

PARLIAMENT OF KENYA

THE SENATE

THE HANSARD

Wednesday, 28th April, 2021

Special Sitting

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

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

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

PRAYER

The Speaker (Hon. Lusaka): Hon. Senators, welcome back. I am sure we have had time to go through---

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

The Speaker (Hon. Lusaka): What is it, Sen. Cheruiyot?

POINT OF ORDER

ARREST OF SEN. LINTURI BY THE POLICE

Sen. Cheruiyot: Mr. Speaker, Sir, thank you for this opportunity and for listening to us earlier in the day. However, I want to bring to your attention something that has just happened which perhaps will require your direction and guidance.

I received a distress call from one of our colleague, Sen. Mithika Linturi. If you may recall, in the morning he raised a point of order on his reading and understanding of Article 257 of the Constitution, and you promised that we first dispense with the earlier matter which was whether to adjourn or not, and then we will respond to it.

This afternoon on his way to Parliament, he was stopped by gentlemen who claimed to be police officers from the Directorate of Criminal Investigations (DCI). They asked him to alight from his car and he is now in a car which, he says, is headed to DCI headquarters, but he does not understand what his crime is.

Mr. Speaker, Sir, you will recall that three months ago, we had the Inspector General (IG) of Police seated where Sen. Malalah is seated and the Director of Criminal Investigations was seated where our colleague, Sen. Pareno is seated. We were discussing

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the unfortunate events of what had happened during the revenue sharing formula debacle. They made a commitment before this House that any time Senators are considering such monumental issues and if there was an issue that warranted them being arrested, it would be done first with consultation with the Speaker.

Mr. Speaker, Sir, I would wish to know from you whether you are aware why Sen. Mithika Linturi has been arrested. If you are not aware, how do we proceed knowing that we are about to enter that silly season again as we did during the debate on the revenue sharing formula where colleagues used to be picked one by one. We had to drive to places such as Kiserian and Kitengela to look for some of our colleagues and protect them.

We need your guidance so that we know how to behave in the next few days if this is what we will go through as we discuss this very important matter. Therefore, please guide the House on how we should handle such matters.

Sen. Khaniri: Mr. Speaker, Sir, the issue being raised by the Senator for Kericho and my good brother, Sen. Cheruiyot is extremely important. It should be noted that an attack on one of us is an attack on all of us. If we let this to go on unabated, then today, it is Sen. Linturi, tomorrow it will be Sen. James Orengo, the day after, it will be Sen. Poghisio or Sen. Khaniri.

We must stand and speak with one voice as a Senate. If, indeed, our colleague has been apprehended or arrested in line of duty, just for performing his constitutional duty, then we, as a Senate, must protest. Some of us will not participate in the debate this afternoon until it is explained to us what is happening to our colleague.

Mr. Speaker, Sir, you are the leader of this House and we are urging you to take this matter seriously. For me as a person, I am declaring that if that is not explained, then I will boycott. I will not participate in the sessions that we will have this afternoon and even tomorrow.

Sen. Mutula Kilonzo Jnr.: Mr. Speaker, Sir, this matter is so serious. If Sen. Linturi has been arrested in the course of duty, we should all leave this Chamber. It is not fair. I participated in the inquiry into the arrest of Sen. Malalah; the Senator for Bomet, Sen. Langat and Sen. (Dr.) Lelegwe. Since that time, nothing came out of those arrests. It was just pure harassment at that time.

Mr. Speaker, Sir, at that particular moment, the resolution that was made by the then Chair, together with the gentlemen from the National Police Service, including the DCI and IG, was that there would be what is called a liaison committee between the offices of the Speakers of both Houses and the police so that if there is something that they need from a Member of Parliament, including the Senate, they would, first of all, make the necessary inquiries before arresting a person in the middle of proceedings.

An. Hon. Senator: It is unacceptable.

Sen. Mutula Kilonzo Jnr.: It is just totally unacceptable! It is wrong. It does not matter what he believes because this Chamber is supposed to be a Chamber of debate. This is not a choir where we are supposed to agree or sing the same song. People are supposed to debate and vote. Even if there was something that they were looking for, it would be misconstrued that they have arrested him so that they either reduce the number of people, or they intimidate the people who have an alternative view. It is very unfortunate that they would do so.

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Mr. Speaker, Sir, as in the case of your predecessor, when the police came to Parliament Road during our debate on Election Laws Amendment Bill, we were barricaded here. We got out of our cars at around Uhuru Highway. Your predecessor adjourned this House until the police moved out of Parliament Road.

There must be an explanation. I said the last time it happened that next time it will be somebody else. There will never be an end to this.

Thank you, Mr. Speaker, Sir.

Sen. Wamatangi: Thank you, Mr. Speaker, Sir. I rise to also convey my concern and agree that indeed, the independence of every one of us when we are participating in our duty is paramount. It cannot be compromised. Members of this House must be able to debate, express themselves and say what they think is their opinion without any interference and without fear. That must be how we debate and how members feel.

Sen. Linturi was with us here in the morning. He made the contributions he made then and we have just been informed by Sen. Cheruiyot that he has been arrested. My plea to the House would be this; because we are here and Sen. Linturi must be within the boundaries of this country or this city, we need to find out now where Sen. Linturi is without first imputing that he has been arrested for participating in this House.

Mr. Speaker, Sir, once that is ascertained, then you can proceed to take the necessary action as the leader of this House. I believe in the best interest of not only parity but fairness, to both Sen. Linturi and to the integrity of the House, that before we conclude the reason why Sen. Linturi has been arrested, we find out as to why and the whereabouts of Sen. Linturi and within a few minutes, report to this House, because we have the means to do so.

I was seeking your indulgence so that we can put the truth on the table. It is possible to do that within no time and in a short while.

(Loud consultations)

The Speaker (Hon. Lusaka): I am not gagging anybody. I have not even said anything, honestly. Do not suspect.

(Laughter)

As we continue contributing to that in the next 20 minutes, if Sen. Linturi is not here by then, we are going to make a decision.

Proceed, Sen. Wambua.

Sen. Wambua: Mr. Speaker, Sir, I want to be very clear on this matter. This is an attempt to intimidate not just Sen. Linturi but all the Senators and all the legislators. I took time to look at this document. One of the very controversial issues in this document which has been cited by the Committee is an attempt to transfer the powers and functions of the National Police Service Commission to the Office of the Inspector General of the Police.

If the Inspector General is behaving the way he is behaving now before these powers are transferred to him, how will he behave when the powers are transferred to him?

Some people have already implemented this Building Bridges Initiative Bill. My submission is that you require the Inspector General in person to produce Sen. Linturi here. Whether Sen. Linturi was arrested in connection with this or not, the timing is suspect.

Thank you Mr. Speaker, Sir.

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

Sen. Wamatangi: Mr. Speaker, Sir, as members ventilate, I have said it is possible to find out where Sen. Linturi is. I am informed and I need to inform the House because I said we will call and find out. Sen. Linturi had a mishap with some police officers who apprehended him but---

(Loud consultations)

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

Sen. Wamatangi: Sen. Linturi has been released and he will be here in the House in the next 10 minutes.

(Loud consultations)

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

Sen. Wamatangi: Mr. Speaker, Sir, this matter was brought here and we have agreed that indeed it is absolutely wrong for any member of this House to conduct business in fear. It is completely unacceptable that a member of this House should be looking behind his back when doing the things that he is doing.

Mr. Speaker, Sir, I am on a point of order.

The Speaker (Hon. Lusaka): What is your point of order, Sen. Cheruiyot? But he is on a point of order!

(Loud Consultations)

Sen. Wamatangi: Mr. Speaker, Sir, I am on a point of order.

(Loud Consultations)

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

Sen. Wamatangi: Mr. Speaker, Sir, I am on a point of order. Let me finish. Any member is free. I volunteered to go and find out. What I am firmly saying is, as far as we are concerned and as a Senator in this House, it is completely wrong for any member of this House to conduct his business looking behind his back in fear. That is absolutely what you were saying.

No one should imagine that for any one reason, we would condone that kind of thing.

(Loud Consultations)

The Speaker (Hon. Lusaka): He is on a point of order.

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Sen. Wamatangi: Mr. Speaker, Sir, I want to say to my colleagues firmly so that we do not unnecessarily raise temperatures that Sen. Linturi has now been released and he is on his way here.

(Loud Consultations)

That is the point of order Mr. Speaker, Sir.

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

Sen. Kihika: Mr. Speaker, Sir, I have spoken with Sen. Linturi as the Government apologist continued talking and he is still under arrest. He is still in custody.

The Senate Minority Leader (Sen. Orengo): Mr. Speaker, Sir, this matter ---

(Loud Consultations)

The Speaker (Hon. Lusaka): Order Senators!

The Senate Minority Leader (Sen. Orengo): This matter is not as simple as the majority whip is making it.

(Loud Consultations)

Mr. Speaker, Sir, it is not. This issue has everything to do with the liberties of Parliament. There used to be a practice which is observed in the Commonwealth. When a Member of Parliament is on the way to Parliament, or if Parliament is in session and he is required to attend, the Member of Parliament should not be arrested without the leave of the Speaker.

(Applause)

The Speaker would understand that the arrest has nothing to do with the proceedings before the House. Mr. Speaker, Sir, I am saying this because I have been a victim. If these rules were not complied with, many members would have been arrested from even the belly of the Chamber. If we let it continue, one of these days, policemen are going to run coming to the Chamber, not just to arrest Sen. Linturi but to arrest the Speaker too!

(Applause)

Mr. Speaker, Sir, at the end of the day, you are the head of this House. I cannot take the powers of communicating with another arm of Government on behalf of parliamentarians. Unfortunately, Sen. Wamatangi cannot speak for the Executive. He can only speak for this House. So, I suggest that until you have a proper answer, we have no business continuing---

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

Mr. Clerk, I want the Speaker to listen to this.

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Mr. Speaker, Sir, sometimes you want to vote and you do not know whether that arrest has a link to what will happen in the House. That is why that tradition was very important. In England, in the 16th Century, a King went to the Chamber of the House of Commons with 400 policemen to arrest five Members of Parliament. The Speaker refused. He said he is the one who determines the liberties of Parliament and defied the King. Therefore, today, until you are told where Sen. Linturi is, you must treat everything we are giving you as rumours. No one of us can tell you whether Sen. Linturi has been released, until officially there is communication between you and the involved parties or Sen. Linturi himself is here.

I move that the House adjourns to give you time to deal with this matter.

(Applause)

The Speaker (Hon. Lusaka): Order, Senators! This is very serious. Because of the gravity of the matter and what has been requested, I am suspending the House for 30 minutes, during which time I will use to find out what exactly has happened.

I direct the Committee on National Security, Defence and Foreign Relations to get into this matter and find out what happened, so that as a deterrent, this does not happen again to any Member of this House. It is so directed.

(Applause)

(The Senate was suspended at 2.55 p.m.)

(The Senate resumed at 3.40 p.m.)

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

The Speaker (Hon. Lusaka): Hon. Senators, I want to confirm to the House that Sen. Linturi is here with us. He has been in my office and will be here in the next two minutes. I will give him an opportunity to say something.

(Applause)

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

Proceed, Sen. Mutula Kilonzo Jnr.

Sen. Mutula Kilonzo Jnr.: Mr. Speaker, Sir, when we elected you, there was an announcement by the Clerk to go and find a person with your name in the corridors. Maybe you should make a similar order for Sen. Linturi, so that he comes and we can proceed.

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

(Sen. Linturi was applauded as he walked into the Chamber)

Order, Members! I am a servant of this House and I go by the wishes of this House. We suspended the Sitting because one of us was missing. Now he is here; I will give him five minutes to tell us where he was.

Sen. Linturi: Thank you, Mr. Speaker, Sir, for according me this opportunity to brief the House on what I have been doing since the House was suspended to give us an opportunity to go and read the Bill and the Report of the Committee and get back to this Chamber at 2.30 p.m. to debate on the same.

Mr. Speaker, Sir, the few hours I have been in the hands of my good brother, Mr. Kinoti, has not been one of the best experiences, to say the least. I must thank this House. I thank you and the Members of Parliament who have found it very necessary to stand and be with me at this particular time, not because I am not answerable to an agency that is investigating any matter or that I am not supposed to be arrested.

I thank this House because today is a serious day in the history of this country. You found it necessary to call the Senate to discuss this Bill and find a way on how the proposed constitutional changes can take place. However, despite this serious moment in our history that will never probably come in the next few months, and the way I represent the people of Meru, who expect me to give my ideas and their thoughts because I have been discussing with them, and what position they want me to take---

I find it very absurd because I could have been summoned to go to the DCI on Monday, yesterday or any other day. Doing it today really annoys me and is very painful.

Be that as it may, you and this House have demonstrated leadership and I must thank you. We do not know what would have happened next. I remember the other Senators were arrested at a time when we were discussing serious issues and this gentleman does not even understand. I cannot understand why this has to happen. We condemn it.

Thank God, I sit in the Committee on National Security and Foreign Relations and we had a discussion with the DCI, the Inspector-General (IG) of Police and others. If there is no other way, we agreed that whenever there is an issue that requires a Member of Parliament to present himself before DCI, write to the Speaker who will then communicate to the Member and he will then gladly go before DCI.

When I left here for my house, I found police officers and other people in three vehicles brandishing guns wanting to arrest me. I do not think I deserve that kind of treatment. We require to be treated with dignity. We require to be told whenever we have done anything wrong or even when something is being investigated, to appear and share information because we are equal before the law. We cannot run away. I cannot leave Kenya. I am an elected Member of Parliament. If I were to run away from this House, I would lose my position as Senator for Meru County.

Mr. Speaker, Sir, and Members, today it was me, tomorrow, it might be you. Let us be each other's keeper. However, I have no words to use to express my thanks to you, Senators. You can be sure - my history will tell - that I have always been there for anyone of us.

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I do not want to take more time because of the matter before us, but I thank you. I have been told to appear tomorrow at 9.00 a.m., and we have a Session tomorrow. I do not know, but you will guide us on how to go about it. I feel I need to be around to discuss this matter.

The Speaker (Hon. Lusaka): Sen. Wamatangi, proceed. We need to conclude this matter and proceed.

Sen. Wamatangi: Mr. Speaker, Sir, I wish to say one thing. I said here that we cannot take the freedom of an MP for granted. An MP has the right to prosecute his business and go around in freedom without fearing anything he says or does in this House can be used against him. That is uncompromisable.

I just wanted to affirm that because when I stood here, some in this House may have misconstrued that I was speaking for what they call “Deep State”. I am speaking for my friend. Unbeknown to many people here, this morning I had breakfast with Sen. Linturi while discussing our own issues.

(Loud consultations)

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

Sen. Wamatangi: Mr. Speaker, Sir, let me put it to rest for anyone in doubt. Sen. Linturi has been my personal friend for many years and he ought to have said that when he was here. Our relationship did not start yesterday. When I went to speak there, I was not only speaking for an MP, but for a friend as well. That is what we shall do for any Member if there is anything.

(Loud consultations)

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

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

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

The Speaker (Hon. Lusaka): Okay. Sen. Cheruiyot, proceed.

Sen. Cheruiyot: Thank you, Mr. Speaker, Sir. As a House, first, we appreciate you listening to our plight and the fact that this solidarity has brought Sen. Linturi back to the House. As colleagues, that is a big lesson that if we stick together, all the people who are trying to reduce this honourable House to a rubberstamp will scatter in seven directions.

As we transact the business before us, I plead with all our colleagues, please, let this be the guiding spirit and attitude. We have a duty that surpasses our political leanings or any ambitions that we may carry; either our own or for different people.

Mr. Speaker, Sir, Sen. Linturi has requested you that he wishes to be in the Chamber tomorrow at 10.00 a.m. and participate in the deliberations without feeling bothered, intimidated or as if he has to report somewhere else. Will it be too much if we, as a House, request you to write to the people looking for Sen. Linturi? Let them know that tomorrow is a very important day in the Calendar of this Legislature. As such, Sen. Linturi should be available at in the House between 10.00 a.m. and 6.30 p.m. If we conclude the business that will be before us, they can look for him. I am sure he is a

good, respectable, civil citizen and, therefore, he will present himself afterwards if they want him.

Mr. Speaker, Sir, my humble request is that you guarantee Sen. Linturi his presence in the House tomorrow at 10.00 a.m.

The Speaker (Hon. Lusaka): Let me say this so that we make progress. One, I have already spoken to the Inspector General and the Cabinet Secretary (CS) for Interior and Coordination of National Government, that Sen. Linturi will not appear until this matter is concluded. Therefore, he will be with us here tomorrow.

(Applause)

Second, we have also agreed that no Member of any Assembly, be it County Assembly, National Assembly or the Senate, will be arrested without the Speaker's knowledge. I spoke to the CS and there were witnesses in my office when I spoke to him. I hope we stick to that because as you have rightly said, we must protect the integrity of our House. Like you said, next time it will be the Speaker and I will expect you to defend me.

(Laughter)

That is where we are. Let us proceed.

Next Order.

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

The Speaker (Hon. Lusaka): What is it, Sen. Sakaja?

Sen. Sakaja: Mr. Speaker, Sir, I would not exasperate you with the same issue.

Just to draw your attention and that of Members that we recently lost one colleague to COVID-19 and the numbers do not look good. I have seen two Members use the same microphone without a mask and before it is sanitized. I am not pointing at any part of this House, but we are not all distanced properly and there is space to sit.

Mr. Speaker, Sir, I urge Members that even if you have been vaccinated, do not take it lightly. Our departed colleague had been vaccinated. Just consider that especially for use of the Dispatch Box. I have seen the Deputy Senate Majority Leader is going back to the Dispatch Box that Sen. Linturi used. Sen. Wamatangi went to it before it was sanitized. Let us just be careful.

The Speaker (Hon. Lusaka): Okay. He has raised a pregnant point. Let us observe social distancing. This thing is real and you have heard our colleagues talk about it. You heard Sen. Wako and Hon. Murungi had very moving stories about it. It can attack anyone of us. Let us be careful. We have been told that even if you are vaccinated, you can still get COVID-19 only that it may not take you very fast. However, it can have an impact and be a slow puncture.

(Laughter)

Sen. Farhiya, proceed.

PROCEDURAL MOTION

LIMITATION OF DEBATE ON MOTION

Sen. Farhiya: Thank you, Mr. Speaker, Sir, I beg to move the following Motion-

That, notwithstanding the provisions of the Standing Order No. 106(4), pursuant to Standing Order No. 106(1), the Senate resolves that each Senator shall be limited to speak for not more than 10 minutes on the Motion on Order No.3 in the Order Paper provided that the Mover, the Senate Minority Leader and the Chairperson of the Standing Committee on Justice and Legal Affairs and Human Rights shall speak for not more than 30 minutes.

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

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

Sen. Murkomen: Mr. Speaker, Sir, before Sen. Farhiya moved that Motion, you had already made a Communication that each Senator has 20 minutes.

Hon. Senators: It was 10 minutes.

Sen. Murkomen: Sorry for that. When you attend the sitting virtually, you sometimes miss some communication. You made a Communication giving each Senator 10 minutes and she has moved a Motion requesting for 10 minutes. I have a problem with that.

This is a once in a lifetime opportunity for us to discuss a serious matter. We can be here up to midnight, the next day, two or three days. We are discussing a Constitution that took 20 years to be made and many people lost their lives fighting for. We should not allow Sen. Farhiya to proceed in that direction.

The Speaker (Hon. Lusaka): Let her have a Secunder.

Sen. Murkomen: Mr. Speaker, Sir, I am trying to help Sen. Farhiya not to go that direction.

The Speaker (Hon. Lusaka): I understand that you have come very fast from Embobut.

Sen. Farhiya: Mr. Speaker, Sir, I beg to move and request Sen. Pareno to second.

Sen. Pareno: I second.

(Question proposed)

Sen. Wetangula: Can you sanitize the microphone?

(Laughter)

Mr. Speaker, Sir, I oppose this Motion. I urge the Leadership, both the Senate Majority Leader and the Senate Minority Leader to resist any temptation, act or omission that entrenches the feeling that we are a rubberstamp.

Mr. Speaker, Sir, we have all participated into getting these documents to where they are and they have a far-reaching effects on our country. We are the leaders and representatives of the millions of Kenyans out there. Therefore, I urge that we give

Members time and room to ventilate on this matter so that we can enrich the thinking of Kenyans.

For us to come here, you gazetted special sittings for two days. We missed out the morning session for reasons we understand because we needed the documents and we have gone through them. We have lost an hour in the afternoon because of the conduct of the State on Sen. Linturi. Now we are left with an hour and a half or so and tomorrow. You can very well gazette for a special sitting next week so that we speak to this document. Even if we will vote differently, we must put our views on record for posterity.

(Applause)

We are touching and affecting the lives of each and every one and we must tell Kenyans why we are doing so.

We have already been told, repeatedly, by some young politicians out there that we have no rights to question, that we are a rubberstamp, conveyer belt and we cannot change even a comma. If that is the case, the adage of Parliament remains; have your way, let me have my say. That is what we should give Kenyans. Give the Senate Majority and Minority Leaders the usual one hour.

I also suggest that you give us 20 minutes for some Members. Some of us will require about 40 minutes so that we can ventilate on this matter as seriously and exhaustively as we can.

(Applause)

Mr. Speaker, Sir, in the interest of saving time, making progress and telling Kenyans what we are doing, the Senator who has moved the Motion should abandon it so that it collapse as if it was never there, in the first place.

The Speaker (Hon. Lusaka): Since this is a procedural Motion, it is a voice vote.

(Loud consultations)

Order! You are already eating into the time that you are asking for. So, let me put the question, you take a vote so that you can even have 50 minutes. I have no problem.

(Question put and negatived)

That ruling means that we now go back to Standing Order No.106 where the Senate Majority Leader, the Seconder and Chairperson have 60 minutes and the rest of you 20 minutes.

Proceed, Senate Majority Leader.

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

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

Sen. Sakaja: Thank you, Mr. Speaker, Sir. We appreciate your clarification that we now go back to the status quo where the Senate Majority Leader and the Seconder have an hour and the Chair of the Committee has 30 minutes.

The reason the Chairperson of the Committee has 30 minutes is because he has led this process ably and penned a report. I also have a minority report that informs the debate. Therefore, while the Chairperson needs 30 minutes, I need 60 minutes to move the minority report so as to give context. I would like to be treated equally as the Chairperson in terms of the time given so that Members can understand the different perspective in the minority report.

I request for your discretion to give me at least 40 minutes.

(Loud consultations)

The Speaker (Hon. Lusaka): Order Senators, there is only one Speaker in this House. He was addressing the Speaker.

You will have your time and talk about those other things. Let the Speaker have his time. Sen. (Dr.) Ochillo-Ayacko has a point of order virtually. Let us hear him.

Unmute your microphone. We cannot hear you.

Sen. (Dr.) Ochillo-Ayacko: Thank you, Mr. Speaker, Sir, for giving me the opportunity to be heard. On behalf of those who are being heard virtually, I want to make a request that you also recognize us, as people, who desire to participate, the same way that you are able to identify those who are in the Chamber. We appreciate the fact that they made time for it.

The Speaker (Hon. Lusaka): That is why you are talking. I have given you an opportunity because I recognize those who are there virtually.

(Laughter)

The Senate Majority Leader.

The Senate Majority Leader (Sen. Poghio): Mr. Speaker, Sir, as I go to move this Motion, let me advise on my side that we keep social distance. At the back, I do not see social distance being observed.

The Speaker (Hon. Lusaka): Proceed.

The Senate Majority Leader (Sen. Poghio): People need to sit on labelled seats so that we do not have the problem that we have had before.

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

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

Sen. Kinyua: Mr. Speaker, Sir, Sen. Sakaja made a request which was not answered. He does not know where he stands.

The Speaker (Hon. Lusaka): We have not concluded yet. We have just started and I will give an answer at an appropriate time.

The Senate Majority Leader, please proceed.

The Senate Majority Leader (Sen. Poghio): Mr. Speaker, Sir, we need to rewrite our own rules so we know when it is a point of order, a point of request or something like that because there is a lot of misuse on the points of order.

Sen. Mutula Kilonzo Jnr.: Absolutely!

BILL*Second Reading*

THE CONSTITUTION OF KENYA (AMENDMENT) BILL, 2020

The Senate Majority Leader (Sen. Poghisio): Mr. Speaker, Sir, I beg to move that the Constitution of Kenya (Amendment) Bill, 2020, be now read a Second Time.

Mr. Speaker, Sir, I begin with citing the Article 257 of the Constitution 2010 which provides for the mechanism through which the Constitution of Kenya may be amended through a popular initiative signed by at least one million voters. The popular initiative may be in the form a general suggestion, or a formulated draft of which the promoters of that popular initiative may formulate into a draft Bill.

Mr. Speaker, Sir, the Constitution of Kenya (Amendment) Bill, 2020, the one we are debating today is a product of the Building Bridges Initiative (BBI) taskforce that was created shortly after the 2018 discussion between His Excellency President Uhuru Kenyatta, the President of the Republic of Kenya and the Hon. Raila Amolo Odinga, former Prime Minister of the Republic of Kenya.

Through this BBI, citizens from all corners of our country share their concerns and views on issues ranging from their responsibilities and rights, national ethos and responsible citizenship, corruption, productivity and shared prosperity, devolution, divisive elections, ethnic antagonism, inclusivity and security, among others. This Bill focuses on those issues with an overriding objective of promoting a cohesive society and to further the ideals of a united, prosperous and a just nation.

The Constitution of Kenya (Amendment) Bill, 2020 also affirms or reaffirms the sovereignty of our people of Kenya as espoused in the Article 1 of our Constitution. Having originated and encompassing the views of the people of Kenya, as we all know the people may exercise their sovereignty or sovereign power either directly or through the democratically elected representatives. This is a case where the people have opted to exercise the power directly.

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

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

Sen. Murkomen: Mr. Speaker, Sir, first of all, I am on a point of order and the Senate Majority Leader is still standing.

The Speaker (Hon. Lusaka): He needs to sit. Please take your seat.

(Sen. Poghisio resumed his seat)

Sen. Murkomen: Mr. Speaker, Sir, have you realized that the Senate Majority Leader is reading his notes, report or whatever? I am a proponent of Senate changing its Standing Orders to allow Senators to read their notes if they want like the American Senate. As it stands now, the Standing Orders do not allow anyone to read notes while debating unless with the permission of the Speaker. Did you grant him the permission to read his notes?

The Speaker (Hon. Lusaka): He was not reading. He was making references by looking at them. I will observe if he reads. So far, he is making references.

The Senate Majority Leader (Sen. Poghio): Thank you, Mr. Speaker, Sir. I am just holding them. I have a problem with having nothing to hold. I am only making reference to them. If you notice I take my eyes off them more often than I put them on there.

Mr. Speaker, Sir, it is also important that when you are quoting the law to have a look at it and quote it from the written notes. It was just one way of my predecessor trying to say “hello” which I appreciate.

Mr. Speaker, Sir, this is a case where the people have opted to exercise their power directly and that is why it is a popular initiative. This amendment was ably considered by all the 47 counties. The Bill was overwhelmingly passed by 43 out of the 47 and copies of the draft Bill submitted to the Speakers of the Senate and the National Assembly according to Article 257(6). Consequently, the Senate is mandated under Article 257 (7) to consider the Constitution of Kenya (Amendment) Bill, 2020 without delay as has been stated by yourself.

Mr. Speaker, Sir, at the risk of overemphasizing this matter, the principle object of the Bill is to amend the Constitution of Kenya, 2010, so as to address issues arising from its implementation specifically the need to resolve issues of divisive elections and promote gender equity in governance, strengthen the structures of devolution and increase resource allocation to the counties.

Additionally, it aims to broaden mechanisms for all the people of Kenya to benefit from the economic growth, harmonize certain roles and functions of the bicameral legislature, fortifying national ethos by specifying the responsibilities of the citizens and strengthen accountability on public resources and fight against corruption.

Mr. Speaker, Sir, let me briefly remind ourselves and the House that the Constitution of Kenya (Amendment) Bill, 2020 seeks to do one or so many of the following, and I will cite a few-

The Bill seeks to amend Chapter Two of the Constitution of Kenya, 2010 on the formative aspects of the Republic in order to address regional integration, cohesion, shared prosperity and the centrality of the economy. The aspiration is to enhance Kenya’s standing and leadership in the region and to balance production and sharing. This provision is set out in clauses two and three of this amendment Bill.

This amendment Bill also intends to amend Chapter Three of the Constitution on Citizenship, to introduce a new article on the responsibilities of a citizen, to enhance patriotism and set out the duties of a citizen to a country and to fellow citizens. This provision is set out in Clause four of this Bill.

The amendment Bill further intends to amend Chapter Four of the Constitution on the Bill of Rights, to provide the constitutional underpinning for privacy of personal data of citizens as an emerging area in human rights, to technological advantage. This provision is set out in clauses five and six of this amendment Bill.

The amendment Bill also seeks to amend Chapter Seven of the Constitution, 2010 on representation of the people to enhance equity, transparency and fairness of the electoral system and specifically to give effect to the principles set out in Articles 81(b) and 89(7)(b). The aim is to foster electoral competition hinged on ideologies and values,

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and to ensure that every vote that is cast by a citizen counts. This provision is set out in clauses seven, eight, nine, 10 and 11 of this Bill.

The intention to amend Chapter Eight of the Constitution, 2010 on the Legislature to remodel the Parliamentary System by including the Government in the National Assembly and to enhance the oversight powers of the Houses of Parliament, it is proposed that the Executive will be represented in the National Assembly by a Prime Minister, Deputy Prime Ministers, Cabinet Ministers, Deputy Ministers and the Attorney-General. The office of the Leader of Opposition is created or established by this amendment. The existing disqualifications for Members of the County Assembly from being qualified to be elected as Members of Parliament are now removed.

The Bill further proposes to expand the composition of Parliament to give effect to gender equity and also equality of the vote principles. This provision is set out in clauses 12 up to 21 of this Bill.

Mr. Speaker, Sir, to amend Chapter Nine of the Constitution on the Executive and to broaden the Executive structures to achieve inclusivity is one of the other intentions of this amendment Bill. The Constitution of Kenya (Amendment) Bill, 2020 talks about cohesiveness and unity as the benefit of the people. This Chapter introduces the Office of the Prime Minister and two Deputy Prime Ministers with leadership roles in the Executive and in Parliament. It also provides that Cabinet Ministers may be appointed from among Members of the National Assembly. This provision is set out in clauses 22 up 36 of the Bill.

We all know that this is not new in this country. Those of us who have been in Parliament before, from independence all the way to the Tenth Parliament, know that it used to be that Ministers came from Parliament. It would be good to note that the Parliamentary System allows Members to interact directly with the Government. It is not like this moment where we have found ourselves trying to shuttle between here and Government offices in search of information. We always found that to be very useful.

The Constitution of Kenya (Amendment) Bill, 2020 also intends to amend Chapter 10 of the Constitution on the Judiciary to provide for more transparency in the judicial processes. The proposed amendments provide for the finality of the decisions of the Court of Appeal in petitions concerning an election and limits the tenure of the President of the Court of Appeal and High Court to five years. The amendments further provide for the tenure of the Deputy Chief Justice and aligns it with that of the Chief Justice.

This Bill, therefore, further seeks to introduce the Judiciary Ombudsman as a non-voting member of the Judicial Service Commission (JSC). This provision is found in clauses 37 to 44 of the Bill.

Mr. Speaker, Sir, further, the Constitution of Kenya (Amendment) Bill, 2020 intends to amend Chapter 11 of the Constitution on the Devolved Government to provide for further clarity on the nomination of members of the county assembly, and powers of the county governor. This provision is set out in clauses 45 up to 48 of this Bill.

The Bill further intends to amend Chapter 12 of the Constitution on Public Finance to streamline various finance principles and processes to promote efficiency and ensure expenditures are directed to maximize utility. The proposal promotes the

actualization of the rights guaranteed under Article 43 and strengthens devolution. This provision is set out in clauses 49 up to 61 of this Bill.

Mr. Speaker, Sir, in order to amend Chapter 13, the intention of the Constitution of Kenya (Amendment) Bill, 2020 on the Public Service is to remove the national security organs from the ambits of the Public Service Commission (PSC). This provision is set out in clauses 63 and 63 of this Bill.

Further, in order to amend Chapter 14 of the Constitution on National Security to provide clarity on the unity of command in the service, this Bill provides for it in clauses 64 to 67 and simplifies that matter.

Chapter 15 is the other one that is intended to be amended by this Bill. It is on the constitution of commissions and independent offices to require constitutional commissions to enhance corporate governance practices in managing their affairs and those of independent offices. This is also to include the Directorate of Public Prosecutions as an independent office. This provision is set out in clauses 68 and 69 of the Bill.

Mr. Speaker, Sir, the intention to amend Chapter 16 of the Constitution on the general provisions is to provide for the filling of a vacancy of an appointive office under the Constitution. This requires that the process of replacing the holder of an office shall commence at least six months before the lapse of the term of that office holder and conclude before the lapse of the term of the office holder. That means that six months before, and this must be finished within the six months. This is to ensure a seamless transition and fewer disruptions in the running of appointive State constitutional offices. This provision is in Clauses 70 and 71 of this Amendment Bill.

Mr. Speaker, Sir, the other part of the Constitution, which has been touched, and will be amended by this Amendment Bill is the Third Schedule of the Constitution on National Oaths and Affirmations. Clause 72 of the Bill proposes to amend the Third Schedule to include the Prime Minister and Deputy Prime Minister as State officers, who should take an oath or make a solemn affirmation as described in that particular Schedule.

In addition to the above cited Clauses, also the First Schedule to the Bill lists the legislation proposed for Parliament to enact and the recommended time and specification, in order to ensure the full implementation of the proposed amendments of the Constitution.

To this effect, Clause 73 of the Bill provides that the Kenya Law Reform Commission and the Attorney-General shall prepare the relevant Bills to introduce to Parliament.

To amend the Second Schedule of the Bill, Clause 74 outlines the transition and consequential provisions on various aspects, including serving terms of office of various institutions restricted in the Bill.

The Schedule further guides on the manner of delimitation in respect of additional 70 constituencies that have been proposed. That is to be found in Clause 74.

Mr. Speaker, Sir, we have an opportunity here, as Members of Parliament, to be in a rare space, to be debating a Bill that will amend the Constitution. It is very important, as you ruled this morning, that Members need to be given time to go and look at the details, not only of the Bill itself, but also on the Report of the Joint Committee,

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particularly the Report that our Justice, Legal Affairs and Human Rights (JLAC) has given to us.

I want to assure Members that the opportunity to speak will be accorded because this is a rare opportunity. Everyone who wishes to speak on this matter should actually have a chance to record their participation. This is akin to those of us who participated in the 2010 Constitution, when we went to a constitutional conference.

In this case, this is a direct application and Members are beginning to change the Constitution without having to go to that conference. Those of us who attended the constitutional conference felt like we participated and contributed, and this is another chance. Members who wish to contribute to this matter will have built their names into the annals of history as having participated in amending the Constitution.

Mr. Speaker, Sir, I have highlighted some of the changes or amendments intended by this Bill. I have spoken to the chapters of the Schedules, and now, according to our Standing Order Nos. 141 and 224, this Bill, after First Reading, was committed to the Standing Committee on Justice, Legal Affairs and Human Rights, which was mandated to work jointly with the National Assembly's Departmental Committee on Justice and Legal Affairs, in accordance with the National Assembly Standing Order Nos. 127 (1) and 202 (a).

Commendably, there has been a thorough scrutiny by the joint sittings of the Joint Committee. They have given a very comprehensive Report. Those of you who have the Report can see that it is a big one. As we get to discuss this Bill, we cannot therefore leave behind what we have gathered or gained from reading the Report of the Committee. That is why immediately after this Bill has been moved and seconded, we will get the details of that Report.

Mr. Speaker, Sir, the joint sittings, which have taken quite a number of days, addressed the various issues that had been raised during the immense public hearings. I am sure that the Chairman of the Committee will expound on that and give us more of the details of their experiences.

Mr. Speaker, Sir, the Senators have noted – having had our moments this morning – that The Constitution of Kenya (Amendment) Bill, 2020, significantly benefits the devolved units. It increases revenue allocation and enhances the oversight role of the Senate. Wholesomely, The Constitution of Kenya (Amendment) Bill, 2020; The BBI Bill – has vast benefits in the sustainable development of all sectors of our economy. Economic and political spheres have been covered and the centrality of the Republic and governance within the Republic has been emphasized.

In light of all that, I have shared and whatever will come in here, I urge Members to debate this Bill with the hindsight that the beginnings of this contribution has come from our own citizens. This is a citizen-driven programme or process, and we are the representatives of those citizens, and so they have spoken.

The county assemblies have spoken and the verdict is clear. It is now our turn, as Parliament, to consider this with the view and voice of our people in the background. We represent and listen to them. Therefore, I am confident that Members will support, pass and help this Bill move from this level to the next level.

I urge all Senators to consider and pass this Bill, for the people of Kenya, national development, strengthened devolved units and systems, gender parity, responsive and all-

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inclusive representation, strengthened Bi-cameral Parliament and accountability of public resources.

We have fought using all sorts of opportunities this element or animal called corruption. Now, the opportunity to fight corruption has come through this Bill, not that we have not tried to fight it using the Constitution 2010, but this one makes it clearer.

Mr. Speaker, Sir, we complain of resources not only being misplaced, but also misplaced and misappropriated. Now, strengthening the systems that work; the legal systems and prosecution systems---

All of us who deal with making laws, now ask that we support the Constitution of Kenya (Amendment) Bill, 2020, in order for us to leave a footprint in the constitution making of this country.

Mr. Speaker, Sir, I ask that we consider this Bill with clarity of mind, clear debating, knowledge and with information we have garnered from the Report of the Committee, knowing that it is for our own good and for our country.

With those few remarks, I beg to move and ask the Senate Minority Leader to second.

The Senate Minority Leader (Sen. Orengo): Mr. Speaker, Sir, I thank the Senate Majority Leader for moving this Motion.

Before I go into the substance of this Bill and the Report, somehow out there, a notion has been fed to members of the public that certain Members of this Committee were the driving force behind the Report. In fact, many times we hear the name of our Co-Chair, Sen. Omogeni, Senior Counsel, Sen. Mutula Kilonzo Jnr. and Hon. Otiende-Amollo.

I confirm to this House that this Report was signed by the majority Members of this Committee. In fact, if you look at the introductory page where there is a foreword by the Co-Chairpersons, it is signed by Hon. Clement Muturi Kigano and Sen. Eric Okong'o Omogeni, Senior Counsel. If you go to the signatories found on (vi), you find all the names of the Members who signed the Report.

Generally, it was a unanimous Report, save for the abstention of Sen. Kang'ata and the distinguished Sen. Sakaja, Senator for Nairobi City County.

Mr. Speaker, Sir, a notion should not be passed out there, that there are Members of these two Committees who drove this Committee in a certain direction. Sometimes I do not know where some people put their brains.

Sen. Mutula Kilonzo Jnr.: I am telling you!

The Senate Minority Leader (Sen. Orengo): Mr. Speaker, Sir, they lock their brains somewhere in a toilet and just speak. There are people out there who are telling us to support this Report as if there is anybody saying something different.

If you look at the last page of this Report, even Sen. Sakaja who had a minority Report and the Sen. Kang'ata who abstained, there is no contrary recommendation. The recommendation is that the Bill should be passed. Those saying this and that, out there, have never looked at this Report and are trying to find fault where there is no fault.

The second issue that I think is more crucial for us is those who are saying the role of Parliament is ceremonial or rubberstamping. Indeed, if our role was rubberstamping, we would need more ink than brains. This is because when you rubberstamp many times, you may run out of ink.

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Mr. Speaker, Sir, this Constitution is clear that we have certain responsibilities and it starts from Article 1. People have not distinguished the various roles of Parliament and they think that Parliament is just a Legislature. According to this Constitution, Parliament is more than a Legislature.

That is found in Article 1(2) which says:

“The people may exercise their sovereign power either directly or through their democratically elected representatives.”

That is distinguished with the legislative powers found in 1(3).

I want to dwell on the significance of this issue because it is very important. Just in case people forget, at one time we debated the role of Parliament, while this provision was in the Constitution. You find it in no other provision in the Constitution. It is found in Article 94(4), which says:

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

Mr. Speaker, Sir, it talks about the protection of this Constitution. When this Constitution is talking about “this Constitution”, it means it is something to be hallowed and of value. It also means when you want to change it, you have to think about what you are trying to do before you proceed to do so because it has certain foundational values.

This thing I am talking to you about, Hon. Members, can find fortitude in the fact that all the organs – except the Independent Electoral and Boundaries Commission (IEBC) - deals with this Bill through elected representatives, county assemblies, Parliament and the President, if there is no referendum. You will not find the name of a judge there or any chairman of a commission. It is Parliament, County Assembly and the President.

The most significant thing and that is why Article 1(2) is important, is that it is our role to oversight, discuss and consider any policy issues that the Republic is debating. Even if a private citizen reached out to the Executive, or any arm of Government, we, as a Parliament, have a role to play. We, as a Parliament, need to examine policy issues on behalf of the people.

Mr. Speaker, Sir, the significance of what I am saying is that this process starts as a popular suggestion, which may then be formulated as a draft Bill. Now, you find throughout when it goes to IEBC, we are dealing with a draft Bill. I will point it to you why it is a draft Bill. They are the ones dealing with a draft Bill. According to the Constitution, when it went to the County Assemblies, they were dealing with a draft Bill and not a Bill.

The moment 24 counties have passed the draft Bill, when it comes to Parliament, it becomes a Bill.

Sen. Mutula Kilonzo Jnr.: Absolutely.

The Senate Minority Leader (Sen. Orengo): Mr. Speaker, Sir, it is only Parliament which can pass or reject the Bill. That is a matter of significance. Why? Let me refer you to another Article of the Constitution, which is very critical.

Article 94(3) says:

“Parliament may consider and pass amendments to this Constitution, and alter county boundaries as provided for in this Constitution.”

That is a substantive provision in the Constitution. Parliament may amend. The President, county assembly or courts cannot. This provision in very clear words is not for cosmetic value that Parliament may consider and pass amendments to this Constitution.

I will address you on this issue because I think it is significant to go through it. Why protect the Constitution? When we were in that Committee on the Constitution, we discussed why the Constitution needs protection.

Mr. Speaker, Sir, it is important where this document says that Parliament should protect this Constitution. No other organ of Government is given that authority or power to protect the Constitution. I know that the President is supposed to safeguard and comply by the Constitution, generally. However, the role of Parliament is to protect the Constitution.

When a constitutional Bill comes to Parliament, it will be considered. This has been debated in South Africa many times. We should consider the foundational values that are contained in the preamble of the Constitution and the construct of the Republic, which is Chapter 1 and 2 as protectors of the Constitution.

This Constitution tells us in the preamble that the people of this country made it in the recital to honor those who heroically struggled to bring freedom and justice to our land. There are people who died for this Constitution to be enacted. Therefore, this Constitution reminds us that before we amend it, we should think that there are some people who died for it. We cannot play around with it. There are Members of Parliament (MPs) who died in the protection of this Constitution. We must remember them every time we want to change the law of the land. They struggled for us to have this Constitution. We cannot play around anytime we want to change it. There must be good reasons.

They are saying in the foundational values, which are recited in the preamble that we are recognizing the aspirations of all Kenyans for a Government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. The same foundational values are found in Article 10 of the Constitution.

Mr. Speaker, Sir, I want to convince Members that their role today, and that of the National Assembly is not ceremonial. We are not here to rubberstamp. We are here to consider just like what Article 94 of the Constitution says. We consider and pass. The Constitution does not say we 'pass'. It says, 'we consider and pass'. Therefore, there must be evidence for posterity that we considered. They can read the reasons why we made up our minds to change or amend the Constitution as required by law.

Article 94 is critical so are the Articles that I have spelt out to hon. Members in the procedure for amending the Constitution through a popular initiative.

Having said that, the Committee went through a lot of discussion. In this Report, where certain observations were made, this Committee gave solutions. It was not just a Report that hang without giving solutions. They told us to pass the Bill and where they found challenges, they told us how to address them. They dealt with issues of public participation in the Schedule that created the special category of constituencies and also considered the question of revenue as provided in Article 203.

In all their observations and recommendations, they are gave us an answer and solution. That is why I am seconding this Bill because the Report gives us a way forward.

My colleague, the Senate Majority Leader has spoken to many of the issues, almost clause by clause. Therefore, it may not be appropriate for me to take a similar trajectory and proceed by analyzing each and every clause. For purposes of seconding this Bill, I will make some observations both in the Bill and also in the Report.

Some of the recommendations in the Report are on matters, which are consequential upon amendment of the Constitution. The Senate Majority Leader said that the Executive will partly come to Parliament. They have been given a different title from the one that exists in the Constitution, which is the creation of the positions of Cabinet Ministers as opposed to Cabinet Secretaries (CS). The amendment deals with the amendments of those provisions although some were left out on the question that dealt with Cabinet Ministers as opposed to CS.

They also made recommendations on the procedure for introducing a Bill of this nature into Parliament and whether it should go through the First, Second and Third Readings as the normal Bills or a Bill brought under Article 256. That Parliament should come up with legislation and Standing Orders should be amended so that this matter is addressed and the procedure is clear.

The agreement was that in Article 257, the procedure is not set out. It simply talks about the passing of the Bill.

In regards to Article 203, which is found in Clause 50 on the question of allocation of revenue, we had a lot of debate on it and we should look at it clearly. The observations of the Committee and that of the expert was that the amendment may override the other parameters which are set out in Article 203. It would be important that the issue is addressed. The way to address it is through consequential legislation.

Mr. Speaker, Sir, there was also an amendment to the powers of the Judicial Service Commission (JSC). This is one of the controversial ones. I hope that when we go to the referendum and enact this Bill, through judicial interpretation, we should be hesitant to enforce that clause. This is because it means that a judge may be suspended any time without some kind of process, which goes against what is in the Constitution at the moment.

It may lead to a claw back. Instead of enhancing the protection given to the judges, we may have taken away something because of the interpretation. I think through harmonious interpretation of the Constitution bringing harmony between provisions of the Constitution that may look inconsistent or conflicting.

The overall principle, which is contained in the Constitution itself; how to interpret the Constitution that you must look at its values and objectives. The objectives of this Constitution is to have an independent Judiciary. I think it is a matter we can deal with through consequential legislation or through interpretation by the courts because it touches on a very critical construct of the independence of the Judiciary.

The other critical and controversial issue is the constituencies. The Committee delved into this issue for long. There were very long debates and it is in regard to this particular Clause that we had probably the abstention or the minority report by Sen. Sakaja.

Overall, what the Committee was saying on this provision without amending other Clauses of Article 89, which spells out how you create constituencies, that provision may be hanging on nothing and may mean nothing. That is what the Committee

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was told. It may be creating a parallel system of delimitation of constituencies; one, which is constitutionalized, and one, which can change at any one time.

Again, if you look at that part of the Report, it is not left hanging; they tell you that the Committee and the suggestion of the experts that it actually may be much ado about nothing because on a proper construction of that provision, one would ask the question whether the constituencies have been created or not.

If you read that Section properly, the debate should really be; is it a provision that is enforceable or is it hanging in the air? To me, that is the reason why I have come to the conclusion that, we may not necessarily need to sever Schedule Two or amend it because the reasoning was – I think there were South African cases that were cited - that a Schedule is part of the Constitution. You cannot amend a Schedule thinking that different rules apply.

A Schedule is properly speaking, part of the Constitution and, therefore, severing it offers many challenges. I have heard the cry out there. There is a report by the Kenya National Bureau of Statistics (KNBS) where they are saying, if you look at the demographics and the parameters, a place like Kitui should have had a constituency and that is the expert saying it and not some busy body.

They are saying like Meru, should have gotten a constituency, Kisii and Bungoma as well should have gotten a constituency. We should have those constituencies in those areas if you are using the parameters set out in the Constitution.

I know in my backyard, there were legitimate concerns from the people of Nyatike, Karachuonyo, Homa Bay and Siaya. In the neighbourhood, I know people of Busia and also by all the accounts, Kakamega is one of the biggest counties by population, even by the number of constituencies, they have now. Explaining how Kakamega was getting two constituencies is a bit of a problem if you are using a scientific method. Others are getting five, others four which they deserve.

My position is that they should not be taken away if they deserved but if you are using a scientific process, which has been demonstrated by the KNBS and the Independent Electoral and Boundaries Commission (IEBC) told us that they actually work with the KNBS for purposes of boundaries and delimitations, there is a question mark there.

At the end of the day - which I want to persuade our Members here is that - the severance of that Schedule or amendment of that Schedule may not necessarily be the answer. It will not help. It is better to pass this Report as it is because I have looked at so many reports and this is one of the reports that I can say, a lot of brainwork went into it; many experts, our good people, distinguished Senators and Members of the National Assembly. They put their minds in this Report and if you look at the attendance, people were so regular and constant in their attendance, virtually or physically and even when they were abroad, they took part in the deliberations.

If you say you want to take some constituencies from a place like Nairobi, there will be an argument about population, and we cannot deny them. One of the parameters is population. It is a debate that is very difficult to win. You will go on and on and people will raise issue with the delimitation of constituencies, even if they are fair and just.

The other thing, which was protected was the existing constituencies. You may find an area that may be, overall, they deserve a new constituency, but within it they have

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got protected constituencies, which if you use a scientific process and the parameters set out in the Constitution, you find a county may lose two constituencies and they are quite a number in Central, Western, Nyanza, Makeni, Lamu and all over. If you use those parameters strictly, Lamu would end up being a one constituency county.

Mr. Speaker, Sir, there is the question on North Horr, which is so huge. It is twice bigger than Nyanza and it is one constituency, yet every time we have a review, they do not get it. They are protected constituencies. Why North Horr cannot become a protected constituency using the same criteria, which made it possible for others to be protected is beyond comprehension.

You have Wajir where there is a very legitimate concern about one constituency or two. You have Ijara in Garissa. All over the Republic, there are people who deserve to have these constituencies so that depending on the availability of the number of constituencies, we may not be able to resolve that question. We are now resolving because we are going to have in the National Assembly 360 Members of Parliament and if you do not get the gender balance, which, happily we have attained in the Senate, you have to give a gender top-up.

We are going to have a National Assembly, which has got 500 Members of Parliament. In that Parliament, people are going to be talking for one minute. In the Senate, we are going to be about 100, and your usual five minutes will become three minutes. There are burdens that have been created but those burdens, like the one on gender, is a constitutional requirement and is one of the objectives of the Constitution.

We have tried over the years to address that question of gender without success. One of the things I can say about this Bill is that it has addressed that question and at the same time it has a sunset clause. This means that they will not be there forever or if you reach a situation like in the Scandinavia where Membership in Parliament is in favour of the women as against men. We may reverse the roles and have more nominated Members of the National Assembly or the Senate who are men.

Mr. Speaker, Sir, there is one provision in this Bill, which describes the character of the society that we want to create. It will be a new fundamental provision in the Constitution. Former President Nyerere described Kenya as a man eat man society. Actually, we have not changed character. We are truly a man-eat-man society. Kenya is the only place you can walk near or past a Government organisation and walk out with a Kshs3 billion tender, but you cannot walk past a pub and you are called in for a drink.

Really, we have not changed the definition of a man-eat-man society as propagated by the late Mwalimu Nyerere. Therefore, Clause 11A, which is right on the first page of the amendment Bill that talks about the economy and shared prosperity, I hope it is not just there to please ourselves.

Besides this, the Constitution recognizes the need for an economic system that provides equitable opportunities for all the people of Kenya to benefit from economic growth in a comprehensive and sustainable manner.

I wonder if we will be able to achieve this. In the last two months, if you look at the appointments that have been made, I do not know whether we are going that direction because we are talking of a manner that is giving equitable opportunities.

We should look at every institution and see whether we are creating the face of Kenya, be it in the Judiciary, the Public Service or the security systems. This objective is

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one that if we commit to, and I cannot read the other enabling provisions in this Clause because it will take long, but if this can become a face of the country we call Kenya, which is fairer than we have had it, then we would have made big strides.

Mr. Speaker, Sir, there is another clause about regional integration and cohesion, which is contemplating a confederation. If you want to create a confederation in the region or have a federation, then we will be having underpinning provisions in the Constitution that makes it possible.

The other big achievement through this BBI document was that the Bill of Rights was never touched. As a practitioner of law---. Today we had that experience of one of our own being arrested in a manner that does not reflect the type of society we want to be. Even if you are arrested, this must be done in dignity because it is the Constitution, which sets out, that human dignity must be protected. S

So, we have all these clauses about the Bill of Rights which are there when we want to speak well of ourselves, but when we examine how we apply them, then it looks like we are trying to create a very different kind of society.

Article 31 of the Constitution is to be amended by expanding the provisions dealing with privacy and to have personal data infringed. We are entering an age of digital revolution and online communication. I think this is a very good provision to have in this Bill. The Majority Leader also talked about the question of speedy investigations on matters dealing with corruption.

Mr. Speaker, Sir, Clause 18 deals with the responsibilities of a citizen. I think they are well placed, but they should never be used to create additional burdens on the people of Kenya because these are just broad responsibilities, they are not a legal obligation or set out in terms of an obligation. This is so that if a taxman requires you to make your tax returns, he should not rely on that Article dealing with responsibilities of citizenship.

Now that we are bringing the Executive back to the House, and more particularly the National Assembly, this is good for our type of democracy. We have seen how difficult it is to have this kind of separation of powers that we had. The Executive feels that they are distinct from Parliament and when they are summoned, they hesitate to come before Parliament.

However, I know that the Majority Leader, Sen. Wetangula, myself and others who have grown in that system, know that when Ministers are in the House, they tend to be more reflective about how they relate not only to Members, but also to business in the House. Bringing the Executive back to Parliament is absolutely a good thing.

I hope that when they begin to have Ministers who are *ex officio* Members of Parliament, that will not bring a big number of non-elected Members because part of being a Minister in a National Assembly is that you are not only accountable to the Head of State and the head of Government, but also accountability to the people who elected you.

If you have a person who is not elected and is a member of the Cabinet like we have now, they just become part of the bureaucracy. They cannot speak for you or for anyone.

Mr. Speaker, Sir, all this depends on how we manage our affairs. This is about institutions. Institutions work when people respect what is required of them. When we, as

leaders, only want to be told what we want to hear or know, and not what we do not want to hear or need to know, sometimes that is the beginning of autocracy.

As a Parliament and a people, this is how we get it wrong sometimes. Slowly, you can have dictatorship stepping in because advisors and officials who are only keen on telling the leader what they want to hear or know surround somebody. However, the responsibility is first to tell the people the truth, and whoever is in authority to be told the truth. If that does not happen, then autocracy will step in at a great cost and disadvantage.

Mr. Speaker, Sir, finally, in the future, we may want to think about revisiting the role of the Senate. I think this was not very well handled, but the role of the Senate should be enhanced if the Senate is not in the Executive as it is going to be. There is some hesitance, official or otherwise, to try and make the Senate as weak as possible, and for the Senate to be disregarded.

There is a time when we made a trip to France and they told us that on paper, the Senate in France is a much weaker Chamber of the Bi-Cameral system they have there. But they said that when they have an important or complicated legislation or issue, they would rather it be dealt with by the Senate. They said that over time, the Senate has assumed quite a number of responsibilities, some of which are unwritten.

Since the Government will sit in the National Assembly, the most effective way of putting it to account is by having a strong Senate. I think the position of Senators should be enhanced even as we deal with governments, officials and bureaucracies. That was not quite well done, but that is not to say that some vetting powers that were not there originally have not been placed before the Senate.

Regarding the Salaries and Remuneration Commission, again, the role of Parliament has, to some extent, been compromised. It will make that body more accountable to the Executive rather than to Parliament and other institutions, which are important like the independent Commissions.

I also hope that when the BBI Bill goes through, the National Assembly will not use it to appeal for more funds. The Ward Fund is 5 per cent of the funds that go to the counties, and there will be competition for funds. The more we do that, the less the role the Senate and then Parliament will be undermined.

Mr. Speaker, Sir, as we had agreed, I do not have to take all the time. I want to say without fear of contradiction, and I must repeat this because it has been said again and again, that our role is simply ceremonial. I think the provisions that I have gone through answers that question very clearly.

When we pass this Report, it is on the basis of the process that we undertook, including public participation. The Bill, for the first time, is edified by being passed through Parliament. This is because all through, it was a draft Bill. What we are going to pass is a Bill that now can go to the people for enactment.

Mr. Speaker, Sir, with those many remarks, I beg to second.

(Question proposed)

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

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

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Sen. Omogeni: Thank you, Madam Deputy Speaker. First, I want to thank Members of my Committee, who worked with me in preparing the Report that was tabled before the House this morning. It is never easy to obtain quorum of eight Members, that is, the full composition of my Committee, to sit and consider a matter before it. However, on this particular one, I want to report that I was able to mobilize and have in attendance all my Members.

I also want to salute the democratic right that was exercised by the Senator for Murang'a, Sen. Kang'ata, who abstained from appending his signature to the Report. This is also the Senator for Nairobi, Sen. Sakaja, who has prepared a Minority Report, but only on one Article that deals with the issue of constituencies.

I also want to register my appreciation to the members of staff who worked with us tirelessly, at times until very late into the night, in preparation of the Report that is before the House.

Madam Deputy Speaker, I want to make it very clear from the onset that the reports you have seen in the media to the effect that there were disagreements within the Members of the two Committees, that is, the National Assembly Committee and the Senate Committee, are untrue.

If you read Parts VI and VII, all the Members who attended the deliberations of the Committee appended their signatures, including my Co-Chair, hon. Clement Muturi Kigano. Therefore, this is a Report that was unanimously prepared and arrived at by the Members of those two Committees.

Madam Deputy Speaker, at the conclusion of our deliberations, before I make the observations that were made by the Committee, we had a long deliberation on the import of Article 257 of the Constitution *vis-à-vis* the legislative powers of Members of Parliament, that is, the National Assembly and the Senate.

We were also privileged to be guided by two consultants; very renown lawyers in this country. One of them was a candidate for the position of Chief Justice, that is, Prof. Mbote. She did not make it, but was one of the shortlisted candidates. She was one of our consultants. The other one was Dr. Odote. We want to register our appreciation as a Committee for their invaluable support and guidance as we deliberated the contents of the Report before the House.

With the observations that we made, which I will highlight before the House, we made a unanimous decision as a Committee that we propose that this honourable House passes the Constitution of Kenya (Amendment) Bill, 2020, but with the observations that were made by the Committee.

Madam Deputy Speaker, I want to begin with the issue of Article 257 of the Constitution. The Committee took note of the fact that this is the very first time that this House is being called upon to midwife a Bill by a popular initiative by the people of this great Republic. So far, we do not have any legislation guiding Members on how this matter should be dealt with.

In fact, you saw the confusion that we had this morning, when we were forced to adjourn the deliberations of the House, to enable Members get copies of this Report and read through before the same could be debated. We also noted that there are no timelines on how long this honourable House should take in considering amendments by popular initiative.

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We arrived at a conclusion that going forward, there is need for us to pass our legislation that will clearly guide this process.

Madam Deputy Speaker, the second observation made by the Committee is that there are instances – as we have done in this particular case – where this House may come to the conclusion that some proposed amendments to the Constitution may be unconstitutional. That is what we termed in the Report as unconstitutional constitutional amendments. We had a long debate on this.

The stakeholders who appeared before us, including Katiba Institute, the President of the Law Society of Kenya (LSK) who appeared with three Council members, the International Commission of Jurists (ICJ) and, others, had entertained thoughts that exercising our legislative mandate under Article 94 we have powers to amend a proposal to amend the Constitution, under Article 257.

Madam Deputy Speaker, after a long debate, we arrived at a conclusion that the only amendment that this House can carry - an amendment that has been brought through Article 257, is to do some corrections on errors or amendments that may not go to the substance of the Bill, but which may just touch on the form of the Bill.

We have made a conclusion in our Report that our Judiciary, which remains very independent, retains the jurisdiction to hear issues that may be unconstitutional and they can make their pronouncements. We were taken through a number of decisions, some from very established jurisdictions in this area, like South Africa.

Therefore, we are firm as a Committee that if there are any clauses in this Bill that are unconstitutional, then the Judiciary retains jurisdiction to declare them unconstitutional.

I also noticed that this House is being rushed into considering this Bill. In our Report, we have drawn the attention of the House to the fact that as I speak today, there are two injunctive orders that have been issued by the High Court of Kenya stopping IEBC or the President, from assenting to this Bill. Therefore, even if we passed this Bill today, we will have to await the outcome of the cases filed before the High Court before we can move forward.

Madam Deputy Speaker, we were invited as a Committee to make a finding whether this is a Bill being pushed by the Executive, or is a popular initiative through the people of Kenya. The finding is that this is a popular initiative by the people of Kenya and not the Executive. Nobody, should therefore, tell us that they have received calls from the Executive because this Bill belongs to the people of Kenya.

In fact, if you read the Bill, the promoter is the BBI. It is not the Government of Kenya. The Memorandum of Objects and Reasons says that the proposed constitutional reforms originate from the views of citizens expressed through BBI.

Madam Deputy Speaker, we have made a number of observations that there are characteristics that should be eminent when a Bill is being marketed as a popular initiative Bill. The first and which we have pointed out in our Report is that, such a Bill should emanate from the people themselves or civil society. It should not have the presence of the Executive.

If you read page 88, we have quoted a write-up that was brought to us by our expert. It says:

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“The essential pre-condition for a referendum that is initiated by the people themselves is that it must go against the wishes of either the Government or Parliament.” Those are the characteristics of a popular initiative.

As we process this Bill, therefore, let us bear in mind that this is a Bill that is being promoted by the citizens themselves. The people who appeared before us made very strong observations, that in such a Bill, the Government should not expend money in promoting it and that that should purely be a task undertaken by the people of Kenya.

Going back to the observations of the Committee, we made a number of them that point to this Bill as being progressive, especially to counties. Some of the clauses that we picked include the amendments to Article 203 where resources being sent to counties will increase from 15 per cent to 35 per cent.

We also picked out the proposed amendments to Article 202 of the Constitution, where when we deal with sharable revenue, we will no longer look at the accounts as audited by the National Assembly, but as audited by the Auditor-General and delivered to the National Assembly. We did assimilation and realized that if we use this new formula next year, counties will benefit from an increase in allocation from the current Kshs370 billion to Kshs570 billion.

Madam Deputy Speaker, there are a number of clauses we found to be very problematic. We have made recommendations that there should be some legislative intervention by Parliament. In Clause 13, for example, the format of nominating candidates to fill up special seats to meet the two-thirds gender rule, has been changed from the number of seats won by a particular political party to the number of votes garnered by a political party.

Madam Deputy Speaker, the most problematic Clause is the proposed amendment to Article 97(4) of the Constitution. It says:

“The candidates for special seats will comprise candidates who stood for elections under Clause 1(a) with precedence being given to those who receive the greatest number of votes.”

We debated this Article and even tried to involve the experts to give us some light. However, we were unable to get clear answers. The question is: What happens to people from counties with low populations and low number of registered voters? I know some counties are well endowed with the number of registered voters, but there are others with few registered voters. A good example is Lamu East Constituency that has 18,000 registered voters compared to a constituency in Nairobi City County that has over 234,000 registered voters.

Madam Deputy Speaker, this particular clause that is trying to address issues of gender is problematic. We have proposed in our Report that it should be relooked with a legislation being passed to ensure this Article is given some clarity.

On the re-composition of the Executive, the Committee had no problem with the new arrangement where we will have seats of Prime Minister and Deputy Prime Ministers. The only observation we made under Article 151(a) is that there seems to be a systematic campaign to render this House irrelevant.

Madam Deputy Speaker, if you see the proposed Article 151, the Prime Minister will only oversee the legislative agenda of the Government in the National Assembly.

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The Senate has got no power to summon the Prime Minister to appear before this House and answer any questions on behalf of the Government.

We also found it to be a bit quire that the impeachment of the Prime Minister will be dealt with to conclusion by the National Assembly unlike the case for the President and the Deputy President which starts from the National Assembly but finds its way to the Senate.

Therefore, we have made a strong observation that there is a sustained campaign by some people to weaken the powers of the Senate. We have proposed that going forward, we need to look for interventions to ensure that this House is not rendered moribund.

Madam Deputy Speaker, we also considered something that we thought is a big claw back on accountability and we made a strong finding as a Committee that it is an undesirable state of affairs.

Clause 29 proposes to delete the powers given to the National Assembly to vet Cabinet Secretaries (CSs). The view of the Committee was that whereas it may not be necessary or desirable to vet CSs who are elected MPs, the non-elected Members who will be appointed to the Cabinet ought to be vetted. The view of the Committee is that since Government will be domiciled in the National Assembly, instead of deleting that power of vetting, it should have been transferred to the Senate.

We also took issue with Clause 32, which proposes to amend Article 154(2). For reasons that were not clear to us as a Committee, there is now a proposal to amend the powers of National Assembly to vet the Secretary to the Cabinet. That has been deleted. The implication is that, henceforth, you will just read in the newspaper that the President has appointed the Secretary to the Cabinet.

There was a strong view that now that the Executive will be domiciled in the National Assembly, this is power that ought to have been transferred to the Senate. This is because bicameral Parliament is about balance of power between the two Houses.

The third one was Clause 33, which proposes to amend Article 155 by totally removing the power of the National Assembly to vet persons who are appointed to positions of Permanent Secretaries. Again, this removes the issue of accountability.

The doctrine of separation of powers and limited Government is that the Executive should have the power to appoint but also Parliament should retain the power to scrutinize the suitability of persons who are picked to occupy some of these positions.

As we stand today, the BBI has proposed that there will be no vetting at all of Permanent Secretaries. We were of the view that this is power that ought to have been given to the Senate and there should not have been this blanket deletion of these vetting powers.

Madam Deputy Speaker, there was a Clause that invited a lot of debate. This is the first time that you will find us using a strong term declaring a particular Clause in this BBI as being unconstitutional. That is Clause 43, which proposes an amendment to Article 172, by introducing Clause 172(1) (c) (a).

We had a long debate. We looked at the history this country has gone through in trying to build an independent and professional Judiciary. We made reference to the Kreigler Report where it was pointed out that, part of the reasons why we had post-

election violence in 2007 is because Kenyans had lost confidence in the institution of the Judiciary.

We also looked at the best international standards including the Latimer House principles on the independence of the Judiciary. We took issue with this Clause. I wish to read. Clause 172(c) (a) says that Judicial Service Commission (JSC) will receive complains against judges, investigate them and then discipline judges by warning, reprimanding and suspending them.

We took very strong exception on this Clause and our report has made a pronouncement that this particular Clause should be termed unconstitutional and if we had powers, it should be deleted from the BBI.

Sen. Wetangula: On a point of order, Madam Deputy Speaker.

The Deputy Speaker (Sen. (Prof.) Kamar): There is a point of order from the Senator from Bungoma. There should not be sharing of microphones.

Sen. Wetangula: Madam Deputy Speaker, I am following with keen interest what my distinguished learned friend and junior, Senior Counsel is saying. He has pertinent points. He has been a Co-Chair of the Committee and he has cited several provisions, clauses and issues in the Report which he says are unconstitutional, unreasonable and untenable. However, he is not telling us what the Committee wants us to do or how they affect the fundamentals of the Bill.

If a provision is found as a fact by the Committee to be unconstitutional, unreasonable or overbearing and, the Committee does not tell the House what they want us to do, then they have not gone far enough.

Lastly, how does he, as our Chair and the Members in the Committee, the Senate Minority Leader and Sen. Mutula Kilonzo Jnr., reconcile these findings that are so important with the adage all over; cannot amend, will not amend, pass as is, where is, conveyer belt, rubberstamp and all the things being said about what we should do with this Bill? We want to benefit from the industry of the Committee so that at the end of the day, we vote from an informed position.

Some of us who are always in a hurry to speak have held back to hear this industry from the Committee before we speak.

The Deputy Speaker (Sen. (Prof.) Kamar): Thank you, Senators. I see another point of order from Sen. Wambua. However, listening to the Chair of the Committee, he has talked of how to cure two. It is only the last one that he has not cured. If we listen carefully, he seems to have cured two of them. He has not yet completed his submission.

Sen. Wambua: Madam Deputy Speaker, I hate to be the person to interrupt the presentation by the Senior Counsel. I told him that one of the reasons why I am seated here is to learn from him and understand how to deal with this.

I am in the same position that my leader, Senator for Bungoma, is in.

Once you make it in black and white that a clause or a section of what we are dealing with is unconstitutional and you put it in writing, Madam Deputy Speaker. How do you cure that and then you proceed to say pass? I will sit back and listen but just as she does it, it will be very important that it provides the cure to this mischief and there is a lot of it. It should provide the cure so that as we come to debate, then we debate from a position of information.

The Deputy Speaker (Sen. (Prof.) Kamar): Let us hear the last point of order from Sen. Cherargei. Chair of the Committee, please, take note so you can respond to those issues.

Sen. Cherargei: Thank you Mr. Speaker, Sir. I have listened to the Chair and as the *Chair Emeritus* is that in the presentation that is he is making in the report, he has said the Committee findings, and Sen. Were is distracting our Chair, she is consulting. In the findings, he is finding that it is unreasonable, it is unconstitutional and it is not captured very well. The question is: Is the Chair giving us findings, then later he can still come back without a cure? This is because if you have declared something unreasonable and unconstitutional, it does not have a cure and it will just remain as is.

Mr. Speaker, Sir, the Chair should go ahead after the findings, and tell us what was the Committee way forward is and what are the determinations of the Committee. I have read the report, and I say this with a lot of respect because I have not heard whether the Chair is extrapolating but having hearing and reading the findings are two different things unless he is just explaining.

The findings are not in tandem with what the Chair is submitting. Thank you.

The Deputy Speaker (Sen. (Prof.) Kamar): Thank you. There is another point of order from Senator Wamatangi, then finally Sen. Lokorio. Let us be very specific so that the Chair can be able to respond.

Sen. Wamatangi: Mr. Speaker, Sir, if I could just raise mine from here. Mine is close to what my colleagues have raised. The Chair referred us to page 88. That time he had told us that they had a very robust discussion on the point as to whether this Bill satisfies the requirement that it is through a popular initiative.

He referred us to that paragraph 88 of the report and said that the seven characteristics that binds the two forms of citizen initiated referendums is that they occur against the wishes of either Government or Parliament. The Chair did not tell us what was their finding after having received this presentation and them having accepted and published it, did they settle then that the Bill satisfies that criteria?

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

Sen. Were: Thank you, Madam Deputy Speaker. I want to urge my colleagues to hold their horses. He is giving us the findings and after that, he will give us the recommendations. Once we get the recommendations and he does not seem to give us a solution to those findings, then we can seek for further clarification. So let us wait for him to finish his contribution to the report, then we can seek clarifications.

The Deputy Speaker (Sen. (Prof.) Kamar): Thank you, Sen. Were. I was almost there because I think there is a lot that is still on. If we can allow it. Sen. Sakaja, do you have a different view?

Sen. Sakaja: Madam Deputy Speaker, that is the reason why earlier on I sought direction which the substantive Speaker did not give as to what point and to what extent I can give the Members the minority report. The questions the Members are asking are captured to some extent in the minority report which addresses the emphatic declaration by the Committee on unconstitutionality.

It would have been good order because Members would contribute and the Chair's presentation is giving information to Members on what happened. It would be good for us also after the Chair has finished to hear the contrary view on emphatic

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proclamation of unconstitutionality so that when Members debate, they can be able to have both sides of the coin in that respect. That direction was not given by the Speaker. I asked yesterday at our House Business Committee, I have asked twice today and again, I am asking you, Madam Deputy Speaker, being on the Chair, for good order.

The Deputy Speaker (Sen. (Prof.) Kamar): Thank you, Senator. Let us allow the Chair to complete the presentation. Sen. Kang'ata, you are going to be the first one anyway in the order after the Chair according to what you all demand that it must be first come, first served. I will consult on the issue of Sen. Sakaja but you have your 20 minutes. I know what you are requesting for was to have extra time. We can re-look at prioritizing if Members agree that I can skip four and go to you.

Sen. Sakaja: Mr. Speaker, Sir, it is all right.

The Deputy Speaker (Sen.(Prof.) Kamar). Thank you. We are okay, we will take care of that. Chair, please, finish. Switch off your microphone, Sen. Sakaja. Somebody switch it off for him. Thank you.

Sen. Omogeni: Thank you, Madam Deputy Speaker. First, I started by giving the first answer to the questions being asked by Sen. Wetangula in that there was a finding, and I am answering both Sen. Wamatangi and Sen. Wetangula that once the Committee made a finding that this is a popular initiative under Article 257. I did state that we are of the view that we can amend issues of form but not substance which will take away the wishes of the people of Kenya. That is the first solution.

The second solution is that this report has arrived at a finding that clauses that are unconstitutional can be subjected to litigation in a court of law to declare them as being unconstitutional.

The third one, Madam Deputy Speaker, if you read the recommendations of the Committee---

(Loud consultations)

The Deputy Speaker (Sen. (Prof.) Kamar): Order, Senators! Please, consult in low tones.

Sen. Omogeni: Madam Deputy Speaker, I want to refer Members to the observation on the area I was on, on the independence of the Judiciary. If you look at paragraph 67, this is the recommendation that the Committee has made to the House. This can be found at page 168, and I wish to read if you permit me.

“The Committee found that the proposed amendments to Article 172 is a claw back provision in light of the current provisions on the Judiciary particularly those that guarantee the independence of the Judiciary and also provides security of tenure for the judges. For these reasons, the Committee found that the proposed amendment to Article 172 is unconstitutional and will require urgent reconsideration at the appropriate time.”

That is the proposal of the Committee.

The Deputy Speaker (Sen. (Prof.) Kamar): Honourble Senators, I did not want us to be taking one paragraph after the other because we will all get opportunities to speak. If we respond to one paragraph after the other, just read what the Committee resolved because what he has done is nothing but to read what the Committee said. He cannot change the report at this stage.

Sen. Wetangula, I am giving you only one minute because he has not said anything except to read what the Committee said and we are not telling him to change what the Committee said.

Sen. Wetangula: Madam Deputy Speaker, we have been part of this process and we want it to get to a conclusion that is helpful to everybody. When a House is legislating, there is a presumption that what you are legislating is constitutional. How can we say that this is unconstitutional, we will pass it but let it be challenged in court at an appropriate time? That amounts to abdication of responsibility.

There is no doubt Sen. Okong’o is a very fine lawyer. He has been the Chairperson of the Law Society of Kenya (LSK). Sen. Orengo is a senior lawyer while Sen. Mutula Kilonzo Jnr. is mercurial. They will help this House a lot more, particularly for colleagues who have no background in legal training, to understand that you cannot bring a legislation and tell the House: “This provision is an assault, affront and claw back on the Constitution, but pass it and let somebody challenge it in court.” This is what we are grappling with. On this, a point of order can be raised at any moment. It cannot be predicated on the totality of the Member on the Floor. Where he veers off the track, we have the right to move him. Where he side steps, we also have the right to move him. We are not doing this because we want to derail debate; we want to have a good Constitution to help this country.

The Deputy Speaker (Sen. (Prof.) Kamar): Proceed, Sen. Naomi Shiyonga.

Sen. Shiyonga: Madam Deputy Speaker, I just want to expound on what Sen. Wetangula has said. Most of us are interacting with this Report for the first time. That is why we are keenly listening because we are the representatives of the people. If we interact with the Report as it is being presented, we are doing it so because we want to understand it more. If we wait for the Chairperson to finish and then we interact with it, we might be left out. So, give us time, if possible to interact with it as we continue so that we get its contents. Some of us do not have a legal background as has been said. We want to learn more so that we do something to enable a change to the Constitution.

The Deputy Speaker (Sen. (Prof.) Kamar): There is a point of order from Sen. (Dr.) Langat on the Zoom platform. While we wait for him to get through, let us hear a point of order from Sen. Orengo.

The Senate Minority Leader (Sen. Orengo): Madam Deputy Speaker, I have just heard the distinguished Senator from Bungoma County talking about issues such as: How can you pass something that you have declared to be unconstitutional? With respect, I think it is predicated on not the correct understanding. For example, if I was amending an ordinary legislation, if there are provisions that are unconstitutional, then normally, even without approving that Bill or bringing it to the Floor for discussion, you would say without the Constitution, you would not be able to prosecute that Bill because on the face of it, it is unconstitutional.

However, where you are amending the Constitution, on the face of the provisions that are there, it may be unconstitutional. The people may want to do whatever they want to with their Constitution. They can amend anything, including saying “we cease to be a republic”. The people of Kenya can say they do not want to be a republic. There is no provision of the Constitution that is not amendable by the people. Parliament may not

amend some, but the people can amend anything. So long as there is an amendment to the Constitution by the people, we really cannot stop them.

Madam Deputy Speaker, if you remember, I was talking about the foundational values: That the only recourse that we have, and there are certain cases in India that when you amend and you are moving out from the basic structure of the Constitution, then the courts can stop you. However, we do not have similar jurisdiction and jurisprudence in Kenya. I must say that whereas I sympathise with Sen. Wetangula, but you will find that in many those parts of the Report, the experts were saying if you amend this provision, it will be unconstitutional because if the provisions remain the way they are without amending certain provisions, then they will be unconstitutional. That is why they were saying with regard to the Schedule, that because we have not amended certain sections of Article 89, then it will be unconstitutional or it will not be properly anchored.

Therefore, I beg to disagree a little bit. In South Africa, they had this process when they had the constitutional assembly where it was not just Parliament. After amending, the amendment would be taken to the constitutional court to determine whether the amendment as a Parliament or a constituent assembly complies with the foundational values and the basic concepts of the Constitution. Unfortunately, in Kenya, we do not have this. If you read the experts' report, where there was something unconstitutional, they said it. However, they said if you amend it, then you are constitutionalising it. That is in the Report.

Sen. Mutula Kilonzo Jnr.: On a point of information, Madam Deputy Speaker.

The Deputy Speaker (Sen. (Prof.) Kamar): Before we get to the point of information from Sen. Mutula Kilonzo Jnr., let us hear Sen. (Dr.) Langat. I think we can hear him now.

Sen. (Dr.) Langat: Madam Deputy Speaker, I tend to think that as Sen. Orenge has said, it is important for us to ventilate at every stage, either through points of orders or points of information because we being watched by the public that we represent. Our contributions will also shed light that will help make an informed decision during the referendum. Therefore, it is very important that we ventilate more at every stage on the retrogressive and unconstitutional areas of this Bill, so that it can help not only us in the House, but also some of us who do not have the legal background and those who are watching us in the villages that we represent. This will give them more information.

I support that we ventilate at every stage. We should not hurry.

The Deputy Speaker (Sen. (Prof.) Kamar): Thank you, Sen. (Dr.) Langat. Proceed, Sen. Mutula Kilonzo Jnr. To who was the point of information?

Sen. Mutula Kilonzo Jnr.: Madam Deputy Speaker, to Sen. Wetangula and Sen. Wambua. It is also a point of order.

The Deputy Speaker (Sen. (Prof.) Kamar): Okay, but Sen. Wetangula is not interested in any information.

Sen. Mutula Kilonzo Jnr.: It is also a point of order.

The Deputy Speaker (Sen. (Prof.) Kamar): Okay, let us listen to the point of order first.

Sen. Mutula Kilonzo Jnr.: Madam Deputy Speaker, this morning Sen. Wetangula said that people should read this Report. The lawyers will take less time and the non-lawyers will take a little shorter time.

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I would like to point Members to page 100, paragraph 369 of the Report.

(An hon. Senator spoke off the record)

That is why I said it is information, but it is also a point of order.

The Committee considered what in other jurisdictions is called unconstitutional constitutional amendments. You will get the findings of the Committee here. So, while making findings on unconstitutionality of some of the clauses – it is addressed here, I am trying to assist.

I also would like you to turn to page 123 of the Report where we were looking at the jurisdiction of Parliament *vis-à-vis* other jurisdictions in so far as amendments are concerned. In the case that we have cited here, and it is a provision of the Constitution of India, it reads as follows-

“For the removal of doubts, it is hereby declared that there shall be no limitation whatsoever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this Article.”

In making this comparative jurisdiction, we were looking for security of a similar provision of doing the same when we are here. I am informing Members that the Committee also considered these issues. I am trying to help Sen. Shiyonga who has said they are non-lawyers. This is what the Committee was trying to do, so that it answers part of the queries, so that then in terms of the debate, we are able to say if we have a similar provision like the ones in India and, secondly, what do you do with what you consider an unconstitutional constitutional amendment at this stage and what happens when it goes to the public? Those concerns are also raised here in a very succinct manner.

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

(Loud consultations)

Order! Order, Senators! There is a point of order from Sen. Kinyua.

Sen. Kinyua: On a point of order, Madam Deputy Speaker. I am following very closely what the Chairperson for the Committee on Justice, Legal Affairs and Human Rights is saying. However, it would be more informing if after he finishes, we can hear from Sen. Sakaja on the Report of the minority. This is so that we can compare and get the gist of the matter. As it is said, it will be better---

(Loud consultations)

The Deputy Speaker (Sen. (Prof.) Kamar): Order! Order!

Sen. Kinyua: Madam Deputy Speaker, the reason I am saying this is because you said that after Sen. Omogeni, the person who will follow is Sen. Kang’ata. I am requesting so that we can compare the two Reports and be more informed.

The Deputy Speaker (Sen. (Prof.) Kamar): Order, Sen. Kinyua! I have given assurance to Sen. Sakaja that both of them are priority contributors. We will still start with Sen. Kang’ata and get the reasons for the minority Report. The two will flow; there is no problem.

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The next point of order is from Sen. Nyamunga. I have a list of points of order.

Sen. Nyamunga: Madam Deputy Speaker, mine is very simple. In the foregoing circumstances and from the mood of the House, I think we should have done a brief *Kamukunji* before we got into this debate. This is because there are many questions of concern to us. If something is unconstitutional and it is amending a Constitution, we should have been put in a position that we understand all these things before getting into the main debate.

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

There is a point of order by Sen. Wambua, then Sen. Wamatangi.

Sen. Wambua: Madam Deputy Speaker, you remember that initial point of order that was raised on this matter. It was on the issue of when a Committee, in writing--- These are not mere words; it is in writing. When a Committee writes and says that this provision is unconstitutional--- I know that Sen. Sakaja has a different view on that matter, but when the main Report of the Committee says that this matter is unconstitutional, how do we, as leaders, proceed to pass an unconstitutional provision and assume that the public will cure that mischief when we go for the Referendum? How will that be cured?

The Deputy Speaker (Sen. (Prof.) Kamar): Thank you, Senator. Remember, we are posing these questions, so that the Chair can respond. Please, let us not repeat any of them, because he is writing them down.

Sen. Wamatangi, do you have anything different? Let us avoid going into debate. I know you have requested to raise points of order, which I have allowed, but let us avoid debate because you have your 20 minutes intact.

Sen. Wamatangi: Madam Deputy Speaker, I understood what the Chair said earlier in response to what Sen. Wetangula had raised, when he tried to explain the limitations that the Committee faced when they were considering the legal latitude they could employ in dealing with a popular initiative.

In that explanation by the Chair, he has said that in dealing with the unconstitutionality, the remedy would be some people going to court. At what point did the Committee envisage that, that remedy would be found by going to court?

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

Sen. Wetangula. Please, let us take the shortest time. I would wish that he responds before we rise in 15 minutes, so that he does not forget.

Sen. Wetangula: Madam Deputy Speaker, I want the Chair, Sen. Mutula Kilonzo Jnr. and the Senate Minority Leader to remember the words of Kethi Kilonzo; that if the input is illegitimate, the outcome cannot be legitimate.

What made me rise on a point of order that has led to this flurry of points of order was a statement from the Chair – and he is honest because he was reading from the Report – that this matter is unconstitutional. He ended up by compounding it even worse, by saying that those aggrieved may have to go to court after we pass an unconstitutional amendment.

What the Senator for Makueni has said even compounds the difficulties that we find ourselves in. This is because he has said that in India – what he was quoting – you debate, consider and legislate. What we are doing here is neither considering nor debating or legislating; we are just a conveyor belt. We have been told so. We must pass ‘as is,

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where is.’ We are telling the Committee that the conclusions they have made are grossly inconsistent with what they are telling us, as a House, to do. They could have done better. We need to pass this amendment, but let us not pass an amendment and go down in history in ignominy as a House of Parliament that did something that jurisprudence will be sneering at, at every twist and turn.

Sen. Omogeni, as you go through your Report from the Committee, we want you to help this House understand--- I do not believe that what is unconstitutional becomes constitutional simply because we have passed it. It cannot be.

The Deputy Speaker (Sen. (Prof.) Kamar): Hon. Members, since we did not extend the sitting, we will adjourn at 6.30 p.m. However, for the Chair of the Committee, we will add the time that we have taken. He has five minutes if we were to finish, but we spent about 20 minutes of his time, not raising points of order, but asking for clarifications.

Let us allow him to finish and then, tomorrow, he will still have 20 minutes.

Sen. Cherargei, please, let us raise points of order and not seek explanations now, because we will have the time tomorrow.

Sen. Cherargei: On a point of order, Madam Deputy Speaker. Maybe it escaped my attention, but you were telling the Chair. You have not given him direction to respond to our earlier clarifications. Since you have said that he still has 20 minutes, he should respond before proceeding to other aspects. He should not be in a hurry; we will listen.

The Deputy Speaker (Sen. (Prof.) Kamar): That is not a point of order. You are directing as though you are the Chair. The Chair is okay with that.

Sen. (Dr.) Mwaura has a point of order.

Sen. (Dr.) Mwaura: Madam Deputy Speaker, is it not in order for us to allow the candor of the Co-Chair of the Committee with regard to the real findings of his Committee in this Report? This is because Sen. Orenge said, as and when this BBI constitutional amendment Bill was with the county assemblies, it was a draft Bill. When it comes to Parliament, it becomes a proper Bill to the people. If that is the case, Parliament amends Bills.

Sen. Cherargei: Yes.

Sen. (Dr.) Mwaura: Madam Deputy Speaker, he then goes ahead to make a conclusion that as per Article 257 of the Constitution, we have no powers to amend the Bill. So, what are the inconsistencies that we are hearing? Is it not in order that we just listen to the report of the Co-Chairs, of course, with the understanding that even if it is unconstitutional, we have nothing to do? He is just highlighting what then cannot be done by this Parliament.

In that case, the promoters of this Bill say that it is a constitutional consensus. Now, this is a cocktail. If you take a cocktail of juice from different fruits, it is sweet, yes, but you will find some lump. You cannot say the juice is not sweet.

The Deputy Speaker (Sen. (Prof.) Kamar): Thank you. Sen. Omogeni. You have 25 minutes that will spill to tomorrow.

Sen. Omogeni: Madam Deputy Speaker, there are some matters that we cannot run away from. I began by stating to this House that this Committee made a serious inquiry as to whether this is a Bill under Article 257 initiated by the people of Kenya or by Parliament under Article 256. Each finding had consequences.

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If we had found it was a Bill under Article 256, then it would not be a Bill that carries with it the supremacy of the people of Kenya. However, the moment the Committee made a finding that this is a Bill under Article 257 of the Constitution of Kenya, then it becomes the property of the people of Kenya and this House has no role in amending it. That is the finding of the Committee and what we have before us in the House.

Madam Deputy Speaker, if we begin by understanding that that is the finding of the Committee, then things will be easier for us. Everything else is an observation that was being made by our Committee. If, on the other hand, the Committee had made a finding that this House has powers to amend, then I would have come with proposals to amend.

We were told by experts – it is in the Report – that where we have issues as to an Article in the Constitution that does not have clarity, the recourse is to go to a court of law and seek interpretation. We have done so as a House. We have gone to court on several occasions seeking interpretation on some Articles of the Constitution that are not clear.

I know there could be some of my colleagues who are of the view that under Article 257, you can amend a Bill brought by Article 257. With tremendous respect, I do not have those answers. What I have is the findings of the Committee that seeks to amend the Constitution, initiated by the people with three million signatures. This House has no powers to amend.

However, if the Committee or I are wrong, somebody can seek a ruling from the Speaker or go to court and seek an interpretation. If I get an interpretation from the court that says we can amend, I will be the first one to move amendments to this Bill. As long as I do not have that guideline, I have to respect the provisions that are in our Constitution.

Madam Deputy Speaker, I think that is the answer to all the points of orders that I have received this afternoon.

I beg to proceed.

The next observation is the Article that deals with the Judiciary *Ombudsman*.

(Loud consultations)

Is there another point of order?

Sen. Wambua: Clarification.

The Deputy Speaker (Sen. (Prof.) Kamar): What clarification, Sen. Wambua? We do not have anything called clarification.

Sen. Mutula Kilonzo Jnr.: I am telling you!

The Deputy Speaker (Sen. (Prof.) Kamar): It is only a point of order. Please, refer to what is not in order.

Sen. Wambua: On a point of order, Madam Deputy Speaker. I just want to find out from Sen. Omogeni; out of that presentation, is he telling us and the nation, that the outcome of this process in the Senate is inconsequential, in as far as the next move is concerned?

I want him to come out clearly and tell this nation that whatever we are doing here is inconsequential. It does not matter what we do and how we vote or even if we do not, this Bill will just move to the next level. That will be important.

(Loud consultations)

The Deputy Speaker (Sen. (Prof.) Kamar): One minute for Sen. Kang'ata.

An Hon. Member: Just give them one minute each.

Sen. Kang'ata: On a point of order, Madam Deputy Speaker. One, I seek your direction that tomorrow – as you had rightly stated – I can come after him immediately he is done.

Two, I also seek the Chair to clarify to Members that currently, there are two different Bills being considered in the National Assembly and in the Senate and the effect of that. The Bill which is here, that is IEBC certified, differs from the one in the National Assembly.

The Deputy Speaker (Sen. (Prof.) Kamar): Now, that was not a point of order. It is new information that we never had in this House.

(Loud consultations)

Sen. Kang'ata: No, Madam Deputy Speaker. It is in the Report.

The Deputy Speaker (Sen. (Prof.) Kamar): The last point of order is from Sen. Halake. You have only 30 seconds.

Sen. Halake: Thank you, Madam Deputy Speaker. The points of order are becoming disorderly. We have sat here the whole afternoon. Is it in order for Members to make frivolous points of order?

(Loud consultations)

Yes, they are.

Madam Deputy Speaker, the points of order are becoming points of disorders.

Sen. Cherargei: On a point of order, Madam Deputy Speaker.

The Deputy Speaker (Sen. (Prof.) Kamar): Thank you, Senator. I think for the remaining one second, let me inform the House that you will have a chance tomorrow to use your 20 minutes. Please, use them wisely so that you are able to get the points across.

An Hon. Senator: Does the list remain or it changes?

(Loud consultations)

ADJOURNMENT

The Deputy Speaker (Sen. (Prof.) Kamar): Hon. Senators, it is now 6.30 p.m., time to interrupt the business of the Senate. The House, therefore, stands adjourned until tomorrow, Thursday, 29th April, 2021 at 10.00 a.m.

The Co-Chair will have 20 minutes to finalise.

The Senate rose at 6.30 p.m.

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