

# PARLIAMENT OF KENYA

## THE SENATE

## THE HANSARD

Thursday, 29<sup>th</sup> April 2021

### Special Sitting

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

*The House met at the Senate Chamber,  
Parliament Buildings, at 10.00 a.m.*

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

### PRAYER

**The Speaker** (Hon. Lusaka): The Chairperson, Sen. Omogeni, had a balance of 20 minutes

### BILL

#### *Second Reading*

THE CONSTITUTION OF KENYA (AMENDMENT) BILL, 2020

*(Sen. Poghiso on 28.4.2021)*

*(Resumption of Debate Interrupted on  
28.4.2021 - Afternoon Sitting)*

**Sen. Omogeni:** Mr. Speaker, Sir, when you were adjourning yesterday, a point of order was raised by the Senator for Murang'a, Sen. Kang'ata, on what is contained on Pages 97 and 98 of the Report that has been tabled on the Floor of the House.

In my brief life, I always like speaking the truth and being very candid. What is contained in this Report is nothing other than the truth and the whole truth.

When we retreated as a Joint Committee of the two Houses, as you can see on Pages 97 and 98, we called for the Bills that were tabled before the respective Houses. The remarks that you can see on Page 97 are the anomalies that were picked out in the two Bills; the one that was tabled before the National Assembly and the one that was tabled before the Senate.

Sen. Kang'ata was a Member of our Committee and he sat as we deliberated on this issue. The observations we have made to the House, is that there were some differences on some clauses on the Bill that was read in the National Assembly and the Bill that was read in the Senate.

Regarding Sub clause 3(b), the Bill that was read in the National Assembly was amending Article 97(2) while the Bill that was read before the Senate, was amending Article 97(3). Clearly, we made an observation that there were differences in terms of what was being amended on the Bill that was read in the National Assembly and the one that was read before the Senate.

On Clause 48 of the Bill, we made an observation that, whereas the Bill was amending Article 188, on the marginal notes, reference was made to Article 189.

Finally, we made an observation that in the Second Schedule of the Bill; Clause 1(1), the Bill that was read before the National Assembly was amending Article 89(7) while the Bill that was read before the Senate, was amending Article 87(7). I hope Members have read this Report. So, plainly, we are telling the House that the Bill that was read before the Senate has some errors on the face of the record and we have made a proposal that this House - that is on page 65 - should take legislative action to correct the errors of form.

What we are saying is that, the person who has moved this Bill that is the Majority Leader, has an option of moving an amendment to correct the error of form. If you read the Report---

*(Loud consultations)*

**The Speaker** (Hon. Lusaka): Hon. Senators, please consult in low tones. He is raising a very important matter.

**Sen. Omogeni:** Mr. Speaker, Sir, we had two experts; Prof. Kameri Mbote and Dr. Collins Odote. They pointed out that if we identify an error of form, not an error of substance, which changes the wishes of the promoters of the Bill, we can take steps to amend the Bill to correct those errors.

I want to state that I am not the author of the errors that appear in this Bill. I have seen debates on social media that there were two Bills. Whether there were two Bills or one, I do not know. The only business that we had to undertake as a Joint Committee was to scrutinize each clause of the Bill, make observations and report back to the House.

Mr. Speaker, Sir, I am sure that even His Excellency the President and the Rt. Hon. Prime Minister, the owners of the 'Handshake', are not going to kill any of us if we correct the mistakes in this Bill. Nobody will say we have committed a mistake by correcting this error.

I want this House to note that the Bill that is being considered at the National Assembly does not have these errors. So do not look at what is happening on the other side. The error on this Bill refers to the Bill that was read before the Senate. Therefore, the task of seeing how to correct the errors is only with this House.

Mr. Speaker, Sir, we have proposed that the leadership, that is the Mover of this Bill, takes steps to correct that error. How will we look to the Kenyan people if we consider a Bill that has got these typing errors and we fail in our duty as Members of the Senate in correcting these simple errors then we send a Bill to the people that has got these glaring errors?

I want to persuade the House that this is an error that does not change the substance of the Bill. We are not changing the intention of the promoters; we are just doing an amendment that will correct errors that appear on the face of the Bill that was read before us.

Mr. Speaker, Sir, the next point that I was making yesterday was with regard to the clauses on the Judiciary. Some people did not get the point I was making. If you read Article 172 of the current Constitution, the Judicial Service Commission (JSC), retains the power of considering complaints that are made against judges.

I want to read what is in Article 172(1)(c)-

“The Judicial Service Commission shall promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice and shall-

(c) appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament.”

Mr. Speaker, Sir, the current position is that you cannot suspend a judge of the High Court, Court of Appeal or the Supreme Court before the JSC has recommended to the President the setting up of a Tribunal to look into the conduct of a judge of a superior court.

The clause that the Committee has an issue with is what is contained in Clause 43, whereby it is proposed that just by the mere receiving of a complaint, before that complaint is looked at, and determination made, that a tribunal should be formed to look into the conduct of the judges, the JSC can suspend a judge and later on say:

“We have looked at the complaint and we have found it unmerited. You are free to go back and perform the functions of your office.”

What we are saying as a Committee is that this will be a major claw back on the independence of the Judiciary. It will create a lot of fear among judges. We are proposing that the prevailing situation where judges are suspended only after a recommendation has been made to form a tribunal should remain as it is. That is why we have termed that particular amendment to the Constitution as being unconstitutional.

Mr. Speaker, Sir, we also looked at Article 203. On this particular one, there is a proposed amendment to this Constitution in Clause 50, where there is a new clause (n). I will read that clause to the House.

It states-

“Article 203 of the Constitution is amended-

(a) In Clause 91) by inserting the following new paragraph immediately after paragraph (k)

“to ensure that the average amount of money allocated per person to a county with the highest allocation does not exceed three times the average amount per person allocated to a county with the lowest allocation.”

Mr. Speaker, Sir, if you look at the findings of the Committee, and this is at page 166 of the Report, we have analysed this provision *vis-à-vis* Article 217 of the Constitution, which provides that in every five years the Senate will come up with a resolution to determine the basis for allocating money among counties.

We had a simulation that was done to us by the Parliamentary Budget Office (PBO). If we were to apply that new clause, 50(n), there are a number of counties that will automatically be disadvantaged.

Tana River County, for example, will immediately lose Kshs2.3 billion if that clause takes effect. Samburu County will lose Kshs1.2 billion; Marsabit County, Kshs1.2 billion; Isiolo County, Kshs1.1 billion; Turkana County, Kshs435 million and Taita/Taveta County will lose Kshs368 million.

You may not see this debate being vibrant in the National Assembly because this is a matter that is handled almost exclusively by the Senate. It is us who understand that our role is to defend county governments and the people who reside in those counties.

Mr. Speaker, Sir, when we looked at all these factors and considering that the fact that the last resolution that was passed by this House stated clearly that no county should be allowed to lose money, we made a conclusion that this proposed Article 203(n) will be in clear conflict with the provisions of Article 217 of the Constitution. We said that should this Bill pass, the Executive and Parliament will be called upon to put mechanisms that will ensure that no county is disadvantaged.

We made a conclusion that, that Article in our opinion, is problematic, undesirable and that, it will interfere with the provisions of Article 203(1) of the Constitution, more so, on issues of affirmative action, whereby some of the counties that have been lagging behind in development must be supported with more resources, so that they catch up with other parts of Kenya.

We must also ensure that there is a stable and predictable allocation of resources to counties. If these counties were to lose this money, it will make their budgeting and financial planning to be almost impossible.

Mr. Speaker, Sir, the other Clause that we looked at is on the proposed amendments to Article 230. This is the one that deals with the Salaries and Remuneration Commission (SRC). This is reflected in Clause 61 of the Bill.

If you look at the current architecture of Article 230 of the current Constitution, the composition of SRC includes one representative of the Parliamentary Service Commission, one representative of the Public Service Commission, one representative of Judicial Service Commission, one representative of the Teachers Service Commission, the National Police Service. Then, the Senate picks one representative on behalf of the county governments.

We also have one representative of trade unions, one representative of employers and one representative of the Joint Forum of Professional bodies.

Mr. Speaker, Sir, having listened to the stakeholders – I must say that one of the stakeholders was Sen. Kasanga, who appeared before us – an issue arose that this proposed amendment to Article 230, where all these bodies will be removed and replaced with seven Commissioners, picked by the President and then vetted only by the National Assembly and not by the Senate, yet they will set terms for both Members of the National Assembly and the Senate is highly objectionable.

We also looked at how the SRC will be able to determine terms for professionals, including engineers and quantity surveyors providing service to national Government and county governments. We found that this Article will most likely be very problematic. Therefore, we propose that, in future, they will be need to relook at this particular Article.

Mr. Speaker, Sir, the other point that was very controversial is the Second Schedule of this proposed Bill. On the issue of the proposed 70 constituencies, we looked at it from two angles. The first one is the process leading to the creation of the 70 constituencies. We went through all the BBI reports, and they are contained in this Report that was tabled before the House.

We looked at the initial taskforce, when they released their first reports. Nowhere was there mention of an additional 70 constituencies, and the 28 counties that were to benefit. The taskforce that was appointed to validate the Report that was released by the first taskforce never mentioned these 70 constituencies anywhere.

Mr. Speaker, Sir, the Member for Bobasi and the Senator for Kitui – I will not refer to the exact page because of time – appeared before the Committee during the public hearings. They took us to task to show them where the BBI team held public hearings, where Kenyans gave views as to which counties should benefit from these 70 constituencies. We had no answers. Therefore, the process that was followed to allocate these 70 constituencies to 28 counties and leave out 19 does not have answers within BBI.

Secondly, we invited two critical bodies; the Kenya National Bureau of Statistics (KNBS) and the Independent Electoral and Boundaries Commission (IEBC). When the KNBS appeared before us, they took us through the population data in their possession and the formula of population per constituency that can be used to share out these constituencies.

Their verdict – it is in this Report – was that at least five counties were unfairly denied constituencies. They identified Kitui County, Kisii County, Meru County; at least in total, five counties. They said that if we used a proper formula, those counties should have been allocated additional constituencies.

When we asked the IEBC whether they were consulted or there were any public hearings before these constituencies were allocated to these 28 counties, they appeared before us and stated – it is in this Report – that they were never consulted or involved in the allocation of these 70 constituencies. What is even serious is that the IEBC told us that the BBI taskforce---

Mr. Speaker, Sir, I hope you can add me ten more minutes.

*(Loud consultations)*

**The Speaker** (Hon. Lusaka): Order! Not everybody is the Speaker. I hear and I am following. I will add him five minutes.

**Sen. Omogeni:** Thank you, Mr. Speaker, Sir. Those who will read the Report can look at the submissions by the Senator for Kitui and the Member for Kisii, at Page 147.

The IEBC told us that under the provisions of Article 88 (4) and Article 89 (5) and (&), they are the only ones that have the constitutional mandate of delimitation of boundaries. Even then, they told us that they only do so after they have accorded an opportunity to all Kenyans to make their views on those constituencies.

They also told us that even after the exercise has been concluded, invoking the provisions of Article 89 (10), they still must give another leeway for any dissatisfied Kenyan to go to court and challenge that process.

The Judiciary is given a period of three months to resolve that dispute. The IEBC told us that what is provided in the Second Schedule, which gives them a period of six months to undertake that process, is not practically possible.

Taking into account all those provisions and the fact that a Schedule cannot purport to amend substantive provisions of the Constitution, the Committee arrived at a finding, which is in this Report, that the Second Schedule that proposes to allocate constituencies to 28 counties and leave out 19 is unconstitutional and of no effect.

The question then arises: With all these problems, what must we do as a House? When I read the American history, there are two ways you can interpret the Constitution. You can choose to interpret the Constitution in so much a restrictive manner that this House will more or less be moribund.

You can also interpret this Constitution in a manner that is so liberal that you are able to achieve two purposes. One, you are able to correct some of the mistakes that this Report has pointed out to the House. Two, you could raise your hands and say: Our role as the Senate is to be paper-pushers, we tick boxes and say that anything that is unconstitutional will be handled by the courts.

The choice will be made by us, Senators. We have drawn the attention of this House that Article 94 was given to us by the people of Kenya to exercise legislative authority on behalf of the people we represent.

If you read Article 1 on the supremacy of the people, it says:

“All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.”

If you invoke Article 94, you are not interfering with the supremacy of the people of Kenya. You are acting in accordance with this Constitution.

Mr. Speaker, Sir, I want to appeal to the House to correct the errors that are appearing on this Bill before it is released to Kenyans for voting. It will be very undesirable for the National Assembly to pass a Bill with clauses that differ from this House before we do the corrections.

With those remarks, I move.

**The Speaker** (Hon. Lusaka): Sen. Kang’ata, proceed.

**Sen. Kang’ata:** Thank you, Mr. Speaker, Sir. I rise to contribute on this debate. I will raise issues on the constituencies, errors appearing on this document before the Senate and the cost of this Bill once it goes through.

I will also discuss the issues of the so-called, one man, one shilling and one vote. I will also look at the effect of an expanded Parliament. I will finally discuss as to whether this House has any powers to amend this document.

I start with the issue concerning the constituencies and I will look at it from a technical view and as a substantive issue. Let me start with the technical issue concerning that Schedule.

Mr. Speaker, Sir, there are several Schedules in this Constitution of Kenya (Amendment) Bill. The First Schedule on counties clearly indicates that it has been inserted there pursuant to an Article. The First Schedule says it is pursuant to Article 6(1) of the Constitution. The Second Schedule indicates that it has been inserted pursuant to Article 9(2). It goes like that up to the last Schedule.

One of the problems in this proposed Schedule is that it does not indicate it has been inserted there pursuant to what Schedule. We have several Schedules in several

pieces of legislations. All Schedules must indicate they have been inserted there pursuant to what Article or Section of the substantive law.

Once this one is ratified by Kenyans, it will hang there. Therefore, as currently advised by other people who appeared before us, it may be a superfluous Schedule.

Nevertheless, let me go to the substantive issue concerning constituencies. I come from Mt. Kenya region and we are happy that Kwale County has been given two constituencies; Mombasa, three constituencies; the good people of Kilifi, four constituencies; and, Bungoma, three constituencies.

I am just wondering that Embu County has been given one; Kirinyaga County, one; Murang'a County, one; Tharaka Nithi County, zero; Nyandarua, zero; and Nyeri, zero. What did those of us who come from Mt. Kenya do to the promoters of the Building Bridges Initiative (BBI)?

Mr. Speaker, Sir, I have looked at Nyeri County which has about 500,000 registered voters. Kwale County has about 250,000; Murang'a, 600,000; and, Bungoma County, 500,000. Some people have argued that you should not consider voters but population as set out in Article 89 of the Constitution. Fair enough, Murang'a has about 1.1 million habitats as per the 2019 Census but it has been given only one extra constituency.

Again, Article 89, which talks about delimitation of constituencies, nowhere does the term counties appear. It is all about constituencies. Therefore, the criteria should not have been counties but constituencies. The effect of this Bill will mean a Constituency like Kieni, which has over 100,000 registered voters, over 200,000 residents and a huge surface area will not get an extra constituency.

Gatanga Constituency in Muranga County has almost 100,000 registered voters, 200,000 residents will get only one extra constituency. What of Kinangop Constituency, Nyandarua County, a huge and highly populated Constituency? Since Nyandarua has not been allocated a Constituency by BBI, it will not get an extra constituency. For that reason, I am not so sure whether that Schedule is fair to the many counties of Mt. Kenya region.

Mr. Speaker, Sir, allow be to now go to the errors. As correctly stated by the Co-Chair of the Committee, we have two Bills. One is before the National Assembly and the other one before the Senate. Those Bills are different. Clause 13 of the one before the Senate makes reference to Article 13(b) (ii). The one before the National Assembly makes reference to a proposed Article 13(b)(iii).

The second difference between the two Bills is that, the marginal notes of Clause 48 in reference to Article 188, is different in the Bill before the National Assembly. The third difference between the two Bills is on the Second Schedule. The one before the Senate refers to Paragraph No.1 in Article 89(7). The one before National Assembly refers to Article 87(7) in its paragraph No.1.

Those are not simple typographical errors, particularly the one that refers to Article 89(7). This is because we all know that one of the most contentious debates in this Bill is on the proposal to interfere with the powers of the Independent Electoral and Boundaries Commission (IEBC). The error in Article 89(7) clearly touched on Article 89, which refers to powers of IEBC.

I wonder if we are to endorse, which one will go to the referendum. Remember majority of County Assemblies – more than 30 – passed the erroneous Bill, the one

before the Senate. The one that is IEBC certified is the one that was passed by majority County Assemblies.

Therefore, one can currently argue that this Bill does not meet the Constitutional requirement as provide in Article 257---

**The Speaker** (Hon. Lusaka): There is a virtual point of order from Sen. Kasanga.

**Sen. Kasanga:** On a point of order, Mr. Speaker, Sir. Yesterday, Sen. Sakaja rose on a point of order as to whether his report could also be discussed before the debate started. We are following very closely and it would have been good for us to hear the dissenting opinion, before the debate now fully opens to Members. It is because of this issue of what is constitutional or unconstitutional.

Mr. Speaker, Sir, I am begging if it is possible for us to hear the dissenting view of the minority report as well.

**The Speaker** (Hon. Lusaka): I do not see Sen. Sakaja in the House. When he comes, we will give him a chance to present his part of the report.

Proceed.

**Sen. Sakaja:** Mr. Speaker, Sir, I am attending virtually.

**Sen. Kang'ata:** Mr. Speaker, Sir, allow me to raise the issue of the cost of BBI.

There is a report that is part of the annexure of the documents that were presented before the joint JLAC. It was prepared by none other than the Parliamentary Budget Office (PBO). It is dated 1<sup>st</sup> October, 2020; it indicates that once this BBI passes, Kenyans will be forced to pay an extra Kshs20 billion per year to shoulder the burden of BBI.

For example, the National Assembly will have 453 Members while the Senate will have 94 Senators. This does not factor in nominated Members of the National Assembly who need to be paid salaries, provided for car grants, *et cetera*.

The Kshs20 billion is enough money for us to buy vaccines and ensure each and every Kenyan has a Covid-19 vaccine. You have also not taken into account the cost of conducting the referendum. There has been estimates that it will need Kshs14 billion to be conducted. Once we pass the BBI, the Kenyan taxpayer will incur extra Kshs20 billion annually.

Mr. Speaker, Sir, I now go to the issue of one man, one shilling, one vote in the proposed amendment to Article 203 (a).

I was a great proponent of that idea. However, when I looked at the proposed Article 203(n), it does not speak to what I was fighting for. I thought this proposal will embed the idea that county money should be shared by factoring the issue of population and giving it the right weight. However, this one is about per capita distribution of county resources which should not be given more than a three factor.

For instance, Murang'a, Nyeri, Nyandarua and Meru counties will still have amongst the lowest per capita distribution of county resources. Therefore, let no one say that this Article 203(a) embeds the idea of one man, one shilling.

Mr. Speaker, Sir, allow me to go to the proposal of the expanded Parliament.

We have 67 hon. Senators while the National Assembly has 290 elected Members plus the women representatives and 12 other nominated Members. Once we expand the Senate, apart from the element of cost, there will be practical problems in this House.

One, we will have to build new offices to accommodate the new Members. Two, it will take a long time for each Member to catch the eye of the Speaker. I am not so sure



whether we will give adequate representation to the people. That problem will be more acute in the National Assembly because they will have a huge number.

Mr. Speaker, Sir, there was a time I went to China when I was in the National Assembly. I was surprised that it has 2000 MPs in a population of 1.4 billion people. When you divide that population *vis a vis* the representation of the Chinese parliamentarians, you will find that one MP represents about 500,000 persons. However, in Kenya, we are proposing one MP to represent 20,000 persons yet we are a poor country.

The United States of America (USA) has 100 Senators in a population of 300 million. We are now proposing to have 94 Senators in a population of about 47 or 48 million. As a country, we need to concentrate on issues that bedevil us, for example, issues of economics. We must ensure not to put all our resources to expand the Legislature. We must remember that we represent people. We should not make this society heavy on the bureaucratic element. That is what this BBI is proposing.

Mr. Speaker, Sir, allow me to go to the last issue on the role of this Parliament. Allow me to read Article 3 (1) of the Constitution. It states-

“Every person has an obligation to respect, uphold and defend this Constitution”

It means that the hon. Senators from Makueni, Kisii and Nandi have an obligation to defend this Constitution. When we are told to manifestly pass unconstitutional amendments, we are breaching Article 3(1) of the Constitution.

Mr. Speaker, Sir, I have tasked my mind to read Article 257 of the Constitution on the so-called popular initiative. When I look at it, there is no express positive law that prohibits this House from proposing amendments to this Bill. Therefore, we have a legal duty pursuant to Article 3(1) of the Constitution as read with Article 257, which does not bar this House from doing away with all unconstitutionality that are contained in this Bill. We should ensure that we take a document that is constitutional and fair to every person.

Mr. Speaker, Sir, the first major review of the Constitution in the country was done in the 1963 Constitution making process. There was Lancaster One and Two. Why can we not adopt the same method and have a constitutional conference like they did in 1963?

In 1969, we did not have a consultative conference for constitutional review. That is why the worst Constitution that Kenya had was the one of 1969. It killed the Senate, abolished regional governments and concentrated powers on the Executive. This was because of pushing a constitutional review process without consultation.

Mr. Speaker, Sir, ----

**The Speaker** (Hon. Lusaka): Sorry. Your time is up.

**Sen. Kang'ata**: My machine is still working.

**The Speaker** (Hon. Lusaka): Take your seat and try to consolidate your ideas. Proceed, Sen. Khaniri.

**Sen. Khaniri**: Can you hear me?

**The Speaker** (Hon. Lusaka): Yes, we can hear you.

**Sen. Khaniri**: Thank you, Mr. Speaker, Sir, for giving me the opportunity to make my comments on this important Bill.

**The Speaker** (Hon. Lusaka): Sen. Khaniri, put on your camera.

**Sen. Khaniri:** Mr. Speaker, Sir, I echo the words of the Senators who have spoken before me. This is a momentous occasion for this Parliament; both the Senate and the National Assembly.

**The Speaker** (Hon. Lusaka): Sen. Khaniri, we cannot hear you. You need to increase your volume.

**Sen. Khaniri:** Mr. Speaker, Sir, am I now audible?

*(Sen. Murkomen spoke off the record)*

**The Speaker** (Hon. Lusaka): Yes, we can see you now. Order, Sen. Murkomen! You may now proceed.

**Sen. Khaniri:** Mr. Speaker, Sir, I was saying that this is a momentous occasion for the Houses of Parliament. As I said yesterday morning when I was moving that we adjourn for Members to get an opportunity to look at the Report--- This is probably the most important process canvassed by the Senate---

**The Speaker** (Hon. Lusaka): Order, Sen. Khaniri. Put on your jacket. Order, Sen. Khaniri! It seems he cannot hear me!

**Sen. Khaniri:** Mr. Speaker, Sir, this document is touching on amendments to our Constitution, a document that we hold so dear and one if we alter---

**The Speaker** (Hon. Lusaka): Senator, you are now muted. Put on your jacket and proceed. It looks like we now cannot hear him.

As he sorts himself out and puts on the jacket, let me give this opportunity to Sen. Petronila Were.

**Sen. Were:** Thank you, Mr. Speaker, Sir, for this opportunity to contribute to this constitutional amendment Bill. I begin by thanking the Joint Committee that came up with a very good and comprehensive Report. They also consulted widely. They had various experts whom they consulted when they were coming up with this Report.

Knowing that this Committee was co-chaired by senior counsel, they have taken into consideration serious issues of constitutional nature that we need to look into as a House. Aside from the issue of errors in the two different Bills in the National Assembly and the Senate, there is the issue of constituencies and whether a task force can do delimitation of boundaries and give us constituencies. That has been declared unconstitutional by this Joint Committee. It is up to us, as a House, to see whether we need to correct some of these unconstitutional provisions in this Bill.

Mr. Speaker, Sir, I have also gone through the whole of Article 257 and there is no where it expressly says that Parliament cannot change the provisions of an amendment Bill brought about by popular initiative. The spirit of Article 257 is that it is an amendment brought by the people. When we talk about 'by the people', assuming there was no BBI, those are just ordinary Kenyans. They are bound to make mistakes because they are not a legislative arm. We are the people who make legislative interventions. So, we should have an opportunity to make these corrections.

The spirit of Article 257 indicates that we cannot change the substance or the will of the people, but it certainly does not say that we cannot change the form or the typographical errors that are in this Bill. I want to agree with my colleagues that we need not run away from this responsibility. We shall be judged harshly. Let us make the necessary legislative interventions as a House, first to correct the error of the two Bills. I

do not know if it is too late, but we would have preferred to allow the National Assembly to do their Bill, because that is the one that is assumed to be correct, then they bring it here the way we have always done. We can then look at it as the Senate. If it is too late, the leadership will tell us.

Mr. Speaker, Sir, the Memoranda of Objects and reasons of the Bill, and I am reading from the Report in Index II, the promoters of the Bill, that is the Building Bridges Initiative indicated that the Bill seeks to address certain issues such as: Address issues arising from the implementation of the Constitution of Kenya, 2010, specifically the need to resolve the issues of divisive elections, promote gender equity in governance, strengthen the structure of devolution, increase resource allocation to counties and broaden mechanisms for all the people of Kenya to benefit. That is what we are calling shared prosperity. There is also to harmonize certain roles and functions of the bicameral legislature, that is the Senate and the National Assembly.

My question is: Has the Bill really harmonized the roles and functions of the bicameral legislature? I do not see that having been achieved. It is only that the courts have helped us look like we are working in harmony by the Speakers of the National Assembly and the Senate agreeing. However, this is after certain Bills were threatened to be thrown away. That is when they agreed to work with us. So, I do not see how this Bill has helped us harmonise our relationship with our young brothers and sisters in the other House. I do not want to call them “small House”, but they are just younger than we are.

Mr. Speaker, Sir, the other issue was on strengthening the structure of devolution. Having listened to the Co-Chair of the Joint Committee, they have actually weakened the Senate a great deal yet the role of the Senate is to protect counties and their governments. When you weaken the Senate, you are basically weakening devolution and the counties for that matter.

This Bill was also supposed to resolve the issues of divisive elections. I have not seen any focus on the reforms of the Independent Electoral and Boundaries Commission (IEBC), to make sure that the IEBC deals with issues of divisive elections other than expanding the Executive which will basically give the top tribes positions. I am saying this as a member of one of the top tribes. However, it will not resolve the issues of divisive elections. Resolving divisive elections includes making sure that we have a credible and fair electoral process. We did not touch on issues that try to align or restructure the IEBC, which has the main mandate of conducting elections.

Mr. Speaker, Sir, the vetting of Ministers, Permanent Secretaries and the other appointees by the Executive has been removed completely from this Bill. This is something that was important for us to involve Kenyans, whom we represent, in deciding who will implement the policies that we come up with as a country.

The Co-Chair also touched on the issue of revenue allocation and talked about the issue of per capita as a consideration in allocation of resources. We were told that there are seven counties that will lose money if we apply that formula. If we apply that formula also, the role of the Senate in deciding what formula will be used will also be taken away. That is another thing that will weaken the Senate.

Lastly, let me speak to the issue of gender equity. This Bill, which we can call the BBI Bill, was supposed to promote gender equity in governance. What it has done, other than transferring women from the National Assembly to the Senate, where they have only been brought here so that they can vote, because the nominated women in the Senate now

do not have a vote--- This women will leave the National Government Affirmative Action Fund (NGAAF) on the other side, a Fund that they fought for and held. Moving Women Members of the National Assembly to the Senate also means that the women who will be appointed as Ministers, Deputy Prime Ministers and Prime Minister will be nominated.

Why would we rather not have women Senators, so that we achieve the gender parity in the Senate, but retain the women representatives in the National Assembly, as they are, so that we do not lose the gains we made as women in the fight for gender equity? Therefore, I do not see how this Bill has resolved the issue of gender equity. We will still have women going to vie, simply to be nominated. We already know that in most cases, the nomination slots do not necessarily go to deserving cases.

Article 179 is being amended to allow Members of the County Assemblies (MCAs) to summon governors. This is a role that we have been proud of, as the Senate. This is, therefore, another way of weakening the Senate. This Bill actually does not strengthen the structure of devolution, but weakens it by weakening the Senate.

Mr. Speaker, Sir, I support.

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

**The Speaker** (Hon. Lusaka): There is a point of intervention by Sen. Nyamunga.

**Sen. Nyamunga:** Mr. Speaker, Sir, I am sorry to interrupt by brother, Sen. Murkomen. I just need some clarity because, in my view, I know that we should be debating the BBI Bill. I am not so clear whether we are debating the BBI Bill or the Report. I need some clarity. Which one are we discussing?

**The Speaker** (Hon. Lusaka): We are actually discussing the Bill.

Proceed, Sen. Murkomen.

**Sen. Murkomen:** Mr. Speaker, Sir, I know that we are debating the Bill, but I sympathize with my sister, Sen. Nyamunga, and I know where that comes from. Sen. Petronila said that she is supporting the Report. There is a varied understanding of the Report in terms of its conclusions. The Chair of the Committee on Justice, Legal Affairs and Human Rights said that it should be amended. Therefore, when one is supporting, I understand the contradiction.

Mr. Speaker, Sir, first of all, I would like to say that this is a very historic moment. The time we have does not do enough justice to the subject matter before us. But be it as it may, I will try my best to make my few contributions to this very important debate in the country.

I stand to oppose this Constitutional Amendment Bill. My opposition for this Constitutional Amendment Bill is very clear. It starts with the basics. The basics for me is the understanding of the popular initiative process of constitutional amendment. There is a reason there are various processes of amending the Constitution. One is through Parliament and the other is through popular initiative. Popular initiative, from the tautological understanding of our Constitution, 2010 – and if you read the Yash Pal Ghai Constitution Review Commission Report--- I had the privilege of working for the Constitution Review Commission for a short period of time. Most of the Kenyans are saying that apart from the process of amending the Constitution through Parliament, where the Executive and Legislature have a say, we need another process that a common *mwananchi* can propose for amending the Constitution.

I am very skeptical of this process because the process of establishing the BBI Committee was not a constitutional review committee. Indeed, in terms of composition of its membership and the structure of the appointment of the BBI Committee, it was meant to look at certain issues affecting the country, particularly, we were told that it would go around the country and find mechanisms of uniting the country. We are grateful that one of the Members of the BBI Steering Committee is seated here as a Senator. I must confess that I am aware of how she ended up being in that BBI Committee - the Senator of Machakos. All that process was not intended to amend the Constitution.

Mr. Speaker, Sir, the point to make here is that even if you go to the members of the Committee - the late Sen. Haji was here, and others – the process was not intended to be a constitution making body. It was muted and we must accept that perhaps the intenders of the establishment of the BBI Committee knew what they were doing, but the rest of the country was not made aware of the objective of the BBI process. We were told that we had to unite the country and collect views.

I am glad that the Chair of the Committee on Justice, Legal Affairs and Human Rights has made it clear that even some of the proposals – and the Report captures – on amending the constituencies was never proposed by anybody anywhere across the country. That means that this process was achieved through ‘in my own opinion’ deceit. The people of Kenya were deceived that this was a process intended at achieving a different objective, but those who had ulterior motives wanted to amend the Constitution.

Why would people who have the disposition of the institutions of Parliament and the Executive go and use a process that was for common mwananchi to pass these constitutional amendments? I believe that the popular initiative in this process has been misused. It has been captured by those who have powers of the State and it will be a terrible thing for us to sanitize this approach. This is because I believe that future Presidents will be doing exactly the same to achieve what they will call and tell Kenyans, it is a legacy. There is no legacy here; this thing is about deceit and deceiving the people of Kenya.

Mr. Speaker, Sir, I want to agree with Sen. Orengo, that Article 257 of the Constitution does not bar any of us and Parliament from amending this Constitution. I would like to read Article 257 (8). It says:

“A Bill under this Article is passed by Parliament if supported by a majority of the members of each House.”

If this House can pass a Bill, then it also retains the right to refuse to pass or fail the Bill.

I have heard some arguments from certain lawyers – and they are entitled to their opinion because this is a matter of interpretation – and I disagree with them. They argue that if Parliament does not pass the Bill, it is inconsequential because the will of the people is supreme; that this is about popular initiative and, therefore, the people will have the final say. It was not the people who initiated the amendment of the Constitution. Despite the fact that you collected four or five million signatures does not mean that it is the people who initiated the popular initiative.

Few people in the form of the BBI secretariat and “Handshake” partners proposed the amendments, but they want to seek for people’s signatures to pass them. If you make an argument that Parliament passing or failing the Bill is inconsequential, why do you not make the same arguments that even if they fail to be passed by 24 county assemblies, it is inconsequential? This is because it does not make it more of the people when it is county

assemblies and less of the people when the Senate and National Assembly refuse to pass the Bill.

My argument is that Parliament has a responsibility and the failure of both Houses of Parliament to pass the Bill, has the consequence of failing that Bill and cannot proceed to the Referendum. I will back my argument with Article 257 (9), which says:

“If Parliament passes the Bill, it shall be submitted to the President for assent, in accordance with Article 256 (4) and (5).”

Assuming we were not amending the protected sections of the Constitution, that is, on devolution, structure of Parliament and any section touching on human rights or representation; they were just amendments that are not protected under Article 255 and Parliament fails to pass them---

Do you want to tell me the President was going to sign it into law even if Parliament did not pass it? There must be consequences if both Houses of Parliament fail to pass the Bill.

Mr. Speaker, Sir, I want to back my argument with Article 257(10) which says:

“If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in Article 255 (1), the proposed amendment shall be submitted to the people in a referendum.”

My argument is that for the Bill to go to a referendum, either both or at least one House of Parliament passes it. If both Houses of Parliament fail to pass it, my interpretation of Article 257(10) is that the Bill collapses. People should not fear to collapse this Bill because we have already debated here.

The Co-Chair of the Committee, the Senate Minority Leader, Sen. Were and all the people who have contributed here have referred to glaring mistakes in this Bill. I am coming to that argument in few minutes.

This question was put before the Supreme Court, but the Supreme Court ran away from that responsibility of giving an Advisory Opinion to Nandi, Kericho and Kajiado county assemblies. The Supreme Court transmitted that question to the High Court where it is pending. My argument is that either both or at least one House of Parliament passes it before we can discuss referendum matters.

Mr. Speaker, Sir, that brings me to the second argument. Many people who have contributed, including the Co-Chair, have talked about unconstitutional constitutional amendments. That is a paradox by itself.

Constitutional law experts and practitioners, many of whom are in this Chamber, will tell you the Constitution is what is called in law, the *grundnorm*. It is the final law by itself. However, can the final law be unconstitutional against itself? Can you say, for example, an amendment is unconstitutional? What if that amendment passes and becomes part of that *grundnorm*? Can it then still be unconstitutional?

The new thinking in constitutional law practice is that even though the Constitution is the *grundnorm*, there are certain principles of the Constitution that carry supra-constitutional status. That is why you hear arguments that the basic structure or the foundational principles of the Constitution.

There are particular principles of the Constitution called *use cogent* in Latin. These are the peremptory norms which you cannot derogate against. For example, you cannot amend the Constitution to legislate torture, or legalise genocide. In the same breath, the constitutional structures themselves must protect the basic norms.

What are the basic norms in our Constitution? The basic norms in our Constitution are provided for in Article 10. They include values and principles of governance. Principles include the rule of law, patriotism, national unity, sharing of devolution of power, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised. If these are the basic norms, then we cannot derogate against them.

The question we should ask ourselves is: Can the amendments proposed in BBI Report pass the test of protecting the basic principles and values of the Constitution? Put in another way; is it possible for us to bring constitutional amendments that contradict the basic norms of the Constitution itself?

Article 81 says we must have gender equity. All institutions of governance, including the Senate and the National Assembly, must have at least one-third of its membership from either gender. I do not know why the womenfolk here keep talking about many gains for women in this Bill. The BBI Report says in 2032, if we will not have achieved a third of women in the National Assembly and County Assemblies, that will be the end of gender principle in our constitutional order. For example, if Elgeyo-Marakwet County Assembly elects 20 male MCAs, there will be no nomination in 2032. This is because the principle that is the BBI report will only operate for 10 years.

Mr. Speaker, Sir, let us ask ourselves: Can we provide an amendment that takes away that gender principle and still retain Article 81 of the Constitution that says at least a third? In 2032, we will have a problem. This amendment is sitting on what foundation?

Mr. Speaker, Sir, I am a bit disoriented because I have seen time is running out. However, I would like to give one more example. There is a provision that says there must be equity in share of positions in Government and representation in constituencies. Is it then fair to say that responsibility is left to IEBC in Article 89 of the Constitution? However, the Schedule of the Constitution waives some 70 constituencies from the discussion in the principles of Article 10 that it must be distributed fairly.

The same question would be asked in terms of the provisions of the Ombudsman position. I saw the Chairperson of the Committee on Legal Affairs and Human Rights struggling to justify that the Ombudsman will be there investigating and intimidating judges. He will be calling judges and telling them if you do not this or that, you will be removed. However, the Constitution allows the Judicial Service Commission (JSC) to retain its power to investigate and interrogate judges. How will the two provisions sit together? How do you bring constitutional amendments that contradict the basic structure and foundation of the Constitution in terms of the values and principles?

Mr. Speaker, Sir, it is these glaring constitutional contradictions that you find in the Salaries and Remuneration Commission (SRC) provisions as the Co-Chair has talked about, that you find in Article 203 or the Constitution. Article 217 says on division of revenue, there must be equity and you must take care of the constituencies and counties that have been marginalised for long. You then bring a constitutional amendment that curbs the resources they will get in terms of per capita and population.

Is it fair after the effort that we put last year on division of revenue that now we go back and take away these gains from counties like Lamu, Tana River, Wajir and Garissa? Can we sit here happily and say these counties can lose money anyway and we are putting that principle in the Constitution? I understand why the Co-Chair was struggling by saying we will leave that to interpretation.

Why would we put ourselves in this kind of situation where we are amending the Constitution, knowing too well that most of the provisions are assaulting the basic structure and foundation of the Constitution, so that then a few people can achieve their political objectives at the expense of the principles and values of the country?

Mr. Speaker, Sir, time is too short for me to complete my argument. May I request for only two more minutes?

**The Speaker** (Hon. Lusaka): No, just finish. You are wasting what you already have.

**Sen. Murkomen:** Mr. Speaker, Sir, I know that it will end in a short while.

My submission is that the Constitution does not prohibit this House or the National Assembly to amend this Bill.

I have read Article 1 to the last Article and the Schedule and these provisions are not prohibited. I would like to tell Sen. Orengo and all Senators who are here that Elgeyo-Marakwet County and Rift Valley Region where I come from losses nothing if this Bill passes as it is. However, I am not the Senator of only one region. We must look at the country as a whole.

I come from a region which has received a fair share of extra constituencies and we are happy with that. However, I am still unhappy with the Bill because I am a Senator of Kenya. I believe that all of us should be well. No one should look at me and my political disposition or where I come from and think that there are certain things that we will lose.

Mr. Speaker, Sir, I was in the 'yes' campaign in the 2010 Constitution-making. I worked with Sen. Orengo and we passed the Constitution. However, the people who benefited most when the Constitution was passed, including the Deputy President, were in the 'no' campaign. Being in the 'no' campaign and defending basic issues that are in this Constitution does not mean that that you will be at a loss.

So, if people force us to pass this Constitution, I go on record as one of the citizens of this Republic to say these amendments in the BBI report are clawing back the gains we achieved with the Constitution of Kenya 2010 in terms of the independence of the Judiciary, principles of separation of powers and bringing matters related to the Executive to Parliament so that we will have one constituency that will have a Minister while another that does not. This will create inequality.

Mr. Speaker, Sir, if we really wanted to change the structure of Government, why did we not go straight to the parliamentary system of Government? How will we seat the amendments we brought here for certain few MPs to become Cabinet Ministers---

**The Speaker** (Hon. Lusaka): Your time is up!

*(Sen. Murkomen spoke off-record)*

Order! You are not on record.

Senators, as you prepare to speak, please, have a maximum of 20 minutes in your mind so that you consolidate what you want to say within the 20 minutes.

**Sen. Khaniri:** Thank you, Mr. Speaker, Sir. I hope you can now hear me clearly?

**The Speaker** (Hon. Lusaka): Yes. We can hear you. You are now okay.

**Sen. Khaniri:** I once again thank you for the opportunity to make my comments on this Bill. As I had stated earlier, this is probably the most important Bill that this



Parliament will discuss in its lifetime. This is a Bill that touches on amending the Constitution of Kenya, 2010, a document that, as a country, we hold so dearly.

Mr. Speaker, Sir, I listened to Sen. Orengo yesterday and he narrated that we achieved the Constitution of Kenya, 2010 through blood and sweat. There are people who paid the ultimate price and lost their lives for us to have this Constitution. Therefore, any attempt to amend it must be a serious amendment that makes sense to Kenyans.

As we debate this Bill, let us have in our minds the people that elected us to represent them. If we are amending it, it should not be for a certain group of individuals. It should be for the good of the whole country.

I have seen many good things in this Bill. However, there are other things that, in my opinion, we must be given an opportunity, as Parliament, to make amendments.

I have listened to those who support the Bill without amendments and they are quoting Article 257 of the Constitution. I have read it in and out and I do not see anywhere where it bars us from making amendment.

Sen. Murkomen read Article 257(8). For clarity, there is nothing that bars us from making amendments and correcting the things that are not right in this Bill so that we send a refined Bill to Kenyans in the referendum.

Mr. Speaker, Sir, Article 257 of the Constitution has 10 sub-articles.

The first sub-article states that-

“(1) An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters”

That was done.

(2) A popular initiative for an amendment to this Constitution may be in the form of a general suggestion or a formulated draft Bill.

(3) If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill.

(4) The promoters of the popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission (IEBC), which shall verify that the initiative is supported by at least one million registered voters.”

That was done.

“(5) If the IEBC is satisfied that the initiative meets the requirements of this Article, the Commission shall submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission.

(6) If the county assembly approves the draft Bill within three months after the date it was submitted by the Commission, the speaker of the county assembly shall deliver a copy of the draft Bill jointly to the Speakers of the two Houses of Parliament with a certificate that the county assembly has approved it.

(7) If a draft Bill has been approved by a majority of the county assemblies, it shall be introduced in Parliament without delay”

That is what you did yesterday, Mr. Speaker, Sir.

“(8) A Bill under this Article is passed by Parliament if supported by a majority of the Members of each House”

(9) If Parliament passes the Bill, it shall be submitted to the President for assent in accordance with Article 256 (4) and (5)”

Mr. Speaker, Sir, where in Article 257 does it state that as a Parliament, we cannot make amendments to this Bill? This is a good document but it has its flaws. Let us be allowed to correct the flaws that are in there which are not many.

Senior counsel, Sen. Omogeni, who is a man I believe in, has tabled a report on the same and said that some of the clauses in the Bill are unconstitutional.

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

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

Madam Temporary Speaker, I insist that for us to support this Bill, we should be allowed to make those necessary amendments particularly the creation of constituencies which is in the Bill as the Second Schedule.

We want to increase constituencies. However, our Constitution is clear on how to increase and distribute them. It is the responsibility of the IEBC.

Why are we taking away the responsibility that has been given to the IEBC in the Constitution? The way these constituencies have been distributed is very wanting. I cry for my people of Vihiga County. We strongly believe that if we will have additional 70 constituencies, there is no way Vihiga County can be left out. We need a constituency in Hamisi. We have made proposals for Hamisi to be split into two. We believe that if justice was done, then for sure we would have gotten a constituency as the people of Vihiga in Hamisi.

Madam Temporary Speaker, the other thing that should be rectified in the Bill is that Kenyans are already burdened by the high wage bill. I do not see the justification of increasing these constituencies. Moving the number of constituencies from 290 to 360 is just adding on to Kenyans more burdens. This will result in over representation.

We should look at other jurisdictions and compare ourselves with them. As Sen. Kang'ata said, comparative jurisdictions are the USA, the UK, China and so forth. The wage bill is already too high. We cannot afford to increase the number of Members of Parliament in the National Assembly from 290 to 360 and the Senate from the current 67 to 94. I am opposed to this. If we are given an opportunity to amend, this is one of the amendments that I will propose.

Madam Temporary Speaker, the other issue that I will be proposing to amend is that, yes, it is a good thing that we are creating the Office of the Ombudsman. However, we made many gains in the Constitution of Kenya 2010 whereby there is clear separation of powers. We cannot create the Office of the Ombudsman and then say that the Ombudsman will be nominated by the President. Where is the separation of powers? Where is the independence of the Judiciary? Therefore, it is a good thing that we are creating the Office of the Ombudsman, but the way he or she should be appointed should be amended so that it is not the President nominating.

Madam Temporary Speaker, as I said earlier, there are many good things in this Bill. We do not want to throw it out, like Sen. Murkomen is proposing. There are many gains. If we are allowed to make the amendments, we will be able to pass this Bill and take it to Kenyans who I am sure will pass it.

The Bill is introducing new clauses that will be important to our people. I am particularly impressed by the introduction of Article 11(a) on Economy and Shared Prosperity. It says that-

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

2(d). The State shall promote-

An economic system that supports small and micro enterprises;”

This is a key introduction and a milestone on equitable distribution of resources. The small and micro enterprises are supported by the State, and that is where many Kenyans belong.

Madam Temporary Speaker, the other thing that I am happy about with this Bill is the introduction of the new Article 18A on the Responsibilities of a Citizen.

The proposed Article 18A in (1) and (2) (c) and (d) states that-

“(1) This Constitution recognizes the responsibilities of a citizen as a key building and prosperous, fair and secure nation.

(2) Every citizen has the responsibility to-

(c) practice ethical conduct and combat corruption;

(d) fulfill parental responsibilities towards their children;

Madam Temporary Speaker, for the first time, we are putting in our Constitution matters to do with the fight against corruption. This is adding a lot of value to our Constitution. It is one of the issues that I think we will benefit from if we pass this Bill, but after the amendments that I have proposed.

In unifying the country and for inclusivity, the Bill is creating the Office of the Prime Minister and his two deputies. It is also creating the position of the Leader of Official Opposition. In any democracy, you need a robust opposition that will put the Government to check so that they provide proper checks and balances. Therefore, I think these two inclusions of the creation of the Office of the Prime Minister and his deputies, and the creation of the position of the Leader of Official Opposition will not only provide checks and balances, but it will also ensure that there is inclusivity in the overall Government.

Madam Temporary Speaker, there is a new article that is making the Constituencies Development Fund official and constitutional. There is also introduction of Article 172 on the creation of the Ward Development Fund. For us to have the full gains of devolution, we must have this Ward Development Fund for purposes of equity. This is so that all wards are developed. We know of cases where governors favour some wards where they think the people there support them more than the others. Therefore, the creation of this Fund will ensure equitable distribution of the funds that the Senate fights so hard to go to the counties.

The biggest gainer for me is the increase of funds that go to the counties. We are making it official that the funds that will go to the counties are 35 per cent and not 15 per cent of the total revenue. As I have said before, one of the biggest gains in the Constitution of Kenya 2010 is devolution. That is the inclusion that took care of the common mwanachi. Of course, there are other gains that took care of other groups of people. However, devolution is the biggest gain that we got in the Constitution of Kenya 2010. We must protect it with our sweat and blood and ensure that it works. Gaining

more money for devolution is a step in the right direction in strengthening devolution in this country.

Madam Temporary Speaker, I also want to hail the provision that Members of Parliament can be appointed to the Executive as Ministers. I came to Parliament when we had the previous system where Ministers came from Parliament. Members elected from constituencies interacted directly with Ministers and asked questions. I thought the system worked better than when we refer statements to Chairpersons of committees who are not Members of the Executive and they rely on Cabinet Secretaries to give them answers.

It is important that we have the Executive in Parliament, so that the Executive is answerable to the people of Kenya through their elected leaders who are Members of Parliament. I, therefore, hail the idea of returning Ministers to Parliament, so that they can be accessible to Members of Parliament, who are the people's representative. The idea of returning Ministers to Parliament is noble, so that they can be accessible to Members of Parliament, who are the representatives of people.

Madam Temporary Speaker, I know that my time is almost up. I would like to state that I support this Bill. However, I will only vote for it if we are allowed to make the amendments that we think we should make for it to go through.

**The Temporary Speaker** (Sen. Nyamunga): Sen. Wamatangi.

**Sen. Cheruiyot:** On a point of order, Madam Temporary Speaker. I do not mean to challenge your authority, but there is a reason we come early to queue. I was the first to arrive in this Chamber this morning. The only person who sat ahead of me was Sen. Kang'ata. Since then, five Members, if you include Sen. Wamatangi, have been granted the opportunity to speak. I do not think that is fair.

**The Temporary Speaker** (Sen. Nyamunga): Senator, I will give you the opportunity next.

Please, continue Sen. Wamatangi.

**Sen. Wamatangi:** Thank you, Madam Temporary Speaker. I want to begin by taking the opportunity to thank and congratulate the team that was appointed by this House led by Sen. Omogeni in the Committee on Justice, Legal Affairs and Human Rights. They did the work that culminated in the Report that we have.

In congratulating them, I believe that it is also time when, we, as a House, have to answer affirmatively to the same question that we asked. The question has been asked here continuously: "Does Parliament act or exist in vain as far as this process is concerned?" In my view, this question was answered affirmatively when we first held the discussion in the Speaker's Office, when allowing that Committee to join the Committee of the National Assembly. Indeed, in that sitting, the question was: "Should they invite public participation?" It was arrived at in the affirmative that, indeed, that Committee could invite public participation and collect views, albeit, that information and those views would inform the report of the Committee. It is at that point that the decision was made that Parliament does not exist in vain and is not a conveyor belt in this process.

Even the more fundamental question, as I make my points on the Bill, is that as Senators, do we want then our Committee to have acted in vain in the Report that they have tabled here? The Committee has proffered views, opinions and positions that they have arrived at after deliberations and tabled a Report which we have all agreed is supposed to inform the debate and help to shape the opinion of Members. If you listen to

our continued debate, while the Committee was clear, and that is what the Chairperson started with--- He said: “After our deliberations and collection of views, at the tail-end of the Report, the report can be adapted and the Bill passed and then, members of the public will make a decision.”

Even more fundamental is on the question of whether the Committee resolved the question of Article 257, and whether this is a Bill that is promoted by the people of the Republic of Kenya, Sen. Omogeni was very clear when he said that the Committee of the Senate resolved that question. As we bring out our issues, it is also important for us to ask ourselves: Do we also want our Committee to have acted in vain?

Having said that, I want to associate myself with most of the views that my colleagues have aired here. In recognizing that this Bill has proposed a spectrum of issues; so wide that one would say that it was a very daring venture to attempt to make amendments to the Constitution in so many aspects of it. However, the process has culminated in the Bill that we have today. Most of those issues have been dissected and a position arrived at.

In my view, the Bill has addressed in that wideness of issues, specific issues that we should say firmly that since we promulgated our Constitution 2010, have been matters that still required the input of legal minds of deeper thinking. This is so that we can arrive at more current issues and positions that will help us make progress. I say so recognizing that, indeed, the Constitution 2010, envisaged that it is possible and allowable to amend it.

I want to laud the team that started this process in recognizing that there are various gains in this proposed Bill. In the introduction of the new Article 11 (a), while we all know that the backbone of our economy is largely on the Small and Medium Enterprises (SMEs) – the small traders and farmers – this Bill has proposed that we build an economic system that supports small and micro enterprises. I was one of the sponsors of a Bill in this House supports SMEs, to ensure that when the Government is doing its planning and funds are being allocated, there is a specific fund and kitty that goes directly to ensuring that SMEs are strengthened.

Madam Temporary Speaker, one of the issues we have been grappling with all along is what responsibility we have, as citizens, to ensure that we have a country where corruption is dealt with finality. I also want to point at the new Article 18 (a) on the responsibilities a citizen. Most of the time we have been reduced to just complaining and making noise, but in this Article, it clearly spells out that it is now the responsibility of every citizen to practice ethical conduct and combat corruption. We do not have to sit here all the time and wait or ask what the Ethics and Anti-Corruption Commission (EACC) or Directorate of Criminal Investigation (DC) are doing. Indeed, this responsibility is now constitutional to each one of us.

Madam Temporary Speaker, in Article 89 (1) on the creation of 360 constituencies from 290, I will close the few remarks that I have on that particular issue. The other Article I may want to point out is Article 96 (3). In so doing, I want to remember as a Member of this House, who has sat in the County Public Accounts and Investments Committee (CPAIC) from 2013 to 2015. One of the things we had to combat is that immediately the Auditor-General’s first reports were tabled in this House, governors came together and proceeded to court. The then Governor of Nairobi proceeded to a court in Kirinyaga and obtained orders, which said that the Senate is only

limited to oversight of funds allocated to counties by the national Government and has no role in resources that are collected locally in counties. This was a big blow.

When the Auditor-General was reporting to the Senate, he reports together with all the revenue that is collected at the county level, but we were barred by a court ruling that we could not look at the funds that have been allocated to our counties. This is knowing very well the problems that we have, even today, of accountability at the county governments' level.

I believe that following these amendments, now we can freely and lawfully make sure that we look at what is happening at the county governments' level and, indeed, the funds that are collected locally within our counties. That is an area that we can speak until tomorrow.

On the question of the composition of how this House, I have expressed myself before, as the Senator for Kiambu. I have said that I believe that as history judges what we did, as the Senators, who sat here before, the jury is out there, as to whether we did our best to represent a more strengthened Senate. This is to ensure that the representation that will be here will be firm, strong and carry on the work that this House has done.

I believe that if we had stuck to the process of elections that had been proposed in our earlier system, where we have 47 elected Senators that would be better off. But now that the proposal is there to have 94 members sitting in this House, so be it.

Madam Temporary Speaker, on the question of Article 107 (a) on the creation of the Office of Leader of Official Opposition, let me strongly express my views on it. I believe that it is a positive move. For the last eight years that we have been in this House, one of the questions that has been bogging the mind of Kenyans is if we still have a robust opposition that can put the Government on its toes. Can we have hard questions being asked by somebody who is not saying they are still a part of the system and so we have to comply? Looking into the future, I believe it is the right time we have an Official Opposition Leader in the House. For posterity, we will be able to look at that person of the team in the eye and ask if they have seen what the governor of the day is doing. We have a history that speaks for itself.

Many times, I have listened to Sen. Orengo narrate how as a House, they put up a fight to have the repeal of Section 2A. We do not want to get to a position in the history of our country where we do not have a firm Opposition that is independent of Government.

Madam Speaker, since we came to this House in 2013, most of the time when the leadership of this House has had to stand and make our case, we have been ridiculed. I remember one time I was personally sitting in a meeting and the Senate Majority Leader was in that meeting. A comment was made; "Do you know that your position is not even in the Constitution? So, what are you coming to tell us?"

That is why I laud the inclusion of Article 108(a) which ensures the leadership on the Senate is now entrenched in the Constitution. It is no longer a case that can be used either in jest to ridicule or look like it is a favour that you have a leader sitting in the bicameral system in the "Upper House", who is a Majority Leader, but unrecognized by the Constitution.

That is why I think if one would ask if there have been good proposals in this Bill, I believe those are some of the positive aspects of the Bill. The structure of leadership in this House is clear.

It then follows in this amendment that Cabinet Secretaries (CSs) have been renamed to Cabinet Ministers. In my view, it is okay. However, we must entrench this thinking in Kenyans that it is not the type and title of the name you carry that can make you deliver. Being called a minister or secretary or whatever, does not lessen or diminish that kind of work you do. It is the requirement of your office that you need to deliver.

It is all right that we will now call them Cabinet Ministers. In my view, I believe it was just a question of a hangover of names that were used before. However, I did not believe that it essentially had any value input. Since it is the view of Kenyans as the Committee has told us in Article 257 that it is the views of our people we are talking about, let it be.

Madam Speaker, in Article 142, the amendment that requires the expansion of time for the Supreme Court to determine when a matter of the Presidential election has been raised. I commend the proposal to increase that proposal to 30 days. Given the fact that during the first Presidential Petition, I confess I was one of those people who were very pessimistic. When the panel of Supreme Court judges to look at the petition was constituted, one of the most curious things was that they were all new justices of the High Court. None of them had pended even a single ruling anywhere. We were asking ourselves what kind of ruling they were going to come up with.

*(Loud consultations)*

**The Temporary Speaker** (Sen. Nyamunga): Order, Members! You know what you should do if you want to say something.

Senator, continue.

**Sen. Wamatangi:** Madam Speaker, I had expressed my own views then whether it was possible for those justices to come up with a ruling within 14 days. Yes, they did and it was well reasoned. Now that we have at least 30 days when a ruling can be reasoned and passed, then we are better off.

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

**The Temporary Speaker** (Sen. Nyamunga): What is your point of information, Senator?

**Sen. Wetangula:** Madam Speaker, lest if it remains on record on a statement made *per incuriam*, the distinguished Senator for Kiambu County has alleged that the first Presidential Petition – I believe he means the one of 2013 – was presided over by judges who had never sat in court and made any ruling. I want to correct that misleading impression.

We had distinguished Judges of the Supreme Court at the time. My own Professor, Jackton Ojwang'; my sister whom we had practised law with, Kalpana Rawal; Justice Tunoi, a very distinguished judge; and, Mohammed Ibrahim, who had been in the court for a long time.

**An Hon. Member:** Justice Njoki Ndung'u.

**Sen. Wetangula:** Madam Speaker, the distinguished Senator for Kiambu County is responsible for the veracity and accuracy of the statement he makes on the Floor and he should not mislead Kenyans.

**The Temporary Speaker** (Sen. Nyamunga): Senator, be adequately informed.

**Sen. Wamatangi:** Madam Speaker, maybe my memory fails me, but there was the element of most them not having sat in a bench---

**Hon. Senators:** No!

**Sen. Wamatangi:** Madam Speaker, that was my view.

As I continue, on the question of the creation of the Office of the Prime Minister, I believe it is in order to rename the office of the Majority Leader in the House to have the title of Prime Minister.

Lest my time runs out, I want to go to one of the issues I believe is of a lot of importance to me, which I felt and would hold the liberty to disagree with the Committee. It is on the question of if it is constitutional or unconstitutional, for the promoters of the Bill to propose to create the 70 constituencies and allocate them.

It is my firm belief that I have not perused anywhere in this Constitution suggesting that the Committee can propose and allocate 70 new constituencies. That either eats into or usurps the powers of IEBC. There is nowhere between Article 88, all the way to 89, to the end where it proposes that the IEBC ever had, in our past Constitution, the power to either create or allocate any sub-county or constituency. I have my facts. Any person who has a contrary view can come to this Floor and make the same.

In Article 88, which creates IEBC---

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

**The Temporary Speaker** (Sen. Nyamunga): Sen. Wambua, I prefer that you press the button for an intervention because it makes my work easier. It is not on, but I will give you the opportunity.

**Sen. Wambua:** Madam Temporary Speaker, is the distinguished Senator for Kiambu, who is also the Chairperson of the Committee on Roads and Transportation in order to mislead this House and the country, that the IEBC has no responsibility whatsoever in the creation and allocation of constituencies in this country?

**Sen. Wamatangi:** Madam Temporary Speaker---

**The Temporary Speaker** (Sen. Nyamunga): One more minute, Senator.

**Sen. Wamatangi:** Madam Temporary Speaker, let me use my time. I have been interrupted.

**The Temporary Speaker** (Sen. Nyamunga): You will be given your time. You do not need to worry about it. You only have one minute left and you will get it.

*(Sen. Omogeni's microphone went off)*

Please give Sen. Omogeni the microphone.

Sen. Omogeni, you can come to the Dispatch Box.

**Sen. Omogeni:** Madam Temporary Speaker, I watched the Senator for Kiambu County, who is my good friend, on a show on *Citizen* Television this morning. He was misleading 48 million Kenyans on the provisions of the Constitution. However, we will not allow him to mislead the House.

If Sen. Wamatangi has ever read this Constitution and I believe he has, he can go to Article 88(4) (c). It says that the function of the IEBC will be for delimitation of constituencies and wards. What he was telling the country in the morning relates to amendments of Article 89 and 97.



Kenyans have a right to propose amendments to those Articles and increase constituencies from 290 to 360. However, the function of delimitation under this Constitution is with a constitutional body called IEBC. That is in black and white. We must respect what the Constitution of Kenya says in Article 88.

**The Temporary Speaker** (Sen. Nyamunga): Sen. Wamatangi, please wind up your one minute.

**Sen. Wamatangi:** Madam Temporary Speaker, we are reading the same Constitution. The Senator who is also a Senior Counsel has read that part which he says is on delimitation. I am clear about my facts.

Article 89(8) states that-

“If necessary, the Commission shall alter the names and boundaries of constituencies and the number, names and boundaries of wards”

The Constitution is clear.

The IEBC has got the powers under our Constitution to alter the boundaries of constituencies and not the number, but has the power to alter the number of wards. That is my point. That is why the Constitution starts with putting a number of 290 constituencies on the same Article. How would it start by saying there are 290 constituencies and then give the same IEBC the power to add the constituencies?

There is nowhere in this Constitution that states that IEBC can add or alter the number. Please read it.

*(Loud consultations)*

If I read Article 89(7) as requested, it states that-

“In reviewing the constituencies and ward boundaries, the Commission shall-

(a) consult interested parties; and,

(b) progressively work towards ensuring that the number of inhabitants in each constituency and ward is nearly or equal to as the population quota.

*(Loud consultations)*

**The Temporary Speaker** (Sen. Nyamunga): Order, Members!

**Sen. Wamatangi:** Madam Temporary Speaker, in compliance with the quote, it does not propose that there will be extra constituencies created by IEBC. The Constitution makers had their valid case in saying that and distinguishing between wards and constituencies. That is the misdemeanor.

**The Temporary Speaker** (Sen. Nyamunga): Senator, your time is up.

**Sen. Wamatangi:** I believe that the wording on that is correct. That is my case.

**The Temporary Speaker** (Sen. Nyamunga): Senator, please take your seat.

**Sen. (Prof.) Onger:** On a point of order, Madam Temporary Speaker, Sir.

**The Temporary Speaker** (Sen. Nyamunga): What is your point of order? Make it short.

**Sen. (Prof.) Onger:** Madam Temporary Speaker, I have been sitting here silently. I want to inform my great friend, Sen. Wamatangi that the very same Article 89(3) states that-

“The commission shall review the number, names and boundaries of wards periodically.”

**The Temporary Speaker** (Sen. Nyamunga): Thank you. We are not going back to that debate. You can do a *kamukunji* and get through that.

Proceed, Sen. Cheruiyot.

*(Loud consultations)*

**Sen. Cheruiyot:** Madam Temporary Speaker, you need to bring order to the House.

**The Temporary Speaker** (Sen. Nyamunga): Hold on for one minute Senator. Proceed, Sen. Mutula Kilonzo Jr..

**Sen. Mutula Kilonzo Jr.:** Madam Temporary Speaker, in correcting Sen. Wamatangi, we declare that we also love him. Sometimes, it is correct to say that you do not have the proper information.

Please read the whole Article 89(9) all the way down. It states that-

“Subject to (1), (2), (3) and (4), the names and details of the boundaries of constituencies and wards determined by the Commission shall be published in the gazette, and shall come into effect on the dissolution of Parliament first following their publication”

The course of action for any Kenyan can only arise after the Commission gives the names and details of constituencies and wards. That Commission is the IEBC. So, we should not have a back and forth.

*(Loud consultations)*

**The Temporary Speaker** (Sen. Nyamunga): He was on a point of order. Can you let him finish?

**Sen. Mutula Kilonzo Jr.:** I would like Sen. Wamatangi to listen to me. I will not charge him for this advice. The only time a Kenyan can question a decision on a constituency and a ward is after IEBC has made a decision. It is important for the record. We are doing this for the record.

If you go back to your transitional clauses, the current IEBC is a successor of a former Interim Independent Electoral Commission (IIEC), to the extent that this transitional commission that was prior to this current IEBC was also doing boundaries and it is covered in the transitional commission. I am saying this for good order so that we do not confuse the issues. Sen. Wamatangi do not get yourself into a legal quagmire. Ignorance is no longer bliss when it comes to the law.

**Madam Temporary Speaker** (Sen. Nyamunga): Hon. Senators, you do know Sen. Wamatangi is no longer on the Floor. You should have raised this issue while he was still on the Floor because you are also eating in your time. Let us proceed and we will not go back there.

Proceed, Senator.

**Sen. Cheruiyot:** Thank you, Madam Temporary Speaker. We can carry out that debate elsewhere. They will distract me if they continue. I want to appreciate this opportunity to make my contribution on behalf of the people of Kericho on this very important Bill that has been brought before us and share what I consider to be my

thoughts and reflections on what the feelings of the people that I represent in this House are on this proposed Bill.

Madam Temporary Speaker, I wish to delve into a debate that has prominently featured in this House from earlier on even before this Bill came into this House, on the interpretation of Article 257(10) with regard to the latitude we enjoy as Parliament on a popular initiative.

I wish to be clear about this from the very onset that I belong to the school of thought that believes that Parliament does not have a ceremonial duty of being paper pushers with regard to any Bill that is presented before it; be it the regular Bills that are brought before us or a constitutional amendment Bill such as the one we have before us.

Madam Temporary Speaker, I have listened to people attempt to even limit our mandate, very prominent lawyers and scholars argue that actually our duty as Parliament is only limited to as far as correcting typographical errors. I cannot be convinced that the people of Kenya can elect Senators to this House and Members of the National Assembly who are serious people, only for us to come and reduce them to be lexicographers. That their work is only to check spelling mistakes and errors and not interpret what they feel ought to be the right direction that the country needs to take.

My reading of Article 1 of our Constitution on the three arms of the Government is that Kenyans have donated their sovereign power to Parliament, which is number one on that list. Since it was not possible for all the 47 million Kenyans to gather, the only arm of Government that comes closest to a gathering of the 47 million Kenyans is Parliament.

Neither the Judiciary nor the Executive can claim to exercise that authority. I sit here on behalf of the 1.2 million residents of Kericho County that I represent. Any time they attempt to do anything that has the force of law as per the dictates of Article 94 as was correctly pointed out by the Chairperson of the Committee on Justice, Legal Affairs and Human Rights, then I am duty bound to ensure that whatever they are doing advances their interests. That is my duty. That is representation.

Madam Temporary Speaker, I cannot agree to the school of thought that is being advanced by a few of us that our duty in this exercise is purely ceremonial. I have taken time to listen to the proposers of this Bill and the kind of things they aim to achieve and they are good things. They are progressive proposals that are in this particular Bill. However, it will be an abdication of my responsibility as a leader if I tell my constituents that I read the Bill and even went further to read almost 200 pages of the Report that has been produced by our Committee, which clearly points out to the errors that are herein in this Bill and still tell them that my hands are tied, you do with it as you wish. I do not believe that was the intention of the drafters of our Constitution.

Madam Temporary Speaker, going on to my consideration of what I think ails this particular process and the technical issues that are bound therein, in 2017, the very good Chief Justice, Hon. David Maraga reminded the country that the product is as good as the process that was used to achieve it. What has been the process of attaining this particular Bill?

I may be young, but not too young to remember that there have been previous attempts to amend our Constitution. I consciously remember the 2005 attempt and the 2010 attempt that successfully gave us the Constitution that we are now trying to amend and all the procedures.

It was a gathering of all Kenyans. Everybody was allowed their democratic free will to speak as they wish. Where do I follow when I see what has been happening in this particular BBI process?

There has been a clear attempt to stifle the voices and thoughts of those who do not agree with this process. It will be wrong on my part to support such a process that is flawed from the onset. If you do recall, a few of our colleagues here were Ministers in President Mwai Kibaki's Cabinet in 2010. Perhaps having learned from the misadventure of 2005 and the very unfortunate events that happened in 2007, President Mwai Kibaki allowed his Ministers to choose which side of the Constitutional debate to belong.

Madam Temporary Speaker, I can count as many as four Ministers that I remember including the current Senate Majority Leader who were in the opposition or belonged to the 'No Camp' at that particular time when we were amending this particular Constitution. They were not threatened and the Directorate of Criminal Investigation (DCI) officers were not sent to raid their homes. This particular exercise has seen county governors and anybody who has dared to exercise their free thought on this particular document have all manner of threats, intimidation and blackmail.

Madam Temporary Speaker, it pricks my conscience and it will be a very unfortunate event if we allowed such a process to pass. We are actually dancing on the graves of the very patriotic Kenyans who paid a heavy price for us to have the 2010 Constitution, if we allow it to pass.

In the unfortunate event that this BBI process succeeds in amending our Constitution, it will be a case study across the world on how not to amend the Constitution. This is not how to do it. Something is absolutely wrong. That is why I stand and declare today that as much as I agree with so many of the proposals that have been shared, we must be able to point out what the errors are.

Moving on to the technical issues that are tinkering with independent institutions, the first one being the IEBC, this debate has just ensued on this Floor. I wish Sen. Wamatangi had bothered to read that Article 89(10) on what options are available to Kenyans. It is only after the Commission has made a decision. The biggest and the most absurd thing about this proposal -if this Schedule is allowed - thanks to this misadventure, we will have one Constitution that treats the same issue differently.

Madam Temporary Speaker, Sir, we have 290 constituencies where IEBC has been granted the proper mandate and authority on where to place them, name them and all those other details as Kenyans discern and an extra 70 constituencies that can only be domiciled in a particular county. How absurd can that be? That will be unfortunate if we have a Constitution of that nature.

If you think about the Judiciary, you all know because we are currently trying to recruit the Chief Justice. Look at the challenges that we have in our Judiciary. Kenyans are speaking and observing. We may not be able to say it loudly, but even look at the current composition of our JSC and the decisions they have given us. Is that how to build a Republic? Are we not setting up this country for failure?

It will reach a time when Kenyans will say if in this country, you do not stand a chance if you come from a particular region or tribe, then we would rather divide it so that those who feel that it only belongs to them and it is their privilege, right or birthright

to serve in certain constitutional offices, be allowed to enjoy their part. Those of us that are considered to be lesser Kenyans can have a different country. That is by and large.

If you read Clause 44 of this particular Bill and Senator---

*(Loud consultations)*

**The Temporary Speaker** (Sen. Nyamunga): Hon. Senators, let us kindly consult in low tones because some of us are interested in hearing the debate that is going on.

**Sen. Cheruiyot:** Madam Temporary Speaker, I was referring to Clause 44 of this Bill with regard to the Office of the Judiciary Ombudsman. One of the duties of the Ombudsman is to recommend the actions that will be taken by the Judicial Service Commission (JSC). Let us not reduce this to a technical thing that can be plucked out of the moon. What do you mean when you say somebody will recommend an action? It means that the hands of the JSC are tied. If you are told to sack a judge, you will sack him or her. There is nothing else left for you to do even if you pick an independent JSC. Therefore, the Office of the Judiciary Ombudsman as presently created is a threat to the independence of our Judiciary.

What makes it even more tragic is the fact that this Ombudsman will be nominated by the President. Part of the reason we are still surviving as a Republic is because of the actions of our Judiciary, especially in the last two or three years when we have not had a functional opposition in the country. The institution that has kept the interests and rights of Kenyans to be considered is the Judiciary. Imagine if a judge is presented by somebody whose rights have been violated by the State and they know that there is a gentleman or lady known as the Office of the Ombudsman appointed by the President, who is only awaiting for him to rule against the decision of the Executive. Will that judge have the free reign to make a decision that will protect our rights?

My dear brothers and sisters who sit in Parliament, do not give Kenyans poison when you have the chance and opportunity to stop it from happening. Some of them may be ignorant, they may not have the power to understand some of these things, but they have given you a responsibility. That is why you held a Quran or a Bible and averred to defend and protect this Constitution. Part of defending a Constitution is keeping it alive and ensuring that it is not tampered with in the way that it is being presently proposed before us. Do not allow your citizens, the people who woke up early in the morning to vote for us, to be in a situation where they will not have a free reigning Judiciary.

Madam Temporary Speaker, in the existence of a State, and all scholars that have taken time to study how a State functions agree; this state of tension between Parliament or the Legislature, the Judiciary and the Executive is actually one of the tenets that are so critical to the proper functioning of a State. If you grant one arm of Government the power to lord it over and determine the fate of the rest, they will completely wound the rest of the institutions just like has happened to Parliament. I do not wish to get to the challenges we, as a Parliament, have faced.

One of the products of the 2010 Constitution is the Salaries and Remuneration Commission (SRC). It is now proposed in this particular Bill, that instead of the nomination that the Senate does on behalf counties, and that Parliament does on behalf of Kenya--- I wish somebody should tell dedicated *Mzee* Atwoli to know that the powers of COTU to nominate someone to the SRC have been taken away. We should not take

advantage of ignorant Kenyans like Atwoli. Help them understand what this amendment Bill is doing because it is granting the President power to nominate seven commissioners to the SRC. What are you saying to the rest?

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

**The Temporary Speaker** (Sen. Nyamunga): What is your point of order, Sen. Shiyonga?

**Sen. Shiyonga:** Madam Temporary Speaker, I want to tell Sen. Cheruiyot that Mr. Atwoli is not ignorant. He is just a Kenyan who is supposed to be educated or be taught just like you. This man has done a lot. Please apologise.

**The Temporary Speaker** (Sen. Nyamunga): That is a point of information. Continue.

**Sen. Cheruiyot:** She is right. She said he is supposed to be educated. She actually agrees with me.

Madam Temporary Speaker, that is with regard to the SRC. This is the proper return to imperial presidency that Kenyans avoided. If as a President you can determine the salaries of teachers, doctors or parliamentarians by simply nominating seven of your cronies to the SRC. You can tell them: "I do not like these parliamentarians, pay them peanuts." What will we do? What will be our point of recourse?

Madam Temporary Speaker, I serve in a constitutional commission. You know that I represent you in the Parliamentary Service Commission (PSC). Any proper thinking of how, for example, to strengthen our independent institutions, if I was asked as Sen. Cheruiyot to propose a way and means of doing so, one of the things that I would propose is that let it be determined in our Constitution what percentage of budget each of our independent commissions are supposed to have.

The reason the PSC survives is because we have got Members of the National Assembly and Senate. Therefore, I sympathise with an institution like the JSC. Every time you meet them, they ask you: "Surely, are you people not mindful of the fact that Kenyans need access to justice?" When you think about the police, for example, we criticize the Inspector-General of Police, Mutyambai, and the previous ones. However, I know for the National Police Service Commission (NPSC) to function independently, all it will take is for them to have their independent vote. How do you expect the IG to disagree with the PS and CS for Interior and Coordination of National Government when, tomorrow morning, he has to call them to ask for a budget line? It is not possible. It is the old English adage; he who pays the piper calls the tune.

Let me give another example. Are you aware that for the last five years, the only budgetary support the Kenya National Human Rights Commission (KNHRC) has received from Parliament is Exchequer to pay salaries, not a single shilling to do anything else or undertake any project? Honestly, if we want to strengthen these independent institutions, this is not the way to proceed.

Finally, Madam Temporary Speaker, because I know my time is almost up, I want to talk on the diminished role of the Senate. This is where it gets interesting. I really would want to meet the Senators who will tell us that they want to pass this Bill as it is yet the true import of this Bill as presently constituted is as equivalent as sacking yourself. You will not have any duty.

It is a sad proposal as to the fact that the proposed Constitution makes it mandatory that the only people governors are going to be accountable to are the county

assemblies. What will you be doing in this House? Why would you want to be a Senator? For 10 weeks, the Senate captured the imagination of Kenyans. The Senate brought this country to a standstill because we stood firm and said that Kenya is the territory and its people. We ensured that we gave the Republic a formula that ensures that there is equity and that every child across the country gets services from their counties without being prejudiced because of where they belong, or any other thing.

However, the proposal that is in this Bill which takes away all the fight that we put up for 10 weeks, including the arrests and all things that we talked about---. This is in Article 50(n) where it declares that the per capita gifting on any person should not be more than three times. If you apply that formula in this current division of revenue, close to seven counties are actually going to be wound up because they will not be economically viable. In fact, let me shock you, if you use a spreadsheet, for those of you who are tech savvy and know how to use an excel sheet, this is unachievable. It is not possible. For example, if you use the current formula where Nairobi City County gets about Kshs4,700 as per the capita distribution and Lamu County gets Kshs21,000, if you reduce Lamu's from Kshs21,000 to Kshs12,000 and you increase on the other one, then it tinkers and affects the final variation. Therefore, this proposal is not possible.

**The Temporary Speaker** (Sen. Nyamunga): Order, Senator! Your time is up. It is exactly 12.30 p.m. When we reconvene at 2.30 p.m., we will give the first two minutes to Sen. Cheruiyot. I should have given it to you now, but everybody is up in arms.

Secondly, when we reconvene, after Sen. Cheruiyot, we will give the first opportunity to Sen. Wambua because there was a problem with the system here. The rest will follow.

#### ADJOURNMENT

**The Temporary Speaker** (Sen. Nyamunga): Hon. Senators, it is now 12.31 p.m., time to interrupt the business of the Senate. The Senate stands adjourned until today, Thursday, 29<sup>th</sup> April, 2021 at 2.30 p.m.

The Senate rose at 12.31 p.m.