

PARLIAMENT OF KENYA
THE NATIONAL ASSEMBLY

THE HANSARD

Tuesday, 4th May 2021

The House met at 2.30 p.m.

[The Speaker (Hon. Justin Muturi) in the Chair]

PRAYERS

COMMUNICATION FROM THE CHAIR

ADDRESS BY HER EXCELLENCY HON. SAMIA SULUHU HASSAN

Hon. Speaker: Hon. Members, take your seats! Take your seat or you freeze where you are!

Hon. Members, the Speakers of the Houses of Parliament have received a request from the Office of the President to allow Her Excellency, Hon. Samia Suluhu Hassan, President of the United Republic of Tanzania, to address a Joint Sitting of the Houses of Parliament on Wednesday, 5th May 2021.

(Applause)

Her Excellency President Samia Suluhu Hassan is in the country for a two-day state visit. Hon. Members, pursuant to the provisions of the National Assembly Standing Order No. 25, I wish to inform the House that following consultations between myself and the Speaker of the Senate, I have acceded to the request for a Joint Sitting. In this respect, I wish to invite all Hon. Members of the National Assembly to that Joint Sitting of the Houses of Parliament which will be held tomorrow, Wednesday, 5th May 2021, in the National Assembly Chamber, Main Parliament Buildings, at 2.30 pm, for purposes of an Address by Her Excellency President Samia Suluhu Hassan.

In line with the Ministry of Health guidelines on COVID-19, the total available seats for occupancy in the Chamber will be 112, whereby 24 have been allocated to Members of the Senate while 88 will be occupied by Members of the National Assembly on a first-come basis save for the seats reserved for the House Leadership. In this regard, Hon. Members shall be duly informed of the sitting arrangements.

Further, all Members are hereby advised to remove all their motor vehicles from the parking at the courtyard commonly referred to as the Minister's Parking by the end of the day today. Hon. Members, as you are aware, as per the Calendar of the House, the House is not scheduled to sit for the ordinary sittings on Wednesday, 5th May 2021. Therefore, the National

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Assembly will adjourn immediately after the Address by Her Excellency, President Samia Suluhu Hassan.

I thank you, Hon. Members.

Hon. Rozaah Buyu, what is it you want to say? Say what you have to say. You can say it from here.

STATEMENT

CONGRATULATORY MESSAGE TO HER EXCELLENCY HON. SAMIA SULUHU HASSAN

Hon. (Ms.) Rozaah Buyu (Kisumu CWR, ODM): Thank you, Hon. Speaker.

Pursuant to the provisions of Standing Order No. 43, I wish to convey a message of congratulations to Her Excellency, Hon. Samia Suluhu Hassan, President of the United Republic of Tanzania.

(Applause)

Hon. Speaker, on behalf of Kenya Women Parliamentarians Association (KEWOPA), of which I am the Vice-Chairperson, and on behalf of the women of Kenya at large, I wish to congratulate Her Excellency Hon. Samia Suluhu Hassan on her swearing-in as the first female President and as the sixth President of the United Republic of Tanzania.

Indeed, she is a great source of inspiration and is flying the flag high on behalf of female leaders all over Africa and the world, where women make up only about 5.9 per cent of Heads of State. President Samia is currently the only woman Head of State in the East African Community (EAC). We also commend and appreciate the respect and honour Her Excellency Hon. Samia Suluhu Hassan has accorded our country Kenya by making it the venue of her second official visit, in her capacity as the President of the United Republic of Tanzania.

Hon. Speaker, KEWOPA would also like to applaud Tanzania for ensuring a smooth and peaceful transition of power that has enabled Her Excellency Hon. Samia Hassan take over the reins of power, following the demise of His Excellency, the late President John Joseph Pombe Magufuli. We note with pride that prior to this, President Samia Hassan had served as the Vice-President of the United Republic of Tanzania for a five-year term under the late President Magufuli, and would have served in the same capacity for another five-year term following the former President's re-election in October 2020. Having started her political career in the early 2000s, Her Excellency President Samia had also served in the Zanzibar House of Representatives in various ministerial positions. She is therefore very capable and well prepared for the task ahead as she serves for the remainder of the late President Magufuli's term. We wish her well.

Hon. Speaker, Kenya remains greatly challenged with regard to women's ascendancy into public and political leadership positions. Over the past decade, countries in the East African region have overtaken Kenya on all measures of gender equality indices. Currently, our Parliament has only about 21 per cent women representation, trailing far behind most of the countries in the region. Some African countries have already attained the critical mass threshold of 33 per cent of women representation in their legislatures. Tanzania's Parliament, which is at 36.7 per cent female representation, is now being led by a woman President.

However, we note that since the coming into effect of the Constitution in Kenya 2010, there have been some gains, with women having managed to secure a number of high-level positions in public offices and in the various arms of Government. Some good examples include

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the Cabinet, where we have seven out of 22 Cabinet Secretaries being female, and in the Judiciary, where we have a woman serving as the Deputy Chief Justice, and another in the Supreme Court and about 50 per cent of Judges of the High Court being women. Just recently, the Judicial Service Commission (JSC) nominated Hon. Lady Justice Martha Koome as Kenya's next Chief Justice which, if approved, will see one arm of Government led by a woman. It is our hope that the women in these positions will make a transformative difference in engendering the reforms in their respective institutions. It is also our hope that having women in leadership positions will indeed be of benefit to the women of Kenya and the general populace. As I conclude, Hon. Speaker, in the words of Hillary Clinton, I quote:

"To all the little girls who are watching this, never doubt that you are valuable and powerful, deserving of every chance and opportunity in the world to pursue and achieve your own dreams."

Hon. Speaker, it is my hope that young girls in Tanzania and the larger East African region will draw inspiration from the leadership of Her Excellency President Samia and aspire to be great leaders of our countries in the near future.

I thank you, Hon. Speaker.

Hon. Speaker: The indication is that she was going to speak for one minute so that a few other Members could speak. That opportunity is now over. We will now deal with more serious stuff.

(Loud consultations)

Order Members! You know she was supposed to speak for one minute so that about three other Members could speak. We all welcome Her Excellency the President Samia Suluhu Hassan to Kenya and specifically to Parliament tomorrow.

Hon. Members, we are still at Order No.2. Now, there is this other communication.

COMMUNICATION FROM THE CHAIR

CONSIDERED RULING: THE CONSTITUTION OF KENYA (AMENDMENT) BILL (A BILL TO AMEND THE CONSTITUTION BY POPULAR INITIATIVE)

Hon. Speaker: Hon. Members, you will recall that during the Afternoon Sitting of the Special Sitting of the House on Wednesday, 28th April, 2021, the Member for Garissa Township, Hon. Aden Duale, rose on a point of order during debate on the Second Reading of the Constitution of Kenya (Amendment) Bill, 2020, which seeks to amend the Constitution of Kenya by popular initiative. The Hon. Member sought the direction of the Speaker on a number of issues in relation to the Bill which he termed as "grey areas", including the value of the public participation exercise conducted on the Bill by the Departmental Committee on Justice and Legal Affairs and jointly with the Senate Standing Committee on Justice, Legal Affairs and Human Rights, and the weight to be placed on the submissions received by the Committee, amongst other issues.

Hon. Members, the Member for Ugenya, Hon. David Ochieng', also sought direction on the role of the House in dealing with a Bill to amend the Constitution by popular initiative and whether, and the extent to which, the House may amend the Bill. Additionally, he sought

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guidance on whether the Bill before the House fell within the four corners of Article 257 of the Constitution or is what he referred to as an “Executive initiative” on account of the promoters seemingly being in Government and the moving of the Bill having been deputed to the Leader of the Majority Party by its promoters.

Hon. Ochieng further queried whether proceeding with consideration of the Bill whilst cases challenging its constitutionality are pending judgment before the courts would amount to imprudent use of parliamentary time and public resources in the event the court invalidated the entire process and the constitutionality of the Schedule to the Bill which contains the proposed additional seventy (70) constituencies and their delimitation.

Hon. Members, during the said Sitting, several other Members speaking on points of order, raised other constitutional and procedural concerns generally revolving around the form and nature of the Bill; the processing of the Bill in the county assemblies and Parliament; the effect of the pending court cases on the consideration of the Bill in Parliament; the attendant voting thresholds and the measures put in place to facilitate Members to participate in the consideration and voting of the Bill given the COVID-19 Pandemic. The Members who spoke on these matters include Hon. Dr. Robert Pukose, Hon. Johana Ng’eno, Hon. Kimani Ichung’wah, Hon. Jared Okello, Hon. (Ms.) Millie Odhiambo, Hon. David Sankok, Hon. Caleb Kositany and Hon. Peter Kaluma. Also contributing to the issues were Hon. Ronald Tonui, Hon. Vincent Kemosi, Hon. Alois Lentoimaga, Hon. (Dr.) Otiende Amollo and Hon. T.J. Kajwang’, among others.

Hon. Members, I must note that the concerns raised by Members are weighty and indicative of the importance of the Bill currently before the House, being the first of its kind to get to this stage and seeking extensive and radical changes to the existing constitutional order. Having keenly reviewed the concerns, I have distilled the following five issues as requiring my guidance—

(1) Whether the Constitution of Kenya (Amendment) Bill, 2020, which is promoted by the Building Bridges Initiative (BBI), is a popular initiative under Article 257 of the Constitution and whether the procedure outlined under that Article was followed by the county assemblies and the correct threshold met before the introduction of the Bill in Parliament;

(2) Whether the Bill upsets the basic structure of the Constitution; and whether it contains unconstitutional constitutional amendments;

(3) Whether a Bill to amend the Constitution by popular initiative can be amended and what is the value and intention of the public participation conducted by the Joint Committee;

(4) What is the effect of the pending court cases on the consideration of the Bill currently before the House; and,

(5) What is the procedure applicable to the consideration of a Bill to amend the Constitution by popular initiative in the House and the voting threshold.

Let me resume my seat to allow those Members to make their way in very quickly. This Communication is long. You are likely to stand for a long time. The Members who are loitering at the back there, make your way in quickly. If you intend to take a seat, do it.

(Several Members walked into the Chamber)

Who are those Members who cannot sit? Instead of sitting, they are bending.

Hon. Members, I resume the Communication. At the outset, I must note that the Report of the Joint Committee as tabled by the Chairperson of the Departmental Committee on Justice

and Legal Affairs delves ably into all the matters raised to a great extent. It outlines the theoretical background underpinning the issues raised, as well as the legal justifications and the unique history of our constitution-making process. The two Committees of Parliament acquainted themselves in a highly commendable manner and competently discharged their crucial role of interrogating the proposals in the Bill, facilitating the involvement of the public in the legislative work of Parliament and making recommendations for further action by the two Houses.

I must also note that the process of amending the Constitution by popular initiative in terms of Article 257 of the Constitution is one which espouses the sovereign power of the people of Kenya under Article 1 of the Constitution. It is one which begins from the people who are allowed to propose amendments supported by at least one million registered voters. Fittingly, the process also ends in the hands of the people who approve the proposed amendments through a referendum, particularly in the event that a House of Parliament fails to pass it. This is a process that is people-driven where even this House or indeed its rules cannot stifle or bar the exercise of the sovereign power of the people.

(Applause)

Hon. Members, the first issue is with regard to the question of whether the Bill promoted by the BBI is a popular initiative under Article 257 of the Constitution and whether the procedure outlined under that Article was followed by county assemblies, and the correct threshold met before its introduction in Parliament. In addressing this question, I note that when one compares the amendment procedures prescribed by Articles 256 and 257 of the Constitution, it is vividly clear that a Bill to amend the Constitution by parliamentary initiative is introduced in Parliament by a Member or committee of this House in accordance with the requirements of Article 109(5) of the Constitution. I also note that the joint Report of the Committees also went to great lengths to distinguish between a Bill to amend the Constitution under Article 256 of the Constitution by parliamentary initiative and a Bill to amend the Constitution under Article 257 of the Constitution which is by popular initiative. Hence, I will not delve into this. This is contained in the joint Report in paragraphs 313 to 338.

Hon. Members, in answering the concerns raised by the Members on the nature of the Bill under consideration by the House and in particular whether it is a popular initiative, I will restrict my interpretation to whether the Bill before us followed the provisions of Article 257 of the Constitution by examining the Bill against its conformity with the following five parameters—

First, was the amendment of the Constitution proposed by a popular initiative signed by at least one million registered voters as required under Article 257(1) of the Constitution?

Hon. Members, you will recall that the Independent Electoral and Boundaries Commission (IEBC) confirmed to the country that this requirement was complied with.

Second, was the popular initiative for an amendment of the Constitution in the form of a general suggestion or a formulated Bill as required under Article 257(2) of the Constitution?

As you are aware, the IEBC also confirmed to the whole world that it had received the popular initiative for an amendment of the Constitution in the form of a formulated Bill under Article 257(2) of the Constitution.

Third, did the promoters of the popular initiative deliver the draft Bill and the supporting signatures to the IEBC which verified that the initiative was supported by at least one million registered voters as required under Article 257(4) of the Constitution?

As you are also aware, the IEBC confirmed that it had received the draft Bill and verified that the initiative was supported by at least one million registered voters.

Fourth, did the IEBC submit the draft Bill to each county assembly for consideration within three months of the date it was submitted by the Commission as required by Article 257(5) of the Constitution?

Hon. Members, as you are further aware, the IEBC confirmed that it had submitted the draft Bill to each county assembly for consideration.

Lastly, did the Speakers of the two Houses of Parliament receive copies of the draft Bill from the county assemblies with a certificate that each county assembly had approved it in accordance with Article 257(6) of the Constitution?

You will recall that I communicated to this House on Thursday, 25th February 2021, that the Speakers of Parliament had received returns from the county assemblies with 42 county assemblies having approved the draft Bill as at that date. Thereafter, the draft Bill was subsequently introduced in the House and read a First Time on Thursday, 4th March 2021. From an examination of the Bill against the questions that I have just highlighted, one cannot arrive at another definition or indeed confuse the nature of the Bill with any other Bill other than the one proposed under Article 257 of the Constitution.

The Members also raised the concern that some of the Members of Parliament may have been involved in collection of views of the public through the Building Bridges Taskforce or participated as promoters of the Bill. As you are indeed aware, the Member for Suna East, Hon. Junet Mohamed, is listed as one of the promoters of the Bill in the joint Report. Additionally, I am also aware that several Members of this House signed to support the popular initiative that was submitted to the IEBC. However, the question of whether the Bill before us is a popular initiative or an “Executive initiative” as some of the Members have decided to label it does not arise. Any registered voter, be it a Member of this House or even the President, is at liberty to sign and support a popular initiative in terms of Article 257(1) of the Constitution. There is no bar. The Constitution does not place any restriction with regard to the age, gender, tribe, profession or status of a promoter of a Bill to amend the Constitution by popular initiative, save that they must be registered voters. It is, therefore, my considered opinion that what determines whether a Bill is a Bill by popular initiative is whether the Bill takes the shape, form and follows the procedure under Article 257 of the Constitution.

In addition, Hon. Members, looking at the Bill under consideration by this House, the enacting formula clearly reads: “A Bill for An Act to amend the Constitution by popular initiative.” It further reads “Enacted by the people of Kenya.” This further settles the fact that the Bill before us is a Bill to amend the Constitution by popular initiative and is to be enacted by the people of Kenya and not Parliament. Indeed, it is also worth noting that the Joint Committee did also consider this question and in paragraph 337 of its Report, the Committee found that the Bill is one by popular initiative under Article 257 of the Constitution.

With these facts, Hon. Members, the Bill before this House is evidently one which is a Bill to amend the Constitution by popular initiative in terms of Article 257 of the Constitution.

Hon. Members, Article 257 (5) and (6) of the Constitution provide for the submission to, and consideration by county assemblies of a constitutional amendment Bill proposed through popular initiative. The provisions state as follows:

“257. (5) If the Independent Electoral and Boundaries Commission is satisfied that the initiative meets the requirements of this Article, the Commission shall submit the

draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission.

(6) If a county assembly approves the draft Bill within three months after the date it was submitted by the Commission, the speaker of the county assembly shall deliver a copy of the draft Bill jointly to the Speakers of the two Houses of Parliament with a certificate that the county assembly has approved it.”

Hon. Members, the Constitution expects county assemblies to consider and deliver to Parliament, their decisions on a draft Bill within three months after receiving the Bill from the IEBC. Records indicate that the IEBC submitted the draft Bill to county assemblies between 27th January 2021 and 2nd February 2021. The Constitution requires county assemblies to consider the draft Bill within three months after the date it is submitted by the Commission, and that the speakers of the county assemblies shall deliver a copy of the draft Bill to the Speakers of the two Houses of Parliament with a certificate that the county assembly has approved it, in the case of an approval. Further, to be introduced in Parliament, a draft Bill must be approved by a majority of the county assemblies, being 24 county assemblies.

Hon. Members, the question as to whether the threshold was met in the county assemblies relates to the reported passage of “multiple” versions of the Bill. Indeed, the Report of the Committee has extensively tackled the matter of the errors. I would, therefore, not wish to overstate the matter any further save to say that by way of Communication from the Chair issued between February and March 2021, I regularly updated the House on the progress of submissions of certificates of approval from county assemblies.

From the last update of 4th March 2021, the total number of county assemblies that had approved the draft Constitution of Kenya (Amendment) Bill, 2020 was 42 whereas two had rejected the Bill. Based on this fact, the House Business Committee scheduled the Bill for introduction in the House, which was done on 4th March, 2021.

Hon. Members, in construing whether the majority threshold was attained, the certificates and the accompanying Bills were considered on their *prima facie* basis as the documents expected to be submitted by the county assemblies. Indeed, deriving the practice in law, Section 83 of the Evidence Act (Cap. 80 Laws of Kenya) states as follows with respect to certified documents—

“83. Certified documents—

(1) The court shall presume to be genuine every document purporting to be a certificate, certified copy or other document which is—

- (a) declared by law to be admissible as evidence of any particular fact;
- (b) substantially in the form and purporting to be executed in the manner directed by law in that behalf; and,
- (c) purporting to be duly certified by a public officer.

(2) The court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in such document.”

Hon. Members, I am not aware of any concern regarding the validity of the certificates received from the county assemblies. It is, therefore, evident that the draft Bill obtained the constitutional threshold for passage in the county assemblies and is thus properly before the House.

Hon. Members, a secondary issue did arise from the submission of the copies of the Bills by the county assemblies with regard to the operative version of the Bill in light of reported

circulation of different versions and errors in the Bill. On the issue of the errors, errors noted during the joint consideration of the Bill by the two Committees of the Houses of Parliament, I agree with the Committees' findings that although Parliament may, in exercise of legislative power under Article 94 of the Constitution, take steps to correct noted errors, this may pave way for new substantive insertions that may ultimately affect the form and substance of the Bill. We may then run the risk of eventually overriding the principal intentions of the promoters of the Bill and, therefore, offending the whole idea of an amendment of the Constitution by popular initiative. In any case, the errors have been observed to be inadvertent and mostly typographical or cross-referential and that the text of the Bill is sufficiently clear as to what it intends to amend. The errors were noted in Clauses 13 (b), 48, 51(a) and paragraph 1(1) of the Second Schedule.

With the public debate that has raged on regarding this matter, and the explanations given by the originators of the Bill, any person interested in the matter surely understands the intentions of the promoters notwithstanding the errors. The House will therefore continue to consider the Bill that was introduced and committed to the Justice and Legal Affairs Committee (JLAC) as submitted by the IEBC.

Hon. Members, the second issue was on whether the provisions of the Bill upset the basic structure of the Constitution and whether it contains unconstitutional constitutional amendments. I note that the Committee has, at paragraphs 369 to 379 of its Report, also exhaustively interrogated the constitutional propriety of the Bill. As noted by the Committee, the premise behind the "basic structure theory" that is said to preclude the making of certain amendments to a constitution is the centrality of the provisions targeted for amendment to the sovereign will of the people who give themselves a constitution for posterity. The theory is majorly derived from decisions made by the Supreme Court of India on amendments made to that country's Constitution by the Parliament of India.

Hon. Members will appreciate that the constitutional history and the text of the Constitution of Kenya and that of India are markedly different. A key departure between the two Constitutions is the manner in which they provide for their amendment. Whereas the Indian Constitution provides for amendment of the Constitution by Parliament only, the Constitution of Kenya provides for amendment by either parliamentary initiative or by popular initiative.

Further, Hon. Members, the Indian Constitution does not expressly protect any part of the Constitution from being amended. Conversely, Article 255 of the Constitution of Kenya outlines the additional requirement of submission of a Bill for approval at a national referendum if the Bill seeks to amend any of the matters listed in the Article.

Hon. Members, when comparing our jurisdiction with the United States of America, it is notable that Article V of the Constitution of the United States of America provides as follow:

"The Congress, whenever two-thirds of both Houses deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of several states, shall call a convention for proposing amendments which, in either case, shall be valid to all intents and purposes as part of this Constitution when ratified by legislatures of three-fourths of the several states, or by conventions in three-fourths thereof as one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the First and Fourth Clauses in the Ninth Section of the First Article and that no state, without its consent shall be deprived of its equal suffrage in the Senate."

From the foregoing, Hon. Members, it is notable that the US Congress can propose amendment on its own Motion or upon application by the legislatures of several states. It is also worth noting that the US Constitution may also have what is termed as basic structure of the Constitution that may not be amended. Indeed, Article V of the US Constitution provides that no amendment in any manner shall affect the First and Fourth Clauses in the Ninth Section of the First Article and that no, state without its consent, shall be deprived of its equal suffrage in the Senate. I am sure most Members will appreciate that it is two Members from each state.

Hon. Members, you will recall that the making of our Constitution benefited greatly from the Constitution of the Republic of South Africa. Section 74 of the Constitution of the Republic of South Africa provides the procedure for amending the Constitution as follows:

“Bills amending the Constitution

74 (1) Section 1 and this subsection may be amended by a Bill passed by–

(a) the National Assembly, with a supporting vote of at least 75 per cent of its Members; and

(b) the National Council of Provinces with a supporting vote of at least six provinces.

(2) Chapter Two may be amended by a Bill passed by–

(a) the National Assembly, with a supporting vote of at least two-thirds of its Members and

(b) the National Council of Provinces with a supporting vote of at least six provinces.

(3) Any other provision of the Constitution may be amended by a Bill passed –

(a) by the National Assembly, with a supporting vote of at least two-thirds of its Members; and

(b) also by the National Council of Provinces with a supporting vote of at least six provinces, if the amendment:

(i) relates to a matter that affects the Council;

(ii) alters provincial boundaries, powers, functions or institutions; or

(iii) amends a provision that deals specifically with a provincial matter.

(4) A Bill amending the Constitution may not include provisions other than constitutional amendments and matters connected with the amendments.

(5) At least 30 days before a Bill amending the Constitution is introduced in terms of Section 73(2), the person or committee intending to introduce the Bill must:

(a) publish in the national Government Gazette, and in accordance with the rules and orders of the National Assembly, particulars of the proposed amendment for public comment;

(b) submit, in accordance with the rules and orders of the Assembly, those particulars of the provincial legislatures for their views; and

(c) submit, in accordance with the rules and orders of the National Council of Provinces, those particulars to the Council for public debate, if the proposed amendment is not an amendment that is required to be passed by the Council.

(6) When a Bill amending the Constitution is introduced, the person or Committee introducing the Bill must submit any written comments received from the public and the provincial legislatures:

(a) to the Speaker for tabling in the National Assembly; and,

- (b) in respect to amendments referred to in (1), (2) or (3) (b), to the Chairperson of the Council of Provinces for tabling in the Council.
- (7) A Bill amending the Constitution may not be put to the vote in the National Assembly within 30 days of –
- (a) its introduction, if the Assembly is sitting and the Bill is introduced; or
 - (b) its tabling in the Assembly, if the Assembly is in recess when the Bill is introduced.
- (8) If a Bill referred to in subsection (3)(b) or any part of the Bill concerns only a specific province or provinces, the National Council of Provinces may not pass the Bill or the relevant part unless it has been approved by the legislature or legislatures or province or provinces concerned.
- (9) A Bill amending the Constitution that has been passed by the National Assembly, and where applicable by the National Council of Provinces, must be referred to the President for assent.”

Hon. Members, unlike our Constitution, Section 74 of the Constitution of the Republic of South Africa does not provide for amendment of the Constitution through any other procedure other than through its National Assembly and the National Council of Provinces. It also does not contain a provision for submission of the amendments to a referendum or amendment by popular initiative.

In my view, Article 255 (1) of the Constitution of Kenya expressly provides what constitutes its basic structure and provides a safeguard against arbitrary and whimsical amendment of the matters it lists without submission of the amendment to the people for approval. Indeed, the preamble to the Constitution speaks to matters listed under Article 255 (1) of the Constitution as it provides that:

“We, the people of Kenya...

RECOGNISING the aspirations of all Kenyans for a government based on essential values of human rights, equity, freedom, democracy, social justice and the rule of law: EXERCISING our sovereign and inalienable rights to determine the form of governance of our country and having participated fully in the making of this Constitution.”

As such, I am of the considered opinion that a Bill may be introduced to amend any provision of the Constitution, and that such a Bill may be considered and passed by the House subject to its submission for approval by the people at a referendum, if it touches on any matter listed in Article 255 (1) of the Constitution.

As I have guided in the preceding portion of this Communication and as noted by the Report of the Committee, the Bill before the House does, indeed, touch on various matters listed under Article 255 (1) of the Constitution. This does not invalidate the proposals but merely subjects them to submission to a referendum.

The discussion on the basic structure of the Constitution leads us to the question of whether the Bill contains unconstitutional constitutional amendments. As you are aware, Article 3 of the Constitution (Defence of the Constitution) and Article 10 of the Constitution (National Values and Principles of Governance) place an abiding obligation on the Speaker to respect, uphold and defend the Constitution. As an extension of this constitutional imperative, Standing Order 47 (3) of the National Assembly Standing Orders requires the Speaker to, among other considerations, assess the constitutionality or otherwise of business proposed for introduction to the House. Standing Order No.47 (3) provides:

“(3) If the Speaker is of the opinion that any proposed Motion:

(a) is one which infringes, or the debate on which is likely to infringe, any of these Standing Orders; and,

(b) is contrary to the Constitution or an Act of Parliament without expressly proposing an appropriate amendment to the Constitution or to the Act of Parliament;

(c) ;

(d) ;

(e) ; or

(f) ;

the Speaker may direct either that the Motion is inadmissible, or that notice of it cannot be given without such alteration as the Speaker may approve or that the motion be referred to the relevant Committee of the Assembly, pursuant to Article 114 (2) of the Constitution.”

Hon. Members, I note that Paragraph 557 of the Report isolates the Second Schedule of the Bill which, among other things, allocates the proposed 70 additional constituencies among the 47 counties terming it as unconstitutional for its “attempt to oust the application of Article 89(4) of the Constitution, as proposed in the Second Schedule of the Bill” without expressly amending Article 89 and its alleged lack of anchoring in a substantive provision of the Bill.

Hon. Members, Paragraph 617 of the Report additionally flags the proposed amendment at Clause 43 of the Bill empowering the Judicial Service Commission to “receive complaints against judges, investigate and discipline judges by warning, reprimanding or suspending a judge” as a claw-back on the independence of the Judiciary and judicial officers, terming it as “unconstitutional” and cryptically requiring its “urgent re-consideration at the appropriate time.”

Hon. Members, apart from these two provisions expressly cited in the Report on account of their apparent unconstitutionality, several Members also raised concerns with the following clauses of the Bill questioning their constitutionality:

(a) Clause 29 of the Bill which allows for the appointment of the Cabinet from Members of the National Assembly;

(b) Clause 44 of the Bill on the establishment of the Office of the Judiciary Ombudsman and its effect on the independence of the Judiciary;

(c) Clause 52 of the Bill which establishes the Constituencies Development Fund; and

(d) Clause 61 of the Bill which reconstitutes the Salaries and Remuneration Commission; and Clauses 67 and 68 of the Bill which touch on the functions and powers of the National Police Service and the National Police Service Commission.

Hon. Members, Article 109 of the Constitution outlines the manner in which Parliament exercises its legislative powers with regard to ordinary legislation, and I quote:

“(1) Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.

(2) Any Bill may originate in the National Assembly.

(3) A Bill not concerning county government is considered only in the National Assembly, and passed in accordance with Article 122 and the Standing Orders of the Assembly.

(4) A Bill concerning county government may originate in the National Assembly or the Senate, and is passed in accordance with Articles 110 to 113, Articles 122 and 123 and the Standing Orders of the Houses.

(5) A Bill may be introduced by any member or committee of the relevant House of Parliament, but a money Bill may be introduced only in the National Assembly in accordance with Article 114.”

Hon. Members, the Standing Orders of the National Assembly prescribe, in detail, the procedure to be followed with regard to the initiation of legislative proposals, pre-publication scrutiny of the proposals, publication of Bills, introduction of the Bills in the House and their consideration, including amendment, passage and transmission to the Senate, where applicable. As Members will recall, I have previously applied Standing Order No. 47(3) during consideration of ordinary legislation and other business before the House to exclude specific portions of the legislation or other business found to offend the Constitution or existing laws from debate. The procedure applying to ordinary legislation and other business, however, does not extend to a Bill to amend the Constitution.

Hon. Members, Articles 256 and 257 of the Constitution prescribe express procedures governing the origination and processing of a Bill to amend the Constitution by parliamentary initiative and by popular initiative, respectively. The two articles are straight-jacketed and require any procedural maneuvering to strictly accord with their provisions. In respect of a Bill to amend the Constitution by popular initiative, Article 257 is clear.

Hon. Members, I will go to Clause 7:

“(7) If a draft Bill has been approved by a majority of the county assemblies, it shall be introduced in Parliament without delay.

(8) A Bill under this Article is passed by Parliament if supported by a majority of the members of each House.

(9) If Parliament passes the Bill, it shall be submitted to the President for assent in accordance with Article 256(4) and (5).

(10) If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in Article 255(1), the proposed amendment shall be submitted to the people in a referendum.

(11) Article 255(2) applies, with any necessary modifications, to a referendum under clause (10).”

Hon. Members, Article 94 of the Constitution outlines the general role of Parliament with regard to the consideration and passage of amendments to the Constitution, among its other roles. Parliament is placed under an obligation of protecting the Constitution at all times and promoting the democratic governance of the Republic. This is provided for in Article 94(3) and (4):

“(3) Parliament may consider and pass amendments to this Constitution, and alter county boundaries as provided for in this Constitution.

(4) Parliament shall protect this Constitution and promote the democratic governance of the Republic.”

Hon. Members, Article 257 of the Constitution qualifies the role of Parliament and its Speakers with regard to the consideration of a Bill to amend the Constitution by popular initiative. A close reading of Article 257 reveals four specific obligations relating to Parliament and the Speakers of Parliament. These are:

(a) receipt of copies of a draft Bill to amend the Constitution and certificates of approval by the county assemblies;

- (b) introduction in Parliament without delay, where a majority of the county assemblies approve the draft Bill;
- (c) passage by a majority of the members of each House; and,
- (d) submission of the Bill to the President for assent, if Parliament passes the Bill.

Hon. Members, the text of Article 257 deliberately limits the exercise of legislative powers by Parliament when considering a Bill to amend the Constitution through popular initiative. Parliament has no role in origination of the Bill and is only required to introduce the Bill and pass or fail to pass it. Notably, whereas ordinary legislation may be lost in mediation or lapse for want of consideration; failure to pass a Bill to amend the Constitution by popular initiative only propels it to mandatory consideration at a referendum by the people. Noting the limited legislative role afforded to Parliament and its Members, inescapable doubts arise on the Speaker's role with regard to the substantive aspects of such a Bill.

Hon. Members, as I have noted, by dint of Articles 3 and 10 of the Constitution, and Standing Order No. 47(3), the Speaker's failure to arrest any business found to offend the Constitution or statute would amount to abdication of duty. I have previously ruled and guided Members where such instances have arisen on the specific provisions of the Constitution that the proposals have offended and additionally advised them to introduce amendments to the Constitution as an alternative. The Bill currently before the House seeks to amend the Constitution. Consequently, challenging portions of the Bill for ostensibly offending the same Constitution, the Bill seeks to amend would defy logic.

Hon. Members, in the Report of the Committee, the Second Schedule to the Bill is termed "unconstitutional" for seeking to delimit constituencies which is a function of the IEBC enumerated under Article 89(4) of the Constitution. According to the submissions made to the Committee and those made by Members on the issue, the perceived unconstitutionality of the Schedule would be cured if a direct amendment had been made to Article 89(4) of the Constitution. This position draws our attention to the history of the current Constitution and the mechanisms it puts in place through the Transitional and Consequential Provisions that are set out in its Sixth Schedule of the Constitution. Members will recall that drawing from the mandate outlined in the Sixth Schedule to the Constitution, this House functioned as both the National Assembly and the Senate for close to three years during the existence of the current Constitution.

Additionally, Hon. Members, we remember that my predecessor, the Hon. Speaker Kenneth Marende had occasion to rule that the nominations made by the then President Mwai Kibaki to the posts of Chief Justice and Attorney General had been forwarded to Parliament in contravention of the provisions of the Sixth Schedule which required consultations on the nominations with the then Prime Minister. The Executive at that time had decided to operate within the Constitution and not obey the requirements of the Sixth Schedule. The names were subsequently withdrawn and the nomination and appointment of Chief Justice Willy Mutunga strictly adhered to the provisions in the Sixth Schedule.

Tellingly, Hon. Members, with regard to the first boundary delimitation exercise, the provisions of Section 27(3) of the Sixth Schedule deferred the obligation placed upon the IEBC to complete delimitation at least 12 months before a general election provided for under Article 89(2) of the Constitution. Additionally, Section 27(4) of the Sixth Schedule protected all the constituencies existing at the time of the promulgation of the Constitution from being lost during the first boundary review conducted by the then Interim Independent Boundaries Commission, despite the existence of Article 89(4) in the main text of the Constitution. The existence of these constituencies has never been challenged and the provisions of the Sixth Schedule have remained

perfectly valid despite deviating from the substantive provisions contained in the main text of the Constitution.

Similar competing arguments may also be advanced with regard to the issue raised in the Report on the constitutionality of the additional functions sought to be granted to the Judiciary with regard to the disciplining of judges. According to the Committee, in the event the Bill is assented to without submission to a referendum, the cited provisions would be unconstitutional. I, however, note that Paragraph 377 of the Report qualifies the findings of the Committee by acknowledging that “an unconstitutional amendment becomes constitutional if it is approved by the people in a referendum.” Additionally, at Paragraph 506 of the Report, the Committee notes that “there are provisions in the Bill that touch on some of the matters provided for under Article 255(1) of the Constitution. Consequently, pursuant to Articles 255(3) and 257 (10) of the Constitution, the Bill is one for which a referendum is required.”

Members will note that Clause 5 of the Bill seeks to amend Article 31 of the Constitution which provides for the right to privacy. Any amendment proposed to a provision of the Constitution contained in the Bill of Rights is protected under the matters listed in Article 255(1) of the Constitution, and must be submitted to the people for approval in a referendum. By this argument, therefore, the question of unconstitutionality of the provisions becomes moot, or at the very least, premature as the Bill must be submitted to the people in a referendum. Any attempt by the Speaker to make a preliminary finding on the constitutionality of the provisions would be premature, speculative and, ultimately, an exercise in futility. It would be tantamount to putting the cart before the horse.

In any event, Article 165(3)(d) of the Constitution mandates the High Court to hear any questions on the interpretation of the Constitution and settle any contestations with finality. Indeed, I am informed that currently, the High Court has eight consolidated constitutional petitions challenging the constitutionality of the entire BBI process and had issued an order precluding the President from assenting to the Bill if passed by Parliament until the determination of the petitions. The Petitions are:

- (i) Petition No E282 of 2020: David Ndi & Others vs. Attorney General & Others.
- (ii) Petition E397 of 2020: Kenya National Union of Nurses vs. Steering Committee of BBI & Others.
- (iii) Petition No E400 of 2020: Third Way Alliance Kenya vs. Steering Committee of BBI & Others.
- (iv) Petition No E401 of 2020: 254 Hope vs. Attorney General & IEBC.
- (v) Petition No E402 of 2020: Justus Juma & Isaac Ogola vs. Attorney General & Others.
- (vi) Petition No E416 of 2020: Morara Omoke vs. Raila Odinga & Others.
- (vii) Petition No E426 of 2020: Isaac Aluochier vs. Steering Committee of BBI & Others.
- (viii) Petition No E2 of 2021: MUHURI vs. IEBC & Others (formerly Mombasa Petition E01 of 2020)

Hon. Members, the third issue was with regard to whether, and to what extent the Bill may be amended and the value and place of public participation in the consideration of a Bill to amend the Constitution by popular initiative. The Committee notes at Paragraphs 364 and 365 of its Report that the role of Parliament in considering a Bill to amend the Constitution is not ceremonial and that Parliament can amend the provisions of such a Bill or correct any errors of form or typographical errors to bring drafting harmony to the Bill. Additionally, the Committee

notes that pursuant to provisions of Article 257(10) of the Constitution, Parliament cannot replace or usurp the people's views on a popular initiative with its own. It, therefore, rules out amendments to a popular initiative Bill, finding instead, that the only changes that may be made to such a Bill would be correction of any errors of form.

(Loud consultations)

(Several Hon. Members walked into the Chamber)

Hon. Members, let me allow these Members who are shouting there to walk in. If you are coming in, please, walk in. Make your way in, please, quickly. Take seats quickly, please, so that we can proceed with business. Take seats so that we can proceed with business. Members, take your seats so that we can proceed with business. Those of you who are walking in, you can go to the tent. I am sure you can follow.

(Laughter)

As Hon. Members will recall, I have had, on previous occasion, to address this issue at length in the 11th Parliament during the consideration of the Constitution of Kenya (Amendment) Bill, 2015, sponsored by the Member for Ugenya, the Hon. David Ochieng'. Though the Bill sought to amend the Constitution by parliamentary initiative, the issues raised then are substantively similar to those raised with regard to the present Bill.

Hon. Members, in the Communication issued on 20th August 2015 on amendment of a Bill to amend the Constitution by the National Assembly, I guided the House that I would not allow any amendment to be proposed to a Bill to amend the Constitution. The reasons given then, which similarly apply now, are that a plain reading of the operative provisions on amending the Constitution, the sanctity of the Constitution, and previously adopted procedure on constitutional amendments, discourage such a practice.

The Communication noted the centrality of the people and their will in any process seeking an amendment to what they agreed to in the form of a social contract and the need for precision in any attempt made to amend the Constitution as follows:

“The customs and traditions of our democracy have been to restrict amendment Bills seeking to amend the Constitution. I see no reason to depart from this practice, as the Speaker cannot rely on allegory or allusion in guiding the House. You will note that the preamble to our Constitution highlights that the people of Kenya adopted, enacted and gave themselves and future generations of this Republic, the Constitution. The sanctity of the Constitution as a social contract between the people of Kenya and not a document belonging to the Houses of Parliament, nor any other organ for that matter, is to be jealously safeguarded at every turn. And any process of its amendment is delicate and can only be undertaken with reference to a definite procedure that deviates from the ordinary. Hon. Members, while Parliament has been given the power to amend the Constitution, we should be mindful that the Constitution belongs to the people of this Republic. Treating the process of its amendment as akin to an ordinary legislation would subvert the collective will of the people. In this regard, it is expected that any person intending to amend the Constitution, must be very clear and precise on what he or she is intending to alter, but not to change mind while in the process or midstream. It is my strong view that

any proposal to amend the Constitution should be preceded by the meaningful and adequate consultations before such a Bill is published, a principle embodied in Article 256(2) of the Constitution. Bearing in mind that the legislative power is originally derived and consequently vested in the people, we ought to obtain the confidence of our fellow citizens even as we endeavour to amend the Constitution. The process of making or amending the Constitution, therefore, cannot be without consultations, precision and guarded restraint.”

Hon. Members, in the same manner, I was minded in 2015, and I am still minded today, to disallow any attempt to amend the Bill currently before the House. Indeed, I would say I am actually more persuaded to disallow any amendment for the sole reason that this is a Bill to amend the Constitution by popular initiative. As noted in my opening remarks, once initiated, a Bill to amend the Constitution by popular initiative is irrepressible to any attempts to delay or derail it. I am of the considered opinion that any attempt to amend the provisions of the Bill directly negates the popular nature of the Bill and the exercise of the sovereign will of its promoters who have collected more than one million signatures of registered voters in its support and ostensibly convinced a majority of the county assemblies to approve without alteration.

(Applause)

Hon. Members, an amendment of the text of the Bill is markedly different from the correction of any errors of form that may be noted in the Bill. Members will note in the Report of the Committee that the issue of the so-called “errors of form” is canvassed at length. This issue has generated considerable public debate on whether the errors exist and whether they materially affect the substance of the Bill and can, therefore, not be glossed over.

Hon. Members, having perused the Bill received by the House from the IEBC, which is the Bill that was read a First Time on 4th March, 2021, I have noted that it contains the following typographical and cross-referencing errors:

(i) The marginal note to Clause 48 of the Bill refers to Article 189 instead of Article 188 of the Constitution; and

(ii) Clause 51 (a) of the Bill does not refer with adequate precision to the specific part of Article 204 of the Constitution that it proposes to amend.

Hon. Members, you will also note from the Report that discrepancies have also been identified in the Bills received from the county assemblies in the returns submitted to the two Speakers of Parliament. Twelve county assemblies submitted Bills with similar errors to the ones noted in the Bill currently before the National Assembly. Thirty-four other county assemblies submitted Bills which, apart from containing the errors noted in the Bill before the House, contained the following additional errors:

(i) Clause 13(b) of the Bills seeks to amend Article 97(3) of the Constitution despite Article 97 of the Constitution not having a Clause (3); and

(ii) Paragraph 1 (1) of the Second Schedule cross-references Article 87 (7) of the Constitution, which does not exist.

Hon. Members, you will agree with me that the errors highlighted in the Bill before the House and in the Bills received from the county assemblies are minor errors which do not affect the substance of the provisions of the Bill.

(Applause)

The errors are not material enough to impugn the entire Bill, its processing by the House and the intentions of its promoters. As rightly noted by the Committee at paragraph 365 of the Report, the legislative mandate of Parliament allows it to correct any errors of form or typographical errors that do not go to the substance of the Bill to bring drafting harmony to the Bill.

(Applause)

Both Houses of Parliament have, through their Standing Orders, donated the power to correct errors in a Bill to their Speakers before submission of a Bill to the President for assent. Standing Order No.152 (3) of the National Assembly Standing Orders provides that-

“(3) At any time before the certification of the Bill, the Speaker may correct formal errors or oversights therein without changing the substance of the Bill and, thereafter, submit the Bill to the President for assent.”

(Applause)

Hon. Members, indeed, the Speaker has invoked this power in the past to approve corrections done to Bills during the preparation of Vellum Copies of the Bills for submission to the President for assent. In this regard, I shall invoke the power to correct the highlighted typographical and cross-referencing errors in the Bill at the appropriate time.

(Applause)

Hon. Members, the determination that the Bill presently before the House may not be amended logically begs the question of the need and value of public participation to the consideration of the Bill. Article 118 of the Constitution as read with Standing Order No.127 mandates this House to conduct public participation in its legislative business. This is a mandatory exercise that the House is enjoined to undertake when considering any legislative business. It is not discretionary or optional as it is indeed also one of the national values and principles of governance provided for in Article 10 of the Constitution, which are binding on all state organs and State officers.

Hon. Members, in this regard, although Article 257 of the Constitution is silent on whether to conduct public participation as compared to Article 256 (2) of the Constitution, which mandates Parliament to publicise any Bill to amend the Constitution, Article 118 of the Constitution places a general obligation on Parliament to conduct public participation in all its legislative business. I also note that the Joint Committees, in their Report as contained in paragraph 405, also did address this issue and found that Article 257 of the Constitution does not oust the application of Articles 10 and 118 of the Constitution on public participation.

Hon. Members, having said this, it is also worth noting that the courts have further prescribed the threshold of what is meaningful public participation, a fact that was alluded to by the Member for Garissa Township, Hon. Aden Duale, in raising his point of order. The thresholds are intended to ensure that this House or, indeed, its Committees do not just engage in a ticking-the-box or cosmetic exercise in a bid to comply with the obligation as set out in Article 118 of the Constitution and Standing Order No.127. The process must, therefore, be qualitative rather than quantitative. In this regard, it is not the number of submissions that are made by

stakeholders or, indeed, the number of stakeholders that participate in such an exercise that matter. A Committee must demonstrate that it did engage, consider and examine the submissions made by the public in arriving at its decision. This, Hon. Members, can only be ascertained by a look at the Report of the Joint Committees in an instant case.

Hon. Members, having said this, allow me to refer to a number of court decisions that have also made very imperative pronouncements on what is meaningful public participation.

In *Robert N. Gakuru and Another versus Governor of Kiambu County and three others*, (2013) - as put in the Kenya Law Report (eKLR) - the court observed that:

“Public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the constitutional dictates.”

Hon. Members, the High Court in Constitutional Petition Number 282 of 2017, *Association of Kenya Medical Laboratory Scientific Officers versus Ministry of Health and the Attorney-General*, further observed that: “Public participation is not mere consultation or a public relation exercise without a meaningful purpose”.

Hon. Members, looking at other jurisdictions like in South Africa, the same thresholds of public participation have been upheld. Indeed, referring to the famous case of *Doctors for Life for International versus the Speaker of the National Assembly and Others 1 CCT2 of 2005*, the court held as follows:

“What is intimately important is that the Legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus, construed there are, at least, two aspects of the duty to facilitate public participation. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that the people have the ability to take advantage of the opportunities provided”.

I also observe, from the Report, that the Joint Committee gave the public an opportunity to participate in its public hearings. It received extensive submissions from the public and considered, analysed and examined the submissions, as evidenced in its Report. I also note that the Joint Committees considered the submissions in arriving at its findings and recommendations as contained in the Report. To this end, one can observe that the Joint Committees conducted public participation as required by Article 118 of the Constitution and adhered to the standards and thresholds set by the courts on what is meaningful public participation. Having said this, and in answering the question raised by the Member for Garissa Township regarding the value of public participation on a Bill that may not be amended, it is notable that the submissions made by the public are intended to apprise the Members of this House and assist them to make informed decisions during the consideration of this Bill at Second Reading, Committee of the whole House and the Third Reading. Certainly, any Member of this House is at liberty to raise any of the issues submitted by the public as contained in the Joint Report in making submissions at Second Reading and, indeed, is expected to make an informed decision as to whether to pass or reject the Bill.

Hon. Members, the submissions of the public have been analysed in the Report and are also attached as annexes to the Report and Members may make reference to them. It is my considered opinion that the ventilation of the issues raised by the public during public participation also fall within the definition of meaningful public participation as espoused in Article 118 of the Constitution. This exercise shall, in the end, also assist the people to make an informed decision on whether to approve or reject the Bill when the Bill is submitted to a referendum in terms of Article 257(10) of the Constitution.

In addition, it is my observation that the Joint Report as contained in paragraphs 406 of its Report also found that the public participation process is critical to the processing of the Bill as it is through the process that Parliament would identify any areas of concern on the proposed amendments and noting errors of form for correction. The Joint Committees also found that the process would also enable the Members to harvest the views of the public on the Bill and decide whether to vote to approve or reject the Bill. I think with this, the issue is now settled.

(Applause)

The fourth issue was with regard to the effect of pending court cases on the consideration of the Bill currently before the House. Before guiding the House on the implication of the cases, allow me to note that the issues raised by the Member for Ugenya are valid in light of our own Standing Order No.89 on the *sub judice* rule which provides that “no Member shall refer to active civil or criminal matters and the discussion of such matters is likely to prejudice the fair determination of the cases.”

It is also worth noting that the manner in which Article 257(7) of the Constitution is couched is in mandatory terms that a draft Bill having been approved by the county assemblies is required to be introduced in Parliament without delay for consideration. In this regard, in the event Standing Order No.89 was to apply, it would not be used to oust the express constitutional and mandatory obligation placed on Parliament to introduce and consider a Bill to amend the Constitution by popular initiative. Indeed, such an interpretation would, in addition to being an affront to Article 257 of the Constitution, also offend Article 1 of the Constitution on the sovereign power of the people of Kenya to amend the Constitution as and when they see it fit. Standing Order 89 cannot curtail this sovereign power of the people which is guaranteed and protected by the Constitution itself.

Standing Order 89 provides the circumstances under which the *sub judice* rule would apply and gives power to the Speaker to interpret and apply the same in determining whether a matter is *sub judice* or not. Even in instances where the matter under consideration is deemed to be *sub judice*, the Speaker has discretion under Standing Order 89(5) to allow reference to the matter where necessary. Accordingly, I am of a strong opinion that the public interest on a Bill introduced by way of a popular initiative overrides the provisions of Standing Order No.89 on the *sub judice* principle.

(Applause)

Further, the courts have in the past also issued pronouncements guarding against interfering with ongoing legislative processes, in particular, in consideration of a Bill by the House. Interference with the processes of the House has been interpreted by the courts to be tantamount to stifling the legislative authority of Parliament as guaranteed under Article 94 of the Constitution. The courts have jurisdiction to interpret and consider Bills of this House once enacted into law as Acts of Parliament.

As to whether this House shall be acting in vain by considering a Bill that may fail to be submitted to the President for assent in terms of Article 257(9) of the Constitution, it is worth noting that there are two main court orders in place touching on the Bill under consideration. One is a conservatory order that was granted in the consolidated Petitions before the High Court Petition E282 of 2020 restraining the Independent Electoral and Boundaries Commission from

facilitating and subjecting the Constitution of Kenya (Amendment) Bill, 2020 to a referendum, or taking any further action to advance the Constitution of Kenya (Amendment) Bill, 2020, pending the hearing and determination of the consolidated petitions. The second order is one also in the consolidated petitions before the High Court barring His Excellency the President from assenting to the Constitution of Kenya (Amendment) Bill, 2020, should it be approved by the two Houses of Parliament. The order further provides that, should the President assent to the Bill, the amendments shall not come into force until the determination of the petitions challenging the process.

From the foregoing, it is clear that the orders are against the IEBC and the President. There are no orders barring the House from considering the Bill. I also note that the Committee did consider this issue and also found that there are no orders that have been issued barring consideration of the Bill by this House or, indeed, Parliament as a whole as contained in paragraph 310 of the Joint Report.

Allow me to also note that Members must refrain from engaging in speculative debate, because it is not possible at this stage to foretell the manner in which the courts shall determine the pending cases. The judicial processes are outside the ambit of this House and, therefore, the question of whether this House may be acting in vain in light of the pending cases is speculative and non-issue. The House cannot elevate a speculative outcome and conjecture above the discharge of its constitutionally mandated functions.

The fifth and final issue raised was with regard to the procedure applicable in the consideration in the House of a Bill to amend the Constitution by popular initiative. Article 109 of the Constitution vest the legislative power at the national level to Parliament. Article 109(1) is clear. It says that:

“Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.”

In exercise of its legislative power, the House has established rules and procedure for its operations as provided for in Article 124 of the Constitution. The National Assembly has established Standing Orders that guide the manner, in which the House and its committees introduce, consider and determine any business before the House. In the case of Bills, the Standing Orders prescribe the process to be followed with regard to the initiation of legislative proposals, pre-publication scrutiny of the proposals, publication of Bills, introduction of Bills in the House and their consideration, including amendments and transmission to the President for assent or to the Senate where applicable. The joint Report of the two Committees of the Houses of Parliament notes the absence of a clear procedure for consideration of a Bill to amend the Constitution by popular initiative. Indeed, at paragraph 464, the Report notes that:

“... Article 257 of the Constitution does not give a clear procedure on how to process such Bills... (and)... it will be necessary for the Speakers of the Houses to give guidance on the processing of the Bill through the subsequent stages.”

Further, the Committees at paragraph 454 of their Report have cited the Supreme Court of India in the case of Shankari Prasad Sing Deo vs. the Union of India, A.I.R 1951 S.C 458. In the case, the court notes that in the passage of a Bill to amend the Constitution by each House, the term ‘passed’ would be construed to mean the legislative processes that follow in the exercise of legislative function of Parliament. The court found that such a Bill was “to follow the procedure set out in the Rules of Procedure and the conduct of business in Parliament subject to requirements of the Constitution regarding the special majority required for passage and the requirement for assent by the President.”

Whereas there is no direct procedure provided for in the parliamentary consideration of a Bill seeking to amend the Constitution by popular initiative, Article 257 of the Constitution prescribes the procedures governing origination and general processing of such a Bill. Clauses 7 to 10 of the Article provide that:

“(7) If a draft Bill has been approved by a majority of the county assemblies, it shall be introduced in Parliament without delay.

(8) A Bill under this Article is passed by Parliament if supported by a majority of the members of each House.

(9) If Parliament passes a Bill, it shall be submitted to the President for assent in accordance with Article 256(4) and (5).

(10) If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in Article 255(1), the proposed amendment shall be submitted to the people in a referendum.”

In answering the question on the procedure to be followed, it should be noted that the Constitution expects a resolution for approval of the Bill by county assemblies and passage or otherwise by Parliament. In our Parliament, as is the practice in many Commonwealth jurisdictions, consideration and passage of Bills follow the stages of publication, First Reading, Second Reading, Committee of the whole House and Third Reading. Except for the First Reading, all the stages involved require a vote, which determines the next course of action. The net effect of this then is that in order to fulfill the requirements of the Constitution for a decision on whether the House has passed the Bill, it is expected that the House will consider the Bill through the usual legislative stages with the necessary votes at each stage.

This then brings me to the question of the thresholds applicable to the consideration of the Bill in view of the required votes I have alluded to as provided in Article 122, which provides about the majorities. In the case of a Bill to amend the Constitution by popular initiative, Article 257(8) provides a specific majority in each House. In this regard, a majority of all Members of the National Assembly means at least 176 members will be required to pass the Bill in its Second Reading and Third Reading. This number has been arrived at by ascertaining 50 per cent of all Members of this House and adding one to get a majority. Motions in committee of the whole House will be dispensed with in the usual manner.

Having said that, allow me now to respond to concerns raised by the Member for Kikuyu, Hon. Kimani Ichung’wah, regarding the measures taken to ensure Members participate in the voting in view of the public health restrictions owing to the COVID-19 pandemic. From the outset, I wish to reiterate that the House leadership thanks Members for their continued co-operation in the implementation of the existing protocols. As you are all aware, the Ministry of Health guidelines currently restrict the maximum number in the Chamber to 112. It is for this reason that I designated other areas as being part of the Chamber, including the Members’ Lounge and the extended tent zones. This has allowed the attendance and participation of a greater number of Members in the business of the House. In view of prevailing circumstances, this arrangement will be upheld during the period of debate and voting on the Constitution of Kenya (Amendment) Bill, 2020 to ensure that all Members who wish to participate are facilitated to do so. With regard to actual voting, the House shall vote by roll call, pursuant to Standing Order 72(2).

(Applause)

For avoidance of doubt, Standing Order 72(2) provides that:

“The Speaker shall direct a division to be taken in every instance where the Constitution lays down that a fixed majority is necessary to decide any question.”

Given the exceptional circumstances occasioned by the COVID-19 pandemic, should it become necessary, I may invoke the provisions of Standing Order No.265D and direct the Clerk to facilitate Members to take part in the vote virtually. In this regard, names of Members will be called out using the Division List, with those seated in the other designated areas being allowed to come into the Chamber to vote and thereafter immediately exit the main Chamber. The process will be carried out in strict compliance with the health protocols.

At this stage, you may wish to note that a decision on the Bill is one of the instances where the Constitution requires a fixed majority and, therefore subject to the provisions of Standing Order No.62. You will also recall that on 28th August 2015, during the 11th Parliament, while the House was considering the Constitution of Kenya (Amendment) (No. 2) Bill, 2013 sponsored by the then Member for Samburu West, Hon. Lati Lelelit, I gave guidance on the process and rationale for the procedure under Standing Order No.62. In a nutshell, the gist of my guidance was that the extended period provided in the Standing Order enables Members to reflect on a matter before the House and either reconsider or reconfirm their decision. This is premised on the fact that there are not many instances that require a fixed threshold for passage and the few that do are usually of a higher consequence in the operation of governance such as amendment of the Constitution. The second vote, therefore, affords the House an opportunity to actually express its desire. Indeed, during the above instance in 2015, the repeat vote saw a reconsideration of the decision and the Bill was passed by the House. We shall, therefore, proceed in a similar manner should the circumstances dictate.

The matter of timelines is fairly straightforward and I had previously guided on this. But for the avoidance of doubt, debate on the Bill will continue as long as there are Members present and wishing to speak, subject to the rules of the House on relevance and closure of debate and being tediously repetitive. The only limitation that the House imposed is with regard to how much time each Member has and not of the overall debate.

As I conclude, I must commend Members for both the queries raised with regard to the propriety of the Bill and its content and for the overwhelming interest that has been exhibited during debate on the Bill. We are at a constitutional moment which calls for a delicate balancing act on the part of Members on the discharge of their legislative and representative mandates. Though the Constitution has in effect made the submission of the current Bill to a referendum a must, whether the House passes the Bill or fails to pass it, this *fait accompli* affords the House a unique chance of interrogating proposals introduced in Parliament by ordinary citizens who have chosen to bypass Parliament.

Hon. Members, I wish to thank the Joint Committee for the invaluable contribution that their Report has made to this guidance and the contribution it shall make to the debate on this Bill. In summary, my considered guidance is, therefore, as follows:

1. THAT, on the question as to whether the Constitution of Kenya (Amendment) Bill 2020 promoted by the Building Bridges Initiative is a popular initiative under Article 257 of the Constitution and whether the procedure outlined under Article 257 was followed by the county assemblies and the correct threshold met before the introduction of the Bill in Parliament; the Bill currently before the House is a Bill to amend the Constitution by popular initiative as envisaged by Article 257 of the Constitution. Any registered voter is at liberty to sign and support a popular initiative in terms of Article 257 (1) of the Constitution. The

Constitution does not place any restriction with regard to the age, gender, tribe, profession or status of a promoter of such a Bill. Further, the procedure prescribed under Article 257 of the Constitution was followed with regard to the origination and processing of the Constitution of Kenya (Amendment) Bill, 2020 promoted by the Building Bridges Initiative before its introduction in Parliament.

The certificates submitted by the county assemblies in their returns to the two Speakers of Parliament are conclusive evidence of the propriety of the procedures undertaken with regard to the Bill prior to its introduction in Parliament. The errors highlighted in the Bills currently before the two Houses are not in a nature that affects the substance of the Bill. The errors may be corrected by the Speaker before submission of the Bill for assent;

2. THAT, on the question as to whether the Bill upsets the basic structure of the Constitution and whether it contains unconstitutional constitutional amendments; the matters listed under Article 255(1) constitute the basic structure of the Constitution of Kenya as any amendment relating to them must be submitted for approval at a referendum. The Bill touches on various matters listed under Article 255 (1) of the Constitution and ought to be submitted for approval at a referendum. To the extent that the Bill currently before the House touches on various matters listed under Article 255 (1) of the Constitution, which the Constitution requires to be submitted to a referendum for approval, any question as to the constitutionality of its provisions is premature.

3. THAT, on the question as to whether a Bill to amend the Constitution by popular initiative can be amended, and the value and intention of the public participation conducted by the Joint Committee; a Bill to amend the Constitution by popular initiative may not be amended by the House as any amendment shall negate the popular will of the people in directly amending the Constitution. Alterations to the text of such a Bill may only be allowed to correct errors of form or typographical errors before submission for assent as provided for in the Standing Orders. I will invoke this provision of the Standing Orders donated to me by the House at the appropriate stage.

In addition, pursuant to the provisions of Article 118 of the Constitution, public participation on a Bill to amend the Constitution is mandatory and must be meaningful. The value of the exercise is to apprise hon. Members on the content of the Bill and assist them to make informed decisions during the consideration of this Bill at Second Reading, Committee of the whole House and the Third Reading. It will also assist the people to make informed decisions on whether to approve or reject the Bill when the Bill finally proceeds for a referendum.

I am also satisfied that adequate public participation has been undertaken in respect of the Bill, the Bill by its nature being a popular initiative and public participation having been undertaken by the two Committees jointly. An enabling environment and opportunity were given to the public to have their say on the matter.

4. THAT, on the question of the effect of pending court cases on the consideration of the Bill currently before the House; currently, there is no court order directed at Parliament with regard to the consideration of the BBI Constitution of Kenya (Amendment) Bill, 2020. Standing Order No.89 of the National Assembly Standing Orders cannot oust the obligation on Parliament to introduce and consider a Bill to amend the Constitution by popular initiative without delay; and

5. THAT, the procedure to be applied during the consideration of the Bill in the House shall be as follows:

(a) The Bill, having been read the First Time, shall undergo Second Reading, Committee of the whole House and Third Reading.

(b) The voting threshold applicable to the Second Reading and Third Reading of the Bill shall be a minimum of 176 Members, being a majority of all Members of the House, to pass.

(c) Voting shall be by roll-call. Members will be called out as per the Division List with those seated in the other designated areas being allowed entry into to the Chamber to cast their votes and, thereafter, immediately exit the Chamber. In light of the exceptional circumstances occasioned by the COVID-19 pandemic, should it become necessary, I will invoke the provisions of Standing Order No.265D and direct the Clerk to facilitate Members unable to attend the sittings of the House physically to take part in the vote virtually.

(d) I may, if necessary, direct the holding of a further vote at the various stages of the consideration of the Bill, pursuant to Standing Order No.62 (2).

Hon. Members, as the House henceforth, proceeds with the consideration of the Bill with this guidance, may I end by stating that, as your Speaker, it is my considered finding that the Constitution of Kenya (Amendment) Bill, 2020 promoted by the Building Bridges Initiative is properly before this House.

Further, it is my considered view that, in the reading of the Constitution, no state organ or person to whom power is delegated by the people under Article 1 of the Constitution can stand in the way of the exercise of the sovereign power of the people of Kenya to chart the course of their future in any manner they deem fit within the provisions of the Constitution.

I, therefore, wish to urge Hon. Members that, while debating and deciding whether to pass the Bill or not, the House must always be mindful of the considerations that motivated the people of Kenya to make and reduce their current social contract into writing in the first place.

The last three paragraphs of the preamble to the Constitution of Kenya encompass these considerations where the people of Kenya, while RECOGNISING the aspirations of all Kenyans for a Government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law; and EXERCISING their sovereign and inalienable right to determine the form of governance of the country, and having participated fully in the making of the Constitution; ADOPTED, ENACTED and GAVE the Constitution to themselves and to their future generations. The centrality of the people to the making and amending of the text of the Constitution cannot, therefore, be gainsaid.

The House is accordingly guided.

I thank you.

(Loud consultations)

What is the issue? What is it, Hon. John Mbadi?

Hon. John Mbadi (Suba South, ODM): Thank you, Hon. Speaker. First of all, let me thank you for your ruling, which is long but very clear.

I cannot remember in my entire life in this Parliament any Communication from the Chair which is of this length. The length of this Communication cannot be compared to any other that I have come across.

There is one clarity that I would want you to consider and, maybe, make it clearer. You mentioned that according to the provisions of Article 257 (8), all the stages of this Bill will require a simple majority. You went ahead to mention the number at 176. It may be a small matter but may be very important in future. I want to ask Hon. Cate Waruguru to allow the

Speaker to hear this issue.

(Loud consultations)

Hon. Speaker, what I was raising is the number 176. It may look like a small matter but when it comes to actual voting, the issue may arise. The membership of this House is 350, including the Speaker – who does not take a vote. Therefore, the membership is basically 349. If you divide 349 by two, you will get 174.5. If you talk about majority out of that number, the majority is 175 Members.

Therefore, Hon. Speaker, majority of the House would be 175 and not 176. Therefore, that is the clarity that I actually wanted. The number is actually 175; the highest that the minority can garner is 174. However, you mentioned 176. In the event that we manage to get 175, it may be ruled that the Bill has not been passed and yet, that is the required threshold. So, that is what I wanted to raise for your consideration. Thank you, Hon. Speaker. Your ruling was well executed. Thank you.

Hon. Speaker: Hon. Members, let us not raise unnecessary points of order. You know we are actually just at the second Order. Maybe, we can deal with these other issues when we get to the business. That is because this business is there anyway. I will deal with that issue Hon. Mbadi. I know you have raised a valid point. We will deal with it... Please, let us not... You know unless maybe we have forgotten the rules, you know it cannot be subject of debate. You know it cannot be. Therefore, it is just to refresh your memory about the rules. Let me deal with that one administratively. Can we go to the next Order? Next Order!

MESSAGES

PASSAGE OF THE MUNG BEANS BILL BY THE SENATE

(Loud consultations)

Hon. Speaker: Hon. Members, please, let me just... You know we still have a lot of other procedural issues to deal with just now. Allow me finish this. Hon. Members, just remain where you are. We are on Order number 3 which is messages.

Hon. Members, Standing order 41(4) requires the Speaker to report to the House any message received from the Senate at the first convenient opportunity and, in this regard, on 19th April 2021, I did notify you of a Message from the Senate regarding the passage of the Mung Beans Bill, Senate Bill No. 9 of 2020. Hon. Members, the Mung Beans Bill which was published vide *Kenya Gazette* Supplement No.130 of July 24th 2020 seeks, among others, to provide for the development, regulation and promotion of the Mung Beans sector in Kenya. The Message conveys in part that the Senate considered and passed the Bill with amendments on Tuesday 13th April 2021, and now seeks the concurrence of the National Assembly. Hon. Members, Standing Order 143(1) paragraph (a) requires the Speaker to cause a Bill received from the Senate to be read a First Time upon conveyance of a message from the Senate referring the Bill to the National Assembly.

In this regard, I direct that the First Reading of the Bill be referred to the Budget and Appropriations Committee to offer the Speaker advice contemplated under Article 143(2).

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Thereafter, I shall guide the House and the Departmental Committee on Agriculture and Livestock on how to proceed with consideration of the Bill.

I thank you.

PETITIONS

TRANSFER OF OVERSIGHT OF KENYA LEATHER DEVELOPMENT COUNCIL

Hon. Speaker: Is there a Petition, Hon. Manje? Hon. Members, we were merely dealing with the first Order, which was Communication from the Chair. Now we go into the rest. Now we are in Petitions.

Hon. Joseph Manje (Kajiado North, JP): Thank you Hon. Speaker.

I, the undersigned, on behalf of leather and leather products investors and interested stakeholders in the country, draw the attention of the House to the following:

THAT, the Kenya Leather Development Council (KLDC) is a State corporation established under the Kenya Leather Development Council Order 2011 vide Legal Notice No. 114 of 2011 under the State Corporations Act. The Council is a specialised agency that provides advisory services on matters relating to processing and trading of hides, skins, leather and leather goods, oversees licensing in the leather subsector, enhances leather marketing strategies, and regulates, harmonises, coordinates and facilitates the growth of the leather industry in the country;

THAT, KLDC was formed on a private-public partnership to represent the interests of the leather sector with representation drawn from the Kenya Livestock Marketing Council, Slaughter Houses Association, hides and skins traders, tanners, footwear manufacturers, informal leather manufacturers and the academia;

THAT, the Council was initially placed under the Ministry of Industrialisation and Enterprises Development where the leather sector was categorised as a flagship industry, before being transferred to the Ministry of Agriculture and Livestock where its core mandate of leather promotion is largely ignored or under-funded;

THAT, recent appointments of board members and the Council's senior management have been unfairly skewed towards a particular region of the country, which has shifted the Council's focus from promotion of leather and leather products manufacturing to hides and skins improvement, which is essentially a devolved function;

THAT, the Council's senior management has been undertaking unauthorised recruitment of staff, and has presided over the closure of three tanneries, the massive decline in industry exports earnings, the increase of imported footwear deliberately mislabeled as second-hand footwear, the shrinking of the market for semi-processed leather and the general marketing and growth crisis currently facing the leather industry in the country

THAT, the Council has failed to adhere to prescribed Government regulations by commencing construction of four warehouses in Kinanie, Machakos County under the Kenya Leather Industrial Park Programme at a cost of Kshs1.2 billion on a site that is yet to be surveyed and which belongs to the Export Processing Zones Authority;

THAT, efforts to have the matter resolved by the Kenya Leather Development Council and other authorities have not borne any fruits.

THAT, the matters raised in this petition are not pending in any court of law in Kenya. Now therefore, your humble petitioners pray that the National Assembly, through the Departmental Committee on Trade, Industry and Co-operatives:

- (i) investigates the matter with a view to recommending urgent transfer of oversight of the Kenya Leather Development Council from the State Department for Livestock to the State Department for Industrialisation;
- (ii) ascertains the qualifications of board members and the Council's senior management as well as their commitment towards improvement of the leather industry;
- (iii) investigates the controversial construction of warehouses on over 100 acres of land belonging to the Export Processing Zones Authority, the possible irregular reallocation of funds meant for Common Effluent Treatment Plant towards the construction of the warehouses, and the procurement and general planning of the project; and,
- (iv) makes any other recommendation that it deems fit in the circumstances of the petition.

And your petitioners will ever pray.

I thank you, Hon. Speaker.

Hon. Speaker: Very well, the Petition is referred to the Departmental Committee on Trade, Industry and Cooperatives.

PAPERS LAID

Hon. Speaker: Let us have the Leader of the Majority Party.

Hon. Amos Kimunya (Kipipiri, JP): Hon. Speaker, I beg to lay the following Papers on the Table of the House today, Tuesday, 4th May 2021, Afternoon Sitting:

The 2021/2022 Annex of Estimates of Revenue and Expenditure for State Corporations of the Government of Kenya for the Financial Year ending 30th June, 2022 from the National Treasury.

Estimates of Revenue Grants and Loans of the Government of Kenya for the year ending 30th June, 2022 from the National Treasury.

Hon. Speaker, I hope Members were paying more attention because we are talking about issues to do with loans and this is a debate that is currently out there. People will say there is no information and yet the information is just in this House.

The Financial Statement of the National Government for the Fiscal Year 2021/2022 for the period 1st July to 30th June from the National Treasury.

Report to Parliament on all new loans contracted by Government from 1st September 2020 to 31st March 2021 from the National Treasury.

Report of the Auditor-General for the National Government for the Financial Year 2018/2019.

Report of the Auditor-General for the National Government Affirmative Action Fund for the year ended 30th June 2019 and the certificate therein.

The Ethics and Anti-Corruption Commission (EACC) Fourth Quarterly Report for the year 2020 covering the period 1st October 2020 to 31st December 2020.

Status of the Economy Report from the National Treasury.

The 15th Annual Report for Anti-Corruption and Economic Crime Cases for the period 1st January to 31st December 2018 from the Director of Public Prosecutions (DPP).

The 16th Annual Report for Anti-Corruption and Economic Crime Cases for the period 1st January to 31st December 2019 from the Director of Public Prosecutions.

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The Annual Report and Financial Statements of the Teachers Service Commission (TSC) for the year ended 30th June, 2019.

Annual Report and Financial Statements of the Competition Authority of Kenya for the Financial Year 2019/2020 and lastly which should be of concern to Members,

The National Government Constituencies Development Fund (NG-CDF) Board's Report on Project Proposal Approvals, Disbursement Status and Restrictions imposed on Constituency Account for the Third Quarter of the Financial Year 2020/2021 (1st January, 2021 to 31st March, 2021).

I thank, you Hon. Speaker.

Hon. Speaker: Hon. Members, many of you who belong to the category of the 290 constituencies, this is an important Report. It talks about the NG-CDF Board Report on Project Proposals Approvals, Disbursement Status and Restrictions imposed on Constituency Accounts for the Third Quarter for the Financial Year 2020/2021 (January to 31st March). I have seen many of you trying to ask questions in our popular page, but none of you today is even bothered about this Report. You, however, will be posting some things asking about the same things.

Next is the Chairperson Departmental Committee on Lands, Hon. Rachael Nyamai.

Hon. (Ms.) Rachael Nyamai (Kitui South, JP): Hon. Speaker, I beg to lay the following Papers on the Table of the House today 4th May, 2021:

Reports of the Departmental Committee on Lands on its consideration of:

A Petition by residents of Kinyona Ward regarding safeguarding public interests in the use of Gituamba land in Kinyona Ward of Murang'a county; and,

A Petition by members of Kagaa Farmers' Cooperative Society regarding liquidation of the society.

I thank you, Hon. Speaker.

Hon. Speaker: Chairperson, Departmental Committee on Finance and National Planning, Hon. Wanga, you have the Floor.

Hon. (Ms.) Gladys Wanga (Homa Bay CWR, ODM): Hon. Speaker, I beg to lay the following Paper on the Table of the House today, Tuesday, 4th May, 2021:

Reports of the Departmental Committee on Finance and National Planning on its consideration of Excise Duty (Amendment) Bill, 2020.

Hon. Speaker, now that we have gone to the bottom, I do not know how we are going to manage again to speak on the Building Bridges Initiative (BBI), because when your light comes, you go down and yet we came a bit early.

Hon. Speaker: How did you get to the bottom?

Hon. (Ms.) Gladys Wanga (Homa Bay, CWR, ODM): Hon. Speaker, I was to raise the same concern because I am very keen to speak on the BBI.

Hon. Speaker: I notice where you are on the list.

Hon. (Ms.) Gladys Wanga (Homa Bay CWR, ODM): Thank you, Hon. Speaker.

Hon. Speaker: Next Order.

NOTICES OF MOTIONS

FURTHER ALTERATION OF HOUSE CALENDAR FOR THE FIFTH SESSION

Hon. Amos Kimunya (Kipipiri, JP): Thank you, Hon. Speaker, I wish to give notice of the following Motion:

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THAT, pursuant to the provisions of Standing Order 28(4), this House further alters its Calendar for the Fifth Session (Regular Sessions) and resolves as follows-

(i) That, the Sittings of the House for First Part of the Session terminate on Thursday, 13th May, 2021 (instead of 6th May, 2021).

(ii) That, the Sittings of the House for the second week of May, 2021 accord with the resolution of the House of 10th February, 2021 with respect to the sitting days and times and prioritisation of business.

(iii) That, the business to be transacted during the Morning Sittings of Thursday, 6th May, 2021 and Thursday, 13th May 2021 be exempted from the resolution of the House of February 10, 2021 (Approval of the Calendar of the National Assembly (Regular Sessions) for the Fifth Session (2021) being days allocated for Business not sponsored by the Majority Party or Minority Party or Business sponsored by a Committee; and,

(iv) That, the House proceeds for its recess from Friday, 14th May, 2021 (instead of 7th May, 2021) to accord committees time to consider Estimates of Revenue and Expenditure for the National Government, Judiciary and Parliament for the Financial Year 2021/2022 and resumes on Tuesday, 8th June, 2021 to commence the second part of the Session.

I thank you, Hon. Speaker. That is the first Notice.

Hon. Speaker: Next

Hon. Amos Kimunya (Kipipiri, JP): Hon. Speaker, I wish to give notice of the following Special Motion on behalf of Hon. Adan Keynan who is doing it on behalf of the Parliamentary Service Commission (PSC)...

I wish Members could pay more attention.

APPOINTMENT OF THE CLERK OF THE NATIONAL ASSEMBLY

Hon. Amos Kimunya (Kipipiri, JP): Hon. Speaker, I beg to give notice of the following Motion:

THAT, pursuant to the provisions of Articles 127(6)(b) and 128(1) of the Constitution and in furtherance of the resolution of the Parliamentary Service Commission of 7th April 2021, this House-

- (a) approves the appointment of Mr. Michael Rotich Sialai, CBS, as Clerk of the National Assembly on contractual terms with effect from 26th May 2021 and ending on 31st July 2022; and,
- (b) calls upon the Commission to commence the process of recruiting a new clerk of the National Assembly not later than February 2022 so as to ensure a smooth and seamless transition.

Thank you, Hon. Speaker.

Hon. Speaker: Hon. Members, that was Notice of Motion. Next Order!

ORDINARY QUESTIONS

Hon. Speaker: Hon. Members, I think you are not paying attention. The first Question is by the Member for Lamu County, Hon. Capt. (Rtd) Ruweida Obo.

Question No.111/2021

DETAILS ON TENDER AND AWARD OF CONTRACTS FOR LAPSSET PROJECT

Hon. (Ms.) Ruweida Obo (Lamu CWR, JP): Thank you, Hon. Speaker. I am not retired and I am still a captain because this is my profession. *Hii nyingine ni* temporary.

Hon. Speaker: I was almost saying tired.

Hon. (Ms.) Ruweida Obo (Lamu CWR, JP): I am not tired.

Hon. Speaker: Very well. Then you are active.

Hon. (Ms.) Ruweida Obo (Lamu CWR, JP): Thank you, Hon. Speaker for giving me this opportunity to ask Question No.111/2021 to the Cabinet Secretary for Transport, Infrastructure, Housing and Urban Development.

- (i) Could the Cabinet Secretary provide details on the process followed by the Government with respect to the tender and award of the contract for the construction of the Lamu Port - South Sudan - Ethiopia - Transport (LAPSSET) Corridor project in Lamu County, including the international and national procurement procedures followed in the entire process?
- (ii) Could the Cabinet Secretary provide a list of all firms and individuals who were prequalified or who tendered for LAPSSET Project?
- (iii) Could the Cabinet Secretary also provide the names of firms and individuals who have been direct beneficiaries of employment opportunities at the project, and in particular, a list of any tenders awarded to residents of Lamu County and employment benefits, if any, to local residents of the County.

Thank you, Hon. Speaker.

Hon. Speaker: The Question will be responded to before the Departmental Committee on Transport, Public Works and Housing. I am told the functions you may be referring to would be under the Departmental Committee on Finance and National Planning. Anyway, the two Chairs will find out what to do. You are the one who has chosen this Committee. You might go there and find there is no answer and then you will walk back to Hon. Wanga. The next Question is by the Member for Homa Bay Town, Hon. Peter Kaluma.

Question No.117/2021

CONSTRUCTION OF KABUNDE AIRSTRIP

Hon. Peter Kaluma (Homa Bay Town, ODM): Thank you, Hon. Speaker. I rise to ask Question No.117/2021 which is directed to the Cabinet Secretary for Transport, Infrastructure, Housing, Urban Planning and Public Works.

- (i) What is the status of compulsory acquisition of land meant for construction of Kabunde Airstrip in Homa Bay County?
- (ii) What steps is the Cabinet Secretary taking to ensure that construction of Kabunde Airstrip is completed and when will it be operational?

Thank you, Hon. Speaker.

Hon. Speaker: Again, it will be replied to before the Departmental Committee on Transport, Public Works and Housing. The next Question is by the Member for Sirisia, Hon. John Waluke.

Question No.120/2021

RECALL OF LIQUEFIED PETROLEUM GAS HOSEPIPES

Hon. John Waluke (Sirisia, JP): I rise to ask Question No.120/2021 to the Cabinet Secretary for Energy.

- (i) Is the Cabinet Secretary aware that Total Kenya recalled a batch of liquefied Petroleum Gas (LPG) hosepipes, namely Batch No.SCG/BS 3212:1991/1, LOW PRESSURE LPG/8MN/MFD: 03/2020/EXP: 03-2025 that were sold in its outlets throughout the country from 12th June 2020 over safety concerns?
- (ii) What steps did the Ministry and Total Kenya PLC take to ensure that all users of the petroleum gas were notified in all parts of the country, in particular persons and households who bought the said hosepipes, and what compensation will they give to affected consumers?
- (iii) What assurances is the Cabinet Secretary giving to the public with respect to safety of all LPG hosepipes in the market and what measures have been taken to ensure that all the defective hosepipes that were sold to consumers have been recovered?

Thank you, Hon. Speaker.

Hon. Speaker: The Question will be replied to before the Departmental Committee on Energy. The next Question is by nominated Member, Gideon Keter. The Member is absent. The next Question is by the Member for Mathira, Hon. Rigathi Gachagua.

Question No.129/2021

MEASURES TAKEN BY KEBS TO ENSURE MOTOR VEHICLE PARTS MEET HIGH STANDARDS

(Question deferred)

Question No.136/2021

ACTION TAKEN AGAINST CRIMINAL GANGS IN MATHIRA

Hon. Rigathi Gachagua (Mathira, JP): Thank you, Hon. Speaker. I rise to ask Question 136/2021 to the Cabinet Secretary for Interior and Coordination of National Government.

- (i) Could the Cabinet Secretary explain what action the Ministry is taking against an organised, vicious and well-coordinated criminal gang operating in Mathira Constituency, Nyeri County, mainly targeting *boda boda* riders by killing and stealing motorbikes?
- (ii) Could the Cabinet Secretary explain what measures are being taken by the Ministry to ensure that the police in Mathira Constituency do not appear to be unable, unwilling or reluctant to apprehend the gang members that cause fear among *boda boda* riders and the public?
- (iii) Could the Cabinet Secretary provide an update on the status of investigations into the abduction and subsequent murder of the following *boda boda* riders- Anthony Miano Wanjiru of ID No. 33025624, Eliud Wambu Waruguru of ID

No.27140710, Timothy Wanjohi of ID No.37831050, William Kirii Gathu of ID No.23045966, Elija Wahogo Gathogo of ID No.34200516 and Alex Wambugu Gichuki of ID No.32971905, which happened on diverse dates in 2020 and 2021 within Mathira Constituency and the actions taken to apprehend the perpetrators of the heinous act?

- (iv) Could the Cabinet Secretary explain what measures the Ministry has put in place to guarantee the safety of the *boda boda* riders and the general public so as to address their fears arising from the insecurity incidences in the area?

Hon. Speaker: It will be responded to before the Departmental Committee on Administration and National Security. Next segment is responses to requests for Statements. Let us have the Chairman of the Departmental Committee on Transport. Are you ready? How long are you likely to take?

STATEMENTS

TRAVEL OF STUDENTS DURING THE COVID-19 LOCKDOWN

Hon. David Pkosing (Pokot South, JP): Hon. Speaker, two minutes.

Hon. Speaker: Proceed.

Hon. David Pkosing (Pokot South, JP): I thank you, Hon. Speaker, for giving me this opportunity to make a response to the Statement raised by my friend, Hon. Kathuri Murungi. I have already shared the Statement with him. He raised two questions. Number one is: Could the Government consider giving university and college students more time to organise their travel and by extension give them clear messages as they travel home? Remember this Statement was raised during the time when parts of the country were closed due to COVID-19, namely, on 30th March 2021. I raised this on the same day and I said that the Ministry will quickly take action. Therefore, the answer to the Statement is that all our children were allowed free travel from the closed counties to their homes hence none of our children were not allowed to go home. All of them were allowed to go home peacefully. This was in consultation between the Ministry of Transport and the police. Therefore, everybody went home safely.

Number two, Hon. Murungi asked: Could the Ministry intervene and direct the National Transport and Safety Authority (NTSA) to act with speed and rein in on rogue *matatu* SACCOs which are hiking fares across the country and consider their operating licences? At that particular time, there was a rush for people leaving the closed counties. The response to the Statement in this question is as follows: The public service vehicles (PSV) subsector is governed by the Traffic Act Cap. 403 and the National Transport and Safety Authority Act No. 3 of 2012 and also regulations. What does that mean? It means that under these laws, there is no express provision in the two Acts that enables NTSA to regulate fares as requested by Hon. Kathuri. There is no legal framework for NTSA to regulate fares. However, we might advise Hon. Kathuri that, in addition, the Ministry is in consultations with the PSV transport stakeholders on the need to streamline fares across the country noting the economic hardships that our country and our people are experiencing during this period of COVID-19.

Hon. Speaker, with those few remarks and responses, I thank you. I have given this statement to Hon. Kathuri. He called me back to say he is satisfied with the response from the Ministry. Therefore, I thank you.

Hon. Speaker: So, Hon. Kathuri Murungi is not present.

Hon. David Pkosing (Pokot South, JP): Hon. Speaker, I have not seen him, but I talked to him. He called me earlier. Thank you, Hon. Speaker.

Hon. Speaker: Next Order!

BILLS

First Readings

THE FOREIGN SERVICE BILL

THE MUNG BEANS BILL (SENATE BILL NO. 9 OF 2020)

(Orders for First Readings read - Read the First Time and ordered to be referred to the relevant Departmental Committee)

MOTION

FURTHER CHANGES TO MEMBERSHIP OF SPECIFIED COMMITTEES

Hon. Amos Kimunya (Kipipiri, JP): Hon. Speaker, I beg to move the following Motion:

THAT, further to the resolution of the House of Tuesday, 5th December 2017, appointing Members into various committees and pursuant to the provisions of Standing Order No.173, this House further approves the appointment of the following Members to the respective committees as specified hereunder:

- (i) The Hon. Peter Mwathi, MP, to be appointed to the Departmental Committee on Administration and National Security to replace the Hon. Josphat Kabinga Wachira, MP.
- (ii) The Hon. Josphat Kabinga Wachira, MP, to be appointed to the Departmental Committee on Labour and Social Welfare to replace Hon. Peter Mwathi, MP.
- (iii) The Hon. Benjamin Dalu Stephen Tayari, MP, to be appointed to the Committee on Implementation to replace the Hon. Owen Yaa Baya, MP.
- (iv) The Hon. Joseph Kalasinga Majimbo, MP, to be appointed to the Departmental Committee on Agriculture and Livestock.
- (v) The Hon. Janet Ongera, MP, to be appointed to the Departmental Committee on Environment and Natural Resources to replace Hon. Benjamin Dalu Stephen Tayari, MP.
- (vi) The Hon. Teddy Ngumbao Mwambire, MP, to be appointed to the Public Investments Committee to replace Hon. Anthony Tom Oluoch, MP.
- (vii) The Hon. Oscar Peter Nabulindo, MP, to be appointed to the Committee on National Cohesion and Equal Opportunity.
- (viii) The Hon. Francis Tom Joseph Kajwang', MP, to be appointed to the Departmental Committee on Justice and Legal Affairs to replace the Hon. Otiende Amollo, MP.

Hon. Speaker, these names were approved by the Selection Committee in its sittings yesterday. The names have been proposed by the political parties and the political coalitions through the Whips and basically it is a reorganisation of the committees to fill some gaps. Partly within the Departmental Committee on Administration and National Security, there is a gap of leadership occasioned by the demise of the Late Paul Koinange. The Jubilee Coalition is proposing to fill that vacancy by proposing Hon. Peter Mwathi to move in that Committee. We

are hoping that Members will then give him the support, so that he can continue with the good work that the late Hon. Paul Koinange had started. He leaves a position in Labour which Hon. Kabinga would occupy, but that will happen after the elections have been declared. The elections will be declared in due course. The two new Members have joined, namely, Hon. Joseph Kalasinga Majimbo and Hon. Oscar Peter Nabulindo and they have formerly been appointed to committees. There is also some reorganisation by the NASA Coalition for better delivery of services within their committees by their membership.

I do not want to belabour the point. We also note that some Members have asked to be removed and be reallocated their committee of choice. I see Hon. Baya wanting that attention to be highlighted. This is really a straightforward matter. It received unanimous support in the Committee on Selection. We, therefore, do not need to debate this.

I beg to move and ask the Leader of the Minority Party to second.

Hon. John Mbadi (Suba South, ODM): Thank you, Hon. Speaker. I want to second this Motion. The Committee on Selection sat yesterday and did some reorganisation for the better functioning of the National Assembly. As the Leader of the Majority has rightly put it, after the passing on of the late Hon. Koinange, there were possibilities of reorganisation of committees. I believe, hope and pray that my friend, Hon. Peter Mwathi, will be given the opportunity by being voted in by Members of that committee, to become the Chair of the Departmental Committee on Administration and National Security, and continue with the task. That is a very busy committee in terms of requests and Statements that go to the Departmental Committee on Administration and National Security. For the rest, it is just rearrangement.

Hon. Tom Oluoch had requested to surrender one of the committees to our very strong Member, Hon. Teddy Mwambire who has only been serving in one committee. This will now accord Hon. Teddy Mwambire opportunity to serve substantively in the Public Investments Committee where he has been acting.

There are other two new Members who have joined us after the passing on of our two colleagues. They also have an opportunity to substantively serve in the two committees.

Finally, we have made some changes in the Justice and Legal Affairs Committee (JLAC) to align it with the aspirations of the ODM and NASA Coalition. Hon. Tom Joseph Kajwang' is joining. He may not be a professor of law, but he is the people's chief justice, and so, he is well versed in legal matters and I wish him well in that Committee.

Thank you, Hon. Speaker. I second

(Hon. (Ms.) Sabina Chege walked in the gangways)

Hon. Speaker: Member for Murang'a, if you could find some seat. You appear to be heavily laden.

(Laughter)

(Question proposed)

Hon. Members: Put the Question!

Hon. Speaker: Is it the desire of the House that I put the Question?

Hon. Members: Yes!

(Question put and agreed to)

SPECIAL MOTIONS

APPROVAL OF APPOINTMENT OF PROF. FATUMA N. CHEGE AS PRINCIPAL SECRETARY

THAT, taking into consideration the findings of the Departmental Committee on Education and Research in its report on the vetting of a nominee for appointment as Principal Secretary in the State Department for Implementation of Curriculum Reforms, laid on the Table of the House on

Wednesday, 28th April 2021, and pursuant to the provisions of Article 155(3)(b) of the Constitution and Sections 3 and 8 of the Public Appointments (Parliamentary Approval) Act, 2011, this House approves the appointment of. Prof Fatuma N. Chege, PhD, as Principal Secretary, State Department for Implementation of Curriculum Reforms.

(Hon. (Ms.) Florence Mutua on 28.4.2021)

(Resumption of Debate interrupted on 28.4.2021)

Hon. Members: Put the Question!

Hon. Speaker: It is not putting of the Question. The Mover has to reply. Can I put the Question that the Mover be called upon to reply?

Hon. Members: Yes!

Hon. Speaker: Hon. Members, it is your decision. I do not have a vote. Let me find out what the mood is like.

*(Question, that the Mover be called upon to reply,
put and agreed to)*

(Question put and agreed to)

Hon. Speaker: Mover, Hon. Florence Mutua.

Hon. (Ms.) Florence Mutua (Busia CWR, ODM): Thank you, Hon. Speaker. I beg to remove my mask.

Thank you, Hon. Speaker. Let me take this opportunity first and foremost, to thank you and the Leader of the Majority Party for saving this Report last week. That was great wisdom. I also want to thank the Members of the Departmental Committee on Education and Research and the Members who gave their views in support of Hon. Fatuma. I also want to thank those Members that gave their varying views.

(Loud consultations)

I have to explain why we are supporting this lady. I want to thank Members for supporting Prof. Fatuma Chege, PhD, as nominee for appointment as Principal Secretary to the State Department for Implementation of Curriculum Reforms. I had notes and explanations as to why the CBC rollout is important, but seeing the mood of the House, I beg to reply.

Hon. Speaker: Order Members! If we can all pay attention, we will move very fast.

(Question put and agreed to)

APPOINTMENT OF CLERK OF THE NATIONAL ASSEMBLY

Hon. Speaker: Leader of the Majority Party, you have the Floor.

Hon. Members: Put the Question!

(Loud consultations)

Hon. Amos Kimunya (Kipipiri, JP): Hon. Members, we need to move the Motion first. Hon. Speaker, I beg to move the following Special Motion:

THAT, pursuant to the provisions of Articles 127(6)(b) and 128(1) of the Constitution and in furtherance of the resolution of the Parliamentary Service Commission of 7th April 2021, this House-

(a) approves the appointment of Mr. Michael Rotich Sialai, CBS, as Clerk of the National Assembly on contractual terms with effect from 26th May 2021 and ending on 31st July 2022; and,

(b) calls upon the Commission to commence the process of recruiting a new Clerk of the National Assembly not later than February, 2022, so as to ensure a smooth and seamless transition.

At the outset, I wish to commend the Parliamentary Service Commission (PSC) for appointing our Clerk, Mr. Sialai, for a one-year contract upon retirement. Indeed, this move is geared to ensure that we have a smooth transition not only in that office, but also as we come to the tail end of this Parliament next year. In light of some of the issues we are discussing in this House, including the constitutional amendment that will occasion a whole reorganisation of this House and Standing Orders, you need a steady head who has gone through similar things in the past and can take us through in the future.

For Members who do not know Mr. Sialai apart from seeing him here, he has a long and decorated career in the public service where he joined in 1989 when some of the Members were in early childhood. He started his job as a teacher of History and Kiswahili. He later became an assistant lecturer at Kericho Teachers' College until 1995 when he joined this Parliament as a Clerk Assistant. He has risen through the ranks to be the Clerk of the National Assembly.

Like I said, we are at a very important phase in this Parliament. Potentially, with the passage of the BBI, this Parliament will change from the way we know it to the Commonwealth or high breed system. It will require a number of legislations to be passed and reorganisation of our Standing Orders. We need Mr. Sialai's expertise which can come in very handy to occasion this reorganisation. Most of the employment contracts in the public sector have some inbuilt terms that end with the possibility of an extension for a standard person. Usually, you have to subject this to a reorganisation. Hence, in taking this decision, the PSC is within its legal powers to exercise that discretion to extend the terms through a contract.

Members are aware of the several civil servants who are serving on contract currently. The most notable is Mr. Joseph Kinyua who was my Principal Secretary in the National Treasury who has done a splendid job. He is past the retirement age. Because of his experience and the way he handles State matters, His Excellency the President, Uhuru Muigai Kenyatta, has kept him up to this point. There is no indication as to when he will be let to go as much as he wanted to retire five years ago. He has the kind of expertise that you feel that you need safe hands and

somebody who understands the mechanics of Government to help, especially in these difficult times.

Mr. Sialai assists this Commission to discharge efficient and effective services and promote the ideas of parliamentary democracy as contemplated in Article 127 of the Constitution. He is already putting in place a very important project occasioned by COVID-19 disease and the realities of the new normal, in terms of facilities in virtual sittings of the House, including all these online voting and participation which we do not want to be disrupted.

It is also important to note that the Parliamentary Service Act neither expressly nor by necessary implication bars the Commission from engaging any person on contractual basis in any position within the parliamentary service. Section 26(2) of the Parliamentary Service Act (No. 22 of 2019) only provides that if the person appointed as a Clerk of a House is an employee of the Commission who is serving on permanent and pensionable terms, he will continue on those terms for the duration of the term or retire upon attaining the age of 60 years. It provides for when you must retire, but does not bar the Commission from extending your service on a contractual basis. I have said that for avoidance of doubt, so that people do not start bringing issues that we know within the law.

Like I said, we congratulate the Commission on making the decision in accordance with the Constitution and Parliamentary Service Act. The consideration was made due to several factors; rare knowledge, the optimum performance of the duties of the Clerk, the need to have stability and continuity in that office, the provision of non-partisan and impartial advice, and the maintenance of honesty, accountability and integrity. We have seen very good remarks being passed in the various pages. Most importantly, there is need to ensure that we have a smooth transition through an orderly transfer of these functions. Hence, the need to have the person in place, so that by the date the Commission is being given to appoint a new person in February 2022, we will have enough time for the incoming Clerk of the National Assembly to understudy the outgoing one. Through the creation of that transition mechanism between February and July when the handing over process will take place, the 13th Parliament will be better.

(Applause)

I hear the mood of the House. I do not want to keep that decision any further. I beg to move the Motion and ask the Leader of the Minority Party to second.

Hon. Speaker: Hon. Mbadi, you have the Floor.

Hon. John Mbadi (Suba South, ODM): Thank you, Hon. Speaker. I do not think there is much to say. We all know Mr. Sialai. If we approve or disapprove his appointment, there is nothing to add. The Leader of the Majority Party has said it all and the reasons behind it.

I second the Motion.

Hon. Members: Put the Question!

(Several Members stood on the gangway)

Hon. Speaker: Are these Members coming to the Chamber? They are in various stages of the...Member for Suba North, you may not have read this because it is history. Some years back, when we used to have Provincial Commissioners (PCs), a former PC of Nairobi decided to mount a raid in various places where people used to go and enjoy themselves. In one place along Ronald Ngala Street, in a building known as Imani House, he claimed in his Press conferences

that he found people in various stages of “development.” So, I was wondering whether the Members walking in are in those various stages of “development.”

(Laughter)

That is on a light note. Those of you who may have read that Press Statement would know the exact words he used.

(Question proposed)

Hon. Members: Put the Question!

Hon. Speaker: Is it the desire of the House that I put the Question?

Hon. Members: Yes!

Hon. Speaker: Very well.

(Question, that the Mover be called upon to reply, put an agreed)

Hon. Amos Kimunya (Kipipiri, JP): Hon. Speaker, I beg to move.

(Question put and agreed to)

Thank you very much and congratulations to Mr. Sialai.
Next Order.

BILL

Second Reading

THE CONSTITUTION OF KENYA (AMENDMENT) BILL 2021

(Hon. Amos Kimunya on 28.4.202)

(Resumption of Debate interrupted on 29.4.2021 – Afternoon Sitting)

Hon. Speaker: Hon. Members, again, let me make this announcement because I already have 72 requests. Up to now, only 32 and-a-half Members have contributed to the Bill. Hon. Githiaka Kiai was on the Floor when the House rose. He has a balance of three minutes.

Hon. Kiai, you have a balance of three minutes.

Hon. Anthony Kiai (Mukurweini, JP): Thank you, Hon. Speaker. I will start from where I left.

I want to congratulate you for the ruling that you made today. It is very deep with a big impact which sets a precedent and, therefore, it will be used in future parliamentary engagements on similar issues. You have already quoted extensively from the Justice and Legal Affairs Committee (JLAC) Report, where I am a Member. I am proud to have participated in this momentous occasion of amending the Constitution.

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Hon. Speaker, there are two issues that came out during the deliberations. One of them is whether or not there is an error in that Report. The issue is with regard to Article 87(7) and Article 89(7). I want to say that the error on the face of the record does not in any way change the substance of the Report. The Report was discussing the issue of delimitation of the constituencies. If you look at the deliberations too, it was captured very well by the JLAC Members. The Article is not fatal.

If you look at Article 103 of the Constitution, you will realise that it omitted sub-section (2). It only has sub-section (1) and then it continues to sub-section (3). Nobody has ever raised the issue of the legality or otherwise of the Constitution yet it has been in operation for the last 10 years without any issue. I want to submit that Articles 87(7) does not exist in the first place. Article 89(7) was talking of delimitation. The error on the face of the record is not fatal.

The other issue is about delimitation of the additional 70 constituencies. I submit that the will of the people, the sovereign power, is captured in Article 1 and that power lies with the people of Kenya. They have the mandate to change any section of the Constitution. They are the ones who created the Independent Electoral and Boundaries Commission (IEBC). They are the same people who created that Article. Under Article 1 of the Constitution, they have the exclusive mandate to amend any section of the supreme law and make any law in this country.

Hon. Speaker, I support.

Hon. Speaker: Let us now have the Member for Limuru.

Hon. Peter Mwathi (Limuru, JP): Thank you, Hon. Speaker, for giving me a chance to contribute to this very important Bill. I start by also expressing my appreciation for your considered ruling that was quite informative, well-researched and one that will set a precedent for future rulings in Parliament. It has put to rest most of the things. In fact, most of the issues that we were going to converse, as I was discussing here with the Deputy Whip, were addressed in your ruling. Therefore, I want to associate myself with that ruling.

Hon. Speaker, let me start by saying that I really appreciate the statesmanship that was shown by our President together with the magnanimity that was also exhibited by the former Prime Minister, Rt. Hon. Raila Odinga, when they came together and did the handshake. The commencement of the BBI and the Bill before us is a result of that handshake which was also supported by many people. When they shook hands, the two great leaders said that the country and the people are greater and bigger than themselves. They relegated themselves to the will of the people to ensure that the electoral violence that had been witnessed after every general election since the early 1990s through to 2007, when it almost culminated in a civil war, came to an end.

The two gentlemen put aside their desires and their ambitions and decided that, for the sake of the people of Kenya, they would address the issue of divisive elections. Every time there is an election, we lose close to two years. One year before a general election, people fear to invest in our country and we lose in terms of income. Also, immediately thereafter an election, we experience another year of uncertainty because of political instability.

This Bill seeks to encompass most of the people from the region by way of having seats which are currently in Parliament, not that they are additional, being distributed within the republic. The Leader of the Majority Party will become the Prime Minister and his deputy becomes Deputy Prime Minister. More importantly, I remind Members that the last election was won by a small margin. There is almost the same number of people who lost who are literally in the opposition. The winner-takes-it-all ensures the leader of the other huge chunk of votes of the ones who lost, almost 50 per cent of Kenyans, is left outside Parliament. But this Bill now

proposes to amend the Constitution to ensure that in this House, we have the Leader of the official opposition and probably his shadow cabinet checking on the Government while here. Previously, the President and the Deputy President would form Government and become a tool to fight the opposition. Now the opposition is recognised by its people in the manner provided for in the Bill.

Hon. Speaker, allow me to bring out an issue which in the region I come from has been used by some of us to peddle lies to the common *mwanachi*, that for us to pass this Bill, we must check whether it contains issues of milk, coffee and tea. This morning I engaged a colleague and reminded him that there was a time milk, tea and coffee were doing very well. I asked him which Constitution addressed the three income generating activities. They never saw anything of that sort in the Constitution that we changed. We never saw anything written about milk, coffee and tea in that Constitution. But in this one, there is a provision in Clause 11A on the economy and shared prosperity, which, among other issues, under 11A(2)(c) talks about sustainable sources of livelihood, including agriculture, pastoralism and the blue economy. At the tail end of the Article, it says that Parliament shall enact legislation to give full effect to this Article.

I have brought up this issue because when we were discussing the Tea Bill, coffee and agriculture in general, the same people who had gone out there to say there is nothing that addresses the main income generating activities within our region were not in this House. I invite them to pass this Bill so that we can amend the Constitution. Further, if they will be lucky to get back to this House, if it would not have been passed, they can address it under the laws that are required to be done under Clause 11A.

Allow me to mention sharing, which is also very pertinent. I feel, and this is my submission, that in Kenya, we know there were historical injustices. The historical injustices are such that some areas were left behind when others were developing. But when we gave ourselves the Constitution in 2010, we found it fit to introduce the Equalisation Fund to try to help those areas that had been left behind. In the same vein, if we are going to amend the Constitution, we should do it in a manner or in a way that we do not marginalise or create marginalisation in areas that are probably perceived to have been developed. I say this because there is a time I did my mathematics, and looked at the money sent as devolved funds to each county and if you check the amount that has been given per head, take the money and divide it with the population, you will find that some areas get an equivalent of Kshs7,000 and others Kshs24,000. But in these changes, Article 203 of the Constitution shall be amended in Clause 50(a)(n) to ensure that the average amount of money allocated per person to a county with the highest allocation does not exceed three times the average amount per person allocated to a county with the lowest allocation. So, that speaks to the new marginalisation that is coming and the injustice that will be done to counties that have so many people, once we do the mathematics per head.

I also want to speak to the issue of National Government Constituencies Development Fund. It is not lost on us that this House spent a whole year trying to address the issue of the NG-CDF which had been ruled unconstitutional by the High Court. I dare say that the NG-CDF has been felt on the ground more than any other fund, be it devolved or otherwise. It is very useful for Members of Parliament to have the NG-CDF, but what happened when we went to court? They ruled that it was an illegality and that it was unconstitutional and it was stopped. I am elated or delighted that this time round, the NG-CDF is going to be embedded in the Constitution and this House will enact legislation to operationalise how the NG-CDF will be distributed.

On top of that, we have devolved funds which are pegged at 15 per cent equitable share to every county being increased from 15 per cent to 35 per cent. Not only is it being increased

from 15 per cent to 35 per cent, but further, the 35 per cent has another 5 per cent which is going to be allocated to the ward. What does that mean? It means that the devolved money to counties is further devolved and gets closer to the people.

It is a requirement by the Constitution and the Public Finance Management Act that when there is development to be done in every county, the governor and the leadership at the county level must involve the people. If people are going to be involved, it means the empowerment people are going to get has the new terminology which came up the other day, probably, two days ago, namely, the bottom-up approach. It is happening currently. We do not want to promise people what will happen. It should happen now. Once we pass the amendments to the Constitution, we are going to have the bottom-up approach. We are going to have the bottom-up approach and not wait up to or after 2022. So, the people who speak in terms of doing it after 2022, should be told that we said it a long time ago and we are doing it now under the Building Bridges Initiative.

Hon. Speaker, allow me to also speak to the issue of the Second Schedule, and I am happy you ruled that there is nothing unconstitutional about the Constitution making by the people because they give themselves that Constitution as long as they follow the provisions of the clauses on how they should change it. I heard here that some of us are trying to say that there needs to be amendments to a schedule within the Constitution.

[The Speaker (Hon. Justin Muturi) left the Chair]

[The Deputy Speaker (Hon. Moses Cheboi) took the Chair]

The people of Kenya can decide how many constituencies are going to be in Kenya. I remember when I was in the 10th Parliament, we had 220 constituencies. However, when we, as Members of Parliament, gave ourselves the 220 constituencies, the people decided that it is not going to be 220 constituencies, but 290 constituencies. We were right. However, I am now asking: “What is wrong with us, the same people of Kenya, deciding that we want to have another 70 constituencies and make it 350?” So, if we increased the number of constituencies from 210 to 290, can we not take it to 350, and indeed, also ensure that we decide which manner they are going to be distributed? It is not that we are doing the delimitation. Delimitation is for the IEBC. We are doing allocation of 70 constituencies in a manner supported by the Second Schedule.

With those many remarks, I urge all of us to support. Thank you.

Hon. Deputy Speaker: The Member on top of the list is Hon. Luyai Amisi, Member for Saboti. Of course, we will be going by the system that the Speaker set of going as per the list, and not necessarily the sides of the House. So, proceed, Hon. Amisi.

Hon. Caleb Luyai (Saboti, ODM): Thank you, Hon. Deputy Speaker. Allow me to put my mask aside for a while. I have been waiting patiently throughout last week to no avail but, at least, I learnt the trick of being an early bird and I have caught your eye.

The 2010 Constitution was heavily borrowed from other advanced democracies. We do not, as a country, exist in vacuum. We are in a global setup where we learn from other nations, and a good example is Switzerland. Switzerland has a very interesting model of rotational presidency, and they aligned this to their distinct multilingual and multi-ethnic composition of

the country. As a country, we also have a distinct composition of our nation and we must align our Constitution to that reality. I think the time is now.

I am so much excited. There is so much that we can talk about on this particular proposal in this Bill, but I am excited on a number of legislative proposals that had been proposed in this particular Report. Most importantly, is the one touching on the Higher Education Loans Board (HELB) that gives a four-year moratorium to loanees. I had a problem when I was vying as a Member of Parliament because one of the requirements was for you to produce a certificate that shows that you have been cleared by HELB. I had to take a loan to clear a loan. You can imagine how many young people go through this difficulty of trying to clear their HELB loans for them to access opportunities.

This particular legislative proposal is going to help many graduates who are out there, and usually get into problems trying to access opportunities simply because one of the requirements is that they have to clear HELB loans. This happens yet, at that time, for example, in my case, I was still jobless. I was looking for a job to come to this Parliament to represent the people of Saboti. So, how do you expect a jobless graduate to clear his or her HELB loan? So, this proposal is some of the reasons that the young people of this country are going to support the BBI Report.

The proposals on Micro and Small Enterprise Act gives a seven-year tax holiday for youth in business. I led a consortium of youth organisations and young leaders to present views to the BBI taskforce. This was my proposal, and I am happy it was well captured that the young people need to be given incentives to uplift their businesses. This will go a long way if the Bill comes to pass. The business incubation centres should provide advisory services.

There is also a proposal of creating a youth commission. Our earlier suggestion was to make it a full-fledged Ministry, but nevertheless, this was a step towards the right direction because the youth commission will be in charge of formulating policies that will enable the young people that make the 70 per cent of our population to participate in the art and craft of nation building.

The legislative proposals on Anti-Corruption and Economic Crimes Act is also an exciting proposal because we have lost so much as a nation through the graft musketeers. It is time to tighten our laws to provide enough punitive laws to enhance our economic fight against economic crimes.

There is also a legislative proposal on the National Economic and Social Council to provide a comprehensive legal framework that our national planning is premised on. We have left our national economic and social planning to political promises, that whatever the presidential aspirants promise the country, is where our country will go. This has been risky to our nation because most of these promises are never fulfilled.

So, we need an economic council that will guarantee this nation a clear plan. You have seen how the Americans have designed their federal reserves such that even at times like now, during the pandemic, they are less affected because they have enough federal reserves to cushion their citizens. So, this is also a very progressive national planning Bill that has been captured here.

There are areas established under Clause 16 on Page 31 that provide the establishment of the leader of official opposition. There will be a problem because the leader of official opposition must be the person who got the second highest votes in the presidential election, and he must come from a party or coalition of parties with at least 25 per cent of the Members of the National Assembly. There will be a problem, probably, if that leader is the runner-up in the presidential

election, but his or her membership in the National Assembly is less than 25 per cent. So, does it mean that Parliament will lack the leader of official opposition? The promoters of the Bill need to look at that going forward.

On Clause 28 on the appointment of the Prime Minister, we all agree that this is where we need to be as a nation to balance our different ethnic composition to allow, at least, various regions to be represented in the management of our country. The mixed Cabinet to allow Members of the National Assembly to be appointed Cabinet Ministers or Assistant Ministers is also good, only that the word “may” can be misused. A rogue President may in future use that word to just have two members of his cabinet coming from the National Assembly and the rest coming from outside. So, those are areas we need to look at.

On the delimitation of boundaries, there is the argument that the BBI taskforce took away the mandate of the IEBC. I do not see anywhere in this document where they have taken away the mandate of the IEBC. The IEBC will still delaminate boundaries. So, on this argument, the only areas we need to look are “doing boundaries 12 months before a general election”. It may be catastrophic or cause chaos towards the electioneering period, especially in highly tribally emotive areas like where I come from. These are very minor things on the basis of which we cannot stop such a nice document from passing. These are areas that can be looked at.

Hon. Deputy Speaker, we need to recognise where this nation has come from. Some of us have been in the centre of the National Super Alliance (NASA) demonstrations. We have gone to the streets. We have been teargassed. I am one of the persons who “consumed” a lot of teargas. A teargas canister was thrown right inside my car through the rear window. Were it not for journalists from an international media house who are trained to save life as they take footage, I could be dead. Hon. Oluoch walks as if he is leaning. You may think he is bouncing, but he is actually suffering from the effects of demonstrations during the fight for what we believed in.

Hon. Deputy Speaker: Member for Amisi, you know, the Members may have to applaud you. If you really can consume teargas and survive, consume it. You know the normal throwing of teargas and sniffing is not the problem, but if you are a consumer, proceed.

Hon. Caleb Luyai (Saboti, ODM): Hon. Deputy Speaker, I hope you will give me those minutes back. I am using the word “consume” because it is actually what happened. I consumed. The teargas was thrown right inside my car. I am using that word carefully to capture the magnitude of the scenario and what we went through. I was a consumer of teargas.

(Laughter)

You may laugh at it, but if it was not for a journalist from an international media house, I could have died. People could have gone for a by-election merely two weeks after being sworn-in. Up to now, I still visit the Nairobi Hospital for check-up on my health. I see Members of a certain formation who whenever they see a cigarette light at their rallies, they run helter-skelter thinking it is teargas.

Hon. Deputy Speaker: What is it, Hon. Ochieng’? What is out of order?

Hon. Elisha Odhiambo (Gem, ODM): I am sorry, Hon. Deputy Speaker. Hon. Amisi, you only consume alcohol. You inhale teargas. If you have an opportunity and the police have thrown teargas unto you, the right English word is “inhale”. “Consume” is wrong English in this context.

Thank you.

Hon. Deputy Speaker: Well, but sitting here, I am a lawyer. You know you can still consume teargas through the nose. Proceed, Hon. Amisi. That is exactly the issue I was raising but “consumption” is getting it into your system. So, you consumed it through the nose.

(Laughter)

Hon. Caleb Luyai (Saboti, ODM): Hon. Deputy Speaker, I was taught English by Dr. Griffin at the Starehe Boys Centre and School. “Consume” is an idiom. When you use “consume”, it is just an idiom in the English language. It does not necessarily need to speak to your local language.

Hon. Deputy Speaker, I hope you will add me the minutes that have been consumed by the point of order. I was trying to explain the far that this country has come. Nations have gone to war to be where we are. The two principals, the President and Rt. Hon. Raila Amollo Odinga catapulted this country from war to peace. It was not easy because it has never been done and we must reflect on this moment. Countries are now borrowing a leaf from Kenya because the aftermath of any war is peace agreements and justice. A nation that was almost at the brink of war was saved by two statesmen and this is the conversation that we need to have as a country.

Every generation in this country has fought for something. There was the fight against colonialism and one-party system. Every generation has always risen up and has done what is expected of them at that time. As a generation, we are now called upon to rise up and do what needs to be done by passing this BBI Bill that binds us as a country. We must disturb the stubborn status quo. We must trespass on the taboos of nationalism. When President Obama came here, he told us we have not inherited this land from our forefathers, but we have borrowed it for our children and we must return it with interest. The interest we are going to give our children is this BBI Bill.

I support the Report.

Hon. Deputy Speaker: Hon. Members, we will follow the list as was ruled by the Speaker. Among the top four in the list, there are two Members who are going to break the fast and all of them will speak, anyway. I will give an opportunity to Hon. Jaldesa. I want to request that since I have tried to make it better for you, please, return the favour by speaking less. I will also give the other Member an opportunity before we come back to the list.

Hon. Jaldesa, you were the second one in the list.

Hon. (Ms.) Rehema Jaldesa (Isiolo CWR, JP): Thank you, Hon. Deputy Speaker, for giving me an opportunity to add my voice on this historical moment on behalf of the people of Isiolo. Just to put the record straight, I placed my card at 1.00 p.m., and, therefore, you have not given me any favour because I was already at the top.

From the outset, I want to take this opportunity to congratulate the Departmental Committee on Justice and Legal Affairs for this good Report. I followed their Report more than the BBI one and I want to congratulate Hon. Muturi and his team for simplifying the Report and making it easy for us to understand. It is said that politics are local and it is about interest. For the interest of the people of Isiolo, I stand to register a lot of reservations on this BBI proposal cognisant of the ruling made by the Speaker this afternoon. We have been told that the Bill before this House is by popular initiative. My understanding of a popular initiative is a people driven process. I have listened and interacted with people in my constituency and my host constituency, Nairobi, and I want to say that the ordinary people seem not to understand the BBI. That begs the question: If it is a people driven process, how come people have not had an

opportunity to see copies of the BBI document? How come civic education has not been conducted? If I can remember, in 2010, we were part and parcel of the civic education process. We were given booklets. People used to knock our doors telling us about the 2010 Constitution. Therefore, I am wondering how it is a people driven process.

In the county I come from, Isiolo County, people only know about the BBI from what politicians say. Some of us have said that they have reservations and even if they have reservations, they will pass the BBI Bill while others have said that there is no perfect document. So, there is a lot of confusion. I have listened to some of my colleagues and they have said that there is no perfect document and constitution making is a process. However, I am wondering if there is no perfect document. We have the Constitution of Kenya, 2010 and we know its challenges. Why can we not improve it other than create more confusion?

Having said that, I want to go to the specific issues that I have reservations on. One is on representation. Looking at the BBI Report, especially on the consideration of the Second Schedule, it looks at the one man one vote one shilling principle. While I agree that each citizen's vote is of equal importance, I am equally concerned about how this principle will be applied. Kenya is defined by its people and its land. If I would have been given an opportunity, I would have proposed we consider the one man one vote together with one kilometre one vote, so that we have fair representation. As the Secretary-General of the Pastoralist Parliamentary Group, we submitted to the BBI taskforce that to be fair to this country, we should also consider people with populous constituencies and huge tracts of land. We proposed each county to be given one constituency and then the remaining 23 be shared by the populous counties. If that is taken care of, this document will be passed without reservations.

I am concerned that the 47 women representatives' seats are being taken from this House to the Senate. That is clawing back on the gains we have made. It is like giving us something with the right hand and taking it away with the left hand. Why am I saying so? The 47 women representatives' seats in this House addressed the gender gaps in a better way. The seats gave women a political voice. Those of us who are elected, when we stand here, we have constituents behind us. The seats also took away the notion that women who are nominated are either flower girls, slay queens or girlfriends of party bosses. The BBI is proposing to take women back to the old days. That makes me sad. The BBI Bill says that the Senate will have one man and one woman. The current Senate is already past that.

I can proudly tell this House my county of Isiolo elected a woman who competed with six men to the Senate. Likewise to Uasin Gishu, Nakuru and Machakos. Now when they say one man and one woman to the Senate, what will happen to the gains that we already made? Those are issues that make me have reservations on the BBI Bill.

My second reservation is on shared prosperity. Much as a lot of counties are celebrating the proposal to devolve 35 per cent of national revenue to the county governments, which of course, I highly doubt will happen, because counties struggle to receive the current 15 per cent from the National Treasury... When you read the preamble of the Bill, it talks about very attractive things like equity, inclusivity, lack of discrimination and many other things. But the proposed Article 203 in the Bill proposes that the average amount of money allocated per person to the county with the highest allocation does not exceed three times the average amount per person allocated to the county with the lowest allocation.

First of all, money allocated to counties is not for distribution to individuals. It is for service delivery and general development. The proposal of per capita allocation capping under Clause 50(a) in the Bill is against the spirit of common good for all Kenyans and negates the

gains made in so far as the objects and purpose of devolution are concerned. Why am I saying this? The current revenue allocation formula is already discriminatory. Most of the parameters used are pegged on population. That is why most of our counties get very little allocations. With the current allocations, Isiolo County gets Kshs25,000 per person whereas Nairobi gets Kshs4,000. If you follow the proposed formula, my county will lose Kshs1.6 billion. If you tell me to pass this BBI Bill because I want to be in good books with the powers that be, all powers are local. Therefore, I have to fight for the interest of my people plus seven other counties that are going to lose money.

The other thing that we are told by BBI promoters is the Ward Development Fund. If there is a county that does not have WDF, they need to send home all their MCAs. For the WDF to be established, we do not need a BBI. All we need is legislation in the counties. I can comfortably tell you most counties have WDF allocations that are more than what is proposed in the BBI Bill.

The last issue, because I want to allow other Members to contribute, is about inclusivity.

The BBI talks a lot about inclusivity, which is a good thing. However, you cannot build a united Kenya if a certain group within the society is not understood or accepted by their fellow citizens. Pastoralist communities and the minority, including my community, are discriminated against when it comes to issuance of Government documents like identity cards, passports and birth certificates. It is only in the pastoralist counties and amongst some minority groups in Kenya, including Muslims, where a child born in a Kenyan hospital, goes through the Kenyan education system, upon attaining the age of 18 years is subjected to a tiresome, dehumanising and ridiculous vetting process before obtaining identification documents. We are told that it is because some of these counties are neighbouring foreign countries. Isiolo County is said to be at the centre of this nation yet my people are subjected to vetting.

We made a presentation to the BBI taskforce and I expected this matter to be addressed. Unfortunately, nothing has been said about it. I, therefore, have so many reservations against the BBI. During voting, I will vote “No.”

Thank you.

Hon. Deputy Speaker: You did not leave even a single second for your colleagues. I thought you were going to be that fair with it. What I am going to do now is to strictly follow the list. The following are the Members who are going to speak: Hon. Ong’era, Hon. Shamalla, Hon. Mboko and Hon. Muthoni, in that order. I would have expected some savings, but it did not happen. Let us now proceed with Hon. Ong’era. Wherever we will reach, it will be fine. However, we still have an evening session.

Hon. Janet Ong’era (Kisii CWR, ODM): Thank you, Hon. Deputy Speaker for giving me an opportunity to make my contribution to the Constitution of Kenya (Amendment) Bill, 2020. I support the Bill.

I would like to take this opportunity to thank you for making a very wise and sagacious ruling that this is a popular decision and must go to the people. As one of the promoters of this Bill, I am very happy that you made such a ruling.

There are many good things in this Bill. In this constitutional moment, Kenya is going through the greater good that exceeds the lesser evil. This constitutional amendment has not just come out of the blues or fans so that we say we are amending the Bill and the Constitution for the sake of amending it. We are amending the Constitution because many Kenyans have died because of lack of a level playing ground and equal opportunity, particularly in the political arena.

This constitutional moment has arisen from what happened in 2017/2018. Many of us in the opposition felt that we had been cheated during the electoral process. We have come here because we want to create a level playing ground. This is why the greater good will always exceed the lesser evil. There are many good things in this Constitution which I do not want to belabour because many of my colleagues have spoken about them. I am particularly happy with the devolution of more resources to the counties.

Hon. Deputy Speaker, I am happy that there will be, for the first time, a larger amount of money, 35 per cent, going to the counties. This will spur more economic growth. There will be more hospitals, more labour wards for our mothers in terms of maternal healthcare, our children will get more access to education and many more things that we know that come from the good of devolution. Another benefit that this Bill brings is the fact that for the very first time we are going to devolve these resources right to the tiniest units and that includes the Ward Development Fund. I think it is a very good thing that we are able to give resources to the politicians who are at the grassroots. They are the ones who are with the people daily. Therefore, when our County Members of Assembly will be getting this money I think that there will even be a lesser number of people interested in coming to this august House. Many people will want to be there in the counties.

However, there is an elephant in the room concerning this amendment. It will not be good that I speak only of the good without mentioning the grey areas. The biggest grey area is the fact that 19 constituencies that deserved to be given another constituency were omitted. Amongst this was Bobasi, one of the constituencies I was elected to represent as the Kisii County Member of Parliament. This constituency meets the criteria. If the basis is population, it meets that criteria. If it is the question of wards, this constituency has eight wards. Hon. Obiri, the Member of Parliament for Bobasi will tell you he has 200 schools to award bursaries in terms of NG-CDF yet we know that there are some constituencies in this august House which have, say, 24 secondary schools only. It is a pity that Bobasi Constituency was left out. I understand from the grapevine that this constituency indeed was there in the schedule but unfortunately in the midst of midnight, I do not know which demon or devils sneaked in and deleted the constituency from the schedule.

Hon. Deputy Speaker, the next thing I would like to speak to, which is a grey area, is Article 89 of the Constitution. I believe Article 89(2) and (3) need to be re-looked at. Moreover, when we speak about a constitutional moment we must be alive to the things that we need to look at. We should be able to leave a good legacy that people will remember us for as legislators.

I agree that we needed, perhaps, to have consulted IEBC on developing this schedule for the constituencies. This is so that we do not seem like on the one hand, we are breaking the current Constitution that we want to amend and, on the other hand, we think we are making another right.

About the doctrine of separation of powers, it is actually about separation between the Legislature, the Executive and the Judiciary. It was to create unfettered discretion and independence of these three arms of government. I do not think it would be right to create an executive ombudsman even if that ombudsman is going to be appointed by the Senate. This is because we would be interfering with the Judiciary in the execution of their duties. It will be very sad, for example, if in this Parliament, after we have made our decisions, we find that we now have another ombudsman who can overrule our decisions. The doctrine of separation of powers is a very powerful doctrine required to carry the issues of democracy to another higher level. I

feel that this is a grey area that needs to be looked at. Let us not kill the independence of the Judiciary. We never know: today we have a very good President, Hon. Uhuru Muigai Kenyatta. Tomorrow we may get a rogue president. We are tying our hands by not ensuring that the doctrine of separation of powers and the independence of each of the three arms of the Government are protected.

I would like to point out the issue of the 47 County Woman Representatives. It is, indeed, sad that we are removing the elected CWR from this House, which deals with the national budget and appointment of cabinet secretaries and ambassadors, and we are instead taking them to the Senate. It would be good if the CWR were left in this House and an alternative way of dealing with the gender parity issue is found.

Hon. Deputy Speaker, may I get your protection from this side. I said I am supporting. I am pointing out the grey areas. As a legislator, it will be very sad if I do not point out the grey areas in this Bill.

Finally, the two principals, Hon. Raila Amollo Odinga and President Uhuru Kenyatta, decided to put aside their differences because they wanted to look at the greater good. The greater good will always override the less. So, in this amendment, we have 75 per cent that is good. That is the reason we must support the Bill. The 25 per cent constitutes grey areas which I believe can be dealt with even before we pass the Bill in this House.

I beg to support.

Hon. Deputy Speaker: Next is Hon. Shamalla.

Hon. (Ms.) Shamalla Jennifer (Nominated, JP): Thank you, Hon. Deputy Speaker. I rise to support the Constitution of Kenya (Amendment) Bill, 2020. In 2017, our country, and more so the Jubilee Party supporters, were stunned when the Supreme Court annulled the presidential election results. Kenya became the fourth country in the entire world to have presidential election results annulled after Austria, the Maldives and Ukraine. Kenya was the first country in Africa to have presidential election results annulled. The country had to go through a second election cycle. The upheaval eventually cost the economy of this country Kshs1.7 trillion.

After the second presidential election, the Supreme Court upheld the victory of His Excellency President Uhuru Kenyatta on 20th November 2017. However, the opposition rejected the judgement stating that they did not recognise the new Government. Immediately thereafter, violence erupted in various parts of the country and there seemed to be no end in sight. Fast forward to March 2018, the country sighed with relief when His Excellency President Uhuru Kenyatta and the Right Hon. Raila Odinga engaged in what would come to be known as the historic handshake at the front entrance to Harambee House. This culminated to the BBI process and the Constitution of Kenya (Amendment) Bill, 2020.

The Bill expresses the dreams and aspirations of the people of Kenya and where they want to go. They said they had witnessed violence since the advent of multiparty elections. Out of six elections, only two have had peaceful transitions since 1992. In this Bill, the people of Kenya have told us that they want regional integration and cohesion. The Constitution of Kenya (Amendment) Bill, 2020 gives assurances that our nation will embrace the goals of African unity with eventual prosperity and stability for all. The people of Kenya told us that they want equitable opportunity for all Kenyans, which is provided under Clause 11(a) of the Bill. The BBI Bill comes with responsibilities on our part as citizens. Amongst these responsibilities are to promote and protect the wellbeing of the family including respect for parents and elders as envisaged under Clause 18 of the Constitution of Kenya (Amendment) Bill.

Indeed, the iconic American evangelist, Billy Graham, said a child who is allowed to be disrespectful to parents will not have true respect for anyone. I hasten to add, for anything. The fourth commandment of the Holy Bible tells us to honour our fathers and mothers so that our days may be long upon the land which the Lord Almighty has given to us. This is the only commandment that comes with a rider, condition and promise.

When I look at this country and see the abuse of elders, I think the respect for parents and the elderly is one of the best clauses in this amendment Bill. I hasten to add that, as a nation, if we abide by this decree, we shall be blessed long upon our land beloved Kenya. According to Kenyans, in order to resolve the cyclical election violence, they said that they wanted a structure of governance that was consociational in nature. The winner takes it all political system should not and could not fit in the consciousness of Kenyans.

Lest we forget, in March 2008, the National Assembly of Kenya passed the National and Reconciliation Accord Act that amended the Constitution introducing the position of Prime Minister and two Deputy Prime Ministers. Article 257 of the Constitution of Kenya 2010 on the amendment of the Constitution by popular initiative recognises the sovereignty of the people of Kenya and the power to make amendments to the Constitution.

The sovereignty of the people is not exercised on specific Articles of the Constitution, but the entire Constitution including the delimitation of the constituency boundaries. The Constitution is the supreme law of a country in contrast to ordinary legislation. A Constitution embodies the fundamental choices made by a country and its people that establish the basis for political and social life. However, while intended to be both foundational and enduring, constitutions are not intended to be immutable. If they are to endure, they must respond to changing needs and circumstances. The motivation for changing the written text of a Constitution differ. Some amendments are made for public interest, for example, the Bill before this House. They can also be made to adjust the Constitution to the environment in which the political systems operate including economies, technologies and international relations.

Constitutions have to be responsive to social change and changes over time in social morals and values. It is true that we have inherited a very robust Constitution, but no Constitution can provide for all eventualities. No document can be searched that it needs no change. At the same time, a Constitution is not frozen and an unalterable document. It is a document made by human beings and may need revision, changes and re-examination. It is true that the Constitution reflects the dreams and aspirations of a society. It must also be kept in mind that the Constitution is the framework for the democratic governance of society. In this sense, it is an instrument that societies create for themselves and amend for themselves.

With those remarks, I also want to thank the Committee on Justice and Legal Affairs and the Joint Committee with the Senate for the work they did in the Report that was prepared. I support.

Hon. Deputy Speaker: Hon. Member for Kandara. I must thank the Member who has spoken because she was very precise and saved some minutes.

Hon. (Ms.) Alice Wahome (Kandara, JP): Thank you, Hon. Deputy Speaker.

Hon. Deputy Speaker: Your time is over. So, take your seat, Hon. Alice Wahome. Take your seat. The implication of that, Hon. Wahome, is that, under any circumstances, you will be the first to speak when the next session starts. That is the essence of that. You should be very thankful. Take your seat.

Hon. Members, just to also save the Members who have really sat through the afternoon, under normal circumstances, the system will be cleared, but if you Members, leave your cards

logged on, we will come and proceed from where we have reached. That will save you the agony of having to rush out of the door and coming back to, again, log-in and queue the next start from where we are now. So, those Members who want to speak in the next session, please, leave your cards in the login gadget.

ADJOURNMENT

Hon. Deputy Speaker: Hon. Members, the time being 6.30 p.m., the House stands adjourned until this evening at 7.00 p.m.

The House rose at 6.30 p.m.