resources:** most independent institutions and offices cite lack of adequate capacity; human, financial and institutional, to effectively carry out their functions.
- iii. **Nature and extent of roles of members and staff of independent institutions:** there are concerns on whether commissioners or members should serve on a full time basis given that each of these institutions has a fully functioning secretariat. Suggestions have been made to have them serve on part time basis.

22. Mr. Speaker, the Committee is concerned that some of the Commissions are not fully funded and this hinders delivery of services especially the oversight Commissions. There is need to recognize the role of Commissions whose mandate relate to oversight and create a framework to allow for scrutiny and a mechanism for prioritization of their resource requests. This will happen only when a sector for oversight institutions namely: Judiciary, Parliament, Auditor General, and Ethics and Anti-Corruption Commission (EACC) in one sector for preparation of the budget under the Medium Term Expenditure Framework (MTEF). Mr. Speaker, Parliamentary Service Commission is currently in a sector together with the Ministry of Foreign Affairs among others. The purpose of sector working groups is to allow trade-offs to be made. What would foreign affairs give away for Parliament to perform its mandates better at the same time enhance the performance of foreign affairs. This is the tragedy of commons.

23. Mr. Speaker, the expenditure for administration has gone up on account of remunerations related to the Commissioners. This House is aware that our sittings are regulated whereas those of Commissions are not. The Committee recommends all Commissioners should serve on a part-time basis and the number of Commissioners be reduced and as necessary the regularity of their sittings be rationalized. It may be necessary to rationalize some Commissions through abolishment and rightsizing as may be necessary.

24. Mr. Speaker, some of the independent institutions are also not performing their duties as per the provisions of the Constitution. This is due to the National Institutions continuing to perform duties as business as usual. For example, the Constitution provides that the Controller of Budget is expected to be the first to approve the request for exchequer issues then pass it to the treasury for financing. However, the current process is inverted i.e. National Treasury approves first then requests for approval from the Controller of Budget (CoB) making the role of CoB unnecessary as it only rubber-stamps.

II. COMMITTEE RECOMMENDATIONS

25. Mr. Speaker, the Committee requests this House to adopt this report, the recommendations therein and resolve as follows:

- (1) That a structured public debate be initiated after the next General Elections and be concluded before June, 30th 2021. Any amendments to the Constitution be proposed in a Constitution Amendment Bill and included as a seventh ballot in the General Elections of 2022.
- (2) Furthermore, the Committee identifies the following issues as deserving public debate and determination:
 - i. Appointment of Cabinet Secretaries and County Executive Committee Members from the respective legislatures
 - ii. Review the need to have two equal chambers and importantly discuss the role of the Senate and whether it is sustainable
 - iii. Review and reduce the number of constituencies and wards
 - iv. Review of Fourth Schedule of the Constitution and in particular address the issues of provincial administration
 - v. Review the number of Commissions and rationalize accordingly
 - vi. Include NG-CDF and CG-WDF in the Constitution
 - vii. Need to adjust the Affirmative action (the one-third gender rule) to be within an achievable period of time i.e. making it progressive

Mr. Speaker, I beg to move.

MINUTES OF THE RETREAT OF THE BUDGET AND APPROPRIATIONS COMMITTEE (BAC) HELD FROM 6th TO 9TH, MARCH, 2017 (DAY 2) FROM 10.00 A.M TO 12.00 P.M AT PRIDEIN PARADISE RESORT AND SPA, MOMBASA

Present

1. **Hon. Mutava Musyimi, M.P.** -Chairperson
2. **Hon. Mary Emaase, M. P.** -Vice Chairperson
3. Hon. Phillip Rotino, M.P.
4. Hon. Richard Onyonka, M.P.
5. Hon. Yusuf Hassan Abdi, M.P
6. Hon. (Dr.) Makali Mulu, M.P.
7. Hon. Jonathan Lelelit, M.P.
8. Hon. Christopher Omulele, M.P.
9. Hon. (Dr.) Njogu Barua, M.P.
- 10.Hon. (Maj.) Marcus Muluvi, M.P
- 11.Hon. Francis Njenga, M.P.
- 12.Hon. Muriuki Njagagua, M.P.
- 13.Hon. Tiyah Galgalo, M.P.
- 14.Hon. Mohammed Shidiye, M.P.
- 15.Hon. Moses Lessonet, M.P.
- 16.Hon. Moses Ole Sakuda, M.P.
- 17.Hon. Shakeel Shabbir, M.P.
- 18.Hon. Suleiman Murunga Kasuti, M.P.
- 19.Hon. Abdulaziz Farah, M.P
- 20.Hon. Ahmed I. Abass, M.P.
- 21.Hon. Bady Bady Twalib, M.P.
- 22.Hon. Ben Momanyi, M.P
- 23.Hon. Christopher Nakuleu, M.P
- 24.Hon. Daniel Nanok, M.P.
- 25.Hon. Gideon Ochanda, M.P.
- 26.Hon. James K. Bett, M.P
- 27.Hon. K.K. Stephen Kinyanjui, M.P
- 28.Hon. Kathuri Murungi, M.P
- 29.Hon. Kenneth Okoth , M.P
- 30.Hon. Patrick Ole Ntutu, M.P.
- 31.Hon. (Dr.) Reginalda Wanyonyi, M.P.
- 32.Hon. Richard Tongi, M.P.

33.Hon. Samuel Gichigi, M.P.

Absent

1. Hon. Benjamin Langat, M.P.
2. Hon. Edick Omondi Anyanga, M.P
3. Hon. Jamleck Kamau, M.P.
4. Hon. Ferdinand Waititu, M.P
5. Hon. Jackson Kiptanui, M.P.
6. Hon. John Mbadi, M.P.
7. Hon. Nelson Gaichuhie, M.P.
8. Hon. Abdullahi Diriye M.P
9. Hon. Denis Kariuki, M.P.
- 10.Hon. Denittah Ghata, M.P.
- 11.Hon. James Gakuya, M.P.
- 12.Hon. Joseph Limo, M.P.
- 13.Hon. Moses Kuria, M.P
- 14.Hon. Nasra Ibrahim, M.P.
- 15.Hon. Peter Weru, M.P.
- 16.Hon. Priscilla Nyokabi, M.P.
- 17.Hon. Alice Ng'anga, M.P.
- 18.Hon. Jones Mlolwa, M.P.

Secretariat Present

- | | | |
|-----|-------------------------|---------------------------------|
| 1. | Ms. Phyllis Makau | Director, PBO |
| 2. | Mrs. Florence Abonyo | Director, Committee Services NA |
| 3. | Mr. Frederick Muthengi | Principal Fiscal Analyst |
| 4. | Mr. Benjamin Ngimor | Fiscal Analyst II |
| 5. | Mrs. Millicent Makina | Fiscal Analyst II |
| 6. | Mr. Joseph Ndirangu | Fiscal Analyst III/ Clerk |
| 7. | Mr. James Chacha | Fiscal Analyst III |
| 8. | Mr. Danson Kachumbo | Fiscal Analyst III |
| 9. | Mrs. Amran Yunis Mursal | Fiscal Analyst III |
| 10. | Mrs. Julie M. Mwithiga | Fiscal Analyst III |
| 11. | Mr. Adan Ahmed Abdi | Fiscal Analyst III |
| 12. | Mr. Joram Baraza | Support Staff |

AGENDA

1. Preliminaries
2. Agenda:
 - i. Adoption of the Socio-Economic Audit Report of the 2010 Constitution*
3. Any Other Business

MIN BAC/002/2017/01: PRELIMINARIES

The Chairman called the meeting to order at 10.00 a.m. and led with a word of prayer. He then welcomed members to the meeting.

MIN BAC/002/2017/02: Adoption of the Socio-Economic Audit Report of the 2010 Constitution

Members were taken through the draft report by the secretariat. After lengthy deliberations the Committee adopted the report.

MIN BAC/002/2017/03: ADJOURNMENT

There being no other business the meeting adjourned at 12.00 p.m. the next sitting shall be held on Wednesday, 8th March 2017 in the afternoon.

SIGNED



.....
HON. MUTAVA MUSYIMI, M.P, CBS
CHAIRMAN, BUDGET AND APPROPRIATIONS COMMITTEE

16th March 2017

.....
DATE

MINUTES OF THE RETREAT OF THE BUDGET AND APPROPRIATIONS COMMITTEE (BAC) HELD FROM 6th TO 9TH, MARCH 2017 (DAY 1) FROM 10.00 A.M TO 2.00 P.M AT PRIDEIN PARADISE RESORT AND SPA, MOMBASA

Present

- | | |
|---------------------------------------|--------------------------|
| 1. Hon. Mutava Musyimi, M.P. | -Chairperson |
| 2. Hon. Mary Emaase, M. P. | -Vice Chairperson |
| 3. Hon. Phillip Rotino, M.P. | |
| 4. Hon. Richard Onyonka, M.P. | |
| 5. Hon. Yusuf Hassan Abdi, M.P | |
| 6. Hon. (Dr.) Makali Mulu, M.P. | |
| 7. Hon. Jonathan Lelelit, M.P. | |
| 8. Hon. Christopher Omulele, M.P. | |
| 9. Hon. (Dr.) Njogu Barua, M.P. | |
| 10.Hon. (Maj.) Marcus Muluvi, M.P | |
| 11.Hon. Francis Njenga, M.P. | |
| 12.Hon. Muriuki Njagagua, M.P. | |
| 13.Hon. Tiyah Galgalo, M.P. | |
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| 15.Hon. Moses Lessonet, M.P. | |
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| 17.Hon. Shakeel Shabbir, M.P. | |
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| 25.Hon. Gideon Ochanda, M.P. | |
| 26.Hon. James K. Bett, M.P | |
| 27.Hon. K.K. Stephen Kinyanjui, M.P | |
| 28.Hon. Kathuri Murungi, M.P | |
| 29.Hon. Kenneth Okoth , M.P | |
| 30.Hon. Patrick Ole Ntutu, M.P. | |

- 31.Hon. (Dr.) Reginalda Wanyonyi, M.P.
- 32.Hon. Richard Tongi, M.P.
- 33.Hon. Samuel Gichigi, M.P.

Absent

1. Hon. Benjamin Langat, M.P.
2. Hon. Edick Omondi Anyanga, M.P
3. Hon. Jamleck Kamau, M.P.
4. Hon. Ferdinand Waititu, M.P
5. Hon. Jackson Kiptanui, M.P.
6. Hon. John Mbadi, M.P.
7. Hon. Nelson Gaichuhie, M.P.
8. Hon. Abdullahi Diriye M.P
9. Hon. Denis Kariuki, M.P.
- 10.Hon. Denittah Ghati, M.P.
- 11.Hon. James Gakuya, M.P.
- 12.Hon. Joseph Limo, M.P.
- 13.Hon. Moses Kuria, M.P
- 14.Hon. Nasra Ibrahim, M.P.
- 15.Hon. Peter Weru, M.P.
- 16.Hon. Priscilla Nyokabi, M.P.
- 17.Hon. Alice Ng'anga, M.P.
- 18.Hon. Jones Mlolwa, M.P.

Secretariat Present

- | | | |
|-----|-------------------------|----------------------------------|
| 1. | Ms. Phyllis Makau | Director, PBO |
| 2. | Mrs. Florence Abonyo | Director, Committee Services, NA |
| 3. | Mr. Frederick Muthengi | Principal Fiscal Analyst |
| 4. | Mr. Benjamin Ngimor | Fiscal Analyst II |
| 5. | Mrs. Millicent Makina | Fiscal Analyst II |
| 6. | Mr. Joseph Ndirangu | Fiscal Analyst III/ Clerk |
| 7. | Mr. James Chacha | Fiscal Analyst III |
| 8. | Mr. Danson Kachumbo | Fiscal Analyst III |
| 9. | Mrs. Amran Yunis Mursal | Fiscal Analyst III |
| 10. | Mrs. Julie M. Mwithiga | Fiscal Analyst III |
| 11. | Mr. Adan Ahmed Abdi | Fiscal Analyst III |
| 12. | Mr. Joram Baraza | Support Staff |

AGENDA

1. Preliminaries
2. Confirmation of Agenda
3. Agenda:
 - i. *Equalization Fund 2016/17*
 - ii. *Presentation on the Unpacking of the 2017/18 Budget Estimates and The Medium Term*
 - iii. *Review and adoption of the Socio-Economic Audit Report of the 2010 Constitution*
4. Any Other Business

MIN BAC/001/2017/01: PRELIMINARIES

The Chairman called the meeting to order at 10.30 a.m. and led with a word of prayer. He then welcomed members to the meeting. In his introductory remarks, the Chairman informed the committee that at the end of the day they will need to deliberate on the Socio-Economic Audit Report of the 2010 Constitution and come up with a report.

MIN BAC/001/2017/02 Review and adoption of the Socio-Economic Audit Report of the 2010 Constitution

In its Submission the Parliamentary Budget Office noted out to the meeting that on the 26th of February 2014, through a resolution of the House; the National Assembly established a working group to carry out a socio-economic audit of the Constitution of Kenya 2010. This was pursuant to the need to assess the impact of the implementation of Constitution in the economy and the social well-being of the citizenry. The main objective of the working group was to make recommendations to the National Assembly on potential measures that could enhance prudence in management of the country's public resources. This was necessary due to the perceived high cost in the implementation of the Constitution.

The office also indicated that the working group was able to carry out the audit mainly through a review of existing documentation, consultations with different stakeholders as well as a national survey which was carried out in all the 47 counties. Subsequently, a report containing findings on the matters aforementioned was submitted to National Assembly on 13th October 2016 and was committed to

the Budget and Appropriations Committee. The committee has reviewed and deliberated on the report and now presents its findings for which it was required that they come up with recommendations for tabling in the house.

Concerns raised by the Members

- That counties and wards should remain the same since it was a structural issue and is difficult to alter population dynamics.
- Cabinet should come from the respective legislature's i.e. the National Assembly for the national government and the county assemblies for the county government. Members were of the opinion that elected leaders understand the needs of the people better than technocrats who are out of touch with realities. A case was given that the doctor's strike would not have prolonged had the cabinet been coming from parliament.
- There was a need to come up with a minimum threshold on education qualification for members of parliament and members of county assembly to allow them execute their role better.
- Members were also of the opinion that public participation processes should be left to elected leaders.
- That the functions of the Senate be performed by a committee in the National Assembly.
- Reduce and subsequently do away with all nominations be it in the county assemblies or the national assembly.
- Members were also of the view that the election petition process should also be holistically relooked at with an MCA petition that started from a lower court ending up in the Supreme Court. There was need to redefine the role of the supreme court with respect to election petition.
- The Committee also noted with concern the duplication in the performance of mandates by National and County Institutions at the grassroots level. Specifically, provincial administration at the county level has remained unchanged despite the new administrative structures created by the county government. This creates duplication of services and sometimes leads to conflict of interest.
- The committee further noted that, the Constitution provides a limitation of the number of Cabinet Secretaries. This has led to amalgamation of the

old structures into one large organization which is proving difficult to manage.

- The committee was also of the opinion that National Government Constituency Development Fund (NG-CDF) be recognised in the Constitution since it provided for basic but essential services at the Constituency level.
- The committee further agreed that there was need to reduce the number of constituencies especially after the 2019 census in order to save the country some resources for development. Additionally the committee had suggested there was need to rationalize commissions.

After lengthy deliberations, the committee recommended that a referendum question be part of the 2017 elections for the public to allow the amendment of the Constitution and to initiate debate on the following;

- i. Appointment of Cabinet Secretaries and County Executive Committee Members from the respective legislatures
- ii. Review the need to have two equal chambers and importantly discuss the role of the Senate and whether it is sustainable
- iii. Review and reduce the number of constituencies and wards
- iv. Review of Fourth Schedule of the Constitution and in particular address the issues of provincial administration
- v. Review the number of Commissions and rationalize accordingly
- vi. Include NG-CDF and CG-WDF in the Constitution
- vii. Need to adjust the Affirmative action (the one-third gender rule) to be within an achievable period of time i.e. making it progressive

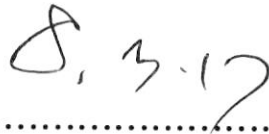
MIN BAC/001/2017/03: ADJOURNMENT

There being no other business the meeting adjourned at 2.00 p.m. The next meeting shall be held on Wednesday, 8th March, 2017 at 10.00 am.

SIGNED



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HON. MUTAVA MUSYIMI, M.P, CBS
CHAIRMAN, BUDGET AND APPROPRIATIONS COMMITTEE



.....
DATE

MINUTES OF THE RETREAT OF THE BUDGET AND APPROPRIATIONS COMMITTEE (BAC) ON SOCIO- ECONOMIC AUDIT OF THE CONSTITUTION HELD ON 10TH- 11TH NOVEMBER 2016 AT BOMA, SOUTH C

Present

1. **Hon. Mutava Musyimi, M.P.**
2. **Hon. Mary Emaase, M. P.**
3. Hon. Phillip Rotino, M.P
4. Hon. Shakeel Shabbir, M.P.
5. Hon. Yusuf Hassan Abdi, M.P
6. Hon. Abdulaziz Farah, M.P.
7. Hon. Jackson Kiptanui, M.P.
8. Hon. (Dr.) Makali Mulu, M.P.
9. Hon. (Dr.) Njogu Barua, M.P
- 10.Hon. Abdullahi Diriye M.P
- 11.Hon. Ahmed I. Abass, M.P.
- 12.Hon. Alice Ng'anga, M.P.
- 13.Hon. Bady Bady Twalib, M.P.
- 14.Hon. Ben Momanyi, M.P
- 15.Hon. Christopher Omulele, M.P.
- 16.Hon. Daniel Nanok, M.P.
- 17.Hon. Denittah Ghati, M.P.
- 18.Hon. Ferdinand Waititu, M.P
- 19.Hon. Francis Njenga, M.P.
- 20.Hon. James Gakuya, M.P.
- 21.Hon. James K. Bett, M.P
- 22.Hon. Jonathan Lelelit, M.P.
- 23.Hon. Jones Mlolwa, M.P.
- 24.Hon. Joseph Limo, M.P.
- 25.Hon. K.K. Stephen Kinyanjui, M.P
- 26.Hon. Kathuri Murungi, M.P
- 27.Hon. Mohammed Shidiye, M.P.
- 28.Hon. Moses Lessonet, M.P.
- 29.Hon. Moses Ole Sakuda, M.P.
- 30.Hon. Muriuki Njagagua, M.P.
- 31.Hon. Peter Weru, M.P.
- 32.Hon. Priscilla Nyokabi, M.P.
- 33.Hon. Richard Onyonka, M.P.
- 34.Hon. Richard Tongi, M.P.

-Chairperson

-Vice Chairperson

35.Hon. Samuel Gichigi, M.P.

36.Hon. Tiyah Galgalo, M.P.

Absent

1. Hon. Ababu Namwamba, E.G.H M.P
2. Hon. Edick Omondi Anyanga, M.P
3. Hon. Benjamin Langat, M.P.
4. Hon. Jamleck Kamau, M.P.
5. Hon. John Mbadi, M.P.
6. Hon. Nelson Gaichuhie, M.P.
7. Hon. (Dr.) Reginalda Wanyonyi, M.P.
8. Hon. Gideon Ochanda, M.P.
9. Hon. Christopher Nakuleu, M.P
- 10.Hon. Denis Kariuki, M.P.
- 11.Hon. (Maj.) Marcus Muluvi, M.P
- 12.Hon. Nasra Ibrahim, M.P.
- 13.Hon. Moses Kuria, M.P
- 14.Hon. Patrick Ole Ntutu, M.P.
- 15.Hon. Kenneth Okoth, M.P

Working Group of Socio Economic Audit of The Constitution 2010

- | | |
|--------------------------|--------|
| 1. Prof. Karuti Kanyinga | Member |
| 2. Dr. Elizabeth Owiti | Member |
| 3. Susan Mang'eni | Member |

National Treasury

- | | |
|-------------------------|------------------|
| 1. Dr. Geoffrey Mwau | Director General |
| 2. Mr. Geoffrey Malombe | Member |
| 3. Mr. Wohoro Ndohho | Member |
| 4. Mr. Daniel Ndolo | Member |
| 5. Mr. Fred Owegi | Member |

Budget Committee Secretariat

- | | |
|---------------------------|--------------------------------|
| 1. Ms. Phyllis Makau | Director |
| 2. Mr. Joseph Ndirangu | Committee Clerk/Fiscal Analyst |
| 3. Mr. Robert Nyaga | Chief Fiscal Analyst |
| 4. Mr. Frederick Muthengi | Principle Fiscal Analyst |
| 5. Ms. Millicent Makina | Fiscal Analyst II |

6. Mr. James Chacha	Fiscal Analyst III
7. Ms. Catherine Burure	Fiscal Analyst III
8. Ms. Amran Yunis	Fiscal Analyst III
9. Mr. Danson Kachumbo	Fiscal Analyst III
10. Mr. Vitalis Ndambuki (SS)	Office Assistant

AGENDA

1. Preliminaries / Confirmation of Agenda
2. Matters arising
3. Agenda:
 - i. Presentation on the first quarter performance of the 2016/17 Budget
 - ii. Discussion on the report on all new loans contracted by the Government at 31st August 2016 with National Treasury
 - iii. Presentation and Discussion on the content of the report on socio-economic audit of the Constitution
4. Any Other Business

MIN: BAC/029/2016/001: PRELIMINARIES

The Chairman called the meeting to order at 9:00 a.m. and led with a word of prayer. He then welcomed Members, the National Treasury officials and the Socio-Economic Audit working group members to the meeting. In his introductory remarks, the Chairman informed the committee of the day agenda and what the committee was expected to discuss during the retreat.

MIN: BAC/029/2016/002: CONFIRMATION OF THE PREVIOUS MEETING

The confirmations of the minutes of the previous meeting were postponed to the next meeting.

MIN: BAC/ 029/2016/003 MATTERS ARISING

There were no matters arising since the confirmation of minutes had been deferred.

**MIN: BAC/ 029/2016/004: DISCUSSION ON THE REPORT ON ALL NEW
LOANS CONTRACTED BY THE
GOVERNMENT AT 31st AUGUST 2016 WITH
NATIONAL TREASURY**

The chair called upon Parliamentary Budget Office to make their presentation. The presentation highlighted that the analysis of the new loans report submitted to Parliament on 7th October 2016, is in accordance to Article 211(1) of Constitution and Section 31 of PFM Act 2012. The report provides information on projects financed by new loans, the amounts involved, creditors, maturity date, interest rate charged etc.

The report indicates that a total of 21 new loans were procured by the government between by August 31st 2016, which amount to Kshs. 218.7 billion. The funds will finance projects in different sectors with infrastructure receiving the largest share of total foreign finance worth of Kshs. 87.7 billion followed by the Energy sector at Kshs. 31.4 billion.

As at March 2016, the national outstanding debt level stood at KSh. 3.312 trillion or 51% of KSh. 6.44 trillion nominal GDP. Of this, KSh. 1.67 trillion associated to externally held debt while KSh. 1.65 trillion associated to domestically held debt. Given the pressures of financing ongoing government projects on the primary deficit, this upward trend of debt is expected to continue in the medium term and the long term.

Increase in debt growth rate since 2008 that was catapulted by domestically held debt that pushed the level of total debt to a near vertical trend. This was as a result of the country's' objectives of developing domestic markets and the need for short term finance for budget supply in order to supplement revenue shortfalls; therefore, the level of debt was greatly influenced by domestic debt for the past decade.

The presentation also highlighted that:

- i. Kenya Airways Financing - The government has attained a syndicated loan facility worth \$ 200 million / to support the turn-around of the Kenya Airways carrier. However, this loan has only a grace period of 2 years and will be due in 2018 payable within one instalment. This payment of a huge

amount of the national debt within one single period is likely to cause a shock in the financial structures of the national budget.

- ii. Noting that a company is receiving \$200 million/KSh. 20 billion worth of foreign finance payable by public money, there should have been an indication of terms and conditions set to restructuring the company including targets, goals and other cost cutting / austerity measures.
- iii. Lack of Interest rates & maturity dates - The report tabled in Parliament does not provide full detail of the loans acquired such as interest rates applied and the maturity date i.e. the Upgrading of the *Gilgil Machinery Road Project*. This therefore makes it hard to determine the concessionality qualities of some of the loans.
- iv. Adherence to comprehensiveness of the Law - The PFM ACT 2012 also requires the report to provide a statement of *loan balances brought forward; carried down; drawings and amortization* of new foreign loans which were not provided by the report. This therefore makes it impossible to determine of new debt on the most recent status of public debt.
- v. The new loans report as provided, reported government debt finance in terms of foreign currency and this therefore also makes it impossible to monitor the true effects of this new issues – Regulation 195 (5) requires that for purposes of monitoring compliance with the debt limit, the amount of government debt and government guarantees which are not denominated in shillings shall be recalculated at the prevailing exchange rate of the Central bank of Kenya.
- vi. Absorption rates – after successful acquisition of loan financing, it has been noted not much attention is given to absorption rates of projects financed by nationally acquired debt. High absorption rates as a result of efficient investment of public resources has been linked to positive effect on debt

ratios due to its positive effects in the medium term. The Budget Watch 2016-2017 presses for a minimum absorption rate of 90 Percent in order for the country enjoy maximum returns from such investments in the medium term.

After the presentation, the committee deliberate on the analysis thereafter the chair called upon Working Group of The Socio-Economic Audit Of The 2010 Constitution.

**MIN: BAC/ 029/2016/005: PRESENTATION AND DISCUSSION ON THE
CONTENT OF THE REPORT ON SOCIO-
ECONOMIC AUDIT OF THE CONSTITUTION**

The Socio-Economic Audit team took the Committee through the report and Members were informed of the following key chapters:

1. DEVOLVED GOVERNANCE

The aim of devolved governance in Kenya was to address imbalances in development as well as promote equitable distribution of resources and access to services. The constitution created two levels of government; the National and County levels. The counties are 47 but the numbers can be adjusted through a referendum. Key concerns that were raised in the audit on devolved governance are as follows:

- a) Public participation: A number of Kenyans felt that they have little to no influence on decisions made by the two levels of government even though it should be noted that many still felt that decisions made by the two levels of government reflected their needs. This is despite the provisions for public participation in the budget process. Most Kenyans have not participated in any county forums on budgets as well as making of relevant laws and policies.
- b) Structure and implementation of devolution: concern was raised over the cost effectiveness of having 47 of counties. This is deemed to have increased the cost of implementation of the constitution

- c) Delineation of functions: though the fourth schedule assigned functions to the two levels of government, the Transitional Authority did not exhaust the unbundling of functions. The fourth schedule therefore requires further interpretation to clarify the functions of both levels of government and prevent confusion. The unclear roles include roads and infrastructure, gambling and betting control, management of water resources and water services, procurement in health services, outdoor advertising among others. Concurrent functions also need to be clarified
- d) Prudence in use of public resources: concern was raised over flagrant expenses of county assemblies, misuse and misapplication of resources by county executives and non-adherence to public procurement laws. Majority felt that corruption is rife in county governments
- e) Conditional funding: currently, there is no policy or regulations to guide the provision of conditional grants to counties; how these grants should be applied or managed. Some grants are fully managed by the national government on behalf of counties and therefore do not qualify as grants.
- f) County own revenue: counties are facing serious challenges on own revenue collection with some counties collecting less than what the defunct local authorities, municipal and/or county councils used to collect when combined. This inability to collect revenue and meet targets is a challenge to effective devolution. There is need for a discussion on how counties can address this
- g) Determining the sharable revenue: there is no consensus on what should constitute sharable revenue especially since the last audited is usually behind schedule by two to three years. Others feel that whatever resources are available in the national budget should be sharable revenue. On the other hand, the national government argues that borrowed money or grants earmarked for projects cannot be included as sharable revenue
- h) National planning priorities and county mandates: there are concerns about inadequate institutional interaction between the two levels of government. The Inter-Governmental Relations Technical Committee is not yet fully functional and has not facilitated effective intergovernmental relations and harmony. Furthermore, there is evidence of fragmentation in service delivery with constituencies and wards implementing development funds though it isn't clear whether these plans are aligned with broader county development plans
- i) Senate and representation of counties at the national level: the constitutional design of a directly elected senate has inadvertently undermined the objective of enabling the Senate to scrutinize the national government

i. Committee Observations and Recommendations

- i. On the number of counties, the Committee agrees with the recommendation in the report to retain the 47 counties but focus on improving efficiency within the current structure.
- ii. The governor and the County Executive Committee Members are accountable to the County Assembly. There is need for a policy and legal framework clarifying the role of the Senate vis-à-vis that of the County Assembly in exercising oversight.
- iii. On qualifications of MPs and MCAs, members agreed that there is need to improve the standard of educational qualifications.

2. LEGISLATURE

The people are the source of legislative authority at both the national and county levels. The constitution establishes and defines roles, membership and composition of the National Assembly, the Senate and the County Assemblies at the national and county levels of government. Key concerns that were raised in the audit report on the legislature are as follows:

- a) Structure and functions of parliament: a notable weakness in the current structure of the national parliament is that there is no single head of the two chambers. Both chambers are led by the respective speakers, and the two chambers are perceived as co-equal chambers without any of them subjecting itself to the control of the other. This has led to legislative gridlock and causes delays in passing of certain important bills.
- b) Composition of the National Assembly: there is concern that the number of MPs is too high which is not only costly but also hinders the quality of debate. Given 349 members of parliament, 67 senators and over 2200 MCAs, there is concern that Kenyans are over-represented.
- c) Composition and role of the Senate: the concerns with regard to the senate pertain to confusion in the oversight role given to the senate over the counties. It is not clear in the constitution whether the Senate can exercise oversight over the county executive in the same manner as the County Assembly. Indeed, the Senate has no direct linkages with the

County Assemblies and the County Executive. The process of impeachment should also involve the voters and not the county assembly and the senate alone.

- d) Gender: there is need for a proper framework no how the one third gender rule can be adhered to. The report suggests adoption of Mixed Member Proportional Representation.
- e) Law Making function of Parliament: the shared legislative function between the National Assembly and the Senate has encountered challenges due to a lack of clear boundaries on the legislative role of the senate and the National Assembly. Consultation between the two houses on laws is facing challenges and has sometimes resulted in conflict.
- f) Parliamentary accountability, leadership and organization: members of the public are in support of a minimum of a degree in terms of educational qualifications for a member of parliament as well as other categories of representation in the national assembly and even in the county assemblies.
- g) Electorate's right to recall: as presently provided, the law on recall is not serving the purpose of the constitution. Article 104 of the constitution does not expressly provide grounds and procedures for effecting the right of recall.
- h) Special seat members in county assemblies: there seems to be a disproportionately high number of nominated representatives in the county assemblies. As such, even the final number of MCAs is hard to determine until after the elections because the number is determined by the gender composition of the MCAs
- i) Legislative role of county assemblies: counties seem to lack adequate capacity to develop laws and policies for county governance. Legislation and policy development requires counties to have capacity for legislative and policy drafting as well as adequate human and financial resources. However, there isn't enough technical expertise to support counties to develop quality laws and policies.
- j) County assembly leadership, organization and representation: membership of the county assembly service boards does not facilitate professionalism and objectivity in the performance of its core functions. Members of these boards - speaker, two MCAs (majority and minority leader), a member of the public and the clerk – are involved in county politics by virtue of their position in the County Assembly structures. There is no space for professionalization of the board
- k) Budget making: the short period for national and county legislatures to process the budget in an election year is a challenge to the budget cycle.

Furthermore, during adjustment of the budget, expenditure increments are rarely accompanied by reductions which increases the budget deficit

- *Committee Observations and Recommendations*

- i. On the issue of overrepresentation, the Committee agreed that Kenyans are overrepresented in the legislative bodies. The following options were explored to address this matter:
- ii. Consider abolishing the Senate or strengthening it to carry out work similar to that of the Council of governors
- iii. Consider reducing the number of nominated MCAs while still taking into account affirmative action to ensure the one third gender rule is observed
- iv. To ensure gender balance, can consider proposal for governors to be required to nominate someone of the opposite gender as their running mate
- v. Consider reducing the number of constituencies and consequently that of Members of Parliament
- vi. Reduce the nomination of MCAs to one per constituency
- vii. Limit the terms of service for women representatives
- viii. Governors should be appointed as opposed to being elected

3. JUDICIARY

The constitution introduced fundamental changes aimed at securing an independent judiciary. Since then, the judiciary has made some notable changes to provide services to the people such as increasing the courts infrastructure. However, some challenges still exist. These are as follows:

- a) Perception of corruption: there are people who believe that courts cannot give a fair ruling and that they favour people based on their stature.
- b) Separation of powers and oversight: parliament and the Executive has raised concern over what is perceived as judicial interference with courts sometimes ruling to halt parliamentary business on matters before the courts. The executive is also concerned about the use of judicial mechanisms to halt and/or delay executive programmes through issuance of ex-parte injunctions
- c) Role and jurisdiction of the Supreme Court: one major problem with the jurisdiction of the Supreme Court is that many matters concerning the interpretation of the constitution can only reach the Supreme Court through an appeal from the lower courts. This is expensive for the parties involved. Supreme Court should therefore pro-actively seize every opportunity and expand the jurisprudence.
- d) Qualifications of Supreme Court judges: there is concern that the technical requirements for appointment of Supreme Court judge are not enough for the court's role in interpreting and implementing the constitution in a progressive manner because they emphasize on technical qualifications rather than ability and competence to deliver the jurisprudence expectations of the court.
- e) Specialized courts: the manner in which the specialized courts are administered could potentially undermine fair administration of justice as it has the potential of making a few judges serve in these limited areas of law on a permanent basis. Thus, if the judges are compromised or wrong in their line of thought, the litigants are stuck with them permanently with no option of alternative views on matters concerned.

- ***Committee Observations and Recommendations***

- i. Members agree that parliament should be represented in the National Council for Administration of Justice

4. NATIONAL EXECUTIVE

According to the 2010 constitution, executive power is recognized as emanating from the people. However, there exists some key challenges with regard to the following:

- a) Structure and functions of the National Executive: though the number of cabinet secretaries is set at a minimum of 14 and a maximum of 22, the expected reduction in cost and bureaucracies is not apparent as most of the new ministries are a fusion of a number of old ministries
- b) Effectiveness of the national executive: the ambiguities in the division of functions are affecting the performance of the national government. Despite attempts to address these ambiguities through various policy drafts, these have never been completed. The taskforce on parastatals reforms gave recommendations which could have facilitated transition to current constitutional structures but these have not been implemented.
- c) Restructuring of the provincial administration: there is concern that the restructured provincial administration did not embrace public participation and there was no policy to guide the process. This has created challenges such as lack of linkages with ministries other than the ministry of interior yet the provincial administration is expected to oversee implementation of government programmes, there are no institutional structures for cooperation between the two levels of administration. There is need for an institutional mechanism that would bring the Provincial administration and the two levels of government together. The restructuring process should also rationalize functions to cut unnecessary costs

- Committee Observations and Recommendations

- i. On the duplication of functions, the institution which has a higher mandate should take up the responsibility and the one with a lower mandate be dissolved.

5. CONSTITUTIONAL COMMISSIONS AND INDEPENDENT OFFICES

The constitution establishes independent commissions and offices with a primary objective of protecting the sovereignty of the people. However, some challenges have emerged in implementation. These include the following:

- a) Lack of clarity on roles and mandates of constitutional commissions and ministries: this pertains to specific commissions such as the National Land Commission and the Ministry of Lands, Housing and Urban Development

over their respective mandates with respect to administration of land matters; the Ministry of Education and the Teachers Service Commission and their conflict with regard to administration of teachers. Furthermore, there is ineffective service delivery between the Public Service Commission and County Public Service Boards.

- b) Limited capacity and inadequate resources: most independent institutions and offices cite lack of adequate capacity, human, financial and institutional, to effectively carry out their functions
- c) Nature and extent of roles of members and staff of independent institutions: there are debates on whether commissioners or members should serve on a full-time basis given that the each of these institutions has a fully functioning secretariat. Suggestions have been made to have them serve on part time basis.
 - Committee Observations and Recommendations
 - i. Membership of commissioners should be limited to 3 to 5 and they should serve on part time basis
 - ii. There is need for a policy and legal framework to clarify on the ambiguities in the roles of the constitutional commissions and the ministries
 - iii. Sector Working Groups should allow independent commissions to have their own sector; a sector for independent commissions

MIN: BAC/029/2016/006: Any Other Business

There being no other business the retreat was officially closed on 11th November, 2016 at 6 p.m.



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Signed Chairperson

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Date

8.3.17