

**COMMUNICATION FROM THE CHAIR ON THE PROCEDURE FOR
CONSIDERATION OF THE CONSTITUTION OF KENYA (AMENDMENT)
BILL, SENATE BILLS NO. 16 OF 2015**

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1. Honourable Senators, as you will recall, at the sitting of the Senate held on 10th February 2016, the Constitution of Kenya (Amendment) Bill, Senate Bills No. 16 of 2015, which appeared as Order No.12 on the Order Paper of that day, was called for Second Reading.
2. Thereafter, the Motion for the Second Reading of the Bill was moved by the Sponsor of the Bill, Senator Judith Sijeny, who was seconded by Senator Anyang' Nyong'o.
3. Honourable Senators will recall that after the Motion was moved and seconded and the question on the Motion subsequently proposed, the Senator for Kakamega County, Senator, (Dr.) Boni Khalwale rose on a Point of Order and sought the direction of the Chair as to whether the Bill was one that would require a referendum in terms of Article 255(1) of the Constitution. Article 255(1) of the Constitution provides that a proposed amendment to the Constitution shall be enacted in accordance with Article 256 or 257 of the Constitution and shall be approved in a referendum in accordance with Article 255(2) of the Constitution if it concerns any of the matters set out in paragraph (a) through to (j).
4. Senator Khalwale argued that the amendments proposed in the Bill extended to the "sovereignty of the people" as set out in Article 1(2) of the Constitution and that therefore, in accordance with Article 255(1)(c) of the Constitution, the Bill was one that required to be approved in a referendum.

5. Sen. Khalwale stated that it was important that guidance be given by the Chair as to whether the Bill was one that fell within the ambit of Article 255(1) of the Constitution before further proceedings on the Bill. There were some interventions on this issue from the Senator Nabwala Mukiite, Senator Muthama and Senator (Dr.) Zani.
6. In the end, the Chair observed that Senator Khalwale had raised fundamental issues that would require determination before proceeding with the consideration of the Bill.
7. From the deliberations, two issues arose for the direction of the Chair-
 - (1) *Who is to determine whether a Bill is one that falls within the province of Article 255(1) of the Constitution and therefore one that requires a referendum?*
 - (2) *At what point in the consideration of the Bill should such determination be made?*
8. As Honourable Senators are aware, Chapter Sixteen of the Constitution provides for amendment of the Constitution. In this regard, Article 256 of the Constitution provides for amendment by way of parliamentary initiative while Article 257 of the Constitution makes provision for amendment by way of popular initiative. Either way, whether a Constitution Amendment Bill proposes amendment by parliamentary or by popular initiative, if the Bill provides for any of the matters set out in Article 255(1) of the Constitution, in terms of Articles 256(5) and 257(10), respectively, the Bill would require to be submitted to the people for ratification by way of a referendum.

9. It is however noteworthy that the Constitution does not provide detail as to when or by whom the determination as to the applicability or otherwise of Article 255 of the Constitution to a Bill for the Amendment Constitution is to be made. Our Standing Orders also do not contain provisions on this matter.
10. Honourable Senators, there is no doubt that for good order and in order to provide guidance to Senators as they consider no less than a Bill for the amendment of the Constitution, a determination would require to be made in the Senate as to the nature of a Bill to amend the Constitution and in particular whether the Bill falls within the ambit of Article 255 of the Constitution. It cannot be the case that this determination would be reserved to be made after the Senate has concluded its consideration of a Bill. This cannot have been the intention of the Constitution and it would certainly not be useful to the process of consideration of the Bill.
11. I therefore find and rule that the determination as to whether a Bill is one that falls within the province of Article 255(1) of the Constitution and therefore one that requires a referendum ought to be made by the Speaker of the Senate whenever the Senate is to consider a Bill for the amendment of the Constitution.
12. As to the point at which such determination is to be made, our procedure regarding voting on a matter other than a Bill provides useful lessons. Standing order 72(1) requires that *“where the Senate is to vote on any matter other than a Bill, the Speaker shall rule on whether the matter affects or does not affect counties”*. Standing order 72(2) further provides that *“the Speaker’s ruling under paragraph (1) shall be made after conclusion of debate on the matter but before the question is put”*.

13. This, Honourable Senators, would similarly be an appropriate point at which to make a determination as to whether Article 255(1) of the Constitution applies to a Bill proposing amendments to the Constitution. Prior to such determination, Senators in Committee and in Plenary, as well as the public would have an opportunity, in the course of deliberation on the Bill, to ventilate on this matter before the final determination by the Speaker.
14. In light of these directions, Honourable Senators, the Senate shall proceed with debate on the Second Reading of the Constitution of Kenya (Amendment) Bill, Senate Bills No. 16 of 2015. After the conclusion of the debate on the Bill and before the question for Second Reading of the Bill is put in terms of standing 131(1) of the Senate Standing Orders, the Speaker shall make a ruling as to whether the Bill falls within the ambit of Article 255(1) of the Constitution and therefore whether it is one that would require ratification by the people of Kenya in a referendum.
15. Finally, Honourable Senators, it is evident that there is need, for the future, to set out this procedure in our Standing Orders. I therefore direct that the Rules and Business Committee, at the appropriate time, considers this matter and proposes suitable amendments to the Standing Orders.

I thank you.

SEN. EKWEE ETHURO, EGH, EBS, MP
SPEAKER OF THE SENATE

28th June, 2016