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KENYA NATIONAL ASSEMBLY

TENTH PARLIAMENT - FOURTH SESSION (2010)

REPORT OF THE DEPARTMENTAL COMMITTEE
ON JUSTICE AND LEGAL AFFAIRS

ON THE APPROVAL OF NOMINEES TO THE JUDICIAL SERVICE
COMMISSION

Clerk's Chambers,
Parliament Buildings,
NAIROBI.

December, 2010



PREFACE

Mr. Speaker Sir,

The Departmental Committee on Justice and Legal Affairs derives its mandate from provisions of Standing order 198(3) which defines functions of the Committee as being:

- a) To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
- b) To study the programme and policy objectives of ministries and departments and the effectiveness of their implementation;
- c) To study and review all legislation referred to it;
- d) To study, assess and analyze the relative success of the ministries and departments measured by the results obtained as compared with their stated objectives;
- e) To investigate and enquire into all matters relating to the assigned ministries and departments as may be deemed necessary, and as may be referred to it by the House or a minister; and
- f) To make reports and recommendations to the House as often as possible, including recommendations of proposed legislation.

In accordance with Schedule II of the Standing Orders, the Committee is mandated to consider:-

- a) Constitutional Affairs
- b) The administration of law and order (Judiciary, police, prisons department, and community service orders)
- c) Public prosecutions

- d) Elections
- e) Integrity
- f) Anti-corruption and human rights.

The Committee oversees the following Ministries/Departments:

- a) Ministry of Justice, National Cohesion and Constitutional Affairs
- b) State Law Office
- c) The Judiciary
- d) Kenya Anti-Corruption Commission
- e) Interim Independent Electoral Commission
- f) Interim Independent Boundaries Commission

The Committee also has oversight mandate over all matters relating to political parties.

COMMITTEE MEMBERSHIP

The Committee comprises of the following members:

- | | |
|--|---------------------------|
| Hon. Ababu Namwamba, M.P | - Chairperson |
| Hon. Njoroge Baiya, M.P | - Vice-Chairperson |
| Hon. Abdikadir Mohammed, M.P | |
| Hon. Millie Odhiambo-Mabona, M.P | |
| Hon. Mutava Musyimi, M.P | |
| Hon. George Omari Nyamweya, M.B.S., M.P | |
| Hon. Amina Abdalla, M.P | |
| Hon. Olago Aluoch, M.P | |
| Hon. Isaac K. Ruto, E.G.H., M.P | |
| Hon. Sophia Noor Abdi, M.P | |
| Hon. Eugene Wamalwa, M.P | |

Appointment of Members of the Judicial Service Commission

The Judicial Service Commission is established under Article 171 of the Constitution. Article 20(1) of the Sixth Schedule to the Constitution further provides that:-

“The Judicial Service Commission shall be appointed within sixty days after the effective date and the Commission shall be deemed to be properly constituted under this Constitution despite the fact that there may be a vacancy in its membership because any of the bodies nominating or electing members have not done so”.

Pursuant to these constitutional directions, the National Assembly proceeded to facilitate the approval of nominees to the Commission from the respective nominating bodies, namely the Association of Magistrates and Judges, the Law Society of Kenya (LSK), the Court of Appeal, the Public Service Commission (PSC) and Office of the President, by conducting vetting in accordance with the laid down procedures.

Committee Sittings

The Committee held seven meetings and vetted the six nominees elected by the Law Society of Kenya, Court of Appeal, the Public Service Commission and two nominees nominated by the President in consultation with the Prime Minister to represent the Public. The exercise was conducted in accordance with the Constitution, with each nominee considered individually on the basis of set criteria.

Acknowledgements

The Committee wishes to thank the Offices of the Speaker and the Clerk of the National Assembly for the support extended to it in the execution of its mandate.

Mr. Speaker, Sir,

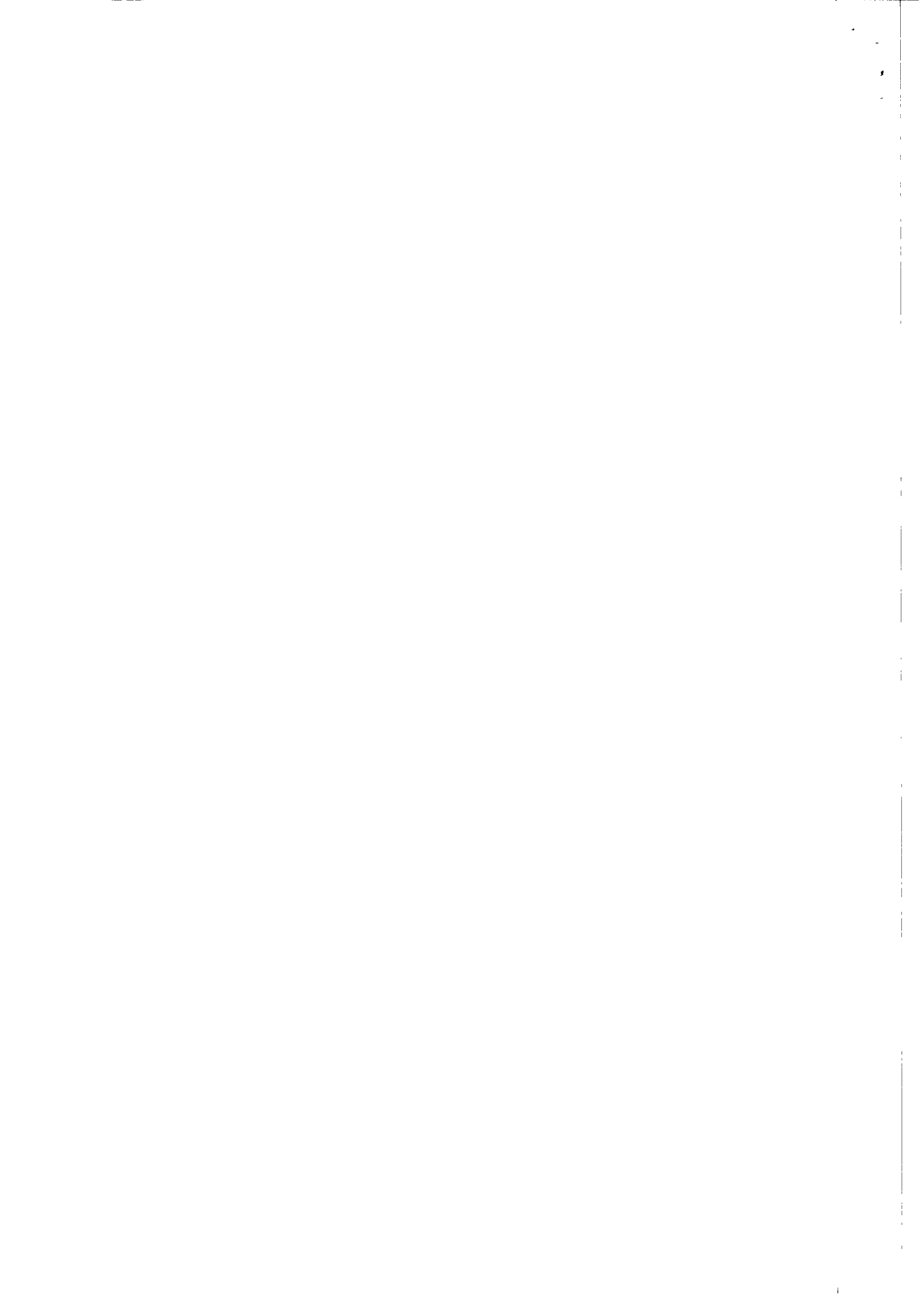
It is my pleasant duty and privilege, on behalf of the Departmental Committee on Justice and Legal Affairs, to present and commend this report to the House for adoption pursuant to Standing Order 181.

Thank you

Signed.....

Hon. Ababu Namwamba, MP
Chairperson

Date:.....



Background

The Judicial Service Commission (JSC) is established under Article 171 of the Constitution. Article 171(2) provides that the JSC shall consist of:-

- a) The Chief Justice who shall be the chairperson of the Commission;
- b) One Supreme Court Judge elected by Judges of the Supreme Court;
- c) One Court of Appeal Judge elected by Judges of the Court of Appeal;
- d) One High Court Judge and one Magistrate, one a woman and one a man, elected by members of the Association of Judges and Magistrates;
- e) The Attorney-General;
- f) Two advocates, one a woman and one a man, each of who has at least fifteen years experience, elected by members of the statutory body responsible for the professional regulation of advocates;
- g) One person nominated by the Public Service Commission;
- h) One woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly;

The Chief Registrar of the Judiciary shall be the Secretary to the Commission.

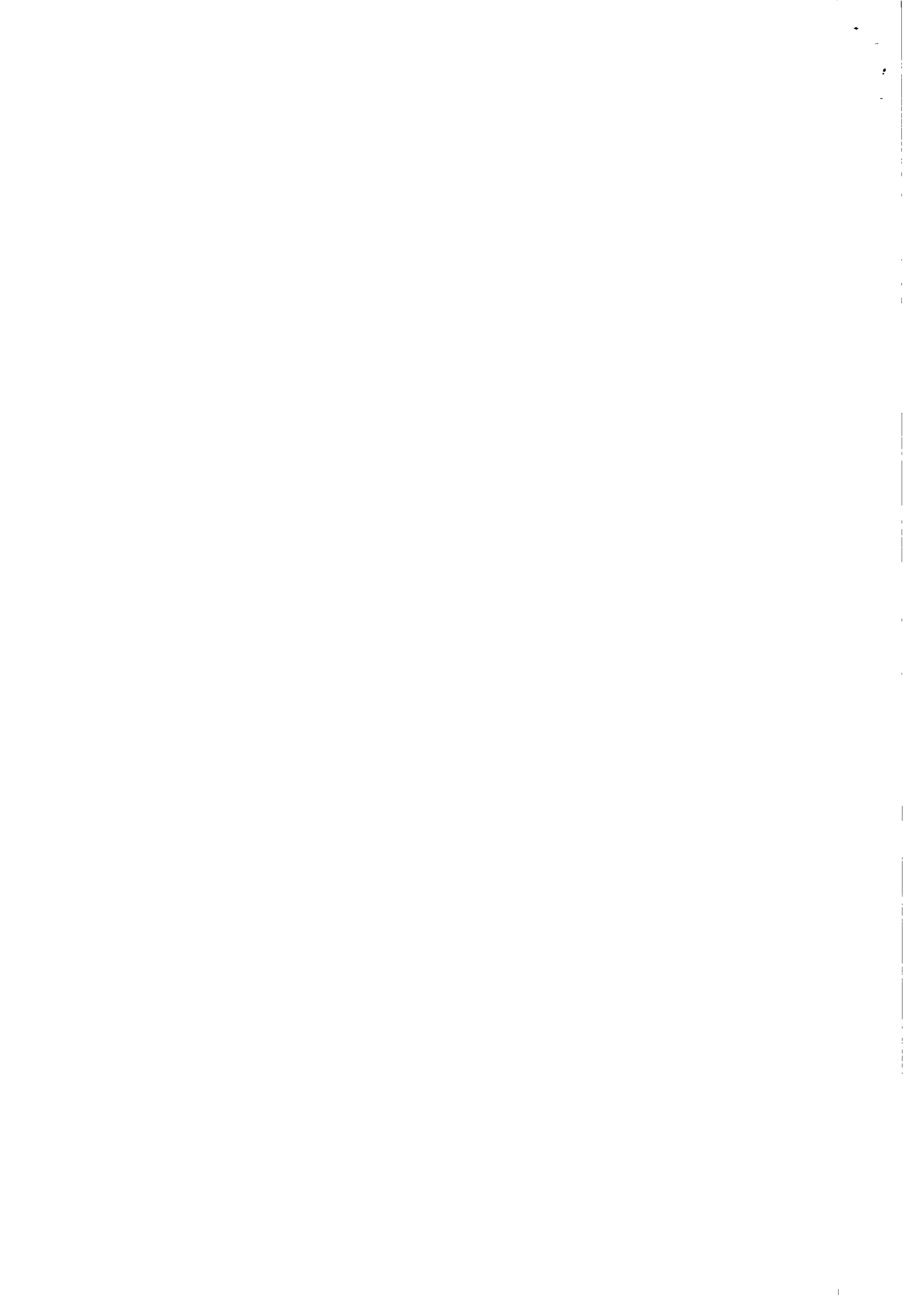
The Committee vetted all nominees to the JSC in exercise of its general oversight mandate, and the constitutional confirmation mandate of Parliament under Article 250 of the Constitution.

Having earlier recommended the appointment of the two representatives of the Association of Judges and Magistrates, who were approved by the Honorable House, the Committee held further vetting sessions on diverse dates to consider candidates selected by the Law Society of Kenya, the Court of Appeal, the Public Service Commission and the President. This report is on that process.

Committee Vetting Proceedings

Law Society of Kenya (LSK)

1. Pursuant to Article 171(2)(f) of the Constitution and Article 20(1) of the Sixth Schedule, the Law Society of Kenya, with the aid of the Interim Independent Electoral Commission (IIEC) conducted elections to pick two (2) representatives to the Judicial Service Commission.
2. The LSK subsequently forwarded to the National Assembly for approval the two names, respectively, of **Mr. Ahmednasir Abdullahi** and **Mrs. Florence Muoti Mwangangi** as the elected representatives of the society.
3. The Committee held one meeting on 26th October, 2010 to consider the two nominees. In conducting the vetting process, the Committee examined the candidates against the following criteria, *inter alia*:
 - (1) Education
 - (2) Honours and Awards
 - (3) Employment record
 - (4) Professional Associations
 - (5) Published writings
 - (6) Public office, political activities and affiliations
 - (7) Statement of net worth
 - (8) Potential conflict of interest
 - (9) Pro-Bono/Charity work
 - (10) Moral Probity and Ethics
4. It should be noted that Mr. Ahmednasir challenged the jurisdictional mandate of the National Assembly to vet his appointment to the JSC, on the argument that since he had been elected by a membership organization, he was not subject to

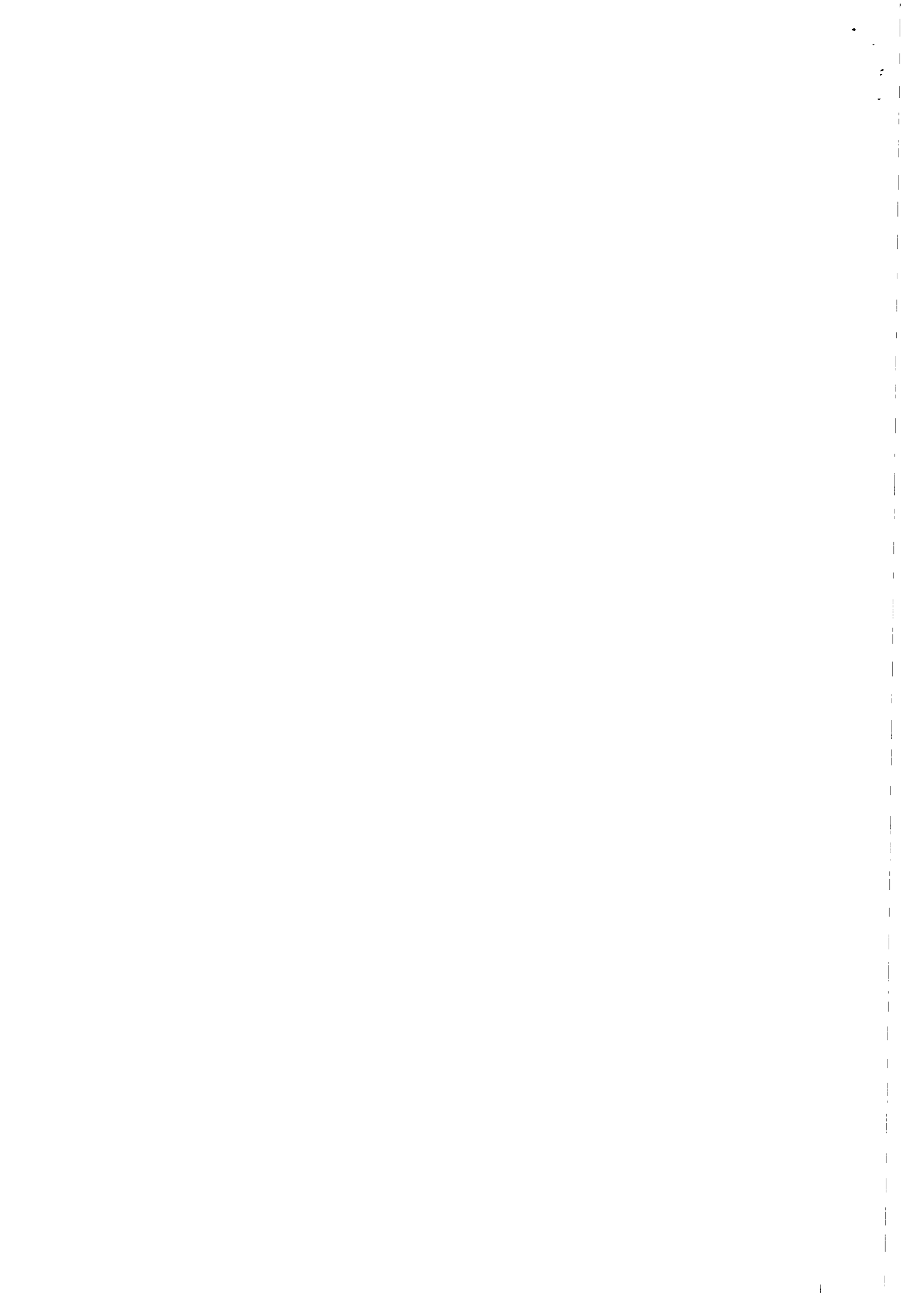


vetting or confirmation as the act of election had already confirmed him as a member of the JSC. He raised this objection at the Committee meeting held on October 26th, 2010. While the LSK as an institution never stated its position on this matter, including at the same meeting which was attended by the society's chairperson and secretary, sentiments reported in the media and attributed to the chairperson seemed to support Mr. Ahmednasir's position.

5. The Committee considered Mr. Ahmednasir's objection, and disagreed with him on his interpretation of the Constitution. The Committee held the view that the Constitution under the new dispensation vested in Parliament specific and general powers to vet nominees to key public offices, including Commissions such as the JSC. This is part of the Legislature's oversight mandate. The Committee then gave the nominee and the LSK the option of withdrawing from the confirmation process. Mr. Ahmednasir decided of his own volition, with the agreement of the LSK, to subject himself to the vetting process. Mrs. Mwangangi, the other LSK nominee, did not raise any objection to her being vetted. The Committee subsequently proceeded to consider the two nominees, on their respective individual merit.
6. The Committee made the following observations on the two nominees, respectively:-

Mrs. Florence Mwangangi

A holder of a Bachelor's Degree in Law (LLB) from the University of Nairobi, Mrs. Mwangangi has been in private legal practice since 1992, running her own firm in styled as F. Mwangangi & Co. Advocates. She has served in the Law Reporting Council between 2007 and 2009, and further as a member of the LSK Council and the society's Ethics Committee between 2005 and 2007. The nominee has further



attended educational seminars both locally and internationally in diverse fields. The committee found that the nominee meets the basic requirements of academic and professional competence, and apparent political non-partisanship.

IMPORTANT: The Committee noted that the issue of a litigating advocate sitting on the JSC while remaining in active legal practice would raise definite serious conflict of interest. There was real potential of intimidation and undue influence should such a member appear before a judicial officer that is by all intents and purposes and employee of the JSC. This issue was further well ventilated in submissions made to the Committee by at least two senior practitioners of law. Mrs. Mwangangi remains in active legal practice.

Mr. Ahmednasir Abdullahi

An advocate of the High Court of Kenya since 1991, Mr. Ahmednasir Abdullahi holds a Master of Laws (LLM) Degree from Cornell University and has previously taught law at the University of Nairobi besides chairing the pioneer Kenya Anti-Corruption Advisory Board, from which he resigned in controversial circumstances. The nominee was the Chairman of the Law Society of Kenya between 2003 and 2004. He is a Director of the First Community Bank in addition to being a publisher and Editor-in-Chief of the Nairobi Law Monthly magazine. The nominee is also a columnist with the Sunday Nation newspaper. The Committee found that this nominee met the basic requirements of academic and professional competence, and apparent political non-partisanship.

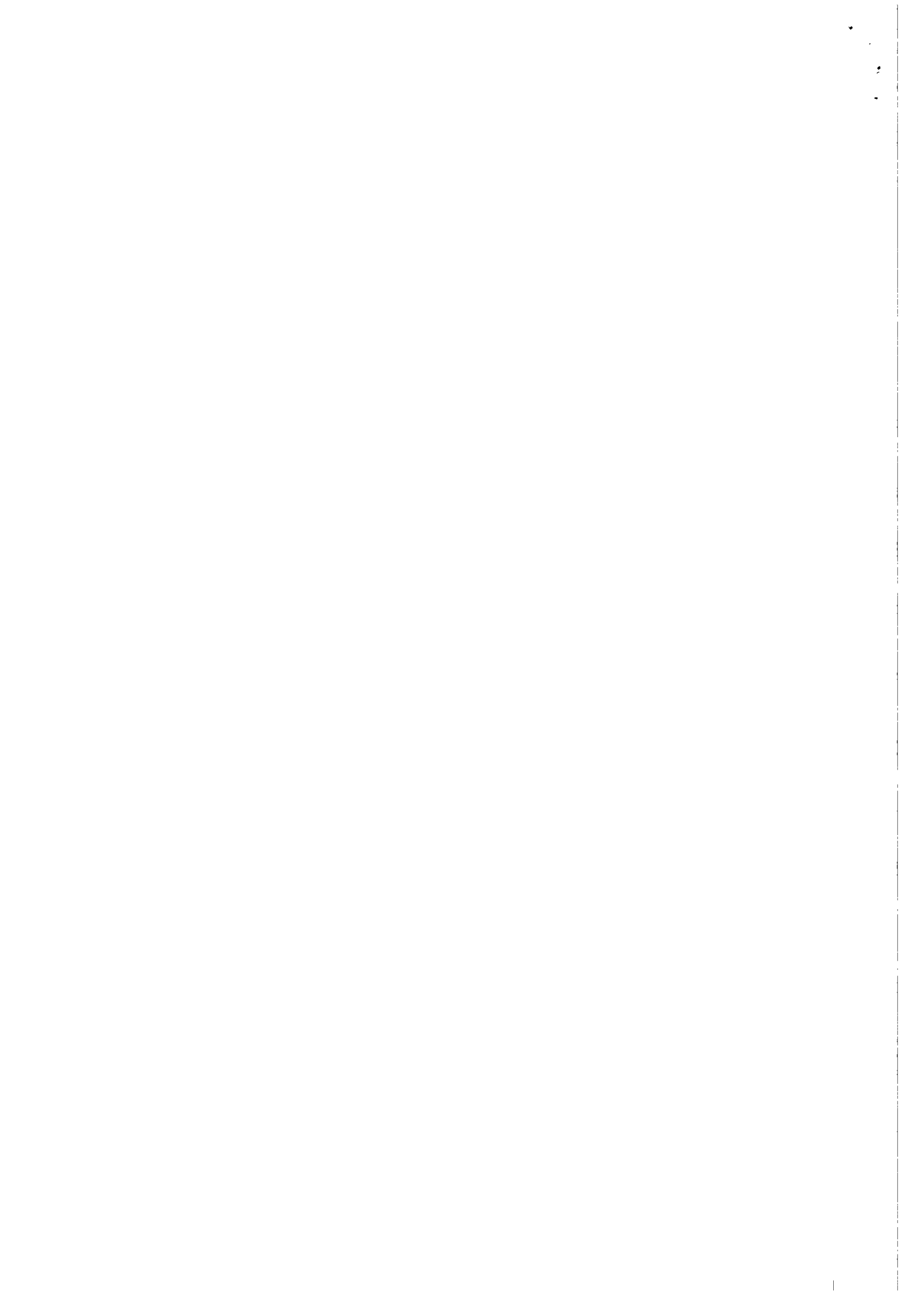
DISCLOSURE

Several issues have emerged regarding this nominee that the Committee wishes to bring to the attention of the House:



1. The issue of an active litigating advocate serving on the JSC applies to Mr. Ahmednasir in similar manner as it does to Mrs. Mwangangi.
2. The Committee received two formal complaints against Mr. Ahmednasir that touch on his integrity and moral probity.
 - a) The Committee received a letter from the National Bank of Kenya accusing Mr. Ahmednasir of violation of professional confidentiality rules relating to obtaining documents from the Bank in suspicious circumstances. The committee considered this matter at length, and even invited the nominee back for further clarification after receiving oral presentations from the Bank's legal department. In doing this, the committee inquired into whether this matter raised a question of integrity in terms of Chapter Six of the Constitution that speaks to the subject of leadership and integrity.
 - b) The Committee subsequently received an affidavit also raising questions on the integrity of Mr. Ahmednasir sworn by Ms. Emily Wangari Kamau of the State Law Office, which affidavit was based on a letter authored by Mr. Dan Ameyo in his then capacity as Postmaster General of the Kenya Postal Corporation. The affidavit alleged that the nominee had attempted to extort Kshs 63 million from the Corporation in inflated legal fees. The Committee recalled the nominee as well as Ms. Kamau and Mr. Dan Ameyo to a meeting held on November 24, 2010. The Committee interrogated the three persons on the allegations made. Again the Committee inquired into whether this matter contravened Chapter 6 of the Constitution.

Even as it considered these allegations, the Committee was unanimous that Mr. Ahmednasir would add value to the JSC because of his passion and strong views. But the Committee also noted that while a conclusive determination could not be



made in the limited time available, the matter could not be ignored and should be brought to the attention of the House and the public.

Court of Appeal

The Registrar of the High Court forwarded the name of Justice Omolo Riaga R.S. as the Court's representatives vide their letter dated October 22nd, 2010. The judge had been elected by nine out of ten Judges of the Court of Appeal at an election process supervised by the Interim Independent Boundaries Review Commission.

Justice Omolo Riaga R.S: The nominee holds an LLB from the University of Nairobi and has over 35 years of experience in the legal profession. The nominee serves as a Court of Appeal Judge and has been a member of the Judicial Service Commission since 2003. The Committee considered this nominee at a meeting held on October 27th, 2010 and found the nominee qualified on the required grounds of academic and professional competence, moral probity and political non-partisanship. He was competent to represent the Court of Appeal at the Judicial Service Commission.

Public Service Commission The Public Service Commission nominated Mr. Titus Gatere vide its letter dated October 27th, 2010 to represent it on the Judicial Service Commission in accordance with the provisions Part 5, Section 20(4) of the Sixth Schedule which provides that the person nominated by the Public Service Commission established under Section 106 of the former constitution to continue to serve on the Judicial Service Commission until the new Public Service Commission is established. The Committee considered this nominee at a meeting held on November 24th, 2010.

Mr. Titus J.K. Gatere: The nominee holds a Master of Science in Management from Arthur D. Little Institute of Management Education, Boston, USA. He has been the Chairman of the Public Service Commission since 2005 and has been representing



the Commission in the Judicial Service Commission since then. He has also been a Member, National Audit Commission and is a member of the African Association of Public Administration and Management –Kenya and Continental Chapter. The nominee worked in various capacities at the Kenya Institute of Administration culminating in him serving as the Director and Chief Executive of the Institution between 1996 and 2005. The nominee serves as a chairman of a Board of Directors of a secondary school and is a patron to many community projects in his rural home. The Committee found Mr. Gatere duly qualified on the basic evaluation grounds of academic qualification, professional competence, moral probity and apparent political non-partisanship.

Office of the President

The office of the President presented the names of Bishop Antony Muheria and Prof Christine Kevin Abungu Mango vide their letter dated 16th November, 2010.

a) Bishop Antony Muheria Ngugi

The nominee is a holder of a Bachelor of Science (Civil Engineering) from the University of Nairobi, and is the Bishop of the Catholic Diocese of Kitui. He has undertaken undergraduate studies in Theology in Rome, Licentiate in Sacred Theology (masters) ,University of Holy Cross, Rome and a Doctorate in Systematic Theology ,university of Holy Cross He also serves as the Chairman ,Finance Commission, Kenya Episcopal Conference in addition to being the Vice-Chairman, Liturgical Commission, Kenya Episcopal Conference. The Committee considered this nominee at a meeting held on November 24th, 2010 and found the nominee qualified on the required grounds of academic and professional competence, moral probity and political non-partisanship.



b) Prof.Christine Kevin Abungu Mango

The nominee holds a PhD in Entomology from the University of Nairobi and an M.Sc. in Parasitology from Columbia University, New York, NY. She has been a Board Member of the Kenya Sugar Board since 2008 and is involved in a charitable organization focusing on widows, orphans and vulnerable Children in Western Kenya. The nominee served as Member of Parliament from 2002-2007 representing Butula Constituency on a Narc Ticket. In 2005, the nominee joined Orange Democratic party as a founder member. The nominee has published over twenty (20) publications in referred scientific journals and has also attended numerous workshops and seminars locally and internationally. The nominee holds the following professional

- A member of the East African Society of Parasitologists
- Member of the National Council for Science and Technology
- Reviewer of scientific manuscripts for scholarly journals
- External examiner for various Universities
- Founder member of Western College of Technology (WECO)
- Founder member of Kenya Women Finance Trust

The Committee considered this nominee at a meeting held on November 24th, 2010 and found the nominee duly qualified on the evaluation grounds of academic qualification, professional competence, moral probity and apparent political non-partisanship.

Committee Recommendations

1. Pursuant to Article 250 (of the Constitution), the Committee recommends as follows:
 - i) **Justice Omolo Riaga R.S:** Be approved as representative of the Court of Appeal



- ii) **Mrs. Catherine Muoti Mwangangi:** Be approved, on condition that she is precluded from litigation while serving on the JSC.
 - iii) **Mr. Titus J,K Gatere:** Be confirmed representative of the Public Service Commission
 - iv) **Bishop Antony Muheria:** Be Confirmed to represent the public.
 - v) **Prof. Christine Kevin Abungu Mango:** Be Confirmed to represent the public.
 - vi) **Mr. Ahmednasir Abdullahi:** **Approved by four members, with four dissenting.** Recommended to be confirmed, also be on condition that he is precluded from litigation while serving on the Judicial Service Commission.
2. That, this House urges the Attorney-General to propose legislation to provide for vetting of all appointments to senior positions by the National Assembly.
3. That, legislation be considered under Articles 75 and 80(d) of the Constitution to address the question of conflict of interest for practicing advocates who serve on the Judicial Service Commission.



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