

PARLIAMENT OF KENYA

THE SENATE

THE HANSARD

Wednesday, 22nd May, 2013

*The Senate met at the Kenyatta International
Conference Centre at 9.00 a.m.*

[The Deputy Speaker (Sen. Kembi-Gitura) in the Chair]

PRAYERS

QUORUM CALL AT COMMENCEMENT OF SITTING

The Deputy Speaker (Sen. Kembi-Gitura): Hon. Senators, let us start by determining if we have a quorum. It seems we do not have a quorum. I order that the Division Bell be rung for eight minutes.

(The Division Bell was rung)

The Deputy Speaker (Sen. Kembi-Gitura): Order, hon. Senators! The Division Bell has been rang for ten minutes. At my discretion, I will allow it to be rung for another five minutes, because we have business to do. If we do not get a quorum, then we shall adjourn until the afternoon sitting. Ring the Bell!

(The Division Bell was rung for a further five minutes)

(Hon. Senators entered the Chamber)

Hon. Senators, I am advised that we now have a quorum. Let us proceed with today's business.

BILL

Second Reading

THE DIVISION OF REVENUE BILL
(NATIONAL ASSEMBLY BILL, NO.1 OF 2013)

(The Senate Majority Leader

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(Sen. (Prof.) Kindiki) on 21.5.2013)

(Resumption of Debate interrupted on 21.5.2013)

The Deputy Speaker (Sen. Kembi-Gitura): Hon. Senators, I notice from the record that Sen. Sang had a balance of time to conclude his contribution. After he concludes, Sen. Wako can then make his contribution.

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

The Deputy Speaker (Sen. Kembi-Gitura): What is it, Sen. Orengo?

POINT OF ORDER

DETERMINATION OF WHETHER THE DIVISION OF REVENUE BILL IS PROPERLY BEFORE THE SENATE

Sen. Orengo: Mr. Deputy Speaker, Sir, I rise on a point of order on the basis that a question has arisen in the National Assembly on whether the Division of Revenue Bill is properly before the House. It is important, before proceeding with debate, for the Chair to make a determination whether this Bill is properly before the House. Otherwise it may be an exercise in futility for us to go on with the debate when the legitimacy of the debate is in question.

Mr. Deputy Speaker, Sir, I am aware that there were some informal discussions between the leaderships of the House. But that was generally on the creation of an enabling environment for purposes of effective business between the two Houses. Probably, a statement was forthcoming in that regard. But purely on the basis of this Bill that is before the House, and on the strength of the fact it was formally referred to the Senate by the National Assembly, a question has arisen which we cannot proceed without taking judicial notice of the proceedings in the National Assembly. I urge the Chair to make a determination as to whether or not debate should proceed or we should proceed on the basis that you will make a ruling at some point.

Mr. Deputy Speaker, Sir, on the other hand, if you feel that a few hon. Senators should ventilate on the constitutionality or otherwise of this process, before you make a determination, some of us are quite ready to proceed in that regard. I notice that both the leadership is now in the House.

The Deputy Speaker (Sen. Kembi-Gitura): Hon. Senators, I want to thank Sen. Orengo for raising that important point of order. It is common knowledge that the Lower House dealt with this issue last evening. Some of the hon. Members felt that we should not be handling this Bill. For record purposes, I would like to hear ventilations from a few of you. As you are all aware, as per the Constitution and the Standing Orders of both the Lower and Upper houses, we received a Message from the Speaker of the National Assembly dated 14th March, 2013. Pursuant to the relevant Standing Order of the National Assembly, the Message clearly said:-

The Division of Revenue Bill, 2013

“Pursuant to the provisions of Standing Order No.142 of the National Assembly, I hereby convey the following Message from the National Assembly:-

THAT, the Division of Revenue Bill (National Assembly, Bill No.1 of 2013) was published in the *Kenya Gazette* Supplement No.63 of 29th April, 2013 as a Bill originating in the National Assembly and was passed by the National Assembly on Thursday, 9th May, 2013 in the form attached hereto;

And further that the National Assembly seeks the concurrence of the Senate to the said Bill as passed by the National Assembly.

Signed by Hon. Justin B.N. Muturi, MP, Speaker of the National Assembly.

14th May, 2013.”

If you look at the end part of that Bill, and again as required by law, both the Clerk and Speaker of the National Assembly have certified this as a true copy of the Bill that they have sent to us to consider. For my part, I do not expect that we are just supposed to look at it and then send it back without our input. I would like to hear a few more views on this matter and then I will make a ruling on how we should proceed.

The Senate Majority Leader (Sen. (Prof.) Kindiki): Mr. Deputy Speaker, Sir, first, the remarks that came from the Lower House yesterday were extremely unfortunate, uncalled for and which can put this country on a wrong direction at a time when Kenyans were beginning to feel that we have replenished our country. The issue of the Bill before this House has been done in accordance with the laws of our country and in particular the Constitution. I do not think this House is interested in exercising powers it does not have. We are a House that believes in the rule of law, which is humble enough to appreciate that we want to do what the law allows us to do. We are also humble enough to also realize that there are other players who have equally important roles to play in our country. The Lower House misses the point. I am afraid this only aggravates the already worsening public image of the National Assembly. Just the other day they were grappling with livestock in their precincts. While the issue they were raising was constitutional, the method they used was wrong. I am afraid that even on this issue, they are wrong because we, as hon. Senators, may also have issues of salaries, but we have chosen to follow the law and use the constitutional pathway of agitating for this. That is why we have the Parliamentary Service Commission (PSC).

Mr. Deputy Speaker, Sir, this Bill is properly before the House. On our part, from the Majority side and I hope and believe I have the support of the Minority side, the Senate of the Republic of Kenya will not accept to be intimidated by the National Assembly. We will also not accept to be belittled by the National Assembly or any other person.

Secondly and my last point, because I want to allow other hon. Senators to contribute, is that we respect the National Assembly because they are an important part of our constitutional dispensation and architecture. This is the same way we respect the county assemblies. This debate on seniority is uncalled for; it is not what Kenyans are expecting from us. It is childish and should be stopped. Let us start building our country.

I do not think the Senate is interested in perpetuating this debate. But we want to make it loud and clear that we will not entertain childish remarks from the rest of the leadership of this country.

Thank you, Mr. Deputy Speaker, Sir.

(Applause)

The Deputy Speaker (Sen. Kembi-Gitura): Senate Minority Leader!

The Senate Minority Leader (Sen. Wetangula): Mr. Deputy Speaker, Sir, I wish to be enjoined in the outrage that should be visited from what I heard going on in the Lower House last evening. In law, we always say you are better off focusing on substance rather than form. The Lower House is engaged in focusing on form and avoidance of substance. Any attempt to belittle the status, legitimacy and existence of the Upper House, also known as the Senate, is an affront to the very fundamental principle of devolution.

The remarks and debate that went on in the Lower House can at the very best be described as totally unhelpful. I even heard one excited hon. Member of the Lower House pronouncing that they can scrap the Senate. These are the same hon. Members who swore in Kiswahili: “*Kutetea, kulinda na kuhifadhi Katiba.*” This is very unfortunate.

Mr. Deputy Speaker, Sir, even at the basic levels of legal tenets - the “principle of Estoppel” - before you even look at the Constitution and other material, the Bill did not fly here, it was forwarded in writing by the Speaker of the Lower House. He is consequently, in law, “estopped” from making any different finding on the same issue. He did not forward the Bill to this Upper House on the basis of magnanimity; he forwarded the Bill on the basis of a constitutional grounding. Indeed, if you look at Article 218 of the Constitution, it talks of the Revenue Allocation Bill being introduced in Parliament. It does not talk of the Lower House. Parliament means and includes both the Upper and Lower Houses. The diversionary engagement that we see going on in the Lower House is, indeed, unfortunate. I want to urge my colleagues that we remain seized with the focus we have established, the dignity and respect we have earned and the admiration we are commanding from the people of this country.

Mr. Deputy Speaker, Sir, again, one excited hon. Member of the Lower House referred to this House as a House of retirees.

An hon. Senator: *Mjinga huyo!*

The Senate Minority Leader (Sen. Wetangula): Mr. Deputy Speaker, Sir, look at this House, is that distinguished young lady hon. Senator a retiree?

An hon. Senator: Beautiful!

The Senate Minority Leader (Sen. Wetangula): Is my learned junior here a retiree? Are the distinguished hon. Senators for Nandi, Nairobi and Bomet counties retirees?

Mr. Deputy Speaker, Sir, are you a retiree? This is the height of insolent and indolent behavior by colleagues who should know better. Our colleagues in the Lower House should even see that the distinguished hon. Senator for Kakamega County has a jurisdiction over 12 of them. The distinguished hon. Senator for Machakos County has

jurisdiction over eight of them. The distinguished hon. Senator for Nairobi County has a jurisdiction over 17 of them. The distinguished hon. Senator for Bugoma County, yours truly, has jurisdiction over nine of them. We can count on and on. Even at the basics of elementary logic, where is the Upper House?

Mr. Deputy Speaker, I urge, in your ruling, to urge caution on this emerging reckless behaviour that is totally out of tune with the expectations of the people of Kenya.

I beg to support the request by the distinguished hon. Senator for Siaya County.

CONSIDERED RULING

THE DIVISION OF REVENUE BILL IS PROPERLY BEFORE THE SENATE

The Deputy Speaker (Sen. Kembi-Gitura): Hon. Senators, if you refer to Standing Order No.88(4) and (5), although I am not saying any of you has breached the Standing Orders, it says:-

“(4) No Senator shall impute improper motive to any other Senator or to a Member of the National Assembly except upon a specific substantive Motion of which at least three days’ notice has been given, calling in question the conduct of that Senator or Member of the Assembly.

(5) It shall be out of order for a Senator to criticize or call to question, the proceedings in the National Assembly, a County Assembly or the Speaker’s ruling in the National Assembly but any debate may be allowed on the structures and roles of County Assemblies or the National Assembly.”

I know that no ruling has been made in the National Assembly as yet although we understand that one may be made at 2.30 p.m. So, there is nothing illegal or out of order in what we are discussing. Having said that, I would like to bring this issue to a close for two reasons.

One, this ruling must be made because the Bill is still being debated. In my ruling on this issue, I wish to refer you to Standing Orders No.158 (3) which says:-

“The Senate shall proceed upon and conclude its consideration of a Division of Revenue Bill not later than ten days after the Bill has been introduced with a view to approving it, with or without amendments.”

Hon. Senators, I also referred to the Message that was sent to us by the Speaker of the National Assembly dated 14th May, 2013. It clearly states that he seeks the concurrence of the Senate. In my humble submission, the concurrence requires that we consider the Bill as passed by the National Assembly, go through it and even go to the Committee Stage, which we propose to do this afternoon. It is then that Article 112(1) of the Constitution shall come into play. It says:-

“(1) If one House passes an ordinary Bill concerning counties, and the second House-

(a) rejects the Bill, it shall be referred to a mediation committee appointed under Article 113; or

(b) passes the Bill in an amended form, it shall be referred back to the originating House for reconsideration.”

We have a right to consider this Bill and even reject it and then, as stated in Article 113, the Mediation Committee shall come into place.

Hon. Senators, my ruling is, contrary to what anybody else may think, we are properly seized of this Bill. We will deal with the Division of Revenue Bill to its conclusion. We will then send it back to the National Assembly with or without amendments. Then the constitutional provisions and those of the Standing Orders shall then come into play. It is so ordered.

We can now resume debate on the Bill.

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

The Deputy Speaker (Sen. Kembi-Gitura): What is it, Sen. Mbuvi?

Sen. Mbuvi: Thank you, Mr. Deputy Speaker, Sir. With all due respect, I take note of what you have just ordered. However, there are a few remarks I would like to make. The Constitution is very clear. Article 96 explains our role. If it is a battle of supremacy, we are the Upper House. We represent and protect counties and their governments at the national level while our brothers and sisters at the National Assembly have a responsibility of representing constituencies.

Mr. Deputy Speaker, Sir, I want you to put yourself in our shoes, between a village elder and a chief or between a village elder and a District Officer (DO), who is senior? Again, we have the oversight and impeachment responsibilities over the President, his Deputy and all the Governors while our brothers and sisters at the National Assembly do not have this responsibility. Who is senior? Which is the Upper House?

Again, we have the responsibility of debating and approving all the county bills before they become law. Who is senior in this case? We also determine and discuss revenue allocations as per the counties. Which is the Upper House in reference to this? Why should we be addressed in a disrespectful manner? We are national leaders and respect our colleagues in the Lower House. I refer to the National Assembly as the Lower House---

An hon. Senator: Indeed, it is!

Sen. Mbuvi: We campaigned and ensured the promulgation of a new Constitution. We deserve to be respected as national leaders. The National Assembly Standing Orders do not allow them to address us in a disrespectful manner. They were not supposed to use abusive terms. We have young, beautiful ladies here, who are wives to prominent people in this Republic.

(Applause)

The Deputy Speaker (Sen. Kembi-Gitura): Order, Senator Sonko! Please, take your seat!

Sen. Mbuvi: Mr. Deputy Speaker, Sir, I am about to finish!

The Deputy Speaker (Sen. Kembi-Gitura): Order, Sen. Sonko! Please, stick to the issue.

Sen. Mbuvi: Mr. Deputy Speaker, Sir, I think that today I have known why the civil society was referring to these hon. Members as pigs.

The Deputy Speaker (Sen. Kembi-Gitura): Order, Sen. Sonko! Order, Members! We are the Upper House. We understand the Constitution and the reason we are here, and I made a ruling on this issue. I think that the important thing is for us not to engage. Let us not go beyond what we should. Let us not transgress our own Standing Orders. I referred to Standing Order No.88 (4) and (5). If we appreciate our position as the Upper House, under Article 96 of the Constitution, we do not need to further this debate. We should be able to debate the Motion that is before us and come out with whatever it is that we want to come out with, because we are the guardians of the county governments. I would like the issue to rest at that.

Sen. Sang still has 25 minutes remaining.

Sen. Sang: Thank you, Mr. Deputy Speaker, Sir. I am going to take less than the available 25 minutes, because I guess that all of us in this House would want to ventilate on this issue.

Mr. Deputy Speaker, Sir, as I mentioned yesterday, I support this Motion. Our constitutional responsibility as the Senate is to protect and serve the interests of the counties. This Bill provides us with an opportunity to execute our constitutional mandate of protecting the interest of counties. You cannot protect the interests of counties if you cannot allocate adequate resources to these counties. It does not make any sense for somebody to imagine that a whole Senate – our responsibility being to protect interest of counties – would only concentrate on dividing and sharing the revenue that the Lower House has made a determination on. What if, for example, the Lower House decides in its wisdom or lack of it, that we only have Kshs100 billion to share amongst our counties? It does not make sense. We cannot concentrate on just the sharing formula among counties without having a say in the amount of national Revenue that will come down to the county governments. The Division of Revenue Bill gives us that opportunity.

Mr. Deputy Speaker, Sir, the success of the new Constitution will entirely depend on the success of devolution. If we are not going to have our counties taking shape and succeeding in providing services to our Kenyans, then we will have failed in our new constitutional dispensation. I want to propose that this House carefully considers the Division of Revenue Bill for two reasons; one, as a way of asserting our authority as the Senate in terms of protecting the interests of our counties. But more importantly, arising from yesterday's debate in the Lower House, in terms of asserting our authority as the Upper House, so that we should not be seen as a rubberstamp of what the Lower House has given us.

Mr. Deputy Speaker, Sir, if you look at the Fourth Schedule of the new Constitution, it has in part "1" enumerated the 35 functions allocated to the national Government. In part "2", it has given the 14 functions allocated to the county governments. If we take agriculture, for example, the Constitution under the Fourth Schedule indicates that agricultural policy will be handled by the national Government. But the actual implementation of agricultural policies will be done by the county governments. This would translate to almost 20 per cent of the Ministry of Agriculture currently being retained at the national level and 80 per cent being taken back to the

county governments. It only means then that about 80 per cent of the resources previously allocated to the Ministry of Agriculture need to be devolved to the county governments. The same thing applies to the Ministry of Health. We have only two referral hospitals in this country, and I support our colleague, Prof. Anyang'-Nyong'o, for bringing a Bill that would then be able to broadly define what referral health facilities in this country are. This will enable us to have at least one or two referral hospitals in each of the 47 counties in this country. I come from Nandi County where we have one district hospital that serves close to three counties, that is, County of Nandi, County of Vihiga, where my colleague comes from and the County of Uasin Gishu. Some of us still go to Kapsabet District Hospital. We cannot leave the district hospital in Kapsabet as a responsibility of Nandi County. We need to have that taken over by the national Government, so that then our county governments could concentrate on the health centres and other hospitals within our counties in order to provide services.

Mr. Deputy Speaker, Sir, if you look at the roads, the Fourth Schedule indicates that national roads will be handled by the national Government, but the county roads, which constitute about 70 per cent of the road network in this country, will be handled by the county government. That also means that we have to send a lot of resources to the counties. Therefore, as a Member of the Jubilee side, whereas we want to appreciate the Jubilee Government, through the Treasury in terms of raising the revenue allocated to county governments to around 30 per cent, that is not adequate. I think that this House must rise up to the occasion and raise these resources. At the appropriate time – I am sure at the Committee stage – some of these figures will be raised. I think that we need to work with the figures given to us by the Commission on Revenue Allocation (CRA). We can push this allocation to Kshs238 billion to provide enough and adequate resources to the county governments. If you look at the Division of Revenue Bill, the national Treasury did propose Kshs154 billion and the National Assembly, in its wisdom, raised it to Kshs190 billion. I think that it is important for this House not just to rubberstamp the figure from the Lower House, but to raise it a little bit higher, so that we can assert our authority as a House and still be seen as playing our constitutional role of protecting and serving the interests of the counties.

Mr. Deputy Speaker, Sir, I want to propose that there is need for us to do proper costing for the various functions to the county governments. We have the Transition Authority that was given this specific mandate. As the Senator for Nandi, I keep on wondering what the Transition Authority has been doing for the last one and a half or two years. One of their core responsibilities was to do the proper costing of the functions. The figures used by the national Treasury in terms of doing the costing, most likely are historical. This could as well be relating to the costing of the financial year 2010/2011, just like the revenue proportions sent to the county governments. So, we need to do proper costing of the functions that have been allocated to the county governments, so that we are able to have accurate figures. If we do not do proper costing, then even as we send these resources to the county governments, it is possible that the budgeting process at the county governments will not be proper, because the figures that they will be able to allocate to development and recurrent expenditure, will be fairly conservative and we may end up using a lot of the resources that we are sending to the to the county

governments on recurrent expenditure. Therefore, we will have very little resources available for development activities within the counties.

Mr. Deputy Speaker, Sir, it is also important that we are able to enhance the capacity of county governments in developing their budgets. Some of us have had an opportunity to look at some of the budgets emanating from the county governments. If we are not careful, a lot of the resources that we are devolving and sending, as a Senate, to the county governments, may as well all go to recurrent expenditure. We need to enhance the capacity of the counties. We need the county governments to have the required qualified staff to help them in putting in place the proper budgets for their counties, so that we have realistic figures. We have seen counties unveiling budgets of over Kshs20 billion, while the amount of resources allocated to them is way below Kshs10 billion. So, you ask yourself: Are we going to allow our counties to start from the wrong footing, in terms of starting with a budget of Kshs20 billion? Where the national Government has provided less than Kshs10 billion, maybe they raise about Kshs3 billion or Kshs4 billion from their revenues, and we have a budget deficit of over Kshs10 billion and now have the Governors going round looking for donors. If we are not careful, we are going to start on a wrong footing, where our county governments will amass a lot of resources through debts and, in future, we have challenges to repay our debts. So, it is important that we are able to enhance the capacity of the county governments in terms of developing their budgets.

Mr. Deputy Speaker, Sir, the Senate has the responsibility of playing an oversight role. We have had discussion in this House and even outside this House, during our induction training, where the Senators have asked themselves: How do we play our oversight role in terms of ensuring that the resources sent to the county governments are utilized properly? The current legal infrastructure available does not provide for a clear mechanism for this House and the Senators to participate in the budgeting process at the county level. It would be very crucial for this House to ensure that the Senators have a key role in the development of the county development plan or approved plan. So, I am sure that all of us, when we did our campaigns, had our own manifestos. We had a number of issues that we thought that if we were able to address, then our counties would develop. But we are in this House, our role being legislating and ensuring that county governments have their resources. But at the county level, we have the Governor and county assembly whose responsibility within the County Governments Act, is among other things, to develop the county development plan, and the Senator may not have a role. It is important that we ensure that the Senator, being the protector of the interest of counties, is involved in the development of the county development plan. At an appropriate time, I will bring an amendment to this House that will ensure that we amend the County Governments Act, to establish a County Development Board, that will be chaired possibly by the Senator, and which will bring together all the elected leaders, so that we are able to merge all our manifestos and visions for our county, and have one document. So, in the subsequent years, as we do our budgeting, we will already have one document that all of us agree; that this is where we want to take our counties. Therefore, the budgeting process will not be an exercise within the ambit of only the Governor and the county assembly, but it will have the input of all the stakeholders and leaders within

our counties. I will bring that amendment in future but that, obviously, will not affect the budgeting in this financial year. Therefore it is important that we are able to give adequate resources.

Mr. Deputy Speaker, Sir, in conclusion, I support the Motion with the foreseen amendments in the Committee stage. We hope that we can raise the finances from Kshs210 billion to Kshs238 billion. Secondly, the conditional allocation within the Division of Revenue Bill should be shouldered by the national Government.

We cannot count the Kshs20 billion as being part of the resources going to the county governments yet they will be administered by the national government. So, the Kshs20 billion should be under the percentage of resources remaining at the national level so that we have the Kshs210 billion moving down to the county government, just like the Equalisation Fund which is not part of the 15 per cent. That is already a separate fund. So, the conditional allocation should be treated separately from the amount of resources that are going to the county governments.

Mr. Deputy Speaker, Sir, as the Senate, we need to assert our authority. The Senator for Nandi is obviously not a retiree as asserted by Members of the Lower House. I think as we move to raise the resources in this Bill upwards, we will be able to demonstrate to this country that the Senate does not and will never be a rubberstamp to decisions of the Lower House. More importantly when we get the County Allocation Bill, which the Lower House will have no input in whatsoever, we will make a determination on how much Nandi County gets and how much other counties will get with regard to the resources allocated.

I support this Motion with the reservation that we will be able to make amendments.

COMMUNICATION FROM THE CHAIR

MEETING OF ALL SENATORS IN THE CHAMBER

The Deputy Speaker (Sen. Kembi-Gitura): Hon. Senators, there is a short communication from the Chair before we proceed.

Immediately after the rise of the House, the Speaker has called for a meeting of all Senators here in this Chamber, that is, a *Kamukunji* to discuss issues that affect us. That communication requires that all of you should make yourselves available immediately after the rise of the House.

Sen. Orengo!

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

The Deputy Speaker (Sen. Kembi-Gitura): Yes, Senator Wako!

Sen. Wako: Mr. Deputy Speaker, Sir, when the Motion came up before Sen. Orengo raised his point of order, you said that after Sen. Sang, it will be Sen. Wako.

The Deputy Speaker (Sen. Kembi-Gitura): Did I?

Sen. Wako: I am just reminding you of that.

The Deputy Speaker (Sen. Kembi-Gitura): But now I have said, Sen. Orengo. Forgive me, I will call you next. I will make amends.

Sen. Nabwala: On a point of order, Mr. Deputy Speaker, Sir. We are supposed to be having a joint meeting with the Finance and Devolution Committee---

The Deputy Speaker (Sen. Kembi-Gitura): Sorry, what is it now? You do not just rise on a point of order and start talking. You have to be allowed by the Chair. What is the point of order?

Sen. Nabwala: You have said that the Speaker has called a meeting at 12.30 p.m. and at the same time we are supposed to have a Committee meeting between the Finance and Devolution Committee.

The Deputy Speaker (Sen. Kembi-Gitura): The Speaker has called for a meeting at 12.30 p.m., and I was just making a Communication from the Chair.

Sen. Orenge: Mr. Deputy Speaker, Sir, this is a very important business before the House and it concerns the key function of the counties and the Senate in many respects. I want to alert the Senate about the politics that may come later. These are the politics of responsibility and accountability on issues to do with development. When you look at the distribution of functions as contained in the schedule to the Constitution, it is going to be very easy for the national government or anybody who is prepared to derail the county governments to begin to play around with the politics of development in respect of what is contained in the second part of the functions allocated to the counties. Listening to some of the speeches I have heard while touring some of the counties, including my county, when it comes to roads, statements are being made that there is a new structure and a new schedule of responsibility that in future you are not going to ask the national government about roads. If you have any road in the county that needs repair or construction, you ask the county government and the relevant section of the Constitution is quoted. There is a provision that relates to county roads but which has not been defined. Agriculture and health services are also mentioned. I can see Sen. Wako walking out but I wanted to bring to his attention this issue because this is something that relates to his Committee, the Legal Committee and the Devolution Committee. They should very quickly come up with legislation that is anticipated or envisaged by Article 186. That article spells out the functions that are allocated or powers that are distributed to the national or county government. This article was for purposes to do with the fact that even the Committee of Experts and the various organs involved in the constitution making process came to a conclusion that it is not going to be possible in a Constitution to properly distribute these functions with a degree of certainty. So, in page 120 of the Constitution, sub-article 4 of Article 186 says:-

“For greater certainty, Parliament may legislate for the Republic on any matter.”

This is certainty to do with the distribution of functions and powers. If you look at the distribution and functions of powers according to Article 186, there is a large area of this protocol of distribution of functions and powers that one may very well say that some of these functions are conferred on both levels of the Government. I think this may create a lot of confusion, even on the question of costing. You cannot do costing properly until you have defined these powers, that is, distribution of functions. So, I urge the two committees and particularly the Committee on Legal Affairs and Human Rights to come up with legislation which may help us define some of these functions and roles of the various levels of Government with a greater degree of certainty. Then it is going to be

possible to come up with a better costing. I have heard many Senators talking about the issue of costing that it has not been done on a basis that reflects the real and objective situation on the ground.

The other fact which is important to bring into consideration is that the power of raising revenue and powers that relate to public debt contained in Article 209, give the national government the exclusive power of imposing taxation and the various categories of taxation as mentioned including Income Tax, Value Added Tax, Custom, Excise Duties and property rates. So, the responsibility of counties in areas of taxation that is contemplated, for example, if you talk to any of the previous local authorities, the collection of property rates is not only difficult but they do not amount to much. Entertainment tax, again, going by the experiences of the local authorities cannot raise any additional revenue for the county governments to a level which can meet the short fall of the county governments. Regarding the question of borrowing, it cannot be done without the approval of the national government. So, the county governments are going to operate on a very limited scale when we talk about revenue. To that extent, the best way of looking at it is to consider the two levels of government but in practical terms, it is 47 governments at the level of counties and one government at the national level. So, the resources for the 47 counties, if these functions were properly defined and proper costing done, in reality if the national government is going to deal with more policy than anything else and issues of development that are cross-cutting, in my view the division of revenue between the two levels of government should be at the range of more than 45 per cent to 55 per cent. Then you will be talking about county governments having what they will need to carry out development in the various counties and at the same time be able to employ those who will do appropriate work for the counties and its residents.

Mr. Deputy Speaker, Sir, I just want to say this although it is not directly connected to the Bill. I will make some concluding remarks on the Bill later. The most important thing about the issues that arise out of the power and authority of the Senate is that some of the arguments are really misplaced. For example, if you had to engage in a debate as to which one is superior between the executive and the judiciary, which one is superior or whether the National Assembly or Parliament is superior to the executive, I think that would be a discussion not worth engaging in. What one must look at is the architecture of the Constitution. That architecture that is found in our Constitution in terms of structures and the basic framework is that the three arms cannot do without the other. Even in terms of Parliament, the structure is that both the National Assembly and the Senate must operate within the confines of the Constitution. They have functions that are concurrent and others which are distinct. Therefore, to begin to have an argument about which is superior and which is not is a debate that is not going to take us anywhere. In terms of status and decorum, I think there are a lot of experiences, historical and otherwise that show, in the order of things, which House is the upper or lower house.

I have just been reading a discussion on what is going on in the British Government. This is the debate about gay rights which is now before the British Parliament and in both Houses. No lesser person than the Prime Minister of the United Kingdom is recognizing the House of Lords as the Upper House because that has been the tradition and the practice in England. In the United States of America (USA) which is

more in conformity with our system of government, the Senate is considered to be the superior House because it is the House of Delegations. As we come here, we do not come here as individual Senators. We are a delegation to Parliament. We are sent by a government under a county as a delegation and our system of voting is very different because when we are taking a roll call vote, it is on the basis of delegations. That is not worth taking a lot of time. Just by sheer practice and experience in our own history, officially the two chambers were referred to as the House of Representatives and the Senate but in common parlance which was accepted, one was the Lower House and the other one the Upper House.

Even in 1963, the Senate was the Upper House. So, historically speaking and according to our traditions, the Senate is always the Upper House. That is not to say that you take all the functions; even in your house, you maybe the head of the house –and these days, the head of the house does not necessarily need to be a man; I think Sen. (Dr.) Khalwale may not agree with me on this, but I know as a matter of fact that the head of the house need not be a man – but that does not mean that the children in that family do not have functions. So, when you look at the functions, it cannot be a basis for determining which is the Upper House or Lower House. It is by looking at the constitutional arrangement. Therefore, I think this debate is a bit unnecessary. But it is necessary given that when Bills of this nature that relate to counties originate from the National Assembly, they cannot become law until they are brought to the Senate. When the Bill is enacted, it is not called an “Act of the National Assembly”; it is called an “Act of Parliament.” Even for a Bill which does not come to the Senate and is passed by the National Assembly, by constitutional arrangements, it does not have the force of law unless it is called an Act of Parliament, and that shows quite clearly that in this House, we cannot be called “retirees,” especially when we are dealing with a very important Bill like this. I am so delighted that in this House, even by comparison, the number of the ladies in this House in terms of percentages could even be higher than in the National Assembly. In terms of percentages, the number of younger people in this House could be higher than that in the National Assembly. For me, personally, I am not about to retire because there is a constitutional project that we want to see through.

Having said this, I hope that by passing this Bill, we are going to see development at the county level and I support---

The Deputy Speaker (Sen. Kembi-Gitura): Sen. Orengo, you are very right because you referred to Article 110(4) and (5) of the Constitution; it is quite clear that both Houses have to pass the Bill before it becomes law.

Sen. Orengo: In fact, I had marked that section, but I thought it will be repetition--

The Deputy Speaker (Sen. Kembi-Gitura): Sen. Orengo, can you, please, refer to Article 110(4) and (5)?

Sen. Orengo: In fact, Mr. Deputy Speaker, Sir, if you could allow me to begin from the beginning, I think it is better to look at Article 109 first before you look at Article 110. Article 109 says:-

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

It is important to emphasize the word “Parliament.”

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

And (3), which is the important one states:-

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

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

The division of revenue between the national Government and the county governments is a Bill that affects the counties and there is no way that anybody can convince me that this Bill does not concern the counties.

So, Mr. Deputy Speaker, Sir, that Article, together with Article 110, which I think is more to the point, states:-

“(1) In this Constitution, “a Bill concerning county government” means—

(a) a Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule;”

Nothing affects the county governments more than the amount of revenue that is going to be allocated to the counties as a whole or individually.

So, Mr. Deputy Speaker, Sir, I do not want to take a lot of time. I beg to support and I look forward to the amendments so that we can raise the amount that is going to the counties.

Thank you, Mr. Deputy Speaker, Sir.

The Deputy Speaker (Sen. Kembi-Gitura): Sen. Wako, it is now your turn without trying.

(Laughter)

Sen. Wako: Thank you, Mr. Deputy Speaker, Sir, for giving me this opportunity. There is no doubt whatsoever that the Senate is the Upper House, and proof of that, I think, is in Sen. Mbuvi. I was in the 10th Parliament when Sen. Mbuvi was elected a Member of Parliament; the manner of his dressing and the way he used to come to the House reflected that House – I know where he has gone!

(Laughter)

But since he came to the Senate, he is now wearing designer suits more than anyone of us.

(Applause)

He is taking leadership very, very seriously, and that is nice. Also, the hair is well done, and so on. So, the change in the behavior of Sen. Mbuvi is in itself enough evidence that we are the Upper House, and even Sen. Mbuvi recognizes that fact.

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

Sen. (Dr.) Machage: On a point of order, Mr. Deputy Speaker, Sir.

The Deputy Speaker (Sen. Kembi-Gitura): What is it, Sen. (Dr.) Machage?

Sen. Wako: It is with a light touch---

Sen. (Dr.) Machage: Mr. Deputy Speaker, Sir, is the Senator in order to discuss Sen. Mbuvi---

(Loud consultations)

Sen. Wako: I am not imputing improper motives---

The Deputy Speaker (Sen. Kembi-Gitura): Maybe as a matter of interest, Sen. (Dr.) Machage, you could refer me to the Standing Order you are referring to; maybe I could make a decision on that?

Sen. (Dr.) Machage: Let him go on! `

(Laughter)

The Deputy Speaker (Sen. Kembi-Gitura): Thank you, Sen. (Dr.) Machage.

Sen. Wako: Mr. Deputy Speaker, Sir, you were right this morning in your ruling that this Bill is properly before this House, and I do not have to quote the sections that have been quoted. I defend the right of the Member of Parliament who sought the ruling of the Speaker in the National Assembly on whether or not this Bill is properly before us; he had that right. But in the exercise of that right, unfortunately in the debate concerning that issue, they went overboard. But I would like this House to show – because we are here to show that we are the Upper House – by conducting our debate here with decorum, sticking to the issues, not being abusive or anything of what went on yesterday in Parliament.

Mr. Deputy Speaker, Sir, I believe that hon. Member read Section 96(3) of the Constitution a bit too narrowly. Section 96(3) reads as follows.

“The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments.”

So, he read that to show that we do not have the responsibility to decide the issue of division of revenue between the national Government and the county governments but, as usual, little knowledge can be quite dangerous.

(Laughter)

If you take one small section somewhere and exaggerate it without taking into account the overall Constitution, you definitely come to a very absurd conclusion. This is because this Constitution demands that it be interpreted in a manner in which the purposes, values and principles of the Constitution are promoted. It should be interpreted in a manner

which takes into account all the other sections of the Constitution. If you take into account all other sections of the Constitution, including our legislative power, which is in Article 96(2), we participate by enacting legislation in respect of the counties. And then you go to Article 109, which the Senator for Siaya has referred to, and which states that we are concerned with Bills which touch on counties. There is no other Bill that touches on counties which is more important to me than the Division of Revenue Bill. Why? Because unless you have a proper division of revenue between the national Government and county governments; if they allocate an amount which is too small and we are only left to divide that small amount, it will be affecting the functions of the counties. Therefore, we have a big interest to ensure that the county governments are allocated enough money to perform their functions in accordance with the Fourth Schedule. Those functions are many; apart from the big national issues such as national security, administration and so on; all the work and functions of the Government are going to be done at the county level. We must bear that in mind.

Therefore, to me, the proper allocation between the national Government and the county governments should be in the ratio of 45:55, because all these functions are going to be done at the county level. Unless we give these counties enough money, the blame will go to the county governments that they have not made roads; they have not constructed health facilities, they have not done this or that. The blame goes to them, and when it goes to them, they will not look at the governors; they will look at the Senators; did we fight for the rights of the county governments? Did we ensure that they had enough allocations given to them to perform their functions properly under the Constitution? Therefore, it will be us who will be blamed. Therefore, it is our duty to interrogate this Division of Revenue Bill thoroughly and to ensure that the county governments are properly given the money that they have.

Mr. Deputy Speaker, Sir, when I read Section 15 of the Sixth Schedule, it does appear to me--- Section 15 is the one which provides for devolution of functions to be made by an Act of Parliament. This devolution of functions was supposed to have taken place over a period of three years, and before a particular function is devolved over the three year period, a criteria had to be established which had to be met before the functions are devolved to the counties. Secondly, the national Government was to assist the county governments in building their capacities to govern effectively.

Mr. Deputy Speaker, Sir, what has happened, according to this budget, the way I see it, is that all the functions have – immediately from day one, before we even find out whether or not the county governments have the capacity to perform those functions – been transferred to county governments. I do not begrudge that, but because they have put the cart before the horse, then it behooves us to ensure that the county governments are given enough money to do that. What should have happened is that, may be, this year, the costing of so many county functions should have been done; these functions would then have been transferred to the county governments and money given. The following year, some more functions are given and during the third year, all the functions are given. But now, county governments have all the functions which they are entitled to have ultimately in the Fourth Schedule. Therefore, there is the need for us to ensure that they have enough money.

From what we are hearing, even those officers who were transferred to the county governments are officers who have not performed well or who are facing some disciplinary action one way or the other. Are those the type of officers that we are going to start off with? Will they be able to deliver the services that are required to be delivered by the county governments? It therefore means that the county governments must almost immediately try to identify the right officers who are going to give the services to the people there. If the county governments do not have the capacity and the finances to be able to recruit appropriate staff, will they succeed? That is why I am really in favour of the proposal that we amend this Division of Revenue Bill by following the figures of Kshs184.7 billion – cost of devolved functions – but now specifically addressing the recruitment of staff and the remuneration of county executives and assemblies, which should not be part of the Kshs190 billion. Because when they are made part of the Kshs190 billion being allocated, it will affect the service to the counties. That should be treated separately and given a big share of Kshs15 billion as per the estimate of the Commission on Revenue Allocation. The administration expenses should be given Kshs7.5 billion, the county PM expenses KShs13.8 billion and contingency Kshs18.4 billion which brings it to about Kshs234 billion or thereabout. I am in support of those who have said that we amend this by giving more to the counties.

Mr. Deputy Speaker, Sir, the other issue relates to what was stated in the Lower House that we are retirees. I am a retiree but I am not tired. I wanted to make it clear to them that I am not tired and about 150,000 people of Busia saw me and said that I was very fit to be their Senator. So, we should not refer to elders in derogatory terms because under Section 57 of the Constitution, even the elders have rights. Section 57 says:-

“The State shall maintain the rights of older persons to fully participate in the affairs of the society”.

I am fully participating in the affairs of the society by the consent of the people. It goes on -

“To pursue their personal development”

Well, I am developed but I want further development. It goes on -

“To live in dignity and respect and free from abuse”

That is what I am complaining about. We should never refer to elders in derogatory terms. It is against the Constitution. Not only is it against the Constitution but it is against our African traditions. We must give respect to the elders and we must receive reasonable care and assistance from the State. I hope that our Parliamentary Service Commission is going to do that so that we receive the appropriate care and attention. I hope Sen. G.G. Kariuki, my elder here, is supporting me in this particular regard.

Mr. Deputy Speaker, Sir, the most serious point is that – I agree with Sen. Orendo that you do not look for functions – this Constitution is about checks and balances. So, one cannot claim to be superior to the other because there is somebody else to check you. The President, the Judiciary and Parliament have somebody else to check them. So, checks and balances are the norm on this thing but when it comes to deciding who is upper, I would myself not use as was used in the Lower House, that because we are concerned with a minimum of 15 per cent of the Budget, we are lower than the other House which is concerned with the entire Budget. We are all concerned with the entire

Budget, but people should not forget that the sovereign power lies in the people of Kenya. The people of Kenya vote and delegate that power by voting. So, the number of votes somebody has received in a particular area, to me, is important. For example, in Busia County, no Member of Parliament received more votes than me. I got a totality of all their votes and more.

Therefore, when it comes to the sovereign power of the people, I am the bearer of the sovereign power of the people of Busia. When it comes to the nation, the President is the bearer. When it comes to the County Assembly, it is the County representative. To say that the National Assembly is higher than the Senate is actually absurd because it is to say that the County Assembly is higher than the National Assembly. Because as I am in charge of seven Members of Parliament, a Member of Parliament is maybe in charge of six to seven county representatives and so on. That is how the pyramid goes. It is the County Assembly, the National Assembly, the Senators at the apex and at the very top the President of the country. The Senators and Governors follow the President, but in terms of Parliament, Senators lead. Do not upset that order. I would appeal to them not to upset that order.

Mr. Deputy Speaker, Sir, in one of our seminars, I said that actually we have enough power and functions in this Constitution. I cannot conceive of any legislation which does not touch on the county. Therefore, all legislation – as you rightly stated – ideally have to come here because they touch on the county in one way or another. Therefore, as far as the legislative power is concerned, we have it. But together with the National Assembly, we have another more important function. It is the function to protect the Constitution. It is the function to promote the democratic Government. In that regard, we have power to discuss here and to pass resolutions on any issue, provided we are in the process of protecting our Constitution and advancing the democratic society of Kenya. In the unlikely event there is some legislation which does not touch on the county, we are not involved. In the exercise of our legislative power, we shall not be involved. But I think in the exercise of our passing resolutions here, if that legislation is unconstitutional, in our function to protect the Constitution, we have the right to pass a resolution. If there is any policy which derogates or violates the democratic governance of Kenya, we may not pass a legislation, but we have a right to discuss here and pass a resolution in the exercise of our function to protect the Constitution and to promote the democratic governance of Kenya. So, we have it.

It could be very well be that there may be a few anomalies here and there in the Constitution but those are things that we can go into slowly with a view to amending the Constitution. Maybe for this purpose, it may be better that we have a joint *ad hoc* committee not only of Members of the Senate, but also of Members of the National Assembly, to go into some of those areas that need clearing up in a more civilized way rather than name calling which is a diversion from our core function of legislating. Calling each other names is a useless debate which should not be entertained. We should focus on the issues. There may be one or two issues in the Constitution which somehow escaped the drafters which somebody may hang on to and think that because of that, the National Assembly is higher than the Senate. I am saying that we discuss it jointly in a sober atmosphere with the interest of the people at heart. We could also have a joint

committee that deals with legal matters to deal with this issue and come up with a solution on how to carry out these amendments. We would ultimately be required to do that.

In the meantime, let me assure Senators that we have enough powers to work on here. On the issue of legislations, I support what my Vice-Chairman stated that this Senate must be involved in this process because of our oversight role and also because we want people on the ground to know that we are there. If you are not involved in any development activities on the ground, the people on the ground will not know that we are involved and that we are helping them. It is our ultimate function to represent counties, but behind the counties, there are people. That is why I support what my Vice-Chairman stated, that we should develop legislation which can bring us to be involved at the county level not only in development and drafting strategic plans, but those plans should be the basis of the Budget.

Mr. Deputy Speaker, Sir, this year was a bit unusual because the timelines were not followed. Everything was delayed. Let us hope that this is the last Division of Revenue Bill that we shall debate under these conditions. In the next one, the timelines for various things should be followed. We would have developed legislation to ensure that Senators and Members of Parliament get involved in the crafting of development plans and strategies and then the county budget being in conformity with those development plans and strategies. This is really the ideal situation that we would want to see so that when it is passed and when we are now doing the oversight, we know what we are doing an oversight about. So, I would support those legislations.

The issue that was brought by Sen. Orenko on the grey area about functions, of course, the Constitution talks about the levels of government being interdependent and there is no area where there is more interdependence between the National and the county government than the issue of functions. For example, even in the area of health, we are interdependent and I would like to encourage the State to ensure that just as every county must have a High Court, there are certain basic things that every county must have and one of them is a referral hospital. I am speaking on behalf of my people of Busia to say that Busia should have a referral hospital because we serve not only that big area but also the neighbouring communities from Uganda. Whereas a county may have access to a number of health centres everywhere, when it comes to complicated diseases and so on, a referral hospital must be near. Right now, I must say that people in my area tend to go to Eldoret Teaching and Referral Hospital when they are sick. They should not go that far. By the time they get almost there, some of them are almost gone and then they die. I would urge that every county must have a referral hospital.

I would encourage, when it comes to infrastructure, that we identify how many kilometres of tarmac roads the various counties must have. That really becomes the responsibility of the national Government. We will make sure that we are given money to ensure that paved roads are within the counties.

With those few remarks, I support this Bill.

The Deputy Speaker (Sen. Kembi-Gitura): Senator Karaba!

Sen. Karaba: Thank you very much, Mr. Deputy Speaker, Sir. I want to contribute to the Bill in front of us. As I support, from the outset, let me take some time

to digress to what might have prompted the Lower House to discuss us last evening. Possibly, this was because of this Bill *vis-a-vis* who should contribute to it.

In the first place, it appears as if majority of the people in the Lower House are competing with Senators. We concluded elections on March 4th and they could not beat the Senators. They are aware that the number of votes we got is, certainly, higher than what they got. Indeed, if you look at Kirinyaga, you will see that I was convincingly voted for by over 220,000 people whereas any other Member of Parliament had less than 20,000 or even 30,000. That could be the reason why they are wondering what we are doing here. They know how they got into the National Assembly.

The other issue is that as we sit here and talk, we need to define the laws which are spelt out in the Constitution and see how we can assert ourselves in the counties against a majority of doubting Thomases that we have the power. True to that, if you go to the counties, you will see that governors are treating Senators like second class citizens. That is what they think. They have that notion since they govern the counties.

Recently, they employed executive officers. They have county representatives under them. They are supposed to manage billions of shillings that we will endorse here. Ours is to oversight; the law which makes them imagine that they are above Senators, as far as we are concerned---

[The Deputy Speaker (Sen. Kembi-Gitura) left the Chair]

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

Sen. Bule: On a point of order, Madam Temporary Speaker. I think there has been a ruling on this matter with regard to Governors and Members of the Lower House. Is Sen. Karaba in order to dwell on an aspect that has already been ruled on?

Sen. Karaba: Madam Temporary Speaker, I withdraw that and continue. What we have in front of us is a budget which we are supposed to scrutinize. That is what we are doing and we have the mandate to do so. As I stand here, I have a feeling that we, as Senators, need to be seen as having the power to endorse, discuss and dispose of this Bill as we pass it with or without amendments.

Sen. Murungi: On a point of order, Madam Temporary Speaker. Should the hon. Senator continue misleading Kenyans by saying that we should be seen to have power when we have the power? Could he be advised to stop taking that line because he is misleading the country?

The Temporary Speaker (Sen. Ongoro): Sen. Karaba, you have been advised and you know that is the position. We have power and we are the Upper House.

Sen. Karaba: Thank you, Madam Temporary Speaker. The position is that we have power under the Constitution. That is the power we will exercise here. One thing we need to think about here is how the Kshs190 billion was arrived at as per the schedule and the retention of Kshs20 billion at the national government to finance national issues. You reckon that most responsibilities and functions at the counties are almost similar to those of the national government. Therefore, it is needless to discuss the functions that county governments will continue with as opposed to the central government. We need to

equate and see that the functions of the national government are almost equal to those of the county assemblies. In that case, we need to raise the amount allocated to the county assemblies so that we can disseminate what is important in the county assemblies.

You will note that the amount that is reserved in the national kitty, Kshs20 billion, cannot employ, promote or recruit teachers. If the national government will employ more than 60,000 teachers that we have in the counties, the Kshs20 billion which has been set aside cannot even be enough for this. We need to think about the looming strike which will be mooted by teachers once this budget is passed. The teachers argue that the allowances which they were promised, right from 1997, have not been met. They are asking the national government to take it upon themselves and make sure that their allowances and promotions are released. I can see that this money is not enough. I am requesting an increase of money so that we can cater for teachers who are yet to be paid their allowances at a time when this will be necessary.

I also take note that most of the county assembly agricultural practices are geared towards production and the export of semi-processed goods and raw materials. We are yet to see agricultural products coming from such counties being processed. It is only when we export these items that these counties will get more money for their expenditure. We request that more money be voted to promote agricultural products and production in the counties so that our exports which will continue earning more revenue and foreign exchange are either processed or semi-processed. I have in mind, my county where we grow rice, tea and coffee. If these products were packed at the initial processing factories in the form of export processing zones (EPZs), we would add more value to the products. We would then get more money not only to the county but also contribute more money to the national kitty in the form of revenue. I, therefore, ask that more money be voted for agriculture so that counties that embark on agricultural production get more money for export so as to generate more revenue which can be allocated to other counties which cannot produce the same.

It is also important to note that counties have rural roads. These are what we refer to as access roads. These roads are very important. We need to allocate more money so that we upgrade the said roads to levels which can allow one to access remote areas which others wise would be producing good products but cannot do it now because of the poor state of roads. We need to improve our roads in the rural areas and in the counties. This will add value to the production and revenue. The idea of having the Kshs190 billion shared equally is something that would make some counties receive more than they can generate. I, therefore, ask that more money be paid to the counties so that the same can be generated and multiplied so that we have more to share in the future.

With regard to providing oversight role, we are supposed to have county offices. Those who have more than 10 or eight constituencies should have offices in those constituencies and see that people are served so that we do what is necessary in terms of giving oversight. It is important that the Senators are involved in the making of the budgets, right from the county level, so that we do not oversee things that we are not very sure of. That is the oversight role of a Senator.

Madam Temporary Speaker, I support.

Sen. Kajwang: Thank you very much, Madam Temporary Speaker. First, this is a good day for us, as a Senate, that we are discussing distribution or division of revenue between the national Government and the county governments. There was a first Senate that would have done this job because I think it was set out even better in that Constitution. But instead of debating the Division of Revenue, so that regions would get that revenue, they dissolved themselves popularly. It was the first elected body to dissolve popularly. One of the then Senators came from Mbita Constituency. This is my constituency. He was the Senator for South Nyanza who was, of course, thanked with a seat after dividing the then Lambwe Constituency. That is how Mbita Constituency was created. Senators were bribed to dissolve themselves popularly. I hope we will not do such a mistake. I am not about to dissolve myself. If they did what they were supposed to do 50 years ago, Kenya would not be the same again. We would have developed some of these institutions and infrastructure. I believe the country would be in a better place than it is in today. It would not have been the most unequal society that we are in the world today. We, as a country, will have to work very hard to deal with this tag of “the most unequal society in the world” after South Africa and Brazil.

Madam Temporary Speaker, I was listening to the Members of the National Assembly, the Lower House, yesterday evening speaking and pitied them, because you cannot win in such a debate. If somebody says “I am the greatest” and another one also says “I am the greatest” you cannot win in such a debate. What needs to be looked at is what Sen. Wako asked. Whom are you representing? It is a question of sovereignty. How many people are you representing here? They represent constituencies and we represent counties. They represent 290 constituencies and we represent 47 counties. When I speak, I speak with the authority of one million people. These people, through the ballot box, said: “This is our representative.” Just go and ask the villagers and not even the Members of Parliament themselves: “Who is the most senior politician?” They will tell you quickly because they voted for him or her. So, we do not have to bother with this kind of notion.

Madam Temporary Speaker, let me now go to how I think the Government has treated devolution.

Sen. Murkomen: On a point of information, Madam Temporary Speaker.

The Temporary Speaker (Sen. Ongoro): Sen. Kajwang, do you wish to be informed?

Sen. Kajwang: Madam Temporary Speaker, Sen. Murkomen is a good man.

Sen. Murkomen: Madam Temporary Speaker, before my friend, hon. Kajwang, departs from that point, particularly the role of this House in discussing the Division of Revenue Bill, I wanted just to inform him and the House at large, that, first of all, there is confusion. I noticed that there was confusion in the Lower House when they were talking about Parliament. When they read the Constitution, where it is written “Parliament” they think that Parliament is the National Assembly. There is a challenge in dealing with that House because there are so many Members. They miss the ambience, soberness and brotherhood and sisterhood of this House. We have had the chance to bond and that bonding was not just social bonding, but bonding using the Constitution. That is why we are more intimate with this Constitution than them. If you read Article 205(1) it says:

“(1) When a Bill that includes provisions dealing with the sharing of revenue, or any financial matter concerning county governments is published, the Commission on Revenue Allocation shall consider those provisions and may make recommendations to the National Assembly and the Senate.”

Madam Temporary Speaker, it does not say “to the National Assembly or the Senate.” This means that if anything is concerning resources or money touching on the county, it has to go to two Houses. If you read Article 218(1) which the previous speakers, especially the Senator for Siaya had read, it says:-

“(1) At least two months before the end of each financial year, there shall be introduced in Parliament—

(a) a Division of Revenue Bill, which shall divide revenue raised by the national government among the national and county levels of government in accordance with this Constitution; and

(b) a County Allocation of Revenue Bill, which shall divide among the counties the revenue allocated to the county level of government on the basis determined in accordance with the resolution in force under Article 217.

Madam Temporary Speaker, “in Parliament” means both Houses. Article 111 talks of Special Bills Concerning Counties. Article 114(1) says:-

“(1) A money Bill may not deal with any matter other than those listed in the definition of “a money Bill” in clause (3).

(2) If, in the opinion of the Speaker of the National Assembly, a motion makes provision for a matter mentioned in the definition of “a money Bill”, the Assembly may proceed only in accordance with the recommendation of the relevant Committee of the Assembly after taking into account the views of the Cabinet Secretary responsible for finance.

(3) In this Constitution, “a money Bill” means a Bill, other than a Bill specified in Article 218, that contains provisions dealing with—

(a) taxes;

(b) the imposition of charges on a public fund or the variation or repeal of any of those charges;

(c) the appropriation, receipt, custody, investment or issue of public money;

(d) the raising or guaranteeing of any loan or its repayment; or

(e) matters incidental to any of those matters.

(4) In clause (3), “tax”, “public money”, and “loan” do not include any tax, public money or loan raised by a county.”

Madam Temporary Speaker, so the National Assembly has been allowed to deal with all money Bills, but not the ones that deal with Article 218, which is Division of Revenue Bill.

Madam Temporary Speaker, as I appreciate my brother for allowing me, I just want to make one comment. It is important for the Lower House to realize that as they try to brand this House as a House of Elders, what that means in African culture, is that it is a House of wise people. If it means that it is a House of wise people, Chinua Achebe said that if a young man, like Kipchumba Murkomen or Stephen Sang or young lady like Naisula Lesuuda washes her hands, she can dine with elders. That means that she can

dine with wise men. So, to the extent that they refer to us as “elders”, as wise people, we accept.

Madam Temporary Speaker, the last statement that I want to make is that in the Lower House, they need to appreciate one thing. We have not and never said that we wanted to be seen as big, but it is the people of Kenya who voted for us. I was voted for by four constituencies. So, under me, there are four Members of the National Assembly. Even putting that aside, we have been so magnanimous and humble. Like Jesus said: “Whomsoever wants to be great must be willing to serve.” We have left all sideshows, unlike the National Assembly, and been busy serving Kenyans because we know that the greater person is the one who serves well.

Madam Temporary Speaker, I just wanted to inform the House to that extent.

(Applause)

The Temporary Speaker (Sen. Ongoro): The point of information was very long.

Proceed, Sen. Kajwang!

Sen. Kajwang: Madam Temporary Speaker, I was very generous to my brother. He actually touched on the issues which I wanted to touch on. So, I will not belabour them.

Madam Temporary Speaker, let me say from the outset that we need to seriously deal with the historical injustices which we wanted to address and have already referred to in the Constitution as marginalized areas. But the Equalisation Fund cannot deal with these issues, because it is so small that even when they try to spread it around, they had to leave other areas out, like my own county which falls in that bracket. It was left out because the spread was too thin. I want to urge that when we amend this Constitution, we must deal with the Equalisation Fund and make it reasonable, so that we can seriously say that some people can be brought up to some level. They may never ever be equal to Nairobi or Kiambu, but they will be somewhere. At least, there will be some infrastructure and social amenities in those areas.

Madam Temporary Speaker, let me refer to one thing that bothers me most; that is, the Constituencies Development Fund (CDF). I must talk about it because it takes 2.5 per cent of money that we should be distributing to counties. The father of CDF was here and he has just walked out. We did this because there was no devolution. We wanted to devolve some funds to the constituencies, so that we could do certain things that the national Government was not doing at the centre. That is how we came to this 2.5 per cent. In fact, it should have been 5 per cent, but hon. Mwiraria, who was then Minister for Finance during that period, persuaded us that when the economy did better, we would improve it to 5 per cent. The economy has done very well, but it has never gone beyond 2.5 per cent. We should have insisted on 5 per cent. But it was a forerunner like the John the Baptist to Jesus Christ. Now, when “Jesus” arrived, “John the Baptist” must recede and diminish and Jesus must come forth. The CDF must now go and devolution takes its place, because that was the reason we created it. We created it because there was no other

structure at the local area in which we could put money. So, we agreed to create something called the CDF and let the Member of Parliament chair it or even be a patron. That is how we did it. It was patchwork waiting for the real thing. Now, the real thing is here. This 2.5 per cent must now go to the county governments. There are only two governments in this Constitution. There is the national Government and the county government. My brothers and sisters in the Lower House must know that there is no constituency government. This Constitution does not allow you to be a member of the Executive, the Legislature and a representative at the same time. We cannot have those. We have so many chaos and court cases on things that were done chaotically because we did not have a structure.

Madam Temporary Speaker, I am not saying that the CDF has not done a good job. In fact, in my constituency, if there was no CDF, I am sure that we would be very much backward now. But that job can now be done by the county government which has an assembly which can do these things. The county government will devolve to the constituencies, sub-counties and even wards. So, there is no vacuum that needs to be filled by a Member of Parliament, so that he or she becomes a little executive in some constituency. I am doing this boldly because I know that some people will accuse me, but I want to take it.

Madam Temporary Speaker, the CDF is now the bad tooth. We have to remove and replace it with the good tooth, that is, the county government. This is because if we leave it this way, there is going to be a serious competition between the Members of Parliament and Governors and county representatives. There is going to be confusion and chaos. This Constitution was not written so that we promote chaos in this country. When a good idea comes, like that of the CDF, we celebrate it. But when a better idea comes, like the county governments idea, then the good idea must give way to a better idea. This is what I am promoting.

Look at the job that we have been given at the counties. If you look at the manifestos of everybody in this country, including that of Obama in America, they talk about agriculture. There is no country or a political party that has ever written a manifesto without agriculture as the prime mover. Of course, you can talk of industrialization. However, if you cannot feed your people, you will be overthrown. The Soviet Union Empire collapsed because they could not feed their people in winter. America had to give them some money. They broke into pieces. So, agriculture is the core of any society or economy, and this function has been given to the county. So, you should give the county money to run agriculture because it is the biggest thing in this country. In fact, it employs 70 per cent of the workforce in this country. It can employ more if we put more money in it. There is a young lady from my own county, whom I saw on television. She had looked for a job as a journalist and could not get it. She went back home. She is now earning Kshs1.2 million, every three months when her watermelons get ready. She is so comfortable. She has already been called by the Cabinet Secretary for Agriculture, Livestock and Fisheries, to showcase her as a youth who can transform the other youths who are idle and wasting time.

Agriculture can employ many people and feed the world. In Kenya, we can expand it because we have not even used 20 per cent of our country properly for

agriculture. But when we say that the counties are going to do agriculture, then we should give them the money to do it. We are not going to do agriculture without mechanization and modernization. Where is the money to do that? I remember in his last speech the former President said that he is leaving, but we have to modernize and mechanize agriculture. How are we going to do that without money? If we are going to do agriculture, we need personnel. There were extension officers who used to tell people how to plant the hybrid maize. I saw it long time ago when I was a young boy. They used to tell us how to space the lines and how many seeds should be put in. Those are the people who changed our lives. They were withdrawn by the national government. They need to go back there, but who is going to employ them unless we give money.

Who is going to look after our animals? The veterinary officer who used to come to our village every Tuesday - I remember very well and we could take our animals for injections - were withdrawn by the central government. Now everybody is a veterinary officer. Now everybody who has some animals seems to know how to inject them because there is no veterinary officer. You become a quack doctor for your animals. So, if the animals are expensive, as Sen. Wetangula's, you can kill them because you are just a quack. Since there is nobody to do this job, we have to employ them. In my own village where we are still looking after those range animals like the Deputy Minority Leader's place, we still look after them, they need water. The *mzungus* did some water pans 50 years ago. We used to call them *tinga* in my place because they were done by a tractor. Tractor is called *tinga* in my language. They have served us for 50 years. This Government has never done even one *tinga*. They have not even desilted the ones that we have. Unless we do so, where are our animals going to get water? Where is the money for it?

So, we have to put money where it will change our lives. It will mechanize and modernize agriculture. It will provide water services for human consumption and also for livestock. It will also deal with public health. We would depopulate our hospitals if we just looked at public health, if we take clean water, if we make sure that there are no mosquitoes and so on. By doing so, we would reduce illnesses to our children by almost 40 per cent to 60 per cent. But where is the source of that clean water unless we provide money for it? Who will look at public health unless we put money in it? So, public health is now our job. Primary health care is now our job, but where is the money for this?

Madam Temporary Speaker, my brothers and sisters have already said that we will be moving amendments, I agree and I support. We should put that money where it changes our lives most. I hope that the amendment will also say that the 2.5 per cent which we have left to the Constituencies Development Fund (CDF) comes to the county where it can be better managed and be dealt with.

Madam Temporary Speaker, let me just say one or two things about national projects in the counties. If we leave the counties the way they are and we do not do some national projects, we will kill them. Let me give my county as an example. Mbita Causeway which joins Mbita mainland and Rusinga Island has blocked the whole of the gulf of Lake Victoria up to Kisumu. If you have gone to Kisumu recently, you may have noted that the water is dirty because there is no circulation and oxygenation of water coming from the deep waters to the gulf. There is now less fish in the gulf although there

is a mass of water. This is because oxygen is low and the water is dirty and shallow because of the Mbita Causeway. Now the national government has decided to break it and we have a Chinese contractor working on it. I want to thank the national government for doing that. Sooner or later, within one year, the water should start moving and the fish from that place will start kissing each other and we will have a lot of fish in that area. The other thing that we must do---

Sen. Murkomen: On a point of order, Madam Temporary Speaker.

Sen. Kajwang: What is the point of order?

The Temporary Speaker (Sen. Ongoro): Sen. Murkomen!

Sen. Murkomen: On a point of order, Madam Temporary Speaker. Is it in order for my friend, Sen. Kajwang, to combine kissing and fish?

The Temporary Speaker (Sen. Ongoro): Sen. Kajwang, you are out of order! Proceed, Sen. Kajwang.

Sen. Kajwang: Madam Temporary Speaker, I am not quite out of order. You know Sen. Murkomen has never seen a fish. He does not know what the fish do. I am a fisherman and I know where our fish breed. After breeding, they move into the deeper waters. Of course, they do breed and you know what that means. They have to kiss.

(Laughter)

Madam Temporary Speaker, there is another tragedy we have in the lake. That is the water hyacinth. You cannot leave that menace to Homa Bay County, Kisumu County, Siaya County or Migori County. It is a national disaster that must be dealt with. We know that there is a lot of money that has come from the international community to the Ministry of Environment, Water and Natural Resources to deal with water hyacinth. However, some people have an attitude that, that is the lake of Sen. Kajwang and that even if the rest of it chokes, there is no problem. I want to tell them that fisheries alone employ directly more than 800,000 people in this country. There are many others who are employed indirectly. That is a huge industry. There is no industry like this anywhere in this country other than agriculture itself.

The Senate Minority Leader (Sen. Wetangula): Point of information, Madam Temporary Speaker.

Sen. Kajwang: Thank you, my brother, you can inform me.

The Temporary Speaker (Sen. Ongoro): Do you wish to be informed?

Sen. Kajwang: Yes. I agree.

The Senate Minority Leader (Sen. Wetangula): Madam Temporary Speaker, I wish to inform the distinguished Senator for Homa Bay County who is my learned Senior that the role and function of the protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including and in particular fishing, is a national responsibility. Our brothers and sisters in the Lower House should be pre-occupied with this and not bastardizing the Senate.

(Applause)

Sen. Kajwang: Thank you very much, brother. Maybe you could have reminded the Members of Parliament from the lake belt to be very serious about these things rather than talking carelessly.

I am not very happy about one thing in the national government; that is, the creating of a Ministry for Devolution and Planning. This was a mistake because devolution is spelt in the Constitution. It is clear that we have two levels of government. It is clear how they relate. This House disburses the money. I would approve the money that goes to the county governments. They do not require nor do they need to be supervised. It is not provided for that they should be supervised by anybody. I wonder what the Cabinet Secretary for Devolution and Planning will do. Is she going to supervise and with what powers? Is she going to provide on who gets which money, especially this one which we call conditional funds or what is it that she is going to do? Is it the importation of the Minister for Local Government again to control and to throttle, if possible, the growth and development of our county governments? I hope the President will look at it again so that he could give the Minister some other job to do rather than the job of devolution because there is no work to do there.

Thank you and I support.

The Temporary Speaker (Sen. Ongoro): Hon. Senators, I think the debate is of great national importance and interest. All our counties are eagerly waiting to see what their Senators have to say or to contribute. If we go by what is happening now, that every speaker is given 30 minutes, then we will only have two Senators speak. I, therefore, wish to request the House to resolve that we reduce the contribution time to ten minutes, so that we can have as many Senators as possible making contributions because we are already at 11.20 a.m. We want to conclude this by 12.30 p.m. and go to the third stage in the afternoon.

I will now put the Question.

*(Question, that contribution time be limited
to ten minutes, put and agreed to)*

The Senate Minority Leader (Sen. Wetangula): On a point of order, Madam Temporary Speaker. I want to assist the House. Since voting will not be by voice or shouting, but by delegation, I propose that you put the Question at 20 minutes past midday, so that we have ten minutes to vote because we will have to go into a Division. If we go up to 12.30 p.m. then we will be voting outside sitting time.

The Temporary Speaker (Sen. Ongoro): Sen. Murungi, you have ten minutes.

Sen. Murungi: Madam Temporary Speaker, I want to speak very fast. First, we should not waste time discussing the status of this Upper House. That is obvious. It is like asking whether water is wet. Even lions do not go around saying they are lions. It is other people who see them and know they are lions. Everybody in Kenya knows who we are.

The Bill before us is about equitable division of revenue between the national government and the county governments. The operative word is "equitable." This Bill does not provide for equitable division of revenue between the national and the county governments. It provides for inequitable distribution of revenue between the national and

the county governments. The criterion to be considered is set out in Article 203 of the Constitution. That criterion has completely been ignored. The criteria spells clearly that there must be objective analysis of the functions of the national and county governments in the division of revenue. What has happened here is that Treasury itself is what is dividing this revenue. I do remember the late Martin Shikuku telling us that you should never sent hyenas to roast meat for you because they will eat it. Here, we have sent the national government to divide revenue between itself and the county governments and it has eaten the meat on the way. If you read page 309 in this small booklet of the Constitution, the division of functions---

Hon. Senators: Which Article?

The Temporary Speaker (Sen. Ongoro): Which Article, Senator, because we have different versions of the Constitution?

Sen. Murungi: I am looking at page 309, the Fourth Schedule, No.31, Energy policy including electricity and gas reticulation and energy regulation. The national Government is supposed to give us the energy policy. But if you look at page 312, No.8(e), the county government is given the responsibility of county planning and development, including electricity and gas reticulation and energy regulation. The same function which is given to the national Government is also given to the county government. So, the question is; why would you give so much to the national Government and only a mere pittance to the county governments when they are performing the same functions?

Madam Temporary Speaker, look at the roads; being given only Kshs28 billion when they are only doing the national roads, when all the other roads are being done by the county governments. Then, the entire budget for county governments is Kshs158 billion, because the Kshs43 billion or so is actually a Conditional Grant; it will never reach the county governments.

Madam Temporary Speaker, there is no objective criteria; there is no rhyme or reason in this division of revenue. It is done selfishly in the interest of the national Government by centralists who have no interest in devolution.

(Applause)

Madam Temporary Speaker, we have heard about the issue of capacity. We are told the county governments have no capacity. But what capacity is there? In the roads, they are using private contractors. In electricity, we also use labour and transport contractors. Why can the county governments also not employ those contractors to distribute electricity at the county level? So, this issue of lack of capacity is just an excuse for them to retain resources at the centre. We have to see through these tricks.

Madam Temporary Speaker, the Constitution says a minimum of 15 per cent is what should go to the counties, but the key word is "not less than 15 per cent;" but it could be 30 per cent, 80 per cent, or even 90 per cent. We are not bound by these formulae which are set by the Executive. This Senate is the Upper House. We are no longer a mere cheering crowd for anybody; we are no longer holding ultimatum of the Executive. We are not even bound by the resolutions of the Lower House.

An hon. Senator: Not now!

Sen. Murungi: We are here to right this allocation.

(Applause)

I am saying that for us to perform our duties as set out in Article 96 of the Constitution, we have to look afresh at the reallocation. In my own view, the fair allocation should be at least a half.

(Applause)

A minimum of Kshs400 billion should go to the counties, and then we get to the second level of distributing between the counties.

So, Madam Temporary Speaker, we have to take our role as Senators seriously as our constitutional duty. We should not be beaten by any person because ours is to deliver.

Madam Temporary Speaker, I know I have very little time. The way this budget has been organized is the traditional method. Those officials are actually very busy. They look at what was provided for in the last budget and then they say we are increasing by five per cent or 15 per cent on various items. So, they use what they call the historical methods. But the time has come for us to take budget making more seriously. This House is no longer a bystander in the budget making process; we are not here to let the caravans pass. We are now, under the new Constitution. In the past, Parliament was merely a budget approving Parliament. The roles of Parliament were merely to make noise, let off steam, and allow the figures which had been set by the Executive to pass. But our role now is to make the budget; the Executive is merely making proposals, but the real decisions have to be made by the Senate. We are being called upon to do so.

Lastly, Madam Temporary Speaker, we have to understand what the budget is. The budget process is not merely a game of numbers; it is to implement Government policies and the Constitution. What we are doing here is very fundamental to the implementation of the devolution process in this country. So, it is for us to amend these figures to make sure that our role as the custodians of devolution is properly played out and implemented.

With those few remarks, Madam Temporary Speaker, I want to support the Bill with amendments at the Third Reading.

The Temporary Speaker (Sen. Ongoro): Senator for Wajir; Sen. Abdirahman.

Sen. Abdirahman: Thank you very much, Madam Temporary Speaker. I also stand to support this Motion. I want to give a number of comments. I sat through yesterday afternoon and part of this morning listening to a number of hon. Senators contributing to this Motion. Following the footsteps of the very able Sen. Murungi and the manner in which he spoke, we really need to put things right the way they were and in their order.

Yesterday, I listened to a Senator who said the Jubilee Government is generous. Personally, I will not say that this is generosity. Our counties deserve more than what has been indicated and provided here because I have a bone to pick with a number of areas.

One of them is on the costing of functions. All over the country, there has been inequity in terms of development. This is mainly because policy makers and planners never understood this country. At one time I said that the national Treasury, devolution and planning cannot work together effectively. They have never worked together collectively. Now allocation of devolved funds is done by the Treasury and the Commission for Revenue Allocation (CRA). As much as I trust the CRA, their costing is based on what used to happen in the past. In a broader concept, if you take development across the country in the same pattern, it will not actually be ideal. I come from a place where we have been marginalized for long. Nowadays, we do not say we are marginalized. We are only saying that in terms of policy and legislation, people have not understood us.

Hon. Kajwang said the agriculture sector employs over 70 per cent of our population. I totally agree with him. I believe livestock would equally have employed another 70 per cent if we took it seriously, but we never did so. So, I am just saying that when it comes to costing, they must consider issues of pastoral development, so that we equally increase our economic abilities in this county. Of course, poverty levels have somehow been taken care of.

Madam Temporary Speaker, I have a problem with what they are calling Conditional Grants. If I may look at Item 4(a), it says this Bill secures financing for ongoing development programmes. This worries us because projects that have been put in place in the past by the national Government did not adequately cover the entire country. If they continue financing projects where they spent so much money and forget about areas that have been forgotten, then what is going to happen? I think we should amend this bit and say that we should secure funding even for new projects. Why must it only be for ongoing projects?

Madam Temporary Speaker, as much as funding is allocated to counties and even the national Government for functions, if the same bureaucratic red tape continues to persist in this country, we will not be achieving much. You remember how much money meant for improvement of roads and rehabilitation of water pans used to be returned to the Treasury because it was not spent. Funds lie idle just because people do not even use them. We have witnessed this for a couple of years. Procurement procedures are very cumbersome in this country. I spoke to my governor yesterday. He visited the district hospital and when he went there, he found huge amounts of condoms from Kenya Medical Supplies Agency (KEMSA) in the store. Do we require condoms in Wajir?

(Laughter)

Hon. Senators: Yes, we need them! We need condoms!

The Temporary Speaker (Sen. Ongoro): Order, Senators!

Sen. Abdirahman: Madam Temporary Speaker, I am saying that we require more medicine than condoms. Name any medicines or drugs, be it paracetamol or any other, we need it. There is a serious shortage of drugs, but what they do is to procure from suppliers other things. They chip in some money for themselves and continue supplying these kind of things.

Madam Temporary Speaker, since health now is a function of the county governments, we need to provide capacity to them to procure what they need.

Madam Temporary Speaker, I have one or two more comments to make on how best we can actually link development planning and Treasury. As Sen. Murungi said we require Kshs500 billion for counties and not Kshs200 billion.

Thank you very much, Madam Temporary Speaker.

The Temporary Speaker (Sen. Ongoro): Senator Joy.

Sen. Gwendo: Thank you, Madam Temporary Speaker, for giving me the chance to support this Motion. I want to start by informing the Senator for Wajir that the Jubilee Government is actually generous. If you look at Article 203(2) of the Constitution, we are supposed to be giving the county governments not less than 15 per cent of the revenue. However, the Jubilee Government has promised to give 32 per cent. We hope that this will translate into real benefits. If somebody gives you more than you are supposed to be given, is that not a generous person?

(Several Senators stood up in their places)

Sen. Abdirahman: On a point of order, Madam Temporary Speaker.

The Temporary Speaker (Sen. Ongoro): What is out of order?

Sen. Abdirahman: Madam Temporary Speaker, Governments have obligations to its citizenry. The more they provide the better for the welfare of its citizens. Is Sen. Gwendo, in order to say what our right is and turn it into a privilege?

The Temporary Speaker (Sen. Ongoro): There is nothing really out of order, Sen. Gwendo; it is really just a point of argument.

Proceed.

Sen. Gwendo: Thank you, Madam Temporary Speaker. You might have a right that somebody can deny you, but this is somebody who is actually giving you that right in a huge and in generous manner. With this 32 per cent and with the Senate as a watchdog, we will be able to ensure that the county governments use it appropriately. By doing this, we will have good health facilities, good education and our people will have access to electricity and water.

Secondly, Madam Temporary Speaker, I also want to talk about something that my dear uncle, the Senator for Homa Bay, talked about. According to what we have always heard, the Constituencies Development Fund (CDF) is 2.5 per cent, but the Jubilee Government---

(Loud consultations)

Madam Temporary Speaker, kindly protect me.

The Temporary Speaker (Sen. Ongoro): Order! Order, Senators! Consult quietly.

Sen. Gwendo: Madam Temporary Speaker, the Jubilee Government has promised to give 2.5 per cent to the county governments towards the development of the constituencies. This 2.5 per cent is supposed to be managed at the county level. Again,

this is generosity. In my opinion, if somebody gives you the 2.5 per cent that is already there as the CDF, and then there is another 2.5 per cent that will be managed by the governors from the county government aimed towards developing the constituencies then that is generosity. Of course, having the Senate as the watchdog of the same amounts, this will, again, translate to more development in the constituencies.

Madam Temporary Speaker, have all the allocations that have been done by the Jubilee Government taken care of the factors that are in Article 201? They take care of our needs as Kenyans. They must fulfill the promises they made to us. This is going to translate to better life for all the Kenyans.

Thank you, Madam Temporary Speaker.

(Applause)

The Temporary Speaker (Sen. Ongoro): Sen. G.G. Kariuki.

Sen. G.G. Kariuki: Madam Temporary Speaker, thank you so much for allowing me to say something. This Bill has been with us for almost two days because we started yesterday and I think a lot of areas have been covered by those who spoke before me. I am very sure that there are some like Sen. (Dr.) Khalwale who is waiting to speak and, perhaps, we may not finish all the points for him.

We should not say that the Jubilee Government has been very generous and indicated that they are there to comply with the Constitution. The Government should not be generous, what it does is governed by law. The Government must observe and accept what the law says. So, generosity is out of the question, but it is a good indication, as I have said earlier, that the Jubilee Government and also the people in the opposition like Sen. Kajwang and others are just showing their total commitment to the Constitution. The amount of Kshs210 billion has been talked about over again and again and I need not repeat what has been said. However, the Treasury, the CRA and the Transition Authority (TA) and the Senate should work together in the coming Budget because this is where appropriate decisions ought to be made. Therefore, the Committee on Finance, Commerce and Economic Affairs from the Senate and other committees on devolution will be able to advise in advance these kinds of allocations. If we leave it to the Treasury, it is a known tradition that some of these civil servants are very lazy in terms of doing research to be able to understand the current situation. Therefore, I think that will help this Senate not to dwell too much on something which ought to have been done during the time of allocation.

Madam Temporary Speaker, for the county government to succeed, we do not just have to give them money. We can give them 50 per cent or 90 per cent of the total Budget, but what we should do is to make sure that Members of the County Assembly are well trained. They should not be left the way we were left after we had just been elected. During the time of Independence, we were put in a House like this one where you found white men and women and only those who understood what was happening were able to follow. We should not allow our county legislators to be left without training so that they know the role of the Governor, the Senator and also a Member of Parliament. We are making a mistake to assume that they know. We need to do a lot of research to

understand that we have a problem and try to resolve it. So, I think training needs to be taken very seriously by those who are involved in matters of county administration. As Sen. Kajwang said, we do not need any Ministry to supervise the devolution because it is already there and men and women of knowledge are on the ground supervising it. Therefore, we need the Constitution to be followed to the letter. Let us not talk of who has the power. I have said it in this House that we should not agree to be involved in issues with people who do not know enough for them to know that they do not know. So, we need to move on and forget those who are talking because they are politicians. This controversial politics is being done at home. We are not going to allow any Senator here to bring into this Senate their in-house wars. Let them fight their wars at home. Let the Members of Parliament who have a problem with the Senators fight at home without us getting involved. We are going to look very cheap to allow ourselves to be involved in this issue.

Thank you.

Sen. (Dr.) Khalwale: Thank you, Madam Temporary Speaker. I want to thank the Speaker of the National Assembly and the Clerk of the National Assembly for respecting the provisions of Standing Orders of the National Assembly. Standing Order No.142 of the Lower House dictates that the Speaker and the Clerk of the National Assembly must bring this message to this House. I want to thank them and hope that the Speaker in his ruling will prevail over the Members of the National Assembly. I would like to encourage our compatriots in the Lower House to take time and read, not just the letter of the Constitution, but also attempt to understand the spirit of this particular Constitution. Very many Senators have talked to the various Articles and there is no need for me to repeat. However, I want to encourage them to read Articles 205, 209, 210, 217 and 218. Once they read those articles, even their fears that they are being demeaned will be put to rest. Article 217 provides that in the event there is a stalemate between the Upper House and the Lower House, there is provision for a joint committee of the two Houses which can then thrash out whatever differences they have. Allow me the opportunity to congratulate the 12 Members of Parliament from Kakamega County because they did not join the circus that was in the House yesterday.

Madam Temporary Speaker, I support the Bill, but with amendments. I want to state that when I look at this Bill, it is starting to look to me like mischievously the national Government is attempting to lock money in the national Government, which would have been taken to the devolved government. I would like to refer Senators to the Printed Estimates which I believe some of you have looked at. If you look at the money that has been allocated to the National Intelligence Service (NIS) and Defence, you will be shocked. According to the Bill, this year we are going to spend on NIS and the Department of Defence, Kshs74.4 billion. But according to the actual Printed Estimates, we are going to spend on defence Kshs67.8 billion and on NIS Kshs14.2 billion. This is a total of Kshs82.1 billion. If you subtract Kshs82.1 billion from the allocation which has been put in this Bill of Kshs74.4 billion, it means that cleverly the national Treasury has left Kshs7.6 billion hanging without telling us what it would be used for. We are very suspicious, especially those of us who were in the last Parliament. You remember in 2009, Treasury approached us again with Printed Estimates like this only to turn out to

have the so called “computer errors”. We would like to warn the national Treasury that we have plenty of time and we cannot get tired. We must have time to make sure that the right amount of money is taken to our counties.

Again scrutinizing through this Bill, you will realize that the office of the Attorney-General whose work is just to advise the Government is being given a whopping Kshs3.1 billion. The Director of Public Prosecutions (DPP) who needs money is only being given Kshs1.2 billion. Unless the Government is setting up Keriako Tobiko for failure, it is important that the Office of the DPP be the one that should be given more funding than the office of the Attorney-General. In this Bill, a whopping Kshs149.9 billion is being given to constitutional commissions, but hon. Senators, I would like you to appreciate that it is possible for us to release some of these money to the devolved government because all these committees sit on a continuous basis. I want to propose that when the Committee on Finance, Commerce and Economic Affairs looks at these things, they must negotiate hard with Treasury and tell them that we can make a lot of savings from this money which is going to commissions by insisting that the following commissions sit on a need to sit basis. These are the Kenya Human Rights and Equality Commission; the National Land Commission---. In fact, the Judicial Service Commission is already leading. At the moment, they are not sitting continuously. The Parliamentary Service Commission and the Salaries and Remuneration Commission can sit once in a year.

Madam Temporary Speaker, I want to congratulate the Government for the provision of Clause 6(3) where the Bill intends to hold to account any lazy and inefficient officer who causes wasteful expenditure. We do not expect anybody in the county government to approach court on a matter that could have been easily sorted out through arbitration. Therefore, if such a person is so found, I would be the first person in the case of Kakamega and Siaya my neighbour to support that, that person be surcharged. I also want to comment Treasury and the Commission on Revenue Allocation for reaching a gentleman’s agreement that they raise this from Kshs190 billion to Kshs210 billion. But it is possible that we can raise it using nothing, but just the Constitution. If you look at page 210(2), it provides for the devolved funds being given conditionally and also provides that funds can also be given unconditionally. So, we would like to use that window of unconditional provision of funds to ensure that we raise the amount to Kshs238 billion or more.

I would like to request the national Government to see the need to save on these funds by avoiding unnecessary constructions on the seats of Government. The counties that are found in the former provincial headquarters have more than what they need by way of infrastructure. The people of Kakamega, Mombasa, Kisumu *et cetera*, do not need this infrastructure. All you have to do for these ones is to ask that officer called the former Provincial Commissioner (PC) to go away and then Oparanya, Ranguma and our brother Joho can move into those offices and that money will be free for use.

Finally, Madam Temporary Speaker, you have seen the national government trying to use public debt to deny them funds that they deserve. County governments were not there when the national government was incurring these huge debts. In any case, even

the so-called public debts, in many instances, are not genuine. There are many debts we are paying in terms of hundreds of billions per year that we do not have to pay.

Let me give you an example. Sen. Wako is here and will tell you the truth. All the so-called security tenders with regard to Anglo Leasing are debts we are paying that we do not need to pay. We are even paying for a project called KenRen Fertiliser Factory. I think last year, we paid Kshs145 billion for this factory. KenRen was a fertilizer factory that never was when the former President Kibaki, was Minister for Finance.

I support.

Sen. Hassan: Madam Temporary Speaker, as much as we have been advised not to make reference to the debate in the Lower House, I think I must respond to a thing or two. It was totally out of order for anybody to imagine that a Member of this Senate is in his or her retirement. For those who are here, there is no doubt, indeed, that we have just began. In fact, this is our first electoral contest and we were audacious enough to run for the office of the Senate. We made it as Senators in our respective counties. I can mention a number of Senators here who are at the prime of their careers. I think it was ill-advised for them to perpetuate a perception that we have fought, deliberately, over the last couple of months to try to dissuade.

I made this remark when I was in Mombasa, that, I have had, probably, some of the best four months in public service since I started off as a Senator in this House. I think everybody here has shown some level of astuteness, character, intellect and diligence that is incumbent upon every Senator in this Republic. Just to remind them, some of them must have come from the ODM party and other parties affiliated to the CORD Coalition. When they were paying their nominations fees, it was deliberate that those who were running for the Senate position would pay Kshs250,000. Those who were running for the National Assembly posts paid Kshs100,000 because the parties were persuaded that these were lower cadre political offices. I do not see why I would pay Kshs250,000 to run for a much junior seat instead of paying Kshs100,000 for a much more senior seat.

Sen. (Dr.) Khalwale: On a point of information, Madam Temporary Speaker.

The Temporary Speaker (Sen. Ongoro): Do you wish to be informed, hon. Senator?

Sen. Hassan: Yes, Madam Temporary Speaker.

Sen. (Dr.) Khalwale: Thank you, hon. Senator. That is a very an important observation with regard to the payment of Kshs250,000 against Kshs100,000. The Independent Electoral and Boundaries Commission (IEBC) also asked Senators to pay Kshs100,000 and Members of Parliament Kshs50,000.

Sen. Hassan: Madam Temporary Speaker, in legal jargon, we talk about taking judicial notice. When a fact is a fact, it is non contestable. Unless those facts change, the Senate remains the House of reference as the Upper House of this Republic. We must always interpret the Constitution both in letter and spirit. The spirit of the Constitution and the spirit of the entire Kenyan public was that when they were voting for Senators, they were voting for the Members of the Upper House. That is why people with distinguished careers like hon. Sen. Wetangula, Sen. G. G. Kariuki, Sen. Amos Wako, Sen. Haji and Sen. Murungi, among others, are here. These are Members who could have

won any particular seat in their constituencies. Why did they opt to go for the Office of the Senator?

To make my point before I leave, devolution did not come to prejudice any of us. Many people of Mombasa still complain about marginalisation notwithstanding the fact that we see super highways and roads in Mombasa County. The fact that there are physical structures of development in Mombasa, should not delude anybody to believe that Mombasa does not need money to commensurate the services there.

I agree with the Senator for Nyeri County and the other Senators from counties which will be most severely harmed by any deficit when we start devolution on a wrong footing. Mombasa needs more than Kshs4 billion to run its transactions. For us to say that there is a formula that has been developed disenfranchises the possibility of Mombasa to meet its own obligations and starts devolution on the wrong footing. Therefore, this House must move with the kind of speed that will ensure that no county will start its transactions as a county government with deficits.

We will be joining hands, in this House, to move an amendment that ensures that we secure services that are rendered by this county that have been severely disarmed on the basis of devolution vote. I believe that we need, more and more, to question all counties as we go into devolution.

Mombasa is the second highest contributor to the country's GDP. I have seen that we have been ranked 23rd in the allocation of quarters. I think devolution was not supposed to do a Robin Hood kind of strategy that you take from those who have and give those who do not have. It meant that you equalize the society so that everybody has an equal ability to compete.

Finally, I think we need to continue to change the philosophies of this Government. I come from the Human Rights background. Many of you here come from different backgrounds. I made reference to Article 19(1) and (2) of the Constitution. That is on the fundamental rights and freedoms. The Constitution must not only look at the possibility of equality of counties, but the most important equality that we need to promote which is the equality of every human being who lives within the territory of Kenya. It also talks about elements of social justice which effectively mean that the Government must continue to provide itself to its obligations and in particular, obligations under Article 43 of the Constitution which is the right to food, shelter, health and the right to education.

I beg to support this Motion with the necessary amendments.

The Temporary Speaker (Sen. Ongoro): Order, hon. Senators. As you are aware, the Order Paper for this afternoon is already out. That means that the Bill before the Senate must proceed to conclusion. In the afternoon, we will proceed to the Committee Stage which now makes me call upon the Mover of the Motion to reply.

Sen. Murkomen: How many minutes do I have, Madam Temporary Speaker?

The Temporary Speaker (Sen. Ongoro): You have ten minutes, but you are allowed to donate one or two minutes to a Senator of your choice.

Sen. Murkomen: Madam Temporary Speaker, on behalf of the Senate Majority Leader, I would like to move this Bill. I would like to appreciate hon. Senators for very candid, honest and well researched positions on this Bill.

Sen. (Dr.) Khalwale: Madam Temporary Speaker, the rules of debate demand that since it was not Sen. Murkomen who moved this Bill, if he is the one officially responding to it, then he has to make that clear. Otherwise, we will assume that he is just another contributor.

The Temporary Speaker (Sen. Ongoro): I have heard Sen. Murkomen state the fact that he is responding on behalf of the Senate Majority Leader.

Sen. Murkomen: Madam Temporary Speaker, I take that to have been a point of information; that instead of using the word “moving,” the hon. Senator wanted me to use the word “responding.” I am, therefore, responding on behalf of the Senate Majority Leader.

Basically, I said that I appreciate the well researched positions that Senators have given. This House appreciates the effort that has been put by the Government in terms of tabling this Bill. It appreciates the work done by the CRA and the Treasury in terms of giving good foundation for us to improve on.

I would like to quote Senator Kajwang. I think that when we go to the Committee stage in the afternoon, Members will come back as promised from both sides of the House, to ensure that, that good idea from the Government is improved to a better idea.

Madam Temporary Speaker, a lot has been said about some discussion outside this House by our brothers in the Lower House. I think that those who were watching and listening are now well educated in the Lower House; that the term “Parliament” means both the National Assembly and the Senate. The Senate has the jurisdiction and rightly so, to debate on this matter. It is going to perform its constitutional duty to ensure that the resources that are going to the counties are adequate and that the Senate is ready and willing to serve the people of Kenya without fear, favour or intimidation. I am told that the word “Senate” was derived from the word “senior.” Now, it is even in English itself that this House is senior. But we have been magnanimous enough to avoid reminding our brothers about this seniority, because it was Wole Soyinka who said that a tiger does not need to shout all the time about its tigritude. We do not have to say this. We know it, but have been carrying ourselves so humbly, as required by Chapter Six, that we are servants of the people of Kenya. But if we need to remind them, I think that we have done it enough today.

Madam Temporary Speaker, I have been informed by the Senate Minority Leader that it would be unprocedural for me to donate my time. The Members who were not able to contribute this morning will have the opportunity in the afternoon to do the same when we go to the Third reading stage. I think that I have nothing else useful to add because I had prepared myself to donate time. It is important for us then to move forward.

The Temporary Speaker (Sen. Ongoro): Hon. Senator, you will remember that I allowed you to donate time before contributing. So, you cannot do so at this stage.

Sen. Murkomen: Madam Temporary Speaker, since we are learning, you can use the powers vested in your office and allow me for purposes of today only.

(Loud consultations)

Madam Temporary Speaker, I am properly advised by you; that I cannot donate. But I think that I need to mention that---

Sen. Hassan: On a point of order, Mr. Temporary Speaker. Sen. Murkomen said that he had nothing else useful to say and then he now says that he wants to say something. I would advise him not to say anything that is not useful to this House.

(Laughter)

Sen. Murkomen: Madam Temporary Speaker, I am well advised and accept, except to say that in the analysis of functions in Schedule Four, Members have dwelt on this very important matter of whether a function is concurrent or exclusive. I said yesterday that the challenge that we have, something that we must expeditiously do, working together with the Treasury and Transition Authority, is unbundling these functions, so that we are able to know what exactly it means to say “financing agriculture.” As you have heard from Sen. Kajwang, when I was a young boy – and the Minority Leader whispered to me that it was also the same in Bungoma County - there used to be a person called “*Borafya*”. I did not even know that it was a Kiswahili word “*Bora Afya*.” The person used to come around and remind us to dig latrines and ensure that we are maintaining good standards of public health. We need to restore this kind of officers because they are the ones who made the great Senators who are here. We want them to also perform those functions at the county level to ensure that the future generation is getting good health and that we have good agriculture and housing at the local level. Let me pause and ask a rhetorical question. If you give counties that have slums Kshs5 billion or Kshs7 billion and the Constitution says that housing is a function of county governments, does it take Kshs5 billion to remove slums in Kibera, Mombasa, Eldoret or Kisumu? I think that it takes more resources and that is why it is important that when we come back to this question of unbundling an analysis of functions, it has to be very clear that the counties are actually performing functions under Article 43; what will be called socioeconomic rights. Therefore, in achieving that important right, which is recognized internationally, it is important that the necessary resources are given to the counties to ensure that they perform their constitutional duties and this country has equity, so that we avoid what the Senator for Mombasa told us; that we do not want also to rob Paul and give it to Peter. We want to ensure that the counties are performing their functions and the resources are shared equitably.

Madam Temporary Speaker, with those remarks, I beg to move.

The Temporary Speaker (Sen. Ongoro): Hon. Senators, with a lot of constraints, I now want to state that we have come to the end of the deliberations. Although we would have liked to interrogate this matter further, time is of essence. We have to move on to the next stage in the afternoon.

Before I put the Question, you are aware that the matter before the Senate is a Motion that affects counties and shall require the support of a majority of delegations. Therefore, I now direct that the Division Bell be rung for eight minutes. Meanwhile, can we have the two Whips give us the proposed names of the two tellers?

(The division bell was rung)

The Temporary Speaker (Sen. Ongoro): Hon. Senators, I now direct that the doors to the Chambers be locked. Tellers are as follows:- Sen. Kanainza for the Nays and Sen. Sijeny for the Ayes. I direct that the two tellers take their seats on either side of the table.

I now direct the Clerk to call out the names of the Senators in alphabetical order.

(Loud consultations)

Order, Senators! Order!

DIVISION

ROLL CALL VOTING

(Question put and the Senate proceeded to vote by County Delegations)

AYES: Sen. Abdirahman, Wajir County; Sen. Anyang'-Nyong'o, Kisumu County; Sen. Chiaba, Lamu County; Sen. Haji, Garissa County; Sen. Hassan, Mombasa County; Sen. Hargura, Marsabit County; Sen. Kajwang, Homa Bay County; Sen. G. G. Kariuki, Laikipia County; Sen. (Dr.) Khalwale, Kakamega County; Sen. Mbuvi, Nairobi County; Sen. (Dr.) Kuti, Isiolo County; Sen. (Prof.) Lesan, Bomet County; Sen. Leshore, Samburu County; Sen. (Prof.) Lonyangopuo, West Pokot County; Sen. (Dr.) Machage, Migori County; Sen. Melly, Uasin Gishu County; Sen. Mositet, Kajiado County; Sen. Mungai, Nakuru County; Sen. (Eng.) Muriuki, Nyandarua County; Sen. Murkomen, Elgeyo-Marakwet County; Sen. Murungi, Meru County; Sen. Kagwe, Nyeri County; Sen. Ndiema, Trans Nzoia County; Sen. Obure, Kisii County; Sen. Okongo, Nyamira County; Sen. Sang, Nandi County; Sen. Wako, Busia County; Sen. Wamatangi, Kiambu County; and Sen. Wetangula, Bungoma County.

Teller of the Ayes: Sen. Sijeny.

Teller of the Noes: Sen. Kanainza

Madam Temporary Speaker (Sen. Ongoro): Hon. Senators, I wish to announce the results as follows.

AYES: 29

NOES: Nil

ABSENTIONS: Nil

You will appreciate that this vote has exceeded the threshold of 24. Therefore, the Motion is carried.

(Question carried by 29 votes to 0)

ADJOURNMENT

The Temporary Speaker (Sen. Ongoro): Hon. Senators that completes the business of the House this morning. The Senate is adjourned until this afternoon at 2.30 p.m.

The Senate adjourned at 12.30 p.m.