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THE SENATE

ELEVENTH PARLIAMENT

SECOND SESSION

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06/12/14*

THE STANDING COMMITTEE

*N/A  
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of Committee*

ON

LEGAL AFFAIRS AND HUMAN RIGHTS

A REPORT ON A BENCHMARKING VISIT TO GERMANY

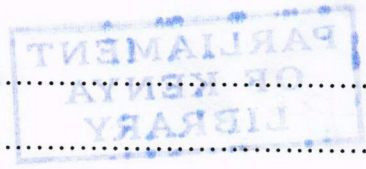
(5<sup>TH</sup> TO 11<sup>TH</sup> OCTOBER, 2014)

Clerk's Chambers,  
Parliament Buildings,  
P. O. Box 41842-00100,  
**NAIROBI.**

NOVEMBER, 2014

*2 Approved -  
9.12.14*

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## ABBREVIATIONS

|        |                                       |
|--------|---------------------------------------|
| BPI    | Bribe Payers Index                    |
| CPI    | Corruption Perceptions Index          |
| EU     | European Union                        |
| ESCR   | Economic, Social and cultural rights  |
| FRANET | Fundamental Rights Agency             |
| GCB    | Global Corruption Barometer           |
| GCR    | Global Corruption Report              |
| NIS    | National Integrity System assessments |
| TI     | Transparency International            |
| UN     | United Nations                        |

## **PREFACE**

**Mr. Speaker Sir,**

The Standing Committee on Legal Affairs and Human Rights is established pursuant to the Standing Order 208 of the Senate Standing Orders. It is mandated under the Second Schedule to consider all matters related to constitutional affairs, the organization and administration of law and justice, elections, promotion of principles of leadership, ethics and integrity; and implementation of the provisions of the Constitution on Human rights.

### **Membership of the Committee**

The Committee is comprised of the following members:-

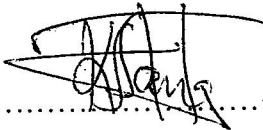
1. Sen. Amos Wako - Chairperson
2. Sen. Stephen Sang - Vice Chairperson
3. Sen. Kembi Gitura
4. Sen. Kiraitu Murungi
5. Sen. Judith Sijeny
6. Sen. Fatuma Dullo
7. Sen. Kipchumba Murkomen
8. Sen. Hassan Omar Hassan
9. Sen. Mutula Kilonzo Junior

**Acknowledgement**

The Committee appreciates the support from the offices of the Speaker of the Senate and the Clerk of the Senate for facilitating the benchmarking visit to Germany by the Committee on Legal Affairs and Human Rights.

**Mr. Speaker Sir,**

It is my pleasant duty, pursuant to Standing Order 204, to present the Report of the Standing Committee on Legal Affairs and Human Rights on the benchmarking visit to Germany for consideration and adoption by the House.

Signed.....

Date.....4/12/14

**SEN. STEPHEN SANG**

**VICE-CHAIRPERSON**

**STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS.**

## EXECUTIVE SUMMARY

A delegation of four (4) Members of the Senate Standing Committee on Legal Affairs and Human Rights and two Staffers undertook a benchmarking visit to the Federal Republic German from 6<sup>th</sup> to 10<sup>th</sup> October, 2014. During the visit, the Delegation held meetings with Members of; the Office of the Federal Attorney General, the German Institute of Human Rights, Transparency International- German Chapter and the Bundesrat. Further, the delegation had an opportunity to observe a plenary session of the Bundesrat when the election of the President of the Bundesrat was ratified.

This report highlights issues raised and discussed during the various meetings that were held. Chapter one of the report gives background information on the visit which was to understand the role and function of the Bundesrat and in particular, its counterpart Committee of the Bundesrat and human rights system in Germany.

Chapter two summarizes presentations made and discussions held on various topics during the meetings which included but were not limited to;

- a) Mandate and structure of the Office of the Federal Attorney General*
- b) Mandate and operations of Transparency International- German Chapter*
- c) Mandate and Operations of the German Institute of Human Rights*
- d) Role of the Bundesrat and Legislative procedure*
- e) Functions and procedures of Committee on Legal Affairs of the Bundesrat*

### **Observations**

The observations made following the meetings held during the visit are summarized in Chapter three of the reports as follows;

### **i. Submission of Bills to the Bundesrat**

The Basic Law requires the Federal Government to submit its draft Bills directly to the Bundesrat for its review and discussion at the first instance.

### **ii. Bundesrat's express approval for consent Bills**

Consent Bills, which have a special bearing on Länder interests, cannot become law unless the Bundesrat gives its express approval on them. The Bundesrat is also involved in the legislative process for objection Bills which do not require its consent.

The constitutional rank and importance of the Bundesrat mainly stem from its ability to veto Consent Bills. This right gives the Bundesrat a great deal of influence on the legislative process, as in practice about one half of federal legislation consists of "Consent Bills" requiring Bundesrat's approval.

### **iii. Central Intelligence Repository**

There is a structured linkage and synergy between the office of the Federal Prosecutor/Attorney General, the intelligence, the police, the immigration department and the ministries of Justice, and Interior in setting up a central intelligence repository where information is shared to safeguard the Country against acts of Terrorism.

### **iv. Linkages between Parliament and other Institutions**

Institutions like Transparency International have formed linkages with the Bundesrat as follows:-

- They are invited to attend and give their opinions on hearing on corruption cases
- They participates in legislation by giving their comments on Bills

- They can petition the Bundesrat to hear certain matters on corruption.

**v. Research as a basis for policy decisions**

The German Institute of Human Rights carries out continuous research and study on Human rights and other emerging issues which inform policy decision both at the State/Lander and the Federal level.

**Recommendations**

Following the observations made above, the Standing Committee on Legal Affairs and Human Rights makes the following recommendations:-

**i. Submission of Bills to the Senate**

The Senate to engage with Attorney General to ensure that Government Bills are simultaneously forwarded to the Senate alongside the National Assembly for its review and discussion at the first instance.

**ii. Senate's express approval for Bills concerning Counties**

The procedures for enacting legislation as provided for under the constitution of Kenya 2010 should be amended to provide for the consent of the Senate for approval of Bills concerning Counties without referral to a Mediation Committee.

**iii. Central Intelligence Repository**

The Office of the Director of Public Prosecution, Office of the Attorney General, Ministry of Interior and Coordination of National Government and Immigration and Ministry of Defence to form linkages to set up and run a central intelligence repository for sharing of information.



**iv. Linkages between the Civil Society, Political and Economic Sector**

The Senate to establish linkages with civil society, political and economic sector in the exercise of its legislative and oversight role.

**v. Research as a basis for policy decisions**

The Committee on Legal Affairs and Human Rights to initiate a Bill which will seek to establish a Human Rights Institute for Policy research on Human Rights Issues which will form a basis for policy decisions.

The Senate Standing Committee on Legal Affairs and Human Rights resolved to undertake a benchmarking visit to the Bundesrat in Germany. The Bundesrat is a Constitutional Body in Germany that represents the sixteen Federal States at the national level and has three central functions:-

- It defends the interests of the Länder vis-à-vis the Federation and indirectly vis-à-vis the European Union.
- It ensures that the political and administrative experience of the Länder is incorporated in the Federation's legislation and administration and in European Union affairs.
- Like the other constitutional organs of the Federation, the Bundesrat also bears its share of the overall responsibility for the Federal Republic of Germany.

Germany has a federal Constitution hence its constituent states retain a measure of sovereignty. Sovereignty is constitutionally divided between a central governing authority and the States. The objective of the visit was to benchmark and exchange experiences with Members of Parliament from the Bundesrat and specifically, to gain an insight on the role and operations of the counterpart Committee of the Bundesrat.

The Delegation for the visit comprised of four Senators and two Staffers as follows:-

1. Sen. Amos Wako – Committee Chairperson and Leader of delegation
2. Sen. Kembi-Gitura – Deputy Speaker and Committee Member
3. Sen. Fatuma Dullo – Committee Member
4. Sen. Hassan Omar – Committee Member
5. Ms. Joyce Aluoch – Committee Clerk
6. Mr. Mohamed Hassan – Committee Clerk

The delegation held meetings with the Members from the following institutions:-

1. Office of the Federal Attorney General in Karlsruhe
2. Transparency International-German Chapter
3. German Institute of Human Rights
4. Bundesrat

### **2.1 MEETING WITH THE OFFICE OF THE FEDERAL ATTORNEY GENERAL IN KARLSRUHE**

Mr Range, the Federal Attorney General of the Federal Republic of Germany while noting that Kenya and Germany face similar challenges in the implementation of the Rule of Law, gave a presentation on the general overview of the role and mandate of the office of the Federal Attorney General as follows:-

The Federal Attorney General is the Federal Prosecutor General at the Federal level in Germany with various prosecutors at the State/ Länder Level.

#### **Mandate of the Office of the Attorney General**

The mandate of the Office of the Attorney General includes prosecution of the following;

- i. Crime against Humanity and War Crimes
- ii. Crimes against the State
- iii. Crimes under international Law

Ms. Annette Boeringer, an Officer of the Appellate Unit of the Office of the Federal Attorney General made a presentation as follows:-

### **Constitution of Kenya**

The Office of the Federal Attorney General is interested in and appreciates the promulgation of the new Constitution of Kenya, 2010. The elaborate chapter of Human Rights and that on Devolution is more eminent in the new document.

### **Structure of the Office of the Attorney General**

Germany has a Federal System of Government with sixteen Länders/States and a Federal Government. The Länders/States have a Judicial arm and an Office of the Attorney/Prosecutor General which are distinct and independent from the Office of the Attorney General at the Federal level.

The Office of the Federal Attorney General does not have influence over how cases are prosecuted at the Länder /State level. The prosecutors at the Länder /State are answerable to the Head Prosecutor at the Länder /State and not the Federal Attorney General.

### **Counter Terrorism Unit and its mandate**

Mr. Holger Brocke, an Officer of the Counter Terrorism Unit of the office of the Federal Attorney General made a presentation as follows:-

The Counter Terrorism Unit of the Office of the Attorney General is in charge of the investigation and prosecution of crimes of terrorism and crimes against the State. There are three extremist groups in Germany with operations in and outside the Federal republic of Germany.

The groups are either political or religious based extremists. The groups include:-

- i. The Kurdish Movement-PKK section

- ii. The Right Wing Extremist- Marxist/Leninist extremist group, DHKPC
- iii. The Islamic Terror Organisations- ISIS in Syria and Iraq

Terrorism is a global problem facing the community of nations, and therefore, Germany and Kenya are not an exception.

#### Limiting definition of Terrorism

In the Department of the Counter terrorism, there are forty (40) Prosecutors. The competence of the Prosecutors to investigate and prosecute is limited by Section 129A of the Criminal Code of the Federal Republic of Germany. This Section limits the definition of terrorism to the following elements;

- Membership and participating in the activities of a terrorist organization.
- Supporting of terrorist organisations like fundraising and paying subscription to such organisations
- Activities geared towards building popularity and increasing membership for terrorist organisations.

Mere sympathy and passion for a terrorist organization are categorized as crime under Section 129A of the Criminal Code.

The prosecutor play a very important role in the investigation, preliminary inquiry, preparation of prosecution file, prosecution and the execution of the penalty in terrorism and crime against the state cases.

#### Separation of Powers

The Constitution of the Federal Republic of Germany, like any other Constitution, recognizes the principle of separation of powers. There is separation of powers between the Legislature,

Judiciary and the Executive. Similarly, there is the Separation of powers between the Federal and the Länder /States. The Office of the Federal Attorney/Prosecutor General falls under the Ministry of Justice which is in the Executive arm of the Government.

#### Investigation of terrorism cases

The Office of the Federal Prosecutor General usually delegates the investigation of terrorism cases to the Police. However, if it is convinced that the police are not undertaking this role effectively, then the role is transferred to another department in the police force or withdrawn entirely from the police.

The prosecutor's primary role is to investigate, prosecute and ensure execution of the verdict of the police investigation

#### Independence of the office of the Federal Prosecutor General

The office of the Federal Prosecutor General is an independent office with its own budget. Despite the Office of the Federal prosecutor being under the Ministry of Justice, it is bound by the principle of legality and there is no history of the office receiving instructions from the Ministry of Justice or the Executive as a whole. Theoretically the Office of the Prosecutor can reject unlawful and illegal accusation or charges.

#### Accountability to the Bundesrat and Bundestag

The Federal Prosecutor General can be summoned by the Bundesrat and the Bundestag to account for the actions of omission and commission of the Prosecutors in handling of cases. The Corporate Communications Office within the Office of the Prosecutor General will make public announcement and brief the public about the handling of some high profile cases.

### German link to terrorism cases

When prosecuting terrorism cases, the political nature of the Organisation is irrelevant but the terrorist activities must have a German link whether the victims, perpetrators are Germans or have a permanent residence in Germany.

There is a social economic research and discussion going in German to establish what attracts young professionals and well established people to join terrorist Organisations.

### Legal Representation

A terrorist suspect is entitled to legal representation, whether private or from the office of the prosecutor. The focus now is in Syria because so many extremist left Germany to fight along side the ISIS.

### **War Crimes Unit**

Mr. Christian Ritscher, an Officer of the War Crimes Unit of the office of the federal attorney general, war crimes unit made a presentation as follows:-

### Terrorism an International Crime

In the International Law Commission where Germany is a member, terrorism is considered an international Crime. For any State to prosecute there must be a link on the other hand in prosecuting crimes against humanity. Courts of the member states can invoke universal jurisdiction provided in the Rome statute.

The Community of States is not yet in existence hence it is impossible to prosecute terrorism crimes for the time being. However, International Criminal law links terrorism to Crimes against Humanity. The German version of International law provides that some international crimes can be prosecuted in Germany if there is a slight linkage for instance residence in Germany.

## **Financing of Transparency International**

Transparency International is financed through Membership fees/donation by members, grants and donations by non-members, allocation of penalty/fine charges by the Court both in Germany and in the European Union and revenues raised through events/fees.

## **Annual Report**

The Total budget for the year 2012 was approximately four hundred thousand Euros. Any source of income that gives more than one thousand Euros must be disclosed in the annual report.

## **Instruments to Detect Corruption**

Corruption causes grave damage both materially and immaterially like loss of trust and credibility. And in the fight against corruption Transparency International uses the following instruments to detect and fight corruption;

- i. **Corruption Perceptions Index (CPI):** The CPI ranks countries/territories based on how corrupt their public sector is perceived to be.
- ii. **Global Corruption Barometer (GCB):** a representative survey on people's perceptions and experiences of corruption.
- iii. **Bribe Payers Index (BPI):** a ranking of leading exporting countries according to the perceived likelihood of their firms to bribe abroad.
- iv. **Global Corruption Report (GCR):** a thematic report that explores corruption with regard to a specific sector or governance issue.
- v. **National Integrity System assessments (NIS):** a series of in-country studies providing an extensive assessment of the strengths and weaknesses of the key institutions that



enable good governance and integrity in a country (the executive, legislature, the judiciary, and anti-corruption agencies among others).

### **Instances of Corruption by Politicians/Big wigs**

There had been an instance of petty accusations against President Wolf who had to resign although he was not found guilty. The alleged actions were done at the time when he was not President of Germany. He had called the media personally trying to stop the publication of a story against him.

In a second instance, a Minister was fired for having given money to his favourite football club.

There is a grey field as to what point an action amounts to corruption in Germany.

### **Laws on Campaign Financing**

In Germany, there is a law that provides for transparency of campaign finances. It is mandatory to publish information on who pays what amount. There are extreme fines for publication of wrong information. There are some parts that payment is not allowed totally. After election campaigns, funding can be done to the political parties based on the strength of the number of seats. Similar is the case of political parties funding in Kenya.

### **Use of Government Resources for Campaigns**

Use of Government resources for campaigns is prohibited in Germany. The President is not allowed to take part in political party campaigns. There can be instances where the Chancellor happens to be the Leader of a party and at times there can be conflict. The media and institutions which control use of government resources are very vigilant in this area.

## **Linkages with the Political Sector**

In Germany, there are established linkages between the civil society, political and economic Sector in Germany. Transparency International engages with Ministries and secretaries of State on emerging issues for instance on the “cooling off period” issue where an officer leaves a public job to go to a private job taking all the knowledge he has gained therefrom.

## **Linkages with Parliament as an institution**

Transparency International is invited to attend and give opinion during parliamentary committee hearing on corruption cases both at the Federal and Lander Parliaments.

Transparency International participates in legislation by giving comments on legislation both in the Lander, Bundestag and Bundesrat.

Transparency International can petition, initiate and request parliament to hear certain matters on corruption.

## **Statistics on Corruption in Germany**

There were two thousand three hundred and ninety one cases on bribery and economic crimes in 2012 but are yet to be brought to justice as the cases are still under investigation.

## **Corruption in Sports**

It was noted that the FIFA Report on corruption in election officials is completed but cannot be made public. However, Transparency International, International Commission of Jurists and civil organizations have a draft on Freedom of information law which the Committee on Legal Affairs of the Bundesrat will fast track.

Transparency International undertook to facilitate the engagement of the Senate Committee with Transparency International Kenya.

### **2.3 MEETING WITH THE GERMAN INSTITUTE OF HUMAN RIGHTS**

Dr. Wolfgang S. Heinz, Senior Policy Advisor, German Institute of Human Rights made a presentation as follows:-

Human Rights cover a great number of issues and affect virtually all fields of politics and society. Because of their complexity, it is crucial to determine the central idea that links all human rights norms Human rights are based on respect for human dignity. With regard to their dignity, all human beings are equal. Thus human rights are intended to ensure equality and the effective elimination of discrimination. In this sense, the 1948 Universal Declaration of Human Rights states programmatically: "All human beings are born free and equal in dignity and rights."

#### **Rights of Persons with Disabilities**

Only during the last decades has the social exclusion of persons with disabilities been recognized as a human rights issue. The 2006 Convention on the Rights of Persons with Disabilities stipulates rights of persons with disabilities in different areas of life, including education, labour market, politics, culture, marriage and family, health system and other social fields, in which persons with disabilities claim participation on the basis of non-discrimination. In combination with disability, non-discrimination means above all accessibility. Reaching the goal of an "inclusive society" without barriers for persons with disabilities requires great political efforts and concrete implementation mechanisms, even in Germany.

## **Women's Rights**

During the last decades, the reinforcement of women's human rights essentially led towards an expanded understanding of human rights in general. Women's rights are based on the principles of universality and indivisibility of all human rights. The 1979 Convention on the Elimination of Discrimination against Women (CEDAW) shows that not only at state level but in all social spheres, far-reaching measures are required for the elimination of discrimination against women and for guaranteeing women's full and equal enjoyment of political, civil, economic, social and cultural rights. Also included is the recognition of violence against women as a human rights violation.

## **Children's Rights**

The UN Convention on the Rights of the Child (1989) stipulates human rights from a children's perspective. It is their special situation in life and partly their special vulnerability that requires a concretization of human rights for children, such as the right to life, freedom of opinion, freedom of religion, education and health care. The best interest of the child is the central issue and requires priority consideration. According to the UN Convention, every young person under the age of 18, which includes juveniles, are defined as children.

## **Economic, Social and Cultural Rights (ESC rights)**

The economic, social and cultural rights (ESC rights) provide protection from intrusion upon a person's fundamental areas of life, such as nutrition, health, education and work. At the same time, the ESC rights entitle everyone to equal rights, i. e. discrimination free access to health care, education and to the labour market as well as to other elementary areas of social life. These rights thus contribute to dignified living conditions in compliance with freedom on the basis of equal justice and solidarity. The ESC rights form an indivisible unit with civil and political

rights. As is typical of human rights, immediate and indirect state obligations derive from the ESC rights and in particular from their justiciable cores. The work of the Institute in this area focuses on the following issues and projects:

- Social human rights of elder people in care situations
- The human Right to health of irregular migrants in Germany
- The human right to education
- The human rights to water
- Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
- UN Principles and guidelines on forced evictions and displacement
- The human right to social security
- Integration of female refugees into the German labour market

### **Security Policies**

Even in times of war, crisis or threat of terrorism, human rights and the rule of law need to be respected both in domestic and foreign policy. Some human rights norms, such as the *prohibition of torture* have the status of absolute norms which can never be restricted. Other human rights can only be restricted if the special requirements of the relevant human rights norm are met and if the restriction is proportionate to the legitimate aim thereby pursued. The German Institute for Human Rights rejects the common assumption that there is a general contradiction between security considerations and human rights norms. Moreover, the protection of human rights is both the goal and the precondition of an enlightened security and defence policy based in the trust and the civic commitment of the people. The active participation of women must be a defining principle of such a policy.

The Institute works on human rights requirements of national and international Security Policy.

It researches and comments especially on the following topics:

- Security legislation and its practical implementation in Germany
- Police and judicial cooperation in criminal matters within the EU and their impact on national law
- Data protection at national level and at EU-level
- Human-rights-oriented evaluation of security legislation
- The principle of non-discrimination and contemporary security policy
- International security policy and the fight against terrorism, international norms and state practice
- European Security and Defence Policy
- Humanitarian law and human rights
- Foreign Military operations of the German Armed Forces

#### **Reporting to the Fundamental Rights Agency (FRANET)**

Since November 2007, the German Institute for Human Rights serves as the national focal point for reporting to the European Fundamental Rights Agency (FRA) in Vienna. The Institute is therefore part of the Agency's so-called FRALEX network. The Agency has focal points in all twenty seven member states. Based on a framework contract between the Agency and the Institute, the German Institute for Human Rights produces comprehensive legal studies regarding the situation of fundamental rights and freedoms in Germany. For the period from 2007 to 2012, the Agency's multi-annual framework identifies nine subject areas:

- racism,
- discrimination,

- compensation for victims,
- children's rights,
- asylum and migration,
- visa and border control,
- internal security and data protection,
- participation of EU citizens in the Union's democratic functioning
- access to justice.

Reports of the German Institute for Human Rights as well as reports by all twenty six other EU member states form the basis for Europe-wide comparative studies on individual subjects. Reports by the Institute are based on guidelines regarding framework and emphases of each topic, predefined by FRA.

To date, the Agency has published an EU-wide comparative report on the issue of homophobia (2008), for which the German Institute for Human Rights supplied the relevant national expertise. A report on child trafficking followed in 2009, while a comparative studies on national human rights institutions and on data protection in May 2010. A study on the impact of the Racial Equality Directive has been published.

The Institute has also supplied the Agency with flash reports and bulletins outlining recent developments in the subject areas of the Agency's multi-annual framework. They are used by FRA for compiling newsletters and annual reports. With its reporting function in the framework of the FRALEX-network, the German Institute for Human Rights aims to strengthen the Fundamental Rights Agency as a key actor for the preventive protection of human rights in the region, and to expand its competences in European human rights protection.

## **Policy Advisor to Government**

The Institute has repeatedly over the past years advised the Government of the need to change Policy on Refugee and immigrants in vain. The Institute engages directly with parliament and government, press publications and also lobbies for support from civil society, people and interested politicians.

However, the Institute does not confront or condemn political parties, politicians or Government but rather engages in constructive dialogue.

### **2.4 MEETINGS AT THE BUNDESRAT**

Dr. Michael Wisser, Director General for Parliamentary Affairs made a presentation on the role and functions of the Bundesrat in the German federal system as follows:-

#### **A constitutional body within a federal system**

The basic idea underlying the democratic and federal constitution of Germany is the division of power. In the performance of their tasks, the Federation and the Länder should work within a mutual checks-and-balance system but also practice mutual co-operation and consideration. The main difference between the German form of federalism and other federative systems when it comes to the division and execution of tasks is that the individual federal state governments participate directly in the decisions of the national state or Federation. This is done through the Bundesrat.

#### **Functions of the Bundesrat**

Within this system of division of power and combined performance of tasks, the Bundesrat has three central functions:



- It defends the interests of the Länder vis-à-vis the Federation and indirectly vis-à-vis the European Union.
- It ensures that the political and administrative experience of the Länder is incorporated in the Federation's legislation and administration and in European Union affairs.
- Like the other constitutional organs of the Federation, the Bundesrat also bears its share of the overall responsibility for the Federal Republic of Germany.

### **Structure of the Bundesrat**

The structure of the Bundesrat is as follows;

#### The Presidency- Rotational

The states have equal access to the presidency of the Bundesrat. Every year the Premier/ Minister or President of a different state is elected President of the Bundesrat. The election of the president is automatic and it is rotational where each Länder will hold the presidency for One year. Automatic and it is rotational where each Lander will hold the presidency for One year.

#### Plenary session

The Bundesrat's plenary means the meeting of all its members. The Bundesrat meets twelve to thirteen times a year to transact business in the plenary and the agenda is pre-determined before the session starts. Article 51 of the Basic Law stipulates the composition of the plenary: The Bundesrat shall consist composed of members of the Lander governments, which appoint and recall them. Each Länder is represented by a delegation in the plenary headed by the Premier/Minister President of the Länder. During voting each Länder has a specific number of votes depending on the population and surface area. In voting each Länder will vote as a block and represented by the head of the delegation or his deputy.

According to article 51 paragraph 2 of the Basic Law each Lander has at least three votes; Länder with more than two million inhabitants have four, Länder with more than six million inhabitants five, and Länder with more than seven million inhabitants six votes.

In certain specific and exceptional cases, the Chamber for European Affairs, rather than the plenary, may take decisions.

### Bundesrat members

The Bundesrat is composed of members of state governments; the members are appointed and recalled by the state government. They may be represented by other members of their state government.

### Permanent Advisory Council

The Permanent Advisory Council, which is composed of the sixteen envoys from the states to the Bundesrat, supports the Presidency of the Bundesrat in its work.

### Secretariat

Around two hundred public servants and employees work in the Bundesrat. They form the Secretariat. The Bundesrat Secretariat is fairly small compared with the administrations in other parliamentary bodies.

### The Federal States

The Federal Republic of Germany is made up of sixteen Länder, or federal states. Each Lander has something unique to offer and its own special charm.

## **Responsibilities of the Bundesrat**

### Review and discussion of Bills at the first instance

The Federal Government introduces the great majority of Bills in Germany. The Bundesrat has the "first say" in the parliamentary processing of executive bills. The Basic Law states that the Federal Government is required to submit its drafts directly to the Bundesrat for its review and discussion.

The Bundesrat undertakes this responsibility through its committees by assessment of Bills in terms of constitutionality, technical expertise, finances and political factors. Quite often, amendments, additions or alternatives are proposed. In many cases the result of the review is "no objection". It rarely happens that a Bill that has been totally rejected by the Bundesrat is still submitted to the Bundestag by the Federal Government.

At this stage the Bundesrat's assessment of a Bill is not binding on the Federal Government or the Bundestag. However, this initial assessment is an important indication as to what the second assessment and the Bundesrat's final word will be in the "second reading". These assessments cannot be ignored. The Federal Government formulates its view in a "counter-statement". The Bill, the Bundesrat's initial statement and the Government's counter-statement are then submitted to the Bundestag.

The Bundesrat is entitled to present its opinion within a six-week deadline and in specific cases it has three or nine weeks. The Bundesrat makes use of this right in almost all cases.

## Checks and Balances

The experience of the federal states in the implementation of laws, almost all of which are implemented by them, is incorporated into federal legislation in this "first reading". In this context, the executive officials of the state governments conduct an intensive dialogue with the executive officials of the Federation. The Bundesrat's checks-and-balance function in the federal system of government is clearly manifested here.

### Assessment of Bills adopted by the Bundestag

All Bills adopted by the Bundestag must be forwarded to the Bundesrat by the President of the Bundestag which initiates the second "reading". Relevant Committees then determine whether or not the results of the first "review" have been taken into account and whether or not the Bundestag has introduced other amendments.

### Convening of Mediation Committees

If the Bundesrat is not in agreement with the version of a Bill passed by the Bundestag, it can approach the Mediation Committee within a period of three weeks. In its submission to the Committee, which must be adopted in the plenary with an absolute majority, the Bundesrat normally includes specific proposals for amendment, along with comprehensive justification.

If the Bundesrat files an objection within two weeks of the conclusion of mediation proceedings, the Bundestag must subject the Bill to another reading. If the Bundestag does not share the Bundesrat's reservations, it can override the objection (adopted with an absolute majority in the Bundesrat) with an absolute majority of its own (known as the chancellor's majority). If the Bundesrat's objection was based on a two-thirds majority, a corresponding two-thirds majority of

votes cast in the Bundestag is required to override it (this majority must also represent a majority of the Bundestag's members).

If the objection is overridden, the Bill in question may be signed and promulgated despite the Bundesrat's disapproval. However if the Bundestag cannot muster the majority needed to reject the objection: the Bill cannot be adopted, as is also the case if the Bundesrat refuses to approve a consent Bill.

#### Express Approval for Consent Bills on Lander Interests

Consent Bills, which have a special bearing on Länder interests, cannot become law unless the Bundesrat gives its express approval.

In instances where the Bundesrat votes definitively against a consent Bill, the Bundestag cannot override the Bundesrat's rejection. The Bundestag and the Federal Government may merely apply to the Mediation Committee in an attempt to reach a compromise. This means that for consent Bills, the Bundestag and the Bundesrat must be in agreement before legislation can be enacted.

Specific clauses in the Basic Law stipulate which Bills require Bundesrat consent. These can be divided into three categories:

- i. Bills that amend the constitution.

Bills to amend the Constitution require the approval of the Bundesrat based on a two-thirds majority.

- ii. Bills affecting the Länder's budgetary revenue.

Bills affecting the Länder's budgetary revenue include those relating to taxes in which Länder or local authorities are involved, e.g. income tax, value-added tax and motor-vehicle tax.

iii. Bills that affect the administrative jurisdiction of the Länder.

These Bills are important in quantitative terms, because, even if a Bill contains only one provision that affects the administrative jurisdiction of the Länder, the entire Bill has to be approved by the Bundesrat. This holds, for example, when federal law prescribes certain jurisdictional arrangements, forms, time limits, administrative fees, types of document delivery or new authorities and public agencies for Länder authorities. Due to these individual clauses, even Bills that do not affect "Länder interests" in general, such as international agreements or defence issues, may have to be approved in their entirety.

The constitutional rank and importance of the Bundesrat mainly stem from its ability to veto this type of legislation. This right gives the Bundesrat a great deal of influence on the legislative process, as in practice about one half of federal legislation consists of "consent bills" requiring Bundesrat approval.

#### Involvement in Objection Bills

The Bundesrat is also involved in the legislative process for Bills where its consent is not required. These are known as objection Bills. The Bundesrat's role is limited to forcefully admonishing the Bundestag.

## Introduction of Bills to the Bundestag (Lower House or House of Representatives)

The Bundesrat has the right to introduce Bills into the Bundestag. The Bills are first sent to the Federal Government for comment. The Federal Government is required to forward the Bill within six weeks - in special cases, within three or nine weeks - to the Bundestag.

The Bundestag handles these Bills according to the same procedure as draft Bills from the Federal Government or draft legislation drawn up in the Bundestag itself.

The Bundestag is free to decide as it sees fits and can therefore also refuse to adopt the draft. If the Bundestag rejects the Bills, it is not possible to convene the Mediation Committee in an attempt to reach a settlement. In essence, the Bundestag has a final say on such Bills.

The Bundesrat adopts relatively few legislative initiatives, partly perhaps because the overall procedure does not work in the Bundesrat's favour. However the number of draft Bills initiated by the Bundesrat has increased over the last few years.

The parliamentary tool of resolutions is increasingly used more frequently as a political complement to the right of initiative. These requests are generally addressed to the Federal Government to draw its attention to problems that have not yet been adequately resolved.

## Consent on Statutory Instruments

Statutory instruments are generally binding provisions to implement Bills. Bundesrat consent is prescribed for most statutory instruments issued by the Federal Government and individual Federal ministers. An example is the German Highway Code, which affects almost everyone in the country and was adopted not by the Bundestag but by the Federal Minister of Transport with the Bundesrat's consent.

The Bundesrat is kept very busy examining these legislations, with the Bundestag being involved only in very exceptional cases. Most of the work is done in the committees. In the public plenary sessions, these provisions, which are generally of limited political significance, take up less time.

The Bundesrat's right of consent means that it can determine the content of statutory instruments on an equal footing with the other bodies involved. In practice consent is often granted "subject to the proviso" that certain points must be amended.

It is not possible to convene the Mediation Committee to address conflicts concerning statutory instruments. As such, the Bundesrat has a final say on these instruments.

#### Consent to General Administrative Provisions

Just like statutory instruments, numerous general administrative proposals depend on Bundesrat consent if these provisions, addressed to the administrative authorities, affect the competences of the federal states. For example, Bundesrat consent was required for the "Fines Schedule" for traffic offences and the "Points Schedule" for suspension of driving licences.

#### Deliberations on European Union Legislation

As the process of integration in the European Union continues, national legislation is increasingly being influenced by regulations approved in Brussels. The relevant decision-making body is the Council of Ministers, in which each EU Member State is represented by a government member.

Pursuant to Article 23, Subsection 2 of the Basic Law, the Bundestag and the Länder (through the Bundesrat) participate in affairs of the European Union. For this reason, the Federal



Government is charged with providing the Bundestag and the Bundesrat with comprehensive information on all European Union activities at the earliest possible date.

The Bundesrat, represented in urgent cases by the Chamber of European Affairs, gives its opinion on the drafts of European Union regulations and directives submitted to it. This assessment entails comprehensive deliberations in its committees. If this European legislation affects matters which fall within the internal jurisdiction of the Federation, the Federal Government must give "due consideration" to the Bundesrat's opinion in its decisions in Brussels.

The Bundesrat has the last word in determining the German position within the EU Council of Ministers on legislation that primarily affects state (Länder) legislative jurisdiction, the structure of Länder authorities or their administrative procedures. The Bundesrat is thus not only involved in shaping policy within Germany but also takes direct decisions with a view to protecting the Federal Republic of Germany's rights as a European Union member state.

#### Participation in Foreign Affairs

Pursuant to Article 32, Sub-section 1 of the Basic Law, the Federation is responsible for maintaining international relations with other countries. This provision does not assign this responsibility to any particular constitutional body; thus it excludes neither the Bundesrat nor the Bundestag as relevant federal organs.

A treaty law requires the consent of the Bundesrat when the adoption of a domestic law with similar content would, according to the Basic Law; likewise, it requires the consent of the Bundesrat. If the Bundesrat denies approval of such an international agreement, the agreement cannot come into force. Other types of agreements subject to the Bundesrat's approval include

agreements on emergency aid, official and legal assistance, tax laws, pension laws, protection of capital investments and environmental protection.

If the Basic Law does not require the Bundesrat's consent for national implementation of the content of an international treaty, the treaty law must still be forwarded to the Bundesrat, but here the Bundesrat only has a right of objection. In such cases, the Bundestag can override the Bundesrat's objections, thus opening the way for treaty ratification.

The Bundesrat's involvement in foreign affairs is also expressed in the Bundesrat's contacts with other countries through its committees, the Bundesrat President and individual members and in particular through official visits by delegations.

#### Right to be Informed by the Federal Government

Article 53, third sentence of the Basic Law stipulates that the Bundesrat "shall be kept informed by the Federal Government with regard to the conduct of its affairs".

The Federal Government must provide to the Bundesrat on its own accord information relating to all government business, promptly and in full on an ongoing basis.

Furthermore, the Bundesrat also has a right to "summon" any member of the Federal Government to its plenary and committee meetings and to put questions to them. The members of the Federal Government are conversely also entitled to attend all meetings of the Bundesrat and its committees and have the right to speak at any time in these meetings. However, the Bundesrat only rarely makes use of its formal right to question members of the government in its plenary sessions. The Bundesrat does not use the Bundestag's system of what are known as major and minor interpellations, nor is there an explicit "Question Time" in the Bundesrat.

## Other Functions

The Basic Law assigns numerous other tasks and competences to the Bundesrat:-

- Election, along with the Bundestag, of half of the members of the Federal Constitutional Court (Supreme Court).
- Lodge complaints of unconstitutionality and can testify in cases before the Federal Constitutional Court.
- The Bundesrat also appoints representatives to the governing board of the Federal Employment Office and to various other public bodies.
- The Federal Government may enact Bills with the consent of the Bundesrat in cases of legislative emergency, as described in Article 81 of the Basic Law. The Bundesrat is a "reserve of legality" for the Bundestag, which would otherwise be unable to act.
- The Bundesrat also fulfils a checks-and-balances function when it comes to the provisions enumerated in the Basic Law on federal monitoring of the states, internal emergencies and natural catastrophes.
- The Bundestag may only determine that there is an external emergency, i.e. the state of defence, with Bundesrat's consent.

### **2.5 MEETING WITH THE SECRETARIAT OF THE COMMITTEE ON LEGAL AFFAIRS**

Ms. Silke Podschull-Wellmann, Deputy Clerk of the Committee on Legal Affairs made a presentation on the role of the Committee on Legal Affairs as follows:-

## Standing Committees

Like all parliamentary bodies, the Bundesrat has permanent/standing committees which submit recommendations for decisions to be taken by the Bundesrat as a whole. Their areas of responsibility correspond to areas of ministerial jurisdiction. Thus, the expertise of the Federal Government is complemented by that of the Bundesrat and the states.

There are sixteen (16) standing committees and each committee is chaired by a Minister President from one of the sixteen Landers/States. The Committee on Legal Affairs is chaired by Minister of Justice and Gender Equality, Saxony-Anhalt and the members are Minister of Justice and Gender Equality in their respective Landers/States.

The areas for which the Committee on Legal Affairs is responsible correspond approximately to the sphere of competence of the Federal Ministry of Justice. The committee is in particular responsible for considering the following issues:

- i. Private law
  - The Civil Code
  - Consumer protection law
  - Private law matters pertaining to unification
  - Private international law
- ii. Criminal law, administration of penal justice
  - The Criminal Code
  - Criminal procedure and law of prison administration
  - Regulatory offences

iii. Public law

- The Basic Law
- Constitutional rules governing public finances
- Jurisdiction of the Constitutional Court

iv. The administration of justice

- Law on judges, notaries, lawyers and judicial officers
- Procedural law
- Law of enforcement of civil judgements
- Law pertaining to registries, insolvency, notarial or judicial recording of transactions

v. Mercantile and business law

- Company, accounting and copyright law

### **Scrutiny of Bills**

The Committee on Legal Affairs is responsible for examining bills that have been drawn up under the aegis of the Federal Ministry of Justice or one of the state Ministries of Justice, or that fall within their sphere of competence. The committee is involved in discussions of other Bills too if the areas mentioned above are also affected. The Committee on Legal Affairs also assesses Bills to ensure that they are consistent with the Constitution. In addition, the Committee on Legal Affairs is responsible for examining all amendments to the Basic Law. for example the Committee will table a report on Xenophobic crime this has informed an amendment in the Federal Penal code.

## **Preparation of the Bundesrat's plenary sessions in the German Lander - Coordinating different interests**

Dr. Claus-Peter Clostermeyer, Director-General of the Permanent Representation of the Land Baden-Württemberg took the delegation through a presentation on "Preparation of the Bundesrat's Plenary Sessions in the German Lander - Coordinating different interests."

### **About Wurttemberg**

Wurttemberg is one the Landers/states in south-western Germany and as one of the donor States; Wurttemberg gives donations to other states within the Federal republic of Germany and other foreign countries. Baden-Wurttemberg is an industrial business hub not only in Germany but in Europe too. The State has deployed Business liaison officers and set up commercial desks in substantially big markets such as China, Malaysia, Hong Kong and United States of America in order to market the state and facilitate potential investor who are interested in coming to German and Baden-Wurttemberg in particular. They also help in locating and informing the manufactures about the potentials of the markets and find dealerships abroad.

There is no conflict or overlap of functions between the Federal Government and States since there is a clear distinct and long standing tradition of mutual respect for the rule of law by the Federal Government and States. Also the Commercial liaison officers/desk in foreign countries do not usurp the powers of the Federal mission/embassy in that country since the liaison officers are not part of the diplomatic community that enjoy immunity and they don't interfere with the work of the mission in any way.

### **Plenary session**

Ms. Dr. Sandra Michel, Desk Officer Parliamentary Relations took the Members through a

presentation on the Plenary Session as follows:-

### **Composition**

The Bundesrat means the meeting of all its members, the plenary. Article 51 of the Basic Law stipulates the composition of the plenary: The Bundesrat shall consist of members of the Land governments, which appoint and recall them.

Having a seat and a say in state government is thus the prerequisite for membership in the Bundesrat. The state governments themselves decide who is to be sent to the Bundesrat. However, each state can appoint only as many full members as the number of votes it has in the Bundesrat. The remaining members of the state cabinets are usually appointed to the Bundesrat as an alternate member, which means that in practice all members of the state governments belong to the Bundesrat.

### **Enjoyment of rights**

As the Bundesrat's rules of procedure grant the alternate members the same rights as the full members, all of the roughly 170 members appointed de facto enjoy the same rights. The Bundesrat is a "parliament of state governments" The opposition in the federal states thus cannot make its voice heard directly in the Bundesrat.

### **Election**

Since the members of the Bundesrat are not elected, the Bundesrat does not have legislative terms as such. In constitutional parlance it is a "permanent body" that changes from time to time as state elections take place. This means that state elections always have nationwide political significance too. Even in the Fifties there was a saying "**Your election in the state of Hesse**

**counts in the Bundesrat in Bonn".** Voters decide first and foremost on how the state parliament or Landtag will be composed and who will govern in their federal state. However, at the same time, voters also determine who will have a seat and a say in the Bundesrat, as the majority in the state parliament determines the state government, which in turn appoints the Bundesrat members from its ranks. This is also the source of the Bundesrat's democratic legitimacy, as its composition is determined through elections expressing the will of the people. The political power exercised by the Bundesrat derives from the people.

### **The Presidency**

The states have equal access to the presidency of the Bundesrat. Every year the Premier of a different state is elected President of the Bundesrat.

The order in which this takes place is determined on the basis of state populations. The rotational cycle begins with the Premier of the most populous state. This arrangement was agreed upon by the Premiers of the states in 1950 in Königstein/Taunus. This arrangement has the double advantage that each of the sixteen states is allowed to assume the presidency once every sixteen years and that the holder of this office is not determined on the basis of changing majorities and party-political considerations.

The President's main duty is to convene and chair the plenary sessions of the Bundesrat. In legal terms, he/she represents the Federal Republic of Germany in all Bundesrat matters. The Bundesrat President is aided by two Vice-Presidents who advise him/her in the fulfilment of duties and deputise in his/her absence.

The Basic Law also ascribes a particularly responsible role to the Bundesrat President outside the Bundesrat where if the Federal President is unable to perform his duties, or if his office falls



prematurely vacant, the President of the Bundesrat shall exercise his powers, Article 57, Basic Law.

In government protocol, the Bundesrat President is often referred to as "No. 2" after the Federal President because of this deputising function. However, there is no binding definition of protocol rankings in the Federal Republic of Germany. While the Federal President indisputably holds the highest protocol ranking, the respective protocol ranking of the most senior representatives of the constitutional bodies, namely Bundesrat, Bundestag, the Federal Government and the Federal Constitutional Court, is not stipulated.

### **Distribution of votes**

According to Article 51, paragraph 2 of the Basic Law, each Lander has at least three votes; Länder with more than two million inhabitants have four, Länder with more than six million inhabitants five, and Länder with more than seven million inhabitants six votes.

The Bundesrat has a total of 69 full members and the same number of votes. Accordingly, thirty five votes are needed for an absolute majority, generally needed to take a decision, and forty-six for the two-thirds majority occasionally required.

The number of votes that a Lander has in the Bundesrat are weighted as a function of each Land's population, although this is not the only factor. The Länder united in the Federation also "count" per se. That makes the system a hybrid one, halfway between federative and democratic representation. The Basic Law wanted to ensure that the larger Länder would not be able to outmanoeuvre the others, whilst at the same time making sure the smaller Länder would not be in a position to defeat the others as a consequence of having more votes.

## 2.6 MEETING WITH MEMBERS OF THE COMMITTEE ON LEGAL AFFAIRS OF THE BUNDESRAT

Ms. Prof. Dr. Angela Kolb made the following presentation on the Legislative role and procedure of the Bundesrat;

### **Legislative procedure**

The Länder shall have the right to legislate in so far as this Basic Law does not confer legislative power on the Federation (Article 70 Sub-section 1 Basic Law).

On the basis of the fundamental premise that powers and responsibilities are in the first instance incumbent on the federal states, the Basic Law has on the whole ascribed legislative power to the Federation. Only a few areas remain under the aegis of the federal states, for example education, culture, police and administrative law. It is only in these spheres that parliaments in the federal states are entitled to adopt their own legislation.

The vast majority of Bills are adopted by the German Bundestag and hence by the Federation. However, the federal states do participate in lawmaking at the federal level via the Bundesrat.

### Legislative initiatives

Draft Bills may be introduced to the German Bundestag by the Federal Government, the Bundesrat by a resolution or indeed by the Bundestag itself.

### Opinions

Legislative initiatives of the Bundesrat are transmitted to the Bundestag via the Federal Government. The Federal Government may submit an opinion within six weeks – or within a deadline of three or nine weeks in certain specific cases.

In the case of draft Bills from the Federal Government, the Bundesrat is entitled to comment on the draft before the German Bundestag in what is known as the first reading. The Bundesrat may submit an opinion on the draft government bill within six weeks – or within a deadline of three or nine weeks in certain specific cases.

The Federal Government tables its position on this in a counter-statement. The draft bill is then submitted to the Bundestag along with the Bundesrat opinion and the government counter-statement.

### Legislation Adopted by the German Bundestag

The German Bundestag generally examines draft legislation in three readings. At the end of the first reading the draft bill is transmitted to one or more committees. The second and third readings follow after deliberations in the committees. Whilst the second reading mainly involves tabling amendments, the final vote is generally taken during the third reading.

### Second Reading in the Bundesrat

All Bills adopted in the Bundestag are forwarded to the Bundesrat. The scope for Bundesrat intervention in this second round depends on whether the bill adopted by the Bundestag requires Bundesrat consent.

If the Bill is a consent Bill, three options are available to the Bundesrat: it may consent to the bill, it may refuse consent or it may convene the Mediation Committee.

If the Bundesrat wishes to object to a bill that is not a consent bill, it must first take a decision as to whether it will convene the Mediation Committee. A mediation procedure must be concluded before the Bundesrat can submit an objection to a Bill.

## Mediation Procedure

Whilst the Bundesrat may request that the Mediation Committee convene to address any Bill adopted by the Bundestag, the Bundestag and the Federal Government may only convene the Mediation Committee if the Bundesrat has refused to consent to a Bill that requires Bundesrat consent.

In its meetings the Mediation Committee strives to reach a consensus between the divergent opinions of the Bundestag and the Bundesrat. The committee may table proposals to amend the Bill adopted by the Bundestag or propose that the Bill be repealed in its entirety.

Any member of the committee may submit a motion to conclude the procedure if a consensus proposal has not been adopted after two Mediation Committee meetings addressing the same Bill. Should a consensus not be achieved in the subsequent meeting either, the procedure is concluded – without having reached a consensus.

A further possible outcome of the mediation procedure is that the Mediation Committee confirms the Bill adopted by the Bundestag.

## Renewed Examination

The Mediation Committee may only submit proposals to resolve conflicts between the Bundesrat and the Bundestag, but is not empowered to adopt amendments to legislation. Consensus proposals from the Mediation Committee must be confirmed by the German Bundestag and the Bundesrat.

If the Mediation Committee proposes that the Bill be amended, the Bundestag must take a further vote on the amendments. The Bundesrat then takes a decision on the amended Bill.

If the Mediation Committee confirms the Bill adopted by the Bundestag or if the procedure is concluded without a consensus being attained, the legislation, which in these two possible scenarios is not amended, must only be considered again subsequently by the Bundesrat. In both instances the Bundesrat may opt either to consent to the Bill or to table an objection.

#### Objection by the Bundesrat

If the Bundesrat wishes to submit an objection, it must do so within two weeks. This two-week period begins when a new bill adopted by the Bundestag is received or when the chair of the Mediation Committee communicates the results of a mediation procedure. There is no deadline in the case of consent bills. For this category of bills the Bundesrat is simply required to adopt a decision within a reasonable period of time.

The Bundesrat's objection may be overturned by the German Bundestag.

#### Counter-Signature, Assent and Promulgation

The parliamentary legislative procedure has been concluded successfully if the Bundesrat has consented to a Bill or refrained from submitting an objection, or if the Bundesrat's objection is overturned by the Bundestag.

The Bill must then be counter-signed by the relevant minister and the Federal Chancellor, duly authorized by the Federal President and promulgated in the Bundesgesetzblatt (Federal Law Gazette).

#### Consent Bills

The Bundesrat's constitutional status and significance derive primarily from its rights of co-decision in the case of consent Bills. These Bills can only come into being if the Bundesrat and

Bundestag are in agreement. Should the Bundesrat take a definitive decision to reject a consent Bill, the Bill in question cannot be adopted.

The Basic Law contains explicit, definitive provisions stipulating which Bills fall into the category of Consent Bills. In essence this legislation can be divided into three groups:

- Bills amending the constitution. In this case a two-thirds majority (46 votes) is required in the Bundesrat for approval of the bill.
- Bills that impinge in a particular manner on the finances of the federal states. On the revenue side this category comprises all bills relating to taxes for which all or part of the revenue accrues to the federal states or local authorities: for example income tax, value-added tax, trade and motor vehicle tax. On the expenditure side this category comprises all federal bills that oblige the federal states to make cash payments, provide benefits equivalent to cash payments or provide comparable services to third parties.
- Bills that impinge on the organisational and administrative jurisdiction of the federal states.

### Objection Bills

The underlying assumption in the Basic Law is that Bills generally do not require the consent of the Bundesrat. Bills that expressly require Bundesrat consent are stipulated clearly in the Basic Law. All Bills that do not fall into one of the categories of subject-matter enumerated in these provisions are hence described as objection Bills. The Bundesrat has less influence on this legislation than is the case for consent Bills. The Bundesrat may table an objection to the Bill if it disagrees with the Bundestag. The Bundesrat's objection can be overturned by the Bundestag.

If the Bundesrat's decision to table an objection is adopted with an absolute majority, the objection may only be overturned by an absolute majority in the Bundestag . Two-thirds of the votes cast in the Bundestag or at least the votes of half of all members are required in order to overturn a Bundesrat objection if this is tabled on the basis of a two-thirds majority in the Bundesrat.

#### Separation of Sections of Bills and Disputes on the Consent Status of Bills

A Bill may only be accepted or rejected in its entirety; it is not possible to reject just part of a Bill.

If a Bill only requires consent due to the procedural provisions it includes, the legislation is divided into separate parts: a procedural Bill that requires Bundesrat consent and a Bill on the actual substance, which does not require consent.

While the Bundesrat may submit an objection to the Bill on the substance, this objection can be overturned by the Bundestag. The Federal Constitutional Court has authorised division of Bills in this manner at the legislator's discretion. To date the Federal Constitutional Court has not yet had occasion to give a ruling on the specific extent of these discretionary powers. The Bundesrat is of the opinion that these discretionary powers are not exercised correctly if the Bills ought to be combined in a single piece of legislation due to the subject-matter addressed therein.

If there is any dispute as to whether the consent of the Bundesrat is necessary, the Federal President decides in the first instance when promulgating legislation whether a particular Bill is a consent Bill. However, a definitive and binding decision can only be taken by the Federal Constitutional Court.

## **Mediation and Joint Committees in the Bundesrat**

Ms. Uta-Maria Kuder, Minister of Justice, Mecklenburg-Western Pomerania took Members through a presentation on Mediation and Joint Committees in the Bundesrat

### **Mediation Committee**

This is a joint Bundestag and Bundesrat committee in which both institutions have the same number of representatives.

#### Members

Each federal state has a seat on the committee, while the other half of the committee is made up of representatives from the Bundestag; the seats are distributed among the parties represented in the Bundestag as a function of the relative size of the various parliamentary groups. As there are 16 sixteen federal states, the committee comprises thirty two members.

A substitute is nominated for each member, who may however only attend meetings should the member they represent be unable to attend. This is to ensure that the number of participants at meetings is kept small. Each parliamentary group or federal state may choose a new representative at most four times in each Bundestag term.

#### Meetings

The meetings are strictly confidential. The two chairs, one a member of the Bundesrat, the other a member of the Bundestag, take turns in chairing the meetings during a three-month period and may stand in for each other if necessary.



## The Mediation Process

None of the members of this committee are bound by instructions. It would however be unrealistic to assume they would not take the (party) political balance of power into account, for the Mediation Committee is only successful if the Bundestag and the Bundesrat ultimately accept its proposals.

The committee may only act on the basis of a request from the Bundesrat, the Bundestag or the Federal Government to address a specific Bill. Given the way in which legislative procedure is structured, the Bundesrat is of course the main source of such requests. The Bundesrat may request a meeting of the Mediation Committee for all Bills adopted by the Bundestag. The Bundestag or the Federal Government may only convene the Mediation Committee if the Bundesrat has not expressed approval of a consent Bill. Three mediation processes may be held in succession for this category of legislation. That is however the upper limit, as each constitutional body is only authorised to make one request per bill that the Mediation Committee meet.

## Results of Mediation

Mediation Committee decisions are taken on a majority basis. This means that a committee decision, known as a compromise proposal, does not require unanimous backing from all committee members.

In accordance with the rules of procedure, the mediation process can lead to four different outcomes:

- The Committee may recommend that a bill passed by the Bundestag be revised, i.e. that provisions not acceptable to the Bundesrat be reformulated, that additions be made, or that parts be deleted.
- A bill passed by the Bundestag may be confirmed. In this case draft amendments submitted by the Bundesrat are rejected.
- The proposal may be made that the Bundestag repeal the bill in question. This happens when the Bundesrat rejects a bill in its entirety and is successful in having this accepted by the Mediation Committee.
- Mediation Committee proceedings may be concluded without the submission of a compromise proposal. This happens, for instance, when no majority decision can be reached in the committee.

The Mediation Committee may only make proposals to resolve differences of opinion between the Bundestag and the Bundesrat, but is not empowered to adopt Bills itself. It is not a "super-parliament".

### **Joint Committee**

In a state of defence (when the country is under attack by armed force or imminently threatened with such an attack), the Joint Committee exercises the rights of the Bundestag and the Bundesrat if there are insuperable obstacles to timely convening of the Bundestag or if the Bundestag cannot muster a quorum.

If these conditions pertain, the Joint Committee is also empowered to determine the state of defence (Article 115a, sub-section 2 and 115e, Basic Law).

### Composition of Joint Committee

The Joint Committee is made up of thirty two Bundestag members and Sixteen Bundesrat members. The Bundestag members are appointed by the Bundestag as a function of the relative size of the various parliamentary groups and must not be members of the Federal Government. Each federal state appoints a member of the Bundesrat to represent it on the Joint Committee; these members are not bound by instructions.

### Sector-specific Conferences of Ministers

The Länder, or federal states, work together within their own sphere of responsibility in the Conference of Minister-Presidents and the various sector-specific Conferences of Ministers. That means these bodies are neither federal organs nor part of the Bundesrat as such.

There are however close links between the Bundesrat and each of these Conferences, as the politicians represented in the Bundesrat are also members of the various Conferences. Some of the sector-specific Conferences also have their coordination offices in the Bundesrat Secretariat.

The Conferences give the federal states scope to coordinate their own work within the federal cooperation system. In these meetings the Länder agree upon their strategy for shared problems and define their position vis-à-vis the Federation but also seek to arrive at consensus-based solutions together with the Federation. As a rule, decisions on points of substance are only made if there is unanimity. However, such decisions do not have direct legal effect, although they are binding as political recommendations.

## 2.7 ATTENDANCE AT THE BUNDESRAT'S PLENARY SESSION

The delegation had an opportunity to attend a Plenary Session of the Bundesrat when the President was being elected. This is a tradition which was determined at a Prime Ministers Conference of the sixteen states held in 1950 in Königstein/Taunus. The rotational cycle begins with the Premier of the most populous state. This arrangement has the double advantage that each of the sixteen states is allowed to assume the presidency once every sixteen years and that the holder of this office is not determined on the basis of changing majorities and party-political considerations.

### 3.1 OBSERVATIONS

The following observations were made during the visit by a delegation of the Standing Committee on Legal Affairs and Human Rights to the Federal Republic Germany:-

#### **i. Submission of Bills to the Bundesrat**

The Basic Law requires the Federal Government to submit all draft Bills to the Bundesrat for its review, comments and discussion at the first instance.

#### **ii. Bundesrat's express approval for consent Bills**

Consent Bills, which have a special bearing on Länder interests, cannot become law unless the Bundesrat gives its express approval on them. The Bundesrat is also involved in the legislative process for objection Bills which do not require its consent.

The constitutional rank and importance of the Bundesrat mainly stem from its ability to veto Consent Bills. This right gives the Bundesrat a great deal of influence on the legislative process, as in practice about one half of federal legislation consists of "Consent Bills" requiring Bundesrat's approval.

#### **iii. Central Intelligence Repository**

There is a structured linkage and synergy between the office of the Federal Prosecutor/Attorney General, the intelligence, the police, the immigration department and the ministries of Justice, and Interior in setting up a central intelligence repository where information is shared to safeguard the Country against acts of Terrorism.

#### **iv. Linkages with Parliament as an Institution**

Institutions like Transparency International have formed linkages with the Bundesrat as follows:-

- They are invited to attend and give their opinions on hearing on corruption cases
- They participate in legislation by giving their comments on Bills
- They can petition the Bundesrat to hear certain matters on corruption.

#### **v. Research as a basis for policy decisions**

The German Institute of Human Rights carries out continuous research and study on Human rights and other emerging issues which inform policy decision both at the State/Lander and the Federal level.

### **3.2 RECOMMENDATIONS.**

Following the observations, the Recommendations of the Standing Committee on Legal Affairs and Human Rights are as follows:-

#### **i. Submission of Bills to the Senate**

The Senate should engage with the Attorney General to ensure that Government Bills are forwarded to the Senate for its review and discussion at the first instance.

#### **ii. Senate's Express Approval for Bills Concerning Counties**

The procedures for enacting legislation as provided for under the constitution of Kenya 2010 should be amended to provide for the consent of the Senate as a final authority for approval of Bills concerning Counties.

**iii Central Intelligence Repository**

The Office of the Director of Public Prosecution, Office of the Attorney General, Ministry of Interior and Coordination of National Government and Ministry of Defence to form linkages to set up and run a central intelligence repository for sharing of information.

**iv. Linkages between the Civil Society, Political and Economic Sector**

The Senate to establish linkages with civil society, political and economic sector in the exercise of its legislative and oversight role.

**v. Research as a Basis for Policy Decisions**

The Committee on Legal Affairs and Human Rights to initiate a Bill which will seek to establish a Human Rights Institute for Policy research on Human Rights Issues which will form a basis for policy decisions.

## TENTATIVE PROGRAMME

Visit of the Committee on Legal Affairs and Human Rights of the Senate of Kenya

Meeting with the Federal Constitutional Court, Transparency International-German, German Institute of Human Rights and the Bundesrat in Berlin/Germany.

### Saturday 4<sup>th</sup> October, 2014

18.05                      Arrival in Berlin

### Sunday 5<sup>th</sup> October, 2014

Free day

### Monday, 6<sup>th</sup> October, 2014

9:00 - 12:00 a.m.      Meeting with a representative from the Foreign Office  
*Mr. G. Schmidt, Regional Director for Sub-Saharan Africa and the Sahel at the Foreign Office*  
*Foreign Office*  
*Werderscher Markt 1, 10117 Berlin*  
*(Not confirmed)*

### Tuesday, 7<sup>th</sup> October, 2014

9:00 - 11:30 a.m.      Welcome and Introduction to the mandate of the Office of the Attorney General in German;  
  
Presentation on Counter terrorist, Extra Judicial Killings and the best practice in the prosecution of terror suspect, Human Rights and Terrorist.  
  
*Office of the Attorney General*  
*Karlsruhe.*

11:30 – 12:30 p.m.      Lunch and departure to Berlin

### Wednesday, 8 October, 2014

9:00 - 11:30 a.m.      Welcome and Introduction to the mandate of Transparency International in German;  
  
Presentation on Ethics and Good Governance in a federal system/Devolved System of Governments.  
  
Presentation on the Fights against Corruption at all levels of Government and in particular at the Federal State/ County

...



**Friday, 10 October 2014**

- 9.30 - 10.30 a.m. Attending the plenary meeting of the Bundesrat (including the election of the new president of the Bundesrat)  
*Bundesrat,  
Leipziger Straße 3-4, 10117 Berlin*
- 10.30 a.m. - 12.00 p.m. Meeting with members of the Committee on Legal Affairs of the Bundesrat.
- 12:00 - 2:00 p.m. Courtesy Call to the Kenyan High Commission in Berlin and the Embassy Staff.
- 17:25 p.m. Departure to Nairobi, Kenya

REPUBLIC OF KENYA



PARLIAMENT

THE SENATE

-----  
ELEVENTH PARLIAMENT  
-----

THE STANDING COMMITTEE

ON

LEGAL AFFAIRS AND HUMAN RIGHTS  
-----

A REPORT ON PUBLIC HEARINGS ON:-

1. The Statute Law (Miscellaneous Amendments) (No. 2) Bill, 2014
2. The County Assemblies Powers and Privileges Bill, 2014 —
3. The Public Appointments (County Assemblies Approval) Bill, 2014
4. The Public Fundraising Appeals Bill, 2014
5. The National Government Co-ordination (Amendment) Bill, 2014

4<sup>TH</sup> NOVEMBER, 2014  
-----

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

NOVEMBER, 2014

*Report filed in the  
February 2015, by the  
Member Kinoo*

*Adhwa*

*Hon. Speaker  
You may approve  
for tabling.  
06/12/14*

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The Public Fundraising Appeals Bill, 2014  
The National Government Co-ordination (Amendment) Bill, 2014  
Attendance lists

## ABBREVIATIONS

|            |   |
|------------|---|
| DPP        | Director of Public Prosecutions                       |
| PSC        | Public Service Commission                             |
| SEN        | Senator   |
| SO         | Standing Orders                                       |
| SoCATT (K) | Society of Clerks-At-The-Table in Kenyan Legislatures |

## **PREFACE**

### **Establishment of the Committee**

The Standing Committee on Legal Affairs and Human Rights is established pursuant to the Senate Standing Order 208 and mandated to consider all matters related to constitutional affairs, the organization and administration of law and justice, elections, promotion of principles of leadership, ethics and integrity; and implementation of the provisions of the Constitution on human rights.

### **Membership of the Committee**

The Committee is comprised of the following members;

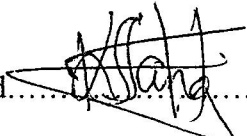
1. Sen. Amos Wako - Chairperson
2. Sen. Stephen Sang' - Vice Chairperson
3. Sen. Kembi Gitura
4. Sen. Kiraitu Murungi
5. Sen. Fatuma Dullo
6. Sen. Kipchumba Murkomen
7. Sen. Hassan Omar Hassan
8. Sen. Mutula Kilonzo Junior
9. Sen. Judith Sijeny

### **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. The Committee also thanks members of the public who made submissions, both orally and in writing.

**Mr. Speaker Sir,**

It is my pleasant duty, pursuant to Standing Order 201, to present a Report of the Standing Committee on Legal Affairs and Human Rights on public hearings held on 4<sup>th</sup> November, 2014, on the Statute Law (Miscellaneous Amendments) (No. 2) Bill, 2013; the County Assemblies Powers and Privileges Bill, 2014; The Public Appointments (County Assemblies Approval) Bill, 2014; The Public Fundraising Appeals Bill, 2014; and the National Government Co-ordination (Amendment) Bill, 2014

Signed.....

Date.....4/12/14

**SEN. STEPHEN SANG**

**VICE-CHAIRPERSON,**

**STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS.**

## EXECUTIVE SUMMARY

The following Bills were read a First Time in the Senate on the dates indicated below:-

1. The Statute Law (Miscellaneous Amendments) (No. 2) Bill, 2013 (Sen. (Prof. ) Kithure Kindiki; First reading- 6 August 2014)
2. County Assemblies Powers and Privileges Bill, 2014 (Sen. (Prof. ) Kithure Kindiki; First reading- 10 June 2014)
3. The Public Appointments (County Assemblies Approval) Bill, 2014 (Sen. Stewart Madzayo; First Reading-2nd July, 2014 )
4. The Public Fundraising Appeals Bill, 2014 (Sen. Anyang' Nyong'o; First reading-25<sup>th</sup> September, 2014)
5. The National Government Co-ordination (Amendment) Bill, 2014 (Sen. John Lonyangapuo; First reading-25th September, 2014)

Following the First Reading of the above listed Bills, they stood committed, pursuant to Standing Order 130(1), to the Standing Committee on Legal Affairs and Human Rights for facilitation of public participation. Subsequently, the Committee, Pursuant to Article 118 of the Constitution and Standing Order 130 (4), invited submissions from members of the public on the above Bills via an advertisement on the Daily Nation Newspaper of Friday October 31<sup>st</sup>, 2014. The Committee received both oral and written submissions on the Bills during its meeting with the members of public held on 4<sup>th</sup> November, 2014 on first floor, Shimba Hills Hall at Kenya International Conference Centre, Nairobi.

The submissions from various stakeholders and Members of the Public are contained in Chapter Two of this report as follows:-

- i. Mr Alex Mwaniki, a lawyer and student at Kenya School of Law
- ii. Ms. J.M.Moraa - Teaching Fraternity
- iii. Mr. John Kiptoo- Chairman, Bunge la Mwananchi (People's Parliament)
- iv. The Commission on Implementation of the Constitution
- v. The Society of Clerks-at-the-Table in Kenyan Legislatures (SoCATT- Kenya)
- vi. The Council of Governors

### **Committee observations and recommendations**

The Committee observed that Members of the public did not support the National Government Co-ordination (Amendment) Bill, 2014 and recommends for its withdrawal.

The County Assemblies Powers and Privileges Bill, 2014, on the other hand, was applauded as a progressive legislation with proposals for a few further amendments.

There were no submissions made on the two other Bills:-

1. The Statute Law (Miscellaneous Amendments) (No. 2) Bill, 2014
2. The Public Appointments (County Assemblies Approval) Bill, 2014

Sen. Sang reiterated to Members of the Public the need for them participate by giving their submissions on Bills before the Senate pursuant to Article 118 of the Constitution.



## **CHAPTER ONE INTRODUCTION**

The Statute Law (Miscellaneous Amendments) (No. 2) Bill, 2013; County Assemblies Powers and Privileges Bill, 2014; The Public Appointments (County Assemblies Approval) Bill, 2014; The Public Fundraising Appeals Bill, 2014; and The National Government Co-ordination (Amendment) Bill, 2014 were published and underwent the First Reading in the Senate.

Under Standing Order 130(1) of the Senate Standing Orders, the following Bills stood committed to the Committee on Legal Affairs and Human Rights. Standing Order 130 (4) requires the Committee to facilitate public participation and to take into account the views and recommendations of the public when it makes its Report to the Senate. The object of the Bills are highlighted herein below:-

### **1.1 THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) (NO. 2) BILL, 2014**

The Bill is sponsored by Sen. (Prof.) Kithure Kindiki, the Senate Leader of the Majority. It was referred from the National Assembly underwent First reading in the Senate on 6 August 2014.

The Statute Law (Miscellaneous Amendments) (No.2), Bill 2014 seeks to amend the following Laws:

#### **a) The Land Adjudication Act (Cap 284)**

The Bill proposes to amend the Land Adjudication Act to introduce new definitions of 'community land and "Cabinet Secretary".

#### **b) The Urban Areas and Cities Act, 2011 (No.13 of 2011)**

The Bill proposes to amend the Urban Areas and Cities Act, 2011 to adjust the population criteria for conferment of city, municipality and town status. It also empowers a County governor to confer the status of a special municipality to the headquarters of the County. It also empowers

Urban Areas and Cities to impose rates and charges under the law for the time being in force until a new law is enacted in that regard.

**c) The Transition to Devolved Government Act, 2012 (No.1 of 2012)**

The Bill proposes to amend the Transition to Devolved Government Act to provide for the criteria to be applied by the Transition Authority in the devolution of functions to the counties, and the course of action in cases where a county is lacking in specified aspects of the performance of the devolved functions.

**d) The County Governments Act, 2012 (No. 17 of 2012)**

The Bill proposes to amend the County Governments Act, 2012 to reduce the number of wards required for a County for purposes of the first general election under the Constitution from fifteen to ten. It also proposes the establishment of a consultative forum for heads of departments in the county and the recognized professionals in the county.

**e) The Agriculture, Fisheries and Food Authority Act, 2013 (No. 13 of 2013)**

The Bill proposes to amend the Agriculture, Fisheries and Food' Authority Act to remove fisheries from the purview of the Act and to make provisions on the membership of the Board of the Authority.

**f) The Crops Act, 2013 (No. 16 of 2013)**

The Bill proposes to amend the Crops Act to provide for the Cabinet Secretary responsible for matters relating to agriculture to appoint the Board to manage the Commodities Fund.

**g) The Kenya Agricultural and Livestock Research Act, 2013 (No.17 of 2013)**

The Bill proposes to amend the Kenya Agricultural and Livestock Research Act to remove livestock and fisheries from the purview of the Act and to make other minor amendments.

## **1.2 COUNTY ASSEMBLIES POWERS AND PRIVILEGES BILL, 2014**

The Bill is sponsored by Sen. (Prof.) Kithure Kindiki, the Senate Leader of the Majority Party. It was published on 22nd April, 2014 and underwent the First Reading in the Senate on 10th June, 2014.

The principal object of the Bill is to give effect to Article 196(3) of the Constitution that provides that Parliament shall enact legislation providing for the powers, privileges and immunities of county assemblies, their committees and members. The Bill is arranged into eight parts.

**Part I** of the Bill contains preliminary provisions including the interpretation of terms used in the Bill.

**Part II** of the Bill describes the precincts of a county assembly and regulates the control of the precincts.

**Part III** of the Bill provides for privileges and immunities of members of a county assembly including the freedom of speech and debate in a county assembly. The Part also proposes various measures to ensure the independence and protection of a county assembly and its members.

**Part IV** of the Bill provides for the establishment of a committee of privileges, for each county assembly. The mandate of this committee includes inquiring into the conduct of a member whose conduct is alleged to constitute a breach of a county assembly privileges.

**Part V** of the Bill deals with summoning of witnesses before the county assemblies or their committees.

**Part VI** of the Bill contains provisions relating to the publication and broadcasting of the proceedings of a county assembly.

**Part VII** of the Bill sets out the enforcement procedures, including the creation of certain offences.

**Part VIII** contains miscellaneous provisions including the proposed repeal of some provisions of the County Governments Act, No.17 of 2012, which provisions shall become redundant upon enactment of the Bill into law.

### **1.3 THE PUBLIC APPOINTMENTS (COUNTY ASSEMBLIES APPROVAL) BILL, 2014**

The Bill is sponsored by Sen. Stewart Madzayo, Chairman of the Standing Committee on Labour and Social Welfare. The Bill was published on 30<sup>th</sup> May, 2014 and underwent the First Reading in the Senate on 2<sup>nd</sup> July, 2014.

The principal objective of the Bill is to provide a legislative framework through which nominees for appointment to public offices, for which the approval of a County Assembly is required under the Constitution or any other law, are vetted and approved for appointment by the County Assemblies.

**Clause 4** of the Bill provides that an appointment under the Constitution or any other law for which the approval of a County Assembly is required shall not be made unless the appointment is approved by the relevant County Assembly in accordance with the proposed Act.

**Clause 6** of the Bill requires an appointing authority nominating a person for an appointment to which the Act applies, to notify the relevant County Assembly.

**Clause 7** of the Bill sets out the procedure to be followed during approval hearings by the County Assemblies

**Clause 8** of the Bill sets out the issues for consideration in relation to any nomination

**Clause 9** of the Bill provides that unless otherwise provided in any law, a committee shall consider a nomination and table its report in the County Assembly for debate and decision within fourteen sitting days from the date on which the committee first sits to consider the nomination.

**Clause 10** of the Bill provides that where the nomination of a candidate is rejected by a County Assembly, the appointing authority may submit to the County Assembly the name of another candidate, and the procedure for approval specified in this Act shall apply accordingly.

**Clause 12** of the Bill provides that the committee shall have power to summon any person to appear before it for the purpose of giving evidence or providing information during the approval hearing.

The **First Schedule** sets the Questionnaire to be used during the vetting of nominees for approval by the County Assemblies

The **Second Schedule** sets out the Assessment Form to be used during the appraisal of nominees for appointment.

#### 1.4 THE PUBLIC FUNDRAISING APPEALS BILL, 2014

The Bill is sponsored by Sen. Anyang' Nyong'o, Chairman of the Senate Ad Committee on Legislation on Harambee (Voluntary Contributions). The Bill was published on 27<sup>th</sup> June, 2014 and underwent the First Reading in the Senate on 25<sup>th</sup> September, 2014.

The principal object of this Bill is to provide for the establishment of regulatory mechanisms at the national and county levels which oversee the conduct of fundraising appeals, to provide for the licensing and regulation of fundraisers; the promotion of transparency and accountability in the conduct of fundraising appeals.

The Bill seeks to repeal and replace the *Public Collections Act, Chapter 106, Laws of Kenya*, whose institutional architecture does not align with the devolved structures of the Kenyan constitution and is not sufficiently robust to address corruption tendencies associated with voluntary contributions. Further, the Public collections Act excludes from its purview, charitable and religious purposes yet this forms a large component of harambees.

**Part I** of the Bill contains preliminary provisions including the interpretation of terms used in the Bill.

**Part II** of the Bill in **Clause 4** establishes the National Public Fundraising Appeals Committee which, among other functions, regulates and monitors the conduct of fundraising appeals and establishes mechanisms for the promotion of transparency and accountability in the conduct of fundraising appeals;

**Part III** of the Bill establishes the County Fundraising Appeals Committees. **Clause 16** provides for their functions include regulating, monitoring and evaluating fund raising appeals within the county;

**Clause 19** provides that the expenses of a county committee shall be defrayed from moneys that may, in the future, be provided by the county assembly for that purpose.

**Part IV** of the Bill regulates fundraising appeals. **Clauses 21-44** define fundraising appeals, indicate who can undertake a fundraising appeal and lays out procedures for applying for permits, conditions to be fulfilled and consequences of not following these conditions.

**Part V** of the Bill provides for the record and accounts of fundraising appeals. **Clauses 45-51** sets out the requirement for financial records in fundraising appeals, the storage of records and the conduct of inspectors.

**Part VI** of the Bill provides Miscellaneous Provisions in **clauses 52-61**. These include provisions on tax incentives, decentralization of services, penalties and transitional provisions among others.

**Schedule-** The schedule makes provisions as to the conduct of business and affairs of the National Committee and the County Committees.

## **1.5 THE NATIONAL GOVERNMENT CO-ORDINATION (AMENDMENT) BILL, 2014**

The Bill is sponsored by Sen. John Lonyangapuo (West Pokot County). The Bill was published on 2nd July, 2014 and underwent the First Reading in the Senate on 25th September, 2014.

The principal object of the Bill is to amend section 15 of the National Government Co-ordination Act, No. 1 of 2013, so as to recognize and provide for the role of village elders formally in the execution of national government and county governments functions. It is proposed in the Bill

that the village elders shall be recruited and appointed by the Public Service Commission as envisaged under section 15 of the National Government Co-ordination Act.



## CHAPTER TWO SUBMISSIONS FROM INSTITUTIONS AND THE PUBLIC

The Committee during its meeting held on 4<sup>th</sup> November, 2014, received submissions on the Statute Law (Miscellaneous Amendments) (No. 2) Bill, 2014; County Assemblies Powers and Privileges Bill, 2014; The Public Appointments (County Assemblies Approval) Bill, 2014; The Public Fundraising Appeals Bill, 2014; and The National Government Co-ordination (Amendment) Bill, 2014. Submissions were received from individuals and institutions respectively:-

1. Mr Alex Mwaniki, a lawyer and student at Kenya School of Law
2. Ms. J,M.Moraa - Teaching Fraternity
3. Mr. John Kiptoo- Chairman, Bunge la Mwananchi (People's Parliament)
4. Society of Clerks-at-the-Table in Kenyan Legislatures (SoCATT- Kenya)
5. Council of Governors

### 2.1 THE NATIONAL GOVERNMENT CO-ORDINATION (AMENDMENT) BILL, 2014

#### 2.1.1 Submissions from Mr. Alex Mwaniki, Lawyer

Mr. Mwaniki made submissions as a member of the public and opposed the amendment Bill based on the following reasons:-

- i. The amendment Bill will undermine Article 6(2) of the Constitution which states that ,  
*“The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation”*;
- ii. Section 48 County Government Act provides the decentralized units in the county government. Section 48 (d) provides includes, *“such number of village units in each county as may be determined by the county assembly of the respective county.”*

Therefore, the County Government Act envisions village elders as officials of county Governments and not the national Government;

- iii. Section 14(1) of the National Government Coordination Act gives the Cabinet Secretary the power, with the approval of the President and a notice in the Gazette to establish national government service delivery coordination units. Section 14 (2) states that in doing so the Cabinet Secretary shall accord and respect the decentralized units of the County government established in section 48 of the County Government Act , 2012;
- iv. There is ambiguity with regard to the role of the elders as proposed in this amendment. What will be their role under the government since they cannot simultaneously represent both levels of government?;
- v. The amendment violates Article 201 of the Constitution on the principles of public finance which requires that public money should be used in a prudent and responsible way. There will be two sets of village elders to represent both levels of government if the amendment is passed. There will be a violation of this principle;
- vi. The amendment is a violation of employment laws and policies. Practically, every village elder is over 60, which employment policies are they going to follow with regard to hiring the village elders? Village elders have a certain purpose; will there be another village elder who is not an employee at the state?

### **2.1.2 Submissions from Ms. J.M. Moraa, Teaching fraternity**

- i. For a long time the republic has had a functioning unit of elders, they are people of old age and wisdom. Village elders being employed by the public service commission is not in line with their role.
- ii. Some functions like security cannot be assigned to people who are not in the national government, thus employing village elders may help with this role but as long as employing them does not interfere with both systems of government.
- iii. Lack of definition of a village.
- iv. The idea of remuneration of village elders is a good but there are no cost implications.
- v. There are areas where clan elders are better placed, that is, in the rural areas than in the cities.

### **2.1.3 Submissions from Mr. John Kiptoo, Chairman Bunge la Mwananchi**

- i. The amendment should clarify the roles of the village elders. There is a duplication of roles with village elders under the County Government Act;
- ii. Security is a core function of the government. Proposing that village elders should play a crucial security roles-not proper. Their role has been the quasi –judicial function of conflict resolution;
- iii. There is the issue of an unsustainable wage Bill. The amendment is not clear on the roles of the village areas and the number of the village elders;

- iv. Village elders are often elderly males who are distinguished. Their employment will be unconstitutional as it may leave other sections of the society discriminated, that is, women and the youth who are specifically catered for in the Constitution;
- v. The proposal to include village elders in the Public Service Commission (PSC) contradicts policies the policies of the PSC. There are many young graduates volunteering for stipends. Elderly people being employed by PSC is against employment policies;
- vi. Public Service Boards are present at the County Level. It is not proper to employ people at the two levels of government to do the same functions

## **2.2 THE COUNTY ASSEMBLIES POWERS AND PRIVILEGES BILL, 2014**

### **2.2.1 Submissions from the Society of Clerks-at-the-Table in Kenyan Legislatures (SoCATT (K))**

- The Society appreciates the fact that the Bill has taken measures to protect staff of the Assemblies from harassment and intimidation, through the provisions of Section 26(1) (b) and penalties therewith;
- These provisions are progressive and in tune with realities in the County Assemblies across the Country, having witnessed a worrying trend where Members of the County Assembly occasionally abuse, harass, intimidate, threaten and assault Members of staff. The outcome of this engagement has been a climate of staff working under a cloud of stress, anxiety, fear and intimidation;

- The County Assemblies are new and there are still capacity gaps within the membership and lack of understanding on the role of the Secretariat. Members of staff work within a challenging environment and as employees they are entitled to all the protection of employees provided for in the Employment Act, Cap 226, and Article 236 of the Constitution;
- The Bill, could not have come at a better time. However, they made proposals for further amendments as follows:-
  - i. that the provisions' on staff safeguards can be made better; Clause 26 (1) (b) be amended by inserting the word "or insults, threatens, uses, uses abusive language". The rationale for the amendment is to widen the net and specify all acts that are prohibited under the Bill as experienced across Assemblies and leave no gaps in interpretation;
  - ii. A new Clause 34(1)(A) be inserted as follows, "*Where an offense is suspected to have been committed under Section 26(1)(b), the Clerk shall make a request to the Director of Public Prosecutions to take such action as may be appropriate.*" The rationale for the amendment is the Experience across County Assemblies has shown that having the Clerk make direct requests to the DPP where staffers file complaints of harassment offers better protection or safeguards than having the process initiated go through the Assembly Speaker for such specific cases concerning staffers.

### **2.2.2 Submissions from the Council of Governors**

- The Council of Governors identified problematic provisions that are either unconstitutional or generally improper and inadvisable as follows:-

- i. Clause 4 of the Bill should be deleted because it unnecessarily introduces members of the national security apparatus into the precincts of the county assemblies without justifying the need for such persons to be present. This is likely to stifle debate by members on discussion of topics the national government finds sensitive for fear of investigation;
- ii. Clause 4 (b) introduces an open clause which can be abused by a national security organ to interfere with the work of the county assemblies;
- iii. Clause 6 should be deleted. It is unconstitutional as it purports to bar summons issued by competent courts from being served. It violates the right to access to justice under Article 48 of the constitution which enjoins the State and which county assemblies are part of, to ensure access to justice for all persons. Service of court is a key ingredient of the justice system. It does not pass the limitation of rights set in Article 24. The limitation not reasonable nor justifiable.
- iv. Clause 7 should be amended. The Bill gives speakers of the county assemblies unchecked discretion to limit the exercise by members of the public of their constitutional rights, peaceably and unarmed to assemble, to demonstrate, to picket and to present petitions before parliament;
- v. Clause 8 should be amended. It is unconstitutional as it seeks to grant absolute criminal and civil immunity to members of county assemblies in regard of any matter said in any debate, petition, motion or any other proceedings of a county assembly. Assembly members cannot be protected in the manner contemplated by Clause 8. It attempts to oust the jurisdiction of the courts and especially Article 65 on the High Court;

- vi. Clause 10 should be amended. It misguidedly attempts to oust the jurisdiction of the courts in determining disputes. Institutions of government are supposed to act as checks and balances on each other;
- vii. Clause 11 should be amended. It errors by purporting to grant absolute legal immunity to the county assembly members. It is in violation of Article 159 (2) of the Constitution;
- viii. Clause 12 should be amended. It goes too far in protecting county assembly members from arrest for civil debt during the session;
- ix. Clause 13 should be amended. Contrary to its provisions, the Courts have the unqualified power to summon anyone to give evidence in relation to any document prepared by himself or under his discretion.
- x. The requirement that a county assembly must grant special leave to such person is unconstitutional and a usurpation of the independence of the judiciary as the courts will be forced to wait for leave from the county assemblies before summoning witnesses;
- xi. Clause 15 (2) be amended. The quorum should be increased a third to one half of the membership. The quorum provided is insufficient considering the potential consequences of the recommendations of the Committee of Powers and Privileges;
- xii. Clause 18 (4) should be amended. Police Officers are under the command of the Inspector General, not the Clerk of the county assembly and may not be available for the duty of service summons.
- xiii. Clause 21 should be amended to provide that no person summoned before a county assembly or committee will be required to produce private documents that do not touch

on that inquiry. As it is the clause does not give enough protection to members of the public appearing before a county assembly or its committees from being required to produce a private document that is not relevant to the subject of the inquiry;

- xiv. Clause 25 should be amended. The reasons given for limiting the right of any person to broadcast proceedings of a county assembly and its committees do not meet the standards for limitation in Article 34 of the Constitution. Article 117 merely provides for freedom of speech and debate and it is not a justification for limiting a fundamental right;
- xv. Clause 32 should be amended to provide that it will be an offence only if a person knowingly and willfully speaks or publishes information that they know to be false;
- xvi. Clause 34 (2) is unconstitutional as it seeks to place the DPP under the direction and control of the Speaker of the County Assembly contrary to Article 157 (10) of the Constitution;
- xvii. Clause 35 be amended as it misguidedly purports to grant the police powers to the members of staff of county assemblies. The clause lacks legal justification;
- xviii. Clause 38 be amended. The rule making powers granted to the speaker of the county assembly should be subject to the approval of the whole assembly owing to their importance and potential impact.

## **2.3 THE PUBLIC FUNDRAISING APPEALS BILL, 2014**

### **2.3.1 Submissions of the Commission on Implementation of the Constitution**

The Commission on Implementation of the Constitution is of the opinion that it may not be necessary to establish an entire institutional framework for licensing and overseeing fundraising



appeals. The rationale being the need to reduce the size of government and the resultant public usage. The National and County Governments could set up administrative mechanisms to oversee the licensing of public fundraising appeals and the Bill to provide the requisite rules on regulation of the appeals.

In the event that the policy decision is to have a separate institutional framework, then the Commission proposes the following amendments:-

#### Clause 4

Clause 4 be amended for the Committee to comprise of appointees of the National Government only, the rationale being that:-

- i. Clause 11 which provides that the secretariat of the Committee shall be a department of the National Government is consistent with a national government entity.
- ii. There is no justification for an intergovernmental body considering the functions it has been granted.
- iii. County Governments are distinct from Council of Governors which is an institutional arrangement for consultation amongst distinct county governments.

#### Membership in Committee

The representation in the Committee under clause 4 (1) (d) be reviewed to include a similar composition to the one in clause 13(1) (b) on the composition of county committees. The same should be read mutatis mutandis with clause 16 and 17(2). This is based on the following rationale:-

The concern that Public regulatory institutions like the PBO Authority are being engaged in executive functions

The PBO Act under which the proposed office exists is undergoing extensive review and has not commenced operations.

### Functions

There is need to define what National Public Fundraising Appeals are so as to define the jurisdiction of the National Committee. This is because the Bill does not provide clarity as to the boundaries between the functions of the National Committee and those of the County Committees under clause 13

### Removal of Member

There is no need for a provision on the security of tenure of the Members in the Bill since Article 47 of the Constitution Fair Administrative Action is applicable.

### Exemptions

The exemption from requirement of licensing should be clearly defined so as to avoid abuse. This is because as provided in the Bill, the exemptions are too broad and imprecise and therefore open to abuse.

### Appeals to the National Committee

If an institutional appeal is necessary, this would need to be constituted or the matter left to the Courts to adjudicate. Appeals from county committees cannot lie with the National Committee unless it is an intergovernmental body.

### Details of Donors

Details of possible donors to be included in clause 45(1)

### Regional offices

The term “regional” under clause 54 (2) in the context of devolved system of government is not clear and requires further elaboration.

### Social Development Fund

It is not clear how the monies collected by the committee and deposited in the county revenue fund under clause 19(2) can be used to set up a social development fund.

There is need to clearly define the area of operation of a national committee in the use of social development fund.

### Approval of the Cabinet Secretary

It is not clear how the Cabinet Secretary at the National Level will be the one approving the expenditure of the county based social Development Fund under clause 55(3).

## **CHAPTER THREE                      COMMITTEE      OBSERVATIONS      AND RECOMMENDATIONS**

The Committee made the following observations having considered the submissions of members of the public on the following Bills:-

### **3.1    The County Assemblies Powers and Privileges Bill, 2014**

The Committee approves of the County Assemblies Powers and Privileges Bill, 2014, except for proposals for further amendments as follows:-

#### **Clause 26**

**THAT** Clause 26 of the Bill be amended in paragraph (b) of sub-clause (1) by inserting the words “threaten, use abusive language” immediately after the word “assault” appearing at the beginning of the paragraph.

#### **Clause 34**

**THAT** the Bill be amended in Clause 34 by inserting the following new sub-clause immediately after sub-clause (1)-

(1A) Where an offense is suspected to have been committed under section 26(1)(b), the Clerk shall make a request to the Director of Public Prosecutions to take such action as may be appropriate.

### **3.2    The Public Appointments (County Assemblies Approval) Bill, 2014**

The Committee approves of the Public Appointments (County Assemblies Approval) Bill, 2014

### **3.3    The Public Fundraising Appeals Bill, 2014**