



REPUBLIC OF KENYA

**TWELFTH PARLIAMENT - (FIFTH SESSION)
THE NATIONAL ASSEMBLY
COMMUNICATIONS FROM THE CHAIR**

(No. 22 of 2021)

**CONSIDERATION OF THE CONSTITUTION OF KENYA (AMENDMENT)
BILL, 2020(A BILL TO AMEND THE CONSTITUTION BY POPULAR
INITIATIVE)**

Honourable Members,

You will recall that during the afternoon sitting of the Special Sitting of the House of Wednesday, 28th April, 2021, the Member for Garissa Town, the Hon. Aden Duale rose on a Point of Order during debate on the Second Reading of the Constitution of Kenya (Amendment) Bill, 2020 which seeks to amend the Constitution of Kenya by popular initiative. The Hon. Member sought the direction of the Speaker on a number of issues in relation to the Bill which he termed as “grey areas” including the value of the public participation exercise conducted on the Bill by the Departmental Committee on Justice & Legal Affairs and jointly with the Senate Standing Committee on Justice, Legal Affairs and Human Rights and the weight to be placed on the submissions received by the Committee amongst other issues.

Hon. Members, The Member for Ugenya, The Hon. David Ochieng’ also sought direction on the role of the House in dealing with a Bill to amend the Constitution by popular initiative and whether, and the extent to which, the House may amend the Bill. Additionally, he sought guidance on whether the Bill before the House fell within the four corners of Article 257 of the Constitution or is what he referred to as an “Executive initiative” on account of the promoters seemingly being in government

and the moving of the Bill having been deputed to the Leader of the Majority Party by its promoters.

The Hon. Ochieng further queried whether proceeding with the consideration of the Bill whilst cases challenging its constitutionality are pending judgment before the Courts would amount to imprudent use of parliamentary time and public resources in the event the Court invalidated the entire process and the constitutionality of the Schedule to the Bill which contains the proposed additional seventy (70) constituencies and their delimitation.

Hon. Members, During the said sitting, several other Members, speaking on Points of Order, raised other constitutional and procedural concerns generally revolving around the form and nature of the Bill; the processing of the Bill in the county assemblies and Parliament; the effect of the pending court cases on the consideration of the Bill in Parliament; the attendant voting thresholds and the measures put in place to facilitate Members to participate in the consideration and voting of the Bill given the COVID-19 Pandemic. The Members whose spoke on these matters include the Hon. Dr. Robert Pukose, the Hon. Johanna Ng'eno, the Hon. Kimani Ichung'wah, the Hon. Jared Okello, the Hon. Millie Odhiambo, the Hon. David Sankok, the Hon. Caleb Kositany, and the Hon. Peter Kaluma. Also contributing to the issues were the Hon. Ronald Tonui, the Hon. Vincent Kemosi, the Hon. Alois Lentoimanga, the Hon. (Dr.) Otiende Amollo, and the Hon. T.J. Kajwang among others.

Hon. Members, I must note that the concerns raised by Members are weighty and indicative of the importance of the Bill currently before the House, being the first of its kind to get to this stage and seeking extensive and radical changes to the existing constitutional order. Having keenly reviewed the concerns, I have distilled the following five issues as requiring my guidance—

- (1) Whether the Constitution of Kenya (Amendment) Bill, 2020 promoted by the Building Bridges Initiative is a popular initiative under Article 257 of the Constitution and whether the procedure**

outlined under Article 257 was followed by the county assemblies and the correct threshold met before the introduction of the Bill in Parliament;

- (2) Whether the Bill upsets the “basic structure” of the Constitution; and whether it contains “unconstitutional” constitutional amendments;**
- (3) Whether a Bill to amend the Constitution by popular initiative can be amended and what is the value and intention of the public participation conducted by the Joint Committee;**
- (4) What is the effect of pending court cases on the consideration of the Bill currently before the House; and,**
- (5) What is the procedure applicable to the consideration of a Bill to amend the Constitution by popular initiative in the House and the voting threshold?**

Hon. Members, From the outset, I must note that the Report of the Joint Committee as tabled by the Chairperson of the Departmental Committee on Justice and Legal Affairs does ably delve into all the matters raised to a great extent. The Report ably outlines the theoretical background underpinning the issues raised as well as the legal justifications and the unique history of our constitution-making process. The two Committees of Parliament have acquitted themselves in a highly commendable manner and competently discharged their crucial role of interrogating the proposals in the Bill, facilitating the involvement of the public in the legislative work of Parliament and making recommendations for further action by the two Houses.

Hon. Members, I must also note that the process of amending the Constitution by popular initiative in terms of Article 257 of the Constitution is one which espouses the sovereign power of the people of Kenya under Article 1 of the Constitution. It is one which begins from the people who are allowed to propose amendments supported by at least one million registered voters. Fittingly, the process also ends in the hands of the people who approve the proposed amendments through a referendum particularly in the event that a House of Parliament fails to pass it. This is a process

that is people driven where even this House or indeed its rules cannot stifle or bar the exercise of the sovereign power of the people.

Hon. Members, The **First Issue** is with regard to the question of whether the Bill promoted by the Building Bridges Initiative is a popular initiative under Article 257 of the Constitution and whether the procedure outlined under Article 257 was followed by County Assemblies and the correct threshold met before its introduction in Parliament. In addressing this question, I note that when one compares the amendment procedures prescribed by Articles 256 and 257 of the Constitution, it is vividly clear that a Bill to amend the Constitution by parliamentary initiative is introduced in Parliament by a Member or Committee of this House in accordance with the requirements of Article 109(5) of the Constitution. I also note that the Joint Report of the Committees also went to great lengths to distinguish between a Bill to amend the Constitution under Article 256 by parliamentary initiative and a Bill to amend the Constitution under Article 257 of the Constitution which is by popular initiative and hence I will not delve into this. This is contained in the Joint Report in paragraphs 313 to 338.

Hon. Members, in answering the concerns raised by the Members on the nature of the Bill under consideration by the House and in particular whether it is a popular initiative, I will restrict my interpretation to whether the Bill before us followed the provisions of Article 257 of the Constitution by examining the Bill against its conformity with the following five parameters—

First, was the amendment to the Constitution proposed by a popular initiative signed by at least one million registered voters as required under Article 257(1)?

Hon. Members, you will recall that the Independent Electoral and Boundaries Commission confirmed that this requirement had been compiled with.

Second, was the popular initiative for an amendment to the Constitution in the form of a general suggestion or a formulated Bill as required under Article 257(2)?

Hon. Members, as you are aware, the Independent Electoral and Boundaries Commission also confirmed that it had received the popular initiative for an amendment to the Constitution in the form of a formulated Bill under Article 257(2).

Third, did the promoters of the popular initiative deliver the draft Bill and the supporting signatures to the IEBC, which verified that the initiative was supported by at least one million registered voters as required under Article 257(4) of the Constitution?

Hon. Members, as you are also aware, the Independent Electoral and Boundaries Commission confirmed that it had received the draft Bill and verified that the initiative was supported by at least one million registered voters.

Fourth, did the IEBC submit the draft Bill to each county assembly for consideration within three months of the date it was submitted by the Commission as required by Article 257(5) of the Constitution?

Hon. Members, as you are further aware, the Independent Electoral and Boundaries Commission confirmed that it had submitted the draft Bill to each county assembly for consideration.

Lastly, did the Speakers of the two Houses of Parliament, receive copies of the draft Bill from the County Assemblies with a certificate that each county assembly had approved it in accordance with Article 257(6) of the Constitution?

Hon. Members, you will also recall that I did communicate to this House on Thursday, 25th February, 2021 that the Speakers of Parliament had received returns from the county assemblies with forty-two (42) County Assemblies having approved the draft Bill as at that date. Thereafter, the draft Bill was subsequently introduced in the House and read a First Time on Thursday, 4th March, 2021. From an examination

of the Bill against the questions that I have just highlighted, one cannot arrive at another definition or indeed confuse the nature of the Bill with any other Bill other than one proposed under Article 257 of the Constitution.

Hon. Members, the Members also raised the concern that some of the Members of Parliament may have been involved in collection of views of the public through the Building Bridges Taskforce or participated as promoters of the Bill. As you are indeed aware, the Member for Suna East, Hon. Junet Mohamed is listed as one of the promoters of the Bill in the Joint Report. Additionally, I am also aware that several Members of this House signed to support the popular initiative that was submitted to the IEBC. However, the question of whether the Bill before us is a popular initiative or an "Executive Initiative" as some of the Members have decided to label it, in my view, does not arise. Any registered voter be it a Member of this House or even the President is at liberty to sign and support a popular initiative in terms of Article 257(1) of the Constitution. The Constitution does not place any restriction with regard to the age, gender, tribe, profession or status of a promoter of a Bill to amend the Constitution by popular initiative. **It is therefore my considered opinion that what determines whether a Bill is a Bill by popular initiative is whether the Bill takes the shape, form and follows the procedure under Article 257 of the Constitution.**

In addition, **Hon. Members**, looking at the Bill under consideration by this House, the enacting formula clearly reads and allow me to quote: ***"A Bill for AN ACT to amend the Constitution by popular initiative". "ENACTED by the people of Kenya."*** This further settles the fact that the Bill before us is a Bill to amend the Constitution by popular initiative and is to be enacted by the people of Kenya and not Parliament. Indeed, it is also worth noting that the Joint Committee did also consider this question and in paragraph 337 of its Report, the Committees found that the Bill is one by popular initiative under Article 257 of the Constitution.

With these facts **Hon. Members, the Bill before this House is therefore evidently one which is a Bill to amend the Constitution by popular initiative in terms of Article 257 of the Constitution.**

Hon. Members, Article 257(5) and (6) of the Constitution provide for the submission to, and consideration by county assemblies of a constitutional amendment Bill proposed through popular initiative. The provisions state and I quote

—

"257. (5) If the Independent Electoral and Boundaries Commission 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 a 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."

Hon. Members, The Constitution expects county assemblies to consider and deliver to Parliament, their decision on a draft Bill within three months after receiving the Bill from the Independent Electoral and Boundaries Commission. Records indicate that the IEBC submitted the draft Bill to county assemblies between 27th January 2021 and 2nd February 2021. The Constitution requires county assemblies to consider the draft Bill within three months after the date it is submitted by the Commission, and that the speakers of the county assemblies shall deliver a copy of the draft Bill to the Speakers of the two Houses of Parliament, with a **certificate** that the county assembly has approved it, in the case of an approval. Further, to be introduced in Parliament, a draft Bill must be approved by a **majority** of the county assemblies, being 24 county assemblies.

Hon. Members, the question as to whether the threshold was met in the county assemblies relates to the reported passage of "**multiple**" **versions of the Bill.**

Indeed, the report of the Committee has extensively tackled the matter of the errors. I would therefore not wish to overstate the matter any further save to say that by way of Communications from the Chair issued between February and March 2021, I regularly updated the House on the progress of submissions of certificates of approval from county assemblies.

From the last update of 4th March 2021, the total number of county assemblies that had approved the draft Constitution of Kenya (Amendment) Bill, 2020 was **forty-two (42)** whereas two (2) had rejected the Bill. Based on this fact, the House Business Committee scheduled the Bill for introduction in the House which was done on 4th March 2021.

Hon. Members, in construing whether the majority threshold was attained, the certificates and the accompanying Bills were considered on their *prima facie* basis as the documents expected to be submitted by the county assemblies. Indeed, deriving the practice in law, section 83 of the Evidence Act, (CAP 80 Laws of Kenya) states as follows with respect to *certified documents* –

"83. Certified documents

(1) The court shall presume to be genuine every document purporting to be a certificate, certified copy or other document which is—

(a) declared by law to be admissible as evidence of any particular fact;

(b) substantially in the form, and purporting to be executed in the manner, directed by law in that behalf; and

(c) purporting to be duly certified by a public officer

(2) The court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in such document"

Hon. Members, I am not aware of any concern regarding the validity of the certificates received from the county assemblies. **It is therefore evident that the draft Bill obtained the constitutional threshold for passage in the county assemblies and is thus properly before the House.**

Hon. Members, A secondary issue did arise from the submission of the copies of the Bills by the county assemblies with regard to the operative version of the Bill in light of reported circulation of different versions and errors in the Bill. On the **errors**

noted during the joint consideration of the Bill by the two Committees of the Houses Parliament, I agree with the Committees' findings that although Parliament may, in exercise of legislative power under Article 94 of the Constitution, take steps to correct noted errors, this may pave way for new substantive insertions that may ultimately affect the form and substance of the Bill.

We may then run the risk of eventually overriding the principal intentions of the promoters of the Bill and therefore offending the whole idea of an amendment of the Constitution by popular initiative. **In any case, the errors have been observed to be inadvertent and mostly typographical or cross-referential and that the text of the Bill is sufficiently clear as to what it intends to amend.** The errors were noted in Clauses 13(b), 48, 51(a) and Paragraph 1(1) of the Second Schedule. With the public debate that has raged on regarding this matter, and the explanations given by the originators of the Bill, any person interested in the matter surely understands the intentions of the promoters notwithstanding the errors. **The House will therefore continue to consider the Bill that was introduced and committed to the Justice and Legal Affairs Committee as submitted by the IEBC.**

Hon. Members, The **Second Issue** was on whether the provisions of the Bill upset the "basic structure" of the Constitution and whether it contains "unconstitutional" constitutional amendments. I note that the Committee has, at **Paragraphs 369 to 379** of its Report, also exhaustively interrogated the constitutional propriety of the Bill. As noted by the Committee, the premise behind the "basic structure theory" that is said to preclude the making of certain amendments to a Constitution is the centrality of the provisions targeted for amendment to the sovereign will of the people who give themselves a Constitution for posterity. The theory is majorly derived from decisions made by the Supreme Court of India on amendments made to the Constitution by the Parliament of India.

Hon. Members will appreciate that the constitutional history and the text of the Constitution of Kenya and that of India are markedly different. A key departure between the two Constitutions is the manner in which they provide for their amendment. Whereas the Indian Constitution provides for amendment of the Constitution by Parliament only, the Constitution of Kenya provides for amendment by either parliamentary initiative or by popular initiative.

Further, **Hon. Members**, the Indian Constitution does not expressly protect any part of the Constitution from being amended. Conversely, Article 255 of the Constitution of Kenya outlines the additional requirement of submission of a Bill for approval at a national referendum if the Bill seeks to amend any of the matters listed in the Article.

Hon. Members, When comparing our jurisdiction with the United States it is notable that Article V of the Constitution of the United States of America provides as follows and allow me to quote-

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate"

From the foregoing **Hon. Members**, it is notable that the US Congress can propose amendments on its own motion or upon application by the Legislatures of several States. It is also worth noting that the United States Constitution may also have what

is termed as “basic structure” of the Constitution that may not be amended. Indeed, Article V of the US Constitution provides that no amendment in any manner shall affect the first and fourth Clauses in the Ninth Section of the first Article and that no State, ***without its Consent***, shall be deprived of its equal Suffrage in the Senate.

Hon. Members, You will recall that the making of our Constitution benefitted greatly from the Constitution of the Republic of South Africa. Section 74 of the Constitution of the Republic of South Africa provides for the procedure for amending the Constitution as follows—

"Bills amending the Constitution

74(1) Section 1 and this subsection may be amended by a Bill passed by—

a) the National Assembly, with a supporting vote of at least 75 per cent of its members; and

(b) the National Council of Provinces, with a supporting vote of at least six provinces.

(2) Chapter 2 may be amended by a Bill passed by—

(a) the National Assembly, with a supporting vote of at least two thirds of its members; and

(b) the National Council of Provinces, with a supporting vote of at least six provinces.

(3) Any other provision of the Constitution may be amended by a Bill passed—

(a) by the National Assembly, with a supporting vote of at least two thirds of its members; and

b) also by the National Council of Provinces, with a supporting vote of at least six provinces, if the amendment—

(i) relates to a matter that affects the Council;

(ii) alters provincial boundaries, powers, functions or institutions; or

(iii) amends a provision that deals specifically with a provincial matter.

(4) A Bill amending the Constitution may not include provisions other than constitutional amendments and matters connected with the amendments.

(5) At least 30 days before a Bill amending the Constitution is introduced in terms of section 73(2), the person or committee intending to introduce the Bill must—

(a) publish in the national Government Gazette, and in accordance with the rules and orders of the National Assembly, particulars of the proposed amendment for public comment;

(b) submit, in accordance with the rules and orders of the Assembly, those particulars to the provincial legislatures for their views; and

(c) submit, in accordance with the rules and orders of the National Council of Provinces, those particulars to the Council for a public debate, if the proposed amendment is not an amendment that is required to be passed by the Council.

(6) When a Bill amending the Constitution is introduced, the person or committee introducing the Bill must submit any written comments received from the public and the provincial legislatures—

(a) to the Speaker for tabling in the National Assembly; and

(b) in respect of amendments referred to in subsection (1), (2) or (3)(b), to the Chairperson of the National Council of Provinces for tabling in the Council.

(7) A Bill amending the Constitution may not be put to the vote in the National Assembly within 30 days of—

(a) its introduction, if the Assembly is sitting when the Bill is introduced; or

(b) its tabling in the Assembly, if the Assembly is in recess when the Bill is introduced.

(8) If a Bill referred to in subsection (3)(b), or any part of the Bill, concerns only a specific province or provinces, the National Council of Provinces may not pass the Bill or the relevant part unless it has been approved by the legislature or legislatures of the province or provinces concerned.

(9) A Bill amending the Constitution that has been passed by the National Assembly and, where applicable, by the National Council of Provinces, must be referred to the President for assent"

Hon. Members, unlike our Constitution, section 74 of the Constitution of the Republic of South Africa does not provide for amendment of the Constitution through any other procedure other than through its National Assembly and the National

Council of Provinces. It also does not contain a provision for submission of the amendments to referendum or amendment by popular initiative.

Hon. Members, In my view, Article 255(1) of the Constitution of Kenya expressly provides what constitutes its “basic structure” and provides a safeguard against the arbitrary and whimsical amendment of the matters it lists without submission of the amendment to the people for approval.

Indeed Hon. Members, the **preamble** to the Constitution speaks to matters listed under Article 255(1) as it provides that **“We the People of Kenya RECOGNIZING the aspirations of all Kenyans for a government based on essential value of human rights, equity, freedom, democracy, social justice and the rule of law: EXERCISING our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution”** As such, I am of the considered opinion that a Bill may be introduced to amend any provision of the Constitution, and that such a Bill may be considered and passed by this House subject to its submission for approval by the people at a referendum if it touches on any matter listed at Article 255(1) of the Constitution. As I have guided in the preceding portion of this Communication and as noted by the Report of the Committee, the Bill before the House does, indeed, touch on various matters listed under Article 255(1) of the Constitution. **This does not invalidate the proposals but merely subjects them to submission to a Referendum.**

Hon. Members, The discussion on the “basic structure” of the Constitution leads us to the question of whether the Bill contains “unconstitutional” constitutional amendments. As you are aware, Article 3 of the Constitution (Defence of the Constitution) and Article 10 of the Constitution (National values and principles of governance) place an abiding obligation on the Speaker to respect, uphold and defend the Constitution. As an extension of this constitutional imperative, Standing Order 47(3) of the National Assembly Standing Orders requires the Speaker to,

among other considerations, assess the constitutionality or otherwise of business proposed for introduction into the House. Standing Order No. 47(3) provides, and I quote,—

(3) If the Speaker is of the opinion that any proposed Motion—

(a) is one which infringes, or the debate on which is likely to infringe, any of these Standing Orders;

(b) is contrary to the Constitution or an Act of Parliament, without expressly proposing appropriate amendment to the Constitution or the Act of Parliament;

(c).....;

(d).....;

(e).....;or

(f).....;

the Speaker may direct either that, the Motion is inadmissible, or that notice of it cannot be given without such alteration as the Speaker may approve or that the motion be referred to the relevant committee of the Assembly, pursuant to Article 114(2) of the Constitution.

Hon. Members, I note that Paragraph 557 of the Report isolates the Second Schedule of the Bill which, among other things, allocates the proposed seventy (70) additional constituencies among the forty-seven (47) counties terming it as unconstitutional for its *“attempt to oust the application of Article 89(4) of the Constitution, as proposed in the Second Schedule of the Bill”* without expressly amending Article 89 and its alleged lack of anchoring in a substantive provision of the Bill.

Hon. Members, Paragraph 617 of the Report additionally flags the proposed amendment at Clause 43 of the Bill empowering the Judicial Service Commission to ***“receive complaints against judges, investigate and discipline judges by warning, reprimanding or suspending a judge”*** as a claw-back on the independence of the Judiciary and judicial officers, terming it as ***“unconstitutional”*** and cryptically requiring its ***“urgent re-consideration at the appropriate time”*** .

Hon. Members, Apart from these two provisions expressly cited in the Report on account of their apparent unconstitutionality, several Members also did raise concern with the following Clauses of the Bill questioning their constitutionality—

- (a) Clause 29 of the Bill which allows for the appointment of the Cabinet from Members of the National Assembly;
- (b) Clause 44 of the Bill on the establishment of the Office of the Judiciary Ombudsman and its effect on the independence of the Judiciary;
- (c) Clause 52 of the Bill which establishes the Constituencies Development Fund; and
- (d) Clause 61 of the Bill which reconstitutes the Salaries and Remuneration Commission; and Clauses 67 and 68 of the Bill which touches on the functions and powers of the National Police Service and the National Police Service Commission.

Hon. Members, Article 109 of the Constitution outlines the manner in which Parliament exercises its legislative powers with regard to ordinary legislation. It provides, and I quote—

"(1) Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.

(2) Any Bill may originate in the National Assembly.

(3) A Bill not concerning county government is considered only in the National Assembly, and passed in accordance with Article 122 and the Standing Orders of the Assembly.

(4) A Bill concerning county government may originate in the National Assembly or the Senate, and is passed in accordance with Articles 110 to 113, Articles 122 and 123 and the Standing Orders of the Houses.

(5) A Bill may be introduced by any member or committee of the relevant House of Parliament, but a money Bill may be introduced only in the National Assembly in accordance with Article 114."

Hon. Members, The Standing Orders of the National Assembly prescribe, in detail, the procedure to be followed with regard to the initiation of legislative proposals, pre-publication scrutiny of the proposals, publication of Bills, introduction of the Bills in the House and their consideration including amendment, passage and transmission to the Senate, where applicable. As Members will recall, I have previously applied

Standing Order 47(3) during consideration of ordinary legislation or other business before the House to exclude specific portions of the legislation or other business found to offend the Constitution or existing laws from debate. The procedure applying to ordinary legislation and other business, however, does not extend to a Bill to amend the Constitution.

Hon. Members, Articles 256 and 257 of the Constitution prescribe express procedures governing the origination and processing of a Bill to amend the Constitution by parliamentary initiative and by popular initiative, respectively. Articles 256 and 257 are straight-jacketed and require any procedural maneuvering to strictly accord with their provisions. In respect of a Bill to amend the Constitution by popular initiative, Article 257 provides, and I quote—

"Amendment by popular initiative

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

(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 a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters.

(5) If the Independent Electoral and Boundaries Commission 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 a 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.

(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).

(10) 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.

(11) Article 255(2) applies, with any necessary modifications, to a referendum under clause (10)."

Hon. Members, Article 94 of the Constitution outlines the general role of Parliament with regard to the consideration and passage of amendments to the Constitution, among its other roles. Parliament is placed under an obligation of protecting the Constitution at all times and promoting the democratic governance of the Republic. The Article expressly provides as follows—

"94. Role of Parliament

(1)

(2).....

(3) Parliament may consider and pass amendments to this Constitution, and alter county boundaries as provided for in this Constitution.

(4) Parliament shall protect this Constitution and promote the democratic governance of the Republic."

Hon. Members, Article 257 of the Constitution qualifies the role of Parliament and its Speakers with regard to the consideration of a Bill to amend the Constitution by popular initiative. A close reading of Article 257 reveals **four (4)** specific obligations relating to Parliament and the Speakers of Parliament. These are—

- (a) receipt of copies of a draft Bill to amend the Constitution and certificates of approval by the county assemblies;

- (b) introduction in Parliament without delay, where a majority of the county assemblies approve the draft Bill;
- (c) passage by a majority of the members of each House; and
- (d) submission of the Bill to the President for assent, if Parliament passes the Bill.

Hon. Members, The text of Article 257 deliberately limits the exercise of legislative powers by Parliament when considering a Bill to amend the Constitution through popular initiative. Parliament has no role in origination of the Bill and is only required to introduce the Bill and pass or fail to pass it. Notably, whereas ordinary legislation may be lost in mediation or lapse for want of consideration; failure to pass a Bill to amend the Constitution by popular initiative only propels it to mandatory consideration at a referendum. Noting the limited legislative role afforded to Members, inescapable doubts arise on the Speaker's role with regard to the substantive aspects of such a Bill.

Hon. Members, As I have noted, by dint of Articles 3 and 10 of the Constitution, and Standing Order 47(3), the Speaker's failure to arrest any business found to offend the Constitution or statute would amount to abdication of duty. I have previously ruled and guided Members where such instances have arisen on the specific provisions of the Constitution that the proposals have offended and additionally advised them to introduce amendments to the Constitution as an alternative. The Bill currently before the House seeks to amend the Constitution. **Consequently, challenging portions of the Bill for ostensibly offending the same Constitution the Bill seeks to amend would defy logic.**

Hon. Members, In the Report of the Committee, the Second Schedule to the Bill is termed "unconstitutional" for seeking to delimit constituencies which is a function of the IEBC enumerated under Article 89(4) of the Constitution. According to the submissions made to the Committee and those made by Members on the issue, the perceived unconstitutionality of the Schedule would be cured if a direct amendment had been made to Article 89(4) of the Constitution. This position draws our attention

to the history of the current Constitution and the mechanisms it put in place through the *Transitional and Consequential Provisions* set out in its Sixth Schedule. Members will recall that drawing from the mandate outlined in the Sixth Schedule to the Constitution, this House functioned as both the National Assembly and the Senate for close to three years.

Additionally **Hon. Members**, it will be remembered that my predecessor, the Hon. Speaker Kenneth Marende had occasion to rule that the nominations made by the then President Mwai Kibaki to the posts of Chief Justice and Attorney General had been forwarded to Parliament in contravention of the provisions of the Sixth Schedule which required consultations on the nominations with the then Prime Minister. The names were subsequently withdrawn and the nomination and appointment of Chief Justice Willy Mutunga strictly adhered with the provisions of the Schedule. Tellingly, **Hon. Members**, with regard to the first boundary delimitation exercise, the provisions of section 27(3) of the Sixth Schedule deferred the obligation placed upon the IEBC to complete delimitation at least twelve months before a general election provided for under Article 89(2) of the Constitution. Additionally, section 27(4) of the Schedule protected all the constituencies existing at the time of the promulgation of the Constitution from being lost during the first boundary review conducted by the then Interim Independent Boundaries Commission despite the existence of Article 89(4) in the main text of the Constitution. The existence of these constituencies has never been challenged and the provisions of the Sixth Schedule have remained perfectly valid despite deviating from the substantive provisions contained in the main text of the Constitution.

Hon. Members, similar competing arguments may also be advanced with regard to the issue raised in the Report on the constitutionality of the additional functions sought to be granted to the Judiciary with regard to the discipline of judges. According to the Committee, in the event the Bill is assented to without submission to a referendum, the cited provisions would be unconstitutional. I note that **Paragraph 377 of the Report** qualifies the findings of the Committee by

acknowledging that ***"an unconstitutional amendment becomes constitutional if it is approved by the people in a referendum."*** Additionally, Hon. Members, at **Paragraph 506** of the Report, the Committee notes that ***"there are provisions in the Bill that touch on some of the matters provided for under Article 255(1) of the Constitution."***

Consequently, pursuant to Articles 255(3) and 257 (10) of the Constitution, the Bill is one for which a referendum is required." Members will note that Clause 5 of the Bill seeks to amend Article 31 of the Constitution which provides for the right to privacy. Any amendment proposed to a provision of the Constitution contained in the Bill of Rights is protected under the matters listed in Article 255(1) of the Constitution and must be submitted to the people for approval at a referendum. By this argument therefore, the question of unconstitutionality of the provisions becomes moot, or at the very least premature as the Bill must be submitted to the people at a referendum. **Any attempt by the Speaker to make a preliminary finding on the constitutionality of the provisions would be premature, speculative and, ultimately, an exercise in futility. It would be tantamount to putting the cart before the horse.**

In any event, **Hon. Members**, Article 165(3)(d) mandates the High Court to hear any questions on the interpretation of the Constitution and settle any contestations with finality. Indeed, **Hon. Members**, I am informed that currently the High Court has eight (8) consolidated Constitutional petitions challenging the constitutionality of the entire BBI process and had issued an order precluding the President from assenting to the Bill if passed by Parliament until the determination of the petitions. The Petitions are—

(1)Petition No E282 of 2020; David Ndi & Others vs. Attorney General & others

(2)Petition E397 of 2020; Kenya National Union of Nurses vs. Steering Committee of BBI & Others

(3)Petition No E400 of 2020; Third Way Alliance Kenya vs. Steering Committee of BBI & Others

(4)Petition No E401 of 2020; 254 Hope vs. Attorney General & IEBC

(5)Petition No E402 of 2020; Justus Juma & Isaac Ogola vs. Attorney General & Others

(6)Petition No E416 of 2020; Morara Omoke vs. Raila Odinga & Others

(7)Petition No E426 of 2020; Isaac Aluochier vs. Steering Committee of BBI & Others; and

(8)Petition No E2 of 2021; MUHURI vs. IEBC & Others (formerly Mombasa Pet. E01 of 2020)

Hon. Members, The **Third Issue** was with regard to whether, and to what extent the Bill may be amended and the value and place of public participation in the consideration of a Bill to amend the Constitution by popular initiative. The Committee notes at **Paragraph 364 and 365** of its Report that the role of Parliament in considering a Bill to amend the Constitution is not ceremonial and that Parliament can amend the provisions of such a Bill or correct any errors of form or typographical errors to bring drafting harmony to the Bill. Additionally, the Committee notes that pursuant to the provisions of Article 257(10) of the Constitution, **Parliament cannot replace or usurp the people's views on a popular initiative with its own.** It therefore rules out amendments to a popular initiative Bill, finding instead that the only changes that may be made to such a Bill would be correction of any errors of form.

As Hon. Members will recall, I have had on previous occasion to address this issue at length in the 11th Parliament during the consideration of the Constitution of Kenya (Amendment) Bill, 2015 sponsored by the Member for Ugenya, the Hon. David Ochieng'. Though the Bill sought to amend the Constitution by Parliamentary initiative, the issues raised then are substantively similar to those raised with regard to the present Bill.

Hon. Members, In the *Communication* issued on 20th August, 2015 on *Amendment of a Bill to amend the Constitution by the National Assembly*, I did guide the House that I would not allow any amendment to be proposed to a Bill to amend the

Constitution. The reasons given then, which similarly apply now, are that a plain reading of the operative provisions on amending the Constitution, the sanctity of the Constitution and previously adopted procedure on constitutional amendments discourage such a practice.

The *Communication* noted the centrality of the people and their will in any process seeking an amendment to what they agreed to in the form of a social contract and the need for precision in any attempt made to amend the Constitution as follows—

"The customs and traditions of our democracy have been to restrict amendment Bills seeking to amend the Constitution. I see no reason to depart from this practice, as the Speaker cannot rely on allegory or allusion in guiding the House. Hon. Members, you will note that the preamble to our Constitution highlights that, the people of Kenya adopted, enacted and gave themselves and, future generations of this Republic, the Constitution. The sanctity of the Constitution as a social contract between the people of Kenya, and not a document belonging to the Houses of Parliament, nor any other organ for that matter, is to be jealously safeguarded at every turn. And any process of its amendment is delicate and can only be undertaken with reference to a definite procedure that deviates from the ordinary. Hon. Members, while Parliament has been given the power to amend the Constitution, we should be mindful that the Constitution belongs to the people of this Republic. Treating the process of its amendment as akin to an ordinary legislation would subvert the collective will of the people.

In this regard, it is expected that any person intending to amend the Constitution, must be very clear and precise on what he or she is intending to alter, but not to change mind while in the process. It is my strong view that, any proposal to amend the Constitution should be preceded by the meaningful and adequate consultation before such a Bill is published, a principle embodied in Article 256(2) of the Constitution. Bearing in mind that the legislative power is originally derived and consequently vested in the people, we ought to obtain the confidence of our fellow citizens even as we endeavor to amend the Constitution. The process of making or amending the Constitution, therefore, cannot be without consultations, precision and guarded restraint."

Hon. Members, In the same manner I was minded in 2015, I am still minded to disallow any attempts to amend the Bill currently before the House. Indeed, I would

say I am actually more persuaded to disallow any amendment for the sole reason that this is a Bill to amend the Constitution by popular initiative. As noted in my opening remarks, once initiated, a Bill to amend the Constitution by popular initiative is irrepressible to any attempts to delay or derail it.

I am of the considered opinion that any attempt to amend the provisions of the Bill directly negates the popular nature of the Bill and the exercise of the sovereign will of its promoters who have collected more than one million signatures of registered voters in its support and ostensibly convinced a majority of the county assemblies to approve without alteration.

Hon. Members, Amendment of the text of the Bill is markedly different from the correction of any errors of form that may be noted in the Bill. Members will note in the Report that the issue of so-called “errors of form” is canvassed at length. This issue has generated considerable public debate on whether the errors exist and whether they materially affect the substance of the Bill, and can therefore not be glossed over.

Hon. Members, Having perused the Bill received by the House from the IEBC, which is the Bill that was read a First time on 4th March, 2021, I have noted that it contains the following typographical and cross-referencing errors—

- (a) The marginal note to Clause 48 of the Bill refers to Article 189 instead of Article 188 of the Constitution;
- (b) Clause 51(a) of the Bill does not refer with adequate precision to the specific part of Article 204 of the Constitution that it proposes to amend.

Hon. Members, You will also note from the Report that discrepancies have also been identified in the Bills received from the County Assemblies in the returns submitted to the two Speakers of Parliament. 12 County Assemblies submitted Bills with similar errors to the ones noted in the Bill currently before the National Assembly. 34 other County Assemblies submitted Bills which, apart from containing

the errors noted in the Bill before the House, contained the following additional errors—

(a) Clause 13(b) of the Bills seeks to amend Article 97(3) of the Constitution despite Article 97 of the Constitution not having a Clause (3);

(b) Paragraph 1(1) of the Second Schedule cross-references Article 87(7) of the Constitution which does not exist.

Hon. Members, you will agree with me that the errors highlighted in the Bill before the House and in the Bills received from the County Assemblies are minor errors which do not affect the substance of the provisions of the Bill. The errors are not material enough to impugn the entire Bill, its processing by the House and the intentions of its promoters. As rightly noted by the Committee at **Paragraph 365 of the Report**, the legislative mandate of Parliament allows it to correct any errors of form or typographical errors that do not go to the substance of the Bill to bring drafting harmony to the Bill. Both Houses of Parliament have, through their Standing Orders donated this power to correct errors in a Bill to their Speakers before submission of a Bill to the President for assent. Standing Order 152(3) of the National Assembly Standing Orders provides that, and I quote,—

(3) At any time before the certification of the Bill, the Speaker may correct formal errors or oversights therein without changing the substance of the Bill and thereafter submit the Bill to the President for assent.

Hon. Members, Indeed, The Speaker has invoked this power in the past to approve corrections done to Bills during the preparation of Vellum Copies of the Bills for submission to the President for assent. In this regard, I shall invoke the power to correct the highlighted typographical and cross-referencing errors in the Bill at the appropriate time.

Hon. Members, The determination that the Bill presently before the House may not be amended logically begs the question of the need and value of public participation to the consideration of the Bill. Article 118 of the Constitution as read with Standing Order 127 mandates this House to conduct public participation in its legislative

business. This is a mandatory exercise that the House is enjoined to undertake when considering any legislative business. It is not discretionary or optional as it is indeed also one of the national values and principles of governance provided for in Article 10 of the Constitution which are binding on all State Organs and State Officers.

Hon. Members, in this regard, although Article 257 of the Constitution is silent on whether to conduct public participation as compared to Article 256(2) of the Constitution which mandates Parliament to publicize any Bill to amend the Constitution, Article 118 of the Constitution places a general obligation on Parliament to conduct public participation in all its legislative business. I also note that the Joint Committees in their Report as contained in paragraph 405 also did address this issue and found that Article 257 of the Constitution does not oust the application of Articles 10 and 118 of the Constitution on public participation.

Hon. Members, Having said this, it is also worth noting that the courts have further prescribed the threshold of what is meaningful public participation, a fact that was alluded to by the Member for Garissa Township, the Hon. Aden Duale, EGH, MP in raising his point of order. The thresholds are intended to ensure that this House or indeed its Committees do not just engage in a ***"ticking the box or cosmetic exercise"*** in a bid to comply with the obligation set out in Article 118 of the Constitution and Standing Order 127. The process must therefore be qualitative rather than quantitative. In this regard, it is not the number of submissions that are made by stakeholders or indeed the number of stakeholders that participate in such an exercise that matter. A Committee must demonstrate that it did engage, consider and examine the submissions made by the public in arriving at its decision. This, **Hon. Members,** can only be ascertained by a look at the Report of the Joint Committees.

Hon. Members, Having said this allow me to refer to a number of court decisions that have also made very imperative pronouncements on what is meaningful public participation. In *Robert N. Gakuru and Another versus Governor Kiambu County and*

3 Others (2013) eKLR, the court observed that **"... public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfillment of the constitutional dictates."**

Hon. Members, the High Court in Constitutional Petition number 282 of 2017 Association of Kenya Medical Laboratory Scientific Officers versus Ministry of Health &The Attorney-General further observed that **"public participation is not mere consultation or a public relation exercise without a meaningful purpose"**.

Hon. Members, Looking at other jurisdictions like in South Africa, the same thresholds of public participation have been upheld. Indeed, referring to the famous case of Doctors for life for International versus the Speaker of the National Assembly and Others 1 CCT2 of 2005, the court held that and allow me to quote—

"What is intimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law making process.

Thus construed there at least two aspects of the duty to facilitate public participation. The first is the duty to provide meaningful opportunities for public participation in the law making process. The second is the duty to take measures to ensure that the people have the ability to take advantage of the opportunities provided".

In Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others (CCT 41/07) [2008] ZACC 10; 2008, the court reiterated the importance of public participation and noted that the public participation process gives Parliament an opportunity to inform itself of the concerns of the people. Further, in Matatiele Municipality and others versus the President of the Republic of South Africa and Others (2) (CCT73/05A(2006) ZACC 12, 2007, the Court observed that—

"The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also participation in the law making process".

Hon. Members, From these court pronouncements, it is expressly clear that public participation is an exercise with significant probative value. From a reading of Article 118 of the Constitution and the court pronouncements, one can clearly deduce that public participation must be purposeful and not perfunctory.

Looking at the Report of the Joint Committee of the National Assembly Departmental Committee on Justice and Legal Affairs and the Senate Standing Committee on Justice, Legal Affairs and Human Rights, I note that the Committee did consider the question of whether Parliament is required to undertake public participation and, if so, the extent of such public participation as contained in paragraphs 382-409 of the Report. I also observe from the Report that the Joint Committee did give the public an opportunity to participate in its public hearings, received extensive submissions from the Public and considered, analyzed and examined the submissions as evidenced its Report. I also note that the Joint Committees did consider the submissions in arriving at its findings and recommendations as contained in the Report.

Hon. Members, To this end, one can observe that the Joint Committee conducted public participation as required by Article 118 of the Constitution and adhered to the standards and thresholds set by the courts on what is meaningful public participation. Having said this and in answering the question raised by the Member for Garissa Township *regarding the value of public participation on a Bill that may not be amended*, it is notable that the submissions made by the public are intended to apprise the Members of this House and assist them to make informed decisions during the consideration of this Bill at Second Reading, Committee of the Whole House and the Third Reading. Certainly, any Member of this House is at liberty to raise any of the issues submitted by the public as contained in the Joint Report in making submissions at Second Reading and indeed is expected to make an informed decision as to whether to pass or reject the Bill.

Hon. Members, The submissions of the public have been analyzed in the Report and are also attached as annexes to the Report and Members may make reference to

them. It is my considered opinion that the ventilation of the issues raised by the public during public participation also fall within the definition of meaningful public participation as espoused in Article 118 of the Constitution.

This exercise shall in the end also assist the people to make an informed decision on whether to approve or reject the Bill when the Bill is submitted to a referendum in terms of Article 257(10) of the Constitution.

Hon. Members, in addition, it is my observation that the Joint Report as contained in paragraphs 406 of its Report also found that the public participation process is critical to the processing of the Bill as it is through the process that Parliament would identify any areas of concern on the proposed amendments and noting errors of form for correction. The Joint Committees also found that the process would also enable the Members to harvest the views of the public on the Bill and decide whether to vote to approve or reject the Bill. This now settles the issue.

Hon. Members, The **Fourth Issue** was with regard to the effect of pending court cases on the consideration of the Bill currently before the House. Before guiding the House on the implication of the cases, allow me to note that the issues raised by the Member for Ugenya are valid in light of our own Standing Order 89 on the sub judice rule which provides that "*no Member shall refer to active civil or criminal matters and the discussion of such matters is likely to prejudice the fair determination of the cases.*"

Hon. Members, it is also worth noting that the manner in which Article 257(7) of the Constitution is couched is in mandatory terms that a draft Bill having been approved by the county assemblies is required to be introduced **in Parliament without delay** for consideration. In this regard, in the event Standing Order 89 was to apply, it would not be used to oust the express constitutional and mandatory obligation placed on Parliament to introduce and consider a Bill to amend the Constitution by popular initiative. Indeed, such an interpretation would, in addition to being an affront to Article 257 of the Constitution, also offend Article 1 of the

Constitution on the sovereign power of the people of Kenya to amend the Constitution as and when they see it fit. Standing Order 89 cannot curtail this sovereign power of the people which is guaranteed and protected by the Constitution.

Hon. Members, Standing Order 89 provides the circumstances under which the sub judice rule would apply and gives power to the Speaker to interpret and apply the same in determining whether a matter is *sub judice*. Even in instances where the matter under consideration is deemed to be *sub judice*, the Speaker has discretion under Standing Order 89(5) to allow reference to the matter where necessary. Accordingly, I am of a strong opinion that the public interest on a Bill introduced by way of a popular initiative overrides the provisions of Standing Order 89 on the *sub judice* principle. Further, the courts have in the past also issued pronouncements guarding against interfering with on-going legislative processes in particular in consideration of a Bill by the House. Interference with the processes of the House has been interpreted by the courts to be tantamount to stifling the legislative authority of Parliament as guaranteed under Article 94 of the Constitution. The courts have jurisdiction to interpret and consider Bills of this House once enacted into law as Acts of Parliament.

Hon. Members, As to whether this House shall be acting in vain by considering a Bill that may fail to be submitted to the President for assent in terms of Article 257(9) of the Constitution, it is worth noting that there are two main court orders in place touching on the Bill under consideration. One is a conservatory order that was granted in the consolidated Petitions before the High Court *Petition E282 of 2020* restraining the Independent Electoral and Boundaries Commission from facilitating and subjecting the Constitution of Kenya (Amendment) Bill, 2020 to a referendum, or taking any further action to advance the Constitution of Kenya (Amendment) Bill, 2020, pending the hearing and determination of the Consolidated Petitions. The second is an order also in the consolidated Petitions before the High Court barring His Excellency the President from assenting to the Constitution of Kenya

(Amendment) Bill, 2020, should it be approved by the two Houses of Parliament. The order further provides that, should the President assent to the Bill, the amendments shall not come into force until the determination of the Petitions challenging the process.

Hon. Members, from the foregoing, it is clear that the orders are against IEBC and the President. There are no orders barring the House from considering the Bill. I also note that the Committee did consider this issue and also found that there are no orders that have been issued barring consideration of the Bill by this House or indeed Parliament as contained in paragraph 310 of the Joint Report.

Hon. Members, allow me to also note that Members must refrain from engaging in speculative debate, because it is not possible at this stage to foretell the manner in which the Courts shall determine the pending cases. The judicial processes are outside the ambit of this House and therefore the question of whether this House may be acting in vain in light of the pending cases is speculative and non-issue. **The House cannot elevate a speculative outcome and conjecture above the discharge of its constitutionally mandated function.**

Hon. Members, The **Fifth and final Issue** raised was with regard to the procedure applicable to the consideration of a Bill to amend the Constitution by popular initiative in the House. Article 109 of the Constitution vests the legislative power, at the national level, to Parliament. Specifically, Article 109(1) states, and I quote, –

109 (1) "Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President."

In the exercise of its legislative power, the House has established rules and procedures for its operations as provided for by Article 124 of the Constitution. Article 124(1) provides –

"124. Committees and Standing Orders

(1) Each House of Parliament may establish committees, and shall make Standing Orders for the orderly conduct of its proceedings, including the proceedings of its committees.

(2) ...”

The National Assembly has established Standing Orders that guide the manner in which the House, and its Committees, introduces, considers and determines any business before it. In the case of Bills, the Standing Orders prescribe the process to be followed with regard to the initiation of legislative proposals, pre-publication scrutiny of the proposals, publication of Bills, introduction of the Bills in the House and their consideration including amendment, passage and transmission to the President for Assent, or to the Senate, where applicable. The Joint Report of the two Committees of the Houses of Parliament notes the absence of a clear procedure for the consideration of a Bill to amend the Constitution by popular initiative. Indeed, at paragraph 464, the report notes that—

“...Article 257 of the Constitution does not give a clear procedure on how to process such Bills ...(and)... it will be necessary for the Speakers of the Houses to give guidance on the processing of the Bill through the subsequent stages.”

Further, the Committees, at paragraph 454 of the report, have cited the Supreme Court of India in the case of *Shankari Prasad Sing Deo vs, Union of India, A.I.R 1952 S.C. 458*. In the case, the Court notes that in the passage of a Bill to amend the Constitution by each House, the term “passed” would be construed to mean the legislative processes that follow in the exercise of the legislative function of Parliament. The Court found that such a Bill was **“...to follow the procedure set out in the Rules of Procedure and the Conduct of Business in Parliament subject to the requirements of the Constitution regarding the special majority required for passage... and the requirement for assent by the President.”**

Hon. Members, Whereas there is no direct procedure provided for the parliamentary consideration of a Bill seeking the amendment of the Constitution by way of a popular initiative, Article 257 of the Constitution prescribes the procedures governing the origination and general processing of such a Bill. Clauses (7) to (10) of Article 257 of the Constitution provide, and I quote—

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

(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).

(10) 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."

Hon. Members, In answering the question as to the procedure to be followed, it should be noted that the Constitution expects a resolution for approval of the Bill by County Assemblies and passage or otherwise of the Bill by Parliament. In our Parliament, as is the practice in most Commonwealth jurisdictions, consideration and passage of Bills follow the stages of publication, ***First Reading, Second Reading, Committee of the Whole House and Third Reading.*** Except for the First Reading, all the stages involved require a vote which determines the next course of action. The net effect of this then is that, in order to fulfill the requirements of the Constitution for a decision of whether the House has passed the Bill, it is expected that the House will consider the Bill through the usual legislative stages, with the necessary votes at each interval.

Hon. Members, this then brings me to the question of the thresholds applicable to the consideration of the Bill, in view of the required votes I have alluded to. Article 122 provides for voting in Parliament. Specifically, Clause (1) states as follows –

"122. Voting in Parliament

- (1) *Except as otherwise provided in this Constitution, any question proposed for decision in either House of Parliament shall be determined by a majority of the members in that House, present and voting."*

In the case of a Bill to amend the Constitution by popular initiative, Article 257 (8) provides the specific threshold of "...a majority of the members of each House." In this regard, a majority of all members in the National Assembly, meaning at least 176 Members, will be required to pass the Bill in its Second and Third Reading.

This number has been arrived at by ascertaining fifty percent of all the Members of this House and adding one to obtain a majority. Motions in Committee of the Whole House will be dispensed with in the usual manner. Having said that, allow me to now respond to concerns raised by the Member for Kikuyu, Hon. Kimani Ichung'wah, regarding the measures taken to ensure Members participate in the voting in view of the public health restrictions owing to the COVID-19 Pandemic. From the onset, I wish to reiterate that the House Leadership thanks all Members for their continued cooperation in the implementation of the existing protocols. As you are aware, the Ministry of Health guidelines currently restrict the maximum number in the Chamber at 112. It is for this reason that I designated other areas as being parts of the Chamber including the Members' Lounge and the extended tent zones. This has allowed the attendance and participation of a greater number of Members in the business of the House. In view of the prevailing circumstances, this arrangement will be upheld during the period of the debate and voting on the Constitution of Kenya (Amendment) Bill, 2020 to ensure that all Members who wish to participate are facilitated to do so.

Hon. Members, With regard to the actual voting, the House shall vote by **roll-call** pursuant to Standing Order 72(2). For the avoidance of doubt, Standing Order 72(2) states –

72. (1) ...

(2) The Speaker shall direct a division to be taken in every instance where the Constitution lays down that a fixed majority is necessary to decide any question."

Hon. Members, Given the exceptional circumstances occasioned by the COVID-19 Pandemic, should it become necessary I may invoke the provisions of Standing Order 265D and direct the Clerk to facilitate Members to take part in the vote virtually. In this regard, Members will be called out using the Divisions List, with those seated in the other designated areas being allowed to come into to the Chamber to vote and thereafter immediately exit the Main Chamber. The process will be carried out in strict compliance to the COVID-19 Pandemic's health protocols.

Hon. Members, at this stage, you may wish to note that a decision on the Bill is one of the instances where the Constitution requires a fixed majority and therefore subject to the provisions of Standing Order 62. Standing Order 62 provides and I quote –

62. (1) In every instance where the Constitution lays down that a fixed number of Members is necessary to support the moving of, or to decide any question on a motion, any amendment motion to such motion shall not be passed unless supported by the fixed number of Members required to pass the original motion.

(2) Notwithstanding paragraph (1), whenever a Bill or a special Motion the passage of which requires a special majority in the Assembly fails to obtain the required majority and the vote results in a majority of the "Ayes" but the "Noes" have not numbered at least one third of all the Members of the Assembly, the Speaker may direct that a further vote be taken on the particular question, and the further vote shall be taken within five sitting days from the day the first vote was taken.

(3) If the Speaker does not so direct any further vote, or if on such further vote the fixed majority is not obtained, the Speaker shall declare that the Motion is negatived."

Hon. Members, You will recall that on 28th August 2015 during the 11th Parliament, while the House was considering the Constitution of Kenya (Amendment) Bill (No.2) of 2013 sponsored by the then Member for Samburu West Hon. Lati Lelelit, I did guide on the process and rationale for the procedure under Standing Order 62. In a nutshell, the gist of my guidance was that the extended period provided in the Standing Order enables Members to reflect on a matter before the House and either reconsider or reconfirm their decision. This is premised on the fact that there are not

many instances that require a fixed threshold for passage, and the few that do are usually of a higher consequence in the operation of governance, for example the amendment of the Constitution. The second vote therefore affords the House an opportunity to actually express its desire. Indeed, during the above instance in 2015, the repeat vote saw a reconsideration of the decision and the Bill was passed by the House. **We shall therefore proceed in a similar manner should the circumstances dictate.**

Hon. Members, The matter of timelines is fairly straightforward and I had previously guided on this. For the avoidance of doubt, debate on this Bill will continue for as long as there are Members present and wishing to speak subject to the rules of the House on relevance and closure of debate. The only limitation that the House has imposed is with respect to the allotting of speaking time for each Member and not on the overall debate.

Hon. Members, As I conclude, I must commend Members for both the queries raised with regard to the propriety of the Bill and its contents and the overwhelming interest that has been exhibited during the debate on the Bill. We are at a constitutional moment which calls for a delicate balancing-act on the part of Members on the discharge of their legislative and representative mandate. Though the Constitution has, in effect, made the submission of the current Bill to a referendum a must whether the House passes the Bill or fails to pass it, this *fait accompli* affords the House a unique chance of interrogating proposals introduced in Parliament by ordinary citizens who have chosen to bypass Parliament. Members have, at their disposal, the Hansard of the House to make a case for, and record for posterity, their individual reasons for either passing or rejecting the proposal before the House.

I would again, **Hon. Members,** wish to thank the Joint Committee for the invaluable contribution that their Report has made to this guidance and the contribution it shall make to the debate on this Bill.

In summary, my considered guidance is therefore as follows—

1. THAT, on the question as to whether the Constitution of Kenya (Amendment) Bill, 2020 promoted by the Building Bridges Initiative is a popular initiative under Article 257 of the Constitution; and whether the procedure outlined under Article 257 was followed by the County Assemblies and the correct threshold met before the introduction of the Bill in Parliament;

The Bill currently before the House is a Bill to amend the Constitution by popular initiative as envisaged by Article 257 of the Constitution. Any registered voter is at liberty to sign and support a popular initiative in terms of Article 257(1) of the Constitution. The Constitution does not place any restriction with regard to the age, gender, tribe, profession or status of a promoter of such a Bill. Further, the procedure prescribed under Article 257 of the Constitution was followed with regard to the origination and processing of the Constitution of Kenya Amendment Bill, 2020 promoted by the Building Bridges Initiative before its introduction in Parliament. The Certificates submitted by the county assemblies in their returns to the two Speakers of Parliament are conclusive evidence of the propriety of the procedures undertaken with regard to the Bill prior to its introduction in Parliament. The errors highlighted in the Bills currently before the two Houses are not a nature that affects the substance of the Bill. The errors may be corrected by the Speaker before submission of the Bill for assent;

2. THAT, on the question as to whether the Bill upsets the “basic structure” of the Constitution and whether it contains “unconstitutional” constitutional amendments: **The matters listed under Article 255(1) constitute the “basic structure” of the Constitution of Kenya as any amendment relating to them must be submitted for approval at a referendum. The Bill touches on various matters listed under Article 255(1) of the Constitution and ought to be submitted for approval at a referendum.**

To the extent that the Bill currently before the House touches on various matters listed under Article 255(1) of the Constitution, which the Constitution requires to be submitted to a referendum for approval, any question as to the constitutionality of its provisions is premature;

- 3. THAT, on the question as to whether a Bill to amend the Constitution by popular initiative can be amended and the value and intention of the public participation conducted by the Joint Committee: A Bill to amend the Constitution by popular initiative may not be amended by the House as any amendment shall negate the popular will of the people in directly amending the Constitution. Alterations to the text of such a Bill may only be allowed to correct errors of form or typographical errors before submission for assent as provided in the Standing Orders and I will invoke this provision of the Standing Orders donated by the House at the appropriate stage.**

In addition, pursuant to the provisions of Article 118 of the Constitution, public participation on a Bill to amend the Constitution is mandatory and must be meaningful. The value of the exercise is to apprise the Members of and assist them to make informed decisions during the consideration of this Bill at Second Reading, Committee of the Whole House and the Third Reading. It will also assist the people to make an informed decision on whether to approve or reject the Bill when the Bill finally proceeds for a Referendum.

I am also satisfied that adequate public participation has been undertaken in respect of the Bill as the Bill by its nature being a popular initiative and the public participation having been

undertaken by the two Committees jointly an environment and opportunity was given to the public to have their say on the matter;

- 4. THAT, on the question of the effect of pending court cases on the consideration of the Bill currently before the House: There currently does not exist any Court Order directed at Parliament with regard to the consideration of the Constitution Amendment Bill, 2020. Standing Order 89 of the National Assembly Standing Orders cannot oust the obligation on Parliament to introduce and consider a Bill to amend the Constitution by popular initiative without delay; and,**
- 5. THAT, The procedure to be applied during the consideration of the Bill in the House shall be as follows—**
- (a) Having been Read a First Time, The Bill shall undergo Second Reading, Committee of the Whole House and Third Reading;**
 - (b) The voting threshold applicable to the Second and Third Reading of the Bill shall be a minimum of 176 Members, being a majority of all Members of the House, to pass;**
 - (c) Voting shall be by roll-call. Members will be called out as per the Division List with those seated in the other designated areas being allowed entry into to the Main Chamber to cast their votes and thereafter immediately exit the Chamber. In light of the exceptional circumstances occasioned by the COVID-19 Pandemic, should it become necessary, I will invoke the provisions of Standing Order 265D and direct the Clerk to facilitate Members unable to attend sittings of the House physically to take part in the vote virtually.**

(d) I may, if necessary, direct the holding of a further vote at the various stages of the Consideration of the Bill pursuant to the provisions of Standing Order 62(2).

Hon. Members, As the House henceforth proceeds with the consideration of the Bill with this guidance, may I end by stating that as your Speaker, **it is my considered finding that the Constitution of Kenya (Amendment) Bill, 2020 promoted by the Building Bridges Initiative is properly before this House. Further, it is my considered view that, in the reading of the Constitution, no state organ or person to whom power is delegated by the People under Article 1 of the Constitution, can stand in the way of the exercise of the sovereign power of the People of Kenya to chart the course of their future in any manner they deem fit within the provisions of the Constitution.**

I therefore wish to urge Hon. Members that while debating and deciding whether to pass the Bill or not, the House must always be mindful of the considerations that motivated the People of Kenya to make and reduce their current social contract into writing in the first place. The last three paragraphs of the Preamble to the Constitution of Kenya encompass these considerations where the People of Kenya while **RECOGNISING** the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law; and **EXERCISING their sovereign and inalienable right** to determine the form of governance of the country and having participated fully in the making of the Constitution, **ADOPTED, ENACTED** and **GAVE** the Constitution to themselves and to their future generations. The centrality of the People to the making and amendment of the text of the Constitution cannot therefore be gainsaid.

The House is accordingly guided.

I thank you!

THE HON. JUSTIN B. N. MUTURI, E.G.H., MP
SPEAKER OF THE NATIONAL ASSEMBLY

Tuesday, May 04, 2021