

PARLIAMENT OF KENYA**THE NATIONAL ASSEMBLY****THE HANSARD****SPECIAL SITTING**

*(Convened vide Gazette Notice
No. 9078 of 30th August, 2021)*

Wednesday, 1st September 2021

The House met at 10.00 a.m.

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

PRAYERS

Hon. Speaker: Sergeant-at-Arms, ring the bell for Quorum.

(The Quorum Bell was rung)

Hon. Speaker: Very well. We now have the requisite quorum. I am sure many of you are quite aware of some statements and determinations about the importance of quorum. It has been pronounced not too long ago by the courts. We can now start.

COMMUNICATION FROM THE CHAIR**THE BUSINESS OF THE HOUSE DURING THE SPECIAL SITTINGS**

Hon. Speaker: Hon. Members, I take this opportunity to welcome you to the Special Sitting of the House, today, Wednesday, 1st September 2021, which has been convened pursuant to the provisions of Standing Order No. 29 relating to the procedure for convening of special sittings of the House during recess.

Indeed, Hon. Members, I wish to report to the House that on 27th August 2021, I received a request from the Leader of the Majority Party asking me to convene special sittings of the National Assembly to consider certain urgent business. Having taken cognisance of the urgency of the business so specified in the request by the Leader of the Majority Party, I acceded to the request to convene today's Special Sittings, Wednesday, 1st September 2021, commencing at 10:00 a.m. for the Morning Sitting, and at 2:30 p.m. in the case of the Afternoon Sitting.

Consequently, and in keeping with the requirements of Standing Order No. 29, I did gazette the said Special Sittings of the House vide Kenya Gazette Notice No. 9078 of 30th August 2021. In this regard, the sittings of the House this morning and in the afternoon are properly convened. As specified in the said Gazette, the purpose of the sittings is as follows:

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1. Tabling of the Report of the Departmental Committee on Justice and Legal Affairs (JLAC) on the vetting of nominees for appointment to the position of members of the Independent Electoral and Boundaries Commission (IEBC) and notification of the attendant notice of Motion.
2. Tabling of the Report of the Departmental Committee on Education and Research on the Vetting of the Nominees for appointment to the position of Member of the Teachers Service Commission (TSC) and notification of the attendant notice of Motion.
3. Tabling of any other Papers with statutory timelines.
4. Conveyance of any urgent Messages from the National Executive and/or the Senate, which I will do during the Afternoon Sitting.
5. First Reading of the following five Bills:
 - (a) The Sustainable Waste Management Bill (National Assembly Bill No. 22 of 2021).
 - (b) The National Disaster Risk Management Bill (National Assembly Bill No. 28 of 2021).
 - (c) The Public Procurement and Asset Disposal (Amendment) Bill (National Assembly Bill No. 32 of 2021).
 - (d) The Universities (Amendment) Bill (National Assembly Bill No. 35 of 2021).
 - (e) The Public Procurement and Asset Disposal (Amendment) (No.2) Bill (National Assembly Bill No. 36 of 2021).
6. Voting on the Motion for Second Reading of the Central Bank of Kenya (Amendment) Bill (National Assembly Bill No. 10 of 2021), whose debate was concluded on 11th August 2021.
7. Consideration of Special Motion on appointment of nominees to the position of Member of the Independent Electoral and Boundaries Commission (IEBC).
8. Consideration of Special Motion on appointment of nominees to the position of Member of the Teachers Service Commission (TSC).

Hon. Members, for the convenience of the House, the last two items that I have mentioned will be considered during the afternoon sitting.

Having said that, may I remind the House that today's Sittings has come at a time when the country is experiencing an increase in the number of cases of COVID-19 pandemic infections. In this regard, I urge Hon. Members to strictly adhere to the Ministry of Health's protocols issued for the prevention and control of the pandemic. In particular, Hon. Members are advised to observe social distance while in the Chamber and in the other facilities, have our face masks properly worn at all times, strictly sit only in the designated places in the Chamber and avoid changing seats or having close physical interactions.

The House is accordingly guided.

I thank you, Hon. Members.

(Applause)

PAPERS LAID

Hon. Speaker: The Leader of the Majority Party.

Hon. Amos Kimunya (Kipipiri, JP): Hon. Speaker, I beg to lay the following Papers on the Table of the House today, Wednesday, 1st September 2021, in the Morning Sitting:

Legal Notice No.115 of 2021 relating to Income Tax Exemption on the Send-Off Package Paid to Employees of the Kenya Airways Limited from the National Treasury and Planning. This is to be referred to the Select Committee on Delegated Legislation.

Monetary Policy Statement for June 2021 from the Central Bank of Kenya.

Reports of the Auditor-General and Financial Statements in respect of the following Institutions for the year ended 30th June 2019 and the certificates therein:

- (a) Tetu Technical and Vocational College.
- (b) Kieni Technical and Vocational College.
- (c) Kaimosi Friends University College.
- (d) Kiirua Technical Training Institute.
- (e) The Kenya Tourism Board.
- (f) The Pest Control Products Board.
- (g) The National Youth Council.
- (h) Kenya National Bureau of Statistics.
- (i) Kenya Ferry Services Limited.
- (j) Bomas of Kenya.
- (k) Kenya Veterinary Vaccines Production Institute.
- (l) Lamu Water and Sewage Company Limited.
- (m) Trans Nzoia County Public Service Board.
- (n) The County Assembly of Tana River Car Loan and Mortgage Scheme Fund.

Reports of the Auditor-General and Financial Statements in respect of the following Institutions for the year ended 30th June 2020:

- (a) The Kenya National Bureau of Statistics.
- (b) Jaramogi Oginga University of Science and Technology.
- (c) Agriculture and Food Authority.

Thank you, Hon. Speaker.

Hon. Speaker: The Chairperson, Departmental Committee on Justice and Legal Affairs, Hon. Muturi Kigano.

Hon. Clement Kigano (Kangema, JP): Hon. Speaker, I beg to lay the following Paper on the Table of the House today, Wednesday, 1st September 2021, in the Morning Sitting:

Report of the Departmental Committee on Justice and Legal Affairs on the Approval Hearings for Appointment of Ms. Juliana Whonge Cherera, Mr. Francis Mathenge Wanderi, Ms. Irene Cherop Masit and Mr. Justus Abonyo Nyang'aya as Members of the Independent Electoral and Boundaries Commission (IEBC).

Thank you.

Hon. Speaker: Very well.

The Chairperson, Departmental Committee on Education and Research, Hon. Florence Mutua.

Do you have a card?

Hon. (Ms.) Florence Mutua (Busia CWR, ODM): Thank you, Hon. Speaker. I beg to lay the following Paper on the Table of the House today, Wednesday, 1st September 2021, in the Morning Sitting:

Report of the Departmental Committee on Education and Research on the Vetting of Nominees for Appointment to the Teachers Service Commission (TSC) of Dr. Nicodemus

Ojuma Anyang, Ms. Christine K. Kahindi, Ms. Sharon Jelagat Kisire, Ms. Annceta G. Wafukho and Mr. Salesa Adano Abudo as Members of the TSC.

Thank you, Hon. Speaker.

Hon. Speaker: Very well.

Next Order!

NOTICES OF MOTION

NOMINEES FOR APPOINTMENT TO IEBC

Hon. Speaker: The Chairperson, Departmental Committee on Justice and Legal Affairs.

(Hon. Clement Kigano consulted loudly)

Hon. Clement Kigano (Kangema, JP): I apologise, Hon. Speaker.

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

THAT, taking into consideration the findings of the Departmental Committee on Justice and Legal Affairs in its Report on the Approval Hearing for Appointment of Ms. Juliana Whonge Cherera, Mr. Francis Mathenge Wanderi, Ms. Irene Cherop Masit and Mr. Justus Abonyo Nyang'aya as Members of the Independent Electoral and Boundaries Commission, laid on the Table of the House on Wednesday, 1st September 2021, and pursuant to the provisions of Article 250(2)(b) of the Constitution, Section 7A of the Independent Electoral and Boundaries Commission Act, 2011, and Section 8 (1) of the Public Appointments (Parliamentary Approval Act, No. 33 of 2011, this House approves the appointment of the following persons to the Independent Electoral and Boundaries Commission:

- (i) Ms. Juliana Whonge Cherera – Member.
- (ii) Mr. Francis Mathenge Wanderi – Member.
- (iii) Ms. Irene Cherop Masit – Member.
- (iv) Mr. Justus Abonyo Nyang'aya – Member.

Thank you.

NOMINEES FOR APPOINTMENT TO TSC

Hon. Speaker: Very well.

The Chairperson, Departmental Committee on Education and Research, Hon. Florence Mutua.

Hon. (Ms.) Florence Mutua (Busia CWR, ODM): Thank you, Hon. Speaker. I beg to give Notice of the following Motion:

THAT, taking into consideration the findings of the Departmental Committee on Education and Research in its Report on the Vetting of Nominees for appointment to the Teachers Service Commission, laid on the Table of the House on Wednesday, 1st September 2021, and pursuant to the provisions of Article 250(2)(b) of the Constitution, Section 8(8) of the Teachers Service Commission Act, 2012, and Sections 3 and 8 of the Public Appointments (Parliamentary Approval) Act, 2011, this House approves the appointment of the following persons to the Teachers Service Commission:

- (i) Dr. Nicodemus Ojuma Anyang – Member.
- (ii) Ms. Christine K. Kahindi– Member.
- (iii) Ms. Sharon Jelagat Kisire– Member.
- (iv) Ms. Annceta G. Wafukho– Member.
- (v) Mr. Salesa Adano Abudo – Member.

Thank you.

BILLS

First Readings

THE SUSTAINABLE WASTE MANAGEMENT BILL

THE NATIONAL DISASTER RISK MANAGEMENT BILL
THE PUBLIC PROCUREMENT AND ASSET DISPOSAL

THE UNIVERSITIES (AMENDMENT) BILL

THE PUBLIC PROCUREMENT AND ASSET DISPOSAL (AMENDMENT)
(NO.2) BILL

(Orders for First Readings read - Read the First Time and referred to the relevant Departmental Committees)

Second Reading

THE CENTRAL BANK OF KENYA (AMENDMENT) BILL

(Hon. (Ms. Gladys Wanga on 11.8.2021)

(Debate concluded on 19.8.2021)

Hon. Speaker: Hon. Members, debate on this Bill was concluded before the House went on recess, but the Question was not put for the Second Reading. I will, therefore, put the Question.

(Question put and agreed to)

(The Bill was read a Second Time and committed to a Committee of the House tomorrow)

Hon. Speaker: It is fair for any Member to propose amendment during this time of recess and submit them to the Clerk's Office so that people can begin looking at them.
Hon. Duale.

POINT OF ORDER

STATUS OF BILLS TO AMEND THE CONSTITUTION

Hon. Aden Duale (Garissa Township, JP): Hon. Speaker, I rise on a point of order under Standing Orders 83 and 218(2) to seek your guidance on the status of Bills to amend the Constitution that are at different stages of consideration by this House. I would also like to seek guidance on the status of legislative proposals that are pending before the Departmental Committee on Justice and Legal Affairs for pre-publication scrutiny.

Hon. Speaker, I ask this in light of the judgment of the High Court and the Court of Appeal on the Constitution of Kenya (Amendment) Bill 2020, regarding the Building Bridges Initiative (BBI) on the basic structure.

To refresh the mind of the Members in this House, the decisions of the High Court and the Court of Appeal on the BBI Bill, and more so regarding the basic structure of the Constitution is that the basic structure doctrine is applicable in Kenya; that, the basic structure doctrine limits the amendment power set out in Articles 255, 256 and 257 of the Constitution; and that the basic structure of the Constitution can only be altered through primary constituency power, which includes four sequential processes: civic education, public participation, constituency assembly debate and a referendum.

Hon. Speaker, as you are further aware, there are at least seven published Bills proposing seeking to amend the Constitution pending before the House. The Bills are at different stages. They include the Constitution of Kenya (Amendment) Bill, 2019 by Hon. Florence Mutua; the Constitution of Kenya (Amendment) Bill (No.2) of 2019 by Hon. George Kariuki; the Constitution of Kenya (Amendment) Bill (No.3) of 2019 by Hon. Gladys Boss Shollei; the Constitution of Kenya (Amendment) Bill (No.4) of 2019 by the Committee on Implementation of the Constitution; the Constitution of Kenya (Amendment) Bill (No.5) of 2019 by the Committee on Implementation of the Constitution; the Constitution of Kenya (Amendment) Bill (No.6) of 2019 by Hon. Vincent Kemosi; and, the Constitution of Kenya (Amendment) Bill by the Committee on Implementation of the Constitution.

In summary, these Bills are seeking to amend various provisions of the Constitution and provide, among others, change of timelines for nomination of Members to Parliament so that the exercise is done after a general election; including Kenyans in the Diaspora as special groups, under Article 97 of the Constitution; increase the number of elected women Members of the National Assembly from the current 47 to 136; amend Article 152 of the Constitution to provide that the President shall appoint Cabinet Secretaries from amongst sitting Members of Parliament; and, amend Article 90 of the Constitution to make provisions for political parties to nominate to the National Assembly and the Senate presidential and deputy presidential candidates who lose in the general elections.

There are also several legislative proposals to amend the Constitution that are pending before the Departmental Committee on Justice and Legal Affairs for pre-publication scrutiny or before the Budget and Appropriations Committee for financial analysis. Some of them touch on various items, including: The establishment of the positions of prime minister; two deputy prime ministers who shall be from the largest political party in the National Assembly; and to provide that the prime minister and the two deputy prime ministers shall be appointed by the President, with approval of the National Assembly.

Looking at the proposals for the amendments as contained in the pending Bills and legislative proposals, it is clear that they contain matters that were contained in the BBI Bill, which has since been declared unconstitutional. In light of the judgment of the High Court and the Court of Appeal on the Constitution of Kenya (Amendment) Bill 2020, on the basic structure of the Constitution, I seek your guidance on the following:

First, what is the effect of the judgement on the various Bills to amend the Constitution, which are at different stages in the House, and legislative proposals which are yet to be published in terms of the basic structure application?

Two, how is the question of the basic structure to be determined? At what stage of a Bill shall that determination be made?

Three, could it be prudent for the House to suspend any further processing of these Bills and Legislative Proposals until a determination is made on the application of the basic structure doctrine on each of them and a legal framework on reviewing the Constitution of Kenya developed? It is notable that the courts agreed with your considered Rulings. In particular, that a Bill to amend the Constitution under Article 256 and Article 257 cannot be amended; that, corrections and errors may be effected as they are not amendments, and; that, there is definitely a fundamental lacuna on the processes under Article 256 which is on amendment by a parliamentary initiative and Article 257 which is on amendment through popular initiative. The courts have on this matter agreed with your Ruling and the Communication you gave to this House.

Hon. Speaker, you have in a number of your Rulings before ruled that Parliament should not act in vain. In this regard, I respectfully hold the view that we should not spend the time of this House and its Committees considering Bills and legislative proposals to amend the Constitution only for the courts to again fault the outcome for not following the just process due to lack of a sound legal framework. Setting up the legal framework is the business of this House and the Senate. So that we do not put the cart before the horse, could I be in order to request you to once again rise to the occasion, as you have always done, and use your powers under Standing Order No. 1 and Standing Order No. 281(2) to ask the Constitutional Implementation Oversight Committee (COIC) and the Departmental Committee on Justice and Legal Affairs to formulate a Bill to actualise the provisions of Article 256 and Article 257 with specificity?

I ask you, Hon. Speaker, to consciously see that this task could be better undertaken by a Committee and not an individual Member. It is due to its magnitude and the enormity. Indeed, both the High Court and the Court of Appeal upheld that there exists no legislation to govern the popular initiative process, including the manner in which the verification of signatures was to be conducted. Should this not be the first step before all these Bills can be considered by the House?

Finally, I have in mind a Bill close to the Constitution of Kenya Review Act (Cap 34 of 2008). It could provide, among others, the form and the legal framework for the amendment of the Constitution under Article 256 and Article 259. The mechanism and the responsibility of undertaking signature verification, civic education, public participation, and constituency assembly debate are all found under Article 256 and Article 257, among other things.

So, I have, as a ranking Member, seen a lot happening out there. People want to engage the House and its Committees in trying to amend certain provisions of the Constitution. Based on the ruling of the courts at both levels and with the introduction of the concept that the basic structure doctrine is applicable in the amendment of the Constitution, it is imperative that we reconsider. To be more specific, the basic structure doctrine touches on the function of

Parliament. So, when you want to add the number of women Members of Parliament (MPs) from 47 to 130 plus, it touches on the function of Parliament.

The basic structure doctrine, within the reading of the courts, touches on the Bill of Rights, the Judiciary and the Executive. Those four key areas have been cited as the anchors of the basic structure doctrine. Let us consider this so that we do not take this House into a limbo and do a lot of stuff that will not see the light of day. We spent resources, time and energy on this animal called the BBI. Today we are back to square zero. We do not want the same shenanigans and issues to be taken through this House. Hon. Speaker, you gave risen to the occasion a number of times. We will ask you to guide this House and even ask the Leader of the Majority Party. Before we do anything else, I think the first on the table is to dispose of and ask even the Senate to dispose of, very fast, the Bill that was supposed to set the process and the legal framework of a referendum, on these signatures.

I beg to submit and request your considered Ruling. I am sure you have enough time between now and 21st when we come back. We really want you to make a Ruling. Just like with Judge Odunga and his team, just like Judge Musila and his team, Kenya must remember you. Kenya must remember you. You are coming at the tail end of the 12th Parliament. I am sure the judgment of those judges, the five and the seven, will be celebrated both in prominent law schools in Kenya and globally. Their judgment will be used by many postgraduate law students, as an authority on constitutionalism. Speaker Muturi has been known for his Rulings. I want you to join the ranks and file of those 12 judges. You come from the Judiciary. Join your colleagues in protecting this House from those who want to bring amendments.

(Applause)

Please, protect the House. Tell this House that the interpretation of the basic structure doctrine is applicable. This House is not outside the framework of our boundary. Rise to the occasion. Use Standing Order No. 1. Use Standing Order No. 218(2). In preparing these arguments, I have gone into the many Rulings you have made.

Hon. (Ms.) Rachael Nyamai (Kitui South, JP) *Off-record.*

Hon. Aden Duale (Garissa Township, JP): Hon. Rachael, when you say it is enough, you do not know how much time I have spent in reading this and studying this. If you did not do that, have your space and sit down. Let me finish. I spent time to study this. It is not something for granted. I am not arguing on pedestrian grounds. My argument is based on law. So, you should give me my space and the Speaker will give you time, if you have at all done a research.

Hon. Speaker, I have looked at this matter. I have seen the Bills. I read the Bills. I have asked myself how we will move.

Finally, Hon. Speaker, when I was the Leader of the Majority Party, you are my witness; a number of pieces of legislation were annulled by courts or the Judiciary. For some it was on the basis of public participation; for some it was for many reasons. So, I am talking from a dark room; I am talking from experience. We do not want to use the resources of this House on shenanigans, intimidation, bribery and coercion that were synonymous with the BBI train. We do not want that to be brought again.

Hon. Speaker, I submit and wait for your ruling when we come back. Thank you.

(Applause)

Hon. Speaker: I think the Judges in both courts ought to have gone further to clarify whether the reference to the doctrine of the basic structure only refers to the provisions in Article 255 of the Constitution. If it applies to everything, then everybody, including the Judiciary and the highest office which advised the President to dissolve Parliament for not doing something about the Constitution, would have to tell us how we are to do it if we cannot touch the Constitution.

(Applause)

How were we to ensure that not more than two-thirds of either gender are represented here as required in Article 27(6) and (8) of the Constitution? How were we also to ensure that the provisions of Article 81 on the electoral system ensuring that no more than two-thirds of either gender is represented in any appointive and elective office, notwithstanding the efforts that Hon. Duale made, both in the 12th and the 11th Parliaments, and the entire House, indeed, to try and actualise those provisions? Article 27 is under the Bill of Rights. How can the same Judiciary then claim that Parliament has failed without explaining what it is we were supposed to have done? Is it Parliament that is responsible for the electoral system under Article 81 of the Constitution? It is not Parliament. Parliament is not the electoral system. So, how can somebody even proceed to advice on dissolution of Parliament on a matter that does not belong to Parliament?

There are certain other issues that have not been clarified. I believe it is a matter that is still quite murky and have not been quite clarified. What is the basic structure? If they wanted to be direct, they should have said the matters provided under Article 255, which require popular initiative. They should then have gone ahead to fault the method that was used and say it should not happen that way. You do not just say that the basic structure doctrine applies. If you read the Constitution, it is all the matters referred to in Article 255, including the term of the President, the functions of Parliament, independence of the Judiciary, Chapter 4, and national values under Article 10 that are specified. Nothing should have stopped them from going further to indicate what they were talking about, and then go ahead and fault the method used to try and get that Bill through. It is a matter that requires a lot of reflection. Maybe, we have not heard the last of it. There is the other matter, which is before the courts, because the Chief Justice advised the President to dissolve Parliament for having not implemented the two-thirds gender principle, which is under Chapter 4 of the Constitution. If we cannot touch that Chapter, how can we be blamed? I think people should not eat their cakes and still have bits of it.

Leader of the Majority Party, I can see you want to say something.

Hon. Amos Kimunya (Kipipiri, JP): Thank you, Hon. Speaker. I wish to thank my predecessor for raising this issue because it disturbs some of us. When you go through the political process that was involved, in both the High Court and the Court of Appeal - because it is a blend of politics and the law - you will get to see the confusion that has been brought to the country.

At the very basic level, which you might wish to consider in your ruling - and I am sure it will be canvassed at the Supreme Court - is the sheer admission by the Court of Appeal that it is not properly constituted. If the IEBC did not quorate at the point of verifying the signatures, the same IEBC supervised the election of the President of the Court of Appeal, who then appointed the bench that heard this case. So, if the President of the Court of Appeal is in office illegally *ab initio*, then the Court of Appeal did not have jurisdiction to look at this matter. So, we need to

look at a number of things. Even their own judgment could well be the subject matter of a challenge.

Going back to the High Court, which does not have the same challenge, they seem to have introduced a new Article 255A. We were all at the Bomas of Kenya during the making of the Constitution. The prayers by stakeholders were that, now that we are coming up with a new Constitution, how do we protect it from being dismembered progressively by Parliament and other bodies like had happened with the 1963 Constitution? I remember those discussions. The stakeholders said: Let us identify the very core items that cannot be changed without going back to the people who have sovereign power. In fact, that was the first time I heard of the term basic structure. All those provisions were listed. It was then said that any other provision could be proposed for amendment by Parliament or any other person as long as it does not touch the items that were listed under Article 255.

Politics being what it is, it has led the courts to be politicised and now they have imported some provisions from India and other jurisdictions that operate in totally different systems. India does not have a popular initiative route. All amendments are through Parliament. Hence, there was justification for the courts to then say the minimum that Parliament could do. The same thing obtains in Canada. In fact, Canada has not quite determined the issue, but they say a matter could be challenged. If you compare with where we get most of our practices from, because we adopted the American system, the framers of the American Constitution, in changing from the Confederation to the Union, looked at whether the Constitution should be cast in stone. I remember one of the quotes was that it should not be so easy to amend even on frivolous grounds and yet, it should not be made so rigid that when necessity calls, it cannot be changed. You recall even when they had the prohibition amendment that excluded alcohol in the US for 10 years, when it became necessary that it was a prohibition in futility, they then brought the other amendment to change that provision.

Therefore, there is no way you can have a Constitution that is cast in stone and one that cannot be amended like what the judges have said. If you look at this ruling - and I want to invite you to have a look at it - it states that Parliament cannot touch anywhere. All the Articles within the Constitution as well as the sub-articles are inter-linked. There is no way you are going to look at one Article in isolation to the other. Therefore, anything you touch will then have its roots in the basic structure. It is probably the un-intended consequences of the convoluted ruling that we respect. The ruling has now made it totally impossible for Parliament to touch any other matters in the Constitution. My worry is that this could be extended to some of the laws that we are making. We will be told that this law touches on a certain right that is tied to something in the Constitution that touches the basic structure. We could go on and on.

For instance, you will remember the convoluted orbiter in one of the judgments on the interpretation of whether Bills affect counties. It is unimaginable that there is any law in Kenya that can be created that does not affect a county. Moreover, that was a judge putting it.

However, we know that the intention was on a law that affects the functioning of a county, but not the people in a county. You can see that a broader interpretation or mischievous interpretation could well mean that we do not do anything in this House.

Therefore, as you look at the issues that Hon. Duale has raised, I would like you to expand because it may as well be that the future of Parliament is at stake. We actually have no job. We will leave it to the courts to amend the law, which they already have. They have amended the Constitution by introducing matters that are not in the Constitution and yet, they say no one else can do it.

Hon. Speaker, another thing that has come out is that any amendment to the Constitution that touches more than one part should have multiple questions. I am not sure how that would affect us because if you are amending five connected sections, then you need to have five Bills in this House. How do you even process them? It has made them so complicated and we might have to re-publish all the Bills that are in the process and split them into 10 to 20 Bills. I am not sure whether we have that time to go through all those things. There are so many things that we unfortunately thought we would get a solution to, but it seems we have dug deeper into murk of confusion because of this.

I hope the parties that are proceeding to the Supreme Court would also have the future of Kenya in mind in terms of the legislative capacity of Parliament and the legislative framework through which people can change their Constitution and their laws. Unfortunately, as mentioned in the courts, if the people cannot amend their Constitution to fit the circumstances of the day, then we are headed to the alternative which is setting the Constitution aside and starting afresh. I am not sure that is where Kenya wants to go.

Therefore, I want you to exercise a lot of insight into this matter. As you guide the House, we must look at all those issues so that when we come back in September, we will know whether any legislation we will be making will be in vain.

Hon. Speaker, it is those same courts that have declared the Appropriations Act and the Supplementary Appropriations Act and rendered them unlawful and yet, they are part of the people that spent the money. Therefore, I am not even sure whether we should be going to the court and asking it to refund the money they spent on a Bill that they themselves declared illegal. I think it is this almost cantankerous way of looking at things where people are not exercising their minds in terms of the bigger implications.

Where is the public interest in the decisions they are making? That is, perhaps, putting us in this particular situation? This could be fuelling frustrations that people cannot get what they want from the legal system because it has been captured. People will then go for the alternative and that is not something that we really want for this country.

Therefore, I want to urge you that, as you look through that, we must bring up all these issues so that if need be, we can have a meeting with the Judiciary so that they can see the implications of what they are doing.

Thank you, Hon. Speaker.

Hon. Speaker: Or, perhaps, they need to clarify whether before we attempt any amendment to the Constitution, we need to go to them, kneel and ask them whether it is touching on the basic structure, and we can also know how long their processes take because you will be told to come for mention of the issue and all that. These are all issues at hand and I think it is good for me to allow Members to ventilate on them.

Hon. John Mbadi.

Hon. John Mbadi (Suba South, ODM): Thank you, Hon. Speaker. I also want to thank Hon. Duale for bringing up this matter, so that the House would engage its mind on it.

Hon. Duale has specifically sought your intervention and probably ruling on how we should proceed with various legislations that are before this House, namely, the proposed constitutional amendments. We have a number of them. I do not want to discuss the rulings and the judgments of the courts, the Court of Appeal and the High Court, because if we were to do that, then we would need to follow another procedure. However, I would like to ask you to consider that the power of the House to legislate remains. Whatever happens, this House has a legitimate legislative power and authority vested on it by the people of Kenya through the

enactment of the 2010 Constitution that cannot be taken away. Therefore, whatever the courts have said and whatever the rulings of the various judges, the power to legislate must remain with this House. That is my starting point.

Secondly, following in line with what the Leader of the Majority party has said, if we can have a Constitution that the people cannot amend, in my view, that becomes constitutional slavery. I do not think the people of Kenya are ready to be put to slavery of whatever kind. Therefore, regardless of what the judges and the courts have said, the people of Kenya cannot accept slavery. That is also something that needs to come out very clearly.

Hon. Speaker, you are right. I am not a lawyer, but I am an intelligent Kenyan. I am an educated Kenyan and I have taken my time to read and understand what the courts have been saying on this doctrine of basic structure. I am still at a loss. I really do not know whether they are referring to these protected clauses in the Constitution which the people of Kenya did not want Parliament to be the only sole body to make decisions on. This is why we have the popular initiative and the referendum. It is not just the popular initiative because if a legislative proposal is brought and passed by this House and it touches on those protected clauses, it would still go to the people of Kenya to decide. In my view, this was the best safeguards that the people of Kenya provided for themselves to ensure that the Constitution is not mutilated and interfered with to their detriment.

Hon. Speaker, when you apply brakes even to the very people of Kenya to make a determination on the same clauses, then the question would be: Was it the intention of the people of Kenya to have a Constitution that cannot be amended by anybody?

Finally, because a lot has been said and I do not want to go into the substance and discuss the issues that were brought up, how on earth would one imagine that we have a Constitution that Parliament cannot amend? All the Parliaments in the world amend constitutions and so it cannot be that people's representatives can only make statute amendments and not amendments to the supreme law. We can. That is why we are the peoples' representatives. There is that safeguard of protecting certain clauses which is, again, basic in many jurisdictions.

People have called it names such as judicial activism. Going forward, the people of Kenya need to ask whether when we talked about dictatorship, we had in mind only dictatorship by the Executive. We can have Parliamentary dictatorship where Parliament loads it over other institutions. We can equally have judicial dictatorship. Dictatorship by any arm of the Government is bad for democracy and for the people of Kenya. We do not want Executive dictatorship. We do not want a president who thinks he is god. We do not want Parliamentary dictatorship where we would appear like the god for this country. We equally do not want judicial dictatorship where the Judiciary thinks they are gods. Any dictatorship is not good for this country.

I thank you Hon. Speaker.

Hon. Speaker: Obviously, the Chairman of the Departmental Committee on Justice and Legal Affairs would take precedence. The rest will go as per the request list.

Hon. Duale will be the first because he was the one who raised the issue and then we will be done with the issues of the Constitution.

Hon. Clement Kigano (Kangema, JP): I thank the ranking Member for raising this matter. He came earlier but he did not give any hint that he had this weighty matter coming up.

Hon. Speaker, I agree with your sentiments, those of the Hon. Leader of the Majority Party and those of the Leader of the Minority Party. What is happening today is that the courts are invading on the powers of the Legislature. They have become rogue. One of the most learned

Judges in the last century was Lord Denning, who is known all over the world. In his book titled: *The last word...* All his speeches became books but in *The Last Word*, he says the courts all the time should guard with a lot of circumspection any matters touching on *Magna Carta* and any matter touching on the liberty of the subject.

Another learned Judge was the Chief Justice of Uganda in the 1960's, Sir Udo Udoma, a Ghanaian. He was called upon to interpret and declare the then government, "the Government of Obote" and not "the Government of Uganda." One Legal Counsel called Abu Mayanja went to court in the matter of Abu Mayanja against Uganda. He asked the court to declare the then government "the Government of Obote" and not the "Government of Uganda after he overthrew the Kabaka with the assistance of Iddi Amin. The then Chief Justice said that he agreed with Abu Mayanja that the Government of Uganda was not *de-jure* – that, it was not the legal Government of Uganda but, because it seemed to be in substantial control of the institutions of Government, that control made it the *de facto* Government of Uganda. That way, he saved the country. The Judiciary ought to look at Article 259. If I may refer to it, it states that the Constitution shall be interpreted in a manner that promotes its purposes for good governance, peace and unity. It underpins the word "purposes".

Why do I say they are wrong? It is because of matters to do with injunctions and conservatory orders. When they say that this House is no longer a House and shall be dissolved, what do they expect Kenyans to look up to? I have a lot of reservations with regard to the Independent Electoral and Boundaries Commission (IEBC). The judges have imported a doctrine that is not known to our Constitution and baptised it "basic structure doctrine." Our Constitution does not recognise matters that *Wanjiku* has not specified in Article 1. I agree with you, Hon. Speaker, when you say that if we were to import that doctrine, then it will intrude into Article 255.

According to Article 255, you must go to the people. This is the same thing they are saying. On one hand, they are telling us that *Wanjiku* had no rights under the Building Bridges Initiatives (BBI) to go to the people. What they are trying to do is what we call dis-appropriating and appropriating – approving in one hand and disapproving on the other hand. So, as you said, what they are saying is that you can eat your cake and still have it. That is what they are seeking. They are inviting us to a constitutional crisis. I think they are more than eager to dismantle the Government and, more so, the Legislature. Article 259 (d) says that the manner in which they interpret the Constitution must promote good governance. Is their interpretation in agreement with that provision of Article 259 on good governance?

My submission is that the sentiments expressed by the courts are hollow. They have no substance. We know our duty and any matters that we may not agree with in this House, cannot be left to the courts. The courts have their role to interpret the law as we legislate, not to make laws. By importing this doctrine here, I agree with you, they usurp our powers and become Parliament. They become Judiciary and Parliament. With time, they will become the Executive. In a way, if we find and when we go to the insights of these matters, we have our own say. We should say this will not do because the courts have intruded into our province in trying to legislate. The same judge I mentioned also said: Yes, the courts can interpret and make laws. He contradicted himself by saying that the courts can make laws, but only interpret where there is total lacuna, but not on matters that touch on *Magna Carta* and bureaucrats.

Thank you, Hon. Speaker.

Hon. Speaker: Hon. Ochieng'.

Hon. David Ochieng' (Ugenya, MDG): Thank you so much, Hon. Speaker. I want to thank Hon. Duale for bringing such an important issue for your considered ruling. Remember on the day of voting on the BBI Bill in this House, I raised so many pertinent issues on which you made your considered ruling. I want to say that, where Hon. Mbadi and I come from, we say that when a mongoose catches the chicken, we chase the mongoose, but we also blame the chicken. What was it doing in the bushes where the mongoose is supposed to be? On this matter, we are dealing with an issue where the Executive tried to mess us with the Constitution. That is the truth. As we consider what Hon. Duale has told you, I want you to separate those Bills that are before this House today, from what has been decided in the courts. These are very new Bills. In my opinion, they do not touch on what the courts have said. So, I would not imagine that the judgment given by the two courts would stop us, as a House, from processing any Bill.

Having saying that, there are things that are in the realm of politics and which must be left to politics; whether they are bad or good. In the same vein, there are those things that are in the realm of the law that we would easily leave to the courts.

Hon. Speaker, in your ruling, you should do both because you stand on both aisles namely, politics and the law. That is why you guide us here, but your rulings are considered as rulings that would be at the level of the High Court. As you do that ruling, I would also want to request you to consider the following: One, the issue of whether the Bills being proposed on this Floor are amendment Bills or they are repealing the Constitution. That was an issue before the courts. The courts were saying that the total effect of the 70 old amendments in the BBI amounted to repeal, not amend. So, when you are making your ruling, I would like you to look at those two, whether the Bills before this House are repealing or amending. It is my considered view that they are amending. By amending, I want to disagree with the Leader of the Majority Party that if you are amending and, for example, you propose to bring in ministers to the Floor of this House, the courts are saying, and I agree with them, that you should deal with one issue in any amendment. Do not mix so many issues. You want to raise 30 per cent of county money, you want to bring ministers to parliament, and you want to deal with the gender rule. It is a mix that no one can think about. You are trying to overturn the Constitution. In my mind, I do not think the Bills on the Floor of the House as proposed by Members, amount to what we saw being done to the BBI.

On the issue of the IEBC, I also want to refer to what the Leader of the Majority Party has said. The courts are very clear that we must distinguish between two things; issues of policy and issues that require the IEBC as a Commission. The Commissioners sitting are seven, deciding on how one matter will go. This stems from the issues the IEBC deals with in their administrative function. Like now people have been asking about the Ugenya by-election. I came here through a by-election and at that time, the IEBC had only three Commissioners. The court said in their judgment that on matters where the IEBC commission has no decisive vote, matters whose results are unpredictable because they do not belong to the IEBC but to the people, you cannot fault the IEBC. That is the case with the election of the President of the Court of Appeal. The IEBC role was not to decide whether Hon. Justice Musunga would be president or not. They are only facilitating the administrative process. The courts are saying that those ones are okay, but where the Commission has decided, we would determine one way or the other, how we will collect signatures, decide one way or the other, and how the regulations look like, then that requires the IEBC to be fully or half quorate. We need to distinguish those ones.

The courts are introducing something that is very unique. I think that we, as Parliament, must look at and see whether we want to comply with it or not. The issue of whether if you are

to touch the issues under Article 255 and you are going to do it through a popular initiative, you must do what was done before the 2010 Constitution came to be; whether you must put together a constituent assembly... If that is to be the case and if this House considers to be an important matter, then we just need to make a law, provide for how we will deal with the matters under Article 255. We cannot say that the courts are wrong in saying that there are some issues in the Constitution that are so deeply entrenched that we cannot leave it to one individual. A popular initiative can be promoted by a single individual. You can imagine, if David Ochieng' would sit down and say that he is proposing that from the next election, we will have specific members of parliament and he therein decides that Nairobi will now have 100 constituencies. Which tools would he have used as an individual to determine that this county will have 100, another will have three and another will have four? The courts, in my opinion, were just reading the Constitution holistically and what they could have added especially on deciding how we can amend the Constitution.

I do not believe that every time we amend the Constitution, we will have to go back to the courts and ask them whether this is basic doctrine structure or not. That, for me, is wrong. We cannot keep on going to the courts. Whether a matter belongs to the basic doctrine structure must be decided on a case by case basis. I do not know how many times we have to go to the courts to decide that. That is why I want to say that on this regular issue, Parliament should not have its hands tied on any issue under the sun. I believe this Parliament can amend the Constitution. The only issue is in amending it, let us do our role, vote on it and let the IEBC deal with the issue. If the IEBC wants to go to court to determine whether an issue falls within that legislature or not, should not be our business. Let us do our job, let us not claim that we are being handcuffed in any way and yet, I do not see that in the ruling of the court.

I want us, as House, to properly legislate on this matter. This has been said before severally in term of the issue of putting the cart before the horse. Before the BBI was brought to this House or before it was taken to the assemblies, what was difficult in this House passing a law on referendum? What was difficult in us passing a law on how to process Questions?

As you retire to do your ruling on this, I want you to be guided not by emotion or sentiments, but by good order, the Constitution and above all, respecting the role of Parliament as the only law-making authority in this country.

Thank you, Hon. Speaker.

Hon. Speaker: Hon. (Dr.) Chris Wamalwa.

Hon. (Dr.) Chris Wamalwa (Kiminini, FORD-K): Thank you, Hon. Speaker. First and foremost, I want thank Hon. Aden Duale for bringing up this matter. Indeed, this matter is fundamental.

This is Parliament and our key role is to enact laws. We are here to legislate. Article 94 of the Constitution clearly stipulates that the legislative authority belongs to this House and not anywhere else. According to the principle of separation of powers, under the Arms of Government, Parliament is there to legislate while the Judiciary is there to interpret. They must be separated. There is no way Parliament can be gagged by the Judiciary and in any case, the matter at hand is still in progress. In my opinion, I find it premature because this is a matter that should find its way to the Supreme Court. The rulings of the High Court and the Court of Appeal are not final. You can only be invited to make a ruling or a determination on a matter that has gone into finality. We know that the apex court is the Supreme Court. For purposes of academia and as a scholar, I also went around to look at the theoretical framework on the jurisprudence

under this basic structure doctrine, and I found out that it is also not clear in academia and there are a lot of gaps. This is an area that PhD students in law need to research on.

Having said that, I want to state that the matter that has been raised by Hon. Aden Duale is very key. There are Bills by Members of Parliament that have been processed and I want to state that this Parliament has very knowledgeable people as far as matters of the law are concerned. They should go through the pre-publication scrutiny and if the Bills have been processed and have reached some stage, you should allow them to continue. You should not stop anybody's law just because of the ruling of the Court of Appeal or the High Court. We do not know whether the matter would be overturned if it goes to the Supreme Court. As much as this matter is fundamental, I find it premature because as per the apex of the Judiciary in our area, we know very well that the matter must be concluded by the Supreme Court where it will not be challenged.

Hon. Speaker, we must wait until it reaches there, then we can pronounce ourselves that the matter has been determined by the Supreme Court and it cannot be challenged anywhere. For now, in my opinion, let us allow all the Members of Parliament who have come up with laws to go through the entire process of legislation. Later on, if a law that had been enacted is challenged by the Judiciary in terms of interpretation, then the same House can amend as per the interpretation.

In my own small reading, Article 255 of the Constitution is very clear. We need to expedite the law on referendum to operationalise on a matter like this where there is confusion.

(Applause)

This House must prioritise that. I am aware that Hon. (Dr.) Robert Pukose had brought a Bill on the issue of referendum. There was also a Committee Bill and I am aware that it was consolidated some time back, so that we can operationalise and understand how we can go about the issues of the referendum. When it comes to the issue of vetting signatures, how is it supposed to be done by the IEBC? There is no clear law that guides that. As a House, we should prioritise the referendum law.

Hon. Speaker, when it comes to public participation, there are so many laws that have gone through the courts, but have been nullified because of the issue of public participation. According to Article 118 of the Constitution, I brought a law to this House, but its processing has delayed in terms of what is public participation. We also do not have a clear law on a framework or guideline on the process of public participation.

For now, as Parliament, we must prioritise the issue of the referendum law and if it works, it is not a must that the Constitution is amended before 2022. If we put a referendum law and deal with the gaps that are there, then this can be done afterwards. For purposes of posterity and jurisprudence, let this matter go to the Supreme Court, so that we can hear its determination.

Hon. Speaker: Hon. Members, for purposes of clarity, Hon. (Dr.) Chris Wamalwa has said that there have been very many laws that have been nullified on the basis of lack of public participation. However, I want to just make a correction and to be factual: The ones that have been nullified - as Hon. Aden Duale would recall - are some of the proposed amendments that I have from time to time rejected when they are coming at the Committee of the whole House especially when you introduce totally new things that were not part of what was taken when the Bill had gone to public participation. In fact, on the contrary, the courts have upheld many laws when there was evidence that there was public participation. We advertise and invite views and

the public to appear, but you also cannot force them to appear. The courts just require evidence that you invited the public to submit views or to appear before the committee. If the public chooses not to appear, it is like taking cattle to the river and if it refuses to drink the water, you just take it away. It is the same thing. I am sure the pastoralists would know this very well.

The courts have always held that whenever there is evidence adduced that Parliament has shown that it advertised for the public to appear or submit views, even if it is one person or the public did not submit their views, then that is satisfactory. They just require the effort that we did not ignore the provisions of Article 118 of the Constitution. And just to be cautious, we are a House of Parliament and we have our own rules in the Standing Orders. It is much easier to provide for this public participation in your Standing Orders rather than in a stand-alone Act of Parliament. The danger of codifying that kind of a process in an Act of Parliament is to tie yourselves. In your own Standing Orders, you can move a motion to suspend an operation of a particular Standing Order and for reasons which are on record.

However, when it is in an Act of Parliament, every now and then, if circumstances change, you will have to go through the process of an amendment to that Act of Parliament. You will still have to go to the public and ask them, but they will tell you they are not convinced about that.

In fairness, let us consider that because the courts have not faulted the process of public participation. The only thing they have done - and I am speaking from a point of knowledge - is to note that some of the things have been introduced on the Floor and yet, they had been challenged by people out there. For instance, the courts would note that a certain Bill was about this and some other stuff were introduced on the Floor of the House during the Committee of the whole House and yet, the public were not aware that you had considered something or it was to be part of the law.

Those are the things that the courts have always pointed out that: "No. On this, you have gone out of your way." That is why, from time to time, whenever there is a Bill that comes here and is going to the Committee of the whole House, I have to look through the various proposed amendments to see whether they go outside the scope of that Bill. This is because if they go outside the scope and I allow you to consider it here, then it will be of no consequence. You will be happy that it has passed here, but it will run the risk of being outlawed or annulled by the court. That is something that we can always be on the guard.

The courts have not, in any way, been gagging the House. Is it you, Hon. Chris Wamalwa, that pointed out Article 94 of the Constitution that, indeed, you are the House that legislates but, sometimes, with the assistance of the other participants? You know them.

Hon. Ichung'wah.

Hon. Kimani Ichung'wah (Kikuyu, JP): Thank you, Hon. Speaker, for giving me the opportunity to add my words on this matter. Let me also begin by thanking Hon. Duale for raising the issue because, as he indicated, it is quite a substantive matter that needs your very considered guidance.

I identify myself more with what has been said by the Member for Ugenya that, indeed, what the court was doing was creating a clear distinction between the repeal of the Constitution and amendments to the Constitution. What we are involved in, that is, the legislative Bills before the House, are actually amendments to the Constitution and not a repeal of the Constitution.

I have also listened to quite a number of Members trying to belabour the point that the courts may have erred. I am not saying that the courts are angels that cannot make mistakes. They can make mistakes and that is why we have the Supreme Court. So, the parties involved in

the matter still have the right and opportunity to canvas the issues that were before the High Court and the Court of Appeal in the Supreme Court.

In my own reading and understanding of that judgement, especially on the doctrine that has been raised on the basic structure, although I am not a lawyer, just like Hon. Mbadi who is an accountant and an intelligent Kenyan, has said, we are able to read and decipher what basically forms the basic structure of a constitution or even a building like this one. Those are things that hold even a structure like this Chamber together. The pillars that hold this structure together are equivalent to what the doctrine calls the basic structure. There are those particular pillars that the judges have identified. We do not need to say that they are importing things from India because everything has its own basic structure. I identify with the judges that even our Constitution has a basic structure that holds the country and our Republic together.

If you listened to the judges, they spoke to particular things. Listening to Justice Musinga, the President of the Court of Appeal, he, for instance, gave the example of the question that Kenyans voted on in 2010 and asserted that Kenyans elected to have a pure presidential system. Therefore, if you were to touch on the system of governance and move from a pure presidential system to a hybrid or a parliamentary or some mongrel sort of system of government, then it means that you are touching on the basic structure that Kenyans elected to govern them in 2010.

I want to avoid the temptation that I have seen with a number of my colleagues to condemn the Judiciary and the courts because of their ruling. It is not the courts or the Judiciary, but the 2010 Constitution that is protecting and fighting for itself. The judges are only re-emphasising that Kenyans elected a Constitution where we sought to have the independence of the Judiciary. Kenyans elected to have an independent Legislature and that, at no time, should we introduce an Ombudsman that will interfere with the independence of the Judiciary. Kenyans also elected to have a free and independent Legislature that the Executive will not capture. Therefore, when the Constitution protects the Legislature from the Executive or State capture, we cannot blame the Judiciary. We can only laud the 2010 Constitution.

I would like to ask that, even as you make your considered ruling, you look at those basic things like the question of the independence of the Judiciary, Legislature and the Bill of Rights because those are the issues, if you listened to the judges, that they were speaking to. If you dwell your considered ruling on that, you may find that we do not need to refer many of the amendments that we have before the House to the Judiciary as has been said by other Members.

We do not need to ask anybody for permission to amend. However, anybody, whether the President, the “Peoples’ President” or whoever you think you are, you cannot interfere with the independence of the Judiciary and the Legislature. You cannot interfere with the Bill of Rights of Kenyans. The Constitution will fight and protect itself.

I beg that, even as you consider your ruling, you look at those three issues on the independence of the Judiciary and the Legislature as well as the Bill of Rights.

Thank you.

Hon. Speaker: Hon. Wandayi.

Hon. Opiyo Wandayi (Ugunja, ODM): Hon. Speaker, let me add my voice to this very critical issue. I thank Hon. Duale for raising such a matter of great significance.

For starters, both the High Court and the Court of Appeal rulings on the matter of the Building Bridges Initiative (BBI), even though some of us disagree with them very strongly, as we speak, they now form part of our laws. Again, we must take judicial notice of the fact that

there are parties out there who have expressed intentions to appeal the Court of Appeal Judgment. Therefore, the matter is not yet settled until the Supreme Court pronounces itself on it.

If we go to Article 95(3) of the Constitution on the role of this House, that is, the National Assembly, this House enacts legislation in accordance with Part IV of that Chapter. Of course, we know the procedures. In short, what I am saying is that this House cannot abdicate its constitutional responsibility even in the face of those two judgements by the two courts and, more so, taking into consideration the fact that the two courts' pronouncements on the matter of basic structure doctrine remains as vague as it can get.

Ambiguity is something which is highly found against in law. Even up to now, no one, for sure, can say with certainty what the court meant by implying that you cannot amend the Constitution if the amendments touch on the basic structure and yet, Article 255(2) is so clear, in my view, as to what ordinarily constitutes basic structure. What was so difficult for the courts to clearly re-state the key areas that should not be touched as indicated under Article 255(2)?

Finally, it would be a very dangerous situation for us to take a position that we cannot touch the Constitution by way of amending it either through this Parliament or through a popular initiative. That is what has brought anarchy and chaos in many countries. The moment it becomes clear that it is almost impossible to amend the Constitution, people will be tempted to look for alternative ways to bring change. If you cannot bring change through a constitutional process, you will be tempted to look for extra-constitutional means to bring change. In countries where military *juntas* have taken over, the first thing they do is to suspend the constitution because to them, it is an impediment to the changes they intend to effect.

Therefore, we should treat this matter with a lot of seriousness. As you retire to make your ruling, please, take into consideration all those factors.

Thank you, Hon. Speaker.

Hon. Speaker: Hon. Nyamai.

Hon. (Ms.) Rachael Nyamai (Kitui South, JP): Hon. Speaker, first of all, I would like to thank you very much for giving me this opportunity to make a comment.

As Hon. Duale was speaking, I was consulting with my colleague from Wajir, who has just left. We were whispering because it is allowed that we consult in low tones. So, if he heard what I was saying, then I do not need to disrespect him or to disrespect this august House, which I have been elected into.

The matters that Hon. Duale has raised are weighty and worth your considered opinion, direction and ruling. I was wondering aloud as Hon. Duale spoke, and I listened carefully to what the Leader of the Majority Party said. I have also listened to all the Members who have raised matters on this subject. I hear all of us wondering whether there is a possibility of this House being remotely controlled by another institution somewhere.

Hon. Speaker, as you read through the issues that Hon. Duale has raised and consider the comments that other Members have made, ensure that this House is not gagged. Hon. Duale raised the issue of time that this House spends in dealing with legislative proposals and Bills that are referred to the various committees. I was just thinking about what has already been brought by various Members and by the Committee on Implementation of the Constitution, which is chaired by my colleague who is seated here. The question is: When a Member raises a legislative proposal or a Bill, he does so with a purpose. So far, a lot of resources and the time of this House have been put into them. Is it a solution to say that we drop everything because we are listening to another institution at another level?

Hon. Speaker, kindly consider this as you give guidance on the matter that has been raised through Hon. Duale's point of order as you consider the issues that have been raised by the courts. I am careful not to comment on the matters that seem to have been concluded by the courts. The question is: Why is the basic structure doctrine issue being introduced in this House at this time, bearing in mind its sensitivity? Is the doctrine they mentioned a foreign word within our Constitution or is it a matter that we can prosecute?

I have not researched on this subject but I would like you to give us guidance on how to proceed on the matter that has been raised by Hon. Duale, considering the fact that the roles of legislation and representation that we have been given by the people who sent us to this House must not be pulled down smoothly by another institution seated somewhere and we lose out on the work we should do.

Thank you, Hon. Speaker.

Hon. Speaker: Hon. Eseli.

Hon. (Dr.) Eseli Simiyu (Tongaren, FORD-K): Thank you, Hon. Speaker, for giving me this chance to also give my thoughts on the matter. I wish to thank Hon. Duale for bringing up this matter.

Hon. Speaker, even as you bring us your considered opinion on this matter, perhaps, you need to keep in mind the fact that what has happened with the courts is that they have virtually blocked any popular initiative because there is no way *Wanjiku*, *Nekesa* or *Moraa* will raise the capital to do all the things that the court said they should do in order to promote a popular initiative. So, that avenue is more or less closed. So, the only avenue open now is the parliamentary initiative. As you give your opinion, please, consider the fact that, that is perhaps the only avenue left for us to amend the Constitution and allow the Bills before the House to run their course. Some of the Bills might require a referendum and some might not. So, it will be good to let the Bills run their course in the House.

We are not foreigners in this country. The Judiciary did not come from Mars. It is part of this country. We must accept the fact that whatever vicissitudes the country goes through, they also affect the Judiciary. Impunity, corruption and tribalism also affect the Judiciary because it is part of us. So, we should not behave like the Judiciary is a different animal from Kenyans. The Judiciary is Kenyan and what ails Kenya also ails the Judiciary. We should keep that in mind. We should also realise that there has been a push and pull between the Judiciary and the Executive on one hand and between the Judiciary and the Legislature on the other to an extent that the Judiciary has thrown out certain sections of Statutes that were enacted by the Legislature. The Judiciary has annulled many appointments by the Executive. So, there has been that push and pull. We cannot pretend that those things are not happening. They are.

When we go back to the basic structure issue, when they say that the pure presidential system is part of the basic structure, I start wondering whether some people have just landed from Mars. The constituent assembly that was held at the Bomas of Kenya did not recommend a pure presidential system. The pure presidential system was a creature of some people who sat in Naivasha. It was not from Bomas. So, on the matter of basic structure, one of the main amendments was to get what was agreed upon at the Bomas of Kenya during the constituent assembly. It is a bit vexing if we keep accepting that we should bow down to the Judiciary. We should be collaborative and work in tandem, and not antagonistically.

Hon. Speaker, when you make your ruling, I hope you will take all the things into consideration because we do not want a situation where everybody is at war with the other. As Hon. Mbadi has said, the person who is best placed to be a dictator is the Judiciary. They can

annul everything that the Executive does. They can annul everything that the Legislature does. We do not want to open that kind of avenue. I hope as you make your considered ruling on this matter, you will take all these matters into consideration so that we do not create a more acrimonious situation than we already have.

Thank you, Hon. Speaker.

Hon. Speaker: Hon. Nyikal.

Hon. (Dr.) James Nyikal (Seme, ODM): Thank you, Hon. Speaker, for giving me this opportunity. I also laud Hon. Duale for bringing this matter to the House. The matter he has raised is so important that it should have come here in form of a Motion. We would discuss and resolve on it. Probably, that would have been faster but maybe within the purview of what your recommendations will be.

What I see is that we are in the process of implementing the Constitution and, perhaps, there are certain areas, like where we got ourselves into now, that we have not looked into. It looks to me that it is very important that the Committee on Implementation of the Constitution should constantly look at our Constitution and point out areas where there are gaps that would create problems, or they were to be handled at a time of a crisis when interests are high. That is the basic issue that we came up with. What went on in court on the BBI was to a large extent the process of how *Wanjiku* would start a popular initiative. That was the main issue. It looks like when we have an area where there is no clear letter of the word, then obviously the courts have to make their decisions, and it attracts a lot of interpretation from many people including non-lawyers. We need to have those clearly stated somewhere. It is also sad because when you get into such a situation, the contents of the issue of the BBI initiative get lost in the process.

Once that happens, the whole process gets politicised and it is now easy to see it in terms of those who are pro and against, instead of the content of what is being discussed. The only content I saw here was the basic structure doctrine. This phrase has become so popular. I am not a lawyer but, it has become so popular. It is so romantic that it looks like something that you cannot touch. I cannot imagine people coming together to create a constitution and then they are told: “Even you cannot touch this Constitution you created”. How can that be? Even the provisions in our Constitution that said do this and this if you want to change the Constitution, you go through a referendum, to some extent really, gave what that basic structure is. That is probably what we should have used.

Having said that, go beyond the issues before us when you are considering your guidance. Look at the whole of this great Constitution we have and keep seeing areas we need to look at as we implement it. Every day even in the functioning of Government or the relationship between the county governments and the national Government, we constantly find ourselves where we are not clear on what should be done. I think that is okay. It should be a living document. We have a structure for looking at it. That is what we should look into. As you give us guidance, I think that we should let the process go to the Supreme Court. My argument for that is we should hear what the judges are saying — what they said in the High Court, what they are saying in the Court of Appeal and what they are going to say in the Supreme Court. Then, we will take all those issues to guide us as a House to get the processes and procedures that we need.

Thank you, Hon. Speaker.

Hon. Speaker: Hon. Kioni.

Hon. Jeremiah Kioni (Ndaragwa, JP): Thank you, Hon. Speaker, for giving me the opportunity to say one or two things.

I want to open my statement by reading what Justice Fatuma said: “If amending the Constitution is too difficult, it may lead to revolutionary tactics to bring about changes. Those who make peaceful revolutions impossible will make violent revolutions possible”. With your permission, we went and visited Brazil at the beginning of this term, as the CIOC. Our experience in Brazil is something that we need to learn from as Members of this House and also as a country. They have a Constitution that is, by and large, similar to ours, even in terms of age but, they ran into a problem. They are now trying to get out of the problem they ran into. The problem they are in is that the country is no longer controlled by the Executive or the Legislature, but by the Judiciary. They are trying to get their way out of that control by the Judiciary. These are not tall-tales. These are not things we are guessing around. They are things happening in a country that we visited as MPs. The mistake they made was that they allowed the Judiciary’s overreach. Today in Brazil, the Judiciary can arrest even an MP from the Floor. They can start a case against the President at any time. These are issues that we need to be aware of and be careful about.

Yesterday, we were out in Turkana County, Lodwar. I see my colleague Hon. Yusuf, MP of Kamukunji. We were having public participation on the Constitutional (Amendment) Bill No. 40. The opening statement from one mzee was: “We want everybody elected, including chiefs”. If you allow me to say it in Kiswahili, “*kila mtu apigiwe kura*”. While we did not get to the depth of that statement, you could see that is a fundamental statement coming from an ordinary person out in the County of Turkana. What informs him to say that he wants everybody voted for? It is something we wanted to go back and ask him but we did not have that time. I know MPs keep saying we have three functions. It is true we have the three functions but Article 94 of our Constitution seems to add another function; that is protecting the Constitution of 2010. It has been given to Members of Parliament. Parliament has the role of protecting the Constitution. I have gone through the functions of the Judiciary. Theirs is to interpret. It is important that we understand that if we are the ones to protect the Constitution, it is unimaginable that somebody can then think that we have to go to the Judiciary every time we want to deal with the Constitution or amend it for them to allow us to do what we are supposed to do, including amending the Constitution. This ruling that was given is useful because it has helped us to get into a lot of debate.

I was involved in the making of the Constitution of Kenya 2010 at one stage or another. I cannot remember anywhere where we all wanted to have clauses that were eternal like the Bible. You cannot rewrite the Bible. The Bible was written by God, by Jesus, and you cannot rewrite it. So when you talk of eternal clauses, it is like we gave ourselves clauses that we can no longer touch. We will all die with the way they are written. I do not remember that kind of a discussion where we gave ourselves Articles in the Constitution that we cannot amend. I know and believe that is the discussion we had, that it is the amending of Articles that is different. Some will require a referendum, others will not. Others could be amended through a popular initiative. All these channels were opened in our Constitution. Where we thought they are fundamental issues that relate to our country, we said one needed to go to the people through a referendum.

I also want to associate myself with the issue of popular initiative. If it is not again given another interpretation by the courts, it has been taken away from *wanjiku* because *wanjiku* cannot amend the Constitution through popular initiative and conduct civic education...

Hon. Speaker: Hon. Kioni, I will give you an extra minute because I also want you to tell the House where the Referendum Bill is.

(Laughter)

Hon. Jeremiah Kioni (Ndaragwa, JP): Hon. Speaker, I wanted to say that even bringing the constituency assembly together was impossible. Remember we said there is a 20 per cent that we need to work on when we passed the 2010 Constitution. Even that has been shut out by the ruling of the courts.

On the Referendum Bill, I remember that we tabled it in this House. It was at the very beginning, before any other person had a proposal. That time, the Leader of the Majority Party was Hon. Duale. I wish he was here to tell us where it went because we have been waiting for it to be brought to the other stages. Instead of it being processed, the Departmental Committee on Justice and Legal Affairs came up with another one and it was processed ahead of ours. That also happened with another Bill that we had done on the Independent Electoral and Boundaries Commission (IEBC), on the issue of quorum. When I hear the courts talking about quorum, I know also that there are those individuals who made it impossible for us to process those Bills. Perhaps, they are rejoicing because now they seem to have cost us.

As the CIOC, we worked on those two issues that the court talked about — the IEBC quorum – and we finished with that Bill and the Referendum Bill. We went through public participation. They are in the process. They should have been brought to the Floor to be processed. That was way before Hon. Kimunya came into office for those who would want to talk about it. I wish Hon. Duale was here to tell us why the House Business Committee never prioritised them.

Thank you, Hon. Speaker.

Hon. Speaker: Hon. Akoth.

Hon. (Ms.) Odhiambo-Mabona (Suba North, ODM): Thank you, Hon. Speaker, for giving me this opportunity.

I want to thank Hon. Duale for raising this issue. Let me start by saying that I very respectfully and honourably disagree with the courts, especially on the issue of the basic structure. I want to say that just the way the country has given us this opportunity to legislate as MPs, we have also given honourable men and women the opportunity to serve us in the Judiciary. When they sit in that position, they sit as a few honourable men who will give their views which may differ from our views. I speak with authority and also as a lawyer. As a lawyer, I can say I disagree with them respectfully. That does not mean I disrespect the Judiciary.

I listened to Hon. Mbadi on my way here and I want to agree with him that any arm of the Government can actually be autocratic. We must always guard and ensure that none of the arms goes way above the powers they have been given in the Constitution. You should not go against your powers. The President cannot go beyond his powers, neither can the Judiciary. When the Judiciary goes beyond its powers, there are people who want us to walk stealthily around them, as if they are sacrosanct or they are God. The only person I do not challenge is God. When I disagree with the Judiciary, I speak clearly about them, because they are not God. Even when I disagreed with the President, I said it clearly, because he is not God. If I disagree with you, Hon. Speaker, I will be clear, because you are not God. The only person I may disagree with but I will not say is God. Yes, I may disagree with God, but I may not say because he is God.

I want to say the reason I do not agree with the basic structure concept. I was a litigator on the issue of public interest law and public impact litigation, what you generally call the *lacuna* of law but this applies when there is no provision in law. When there is clear provision in

the Constitution on how to operate, then we cannot operate as though we work in a vacuum. Assuming the basic structure principle was correct - and that the Constitution has a structure that we must adhere to - then in international law, it is already stated. Our Constitution in Article 2(5) already provides that every principle of international law is acceptable. One of those principles is called the *jus cogens* principle. It provides that no country shall legislate a law that goes against certain standards. Those standards include self-determination and protection from torture. What the court is saying does not include this. We do not even need the Judiciary to go that direction, because *jus cogens* principles raise what we call *erga omnes* obligations, which are obligations that will emanate from every country against Kenya if we were to make those decisions. This is a very dangerous path, especially for minorities.

Hon. Speaker, as you make your decision – and I know that we still have the next step at the Supreme Court and your decision should take that into account - I want to tell women of this country that this has sounded the death knell on the two-thirds gender principle. It is a basic structure principle, because it is about how the Parliament of Kenya is structured. So, as the women of Kenya, let us get used to 47 positions until death do us part.

Thank you.

Hon. Speaker: Hon. Kimani Ngunjiri.

Hon. Kimani Ngunjiri (Bahati, JP): Thank you, Hon. Speaker, for giving me this opportunity. Ningetaka kuangazia mambo mawili au matatu. Ya kwanza, nashukuru Mhe. Duale kwa kuleta jambo nyeti ambalo tunafaa kuangalia kwa urefu. Kwa sababu ya ujuzi wake, tunamheshimu. Ni mtu anajua mambo mengi. Ametuongoza kwa hili Bunge. Lakini ningekuwa na maoni ya kufikiria. Hii mambo ya BBI iko kortini na inaenda Korti ya Upeo. Tuwape nafasi kwa kisheria waendeleo na mambo yao. Lakini sisi kama Bunge, kuna mambo matatu nyeti tunafaa kuangalia.

Moja, kuna shida kubwa kwa sababu ya ugonjwa wa COVID-19. Hilo ni jambo muhimu ambalo tunafaa kulifikiria katika Bunge. Katiba mpya tunaitea nani wakati watu wanakufa? Ukifanya uchunguzi wako katika vyumba vya kuhifadhi maiti, utashangaa! Wacha wale wanatangazwa! Watu wetu wameisha kwa sababu ya ugonjwa wa COVID-19. Tunangoja pesa za kununua dawa. Kama tunaendesha haya mambo ya BBI, ile pesa iliyotumika ingesaidia sana watu wetu wasikufe. Tungekuwa na watu ambao tunajadiliana vile watapiga kura kwa sababu wangekuwako. Hawangekuwa wamekufa! Tunatengeneza mambo gani ilhali watu wetu wameisha? Sisi tumechaguliwa na wananchi na itaonekana vibaya kama hatutetei mambo nyeti yanayohusu watu wetu.

Ukiangalia shida iko mbele yetu, ile muhimu ni ng'ombe za wafugaji zimekwisha. Tunahitaji kujadiliana watafanyiwa nini kwa sababu ya ng'ombe wao. Hilo ni jambo muhimu kwa sababu ni uchumi ambayo tumetengeneza tayari. Huo uchumi unaisha. Kama hatuna nafasi ya kuichunga, tutafanya namna gani?

Jambo lingine ni kuwa ni muhimu sana tujue tutachunga watu wetu namna gani. Tutawaangalia namna gani kama tunafikiria uchaguzi wa 2022 ufanywe kwa njia nzuri? Jambo la umuhimu ni tupitishie haya majina tumeletewa ili kuhakikisha Chebukati ako na watu wa kutosha asikosolewe na korti. Tunafaa kutengeneza mikakati mizuri ya uchaguzi wa 2022. Tunaendesha Hoja ya BBI na tutasahau tunaielekele uchaguzi. Mikakati ambayo tunataka kuweka ili uchaguzi uwe wa wazi itakuwa shida. Itafika pahali Chebukati atasema: “Mlinipa pesa kuchelewa na kwa hivyo, sikuweza kuleta vifaa vinavyotakikana.” Saa hii kunatakikana usajili wa wapiga kura. Anafaa awe na pesa. Jambo hili ndilo tulikuwa tunazungumzia kuona vile tutasaidia ili uchaguzi wa 2022 uwe ni uchaguzi wa kubalika na pande zote. Ni muhimu sana,

Wabunge wenzangu, tufikirie sana mambo yaliyo mbele yetu. Hili jambo la BBI wacha liendelee kortini. Likimalizika, tutajadiliana. Ya umuhimu ni mambo mawili: Uamuzi wa Korti ya Upeo na uamuzi wako Mhe. Spika. Tupe mwelekeo tujue ni mambo yapi tunahitaji kuzingatia. Tuna mikakati ya mambo muhimu ya kusaidia nchi hii yetu. Watu wetu wako kwa shida. Iko njaa. Ng'ombe wanakufa. Hatuko tayari kwa chochote. Tunawaweka na mambo ambayo sio muhimu kwao. Mambo nyeti yaangaliwe.

Nashukuru sana.

Hon. Speaker: Because we may be veering off the issue raised by Hon. Duale, let me hear the Member for Ndhiwa and then we close the matter.

Hon. Martin Owino (Ndhiwa, ODM): Thank you, Hon. Speaker. My own worry in this is that the process of popular initiative was challenged, but those who were challenging the process in the High Court did not even conduct public participation. They were just lawyers. The name of *Wanjiku* has been abused to the core.

The second point is this: Can we have seven judges replacing the Constitution by judgment, especially when it is about the basic structure doctrine, which I think is foreign? We need your ruling on that. Third, I listened to the 10-hour judgment and I would like your guidance on how you borrow jurisprudence from foreign countries on something which is local. If it is something across East African countries or beyond, you carefully use references in the Commonwealth. There was a lot of borrowing in this matter.

Lastly, I hope people who are enthusiastic like Hon. Ichung'wah will also celebrate when the Supreme Court overturns the judgment.

Hon. Speaker, why should we have rulings that are based on knowledge but care less about the content of what is going to help *Wanjiku*? Nobody touched on the issues of corruption, time limit, and inclusivity yet those are the ones that bring war and chaos during elections. All these issues were thrown out in the name of the process! People are now taking sides without considering whatever is on the table. In this case, there are things which are affecting *Wanjiku* but are now political weapons used by both sides. Hon. Ichung'wah, when the ruling will be overturned, we want you to talk enthusiastically like you did when it was ruled by the Court of Appeal.

Hon. Speaker, your ruling will be of important guidance, especially on this basic structure doctrine which I really disagree with. As it stands now, for this House to change the Constitution, we have to get permission from the courts. We represent the people and they did not want to send anyone else here. I agree when it is said that those who are elected, when they talk, they do so with the authority of the people! It is not just sitting on a bench and making amendments which are very difficult even for this House to pass.

Lastly, this House must stand, in whichever way, for this progressive Constitution. As it is now, if it has to die with its 20 per cent deficiency, then we are not going to move as a country.

Thank you, Hon. Speaker.

Hon. Speaker: Hon. Members, let me just make this clarification. I believe because some of you came in a bit late, you might have been derailed in your thoughts by the mention of certain exciting words and therefore you may not know the basic structure of what Hon. Duale raised. You may have been carried away and assumed that what you found being said by others was actually what you were supposed to be dealing with. We are not actually dealing with BBI. For avoidance of doubt, Hon. Duale rose in his place to seek guidance on the actual position of various constitutional amendment Bills that are pending before the committees and before this House as well as legislative proposals seeking to amend the Constitution, which are also in

various stages. I have actually approved some and they are either at the Departmental Committee on Justice and Legal Affairs, or the drafting section within Parliament. In light of the judgment by the Court of Appeal, and we do not need to look at the judgment of the High Court when there is the judgment of the Court of Appeal,... This is for purposes of convenience and even to appreciate where we are at. It is just the place of those Bills relative to that judgment and also whether the House and the committees should continue considering those Bills and legislative proposals as the case may be depending on where they are.

One of those Bills was by Hon. Florence Mutua that the House was debating just the other day before we went on recess. Was it about the two-thirds gender principle? There was another one by Hon. Shollei that sought to increase the number of women to 136. Some of you who came in late may have been carried away thinking that that is part of the basic structure of the issue that Hon. Duale raised. You need to note that it is in relation to the ruling of the court. Where do we stand? Can we, as a House, continue with those Bills or do we stop and await further guidance? I will be making a ruling on that. It is important that I was able to hear many ideas, including some which may not have been very useful.

(Laughter)

However, today being a Special Sitting of the House and there being no other business, there was no harm in listening to palaver; the usual *gumzo mtaani* as they say in Kiswahili. This is because part of it is not going to be helpful in making that determination. Hon. Members, I doubt that there is anything else.

Hon. Kimani Ichung'wah (Kikuyu, JP): On a point of order.

Hon. Speaker: Hon. Ichung'wah, what is your point of order?

Hon. Members, with regard to the issue that was raised by Hon. Duale, let us please rest it at that point. I was asking Hon. Kioni to respond to the issue of the Referendum Bill and others and he has made his Statement. I am sure that within ourselves in Parliament, we know where those various Bills are. Therefore, I will be referring to all those. On this issue, let us just end it there so that we can maybe hear any other point of order. Those who were unable to contribute should remember they have an opportunity in the afternoon to look at the Report of the Departmental Committee on Justice and Legal Affairs (JLAC) and if you want to say something you think will help me on this issue, you could say it at that time.

Hon. Ichung'wah, what is your point of order?

POINT OF ORDER

THE MANDATES OF COMMITTEES

Hon. Kimani Ichung'wah (Kikuyu, JP): Thank you, Hon. Speaker, I rise under Standing Order No. 83 to raise a matter relating to Standing Order No. 218 which provides that a Committee should be limited to its mandate unless a matter has been referred to it by the House on a Motion, or by the Speaker, or by way of a Statement or Question sought in the House. Standing Order No. 195 provides for attendance of non-members. You are aware that by practice of this House, sittings of the House take priority over any sittings of a Committee and this being a Special Sitting, it takes precedence over other sittings of the Committees. As you have

previously guided and in line with our Standing Orders, a Committee can only meet with your permission while the House is sitting.

Hon. Speaker, I want to raise this issue because I am aware that the Departmental Committee on Administration and National Security is currently holding a meeting. You have made many considered rulings before. In particular, I remember the one you made on 10th June 2014 on the issue of the recall of Cabinet Secretaries (CSs) and how Committees of this House should go about the procedure of recalling or impeaching a CS. In that ruling, there was a point where you said that you do not countenance committees of this House going on a fishing expedition. In many other determinations, you have ruled that our committees should not be on fishing expeditions. That the businesses of committees and the House should not dwell on matters that we pick from the newspapers and electronic media. I want to state this with all due respect because I have noticed that that has been happening in the last few weeks. In one instance, about a week ago, the Departmental Committee on Finance and National Planning was interrogating an issue that in my recollection, and you know that I am very diligent in attending sessions of this House, had never in any way been referred to the Committee. I doubt whether the matter was in any way within the mandate of that Committee. It was inquiring how a private bank, Equity Bank, was able to advance money to a Ugandan. It was not even Equity Bank Kenya but Equity Bank Uganda. It was a matter that was canvassed before broadcast media and I found it wanting that we are now getting tempted to use committees of the House to advance our party politics. I am raising this issue because today, the second instance, the Committee chaired by Hon. Mwathi... I did see him speak to the media. At the risk of alluding to things that are in the media, I heard him say that they will be sitting today to have a meeting with the CS for the Ministry of Interior and Coordination of National Government on the question of the withdrawal and scaling down of the security of the Deputy President.

Hon. Speaker, my recollection, again, is that this House was on recess. There was no Question, no Petition or Statement sought. When I listened to the Chair, in the electronic media, asserting that the Deputy President's people raised these questions and therefore the Committee is looking into that matter, I was surprised. I do not know who those people are because all Kenyans are Deputy President's people.

Hon. Speaker, this is a Special Sitting today. You will recall that this morning you had to order for the Quorum Bell to be rung so that we could raise the requisite number of Members for business to begin. You can count the handful Members who are here this afternoon and from morning. I am aware that that Committee is now sitting. I am privileged to have perused through some of the documents that have been tabled before that Committee. You gave the impression that either the Chair of that Committee or certain members of that Committee are using the Committee to advance courses other than those they ought to be enquiring into. I have just looked at the business before that Committee. There are 55 Questions that have been referred to that Committee.

When I checked at the Table Office this morning, it was not yet clear how many of those Questions have been responded to. There are 32 statement requests that we have sought, including two that I have sought touching on the lives and security of Kenyans. Some Statement Requests are on banditry issues in the counties of Samburu, Laikipia, Turkana and the recent skirmishes that occurred in Marsabit. Out of the 32 Statements sought, only 12 have been responded to. It, therefore, begs the question: why would this Committee be so overzealous to get into business that has not, in any way, been referred to it by the House or the Chairman?

Hon. Speaker, there are indications that, indeed, the Cabinet Secretary in charge of the Ministry of Interior and Coordination of National Government is the one who had orchestrated the meeting that is to be held this morning with the print and electronic media fully broadcasting the proceedings of that Committee live.

Hon. Speaker, we talk about state capture and capture of the Legislature by the Executive. That is one of the issues I would want you to guide us on. How do those other people outside there come to allow Cabinet Secretaries and other functionaries of Government to cause committees to sit for them to come and advance whatever issues they want to advance? Why are they using a parliamentary process to sanitise their actions? To me, this is going to the core of belittling the mandate of this House and playing games using our oversight role. I am not saying that the Committee should not enquire into anything. They have every right to enquire into anything, but we must not allow the Committee to be used by the Executive to cleanse or, in any way, use parliamentary privileges to discourage people who cannot defend themselves before that Committee.

I have seen part of the document tabled. It has information that has been tabled before that Committee, including listing all the properties, farms, businesses and kiosks owned by the Deputy President. How many officers are guarding those premises? How I wish we could have seen the same Cabinet Secretary indicating how many GSU officers are guarding his own house in Karen and in Nyamira, and how many are guarding his farm in Kiserian.

Hon. Speaker, he needs to tell us how many are guarding me and you. We must not use the privileges of this House and its Committees to advance our partisan politics. We are all Members of Parliament, and have the liberty to raise issues before this House like I am raising today. However, I must not use the Floor of this House to disparage people I believe are thieves: people I believe have stolen from the Kenya Medical Supplies Authority (KEMSA), and those who I believe have stolen children's land in Ruaraka! What I want you, Hon. Speaker to give us is a very considered ruling on pertinent issues.

Firstly, who sought the matter to be inquired into because as far as I am aware, the matter that had been sought was by Sen. Cherargei in the Senate. I do not know how the two Houses are working on that matter. That is a matter that can be raised in the Senate but a Committee of the National Assembly has started to enquiry into it.

Secondly, as I said, the Committee has 32 statement requests, 20 of which are yet to be responded to. Was it a priority for this Committee to belittle issues that concern security and the lives of Kenyans as raised by Members? I remember how Hon. Rasso and Members from Isiolo and Marsabit have been crying out to the Committee. Many times, the Chairman of the Committee would assert that the Cabinet Secretary for Interior and Coordination of National Government was not available. However, today, on his own prompting, he is available with full broadcast by the media.

Thirdly, could the Clerk of the National Assembly inform the House how many of the over 55 Questions that have been referred to this Committee have been responded to and why the Committee is not according those matters priority over the matters that have been brought to them by Cabinet Secretary?

Hon. Speaker, I would want to know if there are any Members who are not Members of the Departmental Committee on Administration and National Security that had written to the Committee asking to be allowed to attend the sittings of that Committee during this particular matter under Standing Order 195. If so, who are those Members?

Finally, as I said, since the business of this House takes priority, today is a Special Sitting Day. It may be too late because it is now 12.30 p.m. However, I would request you to consider suspending the matter that is under consideration by the Committee so that Members can focus on the issues that the Leader of the Majority Party called the House to address during this Special Sitting.

Hon. Speaker, also consider directing the Committee to prioritise matters pending before it. I particularly mentioned a Statement I had sought and a Question I had filed. There are also other 20 Statement Requests and 55 Questions that are before that Committee. They need to handle those before embarking on headline-chasing matters that only end up embarrassing this House. I must, again, reiterate that we honestly embarrass this House when we allow Members of the Executive – be it a Cabinet Secretary or a Principal Secretary (PS) – to misuse a Committee of this House and the media with full benefit of parliamentary privileges to say things about people who do not sit in that Committee.

More importantly, if the Committee is not enquiring into a matter that has been referred to it by this House, automatically, it means there is no Report that will be brought to this House for us to interrogate the issues being discussed in that Committee. That is the tragedy I saw with the Departmental Committee on Finance and National Planning, where people go on a fishing expedition to the extent of saying very disparaging things against a Head of State of a friendly nation. The President of the Republic of Uganda had twitted that a Ugandan company got assistance from Equity Bank.

Hon. Gladys Wanga, being the Chair of that Committee, may be very averse to fishing expeditions. However, on finance matters, it is possible for Equity Bank, Uganda, to organise syndicated loans to an individual or an organisation in Uganda to the tune of Ushs15 billion but it may not be possible, even with the capitalisation of Equity Bank, Uganda, to lend money as an institution. When the Chairman uses the media, in that particular sitting, to ask how Equity Bank is lending Ksh15 billion to Ugandans and not Kenyans... People need to get the information that, indeed, even in Kenya, probably, Equity Bank or even KCB may not give you a loan of Kshs 15 billion singularly; they do it just like insurance companies do, that is, reinsure collectively through syndicate loans. Therefore, we must not use...

(Hon. Members rose on points of order)

Hon. Speaker, you may advise the Members shouting that I am on a point of order. I know the Member for Gem is new in this House, but it may have taken him a bit longer to learn that when one is on a point of order, you allow them to finish their point of order, then you will be at liberty to raise the issues that they will be raising.

I, therefore, want to beg that you give us direction on the following: one, whether we should be using our committee to go on fishing expeditions. Two, how do committees and their chairs conduct themselves? In the words of T. J. Kajwang', can a Chair of a committee act *suo moto*, that is, on their own motions? It could be on matters that the House will not benefit from or matters it cannot interrogate with a report not being tabled before it! I wish to ask that you also consider directing the two committees: the Departmental Committee of Finance and National Planning to table a report inquiring into the issue of Equity Bank's activities in Uganda; and, the Departmental Committee on Administration and National Security to table a report if, indeed, they are inquiring into the issue touching on the security of the Deputy President. This is because it is not a matter to play politics with.

Lastly, allow me to ask those in the Executive not to use this House or committees of this House to sanitise and cleanse their deeds or misdeeds in Government. If you want to offer information on the Speaker, I think you should bring a petition, a Motion, a Question or a Request for a Statement before this House and we will then be able to inquire on things relating to anyone.

Thank you, Hon. Speaker.

Hon. Speaker: Order, Hon. Members. He rose on a point of order; he was not seeking your views.

Hon. Members, for avoidance of doubt, Hon. Ichung'wa decided to rise on Standing Order No. 218.

(Hon. Jeremiah Kioni and Hon. Elisha Odhiambo consulted loudly)

Hon. Kioni and Hon. Odhiambo, I am on my feet! For avoidance of doubt, you are being out of order, Hon. Kioni. You cannot sit there and start shouting that you are on a point of order. Which point of order? Who gave you the leave to say you are on a point of order? You cannot...

He stood in his place citing Standing Order No. 218. Hon. Ichung'wah cited Standing Order No. 218 but overlooked Standing Order No. 216 which deals with mandates of departmental committees specifically and more particularly, subsection 5 of Standing Order No. 216 which states that the functions of a departmental Committee shall be to;

- a) investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments.

In doing these investigations, the committees are at liberty to act without seeking authority, that is, *suo moto*.

The Committees also have a function to study the programmes and policy objectives of Ministries and State Departments and the effectiveness of the implementation; study and review all legislations referred to it; study, assess and analyse the relative success of the Ministries and Departments as measured by the results obtained as compared with their stated objectives; and more importantly investigate and inquire into all matters relating to the assigned Ministries and Departments as they may deem necessary and as may be referred to them by the House. On their own, the Committees are not limited.

With regard to what Hon. Kimani Ichung'wah has raised, you do not have to wait for me to give a Communication because all committees have been doing this. You only need to go to the Fourth Schedule and know the areas that you cover and the activities of the various Ministries and Departments. You are at liberty. You do not have to come here to say that you want to go and find out whether people are doing irrigation or the parts that the Ministry of Water is doing irrigation in because that is your mandate. You do not have to come here to seek authority. You just need to ask the Clerk's Office to facilitate you to go and find out who is being supplied with electricity in the Last Mile Connectivity Program (LMCP) and such like things. You do not have to come to the House. It is just the Clerk's Office to facilitate a particular Committee. The only valid thing is whether they are going to report their findings to the House. If you undertake an investigation, you must bring a report to the House.

The Departmental Committee on Administration and National Security and the Departmental Committee on Finance and National Planning are hereby put on notice to bring Reports of their investigations and inquiries here.

(Applause)

If they want to travel to Uganda or to Kaksingri, Hon. (Ms.) Odhiambo-Mabona can facilitate the Kaksingri visit. If they want to go to see the farms, Hon. Kimani Ichung'wah or any other person will facilitate. More importantly, Hon. Kimani Ichung'wah was underscoring that Committees should stick to their mandates. When you do so and make inquiries like those ones, you must bring a report to the House.

(Applause)

The House must benefit from your inquiries and investigations as long as they are well founded. The Committees must of course give us their schedule of activities.

The other point is the one on the various Statements that have been requested by Members. When those functionaries appear before you, you must take advantage and place before them those Questions and Request for Statements which have been filed with them so that they can also respond at that time and invite the Members who had either asked the Questions or requested for Statements because it cannot just be one. I want to discourage Committees from kowtowing to other forces outside the House. You can only kowtow to the dictates of the House because you are a Committee of the House. People should not write to you and express desire to appear before you. What are they coming to do? You may never know what they want. You may need to interrogate their intention to appear before you invite them. Is it to entertain you with stories or what is it?

If you are genuine and want to inquire into a matter, please go ahead and do it within your mandate but you must also allow the House to benefit from that investigation or inquiry through a report that must be tabled before the House. I would advise that you raise the issue of the Reports when the House resumes because what we say here is on record. The chairpersons of those committees should be informed that the House will expect reports on their expeditions in those inquiries. There is no need for us to debate that.

(Hon. (Dr.) James Nyikal spoke off-record)

Is it on the same matter, Hon. Nyikal?

Hon. (Dr.) James Nyikal (Seme, ODM): Hon. Speaker, I seek your guidance on exactly what... You have given guidance as expected. One issue then comes out: a Member who thinks he is rising on a correct point of order actually comes out on a wrong point of order that the committees have the right to do what they do. In the process, the Member makes statements that makes the committees sound bad! Even now we are not sure whether those committees went on to sit at the behest of somebody else.

What do we do in terms of the allegations that he has made in respect to the committees? It is because those points have come out and the committees have been made to look like they got somebody to invite them. Those are also important points that we should take into consideration. How do we handle those that have come out? How do we expunge all what Hon. Ichung'wah has said from the *Hansard*?

Hon. Speaker: On the day that the two chairpersons are in the House, they will report their findings. During that debate on the Report, Hon. Nyikal, the issue you have raised will also be conversed. Let us not debate that now.

ADJOURNMENT

Hon. Speaker: There is no more business to be transacted. So, Hon. Members, the time being 12.53 p.m., the House stands adjourned until Wednesday, 1st September 2021, at 2.30 p.m.

The House rose at 12.53 p.m.