PARLIAMENT OF KENYA

THE SENATE

THE HANSARD

Tuesday, 20th November, 2018

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

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

PRAYER

PAPERS LAID

REPORTS ON FINANCIAL STATEMENTS OF
VARIOUS COUNTY EXECUTIVES

Sen. (Eng.) Mahamud: Mr. Speaker, Sir, I beg to lay the following papers on the Table of the Senate, today, Tuesday, 20th November, 2018:-

(a) Report of the Auditor General on the Financial Statements of the County Executive of Kwale for the year ended 30th June, 2017.

(b) Report of the Auditor General on the Financial Statements of the County Executive of Mombasa for the year ended 30th June, 2017.

(c) Report of the Auditor General on the Financial Statements of the County Executive of Lamu for the year ended 30th June, 2017.

(d) Report of the Auditor General on the Financial Statements of the County Executive of Elgeyo-Marakwet for the year ended 30th June, 2017.

(e) Report of the Auditor General on the Financial Statements of the County Executive of Uasin Gishu for the year ended 30th June, 2017.

(f) Report of the Auditor General on the Financial Statements of the County Executive of West Pokot for the year ended 30th June, 2017.

(g) Report of the Auditor General on the Financial Statements of the County Executive of Turkana for the year ended 30th June, 2017.

(h) Report of the Auditor General on the Financial Statements of the County Executive of Nandi for the year ended 30th June, 2017.

(i) Report of the Auditor General on the Financial Statements of the County Executive of Trans Nzoia for the year ended 30th June, 2017.

(j) Report of the Auditor General on the Financial Statements of the County Executive of Tana River for the year ended 30th June, 2017.

(k) Report of the Auditor General on the Financial Statements of the County Executive of Taita-Taveta for the year ended 30th June, 2017.

(Sen. (Eng.) Mahamud laid the documents on the Table)

The Speaker (Hon. Lusaka): Let us go to the next Order.

NOTICE OF MOTION

APPROVAL OF SENATOR TO SERVE IN SELECT COMMITTEES

Sen. Dullo: Mr. Speaker, Sir, I beg to give notice of the following Motion-

THAT pursuant to Standing Order Nos.187 and 189, the House approves the nomination of Senator George Ochillo-Ayacko Mbogo, EGH, MP, to serve in the following select committees of the Senate-

(a) The Committee on Agriculture, Livestock and Fisheries; and,

(b) The Committee on National Cohesion, Equal Opportunity and Regional Integration.

I thank you, Mr. Speaker, Sir.

Sen. Khaniri: On a point of order, Mr. Speaker, Sir. I do not know if I heard the Senator right. To the best of my knowledge, the Committee on Agriculture, Livestock and Fisheries is not a select committee. Did she mean a select committee or standing committee? The notice has to be amended.

The Speaker (Hon. Lusaka): Sen. Khaniri, all standing committees of the House are select committees.

Let us go to the next Order.

STATEMENT

IMPLEMENTATION OF UNIVERSAL HEALTH CARE IN COUNTIES

The Speaker (Hon. Lusaka): Hon. Senators, we agreed that the Statement by Sen. Dullo be sought tomorrow because of the interest it has.

(Statement deferred)

The Speaker (Hon. Lusaka): Hon. Members, for the convenience of the House, we will defer Order Nos.8 and 9.

BILLS

Second Reading

THE LAND VALUE INDEX LAWS (AMENDMENT) BILL (NATIONAL ASSEMBLY BILLS NO.3 OF 2018)

(Bill deferred)

Second Reading

THE COUNTY ALLOCATION OF REVENUE (AMENDMENT) BILL
(SENATE BILLS NO.29 OF 2018)

(Bill deferred)

Next Order!

MOTIONS

ADOPTION OF CPAIC REPORT ON INQUIRY INTO POSSIBLE
LOSS OF FUNDS THROUGH ACQUISITION OF
LAND BY THE NLC

THAT, this House adopts the Report of the Sessional Committee on County Public Accounts and Investments on the inquiry into possible loss of funds through the acquisition of Land LR.No.7879/4 (part) by the National Land Commission, for use by two public schools (Ruaraka High School and Drive-In Primary School), Nairobi City County, laid on the Table of the House on Wednesday, 8th August, 2018.

(Sen. M. Kajwang' on 15.11.2018)

(Resumption of Debate interrupted on 15.11.2018)

The Speaker (Sen. Lusaka): Honourable Senators, the House Business Committee did direct that the division for Order No. 10 be done on Tuesday next week.

(Motion deferred)

Next Order.

CONSIDERATION OF NATIONAL ASSEMBLY AMENDMENTS
TO THE URBAN AREAS AND CITIES(AMENDMENT) BILL

(Loud Consultations)

The Senate Majority Leader (Sen. Murkomen): Mr. Speaker, Sir, I beg to move-

THAT, the amendments by the National Assembly to the Urban Areas and Cities (Amendment) Bill (Senate Bills No. 4 of 2017) be now considered.

This is a procedural Motion. The substantive discussions of the amendments will occur if the Senate approves it. I am requesting the Senators to vote in the affirmative because it will give us an opportunity to now look at the amendments that have come from the National Assembly. Failure to support it now will mean that we go to mediation without considering the amendments that have come from the National Assembly. I want to request Members that we vote in the affirmative in support of this very important Bill.

Mr. Speaker, Sir, I want to thank the National Assembly for the new spirit of working together. I want to also thank your office and the office of the Speaker of the National Assembly. Maybe you have reached a certain level of working in consensus, which helps in moving Bills in this House. I am happy because I know that there are two Bills that are under consideration at the National Assembly, and that spirit will assist many Private Members' Bills that have moved from this House, to be given the due consideration. When the time comes at the Committee stage when considering these Bills, we will then see the viability and the wisdom behind the amendments that they will have brought before us. I would like to ask Sen. Wetangula to second.

I would like to emphasize that this is a procedural Motion meant to introduce the Bill to the House. It is not for a vote or for anything. It is just to make sure that the Bill comes to the House, then when we go to the Committee, we can raise the issues around it. I need the attention of Senators to appreciate what I am trying to say.

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

Sen. Wetangula: Mr. Speaker, Sir, I am sorry the Senate Majority Leader had not consulted with me on this matter. I am at a loss as to what he is prosecuting.

If this is a Bill from the National Assembly, when it is referred to this House via a message, it is subjected to First Reading, then Second Reading; then we go through all the Motions of a Bill. Now we are being told that this is a procedural Motion to introduce an amendment to a Bill. I have never heard of this here. We cannot just acclaim to what looks like very far reaching introductions into a Bill.

First of all, we would want even to know what is being defined as a city. If we are going to add to cities the responsibility for managing information, communication and telecommunication services and so on; I know we are not there yet.

Let me prosecute my argument. If we are going to do this, then the ordinary course of procedure is for the message from the Lower House to go through those Motions and the Bill itself to be given to Members to look at and understand. We still have issues about what a city is. I would want Eldoret to be a city given its expansive nature, and I would want Nakuru to be a city. I understand the city is limited to Mombasa, Kisumu and Nairobi. If you go to the United Kingdom (UK), you will find small towns like Oxford and Cambridge are called cities. If the description of a city is going to confer additional responsibilities and advantages to a city, then this House, as a representative of counties, must look at this and define it more broadly than it is being defined.

Let us understand what procedure we are following before I agree to second the procedural Motion that I do not understand.

The Speaker (Sen. Lusaka): Yes, Leader of Majority.

The Majority Leader (Sen. Murkomen): That is precisely what I was trying to explain here, Mr. Speaker, Sir.

Standing Order No.159 provides for the procedure for receiving a Bill. First of all, remember that this is our Bill, which went to the National Assembly. They have considered and made amendments. The Bill is coming back to us and then upon receipt of that Bill, there is a procedure of introducing it to the House. That procedure is provided for in Standing Order No.159(1) which states that:-

"Amendments by the National Assembly to a Bill originating in the Senate shall be circulated to Senators within seven days of receipt of the amendments from the National Assembly and shall be put down for consideration in a Committee of the Whole on such day as the Senate Business Committee shall appoint".

So, it just comes to the House and it goes to Committee of the Whole, then we will consider. If you read paragraph (3), it says:-

"Where the Senate has resolved that the amendments by the National Assembly to a Bill be considered and, on the appointed date, the Senate shall dissolve into Committee of the Whole where each amendment shall be called out by the Clerk and may be agreed to or rejected in accordance with Article 112 (2) of the Constitution".

If it is rejected at that stage, it goes to mediation. How do you introduce it to this House for purposes of taking it to the Committee of the Whole? You bring a procedural Motion, which is the one I am moving now, Sir, which is just to introduce it to the House. That is why this procedural Motion does not require the debate on the substance because we do not have a Motion in the House yet. Once it is introduced, we will move to the Committee where we will debate and proceed to vote. At this stage, we just need a vote by acclamation of *Aye* and *Nay,* then we introduce it.

The consequence of, for example, of voting no will mean that the Bill will go to mediation without our contributions and considerations at the Committee of the Whole as to whether we agree with the National Assembly or not.

With that explanation, does that suffice now for me to ask Sen. Fatuma Dullo to second? Sen. Wetangula agrees with me.

(Laughter)

Sen. Dullo seconded

(Question proposed)

Sen. Wetangula: Mr. Speaker, Sir, I will be very brief. Now that the Senate Majority Leader has explained this process, it is a little clear. Let me caution the House that when we go to the Committee of the Whole, we must very carefully look at what we are defining as a city, so that we do not lock out areas and growing urban centres that require elevation. They need to be conferred with responsibilities and opportunities that can help them grow into urban areas.

I say this because there are programmes coming from the World Bank and other donors that are clearly defined to benefit cities. It means that we will end up with such huge doses of donor support ending up in only three counties out of 47. We would want to enlarge. In future, we, as a House, should legislate that every county headquarters qualifies, subject to meeting certain requirements, to be called a city. We need to see benefits conferred upon these areas.

I look forward to seeing the real amendments in the Committee of the Whole, so that we deal with them appropriately.

The Speaker (Hon. Lusaka): Hon. Senators, pursuant to Article 123 of the Constitution and the Standing Order No.80, I have determined that this matter does not affect counties.

(Question put and agreed to)

The mater will be further deliberated in the Committee of the Whole tomorrow. That is where the amendments will now be discussed.

Sen. Wetangula: Mr. Speaker, Sir, can they be circulated to us those amendments?

The Speaker (Hon. Lusaka): They will be circulated. They are attached to today's Order Paper.

Sen. Wetangula: Mr. Speaker, Sir, it is normally the amendments plus the original Bill.

The Speaker (Hon. Lusaka): The Secretariat will do the needful.

Next Order.

BILLS

Second Reading

THE PUBLIC PRIVATE PARTNERSHIPS (AMENDMENT) BILL
(NATIONAL ASSEMBLY BILLS NO.52 OF 2017)

The Senate Majority Leader (Sen. Murkomen): Mr. Speaker, Sir, I do not see both Whips and their deputies on both sides. As I move this Bill, I am requesting them be alert, so that we can dispose of the business of the Division. They can stop me at any point for purpose of that Division for the three Motions.

Mr. Speaker, Sir, I beg to move that The Public Private Partnerships (Amendment) Bill (National Assembly Bills No.52 of 2017), be now read a Second Time.

This are straight forward amendments. I do not wish to say much. First of all, there has been a lot of concern across the country insofar as issues related to public-private partnership. This Bill seeks to provide ways of accommodating a lot of interests from various stakeholders, particularly at the county level.

We were here last term when the Governor for Kericho County was brought to this House, pursuant to a public-private partnership memorandum he had signed at the county level. Part of the reasons why he was brought here was because there was no legal framework of engaging with private entities for purpose of partnership, partnering and delivery services at the county level. This Bill seeks to deal with that anomaly.

Mr. Speaker, Sir, there are many concerns across the country now about the amount of debt that we are accumulating. The concerns are informed by the model we have adopted to achieve the development agenda for this nation, particularly infrastructure; that is, roads, ports and railways. There is an argument that public and private sector can work together to achieve public good and development of a nation without resorting to debt.

This happens in forms of concession. For example, there is a discussion now on how to develop the road from Mombasa to Malaba. There are many entities that are pushing for national Government to take a loan from the United States of America (USA) Exim Bank and repay within a certain period of time. The road will be constructed by an American company. You know the concept on how export-import banks or exim banks work across this country.

That kind of model will over-burden the citizens of this country who are already reeling from the effects of high loans that people have borrowed. This Bill provides that it is not just national Government that will deal with matters public-private partnership. However, in Clause 2, it is proposed that an amendment is brought in to substitute the definition of a contracting authority from just being national Government or a State department agency or corporation, but it also includes the county governments. The county government or county corporation which intends to have its functions undertaken by a private entity can do so suing this piece of legislation.

We hope that with the introduction of this law, the counties can now have an opportunity to engage the private sector for purposes of partnership for service delivery. Nairobi County needs this law, and the Senator for Nairobi City County is here. One of the biggest problems that Nairobi City County is dealing with is collection of waste. With a Public-Private-Partnership (PPP) arrangement, it is possible for a private investor to provide a model to the county that can collect all the waste in this City. Some of it can be recycled and used to generate energy. I know that, that proposal is already on the table.

Mr. Speaker, Sir, secondly, it has become almost impossible to operate in Nairobi when it comes to transport. Particularly when the *matatu* sector was under a challenge in terms of complying with the traffic laws, it became apparently clear that the number of vehicles that people have in this City is so high that if we allow everybody to bring their car to the roads, we may never move in this City from morning to evening. The best way to sort out the problem of transport in this country is by having a light rail. In other cities it is called the metro system.

If we go to many cities such as Washington DC, we have the metro system operating there. One day, while using the metro in Washington DC, I saw senior officers and other staff from the World Bank, the International Monetary Fund (IMF), Capitol Hill and the White House. They do not need to drive. One just jumps into the metro and moves around. It is clean and new. In fact, when I visited there this year I realised that they had bought new trains. It is beautiful. In fact, it becomes a burden to drive.

For Nairobi to achieve a metro system, I think the best thing would be to utilise these amendments that are provided for in this law that open doors for counties to now engage with the private sector. The national Government does not have to borrow or be involved in the PPP. The county government can now directly source private investors who can run a metro system for 40 or 50 years. The value it will bring in terms of opening up and marketing this City will go up.

Mr. Speaker, Sir, Nairobi has no other way than to have a metro system, and the only way to do so in the current financial environment is to have a PPP. It will not just benefit Nairobi, but also Machakos, Kajiado, and Kiambu counties. Movement of persons from Thika to Ongata Rongai, Mavoko and other parts of the country will be extremely easy. Counties are, therefore, now being included.

There is also a definition of who can be a transaction advisor, which means a person who has the appropriate skill and experience to assist and advise the contracting authority, or the unit on matters related to a PPP. This will ensure that one does not get a quack, who becomes a 'transitional advisor,' but in reality they cannot provide the expertise.

The Act is also amended to provide a New Section 3A which provides that the provisions of the Public Procurement and Asset Disposal Act, 2015 shall be exercised subject to relevant provisions of this Act and applies to contracts under this Act only in the event where there is no express provision setting out the applicable procurement procedures under this Act. It is also being qualified under this Act to the extent to which we can apply the procedures of the Public Procurement and Assets Disposal Act, which can also lead to inordinate delays if they are not applied properly for purposes of producing results. Those exemptions are to adopt or capture the uniqueness of PPP as a way of dealing with matters.

Mr. Speaker, Sir, this law is being amended to empower the contracting authority. This law also gives power to the contracting authority to reserve certain projects for disadvantaged groups. It is important for citizens to understand that PPP does not mean a foreigner coming to invest in the country. It also means private citizens locally. The understanding of a PPP, to many people, is about foreigners, foreign entities, governments and so forth. In this regard, there is room for reserving certain PPP projects in the counties or national level for disadvantaged groups such as women, Person with Disabilities (PWDs) and the youth, as provided for and defined in other parts of the law.

Mr. Speaker, Sir, it is important for us to appreciate that the Constitution defines women generally as marginalised groups. One of the sections that will be amended in future if men rather than women become marginalised is that section.

This law also gives the county governments the mandate to approve the county priority list before they can submit it to the PPP unit for publication along other national Government priority projects. The counties, therefore, have the mandate to ensure that they provide that list. It should be remembered that the PPP unit is managed in a centralised manner or is a national entity that requires considering both the county and national projects, and not just for one sector. Priority lists are, therefore, provided by the national Government and county governments to the unit.

Upon receipt of the list from the national Government contracting authorities, the unit shall consider and prepare a report to the Cabinet for approval, because then they become a national priority list, which captures both county government and national Government concerns. In fact, part of the reason Gov. Chepkwony had immense struggle convincing this House why he should not be impeached with regard to the solar project that he wanted to do in Kericho County, was because there were no approval procedures in the counties. He was undertaking a process that had not been approved anywhere.

Mr. Speaker, Sir, I have insisted that counties should not fight to become agents of doing big white elephant projects, just because they want to be part and parcel of procurement processes that involve major projects. Counties have no business building universities. There are some counties that want to build universities yet agriculture, prices of products and goods, irrigation and the health sector are struggling and they have not even completed the Early Childhood Development classes. As a Senate, we want to see that our counties prioritize the areas that have been provided for in the Fourth Schedule, Part 2, of the Constitution, before they can reserve any resources for supporting projects that can be undertaken from the national level.

In continuation of the same, the Bill provides that when the committee receives those projects, it goes to the Cabinet. The Bill also sets out expressly the technical expertise that a contracting authority shall have to procure - development, preparation, procurement, contract negotiation and management of a project - under this Act. It states that there must be an assessment of the technical expertise of the contracting authority. Clause 10(b) states that;-

'Where the unit finds that the contracting authority does not have the technical expertise to procure the project under this Act, the contracting authority shall, in consultation with the unit, appoint a transaction advisor to assist the authority in the preparation, procurement, contract negotiations and financial clause phase of a project.'

There is recognition under the Bill that the counties, an entity, a parastatal or any other entity may not have---

(The Senators consulted loudly)

The Speaker (Hon. Lusaka): Hon. Members, let us consult in low tones.

The Senate Majority Leader (Sen. Murkomen): Thank you, Mr. Speaker, Sir, for protecting me from Sen. Orengo and Sen. Cherargei who have arrived in the House in an exciting manner for reasons that I may not know. I would only want to say that they were absent when we wanted to vote.

In this Bill, there is recognition that a procurement entity or a contracting entity may not have the capacity to undertake the Public Private Partnership (PPP) consultation processes. To avoid a situation where a private entity is going to take advantage of the public sector or the lack of capacity in the public sector, this law states that the unit must provide that capacity to be used to assist the county or national entity in pursuant of that important process.

The law, in Clause 14, also provides for the procedure of preparing and evaluating the report. It provides that the proposal evaluation team may reject all submissions by bidders, prepare reports, state reasons for rejecting and if they have accepted the contract, they must provide the reasons for accepting to pursue a particular direction.

The law also provides for the procedure for county government PPP projects and it gives the counties a right to enter into a PPP and be responsible for the administration of the overall project cycle for the counties to also have control in the delivery. That will be the new Section 54A which gives a detailed procedure of how the county is going to be involved and how they are going to control the projects.

This law is amending the Public Private Partnership Act, 2013, to provide a framework that will regulate the entry of county governments into an implementation of PPP and regulate the manner in which county governments can carry out the PPP. This Bill is useful and I want to convince my colleagues that we should pass it. We should not give our counties any excuse not to engage the private sector in so far as this process is concerned. I am looking for Sen. Mutula Kilonzo Jnr. who was in this House.

(A Member spoke off record)

I am not looking for him to second. I am looking for him because he was around. I had a discussion with Sen. Mutula Kilonzo Jnr. and he, together with Sen. Wetangula, know what happened to Governor Chepkwony. We let him off because the threshold was not as high as required. Otherwise, he would have been impeached and removed from his seat on an account of failure of procedure and legal framework to deal with PPP.

As a Mover of this amendment, I suggest that the Committee that is chaired by Sen. (Eng.) Mahamud should look into the PPP delivery unit. The PPP delivery unit is going to participate in the approvals that are required from counties, hence the composition of that unit should be expanded to include representation of counties. The reason for that is because we have all the entities of Government that are performing functions that relate to national and county level and we have ensured that we amend the law to accommodate the county governments. If that is not going to be the case, then nothing will stop the national Government from using the institutional structure for the establishment of that unit to deny certain counties certain projects because there is no one doing the bidding on behalf of the counties.

Although I am moving the amendments as they are, Sen. (Eng.) Mahamud, who is the Chairperson of the Committee that is looking at this issue, must come up with amendments to accommodate the representation of county governments in the PPP procurement unit under the Public Private Partnerships Act, 2013.

With those so many remarks, I move this Bill and request the Chairperson of the Committee on Finance and Budget, Sen. (Eng.) Mahamud, to second.

Sen. (Eng.) Mahamud: Thank you, Mr. Speaker, Sir. I beg to second the Public Private Partnerships (Amendment) Bill (National Assembly Bills No. 52 of 2017).

This Bill is being amended to recognize county governments as the contracting agencies because there were no counties when the initial Act was enacted in 2013. The idea is, therefore, to provide for the counties---

(The Senators consulted loudly)

The Speaker (Hon. Lusaka): Order Members.

Sen. (Eng.) Mahamud: The idea is, therefore, to provide for the counties as contracting agencies for them to take part in the PPP.

The question that we need to ask is; why PPP? An increased demand for infrastructure like roads, water, telecommunication and power on government requires that we need other sources of funding. In fact, PPP is meant to provide the funding gap for infrastructure. In the arrangement of PPP, contracting entities like the national Government and the counties will engage private sectors to provide the needed infrastructure which will be preceded with a lot of preparation in terms of the design and feasibility study which the private sector must also take part in.

The Government entity must have its own model so that when the private sector proposes to fund a project and say that it is going to generate revenue through the tolls and the rest, then the fees charged must be reasonable and the contracting agency must have its own financial model to agree with that.

Mr. Speaker, Sir, Public Private Partnership (PPPs) have been accepted and in many parts of the world, infrastructure projects, for example, toll roads are funded through the private sector so that they can get their funding back.

Mr. Speaker, Sir, the procurement is a bit different from the normal traditional procurement where a person tenders then gets a responsive offer to do the job. In this kind of procurement, there must be interested parties from the private sector who must have the capacity to undertake that work. In most cases, the project is the collateral and the risk is apportioned to the party that can best take it. Government can only take the political risk while the private sector takes the financial risk.

Mr. Speaker, Sir, we have looked at this Bill as a Committee. We carried out public participation and had a lot of submissions from various entities including the private citizens. The Council of Governors (CoGs) presented their memorandum to us. In fact, they had issues with the few Clauses in the Bill. When the Senate was sitting in Eldoret, we conducted public participation and what we got from the public was very encouraging and we will incorporate it in our proposed amendments.

Mr. Speaker, Sir, the fundamental of PPPs is that there must be a feasibility study to ensure that the project can be undertaken especially for large projects. There is a proposed project Committee which is composed of the national Government, the CoG and a nominee from the private sector; these are people who are not in the Government but nominated by the Cabinet Secretary (CS). There is also a proposed specialised unit in the National Treasury called the PPP Unit. In fact, the approval of this process down from the county level to the national Government will be done at the Cabinet level, Parliament and the county assemblies, which must have a say in what is being done in the county.

Once the project is approved, the approval will be subjected to competitive dialogue and bidding. People who are interested can dialogue or bid with the private sector. That way, they will know the cost and the revenue that will accrue from the project. This is because after a concession period of about 30 years, the project will be handed over to the Government.

Mr. Speaker, Sir, there is also the approval by the PPP Committees both at the national level, Parliament and at the county assemblies as required. From there, the private sector and the Government will discuss when there will be financial closure and the project will kick on. Therefore, this is a very important model which was tried in the country on Uhuru Highway from Nyayo Stadium to Rironi.

In fact, I remember that when I was in the Ministry of Roads, we did a tender for an overpass road between Nyayo Stadium to Rironi and STRABAG International was rated the best but later on it was discovered that it had one Russian in their partnership who was corrupt. Therefore, the project never took place. In fact, up to now, the project has not been implemented. The discussion on the road mentioned by the Senate Majority Leader between Mombasa and Nairobi is that the Government should borrow. However, the Government should not borrow because PPP means that the private sector will bring the finances and the Government will partner with them.

Mr. Speaker, Sir, we saw the Bill that came from the National Assembly which proposes that we give a chance to the disadvantaged people in terms of finances. However, this model will not allow that because this project is for people who are able to source for funds.

We have looked at the Bill and proposed a lot of amendments and our report was tabled. In some areas our colleagues in the other House rushed over it. However, it is a very important Bill. One thing that must be clear is that PPP is not privatization.

Therefore, it is important for Kenya because it has worked elsewhere. Since the law of 2013 was enacted, no project has ever taken place. However, with these amendments, we encourage the national Government and the counties to do that.

This Bill proposes that the Government will have a transaction advisor whose job is to advise the entity on the contracting process. Where there is no capacity, the advisor will do what is needed. The Government and the private party will have their own designs which must be challenged. If not, we will have projects that will be very expensive and whose tolls and tariffs will be too high for anybody to take.

Mr. Speaker, Sir, when the Lamu Port-South Sudan-Ethiopia-Transport (LAPSETT) Corridor model initially came up, some of us were very scared because it was a large project which had a railway, a pipeline, roads, resource cities and harbors. It was to concession at a go which was something very ambitious. That is why from 2003 up to date, we are slow on that project. In fact, by that time, if we had invested on Mombasa-Malaba Corridor and done six lanes, deepened the harbor or the railway, we would have done much better.

I am not criticizing the project. However, we are stuck because it is not easy to get revenues from the toll stations to pay for the project. Therefore, as we move forward, it is important for Kenyans to be educated about these important models. We must also differentiate them from the traditional procurement process where public money is applied directly to the project. In these models, money is applied from the private sector and the project infrastructure reverts back to the Government after the number of years of concession has been agreed which is 20 or 30 years or so after the private sector has recouped its financing.

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

(Question Proposed)

Sen. Wetangula: Thank you, Mr. Speaker, Sir. This is a very important Bill in correcting previous problems but also clearing the way for better management of public affairs in the future.

In the last Parliament, Sen. Fatuma Dullo, Sen. Murkomen, Sen. Mutula Kilonzo Jnr. and other Senators who were here saw this House nearly hang an innocent man from Kericho. Gov. (Prof.) Chepkwony, as an enthusiastic governor, eager to get his county moving, signed a Memorandum of Understanding (MoU) with some investors from Europe. An equally enthusiastic assembly in Kericho frog-matched him to the guillotine and impeached him. It is in this House where we were able to save him by appreciating that a MoU is a mere document of comfort. It cannot, by any standards, create contractual obligations.

Mr. Speaker, Sir, I also know that the former governor of Nairobi, Dr. Evans Kidero continues to visit the Ethics and Anti-Corruption Commission (EACC) headquarters to answer questions about some MoUs that he signed with some German companies.

Therefore, this Bill brings into focus the need to properly manage PPPs. The Committee on Finance and Budget in which I sit, chaired by the distinguished Senator for Mandera, has gone through this Bill very carefully. We have proposed far-reaching amendments that will come at the Committee Stage to make things better. Therefore, I hope that Members will follow closely because this unlocks a very major potential.

(Sen. Murkomen, Sen. Orengo and Sen. Mutula Kilonzo Jnr. consulted loudly)

Mr. Speaker, Sir, can you protect me from the Senate Minority Leader and his group?

A major potential lies in the future of economic development through PPPs.

Mr. Speaker, Sir, this country now has an unmanageable public debt because of the inability of the Houses of Parliament to regulate how the National Treasury borrows. The Word Bank, The International Monetary Fund (IMF) and internal organisations that observe our debt growth are raising alarm. We need a proper management structure. A unit is created to help counties and the national Government in processing Public Private Partnerships (PPPs).

Mr. Speaker, Sir, allow me to point out a few things that, as Members contribute, they should look at. Clause 7 of the Bill attempts to bring in the now popular provision that projects should be set aside or reserved for disadvantaged groups. This is a completely misplaced provision. You cannot obligate a PPP to the rigours of youth, women or Persons with Disabilities (PwDs). Why? This is because the entity contracting with the private partner is either the national Government or the county government.

The national and county governments will contract with a person or an entity with money to run a project. So, a Japanese, German or Chinese national cannot walk into your county to enter into a PPP and you reject or tell them that you want only to deal with the youth, a woman or a disabled person. You are dealing with people with big money. What we probably need to do is when the benefits come, then they should be tailored ---

(Sen. Murkomen and several Senators consulted loudly)

The Speaker (Hon. Lusaka): Order, Senate Majority Leader. Let us consult in low tones.

Sen. Wetangula: Mr. Speaker, Sir, we must have this. The Committee has recommended that Clause 7 be deleted because it does not make much sense to PPPs.

On Clause 8 of the Bill, the Committee will be recommending – my Chairman may have said this because the House was very loudly consulting – that even in the counties, it will not be the county executive to source private partners and execute the transactions on their own. County assemblies must have a say. Whatever transactions they enter into must be subjected to the approval of the county assemblies.

Mr. Speaker, Sir, in my view, the most important Clause in this Bill is Clause 10. It realizes that if you strictly go in accordance with public procurement and disposal act provisions, then you will never give the contracting parties, particularly the counties, a fair deal. Most counties do not have sufficient expertise. This provision now opens up; that instead of the usual ways of saying; in procurement parties are not allowed to sit and talk prior or they are not supposed to fix this and that. This opens the window for the unit to assist the counties where necessary and give the necessary expertise to do prior negotiations so that by the time they come to procurement, everybody is in tandem with the technical aspects, financials, timelines and eventually the economic benefits of the projects.

This, if we strictly went to the Public Procurement and Disposal Act, will not happen because the moment you start negotiating with a tenderer, you are already presumed to be flouting the law by fixing. Here is a situation where parties are allowed to go step by step so that everybody understands because PPP projects are not projects of Kshs1, 2, 3, 4, 5 or 10 million. These are mega projects. I do not expect that any county will start entering into PPPs to run projects of Kshs10 or 15 million because those can be financed directly by their budgets. You are talking about looking for projects that have long term financing; either build, operate and transfer; build, own, operate and transfer or build and transfer, whatever the arrangement you have. So, Clauses 10 and 11 provide that this is very important to be followed.

Clause 12(1) is equally important because it provides for the contracting entity – especially, I am focusing on counties because they are the ones that do not have a lot of capacity – will be allowed to talk to three, four or five competing parties. They can talk to part “A”, “B” or “3” and see which one is giving them the best deal. This is how counties can have value for money. In general terms, PPPs can be very good but they can also be very dangerous if the country’s institutions of governance do not do their work. What may happen in some situations is that you will find in a county that those in the executive benefit from these private partnerships through phoney companies, offshore companies and so on.

I urge that we tighten the law so that when the assemblies look at the process, when this Senate looks at the process and when the PPP unit looks at the process, they make sure that provisions of probity, fair play, honesty and lack of corruption in the transactions are adhered to so that if it is a transaction in Isiolo County, it should never be a transaction to benefit the Governor of Isiolo County or anybody else in Isiolo but the people of Isiolo.

This is what ---

(Hon. Senators consulted loudly)

The Speaker (Hon. Lusaka): Order, Members.

Sen. Wetangula: Mr. Speaker, Sir, those disruptions in such an important Bill are not helpful.

If you look at the history of our country, almost all filthy rich people in this country have been public servants; sitting in public offices doing personal work. Every time there is an agreement between the Government and a foreign entity, the benefits flow to individuals. We must seal these loopholes so that counties can become focal points of growth. I am so happy about this Bill because we want to allow, and the law now allows that if Bungoma County wants to engage a German entity to tarmac their roads and commit payment for the next five years, they can do so provided there is concurrence from the PPP unit that must have representation from the counties. In fact, our Committee has recommended that we reduce the representation by the national Government to a level where it is almost at parity with the representation from the Council of Governors.

There is also a provision that where the CoG lacks expertise, they can hire a qualified professional to represent them in these transactions. Which means that where you need a qualified financial analyst, engineers, architects, assessors, and actuaries, you can hire them as transaction advisers. So that at the end of day, the bottom line is value for money and benefit to the people of this country.

Mr. Speaker Sir, I urge hon. Members that this Bill, apart from allocation of resources that we pass year in, year out, opens up an enormous potential. Now, the City County of Nairobi can now enter into a Public Private Partnership (PPP) to clean up our city, get the eyesore of Dandora Dumpsite out of our way, clean Nairobi River and make it clean to the extent of being navigable by recreational groupings and so on. So, this Bill portents very good tidings for the growth and expansion under the benefits of devolution that we so much defend and represent in this House.

I beg to support, Mr. Speaker Sir.

The Speaker (Sen. Lusaka): Sen. Dullo.

Sen. Dullo: Thank you, Mr. Speaker, Sir. I wish to support this Bill because it will solve partly the problem that I have with the County Government of Isiolo. I am hoping and praying that it will be assented to before the implementation of the current project that the County Government of Isiolo has started.

Mr. Speaker, Sir, I have had issues with the County Government of Isiolo because they have introduced a Public Private Partnership programme for health care services without following the due process of the law. Public Private Partnership is very important and we support it as leaders in this House. Unfortunately, the challenge that we have in the counties, I am sure it is not restricted to the County of Isiolo, and I have had a discussion with several Senators, where county governments have entered into a partnership with individuals or private companies.

If I may give an example, the County Government of Isiolo has entered into a partnership with a particular company which is a limited company by guarantee, where they are not subjected to provisions of this Bill that is being proposed. When this project came up, I really objected to it and protested because the law was not followed. In my view, this Bill will solve much of our problems because the provision is clearly pointing out the areas of concern. First, the survey is supposed to be done before entering into any partnership. However, before the survey is done, the governors pick partnership singlehandedly without subjecting them to a competitive process, and the County Government of Isiolo is a very good example.

Secondly, Mr. Speaker Sir, the Bill proposes that an evaluation report must be done and be subjected to the PPP unit for purposes of ensuring credibility and financial ability of the company. Today, we have a scenario - and I know there is a petition before the Senate Committee on Health - where the Governor has entered into a partnership, the survey was done secretly without public participation, and they have prepared an agreement that was tabled before the County Assembly.

When I queried and told the County Government that they cannot give them budgetary allocation, the County Assembly has gone ahead, and the executive have tabled a regulation to allow them establish a fund without consulting the national Treasury. This is taxpayers' money. This is a company that the people of Isiolo County do not know about. Therefore, when this Bill goes through, it will help us.

Mr. Speaker Sir, I have a challenge with one of the provisions of the Bill. In the agreement between Isiolo County and the private company, the Governor has established a Special Purpose Joint Account with a private entity, which is against the Public Finance Management (PFM) Act. Out of that, the money is transferred to the company's account. This is "pen" theft, which I believe the Committee on Health will be able to expose; this is unacceptable because taxpayers' money is involved.

Mr. Speaker Sir, public participation is one of the things that I feel should be amended or brought into this provision. Members of the public must know where their money is being taken to and should not be taken for a ride. The constitutional provision is very clear in terms of public participation. Today, the agreement and regulation that the County Assembly of Isiolo has passed was not published, gazetted, and subjected to public participation. This is happening in Kenya today, when we have legislation.

As the Senate, we must come out and condemn this position. In one of the clauses on that particular regulation, it is proposed that the Chief Officer of Finance can appoint any person and institution to operationalize the account. This can be anybody. Even members of the public can be appointed by the Chief Officer to manage the fund for that particular purpose. This is very serious and we need to deal with it.

The other aspect, Mr. Speaker, Sir, is submitting the list of the PPP contractors. This will avoid contractors being singlehandedly picked by the County Government and thus deal with the current issues we have. Again, the Bill proposes that the evaluation report once it is submitted to PPP, the PPP unit should be able to advise and tell them which contractor is valid and which one is not. In the event that the contractor does not meet the threshold, the County Government will re-advertise that position, and that is very critical. That is why I am supporting this Bill.

Mr. Speaker Sir, in the aspect of benefit, when the agreement was presented before the County Assembly of Isiolo, the only thing that the members of the public were told is that the company was going to deal with community health workers. However, when you clearly look into that agreement, you will see that they are going to provide everything that deals with health care services in hospitals yet this company has not been subjected to public participation to establish whether they are able to carry out those services or not.

We are therefore having a problem in this country and this Bill addresses that aspect because the public needs to know what their benefits and proposals are, together with the strategies that are in place, to make sure that they have benefited from this project. I strongly support this Bill, and if we do not deal with the issues of PPPs in our country, most of the counties are going to lose huge sums of money.

I have been in discussions with the PPP unit here in Nairobi, because of Isiolo issues. You can imagine the PPP unit advised the County Government of Isiolo not to enter into this agreement and they went ahead and implemented it. They requested the services and the PPP unit went all the way to Isiolo to train them on how to enter into agreements. Unfortunately, they avoided that route because it is lengthy and it is a route that could protect taxpayers' money. County governments avoid those routes and the legal procedures that are required. We should tell them off when these issues are brought to this Senate.

Another issue concerns whether PPP projects are within County Integrated Development Plans (CIDPs) or Annual Development Plans (ADPs). A good example is the petition before the Senate on whether it should have been in a CIDP or an ADP. The county government ensured that the county assembly passed that particular project but that is wrong.

We need to deal with these matters. I hope we will subject this particular Bill to public participation, especially in the rural areas where these issues happen so that we close or seal loopholes in our counties.

I thank you and beg to support.

The Senate Minority Leader (Sen. Orengo): Mr. Speaker, Sir, I will speak briefly on this Bill. From the outset, I support the Bill. Anything that enables county assemblies to be more involved in development projects, whether they are directly undertaken by the counties or are national, there must be an entry point for county governments. This Bill seeks to seal that gap in respect of PPPs and it should with no doubt find support from this House.

The only reason I am standing up to speak to this Bill is that there is a cocktail of legislation which needs to be synchronised. Those undertaking this work, particularly the county governments are confronted with several legislation which include; the Public Finance Management (PFM) Act, the County Governments Act and the Public Procurement and Asset Disposal Act. As you are aware, there are proposals for amendments to some of these Acts. So, this is not a straightforward amendment of the Public Private Partnerships Act.

There was also the question of Government financial regulations which will come to play. Having listened to what the Deputy Senate Majority Leader has just said, it is without doubt that all these statutes, including regulations that relate to Government expenditure or management of public funds will come into play. I think we will benefit from the Committee.

I have not seen the report, but I think eventually, we may need to go through these amendments with a toothcomb. The speaker before me talked about memorandums of understanding (MoUs). Many governors are getting into trouble because of signing MoUs. What is the legal status of an MoU? In my view, an MoU does not go beyond implementation. There are requirements that must be undertaken under the law in respect of projects undertaken by public bodies, including the national and the county governments.

Mr. Speaker, Sir, there are instruments like feasibility studies which will find a place in this Bill. However, from where you sat before, what constitutes a feasibility study is a matter of legal interpretation because one would want to determine what a feasibility study is and if a county or a Government entity should undertake it. Therefore, we need to understand what a feasibility study is. Having said all that, we need to have an environment where it is easier to do business with the Government with least red tape and bureaucracy.

We are adding several sets of regulations as if the ones which are in place are not enough. Under the County Governments Act and the PFM Act, before resources can be allocated to any projects, there is a requirement that it should be a project envisaged by CIDP of every county, so that if in the middle of a period of five years you get an investor who is interested in entering into a PPP under the Act and in accordance with the regulations, the mere fact that a particular project was not planned for in the five-year development plan would render it null and void.

Some counties have found themselves in criminal courts for undertaking projects not planned for in their five-year development plans. The Committee should act as urgently as possible to ensure that, that happens. I call upon Members of this House that we interrogate the PFM Act, the County Governments Act and the Public Procurement and Asset Disposal Act and the various financial regulations.

As you can see, Clause 4 seeks to insert a new section. It states as follows:-

"The principal Act is amended by inserting the following new section immediately after section 3–

3A. The Provisions of the Public Procurement and Asset Disposal Act, 2015 shall be exercised subject to the relevant provision of this Act and apply to the contracts under this Act only in the event where there is no express provision setting out the applicable procurement procedures under this Act."

There is conflict between the Public Procurement and Asset Disposal Act and the PFM Act. We also have a third legislation that has an impact on public procurement and asset disposal. In order to make the work of the counties easier, not less accountable but user friendly, we need to have a thorough examination and bring cohesion in all these sets of legislation, so that there is no confusion in the sector, especially in matters development.

I hope that these amendments, particularly as they relate to counties, will make it possible for counties to undertake projects in which they can secure private investments but with the participation of the counties in an accountable, transparent manner, in which members of the public will get satisfaction in terms of their needs and stresses.

However, it cannot be left unsaid that in the past, where projects were undertaken under PPPs, private investors willy-nilly made money in the end but public entities and the public at large never benefited out of the projects, even if missions were fulfilled and services effectively rendered to the public. I am hoping that we are not giving an opportunity to counties, particularly to be in a position to undertake projects of this nature and use them as rent-seeking instruments or devices to fill the pockets of those who will undertake them on behalf of the people of the counties and the national Government.

One would remember in the period where PPP became popular in this country, our people lost money. Some of the projects floundered even at the time of inception. Therefore, I hope that the mechanism that has been set here, particularly undertaking feasibility studies; that these studies would be proper studies carried out. For example, if the designs are required before project implementation, then they will be done properly and in the interest of the public.

We need to undertake risk assessment to ensure that we do not engage in enterprises that will not make us move forward in terms of national and county needs. Provisions of Clause (9) are useful in terms of making technical assessment. The people would be able to prepare these technical assessments all geared towards procurement preparation and contract negotiations. These are important tools to use to ensure that any enterprise undertaken under this Act and the amendments proposed, fulfill their ultimate objectives.

I fully support this Bill.

Sen. Sakaja: Thank you very much, Mr. Speaker, Sir. This is a good Bill. It is an amendment to the 2013 Act of Parliament that sought to provide a legal framework through which PPPs can be done. As Sen. Wetangula said, it presents a lot of opportunities. The scope of what then can be done by the national and the county government increases exponentially once we have been able to diversify the sources of funding and financing such projects.

Mr. Speaker, Sir, the national Government provides in the PPP unit that its intention for having such a legislative framework and for dealing with provisional services in such a matter, is to improve the quality, quantity, effectiveness and the timely provision of the much needed public infrastructure and services to the people of Kenya.

This only happens in the realms of PPP where the interests of the private sector and that of the public sectors converge. That area of convergence is where we have mutual interest. One of the interests of the private sector is to make money and that of the Government is to provide that service. The Government must change its orientation in many sectors because it is not in business. Government needs to get out of business and let business people do business. However, it needs to create an enabling environment or the framework to let businesses thrive. The interest of the Government is just to provide services and infrastructure to its people.

We have seen a lot of areas where there are many pending projects, for instance, I know the Kenya Pipeline Company (KPC) has around 70 PPP projects in the pipeline. If you look at the energy sector, for example, there are many people who want to bring in energy into the national grid. Turkana Wind Power is one of them. I can see Sen. Mutula Kilonzo Jnr., who is a ranking Member of the Senate Budget and Finance Committee, and I hope when the Committee looks at Bill, they will ask themselves why these people, despite having legal framework at the national level, had no serious PPP projects since 2013.

Where is the problem? These amendments will not cure that issue. They will also provide a similar framework at the county level to what we have at the national level, but the problem that has been there that has prevented the private sector from engaging with the Government on projects still exists. That is where the solution must be found.

We should ask ourselves whether there is lack of confidence in the word of Government. When I come here and speak about demolitions and some people want to know what is wrong with me, it is because I know what the sanctity of a title deed means to a private investor. If they see on one hand that this Government does not respect the sanctity of a title deed and then tomorrow you invite them to invest on a place where the title deed is the basis, they will not come if the Government does not respect it.

Why do they have such high appetite for Government guarantees? They want a sovereign guarantee to do a PPP yet it is not Government borrowing. It is because of lack of trust and political stability. I am glad that now we see a semblance of political stability which came about with the handshake. The other day, we saw the former, His Excellency, the Vice President, hon. Kalonzo shaking hands. That brings some calmness in the country and further strengthens investors' confidence in our country. They know that what they invest in this country will last.

Mr. Speaker Sir, this Bill brings county governments in PPP. It was long overdue. We understand the principles of fiscal decentralization. If you look at those principles, apart from the expenditure responsibilities that we assign to county governments and national government in the Fourth Schedule, here we are saying that the county government must do this and that whereas the national Government must do this.

From there, we move to No.2 which says that counties will raise money from this and national Governments will raise from this in accordance with Article 12 of the Constitution that provides revenue raising mechanisms. Then now you go to No.3 which is the intergovernmental transfer; what we call, the minimum 15 per cent that we give to counties. We start from the wrong place. How much do we give counties? We have not looked at expenditure responsibilities because we have not costed functions properly. For example, we do not know how much it costs to run the health sector in Makueni County. For example, we just estimate and say: "Let us allocate them Kshs300 billion".

People have been talking about the wage bill and *punguza mzigo* without knowing where the real *mzigo* is. Today, if you get rid of everybody in Parliament; Speakers of the National Assembly and Senate, all Senators and Members of the National Assembly, you will not have reduced our budget, even by 1 per cent. If you decide to get rid of counties, all the money we take to the counties to pay Speakers, Members of County Assemblies (MCAs) and the money we give county governments for development and recurrent expenditures, we will hardly have scratched 15 per cent of the budget. Therefore, focus must be on that larger amount.

Once you go through those principles and after the inter-governmental transfer and go to what we call sub-national borrowing, it is an international principle where you have physical decentralization, we have given our counties a raw deal. In the last dispensation, this Senate put governors to task because of engaging in PPPs because the Constitution is clear that that they must be guaranteed by the national Government.

Before the national Government guarantees – I am sure you had a similar challenge in your previous life as a governor – the hurdles that you will be taken through as a county government to get a guarantee are too much. Even within this context, we must make sure that once you provide this framework, we are not putting hurdles so that county governments, again five years from now, will not be able to achieve projects through PPP in the same way the national Government has not been able to achieve any projects based on PPPs so far. I hope those who have Bills coming on energy, pipelines or roads are done.

Mr. Speaker, Sir, this Bill talks about prioritisation. You cannot do prioritisation if you do not have access to information. Many of these projects or attempts at these projects are shrouded in a lot of secrecy. You do not know where they started or whether the request for proposals was open and whether it was public. The other day, we had issues in Pumwani Maternity Hospital and after three days, the Governor named it Sonko Pumwani Maternity Hospital and now partnering with Aga Khan Hospital. No one looked at it and the Assembly had not discussed it.

Mr. Speaker, Sir, at one point, the Committee on Finance and Budget failed to look at it – I hope we bring it in amendments – because of that component of access to information and the secrecy.

The other reason is that governors also have this habit of hiding behind the provisions of the Senate, which only oversights the shareable revenue from the national Government. The Senate must have a role to play in these projects because of their magnitude and the fact that we can then protect the interests of the counties and their governments.

Once a compendium of these projects is prioritised, it must then be brought to the Senate for approval, that these are the kind of projects that should go through PPP. That way, we will not wake up tomorrow and see Kivutha Kibwana Maternity partnering with this. It is neither a priority nor what the people of Makueni County want. If you go to Bungoma, you will see so-and-so has done this. If you go to Migori County, you will see Governor Obado has done this.

There must be that process of accountability and the Senate must play its role in inter-governmental fiscal relations by making sure that as part of the approval process, once you have done a Request for Proposals (RFP) and the County Integrated Development Plan (CIDP), and you have said that out of my CIDP, these are projects that I want to do as a county and these are the ones that we want to take through PPP, we can do it as quickly as we normally give them money. As quickly as we do the cash disbursement, that is the way we will quickly say this financial year, that these are the projects we are prioritizing for PPPs.

Mr. Speaker, Sir, it is extremely important that we do that. Otherwise, we are creating a law that then as Senators, Members of the National Assembly and leaders in counties will be going to the counties and they are shocked that this is happening and it is a PPP; this huge building is being done and it is a PPP. We will be providing an avenue, for instance, for the Senator of Isiolo County to just find out, that from the grapevine, this medical thing is being done. She must have a role to play in that process.

As we prioritise these projects, let us not just look at the viability of a project in isolation. Projects must be looked at for them to go through PPP in terms of the viability *vis-à-vis* other projects that are being considered by the county. At the national level, I have said and I am sorry – I know my Deputy Senate Majority Leader is here – but I do not understand why as a country, we are insisting on doing a Kshs480 billion project to add another layer of road from Mombasa to Nairobi, yet we still cannot get jobs for our young people and are unable to provide, just with Kshs45 billion, a mass transit system for Nairobi City County. I am talking about a metro system with trams and a light rail. Addis Ababa has done it for USD457 million.

In fact, theirs was a loan and not even a PPP. Today, if you do an Expression of Interest (EOI), advertise it internationally in the *Time Magazine* and request for proposals or you have an EOI for anybody willing to come and implement a mass transit system in Nairobi City County – build and operate transfer for 10 years, collect the bus fare and the tolls – people will be falling over themselves at the door. The TGV of Paris, Qataris, Americans and the Spanish will be here because it is viable. This is a county of close to six million people transiting through it every day. It has the resources and an annual budget of Kshs32 billion. The Kshs45 billion project can be paid back even in less than 10 years.

By doing this project, you are then able to increase the economic viability of Nairobi City County and people will not spend hours on end in traffic. Today, if I want to go to Githurai from Nairobi, I just go to the station, and I am there in five minutes. There will be predictability as it used to be when I was growing up in Nairobi and we knew that at 10.00 a.m. there is a Kenya Bus Service (KBS) coming and a No.42 will come from Huruma all the way to Kibera without going through town.

Mr. Speaker, Sir, you cannot have a 21st Century modern city, fastest growing in this continent, with a 19th Century transit system. I would prioritise that before I go to look for Bechtel or whoever is doing that project to build another road from Mombasa to Nairobi, I would prioritise the provision of health facilities and finish Mathare North

Hospital which potentially has 320 bed capacity but it is a white elephant project even from the time of the former Governor of Nairobi City County.

It needs just Kshs2 billion to complete before doing a double decker road in this country. That is why I am saying that these projects for their prioritisation and for them to be factored as PPP projects, need to be brought to the Senate. I am appealing to the Members of the Committee on Finance and Budget to see the sense in that. Otherwise, governors will prioritise projects that will give them direct benefits in one way or another – either political or financial benefit that accrues to them.

A big problem that we are facing in this county is garbage, yet in other countries, there are private companies fighting to buy garbage. In fact, there are countries that import garbage because of waste to energy. If, today, we are able to properly structure, as provision, through which we, of course, still secure our young people---.

Sen. Mugo will tell you that our young people want to be involved in the estates. She knows she is a legend in leadership in Nairobi City County and she understands. Her constituency used to extend all the way to town. It was a rural-urban constituency but she knows the dynamics. So, we involve the youth but we make sure that you have set up a company together with the people of, for instance, Dandora at the dumpsite, that source and collect the garbage, process it and put energy into the grid and the profits then go back to the people and they are able to pay back the county government. It is not rocket science and will not take 10 years to do. It can be done but with the proper framework.

Mr. Speaker, Sir, the reason we have a lot of garbage in the city is because we are paying people to collect garbage but not paying them to clean the city or deliver that garbage. If you give me a contract today and you have divided Nairobi City County into lots, and that I am the one collecting garbage in Westlands, I will do so but dump it in Lang'ata. Have you not paid me for collection?

If the only way I will get money is that; once I have taken it to the dumpsite, the kilos of that garbage are what determines my pay and there is a weigh bridge and my truck is this tonnes coming in and out and the difference is the only way I am paid and I am not a retainer, I tell you private companies will fight for garbage. They will be seeing garbage and they will scramble to pick it up and you will have a clean city. We will have sorted out transport, garbage collection, our rivers will be clean and Nairobi River will be navigable and be able to provide without spending a shilling of public money.

As we move along, I urge the Committee to help us look at this law with a finer toothcomb. We can even have a *kamukunji* like we did on the other Bills that came to the House. I think it was the Physical Planning Bill and the Energy and Petroleum Bill. That way, we can tighten those provisions and not to make it harder for counties to implement, but to ensure that we can truly reap the benefits of PPPs because the world over, that is now the new realm of development.

That is where they are getting financing for projects. That way, Sen. Olekina does not have to go to South Africa to start measuring fences himself and say that this is the fence that I want for Mau Forest. It will be done within this context and you will have a proper fence to protect the Mau Forest.

Mr. Speaker, Sir, we support but we hope you can provide for us as you have always done, in your true fashion, an opportunity as Senators to engage deeper with this Bill, tighten it and make sure that we can give Kenyans what they deserve.

Thank you.

Sen. Mutula Kilonzo Jnr.: Thank you, Mr. Speaker, Sir. I support this Bill. Just like Sen. Wetangula said, it has taken us quite a while to get to this position. In the recommendations that we made in the Select Committee on the impeachment of Governor Chepkwony, we insisted on regulations that would govern the Public-Private-Partnership (PPP) framework within county governments.

I am aware that the PPP unit has been attempting to draft regulations. Once they were drafted, they were unable to get a good framework in the Act itself that would anchor the regulations with counties. I am aware that the national regulations also came here, but the county ones have taken far too long. I am now persuaded and convinced that if this process – I agree with Sen. Sakaja – is done well, the medical leasing equipment that is costing every county, including Lamu, Nairobi and Makueni Kshs200 million. This Senate must interrogate this issue, and I will say this every day because it does not make sense at all.

These governors would have been allowed, in a proper framework like this one, to enter into PPP with other entities, whether it is Phillips or whoever it is, who can provide the equipment and expertise they need, and when they need it. But even then, they would provide current medical equipment. We have picked obsolete medical equipment and leased them for seven years. I do not know what will happen after seven years, because in true leasing, you return the equipment. We have no framework for disposal of medical equipment and will have a problem of storing equipment that we do not need. By that time, this country will have spent Kshs63 billion.

This framework will allow our counties to enter into that framework properly. I will only refer to one Clause which has bothered me. Although I sit in this Committee, the proposed amendment to Clause 54A does not quite sit well with me. This is because, in attempting to ensure that county governments mirror the national Government, in Section 56, the option of approval is disjunctive. This means that the Cabinet has the discretion to ask Parliament to approve a project under PPP.

The word used in Section 56 is ‘or’. The amendment by the Committee which I disagree with uses the word ‘or’ when it comes to the county assembly. Have we reached a situation where we can allow governors of this country the discretion to enter into PPPs without concurrence of the county assembly? The answer is “no.” The word must be ‘and’. We must agree that at the national level, we have a better framework and mechanism, but since our special mandate is to protect counties, we cannot mirror Section 56 on Section 54A.

To that extent, Section 54A (5) reads:

“A feasibility Study completed under sub-section (3) shall be approved by the county government prior to initiation of the procurement process for the project provided that-

(a) Where such studies show that the project will require national government support measures of any other project specific guarantees that cannot be granted by the County Government or

(b) Exceeds the threshold that have been prescribed by the Cabinet Secretary, the county government contracting authority shall obtain the approval of the nnational Treasury prior to commencement of the tender process.”

It must go to the county assembly for approval before procurement. That is the problem that Governor Chepkwony had. Imagine Governor Chepkwony or any other governor entering into a Kshs25 billion contract in good faith without the approval of the county assembly. He committed the county for 25 years and the county assembly was not involved. To pass such a Clause would be injustice to our counties.

What Sen. Sakaja is saying is correct. We can actually subcontract the work of garbage collection *et cetera,* to private contractors under a PPP arrangement. However, since the county assemblies will appropriate money for these PPPs, they must be involved. In the case of Isiolo, we must say "no" to PPPs in matters of health, where they appear to have delegated the responsibility to a phantom company. We must say no to that because it is not a PPP, but something akin to embezzlement. It is a fraud; where you open a joint account and transfer money to a third entity and then that third entity takes money from the health budget and pretends that they can offer health services and yet it is a Non-Governmental Organisation (NGO) whose objectives are not offering health facilities. That is called fraud.

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

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

The provision of this Act shall apply to contracts for design, financing, construction, operation, equipping – this is medical leasing equipment – management or maintenance of a project or the provision of public services undertaken as public-private partnerships. I think that we must put a little more caveat when it comes to provision of health.

My brother, Sen. Sakaja, has talked about borrowing. Under Article 212 of the Constitution, counties are required now to borrow. There was a caveat to stop counties from borrowing on the first three years of devolution. The three years have lapsed, but there is no framework for approval.

To answer Sen. Sakaja on the question of the involvement of the Senate, we toyed with the idea, but do not want a situation where we micro-manage the counties. We would rather have a situation where, if it is a conditional grant and a PPP project or a loan under Article 212 of the Constitution, there should be framework and policy document that dictates how that reporting must come to the Senate, the same way the Controller of Budget reports quarterly.

For example, for purposes of the conditional grants that Nairobi County has entered into with the Danish International Development Agency (DANIDA) or any other entity, every quarter the Controller of Budget must send a report to us so that we can ask questions as to whether the project is ongoing. This is because, if the approval has to come to the Senate, I am afraid that at some point, maybe 20 years from now, when you have three or five projects per county and each county is entering into a PPP, you will subject this Senate to a lot of paperwork and detail, which is not necessary. However, an audit on a quarterly basis in a manner that I have proposed, would cure the problem that my brother, Sen. Sakaja, is talking about.

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

The Deputy Speaker (Sen. (Prof.) Kindiki): Sen. Mutula Kilonzo Jnr. would you like to be informed?

Sen. Mutula Kilonzo Jnr.: Yes, Deputy Speaker, Sir

The Deputy Speaker (Sen. (Prof.) Kindiki): Sen. Sakaja, you may proceed

Sen. Sakaja: Mr. Deputy Speaker, Sir, ordinarily, I would not interrupt my brother, Sen. Mutula Kilonzo Jnr. I would like to inform him that my proposal is not that the Senate necessarily approves or denies, but the fact that access to information must be there and the Senate must be notified when the compendium of projects that are to be subjected to PPP are sent through to the national Government. In that conveyer belt, the Senate must be there because we are the ones who give money to the counties.

That is the information I am giving. Of course, it will be too much paperwork if we have to approve each and every project. That is the work of the county assembly - let them do that- but let us be aware so that even as we are doing the Division of Revenue Bill and the County Revenue Allocation Bill, we are aware of what the counties are trying to do in that respect. I am sure you support that.

Sen. Mutula Kilonzo Jnr.: Mr. Deputy Speaker, Sir, I support that. That is why we have asked the Commission for Revenue Allocation (CRA) to come up with a policy. I picked the example of Bungoma County when we were debating the amendment to the County Allocation of Revenue Act (CARA). Bungoma County has been given Kshs80 million for the water towers. However, they have no idea where that money is coming from, what it is for, who is going to oversight it and what it is going to do.

The framework of how these approvals are done, whether it is a conditional grant, a PPP or borrowing by counties, we must have a system through particularly the Controller of Budget, who controls the release of funds and checks whether they have complied. It can even involve the national Treasury because regulations will come to us.

What Sen. Sakaja is proposing can be put in the regulations, to ensure that there is an approval mechanism, where the information is coming to us for whatever reason, so that we can have it here. This would stop counties from engaging in what would be futile exercises, like the one Isiolo is attempting to do.

Sen. Murkomen had made a comment that the Committee on Finance and Budget must ensure that in the Committee that will approve this, either at national or county level, there must be the involvement of the county governments. The Report that we have tabled under a new Sub-clause 4(a) includes the three persons nominated by the Council of Governors (CoG). We want to see the CoG and governors participating in the management of PPP.

Mr. Deputy Speaker, Sir, it has been said that county governments have not entered into PPPs despite the fact that there is a national framework. Although the training has been done, the national framework does not provide for the approval of county assemblies. We simply cannot allow governors to come to Nairobi and enter into PPPs through the national Government without consulting the people who have been elected at county assemblies.

We must empower counties and give them teeth to bite. The only people who can do that is this Senate. That is why I object to the proposal to mirror Section 56 as disjunctive. It must be earned so that every county executive must seek approval of the county assembly before PPPs are entered into.

There are people in this country who think that county government is county executive. We must correct that impression. It is a pity that the National Assembly can pass a Bill written county government which in actual sense means county executive. County government includes county assembly. We must repeat everyday like the Bible that it includes county assembly. Therefore, when the marginal notes read: "Procedure for approval by county government" and then the wording is 'county executive," that is wrong. In the regulations, we provide the framework where a document must go to the county assembly.

I hope that this is one of those things that will cause the County Government of Isiolo to step back, take a "chill pill" and read the report of Governor Chepkwony, where we nearly hanged him. Governor (Dr.) Kuti sat here with us when we were attempting to impeach Governor Chepkwony. We are not saying this because we like Sen. Dullo. We say it because it is the law. Whether it is Sen. Dullo or another person, the law will not change. It is as static as it can be.

(Applause)

This idea of governors going behind the backs of Kenyans will not be entertained. That is why I am insisting my dear colleagues that, please, let us make sure our county assemblies have a role to play in these things. We are looking at it not as Kshs5 billion. However, in 20 0r 25 years from now, counties will be able to do the sort of roads we are seeing the Chinese do. They will enter into contract with whoever they want and the national Government will step back.

However, we want to have a framework that can stand the test of time. It is time to show governors that the true sense of devolution in the spirit of consultation; public participation, where we sit and listen, as opposed to dictating what we think is best for your country without the involvement of other leaders.

Mr. Deputy Speaker, Sir, sometimes when I speak to Sen. Cherargei, I tell him that the governor of his county spoke at great length and we supported him. One of the Bills that saw the light of day in this Senate was the County Governments (Amendment) (No.2) Bill (Senate Bills No.4 of 2013) that established the County Development Boards. We must find out what exactly happened to that case. Why did we abandon the cause of County Development Boards? It addresses the concern of Sen. Sakaja.

If we have a County Development Board, irrespective of who is the Chair, PPPs together with other matters concerning finance will come to the table. Why are we ostracised when it comes to county matters? We are only important when we are passing the Division of Revenue Bill and County Revenue Allocation Act (CARA). Once we pass them, then we become bystanders in county government matters. Sen. Sakaja sees Pumwani Hospital in the newspapers as I do.

This gentleman here, Sen. Cherargei, sees the bank that the county government want to establish at the tune of Kshs200 to Kshs300 million in *Viusasa* and other places as opposed to---

(Sen. Mutula Kilonzo Jnr. laughed)

The Deputy Speaker (Sen. (Prof.) Kindiki): Order Senator. Where is that?

Sen. Mutula Kilonzo Jnr.: *Viusasa* is a platform created by *Citizen* Television. Instead of us Senators listening and seeing some of these things in *Viusasa,* we will have a platform where we can have a voice, including the nominated Senators.

Sen. Sakaja spoke about Sen. Mugo. The experience that sen. Mugo has on matters of heath, whether it is Pumwani or matters of gender; you cannot take away the experience the good lady has.

Let us have the involvement of everybody. I support an inclusive government. Let us have the involvement of everybody. We must remove this thing where it becomes as if governors have seats that Senators do not have and Sen. Cherargei is throwing stones everywhere because he has been excluded from the bank that the county of Nandi wants to establish. We must tell them straight to their face that what they are doing is wrong.

With those many remarks, I beg to support.

(Applause)

The Deputy Speaker (Sen. (Prof.) Kindiki): Very well. I now give the Floor to Sen. Cherargei, but no stone throwing here.

Sen. Cherargei: Thank you, Mr. Deputy Speaker, Sir, for this opportunity. My colleagues have elaborated more on this amendment. From the outset, I support it.

We are continuing to build capacity of most of our county governments. I thank Sen. Mutula Kilonzo Jnr., because there is a wrong perception even in the national Government and other stakeholders that the county government means county executive. I will try to engage our Members of National Assembly, especially from my county, in capacity building so that they get to know that county government does not mean county executive. It means county executive and county assembly.

We should repeat it just like the good book of John Chapter 3:16, that everybody that goes to Sunday school is aware of, of course, with the exception of our brothers and sisters who are Muslims.

A few weeks ago, we were having problems with our county assemblies over unprecedented, sporadic and unfortunate wave of impeachment of speakers in the country. One of the challenges that our county assemblies are facing is the capacity; the ability to understand their own power. In this second generation of devolution, the MCAs are trying their best to put their foot down. There are so many challenges. This Bill is one of the many Bills that will entrench devolution in this country.

Let me start from where Sen. Mutula Kilonzo Jnr., left. He talked about the Lake Victoria Economic Bloc. It is a good idea. However, I thank the people of Kakamega County for going to the High Court to block the establishment of a bank where everyone of the 14-member counties is supposed to contribute Kshs200 million. Some people seem not to be aware that there is a Constitution that was promulgated in 2010. The reason residents have moved to court with regard to the creation of the Lake Victoria Economic Bloc is because of one thing; public participation. The 14 governors, including my own governor and good friend, decided to sit down and while taking some tea and *mandazi,* they thought to create a---.

The Deputy Speaker (Sen. (Prof.) Kindiki): Order, Senator! Are you sure that was the menu?

(Laughter)

Sen. Cherargei: Mr. Deputy Speaker, Sir, I am presumptuous because I am Kenyan. But I do not want to infer other things.

I am just giving an example on the importance of PPP. The reason they have moved to court is because of one thing that is captured very well under Article 10 of the Constitution on the role of public participation. I know that there is a Bill before my Committee that one of the Members is sponsoring on how to conduct proper public participation.

Public participation does not mean having a drink, babysitting somewhere or doing a birthday party, and imagining that you can pass critical things that matter to the people. No one is opposing the improvement of our citizens' lives across our counties. Let us always yearn to do the right thing. The right thing is to include public participation. Therefore, I am keen to know how that case will proceed. Of course, we are aware that under Article 10 of the Constitution, public participation is key. I also know that there are many cases lying before the court, where the court has taken the position that public participation should be key.

I have even tried to contact the Cabinet Secretary for Devolution and ASAL areas, Hon. Wamalwa. They are trying to come up with a policy on how counties should get involved in economic blocs. I wanted to find out from the Cabinet Secretary for Devolution and ASAL areas if the Senate is represented. However, I know that in the fullness of time, we will be able to engage with him.

After the creation of the economic bloc, the vision that the 14 governors had was rosy and nice. They told us that after they had formed the bloc, they would go to China and Japan and get foreign investors to bring mega projects across the western and parts of the Rift Valley regions. I agree---

Sen. Sakaja: On a point of order, Mr. Deputy Speaker, Sir. Our Standing Orders are clear on the role of Committees in this House. Is the good Senator for Nandi, who has dismayed and shattered my hopes for what is happening in this House, in order to say that he wants to ask the Cabinet Secretary for Devolution and ASAL areas, Hon. Wamalwa, how the Senate is involved in a matter that ideally, as the Chairperson of the Committee on Justice, Legal Affairs and Human Rights together with the Chairperson of the Committee on Devolution and Intergovernmental Relations should be informing the House on how counties are engaging in regional blocs?

Is he in order to shirk his responsibility as the Chairperson of the Committee on Justice, Legal Affairs and Human Rights? The Senate must be taking the lead; front and center on the issue of the legal framework for counties to engage in the regional development blocs. They have, however, left it to the Cabinet Secretary for Devolution and ASAL areas, Hon. Wamalwa, who, as far as I can remember, has never been elected a Senator.

Sen. Mutula Kilonzo Jnr.: On a further point of order, Mr. Deputy Speaker, Sir. It is even worse of him to admit that he does not know about regional blocs. He left early during the Devolution Conference, and I was holding his brief. We, as the Senate, were supposed to have the legal framework for regional blocs. Therefore, the Chairman should better get up to speed about this issue. The fact that the Cabinet Secretary has formed a caucus for regional blocs without involving the Senate, he should actually be complaining. Even then, he should not complain, but bring the framework here as the Chairperson of the Committee on Justice, Legal Affairs and Human Rights.

The Deputy Speaker (Sen. (Prof.) Kindiki): Sen. Cherargei, what do you have to say?

Sen. Cherargei: Mr. Deputy Speaker, Sir, I agree with the concerns of Members, but if there is one hardworking Chairperson of Committees in this House, it is yours truly. I know that is not in doubt.

We have been trying to have an engagement with the Cabinet Secretary on the policy. That is at policy administration level and we must also come up with legislation that will guide the regional economic blocs among counties. As the Committee on Justice, Legal Affairs and Human Rights – and I am not complaining – we have been concerned about how we can buttress and add flesh to that policy to ensure that the Senate is fully involved.

It is just like the Privatization Commission. We have been asking questions because the Senate has been given no role in some of the agencies that are supposed to be privatized by the national Government, yet some of them are found within counties. As the Chairperson of the Committee on Justice, Legal Affairs and Human Rights, I want to thank Sen. Sakaja for that point. We will take the necessary steps.

I am a Member of the Jubilee party and know that Sen. Sakaja is the founder of the Jubilee party. Of course, I would not want to say at this point that the Cabinet Secretary for Devolution and ASAL areas, Hon. Wamalwa, has defied or not engaged us. We are in the process of engaging him and ensuring that we move forward.

Mr. Deputy Speaker, Sir, the list should be submitted to the Public-Private-Partnership. This amendment has also brought the issue of priority list. I know that our counties have unique priority lists. For example, the priority list for counties in the north eastern region could be infrastructure and water. However, when you go to the Rift Valley region, where I come from, the priority is agriculture and infrastructure.

If you look at the records in 2016, my County Government wanted to buy construction equipment through financial leasing. At that point in time, the High Court in Eldoret held the view that we needed a loan guarantee according to Chapter 12 of the Constitution on issues of public finance. These are some of the issues that if we allow counties to do without a public-private-partnership unit and priority, it will not be very good for them.

Sen. Dullo has talked about issues in the medical sector that are happening in Isiolo County. In my county, there was an agreement on special economic zone, where the county government decided to bring an investor at Chemase which is at the border of Nandi County and Kisumu County. The population was not aware of it until I made noise. The county assembly was never involved and there was no public participation, but the investor was already on site.

I know that there are many other counties that have gone into agreements on special economic zones, yet there is no proper involvement of the public and guidelines to the county governments. A governor just decides to travel abroad alone and enter into some agreements without involving the county assembly. This amendment is timely so that we can give the necessary priority.

The issue of capacity has been captured well. Some of the Memoranda of Understanding (MoU), engagements and processes that the counties are undertaking are sometimes done out of ignorance and lack of technical expertise and capacity. I hope that the county assemblies will be given the opportunity and technical advice, before they allow the county executive to approve any MoU with any investor without any necessary procedure or infrastructure.

The amendment has come up with the issue of evaluation and it is important. I know that there is already an audit that is provided by the unit that has been created through this amendment. By the time the county assembly approves or rejects something through the evaluation report, they should seek public interest as a priority. I like this amendment for it proposes priority projects. The Lake Region Economic Block is proposing a bank which might not be a priority if the residents of the 14 counties have challenges with roads, bursary and even healthcare. The aspect of priority list is important for the county assembly and it should be provided and factored in as they prepare the evaluation report. It gives a county government the right to enter into Public Private Partnership (PPP).

When you go to a place called Karebe gold mine, there is a very good investor there.

The Deputy Speaker (Sen. (Prof.) Kindiki): Where is that?

Sen. Cherargei: Mr. Deputy Speaker, Sir, it is in Nandi County in a place called Chemelil/Chemase Ward, in Tinderet Sub-County. I am using it as an example to show you how the county governments have been excluded. You will find those people perpetuating their own issues. Karebe Gold Mining Limited is the leading gold producer in this Republic. One of these days, you will get to see it. I know that you are someone who moves around the country with the intention of interacting with the people and listening to them. Your future is bright; you never know what might happen in the future.

The Karebe Gold Mining Limited is mining gold but the county government cannot access the place because they have put dogs at the gate and the county government has no idea what they are doing. They could be using mercury that can cause cancer to the residents of Chemelil/Chemase Ward.

If such an amendment had been passed, the county government of Nandi would have had unlimited access to the place and it would have addressed the complaints that the people have against the investor. The investor took advantage because the amendments were not in place. These amendments are important to our people for they must now be included when a PPP agreement is being considered and they will be required to give the go ahead.

We have the issue of priority projects that the Senate Majority Leader talked about. He said that the county government should be part of it so as to allow monitoring and evaluation. I do not doubt the wisdom of the Senate Majority Leader for he was my law lecturer. I agree with what he has raised.

The Deputy Speaker (Sen. (Prof.) Kindiki): Suppose the Senate Majority Leader never taught you, would you be of the similar view?

(Laughter)

Sen. Cherargei: Yes, Mr. Deputy Speaker, Sir. He is leading well and is the leader of the majority side. I would still hold the same views.

The Deputy Speaker (Sen. (Prof.) Kindiki): Is there a connection between him teaching you and being the Senate Majority Leader?

Sen. Cherargei: Yes, Mr. Deputy Speaker, Sir. I am a testimony of someone that he taught and mentored. It is important and I hold the same view right now and even in the afterlife when we will be in heaven.

The Deputy Speaker (Sen. (Prof.) Kindiki): Proceed.

(Sen. Murkomen spoke off record)

Order, the Senate Majority Leader. You are an interested party so you are the least qualified to ask for more time for the Senator.

Sen. Cherargei: Mr. Deputy Speaker, Sir, I know that your future is bright. I can see it from where I stand. Kindly add me one minute.

We have an amendment of the principal Act by the introduction of Clause 54B (1) which states that:

"Subject to sub-section 54(A)(5)(b), a County Government Contracting Authority shall seek and obtain the approval from the county assembly where no national government support measures are required for the project prior to the execution of a project agreement at the county level, the contracting authority".

The Deputy Senate Majority Leader raised a serious issue regarding the medical situation in Isiolo County. It is sad and painful that some of our Members of County Assemblies (MCAs) have been used to rubberstamp things that contravene the law, public interest and morality. As we give this power to our MCAs across the 47 counties, I hope that they will take it in their stride and bring accountability before a Memorandum of Understanding (MOU) is signed or a decision is made or proposal is brought.

I hope that this will bring to an end a situation where governors walk around in hotels and take tea and *mandazi* then just decide to sign an MOU which they take back home and shove down the throats of citizens at the grass root level.

I support.

The Deputy Speaker (Sen. (Prof.) Kindiki): Very well, though you should not connect the shade of the Speaker's future with your time. The two are not connected but thank you for the kind remarks.

I will now give the Floor to Sen. Olekina.

Sen. Olekina: Thank you, Mr. Deputy Speaker, Sir. I rise to support this important Bill.

In terms of the amendment, I wish that I had the opportunity to look at the Committee Report. In future, I hope that the Committee reports can be circulated so as to give us the opportunity to see what our colleagues thought about.

From the onset, I have to say that the amendments being brought in to introduce county governments are important for we must respect the two levels of governments that we have. As we bring the services to the people, it is important that the people and the county governments, particularly the elected leaders in the county governments, are aware and play a critical role in the development of this country. I am not a big proponent of PPP given that there are many risks involved and I hope that this Committee looked at the risks involved.

Even though I support these amendments, I am a bit apprehensive to support it fully. As my sister from Isiolo County said and based on what happens worldwide, PPP is not for every sector. In the United States of America, PPP can never be introduced in public health. This is because they are never good and there is always the risk of distraction which might make people not focus on the need to provide the true agenda of improving public health.

When the aspect of competition is eliminated, we have certain people being favored which brings competition and certain interests are developed. I do not support PPP in all aspects.

It is important for the public to be aware of the serious risks that are involved in PPP. Sen. Sakaja talked about the issue of garbage collection in this country and Sen. Murkomen talked of how it will be easy for us to resolve the transport issue in this country if we approach it through PPP. Development bidding and the ongoing cost of PPP are likely to be greater than those of traditional Government and that is why we have to be extremely careful when venturing into PPP.

Some people will say that PPP is good for it can help when a public agency needs some money to finance certain projects. They say that the public agency can partner with a private sector that is looking for an opportunity to make a quick buck which they might consider as a good marriage. However, in my own thinking and based on what I have read worldwide, PPP is not always the best solution.

Therefore, we have to be aware of these risks which are involved and then develop legislation that can cushion citizens of this Republic on those risks involved. Some of those risks include, the issue of the debt incurred; that has got to be paid by somebody. It might be easy for a private entity to get money to finance a project but the risk is that in most cases, the Government, which the public expect to protect their interests will either end up bearing the consequences of a failed project in the event that there are certain risks that the private actor had not taken into consideration, such as fluctuation in exchange rates, where they borrowed money from abroad, and all of a sudden paying back the debt is becoming too expensive. This might render some of these projects as white elephant.

Mr. Deputy Speaker, Sir, it is imperative that we look at the issue of value for money. I would have expected that the Committee while introducing these new amendments now, where they are involving the county governments, should have taken into consideration the citizens and also the lack of expertise.

Currently, we are dealing with issues of financial risks. When you go through the reports of county governments, you find out that there is lack of capacity in these counties. When you allow county governments to enter into public private partnership agreements, you have not looked at the capacity. These amendments which are being proposed here suggest that a certain department will be looking at their needs in terms of what they want to introduce through the public private partnership. However, what about the risk involved in terms of assuming that there is enough expertise?

Mr. Deputy Speaker, Sir, when you look at these public private partnerships, the private sector itself, which is coming in to work with the public, will invest a lot of money and overtime, to those private entities that will have the expertise to control even the data. While they are controlling the data, the public might end up losing big time. Therefore, when we come up with the issue of approving these projects, since the definition of public private partnership really ventures on long term projects, it is imperative to set up legislation that will look at the scope of the projects and give provision for re-negotiations of the terms of engagement. If we do not take those issues into consideration, then we are putting the public at greater risk of losing a lot of money.

The issue of value for money is something which is important. My biggest problem is where a project was designed with the intention of helping the public but the Government is forced by the terms of engagements in this Public Private Partnerships, (PPPs) to raise the tariffs, which will leave consumers suffering. This Bill has got to define what projects county governments can venture in, in terms of their PPPs. Certain projects which might be easy to raise local revenue, for instance, water projects, should be left for local companies that want to venture into projects and partner with the national Government or county governments.

However, any time you are dealing with a project that involves risks of exchange of currencies, then it is important that they are clearly defined. Before a county government submits their list of the approved projects to the Cabinet Secretary for approval, it is important for the public to be involved and to get their views on them.

Mr. Deputy Speaker, Sir, I hope that it will be important to introduce amendments to these amendments, so that we can take care of the public. I am extremely apprehensive because we are a new devolved Government; we are still a baby. We are still going through different challenges in terms of what is acceptable or what is good for the public. This is why when the Committee deleted the amendments which were proposed in Section 54(b); where before a county government---. A county government comprises of both the executive and the Assembly. Before they approve this list, it must be approved by the latter.

Even if the project is of national importance, Section 54(b) (2) states:-

"Where the project requires national Government's support measures or other project guarantees which cannot be granted at the county level, or exceed the threshold prescribed by the Cabinet Secretary by way of regulation, the county government shall not execute a project agreement without first seeking and obtaining approval from the national Treasury."

Mr. Deputy Speaker, Sir, once the Committee decides to delete this section or even the one prior to that which seeks to add the voice of the county assemblies, then you are not only doing away with competition but also introducing another element of dictatorship. If there is a CS who decides that this project is only for national projects, we will deal with it from a national perspective; you may not even consider other things like what we were talking about last week on compulsory acquisition of land.

If there are interests on land, that community must be fully involved. It does not matter whether it is gold that you will mine, you must involve that community. We keep on talking about raising local revenue; how do we then expect our citizens from different counties to participate in that process of ensuring that the county government raises more revenue, if we choose what to involve and what not to involve them?

Mr. Deputy Speaker, Sir, given the long-term and complicity of this project - I had mentioned that before, and the fact that there are certain projects, where a lot of political risks are involved - Government policy is not stagnant. It changes over time. When it comes to these PPPs, these amendments should incorporate an element where they take into consideration that other governments would come and decide to change their policies.

Therefore, they should introduce a transitioning clause in the event a Government changes, because this government policy is in terms of agreements and is something which I know from time to time will change. For instance, new governors will come in, they will leave office and others will come in.

Mr. Deputy Speaker, Sir, this is why I insist that a clear legal and regulatory framework must be emphasized on these amendments, because when this Act was in place - I think it was in 2013 - the devolved government structures were new. Therefore, there is much that we have learnt. This House will be debating the fiduciary risk involved.

It is important for the Committee to consider the need to reintroduce Section 54, which they are proposing that it should be deleted, and also come up with a risk mitigation strategy in the amendments that they are bringing in. Tough regulations will ensure that despite the long term aspect of the project, the interests of the public and private sectors are always protected.

I am very worried by the issue of expertise. This is because when the private sector invests a lot of their money, without proper regulations to monitor how they develop their infrastructure, it might force the Government or the consumers to bear more cost because they will not have a lot of information. Therefore, an information sharing policy must be put in place so that the private and private sectors involved can continue to report, on a daily basis, on the improvements that they are bringing and the possible changes that might affect the public. That way, it will be a true partnership between the private and public sector.

In conclusion, Mr. Deputy Speaker, Sir, I reiterate that public participation is missing from the current proposed legislation in terms of discussing and agreeing to have these projects. We also need to ensure that whatever legislation we come up with in this House, we should think about the future and not the current interests.

With those many remarks, Mr. Deputy Speaker, Sir, I beg to support.

Sen. Mwaura: Thank you, Mr. Deputy Speaker, Sir. I rise to speak to this Bill with regard to PPPs, both at the national level and, in particular, at the county level.

This is a new impetus to the way we finance our public facilities or projects. It is important to note that we are in this realization because of the rising debt. Recently, the International Monetary Fund (IMF) revised our Debt to Gross Domestic Product (GDP) ratio at 63 per cent, yet the red line is at 72 per cent. If we are to borrow the monies that we anticipate to finance the otherwise ambitious Kshs3 trillion budget, we are likely to go beyond the ceiling. This is not very good because there are serious challenges of liquidity and cash flow management in the projects that we have put in place, which are now in terms of billions. For the last few years, the cost of doing projects in this country has escalated inordinately and disproportionately to the growth of the economy.

Mr. Deputy Speaker, Sir, as a lower middle economy, we need to look at alternatives, because by the end of the day, the common *mwananchi* wants to be provided with services, but the demand is still very high.

Mr. Deputy Speaker, Sir, the challenge that we have is that the current framework for the PPPs does not give proper guidelines with regards to what needs to be done. In fact, the only successful PPP that has happened in this country is Jomo Kenyatta University of Agriculture and Technology (JKUAT) Hostel Project, where we also had some challenges. However, there are so many engagements that are happening below the radar.

A good example is the contentious issue of Githurai Market around the Githurai 45 roundabout, where there is land that was acquired by the Kenya National Highway Authority (KeNHA) for the construction of Thika Road and also a development of a bus park. However, there has since been news by the county government to tender it for a public market based on the promises by the Jubilee administration, where some Chinese contractors are supposed to install some establishment worth Kshs2.7 billion. The question is, where does this leave our people? Who is in charge of this process? How will this partnership benefit the investor? What will be the cost of hiring the stalls? Who will supply the building materials and procure the approvals? Where will the small *mwananchi*, who has been doing business there, relocate to?

I can proudly say that I am a product of that area, because it is my home area. However, people are treated badly as a result of an investor from China who has made money from I do not know where. He comes under the aegis of PPPs to displace people, make his money and go away. We do not even know how the project will take off because all these things are below the radar. I can bet that the only person who may know what is happening is Gov. Ferdinand Waititu, who seems to be doing well. Therefore, these are some of the things that we need to discuss openly. When there is PPP, what are the facilities that the Government is supposed to provide? What are the concessions? What is the value of land with regards to this project? Finally, what do we do with the people?

The issue of PPPs is predicated upon the return on investment. When a person uses their revenues, they are recommitted. When they borrow, they have to look at the interest rate. However, the question is what is the return on the investment; not particularly on the investor, but on the people who are supposed to be the beneficiaries of these projects? Will the fees, which will be raised in this project, be affordable? What are the human rights issues around some of these things?

Mr. Deputy Speaker, Sir, I am the Vice Chairperson of the Committee, and we discussed this extensively. Therefore, no amount of money should be put by Government on PPP projects. However, that has not been the case because it sometimes looks like a cost sharing situation. A good example is Thika Road, which was funded by the Government of Kenya (GoK), the Africa Development Bank (ADB) and The Chinese Exim Bank. These are gray areas which we need to unpackage as we go to the Committee of the Whole, so that we do not leave anything to conjecture. If we do so, there will definitely be some form of malfeasance, because this is big business. For example, when a person is building a facility of Kshs2.7 billion, has the project been costed well so that it reduces the number of years the investor is supposed to recoup their money?

I am sure one of you may have seen some rather ambitious investor in China who recently wanted to buy Nairobi at the cost of Kshs30 billion and do fabrications around. Therefore, we also need to look at the issue of relations because it is about the dignity of a country. We cannot just be people who are looking left, right and center for whoever is availing money for investment. We cannot be that cheap.

Mr. Deputy Speaker, Sir, from the projects that we have - which are quite ambitious – everybody is scrambling for a piece of Kenya. There is a reason why we are needed in Washington; Theresa May with her Brexit is visiting and Xi Jinping is always visiting. Therefore, we have to know the value we are getting, because everybody's analysis is that we have a very educated population and we are not very complicated. However, these kind of engagements reek of development corruption, as elucidated well by Ronald Reagan.

We have to interrogate them, and the best way to go about it is by having a framework that speaks to each and every procedure. This is not to impede the investments, but to ensure that there is transparency and accountability. Otherwise, at face value, it looks good. This is because, for example, government "A" needs a certain project to be implemented; a person invests his or her money in that project, recoups his or her capital, makes profit and then moves on, and everybody is happy. Therefore, it is not just a question of doing so because in practical terms, it is not that simple.

We, therefore, also need to learn. We want to look at what other jurisdictions have done regarding this and how has far it been successful. This is how we will ensure that we implement the Big Four Agenda and attract foreign direct investments.

We recently got a convention facility for about Kshs519 billion. How can we then ensure we get value for our money if, for example, we do the 10,000 housing projects units that are supposed to be done in Kiambu and which will employ about 80,000 people? It is good to argue from one point and say, "well, yeah, when we finance these facilities, how long will we take to recover our investment or push the economy forward in terms of growth?"

The risk associated with your own revenue is that nobody will question you about the repayment period and so on, and so forth. However, that bracket has already been exhausted. It is, therefore, a question of being pragmatic. With the appetite for debts by the county governments, as nascent as they are, without cogent measures, they will find themselves in problems. We, as the Senate, need to help counties to protect themselves from greedy investors whose only motivation is to make one more dollar.

From what we have canvassed on the Floor of the House, it seems as if wisdom has not percolated into this Bill. We may need to have an informal engagement – just like I have seen a lot of breakfast meetings on this and that Bill – to further interrogate this Bill. When it leaves here, we will then have no control on which investors governors will be looking for so that they can recapitalise on the local resources that need to be exploited.

It is amazing, because it is through this vehicle that we are then going to either empower or disempower our country and, of course, the bigger platform of Africa. We need to put this very clearly. One of the things that I have actually been contemplating seriously is that we have to create sanctions in law for individuals who profiteer from public contracts without full disclosure. This is because we may end up committing debts to people unknowingly, yet we are benefiting privately.

Recently, there has been the declaration that Kshs14.8 trillion is banked offshore from this economy. Now, if you do a quick calculation, if the Standard Gauge Railway (SGR) is costing us Kshs326 billion –there has been serious claims that it is inflated; and I beg to agree, because we know how government projects are – how much can we do with Kshs15 trillion?

Recently, we heard the President of Switzerland saying they have our US$1 billion. If that money was to be channeled back through PPP – because that is private equity, even if it was stolen – how much more can it do to transform this country? Is there a way we can have a PPP framework? This is a question of being pragmatic, which enables people who have looted from their own country to return the money for public investment.

This money is currently contributing to the growth of other people's economies in the world, yet we are still struggling in poverty and going to borrow the same money at very high interest rates. Is there a way we can tap this money back through this framework? Can we have creative provisions in law that would enable such kind of engagements? Even if we say that it is a question of using the legal mechanism of asset recovery and fighting corruption, we may not make a lot of progress.

We can see the serious challenges of cash flow that we face when transacting Kshs1 million. There is a pastor at CBK – Dr. Njoroge – and I congratulate him for being a good pastor. Because of this, people are not able to invest fraudulent money using the financial system. They are hiding their money in the pillows and under their mattresses, leading to a problem of circulation. How do we tap into it? It is not just a question of provisions of the law. Once again, we need to move further and ask ourselves these questions philosophically. Where are we? Can we develop using corruption money? Are there economies that have developed by using corruption money? How can we curtail other people from being corrupt in the fight against corruption? It is, therefore, a wider debate.

The reason we are here is because we have exhausted our borrowing capacity, yet projects need to be done. Everybody who is here as Senators do not have any kitty; and people do not see us as development agents or interlocutors. However, primarily, when we are demanding for equitable share of counties, what we are asking for is projects. There has been a very great increase in terms of the money that we are sending down as conditional grants, especially from donors.

I would still insist that we should not just rush this Bill to the Committee of the Whole. I know there is urgency with regards to the pending projects under the Big Four Agenda. However, we can have informal sessions where we can inform and interrogate these issues further so that whatever proposals we make, they can carry us through with regard to this new form of fiscal financing.

Mr. Speaker, Sir. I beg to support.

Sen. Ochillo-Ayacko: Thank you, Mr. Deputy Speaker, Sir, for the opportunity to contribute to debate on this extremely important Bill. I support it with certain reservations. I need to amplify what Sen. Mwaura has said, that we need more time to look at this Bill, either within the regulations that we have in this House, or within a more relaxed setting.

I have had the privilege of listening to Sen. Dullo, who passionately talked about the difficulties she was experiencing as a Senator from Isiolo. She shared how the County Government of Isiolo deliberately circumvented or bypassed her office and other establishments; and entered into what they claim to be a PPP contract for the provision of health services. When I listened to her, it was a litany of complaints and a situation of helplessness. There was an indication that a lot of things were passing below the radar without the ability of the very good Senator, who is my friend, to have a positive contribution or input into it.

I also listened to Sen. Wetangula, and he was very clear that this is a timely Bill which is going to unlock the potential for growth, partnership and development in counties; something we truly need. Now what is clear here –and a bit of it was captured by Sen. Sakaja – is that the role of the Senate is not amplified in this matter. If you look at the constitutional responsibility of the Senate, you will find that it has been given the responsibility of protecting the interests of counties.

The Senate has equally been given the responsibility of being a platform through which citizens can exercise their sovereignty. It is assumed that whatever is within any county and any country is owned and controlled by citizens. When part of that is contracted out to private persons, the citizens cede that part of their sovereignty to the party to which that contract is made, or the party that is sharing that contract with the county or the citizens. It, therefore, touches on the sovereignty of the citizens.

The body that is properly mandated to protect the sovereignty of the citizens, in the context of counties, is the Senate. I have looked at the Bill and I have not seen the role of Senate provided therein. Therefore, when I heard my sister, Sen. Dullo, lamenting about the things that were happening in Isiolo, I got concerned. This is because we have authority here, as the Senate, but we are letting it disappear by trying to rely on the county assemblies.

Mr. Deputy Speaker, Sir, where I come from in Migori County, we are known for very extreme things. The County Assembly of Migori has never raised a finger about the extreme things that we are known for in Migori, including suspicion of murder most foul. The assembly has also never raised a finger on the suspicion that public funds, which should have been available for use, are offshore in other nations. In fact, our county assembly has never done anything. I have taken time to look at what they debate and compared it what is debated in Homa Bay County Assembly. What is debated in the Homa Bay and Migori counties are quarrels over who gets an allowance to do what. They never think about what is affecting the public or what is important to those counties.

Therefore, Mr. Deputy Speaker, Sir, if we are to sit here, as a Senate, and think that we are protecting counties by providing, ceding or abdicating our constitutional responsibility to protect them and leave it to the county assemblies, I can assure you that some time down the road, we will have abdicated our duties. We will have been party to robbing the public by allowing county assemblies to be the port of call when it comes to oversight.

I heard Sen. Sakaja and Sen. Mutula Kilonzo Jnr. indicating that it would be difficult to grant approval, as the Senate, for these PPP projects, because there will be too much paper work. I believe that we were elected by many people and that we are remunerated well. We would like to have better remuneration so that we can sit here and go through the paper work, if that will protect the counties we represent. I believe that we have specialised committees that can look at all those requests and, perhaps, bring them to the attention of the plenary, if the need arises.

In this Bill, there could be a provision for tabling of a request for approval of a PPP project. Thereafter, if no Senator objects to it, it can then be deemed to have been passed without objection and that would expedite the process. However, it would be unfair to sit here and say that we do not have time to go through the details while we are abdicating our responsibility to protect the rights and interests of our counties. Getting elected is a difficult thing. People look up to you as a person who will protect their interests, take time to go through voluminous documents and see what their interests are all about.

Mr. Deputy Speaker, Sir, even if we do not talk about approval for each and every PPP project, we then need to have a certain threshold of projects that have to come before the Senate. A project of that kind that quickly comes to mind is a project that, perhaps, would bind a county government to a period beyond its elective tenure of five years. Therefore, if there is the possibility of contracting out a service or anything that would overlap the tenure of a county government, it would then be important that such a project is brought to the attention of this august House for posterity.

We are given mandate every five years, and you will find overzealous Governors go out there and contract your rights beyond their mandate. The people who will be left behind will be relating to this project for periods beyond five years. It is not sound argument and it is not persuasive, in my view, that we should shy away from poring through the paper work by saying that it is too much. We can establish a Committee that looks at it so that when it is brought before the plenary or when a Member representing a particular county picks it as something of interest, that Member may raise it and it can be debated.

If you listened to what my colleagues, who have spoken before me, they said, that we should not be a rubber stamping Senate. They also said that oversight should be done after all these processes have been concluded. I am cognizant of the fact that there is a provision in the Bill for approval being granted by a unit. There is also a provision for carrying out feasibility studies. However in my view, those provisions are not equivalent to protecting the interest of the public. Those entities, just like the county assemblies, do not take elective responsibility for being voted to protect the interest of the public.

We cannot, therefore, sit back and say, "Yes, the interest of the public is protected when a unit or a Government agency is given the sole right to review a particular project." I believe in the interest of sovereignty, Constitution and the protection of interests of our county governments. It is important to create a right and a duty, as a last port of call, that this House should have a say over the approval of projects of these kinds.

Mr. Deputy Speaker, Sir, I have also looked at this Bill and the Act that it seeks to amend. I have noticed that there is no provision for sanctions, criminal or otherwise, for people who violate the provisions of the Bill. There is need to introduce an amendment to provide for what I am mentioning; but specifically to provide for sanctions against irresponsible officers who rush and expose the public to risks without adhering to the requirements of the Bill.

Mr. Deputy Speaker, Sir, this Bill is important; but as a House, I am of the considered view that we should do the best we can to ensure that we do not allow overzealous people to do things that would expose our counties to risks. I come from a county that is full of risks. My county neighbours counties that are full of risks. My brother from Kericho County is very knowledgeable about such risks. I heard contributions here that the Governor of Kericho County escaped through the eye of a needle because of the magnanimity of the Senate.

We should not be a House of magnanimity; we should be a House of law. We should be a House that protects the interests of our people without favouring some people, or being kind to others as our people continue to wallow in abject poverty and as billions of shillings are stashed in other counties, whereas, they are expected to be in our counties to execute or expedite issues that relate to development.

Mr. Deputy Speaker, with those few remarks, I promise that I will bring appropriate amendments to areas I think are of concern.

The Deputy Speaker (Sen. (Prof.) Kindiki): Well spoken, Sen. Ayacko; but those words are anything but few.

Proceed, Sen. (Dr.) Musuruve.

Sen. (Dr.) Musuruve: Thank you, Mr. Deputy Speaker, Sir, for giving me an opportunity to add my voice to this Bill. Our role as a Senate is very clear; that we represent and also protect the interests of the counties. As we protect the interests of the counties, there is need for us to ensure that county assemblies are strengthened to perform their duties, as mandated.

Building the capacity of Members of County Assemblies (MCAs) is important when it comes to PPP arrangements. This is because when MCAs are empowered, they can perform their mandated duties with ease since they can question issues objectively. That way, MCAs will be strong enough because we would have given them teeth to bite and, therefore, they will not be toothless bulldogs.

Mr. Deputy Speaker, Sir, I support the issue of consultation. When it comes to PPP arrangements, there is need for consultation and public participation at county levels on whatever projects that are undertaken in counties. This is because these projects should have the goodwill of the people. When a project has the goodwill of the people and public participation is done objectively, everybody will be happy about it when it is on course. This eventually helps to avoid many complaints about new projects and questions on whether there was public participation. Therefore, there is need for approval by the county assemblies.

Mr. Deputy Speaker, Sir, I also agree that there is need for feasibility studies to be carried out on upcoming projects in order to reveal whether a project is viable or not. With feasibility studies, we are able to know if there are any unforeseen and visible risks. It also ensures that visible risks are attended to and provides for how do deal with unforeseen risks. For example, where a deal goes sour and there are liabilities, people know how that is handled.

There is need for proposals to be done so that we know how county governments benefit from projects. When a proposal is being done, it is important that procurement of whatever is agreed upon is done in a procedural and transparent manner. This will ensure that no questions will be asked with regard to what was procured, who was given the tender and all that. There is need for policies to be put in place to ensure that procedures are done in a manner where there is a win-win situation for both parties in a PPP arrangement.

Thank you, Mr. Deputy Speaker, Sir, for giving me the opportunity to support this Bill.

Sen. Seneta: Thank you, Mr. Deputy Speaker, Sir, for giving me a chance to also add my voice to this important Bill. From the outset, this is a timely and also a constitutional Bill which seeks to align PPPs to county government structures. This Bill will promote more development in our counties. The PPPs will help our counties to get more funds to fund huge infrastructural development projects, which our normal allocations cannot cater for.

Mr. Deputy Speaker, Sir, in the counties where we come from, there are quite a number of developments that our people need. These include modern structures and even the very basic needs like roads and waste management. These are important projects that our counties are unable to fund, and the Public-Private-Partnerships (PPPs) will leverage on this situation.

The PPPs will also bring in many actors, meaning that more expertise, technological methods and effective and efficient managerial skills mainly found in the private sector will get to our counties. Many private institutions and organisations today perform very well because they have open and transparent managerial skills. They also have efficient and effective ways of managing projects. Therefore, this Bill will bring good energy to the public sector if we partner with the private sector.

Mr. Deputy Speaker, Sir, this Bill also seeks to bring a situation where the public, through county governments, can also offer what they have. Many counties have huge pieces of land but lack capital or the financing ability for mega projects which can help them. This Bill seeks to bring actors who can finance mega factories, companies and institutions which will recruit and give opportunities to the bulk of our youth and women. Therefore, the PPPs will open up more ways of developing our counties. Similarly, PPPs will also provide counties with room to give what they have. For example, many counties have land and resources, like minerals, but they may not be able to add value on them. If we allow the PPPs we shall open up our counties.

Mr. Deputy Speaker, Sir, I have noted a few issues that are not highlighted in this Bill. One of them is the approval of these projects by the county assembly and the Senate. The Senate is mandated to oversight projects done by counties and allocations to the counties. Therefore, to overlook the mandate of the Senate in these PPP projects will mean that we will not be able to tell the projects that will be funded under this arrangement.

This good Bill also lacks provision for the approval of these projects by county assemblies. The Bill has provided for a county committee to write the proposals and priorities of counties and forward them for approval. However, it is not stated who is supposed to approve them. I wish to see county assemblies being given the mandate to scrutinise the proposals and projects to be funded under the PPP arrangement.

Mr. Deputy Speaker, Sir, this Bill does not also state the nature of projects we can do under the PPP arrangement so that we do not just allow our counties to enter into partnership on small projects which have already been allocated money. We allocate monies to counties for water, agriculture and all other functions provided under the Fourth Schedule.

We, therefore, need to know the projects that county governments could enter into under the PPP framework so that we do not have a duplication of funds. This is because funds for the same project will be coming from the national Government while others will be from the private actors. This Bill, therefore, needs to be very specific on the projects that we can enter into partnership in our counties under the PPP framework.

Another thing that has not come out very clearly in this Bill is the levels of these committees. They need to be decentralised to the counties and the national Government.

[The Deputy Speaker (Sen. (Prof.) Kindiki) left the Chair]

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

We also need to look at the funding procedures so that we do not take debts at the national Government level and also at the county government. This is to avoid situations where, at one time, we may not be able to pay the loans we borrow from different organisations and countries.

Madam Temporary Speaker, this Bill also should have at least explained the public participation in the PPP framework. It should have stated how we are going to involve the public and what the public can do in case this private actor breaches the law. It is not very clear on the penalties.

Therefore, this is a timely and important Bill, save for some few amendments on approval of projects by the Senate and county assemblies. It should also bring out clearly who will enter into which agreement, which county projects are going to be done through these PPPs, and how it will help the people in those counties.

With those few remarks, I beg to support.

Sen. Cheruiyot: Thank you, Madam Temporary Speaker, for giving me this chance. I was committed elsewhere just after the Leader of Majority began moving this Bill. However, because I was chairing a very urgent meeting, I prayed that by the time he was done, I would be able to come to the House and make my submissions to this Bill.

This Bill is extremely important and a game changer in matters devolution. Therefore, we need to treat it with extreme importance. Despite it being fairly urgent, there are a few things that, unless properly addressed, I personally will be not be very comfortable supporting it. At the moment, I agree with the framework of the drafters on what they want to achieve. Various Members have gone into it.

It will be important to note that at the beginning of this year, when I was writing my new years' resolutions. as we normally do, part of the legislative things that I wanted to achieve was to pass a Public Private Partnerships Bill which would enable our county governments to enter into these kind of projects. When I requested for the drafting team, I was informed about this Bill that was before the National Assembly. I, therefore, shelved my desire to draft that law with the hope that when it eventually comes, it will address many of the challenges and things that were in my mind at that time.

Mr. Deputy Speaker, Sir, I know that one of the Senators pointed out that my county of Kericho was the first County to have a dispute between the assembly and the executive with regards to PPP projects; which eventually led to the impeachment of the Governor. Therefore, this is something that I have seen practically and I understand what PPPs can do for our county governments. This is in relation to our work, as defenders of devolution and people who are tasked with the responsibility of coming up with legislation that will ensure that the process of devolving power down to the people continues. This is because the people have a right to self-determination at the local level, where they can sit down and determine what is of priority.

We had an opportunity to listen to presentations that were made before us, as a Committee, and I sat through a number of them. Many people who spoke to us were primarily concerned by the fact that there seems to be a particular obsession; that the national Government will always do better than the county governments, despite the fact that we are aware and alive to the fact that Kenya has two levels of Government.

If the submissions and what we have been reading in the media lately about what has happened with the leased medical equipment is true, then the converse of that argument is what holds to be true. I do not believe that the national Government has got the best capacity to determine everything for the counties. That is a fallacious argument which we should not continue to enshrine in the Senate. Unfortunately, some of the provisions of this Bill support that fallacy, and you will realize it when you read it.

One of the overviews that we are told is that they want to provide empowerment for contracting authorities by granting them the permission to reserve certain projects for disadvantaged groups; and ensuring that county governments are also considered as contracting authorities. Who does the national Government consult when it does its major projects, such as PPPs or the ones that are granted by loans such as the Standard Gauge Railway (SGR) or the one for the wind power in Lake Turkana? They consult nobody. It is a decision that it is made by national Government and we, from the 47 counties who are gathered here, will eventually pay.

It will be important that we also look at the composition of the PPP unit. Despite the fact that the object of what we are trying to achieve is to make sure that county governments have the capacity, it bothers me when we only have two representatives of county governments. We are determining and saying that eventually, when counties present the list of priority projects before this particular Unit, there will be a team of six or ten officials from the national Government, but only two representing county governments. Surely, what are we saying?

We had proposed in the Committee that the neater thing for us to do was to have a capping of these projects. However, I have not been able to scrutinise the report to see if it is included therein. These projects can determine the capacity of a county to absorb debt. For example, if a county collects revenue of Kshs400 or Kshs500 million, we can pick a figure of five and say that the county assembly should approve projects of up to Kshs2.5 billion. Let the county executive propose and enter into such projects with the approval of the county assemblies. The continuous obsession with the national Government that we continue to inculcate every now and then as we do laws is not fair to county governments. The CoG appeared before us and shared with us good views about this particular trend.

Madam Temporary Speaker, I also propose that Section 24(3) be amended by adding the words 'in consultation with the county governments through the Council of Governors' immediately after the words 'Cabinet Secretary'. It will be a great injustice and we will be left with a bad dent on our face if, as the Senate, we allow this law to pass as it is; where the final determination is made by the Cabinet Secretary (CS) alone without the input of the CoG, yet we pride ourselves as the defenders of county governments. I had said during my initial submissions that there are non-negotiable minimums. The first one is on the figure that the county assembly should approve. The second one is the provision of the law that this should be in consultation with the county governments.

Madam Temporary Speaker, the fourth and the final one is that a replica of the format used in drafting the Public Finance Management Act of 2012 should separate the provisions of the approval of the county PPPs from the ones from the national Government. This only appears to be specific to having one unit. It is still in support of what I am saying so that at the level of our county assemblies, it is easy to domesticate this law and pass it. For example, while their qualifications might be Kshs2 billion or Kshs3 billion for the current tenure of a particular county government, they cap it at Kshs1 billion.

We should allow them and stop this continuous belittling of our county assemblies. Despite the kind of behaviour that they exhibit, many county assemblies are made up of people who are extremely qualified and sometimes even better than us. Therefore, that will be my third and final non-negotiable minimum. When it comes to the Committee of the Whole, we should push it through as an amendment. Otherwise, it will be difficult to---

(*Sen. Murkomen consulted loudly)*

Madam Temporary Speaker, protect me from the Senate Majority Leader.

I take back my words. Sometimes he shoves Bills down our throats so quickly with very little regard to what county governments are doing.

The Temporary Speaker (Sen. (Prof.) Kamar): What is your point of order, Sen. Murkomen?

The Senate Majority Leader (Sen. Murkomen): On a point of order, Madam Temporary Speaker. Is it in order for Sen. Cheruiyot to use threats and intimidation in canvassing his position? It is non-negotiable between him and who? When he says that he has three non-negotiable positions in this Bill, whose negotiation is he talking about?

The Temporary Speaker (Sen. (Prof.) Kamar): Senator, I think you missed his point. He had outlined, at the beginning before you came in, that there were things he would negotiate for in the Committee of the Whole. Did I get you right, Sen. Cheruiyot?

Sen. Cheruiyot: Yes, Madam Temporary Speaker. Thank you for helping the ever enthusiastic but never present Majority Leader. Anyway, I have said that I will try and persuade my colleagues---

(Sen. Murkomen spoke off record)

The Temporary Speaker (Sen. (Prof.) Kamar): Why are you inviting trouble every time, Sen. Cheruiyot?

What is it, Sen. Murkomen?

The Senate Majority Leader (Sen. Murkomen): Madam Temporary Speaker, from your Chair, I want you to order the Clerk's office to demonstrate who has contributed more in this House. This should be computed in terms of man-hours, even if it will take two months to make a ruling as to who is ever present---

The Temporary Speaker (Sen. (Prof.) Kamar): Majority Leader, why are you directing the Speaker? I thought you had a point of order?

The Senate Majority Leader (Sen. Murkomen): Madam Temporary Speaker, is it in order for Sen. Cheruiyot to insinuate that I am not usually present in this House? When the records of this House will be unveiled, it will show that my presence and contributions in this House are four times more than the young Senator for Kericho; and they are captured in the HANSARD.

The Temporary Speaker (Sen. (Prof.) Kamar): Sen. Cheruiyot, please wind up.

Sen. Cheruiyot: Madam Temporary Speaker, maybe you can add the number of hours of listening, not just talking and leaving. That is what I alluded to.

The Temporary Speaker (Sen. (Prof.) Kamar): Are you looking for trouble again?

Sen. Cheruiyot: Madam Temporary Speaker, that is my conclusion. By and large, I said that when we eventually come to the Committee of the Whole, I will persuade my colleagues to ensure that those three particular things are included in this Bill so that we can secure devolution firmly.

Sen. (Dr.) Zani: Madam Temporary Speaker, in the Senate we concentrate on counties to ensure that their abilities can be unlocked 100 per cent for them to be productive. Counties are allocated money from the exchequer, but that money is not enough. There is a lot that needs to be done in these counties in terms of developing the infrastructure and ensuring that a county unlocks its resources so that its members benefit.

Many county governments have been trying to do that to a large extent; only that the process has been left more or less strictly to the governors at that level. Some governors have been well meaning and they have ensured that they get into PPPs and, from that process, unlock the potential of their counties.

However, that has sometimes caused problems; mainly at an individual level. This Bill has addressed that, where it suggests that county assemblies need to be involved, especially in the approvals. Therefore, a county government contracting authority shall seek and obtain the approval of the county assembly. That is important.

There is also a provision that the county government shall not execute a project agreement without first seeking and obtaining approval from the National Treasury. This is so that there is synergy and linking in terms of the resources that are available. In Kenya, PPPs are critical in reducing the funding gap for infrastructure, which is now estimated at about US$50 million over the next year. It is, therefore, important for people to engage in PPPs, because they also help in reducing government borrowing and associated risks since the partner brings in money and is part of the process of executing the project.

They also become part and parcel of executing that process to ensure that the money is used well. PPPs also provides a new source of investment capital right from the source. It also drives the creation of local funding and enable the market to create and use it funding adequately.

Madam Temporary Speaker, another very important reason why it is critical to have PPPs is because the private partners do not step out. Therefore, their role is not only in funding, but also coming in with their expertise. That way, they utilize the efficiency of private sector in running the public sectors so as to catapult the processes within the counties.

Madam Temporary Speaker, all this is important because in the long run, it helps to create job opportunities. For Instance, if it is an infrastructural or health project, Kenyans will be part and parcel of it. More jobs will be created for them. Many counties have been facing a problem where the PPP does not reap fruits because a debt is incurred, and there is no recourse to how that should be utilized or how the gap can be filled. This, in turn, creates a situation where the county governments find themselves running bills for projects which they started without proper feasibility studies on how they were going to unlock capital. Were they over ambitious? This can create a situation where the project has started, but cannot be proceeded with.

Mr. Deputy Speaker, Sir, Clause 54(3) of this Bill clearly states that it is important that feasibility studies are done before people enter into projects. People can engage after assessing those projects by projecting, doing evaluation reports, vetting of these evaluation reports and the reality of the viability of that project has been put on the table. That process is encouraged so that it does not become a one man or one woman show, but an issue of concern for the whole county. The expertise of that county should also be brought into the fore to ensure that it happens.

Madam Temporary Speaker, Clause 54(3) also says that it will be necessary to prepare project proposals which will be approved at the county government level. This will detail the strategic and operational benefits of entering into such an agreement. This guides that a PPP agreement is not entered into if it is not macro in terms of its approach on benefiting people, but remains micro. This will ensure that, at the end of the day, these proposals can be vetted.

A county government may also enter into a PPP agreement and shall be responsible for the administration of the overall project. This will create a situation where everything is not left to one partner. The private partner shapes the project and the county government remains cognizant and keeps in synch with that project and how it is executed. Therefore, it will be in charge of the overall project development cycle and in accordance to this section, ensure adherence to all these provisions. This will ensure that the success or failure of the PPP is not left with one person, but with everybody else.

Madam Temporary Speaker, when so many people have been involved in the process, it is then less likely to find a situation where there are problems when a PPP agreement has been put into place. It will be possible for somebody with a hawk eye, expertise and knowledge to identify that there is a problem, be it a quagmire, a lacuna, or even if they are not sure how it should be filled or even when they are going in the wrong direction. Therefore, the participatory mood and public participation that is envisaged in this amendment is critical in ensuring that the people move in the right direction.

Madam Temporary Speaker, a provisions has also been made to Clause 8 where it will be important for this process to have a priority list. This will be subject to the approval by the county governments. Since there might be more than one Public-Private-Partnership (PPP) within a county, it will be important to have an understanding, even within that county, on what is important and what is not; what comes first and what comes second. This will then be submitted to the unit for publication along the national Government priority list.

Not only is there a priority list within the counties, but there is also a priority list in comparison with the national Government goals. This enables a more targeted development procedure within a particular county. Whatever it is that the PPP agreement is being put on, it is very important as emphasized in this amendment Bill. For every contract for the design, financing, construction, operation, equipment, management or maintenance of a project or provision of public services undertaken as PPPs, the provisions in this Bill will apply to the contract. For any construction, operation or equipment, the responsibility is given specifically to the county.

The amendment Bill also gives various definitional updates or amendments that have been made. These are meant to highlight and make the responsibility areas very clear, for example, 'contracting officer' and what it means. There is also 'transaction advisor' and what it means. As far as PPPs are concerned, everybody starts with goodwill. But the more private and singular it is kept, this Bill tries to address the problem of issues that come as a result of singularity, rather than when a broad spectrum of people getting involved and not having the specific rules put into place to ensure that PPPs are able to unlock the procedures and issues within the counties.

The adoption of a PPP framework reflects the desire for improvement of the quality and quantity of a particular service and its provision. It should be aimed at cost effectiveness to ensure that at the end of the day, the project has utilized the least money and produced the most advantages. It should also be about timely provision of the much needed public infrastructure, services and goods that are to be given to the people.

Some people have referred to it as a performance based contract between the various partners, to ensure that unlocking of resources is made and that it is successful. It is a streamlined and targeted process to ensure that the goals are actually attained. This amendment Bill, to a large extent, goes on to provide provisions to make this process feasible, so that county governments engage with PPPs within a framework that leads to the success of those PPP agreements.

Madam Temporary Speaker, I beg to support.

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

Hon. Senators, there being no other person requesting for the Floor, I now call upon the Mover to reply.

The Senate Majority Leader (Sen. Murkomen): Thank you, Madam Temporary Speaker. I wish to thank all Senators who have made tremendous contributions to this Bill. It is important, as has been recognized by many of them, that without it, counties would remain poor because they have no opportunities to utilize the existing methods of mobilizing resources and facilitating development.

I believe that PPPs will be useful in all sectors. Gone are the days when we looked at Government services as only being achievable if done by the Government alone. It is possible for citizens – because PPPs open doors for citizens of the country and the world – to make their contributions through the private sector, employ more people and bring private sector ethics and work ethics to public service by charging a reasonable fee and at the same time delivering credible services. This is something that can be done, and that is why supervision is important. That is also why the role of the county or the national Government to supervise that process is important.

Mr. Deputy Speaker, Sir, I do not want to say much because I know that Sen. Dullo has another Bill to move. However, I I appreciate Senators for the good work they have done.

I beg to reply and request you, under Standing Order 61(3), to defer the putting of the question to next time.

Thank you, Madam Temporary Speaker.

The Temporary Speaker (Sen. (Prof.) Kamar): Thank you Senator. For the convenience of the House, I, therefore, order that the Division will be done next time.

(Putting of the question on the Bill deferred)

Next Order!

Second Reading

THE TREATY MAKING AND RATIFICATION (AMENDMENT) BILL
(SENATE BILLS NO.23 OF 2018)

The Temporary Speaker (Sen. (Prof.) Kamar): Sen. Fatuma Dullo, you may proceed.

Sen. Dullo: Madam Temporary Speaker, I beg to move that The Treaty Making and Ratification (Amendment) Bill (Senate Bills No.23 of 2018) be now read a Second Time.

If I may give a bit of background to this Bill; the reason I wanted to bring this amendment is because I remember in the last Parliament, the National Assembly moved an amendment to remove the Senate from getting involved in the ratification of the treaties and obligations. That was the Treaty Making and Ratification Act No.45 of 2012.

The Senate Committee on National Security, Defence and Foreign Relations struggled to summon the CS for Foreign Affairs then to just simply to understand how the ratification and also what kind of responsibilities the counties are engaged in, in terms of obligations and treaty making. Unfortunately, it was unfruitful. We tried to see how we can salvage that, but that never happened.

This is fairly a very straightforward amendment. I am not going to take a long process and time to try to explain. I am moving this amendment because I feel that the treaties are very important to the county governments. In as far as the responsibility of the Senate is concerned; the Senate is mandated by law to protect the interest of the counties. If they are involved in the treaty ratification process, then their obligation by the country will be attained.

With that, it is important that whenever treaties are submitted to Parliament, we can then involve the Senate so that it can bring amendments or ensure that it is in compliance with the provision of the Constitution and other legislations so as to protect the interest of the Senate. If you look, for example, at the treaties that affect boundaries, environment and many other aspects; you will see that the Senate, which is mandated with the protection of the interests of county governments has a role to play. This is key for the Senate. It is not right for the National Assembly to have left out the Senate in ratification of treaties. It is important that we bring back this amendment so that the Senate will deliberate on the issues of treaty making and ratification in this country.

There are about three or four clauses, and most of them are fairly straight forward. Clause 2 is about bringing back the responsibility of the Senate. Clause 3 looks at the process where once the National Assembly is done with the treaties, they pass it on to the Senate. This follows the normal procedure where Bills are referred to the Senate. I believe that this procedure must be followed so that the Senate can deal with the issues of treaty ratification in our country.

There is also a provision within the Bill where the CS is mandated to table a report within a financial year to give the status on the ratification of treaties in this country. This is important because we will understand what the countries are doing or the status of ratification in terms of various agreements and obligations that the country has gotten into. I believe that if this takes place, the counties will participate in the treaty making process.

We once had a meeting with the Members of Parliament (MPs) of the East Africa Legislative Assembly (EALA), and they felt that we, as a Senate, should be involved. This is because of what MPs in EALA are doing in their assemblies or sittings affects the county governments. If you witness the deliberations they are doing, it is on matters that affect the county governments. However, their reports do not reach county governments. This is important and we need to consider all these.

I will not take a lot of time to explain the process, because it is fairly straight forward. I will stop and now give an opportunity to Sen. Mutula Kilonzo Jr. to second this Bill.

Sen. Mutula Kilonzo Jr.: Madam Temporary Speaker, thank you. This Bill is fairly straight forward, as Sen. Dullo has said. For the record, I want to bring the attention of the Senate to Article 26, which states:-

"Any treaty or convention ratified by Kenya shall form part of the law of Kenya."

Article 94 states:-

"Legislative authority of the republic is derived from the people and at national level is vested in and exercised by Parliament which includes the Senate."

The amendment to remove the word "Parliament" and include the National Assembly is, at best, mischievous and, at worst unconstitutional of people who, as I have mentioned, think that the county government is the county executive. There are people who think that Parliament is the National Assembly; Parliament is the Senate and the National Assembly.

Sen. Dullo has pointed at very interesting issues. We have come to now know that there is a Register of Treaties, which must ideally be brought to the Senate. We need to know what commitments Kenya has made out there in the world. Those people who think that Senate does not form part of Parliament, or who think that counties do not form part of Kenya, are people who have not read this Constitution well.

As I support this Bill, this is a matter that should not, in fact, bring rancor. I hope that the Determination of the Nature of Bills (Procedure) Bill, 2018, that Sen. Sakaja and I, have proposed, will resolve these disputes where the National Assembly excludes, where necessary, the Senate. They have done it in so many platforms and other laws, but with this Bill we can come to an understanding.

This country and the legislative authority at national level is shared between the National Assembly and the Senate. This country has entered, will enter and will continue to enter into treaties beyond the Jubilee Party, NASA, His Excellency the President Uhuru Kenyatta, Hon. Raila Odinga and all of us. It will enter into treaties and we must, therefore, leave a legacy. That legacy means that the structure of Parliament in making laws, which form part of the laws of Kenya, must be respected.

When the President signs an act of Parliament and it does not come to the Senate, it is not an Act of Parliament; it is an Act of the National Assembly. We must say so, because history will judge us harshly for these things.

I know that there are several treaties that we have entered into, some we have not entered into, some we have ratified – such as the Arms Treaty - and others concerning counties and boundaries. I do not see the reason why the Senate can be excluded. This was mischief because I do not know why it was done.

I beg to second.

ADJOURNMENT

The Temporary Speaker (Sen. (Prof.) Kamar): Hon. Senators, it is now 6.30 p.m. It is time for the interruption of the Business of the House. Therefore, the Senate stands adjourned until tomorrow Wednesday, 21st November, 2018, at 2.30 p.m.

The Senate arose at 6.30 p.m.