

THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2015

MEMORANDUM:

The Parliamentary Initiatives Network (PIN) is a forum for non-state actors in Kenya with a programmatic interest in the work of Parliament. PIN brings together eighteen Kenyan organizations including civil society, professional associations, think tanks and research institutions that focus on supporting parliamentary business. Its mandate extends to providing information and research support to the Kenyan Parliament in its oversight, legislative and representation roles, as well as designing tools to help parliament systematically monitor and track the implementation of decisions, policies and laws in line with the Constitution of Kenya.

In line with this mandate, PIN has undertaken a review of the Statute Law (Miscellaneous Amendments) Bill and the Statute Law (Miscellaneous Amendments) (No.2) Bill 2015, whose main objective is to make minor amendments to various laws which do not merit the publication of a separate Bill. The Bills consolidate amendments in thirty seven (37) different Statutes, most of which are minor changes. However, having reviewed and analyzed the Bills, PIN is concerned about the constitutionality and legality of the proposed amendments to the following Laws:

PRINCIPAL ACT	SECTION	AMENDMENT	COMMENT
I) The Criminal Procedure Code	Section 364(1) Powers of High Court on Revision	Staying grant of bail for a period of 14 days pending filing of application for review of bond terms.	<ul style="list-style-type: none"> ▪ This amendment is an infringement on the judicious discretion of the court, granted by the constitution, to award bail in (Article 49 (1) (h) of the Constitution. As this amendment is being mooted for legislation there already exist guidelines that the court may use while awarding or denying bail. It is tantamount to amending the Constitution (Article 49 (1) (h) through an ordinary statutory route. Articles 255 provides

			<p>for an elaborate process for amendment of the constitution, and clearly states that amendment for the Bill of Rights must be done by a referendum.</p>
<p>II) The Ethics and Anti-Corruption Commission Act</p>	<p>Section 6: Appointment of the Chairperson and Commissioners</p>	<p>The Bill seeks to delete section 6 of the EACC Act. This section provides for appointment of the Commissioners i.e. the Chair and Members. Deleting this section will leave a gap on how the appointment is to be made.</p> <p>Section 10 of the Principal Act provides for filing of the vacancies in the Commission to be done by the Public Service Commission. This will eventually remove the Multi-stakeholders panel from recruiting the chairperson and members of the commission</p>	<ul style="list-style-type: none"> ▪ While PIN appreciates the role of PSC in public service, we are of the view that the proposal would have serious implications on the independence of EACC. The Selection Panel was intended to infuse diversity, objectivity and credibility in the recruitment process. ▪ It is doubtful whether PSC should solely recruit the Chairperson and Members of EACC yet it lacks disciplinary control over them. Moreover, this would create an inconsistency since all other Commissioners are appointed through a similar Multi-Stakeholders Panel. ▪ Section 6 of the Act should be retained to safeguard the multi-stakeholder nature of the panel and cushion the EACC from conflict of interest in their operation especially when they have issues with PSC in the course of their work.

III) The Environment and Land Court Act	Section 8: Tenure of Office of Judge of the Court	Inserts a new section (d) to provide that a Judge of the Court shall hold office until he/she is transferred from the Court to the High Court or other court with the status of the High Court	<ul style="list-style-type: none"> ▪ The amendment to Sec 8 of the Act to transfer a judge to any other court is contested. Judges to the Environment and Land Court (ELC) are appointed specifically to it and are not transferable administratively by the Chief Justice to the High Court. The ELC is a court sui generis – neither the High Court nor an administrative tribunal. It has a constitutional interpretation and human rights enforcement jurisdiction, appellate jurisdiction, supervisory and judicial review jurisdiction. ▪ The transfer of judges from this court is likely to bring an overlap and confusion to the jurisdiction and mandate of the court yet environmental and land matters are unique and hence the need for a specialized court with unique expertise on these matters.
	Section 26	The section is amended to allow the Chief Justice to appoint certain Magistrates to hear and determine disputes relating to the environment and land in any part of the country.	<ul style="list-style-type: none"> ▪ This amendment is against the spirit of Article 162 of the Constitution. The Constitution clearly stipulates the establishment of a court that is of the same level of the High Court/superior court. Magistrates Courts were not anticipated to hear Environmental matters. The challenge of having few Environmental Courts in Kenya can be cured administratively by having more judges or courts without necessarily going against the spirit of the constitution giving prominence to land and environmental matters.

IV) The National Police Service Act	Section 13: Procedure for Appointment of Deputy Inspector General	<p>The proposed amendment deletes the previous section 13 on the procedure for appointment of the DIG and provides</p> <p>“Whenever a vacancy arises in the office of the Deputy Inspector-General the President shall on the recommendation of the Commission within fourteen days from the date the vacancy arises appoint a suitably qualified person to serve as Deputy Inspector-General”</p>	<ul style="list-style-type: none"> By deleting s. 13 entirely, the government has removed the process of public participation in the appointment of a Deputy Inspector-General and instead, the President may now appoint anyone ‘suitably qualified’ to serve. This is plainly unconstitutional as the requirement for public participation is enshrined both under Articles 10 and 232 of the Constitution on the National Values and principles of governance and the values and principles of Public Service respectively.
	Section 14 (b) General provisions on recruitment of Inspector General and Deputy Inspector General	<p>Provides that in the entire recruitment process, Parliament shall ensure that at all times one of the three positions of the Inspector General and the two Deputy Inspector-Generals is of opposite gender.</p>	<ul style="list-style-type: none"> Deleting section 14 (b) takes the affirmative action requirement to have both genders represented in the leadership of the Police force. As it stands, women in Kenya are already under-represented in many appointive as well as elective positions. We propose that the previous section be retained as was
	Section 17 Removal of Deputy Inspector General	<p>The amendment proposes to delete the grounds of removal from office as previously provided and substitute with the provision that</p> <p>“The President may remove, retire or redeploy a Deputy Inspector-General at any time before the Deputy-Inspector General</p>	<ul style="list-style-type: none"> This new provision gives the President the discretion to remove, retire or redeploy a Deputy Inspector-General for any reason while the previous section provided specific reasons for removing the Deputy Inspector-General from office. If this provision comes into force, the DIG will have no recourse and such a provision could be subject to abuse.

		<p>attains the age of retirement.</p>	
	<p>Section 29: Qualifications of the Director of Criminal Investigations</p>	<p>The current section 29 reads:</p> <p>“29 (1) There shall be a Director of Criminal Investigations who shall be appointed in accordance with section 30.</p> <p>(2) The Commission shall set the term of office of the Director of Criminal Investigations.</p> <p>(3) The Commission shall appoint the Director on such terms and conditions as the Commission may determine.”</p> <p>The proposed amendment seeks to insert the words “by the President” immediately after the word “appointed.” in section 29(1).</p> <p>It then goes on to delete sub-sections (2) and (3)</p>	<ul style="list-style-type: none"> ▪ These deletions amount to removing power from the Commission in setting out the terms of office for the Director of Criminal Investigations and placing discretion solely within the President.

	<p>Section 30: Appointment of Director of Criminal Investigations</p>	<p>The amendment deletes section 30 and substitutes with the following new section:</p> <p>s. 30. Whenever a vacancy arises in the office of the Director of Criminal Investigations the President shall on the recommendation for the Commission within fourteen days from the date the vacancy arises, appoint a suitably qualified person to serve as Director of Criminal Investigations.</p>	<ul style="list-style-type: none"> ▪ Public interviews have been deleted and this reduces transparency in the appointment process
	<p>Section 31 Removal of the Director of Criminal Investigations</p>	<p>The amendment proposes to delete the previous section and substitute the following new section –</p> <p>s. 31 The President may at any time remove retire or redeploy a Director of Criminal Investigations at any time before the Director of Criminal Investigations attains the age of retirement.</p>	<ul style="list-style-type: none"> ▪ Again, discretion is placed with the President to remove, retire or redeploy a DCI without formal stated grounds as per the original section 31. There is a need for transparency.
	<p>Section 41</p>	<p>The current provision provides that the functions of the Authority shall be inter alia to develop proposals on priorities, objectives and targets for police performance in the county;</p> <p>The amendment seeks to delete the words</p>	<ul style="list-style-type: none"> ▪ Objectives and targets should remain a function of the Authority to enhance the performance of the police

		‘objectives and targets’ effectively removing this from being a function of the Authority	
V) Independent Police Oversight Authority Act	Section 14 Removal of Commissioners	The amendment seeks to delete sub-section 2-8 on the removal of Commissioners	<ul style="list-style-type: none"> ▪ The proposed amendment is repugnant to the sovereign power of the people in Article 1 of the Constitution. Members of the Public must retain a right to petition the removal of any commissioner at the authority.
VI) The Public Appointments (Parliamentary Approval) Act	Section 7: Procedure not to apply to reappointments	Inserts a new section 7A that provides: “The approval procedure set out in this Act shall not apply to reappointments except in cases where there have been formal complaints on performance or integrity on the part of the proposed appointee	<ul style="list-style-type: none"> ▪ The overall implication of this section is that public officers who’ve gone through vetting can be transferred to other public offices without fresh vetting. ▪ Senior public servants being re-appointed to another institution must be vetted afresh under the current law. The office holders that the law seeks to address include the Inspector General of Police, the Central Bank governor, Auditor-General, Chief Justice, Cabinet and Principal Secretaries ▪ The amendment will allow the President to arbitrarily transfer public officers across different offices, without verifying their suitability to hold the new positions. An example cited is the previous controversial nomination for appointment of the PS-Ministry of Interior to the Office of the Secretary to the Cabinet. If this

			<p>amendment had been in place, the President would not have been required to seek Parliament’s approval.</p>
<p>VII) The Power of Mercy Act</p>	<p>Section 23: Notification of grant or denial of petition</p> <p>Section 25: Effect of Pardon</p>	<p>The Principal Act provides that the President shall, within thirty days of receipt of the recommendations by the Committee, consider the recommendations and either approve or reject the petition.</p> <p>The amendment Bill proposes to delete the words “within thirty days of receipt of the recommendations by the Committee”.</p> <p>The amendment purports to insert a new section 1(a), without deleting the existing section 1 (a)</p>	<ul style="list-style-type: none"> ▪ It is not clear when the petition request will be approved or rejected if President does not have a time limit. A timeline is important in the interests of justice and good governance. <p>Amend by renumbering accordingly</p>
<p>VIII) The Prevention of Terrorism Act</p>	<p>Section 12 A (2) Discretion of the Court</p>	<p>The amendment goes against the principle of innocent till proven guilty.</p>	<ul style="list-style-type: none"> ▪ The judicial officer handling the case should be free to make a determination on circumstantial evidence rather than statutory presumptions
<p>IX) The Industrial Training Act</p>	<p>Section 4 Representatives in the National Industrial Training Authority</p>	<p>Replace the proposed amendment and assert that the Most representative Federation of Employers or Trade Unions shall have 2 representatives in the NITA board and the 2nd most representative shall have 1 member</p>	<ul style="list-style-type: none"> ▪ Since there are 3 slots for FKE and COTU currently, it should not appear that Government is playing a role in controlling FKE’s and COTU’s influence. This way, each of the rival unions shall have a slot depending on their strength. It should not be that the winner takes it

			all and the loser stands small.
X) The Kenya Law Reform Commission Act	Section 8(1)(b) Cabinet Secretary Responsible	Rephrase to read Cabinet Secretary responsible for matters of justice and if there's, none the Attorney General.	<ul style="list-style-type: none"> There are times we do not have a Cabinet Secretary for Justice including currently. It should not be left in limbo and the A.G should perform the role.
	(c) Representative of the LSK at the Law Reform Commission	Remove the phrase “status of Senior Counsel”	<ul style="list-style-type: none"> The provision discriminates against all advocates who are not senior counsels. Some may have a passion for law reform and would be excluded not because of their ability. The LSK is better left to decide who amongst its members is most suitable to be a commissioner. The membership can hold an election like they do for the JSC post or otherwise decide how to fill it without having it fixed in the law.
	(e) Representative of the Attorney General at the Law Reform Commission	Replace the two representatives of the Office of the Attorney General with one	<ul style="list-style-type: none"> No reason warrants the Attorney General having two representatives at the Commission. One suffices.

<p>Kenya Law Reform Commission Act</p>	<p>Representative of the lay people at the Law Reform Commission</p>	<p>Add a person in academia for example the Dean of the Faculty of Law in a recognized University in Kenya</p> <p>Add a person who is not a lawyer, for instance a political scientist or Sociologist</p>	<ul style="list-style-type: none"> ▪ Persons in academia have research and reports on areas requiring Law Reform. Everyone proposed is a Lawyer. Law Reform is not a monopoly of Lawyers. A lay person or even a person in a progressive discipline including sociology, political science should be co-opted into the commission
	<p>(g) Representative of the Judiciary at the Law Reform Commission</p>	<p>Remove the phrase Judge of the Court of Appeal and replace it with a Judge.</p>	<ul style="list-style-type: none"> ▪ Any Judge whether of the Court of Appeal, Supreme Court or High Court can ably represent the Judiciary in this Commission. In fact, High Court Judges deal with more assorted laws requiring reforms than those at the Court of Appeal.

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