

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

Thursday, 11th February 2021

The House met at 7:00 p.m.

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

PRAYERS**PAPERS LAID**

Hon. Amos Kimunya (Kipipiri, JP): Hon. Speaker, I beg to lay the following Papers on the Table of the House:

The 2021 Budget Policy Statement from the National Treasury.

The 2021 Medium-Term Debt Management Strategy from the National Treasury, which has been submitted pursuant to Section 25(7) of the Public Finance Management Act of 2012.

Legal Notice No.202 of 2020 relating to the Architects and Quantity Surveyors Continued Professional Development Bylaws, 2020 and Explanatory Memorandum from the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works.

The Performance Audit Report on Installation and Maintenance of Road Furniture by the Kenya National Highways Authority, the Kenya Urban Roads Authority (KURA) and the Kenya Rural Roads Authority (KeRRA) from the Office of the Auditor-General.

The Annual Statutory Reports of the 2019/2020 Financial Year from the Council of Governors.

The Annual Report and Financial Statements of the 2017/2018 Financial Year for the Kenya Tourism Board from the Ministry of Tourism and Wildlife.

The Financial Statements for the year ended 30th June 2019 from the Public Service Commission.

The Report of the Auditor-General on the Financial Statements with respect to the Competition Authority of Kenya, for the year ended 30th June 2020, and the certificate therein.

The Reports of the Auditor-General and Financial Statements with respect to the following institutions, for the year ended 30th June 2019, and the certificates therein:

- (i) The Petroleum Levy Development Fund Holding Account;
- (ii) The Uwezo Fund;
- (iii) The Youth Enterprise Development Fund;
- (iv) The National Government Affirmative Action Fund;
- (v) The State Department for Information, Communication and Technology;
- (vi) The National Treasury Recurrent Revenue Statements;
- (vii) The National Treasury Development Revenue Statements; and,
- (viii) The Kenya Revenue Authority Revenue Accountability Statements.

ORDINARY QUESTIONS

Hon. Speaker: We have a few Questions. The first Question is by the Member for Kitutu Masaba, Hon. Shadrach Mose. Hon. Members, we just said this morning that we should become a bit more tech savvy. There is a message that was sent to all of you. Therefore, Hon. Mose should know his Question is coming now. We will go back to it.

Next is Hon. Dr. Oundo.

Question No.013/2021

REHABILITATION OF MATAYOS-GANJALA-NAKHASIKO-NANGINA ROAD

Hon. (Dr.) Wilberforce Oundo (Funyula, ODM): Hon. Speaker, I rise to ask Question No.013 of 2021. For record purposes, this Question was asked in the last Session but it lapsed. It is directed to the Cabinet Secretary for Transport, Infrastructure, Housing, Urban Development Public Works.

- (i) Is the Cabinet Secretary aware that the Matayos-Ganjala-Nakhasiko-Nangina (C830) Road that traverses Matayos and Funyula constituencies is among the Roads 10,000 Programme and that the procurement process for a contractor under the Low Volume Sealed Roads (LVSR) was commenced but not completed?
- (ii) When is the Ministry expected to complete the procurement process and have the road improved to bitumen standards?

Hon. Speaker: The Question is to be responded to before the Departmental Committee on Transport, Public Works and Housing. They should note, as Hon. Oundo has said, that the Question had been asked in the last Session. They should fast-track it.

The next Question is by the Member for Kikuyu, Hon. Ichung'wah. Give him the microphone.

Question No.015/2021

IMPORTATION OF RAW HIDES AND SKINS FROM NEIGHBOURING COUNTRIES

Hon. Kimani Ichung'wah (Kikuyu, JP): Thank you, Hon. Speaker. I had requested the Table Office to defer this Question because of the way it was drafted. It did not capture the intent of what I had wanted to do and so, I had asked them to defer it.

Hon. Speaker: That is okay. It is stood down.

(Question deferred)

Maybe, you will go and get it re-drafted afresh. The next Question is by the Member for Alego-Usonga, Hon. Atandi.

Hon. Elisha Odhiambo (Gem, ODM): On a point of order, Hon. Speaker.

Question No. 016/2021

DISMISSAL OF MR. JARED OTIENO OGOLA FROM TSC

Hon. Samuel Atandi (Alego-Usonga, ODM): Thank you, Hon. Speaker. I rise to ask Question No.16/2021 which is addressed to the Teachers Service Commission (TSC).

- (i) Could the Commission explain why Mr. Jared Otieno Ogola of TSC No.390385 and former Principal of Kowet Mixed Secondary School was dismissed from service contrary to Section 41(2) of the Employment Act, yet he was ailing during the time he was accused of absconding duty?
- (ii) Could the Commission consider reinstating the said teacher to service in view of the fact that he applied and received sick leave from the Siaya County Director of Education?

Thank you, Hon. Speaker.

Hon. Speaker: The Question is for written reply from the TSC. Who has a point of order? Is it Hon. Elisha?

Hon. Elisha Odhiambo (Gem, ODM): Yes. Hon. Speaker. I have noticed some behavior which is not good for a Member of Parliament. I am sure that we operate under particular codes of behavior within Parliament. I am not aware that a Member of Parliament is allowed to walk inside here with a gun.

(Loud consultations)

I have noticed that Hon. Ali is carrying something on his back. If that is a gun, then we are not safe.

Hon. Speaker: Sorry, Hon. Odhiambo. What is it?

Hon. Elisha Odhiambo (Gem, ODM): Hon. Speaker, I have noticed that Hon. Mohamed Ali is carrying something on his back which resembles a gun. If that is indeed true, then we are not safe.

Hon. Speaker: Which Hon. Mohamed Ali? Is it the Member for Nyali?

Hon. Mohamed Ali (Nyali, Independent): Thank you, Hon. Speaker. I give my apologies. I forgot to leave my things outside. I am a human being.

Hon. Speaker: Is it a gun?

Hon. Members: Yes.

Hon. Mohamed Ali (Nyali, Independent): Hon. Speaker, allow me to surrender it. Do not personalise it?

Hon. Speaker: Hon. Ali, please, can you go out and....

Hon. Mohamed Ali (Nyali, Independent): Thank you, Hon. Speaker.

(Loud consultations)

Hon. (Ms.) Odhiambo-Mabona (Suba North, ODM): On a point of order, Hon. Speaker.

Hon. Speaker: Yes, Hon. Odhiambo. What is your point of order?

Hon. (Ms.) Odhiambo-Mabona (Suba North, ODM): Thank you, Hon. Speaker. Whereas I do not want to escalate the situation, I want to draw our attention to the fact that the country is becoming a bit politically volatile. Because of that, I request that stronger security measures be put

outside so that, if Members are coming in, they should not have... Even very well-meaning Members can cause harm without intending in the heat of the moment. I, request that so that this is not repeated. There should be strong gadgets that detect guns. There was a time some women Members of Parliament came with pepper spray. Unfortunately, instead of spraying on my eyes, it went to Hon. Kaluma.

(Laughter)

We understand that we are all very good friends when things are not heated, but when things get heated, I do not know what gets into our heads and we become a bit strange. We should be protected from ourselves Hon. Speaker.

Hon. Speaker: Well, I think the issue... Hon. Olago Aluoch, do you want to weigh in on this?

Hon. Olago Aluoch (Kisumu West, FORD-K): Hon. Speaker, I fully associate myself with Hon. Millie Odhiambo's sentiments. However, if there was a fit and proper case for referring to the Committee on Parliamentary Powers and Privileges, this would be one. I kindly ask for your direction that this matter, in view of the admission of the Hon. Member, be referred to the Committee on Parliamentary Powers and Privileges.

(Loud consultations)

Hon. Speaker: Yes, Hon. Mbarire.

Hon. (Ms.) Cecily Mbarire (Nominated, JP): Hon. Speaker, it is well understood that Hon. Mohamed was very apologetic. We need to leave it there. We are in that season where politically, the country gets charged. I am wondering, other than checking for weapons, what do we do with those whose mouths are worse than the weapons? Some of them are Members of this House. It is all about self-discipline for all of us because there are people whose mouths are worse than those weapons.

(Applause)

Hon. Speaker: Now, Hon. Members, I am inclined to allow Hon. Mohamed Ali to say something.

Hon. Mohamed Ali (Nyali, Independent): Thank you, Hon. Speaker. Sometimes, as Members of Parliament (MPs), it is wise to behave like gentlemen. We are all human beings and, sometimes, we end up forgetting things. If my Hon. Colleague saw there was a problem, he could have approached me quietly and politely and asked me to surrender, rather than announcing my name on the national television and now threatening my security. It is bad manners for an Hon. Member of Parliament, rather than talking to you, he makes it a '*Tanga Tanga*' affair.

The law of this country allows each and every Member to apply for a licensed gun. What my colleague could have done was to approach me quietly and I would have walked out and surrendered the gun to the Serjeant-at-Arms.

Hon. Speaker: Well, Hon. Mohamed Ali, you started off by saying that you are sorry and you just forgot. That, for me, is important. In the first instance, you offered to go and surrender - which you have done. I do not know why we need to escalate it beyond there. There is no need of escalating this matter, Hon. Members.

Please, I am unlikely to be of any use with regard to your mouths, except when you are here. I will only deal with the foul mouths here in the House. However, when you are out there, you will be dealt with by other people.

Hon. Duale, what is it?

Hon. Aden Duale (Garissa Township, JP): Hon. Speaker, let us give Hon. Mohamed the benefit of doubt. Maybe, he is on his way home. For tonight, we give you that exception. You did very well by apologising, which I think was sufficient to the Hon. Speaker.

However, it is not about the Speaker and the Clerk putting very tight security measures. We are leaders in this august House. We represent the people of Kenya. We should not be the first people to burn this country.

Forget about the guns! We need to take caution and be role models to the rest of the country. What we say, where we say it and how we say it is very important. But I am sure that it is under the Parliamentary Privileges Act. As Hon. Millie has said, it should not only apply to men. We allowed ladies to come with their bags when we changed the Standing Orders in the 11th Parliament. These bags must be thoroughly checked by the aides. The Hon. Member for Gem has seen what Hon. Mohamed was carrying. Imagine Hon. Shamalla is behind me and there is big bag here. What is inside the bag, I do not know.

(Laughter)

On the other side, Hon. Sophia has a bag and Hon. Haika has one. In fact, Hon. Speaker, you should order, just as Mohamed has returned his weapon, the bags need to be checked and returned. I am very uncomfortable with a very big bag here. I do not know what it contains.

Thank you.

Hon. Speaker: Serjeant-at-Arms! All that is being said fall under the Office of the Serjeant-at-Arms. They are supposed to enforce those rules. They are never meant to harass anybody. No Member should be harassed even if she is a female Member of Parliament. Even if they are going to inspect the bags, however big they may be, do it with an element of decorum. We are sure they may not be carrying very lethal things. Serjeant-at-Arms personnel know that it is their work to make sure that nobody walks into the Chamber or, indeed, beyond the entrance with a weapon. I do not know how that could have happened. That must be a terrible oversight or lapse.

Let us proceed. The Member for Kitutu Masaba. For the second time, Hon. Shadrack Mose. He is a Member of the House Business Committee and I am surprised he has forgotten that...

(Loud consultations)

I thought that matter is being handled. Unless people are just going for purposes of being seen, then there is nothing. It is being handled at some other level. They are onlookers. Of course, it is okay to sympathise and condole with the bereaved. So, we stand down his Question to next week.

Next Order!

(Question No.012/2021)

MEASURES TO EASE REGISTRATION OF SCHOOLS IN KITUTU MASABA CONSTITUENCY

(Question deferred)

Disclaimer: *The electronic version of the Official Hansard Report is for information purposes only. A certified version of this Report can be obtained from the Hansard Editor.*

BILL*Second Reading*

THE REFERENDUM (NO.2) BILL

Hon. Speaker: Sorry Members. Who is the Member unable to sit? Take your seat. Is it Hon. Machogu?

(Hon. Japheth Mutai walked along the Gangway)

Hon. Speaker: Who is that walking in the Gangway?

An Hon. Member: It is the Member for Bureti.

Hon. Speaker: Oh, it is the Member for Bureti. Hon. Members, before we proceed to the business appearing as Order No.8 in the Order Paper, Evening Sitting, which is the Second Reading of the Referendum (No.2) Bill (National Assembly Bill No.14 of 2020), I wish to give the following guidance:

As you are aware, Hon. Members, there are currently two Bills before the House purposing to legislate on the processes and management of referenda in the country. These are: the Referendum Bill (National Assembly Bill No.11 of 2020) by the Constitutional Implementation Oversight Committee and the Referendum (No.2) Bill (National Assembly Bill No.14 of 2020) by the Departmental Committee on Justice and Legal Affairs.

Hon. Members, in the exercise of its mandate as provided for under Standing Order No. 171, the House Business Committee has since prioritised the Referendum (No. 2) Bill (National Assembly Bill No. 14 of 2020) sponsored by the Departmental Committee on Justice and Legal Affairs.

I have received representations in my Chambers asking why the House Business Committee arrived at that decision. I have decided to make the facts of the matter known to the House at this earliest opportunity.

In this regard, I wish to inform the House that on two occasions towards the end of last Session, the House Business Committee asked the two Committees to retreat, consult and agree on which of the two Bills ought to be accorded priority. However, despite lengthy engagements on the matter, the information availed to the Committee indicated that no agreement was reached. This, therefore, prompted the House Business Committee, as the Committee charged with prioritising business in the House, to offer leadership for purposes of facilitating uninterrupted flow of business of the House with respect to enabling the House to legislate on the process and management of referendum.

Hon. Members, in making the determination to give priority to the Bill by the Departmental Committee on Justice and Legal Affairs, the House Business Committee was informed by the following:

(i) During the First Leadership Retreat of the 12th Parliament that took place in August 2018 in Mombasa, it was agreed that draft bills and legislative proposals emanating from independent offices and constitutional commissions ought to be channeled through the relevant departmental committees of the House and accorded priority. This decision was further affirmed during the Third Leadership Retreat that took place in August last year. It was, therefore, imperative that the House Business Committee respects and upholds the previous resolutions of

Disclaimer: *The electronic version of the Official Hansard Report is for information purposes only. A certified version of this Report can be obtained from the Hansard Editor.*

the House Leadership, which were arrived with participation of the Chairpersons and Vice-Chairpersons of the two Committees. This criterion favoured the version of the Bill sponsored by the Departmental Committee on Justice and Legal Affairs.

(ii) We asked ourselves the following Question: Of the two Bills, which one originated from, or has the highest input of the Independent Electoral and Boundaries Commission (IEBC), in line with the said resolution of the House Leadership Retreat, and which one started its legislative journey first? Information availed to the House Business Committee and, indeed, a close reading of the reports of the two committees revealed that the Bill sponsored by the Departmental Committee on Justice and Legal Affairs was initially a product of a lengthy and consultative process which started in the last Parliament, and sought to reform and consolidate electoral-related laws in the country. Indeed, an analysis of the two referendum Bills confirms that the Bill by the Departmental Committee on Justice and Legal Affairs emanated from prolonged engagements between the Committee and IEBC from as far back as 2015. From the Report of the Committee, it is evident that part of the amendments that had been proposed in the draft Bill in the last Parliament were incorporated in the Election Laws (Amendment) Act, 2017, which was a product of the Joint Committee of both Houses chaired by the then Senator for Meru, Hon. Kiraitu Murungi and the Senator for Siaya, Hon. James Orengo.

Hon. Members, records indicate that owing to the weighty nature of the pending work at the time, it was agreed that the balance of the amendments at the end of the Eleventh Parliament, which were substantial in number, be carried forward by the Departmental Committee on Justice and Legal Affairs and considered by the next Parliament, which is this one. Further, information provided by the Committee also reveals that upon commencement of the current Parliament in 2017, the Committee continued to engage with the IEBC on the Referendum Bill and there is evidence of those engagements taking place as late as March 2019.

Having considered the issues therein, it was the determination of the House Business Committee not to allow the two Bills, dealing with similar subject matter, to proceed concurrently.

Hon. Members, a second question which may then arise is: What is to happen to the Bill sponsored by the Constitutional Implementation Oversight Committee? Weighing on the matter, I would like at this juncture to assure Members that all is not lost. I say this because procedurally, the Committee and, indeed, any other Member of the House is at liberty to identify and isolate whatever provisions they may deem crucial from the Constitutional Implementation Oversight Committee Bill, and move them as amendments to the Bill by the Departmental Committee on Justice and Legal Affairs during the Committee of the Whole House stage of the consideration of the Bill.

Beyond that, Hon. Members, the Bill by the CIOC remains valid as the fate of the Bill by the Departmental Committee on Justice and Legal Affairs is still unknown until it is exhaustively considered by the House. This, therefore, means that should the Bill by the Departmental Committee on Justice and Legal Affairs be withdrawn or be defeated, at whatever stage, the CIOC will have an opportunity to move their Bill in the published manner. However, having weighed the alternatives available, my guidance is that the reasonable option would be to have the relevant provisions of the Bill by the CIOC included in the Bill by the Departmental Committee on Justice and Legal Affairs. The so consolidated Bill as would be the result incorporating all areas of concern will then be considered for decision by the House as a whole. This will not only hasten the process but also ensure unity of purpose in legislation.

In conclusion, Hon. Members, may I say that this guidance has been made to allow for business continuity in the House. The CIOC should, therefore, not get discouraged by this decision.

Indeed, the House acknowledges that the Committee has equally done a remarkable job in putting together their Bill which was actually published first. The House and, indeed, the concerned Committee should remain guided in the manner that I have given.

I wish to thank you, Hon. Members. The Vice-Chair of the Departmental Committee on Justice and Legal Affairs, Hon. Otiende Amollo.

Hon. (Dr.) Otiende Amollo (Rarieda, ODM): Thank you, Hon. Speaker. I beg to move that the Referendum (No.2) Bill (National Assembly Bill No.14 of 2020) be now read a Second Time.

This Bill, sponsored by the Departmental Committee on Justice and Legal Affairs and as previously constituted, has a long history as captured. The Bill was published on 29th May 2020 and introduced in the National Assembly for the First Reading on 18th June 2020 and subsequently committed to the Departmental Committee for consideration and facilitation of public participation and reporting to the House.

Public participation - and that is captured in the Report - was undertaken through an in-depth engagement with the Independent Electoral and Boundaries Commission (IEBC), the Council of Governors (CoG), the National Council of Churches of Kenya (NCCCK), the Christian Professional Association (CPA), among others. All this is captured on pages 11 to 29 of the Report that was tabled in the House on 15th October 2020.

The principal object of the Bill is two-fold. First, is to consolidate the law relating to conduct of referenda and, secondly, to provide for a transparent and fair process of ascertaining the will of the people in a referendum. The current law relating to referenda is captured in Part IV of the Elections Act but, during all these consultations, it was agreed that the current legal provisions were inadequate and there was need to enact a comprehensive stand-alone legislation that deals with referenda. The Referendum (No.2) Bill, therefore, is a product of a consultative process between the IEBC, JLAC and other players.

Also more importantly, and this was at the Speaker's prompting, JLAC did meet the CIOC Committee between 19th and 21st November 2020 in a special retreat held in Mombasa, where both Committees appointed five Members to harmonise the two drafts.

Hon. Speaker, even though it was not ultimately agreed which Bill takes priority, the effect of the amendment was agreed on. There is a Report to that effect.

Hon. Speaker, turning to a brief synopsis of the Bill, clauses 1 to 3 talks about a referendum to be treated as if it were an election. It is the recognition that a referendum is an election and an invocation of appropriate laws and procedures to fill any gaps that may arise.

Clause 4 of the Bill talks about amendment by parliamentary initiative and seeks to introduce timelines for the President for efficiency. These timelines had not been there and 14 days is now prescribed under Clause 4.

Clause 5 speaks to referendum by popular initiative and addresses a number of issues. First, it talks about the process of verification of the 1 million registered voters. Secondly, it speaks to the need to make the list public so that anyone can know the 1 million persons sponsoring the amendment. Thirdly, it speaks to the Commission ensuring that the requirements of Article 257 of the Constitution are complied with especially when it comes to the issues of framing. Fourthly, if the requirements of Article 257 are not met, the Bill gives the discretion to the Commission to declare that initiative as having failed and that will be the end of that matter.

Hon. Speaker, further amendments in engagement with the Committee, which shall be introduced at the Committee stage, shall introduce timelines for the Independent Electoral and

Boundaries Commission (IEBC), Parliament and the President. They are all captured in the Report and we will come back to them.

Clause 6 talks of the manner of formulating the Bill. The Bill talks of participation, inclusivity and accommodation of divergent views while formulating the draft that is to be considered. Further amendments in line with Article 257(2) and (3) talk about the promoters framing the draft for consideration in a clear manner and remove the proposed discretion of Parliament to reframe something that was already framed and sponsored by 1 million people. We will speak to that more at the Committee stage.

Clause 7 of the Bill, while it talks to the referendum on other issues, the Committee recommends its deletion because it is not necessary. It talks about holding a referendum at the county or local levels. We will introduce an amendment to that effect. The Committee is of the view that, that kind of local referendum is captured in Section 90 of the County Governments Act and, therefore, you do not need it here. It also seeks to remove the idea that the President can initiate a referendum by *fiat* or without any consultations. The provisions hitherto as proposed were that the President could frame any issue and ask the commission to conduct a referendum on it. That *fiat* is what we want to correct and we will introduce that at the Committee Stage.

Clause 8 is to be adjusted and the Committee recommends its deletion. It is of the view that it is not necessary because it contemplates other legislation as if we would pass this law and have other legislation on a referendum. We agreed that whatever we need to have on the referendum should be in this law. If we need to add or remove anything, then we should do it in this Bill.

Clause 9 speaks to the procedure for the conduct of a referendum. Further amendment adopted by the Committee seeks to adopt the timelines. These were adopted from the Constitutional Implementation Oversight Committee (CIO) draft and we were in agreement that it is a good idea to adopt these timelines. It seeks to have seven days for the IEBC to assign symbols.

The point being that the Constitution so far prescribes timelines only for the county assemblies which are 90 days. It remains open in terms of IEBC, Parliament, the President and many other players. The Bill seeks to introduce a clear timeline so that we know if one is introducing an amendment by popular initiative, what it will take and including if there will be a petition in the High Court - I will get to that.

Clause 10 as currently crafted is to be amended by deleting the word “options”. In this context, the Committee was of the view that in the provisions under Articles 81 and 82, and Articles 257(2) and (3) of the Constitution, anyone who seeks to move any amendment should consult as much as possible, accommodate divergent views and make sure that whatever product he comes up with, by way of a draft, accommodates as many people as possible. However, having done that, ultimately the question that he must ask Kenyans is if they agree with his draft or not. If they say no, it fails and if they say yes, it passes.

Clause 11 talks of referendum committees and it is recommended for deletion by the Committee. The Committee is of the view that there is no need for the Bill to limit the number of referendum committees. You cannot say that if there is a referendum, you can only have one committee for those who support and one committee for those who oppose. Kenyans must have the discretion to support or reject for whatever reasons without having to cocoon them into one. The initial suggestion in the Bill was that, for each side, there will be a committee to be headed by a chief agent and that everyone who wants to support or oppose must go to their specific agent. That is not democratic or in keeping with the Constitution.

Clause 12 talks about the chief agent. The Committee recommends that this clause be deleted. Other than forcing everyone to be led by one person, in supporting or opposing, it gives that person some liability and responsibility. It will give that one person the responsibility to take care of all those who oppose if it is a No Committee or all those who support if it is a Yes Committee. There is no way one individual can take responsibility in the entire country without having a mechanism of controlling those people. Therefore, that particular clause is recommended for deletion.

Clause 13 talks of the cost for a Referendum. This clause is recommended for deletion for a simple reason. That clause as drafted initially was contradictory. On one hand it says each referendum committee will bear its own cost and on the other it talks of if public money is to be used in a referendum. If the committees are bearing their own costs, then there is no public money that will be used. Therefore, there is no way you can have a clause that is internally contradictory. That is why it has been recommended for deletion.

Clause 14 talks of the approval threshold. This particular clause is also to be deleted in keeping with the Constitutional Implementation Oversight Committee (CIOC) draft. The deletion is for two reasons: First, in so far as it talks of the need to be supported by 20 per cent of the registered voters in each of at least half of the counties. Those are at the exact wordings of Article 255(2) (a). We found that there is no need for this Bill to repeat the exact wordings that are already in the Constitution. I had already explained about the question of options.

Clause 15 is what lawyers call inherent powers for the courts, but in this case we are giving it to the Commission. Clause 15 gives the Commission general powers to take administrative measures to ensure successful conduct of a referendum. In other words, there should not be any point when the Commission says it cannot move because a law does not make certain provisions. At that point, the Commission should be able to invoke the general rules and procedures for elections or such administrative measures as would enable successful conduct of a referendum.

Clauses 16 to 32, without discussing them individually, speak to a petition challenging a referendum. One of the things—and this is a matter of principle and we have spoken to it—are that courts should generally be very reluctant to interfere with the legislative role of Parliament. In the same way, courts should be very reluctant to interfere with the elective will of the people. But courts can come in after the process and examine its legality. In this respect, it is contemplated that one may challenge the results of a referendum, because that is the democratic expectation. We realise that election petitions, including presidential election petitions, have limited time. But as this Bill is now, one can challenge an outcome of a referendum even if it is supported by 99 per cent of Kenyans. Because there is no time limit, and you know the mischief in our courts sometimes, a case can take five years in the courts, which would mean a sabotage of the democratic will of the people.

Therefore, Clauses 16 to 32 enable one to challenge the outcome of a referendum, but it does not allow those who frivolously challenge such results. The challenge must be well founded and there are conditions to ensure that a challenge is well founded. If the outcome is challenged, the case should be determined by a bench of at least three judges, so that you do not have one judge in some far-flung town like Oyugis sabotaging the will of all Kenyans, whether it is a yes or a no. Thirdly, the clauses require that such challenge must be filed within 14 days. That is the amendment that will be brought to the House. The initial provision was 30 days. We thought the will of the people should be ascertained as soon as possible. Once the result is challenged, the amendments that will be brought to the House state that the case must be decided within 30 days. The initial provision was six months; we thought that was too long. We recognise that you cannot

have the first-instance court as the final court, except for a presidential election. Therefore, the Bill contemplates the possibility of an appeal to the Court of Appeal. The Bill proposes that, for purposes of a referendum case, the Court of Appeal be the final court without the option of going to the Supreme Court, for a number of reasons which we will explain. Any appeal from the High Court is to be filed within seven days and to be determined within 21 days. That is the contemplation in terms of the discussions we had with the CIOC in Mombasa. The Bill also contemplates other administrative processes within the Judiciary.

Hon. Speaker, although I had 45 minutes, I have used only 15 minutes and I am about to wind up in two minutes. Clauses 33 and 34 make general provisions. These are the usual provisions, including offences, penalties, application of election offences, prosecutions, arrests and the power to make regulations. The power to make regulations is important because we recognise that you cannot include everything under the sun within an Act. Some can be included in regulations.

The last part is a long series of clauses from Clause 41 to 71. Those are consequential amendments to the Elections Act and the County Governments Act. Because some of the provisions in this Bill are already in the Elections Act, the consequence of adopting them is that the Elections Act must stand amended. The Clerk Assistants and Legal Counsel have to painstakingly go through the Elections Act and identify what will be consequentially amended.

Hon. Speaker, having spent a whole 16 and a half minutes, I beg to move and request Hon. George Gitonga Murugara, advocate and member of the Departmental Committee on Justice and Legal Affairs, to second.

Thank you, Hon. Speaker.

Hon. Speaker: Hon. Murugara, Member for Tharaka, kindly have the Floor.

Hon. George Gitonga (Tharaka, DP): Thank you, Hon. Speaker.

I rise to second the Referendum Bill (No. 2) of 2020 as moved by Hon. Otiende Amollo. I associate myself entirely with the remarks he has made and the observations of the two Committees when they met to internalise the two Bills that are pending before this House.

First and foremost, it is important that Members acquire copies of the CIOC Bill which is fantastic and also good. It makes good proposals which should be incorporated at the Third Reading. As you have heard, there are various amendments that have been proposed by the Departmental Committee on Justice and Legal Affairs (JLAC) to this Bill. We want to come up with one of the best laws in the country to govern referenda. It draws a lot of interests when you talk of referenda from time to time. It is not just now because there is a looming referendum that is being referred to and mooted in the country. We want to have a law that is going to guide us and posterity. This is why we propose that the Bill by CIOC be incorporated here. We should also make various amendments to it so that what we come up with is a super law.

Briefly, touching on what has been mentioned, it is of interest that referenda should not be one question. We must provide multiple questions because there may be various issues.

(Hon. (Ms.) Jennifer Shamalla spoke off-record)

Hon. Speaker: Have you forgotten that if you want to speak you put on your intervention button?

Hon. (Ms.) Jennifer Shamalla (Nominated, JP): On a point of order, Hon. Speaker. Hon. Sir George, with utmost respect, is a Member of JLAC. He participated and agreed with the

recommendations to adjust the Bill. Is it right that he can now purport to disown some of these resolutions because of political convenience?

(Loud consultations)

Hon. Speaker: Proceed, please.

Hon. George Gitonga (Tharaka, DP): Thank you, Hon. Speaker. I dissociate myself from those sentiments. I have said we are making one of the best laws in this country that cuts across the entire House. The Committee has made various recommendations for amendments. In my own view, the whole room is available to us to propose whatever amendments we are supposed to make to this Bill.

(Applause)

The reason I am saying so is based on Clause 10(2) (b) which actually makes a provision for referendum question or questions. I am not out of order. What I am saying is that we should actually streamline that clause to ensure that we now have room for multiple-choice questions in any referendum.

(Loud consultations)

Hon. Speaker: There is an intervention from Hon. Olago Aluoch.

Hon. Olago Aluoch (Kisumu West, FORD-K): On a point of order, Hon. Speaker.

With profound respect to my learned friend with whom I have the privilege to serve in JLAC, I want to associate myself with the sentiments expressed by my sister, Hon. Shamalla. I believe the rules require that when Hon. Murugara is standing to second this Bill after Otiende Amollo, he has to go by the Report of the Committee and not introduce other matters. What he is doing now is articulating other issues which are not in the Report of the Committee and I think that is not proper.

Hon. George Gitonga (Tharaka, DP): Hon. Speaker, what I am making reference to is actually in the Bill. We have said as a Committee we will have time to streamline it. This is so that where it is unclear and uncertain, we make it clear and certain. That is the only thing I am saying. As regards Petitions, I fully agree with the observations of the Committee because I was part of it and we made recommendations.

Litigation must be expeditious. There is nothing wrong with the Committee recommending that in every stage where we have set timelines, we can take whatever action needs to be taken within a given period of time so that people can get justice when they go to court. The general amendments as we have said are to ensure that the IEBC is able to give Kenyans a credible referendum. This is very important.

The essence of a referendum is to ensure that whatever question is being tried by the people is actually answered in the best way they want. This is the purpose of this law which is very important despite the fact that it has come on an evening session. You can see the interest Members have in it. What we are doing is to encourage each Member to look at the two Bills and bring amendments where necessary to ensure we have a good law.

With those remarks, I second the Bill.

Hon. Speaker: Member for Ijara, I can see you. Hon. Members, first of all even as I propose the Question, Hon. Gitonga Murugara has made an interesting observation which is correct. That there is an unusual interest, but this is good for the Members of the HBC and me because it is a good beginning of these evening Sittings.

According to the COVID-19 Ministry of Health guidelines and protocols for us, we are only supposed to accommodate 112 Members. With more than 100 Members already in the Chamber, this is quite commendable.

(Applause)

Hon. Members, with that said and done let me propose the Question.

(Question proposed)

Hon. John Mbadi.

Hon. John Mbadi (Suba South, ODM): Thank you, Hon. Speaker. Let me start by saying that I am happy. This is because the issue we had previously with the two Bills that were before us has been resolved in some way. We were worried that we would have conflict between the two Committees of the House dealing with almost the same issue but having different Bills.

Now that we have a solution to this, we have before us this Bill being sponsored by the Justice and Legal Affairs Committee. It is giving space to the other Committee to input through amendments and any other Member. This is a good move. I want to thank Hon. Members for turning out in these large numbers to debate this very important Bill.

Remember in the previous Sitting, I pleaded with Members to be here so as to deal with this Bill so that we demonstrate that the creation of the extra Sitting was for a justifiable cause. I have gone through this Bill and I am happy that it has captured quite a lot of issues that were outstanding; issues which were not clear and have not been clear. I remember when the *Punguza Mzigo* Bill, which was meant to go to a referendum because it was through a popular initiative was introduced, some of us were asking: If we are to go for a referendum, what will guide the process? We were going to basically rely on our Constitution, which does not provide details on how to conduct a referendum. Today at least we have something which once we finish – I am sure we will finish with it quickly – it will guide the referendum process.

Hon. Speaker, I just want to highlight a few things. I do not want to talk to the details of the Bill because I do not think I have enough time to prosecute the entire Bill. I am looking at Clause 5. I am sure the Committee has looked at it. If I missed the submissions of the Mover of the Bill and the Seconder, I will be forgiven but, again, it is something I have observed. So, I have to say it. I feel that Clause 5 (8) is actually unconstitutional. This is because it says if one or both Houses of Parliament fail to pass the Bill, then it goes ahead yet we are talking about a Bill which comes through Article 257 of the Constitution, which talks about a popular initiative. The clause says:

“The Bill shall lapse if it does not relate to a matter specified in Article 255 (1) of the Constitution.”

My reading of the Constitution talks to it differently. I just want to read out Article 257 (10) for record. It 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.”

So, the Constitution says that if it is spelt out under Article 255 (1), whether Parliament passes it or not, it will go to a referendum. However, the text here is that if either House of Parliament fails to pass the Bill or the Bill relates to a matter specified in Article 255... So, any amendment proposed through a popular initiative by the people of Kenya, whether it touches on Article 255 (1) or not, even if either House of Parliament rejects it, it should go to a referendum. However, the Bill says the Bill shall lapse if it does not relate to a matter specified in Article 255 (1). I find this text completely at variance with what is in the Constitution. I hope the Committee identified that and will propose an amendment.

Further, I agree with the timelines provided but, again, I have concern. I definitely heard Hon. Otiende speak to this matter. He said that a referendum may be conducted on the basis of an Act of Parliament which shall specify... Which other Act? I think that one was properly prosecuted. I do not want to over-emphasise that point. However, something that caught my attention is about – let me just mention it without even referring to it directly in the Bill – the provision that the IEBC will send referendum question it framed to Parliament and Parliament can refer it back to IEBC to redraft it. The IEBC redrafts and brings it back to Parliament. Parliament can then refer it back. I find that too cyclical to the extent that we do not know when this would end. The net effect would be to delay, especially if it is a popular initiative.

If promoters want a Bill in a particular manner and they have collected signatures, I do not think Parliament should have much leeway or much space in redrafting such a Bill because then, how would you know that what Parliament is thinking is what the promoters wanted? If the promoters have framed their Bill in a manner that is not acceptable, then it is upon the people of Kenya to decide in a referendum that they do not agree with the promoters so to speak, of the Constitution.

I wanted to talk about the committees and I agree with Hon. Otiende. However, I think the committee should think through this even much further. We can have as many committees as possible but we also need to tidy it up. We also need order much as we want democracy. You may have 1000 committees, each of them wanting to sponsor agents in a polling station, but there would be definitely confusion. You would have 1000 people and 100 groups supporting, and another 100 or 200 groups opposing. How are you going to harmonise in a way that we have order and organisation? We know how our polling stations are structured or how they are. We need to at least put some systems, where those who are supporting, those who are taking similar stand on a Bill state whether it is yes or no. Those who are taking similar stand need to find a way of coming together not necessarily to take responsibility but for ease of conducting a referendum. Otherwise, you would definitely cause a lot of confusion in the process.

I want to end my contribution by saying that I am happy that this Bill is very consultative. I have been following it keenly. To arrive at this Bill, the process was very consultative. I can see the immediate former Chair of the Committee who, together with his Committee took time on this issue. I was in consultation with some of the partners in Naivasha and Mombasa. They accommodated a lot of views and they gave time for IEBC to present their views. I think this is a product of very high level consultation and it is the way to go for committees of this House. We need such kind of engagement and public participation.

My final comment is that I am still not very comfortable with this level of public participation when it is a popular initiative. Yes, we, the people of Kenya decided that public

participation is very integral and we placed it at the core of our Constitution. However, when amendment to the Constitution is being done through popular initiative, people have taken steps to collect and convince Kenyans in whichever way and managed to collect one million signatures and above. I do not see why we should spend taxpayers' money to engage, especially Parliament which may not have much say, whether to reject or support. Our work is basically like a conveyor belt. Why would we spend so much money in conducting public participation on a Bill that is being promoted through popular initiative? It will end up with the people of Kenya. If they do not want it, it is upon the promoters and those who will be rejecting the Bill to campaign and convince the people of this country that the Bill is either good or bad and the people will take a decision. So, to me, when it is popular initiative, we need to reduce the value that we attach to public participation, because it assumed there is already public participation. For you to collect signatures from me, it is assumed that you have convinced me in some way. You have already explained yourself to me. I do not know how *Punguza Mzigo* Initiative is explained because I never saw any engagement. Somehow, they managed to collect a million signatures. The Building Bridges Initiative (BBI) managed to collect signatures. There are some who did not want to read. They said whether it is through chiefs, *askari kanga* or fishermen, it is Kenyans who collected the signatures.

I am the one who led the signature collection in my constituency. I did not have to explain. The people said: "Mbadi, we believe what you are telling us because that is why we elected you, we will sign for you." They do not need these public participations again. Calling my constituents to explain to them this Bill is a waste of time. If I want them to vote for the Bill, I will ask them during the campaigns. I want to request that Parliament should not spend money again going to the people to explain a Bill which they appended their signatures on already.

I support this Bill. I ask the Committee to look at the few amendments which, probably, have not been captured in their Report.

I thank you. I support.

Hon. Speaker: Very well. I am getting to appreciate that this evening Sitting is very convenient. Apparently, it looks like Nairobi Members of Parliament and those from their environs are here. Hon. T.J. Kajwang' is present; he was not here the whole afternoon. The Member for Murang'a is now very busy doing consultations; she was not here when Questions were being directed to her Committee. So, you can see that these evening Sittings are not very bad. I think you are going to see a lot of participation.

Hon. Amos Kimunya.

Hon. Amos Kimunya (Kipipiri, JP): Thank you, Hon. Speaker.

I rise to support this Bill. I am also very happy that the two Committees have had their consultations and harmonised the Bills. The good thing is that the two Bills and the Reports are available in the House. So, we will be able to pick and enrich the Bill by the Departmental Committee on Justice and Legal Affairs, with the provisions in each of them.

I am also happy that we are doing this Bill...

(Hon. Members consulted loudly)

Can I be protected from loud consultations? At times, the consultations interfere with the thought process.

We are excited that we are doing this Referendum Bill when we have something to focus on. We have a live experiment; we have a referendum that we are talking of. So, people can look at all the issues that need to be captured. What we need is to allow, as we are formulating this law,

Disclaimer: *The electronic version of the Official Hansard Report is for information purposes only. A certified version of this Report can be obtained from the Hansard Editor.*

for all the various options in doing a referendum, whether it is the current one or the one that will come in future, so that when we do the law, we are looking at a law that will guide not just now, but into the future.

Unfortunately, we are not the first ones to do a referendum. We did one in 2005 and another one in 2010. Britain did a very major one that made a decision to exit the European Union (EU). The United Kingdom (UK) is not just one country; it is not England. There is Scotland and Ireland, and each of those was affected differently but they had to carry the burden of being enjoined so that as England leaves, Scotland or Ireland decide on their own. It has to be one or all because they entered there as one country. The Chair or Vice-Chair of the Departmental Committee on Justice and Legal Affairs has explained a number of the options that we have. We will be processing some amendments.

I also want to highlight a few things that I have picked up for the Committee to consider so that we make it easier. The first one is Clause 2. Clause 2 is talking about the popular initiative. I know the lawyers know what Article 257 in the Constitution states. A law should stand alone so that any person looking at the Bill does not need to go to the Constitution to see what a popular initiative is. I urge the Committee that the first thing we need to do is to consider including the definition of the term “popular initiative” within Clause 2. That way, some of the issues we are having here might be answered.

The other suggestion is with regard to Clause 5. Clause 5(1) starts by talking about a popular initiative and then Clause 5(3) (c) talks of a draft Bill. There is no link between the popular initiative and how it converts into a Bill. The Constitution states that anyone could, through a popular initiative, raise an issue to be determined in a referendum. It then shows how if it is a general suggestion, it needs to be crafted into a Bill to the point of sending signatures to the IEBC or collecting the signatures. We need to tidy up the steps in this law. From the initiative, how do you formulate the question? What do you take to the people? Do we need a sample of the form for collecting signatures so that I do not collect signatures on the back of an envelope? How do we incorporate the electronic collection of signatures because we are now in an electronic age? This is so that we capture some of the steps so that in moving from Clauses 5(1) to 5(3) (c), it is very clear what the promoter wanted. How has the promoter then convinced the one million people to support that initiative or the question? How does that question get translated into a Bill?

Not everything needs to be a Bill. That is why we are getting some confusion. A referendum could be held on anything. The referendum that was held in the UK on exiting Europe was not a Bill. It was a question. Should Britain exit the European Union? Kenya could make a decision. I could promote a referendum question jointly with Aden Duale or somebody else to ask whether Kenya should continue being in the East African Community (EAC) or the Common Market for Eastern and Southern Africa (COMESA). We could then take it to the people. All those questions are available for people to make a decision. Because you cannot make that decision alone and there is no provision for that, you then take it to Kenyans. We could promote a question to ask whether Kenyans should drive on the right or on the left because it involves millions of cars. All those options need to be captured within this law so that the murmurs we heard of whether the question should be a Bill, should a referendum be a question, a series of questions, multiple choices or a Bill are addressed.

We need to be very clear. If it is a Bill, it can only be good or bad, which is what we do here. When we come to the Third Reading of any Bill, the question is always whether we have approved the Bill or not, especially constitutional ones. We need that here. If it is a question, we could ask a series of questions in which case people will have a choice. Should Kenya quit the

EAC, yes or no? Should Kenya quit COMESA, yes or no? Should Kenya quit the African Union (AU)? All those questions could be asked as a series of questions in which case you have multiple choices and you can choose one or the other. Kenya can stay in the EAC but quit COMESA.

We need to frame it very well, so that this law becomes clear. The responsibility is on the promoter to style the issue he or she is canvassing. I can decide that I want to style my issue by way of a Bill because Clause 2 to Clause 100 are inter-connected. You cannot come and cherry-pick one item from my Bill that I am promoting and you tell me to withdraw Clause 80 and pick Clause 7. At the end of it all, you can end up with a mongrel Bill that is not inter-connected or composite. As we are making this law, I urge the Committee to have some clarity that can be understood by the layman.

You are saying that the provisions on this Bill will apply in the counties. If Nyandarua County wants to know whether it should have some economic partnership with the neighbouring Nakuru County, the people of Nyandarua County and Nakuru County have to decide that. This needs to be in a language that they can understand. Simplicity is the issue. I believe that is the principle that is captured within our law. Our law on election should be simple, transparent and take into account all the special needs, including the people with disabilities and special needs. That is simplicity.

(Applause)

The Vice-Chair is taking notes. Let us not start thinking of whether we want the referendum that is being promoted by Hon. Junet Mohamed and Hon. Dennis Waweru on behalf of the people they are promoting and which was supported by four million Kenyans. Let us not use that to then say that Hon. Junet and Hon. Dennis should have done it like this. They are the ones who did it. How do we ensure that Kenyans support that initiative without confusion? That is up to them to explain.

What we need here are timelines. At what point does it go to the people? When should campaigns end? When do we determine that the people can now be called upon to make a decision? Once we have those small bits done, we will have a good law. However, let us not blind ourselves that if we do this, it will change an ongoing process because the promoter has to be convinced. We cannot make a law for a certain Bill or process. We can only make a law for any process which is initiated by any person.

I agree with Hon. Mbadi. These masks are a bit tight. I have been here the whole day. So, I am a bit more stressed than most of you. I agree that there is some contradiction in Clause 8 of the Bill that I hope the Committee will sort out to make sure that it accords with what the Constitution says. I explained before. I believe that a referendum can have one question or a series of questions which are inter-connected or disconnected depending on what the original promoter wanted. We cannot be the ones to prescribe that the promoter should provide for a, b, c or d.

I am also very uncomfortable with public participation. This Bill should have a lot of public participation. If I am promoting that Kenyans should drive on the left or right side, I should convince them to vote my way, so that I cannot be told that I did not have enough public participation. I can be asked the number of drivers I asked. That should not be a question for me to respond to. It is the people who should say it. I believe that the law should provide for all these options and the people can then decide. Those are the main things that I want to highlight. Obviously, we will be looking at it in detail and we will also be listening to other comments from

different people. We will be working on what amendment we need because this is a great opportunity that we have as Kenyans to make a good law.

The other thing I would like to highlight is that we are probably assuming that we do not have a law. Our current Elections Act of 2011 provides for conducting of referenda. Actually, we do not have a shortage. What we are doing here is to amend that Act by getting a stand-alone referendum law. If we cannot get it that way, perhaps we might need to make amendments to the Elections Act. But we do not have a vacuum; we already have something. So, nobody should feel that because there is no referendum Bill or regardless of what happens to the two Bills that a referendum cannot go on. Kenyans should be encouraged to bring up any issue they want so long as they can bear the cost of doing what needs to be done.

Hon. Speaker, I believe the Committee has heard the issues I have raised. I will also be looking deeper into them and might be able to pick one or two others so that we come up with a law not just for Kenya, but for the region and even for the rest of the world. Just like we have been told, our 2010 Constitution set the benchmark for other countries. Let us make sure that we set the benchmark for a referendum law not just for Kenya, but for the rest of the world.

With those few remarks I beg to support.

Hon. Speaker: Yes, we should not just imagine that the referendum law is about amending the Constitution. Anyone of you or any Kenyan can decide on whether Kenya should continue borrowing from China. Just promote and that will be the question that Kenyans will have to decide on. If they say we cut ties with China, we will have to because they are the sovereign. They will be making that decision in their capacity as sovereign.

Hon. Maanzo, you may have the Floor.

Hon. Daniel Maanzo (Makueni, WDM-K): Thank you, Hon. Speaker, for giving me this opportunity to support this very important law. I want to agree with you that a referendum can be of many forms. In the proposed Clause 7, there are other forms of referenda other than the amendment of the Constitution. This is also a very important law bearing in mind that it is referring a lot to the Election Act such that whatever is not covered here is under that election law.

While the Chair was moving, he talked about petitions or questions to be raised. These particular petitions originate from the High Court and can go to the Court of Appeal, but they do not find their way to the Supreme Court. This is for the simple reason that the current Constitution is supreme and is not one of the proposals in the current Building Bridges Initiative (BBI). The Supreme Court has a specific mandate to deal with presidential elections. Since referendum law is not captured by the current Constitution, then you cannot make use of the Supreme Court for purposes of a petition dealing with referenda although the magnitude of a referenda is equivalent to a presidential election and it is probably something to think of in future.

Clearly, at the Third Reading, we have a lot of amendments to make to this law in order to make it better. You can see gaps from one point to another. For example, on the issue I am talking about of an election petition relating to a referendum, which has a magnitude equivalent to a presidential election, you can see that the timelines are very big in the referendum issue. I believe that whatever matter is taken to a referendum, Kenyans want to sort it out quickly so that they can go back to their normal lives. This is because whether the referendum is on the amendment of the Constitution or dealing with a matter Kenyans want to decide on, Kenyans want to finish with it. For example, when we formed and joined the East Africa Community (EAC), there was no referendum to that effect. If we are going to move out of the EAC, are we going to have a referendum because we never did it in the first place? We need to amalgamate a lot of things so that we can have a schedule of things which can go to a referendum because a lot of matters are

resolved in Parliament by Acts of Parliament and resolutions of Parliament. What specific matters affect Kenyans and what criteria should be used for certain matters to go to a referendum, to what extent do they touch the country? I agree that in the matter of debt from a specific region, for one reason or another, can be taken to a referendum and the country decides.

There is the issue of promotion of referendum question of whatever nature, who promotes it and what turn does it take. Someone can promote it. When you promote it and have one million signatures, it means that you are gathering enough strength and potential and are able to influence massively to amend the Constitution or do a certain thing for the benefit of Kenyans. We have many things in Kenya which can go to that effect. Things that are of a big magnitude, for example, the pandemic or even in the case of our ports when we want to make them a 24-hour economy. There must be a way of measuring and be included in this law. Does everything go to referendum or what goes to a referendum? A lot of matters can be sorted out.

Clause 5 of the draft Bill deals with referendum to amend the Constitution through a popular initiative meaning it leaves a gap for the other amendments of the Constitution which are already specified by Parliament, when it goes through the two Houses. This is a popular initiative and we have already done referenda in Kenya thrice following a popular initiative. We utilised the election law which for now cannot suffice. We can still use the election law. It goes on to the nitty gritty of who is a voter. A person eligible to vote in a general election is the same person eligible to vote in a referendum.

We have the issue of counties, namely, if there is a referendum which needs to be done in the counties and the procedure to be followed in that particular county, then, of course, there is the expense related to a referendum. It must also come in a budget in a particular year and be budgeted for by this House. Although this referendum law does not hang on its own, it is strengthened by many other statutes and many resolutions of the House and many things this House does like the allocation of budget.

When it comes to the offences, we believe the offences which can be committed in a referendum, because it is an election, should carry the same weight as the offences in an election petition so that we do not have variance. This is a matter relating to an election. The regulations which are to be made under this Act are just like the ones we have. The Election Act has a lot of regulations and timelines which are very strict. The moment they are disobeyed, the election will have issues.

For the Regulations, which are yet to be made, once this Bill goes through, it will carry a lot of weight in terms of procedures and what should happen at what point.

Finally, the two Acts have been combined. The one that is now presented by the Departmental Committee on Justice and Legal Affairs under the leadership of Hon. (Dr.) Otiende seems to have swallowed the one for the Committee. However, I am happy that there was amalgamation and consultations. I believe that even during the Third Reading, the Constitution of Kenya Review Commission (CKRC), which had already prepared some law, can bring in a lot of weight into this. As much as this Act is very urgent because we have a referendum in the offing, it is good that we are making law. Probably, it will take many other years before we have a referendum.

It is good we carry everybody on board on this matter so that the question of whether it is a multiple choice or a Bill is cleared. A particular path has not been cleared properly because, for example, now the Building Bridges Initiative is a Bill, and it has its own procedure. It is either yes or no. Suppose now the issues being raised were a few, for example, all the sections in the

referendum Bill we have now, you cannot put a question for that. It would be like sending the whole nation into an examination which is very confusing. So, I think it is going to be specific.

You only have multiple choices when the matters are limited to something, for example, if the issues are three. We can have a law limited to three if the issues are only three or limited to six the way we have six elective positions from the member of county assembly (MCA) to the President. If you have six issues, then people can mark out, and those which fail, fail and those which pass, pass. However, for now, there is that confusion which we need sorted out so that it is clear in the law or regulations.

With those remarks, I beg to support.

Hon. Speaker: Indeed, there is one matter that comes to mind, Hon. Maanzo. We have many people from certain parts of the world who want to spend a lot of their money all over trying to preach certain things such as same sex marriage.

(Laughter)

That is something that one could think of a very interesting referendum question so that Kenyans can decide for once. This will ensure that people do not spend their time coming here to tell us stories, hence they can go and keep those practices where they belong.

(Applause)

Kenyans will make a decision so that they know that our leaders are telling them the truth. However, when you have a few people who are hiding in some funny places and are sneaking in through all manner of things, it is wasting time. So, there are very many things which are of great national significance that I believe Kenyans will be very happy to make a decision on once and for all so that in the next generations, there will be nobody coming around here in the streets or hotels purporting to hold workshops about those things.

Let us hear Hon. Duale.

Hon. Aden Duale (Garissa Township, JP): Thank you, Hon. Speaker. That is a very good suggestion. I concur with you that those people also have constituencies in Kenya, and maybe they are even in this House.

(Loud consultations)

I have said “maybe.” So, that referendum will also be very contentious. Before I go to the Bill, I wish to indulge my colleagues that this is a very important piece of legislation. We make laws for posterity. As we make this law, let us not have in mind the BBI. This law can be used for a referendum that will come 20 years from now. Let us remove emotions and everything. Let us deal with this matter. The Tenth Parliament and the Eleventh Parliament did not get the opportunity. The Twelfth Parliament, namely, those of us sitting here tonight, have an opportunity to make a good referendum law for us.

(Applause)

Having said so, it is very clear that there is no referendum law in Kenya. I will say it with authority and without fear of contradiction. The last time we had a referendum in 2010, we used

the CKRC Act, which became redundant after the promulgation of the new Constitution. So, we have an opportunity.

Parliament, and this House, has indeed, a very clear role of amending the Constitution either through a parliamentary initiative or through a popular initiative. We must agree there exists a lacuna on a number of issues. I want Members to read both Bills. If I had the choice, the Bill by the CIOC was a very good one. Why do I say so? It was defining each and every item. I really want to ask Members of the CIOC, led by the Chair who is Hon. Kioni, when we come to the Committee of the whole House, please, bring some of the salient features so that we have a very good law.

If you read Article 256(5) of the Constitution, it is not clear within what timelines this whole referendum should be conducted. There must be timelines from the beginning to the end when the IEBC will present to the President for assent. There is completely no timeline. So, a timeline is very important. It even does not tell us, for example, it is not clear within what timeline the President is required to request the IEBC to conduct a referendum. The moment this House and the Senate pass the Bill and the two Speakers submit it to the President, the President has no timeline. He can keep it as long as he wants. This Bill must state how long the President can have that Bill to amend the Constitution, particularly to matters relating to Article 255 of the Constitution.

You and the previous House Business Committee are my witnesses. One of the failures of the 10th and the 11th Parliaments, and we did so many legislations, was an oversight that we did not do a referendum law. It is Kenyans' culture that we sit pretty and rush when the matter is with us. We are not even learning from the Krieglger Report. We are told not to change our electoral commissioners two years to a general election. This is a country where people do not want to follow the due diligence of the rule of law.

(Applause)

It is not good if we cannot follow the Constitution, the statutes that we pass in this House and the supreme law. Then, we want to conduct a referendum without the existence of a referendum law. I want to ask very salient questions. This Bill must be passed very fast because if this Bill is not passed, there will be a lot of litigation on the conduct of any referendum. What does the verification process by the IEBC involve? This Bill must state it. The IEBC cannot have or verify one million signatures without a law. The verification process must be in law. There must be something in law. Chebukati and his team cannot have the luxury and say "You have not brought one million signatures" or "You have brought one million signatures". This Bill must have it.

What does the approval process by a county assembly involve? A law or a Bill must go through processes. The public participation has timelines. A county assembly cannot receive the Bill today, read it for the First Time and approve it tomorrow. It is a joke. The people of that county must be subjected to public participation. I want to thank the Speaker of the County Assembly of Nakuru. I watched him last night when he said: "I have received the Bill. We did First Reading. We are taking it to the public of Nakuru County. We will have a report. The report will be debated. There will a Committee of the whole House. The Bill will be passed". That is the way. Public participation, within the reading of Article 118, is a principal Article in our Constitution. We are here because of Article 1. We are here because the people of Kenya gave us the sovereign right to

legislate on their behalf. Outside the legislation, in a popular initiative, the people have a right. That is their product. It cannot be a product of the IEBC. It cannot be a product of the county assembly. It cannot be a sole product of the National Assembly and the Senate. In all whatever we are doing, the public must be involved.

Hon. Speaker, what is the threshold for approval of a draft Bill by a county assembly? Is it a simple majority or two-thirds majority? This referendum law must clearly state the threshold that counties must meet to pass this draft Bill. As we speak, that is not in law. The passage of this Bill by county assemblies is unconstitutional. Prior to the introduction of a draft Bill in Parliament, upon approval by the county assemblies, it is brought to our respectable Speaker, Hon. Muturi. Can the Bill be redrafted without changing the substance to ensure that it takes the right form? The law is not clear. It is not even clear to the Speaker on the person who should introduce the Bill in the National Assembly. Is it the Leader of the Majority Party, the Leader of the Minority Party or the Chair of the Departmental Committee on Justice and Legal Affairs? That must be put in law.

We must be very specific. Who sponsors such a Bill in Parliament in terms of introduction? What is the period for introduction of a draft Bill in Parliament and approval by the county assembly? How long can Parliament keep this Bill? Parliament can decide to stay with it for six months. We must have a timeline. If you look at the Constitution of Kenya Review Commission Act and the Referendum of 2010, each organ and step had a timeline. All these matters must be addressed specifically. I have heard people saying that we might not need a multiple choice system, but I want to ask them to relax. We might not need it during this referendum, but we might need it in five years. Do not freak when you hear a multiple choice system because we make laws for posterity. We must have in law the institution that decides whether we will have a multiple choice or a yes or no system. It must be left to the Independent Electoral and Boundaries Commission.

Hon. Members: No.

Hon. Adel Duale (Garissa Township, JP): We must have that in law. We can even say it is Parliament. People should understand that the moment the Speaker of the National Assembly sends the Bill to the President, the President in consultation with the Attorney-General, the Chief Legal Advisor will sit and look at the issues in the Bill and decide on those that should go for a referendum and those that are legislative. So, by the time President Uhuru Kenyatta and the Attorney-General, Kihara, will look at the Bill, we might just have three questions that require a referendum. We are looking at so many issues.

Finally, the Constitution confers on Parliament the role of amending the Constitution. Time is ripe.

Hon. Members: Just add him a minute.

Hon. Speaker: Let us go by the time. Let us have Hon. Junet.

Hon. Junet Nuh (Suna East, ODM): Thank you, Hon. Speaker, for giving me an opportunity to contribute to this Bill. Having listened to the last speaker, Hon. Duale, I want to say that this is an important Bill for this country. As he has rightfully put it, we have a culture and tendency of bringing Bills that are of high importance such as this one at the last minute. When will that culture end? There are issues that this Bill ought to have addressed early enough when we decided to change the Constitution. For instance, you are asked to collect one million signatures and take to the IEBC for verification, but until now, I do not understand what the IEBC is supposed to verify. In my view, when you are asked to verify a signature, you are supposed to have a specimen signature to check against. As far as I am concerned, my specimen signature is not at the IEBC. They might just be checking whether you are a registered voter or your ID number is correct. This fallacy that IEBC is supposed to verify signatures must come to an end through this

Bill. The truth must be said. This will not be the first or the last referendum. We are going to have other referenda.

Having said that, I happen to be one of the promoters of the BBI Bill. We went out there and collected one million signatures and took them to the IEBC with the draft BBI Bill. The signatures were verified and the Bill was sent to the county assemblies. If 24 counties will pass the Bill, the Bill is expected to come to Parliament. After all that, somebody wakes up from his slumber and tells me that he wants to subject that Bill – a Bill that is by popular initiative from collecting one million signatures – to a multiple choice question. Why! What has stopped them from going to the public to collect one million signatures, so that they can amend the issues that are not good that the BBI Bill has proposed? The popular initiative is open to everyone. It is not open to me only. We managed to collect one million signatures for the BBI Bill, we will convince 24 counties to pass it and bring it to Parliament then take it to a referendum. We will either win or lose the referendum.

When I go through such a process, you cannot convince me in any way that you want to have a multiple choice question on the BBI Bill that I am promoting. It is dishonest to say that you want to have a multiple choice question on a Bill promoted by different people. Having said that, I want to urge Members that they should not look at this Bill with partisan lenses. That, we are going to have a referendum on a Bill because it is being propagated by so and so. Tomorrow, you may have your own Bill, desirous to change a few parts of the Constitution. Think along that line. You may want to use the multiple choice question against me now, but tomorrow I can apply it against you. I will tell you if want to amend the Constitution, bring a multiple choice question I decide on it. Let us be objective and legislate for posterity. Let us look at what is in the best interest of Kenyans. That is when we will succeed as a House.

The other thing I agree with Hon. Duale is that, there are no timelines. This Bill is going to help us put timelines on how we are going to conduct the change of the Constitution through a referendum. One thing I do not agree with him is on how a Bill is going to be transacted at the level of the county assemblies and Parliament. Bills are Bills. When they land here in Parliament, there is a process. It has to be taken to the Speaker for approval then it goes to the House Business Committee that slots it for First and Second Readings. That is how law is made in Parliament. Hon. Speaker, you do not need to address that. After all, this is one Bill that we will not be able to amend. So, there is no reason why we should argue on how the Bill is going to be processed at the county assemblies' level or in the National Assembly.

Hon. Speaker, we have been in touch with some of the counties that have passed the BBI Bill and some have done proper public participation. Counties were trained when devolution came into place by experts from this House on how to conduct processes on Bills. Some of them have done public participation by taking the Bill through all the processes that a Bill needs to go through. For that reason, I want to urge Members to pass this Bill so that we have a Bill that is going to guide us and help us in conducting referenda in many years to come. We must also understand that there is a difference between a question – as the Leader of the Majority Party, Hon. Kimunya has put – and a Bill. If you want to ask a question like the Hon. Speaker has said on the same sex, you will ask Kenyans: Do you support the same sex in this country or you do not? Then they can say yes or no. You can ask: Do you want to leave the East Africa Community (EAC)? Then they can answer yes or no.

But this is a Bill that contains issues that relate to each other from Clause 1 to Clause 100 and then you tell me we need to have a multiple-choice referendum. Go and develop your own Bill. Nothing stops one from developing their own Bill unless you fear collecting one million

signatures or facing 24 counties and Parliament. If you have those fears, then you have nothing to tell Kenyans. Stay put. Wait for the referendum. If you want to agree with my Bill, say yes. If you want to disagree with it, say no. You have all the democratic rights to vote in any way you feel like. Nobody will force you. A referendum is just like an election. You will go to the voting booth and find my Bill and decide whether it is good for you or not and vote yes or no.

I was shocked when I heard the Secunder of the Bill soliciting for amendments on the Floor of the House saying Members must be allowed to make amendments to the Bill. Every Member has a right to propose amendments to a Bill. Nobody will be stopped from bringing his or her amendments. I want to urge my colleagues from the *Tangatanga* faction to let us meet at the referendum ballot.

Thank you very much, Hon. Speaker.

Hon. John Kiarie (Dagoretti South, JP): On a point of order, Hon. Speaker.

Hon. Speaker: What is your point of order, Hon. Kiarie?

Hon. John Kiarie (Dagoretti South, JP): Thank you very much, Hon. Speaker. While the Whip of the Minority Party was still on the Floor, I needed some clarity to know if he was in order to promote this Bill as his own. As has also been mentioned by the Leader of the Majority Party, this Bill is being proposed by Hon. Junet and a former Member of Parliament, while we very well understand that this Bill is being funded from public coffers. We would like to know for sure who the promoter of this Bill is and how it becomes an interest of debate where we...

Hon. Speaker: Hon. Members, because this debate will continue, I want you to limit yourselves to the Referendum (No.2) Bill (National Assembly Bill No. 14 of 2020). Those other things you are talking about are just like what I am talking about on whether you support same sex marriage or not. They are neither here nor there. So, there is no need of asking questions about matters which are not before the House.

Hon. Kajwang', you also had a point of order?

Hon. T.J. Kajwang' (Ruaraka, ODM): Hon. Speaker, there is a lot of interest in this matter. I am sure we may not all have an opportunity to say something on it. On a point of order, I am a Member of CIOC and we have gone through all these Bills and tried to harmonise them. Because you ordered for a joint sitting, there should be a joint report of the Departmental Committee on Justice and Legal Affairs and the CIOC somewhere. We spent taxpayers' money for close to five days trying to harmonise the Bills. I have noticed, upon inquiring from the Clerk, that for some reason, the Chairs of the two Committees did not append their signatures to the joint report.

Would I be in order, Hon. Speaker, to request your office to cause the Chairpersons to append their signatures to that report, for whatever value it may have, so that it is tabled? It would help Members to see the areas that the Committees harmonised. A lot of things have fallen by the wayside. If you look at these Bills, they are the raw ones that were drafted but a lot of work has gone through them over time and the areas we could debate are very few. Would I be in order, Hon. Speaker, to ask your kind office to cause the Chairs to have the joint report tabled and provided to Members in Room 8, so that we can look at them to enhance and enrich the value of our debate?

Hon. Speaker: Hon. Otiende Amollo, do you wish to say something about that?

Hon. (Dr.) Otiende Amollo (Rarieda, ODM): Yes, Hon. Speaker. Indeed, I confirm that Hon. T.J. Kajwang' was one of the Members of the harmonisation team that met in Mombasa from 19th to 22nd November 2020. I will confirm that Hon. T.J. Kajwang' and the other Members did that on behalf of JLAC. I had the opportunity to co-chair that meeting with the Chair of CIOC,

Hon. Jeremiah Kioni, and his Deputy, Hon. Peter Kaluma, who was also present. On behalf of JLAC, I confirm that I signed the report. On my inquiry, I was advised that the Chair of the CIOC was unavailable to sign and I indicated why. Perhaps that is something that only he can speak to. However, indeed, the report is available. I have a copy.

Hon. Speaker: Very well. Hon. Members, it is quite unfortunate. I can see there is immense interest on this matter. What is coming out from what Hon. T.J. Kajwang' has raised should be of even greater interest. It is interesting to learn that there are harmonised reports which only lack the signature of one Member. Hon. Kaluma, please, undertake to sign and possibly bring it to my attention. Have it brought to me for tabling because it will do a great deal of service to Members making contributions when we resume next week. It will be very useful.

ADJOURNMENT

Hon. Speaker: Hon. Members, the time being 9.00 p.m., the House stands adjourned until Tuesday, 16th February 2021 at 2.30 p.m.

The House rose at 9.00 p.m.