

Parliamentary Initiatives Network

Memorandum on the Senate Standing Orders

**Draft Prepared By:
PARLIAMENTARY INITIATIVES NETWORK(PIN)
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I. Introduction

This memorandum is a response of the Parliamentary Initiatives Network to the advertisement of the Rules and Business Committee of the Senate, inviting interested members of the public to submit written memoranda on proposed amendments to the Standing Orders of the Senate. It takes the approach that the Standing Orders of the Senate should be informed by the role that the Constitution gives to the Senate, and by the need for a coordinated approach between the two Houses of Parliament if they are to fulfill their constitutional mandates. Part II of the memorandum consists of an analysis of the provisions of the constitution dealing with the Senate and the National Assembly. Part III consists of evaluations of, and suggested changes to, specific provisions of the Standing Orders. Part IV concludes.

II. The Role of the Senate

Standing Orders are a set of rules of procedure whose purpose is to facilitate the work of a legislature. The design of these rules should therefore be informed by the powers and functions of the legislature, which are typically allocated to it by the Constitution. In the case of the Senate, the Constitution assigns it the following four roles:

- a) Representing the counties, and serving to protect the interests of the counties and their governments;
- b) Participating in the law-making function of Parliament by considering, debating and approving bills concerning counties;
- c) Determining the allocation of national revenue among counties, and exercising oversight over national revenue allocated to the county governments; and
- d) Considering and determining resolutions to remove the President or Deputy President from office.

Like other legislatures, the Senate therefore makes laws, holds the (national and county) executive to account, and represents the people in (national and county) governance. However, the Senate shares these roles with the National Assembly.

Indeed, it is important to appreciate that the Senate plays a limited role in governance in comparison to the National Assembly. First, the National Assembly is exclusively responsible for determining the allocation of national revenue between the levels of government.¹ In practical terms, this means that there is a clear division of responsibility between the National Assembly and the Senate. The idea is that once the National Assembly has determined the respective shares of the annual national revenue of the National Government and the County Governments, the Senate then determines how much of the annual national revenue is allocated to each county. This division of responsibility has two implications. On the one hand, consideration of the Division of Revenue Bill (which divides the revenue raised by the national

¹ Constitution of Kenya 2010, article 95 (4) (a).

government between the two levels of government) is the exclusive mandate of the National Assembly.² On the other hand, the consideration of the County Allocation of Revenue Bill (which divides the revenue allocated to the county level of government among the counties) is a mandate shared by the two Houses.³ Further, the Senate is responsible for overseeing how each County Government spends and accounts for the national revenue allocated to it. Again, this mandate is shared with the National Assembly, whose roles include exercising oversight over national revenue and its expenditure.⁴

Secondly, the exercise of the law-making power of the Senate requires the concurrence of the National Assembly in a number of significant respects. One example is the determination of the basis for the allocation of national revenue among the counties.⁵ The Constitution gives the senate the responsibility of making this determination by passing a resolution once every five years. However, in making this determination, the Senate must: (i) consider certain criteria on equitable sharing of revenue; (ii) consider the recommendations of the Commission on Revenue Allocation; (iii) consult county governors, the Cabinet Secretary responsible for finance and any organization of county governments; and (iv) consider the views of the public, including professional bodies. More significantly, the resolution of the Senate cannot take effect before it is considered by the National Assembly, which can either approve or reject it. Where the National Assembly rejects the Senate's resolution, the matter should then be referred to a joint committee of the two houses of Parliament for mediation.⁶

The second example concerns the consideration of bills concerning county governments, which the Constitution classifies into the two categories of special and ordinary bills. Special bill are the annual County Allocation of Revenue Bill, and bills relating to the election of members of a county assembly or a county executive.⁷ All other bills concerning county governments are ordinary bills.⁸ The Constitution gives the National Assembly power to amend or veto special bills that have been passed by the Senate.⁹ In effect, the President can only assent to Senate versions of special bills if the National Assembly fails to marshal the support of at least two-thirds of its members.¹⁰ But the concurrence of the National Assembly is required even in the case of ordinary county government bills. The only difference here is that where the National Assembly rejects the bill, it shall be referred to a joint committee of the two houses of Parliament for mediation.¹¹ Ultimately, therefore, all bills passed by the Senate can only become law after they have been considered by the National Assembly.

² Ibid, article 218 (1) (a).

³ Ibid, article 218 (1) (b).

⁴ Ibid, article 95 (4) (c).

⁵ Ibid, article 217 (4).

⁶ Ibid, articles 113, 217 (6) (b).

⁷ Ibid, article 110 (2) (a).

⁸ Ibid, article 110 (2) (b).

⁹ Ibid, article 111 (2).

¹⁰ Ibid, article 111 (3).

¹¹ Ibid, article 112.

Thirdly, money bills can only be introduced in the National Assembly.¹² These are bills whose provisions deal with taxes, the imposition of charges on a public fund or the appropriation of public money, or the raising or guaranteeing of loans.¹³

Fourth, the National Assembly is exclusively responsible for approving the appointment of cabinet secretaries and principal secretaries.¹⁴

In view of the foregoing allocation of responsibilities, the two Houses need to coordinate their operations if they are to fulfill their mandates. In this respect, a need arises to establish joint committees on critical matters, particularly the implementation of devolution. Further, the two Houses need to negotiate and agree on how they will perform their roles, particularly where the Constitution does not stipulate which House has the primary responsibility of originating bills. For example, the National Assembly and the Senate could agree that the Senate should originate the County Allocation of Revenue Bill. Such agreements would then be expressed in their respective standing orders.

Let us now examine how the Senate Standing Orders facilitate the work of the Senate, and deal with the allocation of responsibilities between the National Assembly and the Senate.

III. Comments on the Standing Orders

A. Overview

Our overall impression is the Senate Standing Orders have largely been aligned to the Constitution, and will facilitate the work of the Senate. Further, it is encouraging that the Senate Standing Orders have by and large been harmonized with the Standing Orders of the National Assembly, which is important from the perspective of ensuring uniformity in the procedures and operations of the two houses of Parliament. However, we remain concerned about the powers of the Speaker, facilitating public participation in the consideration of legislation, ensuring integrity in the conduct of the business of the Senate, facilitating effective representation of independent Senators in the committees of the Senate, facilitating effective participation of the Senate in national governance, and restrictions of access to information and the Senate.

B. Part I – Introductory

1. **SO 1 - Power of the Speaker** – The power of the speaker to decide any procedural question not expressly provided for by the Standing Orders needs to be regulated to prevent it from being abused.

¹² Ibid, article 109 (5).

¹³ Ibid, article 114 (3).

¹⁴ Ibid, articles 152 (2), 155 (3) (b).

Recommendation – the Standing Orders should permit a Senator dissatisfied with the ruling of the Speaker to challenge it by tabling a motion before the House. In such cases, the Speaker’s ruling will only bind the House if it is approved by a majority vote.

2. **Vacancy in the Office of the Speaker** – SO 4 (2) provides that where the office of the Speaker falls vacant before the expiry of the term of Parliament, the Senate cannot transact any business until a new Speaker is elected. However, it is not clear from this standing order how the determination that the office of the Speaker is vacant will be made. That is, who declares the office of the Speaker vacant? And what procedure is to be used in declaring the office of the Speaker vacant? In addition, who convenes the meeting of the Senate to elect a new Speaker? A literal reading of this standing order would also mean that the Senate is prohibited from conducting any business, including the business of electing a new Speaker.

SO 4 (3) then provides that the Deputy Speaker shall preside over such an election, unless he or she is a candidate, in which case a Senator elected by the Senate shall preside. However, it is not clear from this standing order how and by whom the Senate is to be convened so that it can transact the business of electing the Senator who will preside over the election of a new Speaker.

Recommendations – (1) In cases where the office of the Speaker falls vacant, the Deputy Speaker should convene the House and preside over the election of a new Speaker. However, where the Deputy Speaker is a candidate for the office of Speaker, the Clerk should have the power to convene the Senate to elect the Senator to preside over the election of a new Speaker.

(2) Amend SO 4 (2) to state that “If the office of Speaker falls vacant at any time before the expiry of the term of Parliament, the Senate shall not transact any business other than electing a new Speaker and shall only transact other business once a new Speaker has been elected.”

C. Senate Minority Leader

- a. SO 20 (1) provides for the election of the Senate Minority Leader and Deputy Senate Minority Leader. These are important offices, and will contribute to ensuring that the views of minority parties or coalition of parties are heard. In particular, these offices speak for the minority parties and their policies, and protect their rights.

Recommendation – In order to enable the Senate Minority Leader and the Deputy Senate Minority Leader to play their roles effectively, the

standing orders should give them a “right of recognition,” which would require the Speaker to recognize them so that they can speak before other Senators seeking such recognition.

D. Part XVI – Rules of Debate

- a. **Matters Sub Judice or Secret** – SO 90 prohibits Senators from referring to matters which are *sub judice* or secret. But while the standing orders clearly stipulate what matters are *sub judice*, it is not clear what matters are to be deemed “secret by the operation of any written law.” The danger is that this broad category can be used by the Speaker to frustrate debate of matters that are arguably in the public interest.

Likewise, SO 230 empowers the Speaker to direct the exclusion of matters that are “secret” or “purely personal” from the journals of the Senate and the verbatim reports of the proceedings of the Senate.

Recommendation: The standing orders should indicate what matters are to be considered secret. Examples could be national security and sensitive communications received from the President or other member of the executive. Further, as in the case of *sub judice* matters, a Senator alleging that a matter is secret should provide evidence to that effect.

- b. **Declaration of Interest** – SO 91 provides that a Senator who wishes to speak on a matter in which he or she has a personal interest shall first declare that interest. It then defines “personal interest” to include pecuniary interest, proprietary interest, personal relationships and business relationships. However, the standing orders fail to establish a mechanism for administering the declaration of personal interests, including sanctions.

Recommendations – (1) The standing orders should require members to register their personal interests to facilitate the enforcement of this provision.

(2) The standing orders should provide for the sanctions to be applied where a Senator is found to have spoken on a matter in which he or she had a personal interest.

(3) The Senate should establish a mechanism for enforcing an ethics regime, including the registration of personal interests, investigations of violations of rules of ethics, and imposition of sanctions.

E. Part XIX – Public Bills

- a. **Bills Concerning County Government** – SO 124 provide that the Speaker of the National Assembly and the Speaker of the Senate *may* appoint a joint committee to advise them in resolving the question of whether or not a bill concerns county government. This is an important committee, and should help the two Houses to ensure the timely enactment of legislation. However, the National Assembly Standing Orders do not have an equivalent standing order, which could frustrate the appointment of this committee. In addition, this standing order contemplates an ad hoc committee appointed at the discretion of the two Speakers to perform what we consider to be a critical function. In our view, this role requires the establishment of a standing committee.

Recommendation: Amend the Standing Orders of the National Assembly to (1) provide for the appointment of this joint committee and (2) make this committee a standing committee.

- b. **Committal of Bills to Committees and Public Participation** – SO 128 (4) gives the public a unique and timely opportunity to participate in law-making by requiring committees to facilitate public participation and take into account the views and recommendations of the public in their reports on bills. However, the standing orders do not indicate the procedures the committees are to use to obtain the views and recommendations of the public. Further, there is no procedure for accounting to the public, so that it can know whether or not its views and recommendations have been considered. Finally, there is a need to stipulate time-lines for public participation if this provision is to be effective.

Recommendations – (1) The standing orders should require committees to use the “notice and comment” or “public hearing” procedures in fulfilling their obligation to ensure public participation. The “notice and comment” procedure entails giving the public, for example, thirty days to submit comments on a draft bill. On the other hand, the “public hearing” procedure would entail the committee convening a meeting at which the public can present its views on a bill. In either case, however, there should be an accountability procedure. In particular, the standing orders would require each committee to demonstrate, in its report to the Senate, how it has considered the views of the public in revising the bill before it for the consideration of the Senate.

F. Part XXIII – Select Committees

- a. **Rules and Business Committee** – SO 174 provides for the composition of the House Business Committee. This committee consists of the Speaker, Majority Leader, Minority Leader and not more than nine Senators “reflecting the relative majorities of the seats held by each of the parliamentary parties in the Senate.” Our concern is that this formula excludes independents, even if there are no independent Senators in the current Senate. For the future, however, it will be necessary to ensure that independents are represented in this critical committee.

Recommendation: Amend SO 174 (1) (d) to state as follows: “not more than nine senators, reflecting the relative majorities of the seats held by each of the parliamentary parties in the Senate while taking into account the interests of independents.”

- b. **Nomination of Members of Select Committees** – SO 175 (4) provides that “A Senator against whom an adverse recommendation has been made in a report of a select committee that has been adopted by a House of Parliament shall be ineligible for nomination as a member of that committee.” We find this provision unduly restrictive. It literally means that a Senator against whom an adverse recommendation has been made in a report of one select committee is free to serve as a member in all other select committees. However, adverse recommendations would arguably undermine the competence of such a Senator to serve on any select committee. Perhaps the concern of this standing order is to ensure that the Senate has sufficient numbers of Senators who can serve on its committees, since numerous adverse recommendations would greatly reduce the pool of committee members if such recommendations were a bar to membership of committees. However, this concern could be addressed by requiring that the adverse recommendations should first be resolved by the Senate or the Senator in question before they can become eligible to serve on committees.

Recommendation – Amend this standing order to make Senators against whom adverse recommendations have been made in reports of committees ineligible for nomination as members of any committee of the Senate until the adverse recommendation has been resolved by the Senate or the Senator.

- c. **Minutes of Select Committees** – SO 192 provides, *inter alia*, that the minutes of the proceedings of a select committee may be published once formal errors and oversights therein have been corrected. However, we are concerned that this standing order leaves the publication of such minutes to the discretion of the Speaker, who can therefore choose not to publish them.

Recommendation: In order to enhance public access to the records of the Senate, there is a need to mandate the speaker to publish the minutes of select committees, but list specific exceptions that would justify the exclusion of such minutes from publication, for example, national security.

- d. **Public Access to the Senate and Meetings of Select Committees** – SO 233 provides that the Senate or a committee of the Senate may exclude any person or media from its sittings in “exceptional circumstances” should the Speaker determine that there are justifiable reasons for the exclusion. Similarly, SO 200 provides that the proceedings of select committees shall be open to the public unless “in exceptional circumstances” the Speaker determines that there are justifiable reasons to exclude the public. These standing orders give the Speaker wide discretionary powers without stipulating their limits. A need therefore arises to circumscribe the exercise of these powers.

Recommendation – the Standing Orders should provide an indicative list of the “exceptional circumstances” and the reasons that would justify the exclusion of the public from meetings of select committees.

- e. **Engagement of Experts** – SO 205 provides that committees of the Senate may engage experts to facilitate their work. The only regulation is that they should seek the approval of the Speaker. There is a need to regulate the engagement of experts to prevent corruption and to ensure that committees engage competent experts.

Recommendation – Amend this standing order to require adherence to the Public Procurement and Disposal Act in the engagement of experts.

- f. **Joint Committees** – SO 213 (3) establishes two joint committees of Parliament, namely the Joint Committee on National Cohesion and Equal Opportunity and the Joint Committee on Parliamentary Broadcasting and Library. It also empowers the two Houses to establish other joint committees by resolution or by passing a law. While these two committees are no doubt useful, there is a need to establish a joint committee on the implementation of devolution, given the significance of devolution in enhancing national cohesion and equitable regional development. In addition, the Constitution and the laws on devolved government establish a complex structure for the administration of devolved government, which will need the two Houses to work together if they are to ensure meaningful oversight of the executive at the two levels of government.

Recommendation: The standing orders of the two Houses should establish a Joint Committee on the Implementation of Devolution.

IV. Conclusion

It is important to appreciate that the Senate operates in a context in which it shares responsibilities with the National Assembly. Further, it is clear from the Constitution that the Senate plays a limited role in governance in comparison to the National Assembly. However, the Constitution gives the Senate the critical role of representing the counties and serving to protect the interests of the counties and their governments. In view of the architecture of the Constitution, which for example dictates that all bills passed by the Senate can only become law after they have been considered by the National Assembly, it will be necessary for the Senate to negotiate with the National Assembly how it should play its role in making law and holding the executive to account. Further, the two Houses need to coordinate their operations if they are to fulfill their mandates. In this respect, a need arises to establish joint committees on critical matters, particularly the implementation of devolution. Further, the two Houses need to negotiate and agree on how they will perform their roles, particularly where the Constitution does not stipulate which House has the primary responsibility of originating bills. For example, the National Assembly and the Senate could agree that the Senate should originate the County Allocation of Revenue Bill. Such agreements would then be expressed in their respective standing orders.