REPUBLIC OF KENYA
TWELFTH PARLIAMENT- (FIFTH SESSION)
THE NATIONAL ASSEMBLY

COMMUNICATION FROM THE CHAIR

(No. 054 of 2021)

ON

THE CONSTITUTIONALITY OF CERTAIN CLAUSES OF THE PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING BILL (NATIONAL ASSEMBLY BILL NO. 39 OF 2021)

Honourable Members,

You will recall that during the Afternoon Sitting on Thursday, December 02, 2021, before the Order for Second Reading of the Proceeds of Crime and Anti-Money Laundering (Amendment) Bill (National Assembly Bill No. 39 of 2021) was read out, the Member for Tharaka, the Hon. George Gitonga Murugara, rose on a Point of Order seeking the Speaker's guidance on the constitutionality of certain clauses of the Bill. The Hon. Murugara claimed that the Bill as published contains provisions that fail the test of constitutionality and therefore should not be proceeded with. He singled out Clauses 2 and 9 of the Bill, whose import is to include advocates, notaries and other independent legal professionals as reporting institutions obligated to report reasonably suspicious financial transactions likely to fall within the meaning of money laundering to the Financial Reporting Centre. He stated that the two Clauses, if passed, would be unconstitutional on the following grounds –

(1) **That**, singling out advocates and accountants among all other professions and designating them as reporting institutions violates Article 27(4) of the Constitution which prohibits any form of discrimination; and,

(2) That, requiring advocates under the law to report financial dealings of their clients would erode the settled legal principle of advocate-client confidentiality.

Honourable Members, the Fourth Chairperson, who was presiding then, took cognizance of the weighty nature of the claims by the Hon. Murugara and did permit several other Members to weigh in on the matter. The Members who spoke include; the Hon. (Dr.) Otiende Amollo, the Hon. Aden Duale, the Hon. Peter Kaluma, the Hon. Peter Mwathi, the Hon. Gladys Wanga, the Hon. (Dr.) Patrick Musimba, the Hon. Millie Odhiambo, and the Hon. (Dr.) Makali Mulu. In their submissions on the issues raised by the Hon. Murugara, the overarching sentiments of most Members converged on the question of the constitutional propriety of the Bill.

Honourable Members, for the record, I wish to inform the House that before raising the matter at hand on the floor of the House, the Hon. Murugara had written to the Speaker on 2nd December, 2021 requesting that I give direction on certain issues regarding the Proceeds of Crime and Anti-Money Laundering (Amendment) Bill, 2021 before its Second Reading. In my estimation, the matters raised by the Member were weighty and could not have been adequately responded to by way of mere correspondence. It was the view of the Speaker that the floor of this August Chamber has been and shall remain the most appropriate place for the House to address matters of such importance to the populace as the constitutionality of a Bill. It will be recalled that, following the issues raised by Honourable Members, the Speaker directed that the debate for Second Reading of the Bill proceeds so as to accord Members an opportunity to debate the merits and demerits of the Bill and raise any other constitutional matters therein. He however ordered that the question for second reading shall not be put until a considered ruling on the issues raised by members has been rendered, which I hereby proceed to do.

Honourable Members, having reviewed the letter by the Hon. Murugara and distilled the contributions made by other Hon. Members following the Point of Order raised in the House, I have isolated **THREE (3) questions** as requiring my determination. These are –

(1) Whether the Proceeds of Crime and Anti-Money Laundering (Amendment) Bill (National Assembly Bill No. 39 of 2021) is properly before the House;

(2) Whether, some proposals in the Proceeds of Crime and Anti-Money Laundering (Amendment) Bill (National Assembly Bill No. 39 of 2021) seek to limit fundamental rights and freedoms and therefore render the Bill unconstitutional; and,

(3) Whether the inclusion of advocates as reporting institutions for suspicious financial transactions in the manner proposed in the Bill erodes the legal principle of advocate-client confidentiality.

Honourable Members, before I guide the House on the pertinent questions for determination, it is worth noting that Articles 3 and 10 of the Constitution oblige the Chair to respect, uphold and defend the Constitution. As you are aware, all business that comes before the House is approved by the Speaker and among other considerations, the Speaker applies his mind as to the constitutionality or otherwise of such business, as contemplated under Standing Order 47(3). Let me also hasten to add that notwithstanding the approval of any business by the Chair under the Standing Orders, it has now become established parliamentary practice of this House that a question of the constitutionality or otherwise of any matter under consideration by the House may be raised at any stage of its consideration. Indeed, my predecessors and I have been invited on several occasions to guide the House on issues of constitutionality of various matters before the House.

Permit me, **Honourable Members,** to highlight a few such cases for the benefit of this House and the general public. Members who served in the 11th Parliament will recall that the Speaker was invited to rule on the constitutionality of several Bills. First, on July 23, 2013, the Member for Suba South, the Hon. John Mbadi, who is the current Leader of the Minority Party, sought the Speaker's guidance on whether it was constitutional for the House to consider the National Police Service (Amendment) Bill, 2013 and the National Police Service Commission (Amendment) Bill, 2013. In this case, it had been argued that the two Bills contradicted provisions of the Constitution. I am on record as having determined, then, that the Member failed to demonstrate a nexus or close connection between any specific clauses of the Bills and the specific provisions of the Constitution that those clauses offended. Additionally, I guided that where any nexus was drawn, the proposed amendments were indeed enhancing the functions and powers of the National Police Service Commission and not contradicting any provisions of the Constitution as claimed in the point of order raised then. As such, not having found any provision that offended the Constitution, I directed that the two Bills proceed to the Second Reading.

Second, **Honourable Members**, on 11th December, 2014, during consideration of the Security Laws (Amendment) Bill, 2014, several Members rose on points of order and sought the Speaker's guidance on the general admissibility and constitutionality of the Bill. Two key issues stood out in the arguments advanced by Members who spoke then. The first issue was the adequacy of public participation in light of **Article 118 of the Constitution** and the absence of a report of the relevant Committee on the Bill. The second issue related to limitation of rights and fundamental freedoms contrary to **Article 24 of the Constitution.** In my communication to the House, I did guide as follows –

(1) With respect to public participation, the Clerk had indeed published a notice in the daily newspapers inviting interested members of the public to give their views on the Bill; and that the precedent of the House has been that the absence of a report of a committee on a Bill does not prevent a Bill from proceeding to Second Reading.

(2) With regard to limitation of rights and fundamental freedoms, I noted that Article 24(1) of the Constitution permits limitation of certain rights by law, which can only be done by Parliament as the sole law-making authority. Hence, it was my finding that it was only fair that I accord the House the opportunity to satisfy itself that the criteria set out in Article 24 was complied with or make an appropriate determination by way of decisions at various stages of its consideration of the Bill.

I therefore allowed the House to proceed with the Bill and make a decision whether or not to accept the Bill as proposed or make any necessary amendments to reflect its wishes and meet the obligation under Article 24 of the Constitution.

Honourable Members, the third case of interest to the instant matter is that of the Military Veterans Bill, 2013. Other than the concern of being a 'Money Bill', it was argued that by proposing to establish a Government Department headed by a Director-General, an advisory council and a military veterans appeals board, the Bill offended Article 132(4)(b) of the Constitution by usurping the power of the President to establish offices in the public service.

In my guidance to the House, I did direct the Departmental Committee on Defence and Foreign Relations to further engage the Attorney-General and the Cabinet Secretary for Defence to shed light on the issues of constitutionality of the Bill and table a report for the Speaker to guide the House on how to proceed. The Bill lapsed and so, the intended guidance never materialized.

Honourable Members, from the foregoing examples, you will notice that the Speaker has been hesitant to outrightly declare a Bill as unconstitutional.

The Speaker has consistently refrained from curtailing the House from considering a Bill where adequate opportunity for the House to cure any alleged unconstitutionality exists. I have stated before and do reiterate that the role of the Speaker is facilitative and not obstructive. Where it is still within the power of this House to take action on a matter, which action is likely to remedy a question of doubt cast on the constitutionality of a matter before this House, I must trust that the House shall act in the best interest of the people which it represents, unless compelling reasons exist to the contrary.

Having shared that brief history, **Honourable Members,** let me now turn to the first issue for determination, which is *Whether the Proceeds of Crime and Anti-Money Laundering (Amendment) Bill (National Assembly Bill No. 39 of 2021) is properly before the House.* The Hon. Aden Duale is on record as having wondered why the allegedly *unconstitutional* amendments contained in the Bill have been re-introduced in the House at various times between 2015 and 2021. He claimed that *"any Bill that fails the constitutional test cannot be cured even if one keeps on reintroducing that Bill and bringing the same amendments and sneaking them through various Bills, whether it is through amending the Statute Law or through the Finance Bill."* By alleging that the proposed amendments were being *sneaked* into the House through various Bills, the ranking Member was, in principle, casting aspersions on the propriety of the Bill being before the House.

Honourable Members, I have reviewed the records of the House and indeed do agree with the Hon. Duale but only on one fact, that this is not the first time that the impugned amendments proposed in the Proceeds of Crime and Anti-Money Laundering (Amendment) Bill, 2021 have been introduced in this House.

The first attempt to amend the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) was in 2015 when the then Leader of the Majority Party (Hon. Aden Duale) introduced the Proceeds of Crime and Anti-Money Laundering (Amendment) Bill, 2015.

The principal object of the Bill, then, was to amend the Proceeds of Crime and Anti-Money Laundering Act, Cap. 598 to enhance the powers of the Financial Reporting Centre; to impose civil penalties; and to take administrative action against non-compliance with the directives of the Centre. It is important to note that the Bill listed accountants as among the designated non-financial businesses or professions with the obligation to report suspicious financial transactions to the Financial Reporting Centre. This Bill was passed and assented to in 2017.

In 2016, the Hon. Aden Duale, then Leader of the Majority Party, introduced in the House the Statute Law (Miscellaneous Amendments) Bill, 2016 which sought to, *inter alia*, amend the Proceeds of Crime and Anti-Money Laundering Act to remove the position of Deputy Director of the Financial Reporting Centre for the smooth running of the Centre. The then Leader of the Majority Party formally withdrew the said proposed amendments and I did communicate the withdrawal to the House on February 09, 2017.

Honourable Members, it was in 2018 that the House got seized of amendments of similar import to those contained in the Bill presently before the House, through the Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No. 12 of 2018). Among the statutes that the Bill proposed to amend was the POCAMLA, 2009. Of interest was the proposal to amend section 2 of the Act as follows –

> *1. "By deleting paragraph (e) on the definition of the expression "designated nonfinancial businesses or professionals" and substituting therefor the following new paragraph-*
>
> *(e) accountants who are sole practitioners, partners or employees within professional firms;*

2. By inserting the following new paragraphs immediately after paragraph (f)-

(fa) advocates, notaries and other legal professionals who are sole practitioners partners, or employees within professional firms;

(fb) trusts and company service providers."

Honourable Members, you may recall that on, 28th August, 2018, the Member for Rarieda Constituency, the Hon. Dr. Otiende Amollo, raised a Point of Order challenging the constitutionality of the Statute Law (Miscellaneous Amendments) Bill (National Assembly Bill No. 12 of 2018) in its entirety. Among other arguments, the Hon. (Dr.) Otiende and other Members who spoke cited the above-mentioned amendments as being in violation of the Constitution and not deserving to have been contained in a miscellaneous amendments Bill. In respect of this matter, I did permit the House to proceed with Second Reading and subsequent stages of the Bill and take conscious decisions on the contested proposals in one way or the other. The Hansard Report of the House on 15th November, 2018 when the House considered the Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No. 12 of 2018) in the Committee of the Whole House records the then Chairperson of the Departmental Committee on Justice and Legal Affairs, Hon. William Cheptumo moving the House to delete the Clauses of the Bill that were proposing to include advocates and accountants as reporting institutions. In his justification, the Chairperson is on record stating as follows –

"... we are proposing a deletion to that section (2) because this is a very serious step. It requires wide consultations. We cannot deal with this under miscellaneous amendments. That is the basis and justification of that. That is the same case in section 48 which we will do later."

The House did agree with the Committee and the two provisions were forthwith deleted from the Bill. It is however instructive to note that there was **no mention of unconstitutionality of the said provisions as a ground for recommending their deletion. Instead, the Committee cited the need for such amendments to be contained in a separate Bill in order to allow wider public participation.**

Honourable Members, the same amendments were re-introduced in the Finance Bill, 2019 under Clauses 50 and 51 relating to the Proceeds of Crime and Anti-Money Laundering Act.

Their re-introduction elicited concern within the House and external stakeholders alike. At that time, two overarching arguments arose. First, it was claimed that a Finance Bill principally addresses issues of **taxation and revenue-raising measures** and should, therefore, not be used to introduce proposals such as those amending the Proceeds of Crime and Anti-Money Laundering Act which are not incidental to taxation or revenue raising measures. Secondly, it was claimed that the amendments to Proceeds of Crime and Anti-Money Laundering Act proposed to limit to fundamental rights and freedoms without satisfying the criteria set out in Article 24 of the Constitution on the manner of limiting fundamental rights and freedoms in statute.

In my guidance to the House on 19th September, 2019, I observed that Article 24 of the Constitution permits limitation of certain rights and freedoms by law, hence the argument that clauses 50 and 51 of the Finance Bill, 2019 ought to be excluded from consideration by the House on account of limiting constitutional rights seemed **NOT** to hold any water. With regard to compliance with the criteria set out in Article 24 of the Constitution, I observed that to the extent that the Finance Bill, 2019 had proposed to amend sections of the Act with a discernible link to the limitation of rights guaranteed under the Constitution, the said amendments ought to comply with the requirements of Article 24(2) of the Constitution.

Consequently, I determined that clauses 50 and 51 of the Finance Bill, 2019 had not been accompanied by any additional provision **stating the intention to limit the right to privacy and the nature and extent of the limitation in relation to the new categories of professionals it (sought) to designate as reporting institutions under the Proceeds of Crime and Anti-Money Laundering Act, 2009**. I therefore found that the two proposed provisions failed to comply with the standard of disclosure set out by the Constitution and therefore were procedurally defective and, consequently, ordered the exclusion of those two provisions from consideration by the House during the Second Reading and subsequent stages of the Bill.

In so guiding, I was very clear that my determination related to the procedural defects in the manner in which the proposed amendments had been presented and not their constitutionality or otherwise.

Honourable Members, it is instructive that the Departmental Committee on Finance and National Planning, after undertaking public participation on the Finance Bill, 2019, had also recommended that the amendments relating to POCAMLA be excluded from the Finance Bill. The Committee noted that the said amendments had serious ramifications and ought to have been proposed in a separate Bill instead of an omnibus Bill. The Committee made reference to the submissions by the Law Society of Kenya (LSK) that *the amendments impacted several principles, practices and laws touching on the subject of legal profession privilege/advocate-client confidentiality cemented under the evidentiary rule of privilege under the law of evidence and the common law principle adopted under the Judicature Act.*

In this regard, the Committee is on record as having taken cognizance of the weighty submissions by the LSK and recommended as follows at paragraph 192 of the *Report on the Consideration of the Finance Bill, 2019* –

"The committee resolved to reject the proposed amendments in the Bill to allow introduction of the amendment Bill to POCAMLA and not through miscellaneous amendments. This will allow extensive public participation."

Honourable Members, a plain reading of the Committee's observation and recommendations indicates that there was nothing unconstitutional about the proposed amendments. What arose was the need to have the proposed amendments published in a separate substantive Bill in order to allow **sufficient public participation**. And now, therefore, out of this long and winding journey, a separate and substantive Bill to amend the Proceeds of Crime and Anti-Money Laundering Act, 2009 has been introduced and is now before the House for consideration.

Honourable Members, the foregoing recap of the meandrous journey of attempts to amend the Proceeds of Crime and Anti-Money Laundering Act, since 2015 contradicts the view that a mischievous attempt has been made to '*sneak*' undesirous and unconstitutional amendments into this House as claimed by the Hon. Aden Duale. It is also inaccurate for certain Members to have claimed that the amendments in question had been severally rejected on account of unconstitutionality. Clearly, the only reasons on record as having curtailed consideration of the said amendments by the House whenever they were introduced were structural and procedural errors with regard to the form of the amendments and the vehicle through they were proposed for introduction in the House.

With regard to the Proceeds of Crime and Anti-Money Laundering (Amendment) Bill (National Assembly Bill No. 39 of 2021), as currently before the House, I note that in introducing the Bill in the House, the Leader of the majority party satisfied the procedure prescribed in Standing Order 114 *(Introduction of Bills)*. In addition, the procedural defects that sounded a death knell to the previous attempts that I have narrated seem fully addressed.

Of particular interest is that unlike previously where the proposed amendments were contained in an omnibus Bill, they have now been published in a separate substantive Bill. I therefore find that Proceeds of Crime and Anti-Money Laundering (Amendment) Bill (National Assembly Bill No. 39 of 2021) is properly before the House and nothing precludes the House from considering the Bill in the remaining stages. This settles the first issue regarding propriety of the Bill being before the House.

Honourable Members, let me now proceed to the second matter, which is ***Whether, the proposals in the Proceeds of Crime and Anti-Money Laundering (Amendment) Bill (National Assembly Bill No. 39 of 2021) that seek to limit fundamental rights and freedoms render the Bill unconstitutional.***

Members opposed to the highlighted amendments aver that the proposals contained in the Bill single out advocates specifically and impose obligations on them. This in turn, the Members further aver, unfairly discriminates against advocates as professionals and **renders the proposed amendments unconstitutional**. Before I delve into the question of constitutionality, it is worth noting that as the Member for Homa Bay Town, the Hon. Peter Kaluma, alluded to in the debate arising from the Point of Order, **NO Member** demonstrated with precision, the nexus between any alleged violation of any one of the 264 Articles of the Constitution and the 16 Clauses contained in the Bill. I will therefore attempt to address the issues as discerned to be violations of the constitution based on the arguments of Members.

Honourable Members, Standing Order 47(3) places a specific obligation on the Speaker to exclude any motion from being debated, or direct the amendment of a motion in an appropriate format where the motion either offends the Constitution, an Act of Parliament or the Standing Orders. The Standing Order provides, and I quote—

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

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

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

.....

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

Over the years, I have not shied away from invoking this provision as indeed will be recalled during the debate of this very matter in the past. However, the expected invocation calls for clear and discernable contraventions of the law to avoid misuse. For clarity, the impugned clauses 2 and 9 of the Bill propose to make advocates, notaries, and other independent legal professionals who are the sole practitioners, partners or employees within professional firms as designated non-financial businesses or professions required to report suspected money-laundering and related activities to the Financial Reporting Centre. The concern of the Hon. Murugara and the other Members challenging the constitutionality of the Bill is that the amendments run short of the age-old legal practice of advocate-client confidentiality, the right to privacy and the right of access to information as guaranteed in the Constitution. However, as Members are aware, the Constitution is very clear on the rights and freedoms that may not be limited under any circumstances.

For certainty, **Article 25 of the Constitution** provides as follows, and I quote—

"Despite any provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
(b) freedom from slavery or servitude;
(c)the right to a fair trial; and
(d) the right to an order of habeas corpus."

A close reading of Article 25 of the Constitution therefore reveals that the Constitution allows this House to limit any other right or fundamental freedom subject **only to the protections outlined by the Constitution**. Up to that point, and without interrogating the merits of the proposals, the argument that clauses 2 and 9 of the Bill, in so far as they allegedly limit the right to privacy and therefore ought to be excluded from consideration by this House, seems **implausible,** in my view. In outlining for the limitation of rights and fundamental freedoms, the Constitution provides in Article 24 (1) & (2), and I quote –

(1) A right or fundamental freedom in the Bill of Rights shall not be limited ***except by law,*** *and then only to the extent that the limitation is* ***reasonable and justifiable*** *in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—*

(a) the nature of the right or fundamental freedom;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

Honourable Members, as observed in the Speaker's Communication of 19th September, 2019 when the same matters arose during the consideration of the Finance Bill, 2019, Article 24(2) of the Constitution requires any provision enacted or amended on or after 27th August, 2010 to expressly stipulate the intention to limit a fundamental right or freedom and the nature and extent of the limitation for the provision to be valid.

Further, it has been the practice that this stipulation be contained in the **substantive sections of the Bill** and not just in the statement/memorandum of objects and reasons. As I guided then with regard to the Finance Bill, 2019, there was a requirement for "...**an additional provision stating the intention to limit the right to privacy and the nature and extent of the limitation in relation to the new categories of professionals it seeks to designate as reporting institutions under the Proceeds of Crime and Anti-Money Laundering Act, 2009**."

The question that follows therefore is whether, in seeking to limit the right of privacy, the Bill expressly provides for this in keeping with the constitutional dictate.

The long and short of it, Honourable Members, is that, unlike in the previous case regarding the Finance Bill, 2019, **clause 15** of the Proceeds of Crime and Anti-Money Laundering (Amendment) Bill, 2021 expressly provides for the nature and extent of the limitation of the rights. This, in my view, constitutes sufficient disclosure in as far as the constitutional requirement in Article 24 is concerned.

Honourable Members, it is instructive to note that this is not the first time that the House is being confronted with the need to consider a limitation of rights as provided in the Constitution. When faced with a similar matter during the consideration of the Narcotic Drugs and Psychotropic Substances (Control) (Amendment) Bill, 2020, the Departmental Committee on Administration and National Security approved the express limitations of the right to privacy by among other things allowing for the interception and retention of certain communication **to aid in gathering evidence related to the commission of an offence** under the principal Act. The inclusion of an express provision of the nature and extent of limitation of the rights affected by the Bill aligned the Bill was with the Constitution. The question as to whether the justification provided for the limitation proposed is adequate is one that only this House, in the exercise of its exclusive legislative mandate, can consider and either agree with, enhance where a gap is noted, or disagree with entirely.

Interestingly **Honourable Members**, just recently, on 15th November, 2021, the *High Court Kenya in Mombasa in Petition No. 134 of 2019* held as follows with respect to limitation of certain rights and freedoms –

> *53. On the right to privacy, As O'Higgins C.J commented in Norris vs Attorney General (1984) I.R 587, a right to privacy can never be absolute. It has to be balanced against the State's duty to protect and vindicate life.*

What needs to be done, as was recognised in Campbell vs MGN Ltd (2004) 2 AC 457, is to subject the limitation and the purpose it is intended to serve to a balancing test, whose aim is to determine whether the intrusion into an individual's privacy is proportionate to the public interest to be served by the intrusion.

Honourable Members, in considering the proposal in the Bill as against the claim of intrusion of privacy and other rights, the House is expected to weigh the claim as against the public interest that the State seeks to secure through the proposed legislation. At face value, the limitations contemplated in Clauses 2 and 9 of the Bill seemingly seek to avail to the State the legal framework for enforcing integrity, transparency and accountability, being inviolable national values and principles of governance in accordance with Article 10 of the Constitution.

Therefore, **Honourable Members,** to the extent that Article 24 of the Constitution permits limitation of certain rights and fundamental freedoms by law and the fact that the Proceeds of Crime and Anti-Money Laundering (Amendment) Bill (National Assembly Bill No. 39 of 2021) explicitly discloses the intended limitations as required in the Article, there exists no procedural defect in the Bill to preclude the House from considering it at this stage.

Honourable Members, with regard to the reasonability and/or justifiability of the nature and extent of the limitation of rights as contained in the Bill, as your Speaker, I wish to state that that determination falls outside remit of the Speaker.

I will therefore not delve into the merits or otherwise of the matter save to say that due process has thus far been followed in the processing of the Bill. In any case, there exist various **levels for determination** of such matters including by Parliament, through the various legislative processes, by the judiciary, through interpretation and/or review of any legislation passed by Parliament, and by the various enforcement bodies as provided in law.

Indeed, Article 165(3) of the Constitution provides for direct determination of such questions of infringement or violation of the Bill of Rights by the High Court whenever they arise.

Honourable Members, the matter of alleged discrimination of advocates and accountants by the Bill also arises from the questions raised on the constitutionality of the Bill. Article 27 of the Constitution provides for the equality and freedom from discrimination for all persons. Clause (4) provides, and I quote –

> ***"(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."***

The inclusion of advocates as professionals required to report any suspicious financial transactions law has been cited as discriminatory and prejudicial against legal practitioners. However, my reading of the principal Act which the Bill seeks to amend indicates that there are other professions already designated as reporting institutions. Indeed, section 48 of the principal Act provides for among other persons, ***accountants*** *when preparing or carrying out transactions for their clients in specified transactions;* ***trust or company service providers*** *acting as a formation agent of legal persons,* ***a director or secretary of a company****, a* ***partner of a partnership****, or a similar position in relation to other legal persons; providing a registered office, business address or accommodation, correspondence or administrative address for a company, acting as or arranging for another person to act as, a nominee shareholder for another person.*

You will agree with me, **Honourable Members,** that this incorporates other professionals in their various capacities when undertaking the specified actions. I am unaware of any proceedings that have been instituted to the effect that the inclusion of those professions is discriminatory.

In any case, as I have explained earlier, and as the courts have also held, the Constitution permits certain levels of discrimination in law as long as such discrimination is proportionate to the public interest to be served by such discrimination. In fact, from my analysis of the contribution by the Member for Suba North, **Hon. Millie Odhiambo** from the proceedings on that subject, I could sense that she noticed the high public interest that the proposed amendments seek to address. For the sake of the concerned Members, the **Hon. Millie** had indicated her intention to propose amendments that would try to rectify the alleged discriminatory provisions if indeed any exist. And as I have indicated prior, the determination of whether there will be any discrimination that will arise from the Bill can only be conclusively addressed in a court of law. The role of this House is to legislate. We cannot put the cart before the horse and debate concerns reserved for another arm of government after the House dispenses with its role. It is therefore only fair that we allow the Bill to proceed to the next level and let the competent authorities determine any subsequent matters that may arise. At this stage of law making, it would be premature to conceive that the Bill is discriminatory. This settles the second question on constitutional propriety of the Bill.

Honourable Members, the final concern raised was on whether the proposed amendments in Clauses 2 and 9 of the Bill erode the legal principle of advocate-client confidentiality. On this question, I wish to single out the following as explained by some of the Members who spoke on this matter –

(1) that the said principle of advocate-client confidentiality is not founded in the Constitution of Kenya or any statutes thereof, rather, it is based on the legal practice; and,

(2) that, even if it were, it would ordinarily play second-fiddle to Article 10(2)(c) of the Constitution which elevates the principles and values of good governance, integrity, transparency and accountability to an inviolable status.

Honourable Members, It is therefore inconceivable that legislating in the manner proposed in the Bill would cause the principle to be violated unduly. I do note that Proceeds of Crime and Anti-Money Laundering Act, 2009 is an Act of Parliament passed by this House. In passing the Act, this House took cognizance of the advocate-client relationship and included it in Section 18 of the Act. For the avoidance of doubt, it provides, and I quote—

"Client advocate relationship

(1) Notwithstanding the provisions of section 17 (Secrecy obligations overridden), nothing in this Act shall affect or be deemed to affect the relationship between an advocate and his client with regard to communication of privileged information between the advocate and the client.

(2) The provisions of subsection (1) shall only apply in connection with the giving of advice to the client in the course and for purposes of the professional employment of the advocate or in connection and for the purpose of any legal proceedings on behalf of the client.

(3) Notwithstanding any other law, a Judge of the High Court may, on application being made to him in relation to an investigation under this Act, order an advocate to disclose information available to him in respect of any transaction or dealing relating to the matter under investigation.

(4) Nothing in subsection (3) shall require an advocate to comply with an order under that subsection to the extent that such compliance would be in breach of subsection (2)."

Honourable Members, this, in my view, renders the concern moot. In the event that the aggrieved Members feel that the statutory entrenchment of the principle in the Act has been affected in any way by the amendments proposed in the Bill, they remain at liberty to propose amendments to further buttress it for the consideration of the House.

Indeed, pursuant to the communication of the Special Sittings of the House and inviting the submission of any proposed amendments to the Bill, I can confirm that the office of the Clerk is in receipt of amendments by the Leader of the Majority Party and the Chairperson of the Departmental Committee on Finance and National Planning. These, I believe, shall inform debate on the Bill and allay the fears of the concerned Members.

Hon. Members, I wish to reiterate that the Constitution grants this House exclusive law-making powers. Towards this end, a proposal has been brought to this House under the name of the Leader of the Majority Party. The proposal accords with several directives that this House has given with regard to the manner in which the proposal should be introduced and the form that it should be in. The only thing that remains is therefore the question of whether the House agrees with the contents of the Bill either fully or partly after proposing necessary amendments. Any Member is well within their right to support, oppose, or propose amendments to the Bill.

Hon. Members, as you are well aware, I, as your substantive Speaker, only preside; I do not debate or vote on any question proposed for determination by the House.

In summary, I therefore guide the House as follows –

1. **THAT, The Proceeds of Crime and Anti-Money Laundering (Amendment) Bill (National Assembly Bill No. 39 of 2021) is properly before the House. In introducing the Bill in the House, the Leader of the Majority Party has satisfied the procedure prescribed in the Standing Orders and previous guidance issued by the Speaker;**

2. **THAT, The proposals contained in Proceeds of Crime and Anti-Money Laundering (Amendment) Bill (National Assembly Bill No. 39 of 2021) seeking to limit certain fundamental rights and freedoms safeguarded under the Constitution do not, in my view, render the Bill unconstitutional. The Bill explicitly discloses the intended limitations and the purpose and extent of the limitations as required by Article 24 of the Constitution;**

3. **THAT, The inclusion of advocates as reporting institutions for suspicious financial transactions in the manner proposed in the Proceeds of Crime and Anti-Money Laundering (Amendment) Bill (National Assembly Bill No. 39 of 2021) does not, at face value, erode legal principle of advocate-client confidentiality. Section 18 of the Proceeds of Crime and Anti-Money Laundering Act, 2009 currently provides for the entrenchment of the principle. Any Member seeking to buttress the principle further in light of the amendments proposed by the Bill is at liberty to propose appropriate amendments for consideration by the House.**

In conclusion, **Honourable Members**, allow me to state that I have shared the above information for the guidance of the House in considering the Proceeds of Crime and Anti-Money Laundering (Amendment) Bill (National Assembly Bill No. 39 of 2021) and for your making a decision in the manner you may so wish as required of you by the Constitution. I wish to emphasize that the matters raised by the Member for Tharaka, and indeed the contributions from other Members, are very critical and contribute to the development of our parliamentary and legislative practice/procedure. Such instances enable us to self-reflect and to ensure that every step we take as a House is carefully considered before a decision is made.

The House is accordingly guided, and I will therefore proceed to put the Question for Second Reading of the said Bill as indeed indicated in the Order Paper in order for the House to take a vote on it.

I thank you.

THE HON. MOSES CHEBOI, CBS, MP
DEPUTY SPEAKER OF THE NATIONAL ASSEMBLY

Tuesday, 21st December, 2021