

# PARLIAMENT OF KENYA

## THE SENATE

## THE HANSARD

Thursday, 13<sup>th</sup> June, 2013

*The Senate met at the Kenyatta International  
Conference Centre at 2.30 p.m.*

*[The Speaker (Hon. Ethuro) in the Chair]*

### PRAYERS

### QUORUM CALL AT COMMENCEMENT OF SITTING

**The Speaker** (Hon. Ethuro): Order, Hon. Senators! Could we confirm if we have a quorum? Yes, indeed, we have a quorum.

### COMMUNICATION FROM THE CHAIR

#### VISITING DELEGATION FROM GARISSA COUNTY ASSEMBLY

**The Speaker** (Hon. Ethuro): Hon. Senators, before we continue, I wish to acknowledge the presence of our visitors who are visiting us today. Allow me to introduce to you a delegation of the Members of the County Assembly from the County of Garissa who are seated at the Gallery to my right. The delegation is led by the Garissa County Assembly Speaker, hon. Mohammed Abe. As I continue to introduce the rest, I request that when an hon. Member is called, he or she should stand up and be acknowledged in the normal tradition of Parliament. Arising from the inadequacy of space in our gallery in this temporary Senate Chamber, the delegation has divided itself into three groups. This will be the first group. They are as follows:- Hon. Abubakar Mohammed Shide, Deputy Speaker; hon. Abdi Ali, hon. Abdiwahab Suleiman Baraki, hon. Mohammed Abdullahi Abdi and hon. Siyat Abdikarim Salat. They are accompanied by staff. Please, feel welcome to the Senate.

Thank you.

*(Applause)*

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## PETITIONS

### REPORT FROM THE SPEAKER: PETITION ON THE REPEAL OF THE NATIONAL GOVERNMENT COORDINATION ACT, 2013

**The Speaker** (Hon. Ethuro): Hon. Senators, you remember that today we have reactions on the petition by Mr. Humphrey Khaunya. But before I allow you to do so, there is also another petition which I want to present to you.

Hon. Senators, I have the following communication to make on a petition that has been presented through the Clerk pursuant to Standing Order No.222(2)(b). As hon. Senators are aware Article 119 of the Constitution says:-

“Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation.”

Standing Order No.217(1) provides that:-

“ A petition to the Senate shall be—

(a) submitted to the Clerk by the petitioner and reported to the Senate by the Speaker;”

Standing Order No.222(2) further provides that:-

“(2) When the Order “Petitions” is read, the Speaker shall-

(b) in the case of a petition presented through the Clerk, report the petition to the Senate.”

Hon. Senators, pursuant to Standing Order No.222(2)(b), I hereby report to the Senate that the Petition on unconstitutionality of the National Government Co-ordination Act, Act No.1 of 2013, has been submitted by Ms. Wanjiru Gikonyo of the Institute for Social Accountability through the Clerk. Ms. Gikonyo, the petitioner, is a citizen of Kenya and the Chief Executive Officer of the Institute for Social Accountability (TISA); a civil society initiative committed towards the achievement of sound policy and good governance in local development and the uplifting of livelihoods, especially of the poor and marginalized in Kenya.

In her petition, the petitioner draws the attention of the Senate to, among other provisions of law, Section 17 of the Sixth Schedule to the Constitution, which provides that:-

“Within five years after the effective date, the national Government shall restructure the system of administration commonly known as the provincial administration to accord with and respect the system of devolved government established under this Constitution.”

The petitioner is of the view that the National Government Co-ordination Act, 2013, does not accord with the Constitution and other legislation on a number of grounds, including the following.

1. That the Act undermines the functional approach to the assignment of responsibilities as espoused in the Constitution and the Transition to Devolved

Government Act, Act No.1 of 2012. The petitioner is of the view that the Act undermines the Transition Authority's role and mandate as far as assignment of functions between the national and county levels of Government is concerned.

2. The Act offends the distinctness of the two levels of Government. The petitioner avers that the National Government Co-ordination Act, 2013, appoints national government officers at the county, sub-county, ward, location and sub-location levels and yet the location and sub-location levels are not established in law.

3. That the Act offends Article 201 of the Constitution which provides for the principles of public finance and generally requires prudent use of public resources. The petitioner is of the view that the Act does not justify the cost of maintaining a parallel administrative structure at the county level, especially at the sub-county levels and below.

4. That the Act offends Articles 174(c) and 232 of the Constitution, which require participation of the people. The petitioner states that during the process leading to its enactment, the Act was not subjected to public participation. The petitioner further states that the Act lacks any provisions for public engagement and does not, therefore, meet the constitutional standards of public participation.

The petitioner concludes with a prayer that the National Government Co-ordination Act, 2013, be repealed. The petition is signed by the petitioner, Ms. Wanjiru Gikonyo.

Hon. Senators, copies of the petition shall be availed to Senators at the Table Office. In order to allow Senators sufficient time to study the petition, I shall allow comments, observations or clarifications in relation to the petition in terms of Standing Orders No.223 next Thursday, 20<sup>th</sup> June, 2013, when the order "Petitions" is read out. Since we set precedence by the request of Sen. (Dr.) Khalwale, we think it is just prudent to give a one week's notice. Thereafter, pursuant to Standing Order 224(1), the petition shall stand committed to the relevant Standing Committee. In this case, it is the Standing Committee on Legal Affairs and Human Rights.

In terms of Standing Order No.224(2), the Committee will be required in not more than 60 calendar days from the time of reading the prayer, which is today, to respond to the petitioner by way of a report addressed to the petitioner or petitioners and laid on the Table of the Senate.

I thank you.

Now I will allow the Petition by Humphrey M. Khaunya.

REPORT FROM THE SPEAKER: PETITION ON  
ENACTMENT OF THE LICENSING ACT, 2013

**The Speaker** (Hon. Ethuro): I will assume that there are no contributions to that particular Petition because we will be awaiting a report from the Committee.

*(The Speaker consulted with the Clerk-at-the Table)*

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Hon. Senators, pursuant to Standing Order No.224(1), I now, therefore, direct that since you have no comments, that the Petition be committed to the Standing Committee on Finance, Commerce and Economic Affairs. The Committee is required, in no more than 60 calendar days from the time of reading the prayer, to respond to the petitioner by way of a report addressed to the petitioner and laid on the Table of the Senate.

## STATEMENTS

### BUSINESS FOR THE WEEK COMMENCING 18<sup>TH</sup> JUNE 2013

**The Senate Majority Leader** Sen. (Prof.) Kindiki: Thank you, Mr. Speaker, Sir. Notwithstanding the turbulent times that we are facing, we will continue discharging our Business as follows. I read my Statement.

Hon. Senators, pursuant to the provisions of Standing Order No.43(2), I beg to present the Senate Business for the coming week. The Rules and Business Committee will meet on Tuesday, 18<sup>th</sup> June, 2013, at 12.00 noon to schedule the Business of the Senate for the week commencing the same day. The Senate will continue with Business that will not be concluded in today's Order Paper.

In addition, the Senate will commence debate on the Motion by Sen. (Dr.) Machage concerning Establishment of Hospitals in Counties.

On Wednesday, 19<sup>th</sup> June, 2013, during the morning sitting, the Senate will continue with Business not concluded on Tuesday, 18<sup>th</sup> June, 2013, and commence debate on the Motion by Sen. Catherine Mukite on Establishment of Graduate Enterprise Fund.

In the afternoon sitting, the Senate will continue with the Business not concluded on Tuesday and Wednesday morning and consider any other Business scheduled by the Rules and Business Committee.

On Thursday, 20<sup>th</sup> June, 2013, the Senate will continue with the Business not concluded on Wednesday afternoon and consider any other Business scheduled by the Rules and Business Committee.

Mr. Speaker, Sir, I hereby lay the Statement on the Table.

Thank you.

*(Sen. (Prof.) Kindiki laid the document on the Table)*

### BENEFITS OF THE DEPUTY PRESIDENT'S SHUTTLE DIPLOMACY TO THE NATION

**Sen. Haji:** Mr. Speaker, Sir, it will be remembered that a few weeks ago, Sen. (Dr.) Khalwale sought a Statement on the shuttle visit by His Excellency the Deputy

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President. I am now ready to give this Statement. But, apparently, my brother, Sen. (Dr.) Khalwale, has requested that he be given more time to be able to interrogate the Statement which I am going to give. So, in this regard, I want to get your direction on how I can go about this issue.

**The Speaker** (Hon. Ethuro): Sorry, Sen. Haji. Could you kindly repeat what you have just said?

**Sen. Haji:** Mr. Speaker, Sir, I am ready now to give the Statement sought by Sen. (Dr.) Khalwale, but apparently, he is appealing that he be given more time to interrogate the Statement. So, I wanted your direction on whether I should proceed or not.

**The Speaker** (Hon. Ethuro): It depends. Are you giving it within the time you promised that you would deliver the Statement?

**Sen. Haji:** Absolutely, Mr. Speaker, Sir.

**The Speaker** (Hon. Ethuro): You should proceed.

**Sen. Haji:** Thank you, Mr. Speaker, Sir.

Mr. Speaker, Sir, question number one was whether the visit to African countries was a State visit or a private function. The visit by His Excellency the Deputy President to the four African countries was a State function. In accordance with Article 147(1) and (2) of the Constitution, His Excellency the President instructed him to undertake travel from the 16<sup>th</sup> to the 19<sup>th</sup> of May, 2013, to meet the Heads of States of the four African nations, namely; Congo Brazzaville, Gabon, Nigeria, Ghana and Algeria. However, the Algerian President was undergoing treatment and, hence there was no visit.

The list of the delegation comprised 14 persons, which included the Deputy President and his Chief of Staff, four Members of Parliament nominated by the Majority Leaders of both the Senate and the National Assembly; a protocol officer from the Ministry of Foreign Affairs, three security officers, a personal assistant to the Deputy President, two communication officers and an accountant from the Office of the Deputy President.

Mr. Speaker, Sir, the purposes of the visit by the Deputy President to the four African countries are as follows:-

(1) To address the enormous security challenges Somalia has posed to Kenya. It was necessary for Kenya to solicit support and influence the African Union (AU) position in so far as the management of Somalia is concerned; specially, the mandate of the African Union Mission in Somalia (AMISOM) to be enhanced and more resources made available to assist the Somali Government to set up local administrative and governance structures under the IGAD framework in Southern Somalia.

(2) There are currently more than 500,000 refugees who have been resident in Kenya for more than a decade. Kenya pursued the matter at the AU Summit which was held between 23<sup>rd</sup> and 27<sup>th</sup> May, 2013.

(3) To establish a deployment force to firmly deal with *Al-Qaeda*, *Al-Shabaab* and other terrorist activities.

(4) Enhance the capacity of the African Union Mission in Somalia AMISOM on the local units to stop the inflow of contraband goods mainly sugar and electronics coming to the Port of Kismayu and causing security instability in northern Kenya; namely, in Garissa, Wajir and Mandera.

(5) Effective security checks and enhancement of the capacity of AMISOM to stem the entry of *Al-Qaeda* elements from crossing into Kenya and affecting the economic growth of the country as well as the implementation of the Jubilee Manifesto.

(6) The President was in South Africa to consult President Zuma and canvas for the regional position in bringing stability to Somalia and the East and Horn Africa Regions. The President subsequently dispatched the Deputy President to further pursue the agenda with other key members of the AU such as Nigeria, Ghana, among others.

(7) To establish a mechanism of African countries in enhancing intra-Africa trade and collaboration.

(8) To work on instruments to promote regional investments and business.

(9) To enhance communication between East and West Africa through regional infrastructure projects and other networks such as railway and road, to facilitate movement of goods and services so as to promote trade.

Mr. Speaker, Sir, another question was: If the visit was a State function, how much did it cost the taxpayer? The travel expenses by the Deputy President and his delegation was financed by the Office of the Deputy President. The cost of travel was as follows:-

(a) Kshs18.5 million for hire of chartered aircraft; and,

(b) Kshs193,000 for quarter per diem allowance to members of the Deputy President's delegation.

Mr. Speaker, Sir, the hon. Senator also wanted to know what benefits the African visit would accrue to the Republic of Kenya.

(1) The visit by His Excellency the Deputy President was successful in strengthening Kenya's bilateral relations with the visited African countries and advancing Kenya's trade interests in the western region. In particular, he was able to secure the support of Kenya's position with respect to establishing a rapid deployment force to assist the AMISOM in taming *Al-Qaeda*, *Al-Shabaab* and other terrorist networks in Somalia.

(2) Secure support for Kenya's position on AMISOM in setting up local governance structures within the southern part of Somalia, so as to eliminate the flow of contraband goods into Kenya.

(3) Secure support for the Government of Kenya's proposed timetable of repatriation of over one million refugees back to their country and remove the strain and stress the refugees have caused in the local economy and on security.

(4) Confirm a meeting of the heads of states of Nigeria and Ghana within the year to fast-track other bilateral business and investments agreements.

(5) The Deputy President assembled information that is relevant for Kenya's private sector which he will use as he chairs the private sector round table soon.

Mr. Speaker, Sir, the specific benefits of the visit to the country are as follows:-

In Nigeria, the Deputy President discussed with His Excellency Goodluck Jonathan, the President of the Republic of Nigeria, the joint economic co-operation agreement that will facilitate Kenya's products to access Nigerian markets mainly, horticultural, dairy products and flowers that are on high demand in Abuja.

Mr. Speaker, Sir, the Deputy President concluded with His Excellency John Mahama, the President of the Republic of Ghana, the setting up of a Kenyan Embassy in Accra which has been outstanding for the last 16 years. They also agreed on a framework for up scaling up trade, especially on horticultural and livestock products that are already in the Ghanaian market.

Mr. Speaker, Sir, he initiated a framework with His Excellency President Denis Sassou Nguesso of Congo Brazzaville which is home to the second largest forest in the world to establish an environmental and climatic change secretariat that was initially a project of the late Nobel Laureate (Prof.) Wangari Maathai and the Government of Congo Brazzaville.

Mr. Speaker, Sir, the hon. Senator wanted to know whether a similar short-term diplomacy by the former Vice-President was declined by the UN Security Council and whether the shuttle diplomacy is an effort in furtherance of the recent request by Kenya's Ambassador to the UN, Amb. Macharia Kamau, on the same matter. He also wanted to know whether the ICC will be bound by whatever the Deputy President will procure from the shuttle diplomacy.

Mr. Speaker, Sir, the visit by His Excellency the Deputy President was not in any way related to the court cases involving a number of Kenyans that are currently before the International Criminal Court (ICC). The visit by the Deputy President, therefore, had no bearing whatsoever on the short-term diplomacy by the former Vice-President or the request by Kenya's Ambassador to the UN on the same matter. There is no action expected from the ICC as a consequence of the visit to the African countries by the Deputy President.

In conclusion, the visit carried out by the Deputy President to the four African countries was undertaken in the best interest of Kenya. The agenda of the visit was entirely official Government business and accrued substantial social economic benefits for the country as enumerated above.

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

**The Speaker** (Hon. Ethuro): What is it Sen. Hassan Omar?

**Sen. Hassan:** Mr. Speaker, Sir, following the issuance of that Statement, I want to know from Sen. Haji whether this Statement is signed by himself, the Cabinet Secretary or the Department? We are trying to lay precedence in terms of how these Statements are presented to the House.

**The Speaker** (Hon. Ethuro): Sen. Haji, let us take a few more clarifications. Our tradition is that we first allow the one who sought the Statement a chance to seek clarifications. I gave Sen. Hassan the first chance because he purported it to be a point of order.

Sen. (Dr.) Khalawale, proceed!

**Sen. (Dr.) Khalwale:** Mr. Speaker, Sir, I thank Sen. Haji for the seriousness he has given this matter because as the Senate is aware, there was an attempt to address the same issue elsewhere hurriedly.

I would like the Chairman of the Committee to give us a comparative cost of what it would have cost the taxpayer if the delegation of the Deputy President had chosen to use commercial flights. Kenyans know that we have continental flights, especially by Kenya Airways, that fairly connect all the capitals of Africa.

The second point, Mr. Speaker, Sir, is on the issue of cost. Whereas Sen. Haji has stated this, could he kindly avail copies of invoices and receipts to support the figures that he has indicated were what cost the taxpayer?

Thirdly, could he also table copies of the procurement process to indicate the competitiveness of that tender, so that it does not look like somebody single-sourced for weird reasons?

Finally, this is not the first time this jet is being used. The former Prime Minister used this jet. When he used it, there were United Nations (UN) and international organizations that paid for this. This means that the Government had earlier on already known that this is a very expensive exercise. Is it the policy of the Government that without regard to any cost implications of any particular venture, they will just travel with impunity and commit taxpayers' money the way they did?

**The Speaker** (Hon. Ethuro): Sen. Haji, please, take note of the clarifications, so that you can respond to them one by one.

Deputy Minority Leader!

**Sen. Abdirahman:** Mr. Speaker, Sir, I want to thank Sen. Haji for the Statement. But there are a few things that do not add up in that it, particularly with regard to deployment of forces across our borders to Somalia. In fact, the only West African country that has contributed a small contingent of armed personnel is Sierra Leone. The fact that the Deputy President went to visit Congo Brazaville, Nigeria and Gabon really, if it was of any interest to this nation and with regard to issues that relate to the AU or AMISOM, in particular, he should have consolidated his efforts with IGAD. I tend to think this does not come out very clearly. May be he should tell us the actual reasons for the visit. Even if the visit was for bilateral talks, the composition of the membership of that delegation did not even include senior members in the Ministries of Foreign Affairs and EAC Affairs, Commerce and Tourism. So, Probably what Sen.(Dr.) Khalwale raised the other day, may be true. There may have been elements of lobbying.

Finally, Mr. Speaker, Sir---

**The Speaker** (Hon. Ethuro): Order, Sen. Abdirahman!



**Sen. Abdirahman:** Mr. Speaker, Sir, one more comment, if you will allow me.

**The Speaker** (Hon. Ethuro): I will allow you one more comment. But I will not allow you to give your own opinions. You are supposed to seek clarifications from the Statement made.

**Sen. Abdirahman:** Thank you for the guidance, Mr. Speaker, Sir. Could he clarify what the intentions were with regard to the movement?

Finally, my last comment is, it is even cost-effective to use the air force planes. Why did the Deputy President chose to fly on that jet? Why did he not use the commercial airlines? We need to save money for this country.

Thank you, Mr. Speaker, Sir.

**The Speaker** (Hon. Ethuro): Sen. Haji, do you have the capacity to take some more clarifications?

**Sen. Haji:** I do not mind, Mr. Speaker, Sir. I can take two more clarifications.

**The Speaker** (Hon. Ethuro): Let us have the last two.

Sen. (Prof.) Anyang'-Nyong'o!

**Sen. (Prof.) Anyang'-Nyong'o:** Mr. Speaker, Sir, could the Chairman clarify whether the trip by the Deputy President to the countries mentioned had anything to do with the agenda that came up at the AU? It makes sense if it had something to do with the agenda.

Secondly, given the omnibus character of the Statement that the Chairman has given, it looks like the Deputy President had a whole laundry list of issues that he was raising. What was the key issue that took the Deputy President, was it Somalia or all the other issues?

Finally, could these other issues which, to me, look very peripheral, not have been handled at the ambassadorial level rather than having a Deputy President sauntering around Africa on issues that ambassadors can handle and bring back to the relevant Ministries for the consumption of the Government?

**The Speaker** (Hon. Ethuro): Sen. Muthama!

**Sen. Muthama:** Mr. Speaker, Sir, from the Statement that was given by my colleague, Sen. Haji, he indicated that this trip was to serve the country. When the Deputy President came back, there was no statement whatsoever that was made by him to explain to Kenyans where he was and what he achieved for this country.

Secondly, Sen. Haji tried to prove the cost of the private jet. It was very clear that, that private jet was not just paid for one trip. It was paid for a whole year. The cost that was given was only 25 per cent or a quarter of the payment that was made. He should clarify why the private jet was paid for one year in advance to await further trips to be taken.

Lastly, Mr. Speaker, Sir---

**The Speaker** (Hon. Ethuro): And the very last!

**Sen. Muthama:** Mr. Speaker, Sir, what came out in Addis Ababa had absolutely nothing to do with this country, but the ICC issue. Let him clarify that.

**The Speaker** (Hon. Ethuro): Sen. Haji, you may now respond.

**Sen. Haji:** Mr. Speaker, Sir, to respond to Sen. Hassan Omar, the Statement is given and signed by myself. So it is from me.

As to the question raised by Sen. (Dr.) Khalwale---

**Sen. (Dr.) Khalwale:** On a point of order, Mr. Speaker, Sir.

**The Speaker** (Hon. Ethuro): What is it, Sen. (Dr.) Khalwale?

**Sen. (Dr.) Khalwale:** Mr. Speaker, Sir, did you hear the Chairman say that this was his own Statement, by him and from him?

**Sen. Haji:** Of course!

*(Sen. Haji stood up in his place)*

**Sen. (Dr.) Khalwale:** Hey, please, can you yield? He is about to punch me! He is a former Provincial Commissioner (PC)!

*(Laughter)*

**The Speaker** (Hon. Ethuro): Sen. Haji, both of you cannot be standing. It is Sen. (Dr.) Khalwale who has the Floor.

*(Sen. Haji took his seat)*

**Sen. (Dr.) Khalwale:** Thank you, Mr. Speaker, Sir. If, indeed, that is the case, then as the originator of the Statement, I do not want to listen to it.

**Hon. Senators:** Why?

**Sen. (Dr.) Khalwale:** Mr. Speaker, Sir, because a member of the Legislature cannot purport to respond on a matter directed to the Executive on behalf of the Executive. I was expecting that on that point of order the Chairman would table a Statement signed by the Cabinet Secretary in the respective department. Then we will know that arising from whatever we shall deliberate here, when it comes to the time of implementation or when we want to hold him to account, then this will be the evidence to signify that, indeed, the Government---

**The Senate Majority Leader** (Sen. (Prof.) Kindiki): On a point of order, Mr. Speaker, Sir.

**The Speaker** (Hon. Ethuro): Sen. (Dr.) Khalwale is already on a point of order! But I will allow you after him.

**Sen. (Dr.) Khalwale:** Mr. Speaker, Sir, this will be evidence to signify that the Executive was taking responsibility. Surely---

**The Speaker** (Hon. Ethuro): Order, Sen. (Dr.) Khalwale! This was supposed to be a point of order. I think you have made your point.

**Sen. (Dr.) Khalwale:** Thank you, I thought I was not quite clear.

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**The Speaker** (Hon. Ethuro): Sen. (Prof.) Kindiki!

**The Senate Majority Leader** (Sen. (Prof.) Kindiki): Mr. Speaker, Sir, is it in order for Sen. (Dr.) Khalwale to request the Chairman of the relevant committee to comply with conditions which have not been set by either the ruling of the Speaker or any other Standing Order or precedent? For example, Sen. (Dr.) Khalwale has said we need a Statement signed by the Cabinet Secretary. These are new ways of doing things. The Speaker has not either through a ruling or review of the Standing Orders given any direction on this. This House is not seized with a proper tradition. So, is he in order to require the Chairman to do something which is not required by any law, Standing Orders or the rulings of the Chair?

**Sen. (Dr.) Khalwale:** The point of order is directed at me!

**Sen. Haji:** Mr. Speaker, Sir, that---

**The Speaker** (Hon. Ethuro): Order, Senators Dr. Khalwale and Haji! Let me just dispose of the tussle between Sen. (Dr.) Khalwale and the Senate Majority Leader. Sen. (Prof.) Kindiki was very clear. He was addressing the issues to the Chair and not to the Senator for Kakamega County. I will dispose of that matter if the Chairman of the Committee responds to it first. Before he proceeds with the rest of the issues, I will deal with that matter for the substantive issues.

Proceed, Sen. Haji!

**Sen. Haji:** Mr. Speaker, Sir, I think we should get things right. In the first place, when Sen. (Dr.) Khalwale asked for a Statement, he requested that the Statement be given by the Chairman of the National Security and Foreign Affairs. It will also be recalled that by that by that time, we did not have a Secretary of State responsible for these matters. Therefore, the Statement is being delivered by me. As to how I got the information, that is not relevant because if---

*(Laughter)*

*(Loud consultations)*

**The Speaker** (Hon. Ethuro): Order, hon. Senators! I will allow you. Let him finish first!

**Sen. Haji:** Mr. Speaker, Sir, I got the information required from the Office of the Deputy President. Therefore, it is official and quite in order. So, if I may continue---

**The Speaker** (Hon. Ethuro): Order! Resume your seat! Hon. Members I think I had said I will respond to this in terms of the source of the information. To start with, I want to agree with the Senate Majority Leader that this issue has actually been canvassed on the Floor. The facts are that, Sen. (Dr.) Khalwale sought the Statement from the Chairman and Sen. Hassan, at some stage asked whether that Statement should come from the Chairman alone or it should come after the Committee as deliberated. Sen. (Dr.) Khalwale and your good self canvassed that matter last time, but only yesterday, you

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came back and withdrew the request in its entirety, including the other issues. So, you denied the Speaker the opportunity to respond to that particular matter. But I think it is valid when you ask the source of the information. It is also valid, the fact that Sen. Haji is a Member of the Senate. He is not the Executive. So, it is important that the sources are known. But he has clarified although in a convoluted manner that he actually obtained the information from the relevant office. I feared that he was going to say that, that was his secret weapon. Just to confirm, this is a place to reveal all secrets. So, it is important to have the information. But I think Sen. Haji, the Chairman has acquitted himself properly on his sources. So, let us proceed.

**Sen. Abdirahman:** On a point of order, Mr. Speaker, Sir. I want to go one step further. We have understood what you said. From the inception of this House, when we started we said that we are all learning. In the past, practice demanded Cabinet Ministers to come to the Floor and they were asked Questions. Now that they have been replaced by Chairmen of the various committees, particularly with regard to the majority side that runs Government. Authenticity is one thing; just like Sen. Haji was responding he said that this is from the office of the Deputy President. That is acceptable. But the question now is, for authenticity's sake, must the Chairman carry along with him something that confirms that this is from the Office of the President or the Deputy President; a signed document. So, could he clarify for us?

**The Speaker** (Hon. Ethuro): But I think that is not the matter for this Chairman or any other Chairman of the Committee. This is really a matter for the House to speak to itself. So, I think the appropriate method is for you to canvas from the Chair. As you said, this is a new practice. So, we will need to establish what we consider to be the best practice. But I think as of now, it is not a requirement. Even previously, Sen. Abdirahman, it was not a requirement until you demanded for the documentation to be tabled or any other evidence which you can still seek as a requirement. So, this is a matter we will need to dispose of.

**Sen. (Dr.) Khalwale:** Thank you, Mr. Speaker, Sir. In my view, this matter is important. We are about to create a precedent that will set a tradition that other Houses, later on, many years to come, will be using. Maybe there might be wisdom for you to spend some time so that you see if you can create a clear road map of what is expected of a Chairman of a Committee once a Statement is sought. It should be clear to the Chair that it is not an opportunity for him to show his expertise or understanding of his Committee, but an opportunity for him to summon the respective Accounting Officer who then appears before his Committee or a sub-committee of his Committee, brings relevant supporting documents which he can use to convince the House. Maybe you want to consider that for further clarity.

**The Speaker** (Hon. Ethuro): Those are definitely good suggestions which will be considered at the appropriate time.

**Sen. Billow:** Mr. Speaker, Sir, I want to request that you guide the House on two issues. This is a House of Parliament. We have traditions from other Houses of

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Parliament all over the world. Indeed, any Statement read by the Chair of a Committee must be a Statement signed by the relevant Cabinet Secretary and not by the Chair. We will need guidance on that.

Secondly, we also have seen today in one of the Houses of Parliament in this country, a precedent where a Cabinet Secretary has been invited to come and present or read a Statement from the Floor of the House. Again, if you could guide this House when we are going forward if the relevant Committee can invite a Cabinet Secretary to come in person and read the Statement from the Floor of this House.

**Sen. Orengo:** Thank you, Mr. Speaker, Sir. Following in the footsteps of Sen. Billow, I want to reveal that the sub-Committee of the House Rules and Business Committee is actually dealing with this problem. It is a unique problem. We have to decide what type of Parliament or Senate we want to be. In the United States of America, for example, it is not a pure presidential system because the Vice-President of the United States of America is actually the Speaker of the Senate. So, there is some linkage. But in our system, as of now, we have a pure presidential system and it will be very odd for a Member of this House or even a Chairman to pretend to be speaking for the Executive. That also notwithstanding, the principle or collective responsibility was enshrined in the old Constitution so that when a Member of the Government was speaking wherever, and more so, in the House, he was bound by his Statements. Not only just him, but the Government was bound by his Statement. But the Executive now is not bound by the Statement made by the Chair. I am also a Chairman of a Committee. For that matter, I am sure the Government of the day would not want to be bound by whatever I say even if there was a pertinent question that should come to the Implementation Committee. I am sure the Members of that Committee would, in fact, vote and say: Let somebody else speak for the Government in the Committee. So, I think we need a clear road map and just understand that what we are doing now is a makeshift mechanism for finding accommodation for the Executive and the House, so that there could be some kind of linkage. But I think this House must establish a procedure of linkage between the Executive and the House, but not in an *ad hoc* manner. I am sure if---

**The Speaker** (Hon. Ethuro): Order, Sen. Orengo! You are becoming repetitive.

**Sen. Orengo:** Okay. That is all that I wanted to say. We need a clear guideline on this.

**The Speaker** (Hon. Ethuro): Indeed, hon. Senators, I want to agree with Sen. Orengo. This is why I have been reluctant to make a ruling on this particular matter because we need to do a bit of research. We set up a Committee to review our Standing Orders and only yesterday I gave them a notice that they had one day to submit those proceedings. I think they are concluding today. So, we are waiting for all those kinds of input, so that we can now dispose of the matter. This is a new experience for us. So, we will need to deliberate a bit more on what will serve us better, taking into account other experiences from elsewhere. So, for the time being, we will take the understanding that the Chair, which is responsible to the House and not to the Cabinet Secretary, will do due

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diligence of ensuring that the information is actually obtained from Government and not elsewhere. The crux of the matter has been the assumption of the Standing Orders that every Committee Chair must come from a party that belongs to the Government. What happens when the Chairs are from parties that are not forming the Government? Then you will find the thick part in this arrangement. But we do not want to rush and take a position now. Our position will be informed by all difficulties reflected in the discharge of our responsibilities this afternoon. So, let us have a bite and also look for a way forward.

Thank you.

*(Sen. (Dr.) Machage stood up in his place)*

**The Speaker** (Hon. Ethuro): Sen. (Dr.) Machage, we need to conclude this matter.

**Sen. (Dr.) Machage:** He should desist from giving us illegitimate information.

**The Speaker** (Hon. Ethuro): I do not think that anybody in this House said that the information was illegitimate. Hon. Senators were just wondering about his sources of information and he has clarified that. We are only saying that we are not happy with the procedure, but we will fix it. But in terms of the information, Sen. Haji who is in charge of the Committee was quite within his rights to deliver the statement he has delivered. Nobody questioned it at that time apart from a clarification that we got.

Sen. Haji, just conclude.

**Sen. Haji:** Mr. Speaker, Sir, I was trying to answer the concerns that were raised by Members. However, they are apparently overshooting on our time notwithstanding the fact that with regard to comparative cost, it would not be reasonable to expect the Deputy President to travel to four countries with the same appointment of time and days in a commercial plane which out of experience we know causes a lot of delays. That would have been an embarrassment to Kenya as a nation.

On the issue of receipts and invoices, I do not have those with me neither am I prepared to present them today as well as documents showing the procurement process.

The issue of the former Prime Minister using this plane earlier is irrelevant. We are not dealing with the previous Government. We are dealing with the current Government.

Hon. Hassan asked whether the visit was relevant. It was relevant. If you listened to me carefully when I was explaining why the Deputy President was going for this shuttle, I said it was to get a report that he would give to the President to go with to the African Union (AU) meeting which was held on 23<sup>rd</sup> and 24<sup>th</sup> May. Top of the agenda was the issue of Somalia and the African Union Mission in Somalia (AMISOM). It was clearly not important for him to visit the Inter-Governmental Authority on Development (IGAD) Members because these ones are already on board and support the initiative being undertaken by Kenya.

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Sen. (Prof.) Anyang'-Nyong'o, I want to thank him for being very sharp and saying that if this had some relevance with the AU meeting, then it was in order. I want to assure him that it had a lot of relevance to the AU meeting.

Sen. Muthama said that when the Deputy President came back he did not make a statement. I think making a statement is not relevant. He was tasked by the Office of the President and, indeed, he went to brief the President when he came back. As a result of that brief, the President attended the AU meeting and IGAD was mandated to deal with the issue of Somalia. Therefore, it was quite relevant.

I think I have answered all the questions.

**The Speaker** (Hon. Ethuro): The last one is by Sen. (Dr.) Khalwale, but this is not question time.

**Sen. (Dr.) Khalwale:** Mr. Speaker, Sir, I am not introducing anything new. I am just requesting the Chair to direct that the Chairman comes back and tables the procurement process documents, the invoices and receipts. The Chair should direct further that the Chairman desists from hiding the embarrassment of the Executive by way of them avoiding to wait. We know that when you are connecting at Heathrow to go to the US, at times, you wait for eight hours. No one gets embarrassed. So, the issue of waiting for two hours to connect to another flight cannot be the reason not to give a comparative study. He must give us a comparative cost of the trip if we had used a commercial flight.

**Sen. Haji:** Mr. Speaker, Sir, I think we should---

**Sen. Mugo:** On a point of order, Mr. Speaker, Sir. Is it in order for Sen. (Dr.) Khalwale to mislead this House that while traveling to West Africa, we wait for two or three hours while we know that connections to West Africa do not exist and at times we even fly to France or to Italy or another country in Europe to connect to a country like Nigeria which is in Africa?

Is Sen. (Dr.) Khalwale in order to mislead this House?

**Sen. Dr. Khalwale:** Mr. Speaker, Sir---

**The Speaker** (Hon. Ethuro): Order, Sen. (Dr.) Khalwale! Who has asked you to respond?

Points of order are directed to the Chair. It is up to the Chair to ask that you respond or to say otherwise. Let the Chairman handle that matter.

**Sen. Haji:** Mr. Speaker, Sir, I think we should be a little bit more considerate and know that travelling alone as a passenger in a commercial flight is quite different from a Deputy President or for that matter a President travelling to another state. It would be embarrassing for any nation to see that a President has been delayed for six hours because he is using a commercial plane. So, I think it was quite in order for them to travel in a hired jet.

**Sen. Musila:** On a point of order, Mr. Speaker, Sir. I am seeking the indulgence of the House because I noticed that we very quickly moved to Order No.7 whereas in the

appendix, there were Motions whose notices were to be given. I was listed to give notice on Motion No.1(c).

**The Speaker** (Hon. Ethuro): Order, hon. Senators. While Sen. Musila had petitioned the Chair to allow this, I take great exception to his use of the word “quickly”. All the Orders were called out in a systematic manner. It is up to the Members who have Notices of Motions to stand up for the Chair to acknowledge them. When you sit, I may not be sure whether you want to proceed with the Motion or whether you have changed your mind. I will allow you, but demand that as you give your notice, you also apologise.

### NOTICES OF MOTIONS

**The Senate Majority Leader** (Sen. (Prof.) Kindiki): Mr. Speaker, Sir, I will comply and apologise for not standing at the appropriate time to give notice of this Motion. The reason for this is simple.

You have seen that the House is in some sort of turbulence because of circumstances which are known to everybody. This was not intended to interfere with the Business of today. Therefore, I apologise.

I beg to give notice of the following Motion.

#### REQUEST FOR ADVISORY OPINION FROM THE SUPREME COURT ON THE CONSTITUTIONALITY OF THE PROCESS FOLLOWED IN THE DISPOSAL OF THE DIVISION OF REVENUE BILL, 2013

THAT, aware that the Division of Revenue Bill, 2013 was assented to by the President on 11<sup>th</sup> June, 2013, convinced that the action of the National Assembly to reject or ignore the amendments passed by the Senate to the Division of Revenue Bill, 2013, on 23<sup>rd</sup> May, 2013 and resolve to forward the Bill to the President for assent without further reference to the Senate, is in contravention of the Constitution, the Senate resolves to request the Supreme Court to give an Advisory opinion on the constitutionality of the process followed in the disposal of the Division of Revenue Bill, 2013 and the appropriate way forward in the matter.

**The Speaker** (Hon. Ethuro): Hon. Senators, you will notice that this Motion was in yesterday's Order Paper. However, due to lack of quorum, we could not proceed. Therefore, I have directed that the Notice and the Motion, according to our Standing Orders, be prosecuted on the same day. This is also due to its urgency.

**Sen. Khaniri:** On a point of order, Mr. Speaker, Sir. I stand to seek your guidance on the Notice of Motion given by the Senate Majority Leader or by the Leader as we now refer to him. This is in pursuant to Standing Order No.90(1) which says;

“Subject to paragraph (5), no Senator shall refer to any particular matter that is *sub judice* or which, by the operation of any written law is secret.”

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I seek your guidance because we are all privy to the events that took place this morning. Most of us participated and lodged our plea to the Supreme Court. My worry is that it is very likely that we will stray into the subject matter of the issues we are seeking the Supreme Court to interpret for us. Therefore, I think that this Motion has been overtaken by events. I do not think we are adding any value to this. We made our plea to the Supreme Court. It is only fair that we wait for a ruling from the Supreme Court.

**Sen. Murkomen:** On a point of order, Mr. Speaker, Sir. While recognizing the concerns of Sen. Khaniri, I think it is important, for the record, that this House dispenses with this Notice of Motion or subsequently, the Motion itself. The objective here is to have it on the records of this House. We filed a case this morning and thereafter had a Press Conference where we restrained ourselves. Nothing stops these Members from restraining themselves in terms of their contributions to this issue. It is not even a must that we debate it for long. We can have about three contributions then we move on.

**The Speaker** (Hon. Ethuro): In addition to what Sen. Murkomen has stated, this Motion is not discussing the substance of the matter. This is actually a Procedural Motion, so that the Senate can have a resolution on the actions that we have been taken. So, speak to the process. In terms of whether you can stray, that is why we have a Chair. It is my job to make sure that you are within the determined path. So, be prepared for restraint if you have any illusions of overstepping.

*(Sen. Orenko stood up in his place)*

What is it Sen. Orenko?

**Sen. Orenko:** Mr. Speaker, Sir, just in agreement with what your comments are on this issue of the *sub judice* rule, I think that there is enough precedent. Even in the previous House, there was a substantive ruling that was given. Sen. Khaniri says if it is taken too far, then you may never even have to discuss issues that are legitimately before the Senate. Somebody may by mischief know that a matter is valid before the Senate and run to court and declare that the matter is *sub judice*. I think that there are fundamental rules that are applicable. So long as no prejudice is caused to the matter which is in contest in the court, you are not absolutely stopped from discussing an issue of this nature. But I know that you will guide us. I am just scared that if it is taken too far, then we may never have to discuss anything which is validly before the House.

**Sen. G.G. Kariuki:** On a point of order, Mr. Speaker, Sir. I think that what Sen. Khaniri said is very relevant to this matter. This Motion may not add value in terms of debate, but in terms of resolution, it will be taken as the property of the Senate. Since we all agree that the action that was taken is relevant, then I think that we should allow the Mover and Seconder and then put the Question. That is my humble suggestion.

**The Speaker** (Hon. Ethuro): Well said, Sen. G.G. Kariuki, except that this is a Notice. I am sure that the Members will observe your wise suggestions when the Motion itself is being prosecuted.

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AGREEMENT BETWEEN NATIONAL AND COUNTY GOVERNMENTS  
ON INFRASTRUCTURE DEVELOPMENT AND EQUIPPING  
OF EDUCATIONAL INSTITUTIONS

**Sen. Murkomen:** Mr. Speaker, Sir, just like the Senate Majority Leader initially said, I am also apologizing for not rising at the right time. I will be more honest and say that I am still in the learning process. Next time, I will be more cautious.

Mr. Speaker, Sir, I beg to give notice of the following Motion:-

THAT, recognizing that the respective functions and powers of national and county governments are provided for in Article 186 and the Fourth Schedule of the Constitution, and that under paragraphs 15, 16 and 17 of Part 1 of the Fourth Schedule, education policy, including promotion of sports, is a function of the national government; further recognizing that Article 187 of the Constitution provides for the transfer of functions and powers from one level of government to the other, particularly if the function or power can be more effectively performed by the receiving government; aware that Part III of the Intergovernmental Relations Act, 2012 requires that agreements on transfer of functions be in writing and Part III of the Transition to Devolved Government Act, 2012 recognizes the role of the Transition Authority in the transfer of functions; the Senate urges the national government to enter into agreement with county governments with a view to transferring resources, functions and powers relating to development of infrastructure and equipping of institutions of learning, at primary and secondary levels, to county governments.

PROVISION OF MOBILE TELEPHONE SERVICES IN  
MARGINALIZED AREAS

**Sen. Musila:** Mr. Speaker, Sir, I beg to give notice of the following Motion:-

THAT, aware that mobile telephone communication plays a major role in the social and economic development of any nation; acknowledging the positive role mobile telephone providers have played in providing communication and other related benefits to our country; noting with concern, however, that despite these efforts, mobile telephone penetration in Kenya still remains at less than 50%, which is a major constraint to development particularly in the rural areas; the Senate urges the National Government to provide a policy framework of partnership with private telephone network providers, to provide mobile telephone services to hitherto neglected parts of the country, and further urges all County Governments to provide budgets to supplement mobile telephone

providers to develop mobile telephone networks in areas deemed to be not economically viable with a view to ensuring that 100% mobile telephone penetration is attained in Kenya by the year 2017.

### MOTIONS

#### REQUEST FOR ADVISORY OPINION FROM THE SUPREME COURT ON THE CONSTITUTIONALITY OF THE PROCESS FOLLOWED IN THE DISPOSAL OF THE DIVISION OF REVENUE BILL, 2013

**The Senate Majority Leader** (Sen. (Prof.) Kindiki): Mr. Speaker, Sir, I beg to move the following Motion:-

THAT, aware that the Division of Revenue Bill, 2013 was assented to by the President on 11<sup>th</sup> June, 2013, convinced that the action of the National Assembly to reject or ignore the amendments passed by the Senate to the Division of Revenue Bill, 2013, on 23rd May, 2013 and resolve to forward the Bill to the President for assent without further reference to the Senate, is in contravention of the Constitution, the Senate resolves to request the Supreme Court to give an Advisory opinion on the constitutionality of the process followed in the disposal of the Division of Revenue Bill, 2013 and the appropriate way forward in the matter.

Mr. Speaker, Sir, given your direction just now, I think that this is fairly a procedural matter that is also constrained by the fact that part of the action in question has already happened and we are bound by certain traditions and legal constraints. It is only fair that this House resolves in a formal way that this position is the correct way of attending to this matter. All Senators here are aware of the subject matter of the Motion and that we have gone to the Supreme Court to find a legal way of interpreting the relevant parts of the Constitution and ours is not a contentious, but advisory matter. In other words, the court will be called upon to exercise its advisory opinion. In the circumstances, I just wish to say that it is only proper that the authorization of this House, in form of passing this Motion, be obtained as quickly as possible, so that we can move on to other business. I do not think that any Senator has any problems with this Motion.

Mr. Speaker, Sir, with those few remarks, I beg to move and request Sen. Elachi, the Majority Chief Whip to second this Motion.

**Sen. Elachi:** Mr. Speaker, Sir, I beg to second.

*(Question proposed)*

*(Several Senators stood up in their places)*

**The Speaker** (Hon. Ethuro): Order! Order, Senators! Where you need to stand is on a matter seeking leave of the House, so that we can count to determine whether the requisite number has been met.

On this one, if you wish the debate not to proceed and for the Question to be put, then you should all be seated.

**Hon. Senators:** Put the question!

*(Sen. Orengo stood up in his place)*

**The Speaker** (Hon. Ethuro): Obviously, just to confirm that while the majority want the Question to be put, there are two dissenting voices and they will be allowed.

What is it Sen. Orengo?

**Sen. Orengo:** On a point of order, Mr. Speaker, Sir. I think that I was really persuaded by what Sen. G.G. Kariuki said; that in as much as all of us would want to say something about this matter, I think that we are safer leaving the contest to be fought in court. Sen. Khaniri, I think, also had these concerns. So, without shutting the mouth of any of the Senators, I request that the Question be put and we move on to the next Order.

**The Speaker** (Hon. Ethuro): Sen. Orengo, this is a matter that the Chair can be unhelpful to you. You need to persuade your colleagues. I think that you have persuaded them.

Senators, before I put the Question, I need to confirm that this is not a matter affecting counties. This is a matter for the entire Senate.

I, therefore, wish to put the Question.

*(Question put and agreed to)*

ENACTMENT OF LAW TO REQUIRE PAYMENT  
OF ROYALTIES BY INVESTORS TO COUNTIES

THAT, aware that various counties in Kenya are endowed with natural resources such as oil deposits, wildlife, minerals, among others; appreciating that their capability to exploit and utilize the resources varies according to economic and technical potential; cognizant of the fact that under the devolved system of government, the county's role in the creation of national revenue is critical; concerned that there may be no direct and proportional share on the basis of the revenue that a county is able to generate since equitable sharing of revenue raised will be done by the national government; affirming the need for direct benefit from the proceeds of the said natural resources to the local communities, especially in marginalized counties; aware that imposition of tax by national or county government can only be by way of legislation and that only the

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national government can impose tax; the Senate urges the government to take immediate steps to initiate legislation, pursuant to Article 209 (2) of the Constitution, to require investors to pay at least 20 percent of their turnover as royalties to the respective counties where they operate so as to enable resources of specific counties to be directly utilized in the counties to address specific social needs and, thereby, act as an incentive for the said counties to optimize their capacity to raise revenue.

*(Sen. (Dr.) Zani on 22.5.2013)*

*(Resumption of Debate interrupted on 22.5.2013)*

**The Speaker** (Hon. Ethuro): Who was on the Floor last time? Hon. Senators, this Motion has a balance of 20 minutes. We had reached the stage of disposing of an amendment which had been proposed by Sen. Wamatangi. You appreciate that this is a Motion affecting counties. So, the voting to the amendment would be by County Delegations. Just to refresh your memory, the Motion as proposed by Sen. Wamatangi reads:-

“THAT the Motion be amended by deleting the word “Senate” in the 11<sup>th</sup> line and replacing thereof with the following words “resolves to establish a Select Committee to initiate legislation to require investors to pay a percentage of the turnover as royalties to the counties where they operate and to determine.

(a) the criteria to be used in payment of percentage of royalties by investors in the counties where the exploitation of natural resources occurs;

(b) how the revenue accrued will be utilized by the country and the counties;

(c) any other relevant issue that may arise in regard to other existing legislation.

The Committee shall comprise the following Senators:-

Sen. Peter ole Mositet

Sen. Peter Kimani Njoroge Wamatangi

Sen. Danson Mwazo

Sen. Boy Juma Boy

Sen. (Prof.) Anyang’-Nyong’o

Sen. (Prof.) John Lonyangapuo

Sen. Catherine Mukiite

Sen. Lisa Chelule

Sen. (Dr.) Agnes Zani, and

Sen. Stephen Sang.

*(Sen. Murkomen stood up in his place)*

Order! Sen. Murkomen, are you on a point of order?

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**Sen. Murkomen:** Mr. Speaker, Sir, there are counties where this question of natural resources is very dear and some Senators had expressed to be part and parcel of this Committee. They include Sen. Obure from Kisii County, Sen. Murkomen from Elgeyo-Marakwet County and Sen. (Dr) Machage from Migori County. I do not know why the Senator from Trans Nzoia is raising his hands. That is, Sen. Ole Ndiema and Sen. Chiaba from Lamu. The Mover of this Motion has no objection to the addition of those names. So, the names could be added to be part and parcel of what we are going to vote for in the amendment. You could give direction on that.

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

**The Speaker** (Hon. Ethuro): Sen. Hassan, I was consulting to determine the stage in which the matter had reached.

**Sen. Hassan:** Mr. Speaker, Sir, I am not particularly sure of the order, but the Clerk can advise us. I know that when names are tabled in Parliament or on the Floor of the House, there is a Standing Order that says you either accept the names in total or you reject them in total. You cannot start to amend by including names. So, the decision that can be taken is to stay the adoption of this report or this standing committee, so that the House Business Committee can regenerate the names afresh and bring them here.

**Sen. Murkomen:** On a point of order, Mr. Speaker, Sir. The names do not come from the House Business Committee. It was an amendment on the Floor of the House. So, it has nothing to do with clearance in any other institution.

**Sen. Kivuti:** On a point of order, Mr. Speaker, Sir. I would like to know if the Committee on Natural Resources should not be seized of this matter.

**Sen. (Dr.) Machage:** On a point of order, Mr. Speaker, Sir. Sen. Murkomen's view is highly acceptable to most of us. Would I be in order to request him to move an amendment on the amendment to change the list of names tabled?

**The Speaker** (Hon. Ethuro): Order, Senators. This matter is fairly straight forward. This is one amendment. If we make many amendments to amendments, I think the Standing Orders are very clear. As long as the amendments do not alter the substance of the original Motion or even the further amendments to other amendments should not alter the intention of that particular amendment. This particular amendment being sought, although we shall come to it later because there is no amendment, we are talking about an amendment in the air. This House has rules; it is not for the Chair to amend or to provide amendments. It is up to you to come up with your own amendments as you have indicated. You do not even need to indicate to the Plenary. You just propose, you write, let the Clerks-at-the-Table look at it to make sure the language is fine then it comes to the Chair for approval. Then the Chair will give you the opportunity when you rise to contribute in order to now start with the proposed amendment. That is the procedure to follow, Sen. Murkomen, if you are keen on the matter. That is for the benefit of Sen. Hassan, Sen. (Dr.) Machage and Sen. Kivuti.

Our Standing Orders are very clear on the mandate of Committees. You are at liberty to look at a particular matter because this Motion will not stop you. That should

also not affect the Motion on its own merit. So, we will proceed on this Motion and you should be at liberty to consider whatever issues that will be canvassed in this particular Motion. I have consulted because we had postponed the Motion to another day for purposes of voting, but since I have not put the Question, you still have a bit of time to dispense with that amendment. So, if the amendment is ready then you can contribute to it without spending a lot of time on it because we are running out of time for the Motion itself to be concluded.

*[The Speaker (Hon. Ethuro) left the Chair]*

*[The Temporary Speaker (Sen. Ongoro) took the Chair]*

**The Temporary Speaker** (Sen. Ongoro): Order, Senators. I call upon Sen. (Dr.) Machage to move his further amendments.

**Sen. (Dr.) Machage:** Madam Temporary Speaker, in view of the importance of management of resources in Kenya and taking cognizance of the fact that Sen. Wamatangi had wisely thought of having a committee to manage the legislative matters on this issue, and he did submit a few names, I beg the Chair to allow me to move an amendment on Sen. Wamatangi's amendment.

I beg to move:-

THAT the names proposed do also include the following names:-

1. Sen. Musila
2. Sen. Obure
3. Sen. (Dr.) Machage
4. Sen. Murkomen
5. Sen. Ole Ndiema
6. Sen. Wako
7. Sen. Hassan.

I beg to move and request Sen. Murkomen to second.

**Sen. Murkomen:** Madam Temporary Speaker, I second.

*(Question of the further amendment to the amendment proposed)*

**The Temporary Speaker** (Sen. Ongoro): Hon. Senators, you are aware that this Motion affects counties, so voting will be by delegations. The names will be read to you and you will affirm whether you support or not. Can you ring the Division Bell for eight minutes?

**Sen. Murkomen:** On a point of order, Madam Temporary Speaker. When I came here, I said that I was still learning, but I think we are mixed up. What are we voting for?

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**The Temporary Speaker** (Sen. Ongoro): The further amendment on the amendment.

**Sen. Murkomen:** But we had not disposed of the first amendment.

**The Temporary Speaker** (Sen. Ongoro): It is procedural that we have to dispose of the amendment to the amendment before we deal with amendment.

**Sen. Murkomen:** Thank you, Madam Temporary Speaker. I have learnt.

**The Temporary Speaker** (Sen. Ongoro): Can the Division Bell be rung because we are running out of time?

**Sen. (Dr.) Machage:** On a point of order, Madam Temporary Speaker. Under Standing Order No.53, would I be in order to request that the numbers of the Senators be authenticated to meet the threshold to proceed to vote?

**The Temporary Speaker** (Sen. Ongoro): We shall ring the Division Bell first and then we will ascertain. Could the Division Bell be rung? Meanwhile, could we get two tellers; one for the Ayes and the other for the Noes?

*(The Division bell was rung)*

## DIVISION

### ROLL CALL VOTING

**The Temporary Speaker** (Sen. Ongoro): Order, hon. Senators! The Division Bell has been rung. We will now move to vote.

**Sen. (Dr.) Zani:** On a point of order, Madam Temporary Speaker. I stand on a point of order following the request by Sen. (Dr.) Machage with regard to Standing Order No.51(3)

“Despite paragraph (2), the Speaker may, on the request of a Senator, defer the putting of the question to the following day in which case the Speaker shall thereupon nominate a time at which the question shall be put.”

I stand to request that the Question be put on Tuesday, 18<sup>th</sup>, June, at about 3.00 pm due to lack of adequate quorum at this moment.

**Sen. (Dr.) Machage:** Madam Temporary Speaker, as I support the point proposed by Sen. (Dr.) Zani, I will also refer to Standing Order No. 56 which also specifically talks about quorum and this is a request we pray that the Chair will consider.

**The Temporary Speaker** (Sen. Ongoro): Hon. Senators, I have made reference to the Standing Orders. That request is granted. We will defer putting of the question to Tuesday, 18<sup>th</sup> at 3.00 pm.

*(Deferment of Voting by Delegations on the Question of the amendment)*

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ESTABLISHMENT OF SELECT COMMITTEE TO INQUIRE INTO EXISTING  
LEGISLATION AFFECTING FUNCTIONS OF COUNTY GOVERNMENTS

**Sen. Orengo:** Madam Temporary Speaker, I want to move this Motion subject to permission being granted by the Speaker under Standing Order No.46 which reads as follows:

“The Speaker may permit a Senator to move in an amended form a Motion of which notice has been given if in the opinion of the Speaker the amendment does not materially alter any principle embodied in the Motion of which notice has been given.”

Subject to your permission, I will move as follows. However, before I proceed to move the Motion, I have to read out the Motion so that you see if the amendment materially alters the spirit and the substance of the Motion.

I beg to move:-

THAT, knowing that Section 17 of the Sixth Schedule to the Constitution requires the national government to restructure the system of administration commonly known as the “Provincial Administration” to accord with and respect the system of devolved government established in the Constitution; noting that the Provincial Administration continues to operate in circumstances that have affected the exercise of certain functions and operations of the county governments; appreciating the doubts about the constitutionality of offices linked with the Provincial Administration including provincial, regional and county commissioners, as established and deemed to be part of the national government; the Senate resolves to establish a select committee comprising the following Senators to inquire into all existing legislation that may undermine the authority, mandate and functions of the county governments and draft appropriate legislation for enactment by Parliament.

Madam Temporary Speaker, on that last line, I am deleting the words, “with the aim of drafting” and simply saying, “draft appropriate legislation by Parliament.”

The names of the Senators to comprise the Committee include;

1. Sen. James Orengo
2. Sen. Beth Mugo
3. Sen. Moses Wetang'ula
4. Sen. Kindiki Kithure
5. Sen. Murkomen Kipchumba
6. Sen. Amos Wako
7. Sen. Hassan Omar
8. Sen. Judith Sijeny
9. Sen. Kiraitu Murungi
10. Sen. Otieno Kajwang

11. Sen. (Dr.) Agnes Zani
12. Sen. Dullo Fatuma
13. Sen. David Musila
14. Sen. Lesuuda Naisula
15. Sen. Boni Khalwale

I will also leave out the Chair and the Vice Chair to be determined by the Committee.

First of all, I want to make it very clear, from the outset that this Motion is not about abolishing the system of government known as the Provincial Administration. It is simply to inquire into all existing legislation including the legislation affecting the Provincial Administration to ensure that it complies and accords with the system of devolved governments as presently constituted under the Constitution.

I also want to say right at the outset that this exercise will not be limited to legislation relating to Provincial Administration as I will show subsequently as I move the Motion but all existing legislation particularly in the law and order sector--- I will demonstrate how all these are not in accord with the devolved system of government.

I will pose there before I go any further to see if I have permission to proceed with the Motion as amended under Standing Order No.46 and whether those amendments alter or depart from the substance and spirit of the Motion.

**The Temporary Speaker** (Sen. Ongoro): Hon. (Sen.) Orengo, you are now speaking for me. I have listened to your request and, in my opinion; the proposed amendment does not materially alter the principles of this Motion. So, we can proceed.

**Sen. Orengo:** Thank you, Madam Temporary Speaker. The other time, I was looking at what other legislation exists which affects the system of devolved governments. To begin with, on matters of public administration and security, there is a whole cocktail of statutes that if not looked into and reviewed or amendments made to them, we will enter into a system where the Provincial Administration, particularly governors and county assemblies, will experience difficulties in governing counties.

For example, under the law relating to liquor licensing, if you look at the Constitution, the authority of the county governments includes this kind of licensing. If you go into that Act, you will find that the process is under the District Commissioners. If you want a liquor licence, you have to apply to the District Commissioner. If you want to appear before a tribunal established under that Act, the Tribunal is presided over by the District Commissioner and yet under the Schedule, issues relating to liquor licensing fall under the county governments.

In fact, I was looking at the Schedule of the Constitution, page 187, you will find that on cultural activities, public entertainment and public amenities, there is a whole lot of responsibilities which now fall under the county governments. These include betting, casinos, and forms of gambling, cinemas, video shows and museums.

All those fall under the system of devolved governments meaning that the county assemblies will make legislation. If they make legislation at the county level which is not in sync with the national legislation then there will be a conflict. I know that the

Constitution has a basis of how to address conflicts between national legislation and legislation of the county assemblies. However, that conflict will lead to a lot of anarchy in issues relating to county governments and the operations of the county governments and the operations of the governors.

If you look at the Chiefs' Act under the current dispensation, we have the National Coordination Act which recognizes some of these offices. I know that there is an attempt, at the very last minute, to try and have a mechanism for the national government to have government agencies at the county level. However, if you look at that law carefully, you will see that it does not address the question that the Constitution wants us to address; of restricting the system of government known as the Provincial Administration to accord with the current system of devolved government.

Madam Temporary Speaker, the worst area we will find a lot of legislation that concerns county governments is in the field of agriculture and animal husbandry. There are about 67 pieces of legislation affecting the agricultural sector and the livestock sector. If you look at those statutes, you will find that there are certain offices that will deal with these matters under the current law. If they are not amended, it will not be possible for the county governments to carry out their roles as required under the Constitution. You may find that if the national government is generous, it may have the money but under the law, there is no mechanism at the local level to ensure that the roles of the national government are carried out in a manner that accords with the spirit and content of the Constitution.

I was in charge of the lands sector until a few months ago. Under the law, at least, the Land Act and the Land Commission Act provided for a mechanism that accords the governors, under the system of devolved governments, responsibilities to appoint Division of Land Boards. There are other numerous issues that relate to land. Under the current Constitution, the definition of land includes the water mass which includes rivers and lakes; all that is land. So, if there is a river, lake or even a forest that is categorized as belonging to the counties, that is also land. If that legislation is not looked into properly and brought in sync with the system of devolved governments, you may as well find that the law is there, the governors are there but because there are many legislations in existence, the operations of the county governments will be affected.

One of the tasks that were undertaken when Kenya became independent was the exercise to try and review the ordinances that existed at that time, to make sure that they conformed to the new Constitution. This was undertaken at that time by the Office of Attorney General. But it had to be done in an expeditious manner to ensure that the new system of government was operational.

Madam Temporary Speaker, all that I am trying to say is that we need to inquire and review this cocktail of legislations to bring them in sync, so that the authority of the system of devolved government is not compromised, especially on very simple things like, for example, in the area of Provincial Administration. I went to a national day in Siaya during the last Madaraka Day and, again, the supremacy battles were there at the

occasion between the County Commissioner and the Governor. Of course, the County Commissioner was in control of all the departments of Government, as they are at the moment. When the County Commissioner was introducing his team, the Agricultural Officer and Livestock Officer were part of his team. In contradistinction to the commissioner, the Governor basically had the assemblers and three or four officers who operate around him. But at that Madaraka Day celebration was just the entire machinery or face of national Government, not because it was a desire that it be so, but because the laws that are in existence and the way they operate, these officers have still to answer to the County Commissioner. I was very happy, at least, with my Governor, because when he was reading his speech and got thirsty, he insisted that the County Commissioner must open the bottle of water for him, which the County Commissioner, without realizing what he was doing, opened. As the Governor was drinking the water, he told the crowd:-

“You see, I wanted to tell you that between me and him, I am the principal party.” They actually made the County Commissioner stand there as he was making the speech, because the crowd, of course, was very much with the Governor.

Madam Temporary Speaker, there are some people who may be raising a lot of concerns that there is something else behind this Motion and that probably we want to drastically deal with the issue of the Provincial Administration and do away with it. But I have read the Constitution very well and know what its command and directive is; “that it should be restructured in order to conform.” That is not just for the Provincial Administration. The Constitution requires that in making any law or policy at any level; either the national or county level, you must put into perspective the system of devolved government. I am sure that those who were with me in the Cabinet Committee of the last Government, dealing with legislation, know that one of the checkpoints – because there was a checklist of what has to be contained in every legislation – was to ensure that, that system accorded with the system of devolved government. One of the good examples was the Police Act. This is because you will find in that legislation the chair of the County Police Authority is the Governor, to make sure that there is a linkage between the operations of the police and the county government.

Madam Temporary Speaker, there are so many other examples that one would want to give, including even the Water Act. You will find that the Water Act, in many respects, still exists on the basis that this is the function of the national Government, yet, under the Constitution, it is not.

Madam Temporary Speaker, I also want to assure Senators that this is not to derogate or compromise the good work which is being done by the Committee on Legal Affairs and Human Rights. But there has been such Sessional Committees established by previous Parliaments to look into specific questions, because the Departmental Committee on Legal Affairs and Human Rights has several functions which include oversight, for the period of the tenure of this Parliament. But when it comes to legislation of this nature, where we want the Senate to act expeditiously and ensure that the counties are protected, without prejudice to the operations of the national Government, I plead

with the Senators that this particular Committee will come out with this draft legislation for enactment. That will enable the Senate to proceed to protect the counties, as we have shown in the last two weeks or so.

Madam Temporary Speaker, as far as the names are concerned, they are not cast in stone. If anybody feels that there should be additions or deletions, I would encourage Senators to do so.

Madam Temporary Speaker, without any further ado, I beg to move and request my very able learned friend and colleague, Sen. Kiraitu Murungi, to second.

**Sen. Murungi:** Thank you, Madam Temporary Speaker. I rise to second this very important Motion. As is now well known, this Senate is taking the issue of devolution very seriously. We are guided by principles of constitutionalism and the rule of law.

Madam Temporary Speaker, what the Motion seeks to do is to establish a special purpose vehicle to review all the laws which might stand in the way or hinder the smooth implementation of devolution in this country. It is our duty, as the Senate, to make sure that this review is done.

Madam Temporary Speaker, we must commend the Speaker of the Senate for the case that he filed in the Supreme Court, to emphasize the fact that the principles enshrined in our Constitution must be taken seriously by all the organs of State. It is in that spirit that we should also move with speed to ensure that all the laws are also put in line with the new Constitution. Those of us who were there then will remember that after the repeal of Section 2A in 1992, there remained a lot of colonial and one-party authoritarian rules, which made it impossible for us to enjoy the democratic space brought about by the move from one party rule to the multiparty system of Government. It was impossible for us to hold meetings in this country because of the Public Order Act. It was very difficult for us to move because of the Chiefs' Authority Act. It took us five years to review those laws and remove them, so that Kenyans could enjoy freedom, which was guaranteed as a result of the repeal of Section 2A.

Madam Temporary Speaker, we are exactly in the same position. The fact that there are some general provisions in the Constitution recognizing devolution does not mean that devolution is going to happen. There are so many laws in this country which do not recognize the governors and the Senate. There are many laws in this country which reflect the mentality and structures of the previous Government. So long as those laws are in place, it will not be possible for us to have devolution and decentralization of power and resources in this country. My learned friend, James Orengo, has talked about a few of them, but there are many others. For instance, the Chiefs' Act now gives the chiefs power to manage the environment within the locations. There is no law which authorizes the Governor or Cabinet Secretary for Environment in the county government to do anything with the environment. All they have is a piece of paper appointing them to be in charge of that docket. But when they go to the ground, they will find that the person with the legal authority to deal with environmental issues is the chief. So, we have to amend

the Chiefs' Act, so that the Cabinet Secretary can have space to issue orders regarding environmental degradation within the county.

Madam Temporary Speaker, all the laws recognize Ministers as the implementing authorities, and these are not Ministers in the county government. These are the Ministers of the national Government. Any law that you talk about – the Agriculture Act, Mining Act, and Forests Act – go back to the Minister as the implementing authority. Unless those laws are amended, the governors are merely going to implement indirect rule. This is because they will have to look for Ministers to issue orders since there is no law authorizing them to issue those orders.

Madam Temporary Speaker, the parastatal system in the country is what is governing the economy. We have parastatals virtually for everything. There is even a Pineapple Authority in this country. But those parastatal authorities do not recognize the new system of government but the Minister. There is a need for us to review all the parastatal laws - and they are more than 150 of them in this country – for us to be able to empower the county governments to perform those economic tasks within the counties. Regarding issues of licences and all that, there are no specific laws which give governors powers to remove the trade licences. There will be the Licensing Act and the authority is the Minister. So, if we are devolving that power to the county government, then we have to give that power from the national Minister to the county Minister. Therefore, the Motion which has been brought by my learned friend here is a very critical Motion for implementation to take place.

Madam Temporary Speaker, when we talk about devolution, we must be aware that they are just like our counter-revolutionaries in the past. There are counter-devolutionaries within the system, and they will give us a lot of problems.

Madam Temporary Speaker, we have to arrange so that we have a protracted struggle against those counter-devolutionaries within the system, the so-called “centralists”. They are not going to make it easy for us. I remember when we appointed the Minister for Nairobi Metropolitan Development and the President gave a circular giving powers to him to do so many things here, he was not able to move because all the powers were vested in the Minister for Local Government. So, the Minister sat in an office in KICC here but decisions were being made from the Old Jogoo House. Apart from flying the chopper which the later Mutula Kilonzo flew a few days over Nairobi, he was not able to do anything because of obstruction by the Local Government Act. Our own governors will face similar problems because in public, we are saying that they are very powerful, they can do this or that but real power is vested in the laws and regulations.

I am aware right now that there is no speaker of the county assemblies anywhere in the Republic who has security; whether in their cars or in their homes but the District Commissioners (DCs) and District Officers (DOs) have Administration Police Officers guarding them for 24 hours. When I inquired, I was shown a circular showing the people to be provided with security. That circular did not include the speakers of the county

assemblies. That circular was issued following a certain law. Unless these circulars are amended, we are not going to get any security for our county speakers. When we say that we have to amend all the laws and administrative measures that weaken the implementation of devolution, that matter should be taken seriously. These special purpose vehicles should be formed as a matter of urgency. We know we do have the Committee on Legal Affairs and Human Rights but that Committee will be having other business. We need a committee which does nothing else but look at all these laws with the necessary expertise even from outside the Senate so that we can have a report. We are talking about more than 500 laws and we need to read all of them and see how we can strengthen the devolution system.

With those few remarks, I beg to second.

*(Question proposed)*

**Sen. Hassan:** Madam Temporary Speaker, I rise to support this Motion by Sen. Orendo. First and foremost, I would like to applaud Sen. Orendo for his credentials in the democratic struggle of this country. I do believe that this Motion tends to complete the democratization of Kenya. If you look at it critically, in Kenya, the suffocation of democratic space was largely a function of the Provincial Administration. Any government with a temptation to ensure that they protect the structure of the Provincial Administration in its current state is a government that is bent on undoing the gains of democracy in this country. Therefore, our democracy and constitutionalism is directly intertwined to the fact that the provincial administration must be restructured and reformed to conform to the new democratic aspirations of the Kenyan people. It is not in context that the temptation was an almost intact Provincial Administration by governments to ascertain controls that go in excess of the Constitution. We know for a very long time that chiefs, DOs, DCs and Provincial Commissioners (PCs) have been used for extra-constitutional enforcement of other issues that might not necessarily meet the test of constitutionality. The fact that this Motion was proposed by Sen. Orendo and then seconded by Sen. Murungi is testament to the fact that this is a Motion that comes from people who over the last couple of years demonstrated to be men who care to give this country the Constitution that matters and to deliver the promise of a new nationhood. Therefore, I come as one of their friends, who admired them greatly, to support this Motion because it properly tries to capture the spirit of our devolution.

Madam Temporary Speaker, right now, it is no longer in doubt in this country that devolution is under threat. Constant systematic actions by the Government have demonstrated that given the opportunity, they will defeat the creed of devolution. That is why we have today decided to move in the manner that we have done as a Senate. We have decided that we needed to amend the Constitution to strengthen the role of the Senate. Therefore, inevitably we must amend all existing legislation to ensure that the

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role of devolution is protected and the mandate of devolved units are secured and not in competition or in conflict with the Provincial Administration.

A couple of years back when this Constitution was promulgated, I had the radical view that the restructuring of the Provincial Administration could as well mean the abolishment of the Provincial Administration. At that point in time, those of us who were charged with the responsibility of protecting Kenya's human rights believed that there was a direct correlation between the excessive government manifest to the Provincial Administration, the police and other organs of the central government towards the abrogation of fundamental rights and freedom. I got to a point where I believed that we could restructure the Provincial Administration and keep part of its structure to allow certain limited functions in terms of enforcement of national government policies but that only will depend on the conduct of county commissioners as currently is. If they misbehave, it will become the incentive of this Select Committee to continue to propose radical legislation that fundamentally changes the nature and character of this arrangement.

Therefore, I think this Motion is also a red card or a warning shot to the provincial administrators, whatever the form of organization they are in, whether it is county commissioners, regional commissioners sitting in Nairobi, DC, DO or chief, they must be aware that the ground has shifted especially the constitutional ground. Therefore, if they conduct themselves improperly to the aspirations of our current Constitution, then we shall render them incapable of the discharge of the new mandate under the Constitution and therefore abolish some of these offices.

That said and done, I think a myriad of legislations in this country need audit. There is a lot of legislation that was done in successive parliaments that was authoritarian and not in the interest of this country, that defeated the citizen participation, defeated democratic participation and therefore the need for us to bring every legislation in this country in conformity with the new Constitution and in conformity with the aspirations of the Kenyan people.

As suggested, this Select Committee draws part of the great diversity of our rich capacity as Senators. These include constitutional lawyers, Attorney-General *Emeritus* and other people who have distinguished themselves in the democratic discourse of this country. Therefore, it has the requisite membership that can align our entire legal framework to meet the aspirations of the Constitution so that we are able to facilitate county aspirations to discharge the county governments under the governorships and under our Constitution to facilitate and allow them to deliver on the mandate and the promise of devolution.

Madam Temporary Speaker, we are not lost to the fact that this legislation, as much as might appear few in terms of the perking order, I think we might need a reloaded. Therefore, the inclusion of the Attorney-General by Sen. Orenge exudes wisdom because Sen. Wako knows where he hid all these clauses. So, I think he will help us in a proper manner so as to ensure that we locate these particular oppressing



provisions of the law for this Senate to amend, abolish and even repeal. So the inclusion of the former Attorney-General even in his capacity as the Chair of the Committee on Legal Affairs and Human Rights is an important inclusion so that we can drive this process forward. Then I see those who have been victims to the Provincial Administration; Sen. Orendo himself being one, Sen. Murungi being a victim of the Provincial Administration and even Sen. (Dr.) Khalwale. So, we have a rich diversity. There is also Sen. Musila. I think I want to appreciate the wisdom of Sen. Orendo in coming up with these names. Sen. Musila himself was a provincial administrator. He will tell us what it is now that we need to amend. Sen. (Prof.) Kindiki and Mr. Murkomen are scholars. So, we will be able to sieve through this legislative process to be able to amend the law.

Madam Temporary Speaker, as I draw to a close, this Committee in the discharge of its functions must hear broadly from the contributions of county governors and county speakers because they will tell us at this point in time where they actually do feel that there has been an impediment or an obstacle towards the implementation of devolution. Our county speakers and county governors have articulated time and again that the Provincial Administration has continued to lord over responsibilities that are properly now the functions and mandate of the county governments. Therefore, it is this Committee that shall set itself within a given timeframe, it not being a standing committee of the Senate, must allocate itself a definite timeframe so that a wish list of amendments is presented on the Floor of this House.

Therefore, we need to ensure that in the next five or six months, this Committee has done a full audit of every legislation that impacts on the management of our new devolved structures of Government and be able to make the necessary amendments to abolish or repeal part of that legislation. I just want to commend this Motion because it is here properly and in good faith. It gives us a vehicle upon which this Senate can assert its real mandate as the defender of devolution and set itself on a path to audit existing legislation so that it is brought in conformity with the provisions of the Constitution and the aspirations of the Kenyan people. So, I want to commend Sen. Orendo. Inside and outside this House, we must now lobby to ensure that the Motion is passed and ensure its full implementation.

Thank you.

**The Temporary Speaker** (Sen. Orendo): Senator Janet.

**Sen. Orendo:** Thank you, Madam Temporary Speaker, for giving me this opportunity to support---

*(Loud consultations)*

**The Temporary Speaker** (Sen. Orendo): Order, Senators! Let us hear Sen. Orendo.

**Sen. Orendo:** Thank you, Temporary Speaker, for coming to my rescue.

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Madam Temporary Speaker, first of all, I would like to congratulate Sen. Orengo and Sen. Kiraitu Murungi. I would like it to be noted in this House that these were the “young Turks” who brought us the Second Liberation to this country and were instrumental in ensuring that we had a new Constitution. Of course, not forgetting that the new Constitution brought to us great benefits, including our “baby”; devolution.

Madam Temporary Speaker, this Motion has come at the most appropriate time in the history of this nation, because today, more than ever, we are faced with an “elephant” in the House, and this “elephant” is the provincial administration. We have to come up with a way in which we can deal with the provincial administration so that we do not have a duplication of tasks in the counties.

Madam Temporary Speaker, as you are aware, right now, there is a real concern in this country as to what are the roles of the Provincial Administration, whether at the county level or at the provincial level, *vis-a-vis* the county assembly and the governors. Therefore, apart from these legislations being consolidated, I am sure it will be an ease on the burden which has been laid on the taxpayers because currently, there is a duplication of roles and functions and, therefore, with that, it means that there is duplication in terms of how we are paying money from our Treasury kitty.

Madam Temporary Speaker, I am very sure that this Motion, if passed by this House and when the appropriate legislations are looked into, it will entrench devolution firmly in the hands of the county assemblies, where we want it to be in the counties. As you are aware, more than ever now, our “baby,” devolution – which is only three months old – and who we are still “breastfeeding” has been under attack. I am very sure that if these legislations are amended and/or consolidated, the mischief that the central Government sometimes plays – like we recently saw the mischief that happened where a certain Bill was unconstitutionally signed into law – will be avoided in the future.

Finally, Madam Temporary Speaker, the men and women who have been proposed in this Select Committee are people who have made outstanding contributions in society. We know them as people who are respected legislators; they are men and women with a wealth of knowledge, and I am very sure that if they are given this task, they will bring us credible legislation that will easily pass in both Houses.

I thank you, Madam Temporary Speaker, and I beg to support.

*(Applause)*

**The Temporary Speaker** (Sen. Ongoro): Senator (Prof.) Anyang-Nyong!

**Sen. (Prof.) Anyang’-Nyong’o:** Thank you, Madam Temporary Speaker. Like my colleagues who have contributed to this Motion, I stand to support. I support it for three reasons; one, somewhere in the Constitution, it is said that, that thing which is called the Provincial Administration shall be restructured. The wording here is “shall be restructured”. There is no option about it. But restructuring the Provincial Administration does not simply mean just taking Provincial Commissioners (PCs) from the provinces

and bringing them to the President's Office. That is not restructuring. Restructuring means that the very rules of the game that establish certain offices must be changed, because the structure of a state is given by the legal framework that establishes that state. So, in this regard, what Sen. Orengo and his team are trying to do or are intending to do is to create this legal order that will restructure the Provincial Administration. That is very important. You cannot restructure that Provincial Administration if you do not deal with the legal order that existed before it. The pretense that we can do a kind of a little game of just moving personnel will not help.

Secondly, Madam Temporary Speaker, we must understand that we should not devolve the bad manners of the authoritarian regime through the counties. By the bad manners of the authoritarian regime, I mean the kind of rules and instruments developed for over 50 years, because one of the reasons we have so many laws is because for every action of the state that was intended to meet certain interests, laws were passed. You have seen Sen. Kiraitu Murungi say here this afternoon that we have as many parastatals as there are plants or crops to be looked after. Specifically, when somebody wanted to focus on a certain commodity, they created a law and an institution called a parastatal, and within the framework of that parastatal, the law could actually tell you who was interested in establishing that parastatal.

Madam Temporary Speaker, I will give an example. When I was the Minister for Medical Services, one of the parastatals under me was the Moi Teaching and Referral Hospital. This is the only parastatal where the President appointed the chairman as well as the Chief Executive Officer (CEO). In other parastatals, the President only appoints the chairman and the CEO is appointed by the Minister. But the Moi Teaching and Referral Hospital was done that way because of the specific interests that wanted it to exist and the specific powers that wanted certain appointment roles in there. So, we cannot come into the era of devolution and the new Constitution and leave these laws intact. Otherwise, the restructuring of the thing so-called the Provincial Administration will not have taken place.

The third thing I want to say, Madam Temporary Speaker – which is extremely important – is that, devolution means that we are creating systems of government that will allow popular participation in the process of governance. In other words, allow people's participation in that process. People cannot participate in local governance under institutions, laws and regulations that are taken from an authoritarian regime; it is a contradiction in terms. That is why in this process of restructuring the provincial administration, we must create laws and regulations at the local level that will enable popular participation in the process of governance. That means – and I would urge the people going to this Committee to take this very seriously – in the urban areas at the very local level, neighborhood councils must be the fundamental structure of government. In the rural areas, village assemblies – where people meet to discuss affairs of the village – must be the very primary structure of governance in the local areas.

In that regard, Madam Temporary Speaker, we cannot continue using such names or nomenclature like chiefs and the assistant chiefs. The word “chief” is very authoritarian. When you are a chief, you are not expected to be questioned; when you are a chief, you sit on a throne. Therefore, even the concept of the word “chief” to be used when talking about local administrators after independence was a big contradiction because the colonial regime needed chiefs as authoritarian characters in the rural areas to lord it over the people. Then we got Independence and we are still using the same words; chief and assistant chief. Obviously, what we experienced during the struggle for multiparty democracy demonstrated who exactly these people were. These people could come to a meeting and just take the microphone from a Member of Parliament, who was popularly elected by the people. This is precisely because to them, the idea of being popularly elected was antithetical to their rule as authoritarian characters at those local levels. So, I think in this process of restructuring the Provincial Administration, all these concepts, nomenclature, names and so on, will have to change so that we really give character to what is new to the very essence of devolution; in other words, giving power to the people. Those who were there in charge of administration cannot bear titles like chief or District Officer; no, I think they should have much more friendly, people oriented titles; like I have seen we are going to have ward administrators. This means you are administering something; you are a technical person and, therefore, you will look for elected people to discuss with them what you do. Therefore, in framing these new laws, these are some of the things that will have to be looked into; the character of the new political culture that must be encouraged in our system of government.

Finally, Madam Temporary Speaker, one of the reasons why I really support this Motion is because good governance does not mean that you have too many laws; good governance means that you have good enough laws which are accessible to the people. Now, if you look at our system, it is intimidating enough to have all of them like this, but you are wondering whether each of them is necessary. So, in looking at all these laws which have come up over time just to terrorize people and just to make the state look mystified and mythical, the state is kind of venerated to be such a complicated instrument that its power must be hidden in so many laws which are inaccessible to people. Of course, that gives jobs to lawyers, definitely – I mean, I understand – but really, when you are coming to democratizing society, we must also democratize the legal system and make it accessible to the people. This is demonstrated very well; the other time I went to attend this Madaraka Day and, quite honestly, it was embarrassing because we have all kind of an array of officials. What embarrassed me was that in the front row to the right of the governor, there were all these people in uniform, *kofias* and everything else and the popularly elected people were sitting behind. In other words, the Provincial Administration has not been restructured so that these servants of the people should be sitting back, serving the people; and the people elected by the people should be sitting in front, representing the people. So, that is why I felt necessary that we, as Senators, should

have come up with a law regulating even the character of national ceremonies to represent the new political culture that is participatory and democratic.

With those few words, Madam Temporary Speaker, I beg to support.

**The Temporary Speaker** (Sen. Ongoro): Senator (Dr.) Machage.

**Sen. (Dr.) Machage:** Thank you, Madam Temporary Speaker. As I support this Motion as put forward to us and amended thereafter by Sen. James Orengo, I would like to remind the House that, actually, it is not only the House that has seen these issues; even members of the public have started complaining. Today we had a petition by Ms. Wanjiru Gikonyo, actually complaining about the unconstitutionality of the National Government Co-ordination Act, 2013. Like I put it, and I quote a Swahili phrase, “*Majuto ni mjukuu*,” these are not issues that are being looked at today. I remember at one time when we were looking at the draft, I opposed the draft vehemently so because I saw a lot of lacunae, a lot of loopholes for abuse; a lot of inefficiencies and deficiencies.

At one time, I was bold enough to pick on a Government Policy Paper on Lands; to be more explicit, Sessional Paper No.3 on the National Lands Policy of, I think, 2008. I think it is part 63.3.2. Check on that; I may have forgotten a little. But that was Sessional Paper No.3 on the National Lands Policy, which was talking about addressing historical injustices from 1895, just because that is when Kenya became a British protectorate. Then I questioned myself loudly; who was living where in 1895? Then, who will come out, really, using the legal procedures that we are now putting in place to actually begin demanding land of ancestral existence from 1895? Of course, I was accused of hate speech and I was thrown in for saying the truth and interpreting a national policy paper. That is exactly what is happening; the draconian legislation that we see now was planned, and intended to be. I am not surprised!

We are now talking about our midwifed baby that was born; it is hardly three months old and the baby is being strangled. These things were written in black and white right in our Constitution! We forgot that the law is like a scorpion, you have to check not only where the head is, but also be careful of where the tail is as it strikes when you are not very much aware. I remember when Sen. Orengo and the rest were fighting for our freedom now, they did come up with laws that were supposed to actually tie and throw somebody out of power. Those laws were put in black and white on paper and they are now hitting the Government, and hitting very hard.

Indeed, Madam Temporary Speaker, this Committee is long overdue, but there was nothing Sen. Orengo could have done because this is the opportunity that this Committee has to be given the mandate to look at some of these laws and especially so those involving the Provincial Administration. Actually to think loudly, we are having a parallel government sort of situation at that level. We are having the National Assembly with that role right down to the grassroots, duplicating the role of the Government right from the county level. Who is financing that? Is it necessary to have double roles? The governor will have his own sub-county commissioner, blah, blah, blah, up to the village

level; and then you have the District Commissioner with his district officers, chiefs and headmen up to that level, all consuming government resources. Is it necessary?

So, really, Madam Temporary Speaker, I request that this Committee not only looks at the particular Provincial Administration laws, but they should also open up their horizon of mandate and look at all the existing – not only laws, but also – current policies that are actually managing the day to day existence of the government.

Madam Temporary Speaker, it is no wonder these deficiencies of saying: “Okay, the provincial government shall be restructured to conform to the county government;” the word is “shall,” but they did not say that the provincial administration will be inferior. Look at that; they have not said that the provincial administration will be inferior to the county government. We have to look at a way of circumventing that because, okay, we are restructuring to conform and we have decided now to be above the governor. The law gives the mandate; the law gives the latitude. In my own layman’s understanding, we have to come up with proper clauses that will catapult what we want properly, especially in the protection of the county government system as dreamt of and envisaged by what we wanted in the Constitution. That must be done because it is our role as the Senate to do that. Whether we have hiccups or not, let us speak loudly and put it in black and white so that Kenyans can listen. They are listening to us and we shall succeed.

Thank you. I support.

**The Temporary Speaker** (Sen. Ongoro): Hon. Senators, Sen. Wako has appropriately presented before the Speaker a notice to move an amendment to this Motion.

**Sen. Wako:** Thank you, Madam Temporary Speaker, for giving me this opportunity to propose an amendment and also to contribute to the Motion. This is indeed a very important Motion which goes at the root and at the heart of the success of a devolved structure of Government. Way back in the 1990s when people were agitating for a multi-party democracy; when people were agitating that we no-longer wanted an imperial presidency, a survey was carried out to determine what chapters of the Constitution they wanted amended. The survey asked the people what they really objected to. The surprising thing was that the survey at that time which involved the common man or ordinary person, they never suggested any amendment to the Constitution. They suggested amendments to the Chiefs’ Act, the Public Order Act and the Vagrancy Act.

In other words, this machinery which was being used by the national Government at that time was the machinery which was seen by the people as oppressive and people wanted them amended. That is why also during the Inter-Parliamentary Parties Group (IPPG) of 1997, if you read that Statute Law Miscellaneous (Amendment) Bill, we did carry out quite a number of amendments to the Chiefs’ Act, the Public Order Act and other pieces of legislation which had been the base of the complaints by the people when specifically asked: What constitutional amendments do you want? To cut the long story short, that is why during the constitutional review process, everybody went for a

devolved structure of Government. It is our duty, really, to ensure that this devolved structure of Government does indeed, work and work effectively in accordance with the Constitution which was endorsed by the majority of the people.

Madam Temporary Speaker, the key words are that:-

“The Provincial Administration must accord with and respect the system of devolved Government established in the Constitution”.

I can say without any degree of contradiction that what has happened up to today as far as reforms to the Provincial Administration are concerned, do not in any way accord with a system as envisaged under our Constitution for the Devolved Government. For the Devolved Government to be effective, it must recognize the right of communities to manage their own affairs and to further their development. An effective devolved government must give powers of self governance to the people.

One would pose the question: Have we really given – I know you have elected county representatives and so on – the people that power to participate in the decision making process; that power to be responsible for their own development and to contribute to their own development? That freedom of speech that is required at the various meetings at the local level; have you really given that power when I can assure you today that if a *baraza* was called to discuss a local issue and the chief or the District Officer (DO) were present and even the county representative was present, people will tend to fear the presence of the chief or the DO because they will say that that is the Government. The County Representative may say a few things, but he will just be seen to be in opposition, populist and so on.

Madam Temporary Speaker, a reform of the Provincial Administration does not just involve the change of names, for example, instead of a Provincial Commissioner or a District Commissioner which was part of the Provincial Administration, you now call them regional commissioners or county commissioners because the name has changed from provincial to county which is now a county government. It does not just involve that. It does not involve changing the offices. If you were operating say from Kakamega, you now come to Nairobi and operate from an office in Nairobi and change the name from Provincial Administration to regional commissioner.

To me, the fact that the Provincial Administration has been there since the colonial times up to today, and I must say, served its own useful purposes for the governments of the day at that time, and it has gone into the psyche of the people, we cannot change that culture without at least changing not just the name but the entire process of governance at the county level. As I stated earlier, we must start by amending the appropriate legislations even to get away from the word “commissioner” which is associated with colonialism. It is associated with that period in our history when we had dictatorship in this country. We must remove the word “commissioner” and maybe call them what we called them under *Majimbo*; national government agents or representatives or some other name so that people realize that things are changing. Even the houses where they are staying must really go to the governors and so on.

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Madam Temporary Speaker, I thank the Mover of the Motion for having been very detailed in his submission on this matter, and all those who have spoken on this matter and who have suffered the inequities of the Provincial Administration, like the professors and so on. I will not go very much into it. What I really want is to ensure as Chairman of the Committee on Legal Affairs and Human Rights that this select Committee we are appointing today actually does work and helps the Senate in achieving its objectives. I believe Sen. Hassan is not here, I was going through the merit of all these people who are proposed as members of the Committee and I would like to inform you that actually seven of these Members including the Chair are Members of the Committee on Legal Affairs and Human Rights. Therefore, those additional actually add value to the work that is going to be done. I want to propose that the only Member that has been left out from the Committee on Legal Affairs and Human Rights is my very able Vice Chairman, Sen. Stephen Kipyego Sang. A lady, whom I know has been on the forefront of fighting for democratic space in this country, I want to add, is Senator Ongoro Masha. I want to add Sen. Gideon Moi who is a Chair of a very important Committee and Senator Lenny Kivuti who is also a Chair of a very important Committee. The myriad of those Committees all relate to what provincial administrators do in terms of development in their respective areas.

I want to move that the Motion be amended by inserting the following names immediately after the name of Sen. (Dr.) Boni Khalwale.

1. Sen. Ongoro Masha
2. Sen. Stephen Sang
3. Sen. Gideon Moi
4. Sen. Lenny Kivuti

That is my proposed amendment. This is to enrich the work of this Committee. The experienced Senators will enrich the work of the Select Committee.

With those few remarks, I beg to move.

**Sen. (Prof.) Anyang'-Nyong'o:** Madam Temporary Speaker, I beg to second. As hon. Wako was speaking, I remembered something very important about this Motion; about the political culture of changing names and so on.

After the change of Government in Uganda in 1986 and the coming in of the National Resistance Movement (NRM), all local authorities were called resistance councils. They were referred to RC1, RC2 and this went up to the top. In fact, they did away with the previous way of naming the local organizations. So, they became part and parcel of this political culture of the NRM which was resisting the old order. This made the ordinary peasants in the countryside realise that they were also part of the change.

I urge the Committee to think very creatively on how to restructure our local governance and bring in new names. The word location is very colonial. This is where the natives are located. The words "village headman", even on gender consideration, presumes that a woman will never head anything. Probably we should think about



names of popular councils or something like that so that we come in with a new culture. At the moment, the only thing that is popular is the word “devolution.”

However, we need to break down devolution to the local level so that all of us are---

**The Temporary Speaker** (Sen. Ongoro): Sen. Prof. Anyang’-Nyong’o, are you aware that you have already spoken to the main Motion?

Probably, you should stick to seconding the amendment.

*(Question of the amendment proposed)*

**Sen. Orengo:** Thank you, Madam Temporary Speaker. In speaking to the amendment, I would like to thank Sen. Wako for the reasons he has given as to why this amendment is important. As he has pointed out, I did not, in the same way that Sen. Hassan did, go through the membership or try to justify why those names are there. However, he did a good job in trying to establish some kind of rhythm and justification in having those names in the original Motion although we are still discussing an amendment to that Motion. To that extent, the Attorney-General *Emeritus* has gone further to give justification for the membership. What he has done in effect is to make sure that other relevant committees that have functions and mandates that may ultimately involve the work of this proposed Committee are also included in the Committee.

I am very excited to have the Chair of the Agriculture, Land and Natural Resources Committee join this proposed Committee because as you know, I said this at the beginning, and there are about 67 pieces of legislations covering the area of agriculture and animal husbandry. I am using the phrase animal husbandry even though Sen. Amos Wako is looking at me. If you look at the index to the laws of Kenya, there is a whole chapter dealing with animal husbandry.

All legislation dealing with animal husbandry is cited. Together with the legislations dealing with agriculture, there are 67 pieces of legislation. I think it is necessary and almost imperative that we have the Chair of the Agriculture, Land and Natural Resources Committee join this Committee. I must say that I had a discussion with Sen. Gideon Moi who has a tremendous interest in trying to make sure that there is a review of these laws in totality and finding some harmony.

I was always taught that if you look at laws in isolation, you may not achieve much. If you also read a specific law, clause by clause, you may not achieve much. So, a review of all laws that affect the functions and mandates of the county governments will be important for us to see the whole picture rather than see the pieces of legislation in isolation. The richness that we have been brought to this Committee by bringing these other Senators to this Committee cannot be gainsaid. So, I hope that when we come to vote, people will see that this is an important amendment which is supposed to improve not only the capacity but also the share in numbers. All sectors within the Senate will be represented including gender balance.

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I do not want to take more time. However, you will realise that we may not take a vote on the amendment because of the position we are in, in the House, which is understandable. In the last two to three days, people have been focused on one issue. However, if you listened to the speeches that have been made, you will see that they all relate to the events that have happened in the last two days. Let me say that when you have a new dispensation, vigilance is always important. As lawmakers, if we are not vigilant, we may not achieve much. The great democracies of the world, as we may think they are great, like in the West and Europe have survived because of constant vigilance and review of laws that are in place so that systems are perfected.

In the United States, they say that in order to have a more perfect union, you continue to review and utter all the time and in all ages exercise absolute vigilance.

In the area of lawmaking, it never stops. Some of the ordinances that we find in Kenya today were enacted in the year 1911. Actually, there are some laws in Kenya which are still in place, as they were enacted in 1912. In fact, there is even some legislation which concerns particular individuals, like the Mazrui Laws or Isaac Okwiri Act. Some of those legislations are still in our law books. Why are they still there? It is because we have not forever been vigilant in reviewing and ensuring that the laws that are in place are updated, so that they are in accord with the new dispensation. So, achieving a Constitution like the one that we have done, requires this constant vigilance, so that we perfect our legal system and constitutional governance and also ensure that what is outdated or archaic and belongs to the dark ages must be removed from the statute books. Nobody knows this better than the Attorney General *Emeritus*. In fact, I cannot say that this exercise has never happened because every year the Attorney-General – when I was in Parliament – always came up with legislation which in effect was looking at the laws of Kenya as a whole. If there was anything that did not merit being in the statutes books, then they were repealed. I think that this is part of the exercise; not about destroying but building, so that these building blocks will make Kenya a better and more perfect union.

Thank you, Madam Temporary Speaker.

**Sen. Ong'era:** Madam Temporary Speaker, I also rise to support the amendment by the leader of the delegation from Busia.

Madam Temporary Speaker, I think that it is a very good amendment. The four nominees, in my view, will enrich the Select Committee. Apart from the gender consideration that the delegation leader from Busia made, I also think that the four other nominees, especially the Chairman of the Committee on Agriculture, Sen. Kivuti, will add a lot of merit to this Select Committee.

Madam Temporary Speaker, I support.

**Sen. Elachi:** Madam Temporary Speaker, I rise to move that we adjourn and defer the putting of the question to next week on Tuesday. Standing Order No.51 (3) says:-

“Despite paragraph (2), the Speaker may, on the request of a Senator, defer the putting of the question to the following day in which case the Speaker shall thereupon nominate a time at which the question shall be put.”

Madam Temporary Speaker, I, therefore, request that we defer the putting of the question until next week on Tuesday.

**The Temporary Speaker** (Sen. Ongoro): Hon. Senators, that request is in order, according to Standing Order No.51. I now rule that the putting of the question be deferred to Tuesday, 18<sup>th</sup> June, 2013, at 4.00 p.m.

*(Deferment of vote on the Question of the amendment)*

### ADJOURNMENT

**The Temporary Speaker** (Sen. Ongoro): Hon. Senators, it is now time to adjourn the House. This House is, therefore, adjourned until Tuesday 18<sup>th</sup> June, 2013, at 2.30 p.m.

The Senate rose at 5.55 p.m.