NATIONAL ASSEMBLY

OFFICIAL REPORT

Thursday, 19th February, 2015

The House met at 2.30 p.m.

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

PRAYERS

PETITION

CHALLENGES OF EDUCATIONAL
ASSESSMENT AND RESOURCE SERVICES

Hon. Mwaura: Hon. Speaker, I wish to present a public petition by the Kenya Education Assessment and Resource Centres (EARC) Association on the challenges of educational assessment and resource services.

I, the undersigned, on behalf of citizens of Kenya, and in particular education assessors of the educational assessment and resource centres, draw the attention of the House to the following;-

(i) THAT, the Ministry of Education, Science and Technology has failed to transfer the special needs education top-up funds to special schools and units in schools for children. Schools have not received special needs education top-up funds since 2010, hence children with special needs fail to get adequate and quality education.

(ii) THAT, the assessors' special allowance has been scrapped off the Teachers Service Commission (TSC) since January, 2006. This allowance was paid to the assessors, who are professionally trained special needs teachers.

(iii) THAT, the assessors are professionally trained special needs teachers employed by the TSC, yet the educational assessment is a function of the Ministry of Education, Science and Technology. This has brought misunderstanding in their terms of service in the Ministry of Education, Science and Technology and the TSC.

(iv) THAT, the educational assessors lack facilities and equipment to conduct the educational assessment of the special needs children and also inadequate personnel to address issues that may arise in assessment of special needs children.

(v) Further that the issues in respect of which this Petition is made are not pending before any court of law or any constitutional or legal body.

Therefore, your humble Petitioners pray that Parliament, through the Departmental Committees on Education, Research and Technology, obtain without delay an undertaking from the Cabinet Secretary in charge of the education, science and technology that:-

(i) the Government will resume remittance of the special needs top-up funds to special schools and special needs units in schools;

(ii) the Government will absorb the educational assessors as the assessment of special needs is a function of the Ministry of Education, Science and Technology, and not of the TSC;

(iii) the special needs education Sub-sector policy will be implemented by the Ministry of Education and the TSC in full;

(iv) the Government will resume remittance of the allowance of the educational assessors on special needs; and,

(v) the Government will establish a clear organizational structure and terms of service for educational assessment and resourcing of the EARCs.

Hon. Speaker, your petitioners will ever pray.

Thank you, hon. Speaker.

Hon. Speaker: I am reminded that in the event that there is a Member who desires to make a comment on that Petition, he can do so. I will allow about 10 minutes.

Hon. Gumbo has indicated his desire to make a comment on the Petition. Otherwise the Petition will be committed to the Departmental Committee on Education, Research and Technology.

Hon. (Eng.) Gumbo: Hon. Speaker, I just wish to make a brief comment on the Petition presented by hon. Mwaura. From its content, this is an important Petition because it targets special groups in our society. It is not for nothing that the Constitution allows this House to receive Petitions from members of public; but as you rightly pointed out two days ago, it is becoming more than just a ritual to present Petitions here. We have had so many Petitions presented and our Standing Orders are very clear that when Petitions are presented, reports should be tabled before the House within 60 days. Therefore, as a House, it is incumbent upon us to be enslaved by the dictates of our Standing Orders, so that when Petitions are presented in this House action is taken.

The Petitions presented here time and again touch on issues that affect our people but no answers have been forthcoming; it looks like an exercise in futility. As a House, we must move from the business of Petitions being presented only as routine affairs which lead to nothing.

That is my comment, hon. Speaker.

Hon. Speaker: Yes, hon. Kabando wa Kabando.

Hon. Kabando wa Kabando: Hon. Speaker, I happen to represent a constituency where we have a school of children with special needs. Rev. Muhoro School for the Deaf is located in my constituency. It is among three such schools in the East and Central African region, which need a lot of attention. Hon. Mwaura has consistently been bringing up these matters. Obviously, he has received a lot of public endorsement through the various fora that he has had. It is expected that once Petitions are submitted to the relevant committees, matters should receive the requisite attention because a Petition is a constitutional matter. It is not a privilege, neither do we do any favour by allocating money to the disadvantaged, the poor, the destitute and individuals with special needs; it is an obligation. Hopefully, when the Committee starts hearings, they will not procrastinate, but will deliver their observations and reports to the House, so that we also

know the constitutional compliance that our State departments are observing, particularly the Department of Education.

Hon. Speaker: Yes, Bishop Mutua!

Hon. (Bishop.) R. Mutua: Thank you, hon. Speaker, for giving an opportunity to make a Statement about this Petition.

I thank hon. Mwaura for bringing the Petition. This is about people with special needs, which means they require special attention. Most of the time that special attention is not provided.

My plea to the Committee and the Budget and Appropriations Committee is that it is high time we began giving special attention to people with special needs, particularly the institutions of learning where people with special needs learn. Some of them go through very difficult conditions and scenarios and so I am expecting to hear what has become of this particular Petition.

Thank you, hon. Speaker.

Hon. Waititu: Thank you, hon. Speaker, for giving this chance to also agree with hon. Mwaura. I had an opportunity to call him to my constituency where he came and saw what was happening in classrooms in all primary schools. We know there are special classes and when you visit children who are in special classes in primary schools you see that they learn in very difficult situations.

When I invited hon. Mwaura, who represents special interests in the House, we even thought of doing a *Harambee* in Juja Constituency. I spoke to so many people because we have so many children in my constituency, who are hidden in homes. They are not brought out. They are even locked in houses. This is the time when we should think about these special needs children, who are left by their mothers at home unattended.

I support the Petition and thank hon. Mwaura for coming to my constituency.

Hon. Speaker: Very well; hon. Members, that Petition, as indicated, is committed to the Departmental Committee on Education, Research and Technology. It is fair for hon. Members of that Committee to take into account the sentiments which have been expressed. Please move with speed and bring a report here, and hon. Members will sit and consider it. It is only fair that you bring a report here.

PAPERS LAID

Hon. A.B. Duale: Hon. Speaker, I beg to lay the following Papers on the Table of the House today Thursday, 19th February 2015:-

Annual Report and Financial Statements of the Tea Research Foundation of Kenya (TRFK) for the year ended 30th June, 2013 and the certificate of the Auditor-General therein.

Report of the Auditor-General on the Financial Statements of the National Gender and Equality Commission (NGEC) for the year ended 30th June, 2014 and the certificate of the Auditor-General therein.

Report of the Auditor-General on the Financial Statements of Kenya Roads Board (KRB) for the year ended 30th June, 2014 and the certificate of the Auditor-General therein.

Report of the Auditor-General on the Financial Statements of the Capital Markets Authority (CMA) for the year ended 30th June, 2014 and the certificate of the Auditor-General therein.

Report of the Auditor-General on the Financial Statements of the Ministry of Foreign Affairs and International Trade for the year ended 30th June, 2014 and the certificate of the Auditor-General therein.

Report of the Auditor-General on the Financial Statements of the Political Parties Fund for the year ended 30th June, 2014 and the certificate of the Auditor-General therein.

Thank you, hon. Speaker.

Hon. Speaker: Hon. Members, before we go to the next Paper to be laid, let me take the opportunity to recognize the following institutions in the Public Gallery:- St. Mark High School in Yatta Constituency, Riverside Secondary School of Nakuru Town East Constituency and Star Shake Academy of Mavoko Constituency.

You are welcome to the National Assembly.

(Applause)

Hon. Were: Hon. Speaker, I beg to lay the following Papers on the Table of the House today Thursday, 19th February, 2015:-

The Report of the Departmental Committee on Labour and Social Welfare on the Petition regarding recruitment of top managers at the Unclaimed Financial Assets Authority.

The Report of the Departmental Committee on Labour and Social Welfare on the Petition regarding the unlawful dismissal of Mr. Vitalis Omondi Othuong from the National Water Conservation and Pipeline Corporation.

The Report of the Departmental Committee on Labour and Social Welfare on the National Social Security Fund Tassia II Settlement Scheme Infrastructure Development.

Thank you, hon. Speaker.

Hon. Speaker: Are you through?

Hon. Were: Yes, hon. Speaker.

NOTICES OF MOTIONS

ADOPTION OF REPORT ON PETITION FOR REMOVAL OF CHAIRPERSON OF NGEC

Hon.Were: Hon. Speaker, I beg to give notice of the following Motion:-

THAT, this House adopts the Report of the the Departmental Committee on Labour and Social Welfare on the Petition for the removal of the Chairperson of the National Gender and Equality Commission laid on the Table of the House on Wednesday 18th February, 2015 and in accordance with the provision of Article 251(3) of the Constitution and Standing Order 230(5) finds that the Petition does not disclose sufficient

grounds for the removal of the Chairperson of the National Gender and Equality Commission.
Thank you.

ADOPTION OF SESSIONAL PAPERS

Hon. A.B. Duale: Hon. Speaker, I beg to give notice of the following Motions:-
THAT, this House adopts:-

1. Sessional Paper No. 4 of 2013 on the Employment Policy and Strategy for Kenya tabled in the House on 17th September, 2013.
2. Sessional Paper No. 5 of 2014 on the National Policy for Peace Building and Conflict Management tabled in the House on 31st July, 2014.
3. Sessional Paper No .9 of 2014 on National Cohesion and Integration tabled in the House on 31st July,2 014.

ADOPTION OF REPORT ON PRIVATISATION OF PUBLICLY-OWNED SUGAR COMPANIES

Hon. Lang'at: Hon. Speaker, I beg to give notice of the following Motion:-
THAT, this House adopts the Report of the Departmental Committee on Finance, Planning and Trade on the privatisation of the public-sector owned or controlled sugar companies, Nzoia Sugar Company, South Nyanza Sugar Company, Chemelil Sugar Company, Muhoroni Sugar Company and Miwani Sugar Company, laid on the Table of this House on Tuesday 2nd December, 2014.
Thank you.

Hon. Speaker: Very well. Before we leave this Order, I want to draw attention of the Departmental Committee on Agriculture, Livestock and Co-operatives that we are expecting reports from it. It is an open secret that Committee has taken some leave of absence. So, we expect reports. Do not tell us you are investigating this or that, or you are digging graves or whatever, tell us what you have found in those graves.

(Laughter)

It is long overdue and it is fair that I make this clear, so that we can end some of the speculation that we are hearing all over. Please, Members of the Departmental Committee on Agriculture, Livestock and Co-operatives, whether you will bring skeletons or flesh, please bring a report. We want reports to be adopted by members of the Committee, if possible all of them. I am speaking now like somebody who has consumed some of the vibes out there.

Please, sit as a committee as soon as possible and give us a report. Let the House see what it is you have excavated, if at all you have done it.

Leader of the Majority Party, the Floor is yours. It is about Standing Order No. 44(2).

STATEMENTS

BUSINESS FOR THE WEEK COMMENCING
24TH TO 26TH FEBRUARY, 2015

Hon. A.B. Duale: Hon. Speaker, pursuant to Standing Order 44(2)(a) on behalf of House Business Committee, I rise to give the following Statement regarding the business to appear before the House in the week beginning Tuesday 24th February, 2015.

The House Business Committee met on Wednesday this week to give priority to the business of the House. The House Business Committee has, therefore lined up heavy and crucial business. Having resumed from a long recess, Members are now ready for the business at hand. On Tuesday next week, the House is expected to continue with the Second Reading of the Public Procurement and Asset Disposal Bill, 2014 if we do not conclude it today. This is one of the Bills with a constitutional timeline, which we extended to 27th May, 2015. This Bill concerns county Governments, and so will require consideration by the Senate. The House Business Committee is of the view that we should conclude the Second and Third Reading by the end of this month so as to give the Senate ample time to also consider the Bill.

Hon. Speaker, the House Business Committee has also scheduled two Senate Bills, both of which are amending the County Governments Act. Should we conclude with these Bills, we will also consider the National Honours (Amendment) Bill, 2014, the Private Security Regulation Bill, 2014 and the Business Registration Bill, 2014, among other Bills.

Hon. Speaker, the House Business Committee is of the view that on Wednesday mornings, priority be accorded to Private Members Bills published in 2013. In this regard, on Wednesday morning, next week, we will continue with the Committee of the whole House on the Retirement Benefits (Deputy President and Designated State Officers Bill), 2013 by hon. John Mbadi, and the Persons with Disabilities (Amendment) Bill, 2013 by hon. Wanjiku Muhia. However, owing to the resolution of the House yesterday to name the hon. Member for Suba, the House Business Committee will have to reschedule the consideration of that Bill to another day.

Hon. Speaker, through you, may I take this opportunity to urge Members with the proposed amendment to the two Bills to hand them over to the office of the Clerk in good time as they have to appear on the Order Paper.

Also scheduled for debate by the House are a number of committee reports including the following:-

1. The Reports of the Public Accounts Committee (PAC) for the Financial Years 2010/2011, 2011/2012 and 2012/2013. These Reports have implications on the sharing of the national revenue between the national Government and the county governments.
2. Several Reports of the Public Investments Committee (PIC) which were laid on the Table of the House last year.
3. The Report of the Departmental Committee on Finance, Planning and Trade on the Privatisation of the Public Sector- Owned/Controlled Sugar Companies.

Through you, hon. Speaker, I request chairpersons of respective committees to give fresh notices of Motion as this is a new Session. That goes to the Chair of PAC, hon.

Ababu, the Chair of PIC and the Chair of the Departmental Committee on Finance, Planning and Trade, who has already given a fresh notice.

On Statutory instruments, I urge the Committee on Delegated Legislation to fast-track the consideration of 18 pending statutory instruments. The House Business Committee will also give priority to several Sessional Papers that are pending.

Regarding the Cabinet Secretaries appearing before committees on Tuesday, 24th February, 2014, the schedule is as follows:-

1. Cabinet Secretary for Lands, Housing and Urban Development is to appear at 10.00 a.m. before the Departmental Committee on Lands to answer questions from hon. Jessicah Mbalu, and hon. Godfrey Odanga at the National Assembly Chamber.

2. Cabinet Secretary for National Treasury will appear at 11.30 a.m. before the Departmental Committee on Finance, Planning and Trade to answer questions from hon. Chachu Ganya and hon. Rachel Ameso at the National Assembly Chamber.

3. Cabinet Secretary for Sports and Arts will appear at 10.00 a.m. before the Departmental Committee on Labour and Social Welfare to answer a Question by Private Notice from hon. David Gikaria regarding the wrangles between Football Kenya Federation and Kenya Premier League, and an Ordinary Question from hon. Augustino Neto, at County Hall Mini Chamber

Finally, the House Business Committee will meet on Tuesday, 24th February, 2015 at the rise of the House to consider business for the rest of the week. I now wish to lay the Statement on the Table of the House.

(Hon. A.B Duale laid the document on the Table)

Hon. Speaker: Hon. Gumbo, the Floor is yours.

Hon. (Eng.) Gumbo: I wish to thank the Leader of the Majority Party for laying on the Table the programme for next week. I am also glad that he has alluded to some of the pending reports, particularly those of the PIC. I am also aware that some of the reports of the PIC, which are pending include the one on the sale of Government shares in Telkom Kenya, which was presented here a while back and the pending Bill by Essar when they made an exit from KPRL. It would be nice if we could have them cleared because some of these reports have really been here for quite a while.

I have looked at our Standing Orders and probably the lacuna happens to be due to the fact that, while the Standing Orders stipulate the time within which a report is to be presented and debated, they tend to be silent on how long it should take to be debated once one is tabled; but I think we can overcome that through goodwill.

More fundamentally, last week we discussed the programme of events for this particular Session. If you recall, sometime back, the Supreme Court gave a ruling for the Houses of Parliament to give effect to the two-third gender rule. This House is required, under Article 81(d) of the Constitution, to give effect to that Article within this Session. The deadline is 2015 and I would be happy if the House Business Committee pronounced itself on this matter, because it is clearly on record that we are required to look into it within this year.

Thank you, hon. Speaker.

Hon. Speaker: Even before the Leader of the Majority Party responds, of course that is about giving effect to Article 81(b) on not more than two-thirds of either gender is to belong to any elective body, and Article 100 on representation of minorities and such like groups. I am sure, and the hon. Gumbo knows it, behind the scenes, as Chair of the Centre for Multiparty Democracy (CMD), I was one of the people who went to court. So, I am aware of the ruling from the Supreme Court. It is one of those rulings that sometimes I do not know whether they help grow jurisprudence. Everything was thrown back to Parliament.

But how is Parliament going to ensure that by August of this year, not more than two-thirds of either gender is represented in this House? It is not easy unless we are saying some of these Members like hon. Gumbo, hon. Nyikal, hon. Mwadeghu, hon. Opiyo Wandayi, hon. Pukose, hon. Mwashetani, hon. Elmi, the Leader of the Majority Party, hon. Washiali will go home to give room for the other gender to come and be represented.

How is it possible to ensure that in August of this year, during the lifetime of the 11th Parliament, not more than two-thirds of either gender is represented in this House? I do not know anybody who can give us the mechanism of how we are to enact a law to ensure that not more than two-thirds of either gender is represented here without--- I am saying this because if you look at Article 89(1), the number of single-member constituencies is specifically 290. Go to Article 97(1)(b) which provides for 47 women representatives. Unless somebody tells the Supreme Court to now tell us those provisions of the Constitution are being amended--- If you amend them, you will also have to amend Article 98 with regard to the Senate.

So, how is this going to be achieved? Is it to say that we are going to amend the Constitution to create more constituencies while at the same time there is hue and cry about the wage bill and bloated numbers? All these arguments were presented to the Supreme Court in 2012. We were well represented by Stephen Mwenesi. However, the Supreme Court did not give guidance. So, I do not know whether anybody will be moving to that same Supreme Court to purport to dissolve the 11th Parliament. If the Supreme Court had taken the route of compelling political parties, which is what we were agitating for, perhaps it would have been easier, because all we needed to do was to enact a law to amend the Political Parties Act and the Elections Act to just comply with an order which would have been directive. Remember it is not just Parliament which has to come up with that legislation, the Commission for the Implementation of the Constitution (CIC), having been also represented at that hearing, has an obligation to generate a law that helps to realise that Supreme Court's decision.

However, it is a very good point, hon. Gumbo, that you are raising, so that these Members keep in mind that there is also some threat either to them or to the other House. Indeed, the country has to come to terms with the ruling as to how we are going to realise that not more than two-thirds of Members of either gender are to be in Parliament as a whole. I think the point you are raising is fundamental and useful.

However, I also want to say that what the Leader of the Majority Party has said is quite right. Hon. Members, maybe, this is where it is important to also recall the provisions of our own Standing Order No. 97, whose advantage was well taken by hon. Gumbo yesterday.

In view of these so many Bills and reports, we should strike a balance between the need to ensure that as many Members as possible contribute to every report and Bill, and guaranteeing that as many of those Bills and reports are passed. There is the need to strike a balance. How do we go about it? It is as fair as a plenary making a decision. Is it enough, for instance, that when we have had 50 or 60 Members contributing to one Bill for the presiding officer to call the Mover to reply, yet most likely you will see that there are several other Members still on the queue to contribute to the same Bill?

Hon. Members, let us think through all this. There is need on one hand for us to make sure that the Bills that you as individual Members generate see the light of day, as obviously would be the intention of the Members moving them, as well as reports by various committees and Bills from the Executive through the Leader of the Majority Party. The desire to see as many of them as possible passed as well as the desire to have as many of you contribute is what seems to be the greatest challenge we have as the National Assembly of the 11th Parliament.

Hon. Nyikal, do you want to add to that? Maybe you have a formula, having been a Permanent Secretary (PS).

Hon. (Prof.) Nyikal: Thank you, hon. Speaker. I just got frightened that I may lose this seat. However, that issue is very important. If left unresolved because we think it cannot be done, it can actually give a chance to people with mischief to call for the dissolution of Parliament. When I was in the Ministry of Gender, this issue was canvassed and a whole Cabinet committee was put in place to look at it. You have only one possibility out of it. Even with that, you may still have to amend the Constitution. The only way you could do it is to wait up to soon after the elections when we know the number of Members who have been elected in terms of how many will be male and how many will be female. You will then have to nominate numbers, so that you have not more than two-thirds of either gender. When that is done, we will end up with numbers of over 500 Members of Parliament just arising from that. Even with that, you would still have a problem with Articles 97 and 98 of the Constitution, because in each case there are given actual numbers that have to be nominated. The only way out would be to have recourse to Article 177(b), which says:

"the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender."

That gives you room to do the arithmetic we were doing. So, the National Assembly must address itself to that factor. Otherwise, we will be living at the mercy of anybody who may at the end of this year say: "This Parliament is unconstitutional." A whole Cabinet committee with Ministers who were lawyers had difficulty with it. So, we need to address it. The only thing is that one would have thought the court would have gone to---- the part of the Constitution that accepts progressive achievement of the two-thirds gender rule.

Thank you, hon. Speaker.

Hon. Speaker: Indeed, what you have said is exactly what was the proposed amendment by the late hon. Mutula Kilonzo; he proposed amendment of Articles 97 and 98 to bring into operation the provisions of Article 177(2); but again, the fear is - that is why the Tenth Parliament was unable to even accept it - that you would end up with a

legislature which would have Members in excess of 500. That was the fear. As people have said, the numbers are enormous, the wage bill is high and all manner of things. It is good, but let us actively think about it.

Yes, Leader of the Majority.

Hon. A.B. Duale: Hon. Speaker, the first one on hon. Gumbo, we have 20 reports which have been tabled and are awaiting debate. To make it clear, two of these 20 reports are from the Public Accounts Committee. Five or six are from the Public Investments Committee. There are reports from the Committee on lands. There are about seven reports from delegations, a report from the Committee on Powers and Privileges, one from the Committee on Health and one from the Committee on Finance, Planning and Trade. These are the 20 reports that the House Business Committee is going to deal with. I am sure the ones that hon. Gumbo has referred to are part of the 20.

The Chairman of the Committee on Delegated Legislation was sitting behind me and I do not know where he has gone. He has 18 statutory instruments, which are pending before his Committee. We raised the issue in the House Business Committee because it is a very serious matter. If Members of the Committee on Delegated Legislation are here, they are sitting on 18 statutory instruments which are important to the people of Kenya. So, the House Business Committee will give priority to Committee Members and even share time on Tuesdays, Wednesdays or even Thursdays afternoon.

Coming back to that hot matter of the gender rule, it is very good to call a spade a spade. It is good to make it clear that it was the hottest potato to hold in the Tenth Parliament. When it became too hot and the elections were near, we threw the ball to the Supreme Court. I am sure we will still hold it. If it becomes too hot, we will again return it to the Supreme Court. That is the highest court in the land.

The people of Garissa Township will elect in free and fair elections any of the gender that they want. Nobody can force them on a particular gender. At least, I can speak for Garissa. I do not know about Rarieda, Seme and many other places. People can volunteer and donate constituencies out of good will, if they feel like it, to the other gender. That should be the beginning.

In the Constitution that we promulgated in 2010 - people will agree with me - the governance structure of our country is too expensive. I am sure part of the serious challenge that we are facing in this House is the 349 Members. As hon. Nyikal suggested, if you look at the formula used at the county assembly, in my opinion, it is even unconstitutional. There are county assemblies where 50 per cent of the Members are nominated because of that gender rule, which is unconstitutional.

We have a Gender Commission, Committee on Justice and Legal Affairs of this House, the Attorney-General and the CIC. Those are the right people to hold this hot potato. If they cannot hold it any more, please, let us seek an advisory opinion from the seven wise men and women of the Supreme Court. I am sure their decision will not be to shut down Parliament. Parliament has a very strong position in the Constitution. But, I am sure, as you said, it is for the Kenyan people to decide. One of the most brilliant lawyers, the late hon. Mutula Kilonzo, used to agonise over that issue in this House during the Tenth Parliament. We used to tell him "You are the Minister for Constitutional Affairs, that is your baby and where you take it, we do not know". Later the Supreme Court gave us until 2015. I agree with hon. Gumbo that 2015 is a very special year. It is

the year when we have to resolve this, and it is the year when we are going to know who is a candidate for the presidential seat and who is a joker.

So, it is a very crucial year for both gender equity and political parties presidential candidates. For us, we already know our candidate. Then 2015 will be the year for our colleagues to identify their candidate.

Hon. Speaker: Sorry, Members who have put their cards on intervention. Hon. Ochanda and hon. Nyokabi, you still want to go back to the issue of gender? I know hon. Nyokabi may be very passionate about the issue of gender; of course, we are comforted by one thing; that Article 81(b) is about elective offices, but Article 27 is on appointive offices and other offices. Is the Supreme Court itself in observance of that gender rule, yet their offices are appointive? Do they have the high moral ground to say that this one is observing this? Hon. Nyokabi, just the last one before we get to hon. Ochanda.

Hon. (Ms.) Kinyua: Thank you, hon. Speaker. Just to add my voice to this two-third gender debate, we have a country of men and women that must work together to define their destiny and to move forward. This country must have both men and women in leadership. The two-thirds gender rule is not about women replacing men. It is about men and women of our country moving forward. If you look at Article 100, the duty of this Parliament is to pass a legislation that will be used in 2017. We are not required by this Constitution in this House to meet the one-third or two-third gender rule. If you look at Article 100, it is to pass legislation within five years; this is the deadline given by the Supreme Court; we should do it by August of 2015. We are required to pass legislation that will be applied in the 2017 election and that will move the country forward in terms of progressive realisation of gender equality.

So, it is not true to say that by August we are required to bring more women to this House. We are only required to pass legislation that will be used in the 2017 election. A country where men and women live together is a good country. Here we will champion that law. We will ask that women be also allowed to come to this House. Thank you, hon. Speaker.

Hon. Speaker: Hon. Nyikal has heard that, Of course, it is also important to observe that in a recent report, 19 counties did not elect a single woman MCA. That is telling. But, it is work in progress.

Yes, hon. Ochanda.

Hon. Ogolla: Thank you, hon. Speaker. Mine is not related to that difficulty, but it also raises another difficulty that I was experiencing particularly in reconciling quite a bit of developments of yesterday in terms of the procedures of the House.

The difficulties I had after the events of yesterday--- I am a new Member and the fact that we are experiencing the issue of naming Members for the first time--- I looked at certain things and I was in difficulties reconciling them. The first one is the kind of mood and the tone that you hon. Speaker had when we started this Session on 10th this month; I recall your Statement on 10th and the kind of things that were happening yesterday. I was unable to reconcile the two in terms of which one takes precedence. Is it the good tone which was reconciliatory, the one that was like a warning, or the fact that we have to take our work seriously? Issues of disorder need to be limited but we went ahead and brought in this idea about naming! It was like we were working backwards against your Statement

which was made on 10th February. It was like a retroactive or retrogressive. That is one thing that I observed yesterday.

The other thing I observed, which I really need your guidance on, is the flow of Standing Orders 107 and 108. In terms of issues of misconduct, the Speaker has the discretion. As you have the discretion, Standing Order 107(3) says that when the Speaker's powers are inadequate, then it amounts to the Speaker naming. When it amounts to the Speaker naming, where is disconnect between the naming in Standing Order 107 and the naming in Standing Order 108? I am wondering whether it is the Speaker to prompt naming under Standing Order 108, and how we can relate that to Standing Order 107. That is one difficulty I had; hon. Speaker, you can guide us to see how it works.

The other thing that I have difficulties with is in terms of the procedure itself, particularly under Standing Order 108. Once a Motion is brought and there is no discussion or debate, we go ahead and propose and vote. The people who are affected, as in the first case where they were three, participated in the voting. In the second case they were six and, again they participated in the voting. I am wondering because in my experience, the people who are affected do not take part in the matter that affects them. Hon. Speaker, I also need some guidance here.

Finally, for purposes of protecting the minority in the House, I do not know exactly who has power. If you want to look at it in relation to Articles 27 and 56 of the Constitution, who really should take care of the interests of the minority in certain things that are fairly objective and are in the purview of the public? We are very certain that there were issues of disorder, particularly on December 18th, 2014. When we use numbers and the vote, what are we doing as a House?

Hon. Speaker, please, guide us in this matter. My idea is not that we change what we have done. I am not requesting you to go back to the matter but, at least, we need some guidance, so that when we face a similar situation in future, we will know how to relate Standing Orders 107 and 108 to the flow of events.

Thank you, hon. Speaker.

Hon. Speaker: Now we will be engaging in a workshop discussion, because that is a matter of trying to educate a Member who is having difficulties understanding the Standing Orders. There is nothing that is contradictory. Standing Order 107 is used if the Speaker, or the chairperson, decides to act in the manner that is indicated. Standing Order108 provides that any Member may at any time, including now--- The Standing Orders are actually progressive. I think there was merit in making a provision for regular reviews of the Standing Orders; in the past, they would be reviewed at the tail-end of a term of Parliament. So, Standing Order 107 is distinct from Standing Order 108, because Standing Order 108 provides that you, as a Member of Parliament, are at liberty to do so at any time. Standing Order 107 is for when the Speaker can exercise the option of naming. So, if the Speaker chooses not to exercise that discretion it is left to you, hon. Members, to exercise the option under Standing Order 108. So, there is nothing that is contradictory.

Hon. Ogolla, for instance, should you think that there is need to make amendments in a particular way, you are at liberty – the provisions are clear – to make suggestions and bring them to the Procedure and House Rules Committee for the

Committee's consideration. However, as they are now, these are the Standing Orders which we must live with. There is no contradiction.

Hon. Members, some of you are very good at debating. I have noticed it at some forums outside this House. Please, it will be better if the House benefits from your immense knowledge which you exhibit in various fora. The House will be enriched. You go and exhibit a lot of knowledge out there; I do not know why this knowledge is not being shown here. You have a lot of capacity and that is why a lot of people invite you to go and speak to them. Hon. Wandayi, we are not opening debate on this matter. So, let us just do business.

Sorry hon. Ogolla, you raised the other issue. I have been reminded that you raised another issue. What was it about? Was it about the protection of minority?

Hon. Ogolla: Hon. Speaker, it is basically about the relationship between your Communication of 10th February, 2015 and the happenings of yesterday – the naming process. The other issue is the protection of the minority in the House.

Hon. Speaker: Hon. Members, the Communication from the Chair on 10th February, 2015 did not bar hon. Members from exercising any of their rights. It will be fair for you to just look at that Communication. It did not, in any way, prevent hon. Members from exercising their rights under the Standing Orders, and even under the Constitution. Nobody is limited.

On the issue of minorities, we are in a democracy where the majority will have their way and the minority will have their say. I cannot invent anything different from that principle. However, as an individual, if you are being oppressed, then you have a right to complain to the Speaker about how you think you are being oppressed, so that action can be taken to correct the situation.

With regard to voting, the only bar there is in our Standing Orders is for hon. Members not to vote on a matter in which they have pecuniary interest in, that is in terms of Standing Order 76 (3). There is nothing pecuniary about being named. So, it is perfectly in order for hon. Members to vote and even defend themselves. Under Standing Order 108, the only way to defend yourself is by a vote. That is not my invention. There is no debate or adjournment; it is just a Question to be put. It is fair that if those Members are present they vote to defend themselves. That is the only avenue available. Should you think that it is necessary to change that aspect, again, it is up to you. You can make proposals.

Hon. Members, let us not reopen unnecessary debate.

Next Order!

MOTION

DEVELOPMENT OF RENEWABLE/GREEN ENERGY

Hon. Speaker: Hon. Members, as you look at the Order Paper, we will do the unusual thing because this is a Motion by hon. (Dr.) Ottchilo. It is a Private Member's Motion but what remains is for the Question to be put. I think it was felt that we should not wait for Wednesday next week. So, we can dispose of the Motion now by putting the Question.

(Question put and agreed to)

Resolved accordingly:

THAT, aware that the Kenya Nuclear Electricity Board (KNEB) was created and tasked with spearheading the development of Nuclear Energy in the country; deeply concerned that the construction and maintenance of a nuclear plant is a highly technical, expensive and risky undertaking that potentially exposes a country to the threat of nuclear radiation and the challenge of disposal of radioactive nuclear waste; further aware that due to these inherent risks in nuclear energy production, many of the developed countries like Germany, India, Japan and South Africa, amongst others, have increasingly embarked on the systematic shut-down of their nuclear plants and instead are promoting the development of clean renewable energy, especially wind and solar energy; noting that Austria, which hosts the United Nations International Atomic Energy Agency, has terminated the development of any nuclear energy, this House resolves that the Government shifts its attention from the development of nuclear energy and instead invests in the development of renewable or green energy, which is safe and abundant in the country.

BILL

Second Reading

THE PUBLIC PROCUREMENT AND ASSET DISPOSAL BILL

(Hon. A.B. Duale on18.2.2015)

(Resumption of debate interrupted on 18.2.2015)

Hon. Speaker: Hon. Gumbo, you have a balance of 20 minutes. Is it?

Hon. (Eng,) Gumbo: Yes, 20 minutes.

Hon. Speaker: Yes, I was listening to the debate as it adjourned. I do not have to consult the records. That is to show you that I was listening.

Hon. (Eng.) Gumbo: Thank you, hon. Speaker. You are absolutely right. I have a balance of 20 minutes. Actually, it should be more because much of debate was interrupted by the point of order from the hon. Member. However, I am okay with the 20 minutes.

Once again, I want to say that the Bill before this House is a very important one because it affects assets of our society. I had gone through Clause 2 of the Bill and made a comment that in my view, the definition of "tender security" where we are now allowing surety bonds, standby letters of credit and insurance bonds is very good, because it is going to allow young Kenyan business people to participate in public procurement. For a long time, the major impediment to our young people has always been the requirement to provide a tender security in the form of a bank guarantee.

I am also happy with the definition of "urgent need". A lot of times, procurement rules are violated on the pretext of an urgent need when clearly there is no urgency involved at all. The fact that "urgent need" has been clearly defined is good; now we will avoid frivolousness in procurement that will be done with vested interest encapsulated as urgent needs.

However, I have a problem when I go to the body of the Bill. This is owing to the fact that I am in this House with a professional background and training in engineering; at the same time there are several of my colleagues who are here professionally trained as doctors, lawyers, valuers and architects.

Clause 5(1) of this Bill says:

"This Act shall prevail in case of any inconsistency between this Act and any other legislation or Government notices or circulars, in matters relating to procurement and asset disposal."

I want to submit before this House that those of us who have professional backgrounds know that the procedures we use when we are procuring professional services cannot be the same as when you are procuring such things as pencils, pens and toilet paper. To have a blanket provision such as this one throws us back to where we have come from. There is a background to this. The professionals of this country have been seized of this matter and there have been a lot of debate on this matter, Professional societies in Kenya have had a lot of engagements with the Public Procurement Oversight Authority (PPOA).

Out of this engagement, on the 10th February, 2012, PPOA realising the difficulty of lampooning procurement of professional services along the same procedures as those you use to procure other tangible goods came with the circular, PPOA Circular No. 1/2012 of 10th February. This Circular says the following in paragraph 1, and I wish to quote:

"The Public Procurement Oversight Authority has in the recent past received various complaints by professional bodies over the manner in which the procurement of professional services is carried out by procuring entities (PEs). Their main concern is that PEs ought to request technical proposals only and, thereafter, negotiate on the contract price with the technically qualified bidder, citing that their respective legislations bar professionals from charging below laid down fees."

The reason why this clause, as currently provided, is actually not workable is because we have professional bodies which are guided by specific Acts of Parliament. As engineers, for example, we have the Engineers Act, which clearly guides the profession of engineering. The architects and quantity surveyors have the Architects and Quantity Surveyors Act, Chapter 525 of the Laws of Kenya, which clearly guides and sets out the minimum fees that are chargeable by those professions. In fact, under the Architects and Quantity Surveyors Act and the Engineers Act it is actually illegal to charge below the minimum fees. Hon. Speaker, even you are a lawyer and I am sure even the lawyers have provisions which clearly stipulate how much fees you can charge for professional services.

I do not think it is vanity that professionals in Kenya have been gunning for their services to be charged as per the laws governing specific professions. I would probably want to give you a background. When you are talking about professional services, what

are you really charging for? You are not charging for goods. I am reminded of a very interesting cartoon which used to feature in the early 1980s called "Bogi Benda" by James Tumusiime (JT). In one cartoon, Bogi Benda took his car to a mechanic because it could not start. The mechanic told him to open the bonnet and touch some green wire. He touched the green wire and the mechanic told him to go back and restart the car. So, Bogi Benda restarted the car and it started. So, he asked the mechanic how much he was going to charge him. The mechanic said Kshs.1,000. Bogi Benda asked: "Just for touching a wire?" Then the mechanic said: "No. For touching a wire I am only charging you Kshs50 but for knowing which wire to touch I am charging you Kshs.950."

(Laughter)

Hon. Speaker, this is a very clear distinction. Clearly, you cannot lampoon professional services with tangible goods. Even me, yours truly the hon. Member for Rarieda, have had an occasion to make Kshs1 million while sleeping on my bed. How did I do it? Somebody was having a problem which I knew. He had run all over the place and had been charged millions of shillings and I told him that I could sort out his problem, but first of all he had to give me a Local Purchase Order (LPO) for Kshs1 million. Sleeping on my bed, I gave him advice that helped him. Of course we argued later. He told me: "But you never even came" but I told him: "No. I am charging you Kshs1 million for knowing what you should do."

So, you cannot sincerely charge professional services in the manner you charge for goods. I think we have to move an amendment even as we go into debating this Bill. Honestly, it is not even asking for too much. The PPOA actually realised this problem and in this circular, they went ahead and accepted that they had no problem as long as professionals were willing to charge within the guidelines. However, they can compete on financial terms if they wanted to charge more.By making this provision, as it is, we are taking ourselves backwards and I will propose it be changed in my amendments.

Clause 6 of this Bill talks about conflict in international agreements. We will need to look at this at it; you know that this country, and others in the Third World in general, have had very many issues with economic partnership agreements, yet this clause says that:

"Subject to the Constitution, where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from treaty, agreement or other convention ratified by Kenya and to which Kenya is party, the terms of the treaty or agreement shall prevail."

Hon. Speaker, I honestly have a problem with this provision because some of these provisions take account of the interests of those who are outside our borders and not the people of Kenya. Provisions under Part II, which define the bodies involved and the role of the National Treasury, are good. What we have to avoid, however, is letting the National Treasury to micro-manage procurement processes, as has happened before in so many cases.

I wish to move to the next area, which is Part III on the county government responsibilities with respect to public procurement and asset disposal. The procedure outlined by Clause 33 is good because we have problems in the counties. As we speak today, there is a lot of wastage in our county governments; a lot of times procurement procedures are literally thrown out of the window before people engage in procurement.

Hon. Speaker, Part V of this Bill talks about internal organisation of procuring entities. One of the things that I am most proud of is the fact that I am a Kenyan and given a second chance in another life, I would request to be born a Kenyan again. One of the problems that we have had in this country--- I think it affects professionals virtually from all cadres. I think in any form of procurement, even if it is an international bid, it has to by all means transfer maximum benefit to the people of Kenya.

We have had many cases, especially some of us professionals in the built-up environment; you have people who come from outside using the international treaties. They engage in professional services in this country and at the end of the day, not only do they take away knowledge but they also take away capital from our country. I think as we look at this Part V we have to find a way to make it mandatory that when we are procuring and engaging in international competitive bidding, we have to confer certain mandatory benefits on the people of Kenya. Part V is good.

If you look at Clause 44, it talks of internal organisation of procuring entities; it clearly defines the responsibilities of an Accounting Officer. This removes a lacuna; many times we have had cases where you have ping pong between the procuring department and the Accounting Officer. Therefore, by clearly defining and setting out the responsibilities of the Accounting Officer, we are removing the lacuna.

Clause 48 talks about sector-specific procuring and disposal agencies. I think this clause in way will indirectly refer to what I spoke about, where you have to look at procurement in specific sectors and treat it differently. This is because if you put everything together, then the point may be lost.

I have looked at Clause 73 and I think this is the clause which talks about invitation to tender. I think some of these provisions have clearly been put here---I have been in this business for a while now, that is for over 20 years; it is not a short time. I think some of these provisions that have been put here, particularly the ones that have been put in Clause 73, in my view, belong to those who tender.

Clause 76 talks about submission and receipt of tenders. What we have seen in the past is that sometimes people lose tenders not because they are unable to perform the task at hand but because of the mischief involved in the receipt of the tenders. Right now anybody who has engaged in tendering in Kenya knows that some of the mandatory requirements that you have to meet are like a tax compliance certificate. Sometimes somebody, purely out of mischief, will pullout the tax compliance certificate. Perhaps, it is not possible to encapsulate everything in an Act of Parliament. However, I think as we go forward it will be important to make sure that there is a way of recording all the submissions, so that people are not disqualified merely out of malice and mischief.

Clause 88 talks about international tendering and competition. I think I alluded to this when I said that whether we do international tendering and competition, whatever it is that we do, ultimately maximum benefit must be transferred to the people of Kenya. This is because I am not aware of any country in this world which has grown using capital from another country. Therefore, when we see a lot of big international contracts going on and Kenyans get what we would probably describe as mere leftovers, I think that is not right. So, whatever we are going to do, particularly in the regulations, it will be nice to clearly stipulate the minimum returns that the Kenyan bidders acquire. It should be clearly stipulated that when people come here from outside to engage in international

competitive bidding, we have to make it mandatory for them to make sure that a certain percentage of all the international bids that we have are set aside for the people of Kenya.

Clause 91 talks about the different methods of tendering and I am very interested in 91(c) on design competition. I am a bit surprised at what this Bill has done because design competitions are not easy things. In my life, I have had occasions to compete in design competitions. Design competitions are expensive and time consuming. They extract your intelligence and wisdom. These are not easy things. Again the question must be asked: Why does this Bill allude to other provisions that already exist in other statutes, yet when it comes to important provisions like those on design competitions it is silent? When you look at the Architects and Quantity Surveyors Act, Chapter 525 of the Laws of Kenya, it is very clear how you can go about a design competition. The regulations in that Act clearly state the procedure for undertaking design competition. I just do not know why this Bill is short of giving the procedure, which already exists in law. Why are we again doing another procedure when a law already exists? This is because when you talk about design competition, you are looking mainly at it as it affects a profession.

I will just give you an example. I happen to have been very much aware of how this Chamber, where we sit today, came about. I give absolute plaudits to my good friend, Architect James Kimathi from Meru County. All this work that you see here was done by a Kenyan. Everything that you see here--- This was a very rigorous design competition, where even samples were required to be brought from the Democratic Republic of Congo (DRC). By the time the designs were presented here and adjudicated on under the able leadership of Senator Musila, I can assure you that all those people who competed had incurred huge expenses.

Therefore, just to outline qualitative procedures on how to go about design competitions without in a way marching it with quantitative kind of guarantee--- I am aware that when this design competition was undertaken, the winning design was guaranteed Kshs500,000 just to try to recoup a bit of the expenses that went into going through the design competition. I am proud that it went that way.

Recently, those of you who were watching international events saw what happened in a parliament of another fairly advanced country in Africa. It was possible for more than ten microphones to be on at the same time. That cannot happen here because that was assessed and clearly there was a panel that went through it. Everybody was explained to and that is why the chairman's counsel has overriding facilities, so that you decide that at no time will any two delegates speak at the same time. This is because as per the lay out here, we are all called delegates. At no time will any two delegates be speaking at the same time.

Therefore, just to enumerate qualitative aspects of such an important procedure without saying that this thing, which is so costly for people to undertake - You do not give any rewards to those who participate in it, I think that is an omission that we also need to correct. In any case, I have clearly said that the Architects and Quantity Surveyors Act is clear on how you conduct design competition. Why do we come up with new procedures when procedures already exist in an Act of Parliament? I think we will have to borrow from it.

So, let me conclude by saying this: I think this Bill is important; but ultimately, the importance of this Bill will be to make procurement processes not the labyrinth that they are today.

Hon. Speaker, let me conclude by saying that the importance of this Act will be to make procurement processes not the labyrinth that they are today. Today, a procurement process can last as long as five years. Within that time, the convergence of cost, quality and time will have been lost. They have to have processes whereby the time the tendering is concluded unit prices of things have gone up two, three or five times. At the end of the day, if we can lock that and confirm maximum benefits to the people of Kenya, who really are the ones to grow this country, we shall have succeeded in making a law that moves this country forward.

Hon. Speaker, with those remarks, I beg to support. However, I am supporting with the caveat that I am proposing an avalanche of amendments to some of the clauses that I have cited and many others. I thank you, hon. Speaker.

Hon. Speaker: Hon. Members, you had agreed that each Member speaking will be limited to a maximum of 30 minutes on this particular Bill. The yellow light will go on when you have two minutes left, that is, at the 28th minute. So, it is not like when you normally contribute for ten minutes and the light goes off when you have only one minute to go. So, be accordingly guided so that you know that you have two minutes even when the yellow light comes on.

Hon. Kimani Njuguna.

Hon. H. K. Njuguna: Thank you, hon. Speaker.

Hon. Speaker: Sorry. The Leader of the Minority Party was not in the House yesterday. It is good to inform him that he will be limited to 45 minutes. So, prepare to speak for a long time.

Hon.H. K. Njuguna: Thank you, hon. Speaker. I would wish to make my contributions to this very important Bill. I take note of hon. Gumbo's contribution because he has fundamentally tackled some of the issues that I would have wished to raise.

The basis of this Bill is Article 227 of the Constitution. Like we all know, the Constitution is the supreme law. For this Article to have found its way into the Constitution, it means that the matter before us is very important to this country and to Kenyans at large. This Article 227 requires this Bill to have salient features like fairness, equity, transparency, competitiveness and effectiveness. In my opinion, these salient features should not be construed narrowly.

Going further, the Article requires that the Bill should provide for any of the following: Categories of preference in the allocation of resources; categories of people who were previously disadvantaged; sanctions against contractors who have not performed according to professionally regulated procedures; sanctions against people who have defaulted on tax obligations, or are guilty of corrupt practices. It is important that we interpret this Article because it is the basis of what we are discussing today.

Public procurement is a very important area in any country because it is a big business in a political process. Therefore, the law regulating such a business must be such that it should deliver value for money. Ten per cent of our Gross Domestic Product (GDP) goes to public procurement. This translates to 60 per cent of our annual budget. If

we look at the annual budget today which is over Kshs1.9 trillion, 60 per cent of this budget will translate to over Kshs1 trillion. Put that way, hon. Speaker, then all of us should be able to appreciate how big this business of public procurement is. In fact, if this business is well managed, it has the potential to kick start the required economic growth and development of any nation.

Perhaps, historically, it is important to note that we did not have anything that we would have called sound procurement law in this country. It is only in 2001 that this country was forced to come up with the famous Exchequer Regulations of 2001 which translated to the Public Procurement and Disposal Act of 2005. The mischief is that because public procurement controls a very big market, the powers that were there then did not want to have any law because they were able to manipulate this market. To prove my point, hon. Speaker, it is only after 2001 that we started hearing of Anglo Leasing, maize and "chicken" scandals. Why were they not there before 2001? It is because after 2001, we now developed a legal framework that is mandated to oversee the expenditure or the process of procuring goods and services in this country. Even with these scandals, it is good to appreciate that we are aware of them now because we now have the law. Before 2001, we did not have the law. That is why you cannot talk of the scandals then. The scandals are coming up now because we now have something that we can call a legal framework.

Even with the law, we have had challenges because of political patronage. In all these scandals that I have mentioned, there is the invisible hand of political patronage. According to the latest Ethics and Anti-Corruption Commission (EACC) survey, over 80 per cent of all the corruption cases that they investigate relate to public procurement. One of the weaknesses has been failure to promote our local industries like hon. (Eng.) Gumbo has mentioned. There is also conflict of this law with other laws.Going through this Bill, I have various concerns. One of my concerns, like hon. (Eng.) Gumbo has mentioned, is Clause 2 where there is an attempt to define "consultancy services:. For me, the definition therein is very narrow because consultants are regulated both in training and in law. I am going to bring in necessary amendments so that the concerns of professionals are taken care of. Like hon. (Eng.) Gumbo mentioned, Clause 5 of this Bill ousts the jurisdiction of other statutes. This is more so when it comes to professionally regulated services like medicine, architecture and law. In the past, this ousting of jurisdiction of other statutes, the law in a way of trying to procure these services was generating a lot of undercutting, unhealthy competition and the net result has been compromising service delivery.

Looking at the Bill, the whole thing has come back in Clause 5 where it says that any other law that is in conflict with this, in matters of procurement, is null and void. As professionals, there is an outcry. There is a feeling that for the professionals to be regulated, the new law should take into account that most of these professions have their remuneration order, which is supposed to promote the professions and also to take care of consumers. I also intend to liaise with my colleagues here to bring the necessary amendments to that clause, so that this law does not undermine professionalism in this country like it has done in the past.

I have concerns about Clause 29 of the Bill which deals with the composition of the Public Procurement Review Board. This is the administrative review Board where, in

case of complaints, you appear before it. It is the court on public procurement matters. In this Bill, the membership of the Board shall be 15. My concern is that a few professionals should not monopolise the Board. It should reflect the face of Kenya because procurement is a concern for the whole country. Very important professionals have been left out such as surveyors, valuers, IT experts and economists. The Bill has provided for 15 members, but I feel that members of these other professions should also be included. The matters and issues that they deal with keep on coming up in this administrative Board. The nomination of the members of the Board, in my opinion, should be done by the professional bodies, which have the mandate and know their members in terms of integrity and standing. Therefore, the people they are likely to forward for nomination are of high integrity, moral standing and who can give the society what is expected in this Bill.

Clause 32 talks about the members of the Administrative Review Board as being full-time members. I have an issue with that. In the past, they have been part-time, but moving forward it is important to appreciate the role of this Board and the fact that it controls, regulates and listens to cases involving over Kshs1 trillion in terms of Government expenditure and in terms of purchases of goods and services. Therefore, an *ad hoc* Board might not have the commitment that is anticipated of this Board. I am just wondering whether it is not possible for these members to be made permanent for the period they serve on the Board, so that we can get the expected commitment. When the members of the Board are not committed, they will be out there doing other things. But when they are committed, their discharge of services to this country is likely to meet the threshold expected of them.

I am concerned about Clause 10 of this Bill which talks about the Public Procurement Regulatory Board. It is the ultimate Board that will oversee the Secretariat. It is, therefore, a very important Board because it will give direction to the Secretariat. I am concerned about this Board because all the members, according to Clause 10, are supposed to be nominated by the Cabinet Secretary. In my opinion, this Board should be independent if it has to deliver. According to Clause 10, the Cabinet Secretary shall appoint five people and one of them will be the Chairman, who will ultimately be appointed by the President. Then there will be two other members, namely, the Cabinet Secretary and the Attorney-General. The quarrel I have with this clause is the Executive control. Being the ultimate body that is going to control the secretariat and therefore, controlling all matters concerning procurement, this Board ought to be independent. The Cabinet Secretary should nominate these people from persons forwarded by the professional bodies. He should not have the authority to nominate. Once he has this authority, it means that, by extension, he has patronage on how they discharge their duties.

The Bill talks about seven members of the Board. However, this number is small and perhaps we should expand it to about ten because we now have counties, so that they can discharge their services without any lapse. We should not forget that the biggest problem that we have had in public procurement, even in the unresolved scandals, is the patronage of the process. We must find a way to anchor the new role such that this patronage is not there for our public procurement law to work as we want it to.

I am also concerned about Clause 3. Among the principles that are supposed to guide the new role is the promotion of local industry and sustainable development. This is a very crucial clause because we now have an opportune time to domesticate this role. Micro and small enterprises in this country play a very important role. According to the Micro and Small Enterprises Authority, 2012, the total employment in this country from this sector was 71 per cent. In terms of contribution to the Gross Domestic Product (GDP), this sector contributed over 20 per cent.

Hon. Speaker, the authority noted over 70 per cent of all our public procurement went to large corporations and foreigners, an issue that hon. (Eng.) Gumbo talked about. If we are talking about realizing Vision 2030, it is very important that we take into account our local industries, micro and small enterprises. If you look at employment creation and income generation and the way they are situated in the whole country in terms of regional balancing, they are centers of creativity and innovation. So, if we are futuristic in this country, the new law should take deliberate affirmative action to promote the products from SMEs. We can talk about Uwezo Fund and the youth funds but when you relate Kshs6 billion in the Uwezo Fund and compare it with Kshs1 trillion in the public procurement market, if we can create a definite affirmative action to promote our local industry, then we will be there by 2030 as anticipated by our Vision 2030 where we will create an entrepreneurial nation.

All the countries that we can talk about now that we would want to emulate have adopted one thing; they have embraced the entrepreneurial culture. I do not think the issue of MPESA came up with Safaricom. This must have been an idea that came from the SMEs but because they did not have the ability to develop the idea, most likely the idea then was sold to Safaricom. So my point is, these SMEs come up with very creative ideas but some of those ideas remain in the shelf because they lack the ability to operationalise them, what we call innovation. So our public procurement sector that controls the largest market in this country should be skilled to promote local industries.

I will briefly touch on Part X and I will dwell much in it because hon. (Eng.) Gumbo gave it a very good touch. This is procurement of professional services. I would like to reemphasize that professionals offer services of intellectual nature and it is very important that the way they conduct their business is respected. I will give you an example for purposes of understanding the issue that I am raising. You cannot tell a doctor to quote fees because he does not know how long the treatment will take. You may even eventually die in the process but it is very important to appreciate that doctors have a way they are regulated in the way they go about their business. Similarly, hon. Speaker, I know you are a lawyer. You cannot be told to quote fees by way of procurement because the case might even end up in the Supreme Court and you do not know how long it would take. So for professions, the anatomy and chemistry, it should be appreciated by this law and that is why they are regulated. That is why we have professional bodies so that they can take charge. Their elimination orders are well articulated. Some are even gazetted for the benefit of the professions, the consumers and the entire country. This is an area which has been handled very badly by the existing law. So I intend to bring the necessary amendments so that this mischief can be cured moving forward.

Hon. Speaker, I think I have exhausted my points and I support this Bill subject to the amendments that I intend to bring at the appropriate time.

Hon. Nyenze: Hon. Speaker, thank you for giving me this chance to contribute to this very important Bill; the Public Procurement and Asset Disposal Bill, National Assembly Bill, No.40 of 2014. I note that this Bill has a deadline and it is good that it has come because those who have known this country for a long time know that Kenya can be described as a country of 42 million people and 18 million live below the poverty line. When we talk about living below the poverty line, I mean they earn less than Kshs100 a day. That is 18 million Kenyans. The other 20 million Kenyans are poor; they earn that Kshs100 a day but because of the cost of living because times are very hard; the cost of food and goods is high, they are also nearly in that category. That makes 38 million poor Kenyans. Then we have only 1,000 Kenyans who are super rich; who own 80 per cent of the economy. All this has come about because of poor procurement laws and implementation. It is through this Bill that the Committee seeks to rectify this situation so that we move forward and distribute wealth equally so that we do not have instability in this country. The Bill is important because public procurement plays a social, economic and political function. Economically, we know that public procurement consumes 11 per cent of the GDP and 30 per cent of the Budget. Those are colossal amounts of money and if they are managed well, they will create wealth and redistribute it so that every region in this country can develop at the same pace as the rest of the country.

For us as a country to boost economic growth and to grow at a pace where we drive out poverty and everybody enjoys a fairly comfortable life, we have to correct those problems that we have been having in procurement. It is common knowledge that in most of the tendering, those who tender are predetermined. Before you even tender, there are arrangements and it becomes very inflated so that there is money for *kitu kidogo* and that is what kills the economy. In 2007, the Public Procurement Oversight Authority (PPOA) estimated that procuring entities were buying at an average of 60 per cent above the prevailing market levels. That means there was no competition and procurement was not competitive. If we invite competition, at least, it will stabilize at nearly 10 per cent of that.

The Constitution requires prudent use of taxpayers' money so as to ensure value for money for whatever we do. Our economy runs into a Kshs1 trillion plus but because of wastage, corruption and unfair procurement processes, we lose so much and very little money goes to development.

All the big scandals that we have had were to do with procurement. We have had Goldenberg, Anglo Leasing and todaywe are talking about "chicken gate". I am happy that the Ethics and Anti-Corruption Commission is taking action. Today, I read in the newspapers that the Kenya Ports Authority Board has suspended top managers because of irregular procurement processes. We have to spend the taxpayers' money in a way that value for money will be realised and we will achieve economic growth for this country and will enable every Kenyan to live happily.

In the 60s, we had no regulations. In the 70s and 80s, we had Treasury circulars guiding us on procurement. Finally, we enacted the Public Procurement and Disposal Act of 2005 and now the Public Regulations of 2006. At least, we are moving in the right direction. If we can prevent corruption, theft and wastage of public resources, both at the

national Government and county governments, this country would develop very fast. But as things are both at the national Government and county governments, we have not eradicated corruption although we have tried to fight it. We have not succeeded. Corruption has increased instead of decreasing. In our school curriculum, we have to start teaching our children good values of financial management where you do not engage in corruption and all these other vices. Instead of fighting corruption through prosecution, we should nib it at the bud and stop it. People will not have appetite for it.

India, which is one of the fastest growing economies apart from China, has shown a marked growth for the last ten years; every village is required to produce one product and that product is bought by the Government. People in these villages do a SWOT analysis to see what is available in their regions. They do the best to produce and do value addition. They produce and the Government helps the MSMEs and women groups to add value to the product. Once the products are value added, the Government buys them and some of them are exported. It is only through the promotion of small and medium enterprises that this country will grow. Mega projects are where the big fish, through bad procurement processes, benefit from. They benefit where they have not planted. We should promote youth and women groups in the villages by giving them capital, training them on manufacturing what is available and what they are good at, promoting their products and assisting them to access markets. That is how a country develops. Unless we do that, poverty will spread and instability will creep in.

In this country, we have heard the teachers saying "*haki yetu*". Nurses and doctors and all manner of employers are crying for salary hikes because the cost of living is very high. Even for policemen and other employees who have no trade unions and nobody to fight for their rights, the cost of living in this country has shot through the roof. Most of the Members of the National Assembly can attest to this. Whenever they go to their constituencies, they find long queues of parents who cannot take their children to secondary schools or pay medical bills for their sick ones. The burden is passed on to the legislators to chip in and help.

This country is not poor, but because of bad procurement laws, poor implementation of policies and corruption, we lose so much money. That money goes to the rich; the bourgeois or the big people. They are the ones who can get those big contracts, but the poor people do not have that capacity to get those big contracts. They even do not know how it is done. I am very happy that this Bill tries to promote education and uplifting of women groups, so that they can access these contracts.

I come from Kitui County and I have been concerned about procurement in that county. Just a few weeks ago, the governor invited us to go and witness the opening up of two murram roads where a grader passed and cut a road through. All the Members of the National Assembly from Kitui were being invited to go and witness that miracle where a road has been created because the grader passed through. When I asked about the cost, I was told it was Kshs400 million. Surely, if this is the way we are going to develop these counties; a grader cuts an earth road and Kshs400 million is gone, what kind of procurement was that? I am sure most of these Members have similar cases where resources devolved to county governments are being wasted. Instead of consultation with the elected Members of the National Assembly and the Senate on what should be given priority, the governors just go on and do whatever they feel is good. They even do not

consult the MCAs. Then you find shoddy jobs being paid for exorbitantly. Those are the losses that the county governments are incurring.

We do not want to export corruption to the counties. That is why we are saying that public procurement should be strengthened in the counties so that there is efficiency, transparency, equity and fair play. We should not be treated to these kinds of situations where money is spent and after one rainy season, no vehicle can pass through that road because no murram was put yet, colossal amounts of money have been spent.

This country is made up of 42 tribes. Most of the contracts, and I have no regrets to say this, go to persons from certain communities who own companies; other communities never get big contracts. Through this, because the Government controls 85 per cent of the national Budget, only 15 per cent goes to the county. If you do not re-distribute wealth through procurement--- Companies that win big tenders come from only two or three regions. This will create instability in this country because some people will grow poor and others will grow rich. Those who are poor are more than those who are rich. They will later know that they are poor and suffering because of poor and biased procurement. I want to give an example. If you look at the Standard Gauge Railway that passes through Ukambani, more than one-half of it passes through Ukambani from Mtito wa Ndei to Nairobi. However, how many people from the Kamba Community have got contracts there? I can assure you, nearly none. How many Maasais have got any contract? Nobody! How many Taitas have got a contract? Nobody! Surely, if this railway line is passing through those regions and these people just go there as casual workers, are we not creating instability?

Hon. Speaker, I want to appeal to the National Assembly to keep on revising these public procurement laws so that those communities that may lack capacity to produce contractors to take those tenders, we do an affirmative action. We should try to promote and educate them so that they get part of the cake because it belongs to all of us. This country belongs to all of us. However, when you see a contract say geothermal or electricity generation--- One thing that the Jubilee Government has done well is to distribute electricity everywhere for the laptop project although the laptops did not come, they may not come and they will not come.

(Laughter)

At least, laptops have brought us electricity. However, when you look at the companies which were digging holes, you cannot get people from Central Province digging holes in Kisii, Western Kenya, Maasailand and so on. Even digging holes! I am sure about what I am saying. Ask these Members. Ask Turkanas or anybody else. Only people from two ethnic groups were giving contracts of distributing electricity in the country. This cannot go on because this country belongs to all of us. So, procurement creates wealth and poverty. This wealth, however, is only going to a few people from certain ethnic groups. I am appealing to the Jubilee Government to make sure that they re-distribute wealth by inclusivity. Make sure that all people of Kenya are included be they Turkanas, Maasais, Kambas, Luhyas, Luos, Kisiis, Merus and so on. But Merus are nearly inside. So, make sure that all communities benefit through procurement so that we re-distribute wealth in this country.

(Loud consultations)

Hon. Speaker, protect me from my friend. I know he belongs to the BUS Party and I know they will work with us in the next election. Please, protect me from him so that I finish. I will donate 10 minutes to hon. (Dr.) Chris Wamalwa. Allow me to say this: Through my own observation, I have seen men die younger than ladies. Ladies live longer than men. They enjoy more health. I was discussing with people why men die early. Why are men not living as long as women? I was told by many people that when women go to the *Chamas* they talk about everything. When they meet their next door neighbour, they also talk, cry and laugh. They say, *huyu mzee ako hivi na hivi.* So, they ventilate. I mean what I am saying. So, hon. Speaker---

Hon. Speaker: Hon. Leader of the Minority Party, our rules are that if you chose to speak in the English language, you must continue without mixing it with other. Also, please, be relevant to the Motion. It is about public procurement and not about women and *chamas;* they are not covered in this law. So, it is not necessary. I am saying this to the Leader of Minority Party with respect and this is a wakeup call to all of us. If you have not read the Bill, please, you can sit and listen to those who have read because women *chamas* are not in this law.

Hon. Nyenze: Thank you, hon. Speaker. There is a point I was trying to drive home, but in the interest of time, I will not pursue it. I want to conclude by saying that Part XV of this Bill which deals with administrative review of procurement and disposal proceedings should take cognisant of Article 50 of the Constitution which deals with fair hearing.

This Bill has several advantages. I have read this Bill through and through. As the Leader of the Minority Party, I have to point out those areas that I feel should be addressed. This economy will grow once we have efficiency in procurement. We need to encourage participation by women and youth groups to be suppliers and contractors in these tenders. This will also drive out poverty. I had promised to donate 10 minutes to hon. (Dr.) Wamalwa, who is the Deputy Whip. Allow me to donate those remaining 10 minutes to him.

Thank you, hon. Speaker.

Hon. Speaker: Hon. Priscilla Nyokabi.

Hon. (Ms.) Kanyua: Thank you, hon. Speaker. I am also happy to contribute---

Hon. Speaker: You know the Leader of the Minority Party has no such power of donation.

(Loud consultations)

Hon. (Ms.) Kanyua: Thank you, hon. Speaker. I am happy to contribute to this debate on the Public Procurement and Asset Disposal Bill, 2014.

Hon. Speaker: It is also good for him not to have spent 45 minutes, but only 20 minutes saying what he did.

Hon. (Ms.) Kanyua: Thank you, hon. Speaker. A story is told of two people who went to a university in the United States of America. One, a Kenyan Minister another one a Minister in Malaysia. They visited each other. The Malaysian came to visit the Kenyan

and the Kenyan went to visit the Malaysian. When the Kenyan went to visit the Malaysian, he was welcomed to a beautiful palatial home.

He realised that the Malaysian had a beautiful home. He welcomed the Kenyan, showed him a road and said: "My friend, enjoy my home." The Kenyan asked: "How did you acquire this home?" The Malaysian Minister opened the window and showed his friend the road and said: "Do you see that road out there? When they were building that road, I took 10 per cent of the money and put up this home." The time for the Malaysian visiting the Kenyan came. The Kenyan Minister's home was not a home; it was a full estate – a palace with many homes around it. The Kenyan also opened the window and said to the Malaysian: "Do you see that road?" and the Malaysian said: "I see no road." The Kenyan said again: "Look carefully, there is a road." The Malaysian said: "I see no road." The Kenyan Minister said: "I took 100 per cent of the road money."

Hon. Speaker, as we critique the public procurement law, this is what we are talking about: A country that has decided not to invest its money in development but use the procurement law as a way of individuals enriching themselves. As the National Assembly and the Eleventh Parliament, we have a duty to seal all the loopholes in our procurement law and ensure that we do not have such scenarios. At the worst, we could have the Malaysian scenario, where 10 per cent of the money goes missing, and not 100 per cent of the money.

I speak as a Member of the Jubilee Coalition, with a very heavy manifesto on development. In order for us to be able to live to that manifesto, again, procurement becomes very important for us. In this country, everybody has become a procurement official. If you go to our public hospitals, you will find doctors not in patients' wards treating people; you will find them sitting in the hospitals' procurement committees. If you go to Government offices, you will find that a half of the staff members are in tendering committees. If you go to our commissions, again, most of our staff members are involved in procurement. This is what we are saying must stop. We have a good procurement law which allows us to move forward and embrace processes which can take care of some of these issues.

Hon. Speaker, again, the question of values comes in. Do we want to develop as a country? Do we want to have value for money, in terms of procurement of goods and services that we have? In order for us to have value for money, we have to ensure that we derail and curtail the stalled projects. We are moving so fast into procurement without taking time to find out whether the project is viable or visible. All of us are in a hurry to procure. As we come to the end of the financial year – every May and June – everybody is in a procurement crunch, just to exhaust the budgetary allocations. This is causing us to have so many stalled projects, which are half-way complete. Most of them consume up to about 80 per cent of the project cost but they are not put into use because they could not be completed. In the procurement law that we are seeking to pass for our country, we have got to make sure that this does not continue to happen.

As we pass this law, we have to make sure that the corruption that has affected this country is curtailed and have a clear difference between doing business with Government and engaging in corruption. Doing business with the Government is, of course, alright but doing business with Government also means that people make realistic profits. We have a country where doing business with Government means you make

profits of up to 400 per cent. That is not acceptable. If we are going to do business with Government, we have to make realistic profits that are in line with the market rates and the market trends of between 10 per cent and 40 per cent. A pen that everybody else buys at Kshs20.00 is sold to the Government at Kshs200.00. Everyone of us is really shocked. We have gone to Government Ministries, where they procure pens for 10 years not because they need pens for 10 years but because procurement allows them to take something for 10 years.

Hon. Speaker, at one time, we had the Ministry of Health procure Hepatitis B Vaccination. Nobody could explain whether Hepatitis B had come into the country. Nobody could explain why there was procurement of Hepatitis B Vaccinations. That is, again, a problem we have had with the sort of law of procurement that we have. We will be looking at this law to ensure that standard prices and standard costs are applied. As we procure, the access to information law must become a reality in this country. The records of whatever goods and services we procure must be subject to scrutiny at a particular point in time. There is no reason as to why when people build private homes, they cost a certain value but when they build the same houses for the Government, they cost up to 20 times the value of that same property. A lot of impropriety goes on when people buy land for Government purposes. We need to make sure that such practice is curtailed.

Another story is told and there have been questions on Africa – whether we are corrupt because of our genetics. It has been found out that we are not genetically corrupt. We do not have genes in our bodies that make us corrupt. What we have is an environment that allows us to be corrupt. We have all attended funeral committees. The treasurer of funeral committees, to whom we all contribute our money, does not steal that money. If you put the same treasurer in Government office, he becomes a corrupt person. What that tells us is that in the funeral committee, the treasurer could not steal because we were all there looking at the money and the budget. In Government office, the treasurer is alone and, therefore, he is able to steal the money. If corruption is not genetic, then we have to deal with it through this procurement law. We have to make sure that the procurement law that we pass for our country confirms to everybody that Africans are not corrupt by genes but they can curtail corruption in their environment and in their countries.

Hon. Speaker, we support the 30 per cent preferential procurement. Article 227 of the Constitution envisages a situation where preferential standards will be included to allow groups which have been disadvantaged before to be empowered by the procurement law. We celebrate President Uhuru Kenyatta's vision of 30 per cent preferential procurement for women, the youth and persons with disabilities. We celebrate the mechanisms that have been put in place, but we are asking that the Sakaja Bill that was passed by this House be applied here, so that 30 per cent of public procurement can be reserved for women, the youth and companies of persons with disabilities. We want this policy to be made a reality. It is one thing to promise 30th per cent preferential procurement and another thing to make it a reality. In many of our counties, we still have many young people who are not employed. If the 30 per cent preferential procurement is made a reality, those young people will be employed right where they are because the big contractor even in our counties is the Government.

In the United States, they have a principle of 'Buy American, grow America'. We need to apply the same principle in our country. If you buy Kenyan products, you grow Kenya. Many countries set aside a quota of procurement in the procurement laws to make sure that their countries move forward. Nothing stops the National Assembly from setting aside a mandatory quota of goods and services to be, in the first instance, procured from our country. Only in the second instance, where we do not locally have the goods or services required, do we procure from another country. If we are to develop our country, there are no two ways about it. We have to buy Kenyan to grow Kenya. We have to buy our rice from Mwea Irrigation Scheme and buy tea from my county and other counties that grow tea. We have to buy coffee and dairy products locally. We have to commit ourselves to procuring goods from our country. This is really a matter of personal choice. If you go to our supermarkets today, you have to literally go out of your way to buy Kenyan products. We are swamped by commodities from other countries. So, those of us who care about the growth of our country, we have to buy commodities that are locally produced.

Hon. Speaker, we have to revive industries to ensure that we locally produce the commodities that we need. Cotton is a good example. We have to procure goods from Kenya. There would be no reason for us to have a Kshs1.8 trillion Budget, out of which Kshs600 billion is available to procurement but which procures goods from other countries and not from our country. It is only through procuring goods locally, and sometimes even assembling some of the items locally, that we can develop this country.

I remember when the laptops project came up, Jomo Kenyatta University of Agriculture and Technology (JKUAT) had offered to assemble the laptops here. In this procurement law and in the quota that we will be asking that we reserve, that is what we will be saying. If JKUAT can assemble laptops here there would be no reason to procure them from China. We should procure them from Kenya so that we can employ Kenyans and grow our country.

[The Speaker left the Chair]

[The Temporary Deputy Speaker (Hon. Kajwang') took the Chair]

Hon. Temporary Deputy Speaker, I have also had time to look at specific clauses of the Bill. Clause 3 needs to include county governments. The principles of county governments must also be enshrined within the procurement law. County governments are about two things in our country; they are about service delivery and development. If our counties are to develop then they also must follow the procurement laws that are going to be passed by this House.

In Clause 10, I share the concerns raised by the Member who spoke before me, hon. Kimani. On Public Procurement Regulatory Board, we are in days of independence where open and competitive processes of appointing people have come into our country. It is really sad to look at a law like this being passed in 2014 and which requires the Cabinet Secretary to appoint all the members. Imagine the Cabinet Secretary alone with full discretion to appoint every single member of that Board. I think that is wrong coming

in at this day and time. The Cabinet Secretary can, of course, appoint some of the members. We have had laws in which there is a shared appointment process but there must be some independent persons who come onto that Board who are not appointed by the Cabinet Secretary.

Hon. Temporary Deputy Speaker, again the Board should be independent, competitively selected and it should also have a process. Maybe we can create a panel that allows open applications to be received for the Board. We are also looking at the question of having a youth representative. I think that it would be in order given the preferential procurement model to have a youth representative in that Board.

Hon. Temporary Deputy Speaker, we have celebrated Article 227 of the Constitution. Tax obligations are a must in our country and we are saying that even in this procurement law, tax obligations and the sanctions that go with disobeying tax obligations are really well captured.

On Clause 14(3), a quorum of three members can transact business. I think that is wrong. In a country where procurement is such a problem we must have a well constituted board and we cannot have three members who can transact business. I think we need to look at that provision.

On Clause 27 which is the Public Procurement Administrative Review Board, I do not think there is any reason to create two boards in one law. I think that what the law here ought to create is a hearing tribunal to hear and review disputes of procurement and tendering. We need this because we have lost a lot of time in the courts on procurement and tender questions that should be reviewed at the earliest. If our economy and projects are to move, especially for those of us in the Jubilee Government who have seen quite a number of flagship projects delay because of the cases that arise from tendering, we need this tribunal.

Hon. Temporary Deputy Speaker, this particular tribunal is extremely important and it will be made up of 15 members, which is a good number who can constitute themselves into panels of three and hear and review tendering disputes at the earliest. However, for these particular members again there would be no reason for the Cabinet Secretary to appoint all of them. I think the Cabinet Secretaru can appoint the chair who would have the qualifications of a judge and the other members because there is a list of professions that can provide these people. Those professional bodies provide individuals who can serve in the tribunal. If it is law, the Law Society of Kenya (LSK) can provide a member; if it is architecture the relevant body can provide a member; if it is engineering the body can provide a member and that would be a much better way than having the Cabinet Secretary just select all the 15 individuals who would then have to toe the line in terms of what he asks them to do. I think the best position is for the Cabinet Secretary to appoint the chairperson and to let the professional bodies appoint all the other members who are required.

This particular tribunal would then have the duty to hear the disputes that arise and would even have timelines around which those disputes can be heard. It would make sure that tendering processes do not delay important projects. Looking at absorption rates of our development budget, I think it remains a concern that a lot of our development funds are not absorbed in a country that needs rapid development.

On responsibilities of Accounting Officers, it would be important for the boards to also have responsibilities. We in the Justice and Legal Affairs Committee have had occasion to interact with the Independent Electoral and Boundaries Commission (IEBC) on the equipment around the election and one of their major concerns is that the commissioners were not allowed to take part. They were not even allowed to oversee what the staff and the Chief Executive Officer (CEO) were doing on the procurement process. I think that the law must cure this. Commissioners and boards must be able to take responsibility for the procurement because the monies that are charged to them are really under their oversight.

The same applies to the Judicial Service Commission (JSC). We have had a lot of problems with JSC and the procurement that has been done within the Judiciary. If this is to be cured it cannot only be the Accounting Officer. The way to cure this is to give responsibilities to the Accounting Officer and also the commissions and boards in terms of procurement matters.

Hon. Temporary Deputy Speaker, on methods of procurement in Clause 91, some definitions have been given and many methods of procurement are covered such as, two-stage tendering; the open tender and restricted tendering among others. I think we need a clause that requires as far as possible the open tendering system to be used. That would be the best. That in all the procurement that needs to be done as far as possible, the open tendering system should be used and only in very rare circumstances should the other methods be preferred. Even in those rare circumstances where pre-qualification is needed, there ought to be some guidelines that take care and close the gaps that we have been dealing with as a country.

Hon. Temporary Deputy Speaker, Clause 92 speaks to that and that is the question of having complex, specialised goods, works and non-consultancy services where pre-qualification can be done. We might need to define the value. What is a complex? What is specialised goods works? If we leave it open, again it might be open to the Accounting Officers to keep declaring that every other contract falls in there so that they can escape the open tendering system.

On Clause 141 on the question of interest, which is again a very worrying situation for us here in Kenya, all of these contracts are based on taxpayer's money. I think as a Legislature we can say that there will be no interest earned because any interest earned does not punish the body but rather punishes taxpayers who need a second project tomorrow. I think we need to look at this question of interest so that even if the contractor is owed money, that money should not attract any interest. Any interest attracted on that money remains taxpayers' money. We are saying, if you look at issues of Level 5 hospitals we want to create a Level 5 hospital in every county. If there is delay in County "X" and the contractor is paid interest what that means is that County "Y" cannot get the Level 5 hospital because the little money that we have, we are using it to sort out contractual issues. So, as a Legislature, we can afford to say that we will not pay interest so that we build one Level 5 hospital and move to another Level 5 hospital in another county. I think we want to look at Clause 141 on that question of interest.

Hon. Temporary Deputy Speaker, I think on the matter of penalties, we want to look at best practices. In Singapore, China and Japan where their corruption is very low the penalty for corruption is death penalty. In fact, in Singapore and Japan if you commit

a procurement offence you do not even wait for the police. You actually commit suicide. You jump from the roof of the building in which you committed corruption because the Government is going to come after you.

We need penalties that are tight. We want to look at the option of removing a fine. If you look at Clause 177 where the fine for procurement offences is only Kshs4 million, what we are saying is that it is better for you to commit a procurement offence in, for example, a contract of Kshs100 million and pay the fine. If we are to help our country in these matters of procurement, I think we need to eliminate the option of a fine. If you are convicted for a procurement offence, your penalty should be imprisonment. There should be no fine because fines just encourage people to use and commit procurement offences.

If we use this law well, it will help our country; it will help us to develop. As we support this Bill, we do so with amendments and with the vision that we have to deal with corruption, which has attached itself to the procurement system. Through this procurement law, the National Assembly needs to end the dance with corruption. Dancing with corruption is dangerous; it is injurious to our country. It just means that all of us remain backward; we remain a third world country when we can become a medium income country in the shortest time possible.

I support the Bill and we will be proposing amendments.

Thank you, hon. Temporary Deputy Speaker

Hon. (Dr.) Pukose: Thank you, hon. Temporary Deputy Speaker, for allowing me to contribute to this very important Bill.

Streamlining the procurement processes at both the national Government and county government levels is crucial to the development of this country. Since the creation of the county governments, we have had a lot of teething problems, especially in the procurement process. We have not had very clear laid down procedures on how the counties should carry out the procurement process. We have had a lot of challenges. In the last financial years, many counties overspent in terms of giving out tenders. Some of them are operating on overdrafts, and this is a very big challenge.

Hon. Temporary Deputy Speaker, the Transition Authority (TA) did not perform well in terms of guiding the counties on how they should do their procurement. This law has come a bit late and, therefore, it needs to be fast-tracked so that we can properly deal with the issue of procurement, both at the national and county levels.

In Part II, this Bill seeks to provide a design and prescribe an efficient procurement management system for the national and county governments to ensure transparent procurement procedures and asset disposal as contemplated in Article 227 of the Constitution, provided that the National Treasury shall prescribe, through regulations, a system under this paragraph, which operates, respects and promotes the distinctiveness of the national and county levels of government.

Hon. Temporary Deputy Speaker, in this Bill, there is provision for technical assistance on procurement matters and assisting in the implementation and operations of the public procurement and asset disposal systems, by the National Treasury. The Bill seeks to devolve the procurement process to the county level. One of the biggest challenges that we face as a nation is that, as much as the Constitution provides that the youth and the women should also be covered by the procurement procedures, the tenders that have been given to women and the youth are the small ones – which do not carry any

significant amounts of money. This will not help our economy to grow as much as we wanted. Giving women and the youth small tenders like supplying stationary, cleaning of towns or offices as opposed to giving them the mega businesses is not good for our country.

Under Clause 9(d), the proposed Public Procurement Regulatory Authority will undertake monitoring of classified procurement information, including that of security organs, and make recommendations to the Cabinet Secretary. You are monitoring classified procurement information and giving it to the Cabinet Secretary, who is answerable to the appointing authority, namely; the Executive. How do you expect such information to be used by the Cabinet Secretary to ensure that proper procurement procedures are followed? In the past, corruption thrived in Government because procurement was shrouded in secrecy. Corrupt officials would withhold information required by the Controller and Auditor-General on the basis that it was classified information. Even the Bill on the Office of the Auditor-Generals, we are talking of the Auditor-General not being able to audit security tenders. Therefore, this is an area we need to look into very carefully, as parliamentarians. We need to bring an amendment because if we are going to give classified procurement information to the Cabinet Secretary, there will be no way of ensuring that corruption is eliminated.

Hon. Temporary Deputy Speaker, my other bone of contention is on the composition of the Board and its quorum. The Bill provides that three members of the Board can form a quorum. This is a challenge, given that the majority of the proposed 15 Board members will be appointees of the Cabinet Secretary. This is not good. The fact that most of the Board members will be appointed by the Cabinet Secretary means that there will be no independence in that Board. Such a Board will be unconstitutional since the current Constitution clearly stipulates on how to appoint the membership of such a Board. The proposed Authority will be in charge of trillions of shillings. We must ensure that there is independence within the Board.

We must also ensure that part of it forms the tribunal because the Public Procurement Oversight Authority has not performed well in terms of handling the many complaints that have been forwarded to them. Some of the complaints have ended up in court, leading to delays in implementation of projects. We need to cure this problem by giving independence to the proposed Authority. As hon. Nyokabi suggested, we need a tribunal that can listen to its clients. The tribunal should not be part-time; it should exist permanently because people will be raising issues of improper tendering processes across the country. The tribunal should be able to expedite cases relating to such complaints, dispose of them in the shortest time possible and come up with solutions that will make it possible for projects to be completed quickly to make the process both efficient and cost-effective, as stipulated by this Bill.

Hon. Temporary Deputy Speaker, since many of my colleagues are waiting to contribute to this debate, let me conclude by saying that I support this Bill with various amendments.

Thank you.

The Temporary Deputy Speaker (Hon. Kajwang'): Yes, Member for Balambala.

Hon. Aden: Thank you very much, hon. Temporary Deputy Speaker for giving me the opportunity to contribute to this very important Bill. I wish to, on the outset, say that this Bill is one of those Bills which was a requirement constitutionally under Article 227(2) that this House forms or legislates with regard to the Public Procurement and Asset Disposal laws.

I must say that the biggest challenge that is facing our country is public procurement. Almost all the known issues that have to do with corruption have happened under the disguise of procurement.

Hon. Temporary Deputy Speaker, if you look at the Anglo-Leasing scandal, it was nothing more than a number of procurement issues being put together and, in the name of procurement, there was irregular stealing from public coffers. For that reason, the matter that is before us today is very importance. Several studies have shown that corruption is responsible for 30 per cent funds leakage out of our economy on an annual basis. I can tell you that most of that corruption happens in the form of procurement and, more so, now that we have devolved resources to the counties. As Kenyans, we are now experiencing a rather new phenomenon. While we celebrate devolution, again, unfortunately, we have devolved corruption to a great extent. Most of it has to do with lack of proper laws with regard to public procurement.

This Bill points out very fundamental issues. Of most importance is standardizing specific issues or policies with regard to public procurement. You will realise that because we manage the Constituencies Development Funds (CDF) funds, whereas the CDF might use Kshs1.5 million to construct two classrooms in a school, a person bearing a contract coming from the county will build the same two classrooms with same specifications from the same public works officers who issue the specific Bills of Quantity (BQs) for Kshs4 million. We have seen it. It is happening and it is very unfortunate because those are the ways in which this economy is leaking.

This particular Bill introduces the Public Procurement Regulatory Authority (PPRA) which now has powers and authority to not only investigate the officers in charge of the coffers of counties and national Government which stands accused of corruption, but also of private companies that are in cahoots with those corrupt public officers in the name of being contractors. Therefore, PPRA will go all the way to ensure that those companies are investigated and blacklisted. As hon. (Ms.) Nyokabi has rightly said, we must take this opportunity to bring on board the harshest possible penalties to corrupt persons in the Government, and even businessmen who corrupt Government officers.

I must say that this particular Bill does a lot of work with regard to ensuring that there is fair distribution of resources. Amongst the audit issues that PPRA will do is to ensure that, as per the spirit of this Constitution and per the existing other laws, the youth and women of this country are given the opportunity to benefit from the procurement processes. As it is right now, unfortunately, many of the contracts are given to people who are friends of the authority that is issuing that particular tender. There are people who have, in many occasions, said that they have to pay certain amounts of money before those tenders are awarded to them. Unfortunately, that is happening because of the corrupt nature of awarding the project. The end result is that the infrastructure that is built or the goods and services that are finally delivered are sub-standard in nature. That is because the very person who was supposed to query the nature and the form - the

goodness, the fitness or the construction of that building - is involved in that corruption. For that reason, Kenyans are not getting value for money.

This Bill says that the counties will have to enforce these new laws. I want to send a very strong message to people who are in charge of treasuries either at the national level or the county levels who think that they will steal today and get away with it. I must warn them. Anglo-Leasing happened many years ago but now we are prosecuting the perpetrators. It happened more than 10 to 15 years now, but the prosecutor has now said that he is going to take those guys to court. I want to warn those Accounting Officers. You might be in that position today but I want to tell them that 10 or 20 years from today, Kenyans will follow you. We will ensure that because of the harm that you have done to our people; the harm that you have done to our economy, the law will take its course.

I do not want to say more. I want to give an opportunity to my colleagues. I just want to re-emphasize that procurement issues are the single most serious leakage to our economy. This particular Bill gives us an opportunity to seal that leakage. I want to say that the number of amendments that I am personally going to propose to this particular Bill will ensure harsher penalties to persons who have been found guilty of corruption and, at the same time, hammer out a few issues which I do not want to repeat. The Cabinet Secretary should not be given a free hand to name members of the board without other supervisory measures on this particular issue. It is a good Bill. I support it and upon enactment, Kenyans will have a reason to be happy. At least, we will have laws that will exist to curb corruption in this country

Thank you, hon. Temporary Deputy Speaker.

Hon. Wakhungu: Thank you, hon. Temporary Deputy Speaker. This is a very important Bill. It is one of the Bills that have a constitutional timeframe. From the outset, I want to say that I support this Bill. Many corruption cases in this country are through procurement processes: We have had many scandals in this country, starting from Goldenberg, Anglo-Leasing and even the laptops. Why schools do not have laptops at the moment is because of procurement. We also have the Standard Gauge Railway (SGR). The SGR is being done at this time. There was controversy around it in terms of procurement. At the same time, when you go to the counties, about 90 per cent of the issues that Members of County Assemblies (MCAs) are trying to impeach the Governors on are procurement-related.

I want to go to the specific clauses. I know many hon. Members have mentioned about this, but I will try as much as possible not to repeat myself. Going through this Bill, there is the issue of PPRA. That Authority will evaluate issues of procurement. When you look at the formula, you will realize that there are mainly two categories; the technical evaluation and the financial evaluation. We must be given an opportunity to look at the regulations that the Authority will come up with. That is where the problem is. There is no mention of regulations in this Bill. They will come afterwards. When you look at the criteria, that is where we have problems. I am saying this because we have had issues in the Public Investments Committee (PIC). When we call people to bring those regulations, they are not done in line with the specific job that is going to be done. For instance, you can procure something which is engineering-related or medical-related.

It is important in terms of regulations. We should not just standardize. When it comes to the engineering aspect, let us have some input from the professional association

of the engineers. When it is procurement related to medicine, let us have the input of the association of medical practitioners as opposed to having a standard one which cannot cut across.

Clause 74 talks about the amendment of the tender documents. This is another room for corruption because after the procurement documents are out, they bring an addendum after some time. It is in that addendum that we have a problem. Clause 74 states that in case of any amendment, it should not change the original tender materially. What is "materially"? This is at the discretion of the Procurement Committee and it is likely to be abused. There must be a clear outline because when we leave it hanging like that, you cannot measure that. When we move to the Committee of the whole House, we need to bring an amendment that will clearly bring that measurability of this word "materially" because the way it has been used here, it can actually be abused. We have seen many organizations after some time, in fact, even before going beyond one-third of the period, bringing those addenda to try and change almost the entire tender process and thus become a disadvantage to some of the people who are bidding. They will only give full disclosure to some of those bids that they have connections. Therefore, I have a big issue when it comes to Clause 74.

My colleagues have mentioned something about the Board. Indeed, we cannot accept that the Board constituting of three people will make a quorum. We had an issue during the scandals in NSSF where some few selected people came and sat. They did it intentionally to isolate the Central Organization of Trade Unions (COTU) and the Federation of Kenya Employers (FKE). So, when we have such dangerous clauses of providing for only three members to form a quorum, we are likely to have that problem. When this Bill comes to the Committee of the whole House, I will propose some amendments so that at least, we can have 50 per cent plus one. That is because a number of three is on the lower side and bearing in mind the critical issue---

The Temporary Deputy Speaker (Hon. Kajwang'): No! They are talking about the panels. They are talking about the Review Board mutating into several panels representing regions and not really the quorum.

Hon. Wakhungu: Yes, that is out of the 15 when you rotate around. However, when it comes to the specific quorum of the entire Board, it has been left hanging and this is likely to be abused. We need to clarify so that somebody looking at it knows there is nowhere in these Clauses where there is that specificity.

Clause 27 provides for the Public Procurement Review Board. This is the Board that is going to be in charge of appeals that people are going to bring in, in terms of complaints. Clause 29 talks of composition. The President had issued an Executive Order that 30 per cent of the procurement business should go to the youth. However, when you look at the representation here, there is no youth at all. They are just talking of regional balance and gender. For purposes of clarity, we will also bring some amendments so that we can cover regional balance bearing in mind gender and youth representation. We cannot implement the Executive Order unless we have the youth themselves being represented in this Review Board.

Clause 6 talks about conflicts with international treaties. We have a big problem here. We cannot allow international treaties to take precedence over our Constitution. Article 227 of the Constitution is very clear in terms of bringing in the issue of

competition. When we have big business projects of Kshs5 billion plus, we see a lot of international organizations come here. We are seeing China come in so much. We need to have a clause to safeguard our local contracts the way it is done in Tanzania. They could come in the form of a local partnership so that the local partners also benefit in terms of technological transfer. If you are going to leave this clause that states that the international treaties take precedence, then there will be a problem. We had an issue with SGR. The China Roads and Bridges Company that was awarded the contract is the same company that had proposed to do a free design. It is the same company that went to the China Government to look for a way of going through the EXIM Bank to bring in the conditionality that because it is getting money from international sources, it must circumvent the procurement law. So, unless we have that clause in place, we are going to have a problem. We cannot just come and say: "Where we have an international convention ratified by Kenya in such circumstances, the terms of the treaty or the agreement will prevail."

I strongly oppose and I am going to propose some amendments for us to put this thing in place.

The Temporary Deputy Speaker (Hon. Kajwang'): Just go on. Which clause are you reading from?

Hon. Wakhungu: Pardon?

The Temporary Deputy Speaker (Hon. Kajwang'): Which clause are you looking at?

Hon. Wakhungu: I am looking at Clause 6. The Bill further contains provisions with respect to conflict between the requirements under the Act and with any obligation to the Republic of Kenya arising from a treaty or a convention ratified by Kenya. In such circumstances, the terms of the treaty or agreement prevail. What about the Constitution? The Constitution should be the one that takes precedence and not issues of international treaties. This is the way we are going to circumvent and bring in issues of corruption. Assuming we have got a donor from China and, maybe, he wants the Chinese company to be given a contract. In such a situation and in line with Article 227 of the Constitution, maybe, they can be flexible and say: "Let us have the Chinese firms compete among themselves as opposed to having one so that Kenyans can have value for their money." These are the issues we are talking about from experience because we have seen it happening. We do not want to hide in the international treaties at the expense of our Constitution. Since many other colleagues want to contribute, I do not want to talk too much. I want to say I support this Bill, but I will be coming up with some amendments which I will have to propose at the Committee of the whole House stage.

Thank you and I support.

The Temporary Deputy Speaker (Hon. Kajwang'): Hon. Member for Ndhiwa, what is out of order?

Hon. Oyugi: Thank you, hon. Temporary Deputy Speaker. My point of order was in reference to what my colleague was saying with regard to Clause 6. Is it in order to say that, that clause in his understanding, is *ultra vires*? If you read Article 2(6) and 2(5) of the Constitution, international obligations and international rules form part of Kenya's laws. Therefore, Clauses 6 is actually giving reference to Article 25 and 26 of the Constitution.

The Temporary Deputy Speaker (Hon. Kajwang'): Which provision of the Constitution did you refer to?

Hon. Oyugi: Articles 2(5) and 2(6) of the Constitution. The general rules of international law shall form part of the laws of Kenya.

The Temporary Deputy Speaker (Hon. Kajwang'): That is all right, but I think what the Member was talking about is that this legislation seems to give superiority over the terms of the treaties as far as the Act is concerned. It is true, hon. Member for Ndhiwa, that those treaties form part of Kenyan law by virtue of the Constitution. However, hon. Wakhungu is wondering why then should the terms of those treaties prevail when they conflict with this law?

Hon. Oyugi: Hon. Temporary Deputy Speaker, I really think that Clause 6 is sufficiently very express. It reads, "Subject to the Constitution---". The drafter of the Bill is trying to ensure that there is a direct concurrence and a reference to the Constitution in terms of how then you have the law superior or not superior. In my understanding and interpretation, there is nothing out of order with Clause 6 of this particular law.

The Temporary Deputy Speaker (Hon. Kajwang'): All right. I follow. You are asking the Speaker to rule on whether that was misleading the House. It is not. It is an issue of debate and one is able to construe it depending on how one views the understanding of that section of law. The hon. Member for Nakuru Town East.

Hon. Gikaria: Thank you, hon. Temporary Deputy Speaker, for giving me this opportunity to give my views regarding this very important Bill.

The Temporary Deputy Speaker (Hon. Kajwang'): By the way, people have been doing very well up to now. Everybody has been doing 10 minutes at the most. So, if you keep with this, I am sure all of you in the Chamber will have said something. However, if you do the 30 minutes, just a few of you will participate.

Hon. Gikaria: Thank you, hon. Temporary Deputy Speaker. This is the Public Procurement and Asset Disposal Bill but most of the speakers who have just spoken before me have concentrated their efforts on the procurement aspect and forgetting the disposal aspect of it. That is another area that the Bill has not fully given some direction. At the Committee of the whole House stage, we will need to bring amendments. I am saying this because disposal of assets is something that has also encouraged a lot of corruption. Most of the Government institutions use this to try and divert a lot of resources. So, as we look at the procurement aspect we also need to look at the disposal of assets. It looks a grey area. It looks like not a very harmful area, but it is.

Secondly, much as it stipulates some penalties for people who are not going to comply with the law, it does not specifically indicate what the penalties are. If a certain public institution does not comply with the provisions for the disadvantaged groups like women, youth and the disabled, what will happen? We can go and give companies through the normal tender. Assuming a public institution does not comply with the 30 per cent rule, what happens? These are issues that we really need to look into especially in the Committee of the whole House. We will be bringing some proposals to provide for the mandatory aspects that each procurement entity has to undertake regarding issues to do with procurement for the less fortunate groups.

For us to actualise this Public Procurement and Asset Disposal Bill, the registration of companies is something that is very important. This aspect has just been

left out. The office is only in Nairobi. How will most of the youth say, from the far end of Mandera, Isiolo and the farthest end of this country be able to come and have their companies registered? It is one thing to say that a certain percentage should be set aside for these groups but at the same time even an ordinary able Kenyan cannot have enough money to register a company for him to benefit from these procurement opportunities. So, it is also important for us to look at the Companies Act, Cap. 486 and see how best we can reduce the burden on the people who are not that wealthy to come and register companies.

If you look at the requirements by the National Construction Authority (NCA), specifically on issues to do with the construction industry, they are so punitive. For you to obtain registration for a certain category within the NCA, you have to pay hefty fees. This is going to stop so many other groups and the less fortunate members of the society from registering companies. So, do we need to bring down the registration offices at the county level? We need to start looking at that direction so that people do not spend so much money coming to Nairobi and paying a lot of money to have the Articles and Memorandum of Association through the lawyers. Of course it is a requirement that has to be followed. They are just standard documents, but if you try to go to any lawyer, the amount of fees that is charged is just too much. So, decentralisation of the registration of companies is something that we need to look at, not in this law but maybe in the respective law.

Hon. Temporary Deputy Speaker, most of the procuring entities out there, be it in the national Government or county governments, introduce some other requirements in the tender documents which are not backed by law. This aspect where the procuring entity is introducing some very unqualified requirements which are not backed by law is something that has also brought a lot of issues in terms of disqualification of genuine groups of people. This is something that we need to address. I remember one of the instances is that you are required to attach some documents which are not backed by law. Certificates of registration are supposed to be stamped by a Commissioner for Oaths as true copies of the originals. If, indeed, they need to be there, they must be incorporated in law so that we do not use those small issues to try and kick out or put barriers to interested parties. I have seen and I have gotten so many complaints from my constituency that there are so many issues which are being introduced into the tender documents that are really not backed by law.

The other bit is on court cases. We need to borrow from the electoral process. If the Constitution did not address the time period for petitions, it would be hectic. We used to have cases stay for five years only for a ruling to be made after the term of Parliament has expired. Is it possible, especially for the flagship projects, to have some timelines within which the Judiciary has to conclude matters in case of any litigation? I am saying this because hon. Chris Wamalwa just mentioned the laptops issue. This process was supposed to have been finalised, but some people went to court and we are not certain when these cases will ever end.

On the Standard Gauge Railway (SGR) project, there was a report which was brought here by the Public Investments Committee (PIC) to which hon. Wamalwa is a member. They gave a clean bill of health to SGR. I do not know why he is speaking about it again. Basically, for the flagship projects we need to think whether we must give

timelines regarding the time they are taken to court and the time they should be executed in full.

Going back to the Bill, and I do not want to repeat what most of my colleagues have said, the introduction of the county governments diplomatic missions and the pension funds for public entities is something of importance. It is even more important to the county governments where we have seen a lot of issues coming up. I want to thank the Judiciary for having spoken through the Embu County case by kicking out the Governor. He was taken through a legal process for corrupt practices. It is a warning to the other county governments. However, not only the County Governors should be taken to court, we need to have everybody who was involved in issues of corruption prosecuted. The aspect of kicking out only an individual is not enough. Cases have been cited on how other countries have been able to address corruption. Singapore has been cited several times. The direction that they took is good. It is not that you are only told to refund what you have taken, but we need to keep track of some of these people. That is what Singapore did. If Gikaria is a Chief Executive Officer (CEO) of a certain place, they keep track of me for say, four or five months, including every aspect of what I do and every telephone conversation I make. At the end of the day, most people will just be punished without taking them through the due process of the law and without asking them to resign. The best thing is to go the Singapore way.

The internal mechanism introduced under Part V of this Bill is very important. You will find a person who wants a product doing the tendering, the evaluation and giving the awards. The internal mechanism that has been introduced in Part V will go a long way in addressing that problem, so that if I am the user, my business is only to request. I should allow the other people to do the procurement and tendering process. It is unacceptable to allow only one office to start the process and go all the way to the end. Therefore, the process of internal mechanism is very important. In my area, the Kenya Rural Roads Authority (KERRA) and Kenya Urban Roads Authority (KURA), have a process of procurement which is not acceptable. The engineers identify a road that needs murraming and give estimates. They then take the contractor who has charged the least. They say that they are saving some money to do more projects. If a person quotes 50 per cent less than what the engineer had estimated, unless they were in cahoots to try to siphon money through that process, he should not be given the contract. When you take the lowest bidder, then you do not get value for money. If a tender is supposed to cost Kshs20 million and you award it to a person who has quoted Kshs5 million, then it means that we will be repairing that road every day. The procurement function should be managed by professionals and their estimates must be within some acceptable limits of either 10 or 15 per cent plus or minus.

The principle of electronic procurement that has been introduced in Part VI is very important. With digital migration, this will improve and fasten the process of procurement. Voluminous papers are always sent in the procurement process, but with an electronic procurement process, this is going to shorten the period from when you start the process up to the time you do the project. Also, inappropriate influence on evaluation is outlawed in this Bill. As hon. Chris has said, the procurement process is usually a prior arranged process and the other people are just coming in to push an evaluation process that has already been determined. The Bill proposes that the procurement records should

be maintained for, at least, six years. This is important, so that we can have records and if somebody wants to go back after some time, they can access the records. People leave office and after a few years, in case of any issues, they go scot free because documents cannot be traced. That requirement is very important.

The basic procurement rules talk about the responsiveness of a tender. This is also very important. In most places, in a certain tender, if you do not have three or four interested parties, it is not a responsive tender. It may have taken four months to go through the process. If, indeed, only an individual has shown some interest and has qualified all the way through the tendering process in terms of the technical and financial evaluation, we do not need to indicate that this tender was non-responsive. The procurement methods and procedures which have been used should be specified. I agree with the former speakers that the tenders should be specified. There is an open tender and restricted tender. The only thing that we should include under the procurement methods and procedures is an item for the less disadvantaged groups in the society.

Lastly, we have the issue of consultancy, which has always been a big challenge in the tendering process. This is one of the areas that have been misused in the past by so many procurement entities in terms of giving very specific instructions on the tender document. Part X has stipulated very clearly the procedures that we should use when we are handling consultancy services. I do not want to repeat most of these things, but the last bit that I want to talk about is Part XII on preferences and reservation in procurement. If you go to any public institution and department, you find that the furniture there is from outside the country. As hon. Nyokabi has said, we should buy Kenya and promote Kenya. That is the process that we need to take. Most of this furniture was bought from China yet we have good carpenters that we can promote locally in terms of buying from them. It is important for us to buy products from this country. This Bill has indicated that you have to give reasons as to why you are not buying products from this country. It is a good step towards reducing unemployment in this country.

The last is the disposal aspect. As you dispose assets, most of these business people come with big money into various Government institutions and departments. Whenever you want to conduct a public auction, they come with big money and then the highest bidder will always buy. This denies the employees of a certain procurement entity an opportunity to buy from the company despite having an open tender. This is unfair. The Bill has given a process as to how sales to employees of a procuring entity can be handled. In a place like Nakuru, where we are disposing some Government vehicles or scrap metal, some people come all the way from Mombasa to buy and take everything with them. When the process is localized to the employees, it will go a long way to correct the situation.

With those few remarks, I support this Bill. Of course, in the Committee Stage, we will be bringing the issues that I have indicated. We also need to look into other legislation that goes hand in hand with the Public Procurement and Assets Disposal Bill, so that we can bring them together.

I support.

The Temporary Deputy Speaker (Hon. Kajwang'): Thank you, although the remarks were not few. They were quite enough. Let us move on. Member for Bomachoge Chache. I understand you are a professional in this area. Now, keep us awake.

Hon. Ogari: Thank you, hon. Temporary Deputy Speaker. At long last, I am able to contribute to this Bill, which is very important.

The Temporary Deputy Speaker (Hon. Kajwang'): The level of your microphone is low.

Hon. Ogari: Hon. Temporary Deputy Speaker, my voice is also low. I think I have to bend and get closer.

It is true that I am a professional in this area. I am a Quantity surveyor of many years and prior to the emergence of the procurement profession; Quantity Survey has been and still is the professional in the major sector of procurement, especially in the infrastructure sector.

Unfortunately, I am one of those who yesterday proposed about the 30 minutes and it has turned out to work against me and other hon. Members who are here. So, I will be very brief because my colleagues have prosecuted quite a number of issues on this Bill.

From the beginning, I want to support this Bill. However, I know there will be a lot of amendments to come. Having gone through the whole Bill, I will go straight to the technical issues that I can point out. As much as possible, I will try to avoid what my colleagues have canvassed.

The first one is to generally say that this Bill does not make the difference between goods, services and processes. That is because the procurement of a building or a construction is not the same thing as procuring pens and pencils. This is a process which takes a very long time. As we go on, during the Committee Stage, we will propose amendments to this Bill. About the issue of services, we are talking about professional services. Even within professional services, we should clarify and differentiate between the regulated professional services and other services. That is because even cleaning is a professional service. We have professional cleaners, but we are not going to equate that with the procurement of legal services from lawyers who are regulated by their statutes. I know there is an attempt to try and cure that in Part X but I think it is not complete. We will have to look at that and see what can be done better.

The other issue is that the profession of procurement is quite young and it is our business as a House and as leaders to develop---

The Temporary Deputy Speaker (Hon. Kajwang'): Now that you are a professional in this area, and while you are touching on the procurement of regulated services, how are you able to procure services which are regulated by their own Acts or laws and fees have been provided for in terms of the lowest bid and highest bid? How is this possible?

Hon. Ogari: Hon. Temporary Deputy Speaker, I think that is where we shall have to come in because we shall have to recognise the statutes that govern those regulated professional services and have them incorporated. That way, even if we have the procurement officers overseeing the work, the professionals have to do their work. That is because they have professional liability and they have to answer to their actions already in the statutes. It is something we shall have to look at and strike a compromise because I know in your profession and professions of many of us here, we cannot compete on fees. But, obviously, we can compete on technical issues like designs and other issues. When it

comes to fees, there is this issue of under-cutting and the rest. It is not allowed and is against the existing laws.

The Temporary Deputy Speaker (Hon. Kajwang'): Are you going to help us by bringing a specific amendment to deal with this? That is because it is a question that conflicts on several laws. In many regulated professions, the question of under-cutting *vis-a-vis* the fact that there should be procurement principles has been an issue.

Hon. Ogari: We have discussed this matter and I have been in touch with quite a number of institutions, including the Institute of Quantity Surveyors of Kenya. I have talked to my colleagues who are lawyers as well as the architects and engineers. We are through with the Third Reading. Some hon. Members who are considering this might come up with amendments. We are not going to run away from procurement just like everybody else but, as professionals, we also need to respect the law that already governs our conduct with regard to procurement and our services.

Hon. Temporary Deputy Speaker, I was saying that professional procurement is quite young and, as a House, we should encourage it to grow. However, we have to realise that the capacity we are giving them in this Bill is very limited. I have here with me the Supplies Practitioners Management Act---

The Temporary Deputy Speaker (Hon. Kajwang'): Member for Bomachoge Chache, just hold your guns. Member for Vihiga, what is out of order?

Hon. Chanzu: Hon. Temporary Deputy Speaker, I just wanted to inform my colleague.

The Temporary Deputy Speaker (Hon. Kajwang'): Is it a point of information?

Hon. Chanzu: Yes, on the point that he was just---

The Temporary Deputy Speaker (Hon. Kajwang'): Member for Bomachoge Chache, do you require some information?

Hon. Ogari: He is my senior in the profession. I can listen to him any time.

The Temporary Deputy Speaker (Hon. Kajwang'): Alright, go on with your point of information.

Hon. Chanzu: Hon. Temporary Deputy Speaker, what I wanted to add as a point of information, which I think my colleague knows, is that we are in a very distinguished profession, where there is even a standard of advertising. When you advertise, you can only use prints which are regulated by the Act that is governing us. So, it is already very well taken care of. Maybe, the other professions that we need to take care of are those which are growing very fast. Such professions are accounts and even law, which have grown very fast in various aspects. So, what we need to address are the aspects of those professions. However, our professions like the architects, engineers, Quantity Surveyors and so on---

The Temporary Deputy Speaker (Hon. Kajwang'): Keep it to the point of the information.

Hon. Chanzu: That is what I wanted to say.

The Temporary Deputy Speaker (Hon. Kajwang'): Alright, information given! Proceed, hon. Ogari.

Hon. Ogari: Thank you senior. Hon. Temporary Deputy Speaker, I was saying that the profession of procurement is quite young. The capacity is quite low for the fulfilment of the provisions of this Act. Look at the number of officers required by the

procurement entities, including our own Constituencies Development Fund (CDF) offices. That is going to take a number of years to come by. In the course of it, we might end up having many untrained officers becoming the Accounting Officers because even when I look at their own Act and read about persons entitled to be registered--- Article 16 of their Act says that a person shall be entitled to registration if he satisfies the Council that he is of good conduct and has paid registration fee and that he has successfully undergone a prescribed certificate, diploma, degree or research course of instruction.

Hon. Temporary Deputy Speaker, if that is what is required for the registration of a procurement consultant, the bar is quite low. Yet, we expect them to man and implement this Act countrywide, in every procurement entity.

The other issue which has been canvassed before by quite a number of colleagues purports the Bill will override other professional services. You have been particularly referred to Clause 5 of this Bill. If it goes the way it is, then it means even the professionals who are involved in procurement will be affected. That is because, as a colleague on the other side of the House said, procurement is quite wide and almost every profession, in one way or another; is involved in it. If you look at Clause 5, it is like this shall prevail over other Acts.

Part I has been canvassed. Part I is a provision of an Act that provides for a person or body to approve any work or expenditure. It shall not be construed as giving that person or body any power with respect to procurement processes. What this means is that even if it is a lawyer who has approved a conveyance transition, it does not give him any power at all. If an engineer has specified some materials for construction, somebody else can override that certification. The term "approval" is used quite a lot in professional language, including medicine. It means that it has been approved by a professional. So, if that clause stays, then I think quite a number of us will be out of business and profession.

The other one is Clause 59(3)(a) which says:

"The technical requirements shall, where appropriate –

(a) relate to performance rather than to design or descriptive characteristics."

Hon. Temporary Deputy Speaker, that is very dangerous because it means that your design can be ignored. The procurement officers or entity can go for the performance and not the design or descriptive characteristics which are specifications. That means that even your design can be ignored. I can go on and on and even quote Clause 71. I do not want to go there because that is also compelling everybody else to go by the provisions of this Bill which is something I would not mind to go with as long as it has been amended accordingly.

In a way, I think this Bill also oversteps the mandate of authorities which have been established. One of the issues it talks about is that of establishing standards. When the Authority wants to take upon itself to establish and use their standards, what happens to the Kenya Bureau of Standards (KEBS) which is the statutory body licensed and has the powers to establish and publish the standards for use by other public and private bodies?

Let me also talk of establishing a register by the Authority that we are creating. What happens to the registers being established by statutory bodies like the Kenya Construction Authority (KCA) and what about the regulatory professional bodies? I believe that when you want to procure lawyers, you go to the Law Society of Kenya

(LSK) and if you want engineers you go to Institution of Engineers of Kenya. This must be recognised and whatever authority we are creating must be compelled to respect these other public bodies and regulated professional institutions and use their materials. They even want to establish some cost index. In the construction industry - I do not know about the other industries - we already have the Cost Planning Unit (CPU) of the Department of Public Works. We also have the Institute of Quantity Surveyors of Kenya (IQSK) also giving those cost indexes every month and the Joint Building Council which are recognised by this House and the Government.

If you look at Clause 69 (4), it says:

"An accounting officer of a procuring entity shall be responsible for preparation of tender documents in consultation with the user and other relevant departments."

(Hon. Ochieng stood up in his place)

The Temporary Deputy Speaker (Hon. Kajwang'): Hon. Member for Ugenya, is your seat a little hot for you or that is your gesticulation so that you can receive my recognition?

Hon. Ochieng: I am not clearly getting what hon. Ogari is saying.

Hon. Ogari: So I should be much closer like this so that you get me better.

The Temporay Deputy Speaker (Hon. Kajwang'): Before the Standing Orders are changed, are you able to sit down?

(Hon. Ochieng sat down)

Thank you. Hon. Ogari, proceed.

Hon. Ogari: I said that this Clause has to be amended such that we do not give responsibility especially on professional or technical tenders to innocent procurement or accounting officers who do not profess that knowledge.

The issue which I want to raise here is on Article 227 of the Constitution. What is required of this Bill is to establish a framework and policies. What I am seeing now is that we are having more clauses which are better of in the regulations or in the tender documents themselves. This is because if you look at Clauses 73 to 88, they are not businesses to be legislated here. This is because every tender or contract is unique and we have to give the procurement officer or entity on the ground a chance to deal with the circumstances within the law that we are creating within the Act and the Constitution. This is because once we start legislating about how tenders should be submitted this will be micro-managing and we will not be giving room for somebody to use their brains and adopt the circumstances or the uniqueness of the tender procedures.

I also believe that some information here is not for legislation. I am sorry if I am using some bad language. If you look at the methods of procurement, Clauses 95 to 114, that amounts to something like a textbook. This is because we are being taught about the methods of procurement. Why should we legislate on those when in the actual tender document it is clear? That shall be specified in the tender documents in the particular procurement that we will be doing. Therefore, this information belongs to college. We do

not need to legislate that because procurement methods keep on changing. Regulations can always come here and we adopt them.

The Temporary Deputy Speaker (Hon. Kajwang'): Are you not suggesting that they properly belong to regulations?

Hon. Ogari: Yes. They belong to regulations. Even after regulations, we still have what we call tender documents. That includes instructions to tenderers, the conditions of tendering and the conditions of contract. That is where you specifically point out the method you are going to use and how it runs. We cannot go through all this since we might have to come for an amendment to add another new method which may crop from other jurisdictions.

Hon. Temporary Deputy Speaker, I am about to finish. Finally, there are clauses I want us to look at individually. One of them is 69 (c) and (b) which requires that issues of estimated costs be publicised. To be fair and just to all the tenderers, estimated cost can only be disclosed during tendering. It is 69(6) (b). Estimated cost is what is being abused all over. It is good my colleague referred to tenders from Kenya Rural Roads Authority (KERRA) and the others where a few tenderers are informed of the estimated cost then you start tendering around those costs. I will therefore bring an amendment to make sure that if this clause goes through, because it is among those that I am proposing should go to regulations, the estimated cost should be revealed during the tendering stage together with the other figures.

Now, there is a very controversial issue with Clause 81. It is a good avenue that has been used, is being used and shall be used for a lot of abuse. For those of my colleagues who are lawyers, I am sure you will support me. A tender is more like an offer to treat. If you have asked us to give tenders, knowing that the most substantive part of a tender is the money, and here we are talking about you as the procurement entity can amend an error and give me another figure which I did not submit when the other tenderers were there during the opening, that clause has been subject to a lot of abuse and I can give you an example. If tenderer "A" quotes Kshs20 million and tenderer "B" quotes Kshs15 million, then since I am allowed as a procurement entity to amend or correct that error because Kshs20 million is too high than Kshs15 million, what prevents me from colluding with the tenderer and actually pushing this figure to Kshs19 million? That is exactly what has been happening and as Quantity Surveyors, we have always been against how this came in. It was there in the earlier Act.

However, I want you, as Members, to take the full import of this Bill. It is definitely one of those which must change if that part of the clause can go through. It is also one of those that I propose should go to regulations. That is very critical. If you have tendered your figure, the figure should remain. In any case, for those of us who do a lot of tendering for those contractors - because that is part of our job - those errors are normally intentional. We make errors intentionally, including when I give a discount. Professionally, a discount is an error for us because we did not ask you to give it. So, when we are doing the arithmetic check, we remove it because nobody asked you for it unless we have asked all the contractors to give a discount. When you have been given a document, your work is to put in the rates and the totals. However, when you have reached the end of the document, you realise you are a bit high and then you introduce an error so that you become a bit lower. That will help you to negotiate later on with the

procurement entity. If we can manage to convince our colleagues, this is one of those which must go and finally---

The Temporary Deputy Speaker (Hon. Kajwang'): In the same clause at the foot of it, when the tender is rejected, the security tender will be forfeited. Does this suggest, therefore, that you are punishing the person who has tendered because there is correction and errors in that tender document?

Hon. Ogari: Well, it is unlikely but, in most cases, your errors can also be corrected downwards and then you can refuse. Because of lack of time, that is another issue we shall canvass in the Third Reading. That is because that is security and you cannot just punish somebody for tendering. That is how he did it. If he realised there was a mistake, so long as you have got another tenderer who is willing to do the work, he can go ahead. However, I think we shall bring that in the amendments.

Finally, this is more of a general comment which I have noted. On this issue about relatives, I think we have to be very clear and fair. This is mentioned quite a lot in Clause 54(2) and Clause 65(9) (10). Relatives are ineligible if, for example, you are part of the tendering procuring entity or you are involved. However, I think the law also recognises everybody over 18 years old as independent. It is only that I think, the thinking in our minds is sometimes corrupted. Otherwise, when it comes to business, my wife and I are two different people so long as I declare my interest. So, when you define a relative as a spouse, child, parent, brother or a sister, and then the child, parent, brother, sister of my spouse, when it comes to that, it is like all my constituents are related. Nobody will get the job in there because they are all my relatives.

So, we have to be very careful about this so that we do not deny other people projects just because they are related to the Managing Director (MD). They might not be in good terms. They might be business rivals. Maybe, technically, I cannot comment on that much, but I am bringing the attention of the House to that.

With those few remarks, I want to give other Members an opportunity to contribute. I beg to support.

The Temporary Deputy Speaker (Hon. Kajwang'): All right. Let us also hear the voice of another gender. Let us have the nominated Member, Sunjeev Bindi.

Hon. (Ms.) Sunjeev: Thank you very much for giving me this chance to contribute to this yet another very interesting and very important Bill. I must say that having to follow after a very experienced Member of Parliament who has been in the system for long and is so experienced in this industry, is going to be a serious challenge for me to give a very strong debate. But, nevertheless, I will do my best. Prior to coming into Parliament, I was very much involved in the tendering process for some entities in the service industry in our country. Therefore, I hold this Bill very dear to my heart as do many other business people and Kenyans at large.

I would like to say that this Bill comes at a time when many international organizations and local citizens are trying to make head or tail on the best way forward for the basis of development of the economy, for the homes and for a better way of life. I would like to say that in as much as I support this Bill as a whole, I would also like to bring certain amendments to it. That is because as we said before, some sectors of the economy have not been fully captured.

I would like to say that in as much as Clause 9 (a) is to set a portal for procurement, let us look at the present day what the Public Procurement Oversight Authority (PPOA) website is doing for our citizens. We have set a standard where citizens can check the prices of certain services - though not all. However, it gives a chance for the citizens to kind-of peg what they need to sell the services at. Whether those figures are put at a higher price in the tenders later or not, that is a different story all together. However, it gives people a starting point on where to confer and where to look for those items. The industry standard which I think is available on the PPOA website at the moment is not extensive? Therefore, having this Bill bring out those issues is going to be very important for our youth, women and for that sector of the society that wants to get into public procurement.

There is one thing that the PPOA website, which is currently available, is not doing. It is not stating the complaints procedures. Some of you might know I am very famous for complaining. I think it is very important that when citizens, especially in businesses or in sectors where---

The Temporary Deputy Speaker (Hon. Kajwang'): Did you say you are very famous for complaining?

(Laughter)

Hon. (Ms.) Sunjeev: Yes. I am very famous for complaining. So, I think it is very important that this complaints procedure is checked into right from the beginning and this Bill actually brings that out.

I would also like to say that this Bill touches on how business will be done in the future, not only by investors from abroad, but also from our local citizens. This Bill also checks on the accountability of our internal audit for the public companies. I must say even if we are talking about Anglo-Leasing or Goldenberg, why do we have to wait for 15 to 20 years? We have waited for 15 to 20 years. Let us say, for example, 20 years ago, my son may have been 20 years old. Today, he is 40 years of age. It means he has lost half of his life just trying to get a solution to a problem that started 20 years ago. I think this is very unfair and I think some people have slept on their jobs. I think some people have taken a lot of credit. They have made a lot of use of this system and they have made hay while the sun was up.

I would also like to say that this Bill is very important if we want to achieve Vision 2030. I would like to add that many times, companies commit their tenders to authorities and yet, they do not have a chance of finding out the reason why they did not get the tender. I think it is always important for a person to know why they did not make it through. That is for purposes of knowing how well you have done. You must know how much better you can do next time.

This Bill, in Clause 125, talks about the quality cost-based selection system which is going to help many Kenyans. The digital procurement system has been talked about. Yes, we are going digital. This is important because if there are any changes that are going to take place in the future, then we need to make the digital process work faster than what it is today. It is also said that when there are some amendments to tenders that are supposed to be made--- In the past, big procurement authorities were not advertising.

They could have digital websites, but the voluminous document is not available straight away from the website. In my experience, what has been happening most of the time is that when a tender has been extended, or an amendment has been inserted, it gives room for a lot of corruption. That must be stopped. The bringing of the digital procurement and advertising is going to assist this in the long run.

With regard to the opening of tenders, it is very important for people to understand who submitted the tender and at what price. If we make it mandatory, then we must know what will happen next time when you apply for a similar tender somewhere else - that is how far you stand. It also opens room for open competition. That is because if you apply for a job somewhere and you do not know who else is competing against you, then it is simply impossible for you to find out where you stand as a business.

When you look at the public procurement process today, as I mentioned before, you realize that tenders are very voluminous. What has been happening in the past is that people have been at loggerheads with the authorities. In fact, the authorities have been taken to court. Instead of focussing on the concept of completing projects, we are focussing more on the concept of going to court and spending more money in the judicial system. We spend a lot of money on lawyers who actually take us round and round in circles. I hope that this Public Procurement Authority is going to assist the many people who get into problems during the tendering process.

Clause 149 of this Bill is very important because it says that the advanced payment must be used simply and purposely for that particular contract. Many times what happens is that businesses use the advance payment to actually siphon money hence leaving the contract hanging; which is a criminal thing. Nonetheless, many people have got away with it. We must also find out and debar cowboy contractors, business people and procurement agencies or agents that are out there just to make a quick buck. This Bill is certainly going to shed light and bring all those people into account. I fully agree with hon. Priscillah Nyokabi when she says that we need to set our standards higher on catching the culprits. For example, if there is a contract worth Kshs4 billion and the offence is such that it attracts not more than Kshs4million, then you might as well just take that person to prison. That person has got enough money stashed somewhere and all he needs to do is to serve his sentence of not more than ten years!

This is just a way of telling people that you can go ahead and siphon a lot of money, but you will not live for more than ten years. All that money will be earning interest and your family will be living happily. There has to be a way of calculating and zeroing in on those culprits who take our citizens and our country for a ride.

I also found Clause 17 very interesting on policy and operationalisation, where the national Treasury is setting up an annual review process. This opens up the doors for all the people in public and private sectors who have interest in this particular area. It is important for debate, so that people can get on board and give their thoughts and views to everybody who is concerned. It encourages dialogue.

It is often said that when corruption is out of hand, it is commonly treated as a responsibility of the Government. If it is not taken care of, then it becomes as though a Government has failed. In our country's case, corruption is one of the biggest problems with insecurity being the second. Then we ask ourselves: Why are we still facing those investors who still want to put their money in our country? There must be a reason. It is

about time that we, as legislators, stood up together and brought the right amendments to this Bill, so that the right justification is done towards the public procurement process.

There are lots of reports which have been released by the World Bank and International Monetary Fund (IMF). They talk about public procurement benching, which is a concept that we must also look into. I do not know how we will bring that in the future within our country because we are already looking to open our borders. In my view, corruption has increased 47 times. Before, we had few provinces and now we have 47 counties. In my opinion, corruption has increased 47 times. We must do the necessary to make sure that culprits are brought to book and people can benefit.

In conclusion, a very interesting scholar, Mahatma Gandhi, once said that he will not let anybody walk through his mind with dirty feet. It is about time we all stood up to support this Bill with the necessary amendments.

With those few remarks, I support the Bill.

The Temporary Deputy Speaker (Hon. Kajwang'): I still have a lot of requests here. Hon. Bishop Mutua, nominated Member, Members for Mbita, Bomet Central, Alego Usonga, Ndhiwa and Elgeyo Marakwet constituencies. This Bill will still be on the Order Paper on Tuesday. Come early to the Chamber, so that you are able to share in that order.

ADJOURNMENT

The time being 6.30 p.m., this House stands adjourned until Tuesday, 24th February, 2015 at 2.30 p.m.

The House rose at 6.30 p.m.