

PARLIAMENT OF KENYA**THE SENATE****THE HANSARD****Thursday, 7th November, 2019**

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

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

PRAYER**PETITIONS**

The Speaker (Hon. Lusaka): Hon. Senators, I will defer Petition No.1.

**CORRUPTION AND EMBEZZLEMENT OF FUNDS IN
NAROK COUNTY GOVERNMENT**

(Petition deferred)

I call upon the Vice Chairperson of the Committee on Land, Environment and Natural Resources to table the reports on his petitions.

Sen. Prengei, proceed.

Sen. Prengei: Mr. Speaker, Sir, I beg to lay the following Papers on the Table of the Senate today, Thursday, 7th November, 2019.

**REPORT ON PETITION: ADVERSE ENVIRONMENTAL AND SOCIAL
EFFECTS FROM THE CONSTRUCTION OF PHASE 2A OF THE SGR**

Report of the Standing Committee on Land, Environment and Natural Resources on the adverse environmental and social effects arising from the construction of Phase 2A of the Standard Gauge Railway (SGR), Nairobi-Naivasha Section.

**REPORT ON PETITION: BUDGETARY SUPPORT TO WILDLIFE CONSERVANCIES FOR
SUSTAINABLE CONSERVATION AND COMMUNITY DEVELOPMENT**

Report of the Standing Committee on Land, Environment and Natural Resources on the budgetary support to wildlife conservancies for sustainable conservation and community development.

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REPORT ON PETITION: ALLEGED UNLAWFUL DEPRIVATION
OF LAND SITUATED IN KAJIADO COUNTY

Report of the Standing Committee on Land, Environment and Natural Resources on the Petition on alleged unlawful deprivation of a parcel of land situated in Kaputiei North, Kajiado County.

REPORT ON PETITION: OWNERSHIP OF MGENO LAND RESERVE

Report of the Standing Committee on Land, Environment and Natural Resources on ownership of Mgeno Land Reserve.

REPORT ON PETITION: NON-PAYMENT OF COMPENSATION
FOR LAND COMPULSORILY ACQUIRED TO CONSTRUCT
MWATATE-TAVETA-HOLILI ROAD

Report of the Standing Committee on Land, Environment and Natural Resources on the Petition on non-payment of compensation for land compulsorily acquired to construct Mwatate-Taveta-Holili Road.

REPORT ON PETITION: IRON ORE MINING AT
KISHUSHE IN TAITA TAVETA COUNTY

Report of the Standing Committee on Land, Environment and Natural Resources on the Petition on the effects of iron ore mining at Kishushe in Taita-Taveta County.

(Sen. Prengei laid the documents on the Table)

Mr. Speaker Sir, the Senate Standing Committee on Land, Environment and Natural Resources, at its sitting held on 23rd October, 2019, adopted the Committee Reports that I have tabled.

The first one is the report on the Petition regarding adverse environmental and social effects arising from the construction of Phase 2A of the SGR, Nairobi-Naivasha Section. The Members of the Committee sifted through the issues raised by the petitioners and analyzed the issues to be determined from the prayers of the petitioners.

The Committee invited the Ministry of Lands, Ministry of Transport, Infrastructure, Housing and Urban Development; Kenya Railways Corporation (KRC); the Ministry of Environment and Forestry; the National Land Commission; and the Consortium. The Committee also invited the petitioners and gave an opportunity to other residents of Kajiado County interested in making submissions on the Petition to provide further information to help determine the prayers.

Mr. Speaker, Sir, from the foregoing, the Committee recommended as follows -

- (1) THAT, KRC compensates all the affected residents with legitimate claims with immediate effect and all compensations must be completed by 30th December, 2019.
- (2) THAT, all properties that were affected by the construction process of the SGR, as was observed during the visit, be investigated and compensations be carried out before the project is finalised.
- (3) THAT, in cases where it is confirmed that there are persons who have been affected by environmental pollution and have their health affected, such persons should be compensated adequately.
- (4) THAT, a status report of the implementation of the aforementioned concerns be communicated to the Committee not later than 31st December, 2019.

Mr. Speaker, Sir, on the second Report regarding the Petition on budgetary support to wildlife conservancies for sustainable conservation and community development, the Committee invited the petitioners to provide information to help determine the prayers of the Petition. The Committee as well invited the Cabinet Secretary for Tourism and Wildlife to respond to the concerns of the Petition.

The Committee also conducted a site visit on 21st February, 2019 to Nasuulu Community Conservancy, Sera Conservancy, Kalama Conservancy and Northern Rangelands Trust.

The Committee recommends as follows on the second report-

(1) The Ministry of Tourism and Wildlife should formulate a policy and strategies to support and further recognize conservancies as important players in wildlife conservation and management. This policy and strategy should detail, not only budgetary support, but also provide for incentives, skills transfer, human resource and other investments so as to promote the protection and conservation of over 65 per cent of wildlife resources which are outside Government protected areas.

(2) The Ministry of Tourism and Wildlife should operationalize the Wildlife Conservation Trust Fund as provided for under Section 23(4) of the Wildlife Conservation and Management Act 2013. Proceeds from this Fund should be partly used to help the needs of the community wildlife conservancies to support the conservation of wildlife in Kenya.

(Loud consultations)

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

Sen. Prengi: Mr. Speaker. Sir, on the Petition regarding alleged unlawful deprivation of a parcel of land situated in Kaputiei North, Kajiado County, the Petitioner, Mr. David Muigai Ng'ang'a, prayed that the Senate, through the relevant Committee, investigates the matter with a view of ensuring that his alleged parcel of land, namely Plot No. KJD/KAJIADO/KAPUTIEI NORTH/28126 is properly identified and reinstated back to him.

The Committee met with Ministry of Lands and Physical Planning on 13th February, 2019, and a resolution was made that the Registrar should ensure the petitioner is assisted to identify his parcel of land.

In the foregoing, the Committee notes that the petitioner, Mr. David Muigai Ng'ang'a, wrote a letter to the Committee informing the Committee that the Ministry of Lands and Physical Planning worked on his request and prayer, and that a fresh survey was done and new beacons placed to identify his parcel of land.

The Committee further noted that in his letter, he requested that the Director of Survey ensures that a plan with the mathematical coordinates of the new extract plan indicating his parcel of land is filed at the Lands Registry for future reference.

Mr. Speaker Sir, on the Petition regarding ownership of Mgeno Land Reserve, the petitioner prayed that the Senate assists in the gazettment of Mgeno Grazers' Integrated Management Committee members for easy management of the parcel of land and direct that the national Government to carry out survey and registration of Mgeno Community Land and issue title deeds for the parcel of land as well as direct revocation of the title deeds issued to illegal settlers.

The Committee, therefore, recommended as follows-

(1) THAT, should there be any title deeds issued irregularly, illegally or un-procedurally, they should then be revoked by the CS within 60 days.

(2) THAT, the CS Lands and Physical Planning and the National Land Commission (NLC) jointly form a committee comprising of the county leadership to investigate the matter, noting to carry out detailed and far reaching public participation.

(3) THAT, the CS Lands and Physical Planning and the County Government stop any further subdivisions of the land forthwith, pending a final resolution on the matter.

Mr. Speaker, Sir, on the Petition regarding non-payment of compensation for land compulsorily acquired to construct Mwatate-Taveta-Holili Road; the Committee met with the petitioners to respond to the Petition on land used for construction of the Holili-Taveta - Mwatate Road. The Committee recommends -

(1) THAT, during the construction of the road a survey was done and the affected persons' land was estimated for compensation, but since then many people have not yet to be compensated.

(2) THAT, the process of compensation for those people who were compensated was unfair because some people were paid more for small parcels of land while others being paid less for large parcels of land hence the valuation was contradicting and not clear to them.

The Committee, therefore, recommends as well that the land grabbed on Mwatate and used to build a police station without the consent of the owners or even compensation---

Mr Speaker Sir, following the intervention of the Committee, they were compensated and further the Committee recommends that the NLC should liaise with the

Kenya Highways Authority (KeNHA) to ensure that any other person along the same road Mwatate-Taveta-Holili Road is, without any further delay, adequately compensated.

The last petition was regarding the effects of iron ore mining at Kishushe in Taita Taveta County.

The Committee conducted a successful site visit on 10th May, 2019 that enabled the Committee understand the gravity of the matter. The Committee then invited the Ministry of Lands and Physical Planning and thereafter during the site visit invited the local administration and the County Government of Taita Taveta.

Mr. Speaker, Sir, on this Petition the Committee recommends as follows-

(1) THAT, the Ministry of Petroleum and Mining embarks on critically assessing the working and general mining conditions in all mines in Kishushe, Taita Taveta County and report back to the Committee on the status within 60 days.

(2) THAT, the Ministry of Petroleum and Mining critically assess the environmental conditions in all mines in Kishushe, Taita Taveta County and report back to the Committee on their status of compliance with the law within 60 days.

(3) THAT, the National Treasury finalizes the preparation of the regulations operationalizing sharing of revenue under Section 183(5) of the Mining Act and publishes them within 90 days.

(4) THAT, the Ministry of Petroleum and Mining as the regulator and licensor, investigates Sambruddha Resources Kenya Limited's compliance with the Community Land Act---

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

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

Sen. M. Kajwang': On a point of order. Mr. Speaker, Sir. It is a common practice in parliamentary democracies that when a Member is making a maiden speech, that speech shall be heard without interruption and interference. Am I in order, that Sen. Prengei---

(Laughter)

The Senate Majority Leader (Sen. Murkomen): On a point of order, Mr. Murkomen.

The Speaker (Hon. Lusaka): Order, Sen. M. Kajwang'! What is your point of order, Sen. Murkomen?

The Senate Majority Leader (Sen. Murkomen): Mr. Speaker, Sir, is it in order for Sen. M. Kajwang' to insinuate that Sen. Victor Prengei has not talked in this House for the last two-and-a-half years while in reality, as late as yesterday, he even spoke on the same platform?

The Speaker (Hon. Lusaka): Sen. M. Kajwang' is out of order! Sen. Prengei was making his speech on behalf of the Chairman of Committee on Land, Environment and Natural Resources.

Sen. Wetangula: On a point order, Mr. Speaker, Sir.

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

Sen. Wetangula: Mr. Speaker, Sir, is the distinguished Senator for Homa Bay in order to cast aspersions on a courageous young man, Sen. Prengei, who stood with men and women of courage and signed against the escalation of loans in this country?

(Laughter)

The Speaker (Hon. Lusaka): I had already ruled Sen. M. Kajwang' out of order. Sen. Prengei, please, conclude.

Sen. Prengei: Thank you, Mr. Speaker, Sir. The last recommendation that we made as the Committee on that particular Petition is that the Ministry of Petroleum and Mining as the regulator and licensor, investigates Sambruddha Resources Kenya Limited's compliance with the Community Land Act and takes appropriate action where a breach has been committed.

The Speaker (Hon. Lusaka): I do not see any interest. So, next Order.

PAPER LAID

The Senate Majority Leader (Sen. Murkomen): Mr. Speaker, Sir, I beg to lay the following Paper on the Table of the Senate, today, Thursday 7th November 2019.

REPORT ON THE FINANCIAL STATEMENTS OF VIHIGA COUNTY COMMUNITY EMPOWERMENT FUND

Report of the Auditor-General on the Financial Statements of Vihiga County Community empowerment Fund for the year ended 30th June 2018.

(Sen. Murkomen laid the document on the Table)

The Speaker (Hon. Lusaka): Next Order.

NOTICES OF MOTION

NOTING OF REPORT ON THE CONVENTION OF RIGHTS OF PWDS

Sen. (Dr.) Milgo: Mr. Speaker, Sir, I beg to give a notice of the following Motion-

THAT, the Senate notes the Report of the Standing Committee on Labour and Social Welfare on the 12th Session of the Conference of Parties to the Convention on the Rights of Persons with Disabilities held at the United Nations Headquarters in New York, USA, from 11th to 13th June, 2019.

Thank you, Mr. Speaker, Sir.

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The Speaker (Hon. Lusaka): Next Order.

Sen. Dullo: On a point order, Mr. Speaker, Sir.

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

Sen. Dullo: Mr. Speaker, Sir, I gave you a copy of my notice of Motion. Kindly, if you could allow me to give it.

The Speaker (Hon. Lusaka): Okay, it is because you just brought it here. Proceed.

EXTENSION OF TIME OF AD HOC COMMITTEE ON MES

Sen. Dullo: Mr. Speaker, Sir, it is a bit urgent that is why I ambushed you, but thank you very much for this opportunity.

I wish to give a notice of Motion for extension of time for the ad hoc Committee to investigating the Managed Equipment Scheme.

THAT, aware that the Senate resolved to establish a select Committee comprising nine Senators to investigate and establish the facts surrounding the leasing of the medical equipment in the now 119 beneficiary hospitals countrywide;

APRECIATING THAT the mandate of the Select Committee is due to lapse on Friday, 8th November 2019, and regretting due to heavy workload and sheer magnitude of the assignment, the Committee is yet to table its Report in the House and requires more time to conduct a further and thorough inquiry into the subject matter of its mandate;

NOW THEREFORE, the Senate resolves to renew the mandate of the Committee for a further period of 45 days to enable it conclude its work and table its report in the House.

Thank you.

The Speaker (Hon. Lusaka): Next Order.

STATEMENTS

FINANCIAL AUTONOMY AND INDEPENDENCE OF THE JUDICIARY IN KENYA

Sen. Cheragei: Thank you, Mr. Speaker, Sir. I rise pursuant to Standing Order No.51(1) (a) to make a Statement on the issue of national concern on the financial autonomy and independence of the Judiciary in Kenya.

Mr. Speaker, Sir, access to justice for millions of Kenyans is at a risk. As you may be aware, the Judiciary is facing serious financial constraints from the recent statement by the Chief Justice, Hon. David Maraga. Operations of the Judiciary have been crippled by the alleged budget cuts. The Senate Standing Committee on Justice, Legal Affairs and Human Rights has noted this with great concern.

The Judiciary has been long considered an instrument of state power whose function is to control the constitutionality of the executive and the legislature. In the case

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of *Madbury vs. Madison* 1808, the Supreme Court of the United States of America stated that the most important domain in the separation of State power is an independent Judiciary as the guarantor of the rule of law.

In Kenya's constitutional development, particularly in the 1990s and early 2000, the Judiciary and the Legislature were consistently emasculated and their powers to check the Executive significantly eroded. Of the three arms of Government, the Judiciary's role in checking the Executive was most compromised in effect leaving this institution as an appendage of the Attorney General's Office.

The Judiciary lacked both operational and financial independence. The Executive exercised fiscal control over it. The budget of the Judiciary was a vote under a Ministry that was traditionally exercised by the Attorney General and, subsequently, by the Minister of Justice and Constitutional Affairs during the NARC Administration. As a result, the terms of service of judicial officers, their budgetary provisions and related matters were decided by the Executive thus further diluting the independence of the Judiciary.

Mr. Speaker, Sir, Article 1 of the Constitution of Kenya states that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution. It further states that the people may exercise this power, either directly or indirectly, through their democratically elected representatives. Sovereign power is delegated to the three arms of Government; namely, the Judiciary, the Executive and the Legislature. However, the three arms of Government are supposed to be independent and to exhibit checks and balances as such.

During the constitutional review process, issues that impeded the work and independence of Judiciary were addressed. The Committee of Experts noted that there was need to reinvent the integrity in the system of administration of justice and to inject public confidence in the vetting and work of judges and magistrates.

Further, there was need to protect the appointment of judges from political pressures thus resulting in removal of the requirement of parliamentary approval for all judicial appointments other than the Chief Justice and Deputy Chief Justice.

Mr. Speaker, Sir, the Constitution of Kenya assures the independence of Judiciary in Article 161 of our Constitution which states that:-

“In the exercise of judicial authority, the Judiciary as constituted by Article 161 shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.”

In addition to this, the Judiciary Fund is established pursuant to Article 173(1) of the Constitution of Kenya. The Fund was established to give the Judiciary financial autonomy and control over financial resources required to fund its operations and not to be under the mercy or control of the Executive or the Legislature.

It was thus determined that for the Judiciary to be independent, a proportion of the Government revenue ought to be dedicated to this Judiciary operations and should be payable outside the framework of periodic approvals in addition to Article 160(2)(3) and (4) safeguards the tenure and benefits of the judge.

Mr. Speaker, Sir, for the benefit and interest of the Senate, if you look at the Judiciary budget and share of the national budget, in the Financial Year 2008/2009, the share of national budget that was allocated to the period of Financial Year 2008/2009 was 0.26 per cent. In the Financial Year 2009/2010, it was 0.29 per cent. In the Financial Year 2010/2011, the percentage of the share was 0.33 per cent. In the Financial Year 2011/2012, it was 0.63 per cent. In the Financial Year of 2012/2013, it was 0.86 per cent.

In the Financial Year 2014/2015, it was 1.11 per cent. This one shows that this was the highest time the Judiciary was allocated the highest amount of money from the national Budget.

Mr. Speaker, Sir, from year 2015, there has been a steady decline of allocation despite that there has been rise of the national Budget up to this financial year where it is Kshs3 trillion. In Financial Year 2015/16, we saw a significant drop to 0.83 per cent. In Financial Year 2016/17, it dropped further to 0.76 per cent. In Financial Year 2017/18, it dropped slightly to 0.7 per cent. In the current financial year, it is at 0.57 per cent, which is a very sad state of affairs despite the fact that the national Budget is more than Kshs3 trillion.

My Committee is fully aware of the prevailing financial and economic climate and the budgetary constraints within which we are operating. We are also aware that the onus to ensure access to justice is on the Judiciary. As a result, it requires a significant amount of funds from the national Budget to fulfil its constitutional obligations. However, even in times of economic crisis, an appropriate level of funding must be made available to enable the Judiciary to fulfil its constitutional obligations.

Funding of the judicial system is an issue of significance to any government or society and more so to the economy. Resultantly, financing the judicial system must not be done in a manner that undermines the independence of the judiciary, impedes access to justice and erodes the gains that have been made so far.

Mr. Speaker, Sir, the Executive control over the national Budget undermines the other two branches of Government; that is, the Judiciary and Parliament. The Constitution of Kenya cures this by separating the annual budgets of the Judiciary and Parliament from the budget of the national Executive. Each branch of Government must submit its budget independently to Parliament.

Article 173(3) of the Constitution states-

“Each financial year, the Chief Registrar shall prepare estimates of expenditure for the following year and submit them to the National Assembly for approval.”

Further Article 173(4) states-

“On approval of the estimates by the National Assembly, the expenditure of the Judiciary shall be a charge on the Consolidated Fund and shall be paid directly into the Judiciary Fund.”

The action by the Executive to impose budget cuts on the Judiciary and Parliament is, not only unconstitutional and illegal, but undermines the power and constitutional mandate of Parliament. Only Parliament can amend the budget of the Judiciary through the processes set out in law.

Mr. Speaker, Sir, the best practice across the world on allocation of resources to the Judiciary as a shared national Budget is at 3.5 per cent. The trend over a five-year period, which I have given out, indicates that the budget allocation to the Judiciary as a share of national Budget have reduced over time.

Currently, the allocation to the Judiciary as a share of the national Budget is a mere 0.5 per cent in this financial year in comparison to the highest in Financial Year 2014/15 when it was 1.1 per cent yet, we know for a fact that judicial reforms require significant financial support and national budgets are invariably the key source of financing for the judicial system.

Mr. Speaker, Sir, the effect of 50 per cent budget reduction in the Judiciary would be catastrophic in the operation of the Judiciary and service delivery to the public. Some of the critical on-going projects by the Judiciary and service delivery to the public which we envisage are that each of the 47 counties should have a high court in their headquarters.

Some of the critical on-going projects by the Judiciary is recruitment of judges and magistrates to clear backlog of cases, harnessing technology through its working through and e-filing project, automation of proceedings of the anti-corruption courts to speed up the hearing of cases and even setting up a virtual courts to ensure that diaspora--
- Improving the infrastructure in prisons so that cells are not overcrowded and so that children are not held in custody together with adults. There is also recruitment of more judges to expedite the pending cases some of which are older than five years.

There is also establishment of mobile courts and construction of high court system stationed in each county as prescribed by the Constitution of Kenya in order to make justice accessible and affordable to take justice closer to the people. Currently, there are at least 20 tribunals to assist in the expeditious resolution of disputes. Any form of budget reduction means that tribunals and courts as a whole will not be able to execute their work hence creating a backlog of cases.

Mr. Speaker, Sir, judicial independence consists of two main elements; namely, decisional and institutional independence. The Judiciary should be independent of extraneous influences. This enables the Judiciary to render impartial and objective decisions in individual cases. The law and law alone must guide the court in determining the issues before it. In addition to this, the Judiciary is an independent organ of State and is an equal coordinator to other organs of Government.

The Judiciary cannot receive instructions or be controlled by any other arm or organ of Government. This has particular bearing on appointing and removal of judicial officers, their security of tenure, financial independence in terms of budgetary allocation and remunerations and the judicial discipline. If these two elements lack in assuring independence of our Judiciary, then we do not have a sound judicial system.

Mr. Speaker, Sir, an independent and accountable judiciary is an essential component of high quality, effective and efficient justice system and a prerequisite for a well-functioning governance system, including the security and economy of the nation. I urge all Senators to rise and support the principle of independence, separation of powers

and adequate financing of the Judiciary. Concerted efforts must be made to ensure that judicial system is adequately resourced and protected.

My Committee will do everything possible within the law and explore any possible legislative interventions to safeguard the financial autonomy and independence of the Judiciary.

As I conclude, I would like to say the following:

“First, they came for the socialists, and I did not speak out because I was not a socialist. Then they came for the trade unionists, and I did not speak out because I was not a trade unionist. Then they came for the Jews, and I did not speak out because I was not a Jew. Then they came for me and there was no one left to speak for me.”

When they came for the Judiciary, I did not speak because I was not a member of the Judiciary. When they will come for me, as they did the other day, there will be no one else to speak for me.

I thank you, Mr. Speaker, Sir.

(Applause)

The Speaker (Hon. Lusaka): Proceed, Senate Majority Leader.

The Senate Majority Leader (Sen. Murkomen): Mr. Speaker, Sir, I congratulate the Senate Committee on Justice, Human Rights and Legal Affairs for thinking through this very important statement.

In Article 6(2) of the Constitution says-

“The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation.”

Subsection (3) says-

“A national State organ shall ensure reasonable access to its services in all parts of the Republic, so far as is appropriate to do so having regard to the nature of the service.”

Mr. Speaker, Sir, I watched the Chief Justice in shock when he, in public glare, enumerated a number of frustrations he and the Judiciary are going through. To me, this was not such a surprise because we have enumerated similar concerns about the way the Senate is being treated.

The responsibility to protect institutions is the primary duty of those entrusted to do so. We usually read a prayer in this House that we have a responsibility entrusted to us, as Senators. There is also a responsibility entrusted to the Chief Justice to protect the Judiciary. It was not by accident that the people of Kenya established the Judicial Service Commission (JSC) where the Chief Justice is the Chairperson. It was also not by accident that the Attorney-General is a member who is a nexus on matters of justice, law and order between the Judiciary and the Executive.

Separation of power, as is it, is not a doctrine of frustrating the various arms of Government. It is a doctrine of cooperation, consultation and interdependence. This begs a very important question. This Statement is good, but it is not enough for this Committee

to come and issue this Statement. However, we would like the Attorney-General, who sits in both the Executive and the JSC, to come and sit before the Committee on Justice, Legal Affairs and Human Rights and tell us where the problem is in terms of cooperation between the Executive and the Judiciary.

Mr. Speaker, Sir, there are people who have trivialized the concerns raised by the Chief Justice, but those things are not trivial. When the Chief Justice complains about access to the VIP pavilion in the airport, he is not asking it because it is about himself. We know Justice Maraga is a very humble person. If you have Chief Justices from other countries visiting, you have a diplomatic duty. The principle of international law of reciprocity requires that we treat other Chief Justices from other friendly countries, the way they treat us when we go to their countries.

(Sen. Wetangula spoke of the record)

The former Minister for Foreign Affairs is also reminding me that even those from unfriendly countries, as long as they are visiting the country, they must be treated with the respect that is accorded to the people of that stature under international law. Those concerns are not trivial. When we talk about treating the Chief Justice during public holidays in terms of where he sits is not trivial. This is because, it is not the Chief Justice Maraga we are discussing, it is the Office of the Chief Justice and the respect accorded to the Judiciary.

In the same way, we have always insisted that the Speaker of the Senate must be treated properly. Even when former Speaker, Hon. Ethuro was sitting there, there were days he was trying to be humble and did not want some things. Even when Sen. (Prof.) Kindiki was the Majority Leader, sometimes he would want to sit behind at public functions, I would remind him that it was not him we were discussing, but the Office of the Majority Leader of the Senate. You may not want those entitlements, but there is a stature and standard accorded to certain offices. Those concerns really bother us.

Most importantly is the implementation of Article 63 of the Constitution that requires that the functions of the Judiciary must be taken closer to the people, that the people must not be denied services and adequate resources must be given to the Judiciary to ensure that the courts, court officers and the judges are able to discharge their responsibilities unabated.

If this issue will be resolved, it is important for the Judiciary to also take its strong position. When the Chief Justice issued that statement, I was among the first people to go on twitter and say that it is not that the Chief Justice has no powers and responsibilities. It is also not true that the Judiciary does not have the powers to enforce the principles of respect of its institution. The Judiciary must not sound helpless because if they do so, the people of Kenya will lose hope in it.

Chief Justice, you have the ability to bite! You have the teeth so you must bite! Make rulings and decisions that respect the Judiciary. The people who are trying to undermine his responsibilities are Principal Secretaries in Ministries, Cabinet Secretaries

and juniors. It may appear as though it is the President to blame, but we are talking about Cabinet Secretaries not releasing money to the Judiciary.

That blame should not be on the President because he has immunity. Deal with the junior officers who are frustrating you because their responsibility is to represent the President correctly in their jobs and to advise him on what needs to be done. We cannot use conjecture and blame the President. Deal with the Cabinet Secretaries and the Principal Secretaries. Make the orders that are supposed to be made. Let the Judiciary stand and become a beacon of hope and confidence.

In conclusion, when the Council of Governors (CoG) went to the Supreme Court and asked the Court to make a determination on the Appropriation Bill, which was preceded by the Division of Revenue Bill, to make counties lose resources - These are the same issues the Chief Justice is raising - the Supreme Court, presided over by the Chief Justice, said that the CoG is not a state organ and, therefore, they have no jurisdiction to be heard. The same Constitution says that you must not use procedure and technicalities to deny substantive justice.

The same complaints counties are having are similar to the ones of the Judiciary. At that point, the Judiciary knew that they had a budget and they had already been allocated a certain amount for money. They did not want to disturb the Appropriation Bill because they had their money. But look at what has happened. If the Judiciary will not be bold when other institutions of Government have problems--- the Former Chief Justice Mutunga's Court was bold enough and made a decision that preserved the integrity of devolution and the jurisdiction of this House.

The Judiciary must continue being bold, notwithstanding the criticism they face from the rest of us. This is because if you accede an inch, they will come for a mile. You thought that you were nice by not doing away with the Appropriation Act and a legislation that is in place, look at what is happening. When they were done with the Senate and the county governments, they are now coming for you. The Judiciary must become bold in performing its responsibility.

I have said it before that as a Majority Leader in this House, there might be certain trappings of power that are associated to my office. However, those are temporary allocations. Tomorrow, if I do not have that position--- You could be the most powerful CS reported in all the newspapers and the next day, you are not in office. When you are left on your own and the State comes for you, it is only the Judiciary that can come to your rescue. That is where you can get orders to protect your rights under Chapter Four of the Constitution.

My advice to my friends who might be in the Jubilee Administration as Principal Secretaries, CSs and any other positions they hold is that power is temporary. Let us protect the Office of the Judiciary. Respect the institution of the Judiciary because tomorrow when you are without the titles, the only place you will run for preservation and protection of your rights is in the Judiciary. Let us not be shortsighted in denying them money and in pushing them to make decisions that favour the State at the expense of the rights of Kenyans. Then you will be on the receiving end for more years than the time you spent in public office.

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I thank you, Mr. Speaker, Sir.

The Senate Minority Leader (Sen. Orenge): Thank you, Mr. Speaker, Sir. I want to begin as a witness. There was one time when I was at the airport going to Kisumu. I found the Chief Justice of South Africa at the Kenya Airways Lounge. This is a man who is admired in South Africa for many reasons, and he is a born-again Christian. While he was there, there was no Government officer with him. He was accompanied by the former Chief of Staff of Chief Justice Mutunga. He was awaiting the arrival of Chief Justice Maraga. I went and engaged him in a conversation.

While I was talking to him, somebody else came and sat on the arm of the chair where he was seating. I got into an argument with him that this is the Chief Justice of South Africa. I felt terrible that the Chief Justice of the Republic of South Africa, a man who is almost idolized in South Africa, could be treated in the manner in which he was being treated on that day. Characteristic of him, he had a Bible which he was reading and I interfered a little bit with that reading of the Bible.

I want to be very plain on this issue. The Executive has become rogue in this country. That must be said. The reason why I am saying the Executive has become rogue is because even on this appointment of the Judges, if the National Intelligence Service (NIS) wanted to judge the Cabinet Secretaries on the standards that they are using against judges, not a single Cabinet Secretary who is sitting in this Cabinet would be there today. If you look at the issues that some of these judges are being confronted with, it is double standards.

It should be known that the Judiciary never interferes with the appointment of public officers in the Executive. Why should the Executive interfere with the appointment of Judges? Their role ends with the Judicial Service Commission. Once that role has been performed as required under the law and as the Leader of Majority has said - the Attorney-General sits in the Judicial Service Commission - that should be the end of the engagement.

I would like to say plainly, Achieng Okeno, and Jomo Kenyatta went to prison because we had a Judiciary which was not independent. Matters came out clearly that that conviction should not have taken place in the first place. Since we did not have an independent Judiciary, Jomo Kenyatta spent seven years in prison because a magistrate was mobilized and taken to Kapenguria instead of having a case in Nairobi, which is also irregular.

In 1990, when two judges said that Kenneth Matiba had filed a proper petition before the court challenging the election of the President, the two judges who made that ruling, Judge Togbo and Judge Coldrey were dismissed just on account of making the right decision. I dare say, subsequently, if we had an independent Judiciary, Kenneth Matiba would not have been detained for the time he was detained.

Therefore, I am appealing to the President of the Republic of Kenya because we are going through a very important transition; and his tenure is ending in two or three years' time, that it is important that he protects these institutions. The reason as to why I am saying the Executive has gone rogue is that even in Parliament - I said it here and the National Assembly saw it yesterday - there has been abuse of the use of Article 115 of

the Constitution when it comes to presidential assent. The President is making the law constantly. If he has any problems, what he can bring before the Parliament are reservations. He cannot amend the laws of the Republic of Kenya. That is the responsibility of Parliament. It is happening every day, that when any matter goes to the President, he writes out the amendments. It is for Parliament to amend.

Mr. Speaker, Sir, secondly---

The Senate Majority Leader (Sen. Murkomen): On a point of information, Mr. Speaker, Sir.

The Speaker (Hon. Lusaka): Sen. Orengo, will you receive the information?

The Senate Minority Leader (Sen. Orengo): Yes, I can receive information.

The Senate Majority Leader (Sen. Murkomen): Mr. Speaker, Sir, I would like to inform and remind Sen. Orengo that former Speaker, hon. Ethuro, made three rulings on the issue of presidential memorandum. It is not possible for a presidential memorandum when it comes to Parliament, to be said it has been passed in the reverse if you do not achieve two-thirds.

Under Article 115, a decision must be made which must be a positive decision, either to pass it by more than a half of the Members of Parliament in place or to defeat it by two-thirds. That ruling is available for circulation. I can circulate it in the social media platforms of the Senate but it is also available in my office and Senators can get a copy. That should be the future of the discussions on presidential memoranda.

The Senate Minority Leader (Sen. Orengo): Mr. Speaker, Sir, I thank the Leader of Majority for that information.

On top of it, the Senate is a very important institution. We have been made to be a very weak and emasculated institution. The Supreme Court has given a decision on the powers of the Senate. Those powers are being abused by the fact that Bills are not being brought to the Senate on account of non-compliance with Article 110(3).

Who can ensure that there is compliance with that provision? You cannot keep on running to the court because the President has powers which no organ of the State has. For example, as head of State and the Government, he is the person who upon himself, not only respects and upholds the Constitution, but safeguards the Constitution. The word "safeguard" is not used in relation to any other institution, it is used in relation to the President and the sovereignty of the Republic. If a Bill goes to him, where an institution is supposed to have played a role, the Office of the President is supposed to determine whether Article 110(3) has been complied with.

This complaint that is being made by the Judiciary is not a single complaint; it involves all institutions. For example, the police is supposed to be a service, and that is why they are subject to processing through the Senate and the National Assembly. The National Assembly in its enthusiasm passed a law where now the appointment does not have to come to the Senate. So, the police are now become a force instead of a service. This Constitution wanted the police force to become a service.

For those who have regular audience with the President, this thing about the Judiciary--- The Speaker, you have occasions when you sit close to the President. I rarely have those occasions.

(Laughter)

The message should be sent that people fought for the security of tenure of judges. In fact, when the security of tenure of judges was being removed by Parliament and the Bill was brought by the former Attorney-General, hon. Guy Muli, he said - he should have advised the President being the Attorney-General - that the independence of the Judiciary is inconsistent with the powers of the President. Therefore, that security should be removed.

Indirectly, we are implementing what Attorney General Guy Muli brought before the National Assembly and it was passed as a law. As a result of that, people had to struggle for so many years to create the independence of the Judiciary under this new Constitution. Therefore, this cry by Justice Maraga--- Justice Maraga is a very humble person. He cannot harm anybody. To get him to say what he said, he must have prayed, and had sleepless nights.

(Laughter)

He told us he stopped drinking 10 years ago. He may even have had a tot on that particular day to give him a little courage. I saw the Chief Justice one time here in Parliament Buildings trying to approach the President and he found it so difficult to do so. Everybody was around the President. This is a very humble man that we should listen to. What he is saying, he is saying it for the country.

My Chairman, you have made a very bold statement and I congratulate you for it. Adding that to the stand you took yesterday, the future is bright for you.

Mr. Speaker Sir, we want the Executive to respect the Judiciary. These are co-equal arms of Government. The Judiciary is not a junior partner in the arrangement of the constitutional framework. Parliament is not a junior partner, we are all co-equal. The authority of Parliament, the Judiciary and the Executive all come from the people who are sovereign.

I hope from now on that people will listen a little bit more, but the Judiciary must stand firm. We probably need judge--- Sen. Wetangula, who was that judge?

(Sen. Wetangula spoke off record)

Yes; Judge Chunilal Madan who could disregard the Executive when he felt it was right to do so. Chief Justice Maraga should also stand firm. In saying this, we are not saying that the Executive does not have a role. The Executive has a very important role, but they should respect institutions.

I thank you, Mr. Speaker, Sir.

Sen. Wetangula: Thank, you Mr. Speaker Sir. Sen. Cherargei, a young lawyer, has made us very proud this afternoon. The Statement he has brought to this House carries commitment, courage and hope that, indeed, we have, among our leadership, people who can stand up and say things as they are. They have the courage to tell the king that he is naked and not tell him he has a wonderful suit when he is naked.

Mr. Speaker Sir, the history of the Judiciary in this country, as has been said by the Senate Majority and Minority leaders, is a long story to tell. Sen. Orengo can remember that there was a European Judge called Dugdell, who used to write rulings and judgments and carry files to State House to read them to people in the dark days, to allow him to pronounce them in court because of fear. That was the time when Guy Muli had calmed the House and removed the security of tenure not only of judges, but of himself as well. Eventually, he was sacked and he did not have anywhere to turn to.

Therefore, when we see the Judiciary going through what it is going through, it worries many people. This is because it is the only avenue that presides on and resolves disputes between individuals and individuals; individuals and the State; and the State and individuals. When all is said and done, when you have a problem, you have to go to court. There is no Wild West in Kenya. We have heard the Judiciary and members of the Supreme Court being called “*wakora*”. That was an indication of things to come.

Mr. Speaker Sir, I watched Chief Justice Maraga on television the other day. I actually sympathized with his situation. Like Sen. Murkomen said, some of those problems are self inflicted, because the Judiciary still has power and constitutional protection. We have seen the total disregard of Article 165 of the Constitution that protects members of the Judiciary when they make decisions that are honest. We have seen members of the Judiciary being bastardized for making decisions. The Chief Justice himself sacked a magistrate in Kiambu, Brian Khaemba, for granting bail to Governor Waititu.

This is like a saw; “it cuts going and cuts coming”. We must have a country that respects the rule of law. In this country, under the Constitution, the strongest of the three pillars of Government - the Judiciary, the Executive and the Legislature - is the Judiciary. The Judiciary can strike out our decisions. We cannot strike out their decisions. The Judiciary can render an appointment of the president invalid.

When it comes to the judicial management of its affairs, the President should be advised. Those who have the responsibility to advise like the Attorney-General should tell the President to look around the world. Former presidents in Brazil, Argentina and Chile are all in jail. The former President of South Korea, Roh Moo-hyun even committed suicide, because the things we do come round to haunt us. Who ever imagined that after retirement, former President Moi would live in courts defending the many things he did as a Head of State, including ownership of property? Who ever imagined that, yet it happened?

Mr. Speaker Sir, once you leave office, you are *mwananchi wa kawaida*---

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

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

Sen. Halake: Mr. Speaker Sir, is the senior counsel and the honourable Senator for Bungoma County right in misleading this House that former President Moi lived in courts? Which courts?

Sen. Wetangula: Mr. Speaker Sir, I know the young Senator is here courtesy of the Moi enterprise, so she has a responsibility to voice. Living in court does not mean that

former President Moi is in court himself. When you go to court, you go through lawyers who represent you.

Everybody in this country knows that former President Moi has been in and out of court on land issues and many things. Former President Kibaki has also been taken to court. For your comfort, it is not only former President Moi, even former President Kibaki has been taken to court. Even President Uhuru has been taken to court; we even removed him from office through court. Do not worry about that.

What we are saying is that we want a Judiciary that is respected, is accountable, defends the people and is the last point of call for anybody in distress. That Judiciary will not function if the Executive is pressing panic buttons everyday against it.

The Cabinet Secretary for National Treasury and Planning should be told that he has absolutely no business truncating the budget of the Judiciary. Sen. Cherargei comes from Nandi County, where recently - Sen. Orenge may remember - people were killed on a farm because of adjudication of a case that was filed in court 40 years ago yet we are talking of expeditious disposal of cases. When the Judicial Service Commission (JSC) appoints judges, the only duty the President has is to sign a gazette notice of appointment. He has no other business. If he has any evidence that Justice Mumbi Ngugi, who we respect so much, has any misconduct of any nature, let him set up a tribunal. That is what the law enjoins him to do.

Let him set up a tribunal and investigate her publicly. I am sure that none of those judges are afraid of that, but the President is not enjoined in any law to pass any value judgment on a provision of appointment by the JSC.

My brother, Justice Kihara Kariuki, should advise the President in accordance with the law and the Constitution for him not to embarrass himself and the country. The President is busy because he has to deal with issues such as Al-Shabaab raids, police misconduct and many other things. Therefore, those who advise him must also carry the responsibility.

(Applause)

The junior officers who man the lounges at the airport are the ones who are overplaying themselves. I remember escorting Kofi Annan to the airport when he came here to help us sort out our mess and one very junior officer, from my office, who did not know that I was escorting Kofi Annan because I was still in the car, said that he cannot enter through a particular door. He said that *'hapa haikubaliki'*. That man nearly fell when he saw me. He quickly opened the door for Kofi Annan. We have those kind of people whom Chinua Achebe refers to as people who constantly wail louder than the bereaved. They are the people who have ruined this country.

I am sure that Sen. Murkomen and Sen. Orenge will remember the case of *Kumwaka wa Mulumbi and others vs the State* where a chief went to the market and said that we want a law to kill all witches. The boys took to the streets and picked everybody who looked like a witch and killed them. How does a witch look like? Therefore, responsibility in exercise of state power is very important.

I want to urge Sen. Cherargei to move to the next level with this Statement. It should not end here. His Committee should summon the Cabinet Secretary for the Ministry of National Treasury and ask him to justify his conduct. They should also summon the Attorney General and ask him to explain the reason as to why he is not advising the President properly or ask him to tell us if the President is ignoring his advice. They cannot summon the Chief Justice but can listen to him if he is available. They should also call the Registrar of the High Court.

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

The Speaker (Hon. Lusaka): What is it, Sen. Kang'ata?

Sen. Kang'ata: Thank you, Mr. Speaker, Sir. I know that you may not be able to tell which side of persuasion every Senator who is seeking your eye is in but I pray that those of us who are strongly against the Statement also get an opportunity for our---

The Speaker (Hon. Lusaka): What is your point of order? You are actually out of order. I have the names of all those people who want to speak. Conclude, Sen. Wetangula.

Sen. Wetangula: Mr. Speaker, Sir, the Senator for Murang'a has a very good habit of seeking the Floor to say nothing. Let me finish.

The Senate Minority Leader (Sen. Orengo): On a point of order, Mr. Speaker, Sir.

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

The Senate Minority Leader (Sen. Orengo): Mr. Speaker, Sir, the Senator for Murang'a cannot get away with this. This is a Statement made for and on behalf of the Senate Standing Committee on Justice, Legal Affairs and Human Rights and he is a Member of that Committee. This Statement has been discussed in that Committee, including today---

(Sen. Kang'ata stood at his place)

The Speaker (Hon. Lusaka): Order, Sen. Kang'ata.

The Senate Minority Leader (Sen. Orengo): Mr. Speaker, Sir, it is---

(Sen. Kang'ata consulted loudly)

The Speaker (Hon. Lusaka): Order, Sen. Kang'ata. I will give you an opportunity.

The Senate Minority Leader (Sen. Orengo): Mr. Speaker, Sir, it is not in order for a Member of a Committee to oppose a Statement coming from his Committee. He should have raised these issues in the Committee. He is opposing it when it is too late. He will even be late to go to Heaven.

(Laughter)

The Speaker (Hon. Lusaka): Conclude, Sen. Wetangula.

Sen. Wetangula: I will conclude, Mr. Speaker, Sir. It is actually discourteous for the Senator to do what he is doing because we are not debating the Statement to vote on it. Nobody is opposing or supporting the Statement. We are talking about the State of the Judiciary in this country where he, as a lawyer, goes to practice law. We are of the view that these courts will only dispense justice if they are protected and allowed to be independent.

I want to urge Sen. Cheragei to call the relevant offices and speak to them. He should look at the legislative structures in place and see if there is any lacuna that we need to fill for us to protect the Judiciary.

I advise President Uhuru to read the case of the *Zulfikar Ali Bhutto and others vs the State*. In that case, he will get to learn that whatever he does today can come round to haunt him. Judge Ringera was my teacher and he would always tell us at the end of every lesson that; ‘my students, if you want to know the quality of a good law, imagine that law in the hands of your worst enemy. If you feel safe, then it is a good law.’

Thank you, Mr. Speaker, Sir.

Sen. (Dr.) Mwaura: Thank you, Mr. Speaker, Sir. I wish to support this Statement. I thought that the new Constitution would give us new safeguards but I have seen a pattern where Parliament and the Judiciary are being bullied and the constitutional commissions have become toothless. Things are looking terrible. How did we find ourselves here? We found ourselves here because the Executive has mismanaged the budget. They went on a borrowing spree. We have now given them another opportunity to continue borrowing.

I wish people could go back to the Hansard records. I kept on opposing those borrowings. As a student of development economics, I knew that if one has to be comfortable, they have to borrow between 28 to 35 per cent.

The Speaker (Hon. Lusaka): Remain relevant, Senator. You seem to be discussing something that was disposed of.

Sen. (Dr.) Mwaura: I am coming to that, Mr. Speaker, Sir. The Judiciary is complaining about lack of resources and maltreatment because the Executive has mismanaged the economy, and that is the truth. We should not mince our words. We should say things as they are for posterity. After we are long gone and forgotten, nobody will remember how we came to this Parliament. People will remember what we stood for. In fact, I am being riled on social media right now. People are asking for my voice on the public debt issue. Chief Justice Maraga said that he does not have Wi-Fi or paper to print and that is all about money. Bill Clinton once asked if the economy is stupid. If the economy is managed well, the Judiciary and Parliament will have its money.

We depend on the Judiciary to arbitrate our cases. The last time I checked, there were about 11,000 cases that had not been concluded. Who will suffer when you have such a situation and the cases cannot be determined because the courts are not functioning? Our economy cannot grow if we have commercial disputes with regards to how business is supposed to be conducted.

(Sen. Kang'ata consulted Sen. (Eng.) Mahamud

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and Sen. Kihika)

The Speaker (Hon. Lusaka): Order, Senator for Murang'a!

Sen. (Dr.) Mwaura: Mr. Speaker, Sir, such a backlog means that we are denying Kenyans justice, and it means that the country cannot proceed. We have a very robust Constitution, and it speaks to the separation of powers so that the Judiciary can transact its business. There are times when this Parliament has disagreed with the Judiciary because of the manner in which they sometimes give us orders that try to stop us, or muzzle us from conducting our business. When there is such kind of disagreement, there should be a modicum of civility in resolving it. If the Executive, for example, has had issues to do with any of the judgements, the best way is to resolve them amicably.

However when we hear from the grapevine that the Cabinet Secretary (CS) has said that the Chief Justice (CJ) will be removed from office before the end of the year, it is still the same conversations that the former CJ, Willy Mutunga, was also canvassing about. He said that he realized that he was actually riding a system full of cartels, and there was nothing much he could do.

We need to ensure that even when we give power to the Judiciary, they should follow through in order to confer justice to Kenyans. However, we are in a situation where we are now playing serious politics of patronage. This is muzzling every independent institution in this country, so that you owe your position to the powers that be. How will you ever be independent? How will the will of the people ever prevail? This is a question that we must ask ourselves in essence, because there is a danger of having one story. We are living in very serious circumstances where there is a convergence of interests, therefore divergent opinions may not necessarily be very well tolerated.

Mr. Speaker, Sir, it is embarrassing for the CJ of a country to go on national television to complain about not being allowed to have a Mercedes Benz 500 as your equivalent, as the Speaker of the Senate. He also complained about the lack of VIP privileges and of recognition in public. In fact, there was a time I saw that the CJ was not recognized, and in such manner, you imagine that it is a "by the way". If it has been consistent, then I think we have not fully appreciated that the CJ is actually a President of an arm of Government; he is actually the President of the Supreme Court.

Mr. Speaker, Sir, I did not agree with his ruling during the nullification of the Presidential election, of course because I am from the Jubilee Party. However, that does not mean that we should now go ahead and ensure that the Judiciary is not performing. I am saying so because tomorrow, we will appear there and also expect to have justice served to us, as Parliament.

I consistently think that even when we have had issues that are of pecuniary interest, we have seen the Judiciary being quite objective. I may have an issue about the way corruption has gone into conflict resolution, but it is a phenomenon that is everywhere. We are just in a bandit economy. We are People who are rent-seeking everywhere. It is a problem of ourselves. There was a Judge who was saying that every Judge has a price.

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The point is that our role, as Parliament, is to ensure that we clean up the system. This also speaks to the fact that we have really abrogated ourselves; in fact it is a derogation of the Constitution. The power of the purse vests with Parliament, but it has been taken away and it has been misused by the Executive. Under Articles 110 and 114 of the Constitution, the national Treasury is supposed to be independent of the national Government. It is not supposed to be an appendage of the national Government. That is where the problem is; the combination of the Ministry of Finance and the national Treasury. I am on record as having warned Henry Rotich that we were going down to the drain.

Mr. Speaker, Sir, we need to get out of the fear that we have, even us, as Parliamentarians. This is because it has been proved that 7 out of 10 Members of Parliament (MPs) do not come to Parliament anyway. You cannot tell me that those people are bad guys; that they do not work for their people, and that they are not motivated to make change. It is elections, anyway. Maurice Mumbo says, "Politicians are for elections, but leaders are for generations."

Mr. Speaker, Sir, if we continue going the route we are going, we will be going into a hole very fast. We must rise to the occasion. We must be ready to pay the ultimate price, because how will we leave a country with a first world Constitution that does not speak to the real life of a people? How we will be judged by future generations? All of us are participating, because we would want to protect our safe zones. Right now, it is the Judiciary. If you look at the budget cuts, the Judiciary and Parliament account for only 2 per cent of the total budget, but the cuts are 9 per cent. Why is it disproportionate? When you look at that, what will be politicized is what seems to be favoring MPs and Judges.

Right now the dream of the Judiciary is to ensure that we have High Courts in all the 47 counties. However, we have not seen an appointment of Judges that is concomitant to that endeavor. The Appellate Judges are yet to be appointed; so what is happening? What is this lacuna in law? What is this that we are fearing? We need to ensure that we rise up to the occasion.

Mr. Speaker, Sir, the Leader of Minority is not here, but if we continue this way, I see Kenyans going back to the streets, because you can only push people for so long. You can only do so much. Those of us who are called to stand for justice, we will stand for that justice. We will speak truth to power, because that is the only way we will liberate our country.

Mr. Speaker, Sir, I beg to support.

The Speaker (Hon. Lusaka): Hon. Senators, let me disrupt debate to make a Communication.

(Interruption of debate on Statement)

COMMUNICATION FROM THE CHAIR

VISITING DELEGATION FROM THE COUNTY
ASSEMBLY OF ELGEYO-MARAKWET

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Hon. Senators, I would like to acknowledge the presence, in the Speaker's Gallery this afternoon, of a visiting delegation from the leadership of the County Assembly of Elgeyo-Marakwet.

They are -

- | | | |
|-------------------------|---|--|
| (1) Hon. Paul Kipyatich | - | Chairperson, Public Accounts Committee |
| (2) Hon. Tich Cheboi | - | Chairperson, Finance |
| (3) Hon. Musa Limo | - | Chairperson, Tourism |
| (4) Hon. Jonah Tanui | - | Deputy Majority leader |
| (5) Hon. Zach Magut | - | Chairperson, Roads |
| (6) Hon. Nedi Kiptoo | - | Vice Chairperson, Finance |

On behalf of the Senate and on my own behalf, I welcome them to the Senate. I wish them well for the remainder of their stay.

I thank you.

(Resumption of debate on Statement)

Proceed, Sen. Olekina.

Sen. Olekina: Thank you, Mr. Speaker, Sir. I rise to support this timely Statement by the Chairperson of the Committee on Justice, Legal Affairs and Human Rights. I knew him in the past when he was a milk vendor, but I am very proud of him now, as the Senator for Nandi, for the good work that he has been doing.

As I stand here today, I am a worried man, because we might as well just throw this Constitution in the dustbin. The role of the Judiciary is to defend that Constitution. It is very worrying when you see a notice from a Deputy Registrar of a court in Kenya that reads as follows:-

“Due to Judiciary budget cuts, we have been unable to facilitate the three Judge bench scheduled for the 28th October, 2019.”

Someone once said, “Justice delayed, is justice denied.” Therefore, if legal redress is available for a party that has suffered an injury, but it is not forthcoming in a timely fashion, it is ineffective.

Mr. Speaker, Sir, last week when I saw the CJ giving a Press conference, stating clearly that he is not respected; and that he is denied certain services, a lot of things just came to mind. I wondered if you do not like CJ Maraga as a person, why can you not respect that institution? The three arms of Government were brought about so that they can check each other. They are equal arms of Government; the Legislature, the Judiciary and the Executive. I hope that this time, this Parliament can take this opportunity to correct this. When I say Parliament, I am not only speaking of the Senate or the National Assembly; I am speaking about both Houses.

When people talk about constitutional amendments, the first thing we must do, is to ensure that when we have a Constitution which is supposed to be defended or protected by one arm of Government, we must ensure that when we are doing the Appropriation Act, for example, we have different Appropriations Acts. I have heard my

colleague talking about the Executive controlling the other arms of Government, by ensuring that the national Treasury is part of the Executive. That is where we went wrong.

Mr. Speaker, Sir, the only way we can ensure that each arm of Government does its work effectively, is when we relook Article 219 of this Constitution. Currently, it only protects county governments. We are sitting here happy, because we know that this Constitution has protected the little money that we send to the county governments. It is about time that when we think about amending the Constitution, we think about coming up with different Appropriations Acts. We should define the shareable revenue differently, and share the revenue equally through the three different arms of Government.

Mr. Speaker, Sir, we are facing a very sad occasion in this country. On a daily basis, people are injured and they run to the courts. However, when they cannot get justice there, we might as well say that Kenya is a free country for someone to commit any crime. This is because you know that when you go to the Judiciary, they have no money to hear you. This is a worrisome trend. This House, all distinguished Senators and honorable MPs must rise up to the occasion. There is no way we will have a country called Kenya, if we violate this Constitution.

Mr. Speaker, Sir, when you talk about separation of power, a doctrine of constitutional law under which the three arms of Government are kept separate, we must respect that. If we do not respect that, then I think we are just living in a jungle.

I recently heard the media replaying the clips of when the President was saying, “We shall revisit;” calling the Judiciary, “*hawa wakora*.” I then wondered what the use of the “Handshake” is. I thought that the “Handshake” was supposed to come in so that it can heal all these problems. In fact, we are at a point where some people say that there is no longer an opposition in this country. It is really sad that sometimes some of us believe that the “Handshake” was only made to make certain people happy, yet it destroys others. As a young legislator, it is about time that we tell the Executive that what they are doing is wrong.

(Applause)

It is absolutely ludicrous for a CJ to stand and say: “I cannot even be accorded the respect of a Chief Justice.” Hate the man, but respect the institution. Respect him because he was appointed by you. What worries me, is that if we continue like this – and I will repeat it – every Kenyan will say that there is no law in this country. That is because where am I supposed to get justice if they are not given any money to constitute a bench? I pray to God that reason will prevail, so that we can respect different opinions. We must respect the rule of law.

Mr. Speaker, Sir---

The Speaker (Hon. Lusaka): You better start concluding, because we have a lot of interest in this matter.

Sen. Olekina: Mr. Speaker, Sir, as I conclude, I want to request the President of this Republic to, one, go back and spend a couple of days reading through this Constitution. Secondly, I request him to call the CJ. This is because I remember him making a statement, saying that he hopes that the CJ will meet him so that they can caucus and talk about the issues of this country. The President was right, because the CJ's role is to link the Judiciary with the other arms of Government. I hope that they can do that now, for the sake of this country we call Kenya. At the end, we might see the light at the end of the tunnel.

Mr. Speaker, Sir, yesterday we approved the debt ceiling; and a lot of people are bashing us for doing that. We came out clearly and said that we can no longer afford these commercial loans. If those commercial loans can be retired so that we can have money in this country, please, the last people who should be denied money are the Judiciary.

Thank you, Mr. Speaker, Sir.

Sen. Kang'ata: Thank you, Mr. Speaker, Sir. I have listened keenly to the representation by my fellow Senators. I respect their views because they have raised cogent points. However, be that as it may, allow me to exercise my right of expression to, with all due respect, disagree with those issues that have been raised.

An issue has been raised concerning what we call the doctrine of separation of power. That argument was originally crafted way back in the 1700 by Baron de Montesquieu, in his book, the *Spirits of Law*. His argument was that it is the work of the Judiciary to interpret laws, the work of Parliament to make laws, and the work of the Executive to execute law. He argued that you ought not to fuse all those powers in one institution.

With all due respect, I strongly believe that we should allow the President to execute the law; we should give him that leeway to do that. The reason I disagree with this Statement is because it is failing to appreciate that the President is currently facing a major issue, which we tried to address yesterday. The issue was concerning a budget that was made by the previous CS for the national Treasury and Planning, which was unrealistic and not based on correct revenue projections.

In order to address that issue, the President proceeded to advise the national Treasury to do what we call the austerity measures; to cut the budget. The budget for Parliament has been cut, and no one has raised any issue. The budget for the Judiciary has also been cut. I am surprised that this House is going to great lengths to talk about the Judiciary, whereas its own budget has been cut. To me, that is a contradiction---

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

Sen. Kang'ata: It is unfair; allow me to speak! Surely you are interrupting my thoughts!

The Speaker (Hon. Lusaka): Order, Sen. Kang'ata. Read the Standing Orders.

The Senate Majority Leader (Sen. Murkomen): On a point of order, Mr. Speaker, Sir. Is it in order for Sen. Kang'ata to mislead the House that the budget for Parliament has been cut, when qualified Senators like Sen. Khaniri, Sen. Cheruiyot and

Sen. Beth Mugo are able to update us on the budget of this House? If he continues to pursue that direction, could he table documents showing that Parliament's budget has been cut?

Sen. Kang'ata: Mr. Speaker, Sir, it is in the public realm that the budget for the Judiciary was cut. Simultaneously, the budget for Parliament was also cut---

Hon. Senators: By who? Who has the powers?

Sen. Kang'ata: By the Executive!

(Loud consultations)

(A Member spoke off record)

Allow me to continue!

The Speaker (Hon. Lusaka): Sen. Kang'ata, you may have to substantiate what you---

Sen. Kang'ata: Fine; I withdraw, if at all the budget for Parliament has not been reduced. To the best of the best of my knowledge, it has been. However, that is okay.

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

Sen. Kang'ata: Mr. Speaker, Sir, surely, allow me to finish! Everyone has spoken!

The Speaker (Hon. Lusaka): Sen. Kang'ata, you also do that most of the times.

(Laughter)

Read the Standing Orders. A point of order is allowed.

Proceed, Sen. Olekina.

Sen. Olekina: On a point of order, Mr. Speaker, Sir. Is Sen. Kang'ata in order to misrepresent facts? He is lying to Kenyans. He knows very well that this House and the National Assembly are the ones who are tasked with the division of revenue. How can the Executive, who sits in the national Government, cut money which is supposed to be--- He is given money; he is not supposed to control the money. The money does not belong to the President or the CS. We cannot allow this line of argument, because he is misleading the public and is also wasting time.

The Speaker (Hon. Lusaka): Continue, Sen. Kang'ata.

Sen. Kang'ata: Mr. Speaker, Sir, I agree that there is one mistake that the Executive appears to have made; the idea of trying to abrogate itself the power to undertake budgetary cuts. On that one, I agree. They ought to have brought a supplementary budget before the National Assembly---

The Senate Majority Leader (Sen. Murkomen): Correct!

Sen. Kang'ata: However, notwithstanding that, I strongly believe that we need to support austerity measures to enable the Government to balance its budget. We need to do that. Austerity measures entail those of us who are in Parliament to cut our budget. The Judiciary also cuts its budget, and the Executive cuts its budget. On that account, I

strongly believe in that. Why? So that we have a balanced budget. This will ensure that Government revenues equals Government expenditure, and that can only happen when we reduce our expenditure.

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

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

Sen. Kang'ata: Mr. Speaker, Sir, they do not believe in freedom of expression.

The Speaker (Hon. Lusaka): Order, Sen. Kang'ata!

Sen. Wambua: Mr. Speaker, Sir, is the Senator for Murang'a County in order to portend to lecture this House on the procedure that should be followed to cut down on budgets for all the arms of Government? If that is the line he is taking, he is then off the line in terms of the Statement that was issued by the Senator for Nandi County. The Senator for Nandi County is saying that the Executive should not cut the budget of the Judiciary. What are you, therefore, talking about?

The Speaker (Hon. Lusaka): Sen. Kang'ata, just be careful with what you are saying. These are your colleagues, and points of orders are allowed. If you pursue a line that will attract many points of order, the Speaker cannot assist you.

(Laughter)

Sen. Kang'ata: Thank you, Mr. Speaker, Sir. I respect your decision.

The Senate Minority Leader (Sen. Orengo): On a point of order, Mr. Speaker, Sir.

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

(Sen. Kang'ata remained standing in his place)

The Speaker (Hon. Lusaka): Take your seat, Sen. Kang'ata.

(Sen. Kang'ata took his seat)

The Senate Minority Leader (Sen. Orengo): Mr. Speaker, Sir, there is a Standing Order about relevance. What we are discussing is the Statement by the Chairperson of the Committee on Justice, Legal Affairs and Human Rights. What is there in the Statement that he disagrees with? Do not talk about austerity measures, because the Government has not declared any austerity measures. Just tell us where you stand.

Sen. Kang'ata: Thank you, Mr. Speaker, Sir. I am agreeing with this Statement to the extent that it is saying that the Executive did not use the correct procedure.

(Sen. Cherargei stood up in his place)

The Speaker (Hon. Lusaka): Sen. Cherargei, I am not sure whether you are sitting or standing---

(Laughter)

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Sen. Kang'ata: Mr. Speaker, Sir, I agree with this Statement to the extent that the Executive did not follow the correct procedure in undertaking the cuts. However, I am supporting the spirit of what we call austerity measures. The Government should reduce its expenditure, whether it is the Executive---

(Loud consultations)

Yes, I am referring to it!

Secondly, after every five years, parliamentarians are held accountable by the people of Kenya. The President, after every five years, is held accountable to the people of Kenya. It is only the Judiciary which does not have a sufficient self-checking mechanism. I am, therefore, surprised that a Parliament that is always complaining about its laws being declared unconstitutional, despite having been scrutinized by the Legal Department of Parliament comprised of lawyers; and having been analysed by eminent lawyers in this House, then when those laws are taken to the Judiciary, they are declared to be unconstitutional by one Judge who does not have the direct mandate people.

In other jurisdictions, Judges are elected.

(Loud consultations)

No! Judges are elected by *wananchi*.

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

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

Sen. Kang'ata: No. Allow me to speak!

The Senate Majority Leader (Sen. Murkomen): Mr. Speaker, Sir, ordinarily, we should not have been discussing that Statement. It was a Statement that was made, and you have been generous to give us the opportunity to ventilate.

(Sen. Kang'ata stood up in his place)

If Sen. Kang'ata is not going to stick to the issue of relevance---

The Speaker (Hon. Lusaka): Sen. Kang'ata, take your seat.

The Senate Majority Leader (Sen. Murkomen): Mr. Speaker, Sir, the most important thing we are discussing here is not amending the Constitution to create a provision whereby Judges will be elected by the people. We are not amending the Constitution to bring Judges to be vetted in this House. We are discussing the Constitution of Kenya, as it is. The point under discussion is the independence of the Judiciary, as enunciated in the Constitution; and the protection of the independence of the budget of the Judiciary.

Therefore, Mr. Speaker, Sir, if he cannot address himself to that question, we have four other pending Statements and legislation that we would rather attend to. The

Judiciary is perfectly in order to declare legislation that comes from a House unconstitutional, and the legislation we pass here is not personal. It is a public process and document. Once it gets out of here, we have no business defending or protecting it. It is about the Judiciary to protect the people of Kenya.

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

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

Sen. Cherargei: On the point of relevance, Sen. Kang'ata is one of my Committee Members. However, he has been conspicuously absent for many meetings.

(Laughter)

The point of relevance was on three things; one, the issue of illegality or unconstitutional budget cuts that has been purported by the CS. Secondly, on the independence of the Judiciary, and the issue of operations of the Judiciary. I wish Sen. Kang'ata could be appraised of this issue, the way he is appraised of the air accident that happened in Ethiopia. I wish he would be seized of the matter the way he is seized of Boeing issues.

The Speaker (Hon. Lusaka): Sen. Kang'ata, please try to be relevant so that we save on time. There is a lot of interest on this matter.

Sen. Kang'ata: Thank you, Mr. Speaker, Sir. Let me apologise, if at all I am not relevant. I will endeavour to be relevant. Let me also beseech Members; please, I am only speaking for a very few minutes. I may be the lone voice holding this position, but it does not hurt to listen to my view. Please, I beseech you with all my kindness; just allow me to ventilate on my point. I am Sorry; if I am not relevant, I will apologise. I will do whatever I should do to ensure that I am relevant. Just allow me a few minutes to ventilate the very lone voice in support of this idea.

Mr. Speaker, Sir, the reason why I have stood here is to strongly argue that the Government has done everything to give Judiciary its independence.

(Sen. Cherargei stood up in his place)

The Speaker (Hon. Lusaka): You know, because of Sen. Cherargei's height, I am not sure whether he is standing or sitting.

(Laughter)

Sen. Cherargei, can you make up your mind about what you want to do?

Proceed, Sen. Kang'ata.

Sen. Kang'ata: Mr. Speaker, Sir, I have heard one of my learned Senators arguing that the President must, as a matter of course, appoint Judges who have been proposed by the Judicial Service Commission (JSC). With all due respect, I strongly believe that, that Statement was *sub judice*. We all know that there is pending litigation in court on that point.

Secondly, notwithstanding that point, are we saying that the President does not have any power at all; and that his work is just to appoint without interrogating that issue?

(Loud consultations)

The Speaker (Hon. Lusaka): Order, Sen. Kang'ata!

Sen. Kang'ata: No, Mr. Speaker, Sir. I am replying to submissions that have been raised here by Sen. Wetangula.

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

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

Sen. Wambua: Mr. Speaker, Sir, I wish to plead with the Chair that we find Sen. Kang'ata grossly out of order. He has been reminded so many times about being relevant. This Statement has got nothing to do with the appointment of judges by the President. Stick to the Statement, Sen. Kang'ata.

The Speaker (Hon. Lusaka): Sen. Kang'ata, I give you two minutes to conclude, because we must make progress.

Sen. Kang'ata: Mr. Speaker, Sir, it is my honest belief that we need to allow the President to do his work. The President has a mandate to deliver, and he has set out certain elements that he has to do. I hold the view that the Judiciary has been fettering the President in delivering his vision. Therefore, I strongly believe that we need to do something to ensure that the Judiciary does not vitiate the vision of the President.

Mr. Speaker, Sir, put yourself in the shoes of the President; in fact, any other Senator should do so. Imagine that you are making every appointment, and then it is being stalled in court. Similarly, when you prosecute people, it is also stalled by court orders.

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

(Loud Consultations)

Order, hon. Members!

The Senate Minority Leader (Sen. Orengo): On a point of order, Mr. Speaker, Sir. Sen. Kang'ata has to declare his interest. I am leading him in a case where we have gone to the courts. He had to run all the way to Mombasa to challenge the actions of the Executive in the campaign against corruption. He is now saying that the Judiciary is interfering, and he was running to the courts when people were being locked up. He cannot blow hot and cold; he should declare his interest, because when he is in court he is saying something else.

The Senate Majority leader (Sen. Murkomen): Mr. Speaker, Sir, I really want to plead with you to protect Sen. Kang'ata. The more you give him time, the more you are harming him. I will not allow, as the Majority Leader in this House – and Sen. Kang'ata serves under me – that it can be insinuated that President Kenyatta is trying to punish the Judiciary.

What Sen. Kang'ata is trying to say to the public is that the reason the Judiciary is being denied a budget, is because the President is unhappy with the decisions of the Judiciary regarding his mandate. I will not accept that, as a member of Jubilee. That cannot continue flying. It is not the position of President Uhuru Kenyatta, the Jubilee Government and the Senate. It is not one of the things that we should be propagating on the floor of this House. Therefore, the lesser this man speaks, the higher the likelihood that you will protect him from himself!

The Speaker (Hon. Lusaka): Sen. Kang'ata, you have used all the time just circumlocuting and saying things that are not valid.

(Laughter)

Please conclude, so that we can make progress.

Sen. Kang'ata: Mr. Speaker, Sir, I will be bringing legislative proposals very soon to address some of the salient points that I am raising. I appreciate that we need to support the independence of the Judiciary. However, I also strongly believe that the President must be allowed to achieve his vision. I strongly believe that the Judiciary, in some instances, is doing a good job. However, I also believe that in several instances, it is doing a very bad job. I have seen a Court of Appeal decision saying that men should marry each other. Surely, I was so ashamed, as an African. I was very shocked to see a Judiciary that is not elected by any person saying that men should have relationships amongst each other. That is not the judiciary I envisioned.

The Speaker (Hon. Lusaka): Order, Sen. Kang'ata!

What is your point of order, Sen. (Dr.) Mwaura?

Sen. (Dr.) Mwaura: On a point of order, Mr. Speaker, Sir. We are here, as an arm of Government. Our role is to oversight and ensure that there is parity in whatever decisions that are made for the benefit of Kenyans. The moment I am listening to my good brother and friend, Sen. Kang'ata, invoking the name of the President in this dispute. Is he really in order to attribute the budget cuts to the person of the President, as to occasion the thinking that the President has a personal vendetta on the Judiciary?

Mr. Speaker, Sir, when you hear Sen. Kang'ata arguing that the budget cuts can be done based on judgments, does it say that there should be no rule of law? I would want to advise and caution him that he should address the Executive in totality, rather than the person and the Office of the President.

The Speaker (Hon. Lusaka): Sen. Kang'ata, you have got one minute. You can see that you are alone; just conclude.

Sen. Kang'ata: Thank you, Mr. Speaker, Sir. I am very educated by the representation by my colleagues. I am quite happy that they have been able to give very cogent arguments in support of the so-called interference of judicial independence. However, on my own opinion, I still stand that we have a situation of what we call judicial overreach. In several jurisdictions like Canada, you cannot go there and do judicial review. In the United Kingdom (UK), there is nothing called judicial review---

(Loud consultations)

Allow me to finish. You are allowed judicial review in the UK only under what is called the Human Rights Act.

(Loud consultations)

It is true! I am arguing, there has been judicial overreach over the last---

The Speaker (Hon. Lusaka): Order! Sen. Kang'ata.

Proceed, Leader of Majority.

The Senate Majority leader (Sen. Murkomen): Mr. Speaker, Sir, I want to inform the House that I know that Sen. Kang'ata is a very intelligent young man. I suppose it is the person who is watching in the gallery, who is confusing him. Otherwise he has a very brilliant mind!

(Laughter)

To that person in that gallery, he has done a very bad job, because there is no argument that can be made in that direction in so far as independence of institutions is concerned.

(Interruption of debate on Statements)

Mr. Speaker, Sir, I am sorry for the interference; I know you wish to allow more Senators to contribute to the Statement. However, I wish to move the following Procedural Motion.

PROCEDURAL MOTION

ELECTION OF A SENATOR TO PRESIDE OVER SITTINGS OF THE HOUSE PURSUANT TO STANDING ORDER 15 AND ARTICLE 107 (1) OF THE CONSTITUTION

Mr. Speaker, Sir, I beg to move that:-

Pursuant to Standing Order 15 and Article 107(1) of the Constitution, the Senate elects Sen. Halake to preside over, in the absence of the Speaker and the Deputy Speaker, the sitting of the Senate for the remainder of the day.

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

The Senate Minority leader (Sen. Orengo): Mr. Speaker, Sir, I second. However, I hope that the new Speaker will deal with the Senator for Murang'a firmly.

(Laughter)

(Question proposed)

(Question put and agreed to)

(Resumption of debate on Statements)

The Speaker (Hon. Lusaka): Sen. (Dr.) Kabaka, the Floor is yours.

Sen. (Dr.) Kabaka: Thank you, Mr. Speaker, Sir, for giving me this opportunity to ably support this Statement by Sen. Cherargei, of Nandi County. It is very important and timely. The issue of independence of the Judiciary, which my learned friend, Sen. Kang'ata, seems not to have forgotten, is well espoused in Article 160 of the Constitution of the Republic of Kenya, 2010. The independence of the Judiciary, well espoused in that Article, clearly gives five limbs. This is the scenario where, I think, Sen. Cherargei derived his thoughts.

It is espoused strongly that the authority of the Judiciary can only be exercised subject to the Constitution, and the law and shall not be subject to any control or direction of any person; that is given.

Mr. Speaker, Sir, the Constitution further states that the Office of the Judge of a superior court shall not be abolished while there is a substantive order of the Office. This one gave the security of tenure, which had been eroded like we have been told by Sen. Orengo here and Sen. Wetangula.

The issue of remuneration and benefits payable to the Judges shall not be a charge on the Consolidated Fund. Therefore, on matters finance, it is very clear that the remuneration and benefits payable to Judges cannot be varied to their disadvantage. Therefore, the Constitution insulates and fortifies the Judiciary, for its own efficient management of its day-to-day activities.

Finally, Mr. Speaker, Sir, it is also stipulated in the Constitution that a Judge or a member of the Judiciary is not liable on any action or suit in respect of anything done or meted to be done in good faith in the lawful performance of their judicial functions. What is happening in the country is that the Executive has tried many times, through action and deed, to emasculate or interfere with that independence. Therefore, any time the funds are reduced, we do not expect efficient management of justice.

The independence or the separation of the three arms of Government, as it has been said – more so by Montesquieu – and the rule of law go hand to hand, as expounded by John Locke, a British intellectual. We are saying very clearly that even the Judiciary does not interfere with the activities or the functions of Parliament.

According to Lord Denning, the Master of Rolls, as he is known, in a point of admissibility of evidence in a criminal justice trial and also in interpretation of the laws, the Judge clearly says that whereas he is not bound by the Parliamentary HANSARD Report, but sometimes he finds himself referring to the said Hansard for purposes of determining the mischief which was intended by Parliament. Therefore, this shows the respect upon which the Judiciary has towards Parliament. The elephant in the House is a rogue Executive. Whenever the Executive in any country decides not to respect the other arms of the Government, that sounds a death knell to that Republic. The Republic then ends up being a banana republic.

As I wind up to give other Senators an opportunity, there is a provision, under Article 145, for testing the rule of law, by looking at the impeachment laws. Under Article 145(1), when the President or the Head of Executive commits grave misconduct, Parliament is called upon, especially the Senate, to impeach the Head of the Executive. Therefore, I need to say that His Excellency the President needs to be given proper guidance in law by the Attorney General, so that he will not be caught by this provision of gross violation, because that could be the direction we are heading to.

I support the Statement by Sen. Cherargei.

The Speaker (Hon. Lusaka): Hon. Senators, we still have a lot of interest; this is a topical matter and I want everybody to, at least, say something. However, since we are way beyond our time, I will allow those who are coming next three minutes to at least also say something.

Proceed, Sen. Halake.

Sen. Halake: Thank you, Mr. Speaker, Sir. As the incoming temporary Speaker, I will not speak much, because Speakers are supposed to listen. I congratulate my colleague, Sen. Cherargei, for this Statement.

Mr. Speaker, Sir, allow me to mention that an independent Judiciary is critical to promoting a peaceful and inclusive society. One of the pillars of the rule of law in a modern State is the division of powers between the Legislature, the Judiciary and the Executive.

I will speak to the role of Parliament in letting down the Judiciary. Listening to the CJ a few days ago on Monday, I was very saddened that he has been subjected to that level of incivility in addition to the lack of funds. However, the level of incivility and disrespect for an office, such as that of the Chief Justice, is unacceptable. Parliament has let the Judiciary down.

We should look at our role, as Parliament, even as we shout on top of our voices about the Executive. Let us look at our role, as Parliament, and how we have played a role in letting the Judiciary down. The relationship and interactions between Parliament and the Judiciary is central to good governance, and is key in ensuring the culture of rule of law and justice.

Mr. Speaker, Sir, we make laws which are validated and applied by the Judiciary. If we think that we are safe from the disrespect and incivility that the CJ is experiencing right now, we need to know that we are not safe. We are the ones who make these laws, and they are to be validated and applied by the Judiciary. If the Judiciary is not independent and it does not have anything to apply these laws, then where on earth are we expected to contribute to the rule of law in this country?

What we do not realise, as legislators, is that an independent Judiciary is essential to safeguarding other arms of Government. What the Executive should realise is that if the Judiciary does not have the powers to do its job, we are all in trouble. This is because who are we legislating for? Who is going to apply these laws? These laws, which we spend the whole day making here, where are they going to go if the CJ and his team cannot apply them?

I do not want to say too much; but we, as the House of Parliament, have the purse. It is Parliament that gives resources. It is Parliament that puts laws in place, even to put judges in place. If there is one branch of Government that should realise that we are contributing to the dysfunction of the other arms of Government, it is ourselves. We should look at how we can rectify these things. We should start by legislating to protect the independence of the Judiciary as soon and possible. We must support and have sufficient resources allocated to the Judiciary, and ensure that Parliament works as guardians and over-sighters.

I beg support this and congratulate Sen. Cherargei.

Sen. Faki: Asante, Bw. Spika, kwa kunipa fursa hii kuunga mkono taarifa ya Mwenyekiti wa Kamati ya Sheria na Haki za Binadamu la Seneti. Ningependa kumpongeza Sen. Cherargei kwa kutayarisha taarifa hii. Nimechangia pakubwa katika utayarishaji wa taarifa hii, kwa hivyo, baadhi ya kongole pia zinafika kwangu.

(Laughter)

La msingi, Bw. Spika, ni kwamba uhuru wa Mahakama ni kiungo muhimu katika demokrasia ulimwenguni kote. Ndio maana katika kila sehemu, mahakama zinapewa uhuru wao ili kuhakikisha kwamba zinaamua haki baina ya wananchi na serikali; na pia baina ya wananchi kwa wananchi. Kwa hivyo, ni muhimu kwetu, kama Bunge la Seneti, tuisitize juu ya umuhimu wa uhuru wa mahakama.

Uhuru wa mahakama uko mara mbili; kuna uhuru wa utenda kazi, ili kwamba mahakama zinapofanya kazi haziingiliwi kwa njia yoyote.

Ndio maana tuko na *Judicial Service Commission* (JSC), ambayo inasimamia mahakama, kama vile hapa Bunge, tuko na *Parliamentary Service Commission* (PSC).

Bw. Spika, kwa siku za karibuni, uhuru wa Kamati hii ya usimamizi wa mahakama umeingiliwa katika utendakazi wake. Hii ni kwa sababu mapendekezo ambayo yamepelekwa kwa Serikali kuhusiana na uchaguzi ama uteuzi wa majaji umekwamishwa. Huko ni kuingilia uhuru wa mahakama, na ni lazima sisi Wabunge wa Seneti tukemee jambo hilo.

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

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

Karibu, Bi. Spika wa Muda.

Uhuru wa kifedha ni muhimu, kwa sababu unaipa taasisi ile ya Serikali uhuru wa kupanga matumizi na ukusanyaji wa fedha zake, ambao unaipa mahakama fursa ya kupanga kazi zake na matumizi yake bila ya kuingiliwa na taaasisi yoyote nyingine ya Serikali.

Kwa hivyo, Bi. Spika wa Muda, mahakama Kenya zimepata misukosuko ambayo imsesababisha kuangalia utendakazi wake. Vile vile lazima mahakama zilindwe, kwa

sababu ndipo mahali pekee ambapo raia wanaweza kukimbilia wakati wamepata matatizo.

Bi. Spika wa Muda, suala la uhuru wa mahakama ni muhimu sana katika demokrasia. Hii ni kwa sababu mtu yeyote atakapopatikana na matatizo, lazima aende mahakamani ili kuhakikisha kwamba haki zake zitalindwa. Hivi sasa, Serikali imeingia katika vita dhidi ya ufisadi. Vita vile haviwezi kupigwa wakati mahakama hazina fedha na majaji wa kutosha kusimamia kesi zile. Vita dhidi ya ufisadi haviwezi kufaulu iwapo mahakama zitakuwa hazina nyumba za mahakama, na vilevile wafanya kazi kuhakikisha kwamba kazi zile zinafanyika.

Kwa hivyo, Bi. Spika wa Muda, lazima tukemee vitisho vya Serikali kupunguza ruzuku kwa mahakama, na mawazo ya Serikali kwamba wanaweza kuendelea kujaribu kukwamisha utendakazi wa mahakama. Ni lazima tukemee upokonyaji wa uhuru wa mahakama, kwa sababu Uhuru huu utakapopokonywa, wananchi ndio watakuwa wanalalamika na kupoteza haki zao.

Asante Bi. Spika wa Muda kwa kunipa fursa hii.

The Temporary Speaker (Sen. Halake): Proceed, Sen. Kasanga.

Sen. Kasanga: Thank you, Madam Temporary Speaker and congratulations for being in the Chair today. It is wonderful to see you up there. I congratulate my friend, Sen. Cherargei, for this Statement. Sen. Cherargei, you have a great future ahead of you. We are also very proud of the work that you did yesterday. It is voices such as yours that we want. Keep going, Senator.

Madam Temporary Speaker, since we do not have much time, I lend my voice to the number the Senator has given in the Statement. It is very disheartening. I remember seeing the CJ giving a press statement, and I believe it was out of frustration because he had nowhere else to go.

Sen. Kang'ata: On a point of order, Madam. Temporary Speaker.

The Temporary Speaker (Sen. Halake): What is your point of order, Senator?

Sen. Kang'ata: Madam Temporary Speaker, I apologise for interrupting Sen. Kasanga. However, is it in order for the Chairperson of the Senate Committee on Justice, Human Rights and Legal Affairs to bring a Statement that does not have annexed signatures for those of us who are Members of the Committee, so that we know which Members of the Committee support it and those who do not?

The Temporary Speaker (Sen. Halake): Sen. Kang'ata, you contributed to that--

Sen. Kang'ata: No, Madam Temporary Speaker; I did not raise that issue, if you can check the HANSARD. Is it in order for the Chairperson to bring a Statement purporting to belong to the Committee, when there is no evidence that those of us who supported---

The Temporary Speaker (Sen. Halake): Sen. Kang'ata, you have made your point. Please sit down.

(Sen. Kang'ata resumed his seat)

You contributed to this Statement, and at no point have you raised the issue. So we will move on.

Proceed, Sen. Kasanga.

The Senate Minority Leader (Sen. Orengo): On a point of order, Madam Temporary Speaker. I apologise for interrupting. Congratulations for being in the Chair.

Madam Temporary Speaker, Sen. Kang'ata is the Deputy Majority Whip. He is supposed to lead in many ways, including educating us on the Standing Orders. This Statement is made under Standing Order 51. I think he should leave the Chamber early to go and read that Standing Order, and come and give us a written answer tomorrow.

(Laughter)

Is he in order to continue to be of disorderly conduct, because the Statement was made in accordance with the Standing Order?

Sen. Mutula Kilonzo Jnr.: On a point of order, Madam Temporary Speaker.

The Temporary Speaker (Sen. Halake): What is your point of order, Sen. Mutula Kilonzo Jnr.?

Sen. Mutula Kilonzo Jnr.: Madam Temporary Speaker, other than Standing Order 51, is it in order for a Member who does not attend Committee meetings to insist that his signature should be appended on anything that is arising out of a Committee? Sen. Kang'ata has no record of attending the Senate Committee on Justice, Human Rights and Legal Affairs Committee!

(Laughter)

(Sen. Kang'ata stood up in his place)

The Temporary Speaker (Sen. Halake): Order, Members. Let us allow Sen. Kasanga to continue.

Sen. Kang'ata, please take a seat. You have been ruled out of order.

(Sen. Kang'ata resumed his seat)

Sen. Kasanga: Thank you, Madam Temporary Speaker. I do not know why Sen. Kang'ata is up and about on this Statement. It is a topical issue and Kenyans are interested in listening to this. You should just let it fly. Besides, you are in the legal profession, and you should be the one advising us on these issues.

Madam Temporary Speaker, Sen. Cherargei has highlighted the unconstitutional process that has been used to cut the budget of the Judiciary, and it is absolutely unfortunate. What comes to my mind, at this point in time, is also the role of Parliament, as Sen. Halake, who is now the Temporary Speaker, mentioned. This is because this process is supposed to rightfully pass through Parliament.

Article 173(3) of the Constitution states:-

“Each financial year, the Chief Registrar shall prepare estimates of expenditure for the following year, and submit them to the National Assembly for approval.”

I hate to have to quote a Member of Parliament who was in the media the other day, saying that the National Assembly has failed Kenyans. He said that they have failed in their role to manage the budget, and put the Executive in check when it comes to spending and borrowing. As I was trying to listen to Sen. Kang'ata trying to say that we should support austerity measures, yes, we are where we are, having overspent on loans that we have taken. Now we have to look for loans to retire the current expensive ones. It is a question of turning around a business.

Madam Temporary Speaker, how do you turn around a business? Is the Judiciary where you will get your savings from? This is where it becomes sad, because we are wondering where they have checked to see where to cut money from. From the figures presented in this Statement by Sen. Cherargei, the world over, judiciaries are given 3.5 per cent of the national budgets. Currently from this Statement, one can see that it is at 0.57 per cent of the budget of the Financial Year 2019/2020. The year before, it was at 0.7 per cent, which is a far cry. Beyond that, they want to cut it by half. Honestly we have to say that we have an Executive that has no intention to fight corruption and to give Kenyans access to justice. I support this Statement and say that we need to do a lot more, as Parliament.

Madam Temporary Speaker, yesterday, I felt as if we almost gave the Government a blank cheque to go ahead and borrow some more. Whereas we understand that they want to borrow to retire old loans, what checks and balances have we put in place to make sure that the borrowed money will do that work? The Judiciary is not where the Executive should be looking to cut money for austerity.

I thank Sen. Cherargei for bringing this matter forth. We must fight, as Parliament, to retain the Judiciary and give it the powers it requires.

Thank you, Madam Temporary Speaker. I beg to support.

Sen. Poghiso: Thank you, Madam Temporary Speaker. I join my colleagues in supporting the Statement by Sen. Cherargei. In a crisis, when the situation is bad, it is better to say things as they are. If there is a fire in the house, you do not start saying, “Excuse me, please, may you leave the room if you want to.” You only say “fire,” and people know how to run.

When we are in a crisis, let us face it as a crisis. I hope that what we did, by allowing the Government to borrow, may help alleviate some of these situations. Maybe now, there will be money for the Judiciary and all the other arms of Government. It is the responsibility of the Committee, this House and all legislators to respect the various arms of the Government, and to make sure that we fight for all arms of Government to get their share of the budget so that everyone can perform their functions well.

I know that when the Chairperson for the Committee on Justice, Legal Affairs and Human Rights is raising these matters, he means well for the country. I do not think that he can be accused of being anything, other than a well-meaning Kenyan, when it comes to issues of his Committee. We are the ones who are representing these people in the

House; the other arms of Government do not get to come to the House. We must, therefore, play our role, as the Chair here has decided to do.

Madam Temporary Speaker, there are certain parts of the country where we need to have much more done by the Judiciary. There are a number of people who have never been to a courtroom, and they do not know anything about our laws. There are people in this country who, when they go to court, they do not know what to do. I can quote from my own county of West Pokot. Until recently, when the Judiciary decided to have a Judiciary Day, a majority of the people did not even know that we have Judges and Magistrates. Therefore, a lot has to be done to make our people aware of the law.

It is not just the functions that we know here; it is important to also create awareness among the people. If you survey this country, the literacy rate in certain parts of the country requires that we have to simplify the law, for them to understand. Therefore, we have a lot of work to do, and I agree that the money needs to go to the Judiciary. We need to support that. I do not want to condemn anybody, at this moment.

With those few remarks, I beg to support.

(Applause)

Sen. Wambua: Thank you, Madam Temporary Speaker, for giving me the opportunity to also support the Statement by the Senator for Nandi. A time has come when the leadership of this country must help Kenyans to debunk the notion that the Executive is charged with the responsibility of dishing out money, and cutting budgets for the other arms of Government. The Executive is allocated monies and their budget is passed in the same way and manner that the Judiciary and the Legislature receive their budgets and get them approved by Parliament. It will be pretentious of the Executive to want to create the impression that they have a role and responsibility in determining the budget lines for the other arms of Government. The most appalling thing about this whole process is that once junior officers – who are vetted by Parliament and given public offices – they occupy those offices, they begin to behave like demi-gods and lords of impunity.

The Executive can even go ahead and hire bloggers to create the wrong impression, that the CJ is crying about big cars, access to VIP lounges and respect to himself. However, the truth of the matter is that one of the biggest challenges that the Judiciary in this country has suffered for many years is the backlog of cases.

When the first Chief Justice under the new constitutional dispensation came into office, he began the process of addressing the issue of backlog of cases. The starting point was the establishment of various divisions of the courts, recruitment of more Judges and the decentralization of the appeal courts. The Executive is trying to roll back on those gains, and get us back to a situation where we have a backlog of cases, and justice is denied to our people.

However, on the Statement by Sen. Cherargei, as we fight for the financial autonomy of the Judiciary, let us not forget to fight for the financial autonomy of the Legislature. If we allow the Executive to roll back on the gains achieved by Judiciary in

their budget, and they come and do the same to the Legislature, tomorrow we will not have a country to talk about.

I beg to support.

Sen. Mutula Kilonzo Jnr: Thank you, Madam Temporary Speaker. The Chairman of the Committee on Justice, Legal Affairs and Human Rights is living up to the word “vibrant politician,” by raising this very important matter.

Madam Temporary Speaker, congratulations on your election. I hope and pray that you will sit on that seat on merit election by Senators to become the Speaker, at one time when I am still around.

Madam Temporary Speaker, I have just read in the news that the Judiciary fund has been restored, as we were having this discussion. It is a good thing, but at the same time, it suggests strong-arm tactics that are being used by the national Treasury to intimidate. The idea of a Judiciary fund and the complete separation of powers was to ensure that the Judiciary does not suffer, as it has.

Madam Temporary Speaker, this morning, for the first time since I started practicing law, Judges have been accused in the newspapers without a tribunal. The Standard reports four while the Daily Nation reports nine. In the Standard, they have put pictures of those Judges. That is defamation. Justice Mumbi Ngugi, Justice Muchelule and Justice Tuiyott have been defamed. We cannot allow this, because there is Kenyan somewhere appearing before Justice Mumbi Ngugi today, and they expect that Justice Mumbi Ngugi, like Caesar’s wife, will be above reproach. It is a sad day, and I do not know who is going to save this country, because the Judiciary is under threat.

Going by the newspaper reports, the Legislature has also been swallowed by the Executive. Who is going to save this country, if the Judiciary and the Legislature – which is supposed to defend the Judiciary, and vice-versa – ends up in the chaos that it has?

Madam Temporary Speaker, I have very sad statistics about the standoff between the President and the JSC. The advisor of Government, Justice Kihara Kariuki, sits in the JSC. The President of the Republic has disagreed with the JSC, where his advisor is sitting. What does that say about the conduct and character of Justice Kihara Kariuki, a man we respect?

Madam Temporary Speaker, I have it on record that up to seven judges are retiring by 2019 in the Court of Appeal. We have a shortage. They have estimated that in the current state of affairs in the Environment and Land Court, assuming anybody files a case in the land and environment jurisdiction of the High Court, it will take four years to complete it. That is already a violation of the fundamental rights of the citizens of this Republic.

I would request the good Chairman, the firebrand Senator from Nandi, to bring these good gentlemen to the Senate. The National Assembly has not done it. Please call them here so that we can deliberate on this issue. The Bible in Isaiah 1:18 says, “Come now, and let us reason together.” We want to know the problem with these two arms of Government.

Madam Temporary Speaker, this is a tragedy. I hope we do not get to a situation, like in 2007, where people took the law into their own hands because they do not trust the

Judiciary. An impeachment of somebody is something that is already cooking somewhere because of violating the Constitution continuously.

Thank you, Madam Temporary Speaker.

Sen. (Dr.) Musuruve: Thank you, Madam Temporary Speaker, for giving me an opportunity to add my voice to this Statement. I would like to begin by congratulating Sen. Cherargei for coming up with this Statement. When I was growing up, I remember during the English lesson, we used to have similes such as, “As sober as a judge.” From a very young age, I knew well that judges were able to do whatever they did in a very sober manner, without any form of interference.

Madam Temporary Speaker, it is paradoxical. I did not know how to behave when I heard the statement from the CJ Maraga stating that he will choose the State functions he will be attending. This statement is heavily loaded. It connotes a lot, in the fraternity of law. When a judge makes such a statement, being sober and in his right mind, it tells you that he is not able to hold his emotions anymore. He is not able to keep it anymore, but he has decided to let go because he wants to be free in his heart and mind.

Madam Temporary Speaker, as a nation, there is need for everyone to realize that this Constitution cannot work without the Judiciary. The Judiciary interprets and protects the Constitution. There are instances when people come up with statements that do not seem to hold water. People are even arrested, as a result of the statements they made at some point. When the statements are taken to the judicial system, critically and impartially analyzed, people go scot free.

Madam Temporary Speaker, the Judiciary serves *wananchi* as the watch dog of the ills that happen in the society. Without the Judiciary, many ills will take place in the society, and the common man will be helpless and defenseless. There are instances where even when people have been put in prison and accused wrongly, after ten years, it comes out clearly that these people were on the right.

The Judicial system should not be given the teeth, it has the teeth. These teeth must be enhanced. In enhancing the teeth of the judicial system, they need to be remunerated well with a handsome package. They need to be encouraged in whatever they are doing. They need to be completely separate from the Executive and the Legislature. If they are autonomous, they will have the strength and the teeth to defend *mwananchi*. Right now in the Senate, we can defend each other. However, a time will come when we will have to stand alone, and it is the Judicial system that will come in to ensure that justice prevails.

Madam Temporary Speaker, Sen. Cherargei has come up with a Statement that stands the test of time. It is a Statement that needs to be interrogated to ensure that every *mwananchi* in this country gets justice. Apart from justice, the Statement will also ensure that we defend the Constitution. In the Constitution, there are many Articles that seek to defend *mwananchi*. However, remember that if the Judiciary is a toothless bulldog, there is no way the Constitution will be defended. We must defend the Constitution in order to serve *mwananchi*, because we must be committed to serving the *wananchi* who have elected us to be where we are.

Thank you, Madam Temporary Speaker. I beg to support this Statement.

Sen. Shiyonga: Thank you, Madam Temporary Speaker, for giving me this opportunity to support the Statement and congratulate Sen. Cherargei, the Senator for Nandi County, for coming up with it. I also congratulate you for acquiring the new status of the Temporary Speaker.

Madam Temporary Speaker, the interference of the Judiciary by the Executive is uncalled for, unworthy and in violation of the Constitution. Many have spoken, but we get to understand that the three arms of Government are independent of each other. These three arms of the Government draw their budget from taxpayer's money. Therefore, no arm of the Government is more important or above any other. If we look at the way the Judiciary is being interfered with by the Executive, especially when it comes to budget cuts, this is the highest violation we have ever experienced since independence.

Madam Temporary Speaker, when I was watching the Chief Justice on the television trying to address the press on the challenges, suffering and the oppression that he or the Judiciary is going through, it leaves a lot to be desired. It is the high time that the Executive respects the other two arms of Government.

Madam Temporary Speaker, corruption is rampant in the country today. Who will save Kenyans, if we allow the Judiciary, which is mandated to take charge of the corruption that we are experiencing? Many have blamed the Judiciary of its inability to perform its duties. They have been trying the much they can to utilize the few resources they have. However, hearing CJ, he is oppressed. He is under distress, and he can no longer perform. Being the head of the Judiciary, it tells the country that if that particular arm is suppressed, then all of us are suppressed. That is where any other common *mwananchi* gets justice from.

We are talking about poverty. A few individuals that we elect and vet here in Parliament are the ones who sit in the Executive. They are the ones roaming around with bodyguards and talking at the highest volume of their voices. They are now controlling the Judiciary when it comes to funds. Who said that they are more important than others? Who said that they are more important than the Chief Justice? The Chief Justice needs to be left alone with his arm of the Government to execute his mandate so that he can save Kenyans.

We need infrastructure in the courts. We need justice in the courts. We need everything that we want, because the courts are the last determination of our lives. If they are interfered with, we are all gone. I repeat that it is high time that the Executive respected the other two arms of Government for us to respect them.

Thank you.

The Temporary Speaker (Sen. Halake): Thank you, very much.

Sen. Cherargei, there is no provision for you to respond. Could you allow us to move to the next Order? Well done for the great job, but we will not allow you to respond.

Sen. Cherargei: Madam Temporary Speaker---

The Temporary Speaker (Sen. Halake): Are you on a point of order?

Sen. Cherargei: A point of information, Sir.

Madam Temporary Speaker, you should be happy because I wanted to congratulate you for being given the Chair. As your friend, I am very proud of you, and you know that. On a quick succession, I want to thank my colleagues for their support to this Statement on the Status of the Judiciary.

Secondly, I want to confirm to my colleagues that our Committee on Justice, Legal Affairs and Human rights, will from next week engage various stakeholders on this issue; the Attorney-General, the Cabinet Secretary, National Treasury and the Chief Registrar of the Judiciary, so that we can have a conversation.

I want to welcome my colleague Senators during that time when we will have the CS, National Treasury, the Attorney-General and the Chief Registrar of the Judiciary to come, so that we can have a conversation. I have listened keenly to all your concerns on legal intervention and everything that you have said. As a Committee, we will follow up so that we can have a more powerful and independent Judiciary.

Thank you.

The Temporary Speaker (Sen. Halake): Thank you.

Hon. Members, we have spent so much time on this particular Statement, and rightfully so. We will, therefore, defer all the rest and go to the Statement by the Senate Majority Leader on the Business of the Senate for the following week.

ELECTORAL VIOLENCE IN THE BY-ELECTION CAMPAIGNS

(Statement deferred)

Sen. Olekina.

BUSINESS FOR THE WEEK COMMENCING TUESDAY, 12TH NOVEMBER, 2019

Sen. Olekina: Thank you, Madam Temporary Speaker. I also want to congratulate you. You are an amazing Senator and to see you sitting there, I can guarantee Kenyans that this House will be in order.

Before I read the Statement of the Senate Majority Leader, I am happy to see that this House has spoken strongly, and I think, some sanity has prevailed in the National Treasury. I am reading from the news that the Judiciary money has been restored. It shows that when this House starts speaking, Kenyans and every one listens. I am very happy about that.

Madam Temporary Speaker, pursuant to Standing Order No.52 (1), I hereby present to the Senate, the business of the House for the week commencing Tuesday, 12th November, 2019.

On Tuesday, 12th November, 2019, the Senate Business Committee will meet to schedule the business of the Senate for the week. Subject to further directions by the Committee, the Senate will consider Bills due for Second Reading and those at the Committee of the Whole stage. The Senate will also continue with the consideration of business that will not be concluded in today's Order Paper.

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Madam Temporary Speaker, the following Bills are due for Second Reading and at the Committee of the Whole stages respectively and will be scheduled accordingly by the Senate Business Committee:

Bills at Second Reading Stage-

- (1) The Registration of Persons (Amendment) Bill (Senate Bills No. 14 of 2019).
- (2) The Care and Protection of Child Parents Bill (Senate Bills No. 11 of 2019).
- (3) The Kenya Sign Language Bill (Senate Bills No. 15 of 2019);
- (4) The County Licensing (Uniform Procedure) Bill (Sen. Bills No. 17 of 2019).
- (5) The Statute Law (Miscellaneous Amendments) (No. 2) (National Assembly Bills No. 13 of 2018).
- (6) The Alternative Dispute Resolution Bill (Senate Bills No. 19 of 2019).

Bills at Committee of the Whole Stage -

- (1) The Retirement Benefits (Deputy President and Designated State Officers) (Amendment) Bill (Senate Bills No. 2 of 2018).
- (2) The Kenya Medical Supplies Authority (Amendment) Bill (Senate Bills No. 38 of 2018).
- (3) The Cancer Prevention and Control (Amendment) Bill (Senate Bills No. 9 of 2019).
- (4) The Street Vendors (Protection of Livelihood) Bill (Senate Bills No. 10 of 2019).
- (5) The Establishment of Children's Homes (Senate Bills No. 12 of 2019).
- (6) The County Tourism Bill (Senate Bills No. 5 of 2019).
- (7) The County Hall of Fame Bill (Senate Bills No. 39 of 2018).

I urge respective Standing Committees to expedite consideration of the aforementioned Bills and to table reports within the stipulated timelines. This will enrich debate at the Second Reading stage and facilitate the House to effectively navigate the Committee of the Whole stage. I also urge respective Movers of the Bills to be in the Chamber, whenever the Bills are scheduled in the Order Paper.

Madam Temporary Speaker Standing Order No. 51(1) (b) provides for quarterly reports to the House by Select Committees relating to their activities, including, consideration of Bills, Statements and Petitions and inquiries undertaken.

During its sitting held on Tuesday 5th November, 2019, the Senate Business Committee approved a schedule of reports by Select Committees. The schedule indicating the date when a Select Committee is required to make a Statement pursuant to the aforementioned Standing Order is attached to this Statement. In this regard, I urge respective Chairpersons to prepare accordingly.

Madam Temporary Speaker, I thank you and hereby lay the Statement on the Table of the Senate.

The Temporary Speaker (Sen. Halake): Next Order.

BILLS

First reading

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THE SACCO SOCIETIES (AMENDMENT) BILL
(NATIONAL ASSEMBLY BILLS NO. 1 OF 2018)

(Order for the first reading read - read the first time and referred to the relevant Senate Committee)

The Temporary Speaker (Sen. Halake): Next Order.

First Reading

THE SECTIONAL PROPERTIES BILL
(NATIONAL ASSEMBLY BILL NO. 23 OF 2019)

(Order for the first reading read - read the first time and referred to the relevant Senate Committee)

The Temporary Speaker (Sen. Halake): Next Order.

Second Reading

THE REGISTRATION OF PERSONS (AMENDMENT)
BILL (SENATE BILLS NO. 14 OF 2019)

The Temporary Speaker (Sen. Halake): Mover.

Sen. (Dr.) Mwaura: Madam Temporary Speaker, I rise to move that the Registration of Persons (Amendment) Bill (Senate Bills No. 14 of 2019) be read a Second Time.

The aim of this Bill is to amend the Registration of Persons Act and the Births and Deaths Registration Act in order to make provisions for the registration of intersex persons. Intersex persons can be defined as persons born with sex characteristics including genitals, gonads, and chromosomes that do not fit the typical binary notions of male or female bodies.

Traditionally, human beings have been broadly categorized as either male or female based on reproductive functions.

The Registration of Persons Act was enacted in 1949 to make provision for the registration of persons and for the issuance of an identity card. On the other hand, the Births and Deaths Registration Act was enacted in 1926 to provide for the notification and registration of births and deaths. Whereas these two laws have been amended several times over the years, they provide for registration of persons along the binary classification of either male or female.

Recognition of persons in Kenya in terms of sexes as either male or female has caused intersex persons countless challenges including; discrimination, stigmatization,

ridicule and inadequate or denial of medical attention. The intersex persons face these challenges right from birth to adulthood.

Whereas the Constitution provides for protection of fundamental rights and freedoms of all Kenyans, including the intersex persons, Kenya has not put in place policies or adequate legal framework on intersex persons. There is, therefore, an urgent need to address their plight. This observation was made by the High Court in the case of Baby 'A' suing through Mother 'EA' and another vs the Attorney-General and six others; the Petition No. 266 of the year 2013.

Madam Temporary Speaker, in the case, Baby 'A' was born with both male and female genitalia and the hospital records indicated the baby's sex by using a question mark. As a result, the child could not be issued with a birth certificate. The court directed the Government to consider developing an appropriate legal framework governing issues related to intersex children. Additionally, the Government was urged to consider the issue of collecting data relating to intersex persons with a view to designing policies to protect them as a marginalized group in society.

On the findings of the court in the case of Baby 'A' on 26th May, 2017, the Attorney-General through Gazette Notice No.4904, appointed a task force on policy, legal, institutional and administrative reforms regarding intersex persons in Kenya. The task force finalized its work and prepared a Report with various recommendations. The task force made recommendations such as the amendment to various laws including the Registration of Persons Act, the Births and Deaths Registration Act and the Kenya Citizenship and Immigration Act.

There are concerted efforts all over the world to promote the fundamental rights and freedoms of intersex persons. Countries such as Uganda, Malta, United Kingdoms, Netherlands, Germany and the City of New York have put in place legal mechanisms for registration of intersex persons. In Uganda, Section 38 of the Registration of Persons Act gives the executive director of the authority responsible for registration of person's, powers to change particulars of a child who is born as intersex upon application by the parent, guardian or the child notwithstanding the use of the word intersex which many people do not understand. This is actually a positive way of addressing the problem.

To achieve the objective of the Bill, Clause 2 of the Bill proposes to amend the Registration of Persons Act by inserting the definition of the words 'intersex' and 'sex' so as to take into account the third sex marker, 'intersex' in addition to the two traditionally recognized sexes of male and female.

Clause 3 on the other hand proposes to insert a new Section 9(b) to the Registration of Persons Act to provide for change or particulars of an intersex person. It is proposed that intersex persons who undergo medical procedure and become male or female, shall within six months of procedure inform the registrar of persons in order for the change of the particulars to be effected by the registrar. Once a change of particular has been noted, the old identity card will be surrendered to the registrar of persons and a temporary waiting card issued pending issuance of a new identity card.

Additionally, Clause 4 of the proposed Bill seeks to amend Section 2 of the Births and Deaths Registration Act by inserting the definition of the word 'sex'. The definition

of the word 'sex' will be that proposed under the Registration of Persons Act under this Clause to include intersex people.

This Bill, therefore, proposes to put in place a legal framework, registration of persons and issuance of births and certificates and identity cards and it will go a long way in alleviating some of challenges that persons who are intersex experience in their day to day activities as citizens of this Republic. Without a birth certificate or an identity card, it is nearly impossible to be enrolled in formal education system in this country. One cannot get a Sim card and they cannot even open a bank account.

The issue of intersex people is very interesting and many people do not seem to understand what we are talking about when we talk about intersex persons. I was also oblivious of this matter or did not consider it until somebody contacted me on *Twitter*. That individual had referred to themselves as 'outcast accepted'. The person went ahead and told me that I represent them in Parliament, hence, I should take up their matter.

I interrogated the issue and asked the person to come and see me the following week. True to it, he came to visit me at my National Assembly office accompanied by a human rights defender called Patrick. That is how we started this journey.

The young person was Mary Waithera but the person who came to me was a man. It was not a lady as the name suggested. James Karanja had been brought up as a girl and he even went to a girls' secondary school and was the head girl. He was very uncomfortable there because the other teenage girls started getting attracted to him. His identity card read Mary Waithera and in as much as he had scored grade B-, he could not proceed to university. The mother developed mental health conditions because of the stigma associated with intersex children. I am glad to have Sen. Kasanga here because she is a champion of this. Therefore, it was impossible for him to continue with his studies. The mother was living in a deplorable condition and people were raping her. You can imagine that kind of stigma.

We started a campaign in the media to ensure that there is recognition and we also wanted to tell the story as it were. People started to listen and it was the first for them to hear such a conversation in the public domain. We then drew up a Petition to the National Assembly to have intersex people recognized in law and we actually struggled with terminology. We were not sure whether we should refer to it as gender identity disorder or intersex. It was difficult because it was a new phenomenon. You can imagine how difficult it was talking about it in Kiswahili but thank God we got the term '*jinsia tata*'.

We were also coming from a situation where people were afraid of Lesbian, Gay, Bisexual and Transgender (LGBT) issues and they did not want to be seen to be allowing LGBT issues to come through the back door.

When I finally presented the Petition in the National Assembly, there was uproar and furore. I remember none other than the Leader of Majority asking whether these people exist. I had to demonstrate by saying it is just like the way you may have some form of disorder on your arm or any other organ of the body, but this affects your reproductive system.

Eventually, the Petition was committed to the Committee on Administration and National Security lead by then Chairman, Hon. Asman Kamama. We then retreated in

Mombasa to come up with the report, but before that we had a public hearing where the intersex persons could tell their own story. While people were wondering if these people do exist, the moment they appeared before the Committee, there was a transformation.

Eventually, we adjourned *sine die* because the Eleventh Parliament came and passed. It was good because it was out of this action in 2017 that the Attorney-General constituted a task force to look at these matters because of the political push. We also took the matter to the National Gender and Equality Commission (NGEC). I am afraid to say that at that point, the NGEC was not very useful. For me, it was very clear that this was not an issue of disability rather the issue of gender. To be more precise, it was the issue of sex. Eventually, we went to the Kenya National Commission on Human Rights (KNCHR) and we have worked with the commissioners there, renown civil society activists and human rights defenders like Commissioner Jedidah Wakonyo, the former Chief Executive Officer (CEO) Ms. Patricia Nyaundi and Mr. George Morara among others.

These are people who have been on the struggle for the emancipation of Kenya and people, depending on what rights we are looking at. We know for sure that human rights are inalienable, interdependent and indivisible. That is to mean that if one right is affected, it affects another. If you do not have the right because of your status and you are denied that same right, it means I will be denied and another person too.

I am very glad to say that we have made progress since that time. We were able to organize conversations with various institutions. Professionals were resistant like the Kenya Christian Professional Forum (KCPF). They thought that this is some other anti-Christian issue, but they have come by slowly but surely.

Mr. Temporary Speaker, on the 26th October, 2016, Kenya was able to celebrate, for the first time, the Intersex Persons Remembrance Day, which is a global day. The intersex people were able to come to Parliament and present some Public Petition, which I was able to receive. However, here we are, we were able to bring together intersex people to form the Intersex Persons Society of Kenya (IPSK) because we knew we could not be the advocates, they also needed to be safe advocates to tell their stories as they are.

You can imagine when we lodged the papers at the Registrar of Societies to have this IPSK registered, it was not accepted and they said: "We do not want such kind of people." Again, it took the intervention of the AG's Emeritus Prof. Githu Muigai to have this come to bear. I am very glad to say because these are the unsung heroes who help people to fully achieve their rights and fundamental freedoms.

Today as we speak, James Karanja has an identity card. Ruth Wangui, who I found in a radio station when he was speaking about his story after we had done the campaigns is running the organization together with another young man. We now call him Kwamboka which is a challenge. You can imagine when you have to doubt your essence of being, your own identity; who am I? Where do I come from? Where am I going to? It is very easy, the binary distinction of; "I am male and you are female." It goes like that.

Recently, when we had the public hearing about this Bill, Kwamboka was at the small Chamber, but he could not access the toilets because our Serjeant-at-Arms were

asking: “Which one are you going to?” These are the challenges of intersex people. We have a case of another person called Ndung’u, brought up as Ndung’u, but then when he got to Form Three, he started menstruating. What do you do about that kind of a thing? We have another young child who has both a male genitalia and ovaries. Maingi is already eight years old, then it becomes cancerous. These are people who are born that way; they are not individuals who are male and want to be female and vice versa, they are God’s creation.

We have just come from having the Kenya Census 2019. The results were read by the Director-General, Dr. Zachary Mwangi. It was extremely difficult to ensure we had that sex marker in the census. It took a lot of convincing for that to be realized. However, I am very glad that with this first attempt, 1,524 individuals were positively identified as intersex. What is further greater than this is that every county has intersex people who were identified positively. Nairobi is leading with 235 people, Kiambu had 145 and Samburu had two with the least.

So, it is not a phenomenon of a certain area of the country; it is not an endeavor of 10 People in Nairobi trying to seek attention, rather it is something that has existed for the longest time. We have read a lot about other countries. I am very proud to report that today, Kenya is the first country in the world to conduct a comprehensive census on intersex people.

We have set the pace. The only country that has tried to do so is Australia. They had extrapolated that they would get about 420,000 people, but only 40 registered. We have the biggest data of intersex people in this country. This is a product of the parliamentary process and that shows the value of representation in this House. Some of these gains may be passed unattended. This is the same August House, through a Petition that we presented, that also made the currency that we are using to be more user-friendly to visually impaired people. As a result of the current contestation about the role of Parliament, I can see a headline in *The Standard* newspaper saying: “We are all the President’s puppets, the 416 of us.” People want to smear the role of Parliament to make it look like there is nothing that comes out of it.

We have an opportunity, as the Senate, the August House, ‘Upper House’ and the House of reason, to confer to the 1,500 Kenyans, the right to be identified positively as intersex persons. I remember when we first brought the Petition in the National Assembly and there was a very established doctor who sat in the Public Gallery. He is an intersex person, but he could not declare although he was there to witness this occasion.

I would want to imagine that there are so many, including senior people in Government and other places who are intersex, but they have never come out or told their story because of the stigma associated with this matter.

Today, we celebrate the figures that we have, but recently on 26th October, 2019 when we had the international Intersex Persons Remembrance Day at Pumwani and we asked people to stand and positively identify as intersex people, they were very few who could stand. Their fear was that if they were to do so, others would follow them to undress them so they can confirm that they are intersex. It is that serious. The intersex

people have been arrested and confused for what they are not; they have been said to be personifying themselves. They have even been given wrong titles.

Let me give you an example. One day I received a call from Ryan Muiruri. He had been detained for four hours at a bank in Limuru because they thought he was using the wrong kind of ID. I had to call Achieng, the police lady, who was convinced to release Ryan. Ryan the other day had to almost undress at the immigration so that he could get a passport to travel. There is also a story about a young lady named Simon and the kind of humiliation she underwent in Siaya County.

We were with you when we recently had the breakfast organized jointly by the Intersex Persons Implementation Committee. These are very compelling stories. When you hear of a parent like Peter Maingi having to sell all his property so that they can get money to fund this corrective surgery and there is no end in sight.

We hear doctors telling parents to go to their clinics for five years continuously, milking money from them and yet they do not have a solution. People losing their livelihoods and time; the agony and stigma. This is the time that we need to rise as a House to ensure that this cannot happen again. Why do we say so? This is because all of us here are parents, grandparents, future parents and future grandparents and it could happen that you get a child who is intersex.

In fact, I was sharing with one of the Senators who told me that he has been brought an intersex person and he does not know what to do with that child. So, it is a matter that we need to take up seriously and I believe that we can amend this Registration of Persons Act and provide for procedures so that even at birth, children are not forced to undergo surgery because of the expectation of the society that, which child did you give birth to, was it a boy or a girl? Parents have been doing that. When they force surgery on a child, it means that this child, upon attainment of puberty, when the body expresses itself towards a certain sex orientation, then it is a misnomer.

We have had situations where parents have got a child and they named the child to be a boy but then upon puberty, the body expresses to be a girl. However they had already interfered with the reproductive organs of a female. So, then, what do you tell that boy?

We have also had cases where a child was seen to be a girl and then they did away with the male reproductive sex organs; the child now expresses himself as a boy but he no longer has the vital organs of a boy. You can imagine that kind of a thing. It is extremely fundamental and definitive. This is the essence of being. Just pause for a moment and imagine yourself, if you did not know whether you are a male or female; but you are tossed this way and that way. You cannot quite figure it out. I have sat for hours, I have walked the journey with these fellow Kenyans and I think that there is urgency to ensure that we confer to them the citizenship and recognition that is due to them.

There have been contestations about; is this the introduction of lesbian, gay, bisexual, and transgender (LGBT) issues in the background? No! There is a difference about this because when we talk about intersex people, we are talking about children born that way. That is something that I want to re-emphasize because it is always thrown at us; who are you talking about? Are you talking about people who are transgender? No,

transgender people are those who are born male but think that they are female. That is not what we are talking about here. We are talking about the biological aspects of reproduction, the actual anatomy that actually represents themselves in a binary way so that you do not quite necessarily fit so.

Madam Temporary Speaker, I can really speak a lot but I would want to say that it is timely. I think sometimes we in the third world want to think that it is only the first world that can set pace for us. However, there are a lot of ideas which are never given credit to third world countries. Kenya remains to be seen as a leader, the first country in Africa to have a census. It is also actually the first country in the world because, you know, sometimes Western media does not want to recognize that actually it has not happened in their jurisdictions.

So, let us do this. Let us have an opportunity so that after this legislation, all of those people who are hiding, and after seeing the results during the census, they can now come out and use this legislation to confer upon themselves their fundamental rights and freedoms. When we talk about the human rights issue, it keeps on expanding. Eventually, this August House will require to legislate a whole Intersex Persons Bill. Over and above that, it will also require that we have a situation where we do a Miscellaneous Amendment Bill, because it affects a lot of legislations.

This is just one of them as an entry point. I am very glad because the Committee on National Security, Defense and Foreign Relations has been able to go through the matrix and I hope by Tuesday, we shall have the Report so that Members can profit from it.

However, I would really want to say that the time is ripe. For all the sins that we may have done to the people of Kenya for whatever reason, whether of omission or commission, let us use this opportunity to show that, indeed, we care for our people and the most marginalized and the most vulnerable.

I am very proud - this cannot be gainsaid - that it is under this Constitution, that I, Isaac Mwaura, as the first person with albinism has found my way to this August House. It is because of that reason that I am also using this platform to also raise other minorities so that they too can be recognized.

If you become a generalist as a Parliamentarian, then there is nothing to be shown for it. Sen. Orendo is a "Walking Constitution"; he is known for that. When he speaks here, we listen. Even when we may not agree with him, we know that he is speaking to our senses. Most politicians speak to their stomachs and sometimes they are hired and sometimes those things are not very well choreographed. When you look at Sen. Kassanga here, she has distinguished herself as a leader on mental health issues and that cannot be taken away.

So, I think that we have a good opportunity to also look down memory lane and see, what is it that Parliament was able to do, and particularly the Senate.

Having been in the National Assembly, I can say without fear of doubt that the real legislative work is actually happening here. We may have issues to do with Money Bills and what have you, but the kind of legislative work that we are able to on a day-to-day basis, the form of transformation that happens, justifies the reason as to why Senate

should continue to be what it is; as House of revision. Why am I saying so? Even just two days ago, we had a Petition that I sponsored about scrapping fees for youth so that we do not tax unemployment. The Governor of Central Bank has actually committed to do away with Credit Reference Bureaus (CRB) fees.

Also, today in the morning, we were able to have the Committee on Health speak to the issue of connective tissue disorder. Those are some of the things that we are supposed to be bringing to the Senate and to Parliament so that we transform our people.

I believe that we are in the cusp of history and history will judge us fairly. As Nelson Mandela said:

“The transformation of a nation is not about one individual, the transformation of a nation is a collective endeavor.”

Nobody can do this alone.

So, with those many remarks, I beg to move and ask the Senate Minority Leader, Sen. James Aggrey Bob Orenge to come and second.

(Applause)

The Senate Minority Leader (Sen. Orenge): Madam Temporary Speaker, let me thank Sen. Mwaura. Let me take note of the fact that Sen. Mwaura is a very distinguished Kenyan and parliamentarian in the two terms he has been in Parliament. It is not without significance that he has served both in the National Assembly and the Senate. In those two terms, he has distinguished himself as a fighter for justice. That fight for justice is not related to any particular group; it is related to the entire objectives, which are spelt out in the vision that is found in the preamble of the Kenyan Constitution.

So, I would wish to encourage Sen. Mwaura, because there are very few people who take causes like this; who may have opportunity to bring causes like this before the legislature but who either do not have time or probably they are ignorant of what is around them.

I remember when Hon. (Dr.) Ombaka became blind, he had gone through some medical problems. However, when he spoke in the National Assembly, he actually made a great impact on us. He said that he could once see but now that he is blind, he has got an inner sight that is so amazing that he does not regret being blind. He was able to do things in that condition because he took it positively. From then on, many people had respect for him because he could do anything, any legislator could do.

Sen. Mwaura, I cannot stop but continue encouraging you that there are very few people - you can even see in the Chamber how many people are present because this is not a subject that people would want to speak to or they do not think that it is so significant.

Madam Temporary Speaker, on my real contact with this subject, I never really thought that there were intersex people because I did not understand that terminology in the first place. One time, I came across some literature and a video showing the number of intersex people in India. In fact, they were having some kind of fellowship. They were many and they were doing this with a sense of pride in order to bring the attention of the people in India. India is a very religious country. There is the Muslim population. Outside

India, I think most Muslims in the world are found in India. Then we have the Hindus and, of course, the other religions.

It is a fairly conservative country in terms of matters of this nature. When I saw that number of people, I thought we are so unkind to God's creation. We are so selfish. We think about ourselves the way we look and anybody who does not look like us is an abnormal person. In fact, this is the very basis of racism; that if you are not black, then you are not part of my space. If you are a white man and a white Caucasian, then you are alien or foreign. The way we relate to those who look different from us demonstrates the kind of personality that we have. If you cannot recognise humanity in its various forms, then we are not human ourselves.

Madam Temporary Speaker, I particularly liked a meeting which was held in Asia. Sen. (Dr.) Mwaura is right that what we are doing is kind of historic, but there have been many conferences bringing together intersex people or of international organisations. If I am correct, I think there was a significant one which was held in Malta in 2013.

Recently, just last year in February, 2018, there was a conference in Bangkok, Thailand. It was the first Asian intersex forum. I like the resolutions they came up with. They said the following in the preamble to those resolutions."

"We affirm that intersex people are real."

They are real in the form in which they are. That is why I agree with Sen. (Dr.) Mwaura, that we should accept them in the form in which they are and recognise that as part of humanity, without exception and distinction.

Madam Temporary Speaker, when you go to antiquity, the incidents in old Greece and old Rome of antiquity, not the times of Julius Caesar, I am talking about 5,000 or 6,000 years ago, there were some divinities who were intersex. They were regarded as very powerful. It is just like the image of God; we do not really think of God as either male or female. I mean, God created us in His own image. The Church, as opposed to the Scripture, has behaved as if God having been said to have created man in his own image, then that meant that God or divinity has some kind of sexual distinction.

That is not the case. Therefore, any human being who is a product of a relationship between man and woman, that person is a real being whatever his or her biological condition. However much, that person will look different.

To that extent, the conference that was in Bangkok, Thailand discussed a great deal the problems that are being confronted by intersex people. That conference was followed by another one in Seoul this year, one and a half months ago, on the 19th August 2019. This is important in building this awareness, like what Sen. Mwaura has been doing before bringing concrete proposals before this House in terms of petitions. It has translated into a Bill which hopefully will become law soon.

I also believe, just like you pointed out earlier, that the number of intersex people in Kenya is a lot more. This is because during the census, I do not think the enumerators would be able to determine. This is where people were able to proclaim their sex as it were.

If there was no stigma and we had done a lot more public awareness, the population of people who can be referred to as intersex are a lot more than what came out in the census. Probably after this legislation, it may be a way of encouraging them to come out. In the region, we live in a continent and society that is really conservative even on simple things and realities that people should accept. In parts of Malawi, Tanzania and even here in Kenya, there are people who believe in witchcraft.

We still have got quite a bit of work to do before we can come to full realization. I am going backwards in terms of the dates of some of these significant conferences. There was one in Malta in December, 2013 where a series of declarations were made. It is important that some of these meetings were not only meant to create awareness, but the fact that they were international organizations which were attended, they were able to translate some of these resolutions into actionable decisions and policies. In some countries, they have led to some kind of legislation, but not in the manner in which Sen. Mwaura is doing. What he has done is quite courageous.

I was being told that the other day there were people from part of the Lesbians, Gay, Bisexual and Transgender (LGBT) community that wanted to come to Parliament to hold a meeting. They were dismissed. These are people who probably voted for some of these Members of Parliament. They were not able to come here and give a presentation.

Madam Temporary Speaker, in this meeting in Malta, there were concerns that there was discrimination all over, not just in Malta, but all over Europe. There is still discrimination and stigmatization of persons who are intersex. It behooves us to be pioneers, to make sure that some of these things that make sense in some of these forums are translated into policy decisions like I have said before.

I support and second this Bill by Sen. Mwaura. This is the first step. As he said, there will be consequential legislation. This is not only in terms of Statutes, but even regulations to some of the Statutes. This will make it consistent with what is being achieved by this Bill.

Madam Temporary Speaker, this Bill seeks to amend the Registration of Persons Act. If you look at the Title, it speaks to that. In terms of Clause 1 and 2, this captures who an intersex person is. The definitions that are there are plain enough and not complicated, for anybody wishing to be identified or if a process is undertaken, to make such identification. That definition comes out very clearly.

At an appropriate time, I would like to encourage Sen. Mwaura to maybe cross-reference with another section. The proposed Clause 9 (B)(1) states-

“An intersex person who undertakes a medical procedure that leaves them with physical features that are either fully male or fully female, shall within six months of the completion of the medical procedure, attend before a registration officer for the purpose of changing the particulars of their sex in the register.”

The proposed Clause 9B(2) further states that-

“A person who changes their particulars under sub-section (1) shall simultaneously surrender their identity card to the registration officers.”

I am afraid that these provisions are made in a mandatory form which I think I am prepared to live with. They should remain so because even people who are described as male or female have a duty under the law to be registered as persons.

For the reasons which were clearly articulated by Sen. Mwaura, I wanted to draw his attention to Section 14 that talks about Offences and Penalties.

Section 14(1) (a) of the principal Act says-

“Any person who-

(a) fails to apply to be registered in accordance with the provisions of this Act; or---“

The Act says that such a person will have committed an offence and that offence carries certain penalties which can be administered to the person who is said to have contravened any sections in the Registration of Persons Act.

I was going to plead with Sen. Mwaura that we put it in such a language that we do not amend that Section. However, I think we need to do something about Section 14 because we want to encourage intersex people to register. If they fail to register, I do not think it is their problem or their mistake.

We must undertake to educate certain registration officers. For example, if somebody appeared before a registration officer and wants to declare himself as intersex, probably he will undergo so many questions and problems. He will be asked many questions, for example: “Have you undergone a procedure? Where did you undergo it?”

Madam Temporary Speaker, I remember at one time when President Museveni said that sometimes you can find a person who wants to invest in Uganda; the person is very enthusiastic and probably has visited Uganda before and loves the country. However, his first point of contact is with the immigration officer who may ask so many questions that in the end he says: “I have a visa, I have a legitimate reason to come to this country, but now that I am being asked all these questions, I had better go away. After all, it is my money.”

Some of these laws can be frustrating. It is not the mistake of the person who is seeking registration, but it may be used by registration officers to punish those who we should not be punishing or prosecuting.

In effect, I support that this Clause should remain intact as it is. However, I urge that at the Committee stage or even before, we can continue to debate on this matter and have a new section or a proviso to that Section 14 that I have been reading, so that we do not punish intersex people for a reason which is our own problem.

We have left them out of the general society. This Bill wants to bring them as part of humanity, fellowship and nationhood. This should not be used to cause the kind of problems that I imagine it would.

Madam Temporary Speaker, having said all that, I hope that this Bill will find popular support and lead to even general recognition of Lesbian, Gay, Bisexual and Transgender (LGBT) persons. Sometimes we want to live in the past. In the United States of America (USA) we now have somebody who is running for president under the Democratic Party who is gay. What if he becomes president of the USA? We cannot turn him away from the airport. We have to live up with these new realities.

To that extent, South Africa has done so well in opening up and making sure that sexual orientation is not a matter to bring about discrimination. You can see even the leadership there from the President down talking about the gay community and so on. Here we are still trying to live in the past. There are many other things the world is coming to live with and we cannot be an island. Even as we say we are a nation of religions, we must also remember also there was one time that Kenya---

It would rather be said that Kenya was a Christian country at one point in time which was not true because there were so many religions. I think it was courageous of those who worked hard and formulated this Constitution not to recognise Kenya as a nation which was committed to any particular religion. This was the great message of Mahatma Gandhi who lived in India where Hindu nationalism was at its height.

You will find that in India, a population of 150 million Muslims can live with 600 million Hindus. Even in Northern Ireland, Catholics and Protestants have been fighting for centuries. Visionaries like Mahatma Gandhi were way far ahead of their contemporaries in many matters.

Madam Temporary Speaker, without taking any more time, this is a Bill that I should commend to my brothers and sisters in the Senate. Now, in the Memorandum of Objects and Reasons, Sen. Mwaura has done well although, it is not a whole chapter as it were. He has spelt out clearly what the objectives of this Bill are and why it is relevant. He has stated that this law is not in any way going to limit any fundamental freedoms and rights of any persons. In fact, it does the opposite; it expands the human rights of persons who have been oppressed, ignored and stigmatized.

I hope that by discussing this Bill, the intersex people living with us should come out without fear and know that they are truly Kenyans. Like any other Kenyans, they should enjoy all the fundamental freedoms that are spelt out in the Constitution. Our Constitution was very well considered. The rights and the freedoms under the Constitution are not the only ones. There are others. Human rights cannot be abridged; they go beyond what is stated in the Bill of Rights.

Let them come out as patriots and let churches, mosques, temples and other religious organizations also come out. The discrimination against children and women cannot be accepted in the 21st century, particularly being a Christian, some churches actually discriminate against women and they continue to do so. I hope that with the fullness of time, these religious organisations will open up to intersex people.

I am sure that in some of the churches, these people are stigmatized. If they continue to do that, they are disobeying the command of providence of the Almighty. That is not what religion is all about.

With those remarks, I beg to second and thank Sen. Mwaura for bringing this Bill.

(Question proposed)

Sen. Kasanga: Thank you, Madam Temporary Speaker, for giving me this opportunity to support this Bill by Sen. Mwaura.

Nelson Mandela said-

"What counts in life is not the mere fact that we have lived; it is what difference we have made to the lives of others that will determine the significance of the life we lead."

Sen. Mwaura, the journey you have described, walking through with persons who are intersex, right from the last Parliament to this Parliament, and the strides that you have achieved for them is, indeed, of great significance. For that, God bless you.

Madam Temporary Speaker, I have now interacted with stigma when working on the issues of mental health. There is nothing more difficult or more painful for a human being than to live in the shadow of stigma because of something that is not within your control. Like the intersex, nobody chooses where they are born, how they are born, what they look like, whether they have a big eye or a short leg, you name it. This falls in the same category. We are all human beings as Sen. Orenge has said. We have a beautiful Constitution in this country that recognizes the Bill of Rights and the fundamental freedoms of every human being.

As I said, one time, we tend to live in a bubble. As long as I am okay, my children and parents are okay, then the world is okay. We lack the empathy and refuse to see beyond the bubble. What Sen. Mwaura has done here today by bringing this Bill, is bring the information and the knowledge that we need so that we can look beyond our bubble; that bubble, which we wish every human being could look beyond and make this world a better place.

I did not know much about intersex persons. It has taken a breakfast meeting with Sen. Mwaura, the Intersex Community, the Kenya National Commission on Human Rights (KNCHR) amongst others, for me to understand what these persons go through.

Also just to understand the stigma around them that they are not normal. I realised that I have been interacting with them every day and I just did not realize it. It also made me understand the challenges they go through as intersex, that they cannot get the registration that they so deserve. This is actually heartbreaking.

I want to thank you, Sen. Mwaura, for bringing this Bill today, for teaching us what intersex is and for making us understand the challenges they go through. I also want to agree with you, Sen. Mwaura. You have said that this platform, Parliament, in as much as we can be castigated for all the wrong things, some of the best things also happen here because when would have these people gained a voice?

Thank you for speaking for them; the disabled and the minorities. I agree with you that it is in this House that we make a difference. I am sure this Bill will definitely pass this House and the next. Already what you have achieved for the intersex persons by having them counted in the census is most commendable.

The very essence of our being is what we are discussing here. You have been born in a certain way and you should be recognized that way. True enough, many of them do not need to go through an expensive surgery to determine whether they are male or female. They can live normal lives as they are.

At birth, that they can be recognized as intersex is a beautiful thing. Thank you for changing the definition of sex to include the intersex. Later in life, they can decide

whether they want to do a surgery, if they can afford it. As we know, many Kenyans cannot afford this expensive surgeries.

I appreciate that provision that you have added there and the fact that they then can make a decision upon puberty. Those who can afford can choose whichever of the dominant sex they are. They can chose through either an elective surgery and then get their identity changed without a challenge.

I have had challenges with my ID card. I cannot imagine what intersex persons go through. When we were at the breakfast meeting, I heard a story of the challenges that intersex persons go through from an intersex person who talked to us. I really appreciate that this will now be tackled.

I do not have much more to say other than to support this Bill and thank everyone who has walked with Sen. Mwaura. I now appreciate the journey of working towards a Bill. It is really tough, and this is something that many Kenyans do not understand. Without the support of people and organizations like the Kenya National Commission on Human Rights (KNCHR) and other civil society organizations who have been out there working, it is really difficult to get some of these agendas out, even by the time they get a voice at Parliament.

Therefore, I thank everyone who has walked with Sen. Mwaura to reach where we are today because it is a really tough journey. I thank Sen. Mwaura and congratulate him for this Bill. I hope that every Senator will support it so that it can see the light of day.

I support.

The Temporary Speaker (Sen. Halake): Sen. (Dr.) Milgo.

Sen. (Dr.) Milgo: Thank you, Madam Temporary Speaker, for this chance to also support this Bill. I wish to begin by thanking Sen. Mwaura for bringing to light the plight of very many Kenyans who would otherwise be languishing in stigma.

I wish to support this Bill which seeks to amend the Registration of Persons Act (107) and the Births and Deaths Registration Act (149) in order to provide for the registration of persons born with both female and male genitalia and other rudimentary structures as such. As Sen. Mwaura explained to us, he started talking about this issue way back because he was elected to represent Persons with Disabilities (PWDs). Out of his concern, for the first time, the Kenyan Census in 2019 recognized these people. In this case we got to establish the fact that there are 1,524 intersex persons in Kenya.

The KNCHR, however, estimates this population to be well over 20,000. I think the reason that we were not able to capture many of them is because this was a very short time for them to come out freely and register themselves. They ought to have been counseled and told that they are now being appreciated in society. The time was not enough to tell them that this country is now recognizing them in the same way other people are recognized.

Madam Temporary Speaker, it is quite unfortunate that this group of people has had to suffer for many years because of the fact that they have a unique gender. Furthermore, having medical procedures to make them either male or female is quite expensive. The proposed Clause 9B that has been added to this Bill will go a long way to

bring changes in this country in terms of registration of intersex persons. This will make Kenya stand out among many countries in the world.

Article 59 of the Constitution, together with the Kenya National Commission of Human Rights Act of 2011, ensures that there is promotion and protection of human rights in Kenya, including safeguarding the rights of intersex persons. This Bill has come at the right time.

It is interesting to know that persons who are intersex have had to suffer for a long time. I had time to attend a breakfast meeting with Sen. Mwaura where one parent stood up and explained the stigma they have undergone. We ended up shedding tears. That particular mother has had to shift many times from where she has been staying. That is not even the end of the story. Despite the fact that she would shift from one place to another, somebody would follow her with some information that there was somebody living with a strange child in her village. You can visualize how the mother and the child were stigmatized.

A commission was mandated in 2017 to collect information and to do a comparative approach to care, treatment and protection of intersex persons. They were to also look at the existing policies, in this case, the legislation as well as medical administrative structure, but that policy has not helped this particular group of people. I believe that this Bill will help us realize better things for this group of people.

Intersex people, together with their parents, have suffered a lot. Those people have issues with identification. When a child is born in hospital, they are either considered male or female but one big hospital once put a question mark on the gender of the child, and the mother was shocked. She did not understand the reason as to why they placed a question mark on the gender section. The doctors did that because they did not know how to assign the child's gender. Identification for this group of people is a nightmare yet one needs to have identification to belong in this country. One can face extradition or insecurity issues if they do not have identification. The identity card also allows one to access various services such as banks and many others.

The intersex persons have suffered when it comes to access to social amenities. They never get to know the toilets that they are supposed to use, especially when they are in school. That is why they drop out of school. That mother explained the stigma that the child faced when it came to the use of toilets. High schools make it difficult because one fails to know if the child should go to a girls' or boys' school. One intersex person explained that they at times face insecurity issues because people always insist on checking if they are male or female.

In our education system, one is either registered as female or male and assigning these people's sex has been a nightmare. This Bill will enable intersex people to get placement in schools. They will also be able to get amenities in hospitals. Our culture has forced many parents to hide these children just as they hide the physically challenged children.

There was a case in Western Kenya of a man who lost part of his reproductive organs and he did not have a father figure around him. The only person who was there to sympathize with him was his old mother. It is actually that mother who said that the man

was suffering. We have had cases where fathers run away when an intersex or physically challenged child has been born. Sen. Mwaura should include something in this Bill that will ensure that the responsible fathers take responsibility.

The Temporary Speaker (Sen. Halake): Sen. (Dr.) Milgo, you have ten minutes left and you can contribute in the next sitting.

ADJOURNMENT

The Temporary Speaker (Sen. Halake): Hon. Senators, it is now 6.30 p.m., time to adjourn the House. The Senate, therefore, stands adjourned until Tuesday, 12th November, 2019 at 2.30 p.m.

The Senate rose at 6.30 p.m.