

PARLIAMENT OF KENYA

THE SENATE

THE HANSARD

Thursday, 29th April, 2021

Special Sitting

*(Convened via Kenya Gazette Notice
No.4008 of 27th April, 2021)*

*The House met at the Senate Chamber,
Parliament Buildings, at 2.30 p.m.*

[The Speaker (Hon. Lusaka) in the Chair]

PRAYER

MESSAGE FROM THE NATIONAL ASSEMBLY

PASSAGE OF THE DIVISION OF REVENUE BILL (NATIONAL ASSEMBLY BILL NO. 7 OF 2021)

The Speaker (Hon. Lusaka): Hon. Senators, I have a Message on the Passage of the Division of Revenue Bill (National Assembly Bill No. 7 of 2021).

I wish to report to the Senate that, pursuant to Standing Order No.41 (3) and (4), I have received the following Message from the Speaker of the National Assembly regarding the passage, by the National Assembly, of the Division of Revenue Bill (National Assembly Bill No. 7 of 2021) –

PURSUANT to the provisions of Standing Order 41(1) of the National Assembly Standing Orders, I hereby convey the following Message from the National Assembly –

WHEREAS the Division of Revenue Bill (National Assembly Bill No. 7 of 2021) was considered and passed by the National Assembly without amendments on Tuesday, 23rd March 2021 and referred to the Senate for consideration on Wednesday, 24th March 2021;

AND WHEREAS the Senate considered and passed the said Bill with an amendment to the Schedule on Tuesday, 13th April 2021 and referred it back to the National Assembly for reconsideration in accordance with the provisions of Article 112(1)(b) of the Constitution;

FURTHER WHEREAS the National Assembly considered and approved the Senate amendment to the Schedule of the said Bill without amendment on Wednesday, 28th April 2021;

NOW THEREFORE, this concludes the bicameral consideration of the Bill, and in accordance with the provisions of Article 112(2)(a) of the Constitution and Standing Order 148(a) of the National Assembly Standing Orders, I will hereby proceed to present the said Bill to H.E. the President for assent.

I thank you.

Next Order.

BILL

Second Reading

THE CONSTITUTION OF KENYA (AMENDMENT) BILL, 2020

(Sen. Poghiso on 28.4.2021)

*(Resumption of Debate interrupted on
29.4.2021 - Morning Sitting)*

The Speaker (Hon. Lusaka): Sen. Cheruiyot, you have two minutes.

(An hon Senator spoke off record)

The records tells me something different.

(Laughter)

Sen. Cheruiyot: Mr. Speaker, Sir, I will wrap up my thoughts. I was speaking to the paradox and the irony that is in this Constitution (Amendment) Bill; in that Clause 3 speaks about a shared prosperity for this nation yet if you move downwards to Clause 50, it returns us back to the Sessional Paper No.10 of 1965, where back then it was allowed for people to imagine that you can pay more premium on people but consider nothing in terms of the vast lands that this country has.

Back then in 1965, that was allowed but not any more. Think about even a simple project, for example, the Lake Turkana Wind Power in Marsabit County. It generates billions of shillings for this country; more than some of these counties that are filled with people but the only thing they give to Kenya is potatoes.

So, we have now brought this attitude of disparaging and looking down on counties that are least populated and we want to put it as a constitutional principle. I pointed out before we took a break that even the tabulation of this proposal is not possible. If you run it on an excel sheet, it gives you something called the circular reference error. It turns out to zero because the more you reduce from certain counties to others, that balance will never be achieved.

Therefore, I will conclude by saying the following; what are our options as a House? I do not think this House lacks intelligent people to guide the country in terms of what to do with such a constitutional amendment Bill. The only problem are the phone calls that keep on coming; this thing called party position and so many of these things that interfere with the independent thinking of Members of this House. I can bet that if you were to throw phones out of this House and give us six hours, we will come up with a document that will give prosperity to Kenya the way we have been dreaming about.

Mr. Speaker, Sir, I plead with our colleagues. I know that there are some of our colleagues who are at this point in time working on amendments to this document. If we get to that point and I believe we will, let us support them so that we do something right and just for the people of Kenya. Otherwise, we will be left with no option but to reject it in total.

Sen. Wambua: Mr. Speaker, Sir, I thank you for this opportunity to contribute to this Bill. I begin by saying that a very important call has come through for all of us, as Senators, in this Chamber. It is a call to make a choice between moving this country to confront the challenges that we face together or profile this country as a patchwork of winning communities and losing communities. This is not the first time that this call is coming through. This call came through last year and we demonstrated as a House, that we have what it takes to put Kenya first and ensure a win-win outcome for purposes of the sharing of revenue among counties.

I have taken a lot of time to go through both the Report and the Bill. I begin my contribution on this confusion arising around the popular initiative as captured in Article 257 of the Constitution. I have heard very distinguished colleagues, most of them lawyers, including ---

(Loud consultations)

Mr. Speaker, Sir, I request that the Senator for Kitui be heard in silence.

The Speaker (Hon. Lusaka): Let us consult in low tones. Order, Members.

(Laughter)

Sen. Wambua: Thank you, Mr. Speaker, Sir. I said that I have heard conversations amongst my colleagues in the matter of this being a popular initiative.

The Co-Chair of the Joint Committee went on record and said that the Committee really agonized over whether this was a popular initiative and how to deal with the Bill. I want to go on record that the body, spirit, mind and soul of this Bill is Executive. What has happened is that this Bill has been clothed with a *Wanjiku* dress, but when it speaks, you realise that, that is not *Wanjiku's* voice. It is a strong and heavy voice. This is an Executive initiative. Let us just admit that and then process it as such.

Mr. Speaker, Sir, having said that, the proponents of this Bill, and the Committee has captured it very well. They have said that some 28 or so counties should have additional constituencies. However, an expert opinion from the Kenya National Bureau of Statistics brought evidence before the Joint Committee, and it is captured in the Report, that six counties, including Meru, Kitui, Bungoma, Homa Bay, Kisii and Nairobi City County, have been unjustifiably denied additional constituencies.

That having been captured in the Report as a submission by the Kenya National Bureau of Statistics, the Committee has taken the next bold step. They have gone on record to say that the omission of constituencies and their allocation in the counties is unconstitutional. I have a small challenge when the Committee, in their Report, tell us that we should go ahead and pass the Bill.

My challenge is simple. When the Co-Chair of the Joint Committee stood here, he admitted that there are even typographical and reference errors. I heard the Co-Chair, to my dismay, asking and pleading to be allowed to harmonize the errors. The question is: Who is supposed to give us the permission to do our work? The people of Kenya, under Article 1 of the Constitution, have delegated their legislative sovereignty and authority to us, the elected leaders. Yes, the people of Kenya, through collection of signatures and views, have said what it is that they want to be done on this document. I am very sure the Executive must be very happy to hear Senators and Members of the National Assembly seeking permission, from I do not know who, to do their job.

Mr. Speaker, Sir, we have a Bill before us and its processing is captured both in the Constitution and our Standing Orders. I would propose that we debate this Bill with a very open mind of correcting the mistakes and wrongs that have been committed in this Bill. Arguments have been made here--- Some Senators said that they are more than the Senators of their counties, while others have said that their first recourse is to their counties.

I want to go on record and say that the only reason I am here is because the great people of Kitui County gave me the mandate to represent them and their interests in this Senate. Therefore, when the Kenya National Bureau of Statistics, the legal and legitimate body that is the custodian of population data says that Kitui County should have been given an additional constituency--- When the Committee on Justice, Legal Affairs and Human Rights captures that in their final Report, I will look very foolish, and I have no intention of doing so, to stand against such a verdict.

Mr. Speaker, Sir, I stand here to say that the Second Schedule of the Bill on Pages 26, 27 and 28 creates unnecessary confusion. As a House of Parliament, we should be able to expunge the Second Schedule from this Bill and leave the Independent Electoral and Boundaries Commission (IEBC) to do the work of allocating constituencies in counties using the parameters as set out in the Constitution.

The other thing that is a bit baffling about this Bill is that it seeks to amend the Constitution of Kenya 2010 that we are using to govern this country. But we are being told – I do not know who is saying this – that we cannot amend the Bill that seeks to amend the Constitution. That sounds very absurd. I want to go on record and say that to the extent that the Second Schedule continues to be part of this Bill – the Schedule that denies my county an extra constituency – I will oppose this Bill.

Mr. Speaker, Sir, there is the issue of the Kenya National Police Service Commission (KNPSC) and the Office of the Inspector-General (IG) of Police. Some of these things are just self-explanatory. Articles 245 and 246 of the Constitution establish and define the role and responsibilities of both the KNPSC and the Office of the IG of Police.

Clauses 66 and 67 of the proposed Bill attempt to transfer the roles and functions of the KNPSC to the Office of the IG of Police. This is an attempt to create a police State.

You remove power and functions from a Commission and put it in the office of an individual. To the extent that matter remains in this Bill, I have a problem with it.

The issue of the Judiciary has been ably canvassed by legal scholars in this House, including the Co-Chair, Sen. Omogeni. There exists a procedure to discipline judges in the Judiciary. That procedure is clearly stated in the Constitution. It includes the appointment of a tribunal when it comes to removal of a judge from office for whatever reason.

This idea that we will now have a Judiciary Ombudsman appointed by the President and approved by the Senate; that office has power to dismiss a judge, by-passing a tribunal, is a serious affront to the independence of the Judiciary. There will be need to harmonise this document. As much as we want to change the Constitution to reflect the current needs and aspirations of Kenyans, it will not be done at the expense of whittling down the powers and responsibilities of certain arms of Government and enriching the powers and responsibilities of other arms of Government.

Mr. Speaker, Sir, the country is watching. At the end of the day, Kenyans want to know what we will do to better their lives through this Bill. I must go on record that the initiative could be noble. The initiative to expand the Executive and create positions of authority and influence to ensure that no part of this country feels left out in Government, is a noble thing to do.

The initiative to ensure that 35 per cent of revenues collected nationally is shared among counties, is a noble idea, only that we might need to do a lot more in terms of administrative and policy interventions to bake a bigger cake so that we have 35 per cent to share among counties. It is a noble idea.

It is a noble idea to have a Ward Development Fund (WDF), so that decisions on development of wards are not the governor's, but legislated. The only thing I have a problem with is a situation where amidst all these very good things we want to do, but there seems to be a mischief in trying to allocate constituencies to the disadvantage of certain other areas in this country. This must be said as it is. The import of this Bill is that we will have at least 40 new constituencies in Mt. Kenya region. There is no problem with that. However, out of 70 constituencies, 40 of them are being allocated to one region. The rest of the country has to grapple and share the remaining 30 constituencies. That is not right. It will be right for us to allow the IEBC to use whatever parameters they will use to ensure the distribution, sharing and allocation of these constituencies is acceptable across board.

Sen. Kang'ata: On a point of order, Mr. Speaker, Sir.

The Speaker (Hon. Lusaka): Sen. Kang'ata, you know how to catch my eye. You do not shout. Is it a point of order?

Sen. Kang'ata: Yes, Mr. Speaker, Sir. Is the hon. Senator in order to say that a vast majority of the constituencies will go to Mt. Kenya region, whereas Nyeri, Nyandarua and Tharaka-Nithi counties are getting zero?

(Loud consultations)

Muranga County is getting one. This is in comparison to places like Kilifi County---

The Speaker (Hon. Lusaka): Order, Sen. Kang'ata! That sounds like a point of disturbance.

Hon. Senators: Yes.

(Laughter)

The Speaker (Hon. Lusaka): Sen. Wambua, continue.

Sen. Wambua: Mr. Speaker, Sir, I thank you for rightly pointing out that was a point of disturbance. It was not a point of order, but a point of disturbance.

(Laughter)

If Sen. Kang'ata does not know that Nyeri County belongs to Mt. Kenya region, then I pity the people of Murang'a County.

(Sen. Kang'ata spoke off record)

I am saying it is an entire region getting 40 constituencies. This matter is not contestable. It is in on record and it is true that 40 new constituencies are being allocated to Mt. Kenya region. That is a fact.

(Loud consultations)

Mr. Speaker, Sir, I need to conclude my submission.

Sen. Murkomen: On a point of order, Mr. Speaker, Sir.

The Speaker (Hon. Lusaka): What is your point of order, Sen. Murkomen?

Sen. Murkomen: On a point of order, Mr. Speaker, Sir. I know you had ruled that Sen. Kang'ata's was a point of disturbance. Sen. Wambua of Kitui County is making very good points and I am the only one who has been stamping my feet to congratulate him for the same. However, this is a House of equity. Is it in order for him to try to drive his debate to a direction of us versus them? The principle objective of the BBI is to unite the country. Can the Senator for Kitui County make the case for Kitui County without trying to disenfranchise or compare to any other region?

The Speaker (Hon. Lusaka): That also does not sound like a point of order. You are trying not push a cheeky point.

(Laughter)

Senator, conclude.

Sen. Wambua: Mr. Speaker, Sir, thank you for your wisdom and for seeing these attempts.

(Loud consultations)

The Speaker (Hon. Lusaka): Order! Let him conclude.

Sen. Wambua: Mr. Speaker, Sir, yes, I will advance the cause of my County of Kitui, but not in isolation. We do not live in an island. We live among other counties and I have made my point.

Once we determine we want to create 70, 80, 100 or 60 constituencies, the role of allocating them should revert to the IEBC. That is all I am saying.

In conclusion---

(Loud consultations)

Mr. Speaker, Sir, there are loud consultations.

The Speaker (Hon. Lusaka): Hon. Senators, let us consult in low tones.

Sen. Wambua: Mr. Speaker, Sir, the initial attempt at bringing this country together was noble. How I pray that as we debate and conclude on this Bill today, this country will be left a lot more united than when we started. The only way to do that, is for every arm of Government including the Legislature to undertake its role and responsibility respectively and respect the boundaries that establish responsibilities and roles of other arms of Government.

Mr. Speaker, Sir, the Senate has distinguished itself as a House that has been able to crack difficult situations. The situation that we face today is not any more difficult. We have successfully dealt with other things before.

With those remarks, I hope that there will be an opportunity---

(Loud consultations)

The Speaker (Hon. Lusaka): Order Senators. There is a lot of murmuring.

Sen. Wambua: Mr. Speaker, Sir, I hope that there will be an opportunity to be allowed to move amendments so that we can pass this Bill. Otherwise, if that opportunity is not availed---

(Sen. Wambua's microphone went off)

The Speaker (Hon. Lusaka): Your time is up.

Sen. Sakaja: Thank you, Mr. Speaker, Sir. Before I start---

(Loud consultations)

The Speaker (Hon. Lusaka): Order, Senators. I do not know what is creating this excitement.

Sen. M. Kajwang': On a point of order, Mr. Speaker, Sir.

The Speaker (Hon. Lusaka): What is your point of order?

Sen. M. Kajwang': Mr. Speaker, Sir, I rise on a very important matter of health which affects all Members in this House. You have just seen the Senate Majority Whip walk in with a welder's helmet; some glass kind of thing. Is that the right attire for this House and is he fit to be part of this Assembly today?

(Laughter)

The Speaker (Hon. Lusaka): Order, Senators.

Sen. Wamatangi, I give you one minute to explain what you are wearing because it looks strange to the House.

Sen. Wamatangi: Mr. Speaker, Sir, I appreciate the point of order raised by Sen. M. Kajwang'. It is not that I have not been in the *jua kali* sector. I have done all manner of trade including welding. However, this is a mask. If you look at the actual meaning of a mask---

(Loud consultations)

It is a face shield but it is also a mask. For the purposes of explaining what the item is, it is a mask. Now that I am on the Floor, would you be kind enough---

The Speaker (Hon. Lusaka): I only gave you an opportunity to explain what you are wearing.

Sen. Wamatangi: Mr. Speaker, Sir, if I seek your indulgence, would you kindly allow me because I came running hoping to find the Senator for Kitui on the Floor?

The Speaker (Hon. Lusaka): Now that he is not there---

Sen. Wamatangi: Mr. Speaker, Sir, this is a House of records.

The Speaker (Hon. Lusaka): Order, Senator!

Sen. Wamatangi: We are debating the same Bill. The Second Schedule to the Bill is here.

The Speaker (Hon. Lusaka): Order, Sen. Wamatangi. You will seek for an appropriate opportunity. Stand on a point of order and I will give you an opportunity. I gave you an opportunity to explain what you are wearing but you have already removed it.

Proceed, Sen. Sakaja.

Sen. Sakaja: Thank you, Mr. Speaker, Sir. I will ask the team to add the volume because I cannot hear.

(Sen. Poghio consulted with the Speaker)

The Senate Majority is taking your attention. Before I proceed, I will need it.

Yesterday, I made a request on the issue of time. I will need guidance before I proceed, to know how much time I wanted. I had requested for at least 40 minutes because there are general issues in the report that I want to talk about. Also, I have a minority report that might take more time to explain systematically. That is my kind request. I need your guidance.

The Speaker (Hon. Lusaka): I will use this opportunity to make this announcement. I see a lot of interest on this important matter that we are discussing. From the look of things, it is not good to push ourselves too hard so that by the time we are voting, people are tired. So, I will allow everybody an opportunity to speak. I direct that we gazette another day next week so that we conclude the matter and vote because we also have other urgent matters that are coming our way. So, I will give you an opportunity to discuss. Everybody will get an opportunity.

Sen. Sakaja, you have 30 minutes.

Sen. Sakaja: Mr. Speaker, Sir, from the onset, this first amendment that we are considering today is a historic moment for our country. The manner in which we process this as a House, the HANSARD of these deliberations, the reports of the Committee and the discussions in the public participation will create an important precedent for any future amendments to a Constitution by way of popular initiative.

Mr. Speaker, Sir, historically, there have been a lot of opportunities starting from 1963 where we had Legal Notice No. 718 of 1963, the Kenya Independence Order in Council and many other opportunities every year, for example, in 1964, 1965 until we culminated in what we have today as the Constitution of Kenya, 2010.

Subsequently, this then becomes the first amendment of our Constitution. The need has been explained well. I heard the Mover, the Chairperson of the Committee and many Members who spoke to the need for building bridges and cohesion in our country and creating an equitable society.

Mr. Speaker, Sir, before going into the issues of the minority report, I would like to broadly say that I heard earlier, from my Chair, if I am not wrong, that there is a matter of two Bills---

(Loud consultations)

The Speaker (Hon. Lusaka): Order, Senators. There is some gatherings. Order, Senator for Elgeyo-Marakwet and Senator for Kajiado. It is important to listen. People listened to you when you talked. So, let us listen too.

Sen. Sakaja: Mr. Speaker, Sir, I am glad that my Chairperson is here. One thing that we were emphatic about in the Committee was the issue of the Bill. There is one Constitution of Kenya (Amendment) Bill. There were no two Bills. What we found was that there were copies of the Bill that had errors. That is something that is at the discretion of this House to resolve.

I have heard Sen. Wambua say that we can amend to sort out those areas. The question that arises then, which we also considered in our Committee, is what the threshold would be.

Mr. Speaker, Sir, Standing Order No.162---

Sen. Cherargei: On a point of order, Mr. Speaker, Sir. I would not want to interrupt Sen. Sakaja. However, is it in order that we get a copy of the Minority Report?

Secondly, I have noticed that the Members who signed the Minority Report, majority of them are Members of the National Assembly. I wanted to seek direction because only Sen. Sakaja and a few Members of the National Assembly signed this Report. It is important that those clarifications are given.

The Speaker (Hon. Lusaka): Sen. Sakaja, there is another point of order from Sen. Murkomen.

Sen. Murkomen: Mr. Speaker, Sir, is it in order for Sen. Sakaja to mislead this House by saying that the copy of the Bill that came to this House had some few errors? He said that it is a copy. If you take a document like this Standing Orders to a photocopier, there is no way a photocopier will insert errors. So, is he in order to try to water down play a very weighty submission by senior counsel, Sen. Okong'o Omogeni, who has practised law for many years and is the Chairperson of the Justice and Legal Affairs Committee, who ably submitted that there is a problem in the Bill that came to this House, that requires to be corrected and there are glaring errors? Is he in order to mislead the House?

Sen. Sakaja: Mr. Speaker, Sir, I am in order to give my opinion and not just that, the emphatic resolution of the Joint Committee, and Sen. Omogeni can confirm this. The Joint Committee resolved, including at the Press Conference, that there is one Bill.

Allowing a discussion on different Bills will bring the issue of whether this is properly before us. If 34 county assemblies looked at one Bill and other county assemblies looked at another Bill, it should not be at this time.

What I am saying is that during the deliberations of the Joint Committee, they found out that there is one Bill, but certain copies had errors. Yes, he is a senior counsel, but not in lexicography. He is a senior counsel in law, but there is a finding of the Joint Committee and it is in the Report.

Mr. Speaker, Sir, that is not the essence of a minority report. To Sen. Cherargei, who has been a chairperson of a committee, even one Member is a minority. At the time of signing and compiling my Minority Report, six Members had signed. Now there are 10 Members. This morning, the Co-Chair of Sen. Omogeni, Hon. Muturi Kigano in the National Assembly actually said he supports the minority view. He has mentioned that in the National Assembly. However, that is neither here nor there. Whether people disown a report or not, the issues that we are discussing are of utmost importance to us.

Mr. Speaker, Sir, the first ground on which I took a different view as I go into the substance of the Minority Report--- For the information of Members, if you look at our Standing Orders, when a report is tabled---

Sen. Kang'ata: On a point of order, Mr. Speaker, Sir. The hon. Senator for Nairobi City County has said a very strong point that we seek your directions on. He has said that some Members signed both the Minority and Majority Reports. Is that a legal and correct parliamentary procedure where you have Members who are signing the Majority and Minority Reports, which reports conflict?

The Speaker (Hon. Lusaka): What is your point of order, Sen. Wetangula?

Sen. Wetangula: Mr. Speaker, Sir, I regret interfering with the thought process of my distinguished nephew, who is not even listening. Yesterday, a Member raised an issue on the Floor. You directed, and rightly so, as to whether we are debating the Constitution of Kenya (Amendment) Bill, 2020 or the Report of the Committee. I think it was Sen. Nyamunga. You ruled very clearly and rightly so, both in law and in fact, that we are debating the Constitution of Kenya (Amendment) Bill, 2020.

This House is not debating any report; majority or minority. You can only make reference to the report in relation to clauses of the Bill. You cannot start debating a matter that is not before the House. Reports of committees, through precedence, usage and the Standing Orders on Bills inform and assist the Bill in the manner in which it is debated. If it is an amendable Bill, then the report of the Committee can propose amendments to the Bill. We cannot in the process of debating the Bill then cleverly disguise the debate and start debating a report of the Joint Committee that is not before the House.

The Speaker (Hon. Lusaka): Why do you not let him proceed? However, that is the correct position.

Sen. Sakaja: Mr. Speaker, Sir, if Members are patient---

Sen. Murkomen: On a point of order, Mr. Speaker, Sir. Sen. Wetangula has raised a very fundamental issue. I had not seen it from that angle. The fundamental question is that we are neither discussing the majority or minority reports. Sen. Sakaja has risen under the pretext ostensibly to move a Minority Report. There was no Majority Report that was moved. What was moved was the Bill. All the debaters in the chambers

are debating after reading the report as a whole, together with the additional arguments made by Sen. Sakaja in the Joint Committee.

Mr. Speaker, Sir, if you allow this method to proceed, I foresee danger in the future in terms of procedure. Members will be going to their committees during the making of Bills. When they come back, they will agree with a Bill, but two or three may not agree on a few things. They will come up with a report and when they come to the chambers, the Mover of the Bill, whether the Majority Leader or the Chairperson of the Committee will move the Bill and then some other person will allocate themselves one hour in the pretext that they have a minority report. This is so that they have an undue advantage. Do you see the danger that I am seeing?

The Speaker (Hon. Lusaka): Okay, Sen. Murkomen.

Sen. Sakaja: Mr. Speaker, Sir, I am very clear.

The Speaker (Hon. Lusaka): Listen to the directions I want to give. We are discussing a Bill, just like I stated in my earlier ruling. Stick to that.

Sen. Sakaja: Mr. Speaker, Sir, I am discussing the Bill and giving my opinion which has also been expressed in a Minority Report. There is no Majority Report that was moved. That is not lost upon us, but I expressed my views on the Bill in a Minority Report that is allowed in our Standing Orders.

Is the direction that I do not refer to anything I said in the Minority Report? No one has said that "I wish to move a Minority Report." My opinions on the Bill, on certain clauses, and I will quote them, are also expressed within the Minority Report. Therefore, Sen. Wetangula, I did not stand to say that I hereby want to move that this House adopts any report. The House is not adopting any report. The Report by the Co-Chair of the Joint Committee was tabled in the House to inform us. It will be of value to Members, and a few Members have asked, that they would like to be informed on what the thinking in the Minority Report was, within the context of the Bill. I do not think there is any need to prevaricate on that. Let me go into it and why I took a different view on certain aspects.

I also wish to point out, and Sen. Kang'ata has also said that there are people who signed both reports.

Mr. Speaker, Sir, if you look at the Report, where there has been a signature on the main Report, and I will give my example, we accept the entirety of the Report with exception. There is a disclaimer that apart from paragraph 557, we support the resolution to pass this Bill and every other finding of the Committee with exception to that particular section.

I would go from Clause 1 to the end, but because of time, I think it is only efficient that I focus on the areas where I dissented on that position. The first issue is that on the view regarding the proposed distribution of additional 70 constituencies among the counties, I held and still very emphatically and strongly hold that the pronouncement by the Committee that the Schedule is unconstitutional is wrong. It goes too far. It was not for us, first, to determine the constitutionality of it.

Sen. Wetangula raised a very important point yesterday; that by the time the Speaker has referred a Bill to a Committee, he has seen that it is constitutional. We cannot be in this House processing something that we have all agreed is unconstitutional.

But beyond that, the issues raised – and I have heard the contributions – were really of a technical and drafting nature, but not of substance.

The essence of a popular initiative is the substance of the decision that Kenyans are being asked to take. In fact, in Article 257, it says that it could be in form of a general suggestion; that then, these Houses are supposed to facilitate that Kenyans or the IEBC to draft it into law. If the intention of the Kenyans or *Wanjiku*, who has gone and collected signatures, and gone to 24 counties, is clear, you cannot say then that their suggestion is unconstitutional. I will explain and give an opinion.

Within the Report, the Committee has stated – and this is something that has happened in various different jurisdictions--- I hold that the power to amend the Constitution is what we call constituted power. It is different from constituent power. It is not the power to destroy the system created by a Constitution, and I will explain.

Parliament cannot usurp the sovereign power of an individual or groups of Kenyans to actually exercise their sovereignty as per Article 1 of the Constitution. Article 1 of our Constitution is very clear. It says that all sovereign power belongs to the people, and the people can exercise it directly or in accordance with the Constitution. A plebiscite or referendum is one of the events when the sovereign do what we call direct exercise of their sovereignty.

Mr. Speaker, Sir, there have been many different discussions on this even in our country. If you look at the Constitution of Kenya Review Commission (CKRC), its final Report, they stated that the purpose of including Article 1 in our Constitution was to acknowledge the Constitution and the fact that ultimately, the Constitution is a product of and must carry the aspirations of the people.

Mr. Speaker, Sir, in *Njoya versus the Attorney General*, the court considered the issue of constituent power. Justice Ringera said that the sovereignty of the people necessarily beckons that they have a constituent power, the power to constitute and/or reconstitute, as the case may be, the framework of their government. That power is with the people. That power is a primordial one. It is a basis for the creation of the Constitution and can, therefore, not be granted or referred to by the Constitution.

Prof. Nwabueze, in his book “*Ideas and facts in constitution making*” summarizes what I am calling constituent power as the authority to approve and adopt a constitution. He says that the notion of the people as a constituent power is only an integral part of the wider concept of the people as a repository of the totality of a country’s sovereignty. There is only one case that was referred to in this Report, if you look at it. That case that was referred to, where the issue of constitutionality arises, was in India.

In this case, which is *‘Bharati versus State of Kerala and Minerva Mills Limited versus Union of India*, the courts held--- That is why the Chairman says that the courts can then declare later that this Schedule is unconstitutional. But they held that they can only declare that amendment of the Constitution unconstitutional if it interferes with the basic structure of the Constitution. That means that the people, through a popular initiative can decide to amend anything so long as they do not go to what we call the basic structure of our Constitution.

Mr. Speaker, Sir, further to that – and the Committee did not note that – there is the doctrine of basic structure. The Supreme Court again, in the same jurisdiction, I think it was Justice Khanna, went over and even described what within a Constitution, is called

basic structure, which cannot be amended. There is also the theory of amendability which includes areas like supremacy of the Constitution. You cannot collect signatures and go round the country and say that now you are passing an amendment to remove the supremacy of the Constitution.

The second one is the rule of law. The third is the principle of separation of powers. The fourth is the objects and principles of a constitution. The fifth is Judicial review; things like federalism and devolution. Those are basic structure things. Kenyans coming together from wherever to say that they want more constituencies and where they want them, does not in any way touch the basic structure of our Constitution. It cannot, therefore, be stated to be unconstitutional.

Sen. Linturi: On a point of order, Mr. Speaker, Sir. I rarely interrupt Senators when they are debating, and especially on such an important Bill before the House. However, is it in order for Sen. Sakaja to mislead this House that the Kenyan people, through the BBI initiative, went and made requests and recommendations that they want extra constituencies? When you look at the page on memoranda and objects, the BBI Bill says that the issues that will form constitutional change will be from the public. I want him to tell us which constituency, county or who in particular, as a participant in the BBI process, proposed the additional 70 constituencies. Did the first report that was introduced at the Bomas of Kenya have any proposal on increase of constituencies?

Sen. Sakaja: Mr. Speaker, Sir, I will gladly do so, and I would like Sen. Linturi to listen carefully.

If you look at Article 257 of the Constitution, all the processes, from the setting up of a BBI Secretariat to the gazetting of a taskforce, meeting in Bomas of Kenya, going to Naivasha with Members of Parliament as strangers to the process of popular initiative-- The first document that is introduced in a popular initiative is the one that is gazetted by the promoters in Article 257 (4) and (5). That becomes the first document. There is no requirement in our law for a popular initiative or promoter Kenyan to conduct any public participation before drafting a constitutional amendment. I can decide with Sen. Ledama to draft a proposal to create 100 constituencies in Narok, so long as I get one million signatures. Thereafter, I will go to 24 counties and then public participation is done. I have the right, and I challenge anyone, including my Chair, the Senior Counsel, to show me---

The Speaker (Hon. Lusaka): I can see he wants to intervene.

Sen. Sakaja: Mr. Speaker, Sir, kindly, let me finish. I challenge anyone to show me where there is a legal requirement before the publishing of a draft Bill by a promoter of a popular initiative to have conducted public participation.

The Speaker (Hon. Lusaka): Sen. Omogeni.

Sen. Omogeni: Mr. Speaker, Sir, I rarely raise points of order. However, I cannot remain on my seat when Sen. Sakaja wants to mislead the entire country.

May I refer my friend, the Senator for Nairobi City County, to the provisions of Article 10 of the Constitution which has the national values and principles of governance. Article 10(2)(a) says:

“The national values and principles of governance include—

(a) Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.”

I want to underline the last one on participation of the people. Now, Article 10(1)(b) – that is very important, Sen. Sakaja – says:

“The national values and principles of governance in this article bind all State organs, State officers, public officers and all persons whenever any of them

–
(b) enacts, applies or interprets any law”

The other one is if you are implementing any public policy decisions, you must have public participation.

Sen. Sakaja: On a point of order, Mr. Speaker, Sir! I am very happy that the Co-Chairperson of the Committee has not shown me any provision that demands for a sponsor of a public initiative before publishing the Bill to conduct public participation. He is talking about the principles of national governance in Article 10.

(Loud consultations)

You do not have to shout.

Once the draft Bill has been published, the mandate, load or burden to conduct public participation then rests with this institution. That is why we did public participation ---

(Sen. Cherargei crossed the Floor)

The Speaker (Hon. Lusaka): Order, Sen. Cherargei. Why are you being very nomadic? You are all over. Take your seat.

Sen. Sakaja: Mr. Speaker, Sir, that is why county assemblies conducted public participation on a document presented by Kenyans. However, to say that for Kenyans, before they presented a document, to have conducted public participation, any ordinary Kenyan can exercise their sovereignty in Article one and propose a popular initiative. Who will fund them to conduct participation? Once they have drafted a Bill or given a general suggestion to IEBC, then once it has been published, are the ones mandated. I think we are saying the same thing. It is about before it is published.

Mr. Speaker, Sir, allow me to go on because of time. I stated that the issue of basic structure where you create amenability, the only part that you can prevent anybody from amending is what affects the basic structure of the Constitution and it is defined and there is precedence in that Supreme Court - *Justice Bharati Versus the State of Kerala*. He said that those are the constitutive elements. Even if you collect 10 million signatures, go to all counties and say you want to amend the Constitution to get rid of this part of Kenya, that cannot be. It is not that everything can be changed.

However, my contention was that the Second Schedule that we are trying to amend does not, in any way, change the basic structure of a Constitution. Secondly, in terms of the reasons, Section 27(3) and (4) of the Sixth Schedule of our current Constitution, gives us a precedent and it was doing the same thing. It provided protection of existing constituencies under Article 89(4).

Which means even when IEBC was going to do delimitation, there were constituencies they were not going to touch. That means that the provisions of Clause 74 read together with the Second Schedule is not a new idea. It has happened before. If it was constitutional then, it should be constitutional now as well. It cannot be that it was

okay then, to say that there are a certain 27 constituencies that no matter how you apply Article 89 can change; but now it is unconstitutional to say that we want 70 and we want them here.

I repeat; the people of Homa Bay County can feel that they have been slighted. They may then say that as Homa Bay County people, they want to add five constituencies, collect one million signatures and go to 24 county assemblies. We will not say that Homa Bay County people are usurping the role of the IEBC because we have supported them as Kenyans.

However, they want to amend the Constitution to create five more constituencies and they have decided where they want the five. In the same breath, Kenyans had the right to say they want 70 new constituencies and this is where we want them.

Mr. Speaker, Sir, I have heard Members say that delimitation is the work of the IEBC and no one else can do it. May I state that the provision of 70 constituencies is not delimitation. The Africa Union Border Programme (AUBP) says delimitation and demarcation are taken together to emphasize the close relationship and they are not interchangeable. Delimitation is the term applicable to describing a boundary line and a limit of an electoral area.

Of the 70 constituencies, Nairobi City County gets 12. The IEBC will determine where those 12 will be. They will say Kasarani Constituency which has 397, 000 people can get be divided into two. They will go to another county which is to get five new ones and do the same. The actual delimitation using the formula in Article 89 of 40 and 30 per cent will be applied by IEBC. However, allocation is the same thing that we did in the last Constitution so that this is the exact number that---

The Speaker (Hon. Lusaka): There is a point of order from Sen. Wetangula.

Sen. Sakaja: Mr. Speaker, Sir, I beseech you to also hold my time because there have been almost 20 points of order and I have not even gone halfway.

Sen. Wetangula: On a point of order, Mr. Speaker, Sir! Is it in order for my distinguished nephew, the Senator for Nairobi City County, to cloud his argument with sectarian interests and mislead the House on what delimitation means?

Delimitation of boundaries of constituencies and wards is first, vested in the IEBC. Secondly, it is exercised after the IEBC has listened to all Kenyans in every county and constituency. Nobody can sit in a room somewhere and create constituencies and say where they will be and then hand over to the IEBC and say now you can delimit. It must be an equitable process involving each constituency, ward and county in the country.

Sen. Sakaja: Mr. Chairman, Sir, of course, I disagree with that and it is not a sectarian view. I was going to give even Bungoma County.

The word delimitation is not based on anyone's opinion. It is an English word and it is used in geospatial science. It is a scientific word. Even legally, if you go to Blackstone dictionary and google it, it is not based on opinion. Delimitation is allocating where exact boundaries are going to be. Our problem is in the allocation and where those allocations have been made. That is the problem that Members have.

Mr. Speaker, Sir, my point is, the problem---

(Loud consultations)

Surely, Mr. Speaker, Sir---

The Speaker (Hon. Lusaka): Proceed, Sen. Sakaja. I will give you at some time.

Sen. Sakaja: Mr. Speaker, Sir, the point I am making is that the actual delimitation where you will go, listen to people's arguments--- Even in the last Constitution, they said that 29 constituencies ---

The Speaker (Hon. Lusaka): Senator, there is another point of order.

Sen. Sakaja: Mr. Speaker, Sir, they cannot even allow me to finish a sentence.

The Speaker (Hon. Lusaka): there is a point of order from the Senate Minority Leader.

The Senate Minority Leader (Sen. Orenge): On a point of order, Mr. Speaker, Sir! The judges normally look at people who are using judicial craft. You become crafty and try to make a word meaning what it is not.

The Constitution has its own language. If you want to know what delimitation is, you do not go to the Blackstone law dictionary. That is just a tool of interpretation. The first document you go to is the Constitution. The Constitution says what delimitation involves. It also says what and how it is done when delimitation is carried out.

This cloudy thing you are looking for is very fanciful and attractive. If you want to know what delimitation is, it is very clear if you read it in the context of the Constitution. I hope, Sen. Sakaja, you can listen to your uncle there because he has been in this business a little longer.

He has done cases in court which involved the question of delimitation. In fact, if you want to review the powers of the IEBC under Article 89, you normally find a lot of case law and jurisprudence on what delimitation is. So, it is not a fanciful word that you check on the Oxford Dictionary. In fact, in the Oxford Dictionary, you can find a meaning of a Swahili word. It is so wide these days. The Anglo-Saxon English is different from American English because their spellings are different. You should just declare that you are in a good place as far as Nairobi is concerned.

The Speaker (Hon. Lusaka): There is another point of order. Hold on, Sen. Sakaja.

Sen. Sakaja: Mr. Speaker, Sir, will you give me more time?

The Speaker (Hon. Lusaka): Yes.

Sen. Cherargei: Mr. Speaker, Sir, I agree with the Senate Minority Leader. Article 88(4)(c) is on the delimitation of constituencies.

Article 259 (3) on construing this Constitution states that-

“Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, therefore, among other things-

So the interpretation of the Constitution according to Prof. Mutakha Kangu who taught me constitutional law, is that the Constitution should be interpreted in a language. It is alive both in spirit and substance.

Sen. Sakaja is trying to put across the interpretation that ordinary English---

(Sen. M. Kajwang' consulted loudly)

The Speaker (Hon. Lusaka): Sen. M. Kajwang' let us have some order up there. You are behaving in a suspicious manner behind there.

Sen. Cherargei: Mr. Speaker, Sir, as I conclude, there is the language of the Constitution. So, I advise Sen. Sakaja to avoid being intellectually dishonest or legally crafty by introducing things that do not exist.

Sen. Wamatangi: Mr. Speaker, Sir, I wanted to raise my point of order when Sen. Wetangula was on the Floor and then he was followed by the Senate Minority Leader. I raise that point of order because I virtually agree with what Sen. Sakaja has said.

My point of order is derived from that Article of Constitution. The point Sen. Sakaja is making is simple. It is provided as to how it would arise that the creation of a constituency would occur. That is in the quest and exercise of the responsibility of the IEBC to ensure that there is compliance with the population quota.

In that compliance, the argument he makes is simple. The quota of that population can only be domiciled in a certain region or area, for example, a constituency. If it is found that the population of that area does not conform to the requirement of that quota then, a constituency will be created within that region. So, if it was within Nairobi Central Business District (CBD) for example, and the IEBC finds that as required by the Constitution, the population quota is not complied with then, they will have to propose the creation of a constituency using the right---

Sen. Cheruiyot: On a point of order, Mr. Speaker, Sir.

The Speaker (Hon. Lusaka): So, what is your point of order?

Sen. Wamatangi: Mr. Speaker, Sir, my point of order is simple. Sen. Sakaja is right to the extent that Sen. Wetangula and the Senate Minority Leader, with due respect, are wrong. The creation of that constituency will have to be within the area that is non-compliant. So, you cannot create a constituency in Nairobi and transfer it to Bungoma. It has to be within the place where it is created. Thus, when it is complied with, in the Second Schedule, those constituencies are within the areas that are non-complaint with the population quota.

Sen. Cheruiyot: Mr. Speaker, Sir, there is something that Sen. Wamatangi does not get. He made this mistake in the morning and he keeps on repeating it. This is the point. The debate is not about where the constituencies are placed or where they will exist.

The debate---

(Loud consultations)

Listen, Sen. Wamatangi. Since you became a whip, you listen to no one any more. I remind him that there have been previous occupants of that office who were very powerful and there will be others.

(Laughter)

So, please, keep your cool just like when we kept quiet when you were speaking.

The point is whether it is possible in a constitutional amendment Bill, to domicile a number of constituencies and limit the IEBC, so that the constituencies can only exist in

a particular area. That is why we were asking, what is the interpretation of Article 89(10) for people like him and Sen. Sakaja?

Sen. Orenge keeps on repeating the response. If anyone was to appeal this process, it can only be after the Commission is done and satisfied with the delimitation of boundaries. Therefore, it means you agree with our school of thought.

Sen. Sakaja, this is the point Sen. Wetangula was making---

The Speaker (Hon. Lusaka): Order. Address the Speaker. You might throw the Constitution at Sen. Sakaja.

Sen. Cheruiyot: Mr. Speaker, Sir, I cannot. I am a gentleman.

In linguistics, there is something they teach at the university called English for specific purpose. Not every word means the same thing in different fields. I can give you an example. If you take a phrasal verb for example, 'to know someone' in basic English, it means that I know you as Ken Lusaka. However, in religious English, 'to know someone' means to procreate with them.

(Laughter)

So you cannot take delimitation of boundaries the same way they want to interpret it. That it is the work of the IEBC. That is not what this Constitution intended. That is why they have provided it in 89(10) that a person will only appeal after it is done. If you domicile it in a particular county, what is the work of the IEBC?

The Speaker (Hon. Lusaka): There is a last point of order from, Sen. (Eng.) Hargura.

Sen. (Eng.) Hargura: Thank you, Mr. Speaker, Sir. I rise on a point of order. I would like to know whether Sen. Sakaja is in order to insist that, while it is clear that we are not disputing that either by popular or parliamentary initiative, the number of constituencies can be increased? The issue is to locate them because the Constitution talks of the population, that is the work of the IEBC.

If there is a Schedule which has already been allocated to them, what will be the work of the IEBC?

Sen. Sakaja: Mr. Speaker, Sir, if Members listened for the logical conclusion of an argument, even what Sen. Cheruiyot and Sen. Hargura are asking will not be a question.

Our Standing Orders are clear. When someone rises on a point of order, let them say what is out of order. This is because all we have had are points of arguments. Despite all the poetry we have heard about delimitation, no one has given a contrary definition. This is because, that is the definition that is there. Allocation of constituencies is one thing and delimitation is deciding exactly where in that area it is.

Mr. Speaker, Sir, in the same way Sen. (Eng.) Hargura says it must be done by population quota, in this Constitution that we have, the Schedule spoke about 27 constituencies which fell below the population quota and said they will not be touched. That was a Schedule. The Schedule is part of the Bill. It is not an inferior part of the Bill. That Schedule became part of the Constitution today.

In the same way, and Sen. Cheruiyot is asking, why is it that Kenyans can say they want 70 more constituencies and say where they are? If that is unconstitutional then what you are saying as well is that Sen. (Prof.) Onger's people, having passed the

threshold required in the Constitution cannot do a popular initiative to ask for one more constituencies in Kisii County. They will have to ask for constituencies be increased by a certain number and where they should be put. On that one, I disagree, even if I am alone.

We cannot usurp the role of the people. The people can bring an amendment here to do away with the IEBC. The IEBC is a creature of the Constitution. In fact, the people can bring an amendment to do away with the Senate. What people have proposed here to increase constituencies is within their right. The final say will be with the people of Kenya at a referendum. They will decide whether they agree with it or not. Tomorrow, Makueni people can bring the same proposal. That is my point. The points of order are points of argument. We do not have to agree, we shall express it at the referendum.

Mr. Speaker, Sir, some of the imbalances---

The Senate Minority Leader (Sen. Orenge): On a point of order, Mr. Speaker, Sir. I support this Bill, and that is what I said. However, it is always wrong to make factual misstatements. In fact, if you go and argue today that this is what the law says and you appear before the courts and argue the opposite direction, you will be put to order or you may be cited.

There is a problem that we are having persistently when people think that if you have a Bill to amend the Constitution through the popular initiative, it is by the people. It is not by the people, it is by the promoters. A promoter can be one person. All he or she needs is to get one million people. If it is the people then we need all Kenyans to sign. This is a Bill brought by the promoters. It is not by the one million people. The one million people were a condition precedent before you can take it to the IEBC. So, you should think of the process, which is a popular initiative. It is not that it is by the people. It is a popular initiative because you go through certain thresholds. We have to be careful about what we are saying.

Sen. Sakaja: Mr. Speaker, Sir, there is a difference between a popular initiative and a parliamentary initiative in terms of who originates it. A parliamentary initiative does not need a threshold of one million signatures before it comes to this House. It also does not need approval of 24 county assemblies. The reason there is a higher threshold and that is why I have given the precedent, I have quoted the case law in India, it is the people who ultimately make the decision at a referendum. If the people agree that those five constituencies, for example, be added to Siaya County or two be added in Nandi County or 12 be added in Nairobi City County, it is so. It cannot be unconstitutional. I disagree there.

Mr. Speaker, Sir, if you allow me to go on, clearly, there is no point of order there. On the process of delimitation, for instance, I know the BBI will pass. When it passes, there will be 360 constituencies. These 360 constituencies have been defined in terms of where they will be. I think there are a few in Kilifi, Kiambu and other places. For those in Kiambu, Murang'a or Uasin Gishu, for instance, the authority to determine the boundaries, the population quota, where these constituencies will start or end is the role of the IEBC. This BBI has not touched on that role. I hold that as unconstitutional.

Sen. Wetangula: On a point of information, Mr. Speaker, Sir.

Sen. Sakaja: I do not seek to be informed, Sen. Wetangula. He is stopping my flow of information.

The Speaker (Hon. Lusaka): Sen. Wetangula is even invoking your relationship for you to listen to his information.

Sen. Sakaja: Mr. Speaker, Sir, many times you interrupt me even in the middle of a sentence. Can you just allow for flow of information, for me to finish a paragraph and let him to come in? I would never refuse information from my distinguished uncle. However, I want him to hear this part because somebody has asked about public participation.

In the proposed amendment by popular initiative, the burden to conduct public participation required by Article 89(7) in the review of boundaries does not follow the promoters. The burden to conduct public participation will then fall on the IEBC in Article 89(10) once those numbers have been created.

As I have said, a schedule is part of the Bill. In this case, the same rules would apply to consideration of the main body as applies to the schedule. Again, we have people raising concerns on where these constituencies are going. The point I want my distinguished uncle and the Senator of Siaya County to hear is that the issue of fairness should not be mistaken for the issue of constitutionality. The issue of why a certain county has got and the other one has not been allocated is not the same issue as that of constitutionality because that is debatable. When the---

Sen. Wetangula: On a point of information, Mr. Speaker, Sir. My distinguished nephew, the Senator for Nairobi City County, is making very cogent, but extremely faulty arguments. The issue I want to inform him is this in delimiting and creating additional constituencies, whether the people of Marsabit, Mandera, or Kitui counties qualify or not, the underlying principle and philosophy in this Constitution is equity and fairness. You can find that in Article 10. You will end up giving Nairobi City County the constituencies, but hear people of Marsabit, Mandera and other parts of the country.

What is even more important and that is why his arguments are faulty, even for us who support this constitutional amendment is that when you look at Article 89---

The Senate Minority Leader (Sen. Orengo): Mr. Speaker, Sir, can I inform Sen. Wetangula also?

Sen. Wetangula: I do not mind the information before I finish. You can inform me.

The Speaker (Hon. Lusaka): Order, Senators!

Sen. Wetangula: Mr. Speaker, Sir, in law we have a doctrine called watching the watchers. We can also have informing the informers. This is the growth in law and debate.

I want to inform my distinguished nephew that when you look at Article 89, the delimitation of boundaries of constituencies, you have to take into account Article 89(5) on geographical features and urban centres, community of interest, historical, economic and cultural ties and means of communication. Can you show us from your report since you were in the Committee; whether these requirements were met before the 70 constituencies were fixed in the amendment?

Do not be so agitated my nephew. You know there is a doctrine in English called being clever by half. It is very dangerous.

(Loud consultations)

I am sorry, my nephew. I retract that, but the hyena told a stone: "*Hata usipo nijibu, umesikia.*"

Mr. Speaker, Sir, my distinguished nephew must know that we know what he is saying; defending the constituencies given to Nairobi. He is taking a long cut. You can actually take a short cut and say you support what is given to Nairobi City County and let others debate these issues.

Sen. Sakaja: Mr. Speaker, Sir, Sen. Wetangula is grossly out of order to impute improper motives as my intentions. If there is a Member in this House who sacrificed for other counties and you know it, and what counties are getting, it has been me, even in the revenue formula. I have been very clear.

When Nairobi was getting Kshs100 million I stood with 18 counties. It is not about what Nairobi is getting. On allocation of resources, I have the T-shirt and I can wear it. But on equality of the vote---

The Speaker (Hon. Lusaka): Order, Sen. Sakaja! I am going to allow you, but avoid situations that will attract so many points of order. You are attracting these things yourself and when they ask, I cannot deny them.

Proceed.

Sen. Sakaja: Mr. Speaker, Sir, I am making my point. I have a track record in this House. This House has a HANSARD. This is a House of records. The Senator of Kilifi, I stood with you when Kilifi was losing. It is not about who is gaining.

On allocation of resources and equity, I am clear, but on equality of the vote; a principle in Article 21 of the Universal Declaration of Human Rights. Even in our Constitution, we talk about 30 and 40 per cent.

I will ask the lawyers who are senior here. Look at *Catcher vs Dage* in the United States Supreme Court, a deviation of 0.7 per cent was found to be too much.

Another point of information, because I can see Sen. Wetangula going to Article 89, again consult the HANSARD of this House. In 2009/2010, when this Constitution was being written, I dictated the whole of Article 89 that we have in this Constitution. So, I understand it. Therefore, the question that you have asked is a record of this House.

Mr. Speaker, Sir, the question you were asking on how geography will be taken into account, on how community of interests will be taken into account and how all the factors there will be taken into account, that then is the work of the IEBC when they are drawing the actual boundaries.

As I conclude, the cardinal point of imbalances, which we are talking about, I will show imbalances. The principle of equality of the vote is that because not all Kenyans can come to Parliament, Kenyans need to be in as equal as possible constituencies to give one representative.

Today the people of Kasarani, for instance - I will use Nairobi as an example - are 398,000 with one Member of Parliament, while the people of Isiolo South are 77,000, but both have one vote. The people of Elgeyo-Marakwet as a county are 444,000, while Nairobi is 4.3 million, yet we are talking about representation of the people. It is the right of the people to be equally represented. The issue in our country is that we mix two things; allocation of resources and representation of the people.

Sen. Halake: On a point of order, Mr. Speaker, Sir.

The Speaker (Hon. Lusaka): There is a point of order from Sen. Halake.

Sen. Halake: Mr. Speaker, Sir, is the Hon. Member in order to use the same things that were protected by the same Constitution and the same constitutional Amendment Bill, 2020 to argue and counter-argue? It makes null and void the argument that the constituencies were required in the first place using the same arguments. What happens to the argument that there are others that have been protected by the same amendment Bill?

Sen. Sakaja: Mr. Speaker, Sir, in this BBI, because of the constituencies that fall below the population quota, all of them are protected. However, because you protected a constituency that is below the population quota, does not mean we deny a constituency that requires proper representation. That is the point. That principle is enshrined in our Constitution.

I hold that assertion by the Committee that the Schedule is unconstitutional is completely wrong. The question of fairness, for instance, Kisii with 1.2 million people has been given nine constituencies. Ideally, they should have 10. Kitui County, ideally should have nine.

The reason you are seeing some fringe ones are not getting one more, is because of the ones which are protected. In fact, in the same proposal, Nairobi where people are complaining because it is getting 12, is supposed to be 16. That is what KNBS has told us. Even the extra 12 we are getting should have been 16.

An hon. Senator: What about Kakamega County?

Sen. Sakaja: I do not know what Kakamega is getting, but Bungoma has nine constituencies and it has gotten three, to come to 12, yet ideally, it should have 13. Do you know why you do not have 13? It is because Lamu County, which has two should have one if you look at that formula. We are protecting the two constituencies in Lamu.

Mr. Speaker, Sir, equity is give and take. For that reason, I support the BBI, but I will forever stand to support equal representation for my people in Nairobi who deserve fair representation.

I submit.

The Speaker (Hon. Lusaka): Thank you. Proceed, Sen. (Dr.) Zani.

I can see a point of order before you even start. Sen. Wamatangi.

Sen. Wamatangi: Mr. Speaker, Sir, I had earlier on requested that I rise on a point of order because this is a House of record. When I walked in, the Senator for Kitui, Sen. Wambua, was on the Floor and he put it emphatically on record that as far as this Second Schedule is concerned, Mt. Kenya region has been allocated 40 constituencies, which is faulty, wrong and misleading in the records of this House.

The counties that have been allocated constituencies in the Mt. Kenya region are here in this Schedule. It has been put on the record of this House. Something that is erroneous, wrong and untrue. The Mt. Kenya region is not receiving 40. Indeed, we are receiving 17 constituencies and they are here.

The Speaker (Hon. Lusaka): Sen. Wetangula, what is your point of order? Sen. Kang'ata, this is not a market. You are just roaming all over. Sit down.

Sen. Wetangula: Mr. Speaker, Sir, I want to beseech the Chair that this is the 'Bible' that guides debate in this House. It is grossly wrong for the Senate Majority Whip, whatever the issue, to seek the Floor and purport to answer and challenge views of

a Member who spoke long time ago. In between, we have heard about three other speakers. The reason he says is because he walked in and overheard him saying something.

These Standing Orders are very clear. You challenge a Member who is on the Floor, when he is on the Floor on an issue that you do not agree with or that is offensive to the Standing Orders, the law or the Constitution.

There is no point of correction in these Standing Orders or point of straightening the record as the distinguished Senator for Kiambu says.

The Speaker (Hon. Lusaka): Senate Majority Whip, you are out of order.

Sen. Wamatangi: I rose on Standing Order No.103.

The Speaker (Hon. Lusaka): Order, Sen. Wamatangi. Sen. Orengo

The Senate Minority Leader (Sen. Orengo): Mr. Speaker, Sir, there are conventions of this House, which you must keep. When somebody is out of order, you challenge him when he is on the Floor. That is the practise of this House. You do not wait until he goes and then you raise a point of order. Who is going to respond to his point of order? He may be wrong. I do not know whether his arithmetic is as good as Sen. Wambua's. Maybe it is different.

We should never allow a situation where I come here, somebody spoke a week ago, the person is not here, and I raise a point of order on his or her contribution. If you have to raise a point of order, you have to raise it when the other Member is here, then he can also respond to what you are saying. You are being given advantage of speaking when the Member who spoke is not here. That is not equality of arms. There must be equality of arms.

The Speaker (Hon. Lusaka): Sen. Sakaja, what is your point of order?

Sen. Sakaja: Mr. Speaker, Sir, while it is true that Standing Order No.100 talks about responsibility for a statement of fact, Sen. Wetangula has spoken about fidelity to these Standing Orders as the Bible. What is good for the goose must be good for the gander.

It cannot be that when Sen. Wetangula and Sen. Orengo who are our seniors are going against the Standing Orders, there is no problem. In fact, even they were doing tug of war, giving each other information, going against the Standing Orders, but when Sen. Wamatangi stands up, you remember the Standing Orders. These rules apply to all of us. It cannot be that they are allowed to contravene, but there are other Members who are not allowed to raise points of order. It is not fair.

(Loud consultations)

The Speaker (Hon. Lusaka): Order, Members! We are discussing a very important Bill. It is fundamental to this country and even for our future. Please let us not waste a lot of time on sideshows and things that will not add value to the Bill that we are discussing. That is all I am asking of you.

What is it, Sen. Wamatangi?

Sen. Wamatangi: Mr. Speaker, Sir, with tremendous humility, I want to request that you give an interpretation. This is because, indeed, I want to confirm to the two Senators that I did approach you, as the Speaker. I requested that I rise under Standing

Order No.1. It cannot be a contest when the Standing Orders are clear. Kindly, tell us what Standing Order No.1 implies. It means that when something is not provided for, you have the discretion. That is why I came to you.

The Speaker (Hon. Lusaka): What you asked is that you wanted to make a clarification on a matter that had been put to this House. It was not a point of order. When you ask for a point of order with regard to somebody who is not here, then you are out of order. That is what our Standing Orders say.

Sen. Wamatangi: Mr. Speaker, Sir, since I respect you a lot, then the right thing to amend that to say that it is a point of clarification. I rose on Standing Order No.1 to make that clarification because it is wrong for the record of this House to be misinformed, when the facts are on the Floor.

The Speaker (Hon. Lusaka): Okay, it is clarified.
Proceed, Sen. (Dr.) Zani.

Sen. (Dr.) Zani: Thank you, Mr. Speaker, Sir. I stand to support the Constitution of Kenya (Amendment) Bill, 2020. It is evoking a lot of issues that need to be discussed.

First, the Joint Committee of the two Houses did a very good job of identifying what the issues were, articulating them, giving us their version from the public participation in terms of what the arguments were as they were presented and finally, giving direction in terms of where we should go to. However, I do not want us to lose sight of why we need to have this particular Bill, especially in the context of the “Handshake”, BBI Taskforce Report and Steering Committee.

[The Speaker (Hon. Lusaka) left the Chair]

[The Deputy Speaker (Sen. (Prof.) Kamar) in the Chair]

Madam Deputy Speaker, certain very critical amendments are going to be made in this Bill that will touch on specific issues that the country has seen over time. It is well known that there is no society that does not change its legal statutes and understanding of what they are put together. They are always reviewed.

Some of the issues for Kenya are divisive elections, promoting gender equity in governance, strengthening the structure of devolution. I do not want to get into the specific amendments now, but these must not be lost as we discuss this Bill. There is increased resource allocation and harmonizing bi-cameral roles. We know that the Senate is one of the institutions that has really suffered to the point that, for example, we have not been able to do proper oversight because we cannot have the Cabinet Secretary come into the House. We have seen the introduction of this now through the amendments.

Overall, the key issues of constitutional amendments, looking at policy reforms, statutory enactments and institutional reforms because important. Throughout in terms of policy and administration, these are all put together in this Bill.

There are key amendments that have been made at various levels. These have been well articulated both in the Bill and within the Report. There are amendments right through Chapters 2, 3, 4, 5, 6, 7, 8, 9 and 10. Chapter 11 is clear. It talks of the allocation increase from 15 per cent to 35 per cent based on the last audited accounts. This makes it possible for these funds to be delivered pronto.

There is also the issue of ward development fund, which is very critical. Also, there are specific schedules that have been put there which are also very important.

I want to touch on a few of the amendments that have been made. There is the Controller of Budget Act No.26 of 2017, which allows money to be checked before releasing more funds to the counties. You will remember that most of them in the Senate, this has become an issue. Our oversight ability has not been able to help us capture how funds are used within the counties. We keep having the problem that the Controller of Budget has released more funds. We hope that these particular amendments allow counties to be accountable to themselves because they know they will not be able to get more funds.

On the Higher Education Loans, one very critical amendment is that the loanees will now have a grace period of four years. Having come from the university background, we know the problems that students have had, especially when they do not have jobs. Even without a source of income, they are expected to pay up. This will release some pressure from them.

The Prompt Payment Bill by the Senate, through Sen. Farhiya and the prompt payment of services and goods that have been procured---

Sen. (Dr.) Langat: On a point of order, Madam Deputy Speaker.

The Deputy Speaker (Sen. (Prof.) Kamar): Sorry, there is a point of order from Sen. (Dr.) Langat. I do not know whether it has to do with this presentation. It is virtual.

Yes, Sen. Langat.

(There was a technical hitch)

Let us continue.

Sen. (Dr.) Zani: Madam Deputy Speaker, I will continue. We have the County Wards Development Bill which has been very exciting. This came at different points through different Bills. I think at one time, Sen. Kang'ata was dealing with it as well. This now entrenched. We have the Ward Development Fund that will help.

On anti-corruption and economic crimes, for those who have been dealing with issues of penology and crime generally, we know that these are the areas where many people are able to escape penalties. Those who end up paying the price and being punished are those who commit social and cultural crimes rather than economic crimes.

We also have the Public Participation Bill. Unfortunately, this is a Bill that we started in 2013 or 2014. This has not come through up to now. This Bill provides an effective framework for effective public participation. We also have the Persons With Disability Act No.14 of 2013, which will reflect the rights declared under Article 54 of the Constitution. It is critical for people living with disabilities.

Through all these, we have the draft Bill that we are now debating. At the end of the day, we understand that this is through a popular initiative that has specific stages to follow, from Article 257 of the Constitution. Even though, Article 257 is silent on public participation *per se* and the Members of the Joint Committee also clarified this. They said that these values are entrenched in Articles 10 and 118. This is what Sen. Omogeni was saying earlier. Therefore, taking this through public participation and getting various views is very important for us.

Madam Deputy Speaker, on the issue of whether the Bill needed to be published, and this has been well argued in different forums, we said that the Bill is *sui generis*

because the counties have already debated it and now it has come to the Floor of the House.

Very quickly, some of the issues that are critical include the increase of the percentage of allocation to counties from 15 to 35. There is also the issue of subjecting the Bill to a referendum and Parliament will and has participated in this process. There is also the value of input at the various stages.

Madam Deputy Speaker, one of the issues that have raised a lot of contention, and this happened in the morning, is the proposed additional 70 constituencies. The basis of this has been and is reported to be from a report from the IEBC on the revised preliminary report of the proposed boundaries, constituencies and wards, published in 2012. Many of these counties are the ones that have been incorporated. Again, a lot of insights and discussion is coming in terms of how these 70 additional constituencies should be allocated and delimited. All these are healthy because in the long run, we need to ensure that at the end of it all, equitable resource allocation can be adhered to for all the counties. The population data needs to be put in place for us to be able to do that.

Madam Deputy Speaker, the framework for compliance of the two-thirds gender principle is key. In the Senate, we will not only have the two-thirds gender representation, but we will be at 50 per cent. In the National Assembly, arguments have been put that if the Woman Representative will not be there as a position, what will happen to the National Government–Constituency Development Fund (NG-CDF) money they had and the role it played in the development they did at various levels?

Another important component of the Bill is removal of vetting of Principal Secretaries (PSs). That way, they will not feel that they have to be necessarily tied up with the politics of the day. They have been left free of vetting.

We also have the implication of the proposed amendment on Article 203, on prioritization of per capita allocation and capping. This is key in resource allocation and how that money is meant to be distributed across the board.

Madam Deputy Speaker, some technical issues have come up. From Sen. Omogeni's Report, there are mix up of certain clauses. The Senate has to find a way to identify these areas. For example, in Clause 13(b), Clause 3 does not exist and the clause referred to is Clause 2 which is from the National Assembly. At the same time also from the Senate draft, we are referring to Clause 87(7), whereas it should be 89(7). These are basic issues that need to be ironed out.

I also think from Sen. Sakaja's input, the substantive issues need to be taken into consideration and left in place across the board because they are critical.

Over time, a moment like this has been awaited in this country. This moment has come for us. It is good that we are having these discussions and are able to put both the pros and cons. However, at the end of the day, we should not lose the motion and direction for the amendments being made in this Bill. That way, we will address the issues that need to be addressed.

The Deputy Speaker (Sen. (Prof.) Kamar): Thank you, Senator.

We will take one online. Sen. (Dr.) Langat, proceed.

Sen. (Dr.) Langat: Thank you, Madam Deputy Speaker, for giving me this opportunity to contribute to this fundamental process of amending our Constitution. Let me begin with what Sen. (Dr.) Zani has highlighted. Before I read this constitutional

amendment Bill, I was also very keen on matters to do with the loans and tax holiday. However, after reading critically, I realised these are sweeteners meant to attract the attention of the youth. It is meant to win them that this is a wonderful document that will transform their lives. However, university graduates who have are employed and can enjoy these privileges, are very few *vis-a-vis* the number of youth suffering in this country. I would have expected a robust structure that would have helped a greater percentage of youth in this country.

(There was a technical hitch)

The Deputy Speaker (Sen. (Prof.) Kamar): Sen. (Dr.) Langat, we cannot hear you.

Sen. (Dr.) Langat: Madam Deputy Speaker, the 42 tribes are fairly included in sharing the resources of this country through devolution. However, the Bill has not effectively represented the 42 tribes, especially the small ones at the Executive level. The five or six positions that have been created in this Bill are only intended to convince the bigger tribes to get into a political coalition so that they manipulate smaller tribes in terms of leadership. So, I am yet to be persuaded on inclusivity, which was the core objective of this Bill. To me, this inclusivity has not been catered for as Kenyans expected.

Third, when we are told of different versions of the Bill; be it in terms of grammatical or content, I am more or less convinced that the draft that went to county assemblies might have had more errors than what we have in both Houses. Maybe even the draft that citizens were given had more errors.

Madam Deputy Speaker, when dealing with serious constitutional amendments which will guide the framework of the development, sharing resources and creating peace and harmony in our country, these small errors and differences should not allow any advancement of this document.

All over the world, Bills aimed at the reduction of Government expenditure are prioritized. This happened with President Ronald Reagan of USA. However, this Bill creates more burden to taxpayers of this country. It is not enough to say there will be a Prime Minister and two Deputy Prime Ministers. We should also be concerned with a lot of resources that will be allocated to those offices.

The other time we had to open the debt ceiling so that we can continue borrowing. Who will allow us to continue borrowing for the sake of creating positions? This Bill overburdens the taxpayers and should not be allowed to see the light of day. If you check critically, all those things we say they are good, but to me, they are sweeteners. They are aimed at making some communities and youth to support this Bill.

Any amendment retrogressive on matters to do with justice and touching the Judiciary should not be allowed to see the light of the day because Judiciary is a very important arm of the Government. We are now allowing the Executive to introduce the Ombudsman. That is usurping the powers of this Constitution which provides for the separation of powers. Again, this is an issue that we have to address seriously because it is meant to weaken the intuition of Judiciary.

I do not want to belabour so much of what other Senators have talked about. I am concerned with the Office of the Prime Minister. The appointees are the same people who can implement an impeachment. This is an important point.

Those powers of impeachment should end up in the Senate which is not among the appointing authorities so that the Prime Minister may get some immunity. Otherwise, if we allow the Prime Minister to be appointed by the President and approved by the National Assembly, they will control that office and impeach the person whenever they want just like the way the MCAs are doing in the county assembly.

If it was not for the Senate that balances the impeachment of the county assemblies based on some of the greedy needs, the Office of the Governor would not be what it is.

The Deputy Speaker (Sen. (Prof.) Kamar): Order, Sen. (Dr.) Lang'at. Can you hear us?

Sen. (Dr.) Lang'at: So, we must look into this particular Office of the Prime Minister---

The Deputy Speaker (Sen. (Prof.) Kamar): Sen. (Dr.) Lang'at, we need to see your face. According to our regulations, we must see your face. We thought it was our cameras. However, we have checked them and we are perfect on this side. Please go to a place where we can see you so that we can give you your five minutes to speak. We will only give you the balance of five minutes only when we can see you.

(Sen. Olekina consulted loudly)

Sen. Olekina, you are correct. However, this time, I have correctly used Standing Order No.1. I considered some factor, you will be next.

Sen. (Dr.) Musuruve: Thank you, Madam Deputy Speaker, for giving me this opportunity to give my comments and thoughts about the Constitution of Kenya (Amendment) Bill, 2020.

I begin by thanking Sen. Omogeni and his team for coming up with a report and giving us information, which is good. However, there are diverse and divergent views about the Bill. Overall, there are enormous gains that we cannot just wish away. We must speak to them so that people can know the good about the Bill. For example, some amendments of the Bill come out strongly to support the gender issue and close the gender gap.

Clause 7 of the Bill seeks to amend Article 82(f). There is a new word that has been inserted sanctioning political parties that do not comply with the two-third gender rule. This is a plus for the women in this country. This is because political parties will ensure that in as much as they are nominating people for elective positions, women are also nominated. The sanctions mandates and obligates political parties to ensure that they implement the two-third gender rule.

Madam Deputy Speaker, I clearly note that Clause 13 of the Bill is also amended. It speaks on issues of disability. As a representative of Persons Living with Disabilities (PwDs), I would like to say before the Floor of this House that this amendment is a plus. This is because in the Senate, we have two representatives for PwDs. That is Sen. Mwaura and I.

This amendment is a gain for people living with disabilities because they have been shifted from the Senate and taken to the National Assembly where the number has been doubled to two women and two men. It will be mean for me to not acknowledge this gain for PwDs. Apart from that, it is a guaranteed position. I support this because we will have representation at the political level.

Most of the times, PwDs have complained that when it comes to leadership and political representation they are under-represented. This is a chance for their representatives to be higher and their voice will be greater.

There is a clause that proposes to amend Article 98 concerning representation in the Senate by increasing the number of Senators to 94. Women Senators will be represented on a 50/50 ratio. This is a gain for the women fraternity who will have the same voting powers just like the male counterparts.

It is a reality that in this House nominated women are discriminated upon. Sometimes, when there is need to vote and there is one representation per county, nominated Members go through harrowing moments. For example, a letter was written to bar Sen. Shiyonga and I from voting. This Bill comes to strengthen the women who will be here because they will have an equal vote as well as the men.

On the issue of the women Fund, the gains can be relooked at. However, the women who come stand and equal chance of getting the same amount of money that the male counter parts will get. That is a big gain. The women who will be in the Senate will be at par with their male counterparts. The same should apply to women in the National Assembly. That is a plus for the women of Kenya.

I am happy with the issue of 50/50 representation. This means that the issue of delegation will not be there. Everyone will be here on his or her own right. This is a gain that we cannot wish away.

Clause 22 amends Article 131 of the Constitution. On the proposed expanded Executive, among the functions of the President is that every year, he or she is supposed to make an annual speech to talk about issues that will be happening. However, in the current Constitution, he or she is not mandated to talk about socio-economic rights which is important.

Article 43 of the Constitution talks about Economic and Social Rights. These are issues of water, health and other basic needs. Basic needs are very important. If you are not able to meet your basic needs, even Maslow, the psychologist, stated that you cannot aspire to move to the next level of needs. The amendment Bill will ensure that the President will stand before the nation and say what exactly he has done and what the country has achieved with regards to issues such as water, housing, infrastructure, health and so on. These are issues that directly affect each and every family.

It is also a plus for the President to tell the nation the improvements that are being made, for example, the number of hospitals that have been constructed and equipped. This will ensure that this cascades to the county governments. The county executives should be in a position to provide what they have done in their dockets with regard to the socio-economic needs and rights. There are rights that affect women and children. Women and children are among the poorest, nationally and internationally. The President needs a platform indicating what he wants to do with regard to addressing these issues.

On this strength, it is a good point that Kenyans must know that when the President addresses these issues, many hospitals will come up, more funds will be channeled to fund health, education and provision of clean water. This is because this is a constitutional requirement.

Madam Deputy Speaker, Clause 22 that seeks to amend Article 130 talks about the expanded Executive. As Kenyans, we must be alive to the fact that what has really been ailing us in most elections is the winner takes it all. After every election you will find that the winner takes it all and the number two has no space at all politically. The third and fourth are also stranded. The expanded Executive gives an opportunity for the face of Kenya to be seen in the political arena. In the expanded Executive, we will have the President at the top, the Vice-President following, the Prime Minister and the two Deputy Prime Ministers. We will also have Ministers. This is a plus because the face of Kenya will be represented.

The number two in an election has followers and value addition in this country. When someone is a loser, it does not mean that he does not have followers or he cannot add value. The amendment allowing these positions will help bring down the curve of the many post election violence incidents that always happen in the country. We, as Kenyans, we need to give this a trial and see how it works with an expanded Executive. We should do an analysis of what happens after elections. We should ask ourselves if we have any gains. If there are, we should do things differently because we cannot have Kenyans dying every now and then. Every time after an election, people are afraid of going back to their farms or meeting their neighbours. People become enemies yet we are one nation Kenya. There is no room for us to become enemies and hate each other.

We must see how to deal with the issue of post election violence. We are talking about many things, but the elephant in the room is the leadership at the apex. We have to see how to deal with the leadership at the apex to ensure that it is representing the face of Kenya.

Madam Deputy Speaker, Clause 47 seeks to amend Article 180 on the opposite gender rule. In the appointment of county executives, if the governor is male, then the deputy should be female and vice versa. This is good because it will ensure that the 50-50 representation is not only in the Senate, but also in the county governments. This will also help women come up and ensure they are getting mentorship from their governors in a case where the governor is male. In a case where the governor is female, the mentorship will also come up from the male counterpart.

Madam Deputy Speaker, this amendment will ensure that the inequality that is in Kenya comes to a stop. It will also ensure that the discrimination and marginalization stops. This is because when PwDs are given opportunity to lead, and their numbers are expanded, their voices will be stronger. It will not only be stronger, but it will help others rally behind them and ensure that they are supporting them.

Madam Deputy Speaker, I also want to talk about the funds that will go to the counties. The five per cent of the Ward Development Fund will provide support in a big way because it will ensure that inequality in development that is in the counties is also addressed. When you go to the counties, you will find that there are some wards that are more developed than the others. The five per cent ensure that it is addressing the core

issues that are in Article 43 of the Constitution such as water, education and infrastructure. This will be a plus because families will gain.

Madam Deputy Speaker, we are mandated to represent the people of this country. We can only represent them effectively when services reach wananchi. If services cannot reach wananchi, we are losing our point of being in this House.

Madam Deputy Speaker, there is also the issue of the Equalization Fund. I am happy because the time has been increased from 20 years to 30 years. This will ensure that we live in a nation that is equal and where everyone is enjoying the services provided in the country. No one should be left behind.

With those few remarks, I support the BBI Bill. I will not turn back; I will continue supporting because of the gains I have seen.

The Deputy Speaker (Sen. (Prof.) Kamar): Thank you, Sen. (Dr.) Musuruve. Let us now hear Sen. Olekina.

Sen. Olekina: Thank you, Madam Deputy Speaker, for allowing me to say a few words with regard to this Bill. To my dear colleagues and Kenyans, allow me to disabuse you of the illusion that the BBI Bill before Parliament is a perfect document arrived at in a flawless, perfect process that is supposed to solve all the problems that we have in this country.

Most of the things that I wanted to touch on have been dealt with by my colleagues. I will try to demonstrate why I have serious reservations on the process, particularly on this Bill in very few words. I will focus my contribution today in the following five areas. One, the creation of the additional 70 constituencies. Two, the Judiciary; three, money to counties, focus on the issue of the equalization fund and the mandate of Article 203; the introduction of Article 203(n) by this Bill. I will also focus on the role of Parliament in ensuring fiducial responsibility when it comes to the Executive.

Madam Deputy Speaker, without taking so much time, I will begin by focussing on one area. I strongly believe that for the last decade, this country has made tremendous steps because of the Judiciary. I have had a chance to look at the Bill and also all the submissions which are in two volumes; almost 2000 pages by all distinguished people in this country, the Judiciary, the Law Society of Kenya (LSK), the IEBC and prominent personalities. One of the things that baffles me is the proposed amendment to Article 168 of the Constitution. This essentially makes it difficult for any judge to sit and perform their duties when they know they have no security of tenure.

Madam Deputy Speaker, the proposed removal of a Judge simply because of a complaint is a very dangerous proposition. The promoters of this Bill are telling Kenyans that so long as you have a case and you know that Judge XYZ is the one going to sit to hear that matter. If you do not like them, you can sponsor individuals to file complaints and the Ombudsperson will suspend that Judge simply because of a complaint. That is a very dangerous trend.

We have survived in this country because of the Judiciary. This House, the Senate has been able to stamp its authority when most of our Bills, which were disregarded by the National Assembly found life again because of the Judiciary. When you now create a very powerful Ombudsman who has the powers to initiate disciplinary action because of a simple complaint by Kenyans, you take away the presumption of innocence until

proven guilty. That is a very dangerous precedent that we will be setting if we in this House clap and say the promoters of the BBI have given us a solution to our problems.

Madam Speaker, I will get into the issue of the constitutionality of the entire process. I have heard my colleagues, mostly the proponents of the BBI, alluding to the fact that this is a people driven constitutional amendment. When I look at even the documentation and the BBI, it talks about the promoters of this initiative. We have referred to Article 257 of the Constitution and some of my colleagues have alluded to the fact this House can initiate changes. My view is that we cannot because we are not the promoters of the Bill.

I will refer to Article 257 of the Constitution. Article 257(3) of the Constitution reads as follows:

“If a popular initiative in the form of a general suggestion, the promoters of the popular initiative shall formulate it into a Bill.”

I would agree with my colleagues if this Bill was originated in this House because then the promoter of that Bill would be a MP. The same Article 257 talks about the fate whether we vote for this Bill or not, the final say is bestowed by the people of Kenya. They are the ones who will decide the fate of this Bill.

I want the people of Narok and the people of Kenya to know that when I stand here and I raise my reservation in supporting this Bill, it is because I know it does not matter what my one vote will do. The ultimate decision as per the law falls under the people. If you read the report by the Joint Committee of the Senate and the National Assembly, you are alive to that fact. In fact, when you read them, you hear them dancing around and saying well this is an unconstitutional and there is really nothing you can do about it.

There are some other clauses where they come in and say, this needs to be reviewed at a later date. Then what exactly are we doing? I have gone through the report and I know the Report is supposed to guide or aid us in terms of our contribution to this Bill, either in support or opposing it.

Madam Deputy Speaker, when you read this Bill and the report by the Joint Committee of the Senate and the National Assembly, you will question whether this Bill is the one which taxpayers' money was used to set up a steering committee to draft that Bill.

Madam Deputy Speaker, I have come across four versions of the Bill not even two as they are saying. The first Bill was the one that was launched at the Bomas of Kenya on 21st October 2020. When you look at that Bill and go to Article 203 as an example and you compare Article 203 with the proposed amendment to Article 203 on the first Bill, it is not the same as the proposed amendment with Article 203 on the second Bill. Then it begs the question on the mandate of the so-called promoters of this Bill.

I have come across a gazette notice that clearly states that the mandate of that Bill lapses on 30th June, 2020. The second Bill which I have come across is the Bill dated the 25th of November, 2020. In this Bill, there are two versions in regard to the Second Schedule. When you refer to the first Bill of October 2020, the Second Schedule talks about the structure of the IEBC. Now fast forward it to the Second Schedule in regards to the second Bill which was published by the promoters that is the one that is purported to

be discussed in this House, those are two different versions, introduces a complete different thing which was never there in the first place.

Madam Deputy Speaker, I am a firm believer that the framers of our Constitution as it stands, were alive to the fact that it becomes very difficult for Parliament or rather for anyone to constitutionalize and protect certain constituencies and leave the rest. There are 290 constituencies save from the few from Taita Taveta and Lamu because of the population that have been protected by the Constitution, the rest can be changed at any given time.

I live in Narok East. Anytime the population reduces in Narok East, I might end up losing Narok East because it is not protected. Therefore, to attempt to say that you are not taking that power away from the IEBC and saying as soon as this Bill has been assented to by the President, you have six months to create these constituencies and disregard what the IEBC said, is not fair.

If you read the Report, the IEBC has shared the practicality of setting up these 70 constituencies; that it would not take less than a year. You forget that the same Constitution states clearly that the referendum must be held a year into a general election. We are in May today; I want to see this magic that will come from somewhere, that we will propel the IEBC with budget in this COVID-19 period, for them to be able to go out there albeit illegal, because these are not the views of Kenyans, but a few individuals---

Madam Deputy Speaker, if you look at the letter that was signed by Mr. Chebukati, in his communication, he indicates that the promoters of the Bill are two individuals. One, who is a Member of the National Assembly, hon. Junet Mohamed and, two, is hon. Denis Waweru. These are facts on the Committee Report. There are annexures there and anyone in doubt can refer to them.

Madam Deputy Speaker, I am of the opinion that when you discriminate against 19 counties and look at 29 counties and say that you can set up constituencies and name them, you are not only discriminating them and creating a disparity in this country, but also creating a problem that cannot be solved easily politically.

Madam Deputy Speaker, I want to end that point by stating as follows. It is quite evident that issues of constituencies and boundaries are very emotive. They are things that need people to be consulted and convinced of the need to be able to set up and alter boundaries to create new constituencies and wards. That is why the framers of the current Constitution took their time. By the time we got the Constitution 2010, I dare say, the process we took was very painful. Kenyans assembled at the Bomas of Kenya and gave their views. Even though that draft did not end up being the Constitution, the final Constitution took into consideration what Kenyans all over had in mind.

Madam Deputy Speaker, the promoter of the Bill are two individuals who are noted here. They ought to really think and ask a few questions. Are we amending the Constitution for short gains or are we doing so for posterity?

Madam Deputy Speaker, my third point is the issue of revenue that we fought so hard in this Senate and which led to the arrest of our colleagues. The promoters of this Bill were defeated in this House, but they have found a way of introducing an amendment to Article 203. We fought heavily against the issue of per capita, but they have now found a way to reintroduce it by coming up with an amendment to Article 203 and cap how

much people can get. Is this realistic? They argument they make is that we have the issue of Equalization Fund.

Madam Deputy Speaker, let me once again disabuse Kenyans of the illusion that this Equalization Fund actually helps. Currently, we have hospitals which were built, funded by that Equalization Fund. However, they are not in operation. The people who are supposed to have benefited never benefited. Therefore, when you tell us that you are increasing the term, first of all, show us the money. Tell us what happened to the money that had been set aside?

Madam Deputy Speaker, when we talk about the structure of governance, one thing that baffles me and the question that comes to mind is: Does creating new levels of government – increasing the number of representation in this Parliament – solve our problems? The answer is ‘no’. When you look at it, the promoters of this Bill do not even want workers to be represented in Parliament. That is why they have sought to amend Article 97 (c) and do away with the provision of allowing workers to be represented here. I do not know what hon. Sossion and hon. Omboko who represent workers in the National Assembly or even Mr. Atwoli, who on a daily basis, talks about the rights of workers will say about this. He had a beautiful chance and the Constitution, 2020, had given him that chance.

Madam Deputy Speaker, the last thing that questions that motive of this Bill is the role of Parliament once again in terms of overseeing the Executive. Now, there is an amendment to Article 154, which brings up the issue of removing the vetting of Cabinet Secretaries and Principal Secretaries. We have a very difficult time right now overseeing the Cabinet Secretaries. When you do not give Parliament the power to vet them, will we not just be brewing a lot of impunity and corruption? What happens to the issue of integrity in this country?

Madam Deputy Speaker, I am a firm believer that coming up with the proposal to amend the Constitution, when you have not even implemented the first Constitution that we fought so hard for, you become an escapist and not a person who wants to help this country. We need to think about the future generation in this country. We can create many goodies. We can actually say that a MCA will be in the Executive. We will have taken away that checks and balances system in the devolved system of governance. This is because an MCA, who can become a County Executive Committee Member (CECM) will just team up with the governor, and when overseeing the governor, they will just collude.

I would want us to be very critical. I would want to be convinced that, first of all, interfering with the Judiciary will help this country move forward. Secondly, whether interfering with the role of Parliament will help this Government go forward. I am not saying that there is nothing good in this Bill. There are many good things that can be amended.

I want to end with the following words. Whether I vote for this Bill or not, the Constitution as it stands, gives the last word to Kenyans. I am here to inform Kenyans, as their representative, and point out areas I think are wrong.

Thank you, Madam Deputy Speaker.

Sen. (Eng.) Mahamud: Thank you, Madam Deputy Speaker, for giving me a chance to contribute to the Constitution of Kenya (Amendment) Bill, 2020.

- In the Memorandum of this Bill, the promoters set the following objectives:
- (a) The need to resolve issues of divisive elections.
 - (b) Promotion of gender, equity and governance.
 - (c) Strengthening of the structure of devolution and increase resource allocation to counties.
 - (d) The broadening of mechanisms for all people of Kenya to benefit from economic growth.
 - (e) Harmonization of certain roles and functions of the bicameral Parliament.
 - (f) Fortification of national ethos by specifying responsibilities of citizens and
 - (g) The strengthening of accountability of public resources and fight against corruption.

As we look at this Bill, it is important to see whether the object and reasons for the Bill, as stipulated in the Memorandum, are fulfilled.

Since the 'Handshake' between the President and the former Rt. Hon. Prime Minister in March 2018, this country has been seized with the matter of BBI. In fact, Kenyans call it the BBI Bill and are waiting for it to be passed or rejected. So, we have the BBI Report.

The journey of BBI as you remember, started with the BBI Taskforce. The Taskforce brought a report to the nation and it was launched at the Bomas of Kenya as Bomas I in 2019.

A steering Committee was put in place for implementation. The Committee brought a Report to Bomas and it was called Bomas II. Before that, there had been draft bills here and there. Between Bomas II and the final Report that was launched at the Kenyatta International Conference Centre (KICC), there were drastic changes and we finally got this Bill.

Madam Deputy Speaker, I am going back to that history because views were collected from Kenyans. Kenyans spoke to the BBI Steering Committee and thereafter the promoters, who are one Members of Parliament (MPs) and former MPs, submitted the document to IEBC. Were the ideas of Kenyans collected properly?

Article 94 of the Constitution states the role of Parliament. Article 94(1) says:

“The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.”

Further, Article 94(4) says:

“Parliament shall protect this Constitution and promote the democratic governance of the Republic.”

Madam Deputy Speaker, this 2010 Constitution was the result of a lot of discussion over many years. We are now having a Bill to amend the Constitution. The problem is that Article 257 says that you cannot amend a public initiative.

However, you wonder: If you are amending a constitution, why can you not amend the proposed amendments? We are amending the Constitution and we are told you cannot amend the proposed amendments. There is a fallacy here!

I congratulate the Joint Committee of the Senate and the National Assembly for a job well done. They were put in difficult circumstances because the Bill had many confused sections with many problems. Kenyans have been talking about it and owning the Bill without even knowing what is in there.

In fact, at one time we were told to either take it or leave it. That is a bitter pill to swallow and it is very unfortunate. This is the Constitution of Kenya, which must be protected and safeguarded by all Kenyans and, more so, the Executive and Parliament, the representatives of the people.

The Committee did a good job because they sieved this Bill properly. They have told us what is proper and what is not. They have also told us what is constitutional and what is unconstitutional. I am surprised by the recommendations of the Committee that this is unconstitutional. How then do you proceed again to say we will amend the Constitution?

We are at a crossroads. The Committee has done a good job of highlighting all the issues. However, as we are told our hands are tied and that our role is ceremonial.

Again, the argument is that, our role is not ceremonial because we represent the people. You cannot knowingly pass something bad to the people and ask them to just do it. I think we are just assigning ourselves something unnecessary.

Today, we have this Bill before Parliament and we have to either reject or pass it. *Wananchi* out there must listen properly, so that by the time it goes to the public, they will properly be educated. I hope there will be proper civic education that will not allow our people to pass unconstitutional amendments because this is a document for posterity.

Various sections of the Bill address amendments and I will look at a few. One of them is that the Bill proposes to increase representation constituencies by 70. Fair enough, you can increase the constituencies but under Article 89 of the Constitution, it is improper for you to allocate those constituencies. That is the role of IEBC. Unless the whole Article is expunged and we come up with a new thing, we can then allocate the constituencies to counties.

I say this even with the knowledge that my own County of Mandera is getting a constituency and I am happy. However, the process in which it was done is wrong. This is because delimitation and demarcation is the role of IEBC. It is not right to do something unconstitutional. The Committee has recommended that it is unconstitutional.

How do we deal with this? Kenyans are very selfish and for selfish reasons, I will support because Mandera County has got one out of the 70 constituencies. I will take it but I have to say the process is wrong.

On the issue of resources allocation, Article 203 of the Constitution has a clear and elaborate criterion set out on the criteria to allocate resources between the national and county governments. This Bill introduces three other criteria.

The first one talks about avoiding corruption. I do not know how you talk about corruption in allocation but I think it is superfluous. The worst one is when you bring the issue of per capita.

Under Article 217 of the Constitution, the Senate is supposed to originate the criteria for allocating money among counties. We know what we went through here a few months ago. You develop a criterion, have a formula and then what follows is the basis for allocation.

It is like you are doing an examination, where you look at the parameters from the Commission on Revenue Allocation (CRA), score the counties and then do the allocation.

You then come back and negate it by capping it to a certain level because you say some counties are not supposed to get money. This provision on amendments to Article

203 of the Constitution is illegal because it actually profiles and targets people. It is discrimination. The Constitution of Kenya does not allow discrimination.

In the last debate we had here, you all remember what you went through. We came out of that victoriously because we agreed with the Executive on how to overcome that. Someone said it was not enough and it should be capped. To make the matter worse, they have not realized that what they are doing is impractical.

If they say that the allocation to the highest per capita county should not be more than three times, then what will be done with the balance of the money? You cannot take out some counties and divide the money among a few counties. It is not practical. However, more that, it is totally illegal.

I am surprised by the recommendation of the Committee. It says that the Legislature and the Executive must come up with a way out. How will they do that yet the Constitution is being amended and the matter is before it? For that purpose, this matter is totally wrong and unacceptable.

Madam Deputy Speaker, there some amendments that have been proposed for the Judiciary. In this country, we have had a history where one time Parliament and the Judiciary were under the Executive.

The whole issue was liberalized and we had the Constitution, 2010. The Judiciary and Parliament are now independent but we want to claw that back and bring amendments to the Constitution so that the JSC can discipline judges, sack and suspend them. These are illegal. What we have in the Constitution today is right. The amendments are not proper.

There are proposals that will claw back what was done so that a lot of power is given to the Inspector-General (IG) of Police. We should be content with having an independent police force so that the commission can do its job properly.

We have a proposed amendment which talks about shared prosperity in terms of economic development and all that. I agree. However, what we are seeing every day negates that proposal. Kenya needs to have equal opportunities. If you look at the appointments and how developments are done, it is not equitable. We should not pay lip service to the Constitution. We should mean what we say and do what is supposed to be done.

I have touched on the issue of the amendment to have 70 constituencies and how they are allocated. The IEBC can do it. It is the right body to do it.

The structure of the Executive has been changed. They are proposing to have the Prime Minister and Deputy Prime Ministers. The surprising thing is that vetting of executives has been removed. I do not know the reason but it is not proper.

When the Executive joins National Assembly, they can be vetted in the Senate. However, the Senate cannot even summon a Cabinet Minister. This is a claw back. We have gone backward instead of going forward.

Whereas the idea of having Cabinet Ministers in Parliament makes some sense, the issue of vetting and suppression of powers has not been properly addressed. The Senate should have been made as the House to vet Cabinet Ministers and Principal Secretaries (PSs).

A proposal has been made to strengthen the Senate but it is not enough. Article 96 should have expressly said that the Senate is the 'Upper House' and should vet Cabinet Secretaries. It should have been done properly. However, it just says that we will have access to overseeing all resources. The role of this House has been relegated to a low level.

The promoters have been unfair to the Senate. This matter will now leave Parliament and go to *wananchi*. Ultimately, the Constitution will have amendments. An amendment is supposed to be a small change but this is a radical change. It is like rewriting the Constitution.

We hope for the best in the country. I selfishly say that I am happy for the one constituency that I got in Mandera County. However, my neighbours, Wajir, Garissa and Marsabit did not get, which is wrong.

The 47 women representatives in the National Assembly have been removed while the Senators have been increased to 94. What is the logic? The number of people to be nominated has been limited.

The women of Kenya must not be left to the tokenism of nominations. They must be allowed to contest for seats and win. If they are given 47 seats in the National Assembly and Senate, they total 94. In fact, the number of nominations will be few because a few of them will get elected in the constituencies. Whoever the promoters were, they have not done justice.

The BBI has been the rallying call in the country and anybody who opposes it is anti-Government. I do not understand this. We must change the way we do things. The Bill is before us. Whether we vote yes, or no, it will still go to the people.

Our people must be properly educated through civic education so that they vote for it. This will not solve any miracle. The Bill is not a miraculous solution to the problems of Kenya. It will not be a first world by passing this Bill. Our problems will still be there unless we change the way we do things.

With those many remarks, I wish to contribute.

Sen. Pareno: Thank you, Madam Deputy Speaker. I rise to support the Bill and the work of the Committee. I thank them for a job well done and a good analysis. The Chairperson took us through the deliberations of the Committee and what they felt needed to be done.

We know where we have come from and how we arrived at this particular moment of constitutional amendments. We definitely do not want to go back to where we were in 2007 and 2017, where at some point, some of us were convinced that we needed to divide this country into two so that those of us who were oppressed can go their way and those that felt comfortable in the system could also go their way.

We also know that the 'Handshake' led to the Building Bridges Initiative (BBI), which speaks to building bridges for this country. Thereafter, this has been reduced to this draft Bill that we are debating in this Parliament.

Madam Deputy Speaker, I had time to read the BBI Report initially. I have also had time to read and appreciate the Bill as drafted. I also appreciate the concerns that have been raised by the Joint Committee as they were considering the Constitution of Kenya (Amendment) Bill. I have taken time to direct my thoughts into certain sections of what has been provided for in this Bill.

I will talk about Clauses 9 up to 13 that talk about the two-thirds gender rule and inclusivity. I will also talk about Clause 50 which talks about equitable share of revenue and increase of revenue to the counties to 35 per cent and the Ward Development Fund as well as the Constituencies Development Fund. Then Clause 51 that speaks to the Equalization Fund and, finally, I will talk about the implications of these amendments as analyzed by the Joint Committee.

Madam Deputy Speaker, let me proceed to make my comments on Clause 7 of the Bill which proposes to amend Article 82 of the Constitution on Legislation on Elections. This is in order to mandate Parliament to enact legislation imposing sanctions on a political party that fails to ensure that no more than two-thirds of the parties' candidates are of the same gender.

We have had a problem with the two-thirds gender rule that is provided for in the Constitution of Kenya 2010. This has come in handy and it is a plus that in this Clause, we are amending the Articles of the Constitution to ensure that political parties actually submit a list of candidates that comply with the two-thirds gender.

I feel that we should have been bolder about this. This provision is like giving with this hand and taking away with the other hand. Why do I say so? I know like in the political party where I have been in my political life; the Orange Democratic Movement (ODM), they will definitely comply to submit the names of candidates with the two-thirds gender rule, like it has done in a lot of the other structures of the party.

Every time we have done grassroots elections, we actually submit to the IEBC and take care of the two-thirds gender rule. However, this does not expressly mean that we will achieve the balance at the end of the day at the end of elections.

Yes, we will submit, and the IEBC will also compel parties to submit the list that complies with the two-thirds gender rule, but how will we force the electorate to comply at the time of the ballot? It simply means that this provision has given us on this hand, but has taken away from the other hand because at the end of the day, you might find that the electorate will not have elected the candidates that you have submitted, and the result of the election will be that you do not have the balance, anyway.

I feel it was short of just doing the right thing. This provision has not been bold enough to ensure that there is gender parity and respect for what the Constitution has provided for in as far as bringing women to leadership.

We should have been bolder and stated that at the end of the election, we should have had parties promoting and ensuring that the candidates that they submit will actually become successful after the ballot.

Madam Deputy Speaker, Clause 8 of the Bill proposes to amend Article 87 of the Constitution, which also brings in the electoral disputes to be handled by another mechanism other than the mechanism that had been provided for.

My party suffered so much because of lack of proper provisions as to how to handle disputes. In fact, I was in and out of court for the entire period of nominations of ODM for 2017 until one day before the general elections. I was in court following the party being sued right, left and centre.

People were pretending they were serving orders when they were not serving me or the party. In fact, there is a day I woke up and saw in the news that hon. Judith Pareno be arrested and been brought to a court of law within 24 hours. I just saw this in the news

only for me to inquire and I was told that a purported court order had been served somewhere and it was not served on me. The court felt that I was in contempt. A procedure that will help the political parties handle this dispute is good to be enshrined in the amendment.

We have another amendment where the IEBC is no longer going to handle disputes that arise from nominations of political parties. I always felt it was a conflict of interest and it is good that the IEBC concentrates on their mandate while another mechanism is brought on board for political parties to handle disputes that arise out of their nominations. The IEBC can handle disputes that arise out of the elections. This is a plus. That is the reason I am highlighting what I support in these amendments.

Madam Deputy Speaker, Clause 9 is still the same. This is the conflict of interest on the IEBC to be handling disputes arising out of nominations. It is good that we move away. I do not think that was really their mandate, but they had to step in because there was no provision.

Clause 13 of the Bill proposes to amend Article 97 of the Constitution on the Membership of the National Assembly, to increase it because of the additional constituencies and to create special top up seats. This is another plus to try and handle the issue of the two-thirds gender rule.

Like I have said, you might submit the list of candidates and the electorate does not elect, and you end up not achieving. There will be a provision for top up. At the end of the day, we will achieve the two-thirds principle in the National Assembly because at the Senate, I am one of those who is happy that after we pass this Bill, and after the referendum, I am hopeful that Kenyans will pass this because it arose out of their submissions.

We shall have two Senators; one woman and one man from every county. Specifically, this provision will actually address the issue of us looking – I do not know which term to use – but when we speak here and we are not able to vote, this has always felt bad.

At least there will be equal Senators, men and women, who can vote for whatever that will be on the Floor of the House. I am happy that this Bill proposes to bring in that amendment of having one woman and one man Senator with equal rights in this House. Of course, with the top up issue in the National Assembly, as we get the 50-50 Membership in the Senate, we will also have not more two-thirds of either gender in the National Assembly.

This is notice to the women out there. There is a provision in the Bill that you get priority to be nominated in that top up list only if you have attempted to run and they will look at the votes that you garnered while running for the constituency seats.

This will encourage many women to come out because if you do not run then you do not have that priority. We have an issue there because suppose people do not run in a particular constituency and women do not come out and run, where will you take those slots that they are supposed to be allocated for that top up? Suppose they do not come out, do we say that there is a constitutional crisis, or do we have another option? I support that provision to increase women by top up and making the women senators equal to their peers in the Senate.

There is an important provision in Clause 50, amending Article 203. This is so sensitive. New parameters have been introduced on how we will share revenue. However, as a pastoralist and as a person coming from those that have been marginalized for a long time, I am not happy with this provision and the way it has been crafted. I was asking myself why they crafted it in such a way. It would have been so easy for us to pass this Bill if those who drafted it did their work well. It was not properly done.

Madam Deputy Speaker, Clause 50 of the proposed Bill seeks to amend Article 203(1) on Equitable Share of Revenue.

It says:

“The following criteria shall be taken into account in determining the equitable shares provided for under Article 202 and in all national legislation concerning county government in terms of this chapter-

- (a) the national interest;
- (b) any provision that must be in respect of the public debt and the other national obligations;
- (c) the needs of the national government, determined by objective criteria;
- (d) the need to ensure that county governments are able to perform the functions allocated to them;
- (e) the fiscal capacity and efficiency of the county governments;
- (f) developmental and other needs of the counties;
- (g) economic disparities within and among counties and the need to remedy them;

I emphasize on this one because this is where some of us lie.

- (h) the need for affirmative action in respect of disadvantaged areas and groups;
- (i) the need for economic optimisation of each county and provide incentives for each county to optimise its capacity to raise revenue;
- (j) disability of stable and predictable allocations of revenue; and
- (k) the need for flexibility in responding to emergencies and other temporary needs, based on similar objective criteria.

This Bill seeks to water down these provisions that Kenyans had done in 2010. We should take into account all these parameters. I am particularly not happy with this kind of crafting.

If you look at the provision on issues of Equalization Fund, why did we bring an Equalization Fund in our 2010 Constitution? This was because some of us were left behind while the rest of Kenya was developing. We came to realize that we are one country, one people, one destiny and we should equally share these resources.

We should bring the rest that had been left behind to the same level of those that have developed. That is why the Equalization Fund was brought in. What happened to it that affects the ones that have been marginalized? It has never been implemented to date. If anything, I am happy a little that this Bill seeks to extend its timeframe for which it will operate. It has extended the Equalization Fund to 30 years, instead of the 20 years.

Madam Deputy Speaker, nothing has happened in the last few years since enactment of the 2010 Constitution. The Equalization Fund has not brought us equal to

the rest of the communities that are ahead of us because they had advantage. They had the President then.

The Maasai might take so long to have a president or a deputy president. Are we going to wait forever for us to be brought equal to the rest of the communities? Why did we water down this particular provision by bringing in new provisions to enlarge the criteria, but removed the core provisions that should be there?

Madam Deputy Speaker, on that one, I am happy that the Committee has observed that, that provision has removed the very basics. We need to relook at what we need to do to be able to make sure that no county will lose by virtue of removing these provisions.

I am happy that the Committee has advised, in as much as people would want to say that we are just a conveyor belt. We are not and we will state what it is that needs to be done and will be watching to see that what needs to be done is done because that is our job as legislators.

Madam Deputy Speaker, I am happy that the revenue allocation to counties is going to improve. We will have 35 per cent instead of 15 per cent by passing this Bill. This translates to almost two or three times the current amounts that we are getting as counties. This is a plus. We should not erode it in such a way that by the end of the day, that 35 per cent will be equal to nothing by not making the necessary provisions for us to be able to realize it.

Madam Deputy Speaker, I am also happy that in this Bill, the county assemblies shall have autonomy. They will have their own fund. You can imagine MCAs having to kneel before their governors for them to be able to run an assembly. This is a very good provision.

The 5 per cent allocation to the Ward Development Fund is also another plus to our counties. Each county will have its own share, irrespective of who you voted for or irrespective of those parameters that are used in the counties to be able to allocate money.

Madam Deputy Speaker, allow me to address myself on the issue on the East African Community (EAC) now that this Bill also talks about it. I have been a Member of the East African Legislative Assembly (EALA). We were there last week to celebrate the appointment of our own, Hon. Mathuki as Secretary-General. I was told by my former colleagues there that they have not been paid salaries for the last six months. Imagine Members of Parliament have not been paid for the last six months in the EAC.

The Deputy Speaker (Sen. (Prof.) Kamar): Your time is up.

Sen. Pareno: Madam Speaker, if you could just give me two minutes, I will wind up.

The Deputy Speaker (Sen. (Prof.) Kamar): One minute

Sen. Pareno: Madam Deputy Speaker, we were told that the Secretary-General then, had refused to approve their salaries. It is important for us to think about how the assemblies all over, both the county assemblies and even the EALA can be economically empowered. They should have their autonomy when it comes to their budget.

Madam Deputy Speaker, finally on the Judiciary, that provision of the *Ombudsman* will infringe on the rights of Judges. You cannot be sitting there to wait for a Judicial Service Commissioner to recommend your removal. The tenure of the judges should be protected. Even as we pass this Bill as it is, we should look into the

independence of the Judiciary, just as much as we have the independence of the Legislature. The Executive can do their bit and they should let us do our bit.

I thank you.

The Deputy Speaker (Sen. (Prof.) Kamar): Thank you, Senator.

Proceed, Sen. (Eng.) Hargura Godana.

Sen. (Eng.) Hargura: Thank you Madam Deputy Speaker, for giving me this opportunity to contribute to this very important Bill. What we are dealing with is the first amendment to the Constitution of Kenya 2010. The main gain or cornerstone of the Constitution of Kenya 2010 is devolution, where parts of this country that had been left behind, at least, felt that now they can address their issues. This is because the main issue was resource allocation, representation and self-governance at the county level.

Madam Deputy Speaker, by amending this Constitution, either by popular initiative or parliamentary, my understanding is that we are improving. Based on that aspect of devolution, I would like to look at what the proponents of these amendments by popular initiative have brought in, which will enhance that.

First, I would like to look at Clause 49, which amends Article 202 of the Constitution. When we are sharing resources, we look at the recent approved audited accounts by the National Assembly. This year, in the Division of Revenue, we used the audited accounts of the Financial Year 2016/2017. That is why when you look at the Division of Revenue Bill, it was giving 27 per cent of the resources to the counties. This is because it was based on an old financial year.

This amendment is timely because it looks at the latest audited accounts by the Auditor-General. If we had this Clause in the Constitution when we were doing this year's Division of Revenue, we would have used the audited accounts for the Financial Year 2018/2019.

Therefore, the Kshs370 billion would have even less than 20 per cent. These amendments will enhance the second amendment. This way then, we will be making progress in terms of enhancing the allocation of financial resources to the counties. That is Clause 49, which amends Article 202.

The second part that amends Article 203 (2) increases the sharable percentage to the counties from 15 to 35 per cent. With Clause 49, 35 per cent will now be meaningful. If Article 102 was not amended, we would not gain from 15 to 35 per cent, because we would still be using the old accounts.

What I have an issue with, which has been raised by many Senators who have contributed, is Clause 50 (a), which amends Article 203 (1), which introduces the issue of capping.

On the issue of coming up with how funds are shared, the Constitution already has given very clear guidelines; that every five years, the Senate is supposed to come up with the basis of sharable revenue. That is what we have done. For example, in the last year, for ten weeks the Senate has been coming up with the sharable formula. In that formula, if you remember what we went through, already population has been given prominence. Up to 70 per cent or so of that money is based on population issues.

For the marginalized areas, the Arid and Semi-Arid areas, which are sparsely populated and have bigger land mass---. When we talk of a country, we refer to the people and the territory. I do not know why when we talk of resources, we want to talk

only about people. We know that resources are shared and services are delivered based on the way people are settled. In a sparsely populated area, like my county, the cost of delivery of services is more than in a densely populated county like Nairobi.

Already, Article 217 gives us how that formula is generated. In that formula, already, the marginalized and sparsely populated areas have been jeopardized because the land area has been capped. What this amendment is saying is: Now that we have the formula, put in the variables. Once you have calculated and generated for every county, then go back again and look at what the per capita for the most densely populated county like Nairobi is, and then no county gets more than three times per person.

You are now introducing another formula on top of that formula, which some of us feel that already we have been jeopardized by capping population. This is a case of double jeopardy for the sparsely populated areas because we are introducing that capping again. That is why the Committee in their Report found an issue with this. This is an area which needs to be looked at because it disadvantages already disadvantaged areas.

I will tie the Equalization Fund on this, because the argument has been that marginalized areas will benefit from the Equalization Fund. The Equalization Fund, which is 0.5 per cent of the revenue, has not been utilized for the last ten years or since the promulgation of the Constitution 2010. The sunset clause is that it runs for 20 years.

Already, ten years are gone and nothing has been done. In 2016, there was a court ruling that suspended the use of the mode of implementation, but I am wondering because the Constitution is very clear that the national Government can use it directly or give it as conditional funds to the counties. It is very clear. We have a problem because of lack of goodwill for implementation.

Clause 51 amends Article 21, saying that we extend the period from 20 years to 30 years. By doing so, we are saying that we will use it only for 20 years. The problem is that for the last 10 years, the Executive did not find any goodwill to come up with the enabling regulations or legislations to implement this.

What assurance do we have that anything will happen in the next 20 years? Nobody should look at equalization and say that we are capping on this end because you are benefiting on the other end. That benefit is not there.

[The Deputy Speaker (Sen. (Prof. Kamar) left the Chair]

[The Temporary Speaker (Sen. Pareno) in the Chair]

Madam Temporary Speaker, the other issue is Clause 13, which amends Article 97, which is changing the number of constituencies from 290 to 360 – the 70 new constituencies. The proposers of the Bill can come up with any number. Parliament can also change that clause, but once that need has been felt, that there is more representation required, then the technical aspect of determining where these extra constituencies will go, should have been left to the technical commission that has been created by this Constitution. That is why the Committee went ahead and said that this is an unconstitutional amendment. It conflicts already existing provisions of the Constitution.

When these extra seats are created, as somebody representing Marsabit County, which is the largest county in this country--- We have the largest constituency in Kenya, which is North Horr. When you only consider population and have one constituency covering 40,000 square kilometers, several counties in this country put together---

Madam Temporary Speaker, I am sure the residents of that constituency are suffering because they cannot get services. The reason is that you are giving the same amount of the National Government-Constituencies Development Fund (NG-CDF) as you are giving a small constituency in Nairobi City County. Remember the cost of service delivery is very different. That is why we are saying that you come up with any number you want, but leave it to IEBC to look at it after collecting views.

At the end of the day, if anybody feels left out, then IEBC outcome can be challenged in court unlike this process. Therefore, the 70 constituencies and basically the Schedule, should not have been in the Bill. The Schedule is selfish in the sense that people come up with numbers, distribute it amongst themselves and put it in the Constitution and expect Kenyans to pass for them. That is being selfish. That Schedule should not have been there.

Let me now go to Clause 12, which talks of the Senate oversight role. Yes, it enhances our role because initially, Article 96(3) talks of the Senate oversighting only the funds allocated to counties from the national resources while we know counties generate their own and also receive funds from other sources.

This Bill talks of amending that and says all funds received by counties – whether own-source revenue, from other quarters or national Government – is all now under the oversight of the Senate. That way, we will avoid the case like what was cited today in the morning, where governors went to court at the beginning of this devolution. They wanted to stop the Senate from oversighting their own-source revenue funds and those they get from other sources, saying that the Constitution says the Senate should only oversight funds from the national Government.

Madam Temporary Speaker, that is good because it makes it clear that governors have to be oversighted for everything. The Auditor-General's report does not discriminate the source of funds. They audit all funds which counties received and expended in any financial year. Therefore, when it comes here, there is no way the Senate can be told not to oversight only national Government funds and not own-source revenue.

Lastly, on the issue of the two-thirds gender rule, we are alive to the fact that last year under Article 261(7), the then Chief Justice gave an advisory to the President to dissolve Parliament. It was because we could not come up with the legislation to operationalize that aspect of the Constitution. Maybe these amendments to the Constitution are a way of coming with a solution to that.

The issue I find difficult here is the creation of more constituencies. The national Government is oversighted by the National Assembly and that is where even the national Government is going to be represented. That is where I felt women need to be empowered to be part of the Government process because that is where decisions affecting women are made. Having been in Parliament for a second time now, being elected and being nominated are two different things.

Madam Temporary Speaker, when you are elected, you have been elected by the public. You owe your responsibility to them and you will be working for them. On the

other hand, when you are nominated that value addition to the electorate will not be there because you are just nominated by a party and the most you can do is to be loyal to that party. The larger womenfolk of this country will not feel any service from you because you will not be answerable to them but your party.

Achieving the two-thirds gender rule in the House is not enough. Let the two-thirds be by people who actually have that mandate and will improve the welfare of the gender they are representing. I thought the issue of Women Representatives in county assemblies was a better way to go.

Madam Temporary Speaker, if the issue was women competing with men because the political environment has always been seen to be a problem, then creating seats like the Women Representative will have them compete among themselves. Once they are in Parliament, they are representing their electorate. That way, we will minimize and move out of this issue of nomination.

In any case, the Constitution still puts a succinct Clause on that. So, what happens after that? have you prepared that affected gender to be able to participate in competitive elections after the 20 years? You must have a way of engaging. It would be better if it were the Women Representative type and then improve. Even if the number was increased, then it would be better.

Madam Temporary Speaker, I do not have issues with the Senate having equal numbers. I think even the American Senate is represented by two Senators. How they relate is how we should be relating because sometimes you may have two Senators from one county but on the opposite side of the House. How will we be coordinating and representing the county, when we are on opposite sides of the House? Those are some challenges we will grow with as we progress. That will make sure that we improve the representation and gender equity. With that, there is always room for improvement.

In this Bill, there are concentrated areas, which I think enhance devolution, especially on the aspect of resources. If we attain that, I am sure counties will get more resources and develop.

However, Clause 203 on capping has an effect. For example, my County of Marsabit may not get less than what we are getting because already, the sharable revenue has been increased using the current audited revenue. If that capping was not there, then we will get four times *per capita* of Nairobi City County.

Now, a three-time maximum has been introduced arbitrarily without any scientific backing and automatically, Marsabit County will lose a quarter of whatever it was to get. It may be more than what we get now, yes, but we still lose a quarter because of this arbitrary insertion of this clause.

I hope the only way out, as we have been told, is to wait for it to go through and then seek constitutional interpretation. Maybe that is an area people from affected counties have to look at and see how to remove that claw back on revenue. To me, it looks like a backdoor introduction of one man, one shilling which we defeated during the debate on the the revenue formula.

The Temporary Speaker (Sen. Pareno): I see Sen. Cherargei is not there, and my Senator is not there.

Sen. Kavindu Muthama, proceed.

Sen. Kavindu Muthama: Thank you, Madam Temporary Speaker, for this opportunity to support this Bill. To me, this is a very important document because I am a mother. I want it to go on record that a Senator in this House said that the Committee went round the 47 counties just collecting signatures.

Let me make it clear that the Committee went round the 47 counties collecting views of the citizens. They even took views of stakeholders in Nairobi City County. They worked with citizens.

This is an important Bill, which if passed, will benefit Kenyans. For example, it recommends that counties get 35 per cent of revenue instead of 15 per cent, and 5 per cent of the Ward Development Fund. Women will also benefit. This is because the Bill proposes ways of how to have enough women in Parliament. The Bill also proposes to have a Youth Commission which will include youths and PwDs. This will give them a voice, which they have been crying for, for many years.

This Bill will pass and go to the referendum. Therefore, those Clauses will be changed and they will benefit women, youth and PwDs. The Small-Medium Enterprises (SMEs) will also benefit a lot.

Madam Temporary Speaker, we need an official opposition leader in Parliament to have checks and balances on the Government of the day. This will bring down corruption.

The Bill also suggests ways on how corruption cases will be done. They should not take long. They should only take a few months.

It is important for inclusivity for us to have the position of the Prime Minister, Deputy Prime Ministers and the official opposition leader so that most of the areas will have representation in Parliament. I believe that even if those are not enough, the other appointments will cover them and people will feel included in the Government of the day.

We have always had fights after every five years. This country goes into war and we waste two good years fighting and taking each other to court. I believe that if this Bill passes, this will be a thing of the past for our country.

Clause 51 of the Bill proposes that Article 204 on Equalization Fund for the marginalized counties be amended. This will bring them to par with counties that are ahead of them. For 10 years, it has not been utilized. They suggest that it is moved to 30 years instead of 20 so that they can recover the years that have been wasted. I believe this will bring them to par with other counties.

There are many benefits in this Bill. This is because the SMEs will also get seven years tax holiday after they start their new business. This will enable their businesses to stabilize and move on.

The Report on the Bill also suggests that loans that are given to university students be recovered four years after they have completed university so that they can find jobs and repay them. There are more benefits in this document if one goes through it nicely.

I stand to support this Bill.

Sen. (Dr.) Milgo: Thank you, Madam Temporary Speaker, for giving me this chance to weigh in on this Bill. I support it more specifically coming at the backdrop of challenges that have faced our country for many years.

His Excellency the President of this country, together with the Rt. Hon. Raila Odinga came together in 2018 and in their communication, they came up with nine issues, notable among them was ethnic antagonism, competition, inclusivity, divisive elections and lack of equity in resource allocation as well as gender, among others.

Out of this, there was a taskforce that went round collecting suggestions and opinions from people. As stipulated in the Constitution, this culminated into the popular initiative Bill that is before this House today.

I thank the Joint Committee on Justice and Legal Affairs for burning their midnight oil to come up with a refined Bill from such a huge document in a short time.

While there are many contentious issues in this Bill, there are good clauses. Just like in the Constitution, 2010, there were many contentious issues that were to be amended before its passage. I am sure amendment of a Constitution is open many times. For example, the Constitution of USA has been amended for over 57 times. Maybe, we may have an amendment next year and the other year.

Therefore, I support this Bill more specifically because of a number of clauses. I will start with the elusive two-thirds gender principle. As many of my colleagues have said, last year, there was an advisory from the former Chief Justice David Maraga that Parliament should be disbanded for not meeting the two-thirds gender rule. It was to be costly for our country. So, we cannot afford to wait for another advisory when we have such an opportunity to amend our Constitution.

Clause 7 compels political parties to ensure the two-thirds gender rule. There are holes in this but it is better to have a provision than not have one at all. When there has been no provision, women have had a challenge. More specifically, they do not have a level playing ground like men when it comes to elective position.

I am more excited about Clause 4 that amends Article 98 where there shall be election of one man and a woman in the Senate. Some of my colleagues feel that there will be many legislators in this House. However, we are only 27 short of them. This is the right time to bring on board the 52 per cent of the population that has been excluded. Based on this, we shall progressively achieve the two-thirds gender rule.

The only sad side of it is the fact that there is no clear way to achieve the two-thirds gender rule in the National Assembly. The provision that we may end up nominating 103 women is there. I would have loved if we had left the 47 women who had a kitty that is going a long way in improving the lives of women in the villages.

In that area, we lost because when it comes to nominations it is usually a challenge. Many of my colleagues, including Sen. (Eng.) Hargura, have spoken to this. This relates more specifically to me because in the last one year, I have lost the right to vote. I cannot vote as a Member of the Bomet Delegation because of receiving a letter from the head of my delegation that stated that I cannot vote any more. This is one of the challenges that affects a nominated Member.

In addition to this, any nominated Member cannot have an independent mind. I do not want to expound on this, but there are many examples that can be given to explain the fact that nomination has majorly affected women.

Looking at this House, for example, the larger number that has been nominated, save for areas of Persons with Disabilities (PwDs) and the youth, has been that of women. These women have been subjected to many challenges.

Madam Temporary Speaker, Clause 49 is important since it amends part of the Public Finance and Management Act. This is a very interesting Clause because it speaks to issues of revenue allocation to the counties. We have been having several fights in this House trying to allocate funds to the counties. Last year it was even more challenging.

This one is speaking to the fact that one will use the current audited accounts by the Auditor-General. This will go a long way in ensuring that there is reduction of time in terms of waiting for funds that go to the counties. Counties have really suffered.

Recently, I saw the Council of Governors (CoG) complaining that seven months have passed without any funds going to the counties. This is an indicator that salaries and bills have not been paid. Projects that were started cannot also be completed. Therefore, people are not getting value for their money.

Madam Temporary Speaker, this is a major challenge to the extent that we have had people having reservations of carrying out projects in the counties because they feel they will not be paid in good time.

In addition, Clause 50 of the Bill amends Article 203(b) to increase revenue to the counties from 15 per cent to 35 per cent. Clause 54 also adds a new clause to introduce the Ward Development Fund. This will go a long way to spur equitable service to our people at the village level. In this case, irrespective of the voting affiliations, this money will go a long way to assist the counties. This will create new investment centres, provision of high quality healthcare, water and improved education and infrastructure.

Furthermore, there is a provision that gives the management of this Fund, and if followed to the letter, the County Integrated Development Plan (CIDP) will incorporate public participation. It will then be implemented in a better way.

Madam Temporary Speaker, this amendment Bill is very critical because it is addressing the problems of the youth. The youth constitute over 75 per cent of the population of this country. Many of them are educated, but unemployed. There is already creation of the Youth Commission that will focus on the issues affecting the youth, the four year grace period after completing university and even for the graduates who have start up businesses; they have a seven-year tax holiday.

As the Chairperson of the Committee of Education, I have been meeting many graduates who have been complaining about payment of loans that they acquired for their education in the universities. I think this shall go a long way in curing this challenge.

Madam Temporary Speaker, Clause 10 amends Article 89 to increase the constituencies from 290 to 360. While this has become a very contentious issue since morning up to now, while we feel that a function of the IEBC has been usurped, it is not the end. We still have a lot of work to be done to these 70 constituencies that are proposed.

As a Senator from Bomet County, I am very proud because I am a supporter of the BBI. At the same time, my constituency is gaining two constituencies. This is assuring my county of improved representation and resource allocation. It will also actualize what we call one vote, one man, one shilling. It could not have come at a better time.

Madam Temporary Speaker, Clause 44 amends Article 172 to the office of the Judiciary Ombudsman. Many of my colleagues have actually disagreed with this and

actually felt that it was not good. While the Judiciary forms another arm of the Government, it has got to show a lot of efficiency.

The only major challenge here is the appointing authority of the Ombudsman. If the Office of the Ombudsman is streamlined, it will go a long way to ensure there is transparency and accountability in the Judiciary.

There has been a lot of backlog of cases. Some of them going as far back as 10 years. Sometimes we are talking about the shortage of judges, but some of the cases have been affected by corrupt practices that were going on there. That is with due respect to my learned colleagues who are here.

The office of the Ombudsman should be streamlined so that the people in this country receive judicial service in a seamless and efficient manner. However, while that is a challenge there are many good things when we have an oversighting authority to every institution.

Madam Temporary Speaker, besides of these few provisions that I have spoken to, I support this Bill. I look forward to this Bill passing because it shall improve the living standards of the people of this country.

Thank you.

Sen. Shiyonga: Thank you Madam Temporary Speaker, for giving me this opportunity to express my submissions on this Bill.

I start by thanking the sponsors of this Bill through the 'Handshake'. We now have many of the awaited fruits that we have been yearning for. In the same tune, I would like to thank the Joint Committee that submitted its Report through its Co-Chair, Sen. Omogeni.

To start with, I will touch on a few issues on the Bill. I will talk about the creation of the new 70 constituencies, the gender issue, the role of the Senate; where we are now and how it is in the current Constitution, and where this Bill will take it. I will also talk about devolution and funding, the increase of resources in the counties, especially the Ward Development Fund and the gains for the youth and the marginalized in other submissions that I will do. I will not evade talking about corruption, which I like talking about as a topic.

Let me start with the issue of the two-thirds gender in this country---

The Temporary Speaker (Sen. Pareno): Order, Sen. Shiyonga. You will have a balance of 18 minutes when this matter comes up next.

ADJOURNMENT

The Temporary Speaker (Sen. Pareno): Hon. Senators, it is now 6.30 p.m., time to interrupt the business of the Senate. Subject to a Special Sitting being gazetted, the House, therefore, stands adjourned until Tuesday, 11th May, 2021 at 10.00 a.m.

The Senate rose at 6.30 p.m.